OWNERSHIP OF IPR AND THE RELEVANCE OF INSURANCE IN E-SPORT CONTRACTS: AN OVERVIEW

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ABSTRACT

The Indian e-Sports industry is expected to be exponential in the years to come. Viewership ratings and engagement of people in the e-Sport leagues will attract more sponsors. The inclusion of Indian servers would eventually lead to an increase in the influx of professional players in the Indian regiment. Foreign ventures are reaching out to Indian companies to hire professional trainers and players for international tournaments. The developments mentioned above show that Indian players would be subject to contracts. Most of them could be potentially young players who would not be recognised as competent parties within the Indian Contract Act, 1872. In addition to this, training contracts are on the rise, and the implications on the players would be different from the agreements entered with designated streamers and professional players. In this paper, essential clauses pertaining to the Intellectual Property Rights of the players and other stakeholders such as event organisers, owners, and sponsors are recognised. The dynamics of the Intellectual Property and Insurance Laws will also be dealt with. Additionally, the significance of identifying the stakeholders in the e-Sports industry is analysed in the paper, along with a comparative analysis of e-Sports laws of some top leaders in e-Sports, namely South Korea and the US. The author intends to focus on the relevant stakeholders' IPR and Insurance contractual obligations since there is a gap in the existing pool of literature that discusses the influx of IP and Insurance obligations.

I. Introduction

The e-Sports Industry in India has been increasing in great manifold.¹ India is currently a member of the International e-Sports Federation

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¹Sreehari Menon, 'e-Sports And Gaming Industry In India Grows By 21 Per Cent
Amidst Lockdown: Report' (Republic World, 29November 2020)

https://www.republicworld.com/sports-news/other-sports/e-Sports-and-gaming-industry-in-india-grows-by-21-amidst-lockdown.html accessed 27 February 2022

along with 87 other member states,² wherein statutes and governance policies are adhered to. The popularity of e-Sports started with the inclusion of the e-Sports regiment for the 2018 Tokyo Games as a demonstration and India won the bronze medal for the same.³Leading game sponsors are investing in gaming cafés, and third-party tournaments are witnessing an increase. Recently, Riot Games hosted the 10th edition of the 'Worlds' in China and over 1 million people pre-registered (for tickets) in 4 hours.⁴The developments mentioned above also mean that many endemic and non-endemic sponsors are levelling up their support since engagement towards these games have exponentially increased.

In India, there have been many partnership agreements signed by leading game sponsors with venture capitalists to build teams. Recently Fnatic, one of the major e-Sports organisation partnered with Loco, an Indian Online Streaming platform to create and broadcast content online based on the PUBG Mobile game.⁵ In addition to this, Fnatic has engaged itself in scouting Indian players and has built its presence in the Indian gaming sector after building a team for PUBG Mobile.⁶ Furthermore, the legal context in India, especially in terms of the dynamics of age and coaching strategies, must be considered whilst deriving an analysis of the e-Sports regime. India does not have a law on e-Sports in general, but in terms of enforcing intellectual property rights, the *status quo* of enforceability is established through the Copyright Act, 1957;⁷ Trademark Act, 1999,⁸The Patents Act, 1970⁹ and the Designs Act, 2000.¹⁰ This article will mainly focus on the dynamics of the contracts entered between the

² International e-Sports Federation < https://ie-sf.org/about/members> accessed 30 November 2020

³Roland Landers, 'e-Sports: The big medal opportunity for India' (*Forbes India*, 21 September 2020) < https://www.forbesindia.com/blog/business-strategy/esports-the-big-medal-opportunity-for-india/ accessed 27/02/2022

⁴Sujay Chakraborty, 'League of Legends Worlds 2020 Finals Ticket Sale Records Over 2 million Registrants' (*Republic World*, 15 October 2020) https://www.republicworld.com/sports-news/esports/league-of-legends-worlds-2020-finals-ticket-sale-esports-news.html accessed 27/02/2022

⁵Jonno Nicholson, 'Fnatic enters India-focused content partnership with Loco' (*e-sports Insider*, 17 June 2020) < https://esportsinsider.com/2020/06/fnatic-loco/ accessed 27/02/2022

⁶Fnatic, < https://fnatic.com/esports > accessed 27/11/2020

⁷Copyright Act 1957

⁸ Trade Marks Act 1999

⁹ Patents Act 1970

¹⁰ Designs Act 2000

players(professional and trainees) and the e-Sports organisation. The terms of the training contract agreements will be pondered upon in comparison with professional gaming contracts that are entered between the owners and the potential team players representing the teams in major world leagues. Further, the article shall delve into the sponsorship agreements and the influence of sponsors in a player's IP rights. The article provides a comparative analysis of laws in South Korea and the US with India to provide suggestions and concludes with concluding remarks of the author.

II. CONTRACTUAL TERMS CONCERNING INTELLECTUAL PROPERTY RIGHTS

In general parlance, professional player contracts have an interplay of labour rights and intellectual property. Although it may seem obvious, the principles of contract law play a defining factor in ensuring that trade secrets, sponsors' interests and team's interests are not compromised. This includes proprietary information that has a commercial value and is protected through the ambit of breach of confidence and principles of equity. However, it is interesting to note that most of the players who end up signing these contracts are minors. 11 Training contracts have become common, and they regulate coaching hours, work hours, dynamics with coaches and broadcasting rights. This goes on to show that these training contracts and professional gaming contracts are similar. In addition to this, some of the players are loaned to other teams on a limited tenure basis, further adding scope for more revenue to the e-Sports gaming houses.¹² Another important question that arises with this regard is when a player is loaned off to another team on a limited basis, will the property of the player like the 'gamer tag' lie with the player or the owner; furthermore, the issue of whether the other team (i.e, the team that has the loaned player) have some control over the player's rights is something

¹¹Angad Makkar, 'Minors' Contracts in Sports: Need For Reform In India (*Iprment Law*, 7 December 2019) < https://iprmentlaw.com/2019/12/07/minors-contracts-in-sports-need-for-reform-in-india/ accessed 27November 2020

¹²Vishakh Ranjit, et.al, 'e-Sports Player Contracts: Common Clauses and Potential Legal Issues in India' (*Mondag*, 18 June 2020)

https://www.mondaq.com/india/gaming/955392/e-sports-player-contracts-common-clauses-and-potential-legal-issues-in-india/accessed 27 November 2020

that must be discussed. These dynamics showcase the various clauses that a player loan off clause must/can include. Generally, in a player's contracts the duration of contract, fee, daily working hours, intellectual property right ownership, use of gaming equipment are included. The specific intellectual property rights and the implications are dealt in the subsequent sections.

1. Image Rights

In terms of the image rights, players are usually asked to enter into the agreement enabling the company or the organisation to use the player's gamer tags, regulate their social media accounts and enter endorsement deals with potential sponsors and leagues. 13 Players' engagement with fans and viewers are regulated by the e-Sports companies. Merchandise and souvenirs made by the company involve signs, slogans and pictures of the players themselves. These permissions are mainly dealt in contract agreements. However, if the product is made through a manufacturer (in a licensing agreement for instance), then there must be an express agreement between the owner of the e-Sports team and the manufacturer allowing such a product to be released in the market. There are some issues and challenges that must be addressed to completely understand the players' future. First, most player contracts are subject to a limited time period. In games such as League of Legends, every player can be subject to a contractual tenure of maximum three years. 14 This means that the players can change teams in the foreseeable future thus creating an effect on products that are attached to the image of the players. If the player happens to change the team and the products attached to his/her previous team are out there in the market, it would affect the rights of the new team (depends on whether the agreement recognises the implications of having the player on the team), and sponsors involved. Second, if the

¹³ Hayley Morgan, 'Know your image rights in esports' (Brabners, 8 February 2021) < https://www.brabners.com/blogs/know-your-image-rights-esports> February 2022

¹⁴Ryan Hawkins, 'e-Sports in the off-season - A guide to the League of Legends free agency period from the perspective of team Fnatic' (Lavinsport, 22November 2018) < https://www.lawinsport.com/topics/features/item/esports-in-the-off-season-a-guideto-the-league-of-legends-free-agency-period-from-the-perspective-of-teamfnatic>accessed 27November 2020

player does not wish to endorse his image in the products despite the contract, then the issue of violation of right to privacy may arise. In addition to this, the player also has a 'right to publicity' which protects the commercial interests of the players from being compromised for unauthorised purposes These include use of the player's image/publicity without prior permission and a licensed agreement to do the same.¹⁵

2. Broadcasting Rights

Contracts pertaining to the broadcasting rights differ on the nature of work that the players are expected to undertake. Some players are designated the role of solely streaming their gameplays through the regulation and backing the gaming organisation. Additionally, professional e-sport players are also subject to some restrictive broadcasting gigs. In the case of individual player streams, sponsors are brought into endorsement agreements through their association with the e-Sport organisation. The e-Sport organisations regulate the individual player's sponsor endorsements through the individual player's contract. This establishes the dynamics between the sponsors and players. In most case scenarios, these streamers are given equipment by the company and are expected to stream content on a regular basis. They are limited to only stream gameplays of specific games mentioned by the company. Professional Indian players are also involved in streaming contracts. Recently, the Fnatic Indian team for PUBG Mobile has become the official streamer for the Loco platform.¹⁶

3. Trade secrets

Players in the contract can be subject to a non-disclosure clause that refrains the player from sharing information related to the diet, technical know-how, company software and strategies employed in the practice

¹⁵Laura Gastaldi, 'e-Sports: a new frontier for the advertising law and image rights?' (*Dla Piper*, 14 February 2019) < https://blogs.dlapiper.com/iptitaly/2019/02/esports-a-new-frontier-for-the-advertising-law-and-image-rights/#page=1>accessed 30 November 2020

¹⁶Jonno Nicholson, 'Fnatic enters India-focused content partnership with Loco' (*e-sports Insider*, 17 June 2020) < https://esportsinsider.com/2020/06/fnatic-loco/ accessed 27 February 2022

sessions. Moreover, misappropriation of trade secret by wrongful means would eventually amount to the enforcement of action against the wrongdoer.¹⁷

4. Protection from infringement of IP rights

The team owners are bound by the agreement to not misappropriate the players brand value in unauthorised ways and shall seek consent from players in case of using the IP rights and gaining commercial benefit that is deemed to be fit. The concept of 'right to publicity' recognises the protection of these players from infringement of their rights from third party violations. If the image rights of the players are infringed, then the team owner shall take all measures to institute actions against the violators.

The aforementioned terms of contractual obligation determine the extent to which players can assign intellectual property rights to the owners of the gaming organisations. But most players are treated as independent contractors and not as employees. If the players are treated as employees, only then the company is expected to pay benefits and assume liability for any violations done by the players.

III. ACADEMY CONTRACTS AND IPR IMPLICATIONS

Indian players are being brought into training contracts with major gaming organisations to learn and gain skills that would potentially bring India to the major world stages. The e-Sports Federation of India (ESFI) happens to be the regulatory authority of harnessing and recognising talent.¹⁸ In addition to this, the federation aims to train and provide support to young players who could potentially represent India in the world leagues. As of now, the Olympic Council of Asia has recognised e-Sports tournaments as one of the main events to be conducted in major

accessed 30 November 2020

¹⁷ Charles Throckmorton, Carlton Fields, 'Keep it secret, keep it safe: Trade Secrets in Video Games and Esports' (*Jd Supra*, 17 April 2020) https://www.idsupra.com/legalnews/keep-it-secret-keep-it-safe-trade-secr-19177/

¹⁸ e-Sports Federation of India, https://esportsfederation.in/#main_objects>accessed 30 November 2020

Asian tournaments.¹⁹ However, though ESFI trains players for representing the country in major games, it does not elaborately make contracts pertaining to IP rights of players such as gamer tags, broadcasting rights and commercial agreements. According to the contract prepared by the ESFI for the Asian Games 2018, the players were responsible to bear the expenses of participation in the games.²⁰

IV. INDIAN LEGISLATIONS THAT PROTECT PLAYERS' IP RIGHTS

The Indian laws pertaining to the protection of IP Rights of players can be recognised in various angles. Firstly, every player's contract is governed by the Indian Contract Act, 1872.²¹Secondly, the Indian Copyrights Act recognises video games under the definition of a cinematograph and protects the performers' rights. Personality rights are protected within the ambit of the common law principle of 'passing off'. This section will primarily be dissected into explaining the facets of contracts, performers rights and personality rights.

1. Indian Contract Law

The Indian Contract Law promotes and provides protection to players in various ways. First is the protection of minors through the exceptions established. If the contract is with a minor, then the minor has the option to either honour or not oblige for the same. In the e-Sports context, if a minor has fulfilled his/her obligations in the promise and the e-Sports organisation does not fulfil the promise, then the contract can be enforced. In addition to this, if the guardian has entered into the contract for the minor, then the contract could be enforced. If the contract is done for the benefit of the minor, then the contract could be enforced. Furthermore, the players can be protected for employing their skills and gameplay without the fear of pressure from restraint of trade via section

19Ibid

²⁰RishikaMendiratta, 'A Primer on e-Sports in India- Analysis of Player Contracts and Property Issues' (Kheladhikar, India, July <https://kheladhikar.com/2018/07/11/a-primer-on-esports-in-india-analysis-of-playercontracts-and-intellectual-property-issues/> accessed 30 November 2020

²¹ Indian Contract Act 1872

27 of the Indian Contract law.²²

2. Performers' Rights

The amendment of the Copyright Act has included performers' rights in a definitive precision. Section 2(q) of the Act provides that 'in relation to performer's right, means any visual or acoustic presentation made live by one or more performers.²³ This by interpretation includes the performance of professional players in the e-sport forum. There are players in the e-Sports community who are known to employ an interpretative and profound gameplay style. As every other sport, a successful gameplay requires intense training and hours of preparation. This can be read along with the meaning of Section 38 of the Copyright Act.²⁴ In the case of *Star India Pvt. Ltd.* v. *Piyush Agarwal*,²⁵ the court held that the meaning of work within Section 2(y)²⁶ of the Act can be read along with Section 38 which provides the right of the performer to have copyright for his/her performance. Therefore, interpretative and unique gameplays of players can be protected.

3. Image Rights

The image or publicity rights of the players are protected within the ambit of the common law principle of 'passing off'. This was initially discussed in the case of *Zacchini* v. *Scripps-Howard*,²⁷ wherein the court held that the performer is protected from getting his performance broadcasted without his/her consent. The 'right to publicity' has derived interpretation in the Indian Courts primarily through the judgement of *ICC* v. *Aarvee Enterprises*,²⁸ wherein it was held that the right to publicity and right to privacy go hand in hand and the individual subject to these rights must be protected against the violation of these rights. The judgement has

²² India Contract Act 1872, s 27

²³Copyright Act 1957, s 2

²⁴ Copyright Act 1957, s 38

²⁵Star India Pvt. Ltd. v Piyush Agarwal 2014 (58) PTC 169 (Del) at p. 175.

²⁶ Copyright Act 1957, s 2(y)

²⁷Zacchini v Scripps-Howard Broadcasting Co. 433 U.S. 562

²⁸ICC Development (International) Ltd. v Arvee Enterprises and another 2003 (26) PTC 245

recognised this right by reflecting through Art. 19 and Art. 21²⁹ of the Indian Constitution. Furthermore, the judgement of Puttaswamy³⁰ recognised that image rights are mainly derived from the UK common law principle of 'passing off'. These judgements clearly establish the image rights protection given to players.

V. Contractual Obligations And The Intersection Of Insurance Laws In E-Sports

e-Sport tournaments involve players who are assigned specific roles in the team. Each team member (in tournaments) is bought either through auctions or through private negotiations. In sporting events, the team managers and coaches choose team players according to gameplay strategies and team ethos. There may be instances where any of the key players are injured or are unable to turn up for the tournament, which may result in a detrimental effect to the team especially in terms of investments that were incurred. Therefore, e-Sport organisations need to enter into insurance contracts to cover risks such as non-appearance to the tournament. This is used when the substitutes do not actually match up to the expectations that the management intended to execute in gameplays.

Furthermore, personal accident covers can also be provided to professional players. This is definitely conditional to the nature of the accident and injury that occurred. Some of the injuries that are identified include mental trauma, wrist injuries due to repeated gameplays and practice overhauls. This is different from insurances that are incurred due to a single defined event such as a physical injury caused due to a ball being hit onto the leg with immense force while playing football.

Other notable insurances that can be taken by e-Sport organisations and players are death insurance, disablement insurance, event cancellation insurance, key man insurance, cyber insurance, equipment insurance and

²⁹ Constitution of India 1950, art 19 & 21

³⁰Justice K. S. Puttaswamy (Retd.) v Union of India AIR 2017 SC 4161

disgrace insurance.31

Disgrace Insurance: In terms of disgrace insurance, if the players include in an activity or an instance that hampers the reputation of the team and brand image, then the organisation involved in the team can claim the contract value equivalent to the amount used to remunerate the professional player.

Property Insurance: These insurances cover gaming equipment damage. It includes damage incurred due to loss of equipment, theft, fire, accidental damage to property and so on and forth.

Event-cancellation Insurance: These insurances cover financial losses, hiring costs, low attendees rate in on-site events, ticket sales, venue costs and reputation damage control.

Event Liability Insurance: Through this insurance contract, the event organisers can claim contract amount in case the policy covers accident or injury caused to attendees in case of events such as an accident, stampede or even instances such as tripping at stairs. This also includes coverage for damaging the event venue.

General Observations in Insurance law and e-Sports: Understanding the scope of Contractual Obligations

In terms of loss of items and injuries to the attendees, the *prima facie* liability rule can be applied, wherein the event organiser can prove that the loss/injury did not arise due to the negligence that occurred due to his/her part or the workers in the event. Furthermore, the event organisers while having possession of the gaming equipment in the premises will most likely establish a bailor-bailee relationship wherein the event organiser actively arranges the equipment to meet the broadcasting needs (i.e., giving time for teams to prepare for the tournament, arrange the equipment as per the camera team plan, interior and aesthetic arrangements, so on and forth.) In that case the strict liability rule will apply. However, the event organisers (if applicable) can prove that they

³¹ G & M International, https://www.esportinsure.com/our-services/esports-team-insurance/ accessed 27 February 2022

have taken reasonable care to ensure that the damage, theft or loss of property did not occur due to neglect or misconduct.

VI. COMPARATIVE OVERVIEW

In the previous sections, the Indian laws pertaining to players' rights and general clauses of contracts were discussed. This section will focus on the laws and organisations that regulate the e-Sports contingent in the national level of some of the leading e-Sports contingent, namely South Korea and US. The analysis would enable more research and highlight ways of possible dialogues that can set forth a stable e-Sports regiment in our country. Firstly, the e-Sports Federation of India is not recognised by the Ministry of Sports.³² This goes on to show that a certain level of uncertainty is set forth for players who wish to represent our country in international forum.

Another problem is that sporting regulation authorities have not actively provided schemes for player insurances. The exception to this statement is only applicable to Board of Control for Cricket in India (BCCI) which provides insurance coverages to players.³³ Such an extensive policy is prevalent due to the capital that BCCI manages to create every year.

South Korea, which happens to be the leader of e-Sports at the present moment has express and specific laws pertaining to e-Sports. With regards to the intellectual property rights, Art 13 of the Game Industry Promotion Act³⁴ expressly provides that creative elements in games would be promoted as a matter within Intellectual Property Rights. In the US, the Sherman Anti-Trust Act prohibits unreasonable restraint in trade, ³⁵ which can be compared with the provisions given under section 27

³²Abhimannu Das, 'Indian Gaming and Esports Policy Discussed in Parliament' (AFK Gaming, 7 February 2021) https://afkgaming.com/esports/news/lol-patch-1211-riot-previews-super-massive-patch-with-more-system-changes accessed at 27 February 2022

³³ Medical Benevolent Fund- Players & Umpires, (BCCI, 30 September 2019) https://www.bcci.tv/articles/2019/news/126413/medical-benevolent-fund-players-umpires#:~:text=PLAYERS%20%26%20UMPIRES%20MEDICAL%20BENEVOLENT%20FUND,(Maximum)%20during%20their%20lifetime. accessed 27 February 2020

³⁴ Game Industry Promotion Act 2006

³⁵Sherman Antitrust Act 1890, s 1

of the Indian Contract Act.36

Apart from these developments, the inclusion of the e-Sports Federation Act in Korea gives stability for regulating matters pertaining to e-Sports. This model goes on to show that India must also derive official recognition from the government via a legislation or a notification from the ministry of sports to make the most of international opportunities and also receive funds.

In 2018, an attempt was made to grant recognition to the e-Sports industry through the 'The Sports (Online Gaming and Prevention of Fraud) Bill, 2018'³⁷ which was not passed by the legislature. This Bill has extensively given provisions on operator/organisation within the definition of licensee to take part in international tournaments.³⁸ Players are also included in the Act as a 'member' of the team enumerated in the definition part of the Act.³⁹ Moreover, the Bill has also given powers to the 'Online Sports Gaming Commission' to make rules whenever necessary and in the Financial Memorandum given under the Bill the Funds for the Commission would be derived from the Consolidated Funds of India.⁴⁰

VII. SUGGESTIONS

Based on the analysis made, certain inferences can be laid down by revisiting and recognising problems. Firstly, the awareness mechanisms are very minimal. Players can be subject to unconscionable contracts and to avoid such instances, players would require legal advice. Secondly, Internet has enabled almost omnipresent access to resources, but proactive recognition of e-Sports leagues and gaming must be fostered through governing authorities. This would improve the industry in the long run by growing influx of foreign investment. Thirdly, conferences and discussions on Intellectual Property and its interface with e-Sports must be convened by experts to devolve and analyse major issues and

³⁶ Indian Contract Act 1872, s 27

³⁷ The Sports (Online Gaming and Prevention of Fraud) Bill 2018

³⁸ Ibid s 2 (i)

³⁹ Ibids 2(j)

⁴⁰Ibid 12

improve the scope of players' contracts. Fourthly, Inclusion of e-Sports specific law would also increase the legal development in e-Sports law enforcement Lastly, the recognition of the ESFI as a governing body would improve the infrastructural and financial arrangements for training and enforcement of conscionable contracts.

VIII. CONCLUSION

e-Sports Fraternity in India cannot thrive as long as the rights of the players are protected in the long run. India has a knowledge economy which could potentially bring youngsters laurels in the field of e-Sports. Previously, Indian gamers had to join servers from neighbouring Asian states. But with the inclusion of Indian servers in the gaming space, this trend has explicitly given hopes in ensuring that the Indian gamers would be included in greater numbers. As much different as it sounds, comparing physical exertion to mental exertion and dexterity has brought in conceptual extensions in the field of Intellectual Property Rights and Insurance laws. Furthermore, e-sports and insurance intertwine as attributes such as team reputation, brand image, goodwill of the team hold relevance in the industry. A lot of investment is being put into esports and the growth of the industry has paved ways for situations wherein challenges and obstacles need to be recognised and addressed. For instance, attendee accidents in e-sport tournaments are likely to occur and the event liability insurance coverage would potentially solve the consequences (through compensation to injured attendees) arising from such accidents; property insurances would cover the damages that occurred due to damage in gaming equipment (which is necessary for the gameplay and training sessions). These instances and observations goes on to show that the economic and moral rights of players are respected and protected under law through formation of contracts (including insurance and intellectual property agreements). However, through the comparative analysis made in the paper we can infer that India has a long way to go in terms of recognition of e-sports in the legal system as exponential changes are brimming in a wide scale.

To briefly encapsulate the observations and analysis made herein, a comprehensive law on e-Sports would potentially benefit negotiations and contract awareness amongst lawyers and players.

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(See Rule 8 of the Registration of News Papers (Central) Rules, 1956 under the Press and Registration of Books Act, 1867)

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