

QUEST FOR PROTECTION OF PERSONALITY AND ITS ATTRIBUTES UNDER TRADE MARK LAW: AN ANALYSIS OF INDIAN SCENARIO

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Abstract

This paper attempts to study the issues of personality protection under trademark laws in India. This study proposes an answer to the question of whether trade mark law can protect personality and its attributes like likeness, biography, name, and other personal characteristics. This paper seeks to understand how the intellectual property law can protect a celebrity's personality as a whole inclusive of their name, image, voice, signature move or dialogues, etc. Explicitly, it draws on trade mark and right of publicity laws as a foundation, but also looks at how both fail to protect an "identity" and a "product" adequately. Trade mark law protects the source of a mark, and its ultimate goal is to protect the consumers. That is, in the legal sense, a trade mark is a name, a designation, and not the celebrity itself. Just as the word "celebrity" indicates a person with specific characteristics, so should a trade mark suggest a product with a certain level of quality.

Keywords : Trademark, Personality, Celebrity, Brand, Artificial Intelligence

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I. Introduction

EVERY INDIVIDUAL has specific trait or characteristics which are solely identifiable with them, which often termed as the personality of an individual. Personality is something that one always carries along; it affects the process of thinking, feelings, and behavior, where and with whom they are, in all situations at all the time. In a sense, personality is in part psychological but also

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physiological. It is inclusive of behavioral characteristics, both inherent and acquired.¹ Personality distinguishes one person from another, and that can be observed in people's relations to the environment and the social group.

American psychologists Randy Larsen and David Buss², define personality as: "personality is a stable, organized collection of psychological traits and mechanisms in the human being that influences his or her interactions with and modifications to the psychological, social and physical environment surrounding them."

The concept of personality can be said to have its origins in the fundamental idea that people are distinguished by their characteristic, individual patterns of behavior—the distinctive ways in which they walk, talk, furnish their living quarters, or express their urges. People involved in arts, music, films, TV series, politics, sports and the news who are considered famous, popular or well-known because they are featured in everyday discourse are the one who establish broad impact through their personality. Daniel Boorstin³ stated: "The celebrity is a person who is well known for their well-knownness." This stature of celebrity requires certain intermediaries who help to build the image of being a celebrity. Various industries are intermediaries or catalyst in this status building, namely: the communication industry (*i.e.*, the media) that plays a paramount role as an interface between celebrity and public. The celebrities heavily rely upon the communication industry to make the impact of being socially acceptable and vital. The individual and media work hand-in-hand to help in acquiring the fame desired for an individual to become a celebrity. Secondly, the merchandising industry which prints names, pictures, and slogans on T-shirts, towels, perfumes or any other consumer goods is very instrumental in building up the personality of an individual as a celebrity. In other words, celebrity is used as an indication of origin.⁴

¹ Philip S. Holzman, "Personality," *Encyclopaedia Britannica*, June 2013, available at: <https://www.britannica.com/topic/personality> (last visited on April 2, 2021).

² Randy J. Larsen, David M. Buss, *et. al.*, *Personality Psychology: Domains of Knowledge about Human Nature* (McGraw-Hill Higher Education, 2013).

³ Boorstin D, *The Image: A Guide to Pseudo-Events in America* (New York: Atheneum, 1971).

⁴ Rein I, Kotler P, Hamlin M, *et. al.*, *High Visibility Transforming Your Personal and Professional Brand 3* (New York: McGraw-Hill, 2006).

When a general overview is considered, majority of celebrities are entertainers, but this status of a celebrity is open to many diverse occupations namely: models and supermodels, fashion, interior designers, TV anchors, talk show hosts, athletes, beauty queens, famous hostesses and society ladies (“socialites”), members of the rich upper classes, occasionally a politician (or his wife). Boorstin⁵ wrote, they are:

differentiated mainly by trivia of personality... Entertainers ...are best qualified to become celebrities because they are skilled in the marginal differentiation of their personalities”. He further wrote: “The hero was distinguished by his achievement: the celebrity by his image or trade mark... The celebrity... is always a contemporary

The image of an individual in general – and of celebrities in particular – can be a powerful instrument, when used to add to our shared cultural experience, to pass political comment, to raise awareness of social issues, to promote goods or services, or merely to illustrate the latest gossip and tittle-tattle. With trademarked products often homologous regarding attributes, ‘identity’ or ‘image’ is often the only distinguishing factor on which consumers can differentiate. The most important aspect of a product is the Unique Selling Proposition (USP) which makes it possible for a product to be seen as unique when compared to other similar products. This uniqueness is composed of the following factors: trade mark history; name and package; product characteristics, formula, and performance. The economic, financial aspects, price, etc.; associating the trade mark with a celebrity with whom the target group wants to identify has become the contemporary practice prevalent in today’s marketplace.

The present paper mostly considers past common practices, concepts, legal frameworks and traditions to evaluate the ambit of personality protected by trademark. For instance, Paris Hilton got a trade mark for her name for the sale of clothes and perfumes; David Beckham has a trade mark registration for clothing, footwear, and headgear. Shah Rukh Khan too has filed applications to register trade mark ‘SRK,’ in almost all the 45 classes of Indian Trade mark regime. Also, many celebrities have already registered names as trademarks like Beyoncé has got a trade mark registration for her daughter’s name, Blue Ivory Carter, concerning a range of baby products. Angelina Jolie fought a legal battle with fragrance designer Symine Salimpour, where Shiloh’,

⁵ *Supra* note 3.

which is the name of Angelina's daughter, was used by later as the name of her new perfume. Kendall and Kylie Jenner to have filed trade mark applications for registering their name concerning hair accessories, clothing, and beauty products.⁶

The scope of the study is limited to the Indian Bollywood celebrity's personality protection by trade mark law. This paper aims to assess the practice and theory of protection of personality of an Indian Bollywood celebrity under trade mark law. In detail, this study will analyze the concept, needs, and objectives of celebrity's personality being trade mark protected and the legal and societal aspect of it. Further, an analysis of Indian position concerning the contemporary protection of personality as a trade mark is also examined.

II. The emergence of Personality Protection – A background

There are a plethora of issues relating to the personality protection under trade mark law, and many would gradually surface with the contemporary market player's intervention into the field. The interrelation between trade mark law and various personality traits are very complicated to understand. There have been studies in the past concerning personality protection through article 21 of Indian Constitution, Copyright law and other aspects in Indian legal regime but no research has advocated for a separate personality trademark regime which is justified and advocated in current research. The author thinks that personality as trademark has varied potential that can be leveraged only *via* a separate protection regime. This study tries to overcome this limitation by putting an effort to analyze and synthesis all the relevant literature available on the subject matter.

The emergence of personality (especially celebrities) into a brand

The concept of personality is regarded as a terminological umbrella that covers two values: privacy and reputation, enjoyed by and inseparably attached to an individual within a society of which he is a member.⁷ Macmillan dictionary defines celebrity as "the state of being well known." There are various dimensions attached to a celebrity, one of the core structural features being the media presence. Hajo Rupp mentions eight industrial sub-fields: entertainment, representation, publicity,

⁶ Raashi Jain, "Can a Celebrity name be registered as a trade mark?," *Lex Orbis blogpost*, August 2015, available at: <https://www.lexorbis.com/can-a-celebrity-name-be-registered-as-a-trade-mark/> (last visited on April 2, 2021).

⁷ Edina Márton, "Violations of Personality Rights through the Internet: Jurisdictional Issues under European Law", 37–54 (Baden-Baden: Nomos Verlagsgesellschaft, Bloomsbury Collections, 2016).

communications, merchandising, appearance, coaching and legal & business which helps celebrities to enter into commodity industry. Also, fan, followers, and opponents validate the existence of celebrities. The author solely considers audience affiliation towards public persons giving them the true meaning of celebrity, a valuable good the commercial sector tries to exploit.⁸

The right of publicity gives people the right to control the use of names and likenesses for commercial purposes. There exists a struggle between two dimensions of this right - what it means to name or likeness "commercially," and what aspects of a person's "likeness" protected against the appropriation. The right of publicity protects a celebrity's interest in her/his name and likeness, much as trade mark law protects a business's name and another trade mark.⁹ Celebrity culture, therefore, signifies this system of values whereby an individual achieves well-knownness, which, regardless of merit, is often fashioned regarding publicity, mediation and a quasi-mystical scale of promotional value, becoming a 'public' personality.¹⁰

Out of many connotations, one meaning which term "brand personification" holds is in the context of the special case where the person personifies the brand itself—and typically named after the person—who founded, built, owned, or otherwise is (or was) known to be the dominant force in the life of the brand. These human "brand personifiers" as we will refer to them, are so closely identified with the brand that they lend not only their name to the brand but their human attributes to it as well.¹¹

Modern corporations strive to create brands with personalities and souls, brands that tug at consumers' heartstrings. People can recognize "brand personalities": they attribute values and ideas to commercial products represented by brands, which allows trade mark owners to exploit their marks as mere psychological stimuli rather than as designations of origin.¹² Emotional positioning is achieved using those images and symbols client associates with the brand when purchasing or using it. Celebrities or famous sportsmen are brought into play to transmit the symbols of cosmetic

⁸ Hajo Rupp, "Who Owns Celebrity - Law and the Formation of Fame", 12 *Entertainment and Sports Law Journal* (2014).

⁹ Stacey L. Dogan and Mark A Lemley, "What the Right of Publicity Can Learn from Trade mark Law", 58 (4) *Stanford Law Review* 1161-1220 (2006).

¹⁰ Rod Rosenquist, "Modernism, Celebrity and the Public Personality", 10 (5) *Literature Compass* 437-448 (2013).

¹¹ Ronald Jay Cohen, "Brand Personification: Introduction and Overview", 31(1) *Psychology and Marketing* 1-30 (2014).

¹² Katya Assaf, "Brand Fetishism", 43 *Connecticut Law Review* 83- 148 (2010).

brands, mineral waters, juices, sports equipment, etc. because their fans and other persons emotionally associate the advantages of those specific brands with those persons in their position of opinion leaders.¹³

A brand identifies a business's products or services by creating an association in the customer's mind and solidifying preference and loyalty. Brands simplify decision making, represent an assurance of quality, and offer a relevant and credible choice among competing offerings. Intellectual property law must balance incentives with the needs of the marketplace and freedom to express one's creative ideas without being unduly constrained by what has come before.¹⁴

The interrelation of brand and trade mark

Brands and trademarks have existed to serve a dual purpose: The first, and obvious reason is to function as a tool for denoting the source of the products and services that they cover. The second, less apparent purpose is to create a "codified" market in which the trade mark encapsulates all of the information that the consumer seeks in his endeavor to choose a specific product that is available among a wide array of other competing products. This brand loyalty by the consumer ought to be reciprocated by the brand owner practice. Khoury has argued that the property interest that a brand owner has over his mark needs to be counterbalanced by obligations, namely the obligation to sustain the quality of products (or services) covered by his brand.¹⁵

Today consumers recognize celebrities as human brands¹⁶; since celebrities employ branding techniques such as managing¹⁷, trade marking and licensing their names, launching their product lines and agreeing to product endorsements to enhance their perceived value and brand equity.¹⁸

¹³ Brindusa-Mariana Amalancei, "New Trends in Brand Strategies", 81 *Procedia - Social and Behavioral Sciences* 275 – 279 (2013).

¹⁴ David M. Adler, "Fashion Law - Protecting Brands and Designs", 5 *Landslide* 21- 24 (2013).

¹⁵ Amir H. Khoury, "Brand Loyalty & Loyalty of Brands: A Symbiotic Relationship", 32 *Journal of Law & Commerce* 173 (2014).

¹⁶ A.A. Parulekar and P. Raheja, "Managing celebrities as brands: Impact of endorsements on celebrity image", as quoted in Kahle LR and Kim C (eds.), *Creating Images and the Psychology of Marketing Communication* 161 (New Jersey, USA: Lawrence Erlbaum, 2006).

¹⁷ *Ibid.*

¹⁸ Pappas B., "Star power, star brands. Forbes Global", *Forbes Magazine*, March 1999, available at: <http://forbes.com/global/1999/0322/0206060a.html> (last visited on April 3, 2021).

One of the primary purposes of trade mark law is to protect consumers from being misled¹⁹ and deceived and to view the goodwill and anti-misappropriation rationales which are attached to it.²⁰ The author comments on the economic system and connection between trademarks as it is beneficial to all when the marketplace is organized to prevent the deceptive use of brands and trade names. According to the Lastowka, trade mark serves diverse: the protection of artistic creativity, individual identity, and the goals of propertization and efficiency.²¹ Also, trade mark law is seen to regulate a set of distinctly economic rights— by costs for art buyers and the art-viewing public which accords incentive to create without having other actors/celebrity unfairly reap their goodwill which, is said to incentivize the creation of a body of work.

In today's marketplace reputation can be reformulated to signify an artist's strategic to efficiently trade on his public image, just as trade mark trade on their "goodwill." The author establishes an analogy between trade mark and personal reputation that a trade mark owner has right to enjoy use of its trade mark in connection a substantial alteration of its original product which is very similar to prevent the distortion, mutilation, or modification of actor/celebrity work subsequently be prejudicial to his honor or reputation, which finds mention under copyright law as moral rights but is absent as such under trade mark law. He proposes that rights attached to celebrity/artistic status are more or less like trade mark law—that consumerism, beating ceaselessly on in the name of commerce, capitalism and even culture.²² Chronopoulos forwards an argument that there is an extension in scope of trade mark law to protect the competitive interests of the rights-holder independent from a finding of consumer confusion and at the same time promote the effectiveness of competition to the benefit of consumers.²³

¹⁹ Thomson M., "Human brands: Investigating antecedents to consumers' strong attachments to celebrities", 70 *Journal of Marketing* 104–190 (2006).

²⁰ A.P. Towle, "Celebrity Branding", *The Hollywood Reporter*, November 2003, available at: http://www.hollywoodreporter.com/thr/television/feature_display.jsp?vnu_content_id=2030984 2003 (last visited on April 3, 2021).

²¹ Greg Lastowka, "Trade mark's Daemons", 48 *Houston Law Review* 779-822 (2011).

²² Xiyin Tang, "The Artist as Brand: Toward a Trade mark Conception of Moral Rights", 122(1) *The Yale Law Journal* 218-257 (2012).

²³ Apostolos Chronopoulos, "Goodwill Appropriation as a Distinct Theory of Trade mark Liability: A Study on the Misappropriation Rationale in Trade mark and Unfair Competition Law", 22 *Texas Intellectual Property Law Journal* 253-310 (2014).

Trade mark holders and celebrities can prevent the deceptive appropriation of the meaning associated with their goodwill and identity, while consumers can buy products with confidence in the truth of assertions about who makes, sponsors, endorses, and stands behind that shadow. The best justification for a right of publicity trade mark-based justifications, and trade mark law, unlike the right of publicity, has developed a coherent set of rules designed to promote purposes. The overlap isn't complete - there are ways in which trade mark rules must be modified to accommodate the particular characteristics of personal identity - but it is sufficiently great that the rights and limitations of trade mark law should serve as the baseline for defining and limiting the right.²⁴ The traditional approach to intellectual property infringement will not work in the modern age.²⁵ Modern trademarks are equally or more likely to convey, among a multitude of other messages, personality, position, and panache.²⁶ The right of publicity and trade mark laws leaves a gap that does not adequately protect a brand as a whole. The fact that name is accorded trade mark protection but no provision exists for protecting voice, aura or the style synonymous to an individual under either trade mark or right of publicity is the void that needs to be addressed. The celebrities have moved past endorsement to a branding, and in the process highlighting the "negative spaces" in intellectual property relating to celebrity brand protection and innovation.²⁷

III. Personality protection *via* Trade mark in India

Indian society has a well-knit culture and emotional bond with the Bollywood industry. Celebrities are essential members of every household. The Bollywood has its legacy by absorbing generations from same families into the industry. One of such celebrity is, Sonam Kapoor. The star icon Sonam and her sister Rhea Kapoor recently launched their high-street label RHESON²⁸ which can be found at Shoppers Stop outlets. Younger sister Rhea is a fashion designer and has designed this

²⁴ Stacey L. Dogan and Mark A Lemley, "What the Right of Publicity Can Learn from Trade mark Law", 58 (4) *Stanford Law Review* 1161-1220 (2006).

²⁵ Meghan L. Collins, "Still Standing, New Branding: Corporate Crossroads of Shaping a Modern Brand While Protecting Intellectual Property", *Duquesne Business Law Journal* 197- 228 (2015).

²⁶ Jerre B. Swann, "The Trade mark Reporter as Catalyst", 101 *Trade mark Reporter* 81-93 (2011).

²⁷ Naeha Prakash, "Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill", 35 *Hastings Communications. & Entertainment Law Journal* 247-276 (2013).

²⁸ Maverick Martins, "Sonam, Rhea Kapoor's fashion brand 'Rheson' launched in Mumbai", *Fashion network blogpost*, May 2017, available at: <https://uk.fashionnetwork.com/news/Sonam-rhea-kapoor-s-fashion-brand-rheson-launched-in-mumbai,827312.html> (last visited on December 24 2020).

clothing line around her sister Sonam. Celebrities not only individually leverage the public association with their personality but also try to penetrate efficiently in society by joint ventures. One such example is where the trio consisting of Bipasha Basu, Susanne Khan, and Malaika Arora had launched a home and clothing label—THE LABEL LIFE,²⁹ which comprises of home décor pieces, clothing, and accessories. Also, Malaika Arora has started her online fashion line – *TheClosetLabel.com* as well as her very own online fashion store – *Turquoise & Gold*. The influence of Bollywood is not only restricted to the female fraternity, but the male superstars have also established their prominence in this personality extension game. Hrithik Roshan, who is known for his dedication towards fitness and sports has launched HRX,³⁰ a sportswear brand. Initially, the brand targeted only men but expanded to include women's wear as well, and now HRX has started to grow its business by collaborating with other companies who have visibility in Indian society like Xiaomi and other companies to market his products. Launching his fashion label, Shahid Kapoor said, “SKULT is something very close to my heart. It is about freedom, freedom of expression, movement and street style.” Athleisure, which is a huge trend globally found its way on the home soil courtesy SKULT³¹. These instances show how individuals have incorporated their personality element as celebrity and established new ventures altogether, it highlights that the trade mark protection concerning celebrity can be expanded into an umbrella protection incorporating various parameters and sub trade mark protected traits.

Actor Salman Khan by launching a casual wear brand, Being Human makes his personality marketable in the Indian society which caters to his considerable fans in India and abroad. Also, Mandira Bedi who is a famous anchor and has imposed Indian societal setup with her brilliant work as an actor in mid-1990's launched her label called Mandira Bedi Designs of sarees.³² The

²⁹ Our Story, available at: <https://www.thelabellife.com/pages/our-story> (last visited on December 26, 2020).

³⁰ Saumya Tewari, “Actor Hrithik Roshan's HRX partners Flipkart to launch audio device range”, *Livemint blogpost*, June 2020, available at: <https://www.livemint.com/news/india/actor-hrithik-roshan-s-hrx-partners-flipkart-to-launch-audio-device-range-11592564246063.html> (last visited on December 24, 2020).

³¹ Team Indulge, “India's first athleisure brand, Skult by Shahid Kapoor is now available on Amazon Fashion!”, *Indulge express blogpost*, May 2018, available at: <https://www.indulgexpress.com/fashion/new-launches/2018/may/21/indias-first-athleisure-brand-skult-by-shahid-kapoor-now-available-on-amazon-fashion-7585.html> (last visited on December 28, 2020).

³² Panache, “Mandira Bedi launches new saree collection inspired by nature”, *Economics Times*, September 2015, available at: <https://economictimes.indiatimes.com/magazines/panache/mandira-bedi-launches-new-saree-collection-inspired-by-nature/articleshow/49101105.cms?from=mdr> (last visited on December 25, 2020).

collections feature some bold designs, just like the actor herself which is the extension of her personality into the product.

Celebrities try to put in all the attributes which are unique to them and to which the public can readily associate. The factor of public recognition and association is very crucial. Shilpa Shetty channeled her style sense into a clothing line and launched her collection of sarees with the Home Shop 18 label, calling it SSK brand. She extended her style by including the modern twists for which she is known. When we talk about Bollywood industry it's not just the actors, but the directors, singer, designers, etc. which are included. Also, sometimes although every individual tends to have a separate style the way they are projected to society is somewhat similar, for instance, the way they wear cloths, the fabric choice they make, which is again an incentive for the celebrities. Famous director Karan Johar collaborated with Vero Moda for the Marquee collection in September 2014, and in 2015 which has the peculiar inclusion of his taste of fabric and glitters in its/the cloth line, the label also collaborated with actress Kangana Ranaut for an edgy party wear collection under the same name. Shraddha Kapoor, who is a newcomer in Bollywood and is a celebrity-turned-designer has launched her line of exquisite clothing under the brand name of *Imara* with a partnership with Anjana Reddy of USPL.

In India, there are neither adequate case laws nor statute governing celebrity rights per se. Thus, the legal system in India, at present, is quite deficient in dealing with the modern phenomena of endorsement advertising. Unlike action under the tort of passing off or the Trade Practices Act, 1974, trade mark registration is unique in providing a prospective form of protection for celebrity personality. In India, celebrities and commercial partners can obtain some protection from trade mark law, but such protection may be limited in scope. Section 2(1) of the Indian Trade Marks Act, 2000, allows registration of any 'sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numeral and shape of goods or their packaging' as trade mark.³³

³³ Tabrez Ahmad and Satya Ranjan Swain, "Celebrity Rights: Protection under IP Laws", 16 *Journal of Intellectual Property Rights* 7-16 (2011).

In India, an action for protection of image rights/personality rights has taken various shields: An action for violation of the tort of privacy with prayers for an injunction and damages; An action for breach of confidence with prayers for an injunction and damages; An action for defamation, civil or criminal. A civil suit may seek an injunction and damages; An action for the economic tort of unlawful interference with business or the procurement of breach of contract where the plaintiff celebrity has a subsisting contract with a third party to commercially exploit his image/likeness in any manner or an action may be maintainable before the Monopolies and Restrictive Trade Practices Commission against an unfair “trade practice” as defined under the MRTP Act. Competition in the market is becoming fierce day by day. All these have made the advertisement industry as one of the major service sectors. Indian celebrities are also growing in stature from national to international stage. Celebrities like Amitabh Bachchan, Sachin Tendulkar, Saurabh Ganguly, Shahrukh Khan and much more have acquired the brand status and goodwill, which has very much possibility of getting misused.³⁴

Trade marking various traits constituting personality of a celebrity has been on the continuous rise around the globe, to which India is not far behind. The concept of personality is evolving with time, and several emerging trends have been impacting Indian society. The personality rights of these celebrities represent significant commercial value, which should be afforded substantial protection under the law while balancing the fair use rights of others. As legal systems across world grapple with defining and protecting celebrity rights, there is urgent need to address this issue and also to fill the gap with the desired law.

Indian Judicial Response

The Trade Marks Act, 1999 defines ‘marks’ under section 2(1) (m):

“mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;

³⁴ Vidya Bhaskar Singh Nandiyal, “Celebrity Mark: The emerging dimension in the domain of Trade Mark an Indian perspective”, *SSRN*, August 2010, available at: <http://ssrn.com/abstract=1656355> (last visited on April 4, 2021).

Although the definition talks about the label, names, signature, etc. which are considered an attribute of the personality of an individual but the Act does not make any specific mention of Celebrity's personality rights. The lack of exclusive provision makes it difficult for the proprietor to establish his ownership, as the claim needs to structure regarding ownership of the mark and use rather than just extension of one's personality in those marks. With all this USP attached to an individual's personality, there are various drawbacks. Infringement of one's personality extension is the issue in Indian legal setup. When an individual is famous, the society tends to identify him/her quickly with his name, face, voice or any other thing which forms an association with the person. This association is the link which is crucial for a celebrity. When this link is hindered, it causes issues. India does not have legislation which protects individual's right to publicity. In India, law tort of passing off deals with infringement of the right to publicity which is dependent on the market presence and exploitation of the plaintiff's mark which would be indicating the reputation of the mark. It is necessary to establish that:

- i) the disputed mark possessed goodwill and reputation,
- ii) there was a misrepresentation of the mark creating the likelihood of confusion and
- iii) there was actual damage or likelihood of damage.

The Indian courts took its first step towards protection of one's personality by establishing the jurisprudence recognizing the publicity rights in *ICC Development (International) v. Arvee Enterprises*³⁵. Delhi High Court said:

The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc....Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be violative of articles 19 and 21 of the Constitution of India. No persona can be monopolized. The right of Publicity vests in an individual and he alone is entitled to profit from it.

³⁵ 2003 (26) PTC 245 Del.

Logically, the commercial exploitation rights and benefits should be with the person whose efforts it results from which is established by Locke's Labour theory. The liability for infringement of these publicity rights was discussed in *Titan Industries Ltd v. Ramkumar Jewellers*³⁶, it laid down two-step test for determining the liability. The steps are as follows:

Validity: The plaintiff owns an enforceable right to the identity or persona of a human being.

Identifiability: The Celebrity must be identifiable from defendant's unauthorized use. Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is recognizable. The right of publicity extends beyond the traditional limits of false advertising laws.

Which makes it clear that there should be an association established in the minds of public with relation to the infringed mark and the celebrity claiming ownership over it. The aspect of civic association is the key factor which was discussed in *Gautam Gambhir v. DAP & co.*³⁷ Where two pubs in Delhi, 'Hawalat' and 'Ghungroo', were using the line 'by Gautam Gambhir', which was alleged to cause confusion among his fans of cricketer Gautam Gambhir because it is well-known fact that he has massive fan following and international repute but the High Court decided otherwise and stated that there existed no connection between the restaurant and the cricketer from the beginning. The only thing which lacked was the disclaimer of non-association by the owners of the restaurant.

Pan Bahar's new advertisement³⁸ drew attention of public because the star Pierce Brosnan who was featured in the advertisement made a statement that he is "*deeply shocked and saddened*" by his association to pan masala endorsement. He explained his position by clarifying that Pan Bahar used his image to endorse pan masala products which were unauthorized and deceptive. He further explained that the contract said that the product was a mouth freshener and contained all natural

³⁶ MANU/DE/2902/2012.

³⁷ MANU/DE/5440/2017.

³⁸ Inika Charles, "Brosnan's 'Pan'demonium – The Right of Publicity and a Possible Contractual Breach", *Spicy IP blogpost*, October 2016, available at: <https://spicyip.com/2016/10/brosnans-pandemonium-the-right-of-publicity-and-a-possible-contractual-breach.html> (last visited on April 4, 2021).

elements as composition. In this case, probably Pierce can file a suit for breach of contracts but what draws attention is an extension of Pierce personality and the establishment of the public association with him and the product he is endorsing. In Indian legal system, the only option available is to sue for breach of contracts, but situations like this urge us to take few steps further and establish a legal regime which does not only urges the traditional breach issues in the marketplace rather considers the social and market set up in dealing with such situations.

In *D. M. Entertainment v. Baby Gift Horse*³⁹ the court said that an individual's property is the extension of his personality. In the instant case, a shop in Delhi was selling tiny toys which resembled Daler Mehndi and used to sing some songs of him when a button attached to them was pressed. The plaintiff company filed for the permanent injunction from infringing the artist's right of publicity and false endorsement leading to passing off. The court said it is such use was done for commercial exploitation without adequate permission from the person or any other authorized by him, shall constitute the infringement of the person's right to publicity. The court ordered compensatory amount to the tune of Rs. 1, 00,000.

The Kerala Wildlife Department was caught in the soup when they named their crocodile park 'Steve Irwin Crocodile Research and Rehabilitation Centre.'⁴⁰ The Department received a legal notice for intellectual property violation. Also, Madras High Court in *Shivaji Rao Gaikwad (aka Rajinikanth) v. Varsha Productions*⁴¹ vividly stated that being a well-known personality, if names/ caricature/image/style of dialogue delivery used without authorization, would amount to infringement of his personality rights as well as passing off. It confuses public about an association. In this case, the defendant was using Rajinikanth's name, personality as the main character of the movie which was not authorized by the celebrity himself. Also, Boney Kapoor filed a suit against producer Ram Gopal Verma alleging that he is releasing a Telugu movie called 'Sridevi'⁴² which had no connection with his wife. In India, celebrities are remembered for their dialogues, voice,

³⁹ MANU/DE/2043/2010.

⁴⁰ Ankita Aseri, "Personality Rights: A Need for Legislation", *The IP site*, April 2018, available at: <http://blog.ciprnuals.in/?p=390> (last visited on April 2, 2021).

⁴¹ 2015 (62) PTC 351 (Madras).

⁴² FP Staff, "Boney Kapoor slaps 'Sridevi' with legal notice: Well played Ram Gopal Varma", *Firspost*, October 2014, available at: <https://www.firstpost.com/entertainment/boney-kapoor-slaps-sridevi-with-legal-notice-well-played-ram-gopal-varma-1755675.html> (last visited on April 4, 2021).

and attitude. Amitabh Bachchan⁴³ recently raised his voice against his voice being used by a tobacco company which was the violation of his personality, and he termed it as unethical. In another case *Sourav Ganguly v. Tata Tea Ltd.*⁴⁴ the Petitioner challenged Tata for selling tea with an offer to meet him and congratulate him, which projected his association with the company. The court ruled in favor of the cricketer and compensation was imposed.

Further, in *Sonu Nigam v. Mika Singh*⁴⁵ the singer sued the defendants for violation of his personality rights. The defendant installed billboards for an award ceremony featuring Sonu Nigam which was not known to him. Bombay High court passed injunction with damage of Rs. 20 Lakhs to be paid. The extension of personality is not only limited to voice, name, face or attitude but also encompasses small details of one's daily routine.

*Justice K. S. Puttaswamy (Retd.) v. Union of India*⁴⁶ was a landmark, nine judges bench case where Supreme Court observed that if the public gets an impression of association or endorsement of particular brand or product, the company is liable to sue for passing off and is considered the right to personality being protected under article 21 of the Constitution. Celebrities have influenced the world because of the character they carry, not only their name, image but sometimes the product they endorse tend to form their personality association in public eyes. Bollywood celebrities like Kajol, Shah Rukh Khan (TM no. 1744444, 1737534), Sunny Leone (Reg. No.: 3139186 (USA)), Sanjeev Kapoor (Application No.: 2006064) and Amitabh Bachchan are few names who have trade marked their names and their images in classes ranging from telecommunications to sacks, bags and even thread. Recent additions to the list are Baba Ramdev, Mallika Sherawat, Yuvraj Singh and Sachin Tendulkar.⁴⁷

⁴³ Shouvik Kumar Guha, "Bachchan lodges Protest not in sotto voce, but in Customary Baritone", *Spicy IP blogpost*, November 2010, available at: <https://spicyip.com/2010/11/bachchan-lodges-protest-not-in-sotto.html> (last visited on April 3, 2021).

⁴⁴ C.S. No. 361 of 1997.

⁴⁵ Priya Gupta, "Sonu Nigam wins case against Mika Singh for defamation and infringement of personality rights", *The Times of India*, May 2014, available at: <https://timesofindia.indiatimes.com/entertainment/hindi/music/news-and-interviews/Sonu-Nigam-wins-case-against-Mika-Singh-for-defamation-and-infringement-of-personality-rights/articleshow/34534010.cms?from=mdr> (last visited on April 4, 2021).

⁴⁶ Writ Petition (Civil) No 494 of 2012.

⁴⁷ Swaraj Paul Barooah, "When Man becomes a Brand", *Spicy IP blogpost*, January 2014, available at: <https://spicyip.com/2014/01/guest-post-when-man-becomes-a-brand.html> (last visited on April 2, 2021).

Another exciting instance was not a Bollywood celebrity, but a man of National importance was targeted. In 2009 Montblanc released luxury, special-edition pens in India entitled 'Mahatma Gandhi Limited Edition 241' and 'Mahatma Gandhi Limited Edition 3000', which were engraved with Gandhi's portrait on the nib. The grandson of Mahatma Gandhi gave the company permission for the same but under the Emblems and Names (Prevention of Improper Use) Act 1950, the use of names and images of nationally essential personalities for any trade, business or professional purpose is prohibited unless permitted by the government. Due to which the company had to withdraw the advertisement and product from the market.

The producers of the famous comedy film Munna Bhai MBBS has filed for trade mark protection.⁴⁸ The process where the individuals are evolving as brands and the public recognition received for the same raises fair demand for the development of personality protection of celebrities or famous individuals not only by article 21 of the Constitution or through breach of contracts or passing off law under torts. Instead, it's time for Indian legislature to dwell on intricacies which an individual goes on adding to his personality in the journey of evolving as a celebrity. The public aspect is everything celebrities personality is essential for their existence. It should be kept in mind that economic aspect of personality develops from reputation and value attached to one's acknowledgment by society. It is essential to maintain a balance between the personal information and public interest relating to celebrities.⁴⁹

Celebrity's personality which builds the goodwill in the market is the commodity on which they establish their stardom. Any wrongful association will cause significant loss to their reputation and lower their 'brand value' which is created over time. The above instances show that in the absence of any specific legal protection, celebrities are still trying to protect their distinctiveness. India needs legislation or statutory provision which empowers celebrities to control the commercial use of their personality.

⁴⁸ Rasul Bailay, "Munna Bhai, Circuit head to trademark office", *Livemint*, August 2010, available at: <https://www.livemint.com/Home-Page/xXgW4IsIXZoMKZkSNqGiOK/Munna-Bhai-Circuit-head-to-trade-mark-office.html> (last visited on April 3, 2021).

⁴⁹ T. V. Kumari, "Celebrity Rights as a Form of Merchandise – Protection under the Intellectual Property Regime," 9(2) *Journal of Intellectual Property Rights* 120 – 135 (2004).

One can safely say that if the wording of these judgment is to be followed, then the right of publicity and a celebrity's control over the commercial use of his image under the realm of personality rights is recognized in India.

IV. Suggestions

The existing trade mark protection and Constitutional protection in the form of right to publicity or right to privacy are contingent on the strength of the celebrity's fame. The right to publicity has trade mark based justification, and the later has developed based on specific rules designed to promote particular purpose. There exists a gap between both the laws and the ambit of protection offered by them. There is a need to modify the existing trade mark law to accommodate the particular characteristics of personal identity protection under it. The emergence of non-conventional trademarks brought in various products or things which were as such not protected by trade mark law initially. A trade mark law which embraces economic rationale for the trade marks, based on the commercial value of the persona, and the social values of the right which derive from the idea of personal autonomy, dignity, and moral rights would be the best way to protect personality. The analysis of existing body of knowledge with regards to personality protection shows how it fails to protect an "identity" and a "product" adequately via existing legal regime.

Based on the above study, certain gaps are identified. First being that many authors argue on the point of personality being protected by law and its procedures and also by trade mark. However, none of them provide a conclusive framework. Secondly, Works of literature available on personality and trade mark protection in India are few. Further, there is no specific IP framework and legislation in India which exclusively protects personality.

Through the critical analysis of the current protection offered by Indian law to non-conventional functions of trade marks, few fundamental flaws exists.

- i. The first flaw is in the limited understanding of the term trade mark which is reflected in interpretation of section 2(1)(zb) of the Trade Marks Act, 1999⁵⁰, where the

⁵⁰ The Trade Marks Act, 1999 (Act 47 of 1999).

- provision is not broad enough to cover personality trademarks. In all the instances where court had an opportunity to discuss and widen its ambit it failed to address the same. It was never thought to address the components which form the personality trade mark protection, rather courts always decided on yes or no clauses and never moved towards the jurisprudence or reasoning for such protection.
- ii. The second flaw is in the rigid attitude of judicial decisions addressing the non-conventional functions of trade mark, where trade mark protection has not been granted to personalities except in the scenarios where a reading of right to privacy and a right to publicity resulted in a judgements that granted a degree of protection to the personalities associated. The judiciary has very conveniently over looked that personalities can be protected as an intellectual property. They have failed to recognize and consider the intricacies of personality that are only complemented *via* trademarks protection. To adequately address the protection of personalities under trade mark there is need of a separate provision which would focus on every individual factor unique to formation of personality and consequently should be offered protection.
 - iii. The third flaw lies within the scope of the term mark itself, particularly in relation to section 2(1) (m) of the Trade Marks Act, 1999, wherein the meaning of mark has not been read broadly to include personality marks. In no Indian judgment the term mark is been interpreted or appears to be interpreted in relation to accord protection to personality which directs towards the need of a new provision inclusive of such intricate details.
 - iv. The final flaw lies with the absence of an effective understanding for the need of non-conventional trademarks to develop in Indian system. As, the current study relates to personality trade mark protection which is one of the non-conventional trademarks, it is seen that there exists a gap. Hence to bridge this understanding, individual provisions might be beginning to address this contemporary changes.

Indian legislature and judiciary need to reconsider the social development and protection they offer to personalities not only to Bollywood but also to sports or political domain, but the scope of this study is limited to Bollywood celebrities. There exists a gap between the understanding of non-conventional trademarks and what they are capable of and the Indian stand on it. With

the development of society and marketplace the concept of trade mark evolved. Consumers being the soul for the personality trade mark it is vital to monitor the trademarks growth which should not be achieved at the cost of manipulating the consumer decision and disturbing the balance in the market. It can be suggested that traditional policy and theories of trade mark protection needs to be supported by the contemporary understanding and these non-conventional functions. This development would not be pro-trade mark owner protection rather it would open new dimensions of trade mark and its features which would further develop this concept. If this update would not be done the law will become obsolete. This hampers the ability of the law to understand and deal with non-conventional function efficiently. The current legal scenario may address these functions due to the extended interpretation offered but it is inefficient and hinders the functioning of the non-conventional trade mark in India, hence need for introduction of a new section in trade mark definition by Indian legislations. To bridge this radical evolution concerning trademarks, a new provision solely aiming at personality protection is attempted, that will have the following parameters establishing the wholesome trade mark protection:

- a. Substantial segment of public begins to perceive any use of such goods or services as indicating a connection between the eminent personality and such goods and services.
- b. The knowledge/ recognition among the relevant sectors and public at large and the extent of geographical area concerning such recognition would play pivot role.
- c. Number of actual and potential goods and services derived from the extension of such eminent personality that can be protected as trade mark would be included.
- d. It should not be necessary that an application should be made or should be pending with trade mark office to establish the usage in India.

The attempt has been made to put forth an inclusive provision which would be welcoming all the possible changes and advancements concerning personality marks.

Personality mark means mark capable of represented in any form and manner and not bound to be represented graphically and is capable of distinguishing the goods and services of the one

eminent personality from those of others and may include shape of goods, their packaging and combination of colours, their association with a famous dialogue, smell, aura or signature move.

The draft provision is indicative of essential factors and the parameters mentioned above should be the driving force while vetting such provision.

V. Conclusion

The study is focused on the Bollywood industry to provide an insight on the importance of non-conventional personality functions, their conceivable standardizing justifications, and the ramifications of their assurance from a social point of view. The trademarks have become the guiding light for consumers which is based upon certain rational and is brand specific. The analysis reveals the current overrun between trademarks, brands, and extended forms of goodwill, and also reflects that the segregation of these three is impossible in the legal realm. This overrun is the reason for recognition of non-conventional functions for trademarks. Another significant finding is that consumers are the creators of the non-conventional trade mark functions. To cajole this vast and modern development in relation to probable trade mark regime, it is understood that amendments relating to trade mark law has to be thought upon. The modifications accommodating personality protection will pave way for social development of trade mark law and also serve as guiding principles pointing to many new legal domains like AI and energy law. As the development relating AI is driving the social media hence the consumers are being led by AI, thus it is essential to evolve with the pace of AI to accommodate the demands of consumers and accord the deserved protection to non-conventional trademark, so to say personality trade mark. This suggested synthesis will allow the protection to grow wider yet stronger and would further the jurisprudence of intellectual property protection.