

## REACH FOR GOLD: SPORTS AND INTELLECTUAL PROPERTY RIGHTS

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### I. INTRODUCTION

Every premier league match witnesses a wave of fans wearing their favourite team merchandise. Amongst others, this fan base is an integral part of the global sports and gaming ecosystem, which accounts for over USD Three Hundred Billion- ten times that of the Indian GDP. Brands such as Nike, Adidas, and Nintendo make into the list of world's top 100 brands, churning a cumulative brand value of around USD Forty-Six Billion.<sup>1</sup> It would be worth noting that in 2017, the US National Football League (NFL) had generated revenue of around USD Fourteen Billion, a significant part of which accounted from commercializing their intellectual property rights. Quite apparently, the sports and gaming ecosystem grants immense opportunity for creation and innovations, which are leveraged for humungous commercial and personal gains. Intellectual Property Rights, in essence, are the real gold in the sports and gaming domain.

This article provides a bird's eye-view of the aspects which create intellectual property rights in sports and gaming and opportunities for stakeholders from these valuable exclusive rights.

### II. CREATION OF IPR IN SPORTS

Broadly, the intellectual property rights in sports and gaming businesses are mined from 3 P's – Player, Participation and Performance. During any sports or gaming event, several parties are engaged, who in turn are creators or exploiters of the resulting proprietary rights. To understand this lifecycle, it would be imperative to identify the intangible properties. Amongst others, following are certain exclusive and proprietary rights created and developed in the sports and gaming domain.

#### A. Branding and Personality Rights:

The name and logos of the league and the event, team and player's name and even distinctive acronyms and jersey numbers develop into and are treated as invaluable brands and trademarks. Football clubs such as Liverpool, Chelsea and Arsenal have registered their club names and famous indicia as trademarks, to assert the exclusivity of the said names and brands.

Players and athletes often function as brands and influencers. From common personal names, signatures and initials, to personal beliefs and entertaining antics,<sup>2</sup> players and

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<sup>1</sup> Best Global Brands 2018 Rankings, INTERBRAND, <https://www.interbrand.com/best-brands/best-global-brands/2018/ranking/>.

<sup>2</sup> Usain Bolts' Lightning Bolt is a registered trademark in several jurisdictions. The Indian multi-class

trademark application bearing number 2761230 for the mark  stands opposed.

athletes use several indicia as trademarks. The brand value is subject to their career and performance, which more often than not depends on the organizers, sponsors and managers. It is therefore quintessential for players and athletes to identify their intellectual property rights at the earliest stage and strategize their protection and enforcement. Roger Federer faced a volley by the leading sportswear brand, Nike, which

has refused to assign the famous  logo to the master of Central Court. This deuce may not have seen light of the day in case Federer had strategized his IPRs well and, consequently, he had negotiated favourable contractual terms with the sportswear giant. Similarly, Chelsea owns trademark rights for the personal name of legendary Team Manager, José Mourinho, who was appointed as the Manager of a rival team, Tottenham in November 2019. The club owns the trademark since 2006 and is part of a wide variety of merchandises, including teddy bears, aftershave, football boots and even computer games. Reports suggest that in 2016, Chelsea had sought a multi-million-pound settlement with Manchester United for permitting use of its trademark, José Mourinho.

It is heartening to see that sportsmen and athletes including Sachin Tendulkar, Novak Djokovic, Usain Bolt, Cristiano Ronaldo et al. have obtained trademark registration for their personal names and popular indicia, in respect to inter alia sportswear, shoes, lifestyle products, hotels, and hospitality. Players also utilize their goodwill and notoriety to help other businesses as brand ambassadors and influencers and create co-owned brands. In order to avoid passing off or dilution of their brand value, the players and athletes should sign on carefully worded marketing contracts. The player's personality is also commercialized and protected under the ambit of publicity rights. Although Gautam Gambhir lost his case against a namesake restaurant owner, the judgment<sup>3</sup> is a step towards the development of a jurisprudence of publicity rights in India. What also emerges from the said judgment is that unlike as in trademark infringement or even passing off, where even a "likelihood of confusion" is sufficient to give rise to legible cause of action, violation of publicity rights mandates substantial proof of impersonation or deception.

To the extent that a photograph of a player's performance or his/ her iconic style, forms prominent part of the logos,<sup>4</sup> the intellectual property rights created or generated by performances are commercialized by the organizers, broadcasters and even sports and gaming associations. Such adoption and adaptation of one form of IPR generated in a sports and gaming event into another has also been subject matter of disputes.<sup>5</sup>

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<sup>3</sup> Gautam Gambhir v. DAP & Co., AIR 1988 Bom 167.

<sup>4</sup> Adam Wells, Jerry West Says He Wishes NBA Would Change Logo, BLEACHER REPORT (April 8, 2017), <https://bleacherreport.com/articles/2702436-jerry-west-says-he-wishes-nba-would-change-logo>

<sup>5</sup> Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018); The Ninth Circuit affirmed the district court's dismissal of a copyright infringement action brought by renowned photographer Jacobus Rentmeester against Nike. Rentmeester alleged that Nike infringed a famous photograph he took of Michael Jordan when Nike commissioned its own photograph of Jordan and then used that photo to create the

## B. Copyrights and Broadcasting rights

Proprietary, and even quasi-proprietary rights are generated during the performance of a sporting or gaming event. Every time a legendary goal is scored or a player or a too-cool-for-school shot is captured by a photographer, sports and gaming generate invaluable original works, which become subject matter of copyrights. Photographs, videos, teams and players' data et al. are hence valuable intellectual properties.

'Match scores' is a hotly contested subject of proprietary rights. Whether match scores can qualify as intellectual property, is a question which is sub judice before the Hon'ble Supreme Court of India. This issue had arisen before the Division Bench of the Delhi High Court,<sup>6</sup> and the Hon'ble Division Bench had observed that the rights claimed by the organizer/broadcaster to prevent others from publishing or sharing match information or facts, for irrespective of commercial or non-commercial use are precluded by Section 16 of the Copyright Act, 1957. The court also discussed the applicability of the 'Hot News' doctrine, which was established in an old case of *INS*<sup>7</sup> and has been discussed in a long line of case laws. In the context of sports, 'hot news' refers to time sensitive information such as scores and updates which are created as a result of sporting events. The dissemination of such information has enormous public value. The doctrine allows a plaintiff to injunct the publication of such time sensitive information by 'direct competitors.' The Bench rejected the applicability of 'hot news' doctrine in India, especially with respect to non-competing entities.

## C. Patents and design rights in sports technologies and equipment:

Performance is subject to efficiency of the player, which immensely depends upon the quality of equipment, type of sportswear and even the technology used. Bio-sensing garments and articles of sports clothing,<sup>8</sup> athletic performance user interface,<sup>9</sup> and many such inventions from present times, which immensely impact upon the player's efficiency and performance, are granted patents. Often, sportswear companies and teams maintain their research and development as highly confidential and treat the outcome as trade secrets. To stay ahead in the race, the competition is ever inquisitive about others' R&D and has even indulged in corporate espionage.<sup>10</sup>

## D. Commercialization of IP Rights:

A large sum of revenue in sports and gaming business is generated via public engagement. Organizers, broadcasters, sponsors and other stakeholders spend

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"Jumpman" logo. The panel held that, although Rentmeister plausibly alleged that he owned a valid copyright in his photo and a presumption that the Nike photo was the product of copying rather than independent creation, he failed to plausibly allege that Nike copied enough of the protected expression from his photo to establish unlawful appropriation.

<sup>6</sup> *Akuate Internet Services Pvt. Ltd. and Ors. v. Star India Pvt. Ltd. and Ors.*, MIPR2013(3)1.

<sup>7</sup> *International News Service v. Associated Press*, 248 U.S. 215 (1918).

<sup>8</sup> *Article of Sports Clothing*, U.S. Patent No. 9,532,612 (filed May 29, 2012).

<sup>9</sup> *Athletic Performance User Interface*, U.S. Patent No. 9,224,291 (filed May 17, 2013).

<sup>10</sup> Mark Meadows, Ferrari agree to make peace with McLaren over spy scandal, *INDEPENDENT* (July 12, 2008), <https://www.independent.co.uk/sport/motor-racing/ferrari-agree-to-make-peace-with-mclaren-over-spy-scandal-865868.html>.

enormously on promotion and marketing of their leagues and tournaments. Be it selling merchandizes,<sup>11</sup> allowing the public to create their own dream team,<sup>12</sup> or to speculate final scores, intellectual properties give way to a wide range of revenue streams through participation of stakeholders, players and public. In order to capitalize on this market potential, right-owners have created diligent commercial strategies such as global licensing, broadcasting arrangements and sponsorship. This would be further helped if such organizations and other right-owners ensure that their contracts clearly make out the nature of their IP assets, as it would help the courts in identifying infringements.

The growing sports and gaming merchandise market attracts infringing goods, counterfeits, and knock-offs. During FIFA World Cup, 2018, the Chinese customs authority had seized over hundred thousand counterfeit footballs and jerseys. This is just the tip of the iceberg as the global counterfeiting economy is estimated to reach USD 2.3 Trillion by 2022. Besides counterfeits and knock-offs, trademark violation also takes place by unauthorized use of trademarks/names of the league,<sup>13</sup> team,<sup>14</sup> or even the sponsor.<sup>15</sup> Indian courts, particularly the High Courts at Delhi and Bombay have taken proactive steps against counterfeiting and piracy in general. The Courts have been readily granting Anton Piller<sup>16</sup> and John Doe<sup>17</sup> orders to nip the menace of counterfeiting and piracy in the bud, both in brick and mortar and virtual world.

### III. ON THE OTHER SIDE

The law, as it stands today, does not recognize certain essential and commercially viable aspects of sports and gaming business. Lack of clear provisions relating to personality rights and proprietary rights in facts and data; lead to ambiguous, and even unfair and illegal contractual terms. While the Indian Courts<sup>18</sup> have endeavoured to classify these rights, the precedents do not set a level playing field for all the stakeholders. Spain has classified the right to one's own image, or personality right, as a fundamental right of the citizens. However, this approach can seriously impede the commercial aspect of personality rights and hence may not be favourable for sportspersons. Jamaica, on the other hand, has carved out a more specific approach for celebrities by bringing the personality rights of celebrities under the domain of commercial torts.<sup>19</sup>

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<sup>11</sup> Sumesh Kumar & Roshan Deshmukh, Sports Apparel Market by End User (Children, Men, and Women) and Distribution Channel (E-Commerce, Supermarket/Hypermarket, Brand Outlets, and Discount Stores): Global Opportunity Analysis and Industry Forecast, 2019-2026, ALLIED MARKET RESEARCH, <https://www.alliedmarketresearch.com/sports-apparel-market>.

<sup>12</sup> *Gurdeep Singh Sachar v. Union of India & Ors.*, (2019) 75 GST 258 (Bombay).

<sup>13</sup> *Mustafa Plumber*, Bombay High Court: Don't use any trademark resembling Pro Kabaddi League, DNA INDIA, <https://www.dnaindia.com/mumbai/report-bombay-high-court-don-t-use-any-trademark-resembling-pro-kabaddi-league-2640525>.

<sup>14</sup> *Arsenal Football Club v. Matthew Reed*, [2003] EWCA Civ 96.

<sup>15</sup> *MRF Ltd. v. Mr. Sathish*, C.S.No.340 of 2017.

<sup>16</sup> *Lacoste & Anr. v. Global Impex India*, 2011 (46) PTC 502 (Del).

<sup>17</sup> *Multi Screen Media Pvt. Ltd. v. Sunit Singh & Ors.*, CS (OS) 1860/2014.

<sup>18</sup> *ICC Development (International) Ltd. v. Arvee Enterprises*, 2003 (26) PTC 245.

<sup>19</sup> *The Robert Marley Foundation v. Dino Michelle Ltd.*, JM 1994 SC 032.

The technology has rendered quasi-proprietary rights in facts and scores non-est. However, since a significant part of revenue is generated from commercializing these facts and data, it is imperative to have laws which can fairly recognize the commercial rights in the said facts and data. These facts and data are raw feeds for statistics,<sup>20</sup> which are extremely crucial. This important aspect mandates the need for a data protection regime to safeguard the interest of all stakeholders.

#### IV. IN CONCLUSION

The Sports and gaming industry profits immensely from its intellectual property rights. The stakeholders invest heavily in the creation, innovation, and protection of their intellectual property rights to reap due benefits. The interplay and overlap of intellectual property rights in the sports and gaming domain has added new paradigm to IP jurisprudence and has opened several revenue streams for the stakeholders. On the other hand, lack of proper understanding and knowledge of the intellectual property rights and related laws has led to a significant loss and dilution of valuable proprietary rights. Federer's RF dispute is a warning sign for all budding players, who sign over the dotted lines, unconscionably. Several proprietary rights, existence and recognition of which is doubtful, also add immense value to the IPR pool in sports and gaming business. Hence, it is imperative that the law is shaped to consider all such rights for reasonable and equitable exploitation in the best interest of all.

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<sup>20</sup> Sports Data Pty. Ltd. v. Prozone Sports Australia Pty. Ltd. [2014] FCA 595 (Austl.).