

Copyright and Related Rights Law

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WEEK - 07

LECTURE – 35

Performers Rights and Personality Rights

Welcome back to this course on copyright and related rights law. This week we have been discussing performers' rights. We have seen the definitions of performers and performances in various copyright Acts in different parts of the world. We have also seen how works and performances are distinct. We have also understood the economic and moral rights that are provided to performers in India. What we will look at today is an interesting query into whether aspects of a person's personality can be considered as lying within performers' rights.

Because in recent considerations, a question that seems to be arising is whether a moral right claim against the distortion of a person's image is, in effect, a moral right of the performer that is being used. What if a person's image generated by AI tools is infringing on a performer's economic rights? These interesting questions are what we will discuss today, because the question would also involve a look at whether copyright is attracted, and performer rights is also something that we will seek to understand. Let us consider this illustration. X is an IT professional who works in Mumbai.

X is at a café. He is sipping his coffee. Completely unknown to him, Z, an amateur photographer, takes a photograph of X. Can Z now monetize this photograph? Let us provide some supporting facts here. Let us say that Z did in fact intend to use this photograph as part of a larger collection which he intends to publish.

Let us also consider that X is not a well-known personality. There is no specific reason for the star power of X that made Z photograph X. Rather, it was just that particular setting and the manner in which X was sitting, minding his own business, having that coffee - a candid photograph. Can Z control the commercial use of this photograph without any authorization from X? Or is X in a position to control the usage of this photograph because he is the one who has been photographed? Let's say that X decides to

pursue a course of action. The first course of action is to restrict or restrain the publication of this photograph.

X is not happy. X had a reasonable expectation of privacy despite it being a public space. He was photographed without his permission. It wasn't as if the photograph was of the café and he was just one of the elements in that photograph. It was he specifically that Z photographed.

Consider the second course of action. In this, X does not particularly have an issue with publication; rather, X wishes to negotiate a revenue-sharing model over the revenue that will be generated on account of the usage of this photograph. We can see that there is a distinction in perspective when the context is economic utilization. In the first course of action, the perspective is non-economic. There was not one rupee that X wished to claim from Z.

Rather, X is more interested in taking action against the unauthorized clicking of the photograph by Z. The second course of action has an economic perspective. X, as we discussed, is not interested in non-publication but rather is interested in the proceeds of revenue that arise from such publication. The first perspective, which is clearly non-economic. Can we say that this first perspective takes us to the right to privacy? We have understood from the Justice KS Puttaswamy v. Union of India case, a landmark judgment, that the right to privacy is not an all-or-nothing right. In fact, when we consider it in a setting such as this, the one X finds himself in, we can say that even in a public space, X has a reasonable expectation of privacy. Obviously, the more intimate the setting, the higher the threshold of privacy will be. But nevertheless, the fact that X was in a public space does not, by itself, take away the claim of the right to privacy. Let us consider this in relation to a case that arose in the UK.

This is a case that involved a supermodel by the name of Naomi Campbell. In this case, we can see that Naomi Campbell, who was recovering from addiction, was photographed coming out of a rehabilitation clinic. The difference between X and Naomi is that Naomi is a very famous person. And such a famous person should have an even more diluted expectation of privacy in a public space than a person who is not famous. But the court that looked at the question of whether Naomi Campbell had an expectation of privacy went ahead and stated as follows: Photographs have a special, intrusive effect in conveying visual information that words alone cannot achieve.

Photographs are a record of a frozen moment and, therefore, have a permanence and presentational power that the human eye and words alone cannot capture. Whether photographs taken in a public place are capable of protection is relevant to take into account by reference to the context in which the photographs were taken and published. Whether and to what extent the person photographed had a reasonable expectation of

privacy in relation to the subject matter and whether the photographs were taken surreptitiously. The court went ahead and explained that it has a duty to strike a fair balance between the competing rights of the claimant to respect for private life and the defendant to freedom of expression. Since neither the right to privacy nor freedom of expression has preeminence over the other, The court has to consider the proportionality of the proposed interference with each right in turn, weighing those features that enhance the importance of each right in the particular case.

In this case, the disclosure of the material would tend to endanger the claimant's health, mental stability, and treatment. The more intimate the aspect of private life being interfered with, the more compelling the reasons for interference must be. What we are seeing here is the court considering the application of a balanced approach wherein there is a seeming conflict between the right to privacy and the right to freedom of expression. What we see here is that there is no issue as such that copyright itself places because we are talking about a fundamental right that is being breached. Copyright, as you know, is a statutory right.

You may recall from our earlier discussion, when we discussed a case pertaining to works of architecture, *Raj Rewal versus the Union of India*. In that particular case as well, we understood that the statutory right of copyright, or in other words, a right that has been granted through a specific Act, is not something that can override a right that is of a higher order, such as a fundamental right. That even where a celebrity has a reasonable expectation of privacy in a public place, a person who is not famous will also have a reasonable expectation of privacy. To understand this better, ask yourself: would you object to the dissemination of an unauthorized photograph of yours? What kind of context would raise such an objection from you? I'm sure you are now able to clearly connect aspects of the right to privacy with respect to such activities as an unauthorized photograph. The first perspective, which is a non-economic perspective, took us through the right to privacy.

The second perspective is that X does not have any objection to publication but is rather more interested in engaging in a negotiation for revenue sharing. Is this something to which we can apply intellectual property? Or is this also an extension of the right to privacy? After all, if the photograph itself is a violation of this individual's right to privacy, can we not say that the commercial utilization is also connected to it? And therefore, there need not be any claim in intellectual property at all. The right to privacy and its application through personality rights, wherein a person's image or voice is used in content. Then why should we refer to the Copyright Act? Nevertheless, this is a question that we will investigate regarding whether aspects of a person's personality can, in fact, constitute subject matter of copyright and of performers' rights. Let us consider the first characteristic.

Let us say that X's name is a literary work. In considering whether a name can be a literary work, we must determine whether there is a literary expression. I am sure all of you have understood subject matters pertaining to literary work and other subjects as well; you are now clearly in a position to answer: That objective assessment is not enough. A name can be expressed in words, but the mere presence of a word does not indicate that the literary work has originality. Is the name in fact originated from X? More importantly, you would realize that a person's name is not given by the person to himself or herself.

It could be. But in the majority of cases, it is the person's parents who are naming this individual. Are we then saying that if X is a literary work, the author of the name is a parent or the parents of this person? What is also playing in our minds is that a name by itself doesn't provide us with any specific information. Because it's the informative value that we are considering for the purpose of literary work consideration, Without the name being used in conjunction with other words, it does not give us any specific information. What about X? Is X ill? Did X have food? Has he climbed a mountain? What do we know in terms of specific information just by the reference to X? Therefore, neither does the name seem to meet the consideration of informative value nor does it seem to clearly answer who the author of the work will be. Let us consider the question of X's image.

Is a person's bodily representation an artistic work? When a person is photographed, you would note that if an artistic work claim has to be made at all, the person is saying that his image is a work, is an artistic work. But is it? This is particularly difficult when we consider the compartments of artistic work's subject matter. Under what would we place this? And similar to literary works, who are the authors? We say that God is the greatest artist. But I'm sure we all would agree that God is not interested in having copyright protections. Therefore, we can say that X's image is not an artistic work.

What about X's voice? Is X's voice a musical work? You would recall in our discussion on musical work that we stated that voice is a means to create expression. Voice can be used to create tunes. Just like a guitar. But the voice itself is not a subject of copyright. Composition can result from the use of voice, but voice itself is not composition, because then we will be asking the same kinds of questions.

Who is the originator of a person's voice? It is clearly not he. Therefore, we can say that in terms of attempting to apply copyright subject matter to aspects of a person's personality, we do not seem to be succeeding. What about performers' rights? The performer rights we understood are visual and acoustic presentations made live. What are the illustrations? Singing, dancing, and juggling. These are the kinds of illustrative examples we find in section 2(qq) of the Indian Act.

Is there any visual or acoustic presentation here in this case? What is X presenting? The fact that X is performing daily routine activities, just minding his own business. Even if, say for example, there was a recording, is that a recording of a performance? We had seen explicitly within the provisions of certain copyright Acts that a presentation by a performer will be considered a performance with or without any audience being present. We had considered the Indian scenario where, despite there not being an explicit provision, the court has considered it to be so. But what we cannot take away from a consideration of performance is that every performance is intended for an audience's consumption. Therefore, daily routine activities.

A person is walking, a person is running, a person is having coffee somewhere. These are not activities that can be considered performances. In other words, when we are considering the question of whether a singer protects his voice through his performance, we can say no. The singer controls only his performance. The voice, if it had to be protected at all, would be a content feature.

And as we have discussed, the content feature also doesn't arise because it is not a subject matter of copyright. Now, what about the application of 38B? 38B, we understood, pertains to the moral rights of performance. Look at Section 38B - it is provided that the performer of a performance shall, independently of his right after assignment, have the right. What 38B provides is that where there is a performance, the performer will have a moral right. As we have discussed, a person having coffee in a cafe is not a performance, and therefore moral rights cannot be attracted.

In other words, moral rights cannot exist without a performance existing. Let us consider a case that came before the Bombay High Court involving a leading playback singer from India, Arijit Singh. Arijit Singh was making a claim against the use of elements of his personality in different modes of commercial utilization. One type of use was the use of AI tools, which enabled the mimicking of his voice. Another was the use of his image as merchandise on T-shirts.

The question is, is this something that pertains purely to personality rights? And is this something that deserves any kind of investigation for a claim that was also made by Arijit Singh under 38B? The court we can see does not feature 38B in its discussion but rather focuses on personality rights. What does the court say? It is now well settled that celebrities are entitled to protection of the facets of their personality, such as their name, images, likeness, voice, signature, etc. Against unauthorized commercial exploitation by third parties. This form of technological exploitation not only infringes upon individuals' rights to control and protect their own likeness and voice, But it also undermines their ability to prevent commercial and deceptive uses of their identity. We can thus now clearly say that whether the use is commercial or non-commercial, If elements of a person's personality are captured without authorization, it could be brought within the

realm of the right to privacy and taken down or controlled in terms of its commercial usage.

It does not attract copyright or performer rights. With this, we are ending week 7. In week 8, we will be looking at certain other rights that are present within the Copyright Act in India. These are broadcasting rights, resale royalty rights, and the right to receive royalties.

Thank you for joining me. See you all in the next session. Thank you.