

## INTELLECTUAL PROPERTY RIGHTS IN SPORTS: A TRICK OR TWO NIGERIA CAN LEARN FROM THE GLOBAL GAME

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### ABSTRACT

*The concept of sport has transcended the context of mere leisure and entertainment to become a significant revenue stream and a major contributor to economies all over the world. Sports practitioners all over the world have been able to generate enormous revenues from the exploitation of aspects of intellectual property rights via merchandising and so on. However, in Nigeria the recognition of the potential resident in a vibrant sports industry has been non-existent or too little. This article explores generally how sports professionals and sports events organisers in the UK, US and India have been able to exploit intellectual property rights in sports with a view of suggesting that sports professionals and sports associations/sports events organisers to embrace intellectual property rights. Finally this article will proffer solutions that could be adopted in the Nigerian jurisdiction with respect to more effectively protecting intellectual property rights in Nigerian sports.*

### *Introduction*

Sports have always been an important part of human social existence. They are so ingrained in our lives and have hence become an exciting part of our daily lives. Right from the time of the Roman Empire to this modern era it has always been a crucial and endearing sector. However, in recent time sports has transcended from pure entertainment or leisure and have now gained commercial and economic significance especially in the United States, the United Kingdom and all through the European Union. Through marketing, promotion, franchising, merchandising and brand building of professional sports teams, such teams these teams in these countries have now become more economically significant and viable and have assumed the influences associated only with multi-national companies. Sportsmen and women have also become more commercially important surpassing previously existing notions with respect to their financial worth.

There has been an evolution of the most popular sports, such as football, tennis, basket, cricket, car-racing, and so on into mega international events. They have also evolved into profitable domestic sports events like; Major League Soccer (MLS), the English Premier League (EPL), The Spanish La Liga. The organisers of these sporting events on the international level have been able to reap immense financial rewards by inter alia exploiting and leveraging on aggressive marketing campaign taking advantage of the marketable potentials resident in these sports<sup>1</sup>.

Therefore it has only become logical for professional sports teams and corporations to exploit and capitalize on varying intellectual property rights. These intellectual property rights are usually exploited via merchandising, advertisement, exclusive and non-exclusive licenses, broadcast rights and so on. However, it is imperative to point out that the major IP related tool that is inadvertently exploited by these sports powerhouses are their brands.

Brand exploitation is a fast and ever growing trend among sporting corporations in various sports and sports competitions and/or events. In football for instance, Clubs like; Chelsea FC, Real Madrid, Manchester United and Futbol Club De Barcelona, are examples of professional sports clubs that have been developed and consequently marketed as huge brands worth multi-million dollars. The popular sports brand publication *Brand Finance Football 50* in its 2014 edition ranked German Bundesliga giant Bayern Muchen<sup>2</sup> as the most valued football club in the world for the year 2014 with the winning of Bundesliga title for the 2014/2015 season valued at \$896,000,000.00. Sports business is big business and IP is a big part of that business. Therefore, it is important that professional sports

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<sup>1</sup> P Kandiah, Sports and Intellectual Property, <http://EzineArticles.com/5202279> accessed on 28th July 2015

<sup>2</sup> Brand Finance Football 50, The Annual Report On the World's Most Valuable Football Brands, 2014 pg 4; it is a yearly report on football finances and brand related issues

teams in countries like Nigeria, especially the Clubs in the Nigerian Premier League; Kano Pillars (Kano State) Sharks, Dolphins (Rivers State), Bayelsa United (Bayelsa State), Enyimba (Abia State) for example look at the immense potentials in the development and exploitation of intellectual property rights.

This present article intends to explore the creation and nexus between various calibre or specie of intellectual property rights and professional sports teams internationally with a view of drawing lessons for professional sports clubs in Nigeria to imbibe, emulate and exploit. It is true that the subject of intellectual property rights more often than not raises various legal issues. This article will make attempts to comprehend how professional football clubs can protect their intellectual property rights while creating palpable value from them.

#### Sports and Intellectual Property

In today's climate sports is no longer only a source of leisure and entertainment. Now it not only creates a profitable career path but also represents a significant industrial and business opportunity. Upon the creation of a sports team whether professional or amateur it becomes recognisable by its name. Further, for the purposes of identification and distinction logos tagline/slogans are created. Also sports associations outside the pitch and beyond the stadiums, sportsmen enter into endorsement and advertisement contracts worth millions of dollars. Similarly, sports teams and sports organisations are able to derive commercial benefits via branding, merchandising, licensing sponsorship and other related activities. It is argued therefore that sportsmen, sports teams and sports associations in Nigeria should consider similar activities.

On the successful commercialisation of various creative aspects the issue of their protection immediately arises and becomes imperative. For example names like New York Yankees, Chelsea FC, Los Angeles Lakers, and so on alongside their distinguishing logos, signs, emblems and taglines are of high commercial value and are important components of merchandising and branding alongside similar type of activities. The same is true of sports events like; the Wimbledon and US Tennis Tournaments, UEFA Champion's League and so on. Hence their legal protection is made necessary to prevent free-riding third parties from illegally exploiting them. In another respect, television broadcast rights, licensing, sponsorship and other like revenue stream for sports teams and associations also require certain legal instruments to preserve and serve as safeguards for such rights.

However, it is important at this point to state that there is no singular law that is capable of protecting all these rights in one swoop. Hence a set of laws are resorted to serve like a legal protection *cocktail* in the bid to secure the business interests within sports. These sets of Laws are dominated by intellectual property law.<sup>3</sup>

The following is a consideration of the key areas with respect to intellectual property rights in sports:

#### Trademarks

Trademarks provides protections for marks, symbols, logos, slogans, names and so on that distinguish the products (goods/services) of one undertaking from those of other undertakings<sup>4</sup> and business from other businesses. They can also be described as indicators of the source of origin of particular product as against others. In the UK's Trademark Act 1994 S.1 a trademark is defined as '...any sign capable of being represented graphically which is capable of distinguishing the goods and services of one undertaking from other undertakings...'<sup>5</sup>. From the foregoing statutory definitions, the major characteristic of a trademark is the ability to create a visible distinction via graphical representation between two or more like products produced or supplied by different undertakings. In Nigeria similar sentiments are shared with the British statutory provisions as to the nature of trademarks<sup>6</sup>

Trademark is one the most commonly created intellectual property rights associated with sports. The ability to protect and distinguish one sport team/club from another is crucial with respect to brand building and development. The names, titles, tagline, slogans and logos of professional sports teams

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<sup>3</sup> Intellectual property law is used to represent the set of rules and regulations utilised in the protection of properties that are created by human intellect; trademark, copyright, patent and so on.

<sup>4</sup> D. Bainbridge, Intellectual Property Law (OUP) 2010, *Sporty's Farm LLC v Sportsman's Market Inc., World Sport Networks Ltd v. Artinternet S.A, CCBN.com, Inc v. C-Call.com. Inc*

<sup>5</sup> *Arsenal Football Club Plc v Matthew Reed* (2003), S.10(1)–(3) *ibid* 4 S.43 and S.42

<sup>6</sup> *Alliance International Limited v Saam Kolo International Enterprises Limited* (2010) 13 NWLR (pt121) C.A 270, see also S.57 Trademark Act Cap T13 LFN 2004

can be registered as trademarks. For instance Chelsea FC has logos, badge, etc registered as a trademark<sup>7</sup>. It is argued that since in Nigeria similar provisions exist with respect to trademark Nigerian professional sports teams should be able to exploit intellectual property protection. Sports events organisers also protect their competitions via trademark; for instance the English Premier League and the Olympics spring to mind.

Trademark registration therefore adds immensely to the value associated with sports teams and sports events as well. Trademarks are utilised by sports teams not only to protect the jerseys worn by their individual teams during competitions but also other items that may be associated with or bear the trademark or logos; for instance Kolkata Knight Riders in India apart from being a cricket team exploits their trademark as represented by its team badge in the sale of t-shirts, caps and so on<sup>8</sup>. It is argued that a professional sport team can register its trademark under multiple classes. Spanish La Liga giants Real Madrid has registered its trademark under sixteen (16) classes as international trademark at the European Union's trademark office<sup>9</sup>. Trademarks can also be registered in multiple jurisdictions and therefore can be enforced over different jurisdictions and this is crucial as sports teams have fan bases that spread across the world.

In cases of trademark infringement statutory remedies exist in the EU, United Kingdom, United States, India, Nigeria and so on<sup>10</sup>. Trademark registration is important for sports teams but however, if a trademark is not registered a party can rely on the common Law principle of passing-off subject to proving the trinity or three basic requirements for establishing passing-off<sup>11</sup>. The trinity with respect to establishing or proving passing-off are; the claimant's goodwill, misrepresentation and damages, these must be proved by the claimant conjunctively, that is all three elements must exist in the act that is alleged to be passing-off.

A professional sport team, sports association and/or event organizer must establish it has a certain level of goodwill or reputation, which it has built up over a period of time that makes consumers (fans, TV broadcasters, etc.) continuously return because of the quality of its brand<sup>12</sup>. It may seem that goodwill implies that the claimant which in this case would be a stakeholder in sport needs to establish that its reputation or goodwill has been built up for years or at least a long period of time. This would then imply that only well established sporting associations and/or event organizers and professional sports teams could rely on passing off. However, in *Elida Gibbs Ltd v Colgate Palmolive Ltd*<sup>13</sup> and *Stannard v Reay*<sup>14</sup> the courts held inter alia that even if an organisation has been in business for a relatively short period of time it could still rely on passing off. This therefore implies that relatively new sports associations and/or sports events organizers and professional sports teams in Nigeria can rely on the passing off.

In order to rely on passing off a professional sports team, sports association and/or event organizer must establish that another sports team, event organizer or other party has misrepresented its product<sup>15</sup> which could be the name of the or the title of the event or the unauthorised broadcast of an event. It is immaterial whether misrepresentation was done intentionally with respect to establishing a claim in passing off. For instance, the NFF and the LMCNPFL must be able to establish that a television station broadcasting its matches in the Cameroun is misrepresenting the fact that such telecast emanates from or at least is authorized by the NFF and the LMCNPFL. It is also crucial that the misrepresentation in question has caused or has at least the likelihood of causing confusion in the minds of not just the consumer (fans) but in the minds of business associates like sponsors for example.

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<sup>7</sup> <http://us.trademarkdirect.com/chelsea-fc-7910895> accessed on the 28th of July 2015

<sup>8</sup> S. Kalamadi Intellectual Property and the Business of Sports Management, 18 July 2012

<sup>9</sup> <http://trade.markify.com/trademarks/ctm/real+madrid/000517474>, accessed 30th July 2015, Detailed trademark information from the official European Union trademark database (OHIM/CTM)

<sup>10</sup> Trademark Act 1994, Trademark Act 1999 (India), Trademark Act LFN 2004

<sup>11</sup> The three basic requirements are famously referred to as the classical 'trinity' and was first enunciated in the House of Lords decision of *Reckitt Products Ltd v Borden Inc* [1990] 1 WLR 491

<sup>12</sup> *Trego v Hunt* [1895] AC 7,

<sup>13</sup> [1983] FSR 94

<sup>14</sup> [1967] RPC 589

<sup>15</sup> *Coombe International v Scholl* [1977] RPC 1., *Spalding (A G) & Bros v Gammage (A W) Ltd* (1915)

The last limb in the proof of passing off is establishing that there has been some level of damage or at least there is the probability of damage<sup>16</sup>. Therefore, in sports, sports teams and sports association and/or sports events organizers and sports professionals must prove that as a result of the unauthorized exploitation their goodwill, and the false representation of the claimant has resulted in at least in potential damage probably in form of profits that would have accrued to the claimant or damage to public perception of the goodwill of the sports brand.

A further protection of trademark resides in anti-dilution laws, which are limited to very popular and well known trademarks. When a trademark is very popular and well-known it is given prime importance under the trademark laws due to ready association of the human mind with those products. Therefore, if for instance an automobile industry manufactures a sport sedan and sells under the trademark Manchester United it would be in default of anti-dilution laws as it would amount to a dilution of the Manchester United trademark.

In Nigeria like in most Common Law jurisdictions statutory protection for regular trademark exists and the doctrine of passing off is also in force as well. However, the courts have not interpreted the provisions of the Nigerian Trademark Act to cover trademark within the context of the sporting industry though this may stem from the fact that sports jurisprudence in Nigeria is not as active as it is in other jurisdictions like the UK, US, Germany, etc. It is therefore crucial in order to reap the rewards of exploiting trademark in sports stakeholders in the Nigerian sporting industry fully exploit the provisions of the Trademark Act LFN Cap. T13 2004 and the Common Law doctrine of passing off.

This present article will now examine *Sports Events Marks* which are a relatively recent intellectual property rights development.

#### Sports Events Marks

Sports events marks are essentially any sign logo, mark, name, etc that is capable of distinguishing one sports competition (event) and its organiser from another. The most popular example of a sports event mark would be the interconnected rings of the Olympic Games<sup>17</sup>. The rings of the Olympic Games are not only the most important Sports Event Mark due to the obvious popularity of the games but they are also important with respect to the legal protection that can be available for sports event marks.

The Olympic Games being an international event is protected not only at the international level but also at the various national levels. At the international level it is protected by the *Nairobi Agreement*<sup>18</sup>. At the national level the rings of the Olympic Games are protected by special local trademark legislation which the International Olympic Committee makes a prerequisite for any country that intends to host the Olympic Games. For instance in the United Kingdom the Rings are protected by the provisions of the London Olympic Games and Paralympic Games Act 2006 (as amended), which also protects the motto of the Olympic Games as well as the expression 'the Games', 'Olympians' and 'Olympiads'. This protection available for the Olympic Games it is argued is to guard against free-riders or Ambush Marketers and the preservation of the interests of the sponsors of the games. In the UK the protection available to the Olympic Games has been criticised by the members of the UK's Advertising Industry positing that it is draconian and hinders free speech which includes commercial or advertising free speech<sup>19</sup>. In other words they are of the opinion that enforcement of the protection for the Mark, symbol and phraseology associated with the London 2012 Olympic Games by the London Organising Committee of the Olympic Games (LOCOG) which insists on its express authorisation for the use of any of the phrases associated with the Olympic Games or its mark or symbol for the purpose of trade or commerce irrespective of the form of commerce is very strict. In the defence of the LOCOG and the International Olympic Committee (IOC) the reputation and integrity of the Olympic Games is crucial to its brand and since the IOC and any OCOG are usually in the business of granting licenses it is only fair that steps are taken to protect the integrity of the license granted to licensees.

Away from the radical protection available for the Olympic Games, sports events marks can be protected by relying on the various trademark laws. For instance a close examination of the UK's

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<sup>16</sup> *Tattinger SA v Allbev Ltd* [1993] FSR 641, Chocosuisse

<sup>17</sup> I, Blackshaw 'Protecting Major Sporting Events with Particular Reference to the 2012 London Olympic Games' Entertainment and Sports Law Journal, ISSN 1748-944x, January 2010

<sup>18</sup> The Agreement on the Protection of the Olympic Symbol of 1981

<sup>19</sup> I, Blackshaw, Protecting Major Sporting Events with Reference to the Olympic Games, 2012

Trademark Act 1994 which reads thus in S.1 with regards to what a trademark is “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including names), designs, numerals or the shape of goods or their packaging”<sup>20</sup>

It is argued that sports events marks could be protected via trademark statutory provisions provided such event marks meets the basic legal criterion of distinctiveness. In 1998 the attempt to register the words ‘World Cup’ failed the distinctiveness test. A similar attempt in the year 2000 met a similar fate; it is however, argued that if these words were combined with a unique and thus distinctive logo the trademarks would have been granted.

With respect to Nigeria it would be advisable if sports events organiser protect their event marks by adopting the stratagem of the International Olympic Committee as well as relying on the protection available via the Trademark Act<sup>21</sup> which is similar to the provisions of the UK Trademark Act<sup>22</sup>. It is suggested that every state where a particular sports event would take place should enact a Law that would provide a mirrored protection available in a Federal Act enacted by the national Houses of Assembly. For instance, with respect to the Nigerian Premier Football League an Act tagged ‘the Nigerian Premier League Event Mark and Related Rights Act’ while at the various State levels there could be enacted by the State Houses of Assembly tagged ‘the Nigerian Premier League Event Mark and Related Rights Law’. This would serve as the principal protection for the all marks associated with the NPFL throughout the Federation while the Trademark Act serves as secondary or ancillary protection for the football league.

Sports events marks would allow sports events organisers in Nigeria to benefit from licensing the use of their event marks in exchange for license fees. Also it is argued that with a Law such as the one suggested above prospective sponsors and commercial partners would feel confident and have a sense of security with respect to their investments.

## Copyrights

Copyright is an aspect of intellectual property rights that provides legal protection of the expression of ideas. This is to be distinguished from an idea in itself which at this stage of legal development has no actual legal protection<sup>23</sup> save for schemes like confidentiality agreements and trade secrets. Copyright protects the ideas expressed in; literary works, musical works, dramatic works, photographs, sound recordings and cinematographic films<sup>24</sup>. The protection that is available via copyright arises immediately it is created, though works created on or before the 1<sup>st</sup> of January 1978 are seen as being in the *public domain* which implies that works created at that period though ordinarily protectable via copyright would be open to the public to exploit.

Copyright bestows on the creator or owner via assignment the right to produce, reproduce, make replica copies, market and sell, adapt the work into several formats, license or assign entirely the ownership of the work to another. The immediately mentioned rights remain in the owner to the exclusion of other third parties thereby preventing freeriding<sup>25</sup>.

In the promotion and marketing of sporting events and/or competitions copyright is inadvertently created. The artistic designs of the logos of both sports teams and sports competitions represent copyrights, as well as the literature contained in promotional literature for sports events including game-day programmes sold to fans and supporters, the merchandise, the software of computer and online games are also subject-matter of copyright. As earlier alluded to copyright resides in a work whether it is registered or not and its legal protection lies in its creation and originality. However, it seems that it is the global trend that a copyright be registered in order for an owner of an infringed copyright to claim remedies and damages under copyright statutes; India presents a veritable case in

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<sup>20</sup> See S. 1 (1) of the UK Trademark Act, 1994

<sup>21</sup> Cap T13 LFN 2004

<sup>22</sup> S.1(1)

<sup>23</sup> *Opportunity knocks case* see also *Exxon Corp v Exxon Insurance Consultants (1982)* R.P.C 69 (C.A.)

<sup>24</sup> S.3(1) Copyrights, Designs and Patents Act 1988 (UK), *Kenrick v. Lawrence (1890)* 25 Q.B.D, *Oladipupo Yemitan v. Daily Times (Nig.) Ltd & Anor (1980)* F.H.C.R, Copyright Act Cap. C28 LFN 2004

<sup>25</sup> M. Ajakpovi, ‘Intellectual Property In An Electronic Environment: The Nigerian Perspective’ 9 *Modern Journal of Finance and Investment Law* Nos 3-4 (2005)

point<sup>26</sup>. It is however argued that this trend is not in conformity with the spirit and nature of Copyright. Since the right to ownership of a copyrightable subject-matter does not reside in its registration but rather in the fact that it has been created and therefore the creator or legal owner of a copyright should not need to have his/her copyright registered in order to claim damages unlike patent that has at its core the need for registration to ensure its monopoly.

If a copyright is infringed upon certain remedies are available to professional sports team or sports event organiser which include; injunctions, prohibitive orders, claims on damages, account of profits, seizure and destruction of infringing materials, and so on<sup>27</sup>.

Therefore professional sports teams and sports events organisers in Nigeria should create and develop their copyrights not only for the singular reason that it is profitable to do so but also that legal protection is available even within the ambit of present national Laws.

#### Patents

Patents are intellectual property rights that are used to protect inventions and inventive processes. For these inventions and inventive processes to be protected via patents they must be new, innovative and capable of industrial applications<sup>28</sup>. A patent gives the owner the exclusive right to produce, commercially exploit and prevent others from so doing, in other words it bestows the owner with a monopoly<sup>29</sup>.

In sports, patents have been varyingly awarded ranging from sports shoes (football boots, running converse, etc.)<sup>30</sup>. For instance, American sportswear and equipment giants Nike in 2013 were granted 540 patents by the US Patent and Trademark Office<sup>31</sup>. Also in recent times there has also been the introduction of technology to assist officials (referees, umpires, etc.) in making crucial judgement calls; for example in the English Premier League hawk-eye goal-line technology was introduced to determine in certain circumstances if the entire circumference of a ball has crossed the goal line and thus can be awarded as a goal by the human referee<sup>32</sup>. Also inventions with respect to sporting moves, methods and techniques have recently received patent protection; for example the method of placing a golf ball<sup>33</sup>, methods for fitness training<sup>34</sup>, the method for training pitchers in baseball, and so on. A professional sports team, player or league gains immensely significant benefits from exclusive control or rights of usage and permission over a playing technique that gives an edge in competition; sizeable amounts of revenues can be generated via the grant of licenses over agreed period of time which could be open to renewal.

Third party infringers with respect to patents are safeguarded against under patents like in trademark and copyright. However, unlike copyrights and trademark it is imperative that an inventor i.e. a professional sports team, sportsmen and sports events organisers who intend to rely on patents for intellectual property rights protection must register their patent. In registering a patent a qualified patent attorney must be consulted who would prepare a detailed patent claim. This practice is however, either non-existent or insignificant within the general legal space in Nigeria. Though letter of the Law exists and can be used by professional sports teams and other sports stakeholders to their advantage.

#### Trade Secrets

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<sup>26</sup> *Dhiraj Dharamadas Dewani v. M/s Sonal Systems Pvt Ltd*, decided by Mumbai High Court (Nagpur Bench), 2012

<sup>27</sup> Copyrights, Designs and Patents Act 1988 (UK), Copyright Act 1957 (India), Copyright Act Cap. C28 LFN 2004, courts have also not been hesitant in invoking criminal sanctions available via copyright statutes

<sup>28</sup> *Reynolds v. Herbert Smith & Co. Ltd* (1913) 20 R.P.C. 123,

<sup>29</sup> *The World Intellectual Property Organization (WIPO) Intellectual Property Reading Material (WIPO Publication No 476 (E) 13) Copyrights, Designs and Patents Act 1988 (UK), Patents and Designs Act Cap P2 LFN 2004,*

<sup>30</sup> *Detachable Cleat System* US 6421937 B2 <http://www.google.com/patents/US6421937> accessed 29 July 2015 Adidas Co holds 44 patents in football boots and other sports shoes

<sup>31</sup> <http://ml.marketwatch.com/articles/BL-MW244B-1245?mobile=y&mobile=y> accessed 29 July 2015

<sup>32</sup> [www.premierleague.co.uk](http://www.premierleague.co.uk)

<sup>33</sup> US Patent No5,616,089.

<sup>34</sup> US Patent No 6,190,291 issued on the 20<sup>th</sup> of February 2001 describing a new fitness method for an exerciser combining the benefits of isometric-like exercising with isotonic exercising for simultaneous training of the exerciser's cardiovascular and skeletal muscular-ture systems and strength and endurance build-up

Trade secrets are not intellectual property rights in themselves but they involve practices, processes or compilation of pieces of information by a business which is capable of giving that business some competitive edge. These aforesaid pieces of information are normally not divulged in order to maintain the competitive edge of the said business over its competitors. In sports there are certain pieces of information which are confidential in nature and therefore utmost confidentiality must be maintained. For instance, in 2008 veteran quarterback Brett Favre, who quit playing for the Green Packers and signed with the New York Jets went on to transmit the playing schemes of the Green Packers to their opponents the Detroit Lions can be said to have breached trade secrets law<sup>35</sup>.

Trade secrets are not in themselves protected by any law but however professional sports teams, sports associations and athletes can protect their trade secrets by ensuring that in any agreement where crucially vital information *would* be shared a properly couched confidentiality clause is included in the agreement.

Such confidentiality agreements and/or clauses are enforceable in various jurisdictions for instance in the English case of *Terrapin Ltd v. Builder's Supply Co Ltd*<sup>36</sup> Roxburgh said inter alia

*"A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential information, and...it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public"*

The implication of the case is that it is legally unacceptable for any person whether human or corporate to use any information divulged in confidence at the detriment of the person (human/corporate) who so divulges or shares such information in confidence. Nigerian courts have also similarly held in a plethora of decided cases<sup>37</sup>. Therefore it is argued that confidentiality agreements can be enforced by sports teams, sports associations as well as sportsmen to protect unique and crucial information to their trade. In Nigeria Trade secrets exists in terms its concept and is used in general trade and commerce but there has not been any legal activity with regards to sports whether by way of statutory enactment or judicial pronouncements.

#### Personality Rights

Every intellectual property right and scheme that has been examined earlier in this article have been those capable of exploitation by both human and corporate persons i.e. professional sports teams, sports association and sportsmen and other sports professionals. However, with respect to personality it is primarily exploitable by individuals; famous individuals but it is possible for corporations to leverage on these personality rights.

What then are personality or image rights as they are often called? Personality rights refers to the rights to control the commercial and economic exploitation of one's personality and its peculiar attributes, like an individual's name, image, likeness, unique personality traits and/or any other aspect relating to his/her personal identity.

Personality rights can be leveraged upon by sports association/sports events organisers to boost their competitive edge. It can help in no small measure in the brand development and building of sports teams and sports competition. For instance, in the United States Major League Soccer has exploited and continues to leverage on the personality rights of renowned football celebrities in the building of the corporate brand of the league and the brands of the individual clubs examples of this include, Andrea Pirlo Italian Serie A winner with Juventus FC, Champions' League winner with AC Milan and World Cup winner with the Italian national football team, Didier Drogba Chelsea FC legend now plying their trade from MLS Clubs New York City Football Club (NYCFC) and Montreal Impact respectively. These players have contributed in no small measure to the rising popularity of the MLS across Europe and Africa, while boosting the popularity of the sport in the US and strengthening the brands of the respective Clubs. Nigerian professional football clubs can adopt this brand development model, for instance the signing of a popular player like the Portuguese international Cristiano Ronaldo by NPFL champions Kano Pillars would provide immense financial windfall for the Kano Club.

Celebrity status gives birth to a plethora of different forms and shades of image creation and brand endorsements which has as the consequence of leading to revenue generation via fame exploitation

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<sup>35</sup> Williams Latrice Intellectual Property Law for Athletes, *Technologies for Writing*, 7(1-2) (Spring Issues 2010)

<sup>36</sup> [1967] RPC 375, see also *Faccenda Chicken Ltd v. Fowler* [1986] 1 Ch. 117, 137-138

<sup>37</sup> See also *R-Benkay Nigeria Ltd v Cadbury* (2012) SC.29/2006

and capitalization. It is presently, possible for popular sportsmen to register their name and likeness under Trademark laws. In the UK the likes of Alan Shearer and David Beckham registered trademarks in their names under the Trademark Act 1994. In India as well by virtue of the provisions of its Trademark Act 1999 creates this possibility for sports stars like Indian cricket legend Sachin Tendulkar to register his name as a trademark. Nigerian sports personalities could also exploit these rights via the Nigerian incarnation of the trademark laws represented by the Trademark Act Cap T13 LFN 2004. For instance the highest goal scorer in the Nigerian Premier Football league Mfon Udoh of Enyimba FC can afford to register a trademark over his name and derive immense commercial benefits thereby.

The association of a name or image of a sportsman or sports personality to a given product can present significant value to the individual or entity that becomes associated with it. It can also lead to significant loss for the owner of such name or image or the owner of the rights to the name or image and undeserved gain for the individual or entity which is associating itself with that name or image for their own commercial and economic benefits without obtaining prior permission to so exploit from the owner of the rights to the name or image or payment of any license fee and/or royalty<sup>38</sup>. It is therefore pertinent that a distinction is made between the image and personality rights of an individual sportsman in close juxtaposition with his position as a member of a professional sports team; it should be spelt into the sportsman's contract with respect to the extent of his image and personality rights that would be exploited by the his team. Any unauthorized exploitation of the trademark would amount gross unfair trade practice, unfair competition and by extension a dilution of the reputation, goodwill and all round hard-work of the owner of the right.

Connected to the concept of personality rights is character merchandising. In the wider sense, this implies the exploitation and leveraging of popular or well-known characters whether real or fictional, whether human or inanimate, whether representing human person or some other legally created entity used for the marketing and sales of either related or non-related pieces of merchandise. Now, narrowed down to personality rights character merchandising, it is simply the marketing, promoting a name or an image for commercial gains by leveraging on the popularity of that name and/or image of a celebrity's persona it is known character merchandising within the concept of personality rights. Various brands normally enter into endorsement contracts with sportsmen and associating themselves with the popularity of those sportsmen, For instance, Adidas has an endorsement with FC Barcelona forward Lionel Messi, Puma has a similar contractual relationship with 200meters record holder Usain Bolt.

It is however, the practice of some sportsmen to extend the scope of the exploitation of their image and personality rights by establishing enterprises to manufacture, market and sell merchandise bearing their image and personality rights<sup>39</sup>. Another instance of personality and image rights exploitation is a situation where a sports team embarks on a merchandising campaign using the most popular players on its team. A distinction has to be drawn between the players' individual personality rights and the personality rights the team is permitted to exploit for instance via employment contracts. Sports associations or sports event organisers also leverage the personality rights of players in promoting and marketing their various sports competitions. It is argued however, that the sports association can only legitimately exploit such personality rights based on the fact that the players' are members of teams that are participants in their competitions and consequently cannot extend their usage of the personality rights of the sportsman to his individual personal rights.

The above stated point has been enunciated in a number of decided cases, for instance; the position was given clarification in by an Indian High court in-

ICC Development (International) v. Arvee Enterprises and An<sup>40</sup> the court held thus

*“The right to publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, his personality trait, signature, voice, etc. An individual may acquire the right to publicity by virtue of his association with event, sport, movie, etc. However, that right does not inhere in the event*

<sup>38</sup>D. Dalmia Vijay Pal, Intellectual Property Rights in Sports-India Perspective, <http://www.mondaq.com/x/164974/Trademark/Intellectual+Property+In+SportsIndian+Perspective> accessed 31<sup>st</sup> July 2015

<sup>39</sup> India Cricket legend Sachin Tendulkar owns merchandise business that market varying ranges of gifts like; key chains, knapsacks, mugs, crystal glasses and so on that leverage on his personality rights.

<sup>40</sup> 2003 VII AD Delhi 405.



*in question, that made the individual famous, nor in the corporation that brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be vocative of articles 19 and 21 of the constitution of India. No person can be monopolised. The right of publicity vests in an individual and he alone is entitled to its profit. For example if any entity was to use....Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action."*

It is in the opinion of this author that Nigerian Courts should give similar interpretation to personality rights by relying on S.37 of the constitution of the Federal Republic of Nigeria<sup>41</sup> as the foundational bases for personality rights in Nigeria and therefore enforceable in the country. It would also be immensely commercially beneficial for sportsmen within the Nigerian sports industry to register trademarks over their names and/or adapt the Sachin Tendulkar approach and establish sales and merchandising enterprises to deal in merchandise with their names and/or images on them.

#### Broadcasting Rights

Broadcasting rights are a compilation of rights that are created as a result of the screening and live broadcast of sports events. In the UK broadcast rights are recognised as rights that are connected to literary works as some sort of recording. While under the Indian Copyright Act 1957 broadcast rights are recognized as distinct rights. These rights exist side by side but independent of the content of live matches. According to the Indian Copyright Act 1957 a holder of a broadcast right holds it for a period not exceeding 25 years, generally broadcast rights in India lie with the broadcasting companies in India. But the situation in the UK is that the rights reside in the sports event organisers who then go on to market and sell these rights to broadcast companies. In the US however the protection for broadcasts rights of sports event is a radical as it is protected by a Sports Broadcasting Act<sup>42</sup> which regulates and protects the sale and distribution of sports media rights in the US. It is argued in the opinion of this present writer that the American measure which adopts a unique law for sports broadcast is laudable and thus should be adopted in the Nigerian legal system

Broadcasting rights have over the years proven to be an important source of revenue into the football sub-sector particular but as well as the larger sports industry. At the close of the 2012/2013 the Television broadcast rights of the English premier league was sold for the total sum of £3 billion (£3,000,000,000.00), which implied that the bottom ranked club would receive about £60 million (£60,000,000.00)<sup>43</sup>. In 2015 the rights for the English Premier League rights were sold for £5 billion (£5,000,000,000.00). It is argued therefore that the economic importance of broadcast rights to professional sports in Nigeria would be immensely significant to the growth of the Nigerian sports industry.

The holder of broadcasting right can exploit the rights commercially in a number of ways which mainly include; fees received for the advertisement of the product entities who intend to exploit the viewership strength of the league and via licensing of the rights to rebroadcast the competitions to other broadcast companies. In India it is statutorily provided by virtue of its Copyright Act<sup>44</sup> that any rebroadcasting, or causing the audio of the broadcast to be heard or the recording of either the sound or visuals or both without a license properly applied for and obtained from the owner of the broadcast right would be illegal. In the Indian jurisdiction it is also illegal to download a broadcast while the person (human/corporate) does so without authorization<sup>45</sup>.

It is the opinion of this writer that sports events organisers should create a clearly defined process for the offer of their licenses to broadcast stations across the globe. While it is true that domestic sports competitions, for instance the Nigerian Premier League may not at this point of development be able to attract huge bids in the proportion of the EPL but it is trite that with the steady growth of the brand via development and marketing the economic value of such competitions would move towards an upward trajectory.

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<sup>41</sup> 1999 (as amended) LFN 2004

<sup>42</sup> Sports Broadcasting Act of 1961

<sup>43</sup> Owen Gibson Premier League Lands 3Bn TV Bonanza From Sky and BT, *The Guardian* 13 June 2012

<http://www.theguardian.com/media/2012/jun/13/premier-league-tv-rights-3-billion-sky-bt> date accessed 25th May 2015

<sup>44</sup> Copyright Act of 1957

<sup>45</sup> S.43 Information Technology Act 2000

It is also however, important that the Nigerian legal system is re-worked in order to strengthen the position of sports events organisers in within the jurisdiction. For instance, broadcast rights should be given similar statutory placement as it is in India with similar penalties available for infringers. It is argued that with such legislations in place sports associations/sports event organisers would be encouraged to innovate and create and would be more likely to exploit broadcast rights of sports competitions.

### **Internet Domain Names**

In recent history the Internet has become an important tool for the advancement of commercial activities over varying spectra of human endeavour, which includes sports. Domain names have also evolved into one of the most significant aspects of the internet as a tool; they do not only serve as addresses for communications but also serve as identifying markers for the specific entity that owns the domain name or particular site on the internet in view. In sports lots of information are shared and distributed via the domain names of various sporting related domain names be it owned; professional sports teams, sports associations, sports event organisers even individual sportsmen/athletes. For instance, Chelsea FC has its website [www.chelseafc.com](http://www.chelseafc.com), Spanish giants Real Madrid [www.realmadrid.com](http://www.realmadrid.com) as well as sports associations and sports events organisers in England the following domain names exists with respect to sports events organisers and sports associations; [www.premierleague.com](http://www.premierleague.com) and [www.thefa.com](http://www.thefa.com) with respect the English premier league and the English Football Association respectively. An example of a sportsman that has his own domain name is 100 metres world record holder Jamaican athlete Usain Bolt; [www.usainbolt.com](http://www.usainbolt.com).

Despite the economic benefits accruable by virtue of domain names it also creates an avenue for cyber free-riders that squat on the prominence of the owners of domain names. These cyber-squatters benefit from the lack of a domain-specific protection. However, owners of domain names can rely own copyright and trademark as well.

### **The challenge of Ambush marketing**

Ambush marketing can be referred to as a practice where a company claims association with a sports event that it does not legally have. Now, the fact that a company is not the creator of a particular sports event or an owner via assignment does not ordinarily mean that the said company is liable for ambush marketing; it is argued that insofar as the company has paid for and has duly obtained a license with respect to the sports event which backs up its claim, it would not be culpable as an ambush marketer. However, an ambush marketer makes a claim when it's not the creator or owner of the rights to the sports event and more importantly hasn't paid a dime with respect to the event in view. According to Sandler and Shani ambush marketing is an attempt by a third party to capitalize on the popularity of a sports event without the prior consent and authorization of the necessary parties (owner/creator)<sup>46</sup>. Some brand owners feel that ambush marketing is clever business as it represents a cheap way of attracting customers/clients to their specific brand. However, Michael Payne a former marketing director of the International Olympics Committee described ambush marketing thus '*Ambush marketing is not clever marketing-it is cheating...*' it is argued that this sentiment held by Payne is trite because in the opinion of this present author ambush marketing is simply corporate freeriding. It involves the use the unauthorized use of registered sports events logo on merchandise and claims of being official sponsor of a particular competition. For instance, if Etisalat claims to be the official sponsors of the Nigerian Premier League that would be tantamount to Ambush marketing; as it would amount to the telecommunications company capitalizing on the popularity of the league when the rightful sponsor of the league is Globacom Nigeria Limited.

Ambush marketing has the effect of driving down projected revenues of sponsors of a particular sports event. Also if an event is susceptible to persistent ambush marketing, it that would negatively affect the value of the event thus deterring both present and prospective sponsors from investing in the event. Ambush marketing is a major challenge that is faced by sports event organisers, especially as

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<sup>46</sup> D. M. Sandler, D, Shani *Olympic Sponsorship v Ambush Marketing: Who gets the gold?* *Journal of Advertising Research* 29(4) (1989) 9

there is no specific legal protection against ambush marketing even in the United Kingdom, India and the EU. However, event organisers rely on seeking legal redress based on the infringement of other intellectual property rights for instance, copyright and trademark. In India however, the courts have in certain circumstances recognised the concept of ambush marketing and consequently award damages to the plaintiff. Also many event organisers are now in the practice of entering into anti-ambush marketing agreements especially with their sponsors. Such agreements have the effect of creating a feeling of confidence and a sense of security in sponsors.

On the other hand the Olympic committee has adopted the *naming and shaming* technique in the fight against ambush marketing. This technique or procedure involves the announcement of corporations guilty of ambush marketing at public press conferences. The IOC also insists that host countries enact domestic laws to protect IPRs associated with the Olympic Games. Another scheme adopted by the IOC is its insistence on the promulgation of domestic legislations to ensure the protection of intellectual property rights of the Olympic Games especially trademarks and sports events marks and by extension give the exclusive rights of association to the sponsors of the Games.

It is argued that for Nigeria to truly gain the enormous benefits derivable from the exploitation of intellectual property rights in general and with respect to sports in particular there must be in place proper legal mechanism to tackle the menace of ambush marketing. As earlier adduced sports event organisers as well as athletes can rely on the various independent intellectual property rights protections available. However, it would also be immensely beneficial for anti-ambush marketing clauses to be introduced in each of these individual IPRs and additionally a *sui generis* (new or novel) anti-ambushing Law should be enacted to cover every IPR. The adoption of these measures would not only encourage indigenous businesses to invest and innovate within the Nigerian sports sector but will also encourage foreign investors and sponsors to invest in the Nigerian sports sector in general and sports events; with such statutes in place it would suggest to the international business community that their investments and IPRs would be secured.

### **Peculiar legal challenges in the Nigerian intellectual property scene vis-à-vis the sports sector**

The major challenge that confronts the Nigerian sports jurisdiction especially with respect to the harnessing of the full potential of intellectual property rights has been that of brand development and unique intellectual property rights protection. The key to tackling this position it is argued rests on an intra-rights interface between intellectual property rights especially personality rights and trademarks on the one hand and the enactment of an intellectual statute that would give IPR holders in sports a *sui generis* protection.

An interface between personality rights of globally popular sportsmen and trade and games mark in Nigeria would lead to increased viewership not only domestically but internationally as well. For instance, football in the US (soccer) has always ranked below baseball, American football (NFL) and basketball but with the emergence of Major League Soccer and the influx of internationally renowned football from around the globe especially from the European continent the popularity of the sport has begun to move in an upward trajectory. If the NPFL/LMCNPFL for instance begins to enter into agreements to bring in Major European and African football stars into the Nigerian League the brand recognition of the league would begin to soar even higher than as it is presently in the US. It is argued that football is already a very popular sport in Nigeria in some quarters it takes up religious proportions.

### **Conclusion/Recommendations**

With the emergence of sports as a veritable economic sector and its commercial importance increasing rapidly both in terms of events on the field and of the business of the exploitation of various intellectual property rights that are associated with sports events organisers and professional sports clubs.

It becomes imperative that professional sports clubs and sports event organisers within Nigeria not only join this highly profitable global bandwagon but also take into consideration the various species of intellectual property rights that have a serious nexus with intellectual property within the context of sports like; trademark registration, copyright, patents, broadcast rights and so on. Commercial

exploitation of these diverse species of intellectual property rights within the context of Nigeria would not only result in an upward drive of the economic progression of the various domestic sports associations/sports events organisers within Nigeria but would also increase the individual profit margins of individual sportsmen in the country while attracting international interest and foreign investment. It is also imperatively necessary for the Nigerian sports jurisdiction to appreciate the fact that establishing proper protective legal framework for intellectual property rights would ensure the sustainability of foreign investments in the sector.

In all the other jurisdictions examined throughout the course of this work sports professionals and sports associations and/or event organisers have had to rely on a patchwork of rights that exists within regular intellectual property Law. I would recommend that Nigeria adopts a different approach to the question of intellectual property rights in sports. It is argued that Nigeria would be better served by the introduction of a sui generis intellectual property law that would solely protect aspects of intellectual property in Nigerian sports. This Law would be in the shape of a unique sports proprietary right to protect innovation and creativity in Nigerian sports.

This would ensure that Nigerian sports association/sports events organisers as well sports professionals would have a one-stop-shop of sorts for the protection of their intellectual property rights and innovations rather than having to rely on piecemeal protection. Also a sports-specific intellectual property law would grant a more comprehensive protection to aspects of intellectual property rights in Nigerian sports as it would adapt the mainstream definitions of intellectual property rights to suit the realities of sports.

A sui generis law would also boost investor confidence in Nigerian sports. As it would send out a message to local and foreign investors that the Nigeria sports industry is an investor paradise.

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