

CREATIVE V. PURPOSIVE SPORTS: NEED FOR RECOGNIZING SPORTS PERSONS AS PERFORMERS UNDER COPYRIGHT LAW

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Abstract

The sports industry is a multi-billion-dollar global market in terms of revenue and employment. Gone are the days when cricket was a synonym to sports in India. Other sports including aesthetic sports are re-writing its growth abundantly. Sports persons are the vital connecting link between a game in this inordinately emerging industry and it is transferred to the public in general. Despite the fact players in certain sports like cricket, football or hockey operate within certain boundaries owing to the restrictive rule bound nature of these games, as a contrast to ice skating, gymnastics and artistic swimming which are inherently creative, there exist certain sports persons who 'contribute creatively' in a manner which goes beyond the rules of the game. The creativity of sports persons within a game or after its conclusion is manifested in the form of distinct 'sports moves' or 'celebratory dances'. These movements which operate as 'signature moves' of such players are nothing but an extension of the athlete's personality and charisma. These add to their marketability, professional net worth and reputation considerably. For instance, during IPL matches many players have come up with their own style of rejoicing over wickets or runs, for example Darren Sammy, Chris Gayle, the unique pose Usain Bolt gives on winning a race or MS Dhoni's helicopter shot.

This paper seeks to examine the Performance Rights of sports persons in-depth. It analyses the meaning of the terms 'performance' and 'performers' comprehensively and proposes the extension of performers rights under the copyright law to sportspersons who are able to meet the 'creativity' and 'originality' threshold to contribute effectively. However, keeping in mind, the inherent competitive nature of sports and the doctrine of fair use, claiming remuneration in the form of economic rights for such creative contributions might contravene the said principles. Accordingly, the author proposes recognizing these sports persons contributing creatively as 'performers' and meriting them with moral rights to protect their work from distortion or modification and to safeguard their reputation with an objective of promoting creativity in the domain of sports.

Key words: Performer, Performance, Moral Rights, Creativity, Performance Rights

Introduction

Entertainment is ubiquitous in our everyday lives and has the capability to contribute meaning to one's existence. Performance, be it in any form, literary, artistic, dramatic, or even sports, is a golden thread which binds creativity and entertainment to escape the monotony of everyday lives. The underlying purpose behind granting rights to these performers is to protect their interests especially in this technology driven world where replication, modification or distortion have become relatively easier. These rights act as an incentive for performers to contribute creatively and effectively to society. One such domain of entertainment is sports.

Owing to easier connectivity and globalization, sports has emerged as a major industry in India as well as globally (Liam O'Connell, 2020), apart from the emotional sentiments attached to it. It is a common saying that 'Sports is not a game, it is an emotion', and a critical component of sports, are essentially the sports persons who act as the channel of communication between the sport and people. There are numerous instances, in the past as well as the present, where several sports persons have contributed creatively to the game going beyond the restrictive rules which govern these games. These contributions over a period of time develop into an extension of their personality and charisma and are akin to their marketability.

In part I, the author has thrown light upon Performers Rights in depth by analysing International Conventions as well as the Indian position, in the second prong of the paper, the author has discussed the need for recognizing Sports Persons contributing creatively as performers and lastly the author has discussed Moral Rights and the need for meriting such sports persons qualifying as performers with moral rights.

An overview of Performers Rights under the Copyright Domain.

Every day we indulge in a plethora of creative process or performances which can be manifested in several forms. Entertainment has now become a way of our everyday lives. In numerous manifestations of these entertainment process, it is the performers who bring out the essence of an activity and act as a uniting link to deliver a creative process to the common public.

The visual or acoustic presentation of these performers forms the key element of such creative processes. Consequently, it is imperative that these performers who devote adequate skills and labour, merit protection of their rights. The underlying purpose behind such protection is to encourage creation of a variety of intellectual goods and incentivise the hard work and toil that goes into the development of such performances. Primarily, it is imperative to understand the meaning of 'Performance rights' in brief, whereas the in-depth analysis of the term 'performance' will be done in the later prong of the paper.

2.1 Ambit and Scope of Performers Rights.

In layman terms, a performer is an individual who takes part in a performance, brings conventional or modern potential into action, or otherwise artistically fulfils by means of personal achievement the operative factors, that constitute a performance, if there is an existing possibility for him to artistically influence the actual and temporal course of the performance (Ansgar Firsching, 1997). Traditionally performers include actors, musicians, singers, dancers or any other person who performs any creative process. These bundle of statutory rights, namely performer's rights do not fall under the purview of a copyright directly but are protected by means of allied rights, conceptually known as 'Related Rights' or 'Neighbouring Rights', including moral rights.

Performers, have been already defined WIPO. However, the ambit of which varies in different nations based on the framework adopted by the country keeping in mind their cultural diversity, for instance, India also grants 'snake charmers' performance right as they are integral to the nation's culture. They grace various aspects of our lives and are seen through television, plays, cultural venues, cinematographic houses, or maybe even ordinary roads. Commonly, performers are granted economic as well as moral rights under a broad umbrella under Section 38 and Section 57 The Copyright Act 1957.

2.2 International Conventions and Treaties Related to Performers Rights.

The first international initiative undertaken in this regard was the Rome Convention in 1961 (WIPO, 1961). The Rome convention sought to bring about international regulation on performers rights at a time when merely a handful of national laws were prevalent. It granted all grants negative rights to the performer in order to protect their broadcasting rights and right to communicate the work to the public. This communication also includes live performances. They also have the right to protect their right to reproduce their work. (Rome Convention, 1961).

Producers of phonograms get to exclusive rights i.e. "right to authorize" and to "prohibit reproduction (whether direct or indirect) (Rome Convention, 1961). In the current scenario, it is a general consensus that Rome Convention is largely out of date despite the fact that it built a strong foundation for the existing laws on the subject matter (WIPO, 2013). The TRIPS Agreement also contains provisions for safeguarding related rights. The need for further protection of performers was expressed and adopted in the two treaties by the World Intellectual Property Organization (*Hereinafter*, WIPO) by the WIPO Performances and Phonograms Treaty (WPPT). These treaties apart from granting necessary rights, also provided for limitations and exceptions to related rights (WIPO, 2013). These International Conventions played a substantial role in the development of performer's rights as a concept in the Indian landscape.

2.3 Position of Performer's Rights in India.

India acceded to the WCT, 1996 and WPPT treaty, 1996 which makes the treaty binding in India. The 1994 Amendment introduced Section 38 to the act which enlisted certain acts, the contravention of which would lead to performer's rights getting infringed during the period of persistence of their rights.

The acts included are if a person reproduces a sound or a visual recording of the performance without the consent of the performer, or for any other purpose different from what the performer had consented for or made for purposes different from those referred to in Section 39 from sound recording or visual recording which was made in accordance with Section 39, broadcasting which would lead to infringement of performer rights or communication to the public without consent (Copyright Act, 1957, Section 3). Further the 2012 amendment proved to be a boon to performers who could avail royalties from the exploitation of their performances commercially according to Section 38A. It also provided for economic benefits wherein performers' rights subsist for 50 years from the date of the performance. The facet of according moral rights to performers was also incorporated (Nischal Anand and Pravin Anand, 2000). Therefore, this gives rise to the need for recognizing Sports Persons who contribute creativity as 'Performers' under the act.

Sports Persons as 'Performers' under the Copyright Act, 1957.

"*Sports is not just a game; it is a business*" (William S. Kern, 2000). The sports industry is a multi-billion-dollar global market in terms of revenue and employment (Sooraj Aurora, 2016). Gone are the days when cricket was a synonym to sports in India. Other sports including aesthetic sports are re-writing its growth copiously. Sports players act as the vital connecting link between sports and the public. Although a vast pool of commentators are of the view that sports, specifically purposive sports in contrast to aesthetic sports, are inherently rule bound and consequently lack the 'creative element' necessary to obtain a copyright, consequently throwing out the case for meriting such sportspersons to be 'performers'. Although the author agrees with the view partially to the extent of avoiding the copyrightability of sports but however is of the opinion that sportspersons subject to fulfilling the 'creativity threshold' and contributing effectively in a unique manner, warrant recognition in light of their contribution and skill.

4.1 Sportspersons rights vis-a-a Creative Performance.

Section 2(q) of the Act of 1957 is in consonance with article 2 of the Rome convention refers to performance as any visual or acoustic presentation made live by one or more performers.

From a literal text analysis of the above-mentioned definition, the author seeks to make a case to include 'sportsperson' who contribute creatively to a sport or game under the ambit of performers in the act. On a careful reading of the description of word 'performance', it is clear that it includes 'any' visual or acoustic presentation made live. These terms have further not been defined under the act. Article 3 of the Rome convention describes 'presentation' to mean the offering of copies of a phonogram to the public in a reasonable quantity. The Oxford dictionary further defines presentation 'as the way in which something is offered, shown, explained, etc. to others.'

This shows that any creative process visual or acoustic which is communicated to the public is a performance. It is at this juncture that the author proposes that a Sports Person who contributes creatively to a sport either during the game in the form of unique 'Sports Moves' or as a manifestation of 'Celebratory Dances' after the conclusion of the game be recognized as a performer under the Copyright act. It is further clarified that the author proposes that only 'sportspersons' who qualify the threshold of 'creativity' and 'originality' (*Servewell Products Pvt. Ltd & Anr. v. Dolphin, 2010(43) PTC 507. Del.*) be given this right. Every sportsperson just by the virtue of them playing a sport in a rule bound game would not be eligible for being termed a performer, however the exception for this would be aesthetic sports which would be discussed in depth in the next prong.

In the case of *Star India Pvt. Ltd v. Piyush Agarwal and Ors*, (2013 (54) PTC 222 Del) it was held that even a cricket match can be considered as an expression under performers right.

Even though the author is not of the opinion that all players in a cricket match would can be categorized as a performer but only somebody who contributes creatively over and above the rudimentary moves bound by the rules of the game, this judgement is a step in the right direction which supports the idea of granting such rights to Sports Persons.

A small pool of commentators are also of the view that the word ‘presentation’ means something which has been prepared beforehand and is therein presented to the public. Adopting such a narrow and constrained interpretation of the term is erroneous. Additionally, in the interpretation of the term ‘performers’ which “include actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer and a person delivering a lecture”, the principle of ‘ejusdem generis’ can further be applied to include ‘sportsperson contributing creatively under its ambit’. They are all persons who have contributed their skills creatively to a domain and have presented it specifically as it is for the enjoyment of an audience, which is similar to creative acts by such sportsmen.

Indian courts have recognized the performance rights of performers in numerous cases and upheld the same. In another *Akute Internet Services Pvt. Ltd & Anr v. Star India Pvt. Ltd* (SLP (C) No. 29633 of 2013) copyright would mutatis mutandis apply to neighbouring rights including performance rights. Under Copyright act, besides copyright being created, they include rights of performers under sections 38 and 38A and moral rights of performers under section 57 of the act. Furthermore, in the case of *The Indian Singers Rights Association v. Chapter 25 Bar* (2016(159) DRJ244) and *Restaurant*, the court recognized the performance rights of persons who contribute creatively and held that they are conferred with a bundle of rights which cannot be taken away unless consented to.

4.2 Purposive Sports versus Aesthetic Sports.

Sports philosopher David Best (D Best, 1980) originally characterised sports into “aesthetic sports” and “purposive sports” on the basis of degree of creativity integral in them. As per him sports such as cricket, football, hockey and tennis, lacks an aesthetic value and their objective is to merely solve the purpose of playing hence they are called as purposive sport. Whereas, gymnastics, artistic swimming, ice skating and similar sports in reflects one’s which creativity and can be considered as an “aesthetic sports” (Sharma S, 2019).

3.2.1 Purposive Sports.

The EU court with regards to purposive sports in the cases of *Premier League v. QC Leisure and Murphy v. Media Protection Services Ltd* [2012] 1 CMRL 29 was of the view that that purposive sports particularly football matches cannot be considered within the domain of subject matter of copyright. However, the court viewed that football matches are conditional on game guidelines which leaves no chance of creative freedom. In India, the Delhi High Court in the case of *Institute for Inner Studies v. Charlotte Anderson* 2014 (57) PTC 228 (Del) held that sports cannot fulfil the basic requirement of fixation and predictability under copyright law.

Purposive sports like cricket, football, hockey etc which are primarily rule bound pose creativity constraints which is why the author is of the view that only performances which satisfy the elements of creativity and originality should be granted such performance rights. Moreover, these are ‘moves’ which are fixed or akin to the very personality of the sports player itself and is commonly regarded as a ‘Signature move’. These do not change from time to time and are predictable, consequently fulfilling the criteria of ‘fixation’ and ‘predictability’ set by the Delhi HC. At this stage, it will be useful to take an example to understand the set-up better. Sportspersons use their own creativity and skill to devise a ‘signature move’ which is an extension of that player’s inherent personality and charisma itself. An apt example of this in the Indian context would be M.S Dhoni’s helicopter shot. There was once an allegation on Kevin Pietersen to imitate the helicopter shot (K Singh, 2015).

The Copyright Act currently does not warrant protection for the same and hence he would have no locus standi in the matter. His signature is in a sense, an extension of his personality itself and so it is necessary to accredit

him for the same, which has been the underlying philosophy of the copyright law. Furthermore, Dhoni had stated that he had got knack of the helicopter shot while practicing for tennis ball cricket therefore meeting the fulfils the criteria of being “original”. This example brings out the core of the argument made by the author that original and creative rights of performers should be duly accorded. Apart from this there are various celebratory moves for instance, a few players who have developed their own style of rejoicing their win for example Darren Sammy, Saurav Ganguly, Chris Gayle or the unique pose that Usain Bolt gives when he wins a race in which creativity is the persistent underlying element. An analogy can be drawn of the creative ‘moves’ in the game or ‘celebratory moves’ by sportsperson to ‘choreographical acts’ under the copyright act, as these also fulfil the definition of the same. They are a routine, fixed and predictable which also fulfil the elements of creativity and originality.

3.2.2 Creative/Aesthetic Sports.

Aesthetic sports draw an even strong case for warranting neighbouring rights in the form performers rights due to the intrinsic creativity factor in these sports. These include sports like gymnastic, ice skating, figure skating, artistic swimming etc under its ambit. For instance, Ice skating can be analogically compared to the currently recognized choreographic works under the copyright regime (V Elam, 2015). Each move is choreographed, and even sportsperson practice the routine without fail (Griffith, WT, 1998). Aesthetic sports are the creative expressions and can be a dramatic work having certain sequence or the performance. Therefore, the same can be categorised under the subject matter of dramatic works. (S Sharma, 2019). A gymnast, figure skater or synchronized swimmer can be also be considered under the category of choreographic work depending upon the manner in which they deliver the performance and thus entitled for performers rights under Section 38 of the Act. However, going one step ahead, it can be said that even if they are not equated to dancers or actors, they merit recognition as a ‘performer’ and deserve all the benefits under Section 38 of the Copyright Act, 1957 has a residuary clause which allows “any person who delivers a performance” to be called as a performer. Therefore, even an athlete or a sportspersons who performs live must be a performer entitled to performers’ rights.

Moral Rights of a Sports Person.

In *Justice Pradeep Nandrajog in Amar Nath Singh v. Union of India* ((2005), 2005 (30) PTC 253 Del), court held that in this acquisitive world, laws are aimed to grant protection to economic right of the authors and enable them to commercially exploit the same. Moral rights are personal rights granted to authors of literary, musical, dramatic, and artistic works and films.

Moral rights encompass various components under its ambit which is provided under Article 6 of the Berne convention, which requires its members to grant authors the following rights:

- (i) the “right to claim authorship of a work” (also referred to as right of paternity or the right of attribution); and
- (ii) “Right against distortion i.e. Right of Integrity”.

In India, Section 57 of the copyright act lays down moral rights. Founded on Article 6bis of the Berne Convention, moral rights have two key components: “Rights of Attribution/Paternity Rights” and “Right against distortion, modification or mutilation”. These rights enable the author to protect his honour and reputation and these are also called as “Integrity Rights” (The Copyright 1957, Section 57).

Section 38 B of the Act of 1957, confers moral rights upon performers. A performer is granted the “right to claim” so that public can identify him with the performance. He will also have the “right to restrain” or “claim damages in respect of any distortion, mutilation or other modifications of his performance that would be prejudicial to his reputation”.

4.1 Need for granting Moral Rights to Sports Persons falling under the ambit of Performers.

Moral rights are an extension of an individual's personality. The work created by a person is tangible expression on one's soul and mind. Taking away of this work without permission is equivalent to taking of soul and very essence of individual. (Harsha Wadkar, 2019)

A small faction of commentators is of the opinion that granting performance rights to sports person may reduce the group of easily accessible 'moves' in sports thus restricting the number of moves available for freely undertaking the sport which will in turn affect the very competitive nature of sports. However, through this paper the author proposes granting moral rights to performers. Such moral rights governing performers will prevent the integrity of their work by preventing it from getting modified or mutated by a third party and providing appropriate remedies for the same, which could negatively impact the very reputation of the performer.

In *Amarnath Sehgal v. Union of India* (2005 (30) PTC 253 Del), the court opined that moral rights enable authors to conserve their creativity. Every human being is granted "mystique of original genius," it depends upon that individual how they reflect the same.

In today's era, where internet is at the forefront of technological development, dissemination of humungous amounts of information with a single click of a mouse has become a staunch reality. In this digital age of media and entertainment, it is fairly easy for creative content to be replicated, with increased chances of distortion or modification, which directly affects the reputation and personality of a performer whose 'signature move' is vital to his or her personality or charisma. Therefore, it is the need of the hour to confer such moral rights upon sportspersons who contribute creatively and are identified as performers under the act.

Therefore, in such a situation the author proposes a 'middle ground' in expanding the ambit of the term 'performer'. The sports persons who fulfil the 'creativity' and 'originality' threshold subject to meeting the other requirements of the act, be granted 'Moral Rights' as enumerated under Section 38B of the copyright act. In the author's opinion claiming royalty in the form of economic benefits might prove to be problematic in the sports industry and restrict competitiveness thus taking away the very essence of the game however 'Moral Rights' are inherent and fundamental to every creator who needs to be recognised and accorded for his work, along with warranting sufficient protection to prevent the misuse, undue modification or distortion of the work of the performer which is an extension of the person's reputation, performance and charisma influencing him both on a personal as well professional level. Needless to say, these rights would be subject to the exceptions and limitations specified in the act keeping in mind fair use, public policy and the utilitarian theory. Therefore, the author suggests an amendment in the existing law by recognizing sports persons as a performer and thereafter amending Section 38 to include granting Moral rights to such Sports Persons,

Conclusion

The sports industry has always been an amalgamation of entertainment, culture and business and has become a social activity which is omnipresent in our everyday lives. However, it is the contribution of Sports Persons to a game that makes it what it is, without which it may not create the same impact. Consequently, as discussed in the paper above, Sports Persons who contribute to a sport creatively deserve credit and a due recognition of their rights. A few examples of distinct and creative contributions include Dhoni's helicopter shot, Rahul Chaudhari's 'The running hand touch' in kabaddi etc which are a result of the sportspersons skill and creativity which go beyond the restrictions imposed by the rule of the game. This paper dealt with an in-depth analysis of performers rights and its position in India as well as internationally, it enlisted the reasons and need for recognizing the performance rights of sports persons through logical reasoning and dealt with the same considering the nuances of purposive as well as aesthetic sports. Lastly, the author describes the issue with granting the right of economic remuneration to sports players falling under the ambit of performers considering the competitive nature of sports and the doctrine of fair use and consequently suggests a 'middle ground' by proposing granting of 'moral rights' to sportspersons contributing creatively, by way of an amendment which would accredit them for their contribution, protect their work from distortion and protecting their reputation

associated with the work with the ultimate objective of encouraging and inculcating creativity in the domain of sports.

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