

Is Personality a Subject Matter of Intellectual Property as a Trademark? A Legal Discourse

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Abstract

The Trademarks Act has been a formal way of recognising the distinctive marks used by a person during any business operations or commercial enterprises to safeguard the identity they have built. It is important for proprietors to create a brand for their business that can be identified, referred to, and used to expand their goodwill. Traditionally, a trademark refers to marks, logos, and symbols used as a sign to identify with a brand or commercial activity it represents. This goes a long way in creating long-lasting impressions in the minds of consumers who might prefer or choose a particular brand. In light of this ideology, a ‘personality’ or the existence of a particular person with his unique set of attributes, skills, mannerisms, features, and qualities should also be a subject matter of trademark. We come across advertisements that have gone a long way in using these personalities and their attributes to secure a good brand name, reputation, and commercial gains too. Although this represents monetary value in vesting traits of a particular personality, that is also an intellectual property of the person and demands protection. The paper will explore recent examples where a person’s unique traits have attracted his association with the brand, thereby helping in advertising the product with the person’s goodwill. Postures, voice, and mannerisms all go a long way in helping people remember a particular person, distinctly more so when there is an element of reputational goodwill. Any usage of the same must be warranted or allowed by the person, or else it is unfair, and an invasion of privacy too. This paper will analyze how personality is a product of intellect and deserves protection as intellectual property. A doctrinal analysis of the case laws and controversies will help the author formulate and devise how personalities can be given protection like trademarks.

Keywords: Appropriation, goodwill, personality, protection, reputation, trademark

INTRODUCTION

1. How far is personality a subject matter of intellectual property protection?
2. Whether a personality can be granted a trademark for exclusive usage?

CONCEPTUALISING AN UNCONVENTIONAL TRADEMARK

In broad terms, personality refers to all those attributes with which we identify a particular person or individual. The identity peculiar to a person marks him with a sense of distinctiveness—one that can be separately identified from others. Personality includes a person’s physiological and psychological attributes as well as some inherent and acquired features that mark his social interaction and help him stand out [1]. This identity is so strong that people can easily spot and remember a person on this basis.

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Received Date: November 19, 2023

Accepted Date: December 28, 2023

Published Date: December 28, 2023

Citation: Akash Chatterjee. Is Personality a Subject Matter of Intellectual Property as a Trademark? A Legal Discourse. Journal of Intellectual Property Rights Law. 2024; 7(1): 68–73p.

The term “personality as a trademark” describes a person’s distinctive personality attributes or the perception that the person builds up as an image in the form of an identifiable and legally authorized

symbol connected with their brand, goods, or services. This idea is frequently applied in the business, sports, and entertainment sectors to create a distinctive and memorable brand identity. Business functions on goodwill and uniqueness, creating a prospective customer base. This particularly applies to people with a public appeal or celebrated personalities. The celebrity may keep ownership of his name, likeness, and image with the help of trademark protection. Additionally, a celebrity's name and associated image may be registered and utilized as a trademark. After registering the name as a trademark, the celebrity gains from licensing and assigning it as endorsements and advertisements, as often seen.

Section 2(1) of the Trade Marks Act, 1999 states “any sign capable of identifying one person's products and services from those of another” as a trademark, and Section 2(1)(m) gives a wider definition of “mark” to include names as well. This is the only practically used statutory inference to personality as a trademark in Indian laws. The issue is not just about whether a person or his identity is a product of intellectual property rights, but rather the contours of this right and how it is in conflict with publicity or freedom of expression.

Personality rights encompass a wide range of “appearance, signature, voice, silhouette, face, features, gestures, expressions, and mannerisms” that distinguish a person from others. This identity garners fame and popularity and becomes an object for commercialisation. When such peculiar characteristics are used in connection with products or services, selling them becomes easier, increasing their public appeal. Certain unique features of people help us identify them effortlessly—a baritone voice, a signature pose, style of speaking, appearance—they are all sensory appeals that can work as trademarks too [2].

Some notable examples are: Usain Bolt, the famous athlete who applied for registration of his pose [3] resembling his so-called “lightning pose” as a trademark; the image of Turkish chef (Salt Bae) sprinkling salt in a stylish quintessential way has also been granted protection [4]. Swedish tennis player Niclas Kroon's signature pose for celebrating victory after a match is a unique representation of his personality, which are some of the other relevant examples [5]. These registrations define a different sense of uniqueness that rests with the personalities of the people possessing or showing them.

COMPLEXITIES OF REGISTERING PERSONALITY TRADEMARKS

At the very outset, the relevance of this discussion needs to be addressed. Trademarks have been traditionally associated with the perception of the quality of goods, brand names, and reputation. In that case, a personality would not properly fit into that scheme. Still, such a restrictive interpretation is not fair in the contemporary context, where sales and promotional tactics have evolved, especially when creating an identity is to foster a social distinction [6], for example, in the apparel industry. The association of a person with a product lends the idea of not just quality but a standard that others lack, which becomes its unique selling point. With the increasing value of celebrity endorsements, the tendency to capitalise on mass publicity and appeal has increased, leading to unfair use and “infringement” of personality. The primary issue concerning both the intercepting domains of trademark and publicity laws is about public perception and the idea that is conveyed [7]. People with a degree of popularity or appeal associated with their personalities almost merchandise it as a brand that has garnered a good reputation over the years. The motive behind securing strong protection of personality rights is to prevent the mutilation of their reputation and any unwarranted dilution of their personality [8]. Repeated usage of someone's famous persona or character in unwarranted situations where people are confused about whether the association with the product is authentic or false leads to a dilution effect similar to what happens with trademarks. In such a situation, there is a recognisable shift in trademark laws required to incorporate personhood as a subject of protection as well [9].

From the Indian perspective, Section 2(m) and Section 2(zb), Trade Marks Act, 1999, make a clear emphasis on the graphical representation to seek trademark protection but constrict the ambit for

personality marks. This mandatory graphical representation creates a severe hurdle in registering personality as a trademark because it is not always possible to restrict a living trait of a character to a depictable or marked shape, size, or any symbolic representation. Further, a trademark relates to an essentially trade-related practice. In that case, connecting the broad ambit of personality with a trade-specific aspect grants only a partial form of protection. The problem of graphical representation of a personality is rather multifaceted. First, a pictographic way would only describe the appearance and not the associated attributes of voice, and a compilation of sequences of pictures would not be a viable option as well because a living person cannot behave in only a certain descriptive way [10]. The discussion around trademark protection and personality has a justified feature: the distinctiveness of the thing sought to be protected and the commercial nature of its usage [11]. The features of a person exhibited through his mannerisms are always unique, and the purpose of using them to ride on the established goodwill or fandom associated with them is a form of commodification or selling an intangible thing—the personality itself. The issue of protection of personality as a property has its roots in the Hegelian philosophy that metaphysically relates property as an “extension of personality” [12]. In using this property, there has to be some form of regulation or consent, balancing it against privacy rights simultaneously.

Trademark rules have made registration of sound marks possible which is a non-conventional development in the area and helps grant protection to any distinct speaking style as a personality trademark [13].

JURISPRUDENTIAL ANALYSIS

In the case of *Shivaji Rao Gaikwad vs. Varsha Productions* [14], the issue of personality rights was discussed with reference to Rajnikanth. The courts highlighted the fact that personality rights do not get proper recognition in the Indian legal system at present, but the courts have laid down the contours of this right through detailed judgements. The dispute with personality rights is their identification and categorisation. When the distinct nature or character of a person gains popularity, it strikes a chord of familiarity with people, and the fandom of a celebrity works as materialised goodwill. The case of *ICC Development (International) Limited v. Arvee Enterprises* [15] equated privacy aspects with publicity rights, hinting at any unfair use of the same as being condemnable. It also brought in aspects of Articles 19 and 21 to the discussion. However, it was in the case of *Ali v. Playgirl Inc.* that an important angle interpretation emerged—it was about a misappropriation of a person’s reputation that he has earned and how it is also an extension of personality. In the commercial world, selling is the biggest motivator driving success, and any use of a person’s character or goodwill to induce sales is often a very lucrative option.

The complexity of a personality mark or using personality as a trademark lies in the ways of representing the connection. In the case of *Titan Industries Ltd. vs. Ramkumar Jewellers* [16], the idea of a celebrity persona was discussed, where it was opined that the control of commercial use of one’s identity is a personality right. In this case, the pictures of two famous celebrities were used to advertise a jewellery product without their prior consent. The injunction was justified due to the non-consensual use of personality attributes in a commercial activity. It is at this point that a discourse on the utilisation and misappropriation of an intangible product—personality—comes into discussion. As much as it is an argument for personal consent, it has an intellectual property rights aspect. Property rights are one’s entitlement which are guarded against any unfair use by unauthorised persons. In the case of *ICC Development (International) Ltd. v. Arvee Enterprises* [17], the Delhi High Court made an observation: “The right to publicity has developed from the right to privacy and can only be possessed by an individual or by any indication of that person’s personality, such as their name, a distinctive characteristic, their signature, their voice, etc. A person may be granted the right to publicity due to his involvement in a particular activity, such as a movie, sport, or event.” The nature of exploitation is akin to the misuse of private property: the possession of character and traits that make a person identifiable and that collect goodwill and recognition. The name of a celebrated person

is associated with his character too, and any involvement of the name in commercial pursuits is an attempt at riding over that fandom associated with the personality.

The United States judicial interpretation has observed this area with more clarity and precision. The case of *Haelan Laboratories v. Topps Chewing Gum* [18] dealt with the uncontrolled usage of celebrity images in hoardings and advertisements, that is, prejudicial to their reputation. Brand endorsement is a contractual process whereby celebrities use their goodwill to lend popularity to the advertised products. Any unauthorised usage of celebrity pictures associating them with products is an infringement of the distinction that their persona holds—a feature akin to trademarks and their associated value. In this case, judges introduced the concept of “right to publicity” and consent to use pictures. Hence, their use of personality or photographs yielded gains that others should not be allowed without authorisation. In the *Midler v. the Ford Motor Co.* [19], there was a dispute concerning imitating a particular singing style that was distinct and famous. Ford had approached the singer, and on whose refusal, they decided to use one of her backstage artists to imitate her singing style in their advertisement. There was a due cause of action to proceed against Ford, and the action was instituted. There was another similar litigation [20] where a particular voice that was famous for its nature was imitated to induce sales, and in another one, a robot resembling the posture and face of a celebrity was advertised to promote the product for sales in the case of *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.* [21].

These cases represent a striking similarity—the intention to attract potential sales and publicity for a product with the help of a “personality”. Be it voice, photograph, style, or posture, the mark here is personality. It is a paradigm shift from the traditional inanimate meaning of trademarks that companies used to boost their product identity. The basic essence does not change—be it a logo, design, mark, or a particular distinctive attribute of a person, the visual, auditory, and sensory appeal remain. It is in this appeal that customers relate goods and services and accordingly prefer or reject them. The impact on customers’ cognition is what a salesman tries to achieve, and what better way than to infuse sales through people they like, admire, or follow.

As a result, attaching or imprinting a celebrity’s picture or any impression without a prior consent authorisation would be misleading the general public to believe that the celebrity is actively endorsing the product and has a direct relationship with the production firm, and that would obviously have a damaging effect on their reputation. Some fundamental components indicate if the infringement has taken place, whether the right to publicity exists or not, and the court has deliberated upon them in various instances. Some of them include validity and enforceability [22]. That is, the right of personality has to be a distinct one that becomes the subject matter of dispute, and a “direct connection” or pattern must be present between the wrongful usage by the infringer and the original person from whom such attributes are copied. In the case of *Henderson v. Radio Corporation Pvt Ltd.* [23], a claim was made for using pictures of professional ballroom dancers to push sales of a record named “strictly for dance”. Damages were awarded in this case as this was considered an act of passing off. Passing off is increasingly used in these cases where the justification depends on the alleged similarity or direct usage of personality attributes and is about commercialising a gain from the connection. Personality copying or resemblance is evidently aimed at misleading or misguiding the public.

An overall summary of common law jurisprudence hints at some basic styles of interpreting this issue [24]:

- Identity of the plaintiff: The test of resemblance is possible only when the source of imitation is identifiable and has a reputation or goodwill associated with his distinctiveness.
- There should be a particular way or format of using personality traits and attributes of a personality that become the subject matter of imitation to convey a wider meaning.
- Commodification of a “persona” as an object of sales whereby the picture, voice, or any other trait becomes something sellable in association with any product.

In the case of *Arun Jaitley v. Network Solutions Private Limited and Ors* [25], an instance of cybersquatting whereby the name of Arun Jaitley was used without any prior consent or permission by the person was dealt with. The court highlighted how the fame and popularity associated with the name due to the career of the person come into play and how the purpose is to ride on the established fame of the particular name. The name would merely be an ordinary name had it not been associated with the reputation of the success that the person holding it has achieved. It was opined—“*The name “Arun Jaitley”, being the personal name of the plaintiff, immediately gets associated with the plaintiff and no one else. The plaintiff’s name carries enormous goodwill and reputation and is exclusively associated with the plaintiff. The plaintiff has been a household name not only in India but also globally for more than 35 years. In public perception, whenever the name of Mr. Arun Jaitley is mentioned, it is immediately identified and related to him and no one else* [26].”

In the case of *Amitabh Bachchan v. Rajat Nagi & Ors* [27], in order to prevent the defendants from using Amitabh Bachchan’s voice, pictures, and any imitation of his mannerisms to project a picture of endorsement of the product without his consent, an injunction was issued. His characteristics as a distinct identity reside with him and help people understand, remember, and develop affinity for him. Any exploitation of the same to promote a product would be an infringement of the intellect vested in building that public image. The idea of commercialising personality was further interpreted in the cases of *Star India (P) Ltd. v. Leo Burnett (India) (P) Ltd.* [28] and in *Krishna Kishore Singh v. Sarla A. Saraogi* [29], where a tort-based action on the issues of publicity was at the centre of discussion. This shows us that the judiciary has taken note of the changing dimensions of commodifying personality and its new uses in marketing identity, a feature akin to trademarks [30].

CONCLUSION

The development of personality rights under the intellectual property rights regime is a complicated subject, and the discussion is at nascent stage as well. Depending on specific situations and cases, courts are trying to give a concrete shape to the interpretation of personality rights protection and the contours of this right. The EU has implemented the submission of video and audio clippings to demonstrate the attributes of a person for whom a protection is sought so that the subject matter can be described and identified properly. In order to dissect personality rights from publicity rights, the “associational” value of a person’s attributes or distinct features needs to be understood. Here, the source or origin is not the main issue; rather, the degree of involvement of the person becomes debatable in unauthorised infringement cases. The next problem arises in differentiating between misrepresentation and misappropriation and ascertaining which one of the two actually applies in the case of personality rights, which often bars a passing-off remedy from being instituted. The present framework is hence not sufficient to deliberate in establishing a protection of personality rights, and legislative action is required to expand on the scope of trademark laws to accommodate the same.

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