



ADVOCATING FOR IMAGE RIGHT PROTECTION THROUGH THE LENS OF HISTORY

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ABSTRACT

With the emergence of the digital and hi-tech age, image right which embodies the legal, ethical, and practical aspects of one's likeness and visual representations has become very topical in recent times. This article undertakes an overview of the historical background and origin of image right protection. It delves into the evolution of image right from its early roots to contemporary times; examining landmark legal cases, ethical considerations, and shifting societal norms. The analysis underscores the fundamental need for understanding the historical precedents that have shaped image right protection and informed the current legal framework. The article further discusses useful insights into the future of image rights. The article employs a doctrinal research methodology in its analysis. It concludes with recommendations such as the need to recognise image rights as a special class of rights deserving of protection like other fundamental rights.

INTRODUCTION

Generally, rights are claims which inure in favour of a person and are enforceable in court. Fundamental rights are rights which have gained such universal recognition and status that in most cases, they are enshrined in the Constitutions of several Nations of the world and protected from violations both by governments and citizens alike. These rights include right to life, right to dignity of the human person, right to fair hearing, liberty, freedom of movement, freedom of association and the press, freedom of religion, freedom to own property and the right to privacy. These rights are considered essential to man's existence particularly in present civilizations.

An offshoot of the right to privacy is the notion of what is now known as image rights. Some argue that image right is in a class of its own and ought to be protected separately while the right to privacy is essentially different therefrom. The scope of what constitutes image rights for the purpose of according legal protection could be blurred particularly in the light of varying decisions of various courts in different cases. Furthermore, this confusion seems exacerbated by the extensive nature of image rights. It is a concept which runs a thread through other broad areas of law such as property law; succession law; data protection and privacy law; and intellectual property law. More worrisome is that new trends such as social media and emerging technologies such as Artificial intelligence, in particular, the application of synthetic technologies such as holograms, further deepen the uncertainty surrounding the



scope of image rights protection. However, it is possible that the incertitude around image right protection may be cleared up if its historical origins are considered. This article undertakes an overview of the historical background and origin of image right protection. It delves into the evolution of image right from its early roots to contemporary times, examining landmark legal cases, ethical considerations, and shifting societal norms.

MEANING OF IMAGE RIGHT

Image right has been viewed as the expression of a personality in the public domain.¹

Notably, image right has been described as,

The right to protect one's image from unwanted exposure (the right to privacy). It embodies a privacy interest and has been described as the right to the image, meaning that an individual has an exclusive right to his or her own image such that he or she can oppose its unauthorised use and dissemination– the extra-patrimonial nature. The right also embodies the desire to protect a marketable asset– the image of a (popular) person for which compensation for its use may be offered (the right to publicity). This has been described as the right *on* the image (or the right to *profit on* the image)– the patrimonial nature.²

It has been described as the various rights individuals hold in their own *persona* (including their name, image and likeness).³ On the other hand, personality has further been described as a means by which one individual is recognised by another. Through the creation of one's personality, an individual creates an image of himself and his expected behaviour in society.⁴ Although the term 'persona' has a semantic problem, it is usually considered as having some form of combination of economic value in not just a person's name or likeness, but also a person's image; 'image depicts not just what a person looks like, but also the beliefs of

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¹ Intellectual Property Office, 'What are Image Rights.' *Intellectual Property Office* (St Peter Port, n.d.) <<https://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights>> accessed 25 August 2023. Ahmad and Swain assert that Tabrez Ahmad and Satya R Swain, 'Celebrity Rights: Protection under IP Laws' [2011] (16) *Journal of Intellectual Property Rights* 8.

² Elisabeth Logeais and Jean-Baptiste Schroeder, 'The French Right of Image: An Ambiguous Concept Protecting the Human Persona.' [1998] (18) *Loyola of Los Angeles Entertainment Law Journal* 517.

³ Rocket Lawyer, 'Image rights' *Rocket Lawyer* (San Francisco, n.d.) <<https://www.rocketlawyer.com/gb/en/business/protect-intellectual-property/legal-guide/image-rights>> accessed 25 August 2023.

⁴ Tabrez Ahmad and Satya R Swain, 'Celebrity Rights: Protection under IP Laws' [2011] (16) *Journal of Intellectual Property Rights* 8.

audiences about that person.’⁵ This reveals two forms or meanings of persona described by scholars as the commercial persona, and the human persona.

RATIONALE FOR IMAGE RIGHTS PROTECTION

In *Von Hannover v Germany* (No. 2),⁶ the European Court of Human Rights noted that,

one of the chief attributes of (...) personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.

These rights are subject to protection from economic manipulation or exploitation of any kind. This is especially true as the booming social media era poses a threat to privacy rights, especially with the ease with which a person’s photograph may be taken, edited, modified, and transferred or uploaded across several devices in split seconds without the knowledge of the individual whose image is contained in the photograph. This situation is especially encountered by popular figures such as music stars, actors, popular athletes, comedians, and reality TV show stars. These persons are, in more cases than not, regarded as icons by those to whom their art appeals (otherwise known as ‘fans’). The popularity of these faces or individuals could become a target for commercial exploitation by companies, especially advertising companies or media outlets like news agencies. These companies know fully well that the popularity or wide acceptance of the individuals concerned commands a strong sense of appeal and even loyalty from the fans, which is, in most cases, the target audience. Therefore, the companies reap benefits from the personalities or art of such celebrities with no direct correlation to the celebrities in question. This is the rationale for the recognition and protection of image rights.

HISTORICAL EVOLUTION OF IMAGE RIGHT

This section of the article shall attempt to trace the evolution of image right from three lenses - the development of image right from privacy and publicity right, the development of image right protection through legislations across various jurisdictions, and the development of the commodification of image right.

⁵ Dustin Marlan, ‘Unmasking the Right of Publicity’ [2020] (71) *Hastings Law Journal* 426-427.

⁶ (App nos 40660/08 and 60641/08 [2012] EMCR 16 (ECtHR, Grand Chamber), para 96.

The development of Image Right from Privacy and Publicity Right

Falling under the description of personality rights and split between two unique components (i.e, the right to publicity and the right to privacy), image rights, just like the *genus* personality rights which attach to a person, have their origin in antiquity.

The origin of image rights in antiquity falls within the terrain of the rights to privacy and publicity which have always been issues of great concern around the world. As regards privacy, Solove posited that,

People have cared about privacy since antiquity. The Code of Hammurabi protected the home against intrusion, as did ancient Roman law. The early Hebrews had laws safeguarding against surveillance. And in England, the oft-declared principle that the home is one's "castle" dates to the late fifteenth century. Eavesdropping was long protected against in the English common law.... The right to privacy emerged in countries all around the world in many different dimensions.⁷

As an offshoot of the right to privacy (publicity), image right is closely linked to the personhood of an individual. Mihăilă notes that the notion of 'person' comes from antiquity, with the Greek word *prosopon* designating the face or image, and which became a 'theatre mask' representing the idea of a person acting or speaking.⁸ The ontological dimension of the concept of 'person' essentially provides a framework for the conception of image rights as it perceives that while a person is conceived as a 'mask borrowed from the being', 'the image' is the transcendence of the person.⁹

The principles applicable to the protection of seclusion, privacy and certain interests considered as 'natural' rights of the personality were largely the results of 17th and 18th century legal thinking in the domain of public law which were intended to protect the individual against society.¹⁰ As Luthra and Bakhru point out, the root of privacy and the recognition and protection of individuality from intrusion is traceable to ancient European

⁷ Daniel J Solove, *Nothing to Hide: The False Tradeoff Between Privacy and Security*. (Yale University Press, 2011) 4.

⁸ Camelia Mihăilă, 'New Concept of Personality Rights in Romanian and French Law' [2019] (2) (1) *Open Journal for Legal Studies* 11.

⁹ *Ibid*, 13.

¹⁰ Stig Strömholm, 'Right of Privacy and Rights of the Personality: A Comparative Survey' Working paper prepared for the Nordic Conference on Privacy organised by the International Commission of Jurists, Stockholm, May 1967, 17 <<https://www.icj.org/wp-content/uploads/1967/06/right-to-privacy-working-paper-publication-1967-eng.pdf>> .



history. The development of this right grew with the establishment of a right to be protected from physical interference with life and property.¹¹

The Development of Image Right Protection through Legislations from various Jurisdictions

Generally, the first attempt at an official recognition of personality (image) rights is traceable to France. As Strömholm notes, since the early 19th century, French Courts have applied Article 1382 of the Code Napoléon promulgated in 1804 which provides generally that anyone who inflicts an injury upon another is bound to redress the wrong. This Code was used to sanction acts which involved invasions of privacy, in particular, violations of the secrecy of confidential letters, abuse of a person's name, and unwarranted publication of a person's image.¹² Although the provision made it possible for aggrieved persons to seek redress and obtain remedies for invasion of their privacy, it forestalled the development of a theory of privacy in France. Subsequent treatises by French authors were influenced by earlier works of German authors.

However, in the 19th century, the notion of *droit moral* (moral right) in the field of copyright emerged in French legal writing, and was infused into the legal system through the introduction of the concept of *droits de la personnalité* (translated 'personality rights').¹³ During the same period, several writers recognised and wrote on the unique subject of personality rights. For instance, Gareis¹⁴ posited 'a right for the individual to organise his life as he likes, a right to a person's name and to his honour;' Gierke¹⁵ postulated rights to 'a person's body and life, liberty, honour, social position, free activity, commercial sphere of activity, name, marks and intellectual property;' while Kohler¹⁶ proclaimed a 'general right of the personality' which entitles every individual to claim recognition.¹⁷ Logeais and Schroeder¹⁸ assert that in France, the first case to recognise a right to prohibit the unauthorised use of a person's image was *Rachel's case*¹⁹ decided in 1858. In that case, an

¹¹ Samarth K Luthra and Vasundhara Bakhru, 'Publicity Rights and the Right to Privacy in India' [2019] (31) (1) *National Law School of India Review* 127.

¹² See (n11).

¹³ See (n11).

¹⁴ Karl Gareis, *Das juristische Wesen der Autorrechte, sowie des Firmen- und Markenschutzes (The Juridical Nature of Author's Rights, as well as of Tradename and Trademark Protection)*. (Busch's Archive XXXV, 1877).

¹⁵ Otto von Gierke, *Deutsches Privatrecht, Volume 1*. (Duncker & Humblot, 1895).

¹⁶ Josef Kohler, *Urheberrecht an Schriftwerken und Verlagsrecht*. (Ferdinand Enke, 1907).

¹⁷ (n11)

¹⁸ Elisabeth Logeais and Jean-Baptiste Schroeder, 'The French Right of Image: An Ambiguous Concept Protecting the Human Persona' [1998] (18) *Loyola of Los Angeles Entertainment Law Journal* 517.

¹⁹ T.P.I. Seine, June 16, 1858, D.P. III 1858, 52.

artist drew Rachel (a famous actress) on her deathbed and sold the drawing without her family's consent and in spite of their objections. The Tribunal de Première de la Seine ordered the confiscation of the drawing and its negatives, and held that 'No one may, without the explicit consent of the family, reproduce and bring to the public eye the image of an individual on her deathbed...' ²⁰

In England, one of the earliest cases on violation of the right to privacy which centred on the wrongful use of a person's likeness was that of *Tolley v J. S. Fry & Sons Ltd.* ²¹ In that case, a golfer sued a chocolate company for using his likeness for advertising purposes without his consent. It was held that the company 'acted in a manner inconsistent with the decencies of life...' but given that there was no express defamatory use of the likeness, the cause of action was not viewed by the trial court as capable of being the subject matter of complaint by action of law. The decision was however overturned on appeal on the ground that the action of the company actually amounted to libel. ²²

The concept of protecting a person's image has a long tradition in Germany, where the right of an individual to his own image was officially recognised in 1907, in the Copyright in Works of Art and Photography Act (Kunsturhebergesetz, KUG), section 22. The origins of the enshrinement of this right in law can be traced back to 1889, in the Bismarck case, where two photographers entered the bedroom of the former German Chancellor Otto von Bismarck without permission and photographed his corpse. ²³

The German Civil Code subsequently recognised the proprietary right of a person to his name, but subsequently, the Artistic Copyright Act of 1907 brought tremendous progress to image (and personality) rights as the right of a person to his likeness was recognised and explicitly defined therein. ²⁴ This development was further strengthened by Article 2(1) of the Western Germany Constitution 1949 which listed the 'free development of the personality' as a fundamental right, and thus opened a new vista for the recognition of a general right to personality under public and private law. Apart from an earlier related decision, the *Bundesgerichtshof* (the German Federal Court of Justice) which is the highest court of civil and criminal jurisdiction in Germany founded on 1st October 1950, ²⁵ rendered a decision in

²⁰ (n19).

²¹ (1930) 1 K.B. 467 at 478.

²² *Tolley v Fry* [1931] AC 333; (1931) 1 All ER Rep 131.

²³ RGZ 45, Judgment of 28 December 1899, Bismarck, 170, at 173 in Tatiana Synodinou, 'Image Right and Copyright Law in Europe: Divergences and Convergences', 2014, *Laws*, 181- 207

²⁴ See (n11)

²⁵ Wendt Nassall, 'The Legal Profession at the BGH from a Legal Historical Perspective.' [2009] (64) (22) *JuristenZeitung* 1087



1958 with implications for image rights. In a suit commenced by a businessman who was photographed on horseback and whose image was subsequently used in advertisements by a manufacturer of doubtful pharmaceuticals, the court awarded damages and held the action of the company to be an attack on the plaintiff's liberty of decision.²⁶

In some other jurisdictions, statutory recognition of forms of personality rights emerged and could be found in: (a) the Italian Civil Code (Article 10 recognised the right to a person's likeness); (b) the Swiss Civil Code of 1907 (Articles 26-30 dealt with protection of the personality); (c) the Greek Civil Code of 1946 (Article 57 affirmed a general right of the personality); (d) the 1959 Civil Code of Hungary (through which the abuse of a person's likeness was regarded as a violation of rights pertaining to persons in their capacity as such (Article 82)); and (e) the Polish Civil Code of 1964 (Article 23 provided for 'goods inherent to the human personality' which include *inter alia*, likeness).²⁷

In the United States, personality rights were viewed as admixtures of the right to privacy and the right to publicity, and the concept essentially gained significance in the 1890 *magnum opus* of Warren and Brandeis titled 'The Right to Privacy',²⁸ which: (a) emphasised a person's right to be left alone; (b) stated that privacy was 'part of the more general right to the immunity of the person, the right to one's personality;' and (c) advocated for the grant of damages for distress and anguish caused to a person whose dignity was harmed.²⁹ Although the article essentially centred mainly around privacy, publicity rights (which granted an individual control over the commercial exploitation of his personality and a right of action over the misappropriation of their identity) emerged from it.³⁰ The concept of the right to publicity was however formally introduced by Nimmer in his article 'The Right of Publicity',³¹ which emphasised the right of a celebrity to control the commercial value of their identity. Relevant cases were *Pavesich v New England Life Insurance Co.*³² and *Haelan Laboratories Inc. v Topps Chewing Gum Inc*³³ (in which the right of publicity was articulated as a transferable intellectual property right). Subsequently, Prosser expanded earlier views on privacy rights in his article 'Privacy' (which came on the heels of *Haelan's case*)³⁴ and

²⁶ See (n11).

²⁷ (n 11).

²⁸ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' [1890] (4) (5) *Harvard Law Review*

²⁹ Alix C Heugas, 'Protecting Image Rights in the face of Digitalization: A United States and European Analysis' [2021] (24) *The Journal of World Intellectual Property* 346.

³⁰ Ibid.

³¹ Melville B Nimmer, 'The Right of Publicity' [1954] (19) (2) *Law and Contemporary Problems*.

³² 122 Ga 190; 50 SE 68 (1905).

³³ 202 F 2d 866 (2nd Cir 1953).

³⁴ William L Prosser, 'Privacy' [1960] (48) (3) *California Law Review*.



advanced four categories of privacy torts: (a) intrusion upon the plaintiff's seclusion or solitude, or into private affairs; (b) public disclosure of embarrassing private facts about the plaintiff; (c) publicity which places the plaintiff in a false light in the public eye; and (d) appropriations for the defendant's advantage of the plaintiff's name or likeness.³⁵

On December 3, 2012, the Bailiwick of Guernsey became the first jurisdiction anywhere in the world to introduce a registration system for image rights. The Image Rights (Bailiwick of Guernsey) Ordinance 2012 facilitates for the first time the registration of personality and any image rights (including rights in characteristics, mannerisms, or traits) unique to that personality. The ability to carry out such a registration and obtain a property right in one's image is a watershed and allows one to effectively register and protect one's personality and image rights as a matter of public record for the first time. With this registration, the appropriation by others of a registered personality or associated characteristics for unauthorised economic benefit may give rise to statutory infringement proceedings under the Image Rights Ordinance (IRO). Until now, there had been no legal registration of personality and image rights anywhere.

The Development of the Commodification of Image Right

The above developments expanded the frontiers of personality rights, especially through the components of privacy and publicity rights. These rights have resonated in international instruments such as: (a) the Universal Declaration of Human Rights 1948 (article 12); (b) the American Declaration of the Rights and Duties of Man 1948 (article 5); (c) the European Convention on Human Rights 1950 (article 8); (d) the International Covenant on Civil and Political Rights 1966 (article 17); and (e) the American Convention on Human Rights 1969 (article 11). The encapsulation of these rights in national and international instruments, in addition to societal and technological advancements, has given greater impetus to the commodification of personality interests in contemporary times. The concept of commodification is viewed as being generally employed to describe the expansion of economic rhetoric and practices to spheres of social life which had been traditionally considered external to the market realm.³⁶ Resta points out that with the expansion of the frontiers of markets into virtually all aspects of life, the attributes of human personality have increasingly become commodified, such that corporeal (organs, tissues, gametes, DNA

³⁵ Samarth K Luthra and Vasundhara Bakhru, 'Publicity Rights and the Right to Privacy in India' [2019] (31) (1) *National Law School of India Review* 127.

³⁶ Giorgio Resta, 'The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives' [2011] (26) *Tulane European & Civil Law Forum* 41.



samples, etc.) and incorporeal (name, image, voice, personal data, etc.) components of the personal identity have acquired an enormous economic value and are increasingly treated as commodities to be bought, sold and licensed on the marketplace.³⁷

This process, Resta asserts, strongly impacts the regime of personality rights, as it has altered the nature of controversies brought before courts and the functions assigned to the remedial system, and has also orchestrated a paradigm shift in focus from the *protection* of the inviolate personality against invasions by third parties and the recovery of non-pecuniary losses arising from the infringement of dignitary interests, to the *exploitation* of the commercial value of personality and compensation for profits foregone (or restitution of unlawfully earned profits) as a result of the unconsented use.³⁸ The result has been that personality rights have increasingly converged with property rights, and the conceptual boundaries between patrimonial and extra-patrimonial rights, and between alienable and inalienable entitlements are now blurred.³⁹ More succinctly, the classic dichotomy between privacy and property appears to be the major philosophical obstacle standing in the way of the official recognition of an autonomous image right comprising both the dignity and the commodity aspects of a person's image.⁴⁰

LESSONS ON IMAGE RIGHT THROUGH HISTORY

Firstly, from earliest times in the history of man, the human species has instinctively discerned the innateness of individual dignity and desire for the protection of private life and space. The consideration has been that a person's body ought to be treated in a sacred manner, worthy of respect and requiring his consent before it can be dealt with in a particular manner.

Secondly, it is evident from the historical analysis, that the ethical perspectives related to image rights, which include privacy, consent, and the use of images in media and advertising without consent are matters of significant importance. This underscores the fact that these ethical concerns are paramount in any discussion on the future of image rights and ought to form the basis for any legal framework relating to image rights.

Furthermore, the exploitation of a person's image (likeness and personality) for economic gain without his knowledge or permission has been frowned upon by the courts since the 20th

³⁷ (n36), 42.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Tatiana Synodinou, 'Image Right and Copyright Law in Europe: Divergences and Convergences', [2014] *Laws* 181- 207.



century. As noted by Synodinou, one obvious lesson from jurisdictions which practise publicity rights is that image rights have served as a legal basis for the judicial recognition of a broader publicity right covering all aspects of the commercialisation of an individual's identity.⁴¹ Thus, image rights have grown from the sphere of property law, privacy and publicity rights into its own distinct class.

The latest thoughts concerning image right is the commodification of images/personality. In other words, images are now classified as data which has been described as the oil of the digital age. The dawn of social media and disruptive technologies such as artificial intelligence (in particular, deep fakes and holograms) which the 21st century offers, further highlights the distinction and value of images in this age and time. In this dispensation, images transcend mere photos, to being regarded as data, having value in and of itself, thus essentially possessing a life of its own. Being data, images have become valuable commodities which like other properties or commodities require adequate legal protection. This submission is further exemplified by recent technological innovations and inventions such as holograms by which the images and likeness of deceased celebrities are 'revived' and made to engage in monetised public musical and theatrical performances to the glee and amazement of fans. In one such instance, the hologram of a deceased celebrity, Whitney Houston, was fixed to conduct a musical tour across certain states in the United States between 2020-2022.⁴² In another instance, the hologram of the revered deceased rap icon Tupac was used to entertain fans at the Coachella Valley Music and Arts Festival.⁴³ These trends further strengthen the classification of data as a commodity possessing inherent economic value deserving of protection.

CONCLUSION

The dignity of a person's image is sacrosanct and is deserving of utmost protection and preservation. The milestones achieved in image rights protection throughout history mirrors the shifts in the subject of privacy, celebrity status, and the economic opportunities attached thereto especially in the light of the impact of advancing technologies on personality rights. Considering the complexities of the digital age, it becomes more imperative to continually

⁴¹ See (n.41).

⁴² Whitney Houston, 'An Evening with Whitney Houston: The Whitney Houston Hologram Concert 2020-2022' <<https://www.whitneyhouston.com/tour/an-evening-with-whitney-the-whitney-houston-hologram-tour/>> accessed 10th November, 2023.

⁴³ Chenda Ngak, 'Tupac Coachella Hologram: Behind the Technology' <<https://www.cbsnews.com/news/tupac-coachella-hologram-behind-the-technology/>> X-Scitech accessed 10th November 2023.



reassess and update legal frameworks to address emerging challenges in the realm of image rights protection. It is hoped that sooner or later, several jurisdictions across the world will rise up to this challenge.

RECOMMENDATIONS

Image right should be accorded a distinct status as a right of its own so as to provide maximum legal protection for persons who intend to lay claim to it, particularly those who stand to lose economic value from non-protection of their images/personalities. Governments, academia and Civil Society Organisations should embark on widespread public awareness and education regarding image rights. The dissemination of information about the history, legal protections, and ethical considerations surrounding image rights should be encouraged in order to empower individuals to protect their own image rights.

Finally, there is a need for legislative reforms in States across the world. More jurisdictions should establish an Image Right Registry patterned after the Image Right Ordinance of Guernsey. This will further strengthen the emerging field of image/personality right.