



**RGNUF FINANCIAL AND MERCANTILE LAW
REVIEW**

VOL. 5 ISSUE 1

OCTOBER, 2018

**SPECIAL EDITION ON INTELLECTUAL PROPERTY,
ENTERTAINMENT AND MEDIA LAWS**

<i>Image Rights of Famous Persons vis-à-vis Right to Privacy: An Analysis Under the Intellectual Property Laws in India and Other Countries</i>	AKANKSHA JUMDE & NISHANT KUMAR
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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

[Mode of Citation: 5 RFMLR 1 (2018)]

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PREFACE

This is the first issue of the fifth edition of RGNUL Financial & Mercantile Law Review. This law review is an endeavor to better understand the financial market and regimes of India and South East Asia and to promote discourse between academia in India, West and South East Asia. Turning out this issue has been a mammoth challenge but also, a very rewarding one. This issue of RFMLR is concentrated on IPR, Entertainment and Media Laws with papers received from all parts of India with enthusiasm. The review makes for an interesting read and loves to hear your opinions on how to make it better. Please feel free to write in to us.

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**IMAGE RIGHTS OF FAMOUS PERSONS VIS-À-VIS RIGHT TO
PRIVACY: AN ANALYSIS UNDER THE INTELLECTUAL
PROPERTY LAWS IN INDIA AND OTHER COUNTRIES**

Akanksha Jumde & Nishant Kumar***

ABSTRACT

Emerging as an interesting legal trend in India, Publicity or Personality rights of celebrities are contributing to the development of Indian Entertainment law, thereby establishing the need for legal scholars and academics to study the implications of these unique rights.

Publicity Rights have their origins in other common law jurisdictions and arose in response to the presence and influence of the cinema industry. Primarily derived from the right of privacy, publicity rights in India have arisen mainly out of judicial precedents related to unauthorized usage of the various aspects of the celebrity persona, whose appearance or likeness have been unduly exploited for commercial gain by advertisers and brands alike. Unfortunately, the current Indian intellectual property regime seems insufficiently equipped to deal with this issue and its consequences. Judicial decisions in this area have been sporadic, leading towards the need to develop more lucid statutory language for enforcing this right and possibly, a distinct regime of publicity rights.

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With the ever increasing recognition afforded to publicity rights in courts across jurisdictions, the author aims to focus on answering some of the above mentioned questions with the hope that they will culminate in a response to address the question of whether we need a separate rights regime for publicity rights or whether the existing legal infrastructure proves sufficient. The author concludes that Indian approach to publicity rights is constitutional rather than commercial, and, similar to more developed jurisdictions such as U.S., a dual approach needs to be adopted for better enforcement of publicity rights. There is therefore, an urgent need to recognize persona as a commercial rather than right of human dignity.

1. INTRODUCTION

With the growth of digital media, the study of publicity rights assumes an increasing role of importance and finds itself at the centre of several contracts and negotiations in the entertainment industry.¹ Publicity rights very simply, are those which protect the interests of celebrities in their images and identities.² Also referred to as privacy rights in some jurisdictions, the development of the jurisprudence of publicity rights has been surrounded by a great deal of scepticism, often giving rise to debates of whether such a right is truly representative of the need to protect a person's privacy rights or merely an exaggeration of an otherwise frivolous interest. Some scholars advocate that the treatment of the human likeness as

¹ S. Barnett, *The Right to One's Own Image, Publicity and Privacy Rights in the United States and Spain*, 47 AM. J. COMP. L. 556 (1999).

² W.W. Fischer III, *A History of the Ownership of Ideas in the United States*, in INTELLECTUAL PROP. RIGHTS: CRITICAL CONCEPTS IN LAW.

a source of monetary gain is an unnecessary and excessive commercialization of the human body and thus, resulting in speculation as to whether such a right must exist and be encouraged.³ Others consider publicity rights to be an offshoot of intellectual property rights like copyright and trademark, finding no significant difference between the commercial exploitation of a person's idea and a person's likeness, so long as there is consent on her behalf.

2. DEFINING A PUBLICITY RIGHT

A publicity right refers to the right, which protects an individual's interest in an image, a voice or likeness.⁴ This right enables a celebrity to object to the commercial, or use of his or her image or likeness uses without his consent, such that the user may derive commercial benefit or profit by using a celebrity's image. Conversely, it allows a celebrity to gain profits for the consensual use of his or her likeness. Right of publicity may be distinguished from a right of privacy because if man has a right in the publicity value of his photograph, then he has a right to grant exclusive privilege of publishing his picture.⁵

Brook, L.J., in a 2005 decision defined the right to publicity as "An exclusive right of a celebrity to the profits to be made through the exploitation of his fame and popularity for commercial purpose".⁶ This

³ Dogan & Lemley, *What Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1162 (2006).

⁴ M. McKenna, *The Right of Publicity and Autonomous Self - Definition*, 67 U. PITT. L. REV. 346 (2006).

⁵ *Halean Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

⁶ *Douglas & Zeta Zones v. Hello Ltd.*, [2005] EWCA (Civ) 595.

definition helps to distinguish the notion of the publicity right from related moral and privacy rights, as it emphasizes on the commercial value of any celebrity's image. In the same case, it was observed by Sedley, L.J., that any adversity to the reputation of an individual does not amount to financial or economic loss, and thus the publicity right is one which concerns intangible harm. This hints at the recognition of an intellectual property right that aims to secure financial benefits rather than merely provide protection to the celebrity.

The most cited definition of a publicity right can be found in Section 46 of the Restatement (Third) of Unfair Competition Act, 2005, "Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity" which essentially states "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate."

In sum, publicity rights or personality rights, is the right of any celebrity or an individual to navigate the commercial use of his or her own persona or identity for selling any advertisers' products.⁷ Impliedly, it gives an individual the exclusive right to license the use of their identity for commercial promotion.

⁷ *Right of Publicity: An Overview*, CORNELL UNIV. LAW SCH., <https://www.law.cornell.edu/wex/publicity> (last visited Aug. 5, 2015).

3. THE HISTORICAL DEVELOPMENT OF THE RIGHT OF PUBLICITY

The origin of the publicity right lies in the understanding of the right to privacy.⁸ The notion that a celebrity was entitled to financial benefit on the use of his or her image was only a consequence of acknowledging the fact that the celebrity had a right to be left alone. In other words, it was only after the courts⁹ made it clear that being a celebrity and public figure did not justify the full disclosure of everything that occurred in their personal lives, that it was also understood that if a celebrity were to make some part of his or her life public, then he or she would be entitled to monetary compensation for the same. This necessarily led to a controversial two-fold justification for the introduction of publicity rights, namely an economic and a moral justification. The economic justification for the right serves to afford protection because a celebrity is able to derive commercial benefit out of use of his or her image. The moral rights justification adopts the view that since the celebrity is the one who contributes towards the creation of the identity; he or she alone stands to gain from the benefits accruing to the identity. The justifications have a firm basis in the prevention of unjust enrichment.

One of the most common forms of the exploitation of popularity is celebrity advertising, which is often the only way in which one can

⁸ R.J. Frackman & T.C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, UNIV. OF CAL. AT L.A. ONLINE INST. FOR CYBERSPACE LAW AND POLICY, <http://www.gseis.ucla.edu/iclp/rftb.html> (last visited Oct. 1, 2014).

⁹ *White v. Samsung Elec. Am.*, 971 F.2d 1395 (9th Cir. 1992); *see also Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

distinguish between several similarly priced products of the same quality.¹⁰ In addition advertising and marketing, the position of a celebrity adds substantial market value to the product.¹¹ It is the effort to curb ‘free-riding’ and appropriation of another’s popularity, which lends purpose to the creation or rather recognition of the publicity right.

One of the initial cases to recognize the right to publicity was *Halean Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹² This case is known to have devised the traditional right of the publicity doctrine, while recognizing the property right in a baseball player’s photograph that was used on trading cards. The Court held that right to publicity exists independently to the right of privacy, which is vested in the publicity value of his photograph.

Subsequent commentaries however modified our understanding of the publicity right so as to allow it to be independent of the right to privacy. For instance, Professor Melville B. Nimmer¹³ stated that, while plaintiffs in privacy cases were concerned about the invasion of their privacy, the publicity plaintiffs prayed for compensation for exploitation of their commercial identities. In 1977, the U.S. Supreme Court recognized a

¹⁰ A.D. Hogue, *Image Consulting*, INTELLECTUAL PROP. SUPPLEMENT TO NAT’L L.J. 67 (1998).

¹¹ J. Klink, *50 Years of Publicity Rights in the United States and the Never-Ending Hassle with Intellectual Property. and Personality Rights in Europe*, RUGER ABEL PATENT & LAWYERS, http://www.ab-patent.com/downloads/publicity_rights.pdf (last visited Oct. 1, 2014).

¹² *Halean Lab.*, 202 F.2d 866, 868 (2d Cir. 1953).

¹³ M.B. Nimmer, *The Right of Publicity*, J. L. & CONTEMPORARY PROBLEMS 19 (1954).

common law right of publicity.¹⁴ The action was said to lie if the claimant could demonstrate the fact that he:

- Owns a publicity right concerning his own or licensed personality features
- That the defendant without permission used these features in a way that the celebrity is identifiable and
- That this use is likely to cause damages to the commercial value of the personality features.

The right of publicity originated as a prohibition against misappropriating a person's name or likeness, thus creating the idea of a protected persona.

In one celebrated case, Woody Allen was granted his request for an injunction to prevent the use of a look-alike in a commercial, thereby protecting his likeness.¹⁵ In another case, the utilization of the slogan, “Here’s Johnny” which was used to introduce a TV show was held to be indicative of a famous person, and therefore, could not be adopted for the sale of portable toilets.¹⁶ An actor could prevent an eating joint from using the name of the performed film character Spanky McFarland, and prevent the use of the pictures of other actors.¹⁷ The problem regarding the use of sound-alike voices was addressed in several cases. In *Waits v. Frito-Lay*,¹⁸ Tom Waits whose voice was adopted by a voice alike for

¹⁴ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 564 (1977).

¹⁵ *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985).

¹⁶ *Carson*, 698 F.2d 831 (6th Cir. 1983).

¹⁷ *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

¹⁸ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *see also* *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

advertisements. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,¹⁹ modified footage of a famous race car driver's car in a television commercial without authorization and consequently the driver's right of publicity was held to have been infringed. Statutory incorporation of the right has also taken place in different jurisdictions. The publicity right is growing however, in order to combat the ever increasing ways in which one may benefit from another's fame and consequently the driver's right of publicity was held to have been infringed. Statutory incorporation of the right has also taken place in different jurisdictions. The publicity right is growing however, in order to combat the ever increasing ways in which one may benefit from another's fame.

4. STUDY OF PUBLICITY RIGHTS FROM OTHER JURISDICTIONS

4.1. THE RIGHT OF PUBLICITY IN THE UNITED STATES

The development of the right to publicity is closely related to the right to privacy in American jurisprudence. The New York legislature created a statutory right²⁰ to privacy in 1903 following a case,²¹ where the plaintiff claimed that her likeness had been used to create an image on flour bags. The Court rejected her claim; however this gave rise to the need for a right to privacy, violations of which would entail both civil and criminal liability. The Common law principle of privacy however, was soon phased out as it was held to be inadequate in dealing with the commercial interests

¹⁹ *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

²⁰ N.Y. CIV. RIGHTS LAW § 50-51.

²¹ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

of celebrities.²² The need was felt to recognize a right which was meant to protect the pecuniary interest of the celebrity, and possibly the intellectual property produced by them.

The strongest publicity rights in the U.S. exist in California,²³ the home of a powerful celebrity market. The statutory protection afforded is almost custom made to suit the needs of professionals and celebrities in California.²⁴ On federal level, the Lanham (Trademark) Act,²⁵ which affords protection in cases involving passing off, is one of the most sought after routes to ensure celebrity protection.

4.1.1. Latest Developments in Publicity Rights in U.S.

In a recent lawsuit filed before the California Superior Court, right of publicity has been taken beyond college athletes and Hollywood celebrities.²⁶ In this lawsuit, former Central American despot Manuel Noriega has sued Blizzard/Activision over their portrayal of Noriega in its highly successful game “Call of Duty: Black Ops II”. One of the characters in the game bore Noriega’s likeness, and in view of the above, he had sued Activision under California’s right of publicity statute for “portraying him as an antagonist and creating a false impression by using his name and likeness”. The case is *sub judice*.

²² David T., *Beyond the Trademark Law: What the Right of Publicity Can Learn From Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J., no. 3, 2008, at 913.

²³ CAL. CIV. CODE § 3344.

²⁴ CAL. CIV. CODE § 3344(a) & (e).

²⁵ Lanham (Trademark) Act, 15 U.S.C. § 1125.

²⁶ S. Sholder, *Video Game Cases May Break New Right of Publicity Ground*, LAW360.COM, <http://www.law360.com/articles/562163/video-game-cases-may-break-new-right-of-publicity-ground> (last visited Aug. 5, 2015).

The latest trends in publicity rights judgments includes right of personality for college athletes.²⁷ The Court of Appeals applied the transformative use test²⁸ to determine Hart's right of publicity. The Court considered two parameters: appearance of the celebrity's avatar in the video game and the context of the use of the avatar, and whether the user of the game has the ability to alter the avatar's appearance. Holding that the NCAA Football had sufficiently transformed Hart's identity, the Court accepted his claim for right of publicity.

In a case dealing with post-mortem celebrity rights of Albert Einstein,²⁹ the Court found that Albert Einstein's post mortem rights had expired under New Jersey common law. The Court also became the first to accept limit on the common law post-mortem right of publicity and concluded that it could no longer be more than 50 years.

In a 2014 judgment,³⁰ the Seventh Circuit ruled in favour of basketball legend Michael Jordan against supermarket chain Jewel Food Stores, Inc., by making a distinction between commercial and non-commercial speech, the Court held that the advertisement featuring Michael Jordon in a special edition of Sports Illustrated was non-commercial speech, therefore protected by First Amendment, guaranteeing freedom of speech and expression.

4.1.2. Defences and Duration

²⁷ Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

²⁸ Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804-08 (Cal. 2001).

²⁹ Hebrew Univ. of Jerusalem v. Gen. Motors, 903 F.Supp.2d 932 (2012).

³⁰ Jordan v. Jewel Food Stores, No. 12-1992 (7th Cir. 2014).

The right of publicity, which permits a person to prohibit others from using her name or likeness on goods or products, without the person's prior consent, is subject to certain limitations. Although there has been some disagreement as to what limitations can be imposed on the protection accorded to the citizen under the right of publicity, there have been some accepted defences to the right. Firstly, consent, preferably written, is a valid defence, although there have been instances such as Washington's statutory law acceptance of "oral" or "implied" consent as adequate.³¹ Material published with the consent of the celebrity, cannot be said to infringe the celebrity's right of publicity. Another popular defence cited is that of newsworthiness. If the material published is not merely gossip or speculation, and is factual in nature and worthy of being reported as news, it is possible to claim that there has been no infringement on the individual's right of publicity.³²

A very important defence concerns the protection offered under the ambit of the freedom accorded to speech and expression. This has already been dealt with in detail previously in connection with the famed *Tiger Woods* ' case. In U.S. especially, a great deal of literature has been generated on the discussion of First amendment defences which primarily focus on speech and expression. The role of the Courts when determining the applicability of such a defence essentially involves conducting a fact-specific balancing test which aims to compare conflicting interests of the person's right of publicity with the public's right to have access to

³¹ O.Y. Lewis, *Publicity Rights*, HENDRICKS & LEWIS P.L.L.C., <http://www.hllaw.com/images/78222PublicityRights.pdf> (last visited Oct. 1, 2014).

³² *Walter v. NBC Television Network, Inc.*, 27 A.D.3d 1069 (2006).

information. As already mentioned, the transformative elements test is of crucial importance here, as is determining the cardinal message of the work in consideration. For instance, if the purpose of the reference is to advertise or sell an unrelated product, chances are that it will be treated as a commercial endeavour and thereby will be entitled to little or no First amendment protection.³³ Similarly, if the primary purpose of the reference is art, parody or political speech, then the Courts are more likely to support First amendment protection as was witnessed in *E.T.W. Corp. v. Jireh Publishing, Inc.*³⁴

Death is not necessarily a practical defence to adopt, as in most jurisdictions, the right of publicity is descendible and transferable. This effectively allows the right of publicity to persist for a period ranging from 10 to 100 years after the death of the individual. In the U.S., Tennessee, Indiana and Oklahoma are states which recognize the longest potential post-mortem publicity rights³⁵ with Indiana and Oklahoma recognizing a right persisting for 100 years. The Tennessee statute provides protection to the right holder for as long as he or she continually exploits the commercial value of the identity. This necessarily means that the duration of the right is practically unending in some jurisdictions. Washington law provides a post mortem right for ten years for individuals and 75 years for those whose personality rights continue to have some commercial value.

³³ Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).

³⁴ ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).

³⁵ H. Briston, *The Right of Privacy and the Right of Publicity: It's Not Just About Tabloids and Fame*, UNIV. OF OR. PUBL'N, https://scholarsbank.uoregon.edu/dspace/bitstream/1794/2444/2/HFM_paper_v2.pdf (last visited Oct. 1, 2014).

Marilyn Monroe is synonymous with the words “blonde” and “bombshell”. Easily one of the most successful actresses of her time, she was known to have redefined American cinema through her performances and controversies. Her fame earned her a great deal of money, something which has not really changed since her death in 1962. The use of Monroe’s name, voice and likeness in the course of selling a vast range of products, has been a huge source of income for her estate. Combining efforts with leading talent agency C.M.G. Worldwide Inc. the Monroe estate has been able to rake in nearly \$30 million after licensing the actresses’ name and image.³⁶ This enormous income flow however, faced an insurmountable blockade created by two decisions in May, 2007,³⁷ which held that Monroe’s publicity rights died with her. As a result, the Monroe estate was no longer to be held the rightful owner of Marilyn’s voice, likeness or image, thereby preventing them from licensing through CMG or any other agency.

4.2. PUBLICITY RIGHTS IN U.K.

English law has always resisted the creation of a publicity right, and has instead emphasized freedom of speech and expression.³⁸ The gradual development of the right of publicity is partly due to the country’s

³⁶ S.L. Edelman, *Death Pays: The Fight Over Marilyn Monroe’s Publicity Rights*, METRO. CORPORATE COUNSEL,

<http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=August&artYear=2008&EntryNo=6903> (last visited Oct. 1, 2014).

³⁷ *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F.Supp.2d 309 (S.D.N.Y. 2007).

³⁸ *Celebrity Rights*, LEGALSERVICEINDIA.COM,

<http://www.legalserviceindia.com/article/1139-Celebrity-Rights.html> (last visited Oct. 1, 2014).

commitment to international treaties such as the European Convention on Human Rights or the E.C.H.R. In a plethora of cases, Courts have held that taking pictures of individuals without their consent violates Article 8 of the E.C.H.R., regardless of the purpose for which the photographs are meant. There have also been several famous decisions such as the one involving pictures of the Douglas-Jones wedding, and the recent decision concerning a compensation made to Naomi Campbell under the Data Protection Act, for an unauthorized printing of her photo in a story about her drug rehabilitation.

4.3. PUBLICITY RIGHTS IN GERMANY

In Germany, there are many similarities in the treatment of publicity rights to U.K.³⁹ It is here that it is necessary to highlight the fact that both U.K. and Germany have developed torts that grant protection in specific situations, such as the tort of passing off. The tort of passing off establishes that nobody has any right to represent his goods as the goods of someone else.⁴⁰ Every passing off action has at its core, ingredients of goodwill, misrepresentation and damages.

The difference between the U.K. and Germany, in the treatment of this right and the tort of passing off, is the presence of additional tools in German law. Statutory protection afforded by the German Civil Code, the Copyright in Works of Art and Photography Act, 1907 and the German Constitution attempts to provide a stronger legal support to celebrities'

³⁹ *Publicity Rights*, RUGER ABEL PATENT & LAWYERS, http://www.ab-patent.com/downloads/publicity_rights.pdf (last visited Oct. 1, 2014).

⁴⁰ *Reddaway v. Banham*, 13 (1896) R.P.C. 218, 224.

interests in terms of protecting the rights to one's name, picture and personality.

5. DEVELOPMENT OF PUBLICITY RIGHTS IN INDIA

The jurisprudence of publicity or personality rights is at nascent stages in India. While no legislation recognizing *per se* the right of publicity in India exists, the courts, particularly the Delhi High Court and the Bombay High Court have been reasonably active in recognizing and enforcing this right.

The right to publicity stems from right of privacy, as evidenced from *R. Rajagopal v. State of Tamil Nadu*.⁴¹ The Court held that one of the inherent aspects of the right of privacy as enshrined under Article 21 of the Constitution is the right to prevent others from using any individual's name or likeness from being used without his permission for publicity or non-advertising purposes. This also includes the right to prevent others from publishing the life story of a person, whether written in laudatory manner or critical commentary.

However, if a matter dealing with an individual, his family, or education is any information that is public, the right of privacy extends and becomes open for comment by mass media and public inspection.

In a number of instances, the Courts have interpreted the right of publicity of famous persons in the same light as protection afforded to well-known trademarks. For instance, in *DM Entertainment v. Jhaveri*,⁴² Daler Mehndi, a famous Indian singer, composer and performer, brought an action

⁴¹ *Rajagopal v. State of Tamil Nadu*, A.I.R. 1995 S.C. 264.

⁴² *DM Entm't v. Jhaveri* (1147/2001).

against a party that had registered the domain name ‘dalmehndi.net’. The Delhi High Court prohibited the defendant from using the mark and domain name, thus recognizing the fact that an entertainer’s name may have trademark significance. Similarly, in the case of *Arun Jaitley v. Network Solutions Pvt. Ltd.*,⁴³ the plaintiff, Mr Arun Jaitley, a prominent political leader of the Bharatiya Janata Party, had filed for a permanent injunction to restrain the defendants from misusing and the immediate transfer of the domain name “www.arunjaitley.com”. The plaintiff wished to register the domain, www.arunjaitley.com, through the website of the defendants.

The Delhi High Court granted publicity rights to politician Arun Jaitley in the domain name “arunjaitely.com”. According to the Court, any person may be restrained to use popular or well-known personal names, when, firstly it is satisfied that the particular personal name is a well-known trademark as envisaged under the basic principles of trademark law, and secondly, the person is entitled to use his personal name for commercial purposes.

The scope and applicability of the right of publicity was defined in *I.C.C. Development v. Arvee Enterprises*,⁴⁴ wherein the Delhi High Court laid down that right of publicity does not apply to non-living entities or objects such as an event, or a sport which made the individual popular. Neither the company that organized the event is protected under the copyright, trademark law, dilution and unfair competition since, they are non-living entities.

⁴³ Jaitley v. Network Solutions Pvt. Ltd., 181 (2011) D.L.T. 716.

⁴⁴ I.C.C. Dev. v. Arvee Enter., 2003 (26) P.T.C. 245 (Del.).

In another interesting case brought before the Delhi High Court, *Titan Industries v. Ramkumar Jewellers*,⁴⁵ which involved superstars, Amitabh Bachchan and Jaya Bachchan, who had been hired by Titan Industries for promoting Titan's Diwali season jewellery collection, under Titan's brand name of 'Tanishq'. The defendants, Ramkumar Jewellers, allegedly copied the images of the two superstars for their own hoardings, which were put up all over Muzzaffarpur in Uttar Pradesh, to the extent that it became ostensible to the members of the public that Amitabh and Jaya Bachchan were endorsing Ramkumar Jewellers' products. The Court held that the right to control the use of identity of the famous personality should vest with the celebrity himself. Therefore, this right to control the commercial use of the identity of any human being, not only a celebrity or a "famous person" is known as "right to publicity".

Furthermore, the Court has laid down the following guidelines for establishing the burden of proof by the plaintiff in cases of infringement of the right of publicity:

1. The plaintiff has a valid and enforceable right in the identity or persona of himself.
2. The person may be easily recognized in public. For this purpose, plaintiff's identifying features may itself be sufficient to create a strong inference of identifiability.
3. Direct or circumstantial evidence of the defendant's intent to trade upon the identity of the plaintiff, from which identifiability can be presumed.

⁴⁵ Titan Indus. v. Ramkumar Jewelers, 2012 S.C.C. OnLine Del. 2382.

In *Sonu Nigam v. Mika Singh*,⁴⁶ Sonu Nigam, a well-known Bollywood singer, filed a suit against, *inter alia*, Mika Singh and Bright Outdoor Media, before the Bombay High Court because unauthorized hoardings and billboards, featuring the image of Sonu Nigam were put up by the defendants. The hoardings contained advertisements, which featured large picture of Mika Singh, as against smaller images of Nigam.

The Bombay High Court granted an order to restrain Mika Singh and OCP Music from directly or indirectly publishing the advertisement as it violated Sonu Nigam's personality, publicity and image rights and use of the plaintiff's image in any manner whatsoever.

In another case before the Calcutta High Court, *Sourav Ganguly v. Tata Tea Ltd.*, Sourav Ganguly, a popular cricketer and former captain of the national team, filed a suit against a well-known brand of tea was cashing in on his success by offering consumers a chance to meet and congratulate the cricketer. Ganguly successfully challenged the case in court before settling the dispute amicably, through an out of court settlement.

In sum, the courts in India have recognized the right of publicity, or personality rights as stemming from the right of privacy. Similar to the approach adopted by the American courts, Indian courts, as seen from the above mentioned cases, recognize the right of person to control the use of his name, likeness, for selling, promotion or any commercial use for a profitable purpose, without a person's consent.

⁴⁶ Nigam v. Amrik Singh, LAWS (BOM)-2014-4-191.

5.1. SOME UNANSWERED QUESTIONS

A perusal of these cases also reveals that courts also look at the reputation of the person in a claim for right of personality. For instance, both Amitabh Bachchan and Jaya Bachchan in the *Titan* case, are well-known celebrities, with brand value that stretches across the globe. So, it may be concluded that the courts may look at the worldwide reputation of a celebrity. Impliedly, the question left unanswered is, will the court accord the same protection to a lesser-known, i.e. less-widely known celebrity, who may not enjoy the same world-wide fame, like that of say, Mr Bachchan? Is nationwide or localized fame sufficient for a successful claim of right of publicity, or the bench mark is only worldwide fame? In other words, how “famous” or “well-known” does a celebrity or any person, for that matter, need to be so as have “right of publicity”?

6. RELATIONSHIP BETWEEN PUBLICITY RIGHTS AND OTHER I.P. RIGHTS

6.1. TRADEMARKS, PASSING OFF, AND PUBLICITY:

The right to publicity and the law of trademarks has a great deal in common, beginning with their common goal of ensuring that the owners of the right continue to control the use and meaning of their identities.⁴⁷ Trademark legislations attempt to curb such use of trademarks which might result in confusion or ambiguity as regards the affiliation or source of the

⁴⁷ G. Thomas, *Celebrity-focused Culture Highlights Need for Statutory Right to Publicity*, WORLD TRADEMARK REV., <http://www.worldtrademarkreview.com/issues/article.ashx?g=1596958f-55a7-4b2b-a93c-66f887027801> (last visited Jan. 8, 2015).

goods. The right to publicity provides a similar protection in that it tries to prevent cases where a celebrity may be falsely or mistakenly associated with a product that they are not necessarily using, much less endorsing. These rights are significant as they serve a dual purpose of protection; they not only ensure the protection of celebrity interests, but also contribute to creating awareness among the general public. In other words, both rights are responsible for eliminating the possibility of misinformed audiences, or consumers. This is where passing off and dilution finds meaning. The basic premise underlying passing off, is that misinforming or misleading the public is to be treated as unacceptable. The notion of understanding publicity rights in the context of trademark law has several advantages.⁴⁸

Much like publicity rights, trademark rights are rights appurtenant, rather than self-supporting intellectual property rights.⁴⁹ For a trademark claim to succeed, there must be demonstration of the likelihood of consumer confusion, whereas publicity claim requires a demonstration of appropriation of the economic, associative value. For example, a clear, unequivocal disclaimer of affiliation of any kind can be used as a defence to an infringement claim, whereas such a disclaimer in the publicity claim, which is not dependent upon endorsement, could well serve to exacerbate the appropriation.

Thus, there are many noteworthy similarities between the right of publicity and trademark law. Like trademark law, the right of publicity stems from unfair competition, as reflected in the Lanham Act. Similar to

⁴⁸ R.S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165 (1948).

⁴⁹ *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413-14 (1916).

trademark, the right of publicity can function as an expression of quality to consumer, especially if a celebrity, or his estate, maintains self-imposed quality standards and exercises discretion in the licensing publicity rights.⁵⁰

Given the occasional parallels, overlap is inevitable. In *Motown Record Corp. v. Hormel & Co.*,⁵¹ trademark laws were used to protect the ‘persona’ of the legendary music group.

6.1.1. Latest Cases on Right of Publicity and Trademark Rights

In the case of *Brown v. Electronic Arts, Inc.*,⁵² it was held by the Court that “well-known football player Jim Brown cannot make a false endorsement claim for using his likeness in Madden NFL football video games”. The Court further held that “Electronic Arts’ use of NFL great Jim Brown’s likeness in Madden NFL franchise was not explicitly misleading about Brown’s endorsement or affiliation with the game, and thus, Brown’s Lanham Act could not surmount the First Amendment’s protections of freedom of expression”.

6.2. COPYRIGHT LAW AND PUBLICITY RIGHTS

There have been some instances where the application of the law of copyright has created problems in the assertion of publicity rights. In the U.S. this has culminated in the possible pre-emption by copyright law, although there have been cases where the publicity right claims arising

⁵⁰ *Right of Publicity: Brief History*, RIGHTOFPUBLICITY.COM, <http://rightofpublicity.com/brief-history-of-rop> (last visited Aug. 5, 2015).

⁵¹ *Motown Record Corp. v. Hormel & Co.*, 657 F.Supp. 1236 (C.D. Cal. 1987).

⁵² *Brown v. Elec. Arts, Inc.*, No. 09-56675, 2013 U.S. App. LEXIS 15647 (9th Cir. Jul. 31, 2013).

under state law have stood up to the challenge. When the U.S. Congress amended the Copyright Act in 1976, it provided for the explicit pre-emption of certain types of state law claims related to copyright in the enactment of section 301(a) and (b). Section 301(a) provides for a two-pronged test wherein pre-emption is to be allowed if:

- The state right is “equivalent” to the exclusive rights of a federal copyright; and
- The state right is “within the subject matter of copyright” as defined by the Copyright Act, 1976.

In *Stanford v. Caesars Entertainment, Inc.*,⁵³ the plaintiff’s performance was a dramatic work which could be fixed in a tangible medium of expression, it fell within the ambit of copyright law. It thus, satisfied the subject matter and equivalency requirements necessary for pre-emption. The plaintiff’s performance was a dramatic work which could be fixed in a tangible medium of expression, it fell within the ambit of copyright law. It thus, satisfied the subject matter and equivalency requirements necessary for pre-emption.

Nevertheless, the right of publicity does not have much of a relationship with copyright law. Copyright law applies to original works of authorship fixed in a tangible medium of expression.⁵⁴ The exclusive rights are held in the copyright owner and apply to the work itself. This can complicate things because right of publicity and copyright considerations can be implicated in a single usage. An advertisement featuring a celebrity’s

⁵³ *Stanford v. Caesars Entm’t, Inc.*, 430 F.Supp.2d 749 (W.D. Tenn. 2006).

⁵⁴ Copyright Act, 17 U.S.C. § 102(a); *see also* Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

picture may require authorization from the photographer for the copyright use, and from the celebrity for the Right of Publicity use.

In *Sim v. Heinz & Co. Ltd.*,⁵⁵ the Court said that “copyright is neither granted to voice, likeness or other identifiers of persona”. “To pursue an action for copyright infringement, an individual must be able to show ownership of a copyright in the image and copying of the image”. In the context of celebrity photographs, “lack of ownership is one of the biggest issues which a celebrity encounters, if a photograph gets exploited”⁵⁶. “Copyright gives exclusive, but limited rights of protection and allows celebrities to authorize reproduction, creation of a derivative image, sale or sale of commissioned photograph.”⁵⁷

7. PUBLICITY RIGHTS VERSUS FUNDAMENTAL RIGHTS

Publicity rights run a tight rope between protection of individual interests of the celebrities and public interest. For instance, in the US, this translates into cases concerning First amendment protection of freedom of speech and expression as was disputed in *C.B.C Distribution and Marketing, Inc. v. Major League Baseball Advanced Media L.P.*,⁵⁸ where the federal circuit court of appeals rejected publicity rights claims of major

⁵⁵ *Sim v. H.J. Heinz & Co. Ltd.* [1959] 1 W.L.R. 313 (Eng.).

⁵⁶ T. Ahmed & S.R. Swain, *Celebrity Rights Protection under IP Laws*, 16 J. INTELLECTUAL PROP. RIGHTS 10 (2010).

⁵⁷ Prather M., *Celebrity Copyright Law*, EHOW.COM, http://www.ehow.com/about_6461739_celebrity-copyright-law.html (last visited Aug. 5, 2015).

⁵⁸ *CBC Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

league baseball players, stating that their interests were subordinate to the First Amendment free speech protection.

The right of publicity is often found to be at conflict with the right to freedom of speech and expression. In U.S. law, this tense situation is expressed in the form of a continuing debate between the right of publicity and the First Amendment right of freedom and expression. For years, U.S. courts have been attempting to strike a balance between the celebrity's publicity right and the First Amendment rights of speech and expression. In the case of *Hoffman v. Capital Cities/ABC, Inc.*,⁵⁹ court held that commercial aspects were "inextricably entwined" with expressive elements, due to which protection could be opted under the First Amendment. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,⁶⁰ the First Amendment protection would automatically outweigh the state's interest in enforcing the right of publicity. The transformative elements test attempted to resolve the conflict between First Amendment protection and publicity rights by laying down the standard which would balance both rights under amendment protection and publicity rights by laying down the standard which would balance both rights.

The debate between First Amendment protection and publicity rights reached a critical point in 2003, in the case of *ETW Corporation v. Jireh Publishing, Inc.*,⁶¹ *Tiger Woods* case. Essentially, the case was instrumental in the analysis of several precedents. The Court determined that Rush's work, a painting titled, "The Masters of Augusta", featuring

⁵⁹ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

⁶⁰ *Comedy III Prod.*, 21 P.3d 797 (Cal. 2001).

⁶¹ *ETW Corp.*, 332 F.3d 915 (6th Cir. 2003).

Tiger Woods in three poses, was entitled to First Amendment protection as it was more than a mere literal likeness, and involved artistic elements. The balancing test adopted in *Cardtoons L.C. v. Major League Baseball Players Association*,⁶² his case, was greater than Woods' intellectual property right. Therefore, the appearance of Woods' image in an artwork is not detrimental to the commercial value of his image and likeness. Therefore, the appearance of Woods' image in an artwork is not detrimental to the commercial value of his image and likeness.

7.1. LATEST CASES OF INTERFACE OF RIGHT OF PUBLICITY AND FREEDOM OF EXPRESSION

In the case of *Ryan Hart v. Electronic Arts*,⁶³ Ryan Hart filed a lawsuit against Electronic Arts (E.A.) for the violation of his right of publicity. He alleged that "E.A. misappropriated his likeness in an NCAA Football video game in order to enhance the commercial value of the game". The district court granted summary judgment in favour of EA the U.S. Court of Appeals for the Third Circuit mentioned that "this case would be determined based upon 'balance of interest test' between right to freedom of speech and expression against the interests in protecting the right of publicity".⁶⁴ The Court ruled in favour of EA and held that "freedom of speech and expression under First Amendment of the Constitution weighed in favour of EA".

⁶² *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

⁶³ *Hart*, 717 F.3d 141 (3d Cir. 2013).

⁶⁴ See *Zacchini*, 433 U.S. 562, 574-75 (1977).

In the case of *Edgar Winter v. DC Comics*,⁶⁵ the Supreme Court ruled that comic book characters Johnny and Edgar Autumn, modelled on real-life brothers Johnny and Edgar Winter are protected by the First Amendment.

8. STATUTORY PROTECTION OF THE IMAGE RIGHTS OF CELEBRITIES IN INDIA

8.1. COPYRIGHT ACT, 1957

The Copyright Act protects the interests of famous persons by extending moral rights. The important cases dealing with this issue are *Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*⁶⁶ and *Amar Nath Sehgal v. Union of India*⁶⁷.

Sometimes, the lives of famous celebrities have also formed the scripts of many films. In the case of *Phoolan Devi*,⁶⁸ former lady dacoit Phoolan Devi had protested against her portrayal in the film “Bandit Queen”. The court held that a celebrity could protect his/her life and image as a “constitutional right”. Similarly, in the case of *Bala Krishnan*,⁶⁹ the dispute was over the life history of Mr Kamaraj, a national leader. Historical facts are not actionable *per se*, and thus, the producers claimed that no one could hold copyright over the life history of a national leader and the information was already available in public. The court did not restrain the

⁶⁵ *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003).

⁶⁶ *Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, A.I.R. 1987 Del. 13.

⁶⁷ *Sehgal v. Union of India*, 2005 (30) P.T.C. 253 (Del.).

⁶⁸ *Phoolan Devi v. Kapoor*, 57 (1995) D.L.T. 154.

⁶⁹ *Bala Krishnan v. Kamaraj*, (2000) (3) Ar. L.R. 622.

release of the film as it held that the reputation of the national leader was not at stake.

Thus, in India, publicity rights arise from privacy rights and flow from human dignity as enshrined under Article 19 and 21 of the Constitution, as contrasted with treatment of publicity rights as commercial property.

8.2. PERFORMERS' RIGHTS

Performers' rights grant economic rights to the performers. Section 38 of the Copyright Act provides that "where any performer appears to engage in any performance, he shall have a special right to be known as the "performer's right" in relation to such a performance."

Section 38(3) provides that during the continuance of a performer's right in relation to his performance, any person who, without the consent of the performer, does any of the aforementioned acts in respect of the performance, or any substantial part thereof, shall be deemed to have infringed the performer's right.

However, these rights are subject to exceptions as provided under section 39 of the Copyright Act. Section 39 provides that no performer's right shall be deemed to be infringed by:

1. The making of any sound recording or visual recording for the private use of the person making such a recording, or solely for the purposes of bona fide teaching or research;

2. The use consistent with the dealing of excerpts of a performance or of a broadcast in the reporting of current events

or for bona fide review, teaching or research, Such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52.

8.3. TRADEMARK RIGHTS

Section 14 of the Trademarks Act, 1999 prohibits the use of personal names where an application is made for the registration of a trademark, which falsely suggests connection with a living person, or a person whose death took place within 20 years prior to the date of application. Besides, certain names like Sri Sai Baba, Lord Buddha, Sri Ramakrishna, Sri Sharada Devi, the Sikh Gurus, and Lord Venkateshwara cannot be registered under Section 159(2) of the Trademarks Act, 1999. Thus, the Act provides for a basic framework for celebrities to protect their name and Image in India and this right can be claimed by their legal heirs, when the reputation and image of the deceased is at stake.⁷⁰

9. CONCLUSION

In sum, the ability control commercialization and providing revenue streams for the rightful recipient is the policy objective of the Right of Publicity. The right does not simply ensure that a celebrity or celebrity estate gets paid, but the right to control how celebrity is commercialized, or if she or he will be used at all.⁷¹ As may be seen from the discussion above, jurisprudence of publicity rights is more developed in U.S.A. than India.

⁷⁰ Kumari T.V., *Celebrity Rights as a Form of Merchandise Protection Under the Intellectual Property Regime*, 9 JOURNAL OF INTELLECTUAL PROP. RIGHTS, no. 2, 2004, at 134.

⁷¹ Jonathan Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, no. 9, 2000.

However, even U.S. till date lacks a federal Right of Publicity Statute, and most statutes dealing with this right are state-based.

The current regulatory and legislative framework under the current intellectual property laws in India is insufficient to deal to curbing blatant use of various aspects of commercial persona, image or likeness of a famous individual. After the Delhi High Court upheld the publicity rights as an individual right, it is now up to the legislature to the commercial and ownership aspects of the publicity rights. On the one hand, there is a need to either broaden the existing intellectual property legal regime, or an exclusive statutory framework may be adopted to recognize and enforce publicity rights of celebrities.

However, since celebrities are public figures, and their activities evoke everyone's interest, conferring on them special rights may have the effect of putting them on a higher pedestal, and this may, in turn, be a dangerous proposition. These concerns surely need to be addressed before any statutory framework is enabled to protect their rights. The legislature should adequately balance the public interest and the individual interest of the celebrity. This may be done by creating an exception for freedom of speech and expression and other bona fide uses, similar to U.S.

AN OVERVIEW OF CELEBRITY RIGHTS IN INDIA

- *Shreyasi Bhattacharya** & *Aparna Madhu***

ABSTRACT

Celebrity rights are exclusive rights which are different from other rights. It is more of a property right than a personal right which each celebrity enjoys. The increase in consumer's demands and role played by media has not only led to development of entertainment industry but has also increased the craze for the celebrities. The enthusiasm among the public to know more about the celebrity brings in a question of protecting the right of the celebrity. Considering the celebrity right as a property, it becomes susceptible for unauthorized trespass. The paper tries to study the various aspects of celebrity rights especially focusing on Indian perspective vis-à-vis the laws existing in other countries. The method opted for the study is descriptive analytical in nature and depends mainly on the secondary sources of information which include books, articles, Acts etc. Thereafter, it seeks to identify the existing gaps in our legal regime and suggests areas which require more protection so as to strengthen the current legal framework in India in this regard.

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1. INTRODUCTION

In today's world, any person, whether he is an actor, singer, dancer, politician or any other professional who is capable of attracting the attention of the public becomes a celebrity. Public perception is the one factor for determining whether a person is a celebrity or not. The term celebrity is derived from a Latin maxim 'celebritatem', which means 'the condition of being famous'. The word celebrity has been defined in the Oxford Dictionary as "a famous person, especially in entertainment or sport". It was in the famous case of *Martin Luther King Jr. Centre for Social Change v. American Heritage Products Inc.*,¹ where the term 'celebrity' was interpreted in a broader sense so as to allow more than the long-established categories. Celebrity rights can be regarded as the result of the culture penetration of capitalist commercialism which can also be referred to as the residual product of growing cultural industry of the twentieth Century. The emergence of the modern consumer class is a result of the radiance of the celebrity culture. Thus celebrity is a person who receives status of fame and fortune which is accorded to him by the mass media. A celebrity can be an individual, a group (of people or animals) who have attained fame for some reason or the other. The status of being a celebrity is often associated with fame and fortune. Persons who have achieved great heights in their respective careers and whom the media portrays as public figures fall under this category.

¹ *Martin Luther King Jr. Ctr. for Soc. Change v. Am. Heritage Prod., Inc.*, 694 F.2d 674 (11th Cir. 1983).

The right of publicity, which is one of the rights of the celebrities is also called the personality right. It is the individual control over the commercial use of his/her own name, image or any other aspect which relates to his/her identity. It is generally considered as a property right than a personal right and has two classifications: first is the right of publicity which can be commercially exploited and other is the right to privacy which is not to be divulged without permission. In the common law countries, publicity rights fall under the realm of tort of passing off. A celebrity's personality right can be treated as a concept of common law which are similar to property, trespass, etc. Thus, these rights are judge-made in common law countries unlike the civil law countries where there exist specific civil code provisions to protect private information.

The growing importance of media in the present society and their advertisement of celebrities cannot be over-looked. In India there is no specific legislation providing for celebrity publicity rights. But there are various rights of a celebrity which can be classified under three heads. Firstly, the personal rights which refer to the individual contribution of that person to the society, secondly, the privacy rights relating to non-divulgence of personal information which is protected under Article 21 of the Indian Constitution and lastly, the publicity rights which are the value of the fame that is gained by a celebrity and can be commercialized. The Supreme Court, in the recent case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*,² recognized the concept of 'inviolable personality of an individual' as integral part of privacy. Similarly, in the case of *R. Rajagopal v. State of*

² Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

Tamil Nadu,³ the court recognized the right to privacy as a Fundamental Right. There are some other statutes which also deal with this issue namely the Copyright Act, 1957 and the Trade Marks Act, 1999. However, the law in India in this respect is yet to be developed completely. In order to regulate the growing commercialisation of celebrities, a viable legislative framework related to celebrity rights has become indispensable.

2. INTERNATIONAL PERSPECTIVES

In several countries around the world, there exists a plethora of legislations which protect the celebrity rights. In several cases, these rights are generally brought under the purview of trademark or copyright law. However, while celebrity rights have little to do with copyright law, they are closely connected to trademark law. The ‘right of publicity’, first recognized by Nimmer, is a form of intellectual property right that protects against the misappropriation of a person’s name, likeness and perhaps other indicia of personal identity for commercial benefit.⁴ It protects a celebrity’s interest in her name which is similar to the protection extended under trademark law to a business’s name and other trademarks.⁵ The right of publicity thus chiefly aims to reduce the use of the name of a celebrity in promotion of any particular product which may falsely suggest that he/she has endorsed the same.

³ Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264.

⁴ *Right of Publicity*, INT’L TRADEMARK ASS’N, <https://www.inta.org/Advocacy/Pages/RightofPublicity.aspx> (last visited Jan. 13, 2018).

⁵ Stacey Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

In U.S., law regarding the right to publicity is built on the edifice of the right to privacy. The concept of privacy is traditionally associated with the names of Samuel Warren and Louis Brandeis, who published the article titled ‘The Right to Privacy’ in Harvard Law Review.⁶ Following this, the right changed into the ‘right to be left alone’. William Prosser, further developed it into several categories including the personal right to privacy and remedies for appropriation, usually for commercial advantage, of one’s name and likeness.⁷ Developments in this regard mainly took place between the nineteenth and the twentieth centuries with two landmark cases, paving the way for recognition of such rights. The first case was *Haelan Laboratories v. Topps Chewing Gum*,⁸ in which it was recognised that along with the right to privacy, a man has a right in the publicity value of his photograph. Observing that well-known personalities may often feel deprived if they did not receive money for “authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways”, the right of publicity was recognised.⁹ In the second case, *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁰ the petitioner objected to televise his famous “human cannonball” act in the local news. An action was brought against the respondents for “unlawful appropriation” of his “professional property”. Recognizing the petitioner’s right to publicity, the court observed that the decision was to provide “an economic

⁶ M. KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO MUSIC INDUSTRY (10th ed. 2007).

⁷ D. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES (Praeger Publishers 2011).

⁸ *Haelan Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

⁹ *Id.*

¹⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 563 (1977).

incentive for him to make the investment required to produce a performance of interest to the public”. The court recognized the petitioner’s right to publicity and rejected the respondent’s defence under the First Amendment. In doing so, the Court noted that the decision was not only for compensating the petitioner, but it was also to provide “an economic incentive for him to make the investment required to produce a performance of interest to the public”.¹¹

In a series of cases thereafter, the right to publicity has been recognised and established.¹² In the U.S., the right to privacy, though comprehensively protected, varies from state to state. At present thirty-eight states afford protection to publicity rights under the common law where an action for passing off is available. On the other hand, twenty-two other states have some form of statute governing the use of such a right. The state of New York was the first state to formulate a statute in this respect.

The United Kingdom had been slower in recognising the right to publicity. Adhering to the civil law traditions, the concern in European countries has mostly been related to the protection of personality rights. This approach is intricately connected with countries with civil law jurisdictions such as France and Germany. In France, personality rights are covered under the French Civil Code which protects the use of someone’s image, barring publicly known images. In Germany, the German Civil Code offers protection to personality rights including the right of privacy of a

¹¹ *Id.*

¹² *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1989); *see also* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 921 (9th Cir. 1974).

celebrity. Personality rights “recognise a person as a physical and spiritual-moral being and guarantee his enjoyment of his own sense of existence”.¹³ Publicity rights have been slower to develop in these regions and where they have developed, it has mostly been through the medium of personality rights, rather than as a property or quasi-property right.¹⁴ Although law in the U.S. has developed rapidly, the English courts, by virtue of their conservative nature refused to entertain notions which are generally associated with publicity rights. In *Edmund Irvine Tidswell Ltd. v. Talksport Ltd.*,¹⁵ the petitioner’s photograph was falsified to promote the defendant’s radio station. While doing so, the petitioner’s consent had not been obtained. The petitioner sued him for an action for passing off and succeeded. The recognition of his claim was undoubtedly deemed to be a positive step in this direction. In another important case, in *Douglas v. Hello! Ltd.*,¹⁶ the petitioners, prior to the day of their wedding, entered into a contract with a magazine giving it the exclusive right to publish their wedding photographs. The defendants were a rival magazine who were interested in publishing their pictures as well. However they had been unable to agree with the petitioners as to the rates of the contract. A paparazzo photographer gained access to the wedding and took fifteen shots of the wedding, including the bride and the groom. Soon the photos were sold to the defendant magazine and then they were published in both the magazines. Relying upon the Human Rights Act, 1998 which enforced the

¹³ Neethling, *Personality Rights*, in ELGAR ENCYCLOPAEDIA OF COMPARATIVE LAW (M. Smits ed. 2006).

¹⁴ *Id.*

¹⁵ *Edmund Irvine Tidswell Ltd. v. Talksport Ltd.*, [2002] EWHC 367.

¹⁶ *Douglas v. Hello! Ltd.*, [2007] UKHL 21.

European Convention on Human Rights into English law, the Douglas's' action against the defendants for breach of confidence and an invasion of privacy proved to be successful. Both these cases set important precedents in English law which had erstwhile been conservative in this regard till then.

In Canada, the right to publicity is limited in its recognition by the courts. In *Krouse v. Chrysler Canada Ltd.*,¹⁷ it was held that a person with marketable value in likeness which has been used in a manner so as to endorse a product, attracts grounds for an action in appropriation of personality. This principle was reaffirmed in *Athans v. Canadian Adventure Camps*,¹⁸ where both image and name of a person was included within the purview of personality.

3. INDIAN LEGAL FRAMEWORK

In today's world, life without media cannot be imagined. The role of media has become an essential part of our lives, especially by mobilization of public views with the assistance of television, internet, etc. This scenario gives rise to protection of some rights of the people being famous through media. The foreign countries have specialized legislations governing these rights. When compared to the other countries, India is far behind with regards to the protection of publicity rights. The Emblems and Names (Prevention of Improper Use) Act, 1950 is the only specialized Act which is extended for protecting some dignitaries. Therefore, an urge to immediately regulate the media laws, intellectual property laws and other related laws is to be recognized.

¹⁷ *Krouse v. Canada Ltd.*, (1971) 5 C.P.R. (2d) 30.

¹⁸ *Athans v. Canadian Adventure Camps*, (1977) 17 O.R. (2d) 425.

The rights protected by the Constitution of India under Article 19 and 21; and also by the intellectual property regime which include the Trade Marks Act, 1999 and the Copyright Act, 1957. Section 14 of the Trade Marks Act, 1999 lays down that in case a person tries to register a trademark which is directly or indirectly related to a celebrity and it falsely suggests a connection with the living person or a person whose death took place 20 years prior to the date of registration, shall be cancelled by the registrar if such application is unauthorized. Section 2 (qq) and Section 38 of the Copyright Act, 1957 recognizes performer's rights which may be applied in case of protecting the celebrity rights. Section 57 of the Copyright Act, 1957 recognizes the moral right of the author which is also used to protect the reputation of the author. This right of the author can also be of two types one identification right or attribution right and the other is divulgation or dissemination right.

The Supreme Court explicitly recognized the publicity rights in the form of right to privacy in the case of *R.R. Rajagopal v. State of Tamil Nadu*,¹⁹ where it was held that first aspect of violation shall be using a person's name or likeness for advertising without his consent. In the case of *I.C.C. Development (International) Ltd. v. Arvee Enterprises*,²⁰ the Delhi High Court held that the right of publicity has evolved from the right to privacy and can only be associated with people who have an identity of their own. In cases where the right of publicity is being taken away it shall be violative of Article 19 and 21 of the Indian Constitution. It was held by the

¹⁹ *Rajagopal*, A.I.R. 1995 S.C. 264.

²⁰ *I.C.C. Dev. v. Arvee Enter.*, 2003 (26) P.T.C. 245 (Del.).

court that no persona can be monopolized.²¹ For example, if any company or person advertises Kapil Dev or Sachin Tendulkar's name in relation to world cup then without authorization from the owner they may not be able to do so which if done may lead to valid and enforceable cause of action. In another case of *Sourav Ganguly v. Tata Tea Ltd.*, where the Tata Tea took advantage of Sourav's fame and popularity for promoting their 1kg tea packet by offering consumers chance to congratulate Sourav through a postcard which was inside the tea packet. In this case, the court held the Tata Tea liable for violating publicity rights of Sourav Ganguly.

4. A CRITICAL ANALYSIS OF THE DOMESTIC LEGAL FRAMEWORK

Although notable transitions have occurred in India in this respect, the current legal framework still remains at an embryonic stage. There lies an underlying need as well as potential for immense developments in several aspects of the legal protection for celebrity rights in India. Under the current Intellectual Property regime, some limited protection is afforded to celebrity rights including publicity and personality rights under the Copyright Act, 1957 and Trade Marks Act, 1999. The Emblems and Names (Prevention of Improper Use) Act, 1950, also, to a limited extent, protects unauthorised use of the names of any dignitaries by prohibiting the same in its schedule.²² However some glaring shortcomings can be singled out in this respect.

²¹ *Id.*

²² Emblems and Names (Prevention of Improper Use) Act, 1950, No. 12, Acts of Parliament, 1950, § 3.

First and foremost, the rights of a celebrity are often undermined in light of the freedom of speech and expression guaranteed under Article 19 of the Constitution of India. This is quite appropriately synonymous with the conflict observed between the publicity rights and the freedom of speech guaranteed under the First Amendment in the U.S Constitution. The primary concern is whether both of these are complimentary or incompatible to each other. In *I.C.C. Development (International) Ltd. v. Arvee Enterprises*,²³ the Delhi High Court observed that right to publicity has evolved from the right to privacy and can inhere only in an individual or in any indicia of the individual's personality like his name, personality trait, signature, voice etc.²⁴ Although an individual may acquire a right to publicity by virtue of his association with an event, sport, movie etc., the right does not exist in the event that made the individual famous, nor in any corporation that has brought about the organisation of the event. Therefore any effort to take away right of publicity from the individual, to the organiser/ non-human entity would violate Article 19 and 21 of the Constitution of India.²⁵

Moreover the Copyright Act, 1957 does not provide protection to performer's performances. Section 13(4) provides that separate creative portions in a film are subjected to copyright. In *Manisha Koirala v. Shashilal Nair*,²⁶ the question regarding an actor's on screen image's

²³ *I.C.C. Dev.*, 2003 (26) P.T.C. 245 (Del.).

²⁴ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (1996).

²⁵ *Id.*

²⁶ *Koirala v. Nair*, (2003) (1) A.I.I.M.R. 426.

protection was raised. In a later case,²⁷ it was decided that the acting did not fall in any particular category and thus left the actor's performance unprotected and vulnerable to exploitation. Moral rights are only given to authors within whose scope an actor is not included.

The copyright protection of cartoons or characters which are digitally made are also vague areas in the current legal regime. In case of a digital image of a celebrity, the conflict between the right of creation and the right of right in image is a disputable area. These are some of the several grey areas where the scope needs to be defined.

5. CONCLUSION

Celebrity right is a distinct right which requires special legislation due to its unique characteristic. The present scenario depicts that there is no specific legislation to deal with the issues arising out of the publicity rights of celebrities. It must be remembered that publicity of celebrity involves huge amount of money and public image with a tremendous value, this means that there is economic incentive that is involved. This also means that, if properly regulated, the government can also earn money in the form of tax from these rights. The problem with regards to this issue has only been solved through litigations. A legislation which, on top of protecting the right to privacy, statutorily recognizes the commercial aspects of celebrity rights may fill up the lacunae in the existing scenario and assist in rapid commercialization of celebrity status.

²⁷ Fortune Films v. Dev Anand, A.I.R. 1979 Bom. 17.

**AN UNDERSTANDING ON COPYLEFT AND ENFORCEABILITY
OF SUCH LICENSE AGREEMENTS**

- *Nikunj Poddar**

ABSTRACT

Copyright has one of the most fashionable legal tool of recent time. Every author tries to create a monopoly over his/her work. Copyright law has gone through a series of changes to become author friendly and granting sufficient rights to authors over their work. While the copyright law was gaining confidence, there were a group of people who were not very excited about these rights. They believed in distribution of work and collaboration between authors for better community. They revolted against the copyright law by creating something called copyleft. Copyleft is a philosophy where the authors believe that their work should remain free and everyone should be able to gain access to their work, use it, modify it and redistribute it. They used the existing copyright regime to convert it into a dispense rights rather than curtail them. In this paper, I have tried to present an overall understanding on what is copyleft and then compare it with the existing copyright laws. At first instance it seems that copyleft is opposite to copyright but I have tried to present how copyleft works within the copyright regime and not against it. The copyleft has not been legally recognised through a legislation, thus creating a doubt a on its enforceability

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and validity. I have tried to present a compilation of different laws and cases which would elaborate how copyleft agreements are valid contracts and can be enforced under copyright law and contract laws. Establishing copyleft agreement as a valid contract would provide the licensor and licensee more trust and belief in the philosophy and help them gain certainty for the protection of their rights. Copyleft is a Marxist approach to combat the proprietary software models to break the girdle of monopoly and provide and spread knowledge to the masses.

1. INTRODUCTION

Computers, internet and software have become a part of our everyday life. We download software and applications everyday on our computers and mobile phones. These softwares are often redistributed by the user under the terms and conditions of a license agreement. These softwares are of two types- 1. Proprietary software and 2. Non-proprietary software.

Proprietary softwares are that softwares over which the owners have monopoly rights and they decide the usage, modification and distribution policies for their software. Non-proprietary software on the other are not bound under the clutches of the owner and are free to be used, modified and redistributed.

Non-proprietary software licenses such as free software and open source software model is gaining popularity in the legal arena. The legal scholars and legislators have avoided the development for a long time. The concept is working on its own with the help of its propagators and believers.

There a number of concerns and issues that arises from the said concept. The validity of the license agreement under copyright law and contract law is still between lines. No formal legislative recognition has been given for this kind of license agreement. Validity and enforceability of these agreements are not clear in its perspective. A few judicial decisions have thrown some light but this concept still needs a formal recognition and better understanding. An effort has been made in this paper to gather the general understanding on the subject along with providing some insight into the legal validity and enforceability of the agreement with a specific focus on India.

1.1. WHAT IS COPYRIGHT?

Copyright is a branch of ‘intellectual property rights’.¹ It gives the owner, the rights to control the use of his ‘work’ which are the result of his/her skill or investment of time, effort or money.² Copyright protects the original expressions of ideas³ and not the underlying ideas in itself.⁴ Copyright gives the authors certain rights over their work. The authors are called the rights holders.⁵ The rights includes the right to reproduce, right

¹ *Copyright Laws of the United States*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/title17> (last visited Jan. 15, 2018).

² *Copyright and Related Rights*, GOVT. OF U.K., THE NAT’L ARCHIVES, <http://www.nationalarchives.gov.uk/documents/information-management/copyright-related-rights.pdf> (last visited Jan. 15, 2018).

³ Daniel A. Tysver., *Works Unprotected by Copyright Law*, BITLAW, <https://www.bitlaw.com/copyright/unprotected.html> (last visited Jan. 15, 2018).

⁴ LEE A. HOLLAAR, *LEGAL PROTECTION OF DIGITAL INFORMATION* (Bloomberg B.N.A. Library 2016).

⁵ IAN S. BLACKSHAW, *SPORTS MARKETING AGREEMENTS: LEGAL, FISCAL AND PRACTICAL ASPECTS* (T.M.C. Asser Press 2011).

over control of derivative work, distribution, public performance and other moral rights like attribution.⁶ Software also come under the protection of copyright. Article 4 of the WIPO Copyright Treaty, 1996 provides, “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression”. TRIPS Agreement, Article 10 (1) provides that, “Computer programs, whether in source or object code shall be protected as literary works under the Berne Convention”. Indian Copyright Act, 1957 through Section 2(o) includes computer programs as literary works. Thus it is evidently clear that the world community as a whole has accepted that the developer of a software has copyright over his work and that they possess all the rights that a copyright holder possess over his work.

1.2. WHAT IS FREE SOFTWARE MOVEMENT?

Free software and open source software represents a philosophy regarding the optimal manner for the distribution and development of software.⁷ The main idea behind the movement is to make the source code⁸ of the software available to transferees of the software and making the software available to others with limited or no restrictions on its use along

⁶ YU PETER K., *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS* 346 (Greenwood Publ’g Group 2007).

⁷ David McGowan, *Legal Implications of Open-Source Software*, U. ILL. L. REV. 241, 268, 274 (2001); see also Greg R. Vetter, *The Collaborative Integrity of Open Source Software*, UTAH L. REV. 563 (2004).

⁸ Marci Hamilton & Ted Sabety, *Computer Science Concepts in Copyright Cases: The Path to a Coherent Law*, 10 HARV. J.L. & TECH. 239, 266 (1997).

with a right to modify⁹ and redistribute the software. Open source software presents a paradigm shift in the field of software development. The copyright law protects the software under the category of ‘literally work’. This protection prevents the subject matter available to others by entitling other people to see how the software functions by accessing the executing program but not the original expression of the source code.¹⁰ This was the very reason for the birth and the development of the free software movement which opposed this monopoly and believed in availability of the technical information to all, promoting the functioning of the software along with modification,¹¹ redistribution and adaption.

1.3. BIRTH OF COPYLEFT

The philosophy of the open source software was brought to the forefront by Richard Stallman, founder of the GNU Project¹² and President of the Software Foundation. The idea behind the GNU project was to provide a platform where Richard Stallman and numerous other developers can distribute their software under a “copyleft” agreement that allows reproduction and distribution of their works, while preventing the

⁹ R. Stallman, *The Free Software Definition*, GNU OPERATING SYSTEM (1996), <https://www.gnu.org/philosophy/philosophy.html>, (last visited Jan. 15, 2018).

¹⁰ Christian H. Nandan, *Open Source Licensing: Virus or Virtue?*, OPEN SOURCE INITIATIVE (2002), <https://opensource.org/docs/definition.html> (last visited Jan. 15, 2018).

¹¹ R. Stallman, *Selling Free Software*, FREE SOFTWARE FOUNDATION (1996), <http://www.fsf.org/philosophy/selling.html>. (last visited Jan. 15, 2018).

¹² R. Stallman, *The GNU Manifesto*, GNU OPERATING SYSTEM, <https://www.gnu.org/gnu/manifesto.en.html> (last visited Jan. 15, 2018).

subsequent licensors from placing further restrictions on them.¹³ “Copyleft is a play on the word copyright. It describes the practice of using copyright law to remove restrictions on distributing copies of modified versions of a work to others by requiring that the same freedoms be preserved in modified versions.”¹⁴ When a developer makes any new software, he gets the copyright over the software and possess proprietary rights over the software. He gets the right to license it, and distribute it. This monopoly right allows the developer to control the market for the software and exploit its users. If in a situation where the developer does not want to possess any proprietary rights over the software and wants it to be available to everyone for use, modification and development he can put the software into public domain and let other people use its codes. This vision of the developer can be compromised when any other user modifies the software using his code as foundation and then copyright the same, thus stealing away the free availability vision of the developer. Here is when the copyleft clause licensing comes into play. Copyleft is a tool used by software developers to prevent their software from being bound by further restrictive copyright.¹⁵

¹³ *Licences*, GNU OPERATING SYSTEM, <https://www.gnu.org/licenses/licenses.html> (last visited Jan. 15, 2018).

¹⁴ *Copyleft Definition*, LINUX INFORMATION PROJECT, <http://www.linfo.org/copyleft.html> (last visited Jan. 15, 2018).

¹⁵ Chris Sontag, *No, the GPL is not Good for the Software Industry*, NETWORK WORLD, <https://www.networkworld.com/article/2337296/software/no--the-gpl-is-not-good-for-the-software-industry.html> (last visited Jan. 27, 2018).

A copyleft license redistributor cannot develop proprietary applications from the software.¹⁶

2. IS COPYLEFT AN ANTITHESIS TO COPYRIGHT?

The open source movement or the copyleft licensing basically stands against the current ‘proprietary’ model of copyright protection for software¹⁷ because they believe that the proprietary model restricts the benefits to the society.¹⁸ A superficial understanding of copyleft license agreement is likely to confuse people about its working. Since copyleft is a play on the word copyright, it is construed to be an antonym to the concept of copyright. It is believe to be antithesis to copyright in the sense that copyright tends to create monopoly right over original work by their author, while copyleft propagates open source software wherein it is believed that work should be available to people for use, modification and redistribution. Copyleft is not an antonym to copyright but it uses the existing legal foundation upon which the proprietary software exists.¹⁹ Where in the existing proprietary model, copyright is used to exclude, copyleft licensing used the same copyright model to promote inclusion.²⁰ The modus operandi

¹⁶ R. Stallman, *What is Copyleft?*, FREE SOFTWARE FOUNDATION, <http://www.fsf.org/copyleft/copyleft.html> (last visited Jan. 15, 2018).

¹⁷ S. Potter, *Opening up to Open Source*, 6 RICH. J.L. & TECH., no. 2, 2004, at 24.

¹⁸ N. Patel, *Open Source and China: Inventing Copyright?*, 23 WIS. INT’L L.J., no. 1, 2005, at 781.

¹⁹ S. Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS, no. 3, 2003, at 281.

²⁰ C. McMains C & E. Seo, *The Interface of Open Source and Proprietary Agricultural Innovation: Facilitated Access and Benefit-Sharing under the New FAO Treaty*, 30 WASH. U. J.L. & POL’Y 405 (2009).

of the copyleft license is to copyright a software and then use the exclusive rights to mass license for its use, improvement, modification and redistribution with a contingency that the following user need to license with the same terms.²¹ Copyleft licensing is not an antithesis to copyright, in fact, it is entirely dependent on copyright law.²²

3. COPYLEFT AS A CONTRACTUAL OBLIGATION

Copyleft is a contractual solution to stop companies from converting free softwares into proprietary softwares.²³ General Public License is such a standard contract which ensure that the software is passed on, making it obligatory for the redistributor to pass along the same freedom to further copy and change it. Copyleft is not a right in itself like copyright, patent or trademark. It is a contractual obligation that the licensor and the licensee agrees upon while transacting for the software code. The copyright holder of the software used his primary distribution right²⁴ as a contingency in the license agreement that the user needs to pass on the same rights given to him by his licensor. GPL is one of the most commonly used copyleft licensing agreement. It is a mixture of the legal contract law and the

²¹ D. McGowan, *Intellectual Property Challenges in the Next Century: Legal Implications of Open-Source Software*, 1 U. ILL. L. REV. 241 (2001).

²² M. Maher, *Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., no. 2, 2000, at 619.

²³ H. Meeker, *Why You Need to Understand Open Source Licences*, 19 INT'L TECH. L. REV. 24 (2001).

²⁴ P. Lambert, *Copyleft, Copyright and Software IPRs: Is Contract Still King?*, 23 EUROPEAN INTELL. PROP. REV., no. 4, 2001, at 165.

ideological manifesto believing in free software and non-proprietary approach. The preamble reads like:

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.²⁵

The objective of the free software is achieved by licensing through two means:

- a. By protecting the software through the existing copyright laws;
- b. By providing the users a license, giving them the freedom to use and modify the software, provided they pass along the same rights.

This can be reiterated by looking at the section clause of the agreement which reads like. Section 1 for example states:

1. You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice and disclaimer of warranty; keep intact all the notices that refer to this Licence and to the absence of any warranty; and give any other

²⁵ *Supra* note 13.

*recipients of the Program a copy of this License along with the Program.*²⁶

The thing to notice here is that the license gives the user the freedom to make monetary changes when passing the copy till it is consistent with the general free software characteristics. The restriction against using the software as commercial software is specified in the following section:

*2. You may modify your copy or copies of the or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions: [...] b) You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.*²⁷

The software and its derivatives should be available to the public for free. A derivative user should get the same equal rights as given by the original licensor. This license has been termed as ‘viral contract’ by Professor Radin, who define them as “contract whose obligations purport to ‘run’ to successor of immediate parties”.²⁸ The terminology is justified by the working of these contracts. The contract spreads in a viral form as every

²⁶ *Id.*

²⁷ *Id.*

²⁸ M. J. Radin, *Humans, Computers, and Binding Commitment*, 75 INDIA L.J. 1125 (2000).

licensee have to include the same terms of the copyleft agreement in all he further licenses as a part of their contract with the original licensor. The copyleft agreement is a contract in the eyes of law and it fulfils all the basic requirement of a valid contract. The owner of the software is the offeror and the user is the offeree. The offeror is not asking for any consideration in terms of monetary value but the consideration of knowing the source code and able to use, modify and redistribute the software²⁹ is that the subsequent user will also get all the similar rights and the user will not create a proprietary right over the software or any of its derivative work.

4. ENFORCEABILITY OF A COPYLEFT CLAUSE

The copyleft agreements are based on the existing copyright upon a software³⁰ and any infringement of the license agreement would allow the copyright holder to initiate proceedings for infringement of copyright as well as breach of contract.³¹ It is propounded by several copyleft advocates that it is not a contract but a license³² that is “a unilateral permission the property of the licensor without an obligation”³³. They believe that it only consists of freedoms with a minimum allowance to redistribute in

²⁹ ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 655 (W.D. Wis. 1996).

³⁰ M. Stoltz, *The Penguin Paradox: How the Scope of Derivative Works in Copyright Affects the Effectiveness of the GNU GPL*, 85 B.U. L. REV., no. 5, 2005, at 1439.

³¹ Nat'l Car Rental Sys. v. Computer Assoc. Int'l, 991 F.2d 426, 431-32 (8th Cir. 1993).

³² Greg R. Vetter, *The Collaborative Integrity of Open Source Software*, UTAH L. REV. 563 (2004).

³³ ANDREW LAURENT, UNDERSTANDING OPEN SOURCE AND FREE SOFTWARE LICENSING, *available at* <https://people.debian.org/~dktrkranz/legal/Understanding%20Open%20Source%20and%20Free%20Software%20Licensing.pdf> (last visited Jan. 27, 2018).

accordance within the restraints of the license.³⁴ The argument bases their logic on the absence of privity of contract which makes it unenforceable as a contract before the court of law. This confusion arises because they believe that all the subsequent user are bound by the original license agreement between the copyright holder and the first user but as the software is downstream, a new contract takes place at every stage.³⁵

The case of *Jacobsen v. Katzer*,³⁶ has identified the enforcement of both copyright and contract law on a copyleft license agreement. In this case Jacobsen was the copyright holder who sued a software developer for infringing his copyright due to non-compliance of the terms of an open-source licensing agreement. The court held that if a condition placed on the agreement is infringed by the licensee, the licensor's copyright is infringed upon. The court also resounded that such license agreement does not lack consideration and thus they can be enforced under contract law thus giving the court the power to grant injunctions as reliefs.

The court in the case of *Wallace v. International Business Machines Corporation*,³⁷ has accepted the philosophy of GNU GPL and held that the agreement is not only valid on the original software but also on all the derivatives created from the original work. In the case of *Caldera Systems, Inc. v. International Business Machines Corporation*,³⁸ the plaintiff had

³⁴ *GPL Violations Legal FAQ*, <http://gplviolations.org/faq/legal-faq.html> (last visited Jan. 15, 2018).

³⁵ Robert Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 BERKELEY TECH. L.J. 115, 129 (1997).

³⁶ *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

³⁷ *Wallace v. Int'l Bus. Mach. Corp.*, 467 F.3d 1104, 1105 (7th Cir. 2006).

³⁸ *Caldera Sys., Inc. v. Int'l Bus. Mach. Corp.*, No. 03-CV-0294 (D. Utah 2003).

claimed that the defendant has infringed their copyright and trade secrets by incorporating SCO's proprietary UNIX code into open source code Linux operating system. A number of companies were sued by SCO for providing UNIX code to Linux. The court held that 326 lines of code in Linux kernel were potentially infringed. The verdict clearly propounded that the open source agreement used existing copyright laws. The courts have again protected the copyright holder in the case of *S.O.S., Inc. v. Payday, Inc.*³⁹ The court held that though under a copyleft agreement the user works with the freedom given to him by the holder but if the user goes outside the scope of the agreement and violates any provision of the agreement, the copyright holder as the right to initiate a proceeding against the licensee for infringement of his copyright.

This was further clarified in the case of *Graham v. James*,⁴⁰ where the court held that if the provision of the agreement were merely a covenant, then the holder has no remedy under copyright law and he could initiate proceedings only under contract law and ask for damages for breach of contractual obligation. In another case of *Welte v. S. Deutschland*,⁴¹ district court of Frankfurt Am Mainl, German Court has upheld the validity and enforceability of GPL. In this case the Plaintiff was the owner of three softwares which were licensed under the GNU GPL. In 2006, the defendant offered certain service to its users using the programs of the plaintiff without satisfying the conditions of GPL. The court held that the GPL stipulates the

³⁹ *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

⁴⁰ *Graham v. James*, 144 F.3d 229, 236–37 (2d Cir. 1998).

⁴¹ *Welte v. S. Deutschland*, Docket No. 2-6 0 224/06.

freedom to use, modify and distribute the corresponding software which is granted by a non-exclusive license to everyone and is automatically terminated upon the violation of the policies of GPL. In the most recent case of *Artifex Software, Inc. v. Hancom, Inc.*,⁴² a California district judge refused to dismiss the case for breach of contract claims for alleged violation of the GNU GPL thus resounding the acceptance of contract law for addressing breaches of GPL. What happened in the case is that Artifex software is a commercial licensor of a software called ‘Ghostscript’, which is a widely used PDF interpreter. They have two models to distribute it

- a. Purchase the commercial license
- b. Obtain the free copy under the terms of GPL.

Lately, Artifex discovered that Hancom Inc. had been distributing ‘Ghostscript’ along with their other softwares. Artifex realised that Hancom has not bought the commercial license but have the GPL license and thus it is violating the GPL license agreement by not disclosing the source of ‘Ghostscript’ as required under GPL. In lieu of this, Artifex sued Hancom for breach on copyright and contractual obligation.

Another major issue in enforceability of copyleft agreement is the third-party rights. Suppose X is the copyright holder of a software and Y is a copyleft licensee of the software. Further Y licenses the software to Z. Now, if Z breaches the license agreement, whether X will be able to initiate proceedings against Z. This question was answered by court in the case of

⁴² *Artifex Software, Inc. v. Hancom, Inc.*, No. 16-CV-06982-JSC, 2017 U.S. Dist. 2017 W.L. 1477373 (N.D. Cal. Apr. 25, 2017).

Beta Computers v. Adobe Systems,⁴³ in which Beta Computers provided a software by third party named Informix. The court held that though Informix is not a party to the contract between Beta Computers and Adobe, they have a third- party right. This has been criticised by MacQueen who says that when the subject of the agreement is the licensing rights, it cannot create rights to the third party.⁴⁴

Thus, looking at the various judicial pronouncements by the court, it is clear to us that the courts accept the copyleft licensing agreement as a valid agreement and though it has no formal recognition in any legislation. The courts have accepted that the basis of these agreements is found in contract law and all the ingredients and necessities of contract law have to be followed by these agreements. Apart from the courts have also recognised that these agreements cannot work in isolation without his enforceability of copyright law. These agreements stem their strength from copyright law while fulfilling the conditions of contract law.

5. VALIDITY OF COPYLEFT CLAUSE IN INDIA

In India, there is no specific law regarding copyleft. No legislation talks about the validity or enforceability of copyleft. We need to then see the validity of the same through existing laws regarding copyright and contract. In the case of *Tata Consultancy Services v. State of Andhra*

⁴³ *Beta Computers v. Adobe Sys.*, 1996 S.C.L.R. 587.

⁴⁴ H.L. MCQUEEN, *SOFTWARE TRANSACTIONS AND CONTRACT LAW, LAW AND THE INTERNET: REGULATING CYBERSPACE* (Edwards & Waelde ed., 1997).

*Pradesh*⁴⁵, The Supreme Court has held that ‘software’ is an Intellectual Property. It will be covered under Section 2(o) of the Indian Copyright Act, 1957 under literary works which includes computer programs. Open Source software and copyleft license is not specifically recognised under the Information Technology Act, 2002, the Copyright Act or the Indian Patent Act, 1970.

For the working of copyleft license agreement in India, Section 14 of the Copyright Act comes into play. Section 14(a) (ii) and 14(b) (i) allows the copyright holder of a computer programme “to issue copies of the work to public not being copies already in circulation”. This ambiguity in Section 14 regarding, whether the distribution should be free or not helps the developers under copyleft agreement to license and re-distribute their software for free. Also Section 30 of the Act provides the copyright holder the right to license “any interest” in his work. The rights which are passed on by this holder to the licensee is equivalent to the rights attained by the assignee of the copyright. Section 19(3) specifically provides for an option to the licensor to license his work for free. This is further safeguarded by Section 19(2) which makes it obligatory on the licensor to specify the rights licensed, with the duration and the extent of it. Though the copyright law does not specifically recognises open source software but it does provides for enough protection for the copyright holder to enact a copyleft agreement within the legal framework of the country.

⁴⁵ *Tata Consultancy Serv. v. State of Andhra Pradesh*, A.I.R. 2005 S.C. 371.

Another aspect of such agreements is to look whether these copyleft agreement fulfil the requirement of the contract law in India. Section 10 of the Indian Act provides for the ingredients of a valid contract which includes

- a. Free consent
- b. Competent to contract
- c. Lawful consideration
- d. Lawful object
- e. Not expressly declared to be void.

The question before us is whether the copyleft agreement fulfil all these requirement. The first two requirements that are (i) free consent and (ii) competent to contract depends on specific facts. Contract act along with various case laws provides the laws regarding the above mentioned two and are case specific. The main point of contention is whether there is consideration in copyleft license agreement. In general understanding consideration is something done in return for the benefit which we get in the contract. Section 2(d) of the Contract Act defines consideration. This definition makes it clear that the consideration need not always be monetary term. His is further appreciated by the court in the case of *Kedarnath v. Gori Mohamed*.⁴⁶ In this case the plaintiff started some construction work based on the faith of the promise by the defendant. The court held the agreement enforceable stating that the consideration of faith was a valid consideration.

⁴⁶ *Kedarnath v. Gori Mohamed*. (1886) 14 Cal. 64.

Section 25 Explanation 2 clearly provides that the consideration in an agreement need not be adequate. Inadequacy of consideration is not a ground to hold a contract to be invalid. Thus in a copyleft agreement providing the same rights to subsequent users as given by the copyright holder and not to create a proprietary model of the software consists of valid consideration for the rights to use, modify and distribute the software.

We have already discussed above that neither copyright law nor any other law in India has held the copyleft license to be illegal or void, thus fulfilling the requirement of the contract act.

The above discussion clearly points out that a copyleft license agreement fulfils all the requirement of a valid contract. This makes any such license enforceable as a contract in the eyes of law. The licensor can sue a licensee for breach of contract. Not only that, but the copyright holder can sue the licensee for infringement of copyright.

6. CONCLUSION

Copyleft as a philosophy stands against the restrictive and monopoly system of copyright.⁴⁷ It uses the existing regime to fight against it. The copyleft advocates are motivated by individual and community centric welfare. A very strong argument that is made against copyleft is that it deters innovation.⁴⁸ This argument falls flat at the very premise because

⁴⁷ M. Satchwell, *The TAO of Open Source: Minimum Action for Maximum*, 20 BERKELEY TECH. L.J., no. 1, 2005, at 1757.

⁴⁸Anthony DiSante, *Why the GPL is Incompatible with Commercial Software*, ENCODABLE,

copyleft does not forbid commercial usage,⁴⁹ but only provides for passing of the software within the framework of the license. The philosophy focus on other incentive rather than just monetary benefits. The copyright regime protects only the developer while the copyleft protects the developer as well as the user. For example if an individual programmer creates a software for a MNC, all the rights would rest with MNC. On the other hand if he copyleft licenses it, he retains the right to make copies of the program and further make improvements to it.

Software developers who want their software to reach the maximum number of people and want further development in their work should definitely consider copyleft license agreement as their best bet today, the copyleft license is working on the faith and morality of the developers and users. The public policy pressure enables them to respect open source rights.⁵⁰ The judiciary has tried to recognise the copyleft license agreements and the right associated with it but this is not enough. A formal legislative recognition or guidelines are required due to increasing popularity of copyleft. The traditional understanding that the developer likes to create a monopoly over his work is taking a paradigm shift. Authors now want to work in collaborations and like to disseminate their thoughts and opinions

https://encodable.com/tech/blog/2006/02/25/Why_the_GPL_is_Incompatible_with_Commercial_Software (last visited Jan. 27, 2018).

⁴⁹ DAVID BERRY, *COPY, RIP, BURN: THE POLITICS OF COPYLEFT AND OPEN SOURCE* 115 (Pluto Press 2008), available at http://tovarna.org/files0/active/2/8454-copy_rip_burn_the.pdf (last visited Jan. 27, 2018).

⁵⁰ T. McCullough, *Understanding the Impact of the Digital Millennium Copyright Act on the Open Source Model of Software Development*, 6 MARQ. INTELL. PROP. L. REV. 91 (2002).

through their work thus wanting it to reach as many as possible. Authors now welcome modification or change in their work from users by standing “on the shoulders of Giants instead of on their toes”⁵¹.

Thus, it can be concluded that though copyleft has been around for a while, it has struck a chord in recent few years and it is time that the concept is formally recognised.

⁵¹ Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 77 (D. Mass. 1990).

**FAN FICTION AND THE FAIR USE DOCTRINE UNDER
COPYRIGHT LAW**

*- Divya Pinheiro**

ABSTRACT

Fan fiction is not an entirely new concept but it has certainly been reinvented and pushed to the forefront in this digital age. The world as we know it has changed tremendously in leaps and bounds with the evolution of internet; but changes in law haven't always followed in as rapid a succession. Internet is a platform that brings together people with similar interests and ideas. This means that traditional means of fandom communication such as 'fanzines' are now out-dated and replaced by 'fan sites'. It is not unusual for one to watch a movie or a TV show or read a book and feel that certain aspects of it could have gone differently; when these feelings are reproduced in the form of writing it becomes fan fiction. Fan fiction incorporates the characters, the setting, and the environment of the original work. The author of fan fiction uses the original storyline as a backdrop for his/her work. This use can be considered an infringement of the intellectual property rights of the original author, in particular the copyrights of the original author. Copyright law has been formulated in order to protect the creative and economic interest of the original author. While fan fiction for long remained obscure and in background and was

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allowed to develop without much hindrance from copyright laws. The thrust that internet has given to it has resulted in it being pushed to the mainstream and its wide spread prevalence means that it can no longer be written off and pushed to the side. While fan fiction has traditionally been written and published for no charge, there has been a recent increase in the number of fan fiction works that are commercial and written for profit. The question before law is now to decide how much of the original work should be protected under the ambit of copyright laws in order to ensure that the original author's creative and economic interests are protected. The law also needs to ensure that its presence in the form of copyrights do not hinder the development of creativity in the society. It is also important to note that most works which garner such interest and fan activities are those which belong to the sci-fi or fantasy genres. The article is divided into seven sections (or headings), first of which introduces the topic. Second explains the meaning as well as the history of fan fiction, the third section explains how authors of fan fiction have changed their mode of publication from fanzines to websites and blogs on the internet and the role that mass media plays in fan fiction. The fourth considers the new species of fan fiction *i.e.* commercial fan fiction and its impact on copyright law. Next section explains fan fiction with respect to one of the more widely phrased copyright law, that of the US. Section 107 of the Copyright Act of the US, deals with the Fair Use Doctrine, which is an exception to copyright infringement. Similarly, the Indian Copyright Act, 1957 has Section 52 which details acts which do not fall within the purview of infringement of

copyright. Section 52 has been discussed in the sixth section of the article with a brief historical run down of the copyright law in India. The last section sums up various aspects that have been discussed in the article and presses on the need of a suitable law on fan-fiction balancing various conflicting interest.

1. INTRODUCTION

The second half of the twentieth century saw massive changes in the world of storytelling. Genres like science fiction and fantasy, which earlier lurked in the background were brought to the limelight and became immensely popular. With the rise of these genres came the rise of fandoms. Fandoms are not restricted to these genres, but some of the biggest and most popular ones are certainly linked to them. One of the first such formal fandoms was that of the *Star Trek* series which saw overwhelming popularity. While factors such as globalisation and technological advancements certainly played a crucial role in advancement of its popularity, another important factor to be considered is the immersive and imaginative nature of the story. These modern fantasy series created completely different and self – sufficient secondary works which has sparked in readers the need to explore and understand these worlds and imagine events outside of the story itself. The 1960's saw one of the first examples of fan fiction when fans of the *Star Trek* series published stories based on the characters and the environment of the series in magazines known as fanzines. The 1990s saw another drastic change in the world of fan fiction with the introduction of internet which brought together fans

from across the globe and provided them with a medium to interact and build communities.¹ Today, fans communicate using media such as websites, blogs, etc. Not all works published in the name of fan fiction are done so for free. Certain works of fan fiction are published for commercial purposes. Fan fiction arises from the human impulse to know ‘what happened next.’² Fan fiction provides fans with a medium to discuss, enjoy and portray the original works in ways that might not have been contemplated by the original author. Despite all this, the legal status of fan fiction remains unclear. On one hand, law has to protect the rights of these fan fiction authors and provide protection to their works. The question then arises, how much fan fiction should the law protect? Should the law protect only fan fiction that is made purely for the love of the work and not for monetary benefit or include in it commercial works of fan fiction? Balanced against these, on the other hand, are the interests of copyright holders and the original authors. Fan fiction can alter story lines of the original work or portray characters in ways that the original author may not be comfortable with. Hence, law should also protect the economic and creative interests of the original authors and copyright holders.³

The Indian law has had relatively no exposure to fan fiction and so there exists no legal guidelines to define the position of these works. Section

¹ Jane Becker, *Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet*, 14 CONN. PUB. LIT. L. J. 133, 133-34 (2014).

² Rebecca Tushnet, *Legal Fictions: Copyright, Fan fiction and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 652 (1997).

³ Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 387 (2009).

52 of the Copyright Act of India, 1957 aims to provide protection to works that fall under the ambit of fair use. Fan fiction might not fall under this protection and thus leaving fan fiction authors without protection; and if it does, there might be an infringement of the rights of the original author. The article aims to address these ambiguities in law.

2. DEFINITION AND HISTORY OF FAN FICTION AND FANDOMS

“Fan fiction” broadly speaking is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show and is not produced as “professional writing.”⁴ This definition highlights three important aspects of fan fiction. They are; one, it is in writing and not in any other mode of fan activity such as video mash ups, etc. Second, fan fiction is based on an identifiable segment of popular culture and thirdly that the written matter must not be produced as professional writing.⁵

Although fan fiction is associated with internet, its genesis was at least one hundred years prior to the popularisation of internet. When Sir Author Conan Doyle stopped publishing new stories of the popular *Sherlock Holmes* series, his readers began to write their own stories with these characters. From 1869 to 1930, more than two hundred fans used the characters from Lewis Carroll’s *Alice in Wonderland* in order to write their

⁴ Tushnet, *supra* note 2, at 655.

⁵ Jacqueline Lipton, *Copyright and the Commercialization of Fan Fiction*, 52 HOUS. L. REV. 425, 434-35 (2014).

own works. These works included rewritten ending to elaborate political parodies.⁶

Modern day fan fiction can be traced back to the Star Trek era of the 1960s and 70s. Fans of the original *Star Trek* television series published their fan writings in Star Trek fanzines which had a very limited audience.⁷

Most fans are predisposed to behave in a certain way when it comes to fan fiction. Some of the common characteristics that they show include: firstly, fans refrain from activities that would negatively impact the copyright holder's economic and creative interests. Practices that erode these interests could potentially result in the stopping of publication of the works that they are fans of. Secondly, fans incentivise others to share in their affections. Through various modes like blogs, websites, fan conventions, newsletters, *etc.* fans not only interact with one another but also create interest in and expose the original work to others. Thirdly, fans are very particular about differentiating between canon (the official work that is considered to have actually happened in the fictional world) and non-canon works. For example, in the US, fans of works like *Star Wars* and *Star Trek* have created entire databases to distinguish between canon and non-canon works. Fourthly, fans also consider their fan community or fandom (fan and kingdom) very integral to their role as a fan. These fan communities often create an extra legal code of conduct that invariably

⁶ Mollie Nolan, *Search for Original Expression: Fan Fiction and the Fair Use Defence*, 30 ILL. U. L.J. 533, 549 (2006).

⁷ *Id.* at 550.

protects the creative and economic interest of the copyright holder; non-abidance of these rules can lead to ostracism.⁸

3. FAN FICTION IN THE DIGITAL WORLD

Mass media today plays a crucial role in helping us define images of beauty, ideas about gender, sexuality, *etc.* Media greatly influences the way we think and perceive things on a daily basis. Popular culture such as books, television shows, movies, comics, *etc.* gaining a global following due to the internet and mass marketing.⁹ Mega franchises like Harry Potter, Pirates of the Caribbean, Marvel's The Avengers, *etc.* are immensely popular stories that have become part and parcel of our culture and greatly influence the society's thought. Cultural and societal change has accelerated due to greater accessibility to media.¹⁰

The truth is, however, that most of these stories are published through corporates that are owned and controlled by major media conglomerates. Take for example the world of movies Viacom owns Paramount Pictures, MTV, Comedy Central, Nickelodeon and various others. This narrows the diversity of the content considerably to only those versions of the story that best fit ideals of these large conglomerates.¹¹

Through internet, fan fiction authors have a mode of publication that is free of cost and gives access to a limitless number of readers. The internet

⁸ Nathaniel Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan Based Activities*, 20 SETON HALL J. SPORTS & ENT. L. 131, 138 (2010).

⁹ Lipton, *supra* note 5, at 138-39.

¹⁰ *Id.* at 138.

¹¹ *Id.* at 139.

also gives these authors a chance to write and publish works without imposing conditions. One of the largest fan fiction websites is fanfiction.net that has eight categories of fan fiction including books, television shows, comics, movies, cartoons and even video games. Fan fiction is published on this website in 20 languages. In the television category alone there are 450 shows which have fan fiction in numbers ranging from only a few to a few thousands.¹²

The internet provides a platform for those works which represents categories of the society such as women, LGBT persons, people of colour, *etc.*, as, such works would have otherwise gone unpublished for being incompatible with the models of large corporates.¹³ Although fandoms are usually male dominated, 90% of fan fiction authors are female. The reason for this is because the target audience of these works are the males whose interests are satisfied. Women on the other hand are forced to identify with male characters. Fan fiction in a roundabout way gives women a chance to better identify with the protagonists of the story.¹⁴

4. COMMERCIALISATION OF FAN FICTION

One of the most commonly used defences to fan fiction is that it is published free of cost and is written for non-commercial purposes. Fan fiction is supposed to be written to a target of audience of fans who are already aware of the facts and circumstances in the original work. But of

¹² Nolan, *supra* note 6, at 550-51.

¹³ Lipton, *supra* note 5, at 139- 40.

¹⁴ *Id.* at 141-42.

late more and more fan fiction works have been published as commercial works. For example, the best-selling ‘Fifty Shades of Grey’ and Gabriel’s ‘Inferno’ were both originally fan fictions of the popular Stephanie Meyer’s ‘Twilight’ series and have been sold successfully across the globe making profits.¹⁵

Realising the potential for selling commercialised fan fictions, Amazon Publishing in 2013 launched Kindle Worlds publication platform which is based on its ‘Kindle Direct Publishing’ (KDP), a self – publishing platform. Amazon first obtains licenses from the copyright holders of the original works of large fandoms to publish fan fiction and sell them to customers for profit. The author of the fan fiction work then gets a cut of the profits, but not as much as he/she would get if the book is published as an original work. In addition, Amazon also holds an irrevocable, exclusive license for the copyright term of the fan fiction work and also decides the price at which the work would be sold. Amazon also imposes certain conditions like no crossover characters (*i.e.*, characters from another book/series) are allowed in fan fictions. The original copyright holders too set out some guidelines to be followed while publishing fan fiction on the Kindle World program.¹⁶

Another example of commercialised fan fiction is that of the ‘Harry Potter Lexicon’. The Harry Potter fandom is one of the largest fandoms, mainly due to its being published during the age of the internet. Fans built

¹⁵ Lipton, *supra* note 5, at 429.

¹⁶ *Id.* at 430-31.

thousands of websites with millions of pages dedicated to this well-loved series. J. K. Rowling, the author of the Harry Potter series, is known to encourage fan fiction works. The Harry Potter Lexicon was a website of Steven Vander Ark. The lexicon was an encyclopaedia of Harry Potter to the world and contained various characters, places and objects mentioned in the books.¹⁷ In 2007, Steven Vander Ark and RDR Publishers decided to publish the lexicon in book format. This matter was looked into in the case of *Warner Brothers v. RDR Books*.¹⁸ Warner Brothers (the copyright holders of Harry Potter) won the case and Steven Vander Ark was asked to make necessary changes in the lexicon before it was published.¹⁹

In the case of *Suntrust Bank v. Houghton Mifflin Co.*,²⁰ the fan fiction of Alice Randall was found not to be infringing the copyright of ‘Gone with the Wind’ written by Margret Mitchell, instead it was construed to be a parody called ‘The Wind Done Gone’; which is written from the point of view of the African – American slaves of the original story.²¹

Commercial fan fiction is a problem under copyright law; although it may not be right to refer to it as fan fiction because being a professional production it lacks some of the basic features of fan fiction. Lack of litigation is also a hindrance in resolving the stance of law with respect to commercialised fan fiction.²²

¹⁷ Schwabach, *supra* note 3, at 420-21.

¹⁸ Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 519-24 (S.D.N.Y. 2008).

¹⁹ *Id.* at 428-30.

²⁰ Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266-67 (11th Cir. 2001).

²¹ Lipton, *supra* note 5, at 437.

²² *Id.* at 459-60.

5. COPYRIGHT LAWS AND THE FAIR USE DOCTRINE IN U.S.

Copyright law in U.S., similar to India, has its roots in British Law. The Statute of Anne, which was enacted in Britain in 1710, is a predecessor to the American laws. The statute was concerned with the printing, reprinting and importing of books. The fair use doctrine in the U.S. was decided by various Supreme Court cases in the mid nineteenth century. Section 107 of the Copyright Act of the U.S. deals with the Fair Use Doctrine. The Fair Use Doctrine was incorporated by the legislature in the Copyright Act, 1976.²³

Copyright holders have certain exclusive rights: these include:

- i. The reproductive right; wherein the law grants the copyright holder a “work in authorship.” A third party cannot copy from the original work without authorisation from the original author. This copying is not limited to verbatim, wholesale copying. In order to establish infringement the plaintiff has to prove that “the defendant copied his/her work and that the defendant’s copying amounted to unlawful or improper appropriation.”
- ii. The Derivative Works Right; A derivative work is defined in the statute as “A work based upon existing work in the form of ... or in any other form in which a work may be recast, transformed or adopted.” The infringement of this right depends on the source work.

²³ Lipton, *supra* note 5, at 443-45.

iii. The Distribution Right; A strict liability is attached to the infringement of this right, irrespective of whether or not the work was written for commercial purpose. The distribution right is typically infringed along with the reproduction right. This right is particularly problematic in the digital world where a work can be published at the push of a button without incurring any other costs.²⁴

5.1. THE FAIR USE DOCTRINE

In fan fiction cases, the most obvious defence to a claim of copyright infringement is that of fair use given under Section 107 of the Copyright Act.

The need for this doctrine is justified by the following theories:

- a. The Economic Theory; this theory balances the public's access to authorship with the author's incentive to produce creative works. This right limits the public access to make works based upon other work and excessively promotes the overproduction of authored works. It also discourages any improvements made to the original work. It also does not take into account non – commercial art and fan works.
- b. The Labour Theory; this theory was propounded by John Locke. Under this theory, the result of a person's labour is his/her property. In the case of *Feist v. Rural Telephone Service*,²⁵ the court held that copyrighted work does not create copyrightable work and that the *sine qua non* of copyright is

²⁴ *Id.*

²⁵ *Feist v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

originality. Fan fiction authors who labour over their works lack protection because their idea was not original enough.

- c. The Personhood Theory; this theory recognises that each artist has a special connection to his/ her art. This theory is dangerous as the author can no longer control his/ her work after it has been published in a public domain and the public is not required to respect his/ her wishes with regard to the publication of derivative works.²⁶

The following four theories are used by the court in determining if a particular use can be described as fair. The first factor is the nature and purpose of the use; most fan fictions are written free of cost and are published freely on internet. Most fan fiction works also begin with a disclaimer proving their intention to not infringe the rights of the copyright holder and give due credit to the original author. Another aspect of this factor is transformative use. When a fan fiction author takes from an original work characters and settings and then explores new situations in which they can be used, it requires a considerable amount of time and effort. It can easily fall in the category of transformative use. In *Batlin Sons Case*, the court held that fan fiction was a copyright infringement because it did not require sufficient talent and skill to create.²⁷ This is an unfortunate statement and most certainly does not take into consideration the creativity and skill that goes into writing and publishing a work of fan fiction. Further, there

²⁶ Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fan Fiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 193-96 (2014).

²⁷ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

exists no demarcation to determine the original and copied works as most works are to a certain extent inspired by another work.²⁸

The second factor is the effect of the use on the potential market. One of the main purposes of copyright law is to protect the economic interests of the original author. Fan fiction keeps the spark of interest in the original work ignited and keeps its readers loyal to the characters. In *Lewis Galoob Toys, Inc. Ltd v. Nintendo of America, Inc.*,²⁹ the court recognised that access to alternate video game characters had the potential to improve market conditions for the original product. Along the same lines, fan fiction considers possibilities in the story that copyright holders most likely would not allow to be published. Fan fiction often involves rather unbelievable changes in the characters and cannot therefore be considered as substitutes. Lack of copyright protection especially for derivative works has stimulated creativity and investment in new technologies such as photographs, cable, television, radio and even the Internet.³⁰

The third factor is the amount and sustainability. What this means is that fan fiction is more likely to fall under the fair use defence when the amount of the original work borrowed is insignificant. In the case of *Warner Bros. Pictures, Inc. v. Columbia Board Sys., Inc.*,³¹ or the *Sam Spade Case*

²⁸ Tushnet, *supra* note 2, at 664-68.

²⁹ *Lewis Galoob Toys, Inc. Ltd. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

³⁰ Tushnet, *supra* note 2, at 669-76.

³¹ *Warner Bros. Pictures, Inc. v. Columbia Board Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954).

in which the court held that characters are an integral part of the story can be protected by copyright but not “chessmen” characters.³²

The fourth factor is the effect on the original work’s market. Under this factor, fan fiction works that are economic substitutes are generally not protected by the fair use doctrine. While on one hand copyright holders need to have important rights in their creations, they must not be allowed to hoard them so this will go against society’s interest. While fan fiction authors suggest that since their works are both transformative as well as non-commercial it doesn’t make sense that they be considered as instruments to erode the market of the original work. Copyright holders counter argue with the point that they should be allowed the liberty of deciding how and when additional interest should be spurred.³³

6. THE DEVELOPMENT OF COPYRIGHT LAW IN INDIA

The idea of copyright protection came with the advent of printing, which allowed works to be duplicated using machinery. After 1483, England emerged as a major centre for printing trade in Europe. This led to the creation of a class of book printers who also doubled as book sellers. In 1557, Queen Mary I granted them the right to regulate the book trade. This was the first clear law aimed at protecting literal copyright and checking piracy. The first codified law came with the passing of the Statute of Anne in 1710. This statute gave authors the right to print their works for a period

³² Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss*, 9 B.U. J. SCI. & TECH. L. 434, 458-60 (2003).

³³ *Id.* at 461-63.

of fourteen years. The copyright acts of 1814 and 1842 increased the time of protection for the authors from fourteen to twenty eight and forty two years respectively. An Act passed in 1847, during the rule of the British East India Company, applied the English Copyright law to India. Under this, the author's rights were protected for his lifetime and seven years after his death but could not exceed forty two years. The Copyright Act of India 1914 added some new provisions to copyright law in India and remained applicable until the Copyright Act of 1957 was passed in India. This Act has been amended five times in 1983, 1984, 1992, 1999 and 2012. This Act set up a copyright office under the registrar of copyright who acts under the Central government. A copyright board for the judicial proceedings has also been set up under this Act. The term of Copyright protection was extended to 60 years by the 1992 amendment.³⁴

6.1. FAIR USE UNDER THE COPYRIGHT ACT OF INDIA

Section 52 of the Copyright Act of India, 1957 gives us the acts which are considered not to be an infringement of copyright. These acts include; private use including research, criticism or review, making copies or adaptation of a computer program, for the purpose of reporting current events, reading or recitation in public of a reasonable extract and publication in an educational institution.³⁵ The difference between Section 107 of the American Copyright Act and Section 52 of the Copyright Act of India is

³⁴ Charu Dureja, *Historical Development of Copyright Law in India*, 4 I.J.A.R.M.S.S. 50, 50–57 (2015).

³⁵ Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

that the Section 107 can be read and interpreted a lot more widely than Section 52.

The Copyright Act of India under Section 52 lays down very clear guidelines to decide what falls and what does not fall under exceptions to the infringement to copyright. Under the Copyright (Amendment) Act, 2012 under clause (o) of Section 52 the words “public library” has been amended to “non – commercial public library.”³⁶ This very clearly shows that commercial fan fiction under the Indian law will not receive much protection especially in comparison with non – commercial fan fiction. The Indian law does not have any precedents or judicial ruling in the matter of fan fiction. It is therefore very difficult to ascertain the position of Indian law with respect to this matter.

7. CONCLUSION

Since beginning, story tellers have spoken in myths and legends and have retold them and their different versions. The fact that these stories are now recorded in a fixed medium should not prevent such retelling of stories. The original aim of the copyright act was to provide protection to the authors of works as well as their creative ideas while also enabling others to cultivate ideas to the works and so help in the growth of creativity. Lack of litigation in the area of fan fiction and copyright infringement in India is certainly a hindrance in understanding the stance of Indian law in this respect. Lack of certainty as to the legal position of copyright law with

³⁶ Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

respect to the non – commercial fan fiction itself means that commercial fan fiction has a long way to go before its position is clarified. But the essence of fan fiction is lacking when fan fiction is sold for commercial purposes and the intent of furthering the original story as a fan and for no gain of their own is lost. The current copyright law fails to address such issues especially with regard to emerging technologies that make individuals feel that copyright law which has thus far ignored them does not apply to them. And when individuals work outside the scope of law they tend to rely on the concept of fairness rather than legitimacy. Recognising the legitimacy or the illegitimacy of fan fiction on the Internet is a good starting point from which the law can further build up. People should be able to participate actively in the creative aspects of the world around them. Emphasising on non – commerciality, it is in most peoples’ opinion a just way of going up this matter. Non - commercial users are rarely found guilty of copyright infringement and also resounds well with what can be considered the ethics of story - telling. A very loosely worded and vague copyright law, such as the current one, makes fan fiction authors feel legally intimidated. The main concern for copyright holders is that through fan fiction characters and elements of the story may be portrayed in ways that they might not be comfortable with or could end up in the story being misrepresented. The onus is therefore on the law to think of a solution in which the interests of copyright holders, authors as well as fans are taken into consideration. Context is one of the most important elements of a case. This holds true even in copyright law and fan fiction. Fan fiction is a unique blend of

properties that includes its non – commercial nature, as a tool of communication among members of the fandom, and the benefits that it provides to copyright holders and these properties set it apart from other derivative works. Fan fiction is a very good example of how free speech can also be seen in copyright law without infringing on the author’s as well as the copyright holder’s rights. Fan fiction is a unique challenge to copyright law as it is a direct conflict between the interests of the copyright holders and authors of the original work on one hand; and fan, fandoms, and authors of fan fiction on the other, keeping in mind the rights of public to fair use. The current copyright law does not accommodate adequately the interests of these parties and therefore it is important that new rules are framed to effectively address the clashes of interests and ambiguities in law.

**RIGHT TO BE FORGOTTEN: A CRITICAL AND
COMPARATIVE ANALYSIS**

- *Shreya Bansal** & *Deboleena Dutta***

ABSTRACT

Data in the internet age irreversibly records the digital footprints of data subjects as well as their shadows giving it the power to exponentially circulate the data once uploaded on the web. There has been a recent desire expressed by the politicians, the legal practitioners, the researchers and the scholars for a need to recognise the right to be forgotten as a conjecture of the natural human right of right to privacy conferred upon every individual in this digital age. The foundation of the right to be forgotten was laid down in the European Union. The entire trajectory of the erasure right, from the conception to the legal framework, is of utmost importance to put in perspective the importance and necessity of the right. The United States has critiqued it openly, despite having the underlying essence of this right in various judgements. United States, being a strong proponent of freedom of speech and a vocal opponent of censorship, is trying to find a place for right to be forgotten that does not infringe upon any of its central values. There is almost a spectrum whose one end talks about personal dignity reflected through the ideals upheld by E.U. laws and the other end is the overt stance of United States, which respects liberty and freedom of an individual the

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most. Considering the two ends, it is difficult to position India because of its conflicting judicial decisions and an ambiguous stand on right to be forgotten. However, the recent right to privacy judgement has opened avenues for the creation of explicit laws on right to be forgotten. It is now widely believed that the individuals must have the right to erase the information available on the internet related to them, which has the potential to damage their reputation and past actions which can scar the present and future life prospects. Criticism has been raised that this right is in direct conflict with the two essential rights, i.e. right to free speech and expression, and right to information. Thus, it is imperative to draw a fair balance between these inconsistent rights by means of an appropriate regulatory mechanism.

1. INTRODUCTION

In the age of World Wide Web, it has become impossible to truly forget the information posted on the Internet. While such data can be put to multiple uses, it can be detrimental to the data subject if it is used in ways that are harmful to the reputation of the data subject or against its intended use without consent. There can be several adverse effects to unsolicited and unpermitted information floating in the Internet. These unpleasant effects can have wide ranging implications from temporary embarrassment to social hostility and depression. Hence, if the privacy cannot be protected *ab initio*, then it can be done by bestowing a right upon individuals to retroactively erase that which might be harmful.

The European Court of Justice in a decision in 2014 introduced a new right the "right to be forgotten" which provides the data subject with a right to compel removal of the personal data or information posted on the internet from online databases.¹ It was implicitly recognised as a right for the first time by 1995 European Union Directive on Data Protection.² In 2016 E.U. adopted a new General Data Protection Regulation to take effect from 2018 which contains the explicit right to be forgotten.³ This right is grounded on the notions of privacy and data protection but at the same time is criticized for being in conflict with freedom of expression.

The right to be forgotten has been well received by the masses, however, the criticisms and the concerns against such a right remain valid in the current scenario. It directly contradicts the freedom of speech and the right of the public to know. This is especially true in U.S., where the country's central values rest in the right of freedom of expression and against censorship. Moreover, many critique the erasure right by raising the issue of its irrelevance when defamation and libel laws are already in place in most countries. Even in India, neither the judiciary nor the legislature has categorically expressed its position on this right. The right to privacy judgement, although has been unanimously accepted; answers to greater questions still remain unanswered in the wake of India's move to digitising sensitive data, such as credit history, bio-metrics, etc.

¹ Google Spain v. AEPD, 2014 ECLI:EU:C:2014:317.

² Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).

³ Commission Regulation 2016/679, The General Data Protection Regulation.

Thus, the article aims to carry out a comparative analysis of the jurisprudence of the right to be forgotten arising from a landmark decision by Court of Justice of the European Union to development of General Data Protection Regulations by E.U. along with a comparison with the laws of U.S. We also aim to trace the contours of the new right to be forgotten in the Indian legal system especially at a time when right to privacy has been explicitly recognised as a fundamental right conferred upon the Indian citizens. We also propose some solutions to resolve the conflict of this right with other fundamental right of freedom of expression and right of information.

2. EUROPEAN UNION JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

The E.U. has formally recognised privacy as a fundamental right in its legal system since the aftermath of Second World War, where the countries started liberating themselves from oppressive regimes. Privacy as a fundamental right of E.U. citizens have been protected by the Lisbon Treaty⁴ and the E.U. Charter of Fundamental Rights (EUCFR)⁵. Thus, the bedrock of privacy has led to the recognition of right to be forgotten by the C.J.E.U. in the course of time. As a consequence of an unprecedented technological advancement and the human-technology interactions, the

⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec., 13, 2007, 2007 O.J. (C 306) 1, *available at* <http://www.refworld.org/docid/476258d32.html>.

⁵ Charter of Fundamental Rights of the European Union, Oct., 26, 2012, 2012 O.J. (C 326), *available at* <http://www.refworld.org/docid/3ae6b3b70.html>.

existing legislation was challenged and the need for new laws were expressed.

2.1. DATA PROTECTION DIRECTIVE OF 1995

The Directive 95/46/EC on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data⁶ requires each member state to pass national legislation for the protection of “the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.” It takes into account respect for one’s image, name and reputation.⁷ This dignity-based right originates from a concept in German constitutional law, *Informationelle Selbstbestimmung*, or informational self-determination⁸ which describes an individual’s right to determine how they are portrayed to third parties and to the public. Though it does not explicitly contain the right to be forgotten, the ruling of E.C.J. in *Google Spain v. AEPD* laid down the implied right to be forgotten in the Directive 95/46/EC.

2.2. GOOGLE SPAIN SL & GOOGLE INC. v. AEDP AND MARIO COSTEJA GONZÁLEZ⁹

The Court of Justice of the European Union (CJEU) in May 2014 held that the search engine Google had to remove from its search results

⁶ Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).

⁷ Michael Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 359-62 (2015).

⁸ Hayden Ramsay, *Privacy, Privacies and Basic Needs*, 56 HEYTHROP J. 288, 288 (2010).

⁹ *Google Spain*, 2014 ECLI:EU:C:2014:317.

links to two newspaper articles referring a real-estate auction to satisfy public debts owed by a Spanish lawyer and calligrapher named Mario Costeja González under the European Union Law i.e. Data Protection Directive, issued by the European Parliament and the Council of the European Union in 1995 or the Directive 95/46/EC.

In this case, Mario Costeja González requested Spain's La Vanguardia newspaper in 2009, to remove two articles about the real-estate auction from the newspaper's website as the debts were not actually his and they had been satisfied. The publisher refused to remove the articles as it was on the Spanish Ministry of Labour and Social Affairs' order that the notices were first published in print in 1998 and later on the Internet. Costeja González later filed a complaint with the Agencia Española de Protección de Datos (AEDP), which resulted that the publisher was legally entitled to keep the notices online but Google was under an obligation to remove references and links to the articles from its search results.

Google, aggrieved by such a decision, next appealed to the Spain's National High Court, which referred a series of questions to the European Union Court of Justice. In an advisory opinion of the Advocate General of the Court of Justice, it was held that the Data Protection Directive should not be applicable to the Internet search engines in the manner requested by Costeja González as it is violative of the right to freedom of expression as laid down by the European Convention for the Protection of Human Rights and Fundamental Freedoms. It further held that the no explicit right to be

forgotten was created by the Data Protection Directive but only have a right to rectify, erase, or block data that was inaccurate or incomplete.

Rejecting the advisory opinion, the Court of Justice in May 2014, the Court of Justice answered the questions raised by Spanish National High Court in favour of Costeja González holding that the links to the articles about the satisfied debts were inadequate, no longer relevant, or excessive, and therefore Google had to remove those, though the news articles could remain online themselves. The Court held that the Advocate General did not pay attention to Article 6 of the Directive which requires that data controllers ensure their use of personal information is “adequate, relevant, and not excessive in relation to the purposes for which they are collected” and only focused on Article 12 which allowed the individuals to rectify, erase, or block data about themselves that is inaccurate or incomplete. However, it also stated that had Costeja González being a public figure, then the public’s interest in having access to information through the search engine links would have outweighed the individual’s right to have the links removed.

2.3. CRITICAL ANALYSIS OF THE EUROPEAN UNION COURT OF JUSTICE JUDGEMENT

Thus, upholding the foundation and importance of the right to be forgotten, it has been explicitly made clear by the C.J.E.U. that under this right there is no obligation on data controllers to remove data outright but it has to strike out ‘a fair balance’ between the ‘interest’ of Internet users in having access to the data in question ‘and the data subject’s fundamental

rights under Articles 7 and 8 of the Charter'. It also held that right to privacy overrides not only the economic interest of the operator of the search engine but also the interest of the general public to have access to the information which is requested to be removed by the data subject which though can be rebutted in case the data subject's role is of public importance, then the interference with his fundamental rights is justified by the preponderant interest of the general public in having access to the information in question.¹⁰

It is a crucial step taken by the C.J.E.U. to protect the fundamental right to privacy in the age of internet, as well as in recognising the role of private actors in the application of fundamental rights standards. But the Google judgment is not free from critique as it fails to lay down the content and degree of protection offered by this right. It also appears to dismiss important considerations that can be in conflict with the right to be forgotten, such as the rights to freedom of expression and access to information, thus raising serious doubts as to whether this development will signal a positive step in the overall protection of fundamental rights.

The court's decision in *Google Spain v. AEPD* found that the Data Protection Directive included a right to be forgotten even though it contained no express provision giving a right to delete. The decision of the C.J.E.U. did not require the search engine to delete the postings themselves from the Internet. After Google approves a takedown request, the requestor's name and other personal information would still exist on other

¹⁰ Rustad & Kulevska, *supra* note 7, at 361.

web pages, which would not lead to any actual “forgetting” of such information.

2.4. GENERAL DATA PROTECTION REGULATION OF 2016

In April 2016, the European Council and the European Parliament adopted Regulation 2016/679, known as the “General Data Protection Regulation”, and its associated Directive 2016/680 which will take effect from May 25, 2018, thereby replacing the 1995 Data Protection Directive¹¹ with the aim to establish a uniform law across the E.U. The regulation contains in Article 17 a “Right to erasure” (right to be forgotten) that applies not only to search engines but also to source websites and other data controllers.¹²

Article 17 lays down a criteria for determining when a data subject can exercise the right of erasure, data controller’s obligation to erase links to third party websites and procedure of how to exercise such right.¹³ It states that individuals have the right to require data controllers to erase information if the data subject objects or withdraws consent, or if the information is no longer necessary for its original purpose. The provision also requires that data controllers inform other controllers of the request for erasure. It is not an absolute right as Article 17(3) and includes exceptions

¹¹ Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).

¹² Viviane Reding, *Speech at The Centre for European Policy Studies in Data Protection Compact for Europe*, EUROPEAN COMM’N (Jan. 28, 2014), http://europa.eu/rapid/press-release_SPEECH-14-62_en.html.

¹³ Kate Brimsted, *The Right to be Forgotten: Can Legislation Put the Data Genie Back in the Bottle?*, 11 PRIVACY & DATA PROT. 6, 7 (2011).

from the right if processing the information is necessary for freedom of expression, the public interest, or for historical, scientific, and statistical purposes.

Further, Article 18 of the General Data Protection Regulation grants a right of restriction to information if the accuracy of the data is doubtful which will last until the data controller verifies the accuracy. There are further restrictions if processing of personal data is unlawful or is no longer needed by the data controller but is still required by the data subject for a legal claim. Article 19 requires that, in case of erasure or rectification of personal data, data controllers inform recipients of the personal data unless this proves impossible or “involves disproportionate effort.” Under Article 19, data subjects may also request that data controllers inform the subjects about notice given to recipients of the information.

2.5. CRITICAL ANALYSIS OF THE DIRECTIVES

There is an obligation to protect as a fundamental right to protect the personal data under the EU Charter. Restrictions must be imposed on the way in which the personal information is processed must be imposed by the Member States for the data subjects to be able to access the data and have it corrected as their right to be forgotten. Though it is new concept but it derives its genesis from the principles of privacy. The origin of this notion

is derived from the French concept *le Droit a l'Oubli*, which loosely translates to “the right to oblivion”.¹⁴

These regulations though uphold the universally recognised fundamental right to privacy but do not lay down the standards on the basis of which it can be determined by the data controllers whether the data that has to be taken down is no longer required or it is not warranted by a legal basis for its retention, giving discretionary powers to the data controllers to determine such factors.¹⁵ Also there is no obligation on the data subjects to provide for any proof or factual basis for the request of erasure of information or any other information that forms the basis on which such publication is violative of any law. It has also been criticized on the basis that that such a proposal does not make any differentiation between true and false information giving the data subjects power to suppress truthful information also unless it falls with the given statutory exceptions. An overly expansive right to be forgotten will lead to censorship of the Internet because data subjects can force search engines or websites to erase personal data, which may rewrite history.

Furthermore, the directives fail to provide a mechanism to resolve the conflict as to whose right to be considered or given importance in case there are multiple data subjects with respect to a same piece of information which is requested to be removed by one of them. For example, if two

¹⁴ Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, PETER FLEISCHER: PRIVACY...? (Mar. 9, 2011), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-tooblivion.html>.

¹⁵ Brimsted, *supra* note 13, at 7.

people are the ‘data subjects’ of one photograph and only one of them issues a takedown request, the Regulation is unclear as to whose rights must be honoured.¹⁶ Given the open-system nature of an expansive portion of the World Wide Web, data once uploaded on the web in one form or the another can be circulated exponentially. The Regulation requires controllers to notify third parties, but there is no current technology to trace the source of content hosted by third parties.¹⁷

3. U.S. JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

As against the concepts of dignity and right to privacy, which are weighted more heavily in the European Union, the United States framework questioned on the border to distinguish between the right to privacy and the freedom of speech. U.S. values on privacy endeavour to go parallel with the values central to their societal evolution, such as freedom of speech. US does not have a coherent, homogenous federal legal system of data and privacy protection. Therefore, the individuals have to take recourse at the mercy of the companies or federal states. The privacy protection in U.S. is scattered across federal laws that apply only to specific groups of people.

However, the concept of ‘legal forgiveness’ is intensely engrained in U.S. legal structure, wherein in the nineteenth century itself the

¹⁶ Michael Backes et al., *The Right to Be Forgotten - Between Expectations and Practice*, EUROPEAN UNION AGENCY FOR NETWORK & INFO. SEC. (Nov. 20, 2012), <http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be-forgotten>.

¹⁷ Emily Shoor, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation*, 39 BROOK. J. INT'L L. 487, 490 (2014).

Restatement of Torts stated that “One who gives publicity to a matter concerning the private life of another s subject to liability to the other of invasion of his privacy, if the matter publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not legitimate concern to the public.”¹⁸

The U.S. case laws expresses the support for the protection of privacy, such as in the cases of *Melvin v. Reidi*,¹⁹ and *Briscoe v. Reader’s Digest Association, Inc.*,²⁰ the courts have debated over the importance of forgiveness in one’s rehabilitation. The arguments used by courts remain valid till date, even when the decisions in both the cases have been overruled by the First Amendment. First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Any attempt to restrict the most valued and the most cherished freedom of speech may be understood as censorship, which in turn, would lead to immense public turmoil. The court has held that the search results constitute speech under the First Amendment, and that the search engines, like Google, Microsoft and Yahoo are immune with regards

¹⁸ RESTATEMENT (SECOND) OF THE LAW OF TORTS (1977).

¹⁹ *Melvin v. Reid*, 112 Cal. App. 285 (Cal. Ct. App. 1931)

²⁰ *Briscoe v. Reader’s Digest Ass’n*, 4 Cal.3d 529, 532 (1971).

to their editorial decisions regarding screening and deletion from their networks.²¹

In U.S., only California has explicitly recognised the concept and demonstrated the same through its legislative efforts, such as the California Online Privacy Protection Act, 2003,²² and California's data breach law, 2013.²³

Even though the records of individuals who have served their sentences and periods in rehabilitation are allowed to be forgotten from the virtual memory of the public, special protection is given in cases of juvenile criminals. Their criminal records are often concealed from the hands of general public by sealing or expunging them if a petition is filed.²⁴ Similarly, in cases of bankruptcy and missing mortgage payments, the information will not be displayed in the credit history of the defaulter after a stipulated period of time. The problem is that the same laws have not been adopted in the cyberspace, where the information will still be available in search results even after its erasure from credit reports.

²¹ Martin Samson, '*Christopher Langdon v. Google Inc., et al*' 2007 *Internet Library of Law and Court Decisions*, INTERNET LIBRARY OF LAW AND COURT DECISIONS (Feb. 20, 2007), http://www.internetlibrary.com/cases/lib_case458.cfm.

²² Scott Allen, *California Online Privacy Protection Act of 2003 – Good Practice, Bad Pece*, (Oct. 16, 2016), <http://entrepreneurs.about.com/od/internetmarketing/i/caprivacyact.html>.

²³ Adnan Zulfiqar, *California Expands Breach Notification Law to Cover Online Accounts*, HOGAN LOVELLS, <http://www.hldataprotection.com/2013/11/articles/cybersecurity-data-breaches/california-expands-breach-notification-law-to-cover-online-accounts>.

²⁴ Aidan Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Statute*, 1966 WASH. U. L. REV. 147, 149-52 (1996).

Accordingly, it can be safely inferred that although some fragments of ‘right to be forgotten’ can be observed in the U.S. legal framework in its scrappy and ambiguous ways, nobody can contest Americans as the fiercest advocates for human freedoms in the world.²⁵

4. CONFLICT WITH RIGHT OF FREEDOM OF SPEECH AND EXPRESSION

The right to be forgotten which empowers an individual in some instances to erase certain online footprints in order to repair reputational harms, clashes with the freedom of expression²⁶ The regulations laid down by the E.U. Commission do not provide the standard by which the data controllers are to determine when the said exercise of right to request the removal of the data by the data subject comes in contradiction to the right of expression as laid down in Article 11 of the Charter and Article 10 of E.C.H.R.²⁷ which is not an absolute freedom and it cannot be utilised for defamation of against national interests or the security of the state. Article 17(3) provides for such exception which holds that data controllers can retain personal data if retention accords with E.U. or member state law, which inevitably requires balancing a data subject’s request against the public interest, “respecting the essence” of the right to data protection, and

²⁵ Karen Eltis, *Breaking Through the “Tower of Babel”: A “Right to be Forgotten” and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 69, 72 (2011).

²⁶ Manuel Baigorri & Emma Ross-Thomas, *Google Challenges Five Privacy Orders by Regulator at Spanish Appeal Court*, BLOOMBERG (Jan. 19, 2011), <http://www.bloomberg.com/news/2011-01-19/google-challenges-five-privacy-orders-byregulator-at-spanish-appeal-court.html>.

²⁷ Rustad & Kulevska, *supra* note 7, at 361.

remaining “proportionate to the legitimate aim pursued.” But still absolute discretion has been granted to the search engines for balancing out these parameters against the approval of the data subject’s request of removal of the link from the web.

It has also been contended by various commentators that if content becomes less searchable on the Internet, it will “derogate the role of counter speech” and “disrupt the natural process of communication”.²⁸

5. INDIAN JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

5.1. TRACING THE HISTORICAL BACKGROUND

To understand India’s perspective and place it on the E.U. – U.S. spectrum of right to be forgotten, it is imperative to trace its history through the judicial decisions thus far. India has seen contradicting judgements by different High Courts in terms of right to be delisted. The first landmark case that brought the concept of right to be forgotten to the limelight was delivered by Karnataka High Court in the case of *Sri Vasunathan v. Registrar General*.²⁹ In this case, the woman’s father had approached the court requesting to cover the woman’s name in an earlier order passed by the High Court. The petitioner had stated that this was a violation of her right to privacy as his daughter feared grave repercussions if her name was associated with her earlier case and it would affect her reputation in the

²⁸ Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right To Be Forgotten Are Incompatible with Free Speech*, 18 COMM. L. & POL’Y 91, 114 (2013).

²⁹ *Vasunathan v. The Registrar Gen.*, (2017) S.C.C. OnLine Kar. 424 (India).

society. Justice Anand Byrareddy, while passing an order in a writ petition, directed its Registry to make sure that an internet search made in the public domain would not reflect the woman's name in any previous criminal record. The High Court empathetically held that this decision was in line with the trend in Western countries of 'right to be forgotten' in sensitive cases involving women, in general, and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned. Justice Byrareddy, however, declared that the woman's name would not be removed from the order in the High Court website.

A similar approach was taken by Kerala High Court in the case where a writ petition³⁰ was filed asking for the removal of personal information from the search engines in order to protect their identity. Moreover, the absence of Indian Kanoon before the court and gravity of the issue forced the judges to pass the judgment in favour of right to be forgotten. Subsequently, the court ordered Indian Kanoon to remove the available personal information of the petitioner.

However, not every High Court judicial decision has been in the same tandem. Gujarat High Court, in the case of *Dharmaraj Bhanushankar Dave v. State of Gujarat*³¹ held against the existence of any 'right to be forgotten' on two grounds: first, failure on the part of the petitioner to show any provisions in law which are attracted, or threat to the constitutional right to life and liberty; second, publication on a website does not amount to

³⁰ W.P.(C) 9478/2016.

³¹ *Dave v. State of Gujarat*, (2015) S.C.C. OnLine Guj. 2019 (India).

‘reporting’, as reporting only refers to that by law reports. The petitioner sought for a “permanent restraint [on] free public exhibition of the judgment and order.”³²

In the landmark right to privacy judgment delivered by the Supreme Court in *Justice Puttaswamy v. Union of India*³³ has significantly touched upon the right to be forgotten. The concurring opinion delivered by Justice Sanjay Kishan Kaul confirmed the ratio of the case that besides right to privacy being a fundamental right, it also identifies the right to be forgotten, in physical and virtual spaces such as the internet, under the umbrella of informational privacy. Kaul stated, “The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet”. This ties into his reasoning that the public does not have a claim to access all truthful information.³⁴

5.2. INTERPRETATION OF THE JUDICIAL DECISIONS

Indian lawyers are in consensus that the right to be forgotten cannot be a blanket right. For instance, a judge should not stub out the name of a criminal convicted for murder in a judgement, as people have the right to

³² Amber Sinha, *Right to Be Forgotten: A Tale of Two Judgements*, THE CTR. FOR INTERNET & SOC’Y (Apr. 7, 2017), https://cis-india.org/internet-governance/blog/right-to-be-forgotten-a-tale-of-two-judgments#_ftnref6.

³³ Puttaswamy v. Union of India, (2014) 6 S.C.C. 433 (India).

³⁴ Sohini Chatterjee, *In India’s Right to Privacy, a Glimpse of a Right to be Forgotten*, THE WIRE (Aug. 28, 2017), <https://thewire.in/171290/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten/>.

know.³⁵ A thorough examination of the judgements in the preceding subsection would highlight the two-step test that the courts have been using to decide the cases on right to be forgotten: one, they assess the nature and sensitivity of the data i.e. whether it threatens the reputation of the petitioner in the society; two, whether the information is relevant and necessary so as to stay within public domain for the betterment of general public.³⁶ The second step can also be called ‘public necessity test’, i.e. whether the erasure infringes upon the right of the people to know.

The tacit test adopted by the Indian Courts is in contrast with the western countries who have adopted a ‘purpose-behind’ approach wherein a data can be erased from the Internet only when the initial purpose behind uploading it has been achieved. For instance, information about an individual convicted of rape or murder would pass the ‘public necessity test’, however, information of rape victim, or a speeding ticket, would fail the test and thus, can be taken down. These instances will receive similar verdicts in both types of countries as the core test in both India and Europe, is essentially the test of public interest.³⁷

While in the US, the freedom of speech is not restricted, it becomes imperative to explain that the freedom of expression in India has been

³⁵ Kavita Shanmugam, *A Series of Right to Be Forgotten Cases in Courts Highlight How India Doesn't Have a Privacy Law*, SCROLL.IN (Mar. 13, 2017), <https://scroll.in/article/831258/a-series-of-right-to-forgotten-cases-in-courts-highlight-how-india-still-doesnt-have-a-privacy-law>.

³⁶ Swapnil Tripathi, *India and its Version of the Right to Be Forgotten*, SOCIO-LEGAL REVIEW (July 23, 2017), <http://www.sociolegalreview.com/india-and-its-version-of-the-right-to-be-forgotten/>.

³⁷ Shanmugam, *supra* note 35.

construed with subject to restrictions as after the First Amendment (which was brought about as a response to decisions in cases such as *Romesh Thappar v. State of Madras* and *Brij Bhushan v. State of Delhi*³⁸), the modified Article 19(2) reads:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

This was challenged in 2015 following which Section 66A of Information and Technology Act was struck down as unconstitutional and a clear violation of Article 19.³⁹ In its judgement, the Supreme Court held:

The information disseminated over the Internet need not be information which ‘incites’ anybody at all. Written words may be sent that may be purely in the realm of ‘discussion’ or ‘advocacy’ of a ‘particular point of view’. Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Indian Penal Code at all.

³⁸ *Thappar v. State of Delhi*, (1950) S.C.R. 594 (India).

³⁹ *Singhal v. Union of India*, A.I.R. 2015 S.C. 1523 (India).

This line of thinking, despite striking down a restriction of freedom of speech, starts questioning the degree wherein annoyance or inconvenience via Internet posts can become detrimental to a person's life and dignity.

Thus, it becomes unambiguous to understand the position of the Court as there are limitations to freedom of speech, which can be interpreted by the judiciary in case by case basis, till the formulation of explicit laws. These laws should also draw clear distinctions on the scope and extent of the right.

5.3. IMPLICATION OF RIGHT TO PRIVACY JUDGEMENT

There is a conundrum whether the recent uproar about the right to privacy as a fundamental right under Article 21 of Constitution of India has laid down the bedrock for erasure right to be implemented in India. As Justice Y.V. Chandrachud, the author of the judgement⁴⁰ on behalf of five out of nine judges, explicitly observed that a “carefully structured regime for the protection of data may be created”. He affirms that privacy has both positive and negative features because it restrains “an intrusion upon the life and personal liberty of a citizen”, and also requires “an obligation on the state to take all necessary measures to protect the privacy of the individual”.

The court also placed reliance on the 2016 European Union Regulation (Article 17) that created the right to erasure. The realm of the envisioned right to be forgotten would definitely not be absolute extending

⁴⁰ Puttaswamy v. Union of India, (2014) 6 S.C.C. 433 (India).

to an unqualified erasure of history. The opinion expressed by Justice Kaul imposes the necessary restrictions on the basis of a) other fundamental rights (especially freedom of speech and expression) b) compliance with legal obligations (such as taxes) c) public interest d) public health e) archiving f) scientific, historical or statistical research and g) defence of legal claims.

Although the required caveats have been put forth, the immediacy of a legal framework is of cardinal importance. This nascence, however, doesn't undermine the presence of appreciation of right to be forgotten by the Indian courts. As proposed by Sohini Chatterjee, Research Fellow at Vidhi Centre for Legal Policy, two modes of recourse are brought in front of an individual: one, the violation of the envisaged 'right' can be brought to the courts, who in turn will enforce based on ad-hoc resolution; two, individual can approach the website or a private entity to request them to take down the data whose good sense on adjudication of fundamental rights will decide the course of action.⁴¹

6. IDENTIFIED SOLUTIONS

The parameter to decide what type of data comes under the ambit of erasure right under G.D.P.R. is an arguable concern raised by various jurists and other legal professionals. In an attempt to simplify the situations where right to be forgotten might surface, Peter Fleischer, Google's Global Privacy Counsel, describes three degrees of deletion of content in his blog.

⁴¹ Chatterjee, *supra* note 34.

Fleischer's model has made a significant development in understanding the different degrees of deletion of content itself, where the first degree of deletion is when the data subject is himself or herself the data controller and posts a picture, or text. It is, thus, fair that the data subject has complete autonomy in removing the post from the Internet. The second degree of deletion, in this model, is when the data, albeit originated from the data subject, is being subsequently copied and reposted by another individual. In this scenario, the data subject holds the right to exercise control over his original post, along with privacy interest. The third degree, as described in Fleischer's model, is when a third party exercises his freedom of expression by posting a picture or text about the data subject online. The third degree is the most difficult to be regulated under G.D.P.R. guidelines as it challenges the essentials of a democratic society and the fundamental rights bestowed on its citizens. Although the defamation laws do ensure any false information about the data subject is not circulated, its scope ceases beyond that and does not encompass the wide region of involuntary posts about the data subject floating in the internet.⁴²

Based on Fleischer's model of three degrees of deletion of content, Rustad and Kulevska proposed reforms on deletion of links in their research study.⁴³ They suggested that the private individuals, public officials and public figures shall have a right to be forgotten for the first two degrees of deletion: links to data originating with data subject and data originating with

⁴² Fleischer, *supra* note 14.

⁴³ Rustad & Kulevska, *supra* note 7.

the data subject that is reposted by third parties, where in only human beings and not corporations or other entities can claim this right of takedown. The third degree deletion of links to websites should be granted to private individuals where the data only serves to cause distress to the data subject. For public officials and public figures, such a right will not have such a right unless the data was published with actual malice and has no nexus to the public interest. These rights will be subject to the proviso where public's right to know is paramount.

7. CONCLUSION

While E.U. and U.S. have expressed their stands through the evolution of their case laws on right to be forgotten, this right still remains at a nascent stage of comprehension and development in India. The recent judgement has pronounced and cued to a probable law on right to be forgotten, however, drawing the boundaries will remain a contention. Since India is predominantly a politically controlled country, it necessitates differentiating between public and private individuals while structuring the laws. If a private individual that bears no public interest can be conferred the right, a public official or public figure may be excluded because erasure of such information will be detrimental to the society's right to awareness. Such a right can be exercised by a public figure only if the information bears no public interest or had purely malicious intentions from its inception. However, with the rampant intermingling of real and virtual life, it is the need of the hour to protect a person's dignity from being exploited because of past actions. As depicted in the episode titled 'The Entire History of You'

of Black Mirror, most of the past records will only be damaging to the human nexus and society, if left unregulated.⁴⁴

⁴⁴ Ryan Lambie, *Black Mirror Episode 3 Review: The Entire History of You*, DEN OF GEEK! (Dec. 19, 2011), <http://www.denofgeek.com/tv/10738/black-mirror-episode-3-review-the-entire-history-of-you>.

THE NEED FOR THE RIGHT TO BE FORGOTTEN IN INDIA

- *Tejashree J.**

ABSTRACT

The digital age has changed the trend from forgetting things to remembering things permanently and our digital identities are shaped by the online interactions leaving behind permanent digital footprint. In the early days of the internet, people were concerned with the technical details of sharing information. Now, people are concerned with the removal of their personal information. As of now an individual has control over his or her own words, images, videos from digital records but the question arises with regards to the removal of information which isn't under the direct control of an individual. This question can be answered by introducing the right to be forgotten as recognised by the European Union and few other countries. This paper in the various chapters it is divided in deals with the origin, the relation between the right to privacy and the right to be forgotten, the conflict between freedom of speech and this right, various data protection measures in India, the need for right to be forgotten. However, erasing the digital footprints from the data stores of private companies like Google, Facebook and other internet archives becomes significant.

This paper will bring out the need for the introduction of the right to be forgotten through which a request can be made to these companies to

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delete such irrelevant and outdated information about any individual. Countries like European Union, Spain, United States have partially accepted this right and the Indian judiciary has accepted the right to be forgotten in certain cases. The European Union being the first country to have accepted it has incorporated it in the form of directives and data protection policies. This article brings out various bills for the protection of sensitive personal data that is debated in India. This paper brings out the brief discussion of the right to privacy case (Aadhaar case) and the other case in Karnataka High court through which the right to be forgotten is creeping into Indian Law. This paper, briefly analyses the case, *Mario Costeja Gonzalez v. Google Spain SL & Google Inc.* where the European Court of justice first recognised the right to be forgotten. The contrast between the European Union and the US traditions of data privacy are brought out. The question regarding the extent of applicability of this right is also addressed in this paper as the complete acceptance of this right would lead to censorship of information available online which would lead to abuse of the right. Therefore, suggestions regarding various other alternatives that the search engines could take such as de-ranking system to protect personal details of an individual being shared by another individual from public access are discussed. This paper covers mainly, the reasons and the form of acceptance of the right to be forgotten, the fine tuning that is required in implementing this right and the extent up to which it would be acceptable in the Indian scenario.

1. INTRODUCTION

The intention behind the inclusion of the fundamental rights in the constitution by the members of the constituent assembly is to preserve and protect human dignity. Considering the intention of the fundamental rights it becomes important to protect the dignity of a person not only in its literal sense but to protect the personal information of an individual that is available in the electronic form or as digital data. The right to be forgotten should be accepted as a right and should fall within the ambit of right to privacy which has been accepted as a fundamental right in India lately. The origin of the right to be forgotten is from the landmark judgement by the court of justice of the European Union in a case. However, the roots of this right can be found in the French law, *le droit il'oubli* (the right of oblivion) which empowers a convicted criminal to object the publication of the facts of his conviction on the completion of the term of punishment. The European Union has limited this right to search engines. A search engine is a web site that searches, identifies, collects and organizes contents in a database that correspond to keywords or characters specified by the user, used especially for finding sites on the World Wide Web. These search engines sometimes contain sensitive, personal, outdated or irrelevant data which makes the right to be forgotten as an essential part of right to privacy. The right to be forgotten is part of the data protection regulations of the European Union but it is not an absolute right and is subject to certain conditions. The need for this right is to ensure that an individual has the control over the publication of his personal or sensitive data either at his

own hands or at the hands of a third party and to regulate the freedom of speech and expression.

2. THE ORIGIN OF THE RIGHT TO BE FORGOTTEN

The data protection directive of the European Union was officially accepted in 1995 and aimed at regulating the processing of personal data. However, this directive did not explicitly mention the right to be forgotten. The court of justice of the European Union recognised this right in the case, *Google Spain v. Gonzalez*. In 2010, Gonzalez, a Spanish citizen filed a complaint against Google Spain, Google Inc. and a Spanish Newspaper, *La Vanguardia* for posting all its newspapers online far back from 1881 to 2009 which contained the publication of the auction of Gonzalez's property way back in 1998. His property was auctioned to recover social security debt. In 2009, the newspaper posted all their records online and a Google search of his (plaintiff) name showed the advertisement of auction way back in 1998 and he had discharged all his debts almost ten years back. He lodged a complaint against Google as that information was no longer relevant nor timely.¹ The question related to whether Google processes data could be answered by examining its procedure in handling data while searching anything on its search engine. Google's query processor compares the search query with the index and displays the most relevant match. For this Google first stores it temporarily in its cache memory and which is then

¹ Lisa Owings, *The Right to Be Forgotten*, 9 AKRON INTELL. PROP. J. (Nov. 29, 2017, 8:00 AM), <http://ideaexchange.uakron.edu/akronintellectualproperty/vol9/iss1/3/>.

used to determine the right match for the query.² The court also noted that the aggregation of information may allow users to search any individual's name which can enable any person to gather a detailed data profile of the individual simply by typing a name. Thus, the court observed that the right to privacy is being infringed.³

The court held that the search engines do fall within the ambit of the data protection directive 95/46 of the European Union as the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and would mean "personal data" as defined in Article 2(a) of Directive 95/46.⁴ The Article 2(a) of the directive states as follows:

2(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

The right to be forgotten plays a key role when the provisions of the directive are not complied with. The directive states that it is the duty of the

² ANDREW KENYON, *COMPARATIVE DEFAMATION AND PRIVACY LAW* 202 (2016).

³ Owings, *supra* note 1, at 53.

⁴ Herke Kranenborg, *Google and the Right to Be Forgotten*, *EUROPEAN DATA PROTECTION LAW REVIEW* (Nov. 29, 2017, 8:00 AM), <https://edpl.lexxion.eu/list/articles/author/Kranenborg,%20Herke>.

controller of such data or the operator of search engines who is responsible to check if Article 6(1) is complied with. Article 6(1):

...(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.⁵

This judgement acknowledged the right to be forgotten where a request could be made to the respective search engines for removal or erasure of irrelevant and out dated personal data. However, this judgement was heavily criticised. The European Commission responded stating that the right to be forgotten aims at providing an individual the control over his personal data and should have the right to request for erasure of such data, if certain conditions are met.⁶ This right is subject to certain situations where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of data processing.

The European Commission had proposed few recommendations for the reformation of the data protection directive. The proposal stated that the

⁵ Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).

⁶ Michael Kelly & David Satola, *The Right to Be Forgotten*, U. ILL. L. REV. (Nov. 29, 2017, 7:59 AM), <https://illinoislawreview.org/print/volume-2017-issue-1/the-right-to-be-forgotten/>.

data subject has the right to request to the controller for the erasure of personal data from search engines, prevent the further dissemination of such information and make the controller responsible for the publication of personal data of an individual by a third party.⁷ This right is not limited to the publication of any information about the rehabilitated criminals but extends to every individual to preserve one's dignity. Therefore, the origin of this right or the introduction of this right can be found in the proposals or recommendations of the European Union Commission. The practical implication of this right took place to three of the articles of 'The Guardian' where three out of six articles were de-ranked or the access to those articles were made difficult or archived.⁸ It would be relevant to delete all the archives as well in cases where the dignity, job security, well-being of a rehabilitated criminal is concerned. However, de-ranking or archiving the content seems appropriate in cases where certain information seems irrelevant or outdated. The European court stated that Google must act as the data controller and the controller is bound to check the processing of data as per Article 6 of the Data Protection Directive. The General Data Protection Regulation, 2016 has formally accepted the right to be forgotten and aims at 'strengthening' it under Article 17.⁹

⁷ *The Factsheet on "The Right To Be Forgotten" Ruling*, EUROPEAN COMM'N (Nov. 30, 2017, 8:00 PM),

ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf.

⁸ James Ball, *EU's Right to Be forgotten: Guardian Articles Have Been Hidden by Google*, THE GUARDIAN (Jan. 10, 2018, 8:25 PM),

www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google.

⁹ Commission Regulation 2016/679, The General Data Protection Regulation.

3. RIGHT TO PRIVACY AND RIGHT TO BE FORGOTTEN

The right to be forgotten means providing every individual the right or ability to erase, limit, delink, and delete personal information on the Internet that is embarrassing, irrelevant, or inaccurate.¹⁰ The right to be forgotten is within the ambit of the right to privacy. The right to privacy applies to that personal information, both digital or physical that will directly affect the dignity of an individual if published. Privacy can sometimes be considered as an intellectual property right.¹¹ Considering the right to be forgotten as an intellectual property right will form the basis for providing every individual the right to control their own data. The reason being that by considering personal data as a property it can be protected from misuse as an individual could have either quasi control over the data that a third party publishes about the first party and complete control over those information that were published by himself.¹² The right to privacy has two different points of views. Privacy can be the tool to ensure personal liberty as in the case of United States whereas it acts as a tool to preserve personal dignity as in the case of European countries.¹³ Most of the countries have accepted right to Privacy to preserve human dignity. As the Indian constitution stresses on right to life and dignity, then such dignity should

¹⁰ Kelly & Satola, *supra* note 6, at 1.

¹¹ Richard Murphy, *Property Rights in Personal Information: An Economic Defence of Privacy*, GEO. L.J. 2381, 2383-84.

¹² Robert Walker, *The Right to Be Forgotten*, HASTINGS L.J. 257, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017967.

¹³ *Id.* at 268.

include the right to privacy to protect one's personal information and sensitive information.

The Supreme Court of India has recently declared the right to privacy as a fundamental right and that it comes within the ambit of Article 21 of the Indian constitution as right to privacy directly deals with the right to life, liberty and dignity. The right to be forgotten is correlated with the right to privacy. Regarding the removal of information under the right to be forgotten, it is important to note that information or data could be either posted by himself or a third party. Firstly, the information that isn't newsworthy or offending should not be posted but however it can be requested for removal if the information is found to be sensitive.¹⁴ Secondly, the information that has been posted by an individual about another individual can also be removed but only if certain conditions such as timely irrelevancy and inaccuracy are met with. The right to be forgotten is more specific with respect to data protection and should be limited to search engines only whereas the right to privacy has a wider interpretation of protecting all personal and sensitive information of individuals.

Regarding the controversy of whether defamation and privacy are alike. Firstly, defamation as defined by English case laws 'a statement that might tend to lower the plaintiff in the estimation of right thinking members of the society'. Privacy is newly developed as a concept when compared to defamation and becomes relevant when any information that seems to be sensitive or personal whose publication would offend the respective

¹⁴ Owings, *supra* note 1, at 69.

individual. This means that defamation aims at protecting the reputation and esteem of an individual whereas privacy tort deals with statements or information that may not have to be false to take action but offends an individual's private life.¹⁵ Similarly the right to be forgotten would facilitate or extend the right to privacy to online data, search engines and archived links.

4. FREEDOM OF SPEECH AND RIGHT TO BE FORGOTTEN

The most controversial concern about introducing right to be forgotten is, its contradictory nature with the freedom of speech which is a constitutional right. Article 19 of the Indian constitution provides the freedom of speech and thought. Therefore, the right to be forgotten will ensure every individual to express freely without thinking twice about the future consequences. The most important concern about the right to be forgotten is to enable people to speak and write freely, without the shadow of what they express currently to haunt them in future.¹⁶

The C.J.E.U.'s decision in *Costeja's* case by accepting and introducing the right to be forgotten was criticised heavily to the fact that it would lead to censorship. However, the United States and Canadian commentators agreed to the fact that the right to be forgotten will violate the freedom of speech. The threat arises when this right is made a

¹⁵ Kenyon, *supra* note 2, at 310-11.

¹⁶ Mike Wagner & Yun Li-Reilly, *Right to Be Forgotten*, FARRIS (Nov. 29, 2017, 8:00 AM), <http://www.farris.com/images/uploads/MikeWagnerandYunLiReilly,TheRightToBeForgotten,72Advocate82.v2.pdf>.

constitutional right as it would conflict with the fundamental right (freedom of speech). Google's contention is that the introduction of such a right would infringe its freedom of speech as it will have to de-list certain links wherein the original content is made available but not its link on Google. The next alternative would be making it as a statutory right, yet again the same conflict arises between a fundamental right and a statutory right.¹⁷

In U.K., the data protection directive 95/46/EC was implemented by passing the Data Protection Act, 1998. The act aims at regulating the processing of data and concentrates on 'sensitive personal information'. Since the right to privacy has already been accepted as a fundamental right in the Indian Constitution it will be appropriate to include the right to be forgotten within the ambit of right to privacy to ensure the safety of personal information in any form, digital or physical. However, the conflict between the right to privacy and freedom of speech should have a mechanism or rules to be followed when questioned.

5. THE DATA PROTECTION MECHANISM IN INDIA

Data protection laws are of utmost importance in the current scenario. The best data privacy solution could be in terms of user search-query logs and the immediate deletion of such information. The Database of Intentions a platform for government investigators, private litigants, data

¹⁷ Edward Lee, *The Right to Be Forgotten v. Free Speech*, JOURNAL OF LAW AND POL'Y FOR THE INFO. SOC'Y 85, 91-92.

thieves, and commercial parties to exercise excess control and intervene in someone's privacy.¹⁸

There have been various bills for protection of personal data of individuals. The Personal Data (Protection) Bill, 2013 aimed at establishing the several types of data that can be considered and protected as sensitive personal information. Biometric data that can be protected as defined under Section 2(e) of the Personal (Protection) Bill, 2013 states that "biometric data means any data relating to the physical, physiological or behavioural characteristics of a person which allow their unique identification including, but not restricted to, facial images, finger prints, hand prints, foot prints, iris recognition, hand writing, typing dynamics, gait analysis and speech recognition" and the bill also defines sensitive personal data as any personal information that falls under any of the following information:

(i) Biometric data; (ii) deoxyribonucleic acid data; (iii) sexual preferences and practices; (iv) medical history and health; (v) political affiliation; (vi) commission, or alleged commission, of any offence; (vii) ethnicity, religion, race or caste; and (viii) financial and credit information. The bill aimed at regulating the processing of personal data and it is stated under Section 9 that no personal information that no longer serves the purpose for which it was collected should be processed.¹⁹

¹⁸ Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, UTAH L. REV.

¹⁹ The Personal Data (Protection) Bill, 2013, available at cis-india.org/internet-governance/blog/the-personal-data-protection-bill-2013.

The Data (Privacy and Protection) Bill, 2017 as introduced by the Lok Sabha aims to codify data privacy rights. The main objective of the bill is “to codify and safeguard the right to privacy in the digital age and constitute a Data Privacy Authority to protect personal data and for matters connected therewith”. The sensitive personal data as defined in this bill is as following:

(i) racial or ethnic origins, political or religious views; (ii) passwords; (iii) financial information such as bank account or credit card or debit card or other payment instrument details or financial transactions records; (iv) physical, physiological and mental health condition; (v) sexual activity; (vi) medical records and history; (vii) biometric data relating to the physical, physiological or behavioural characteristics of a natural person which allow their unique identification including, but not limited to, facial images, genetic information, fingerprints, hand prints, foot prints, iris recognition, hand writing, typing dynamics, gait analysis and speech recognition; (viii) any details relating to clauses (i) to (vii) above as provided to body corporate for providing service; and (ix) any of the information received under clauses (i) to (vii) above by body corporate for processing, stored or processed under lawful contract or otherwise:

Provided that any information that is freely and lawfully available or accessible in public domain or furnished under the

Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data for the purposes of this Act.

The Bill also provides a right to privacy and data protection under Section 4 of the proposed Bill. The other significant provisions of the Bill are Section 8 and Section 9 which reads as follows:

8. Every person shall have access to his personal data which is collected, processed, used or stored by Data Controllers and Data Processors, including the right to obtain a copy and obtain confirmation that his data is being processed along with any supplementary information corresponding to the information mandated under Schedule II of this Act.

9. (1) Every person shall have the right to have his personal data rectified if it is inaccurate or incomplete.²⁰

These are the recent provisions that aim at protecting sensitive personal information of individuals. However, the issue of search engines might not be completely resolved by these bills. Therefore, the right to be forgotten becomes more appropriate in such cases.

6. THE RIGHT TO BE FORGOTTEN

The right to be forgotten is distinct and independent of the right to oblivion or right to erasure. This right comes within the umbrella of the intellectual privacy available to every human. It aims at maintaining a

²⁰ The Data (Privacy and Protection) Bill, 2017, available at <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/889LS%20AS.pdf>.

balance between data subjects and processors.²¹ This right with respect to search engines involves two aspects of search engine privacy. Firstly, the personal information of any individual being accessible. A balance must be maintained between the efficiency benefits of search engines and the privacy costs of search engine activity. Secondly, there is the privacy interest of the person searching.²² In the critical analysis of right to be forgotten by Bert-Jaap Koops, he has answered the questions as to when and against whom this right can be exercised. The data subject can exercise this right when the information is no longer relevant, it is exercised against the data controller. However, complications may arise in Web 2.0 situations where information is posted by a third party.²³ The right to be forgotten for individuals is to relieve victims by providing a legal remedy whereas the right against institutions will fall under the category established by the European Court of Justice in *Costeja* case where the data controllers are held responsible as per the Data Protection Regulation.²⁴

The right to be forgotten is not mentioned explicitly by the U.S. consumer privacy rights but certain other provisions like the right of expungement of juvenile offences are stated. Although certain countries

²¹ Aidan Forde, *Implications of the Right to Be Forgotten*, 86 TUL. J. TECH. & INTELL. PROP.

²² Tene, *supra* note 18 at 1440-41.

²³ Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to Be Forgotten"* In *Big Data Practice*, SCRIPTED (Jan. 6, 2018, 8:42 PM), scripted.org/article/forgetting-footprints-shunning-shadows/.

²⁴ Wagner & Li-Reilly, *supra* note 16, at 118-21.

extend this expungement right to young adults.²⁵ In California this right is limited to children and social media.²⁶ This right can be claimed based on the circumstantial evidence. If the problem could be solved by just limiting the access or de-indexing the links then this right should not be applicable. However, if de-indexing is insufficient to protect ones privacy, the right to be forgotten must be applicable. The three degrees of deletion of data that conflicts with the right to privacy are classified on the basis whether an information that a person himself posts has to be removed, when an information that has been copied and posted by another person and when a third-party posts information about an individual.²⁷

7. THE RIGHT TO BE FORGOTTEN IN INDIA

The right to be forgotten means that every individual (data subject) has the right to remove the contents they post online if the content is irrelevant or no longer serves the purpose why it was created as per Article 17(1) (a) of the directive.²⁸ The landmark judgment of the right to be forgotten in India by the Karnataka High Court in, *Shri Vasunathan v. The Registrar General*,²⁹ Writ Petition No. 62038/2016 has recognised this right especially considering women and related sensitive issues like rape, modesty and reputation. The writ petition was filed by a petitioner on behalf

²⁵ Michael Rustad & Sanna Kulevska, *Reconceptualising the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARVARD J.L. & TECH. 351, 379-80 (2018).

²⁶ *Id.* at 380.

²⁷ Owings, *supra* note 1, at 67.

²⁸ Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).

²⁹ *Vasunathan v. The Registrar Gen.*, 2017 S.C.C. OnLine Kar. 424.

of his daughter to mask his daughter's name from previous criminal records to prevent further negative consequences in terms of her family, reputation and livelihood. However, the court observed:

*This is in line with the trend in Western countries of 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.*³⁰

Therefore, this is the landmark entry of the partial right to be forgotten. However, the scope of this right as mentioned by Justice Anand Byreddy in the instant case is limited to sensitive issues related to women, but the right that is to be considered is the delinking of the personal information from the direct access of public by typing it in search engines to protect the right to privacy as established by the Supreme Court of India in the Aadhaar case (*Justice K.S. Puttaswamy v. Union of India*). In the instant case, the right to be forgotten has been mentioned explicitly. The bench has accepted to the fact that every individual should have the right to change his/her beliefs and change his views. The court observed:

Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy, has to be balanced against

³⁰Arunima Bhattacharya, *In a First an Indian Court Upholds the 'Right to Be Forgotten'*, LIVELAW (Jan. 6, 2018, 7:47 PM), www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/.

*other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.*³¹

The court also accepted the E.U. regulation of 2017, which applies to information that is irrelevant, inaccurate and serves no legitimate interest.³² There is an ongoing case in Delhi High Court, where the right to be forgotten is being debated. If the right to be forgotten is not accepted to be within the ambit of right to privacy it wouldn't serve its purpose. Therefore, the right to be forgotten should be formally introduced by the legislature and have a regulatory mechanism to ensure non-intervention with an individual's privacy.

8. CONCLUSION

The evolution of technologies has contributed for the development of the country to a significant extent. The digital age has made almost everything accessible easily. Search engines like Google play a significant role by providing access to a large variety of information on a day to day basis. A problem arises when personal information is being displayed in the search results or made accessible to users by matching search queries. The right to be forgotten aims at solving these kinds of issues. This right is not limited to right to oblivion or the right to remove names of rehabilitated criminals from past criminal records. The right to be forgotten means the ability of individuals to erase, limit, delink, delete, or correct

³¹ Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

³² *Id.* at 488.

personal information on the Internet that is irrelevant, inaccurate or inadequate.

The European Union first accepted this right in *Costeja's* case, considering the Data Protection Directive, 1995. However, the scope is limited to 'sensitive data' as defined in the directive. The data protection bills of 2013 and 2017 in India, serve the purpose of protecting sensitive personal information online but remains silent in the context of search engines. The freedom of speech and right to be forgotten are often considered to be conflicting concepts but these concepts are interlinked. The right to be forgotten would empower the legitimate sense of freedom of speech as no individual will restrict his thoughts to prevent future embarrassments or consequences.

Thus, this would bring out the true sense of freedom of thought or speech. The right to be forgotten falls within the ambit of the right to privacy as the latter has a wider scope. The right to privacy has two divisions, first one is personal physical privacy, second is intellectual privacy. Digital privacy falls under intellectual privacy. The right to be forgotten has two aspects, firstly, the safety of personal information and secondly, the links of third parties being displayed as a result of search queries. The scope of this right is limited to children in U.S. law and in California, whereas it has been introduced in India limiting to women so far. The dissemination of information that is no longer relevant, adequate, accurate, or timely is to be considered to enforce the right to be forgotten and the data controller is held accountable as per the E.U. directive and other data protection bills in India.

The extent up to which this right must be exercised is subject to each country and their pre-existing data protection laws. In the Indian scenario, the right to be forgotten should fall under right to privacy and should not be made an absolute right. The right should be made enforceable in cases where the de-indexing or archiving would not be sufficient to protect one's right to privacy.

The introduction of this right will not only protect personal sensitive data and biometric data but will also empower the freedom of speech and extend the scope of the right to privacy to the digital information as well. With the evolution of technology and easy access search engines, a mechanism to protect the privacy of every individual becomes necessary. Thus, the introduction of the right in India with respect to search engines along with other personal data protection laws will resolve the problem of data insecurity and misuse of any kind of personal information. Thus, the right to be forgotten should not be limited only to the extent of the right to erasure (right to oblivion) of personal identity from old criminal records and crimes committed by women or children but should extend to all the citizens of a country in terms of digital footprint, considering the extent of the infringement of their right to privacy or more specifically the infringement of the right to be forgotten.

CROSS MEDIA OWNERSHIP: A NEMESIS TO FREE MEDIA

- Yash Dutt & Shekhar Yadav***

ABSTRACT

Dominance and monopoly have never proved out to be beneficial for the end consumer in any market; similarly, the present scenario prevailing within the media industry is that of leverage and mastery of some behemoths of the industry over the commodity called “Information”. The congestion caused by the influx of various media outlets and channels for the dispensation of information from various forums and sources has been the result of the supremacy of some few organizations exercising what has been termed as cross mediaownership. This paper analyses this phenomenon of monopoly and the ownership pattern of such organizations and shows how they are connected to the political and business worlds and what influence this has caused upon them. The media is often referred to as the fourth pillar of democracy which separates the grain from the chaff for the common masses in order so that they can conceive in their opinions and participate in the democratic process of debate but when the media which is the ultimate information source is bent then it results in serious ramifications adversely affecting the democratic setup of the nation. This paper elucidates that how the control mechanism in the hands of a few individuals from the upper echelons of the society blur the public perception

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and promote misconception. The research also seeks to understand the trends in cross media ownership and its corollaries. Showcasing the hazards of such trends in a democratic country the paper establishes the need for a statutory regulatory mechanism which is requisite in order to curb the menace of this evil. The paper also suggests ways by which the concerned authorities can exercise their powers within the law in order to put in place and regulate this extremely significant sector of an intrinsically democratic nation like India without hampering its functioning and also without violating the fundamental right of free speech.

1. INTRODUCTION

In the past decades the influence and growth of media as a whole have seen rapid strides and in the recent scenario media constitutes to be an important aspect of the functioning of our country. The electronic habitat of the country has developed beyond imagination with the media landscape growing from a few state-owned channels run by Doordarshan to the emergence and introduction of foreign-owned channels and joint ventures like Star and NDTV which shows the ever growing influence media exhibits in the Indian sphere. It can also be seen by the fact that the Indian media industry is estimated at about a whopping Rs. 1052 billion with its value on the rise every single day. Owing to its wide spread influence a reasonable question arises that is, who owns the electronic and information media of our country? The question the easier it seems is rather a difficult one to answer. In India, the control of many media organizations basically resides in the hands of various bodies such as corporations, corporate bodies, and

many individuals. But a detailed investigation and analysis of these organizations is rather a difficult task since most of the information available about these bodies is either incomplete or dispersed. Nonetheless few conclusions from the available insufficient information can still be drawn which are as follows:

1. The Indian media sphere is oligopolistic in nature since a few big players acquire a dominant position and shape the industry's character owing to their large influence which they possess over it.
2. The dominance of the few big players can be observed in both a vertical range (across different Media) and a horizontal range (across a particular region) due to the absence of strict rules and regulations on cross media ownership.
3. In the recent scenario, there also have been seen portions of the media in India being controlled by political parties and a number of influential people associated with such political parties.
4. It has also been seen that along with having an interest in the media outlets, media group's backers and controllers occupy interests in various other diverse businesses too and often put to use the profits derived from their media businesses activities to their other diverse businesses. The profits not only accrue in monetary terms but also in the way of improved brand rapport, increased presence in the media, increase in customer base by rigorously promoted advertisements, easy promotion of new schemes and projects.

Over the years the global media industry has seen various mergers between various media houses which have caused a drop in the heterogeneity level and diversity in the media market across the globe. This phenomenon can be seen as the impact of the growing consolidation of the media entities across the globe especially those in the developed countries. But it is to be noted that there lies a huge contrast between the Indian media market and those of developed countries. For instance, India hasn't achieved the status of a developed nation and is still in the phase of development and thus various sections and divisions of the Indian media industry are still in the phase of development, unlike developed countries where the media industry has fully achieved its potential. Owing to the sheer magnitude of the plurality which exists in a nation like India, which boasts of multiple languages, different cultures, religions, multiparty political system, an economy for diverse businesses, the Indian media remains highly disunited and divided. This, in the present context means that the media as an industry is highly segregated on the basis of the above mentioned factors and most significantly on the basis of their political allegiances and business interests. The sense of unity in Indian media is lost and there exists serious acrimony between media groups, which in turn affects their manner of functioning and showcasing of information.

Over the years there has been observed a rapid expansion in the number of radio stations, television channels, internet websites and various publications which have provided nothing but plurality and an array of choices to the Indian consumers. As per the data available with the

government, a total of 1, 05,443 newspapers/periodicals are registered with the registrar of newspapers as on Mar. 31, 2015 along with a more than 1000 diverse radio stations. Also, after the allowance of Ministry of Information & Broadcasting, India currently boasts of a total of more than 850 television channels including 350 news and current affairs channels.¹ But despite these staggering and huge numbers of various forms of mass communication there are not more than a hundred big groups and corporations which own the Indian media market and their influence over it is ever growing which can be seen by the fact that they continue to directly influence what is read, heard and watched by the general masses. All this has thus led to the ever growing need of certain forms of checks and limitations on control and ownership of various media outlets. But in the recent times the attitude shown by various dominant media corporations and groups towards the need for restrictions and control over ownership is not satisfying and far from desired. We have witnessed an unwillingness and dissent on the part of the established media conglomerates since they contend that a regulation and control over the ownership would result in a deceitful, immoral and an ambiguous framework of censorship. They have also received the much needed support from the government on their desired notion since there exists a dual dependence between them as political leaders need media groups support as much as media groups need political leaders.

¹ Registrar of Newspapers for India, *Press in India*, RNI, http://rni.nic.in/pin2014_15/pin-contents.pdf.

A few years ago, a detailed account in form of a report urging the implementation of the concept of cross media ownership and imposition of various restrictions was brought into Indian public domain. The report was prepared and submitted by an autonomous organization following a censure by a council of legislators. The report which consisted of almost 200 pages was formulated by the Administrative Staff College of India (ASCI) on inducement of Ministry of Information and Broadcasting. The report though being advanced and submitted to the Ministry in July 2009 didn't find a place on the Ministry's website and was subsequently neglected. This move by the Ministry was heavily criticized by the Parliament's standing committee on information technology which termed the Ministry's behaviour as of a neglecting nature and ultimately condemning the Ministry's actions of not taking and instituting any measures on the suggestions made by the ASCI.

1.1. MARKET DOMINANCE

The ASCI in its report carefully scrutinized the Indian media market and its ownership regime and rightfully indicated how the Indian media market is under the influence of certain big market players who possess considerable dominance in the Indian setting and thus contended in favour of an well-established structure and skeleton for implementing restrictions on cross media ownership, chiefly in media markets of territorial nature since regional markets involve notable centring of market dominance unlike markets at a regional levels.

But despite ASCI's strong investigation on the concerned matter and subsequent beneficial recommendations made by it for implementation of a well-established regulatory framework, it received a shunning attitude from the government which ultimately lead to the refusal and non acceptance of the said recommendations. This neglecting attitude could also be witnessed by government's act of hurling the disputable issue before the Telecom Regulatory Authority of India's (hereinafter referred as 'TRAI') court for deciding and adjudicating the said matter.

The Parliament's standing committee which was presided by Congress MP Rao Inderjit Singh placed a strong emphasis on the fact that the matter of imposition of control over cross media ownership is of crucial significance and thus requires immediate scrutinization before it goes on to become a viable menace for our parliamentary structure. The committee also asked the Ministry to formulate its perspective and position on the concerned matter in collaboration with the TRAI with a keen emphasis on the various international practices and general notion on media ownership observed across the world.²

In Feb., 2009 the TRAI came out with its report in which it strongly asserted on the fact that limitations should be imposed on the three footings of Indian media which are radio, television and print since protection of diversity and multiplicity of these footing is necessary. But these ideas of implementation of reforms in media industry by the government were

² MINISTRY OF INFO. & BROAD., 47TH REP. OF THE STANDING COMM. OF INFO. TECH. ON ISSUES RELATED TO PAID NEWS, *available at* <https://keralamediaacademy.org/wp-content/uploads/2015/02/Media-lok-sabha-report.pdf> (last accessed Aug. 27, 2018)

strongly rejected by the prominent media houses that showed great resistance to the said idea. Among various contentions and reasoning presented by them they mainly emphasized on the fact that such regulations and restrictions in their sector would prove to be a roadblock and would hinder and impede the rate of growth of their sector and the nation overall along with stressing on the fact that implementation of restrictions and rules would violate their constitutional right of freedom of speech to a great extent. Furthermore, it was also asserted by print houses and groups specifically those related to newspapers and publishing houses that TRAI lacked the required jurisdiction and thus was not in a position to make suggestions in matters which specifically did not deal with telecommunication and thus TRAI should not have been allowed to make such recommendations. All the arguments advanced on behalf of the various media houses were carefully considered by the TRAI which in its deduction opined to the fact that restrictions in the Indian media sphere over the concept of regulation of ownerships is the need of the hour and should be given the due importance so that their implementation could be done at the earliest. The T.R.A.I. also stated how Indian media market should be run in accordance with the general principles and practices as observed and followed in the developed nations since media holds a significant position in a nation's affairs.

The T.R.A.I. in its conclusion also insisted on the fact on how constraints on vertical integration are greatly desired since vertical integration in the Indian media market directly results into and promotes

behaviour of anti-competitive nature through which a distributor enjoys a dominating position in which he may prejudice his/her own broadcaster's material against the content of his/her rival broadcaster. This sort of situation and behaviour is undesirable in any scenario since it would result in a setting which would give undue advantage to large big aggregate players in the media market giving them the Liberty to force and thrust their favoured content, a situation characterized as hazardous by many.

Regardless of the strong opposition and confrontation on part of the media houses owners a widespread frequent occurrence of a range of Immoral and unlawful activities made the need for a robust, well laid out and a viable regulating framework and rules much desired since the lack of a regulatory framework has made the matters worse has made the matters worse and almost injurious. Due to such a series of events one stands on a confusing notion since one finds it difficult to ascertain the fact that of whether the various news and publications as formulated all over the country include the much desired element of fairness, whether the various media houses situated all over the country follow the prescribed moral trade regulations or not or whether any drive initiated by any media brand in opposition to any step or decision taken by the government is aided or assisted by any pro communal section of the society.

Though the concept of cross media ownership is seen as an ever growing threat by the government, the media industry itself plunges in between the fact of whether to term this growing phenomenon as a boon or a bane. The first line of defence which the media industry and the business

community take when confronted with this question is that of their fundamental right to carry on any trade and profession but no fundamental right is unrestricted in its practice and reasonable restrictions can be placed on them according to Article 19 (1)(6) and while, Article 19(1)(a) of the Constitution of India guarantees a right to “freedom of speech and expression” it also guarantees the people of India the “right to know”³, which in the present context can be interpreted as credible news and information . In a democracy, transparency can only be ensured when the people get to see behind the veils of secrecy and there is no adulteration in the commodity called “Information” in which the media groups these days trade.

Avijit Deb, Solicitor and Legal Adviser to the ABP Group has remarked, “Media has grown over a period of time in the hands of some families. The only thing one has to do is to go to the Registrar of Newspapers for India and apply for a title, and once the title is approved, one can go ahead and print it.”⁴

Pulak Bagchi, Vice President, Legal and Authority, STAR India remarked, “When we look at media there are a few factors to it. These are content, pipeline and investment. For enabling differentiation for media as a whole, we need to recognise and synergise between these three variables. From an economic point of view, India has been regulated to some extent.”⁵

³ P.U.C.L. v. Union of India, (2003) 4 S.C.C. 399.

⁴ Abid Hassan, *Industry Divided on Cross Media Ownership*, EXCHANGE4MEDIA, http://www.exchange4media.com/others/industry-divided-on-cross-media-ownership_50159.html.

⁵ *Id.*

According to Annurag Batra, Chairman and Editor-in-Chief, Exchange4media Group, the industry has seen convergence in terms of technology, advertisement and entertainment. “It is happening all the way and one need not worry about ‘cartelisation’ of Indian media.”⁶ Commenting on the consultation paper on cross media ownership released by the Telecom Regulatory Authority of India (TRAI), he said, “It is very theoretical. How will you pull back the ownership of companies? It won’t work.”⁷

But it has been widely seen that cross media ownership results in a series of disadvantages especially to public and masses in general since the news and its contents which we read and watch on a daily basis goes through a process of filtration by the media houses in order to satisfy the interests of their various controllers since nearly all media groups come under the ownership of powerful political parties who carefully oversee and supervise the various news and content that gets dispersed by the media houses. In April ,2011 when 4 states (namely West Bengal, Assam, Kerala, Tamil Nadu) and one Union Territory (namely Puducherry) were going to polls in India , the Election Commission of India had to issue over 200 notices for stopping political parties from planting campaigns in the garb of news. Gujarat witnessed 414 cases of paid news during the 2012 elections. The Election Commission still struggles with this problem.⁸

⁶ *Id.*

⁷ *Id.*

⁸ Anubhoti Vishnoi, *Paid News Sets Alarm Bells Ringing in Gujarat Again, EC Probing 400 Cases*, THE PRINT (Dec. 6, 2017), theprint.in/politics/gujarat-election-2017/paid-news-gujarat-ec-probing (last accessed Aug. 27, 2018).

In India, the ownership of media groups and houses has traditionally been seen in the hands of certain political parties who have enjoyed significant control over them since their inception apart from being owned by wealthy conglomerates and business groups. Following are the famous examples such ownership regimes as observed in the Indian media market.

The Deccan Chronicle, for instance, has T Venkataraman Reddy as its chairman who is the son of the late Congress MP T Chandrasekhar, and nephew of Congress MP T Subbirami Reddy. Hindustan Times which has forayed into the digital sector apart from a few others has Shobhana Bhartia as the Chairperson and editorial director who is again the daughter of Industrialist KK Birla. The director, Shamit Bhartia, is the husband of Nayantari Kothari, who is a niece of Mukesh and Anil Ambani, CEO of Reliance Industries Limited and Chairman of Anil Dhirubai Ambani Group respectively. Zee News, is a wholly owned subsidiary of Essel Corporate Resources Private Limited, has its shares divided among a wide number of business firms, corporate conglomerates, and individual stakeholders.

These are just some of the facts and figures that come up in the big picture.

Apart from this there is also the factor of chain ownership operating, where the conglomerates hold most of the print and publishing business. For instance, newspapers like the groups headed by the Times of India, Ananda Bazar Patrika, The Statesman, Indian Express, Telegraph and Hindustan Times are such cases. Subhas Chandra who is the Promoter of

the Essel Group is the brother of Laxmi Narayan Goel, the Chairman of Suncity Project Limited and the father of Punit Goenka, the MD of Zee Entertainment Enterprise Ltd. (according to 2012). He also holds a Rajya Sabha ticket from the BJP.⁹ There may not be anything wrong or illegal about the ownership pattern but it certainly raises the possibility of a conflict of interest situation. As far as instance of malice is concerned, it is a widely known fact about Zee media group that they have been accused of being involved in the Naveen Jindal (was a Member of Parliament from the Congress) blackmailing case for which the channel is facing a defamation suit and its senior editors were jailed on extortion charges.

But to say in a nutshell such trends in ownerships and control of media houses can never be encouraged since they ultimately lead to the reduction in the level of plurality, diversity, and multiplicity in the Indian media market since it would prove to be unhealthy and injurious to the general public and the nation as a whole.

Cross media ownership is an emerging threat to the Indian democracy, in a nation like India where the media plays a significant role in exercising democratic rights like freedom of speech and expression the seeping in of such evils makes such rights vulnerable to abuse and misuse in the garb of the exercise of fundamental rights. The most significant reason which contributes towards its growth is the lack of regulation by any statutory body , the Indian government still desires to make up for the loss

⁹ Sanjukta Das Bhowmick, *Hypocritical Media Houses*, ED TIMES, <http://edtimes.in/2017/05/dear-media-houses-when-you-owned-political-partiescorporates-you-cant-be-hypocritical-cry-foul/>.

of reputation which it had to suffer during the emergency era when there was heavy censorship imposed on the media in a dictatorial manner, in addition to this the media guilds have also been vociferous in their opposition to the government for the creation of any regulatory authority which oversees the operation and the conduct of media houses in India. The lack of a regulatory framework not only allows private players to manipulate the media industry but also to manufacture content which proves to be conducive to their interests. The fourth pillar of democracy today stands vitiated as commercial interests have been dissolved in the practice of journalism. Media not only plays the role of disseminating information and informing the masses but also plays the role of a watchdog of democracy, it keeps the political class of the country at check by following public figures like their shadows and keeping them accountable for answers, explanations and by demanding transparency in their conduct as public servants, the same applies to the business world but how will such democratic goals be achieved when the media which has to hold them accountable will be controlled by such individuals themselves. The emphasis needs to be laid on the fact that there is only a need for regulation and not for censorship; regulation and censorship are two entirely different aspects.

The notion of cross media ownership is widespread and evident with the fact that today the media industry is an oligopolistic market which means only few corporations control several media organizations and enjoy their majority stake in them by exercising power and influence over the

content which the media projects out. Cross media ownership has existed in India since independence when the most prevalent form of media which was the print media even had several conglomerates exercising ownership rights over it. Earlier only conglomerates engaged in heavy and mainstream industries were investors in media houses but today it seems as if the media industry has opened up a membership for money throwers as businesses of diverse backgrounds are inter mingling with media houses by either setting up their own channels or their press houses. The absence of a regulatory authority for the media has resulted in various media channels and print platforms mushrooming and operating according to their own fancies reporting what they are instructed to report or print what they are directed to print. Column spaces in newspapers are up for sales and space is not allotted to an important issue but is reserved for the individual who pays the price for that space. The Information and the Broadcasting Ministry of India only has a limited role which only lasts up to the process of providing licenses. Groups from the political and business arenas generally control media houses in our country which significantly raises the vexed question of conflict of interest.

There are myriad examples to prove the above as for instance if we observe the scenario in South India we can find that all the major political juggernauts have their own media fronts with M. Karunanidhi (The supremo of the Dravida Munnetra Kazhgam) owning the Kalaignar TV, his

nephew Kalanithi Maran owning Sun TV, ¹⁰ the recently deceased AIADMK (All India Dravida Munnetra Kazhagam) chief J. Jayalalitha owned Jaya TV, actor turned politician Vijay kanth (Desiya Murpokku Dravida Kazhagam) owns the Captain TV through his brother in law. The South Indian arm of the congress party controls Megha TV, Basanth TV, Jaggan Reddy owning the Sakshi TV and Sakshi newspaper, the son of N. Chandrababhu Naidu the present Chief Minister of Andhra Pradesh owns the Studio N. As far as the business world is concerned noteworthy names from this sphere too are also key players in participating in the process of Cross Media Ownership the most prominent example being Anil Ambani's Reliance Group which has majority shareholding in Network 18 which further owns CNN – IBN, IBN 7 and CNBC TV 18, the TV Today group headed by media mogul Aroon Purie owns channels as famous as AajTak, Headlines Today and India Today. The presence as well as the popularity of electronic media in India has quadrupled in the past three decades due to which every media house has been able to generate heavy profits and like any wise financial entity they have invested their proceeds into diverse fields such as education, oil, textiles etc.

The Bennet Coleman group (BCCL) also known as the Times Group has recently launched its own educational front in the form of a private university namely, “The Bennett University” offering technical education.

¹⁰ *ASCI Cross Media Ownership in India Report*, ADMINISTRATIVE STAFF COLLEGE OF INDIA, http://cablequest.org/pdfs/i_b/ASCI%20Cross%20Media%20ownership%20in%20India%202009.pdf.

Even the controlling stake in today's media houses lies not in the hand of journalists or editors but professionals from other fields as for an instance the board of directors of all famous media companies include people from giant corporations like the board of directors of the Jagran Publications has had Kishore Biyani (Head of the Future Group, former Managing Director Pantaloon Retail) , Mcdonald's India MD Vikram Bakshi , chairman of real estate firm JLL(Jones Lang LaSalle) Meghraj, Anuj Puri. The board of directors of DB Corp the group which manages Dainik Bhaskar has had head of Piramal enterprises group Ajay Piramal, the MD of Warburg Pincus, Nitin Malhan, NDTV's board of directors has included Pramod Bhasin President and CEO of country's biggest BPO company GenPact¹¹.

Media conglomerates seem to have professionals from every field on their boards except famous and prominent journalists. The above facts seem to suggest that in order to fetch sponsorships and financial support it is imperative for the media houses to join hands with mainstream business groups, although it may seem to be a normal affair but often, it is the business group which has the final say in the content which gets broadcasted or published. For an instance, print media like newspapers and magazines have turned into more of an advertisement pamphlets rather than a source of credible information. Paid coverage is an emerging phenomenon, which is used extensively by political parties and business houses. With no regulating body in place in order to oversee or assess such ownership

¹¹ DILIP MANDAL & R. ANURADHA, MEDIA ETHICS (Oxford University Press, 2011).

patterns this trend has been in place since India has emerged as an independent nation with free media.

On May 19, 2012 the Aditya Birla Group announced that it has acquired a 27.5% stake in Living Media India Limited, a company which is headed by Aroon Purie which is the holding company for and has 57.46% stake in TV Today Network. On Dec. 21, 2012 Oswal chemical and Fertilizers acquired a 14.17% stake in New Delhi Television (NDTV). The Network 18 Group has financial arrangements with Mukesh Ambani led Reliance Industries Limited (RIL).¹²

The deep rooted nexus between the politicians and businessmen was known to the masses since a long time but the astounding fact that the media and journalists were also a part of this power mongering process came as a shock to the people especially after the leaking of the Nira Radia tapes when the income tax department tapped the phone conversations of a well-known lobbyist in the power circles of Delhi, her conversation with politicians and many prominent journalists and TV presenters brought out the cold reality that how deals which concern the national interest are brokered by such powerful and extensively connected people.

Such instances proved that even the fourth pillar of democracy had elements which were open to venality by their crony corporate bosses or masters. But even more bewildering is the fact that this is still going

¹² Pranjoy Guha Thakurta, *Media Ownership in India - An Overview*, THE HOOT (June 30, 2012), <http://www.thehoot.org/resources/media-ownership/media-ownership-in-india-an-overview-6048>.

unchecked by the government and no measures are being put in place in order to preserve the independence of media houses.

The Ministry of Information and Broadcasting requested an independent and autonomous institution the Administrative Staff College of India to conduct a research on cross media ownership in India and the institute came out with a report with some conspicuous observations which clearly suggested that cross media ownership is glaringly present in India despite this the government has not made any significant stride in order to at least bring out some remedial measures to curb this evil which seems to be mounting in the democratic space of our country. The media fraternity has always been apprehensive of any measure by the government in order to interfere within their functioning and even a slight move by the government is seen as an attempt to suppress freedom of speech. Emphasis needs to be laid on the fact that “regulation” and “censorship” are two different concepts and it needs to be understood that in a democracy everyone is accountable even the institutions which hold the democratic setup together.

In developed nations like United Kingdom, United States of America and Canada the media community has opposed governmental restrictions on Cross media ownership but the government has still put in place restraints on cross media ownership similarly in India too this trend of one corporation owning many media outlets needs to be regulated in order to preserve the independence and freedom of the mainstream media. An effective regulatory mechanism needs to be put in place in order to

ensure that media ownership does not affect the dissemination of information by the media houses or press. Although, regulatory bodies such as the News Broadcasting Standards Authority and The Press Council of India which is a statutory body have been in place since quite some time but it seems that their functioning and regulation of the media industry has not brought about much change in trend of media ownership and regulation of controlling power of business groups in the media houses.

2. PAID NEWS AS A COROLLARY OF CROSS MEDIA OWNERSHIP

When discussing cross media ownership the contentious issue of paid news cannot be ignored, it cannot be seen as some new phenomenon which has emerged in the new day and age but it has always been the very weapon which has been used by the powerful and the rich to create perceptions of them among the masses. The practice of paid news has been in existence since the time when private media began to emerge within India and it was only when the awareness among the masses increased that they realized that it is an evil in the world of journalism which violates their right to get true and correct information which they are entitled to.

The evil of paid news can be compared to the act of adulteration in food as it also involves spiking of information with material which turns out to be beneficial for the party which has paid the presenter of such information while it is always detrimental to the people who are at the receiving end of such information which is laced with propaganda. Paid news in the modern day can be defined as the act of bribing the mainstream media with favors generally by politicians, businessmen and public figures

in order to project them in such a way which improves their image in the eyes of the larger public of the country. It can also be called as Sponsored Journalism. Paid news is prevalent specifically in the political and financial world of business, it is well known that public perception is the key in both politics as well as in commercial business and without a rapport with the masses neither a politician nor the businessman can survive or thrive. Face value and public relations today outperform credibility and every other aspect in politics for a politician and who else can improve it except the media therefore the collusion between politicians and media houses is not a strange affair as it is the media which today makes or breaks the political career of an aspiring politician by projecting him and his activities.

Every major political party has a public relation office (also known as the PR team) which deals with media relations and interactions. Similarly, in the corporate world every major commercial business constitutes its PR team in order to build a sway of the corporation with the media. No share of a corporation listed either on the BSE (Bombay Stock Exchange) or the NSE (National Stock Exchange) can be bought without a thorough research about the corporation and today dedicated media outlets such as financial news channels and financial news journals exist in order to assist individuals in buying the stock or share of a particular corporation. Both the established as well as the new entrants in media industry are offering either newspaper space or footage on channel to the politicians, the established organizations are raking in huge profits probably that is why the presence of electronic media has been ever expansive in India. The Election

Commission of India (EC) has declared paid news as an electoral offence and in the past it has even reprimanded many politicians for being involved in such an activity which spreads misconception and blurs the perception of the voting population.

The former Chief Minister of Maharashtra Ashok Chavan was admonished by the Election Commission when allegations were made against him for paying media outlets in order to provide him with exclusive coverage during the elections and for not proving the opposite in his financial statement provided to the election commission¹³. Not only the above case there have been myriad instances where the EC has disqualified several candidates from contesting elections for the offence of influencing their public images for electoral gains through media outlets. The manifestation of paid news in the financial world is also prevalent in the form of various broadcasting channels which are solely dedicated for broadcasting news from the financial and stock markets but many of them do not practice honest reportage as many of the outlets have their allegiances to their parent holding company which is some or the other significant name in the financial sphere this fact was corroborated when in July 2010 the Ministry of Corporate Affairs came out with directive report named “A Beginners guide to the Capital Markets” wherein it cautioned the investors to beware of the electronic media especially relating to the stock

¹³ Lyla Bavadam, *Paid News’ Notice to Ashok Chavan*, FRONTLINE, <http://www.frontline.in/the-nation/paid-news-notice-to-ashok-chavan/article6237471.ece>.

specific advice as that advice may have vested interests which may not be beneficial to the investors as it appears to be¹⁴.

The print media is especially affected by this epidemic of paid news and the space in a newspaper is up for sale and specifically the editorial space. The main problem appears to be that the both the print and the electronic broadcasting media have forgot the line between advertisement and news and there appears to be a transgression taking place when it comes to such issues. Therefore, it is quite evident that the epidemic of paid news is omnipotent and is pandemic across all the major media groups. No media house can sustain without profits therefore they become open for investments and favors in exchange for their coverage and content for the one investing and providing the funds. The scenario is so distressing that today some media behemoths today have made it mandatory for its editors to get paid for the coverage which a particular newspaper or channel provides to some politician or a celebrity. The election season happens to be the time when all the media outlets whether of local presence or that of Pan India are the most opportune to cash in huge profits by giving out packages to politicians according to their paying capacity, these packages happen to be coverage packages which range according to their prices.¹⁵

From this, it can be concluded that Paid news is a corollary of Cross media holding patterns and the ownership of a media house definitely

¹⁴ THE INST. OF CO. SEC'YS OF INDIA, MANTRA 10, A BEGINNER'S GUIDE TO THE CAPITAL MARKET 5 (July, 2010).

¹⁵ P. Sainath, *The Medium, Message and the Money*, THE HINDU, <http://www.thehindu.com/opinion/columns/sainath/The-medium-message-and-the-money/article13666073.ece> October 26, 2009.

affects its manner of functioning, the style within which it propagates information and projects it.

3. REGULATORY BODIES

The standing committee of the parliament on Information and technology (IT) was formed under Mr. Rao Inderjeet Singh a member of parliament from the Congress party which gave out specific recommendations for the creation of a dedicated statutory regulatory authority for the media industry in order to bring in restrictions on cross media ownership and holding patterns and which oversees the commercial activities which transpire in this sector especially those relating to mergers and acquisitions of media enterprises. Although various legislations are in place for the regulation of the media industry, for instance, the Broadcasting Act 1990, Media Ownership Act (Local radio and appointed news provider) order 2003, while for mergers and acquisitions provisions have been enumerated in the Enterprise Act, 2002. Mergers within the media sectors are also subject to the Competition law test under section 22 and section 33 of the Enterprise Act 2002.¹⁶ The only drawback which these statutes have is that they are scattered into different legislations and due to this their implementation becomes cumbersome, moreover no adjudicatory authority exists which can entertain disputes relating to the media industry, although

¹⁶ *ASCI Cross Media Ownership in India Report 2009*, ADMINISTRATIVE STAFF COLLEGE OF INDIA, http://cablequest.org/pdfs/i_b/ASCI%20Cross%20Media%20ownership%20in%20India%202009.pdf.

the Telecom Regulatory Authority Of India (TRAI) not only inspects the telecommunications sector but the broadcasting sector and cable television too but it would function more efficiently in the matters of modulating and regulating the sector if the government extends its jurisdiction to the economic arena of this industry specifically the accumulation of the controlling interest¹⁷.The presence of a specific tribunal for adjudicating media industry related disputes is the most important pre requisite in order to regulate the media sector. The Competition Commission of India can be taken up as a role model and based on the principles on which it operates and regulates anticompetitive agreements in the market this centralized media tribunal can also oversee amalgamations and mergers or the setup of new media channels or print stations and their subsequent conduct within the media market. It shall also aim to prevent the congestion of media outlets which is currently increasing specifically in the broadcasting sector.

4. CONCLUSION

Just like any other valuable material information can also be construed as an intellectually enriching “commodity” being delivered as a product to the consumers therefore the media which dispenses this function of information delivery shall be kept under check and regulation like any other trader of a commodity is kept. The Fundamental Rights guaranteed within the Constitution of India assume supreme importance above every legislation and law in this country therefore the protection and preservation

¹⁷ *Id.*

of them is the sole duty of not only the judiciary but also the parliament. Therefore, the Right to Information and specifically the Right to correct and true information is a fundamental right which emanates from Article 19(1) (a) of the Constitution. When people have information then only they would be able to form opinions this is the very essence of a democratic setup, regulation of information mediums needs to be there so that such information channels are not concentrated and blocked. There shall exist a plurality of views within a nation which promotes diversity of opinion which is the very basis of Indian democracy and the fourth pillar of democracy which is the mass media shall contribute towards it only by enriching people with knowledge of their nation.