

VIII. Conclusions and Suggestions:

What Comprises India’s Personality Rights Umbrella – the Ingredients on the Salad Platter

In India, the personality rights umbrella – this researcher’s *salad platter* analogy, thus, given the discussions and study in the foregoing chapters, then comprises of the following rights:

- *Traditional Statutory Intellectual Property Rights Route – Copyright*

As discussed in Chapter III, copyright eligibility criteria need to be satisfied before venturing into making claims about copyright ownership. Celebrities and more importantly, personality rights and entertainment law practitioners thus, could do well to learn from existing case law that copyright cannot be claimed by an actor-entertainer, over the characters that they portray, neither can they claim copyrights in character appearances / costumes / make up and character - tattoos. Furthermore, actor-entertainers cannot proclaim to have registered copyrights in their smiles and body parts and baritones. All of these are not subject matter capable of copyright protection. What can be claimed in India, is as a singer / recording artist / entertainer – moral rights in the performance, and performance rights under Copyright Act. Celebration moves of sportspersons are also not protectable as choreographic works in India, due to the lack of statutory space for the same, however, dancer teachers and choreographers have tried to make use of the dramatic work protections to get recognition for their dance pieces in India

Most importantly, from the perspective of filmmaking and contracts for biopics and documentaries, it does well to remember that there is no copyright on one’s life story.¹ “Life” is lived, and the human body loses permanence as it dies, and hence, it cannot become the “medium” of fixation for “life” to become eligible for copyright protection. However, if a life story is written into a book – the same comprises a *literary work* which can then become eligible for copyright protection. The contracts for *biopics* without books beforehand, rely on *right of publicity* and *right to privacy* as the rights that are licensed for the *script* of the film – which then becomes eligible for copyright protection as a literary work.

- *Traditional Statutory Intellectual Property Rights Route - Trademark*

As discussed in Chapter IV, trademark protection is available only if the marks are registered. For the same, celebrities seeking name trademark protection, must prove *acquired distinctiveness* in their names, in the *class* in which they seek protections, Which is why most celebrities attempt to register their names as Trademarks in Class 25, 41 and 45 such that they relate to their profession and extended merchandise and services. Nonetheless, names are not inherently distinctive, and it is best for legal counsel to suggest marks that are unique and distinctive to the celebrity entertainer – such as Sachin Tendulkar’s “Aapka Apna Sach” word

¹ *Refer* - Telangana High Court, M/S Super Cassettes Industries Private Limited v. Nandi Chinni Kumar and Ors – 19 Oct 2020 - approved by the Supreme Court in SLP No. 12886-87/2020. – Special Leave Petition dismissed without notice. [Nandi Chinni Kumar brought an action against the makers of the film Jhund, as the owner of the copyright in the film script, he wrote based on an exclusive life rights contract with Akhilesh Paul). Kumar also brought an action in Madras against Atlee for a film based on a similar story, starring Vijay, called Bigil. Both films eventually were released and the stay was lifted. Both courts made obiter observations on no copyright in life, but recognised Nandi Chinni Kumar’s claim to copyright in script. [K.P. Selvah @ Panner Selvam v/s Atlee (Director & Writer) & Others C.R.P (NPD) No. 3331 of 2019, Madras HC - Decided On, 22 October 2019]

mark and Device Marks, Samantha Ruth Prabhu's "SAAKI" marks, where the device mark is inspired by her tattoo, "Bhidu" is the registered Trademark of Jackie Shroff, and the character name "Khiladi" has been allowed registration for Akshay Kumar etc. Again, **voice** cannot become the subject matter of Trademark protections either, and any claims being read of in the news about certain legendary actors getting trademarks over their voices, is impossible. However, it may be possible to get "sound marks" over certain specific words being said, to then use in the course of trade – for example, a well known singer could record an introduction yodel or short jingle in her voice, to then register as a sound mark under class 41 for an online podcast based singing learning master-class, hosted on Spotify, available to listeners for a subscription. This yodel could play each time an episode began, as the trademark.

Sports' celebration moves are potentially protectable as trademarks – both as 2-dimensional silhouette device marks and recorded motion marks, however the distinctiveness threshold must be crossed, and registering celebration moves as trademarks, throws up concerns in free speech and cultural accessibility, because sportspersons have immense fandoms, who will obviously, indiscriminately emulate their sports superstars, and their moves will become such immense cultural resources with coded semiotic meanings, that then most moves, become larger than the person who began them. For example, (a non Indian example is used here) – Sheldon Cottrell, West Indies bowler, celebrates his wickets by marching up, saluting towards the stadium audience and then throwing his arms back and looking up. This move has garnered such immense popularity, so much so that fans, are using this move to celebrate milestones in other sports.² Registering a celebration move as a motion marks may also implicate the broadcaster's rights and the rights of the organisers and leagues etc., where the move was performed, if a recording from such an event is used to prove the acquired distinctiveness and submit the same as the proof of graphical representation before the TM Registrar.

- *Misrepresentation Tort – The right against passing off*

Unlike statutory copyright and TM, which may be actively, pre-emptively sought to prevent others from making unauthorised use of, the passing off regime for celebrity personae, is useful *after* an act of unauthorised use has been committed, and protection is sought from courts, seeking enforcement of the right against unauthorised use. However, the celebrity plaintiff must show *reputation*, i.e. goodwill, and that the use by the defendant is likely to cause confusion leading to an endorsement style misrepresentation, that would cause damage to the plaintiff's such built reputation. For celebrities, Indian decisions seem have gone the way of *Henderson* in Australia and *Irvine* in UK, in that, requiring that the celebrity whose personality attributes have been taken without consent, have a 'common field of activity' with the activity of the defendant in which such unauthorised use has happened – has been done away with. This is so because presumptively, celebrities are in the business of licensing their persona for endorsements, and thus, any advertising or endorsement style misuse, as long as reputation and goodwill are shown, is presumed to cause confusion – as has been case law practise. Furthermore, if celebrities need protection against cybersquatters on their names and name combinations having been registered by unauthorised third parties, the tort of passing off is the

² Sheldon Cottrell | Heart, Passion and THAT Salute | ICC Cricket World Cup 2019, Uploaded by ICC, You Tube (Jul 1, 2019) <https://www.youtube.com/watch?v=BDLUIhyBSN0>

methodology used in courts in India to find trademark style value to famous names which have not been registered under the Act.

A good, very recent example of a celebrity name being protected against unauthorised use, in *inter alia* a passing off style remedy (without referring to the actionable claim as passing off) is the case of *Karan Johar v Indian Pride Advisory Pvt Ltd.*³ where a stay was given in favour of film director Karan Johar, against the release of a film by the name “Shadi Ke Director Karan Aur Johar” / “Shadi Ke Director Karan Johar”. The court found that *inter alia* (deciding under *personality rights of Karan Johar, reading the Shivaji Rao Gaekwad, Titan, Anil Kapoor and Arun Jaitley cases*) that by using the name of the plaintiff, even disjunctively, to suggest promotion, endorsement, association, was a violation of his personality rights. In the opinion of this researcher, this outcome is of serious concern, as it did not consider the potential for an *artistic relevance – expressive use* style defense read into the First Amendment protections against names being monopolised, – like in *Rogers v Grimaldi* that allowed the use of famous names, in the titles of films in the USA.

- *Other existing torts that protect dignitary interests: Right to Privacy, Defamation and Malicious Falsehood torts*

Whenever a dignitary interest, such as disclosure of a private fact (for example, social media content creator and internet celebrity Kusha Kapila, separated from her long-time partner Zorawar, and had to reveal the same on her social media handles, because an online publication called her to threaten to reveal the information, if she didn't in 24 hours)⁴, invasion into solitude (for example, Alia Bhatt's pictures of feeding her baby were clicked via zoom lens and leaked online)⁵ anything that is false and purposively, has been falsified but is not defamatory (for example, repeat announcements of Katrina Kaif's pregnancy, without any speculative words used)⁶; or when there is reputational harm simpliciter (for example, Raveena Tandon has brought a defamation claim against a man who uploaded a fake video of her alleging road rage)⁷ – can be claimed. However, one must be careful as an advising counsel, to clearly identify the tort being claimed, and the cause of action wherefrom such claim arises. Each tort has distinct elements to be satisfied to establish a *prima facie* case for the grant of a favourable injunction.

³ INTERIM APPLICATION (L) NO.17865 OF 2024 IN COM IPR SUIT (L) NO.17863 OF 2024; Delhi HC Order of Justice R I Chagla, dated June 13, 2024

⁴Kusha Kapila on her Divorce, LallanTop, Facebook Promo, (February 6, 2024) <https://www.facebook.com/watch/?v=893198369475998>

⁵Bollywood rallies behind Alia Bhatt after 'invasion of privacy'; Anushka Sharma, Janhvi Kapoor share similar experiences, Karan Johar, Soni Razdan condemn incident, Indian Express (February 22, 2023) <https://indianexpress.com/article/entertainment/bollywood/after-alia-bhatt-shares-her-experience-of-invasion-of-privacy-anushka-sharma-janhvi-kapoor-share-similar-experiences-karan-johar-swara-bhasker-support-too-8459390/>

⁶ Watch - Secretly Pregnant Katrina Kaif announces her pregnancy in 5th Month with husband Vicky Kaushal, Uploaded by Bollywood HTV, YouTube (April 30, 2024) <https://www.youtube.com/watch?v=8v0sMs1tzjk>

⁷ 'Actor Raveena Tandon has sent a defamation notice to a man for failing to take down a video in which he accused her driver of road rage, asserting that a police probe had found his allegation to be fake', 'Spat clip' fake, defamed me: Actor in notice, Times of India (June 15, 2024) http://timesofindia.indiatimes.com/articleshow/111008485.cms?utm_source=contentofinterest&utm_medium=txt&utm_campaign=cppst

The privacy tort cannot be claimed when the information which has been revealed is actually based on information in the public domain.⁸ If information is available in court documents, police files etc, which are not easily accessible in the public domain, a claim for right to privacy tort, may still lie.⁹ Nonetheless, all such claims are always subject to being balanced against the freedom of speech and expression, especially such freedom guaranteed for newsworthy reports and revelations, etc., made in the public interest. The rule of thumb to remember is that whatever the public is interested in, may not be always *in public interest*. Thus always, a balance is struck, and courts must actively engage with striking this balance so as to not lead to a chilling effect on free speech.

- *The misappropriation tort – protecting proprietary interests in persona*

In India, Celebrities have always had a limited right, under common law, to control the commercial use of the ECONOMIC ASSOCIATIVE VALUE of their image and personality indicia. So, for example, if a particular company decides to give the impression that a celebrity has endorsed their product they could be sued for the tort of passing off, and alongside that, the Delhi HC style right of publicity tort itself which has emerged. Though the right can be claimed by, and inheres in all individuals, this dissertation's focus is on celebrity plaintiffs, as the claims rarely arise outside celebrity spaces. Furthermore, McCarthy has countered those who suggest that celebrity value and fame are precursors to bringing right of publicity actions, in common law – by suggesting that “*the majority and better view is that everyone, including the non-celebrity, does indeed have a right of publicity. And therefore, for a living plaintiff, celebrity or noncelebrity, there should be no requirement of prior ‘exploitation’ and it should not be a condition precedent to possession of a right of publicity... the logical conclusion to be drawn from a defendant's unpermitted commercial use: the unpermitted use itself creates a presumption of economic value for plaintiff's identity*”¹⁰

The Delhi HC style tort requires the plaintiff (either publicity holder as under contract from the identity holder, or the identity holder in person), to show : a) Identifiability and b) Use of such identity substantially by the defendant. Thus, the action works without the necessity of establishing confusion, and is thus a *misappropriation legal regime* as opposed to a *misrepresentation regime* and as case law practise is suggesting, both action can be claimed together for the same cause of action.¹¹

Life stories are covered by this right, and it is the “right of publicity” and the “right to privacy” that are implicated in a “life rights contract” when films and shows are made. Nonetheless, like for the privacy tort, even for right of publicity, and in fact, **more so** for the right of publicity, as privacy is now a horizontally enforceable Fundamental Right, post *Puttaswamy I*, there is, and there must be a strong free-speech defense. Unfortunately however, with the kinds and numbers of cases being filed in the last few months until June 2024 itself, and the favourable

⁸ Refer, Khushwant Singh and Anr. v. Maneka Gandhi, AIR 2002 Delhi 58

⁹ Refer, Phoolan Devi v. Shekhar Kapoor and Ors., 57 (1995) DLT 154.

¹⁰J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY (2ND ED); § 4:6. Erroneous use of a prior exploitation requirement for living plaintiffs:

¹¹ Refer, Anil Kapoor v. Simply Life Media And Ors., CS(COMM) 652/2023 Delhi High Court Decision of 20 September, 2023; Shivaji Rao Gaekwad v. M/S. Varsha Productions, Madras HC Decision of February 3, 2015.

injunctions being received by celebrities, it is worrisome that such injunctions are taking away from a large pool of fan-made resources and expressive free-speech resources, *for* the fans. The problem with Justice Kaul's opinion in *Puttaswamy I* is that he has effectively converted this erstwhile common law right to a fundamental right and widened it to give every individual the right to control the manner in which his life and identity is portrayed to the world, for commercial purposes. This has affected the discussions on *post mortem* right of publicity for *famous individuals* whose persona's proprietary value lives beyond death; and in fact most biopics get made on stories of the deceased.

Thus, while the debate on whether the right of publicity doctrinally exists – and whether it even exists as an intellectual property type right, a stand alone common law right that is protecting a quasi-property interest or a fundamental right might continue to remain open – what it decidedly CANNOT be – is a horizontally enforceable FUNDAMENTAL RIGHT as a prong of the FUNDAMENTAL RIGHT TO PRIVACY. – apart from the concern that the same would lead to a chilling effect on free speech rights of legitimate takers; it would also have far-reaching consequences for the idea of a post-mortem right of publicity¹²

Furthermore, courts have nonetheless, recognised a right for content creators to *recode the semiotics in a celebrity's identity*¹³. When 'unauthorised taking' is of subject matter protected by copyright law, THEN, Non-commercial speech is protected as copyright fair dealing; Commercial Speech, with newsworthiness, could also be potentially protected as copyright fair dealing by borrowing from tests in copyright law and looking at and *adapting, judiciously and actively* principles from the US Law. When 'unauthorised taking' is of subject matter protected by Right of Publicity and the taking is for a non commercial speech – expressive and transformative purpose, the same shall be protected if covered by Article 19(1)(a) and judicially recognised exceptions such as caricaturing, lampooning, parodying, public interest etc. The single judge's order in *Krishna Kishore v Sarla Saraogi*¹⁴, and the order in *Digital Collectibles*¹⁵, seems to suggest even commercial speech is protected!

¹² Mrs. Chitra Jagjit Singh v. Panache Media (Notice of Motion (L) 499 of 2016 in Suit (L) 111 of 2016); ; Krishna Kishore Singh v. Sarla S. Sarogi & Ors., CS(COMM) 187 OF 2021, Interim order of Justice Narula of Delhi HC on June 10, 2021, Refer pp.6.48 – 6.49 of this dissertation.; Krishna Kishore Singh v. Sarla S. Sarogi & Ors., [Order of Justice Hari Shankar, Delhi HC, July 11, 2023]

¹³ Refer, Jaikishan Kakubhai Saraf Alias Jackie Shroff v The Peppy Store & Ors (CS(COMM) 389/2024), Delhi HC Order of May 15, 2024; 2024 SCC OnLine Del 3664 (Next listed for October 15, 2024 for the YouTube content creator who makes "Thug!Life" videos)

¹⁴ Krishna Kishore Singh v. Sarla S. Sarogi & Ors., CS(COMM) 187 OF 2021, Order of Justice Narula.

¹⁵ Digital Collectibles PTE Ltd and Ors v. Galactus Funware Technology Private Limited and Anr., CS (COMM) 108/2023, Delhi HC Decision of April 23, 2023.

With this summary, this researcher proposes to demonstrate the application of these options in specific hypothetical cases :

Hypothetical Case Study 1, Post-Mortem Rights

- Raj Gopi Vardhan (RGV) makes movies under his film direction and production banner “RGVF”. On October 3, 2023; RGV announced his next film *Sridevi* which deals with the concept of a teenager’s crush towards a woman older than him by releasing an Instagram video in which RGV urged people to share the details of their first crush in their respective lives, adding that he himself had a crush on the late actor and celebrated film heroine *Sridevi*. He also launched a contest named “*Who is your Sridevi?*” on Instagram. Apart from the press release, RGVF released the poster of the film that portrays a young boy, barely in his teens, ogling at the near-bare midriff of a sari-clad, voluptuous woman. The late superstar *Sridevi*’s family, especially her husband, Boney Kapoor, a well-known film producer in his own right, is extremely taken aback and upset at the unauthorised taking of *Sridevi*’s name and the maligning of her memory through what he dubs, “sleazy B-grade” films.
- Advice for Boney Kapoor – to bring an action seeking injunction against the making and promotions etc in relation to the film thus
 - Search if the name *Sridevi* is a registered and valid trademark, then legal heirs may bring claims against un-authorised use of registered trademarks.
 - Since the celebrity in question is deceased, using the conditions laid out in the *Ruba Ahmed* case, Boney Kapoor may attempt to establish that due to an unflattering use of his deceased wife’s name, the daughters and himself are also aggrieved, and an action in defamation may lie.
 - Since there is lack of clarity in India on whether legal heirs can claim right of publicity in the name and likeness, it is proposed that Boney Kapoor and the daughters, apply the test from the *Chitra Jagjit Singh* case and show that:
 - *Sridevi*’s body of work has resulted in her acquiring a right in her name, image and likeness
 - Since this right, is the right to prevent the unauthorised use of the economic associative value of such propertised interest in the name, image and likeness, it has passed onto the legal heirs of *Sridevi*
 - Such unauthorised use, especially in this case, shall be of detriment to the family, as it makes an unflattering use of the name of *Sridevi*, with the overt admission by the filmmaker that the person being evoked in the film title, is the legendary actress. Thus the conditions of *locus*, *identifiability* and *substantive unauthorised use* are met. Furthermore, the case of *Anil Kapoor v Simply Life* may be cited, where the court granted an injunction against unflattering uses of the living plaintiff’s name, and likeness, to not only safeguard the plaintiff but also his family and friends.

- Since the facts are unclear on the content of the film, it will not be prudent to claim any privacy tort for the family, privacy rights of the deceased, die with the death of the individual.
- Advice for RGV – the claim may be countered by first claiming that no endorsement use is being made of the name Sridevi. A cultural studies argument then can be furthered, rooted in the cultural significance of the *phenomenon* that Sridevi continues to remain, even after her death, such that her name has come to mean more than just her – has been coded with meta meanings, like the term Barbie. And thus, when ‘speech events’ like a feature film which is a highly creative and expressive work, is made, then using the name Sridevi in the title of the film, is in furtherance of the cultural function the name performs, and not to free-ride on reputation and goodwill the deceased has. Furthermore, if the film name has not been registered as a trademark, the same can be used to defend oneself against this action, further placing reliance on the artistic-relevance style test, borrowed from US Case law – *Rogers v Grimaldi* to argue that using the name of Sridevi in the film title is purely for artistic relevance and does not perform a source and/or association function with the real, deceased celebrity or her living family.
- Researcher’s argument – since films are highly expressive works, using names of popular celebrities in film titles, rarely suggest any association or endorsement, and the same can be argued better for RGV. Furthermore, content that has not even been made yet, cannot and should not be pre-emptively ceased, when not enough factual information is available. In any case, films go before the Central Board of Film Certification prior to release, and they shall judge the content of the film themselves, and to control the exercise of a venture in furtherance of freedom of speech and expression, would lead to an undesirable chilling effect

Hypothetical Case Study II – Direct taking of Film Stills for endorsement purpose

- Whether Shah Rukh Khan has any right(s) in his image from these movie stills being used to advertise the pain relief oil?



- These images are a clear case of *appropriation* and not merely *evocation*
- The taking is of SRK as the character on the movie posters, and the film title is used to convey a message regarding the efficacy of the oil, just establishing the overt use of the presence of the actor and the film title, in conjunction, to convey a message.
- Relying on first *Titan* and *Daler Mehendi*, SRK can clearly establish that he is identifiable from the use by the defendant brand, Tjori, and that a direct taking, substantially of his image has been done, without his authorisation.
- A direct taking, suffices to prima facie satisfy the Delhi HC style of of the *right of publicity* claim.
- This is not a claim for character copyright, but a claim for right of publicity, in one's own image, as he was in the film.
- Interestingly however, and ideally, the claim can be brought by the PRODUCERS of the film, because generally, the right of publicity of the actors, in the characters (character merchandising, as discussed and claimed in *Applause Entertainment*)¹⁶, Since Red Chillies Entertainment, is the producer of the film *Main Hoon Na*, it may be argued that Red Chillies (and in effect, SRK as the man behind the curtain of Red Chillies), has right of publicity in the Major Ram Prasad Sharma character.
- The brand on the other hand can claim the free -speech parodying defense. However, for a parody to succeed, not only should there be a taking, but then the persona taken, should be the subject of ridicule. In this case, SRK's image has been taken, but he is not the subject of ridicule. Instead, it is his presence, in his character-roles, in these doctored images to make ads, that is being used to convey a semiotic message – of reliability, credibility, strength, and comfort. Therefore, in such a clear taking, meant to free ride on the goodwill of SRK, and as a ““cover-up or subterfuge for commercial appropriation” of his film-character -image, there is no free speech defense.

¹⁶ Applause Entertainment Pvt. Ltd. v. Meta Platforms Inc., Interim Application No. 10257 in Commercial Suit No. 10238 of 2023, BOMBAY HC Order dated May 2, 2023 in Interim Application (Lodging) No. 10257 of 2023 In Commercial IP Suit (Lodging) No. 10238 of 2023

Hypothetical III – Evocative Misappropriation

Will the actor Aishwarya Rai, have any rights against the make-up brand ‘Kissable’ for this advertisement that they’ve posted to their social media handles? [this is a hypothetical case, and the image has been generated using an AI Chatbot, DALL.E, only for the purpose of this hypothetical]



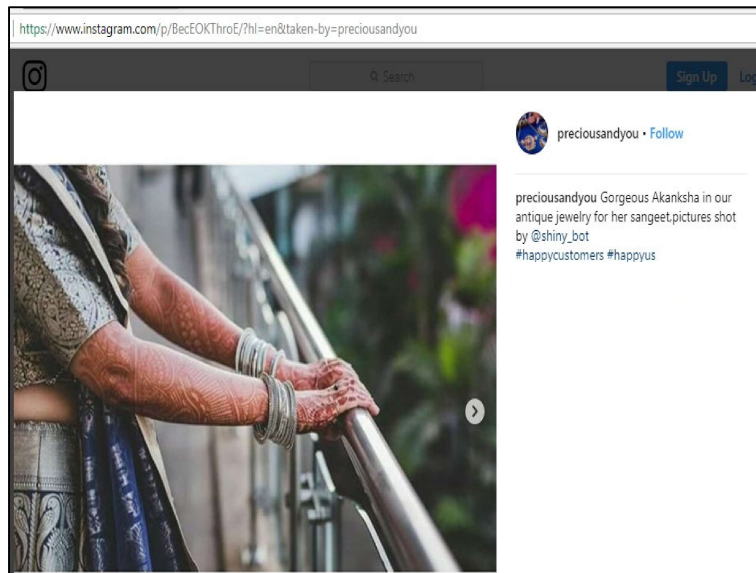
Though an *evocation*, in that, a direct picture has not been taken, and instead an AI generated image has been used by KISSABLE, this does meet the very broad personality indicia criteria that the Indian *right of publicity* interest protects, i.e. evocative portraits may also be protected against misappropriation. The woman in the AI generated advertisement, looks eerily like the former Miss World, actor, philanthropist, Aishwarya Rai, she is clearly identifiable from this taking, and substantial use of her likeness is made. This ad not only attracts a claim in the right of publicity, but a joint complaint, in *passing off* and *right of publicity* shall succeed against the brand KISSABLE, because not only has the brand *misappropriated* the likeness of Aishwarya Rai, for its economic associative value, but has also used the goodwill in her image overtly for an endorsement, thereby causing consumer confusion, given that Aishwarya Rai is one of the endorsers for French cosmetics and skincare brand, L’Oreal Paris. The brand has no defense, as any claim for parodying/lamprooning etc is clearly not feasible.

Hypothetical IV : This researcher’s image was taken

This researcher got married in December 2017, and on the Sangeet night, wore bangles purchased from an Instagram vendor @preciousandyou. After the wedding festivities, the official photographer hired by the family Sahrish Rizvi, uploaded the below photograph she had clicked, to her own Instagram profile @shiny_bot:



The vendor then, took this picture from the photographer’s profile, and re-posted it, to their own, thus:



Will this researcher have a claim against this vendor? Simplistically, no, because the first essential of a valid right of publicity claim is *identifiability* – here, unless the researcher is actively “tagged” using Instagram’s features, this photograph does not identify this researcher. The name of the customer is spelt as “Akanksha” and that is a miss-spelling of this researcher’s

first name. A full-name, if available, is not provided on this post from the vendor. Thus, this could be any Akanksha, and in this researcher's age group, there a an innumerable number of persons with this name considering its popularity in the late 1980s and early 1990s, with different spellings. Names by themselves are not distinctive. Interestingly also, the photographer was tagged, but this photo particularly, was not posted using a "reshare" app, and was posted in a time when Instagram did not have the feature for multiple users to collaborate on a post. Furthermore, since this researcher didn't post pictures of herself to her own profile/anywhere else in this attire, unless someone who was present at the event remembers, proving identifiability is a tall order.

If nonetheless, identifiability is proved, then this is an endorsement use, substantially of the potential plaintiff's image. Even though this bangle set was paid for, what was not agreed to as part of the sale transaction, was to use the image of this researcher for brand promotions. A misappropriation therefore, of this researcher's economic associative value, a non-celebrity, has been made.
