

India

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Sources of law

1 Is the right of publicity recognised?

Yes, the right of publicity is recognised in India, but not as a distinct legal right.

While there is no specific statute relating to right of publicity, the Indian courts have recognised the right of publicity as a form of enforceable right through case law. The Delhi High Court has, in principle, recognised the right of publicity in the case of *ICC Development (International) Ltd v Arvee Enterprises*, 2003 VIIAD Delhi 405.

Further, the violation of the right of publicity can be construed as unfair trade practice, misappropriation of intellectual property and also as an act of passing off.

2 What are the principal legal sources for the right of publicity?

India does not have any specific statute relating to right of publicity, but the right can be derived through various statutes. The legal sources for the right of publicity are as follows.

Constitutional law

The right to publicity is intrinsic in the right to privacy guaranteed under articles 19 and 21 of the Constitution of India. The right may be enforced through a writ issued by the court against government invasion of an individual's right to privacy.

The right to publicity under the Constitution can be enforced only against the state and will be difficult to enforce against an individual.

The Trade Marks Act 1999

Section 14 of the Trade Marks Act 1999 (the TMA) provides that if an application is filed for registration of a trademark suggesting a connection with any living person or with a person who died 20 years before the date of filing the application, the registrar of trademarks may require the applicant to provide the consent of such living person or the consent of the successors of the deceased and may refuse to register the trademark without such consent.

Therefore, under the TMA, an individual cannot register a trademark relating to a celebrity (living or dead) without the celebrity's or his or her successor's consent.

Further, use of a celebrity's name as part of a domain name can also be restricted under the TMA.

The Copyright Act 1957

Sections 38 and 57 of the Copyright Act 1957, relating to a performer's rights and the moral rights of an author respectively, can be used to protect the unauthorised use of the performer's or author's marketing rights and reputation.

Further, an individual's photograph, image, painting or other such derivatives may be protected under the Copyright Act.

Although ownership of the copyright of a photograph may be an issue, since the photographer will have the copyright of the photograph he or she has taken, other aspects, such as the signature of an individual, may be protected.

The Emblems and Names (Prevention of Improper Use) Act 1950

The Emblems and Names (Prevention of Improper Use) Act 1950 (the Emblems Act) to an extent protects the unauthorised use of the names of certain national dignitaries and institutions listed under the Emblem Act, for commercial purpose, without the government's permission.

The Competition Act 2002

Under the Competition Act, any unauthorised use of an individual's name or likeness that suggests to the consumer that the individual is associated with or endorses a product, is untrue or misleading and that can be restricted.

The Advertising Standards Council of India

The Advertising Standards Council of India has prescribed a code to control the contents of advertisements. The Code provides that advertisements should not contain a reference to any individual or institution, or use the image of a popular or famous individual, which may ridicule or bring disrepute to the individual or the institution without obtaining express permission from such individual or institution. The Code is not binding and adherence to it is self-regulatory.

3 How is the right enforced? Which courts have jurisdiction?

The right of publicity can be enforced by instituting a suit in the civil court that has jurisdiction to try the suit.

The suit may be instituted, at the option of the plaintiff, in the court within whose jurisdiction the defendant resides or carries on business or the court within whose jurisdiction the cause of action has arisen. Further, the pecuniary jurisdiction of the court should be taken into consideration before instituting the suit.

4 Is the right recognised per se, or by reference to other laws?

As there is no specific statute relating to the right of publicity in India, the right of publicity is recognised with reference to other related statutes such as the Indian Constitution, intellectual property-related laws, competition law and through case law.

Existence of right

5 Who has or is entitled to the right of publicity?

There is no specific statutory provision regarding the scope and applicability of the right of publicity in India. The Delhi High Court

has observed that the right of publicity can inhere only in an individual or in any indicia of an individual's personality (his or her name, personality traits, signature, voice, etc) (*ICC Development (International) Ltd v Arvee Enterprises*, 2003 VIIAD Delhi 405). Therefore, an individual alone is entitled to profit from the right of publicity. Further, the right of publicity is inheritable and can therefore devolve on the individual's legal representatives after his or her death, although currently there is no specific provision or case law in India to support this.

6 Do individuals need to commercialise their identity to have a protectable right of publicity?

No, individuals need not commercialise their identity to gain the right of publicity.

However, in the event of an infringement action, the individual will have to establish certain fame or popularity attributed to him or her in order to claim protection of the right of publicity.

7 Can a foreign citizen have a protectable right of publicity?

A foreign citizen's right of publicity can be protected in India, but only to a very limited extent. A foreign citizen cannot enforce the fundamental right to the right of privacy under articles 19 and 21 of the Constitution of India, which are guaranteed only to Indian citizens.

However, foreign citizens may have recourse to other related statutes, such as the intellectual property laws, for the protection of their right of publicity.

8 What is protected under the right of publicity?

As there is no specific statute relating to the right of publicity in India the scope of protection that is provided to an individual is unclear. In the case of *ICC Development (International) Ltd v Arvee Enterprises*, the Delhi High Court has provided a broad purview of the term 'publicity rights' and has observed that an individual or any indicia of an individual's personality (eg, his or her signature or voice) can be included in the term 'publicity rights'.

9 Is registration required for protection of the right? If so, what is the procedure and what are the fees for registration?

Registration is not required for protection of the right of publicity.

10 Does the existence, or the extent, of the right depend on where the individual lives or has lived?

No, the right of publicity does not depend on where the individual lives or has lived.

Ownership of right

11 Can the right be transferred? In what circumstances?

There is no specific law on the transfer of the right of publicity in India. However, as a publicity right is a kind of property that has monetary value attached to it, an individual may permit another person to use his or her name or other indicia for commercial gain in the form of a licence or a permitted user agreement.

The individual may also restrict the manner and use of his or her name or other personal indicia by making specific provisions in this regard in the agreement for such transfer.

12 Can the right be licensed? In what circumstances?

Yes, an individual can license his or her right of publicity to another person for commercial gain by executing a licence agreement.

13 If the right is sold or licensed, who may sue for infringement?

There is no specific statute in India in this regard. However, under the trademark and the copyright law, an infringement action can be filed either by the licensor or the licensee, or jointly by them, depending on the terms and conditions of the licence agreement.

14 How long does protection of the right last?

There is no statutory provision or case law in India prescribing the duration of the right of publicity. The right of publicity lasts at least for the individual's lifetime, and sometimes after his or her death, depending on the commercial value attached to such individual after his or her death.

Due to this lack of clarity, the duration of the right may be decided by the courts on a case-by-case basis.

15 Is the right protected after the individual's death? For how long? Must the right have been exercised while the individual was alive?

There is no specific provision under Indian law relating to protection of the individual's right of publicity after his or her death. However, as a property right, the right of publicity is inheritable and can be protected by the legal representatives of the dead individual against any unauthorised use.

As regards the duration of protection of the right after death, it will depend upon the commercial value attached to the dead individual and will be decided by the courts on a case-by-case basis.

16 If post-mortem rights are recognised, who inherits the rights upon the individual's death? How is this determined?

There is no specific statute in India regarding post-mortem rights of an individual. However, under the Indian law of succession, the rights of an individual devolve on the legal representatives of the individual after his or her death. Legal representatives include the individual's widow or widower, children, parents and other members of the family as prescribed under the law of succession.

17 Can the right be lost through the action or inaction of its owner?

There is no specific law in this regard. Therefore, based on common law principles, if a person denounces his or her right of publicity, or does not take actions against long-term unauthorised use of his or her rights by others, such action and inaction can affect an individual's right of publicity.

18 What steps can right owners take to ensure their right is fully protected?

To protect the right of publicity, an individual can, inter alia, take the following precautionary steps:

- the individual should ensure that he or she executes a written consent for every sponsorship deal or transaction involving marketing or endorsement of products where a third party obtains commercial benefits;
- further, the consent that the individual provides should be specific as to the extent of use of the individual's name or personal indicia, the time period for which the use will be permitted and the media through which the use will be extended;
- all restrictions relating to the use of the right should be expressly stated in the agreement permitting the use of the right; and

- the individual should be aware of the rights of publicity available to him or her, and should initiate immediate actions against the infringement of his or her rights.

Infringement

19 What constitutes infringement of the right?

As there is no specific statute, infringement of the right of publicity is not defined under Indian law. However, any unauthorised use of a celebrity's persona, image or information constitutes infringement of his or her right of publicity and can therefore be challenged as a violation of his or her publicity rights.

20 Is an intent to violate the right necessary for a finding of infringement?

No, the intent of the infringer is not a necessary factor while deciding the act of infringement. However, intention is one of the relevant factors that is considered by the courts to determine infringement.

21 Does secondary liability exist for the right? What actions incur such liability?

There is no specific statutory provision in this regard. Secondary liability may be imposed by the courts considering the facts and circumstances of each case.

22 What defences exist to an infringement claim?

There is no specific statutory provision regarding the defences in an infringement claim. However, the defences under trademark law and copyright law may be applied for the right of publicity as well. For instance, the media may publish any information regarding any individual if that information is of public interest and concern.

Remedies

23 What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?

- The owner of the right of publicity may institute a civil suit for unwarranted interference of the right to privacy as this is a civil wrong. The right to privacy can also be enforced through filing a writ petition or through a tort action.
- The owner of the right may file a defamation suit against any person who makes or publishes any imputation concerning the right owner, knowing or having reason to believe that such imputation will harm the reputation of the owner. The owner may file a civil or criminal suit, as defamation is both a civil wrong and a criminal offence in India.
- A passing-off action can be filed against a third party that attempts to create an untrue association between its product and a celebrity by making unauthorised representations that the celebrity concerned endorses the product.

In addition to the injunctive relief, damages are awarded by the Indian courts in the form of actual damages, damages for goodwill and reputation and sometimes punitive damages.

24 Is there a time limit for seeking remedies?

There is no specific statutory provision for instituting legal action for the right of publicity. However, India's procedural law provides that a civil suit should be instituted within three years of the cause of action.

Further, an appeal should be filed within 90 days of receipt of the lower court's order.

25 Are attorneys' fees and costs available? In what circumstances?

The costs awarded by the Indian courts are minimal and are not sufficient to meet attorneys' fees and other costs.

26 Are punitive damages available? If so, under what conditions?

In recent years, Indian courts have started awarding punitive damages in intellectual property infringement cases. However, Indian courts are not normally liberal in granting punitive damages, although actual damages can be recovered.

27 What significant judgments have recently been awarded for infringement of the right?

There have been no recent judgments in India on infringement of the right of publicity. However, under the Emblems Act, the Supreme Court of India has recently restricted the international luxury brand owner Mont Blanc from selling limited edition pens bearing Mahatma Gandhi's picture.

A petition was filed against Mont Blanc, alleging that Mont Blanc's use of Mahatma Gandhi's stick-wielding image on the company's limited edition pens for commercial purposes violated the Emblems Act, which prevents improper use of certain emblems and names for professional and commercial purposes.

As Mont Blanc gave an undertaking in the court not to sell the pens, either in India or elsewhere, the issues in the petition were not analysed in detail; therefore, no clear ruling or observations were made by the Court in this regard.

Litigation

28 In what forum are right of publicity infringement proceedings held?

An infringement suit must be filed in the lowest court having jurisdiction and under whose jurisdiction the defendant resides or carries on business or where the cause of action has arisen. Some of the high courts in India, such as Delhi, Bombay, Madras and Calcutta, have 'original side jurisdiction', and a suit can be filed directly in the foregoing high courts.

Proceedings in an infringement suit are similar to those of other civil suits.

29 Are disputed issues decided by a judge or a jury?

India does not have a jury system, and disputes are decided by a judge.

However, in certain cases, such as an appeal from the judgment of a single judge of a high court, the appeal may be decided by a larger bench.

30 To what extent are courts willing to consider, or bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

Indian courts are not bound by the judgments of foreign courts. However, as Indian law is based on common law principles, judgments of the English courts are often referred to and relied upon by Indian courts while deciding a case.

Judgments of other foreign courts are also referred to by the Indian courts occasionally if the Indian legal position or jurisprudence on a specific issue are not settled.

31 Is preliminary relief available? If so, what preliminary measures are available and under what conditions?

Yes, preliminary relief is available in India, primarily in the form of injunctions.

Update and trends

There has been no recent statutory amendment in Indian law relating to the right of publicity. However, Indian courts are actively extending the scope of right of publicity to protect the celebrity rights. For instance, in a recent intellectual property case (*Titan Industries Limited v. Ramkumar Jewellers*, CS (OS) No.2662/2011), the Delhi High Court had granted a permanent injunction against the defendant restraining the defendant from misappropriating the celebrity rights of famous Indian film actors, Mr Amitabh Bachchan and Mrs Jaya Bachchan. In this case, the plaintiff was an owner of

a famous jewellery brand and had executed an agreement with the actors for endorsing the brand by using the images and other material of the actors. The defendant used the identical image of the actors for marketing and promoting its jewellery brand. The court held the defendant's advertisement as false and misleading and observed that the right of publicity extends beyond the traditional limits of false advertising laws, and the infringement of the right of publicity requires no proof of confusion or deception, specifically when the celebrity is identifiable.

An injunction is granted by the court if all the following three conditions are satisfied:

- there is a prima facie case in the plaintiff's favour;
- the balance of convenience is in the plaintiff's favour; and
- irreparable loss or harm will be caused to the plaintiff if the injunction is refused.

32 What avenues of appeal are available in main proceedings or preliminary injunction proceedings? Under what conditions?

If the suit is instituted in the lower court, an appeal against the lower court's order can be filed in the high court having jurisdiction if the high court is satisfied that the case involves a substantial question of law.

Thereafter, an appeal against the order of the high court can be filed before the larger bench of the same high court and then before the Supreme Court of India, depending upon the nature of the case and the legal issues involved. In this regard, India's procedural law provides specific provisions regarding appealable orders and decrees.

33 What is the average cost and time frame for a first instance decision, for a preliminary injunction, and for appeal proceedings?

Cost of litigation

The cost of litigation in India primarily consists of court fees and attorneys' fees.

Court fees will depend upon the valuation of the suit and are normally not very high. For instance, the court fees for the suit valued at 1 million rupees will be approximately 24,000 rupees. Attorneys' fees are normally payable on a per-hearing basis for the drafting and filing various documents and evidence. Attorneys' fees

will vary according to their level of experience and expertise and also the city in which the suit is filed.

If arguing senior attorneys (equivalent to barristers in England) are engaged, their fees will be relatively high; these may vary between 500,000 and 1.5 million rupees per hearing, depending on the arguing senior attorney's seniority and the criticality of the case.

Arguing senior attorneys are primarily engaged for the ad interim application hearing stage to argue the case and to explore the possibility of obtaining an ex parte injunction order, and for other crucial hearings. Arguing senior attorneys may not be required for all the hearings of the suit, in which case the cost will be reduced after the initial stage.

Therefore, the cost of litigation in India varies widely.

Time frames

As regards preliminary relief, if the court is convinced that there is a prima facie case in the plaintiff's favour the court may grant the injunction on the same day.

However, Indian courts are sometimes reluctant to grant ex parte injunctions, and as such the court may issue a notice to the defendant to appear and show cause. This may require some time, as the defendant may be residing in a different state in India.

If the ex parte injunction is not granted and the court issues notice to the defendant, it may take up to two months for the disposal of the interim application depending upon whether the defendant appears in the court, the number of hearings, the nature of evidence provided by each party, the availability of the judge and so forth.

As regards the suit, it may take two to three years for its final disposal, which time period may get extended if appeal proceedings are filed.



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