

## Intellectual Property and the Business of Sports Management

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*Received 18 July 2012*

Sports which, for a very long time, was considered to be a recreational activity, has today become a thorough commercial activity generating elephantine profits. A major portion of this revenue flows from various activities such as branding, merchandising, licensing etc. which involve exploitation of the various intellectual property rights of sports clubs. In the process of forming a sports team or a sports club to organizing sports events, there is a huge amount of intellectual property created. Thus there arises an intersection between intellectual property rights and the business of sports. This article highlights various species of intellectual property associated with sports, their protection and various ways of their exploitation. The article also analyses various legal issues that arise often or are foreseen with respect to intellectual property and sports.

**Keywords:** Sports and intellectual property, sports law, merchandising, broadcasting rights, ambush marketing

Sports are integral part of our social being. They are so ingrained in our lives that they have become an essential part of our lives. Right from the barbaric era, through the glorious days of Caesar to the twenty first century, everyone loves sports. It has always been a popular sector across the globe bringing together games, competition, entertainment, culture and definitely to an extent monetary business. Sporting activities that started as a hobby or a physical cum leisure activity today are no longer confined to the bounds of entertainment but have gained commercial importance of mammoth proportions. Many aptly consider this age to be an era of corporatization of sports. Marketing and promotions through franchising, advertising, brand building of sports as well as sportsmen have gained gigantic importance, surpassing all other traditional intricacies of sports.

Popular games such as football, golf, tennis, basketball, cricket, yachting, car-racing, and so on have evolved into international events with huge following; creating enormous marketing potential for the organizers. The organizers of popular games such as FIFA (football), PGA (golf), NBA (basketball), IPL (Cricket) and so on organize and manage the events, in such a manner that they are able to extract maximum value from others who want to exploit the marketing potential that the events offer.<sup>1</sup>

Hence, it is an obvious fact that sports franchisees are tapping and capitalizing on various intellectual property rights (IPR) created by them. These intellectual property (IP) created are used by the sports franchises in the form of merchandising, advertisements, licenses, online/computer games, cafes, etc. mainly for creation of brand equity and reputation and of course, to achieve a common end of gaining hefty profits.

There are various sports clubs around the world which are perfect examples of IP brand capitalization. Football teams like Manchester United, Real Madrid, Barcelona, Liverpool from the English Premier League, Boston Red Sox, Texas Rangers, New York Yankees and the likes from Major League Baseball and Chennai Super Kings, Kolkata Knight Riders from our own Indian Premier League (IPL) are few examples that have been developed and marketed as huge brands worth millions of dollars. The world famous Forbes magazine<sup>2</sup> had recently conducted a survey on the World's 50 most valuable sports team and Manchester United was ranked to be the first with the value of \$ 1.86 billion, followed by Dallas Cowboys with value of \$1.81 billion, Tampa Bay Buccaneers (\$1.03 billion), Red Devils (\$97 million), New York Yankees (\$1.71 billion), F1's Ferrari (\$ 1.07 billion) and so on. IPL which is based out of India, is one amongst the popular examples, where huge profits are gained through the exploitation of IP.

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This article makes an attempt to recognize various species of IP that are created in the process of forming a sports team or a club. On creation of any property, protection of the same is the foremost important aspect one would look at. Once we speak of property and rights, it is obvious that lot of legal issues are bound to crop up. Thus in this article, attempts are made to understand ways through which one can protect his IP and create value out of it. Few of the frequently arising IP related issues are also discussed.

### **Sports and Intellectual Property**

Today, both for sportsmen as well as sports associations, sports is not just a career or passion, but is looked at as a huge business opportunity. On formation of a sports team, the teams are generally recognized by a team name. For the purposes of identification, logos and fancy taglines are created. Off the field, on the commercial level, sportsmen get into endorsements and advertisements whereas sports associations get into branding, merchandising, licensing, sponsorship and other similar activities.

Once all these creative elements are put into commercialization, their protection becomes essential. For instance, today intangible assets such as the team names like Royal Challengers, Manchester United, events such as Olympics, US Open etc., along with their colourful logos, emblems, taglines, hold high commercial value and are significant components of branding and merchandising activities and hence their legal protection is necessitated to prevent third party infringements. On the other hand, broadcasting rights, licensing, sponsorships, and other important revenue streams also involve few legal requirements to safeguard the rights.

There is no single law that protects all such proprietary material and resolve all the issues that arise out of them. A set of multiple laws are resorted to in order to safeguard the business interests involved in sports. IP laws form major part of such laws and are often pressed into service in tackling various legal issues. IP is an umbrella term used to describe properties created by human intellect and includes patents, trademarks, trade secrets, copyrights, designs and so on.

The various kinds of IP that form part of sports and provide a spectacular off field action in terms of business topped with some interesting legal face-offs are :

### **Trademarks**

Trademark is a distinctive sign or an indicator representing a trade or business. Trademarks normally are in the form of logo's, captions, tag lines etc. They are the indicators of the source of origin of a particular product or service.

Trademark is one of the most commonly created IP associated with sports. It is the one of the factors that aids brand building of sports business. The names and titles of a franchise, tag lines and other names associated with a sports team are capable of being registered as trademarks and further assist brand building. The public ratings that measure popularity of sports are also based on trademarks. Thus trademarks have an immense value associated to sporting events or sports teams. These trademarks apart from being a symbol of identification, also add to brand value when used in various forms such as merchandises, sponsorships etc. Ad revenues and sponsorship revenues are normally associated with trademarks to ascertain a franchise's brand equity.

Thus, protecting trademarks assumes high importance to safeguard commercial interests. The proprietors of sports clubs can protect their trademark by registering them under the Trademarks Act, 1999. Under the Act, a proprietor can apply for registration under various classes of goods and services in relation to which the trademarks are being used. For example, the Kolkata Knight Riders, apart from being a cricket team, also sells merchandise in the form of caps, t-shirts etc. T-shirt, which falls under the category of clothing, can be registered under class 25 (in India, as per the classification of goods in India) and mugs can be registered in class 21 under porcelain and glassware. Thus it is important to recognize the appropriate class and register the trademark. The team jerseys can also be protected as trade dress. Registration of trademark is a simple process which can be done with the help of a registered trademark agent or a lawyer by paying prescribed statutory fees. Protection to the trademarks can also be sought internationally by making an application under the Madrid system which allows the applicant to apply for trademark registration under multiple jurisdictions.

In cases of trademark infringement, both civil and criminal remedies are available under the Indian Trademarks Act, 1999. For registered trademarks, the Trademarks Act provides for statutory remedies. In case, the Trademark is not registered, the remedy of passing off is available under the common law. The trademark owner who is seeking a remedy under

passing off has to prove three basic requirements.<sup>3</sup> Firstly, the owner has to show that his trademark has acquired goodwill in the market place, secondly there was a misrepresentation and thirdly there was damage caused to him due to this misrepresentation.

Another remedy that is available for the trademark proprietor is under the anti-dilution law. This remedy of anti-dilution is applicable only for well-known marks. Few trademarks become very famous amongst the public and such marks are known as well-known marks or famous marks. These well-known marks are given high importance under the trademark law because of their strong association in the minds of consumers. These marks have a special protection under anti-dilution law i.e. well-known marks have the right to prevent dilution of their marks used by another product or services. For example, Manchester United is one of the well known marks and they come up with lot of merchandising articles such as key chains, T-shirts etc. If someone sells adult toys under the Trademark Manchester United, that would amount to dilution of the Trademark Manchester United.

#### **Copyright**

Copyright law protects the expression of ideas and not ideas in itself. Copyright subsists in literary works, musical works, artistic works, dramatic works, photographs, sound recordings and cinematographic films. Copyright is protected from the moment the work is created. This right allows the owner of the copyright to reproduce, make copies of the work, sell, make derivative works, adapt the work, licence and assign the work. In the process of sporting events and its promotions, the maximum amount of IP that is created is copyright. The artwork in the logos, the literature in the promotional material, the merchandise, software of computer and online games and so on are all subject matter of copyright. There is no mandatory rule to register copyrights; however, looking into the judicial trends in India<sup>4</sup>, it appears that courts have emphasized on registration in order to claim remedies under the Copyright Act. The Bombay High Court in a recent case held that copyright owner cannot avail the statutory remedies under the Copyright Act if he does not register his copyright under the Act. However, this judgement is criticized as not being in conformity with the object of the Copyright Act, as the Act recognizes copyright over a work from the moment it is created.

Copyright infringement and piracy have become rampant in recent times making it necessary for the copyright owners to police their copyright portfolio. The Copyright Act, 1957 provides various remedies to the owners against copyright infringements. Such remedies include injunction and prohibit orders, claiming damages and account of profits, seizure and destruction of infringing materials and so on. Under the said Act, criminal sanction is also provided against infringers.

#### **Patents**

Patents protect inventions that are new, innovative and capable of finding industrial application. Patents are not only granted on products but are also granted to processes of achieving a result. There are a number of sports methods for which patent is being sought. Inventors have recently begun to obtain patent protection for sports method inventions like method for putting a golf ball<sup>5</sup>, method for fitness training<sup>6</sup>, method for training baseball pitchers<sup>7</sup>, method for training swings<sup>8</sup> and so on. A player, team, or league gains significant benefits from exclusive control over a technique that provides a competitive advantage: They can capture sizeable economic rents by dominating sports contests or license their invention. Hence, patent protection to the new inventions safeguards against third party infringements as well as enhances commercial interests. Registration of patents is not a simple process unlike trademarks and copyrights. It is very important for the owner(s) registering a patent to approach a proper patent agent / attorney who should be technically and legally sound. Patent rights are granted for 20 years in India and most of the other territories across the world. Patents in India are governed by the Patents Act, 1970 which also provides both civil and criminal remedies for infringement.

#### **Trade Secret**

A trade secret is a practice, process, pattern, or compilation of information which is not generally known or easily acquired by which a business obtains an economic advantage over its competitors. In sports associations or teams, it is possible that there is some information which is confidential in nature and confidentiality has to be maintained. There have been numerous instances, where there has been a leakage of confidential information by the team members. For instance, in 2008, veteran quarterback Brett Favre, who quit Green Bay Packers and signed with the New

York Jets, called the Detroit Lions and gave them some of the schemes that the Packers would be using on offense. By doing so, he violated trade secret law.<sup>9</sup>

In India, there is no separate statute for protection of trade secrets. Trade secrets are generally protected by having proper confidentiality clauses in the agreements. Thus, having proper agreements between the sports man and sports associations is beneficial in order to avoid such instances. There is no term for protection of trade secrets. Trade secret is protected till it is considered to be a trade secret by its proprietor.

#### **Personality Rights**

Personality/ publicity right is the right to control the commercial exploitation of one's name, image, likeness, or any other aspect of personal identity. Publicity rights of the sportsperson play an important role in the brand creation of individual sports players and teams. Celebrity status leads to various forms of image creation, brand endorsement and revenue generation capitalizing on fame. Today it is very much possible for the celebrities to register their name and likeness as trademarks under the Trademark law. Few of the English footballers such as Alan Shearer, Paul Gascoigne and David Beckham have also registered trademarks in their names. This is also possible under the Indian Trademark Act, 1999 and to quote an example, Sachin Tendulkar has registered trademark over his name. Mere association of the name of a team, their logo or a team player, could offer unprecedented mileage to the person or entity using such name or logo. It is a loss to the team, team owner, the player and an unwarranted gain for the entity associating such name or logo for their own commercial benefits, without taking any permission, or paying any license fee or royalty.<sup>10</sup> Thus having a clear line of demarcation between the sportsmen's individual personality rights and his image as a part of the team is very important. Any such unauthorized use of the trademark would amount to unfair trade practice, unfair competition and also dilution of goodwill and reputation of the respective proprietor.

Another very popular area related to personality rights is character merchandising. Character merchandising has become a huge revenue earning business. In simple words, the marketing of name or image for monetary gain by using a celebrity's persona is known as 'character merchandising'. Lot of brands have associated themselves with some sportsman as that of Michael Jordan and Nike, Sachin Tendulkar and Adidas and so on. On the other hand,

few sportsmen like Sachin Tendulkar have their own merchandising business with all sorts of gifts and collectibles from colourful T-shirts, baseball caps, knapsacks and mugs to china plates and crystal glasses to name a few. Yet another way is where the sports clubs come up with merchandising with the players of their teams. In such situations, it is essential for sports associations involved in merchandising to protect the image rights of the sportsman individually. A clear line of distinction should be drawn between the image of the sportsman as a team member to that of an individual. The sports association may have a right over his likeness or an image as a team member dressed in the team jersey but one cannot use his image just because the player is a part of some particular sports club.

This point has been clarified by the Delhi High Court in *ICC Development (International) Ltd v Arvee Enterprises and An*<sup>11</sup>, held that

*"The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be violative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it. For example if any entity, was to use Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action."*

#### **Merchandising and Licensing**

Merchandising, over a period of time, has become one of the most revenue generating and sophisticated businesses for sports clubs. Today every sports club comes up with its own merchandise which are very innovative and attractive. The most common and popular variety of merchandising range from caps, t-shirts, mugs, shoes, toys, bobble heads etc.

Sports clubs engage into merchandising activities normally by licensing creative works. While licensing creative works, entering into proper licensing

agreements with appropriate terms and conditions is very crucial aspect as these agreements determine the rights of the parties. Generally a standard merchandising license agreement contains grant clause, royalty clause, intellectual property clause, quality control, territory, term and sale after termination.

#### **Domain Names**

With the increase of commercial activity on the Internet, domain name is also used as a business identifier. Therefore, domain name not only serves as an address for Internet communication but also identifies the specific Internet site.<sup>12</sup> In relation to sporting, enormous information is disseminated and events are being broadcasted including online games related to sporting events through Internet, which has acquired a huge market value in branding. Every sports club has its own website through which lot of activities are carried out. Moreover, some of the sportsmen individually have their own website like [www.kapildev.in](http://www.kapildev.in), [www.sachintendulkar.in](http://www.sachintendulkar.in) and so on, where lot of commercial activity is carried out.

On the other hand this also has given opportunities to cyber squatters to take the benefit of the confusion which may be attributable solely to domain names. As India does not have a separate domain name registration mechanism, the best way of protecting one's domain name is to register the domain name as trademark, which generally is taken into account while adjudicating over the domain name disputes.

#### **Broadcasting Rights**

Broadcasting rights is another set of IP that is created during screening of sporting events. Broadcasting rights are separate set of rights recognized by the Indian Copyright Act, 1957. These rights are available apart from rights that are present in the content of a live match. The term of broadcasting rights is twenty five years. Generally, these rights lie with the broadcasting companies. This right allows the owner to rebroadcast the same. According to the Indian Copyright Act, 1957, any person without the license from the owner re-broadcasts the broadcast; or causes the broadcast to be heard or seen by the public on payment of any charges; or makes any sound recording or visual recording of the broadcast; or makes any reproduction of such sound recording or visual recording where such initial recording, or sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording is said to have infringed the

broadcasting rights. In addition to this, for cases of unauthorized downloading, Section 43 of the Information Technology Act, 2000, provides for a penalty upto Rs one crore.

#### **Ambush Marketing**

Ambush marketing is yet another issue that occurs quite frequently due to lack of definite legal framework in India. Ambush marketing refers to a company's attempt to capitalize over the popularity of a well-known property or event without the consent or authorization of the necessary parties.<sup>13</sup> It is an attempt by a third party to create a direct or indirect association with an event or its participants without their approval, hence, defying official sponsors and partners, part of commercial value due to their official designation.<sup>14</sup> Brand owners get into ambush marketing as it is a cheap way of attracting customers to their brand. Ambush marketing generally includes unauthorized use of registered event logo on merchandise, false claims of being official suppliers of a particular team, creating unofficial websites, films, videos, unofficial corporate sponsorship etc.<sup>15</sup> One of the oldest acts of ambush marketing dates back to the Olympics in 1984, where Kodak sponsored television broadcast of games as well as United States track team despite Fuji Film being the official sponsor.

There is no requisite legislation in India which prevents ambush marketing. Most of such cases are decided under various IP laws such as trademark law and copyright law. This is an infrequently litigated matter in India. However, in a recent case, the Delhi Court has recognized the concept of ambush marketing and granted an injunction against the defendant restraining the use of the website [www.commonwealthgamesdelhi2010.org](http://www.commonwealthgamesdelhi2010.org) as well as the use of a logo deceptively similar to that of the plaintiff. However, many of the event organizers have taken initiative by themselves to prevent ambush marketing. Nowadays most of the agreements signed between the event organizers and sponsors have anti-ambush marketing clauses in their agreement.

#### **Conclusion**

Commercialization of sports is so rampant that the competition amongst sports clubs or associations is not only on the event field but also in the business for making huge profits. Most sports clubs have ventured into exploitation of their intellectual property and are into different business such as merchandising,

computer games, café's, and so on. This adventure of sports clubs of earning profits by exploiting their IP makes it essential for them to adequately protect their IP.

The protection of the various species of IP would be in various forms like registrations, agreements with proper terms and conditions etc. Lately, merchandising is one of the most lucrative businesses where the sports clubs have a larger stake. Hence, while venturing into merchandising business, it is advisable for proprietors to not only have business knowledge but also understand the legal intricacies surrounding it. In merchandising, there are lot of minute but highly important issues such as ownership of IP, sharing of revenues, confidentiality etc. With the various personality rights violations happening all around the globe, celebrities today are very keen and cautious about protecting their image and personality rights. Thus the proprietors should also be alert that they do not end up violating personality rights of any sportsman. It is always preferred to take a good legal opinion on what can be used and what cannot be, before entering into the business.

The IP repertoire of a sports organization is bound to grow with expansion of its business operations and the value of such repertoire grows with the popularity and success of the team and/or players. Since most existing business models on commercialization of sports are largely based on IP wealth of sports clubs, it is important to nurture such intellectual properties through activities such as regular IP audits and valuation, adequate protection and maintenance of IP portfolio. These investments, when made with right strategies, are bound to return in multi folds.

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