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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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PERSONALITY RIGHTS AND VIDEO GAMES: WITH A SPECIFIC FOCUS ON THE LAW ON TRADEMARKS

AUHORED BY - KIRUTHIKA SHANKAR RAMAN

(kiruthika.rmn@gmail.com, 9100937502)

4th-year B.com LLB student at the Institute of Law, Nirma University

Abstract

Personality Rights derive their importance from the importance any person places over their identity and personhood. In today's ideology of social presence and the value of the status one holds in society, Personality Rights are highly debated and seek protection. This is more prominent in the world of public figures whose names and personalities become the basis of their success and growth. When such a right is infringed it does become a grave concern for the person in question, but also there is the probability of an influence on society in general given that their identity and personality are followed by the general public.

This is the case with using of celebrity names or identities in public entertainment modes such as videos, media content, and also in video games. While such use could in one sense be looked at as a PR stunt, most celebrities tend to oppose such use owing to their lack of control over the exact usage and contexts of such use. There is also the factor that something so personal, which only they ought to have a right to is being used in the public sphere, leaving them exposed and vulnerable. In order to avoid such usage, celebrities have tried to acquire Trademarks, both conventional and unconventional, on their names or related intellectual property protections as well, to help protect their personality rights.

This paper seeks to give an overview of the prominence and importance of such personality rights and is also an attempt to analyze how such rights are sought to be protected under the IP regime with a special focus on Trademark protection in India and also internationally.

Introduction

People around the world tend to be heavily influenced by celebrities and famous personalities. They are swayed by the words, actions, and opinions of such personalities. This influence goes vice-versa as well, with actors, sportspersons, politicians, and other public figures banking on their public recognition and the people's support. This makes them highly concerned with the image of them that is portrayed to the people at large. From this arises the idea of 'Personality Rights'. Although it is the right of every individual to protect their individuality and personal life, it becomes more important in the context of such personalities who are more under the public lens and often have to deal with appropriation of their personality rights.¹

It is not uncommon for fans and followers, out of affinity for their idol, to use their name, photo, etc. for their own purposes. While on a personal level, this might still be looked at as an exception to privacy infringement and viewed in a positive light as increasing popularity and public image, it becomes a matter of concern when such use is made for commercial purposes without the consent of the person involved. Public personalities' rights are often violated by businesses that use their image, voice, or photographs in advertisements and promotional material without obtaining requisite consent for such use. This is easier and more prevalent, especially with the advent of artificially intelligent tools and technology that can manipulate available input to make it seem like the person is actually promoting the product.² This makes the protection of such personality rights more important for public figures and influencers.

Not only their names but also the information about them available in the public domain needs protection. People often also misappropriate certain names or objects attached to them that have acquired a distinct identity that adds to their image and reputation such as stage names or their unique identification marks such as a novel hairstyle or famous catchphrase which people associate with them and can identify the person based on those features alone as well.³

¹ Vishaka. S, *Personality Rights and Its Protection in India- a Statutory and Judicial Analysis*, LEXOLOGY, (Apr. 17, 2023), <https://www.lexology.com/library/detail.aspx?g=0759e39a-7803-4d67-95fa-f54624e99951>.

² *Personality Rights*, (2023), DRISHTI IAS, (Apr. 17, 2023), <https://www.drishtiias.com/daily-updates/daily-news-analysis/personality-rights#:~:text=Personality%20rights%20refer%20to%20the,companies%20to%20boost%20their%20sales>.

³ *Id.* at 2.

Personality Rights and Video Games

Video games have, for a significant time now, featured characters that each have their names and stories attached. These characters are sometimes inspired by real-life people and this can become problematic when the consent of the personality in question has not been obtained for the purpose of generating revenue out of such video games through the use of such a character.⁴ The video game character could be an inspiration that does not involve the person being embodied in their entirety but could still bear certain characteristics which are significantly associated with the person which enables people to draw the connection and identify the character to be the personality. This would still be a violation of their rights as the fact that these characteristics are so distinct that they enable people to identify the personality based on those alone shows that such characteristics form a part of their personality thus requiring them to be protected in some manner.⁵ As an example, if one were to create a video game character that wore a khadi vest with a rose attached as a boutonniere and a white topi by the name Jedemdal Nahru, any person in the subcontinent of India would recognize it to be a character inspired by the great freedom fighter-Jawaharlal Nehru ji, thus leading to the infringement of his personality rights.

The use of such personalities as the inspiration for video game characters can raise concerns about misrepresentation and identity theft in addition to the consent issue. Characters in video games are frequently depicted in a fictional or fantasy setting leaving scope for their actions and personalities to deviate and cause the character not to exactly coincide with the real-life personality whom the character has been inspired from. It becomes a loophole in one sense as the creator can claim that it is a fantasy or fictional world which does not refer to any real person, However, such use would still in all probability results in a distortion or misrepresentation of the personality of the person given the level of association of their traits or other aspects in the eyes of the public. This gives rise to the concern of the serious harm to their reputation and also cause a negative impact on the community that draws influence from them.⁶

On another note, the technology today is advanced at a level where video game characters can be made to look highly realistic with features that can be micro-designed onto them such as tattoos

⁴ Gaetano Dimita, Andrea Rizzi & Nicoletta Serao, *Image Rights, Creativity and Videogames*, 15 JIPLP 185, (2019), <https://doi.org/10.1093/jiplp/jpz178>.

⁵ Vaishnavi Joshi, *PERSONALITY RIGHTS: Yes, They Exist!*, PHOTONLEGAL, (Apr. 17, 2023), <https://photonlegal.com/personality-rights-yes-they-exist/>.

⁶ Jinghuai Lin J & Marc Latoschik, *Digital Body, Identity and Privacy in Social Virtual Reality: A Systematic Review*, 3 Front. Virtual Real., (2022), <https://www.frontiersin.org/articles/10.3389/frvir.2022.974652/full>.

and hairstyles.⁷ This makes the issue of personality rights more prominent as it gives more scope to fixate on the unique characteristics of the public figure. As an example, it is now easy to create a muscular character wearing a silver bracelet with a blue stone and a t-shirt that reads 'Being Human'. Even in the absence of a name, it is very easy to identify that character to be a representation of Salman Khan.

This was also the ground for contention in the famous case of the basketball game called NBA2K which created players in the video game based on actual basketball players such as Kobe Bryant and LeBron James along with their tattoos on the videogame character which led to a copyright infringement suit.⁸ While the issue, in this case, was more focused on the infringement of the copyright of the tattoo artist, it is important to note that the characters could be identified based on those tattoos alone. This shows that it could be deemed a part of their personality which when used by game creators without due authorization, could very well be a case of personality right infringement.

Thus, the issues regarding personality rights in the context of video games require regulation and bridging of gaps caused by the lack of any specific legislation for governing personality rights presently.

Protection under Privacy Laws

Privacy laws are a possible solution to such infringement of personality rights. The General Data Protection Regulation in the EU is a comprehensive legislation that provides protection for data and the privacy of individuals. Article 4 of the regulation provides that 'personal data' would refer to any information that relates to an identified or identifiable person. While the protection under GDPR is majorly for data that is collected from an individual, the notion of it can be analyzed from the perspective that, in one sense, such information could also extend to mean such information that is used in video games in the process of creating such inspired characters as well. India however, is yet to implement a comprehensive legislation. Currently, there exists a Digital Personal Data Protection Bill, 2022⁹ which has majorly been adopted from the GDPR thus

⁷ Anna Piechówka, *When Video Games Meet IP Law*, WIPO MAGAZINE, (Apr. 17, 2023), https://www.wipo.int/wipo_magazine/en/2021/02/article_0002.html.

⁸ *Video game tattoos and copyright*, LETSLAW BY RSM, (Apr. 17, 2023), <https://letslaw.es/en/video-game-tattoos-and-copyright/#:~:text=if%20the%20tattoo%20has%20been,for%20use%20from%20the%20author.>

⁹ The Digital Data Protection Bill, 2022

awarding similar protection. While both legislations provide for protection against unlawful and unjustified use or processing of collected data, neither provides for a specific scenario of misappropriation of personality rights. It can be an attempt to use these laws to claim protection in the case of personality rights infringement, but it is not yet a soundproof solution.

Trademarks Protection on Personality Rights: Current Legal Position

Personality rights as seen, currently remain ungoverned by any specific law and only derive protection in the form of the 'Right to Privacy' under Article 21 of the Indian Constitution¹⁰ or in the form of tortious remedies.¹¹ In some cases, personalities seek protection under intellectual property laws such as trademarks to ensure that their names, phrases or symbols are not used for economic gains without their due consent.

Usually, the use of personal names or representations of people which suggests some false connection with any person is not allowed under the Indian Trademarks Act, 1999 under Section 14.¹²¹³ This would mean that video game companies cannot acquire trademarks over characters or names that are inspired by famous personalities. However, some personalities have names or symbols that have become so distinct that they become something of an identification mark through which the public recognizes them which have been allowed as subject matters eligible for protection under trademarks. Some examples include the trademark held by Sachin Tendulkar for his name or by Usain Bolt for his initials and his "pose".¹⁴ This is also supplemented by the provision under Section 35 of the Trademarks Act¹⁵ which allows for a person to register for bona fide use, of his own name. Additionally, even if not registered, there is always the established practice of acknowledging the name similar to a well-known mark in exceptional cases as has been held in judgments such as *Arun Jaitley v. Network Solutions (P) Ltd*¹⁶ if it can be established

¹⁰ INDIA CONST. art. 21.

¹¹ Vaishali Mittal, *Right of Publicity in India*, LEXOLOGY, (Apr. 17, 2023), <https://www.lexology.com/library/detail.aspx?g=c2428891-d91a-4fbc-b5a4-a6e0cb9e3913>.

¹² *Id.* at 2.

¹³ Trade Marks Act, 1999, §14, No. 47, Acts of Parliament, 1999 (India).

¹⁴ Manavi Jain, *An Overview of Celebrity Rights - Athletes and Sportspersons*, ALG INDIA LAW OFFICES LLP, (Apr. 17, 2023), <https://www.algindia.com/an-overview-of-celebrity-rights-athletes-and-sportspersons/#:~:text=Celebrity%20Rights%20are%20a%20bundle,referred%20to%20as%20Celebrity%20Rights>.

¹⁵ Trade Marks Act, 1999, §35, No. 47, Acts of Parliament, 1999 (India).

¹⁶ *Arun Jaitley v. Network Solutions (P) Ltd*, 2011 (47) PTC 1 (Del).

under the parameters set under the Trademarks Act.¹⁷

It is also common for celebrities to allow, for limited purposes, the use of their image, voice, taglines, or symbols as a promotional stunt or advertisement, but they still have to be given complete information about the use and also a royalty fee for such use of their personal property. The use of trademarks has been a common recourse across jurisdictions. To consider the famous case involving Lady Gaga, a British entertainment company by the name of Mind Candy had created a video game character, who despite being a toddler had the platinum blonde hair that was a statement hairstyle that Lady Gaga, who was also named Lady Goo Goo which clearly showed their intent to use her style and associated personality. Lady Gaga sued the company for infringement of trademark which due to the British position of not allowing use even for parody purposes was won by her.¹⁸ However, in contrast to the UK law which does not recognize image rights, the US legal system and the EU legal system allow for the protection of image rights which they consider an economic right.¹⁹

Conclusion

Currently, in the absence of such a system and also the lack of air-tight privacy regulations in India, IP protection seems to be the closest to gaining the best possible remedy against the use of personality rights. Since the law of trademarks is one that focuses most on the consumer perception and prevention of confusion among them thus causing harm to the mark in the question of any content that is sought to be protected and the protection of personality rights is somewhat similar as it seeks to protect the person against the misuse of their characteristics that mislead the public to believe that it is, in fact, them, thus causing them loss through unfair gain by the game developers, adopting trademark requirements as the threshold in personality rights seems to be the best possible option.

The regime of Trademarks, although, making an effort to protect personality rights in addition to privacy laws are however not very effective. There is the defense of 'fair use', although not very likely to be granted as there is a third-party interest that is being violated. However, it would

¹⁷ Lucy Rana & Shilpi Sharan, *Protection of Personality and Image Rights in India*, MONDAQ, (Apr. 17, 2023), <https://www.mondaq.com/india/trademark/1211056/protection-of-personality-and-image-rights-in-india>.

¹⁸ *Id.* at 4.

¹⁹ Simon Bennett, *"It's in the game" – unauthorised use of image rights in video games*, FOX WILLIAMS, (Apr. 17, 2023), [foxwilliams.com/2021/03/09/its-in-the-game-unauthorised-use-of-image-rights-in-video-games/](https://www.foxwilliams.com/2021/03/09/its-in-the-game-unauthorised-use-of-image-rights-in-video-games/).

require an in-depth analysis of the intention of the video game developer behind using such characteristics and assess based on such intent, the existence or non-existence of an infringement. While the court may reach a conclusion that it would not amount to infringement due to non-fulfillment of the required threshold, there still exists the threat of loss of personality rights to the public figures, which could have a grave negative impact.

Thus, it would be safe to say that while the current legal system makes an effort, there exists a different and advanced set of laws that enable the protection of personality rights as a *sui generis* system in light of current trends and developments in technology that enable realistic and deceptive virtual characters.

