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E-gaming and IP rights in India

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Introduction

India has recently witnessed a new wave of e-gaming, or fantasy gaming, which involves users drafting fantasy teams based on certain conditions from a list of real-life players scheduled to play live games on a given day. Users draft their teams based on their knowledge and experience of the relevant sport. E-gaming operators charge certain fees from users for contests and tournaments to win cash prizes.

The popularity of e-gaming in India can be gauged from the fact that DREAM11 – one of the most famous e-gaming operators in India – was the title sponsor of the Indian Premier League 2020, which is probably the biggest Twenty20 cricket league in the world. According to a report published by KPMG in 2019, the Indian online gaming industry is set to become a 250.3-billion-rupee industry by 2024.

E-gaming and IP rights

However, there remains a grey area pertaining to the intersection of various IP rights in the e-gaming space.

In essence, e-gaming uses factual information about real-life players, such as their scores, results, statistics and performance metrics, as well as descriptive information, such as their names, logos, images and even their personality. The complexity arises when this factual information is the intellectual property of a certain entity, and its usage by an e-gaming operator constitutes an infringement of such IP rights.

Copyright

It is a well-accepted principle of copyright law that facts in themselves are not copyrightable, and copyright protection is extended only to any unique and novel compilations of facts that are considered to be "literary" copyrightable works under the Copyright Act 1957. In *Akuate Internet Services Private Limited v Star India Private Limited*,⁽¹⁾ a division bench of the Delhi High Court rejected the exclusive rights claimed by Star India on real-time match information to prevent others from publishing or sharing match information or facts, arguing that such use would violate its broadcasting rights. The Court stated that such information or facts, when published in real time, constituted mere facts, which – being in the public domain – were accessible by everyone. Thus, e-gaming operators can use such factual information without violating any copyright, provided that they do not copy any compilation of such facts, which would amount to the violation of the author's copyright in such a compilation.

With regard to images and photographs of real-life players used by e-gaming operators, it is imperative to note that such images are protected as artistic works under the Copyright Act, and the photographer or player is the first owner of the copyright therein, unless the image is commissioned or taken under a prior contract, such as for a newspaper or magazine. Therefore, e-gaming operators have to be cautious and follow the due process of law to obtain prior permission, consent, licences or assignments from the original owners of such images in order to use them on e-gaming portals to avoid any copyright infringements.

Trademarks

E-gaming operators are bound to use various trademarks, brands and logos on their portals, which might amount to trademark infringement or passing off and dilution proceedings against them. However, it is interesting to note that the Indian courts, in several cases, have allowed various parties the defence of "nominative fair use" or "denominative use" of the mark, wherein a mark is used by a third party merely in order to identify the product of the registered trademark's proprietor.

This defence is not codified under the Trademarks Act 1999. However, in *Tata Sons Limited v Greenpeace International*,⁽²⁾ the Delhi High Court took an interesting stance by stating that Greenpeace's use of the mark TATA would not amount to trademark infringement since Greenpeace had used it to focus the user's attention on the activity of the trademark

owners, and not to the mark or the products/services thereunder.

Further, in *Consim Info Pvt Ltd v Google India Pvt Ltd*,⁽³⁾ the Madras High Court laid down three requirements for the applicability of the defence of nominative fair use – namely, that:

- the product or service in question must be not readily identifiable without the use of the trademark;
- only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and
- the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Applying these requirements to the usage of marks by e-gaming operators, the defence of fair use of the mark would essentially depend on the manner in which such marks were used – either for sole identification of the actual players, teams and their brands or to cause a false impression or association with the proprietors of the marks to gain unsolicited financial benefits.

Publicity rights

Finally, e-gaming operators might also commit IP right infringement by using factual information pertaining, for example, to players' professional careers and characteristics, which are recognised as the publicity rights of such players. "Publicity rights" are a broad, nebulous set of rights that vest in an individual's personality, and they include rights over the individual's image, traits, likeness, name and character. Again, although there is no codified law in India pertaining to the publicity rights of an individual, there are a number of cases wherein the courts have dealt with this issue.

In *ICC Development v Arvee Enterprises*,⁽⁴⁾ the Delhi High Court, in recognising the right of publicity, held that such a right has evolved from the right of privacy, that it exists to protect features such as an individual's name and personality, and that the individual is allowed to profit from it. Thus, it naturally follows that a restriction on publicity rights is imposed where the usage is for commercial gain rather than nominative (ie, arising as a necessary consequence of the usage of facts), depending on the specific circumstances and the extent of use by e-gaming operators.

Comment

From a commercial standpoint, since there are no exclusive regulatory laws in place for e-gaming operators in India, e-gaming operators may choose to enter into a collective licensing arrangement to prevent IP right infringements. Such arrangements enable right owners to grant the necessary prior permissions, consent, licences or assignments of their rights, on an exclusive or non-exclusive basis, to bodies, which can then license such rights to e-gaming operators. This allows such operators to make use of the rights in question for the limited purpose of their e-gaming business.

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Endnotes

(1) MIPR2013(3)1.

(2) 178 (2011) DLT 705.

(3) 2013 (54) PTC 578 (Mad).

(4) 2003 (26) PTC 245 (Del).