

SPORTS LAW AND ITS ASPECT OF INTELLECTUAL PROPERTY RIGHTS

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Abstract

For a very ancient time, sports have been considered as a recreational activity which in today's world, has converted into a commercial business which generates mammoth profits. A major portion of the revenue comes from the branding, merchandising and licensing which involves exploitation of various intellectual property rights of the sports club. In the formation of a sports club, there is a creation of huge IP which creates an intersection between it and business relating to sports. There are issues regarding ownership of a particular Intellectual Property and to avoid any disputes regarding ownership, people are tending more to registration of their own Intellectual Properties. This short article highlights the various types of intellectual property rights in relation to sports world and various ways of their protection by using instruments of Intellectual Property like Copyright, Trademarks, Patent and Trade Secret. There are various case laws relating to disputes which arise in relation of Intellectual Property in Sports law. Apart from traditional Intellectual Property Rights like Copyright, Trademark and Trade Secret, this short Article also highlights the other forms of protection of Intellectual property which has arisen in recent times, like Personality Rights, Performer's Right, Broadcasting Rights, Domain Name protection, Ambush Marketing and many more. This short article also speaks about the competition growing out of the commercialisation of the Sports industry and the various IP disputes which can arise out of this arena. In recent times, by way of various amendments, the pecuniary penalty amount has been changed to make the laws more stricter. It has been done with the intention to lessen the opportunities of violating one's true right over a particular Intellectual Property. In India, there are Civil and Criminal remedies to help those who are distressed and whose Intellectual Property has been infringed. It also speaks about the various legal issues in relation to Intellectual Property and sports which are likely to be unforeseen.

Introduction

Sports are an integral part of our life and social being. From the very dawn of civilisation, people love sports. It has been acting as a meeting point in global sector for bringing games, competition, entertainment, culture and definitely, monetary business. In today's world, sporting activities has taken a mammoth size growth and has converted into commercial sector. Marketing and promotions through different franchising, advertising and brand building has given sports as well as the sportsmen limelight which has faded away the traditional intricacies of the sport. Games such as football, tennis, cricket, golf, hockey car-racing and so on has evolved into international events and has created a gigantic marketing opportunity for organizers. Some of the popular organizers are FIFA, PGA, NBA, and IPL who manages and extracts value out of it in such a manner so that they can exploit the marketing potential of the events.....¹ Hence, it is quite obvious fact that the sports franchisees are tapping and capitalizing on various intellectual property rights created by them. These rights are created to be used by the sports facilities are used by them in the creation of brand equity and reputation, as well to achieve hefty profits. There are many example of sports club which are perfect example of brand capitalization. According to Forbes magazine,² the value of the sports clubs goes as high up to value of \$1.86 Billion. In India, IPL is one of the most popular examples where huge profits are gained through IPR exploitation. There are many aspects related to sports which need to be taken care of while speaking about IP like taglines, logo, colours, licensing, sponsorships etc. Till date, there is no single law to protect the issues arising out of them. There is an urgent need of framing a set of law to protect this and IP plays a major role. It is an umbrella to take care of all properties created by human intellect and includes copyright, trademark, patent, designs, trade secret etc. Through this article an attempt has been made to point out the various types of IP used in the world of sport and attempts has been made how these can be protected.

Commercialisation of Sports and growing Competition

In recent times, Sports industry has acted like a catalyst in increasing the economic condition of a country in a mammoth rate. It has also added to individual gains. Intellectual Property Rights are the valuable assets that are used these days as marketing tools toward

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¹ Kandiah P, *Sports and Intellectual Property*, EZINE ARTICLES (June 3, 2019) <https://ezinearticles.com/?Sports-and-Intellectual-Property-Rights&id=5202279>.

² Kurt Badenhausen, *The World's 50 Most Valuable Sports Teams*, FORBES, (June 4, 2019) <https://www.forbes.com/sites/kurtbadenhausen/2011/07/12/the-worlds-50-most-valuable-sports-teams/#e6b328d53963>.

branding of games, as well for various events and achieving celebrity status. It is important to protect the interest of individual along with the team so that other cannot claim authority on their established name and good will. In the sports industry, a chain of title has relevance in sports agreement which includes legal release of the talent of a sportsman, so that their talent can be used for their profit. With the emergence of various leagues, like Indian Premier League (IPL), various teams are formed by various individuals and team in order to ascertain a title in Trademark, Copyright and various other IP formed from that event so that they can gain profit from them.³ Every aspect of Intellectual Property forms an integral part of the sports industry. There are various statutory provisions to deal with them if any dispute arises.

Ownership of IPR in Sports Industry

Due to the inherent basic attributes, Intellectual Property Rights can be bought, sold or licensed. It is mandate to corroborate the ownership so that the attributes of the IPR can be commercially exploited by the owner. Therefore, in order to avoid disputes, the registration of the IPR is recommended so that there can be accurate establishment of the ownership. The protection of IP is territorial in nature i.e. it is confined within a specific jurisdiction. It means an IPR must be registered in India even if it is protected by foreign laws. In India, due to backlogs of IP registration, it can take several months and years for any business to get its IP protected, be it registration of Patent, trademark, designs or copyright. Therefore, there should be plan up of registration ahead before entering the market. They should do an audit of the IP that may be is exposed in the market. If they find its commercial worth to be good, it can think whether steps will be taken for registration or not.⁴ The Trademarks Act of 1999 protects the registered marks such as names, logo, brand of the events and each individual teams and franchise. The merchandise, equipment, footwear and apparels are protected under the Designs Act, 2000. The Copyright Act of 1957 provides for the registration for original literary, dramatic, musical and artistic works, including cinematographic and sound recordings. It also provides protection to the broadcasting and performer's rights. In visual images or commentaries of sports events, including the photograph of the events, the copyright exists.⁵

Sources of IP disputes

³ Kirit S. Javali, *Sports and Intellectual Property in India: An Emerging Sector*, FINANCER WORLDWIDE (June 6, 2019) <https://www.financierworldwide.com/sports-and-intellectual-property-in-india-an-emerging-sector#.XWLTLegzbIW>.

⁴ *Ibid.*

⁵ *Ibid.*

There are various acts of infringement as well as unauthorised use of IP which eventually leads to disputes related to Intellectual Property. Some of the various issues which can rise in a sports industry are infringement of trademark, brand abuse, misbranding, misuse in bad faith, using a sports personality name without proper authorisation and permission or without paying any royalty or license fees, infringement in relation to copyrighted goods, merchandise like sports equipment, artwork in logo, piracy in audio-visual recordings, infringement of designs, along with many others, and in case of patents, the use of patented technology without authorisation from the owner of the patent. These infringement issues can lead to damage of goodwill, unfair trade practice, unfair competition, commercial disputes and ultimately lead to huge commercial losses which will ultimately defeat the principle purpose of exploring the commercial aspects of the sports industry.

Sports and Trademark

A trademark is a symbol, design, word, or phrase that identifies one business' goods or services from those of another. A company may come up with a design that is unique, to stand as a symbol of the company, or a product.⁶ It is one of the most common IP related to sports. The things associated with sports and can be registered under Trademark are the names and title of the franchise, tag line etc. the public rating that measures the popularity of the sports are also under Trademark. Trademark has an immense value associated with sporting events. Therefore, protecting trademark has high importance and has commercial values. It can be safeguarded under The Trademarks Act, 1999. Under this Act, the proprietors can apply for registration under various classes of goods and service in relation to which the trademark are used. It is important to recognise the appropriate class for registration of the trademark. Registration of Trademark is a simple process and it can be done by any Trademark attorney. It can be protected internationally by making an application under Madrid system which also allows multiple jurisdictions. Under Trademarks Act, 1999, both civil and criminal remedies are available. There are statutory rights for registered trademark and in case of unregistered trademark they have remedy of passing off under Common Law system. Passing off requires three basic requirements.⁷ At first the owner has to prove that his trademark has acquired goodwill in market. Second there was a misrepresentation and third, due to that misrepresentation, there was damage caused to him. There are certain trademarks which are very famous in the market and people recognise them instantly. These are known as 'well-

⁶ *Ibid.*

⁷ Reckitt & Colman Products Ltd. vs. Borden Inc., [1990] 1 WLR 491.

known marks' and they have a very high importance. They have a special kind of protection known as Anti-Dilution Law. This means that well-known marks have the right to prevent dilution of their marks if it is used by for any other products. E.g. Nike is one of the well-known marks when it comes to the context of shoes. If any company uses Nike to make toys, that would amount to dilution of the Trademark Nike.

Sports and Patent

Patent is used to protect those inventions which are new, innovative and which are capable of finding an industrial application. Not only to the product, but the patent is granted as well to the process of manufacturing as well. Patent is one of the most important IP used in Sports world. Inventors has recently began to put patent protection in various sports methods like method of fitness training⁸, putting a golf ball, method for training baseball pitchers⁹, method for training swings¹⁰ etc. if a player, team or league gains patent over any product or process, they gain significant benefit from the exclusive control over a technique that provides a competitive advantage. They can also license their invention. Therefore, patent protection to new invention safeguards against third party infringement and enhances the commercial interests. The registration for Patent is a bit complicated than that of Trademark. It requires a proper patent attorney/agent who has all the legal knowledge. In India, patent is granted for a period of 20 years and registration is done under The Patents Act, 1970.

Sports and Trade Secret

Trade Secret is a practice or compilation of information which should not be generally known to the outsiders. By that information, the business obtains economic advantage over its competitors. It is possible that Sports association and teams might have some information which is confidential is nature and which should be maintained. In 2008, veteran quarterback Brett Favre after quitting Green Bay Packers called the Detroit Lions and passed some confidential information. He was charged for violation of Trade Secret.¹¹ In India, there is no proper statute for protection of Trade Secret. Therefore, there should be proper agreements between Sports man and Sports associations in order to avoid such instances. Trade Secret is protected till it is considered to be trade secret by its proprietor.

Sports and Personality Rights

⁸ U.S. Patent No. 6190291. (issued 20th Feb, 2001).

⁹ US Patent No. 5639243. (issued 17th June, 1997).

¹⁰ US Patent No. 6176790. (issued 23 January, 2001).

¹¹ Williams Latrice, *Intellectual property for Athletes*, 7 Tw 1-2 (2010).

Personality right is the right to control the commercial exploitation of one's image, name, likeness and any other aspect of personal identity. Personality rights play an important role in brand creation of individual sports players and personalities as celebrity status leads to various forms of image creations and revenue generation capitalizing on fame. There are many sports personalities like David Beckham, Alan Shearer, Sachin Tendulkar who has registered trademark on their names. Mere association of such name can offer a great deal of commercial benefits. If any team uses such name without proper authorization, there can be hefty penalty imposed on that team.¹² Any such unfair use can lead to unfair trade practice, unfair completion, dilution of goodwill and many more. Another important aspect of personality rights is character merchandising. If any monetary gains are incurred by using the celebrity's identity, it is called character merchandising. There are many brands which has associated with themselves famous sportspersons like Sachin Tendulkar for Adidas. The sportspersons also have their own brands as well. In this field, it is important for the sports association involved in character merchandising to look into the fact that they are giving protection to the image of the sportsman individually. There should be a clear line of distinction between image of a sportsman as a team and as an individual.¹³

Sports and Broadcasting Rights

Broadcasting rights are that type of IP that is formed during the screening of sporting events. They are recognized by the Copyright Act, 1957. These rights are also present apart from the content of a live match. The term of broadcasting rights are for 25 years. These rights allow the owner of the broadcasting companies to re-broadcast the match. According to the Indian Copyright Act, 1957, if any person who is un-authorised to re-broadcast the broadcasts, or charges an amount for doing the same, makes any recording of the broadcast or reproduces it, they shall be liable for punishment as they have said to infringe the broadcasting rights.¹⁴ There are provisions as well where in case of unauthorized downloading there can be penalty up to Rs1 Crores.¹⁵

Sports and Domain Name

¹² Vijay Pal Dalmia, *India: Intellectual Property Rights in Sports-Indian Perspective*, MONDAQ (June 4., 2019) <http://www.mondaq.com/x/164974/Trademark/>.

¹³ ICC Development (International) Ltd vs. Arvee Enterprises & Anr., 2003, VII AD Delhi 405.

¹⁴ R. SeshankShekar & Nihal Zachariah, *An Overview of the Indian Sports Broadcasting Landscape*, LAW IN SPORT (June 5., 2019) https://www.lawinsport.com/topics/sports/hockey/item/an-overview-of-the-indian-sports-broadcasting-landscape?category_id=172.

¹⁵ Information technology Act, 2000, No. 21., §. 43.

Domain Name if used as a business identifier with the increased commercial exploitation on Internet. It only does not serve as an address for Internet Communication but also for identification of the specific internet site. In sports world, there has been dissemination of an enormous amount of information which are being broadcasted thorough Internet and has acquired a huge market value in branding. Every sports club has their own websites through which various activities are carried out. Some of the Sports personalities have their individual websites as well where lot of commercial activities are carried out. The negative impact this has is that it has allowed many cyber squatters to take benefit of the confusion attributed to the domain name. In India, there is no proper separate statute to address these issues but some range of protection can be given to them through trademark. If any domain name is registered as trademark, it can be taken into account while adjudicating them.

Sports and Ambush Marketing

Ambush marketing is an issue which comes up due to lack of definite legal framework in India. It refers to a company's attempt to capitalize over the popularity of well-known property or even without the proper authorization of the owner.¹⁶ It can be also described as an attempt made by a third party to create connection with a particular event or its participants without their proper authorization and by defying the official partners and sponsors.¹⁷ It is a golden opportunity for the Brand owners to attract the customers in a cheap way. Ambush Marketing generally includes unauthorised use of registered event logo on merchandise, false claim of being official suppliers of a particular team, creating unofficial websites, film, video, corporate sponsorships etc.¹⁸ Due to Lack of proper legislation in India, most of the cases of Ambush Marketing are decided under Copyright and Trademark Laws. In a recent case related to commonwealth games, Delhi High Court has recognised Ambush Marketing and has granted an injunction against the defendant for using a website to that of the plaintiff. Nowadays, many of the event managers are taking initiative to suppress ambush marketing. They have started including anti-ambushing clauses in their agreements while signing contract between event organisers and sponsors.

Conclusion

¹⁶ Sandler D M & Shani D, *Olympic Sponsorship vs. Ambush Marketing: who gets the gold*, 29(4) JAR 9 (1989).

¹⁷ Cran David & Griffit Simon, *Ambush marketing: Unsporting behaviour or fair Play*, 21(8) ELR 9 (1989).

¹⁸ Seth Rukmani, *Ambush Marketing: Need for a legislation on India*, 15(6) JIPR 455 (2010).

In today's world, there has been a rampant increase in commercialisation of Sports world and associating it with business to incur big profit from it. Due to the greed for money, many sports clubs has plunged into the trap of exploitation of intellectual property rights into different business like merchandising, game café and so on. There is an imminent need for protection of the intellectual property rights by these clubs. In relation to India, it is a signatory to various international treaties in IPR. These rights can be protected through proper and timely registration. They are enforceable in Indian Courts which in any event of infringement, provides an interim remedies like injunction which are effective in nature. They can also instruct the offender to make compensation from the profits generated out of infringement. In India, there are three major IP enforcement channels, police, custom and judiciary. Trademark and Copyright can be enforced through civil or criminal litigation, whereas patent and designs can only be enforced through civil litigation. There are various ways of protection of IP like registration, agreement with proper clause etc. it is important for the proprietors to have a detailed knowledge about how a business runs along with the legal intricacies. There are a various minute but highly important issues such as ownership rights, sharing of revenues, protection of the image and personality of the celebs etc. proper care must be taken to see that these rights are protected. The IP repertoire in a sports world increases with the popularity and success of the team. It is important to keep a regular check on these IP activities and regular audits must be done in order protect and maintain the IP portfolio.