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Ball-by-ball mobile coverage infringes rights: Delhi court

In a recent judgment, the Delhi High Court has confirmed that ball-by-ball coverage of cricket constitutes infringement of STAR's mobile rights, when offered on a commercial basis by other mobile phone operators. Amrut Joshi and Aditya Shamlal, of Gamechanger Sports Ventures, examine the arguments made in the case, give an explanation for the ruling and assess its implications for mobile media rights to cricket in India.

In April 2012, the Board of Control for Cricket in India (BCCI) conducted an auction to assign exclusive rights - such as television, audio, internet and mobile rights - for all BCCI events. Star India Pvt. Ltd. ('STAR') was the successful bidder. Consequently, the BCCI - by an agreement dated 10 August 2012 - assigned a 'bouquet of rights' (specifically including 'Mobile Rights'), in favour of STAR for a consideration of approximately US\$750 million. Subsequently, STAR alleged that Mr. Piyush Agarwal of Cricbuzz (a cricket website), Idea Cellular (a mobile operator in India) and OnMobile, a leading Mobile Value Added Services (VAS) Operator in India (the 'defendants') were infringing its 'mobile rights' by providing ball-by-ball updates of live cricket matches for commercial benefit, and accordingly sought an interim injunction restraining the defendants from infringing their contractual rights. Though STAR had cited BCCI as a common defendant in its suits against all of the defendants, the BCCI supported STAR in its case, claiming paramount rights over all information emanating from a cricket match in India, by virtue of its status as the governing body for cricket in India.



Amrut Joshi

When this case was first determined by a single judge¹ of the Delhi High Court, he refused to grant STAR any relief on the ground that that the Copyright Act, 1957 ('Copyright Act') did not recognise any proprietary 'mobile rights' *per se*. Accordingly, he held that STAR would only be protected as regards their rights in the audiovisual recording of the live cricket match, and not as regards information underlying such audiovisual recording. This ruling was overturned on appeal by STAR to a Division Bench of the Delhi High Court, where the court held that there had been serious procedural flaws in deciding the case². Accordingly, the decision of the single judge was set aside and the suits were to be restored and heard by another Single Bench of the Delhi High Court. The three civil suits were thereafter re-heard by Justice M.L. Mehta.

'Unjust commercial enrichment'

The primary argument advanced by STAR and BCCI was that the dissemination by the defendants of match information through live scorecards, match updates and score alerts via SMS/Mobile VAS, constituted a tort of 'unfair competition' and 'unjust commercial enrichment'. STAR had paid a sum of US\$750 million to lawfully acquire the media rights that were auctioned by BCCI. This, STAR contended, was in stark contrast to the defendants, who had neither participated in the BCCI's auction nor acquired any license from STAR to disseminate any match information.

It is important to note that STAR did not claim a copyright as regards its media rights or in any information arising from a cricket match. Rather, it claimed a 'proprietary right' *de hors* the Copyright Act, 1957, arising on

account of its acquisition of media rights from the BCCI for a fair consideration. Consequently, STAR placed reliance on the legal principle of 'tort of unjust commercial enrichment' to seek a remedy against the defendants. These principles were originally enunciated in the landmark decision of the US Supreme Court in the case of *International News Service v. Associated Press*³, where the Court held that 'he who has fairly paid the price should have beneficial use of the property'.

The BCCI separately contended that as the organisers of cricket in India, it had exclusive rights in relation to content generated during a cricket match, including the right to commercially exploit all content arising from the match. The BCCI further contended that it alone funds everything relating to cricket, from the setting up of stadiums to training academies for umpires and scorers, and that its main source of funding is from monetising the content arising from cricket matches through sale of media rights, sponsorships and advertisements.

Central pillars in the defence

The defendants argued that no 'proprietary rights' could exist in relation to content generated during a cricket match, as Section 16 of the Copyright Act, 1957 ('Act')⁴ precluded STAR and BCCI from claiming any other right except as provided under the Act. Accordingly, at best, STAR and BCCI could only claim a 'broadcasting right' and a copyright over the cinematograph film of the cricket match or audio recording of the commentary to the extent such rights were recognised under the Act. Since the defendants were neither copying the actual content of the broadcast nor providing access to the audio or visual footage of the broadcast,

their actions in providing score updates/match alerts did not constitute 'free-riding'.

Further, the defendants also argued that they were legally entitled to disseminate score updates to the public and generate income from such dissemination because:

- information emanating from a cricket match such as score updates amounted to 'facts', which could not be owned or afforded copyright protection; and
- even if such information was afforded copyright protection, the score updates/match alerts would have already entered the public domain and, therefore, could be freely used by the defendants.

The defendants claimed that since the Act precluded STAR and BCCI from making such a claim, they were 'fishing for' a right under common law by claiming 'quasi-property rights'. Lastly, the defendants also relied on decisions of US Courts which had digressed from the 'Hot-News Doctrine' laid down in the INS Case⁵.

What the Judge held and why

As regards the defendants' contention that STAR and BCCI could not claim a proprietary right under common law due to the preclusion contained in Section 16 of the Copyright Act, Justice Mehta observed that STAR was not claiming a copyright and had approached the court *de hors* the Copyright Act to find a remedy in common law against the tort of 'unjust commercial enrichment'. Justice Mehta further observed that despite there being an array of rights recognised under the Copyright Act (such as broadcasting rights and performer's rights), the pre-emption under Section 16 applied only to 'works' as defined by the Copyright Act⁶ and could be extended to other rights in any

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manner whatsoever. The judge felt that since score updates/match alerts do not fall under the definition of 'works', the pre-emption under Section 16 of the Copyright Act did not apply in STAR's case.

As regards the issue of whether or not the tort of 'unjust commercial enrichment' is recognised in India, Justice Mehta cited the case of 'Mahabir Kishore & Ors. v. State of MP'⁷ ('Mahabir Kishore Case'), wherein the Court held that 'The principle of unjust enrichment requires; first, that the defendant has been "enriched" by the receipt of a benefit; secondly, that this enrichment is "at the expense of the plaintiff" and thirdly, that the retention of enrichment be unjust. This justified restitution. Enrichment may take the form of direct advantage to recipient, wealth such as by the receipt of money or indirect for instance where inevitable expense has been saved.'

Justice Mehta observed that the BCCI, in order to monetise the expense, effort and skill employed in organising cricket matches in India, conducted an auction in April 2012 to assign exclusive rights in television, audio, internet and mobile platforms for all BCCI events. Justice Mehta observed that STAR had participated in the auction and had successfully bid for the entire 'bouquet of rights' that were on offer from the BCCI (which specifically included 'mobile rights'). Justice Mehta further observed that if STAR had not intended to generate revenue by exploiting these 'mobile rights', it could have resorted to bidding only for selective rights, since these 'mobile rights' were also available on an '*a la carte*' basis at the cost of five million Indian rupees per match. Consequently, it was clear that both STAR and the defendants were seeking to generate revenue

by providing contemporaneous score updates/match alerts. However, while STAR had paid a fair consideration to acquire 'mobile rights', the defendants were generating revenues without acquiring such rights lawfully. Justice Mehta observed that the exclusive right of an organiser to monetise his own event need not find its source in any statutory enactment, because it is a fundamental principle of equity. Accordingly, applying the test in the Mahabir Kishore Case, Justice Mehta held that defendants' actions in cashing upon the efforts of BCCI and STAR did constitute 'free-riding' and that they were clearly enriching themselves at the cost of STAR and the BCCI.

As regards the defendants' contention that the score updates/match alerts would have already entered the public domain, Justice Mehta observed that the information emanating from a cricket match entered the public domain at different moments of time. He went on to observe that all consumers of cricket information cannot be treated equally. Justice Mehta observed that those who have purchased tickets to watch the match in the stadium and the people who chose to stay at home and follow the match on television and radio form a separate class, while those who have chosen their work or vocation or any other engagement instead of going to the stadium or sitting in front of the television cannot be considered and treated at par with those who have. This distinction was considered essential by Justice Mehta in this case, as both STAR and the defendants were targeting the class of persons not in stadiums, with no access to TV or radio, and claiming that such persons had the right to receive match information at par with the others who are at the

stadium or using TV/radio. Justice Mehta observed that ‘news’ or ‘noteworthy information’ arising from a cricket match is very different from the ball-by-ball or minute-by-minute information. The latter had a great demand as opposed to a match summary at the end of a match, evidenced by the fact that customers of such SMS/Mobile VAS were willing to pay a price for every alert/update. Accordingly, Justice Mehta also observed that there was no merit in the argument that the match information had entered the public domain at the very instance that it was broadcasted by STAR.

However, he found considerable merit in the defendants’ arguments that they had a fundamental right to disseminate such information as demanded by the public. Justice Mehta also observed that it was imperative for the Court to balance the right of an organiser of an event to monetise such event against the right of the public to receive information regarding such event. He observed that the public cannot, as a matter of right, claim access to contemporaneous score updates/match alerts, equal to those who are enjoying rights at a premium by buying tickets at the stadium or watching it live on television. Therefore, he held that it would be just and reasonable for the defendants to either obtain a license and gain equal rights to their subscribers or make them wait for some time, in order not to prejudice the right of STAR to earn revenue from the match information. Accordingly, Justice Mehta held that for those who did not obtain a licence or sub-licence for mobile/internet rights from STAR, the information should not be disseminated in the form of an update for 15 minutes from the time such information is telecasted/broadcasted by STAR. He went on to explain that the 15



Aditya Shamlal

minute time period maintains a balance between the right of STAR to monetise the cricket match and right of the public to receive such information, and also prevents the defendants from free-riding on the efforts of STAR and BCCI. Justice Mehta also added that in the event that no licence or sub-licence was obtained, contemporaneous alerts can only be provided if it is done gratuitously, because there would be no free-riding or unjust commercial enrichment in such a circumstance.

Implications

This is the first decision that recognises the tort of ‘unjust commercial enrichment’ in India. The Mahabir Kishore Case had merely made an observation as regards the right as enshrined in England, but had not expressly recognised the right in India.

In terms of commercial impact, this judgment can potentially change the game for media rights owners such as STAR, as it opens up a new revenue stream for them. They could choose to monetise the mobile rights themselves or sub-license such rights to other players in the mobile value added service market. The appetite for cricket content on mobile phones has been consistently growing as the market for mobile devices grows in India, and consequently this bodes well for media rights owners.

This judgment would also compel mobile value added service providers to change their business model as they would now be required to fork out a higher cost to acquire licenses from sports rights owners (the cost of which will undoubtedly be passed on to the final consumer) or provide the service free of cost, in order to continue providing their service on a real-time basis.

On the other hand, for sports rights owners in India (such as the

BCCI), this judgment will go a considerable way in assuring them that courts in India will not permit ‘free-riding’ or ‘unjust commercial enrichment’ by unlicensed service providers. Consequently, as long as the underlying sports market remains robust, sports rights owners would be well placed to command a premium for the rights that they own.

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1. <http://lobis.nic.in/dhc/VJM/judgement/20-11-2012/VJM08112012S27222012.pdf>
2. <http://lobis.nic.in/dhc/PNJ/judgement/03-12-2012/PNJ03122012RFAOS1152012.pdf>.
3. 248 U.S. 215, 39 S.Ct.68 (1918) (commonly referred to as the INS Case).
4. Specifically, Section 16 of the Copyright Act, which reads as follows: ‘No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence’.
5. In particular, the defendants relied on the decisions of the United States Court of Appeals, Second Circuit in ‘National Basketball Association and NBA Properties Inc. v. Motorola Inc.’, 105 F. 3d. 841 (1997) (NBA-2 Case) and in ‘Barclays Capital Inc., Merrill Lynch, Pierce, Fenner & Smith Inc. & Morgan Stanley & Co. Inc. v. Theflyonthewall.com Inc.’, 850 F. 3d 876 where it was held that ‘INS itself is no longer good law. Purporting to establish a principle of federal common law, the law established by INS was abolished by Erie Railroad Co. v. Tomkins, 304 U.S.64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which was largely abandoned by federal common law’.
6. As Justice Mehta observed, the term ‘work’ is defined in Section 2 (y) of the Act to be (i) a literary, dramatic, musical, or artistic work; (ii) a cinematograph film; (iii) a sound recording. This definition is exhaustive and not inclusive, thereby clearly specifying the parameters of Section 16.
7. 1989 SCR (3) 596.



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