

POSTHUMOUS PERSONALITY RIGHTS: A COMPARATIVE PERSPECTIVE BETWEEN INDIA AND THE UNITED STATES

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Abstract

A celebrity alongwith the goodwill and reputation earned throughout their life's work is protected by giving it the status of "personality rights", "publicity rights" or "celebrity rights" during his/her lifetime. Most nations view personality rights as a matter of privacy and not a property right which is meant to be perpetual. The mannerisms, voice, style of speech, the way they walk are very unique to them. These qualities or characteristics become their mark of identity among the public, which can be misused for commercial gains. Such a misuse can be prevented during the lifetime of the celebrity by taking the defence of protecting his personality rights, but the dilemma exists in whether the right should extend posthumously to the legal heirs of the public person. The paper argues that personality rights should continue after death due to the commercial value of a person's traits, work, and character. In many legal systems, personality rights are considered a part of the right to privacy, mainly protected under common law. An effort is made through this paper to understand how personality rights should be distinguished from the right to privacy because the former must be treated as a property right for it to extend posthumously. If it is considered a part of privacy, it ceases to exist with the death of the public personality. Therefore, by comparing the jurisdictions of the U.S. and India, the author of this paper tries to understand the importance of the grant of publicity rights posthumously to protect the monetary nature of the celebrity that can be exploited after they cease to exist.

Keywords:

1. Introduction

Being a celebrity in today's world comes with a lot of baggage, they are perceived by the society based on the commercial value their persona can generate. This perception remains much longer after the death of the person, which can lead to misuse of their name, work, popularity for commercial exploitation. For instance, even after the

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death of Michael Jackson in 2009, his estate has gained over \$2 billion dollars in licensing his images and music.¹ To safeguard the reputation and goodwill of public figures, personality rights are generally granted during their lifetime. These rights allow individuals to control how their name, likeness and distinctive traits are used commercially. There are also posthumous personality rights, which can extend these protections after a person has passed away. The rules for these rights vary depending on the region and can depend on factors such as where the celebrity lived. Some places view these rights as property rights, while others see them as related to privacy. The concept of publicity rights dates back to an 1890 article by Samuel Warren and Louis Brandeis in the *Harvard Law Review*,² where they focused on how privacy protects individuals from inappropriate intrusions.³ Later, William Prosser outlined four types of privacy rights in 1960 - intrusion, public disclosure of private facts, false light claims and appropriation of a person's image for someone else's gain.⁴

The last of these is what we now recognise as the right to publicity. The right is distinct from privacy, which is about protecting personal dignity, whereas the right to publicity is fundamentally a property right. Prosser argued that individuals should have the exclusive right to control their identity.⁵ Melville B. Nimmer referred to the "publicity value"⁶ as the financial worth associated with a celebrity's name and likeness. He pointed out that because publicity rights resemble property, they cannot be easily protected under privacy laws or traditional intellectual property rights. As a result, publicity rights can be viewed in two ways - the right to privacy, which allows someone to be left alone, and the publicity right, which gives someone exclusive control over their image and identity. Therefore, granting posthumous publicity rights seems reasonable to protect an individual's image and personality even after they are gone.

¹ Kristin Bria Hopkins, "When I Die Put My Money in the Grave: Creating a Federally Protected Post-Mortem Right of Publicity," 39(1) *Entertainment and Sports Lawyer* 163-174 (2023).

² Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193-195 (1890).

³ Loren Cheri Shokes, "Life after Death: How to Protect Artists Postmortem Rights," 9 *Harvard Journal of Sports and Entertainment Law* 27 (2018).

⁴ Hannes Rosler, "Dignitarian Posthumous Personality Right - An Analysis of U.S. and German Constitutional and Tort Law," 26 *Berkley Journal of International Law* 153 (2008).

⁵ *Id.*

⁶ Nimmer, "The Right of Publicity," 19 *Law and Contemporary Problems* 203 (1954).

2. Comparison of the Legal Framework in India and U.S.

Different jurisdictions view publicity rights in various ways. In India, there is no specific law that grants these rights. Instead, protection is provided under common law through the remedy of passing off. Furthermore, Section 2(m) of the Trademarks Act, 1999 includes names, allowing celebrities to prevent unauthorised commercial use of their names. Section 14⁷ of the same Act addresses the use of names and likeness after a person's death. Additionally, the Copyright Act, 1957 confers performers rights and moral rights, which can serve as a basis for publicity rights. However, there remains uncertainty about whether these rights can be passed on to a celebrity's heirs after death to protect the goodwill and reputation from unauthorised use, Indian courts have often linked publicity rights to the right to privacy.

This connection was notably highlighted in the 2017 case of *K.S. Puttaswamy v. UOI*,⁸ where the court stated that the “*right to privacy is indeed inseparable and inalienable from a human being.*” This ruling suggests that such rights cease with a person's death and are not inheritable. According to this interpretation, personality rights end with the death of the individual, based on the legal principle “*actio personalis moritur cum persona.*”⁹ In cases of defamation or other civil wrongs, the rights of the deceased do not carry onto their legal representatives. When examining publicity rights as an extension of the right to privacy, the implications of the Puttaswamy ruling indicate that these rights are limited to the deceased's lifetime. However, this analysis overlooks potential misuse of the deceased's name, likeness and reputation after their death. However, the minority judgment given by Justice Sanjay Kishan Kaul introduces an important counterargument. In his judgment, he questioned the status of personality rights as a common law right and said that it should be treated as a fundamental right under Article 21. He also stated 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*

⁷ Dr Pratima Narayan, “Beyond the Grave: Exploring the Legality of Posthumous Publicity Rights,” *SCC Online*, available at: <https://www.sconline.com/blog/post/2023/10/24/beyond-the-grave-exploring-the-legality-of-posthumous-publicity-rights/> (last visited on November 12, 2024).

⁸ AIR 2018 SC (SUPP) 1841.

⁹ *Supra* note 7.

and identity for commercial purposes without his/her consent."¹⁰ He also goes further to explain that such a right prevents others from using or attaching any value to the public image of a personality. Therefore, this part of the judgement leaves room for rethinking personality rights as being distinct from privacy and keeps open the possibility of personality rights being recognized posthumously.¹¹

Thus, in India, the question of whether posthumous publicity rights can be recognised remains open for further judicial interpretation. The Copyright Act in the U.S. outlines the exclusive rights of copyright owners. In contrast, publicity rights are framed negatively. These negative rights are evident from the following provision:

*"Any person who knowingly uses another's name, voice, signature, photograph, or likeness in advertising or selling products without prior consent shall be liable for any damages sustained by the injured party."*¹²

There is no federal law in the U.S. that provides posthumous personality rights to celebrities; however, some states do grant these rights after a celebrity's death. The duration of this protection varies by state. In 31 states, publicity rights are considered property rights, meaning they can be assigned or passed on through wills and can be exercised even after the person's death, regardless of whether they exploited their image during their lifetime. The remaining states view publicity rights as part of the right to privacy, which ends with the person's death.

Whether a celebrity has posthumous rights also depends on their domicile and the laws of the state where they died. For example, a celebrity who died in California and was a resident there retains posthumous publicity rights since California recognises these rights as property rights. This applies to cases like Natalie Cole.¹³ However, Marilyn Monroe,¹⁴ who lived in New York which at the time considered publicity rights non-transferable and tied to privacy, did not have such rights preserved after her death. New

¹⁰ Prashant Reddy, "The Supreme Court's Privacy Judgement Elevates Personality Rights to the Constitutional Plane," *Spicy IP*, available at: <https://spicyip.com/2017/08/the-supreme-courts-privacy-judgment-elevates-personality-rights-to-the-constitutional-plane.html> (last visited on February 10, 2026).

¹¹ *Id.*

¹² Peter H. Karlen, "Publicity After Death: New Rights for the Dead," 8 *Journal of Media Law & Practice* 11 (1987).

¹³ *Supra* note 3.

¹⁴ *Ibid.*

York did implement a statute allowing posthumous publicity rights in 2020.¹⁵ In Indiana, the law allows for publicity rights to apply based on events that occur within the state, regardless of a person's domicile.¹⁶ There have been instances, such as *Shawn Family Archives Ltd. v. CMG Worldwide*,¹⁷ where individuals not domiciled in Indiana have taken advantage of this rule to file lawsuits. In states that treat publicity rights as property, these rights can be passed to heirs or legal representatives through a will or trust. However, if someone like the late actor Prince Rogers Nelson dies without a will,¹⁸ questions arise about how he would have wanted his unreleased songs managed or if he would have approved commercial use of his work. In contrast Robin Williams established a trust two years before he passed away. The will had details of how the actor wanted his name, signature, photograph, likeness, 3D or holographic images to be utilised for the first 25 years after his death.¹⁹

A right may be classified as a property right but it won't be valid unless the state passes a law recognising it. This means that any will or trust trying to uphold such a right will be invalid. That said, some states do allow for the application of these laws retrospectively, if they pass new laws later on. For example, in California, claims can be filed 70 years after the celebrity's death.²⁰ In Indiana, it is granted for 100 years after the celebrity's death.²¹ In Tennessee on the other hand protection is granted for 10 years after death but can be extended later if the name, likeness of the celebrity still holds commercial value.²²

3. Publicity Rights as Interpreted by the Judiciary in India and U.S.

3.1. Position of the U.S. Judiciary on Posthumous Personality Rights

The rulings of U.S. courts regarding publicity rights can be broken down into two main phases. The first phase saw the development of publicity rights as a concept distinct from privacy rights due to its similarity to property rights. The second phase

¹⁵ *Supra* note 3.

¹⁶ *Id.*

¹⁷ 486 F.Supp.2d 309 (S.D.N.Y. 2007).

¹⁸ *Supra* note 3.

¹⁹ *Ibid.*

²⁰ Aubrie Hicks, "The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of Experience Hendrix v. HendrixLicensing.com", 36(1) *Seattle University Law Review* 275 (2012).

²¹ Indiana Code, 32-36-1-7.

²² Tennessee Code 47-25-1104.

established that these rights can be granted after death and are transferable to heirs. In the first phase, a key case was *Pavesich v. New England Insurance Co.* in 1905, which connected the right to publicity to the right to privacy.²³

The New Jersey court also contributed to this understanding in the case of *Edison v. Edison Polyform Mfg., Co.*²⁴ in 1907. The court addressed the unauthorized use of Thomas Edison's name and image, stating that if a person's name is their property, then their likeness is likely also their property, entitled to the owner rather than someone who seeks to use it without permission. The term "rights of publicity" first appeared in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*²⁵ wherein Haelan Labs had licensed player images for baseball cards, and the court ruled that Topps violated these rights by using the same images for their gum. The decision found that the plaintiff could not claim damages under privacy rights, but acknowledged a separate legal category called the "right of publicity".

In the case of *New York Times Co. v. L.B. Sullivan*,²⁶ the court viewed the right of publicity as a commercial right. This distinction was reinforced in *Zacchini v. Scripps-Howard Broadcasting Co.*,²⁷ which clarified that the right to privacy being personal cannot be passed on, whereas the right of publicity treated as a property right can be inherited.

In the second phase, California became the first state to pass a statute to grant posthumous personality rights. This stemmed from the case of *Lugosi v. Universal Pictures*.²⁸ Here, the court ruled against the heirs of actor Bela Lugosi regarding posthumous rights to his character, Count Dracula, while still laying the groundwork for recognising such rights in California. Another significant case in this area pertains to Martin Luther King, Jr. Centre for Social Change, which further explored the posthumous rights of publicity.

²³ 122 Ga. 190 (Ga. 1905).

²⁴ 73 N.J. Eq. 136 (Ch. Div. 1907).

²⁵ 202 F.2d 866 (2d Cir. 1953).

²⁶ 376 U.S. 254 (1964).

²⁷ *Ibid.*

²⁸ 694 F. 2d 674.

In the case of *Elvis Presley*,²⁹ the court decided that he had transferred his rights to his company, Boxcar Enterprises. The ruling established that this exclusive right is transferable and continues even after the owner's death. The court noted that because Presley actively used this right during his lifetime, it could outlive him. It concluded that the right of publicity is both transferable and posthumously valid, emphasising that denying this would unfairly benefit unauthorised parties. In *Experience Hendrix LLC v. Hendrix licensing.com. Ltd.*,³⁰ the initial court ruling stated that personality rights did not survive under New York law. This led to an amendment in Washington recognizing these rights retroactively. A district court found the Washington Postmortem Rights Act (WPRM) unconstitutional because Hendrix had no significant connections to the state. However, the Ninth Circuit later overturned this decision, allowing Washington to apply the WPRM under the circumstances.³¹

One prominent case regarding posthumous publicity rights involves *Marilyn Monroe's*³² estate. This case is significant because it raised the issue of which state's laws apply based on Monroe's domicile at the time of her death. Shawn Family Archives was selling t-shirts featuring Monroe's image and offering licenses for commercial use through their website. Monroe's estate, represented by Marilyn Monroe, LLC and CMG Worldwide, argued this violated her publicity rights under Indiana law. The defendants questioned whether New York or California should govern the publicity rights. The court ultimately did not grant these rights, as New York law at the time only recognised publicity rights for living individuals, while Indiana and California did. The Court stated that it was not possible to transfer a right that did not exist at the time of Monroe's death, as none of the states recognised posthumous publicity rights then. Currently, all states with publicity rights laws allow for their retrospective application, particularly California and Indiana.

3.2. Position of the Indian Judiciary on Posthumous Personality Rights

In contrast, publicity rights in India are still developing. They receive common law protection and are often viewed as part of the right to privacy, which ends with a

²⁹ *Factors etc. Inc. v. Pro Arts Inc.*, 579 F.2d 215 (2nd Cir 1978).

³⁰ 762 F.3d 829 (9th Cir 2014)

³¹ *Supra* note 20.

³² *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (2007)

person's death. India's approach closely follows the United Kingdom's model for publicity rights protection, but there are no specific legal provisions for posthumous publicity rights. In the case of *K.S. Puttaswamy v. UOI*,³³ the court similarly interpreted publicity rights as related to the right to privacy.

The Delhi High Court in *Phoolan Devi v. Shekhar Kapoor*³⁴ in 1995, examined a film based on the plaintiff's life. The plaintiff contended that a scene depicting her character being raped was inaccurate and breached her right to privacy under Article 21. She argued it fell under copyright law. The court referred to its earlier ruling in *Auto Shankar* case,³⁵ stating that once someone becomes a celebrity, they cannot claim a right to privacy because they have opted for public life. However, the court acknowledged that the plaintiff had not authorized the defendants to create the film as they wished. Therefore, the court blocked the film's release for violating her personal privacy. The court hinted at the commercial aspect of publicity rights as part of privacy rights.

Although the court did not directly recognize the personality rights of the plaintiff. It recognized that unauthorized commercial use of a person's identity can give rise to legal injury. Thus, the court laid down the groundwork for the development of personality rights in India. Later in *ICC International Ltd. v. Arvee Enterprises*,³⁶ the Delhi High Court addressed publicity rights directly for the first time:

*"It stated that the right of publicity arises from the right to privacy and belongs solely to the individual or the unique traits like name or voice. This right can be linked to the individual's involvement in events or media. The ruling emphasised that taking away this right from individuals and giving it to organizations would infringe upon Article 19 and 21 of the constitution, no one can monopolize a persona. The right of publicity belongs to the individual allowing them to profit from it."*³⁷

³³ AIR 2018 SC (SUPP) 1841

³⁴ 57 (1995) DLT 154

³⁵ (1994) 6 SCC 632

³⁶ 2003 VIIAD (DELHI) 405

³⁷ Samarth Krishnan Luthra, Vasundhara Bakhru, "Publicity Rights and the Right to Privacy in India", 31(1) *National Law School of India Review* 127-131 (2019)

The court in this case affirmed individual control over commercial exploitation but simultaneously reinforced the view that such a right is non-transferable. By this, we can infer that the court limited publicity rights to the lifetime of the individual.

In *D.M. Entertainment (P) Ltd. v. Baby Gift House*,³⁸ the court further expanded the definition of publicity rights, stating that it includes likeness and traits. The court in this case again, recognized the commercial nature of these rights but did not discuss whether such rights can survive an individual.

The concept of posthumous publicity rights was notably considered in *Makkal Thogai Thodarpu Kazhagam Ltd. v. Muthulakshmi*³⁹ in 2007, referred to as the Veerappan case. The late Veerappan's wife and daughter sought an injunction against a series named "Maveeran Veerappan", "Santhana Kadu", claiming it infringed on their privacy. The court ruled that the right to privacy does not extend beyond Veerappan's life and that the series was based on publicly available information. While the court did not explicitly deal with posthumous publicity rights, it laid down the basis for future consideration.

While the court did not explicitly deal with posthumous publicity rights, it laid down the basis for future consideration. Also, by viewing it as an infringement of privacy, the court again limited the recognition of such rights to the lifetime of an individual.

Even though the Gujarat High Court did not directly deal with posthumous publicity rights in *Kirtibhai Raval v. Raghuram Jaisukhram Chandrani*,⁴⁰ it upheld a trial court's decision to block the release of a film based on the life of Jalram Bapa. The court stated that no one could make a film about a public figure and profit from it without the consent of either the individual or their legal heirs. In this case, the court did not explicitly talk about posthumous personality rights but insisted on consent of legal heirs for commercial use. From this, it can be inferred that the court has recognized the continuing commercial interest of a personality.

The issue again came up in the case of Jayalalita,⁴¹ her niece sought an injunction against the film *Thalaivi* and the web series *Queen*, arguing that they infringed on her aunt's personality rights and her family's privacy. The court examined whether these

³⁸ CS(OS) No. 893/2002.

³⁹ 2007 SCC OnLine Mad 850.

⁴⁰ 2010 SCC OnLine Guj 13952.

⁴¹ *Deepa Jayakumar v. A.L. Vijay*, 2021 SCC OnLine Mad 2642.

rights could be inherited. It concluded that a person's reputation cannot be passed on to their heirs like financial assets. Such rights end with an individual's death. The court again reaffirmed the dominant Indian judicial position against the recognition of posthumous personality rights.

In 2020, the Delhi High Court in the case of *Krishna Kishore Singh v. Sarla A. Saraogi & Ors.*,⁴² wherein Sushant Singh Rajput's father sought to stop the release of films like *Nyay: The Justice and Suicide or Murder, A Star was lost*, arguing that they were made without the family's permission. The court denied the injunction. The court noted that there is no explicit legal framework for a posthumous right in India. It observed that publicity rights stemmed from the right to privacy, which is rooted in Article 21 of the Constitution. Since the right to privacy ceases upon a person's death, posthumous publicity rights cannot be exercised under the current legal framework. The court also stated that freedom of speech and expression under Article 19(1)(a) would be unduly curtailed if consent of the legal heirs is made a prerequisite for events already in the public domain.

Overall, the Indian judiciary has viewed personality rights as an extension of the right to privacy. This has resulted in the limitation of personality rights to the lifetime of an individual and a largely restrictive approach to posthumous protection.

4. Supporting and Opposing Perspectives of Posthumous Personality Rights

4.1. Supporting Arguments

It takes a lot of sacrifice on the part of the celebrity in creating an image for themselves in the public eye during their lifetime. Such an image, likeness, name that is associated with their persona has both social and financial value. Therefore, the same needs to be protected from being exploited post the death of the celebrity for someone else's benefit.

This protection becomes especially crucial in today's time and age where people are intrigued with the lives of their favourite celebrities and could misuse the legacy left behind by them. Social media has become a major influence in our lives, shaping the online identities of celebrities. A notable example is from the 2012 Coachella Valley

⁴² 2023 SCC OnLine Del 2306.

Music and Arts Festival, where a life-sized hologram of Tupac Shakur performed “Hail Mary”, three years after his death. This leads us to the question whether he would have approved of his work being used in this way. The rise of holographic and two-dimensional techniques brings up important issues about posthumous publicity rights.⁴³

In the case of *Martin Luther King Jr. Centre for Social Change v. American Heritage Products Inc.*,⁴⁴ the court decided that posthumous personality rights are crucial for protecting a celebrity’s image from being misused after their death. If these rights are lost after someone dies, the protection they had during their lifetime becomes meaningless, leaving their legacy vulnerable.

In the U.S., many states recognise these rights, despite the lack of a federal law. However, in India, publicity rights are tied to the right to privacy, which does not fully recognise a celebrity’s commercial value after death.

4.2. Opposing Arguments

Courts especially in India have time and again interpreted publicity rights to be a part of privacy rights. Publicity rights have two aspects, commercial and non-commercial. The commercial aspect of the right has not been given much attention by the Indian courts. Since it is considered as an extension of privacy right, it ceases to exist with the death of the individual much like a personal right. For e.g., the claim for personal tort of defamation ends with the death of the person. In the case of *ICC International Ltd. v. Arvee Enterprises*,⁴⁵ the court ruled that no one can own someone else’s persona, as privacy is a right protected by Articles 19 and 21 of the Constitution. The court decided that individuals hold the commercial rights to their own persona, these rights cannot be exercised by anyone else after their death. The court also raised questions about what constitutes the subject matter of these rights, which includes a person’s name, likeness, photographs, voice or signature.

The key issue is the commercial value of these elements at the time of a person’s death. While everything associated with a person has some level of value, it can be challenging to determine how much. In the U.S., particularly in California, laws

⁴³ *Supra* note 3.

⁴⁴ 694 F. 2d 674.

⁴⁵ 2003 VIIAD (DELHI) 405.

regulating posthumous publicity rights do not specify terms like “substantial” or “significant”. There’s also confusion about what is meant by voice; does it apply only to the living or can it include mimicry or artificial voices of the deceased? Similarly, problems arise with names. For example, if two individuals share the same name, such as John Doe and one uses that name for products, would that violate the rights of the other?⁴⁶

Critics of granting posthumous publicity rights argue that it could infringe on freedom of speech and expression. This was highlighted in a case where Sushant Singh Rajput’s father sought an injunction to stop the use of his son’s name and image in the film “Nyay: The Justice”. The Court ruled that such rights do not transfer after death, concluding that they cease with the individual.

The court observed that, “*the right to publish, disseminate information, even in the form of a movie, was guaranteed under Article 19(1)(a) of the Constitution. So long as the publication did not infract Article 19(2) of the Constitution, the right was absolute. The publisher of the allegedly offending information was not required to take permission of the representatives of the person about whom the publication was being made, before making it. Nor was he required to verify the truth of the contents thereof, provided it was earlier available in the public domain.*”⁴⁷

5. Conclusion and Suggestions

In conclusion, this paper deals with the divergent perspectives in India and the U.S. regarding posthumous personality rights. In the U.S., certain states recognise these rights as descendible/inheritable because they view them as property rights. This allows the commercial aspect of the celebrity’s persona to be protected even after death. This allows the legacy of the celebrity to be protected against misuse.

India on the other hand, treats personality rights as a part of right to privacy, which ceases to exist upon the death of the person. This approach does not adequately consider the commercial aspect of the celebrity’s persona. As a result of this, there is no statute that provides for publicity rights in India, consequently posthumous publicity rights are also not recognised. Therefore, a legal reform is needed especially in India which recognises personality rights and consequently posthumous personality rights

⁴⁶ *Supra* note 12.

⁴⁷ *Supra* note 7.

which allows the legal heirs of the celebrity to control and benefit from the commercial use of a deceased individual's persona. Indian courts should consider personality rights to be distinct from privacy rights. This would extend the publicity rights beyond the life of the celebrity.

In contrast, in the U.S. the grant of posthumous personality rights is a state matter. It lacks a federal standard of protection; this creates uncertainties due to different standards applied by different states. Therefore, the U.S. could benefit from a uniform federal legislation. Both the countries could benefit from an analysis of countries with established frameworks in place. This could provide insights into protecting the commercial value of a celebrity's legacy.

Therefore, what we need in India in particular is a legal framework that recognises personality rights in general and posthumous personality rights. Publicity rights need to be recognised as a separate bundle of rights that are not entirely based in Intellectual property laws or right to privacy.