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Critical Analysis of the Right of Publicity: A Comparative Study

Análise crítica do direito de publicidade: Um estudo comparativo

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ABSTRACT: This article critically analyses the right of publicity under the laws of the United States (specifically California and New York), Iraq, the United Kingdom and the European Convention on Human Rights (ECHR) convention. The right of publicity is defined as a right designed to preclude the unauthorised utilisation of an individual's identity, typically involving appropriation of an individual's likeness, name, voice, or image. This right was recognised to address the gaps and shortcomings of the right to privacy. This article analysed the legal frameworks of various jurisdictions, including the US states of New York and California, Iraq, the UK, and the ECHR. It was found that the right of publicity is conferred upon individuals by statutes in New York without reliance on common law. However, in California in addition to statutes, this right is also protected by common law. Conversely, Iraq, the UK, and the ECHR lack dedicated provisions for safeguarding the right of publicity. Still, there exist certain legal frameworks and common law principles in these jurisdictions that provide some degree of indirect protection to individuals. Given the global technological advancements, there is a need for protection to be afforded to individuals in order to safeguard their identity, and this protection could be achieved through the right of publicity. Consequently, this study suggests that Iraq, the UK and the EU should enact specific legislation governing the right of publicity. Such legislation would facilitate a more direct process for individuals seeking compensation for violations of this right. However, any regulation of this right shall carefully strike the balance between an individual's right to control their identity and the right to freedom of expression.

KEY WORDS: Publicity Right; Postmortem Right; Right to Privacy; Appropriation, Unauthorised Use.

RESUMO: Este artigo analisa criticamente o direito à publicidade sob as leis dos Estados Unidos (Califórnia e Nova York), do Iraque, do Reino Unido e da Convenção Europeia dos Direitos Humanos (CEDH). O direito de publicidade é definido como um direito que se destina a impedir a utilização não autorizada da identidade de um indivíduo, o que geralmente envolve a apropriação da imagem, nome, voz ou imagem de um indivíduo. O direito à publicidade foi reconhecido a fim de preencher a lacuna e sanar as deficiências do direito à privacidade. Este artigo analisou os quadros jurídicos de diversas jurisdições, incluindo os estados norte-americanos de Nova Iorque e Califórnia, o Iraque, o Reino Unido e o TEDH. Verificou-se que o direito de publicidade é conferido aos indivíduos por estatutos em Nova York sem direito consuetudinário, porém, na Califórnia, além dos estatutos, esse direito também é protegido pelo direito consuetudinário. É também revelado que o Iraque, o Reino Unido e a CEDH não têm disposições específicas para salvaguardar o direito à publicidade, mas existem certos quadros jurídicos e princípios de direito consuetudinário nestas jurisdições que oferecem algum grau de protecção indirecta aos indivíduos. Os avanços tecnológicos em todo o mundo exigem que algum tipo de proteção seja dada aos indivíduos, a fim de proteger a sua identidade, e isso pode ser alcançado através do direito de publicidade. Como resultado, este estudo sugere que o Iraque, o Reino Unido e a UE deveriam promulgar uma lei específica que rege o direito

à publicidade, uma vez que facilitaria um processo mais directo para os indivíduos que procuram compensação por violações deste direito. No entanto, qualquer regulamentação desse direito deverá encontrar o equilíbrio entre o direito de um indivíduo controlar a sua identidade e o direito à liberdade de expressão.

PALAVRAS-CHAVE: Direito de publicidade; direito *post mortem*; direito à privacidade, apropriação; uso não autorizado.

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1. Introduction

The right of image or publicity safeguards individuals from unpermitted utilisation of their name, likeness, voice, or image by others.[1] There have been heated debates among scholars, commentators and even judges on whether an individual is entitled to be provided with the right of publicity, or whether it is necessary to enact a specific law addressing the issue.

In today's world, companies tend to heavily rely on the identity of famous persons in order to attract the attention of customers to their products through using their names, likeness, voice, or image. It is worth mentioning that a person's identity may be used with or without permission, in the latter case the user may be held liable for such use. Thus, the importance of the right of publicity can be observed in preventing the unauthorised commercial uses of identity.[2]

At the global level, each country may have different attitude towards the protection of the right of publicity. The United States has recognised such rights for a long time ago through common law. Additionally, in some states like California, Indiana, New York, etc., the right of publicity has been acknowledged through state legislations, complementing common law protection. However, the United Kingdom has chosen not to enact specific laws addressing the protection of personal identity, relying on the development of passing off as sufficient for safeguarding this right. In contrast, Iraq lacks an explicit policy on this issue. The only aspect related to the protection of persona is the right to privacy enshrined in the Iraqi constitution. Moreover, the European Union acknowledges that individuals have a legitimate interest in controlling the commercial use of their name, image, and likeness. The EU seeks to strike a balance between this right and the freedom of expression, regulating it under the European Convention on Human Rights (ECHR).

This research relies on a comparative approach to determine whether the protection of the right of publicity is necessary or requires regulation through legislation. Therefore, comparing the laws of the USA, Iraq, the UK, and the ECHR regarding the protection of the right of publicity allows for a comprehensive analysis of how different legal systems approach this issue. There are various reasons for selecting each jurisdiction when examining the right of publicity in relation to the United States. The United States possesses a well-established legal framework for protecting the right of publicity, which varies across different states. It acknowledges the commercial value of an individual's identity and grants individuals the authority to control the commercial use of their name, image, or likeness. Furthermore, the United States has witnessed numerous influential court cases concerning the right of publicity, particularly involving celebrities and public figures. These cases offer abundant material for critical analysis and comparison.

[1] REID KRESS WEISBORD, "A Copyright Right Of Publicity", *Fordham Law Review*, 2016, vol. 84, no. 6, pp. 2803-2844 (p. 2803).
[2] VANDANA MAHALWA, "Burgeoning right of publicity: An overview of the Indian experiences", *Journal of World Intellectual Property*, 2021, vol. 24, no. 1-2, pp. 28-40 (p. 29).

In the case of the United Kingdom, its legal system follows common law, relying on judicial decisions and legal precedents. This allows for a comparative examination of the development and application of the right of publicity in the absence of specific statutory regulations. Additionally, the United Kingdom recognizes a robust right to privacy, which can intersect with the right of publicity. Analyzing the relationship between these two rights can provide valuable insights into the legal landscape and potential conflicts that may arise.

Considering the European Union (EU) Convention on Human Rights provides a common framework for protecting human rights across EU member states. This convention, also known as the European Convention on Human Rights, offers insights into the harmonization efforts within the EU and the influence of supranational legal instruments on the right of publicity. However, while the convention establishes standards, individual member states still maintain their own legal systems. Examining the interplay between the convention and national laws can shed light on how the right of publicity is implemented and interpreted in various EU jurisdictions.

Furthermore, including a jurisdiction like Iraq allows for a comparative analysis from a different legal system. Iraq operates under a civil law system that incorporates elements of Islamic law (Sharia) and civil law principles. Exploring how the right of publicity is understood and protected within this legal framework provides a unique perspective. Iraq's distinct cultural and societal context may also impact the recognition and enforcement of the right of publicity. Considering these factors contributes to a more comprehensive analysis of the subject. Additionally, as Iraq undergoes legal reforms and grapples with various challenges, examining the right of publicity in this context can illuminate emerging legal trends, potential gaps in protection, and practical obstacles faced in safeguarding individuals' rights.

By selecting these jurisdictions, it becomes possible to explore different legal systems, case laws, cultural contexts, and legal developments, enabling a comprehensive and comparative analysis of the right of publicity.

Regard has to be made that the term 'personality rights' is sometimes used synonymously with the right of publicity. However, it should be noted that the term 'personality rights' is broader than the right of publicity, as it encompasses both the right of publicity and the right to privacy.

This research is divided into four chapters. The first chapter is devoted to introducing the right of publicity and its underlying principles. In the second chapter, the right of publicity is analyzed under United States jurisdiction, specifically California and New York laws. The third chapter is dedicated to explaining the right of publicity under Iraqi jurisdiction. The fourth chapter analyzes the right of publicity in the United Kingdom jurisdiction, and the last chapter focuses on the protection of the right of publicity under the European Convention on Human Rights.

2. Introducing the Concept of the Right of Publicity and its Underlying Principles

This chapter will provide an explanation of the origin, definition, and characteristics of the right of publicity. It will also delve into the remedies available for its violation and the limitations that apply to this right.

2.1. Origin of the Right of Publicity

It is agreed that the origin of the right of publicity emerged from the right to privacy; however, its subsequent developments are contentious. The right of publicity has been evolving through the writings of scholars and perspectives of the courts. Both rights of publicity right and privacy right emerged as a result of the challenges posed by the fast-advancing world.[3]

The roots of the right of publicity trace back to a scholarly article written by Samuel Warren and Louis Brandeis in 1890, published by the Harvard Law Review.[4] They proposed a new right to privacy to be recognised which enables individuals to be let alone. This right entitles individuals to seek damages for emotional injury they have suffered. However, this right does not apply to the information voluntarily made available to the public by individuals themselves, nor does it apply to the economic loss suffered by an individual.[5]

Thus, in order to fill the gap and address the shortcomings of the right to privacy, the right of publicity was established in the case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* decided by the US Court of Appeals for the Second Circuit. In this case, the plaintiff obtained permission from the professional baseball players to use their names and likeness on cards, selling them with chewing gum. Subsequently, the defendant, a rival chewing gum manufacturer, separately contracted with the players for the use of their images. The plaintiff filed a claim against the defendant, alleging that it had already contracted with the players; therefore, the defendant cannot use such images without its consent. However, the defendant claimed as a defence that the plaintiff is not entitled to assert the privacy right of someone else, as this right is personal and cannot be assigned. Nevertheless, the court rejected the defence and stated that an individual is provided with the right of publicity, which was defined as the right to inhibit the commercial use of his/her identity and to provide another party with an exclusive privilege, who then had an enforceable interest to assert.[6]

After the lapse of one year over Haelan's case, Nimmer wrote his well-known article and asserted that the right of publicity should be widely adopted on the ground of the theory of

[3] BARBARA BRUNI, "The Right Of Publicity As Market Regulator In The Age Of Social Media", *Cardozo Law Review*, 2020, vol. 41, no. 5, pp. 2203-2241 (p. 2210).
[4] REID KRESS WEISBORD, "A Copyright Right Of…", cit., p. 2804.
[5] STACEY DOGAN and MARK LEMLEY, "What The Right Of Publicity Can Learn From Trademark Law", *Stanford Law Review*, 2006, vol. 56, pp. 1161-1220 (p. 1169).
[6] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc,* 202 F.2d 866 (2d Cir. 1953).

'fruits of labour'. He suggested that only famous people should be provided with the right of publicity, because only they have publicity interest to shield. However, he acknowledged the difficulty of distinguishing between celebrities and non-celebrities, leading to his proposal that everyone should be conferred the right of publicity. Consequently, damages would be awarded contingent upon the value of publicity appropriated. As a result, non-famous individuals would receive nominal compensation for the damage they have suffered.[7]

In addition, in the 1960s, legal scholars began to more fully acknowledge the difference between the right to privacy and the right of publicity. Harold Gordon and Professor William Prosser considered the right of publicity as a property interest. However, some other scholars, including Professor Edward Bloustein, continued to believe that the right of publicity is an integral part of human dignity, not a property interest.[8]

2.2. Definition

The right of publicity could be defined as a right designed to preclude the unauthorised utilisation of an individual's identity, which usually involves appropriation of an individual's likeness, name, voice, or image.[9]

It is worth mentioning that in the definition of the right of publicity, scholars sometimes use the word "person" rather than "individual". However, I believe that it is much more accurate to use the word "individual", because all scholars and courts have agreed that the right of publicity is provided to natural persons only, not to juridical persons. Nevertheless, if we use the word "person" in general, it includes both natural and juridical persons.

The right of publicity is a tortious act that refers to the use of the plaintiff's identity for the interest of the defendant. One difficulty with the right of publicity is that it bans conduct without specifying the particular harm the tort aims to address. Another problem regarding the right of publicity is that in some places, this right is confined to commercial uses only, while in some other places it is not. Moreover, in some places, this right only encompasses economic injury, while in others, it consists of both economic and emotional injury .[10] It is important to consider the right to privacy, as it address emotional injuries; therefore, the right of publicity shall be confined to economic injuries only.

It is also important to note that this right recognises the commercial value attached to identity as a form of assignable personal property.[11] Consequently, the right of publicity is different

[7] MELVILLE NIMMER, "The Right of Publicity", *Law & Contemporary Problems*, 1954, vol. 19, pp. 203-223 (p. 217)
[8] REID KRESS WEISBORD, "A Copyright Right Of…", cit., p. 2804.
[9] ROBERT POST and JENNIFER ROTHMAN, "The First Amendment and the Right(s) of Publicity", *The Yale Law Journal*, 2020, vol. 130, pp. 86-172 (p. 89).
[10] ROBERT POST and JENNIFER ROTHMAN, "The First Amendment and…", cit., p. 90.
[11] SUSANNE BERGMANN, "Publicity Rights in the United States and Germany: A Comparative Analysis", *Loyola of Los Angeles Entertainment Law Journal*, 1999, vol. 19, pp. 479-507 (p. 479).

from the right to privacy, because the former protects the commercial value of identity, while the latter protects emotional injury of an individual.[12]

The right of publicity is considered as a property right that can be assignable and often descendible, while the right to privacy cannot be transferred.[13]

2.3. Characteristics of the Right of Publicity

There are two main characteristics of the right of publicity: assignability and descendiblity. The first characteristic enables the right of publicity to be assigned and transferred to someone else. Therefore, the publicity right could be enforced by the person whose identity has been violated, and where relevant, by the person to whom the right has been assigned or exclusive licensee.[14]

The second characteristic of the right of publicity is descendiblity, also known as post-mortem right. Postmortem right could be defined as the ability of a person to control the appropriation of their persona even after death.[15] It is a contentious subject with different views from scholars, courts and laws regarding whether the right of publicity could be descendible or not. The descendiblity of publicity right pertains to whether the heirs of a deceased individual could sue the users of the right of publicity of the deceased or not. Although historically viewed as non-descendible, the modern trend considers it a descendible right.[16] For example, in the case *Prima v. Darden Restaurants, Inc*., The court ruled that the right of publicity is descendible under New Jersey law.[17]

This debate arose as a result of categorising the right of publicity as a personal right or a property right and also because the right of publicity derived from the right to privacy, creating a strong relationship between the two rights. This is because the privacy interests are considered as personal, non-assignable and incapable of passing to heirs; however, property rights can be assigned, licensed and transmitted.[18] Traditionally, according to common law rules, the postmortem right was not recognised and the deceased person did not own any surviving rights.[19]

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[12] ACADEMIA, "Exporting the Californian Right of Publicity to the UK: Reasons to be Wary", vailable at: < https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.academia.edu/8780398/Exporting_the_Californian_Right_of_Publicity_to_the_UK_Reasons_to_be_Wary&ved=2ahUKEwiXi_SltPv5AhVLSvEDHVxyDIoQFnoECAcQAQ&usg=AOvVaw0Jd72ozUQZQSqBVkbzWPk8> (8. 8. 2023).
[13] DAVID TAN, "Image Rights and Data Protection", NUS Working Paper 2017, August 2017.
[14] ROSINA ZAPPARONI, "Propertising Identity: Understanding The United States Right Of Publicity And Its Implications — Some Lessons For Australia", *Melbourne University Law Review*, 2005, Vol. 28, pp. 690-714 (p. 702).
[15] VANDANA MAHALWA, "Burgeoning right of publicity…", cit., p. 34.
[16] STACEY DOGAN and MARK LEMLEY, "What The Right Of…". Cit., p. 1174.
[17] *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).
[18] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 707.
[19] ALIX HEUGAS, "Protecting image rights in the face of digitalization: A United States and European analysis", *Journal of World Intellectual Property*, 2021, vol. 24, pp. 344-367 (p. 348).

International Trademark Association, in its paper on the minimum standards for the right of publicity, points out that the right of publicity should be licensable, descendible and transferable for a fixed period of time after the death of an individual.[20] Furthermore, another issue with the postmortem right in some states of the United States, such as New Jersey, is whether this right survived death if the persona of an individual was not exploited during his/her lifetime. The duration of the protection of postmortem right is also uncertain in some states of the United States, such as New Jersey, because neither New Jersey state legislature nor any court has addressed the issue.[21]

What affects the descendiblity of the right of publicity is that whether this right is considered a personal right or a property right. If it is regarded as a personal right, it cannot be descendible and it expires along with the death of the person it protects. However, if it is considered a property right, it could be descendible.[22]

Thus, this has divided courts and legislations in a way that some states in the United States have recognised the postmortem right, either through judicial cases or statutes, such as California and Indiana. However, some states have not recognised this right, such as New York, Hawaii and Massachusetts.[23] Moreover, it is worth mentioning that the states recognised the postmortem right through statutes are 17 states, each dealing with the duration of such right differently, with the duration varying from 10 years in Washington to 100 years in Indiana.[24] For example, section 990 under the California Civil Code recognises the postmortem right, stating that the right of publicity is a property right being descendible and assignable.[25]

In addition, due to the strong relationship between the right to privacy and the right of publicity, the courts have been confused about the measures of damages. This confusion was evident in the case of *Waits v. Frito Lay, Inc.,* where the court awarded damages for mental injury, even though it believed that the right of publicity is only concerned with the pecuniary loss.[26]

However, I believe that the right of postmortem shall be conferred upon individuals, but for a certain period of time lasting no more than 25 years after death. This is because the right of publicity is considered as a property and any property right can be freely transferable, licensable and descendible.

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[20] INTERNATIONAL TRADEMARK ASSOCIATION, "Right of Publicity Minimum Standards", 27 March 2019, in https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf (12.8.2023).
[21] MATT SAVARE, JENNA-MARIE TRACY , and BRYAN STERBA, "Right of Publicity Laws: New Jersey", Practical Law Publishing Limited and Practical Law Company, Inc, 2012, in https://www.lowenstein.com/media/7092/savareplustracyplussterba-right-of-publicity-laws-new-jersey-practical-law-9142021.pdf (20.7.2023).
[22] HEUGAS ALIX HEUGAS, "Protecting image rights…", cit., p. 348
[23] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 702; ALIX HEUGAS, "Protecting image rights…", cit., p. 349.
[24] VANDANA MAHALWA, "Burgeoning right of publicity…", cit., p. 33.
[25] California Civil Code 1957.
[26] *Waits v. Frito Lay, Inc.,* 978 F 2d 1093, 1103–5 (9th Cir, 1992).

2.4. Remedies for Breach of the Right of Publicity

The available remedies for the breach of the right of publicity are damages and injunctive relief, similar to other types of intellectual property rights. Moreover, courts have occasionally awarded punitive damages in the United States. Although determining the appropriate amount of compensation in legal cases can be challenging due to inconsistencies, there is a generally accepted principle that the measure of damages should align with the actual monetary loss suffered by the person bringing the claim or the financial benefit that the defendant wrongfully obtained. In other words, the compensation awarded should be fair and reflect the economic impact on the claimant or the unjust enrichment of the defendant.[27]

For example, in the case of *Dorsey v. Black Pearl Books, Inc*., the court granted preliminary injunction which enjoined the publication and distribution of books with the photographs of the claimant on the front and back cover. Additionally, the defendant advertised materials that contained the likeness of the claimant.[28] Moreover, in the case of *Canessa v. J.I. Kislak, Inc.*, the court held that the compensatory damage shall be determined by the benefit conferred on the defendant or the commercial value of the plaintiff's identity.[29] Moreover, it is worth mentioning that speculative damages are not awarded by the courts.[30]

2.5. Limits on the Right of Publicity

The first and foremost limitation to the right of publicity is the freedom of expression and the press, which restricts the right of publicity. Consequently, when the identity of an individual is used for the purpose of news reporting, commentary, entertainment or creating fiction or nonfiction films, this will not amount to the infringement of the right of publicity. Moreover, dissemination of a celebrity's biography, or using the photo or name of a celebrity in connection with a fan magazine or a feature story or incidental use will not be considered an infringement of the right of publicity.[31]

For instance, in the case of *Zacchini v. Scripps-Howard Broadcasting Co.*, the defendant relied on the freedom of expression. However, the Supreme Court of Ohio ruled against the defendant who used an entire 15 seconds performance of the plaintiff in a news report. The Supreme Court of Ohio stated that the defendant cannot be exempted from liability under principle of freedom of expression of the First Amendment when the entire performance is broadcasted without the consent of the owner.[32]

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[27] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 702.
[28] *Dorsey v. Black Pearl Books, Inc.*, (2006 U.S. Dist. LEXIS 83093 (D.N.J. Nov. 14, 2006)).
[29] *Canessa v. J.I. Kislak*, Inc., 235 A.2d 62 (N.J. Super. Ct. Law Div. 1967).
[30] MATT SAVARE, JENNA-MARIE TRACY and BRYAN STERBA, "Right of Publicity Laws…", cit.
[31] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 703.
[32] JOSHUA WALLER, "The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?", *UCLA Entertainment Law Review*, 2021, vol. 9, pp. 60-85 (p. 65).

In addition, fair use doctrine has also been another limitation on the right of publicity based on the transformative use test. Under this test, the defendant will not be liable if the identity of the plaintiff has been transformed in a way that it has become the defendant's expression, rather than a mere depiction of the plaintiff's identity for commercial interest.[33]

The fair use doctrine as a limitation on the right of publicity was discussed in the case of *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, where the court found that using the image of the plaintiff on T-shirts considered an infringement of the right of publicity and such use does not amount to fair use because there were insufficient creative expression in the depiction to justify the use of their image under the First Amendment.[34] However, practice has indicated that courts have only borrowed some factors of the fair use doctrine, but not all of the factors in cases involving the right of publicity.[35]

Moreover, I believe that the factors of fair use doctrine shall be applied as an exception to the right of publicity only when the use is non-commercial. However, even in the case of non-commercial uses, the amount of the use shall be taken into consideration as seen in the case of *Zacchini v. Scripps Howard Broadcasting Co.* in which the defendant used the entire 15 seconds of the plaintiff's performance.

2.6. Justification for the Right of Publicity

The justification of the right of publicity has remained a contentious subject in this area and it is one of the strong factors that some countries, such as the United Kingdom and Australia, have not recognised such a right at the level of legislation, similar to the United States. A fundamental question has been posed as a result of accepting classification of the right of publicity as a form of property, especially in this new and rapidly advancing field of intellectual property.[36]

It is believed that publicity right promotes societal interests by fostering creativity, protecting the individual's enjoyment of the fruits of his labour, inhibiting consumer deception, and precluding unjust enrichment. The most frequent moral justifications concern Lockean labour and unjust enrichment rationales, while the economic justifications include incentive creation and allocative-efficiency rationales.[37] There are two main theories underpinning justification of the right of publicity: natural rights and economic.

[33] ALIX HEUGAS, "Protecting image rights…", cit., p. 347.
[34] *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).
[35] STACEY DOGAN and MARK LEMLEY, "What The Right Of…", cit., p. 1189.
[36] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 715.
[37] DAVID TAN, *The commercial appropriation of fame: A cultural analysis of the right of publicity and passing off* Cambridge University Press, 2017, p. 40.

2.6.1. Natural Rights

According to the Lockean labour theory, it is argued that the identifiable aspects of a person's identity shall be legally recognised as a person's property, which is protected against unauthorised use.[38] It is argued that people spend time and effort in order to develop their skills and become famous only if they are sure that they will reap the fruits of their labour and get the benefit from their fame.[39] For instance, in the case of *Uhlaender v. Henricksen,* Neville J relies on the labour justification, stating that:

> A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labours and is a type of property.[40]

Therefore, in the context of the right of publicity, the monopoly protection provided by publicity right offers an economic incentive to expend the energy required to obtain fame, 'as this is an enterprise which ultimately enriches society, just as providing an incentive to harvest farm land benefits society' .[41] For example, the court in the case of *Zacchini v. Scripps-Howard Broadcasting Co.*, stated that:

> The act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. … the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.[42]

2.6.2. Economic Justification

It is argued that although others may assist celebrities or famous people in building their persona, celebrities themselves are responsible for the vast majority of the potential profit of their persona. Those who help the claimant in building their persona usually get paid for their efforts and time.[43]

Moreover, according to the rational of consumer protection, the right of publicity would safeguard consumers from deceptive trade practices. If traders are authorised to freely attribute their products to a celebrity's identity, consumers may become confused and think that these products are endorsed by the celebrity. Thus, it could negatively affect the goodwill of the celebrity and result in reducing the value of its true endorsements.[44]

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[38] THOMAS MCCARTHY, *The Rights of Publicity and Privacy*, 2nd ed, Clark Boardman, 2000.
[39] MICHAEL MADOW, "Private Ownership of Public Image: Popular Culture and Publicity Rights", *California Law Review,* 1993, vol. 81, pp. 125-178 (p. 181).
[40] *Uhlaender v. Henricksen*, 316 F Supp 1277, 1282 (Minn D Ct, 1970).
[41] ROSINA ZAPPARONI, "Propertising Identity…", cit., p. 719.
[42] *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977).
[43] ROBERTA ROSENTHAL KWALL, "The Right of Publicity v. the First Amendment: A Property and Liability Rule Analysis", *Indiana Law Review*, 1994, vol. 70, pp. 47-118 (p. 56).
[44] JOSHUA WALLER, "The Right of Publicity…", cit., p. 62.

3. The Right of Publicity in the United States

The right of publicity has not been recognised at the federal level in the United States; however, each state individually recognises this right and determines its scope of recognition, including the right of postmortem.[45]

The recognition of the right of publicity in the United States dates back to 1953 when the court in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* made its first decision and recognised the right of publicity.[46] After one year had passed since the court's decision, Nimmer wrote his famous article and called for the recognition of the right of publicity.[47]

3.1. The Test for Balancing Freedom of Speech and the Right of Publicity

One of the issues of the right of publicity that has remained uncertain is the balance between the freedom of speech of the First Amendment and the right of publicity. Therefore, different tests have been relied upon by the courts. Each test considers a different facet to evaluate the appropriation of the celebrity's persona versus the actual expressive work. However, it should be noted that these tests are limited and have already produced different results in their previous applications.[48]

One approach that has been used by courts to reconcile publicity rights with freedom of speech is predominant use test. The Supreme Court of Missouri applied this test in the case of *Doe v. TCI Cablevision*, where the court used the test to find out whether the aim of the work is primarily expressive or rather commercial. In this case, the plaintiff used the name of a hockey player Toni Twist in his comic book. The court held that the author did not make an expressive comment about Twist; however, he exploited the commercial value of Twist's persona.[49]

Moreover, another approach that was used by Court of Appeals for the Second Circuit in *Rogers vs. Grimaldi,* was the Rogers test to balance the right of publicity and the First Amendment interests. In this case, the defendant referred to the movie legend *Ginger Rogers* in the title of the film *Ginger and Fred*. The plaintiff claimed that although the film was not about the Rogers and Astaire dance team, the phrase 'Ginger and Fred' exploited her famous identity when utilised as a title of the film, and thus her persona was commercially exploited for the sake of marketing the film to which she had no connection.[50]

[45] ALIX HEUGAS, "Protecting image rights…", cit., p. 346.
[46] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*, 202 F.2d 866 (2d Cir. 1953).
[47] MELVILLE NIMMER, "The Right of…", cit., p. 218.
[48] ALIX HEUGAS, "Protecting image rights…", cit., p. 347.
[49] *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).
[50] Rogers vs. Grimaldi, 875 F. 2d 994, 1000-01 (2d Cir. 1989).

In its decision, the court held that the use of Roger's identity was deemed an artistic form of expression, leading to the conclusion that the unauthorized usage falls under the protection of the First Amendment:[51]

> In light of the [state's] concern for the protection of free expression, the court would not expect [the state] to permit the right of publicity to bar the use of a celebrity's name in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services. Here . . . the title Ginger and Fred is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product.[52]

In addition, the third approach that has been used by courts to strike a balance between the right of publicity and the First Amendment is transformative use test. This test was first used by California Supreme Court in *Comedy III Prods., Inc. v. Saderup.* In this case, the plaintiff claimed that their right of publicity was infringed by the defendant as their exact likeness was reproduced without their authorisation on T-shirt vended by the defendant. However, in his argument the defendant responded that the First Amendment entitles him to engage in his utilisation a right to express himself by the reproduction and dissemination of the Three Stooges images. The court held that:

> What the [plaintiff] possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity… When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist….We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.[53]

Therefore, in accordance with the Comedy III "transformative use test", the unauthorized use of an individual's image or persona without sufficient transformative contributions or alterations by the user is not protected under the First Amendment. It was worth mentioning that this test was derived from the copyright Fair Use Doctrine, which permits unauthorised uses of copyrighted works, provided that the amount of the use is limited.[54]

[51] LATEEF MTIMA, *Publicity Rights and the First Amendment: Balancing Athletes and Other Celebrity Interests*, Howard University School of Law, 2016, p. 5.
[52] *Rogers vs. Grimaldi*, 875 F. 2d 994, 1000-01 (2d Cir. 1989).
[53] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[54] LATEEF MTIMA, *Publicity Rights and…, cit.,* p. 6.

3.2. Legislations Recognising the Right of Publicity in the United States

As mentioned earlier, the right of publicity has not been recognised at the federal level, but there are states that have recognised this right. However, we will only consider New York and California. In addition, before focusing on laws of New York and California, it is important to mention that section 46 of the Restatement (Third) of Unfair Competition stipulates that 'one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under rules stated in sections 48 and 49'.

3.2.1. New York

New York was the first state in the USA to call for the recognition of the right of publicity in statutes. Therefore, the right of publicity was regulated under sections 50 and 51 of the New York Civil Rights Act.[55] However, the right of postmortem was not recognised under New York law until 29 of May 2021, when the amendment of the New York Civil Rights Act became effective.

Although New York is considered a leader in the development of the right of publicity, it has not advanced sufficiently in comparison to some other states, such as California, because its protection is narrower than that of California.[56] The advancement of publicity right in New York started in 1902 in the case of *Roberson v. Rochester Folding Box Co*., where the defendant used a young girl in an advertisement for his flour company. The likeness of the young girl was reproduced and appropriated by the defendant in advertising purposes in more than 25,000 photographs and prints without obtaining authorisation from the young girl. The court ruled in favour of the defendant and rejected the plaintiff's claim stating that 'in the absence of legislation, the plaintiff and her legal guardian had no cause of action' .[57]

The decision in the *Roberson* case resulted in a rapid response from the New York State legislature that enacted sections 50 and 51 of the Civil Rights Law entitled 'Right of Privacy'. This right entitled individuals to prevent others from appropriating name, picture, or likeness for advertising or trade purposes.[58] Although the right of publicity is not recognised under common law rules, regard has to be made that the New York Federal Court acknowledged an independent right of publicity for the first time in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc*.[59] However, New York courts have consistently rejected the acknowledgement of such a

[55] ALIX HEUGAS, "Protecting image rights…", cit., p. 349.
[56] TARA MULROONEY, "A Critical Examination of New York's Right of Publicity Claim", *St. John's Law Review*, 2000, vol. 74, pp. 1139-1166 (p. 1148).
[57] *Roberson v. Rochester Folding Box Co*., 56 64 N.E. 442 (N.Y. 1902).
[58] TARA MULROONEY, "A Critical Examination of…", cit., p. 1149.
[59] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*, 202 F.2d 866 (2d Cir. 1953).

right in its common law system .[60] For example, in *Stephano v. News Group Publications, Inc*, it was held that because the right of publicity is recognised by the Civil Rights Law as an aspect of the right to privacy, the claimant is not entitled to claim an independent common law right of privacy.[61]

In addition, any prohibited use results in criminal penalties under section 50. However, such unauthorised use enables an injured person to claim for an injection and compensatory and exemplary damages.[62] Under New York law, any unauthorised appropriation of a celebrity's name, portrait, picture or voice for trade purposes is prohibited. It is worth mentioning that voice was added to the protected list in 1995.[63]

Moreover, any plaintiff who wants to make a claim against appropriation of his/her identity must establish the following conditions under sections 50 and 51: a) the plaintiff must establish that the defendant had used his/her name, portrait, picture or voice. B) the use shall have been made for advertising or trade purposes. C) the use must have been made without the claimant's written consent.[64]

Finally, in accordance with Section 50-f of New York Civil Rights Law, the duration of the postmortem right is forty years after death. In order to claim postmortem right, the claimant must establish the following conditions:

> a) Any person claiming to be a successor in interest or a licensee to the rights of a deceased personality may file a claim registration. b) A Claimant may file the claim registration or an Agent of the Claimant, lawfully appointed, can submit a registration on the claimant's behalf. c) A filing cannot be accepted where the date of death occurred prior to statutory enactment, May 29, 2021. d). Deceased person must have been domiciled in New York at the time of death.[65]

3.2.2. California

The right of publicity in California is recognised in legislation and common law.[66] Section 3344 of the Californian Civil Code entitles individuals to claim damages resulting from uses of person's name, signature, voice, photograph, or likeness.[67] In accordance with subsection (g) of section 3344 the available statutory remedies for the right of publicity are merely cumulative. This was acknowledged by the court in *Lugosi v. Universal Pictures*, permitting the acknowledge of the complimentary tort law right of publicity. This acknowledgement has

[60] TARA MULROONEY, "A Critical Examination of…", cit., p. 1149.
[61] *Stephano v. News Group Publications, Inc*., 474 N.E.2d 580 (N.Y. 1984).
[62] New York Civil Rights Law 1957.
[63] PAUL CZARNOTA, "The Right Of Publicity In New York And California: A Critical Analysis", *Jeffrey S. Moorad Sports Law Journal*, 2012, vol. 19, pp. 481-520 (p.494).
[64] TARA MULROONEY, "A Critical Examination of…", cit., p. 1151.
[65] DEPARTMENT OF STATE, "the right of publicity", in https://dos.ny.gov/right-publicity (16. 8. 2022).
[66] RESHMA AMIN, "A Comparative Analysis Of California's Right Of Publicity And The United Kingdom's Approach To The Protection Of Celebrities: Where Are They Better Protected?", *Journal of Law, Technology & the Internet*, 2010, vol. 1, pp. 93-120 (p. 102).
[67] California Civil Code 1972.

resulted in vastly expanding the breadth of the right of publicity beyond statutory parameters.[68]

At the beginning, California courts did not recognise the right of publicity, as in *Haelan's* case.[69] In *Lugosi v. Universal Pictures*, the court ruled against the existence of postmortem right. In this case, the plaintiffs claimed that the defendant had licensed the appropriation of an image of their deceased father without obtaining their authorisation. The court decided in favour of the defendant, holding that no postmortem right of publicity exists. Nonetheless, the court held that the deceased person had the right to exploit his name and likeness during his lifetime for commercial advantages.[70]

It is important to note that section 3344.1 of the California Civil Code protects postmortem rights, prohibiting any unpermitted appropriation of a deceased personality's name, signature, voice, picture, or likeness for the purpose of advertising, selling or solicitation. Under Section 3344.1, postmortem rights last for seventy years after death.[71] However, it shall be born in mind that the heirs are entitled to postmortem rights only if they register their claim with the California Secretary of State. This registration is necessary for exclusive exploitation over the celebrity's persona and to recover damages in cases of infringement.[72]

It can be noticed that postmortem right protection in California is longer than that in New York. I believe that the attitude of New York legislator is better than that of the California, because it is not necessary to grant such long protection after death, considering that the right of publicity itself is an exceptional right granted to individuals to protect their identity.

However, in *Eastwood v. Superior Court*, the California Court of Appeal finally recognised the right of publicity under Common Law to inhibit unpermitted appropriation of identity for commercial advantages. In *Eastwood v. Superior Court,* the court held that the defendant had used the plaintiff's name, photograph and likeness without obtaining authorisation from the plaintiff for the purpose of attracting the attention of customers. In doing so the defendant had infringed the plaintiff's common law and statutory right of publicity.[73]

The scope of the protection of the right of publicity in California Common Law system is broader than that of statutory right of publicity. Under California common law, the name, likeness, voice, signature, identity and persona of an individual are protected, while under California Civil Code, only name, likeness, voice and signature are protected. Moreover, under common law intention is not required, whereas under statutory law, it is one of the requirements that the defendant shall have knowingly used the plaintiff's identity. Finally, the common law right of publicity is nebulous in terms of the requirement of whether the use shall be commercial. Common law states that the use of an individual's identity is actionable if it is done

[68] ACADEMIA, "Exporting the Californian Right…", cit.
[69] PAUL CZARNOTA, "The Right Of Publicity In…", cit., p. 498.
[70] *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).
[71] RESHMA AMIN, "A Comparative Analysis Of…", cit., p. 108.
[72] ALIX HEUGAS, "Protecting image rights…", cit., p.
[73] *Eastwood v. Superior Court*, 149 Cal. App. 2d 409 (Cal. Ct. App. 1983).

commercially or otherwise, however, the courts have not yet explained which kind of use falls under the category of 'otherwise'.[74]

Nevertheless, it is worth mentioning that such broad protection was not established under California common law until the court's decision in *White v. Samsung Electronics,* where the court expanded protection of the right of publicity beyond name and likeness, granting individuals exclusivity as to their general appearance.[75]

Finally, it is important to mention that under California common law, four elements must be met by the plaintiff in order to be entitled to claim the right of publicity, which are: A). The defendant shall have used the plaintiff's identity. B). The use of the plaintiff's identity to the advantage of the defendant commercially or otherwise. C). Lack of consent. D). Resulting injury.[76] Moreover, two additional elements must be met under section 3344 of the California Civil Code, which are: firstly, the defendant shall have knowingly used the plaintiff's identity for advertising, or solicitation, or purchases, and secondly, there must be a direct connection between the appropriation and commercial purpose.[77]

4. The Right of Publicity in Iraq

If we take Iraqi Law into consideration, we can find no law specifically either addressing the right of publicity or the right to privacy. However, Article 17/first of Iraqi Constitution of 2005 recognises the right to privacy, stating that every individual has the right to privacy, provided that it does not conflict with the rights of others and public morals.[78]

In addition, if an individual seeks to protect his/her publicity right, there are some forms of protection that can be found in different codes.

4.1. The Trademark and Geographical Indication Code of 1957 Amended in 2004

Although there is not any specific provision for the right of publicity in the Trademark and Geographical Indication Code No. 21 of 1957, as amended by Law No. 80 of 2004, there are nevertheless a few provisions that can be relied upon for the protection of persona, for example Article (1) defines a mark that includes names within its scope, provided that individuals have registered their name as a trademark.

[74] SARAH ALBERSTEIN, "Right of Publicity in the Era of Celebrity", *California Legal History*, 2019, vol. 14, pp. 241-262 (p. 248).
[75] White v. Samsung Electronics, 971 F.2d 1395, 1396–97 (1992).
[76] RESHMA AMIN, "A Comparative Analysis Of…", cit., p. 103.
[77] PAUL CZARNOTA, "The Right Of Publicity In…", cit., p. 499.
[78] Iraqi Constitution 2005.

Even though Trademark and Geographical Indication Code is able to shield more aspects of personality in comparison to copyright law, it provides celebrities with little practical help. This is due to significant issues with Trademark protection, including registration, requirement of use and terms of protection.[79]

Any aspect of personality is capable of being registered as a trademark, provided that it is distinctive in character, meaning that it must be able to distinguish itself from others and have the ability to be represented graphically. Names are more likely to be protected under trade mark law; however, most of names and surnames may face difficulty as they lack distinctive character.[80]

4.2. Iraqi Copyright Protection Act No. 3 of 1971, as Amended by Act No 83 of 2004

The Iraqi copyright law does not specifically provide protection for the right of publicity. However, Article 2 of the Iraqi Copyright Protection Law No. 3 of 1971, as amended in 2004, provides protection to the arts of drawing and painting with lines and colours, engraving, sculpture and sound recordings. Moreover, Article 34 *bis* protects the right of performers. Thus, it could be noticed that the ambit of protecting the right of publicity is very limited.

4.3. Protection of the Right of Publicity under the General Principles of Civil Code

Another means of protecting the right of publicity is to rely on the general principles of negligence in Article 204 of the Iraqi Civil Code No. 40 of 1951 which stipulates that "every assault that causes damage other than damage expressly detailed in other articles also requires compensation".[81] Thus, based on the aforementioned article, an individual is required to establish the three elements of tort (fault, damage and causation between damage and fault) to be able to ask for the protection of the right of publicity. It must be established that the defendant has committed a fault by breaching the duty of care, the plaintiff has suffered damage as a result of the fault of the defendant.

Moreover, Article 216 of the Iraqi Civil Code of 1951 stipulates that "There should be neither harm nor reciprocating harm, and a harm cannot be eliminated by a harm, and an aggrieved party is not entitled to retaliate for what has been done to him by doing the same wrong."

[79] ALAIN LAPTER, "How the other half lives (revisited): Twenty years since Midler v. Ford—A global perspective on the right of publicity", *Texas Intellectual Property Law Journal*, 2007, vol. 15, pp. 239-316 (p. 292).
[80] VANDANA MAHALWA, "Burgeoning right of publicity…", cit., p. 36.
[81] Iraqi Civil Code 1951.

Hence, it could be noticed that based on the aforementioned article, any damage caused to anyone shall be compensated, including damages caused to individuals' persona.

Another way of protecting the right of publicity is to rely on the unjust enrichment doctrine, which is regulated in article 243 of the Iraqi Civil Code of 1951. This article states that "Every person, even if he is imprudent, who without just cause obtained gain for himself to the detriment of another person is liable to the extent of his profit to compensate such other person for the loss sustained by him; this obligation will remain existing even where the profit has thereafter disappeared."

The doctrine of unjust enrichment is a legal concept that deals with situations where one party has been unjustly enriched at the expense of another party. It is based on the idea that it is unfair for someone to retain a benefit that they obtained through unjust means or at the expense of someone else.[82] Under the principle of unjust enrichment, if one party receives a benefit or gains an advantage that they are not entitled to, and it would be unjust for them to keep that benefit, the law may require them to make restitution or provide compensation to the aggrieved party. The principle aims to prevent individuals from profiting or gaining unjustly from their actions or the actions of others.[83]

Moreover, in order to be able to rely on the doctrine of unjust enrichment, the plaintiff must establish the following four elements:[84]

> First: Enrichment: The defendant must have received a benefit or gained something of value.
>
> Second: Deprivation: The plaintiff must have suffered a loss or been deprived of that benefit.
>
> Third: Absence of legal justification: The enrichment must have occurred without any legal justification or lawful reason.
>
> Fourth: Unjustness: It must be determined that it would be unjust for the defendant to retain the benefit without compensating the plaintiff.

Therefore, if we consider this principle, we can relate it to the concept of the right of publicity. In this scenario, individuals who depend on another person's public image would be able to gain advantages. However, the plaintiff would suffer as they are denied the licensing fees they are entitled to. This enrichment could take place without any legal grounds, and ultimately, the plaintiff may argue that it would be unfair for the defendant to keep benefiting without compensating the plaintiff.

Finally, it could be noticed that the scope of protecting the right of publicity in Iraq is very limited. This needs to be taken into consideration in order to widen the scope of protection by issuing a specific law addressing the issue, or through amending Iraqi Civil Code of 1951 by adding a specific Article in order to address the issue of the right of publicity.

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[82] RUCHIR RAI, "The Principle of Unjust Enrichment", National Law University, 16 April 2012, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353502 (16. 6. 2023).
[83] HARVARD LAW SCHOOL, "Developments in the Law Unjust Enrichment" *Harvard Law Review*, 2020, vol. 133, pp. 2062-2076 (p. 2062). in https://harvardlawreview.org/wp-content/uploads/2020/04/2062-2076_Online.pdf (30.7.2023).
[84] ERNEST WEINRIB, *Corrective Justice: Unjust Enrichment,* Oxford University Press, 20 September 2012, p. 32.

5. The Right of Publicity in the UK

The right of publicity is not explicitly recognized in the UK as a separate legal concept. However, there are several legal remedies available to protect individuals against unauthorized use of their name, image, or likeness.[85] Currently, the right of publicity could be shielded by relying on pre-existing torts, such as malicious falsehood, false endorsement, infringement of IP rights, defamation, libel, etc.[86]

One of the primary ways that individuals can protect their right of publicity in the UK is through the law of passing off. Passing off is a common law tort that prohibits one person from misrepresenting their goods or services as those of another.[87] In the context of the right of publicity, passing off can be used to prevent someone from using an individual's name, image, or likeness without their permission in a way that suggests endorsement or association with a product or service.[88]

Another way that individuals can protect their right of publicity in the UK is through the Data Protection Act 2018. This act provides individuals with the right to control their personal data, including their name, image, and likeness. Under the act, individuals have the right to request that their personal data be deleted, corrected, or transferred to another entity.[89]

In addition, the UK has defamation laws that protect individuals against false or defamatory statements that could harm their reputation. This can include false or misleading statements about an individual's endorsement or association with a product or service.[90]

Overall, while the UK does not have a specific right of publicity statute, there are several legal remedies available to protect individuals against unauthorized use of their name, image, or likeness.

5.1. Protection of the Right of Publicity under Passing Off

Under the law of passing off in the UK, individuals can protect their right of publicity by preventing others from using their name, image, or likeness in a way that creates a false impression that the individual has endorsed or is associated with a product or service.[91]

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[85] JONATHON SCHLEGELMILCH, "Publicity Rights in the U.K. and the U.S.A.: It is Time for the United Kingdom to Follow America's Lead", *Gonzaga Law Review Online*, 2016, vol. 1, pp. 101-119 (p. 110).
[86] KATERYNA MOSKALENKO, "The right of publicity in the USA, the EU, and Ukraine", *International Comparative Jurisprudence*, 2015, vol. 1, pp. 113-120 (p. 115).
[87] BZHAR ABDULLAH AHMED and TALB BRAIM SULAIMAN, "Critical Analysis of The Role of Passing Off in the Modern Intellectual Property Legal System", *International Journal of Global Community*, 2023, vol. 6, pp. 149-158 (p. 150).
[88] KRISTIN KURAISHI, "From the Golden Gate to London: Bridging the Gap between Data Privacy and the Right of Publicity", Brooklyn Journal of International Law, 2021, vol. 46, pp. 733-765 (p. 749).
[89] PAUL JORDAN and SEAN IBBETSON, "The essentials of publicity rights in United Kingdom" November 2019, in https://www.lexology.com/library/detail.aspx?g=ff52596b-50c5-4706-9206-5667e87f9cb4, (20. 3. 2023).
[90] PAUL JORDAN and SEAN IBBETSON, "The essentials of publicity…", cit.
[91] HAYLEY STALLARD, "The Right of Publicity in the United Kingdom", *Loyola of Los Angeles Entertainment Law Review*, 1998, vol. 18, pp. 565-588 (p. 570).

To establish passing off, an individual must show three key elements: firstly, goodwill-the individual must have established a reputation or goodwill in their name, image, or likeness through their work, public persona, or other means. Secondly, misrepresentation-the other party must have made a misrepresentation that has or is likely to cause confusion or deception in the minds of the public, leading them to believe that the individual has endorsed or is associated with the product or service in question. Finally, damage-the individual must have suffered or be likely to suffer damage to their reputation or goodwill as a result of the misrepresentation.[92]

If these three elements are met, the individual can seek legal remedies, such as an injunction, to prevent the other party from using their name, image, or likeness in a misleading or deceptive way. The individual may also be entitled to damages for any harm they have suffered as a result of the misrepresentation.

There are notable cases where the right of publicity is protected under the rules of passing off. For example, in *Eddie Irvine v. Talksport* case, where formula one driver Eddie Irvine sued Talksport radio for using his name and image in advertising without his permission. The court found that the use of Irvine's name and image in the advertising had created a false impression that he was endorsing the radio station, and that this amounted to passing off. The court awarded Irvine damages for the breach of his right of publicity.[93]

Another important case is *Fenty v. Arcadia Group Brands*. In this case, singer Rihanna sued Topshop for using her image on a t-shirt without her permission. The court found that the use of Rihanna's image had created a false impression that she had endorsed the t-shirt, and that this amounted to passing off. The court awarded Rihanna damages for the breach of her right of publicity.[94]

It is important to note that passing off only protects against misrepresentations that create confusion or deception in the minds of the public. It does not prevent others from using an individual's name, image, or likeness in a non-misleading or non-deceptive way, such as for news reporting, commentary, or criticism.

5.2. Protection of the Right of Publicity under the General Data Protection Regulation

The right of publicity in the UK is protected under the General Data Protection Regulation (GDPR), which is the EU's data protection law that has been implemented in the UK through the Data Protection Act 2018 (DPA).

[92] MARTIN HENSHALL and ANNIE WEBSPER, "Mirror image: using UK and US case law to protect publicity rights", 2020.
[93] *Eddie Irvine v. Talksport* [2002] EWHC 54 (Ch).
[94] *Fenty v. Arcadia Group Brands,* [2013] EWHC 2310 (Ch).

Under the DPA, individuals have the right to control how their personal data, which includes their name, image, voice, and other personal characteristics, are used by organizations. This means that organizations must obtain an individual's consent before using their personal data for any commercial purpose, including for advertising or marketing.[95]

If an organization wants to use an individual's personal data for a commercial purpose, they must provide the individual with clear and concise information about how their personal data will be used, and they must obtain explicit consent from the individual to use their personal data for that purpose. The individual has the right to withdraw their consent at any time. If an organization uses an individual's personal data without their consent or in a way that is inconsistent with their consent, the individual has the right to bring a complaint to the Information Commissioner's Office (ICO) and seek compensation for any damage they may have suffered as a result.[96]

It is important to note that the right of publicity under the DPA only applies to personal data, which means that it may not apply to certain types of information that are not considered personal data, such as facts or ideas. Additionally, the right of publicity may be subject to limitations and exceptions, such as when the use of personal data is necessary for legitimate interests, such as freedom of expression or for historical or statistical research.

5.3. Protection of the Right of Publicity under the Trade Marks Act

The UK Trade Marks Act 1994 does not provide for the protection of the right of publicity specifically. However, the Act does provide for protection against the unauthorized use of a registered trademark or a similar sign in relation to goods or services.[97]

In cases where an individual's name, image, or likeness is used in connection with a product or service, and that use is likely to cause confusion among consumers, the individual may have grounds to bring an action under the Trade Marks Act 1994 for trademark infringement.[98]

Under section (1) of the Act, a trademark is defined as any sign capable of being represented graphically, including a person's name, signature, or image. Therefore, if an individual's name, signature, or image is used in a way that creates a likelihood of confusion among consumers, it may be considered an infringement of their trademark rights. It shall be borne in mind that although the Act expressly allows the registration of celebrities' names, provided that they distinguish the applicant's goods. However, it is very difficult for celebrities to register their

[95] KRISTIN KURAISHI, "From the Golden Gate…", cit., p. 753.
[96] KRISTIN KURAISHI, "From the Golden Gate…", cit., p. 755.
[97] DICKSON POON, "Identity Protection in the UK How unauthorised commercial exploitation of a person`s identity should be protected under English law. A comparative study of publicity rights in the UK, the US and Norway", King's College London, 2020.
[98] SARAH WRIGHT and LOUISE BLOOM, "Image rights: the pitfalls of celebrity endorsement" 26 September 2012, in https://uk.practicallaw.thomsonreuters.com/8-521-4902?transitionType=Default&contextData=(sc.Default) &firstPage=true., (15. 3. 2023).

names as trademark in the UK, because of the lack of distinctiveness.[99] For instance, in *Elvis Presley Enterprises v. Sid Shaw Elvisly Yours.*, the court did not accept the registration of the name *Elvis Presley* as it was so commonly known that it possessed no distinctive quality to identify goods.[100]

It is important to note that the extent of protection offered by the TMA for the use of an individual's name, image, or likeness in connection with a trademark will depend on the specific facts of each case. In particular, the strength and reputation of the trademark, as well as the similarity between the trademark and the individual's name, image, or likeness, will be relevant factors to consider.

Overall, while the Trade Marks Act 1994 does not provide for the specific protection of the right of publicity, it does provide legal avenues for individuals to protect their trademark rights against unauthorized use, including the use of their name, signature, or image in connection with goods or services.

5.4. Protection of the Right of Publicity under Copyright, Designs and Patents Act

The right of publicity in the UK is not protected under the Copyright, Designs and Patents Act 1988 (CDPA), as it is a separate legal concept from copyright and design rights. However, the CDPA does contain provisions that relate to the use of an individual's name, image, or likeness in copyrighted works.

For example, section 85 of the CDPA provides that a person's photograph or portrait cannot be reproduced, issued to the public, or communicated to the public without their consent, except in certain limited circumstances, such as when the reproduction is for the purposes of reporting current events. Section 84 of the CDPA also provides that the owner of a copyright in a work that includes a person's image or likeness cannot exploit the work in a way that would be prejudicial to the person's reputation or privacy.

However, it shall be noted that infringers would be barred from only copying all or a substantial part of the original work. The establishment of copying a substantial part of a work could be cumbersome and challenging. For instance, in *Bauman v. Fussell*, when 'an artist created a painting based on a copyrighted photograph, it was found that there was no infringement because the artist creatively infused originality into it, and therefore the painting was not substantially similar to the original photograph'.[101]

[99] KRISTIN KURAISHI, "From the Golden Gate…", cit., p. 752.
[100] *Elvis Presley Enterprises v. Sid Shaw Elvisly Yours*, [1999] EWCA Civ 964, [1999] RPC 567
[101] JONATHON SCHLEGELMILCH, "Publicity Rights in the…", cit., p. 111.

5.5. Protection of the Right of Publicity under Breach of Confidence

Breach of confidence is a legal doctrine that protects information that is confidential in nature and is disclosed in circumstances where there is an obligation of confidence. It can be used to prevent the unauthorised use or disclosure of personal information, including the use of a person's name, image or likeness without their consent. This development is due to enacting the Human Rights Act 1988 which gave effect to article 8 of the European Convention on Human Rights.[102]

In order to establish a claim for breach of confidence in relation to the right of publicity, the following elements must be satisfied:[103]

> The information must be confidential: The information must be confidential in nature and not already in the public domain.
>
> The information must have been disclosed in circumstances that give rise to an obligation of confidence: The information must have been disclosed in circumstances where it would be reasonable to expect that the information would be kept confidential. This may include situations where a person has a contractual or fiduciary duty to keep the information confidential, or where there is an express or implied agreement of confidentiality.
>
> The information must have been misused: The information must have been misused in a way that breaches the obligation of confidence, such as through unauthorised use or disclosure.

If these elements are satisfied, the person whose right of publicity has been breached may be entitled to a range of remedies, including an injunction to prevent further use or disclosure of the information, damages for any loss suffered as a result of the breach, or an account of profits made by the party that breached the obligation of confidence.

For instance, in *Douglas v. Hello! Ltd*. case where actors Michael Douglas and Catherine Zeta-Jones sued Hello! magazine for publishing unauthorized photographs of their wedding. The court found that the publication of the photographs constituted a breach of confidence and a misuse of private information, as well as a breach of the couple's right of publicity. The court awarded the couple damages for the breach of their privacy and breach of confidence.[104]

It is worth noting that the law of confidence can be complex and fact-specific, and the outcome of any particular case will depend on the specific circumstances involved. It is therefore advisable to seek legal advice if you believe that your right of publicity has been breached.

5.6. Protection of the Right of Publicity under the Law of Defamation

Another way in which the right of publicity is protected in the UK is through the law of defamation. Defamation occurs when a statement is made that harms a person's reputation.

[102] DICKSON POON, "Identity Protection in …", cit.
[103] PAUL JORDAN and SEAN IBBETSON, "The essentials of publicity…", cit.
[104] *Douglas v. Hello! Ltd*, [2005] EWCA Civ 595.

If the statement is false, it is considered libel (if it is written or recorded) or slander (if it is spoken). In the UK, individuals have the right to sue for defamation if they believe that false or defamatory statements have been made about them. In order to bring a successful defamation claim, the plaintiff must show that the statement was false and that it caused harm to their reputation. The statement must also have been published to a third party. If the statement is deemed to be defamatory, the plaintiff can seek damages or an injunction to prevent the statement from being further disseminated.[105]

For example, in *Beckham v. Daily Mirror* case where footballer David Beckham sued the Daily Mirror for publishing an article that falsely accused him of having an affair. The court found that the article had caused serious harm to Beckham's reputation and that he was entitled to damages for defamation, as well as for the breach of his right of publicity.[106]

6. Protection of the Right of Publicity under the European Convention on Human Rights (ECHR)

The right of publicity is not explicitly protected under ECHR, which is an international treaty that sets out a range of civil and political rights that are protected under the law. However, the right of publicity can be considered as a component of an individual's right to privacy under Article 8 of the ECHR, which protects the right to respect for private and family life, home and correspondence.[107]

One of the controversial issues in ECHR is striking the balance between the right to privacy and freedom of expression. The right to privacy and freedom of expression are both protected under ECHR. These rights are enshrined in Articles 8 and 10 of the Convention, respectively. Article 10 safeguards the freedom of expression, which includes the right to hold opinions and to receive and impart information and ideas. It protects individuals' rights to express themselves, share information, and participate in public debate, fostering an open and democratic society.[108]

In some cases, the use of an individual's name, image, or likeness without their consent may constitute a violation of their right to privacy under Article 8 of the ECHR. For instance, the European Court of Human Rights (ECtHR) has ruled that the unauthorized publication of an individual's photograph in a newspaper may infringe upon their right to privacy if it is deemed unnecessary in a democratic society and causes them distress or embarrassment. One notable case illustrating this principle is *Von Hannover v. Germany*, a significant ECHR case addressing the balance between the right to privacy and freedom of expression. The case was initiated by Princess Caroline of Monaco, also known as Princess Caroline von Hannover, against Germany.

[105] HAYLEY STALLARD, "The Right of Publicity…", cit., p. 573.
[106] *Beckham v. Daily Mirror*, [2002] EWHC 2312 (QB).
[107] KATERYNA MOSKALENKO, "The right of publicity…", cit., p. 115.
[108] The European Convention on Human Rights, 1953.

The background of the case revolves around the publication of photographs by German magazines depicting Princess Caroline engaged in various private activities, such as shopping, walking with her children, and participating in sports. Princess Caroline contended that the publication of these photographs violated her right to privacy under Article 8 of the European Convention on Human Rights.[109]

The ECtHR examined the balance between an individual's right to privacy and the public's right to freedom of expression under Article 10 of the Convention. The court acknowledged that public figures, such as Princess Caroline, have a reduced expectation of privacy compared to ordinary individuals due to their role in public life. However, the court emphasized that public figures also have a legitimate interest in protecting their private lives from excessive intrusion. The court established a two-step test to determine whether the publication of photographs violated a person's right to privacy. The first step is to determine whether the person has a reasonable expectation of privacy. The second step is to weigh the individual's right to privacy against the public's right to freedom of expression. In the case of Princess Caroline, the ECtHR ruled in her favor and held that the publication of the photographs violated her right to privacy. The court found that Princess Caroline had a reasonable expectation of privacy in the situations captured by the photographs, as they depicted her engaged in private activities. The court also concluded that the public's interest in the photographs did not outweigh Princess Caroline's right to privacy.[110]

The judgment in *Von Hannover v. Germany* has had a significant impact on the interpretation of the right to privacy in Europe. It reinforces the protection of the private lives of public figures and establishes a framework for assessing the balance between privacy and freedom of expression in similar cases.

Furthermore, the ECtHR has also recognized that the right to control the use of one's own image is an aspect of the right to privacy. In particular, the ECtHR has held that the unauthorized use of an individual's photograph or image for commercial purposes may constitute a violation of their right to privacy.[111]

Moreover, in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* ECtHR has considered the protection of the right of publicity under Article 8 of ECHR. This case involved the use of a photo of a Finnish pop singer for commercial purposes without her consent, the ECtHR held that the unauthorized use of the photo constituted a violation of the singer's right to respect for her private life and her right to control the use of her image under Article 8 of the ECHR.[112]

[109] *Von Hannover v. Germany*, Application No. 8772/10, [2013] ECHR 1002.
[110] *Von Hannover v. Germany*, Application No. 8772/10, [2013] ECHR 1002.
[111] MARTIN WESTLUND, *The development of the right to privacy under the ECHR* (Master dissertation, Upssala University) 2018.
[112] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [2008], CJEU, ECLI:EU:C:2008:727.

In a more recent case, *Rolf Anders Daniel Pihl v. Sweden*, the ECtHR held that the unauthorized use of a photo of a man's face for a dating website without his consent constituted a violation of his right to respect for his private life under Article 8 of the ECHR.[113]

The ECtHR acknowledges that these rights are essential and can occasionally come into conflict. Therefore, it requires a careful balancing act when determining the limitations and scope of each right. The Convention allows for restrictions on these rights if they are prescribed by law, necessary in a democratic society, and pursue legitimate aims such as national security, public safety, or the protection of the rights of others. The ECtHR plays a crucial role in interpreting and applying these rights. It has developed a robust body of case law to address the tensions and reconcile conflicts between the right to privacy and freedom of expression. The court considers factors such as the context of the expression, the status of the individuals involved (including public figures), the contribution to public debate, the impact on reputation, and the potential harm caused by the disclosure of private information. In its judgments, the court strives to strike a fair balance between these competing rights, taking into account the specific circumstances of each case. It acknowledges that there is no absolute or unlimited right to privacy or freedom of expression and those limitations may be justified in certain circumstances.[114]

For example, in the *Einarsson v. Iceland* case, the ECtHR held that the courts in Iceland had breached the right to a private life of a controversial media personality by dismissing his defamation claim against an internet user who labeled him a "rapist" online. The case centered around a well-known blogger, writer, and media personality who had been accused of rape by a woman. A week after the rape case against him was dropped, an Instagram user posted an altered image of the media personality with the caption "[f]uck you rapist bastard." The national courts rejected the defamation claim, stating that the statement was a value judgment within its context. However, the European Court of Human Rights disagreed with this approach, arguing that the national courts had failed to strike a fair balance between the media personality's right to privacy and the Instagram user's right to freedom of expression. The European Court of Human Rights specifically took issue with the domestic courts' categorization of the term "rapist" as a value judgment rather than a factual statement. Consequently, the court ruled that the media personality's right to privacy under Article 8 of the European Convention on Human Rights had been violated.[115]

These cases illustrate that the right of publicity can be considered as a component of an individual's right to privacy under Article 8 of the ECHR, and that the unauthorized use of an individual's name, image, or likeness may constitute a violation of their rights under the ECHR. However, it is important to note that the extent of protection offered by the ECHR will depend on the specific facts of each case, and that the right of publicity is not explicitly protected under the ECHR. Overall, the ECHR recognizes the importance of protecting both the right to privacy

[113] *Rolf Anders Daniel Pihl v. Sweden,* [2017], 7473/16 (2018) ECHR.
[114] EUROPEAN COURT OF HUMAN RIGHTS, "Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression", 31 August 2022, in www.echr.coe.int/documents/guide_art_10_eng.pdf (18. 6.2023).
[115] *Einarsson v. Iceland* (Application no. 24703/15) [2017] ECHR 7 November 2017.

and freedom of expression, aiming to ensure that individuals' fundamental rights are respected while maintaining a functioning and democratic society.

7. Conclusion

This research critically analysed the right of publicity under the laws of the United States (California and New York), Iraq, the United Kingdom and ECHR convention. It was found that in the two states analysed, California and New York regulation of the right of publicity is significant at this moment particularly for celebrities as they are mostly barred from relying on the right to privacy due to the characteristics of this right, because under the right to privacy individuals cannot rely on this right if they have already made them publicly available which is the case for celebrities. The right of publicity prevents persons from using the identity of others for commercial gains. It was also revealed that the right of publicity was recognised due to the case of Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., in 1953 and a well-known article written by Nimmer in 1954 in the United States. Moreover, New York was the first State to call for the recognition of the right of publicity, however, it did not recognise postmortem right until 2021. Whereas, California recognises the right of publicity by statutes and common law, New York has not recognised such right in common law.

In addition, in Iraq there is no specific law regulating the right of publicity, however, a very limited protection could be found in Trademark and Geographical Indication Code of 1957, Iraqi Copyright Protection Act No. 3 of 1971 and under the general principles of Civil Code of 1951.

In the UK, the right of publicity is not a specific statutory right, but is instead encompassed within the broader concept of privacy. Specifically, the right to privacy has been recognized in English common law as a right to control the dissemination of private information about oneself. This includes the use of one's image or likeness for commercial purposes without consent. Despite ongoing issues surrounding the Right of Publicity, U.K. courts have consistently declined to address this matter directly. While copyright protection may provide some safeguarding for photographs under the CDPA, it is limited in scope. Similarly, the TMA's trademark protection is of little practical use, as it only protects registered marks and does not cover celebrity names. The common law tort of Passing Off, as interpreted by Irvine, does allow celebrities to prevent the misrepresentation of endorsements or merchandise, but it falls short of giving them complete control over the use of their likeness. Celebrities can potentially win a breach of confidence lawsuit if they took steps to keep the information private and planned to use it for commercial gain later. However, the U.K.'s highest court has declined to view this right as something that can be owned and transferred like property.

Moreover, the protection of the right of publicity is not explicitly mentioned in ECHR, but it is often considered to fall under the broader right to respect for private and family life, as outlined in Article 8 of the convention. The ECtHR has recognized that individuals have a legitimate

interest in controlling the commercial use of their name, image, and likeness and has provided some level of protection in cases where this right has been violated.

Although the right of publicity prevents others from using identity of people, there are limits on such right such as for the purpose of news reporting, commentary, entertainment or creating fiction or nonfiction. Moreover, protection of the right of publicity shall not contravene the right of freedom of expression and fair use doctrine could also be a limit on the right of publicity.

Finally, given the significant influence of technological progress, specifically social networks, on society, it is vital to regulate the right of publicity and provide individuals with some sort of protection against appropriation of their identity without the consent of the owner. As a result, this study suggests that Iraq, the UK and EU should enact a specific Act that governs the right of publicity, as it would facilitate a more direct process for individuals seeking compensation for violations of this right. However, any regulation of such right shall strike the balance between an individual's right to control their image and the right to freedom of expression.

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