LIGHTS, CAMERA AND ACTION: RETHINKING PERSONALITY RIGHTS IN INDIA

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Recent litigation has seen personality rights jump to the forefront of legal debates. With no Supreme Court judgment on the same, the landscape is in the fray with several High Court decisions. The theoretical debate is where to ground the right — in privacy or in property. Some have argued that the courts in India have held personality rights to be part of privacy. This paper shows that the Indian doctrine is best explained as a functionalist approach — neither grounding it exclusively on privacy, nor on property. It shows that Indian courts have based the right in privacy only when the context permitted the same. Therefore, it cannot be read to have grounded personality rights solely on privacy. The paper defends this approach and argues for a structured analysis of the same. Further, the paper highlights the erroneous expansion of personality rights in India by not following the 'confusion' test. It critiques the reasoning of the Court and its misunderstanding of the seminal American case of Haelan v. Topps, which has led to the expansion of the right. Finally, it suggests an additional layer of intentional analysis to refine application in an attempt to prevent over-inclusivity.

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I. INTRODUCTION

"Rishtey mein toh hum tumhare baap lagte hai, naam hai Shahenshaah"[1]

What or whom would one associate the above quote with? Is it possible to quote this line without inducing an association with Amitabh Bachchan? Similarly, one might also associate the famous expression "Jhakaas" with Anil Kapoor.[2] This begs the question — are these celebrities entitled to protection against any unauthorised use of such tag lines that represent their likeness? The broader question here is the issue of protecting the likeness or personalities of celebrities. Likeness can cover many aspects. For example, the expression "Jhakaas" is a likeness attributable to Anil Kapoor. This bundle of rights would be called 'personality rights' in this paper. Forensically, publicity rights refer to the control of one's identity and commercial use,[3] while personality rights are an extension of one's personality.[4] They are called personality rights, because they refer to an individual's 'persona'.[5] Broadly both the terms are used interchangeably.[6] Personality rights can include several things associated with a celebrity, such as their profession,[7] their likeness,[8] or something as simple as their voice.[9]

The importance of protecting them is obvious. Personality rights of celebrities hold economic value. Brands extract it by contracting with celebrities to endorse specific products.[10] However, what if a brand does so without authority? Let us complicate the problem further. What if a brand makes an incidental association with the celebrity without directly making a reference? Should the protection of personality rights extend to these cases as well? Overprotection or underprotection of such rights assumes economic significance. Such questions are of contemporary relevance. The recent cases of *Amitabh Bachchan* v. *Rajat Nagi* ('Bachchan'),[11] *Anil Kapoor* v. *Simplify* ('Anil Kapoor'),[12] and *Jaikishan Kakubhai* v. *Peppy Store* ('Jackie Shroff')[13] have thrown personality rights into the hot seat of legal debates.[14] Moreover, the Court in Anil

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[1] SHAHENSHAH (Shiva Video, India, 1988).
[2] YUDH (Trimurti Films, India, 1985).
[3] Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2nd Circuit, 1953) (United States Court of Appeals for the Second Circuit) ('Haelan').
[4] Garima Budhiraja, *Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime*, Vol. 6 NALSAR STUD. L. REV., 87 (2011).
[5] Amy M. Conroy, *Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?*, Vol. 1(1), WESTERN J. LEG. STUD., 1 (2003) ('Conroy').
[6] Niharika Salar & Sonal Sinha, *India's Take on Legal Remedy of Passing-off: A Celebrity's Perspective*, Vol. 17(2), INDIAN J. L. & TECH., 44 (2021) ('Salar & Sinha'); Samarth Krishan Luthra & Vasundhara Bakhru, *Publicity Rights and the Right to Privacy in India*, Vol. 31(1) NAT'L L. SCH. INDIA REV., 125 (2019) ('Luthra & Bakhru').
[7] Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (US Court of Appeals for the Ninth Circuit) ('Motschenbacher').
[8] White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992) (US Court of Appeals for the Ninth Circuit) ('Vanna White').
[9] Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (US Court of Appeals for the Ninth Circuit) ('Midler').
[10] Prakash Sharma & Devesh Tripathi, *Celebrities' Agony: Locating the Publicity Rights in the Existing IPR Framework*, Vol. 4(1), ILI L. REV., 41, 48 (2019).
[11] Amitabh Bachchan v. Rajat Nagi, (2022) 6 HCC (Del) 641 ('Bachchan').
[12] Anil Kapoor v. Simplify, (2023) SCC OnLine Del 6914 (1) ('Anil Kapoor').
[13] Jaikishan Kakubhai Saraf v. Peppy Store, (2024) SCC OnLine Del 3664.
[14] Pranjali Sahni & Souradeep Mukhopadhyay, *Legal Basis for Personality Rights in India – The Repercussions of Unreasoned Decisions*, SPICY IP, April 17, 2023, available at https://spicyip.com/2023/04/legal-basis-for-personality-rights-in-india-the-repercussions-of-unreasoned-decisions.html (Last visited on July 1, 2024); Dr. (Prof.) Sunanda

Kapoor passed a John Doe injunction order against all defendants for violating Kapoor's personality rights. In brief, a John Doe order allows the party to enforce a Court order against unknown parties as well. Such an order allows Anil Kapoor to enforce the decree against unnamed defendants. The order was heavily criticised for a lack of rationale since the defendants were arguably protected by the Doctrine of Laches and the Doctrine of First Sale. It has been argued that the postcards which were alleged to have been misappropriated were in distribution for a long period of time without any action being taken against them. Therefore, the plaintiffs were barred by laches.[15] However, substantively, such cases mark the need to look at two aspects: the fundamentals underlying personality rights and their application.

The underpinnings of personality rights have been an issue of contention among legal scholars. Personality rights strike a strong analogy with privacy rights.[16] This union has been debated heavily in literature.[17] Contrary to this, it has also been argued that it resembles a property right because of its economic value.[18] Surprisingly, the literature on the same is scarce in India. While some have strictly grounded it in privacy under Article 21 of the Constitution of India ('Article 21'),[19] some have argued in favour of a property rights perspective.[20] On the other hand, some scholars have also taken a neutral approach, denying the link with privacy without commenting on the property theory.[21] This paper seeks to address this gap and clarify the Indian courts' stance in this debate. Before proceeding further, it is important to clarify that the first part shall focus on the intersection between the right to personality and the right to privacy. The debate between personality rights and freedom of speech is beyond its scope.

One position holds that the Indian courts have based personality rights exclusively on privacy. Part II of this paper seeks to counter this stance. Through a close analysis of cases, it will show that Indian courts have taken a functionalist approach in this debate. A functionalist approach refers to deciding based on the particular circumstances of the case, rather than an all-or-nothing categorisation of the right exclusively on privacy or property. It does not contend that

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Bharti*, Image Rights Alright—But Can They Trump Established Rights and Doctrines? Should They?*, SPICY IP, October 1, 2023, available at https://spicyip.com/2023/10/image-rights-alright-but-can-they-trump-established-rights-and-doctrines-should-they.html (Last visited on July 1, 2024) ('Bharti'); Aditya Bhargava, *After Anil Kapoor, Jackie Shroff Follows Suit! Taking a Look at the Recent DHC Order From the Perspective of Personality Rights & Right to Livelihood*, SPICY IP, May 22, 2024, available at https://spicyip.com/2024/05/after-anil-kapoor-jackie-shroff-follows-suit-taking-a-look-at-the-recent-dhc-order-from-the-perspective-of-personality-rights-right-to-livelihood.html (Last visited on July 1, 2024).

[15] Bharti, *supra* note 14.

[16] Conroy, *supra* note 5, 18.

[17] *Id*.; David Westfall & David Landau, *Publicity Rights as Property Rights*, Vol. 23, CARDOZO ARTS & ENT. L. J., 71 (2005) ('Westfall & Landau'); Mark A. Lemley, *Privacy, Property, and Publicity*, Vol. 117(6), MICH. L. REV., 1153 (2019) ('Lemley'); Luthra & Bakhru, *supra* note 6; Gary S. Stiffelman, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, Vol. 25(5), UCLA L. REV., 1095 (1978) ('Stiffelman').

[18] Westfall & Landau, *supra* note 17, 74.

[19] Luthra & Bakhru, *supra* note 6, 145; Akshat Agarwal & Aditya Bhargava, *Whose Personality Right is it Anyway?*, INDIAN JOURNAL OF LAW AND TECHNOLOGY, April 16, 2024, available at https://www.ijlt.in/post/whose-personality-is-it-anyway (Last visited, July 1 2024) ('Agarwal & Bhargava').

[20] Nina R. Nariman, *A Cause Celebre: Publicity Rights in India*, SCC ONLINE TIMES, January 24, 2022, available at https://www.scconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india/ (Last visited July 1, 2024) ('Nariman').

[21] Vandana Mahalwar, *Burgeoning right of publicity: An Overview of the Indian Experiences*, Vol. 24, J. WORLD INTELL. PROP., 28 (2021) ('Mahalwar').

personality rights cannot be seen as privacy rights or property rights. It also does not preclude grounding personality rights on property when the circumstances require so. The scope is more modest. It argues that Indian cases cannot be interpreted to have grounded personality rights 'exclusively' in privacy. In certain cases, the lens of privacy is not the best way to understand personality rights. Any claim to the contrary ignores the circumstances on which the Court classified personality as privacy. The paper proceeds to defend this functionalist method of treating personality rights as both property and privacy, as per facts and argues for a more structured analysis of the same. In the course of its arguments, the paper has primarily referred to cases from the United States of America ('US'). The choice of jurisdiction is the US for two primary reasons: *first,* the extensive development of personality rights in the US, both doctrinally and through scholarships; and *second,* Indian cases have often referred to the cases from the US to support their holdings.

Part III of the paper critically analyses the application of personality rights in India. Recent cases of Bachchan and Anil Kapoor underscore the need for the same. It argues that the scope of personality rights has been expanded erroneously by Indian courts by not following the 'likelihood of confusion' test ('confusion test'). Courts have relied more on loss of goodwill than probing confusion or misrepresentation. It shows how the lack of reasoning with settled precedents and wrongly relying on American cases have resulted in the same. Further, it looks into the confusion test applied by courts and points out its fault lines. In doing so, it suggests an additional layer of intentional analysis to make the test more effective. Part IV concludes the paper.

II. PRIVACY OR PROPERTY: THE CONUNDRUM UNFOLDED

As stated in the introduction, personality rights have been understood as a part of either the right to privacy or the right to property by different scholars. However, the Indian courts have taken a nuanced approach to this debate. This part argues that the Indian courts have taken a functionalist approach to conceptualising personality rights. The right can be understood as either privacy or property, as per the facts and circumstances. The arguments for this part will be structured in the following manner — Section A explains personality rights and sets the debate between property versus privacy theories in its conceptualisation. Section B traces Indian cases on personality rights and shows how judgments where the personality right was held as privacy had unique circumstances that required the same. Section C defends this functionalist approach and suggests a structured method for such functionalism.

A. RIGHT TO PERSONALITY

The growth of the entertainment industry, especially Bollywood, has led to mass advertisements and commerce.[22] This has led to the creation of brand value for celebrities. Whether through their performance or advertisements, celebrities have garnered recognition beyond the cultural aspect. Their 'personality' has gained a certain value in economic terms.[23] This economic

[22] Supriyo Patra & Saroj K. Datta, *Celebrity Endorsement in India — Emerging Trends and Challenges under Globalization*, Vol. 5(3), J. MKTG. & COMMC'N, 16 (2010); *See also* Danish Hussain, *Celebrity use in Indian Advertising: Analysis and Appraisal*, Vol. 19(1), INT'L J. INDIAN CULT. BUS. MGMT., 1 (2019).

[23] Westfall & Landau, *supra* note 17, 104; Motschenbacher*, supra* note 7, ¶11 ("Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental

value has a huge impact on brands and their introduction into the market. The cultural effect of using a particular celebrity's name or likeness has a significant effect on the marketability of any product.[24] It is accepted widely that a person must have control over one's personality and the commercial value of the same. For example, the use of a celebrity's likeness in an advertisement can provide the inference that the particular celebrity is endorsing the product. Personality rights simply provide the celebrity control over such exploitation.

The fundamentals of personality rights were first introduced by Melville Nimmer in his article 'The Right of Publicity'.[25] Then onwards, courts in the US have recognised and enforced it. In *Haelan Laboratories* v. *Topps* ('Haelan'), the plaintiff had exclusive contracts with baseball players to use their photographs on baseball cards. However, Topps got authorisation from certain players to use their photographs on their cards as well. Topps argued that Haelan's contract did not grant them exclusive rights to the images of the players. Rejecting Topps' argument, the Court held that a person has the right to control the publishing of his photograph.[26] Apart from the obvious significance of establishing jurisprudence on a new kind of protection for celebrities, Haelan also started the debate on the theoretical basis of personality rights. Interestingly, Justice Frankfurter explicitly stated that he was creating a right "in addition to and independent of that right of privacy". However, he also included the right of assignability, a property law concept, into the 'independent' right.[27] This started the debate on whether this new right is one based on privacy or property. *Prima facie*, personality rights give off the traits of both privacy and property.[28] The right to control the publishing of one's image definitely has a privacy aspect. At the same time, the image or likeness has a commercial value, thereby offering a property aspect.[29] This paper will term the first basis as the 'privacy theory' and the second as the 'property theory'.

Based on Justice Frankfurter's dicta, Landau argues that the new right was created on an *ad hoc* basis, out of commercial efficacy.[30] While Landau goes on to show the problems of looking at personality rights as property, in cases such as insolvency and divorce, he supports the property conception in certain other cases.[31] Therefore, he does not dismiss the property theory completely. In fact, Landau clearly supports a functionalist view for looking at personality rights, since he is basing his approach as either privacy or property on the particular circumstance at hand. Some scholars, such as Rothman, have argued that property rights in personality were redundant, given the existence of privacy. However, the most obvious counter to this would be the cases of celebrities: where one does not want privacy but wants exclusive control over the commercial value.[32] On this basis, Lemley argues for trademark law as the basis for personality rights. His

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distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless").

[24] Naeha Prakash, *Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill*, Vol. 35(2), HASTINGS COMM. & ENT. L. J., 247 (2013); Arpita Khare, *Impact of Indian Cultural Values and Lifestyles on Meaning of Branded Products: Study on University Students in India*, Vol. 23, J. INT'L CONSUMER MKTG., 365 (2011).

[25] Melville B. Nimmer, *The Right of Publicity*, Vol. 19, L. & CONTEMP. PROBS., 203 (1954) ('Nimmer').

[26] Haelan, *supra* note 3, ¶2.

[27] *Id*. (per Frankfurter, J).

[28] *See generally*, Conroy, *supra* note 5.

[29] *Id*., 18, 19.

[30] Westfall & Landau, *supra* note 17, 77, 78.

[31] *Id*., 101,123.

[32] Lemley, *supra* note 17, 1155.

stance finds support in British jurisprudence, where such rights are protected by common law rights such as passing-off and the tort of misappropriation.

Clearly, some have advocated for the property theory,[33] and some for the privacy theory.[34] Scholarship on this debate is scarce in India. It has been argued that the property theory would be better suited for the Indian system. This stance is defended by arguing that courts have actually classified personality rights as property.[35] On the other side, some have moved on the presumption that personality rights are based on privacy.[36] While some have gone ahead to argue that personality rights should not have been grounded under the right to privacy,[37] some have advocated for separating personality rights from all other intellectual property rights species.[38] The following part will attempt to counter the arguments that Indian courts have used either privacy theory or property theory exclusively. It will show that the Indian courts have approached personality rights with a functionalist stance, treating it as privacy only when circumstances necessitate it.

B. THE INDIAN FUNCTIONALIST APPROACH

There is no denying the fact that many Indian judgments have explicitly stated privacy as the basis for personality rights. However, the same was supported by the facts of each case, which led to invoking privacy. Therefore, it cannot be argued that the basis of personality rights is privacy for all purposes. This ignores the functionalist approach taken by the Courts.

The starting point of the privacy-theory argument is often the case of *R. Rajagopal* v. *The State of T.N* ('Rajagopal').[39] In this case, the newspaper sought to prevent the State from restraining the publication of Auto Shankar's autobiography. The judgment held that the right to privacy is implicit under Article 21. It held that no one can publish anything concerning one's private matter without permission. An infringement would infringe the person's right to privacy.[40] While this looks like a pure right to privacy judgment, a personality right angle exists. The Court prevented the publication of his autobiography, which is part of his personality and likeness — 'persona',[41] without his consent.[42] Indeed, it based personality on privacy rights under Article 21.

Correctly so, Rajagopal has been interpreted to support the privacy theory. However, the functionalist approach is also evident. The Court itself carved out an exception "if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy".[43] Therefore, protection of Article 21 would be available only when the purpose of the petition is to protect privacy. Privacy might not be the best way to protect the commercial value of personality

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[33] Nimmer, *supra* note 25; *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 566 (The United States Supreme Court, 1977) ('Zucchini').
[34] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (Harvard University Press, 2018).
[35] Nariman, *supra* note 20.
[36] Agarwal & Bhargava, *supra* note 19.
[37] Nariman, *supra* note 20.
[38] Mahalwar, *supra* note 21, 37.
[39] R. Rajagopal v. The State of T.N (1994) 6 SCC 632 ('Rajagopal').
[40] *Id*., ¶29.
[41] Conroy, *supra* note 5, 1.
[42] Mahalwar, *supra* note 21, 31.
[43] Rajagopal, *supra* note 39, ¶26.

when the celebrity wants to exploit it himself, that is, 'voluntarily thrusts himself'[44] or his personality aspects into a public sphere. Rather than keeping it private, he would want to control the exploitation. In simple terms, the ratio in Rajgopal, which is based on privacy, may not be available for a plaintiff who has voluntarily monetised his personality and now wants to control its usage. In fact, Nimmer has argued that this exact situation reveals an inadequacy in using privacy solely for personality rights. By voluntarily thrusting oneself into the public domain, one waives the privacy claim if the purpose is to control the commercial usage of personality.[45] Here, the property theory makes more sense. The exception carved out in Rajagopal evinces the functionalism of the Court, that personality rights cannot always be based on privacy.

More than two decades later, the Apex Court pronounced its landmark judgment in *Justice K. S. Puttaswamy* v. *Union of India* ('Puttaswamy'), enshrining privacy as a fundamental right under Article 21. While the majority holding stayed clear of personality rights, the concurrence by Justice Kaul touched upon it. Relying on Haelan, he compared personality rights with the right to privacy. For clarity, the specific portion of the judgment is reproduced:

> "(e)very individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent".[46]

Such an evocation has been argued to have grounded personality rights in privacy.[47] This paper argues to the contrary. *Prima facie*, that does seem to be the logical conclusion. However, Puttaswamy cannot be considered to have grounded personality rights specifically in privacy. First, the judgment by Justice Kaul is not the leading judgment, therefore, it is not a binding decision to be followed. It is merely persuasive. However, this by itself is not the only retort. Justice Bobde's concurrence defines 'privacy' as an antonym of 'publicity'.[48] Therefore, subsuming publicity/personality within privacy is at odds with such an observation. Justice Chelameshwar's observations are also practical and suitable. When a celebrity intends to monetise his image by controlling it, he is not interested in privacy, but in controlled publicity.[49] Logically, this is an 'antonym' of privacy. One might argue that relying on concurrent opinions to argue against another concurrence is a logical fallacy. However, the intention is limited to counter-reading Puttaswamy as having grounded personality rights solely in privacy. Moreover, Justice Kaul's observations were based on his reliance on Haelan.[50] However, it directly contradicts Justice Frankfurter's observations on the right to personality therein: "in addition to and independent of that right of privacy".

Furthermore, Haelan also inserted assignability to the newly created right of personality,[51] which is a property concept. Therefore, Puttaswamy can be argued to have read

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[44] *Id*.
[45] Nimmer, *supra* note 25, 204.
[46] Justice K.S. Puttaswamy (Retd) v. Union of India, 2017 10 SCR 569, ¶58 (per Kaul, J.) ('Puttaswamy').
[47] Luthra and Bakhru, *supra* note 6, 145.
[48] Puttaswamy, *supra* note 46, ¶41 (per Bobde, J).
[49] Nimmer, *supra* note 25, 204; Stiffelman, *supra* note 17, 1105–1107.
[50] *Id*., ¶58 (per Kaul, J.).
[51] Haelan, *supra* note 3, ¶2.

Haelan incorrectly. Interestingly, in *Digital Collectible* v. *Galactus* ('Digital Collectibles'), the plaintiffs relied on Justice Kaul's obiter to posit that personality rights fall under the right to privacy. The Court refuted this on two grounds. The first one was on technicality: the opinion not being the majority judgment. However, the second reason is notable. The Court read Justice Kaul to have simply discussed the US position on publicity/personality rights. It posited that his concurring opinion did not hold on the existence of such a right in India.[52] One might argue that such a stance reads privacy in a strict manner. Indeed, Rothman had argued that privacy should be enough to protect personality rights.[53] However, a counter is intuitive. When a celebrity intends to control his personality, the purpose is autonomy and not dignity. Therefore, privacy theory might not be the best way to understand the protection of personality rights under these circumstances.[54] Nimmer also makes a similar argument — that privacy might not be the best way to understand personality rights in cases of voluntary inclusion into the public realm.[55]

While the concurrence does marry privacy rights with personality/publicity, reading the judgment harmoniously with the majority shows a different conclusion. The majority judgment by Justice Chandrachud focuses on the protection of one's privacy rights. It posited privacy as a part of human dignity and autonomy. It classified privacy into three categories: spatial, decisional and informational.[56] Spatial privacy means control over one's private space. Decisional privacy refers to the protection of intimate choices such as reproduction. Informational privacy is intended to protect the private information of oneself.[57] The thread running through it is the protection of dignity and choice. Therefore, Justice Kaul's opinion can be argued to be restricted to personality as privacy when the intention is to protect one's privacy as, for example, in Rajagopal.

The commercialisation of personality cannot be said to protect autonomy and dignity. That is not the intention behind it. Indeed, one has the right to control the commercialisation of one's personality. However, the purpose of control is to ensure monetisation, and not for the protection of privacy. Therefore, personality rights, when used in this sense, do not fall within Justice Kaul's concurrence. Indeed, an argument can be made that even commercialisation falls within the privacy of choice. However, such an assertion misreads the scope of 'choice'. The majority judgment in Puttaswamy held that privacy of choice refers to intimate personal choices, such as reproduction. Certainly, the choice to voluntarily enter the public realm and then seek protection under privacy for the purpose of controlling the commercialisation of one's personality would not fall within the scope.

Furthermore, the intention of the argument presented in this section is much more nuanced. It is to show that for such cases, privacy theory might not provide the best understanding of personality rights. Nimmer's thesis supports this assertion.[58] Even Posner supports importing property rights in privacy when the value of disclosure is greater than the value of concealment.[59] Indeed, in cases such as Anil Kapoor, the purpose is not to conceal, but simply to control the

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[52] Digital Collectibles (P) Ltd. v. Galactus Funware Technology (P) Ltd., (2023) SCC OnLine Del 2306, ¶122 ('Digital Collectibles').
[53] Lemley, *supra* note 17, 1155.
[54] *Id*., 1162.
[55] Nimmer, *supra* note 25, 204.
[56] Puttaswamy, *supra* note 46, ¶141 (per Chandrachud, J.).
[57] *Id*.
[58] Nimmer, *supra* note 25, 204.
[59] Richard A. Posner, *The Right of Privacy*, Vol. 12, GA. L. REV., 393, 414 (1978).

personality. Therefore, while it is not contended that personality rights cannot be seen as the protection of privacy, in such cases, privacy might not provide the best understanding.

The question was also considered in *Chitra Jagjit Singh* v. *Panache Media* ('Jagjit Singh'). There the Court held that although the right is 'said to' have evolved from privacy, the right to privacy is understood to be distinct from personality rights.[60] It finally accepted the personality as a 'valuable proprietary right'.[61] While not being conclusive on the privacy question, the Court also delved into whether the right can be heritable.[62] Heritability is a property feature. Therefore, far from determining whether personality right is a part of privacy, the Court also looked at whether it can constitute property-like characteristics.

The distinction between protection of privacy and using personality for commercial purposes can be understood properly in the Delhi High Court ('HC') decision in *Krishna Kishore Singh* v. *Sarla Saraogi* ('Krishna Kishore'). Here, the plaintiff was the father of Sushant Singh Rajput ('SSR'). He claimed an injunction against the use of SSR's likeness in any film, caricature or other media without his consent. He argued that any such use would violate his right to privacy under Article 21. The plaintiff intended to protect the integrity of the trial of SSR's death that was ongoing. The purpose was to prevent illicit commercial gain by the defendants by using SSR's death.[63] Therefore, the intention was never of commercialisation or monetisation of personality, but quite the opposite — protection of SSR's dignity and concealment of information. The Court relied on Puttaswamy to hold that personality rights have been birthed from privacy.

This statement is itself questionable. It has been argued above that Puttaswamy's holding on personality as privacy, apart from being a concurrence, was not the correct interpretation of Haelan. However, assuming the holding to be legally correct, the Court's holding has to be considered in light of the facts. The purpose of the plaintiff was to protect the interest of the ongoing trial. Further, the plaintiff, rather than controlling commercialisation, intended to prevent it. Therefore, the intention was quite opposite to that of monetisation of personality, which evokes the property theory. Therefore, holding personality as privacy was functional, given the nature of facts. Still, it must be noted that the Court also considered, albeit in only a single sentence, whether personality rights can be property or not.[64]

Even as recently as 2023, the Delhi HC has implicitly separated personality rights from privacy. In Anil Kapoor, the plaintiff claimed injunctions against several advertisements and endorsements that used his likeness. He also claimed injunction, against certain malicious use of his likeness, such as morphed pictures and derogatory videos.[65] Therefore, the purpose was two-fold: controlling the commercialisation of his personality to ensure all endorsements are paid and protection from derogatory and morphed usage. While the grant of a John Doe injunction by the Court is debatable,[66] its remark is notable. It stated that the balance of convenience was laid in

[60] Chitra Jagjit Singh v. Panache Media, (2016) SCC OnLine Bom 2364, ¶5 ('Chitra Jagjit Singh').
[61] *Id*.
[62] *Id*., ¶6.
[63] Krishna Kishore Singh v. Sarla A. Saraogi, (2021) SCC OnLine Del 3146, ¶5 ('Krishna Kishore').
[64] *Id*., ¶26.
[65] Anil Kapoor, *supra* note 12, ¶25.
[66] Bharti, *supra* note 14.

favour of the plaintiff as the defendants had flouted his personality rights 'as well as' his right to privacy.[67] Therefore, it can be seen that the Court considered the two rights as separate.

Thus, it can be seen that the judgments in India cannot be read as having based personality, absolutely and for all purposes, on privacy. All such cases were based on circumstances which required the Court to evoke privacy. Such an evocation was driven by the purpose — protection of one's image — rather than attempting to stop unauthorised endorsements which the claimant had not monetised. While the Court has not stated this functionalist approach explicitly, such a method is certainly a better one. Celebrities want to control the use of likenesses for commercial purposes. Rather than intending privacy, they would want their likeness to be public, albeit with proper monetisation and consent.

This want for publicity is quite the opposite of privacy. This contrasts with a situation where one intends to protect one's likeness, such as in *T-Series* v. *Dreamline Reality* ('Dreamline'). Here, T-Series wanted to create a film on the life of Jaswinder Singh, who was subjected to honour killing. Her husband objected to the same, as his personal life would also be depicted in the film. Curiously so, the Court refused to invoke privacy here. It reasoned that personality rights only covered celebrities. While the judgment has been deftly criticised on other grounds,[68] this paper does not delve into them. The focus is on the facts of the case, to show the distinction in the type of cases that invoke personality rights.

One type focuses on protection, such as this. The personal life of the deceased had to be concealed. The other intent is to control commercialisation. Therefore, the right to privacy should be preserved for the former type, where privacy is actually the intention. In fact, the much-cited work on the right to privacy by Justice Warren and Justice Brandeis also supports this. They had posited that protection should be removed to "whatever degree and in whatever connection a man's life has ceased to be private to that extent the protection is to be withdrawn".[69] Nimmer's work on the right to publicity also supports the same.[70] The fact that the personality rights of celebrities do not fall within privacy has been accepted by scholars.[71] There is no requirement to invoke privacy when the intention is to protect economic interests. Such an interest, based on reaping the fruits of one's endeavour, must be separated from the protection of reputation.[72]

Moreover, the right to privacy is a fundamental right. Therefore, it should not be invoked simply when the prayer is for the protection of economic interests, such as unauthorised endorsements. The invocation of the right to privacy must be for the purposes envisaged in Puttaswamy: infringement of physical autonomy, informational privacy, and privacy of choice.[73] Mere economic interests cannot be the basis of fundamental right protection. Therefore, unless a functionalist approach is taken, such a distinction would not be possible. In fact, the following

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[67] Anil Kapoor, *supra* note 12, ¶47.
[68] Agarwal & Bhargava, *supra* note 19.
[69] Warren and Brandeis, *The Right to Privacy*, Vol. 4(5), HARV. L. REV., 193, 196 (1890).
[70] Nimmer, *supra* note 25, 205; *See also* O'Brien v. Pabst Sales Co. 124 F.2d 167 (5th Circuit, 1941) (United States Court of Appeals for the Fifth Circuit).
[71] Westfall and Landau, *supra* note 17.
[72] Zacchini, *supra* note 33, 574.
[73] Puttaswamy, *supra* note 46, ¶141 (per Chandrachud, J.).

section delves into a suggested and more structured method for such functionalism. A suggested method of such functionalism is deliberated upon in the following section.

C. THE WAY FORWARD: A MORE STRUCTURED FUNCTIONALISM

The Indian jurisprudence on personality rights can be read as functional. However, courts have not explicitly stated the adoption of such a method. The basis of personality rights, whether on privacy or property, is still unclear for the courts, as none of the judgments have provided reasons for going either the privacy way or the property way. The absence of coherent parameters in the doctrine and the lack of adequate reasoning on the position taken undermines the court's efficacy if confronted with a complex fact situation that flirts with the penumbra of both property and privacy theories. Therefore, this part suggests that rather than an *ad hoc* basis of adjudicating on personality rights as both property and privacy, depending on the factual scenario, courts should refer to Stiffelman's structure on the same. Indeed, his approach has been commended by David Landau as well.[74]

Stiffelman argues that personality rights have both property and privacy components.[75] He describes the property (or, as he terms it, proprietary) component as the misappropriation branch of privacy as well as independent property rights. By 'misappropriation', Stiffelman refers to any broad invasion of privacy rights.[76] The facts of Haelan can be used to illustrate the link between personality rights and property rights. There, a basketball player sued the defendant for unauthorised use of his likeness on an endorsement. The Court defined the right of personality as an 'independent right', thus protecting the player.[77] *Zacchini* v. *Scripps* ('Zacchini') is also informative on this point. There, the Court drew an analogy between personality rights and proprietary rights, stating that it focuses on the individual's rights to 'reap rewards of his endeavours', which are unrelated to the protection of one's feelings or reputation. So, the privacy and proprietary elements are different, based on the circumstances. In simple terms, Stiffelman can be interpreted to argue that where the right is based on the economic interests of the holder, property should be the basis. However, when the claim is based on privacy interests, such as the concealment of personal information, privacy should form the basis.

Stiffelman terms the other side of personality as the 'pure privacy' component. This focuses on the right to be left alone, free from any intrusion. It does not relate to any economic interest.[78] The distinction provided by Stiffelman sets a framework to work with any situation. It may be asked why such a distinction is of any relevance. If the right is categorised as privacy, the same is elevated to that of a fundamental right. On the other hand, personality as property depends on contractual terms and other factors which may guide any property right. However, it would not be a fundamental right.

Stiffelman's framework can be applied to the case of Krishna Kishore. It is apt to state the facts, albeit at the cost of repetition. The plaintiff, the father of SSR, prayed for an injunction against any depiction of his son's likeness by any film or other media. The stated

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[74] Westfall and Landau, *supra* note 17, 104, 105.
[75] Stiffelman, *supra* note 17, 1102.
[76] *Id*., 1099.
[77] Haelan, *supra* note 3, ¶2.
[78] Stiffelman, *supra* note 17, 1104, 1105.

purpose was to protect the fairness of the ongoing trial.[79] Furthermore, he sought to prevent business houses from using his son's likeness for illicit profits. This can be interpreted as claiming an economic interest. However, the purpose was concealment of information and not controlling the exploitation or commercialisation of personality.[80] Here, the plaintiff is not pressing for the protection of any economic right. Therefore, the proprietary element cannot be applied. The fact is squarely covered by the 'pure privacy' component. It can be argued that depictions of SSR's death and the use of his likeness were public disclosures of private facts. Further, such disclosures can portray him in a false light. Therefore, this is an appropriate case for invoking the right to privacy. Such a case necessitates fundamental right invocation.

Similarly, in Anil Kapoor*,* the actor stated that his morphed images were being used for derogatory videos.[81] Even here, the second component kicks in. This prayer is not for protecting economic interests but for reputation.

Therefore, it is suggested that courts can use Stiffelman's framework to decide whether to take the privacy or property approach. This would solve two things. *First,* it would forego the debate on whether personality rights are based on property or privacy, as it can be seen as both. *Second,* it would make sure that the fundamental right to privacy is not used for cases which are purely for the protection of economic interests and not actually for privacy.

This part argued that the Indian doctrine can be best explained as following a functionalist position. A close analysis of the case law showed that they cannot be interpreted to have grounded personality in privacy, excluding the property theory altogether. It proceeded to argue for a more structured analysis of the privacy-property debate by relying on Stiffelman's thesis. Moving away from theory, the second part looks at the application of personality rights in India, highlighting the complexities therein.

III. APPLICATION OF PERSONALITY RIGHTS IN INDIA

Part II of the paper was theoretical. It dealt with the foundation of personality of rights, whether in privacy or property. The purpose of this third part is practical. It delves into the application of personality rights by Indian courts. This part only concerns cases on the protection of economic interest. Cases based on the privacy theory have not been dealt with. The importance of the correct application of personality rights is obvious to understand whether such rights are overprotected or under-protected. Take the following example for clarity on this issue: suppose a local seller prints t-shirts without assigning any brand names. However, the T-shirt bears the picture of a famous movie star. Overprotection can lead to courts opining that there is a likelihood of confusion and that the seller is illegally using the brand image of the celebrity to make profits. However, can anyone possibly think that a celebrity will sponsor a local seller? It is conceded that the celebrity possesses the right to control how his image is used. However, will simply using some pictures which are already public lead to infringing personality rights? Therefore, what is the threshold that one needs to surpass to establish the infringement of personality rights?

[79] Krishna Kishore, *supra* note 63, ¶3.
[80] *Id*., ¶4.2.
[81] Anil Kapoor, *supra* note 12, ¶¶30–42.

Furthermore, the recent issuance of a John Doe injunction order in favour of a celebrity has raised concerns about the limits of this right.[82]

In India, several decisions have applied the confusion test to check the infringement of personality rights. Generally, the confusion test is the third prong of the 'trinity test' of passing-off.[83] For personality rights infringement, the focus has generally been on the third prong only — whether there exists a likelihood of confusion with respect to the alleged misuse or not.[84] This particular test has been imported from traditional trademark law jurisprudence. In trademark disputes, the test is used to check whether the similarity of two trademarks gives rise to confusion in the minds of consumers.[85] Similarly, for personality rights infringement, the test is used to check whether an average consumer would believe that the celebrity is actually endorsing the product or not.[86] In trademark cases, the courts simply check whether an average consumer would be confused between the two marks, leading to injury to the originally registered mark. As will be shown below, importing the confusion test in its exact character as used in trademark law might not be effective for complex cases of personality rights infringement. For example, there might simply be a mere association to a personality. Here, an application of the confusion test by itself might not be enough.[87] While this will be clarified in the subsequent sections, it will also be argued that the confusion test is a beneficial addition for probing personality rights infringement and should be applied.

Several Indian cases have refused to apply this test even after there was precedent for the same. In all these cases, a celebrity had brought an action to protect his image/personality and control it for proper monetisation.[88] As argued in the first part, such a claim does not necessitate lifting personality rights to that of the fundamental right to privacy. However, many such cases have refused to apply the confusion test and overprotected celebrities by aligning their personality right to privacy. This was done without proper reasons and without referring to precedents. Many cases also referred to Haelan but interpreted it incorrectly. Further, it limited the analysis of the US jurisprudence on Haelan*,* ignoring the later developments therein. This added to the continuous stream of faulty reasoning adopted by the courts.

The purpose of this part is brief. It shows how the confusion test was imported and then wrongly deviated from by Indian courts. Further, it specifically deliberates on the two recent judgments in Anil Kapoor and Bachchan, which have refused to apply the confusion test. It shows the negative implications that such deviations mark. While showing the normative benefits of applying the confusion test, the paper will also show certain defects therein. In doing so, it will suggest an additional layer of analysis for personality rights that can help correct the defects.

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[82] Bharti, *supra* note 14.
[83] Reckitt & Colman Products Ltd v. Borden Inc, (1990) 1 WLR 491 ('Reckitt & Colman').
[84] ICC Development (International) Ltd. v. Arvee Enterprises, (2003) SCC OnLine Del 2, ¶4 ('ICC').
[85] *See generally* Ann Bartow, *Likelihood of Confusion*, Vol. 41, SAN DIEGO L. REV., 721 (2004); Reckitt and Colman, *supra* note 83.
[86] Salar & Sinha, *supra* note 6.
[87] David S. Welkowitz, *Catching Smoke, Nailing Jell-o to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, Vol. 3, J. INTELL. PROP. L., 67 (1995) ('Welkowitrz').
[88] Anil Kapoor, *supra* note 12, ¶21; Titan Industries Ltd. v. Ramkumar Jewellers, (2012) SCC OnLine Del 2382, ¶1 ('Titan').

This part will be structured as follows: *Section A* traces Indian cases on the topic and shows how judgments have erroneously evaded the application of the confusion test. Subsequently, it illustrates the benefits of applying the confusion test to personality rights cases. *Section B* explains the problems that may arise in applying the confusion test and suggests an additional layer of 'intentional' analysis for better effectiveness.

A. FROM ICC TO BACHCHAN: OVER-RELIANCE ON HAELAN

One of the earliest Indian cases on personality rights was that of *ICC* v. *Arvee* ('ICC').[89] Here, the Court had to deal with the plea for protecting the personality rights of the International Cricket Council ('The Council'). The Council claimed that its mascot and tag lines for the 2003 South Africa World Cup had gained a 'persona' of their own.[90] It averred that the defendant had been using the slogans and mascots, without authority, to misrepresent their association with the Council and sell their products.[91] The defendants were also using a pictorial representation of a World Cup ticket, as an offer for sale. Based on this, the Council claimed an injunction against the defendants.[92] The single-judge bench of the Delhi HC negatived the contention on the ground that non-living entities cannot have personality rights.[93] The Court applied the trademark test of passing-off.[94]

Before stating the Court's holding, the basic elements of passing-off need to be explained. In *Erven Warnink* v. *Townend & Sons Ltd*., the Court held that to prove passing-off, three elements must be shown. *First,* the plaintiff must show that their goods enjoyed goodwill in the market. *Second,* it must be proved that the defendant misrepresented the plaintiff's goods. *Third,* damage to the goodwill of the plaintiff's goods because of the defendant's misrepresentation must be shown.[95] Applying the passing-off test, the Court in ICC held that 'ambush marketing' cannot be called passing-off, as there is no element of deceit.[96] Further, mere representation of the World Cup ticket cannot lead the consumers to believe that the defendants were official sponsors.[97] Interestingly, the Court also held that non-living entities, such as ICC, cannot claim protection of personality rights, as trademark and competition law is sufficient to accord them protection.[98] ICC did not refer to Haelan. However, it referred to judgments in Zacchini and *Vanna White* v. *Samsung* ('Vanna White'), which used the confusion test. While ICC deftly applied the confusion test, subsequent cases have not — erroneously, as the paper argues– followed this standard.

The Delhi HC faced a similar fact situation in *D.M. Entertainment (P) Ltd.* v. *Baby Gift House* ('DM Entertainment').[99] Singer Daler Mehndi claimed a similar violation of his personality rights by various corporations. The defendants were allegedly selling dolls which bore

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[89] ICC, *supra* note 84.
[90] *Id*., ¶2.
[91] *Id*., ¶3.
[92] *Id*.
[93] *Id.,* ¶12.
[94] *Id.*, ¶5; *See also,* Erven Warnink v. Townend & Sons Ltd., (1979) (2) All ER 927; Cadbury Schweppes Pty Ltd. v. Pub Squash Co. Pty Ltd., (1981) 1 All ER 213.
[95] *Id*.
[96] *Id.*, ¶9.
[97] *Id.*, ¶8.
[98] *Id.*, ¶12.
[99] D.M. Entertainment (P) Ltd. v. Baby Gift House, (2010) SCC OnLine Del 4790 ('DM Entertainment').

a stark similarity with the artist. Further, the sale invoices generated marked the article name as Daler Mehndi.[100] The Court alluded to the same requirements to claim infringement of personality rights. It posited that the plaintiff must be "identifiable" from the unauthorised usage. Further, the use must be "sufficient, adequate or substantial" to prove appropriation.[101] Therefore, the Court did not look at the confusion test. It can be argued that even if the use is substantial, there might not be any confusion that Daler Mehndi is endorsing the products himself. This leads to overprotection of the right.

The trickling down of the test continued in *Titan* v. *Ramkumar* ('Titan').[102] Here, the defendants had put up a poster that originally belonged to Tanishq, the jewellery subsidiary of Titan.[103] The defendant's poster had the same picture of Amitabh and Jaya Bachchan, who had actually endorsed Tanishq.[104] The facts were clearly in favour of Titan. While the Court held in their favour, it did so by laying down principles quite opposite to those in ICC. Relying on Haelan,[105] the Court laid two tests to enforce personality rights. The first is of validity: the plaintiff must hold an enforceable personality right. The second is identifiability: the celebrity must be identifiable from the advertisement.[106] It went on to reason that since the celebrities depicted here are popular, that itself satisfies identifiability. Based on this, it held in favour of Titan.[107] It is submitted that the Court's reasoning is erroneous. The Court did not even test confusion. Based on the two elements, a celebrity's picture in even a small shop can be an infringement of personality rights. Therefore, even if consumers do not believe that the person is actually endorsing something, the test in Titan can prove infringement. Further, the Court did not even refer to ICC, which is a coordinate bench judgment. Had it done so, it would have tested confusion as well. The application of the confusion test would have also resulted in the same order. The impugned advertisement was extremely similar to the original one by Tanishq. Further, portraying famous celebrities on a big billboard bearing the company's name would definitely lead an average consumer to believe that the celebrities are endorsing that brand. Therefore, simply following ICC and applying the confusion test would have not only led to the same outcome but also set a strong precedent.

Another problem with its reasoning was its faulty reliance on Haelan. While Titan referred to Haelan, it ignored several other US judgments that had applied the confusion test. In Haelan, the Court had no necessity to apply the confusion test, as it remanded the case back to the trial court for a decision on facts.[108] It simply held the existence of personality rights. Therefore, Titan's reliance on Haelan for the application of personality rights was fallacious. It simply took Haelan to be the authority on personality rights, something that Haelan had not even applied to facts. Relying on Haelan, the Court simply checked for validity or identifiability, ignoring the confusion test.[109] Further, it is not even clear how the Court derived the factors of validity and identifiability from Haelan, as the Court there was silent on such factors. In doing so, Titan

[100] *Id.*, ¶9.
[101] *Id.,* ¶14.
[102] Titan, *supra* note 88.
[103] *Id*., ¶4.
[104] *Id*.
[105] *Id*., ¶15.
[106] *Id*.
[107] *Id.,* ¶15.
[108] Haelan, *supra* note 3.
[109] Titan, *supra* note 88, ¶15.

completely ignored other US cases which had applied the confusion test. For example, in *Motschenbacher* v. *Reynolds Tobacco* ('Motschenbacher'),[110] a racing driver sued a cigarette manufacturer for misappropriation of his personality. The Court considered the extent of likeness in the advertisement. It held that though the advertisement had changed certain characteristics, the specific design of the car alluded to the plaintiff.[111] Therefore, the Court held in favour of the plaintiff based on the "distinguishing features" of the car depicted in the advertisement.[112] Although the Court did not explicitly evoke the confusion test, the extent of likeness analysis results in the same. In effect, the extent of the likes would lead an average consumer to think that the person had endorsed the brand. Motschenbacher was followed by both *Midler* v. *Ford* ('Midler') and Vanna White. In Midler, the Ford company had signed another singer to record a song originally performed by Bette Midler. The Court allowed Midler's claim, holding that Ford had appropriated the personality of Midler.[113] In Vanna White, the popular TV personality Vanna White sued Samsung for depicting a robot similar to her likeness in an advertisement. Distinguishing the case from both Motschenbacher and Midler, the Court held that a reasonable person would confuse the robot with Vanna White.[114] Also relevant is *Carson* v. *Here's Johny Portable Toilets, Inc.* ('Carson').[115] Here, the defendant company advertised its product with the tagline "Here's Johny", which was attributable to Johny Carson from the famous television show "Tonight Show". Again, the Court applied the confusion test, noting that there was "little evidence of actual confusion".[116] These cases had clearly applied the confusion test. Therefore, by ignoring them and relying solely on Haelan, Titan misinterpreted the jurisprudence, leading to an overprotection of personality rights.

Coming back to Indian decisions, the developments were not limited to the Delhi HC. The Bombay HC added to the confusion in its judgment of Jagjit Singh. However, Titan's ghost had not been exorcised. In this case, the defendant had organised a concert, the poster of which depicted a picture of Jagjit Singh, the late famous artist.[117] His wife filed a suit claiming an injunction against the use of the "voice, name, picture, persona and goodwill of the deceased singer". While the Court cited ICC,[118] it did not follow the standard laid therein, without citing any reasons for not doing so. Rather than applying the confusion test, it applied Titan. Thereby, it simply held that infringement of personality rights requires no proof of confusion or deception.[119] This shows that courts are more concerned with loss of goodwill than actually checking for misrepresentation or confusion.

Bachchan followed suit. There, Amitabh Bachchan alleged a violation of his personality rights. He contended that the defendants had used his "celebrity status" in advertisements without authority and consent. Therefore, he prayed for an injunction.[120] The

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[110] Motschenbacher, *supra* note 7.
[111] *Id.*, ¶16.
[112] *Id*.
[113] Midler, *supra* note 9, 460.
[114] Vanna White, *supra* note 8, ¶3.
[115] Carson v. Here's Johny Portable Toilets, Inc., 698 F.2d 831 (6th Circuit, 1985) (United States Court of Appeals for the Sixth Circuit).
[116] *Id*.
[117] Chitra Jagjit Singh, *supra* note 60, ¶2.
[118] *Id.*, ¶5.
[119] *Id*.
[120] Bachchan. *supra* note 11, ¶20.

single-judge bench of Justice Chawla granted the injunction after considering the factors under Order 39 of the Civil Procedure Code.[121] Bachchan completely relied on Titan.[122] Much like Jagjit Singh, the Court proscribed testing confusion, without referring to any other case. Again, goodwill was given more importance than checking for confusion.

Bachchan was followed by Anil Kapoor. The facts of Anil Kapoor were quite novel. Kapoor prayed for an injunction against any unauthorised use of his 'likeness'. Further, he claimed a right over his voice and his distinctive catchphrase, "Jhakaas".[123] The Court held that using the likeness of a person in an illegal fashion or for commercial gain is not permitted.[124] It also injuncted against the creation of ringtones from Kapoor's movies in his voice. Notably, the Court's order was a blanket John Doe order. Therefore, any use of his voice, no matter what the purpose is, can be stopped. The same was also without any reference to the previous judgments like DM Entertainment or ICC. Even here, the Court did not apply the confusion test. There was no justification for how anyone would think that Anil Kapoor is sponsoring posters and GIFs. Surely, no one would believe that Anil Kapoor was endorsing face masks which had his image. While protecting personality against commercial misuse is logical, if consumers are not led to believe that Kapoor is endorsing an article, protecting his likeness does not satisfy the purpose of personality rights. Even then, the misguided non-application of the confusion test continued, thereby expanding personality rights way more than what was proposed in ICC.

Perhaps winds of change have started to blow, as evinced by the recent case of Digital Collectibles. Here, the plaintiff owned exclusive licenses to use the likeness of certain sportsmen. The defendants began using them without any authorisation.[125] Based on this, the plaintiff claimed infringement of their personality rights and sought an injunction.[126] After considering the relevant decisions, the Court substantially narrowed personality rights *vis-à-vis* free speech. It limited the ratio of DM Entertainment as applicable to only celebrity advertisements and endorsements.[127] Further, it upheld the application of passing-off and, therefore, the 'likelihood of confusion' for infringement of personality rights.[128] The Court held that since the information was already in the public domain, there would be no possibility of confusion in the minds of the public that the defendant is associated with the player.[129] Importantly, the Court emphasised protecting Article 19(1)(a) rights as against personality rights and held that commercial use of public information will not be considered as an infringement.[130]

While Digital Collectibles does sound promising, it is still a single-judge decision. In any case, the cases do not reflect a stable trend. This casts doubts on its strength as a precedent. Most of them have harped the decision on goodwill without checking whether there is actual

[121] *Id.*, ¶21; The Code of Civil Procedure, 1908, Or. 39.
[122] *Id.*, ¶20.
[123] Anil Kapoor, *supra* note 12, ¶25.
[124] *Id.*, ¶39.
[125] Digital Collectibles, *supra* note 52, ¶¶19, 29.
[126] *Id*.
[127] *Id.*, ¶120.
[128] *Id.*, ¶126.
[129] *Id.,* ¶130.
[130] *Id.*, ¶129.

confusion or not. In essence, the precedential value of Titan, Bachchan and Anil Kapoor remains as strong as that of Digital Collectibles.

Indeed, there is significant value in applying the confusion test for personality rights cases. Various judgments have noted that personality rights are not absolute.[131] Especially in India, they are superseded by the right to free speech under Article 19(1)(a).[132] This allows anyone to use public information for even commercial speech.[133] Therefore, using the likeness of a celebrity for parodies or artworks is protected under the same. Further, the objective of personality rights would be better protected if confusion is tested. As noted in Titan, the purpose of the plaintiff was to control the commercial use of one's likeness.[134] So, for example, a brand cannot use the likeness of a celebrity to advertise their products. However, to qualify for the same, the consumers need to believe that the celebrity is endorsing that brand. If not, then there is no 'commercial use'. For example, it is common for many local shops to put up pictures of celebrities on the front of their shops. However, an average consumer would not tend to believe that the local shop is being endorsed by a celebrity.

The 'confusion test' remedies this. Only if the average consumer is likely to believe that the brand is being endorsed by the celebrity can an infringement suit be successful. The US case of Vanna White is an example of this.[135] Here, Samsung had depicted a robot which allegedly represented Vanna White. The Court found Samsung guilty of infringement of the personality rights of Vanna White. The case has been heavily criticised for the overprotection of personality rights. In the ad, the robot had been dressed in a manner representing Vanna White. However, the same has been argued to have simply been a "metaphor" for a time period.[136] The same was not used to exploit her goodwill. Would the public have believed that merely because of a small resemblance to her, Samsung was being endorsed by White? This is the question that should be asked in every case.

One might argue that, irrespective of confusion, people should have the right to restrict the commercial use of their personality or likeness. There is a simple retort to this assertion. *First,* celebrities themselves have made their likeness public. As explained in Part I, privacy concerns cannot be the basis of protection here. *Second,* free speech concerns are rife with overprotecting personality rights.[137] Therefore, checking for confusion restricts the scope of protection to cases where the brand name of the personality can actually be harmed by unauthorised commercial exploitation. By not testing confusion, both Bachchan and Anil Kapoor overprotected personality rights.

B. CONFUSIONS IN THE CONFUSION TEST

[131] DM Entertainment, *supra* note 99.
[132] Digital Collectibles, *supra* note 52; DM Entertainment, *supra* note 99, ¶16.
[133] *Id*., ¶129.
[134] Titan, *supra* note 88, ¶15.
[135] Vanna White, *supra* note 8.
[136] Welkowitz, *supra* note 87, 85.
[137] Eugene Volokh, *Freedom of Speech and the Right of Publicity*, Vol. 40, HOUS. L. REV., 903 (2003).

While the previous section argued in favour of the confusion test, this section attempts to show some of its fault lines. It will also suggest an additional approach that may help fine-tune the test and increase its effectiveness.

1. CONFUSION: THE FAULT IN ITS STARS

While the 'confusion test' has the benefit of actually testing whether the goodwill has been appropriated or not, it is not without faults. This section is restricted to a couple of them.

a. THE RELEVANT CONSUMER BASE

Under this test, the Court needs to consider whether there is a likelihood of confusion among consumers.[138] For a normal trademark passing-off, this prong of the test is relatively simpler. However, the same becomes difficult when celebrities are concerned. This is because the likeness of a celebrity can be gauged differently by different sections of people. The standards used in different cases bring this point home. In *Shivaji Rao Gaikwad* v. *Varsha Productions* ('Shivaji'),[139] actor Rajnikanth sued the defendants for releasing a film bearing his likeness due to its title — "Main Hoon Rajnikanth".[140] In the film, the protagonist was named Rajnikanth, so the movie was never about the actor Rajnikanth. Despite the same, the Court concluded that cine-goers would be reminded of only one person on looking at the title and ordered a change of the film's title.[141] However, in *Anil Kapoor* v. *Make My Day*, the Court took a stricter approach. It was careful not to consider consumers as gullible and uninformed. Contrary to Shivaji, the Court here took the viewpoint of an 'avid moviegoer' who would be able to tell the difference between two films which are not exactly similar.[142] As argued elsewhere,[143] a similar approach in Shivaji would have led to a different result, as an 'avid moviegoer;' would be able to tell that the film is not about the actor Rajinikanth. This shows that differences in consideration of the consumer base can lead to starkly different outcomes in cases.

b. DECEPTION VS ASSOCIATION

Often, we tend to associate celebrities with different characteristics. For example, gestures, which were also granted protection by Anil Kapoor,[144] can be associated with celebrities. However, there might be a fine line between simply associating a characteristic with a celebrity vs actual confusion that she endorsed the product. Simple evocative characteristics of a celebrity cannot be called confusion, howsoever familiar the association might be. The case of Vanna White is illustrative of this account. Here, there was a clear association with her, but it might not have led to confusion. Indeed, the line dividing the two is fine. Moreover, with the rising influence of social media, it is difficult to avoid certain associations with some celebrity or personality even when not

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[138] Suman Naresh, *Passing-Off, Goodwill and False Advertising: New Wine in Old Bottles*, Vol. 45(1), CAMB. L. J., 97, 104 (1986).
[139] Shivaji Rao Gaikwad v. Varsha Productions, (2015) SCC OnLine Mad 158 ('Rajnikanth').
[140] *Id*., ¶3.
[141] *Id*., ¶23.
[142] Anil Kapoor Film Co. (P) Ltd. v. Make My Day Entertainment, (2017) SCC OnLine Bom 8119, ¶15.
[143] Salar & Sinha, *supra* note 6, 64.
[144] Anil Kapoor, *supra* note 12, ¶25.

intending to do so. Therefore, simply going by the confusion test without considering other aspects can sometimes lead to negative results.

2. CHECKING FOR INTENTION

The paper suggests that an intentional analysis of the advertisement should be employed for fine-tuning the confusion test. The facts on record might help in determining the intention of the contested use in an advertisement or other media. The paper concedes that normally intention should not matter if the advertisement is per se passing-off for another. However, the suggestion is limited to its use as a tool in aiding the test. For example — an advertisement uses the likeness of an actor in the background. The same is never meant for commercial exploitation of goodwill, but perhaps as an allusion or metaphor. In Vanna White, her likeness was used simply as a metaphor for the 1990s. The intention was never to exploit her celebrity status.[145] In such cases, the confusion test, due to its varying standards, may lead to uncomfortable outcomes. Here, it might be useful to inquire into the intention of the use. The same is not meant to be an ingredient to be satisfied, but just as a factual aid. By analysing the ad as a whole, one might come to a more conclusive result. Further, the paper argues that such an inquiry can also help in minimising the effect of different consumer bases for the confusion test. For example, in Shivaji, the intention was not to imitate Rajnikanth, but simply to name the film after its protagonist. Based on this, the Court might not have concluded that movie-goers would be deceived. This is because, once the intention is clear, importing the same to the consumers is logical.[146] Therefore, this fine-tunes the test of deception.

A caveat should be marked here. While applying the confusion test, courts must not conflate the 'likelihood of confusion' with simple association. Such conflation can happen if strict standards are not applied. Again, taking the Vanna White example, while there was association, it can be argued that there was no confusion. This becomes even more important with modern advertisements using different evocative tools to associate with nostalgic themes. For example, an advertisement might simply use the pictures of some celebrities in the background to evoke nostalgia about the 1990s. While there can be an association with a personality, the same must not be conflated with the confusion test. The danger with such conflation is the overprotection of personality rights, in prejudice to the right to free speech. A substantive analysis of this hypothesis is beyond the scope of this paper. However, adding an intentional layer to its analysis might help abate such dangers.

The US jurisprudence shows the emergence of what the courts have labelled as the 'transformative test'. It simply checks whether the work has added something new, so as to differ from simply portraying the likeness for commercial gain.[147] Interestingly, this test is subsumed under the proposed intentional analysis. In *Comedy III Productions* v. *Gary Saderup,* the plaintiff was famous for a comedy show called "The Three Stooges". The defendant allegedly made charcoal sketches depicting the same and sold it by exploiting the popularity of the show.[148] The Court, applying the transformative test, held that transformation by the sketches was subordinate

[145] Welkowitz, *supra* note 87, 83.
[146] *See* Salar & Sinha, *supra* note 6, 116.
[147] Comedy III Productions, Inc. v. Gary Saderup, 21 P.3d 797 (Cal. 2001), 799 (Supreme Court of California).
[148] *Id*.

to the overall goal of exploiting the popularity of the show.[149] Clearly, the Court checked for the intention of the defendant through the final use of the product. This helps the proposed test in two ways: *first,* testing for intention is not new, and has been implicitly used by courts in the past. *Second,* intention can be gleaned from the factual matrix, and does not work in abstract.

IV. CONCLUSION

This paper had two objectives. The first part of the paper was theoretical — to clarify the underlying principle on which the Indian courts are basing personality rights. It showed that none of the cases can and should be interpreted as basing personality rights exclusively on privacy. The best understanding of the doctrine is functionalism. Defending this stance, it proposed a tiered analysis, using Stiffelman's thesis. The second part focused on the application of personality rights. It argued that Indian courts have erroneously expanded the scope of such rights by not following the 'confusion test'. It also showed how overreliance on Haelan, without considering subsequent development in the US, led to the same. Further, it defended the confusion test, but also highlighted some problems therein. The part concluded by suggesting an intentional analysis to fine-tune the test.

Personality rights are still in a state of flux. Most judgments by the courts are interim reliefs, pending final order. Perhaps the final judgments will provide more clarity on this right. However, the issuance of John Doe injunctions without sufficient probing is alarming. Further, the extent to which such rights are to be protected must be ascertained. Article 19, guaranteeing the freedom of speech and expression, must be considered for the same. The Supreme Court is yet to conclusively decide on the basis of personality rights, and its proper application. Till then, the field is occupied primarily by the Delhi HC judgments. While this paper has taken up a fractional aspect of the right, many more are yet to be deliberated upon. It would be exciting to see whether, and if yes, how, the Supreme Court and academia in general react to this sudden eruption of personality claims in India.

[149] *Id*.; Volokh, *supra* note 138, 915.