

Legal Issues in ‘IP in Art, Paintings, Photographs’

Issue: Are Celebrities Free to Use/Post Photos of Themselves Clicked by Photographers on Social Media?

Relevant Sections under The Copyright Act, 1957

- ❖ Copyright law protects artistic works which include photographs (see [section 2\(c\)\(i\)](#) of India's Copyright Act, 1957).
- ❖ [Section 2\(d\)](#) defines an 'author' in relation to a photograph as the person taking the photograph.
- ❖ [Section 17](#) of the Act provides that as a general rule, the first owner of the copyright in a work is the 'author' of the respective work.

Provided that—

(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Relevant Sections under The Copyright Act, 1957 (Contd.)

- ❖ By virtue of being the owner of the copyright, the photographer (under [section 14\(c\)](#)) has the sole and exclusive right to reproduce the work or communicate it to the public.
- ❖ Copyright protects the legal right of original creators to publish, reproduce, or sell their literary and artistic works. Others who intend to reproduce those works need to get permission from the owners.
- ❖ In light of the above, paparazzi (not commissioned) have the sole right to circulate celebrity photographs taken by them to the public under the Indian law. Consequently, any other person (including the subject itself viz. the celebrity) publishing such work or exercising any other rights which are exclusive to the photographer, without their authorization, would be infringing their copyright under [section 51](#) of the Act.

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Possible Defenses under Indian Law to Paparazzi Infringement Claims

❖ Fair use – Exception to section 51 of The Copyright Act, 1957

- Certain acts in respect of copyrighted works to not amount to infringement ([Section 52](#) of The Copyright Act, 1957). Section 52 states –

52. Certain acts not to be infringement of copyright.—

(1) The following acts shall not constitute an infringement of copyright, namely,—

[(a) a fair dealing with any work, not being a computer programme, for the purposes of—

(i) private or personal use, including research;

(ii) criticism or review, whether of that work or of any other work;

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public

Possible Defenses under Indian Law to Paparazzi Infringement Claims (Contd.)

- The only purpose that could possibly be argued to apply in the case of circulating one's own photographs is that of 'private or personal use'.
- **Could sharing of one's photographs on social media qualify as 'private or personal' use?**
- The Bombay High Court in *Garware Plastics and Polyester Ltd. v. Telelink and Ors.*, while deciding upon whether the allegedly infringing communication in the case was private or public, had applied the test of the character of audience and observed that a private communication is made to a restricted audience of the members of a family and their guests. Therefore, social media posts, particularly on 'public' accounts which celebrities usually have, do not seem to have the luxury of being considered as 'private or personal use'.

Possible Defenses under Indian Law to Paparazzi Infringement Claims (Contd.)

❖ The Conflict with Right of Publicity

- The right of publicity grants individuals control over commercial use of their name, image or likeness.
- Right of publicity is not codified in India, however it has been recognised and also enforced by Indian courts in a number of cases.
- While copyright law, gives the photographer the right of ownership over the photograph (unless taken under a contract), the right of publicity gives the subject of the photograph control over its commercial exploitation.
- The sale of newsworthy images, including ones of celebrities, to media outlets likely is not a “commercial use,” which is a core element in a right of publicity argument.

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Possible Defenses under Indian Law to Paparazzi Infringement Claims (Contd.)

- However a photographer will be precluded from licensing a photo of a celebrity for purely commercial use (such as on a t-shirt or by selling it for promotion of a brand etc.) without the authorization of the subject of the photograph.
- However, as the right of publicity doesn't encompass the positive right to publish a work (based on one's identity) without its copyright owner's permission, an argument based on that doesn't seem to allow celebrities to publish paparazzi photos of themselves on social media without the photographer's consent.

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Foreign cases and Examples of Copyright Infringement relating to Posting Paparazzi Photographs by Celebrities

- ❖ *Xposure Photos UK Ltd. v. Khloe Kardashian et al*, 2:17-cv-03088-DSF-MRW (C.D. Ca. 2017)
- ❖ *Xclusive-Lee, Inc. v. Hadid*, 1:19-cv-00520-PKC-CLP (E.D.N.Y. 2019)
- ❖ *Ramales v. Victoria Beckham Inc., et al.*, 1:19-cv-08650 (S.D.N.Y. 2019.
- ❖ Recently in April 2020, Jennifer Lopez was sued for \$150,000 over an Instagram photo she uploaded in 2017 without the permission of New York Photographer Steve Sands. The defendant stated that “*The Instagram post made the photograph immediately available to Lopez’s tens of millions of followers... who would otherwise be interested in viewing licensed versions of the photograph in the magazines and newspapers that are plaintiff’s customers.*”

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Foreign cases and Examples of Copyright Infringement relating to Posting Paparazzi Photographs by Celebrities (Contd.)

- ❖ The main argument put forth by celebrities in these cases were of fair use and that they have a right to publicity.
- ❖ In *Beckham V. Splash News and Picture Agency, LLC et al.*, 2:18-cv-01001-JTM-JCW (E.D. La. 2018) Beckham claimed that the photographer violated his right of publicity and right of privacy by taking photos of him in his driveway and subsequently selling them to the photo agency without Beckham's knowledge or consent. He also claimed that the agency's act of licensing the unauthorized photos to other websites is in violation of his right of publicity. After a year of back and forth, the parties settled out of court.

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THANK YOU!

Questions?

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