

IMAGE RIGHTS IN SPORTS: THE NEED FOR AN IRONCLAD INDEPENDENT LEGISLATIVE REGULATION

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1.0 INTRODUCTION:

Sports has departed from the traditional format of athletes being paid to perform only and this is due to the recent commercialisation of sporting activities. For example, Football clubs in a view to increase their revenue, enter into a commercial relationship with brands and lucrative sponsors who want to be commercially associated with the club and their star players in order to boost commercial sales of their products and hence seek the right to use the images of these star players. In the process of contracting for these image rights, some controversies arise due to lack of a statutory framework to guide such process and as such can affect commercial transactions in sports and an example of that is Jose Mourinho's announcement as the manager of Manchester United Football Club of England, being delayed due to negotiations of his image rights. It is to this effect that this paper shall highlight such controversies and state why an independent legislative regulation will help remedy such situations.

2.0 IMAGE RIGHTS IN SPORTS

CLOETE IN

HIS BOOK, INTRODUCTION TO SPORTS LAW IN SOUTH AFRICA(2005) defines image rights as

The ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media....the sportsperson....often earns substantial license fee or royalties that is paid for the privilege of allowing his name to be used for promotional purposes.

Due to the expansion of sports especially in the commercial aspect, it has become obvious that athletes don't earn money from their on-field performance only but also get huge income from their sponsorship deals and brand endorsements of products and an example

of this is Cristiano Ronaldo, the current FIFA best player, earning half of his fifty-two million *dollars* income from commercial endorsements and sponsorship as reported in the year 2013. The nature of image rights in sports proves advantageous to sportsmen and women who use it as a source of major income as in most cases the income are higher than their payment for performing. Image rights agreement are often renegotiated in cases of an increase in the commercial value of the sportsman and a classical example is the initial image rights agreement between Cristiano Ronaldo and his club Real Madrid in which the agreement was to split the earnings 50-50 but his agent renegotiated a 60-40 percent sharing in Ronaldo's favour after his superstar status the following season. Image rights agreement serve as a means of protecting the image rights of the sportsmen that is if the right clauses are put in place and this is the reason for an independent legislative regulation which will regulate all image rights agreement and a case which reflects this is the case of ***PROACTIVE SPORTS MANAGEMENT LTD V. ROONEY AND ORS***¹ in which there was a dispute relating to the image rights of Wayne Rooney who was then a football player at Manchester United Football Club in which an image rights company that formerly handled his image rights agreement sued for entitlement to commission upon termination of the contract and the Court of Appeal in that case ruled that they were not entitled to any commission as the agreement was unenforceable due to it being an unreasonable restraint of trade. This could be avoided at first if there was an independent image rights regulator to guide the form and content of an image rights agreement.

2.1 How It Works(Using Football As An Example)

In

most cases image rights is transferred to an image rights company who then acts as the player's agent by contracting with the club and the potential sponsors in order to enter into an image rights agreement and some of the general factors that parties contemplate in an image right agreement are:

1) conflict of interest between personal sponsors and club sponsors and this is important where the sportsman had previously entered into an image rights agreement with other sponsors and it is therefore

¹ [2011] EWCA Civ 1444

necessary to avoid any conflict of interests.

2) Performance and breach:

This should be contemplated in such a way that it will clearly state parties "rights" and "obligations" and this includes sponsors and clubs having the right to terminate in case of non-performance by the player and it may include failure to show up for team photos and official club advertisement plans. This agreement can also be terminated by a lack of professionalism on the player's side or misconduct and an example of such was the suspension of one of Eric Cantona's major sponsorship deal for his "kung fu" kick on one of the spectators at Selhurst Park in 1995.

3.0 THE NEED FOR LEGISLATIVE REGULATION

There is still no unified international system for the recognition and protection of image rights even with the widespread proliferation of commercial activities involving image rights. The reason being that image rights is taken as something that can be protected under various intellectual property regime as trademark law can be useful for the protection of image rights for sports stars as they have the exclusive control over their registered image trademark which prevents another person from registering such trademark while those that did not register can be protected under the tort of passing off while copyright law also helps but is limited in application. Even as at that, these intellectual property regimes where not specifically created to protect image rights hence the need for an independent image rights regulation. In 1999, Eddie Irvine who was a well known formula one driver sued talksport for the usage of his picture in a way that suggested he endorsed talksport's radio station and the court used the common law of tort of passing off to protect his image.

In the United States Of America, the right of publicity seeks to protect against unlawful commercial exploitation of person's identity. The right of publicity is limited under US law by the first amendment which places the freedom of expression above it as it is "intrinsic to individual liberty and dignity and instrumental in society's search for truth". In most cases of image rights violation, the judge gives his decisions having to balance the limitation in the first amendment and the right of publicity and sees which one outweighs the other in which essentially saying it is left

to the judge's sole discretion and the court have developed the "transformative test" in which the judge examines "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness". The USA case of **DRYER V. NATIONAL FOOTBALL LEAGUE**² is classic case on the application of this test as the former NFL player sued for the right to be compensated for the NFL'S use of their names, images & likeness in game footage taken during his playing days in order to promote the NFL. The court had to balance between the plaintiff's right to be compensated and the NFL'S freedom of expression in which case the court noted that **"THE NFL IS CAPITALIZING NOT ON THE LIKENESS OF INDIVIDUAL PLAYERS BUT ON THE DRAMA OF THE GAME ITSELF"** and viewed "game footage" as a matter of "substantial public interest" which is for the purpose of story-telling. This decision has been faulted on so many grounds and one of them being that there is no universal test for the balancing of right of publicity and right of commercial expression and the decision in this case led to the conclusion that athletes in US cannot sue for the right of publicity in case of live broadcasting of their images as this is a matter of public interest. This then gives the upper hand to broadcasters and such decision can be arrived because of lack of a legislative framework to guide image rights applicability cases which then leaves it at the sole discretion of the presiding and this open doors for inconsistencies in decision as it boils down to the interpretation of the judge.

Taxation of image rights income in sports is also another issue that calls for a legislative regulation. In England for an example, football league players will pay 45% tax on earning over one hundred and fifty thousand pounds however an image right income is not being taxed at this 45% but rather at a corporation tax rate of 20%. Both player and club use an image rights agreement as a means of avoiding tax and the players do it by separating the image rights agreement from the general contract for service between the player and the club in which the image rights company of the player will be established abroad which will make the image right income not taxable as it is a separate commercial contract. This was the **case in SPORTS CLUB, EVELYN AND JOCELYN PLC V.**

² NO.14-3428(8TH CIR.2016):JUSTIA

INSPECTOR OF TAXES 2000 where **DENNIS BERGKAMP AND DAVID PLATT** who were both players of **ARSENAL FOOTBALL CLUB OF ENGLAND**, set up an offshore image rights company and when it was challenged the special commissioners held that the arrangements was legitimate as the agreement was a separate genuine commercial agreement that can be forced.

RECOMMENDATION/PROPOSAL

As already established above, there is proliferation of commercial activities in sports which renders the current existing structures for the protection of image rights useless. It is to this effect that the author proposes a separate image rights law which will codify provisions that will remedy all lingering loopholes.

An image rights law can be modelled after the **IMAGE RIGHTS(BAILWICK OF GUERNSEY)ORDINANCE 2012** which gives separate recognition to image rights and **S.5 OF THE ORDINANCE** gives a recognised definition for image rights. This framework should provide for the registration of image rights which will be similar to what is applicable in trademark law in which the owner has exclusive control over the usage of such image. It should contain provisions that expressly prohibits image agreement that will restrain trade and to that effect image rights agreement should be submitted to the image rights office in that states for scrutiny as to its form and contents. The regulation should also have a provision whereby the image rights agreement cannot exist as a separate agreement and should be an addendum to the general contract so that such income can be taxable. The author lastly proposes the creation of an **IMAGE RIGHTS IN SPORTS AGENCY(IRSA)** which will be the main administrator of the provisions of this regulation and they will come up with clauses that an image rights agreement in sports should comply with.

4.0 CONCLUSION

It has been shown that sports image rights agreements are still open for improved protection by an independent legislative regulation. This paper has examined the current protections of image rights in some jurisdictions and realised that it has leaned towards trademark

law, copyright law, tort of passing off and right of publicity for protection, however none of these were designed to solely protect image rights. In light of the inconsistencies caused by the lack of an independent regulation, the author through this paper suggests that a separate legislative regulation akin to the **IMAGE RIGHTS (BAILWICK OF GUERNSEY) ORDINANCE 2012** be adopted and the establishment of an **IMAGE RIGHTS IN SPORTS AGENCY** to administer the biddings of this legislation