

Celebrity Persona: Can Intellectual Property Law in Indonesia Provide Adequate Protection?

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Abstract

The vast economic turnover in the showbiz industry, which consistently involves numerous celebrities in merchandising activities as a form of product and service marketing, does not always yield positive impacts for the celebrities themselves. Numerous cases involve the unauthorized use of a celebrity persona, often resulting in legal disputes. This study aims to delve deeper into the legal protection of celebrity personas, particularly regarding their use by third parties, which may cause economic and moral losses for the persona owners. Employing normative legal research methods with a statute approach and conceptual approach, this research examines the issue from the perspective of intellectual property law in Indonesia. The study concludes that the protection of celebrity personas under intellectual property rights can be accommodated within copyright law by categorizing personas into "natural persona" and "created persona," enabling their protection under Indonesia's Copyright Act.

1. Introduction

Personality Right is a form of individual ownership that inherently and automatically attaches to a person. In discussing personality rights, the author will first elaborate on

what "personality" actually entails. Personality refers to a creation by an individual that reflects their behavior, which evolves based on societal expectations.

According to Philip Kotler, personality refers to the unique psychological traits that drive consistent and enduring responses to a consumer's environment.¹ This concept is also supported by German theorist Georg Hegel's Personality Theory, which posits that "actualization of the human will requires property."² This rationale suggests that individuals have a claim to their own talents, emotions, character, and experiences. Hegel further explained that "by controlling and managing both tangible and intangible assets through intellectual property rights such as copyrights, patents, and trademarks, creators gain a degree of freedom to express their intentions in the world."³

Based on the above explanation, it is evident that an individual's personality naturally forms through work and creation, and these elements evolve into intellectual property that we possess. Hegel further asserted that intellectual property rights must be granted to those who have developed their inner attributes into creations that are inseparable from their personality as creators. As a form of respect, the personality owner should be recognized not only in economy but also moral.⁴

Personality rights, which recognise a persona as a physical and spiritual-moral being⁵ and guarantee his enjoyment of his own sense of existence, are today protected in various countries to a greater or lesser degree. but the concept of personality rights is not new. In particular classical natural law, with its notion of innate, inalienable human rights which included various rights relating to personality, forms the background to the modern concept.⁶ The concept of personality right encompasses the right of a person to control the unauthorized use of their personality attributes such as name,

¹ Philip Kotler and Kevin Lane Keller, *A Framework for Marketing Management*, Sixth edition (Boston Munich: Pearson, 2016), 94.

² Christopher S Yoo, "Rethinking Copyright and Personhood," *University of Illinois Law Review*, 2019, 1039.

³ Ibid.

⁴ Muhammad Usman Noor and Wihdah Askariyyah, "Improving Music Streaming Services Through Metadata: Case Study from Joox Indonesia," *Record and Library Journal* 7, no. 1 (June 29, 2021): 125–33, <https://doi.org/10.20473/rlj.v7i1.116>.

⁵ Johann Neethling, "Personality Rights," in *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits et al. (Edward Elgar Publishing Limited, 2023), 180–95, <https://doi.org/10.4337/9781839105609.personality.rights>.

⁶ Ibid.

image, voice, likeness, etc.⁷ Though the right includes both commercial and non-commercial aspects, each jurisdiction views the notion of right in a different way, either as a single right that covers both commercial and noncommercial aspects or else as considering both aspects as two separate rights.⁸

Personality rights refer to an individual's right to control the commercial use of their identity, including their name, photograph (image), likeness, or other identifying features.⁹ These rights are typically viewed as property rights rather than personal rights, which means they can continue to be valid after an individual's death, although this can vary depending on the jurisdiction. Consequently, any unauthorized and unethical infringement of these rights will inevitably violate publicity rights. In Indonesia, publicity rights or personality rights are not regulated in a *sui generis* manner,¹⁰ resulting in ambiguity in their application. Personality, in this context, denotes an individual who is widely recognized and acknowledged by the public. Typically, personality rights are referred to as celebrity rights.¹¹ This is due to the tendency of celebrities to attract significant public attention. This attention serves as the starting point for commercial activities. A notable and concrete example related to personality rights in Indonesia occurred in 2021 with the emergence of the group Warkopi on social media, the members of Warkopi were perceived as having physical similarities to Warkop DKI, a comedy group formed in the 1970s with key members Dono, Kasino, and Indro. Unfortunately, the presence of Sepriadi, Alfred, and Alfin—three young men in Warkopi—was met with disapproval from various parties, including Indrodjojo Kusumonegoro, also known as Indro Warkop, a member of Warkop DKI. While Indro had no objections to others adapting the Warkop DKI

⁷ Agnes Augustian, "Protection of Personality Rights in India: Issues and Challenges," *IPR Journal of Maharashtra National Law University* 1, no. 1 (2023): 44.

⁸ Ibid.

⁹ Mulyadi Alrianto Tajuddin et al., "Challenges and Implementation of Human Rights in the Personality Development of Elderly Prisoners," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 9, no. 2 (July 7, 2024): 157–74, <https://doi.org/10.30863/ajmpi.v9i2.6294>.

¹⁰ Agus Sardjono, "Sifat Hukum Hak Cipta Sebagai Kebendaan Sui Generis," *Jurnal Hukum & Pembangunan* 1, no. 2 (August 24, 2022), <https://doi.org/10.21143/TELJ.vol1.no2.1009>.

¹¹ "Protection of Celebrity Rights Under Ipr Regime in India," *Journal of Intellectual Property Rights* 29, no. 6 (2024), <https://doi.org/10.56042/jipr.v29i6.10237>.

concept, Warkopi's imitation of Dono, Kasino, and Indro's clothing and characters without permission was considered plagiarism and a violation of copyright.

Reflecting on the Warkopi vs. Warkop DKI case, the core issue revolves around imitating the attire and characters of Dono, Kasino, and Indro. According to the Copyright Law, such matters are not covered or protected under Article 40 of the Copyright Law. However, does this mean Warkopi is blameless? What is certain is that Warkopi engaged in commercial activities involving the personalities of Warkop DKI.

Locke's theory of labor asserts that individuals have the right to control and own the outcomes of their interaction with nature,¹² primarily because they have expended labor in transforming it.¹³ Locke argues that when a person applies their labor to natural resource,¹⁴ the resultant product becomes their property, as it represents their effort and industriousness. By extension, personality, which emerges from an individual's diligent effort and creative endeavor, should be regarded as their own.¹⁵

To sustain ownership, legal protection is essential. Legal protection encompasses safeguarding dignity and human rights, as well as acknowledging the fundamental rights of legal subjects based on legal provisions to prevent abuse of power. It represents a collection of rules or norms designed to protect certain matters from infringement. Concerning consumers, this means that the law protects consumer rights against situations that may lead to the non-fulfillment of these rights.¹⁶

Given these issues, the researcher intends to conduct a deeper investigation into how legal protection safeguards celebrities in maintaining ownership of their personas

¹² Mala Chatterjee, "Lockean Copyright Versus Lockean Property," *Journal of Legal Analysis* 12 (January 1, 2020): 136-82, <https://doi.org/10.1093/jla/laaa002>.

¹³ Johan Olsthoorn, "Between Starvation and Spoilage: Conceptual Foundations of Locke's Theory of Original Appropriation," *Archiv Für Geschichte Der Philosophie* 106, no. 2 (June 6, 2024): 236-66, <https://doi.org/10.1515/agph-2021-0121>.

¹⁴ Ayu Mustika Pamungkas, "Rekonsepsi Perlindungan Hukum Atas Magic Dalam Perspektif Hukum Hak Cipta Di Indonesia," *Jurnal Cakrawala Hukum* 10, no. 2 (2019): 126-36, <https://doi.org/10.26905/idjch.v10i2.3199>.

¹⁵ Shaoul Sussman, "A Tale of Sovereignty and Liber Eighty and Liberalism: The Lock Alism: The Lockean Myth of Ean Myth of Intellectual Property," *Fordham Intell. Prop. Media & Ent. L.J* XXIX, no. 4 (2019).

¹⁶ Pamungkas, "Rekonsepsi Perlindungan Hukum Atas Magic Dalam Perspektif Hukum Hak Cipta Di Indonesia."

from the perspective of intellectual property law, which will be elaborated in the following subsection.

2. Problem Statement

Personality rights are not explicitly regulated within the existing legal framework in Indonesia. Therefore, this study begins by delineating the scope of the issue into two primary questions. First, what is the urgency of providing legal protection for celebrity personas? Second, how can legal protection be afforded to celebrities in owning their personas as a form of personality rights?

3. Methods

To address the research issues, the analytical method employed is normative juridical, using a statute approach and a conceptual approach. The statute approach focuses on Law No. 28 of 2014 concerning Copyright. Meanwhile, the conceptual approach examines the concepts of intellectual property, the protection of persona rights, publicity rights, and privacy rights. The analysis technique applied is qualitative analysis, utilizing grammatical interpretation and extensive interpretation.

4. Urgency of Legal Protection and Forms of Personality Rights

4.1. Unraveling the meaning of Celebrity Persona

According to the KBBI (Indonesian Dictionary), "persona" refers to a person, individual, or mask, representing someone's face or distinctive characteristics, which are associated with their personality. The term "persona" originates from Latin, where it literally means "mask." In the context of psychology and performing arts, persona denotes the character or identity that an individual presents or projects to the outside world. In marketing and branding, it describes the image or identity crafted by a company or product to communicate with its audience. Additionally, in some contexts, persona can refer to characters in fictional stories or role-playing games.

In discussing the concept of persona, Carl Gustav Jung introduces the term within his personality theory, combining teleological and causal perspectives. According to Jung, human behavior is influenced not only by an individual's history (causality) but also by

their goals and aspirations (teleology).¹⁷ Both the individual's past and their future potentialities impact their behavior.¹⁸ This approach highlights how past experiences and future ambitions interact to shape a person's actions and psychological development.

In Jungian theory, the concept of "persona" refers to the "public personality" that an individual presents to the outside world. Jung borrowed this term from the Roman stage, where "persona" meant the mask worn by an actor. Through this mask, an actor performs a specific role in a drama, projecting their voice and identity through it. Similarly, the persona in Jungian psychology is often associated with the ego's consciousness and serves as the psycho-social identity of the individual.¹⁹ It represents the outward facade or mask that people use to interact with society and fulfill social roles, which may differ from their true, inner self.

Literally, the mask in the context of persona symbolizes how an individual presents themselves to society. Through their persona, a person can conceal aspects of their true self and display a version of themselves that is deemed acceptable by others. The persona often reflects an element of pretense, as individuals strive to present their best side or construct a specific image, much like a public relations expert hired by the ego to create a favorable impression. However, even someone who appears not to wear a mask in public still reveals parts of themselves, as not all personal aspects need or can be disclosed in social contexts.²⁰

In its evolution, a persona has become a highly valuable asset in the showbiz world. Persona now serves as a primary tool for marketing in showbiz, often surpassing the importance of the individual's skills. A celebrity's public image is closely tied to their personal presence. To address the rights of celebrities, it's essential to first define what

¹⁷ John Abraham Ziswan Suryosumunar, "Konsep Kepribadian Dalam Pemikiran Carl Gustav Jung Dan Evaluasinya Dengan Filsafat Organisme Whitehead," *Sophia Dharma: Jurnal Filsafat, Agama Hindu, Dan Masyarakat* 2, no. 1 (2019): 18–34.

¹⁸ Ahad Hadi Setiawan et al., "Persona, Shadow Dan Kepercayaan Diri Berhijab Remaja Putri Dalam Kepribadian Jung," *Bulletin of Counseling and Psychotherapy* 4, no. 2 (July 31, 2022): 428–33, <https://doi.org/10.51214/bocp.v4i2.181>.

¹⁹ Ibid.

²⁰ Maya Al-Khouja et al., "Self-Expression Can Be Authentic or Inauthentic, with Differential Outcomes for Well-Being: Development of the Authentic and Inauthentic Expression Scale (Aies)," *Journal of Research in Personality* 97 (April 2022): 104191, <https://doi.org/10.1016/j.jrp.2022.104191>.

a "celebrity" is. Celebrities hold exclusive rights to capitalize on their fame. Today, this includes actors, writers, artists, politicians, models, athletes, musicians, singers, TV personalities, prominent business figures, and reality show participants.²¹ Public perception largely dictates whether someone is deemed a celebrity. The word "celebrity" comes from the Latin 'celebritatem,' meaning 'the state of being famous'.²²

A celebrity is an individual who is renowned or popular due to their presence in the mass media or entertainment industry. They are often recognized for their achievements in specific fields such as acting, singing, dancing, sports, or even personal controversies. Celebrities frequently appear on television, in films, on the radio, in magazines, on websites, and across social media platforms. Their presence in popular culture often makes them a focal point of significant public attention and interest. Regardless of the reasons behind their fame—whether through their skills in creating work before the public—their persona undeniably contributes to the economic value in the current showbiz activities.

A clear example of how persona plays a role can be seen in the dramatic growth of the entertainment and sports industries over recent decades, which now wield significant influence on society. This shift is largely due to the fact that what were once more casual pursuits have become highly profitable ventures for both participants and investors. Stars in these fields now command extremely high salaries for roles in films, sports seasons, or music recordings.²³ Unlike the past, where celebrity was primarily limited to film actors and top athletes, today's celebrities include reality TV participants, lottery winners, and social media influencers. As public fascination with these figures increases, so does the value of products and services linked to them.

For instance, renowned football athlete Cristiano Ronaldo, due to his persona in the world of football, is able to generate approximately \$700 million through advertising

²¹ Safira Hasna, "Selebriti Dan Fandom Di Era Media Sosial: Fenomena Selebgram," *Jurnal Al-Azhar Indonesia Seri Ilmu Sosial* 3, no. 1 (2022): 1–7.

²² Sai Srinivas Reddy B, "Authorship And Ownership In Respect Of Celebrities And Cinematographic Work," *International Journal of Creative Research Thoughts (IJCRT)* 9 (2021): 779.

²³ Zeehan Fuad Attamimi, Amalina Ahmad Tajudin, and Fadhil Umar, "The Role of Music Aggregator Distribution Toward Music Performers in View of the Three Pillars of the Copyright System," *Journal of Law and Legal Reform* 5, no. 1 (January 31, 2024): 361–82, <https://doi.org/10.15294/jllr.vol5i1.2201>.

on his Instagram platform. Additionally, with an extra \$45 million from being a walking billboard through sales of Nike products and his own CR7 brand, including underwear, footwear, and perfumes, Ronaldo continues to make approximately \$91 million each year.²⁴ The worth of a name is also highlighted by the transfer of footballer Zinedine Zidane. When Real Madrid signed Zidane, they invested \$10 million for 90% of the rights to his name and image. In his first year with the club, they earned \$26 million exclusively from merchandise sales bearing Zidane's name.²⁵

The aforementioned case illustrates the critical significance of persona rights, particularly for celebrities. Given the substantial economic value attached to their personas, celebrities naturally seek to protect their personal value to capitalize on the economic potential. This motivation is not solely driven by greed but also by the brevity and uncertainty inherent in a celebrity's career. The protection sought aims not only to preserve the economic benefits derived from their persona but also to ensure that their reputation remains intact and is not misused. When the public's interest in or respect for the name, face, or identity associated with the persona diminishes, the opportunity to profit from it diminishes. Additionally, it is crucial to consider the evolving market demands and the emergence of new characters, which necessitates ongoing vigilance in managing and protecting one's persona. Given the advancements in the global business world, this should also influence regulatory measures for protecting entertainment-related cases, particularly in Indonesia. The law should ideally serve as a safe haven for all individuals, including celebrities, in safeguarding their personality rights.

Regulations regarding privacy rights and publicity, or merchandising rights for celebrities, remain far from perfect in Indonesia. While regulations in different foreign countries have implemented methods to safeguard personality rights, there is still a lack of uniformity in the laws, which results in inadequate protection for these rights.

²⁴ Farahdilla Puspa, "Dari Penghasilan Iklan Di Instagram, Ronaldo Bisa Jadi Olahragawan Terkaya," *Kompas*, 2020, <https://www.kompas.com/sports/read/2020/04/10/16200068/dari-penghasilan-iklan-di-instagram-ronaldo-bisa-jadi-olahragawan-terkaya>.

²⁵ Antonio Williams and Zack Paul Pedersen, "Athlete Apparel: The Impact of Team Brand Awareness and Apparel Brand Awareness on Athletes' Brands, Logos, and Merchandise," *Sport, Business and Management: An International Journal* 13, no. 5 (September 15, 2023): 582–600, <https://doi.org/10.1108/SBM-06-2022-0059>.

This poses a significant threat to creators and performers. The rapid development of technology, particularly with advancements such as Artificial Intelligence (AI), further exacerbates this issue. AI and other emerging technologies can now clone voices and likenesses with remarkable precision, even replicating figures who have passed away. Additionally, manipulated images of celebrities being used on inappropriate websites can lead to severe defamation. These technological threats highlight the urgent need for comprehensive and effective legal frameworks to safeguard personality rights in the digital age.

In essence, personality rights can be transferred and licensed for commercialization purposes. The public recognition of a celebrity's persona holds substantial economic value, making it a key factor in generating financial benefits. Recognizing personality rights as a form of "property" or asset could also provide tax advantages for the state, equating them with intellectual property rights (IPR). This could create economic incentives for individuals and celebrities, ensuring they receive fair compensation for the commercial use of their fame. Moreover, personality rights should be treated as property that can be inherited, allowing descendants to benefit from the established popularity of their predecessors. Currently, the protection of personality rights in Indonesia is limited to personal data protection and is insufficient for covering the broader scope of personality rights.²⁶ Therefore, there is a need for more comprehensive legal protection that addresses both the rights and obligations associated with personality rights.

4.2. The Urgency of Legal Protection for Celebrity Personas

As previously discussed, it is crucial for celebrities to protect their persona rights. Given the rapid development of the business world, which is closely tied to the entertainment industry, regulatory frameworks should also address the issues arising within the entertainment sector, particularly in Indonesia. The law should serve as a protective space not only for society at large but also for celebrities who seek to defend

²⁶ Law No. 27 of 2022 Article 1(1) describe regarding Personal Data Protection, personal data is classified into two forms: Specific personal data, which includes health data and information, biometric data, genetic data, criminal records, child data, personal financial data, and/or other data in accordance with the provisions of legislation; and General personal data, which includes full name, gender, nationality, religion, marital status, and/or personal data combined to identify an individual.

their persona rights. This underscores the importance and necessity of legal protection for celebrity personas.

When discussing the importance of legal protection for celebrity personas, regulations regarding privacy rights, publicity rights, and merchandising rights for celebrities in Indonesia remain far from adequate. While various foreign jurisdictions have adopted approaches to protect persona rights, there is still no uniformity in regulations, leaving persona rights unprotected. This gap in legal protection poses a significant threat to creators. The rapid development of technology further exacerbates this issue, as it allows for the easy exploitation of persona rights. A tangible example of such a threat is the emergence of Artificial Intelligence (AI) and other advanced technologies capable of perfectly cloning a person's voice and appearance, even for deceased individuals. Another equally harmful threat is the manipulation of celebrity images on inappropriate websites, leading to defamation and damage to their reputation.²⁷

Essentially, persona rights can be transferred and licensed for the purpose of commercialization. In this context, publicity can provide substantial benefits, as a well-known individual's persona carries a significant public image, which is key to its economic value. Recognizing persona rights as a form of "property" or an asset will naturally relate to tax benefits for the state, positioning persona rights similarly to intellectual property rights (IPR). This recognition would create economic incentives for the public and celebrities/public figures, allowing them to receive fair compensation for the commercialization of their fame. Moreover, persona rights should be treated as property that can be inherited. The descendants of celebrities or public figures could benefit from the popularity generated by their predecessors.

Currently, the protection of persona rights in Indonesia does not extend to economic rights; it is limited to safeguarding personal data from dissemination. This level of protection is insufficient for comprehensive persona rights protection. Therefore, a

²⁷ María Fernanda Sánchez Díaz, "Generative Artificial Intelligence and the Challenges in the Protection of Personal Data," *Estudios En Derecho a La Información*, June 13, 2024, 179-205, <https://doi.org/10.22201/ijj.25940082e.2024.18.18852>.

more complex legal framework is necessary to regulate the rights and obligations associated with persona rights.

5. Legal Protection for Celebrities in Owning Their Persona as a Form of Personality Right

5.1. Form and Existence of Personality Rights

Personality, or "kepribadian" in Indonesian, refers to the overall pattern of reactions and interactions of an individual with others.²⁸ According to psychology, Gordon Allport defines personality as an organization of various psychological and physical aspects that function as both a structure and a process. In other words, personality is something that can evolve over time.²⁹ Allport explicitly states that personality develops in a systematic manner and undergoes changes. In the context of personality rights, personality is understood as the way an individual is recognized by others. It is created by the individual to shape an image and behavior that is expected or desired and is accepted by society. Meanwhile, Philip Kotler defines personality as inherent psychological traits that differentiate individuals from one another and result in relatively consistent and enduring responses to environmental stimuli.³⁰ This statement is also supported by the Personality Theory developed theorist Georg Hegel, who argued that the "actualization of the human will requires property."³¹

This argument shows that individuals have rights over their talents, feelings, character, and experiences. Hegel further explains that by exercising control over both tangible and intangible assets through intellectual property rights like copyrights, patents, and trademarks, creators can manifest their ideas and enjoy a level of freedom in defining their presence in the world.³² The Personality Theory posits that an individual's personality naturally forms through their work and creation, and both elements evolve

²⁸ Muhammad Rizal Rifa'i and Noor Hafidhoh, "Pengembangan Kepribadian Anak Melalui Pendidikan Karakter Di Madrasah Ibtidaiyah," *Awwaliyah: Jurnal Pendidikan Guru Madrasah Ibtidaiyah* 5, no. 1 (June 30, 2022): 1–7, <https://doi.org/10.58518/awwaliyah.v5i1.920>.

²⁹ Ni Made Widisanti S Khairulsyah and Tetty Yukesti, "The Effect Of Changes In The Main Character's Personality Towards Social Setting In Lois Lowry's *The Giver*," *Journal Albion: Journal of English Literature, Language, and Culture* 3, no. 1 (2021).

³⁰ Kotler and Keller, *A Framework for Marketing Management*.

³¹ Yoo, "Rethinking Copyright and Personhood."

³² Ibid.

and become part of their intellectual property.³³ According to Hegel, intellectual property rights must be granted to those who have developed what exists within themselves to manifest a creation.³⁴ This creation is inseparable from its creator's personality, and, as a form of respect for their dignity and worth, the creator should receive acknowledgment. In essence, Hegel asserts that intellectual property, as a result of intellectual labor, represents a manifestation of an individual's existence. Consequently, such work should not only receive economic recognition but also moral acknowledgment.

Every personality uniquely contributes to society based on each individual's distinctive talents. This idea aligns with the Hegelian Metaphysical Concept of Property, which suggests that a person's property serves as an extension of their personality. Likewise, a person's contributions to society can also be seen as an extension of their personality. This concept underscores that personal attributes and creative efforts are intrinsically linked to one's identity and should be recognized and valued as such.³⁵

One notable example illustrating that personality can be considered a form of property is the case of *Tolley vs JS Fry & Sons Ltd*. JS Fry & Sons Ltd. advertised their chocolate brand "Fry's Chocolate Creams" using a cartoon image that depicted a well-known amateur golfer named Tolley, and the advertisement also included his name. The persona of the golfer was exploited to market the chocolate, without obtaining permission or providing compensation to Tolley. Consequently, this case is often cited as an early example of "personality appropriation."³⁶

In contemporary times, the law concerning the protection of personality rights has also shown significant development. In various countries, the protection of personality

³³ Yenny Eta Widyanti, "The Urgency of Sui Generis Protection of Communal Intellectual Property in Indonesia: A Comparative Study in Philippines," *JURISDICTIONE* 13, no. 1 (July 27, 2022): 1-23, <https://doi.org/10.18860/j.v13i1.16467>.

³⁴ Reijo Miettinen, "Hegel's Political and Social Theory: Ethical Life (Sittlichkeit) as a Historical-Institutional Context of Human Development," *Mind, Culture, and Activity* 27, no. 4 (October 1, 2020): 360-72, <https://doi.org/10.1080/10749039.2020.1725059>.

³⁵ Arindam Datta, "Celebrity Rights: A Legal Overview," 2022, <https://www.goforthelaw.com/articles/fromlawstu/article31.htm>.

³⁶ Jiming Yi and Qiong Zhou, "On Property with Personality Interests," *Frontiers of Law in China* 3, no. 4 (December 2008): 556-82, <https://doi.org/10.1007/s11463-008-0027-3>.

rights includes different terminologies and scopes. There are two types of personality rights, namely the right of privacy and the right of publicity.

1) Rights of Privacy

According to the KBBI, privacy is defined as personal freedom or latitude. In their influential 1890 article published in the Harvard Law Review, Samuel D. Warren and Louis Brandeis introduced the concept of "the right to privacy." This essay is regarded as one of the most impactful in U.S. legal history and is recognized as the first U.S. publication advocating for privacy rights protection. Warren and Brandeis argued that the basic notion of personal freedom should include the right of every individual "to be let alone".³⁷ They introduced the idea that individuals must receive comprehensive protection both personally and regarding their property.³⁸ This right is related to human spiritual needs that must be safeguarded by the state, and it includes the need to respect personal feelings and thoughts, as well as the right to enjoy life without undue interference.

Initially, Warren and Brandeis reviewed defamation and libel laws to assess whether these legal provisions sufficiently protected individual privacy. They found that existing regulations were inadequate for safeguarding privacy, as they primarily addressed reputational harm.³⁹ In other words, defamation laws, regardless of their scope or applicability to publication, require individuals to experience direct harm in their interactions with others. Warren and Brandeis adds "Even if an act is completely wanton or malicious and causes significant mental distress to someone, as long as the act itself is legally permissible, the suffering it causes is considered *damnum absque injuria* (harm without legal injury).⁴⁰ Which means that Regardless of how severe the mental impact of someone else's actions may be, even if those actions are entirely

³⁷ Gianna Bruno, "The Right to Privacy: The Need for an Ever-Evolving Legal Movement," *Brandeis University Law Journal* 9, no. 1 (October 1, 2021), <https://doi.org/10.26812/bulj.v9i1.556>.

³⁸ Anthony G. Volini, "The Right to Data Privacy: Revisiting Warren & Brandeis," *Northwestern Journal of Technology and Intellectual Property* 21, no. 1 (2023).

³⁹ *Ibid.*

⁴⁰ Any loss or harm that stems from something other than the act itself does not constitute a wrongful act and does not give rise to any legal action.

mischievous or malicious, if the actions are legal, the resulting suffering is considered *damnum absque injuria*.

In addition to examining privacy protection through defamation laws, Warren and Brandeis also explored whether intellectual property rights (IPR) principles and doctrines adequately safeguarded individual privacy. They concluded that The protection granted to ideas, sentiments, and emotions conveyed through written or artistic media, as long as it prevents their publication, is simply an illustration of enforcing the broader right of individuals to privacy.

Warren and Brandeis then explored the origin of what they called the "right to be let alone." They explained that the right to property served as a basis for the right to prevent publication. However, at that time, property rights only protected the creator's rights to any profits derived from publication (the dissemination of works). Property law at that time had not yet recognized the notion that there could be value in preventing publication related to property rights.

One of the notable cases related to privacy issues is *Cohen v. Herbal Concepts, Inc.* The plaintiff and her daughter's images were used by the cosmetic company Herbal Concepts Inc. without their permission. The defendant claimed that neither individual could be identified in the photograph. However, the court accepted the testimony of the plaintiff's husband and granted damages to the plaintiff, recognizing her right to privacy.⁴¹

Another case related to privacy rights is *Barber v. Times Inc.* In this case, a photographer from Times Magazine took photos of Dorothy Barber during her childbirth. Barber subsequently filed a lawsuit for invasion of privacy, alleging that the photographer had unlawfully entered the hospital room where she was giving birth and forced his way in to take the photographs. Barber sued Times for this conduct and won a judgment of \$3,000. The court's decision was based on the understanding that: "Although the media may report private matters accurately, they can still be held liable for damages in some cases. While defamation lawsuits may fail if the media reports the

⁴¹ Danielle Keats Citron and Daniel J Solove, "Privacy Harms," *Boston University Law Review* 102, no. 3 (2022): 793–863.

truth, the media might still face legal action for invasion of privacy based on the same facts. In these instances, the truth can sometimes cause harm." It can thus be concluded that an individual's right to feel comfortable in their life, protecting themselves from the exploitation of their personality by others, can be safeguarded under the right to privacy.

The section highlights the evolution of privacy rights, particularly through the influential work of Warren and Brandeis, who introduced the "right to be let alone" in 1890. They argued that privacy encompasses not only personal freedom but also protection of one's property and emotions. Their analysis critiqued existing defamation laws, which required demonstrable harm for legal recourse, and intellectual property laws, which only protected profit-driven rights. Two key cases, *Cohen v. Herbal Concepts* and *Barber v. Times Inc.*, demonstrate how the right to privacy has been applied in legal contexts, showing that even legally permissible actions can be harmful if they invade personal privacy. These cases reinforce the notion that individuals have a right to protect their personalities from unauthorized exploitation or exposure.

2) Right of Publicity

The Right of Publicity is a legal right intended to safeguard a celebrity's name and likeness from being used without authorization or approval for commercial purposes. J. Thomas McCarthy explains that *"The right of publicity is neither a type of trademark, a form of copyright, nor merely another privacy right. While it shares some similarities with all three, it is distinct from each of them."*⁴²

Judge Jerome N. Frank of the U.S. federal appellate court differentiated the "right of publicity" from the "right of privacy".⁴³ The right to privacy is considered a personal right, typically included under actions for misappropriation, which is primarily designed to protect an individual's personality rights from emotional distress caused

⁴² Jennifer E. Rothman, "Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity and Preemption," *Harvard Law Review* 135, no. 5 (2022): 1292.

⁴³ John R. Vile, "Right to Publicity" (Free Speech Center: At Middle Tennessee State University, 2023), <https://firstamendment.mtsu.edu/article/right-of-publicity/>.

by others. Alternatively, the right of publicity is acknowledged as a property right, primarily aimed at protecting the commercial value of an individual's identity.

This right is also commonly referred to as a "commercial right," which allows for the economic exploitation of the value of a person's name or fame. To claim this right, it must be established that popularity or fame is recognized as a "commodity".⁴⁴ Therefore, if someone uses a celebrity's likeness to promote a product or service without authorization, it is considered an "unfair trade practice, misappropriation of intellectual property, or an act of passing off." This right is closely linked to copyright.

In the famous case of *Midler v. Ford Motor Co. & Others*, an advertising company sought to use a song by Bette Midler in a Ford car commercial. Although the rights to the song itself were available, Midler declined to grant permission for the use of her version.⁴⁵ Subsequently, the agency contacted Ula Hedwig, a former backup singer for Midler, and requested that Ula sing in a manner that closely resembled Midler's vocal style on the song in question. As a result, Midler filed a lawsuit against the advertisement. The defendants argued that they had not violated the Civil Code since they did not use Midler's "name, voice, signature, photograph, or likeness," but rather the voice of Ula Hedwig. However, the court ruled that the right of publicity for a living person is also considered a form of property. The court further stated that the right of publicity, under common law, is protected from acts of "identity misappropriation." The court concluded that by using a voice that closely resembled Midler's, the defendants were clearly seeking a commercial association with her identity. Therefore, the right of publicity provides celebrities and other public figures with exclusive control over the commercial use of their name, likeness, or other elements of their persona.

The Right of Publicity is a legal concept designed to protect a celebrity's name, likeness, or identity from unauthorized commercial use. It is distinct from other intellectual property rights like copyright or trademark, as explained by J. Thomas McCarthy. While

⁴⁴ Emma Perot, "Image Rights in Context," *Journal of Intellectual Property Law & Practice* 15, no. 3 (March 1, 2020): 147-48, <https://doi.org/10.1093/jiplp/jpaa030>.

⁴⁵ Nkem Itanyi and Christian Aniwaku, "Seeking Protection for Use of Images in Commercial Practices in Nigeria," in *Nigerian Intellectual Property Law*, by Ayoyemi Lawal-Arowolo and Kunle Ola, 1st ed. (London: Routledge, 2022), 227-39, <https://doi.org/10.4324/9781003250883-19>.

privacy rights are more personal and protect against emotional harm, the right of publicity focuses on protecting the economic value of a person's fame or identity, treating it as a commercial right or property.

5.2. Legal Protection for Celebrities in the Ownership of Persona as a Personality Right

The protection of persona, in its development, is most relevantly covered under the realm of intellectual property protection. In the fields of law and business, understanding both persona rights and intellectual property is crucial for safeguarding and capitalizing on valuable assets. Although these concepts are distinct, they are interrelated and frequently interact within the context of legal protection.

Persona rights refer to an individual's right to control the use of their name, image, and other attributes of their identity. This right protects individuals from unauthorized exploitation of their persona, whether for commercial purposes or otherwise. In this context, a celebrity possesses persona rights that enable them to control how their image or name is used in advertisements or products. Without the celebrity's consent, others cannot use their identity for commercial purposes. Intellectual Property, on the other hand, encompasses a range of legal rights that protect the results of creativity and innovation, including patents, copyrights, trademarks, and trade secrets. Intellectual Property allows creators to manage and derive economic value from their works. Herein lies the intersection of persona rights and intellectual property.⁴⁶

For example, when a celebrity creates artwork or a product closely associated with their identity, persona rights and intellectual property can interact. A celebrity may use their name as part of their copyright over their work. In such cases, copyright protects their creative work, while persona rights protect their name and image from unauthorized use. In accordance with its criteria, a celebrity's persona can be classified as personal characteristics such as name, physical features, appearance, voice, and distinguishing traits that make the individual recognizable. The branches of intellectual

⁴⁶ Lu Sudirman et al., "Beyond Likes and Follows: Navigating Consumer Trust and IPR-Related Risks in Influencer Marketing," *Jurisdictie: Jurnal Hukum Dan Syariah* 15, no. 2 (January 3, 2025): 245–73, <https://doi.org/10.18860/j.v15i2.28054>.

property law that can potentially protect these persona characteristics is copyright law.⁴⁷

Copyright is a branch of Intellectual Property Rights (IPR) that focuses on the protection of works in the fields of art, literature, and knowledge.⁴⁸ In Indonesia, copyright is regulated under Law No. 28 of 2014 on Copyright (hereinafter referred to as the Copyright Law, or CL, in this study). According to the definition in the CL, Copyright is the exclusive right of the creator that automatically arises based on the declarative principle once the work is fixed in a tangible form. This means that protection cannot be enforced if the work is not manifested in a tangible medium, such as a book, song, music, or film. This is stipulated in Article 40, paragraph (1) of the Copyright Law⁴⁹ stipulates the types of works that are protected by copyright; however, persona itself is not included among the works protected by copyright.

Law No. 28 of 2014 on Copyright defines Copyright as the exclusive right of the creator and/or copyright holder. The law accommodates this nature by providing automatic protection upon its creation.⁵⁰ According to the researcher, for a persona to be eligible for copyright protection, there are several requirements that must be met :

1) Natural Persona

A Natural Persona refers to the inherent persona of a celebrity. This persona is often evident in the authentic characteristics of a celebrity, such as their voice, manner of

⁴⁷ Arif Rahman et al., "Constitutional Transition in a Democratic State: A Critical View of the Omnibus Law Establishing Employment Copyright Law," *Journal of Law and Legal Reform* 5, no. 4 (December 15, 2024), <https://doi.org/10.15294/jllr.v5i4.1552>.

⁴⁸ Sudirman et al., "Beyond Likes and Follows."

⁴⁹ Books, antonyms, published written works, and all other written works such as speeches, educational and scientific aids; songs and/or music with or without lyrics; drama, musical drama, dance, choreography, puppetry, and pantomime; visual arts in all forms such as painting, drawing, carving, calligraphy, sculpture, or collage; applied arts; architecture; maps; batik or other motif art; photography; portraits; cinematographic works; translations, interpretations, adaptations, compilations, databases, arrangements, modifications, and other works resulting from transformation; translations, adaptations, arrangements, transformations, or modifications of traditional cultural expressions; compilations of creations or data, whether in a computer-readable format or other media; compilations of traditional cultural expressions as long as the compilation is an original work; video games; and computer programs.

⁵⁰ Diana Silfiani, "Indonesian Legal Protection for Song Commercialization and Music Copyrights in Digital Platforms," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 9, no. 2 (2022): 152–69, <https://doi.org/10.22304/pjih.v9n2.a1>.

speaking, style of dress, facial features, signature makeup, even their walk, and how they conduct themselves in public. For instance, when we think of Elvis Presley, we can easily picture him as a world-famous rock and pop singer, known for his flamboyant attire, flared pants, short haircut accompanied by sideburns, and his distinctive singing style with a deep voice. Similarly, we can vividly describe Michael Jackson, the King of Pop, and other celebrity personas. The question then arises: how can copyright protect a natural persona.

According to the researcher, if a persona emerges naturally from the characteristics of a celebrity, it can be protected by attaching that persona to the primary work as regulated under Article 40 of the Copyright Law (UUHC). This is because a natural persona cannot be classified as a standalone object eligible for protection; the persona must be attached to an object that is classified under the UUHC. If protected individually, a persona would only be considered an idea, and ideas are not objects of copyright protection, as the primary requirement for copyright protection is that it must be expressed in a tangible form.

A celebrity's natural persona can be attached to primary works such as Portraits, Paintings, Drawings, or Sculptures that depict the distinctive body features, face, or appearance of the persona. If the persona includes unique voice characteristics and/or distinctive speech patterns, the attachment of the work can be achieved through the creation of a song that incorporates the voice of the persona owner. However, it is important to understand that there are limitations to copyright protection for personas.

In the landmark legal case concerning persona under copyright law, *Sim v. Hainz & Co. Ltd.*, there was limited clarity regarding the aspects of a celebrity's rights that can be protected under U.S. copyright regulations.⁵¹ The court ruled that copyright does not extend to the voice, likeness, or other forms of identification of a persona. Copyright grants exclusive, albeit limited, rights, allowing celebrities to authorize reproduction, creation of derivative works, sale, or exhibition. To claim copyright infringement, one

⁵¹ Diksha Arora, "Celebrity Endorsements – the Interplay between Intellectual Property Law and the Consumer Protection Act, 2019," *Journal of Intellectual Property Rights* 25, no. 6 (2020): 173–79.

must establish ownership of the copyright in the image and prove that the image was copied. In the context of celebrity photographs, this involves showing that the photograph is protected by copyright and that an unauthorized party has used or reproduced it without permission, the major issue faced by celebrities is the lack of ownership over the exploited images. In cases involving celebrity authors, any adaptation of their work, if original, remains protected by copyright law.

2) Created Persona

Created Persona refers to a persona intentionally crafted by an individual or celebrity, usually to support their career image. According to the researcher, the copyright protection for created personas differs from that of natural personas. Typically, a created persona originates from a primary work. Created personas can be found in famous film characters, such as 'The Girl' portrayed by Marilyn Monroe in the film *The Seven Year Itch*, which embodies the character of a beautiful and graceful woman, dressed in a white dress with blonde hair. Another well-known character is James Bond from the Bond series, depicting a secret agent characterized by his black suit and pistol. In Indonesia, a notable character is *Dono Kasino Indro*, also known as *WARKOP DKI*. In the film *CHIPS*, *WARKOP DKI* is depicted as a police officer, wearing a brown uniform complete with a helmet and baton, which serve as accessories to the *WARKOP DKI* persona.

Under the Copyright Law (UUHC), there is no specific protection for created personas. Protection for such personas can only be implemented if there is an associated primary work. The primary work referred to here includes films that generate characters within their stories, TV shows, written works such as novels and comics, or paintings. In the United States, characters arising from primary works are referred to as fictional characters, and these fictional works can be protected by copyright, provided certain criteria are met. Several courts in the United States have developed tests or standards to delineate the extent of protection for fictional characters, specifically employing standards such as the Character Delineation Test and the Story Being Told Test.⁵²

⁵² Character Delineation states that only fictional characters that have been sufficiently developed, depicted, or portrayed by their creator to become a unique character, distinct from others, are protected.

In Indonesian Copyright Law (UUHC), the protection of fictional characters is not explicitly mentioned, and there are no judicial decisions available as references. According to the researcher, protection for fictional characters associated with personas can be afforded through moral rights. Moral rights are one of the exclusive rights inherent in copyright, as stipulated in Article 5 of the UUHC. However, the limitation is that moral rights protection can only be applied if the celebrity is a character in the primary work. If a celebrity portrays a character in a film, they automatically acquire moral rights under Related Rights. According to Article 1, paragraph (5) of the UUHC, Related Rights are rights related to copyright that grant exclusive rights to performers, phonogram producers, or broadcasting organizations.

Related Rights, also known as 'Neighbouring Rights,' refer to a set of rights granted to parties other than the creators of original works who are involved in the distribution, broadcasting, or exploitation of these works.⁵³ These rights generally include performance rights, sound reproduction rights, publication rights, and other related rights granted to performers, musicians, recording producers, and collective organizations such as record companies.⁵⁴ These rights are termed 'neighbouring' because they pertain to works that are adjacent to the original copyrighted works, providing legal protection similar to copyright but for those involved in the distribution and exploitation of the works.

In summary, the persona of a character portrayed by a performer or actor can be protected through moral rights under Related Rights. Article 22, letter (b) of the UUHC stipulates that performers have moral rights to prevent any distortion, mutilation, or modification of their creation that could harm their honor or reputation, unless otherwise agreed. In this context, if a persona derived from a celebrity's character, as portrayed in a performance, film, or TV show, is used unlawfully by another party and

The Story Being Told Test explains that a fictional character eligible for protection must be central to the story and not merely a means of conveying the narrative. Michael C. Donaldson, "Inside, Caitlin E. Oh, Inside Out, Upside Down : Circuit Confusion Over Character Copyrightability," *Emory Law Journal* 72, no. 3 (2023).

⁵³ Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 3rd ed. (Oxford University Press, 2022), <https://doi.org/10.1093/oso/9780198801986.001.0001>.

⁵⁴ Murniatun and Fokky Fuad, "Neighboring Rights Dalam Sengketa Penyiaran (Free to Air) Studi Komparasi Hukum Indonesia Dan Korea Selatan," *UNES Law Review* 6, no. 3 (2024): 8570.

results in harm to the celebrity's image, it can be considered a violation of the celebrity's moral rights as a performer. For example, the case of WARKOP DKI vs. Warkopi illustrates the application of moral rights protection. As noted, the character of WARKOP DKI is a persona developed through film, ultimately becoming associated with the performing celebrity. This character was created in detail through the efforts of the celebrity, bringing the story to life. Without the well-developed character, a performance might lose its essence and significantly diminish its entertainment value.

In addition to the UUHC, moral rights for performers are also regulated under TRIPS. Article 14(1) of TRIPS mandates that performers be granted the 'right to prevent' certain actions, including the recording of their performances on phonograms, the reproduction of such recordings, and the broadcasting of their live performances. According to Article 14(5),⁵⁵ the term of protection can be extended from 20 years to 50 years. Unlike other intellectual property agreements, TRIPS features a robust enforcement mechanism, and Member States can be held accountable through the WTO dispute resolution mechanism.⁵⁶

Protecting the rights of performers, including both moral and economic rights, is of utmost importance.⁵⁷ Moral rights of performers are distinct from economic rights. Even after the transfer of related rights (neighbouring rights) concerning live or recorded audiovisual performances, performers retain the right to claim recognition as the performer, unless such recognition is removed as part of the performance's presentation. Additionally, they have the right to object to any distortion, mutilation, or other modifications of the performance that could harm their reputation, considering the nature of the audiovisual recording.⁵⁸

⁵⁵ Marion Motari et al., "The Role of Intellectual Property Rights on Access to Medicines in the Who African Region: 25 Years After the Trips Agreement," *BMC Public Health* 21, no. 1 (December 2021): 490, <https://doi.org/10.1186/s12889-021-10374-y>.

⁵⁶ Hari Sutra Disemadi, "Data Ownership in Regulating Big Data in Indonesia Through the Perspective of Intellectual Property," *JURISDICTIE* 13, no. 2 (January 30, 2023): 188-209, <https://doi.org/10.18860/j.v13i2.17384>.

⁵⁷ Jessica C Lai, "The Development of Performers' Rights in New Zealand: Lessons for the Asian Pacific Region," in *Making Copyright Work for the Asian Pacific Making Copyright Work for the Asian Pacific*, ed. Susan Corbett (Australia: ANU Press, 2018), 257-91.

⁵⁸ Yulia Yulia, Zinatul Ashiqin Zainol, and Fatahillah F, "Protection of Performers' Rights in Indonesian Copyright Law: Copyrighted Works Uploaded to Youtube," *Sriwijaya Law Review* 7, no. 2 (July 31, 2023): 300, <https://doi.org/10.28946/slrev.Vol7.Iss2.1092.pp300-317>.

A natural persona refers to the inherent traits of a celebrity, including their appearance, voice, and public behavior. Copyright protection for a natural persona is limited because it cannot be protected as a standalone entity; instead, it must be attached to a tangible work like portraits or recordings. Legal cases such as *Sim v. Hainz & Co. Ltd.* demonstrate that copyright does not extend to a celebrity's voice or likeness alone, but rather to the specific expression captured in a work. This means that while a photograph or recording of a celebrity can be protected, the mere idea of their persona cannot.

A created persona is an intentionally developed character, often to enhance a celebrity's public image. Such personas are typically tied to primary works like films or TV shows. In the U.S., fictional characters can be protected by copyright if they meet certain criteria. In Indonesia, while fictional characters are not explicitly mentioned in copyright law (UUHC), protection can be granted through moral rights under Related Rights. These rights prevent unauthorized alterations that could harm a performer's reputation. Additionally, international agreements like TRIPS offer further protection, including the extension of protection terms and robust enforcement mechanisms.

Overall on researcher perspective, while natural personas have limited direct copyright protection, created personas can be protected if they are part of a copyrighted work and are subject to moral rights that safeguard the integrity of the portrayal.

6. Conclusion

Based on the discussion outlined above, it can be concluded that the urgency of legal protection for celebrity personas arises from the desire of celebrities to protect their personal value, enabling them to obtain associated economic value, and ensuring that the reputation of their persona is not damaged or misused. In relation to the form of legal protection for celebrities in owning their persona as a form of personality rights, it is categorized under Intellectual Property Rights (IPR) in the form of Copyright. This is because copyright protects the creative works of a celebrity, while persona rights preserve the name and image of the celebrity from unauthorized use. According to the criteria, a celebrity's persona can be classified as personal characteristics such as their

name, physical features, stature, voice, and distinctive traits that make the public recognize the celebrity's identity. Copyright is automatically conferred to the owner of the persona (moral rights). In addition to possessing moral rights, a celebrity also gains economic rights when their persona generates profit. In this context, it is important to understand that within copyright, persona must be distinguished between natural persona and created persona, and this persona should be embedded within the primary creations protected under the Copyright Law (UUHC).

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