INTELLECTUAL PROPERTY AND PROTECTION OF PERSONALITY RIGHTS IN THE DIGITAL CONTEXT

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Abstract

The idea of Intellectual Property (IP) is to foster innovation and enterprise. IP is now being applied in varied new forms. One such case is the application of IP over various attributes of one's personality, including name, image, and voice, with the aim to provide protection from unauthorized exploitation of commercial value of persona. In countries like United States of America (USA) and Germany, protection of the identity of persona has been recognized as a legal right, whereas countries like India and United Kingdom (UK) are still at a nascent stage in this matter. However, the growing judicial pronouncements relating to this subject are a good indicator of recognizing such rights in these countries. It gains more importance in the digital context as marketing with persona in online platforms is becoming an effective marketing strategy for business enterprises. It is considered an effective marketing tool in a competitive market because of its potential to gain access to the target consumers easily. This is also an area where misappropriations at a significant rate are taking place, including unauthorized use of persona in fantasy sports and/or video games, Internet traffic, spam advertising, cybersquatting, digitally altered images, computer animations, hologram creations, unauthorized endorsements via hashtags, Twitter hacking, etc. A huge amount of money is procured by such acts of misappropriations which involve the unauthorized use of the market value of personality. The researcher aims to analyse how these issues have been handled in the USA and Germany, with special reference to India where laws pertaining to it are absent even in the non-digital context.

Keywords: Intellectual Property, Personality Right, Digital Platforms, Misappropriations, Commercial Value.

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1. Introduction

Personality right is the right to control the use of one's identity such as name, image, voice likeness etc.[1] In other words, it is a right of an individual to protect, control, and profit from one's image, name, or likeness.[2] The term used in each country is different; some are referred to as the right of publicity, some as image rights. Just like the difference in terminology, the notion and way of protection provided in each country[3] are also different but ultimately the underlying rationale is that it is the right of the individual to control his/her indicators of identity.

The current digital context's misappropriation of personality rights has become a huge problem. In fantasy sports and video games, cybersquatting, hologram, and computer animation (digitally altered images) have more issues in the digital context. One of the primary reasons is that in the digital world, where almost everything is available on the internet, it has become easy to download, copy, manipulate, and distribute by anyone at any time. It became increasingly difficult for individuals to control their persona from such exploitations, which ultimately led to the question whether technological progress is sufficient enough to cover all these issues under the existing legislative framework or whether it is lagging behind.

Comparing the personality rights among the existing legal jurisdictions such as the United States[4] and Germany[5] reveals a disparity in the scope of protection afforded in the non-digital context.[6] The disparity in the scope of protection is reflected in the digital context regarding the protection of the commercial value of persona. The technological development creates an increase in realistic digital reproductions of persona. It seems difficult to determine whether there is actual infringement or there is any cover in such use under exempted categories.[7] This paper first delves into a general overview of the

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1 Identity- Name, image, voice, manners, caricature, etc.

2 The Restatement (Third) Of Unfair Competition, 2004. See also J. Thomas McCarthy, *MCCARTHY On Trademarks and Unfair Competition* 28:1 (West Group, 4th ed., 2004) - McCarthy defined right of publicity (other term used by US to denote personality right) as *the "inherent right of every human being to control the commercial use of his or her identity.*"

3 US, Germany and France.

4 The Lanham Act, 1946, s. 43.

5 The German Civil Code, 1900 and the German Act on the Protection of Copyright in Works of Art and Photographs, 1907.

6 Alix C. Heugas, "Protecting image rights in the face of digitalization: A United States and European analysis" 24 *The Journal of World Intellectual Property* 344-367 (2021).

7 Exception of personality rights- freedom of speech and expression, public interest, public domain, artistic creation, parody, etc.

personality rights protection offered in the United States, highlighting the lack of federal law and German perspective in protecting image rights. Secondly, it looks into different digital areas where the misappropriation of the identity happens, such as video games and fantasy sports, cybersquatting, and social media. Lastly, the paper gives an overview of the personality right in the Indian context.

2. Concept of Personality Right: An Overview

The USA uses the term 'publicity right' to denote the protection of the commercial value of persona. The concept emerged from a common-law judgment held in 1953;[8] it was part of the right to privacy before that.[9] Even now, publicity right is considered a state-wise protected right but not recognized as a separate right by every state[10]. There is no federal law as such for protecting publicity right in the USA; but in some cases, courts give remedy under Section 43 of the Lanham Act.[11] However in majority of cases court grant remedy based upon each state laws and thus each state laws[12] individually determine its scope and protection of the right. A three tier protection is given in US at the state level, namely, as common law,[13] as state statutes,[14] and the third is a mixture of both.[15] However the base for protection is the Restatement (Third) of Unfair Competition.[16]

The difference in legal protection provided by different states leads to a lack of uniformity which ultimately creates a huge problem in the digital and non-digital contexts. Due to such dissimilarity in the law of each state, there are inconsistencies in the judicial decisions also. While considering the digital context, especially in video games or fantasy sports, many athletes or players have not been given proper protection against their identity misappropriation even through their state law; thus, the state law

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8 *Haelan Lab. V. Topps Chewing Gum, Inc.* Case US Court of Appeals for the Second Circuit - 202 F.2d 866 (2d Cir. 1953). See Melville Nimmer, "The Right of Publicity" 19 *Law and Contemporary Problems* 203-223 (Spring 1954).

9 Warren and Brandeis, "The Right to Privacy" 4 *Harvard Law Review* 193-220 (1890).

10 Alaska, Arkansas, Colorado, Delaware, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, South Dakota, Vermont, West Virginia, Wyoming.

11 *Supra* note 4.

12 The Right of Publicity Act, 1999; the Kentucky Revised Statute, 1999; the Ohio Revised Code, 2000; Pennsylvania Annual Statute, 2003; Texas Property Statute, 1997.

13 Alaska, Connecticut, District of Columbia, Georgia, Missouri, New Jersey, New Mexico.

14 Arkansas, Arizona, Illinois, Indiana, Kentucky, New York.

15 California, Ohio, Pennsylvania, Texas.

16 The Restatement (Third) Of Unfair Competition, 1995, s. 49.

fails to address publicity-rights issues in the digital context. And in other areas, due to the lack of judicial decisions with regard to personality rights, misappropriations in the areas such as digitally altered images, computer animations, hologram creations, unauthorized endorsements via hashtags, Twitter hacking, etc. are lagging behind. The only possible way to provide protection is to look into the pre-existing judicial decisions on video games which also deals with the issue of individuals being digitally reproduced. Such cases can be relied upon to interpret the legal risk of using a real-life person's identity without authorization in the aforementioned digital areas.

Germany uses the term 'personality right,' whereby the concept evolved from Kant's philosophy[17] on individual autonomy and freedom. Still, the legal recognition of each personality attribute was recognized through different judicial decisions.[18] Therefore each personality attribute has different statutory protection for image[19] and name[20] have a specific statute. The other attributes were covered under the preview of general personality rights, which was also introduced through a case[21] later recognized as part of German basic law.[22] In Germany, even in the digital context, the court applies the existing law to protect the persona from misappropriation.

The difference between the USA and Germany for the protection of personality rights is that Germany follows a monistic approach signifying one comprehensive right that protects both privacy interests and exploitation interests. In contrast, the USA follows a dualistic approach where there is a separate right for commercial exploitation of one's persona and the right to privacy. Both countries interpret these statutes and give remedies accordingly in the digital context. But the USA has much more judicial decisions on

[17] Immanuel Kant, *The Metaphysical Elements of Justice* 44 (Hackett Publishing Company, Inc., Cambridge, 1999). Kant observed that "Freedom is an innate right wherein the one sole and original right belongs to every human being by virtue of his humanity and it comprises the attribute of a human being's being his own master again, a notion of control and self-determination". Further Kantian theory of individual autonomy and freedom states that the right is entitled to decide whether, when, and how an individual wishes to present himself to any third party or the public. See A. Haemmerli, "Who's Who? The Case for a Kantian Right of Publicity" 49(2) *Duke Law Journal* 383-492 (1999).

[18] Otto von Bismarck RG 28.12.1899, RGZ 45, 170 (1899). After this case the protection of the person portrayed, i.e. the right to one's own image, was also introduced into the Artists' Copyright Act of 1907. And Section 12 -[Civil Code of 1900] ("BGB") prohibits the unauthorized use of another person's name.

[19] Law on the Copyright in Works of Visual Art Arts and Photography,1907, s. 22, 23; Paul Dahlke- BGH, May 8, 1956 - I ZR 62/54- German courts have interpreted section 22 as modelled on German copyright law which similarly constitutes a hybrid right.

[20] The German Civil Code,1900, s. 12.

[21] Schacht case [BGHZ 13, 334 (1954)].

[22] German Constitution, 1949 Articles 1 and 2.

personality misappropriation in the digital context than Germany; therefore, more cases concerning digital persona can be seen in the USA.

3. Notion of Persona in Digital Context

3.1. Video-Games

In the digital era, most of the misappropriation issues happened in the USA, especially in video games or fantasy sports, where the right of publicity has become the subject of an increasing amount of litigation in the world of athletics. But in most cases, the player publicity rights had been always compromised under the First amendment clause. Reference can be made of *CBS Interactive Inc.* v. *Nat'l Football League Players Ass'n*[23] where player identity was used in the video game. The court in this case held that C.B.C. provided an interactive game for the use of the major league baseball player's information and such information is part of its service; therefore, information used in the fantasy baseball game is in the public domain which is exempted under First Amendment.[24]

The court's decision was completely wrong because the court appeared to place the commercial fantasy sports in the same category as the sports section of a newspaper or magazine,[25] and the court left out the intricacies and true purpose of fantasy sports games. The motive behind such use is commercial gain because they use the player's identity as a market tool, which amounts to commercial misappropriation.[26] Even if the information is already available to the public, that does mean that it can be used for any purpose without consent other than exempted categories.[27] Covering the commercial use of player identity under the preview of public interest or public domain[28] is wrong because

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[23] 259 F.R.D. 398, 419 (D. Minn. 2009); *C.B.C. Distrib. & Mktg., Inc.* v. *Major League Baseball Advanced Media*, L.P., 505 F.3d 818, 820 (8th Cir. 2007).

[24] William K. Ford and Raizel Liebler, "Games Are Not Coffee Mugs: Games and the Right of Publicity" 29 *Santa Clara High Technology Law Journal* 1 (2012).

[25] J. Thomas MC Carthy, *The Rights of Publicity and Privacy* 26 (Clark Boardman Callaghan, 2012) - McCarthy's position is that the game element of C.B.C.'s service made the service ineligible for First Amendment protection from a right of publicity claim.

[26] David G. Roberts, "The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got it Wrong" 58 *Case Western Reserve Law Review* 245 (2007).

[27] Like non-commercial, expressive works. Such as newspaper or magazine article, novels and movies, and entertainment works permission is not needed to use someone's name or likeness.

[28] Michael B. Greenberg, "Full-Court Press: Fantasy Sports, the Right of Publicity, and Professional Athletes' Interest in the Live Transmission of Their Statistical Performances" 20 *Journal of Technology Law & Policy* Article 1 (2015).

more than the public interest, the motive of the defendant's use of such player identity is for commercial benefit, but the court seems to completely ignore such part and did not consider the economic interests of the players. It shows that the courts are more interested in protecting the video gaming industry than players' rights.

Until 2011 the USA court was confused whether using names and images in games was a form of merchandise or not, but after the *Brown* v. *Entertainment Merchants Association*[29] cases, the potential was changed where the USA court held that video games were recognized as a medium of expression, which is equivalent to traditional forms of expression, like, books, plays, and movies,[30] therefore, it was exempted under the First Amendment. It shows that the notion of the court has changed with regard to games which means that rather than considering it as merchandise, it is now considered as an expression when compared to the traditional game's context.

The cases that happened in the non-digital context related to the traditional board games or trading cards wherein the publishers need a license to use someone's name or likeness.[31] This implied that without permission, no one can incorporate someone's name or likeness in a game, but while referring to the video games context, the USA court completely took a different stand by stating that video games was an expressive medium as far as the First Amendment is concerned.

Even on both platforms, the unauthorized use of identity happened, but the reason for taking different views or standing by the court is unclear.[32] One reason might be the market;[33] compared to non-digital platform, the digital platform has an expanded market[34] that helps the giant companies make a huge profit by using the player identity.

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29 131 S. Ct. 2729, 2733 (2011).

30 *Ibid.*

31 *Palmer* v. *Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Uhlaender* v. *Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

32 Where on one hand required license to use someone's identity in a game and on other had not required because it is part of public domain and public interest. It shows the change that happened in the USA perspective regarding the protection of the commercial value of persona.

33 Indian Federation of Sports Gaming, "The evolving landscape of sports gaming in India" *available at*: https://assets.kpmg/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf (last visited on June 20, 2022). The online gaming market in India has seen tremendous growth of late, driven, in part, by the surge in digital usage. The revenues have nearly doubled over a period of four years, reaching INR 43.8 billion in FY18 and are expected to grow further at a CAGR of 22.1 per cent from FY18-23, expected to reach INR 118.8 billion.

34 Elizabeth Thornburg, "Damn Daniels! Back at It Again with The Fantasy Sports Publicity Rights in the Realm of Fantasy Sports" 8 *Mississippi Sports Law Review* (2019).

It is a market strategy that helps to catch the consumer's attention to sell their product. These game companies are making huge profits compared to traditional card games in the present scenario.

While comparing both the platforms, it is observed that more commercial use of persona occurred in the digital games context than the non-digital context even though the court supports these companies by covering such use through the defence of First Amendment which trumped the athlete's publicity rights. After analysing different cases, the main justification cited by the court for the application of these defences are, firstly, public domain, that the information of professional athletes was already available in public; secondly, the players who appeared in these games were already rewarded separately for their labours; therefore there is no need to give further incentive, and thirdly, consumers of fantasy sports services are not confused by the use of player information as that the athlete endorsing the fantasy sports service.

The courts have come up with different tests for more justifiability of the claims mentioned above and for a proper balance between speech rights and publicity rights.[35] Each test focuses on a different facet to evaluate the usage of the persona versus the actual expressive work. However, these tests are limited and have led to different results in their past applications. After analysing these tests, it seems that even in the application of the test by the court, the majority are in favour of these video games companies.

For example, under transformative tests, the video games developer claims that they added numerous creative elements, an analogy to an expressive painting that tends to lend support to transformative-use defense. Further the roger test was designed to protect consumers from the risk of consumer confusion. But the right of publicity seeks to protect the persona's right in their identity rather than consumer confusion. Even under these tests, two-parameters were checked in favor of video gaming companies.[36] It seems that all applications of these tests in the digital context have many variations compared to

[35] Allison L. Hollows, "The Application of the Transformative Use Test in the Right of Publicity Context" 45 *Seton Hall Law Review* Article 7 (2015); Kevin Chin, "The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity" 13 *Northwestern Journal of Technology and Intellectual Property* 197 (2015); Nicholas E. Frontera, "The Best of Two Tests: A Hybrid Test for Balancing Right of Publicity and First Amendment Interests Tailored to the Complexities of Video Games" 22 *UCLA Entertainment Law Review* 200-210 (2015).

[36] Anthony Zangrillo, "The Split on the Rogers v. Grimaldi Gridiron: An Analysis of Unauthorized Trademark Use in Artistic Mediums" 27 *Fordham Intellectual Property, Media and Entertainment Law Journal* 385 (2017).

the non-digital context.[37] In some rare cases, some case courts took a different stand while applying the test, but the majority of the USA courts supported these companies.[38]

An identifiability test,[39] which was an alternative to looking into these tests as a way to regulate such misappropriation, can be used to identify such unauthorised usage. Before the USA court applied the identifiability test to find the misappropriation of persona in the non-digital context, similarly in a video game context, if a player is recognized through his unique feature, they can claim such right.[40] Even the defendant's use can be considered a valid factor to determine such violation because it is a valid proof of commercial utilization of the value of persona. From the market perspective, most gaming companies use the real player persona for commercial gain purposes rather than entertainment.

The position of the USA concerning video game context is completely different compared to the non-digital context. Even their statute or common law protected commercial misappropriation of persona but still, the court omits the true purpose of fantasy sports games. Otherwise, the court misapplied the prima facie legal analysis on public rights due to the lack of uniformity in laws throughout the country.

Whereas in the case of Germany, the context is different, an overall view cannot be given because there are not many cases happening with regard to digital misappropriation of persona in the video games context. But one of the most cited cases was Oliver *Kahn* v. *Electronic Arts.*[41] The court held that consent is required for using one's likeness and name even in video games. Using the personality attributed for any

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37 *No Doubt* v. *Activision Publishing, Inc.* [192 Cal. App. 4th 1018, 122 Cal. Rptr. 3d 397 (2011)]; *Pellegrino* v. *Epic Games, Inc.* [451 F. Supp. 3d 373 (E.D. Pa. 2020)]; *Winter* v. *DC Comics* [30 Cal. 4th 881, 134 Cal. Rptr. 2d 634, 69 P.3d 473 (2003)]; *Hart* v. *Electronic Arts* [717 F.3d 141 (3d Cir. 2013)]; *Comedy III Productions, Inc.* v. *Gary Saderup, Inc.* [25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797 (2001)]; *ETW Corp.* v. *Jireh Publishing, Inc.* [332 F.3d 915 (6th Cir. 2003)]; *Kirby* v. *Sega of America* [144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607 (2006)]; *Hamilton* v. *Speight* [413 F. Supp. 3d 423 (E.D. Pa. 2019)]; *Pellegrino* v. *Epic Games, Inc.* [451 F. Supp. 3d 373 (E.D. Pa. 2020)]; In re NCAA Student-Athlete Name & Likeness Licensing Litigation [724 F.3d 1268 (9th Cir. 2013)].

38 *Keller* v. *Elec. Arts, Inc.*, [No. 09-1967, 2010 U.S. Dist. LEXIS 10719, (N.D. Cal. Feb. 8, 2010)]; *Hart* v. *Elec. Arts, Inc.* [808 F. Supp. 2d 757 (D.N.J. 2011)].

39 *Motschenbacher* v. *R.J. Reynolds Tobacco Co*. [498 F.2d 821, 825-27 (9th Cir. 1974)].

40 *Jordan* v. *Jewel Food Stores, Inc*. [2015 83 F. Supp. 3d 761,113 U.S.P.Q.2d 2093 83 F. Supp. 3d 761 (N.D.Ill. 2015), 10 C 340].

41 The Hamburg Court of Appeal on 13 January 2004 opined that the football player Kahn had filed a lawsuit against video game developer Electronic Arts (EA) for using his likeness and name in a FIFA game without his consent. The German Courts considered this a monopolization of Kahn's personality and rejected EA's expression of art defence.

commercial purposes will not be covered under the purview of public interest. The court is clear that the defendant used the image and likeness of the player to create and distribute a realistic game for financial gain and profit. More than any interest of the general public information, the commercial gain factor prevails more.

While comparing both jurisdictions' views on the protection of personality rights, especially in video games, it seems that the USA is more in favor of gaming companies. In contrast, even Germany does not have many cases concerning the protection of persona in video games context; further it was observed that the German courts have taken a different stand which provides protection. In the practical context, these video companies are making huge commercial gains by exploiting the player's identity. They were not sharing any profit to these real players for utilizing their identity in these games.[42] Thus it is high time to properly remedy such misappropriation of these players' identities.

3.2. Cybersquatting

Cybersquatting[43] is another issue happening on the internet where misappropriation of the persona's name is done for commercial profit. Each country gives protection through its own statutory laws.[44] Nowadays, many unauthorized registration of domain names of well-known celebrities, politicians, public figures, and private individuals can be seen. The motive behind such registration is unlawful commercial gain or unjustly enriched by its use.

The main law which many countries use to regulate such issues is the trademark law, but for protection, the persona needs to register the name as a trademark or else as in the case of well-known personality due to its distinctiveness and secondary meaning through use (when the name and personality become synonymous in the mind of the public) it gets protected.[45] But in both scenarios, there must be products or services

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[42] The sports fans can create their own team made up of real-life players from upcoming matches and is widely played across cricket, football, kabaddi, basketball and other popular sports games. These virtual teams garner points based on the actual statistical performance of players during the course of the real life match and winners are determined accordingly.

[43] Winston & Strawn LLP, "What is the Definition of Cybersquatting?", *available at*: https://www.winston.com/en/legal-glossary/cybersquatting.html (last visited on 21 June 2023).

[44] For name protection, the USA has the State Publicity Right, Federal Lanham Act, 1946; Germany enacted the German Civil Code, 1900 under section 12 and India enacted the Trademark Act, 1999.

[45] Madonna Ciccone, p/k/a *Madonna* v. *Dan Parisi and "Madonna.com*,2000; *Tom Cruise* v. *Alberta Hot Rods*, WIPO Case No D2006-0560, 5 July, 2006; *Julia Fiona Roberts* v. *Russell Boyd* Case No. D2000-

associated with her/his name, and it must be used to distinguish her/his products or services from those sold by others. Thus, the protection under trademark brings complainants more difficulty, especially for those persons who have no trade or trade relation.

In such a situation, it can be solved by two ways, one is by virtue of unjust enrichment principle, which might help to claim protection even if the person doesn't have a trade. Under this principle, two classes of unauthorized use can be covered: one is where the domain name registrant seeks to profit from selling a relevant domain name to someone else even if the registrant herself did not use or intend to use the name; while the other is where the registrant seeks to derive a commercial profit herself from using the domain name in an unauthorized way.[46] But even in an unjust enrichment claim, the person needs to prove that the defendant had made an unjust gain from such unauthorized use. It is difficult to prove, especially for non-celebrities or private individuals, that an unjust gain is made by others with their persona, especially in the context of name.

Another remedy available is, like USA court follow consumer confusion factor, where the public is confused or mistaken, or deceived as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.[47] Just like under the law of trademark, only registered mark holders possess the right of action; the consumers confusion became an efficient mechanism to control such unlawful domain name registration[48] in some cases. It also can be applied uniformly for all persona. With regard to personality rights, protection from cybersquatting is also a challenging issue in the current digital scenario.

0210, May 29, 2000; *Mr. Arun Jaitley* v. *Network Solutions Private*, 2011; *Tata Sons Limited & Anr.* v. *Aniket Singh*, 2015.

46 Jacqueline D. Lipton, "Celebrity in Cyberspace: A Personality Rights Paradigm for Personal Domain Name Disputes" 65 *Washington and Lee Law Review* 1445 (2008), *available at*: https://scholarlycommons.law.wlu.edu/wlulr/vol65/iss4/5/ (last visited on 15 July, 2023).

47 The Lanham Act, 1946, s. 43.

48 Deborah J. Ezer, "Celebrity Names as Web Site Addresses: Extending the Domain of Publicity Rights to the Internet" 67 *The University of Chicago Law Review* 1295 (2000).

3.3. Social Media Platform

Social media are the platform[49] where individual users connect and share information and content to larger audiences than ever before. It has a huge impact, therefore, it may be referred to in a single word as 'social marketing' to connect with the target consumers. Many business enterprises use such platforms as a market tool or branding tool because it has very low-cost marketing sales compared to traditional marketing. Nowadays, social media is a hub of different business entities for businesses, endorsement dealing, and other purposes. Use of personality attributes in the market, especially the usage of real person images, names, voices in the product and service endorsement and a merchandising business, gives more personal feeling and authenticity, which ultimately help for selling their product.[50] In such instances, there is a high chance of unauthorized use of personality attributes for commercial purposes because connecting with the public or global audience is easy through the association with real people through different online social networking sites and e-commerce.

A good example is a case[51] held in the USA where the defendant (social media site) misappropriated the individual identity (names and pictures) in online endorsement sites for marketing purposes. They had commercial gain[52] through such use. The court held in favour of the plaintiff that using any user's pictures in paid advertisements violates publicity rights.[53] In this case, two main factors can be considered, which can be mostly applied to other sites: access to the targeted consumer and the contractual issue with regard to consent in social media. The competition is very high from the market perspective now; every player wants to connect to the consumer as fast as possible.

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49 Facebook, Twitter, Instagram *etc*.

50 Barbara Bruni, "The Right of Publicity as Market Regulator in the Age of Social Media" 41(5) *Cardozo Law Review* 2208 (2020), *available at*: https://ssrn.com/abstract=3720883 (last visited on 10 July, 2023).

51 *Fraley* v. *Facebook, Inc*., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011): where one of the social media companies used one of the user's identities to sell advertisements for products, services, brands without obtaining their consent through Facebook's Sponsored Stories feature. the plaintiffs alleged a violation of California's right of publicity statute when their names and profile pictures were used in association with "Sponsored Stories," which were enabled as a default setting for all members.

52 *Fraley* v. *Facebook, Inc*., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011): statements made by Facebook's CEO Mark Zuckerberg and its COO Sheryl Sandberg is that friend endorsements have more than double the value of a generic advertisement, with much of Facebook's revenue coming in the form of advertisements. Therefore, the plaintiffs could prove they had been identified and that the use of their identities benefitted Facebook commercially -a commercial gain of which the plaintiffs themselves were being deprived. Commercial gain- access to the targeted consumer.

53 California's Right of Publicity Statute, Civil Code s. 3344.

The social media platform has a major hand to help these players to enter into the competitive market easily with the help of different persona. And with regard to consent in most countries such as the USA and Germany, even India, if someone claims for personality right violation, the primary question is whether the usage of persona is done with or without consent. Most social media sites demand consent under the terms and conditions required to enter into the platform, and almost all people agree with the terms and conditions. In such cases, any form of unauthorized use of personality attributes taken from these platforms will be covered under that clause. It seems the contractual issue of consent, in the context of social media platforms agreement terms, stripping away individuals' publicity rights through such contracts.[54] In such cases, the publicity right has importance.

The USA court analysed it in *Perkins* v. *LinkedIn Corp*[55] case, the court held that if someone misappropriated beyond the scope of the given consent, such appropriation amounts to the violation of publicity rights. In this case plaintiffs alleged that defendant, the operator of a popular social networking website, used plaintiffs' names and likenesses to personally endorse LinkedIn's services for the commercial benefit by harvesting email addresses from plaintiffs' contact lists and email history, including the email addresses of every person that has ever emailed. The defendant argued that such use will be covered under the implied consent clause that plaintiff signed to use the platform. But court held that the consent obtained by LinkedIn covered the first email to the users' contacts, subsequent emails were beyond the scope of this consent[56] and therefore it amounts to infringement of personality rights. The conflict of interest between consent and infringement happens when use goes beyond the said matter. However, permission to be photographed does not necessarily signify permission for commercial use. When a photojournalist takes a picture of an individual taking part in a public event, for instance, implied consent could be applicable if the image is used to depict the newsworthy event, but not if it is used in an advertising.[57] Other issues on social media platforms are Twitter

54 Dustin Marlan, "The Dystopian Right of Publicity" 37 *Berkeley Technology Law Journal* 809 (2022).
55 53 F. Supp. 3d 1190 (N.D. Cal. 2014).
56 Barbara Bruni, "The Right of Publicity as Market Regulator in the Age of Social Media" 41 *Cardozo Law Review* 2203 (2020), *available at*: https://ssrn.com/abstract=3720883 (last visited on 11 July, 2023).
57 Susanne Bergmann, "Publicity Rights in the United States and Germany: A Comparative Analysis" 19 *Loyola of Los Angeles Entertainment Law Review* 488 (1999).

hacking,[58] unauthorized endorsements via hashtags.[59] Even though the USA doesn't have federal law for protection, they covered all such issues through their state laws. The variation in each state's law leads to inconsistent judicial decisions, even in similar factual cases.[60] The main issue that the USA faces until now is the lack of federal law concerning personality rights protection. Whereas, as in the case of Germany, under the existing law[61] itself, they try to give protection.

4. Indian Scenario

India is still in the developing stage even though personality rights have been recognized in the 21st century through Common Law.[62] Even in the absence of statutory support for personality rights, the right was protected through various laws by the courts. The primary legal sources for the personality right are Articles 19 and 21 of the Constitution of India,[63] where the Supreme Court[64] of India considered personality right as part of the right to privacy, and some courts protected it under trademarks,[65] copyright,[66] passing off etc. However, in several instances, courts have upheld the claims of personality rights under the existing statute in such a way that it provides proper protection for personality rights.

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58 Andrew M. Jung, "Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites" 86 *Chicago-Kent Law Review* 381 (2011); *La Russa* v. *Twitter*. No. CGC09488101 (Cal. Sup. Ct. May 6, 2009); Wafula June Nicole, "Social Media and Its Effects On Personality Rights: The Case for A Defined Legal Framework On Personality Rights in Kenya" (2018) (Dissertation, Strathmore University Law School).

59 Andrew M. Jung, "Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites", 86 *Chicago-Kent Law Review* 381 (2011).

60 *Cohen* v. *Facebook, Inc*., 798 F. Supp. 2d 1090 (N.D. Cal. 2011); *Fraley* v. *Facebook, Inc.*, 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011).

61 Carol J. Greer - International Personality Rights and Holographic Portrayals - The right of personality is implied from the German Constitution, the German Civil Code, and the German Act on the Protection of Copyright in Works of Art and Photographs of 1907.

62 *D.M. Entertainment* v. *Baby Gift House*- Citation: CS(OS) No. 893/2002 - MANU/DE/2043/2010; *Titan Industries Ltd*. v. *M/s. Ramkumar Jewellers* CS (OS) No. 2662/2011.

63 *ICC Development (International)* v. *Arvee Enterprises and Anr*. 2003 VIIAD Delhi 405, 2003 (26) PTC 245 Del, 2004 (1) RAJ 10.

64 *Justice K. S. Puttaswamy* v. *Union of India*- (2017) 10 SCC 1; *Rajagopal* v. *State of Tamil Nadu* (1994). (1994) 6 SCC 632 - "*Every individual should have a right to be able to exercise control over his/her own life and image as portrayed in 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 out of his/her consent*".

65 The Trade Marks Act, 1999, s. 14; *Arun Jaitley* v. *Network Solutions Pvt. Ltd. and Ors.* CS(OS) 1745/2009 and I.A. No. 11943/2009 and 17485/2010); *Mr. Gautam Gambhir* v. *D.A.P & Co. & Anr.* CS(COMM) 395/2017.

66 The Copyright Act, 1957, s. 38 and 57; *Miss. Kajal Aggarwal* v. *The Managing Director*, M/s V.V.D. & Sons, 2011).

Still, after analysing different case laws,[67] it is clear that the Indian judiciary does not have much clarity on personality rights. The existing statute is not sufficient to protect the right of persona even in the non-digital context. While in the digital context, more issues can be seen in relation to the name of persona; such issue is called cybersquatting,[68] where someone registered or uses a domain name with bad intention/faith to make a profit belonging to someone else by an offer to sell the domain to the person who owns a trademark contained within an inflated price. It shows that the evolution of modem technologies accompanies more legal ambiguity and adds further uncertainty to the scope and extent of the right. Need to conclude that the legal system in India at present is entirely inadequate to deal with personality rights issues both in digital and non-digital contexts. It is high time for India to recognize a statute to protect the persona.

5. Conclusion

The only possible way for proper protection from the commercial misappropriation of persona in India is a statutory recognition or amendment of the existing laws, in IP trademark laws which will help to protect various forms of such misappropriation by proper registration as a mark[69] or else provide protection through separate laws as Guernsey did.[70] Compared to the USA and Germany, both had recognized some sort of protection, even though their laws have certain limitations when coming to the digital context. Comparatively to other countries, they have a better

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67 *D.M. Entertainment Pvt. Ltd.* v. *Baby Gift House and Ors*. CS(OS) 893/2002; *ICC Development (International)* v. *Arvee Enterprises and Anr.* IA No. 9854/2002 in Suit No. 1710/2002 -2003; *Sourav Ganguly* v. *Tata Tea Ltd*. (2008) 1 CS 361- 2008; *Arun Jaitley* v. *Network Solutions Private* CS(OS) 1745/2009 and I.A. No. 11943/2009 and 17485/2010; *Titan Industries Ltd.* v. *M/S Ramkumar Jewellers* CS (OS) No. 2662/2011; *Sonu Nigam* v. *Amrik Singh (alias Mika Singh) & Anr*, 2013; *Christian Louboutin SAS* v. *Nakul Bajaj & Ors* Civil Suit No. 2995 of 2014; *Tata Sons Limited & Anr* v. *Aniket Singh* Civil Suit No. 681 of 2012; *Shivaji Rao Gaikwad* v. *Varsha Productions* Application No. 735 Of 2014 & Civil Suit No. 598 Of 2014; *Kajal Aggarwal* v. *The Managing Director* C.S. No. 635 of 2011; *Mr. Gautam Gambhir* v. *D.A.P & Co. & Anr.* CS(COMM) 395/2017, IA No.8432/17; *Rajat Sharma and Another* v. *Ashok Venkatramani and another* IA No.382/2019 & 383/2019; *Deepa Jayakuma* v. *A.l. Vijay And Others* O.A. No. 1102 of 2019 in C.S. No. 697 of 2019; *Krishna Kishore Singh* v. *Sarla a. Saraogi & ORS.* CS(COMM) 187/2021.

68 *Mr. Arun Jaitley* v. *Network Solutions Private* CS(OS) 1745/2009 & I.A. No. 11943/2009 & 17485/2010; *Tata Sons Limited & Anr.* v. *Aniket Singh* CS(OS) No. 681 of 2012.

69 In India, under the Trademark Act, 1999 Section 2(m) enumerates types of signs which can qualify for a trademark. This includes name and signature. Publicity rights under the domain of trademark law, 'persona' of a celebrity can be added to this clause for establishing trademark rights in the identity.

70 The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 (the "IR Legislation"). From this date a new form of registered intellectual property right in a personality and its associated images has existed in Guernsey. Upon registration the registered proprietor of a registered personality has exclusive rights in the images associated with (i.e. unregistered images), or images registered against that personality.

position. The need for such right is high currently, a huge number of cases with regard to persona misappropriation was happening in the digital context due to the newly available digital tools such as holograms, deep fakes, and VR represents taking people's likeness and recreating or reanimating people's likenesses, voices, etc. with almost perfect fidelity way. It is high time the existing legislation has covered all these issues, and the lawless countries need to propose a law. Otherwise, there will be a rise in important legal and social issues. Now where everything can be accessed and exploited anywhere globally, the chance for commercial exploitation of persona is high. The other issue when coming to the digital world is that there are no boundaries for violating personality rights. It became a major challenge; the only possible way to regulate such misappropriation is through international treaties or laws to regulate such rights at the international level.

Author Emily Grant[71] suggested creating a publicity rights treaty to make equal treatment available to all persons based on economic and social justifications. The harmonized rules help to provide more predictability and consistency in digital and non-digital contexts. While, compared to other countries, India is lacking much behind in protecting personality rights and it is evident from the recent Amitabh Bachchan case also.[72] Even Indian courts had recognised personality rights in cases but there are disparities in the judgments due to lack of clarity on the legal basis for protecting personality rights. This in fact triggered the need to have sui generis law for personality right protection in India like Guernsey.[73] As new technological developments were happening the chance of unauthorised use also rose which in fact led to having a law for protecting personality right in India as the existing law in India is not adequate enough to cover personality right a separate law as such for personality right is required.

[71] Emily Grant, "The Right of Publicity: Recovering Stolen Identities under International Law" 7 *San Diego International Law Journal* 559-598 (2006).
[72] *Amitabh Bachchan* v. *Rajat Nagi & Ors*. CS(COMM)819/2022.
[73] Image Rights (Bailiwick of Guernsey) (Amendment) Ordinance, 2012.