

POSTHUMOUS PUBLICITY RIGHTS

Can publicity rights of celebrities be exploited post their death?

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Despite there being thousands of Gods and Goddesses in India, Indians also worship a unique category of human beings. For example, admirers of movie stars Amitabh Bachchan and Rajnikanth and cricketer Sachin Tendulkar have built temples across the country to show their adulation. This is the level of unparalleled fandom enjoyed by celebrities in India.

So, who is a celebrity? There is no express statutory definition of the term ‘celebrity’ or recognition of the rights emanating from such status. The legal position on recognition of publicity rights has been evolving worldwide. While countries such as France, Russia, UAE and a few of the federal states of the United States of America such as California, Florida, New York and Washington protect publicity rights by way of codified laws, UK, Hong Kong, and a few other federal states of the United States of America such as Georgia, Massachusetts, Michigan and New Jersey provide protection through the common law remedy of passing-off.

In India, the Supreme Court first recognized the right of publicity in the form of right of privacy in R.R. RajaGopal v. State of Tamil Nadu¹ and observed that, “*the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising - or non-advertising purposes or for any other matter.*”

Before going into this discussion further, it is imperative to understand the term ‘celebrity’ as defined by the Indian courts. The Delhi High Court, in Titan Industries Ltd. v. M/s. Ramkumar Jewellers², discussing the proposition of celebrity rights, opined as under:

“A celebrity is defined as a famous or a well-known person. A “celebrity” is merely a person who “many” people talk about or know about. When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity.”

Publicity rights were also recognized in DM Entertainment v. Baby Gift House and Ors.³, wherein the Delhi High Court observed that:

¹ AIR 1995 SC 264

² 2012 (50) PTC 486 (Del)

³ CS(OS) 893/2002

“The right of publicity can, in a jurisprudential sense, be located with the individual’s right and autonomy to permit or not permit the commercial exploitation of his likeness or some attributes of his personality.”

The right of publicity has been recognized to have evolved from the right of privacy⁴. The Supreme Court⁵, while declaring the right to privacy a fundamental right on the anvil of Article 21 of the Constitution of India, reflected upon publicity rights also, and observed that:

“Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.”

Essentially, celebrity rights can be understood to be a bundle of rights which include certain intellectual property rights, publicity, personality, and privacy rights. Specifically with regard to publicity rights, courts have opined that these rights exclusively emanate from the right to privacy.

Do Publicity Rights Survive Post-Death?

As is clear from the above, publicity rights broadly encompass the right to permit commercial exploitation of a celebrity’s likeness or some attributes of their personality. A celebrity’s personality can not only be commercially exploited during their lifetime but post their death as well. This can be seen from the fact that even after 7 years of his death, Michael Jackson earned a whopping \$825 million in 2016, the highest earnings for a celebrity dead or alive in a year⁶. In fact, as per the Forbes’ list of the world’s highest-paid dead celebrities, the total earnings for the 13 best compensated dead celebrities tripled to nearly \$1 billion in 2021⁷.

Despite this, posthumous publicity rights have not yet been recognized by most countries around the world. In the United States of America, only a few of the federal states recognize survival of the right to publicity post death of a celebrity. However, the degree of recognition varies from state to state. For example, while Washington recognizes publicity rights for 10 years from the date of death, California recognizes these till 70 years after the death of a celebrity.

⁴ ICC Development (International) Ltd. v. Arvee Enterprises and Ors, 2003 (26) PTC 245 Del

⁵ Justice K.S.Puttaswamy(Retd) vs Union Of India, AIR 2017 SC 4161

⁶ <https://www.forbes.com/sites/zackomalleygreenburg/2016/10/12/the-highest-paid-dead-celebrities-of-2016/?sh=32be5fdf11b1>

⁷ <https://www.forbes.com/sites/abigailfreeman/2021/10/30/the-highest-paid-dead-celebrities-2021/?sh=6c8c9a563839>

As Indian law on protection of publicity rights itself is in its initial stage, the law relating to posthumous publicity rights is even more unexplored and unclear. That said, this question of posthumous survival of publicity rights has come up before Indian courts on a few occasions.

In *Deepa Jayakumar v. AL Vijay and Ors.*⁸, an appeal was filed in the Madras High Court by the niece of late Dr. J. Jayalalithaa, the former Chief Minister of the State of Tamil Nadu, against the order of a Single Judge. The Single Judge had refused to grant an interim injunction against the release of the film titled “Thalaivi” and “Jaya” respectively in Tamil and Hindi as well as a web-series titled “Queen”. The suit was filed because the films and web-series, which were based on the life of Dr. J. Jayalalithaa were made without seeking the permission/ consent of the petitioner, thereby violating the privacy rights of her aunt and that of her family. The petitioner also contended that the films and web-series were being made for commercial and monetary benefit and thus, violated Dr. J. Jayalalithaa’s personality rights as well.

The Division Bench, while upholding the Single Judge’s order refusing the grant of injunction, observed:

“...it is clear that a privacy or reputation earned by a person during his or her life time, extinguishes with his or her death. After the death of a person, the reputation earned cannot be inherited like a movable or immovable property by his or her legal heirs. Such personality right, reputation or privacy enjoyed by a person during his life time comes to an end after his or her life time. Therefore, we are of the opinion that “posthumous right” is not an “alienable right”...”

The Court refused to interfere with the order of the Single Judge and agreed with the makers’ contention that the films and web series were based on the information available in the public domain and hence, the petitioner’s consent was not required. The Court also considered the argument that the makers of the web-series had put a “disclaimer” stating that it is not a biography depicting any character.

More recently, this proposition of posthumous survival of publicity rights was also discussed by the Delhi High Court in *Krishna Kishore Singh vs Sarla A Saraogi & Ors.*⁹. The suit was filed by the father of late actor Sushant Singh Rajput (SSR) seeking an injunction against the use of his son’s name, caricature, lifestyle or likeness in films and other ventures produced by the defendant film makers. He contended that any such publication, production, or depiction, without the prior approval of SSR’s legal heirs, would be an infringement of *inter alia*, his right to privacy which includes the right to publicity.

In this case, SSR’s father sought to distinguish ‘celebrity rights’ from the ‘right to privacy’. However, the Court observed that publicity rights are inextricably linked to and emanate from the right to privacy under Article 21 of the Constitution. Further, relying on the judgement of

⁸ O.S.A.No.75 of 2020

⁹ CS(COMM) 187/2021

the Supreme Court in the Puttaswamy case, the Court held that as the right to privacy extinguishes with the human being, the right to publicity would also extinguish and would not survive after the death of the person.

While the Court made a *prima facie* observation regarding non-survival of publicity rights post-death, it also observed that the question whether commercial celebrity rights would survive or extinguish after the death of the celebrity, requires a deeper probe. As a first step, it would first have to be proven through evidence that the persona of SSR was still surviving as a commercial property and that such property was being exploited by the defendants for profit. Hence, the Court left the question open for trial.

Regarding the common law relief of passing-off, the Court, considering the specific disclaimer included at the beginning of the film stating that the work is fictional, held that the film would not lead the public to believe that it is a true story or a biopic that has been authorised or endorsed by SSR's legal heirs. As such, the Court observed that the defendants were not making any misrepresentation or claiming a false endorsement for their respective films.

As can be seen from the above, the jurisprudence on publicity rights in India has evolved in such a way that they are considered inseparable from the right to privacy. Accordingly, the treatment that is meted out to privacy rights post death has also been extrapolated to posthumous publicity rights.

A case for recognition of posthumous publicity rights

In the absence of codified laws protecting publicity rights in India, these are recognized through the right to privacy. That said, there is a fundamental difference in the nature of both the rights and hence, they should not be treated in identical ways. While the right to publicity deals with the commercial utilization of the celebrity's name, photograph, voice, image, signature etc., the right to privacy is a personal right, which is a "right to be let alone".

After one's death, their personal life also comes to an end and thus, the question of invasion of their private space may not arise. However, the celebrity status of a person does not get extinguished overnight upon their death. Such status can continue to bear commercial value and be appropriated for profit. In fact, it is possible for a celebrity's popularity to grow manifold post their death. If the proposition of non-survival of publicity rights post death is examined from a practical lens, then the name, likeness, signature, photograph etc. of the dead celebrity may be misused for material gain. As such, upon the celebrity's death, the legal heir's right and autonomy to permit or not permit the commercial exploitation of the celebrity's likeness or some attributes of his personality should not be taken away.

In today's digital age, there is an exponential increase in the number of people who become celebrities. Social media platforms such as Instagram give an insight not just into the vocation

of a particular celebrity, but also into their likes, dislikes, personal lives etc., because of which there is a persona or image that is created independent of their profession. Celebrities capitalize on this persona or image and reap significant financial benefits out of it. This is evident from the fact that Virat Kohli, who has over 182 million followers on Instagram, makes around INR 5,00,00,000 for a single promotional post on the platform¹⁰. This persona or image cannot be said to have extinguished suddenly upon the celebrity's death and hence, the commercial value attached to the personality continues to exist even post their death.

Given all of this, it may not be appropriate to take a simplistic view that as publicity rights emanate from privacy rights, the same would extinguish after one's death, in same the way privacy rights do. In view of the potentially exponential financial implications attached to the personality of a dead celebrity, the legal system in India may need to re-evaluate the present jurisprudence on recognition of posthumous publicity rights.

¹⁰ <https://www.hopperhq.com/instagram-rich-list/>