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EDITORIAL NOTE

Intellectual Property is the key driver to propel the economic growth of a nation. Hence, understanding IP gains utmost significance not only from a business point of view but also from a socio-economic perspective. We as nationals of any country should be vigilant in protecting and defending our IP rights. However, there are multiple issues and challenges that need discussions, and reforms. The IP Press Law Review (IPPLR) is an initiative of The IP Press to extend our objectives of spreading awareness on the issues concerning intellectual property rights and related laws. It aims to promote study and research in the field of intellectual property laws in the form of academic literature. This issue reflects some of the key concerns of the Intellectual property regime both under national and international parlance. It is envisioned to embody some of the most brainstorming insights that help readers to grasp the discourse around contemporary developments in the field of Intellectual Property Law. Throughout the year, the editorial board has reviewed the papers with multiple rounds of editing to ensure quality and standard.

This issue presents intriguing issues and challenges pertaining to intellectual property law in the national as well as the international regime. The first paper encapsulates the protection of personality rights under Intellectual property laws and briefly presents the status of multiple jurisdictions. The second paper discusses a pertinent issue of protection of fictional characters that have been a cause of concern in many disputes. The author discusses the theoretical framework and analyses various tests laid down by the judiciary.

The third paper explores religion as a subject and object of the trademark. The author determines the legality of the trademark of religious symbols for private companies and religious organisations. The fourth paper presents a policy discussion on the overlap between trademark and functionality doctrine. The fifth submission deals with the congruence of intellectual property assets in combination and corporate restructuring wherein the author states that IP has immense power to help businesses to grow and hence its valuation becomes an important aspect of commercialization of IP. The sixth paper demonstrates how open-ended section 57 of the Copyright Act, 1957 is which leads to ambiguity. The author asserts reforms in the current provision of moral rights. The seventh paper discusses the recent dissolution of the intellectual property appellate board in the backdrop of the Tribunal Reform Bill, 2021. The eighth paper discusses the relevance of IP Due diligence and suggests quarterly checks and steps carry out the due diligence process to combat the closing down of businesses and lifelong losses. The ninth paper presents analyses of the patent denials in the biotechnology sector and their impact on the industry. The tenth paper presents an interesting analysis of trademarkability of non-conventional trademarks due to hindrances of graphical representation and discusses multiple judgements of the European courts. The last two items present an analysis of two landmark cases, one Monsanto case and two, Phonpe v. Bharatpe trademark tussle.

Happy reading!

- 1 PROTECTION OF PERSONALITY AND IMAGE RIGHTS- A COMPARATIVE ANALYSIS**
Lucy Rana, Shilpi Saran
- 12 ANALYSIS OF PROTECTION GIVEN TO FICTIONAL CHARACTERS AND ITS OWNERS IN COPYRIGHT LAW-**
Aishwarya Srivastava
- 33 TRIALS AND TRIBULATIONS OF TRADEMARKING RELIGION IN INDIA**
Pavitra Naidu
- 47 TRADEMARK ANALYSIS IN PERSPECTIVE OF THE FUNCTIONALITY DOCTRINE**
Konark Pratap Gupta
- 61 THE CONGRUENCE OF INTELLECTUAL PROPERTY ASSETS IN COMBINATION AND CORPORATE RESTRUCTURING-**
Shantanu Sharma, Prutha Bhavsar
- 73 MORAL RIGHTS AND ITS SHORTCOMINGS IN INDIA**
Vrishti Shami
- 81 JUSTIFYING THE DISSOLUTION OF THE INTELLECTUAL PROPERTY APPELLATE BOARD IN THE BACKDROP OF THE TRIBUNAL REFORM BILL, 2021**
Anirudha Sapre
- 97 IP DUE DILIGENCE: COMBATTING WINNER'S CURSE!-**
Harsha Aswani

- 118 DENIAL OF PATENTS IN THE BIO-TECHNOLOGY SECTOR AND ITS CONSEQUENCES ON INDUSTRY DEVELOPMENT**
Aryan Shah
- 129 NON-CONVENTIONAL MARKS: GRAPHICAL REPRESENTATIONS AND CONTEMPORARY PROBLEMS**
Doyita Mukherjee
- 142 MONSANTO CO V. STAUFFER CHEMICAL CO: THE EXPERIMENTAL USE EXCEPTION**
Anusrita Ranjan
- 146 A CRITICAL NOTE ON THE DELHI HIGH COURT'S RULING IN THE PHONEPE VERSUS BHARATPE TRADEMARK TUSSE**
Ritwik Guha Mustafi

PROTECTION OF PERSONALITY AND IMAGE RIGHTS IN INDIA

Lucy Rana*, Shilpi Saran**

ABSTRACT

“Whatever a man creates should not be taken by somebody else and exploited...”

Hugh Hansen¹

In general, protection of personality rights emerged worldwide as a province of Tort laws. Personality rights protection originated as an independent issue only in the 19th century. In India personality rights have primarily been protected under the laws of privacy and IPR laws and as rightly put in the words of Prof J Thomas McCarthy ‘The right of publicity is not a kind of trademark. It is not just a species of copyright. And it is not just another kind of privacy right. It is none of these things, although it bears some family resemblance to all three.’²

In the recent past, the precedents and judicial dictum have carved out and streamlined the law pertaining to protection of personality and celebrity rights in India. One of the categorical holding of the Hon’ble Delhi High Court has been that right of publicity has evolved from the right of privacy and can emerge from an individual’s personality like his name, personality trait, signature, voice and that any attempt effort to take away the right of publicity from the individuals would be in violation of Articles 19 and 21 of the Constitution of India³.

The present paper is an encapsulation of the laws and cases, which have evolved to determine and contour the law on protection of personality rights in India and present a comparative analysis of this right in other jurisdictions.

Keywords: Personality rights, copyrights, trademark, publicity, well-known trademark, image rights.

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¹ Professor of Law, Fordham University, 7 International Intellectual Property Law & Policy 36-1 (2002) Panel Discussion on Personality Rights.

²J. Thomas McCarthy, ‘The Spring 1995 Horace S. Manges Lecture: The Human Persona as Commercial Property: The Right of Publicity’ (1995) 19Colum.-VLA J.L.& Arts 121.

³ICC Development (International) ... vs Arvee Enterprises &Anr., 2003 (26) PTC 245 Del.

1. INTRODUCTION

The recently concluded Tokyo Olympics 2021 was inarguably the most successful one for India in history, and will be forever etched in the history of Indian Sports as the nation won seven Medals in the Games. However, the aftermath of the Olympics has led to the emergence of a rather thought-provoking issue i.e. the *protection of personality and image rights in India*. It has been widely reported that the names and images of Indian athletes who won medals in the Summer Olympic Games have been used by several Indian entities, including several major brands, for advertising and marketing their products and services in media. In this regard, the use of the name and imagery of the gold medallist Neeraj Chopra and ace badminton player PV Sindhu appear to be the most prominent ones. Pursuant to such unauthorized use, the Advertising Standards Council of India (ASCI) had also placed its strong objections on brands using images of India's Olympics' medallists to promote their own products or services⁴. This whole saga has struck an intriguing deliberation on the concept of the protection of personality and image rights in India.

Perhaps the most high-profile infarction in this context was the news wherein Baseline Ventures, agency managing commercial contracts of PV Sindhu, had sent legal notices to over 20 companies, for making unauthorized use of her name/imagery in advertising.⁵

A. What are Personality and Image rights?

The 'right of publicity', commonly known as Personality rights, recognizes a person as a physical and spiritual moral being and guarantees his enjoyment of his own sense of existence.⁶ The right to personality and image saw its origin globally as a part of common law or classic natural law, with its notion of inalienable human rights, which included within its purview various laws relating to personality⁷. Hence, personality and image right is the right of an individual (which albeit seems more relevance amongst public figures or celebrities), to control the use and commercialization of

⁴Ratna Bhushan, 'ASCI slams brands using Olympics winners without approval' (*The Economics Times*, 05 Aug 2021) <<https://economictimes.indiatimes.com/industry/services/advertising/asci-slams-brands-using-olympics-winners-in-ads-without-approval/articleshow/85080169.cms> > accessed 20 August 2021.

⁵Meenakshi verma Ambwani, 'Baseline ventures sends legal notices to 20 firms for unauthorized use of PV Sindhu's image' (*Business Line, The Hindu*, 6 August 2021) <<https://www.thehindubusinessline.com/news/baseline-ventures-sends-legal-notice-to-20-firms-for-unauthorised-use-of-pv-sindhus-image/article35770116.ece> > accessed 21 August 2021.

⁶Christian von Bar, *The Common European Law of Torts*, vol2 (CH Beck 2000) 61.

⁷WA Joubert Grondslae van die persoonlikheidsreg (1953) at 130-1; 1 Neethling, JM Potgieter & PJ Visser Neethling's law of personality (2005) at 24.

their identity which is their personage in the form of voice, signature, likeness, appearance, silhouette, feature, face, expression, gesture, mannerism, distinctive character.

The essence of the right of publicity or personality rights was succinctly explained by the US Court of Appeals for the Second Circuit, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁸. Some noteworthy insights from US Court's observations in the case are:

1. Right in publicity value of one's photograph;
2. Prominent persons would feel deprived if they did not receive money for authorizing advertisements;
3. Such unauthorized publicity would usually yield them no money unless it could be made the subject of an exclusive grant;

B. Personality/ Image Rights and IPR

It is common knowledge that celebrities often permit or authorize use of their voice, skills, act or names for commercial and non-commercial purposes. However, such use comes under the scanner of Intellectual Property Laws (IPR) when the same is done without any due authorization of the concerned public figure or celebrity. Though the law pertaining to such violation of image rights have not been provided exclusive recognition under the Indian Laws, an indirect reference can be derived from the provisions of existing IPR laws in India.

Hence, personality rights can be protected under the IPR laws as the excerpts of protection of personality rights can be found in the Indian IP statutes, which have been discussed below in detail.

C. Copyright Act, 1957

The Indian Copyright Act does not define the word 'personalities' or 'celebrities'. However, the Hon'ble Delhi High Court in the case of *Titan Industries Ltd. vs M/S Ram kumar Jewellers* in 2012, defined the term 'celebrity' as a person who is famous or merely a person who many people talk about or know about.⁹

⁸*Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* 02 F.2D 866 (2D CIR. 1953).

⁹*Titan Industries Ltd. v. M/S Ramkumar Jewellers* CS(OS) No.2662/2011.

i. Performers, rights of performers and exclusive right of performer under Indian Copyright Law

The Act defines the term ‘performer’ under Section 2(qq) as actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance; Hence, a celebrity can aptly fall within the ambit of a ‘performer’ and shall be entitled to rights construed to a ‘performer’ under the Act.

ii. Exclusive right of performer under the Copyright Act

Additionally, Section 38 of Copyright Act defines “Performer’s right” and states that performer’s right shall be available for a period of 50 years from beginning of calendar year following the year in which the such performance was made. Further, Section 38A postulates a crucial right on performer’s exclusive right and prohibits anyone from making a sound recording or a visual recording of the performance, reproduction of performance in any material form, broadcasting or communicating the performance to the public without the express consent of the performer.

Apart from the previously mentioned exclusive right of a performer, the rights conferred on a personality can be derived from Sections 17, 39 and 52 of the Copyright Act.

iii. First owner of Copyright in Advertisements and protection of personality rights- The Tanishq Diamond case.

Interestingly, in the case of *Titan Industries Ltd. vs M/S Ramkumar Jewellers*¹⁰, the Hon’ble Delhi High Court had deliberated on personality rights and the provision under Section 17¹¹ of the Copyright Act, which states about determination of first owner of copyright. Herein, the Plaintiff sought to restrain infringement of copyright, misappropriation of personality rights and passing off. The case of the Plaintiff was that it had signed an Agreement for Services with the super star couple Amitabh Bachchan and Jaya Bachchan for advertisement of its brand Tanishq. However, the Plaintiff later discovered that the Defendant was making unauthorized use of the images of the said celebrities on hoardings to advertise their goods (jewellery).

The Court while restraining the Defendant from making use or misappropriating the rights of Tanishq and the star couple, observed that when identity of a celebrity is advertised without

¹⁰ibid.

¹¹Indian Copyright Act 1957, s 17.

authorization, then the celebrity's or famous personality's right to control when, where and how their identity is used should vest with the famous personality only. Hence, the right to control commercial use of human identity is the right to publicity.

The Court also noted in the case that "By virtue of Section 17(b) of the Copyright Act, 1957, the plaintiff is the first owner of the copyright in the said advertisement and this fact is substantiated by the endorsement agreements which clearly state that ownership of copyright is with the plaintiff."

While considering the aspect of misappropriation of 'right to publicity', the Court enumerated the two basic elements of 'validity' and 'identifiability' i.e. Plaintiff's enforceable right in identity or persona of a human being and that the Celebrity must be identifiable from Defendant's unauthorized use of right of publicity.

iv. Personality rights vests in an individual

In a case of 2003¹², the Hon'ble Delhi Court while dealing with a case involving right to publicity pointed out that the right has evolved from right of privacy and can be inhere only in an individual or in an individual's personality, for instance his name, personality trait, signature, voice, etc.

v. Commercialization of Personality's name/ image by Defendant

In an intriguing case of *Mr. Gautam Gambhir vs D.A.P & Co. & Anr*¹³, cricketer Gautam Gambhir claimed personality rights in his name when he found out that the Defendant was running restaurants with the tag line 'by Gautam Gambhir' while he had absolutely no connection with the said restaurants. The cricketer alleged that his 'Personality Rights' had been illegally violated by the Defendant.

However, the High Court of Delhi in view of evidence adduced in the case was of the view that the Plaintiff's name had not been commercialized by the Defendant. The Court was of the view that nothing had emerged on record to show that because of running of the restaurants by the Defendant with the tag line 'by Gautam Gambhir' any loss had been incurred to the Plaintiff in his field i.e. cricket.

¹²*ICC Development* (n 3).

¹³*Mr. Gautam Gambhir vs D.A.P & Co. & Anr* CS(COMM) 395/2017.

D. Trade Marks Act of 1999

The Indian trademark law does not specify any exclusive protection for personality or image rights. However, Section 2(m) pertinently includes the term “names” in its definition of what constitutes a “mark”¹⁴. Several Indian celebrities like, Baba Ramdev and the famous actress Kajol, have pursued the trademark route to prevent misappropriation of their names¹⁵.

i. Use of name or representation of a living person or recently deceased person

Section 14 of the Trade Mark Acts deals with the use of name or representation of a living person or a recently deceased person. The statutory provision under Section 14 restricts claims which falsely suggest a connection with any living person, or a person whose death took place within twenty years prior to date of application for the impugned trademark.

In case of *Makkal Tholai Thodarpu Kuzhumam Ltd. vs. Mrs. V. Muthulakshmi*¹⁶, the Hon’ble Madras High Court deliberated upon the right to privacy and related subject matter, regarding the notorious bandit Veerappan, who was gunned down by law enforcement in 2004. The Court observed that “The contention of the learned counsel for the respondent Mr. Manoharan that right to privacy continues and takes the new turn after the death of Veerappan, who died on 19.10.2004 is also baseless because even during the life time of Veerappan himself, the publications have been made admittedly and he has not taken any steps for the purpose of opposing. The same question of continuation of privacy after his death is not at all an acceptable argument.” However, the Court also protected the rights of the kin of the deceased while stating the revision petitioner cannot telecast about plaintiff’s personal life while telecasting the impugned serial and that the serial content should only be premised on publicly available records and information.

ii. Section 35 of Trademark Act and bonafide use of name

In the case of *Precious Jewels & Anr vs Varun Gems*¹⁷ the Plaintiff as well as the Defendant firms belong to the same family sharing a common surname – “Rakyan”. The plaintiff in the case

¹⁴“mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;

¹⁵Rasul Bailay, ‘Celebrities using trademark route to check name misuse’ (*Livemint*, 19 March 2010) <<https://www.livemint.com/Consumer/Dss3fISYwLqa0bQr53dhfL/Celebrities-using-trademark-route-to-check-name-misuse.html>> accessed 20 November 2021.

¹⁶*Makkal Tholai Thodarpu Kuzhumam Ltd. vs. Mrs. V. Muthulakshmi* CRP. (PD) No.3299 of 2007.

¹⁷*Precious Jewels & Anr vs Varun Gems* Civil Appeal no.7191 of 2014.

claimed that the defendants shall be restrained from doing their business in the trademark of their surname “RAKYAN”.

However, the Supreme Court rejected the claims of the Plaintiff while referring to Section 35 of Trademark Act to hold that the provision permits anyone to do their business in their own name in a bona fide manner.

iii. Right of publicity extends beyond the traditional limits of false advertising laws. The World Intellectual Property Organizations (WIPO) in the *Barkha Dutt case*¹⁸ while noting the facets of personality and image rights was of the view that non-consented use of a famous person's name is not a bonafide use as it does not confer rights or legitimate interests on the unauthorized user. The WIPO also held in the case that the right to commercially use or exploit one's own name, vests with the person who has worked towards creation of that fame and such a person can legally restrict its unauthorized use by a third person.

iv. For character merchandising, character must gain some public recognition. The Bombay High Court while dealing with the issue of character merchandising in the case of *Star India P. Ltd., Vs. Leo Burnett (India) P. Ltd.*¹⁹, had held that the characters to be merchandized must have gained some public recognition independently of the original product i.e. recognition attained independently of the milieu/area in which the character appears.

v. Name is a well-known trademark under Trademark Act. While substantiating on the degree of fame acquired by a personality or personal name, the Delhi High Court in the case of *Arun Jaitley v. Network Solutions (P) Ltd.*²⁰, provided that a person can be restrained to use a popular or well-known personal names, when, it is satisfied that such name is a well-known trademark under the trademark law, and that the name can be used for commercial purposes. A similar view was also taken by the Court in the case of *Sourav Ganguly v Tata Tea Ltd.*²¹, wherein it was held that fame and popularity in the case were the Plaintiff's intellectual property.

¹⁸*Ms. Barkha Dutt v. easyticket, Kapavarapu, Vas* Case No.D2009-1247.

¹⁹*Star India P. Ltd., Vs. Leo Burnett (India) P. Ltd.* 2003 (2) Bom CR 655.

²⁰*Arun Jaitley v. Network Solutions (P) Ltd.* CS(OS) 1745/2009 & I.A. No. 11943/2009 & 17485/2010.

²¹*Sourav Ganguly v Tata Tea Ltd.* CS no. 361 of 1997.

Another intriguing case involving the entertainment industry is the case of *Sonu Nigam v. Mika Singh*²², wherein the Court restrained Mika Singh and OCP Music from in any manner publishing the impugned advertisement which violated the personality and image rights of the Bollywood singer Sonu Nigam.

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

The Emblems and Names (Prevention of Improper Use) Act, 1950 restricts the improper use of certain names. In this context, it would be relevant to refer to the incident of Montblanc, wherein the company launched a series pen marking the 140th birth anniversary of Mahatma Gandhi, namely “Mahatma Gandhi Limited Edition 3000”. However, the Union Government objected to the launch of the pen series under Section 3 of the Act. Later, a petition was also filed seeking a ban on sale of the impugned pens in the country. Eventually, the company gave an undertaking before the Division Bench of the Kerala High Court that it would not sell its “Mahatma Gandhi Limited Edition 241” and “Mahatma Gandhi Limited Edition 3000” series pens till further orders by the Court.

F. The Code of Self-Regulation in Advertising in India- ASCI

The Code released by the Advertising and Standards Council of India in 1985 throws light on the concept of celebrities as famous and well-known people from the fields of Entertainment and Sports and may also include other well-known personalities like Doctors, Authors, Activists, Educationists, etc.

Under Chapter 4, the Code postulates the following with reference to misappropriation and exploitation of names in advertisements:

“Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trademark or symbol of another firm or its product or the goodwill acquired by its advertising campaign.”

From the aforesaid, it is evident that though the law pertaining to protection of personality and image rights in India have not been specifically formulated, there are precedents and *obiter dictum* by the Indian Judiciary which have adequately contoured and streamlined the law.

²²*Sonu Nigam v. Mika Singh* CS 372/2013(Bombay High Court).

2. PROTECTION OF PERSONALITY RIGHTS IN OTHER COUNTRIES

A. United States

There is no federal Statute in the USA, that expressly discusses the question of rights of publicity, nor does any law provide any definition for this right. However, the *Unfair Competition Law* provides for protection with respect to false endorsements, associations and affiliations.

One of the first cases, where the US Courts recognized the right, was in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*²³ in 1953, wherein the Court stated that “A man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made in gross i.e., without an accompanying transfer of a business or of anything else. This right might be called right of publicity”

B. United Kingdom

In the United Kingdom, there is no specific statute which has been created for the purpose of dealing with personality rights alone. However, both statutory as well as common law prescribe for protection against non-consented use of celebrity image rights.

The action of passing-off under Torts Law arises when the image of a personality is used for the purpose of trade and generates goodwill. Laws such as Trademarks Act, 1994 and Data Protection Act, 1998 protect publicity rights.

In *Irvine v Talksport*²⁴, the Court of Appeal was confronted with the issue of a false endorsement case and held that the picture published by the Defendant radio station sent the wrong message of false endorsement by the claimant. Hence, the claimant succeeded in a passing off action for false endorsement.

The Data Protection Act prevents the misuse of personal information of an individual whether in form of computer resources or in paper form. In this context, Section 10 of the Act states that an individual has a right to prevent the processing of personal data where it would cause substantial

²³*Haelan* (n 8).

²⁴*Irvine v Talksport* [2003] EWCA Civ 423.

stress. The images and videos of a person constitute personal data, usage of which may amount to infringement of personal rights under the Act.

Further, the European Convention on Human Rights (ECHR) under Article 8 embodies the right to private life of a person with his family without any kind of interference on part of the Government. Article 10 provides the right to freedom and expression according to which a person can freely express his opinion.

C. Germany

Similar to the laws in the UK, Germany provides protection to image and personality rights in both Torts and other statutes such as Trademark Law, Copyright in works of Art and Photography Act, German Civil Code and Unfair Competition Law.

A case which substantiates the protection of personality rights in Germany is *Sihler-Jauch and Jauch v Germany*²⁵. In this case, a celebrity couple had requested the press to not publish or report about their wedding details. However, the German magazine *Bunte* published an article about the wedding along with the celebrities. While pronouncing its verdict, the Hamburg Court of Appeal and the ECHR were of the view that unauthorized publication of the couple's photographs were violative of their personality rights.

D. Canada

Similar to the position as enumerated in other countries, both law of torts and statutory laws cover the subject matter. The statutory laws have been passed in the Provinces of Canada such as Manitoba, New Foundland and Saskatchewan.

In case of *Joseph v Daniels*²⁶, the Court laid down the criteria of 'Identifiability' and held that the image of the personality shall be identifiable to the public at large. While substantiating upon the law, in *Gould Estate v Stoddart Publishing Co*²⁷ the Court held that "While Canada does not have a constitutional provision akin to the First Amendment which is applicable to the private law, no principled argument has been advanced to suggest that freedom of expression considerations

²⁵*Sihler-Jauch and Jauch v Germany* Applications 68273/10 and 34194/11.

²⁶*Joseph v Daniels* (1986) 11 CPR (3d) 544 (BCSC).

²⁷*Gould Estate v Stoddart Publishing Co* (1996) 74 CPR (3d) 206.

should not animate Canadian courts in identifying the public interest and placing limits on the tort of appropriation of personality. Indeed, freedom of expression would seem to be a compelling and reasonably coherent basis for defining the ‘obvious’ need for limits.”

The right to personality is recognized in Canada as a celebrity right. The legislation enacted for this purpose directly addresses the issue, unlike many other jurisdictions, including the ones discussed herein. In *Les Éditions Vice-Versa inc. and Gilbert Duclos v. Pascale Claude Aubry*²⁸, the Court made a reference to the Quebec law and observed that “.....right must include the ability to control the use made of one’s image, since the right to one’s image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity.”

3. CONCLUSION

Undeniably, the issues of violation of personality rights have evolved in several jurisdictions in the past few decades. The Courts have majorly been confronted with issues pertaining to violation of personality rights on print and electronic media i.e. newspapers, magazines, televisions and radio stations. However, the cyber age and penetration of technology and the phenomenal use of social media platforms in the recent past has further augmented the whole issue of protection of personality rights and made it vulnerable.

²⁸*Les Éditions Vice-Versa inc. and Gilbert Duclos v. Pascale Claude Aubry* [1998] 1 S.C.R. 591.