

Do Sports Celebratory Gestures Require Protection?

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When one talks about the scope of trademark law, it is not uncommon for laymen to believe that the extent of the law is limited to brand names and/or their marks, such as Nike and its famous Swoosh. Instead, the reality of trademark law is far from the aforementioned expectation. Trademark law not only covers designs like the MGM Lion logo but also the sound of the lion that we have grown up listening to at the very start of every *Tom and Jerry* episode. Many such non-traditional marks have been added to trademark law, and the list just seems to keep getting longer. Featured in this growing list is one particular type of mark that has garnered great interest, especially in sports law. Gesture marks—the celebratory gestures of famous sports players—have been the topic of discussion amongst multiple scholars, academicians, lawyers, and IP experts. The following will discuss the emergence of gesture marks and how contemporary trademark law requires improvement to remain in sync with such developments.

Signature Celebratory Gestures

In recent times, trademark law has taken breakthrough steps to evolve with the demands of the dynamic world. Sportspersons tend to have shorter careers than the average working individual, with it being common for athletes to work professionally for a maximum of 10-15 years, also known as one's "golden years." Hence, they find unique ways other than just their game to be remembered and maximize their cultural impact. Thus, celebratory gestures have emerged as ways to build or cement an athlete's public brand. For instance, famous soccer player Cristiano Ronaldo is now known for running towards the corner of the pitch, jumping and spinning 180 degrees, and screaming "SIIUU" before landing with a wide-legged stance. Runner Usain Bolt's gesture with his legs stretched and his arms and fingers pointed upwards diagonally is now famously known as "The Lighting Bolt".¹ These are some of the most recognized signature celebratory gestures amongst many others. Ultimately, this has become another mechanism for players to be remembered, and it is now a medium to be protected professionally even after their retirement from the sport. One of the leading authorities in trademark law, *McCarthy on Trademark and Unfair Competition*, has stated that "anything that can be detected by any of the human senses should be eligible for protection as a trademark if it is used to identify and distinguish a source of good or service."² In light of this, many scholars have believed that motion marks such as celebratory gestures can be protected under the trademark law³ since they are unique and distinctive, and the skill and performance of a player for all these glorious years may be considered to be a service rendered to the audience and fans.

With this, athletes now strive to build their own valuable brand not only with their name but also with their unique gestures by having them registered as a trademark. For a gesture to be eligible for registration as a trademark, the signature gesture must be distinctive, must have some functionality, and the gesture must be used commercially in some form.⁴ The elements for a

¹ <https://www.khuranaandkhurana.com/2022/06/30/trademarking-sportsperson-celebration-moves/>

² J.T. McCARTHY, McCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 7:105

³ https://www.vsb.org/docs/sections/intellect/Joshua_A_Crawford_-_Trademark_Rights_for_Signature_Touchdown_Dances.pdf

⁴ Id.

gesture mark to be registered are similar to the parameters of a traditional mark. Take, for instance, the image of Usain Bolt's celebratory gesture and attempt to fit it into the traditional parameters. The gesture can be considered to be distinctive since it is creative, unique, and globally recognizable. Further, Bolt intends to use the trademark on items such as clothing and shoes, which shows the commercial purpose of the trademark as well. Thus, under the traditional trademark regime, the trademark is eligible for registration. What if there was no commercial purpose attached to it and Bolt just wanted to have his iconic 'The Lightning Bolt' gesture protected? In such an instance, Bolt's gesture may not be eligible for trademark registration. Therefore, this is why some non-conventional trademarks are different from traditional trademarks and require their own set of elements and rules to guide such marks.

Conclusion

Having discussed the above, there appears to be no set of elements or factors for an unconventional or nontraditional mark to be eligible to be protected and registered as a trademark. To legally protect these gestures as marks, it is imperative for the legislature to work towards establishing elements and factors specific to the determination of whether a particular gesture is eligible to be registered as a trademark. The already existing factors do not appear to be in sync with a new category of marks. As per the existing elements, an athlete will not be eligible to register their celebratory move, which has no commercial purpose, if an athlete only wants to protect it. Further, it seems it is time for the World Intellectual Property Organization (WIPO) to set a universal standard for whether a particular celebratory gesture or movement can be eligible for trademark registration.

In 2006, the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications discussed the new types of marks. In its 16th session, the Committee focused on the various types of emerging marks and the issues that may be raised.⁵ While it discussed various issues with non-conventional trademarks such as appropriate methods to establish trademark principles, the Committee could not find clear-cut solutions. More than a decade later, we stand on the same path, waiting for the laws and principles to be amended in order to expand the horizons of trademark law.

⁵ https://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf