

FACETS OF IP IN THE SPORTS & E-SPORTS INDUSTRY:

TRAVERSING HORIZONS

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ABSTRACT

A football team called Patiala City FC was established in the year 2015- with a number of academy grown players. In a short span of time, it came to the forefront in the Indian footballing arena. Its journey started from the third division of the football league, winning back to back promotions to the premier football league of India, currently holding the pole position in order to qualify for AFC Champions League, the equivalent to the UEFA Champions League held in Europe. Due to this feat, the club has become one of the most popular clubs in India, with a large fan base. The club has an impressive Jersey inspired from the rich culture of Punjab, a regal logo and a thumping motto “Our Blood, Our Sweat, Your Tears”. Its merchandise (Jerseys, Player memorabilia, etc.) was selling like hot cake. The Club even had a home-grown centre forward player, who was fundamental to the team’s success over the past few years. His stellar performances made him a top target for European Clubs, but with success came forth the breach of his image rights, personality as well as privacy. Lack of legal knowledge, as well as the void of law in our country, made things tumultuous both for the club and also the player to sustain their economic rights. Popular video games used his persona in the game without any consent or contract, with the player seemingly confused as to what legal action, if any, he has at his disposal and should subsequently pursue.

Though the situation narrated above is hypothetical, it might ensue that a high-calibre athlete could potentially lose out on revenue opportunities from the utilization of his

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image rights and suffers this breach of privacy, failing to tap in the commercial conduits which were worth fortunes, flowing from his right to publicity, along with jeopardising the position of our country's sporting franchise. In these situations, there is nothing that the athlete or the franchise can do except for approaching the court under the outmoded facets of law. Thus, there is an increasing need for protecting the IPR in the ever-growing arena of Sports and the myriads of E-sports.

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I. THE SO-CALLED BUSINESS OF SPORT

In India or the United Kingdom, sports cannot be owned by one entity, simply stating, it's incapable of being owned by anyone. Back in the mid-19th century, sports were not beheld upon as an industry. The Webster dictionary defines it as, "Any physical activity undertaken for enjoyment, pastime; such an activity which more or less requires bodily exertion of force and is being carried on according to such rules/ regulations as laid down"¹

Sports no longer remains a social activity linked with recreation, amusement or victory & defeat and sporting events no longer look anything like such events for the money flowing in has increased manifold. Due to the fact that people relate to sports and feel an inherent association to certain sports teams/clubs, sports have become commercially exploitable and generate revenue. For example, in India, the game of cricket has transformed into a colossal commercial diversion attracting mammoth capital, ventures, and profits. Furthermore, in the recent past, leagues like the IPL, Pro Kabaddi, ISL- Football, the organizing of Formula one races etc. has only streamlined sports as a business in the country.

As far as the ownership of sports is concerned, the settled position in Britain is that under the law that "*a spectacle cannot be owned in any ordinary sense of the word*"² then why is so much of money being invested in sports today? Also, why are a lot of sporting activities being treated as a valuable economic asset? The answer is that the capability of a sporting event to generate money is no longer constrained to the ticket sale. here are various analogous commercial aspects to sports, like P.R., building a brand out of a sportsman, licensing of certain rights to the sponsors, which the event organizers can exploit in order to earn money.³ As the economic facet of sports and sporting events amplified, there usurped the need to protect the economic interests of the players as well as the owners who have invested astronomical amounts in the venture.

¹*Definition of Sport*, MERRIAM WEBSTER (Nov. 03, 2019, 5:18PM), <https://www.merriam-webster.com/dictionary/sport>.

² *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor & Ors.* (1937) 58 CLR 479.

³ MUKUL MUDGAL, *LAW & SPORTS IN INDIA: DEVELOPMENTS, ISSUES AND CHALLENGES*, (2nd ed, 2016).

An Intertwined Relationship: Sports and IPR

Intellectual Property Rights (IPR) in sports, chiefly Trademark & Copyright can be a pragmatic instrument towards the marking of exhausting digressions, inspiring more innovations & inventiveness, sports clubs/groups, big-name status, etc.⁴ IPR can protect a franchise and a player to protect its commercial value from fraudsters/ forgers copying their IP without permission and at the same time makesure that inventors and creators get a fair reward for their work⁵, by giving them the monopoly to protect their goodwill and sell the rights which are “*the life-blood of sports events at all levels, right from the elite level athletes down to the grassroots participants*”.⁶

There have been a lot of instances wherein both the club as well as the player benefitted from their marketability. Football due to its popularity has benefitted the most from rights selling. Since 2011, **Real Madrid** has been designated as the ambassador of the “**Made in Spain**” brand, signing a deal to promote Visit Spain campaign for the Spanish Government.⁷ Another such instance was that of **David Beckham** after he moved to **Real Madrid** in 2004. Adidas had fashioned an exclusive emblem for him, depicting his bravura of scoring from free kicks



, which was enthused from Michael Jordan’s Nike logo . He had a fall out with the club president over absolute ownership of his image rights and before leaving the club prematurely, he had interestingly minted approx. €4 Million from playing football for the Madrid based club but around €19 Million out of commercial endorsements.⁸

⁴ Shrishti Sharma, *Sports and IPR*, 2 Sports and Legislature 30 (2018).

⁵ *INTELLECTUAL PROPERTY AND SPORTS: TRACING THE CONNECTIONS*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Nov. 04, 2019, 7:24 PM), [HTTPS://WWW.WIPO.INT/IP-OUTREACH/EN/IPDAY/2019/IP_SPOTS.HTML](https://www.wipo.int/ip-outreach/en/ipday/2019/ip_sports.html).

⁶ Mark Lichtenhein, *Reach for Gold: IP and Sports*, 2 WIPO MAGAZINE (2019).

⁷ *REAL MADRID TO PROMOTE SPANISH TOURISM*, KYERO (Nov. 04, 2019, 7:48 PM), [HTTPS://NEWS.KYERO.COM/2011/03/REAL-MADRID-TO-PROMOTE-SPANISH-TOURISM/3579](https://news.kyero.com/2011/03/real-madrid-to-promote-spanish-tourism/3579).

⁸ *BECKHAM DRIVES MADRID TO TOP OF MONEY LEAGUE*, THE GUARDIAN, (Nov. 04, 2019, 8:02 PM), <https://www.theguardian.com/football/2006/feb/16/newsstory.sport>; BBC Sport, 2007.

II. TRADEMARK: BRANDING & CORRELATIVE RIGHTS IN SPORTS

It is a costly affair if one decides to stage a sporting event. Use of IPR can help the organizers and franchisee owners to stand apart in the marketplace and recover the costs of organizing the mega sporting events. Research by **World Trademark Review** has crowned Sports club like **Manchester United** as the trademark champions with the Manchester-based club having 413 marks in its portfolio.⁹ The club brand was valued at nearly £1.4 billion as it capitalized from the International registration of marks through digital media rights and other sponsorship deals. For example, between 2015 to 2017 it had enjoyed a 4.6% compound annual growth rate in its sponsorship proceeds¹⁰. When it comes to the players and athletes, they too have become more IP savvy, Barcelona FC's **Lionel Messi** leads the chart and has the biggest trademark portfolio with as many as 76 marks registered, breaking down the macro IP bundle into micro shreds circumscribing his logo, name & signature.¹¹

A. Brand Protection: The First Step Ahead

A considerable time, energy and money have been disbursed by the event organizers and the clubs to make a brand name. A strong brand has a direct correlation with a higher value for the products and services provided by its sponsors or promoters. The Marketers' pay astronomical amounts to get sponsorship/ title deals for a prestigious and reputed event or a Sports club, as any sort of association with the big sporting events, which attracts big crowds, gets the brand a higher recognition. If the Brand is properly protected by using IP rights, it can be a major source of revenue for the event organizers which is perfectly elucidated by the fact that Star India paid a whopping ₹16,347.50 Cr. to the Board of Control for Cricket in

⁹ *MANCHESTER UNITED TOPS PREMIER LEAGUE OF TRADEMARKS*, WORLD TRADEMARK REVIEW (NOV. 10, 2019, 10:56 AM), <https://www.worldtrademarkreview.com/brand-management/manchester-united-tops-premier-league-trademarks-messi-overtakes-neymar-player>.

¹⁰ *The International Trademark System and Sports*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/ip-outreach/en/ipday/2019/madrid_trademarks_sports.html (Accessed, 09 Nov 2019).

¹¹ WTR, *supra* note 9.

India (BCCI) for the media rights of Indian Premier League (IPL)¹² and Pepsi shelved out ₹396.8 Cr.¹³ to become the exclusive title sponsor.

The Delhi High Court recognized the desirability of brand protection in the case of *World Wrestling Entertainment v. Savio Fernandez*.¹⁴ In India, one of the few legislations which provides fortification to sports branding is the Trade Marks Act, 1999. The Act provides for registration and protection of trademarks used for business or on goods and also protects against the use of fraudulent marks. The Act follows the *Abercrombie factors*¹⁵, which follows a spectrum of distinctiveness and gives giving protection to words which denotes the source/uses of the word or those which are wholly invented or fanciful in nature.

The latest trends of brand protection by individual athletes also include registration of a winning pose/ celebration such as that of Real Madrid & Welsh footballer Gareth Bale's

popular 'eleven of hearts'  pose or Usain Bolt's 'lightning bolt'  pose. Such trademarks are called "Unconventional" or "non-traditional"¹⁶ marks. Its growth was bolstered by an EU Regulation¹⁷ which eased the prerequisite of graphic representation for registration.

B. Cybersquatting: An Imminent Menace

Cybersquatting is the practice whereby individuals maliciously register a domain name which contains the name of well-known celebrities, registered trademark, etc. and then sells the same to the rightful trademark holders or the celebrity. In the past celebrities such as Julia Roberts,¹⁸ Madonna,¹⁹ along with some others have, through suits against alleged

¹² *Star India wins IPL media rights for next five years*, THE TIMES OF INDIA (Nov. 05, 2019, 2:35 PM), <https://timesofindia.indiatimes.com/sports/cricket/ipl/top-stories/star-india-wins-ipl-media-rights-for-next-five-years/articleshow/60355842.cms>.

¹³ *Pepsi pay Rs. 396.8 Crore to be IPL title sponsors*, FIRSTPOST (Nov. 05, 2019, 4:12 PM), <https://www.firstpost.com/sports/ipl/pepsi-bid-rs-396-8-crores-to-be-ipl-title-sponsors-530517.html>.

¹⁴ *World Wrestling Entertainment v. Savio Fernandez*, 2015 SCC Online Del 6716.

¹⁵ *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4 (2nd Cir. 1976).

¹⁶ Davide Dabergami, *Unconventional marks in sports- when celebration becomes a trademark*, BARZANO & ZANARDO (Nov. 07, 2019, 7:17 PM), <https://www.barzano-zanardo.com/en/approfondimenti/unconventional-marks-in-sports-when-celebration-becomes-a-trademark/>.

¹⁷ Regulation (EU) 2015/2424 of European Parliament of 16th December 2015, EUR-LEX, (Nov. 06, 2019, 3:28 PM), <https://eur-lex.europa.eu/eli/reg/2015/2424/oj>.

¹⁸ *Roberts v. Boyd*, No. D2000-0210 (World Intellectual Prop. Org. May 29, 2000).

¹⁹ *Ciccone v. Parisi*, No. D2000-0847 (World Intellectual Prop. Org. Oct. 12, 2000).

cybersquatters, re-claimed the domain names which were either identical, confusing or contained their names. The practice of cybersquatting is very common in the sports arena. People tend to buy domain names which are the same as or similar to the names of sports teams. *Football Club Barcelona* had to deal with a lot of cases pertaining to this menace. In one of the cases²⁰ they were put in an unwarranted and precarious situation wherein, an individual from U.A.E. purchased the domain name <fbarcelona.soccer> and contacted the football club so offering to sell it to them for \$400,000. The Catalan club approached WIPO's Arbitration Centre and it pronounced a verdict in favour of the club stating the registered domain name was suggestively deceptive and confusing enough to put any prudent person in a state of pandemonium.

CyberSquatting is a growing menace which needs to be addressed seriously but in India there is a dearth of laws on this matter except for the IT Act, 2000 which was hastily drafted. There exists no concrete protection (except Interlocutory Injunctions under Civil Procedure Code, 1908) whatsoever from the perils of cybersquatting. The Trademark Act, 1999 provides protection to registered marks as well as to marks which are unregistered under Section 27. The latter will be discussed in the next head. Section 135 provides for the remedies of injunction and damages for passing off and it forms part of the most common domain name disputes.

C. Sports Merchandising: Passing off Fake as Real

When Cristiano Ronaldo made a sensational move to Juventus, the Italian club sold a staggering 5,20,000 Cristiano Jersey in the space of a day, adding up almost \$62 Million.²¹ The fans love to associate themselves with the club they support and to fuel their thirst for the game, they buy the jersey, cap and other such merchandise which bear the trademark logo or other official insignias (registrable as TM) of the club. The figure above mentioned accounts for the sale of official jersey and there is a void on the data for the sale of replicas. It is projected that the volume of sale of replicas supersedes that of the original. Top European clubs such as Manchester United, Barcelona, etc. earn colossal amounts from the sale of branded merchandise. But it is observed that a lot of entities sell replicas by

²⁰ Futbol Club Barcelona v. Ali Mohamedali, WIPO Arbitration & Mediation Centre, Case No. D2017- 1257.

²¹ Niall McCarthy, *Juventus have sold \$60 Million of Ronaldo Jerseys in 24 hours*, FORBES (Nov. 07, 2019, 11:39 AM), <https://www.forbes.com/sites/niallmccarthy/2018/07/20/juventus-have-sold-60-million-of-ronaldo-jerseys-in-24-hours-infographic/#629ebc67392b>.

misrepresentation as well as deceit thereby riding on the popularity and goodwill of the claimant club. This perilous situation has emphasized the requirement for passing-off action,²² and the recognition of the player's right in his image. One such instance was when Mr. Irvine's (a Formula One driver) image was used in an advertisement without his permission.²³ These Passing off issues are dealt under either the trademark law of the respective country or by a dictum of the court of law, but irrespective of the judicial pronouncements, there subsists a limitation to the aegis of law which the trademark owner should keep in mind. In *Arsenal FC v. Mathew Reed*,²⁴ (landmark case on this matter in the UK) Mr. Reed was selling merchandise bearing the trademark 'Arsenal' & 'Gunners'. The court gave a dictum in favour of Mr. Reed wherein it was stated that, if a person could prove that there was no confusion in the minds of the consumer as to the source of the goods, i.e. there is no misrepresentation of it being official merchandise, then the person wouldn't necessarily violate the trademark of the club. Therefore, it is one thing to sell merchandise without confusing the people of its origin & not selling it as an original and it is another thing to sell the merchandise maliciously, intending to deceive the buyer of its true origin, the former is not passing off but the latter calls for a passing off action.

In India, the action is similar to that in the United Kingdom. The action against this offence can be claimed under the Trademarks Act. Section 27 provides protection to unregistered marks, recognizing the common law right of an unregistered trademark owner to take action against any person for passing off. Indian courts have declared that, "although the action of passing-off is normally available to the owner of a distinctive mark, it is an action not only to preserve the reputation of the plaintiff but also to safeguard the public"²⁵, The court here laid emphasis on prior use doctrine. Another, very important aspect which the Indian courts too have recognized, like in the UK is the action of misrepresentation with the key ingredient being the likelihood to cause confusion without having to prove any malafide intention.²⁶

²² *Irvine & Another v. Talksports Ltd*, (2002) 1 W.L.R 2355.

²³ *Id.*

²⁴ *Arsenal Football Club v. Matthew Reed*, (2001) 2 CMLR 23.

²⁵ *Satyam Infoway Ltd. v. Sifynet Pvt Ltd*, (2004) 6 SCC 145.

²⁶ *Telemart Shopping Network Pvt Ltd v. Tvc Life Sciences Ltd & Anr*, (2018) 249 DLT 27.

III. THE SCOPE OF COPYRIGHT PROTECTION IN THE WORLD OF SPORTS

Copyright forms an unformidable part of protection for sports in toto (players, teams, brands). In order to protect one's right from being flouted and to safeguard its value, the copyright regime is heavily relied upon by the owners. Copyright in Sports applies in diverse segments preserving the right of the creator, creators image rights, computer games, mottos, books, team emblem, etc. The Copyright Act of 1957 might cover these catenae of creations and supplementarily protect them but this remains an uncertainty since the Act doesn't expressly include them.

A. The Relation between Right of Publicity, Personality & Copyright Law

The relation between Publicity, Personality and Trademark/Copyright has been a contentious as well as frequently litigated topic in the US Laws.²⁷ It is worthwhile to note that the right to publicity varies from that of privacy.

The right to privacy extends to one's '*right of being left alone*'.²⁸ In this transient world players and other celebrities' publicity is being transgressed with a lot of fans/paparazzi being inquisitive about every single aspect of their personal lives. In *Cohen v. Herbal Concepts Inc.*,²⁹ Plaintiff's photo was used on the cosmetic product. Defendant argued that the mother and daughter were not recognizable in the picture, but the court thought otherwise and damages were awarded recognizing her image rights. Therefore, in cases of such breach, the athlete can either claim compensation for 'invasion of privacy' or in the form of the avowal of their '*right to privacy*'.³⁰ Moreover, apart from compensation which is the *raison d'être* for advocating privacy rights, emphasis can also be laid on the protection it provides to one's autonomy and self-esteem. In *Auto-Shankar* case,³¹ the Supreme Court endorsed the view that celebrities' right to privacy rights form part and parcel of Art. 21 and termed it as a

²⁷ Joshua Beser, *False Endorsement or First Amendment: An Analysis of Celebrity Trademark Rights and Artistic Expression*, 41 SAN DIEGO L. REV. 1787 (2004).

²⁸ Louis Brandeis D & Warren Samuel D, *The right to privacy*, 4(5) HARV.L.REV. (1890).

²⁹ *Cohen v Herbal Concepts Inc*, (1984) 63 NY.2d 379.

³⁰ Tabrez Ahmad, *Celebrity Rights: Protection under IP Laws*, 16 J. INTELL PROP. L. 7 (2011).

³¹ *Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

horizontal right (surprisingly). Horizontal rights apply both against the State as well as citizens unlike most of the Fundamental rights, which apply only against the State.

Unlike Privacy rights, the right to publicity shields an athlete from being commercially plundered by somebody else of his likeness, image or his tag; the player or the celebrity as the case is, is “the one to decide when and where, and to be paid for (the exposure).”³² The celebrities, as well as the players in the US, have registered their marks in the State of California for it is one of the only states where laws existing which recognize both the common law as well as the statutory rights of publicity. It states: “*Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising... without such person's prior consent... shall be liable for any damages sustained by the person or persons injured as a result thereof.*”³³

The Supreme Court of India in Justice *K.S. Puttaswamy (Retd.) v. Union of India*, overruled the case of *Kharak Singh v. State of U.P.*³⁴ explicitly stating that the right to privacy is a fundamental right protected by the *golden triangle*³⁵ of the Constitution. Sanjay Kishan Kaul, J. elevated personality/ publicity rights from a meagre common law right to that of a Constitutional right which in turn is comprised of within the right to privacy under the Art. 21. He stated that: “*Every person should have definitive control and right over his life and image as depicted to the multitudes and to administer the commercial use of his persona and identity*”³⁶

As regards the personality rights of a celebrity/player, the case of *Rajat Sharma & Zee Media*³⁷ had explicitly dealt with this contentious issue which is still at a nascent stage. The Delhi H.C. enumerated that the promotional advertisement put forth by Zee Media in the national newspapers bore a clear reference to Mr. Sharma’s well-known TV show (Aapki Adalat). This advertisement (promoting anchor-less news initiative) took a dig at some of the

³² *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 127-30, 134 (2d Cir. 1984) (regarding the scanty public figure's right of privacy and publicity asserting against pornographic magazine for erroneously identifying her as nude woman in photograph).

³³ California Civil Code, § 3344, (West 1997).

³⁴ *Kharak Singh v. State of U.P.*, 1964 1 SCR 332, 345, 347

³⁵ INDIA CONST., art.14, 19 & 21.

³⁶ Justice K.S. Puttaswamy (Retd.) V. Union of India, (2017) 10 SCC 641.

³⁷ *Rajat Sharma v. Ashok Venkatramani (Zee Media)*, CS (COMM) 15/2019.

renowned TV anchors of India.³⁸ The court placed high reliance on the principle of identifiability³⁹ and held that Rajat Sharma was clearly identifiable as a celebrity and that such rights transgress the out-of-date laws of advertisement.

Personally, after going through the order, it was felt that the court could have given a deeper analysis of this evolving field. Additionally, a blatant flaw with the narrative that these rights are part of IPR is the “lack of recognition of the role of the public in nurturing and forming publicity rights.”⁴⁰ It will be apt to state that the fame & recognition, consequential to public exaltation (even dislike, like the Sergio Ramos or Kardashians) is pre-eminent for exploiting personality rights.

B. Image Rights and Endorsements Rights of a Player/Athlete

Each athlete enjoying a zealous fan base is not just a player participating in sport to win, but he is in himself a brand, a commodity which is capable of being traded and creating commercial value. Players like Cristiano Ronaldo, Roger Federer, Lebron James, etc. earn more commercially because of their glimmering image than they do it from the sporting conduits. In India, the Delhi H.C. had recognized this aspect and held that this right vests in an individual rather than an organization.⁴¹ FIFA (the governing council of football) corroborates and promotes the principle which gives players the right to explore his/her own image rights by himself and at the same time, clubs the right to exploit the rights in a group of players or the squad as whole...⁴²

It is to be noted that the concept of image rights is akin to that of goodwill, as stated above, it is no less than an “*intangible asset*” or “*brand*” which has been developed over the period of time by unremitting jaw-dropping performances week-in & week-out. In India, like the U.K., there is no specific legislation defending these rights, and legal action can be taken only in

³⁸ **Appendix 1** (Newspaper Advt. in Rajat Sharma v. Zee)

³⁹ Prarthana Patnaik, *Rajat Sharma v/s Zee Media- Delhi HC'S Latest Order on Personality Rights*, SPICY IP (Nov. 08, 2019, 12:37 PM), <https://spicyip.com/2019/01/rajat-sharma-v-s-zee-media-delhi-hcs-latest-order-on-personality-rights.html>.

⁴⁰ Harshavardhan Ganesan, *Reveries of a Publicity Right*, SPICY IP (Nov. 08, 2019, 12:54 PM), <https://spicyip.com/2017/07/reveries-of-a-publicity-right.html> (Accessed, 11 Nov 2019).

⁴¹ ICC Development (International) Ltd. v Arvee Enterprises & Anr, 2003 (26) PTC 245 (Del).

⁴² Professional Football Player Contract Minimum Requirements (Circular 1171/2008), FIFA (Nov. 08, 2019, 1:07 PM), www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professionalfootballplayercontractminimumrequirements.pdf.

cases where any of their legal rights which form part of the “*rag baggage*” of law⁴³ was infringed or illegal reproduction of their image rights took place⁴⁴ or in cases where breach of commercial confidentiality took place.⁴⁵ Nonetheless they are specifically dealt in football players’ contracts, for example, Clause 4 of the *English Premier League’s Standard Contract* vows for the protection of a players image rights.t states that the image of a player can be used by a club only when it is being used with 2 or more club players and that the image right circumscribes the use of nickname, signature, voice, photo or any virtual/electronic depiction which is distinctive and related to one’s fame.⁴⁶

Lately, this issue has also surfaced in the arena of eSports. Ex-Bayern Munich, now retired goalkeeper, Oliver Kahn had successfully sued⁴⁷ EA Sports for using his image and name in their football game without any express consent from his side.⁴⁸ After the emergence of eSports, it has become a prerogative for the legislatures to ponder upon this issue as well as for us to discuss IPR’s in the world of eSports.

IV. INTELLECTUAL PROPERTY IN THE WORLD OF ESPORTS

In a relatively short span of time, eSports has rapidly but surely solidified their position as a highly competitive and spectator-friendly entertainment industry. In 2018 alone, the combined viewership numbers of various esports tournaments and events rose to nearly 400 million, outnumbering the spectatorship of flagship traditional sporting events such as Wimbledon and the US Golf Masters.⁴⁹ Apart from the success of ‘traditional’ eSports titles based on the Multiplayer Online Battle Arena (MOBA) and First-Player Shooter (FPS) formats such as *League of Legends (LoL)*, *Dawn of the Ancients 2 (DotA 2)* and *Counter-*

⁴³ Art. 21 of the Constitution of India, 1950 “breach of Privacy”; Breach of Confidence under Torts; Trademark Act § 135; Breach of Advertising codes (ASCI), etc.

⁴⁴ Elvis Presley Enterprises v. Sid Shaw Yours, CHANF 1997/ 0686/ 3 E No 1337.

⁴⁵ Douglas & Ors v. Hello Limited, (2001) 2 WLR 992.

⁴⁶ Premier League Contract, *The IP Mall- Intellectual Property Collection*, UNIV. OF NEW HAMPSHIRE (Nov. 09, 2019, 2:51 PM), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/6_PREMIER%20LEAGUE%20PLAYERS%20CONTRACT.pdf.

⁴⁷ Kahn v. Electronic Arts GmbH, OLG Hamburg, unreported, 25 Apr 2003.

⁴⁸ Ian Blackshaw, *Understanding Sports Image Rights*, WIPO (Nov. 09, 2019, 4:36 PM), https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html.

⁴⁹ Christopher Ingraham, *The massive popularity of esports, in charts*, THE WASHINGTON POST (Oct. 21, 2019, 2:47 PM), https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/?noredirect=on&utm_term=.1affcebbb590.

Strike, there is also a seeming convergence of sorts between traditional sports and eSports, represented by the overwhelming success of the *FIFA eNations Cup*⁵⁰ and the *e-Premier League*, an international gaming tournament in which players represented and competed as their home countries on *FIFA 19*, a popular football video game.⁵¹ This has further contributed to the success of the eSports model and its positive reception worldwide amongst the next generation of sports enthusiasts.

The meteoric rise of eSports, however, has also brought with it a host of legal and regulatory complications, which if not addressed and dealt with judiciously, can pose major hindrances to its continued growth.

Traditional sports have over time established a stable and sustainable ecosystem of operations and revenue distribution. However, the structure of the eSports ecosystem extensively differs from that of traditional professional sports and as a result, suffers from multiple discrepancies.⁵²

The fragmented nature of the industry, with each video game title being distinct from the other and each having a different framework of rules which is pre-programmed into the game by developers, makes the implementation of a common set of guidelines for eSports governance especially challenging. The highly diverse nature of game mechanics in different eSports titles, varying from sports based games to combat and shooter based games, unlike traditional sports which operates on a set of fundamental rules that extend to all events and tournaments involving the sport, also indicates the expansiveness of the eSports edifice, so much so that it can be considered to be a sub-industry in itself, operating as a part of the larger sports industry, further representing the difficulty in formulating an all-encompassing general regulatory framework. Organisations such as the International e-Sports Federation (IeSF) and World Esports Association (WESA) have been established in this respect, to assist in the regulation of eSports but have largely failed in achieving their purpose, primarily due to the lack of participation of game publishers, who are the prime players in the industry and responsible for organising most of the large-scale eSports tournaments. Publishers refrain

⁵⁰ Jack Morton, *FIFA eNATIONS cup 2019*, DAILYESPORTS (Oct. 21, 2019, 3:05 PM), <https://www.dailyesports.gg/fifa-enations-cup-2019-need-to-know/>.

⁵¹ *FIFA 19 - Soccer Video Game*, EASPORTS (Oct. 21, 2019, 3:22 PM), <https://www.easports.com/fifa>.

⁵² Roman Brtko, *Intellectual Property in the World of eSports*, IPWATCHDOG (Oct. 22, 2019, 5:42 PM), <https://www.ipwatchdog.com/2018/04/02/intellectual-property-esports/id=95245/>.

from engaging in such organizations as they see regulation as an obstacle to their profit-making motives. Publishers unlike tournament organizers in traditional sports events whose operations are restricted to regulating a specific sport, see eSports as a secondary activity, their primary concern being selling the video games they produce. As a result, they often overlook the interests of other stakeholders such as the players and spectators.⁵³

A. IP Monopolisation - Distribution and Streaming Conflicts between Publishers and Organisers

Esports, at their core, involve competition between players of video games. These video games are essentially creative works produced by various game publishers, hence being capable of protection under intellectual property law (*copyright*). Intellectual property and the revenue derived therefrom, constitute the backbone of the eSports industry. Players, publishers and tournament organizers earn significant sponsorship and broadcasting revenue through the intellectual property involved in video games. The issue raised herein is that third parties are superficially making money from rights that they do not own and in which they do not have an immediate interest from a legal standpoint. There are a number of rights and interests of multiple stakeholders, which need to be balanced when it comes to intellectual property. What is especially difficult is protecting these rights and simultaneously catalyzing the growth of the burgeoning phenomenon that is eSports.⁵⁴

IP monopolization has been a long-standing issue which has plagued the intellectual property framework of eSports. Decision making, with respect to the usage of the games by tournament organizers, broadcasters, teams, and players lie solely with the publishers, who effectively exercise a monopoly over other stakeholders. Since these stakeholders place heavy reliance on the intellectual property (the game) of the publishers, it puts the publishers in a position of unprecedented power, where they can easily exploit any benefits derived by other entities from the usage of their IP and control such usage as well.⁵⁵ This has been a cause for much tension between the various stakeholders of the eSports community. In the current

⁵³ Joost, *Esports Governance and its Failures*, MEDIUM (Oct. 22, 2019, 6:07 PM), <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea>.

⁵⁴ Richard Wee, *Three key legal issues currently facing the Esports industry: A perspective from Asia*, LAWINSPOORT (Oct. 22, 2019, 6:21 PM), https://www.lawinsport.com/topics/articles/regulation-a-governance/item/three-key-legal-issues-currently-facing-the-esports-industry-a-perspective-from-asia?category_id=115.

⁵⁵ Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J.L. & SOC. PROBS. 177 (2018)

scenario, the reproduction of a computer or video game in any form, whether permanent or temporary, for whatever purpose, is subject to authorization from the developer. Such authorization is generally granted through end-user license agreements between the publishers and other entities, but by and large, these agreements expressly prohibit the ‘commercial exploitation’ of the games, subject to any further agreement to the contrary’.⁵⁶ Commercial exploitation here refers to the sale, franchising, licensing or merchandising of the intellectual property for economic benefit.⁵⁷ A centralized IP structure provides publishers with exorbitant power with regards to the commercial dissemination of their games, raising many ethical concerns for players as well as sponsors.⁵⁸ Although publishers have to some extent, accommodated their license agreements to allow for streaming of gameplay by players and streamers, it only extends to non-commercial and free streaming, which disentitles individual streamers from prospective revenues.⁵⁹

IP retention by publishers has been a factor behind a number of disputes in the eSports community, relating to the usage rights of third-party entities, the most notable of which is a copyright dispute, the *SpectateFaker* case, which involved the unlicensed streaming of gameplay by third-party streamers. SpectateFaker is a channel on Twitch, a popular video game streaming platform, which streamed gameplay footage of Faker, a League of Legends player. This exact footage, however, was already being utilized by Faker himself on another streaming platform, Azubu. Azubu consequently filed a complaint against Twitch for streaming content which does not belong to them. As the actual rights to the footage of the game lay with Riot, the developer of League of Legends, neither of the conflicting parties could claim ownership and Twitch was thereby held non-labile for streaming the disputed footage.⁶⁰ This dispute highlights the seeming grey area regarding the right to the usage of in-game footage, gameplay and other content by derivative entities such as Twitch and Azubu.

⁵⁶ Brtka, *Supra* note 55.

⁵⁷ James, *Commercial exploitation of intellectual property rights*, CLENDONS BARRISTERS AND SOLICITORS (Oct. 22, 2019, 6:59 PM), <http://www.clemonds.co.nz/resources/background-papers/intellectual-property/commercial-exploitation-intellectual-property-rights/>.

⁵⁸ Richard P. Flaggert & Calvin Mohammadi, *Copyright in esports: a top-heavy power structure, but is it legally sound?* DLA PIPER (Oct. 22, 2019, 7:23 PM), <https://www.dlapiper.com/en/northamerica/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

⁵⁹ *Id.*

⁶⁰ John DiGiacomo, *Copyright Infringement and eSports*, REVISION LEGAL (Oct. 23, 2019, 4:48 PM), <https://revisionlegal.com/revision-legal/copyright-infringement-esports/>.

B. The Intersection of Antitrust and IP Law

One of the major setbacks caused by IP monopolization is entity overlap. Since the intellectual property rights lie solely with the publishers by virtue of the law⁶¹, they are entitled to utilize the same in whatever manner they please and also the benefits derived from such use. This often leads to the publishers assuming the role of organizers, broadcasters as well as sponsors. The most notable example of entity overlap is seen with Riot Games. Riot is the developer of the popular eSports title '*League of Legends*' (LoL) and also organizes the *LoL Championship Series*. Additionally, Riot also controls the broadcasting of the Championship Series.⁶² In this way, Riot deprives many tournament organizers and broadcasters of revenue prospects. Apart from losing out on potential revenues, third-party entities may also be able to carry out the dissemination process better effectively, being experts in these processes and having a wider spectator following. It is understandable why publishers such as Riot seek to retain their IP rights. As developers, they see themselves better equipped and qualified to regulate the game in tournaments and other events and also for promoting the game. However, absolute control over these rights can sometimes stifle the operations of third-party entities, as was the case with the Riot and OGN (a South Korean video game channel dedicated to eSports) debacle in 2017. OGN, which previously broadcasted the *LoL Championship Series* in South Korea and to whom Riot supplied broadcasting rights, were relieved from this prior agreement. Following this, Riot entered the South Korean market as the sole broadcaster of the Championship, which wiped out OGN's share in the market.⁶³

The biggest losers from the current monopolistic IP ecosystem in eSports are tournament organizers. Tournament organizers work in collaborative arrangements with sponsors and broadcasters. Sponsors provide the bulk of financial input for running the tournament, in return for adequate promotion of the sponsor by the organizer, which varies from sponsor to sponsor. For example, if the sponsor is a computer hardware company, such as Intel or MSI, they require organizers to specifically incorporate their hardware in conducting the event. Food and beverage companies like Coca-Cola and Red Bull, require organizers to officially supply their beverages for consumption by spectators and participants. However, if

⁶¹ In India, video games are considered to come under the ambit of '*cinematographic work*' according to § 2 of The Copyright Act, 1957 as a "*process analogous to cinematography*".

⁶² Taylor Cocke, *How the League of Legends World Championship Shaped an Entire Esport*, THE ESPORTS OBSERVER (Oct. 23, 2019, 5:11 PM), <https://esportsobserver.com/esports-essentials-league-worlds/>.

⁶³ Miroff, *supra* note 58 at 189.

the sponsor is a streaming company such as Twitch or YouTube, they might require organizers to enter into exclusive broadcasting agreements for streaming the tournament.⁶⁴ The problem arises in the case of such category of sponsors, with reference to the organisers further supplying intellectual property not being their own. Organisers enter into contracts with developers for the usage of the game for competitive purposes in events. These contracts are generally not expansive in terms of the scope of the passed-on IP rights extending to their distribution to third-party entities such as sponsors. This is largely done by publishers to prevent entailing the potential loss of revenue through Ambush Marketing by unlicensed sponsors. However, what this also does is greatly hamper businesses with derivative operations dependent on the utilisation of such IP rights for their sustenance.

The thrust of competition law, as well as intellectual property law, is fostering fair competitive markets that ensure consumer welfare (*Competition Law*) while protecting the proprietary work of the competitors (*Intellectual Property Law*). The existing IP monopoly threatens the essence of what competition law seeks to protect, by limiting the market competitors to the publishers, a resultant of the persisting entity overlap ecosystem in the eSports market. Publishers are increasingly endorsing an exclusionary approach by retaining organising and broadcasting operations.⁶⁵ What publishers fail to realize is that by not involving independent tournament organisers in the distribution mechanism, they sacrifice mutual spectator growth along with other publishers.⁶⁶ Independent organisers such as ESL organises national as well as international eSports tournaments involving a diverse catalogue of eSports titles for players to compete on, including Counter-Strike, DOTA 2, StarCraft II and Mortal Kombat. These games have all been developed by separate publishers (*Valve, Blizzard and Electronic Arts*) but are contested under the aegis of ESL, allowing for existing spectators of one game to gravitate towards viewing other titles simultaneously being contested in the same event. The success of ESL clearly represents the viability and long-term benefits of decentralised IP distribution.

⁶⁴ Wee, *supra* note 57.

⁶⁵ Miroff, *supra* note 58, at 186.

⁶⁶ Taylor, *supra* note 60.

C. Gamertags and Avatars - Protecting Image and Performance Rights of eSports Players

Contrary to traditional sports, where the player has control over his image rights, which includes the right to the use of their face or name or likeness, subject to any contract between the player and a sponsor, players in eSports generally control an avatar or Gamertag (*nickname*) through which they compete. This avatar or Gamertag is in-game and being a part of the game, any commercial aspects of the character lie with the publishers. Therefore, with respect to building player reputation and popularity, the question of image rights arises with regards to who has the control and subsequent right to monetary gains from the commercial usage of the player's in-game image.

The complexity involved herein is classifying what part of the game and its related content can be considered to be as the IP of the publisher and what can be considered as affiliated to the eSport athlete's image. While the actual footage of the game belongs to the developer, as far as the streaming of footage involving a particular player on streaming platforms is concerned, the player's image rights are affected as the player has a vested interest in the commercial utilisation of his gamertag or avatar.⁶⁷

The legal ambiguity surrounding the ownership of the image rights of virtual identities of eSports players has wide-ranging implications on the commercial exploitation of image rights through licensing and merchandising player likeness'. A perfect representation of publishers exploiting the image rights of eSports players is the contract entered into by Riot Games with contestants of its *LoL Championship Series*. According to § 5 of this contract, Riot is granted unlimited and unfettered usage rights to the player's in-game avatar. This section completely disentitles players from any potential commercial gains made from the usage of their in-game likeness.⁶⁸ Players in the Championship Series, as a result, become completely dependent on tournament winnings as sponsorship revenue is literally 'snatched' away from them by the publishers. Taking into account the low probability of coming out on top from a pool of thousands of players, many players make little or no return on their hard work to qualify for such major tournaments. This is especially alarming as unlike traditional sports where players

⁶⁷ Alex Chun, *Esports players – Do You Know Your IP Rights?*, SPARK LLP (Oct. 24, 2019, 4:21 PM), <https://spark.law/video-game-law/esports-know-your-ip-rights/>.

⁶⁸ Adam Levy, *PWND or Owned? The Right of Publicity and Identity Ownership in League of Legends*, 6 PACE. INTELL. PROP. SPORTS & ENT. L.F. 163 (2016).

are largely in control of their image rights and earn regular revenue through the licensing of the same and salary income (in the case of sports like football and basketball, where players are signed to clubs in the capacity of an employee), eSports players have no source of regular income and whatever little income they receive from their teams is sparsely inadequate.⁶⁹ These teams, unlike professional clubs in traditional sports, lack an organised structure with directors, management and staff are usually a group of players who play together. This means that teams have to solely rely upon the limited IP they have (the team name and logo) for funding themselves through sponsorships and endorsements. In comparison to traditional sports, where teams have a global following which allows for an abundance of sponsorship opportunities, eSports teams who are largely unknown in this regard, do not present lucrative sponsorship avenues to the sponsors. The sponsorships they do receive are largely from computer hardware companies, who, unlike their cash-rich counterparts in traditional sports, can ill-afford paying handsome amounts to these eSports teams.⁷⁰

The professional teams which eSports players are contracted to often undertake the control and usage of the IP rights of their members through the player's contracts entered into by the members. In addition to losing out on the control of their image rights to their teams, any contracts with brands or sponsors on an individual level further dilute the ownership of their image rights. Considering the young age of the majority of eSports players, a lack of awareness on their part about their image rights further aggravates the possibility of their IP rights being exploited. Teams and sponsors, try to capitalise on the intellectual property of these uninformed young eSports players via the inclusion of exploitative clauses in player contracts. Players can become victim to breaching sponsorship agreements due to such exploitative clauses and also because of the lack of effective communication from the team on conflicting sponsorships. Teams should clearly specify team sponsors to their members to ensure clarity to the players while choosing individual sponsors to prevent the possibility of agreements being breached.⁷¹ To this effect, strengthening the licensing system to better protect the publicity rights of eSports professionals is key. Impeding the licensing rights of developers and sponsors is essential in preventing the abuse of these rights. This provides players greater

⁶⁹ *Id.*

⁷⁰ Daniel Alfreds, *IP and Rights Package: Legal issues to consider in esports sponsorships*, THE ESPORTS OBSERVER, (Oct. 24, 2019, 4:50 PM), <https://esportsobserver.com/legal-issues-to-consider-in-endorsements-and-sponsorships-part-1/>.

⁷¹ *Id.*

discretion in commercialising their identity in a manner they best see fit, while also ensuring proportional distribution of benefits accrued from the commercial utilisation of player IP.⁷²

D. What do the players exactly own?

In-game character/avatar authorship by eSports players is characterised as derivative ownership as the construction of such avatars relies on the existence of a game, without which they rendered useless, supporting the retention of commercial exploitation rights with the publisher. The concomitant nature of avatar authorship coupled with the derivative interpretation of their avatars somewhat weakens the stance of eSports players with regards to claiming copyright protection.⁷³ However, a point in favour of eSports players here is that the reliance on input (*the game and its programmed code*) does not grant an absolute right of exploitation to the publishers, primarily because of the possibility of an immense number of outcomes when avatar construction extends to the in-game performance of the avatar through the control of the player. Individual players have unique ways of controlling their avatar by way of using different combinations of movements and interactions. The outcomes of these combinations are neither scripted, nor comprehensively pre-anticipated by the publishers.⁷⁴ This demonstrates that the larger proprietary concern from the point of view of eSports athletes is of player performance, over the question of avatar proprietorship.

Player performance and its protection under intellectual property law present yet another legal conundrum, specifically with regards to the inherent difference between the artistic expression of skill in eSports versus traditional sports.⁷⁵ In traditional sports, a degree of skill and technique underlying the actions of athletes is ever-present and achieved through rigorous practice. The skill an individual athlete possesses and the execution thereof is distinct from his fellow counterparts and entirely unique, thus making it easier to establish copyright originality. In eSports, though there is a similar level of application of skill and technique and practice involved, the execution is through the virtual persona of the player, blurring the lines of distinction between the performances of one player from the other, subsequently complicating claims of proprietorship over a specific style of performance.

⁷² *Esports Contracts: 5 Things Every Athlete Should Consider*, GORDON LAW (Oct. 25, 2019, 9:04 AM), <https://www.gordonlawltd.com/esports-contracts-5-player-considerations/>.

⁷³ Brtka, *supra* note 49.

⁷⁴ Dan L. Burk, “*Owning E-Sports: Proprietary Rights in Professional Computer Gaming*”, 161 U. PA. L. REV. 1535 (2013).

⁷⁵ *Id.* at 1569.

Although the playing styles of the topmost eSports professionals are clearly identifiable and distinguishable to spectators and fans alike, the implementation of these styles by other players cannot be safeguarded against as the execution takes place on digital platforms, which as of now remains uncharted territory in terms of the jurisdiction of copyright law⁷⁶.

CONCLUSION

The quandary of publicity and personality protection in the current IP regime of the eSports and Sports ecosystem, makes it increasingly pertinent to stress upon a community-oriented distribution of IP rights. The developers cannot claim to be the sole beneficiaries from the IP of their games. Players and teams have, if not an equivalent, a considerable stake in these games and corresponding elements. With the proposed inclusion of eSports in the *2024 Paris Olympics*⁷⁷, eSports players are set to stand on an equal pedestal to traditional sport participants, representing their countries at the grandest sporting spectacle. This puts them in a position where they can and for their own benefit, should leverage their interests relating to their '*e-Personas*' and game performances.⁷⁸

Sports organisations, at the national and international level should strive to ensure cooperation and competitive balance between players, organizers and developers in the Sports and eSports industry, supporting the parallel growth of Sports as business by adopting a decentralised distribution model. This ensures every stakeholder in this ecosystem is assured a piece of the pie in terms of revenues and a systematic allocation of costs involved in organising, broadcasting, sponsorships, merchandising, etc. between publishers and other third-party entities. Apart from a stable revenue and cost-sharing model, decentralisation also offers more autonomy to participating players and teams with regards to sponsorships and endorsements related to their own intellectual property.

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⁷⁶ § 38 of the Indian Copyright Act, 1957 provides protection to the performance right of authors. The operative word here, however is "author" and the scope thereof. Legally speaking, authorship refers to the producers of the creative work, which in the case of eSports are the publishers. The extension of authorship to the originality of player performance still remains largely unanswered in the legal context.

⁷⁷ Liz Lanier, *Esports Could Be in the Olympics by 2024*, VARIETY (Oct. 26, 2019, 12:16 PM), <https://variety.com/2018/gaming/news/esports-olympics-2024-1202880818/>.

⁷⁸ Marijam Didžgalvytė, *Labour Rights in Esports*, NOTES FROM BELOW (Oct. 26, 2019, 12:33 PM) <https://notesfrombelow.org/article/labour-rights-in-esports>.