



CHAPTER - 5

POSTHUMOUS PUBLICITY RIGHTS: LEGAL AND SOCIO-ECONOMIC IMPLICATIONS IN THE DIGITAL AGE

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Abstract:

The concept of posthumous publicity rights has emerged as a critical intersection of intellectual property, privacy, and commercial law, particularly in light of increasing digital reproductions and media commercialisation. Posthumous publicity rights encompass an individual's ability to control the commercial use of their name, image, and likeness even after death. This right is having legal as well as socio-economic implications.¹ This paper undertakes a comprehensive review of the legal frameworks governing posthumous publicity rights across multiple jurisdictions, including the United States, Germany, France, and India, and highlights how civil law countries provide more explicit statutory protection compared to common law systems, which rely heavily on judicial precedents. Through a critical analysis of case laws, including *Zacchini v. Scripps-Howard Broadcasting Co.*², *Marlene Dietrich Case*³, and *K.S. Puttaswamy v. Union of India*⁴, the study identifies trends and gaps in current legal protections. Furthermore, it explores the socio-economic impacts of these rights, particularly in the entertainment industry, where deceased celebrities

continue to generate substantial revenue. The research highlights the ethical and legal dilemmas posed by such commercialisation and its implications for cultural preservation, free speech, and the rights of heirs. This study seeks to advance the understanding of posthumous publicity rights and propose actionable recommendations aimed at harmonising privacy, commercial interests, and the public's right to information.

Keywords:

Legal framework, Posthumous, Publicity rights, Digital age, Commercial use

Introduction

Publicity rights is also known as personality rights. It refers to the legal ability of an individual to control the commercial use of their identity. These rights extend beyond a person's lifetime, particularly for those whose persona holds significant economic value, such as celebrities, athletes, and public figures. Though Publicity rights and privacy rights are distinct, they are interconnected as they both aim to protect an individual's personal attributes. However, while privacy rights primarily focus on protecting an individual's personal life from unwanted intrusion, publicity rights emphasise the commercial value derived from one's identity.

The development of publicity rights has its origins in the broader context of privacy and human dignity as fundamental rights.⁵ The basis in the evolution of these rights was the recognition of the right to be let alone, as articulated by Samuel Warren and Louis Brandeis.⁶ This early foundation laid the groundwork for the eventual establishment of publicity rights, which now encompass the protection of a person's name, image, likeness, voice, signature, and other distinctive characteristics that can be exploited for commercial gain.

Definition and Scope

Different jurisdictions provide varying definitions of publicity rights. Section 46 of the Restatement (Third) of the Unfair Competition Act of 2006⁷ 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 under the rules stated in Sections 48 and 49."⁸

Similarly, the International Trademark Association (INTA) defines the right of publicity as an intellectual property right that protects against the

unauthorised use of a person's name, likeness, voice, or other identifiable attributes for commercial purposes.⁹

In the Indian context, Section 14 of the 'Trade Marks Act, 1999' includes provisions regarding the posthumous use of names and likenesses. It mandates prior consent from the person or their legal representatives if the trademark falsely suggests a connection with a living person or a person who died within twenty years prior to the application. This law impliedly acknowledges posthumous publicity rights in India, though the broader statutory framework remains underdeveloped.

In order to have clear understanding of publicity rights, it is necessary to know the Scope of these rights. Firstly, publicity rights protect identifiable attributes of a person that can be commercially exploited, such as their name, photograph, voice, or signature. While these rights theoretically apply to all individuals, they are most commonly invoked by celebrities or public figures whose identities carry substantial commercial value. Secondly, the core of publicity rights lies in preventing unauthorised commercial use, which includes the exploitation of a person's likeness in products, advertisements, or merchandising without their consent. For example, the image of Albert Einstein continues to hold commercial significance, with the University of Hebrew controlling his intellectual property rights even decades after his death. Thirdly, these rights require that the individual, or their legal heirs, provide consent before their persona can be used for commercial purposes. The unauthorised use of one's identity without such consent constitutes a violation of these rights. Lastly, publicity rights often focus on individuals whose personas have economic value.¹⁰

Evolution of Publicity Rights

The legal recognition of publicity rights has evolved in response to technological advancements and the increasing commodification of personal identity, especially in digital media. Early judicial interpretations focused on protecting individuals from defamation and invasion of privacy, but with the rise of mass media, publicity rights have gained prominence as a means to safeguard the economic interests tied to a person's identity.¹¹ Here mention can be made of the Universal Declaration of Human Rights (UDHR), particularly Article 12. According to this article no one should be subjected to arbitrary interference with their privacy, family, or reputation. This provision laid the basis for the expansion of privacy rights, which, in turn, influenced the development of publicity rights as a separate legal concept.

Publicity rights are not uniformly protected across jurisdictions. In civil law

countries, there is often explicit legal recognition of both moral rights (associated with dignity and privacy) and economic rights (related to the commercial use of a persona). For instance, France recognises the dual aspects of publicity rights through its *droit à l'image*¹² (right to one's image) and *droit patrimonial* (economic right), which continue to protect an individual's image even after death¹³. In contrast, common law jurisdictions, such as the United Kingdom and Canada, often lack statutory provisions for posthumous publicity rights, which instead rely on tort law, such as passing off and defamation.¹⁴ In India, the concept of publicity rights is primarily governed through tort, contract, and intellectual property law. Judicial precedents have played an important role in shaping the understanding of these rights, particularly in cases involving the unauthorised use of celebrity personas.¹⁵ Notably, the Supreme Court's decision in *K.S. Puttaswamy v. Union of India*¹⁶ established the right to privacy as a fundamental right under Article 21 of the Constitution, which has been interpreted to include elements of personality and publicity rights.

Legal framework of Posthumous Publicity Rights in Civil and Common Law Jurisdictions

The legal protection of posthumous publicity rights diverges significantly between civil law and common law jurisdictions. While civil law countries often provide explicit statutory provisions governing the use of a deceased person's name, likeness, and persona, common law systems typically rely on judicial precedents to address the complexities surrounding these rights. This section explores the legal frameworks and judicial interpretations of posthumous publicity rights across a range of jurisdictions, including the United States, United Kingdom, France, Germany, and India.

United States

In the United States, posthumous publicity rights are largely governed at the state level, with varying degrees of protection. Many states have enacted statutes that explicitly recognise these rights and grant the legal heirs control over the deceased's persona for a defined period. A landmark case, *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁷, dealt with a performer whose entire act was broadcast without consent. The U.S. Supreme Court held that this unauthorised use violated Zacchini's right of publicity and stressed the commercial importance of protecting a performer's persona. This case established the principle that posthumous publicity rights incentivise creativity and safeguard the economic value of one's persona, even after death.

States such as California and Indiana have provisions on protections for posthumous publicity rights. California Civil Code Section 3344.1 extends the right of publicity for 70 years after death, allowing the heirs of deceased

celebrities to control the commercial use of their image. In contrast, Indiana provides one of the longest durations that grant heirs publicity rights for up to 100 years posthumously under Indiana Code Title 32, Section 36-1. However, these rights can vary significantly across states. For instance, in *Lugosi v. Universal Pictures*¹⁸, the California Supreme Court initially ruled that a deceased person's likeness could not be commercially exploited after their death. This ruling was later reversed by legislative amendments.

United Kingdom

Unlike the U.S., the United Kingdom does not explicitly recognise publicity rights, either for living or deceased individuals. The protection of a person's name, image, or likeness generally falls under intellectual property laws, particularly through passing off and copyright infringement. However, these laws offer limited protection, especially for posthumous rights. The absence of statutory protection for posthumous publicity rights in the U.K. means that the estates of deceased personalities cannot claim damages for the unauthorised use of their likeness or name for commercial purposes. However, in cases where a person's image is protected by copyright (e.g., photographs or artistic representations), the estate may have grounds for legal recourse, but only within the framework of intellectual property law. For example, the estate of the late musician David Bowie would not be able to claim posthumous publicity rights under U.K. law. However, unauthorised commercial exploitation of copyrighted images of Bowie would require permission from his estate. This limited scope of protection illustrates the challenges faced by heirs, in the U.K., who seek to enforce posthumous publicity rights.

France

In France, publicity rights, or *le droit à l'image* (the right to one's image)¹⁹, are primarily governed by privacy and personality rights protected under the French Civil Code and other legal provisions. France offers strong protection for publicity rights, both during life and posthumously. Under *droit à l'image* (right to one's image), a person's image is considered part of their private life and is protected against unauthorised use. French law also recognises the patrimonial aspect of publicity rights, allowing heirs to enforce these rights after death, but only for a limited period.²⁰ The Raimu case (1998)²¹ is one of the most notable examples of France's protection of posthumous publicity rights. In this case, the widow of actor Raimu successfully sued for damages after his image was used in an advertising campaign without her consent. The court ruled that the patrimonial aspect of his image rights could be inherited by his legal heirs. However, French law limits the duration of posthumous publicity rights to 20 years after death. In contrast to common law jurisdictions, France's dualist approach blends moral rights (protection of honor and dignity) and economic

rights (commercial exploitation of an image), and thus ensures comprehensive protection of a person's persona, both during life and after death.

Germany

Germany follows a similar approach to France and recognises the posthumous right of publicity as part of its broader personality rights framework. The Mephisto decision of the Federal Constitutional Court (1971)²² affirmed the existence of post-mortem personality rights under the German Constitution, grounded in the principle of human dignity. The court ruled that a person's right to their image and name could survive death, and thus allow heirs to enforce these rights. In Germany Section 823(1) of the Civil Code legally acknowledges publicity rights as part of the broader right to protect one's personality. The Marlene Dietrich case (1999)²³ further reinforced the protection of posthumous publicity rights when the Federal Court of Justice ruled that the use of Dietrich's image to promote a musical album constituted a violation of her personality rights, even after her death. The court extended her publicity rights for 10 years posthumously. This illustrates how German law balances personality rights with the public's right to access cultural works.

India

In India, the legal framework surrounding posthumous publicity rights is relatively underdeveloped. Publicity rights are often recognised as part of the broader right to privacy, which was declared a fundamental right under Article 21 of the Constitution in the landmark case of *K.S. Puttaswamy v. Union of India*.²⁴ However, Indian courts have only recently begun to explore the boundaries of these rights, particularly in the context of deceased celebrities. The case of *Titan Industries Ltd. v. Ramkumar Jewellers*²⁵ recognised the importance of publicity rights for celebrities in India. In this case, the Delhi High Court ruled that the unauthorised use of a celebrity's name or likeness could infringe upon their right to publicity, which survives their death. However, the *Veerappan case (Makkal Tholai Thodarpuzh Kuzhumam Ltd. v. V. Muthulakshmi)*²⁶ highlighted the limitations of these rights, with the court ruling that a person's right to privacy does not extend beyond death. Another case titled *Krishna Kishore Singh v. Sarla A. Saraogi*²⁷, is regarding the unauthorised depiction of the late actor Sushant Singh Rajput in a biographical film. In this case the court emphasised the need for a clearer legal framework. The Delhi High Court dismissed the injunction, ruling that the right to privacy and personality rights are not inheritable and cease upon death. This decision reflects the ongoing challenges in recognising posthumous publicity rights in India, where common law principles continue to evolve. Further in the case of *Deepa Jayakumar v. A.L. Vijay*²⁸, the Madras High Court addressed the issue of whether the right to privacy and personality rights are inheritable after death.

Deepa Jayakumar, the niece of the late Tamil Nadu Chief Minister J. Jayalalithaa, sought to prevent the release of biopics about her aunt, arguing that as a Class 1 legal heir, she had the right to protect her aunt's posthumous reputation and privacy. The court concluded that the right to privacy, along with personality rights, does not survive after an individual's death. It emphasised that once a person dies, their reputation and rights associated with privacy cease to exist, thus cannot be inherited by their relatives or heirs. The court cited previous rulings to reinforce that legal heirs cannot claim a right to privacy based on the deceased's life. Additionally, the court highlighted the importance of freedom of expression, stating that filmmakers cannot be compelled to present a specific narrative or interpretation of events. It acknowledged that the information utilised in the films was publicly available and therefore did not require consent from Deepa Jayakumar. The ruling established that the claims regarding posthumous rights in this context were unfounded by reiterating the principle that the legacy of personality rights does not extend beyond an individual's lifetime.

Thus the legal frameworks governing posthumous publicity rights vary significantly between civil law and common law jurisdictions. While countries like France and Germany provide statutory protection that allows heirs to enforce these rights, common law jurisdictions like the U.K. and India lack clear statutory provisions, relying heavily on judicial interpretations. In the United States, a fragmented state-by-state approach results in inconsistent protection, though certain states, like California and Indiana, offer extensive posthumous publicity rights. The global legal landscape reveals a growing recognition of the need to balance the commercial exploitation of a deceased individual's persona with ethical considerations surrounding privacy and dignity. As digital media continues to blur the lines between life and death, the future of posthumous publicity rights will depend on developing a harmonised legal framework that addresses both local and global challenges.

Table 1: Comparison of Posthumous Publicity Rights Across Jurisdictions

Jurisdiction	Statutory Basis	Duration of Protection	Judicial Interpretation	Relevant Cases
United States (California) ²⁹	California Civil Code Section 3344.1	70 years after death	Recognises extensive rights posthumously through statutes and case law	Zacchini v. Scripps-Howard ³⁰
United States (Indiana) ³¹	Indiana Code Title 32, Section 36-1	100 years after death	One of the longest protection periods in the U.S.	Lugosi v. Universal Pictures ³²

United Kingdom	No statutory basis	No formal duration	Relies on copyright and passing off	N/A
France	Droit à l'image (Right to One's Image)	20 years after death	Strong dual protection of moral and economic rights	Raimu Case ³³
Germany	Section 823(1) of the Civil Code	10 years after death	Personality rights extend to posthumous protection	Marlene Dietrich Case ³⁴
India	No statutory basis; relies on case law	No formal duration	Still evolving through judicial precedents	Titan Industries v. Ramkumar Jewellers ³⁵

This table shows the inconsistency across jurisdictions, particularly between common law and civil law systems. While Germany and France offer explicit statutory protection, common law countries like the United Kingdom and India rely on judicial interpretations, with India still developing its legal framework in this area.

Conclusion and Recommendation

It is revealed that there exist disparities in how these rights are treated across different legal systems, with civil law countries like France and Germany offering more comprehensive statutory protections compared to the United States, United Kingdom, and India, where common law principles dominate.

while civil law systems offer more explicit legal protections, the common law approach has resulted in a fragmented legal landscape, particularly in countries like the United Kingdom and India, where statutory protection for posthumous publicity rights is lacking.

Keeping this state of affairs in mind, the following recommendations is made to improve the legal protection of posthumous publicity rights. Firstly, National governments should enact specific laws to define and protect posthumous publicity rights. These laws should cover the duration of protection, the scope of rights, and the legal standing of heirs or representatives. This would reduce reliance on fragmented interpretations and offer clearer guidance, especially in countries like India and the UK, where statutory protection is lacking. Secondly, international organisations like the World Intellectual Property Organisation (WIPO) should develop guidelines for protecting posthumous publicity rights, similar to the Berne Convention for

literary and artistic works. These guidelines would promote consistency across borders and make enforcement easier, particularly as digital media allows global commercialisation of personas. Thirdly, posthumous publicity rights should also be extended to individuals who are not traditionally seen as celebrities but still have significant commercial value. This includes social media influencers, public figures, and individuals whose images are widely used in commerce. The current focus on celebrities leaves other individuals under-protected, despite their rising digital presence. Fourthly, Governments and courts should establish guidelines to regulate the commercial use of deceased individuals' digital likenesses, such as holograms and deepfakes. These guidelines should outline the consent needed from heirs and set limits on digital reproductions. The use of such technologies raises ethical and legal concerns, and clear guidelines would protect the dignity of the deceased. Fifthly, Public awareness about estate planning for publicity rights should be encouraged. Legal professionals and advocacy groups should inform individuals, particularly those with commercial value, about including provisions for managing their persona after death in their wills or estate plans. Many people are unaware of their potential commercial value after death, and estate planning would ensure their heirs are protected. Sixthly, Governments could create a public registry where individuals can register their publicity rights and indicate who holds these rights after death. A registry would reduce disputes over control and provide clarity to third parties seeking to license these rights. Finally, Judges and legal professionals should receive training on posthumous publicity rights and emerging technologies.

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² *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), The U.S. Supreme Court ruled that the First Amendment does not protect the unauthorised broadcast of a performer's entire act, as this would violate the performer's right of publicity, emphasising that economic incentives for performances should be preserved.

³*Dietrich v. Lighthouse Musical Production Company Ltd.*, BGH 1 ZR 49/97, Judgment of 1st December 1999, Translated by Raymond Youngs, Professor Basil Markesinis, "Essays on Foreign Law and Comparative Methodology," Hart Publishing 2001., In this case, Marlene Dietrich's daughter, as her heir and executrix, sought injunctive relief and compensation from the defendant for unauthorised commercial use of Dietrich's image, name, and signature, claiming an infringement of her posthumous personality rights. available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=726>(last visited on September 30, 2024)

⁴ AIR 2017 SC 4161

⁵ Krishnan Luthra and Vasundhara Bakhru, *Publicity Rights and the Right to Privacy in India*, 31(1) Nat'l L. Sch. India Rev. (2019). Available at <https://repository.nls.ac.in/nlsir/vol31/iss1/6>.

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The Restatement (Third) of Unfair Competition serves as a valuable source of modern trade secret law. It follows the UTSA approach but also provides statements of the law that are more comprehensive and provides useful comments for understanding various situations and meanings behind the law. The Restatement is a useful tool for interpreting both the UTSA and DTSA.

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¹⁶ (2017) 10 SCC 1

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