

"I'm tired of hearing about money, money, money, money, money. I just want to play the game, drink Pepsi, and wear Reebok." – Shaquille O'Neil

## INTRODUCTION

"Globally, sport is a unique and powerful cultural phenomenon which both unites and divides communities as well as engendering an increasing element of entertainment value."<sup>1</sup> Over three percent of the world's trade and 2 percent of Europe's gross national product comes from business associated with sports.<sup>2</sup>

With over 3.5 billion followers Football is the most popular sport in the world. It has a broadcast in 212 territories and reaches 643 million homes. The Premier League is the most watched League in the world. The FA Premier League was established in 1992 after the clubs in the Football League first division decided to break away from The Football League and take advantage of the television rights deal with BSkyB that will be worth £3 million in the year 2013-14.<sup>3</sup>

The growing commercialization of sports led to focus on the issue of intellectual property rights of athletes. From team logos to individual dance moves being performed by an athlete during the course of a game – everything came to be protected by different forms of IP rights. As the celebrity-obsessed culture grew in society, so did the development of the area of law, known as Image rights - often known as the right of publicity, and it is likely that we will see further legislative development in this area of law as more and more high earning athletes and film stars choose to prevent the use of their image without licensing.<sup>4</sup>

Image rights refer to an individual's proprietary right to control the commercial or unauthorized use of his or her name, image, likeness or style associated with his or her identity.<sup>5</sup> An athlete apart from making money from professional sport generates a huge amount of income by making and marketing his/her own brand and entering into sponsorship deals with brand owners. As Peter York aptly said "It is the brand that people buy and not the product"<sup>6</sup> and therefore sportspersons are now sometimes treated as commodities. Athletes can register not just their names, but also other things associated with their personality like their signature, as in the case of Michael Schumacher or a pose, e.g., Michael Jordan's "Jumpman".<sup>7</sup>

This paper in the first part talks about the laws supporting image rights in the United Kingdom (even though there exists no codified law) and how they differ from the rest of the world specifically other European Nations. It discusses the two landmark cases where image rights were for the first time brought into the forefront in the UK. In the second part the paper goes into detail about the ways in which image rights were exploited both by players and

---

<sup>1</sup> Etal, 2007

<sup>2</sup> Protecting Sports Image Rights in Europe – Ian Blackshaw

<sup>3</sup> "Premier League." *Wikipedia*. Wikimedia Foundation, 04 Oct. 2013. Web. 11 Apr. 2013.

<sup>4</sup> [http://www.lawdit.co.uk/reading\\_room/room/view\\_article.asp?name=../articles/11-may\(1\)personalityrights.htm](http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/11-may(1)personalityrights.htm)

<sup>5</sup> <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights>

<sup>6</sup> The Times, 10 February, 2001

<sup>7</sup> WIPO

clubs to make money. The game of football seemed to have become a secondary form of earning a living and concentration was laid upon other means i.e. Image rights exploitation. Thereafter, the paper engages in an in-depth study of the club Real Madrid, which, even though not British, was responsible for introducing image rights to the world of football and also an inquiry into how it capitalized on the same by selling merchandise. The paper also engages in a case-study on the famous British Footballer, David Beckham, who “commoditized” the sport completely. In the third part, the paper discusses the Financial Fair Play Rules, creating a system brought into the sport to increase the sustainability of the sport. Looking at the huge sums of money being invested by the clubs and the excessive spending leading to most clubs incurring heavy losses led to the drafting of the FFP. However, even though the FFP put a cap on player salary as one of the ways to reduce losses, they leave the matter of Image Rights as a grey area with no clarification. The FFP also does not take into consideration any taxation issues, which are of great importance. As image rights contracts, hitherto exempted from taxation, became the order of the day, Her Majesty’s Revenue and Customs department began looking into the issue of taxation of the surplus money being made out of sources other than football. This important issue occupies most of the fourth part of the paper, which part also contains a discussion on the landmark case, of Sports Club, with regard to the issue of image right payments. In conclusion, the paper suggests certain options, which could be adopted in the United Kingdom to tackle the various issues relating to image rights.

## **LAWS SUPPORTING IMAGE RIGHTS IN UNITED KINGDOM**

With growing eyeballs, the premier league footballer’s image has an instant recognition in the United Kingdom and other territories worldwide where Premier league is broadcast. Sports being sports, the footballers have an ardent fan following, thus a value is created in their image. This intangible value is based on the perception that endorsement from the players enhances brand recognition and acceptability of the product or services amongst the viewers. Being an intangible asset, incapable of physical protection, the term ‘image rights’ has been coined.

Image rights, known as the right of publicity in the United States, are governed by State law as opposed to Federal Law, and therefore the law may differ from one state to another. The Canadian system of law recognition of the right to publicity is restricted. As far as Continental Europe is concerned most countries recognize personality rights. France was one of the first countries to emerge with the concept of image rights when a suit regarding a portrait painted by an artist named Whistler came about.<sup>8</sup> The French protect personality rights are under Article 9 of the French Civil Code, in Germany under the German Civil Code, in Spain Image rights draw protection under the Data Protection Act. Australia, however, follows a similar position as UK (explained in detail below), where there is no specific right to publicity recognized under statute.<sup>9</sup>

UK being a fairly sports crazy nation with cricket being the national sport and soccer clubs in several counties, there were several factors that gave rise to the emergence of image rights which is a fairly recent phenomena in the world of sport. The factors that led up to such rights coming to the forefront were as follows:

---

<sup>8</sup> Exploitation of Image Rights in the UK by Michael Tugendhat

<sup>9</sup> [http://en.wikipedia.org/wiki/Personality\\_rights](http://en.wikipedia.org/wiki/Personality_rights)

- The growing awareness of legal rights. Image rights are supported by several laws under the common law system such as act of passing off, trademarks and other quasi-legal rights including advertising regulatory codes and domain name dispute resolution procedures.
- The awareness about the commercial value that a sports person's image holds and the growing avenues to exploit it.
- The famous taxation case Sports Club vs. HM Inspector of Revenues wherein the existing tax loophole in the UK system was brought into limelight.
- The overseas influence in respect of the protection of image rights was much stronger in other European countries as compared to the UK. Therefore when overseas players came to the United Kingdom to play, they expected if not exactly the same but similar legal protect in terms of image rights.<sup>10</sup>

The above factors led to image rights being recognized in UK even though not under any codified law, however, they came to be protected under several different rights as follows:

- **"Law of privacy** - Article 8 of the European Convention of Human Rights provides that everyone has the right to respect for his or her private life. Article 10 provides that everyone has the right to freedom of expression, subject to restrictions that are prescribed by law and are necessary in a democratic society, for the protection of the reputation or rights of others (among other purposes). The United Kingdom has no law of privacy as such although in an effort to give effect to the rights under the convention, UK courts are gradually evolving laws to protect privacy by way of the tort of breach of confidence.
- **Breach of confidence** - The tort of breach of confidence protects information, which is confidential in nature and is disclosed with an obligation of confidence.
- **Data Protection Act** - The Data Protection Act 1998 imposes broad obligations on holders of personal data and can be used to prevent publication of images which constitute personal data, such as photographs or film.
- **Advertising standards codes** - Advertising codes, such as those for non-broadcast and television advertising, include specific provisions regarding the use of individuals' images and can be used to protect the use of a person's image or to prevent association with a person without his or her permission.
- **Trademark rights** - Names or images can be registered as trademarks and thereby acquire the protection afforded to such a right. For example, golfer Tiger Woods registered his name as a Community trademark in respect of goods including sportswear and golf balls, golf clubs, golf gloves, golf tees and golf club protectors.
- **Tort of passing off** - The tort of passing off protects the commercial value of an individual's reputation. Edmund Irvine v Talksport Ltd established passing off as a means of relief where a name, image or likeness has been used to suggest an endorsement without permission."<sup>11</sup>

<sup>10</sup> Image Rights in Europe by Ian Blackshaw pp. 316

<sup>11</sup><http://www.internationallawoffice.com/newsletters/Detail.aspx?r=22234&redir=1>

Even though the British courts have been reluctant to recognize image rights and there exists no codified law, in the year 2000 image rights were recognized in court for the first time in the Sports Club case which I shall discuss at length later in the paper. However, there are a few other cases landmark cases in English law, which led to the evolution of image rights in UK.

At first “a personality could only take legal action if the reproduction or use of (his/her) likeness results in the infringement of some recognized right which he/she does own.”<sup>12</sup> Michael Douglas and Catherine Zeta Jones sued Hello! Magazine for publishing their wedding pictures in the magazine, without their consent, under the law of breach of confidence, invasion of privacy, breach of Data Protection Act 1998 and intention to damage and conspiracy to injure.<sup>13</sup> The couple had entered into an exclusive contract with OK! Magazine to print their wedding photographs, however, Rubert Thorpe, who was a freelance photographer, attended the wedding and took photographs of the couple, who later sold them to Hello! Magazine. The Douglas were successful in establishing Breach of Confidence claims. Even though the damages awarded in this case were bare minimum, the courts however, recognized the celebrities’ image rights.

The concept further evolved under the act of passing off. In the case of **Irvine v. Talksport Ltd.**<sup>14</sup>, Eddie Irvine, a well-known Formula One racing driver sued Talksport Radio for “false endorsement” (using his image in an advertisement without obtaining his permission). Talksport Radio in their advert doctored an image of Irvine holding a phone and instead edited it to Irvine holding Talksport Radio for a campaign. This was done to promote Talksport by using Irvine’s popularity, which was a clear case of deceiving viewers, and Irvine succeeded. It was held that such fabrication constituted a case of passing off. The Judge, Laddie J. held that “there is nothing which prevents an action for passing off succeeding in a false endorsement case.”<sup>15</sup> Even though the award of damages was a mere sum of £2,000 initially which was later on appeal turned into an amount of £25,000 against Irvine’s claim of £50,000, this case is important in terms of the recognition of image rights. This case therefore laid the foundation for the sports stars having a commercial right in the use of their image. This landmark judgment caused awakening amongst the sports law community and they encouraged protection of image rights.<sup>16</sup>

In the year 2003, further significant developments took place when Naomi Campbell was awarded an ordinary amount of £3,500 for a publication of her photograph in a story about her drug therapy. Campbell sued under breach of confidentiality and section 6 of Human Rights.<sup>17</sup> The courts in order to grant a judgment in line with the European Convention on Human Rights had to first recognize the right to private life (which is the other side of image rights i.e. right of publicity) and therefore declare that there had been a breach of privacy.

The recognition of image rights was further confirmed in the sports industry when Ian Botham, a famous English cricketer and commentator, threatened to sue Guinness beer

---

<sup>12</sup> Sports Image Rights and Endorsement Agreements by Ian Blackshaw

<sup>13</sup> Douglas v. Hello! [2001] QB 967

<sup>14</sup> Neutral citation number [2002] EWHC 539 (Ch) in the Supreme Court of Judicature Chancery Division

<sup>15</sup> Irvine v. Talksport Ltd. – Court of Appeals <http://www.ipso.gov.uk/ipcass/ipcass-legislation/ipcass-legislation-civilprules-1998/ipcass-irvine.htm>

<sup>16</sup> Global Sports Law and Taxation Reports Vol. 2 No. 4 December 2011

<sup>17</sup> Campbell v. Mirror Group Limited [2004] UKHL 22



for unauthorized use of his image. Guinness eventually shut down the advertisement campaign and went in for an out of court settlement. This was proof that the above listed cases had a serious impact on image rights of sports persons in UK.<sup>18</sup>

As we can see from the above, image rights were recognized under various different laws. What is more interesting to note is that both sides of image rights of an individual were recognized in the form of right of privacy, which is an individual's right to protect his personality (which starts to exist at birth – certifying the fact that individuals have a personality which they have a right to protect). When personality of an individual is established, he may choose to monetize it if the right of publicity is created. By examining cases of famous personalities it was clear that they had a right of publicity. Once Image Rights were brought into the limelight, they began to be exploited both by clubs and players. Football was no longer a sport based on talent; it had begun to get commercialized like any other money-making business.

### **EXPLOITATION OF IMAGE RIGHTS BY CLUBS AND PLAYERS**

Brands have the power to influence customers and players take advantage of this fact. There are several ways in which a player can commercially exploit his image through different kinds of agreements namely endorsement, licensing, sponsorship and merchandising. While it is the fame of a sports personality, which is exploited to sell products in the case of a licensing or merchandising agreement, e.g., Roger Federer and Rolex; in case of sponsorship it is the “sports product or event” that acts as a trademark's advertising media and finally in the case of merchandising it is the well-known trademark image which helps in advertising or adding value to the product. “Character merchandising”, a combination of image licensing and merchandising has in recent years enjoyed enormous growth. Examples of Character Merchandising include the Ferrari range of products or Gadgets designed specially for an event like the Football World Cup or Wimbledon. Players, even though free to use their image for commercial purposes often run into conflict with the teams (sports associations) to which they belong. Such a conflict generally occurs in circumstances when an advertisement may require use of the trademark of the association.<sup>19</sup> To avoid such a conflict players often enter into a contractual agreement with their respective sports association.

It is in the year 2000 that the concept of Image Rights first entered the world of Football. Real Madrid bought a mid-fielder named Luis Figo and his Image Rights formed a crucial part of the deal. According to the contract Real retained Figo's image rights and therefore became a shareholder in the profit from personal endorsements and had the permission to exploit his name and image on their merchandise. “If footballers were ever perceived as commodities this was surely it.” Real got into many such deals with other big names in the industry of European Football namely Zidane, Ronaldo and Beckham which led to Real having the biggest fan base in the world in the year 2004 and also the boosted the sales of the merchandize which eventually led to a huge turnover. “The key to this success is the combination of the Spanish club's historic brand as supreme European champions with the global appeal of its many international stars.”<sup>20</sup>

---

<sup>18</sup> Footballers Image Rights In The New Media Age – Richard Haynes (Published: European Sports Management Quarterly, Vol. 7 (4) pp. 361 – 374

<sup>19</sup> [http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms\\_sports\\_id59\\_1\\_ISLJ\\_2004-1-2Def.5.pdf](http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms_sports_id59_1_ISLJ_2004-1-2Def.5.pdf)

<sup>20</sup> Footballers Image Rights In The New Media Age – Richard Haynes (Published: European Sports Management Quarterly, Vol. 7 (4) pp. 361 – 374

Several other clubs followed the trend set by Real. There seemed one common agenda behind all the deals from the players' point of view – which was to save on income tax by making money on the side i.e. apart from just playing football. Players domiciled outside of UK were able to take advantage of the tax loopholes that existed and even though the players were taken to court after investigation by the revenue department, the court ruled in their favor. There seemed to exist two kinds of loopholes – one for those domiciled outside of UK, the other where companies would be set up offshore. Footballers hired several specialists in the form of agents, lawyers, and chartered accountants to manage their affairs and to be able to exploit these ambiguities to the utmost. Looking at this practice, The Footballers association in 2003 made an amendment in their standard form agreement for players with Premier league clubs and included image rights regulations.<sup>21</sup>

As clubs make huge amount of profit from image rights of players, it is a justified reason for them to be investing huge amounts in buying players. With the spread of technology and multiple devices being available for screening and viewing, there are far more opportunities to explore a player's image rights in today's day and age. While clubs exploit image rights to the fullest, players too are aware of and capitalize on any opportunity to maximize profits. A classic example of such exploitation by a player is David Beckham.

Coming from a country where cricket is religion and players are worshipped courtesy all the media hype that surrounds them, the case is no different when it comes to European football. Media gives sports persons their celebrity status not just by publicizing their on-field performance, but also by seeking to try upon and publicize/sensationalize their private lives and creating a buzz around it which impacts Image Rights to a large extent. A case in point is that of David Beckham. He began being idolized by his fans and every product that he became affiliated with or his name was put on – people began to hold onto them. This is the main reason why Real Madrid engaged Beckham so that they could acquire his image rights and earn profits through the Beckham branded merchandize. Real Madrid had already earned huge amounts of profits by selling Ronaldo merchandize and they now wished to capitalize on the market by attracting the half billion fans news reports claimed that Beckham had. Beckham was paid a salary of £4.6m by Real which included a 50% image rights clause i.e. Real got half of any new deals that Beckham signed as a player belonging to Real.<sup>22</sup>

The media began to put spotlight on Beckham's activities in the year 1997 when he went public about his relation with Victoria Adams (now Victoria Beckham), part of the music group, Spice Girls, who had prior experience at commercialization of a celebrity and thus played a huge role in developing the "Beckham Brand". It was this commercialization that Beckham's agents capitalized upon and highly beneficial deals for endorsements were signed with big brands like Pepsi and Vodafone. In the year 2004, David Beckham the footballer turned into a household brand when Adidas, one of his main sponsors, created an exclusive logo for the Beckham branded merchandize. The logo, which portrayed his style of scoring from free kicks was inspired by Michael Jordan's Nike logo. Adidas reported a rise of 350% in the sale of customized Beckham jerseys. While Real's economic gains basked in the glory of Beckham's image, Beckham made huge amounts of personal profit courtesy the

---

<sup>21</sup> Footballers Image Rights In The New Media Age – Richard Haynes (Published: European Sports Management Quarterly, Vol. 7 (4) pp. 361 – 374)

<sup>22</sup> Beckham by Ellis Cashmore, 2002

Spanish tax laws as it excluded migrant workers from its highest tax slab of 45% and served to be a windfall for foreign footballers.<sup>23</sup>

In the year 2003, Beckham setup a company with the name “Footwork Productions” to manage his business affairs (money made from avenues other than football) for earnings made in Madrid. The company had a turnover of £8.7m with Beckham making a personal profit of £6.7m.<sup>24</sup> Beckham’s wealth grew by leaps and bounds in a short span and he became the richest British footballer with assessed earnings close to £87m. This was a lead by a huge margin as compared to the second richest Footballer, Michael Owen, whose personal wealth was estimated at £32m. The interesting fact about Beckham’s earnings in the year 2006 was that while he made on £4m (approx.) from playing football for Real Madrid, the rest £19m was made out of commercial endorsements.<sup>25</sup>

Towards the end of the year, Beckham had a fall out with Real Madrid over his image rights. The President of Real Madrid at that point, Florentino Perez, had assured Beckham of absolute ownership of any income that he earned from resources not related to football, however, this did not go down well with the new President as it would have barred Madrid and this stale mate between the two resulted in Beckham moving to a US Soccer League franchise LA Galaxy. The Beckham and LA Galaxy deal was estimated to be worth \$250 million over a period of 5 years even though the guaranteed income was only \$6.5m per year.<sup>26</sup> This move on Beckham’s part was based entirely on commercial interests. However, some scholars are of the belief that Beckham made the move to the United States simply because the legislature provides protection to his image rights under the Right of Publicity.<sup>27</sup>

As we can see from the above example, David Beckham is a clear case of a footballer, who by commercializing his name and image, earned much more off the field than through his performance on the field i.e. “his face is worth more than his feet – not only to himself but also to his club.”<sup>28</sup>

Chris Bitcher, editor of Sports Business International website,<sup>29</sup> in his article ‘The Beckham Brand’ clearly states the reasons behind Beckham’s success. It is not that Beckham was, at that time, the best player., He was “a product of a world class business plan” which is clearly visible through all the capitalization done by his agents. Beckham won the three major titles while leading Manchester United i.e. the Premier League, the Champions League and the FA Cup but just when he began to reach a saturation point in England and his agents suspected that people may get bored of him, he switched to Real and so on and so forth.<sup>30</sup>

Beckham’s case had a two-fold effect on Premier League football – “(i) it changed the economic position of star players at Premier League clubs (ii) Set a benchmark for future contracts by fellow professionals.”<sup>31</sup>

---

<sup>23</sup> Footballers Image Rights In The New Media Age – Richard Haynes (Published: European Sports Management Quarterly, Vol. 7 (4) pp. 361 – 374

<sup>24</sup> Walsh, Campbell & Barnett, 2004

<sup>25</sup> BBC Sport, 2007

<sup>26</sup> L’Hote, 2007

<sup>27</sup> Footballers Image Rights In The New Media Age – Richard Haynes (Published: European Sports Management Quarterly, Vol. 7 (4) pp. 361 – 374

<sup>28</sup> Image Rights in the Europe by Ian Blackshaw pp. 3

<sup>29</sup> [www.sportsbusiness.com](http://www.sportsbusiness.com)

<sup>30</sup> The Beckham Brand, Chris Bitcher

<sup>31</sup> Football in the New Media Age – Raymond Boyle, Richard Hynes pp. - 73

From the above explanation and example it is clear, to what extent image rights play a role, both for clubs and players in terms of earning profits. Clubs entered into image rights contracts, which allowed them to exploit the player's image and generate huge amounts of revenue, primarily through merchandising and other promotions.<sup>32</sup> The detailed image rights clause in a player contract is discussed at length in the next section of the paper under the head of Financial Fair Play Rules. Another thing the above study makes evident is the amount of money being invested in the sport of football, especially, premier league. The clubs had begun spending a lot more than they were earning in pursuit of their success which threatened the sustainability of the premier league, rather football as a sport on the whole and therefore the UEFA brought in a system called the 'Financial Fair Play' rules to prevent the clubs from spending more than they earn and in the process cut down their losses and increase sustainability.

## **FINANCIAL FAIR PLAY RULES**

As seen above through several examples, looking at the growing commoditization of sport especially football in Europe, the UEFA notified the Financial Fair Play Regulations to regulate the economic malpractices being followed by the clubs. Several clubs having spent high amounts on buying players and paying higher salaries to them to retain them (usually costing more than the revenue generated) seemed to have reported losses in the year 2009. A detailed study of the losses made by 20 clubs under the Premier League was done by Deloitte and published in The Guardian stating, "20 Premier League teams owe £3.1 billion between them".<sup>33</sup> It is then that the UEFA decided to step in, concerned about the deteriorating environment of European Football and the future of the sport, and introduced the Financial Fair Play Regulations (FFP). The purpose of the introduction of FFP was to create a level playing field in the near future of the game by preventing wealthy owners who had more spending power in the form of gifts and donations from gaining an unfair advantage over those clubs who did not possess as much wealth.<sup>34</sup>

THE UEFA President while announcing the FFP legislation stated, "Fifty per cent of clubs are losing money and this is an increasing trend. We needed to stop this downward spiral. They have spent more than they have earned in the past and haven't paid their debts. We don't want to kill or hurt the clubs; on the contrary, we want to help them in the market. The teams who play in our tournaments have unanimously agreed to our principles...living within your means is the basis of accounting but it hasn't been the basis of football for years now. The owners are asking for rules because they can't implement them themselves - many of them have had it with shoveling money into clubs and the more money you put into clubs, the harder it is to sell at a profit"<sup>35</sup>; which made clear the objectives and purpose of the FFP. The FFP Regulations were backed by most clubs and the year 2011-2012 is the first year that its application was seen in European Football however the full rules would only begin applying from the year 2015, giving clubs sufficient time to accommodate to the new regulations.

The FFP Rules for now are applicable only to the Champions League and the Europa League. A call has been recently taken by the Premier League to incorporate an enhanced

---

<sup>32</sup> United Kingdom : Image Rights by Stephen Woodhouse and Debby Masterton

<sup>33</sup> <http://www.guardian.co.uk/football/2009/jun/03/english-premier-league-debt>

<sup>34</sup> [http://en.wikipedia.org/wiki/UEFA\\_Financial\\_Fair\\_Play\\_Regulations](http://en.wikipedia.org/wiki/UEFA_Financial_Fair_Play_Regulations)

<sup>35</sup> BBC News Website September 15, 2009



version of the FFP system<sup>36</sup>, however, they are yet to be put into action. The basic concept of FFP is to curtail losses and allow the clubs to break even, hence protect clubs from winding up as in the recent years several winding up petitions have been issued by the HMRC for failure of paying of taxes. The FFP minimizes the losses that can be incurred during each financial year and clubs exceeding that amount may face heavy penalty to the extent of exclusion from the league.<sup>37</sup> As expenditure is cut down through FFP, it automatically puts a cap on player salaries. However, what the FFP does not mention specifically is whether the cap on salary includes money generated from or payable for exploitation of image rights.

A standard contract between a club belonging to the Premier League and a player in present times contains a clause on “community public relations and marketing” which describes the services related to promotional / commercial activities of a player<sup>38</sup>. Rijkele Betten has summarized the clause relating to the same in Ian Blackshaw’s book on Image Rights as follows:

“The New FAPL Contract requires a much higher degree of cooperation from the players in terms of the club’s promotional activities than the Old. The following is a summary of the key sub-clauses of clause 4:

- **Participation in events:** The player must attend and participate in events (including photo-shoots) as reasonably required by the clubs, although the club may not use photos taken to imply any endorsements by the player.
- **Apparel:** While performing his services under the contract (i.e., essentially playing services), the player must wear only clothing authorized by the club and must not display any branding other than that authorized by the club. However, these requirements do not affect the player’s right to wear boots or goalkeeping gloves of his choice.
- **Prohibition on endorsing conflicting brands:** The player must not endorse or otherwise promote or exploit his image in relation to any brand which conflicts with any of his club’s branded products, or the products, brands or services of any of the club’s two main sponsors or the League’s principal sponsor.
- **Player’s Image in Club Context:** The player cannot exploit his image in a Club context.
- **Photography for promotional purposes:** The player must allow himself to be photographed for the purpose of the promotion of the club’s branded products or services, including those, which are endorsed by or produced under license from the club, or the promotion of the League’s licensed products, services or sponsors.

From the club’s perspective, the purpose of these terms is essentially twofold. First, they assist the club in maximizing the promotional value of its squad, by ensuring that the club is free to take and use photographs and insist on the players’ participation at promotional events. Secondly, they enshrine the club’s exclusive right to use the players’ images for promotional purposes in respect of certain product or service categories in which the club is involved.”<sup>39</sup>

<sup>36</sup> <http://www.premierleague.com/en-gb/news/news/2012-13/feb/premier-league-new-financial-rules-explained.html>

<sup>37</sup> [http://en.wikipedia.org/wiki/UEFA\\_Financial\\_Fair\\_Play\\_Regulations](http://en.wikipedia.org/wiki/UEFA_Financial_Fair_Play_Regulations)

<sup>38</sup> Image Rights Contracts – Good Planning or Foul Play by Julian Hedley and Pete Hackleton, RSM Tenon

<sup>39</sup> Image Rights in Europe by Ian Blackshaw pp. 339 - 340

As though such a clause in the contract was not enough, the last sub-cause of this section reads

“4.11 Nothing in this clause 4 shall prevent the Club from entering into other arrangements additional or supplemental hereto or in variance hereof in relation to advertising marketing and/or promotional services with the Player or with or for all or some of the Club’s players (including the Player) from time to time. Any other such arrangements which have been agreed as at the date of the signing of this contract and any image contract or similar contract required to be set out in this contract by the League Rules are set out in Schedule 2 paragraph 13.” which gives a separate image rights contract an over-riding effect. This sub-clause clearly defines the significance of the image rights contract in a contract between a club and the league, which has not particularly been addressed under the FFP.

The FFP’s failure to address image rights specifically, almost nullifies the entire purpose of introducing the FFP as the players will forever continue to take advantage of their image and put pressure on clubs for higher remunerations under the image right contracts – which do not fall under the purview of FFP and are therefore unaccountable expenditure. The players can continue to get paid huge amounts even in places where there exist wage-capping agreements, as that is restricted to the player salary.

Another area that the FFP fail to take into consideration is the prevalent difference of tax rates in different countries through Europe. Which goes to say that even though UEFA is trying to cut costs and put a cap on salaries, some players due to high tax rates would need to be paid a higher gross salary, so that the net income they take home is equivalent to or higher than a club he previously belonged to in another country. This can affect the transfer of players to a great extent, which is exemplified by the Beckham example.<sup>40</sup>

We can see that the fiscal aspect affects almost every area of the sport. The FFP is a fairly recent phenomenon compared to image rights contracts that have become industry practice since the late 1990’s. What is most important to note about these image rights contracts is the fact that they do not fall under the regular tax regime, as it is not income drawn out of employment under a club. Players usually formed separate image rights companies to which they granted all rights relating to their persona and clubs entered into contracts with such companies, which assisted both parties in making huge tax savings.<sup>41</sup> This exploitation of image rights and the enormous profits being made by both clubs and players brought to the forefront taxation issues. While the tax rates in United Kingdom increased to almost 40 – 50% the government revenue did not increase as players started looking for ways and means to avoid high rate of tax and began to take advantage of a tax loophole. As the value of players’ image rights increased and football began to get commercialized, it drew on itself the attention of the HM Revenue & Customs department in UK.

The above two paragraphs establish a connection between image right contracts and the taxation issues involved and therefore is discussed at length in the next part of the paper.

---

<sup>40</sup> [http://en.wikipedia.org/wiki/UEFA\\_Financial\\_Fair\\_Play\\_Regulations](http://en.wikipedia.org/wiki/UEFA_Financial_Fair_Play_Regulations)

<sup>41</sup> The taxation of image rights : A comparative analysis by Rian Cloete

## IMAGE RIGHTS AND FISCAL ASPECTS

“As with any kind of business, the commercialization of sports image rights also has a fiscal dimension that needs to be considered.”<sup>42</sup> As the revenue earned by Premier League went up, methods of saving tax and national insurance contributions were devised and one such method was Image Rights Contracts.<sup>43</sup>

We see from the above that players get into two separate contracts with the hiring club: one for playing as a part of the team for the club and the other for the exploitation of his image and promotional activities as seen through clause 4 of the contract mentioned above. This is a result of nothing but a tax mitigation scheme, which the players sought due to the high taxation rates in UK.<sup>44</sup> Seeking tax advice from attorneys became a necessity for sports persons, however, it is something that entirely depends on a case-to-case basis wherein a cost-benefit analysis needs to be made, and therefore no two sportspersons would be placed in the same spot. While tax evasion is illegal in any part of the world, tax mitigation i.e. organizing one's business in the best possible way in terms of tax is legal.<sup>45</sup>

In the first contract, which is for playing activities only, the player is subject to PAYE (Pay As You Earn) income tax deductions and NIC (National Insurance Contribution) payments.<sup>46</sup>

As for the second contract, which is the contract for image rights and promotional activities, the player transfers his image rights to a company of which he owns most shares if not all. A contract with such a company is made usually before entering into a contract with the club. The club then contracts with such company for the exploitation of the rights assigned to it by the player. The club then has control over the player's image rights. “The payment is therefore not connected to the employment of the player as it is between two companies.”<sup>47</sup> The club in this case saves on the NIC payments and is taxed under the corporation tax, as it is a contract between two companies, which is much lower. These expenses are usually known as trading expense or a royalty payment. Likewise, for the player there is no PAYE tax deduction for such a contract and if the player is domiciled outside of UK then even other forms of tax are reduced to a great extent.<sup>48</sup>

Tax rates in the UK go up to 40-50% for high earning sports stars and therefore players finally resorted to taking advantage of the tax loophole. As we see above, that there exist no one single image right in the UK, players transfer all rights in relation to the exploitation of their image to a company (generally owned by the player himself) which is often set-up offshore. A license fees is then paid by the club to such company to exploit the image rights of the player.

There are two forms of tax benefits achieved by using this form of payment of remuneration. Firstly, the payments made to players in this fashion are not subject to the high tax rate of 50% income tax or National Insurance. A payment made to an offshore company is

<sup>42</sup> Sports Marketing Agreements: Legal, Fiscal and Practical Aspects by Ian Blackshaw pp. 266

<sup>43</sup> United Kingdom: Image Rights by Stephen Woodhouse and Debby Masterton

<sup>44</sup> The taxation of image rights : A comparative analysis by Rian Cloete

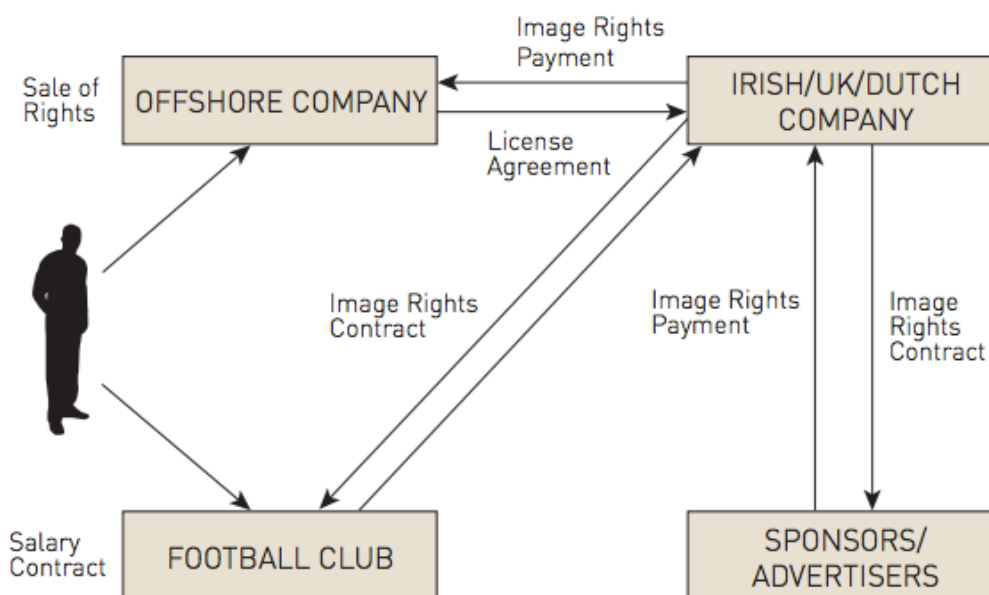
<sup>45</sup> Sports Marketing Agreements: Legal, Fiscal and Practical Aspects by Ian Blackshaw pp. 379

<sup>46</sup> <http://www.hmrc.gov.uk>

<sup>47</sup> United Kingdom: Image Rights by Stephen Woodhouse and Debby Masterton

<sup>48</sup> [http://www.kpmg.co.uk/KPMG/pubs/imagerights\\_colour.pdf](http://www.kpmg.co.uk/KPMG/pubs/imagerights_colour.pdf)

usually subject to a corporation tax of 28%, which in itself is a huge saving for a player who is a high earner and pays 50% tax. Players further reduce their tax liability by loaning themselves money from their offshore companies. This is a fairly recent practice as the law was amended in the year 2007 which enabled companies to loan enormous amounts of money to their directors. Such loans have only 2% of tax liability on them as they are classified as a benefit in kind instead of direct income. The introduction of the 50p top-rate tax has further incentivized the players to avoid income tax. Secondly, the club also benefits by such a contract as it saves them from paying national insurance.<sup>49</sup> This arrangement can easily be understood from the diagram below:



50

This arrangement of image rights contract brought it under the scrutiny of the Her Majesty Revenue & Customs and it was first brought into the limelight by the HMRC in the year 2000 when it filed a case against the image rights arrangements entered into by a UK football club, Arsenal, and two of its payers Evelyn (Dennis Bergkamp) and Jocelyn (David Platt). HMRC was under the belief that the image rights agreements entered into with the players were nothing but a tax cover i.e. an arrangement that would enable the club to pay its players a higher salary and allow tax savings at the same time.<sup>51</sup>

#### **Sports Club, Evelyn and Jocelyn V. HM Inspector of Taxes:**

Apart from the importance of this case with regard to fiscal issues, this case is also important in the UK from a jurisprudence point of view, as even though image rights are not recognized in the country as a separate property, however, in this case they were taken to be capital assets of a player.<sup>52</sup>

The special Commissioner appointed in this case was to investigate whether the payments made by Arsenal to the two footballers were payments made "for valuable

<sup>49</sup> <http://www.telegraph.co.uk/sport/football/competitions/premier-league/8265218/Premier-League-and-HMRC-in-talks-over-payments-for-players-image-rights.html>

<sup>50</sup> [http://www.vistra.com/userfiles/files/sheets/sports\\_persons\\_and\\_entertainers.pdf](http://www.vistra.com/userfiles/files/sheets/sports_persons_and_entertainers.pdf)

<sup>51</sup> United Kingdom: Image Rights by Stephen Woodhouse and Debby Masterton

<sup>52</sup> Sports Marketing Agreements: Legal, Fiscal and Practical Aspects by Ian Blackshaw pp. 381



consideration or whether they were simply tax dodge”<sup>53</sup> According to HMRC this was a gimmick created by Arsenal simply to be able to pay players a higher salary.

The facts of the case were as follows:

Evelyn and Jocelyn entered into service agreements with the Football Club and in return of the services provided they would be paid salaries. The players also entered into image rights agreements with their own companies and assigned all image rights to their respective companies. The football club Arsenal entered into agreements with both companies and hired the services being provided by the players through their company i.e. Image Rights (known as promotional activities). At the same time Arsenal also entered into an agreement with Evelyn’s company for consultancy services in lieu of a separate remuneration being paid to the company.

The issues in the case were whether such promotional agreements and consultancy agreements fell under the category of remuneration in lieu of employment and therefore were taxable income.

“The questions that were considered while determining the proportionality of image rights payments were:

- What is the value of the player's image and is the sum paid for the image rights a true and accurate reflection of their worth?
- Is the percentage attributable to image rights proportionate considering the player's on field value?
- Does the club intend to exploit the player's image?
- Would other factors, such as a salary cap, prevent the club from paying a higher salary?”<sup>54</sup>
- 

From the facts of the case it was clear that both players were world-class players of international standing and their image had worldwide value, which the football club intended to exploit. The football club had not entered into any such agreements for promotional or consultancy services with any other players on the team. And therefore “the special commissioner held that the contracts were genuine commercial arrangements and were not merely an attempt to disguise salary payments as image rights payments”.<sup>55</sup>

“The decision was a watershed one. The recognition of the value of the promotional services of these famous players facilitated the idea that there was something of value over and above the mere performance of those promotional services. After all, it is not disputed that clubs, as a general rule, will pay less for the promotional services of less famous players. This is not because more famous players will render their services more diligently or more often or for longer periods of time than their less famous counterparts. It is simply because a value inheres in the very fame of those players, i.e. in what are generally nowadays referred to as their image rights.”<sup>56</sup>

HMRC’s main concern is not the fact that there exists a second set of contracts known as Image Rights Contracts. It is more about the valuation of such rights. “They wish to see a

---

<sup>53</sup> <http://www.thelawyer.com/image-scrimage/106570.article>

<sup>54</sup> <http://www.internationallawoffice.com/newsletters/Detail.aspx?r=22234&redir=1>

<sup>55</sup> <http://www.internationallawoffice.com/newsletters/Detail.aspx?r=22234&redir=1>

<sup>56</sup> Image Rights in the Europe by Ian Blackshaw pp. 317

link between the income generated through the players' image rights and payments under the IR Contract."<sup>57</sup>

Therefore this case for the first time brought into limelight the fact that there exists a second set of payments in the form of image rights, which led to image right contracts becoming more prevalent in the industry. It also made clear the fact that depending on the profile and popularity of the player, some players may draw a larger remuneration for their image right as compared to those who are not as famous. However such payments must definitely be commercially justifiable and each case must be considered on its own merits. Like we see above in the case of David Beckham, his image rights have more worth than his on field presence as a player.

Even though a new legislation known as the Intermediary Companies (IR 35) was introduced in the year 2000, wherein a worker who provides services through an intermediary is treated as a worker of the client for tax purposes, it was unclear, as in the case of FFP, as to whether it was applicable to image rights contracts. Another system known as the Managed Service Company was established under The Finance Act 2007 which enabled taxation of persons whose services are provided through establish companies, however, again their application to image rights companies is unclear and sportspersons can dodge the system in this case to ensure that their image rights companies do not fall under MSCs.<sup>58</sup>

Ever since the landmark Sports Club case there has been no change in the UK with regard to image rights however, the HMRC continues to investigate and has in the recent years extended its enquiry to cricket and rugby too. A consensus has been arrived at in the rugby league as stated below, however, as HMRC gets deeper into the issue, the clubs need to review their existing arrangement of image right contracts as if found guilty they can be liable to pay huge sums of money.

## CONCLUSION

Image rights have become a distinct part of sport and because of the tax implications and its impact on the regulations sports federations need to address this issue in their regulations. A recent cause of worry for the British has been a refusal by foreign players to participate in sporting events held in the UK, due to its strict tax regime. The matter became worse after the tax rates increased to 50% and post the Agassi v. Robinson (Inspector of Taxes) case in which the court extended the scope of UK income tax to overseas players participating in events held in UK. Such a practice in several cases resulted in an athlete paying more money as tax than the actual prize money they may have earned.<sup>59</sup> One such player who refused to participate in events in UK was Usain Bolt and in light of this action, UK as a nation that thrives on sports decided to ease its laws in certain circumstances since the loss of tax revenue is a small amount compared to the benefits earned from sports.<sup>60</sup> Therefore the United Kingdom has chosen to exempt the following events from its tax rules for foreign players:

- (i) "2011 Champions League final at Wembley
- (ii) 2012 London Olympic and Paralympic Games

<sup>57</sup> United Kingdom: Image Rights by Stephen Woodhouse and Debby Masterton

<sup>58</sup> The taxation of image rights: A comparative analysis by Rian Cloete

<sup>59</sup> The taxation of image rights: A comparative analysis by Rian Cloete

<sup>60</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/9854065/Usain-Bolt-gifted-a-tax-free-trip-to-London-for-2012-Games-anniversary-meeting-at-Olympic-Stadium.html>

- (iii) 2013 Champions League final at Wembley, if either team is foreign
- (iv) 2014 Commonwealth Games in Glasgow<sup>61</sup>

Other cases of UK having realized the importance of Image Rights was in the case of Olympics 2012 prior to which the London Olympic Games and Paralympic Games Act 2006 was passed, which recognized and acknowledged the importance of image rights from a commercial point of view and condemned use of image by unauthorized persons.<sup>62</sup>

However, these are temporary solutions to one of the several problems that affect the Image Rights regime followed in UK and what it needs is a permanent answer. As some nations having been influenced by the UK tax regime are taking after them like Spain having abolished its “Beckham Law” of foreign players being exempt from paying the standard tax rate of 43% and instead paying a mere 24%.<sup>63</sup> Conversely, there are other nations like Guernsey, even though small in size, which realize the importance of image rights and have made great amount of progress with regard to them.

Guernsey has far-reaching laws for the protection and exploitation of Intellectual Property Rights and is all set to be the first nation to offer a tailor-made solution to players for the exploitation of image rights.<sup>64</sup> While athletes and their agents in an attempt to dodge high tax payments in UK use several methods leading to massive confusion and therefore resulting in improper valuation of image rights, the new proposed Image Rights regime in Guernsey would give to athletes the option to have a recognized legal asset in the form of image rights making it much easier to exploit the same. Guernsey’s relaxed tax regime only further incentivizes the athletes to register their Image Rights in the country.<sup>65/66</sup>

Another legislation that supports relaxed tax laws in terms of image rights is Luxembourg which gives to athletes an 80% exemption on the net income earned from specific Intellectual Property Rights.

The first step to resolving tax issues is the UK needs to follow the path initiated by Guernsey and finally pass a legislation recognizing Image rights and clarifying its position on it.

For the FFP to effectively come into force and achieve the purpose for which they have been established, the UEFA needs to clarify the position of Image Rights under the FFP system. UEFA can either follow the pattern recently undertaken by the Rugby Super League wherein the salary cap includes not only just playing agreements but also other agreements. Clause 5.1 of the Salary Cap Regulations of the Super Rugby League states “The “Salary Cap Value” of a Player is the total sum of the Gross payments and other benefits that are paid or payable by a Club or Accrue (or are deemed to Accrue, in accordance with this Clause 5) to the Player in the relevant Salary Cap Year, whether pursuant to a Playing Contract or other arrangement (verbal or otherwise), in consideration for or otherwise on account of the Player’s provision of playing (or related) services to the Club in that Salary Cap Year.

---

<sup>61</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/9854259/How-the-rules-on-tax-work-for-sporting-events-in-the-UK.html>

<sup>62</sup> Comparative Survey on Sports Image Rights: Guernsey Collas Day by Jason Romer and Brandon Doffing

<sup>63</sup> Image Rights and Wrongs by Charles Russell

<sup>64</sup> <http://www.mondaq.com/x/230056/Trademark/Guernsey+Scores+A+Spectacular+Image+Rights+Goal>

<sup>65</sup> Comparative Survey on Sports Image Rights: Guernsey Collas Day by Jason Romer and Brandon Doffing

<sup>66</sup> The Luxembourg IP Regime, a Hole-in-one Shot for the Marketing of Sports Image Rights? By Lars R. Goslings

Comment to Clause 5.1: By way of example only (and without limitation), a Player's grant to his Club of the right to use his name or image or other attributes for commercial and/or promotional purposes is a service 'related' to the playing services he provides to the Club and any payments made by the Club to the Player in consideration of the same must therefore be treated as part of the Salary Cap Value of that Player." Clause 5.2 further defines the general principles stated in the above clause as "Wherever salary or other benefits are expressed as being paid, payable or accruing:

5.2.1 "to a Player", such expression will be deemed to include payments that are paid, payable or Accrue:

- (a) to the Player himself;
- (b) for the benefit of the Player;
- (c) to, or for the benefit of, the spouse, partner, relative or trustee of the Player;
- (d) to, or for the benefit of, any person or business entity associated directly or indirectly with the Player;"<sup>67</sup>

The regulations set by the rugby league clearly eradicate all possibilities that players may use to exploit the tax loophole. Also, the HMRC has reached "a compromise cap of 15% remuneration payable or image right exploitation" with the rugby union.<sup>68</sup> A cap of 15% may not be possible in the case of the Premier League as the sum of money involved is much higher, however, there exists an absolute need to come to a consensus with regard to number or methodology.

Keeping the Sports Club case principles in mind, the HMRC in recent times has begun investigating matters relating to image rights vigorously. The HMRC at this point is trying to investigate into matters of proportionality i.e. whether the remuneration being paid to players in the form of image rights is justified in relation to the value of their image as the common suspicion at this point is that players whose image does not hold much value are being paid high amounts in the form of payments for image rights so as to save on tax. HMRC is looking to reverse the sports club decision by investigating such issues. The clubs being well aware of the risk they run and the payments that could be due in the form of tax, if the decision of Sports Club case is reversed, are therefore being cautious and are now cutting down amounts being paid in the form of image rights.

Looking at the above, the second step needs to be that the UK judicial system and HMRC need to devise a middle path in terms of footballers Image Rights, wherein they reach a consensus with the Premier League. However, if they crack down too much, players would resort to other tax saving techniques as that of registering image rights companies in nations like Guernsey or use bungs like giving higher commission to agents or take payments in kind in the form of a house or other desirables, share in the broadcast revenue as the player's image is used by channels. One such practice (due to the investigations being carried out by the HMRC and both clubs and players fearing huge liabilities) which has already come into existence is the system of Employer-Financed Retirement Benefit Schemes (EFRBS), which is agreement entered into between the players and the club and is not subject to taxation.<sup>69</sup>

---

<sup>67</sup> Super League Salary Cap Regulations – Issue 6 – February 2009

<sup>68</sup> Charles Russell & Co.

<sup>69</sup> Image Rights Contracts – Good Planning or Foul Play by Julian Hedley



The other effect of a very strict regime followed by the HMRC in the future might lead to the clubs being inspired by the music industry and enter into some sort of 360 degree agreements with players, wherein they would have a share in all earnings of a player whether or not to do with football and this may lead to huge conflicts between players and team owners. Clubs have already begun looking for hidden deals with big brands like Nike who sponsor players and help in negotiating transfers by offering benefits on the side. This can be seen in the recent transactions going on between Nike (who is a sponsor for Cristiano Ronaldo) and Manchester United, in an attempt to bring him back from Real Madrid.

One of the regulations that the legislative system of UK can consider establishing is a system where a company cannot own image rights. This is a trend followed in countries like India wherein the Delhi High Court in ICC Development (International) Ltd. Vs. Ever Green Service Station and Anr.<sup>70</sup> laid down that image rights may not be owned by a company.

Last but not the least what is needed to finally give the HMRC some respite is the establishment of a separate tax regime for athletes internationally as suggested by Andrew D. Appleby in his paper "Leveling the playing field: A separate tax regime for international athletes."

As football players move from one club to another not always belonging to the same country which makes them unique in character, a lack of a universal tax regime enables tax mitigation tools. A separate tax regime would place all the players on a level playing field and aid the less developed nations of Europe to come at par with the developed ones apart from providing consistency to the sport. It will prevent players from moving from one nation to the other for the purpose of tax benefits like seen above in the case of David Beckham having moved from UK to Spain. What really needs to be established is a "Multilateral International Athlete Tax Regime between EU Nations incorporating a flat tax regime along with a central withholding agency and simplified allocation methods."<sup>71</sup>

We can see from the above that several sports personalities have become brands in themselves, who are valuable commodities and are widely exploited commercially, well described in the words of Ian Blackshaw "Image Rights represent the asset base on which the livelihood of professional sportsmen and sports women depend, and, given the limited lifespan of an international sporting career, maximum benefit must be extracted from these assets while they are valuable and in demand."<sup>72</sup> Therefore there exists a need for recognition of a separate image rights law in the United Kingdom, especially with the development of technology which gives rise to new ways of exploitation of a celebrity's image and at the same time puts an increase on the legal issues with regard to such rights. These huge amounts of investments and economic interests also give rise to fiscal issues relating to tax and lead to new methods of tax mitigation which in turn lay the foundation for the need of new tax structuring laws especially for high-earning footballers and other celebrities.

Image rights, in the future, will only continue to get bigger and play a vital role in the sports marketing industry. Until Image rights are specifically addressed by sports federations and some sort of harmonization and a level playing field is not established for legal treatment

---

<sup>70</sup> Delhi High Court 2003IIAD(Delhi)707

<sup>71</sup> Leveling the playing field: A separate tax regime for international athletes by Andrew D. Appleby

<sup>72</sup> Paper on How are Sports Image Rights Protected in Europe' by Ian Blackshaw presented in May 2004 at Leiden University School of Management in Netherlands



of the same and taxation issues, the challenges will continue to over-power the new regulations being undertaken like that of FFP leading to football turning into a dying sport with sports players and clubs losing money while increased cases of litigation resulting in lawyers making merry.

