Publicity rights under fantasy sports

Abhishek Bansal
abrahamadamson@hotmail.com
Christ University, Bengaluru, Karnataka

ABSTRACT

The research paper is based on a doctrinal research on the publicity of players against its free-selling through fantasy sports online. My topic comes under the technological law and sports law. To give an introduction to my topic, the issue I’m dealing with is whether the growth of fantasy markets owe any liability to player’s publicity. Online fantasy started with a group of friends over basketball and now is a multi-million dollar industry. It starts with a person acting as a ‘manager’. Before the start of every season, the player picks players from the draft of currently active players and then receive points throughout the season for their performance in the real world. For example, a hockey player who scores a lot of goals, or a baseball player with a high batting percentage, would be highly sought-after both in the real-life professional league and in the various fantasy leagues. Online fantasy sports providers are battling against the professional sports leagues and their players’ associations over whether the fantasy providers should pay licensing fees to use the players’ names and the statistics they generate. This question turns on whether the players have an enforceable right of publicity interest in their names and playing records.

Keywords— Fantasy sports, Sports law, Technological law, Privacy rights

1. INTRODUCTION

Sports had been an intrinsic part of the society since ages. But for a common man to play at an elite level it takes a lot of talent, hardwork, and chance of fate. In this day and age, such onus of expectations is met by ‘fantasy sports’. Online fantasy sports are games where participants (managers of the teams) draft current professional players to create their team. [1] Each player accumulates points based on his actual performance throughout the course of the season. Different accomplishments in a game will result in a set amount of points that are determined by each league. For example in a fantasy football league, every goal scored by a player is worth three points.

The first fantasy leagues were developed in the 1970’s and leagues used sports periodicals and newspapers to collect their game content. [2] Each players’ statistics were then calculated longhand, before releasing the updated fantasy league standings on a weekly basis. [3] The creation of the Internet transformed fantasy sports leagues from a hobby done amongst local friends to a commercial enterprise, connecting people from across the world. No longer are newspapers used to compute player statistics in a tedious weekly exercise. Instead, the Internet has provided fantasy sports participants with up-to-the-minute updates of all player statistics. [3] What began as a handful of friends meeting over burgers has transformed into a cultural juggernaut played by an estimated 19.4 million people in the United States and Canada alone. [4]

Because the fantasy leagues correspond with the professional leagues, the information that makes the fantasy games possible is the factual record of what takes place in live games: the statistics generated by each individual player. Online fantasy sports providers are battling against the professional sports leagues and their players’ associations over whether the fantasy providers should pay licensing fees to use the players’ names and the statistics they generate. This question turns on whether the players have an enforceable right of publicity interest in their names and playing records. [5]

The paper dwells on two aspects of fantasy sports. Part I explores the relationship between copyright law and the use of statistics in fantasy leagues. Part II tries to emphasize the difference between fantasy sports and gambling.

2. USE OF STATISTICS: VIOLATION OF COPYRIGHT LAW?

Fantasy sports games are, at their core, a means to make real-life sportspersons “Player(s)” compete on imaginary playing fields. From its origin as an informal baseball fan league evolved in a rotisserie diner in Manhattan, fantasy sports games today increasingly lean on reality, particularly in light of the increased popularity of the sports and Players, their immense fan following, and instantaneous sporting updates. Through the advent of the internet, gaming websites and mobile gaming application ones, fantasy sports have retained a tether to reality.
The use of Facts and Identity in fantasy sports games not only affects the marketability of the game to its participants “Participants” but is also the essence of the existence and opera on of fantasy sports games. However, Facts and Identity are also valuable to various stakeholders in sports including Players, their teams, owners, leagues, broadcasters, merchandisers and advertisiers “Proprietors”. Players, as well as leagues, invest significant me and skill in gaining recognition and popularity. What they own is intangible yet extremely valuable and generates much of the public interest in sports and Players themselves. As a result, the market for sports-related products and services continues to expand. The celebrated status of Players and popularity of leagues provides tremendous commercial opportunities. In order to maximize the profit and prevent free-riding, the commercial use of Facts and Identity is tightly controlled by Proprietors.

While their popularity worldwide is well known, fantasy sports games in India have gained attraction in parallel with the growing popularity of their real-life counterparts and increasing digitization. As a result, major league operators like the Board of Control for Cricket in India have launched their own fantasy sports games platforms. [6]

The tug of war for the right to Facts and Identity between Proprietors and fantasy sports games operators is seldom an equal one. As seen in the past, an increase in license fees by Major League Baseball by an outrageous $1,965,000 in less than a year, [7] and a warning by National Football League about restricting fantasy licenses severely and greatly increasing the fees involved with fantasy football are symptomatic of this dispute. At the heart of this dispute lies the question of whether Facts and Identities are the IP of the Proprietors and whether the nature of usage by fantasy sports games operator constitutes an infringement of the rights of the Proprietors.

Thus, it is imperative to understand whether the use of such Facts and Identities by fantasy sports game operators constitutes a violation of IP law and the extent to which use is permitted sans licensing. This paper seeks to analyze the interplay of applicable IP regime and the opera on of fantasy sports games in India.

3. USE OF STATISTICS
Statistics or Facts have been of existential importance to the opera on of fantasy sports games since their origin. These Facts are obtained by fantasy sports game operators from various sources, including publicly available information, and displayed alongside the name and image of the Players available for a fantasy sports game on the fantasy sports game operator s platform. The issue arising from the use of such Facts is that the fantasy sports game operators may invite a copyright infringement claim from the Proprietor of such Facts. Thus, the determination of copyright-ability of Facts becomes crucial.

The Indian Copyright Act protects original literary, musical, art and drama work as well as rights of broadcasters and performers from exploitation on by others. In order to be protected under the Copyright Act, statistics must qualify as original literary work. Literary works have been defined under the Copyright Act to include computer programmes, tables, and compilations. This is an inclusive definition and not exhaustive and could include any literary writing or content. Originality as a concept under copyright law does not require that an idea used by a person must be original, but that the expression of the thoughts by a person must be original and not a copy of another author. [8] It is a well-accepted principle of copyright law that facts in themselves are not copyrightable. It has been held in EBC v. DB Modak [9], that there exists no copyright in facts, and that only a creation of work using skill, labor, and capital that is more than a copy of an original work is copyrightable.

The Delhi High Court in Star India Private Limited v. Piyush Agarwal [10] had applied the ‘hot news doctrine’ so established in INS to state that ball-by-ball updates in a sport constituted time-sensitive information with potential commerical value. The Delhi High Court in 2012 held that once match scores have already entered the public domain, they can be freely reproduced without infringing a copyright. [11]

Given the position of law in India as well as the US, it can be concluded that dispute over copyright-ability of statistics or Facts is well settled. Statistics are not copyrightable as they are mere facts and in cases of compilation, a case for copyright infringement can only be made if such statistical compilations are reproduced in the exact same format. The legal and factual position works out well in favor of fantasy sports game operators as the fantasy sports games format does not involve a direct copy of real-time statistics compiled by any entity. Statistics ultimately used by fantasy sports game operators as fantasy points are arrived at by use of scores, which are factual occurrences used by fantasy sports game operator’s only as raw data to compile fantasy points and therefore, are not a copy of compilations made by any person. Therefore, such use of statistics would not lead to copyright infringement.

4. USE OF LOGOS, TRADEMARK, AND NAMES
Typically, fantasy sports games operator in India use names of Players, team logos and team names to enable the Participants to choose Players, teams, and games. The Trade Marks Act, 1999 “Trademarks Act” states inter alia that a registered trademark is infringed when a person, if not being a registered proprietor or a permitted user uses in the course of trade a mark which is identical or similar or deceptively similar trade mark in relation to the goods or services in respect of which the trademark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trademark. To bring a claim of trademark infringement, apart from proving the use of identical or similar trademark in the course of trade, it is essential to prove that use of such mark is likely to be taken as a trademark. [12]In other words, the use of a registered trademark would constitute an infringement only if it indicates a connection in the course of trade between the person and his goods or services, irrespective of his intention. [13]

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5. POSITION IN INDIA

The aim of the law governing passing of states that no person has the right to pass on his goods or services as being the goods or services of another and Indian law and courts have also recognized the same. In ICC Development v. Arvee Enterprises [14], the International Cricket Council had led a suit seeking an ad-interim against Arvee Enterprises to restrain them from publishing any advertisement associating themselves with the plaintiff and the Cricket World Cup in any manner, whatsoever, as it amounted to passing off. It was held that there may be a case of passing off where the defendant has promoted his product or business in such a way so as to create the false impression that his product or business, is in some way approved, authorized, or endorsed by the plaintiff or that there is some business connection between them in order to use the goodwill of another.

In Gautam Gambhir v. DAP & Co & Ors. [15], the Delhi High Court decided on a case where restaurants were using the name of the famous Indian cricketer “Gautam Gambhir” as their trade name. The court held that mere use of the name of a celebrity does not result in the suggestion of endorsement or sponsorship as long as no overt act has been attributed to the defendant whereby he attempted to make representation to any individual or public at large that the restaurants were owned or endorsed by the plaintiff.

6. PLAYERS NAMES AND PUBLICITY RIGHTS

Publicity rights are a broad, nebulous set of rights that vest in an individual’s personality, including rights over the individual’s image, trait, likeness, name, and character.

The Delhi High Court in ICC Development v. Arvee Enterprises recognized the right of publicity, wherein it was held that the right of publicity has evolved from the right of privacy and inherits in an individual or in any indicia of an individual’s personality like his name, personality, etc., and the individual is allowed to protect from it. This case also distinguished between the rights available to an individual i.e. publicity rights and the rights available to entities, being copyright and trademark protection and unfair trade competition law. [16]

Recently, in a landmark judgment on an individual’s right to privacy, Justice Sanjay Kishan Kaul of the Supreme Court in Justice KS Puttuswamy (Retd) v. Union of India [17] elevated the issue of personality rights, from its status as a common law right to a constitutional right, embraced by the fundamental right to privacy under Article 21 of the Constitution of India. While the position on commercial usage of Player names and other indicia of personality is clear, there is no clear pronouncement with respect to the rights of a Player vis-a-vis use of Facts that relate to them.

7. FANTASY SPORTS: A TYPE OF GAMBLING?

Across different jurisdictions in the world, games of skill and games of chance played for stakes are treated differently. The anti-gambling laws of most Indian states exempt games of mere skill. The Supreme Court of India the “Supreme Court” has interpreted the words mere skill to mean “preponderantly of skill” [18]. The Supreme Court has also held that conducting skill games does not amount to “gambling” but a commercial activity and therefore entitled to constitutional protection. [3] Whether a game is of chance or skill is a question of fact to be decided on the basis of facts and circumstances of each case. [19]

While deciding the question of “skill versus chance”, Indian courts have adopted the test followed by the U.S. courts known as the “dominant factor test”, or “predominance test’. This test requires a court to decide whether chance or skill “is the dominating factor in determining the result of the game”. The Supreme Court has applied this test in relation to card games such as rummy (Satyanarayana case [20]) and horse racing (Lakshmanan case [21]).

Fantasy sports games are games which involve users drafting fantasy teams based on certain conditions from a list of players scheduled to play live games on a given day. The users pay an entry fee to enter a contest and it is pooled in for distribution among the users “Entry Pool” a mere deduction of a service/administrative fee by fantasy sports games providers. The user's drafts their teams based on their application of knowledge gathered through systematic research, experience, and adroitness regarding the relevant sport. Based on the performance of the players selected by the user to draft his/her team, the user collects points. The users are ranked based on the points their selected players accumulate throughout the contest as per their on-gold accounts and scoring metrics for the contests.

8. GLOBAL PERSPECTIVE ON SKILL ELEMENT

There have been a few international cases wherein various courts have taken into account recent academic studies and legal precedents and held that fantasy sports games are games preponderantly of skill and not games of chance alone, subject to certain conditions. The legality of online fantasy sports games in the U.S. is persuasively supported by Humphrey v. Viacom [22]. In the Humphrey case, the plaintiff had claimed that the registration fees paid by fantasy sports league participants constitute “wager” or “bets” and that the winners are determined predominantly by chance due to potential player injuries and other chance circumstances. In dismissing the plaintiff’s complaint, the district court held that fantasy sports are games of skill, depending on the fantasy participant’s skill in selecting players for his or her team, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench. The ability to consistently find players who overperform when compared to their salary value is a critical element denoting the skill involved in fantasy sports.

9. POSITION IN INDIA

In 2015, the State of Nagaland introduced a licensing regime for skill games under Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2015 “Nagaland Gaming Legislation”. Prior to the notification of the Nagaland Gaming Legislation, fantasy sports games were not expressly held to be a “game of skill” in any Indian legislation or judgment. The Nagaland Gaming Legislation expressly recognized, inter alia, “virtual sports fantasy league games” and “virtual team selection
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Games” as skill games. In 2017, the High Court of Punjab and Haryana became the first Indian court to rule a fantasy sports game to be a game predominantly based on skill. [23]

Based on what is set out above and the legal precedents, both internationally and in India, it can be persuasively argued that fantasy sports games are games in which success depends upon a substantial degree of skill. It is also pertinent to note that, not all fantasy sports games have been held to be games of skill. Various factors that a participant would need to assess keeping in mind the different conditions and scoring metrics set out for drafting a team to affect the result of the fantasy sports game. Based on the reasoning of various courts, analysis of the conditions or the metrics within which a user is required to draft their team, viz., restrictions on the number of players from a single team, upper caps and limits, etc., plays a critical role in analysing the element of skill involved in fantasy sports games. Hence, the gameplay of each fantasy sports game needs to be analyzed on a case to case basis applying the principles discussed above. Thus, Fantasy sports cannot be in any way taken to be same as wagering contracts under the Indian Contract Act or considered to be falling under any type of gambling.

10. SUGGESTIONS AND CONCLUSIONS

Fantasy sports have revolutionized the way fans experience and pay for the real game. Not only have they greatly increased the economic value of sports statistics, but they have also become a whole new economy. Today, entire companies are solely dedicated to providing fantasy analysis, including numbers, projections, injury reports, scouting reports, and expert advice. Leading experts of the real game appear on television shows, dedicating time to discussing professional players’ fantasy performances and offering game-play advice to the public. Comments aimed at fantasy players appear more and more often during analysis of real games, while statistical “tickers” continually update viewers on fantasy information during network television game coverage. There are fantasy conventions, trade conferences, and even a Fantasy Sports Trade Association. What started as a simple game among friends is now big business. Now that the fantasy sports business involves selling things that used to be quaintly considered public knowledge, intellectual property is being tugged in opposite directions. Given the limitations of the copyright and trademark claims, the court might take the opportunity to determine, as a central issue, whether fantasy sports games violate players’ rights of publicity. So what’s at stake for the public? Aside from concerns relating to the freedoms of speech and information, the public has a strong economic stake. If the court determines that the inclusion of players’ names in fantasy games does not violate publicity rights, more games will be produced, leading to greater competition and better quality. The public benefits from the free enterprise system that promotes the efficient allocation of economic resources. Consumers subscribe to online fantasy games not for their useful information and news reporting, but primarily for their sophisticated gameplay. News reports and analysis are merely added benefits. The free speech informational aspects of the games serve as aids to assist fantasy players in making informed choices in their fantasy lineups. If electronic video game providers pay a premium for exclusive rights to use players’ names and identities in their video games, why shouldn’t fantasy providers as well? The electronic video game market, for example, produces fair and efficient competition. In that market, unlicensed games typically utilize more circuitous descriptions, such as player numbers and teams’ geographical locations. Although some fantasy providers emphasize that they are not using the players’ identities for their commercial value and consumer appeal per se, such use is unquestionably critical to the providers’ commercial enterprise. Unauthorized commercial use hinders the athletes’ interests in controlling and benefiting from the uses of their names and personas, diminishing the returns on their own efforts in the sport.

However, the court must reconcile the definition of “commercial use” in order to determine the line where the use of athletes’ information becomes more than mere recitation and instead exploits the intrinsic market value of names and accomplishments. In relation to my second contention, based on what is set out above and the legal precedents, both internationally and in India, it can be persuasively argued that fantasy sports games are games in which success depends upon a substantial degree of skill. It is also pertinent to note that, not all fantasy sports games have been held to be games of skill. Various factors that a participant would need to assess keeping in mind the different conditions and scoring metrics set out for drafting a team to affect the result of the fantasy sports game. Based on the reasoning of various courts, analysis of the conditions or the metrics within which a user is required to draft their team, viz., restrictions on the number of players from a single team, upper caps and limits, etc., plays a critical role in analysing the element of skill involved in fantasy sports games. Hence, the gameplay of each fantasy sports game needs to be analyzed on a case to case basis applying the principles discussed above. Thus, Fantasy sports cannot be in any way taken to be same as wagering contracts under the Indian Contract Act or considered to be falling under any type of gambling.

11. REFERENCES

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