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Contents

Article

Hot news doctrine - Inapplicable
in India 2

Ratio Decidendi 4

News Nuggets 5



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Hot news doctrine - Inapplicable in India

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Deciding an appeal¹, the Division Bench of the Delhi High Court has set aside the Single Judge's decision², which recognized the popular "Hot News" doctrine and quasi-proprietary rights in the information emanating from cricketing events and held that the publication of scores and ball-by-ball update through SMS by the defendants amounted to misappropriation of the quasi-proprietary rights and unfair competition. The Division Bench held that the Copyright Act, 1957 does not contemplate quasi-proprietary rights as claimed by the plaintiff and upholding such rights on the basis of the "hot news" doctrine or unfair-competition doctrine would conflict with the provisions of the Act.

Note on the case before the Single Judge

The plaintiff was granted exclusive broadcasting rights by the Board of Control for Cricket in India (BCCI) to disseminate all information emanating from cricket matches and other rights under the Act, that arise from recording of live sporting events. The defendants initiated messaging services on mobile phones that provided instantaneous update of the scores of the live cricket matches. The plaintiff instituted the suit de hors copyright, seeking permanent injunction and damages against the alleged misappropriation of its quasi-proprietary rights in the information emanating

from a cricketing event based on the "hot news" doctrine and the tort of unfair competition/unjust enrichment. The Single Judge heavily relied upon the judgment in the case of *INS v. Associated Press*³ and granted relief to the plaintiff. Being aggrieved by the said decision of the learned Single Judge, the appellants/ defendants preferred an appeal on the ground that no statute creates a property right in scores and other match information and also on the ground that factual information cannot be owned by anybody either under statute or under common law.

Reasoning by the Division Bench of the Delhi High Court

A. Regarding Section 16 of the Copyright Act, 1957

The Division Bench negated the contention that factual information is not a copyrightable subject matter and hence a claim can subsist de hors Copyright act, 1957. It observed that Chapter VIII of the Act which refers to the rights of broadcasting organization and performers, was introduced to give limited protection to broadcast rights as compared to copyright and had the Parliament intended to give protection to time sensitive information such as in the instant case, there would have been provisions drafted that

¹ FAO (OS) 153,160 & 161 of 2013

² *Star India Pvt. Ltd. v. Piyush Agarwal & Ors.*, MIPR 2013 (1) 201

³ 248 US 215

expressly mandate the same. Therefore, the Bench concluded that the factual information claim of the plaintiff / respondent shall be subjected to the limitations under Section 16 of the Copyright Act, 1957 i.e. “there shall be no copyright, except as provided by the Act.” Thus the Court held that the rights claimed by the plaintiffs, over and above the broadcasting rights, are precluded by Section 16 of the Act; they are also precluded because of the exhaustive provisions of Chapter VIII of the Act.

B. Applicability of the “Hot News” Doctrine

The Division Bench upheld that the *INS* case branded “Hot News” doctrine was bad law and hence was not applicable under Indian copyright laws. Concurring with the decision of the US Supreme Court in the *NBA* case⁴, the Bench held that the doctrine leads to injunction of time sensitive news only where both parties are “direct competitors”. The Court held that this critical aspect of ‘Hot News’ was absent in the present case, as neither Star, nor BCCI engaged themselves primarily in match news dissemination through SMS. Thus, the Court held that the plaintiffs could not claim any exclusive property or other such rights to prevent the publication of match information, irrespective of whether the object of such third party was to publish such information for commercial gain or without any such motive.

C. Applicability of unfair competition or unjust enrichment doctrines

The Court held that in the instant case, the creation of copyright like rights that protect match information, which is otherwise available freely, transgresses the limits of the Copyright Act and thus, the tort of unfair competition cannot be relied upon by the plaintiff to seek equitable relief by way of injunction. Further, the Court held that the claims of unjust enrichment are precluded by Section 16 of the Act.

Conclusion

In the light of the *NBA* case, the Division Bench analyzed the preemption under Section 16 of the Copyright Act, 1957. Interestingly, the whole claim of the respondent was de hors the Copyright Act and that the subject matter of the dispute was admittedly not a copyrightable subject matter. However, the Bench observed that legislative intent is not to grant any right similar to copyright which includes rights as claimed by the respondent in the factual information. In view of the decision of the Division Bench, the law does not recognize any right over factual information, which essentially highlights the basic tenet of the Copyright Act, that the statute only grants protection to the expression of ideas and not to the underlying ideas or facts.

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⁴ *National Basketball Association v. Motorola Inc.* 105 F.3d 841 approved in *The Flyonthewall.com Inc v Barclays Capital Inc* 2011 WL 2437554 (2d Cir. June 20, 2011) by the Second Federal (Appellate) Circuit Court

Ratio Decidendi

Trademark - Word having direct reference to character or quality, not distinctive

The Intellectual Property Appellate Board has held that a trade mark having direct reference to the quality of the goods for which registration is sought for, cannot be registered. It was hence held that mark SNAX was phonetically similar to the word 'snacks' used for light foods and hence cannot be registered in case of goods falling in Class 30 i.e. biscuits, breads, buns, etc. Registrar's order holding that the word cannot be monopolized by any one as the same shall be required by other legitimate traders to describe their products in the course of trade, was upheld by the IPAB. It observed that when a word has a direct reference to the character or quality of the goods it may be difficult to establish that it has lost its primary significance and has acquired a distinctive character. It was further noted that appellants' other registrations were not for the word SNAX alone as it was always with their house mark Britannia which was prominently given. [*Britannia Industries Limited v. PepsiCo Inc.* – IPAB Order dated 26-8-2013 in OA/11/2007/TM/KOL].

Trademark opposition – onus of proof

Granting relief to the appellant, the owner of mark MEX, the IPAB held that the onus was on the applicant of the mark KAMAX to prove that registration will not cause confusion. Earlier the Joint Registrar of Trademarks had dismissed the opposition stating that the appellants had not proved confusion or deception and that the marks were not similar. The IPAB found on facts, that the appellant produced sufficient proof of prior

adoption and established reputation. The mark 'KAMAX' was proposed to be used and hence it was for the applicant (respondent in this case) to prove that there was no deception or confusion. [*Mex Switch Gears v. Kamax-Werke Rudolf*, IPAB order dated 26-8-2013]

Novel claim without technical contribution – patentability not satisfied

The High Court of Justice, England has declined to interfere in the case pertaining to denial of patent to a claim envisaging two computers connected via the internet where the software moves data from one computer to another using a conventional email technique. It was contended that the invention is a better way of retrieving data from a remote station by using e-mail to transmit retrieval criteria and to receive back the corresponding data and that remote control and transmission is achieved in a manner which does not require a continuous connection between two computers. The court however concluded that the claim was excluded as a program for computer as per provisions contained in Section 1 (2) of the Patents Act 1977 as there was no technical effect outside of the two computers and the computer or the connecting network were not operating in a new way. The contention that one computer was exercising control over another was rejected by the court noting that sending an email message to another computer is not control at all.

The plea that the invention solved the problem of non-availability of continuous internet was also rejected by the court holding that if the process

did not solve the technical problem but only circumvented it, then that the same cannot be said to have taken any technical character from the problem. It further held that the fact that the claim was novel and inventive was not the

determinant of whether it satisfied the requirements for patentability in the Act and the EPC. [*Lantana Ltd. v. Comptroller-General of patents, designs and trademarks* - Case No: CH/2013/0131, decided on 4-9-2013]

News Nuggets

UK seeks comments on regulations for licensing societies

The UK government has released the draft The Copyright (Regulation of relevant licensing bodies) Regulations 2014, as part of the reforms to IP framework in the UK. Imposing proper code of practice and moving away from self regulation were also among the recommendations of the Hargreaves Committee. The UK government has sought comments on the draft regulations. Some of the points discussed in the draft/consultation paper are exemptions to micro

business from the regulation, Secretary of State's powers to impose information requirements on a relevant licensing body, penalties, procedure for appeals etc.

Ratlami Sev seeks GI tag

Seeking perhaps, to prove that the *Ratlami Sev* is not a mere admixture of gramflour and spices, efforts are on to secure GI registration for the savoury. It remains to be seen whether it will wait long like the Hyderabad Biryani or join the ranks of Nagpur Orange and Tirupati Laddu.

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