

**COPYRIGHT IN SPORTS – ARE SPORTS MOVES
COPYRIGHTABLE?**

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ABSTRACT

Copyright Act, 1957 guarantees protection to the original expression of an author/creator keeping in mind to maintain a balance between the right holder and the subject of the public interest. Protection of sports moves under the Indian Copyright Law is quite a challenging task due to its legislative framework. The Copyright (Amendment) Act, 2012 has brought about quite substantial additions to this already existing piece of legislation wherein u/s 2(qq) has dealt with the definition of ‘performer’ but the question lies here is do sportspersons fall under the category of performers? if yes then should the sports moves be eligible for copyright protection under the Indian laws. Under the American copyright law, there have been a few instances where the courts have held and placed sports moves under the category of ‘choreographic works’. Some American courts have sidelined the issue of copyrightability of sports moves and instead of the sporting events themselves receiving copyright protection.

MEANING OF COPYRIGHT

Copyright protection is guaranteed to “an author the right to protect their original expression but encourages others to build freely upon the ideas and information conveyed by a work.”²

A major aspect of modern-day copyright law is that it not just protects the rights of the copyright holder and the related rights but also covers the subject of the public interest and aims to strike a balance between the two in the era of the digital environment. The ambit of copyright has surged in recent times but has is responsible for the creation of many void spaces that may act as the loopholes of the law. The more the technology advances, the more complex the issues tend to get.

NATURE AND OBJECTIVE OF THE COPYRIGHT LAW

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² VK Ahuja, Law Relating to Intellectual Property Rights, 19, (Lexis Nexis, Haryana, 3rd.edn., 2017)

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It is a bundle of exclusive and intangible rights that is granted by a statute to the author/creator of the artistic work. It is provided for a limited period of ‘sixty years PMA’(Post Mortem Auctoris) i.e. life of author + sixty years.

Copyright protection is also a negative right that means that the author can prevent others from copying his work or performing any such act that may not be permissible by the copyright law but can only be done by the author himself.

As the years passed, the world has witnessed a significant shift rather than an up gradation in the technological field resulting in substantial developments and necessary amendments in the copyright law from both national as well as international perspectives.

Subject Matter of Copyright under Copyright Act, 1957

- a) Original Literary, Dramatic, Musical, Artistic Works;
- b) Cinematograph films; and
- c) Sound recording.

BERNE CONVENTION ON COPYRIGHT LAW

One of the major conventions that India is a signatory to be the Berne Convention for the Protection of the literary and Artistic Works, 1886.

“The purpose of the convention is to protect the rights of the author in their literary and artistic works. The expression ‘Literary and Artistic works’ has a very wide connotation. It includes every production in the literary, scientific, and artistic domains. Some of the important aspects that it covers include dramatic or dramatic – musical works; choreographic works and other major works such as works of drawing, painting, sculptures, etc.”³

ARE SPORTS MOVES COPYRIGHTABLE?

As per the Indian Copyright Laws, (Copyright Act, 1956), there is no specific provision that could protect the sports moves as a primary work unlike in the UK.

But this does not mean that there exists no scope in the copyright act, 1956 to protect the sports moves under the Indian Copyright law. It could be protected as sui generis or a related or neighboring right under the Copyright Act. The newly introduced concept of ‘Performer’s rights’⁴ that was inserted in the Copyright Amendment Act, 1994 could be of significance for

³ Ibid 1, Pg.736

⁴ VK Ahuja, Law Relating to Intellectual Property Rights, 115, (Lexis Nexis, Haryana, 3rdedn., 2017)

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the protection of sports moves. The amendment focused on protecting the rights of the performers.

Copyright (Amendment) Act, 1994 included the following crucial insertions:

- “**Section 2(q)** defined the ‘Performance’ about performer’s rights, means any visual or acoustic presentation made live by one or more performers;”
- **Section 2(qq)** performer includes an actor, singer, musician, dancer, a person delivering a lecture, or any other person who makes a performance.
- **Section 38** and its recent 2012 amendments Sec. 38A and Sec. 38B that deal with Performer’s exclusive rights and moral rights.
- **Section 39.** and Section 39(A). (Added recently under 2012 amendment) that deal with the acts not infringing broadcast reproduction right performer’s right and certain provisions that are applicable in case of broadcast reproduction right and performer’s right respectively.”⁵

The latest amendment to the copyright act does not particularly mention the sports persons under **Sec.2 (qq) “performer”**. Since there exists no explicit mentioning of the term sportspersons there arise lacunae in its interpretation.

A bigger problem arises here that is to say that the judiciary too has remained silent on such substantial points of law resulting in more and more ambiguity of its interpretation.

Therefore, the above-mentioned Sec.2 (qq) is an **inclusive** definition, in a way that it broadens the meaning and the scope of the word ‘performers’ because the clause declares all such persons that have not been explicitly mentioned under the Sec.2 (qq) definition of ‘performers’ shall be included. Sportspersons may be implicitly regarded as performers.

It is, therefore, necessary to apply the principle of ‘**Ejusdem Generis**’ to derive a reasonable interpretation of the above-mentioned section

“**Ejusdem Generis** – (of the same kind). It is a well-established principle of law that is used to interpret loosely written statutes where a law lists specific classes of persons or things specifically listed.”⁶

The Indian copyright law has its drawbacks and this dearth in the legislation to guarantee the interests and rights of the performers causes more ambiguity. Even though there exists a

⁵ The Copyright (Amendment Act), 1970 (Act 39 of 1970)

⁶<http://www.legalserviceindia.com/articles/edjem.htm>

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crucial inclusion to the Copyright (Amendment) Act, 2012 that brings into notice the rights of the performers yet it contains a significant number of loopholes to be dealt with.

- The primary concern stands about **Section (38)** of the Copyright Act, 1956 that it implies the protection of the economic rights of the performers exists only until the work is fixed, the performer is bound to lose his economic rights.
- The secondary concern arises when the copyright act, 1956 has guaranteed the rights of a performer but remains unclear on certain traits such as style, persona, etc. which still fall under the ambit of copyrightable work. Hence these performers cannot be regarded as “authors” for this act.

WIPO PERFORMANCES AND PHONOGRAMS TREATY, 1996

“It protects the performances of performers such as actors, singers, musicians, etc., and the producers of phonograms. The treaty can be bifurcated into two major segments i.e. rights of performers and rights of producers of phonograms which are then subdivided into their economic rights and moral rights respectively.

1) Rights of Performers

The WPPT recognizes four kinds of economic rights in the performances of performers that have been fixed in Phonograms (not in audiovisual fixations, such as motion pictures.)

- a) The right of reproduction;
- b) The right of distribution;
- c) The right of rental;
- d) The right of making available to the public any performance fixed in the Phonogram.

In case of unfixed (live) performance the treaty grants the following rights:

- a) The right of broadcasting (except in case of rebroadcasting)
- b) The right of communication to the public (except where the performance is a broadcast performance and the right of fixation).

Moral Rights

WPPT also grants two moral rights to the performers:

- a) The right to claim to be identified as the performer;
- b) The right to object to any distortion, mutilation, or other modification that would be prejudicial to the performer’s reputation.

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2) Rights of Producers of Phonograms

The four kinds of economic rights available for the producers of phonograms are as follows:

- a) The right of reproduction;
- b) The right of distribution;
- c) The right of rental and
- d) The right of making available to the public of their phonograms.”⁷

POSITION OF COPYRIGHT PROTECTION FOR SPORTS MOVES IN OTHER NATIONS AND INDIA

As per the federal laws of the United States of America i.e. (as per the Copyright Act, 1976, the below-mentioned criteria must be fulfilled to claim copyright protection which is as follows:

- a) “The work must be fixed in a tangible form;
- b) The work must be original;
- c) The work must be creative and
- d) The work must be within the subject matter of copyright.”⁸

But as far as the copyrightability of the sports moves is concerned then the subject matter requirement can be classified into eight categories:

- a) “Literary works;
- b) Musical works;
- c) Dramatic works;
- d) Pantomimes and choreographic works;
- e) Pictorial, graphic, and sculptural works;
- f) Motion pictures and other audiovisual works;
- g) Sound recordings and;
- h) Architectural works”⁹

The originality of a work does not necessarily mean that the work must be a new creation in itself rather it must be an independently created work.

In Feist Publications v. Rural Telephones Services Company¹⁰

⁷ Supra 3, Pg.741

⁸<https://blog.iplayers.in/intellectual-property-rights-ipr-in-sports/>

⁹17 U.S.C. § 102(a) (2011).

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“The United States Supreme Court held that the originality refers to the source of the work and the ‘sweat of the brow theory’, that copyright was a reward for the hard work. All the games have been played for many years and standard rules and bye rules are laid down which are well known, and so when an athlete is finding his move to play the game differently, which in turn would give an advantage, his move should be protected.”

There have been a lot of arguments and discussions on the issue of copyrightability of sports moves and somehow the argument over the subject matter requirement of sports moves is very open-ended because of the use of the word “**include**”¹¹.

Many eminent personalities have opined that the issue of copyrightability of sports moves may potentially be copyrightable subject matter and hence qualify for copyright protection.

Copyright protection for sports moves is that such activities can be placed under the category of choreographic moves as the choreographic moves have been left undefined under the US copyright statute.

As per the Wikipedia definition, “Choreography is the art or practice of designing sequences of movements of physical bodies in which motion, form, or both are specified.”¹²

“In the case of **Baltimore Orioles v. Major League Baseball players**¹³

The issue before the court was whether a baseball game was itself subject to copyright law. The court had no difficulty in recognizing the copyright in the telecast of the game, as an audiovisual work, however, the court did not address the question of the copyrightability of the baseball game itself, only making a remark stating that ‘player’s performance is characterized by ‘modest creativity required for copyright ability’, holding back from expressly determining that a sporting event is copyrightable.”

In another landmark case of **National Basketball Association v. Motorola Inc.**

“The case was before the second circuit court where the copyrightability of the Basketball game itself was at issue. The court considered the seventh circuit’s decision in the Baltimore Orioles case and also interpreted **Section 102** of the US copyright act. The second circuit disagreed with the seventh circuit’s view on the creativity of player’s performances finding that sports events are neither ‘authored’ nor ‘scripted’. On section 102 of the US Copyright Act, applying what seems to be the statutory principle ‘expressio unius est exclusio

¹⁰*Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹¹ Bussey, pg.6.

¹²<https://en.wikipedia.org/wiki/Choreography>

¹³*Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663 (7th Cir. 1986).

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alterius'¹⁴, the second circuit concluded that if sports events were intended to be protected by copyright Section 102 would have been drafted to include this category into the language of the provision."¹⁵

These judgments have not directly mentioned the copyrightability of the sports moves per se rather they have attempted to establish a base for when may or may not a sports move be solely and independently be a subject matter of copyright. In addition to the sports copyrightability of the sports moves, one of the issues remaining in the copyrightability of the sports events. Sports move genuinely require a very deep and fine sense of understanding to make them protectable through Copyright.

Position in the UK

Under the Copyright Law of the United Kingdom i.e., (UK Act Copyright Designs and Patents Act, 1988) Copyright subsists in the following Original:

- a) Literary;
- b) Dramatic;
- c) Musical;
- d) Artistic Works;

In the case of Ladbroke ltd. v. William Hill (Football ltd.)

It was held that “the value of work as a whole must be assessed when the claim to be originality is being assessed. The court also held the word ‘original’ requires only that the work should not be copied but should originate from the author.”¹⁶

In another case of Interlego AC v. Tyco Industries Inc.,

“One may claim for the protection under copyright only if he can show that his skill and judgment were the integral parts of the creation of his work. Since we know that a mere idea is not protected under IPR but it should be an expression of it.”¹⁷

A substantial question arises wherein the issue about the ‘Originality’ of the work often depends upon the “particular social, cultural, political context in which the judgment has been pronounced.”¹⁸

¹⁴*Expressio unius est exclusio alterius* is a Latin phrase that means express mention of one thing excludes all others. This is one of the rules employed in aiding the interpretation of statutes. The phrase indicates that items not on the list are assumed not to be covered by the statute. When something is mentioned expressly in a statute it leads to the presumption that the things not mentioned are excluded.

¹⁵*National Basketball Association v. Motorola*, 105 F 3d 841 (7th Cir. 1997)

¹⁶<http://notesforfree.com/2018/01/18/copyright-case-brief-ladbroke-football-ltd-v-william-hill-football-ltd/>

¹⁷https://www.oxbridgenotes.co.uk/law_cases/interlego-ag-v-tyco-industries-inc

¹⁸ Ankur Gupta, “Copyright Eligibility of sports “moves”: A far stretch? Bainbridge, D., 1999, *Intellectual Property*, 4th Ed, Financial Times Pitman Publishing, London

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The uncertainty that persists is ‘what’ is to be recognized as a work in the first place.

The intangibility of the work, as the author’s intellectual creation, “the protection of each contribution may be afforded in the abstract, without categorizing it under the exhaustive list of protected subject matter. For instance, it is but obvious that ballet qualifies for copyright protection as a dramatic work under the CDPA, 1988. For instance, ‘Gymnasts and their coaches devise a complex set of moves, which are intended to be performed with a high level of accuracy on a stage, and they are judged in large part on the aesthetic aspect of their performance’.”¹⁹

It suggests that performers are using a predetermined set of acts in cohesion with one another and the play will carry out the same intrinsically choreographed steps as a ballet or a theatrical play.

But on the other hand, if we take the example of a sport such as Football, there are the specified number of players to represent a team i.e. (11 players/team), The positions, formations, etc. too are fixed but the way of dribbling past a defender or tackling an opponent or the manner of shooting the ball or a celebration move is not fixed. In certain celebration moves that a player may exhibit in his sense of joy as a celebration move, or any specific dribbling method or any particular skill introduced by a person that is “merely not a discovery but a work of originality then it could be made protectable under the copyright law” ²⁰depending upon the copyright laws about that specific country and the reasonableness to protect that sports move.

Position in India

Under the Indian Copyright Law, there is no special mentioning the words ‘sports persons’ or ‘sports moves’ per se.

“**Sec.2 (h)** of the Copyright Act, 1957 deals with the ‘Dramatic Works’ - that includes any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting; a form of which is fixed in writing or otherwise but does not include a cinematograph film;”²¹

The Indian position of the copyright laws stands in equivalence to the position of the UK in certain copyrightable matters. There is no exclusive legislation in India yet for the protection

¹⁹ Kukkonen, 1998, p.810

²⁰ Das, P.K., (2000) Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays, *Indiana Law Journal* 75, (2000), 1073-1101

²¹The Copyright Act, 1957 (14 of 1957)

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of the rights of the performers including sportspersons and other performers that could widen the scope of protection for these performers.

It requires an ample amount of time, skill, hard work, and most importantly the intellect for a player irrespective of the sport is indulged into to come up with a new skill or a move that could be attached to his/her name as an iconic move.

For instance, MS Dhoni's Helicopter shot is considered to be one of the most popular and iconic cricketing shots in the modern day of cricket that he has used an insignificant number of matches to win games for his team. "In an online version of Zee TV news aired on the 11th of December, there were allegations that Kevin Pietersen, the English batsman had replicated Dhoni's helicopter shot. It is not a subject matter of 'work' under **Sec.2 (v)** Copyright Act, but this belongs to Dhoni himself. As per Hegel's personality theory, his 'Signature move' is an extension of himself and so his consent must be required for copying or reproducing the move. In the same interview to Zee TV News, Dhoni had stated that he picked up this helicopter shot from playing tennis ball cricket in his hometown and so meets the criteria being 'original'. Newer technology methods have made copying such moves easier and so must be protected."²²

About a cricket match, **the Delhi High Court in Star India Pvt. Ltd. v. Piyush Agarwal**, stated that "when a cricket match was played, there were various dramatis personae in the performance. So far as the visual recording was concerned, the cricket players were the performers, who played out the match. The umpires were also an integral part of the live performance, and they could also be said to be the performers in the match. Apart from the players and the umpires, the commentators who gave commentary, whether for the television or the radio or any other medium of broadcast, were also performers. Thus, a cricket match very much fell within the definition of 'performance'."²³

The holding of the court in the above-mentioned case suggests that the rights of the performers have the potential to be given copyright protection but the subject matter requirement perhaps is a question that is to be focused upon. As of now, hardly there have been any judgments that could provide us a clear-cut view on the subject matter requirement

²²http://zeenews.india.com/sports/cricket/mahendra-singh-dhoni-helicopter-shot-copied-by-kevin-pietersen_1833157.html

²³ Star India Pvt. Ltd. v Piyush Agarwal, 2014 (58) PTC 169 (Del) at p.173

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of the copyrightable sports moves and under what circumstances would the sports moves be qualified to fulfill any of subject matter requirement.

CONCLUSION AND SUGGESTION

The ambiguity about seeking copyright protection for sports moves is still in contention as the framework of law from country to country differs a lot. An athlete requires a lot of skill and hard work and most importantly the originality of the expression while creating a sports move. The non-granting of copyright protection to the author/creator of the move may tantamount to usurping from the developer/creator of the sports move and make him appear no better than a slave. To seek protection for sports moves under the Indian copyright framework there should be necessary insertions under the definition clause so that it becomes an explicit mentioning of the conditions required to seek copyright protection for the same. Making sports moves a subject matter for copyright protection is challenging since the Indian courts have to keep in mind the interest of the public as well unlike American courts that have been quite liberal towards the party involved in seeking protection for the moves and eventually granting them protection.

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