Digital playgrounds: Navigating the legal maze of athletes' right to publicity

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Abstract

This article critically examines the legal framework governing athletes' personality rights or right to publicity amid the commercialisation of sports. Personality rights, encompassing a celebrity's name, image, and persona, are essential for safeguarding their individual identities and commercial interests. Analysing the Indian judicial approach to the right to publicity reveals inconsistencies in interpretation and protection. Focusing on online fantasy games, Non-Fungible Tokens (NFTs), and moment marketing, the article highlights the unauthorised use of athletes' publicity rights for commercial gain. It highlights the need for a comprehensive legal framework for enhanced protection of athlete's right to publicity in the Indian legal landscape. It is argued that the burden placed on an athlete to prove elements of passing off and false advertisement should be done away with, and a prima facie unauthorised use of the athlete's identity should be sufficient to prove infringement.

Keywords

Right to publicity, moment marketing, athletes, online fantasy sports, NFTs

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1. Introduction

The name, image, likeliness, and persona of an individual gets protected under the umbrella term of what is termed as personality rights.[3] These personality rights are the rights available to a well-known personality or celebrity, which include famous personalities such as actors, politicians, sports persons, magicians, singers and dancers.[4] As per Locke's (1980) labour theory, an individual can claim a property as his when he has exerted labour over the said property and has added value to it.[5] Thus, celebrities are also entitled to protect their well-known personalities because they have put in efforts and labour to create them. Several rights of celebrities have been recognised by the common law and statutes worldwide, one of which is their right to publicity. The right to publicity is a facet of personality rights which entails that no person can use a celebrity's name, image or identity for a commercial gain without their authorisation.[6] This right has been derived from the broader right to privacy in India.[7] Some states in the United States (US) and civil law jurisdictions (such as Italy) have recognised this as a statutory right.[8]

In the era of commercialisation of sports, safeguarding the right to publicity of individual athletes is imperative. This ensures that brands refrain from exploiting the fame and popularity of athletes for their own benefit without proper authorisation. The right to publicity empowers athletes to capitalise on their fame and popularity by engaging in opportunities such as endorsements, advertising and sponsorships. Online fantasy sports (OFS), video games and digital player cards in the form of Non-Fungible Tokens (NFTs) are a way in which the name, image and records of athletes are used to gain commercial advantage. Several gaming platforms have used this information without authorisation and violated the publicity rights of the athletes. In recent times, another manner in which some brands have skirted athletes' right to publicity is by indulging in moment marketing,[9] specifically posting 'congratulatory messages'

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[3] ICC Development (International) Ltd. v. Arvee Enterprises and Ors, 2003 (26) PTC 245 (Del).
[4] Suresh (2017).
[5] Locke (1980).
[6] ICC Development v. Arvee Enterprises and Anr., (2003) 26 PTC 245 (Del).
[7] The Constitution of India, article 21, Justice KS Puttaswamy (Retd) v. Union of India, (2018) 1 SCC 809.
[8] Restatement (Second) of Torts § 652C; Italian Civil Code (1942), article 6-9.
[9] Moment marketing is a promotional technique, wherein the brands exploit trending news and events to create brand awareness and achieve high levels of engagement.

using the image and name of athletes' without authorisation, thereby cashing in on successes of medal winners in the Olympics or other sporting events.[10]

In light of this background, this article analyses the new battleground that has opened up between the 'Athletes' – the right-holders, and 'the unlawful gainers,' by delving into the legal landscape of publicity rights. In doing so, the paper firstly elucidates the judicial approach to the right to publicity in India and highlights the inconsistent interpretation in granting protection to this right. Second, the paper delves into the publicity rights of athletes in the realm of OFS and NFTs. It highlights the need to constitute the unauthorised use of the athlete's identity by these platforms as an infringement to enable the athlete to fully realise their publicity rights. Third, the paper explores the interplay between personality rights and moment marketing, highlighting the lack of remedies available in case of moment marketing. Lastly, due to the inconsistent interpretation and lack of remedies available, this article emphasises the need for a special framework for the protection of athletes' publicity rights in India.

2. Personality rights or right to publicity in India

2.1. Theoretical perspective of personality rights

The theories surrounding personality rights encompass diverse philosophical perspectives, each contributing to the understanding of an individual's entitlement to protect their name, likeliness, and persona. The right of protecting the name, likeliness and persona of a person can be attributed to John Locke's labour theory.[11] Locke (1980)[12] advocated the idea that property possesses inherent natural rights, existing independently. When an individual invests physical or intellectual labour in a property, and others utilise it, the creator should inherently hold natural rights over the outcomes of their labour. Therefore, the individual has their own property rights in one's own body. Essentially, this theory highlights the connection between the work and the creator's personality, termed as the personality theory. Unlike a focus on monetary aspects, the primary goal of this theory is to safeguard the creator's interest in the personality embedded within the creation. Because of athletes' skill in the sport, their name,

[10] Aggarwal (2023).
[11] Fischer (1994).
[12] Locke (1980).

image, voice, and likeness form a part of personality rights of the players. This forms an inextricable part of the athlete and can be utilised only with the athlete's permission.

The traditional justification for intellectual property rights of 'personality theory' was argued by German theorist Georg Hegel. Hegel (1991) argued that the external manifestation of human will necessitates the concept of property.[13] According to this perspective, individuals possess moral entitlements to their talents, emotions, charter traits and experiences. In alignment with this rationale, individuals exercise control over both tangible and intangible elements through intellectual property rights—such as copyrights, patents, and trademarks—to attain a degree of freedom, allowing their will to materialise in the world. The theory posits that everyone's personality unfolds through labour and creation, and as a result, the development of one's personality is intrinsically linked to the property rights they hold.[14] Therefore, intellectual works represent an extension of the creator's personality, justifying the creator's right to regulate these works to safeguard their dignity and personhood supporting 'personality rights' of individuals. Hegel maintained that one's private property is the extension of one's personality.[15] Drawing analogy from this statement one may say that an individual's contribution to the society is also the extension of their personality. Therefore, the endorsement of individual property rights in one's personality finds support in the philosophy of Hegel as he advocates for self-expression, human development, and, consequently, societal contribution.[16]

John Salmond's viewpoint further reinforces the significance of personality rights. Salmond argues that "persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality received legal recognition."[17] Salmond's perspective highlights the essence of personality rights, asserting that individuals are substratum of rights and duties, thereby conferring legal significance to personality. This perspective aligns with the Mill's Utilitarian principle which the Supreme Court noted in the *K.S. Puttaswamy judgement*.[18]

[13] Hegel (1991).
[14] Ibid.
[15] Ibid.
[16] Bird and Ponte (2006).
[17] Fitzgerald (2002), p. 298.
[18] Justice KS Puttaswamy (Retd) v. Union of India (2018) 1 SCC 809.

Mill's Utilitarian principle states that an individual possesses sovereignty over his body and mind. He places a high value on personal freedom and self-development.[19] Therefore, the connection between Mill's Utilitarian principle and personality rights lies in the recognition of an individual's absolute sovereignty over their body and mind, supporting the notion that protecting these rights contributes to overall well-being and happiness. In the context of personality rights, both Salmond and Mill emphasise the fundamental importance on individual autonomy and sovereignty, aligning with the idea that individuals should have control over their own image, likeness, and persona.

2.2. Right to publicity or personality rights: An international perspective

Unlike in other jurisdictions, Indian statues do not expressly recognise or protect personality rights or right to publicity. Right to publicity is a well-established right in the US. In *Hirsch v. S.C. Johnson & Son, Inc,*[20] the Supreme Court of Wisconsin made a distinction between the 'right to publicity' and 'right to privacy' because the former includes economic exploitation of one's personality and this aspect differentiates it from the latter. Differentiating this right from that of privacy, the Court observed that a publicity right is an 'exclusive privilege' in the image of the player. Although there is no federal law with respect to personality rights in the US, the majority of states recognise the right by statute in addition to case laws.[21] Furthermore, there have been developments in the US, particularly regarding the recognition of name, image and likeness (NIL) rights for student-athletes. Following changes in National Collegiate Athletic Association (NCAA) rules, college athletes now have the opportunity to profit from their name, image, and likeness, with some athletes earning substantial sums from endorsements and brand partnerships.[22] This shift in policy provides student-athletes with greater autonomy and rights over their personal identities. Consequently, personality rights have developed as a separate property-like right in the US.

The United Kingdom's (UK) position is similar to India; in both these countries there is no statue which recognises the right to publicity. However, image rights to a limited extent have

[19] Ibid.

[20] 90 Wis. 2d 379 (1979).

[21] Reichman and Furst (2021).

[22] Claybourn (2024); Russo (2022).

been recognised by the English courts. In order to bring a claim of infringement, the elements of passing off and misrepresentation will have to be established.[23] The athlete will have to prove that the image used caused some harm to their reputation.[24]

Civil law jurisdictions often have specific legislation for safeguarding athletes' personality rights deriving it from the right to privacy.[25] France and Germany have strict enforcement of personality rights. France, through Article 9 of the Civil Code, guarantees a private life, with additional provisions in the Code criminalising privacy violations.[26] In Germany, the recognition of personality rights is anchored in the German Constitution, German Civil Code and the German Criminal Code.[27] Article 10 of the Italian Civil Code addresses the misuse of a person's likeness.[28] In a broader context, the right to publicity is treated within the framework of the right to privacy, as provided in Article 8(1) of the European Convention on Human Rights (ECHR), which guarantees the right to a private life.[29] The European Court of Human Rights (ECtHR) has consistently clarified that the scope of private life encompasses various facets of personal identity, including but not limited to control over one's name and image.[30] Furthermore, in Brazil, the Brazilian Federal Constitution protects personality rights and specifies that it can only be exploited by a third party via an assignment agreement.[31] Thus, from an international perspective, it is evident that many countries have established distinct legal frameworks for the protection of personality rights within their jurisdictions.

2.3. Judicial approach to right to publicity in India

2.3.1. Recognition and foundations of right to publicity in India

The right to publicity, a facet of personality rights in India, is recognised through judicial precedents as there exists no specific legislation protecting this right. The Delhi High Court in

[23] The Dickson Poon School of Law (2021).
[24] Ibid.
[25] Ferrari and Riberti (2015).
[26] Ibid.
[27] von Welser (2019).
[28] Martuccelli (1998).
[29] Plakolli-Kasumi and Berisha (2021), p. 1307.
[30] See, Council of Europe (2022).
[31] Eugiona (2020).

ICC Development (International) Ltd. v. Arvee Enterprises[32] held that "right to publicity is an individual's right to commercially exploit and have control over their name, likeliness, fame, image, and other personality traits".[33] Further, the Court noted that the right to publicity is derived from right to privacy under Article 21 of the Constitution of India.

In *Titan Industries Limited v. M/S Ramkumar Jewellers* (*Titan Industries case*),[34] the Delhi High Court outlined two factors for establishing publicity rights. The first element is "validity i.e., right in one's own identity. The second element is identifiability which means, the 'plaintiff' should be identifiable in the unauthorized use made by the defendant".[35] The validity aspect of the assessment identifies the specific characteristics of a celebrity that warrant protection.[36] The identifiability element safeguards two fundamental aspects of identity: name and likeness. The term 'likeness' encompasses attributes like voice, signature, and the distinctive aspects of an athlete's appearance or conduct that set them apart from others and enable people to associate these attributes with the athlete.

Moreover, in *DM Entertainment v. Baby Gift House* (*DM Entertainment*), where the celebrity in question was a famous signer, the Delhi High Court held that "*the persona of the singer was characterised as quasi-property with economic value assigned with its identity*."[37] Therefore, the indica of identity used by the defendant becomes a crucial test to ascertain infringement. Further, the usage of identity should be such that it is a direct reference to the commercial appropriation of a celebrity persona and not merely incidental.

There are three exceptions to the violation of publicity rights in India . The first exception to the claim of personality rights arises in cases involving a public interest element, such as the dissemination of information through news reporting.[38] The other exception is "indiscriminate use of publicity right that creates a chilling effect on the freedom of speech and expression of

[32] ICC Development (International) Ltd. v. Arvee Enterprises and Ors, 2003 (26) PTC 245 (Del).
[33] Ibid, para 14.
[34] (2012) 50 PTC 486 (Del), para 15.
[35] Ibid.
[36] Rai (2021).
[37] DM Entertainment v. Baby Gift House CS(OS) No. 893/2002 (Del), para 5.
[38] Ibid.

others",[39] that is, it deters the public from exercising their democratic right of free speech. The third exception that has been carved out is that if a significant creative component has been added to a celebrity's identity, it would amount to permissive use.[40] Thus, if their identity has been used in the form of caricature, lampooning, parodies, cartoons, newsworthiness then it would not amount to infringement.[41]

2.3.2. Lack of definitional clarity and inconsistency in judgments

An analysis of the cases decided on the grounds of infringement of publicity rights suggests a lack of absolute clarity and inconsistent interpretation in defining right to publicity. In the *Titan Industries case*, it was observed that the right to publicity extends beyond the traditional limits of false advertising and there would be no requirement of proving confusion if the image of the celebrity is identifiable. However, what would make the celebrity identifiable was not elaborated by the court. Further, there has been a number of departures from the position taken in the *Titian Industries case*.

In *Gautam Gambhir v. D.A.P & Co. & Anr. (Gautam Gambhir case)*,[42] the central issue revolved around the unauthorised use of the name 'Gautam Gambhir' (a famous cricketer) by the defendants in their restaurant. However, the court declined to rule in favour of the plaintiff for several reasons. Firstly, there was a failure to substantiate actual consumer confusion. Secondly, the plaintiff could not demonstrate harm to reputation. Thirdly, the court found no evidence of commercial misappropriation of the plaintiff's name by the defendant. This decision underscores the unclear and ambiguous status of publicity rights within the framework of Indian law. While the *Titan Industries case* established that evidence of falsity, confusion, or deception is not obligatory, in the *Gautam Gambhir case*, the court took a divergent approach, emphasising the necessity of presenting evidence to establish confusion and disrepute. This disparity in judicial interpretation further complicates the understanding of publicity rights in the Indian legal context.

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[39] Ibid, para 14.

[40] Cardtoons, L.C. v. Major League baseball Players Association., 95 F.3d 959 (10th Cir. 1996).

[41] Winter v. DC Comics, 30 Cal. 4th 881, 134 Cal. Rptr. 2d 634, 69 P.3d 473 (Cal. 2003); Onassis v. Christian Dior- New York Inc., 122 Misc. 2d 603, 472 NYS 2D 261 (N.Y. Sup. Ct. 1984), paras 14-16.

[42] CS (Comm) 395/2017 (Del).

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There has been a further departure by a recent order passed by the Delhi High Court in the case of *Digital Collectibles v. Galactus Funware Technology Pvt. Ltd* (*Digital Collectibles case*).[43] In contrast to the *Titan Industries case*, the court limited the right to publicity to false endorsement and established that there is a need to prove the likelihood of confusion among consumers, that is, proving the tort of passing off.

However, recent rulings revert to the stance established in the *Titan Industries case*, lacking a thorough rationale, and thereby leaving the foundation and extent of publicity rights protection ambiguous. In *Amitabh Bachchan v. Rajat Nagi & Ors.*,[44] the defendants faced legal action for the unauthorised use of Mr. Bachchan's name and likeness to endorse their product. The order relied solely on *Titan Industries case* without specifying any statutory or common law basis for publicity rights protection. Similarly, in a recent order in *Anil Kapoor v. Simply Life India and Ors case*,[45] the Delhi High Court granted an ex-parte interim injunction restraining 16 entities from utilising Kapoor's name, likeness, and image, employing technologies like artificial intelligence, face morphing, and GIFs for monetary gain or commercial purposes. The common thread appears to be the lack of clarity regarding safeguarding right to publicity of celebrities which highlights the need for a special legislation to protect this right.

3. Publicity rights of athletes in the realm of online fantasy sports and Non–Fungible tokens

This section explores the publicity rights of athletes within the realm of OFS and NFTs. A recent order by the Delhi High Court in the *Digital Collectibles case*, as mentioned earlier, determined that the use of an athlete's identity in OFS does not infringe upon their rights.[46] However, this section contends that this stance indicates, firstly, a departure from the court's previous judgments. Secondly, it contrasts with the perspectives adopted by courts in the US on the same matter. Consequently, the Court failed to consider that such unauthorised use

[43] CS (Comm) 108/2023 (Del).
[44] CS (Comm) 819/2022 (Del).
[45] CS (Comm) 652/2023 and I.A. 18237/2023-18243/2023 (Del).
[46] Digital Collectables PTE Ltd and Others v. Galactus Funware Technology Private Ltd and Another, CS (Comm) 108/2023 (Del).

constitutes an infringement of athlete's proprietary rights because it deprives them full benefits of their labour and personality.

3.1. The Digital Collectible case: Online fantasy sports and Non-Fungible tokens

OFS is a form of game that allows users to create imaginary, virtual teams with genuine players from a specific sport.[47] The user's created team can then participate in the fantasy online sport. The team's performance would depend on the player's real-life performance and statistics. Thus, the athlete's name, image and records are used for creating these games. Video games and trading of digital player cards in the form of NFTs are other forms in which their personality is used. NFTs are unique digital assets representing real-world objects like art, music, in-game items and videos.[48] They are a form of property which can be owned, and they work on the same underlying technology as crypto currencies.

The publicity rights of athletes with respect to unauthorised use of their statistics and images in such games was discussed by the Delhi High Court in the case of *Digital Collectibles case*. In this case, the first plaintiff is a company incorporated in Singapore that conduct its business in India under the trade name '*Rario'* through its website and related mobile applications. *Rario* is an online platform which offered digital player cards of cricketers that can be bought, sold and traded by the users. The cards were in the form of NFTs that used the name, images and other such traits of the athlete. The platform had an exclusive license agreement with the players wherein they had duly authorised *Rario* for using their name and photographs. However, the defendant runs a mobile application by the name '*Striker'* (infringed the exclusive license of the plaintiff by using the identity of the cricketers. They offered a similar platform with digital player cards with the player's name/initials and an artistic form of the player's image. The plaintiff sought an injunction against this action of the defendant on the grounds of an infringement of their intellectual property rights and the publicity rights of the cricket players. Justice Amit Bansal refused to grant the injunction and held that:

> *The use of any information of the athlete which is available in public by online fantasy gaming platforms for commercial gain and has been transformed is protected by the*

[47] Bansali (2022).
[48] Conti and Schmidt (2023).

right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India.[49]

The court emphasised that employing information about a celebrity from the public domain does not infringe upon the right to publicity, asserting that the right to publicity is subordinate to the right to freedom of speech and expression according to the Constitution of India. Further, it delineated the boundaries of the right to publicity in the Indian context, limiting it to false endorsement and invoking advertising laws to determine potential violations of the tort of passing off. Hence, in order to claim an infringement of publicity rights there must be a likelihood of confusion among the users regarding the association of the athlete with the platform. It was stated that, "there is no likelihood of confusion that a particular OFS platform is being endorsed by a particular player or has an association with a particular player as the information about the players including statistics is available in public."[50] Additionally, it was noted that the images used were not exact replicas of the players but had undergone transformation into creative artworks, which is a permissible practice.

3.2. A departure from earlier decisions in Digital Collectibles case

The court's ruling in the *Digital Collectibles case* diminishes the players' ability to choose their affiliations with products, services, or expressions. Allowing a third-party unrestricted use of an athlete's persona, especially in a manner that diminishes or adversely affects the celebrity and has the potential to undermine athlete's right to maintain dignity and privacy. Further, this position is a departure from the earlier cases of *DM Entertainment* and *Titan Industries*. In *DM Entertainment*, the precise images of Daler Mehndi, a famous singer, were not replicated; instead, they were transformed into dolls. Despite this, the Delhi High Court upheld his right to publicity. Similarly, in the *Titan Industries case*, the concept of identifiability was established as an element of the right to publicity. As stated above, this test did not require proving likelihood of confusion or falsity or deception. If the celebrity was identifiable in the unauthorised use, then such would constitute an infringement of right to publicity. A celebrity can be identifiable even if represented in the form of a caricature, art, or a cartoon. In the *Digital*

[49] Digital Collectables PTE Ltd and Others v. Galactus Funware Technology Private Ltd and Another, CS (Comm) 108/2023 (Del), para 58 and para 65.

[50] Ibid, para 59.

Collectibles case, the names of the players were used on the digital cards which clearly established the identity of the players. Therefore, it can be argued that the court in this case departed from its earlier judgements.

3.3. Comparing with the United States

3.3.1. Judgement concurring the Digital Collectibles case

In India, the jurisprudence related to publicity rights of players for use in OFS is limited. However, the growth and the popularity of OFS in the US has been significant and hence there have been several cases. The Eighth Circuit Court's decision in *C.B.C Distribution and Marketing*[51] (*CBC case*) was predominantly relied on by the Delhi High Court in reaching its decision. In this case, *CBC*, a fantasy sports operator, contended that it has a right to use the baseball players image, identity and statistics without a license as the information was publicly available. The Court held that although such use did infringe a player's right to publicity, a balance of this right needs to be created with the right to speech and expression. The decision was in favour of *CBC* because, according to the court, free speech considerations outweighed the right to publicity concerns as the information about the players was in public domain and was available to any fantasy sports operator and not just *CBC*. The court further observed that such a use did not lead to any false advertising or endorsement. There was also no commercial disadvantage because the players are handsomely rewarded for their participation in games and also earn hefty amounts from other endorsements and sponsorship agreements. Hence, such a practice is permissible.

3.3.2. Contrasting view

The decision in the *CBC case* goes against one of the purposes of protecting the right to publicity, which is to allow the athletes to commercially exploit their name, image and likenesses that they have built with their own labour. A professional athlete's ability to make a living from one avenue should not foreclose their ability to earn from another.[52] Restricting professional athletes from licensing their live statistical performances limit their financial

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[51] C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823 (8th Cir. 2007).
[52] Bucher (2012).

opportunities.[53] Such online games also hamper potential enrichments due to lost viewership for the broadcasted games. Allowing athletes to license their performances directly benefits them economically and enhances their commercial value.[54] A decision given by the US Southern District of Florida, in the case of *Gridiron.com v. NFL Players Association*[55] supports this view. Gridiron.com, a website which offered fantasy football games and covered information about the game, had entered into licensing agreements with around 150 NFL football players. Pursuant to these agreements, Gridiron.com was allowed to use players' pictures in conjunction with links to other football websites as well as its own fantasy football offering. In order to capitalise on this association, the website allowed third parties to advertise their products. Consequently, the players' union issued a cease-and-desist letter asserting that these activities violated the agreement and their right to publicity. The website on the other hand sought a declaratory judgement that there was no violation. The court ruled against the website and held that these activities of the website cannot be protected on the grounds of freedom of speech and expression. It acknowledged that fantasy sports in itself were a product and the athlete's image was being used to promote it. Though these platforms are using information that is widely available, their business model is to beyond dissemination or aggregation of the news. They effectively leverage real-time statistical performance of the athletes as input to create marketable products.

Hence, while there is no aspect of false advertising and endorsement in these cases, there is an element of commercial exploitation of the players' identity without their permission. Although it can be said that there is no violation of the right to privacy as the information is publicly available, the right to publicity is infringed. Hence, a distinction between these two rights can also be demarcated using these cases. An infringement of the right to privacy affects the choice of the athlete to be associated with a particular product or brand, whereas the right to publicity gives the athlete the exclusive right to commercially exploit their identity and performance, irrespective of whether there is an infringement of the right to privacy or not. Justice Jerome N. Frank coined the term "right to publicity" in *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc*.[56] In this case, the US Court of Appeals for the Second Circuit recognised a baseball

[53] Greenberg (2015).
[54] Ibid.
[55] Gridiron.com, Inc. v. National Football League Players Association, 106 F. Supp. 2d (S.D. Fla. 2000).
[56] 202 F.2d 866, 346 U.S. 816 (1953).

player's interest in his photograph on a bubble gum card. Justice Frank distinguished between the right to privacy and publicity and observed that, "the right to privacy, including protection against misappropriation, is designed to guard individuals' personal rights against emotional distress; the right of publicity is recognised as a property right, largely designed to protect the commercial value of the image that a person has cultivated in becoming a celebrity."[57] The right of publicity thus bears some resemblance to copyright law.

3.3.3. The transformative use exception

The exception of transformative use which was invoked in the *Digital Collectibles case* was addressed in the US cases of *A. Keller v. Electronic Arts Inc* (Keller case)[58] and *Hart v. Electronic Arts, Inc* (*Hart case*).[59] In the *Keller case*, Electronic Arts, a video game developer had used a college football player's attributes except his name in the games' characters which made him recognisable to the college football fans. The Ninth Circuit Court of Appeals held that the character was not transformative enough and hence violated the player's right to publicity. Thus, according to this case there was a violation even if the player's name was not used directly and the outcome of the video game was not based on the athletes' actual performance. Whereas in OFS, actual names, performances, and statistics of the players are used and hence the work cannot be said to be transformative enough. Similarly, in the *Hart case*, the Court of Appeals ruled against the video game developer. It used the transformative test approach to find a balance between the right to free expression and the right to publicity. The Court noted that the transformative approach test gives courts "a flexible – yet uniformly applicable analytical framework".[60] It reached the same conclusion that the digital avatar strongly resembled the athlete even though his name was not directly used. The court rejected Electronic Art's defence that the users were allowed to change the features of the student athlete and concluded that such ability does not diminish the right to publicity.

Both these cases noted that the realistic depiction of the players is the substance of these digital games without which it cannot function. It cannot be denied that these video games and OFS

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[57] Ibid, para 2.

[58] In re NCAA Student-Athlete Name & Likeness Licensing Litig. v. Elec. Arts, Inc., 724 F.3d (9th Cir. 2013) (hereinafter Keller v. Elec. Arts, Inc.).

[59] Hart v. Electronic Arts, Inc., 717 F.3d 141, (9th Cir. 2013).

[60] Ibid, para 163.

platforms derive their value because they offer the users to play with or compete against famous athletes. Their value will be considerably diminished if they used fictional characters or athlete's unknown to the public at large.[61] Thus these decisions could be relied on to hold that the use of players personality in OFS games and digital player cards is not transformative enough to qualify for copyright protection. In video games the users could change the attributes of the players, yet it constituted as a violation. However, in OFS nothing about the famous athlete can be altered as the fantasy game can only work if the actual statistical performances of professional athletes are utilised in strict adherence to reality.[62] Further, it is important to draw a distinction between a newscast and such games. A newscast only uses facts which are not copyrightable.[63] However, as mentioned earlier the fantasy games are a commercial product in itself which uses such information as a raw material to produce a finished good.

3.4. The unauthorised use by OFS platforms should constitute an infringement in India

The Delhi High court failed to consider the above-mentioned cases and elements and solely relied on the fact that the elements of passing off were not proved because there was no likelihood of confusion. However, such application cannot be strictly applied to OFS platforms which operate on a different model and hence a different test needs to be applied. Therefore, in both the US and India, it is imperative to enact legislation that explicitly recognises the right to publicity. This necessity arises due to divergent court judgments and inconsistent application of established tests. The US legal precedents underscore that the unauthorised utilisation of players' live statistical performances in online fantasy games should not be shielded by freedom of speech exceptions. Such unauthorised use constitutes an infringement on athletes' proprietary rights, depriving them of the full benefits of their labor.[64]

3.5. Position in the United Kingdom

In the UK, the strict interpretation of image rights may pose a challenge for athletes seeking relief against unauthorised use in online fantasy games. In the case of *Robyn Rihanna Fenty &*

[61] Greenberg (2015).
[62] Ibid.
[63] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 578 (1977).
[64] Roberts (2007).

Others v. Arcadia Group Brands Ltd & Another (Topshop)[65] the Court ruled that for Rihanna to pursue a claim against Topshop for using her images on their t-shirts without authorisation, she would need to establish elements of passing off. According to this doctrine, the claimant will have to prove that they have goodwill, that there was a misrepresentation and that they suffered damage whether actual or potential.

However, in another judgment, the England and Wales Court of Appeal recognised the right of athletes to fully exploit their image commercially. In the *Proactive Sports Management Ltd v. Rooney* case,[66] the Court held that despite commercial endorsements being ancillary to the primary activity of playing sports, they are still protected under the doctrine of restraint of trade. In this case, Wayne Rooney, a footballer had assigned his image rights to a company. The company then entered into an agreement with another company according to which the other company would receive a commission of 20% on all endorsements made by Rooney. The Court held that the contract was unenforceable even if endorsement was an ancillary activity for the footballer. He had the full rights to exploit his image rights. The reasoning of the court in this case is in alignment of the view that the ability of athletes to generate revenue from one avenue should not foreclose his/her right to earn revenue from other avenues. This perspective aligns with the earlier discussed case of *Gridiron.com v. NFL Players Association*, where athletes' rights to fully exploit the commercial value of their image was acknowledged.

Athletes in the UK are increasingly aware of their commercial image in the digital sphere and are negotiating contracts more rigorously. In 2021, Zlatan Ibrahimović raised concerns about FIFA EA Sport using his personality in video games without permission. He had posted the following tweet, "Who gave FIFA EA Sport permission to use my name and face? @FIFPro? I'm not aware to be a member of FIFPro and if I am I was put there without any real knowledge through some weird manoeuvre. And for sure I never allowed @FIFAcom or FIFPro to make money using me" adding "Somebody is making profit on my name and face without any agreement all these years. Time to investigate". Electronic Arts and FIFPro responded, asserting that they acquired the rights through proper channels and only use players' likenesses with their consent.[67]

[65] [2015] EWCA Civ 3.

[66] [2011] EWCA Civ 1444.

[67] Bennett (2021).

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These developments illustrate a growing awareness among athletes of their rights, prompting organisations to be more cautious about unauthorised image use. While image rights in the UK are generally narrow, certain judgments have provided a broader interpretation in specific cases, akin to the legal landscape in India and the US.

4. Interplay between personality rights and moment marketing

Personality rights provide an athlete the opportunity to monetise their fame and popularity through endorsements, advertising and sponsorships. Amongst several others, moment marketing is a way in which this right can be infringed. It is a promotional technique, wherein the brands exploit trending news and events to create brand awareness and achieve high levels of engagement.[68] This strategy that has been used by the popular brand Amul for decades.[69]

In recent times, many brands have skirted the personality rights of the athletes by indulging in moment marketing that is leveraging the winning moment of an athlete in Olympics or other sporting events. Companies using moment marketing techniques create problems because athletes have typically authorised official sponsors or endorsements who have the right to use athletes' publicity rights. If moment marketers are left unchecked, then this can lead to athletes losing their official endorsements and sponsorships (as it dilutes the benefits of the official sponsors and endorsements). This section argues that it would be difficult to establish an infringement of publicity rights in a moment marketing scenario due to the lack of clarity and the inconsistent interpretation by the Courts, as explained above.

This relation between publicity rights and moment marketing can be understood through the case of Indian badminton player, PV Sindhu. After claiming her second Olympic medal at the 2020 Tokyo Olympics (having already claimed a medal at the 2016 Rio Olympics), social media was flooded with congratulatory messages. Instagram pages of several brands which did not sponsor the athlete also posted these messages to take advantage of the moment.[70] The ace shuttler, PV Sindhu, decided to take on such brands that made unauthorised use of her image

[68] Aggarwal (2023).
[69] Baruah (2023).
[70] Obhan and Dhingra (2023).

and name on the grounds of violation of her intellectual property and publicity rights.[71] There have been no reports of the case being filed in court. However, the subsequent sections of this paper will contend that proving an infringement of her right to publicity would pose significant challenges. It will further highlight the need for a special framework for protection of athletes' personality rights in India from moment marketing.

4.1. Application of personality rights to moment marketing cases

When a celebrity's name is not registered as a trademark, which is most commonly the case in India, they will have to claim relief on the ground of infringement of publicity rights.[72] The moment marketers in the PV Sindhu's case used her name, image and likeliness when she won the silver medal at the Tokyo Olympics by posting a congratulatory message. This results in the infringement of her right to publicity as she has a right to her identity, and her name and likeliness can be easily identifiable from the social media posts. Furthermore, the usage in social media posts was a direct reference to PV Sindhu's persona, and it was not merely incidental. Therefore, the elements mentioned in the *Titan Industries case* are satisfied, and the act of posting congratulatory messages with her name and image can be termed as a violation of her personality rights.

However, if limitations to the personality rights, as explained above, are taken into consideration, the athlete will have to establish the following to establish the violation of this right. First, the claimant will have to prove the elements of the common law doctrine of passing off.[73] It will have to be proved that the unauthorised use of the name/image of the celebrity has led to misrepresentation and confusion in the minds of the consumers that he/she is endorsing the product.[74] Loss of goodwill and reputation of the celebrity must also be proven. Thus, merely establishing that their identity has been used or there has been commercial gain to the infringer is not sufficient.

Moreover, in cases of moment marketing, it is difficult to establish whether the use constitutes an endorsement because it can be interpreted as an expression of opinion on the moment. For

[71] Ibid.
[72] Sahoo (2021).
[73] D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., CS (OS) 893/2002 (Del).
[74] Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories, AIR 1965 SC 980.

example, in PV Sindhu's case, the posts made were only congratulating the athlete. Therefore, brands were exercising their right to freedom of speech and expression. Thus, even if there is a commercial gain, it is covered under the exception of freedom of speech and expression, explained above. Additionally, it is unlikely such posts would create confusion in the minds of the consumers because these posts were being made by many others to celebrate the moment. Furthermore, the remedies available in cases of infringement of personality rights are inadequate as explained in the following section.

4.2. Determination of damages

In India, the right to publicity is safeguarded; nevertheless, when compared to the US and Europe, the remedies provided by the courts are primarily confined to issuing a permanent injunction in cases of false advertising. For instance, in the *Rajat Sharma v. Ashok Venkatramani case*[75] and the *Titan Industries case*, where the plaintiff's right to publicity was infringed, the court granted only a restraining order against the use of the offending advertisement. Similarly, in the recent Delhi High Court orders passed in the Amitabh Bachchan[76] and Anil Kapoor[77] case, an ex parte ad interim cursory injunction was granted. However, in cases of moment marketing, an injunction restraining further use may not suffice. By the time such legal measures are pursued, the brand may have already established a connection and triggered a high level of engagement with the game's audience on social media. They may have successfully promoted their product by wrongfully using athlete's personality rights and implying an association with the athlete.

In *D.M. Entertainment*, a claim involving passing off and infringement of personality rights resulted in the awarding of damages totalling one lakh rupees. The compensation was granted because an additional claim of passing off was made by the plaintiff where an additional element of '*likelihood of confusion in the minds of the public*' is to be proved.[78] This means, the public should believe that the plaintiff is associated with the tortfeasor's brand or product. Therefore, the violation of personality rights according to the *Titan Industries case* does not

[75] CS (Comm) 15/2019 (Del).

[76] Amitabh Bachchan v. Rajat Nagi & Ors. CS (Comm) 819/2022 (Del).

[77] Anil Kapoor v. Simply Life India and Ors case, CS (Comm) 652/2023 and I.A. 18237/2023-18243/2023.

[78] D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., CS (OS) 893/2002 (Del); Satyam Infoway Limited v. Sifynet Solutions Private Limited, AIR 2004 SC 3540.

require proving of deception on the plaintiff's part as "there exists a claim in right to publicity even if there is no falsity, deception or confusion as to the association of athlete with the brand".[79] However, not proving likelihood of confusion would leave the plaintiff with no punitive damages. On the contrary, in the US, Michael Jordan was awarded $8.9 million in compensation under the right to publicity. This occurred when he filed a lawsuit against two grocery chains for publishing an advertisement congratulating him.[80] Though there is no specific law in US for moment marketing as well, the quantum of damages awarded for violation of publicity rights creates deterrence which is not the case in India as the difference in damages awarded is quite visible.

Due to the above limitations, it is highly unlikely that PV Sindhu will be able to claim damages from the brands that had posted her images. First, many of these brands had not posted exact images but had created cartoons and caricatures in their posts to congratulate the athlete. Second, these brands would have the defence of freedom of speech and expression and no likelihood of confusion in the minds of the consumers. Therefore, given the rapid commercialisation of sports and increasing use of social media advertising, addressing the exploitation of 'moments' requires swift remedies. It becomes essential to implement faster solutions, such as establishing special take-down arrangements with social media platforms.

4.3. Trademark laws and moment marketing

This section seeks to establish a synergy between trademark law and publicity rights, specifically exploring the intersection of passing off and trademark dilution laws in the context of moment marketing. It contends that, despite the application of these laws, there is a notable gap in the protection of athletes' publicity rights when it comes to moment marketing.

4.3.1. Dilution of well-known trademark

Trademarks protect the goodwill or the reputation of a product or service as they are carriers of its commercial origin for the consumers. According to Indian trademark law, celebrity names have been recognised as distinctive, famous marks, considered to be on a higher pedestal than

[79] Titan Industries Limited v. M/S Ramkumar Jewellers, (2012) 50 PTC 486 (Del), para 15.
[80] Janssen (2015).

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well-known marks.[81] An athlete's persona is known to sell goods based on the 'publicity value' and 'consumer perception' attached to it. Free riding is a form of trademark dilution in the European Union jurisdiction, where the defendants ride on the success and goodwill of the trademark holder, taking an unfair advantage.[82] In *L'Oréal and Ors. v. Bellure NV and Ors.*,[83] the Court of Justice of European Union (CJEU) held that unfair advantage relates "not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign."[84] Considering the goodwill associated with an athlete's persona, the trademark gets diluted[85] when brands (moment marketers) use athlete's trademark (name and likeliness) to post on social media as this constitutes free riding on athlete's success. Brands manage to make the connection and trigger high levels of engagement with the game's audience, on social media by posting a quirky or congratulatory message, leading to increased brand visibility, market presence and sales. Therefore, brands unfairly capitalise on the athlete's success, thereby causing trademark infringement of dilution.

Registration of trademark is necessary to prove dilution in India.[86] However, most athletes in India do not register their name as a trademark. Therefore, such a cause of action is difficult to pursue in practice. Moreover, dilution takes place of well-known trademarks, therefore, new athletes' who won their first Olympic medal may not receive protection under the traditional trademark regime. For instance, before the 2022 Tokyo Olympics, Meerabai Chanu was not a celebrity. Similar to P.V. Sindhu's case, Dominos skirted her rights by an unauthorised use of her name and image, suggesting an official link with her.[87] However, she would have no recourse under personality rights.

4.3.2. Common law doctrine of passing off

A remedy can also be claimed under the tort of passing off without the need for trademark registration. An action for passing off arises where one person benefits from another person's

[81] Mr. Arun Jaitley v. Network Solutions Private Limited and Ors., 181 (2011) DLT 716.
[82] L'Oréal and Ors. v. Bellure NV and Ors., Case C-487/07, CJEU, judgement of 18 June 2009, para 41.
[83] Ibid.
[84] Ibid, para 41.
[85] Kankanala and Hegde (2012).
[86] Section 29(4) of the Trademarks Act, 1999.
[87] The Indian Express (2021).

reputation or goodwill by passing off their products as belonging to the other person.[88] The classical trinity of the tort of passing off was discussed in the case of *Reckitt and Colman products Ltd v. Borden Inc.*[89] The claimant needs to establish the following three elements: (1) the goodwill enjoyed by him, (2) misrepresentation by the defendant, and (3) resultant damage to the plaintiff's goodwill.[90]

In the PV Sindhu case, while she enjoys goodwill and reputation, establishing the misrepresentation element, specifically the likelihood of consumer confusion regarding the athlete endorsing the moment marketers' brand, seems challenging. Brands may argue that their participation in social media discussions is not driven by any dishonest intent to cause confusion among consumers. In the realm of moment marketing, asserting that people would mistake congratulatory posts as endorsements during widespread social media conversations become a difficult argument to be proved before a Court. An illustrative example is Oreo's "You can still dunk in the dark" tweet, which avoided infringement accusations by positioning itself as part of ongoing conversations.[91] Navigating the fine line between participating in discussions and implying an official link or endorsement poses a challenge. Astute marketers can exploit this distinction. Consequently, proving passing off becomes difficult, and claiming punitive damages becomes even more challenging. In the case of *Arun Jaitley v. Network Solutions Pvt. Ltd.*,[92] where a passing off claim was raised, the court emphasised that punitive damages are warranted only when the defendant's conduct is '*ex facie*' dishonest. The spontaneous nature of congratulatory messages in the moment does not appear prima facie dishonest. Moreover, establishing damage to reputation is contingent on successfully proving misrepresentation, a task made unlikely by the aforementioned challenges.

Furthermore, in some instances there may be actual damage to goodwill or loss of reputation as an athlete would not like to be associated with some brands because of their ignominious status, for instance Pan Bahar's post in PV Sindhu's case.[93] Also, athletes' can lose out on their authorised official sponsors and endorsement, and hence will not be able to commercially

[88] D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., CS (OS) 893/2002 (Del).
[89] [1990] 1 All E.R. 873.
[90] Ibid.
[91] Pathak (2017).
[92] (2011) 181 DLT 716.
[93] Sharma (2021).

exploit their personality rights. Therefore, it is necessary to deter brands from using athletes name and image without authorisation.

4.4. Advertising Regulations and transformative use exception

The congratulatory messages potentially run afoul of Rule 1.3 of the ASCI Code for Self-Regulation,[94] which safeguards against unauthorised advertisements creating a false impression that a person endorses a specific brand. The legal remedy against such false and misleading advertisement can be claimed under Section 89 of the Consumer Protection Act, 2019. This section imposes penalties, including imprisonment for up to two years and a fine of up to ten lakh (1 million) rupees for manufacturers or service providers, with stricter consequences for repeat offenders.

However, in the context of moment marketing, establishing confusion regarding the athlete's endorsement is challenging, given the spontaneous nature of congratulatory posts amid a social media surge as discussed above. Smart marketers can navigate this by subtly alluding to the event, as exemplified by Amul's pioneering approach with 'Amul Topical Ads,' which has successfully built enduring brand equity over the years.[95] Regarding Amul advertisements, even though the real image undergoes transformation into a cartoon or caricature, one could argue that the celebrity remains identifiable within the context of the picture. Nevertheless, there is no confusion because Amul has been engaged in such advertisements for decades, and people are not misled into believing that the celebrities endorse Amul.

A further challenge that can be anticipated for PV Sindhu to claim infringement of her rights is the transformative use exception. Some brands by relying on the *Digital Collectibles case*, can argue that they had not used the exact images of Sindhu but had converted it into cartoons and artworks, which is a permissible practice.[96] This poses a significant challenge for her, even though she is clearly identifiable in the image used. As discussed, the popular brand Amul is indulging in this practice since years, but no action is taken as it has now become a symbol of

[94] The Advertising Standards Council of India (1985).

[95] Karweer (2022).

[96] Digital Collectables PTE Ltd and Others v. Galactus Funware Technology Private Ltd and Another, CS (Comm) 108/2023 (Del), para 65.

prestige for the celebrities. Consequently, all the existing remedies fall short in providing effective recourse to athletes against moment marketing.

4.5. Rule 40 of the Olympic Charter

Engaging in moment marketing during the Olympics, as exemplified in PV Sindhu's case, also contravenes Rule 40 By-law 3 of the Olympic Charter. This rule imposes restrictions on how athletes can leverage their image during the Olympic blackout period.[97] Official sponsors of Indian and British athletes are prohibited from sharing congratulatory messages.[98] The reasoning behind this rule is to safeguard and affirm the exclusive rights of the official sponsors of the Olympics and to protect the event from ambush marketing. The International Olympic Committee (IOC) released Illustrative Guidance for Non-Olympic partners for the upcoming Paris Olympic 2024.[99] As per the guidance, posting congratulatory messages during the blackout period is not allowed. It states that,

> *Non-Olympic sponsors cannot publish congratulatory advertising during the Games period. This also covers other messages of support and commiseration for athletes competing at the Olympic Summer Games. These kinds of messages can be posted by sponsors before and after the Games Period, without using Olympic Properties or creating any connection with the Olympic Summer Games*.[100]

The 'moment marketers' violate this rule and put the athlete in a position to face sanction by the IOC. They also commit a wrong against the official sponsors who could not post because of the restraint, even though they have supported the athletes.

5. Conclusion

The right to publicity is still in its early stages in India, especially in the sporting industry, lacking specific legislation and sufficient judicial precedents. The divergence in judicial views creates uncertainty in its application. Therefore, the parliament and the courts need to define the contours of the right in a way which ensures wider protection. The authors suggest that the rationale and observation of the *Titan Industries case* can be used as a base for defining the

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[97] Crowther (2019).
[98] PTI (2021).
[99] International Olympic Committee (2023).
[100] Ibid.

contours of publicity right in India. In this judgement, it was observed that for a celebrity to assert a breach of their publicity rights, it is sufficient to demonstrate unauthorised use where the claimant is identifiable. The elements of passing off and false advertisement need not be established. Adopting this approach would simplify the process for celebrities (including athletes) seeking to allege infringement. Furthermore, there is a need to define identifiability. It is argued that even if there is a transformation of the celebrity's image in the form of a caricature or cartoon, they can still be identifiable and if this is the case then the same should also constitute an infringement.

India can take inspiration from many foreign jurisdictions which have provided statutory recognition to this right. While the US lacks federal legislation, many states recognise this right through statutes and case laws,[101] with personality rights gaining recognition as a separate property right. Civil law jurisdictions such as Italy and France have specific legislation for safeguarding athletes' image rights.[102] Furthermore, in Brazil, the Brazilian Federal Constitution protects personality rights and specifies that such rights can only be exploited by a third party via an assignment agreement.[103]

Further, there is a necessity for a re-evaluation of the Delhi High Court's decision in the *Digital Collectibles case*. Drawing from precedents in the US, one can assert that the unauthorised utilisation of athletes' names, images, and identities in OFS constitutes a breach of their publicity rights. This unauthorised usage not only impedes athletes' revenue-generating opportunities in this domain but also provides these platforms with a commercial advantage derived from the use of a renowned athlete's persona. Consequently, compensating athletes for such usage is imperative. It is also crucial to assert that this kind of utilisation does not qualify for exceptions such as freedom of speech or transformative use.

Unlike athletes in foreign jurisdictions, many in India do not trademark or copyright their unique elements. Hence there is a need to create awareness amongst athletes regarding the importance of trademarking their names. Alternatively, sports agents can ensure that an athlete's name is registered as a trademark. A dedicated framework is required to protect

[101] Reichman and Furst (2021).
[102] Ferrari and Riberti (2015).
[103] Eugiona (2020).

personality rights, including against moment marketing. Courts should consider amending intellectual property rights to include personality rights and imposing significant damages to deter exploitation. Existing remedies, as seen in PV Sindhu's case, are time-consuming, and a specialised framework is essential to shield athletes from moment marketing and ensure swift and effective protection.

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