

**INTELLECTUAL PROPERTY RIGHTS AND COMMERCIALIZATION OF SPORTS –
SCOPE, PRACTICE AND ADVANCEMENTS**

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ABSTRACT:

In this research paper, the author has attempted to explain the connection between intellectual property and sports by explaining some of the important aspects of intellectual property rights which are present in the modern commercialized sporting world. This paper is intended to provide the reader with a general understanding of intellectual property rights and their commercial application in sports. Many aspects and forms of intellectual property ranging from patents, copyrights, trademarks etc. and their advancements have been explained in lieu of their connection to the sport industry. Intellectual property forms an important part of the sport industry and being a significant part of the law itself, its protection is necessary to avoid legal disputes and problems. Other aspects such as broadcasting media, eSports and ambush marketing have been explained in detail. Examples of various sports entities and sportspersons have been provided for a better understanding.

KEYWORDS: *Intellectual property, Sports, Patent, Copyright, Trademark, Industry, Broadcasting*

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1. INTRODUCTION

In today's business-oriented world, Intellectual Property Rights (IPRs) are a matter of major concern because of the economic and ethical aspects involved in the exploitation of intellectual efforts. Intellectual property is the property resulting from creative, technical and artistic human efforts, such as an idea, design, name, method, process, expression etc. which is capable of being reproduced.² Bill Cornish has defined intellectual property as 'the application of ideas and information that are of commercial value'.³ Intellectual property rights are a set of legal powers which help to extend protection to the inventor or creator for the work surrounding intellectual effort.⁴

The definition of sport has neither been provided by Indian law nor is the term capable of being given a particular definition. Webster's dictionary has defined sport as any activity or experience that gives enjoyment, recreation or diversion.⁵ It has also been defined as a human activity that involves specific administration of a particular set of rules and regulations which define the objective and limit the pattern of human behavior involving competition and a definite outcome primarily determined by physical skill.⁶ Intellectual Property plays a significant role in an expanding wide range of areas, ranging from technology, art, science, etc. to sports. The basic purpose of IPRs is to give the inventor or creator, an exclusive right over the use of his/her intellectual property which further encourages creative efforts. IPRs are important in sport business as they carry a value in their own right and as a marketing tool as well. Sport is one such field where the law, especially IPRs can play a crucial role in its promotion and development. This field has always been subject to legal disputes and other conflicts which can be solved by the application of law. IPRs are a significant part of law and can be used to boost the sport industry.

2. COMMERCIALIZATION OF SPORTS

In the contemporary world, sport has moved away from the traditional definition of just being an amusement, diversion, recreation etc. It has been commercialized and developed considerably with the help of technological advancements and business models. Commercialization is basically

² P. Kanagavel, *Intellectual Property Rights: A Comprehensive Overview*, 85 J. Pat. & Trademark Off. Soc'y, 663, (2003).

³ CORNISH WR, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS* (4th ed. 2003).

⁴ *Supra* note 1.

⁵ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, (College Ed., 1968).

⁶ R SINGER, HOLD, RINEHART AND WINSTON,, *PHYSICAL EDUCATION: FOUNDATIONS*. (2nd Ed., 1976).

the development of a product into a business which involves funding, marketing, sponsorships etc. In the past few years, sport has developed considerably from just being an activity of entertainment and has acquired a commercial approach involving many stakeholders. It is only with the increased considerations of professional sportspersons, image marketing, media revolution and sport goods merchandising that sport has transformed into an industry involving a huge amount of money and having an economical angle to it. Professional sports are not just games anymore, but an enormous business worth billions of dollars.⁷

The industry of sport today is certainly a global one. Sepp Blatter, the ex-president of FIFA stated that “Football is not only a game but also a product”. Nearly all other sports have been commercialized as well. It has been observed by the council of Europe that sport is “an ideal platform for social democracy”.⁸ Popular sports such as Football, Cricket, Motor-Racing, Basketball, etc. have transformed into spectacular international events which has created an astronomical marketing and industrial potential for the organizers and investors.

The commercial side of sport is capable of providing great economic benefits to any country. The sports sector is very vast and dynamic which is associated with several other industries such as education, tourism, health etc. The commercialization of sport is that aspect which is used to generate a monetary value out of it. An example can be taken by looking at the most popular sport in India which is cricket. When the Indian Cricket team first won the Cricket World Cup 1983, the prize money was 14.3 lakhs INR but in 2011 it elevated considerably to an amount of 13.8 crores INR due to sponsorships from all around the world.⁹ The Indian Premier League’s brand value has surged to 47500 crores INR in the recent season.¹⁰

3. CONFLUX OF INTELLECTUAL PROPERTY AND SPORTS

With the commercialization of Sports and its development which carries an economic and industrial aspect, there has been a capitalization of various Intellectual Properties which are created by various sports franchisees, professional sports-persons, sports management companies and other entities. For generating a monetary value out of it, these intellectual

⁷ QUIRK, JAMES & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 3 (1992).

⁸ LOVELY DASGUPTA AND SHAMEEK SEN, SPORTS LAW IN INDIA, POLICY, REGULATION AND COMMERCIALIZATION, 232 (2018).

⁹ Subhadeep Dutta, *Commercialization of Sports in India: A Study with References to Pre and Post Globalization Era*, Vol. 4 Issue 17, Int. J. Res. (2017).

¹⁰ Gaurav Laghate, *IPL brand valuation soars 13.5% to Rs 47,500 crore: Duff & Phelps*, THE ECONOMIC TIMES (Apr. 2nd, 2020, 7.15 am) <https://economictimes.indiatimes.com/news/sports/ipl-brand-valuation-soars-13-5-to-rs-47500-crore-duff-phelps/articleshow/71197984.cms>

properties are used in the form of merchandising, advertisements, licensing agreements, virtual and online games, database rights etc.¹¹ Intellectual property rights are being used as valuable assets as marketing tools for the branding of games and events, clubs, teams and sportspersons. With growth on both the national as well as international level, there is a serious need to safeguard the interest of individuals and teams. Intellectual property rights form an important part of the commercial sport industry and hence require protection from any disputes or complications that may arise.¹² There are many intellectual elements which are created in the sport industry, both by sportspersons and sports associations. As these elements are put into commercialization, there is a hefty amount of money involved and hence the protection of these elements becomes crucial. With a large amount of money at stake, it is not surprising to see a large number of legal disputes, covering a wide variety of claims, inter alia, sponsorships, endorsements, broadcasting, personality rights, merchandising etc. ¹³ The legal issues include misuse of logos, infringement of trademarks, use of design without license, brand abuse, piracy in audiovisual recordings, use of patented technology without authorization and other problems.

¹⁴

The sport industry provides endless opportunities and these opportunities can be availed to the hilt only if the intellectual elements are protected. Here comes the confluence of sports with the legal perspective i.e. the protection of intellectual property. There are various species of Intellectual Property which are associated with the commercialized sporting world and the same have been explained in detail in the succeeding section.

3.1. Patents

A patent can be said to be one of the strongest forms of Intellectual Property. The main objective of a patent is to encourage and safeguard the inventors by awarding them special rights to benefit from their inventions. After the patent is registered, the owner gets the right to exclude others from making, selling, using the invention. A patent is an important incentive for technical and creative knowledge of the inventor. In sports, it is possible to get a patent for

¹¹ Sharada Kalamadi, *Intellectual Property and the business of Sports Management*, J of Intellec Prop Rights, September 2012 at 437.

¹² Kirit S. Javali, *Sports and intellectual property in India: an emerging sector*, FINANCIER WORLD WIDE (March 28th, 2020, 9.08 pm) <https://www.financierworldwide.com/sports-and-intellectual-property-in-india-an-emerging-sector#.XVLcc-gzY2x>

¹³ Vijay Kumar Singh, 'Issues in Emerging Area of Sports Law: Lex Sportiva', Ind. Law Rev., Inaugural issue 2009, at page 3.

¹⁴ Singh & Associates, *India: Role Of IPR In Sports*, MONDAQ, (Apr. 2, 2020, 7.13 pm), <https://www.mondaq.com/india/Media-Telecoms-IT-Entertainment/808132/Role-Of-IPR-In-Sports>

certain items of sporting equipment. For ex- A new design of a golf club or a new design of a football boot qualifies for patent protection. For enhanced performance and better results, sports technologists keep on applying their creativity and expertise for the development of better and safer equipment.¹⁵ It is also possible to get patents registered in connection with the infrastructure and other facilities of sports, for ex- a retracting roof of a stadium or some other engineering feature.¹⁶ The patent system in sports has enabled the manufacturers of sport equipment to grow economically which has benefitted the whole industry. Apart from the equipment, various sports methods and techniques can also be patented such as a particular method of Specific-Fitness training.

3.2 Copyright

Copyright is a form of intellectual property that gives the creator of an original creative or skillful work, the exclusive right of determination of conditions under which it can be used, for a limited number of years.¹⁷ For a copyright to subsist, the work must be 'original'. It was held in the case of *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*¹⁸ that the word 'original' requires not only that 'the work should not be copied but also that it should originate from the author'.

To claim copyright protection, the author or creator needs to show that his/her own skill and intellect was used to produce the work.¹⁹ There are some sports which are mainly for the demonstration of the skills of athletes and it is not possible to regard them as 'original' works. But other sports like gymnastics, ice skating etc. can be the original works of participants which can also be reproduced. Rhythmic Gymnastics and Figure Skating are very similar to choreographic and acrobatic works and are capable of being reproduced, which can be protected under the copyright law. In sporting events, the maximum amount of Intellectual Property is generated in the form of Copyrights. The artworks, promotional material, merchandise, software etc. are all subject matter of Copyrights.

3.3 Trademarks

A trademark is any unique identifiable sign, expression or design which recognizes goods and services and differentiates them from others. The use of a trademark can be acquired through

¹⁵ *Sport and Technology*, World Intellectual Property Organisation, WIPO (Apr. 2nd, 2020, 6.14 pm) <https://www.wipo.int/ip-sport/en/technology.html>

¹⁶ SIMON GARDINER, MARK JAMES, JOHN O'LEARY AND ROGER WELCH WITH IAN BLACKSHAW, SIMON BOYES AND ANDREW CAIGER, *SPORTS LAW* 415 (3rd Ed. 2006).

¹⁷ BLACK'S LAW DICTIONARY, 'INTELLECTUAL PROPERTY' (10th ed. 2014).

¹⁸ (1964) 1 WLR 273.

¹⁹ *Interlego AG v. Tyco Industries Inc.* (1988) RPC 343.

registering the logo, mark etc. in the Trade Mark Registry. Trademarks in the present time have become a great source of revenue in the sport industry. Generally, Trademarks are in the form of logos, taglines, indicators of a particular sportsperson etc.²⁰ Many legal disputes arise due to the unauthorized usage of trademarked logos, names etc. One such dispute arose between BCCI and UEFA over the usage of the name 'Champions League'. The five interconnected rings symbolizing the Olympic movement enjoy trade mark protection at both international and national levels. Registering of trademarks also helps in Brand-Building and affects the public ratings of various sportspersons. Usain bolt's pose is a registered trademark. Taking an example of Formula One, in 2014 season, every driver was allotted permanent numbers for the rest of their careers as their race numbers, which were also visible at the front of the car. This was a great move to exploit the marketing potential which subsequently would lead to building a brand based on the number.

Various goods related to clubs and individuals such as jerseys, mugs, caps, key-chains etc. can also be registered under the respective particular class which are defined separately under the Trademarks Act 1999. With the growth of technology and internet, now domain names can also be registered as trademarks. By registering a trademark, the organizers of sporting events can earn revenue from sponsorships and merchandising.

3.4 Trade Secrets

Confidential information relating to a business enterprise that provides it a competitive edge over others can be regarded as a trade secret. Some sports in which technology plays a significant role, for ex- Motor-Racing where the design is highly important, the design can be protected under trade secret but only to the extent that it is not easily accessible.²¹ A case filed in the 32nd Edition of America Cup in which spying on another's yacht and taking photographs was held to be a breach of protocol is an example of a trade secret protection. In another instance where a player quit his club and joined a new club but gave some schemes and information regarding the playing style of his former club to the new club, it was held to be a breach of trade secret law.²²

In India, there is no particular act that governs the safeguarding of trade secrets and confidential information but the same can be done by having confidentiality clauses in contracts.

3.5 Personality Rights

²⁰ *Supra* note 10, at 438.

²¹ MUKUL MUDGAL, VIDHUSHPAT SINGHANIA, LAW AND SPORTS IN INDIA, 191 (2nd Ed. 2016).

²² WILLIAM LATTRICE, INTELLECTUAL PROPERTY FOR ATHLETES, TECHNOLOGIES OF WRITING, 7 (2010)

For sportspersons, using their celebrity status in the form of endorsements and capitalizing on fame is a major source of revenue. Personality right is also known as a publicity right and is mainly used to control the industrial exploitation of one's image or identity. Prominent sportspersons such as David Beckham and Sachin Tendulkar, among others, have their names registered under the Trademarks Law. The endorsement of a celebrity's persona is also known as 'Character Merchandising'²³ and is a massive revenue earning business. In India these personality rights of the sportspersons are protected under the fundamental right of Right to Privacy.²⁴ This type of intellectual property also demarks the image of a sportsperson as a part of a team from his/her image as an individual. As this right of personality or publicity has evolved from the Right to Privacy, it can only subsist in an individual.²⁵

4 ADVANCEMENTS AND NEW AVENUES FOR IPRs

The development of technology has had a significant impact on the sport industry, in particular, the advancements in delivery of content through communication media and the rise of eSports Industry. As the biggest source of information, internet has also proved to be a great marketing tool for the development of sport on a global level. Before these technological advancements, the tasks related to team administration such as developing rosters, handling data etc. took a lot of human effort and time but that has been revolutionized as the statistics and information are now stored in computer systems.²⁶ These advancements have led to the creation of new avenues for recognition of Intellectual Property Rights, mainly considering Copyright laws.

4.1 Broadcasting

"Sports from the sofa"²⁷ has made the viewer experience trouble-free and has become a part of our daily lives. It can be said that broadcasting media rights are a part of copyright law.²⁸ Copyrights, particularly those relating to broadcasting media establish the relation between sport and media.²⁹ Competitive sports have a spectator base all around the globe which has provided a niche to media and broadcasting companies.

²³ *Supra* note 10, at 440.

²⁴ INDIA CONST. art. 21.

²⁵ ICC Development (International) Ltd. v. Arvee Enterprises and Anr. (2003) VII AD Delhi 405.

²⁶ Dr. K.A Ramesh, *Role of information technology in enhancing sports performance*, INT. J. OF PHY. EDU, SPORTS AND HEALTH, 2016 at 277-279

²⁷ Robert Alan Garrett Arnold, et al., *Sports Broadcasting and the Law*, INDIANA LAW J.

²⁸ NEO Sports Broadcast Private Ltd. v. New Sanjay Cable Network & Ors., 2010 SCC OnLine Del 3681

²⁹ *Broadcasting & Media Rights in Sport*, World Intellectual Property Organisation, WIPO (Apr. 5th, 2020, 1.01 am) <https://www.wipo.int/ip-sport/en/broadcasting.html>

In the FIFA world cup 2018, the global media rights sale amounted to a whopping \$3066 million.³⁰ A new development in this area is the pooling in of members' broadcasting rights in a league³¹ to solve the problem of who owns the copyright in the broadcast as there are multiple entities involved when an event is being broadcasted.

Broadcasters have been a continuous target of unauthorized transmission of footage. In India, the infringement of broadcasting rights is governed by the Indian Copyright Act, 1957 and further interrelations³² between copyrights and broadcasting rights have been laid down by the courts. Furthermore, unauthorized downloading of content might lead to a penalty upto INR 1 crore under the Information Technology Act, 2000.³³

4.2 eSPORTS

With the improvement in technology, eSports has shaped itself into a complete industry, involving huge finances just like Sports. Video games or virtual games provide an interactive experience and they involve intellectual property as skill and technicality is used by various stakeholders such as game developers, software engineers, designers etc. while developing them. Video games are recognized as a sporting activity.³⁴ Domestic consumption of video games has grown in a flash throughout the world. In fact, the issues concerning IPRs in eSports are complex as compared to the normal sport industry because eSports involve huge reputational aspects to sportspersons and leagues which are used in video games and the invention of new interactive software is increasing at an alarming pace.

The most common problem that game developers and other stakeholders in the eSports industry face today is the illegal downloading of software.³⁵ It invites large-scale copyright infringement. Another problem which has generated a new avenue for IPRs is the concept of Game-Mods, also known as Game-Modding³⁶ which in simple terms means modification made to gaming software. There are clashes over copyright claims between the software modifiers and original

³⁰ Ashish Khanna, *World Cup 2018: Where from FIFA gets its \$3,066 mn media rights revenue*, INSIDE SPORT (Apr. 4th 2020, 2.25 pm) <https://www.insidesport.co/world-cup-2018-where-from-fifa-gets-its-3066-mn-media-rights-revenue-1519062018/>

³¹ United States v. NFL, 116 F. Supp. 319, 321 (E.D. Pa. 1953)

³² ESPN Star Sports v. Global Broadcast News Ltd. & Ors., 2008 SCC OnLine Del 1385

³³ The Information Technology Act, 2000, Act. No. 21 of 2000, Acts of Parliament, § 43 (India)

³⁴ Isaac Rabicoff and Kenneth Matuszewski, "The Rise of eSports creates a Complicated Relationship with IP" IP WATCHDOG (Apr. 5th, 202, 3.14 am) <https://www.ipwatchdog.com/2017/03/25/rise-esports-complicated-ip/id=79418/>

³⁵ Sean Comerford, *International Intellectual Property Rights and the Future of Global E-Sports*, 37 BROOK. J. INT'L L. 623, 624 (2012).

³⁶ Postigo, Hector 'Video Game Appropriation through Modifications', *Convergence*, 14(1) INT. J. OF RES. IN NEW MEDIA TECH. 59, 63 (2008)

developers and there are certain layers of copyrights which are present in recognizing the ownership of these stakeholders. Trademarks are also involved in the eSports industry as there are many professional gamers who register their game-tags or gaming identifications.

5 INFRINGEMENT CLAIMS AND TRENDS IN COURTS

With all these technological advancements in the form of communication media, eSports, internet etc. infringement of Intellectual Property Rights is inevitable. As explained above how various species of Intellectual Property Rights present in the sport industry can be breached, the infringement actions or claims regarding the same are the only Go-To option for the owners of intellectual property to claim remedy or to seek temporary or permanent injunctions. Michael Jordan got a compensation of millions of dollars by suing two grocery shops.³⁷ When an infringement action is initiated in a court of law, according to practice, two things have to be proved, that there exists a valid intellectual property and that the defendant in some way infringed or violated the property holder's enumerated rights.³⁸ Certain other elements which might need to be proved are that the defendant took a free ride from the intellect of the plaintiff, that there was some commercial value, that the defendant is in competition with the plaintiff etc.³⁹ Plausibility of future harm might as well be presumed by the courts if the unauthorized use or infringement is made for a commercial purpose.⁴⁰ Generally intellectual property disputes are covered under the civil law but criminal proceedings might also be instituted depending upon the case. Especially when the matters of sporting nature relate to an economic activity, the courts are prepared to intervene.⁴¹

As there is a huge amount of money involved, the leagues, clubs, sportspersons, associations and all other stakeholders take the infringement actions very seriously and avoid litigation by trying to settle cases outside the courts. Considering the trend in litigation, it is common for the decisions concerning patents, trademarks etc. to be appealed which results in the cases going on for years. Hence, the use of alternative dispute resolution techniques, most commonly arbitration is

³⁷ *Jordan says 'it was never about the money' after \$8.9M jury award*, CHICAGO TRIBUNE (Apr. 9th, 2020, 10.09 pm) <https://www.chicagotribune.com/business/ct-michael-jordan-dominicks-case-0822-biz-20150821-story.html>

³⁸ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991)

³⁹ *International News Service v. Associated Press*, 248 U.S. 215 (1918).

⁴⁰ *NFL v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986).

⁴¹ *Union Royal Belge Des Societes De Football Association Asbl & Ors v. Jean-Marc Bosman & Ors.* [1996] ECJ 15/12/1996.

favourable in case of infringement. Courts have also emphasized on the need of arbitration in dispute resolution concerning matters of sporting nature.⁴²

It is true that the matters concerning the intellectual property rights are also decided on the principles of equity and they might differ from case to case as the courts have to consider a lot of circumstances. In a landmark case in the United States, the National Basketball Association initiated an action against Motorola for transmitting information such as match scores and Statistics of NBA games but it was held that there was no breach of copyright.⁴³ The information was transmitted with a two minute delay. The Hon'ble High Court of Delhi, held that while the right to disseminate news is available to everyone, the right to ball-by-ball commentary contemporaneously is not.⁴⁴ Concerning the Indian judicial system, there is a paucity of laws made with the particular intent to protect the intellectual property in the sport industry, hence the basic principles governing the protection of intellectual property rights in accordance with various international conventions, landmark judgments etc. can also be applied.

6 AMBUSH MARKETING

Another legal problem which arises in the modern commercialized sport industry is ambush marketing. The term ambush marketing was coined by Jerry C Welsh.⁴⁵ Basically, it is a concept when an unauthorized person or entity markets itself in such a way by giving a wrong perception to the public, by suggesting its own involvement with the event. It refers to someone's attempt to capitalize over the goodwill or popularity of another without due authorization.⁴⁶ Ambush marketing is also known as parasite marketing because just like a parasite the host does not get any benefit while the one engaged in ambush marketing gains from the event. During the 2012 Olympic Games in London, the International Olympic Committee recognized the threat of ambush marketing to the official sponsors and took sharp measures to prevent it.⁴⁷

Mr. Norman Mandel, a major sponsor of international sports events has described the practice of ambush marketing as 'stealing and thievery'.⁴⁸ Safeguarding the authorized sponsors against ambushes is an important aspect of Intellectual Property Rights. There is no proper or specific

⁴² M.P. Triathlon Association through its Secretary and Anr. v Indian Triathlon Federation and Anr. (1996) 11 SCC 593 (India).

⁴³ National Basketball Association v. Motorola and STATS (New York), 105 F.3d 841 (2d Cir. 1997).

⁴⁴ Star India Private Limited v. Piyush Agarwal 2013 (54) PTC 222 (India).

⁴⁵ *Supra* note 20, at 193.

⁴⁶ Sandler D M and Shani D, *Olympic Sponsorship v. Ambush Marketing: Who gets the Gold?* 29(4) J. OF ADV. RESEARCH, 9 (1989).

⁴⁷ Brian Lee Pelanda, *Ambush Marketing: Dissecting the Discourse*, 34 HASTINGS COMM. & ENT. L.J. 341 (2012).

⁴⁸ *Supra* note 15, at 459.

law in India to deal with ambush marketing but this problem can be resolved by having anti-ambush marketing clauses in contracts between organizers and sponsors. Injunctions can be granted by the courts restraining the unauthorized use by ambushers who do not pay for the privilege.⁴⁹

7 CONCLUSION

It is true that law plays a significant role in the development of sport which has now transformed into an industry and this role will be fully recognized only if the conflux between the law and sport is properly understood. Due to the involvement of huge finances and economic value in the sport industry, the protection of intellectual property and concerning rights of the investors and stakeholders has become necessary. If the unique characteristics and components of sports which are related to intellectual property are safeguarded, the sport industry will be transformed considerably. It will not be wrong to say that the IPR protection in sports plays a dual role for this industry, by avoiding legal disputes as well as by helping in brand formation to further the growth in terms of business. The new avenues for Intellectual Property such as pooling in of broadcasting rights, database rights and the complexities involved in eSports copyrights, call for a better and more specific legal framework and more awareness in this arena. To encourage the spirit of sports, more comprehensive development should be made in this area where the law and the sport meet. The Indian Constitution empowers the parliament and state legislatures to legislate on areas related to sports and more comprehensive laws should be made with the intent to protect the intellectual property especially relating to the sport industry. The use of alternative dispute resolution should be encouraged to solve legal disputes which may arise due to infringement of IPRs. How intellectual property has become a platform for the growth and opportunities in the sporting world shows the dependency of the sport industry on the law to a certain extent.

⁴⁹ Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd. and Ors. [2003] (27) PTC 305 Del (India).