

Digital Alteration of Photographs and Intellectual Property Rights

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Advancement in technology has made it easier to digitally alter a photograph. This along with faster dissemination of text and images through the Internet has elevated morphing or digital alteration of images to the status of a cottage industry. This paper discusses how such alteration interferes variously with the intellectual property rights of the author, owner, or the subject of the photograph. Digital alteration of photograph has consequences in copyright law, passing off, celebrity's right to publicity as well as areas like criminal law, law of defamation, etc., where the injured party needs to have proper remedy. The paper also discusses law in USA and UK as well as the relevant laws in India.

Keywords: Digital alteration, morphing, image, fake photograph, right to publicity, passing off

Fake or manipulated photographs have existed almost as long as there has been the photographic medium itself¹. In China, during the Mao era and throughout the Soviet period, there were systematic removals of images of dissidents and leaders who had fallen out of favour with the party leadership from official group photos. But these Communist photo purges were limited to a few official photographs and few people were affected by it. Besides, manipulating analog photographs was a difficult and time-consuming process requiring high degree of specialized skill that prevented its wide application.

All this changed with the advent of digital photography and along with it specialized software that is used for photo editing. The growth of Internet that allows for easy dissemination of information acts as an added boost. The result has been the growth of what can be called a cottage industry in fake photographs. This phenomenon is of particular consequence to celebrities but might affect others as well.

The discussion here is confined only to still photographs and not moving frames like cinematograph, performances, web castings, etc. The technology related to each aspect is different and so is the law pertaining to these issues; and hence the focus on still photographs.

The rights affected might be that of the owner of the photograph, the author of the photograph or its

subject. These persons enjoy different levels of protection under laws pertaining to copyright, moral rights, image rights. It is pertinent to note that the subject of the photograph can also bring an action for passing off or seek recourse under criminal law or the law of defamation.

This paper lays down the position of altered photographs under the laws of India, USA and UK.

Fake Photographs as Violation of Copyright Digitally Morphed Photograph as Infringement of Original

Under the American copyright regime, there is no definition of a photograph but there is one in which 'pictorial, graphic, and sculptural works' are defined as including two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans².

A photograph under Section 4(2) of the Copyright, Designs and Patents Act 1988 (CDPA)(UK) means 'recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.'

Section 2(s) of the Indian Copyright Act 1957, (ICA) defines a photograph as including 'any photolithograph and any work analogous to photography but does not include any part of cinematograph film.'

The original image and the manipulated image can both thus be considered to be photographs under the UK and the Indian Act.

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Now, is a manipulated image an infringement of a photograph?

The US law holds that there is no infringement if all that is copied from a photograph is non-original material and there is no appropriation of the photographer's labour and skill³.

In *J H Mendler v Winterland Productions*, the issue before the Court (9th circuit) was whether a digitally altered photograph ceases to be a photograph. It held that in a digitally altered photograph, both lifelike appearance and its objective accuracy can be compromised; and so the real test is whether the departure is a significant one⁴.

In this case, the Court compared the original photograph and the purported illustration and found that the departure was not significant and hence held that copyright was infringed.

In UK, it has been held that digitally manipulated photographs infringe the original if the morphed photo fails to destroy the elements of the photograph in which originality subsists i.e., when there is an appropriation of the labour and skill of the maker⁵.

In India, there is no case law directly on this point of digitally altered photographs but an old Madras High Court decision provides some guidance. In *Associated Publishers v K Bashyam*⁶, the question before the Court was whether a portrait-photograph of Mahatma Gandhi made by combining two photographs of the Mahatma constituted a copyright infringement. The Court held that the plaintiff had expended his skill and labour in producing the photograph by combining the parts of two other photographs and hence is entitled to copyright protection. The Court also held that under copyright law, the originality required is not originality of ideas but of original skill and labour. It cannot however, be specifically stated exactly how much labour and judgment the artist shall have to bestow to be eligible for a copyright⁷.

Fake Photographs and the Parody Defense

Parody has been defined by the Law Lexicon⁸ of P R Aiyer as 'a composition in which an author's characteristics are ridiculed by imitations'. Parody is treated as an exception under fair dealing or fair use provisions in many common law countries.

Fair use is not defined in the US Code but seems a mixed question of law and fact as is determined in the light of four statutory tests, which are:

1. Nature of the copyrighted work

2. Amount and substantiality of the portion used in relation to the copyrighted work as a whole
3. Whether the use is a commercial one and
4. Effect of the use upon the potential market or value of the copyrighted work

In *Campbell v Acuff-Rose Music Inc*⁹, the US Supreme Court dealt with the question as to whether making a parody constitutes fair use. The Court's view was that, 'the first focus of the inquiry is whether the use merely supersede[s] the objects of the original or adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'. In short, whether the use is 'transformative'.

The Court held that commercial use is merely a factor in determining fair use and not a conclusive ground for refusing to find the use as fair use.

On a similar vein, the Court held that the potential market value is merely another factor to be weighed in by the Court and not the primary factor. Indeed, the Court laid down the doctrine of 'aggregate weighing of all four fair use factors'.

The US Court of Appeals (2nd Circuit) also dealt with the question whether a digitally altered image constitutes a parody and hence fair use in another case, namely, that of *Leibovitz v Paramount Pictures Corporation*¹⁰.

The facts of the case were:

The plaintiff's photograph of actress Demi Moore appeared on the August 1991 cover of *Vanity Fair* showing her eight months pregnant and nude. In 1993, the defendant developed a teaser advertisement in connection with the release of its film, *Naked Gun 33: The Final Insult*, which it contended, was a parody of the *Vanity Fair* cover. In the advertisement, a model who was also eight months pregnant was photographed against a backdrop similar to that used in the Demi Moore photograph; the lighting and pose were also similar to the Moore photograph. Further, the photograph was subjected to some computer manipulation in order to duplicate the skin tone and body configuration that appeared in the Moore photo. On top of the second model's body, however, appeared a photograph of the face of Leslie Nielsen, the star of the *Naked Gun* series of films. In contrast to Ms Moore's expression of fulfillment, serenity, and pride, Mr Nielsen's face wore a guilty smirk. Underneath the photo ran the legend 'Due This March' referring to the film's release date.

Though it was undisputed that plaintiff was the sole owner of copyright in this photograph, the Court held that the advertisement was a parody and therefore, there was no violation of copyright. The Court also held that the parodist's copying more of the original than necessary, would not necessarily tip the third factor against fair use. Besides the original photograph, i.e., *Venus Pudica* by Botticelli was in the public domain since the sixteenth century. The only things that Leibovitz was entitled to protection was for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected.

However, the question remained unanswered as to what would have happened had Paramount altered the original picture itself as it generally happens in 'celebrity fakes'¹¹.

Unfortunately, there are no decided cases on whether digitally morphed photos can be a parody of the original either in India or in UK.

In UK, there is no separate defense of parody. But under Section 30 of the CDPA, there is a provision for 'fair dealing' for criticism and review provided sufficient acknowledgement and work made lawfully available to the public. But case law suggests that it is certainly possible to argue that 'parody' is a form of criticism. Indeed this argument was taken in *Williamson Music v Pearson Partnership*¹². In the instant case, the Court held that a parody can be said to be violative of a copyright if it made substantial use of the original work; irrespective of whether the second author has added something of his own. This case makes the ambit of defense so narrow that it necessarily defeats the purpose of parody itself. What is noteworthy is that the EU law is more liberal than the UK law in this regard. In 2001, the EU came with Directive 2001/29 on 'The harmonization of certain aspects of copyright and related rights in the information society'. It allowed Member States to provide for exceptions or limitations to the rights in case of use for the purpose of caricature, parody or pastiche.

In India, Section 52(a)(ii) of ICA allows fair dealing in case of literary, dramatic or musical works for criticism and review. However, with no case laws for reference, it is not clear as to the type of stance the Indian judiciary is likely to take in case a relevant case does arise.

Parody defense to digital manipulation has certain limitations of its own¹³. To qualify as a parody, as the

very definition of parody shows, a manipulated image shall have to ridicule the author's characteristics. The US Supreme Court limits parody to a ridiculing distortion and criticism and fair use can only be gained by a parody if it targets the original work¹⁴. This is also illustrated by the case of *Rogers v Koons*¹⁵. In the instant case, a sculpture did not comment on the original and was therefore held not a parody. This argument can be extended to fake photographs since most fake photographs have no intention to ridicule or in any way comment on the original. For example, when a famous actresses' face is imposed on a body of a nude model there is absolutely no intention to comment on the original photograph, the only interest being the commercial gains. Such cases may more appropriately be treated as passing off and right to publicity cases.

Moral Rights

The moral rights framework provides remedy to the authors rather than owners of copyright. In USA, moral rights as under Section 106A of the US Code Title 17 is subservient to fair use. But the position of moral rights is different under both UK and Indian laws. In both these countries, the right of an author to object to derogatory treatment of his work is not limited by fair use.

Section 80 of the CDPA confers upon the author the right to object to the derogatory treatment of his work. Derogatory treatment¹⁶ within the meaning of the Act is distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director. According to section 89 of the Act, the right to objection applies to all or any part of the work and there is no requirement that the part has to be substantial. In India, Section 57 of ICA, conferring moral rights is similarly worded except that even a modification can be violation of moral rights of the author.

The *Manu Bhandari*¹⁷ case lays down the test for violation of moral rights, the scope of enquiry being whether (a) change to the work is more than necessary due to the constraints of the medium or (b) modification is so serious that the entire work has been mutilated. However, if the change is very radical, then the impugned work is regarded as a completely new one in itself¹⁸.

So in both these countries even a parody can constitute an infringement of the moral rights. Considering the *Leibovitz* case, it would be interesting

to know whether the plaintiff could have claimed an infringement of moral rights had the case been decided in Britain or in India.

Rights Management and Anti-Technological Circumvention Measures

Digital watermarking is a form of 'rights management' that allows an image to be marked as being property of a particular individual or organization. It can be in form of a visible form or logo. It can also be an invisible mark in the form of a digital code used for tagging the image¹⁹.

Technological anti-circumvention goes a step further and actually prevents the circumvention of rights in the subject. At present, there exists no effective measure to prevent the manipulation of digital imagery. So in case of 'fake photographs' there are few anti-circumvention measures.

Articles 12 and 11 of the WIPO Copyright Treaty (WCT) mandates adequate legal protection for both rights management system and technological anti-circumvention measures. There are similar provisions regarding rights of performers in WIPO Performances and Phonograms Treaty (WPPT).

The US Congress accordingly passed the Digital Millennium Copyright Act (DMCA) in 1997. The Act prohibits the circumvention of technological measure in order to control access to any work²⁰.

The 2nd Circuit Court, in the case of *Universal Studios v Reimerdes*²¹ held that fair use defenses are not permissible under Section 1201. Though the context in this case is of technological anti-circumvention measures, there appears to be no reason why this cannot be made applicable in case of the rights management systems as well.

This effectively means that the copyright owner can simply take recourse to any technological measures and get around the defense of parody. Unfortunately, the very nature of photographs suggests that such measures may be difficult without diminishing the value of the picture.

The European Directive 2001/29/EC has been implemented in the UK law through the amendment to the CDPA Act in 2003. Under the amended Act, any removal or alteration of any rights management information without authority where the person knows or has reason to believe that by doing so he is inducing, enabling, facilitation or concealing copyright infringement is actionable²².

India has not ratified the WCT and the concepts of 'rights management' and technological restraint

measures are alien to the Indian law. However, India has constituted a core group of academics, government officials, private sector representatives to implement changes in copyright law to make it compliant.

Right to Publicity

In general, the person whose photograph has been tampered with has no remedy under copyright law. This defect is however remedied partly by the presence of the right to publicity²³. Right to publicity can be said to have emerged from the failure of the action of privacy to adequately protect the commercial and proprietary losses arising out of usurpation of name, image, likeness or persona of a celebrity²⁴.

Many countries do not accept a right to publicity as separate from privacy or an action for passing off. Among a handful of countries like USA, Canada, Germany, etc., that do acknowledge such a distinct right, USA has the most well developed jurisprudence, as far as the effect of manipulated images on the right to publicity is concerned²⁵.

In USA, there is no federal legislation on right to publicity but it is nonetheless a subject of state legislation. So the relevant law varies widely from state to state²⁶. In general, the right protects against the unauthorized commercial use of an individual's identity (e.g., name, image, voice, etc.) and is a property right that can be assigned or licensed. In many, but not all states, the right extends posthumously for a defined period of time.

In 1977, the United States Supreme Court first acknowledged the right of publicity in *Zacchini v Scripps-Howard Broadcasting Co*²⁷.

Hugo Zacchini, a performer known as 'The Human Cannonball', would perform an act in which he was shot from a cannon and land on a net some 200 feet away. A videotape of the entire 15-second act was shown during an evening news programme without Zacchini's consent.

In determining that the broadcast violated Zacchini's right to publicity, the Supreme Court established two key concepts that are still in effect today. First, the Supreme Court held that each state had the power to enact right to publicity statutes that could be crafted to protect a person's image, but not their name, voice or other singular characteristics. Second, the Supreme Court explained in *Zacchini* case that first Amendment interests²⁸ (i.e. free speech

interests) could override the right of publicity only when there was no inherent conflict between the two.

The Supreme Court noted that the right to publicity served three basic functions: (1) it prevented others from being unjustly enriched by the plaintiff's good will, (2) it kept others from interfering with the plaintiff's right to make a living as an entertainer, and (3) it provided entertainers and celebrities an economic incentive to continue to invest in creating performances that the public could enjoy.

The US Federal Court of Appeal held²⁹, the purpose of the right to publicity statutes is to allow a person to control the value of his or her identity to be used for commercial purposes. The obvious inference is that right to publicity is open not only to celebrities, but to non-celebrities alike, provided a commercial purpose is present.

An early case of misuse of identity by alteration of picture was *Pesina v Midway Manufacturing Co*³⁰.

In the instant case, the court granted the defendant's summary judgment motion on the grounds that prior to the defendant's use, the plaintiff's image lacked commercial value, and that the likeness was not sufficiently recognizable.

In *Comedy III Productions Inc v Saderup*³¹, the defendant, an artist, sold lithographs and T-shirts bearing a likeness of the Three Stooges reproduced from a charcoal drawing he had made.

The Court laid down the 'transformative test'. It laid down that literal depiction and imitation of the celebrity is not protected. If the marketability and economic value of the work derives not from the fame of the celebrity depicted but from significant transformative elements it shall receive first amendment protection³².

In *Hoepker v Kruger*³³, a federal court in New York was called upon to decide whether a photograph of the plaintiff, cropped and used as part of a collage, violated her rights under the New York right of publicity statute.

Here the Court enunciated a different standard involving 'commercial aspect versus public interest'. This meant that if the importance of the collage can be found primarily in its social usefulness as a work of art, it would receive First Amendment protection. Conversely, if its primary value lies in generating sales through the popularity of the depicted celebrity, the artist may be liable for a violation of the right of publicity statute.

In *Hoffman v Capital Cities/ABC Inc*³⁴, Capital Cities Media, a magazine included Hoffman in a photo layout called 'Grand Illusions' that also used other stars, including Cary Grant, Elvis Presley and Marlene Dietrich, to promote the latest spring fashions. One picture, from 'Tootsie', showed Hoffman's head, wearing a woman's wig, atop the body of a male model posed like the film character and wearing an evening dress. The caption read: Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.

The trial Court held Hoffman to be a 'one of our country's living treasures' and felt stars featured in the pictorial were 'robbed of their dignity' and 'violated by technology'.

However, the Court of Appeal (9th Circuit) overturned the verdict. It went back to the commercial and noncommercial test. It held that 'in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out 'from the fully protected whole'³⁵.

In UK or in India as well as most part of the Commonwealth (barring Canada³⁶) no distinct right of privacy is accepted. But in these jurisdictions passing off can be used in a major way to give remedy to persons aggrieved with the digital manipulation of their images.

Passing off

Passing off has been defined as Black's Law Dictionary³⁷ as 'the act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers'³⁸.

In *Erven Warnick v Townend & Sons*³⁹ the Court of Appeal laid down that 5 elements have to be established to prove the tort of passing off. They were: (1) misrepresentation, (2) made by a trader in course of a trade, (3) to prospective customers, (4) which is calculated to injure the business of another trader, and (5) which caused actual damage.

Even in UK, the development of law has meant that an action for passing off cases be useful in a number of cases where the digitally manipulated image has been used for endorsing a product. Take for example, the recent case of *Irvine and ors v Talk Sport Ltd*⁴⁰. TalkSport published a doctored picture of one Mr Irvin apparently listening to a radio bearing the

TalkSport logo when he had in fact been speaking on his mobile phone, and not listening to a radio at all. The Court held that an action for passing off is maintainable. The damages awarded were equivalent to what Mr Irvin would take in the minimum had he done the endorsement himself. However, an action of passing off will not have the same breadth as the American style right to publicity.

The Indian Position

The law of passing off is well developed in India. However, there is no case on persons seeking remedy under passing off for manipulated images. In a related case, namely, *R Rajagopal v State of Tamil Nadu*⁴¹, the Indian Supreme Court held that that the right to privacy⁴² is violated by unauthorized use of a person's likeness for advertising or non-advertising purposes.

This however, cannot be held to be the right of publicity. The Supreme Court in this case (or for that matter in any other case) has not described it to be so.

In India, there is only one High Court case dealing with the law of publicity. In *ICC Development (International) Ltd v Arvee Enterprises*⁴³, the plaintiffs alleged that the defendants infringed their right to publicity by engaging in ambush marketing. The Court rejected the argument but laid two significant notions regarding right to publicity. Firstly, the right of publicity is inherent in the individual alone and secondly, the right of publicity originates from Article 19 and 21 of the Constitution.

It is the second pronouncement that fundamentally sets the Indian law of publicity apart from the American one. In the USA the law of publicity is econo-centric, coming from a mixture of passing off and unjust enrichment. The right is completely independent of the right to privacy and as laid down in *Zacchini* the right can sometimes be at conflict with free speech interests as laid down in the First Amendment.

But in India if one goes by the *Arvee* decision, right to publicity originates from Art 19(1)(g). Therefore, not only can there be no conflict between freedom of speech and right to publicity in any circumstance, the ambit of the latter right is greater. The right to free speech emanating from Art 19 can be curtailed only under very restricted sets of grounds under Art 19(2). Thus in *Arvee*, the Court has elevated the right to publicity to a human right as opposed to a mere economic right.

Other Remedies

Defamation⁴⁴ suits can provide damages; criminal law also provides remedies to the injured party. However, there should be no easy inference that all and any digital manipulation of image can constitute defamation. In *Charleston NewsGroup Case* (Australia), a soap opera sued a magazine for posting the doctored photographs of its protagonists in a compromising situation. The Court held that it was clear from the context that it was a fake image so a reasonable reader had no chance of thinking that the original protagonist may have posed such. In a large number of cases, where websites or adult magazines have published fake photographs of celebrities, it is generally not possible to bring a successful action for defamation or invasion of privacy. The simple reason is that the fakes are so obvious that the viewers would not be persuaded that there the photograph was real⁴⁵. This is especially so in USA where defamation is restrictively interpreted⁴⁶.

Criminal law could also provide several remedies. For instance, if the fake photograph is obscene, it would come under prohibition on obscenity as under Section 292 of the IPC and Section 67 of the Information Technology Act.

Besides, there is a growing consensus to criminalize infringement of intellectual property online. Fake photographs so far as it infringes IPR can come within its net⁴⁷.

Also, persons intending to use a digitally altered photo as evidence in Court shall expose themselves to charges of perjury under Section 192 (fabricating false evidence) or Section 196 (using evidence known to be false) of the IPC.

Alteration of a photograph under Section 463 of IPC can be considered as forgery if it is done with the intent of causing damage or injury. This is perhaps the most appropriate provision to deal with fake photos under criminal law since it is not a crime to digitally alter a photograph *per se*.

Conclusion

Altering a photograph can touch vast area of law and there is a wide range of remedies available. However, such remedies are not uniformly available to all affected parties. Under copyright law, several remedies are available for the owner or author of photograph. This is especially true in UK and India where the smaller scope of the parody defense and wider scope of the moral rights give greater protection

to owners and authors even at the cost of free speech interests.

However it is difficult to avail any of the remedies because they are difficult and time consuming to enforce. It shall be easier for large owners like magazines or publications to enforce their rights but quite difficult for individual authors.

Celebrities generally use collective mechanisms like the 'Cyber tracker' that scours the net for the violation of the right to publicity listed with it as well as copyright violation and take appropriate legal action. They can afford that because they have big financial stake in the outcome. For non-celebrities, it is very difficult to enforce their rights. They can recourse to the law of defamation or in some instances criminal law.

This is, however, the situation in the USA and to some extent even UK, but in India, the position is completely different. Copyright law is well developed in India, one can see in the case of *Associated Publishers v K Bashyam* that the Indian law has faced challenges of altered photographs before. This makes remedies for altered photographs narrower in UK or USA. The aggrieved party has to wait till actual morphing takes place and then prove that substantial skill and labour has gone into its production. That could be costly and time consuming. For the photo-owner, it would be benefit enormously if the India became party to the WCT and accept concepts like 'technology restraint measures' and 'rights management system'. But India is not a party to the WCT and the concepts are alien to Indian law.

Whatever little protection the owner has is denied to the subject of the morphed photograph. The main protection in case of morphed photographs lies in publicity rights. In India, the law of publicity being at nascent stage even celebrities are not protected from the assault of morphed photographs let alone non-celebrity subject of a photograph. There are no statutes backing that right and as under *Arvee* and *Rajgopal* violation of right to publicity has been treated as constitutional tort. Only remedy available is under Art 32 and 226 via a writ petition.

Passing off could be a viable remedy and as seen in the *Irvin Case* can substitute publicity rights but in the absence of any decided case law it is a pure speculation.

It is submitted the subject has no effective remedy to speak off except under Indian Penal Code. But these sections of the Penal Code are not tailor made

for fake photographs offences and it will require great deal of judicial innovation to get remedies under them.

The challenge before the legislature is to strike a balance between the protection of the legitimate rights of celebrities and non-celebrities alike while at the same time maintaining freedom of the expression of the artist realize the possibilities that digital alteration of photographs give rise to.

References

- 1 In 1840, Hippolyte Bayard, one of the earliest photographers, staged a picture of himself, as a drowned man because he thought his work was not given proper recognition by the French government
- 2 US Code Title 17 Chapter1 Section 101
- 3 *Greenberg v National Geographic Society* 244 F3d 1267(11th Circuit 2001) www.laws.lp.findlaw.com/11th/0010510opn.html
- 4 Paras 5 and 7 of *JH Mendler v Winterland*, <http://www.fake-detective.com/faqs/law1.html>
- 5 *Antiquesportfolio v Rodney Finch* [2001] FSR 23
- 6 AIR 1961 Mad 114
- 7 Para 5 of *Associated Publishers v K Bashyam*
- 8 Aiyar P R, Law Lexicon, (2nd edn, Wadhawa & Co, New Delhi 1997) 1410
- 9 510 US 569 (1994)
- 10 137 F.3d 109 (2d Cir. 1998), <http://www.caselaw.lp.findlaw.com/cgi-bin/getcase.pl? court=2nd& navby=case& no=977063>
- 11 The general practice seems to be adding the head of a celebrity with the body of another celebrity photograph in a sexual situation. The likelihood is that neither of the photographs is licensed and is scans from various magazines
- 12 [1987] FSR 97; *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210
- 13 For a detailed over views of the parody defense in UK, US and European laws see Itse Gerrits, Parody In *Copyright Law, Intellectual Property Law*, http://www.kent.ac.uk/law/undergraduate/modules/ip/resources/ip_dissertations/200405/gerrits.doc
- 14 *Campbell v Acuff-Rose Music, Inc* see Parody in *Copyright Law*.
- 15 960 F. 2d 301 (2d Cir. 1992)
- 16 Treatment is wider than adaptation in scope
- 17 *Smt Manu Bhandari v Kala Vikas Kendra* AIR 1987 Del 13
- 18 Para 22 of *Manu Bhandari*
- 19 *CDPA Act* Section 296ZG7 (b) 1988
- 20 *DMCA Act* Section 1201 (a)(1)(A)
- 21 111 F.Supp 2d 294 (2000)
- 22 *CDPA Act* 296ZG1(a) and (b)
- 23 The right of publicity, in the words of the Restatement (third) of Unfair Competition § 46 (1995), bars people from "appropriat[ing] the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade." op cit p 905 Eugene Volokh, Freedom of speech and the right to Publicity p 904-930 *Houston Law Review*,

- <http://www.law.ulca.edu> (This article discusses the balance between the first amendment and the right to publicity in light of the *Comedy III* decision)
- 24 The right first emerged in *Haelan Laboratories v Topps Chewing Gum* 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 US 816, 98 L. Ed. 343, 74 S. Ct. 26 (1953). The 2nd Circuit Court invented a right of publicity independent of the right to privacy
- 25 A brief list of the cases involving fake photographs of celebrities has been given in Backside Caesar, Internet legal cases and issues, <http://www.fake-detective.com/faqs/legal-1.htm>
- 26 For a general overview of the right to publicity that exists in the USA see Jonathan Jennings, The right of publicity and cyberspace, [http://www.pattishall.com/pdfs/Publicity Cyberspace.pdf](http://www.pattishall.com/pdfs/Publicity%20Cyberspace.pdf)
- 27 433 US 562 (1977)
- 28 The first amendment to the US Constitution reads “Freedom of Religion, Press, Expression: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”
- 29 *June Toney v L’oreal USA Inc*, United States Court of Appeals for the Seventh Circuit, decided 6 May 2005 (The instant case also involved the issue of whether copyright gets preemption over the right to publicity but that issue is outside the scope of the article)
- 30 948 F. Supp. 40 (N.D. Ill. 1996)
- 31 25 Cal. 4th 387 (2001)
- 32 The Court considered it to be subsidiary inquiry
- 33 200 F. Supp. 2d 340 (S.D.N.Y. 2002)
- 34 255 F.3d 1180 (9th Cir. 2001)
- 35 *Gaudiya Vaishnava Soc’y v City & County of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990) (as amended); *id* at 1185
- 36 For a detailed discussion on the law of publicity in Canada see Michael Henry (ed), *International Privacy, Publicity and Personality Laws* (Butter worth, London) 1998, 73-92
- 37 Blacks Law Dictionary, (7th edn, West Group, America 1999) at p 1146
- 38 The American counterpart of passing off is the tort of unfair competition. It is defined as “Dishonest or fraudulent rivalry in trade and commerce especially the practice of endeavoring to substitute one’s own goods or products in the market for others by means of imitating or counterfeiting the name, brand size shape or other distinctive characteristic of the article of packaging.” (Black’s Law Dictionary, 1529). Unfair competition seems to be of broader scope than passing off
- 39 [1973] AC 731
- 40 [2003] EWCA Civ 423, see in p 4 Image rights appeal triumph for Irvine, <http://www.cliffordchance.com/uk/pdf/Media/Law/Review/Summer/2003>
- 41 AIR 1995 SC 264
- 42 Right to privacy has been read into the Indian law as one of the implicit rights under Art 21. It has been defined simply as the “right to be let alone”. *Govind v State of Madhya Pradesh* (1975) 2 SCC 148
- 43 2003 (26)PTC 245(Del) para 14
- 44 Defamation as defined in the Black’s Law Dictionary(p 427) is “The act of harming the reputation of another by making false statement to a third person”
- 45 *Douglass v Hustler Magazine* 769 f 2d 1128(7th Circuit 1985); also see *Charleston v Newsgroup Newspapers* (1995) 2 AC 65
- 46 There exists the *innocent construction rule*. Under this approach if the statement is capable of a non-defamatory meaning then it shall be taken. See *Chapsky v Copley Press* , 92 Ill 2d 344
- 47 Art 10 of Draft Convention on Cyber Crime, www.privacyinternational.org/issues/cybercrime/coe/cybercrime-final.html