

STAR WARS - CREATING PROPERTY RIGHTS FROM THIN AIR?

The Supreme Court ordered status quo as it existed on the date of the order passed by the single judge of the Delhi High Court, thereby granting Star an interim injunction against Akuate and its fellow defendants during the pendency of an appeal before the apex court of the country. With the final ruling being expected at the end of the year, there is much anticipation that this would be a watershed decision for the Indian media and entertainment industry



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Cricket in India is much more than a sport, it is a multi-million dollar industry controlled by the Board of Control for Cricket in India ('BCCI'), which is in charge of organising tournaments, selecting the national team and the overall development of the sport in the country.

Unlike several other sporting bodies, the BCCI is not a recipient of government funds and is responsible for its own finances. One of its major revenue streams is the grant of media rights for cricket matches to broadcasters, the alleged infringement of which was the focal point of the litigation between the broadcasting media house Star India Private Limited ('Star') and certain entities in the telecommunications and mobile value-added services sphere, including Akuate Internet Services Private Limited ('Aquate').

Star, which, by an agreement with the BCCI was assigned media rights to cricket matches approached the Delhi High Court seeking an injunction against the likes of Akuate in order to restrain them from disseminating live scores and match updates to mobile subscribers, who paid fees for receiving such ball by ball updates.

First Blood - A Star Victory

The first bout of litigation saw the single judge of the Delhi High Court rule in favour of Star in March 2013. Disagreeing with Akuate's primary argument that match information was in the public domain, over which no copyright or other rights could be validly created by BCCI (and by extrapolation assigned to Star); the judge held that Indian courts had previously admitted claims in the nature of unfair competition.

Relying on the decision of the Madras High Court in *Marksman Marketing Services Private Limited v. Bharti Tele-Ventures Limited* [O.A. No. 78/2006] ('Marksman'), having a similar factual background to the present case, it held that appropriating facts and information from the match telecast and selling

the same is "...endeavouring to reap where the defendants have not sown." The single judge therefore granted an interim order, restraining the defendants from disseminating contemporaneous match information for payment, without obtaining the approval of Star.

However, in the interests of ensuring unrestricted access to newsworthy information to the public, the injunction excluded from the ambit of its restrictions information that was offered gratis or even ball by ball updates which were not contemporaneous, but delivered after a lag of fifteen minutes as by then, in the opinion of the judge, such information had already entered the public sphere. This time lag for time sensitive information, according to the judge, would evenly balance Star's commercial rights to monetise cricket matches and the right of the public to receive information on such matches - thereby preventing Akuate from free-riding on the efforts of Star.

The Fact of the Matter

In the appeal filed by Akuate against the single judge's injunction order, the primary issue addressed by the Division Bench of the Delhi High Court was whether Star's claims were barred by Section 16 of the Copyright Act, 1957 ('Copyright Act'), which consequently precluded Star from claiming copyright or other similar rights not specifically enumerated under the Copyright Act. Section 16 of the Copyright Act contemplates that no person shall be entitled to copyright or any similar right in any work otherwise than provided under the provisions of the Copyright Act.

Dismissing Star's contention that the language of Section 16 ('... copyright or any similar right in any work') itself recognises the existence of rights akin to copyright, the court held that the expression 'similar rights' referred to performers and broadcasters rights, which are specifically provided under Chapter VIII of the Copyright Act. The court was also not convinced with Star's further argument that the pre-emption under Section 16 does not apply to broadcast and neighbouring

rights and observed that Chapter VIII was introduced in order to give limited protection to broadcast rights which are akin to copyright (since its absence meant that those rights were precluded by Section 16). Thus, as a natural consequence, all those limitations that apply to copyrights would apply in the case of copyrighted works which are also the subject of broadcast rights. Conducting an in-depth analysis of the scheme of the Copyright Act, the court concluded that the exhaustive nature of the regime in Chapter VIII precludes, by its very nature, any claim for protection over and above what is expressly granted by its provisions.

Cold Shower for the Hot News Doctrine

In its arguments before the lower court, Star had successfully cited the 'Hot News Doctrine' - a common law based tort of unfair appropriation of quasi-property rights. This judicial doctrine had first been authored by the United States Supreme Court at the beginning of the 20th Century to deal with what it viewed as an unauthorised interference with legitimate business activity, such that without incurring the burden of expenses, a party could free-ride on another's efforts and divert profits deserved to such person.

Over the course of the years, this doctrine was diluted in the United States by a succession of judgements, primarily as it sat uneasily with the limitations imposed by copyright statute, as discussed above. In its current limited form, the Hot News Doctrine in the United States appears to suggest that time sensitive news is capable of protection if the parties are engaged in direct competition.

In the present case, these criteria could not be satisfied as neither the BCCI, as the event organiser, nor Star, as the official broadcaster, could claim that its principal activity was the dissemination of match facts and score updates through the medium of mobile and wireless instrumentalities. While the BCCI claimed exclusive rights to carry out such activity were contractually granted by it to

Star, the court concluded that match updates being in the nature of facts, were incapable of being the exclusive property of BCCI to assign in the first place as under Indian copyright law, such facts failed the test of 'modicum of creativity' as laid down by the Supreme Court in *Eastern Book Company v. DB Modak [(2008) 1 SCC 1]*.

Referring to its previous conclusion of other rights being precluded by Section 16 of the Copyright Act, the court stated that in the presence of a specific statute, judicial restraint ought to be exercised so as not to upset the careful balance achieved

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by legislative prescription - especially in a scenario where such judicial intervention would directly contribute to perpetuation of a monopoly. While not expressly stating so, this ruling appears to have placed several question marks on the applicability of the Hot News Doctrine in India.

A Just Rejection

Dismissing Star's contention that the appropriation of match facts could be protected by courts under the grounds of unfair competition, the court ruled that there was no real difference between a claim of copyright

infringement and the ground of misappropriation under a common law action - the latter therefore being excluded by way of statutory mechanism as discussed earlier. The appropriation being essentially facts rather than expression, this was incapable of receiving protection under Indian copyright law.

Similarly, claims under a tort of unjust enrichment, according to the court, would be pre-empted under the Copyright Act and, in the absence of any other misconduct committed by the other party - such as breach of confidentiality or other contractual obligations between the parties, no injunction on Akuate's activities could be granted.

Approaching Star's arguments on unjust enrichment from another perspective, the court analysed the requisite elements for succeeding in such a claim. Firstly, the enrichment of the defendant; secondly, such enrichment being incurred at the expense of the claimant; and lastly, that it would be unjust if the defendant retained such benefit.

Examining if Akuate and other defendants were benefited at the expense of Star, the court found that the defendants' income was based on account of their own efforts and expense incurred by them which was completely independent of Star. Even after applying the rigorous 'but-for' test (in the present facts being, 'but for' Star's acquisition of broadcasting and other rights from the BCCI), the court found it untenable to hold that the defendants would not have made any gains, as they could still have carried out the activity of disseminating scores and match updates for subscriber fees. Therefore, the court refrained from issuing an order for restitution of monetary benefits in favour of Star.

Concerns about Freedom of Speech

The court also observed that any decision by them creating property rights in the facts stemming from cricket matches organised by the

BCCI would set a dangerous precedent as the Indian constitution protects freedom of speech and expression, and by corollary, the right to disseminate news and the right to receive news.

Reacting to arguments that the scheme of the constitution itself envisages reasonable restrictions to such constitutional freedoms, the court advocated judicial restraint in making pronouncements or creating doctrines on what constitutes grounds for circumscribing the fundamental rights, and stated that such matters, being legislative prerogative, must not be interfered with by the courts.

Star Wars Episode III - the Revenge of Star?

While many have welcomed the detailed analysis of Justice Bhat (of the Division Bench of the Delhi High Court) in answering several questions which may consequently have a great impact on the evolving jurisprudence of quasi-property rights in media programmes, this is not the final say on this issue by any means. The Supreme Court ordered status quo as it existed on the date of the order passed by the single judge of the Delhi High Court, thereby granting Star an interim injunction against Akuate and its fellow defendants during the pendency of an appeal before the apex court of the country.

With the final ruling being expected at the end of the year, there is much anticipation that this would be a watershed decision for the Indian media and entertainment industry. With courts sensibly preferring a strict interpretation of the Copyright Act instead of expanding the contours of the bundle of rights granted under the statute, the chief takeaway would appear to be that in a scenario of rapidly developing technology, existing business models would have to keep adapting and innovating to retain their relevancy.



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