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A Multitude of Gaps - From Publicity Rights to Ambush Marketing

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ABSTRACT

The protection of the Intellectual Property Rights of any and every valid discovery is an imperative step in the assurance that the fruit of their hard work will belong to them. It will not be taken away from them and no undeserving copycats will benefit from their effort. Intellectual Property Rights play a huge role in protecting ownership and the work product in several industries across the world, the sports industry and sports law are one of the major players amongst them. The principles of Intellectual property demarcate and uphold authenticity. Sport is a prime example of a discipline that relies on authenticity and genuineness. And as days turn weeks, we observe a steady increase in the necessity to reinforce the need for Intellectual Property Rights in Sports. The avenues for applying IP Rights are extensive in every sports arena. This ranges from the manufacturing process of a particular golf ball to the guidelines imposed by the International Olympic Committee for the Protection of the Olympic Symbol under the Nairobi Treaty. Today IP Rights are moreover used to enable the rights of the sponsors and the stakeholders in particular events. This article is aimed at gaining a broader understanding of the combined applications of the two disciplines, IPR and sports law in a global outlook.

I. INTRODUCTION

"The Law should protect investments in sport."[2]

The protection of the Intellectual Property Rights of any and every valid discovery is an imperative step in the assurance that the fruit of their hard work will belong to them. It will not be taken away from them and no undeserving copycats will benefit from their effort. Intellectual Property Rights play a huge role in protecting ownership and the work product in several industries across the world, the sports industry and sports law are one of the major players amongst them. The principles of Intellectual property demarcate and uphold authenticity. Sport is a prime example of a discipline that relies on authenticity and genuineness. And as days turn weeks, we observe a steady increase in the necessity to reinforce the need for Intellectual

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[2] D Murali, *"The Law should protect investments in Sport",* HINDU BUS, Line, Sept 18, 2008, http://www.thehindubusinessline.com/todays-paper/IdquoThe-law-should-protect-investments-in-sportdquo/article20012903.ece

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Property Rights in Sports. The avenues for applying IP Rights are extensive in every sports arena. This ranges from the manufacturing process of a particular golf ball to the guidelines imposed by the International Olympic Committee for the Protection of the Olympic Symbol under the Nairobi Treaty.[3] Today IP Rights are moreover used to enable the rights of the sponsors and the stakeholders in particular events. This article is aimed at gaining a broader understanding of the combined applications of the two disciplines, IPR and sports law in a global outlook.

II. IPR REGIMES AND SPORTS LAW

A very common interdisciplinary application of the two disciplines can be observed in the manufacturing processes of sports equipment. For example, for a particular kind of Protective Gear that is used in a specific sport, a multitude if IP Rights may come into application during various stages. From Patents protecting the signature manufacturing process of the gear, the designs protecting the "Appearance or the Look" aspect, Trademarks helps consumers to recognise and distinguish their brand product amongst similar ones and also to increase their goodwill and Copyright enables the protection of any and all tags, creative advertisements, catchphrases, artworks etc.[4]

The measures taken to prevent any loss owing to a misconduct in IP are aplenty.[5] We see the notices and copyright warnings before the Major League Baseball("MLB") as well as the national Football League("NFL") have seen nothing but dismay from the part of the consumers. The occurrences of such warnings being absolutely neglected and the losses claimed by such companies as a result of such piracy are in the millions.[6] And the statutory FBI warnings that play at the beginning of recorded games has also had little to no effect in curbing sports piracy.[7] This clearly points to the fact that the mode of notices have proven to be quite ineffective.[8]

Even so, such mandates and arbitrary notifications promulgated have been challenged recently

[3] Nairobi Treaty on the Protection of the Olympic Symbol (1981), WIPO Lex No. TRT/NAIROBI/001, available at https://www.wipo.int/treaties/en/ip/nairobi/

[4] Sport and Intellectual Property, available at, https://www.wipo.int/ip-sport/en/

[5] John Eggerton, NBC U. Copyright Warning Complaint is Frivolous, BROADCASTING & CABLE, Aug. 1, 2007, http://www.broadcastingcable.com/article/CA6464843.html ("IT]he current FBI warnings are generally either ignored, overlooked, or made fun of, in part because of the hardline they effect-which consumers do not recognize as applying to them.").

[6] Sarah McBride & Geoffrey A. Fowler, Studios See Big Rise in Estimates of Losses to Movie Piracy, WALL ST. J., May 3, 2006, at B1 (noting movie studios lose $6.1 billion globally per year, about 75% more than the prior estimate).

[7] Maura Corbett, Separating fact from fiction on digital copyrights, CNET, Aug. 27, 2007, http ://www.news.com/Separating-fact-from-fiction-on-digital-copyrights/2010-1030_3-6204450.html.

[8] Cory Tadlock, Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies and Overreaching Their Copyright Protections, 7 J. Marshall REV. INTELL. PROP. L. 621 (2008).

by the Computer & Communications Industry Association ("CCIA").[9] The primary arguments put forth for the same was that sports and sport related media companies have been refusing the consumer's fair use rights. Fair use doctrine essentially means that the consumers can bypass copyright protection for certain socially useful purposes, educational or otherwise. An example of such use would be accessing plain facts like the unedited player statistics.[10]

III. PERSONALITY RIGHTS & THE RIGHT OF PUBLICITY

"The right of publicity is the inherent right of every human being to control the commercial use of his or her identity."[11]

The components of a violation of the right to publicity are pretty simple. The complaining party must prove the following factors to establish a prima facie case for a breach of the right of publicity:

1. Validity: Plaintiff holds an enforceable right to a human being's identity.
2. The act of infringing on someone else's intellectual property.
    a. Defendant has utilised some component of plaintiff's identity or persona without plaintiff's permission in such a way that plaintiff can be identified as a result of defendant's use.
    b. The defendant's usage is likely to harm the persona's commercial value.[12]

The plaintiff must first satisfy the "validity" factor in order to file a valid claim for infringement of the right of publicity.[13] However, it is expected that in most right of publicity instances, the legality of the asserted right would not be a significant issue. The reasoning is that as long as the plaintiff claims a right of identification in a human being, the right's existence will not be a problem unless the applicable state law does not recognise commercial rights in human identity.[14]

In Ali v. Playgirl, Inc.,[15] the court ruled that A cartoon showing a naked black man seated in the

[9] Request for Investigation and Complaint for Injunctive and Other Relief, In re Misrepresentation of Consumer Fair Use and Related Rights, No. - (Fed. Trade Comm'n Aug. 1, 2007), as attached to Letter from Matthew Schruers, Senior Counsel for Litig. & Legislative Affairs, Computer & Commc'ns Indus. Assoc., to Donald S. Clark, Secretary of the Communication, Office of the Secretary, Fed. Trade Comm'n (Aug. 1, 2007), available at http://www.ftc.gov/os/070801CCIA.pdf [hereinafter CCIA Complaint] (complaining against six copyright-holding corporations: the National Football League, Major League Baseball, NBC Universal, DreamWorks Animation SKG, Harcourt Inc., and Penguin Group (USA)).
[10] *Id* at 7
[11] 4 J. Thomas McCarthy, McCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:1, at 28-3 (1996).
[12] *Ibid.*
[13] *See id*. § 3.1[C], at 3-4.
[14] *See id*
[15] 447 F. Supp. 723 (S.D.N.Y. 1978).

comer of a boxing ring, both hands taped and resting on the ropes, appeared in the February 1978 issue of Playgirl Magazine. The image was titled "Mystery Man," and an additional reference to "the Greatest" hinted at the identity of the portrayed subject. Ali argued that the image had an undeniable resemblance to him and that it infringed on his right to privacy. Ali had "frequently claimed that appellation for himself and that his efforts to establish himself in the public imagination as 'the Greatest' [had] been so successful that he [was] consistently recognised in news media as that he was consistently recognised in news medias as the same. "The plaintiff's cheekbones, broad nose, and biggest brown eyes, as well as the unique smile and close cropped black hair, are unmistakable as the features of the plaintiff, one of the most widely known athletes of our time," the court added. The court stated that in New York, recognition is the proper criteria for determining whether the right of publicity has been violated.'[16] The court found that Ali's right to publicity had been violated because of the cartoon's striking similarity to him.

The concept of "standing to sue" is inextricably linked to the validity aspect. "Enforceable right" in the context of the right of publicity indicates that the plaintiff's own identity or that of others is at stake.

The right to publicity arose from the right to privacy and evolved into a kind of property right. However, the fact that it was originally regarded part of the right to privacy has perplexed many courts and, as a result, many commentators and attorneys throughout the years. Understanding the evolution of the right of publicity is critical to comprehending the nature of the right.[17]

Prof McCarthy observed that publicity rights has the following limitations:

> *"It can give every person the right either to prevent or to permit for a fee, the use of his or her identity in an advertisement to help sell someone's product. But the right of publicity cannot be used to prevent someone's name or picture in news reporting. It cannot be used to prevent the use of identity in an unauthorized biography. It cannot prevent use of identity in an entertainment parody or satire"*[18]

Beyond his or her creative efforts, the celebrity in the public eye has two concerns. The first is to prevent intrusions into what little privacy there is. The second goal is to safeguard the celebrity's name, image, and other identifying characteristics. In our celebrity-obsessed world,

[16] Negri v. Schering Corp., 333 F. Supp. 101, 104 (S.D.N.Y. 1971)
for the proposition that the New York statute in question applies to any representations that are "recognizable as likenesses of the complaining individual.")
[17] Laura Lee Stapleton & Matt McMurphy, The Professional Athlete's Right of Publicity, 10 MARQ. Sports L. J. 23 (1999).
[18] McCarthy, supra note 12, at 130-131

a celebrity's name and image are precious assets. If done with experience and judgement, they can be commercially promoted and yield significant returns. The celebrity is concerned that others may try to profit on them without their permission.[19] Personality and Publicity rights are established so as to prevent this and protect the celebrity's or athlete's interests.

Personality rights in sports have been shown to play an important role in the branding of both individual athletes and teams. Because of their celebrity status, even individual players like Tiger Woods, Cristiano Ronaldo, and Lionel Messi have become global brands. The players' celebrity status allows them to obtain worldwide recognition, which allows them to profit financially by conducting advertising or serving as brand ambassadors for a certain brand. Celebrity status encourages the formation of various forms of images, brand advertising, and money generation. Federations, coordinators, team owners, and athletes must all comply.

The right of publicity vested in a sports individual or a celebrity is usually enforced when one appropriates the commercial value of another's identity or likeness without their consent.[20] The United States were the pioneers in recognising the right of publicity. In the case of *Haelan Laborataries, Inc v. Topps Chewing Gum, Inc.,*[21]the court found that it was unfair for another individual to benefit from the popularity and social status of prominent personalities in advertisements without their permission. Although the US congress has not codified the right to publicity, the Supreme Court recognised it in the case of Zacchini v. Scripps-Howard Broadcasting.[22] Zacchini was a human cannonball performer whose act was videotaped and aired by a local television station despite him explicitly instructed them not to. The court stated that Zacchini is entitled to the right of publicity and as a result defined that the actions of the local TV station would amount to unjust enrichment by the theft of good will.[23]

In fact, some experts believe that the right to privacy evolved into the right to publicity.[24] For example, William L. Prosser split the right to privacy into four separate torts in a widely recognised law review article, one of which protects against the "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[25] Dean William Prosser divided the

[19] MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE § 7.10(1), at 685 (2d ed. 1992).
[20] Jeffrey F. Levine, Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China through Treaties, Chinese Law and Cultural Mechanisms , 9 TEX. REV. ENT. & Sports L. 203 (2007).
[21] Haelan Labs. v. Tops Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953)
[22] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563-64 (1977).
[23] *Id* at 576.
[24] See 1 J. THOMAS McCARTHY, RIGHTS OF PUBLICITY AND PRIVACY, §§ 1.1-1.11 & fig.1-1 (1997) (discussing the areas of the law that contributed to the development to the right of publicity).
[25] William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960) (enumerating the four torts); see Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974) (citing to the Prosser article)

"amorphous collection of civil wrongs falling within the category called 'invasion of privacy'" into four categories:

- Intrusion upon the plaintiff's physical solitude;
- Public disclosure of embarrassing private facts;
- Placing the plaintiff in a false light in the public eye; and the plaintiff in a false light in the public eye; and
- Appropriation for commercial benefit of the plaintiff's name or likeness.[26]

Most courts, on the other hand, appear to have argued that, unlike the general right to privacy, the right to publicity "protects pecuniary and proprietary interests [rather than] emotional interests."[27] States generally have taken two approaches in recognizing the right of publicity- either by enacting a statute to codify the right, or allowing it to remain the subject of common law protection.[28] The concept of marketable identity reflects the efforts of athletes in creating a public image with which consumers desire to associate with.[29]

The New York Supreme Court found in Shamsky v. Garan, Inc.[30] that t-shirts with a team picture of the 1969 World Champion New York Mets infringed on the right of publicity of the persons depicted in the picture. Despite the fact that the defendant maker did not obtain plaintiffs' permission to use the photograph on the shirt, it did so "with authority from the National Baseball Hall of Fame."

The Shamsky court dismissed the defendant's argument, while noting that "[u]nder New York law, [individual] athletes have the right to economic exploitation of their unique identities."

Sports Leagues come under the ambit of Right of Publicity[31]

One of the characteristics that the right of publicity unequivocally protects, both in common law and under statute, is one's name.[32] The district court in *Motorola*[33] found that Motorola used the NBA's name in marketing SportsTrax, including the term "NBA SportsTrax" and the names of individual teams, despite the fact that there was no evidence that Motorola "ever

[26] *ibid*
[27] MJ & Partners Restaurant Ltd. Partnership v. Zadikoff, 10 F. Supp. 2d 922, 930 (N.D. Ill. 1998)
[28] Pamela Edwards, What's the Score: Does the Right of Publicity Protect Professional Sports Leagues, 62 ALB. L. REV. 579 (1998).
[29] See, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 134 (Wis. 1979) ("'An advertiser who appropriates an individual's personality .... uses the audience appeal of [that] personality... to sell goods. Audience appeal is a principal stock-in-trade of a celebrity.").
[30] 632 N.Y.S.2d 930 (Sup. Ct. 1995).
[31] *Id* at 21
[32] See, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 138 (Wis. 1979)
[33] NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)

advertised that the NBA manufactured, licenced, sponsored, or approved SportsTrax."[34] The district court in Motorola acknowledged the commercial importance of NBA games and the League's attempts to safeguard and promote it.[35] The court determined that NBA games have monetary value "huge commercial value and appeal," most of which "is owed to the NBA's promotional efforts over the years."

The right to publicity, according to courts and legal academics, allows individuals the power to influence the distribution of public facts and ideas.[36] Sports leagues, with the exception of states that limit the right of publicity to natural persons, meet the criteria for establishing a prima facie right of publicity. These leagues have not only established a marketable identity outside of the combined identities of individual players (which sounds in and may be separately protected by trademark or Lanham Act provisions), but they have also established a marketable identity outside of the combined identities of individual players.

(A) Commercialization of Sports

The amount of money that plays into intellectual property brand capitalization is humongous, and a rather prime example of the same is various football clubs such as real madrid, Manchester United, Liverpool etc who have developed marketing for attributed brands and merchandise from t-shirts to aftershaves. When such clubs invest into the minute yet cumbersome aspects of a sport, it is imperative that they are not at a disadvantage due to the same. Recently during a press conference in the UEFA cup, Cristiano Ronaldo had moved two Coca Cola bottles away from his podium and held up a bottle of water and said: “Drink Water!”, this caused the stock of Coca Cola to plummet almost 4 billion USD. The organisers of the UEFA as a result had asked all the teams to direct their players to not move the bottles of their event sponsors. This is so as to protect the interests of the stakeholders or sponsors. Because the primary intent behind sponsorship of a big sporting event is to increase popularity and brand image of the sponsor and in turn improve the goodwill and reputation.

Another condition of a right of publicity breach is that plaintiff must show that defendant utilised plaintiffs identify or persona in a way that is likely to harm the identity or persona's commercial value. In Gautier v. Pro-Football, Inc.[37], the court decided that a sports league's broadcast of an animal rainer's halftime show, despite his contract, did not violate his New York statutory right to privacy. Despite the fact that a commercial announcement was made

[34] NBA v. Sports Team Analysis and Tracking Sys., Inc., 939 F. Supp. 1071, 1081-82 (S.D.N.Y. 1996)
[35] *ibid*. at 1077 (describing the NBA's licensing and advertising agreements).
[36] Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 125, 136-38 (1993)
[37] 107 N.E.2d 485 (N.Y. App. 1952)

immediately before plaintiff's performance and immediately after the performance of others who performed after plaintiff, the plaintiff's name and picture were not connected with the commercial announcements.

(B) The Difference Between the "Right of Privacy" and the "Right of Publicity"

As the right to publicity grew in popularity, courts began to acknowledge that it might be justified on grounds other than those that supported the right to privacy.[38] In Hirsch v. S.C. Johnson & Son, Inc.[39], the Supreme Court of Wisconsin distinguished the right of publicity from the right to privacy.[40] The right of publicity, according to the court, "protects a property right, not just a person's right to be left alone or to live his life in seclusion without being mentioned in the media."

The distinctions between the protections afforded by the right of privacy and those provided by the right of publicity, as Professor McCarthy points out, are "quite simple and straightforward."

> "*Privacy rights are personal rights. Damage is to human dignity. Injury caused by an invasion of privacy is measured primarily by "mental distress" and damages causally connected to mental distress. On the other hand, the right of publicity is a property right. Damage is commercial injury to the business value of personal identity. For example, damages for infringement of the right of publicity can include the fair market value of the plaintiff's identity; unjust enrichment and the infringer's profits; and damage to the business of licensing plaintiff's identity*"[41]

(C) Licensing and franchising in sports industry

The Brand and Content Protection Guidelines, which spell out the dos and don'ts, will be a crucial tool for all IP owners in the athletic business. Companies that sponsor sporting events typically invest a significant amount of money in the organising and promotion of the athletic arena[42]

Licensing and franchising play an important role in generating revenue from sporting events, as the licensee or franchisee obtains the right to sell an exclusive merchandize of the IP owner, which is related to exclusive teams, clubs, and so on, with the goal of building goodwill or reputation for the brand name. The main purpose of exclusivity is to generate brand awareness

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[38] The Right of Publicity called attention to Judge Frank's creation of this new right. See McCARTHY, supra note 9, § 28:5, at 28-6 (citing Melville Nimmer, The Right of Publicity, 19 LAW & Contemp. PROBS. 203 (1954))
[39] *Id* at 29
[40] 280 N.W.2d 129, 130-132 (Wis. 1979).
[41] McCarthy, supra note 12, at 134
[42] Brand and Content Protection Guidelines (September 21, 2020, 12:00 AM), https://www.iplt20.com/news/137115/brand-content-protection-guidelines

and increase goods sales.[43]

Profit can be made in a variety of ways, including licencing or franchising IP rights vested in online games, restaurant and bar services, broadcasting rights, including media rights, TV/DTH services, and so on. Ignorance is bliss for individuals who desire to profit from the privileges of others' intellectual property rights simply by denying that their own IP rights exist. However, ignorance is a curse for IP owners who fail to educate the public and even fail to notify the party who is exploiting or preparing to abuse their IP rights without paying a fee. The Brand and Content Protection Guidelines establishes a framework for the protection of brands and their content.

IV. IPR AND SPORTS SECTOR OF INDIA

In India, too, the sports sector has grown in recent years, with certain sports gaining incredible popularity over others as a result of commercialization and investment interest. Cricket has been a gentleman's sport for decades, but it has now evolved into a massive commercial game garnering vast sums of money, investments, and profits. The new T20-20 format and the IPL (Indian Premier League) have ripped the curtain back to reveal that business is now at the forefront of the game. Due to big monetary stakes, manipulation, betting, doping, and gambling difficulties, the money in the sports has led to massive scams in the recent past.[44] The Indian government is also attempting to streamline the industry by introducing the Sports Bill, 2011, which is soon to become a reality and, hopefully, will be able to control the management of sports to some extent, while considering the interests of all parties involved, including players, teams, sponsors, and the general public.

a. Trademarks

In the sports industry, trademarks are quite important. When the sports industry first started branding, it contained elements such as a logo, a mark, taglines, captions, slogans, and other elements that resulted in the establishment of brand value in merchandise, sports clubs, athletes, and teams, among other things. A degree of association with a team name, sports clubs, players, and products is created by the brand value of the team name, sports clubs, players, and merchandise will enable a attribute to the fans and the general public.[45]

[43] World Intellectual Property Day 2019 "Reach for Gold": IP and Sports (September 19, 2020, 10 PM), https://www.wipo.int/pressroom/en/articles/2019/article_0006.html

[44] Christine Chiramel - Intellectual Property Rights In Sports-Indian Perspective; available at https://www.mondaq.com./india/trademark/164974/intellectual-property-rights-in-sports-indian-perspective

[45] Ayush Verma - Role of intellectual property rights law in sports sector, available at https://blog.ipleaders.in/role-intellectual-property-rights-law-sports-sector/

Brand value is produced in sporting teams, clubs, players, and merchandise with the introduction of sports event branding through the existence of elements such as a logo, captions, taglines, slogans, and team names (together referred to as trademarks). Team names and emblems assist a team's, club's, or player's popularity ratings by creating a level of association with the public and fan base. Because of their celebrity, even the athletes' names have become trademarks. Through commercials, brand ambassadors, goodwill and reputation of the sponsors, and other means, this popularity and brand image finally translates into monetary benefit.

The Trademarks Act of 1999, Section 135, offers civil and criminal remedies for trademark infringement and passing off. The Trademark Act, like the Copyrights Act, does not need the registration of a brand, therefore anyone who does not register their brand can still protect their rights under the law. Violation of a trademark/brand is a cognizable offence and criminal proceedings can be enabled against the wrongdoer.

Both civil and criminal remedies are provided against infringement and passing off under the (Indian) Trade Marks Act, 1999. It's worth noting that registration of trademark is not required for seeking protection under Indian Law, thus even people who haven't gotten any can enforce their rights in a court of law. In India, however, trademark infringement is a punishable offence, and criminal actions can be brought against the perpetrator. Such enforcement measures are intended to improve trademark protection in India and reduce trademark infringement and violation.

b. Copyrights

The Copyrights Act of 1957 contains multiple clauses that provide for the protection of various aspects of sporting events, such as artwork related with the logo, slogan, trademark, and so on. Because the Copyright Act does not need the author's work to be registered, it is quite simple for the artwork to be protected as a copyrighted work under the law.[46] The Copyright Act provides civil remedies for infringement of an author's artwork under Section 55 of the Act, which includes Permanent, Temporary, Interlocutory, and Mareva Injunctions, Anton Pillar Orders, Accounts of Profits or Damages, and Litigation Costs. It also allows for criminal remedies under Section 63 of the Act, which stipulates that imprisonment for a cognizable offence may result in the punishment by a fine. The law of copyright in India not only provides civil remedies such as permanent injunctions, damages or accounts of profits, delivery of infringing material for destruction, and legal costs, but it also makes copyright infringement a cognizable offence punishable by a term of imprisonment of not less than six months but not

[46] *Ibid*

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more than three years with a fine which shall not be less than INR 50,000 but may extend to INR 2,00,000. The (Indian) Copyright Act, 1957 empowers the police to file a complaint (First Information Report, or FIR) and act independently to arrest the accused, search the accused's premises, and seize the infringing material without the need for court intervention.

Copyright in sports can be found in a variety of places, including artwork associated with logos and trademarks, promotions, slogans, photos of players or events, and so on, all of which are protected in India under the Copyright Act, 1957. The registration of copyright is also not required, and it is quite straightforward to protect under Indian regulations. Despite the fact that copyright registration is not required in India, international copyrights are protected because India is a member to the Berne Convention for the Protection of Literary and Artistic Works of 1906 and the International Copyright Order of 1999, It is recommended to register the copyright in India since the copyright registration certificate is considered as "evidence of ownership" in courts and by police authorities, and is handled smoothly by them.

V. AMBUSH MARKETING

Intellectual Property Rights protects not only the idea, but protects the expression of that idea itself. Commercialization of Sports is one of the primary and promising income sources for a country. IP rights are a very important aspect of this. The sports industry is one of the biggest commercialization there is and the role that is played by money in it is rather significant in Global Sporting Events like ICC World Cup, Summer and Winter Olympics, FIFA etc. The IP Rights are mostly used in such coveted events to ensure that other imperative factors of the industry such as promotions, sponsorship, broadcasting, merchandise are all at the best interest of the stakeholders.[47]

During the Games, practically all unapproved commercial marketing activities, such as skywriting, the use of fliers, posters, billboards, and any other advertising activity within precisely designated "event zones" around Olympic sites, have been criminalised by the government.[48] All surrounding public roads, walkways, railway stations, and even private property, as well as the airspace above, are included in these zones.[49] Anyone who breaks these

[47] Kishor Bhatt & Sumeet Handa, Intellectual Property Rights (IPR) in Digital Environment: An Overview in Indian Digital Environment, International Journal of Digital Library Services (2015).
[48] London Olympic Games and Paralympic Games Act, 2006, c. 12, §§ 19-24 (Eng.); The London Olympic Games and Paralympic Games Advertising and Trading Regulations, 2011, c. 2898, §§ 5-11 (Eng.); See Jacquelin Magnay, Games Ban on Ambush Marketing: London 2012 Government Plans to Stop Companies Cashing in on London Olympics and to Improve Security at Venues, DAILY TEL., Mar. 8, 2011, at 13.
[49] The London Olympic Games and Paralympic Games Advertising and Trading Regulations, 2011, c. 2898, §§ 5-6 (Eng.).

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rules could face a fine of up to f20,000.[50] These anti-ambush marketing restrictions even threaten criminal penalties for fans who wear promotional clothing from unaffiliated companies at Olympic events, such as a group of female fans who were ejected from the stands during the 2010 World Cup for wearing orange dresses that advertised a Dutch brewery company.[51]

Ambush marketing is most commonly employed to "ride off" the popularity and appeal of a large event, aligning promotional activities and exposure around it without having to pay payments to the event's organiser to be listed as a "official" sponsor in a particular product category. The two types of ambush marketing methods are as follows. The first, "direct" forms of ambush marketing involve advertisers promoting themselves as being a part of or associated with an event, diluting the exposure of official sponsors and their campaigns—especially if they are the product of the non-competitors—while sponsor's indirect forms of ambush marketing use imagery relating to an event in advance of the event, while indirect forms of ambush marketing use imagery relating to an event in advertising to evoke a mental connection with it, without specifically mentioning it.

The issue of so-called "ambush marketing," which is most often alleged to occur during high-profile international athletic events such as the Olympics, has been discussed by event sponsors, corporate stakeholders, and commentators, primarily under the premise that the practise transgresses ethical boundaries, regardless of whether governments legally permit or prohibit certain forms of it.[52] The term has been given by the International Olympic Committee and others to a variety of various corporate advertising methods used during such events, all of which are said to interfere with or dilute "official" corporate sponsorships to differing degrees.[53] "A company's attempt to capitalise on the goodwill, reputation, and popularity of a particular event by forging an association without the authorization or consent of the necessary parties," according to the literature on ambush marketing.[54]

The protection against Ambush Marketing is one of the most crucial aspects of IPR in sports sector. The concept of Ambush Marketing can very well be explained through the landmark judgment of National Hockey League (NHL) vs. Pepsi-Cola Canada Ltd. in the year 1990. In the present case, NHL, through an agreement, made Coca Cola its official sponsor for the

[50] London Olympic Games and Paralympic Games Act, 2006, c. 12, § 21(3) (Eng.).
[51] Tariq Panja and Maud van Gaal, FIFA Detains DressClad 'Fans' Marketing Brew-haha, TORONTO STAR, June 16, 2010, at B4.
[52] See Michael Payne, Ambush Marketing: The Undeserved Advantage, 15 PSYCHOLOGY & MKTG. 323 (1998);
[53] Brian Lee Pelanda, Ambush Marketing: Dissecting the Discourse, 34 Hastings COMM. & ENT. L.J. 341 (2012).
[54] Stephen McKelvey, Atlanta 96: Olympic Countdown to Ambush Armageddon?, 4 SETON HALL J. SPORT L. 397, 401 (1994);

sporting event. Coca Cola eventually obtained the right to use NHL's symbols for its promotional programme in Canada & USA but did not obtain any broadcasting rights on television. NHL has already sold this right to a company named Pepsi-Cola, which was business rival of Coca Cola. The controversy arose between Coca Cola and Pepsi-Cola when Pepsi-Cola broadcasted an advertisement on television showing well-known celebrity conveying a message that Pepsi is the official drink of the tournament. Coca-Cola did not succeed in its claim for passing off against Pepsi-Cola.

On the day of London's season Olympic Games, and at this period that Danish football player Nicklas Bendtner threw his shorts in the Euro 2012 competition to discover that name of an Irish betting firm on his underpants, Thereby violating the exclusive sponsorship agreement, too as UEFA's regulations against ambush marketing, The business report from saint Fraser University in Canada demonstrates that the persistent strength of ambush marketers gives Olympic supporters and those of other leading sporting events especially dangerous – costing them not only their financial investment, But finally their clients.[55]

Patrick Sheridan has listed what he and others allege are the four most prevalent forms of ambush marketing techniques:

> "(1) purchasing advertising time around an event in order to associate a nonsponsoring company as a sponsor of the event; (2) negotiating with individual players or teams, who are participating in a larger sponsored event or league, to have them endorse a nonsponsoring company; (3) using event tickets in a promotional contest to tie a nonsponsoring company to that event; and (4) [aggressive] marketing [by] a nonsponsoring company around the location of an event.[56] In a slightly more specific context, one company's event management guide warns event organizers that. ... Planes flying low over an event trailing banners advertising competitive products, signs erected without permission, and unauthorized distribution of flyers and merchandise are all examples of ambush marketing."[57]

Specific allegations of ambush marketing made during previous Olympic Games highlight some of the problematic gaps in the discourse, demonstrating that event organisers and sponsors

[55] Symonds, M. (Jun. 2012). Ambush Marketing - 7 Lessons To Win Promotional Gold At The Olympics. Forbes. Retrieved from https://www.forbes.com/sites/mattsymonds/2012/06/14/ambush-marketing-7-lessons-to-win-promotional-gold-at-the-olympics/

[56] John Tripodi & Max Sutherland similarly list these four techniques as ambush marketing. Tripodi & Sutherland, supra note 51, at 417.

[57] Graham Medcalf, Bang, You're Dead!: Ambush Marketing Steps Over the Line of Guerrilla Marketing's Legitimacy, N.Z. MKTG. MAG. May, 2005 available at http://business.highbeam.com/6504/article-1G1-132723009/bang-youre-dead-ambush-marketingsteps-over-line-guerrilla.

frequently accuse non-sponsoring companies of ambush marketing simply because they advertised in relation to the event. Event organisers, such as the International Olympic Committee (IOC) and its corporate sponsors, have proved that they operate under the bold assumption that they are entitled to a market niche devoid of any commercial rivalry. They assume that no activity related to their events, or even the fair or permissible use of terms indicative of the event's existence, will be tolerated without their authorization. [58]

The 1992 Winter and Summer Olympic Games were both marred by a bitter feud between the International Olympic Committee and American Express over the latter's alleged use of ambush marketing methods during the Games. Visa had paid $20 million to be one of the Games' twelve official sponsors that year, but American Express, a competitor credit card firm, had not paid to be an official sponsor.[59] During the Winter Olympics in France, American Express launched television commercials depicting the French Alps and referring to "winter joy and sports." 28 There were no registered Olympic symbols or the word "Olympic" in the adverts. Despite this, the IOC vowed to sue and alleged that the ads were made so as to create confusion amongst the consumers and misinform them that American Express is an official sponsor. During the 1992 Summer Olympics in Barcelona, American Express aired numerous additional television commercials that the International Olympic Committee (IOC) and its sponsor Visa denounced as detrimental ambush marketing. The ads employed Olympic-style language, with one ending, "And remember, you don't need a visa to visit Spain," and another, "Obviously, we're here for more than just the fun and games."[60]

The power to restrict a corporation from simply mentioning the Olympics in a non-confusing way would be a significant deviation from trademark law's fundamental goal of minimising consumer confusion about source of origin or sponsorship. Although the American Express ads during the 1992 Olympics may have upset Visa's desire to be the only credit card company allowed to advertise with Olympic-related content, trademark law is only intended to prohibit unfair commercial competition, such as practises that are likely to confuse consumers.[61] Trademark law is not meant to create an economic climate that is free of competition. It appears that arguing that American Express's marketing unfairly or unethically associated itself with the 1992 Olympics would have been difficult, but if the IOC had truly believed that there was a real risk of consumer confusion about American Express's association with the 1992 Games, and

[58] *Id* at 52.
[59] Martha T. Moore, Plastic War: IOC to Sue AmEx Over Ads, USA TODAY, Feb. 6, 1992, at 1A.
[60] Stuart Elliot, Jousting by Mass Marketers is the Newest Olympic Sport, N.Y. TIMES, July 15, 1992, at D1.
[61] Two Pesos v. Taco Cabana, 505 U.S. 763, 767-68 (1992)

that such confusion had caused any harm, it would undoubtedly have had a valid claim.[62]

"A company's attempt to capitalise on the goodwill, reputation, and popularity of a particular event by forging an association without the authorization or consent of the necessary parties," according to the literature on ambush marketing.[63] Clearly, there is a gap between the all-too-common accusations of "ambush marketing," as defined above, and the reality of the marketing methods that are frequently accused of being "ambushes."[64]

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[62] New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201 (9th Cir. 1979)
[63] *Id* at 53.
[64] *Id* at 52.

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