

## ARTICLE

# A Copyright Incentive for Promoting 'Aesthetic Sports' in India

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This article posits that the Indian 'aesthetic sports' industry which exists outside the mainstream competitive sports industry such as cricket, hockey and football is a potential 'soft power' which can leverage India's otherwise dwindling standing in the international sporting arena. This goal is attainable provided these sports incorporate some elements from the Indian performing arts within them. Furthermore, just like other creative works, such sports should be accorded copyright protection provided they fulfil the strictures of the Indian Copyright Act, 1957 (the Act). This will potentially enable such sports to be undertaken as a full time profession and incentivize Indian youth to take up sports such as gymnastics, figure skating and artistic swimming on a regular basis. It should be clarified that by taking the specific case study of aesthetic sports, my intention is not to disregard the importance of other neglected but equally important sports such as hockey, kabaddi and tennis etc. The case of aesthetic sports has been selected due to its soft power potential, the benefits of which should be availed by India.

**Keywords:** copyright law; aesthetic sports; incentive theory of copyright law; Indian sports; performing arts; dance

## 1. Introduction

The size of the global sports industry stands at 1.3 trillion US dollars with the size of the Indian sports industry having the potential to reach 4 billion US dollars in coming years (Nielsen Sports, 2016). The Indian sports industry which was until recently synonymous with cricket has witnessed an unprecedented growth in other field based competitive sports such as hockey, football, kabaddi, tennis and badminton. The primary reason for this new found interest in other competitive sports in India is the replication of the Indian Premier League (IPL) style franchise model to these once lesser known sports.

Outside the realm of field based competitive sports, 'aesthetic sports' or 'routine oriented sports' such as artistic swimming, gymnastics, figure skating and acrobatics – in which creativity is a *sine qua non* – have received scant attention from Indian sports spectators so much so that unfortunately until 2016 no one knew Dipa Karmakar (Karmakar). It was only when she performed the deadly Produnova vault at the 2016 Rio Olympics did she capture the eyeballs of Indian sports spectators and the international media (DNA Web Team, 2016). The unpopularity of these sports is illustrated by a recent survey where it was revealed they are the least favourite category of sports in which Indian citizens are likely to participate in regularly (Statista, 2019). Leaving aside the general public, even the Indian sports authorities seem to be indifferent towards these sports (Ministry of Youth Affairs & Sports, 2014: 48). There have been reports citing the lack of proper infrastructure and training facilities for these sports and a general lack of empathy towards the plight of these sportsmen (The Globe and Mail Update, 2010). Therefore, it comes as no surprise that for the 2016 Rio Olympics, in a thickly populated country such as India, only one Indian gymnast qualified to participate in the Olympics. Even though swimming is a somewhat popular sport in India, no Indian artistic swimmer has ever qualified for the Olympics and the same holds true for figure skating. This state of affairs ultimately gets reflected in India's underperformance in the Olympics. Whatever limited number of Olympic medals India has won have only been in the traditional competitive sports categories of hockey, wrestling, badminton and shooting etc. Indeed, India as a country, has the lowest number of Olympic medals per capita (Ministry of Youth Affairs & Sports, 2013: 2).

Given this background, this article posits that the Indian 'aesthetic sports'<sup>1</sup> industry which exists outside the mainstream competitive sports industries of cricket, hockey and football is a potential 'soft power' which can leverage India's otherwise dwindling standing in the international sporting arena (Grix and Houlihan, 2013). This objective is attainable

provided these sports incorporate some elements from Indian performing arts within them. Furthermore, just like other creative works, such sports should be accorded copyright protection should they fulfil the strictures of the Indian Copyright Act, 1957 (the Act). This will potentially make such sports be viable as full time professions and incentivize Indian youth to take up sports such as gymnastics, figure skating and artistic swimming on a regular basis. It is hereby clarified that by focusing on the specific example of aesthetic sports, my intention is not to disregard the importance of other neglected but equally important sports such as hockey, kabaddi and tennis etc. The case of aesthetic sports has been selected for consideration because of its soft power potential, the benefits of which should be availed by India.

Section 2 of the paper elucidates the different types of sports as they have been articulated by sports philosophers. It argues that since creativity or aesthetics is the *sine qua non* of non-competitive or routine oriented athletic events, a better terminology for such sports would be 'aesthetic sports' rather than 'routine oriented athletic events'. Sections 3–5 of the paper then make a case for incentivising aesthetic sports in India in the light of their soft power potential. They consecutively argue that a robust copyright regime along with other institutional support can go a long way in creating a commercial aesthetic sports industry in India. These sections of the paper elucidate the form of copyright protection that could be granted to aesthetic sports in India. Sections 6 and 7 compare the Indian position on the 'copyrightability' of aesthetic sports with the equivalent positions under UK and the US copyright law. It argues that while judicial opinion and legal commentary in these three jurisdictions disfavour granting copyright protection to purposive sports, the same should not apply to aesthetic sports. This is because aesthetic sports closely resemble art and as with any other form of art, it warrants copyright protection provided it meets the strictures of copyright law. For the sake of clarification, the copyrightability of sports telecast has not been analysed because it is a distinct and separate legal issue. Section 8 concludes the paper by proposing that the Indian sports authorities should pay serious attention to aesthetic sports for improving India's abysmal standing in the international sporting arena.

## 2. A Philosophical Categorization of Sports

Sports philosopher David Best (1980) initially categorised sports into aesthetic sports and purposive sports based on the degree of creativity inherent in them. He calls the vast majority of sports such as cricket, football, hockey and tennis, in which creativity or aesthetic considerations are only incidental to the primary purpose of the sport, as purposive sports. For example, in a football match, it is immaterial how the players score a goal, at the time they score it and the way it is accomplished are within the rules of the games. On the other end of the spectrum are sports such as gymnastics, figure skating, artistic swimming and other related sports in which creativity or aesthetic considerations are an intrinsic component of the sport. For example, a typical figure skating routine integrates music, lightning and costume and is thus like any other choreographic or dramatic work which cannot be devoid of aesthetics. The same holds true for artistic swimming, which is nothing less than a hybrid form of swimming, dance and acrobatics.

Apart from philosophical categorisation, legal commentators have divided sports into different categories for a better analysis from the perspective of copyright law. Karolina Jesien divides sports into four categories: (i) sports events (ii) scripted sports plays (iii) routine oriented competitive sports and (iv) routine oriented noncompetitive sports (Jesien, 2007: 635). According to her, these sports may be arranged in this manner for reflecting those which are least-copyrightable to most-copyrightable. To this list, Alexander Bussey adds a fifth category called function-based athletic routines which encompasses yoga and exercise routines (Bussey, 2013: 31). Out of these five categories, routine oriented competitive sports and routine oriented noncompetitive sports are synonymous with 'aesthetic sports' as articulated by sports philosophers. The reason for categorising these artistic or creative sports as routine-oriented sports is because such sports usually follow a pre-designed pattern. In the context of figure skating Griffith says 'A typical figure skating performance is a routine. Each move is specifically choreographed and the entire routine is practiced often' (Griffith, 1998: 677). This categorisation however fails to take into account the creativity or aesthetic considerations inherent in a figure skating performance. A figure skating routine is not so much about performing a pre-designed routine but more about the elegance, poise and grace with which it is performed. The same holds true for artistic swimming or for that matter gymnastics, in which the ultimate performance is judged based on its aesthetic merit irrespective of whether it follows a set routine or is an impromptu composition of aesthetically choreographed moves. Therefore, 'aesthetic sports' is a more suitable terminology than 'routine oriented athletic events' for addressing artistic or creative sports in which aesthetics as opposed to direct competition is the end result of the sport. In this paper, I have used the term 'aesthetic sports' to refer to sports such as figure skating, artistic swimming and acrobatics due to their prevalence (even though meagre) in India and the term purposive sports has been used to refer to non-artistic sports such as cricket, hockey, football and volleyball etc.

## 3. A Case for Incentivizing Aesthetic Sports in India

### 3.1. Justification for Promoting Aesthetic Sports in India

Indian performing arts such as folklore, dance and music have made their mark in international figure skating and artistic swimming events. For example: renowned US figure skater Michelle Kwan (Kwan) portrayed the lead female character from the Indian Taj Mahal legend in her performance at the 1996 World Championship Figure Skating Competition. Further, numerous artistic swimming and figure skating performances have been performed to the backdrop of Indian music. At the 2016 Rio Olympics, Mexican synchronized swimmer duo Karem Achach and Nuria Diosdado

performed to 'Aila Re Aila', a famous Indian song. In 2007, Bulgarian skating duo performed to the popular Hindi song 'Bole Chudiyaan' from the film *Kabhi Khushi Kabhie Gham* and at the 2010 American Figure Skating Championship, Charlie White and Meryl Davis performed to a medley of Hindi music. Unfortunately, Indian figure skaters, artistic swimmers and acrobats have not yet harnessed the untapped potential of Indian performing arts to their advantage. There have only been sporadic performances based on Indian classical dance forms and to Indian music at major international sporting events. For example, Indian artistic swimmer Avani Dave performed to a melody from the popular Bollywood movie *Bhool Bhulaiya* at the 2010 Commonwealth Games. Not to anyone's surprise, she came last, a reason attributable to the lack of training facilities in the country (The Globe and Mail Update, 2010). Indian-American figure skater Ami Parekh has popularized Indian costume, music and dance in her figure skating performances in the US and around the world. As a matter of fact, she says that figure skating helped her to discover the Indian inside her (Mittan, 2007). She says, 'And as I skated, I discovered myself and the inner satisfaction I got when I did skate to Indian music and when I wore Indian clothing and jewelry on the ice. It was all so natural for me.' If, as an Indian-American, Parekh had no qualms in adorning Indian clothing and jewellery and performing to Indian dance tunes, the vast majority of Indian-born figure skaters, synchronized swimmers and acrobats should be more forthcoming in incorporating at least some elements of Indian culture as part of their performances. Not only will it make their performances indigenous and unique but it will also promote the riches of Indian cultural heritage at an international level. Such sports are a potential medium for promoting traditional Indian performing arts, which has so far received only the limited attention of international audiences. Why can't a female Indian figure skater incorporate elements from Indian classical dance forms such as *Bharatanatyam*, *Kathak*<sup>2</sup> and others in her performance or for that matter recitation of an Indian folklore? If Kwan could portray the female character from the Taj Mahal story so could Indian figure skaters, artistic swimmers and acrobats<sup>3</sup> provided they received some training in the sport and in the performing arts. All it requires would be a little bit of attention and investment into these sports by Indian sport authorities. This will not only help in popularising these sports (which are beneficial for overall human development) but also enable the promotion of Indian performing arts, a symbol of Indian cultural nationalism. At a time when Indian performing arts especially classical Indian dances are losing their prestige to modern dance forms, aesthetic sports can act as a guardian of Indian cultural nationalism by preventing these art forms from further decline.<sup>4</sup> It is unfortunate that such aesthetic sports are not even listed in the Ministry of Youth Affairs and Sports target list of Olympic sports where India has great potential to excel (Ministry of Youth Affairs & Sports, 2013). This is primarily due to the lack of awareness about these so called 'soft sports' (Harley-Jesson, 2017). As a matter of fact, it is likely that most of the Indians are not even aware of the existence of these sports despite their rich legacy. The cultural impact of an aesthetically appealing figure skating routine or artistic swimming or rhythmic gymnastics sequence outside India could be immense. Indian Parliamentary Shashi Tharoor says that Indian culture has the potential to make the country an influential leader in the 21st century (PTI, 2017). Therefore, a cluster of these sports that incorporates at least some elements of Indian performing arts especially classical Indian dance forms, music and theatre has the potential to boost India's soft power, just like Bollywood has. Even political scientists concede that India can gain immense global recognition by leveraging its soft power (Lee, 2010). Many developing countries such as China, Brazil and South Africa have already realized the soft power potential of sports. Each of them has been successful in the bidding process for hosting either the FIFA World Cup or the Olympics. While I am not suggesting that India should bid to host the Olympics, the soft power potential of aesthetic sports should command the considered attention of the Indian sports authorities especially because there is a growing demand for Indian culture at an international level. Apart from their soft power potential, aesthetic sports (with the exception of figure skating as it is a costly sport) have the potential to be a commercially successful set of industries without extensive financial investment or sophisticated infrastructure. Just like other performing arts, a mass scale live performance of an acrobatic feat or a sequence of synchronized swimming or for that matter a figure skating routine is a source of entertainment. As a matter of fact, live acrobatic and gymnastic feats were once a popular form of entertainment in India due to the prevalence of the circus in India. However, due to stiff competition from new media technologies, circuses in India are no longer popular. A live performance of acrobatics or gymnastics either performed at a circus or at a stadium can generate revenues through sponsorship and ticket sales. This in turn would improve the living standards of these acrobats or gymnasts or for that matter other performers of these aesthetic sports. In addition, one of the biggest challenges faced by the Indian performing arts sector is the lack of a reliable source of livelihood for a large section of its community (Ernst & Young, 2016: 7). A possible strategy for mitigating their financial hardship could be to foster a collaborative relationship between these performing artists and Indian gymnasts, synchronized swimmers and figure skaters. These performing artists could train these sportspersons in local theatre and classical or folk dance moves, the cost of which might be borne by the respective sports federation. For example, the Gymnastic Federation of India (GFI) could have a panel of skilled Indian classical dancers regularly training Indian female rhythmic gymnasts in a sequence which incorporates *Bharatanatyam* moves.<sup>5</sup> Thus, if properly executed,<sup>6</sup> aesthetic sports can also create jobs for the Indian performing arts industry.

India is yet to realize the potential of sports as a full-fledged commercial industry (Aurora, 2016). This is primarily due to the lack of a comprehensive study gauging the exact size of the industry, its potential and the available opportunities. Aesthetic sports have great commercial potential. Due to a close relationship with the performing arts sector, a live performance of an exotic figure skating routine which incorporates scenes from Kalidasa's play *Shakuntala* or for

that matter other Indian mythology would leave an indelible impact on the media and entertainment world, that is likely to translate into increased revenues for stadia and ice rinks. The entertainment dimension of sports is a critical factor when you consider that that sports will be the biggest form of entertainment in coming years (Coelho, 2015). Most importantly, if an aesthetic sports performance incorporates elements from Indian performing arts particularly dance and theatre, it will also promote these arts amongst younger Indian generations which has so far have remained aloof from these artistic works (Pradhan, 2017). Traditional Indian theatre and dances are on the brink of extinction and aesthetic sports have the potential to be their saviour. A commercial aesthetic sports industry might also boost employment in other closely inter-related industries such as the costume designers for Indian classical dances, make-up artists and technicians such as lightning designers, scenic designers and set designers etc. Last but not the least, aesthetic sports which are sufficiently creative can also promote sports tourism to and within India. Just as with other creative arts, a sufficiently creative aesthetic sports performance may encourage international tourists to spend money in watching live performances of these sports (Ernst & Young, 2016: 25). However, for that to happen, it is first of all important for India to develop a qualitative aesthetic sports industry which is capable of gaining mass appeal. While exploring specific policy recommendations for developing such an industry is beyond the scope of this paper, many of the general recommendations for reforming the Indian sports industry are also applicable to the aesthetic sports industry (KPMG, 2016: 53).

It should be clarified that even though the Ministry has suggested that the sports industry needs more investment, I am not of the opinion that more funds should be diverted for promoting aesthetic sports and especially if it comes at the cost of India's welfare goals which should be the Government's top priority (Ministry of Youth Affairs & Sports, 2013: 3). But what is required is a prudent allocation of the existing sports budget amongst different categories of sports. It is not very clear how the sports budget is allocated amongst various categories of sports. I filed a Right to Information (RTI) application both with SAI (Sports Authority of India) and the Ministry concerning the budget allocated to gymnastics, swimming and winter sports for the financial year 2017–2018.<sup>7</sup> I sought information regarding the budget allocated to swimming (as compared to synchronized swimming) in the expectation that it was highly unlikely that SAI and the Ministry would maintain a separate record for synchronized swimming. On the same rationale, budgetary information relating to winter sports instead of figure skating was sought. In respect of this application action dated 15 September, 2017, the SAI and the Ministry declined to disclose this information on the grounds that my request was not information as defined under Section 2 (f) of the Right to Information Act, 2005.<sup>8</sup> I have appealed these orders to the respective First Appellate Authorities which appeal is currently pending.<sup>9</sup> I also contacted the office bearers of the GFI (Gymnastics Federation of India), the Swimming Federation of India (SWI) and the Ice Skating Association of India (ICESAI) but to no avail. I sent an email to all of these organisation on 30 August 2017 followed by two reminders on 7 September 2017 and 11 September 2017 respectively.<sup>10</sup> All emails sent to ICESAI bounced back.<sup>11</sup> On 15 September, 2017, I also called Mr. R.K. Gupta and Mr. Bhavanesh Banga of ICESAI and Mr. Kamallesh Nanavati of SWI on the telephone numbers provided at the Indian Olympic Association's website but none of these people answered my call. I could not contact the President of GFI by telephone since his number could not be found online.

#### **4. Copyright as an Incentive for Promoting Aesthetic Sports in India**

Utilitarian reasons mandate that aesthetic sports like artistic swimming, figure skating and acrobatics which are sufficiently creative should be granted copyright protection provided they meet the strictures of copyright law. This is because in the absence of copyright protection, the artistry of these sports and the sports themselves just like other creative works are likely to remain under-produced (Loren, 2008: 5). In the United States (US), the utilitarian underpinning of US copyright law has been challenged by scholars on the grounds that there has been no positive correlation between copyright and creativity (Ku, 2009: 28). Considering that these studies have been conducted within the specific context of the US copyright law, they are likely to have limited applicability to a developing country such as India where the very notion of copyright law has been considered opposed to traditional Indian values. Having said this, one cannot ignore a small but a growing body of literature that supports heightened copyright protection for boosting local creativity in developing countries. In a seminal World Bank study on 'Intellectual Property and Development', economist Keith Maskus found that increased copyright protection was likely to be beneficial for Lebanon's local creative industries such as software development, publishing, and film production and advertising (Maskus, 2000). This study may be considered relevant to India since India and Lebanon are more or less at similar levels of economic development. Furthermore, a commentator has noted that academics and policymakers in developing countries often tend to stifle higher levels of intellectual property (IP) protection without considering the benefits to local industry and commerce (Sherwood, 2002: 39). India neatly fits into this description where higher levels of IP protection have traditionally been opposed purely on ideological grounds without undertaking a rational assessment of the benefits to be gained by the different types of IP (Banerjee, 2016: 617). The reason for this ideological prejudice can be attributed to India's bipolar perspectives on different types of IP. This bipolarity is peculiar to India where as a developing country, it stands to benefit by adopting a low protectionist stance on patents for safeguarding its public health needs and food security for its people whereas if it adopts a high protectionist stance on copyright for protecting its burgeoning computer software and audiovisual works industry, it will reap immense benefits (Yu, 2005: 9). Even India's chief negotiator for TRIPS (Trade-Related Aspects of Intellectual Property Rights) concedes that India is likely to gain tremendously by adopting

high levels of copyright protection (Sagar, 2015: 342). Furthermore, a study found that a reliable copyright system was instrumental for transforming Nashville (the capital city of US state Tennessee) into a Music City (Schultz and Gelder, 2008). While the usefulness of citing an example from one of the world's most developed countries may not be obvious, Nashville's case study is relevant due to its historical context. Nashville was once a poor US city, where just as in Sub-Saharan Africa, policymakers had pinned much hope for its economic development on access to raw materials and large government-funded public works projects. However, these expectations were never realized but Nashville nevertheless found success from its popular creative industries due to a reliable copyright system combined with regional talent and local entrepreneurs. Though India and Nashville cannot be compared in economic terms, this example demonstrates that copyright is possibly the best institutional design for supporting the development of a commercial creative industry even in developing countries. Another independent study commissioned by the World Intellectual Property Organization (WIPO) found that heightened copyright protection was beneficial for Kenya's audiovisual industry (Koskinen-Olsson, 2014). Even though both these studies pertain to different creative industries, their findings can be applied for undertaking more systematic and focused research on copyright's role in developing commercial creative industries especially a commercial aesthetic sports industry in India.

At a time when India's creative economy is projected to reach 34.8 billion US dollars by 2021, it is imperative that it is backed by a sound regulatory regime. Due to the inherent creativity of aesthetic sports (due to its close resemblance to performing arts), it could be a potential contributor to India's creative economy even though conventionally sports are not considered a creative industry. Moreover, creative people are a nation's most important human resource, which should be tapped by a robust copyright regime. For this reason copyright's role in unleashing India's creative economy cannot be underestimated, a fact conceded by none other than the Department of Industrial Policy and Promotion (DIPP), the Government department responsible for IP policy in India. It is difficult to ascertain whether merely granting copyright protection to aesthetic sports would lead to more of such works being created or not. However, it is likely that it would financially reward performing artists and figure skaters, gymnasts and synchronized swimmers in the form of license fees or copyright royalties as the case may be.

Indian performing artists especially theatre artists and choreographers lack a reliable source of livelihood. The aesthetic sports industry can be a potential full-time vocation for them. They would be able to train rhythmic gymnasts, figure skaters and synchronized swimmers in Indian performing arts incorporating these in their performance. Just as with any other choreographic work, such a performance should be granted copyright protection provided it meets the strictures of the copyright law. This would enable the otherwise impoverished Indian performing artists to become self-reliant as it would open a supplementary revenue stream for them in the form of copyright royalties aside from fees that they may charge for choreographing the performance.

Of course, one may argue that over-protecting sport moves would be detrimental to the normal functioning of professional sports in the sense that it would reduce the pool of freely available 'moves' (Mezei, 2018). However, I do not propose that all sports moves should be protected but only highly creative and unique ones. Say for instance if figure skater Nischal Luthra performs a figure skating routine which enacts a *Kathakali* sequence and fulfils all the requirements for extending copyright protection, his performance should be protected. Extending copyright protection to such highly creative moves will not shrink the pool of freely available moves since basic and routine steps of a figure skating routine do not meet the creativity threshold of the Indian copyright law. The same holds true for other aesthetic sports.

Often Indian sportspersons especially those playing non-conventional sports have to support themselves by taking up a full time job which detracts from the rigorous training that the sport demands which eventually takes a toll on their performance. For example, Indian gymnast Sundar works as a full time school teacher to support himself. He says, 'It was easier when I used to be in the hostel. I could just practice without worrying about how to get two meals.'<sup>12</sup> If gymnasts like Sundar could earn royalties for their performances, they will no longer have to worry about how to feed themselves and instead focus solely on their training. This in turn would improve their performance and India would have a higher likelihood of winning medals at major international sporting events. Legally, gymnasts are entitled to performers rights under Indian copyright law. However, in a country like India which is plagued by poverty and illiteracy, not many sportspersons and performing artists would even have basic copyright awareness; let alone the wherewithal to register their work. This is where DIPP and the Indian Copyright Office should step in. While the DIPP's copyright awareness program for school and college students is laudable, it would benefit if it extended its capacity building initiatives to other sections of the Indian population who are equally affected by copyright law. Even the sports federations or SAI could take the responsibility of asserting performers rights on behalf of the gymnast or the synchronized swimmer or the figure skater (as the case may be).

## 5. Copyright Protection for Sports

### 5.1. Copyright Protection Under Indian Copyright Law

#### 5.1.1. Purposive Sports

Section 13 of the Act enunciates the category of works in which copyright subsists. It is hard to argue that purposive sports fit into any of the existing categories. Such sports are clearly not literary works or dramatic works or musical works or artistic works as per their definition under the Act.

This statutory intention of not extending copyright protection to purposive sports is reflected in the decision of the Delhi High Court in the case of *Institute for Inner Studies v. Charlotte Anderson*. In this case, a Philippines based institute for pranic healing and arhatic yoga sued the defendant for teaching yoga asanas claimed to be developed by Master Choa Kok Sui, the founder of the Institute. The plaintiffs asserted copyright protection over the yoga techniques and a trademark over the expression 'Pranic Healing'. The High Court held that yoga asanas were not copyrightable subject matter, either as literary works or dramatic works as per their definition under the Act. It also made a cursory remark that sports fell short of the requirements of fixation and predictability for them to be protected as a dramatic work. Apart from the copyrightability criteria, commentators have also opposed granting copyright protection to sport moves on public policy grounds. They posit that extending copyright protection to these moves is anti-competitive as it will reduce the pool of freely available moves in present and in the future. However, as explained in the preceding section, this argument is superfluous in the context of aesthetic sports.

### 5.1.2. Aesthetic Sports

Aesthetic sports due to their inherent creativity closely resemble choreographic works or dramatic works depending upon the nature of the sequence or the performance. These sports therefore fulfil the definition of dramatic works as defined under the Act due to the inclusion of choreographic works within its definition.<sup>13</sup> The Delhi High Court in the *Charlotte Anderson* case ruled out the possibility of granting copyright protection to sports moves because it failed to fulfil the fixation requirement and because of its inherent unpredictability. Though the Court did not distinguish between purposive sports and aesthetic sports, the grounds for not extending copyright protection to sports moves is inapplicable to aesthetic sports since both the elements of fixation and uncertainty are fulfilled.

Legally, it is relatively straightforward for coaches, trainers and choreographers of aesthetic sports to assert copyright in their compositions as these works are nothing but choreographic works. However, the same is not true for figure skaters and synchronized swimmers due to the inclusive definition of a performer under the Act which includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. A figure skater or a synchronized swimmer who performs a live figure skating or a synchronized swimming routine in the form of a ballet can be equated to a dancer or an actor depending upon the performance. Therefore, just like any other dancer or an actor, they should be entitled to performers rights under Section 38 of the Act. Even otherwise, if the courts do not consider a figure skater or a synchronized swimmer (only if they are in the form of a ballet) as a dancer or an actor, they should still be entitled to performers' rights. This is because a figure skating or a synchronized swimming routine performed for an audience is nothing other than a visual presentation and if it is live, it squarely fulfils the definition of a performance as per Section 2 (q) of the Act (Reddy, 2012). Most importantly, the Act defines a performer in relation to a performance so as to include any person who delivers a performance. Therefore, a figure skater and a synchronized swimmer who renders a live performance will be a performer entitled to performers' rights. Needless to say, no protection shall be granted for their non-live performances.

The Single Judge decision of the Delhi High Court in *Star India Pvt. Ltd. vs Piyush Agarwal & Ors* which was subsequently set aside by the Division Bench merits careful consideration (George, 2012). One of the issues briefly analysed by the Honourable Judge was whether a cricket match was a performance under Section 2(q) of the Act or not. He made an *obiter dictum* by holding that a cricket match was a performance whose performers were cricketers, umpires and commentators. This decision was criticized primarily on the ground that a cricket match was not a performance due to its unpredictability. Further, a cricket player was no more a 'performer' than a soldier fighting a battle. While I agree to this critique of the decision, I humbly think that the decision suffers from another egregious misinterpretation. Justice Valmiki J. Mehta opines that a performer's right was a subject matter of copyright under Section 38 of the Act. This is an erroneous interpretation as performers right and copyright are conceptually different. This is reflected right at the outset of Section 38 of the Act which states that a performers' right is a 'special right' granted to a performer in relation to his (or her) performance. As a matter of fact, a commentator has criticized the Indian performers' rights regime on grounds that copyright law was conceptually incapable of safeguarding all the rights of a performer (Ambast, 2008: 575). The primary distinction between copyright and performers rights is that copyright vests with the authors of the work while a performer is not the author of this work. A performer simply performs the work of its author. It is for this reason that a performer often asserts rights in performances which are not copyrightable such as sports events and stage performances. Even the *Charlotte Anderson* decision which succeeded this case makes no reference to the Delhi High Court's decision in *Star India* considering that copyright and performers' rights in sports games are two separate and distinct issues.

Due to the absence of a prevailing precedent on performers' rights of a sportsperson, their rights in India remain on shaky ground. Irrespective of that, figure skaters and synchronized swimmers as explained before are a special category of athletes who could successfully assert performers' rights under Section 38 of the Act.

## 6. Copyright Protection Under UK Copyright Law

### 6.1. Purposive Sports

The copyrightability of purposive sports has never been litigated before English Courts. However, the issue has been tackled by commentators in light of the decision of the Court of Appeal in *Norowzian v. Arks Ltd. (No. 2)*<sup>14</sup> where it held that a dramatic work was a work of action, with or without words or music, which was capable of being performed

before an audience. Applying the *Norowzian* decision, a notable commentator has noted that purposive sports were not dramatic works since they were not presented or consumed as a drama even though there was no clear cut policy rationale as to why improvised dance or drama should be protected but not a football match (Barendt, 2002: 55).

In addition, this issue was considered at the EU level in the joined cases of *Premier League v. QC Leisure and Murphy v. Media Protection Services Ltd*<sup>15</sup> The European Court of Justice (ECJ) held that purposive sports particularly football matches did not qualify as copyrightable subject matter under the EU copyright law since these were not intellectual creations which could be classified as a work within the meaning of the EU Copyright Directive. According to the Court, football matches were subject to the rules of the game, which left no room for creative freedom, a prerequisite for copyright protection. However, this did not preclude their protection under domestic legal orders. This keeps the room open for the EU member states including UK (so long as it remains a member of the EU) to grant copyright protection to purposive sports.

## 6.2. Aesthetic Sports

Under Section 1 of the Copyright, Designs and Patents Act 1988 (CDPA), copyright subsists in (i) original literary, dramatic, musical or artistic works (ii) sound recordings or films and (iii) the typographical arrangement of published editions.<sup>16</sup> Aesthetic sports due their close resemblance to choreography can be subsumed within the category of dramatic works due to the inclusion of dance and mime within its form (Elam V, 2015: 1), However, this is subject to the fulfilment of originality and fixation criteria:

### 6.2.1. Originality

As per the originality test laid down in *University of London Press v. University Tutorial Press*, a work was deemed original if it was not copied from another work i.e. if it originated from the author.<sup>17</sup> This was subsequently reiterated in the classic case of *Ladbroke v. William Hill*,<sup>18</sup> where the Court held that the requisite originality under UK Copyright Law was that the work should be the expression of original or inventive thought which was dependent upon the skill, judgment or labour involved in making it. Thus, in the UK the originality criterion has traditionally been set low. However, the 2009 CJEU's decision in *Infopaq International v. Danske Dagblades Forening*<sup>19</sup> has raised the originality threshold by holding that a work was original if it was the 'author's own intellectual creation' – in the sense that it contained elements which reflected the expression of the intellectual creation of the author of the work. Since then, the UK Courts have taken different approaches to the issue of whether the (Elam V, 2015: 10). *Infopaq* decision had raised the originality threshold under the English law or not (Savvides and Ibbetson, 2016).

Aesthetic sports would fulfil the old originality criteria as laid down in the *Ladbroke* case provided that they do not slavishly copy from another work or makes immaterial alterations to existing works.<sup>20</sup> Post-Brexit, even if the UK Courts choose to follow the *Infopaq* decision, at least some aesthetic sports such as synchronized swimming which comprise both 'technical' and 'free' routines, are likely to fulfil the ECJ's 'author's own intellectual creation' standard of originality This is due to the individuality and creativity contributed by the author (or the sportsman) to the overall performance.

### 6.2.2. Fixation

Under Section 3 of the CDPA, copyright does not subsist in any work unless it is recorded in writing or otherwise.<sup>21</sup> To fulfill this requirement, an aesthetic sport may be fixed by a combination of written form, graphical diagrams and video-replication. However, in the UK, fixation has traditionally been thought of as being in writing (Waelde et al., 2014: 225). As illustrated in the preceding section, for aesthetic sports which closely resemble choreographic works, written notation systems such as Labanotation and the Benesh Notation systems may be deployed. These are standard notation systems used even in the UK. A commentator has noted that just like improvised dramatic sports, aesthetic sports can be fixed by electronic means (Elam V, 2015: 10). In fact, according to this commentator, electronic means allow for far more details to be captured than written means. However, copyright over the electronic fixation of an aesthetic sport in the form of its recording is different from the copyright over the sport itself. The former will fall under the category of films while the latter is the subject matter of dramatic works. Thus, there is no impediment for aesthetic sports to fulfil the originality and fixation criteria under the UK copyright law. The close resemblance between aesthetic sports and choreographic works warrants their protection as dramatic works.

## 7. Copyright Protection Under US Copyright Law

### 7.1. Purposive Sports

In the US, for the first time the courts addressed the issue of copyrightability of purposive sports in *Baltimore Orioles, Inc v. Major League Baseball Players Ass'n*.<sup>22</sup> The primary issue in this case was whether major league baseball clubs owned exclusive rights to the televised performances which were made during the game. The United States Court of Appeals for the Seventh Circuit held that the telecast of a baseball game was a copyrightable subject matter, all rights related to which were presumed to be held by the baseball clubs. In the footnotes, the Court also addressed the argument raised by the defendant about the copyrightability of their performances. It disagreed with the defendant's argument that their performances were not copyrightable works since they lacked sufficient artistic merit. It concluded by stating that only a modicum of creativity was required for a work to be copyrightable. Leading copyright treatise, Nimmer on

Copyright (Nimmer) has criticized the analysis of the Seventh Circuit in the *Baltimore Orioles* decision on four grounds (B. Nimmer M. & Nimmer D, 2015).

Firstly, Nimmer contends that footnote number seven of the decision stating the Court's conclusion on the copyrightability of the baseball games did not cite any authority dealing with athletic events. This objection to the *Baltimore Orioles* decision by Nimmer in my humble opinion is without any merit. No Court until the *Baltimore Orioles* decision had addressed the issue of copyrightability of athletic events. Hence, when there is no direct authority, none could have been cited. Prior precedents to which Nimmer makes a reference in footnote number seventy of the text do not address the copyrightability of athletic events but primarily to its broadcast. It would have been superfluous for the Seventh Circuit to cite these precedents as suggested by Nimmer. However, it would have been beneficial had it cited precedents on the copyrightability of organized events.

The second ground on which Nimmer has criticized the decision pertains to the non-exclusion of sports as a category of copyrightable works by the Congress under the Copyright Act of 1976. His third contention is regarding the Seventh Circuit's apparent conflict on the requisite level of creativity essential for copyright protection. He states, 'the Court acknowledges that creativity was an essential ingredient of a copyrightable work, yet twice expressed doubt about the creativity of the performance of baseballs players on the field.' I am humbly of the view that this concern as to the *Baltimore Orioles* decision is redundant as the two examples to which he makes a reference represent a mere reaffirmation of the independence of the creativity of the telecasts from the creativity of the performance. The first instance he refers to is the portion of the decision where the Seventh Circuit states, 'Moreover, even if the Players' performances were not sufficiently creative, the Players agree that the cameramen and director contribute creative labor to the telecasts.' By this, the Seventh Circuit merely elucidates that the creativity of the performance was independent of the creativity of the telecast. Even in the second instance, the Court is simply indicating the mutual non-exclusiveness of the creativity required for making a telecast copyrightable subject matter from the creativity of the performance. In none of these instances does it cast a doubt about the creativity of the Players' performances. This makes his third concern regarding the *Baltimore Orioles* decision misplaced. Lastly, Nimmer's contention concerning the *Baltimore Orioles* decision rightly stems from the Seventh Circuit's reasoning which rests on the 'great commercial value' of baseball games.

Chronologically, the second in line decision on the copyrightability of purposive sports is *National Basketball Association (NBA) v. Motorola, Inc.*<sup>23</sup> The primary issue in this case was whether a state-law 'hot news' misappropriation claim based on *International News Service v. Associated Press*<sup>24</sup> could survive pre-emption by the federal Copyright Act. The United States Court of Appeals for the Second Circuit while holding that a narrow 'hot-news' exception did survive pre-emption also considered NBA's copyright claim over its underlying game. It held that basketball games did not fall within the list of copyrightable subject matter under Section 102 (a) of the Copyright Act as it did not constitute 'original works of authorship.' It went on to state that even though the list under Section 102 (a) was non-exclusive, athletic events were neither similar nor analogous to any of the listed categories. The Second Circuit's rationale for not extending copyright protection to sports hinged upon its lack of authorship, which it lucidly elucidates as, 'sports events are not "authored" in any common sense of the word.'

As of date, no higher court in the US has decided whether purposive sports were copyrightable subject matter or not. However, commentators have noted that the Second Circuit's analysis in the *National Basketball Association (NBA)* case holds more ground and is presumably likely to be favoured by higher courts (Weber L J, 2000).

## 7.2. Aesthetic Sports

Under the US copyright law, aesthetic sports can be protected as dramatic and chorographical works provided the originality and the fixation criteria are fulfilled. As per the Compendium of the US Copyright Office (Compendium) for a work to be considered as a dramatic work, it should have: (a) plot (b) characters (c) dialogue/monologue (d) stage directions and directions for performance (e) music and (f) illustrations or descriptions of costumes, scenery, sets, props etc.

A non-competitive figure skating routine usually has a plot (in the form of a storyline), characters (in the form of skaters), directors (in the form of composers or choreographers), background music and it is usually performed in the backdrop of a stage or set. Therefore, except for the dialogue/monologue requirement, a figure skating routine fulfills all the characteristic elements of a dramatic work. There is an ambiguity over whether a dramatic work should have all the enlisted characteristic elements to qualify as a dramatic work or if fulfilment of even some of these elements is sufficient to warrant copyright protection.

Professor Paul Goldstein defines a dramatic work as 'any work in which performed actions, speech, or incident-or all three-convey theme, thoughts or character to an audience' (Goldstein P, 2007). Based on this definition, it seems that plot, characters, stage directions and directions for performance, illustrations or descriptions of costumes, scenery, sets and props are pre-requisites for a work to be categorized as a dramatic work. Therefore, dialogue/monologue is not an essential ingredient of a dramatic work though the legal definition differs from the industry's view point. Irrespective of this, the Compendium is only a policy document which does not have the force of law. Therefore, it is likely that a figure skating routine can be protected as a dramatic work provided that it fulfills the originality and the fixation criteria of US Copyright law.

Having said this, even though there is no impediment for a figure skating routine to be categorized as a dramatic work, legal scholarship has largely focused on comparing it to choreographic works (Roessler V, 2016: 948). This is



perhaps due to the very nature of ice skating which as a special discipline of figure skating is nothing but ballroom dancing on ice emphasizing graceful and entertaining movements. Therefore, due to the very nature of 'ice-dance' this makes its comparison to choreographic works inevitable.

As per the Compendium, there are six elements for a work to be considered as a choreographic work. These are (a) rhythmic movement in a defined space (b) compositional arrangement (c) musical or textual accompaniment (d) dramatic content (e) presentation before an audience (f) execution by skilled performers. In a figure skating routine, there is always a rhythmic bodily movement in a sequential form by the skater. Secondly, there is always a compositional arrangement in the form of a sequence of related dance movements. Thirdly, the figure skating routine is always accompanied by background music. Fourthly, many contemporary figure skating routines are theme based and contain a dramatic content. Fifthly, a competitive figure skating routine is always performed before an audience as opposed to in a personal setting. Lastly, it is usually performed by a skilled performer. Therefore, a figure skating routine fulfills all the characteristic elements of a choreographic work even though the absence or presence of all these elements is not a prerequisite.

Even though aesthetic sports generally and figure skating specifically can be protected as dramatic works or choreographic works (provided it fulfills the originality and the fixation criteria) not all of them will be granted copyright protection. This is because the US Copyright Office does not register copyright claims in competitive events. On public policy considerations all competitive sports including aesthetic sports have been ruled out from the list of copyrightable works. Therefore, if a figure skating routine or a gymnastic feat or a synchronized swimming sequence is performed in an international sporting event such as Olympics, it will not be granted copyright protection. However, perhaps this does not preclude the protection of these sports if they are performed in a non-competitive environment say for instance at a circus or at an ice rink purely for entertainment purposes. This view is widely endorsed by legal commentators who have opined that aesthetic sports were a special species of sports which due to their inherent creativity were worthy of copyright protection mostly as choreographic works.

The above discussion makes it clear that even though courts in prominent common law jurisdictions have not explicitly determined the issue of copyrightability of aesthetic sports, precedents and statutory provisions support that they should be granted copyright protection. In India, precedents support their protection as dramatic works provided the fixation and the originality criteria are fulfilled. In the US, they can be protected as either dramatic or choreographic works depending upon their similarity to theatre or dance. However, the weight of authorities' tilts towards protecting these sports as choreographic works provided they are performed in a non-competitive setting. Lastly, in the UK, these sports are likely to be protected as dramatic works due to their resemblance to choreographic works which are included within the definition of dramatic works.

## 8. Conclusion

The primary aim of this paper has been to contribute to the nascent body of literature advocating for a change in perspective on the discourse surrounding IP in India. It specifically calls for undertaking a rationale assessment on the role of copyright in developing a robust commercial aesthetic sports industry in India. At a broader level, the paper has strived to make at least three contributions. Firstly, to inform the Indian sports authorities, policy makers, the sports industry and academics about the untapped potential of sports such as figure skating, synchronized swimming and figure skating. Secondly, to add to a small but growing body of literature on the importance of copyright law for developing commercial creative industries. Thirdly and most importantly to serve as a starting point for undertaking more industry focused research. For example, researchers can undertake an empirical study on the Indian gymnastic industry and specifically the living standards of these gymnasts. Based on field research, they can propose the viability of copyright law in improving their living standards.

## Notes

- <sup>1</sup> The term 'aesthetic sports' has been coined by sports philosopher David Best. See Best D (1980), Art and Sport, *Journal of Aesthetic Education* 14 (2): 69–80. DOI: <https://doi.org/10.2307/3332478>.
- <sup>2</sup> Figure skater Alyssa Mahatme incorporated Kathak moves in her figure skating performance at the 2011 Junior Ladies Short Program. See YouTube, [https://www.youtube.com/watch?v=2\\_wiDojz4EI](https://www.youtube.com/watch?v=2_wiDojz4EI) (retrieved 20 May 2019).
- <sup>3</sup> Acrobats can incorporate elements from traditional forms of Indian gymnastics such as *Marichilukal* which is a form of acrobatic regime focusing on instinctive moves for self-defense. See *An Ancient Martial Art Form of India*, Rishikul Yogshala, <https://www.rishikulyogshala.org/kalaripayattu-and-yoga-teacher-training.html> (retrieved 20 May 2019).
- <sup>4</sup> Lately, classical Indian dances such as *Bharatanatyam* and *Kuchipudi* are at an all-time low primarily because people have stopped relating to them and are not willing to invest their time and effort into them. See Ernst & Young, *Creative Arts in India: Theater, Dance and Crafts Industry* 1, 9 (December 2016) [http://www.ey.com/Publication/vwLUAssets/ey-creative-arts-in-india/\\$FILE/ey-creative-arts-in-india.pdf](http://www.ey.com/Publication/vwLUAssets/ey-creative-arts-in-india/$FILE/ey-creative-arts-in-india.pdf). See also Veejay Sai, *When Men Danced as Women: An Ancient Tradition on the Decline*, The News Minute (22 November 2015), <http://www.thenewsminute.com/article/when-men-danced-women-ancient-tradition-decline-36193> (noting that Kuchipudi was on a ventilator and required public support).

- <sup>5</sup> India has many skilled Indian female rhythmic gymnasts who have won accolades in international gymnastic events. See for example The Phoenix Indian Gymnastics Academy <http://phoenixgymnastics.in/press-note/thane-city-now-world-map-rhythmic-gymnastics%E2%80%8B/> (retrieved 30 August, 2017). See also Meghana Gundlapally's, *Meghana Gundlapally's Journey@8<sup>th</sup> Senior Rhythmic Gymnastics Asian Championships 2016*, Indian Rhythmic Gymnast Blog (2 June 2016), <http://indiarhythmicgymnast.blogspot.my>.
- <sup>6</sup> Proposing a suitable execution plan is beyond the scope of this paper.
- <sup>7</sup> RTI applications on file with author.
- <sup>8</sup> RTI decision on file with author.
- <sup>9</sup> An appeal can be made against the decision of the Central Public Information Officer (CPIO) within 30 days from the receipt of its decision. See § 19 (1) Right to Information Act, No. 22 of 2005, INDIA CODE.
- <sup>10</sup> Except for GFI, all the email addresses were retrieved from Indian Olympic Association's website see National Sports Federation, Indian Olympic Association, [http://www.olympic.ind.in/national\\_sports\\_federations.html](http://www.olympic.ind.in/national_sports_federations.html) (retrieved 30 August 2017). GFI's email address was retrieved from a sports portal. See Sporting India, <http://sportingindia.com/content/gymnastics-federation-india> (retrieved 16 September, 2017).
- <sup>11</sup> Emails were sent to icesai@yahoo.com.
- <sup>12</sup> Arunabh Saikia, *Inside the Murky World of Indian Gymnastics*, Live Mint (24 September 2016). Retrieved from <https://www.livemint.com/Leisure/KQPZBdgajClNfdWdp1mpMJ/Inside-the-murky-world-of-Indian-gymnastics.html>.
- <sup>13</sup> *Academy of General Education, Manipal and Another v. Malini Mallya*, (2009) 4 SCC 256 (India).
- <sup>14</sup> *Norowzian v. Arks Ltd* (No 2) [2000] FSR 363.
- <sup>15</sup> *Joined Cases C- 403/08 & C-429/08 Football Association Premier League et al. v. QC Leisure et al. & Murphy v. Media Protection Services Ltd ('FAPL')* [2012] 1 CMRL 29.
- <sup>16</sup> Copyright, Designs and Patents Act, 1988, c. 48 § 1(1) (UK).
- <sup>17</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.
- <sup>18</sup> *Ladbroke v. William Hill* 1 ALL ER 465 (21 Jan. 1964).
- <sup>19</sup> *C-5/08 Infopaq International v. Danske Dagblades Forening* [2009] ECDR 16.
- <sup>20</sup> A work will not said to be original if it makes an immaterial alteration to an existing work. See *Interlego AG v. Tyco Industries Inc* [1989] AC 217, 260–263.
- <sup>21</sup> Copyright, Designs and Patents Act, 1988, c. 48 § 3(2) (UK).
- <sup>22</sup> *Baltimore Orioles, Inc v. Major League Baseball Players Ass'n*, 805 F.2d 663, 682 n. 6 (7<sup>th</sup> Cir. 1986).
- <sup>23</sup> 105 F.3d 841 (2d Cir. 1997).
- <sup>24</sup> 248 U.S. 215 (1918).

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The author has no competing interests to declare.

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