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A Study on Extension of Intellectual Property Rights to Sports Moves, On-field Celebrations, and Team Strategies

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ABSTRACT:
The quest for growth and improvement of life makes human beings different from animals. Even though man is a social animal and cannot live in isolation he constantly tries to find newer ways and means to fulfill his desires and, has actually found ways to improve his life by encouraging innovations through the grant of monopoly in terms of Intellectual Property Rights. However, in his desire for a better life which he can call 'owned', man has started expanding the scope of IPR in all directions, including sports, sports moves, sports strategies both team and individual and also sports skills. The researcher through this article analyses the scope and extent of IP laws and the impact of granting IP protection in an area which was earlier a field for fun and frolic, general fitness and physical prowess, thus making it into an individual's commercial venture.

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I. INTRODUCTION

The quest for growth and improvement of life makes human beings different from animals. In the endeavor to strive for better life, man is constantly trying his best to findnewer ways and means to fulfill his desires. Nature on the other hand also provides the best of life to its most precious creation i.e. human beings.

Man has found ways to improve his life by innovations and by encouraging innovators through the grant of monopoly in terms of Intellectual Property Rights (IPRs). But in his unquenchable thirst for a better life and a life which he can call 'owned', man started expanding the scope of IPRs in all directions, including sports.

The expansion of IPR into the domain of sports, and globalization of this regime, has integrated the athletic, creative and intellectual commons. The original idea of a patent being granted on an invention in the mechanical domain was to grant protection to an inventor who had created an indigenous new device. Such protection allowed an exclusion of others from 'copying' similar inventions for a limited period of time, usually twenty years.

However, today, the scope of granting Intellectual Property Rights is not confined to mere technological inventions or inanimate objects but has expanded to sports, sports moves, sports strategies both team and individual, and also spots skills, thus making what was once a field for fun and frolic, general fitness and challenging physical prowess into an individual's commercial venture.

Innovation and creativity are the two key drivers in the world of sport. In every sporting field, teams of inventors and creators are working to push the boundaries of possibility, creating new opportunities for athletes to better their performance and for broader participation in and enjoyment of sport.

Sports show intellectual property in action. Patents encourage technological advances that result in better sporting equipment and other sport-related innovations. Trademarks, brands and designs contribute to the distinct identity of sports events, teams, players and their gear. Copyright and other related rights generate the revenues needed for broadcasters to invest in the costly organizational and technical undertaking of broadcasting sports events to millions of fans all over the world. Thus, IPR are the basis of licensing and merchandising agreements that earn revenues to support development of the sports industry.

The traditional concept of sporting events is no longer in existence. Money has acquired an enormous role in all sporting events. Corporatization of sports has increased to a new level. Marketing through franchising, as well as brand building of the sports, sportsmen and the event have gained gigantic importance, surpassing all other aspects of a game.

However, over the years sporting games have been encouraged by rulers, governments, private individuals and entities not only because of their interest in the sports industry but also due to the monetary business quotient that they entail. With the business angle of the sports growing by the day, dormant IPRs vesting in almost every component of the sports industry are being tapped into and capitalized. Various football clubs around the world are a perfect example of intellectual property brand capitalization. Manchester United,

Real Madrid, Barcelona and Chelsea are a few examples of football clubs that have been developed and marketed as huge brands worth millions of dollars.

Similarly in India, cricket which has acquired a cult status is becoming bigger and bigger over the years due to commercialization and investment interests. The T20 format and Indian Premier League (IPL) have led to huge scams due to large monetary stakes, fixing, betting doping and gambling issues.

In such a scenario, it is possible that the notion of IP laws in the sports moves may become a trend to claim dominance over the particular sport move. But the use of IP rights for sports moves may be something well within positive law. For example, even under the new *Bilski* test for patentability, which focuses on physical transformation,[1]a winning sports move that launches a player farther or faster than her opponents would easily be seen as patentable subject-matter.

At least three forms of intellectual property protection might be used to secure rights in sports moves. Patent protection might be considered for moves that impart a useful result, such as faster races or longer jumps. Copyright protection might be available for moves that are creative, just as copyright may subsist in the choreography of a dance. Trademark or service mark protection might be available for moves that come to indicate a unique source of goods or services.

Throughout sports history, scripted plays and innovative moves performed by athletes have played an important role. There have been groundbreaking plays conceived by coaches either, well in advance of a competition, or thought of in a heat of a close scoring game, perhaps with only a few seconds remaining. In addition, particular moves by athletes have also been viewed as extremely innovative and creative that has not only won important games and also completely changed the way the particular sports are played. For example, the use of the bicycle kick in soccer is credited to Ramon Unzaga from the Basque Country in Spain was revolutionary.[2] However, particular countries also assert claims to inventing the kick. The bicycle kick also became the signature move of the Brazilian player Pele, Mexico's Hugo Sanchez and Argentina's Diego Maradona.[3]With the controversy of who to be attributed the credit for one of the most unique and complicated moves in soccer, should efforts be made to track down the true inventor, so that he can be given intellectual property rights?

In USA inventors have began to obtain patent protection for sports method inventions. For example, in 1997 a method of putting features the golfer's dominant hand so that the golfer can improve control over putting speed and direction was patented.[4]Other sports methods such as a method for fitness training,[5] a method for training baseball pitchers,[6] and a method for training swings[7] have been patented.

But the trend of claiming IP protection for sports has been extended to sports moves. The Following Intellectual Property can be claimed in the Sports industry: Patents, Trademarks and Copyright.

Patents

The owner of a patented product or process can prevent anyone from making, using, offering for sale, or selling the patented invention for the entire term of the patent. Neither innocent copying nor independent origination of a patented invention will provide a defence to patent infringement. While the protection afforded by patents is very strong, it is also short in comparison to the protection that is available for copyrights and trademarks.

The criteria for patent is new or novelty, non-obviousness and capable of industrial application. Also, the inventor must:

(1) Describe the invention adequately to give notice of that which the inventor regards as the invention
(2) Effectively teach the reader to make and use the invention, and
(3) Provide the best way to use the invention.

For example: Cain's move can be described in a way that satisfies all these requirements. But to claim patent it must fall within at least one of the three statutory classes of patentable subject-matter i.e. processes, machines or compositions of matter. The Supreme Court in Diamond v. *Chakraborty*[8]interpreted these statutory categories expansively to "include anything under the sunthat is made by man." Yet, while expansive, these categories do

[1] In *reBilski,* 545 F.3d 943, 961 (Fed. Cir. 2008) (en banc)
[2] http://articles.latimes.com/1990-12-25/sports/sp-7202_1_college-football

[3] Das K. Proloy, Note: Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays, 75 IND L.J. 1073, 1076 (2000)
[4] U.S Patent No. 5,616,089 (issued Apr 1, 1997)
[5] U.S Patent No. 6,190,291 (issued Feb 20, 2001)
[6] U.S Patent No. 5,639,243 (issued June 17, 1997)
[7] U.S Patent No. 6,176,790 (issued Jan 23, 2001)
[8] Diamond v. Chakraborty, 447 U.S 303, 309(1980)

not encompass everything. For example, the Supreme Court has also reminded that laws of nature are not patentable subject-matter. This means that while Einstient might have been able to patent a method for converting mass into energy, his law $E=mc^2$ in itself is not patentable.

It is common for sporting goods companies to obtain patent protection for equipment used in s[ports. A well-known example is Howard Head's Patent No. 3,999,756 on the PRINCE "oversize" tennis racket. Numerous patents exist on golf balls. The same is true of ski equipment, such as ski boots.

However, it can be argued that sports moves done by athletes and the refinement of those moves through scripted plays help a player or team to meet a useful end: winning. Further, moves and plays serve the function of entertaining fans and the general public.This would meet the requirement of utility.

Additionally, the U.S Supreme Court expanded patentable subject-matter to include "anything under the sun that is made by man."[9] Accordingly it would seem that sports moves and plays could easily qualify as a process as referenced by the Patent Act and as defined by the U.S Supreme Court. Also according to the U.S Supreme Court, patent protection is given if the subject-matter is neither a law of nature nor a natural phenomenon. Accordingly, sprots moves and plays must be determined not to be law of nature of natural phenomena. Since sports moves are arguably creative works of a human mind, it seems that they should meet the requirements set forth by the Supreme Court in *Diamon v. Dichr.*[10] Also it must be acknowledged thatour legal system has already afforded patent protection to some areas of sports. For instance, a patent has been issued for a particular golf putter and a method of putting. The Patent Office has also hranted a patent for "an exercising method". Additionally, patent protection has been afforded to particular games for their rules of play and other requirements, such as a method of playing golf on a reduced size course and even to "arena football". Proponents for patent protection argue that if such a new sport as "arena football" can receive patent protection, other professional and even recreational sports should get it too.

Copyright

The question of the applicability of copyright protection to psorts moves and plays has been gaining ground in recent times. Thus whether copyright protection is a good fit for athletic moves and plays, and if so, how such moves can meet the various requirements of copyright protection laws. Just as patents may be available for those moves that are functional, copyrights may be available for those that are creative. Fedral law of USA creates 4 condition for copyright protection:

(1) The work must be fixed in a tangible form
(2) The work must be original
(3) The work must be creative
(4) The work must be within the subject-matter of copyright.

The next argument in favor of sports moves qualifying for copyright protection is that they can be considered as a 'dramatic work'. There is no doubt that the dramatic work of athletics has evolved with the growth of the sports industry itself. One of the best examples of the dramatic nature of sports is in the 'non-ball sport' category of figure skating.

Another argument in favor of sports moves and plays as being a subject-matter of copyright law could be under the category of cinematograph films. Sports moves and plays may qualify as such works if they are recorded on film or DVD. Indeed, thae playing of a sport- not just the televising of it- has been found to be the proper subject of copyright protection in the *Baltimore Orioles* decision.[11] In 1986, the Seventh Circuit hekld that baseball games should be awarded copyright protection. The players argued that the games were being recorded and televised without their consent and the property rights in their own performances were being misappropriated. The athletes claimed that they retained a right of publicity in their performances in the course of playing baseball and that this right of publicity belonged to them and not the team owners or the Maor League Baseball Players Association (MLB). The MLB countered that any right of publicity was pre-empted by the availability of copyright in the game performance. The District Court held that the MLB and the team, not the players, owned a copyright in the telecasts as works-for-hire and that the teams' copyright in the telecasts pre-empted the athletes'' rights of publicity in their performances. The Seventh Circuit affirmed this decision, ruling that federal copyright law pre-empted any State law publicity interest of the players.

Despite the fact that *Baltimore Orioles* decision concerned the televising of baseball games and not the actual playing of the games, the Court's analysis and reasoning supports the conclusion that sports games may be given copyright protection in the future. The Seventh Circuit noted that the players' performances possess the modest creativity required for copyrightability.

[9] Supra note 8
[10] 450 U.S 175, 185 (1981)
[11] Baltimore Orioles Inc. v. Major League Baseball Players Assocaition, 805 F.2d 663, 668

Trademark

Besides patent and copyright, trademark protection may be available for moves that are capable of indicating the source of particular goods or services, or in other words, for moves that embody consumer goodwill.

As an example, in the sports context, the NBA has successfully registered and asserted trademark rights in its logo of a basketball player dribbling a basketball. Similarly, the Kareem Abdul-Jabbar "sky-hook" is also captured in two pending trademark application. While the NBA logo and the "sky-hhok" design mark comprise sports moves frozen in a stylized silhouette, trademark rights might also extend to protect a three-dimensional, real time movement of a sports figure.

The key question, however, underlying all trademark determinations is whether the asserted mark can become a sign, recognized by the public, to point a particular good or service and the goodwill that has become associated with it. With this in mind, sports moves and plays should be afforded trademark protection because they are easily associated with particular players and even specific teams.

II. CONCLUSION

Thus, in the fast-moving world it is time to redraw the boundaries of IPR in such a manner that sports moves and team celebration can be included.

Accordingly, Section 13 of the Copyright Act must be amended so as to include sports moves and plays, and team strategies and team celebrations. Section 15 of the Copyright Act also provides for special provision regarding copyright in designs. In a match of cricket, football, hockey or baseball, etc. the placement of the fielders in a particular original manner may amount to a design and may be capable of copyright protection.

Therefore, granting of IPR on sports moves would definitely help the young talent to improvise on the protected sports moves and team strategies, rather than simply being copycats, which ultimately would bring more fun and talent to the games.

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