

THE 1ST METACEPT® NATIONAL MEMORIAL DRAFTING COMPETITION

BEFORE THE HONOURABLE HIGH COURT OF NEW TELLY

CIVIL SUIT _____ of 2020

filed under SECTION 134 of THE TRADE MARKS ACT, 1999 read with 20 of

THE CODE OF CIVIL PROCEDURE, 1908

IN THE MATTER OF

M.S DHENIER PLAINTIFF 1

VIRET KELLY PLAINTIFF 2

v.

AVENGERS MEDIA AND ENTERTAINMENT PVT. LTD.....RESPONDENT

CLUBBED WITH

WRIT PETITION (CIVIL) No. _____ of 2020

filed under ARTICLE 226 OF THE CONSTITUTION OF INTIA

IN THE MATTER OF

M.S DHENIER PETITIONER 1

VIRET KELLY PETITIONER 2

v.

AVENGERS MEDIA AND ENTERTAINMENT PVT. LTD.....DEFENDANT

-MEMORANDUM ON BEHALF OF THE DEFENDANT/RESPONDENT-

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➤ STATUTES REFERRED

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The Trade Marks Act, 1999.

The Lanham Act of 1946.

The Indian Contract Act, 1872.

The Public Gambling Act, 1867.

The Specific Relief Act, 1963.

The Code of Civil Procedure, 1908.

➤ LIST OF DATABASES REFERRED

www.manupatra.com

www.scconline.com

www.heinonline.com

➤ MISCELLANEOUS

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Law Commission Reports.

INDEX OF ABBREVIATION

ABBREVIATION	EXPANSION
&	And
§	Section
¶	Paragraph
Art.	Article
Id.	Ibidem
Co.	Company
ed.	Edition
Cir.	Circuit
Const.	Constitution
SC	Supreme Court
HC	High Court
S.D.N.Y	Southern District of New York
Corp.	Corporation
Inc.	Incorporation
v.	Versus
Ors.	Others
Anr.	Another
Prop.	Property
APL	Avengers Media and Entertainment Pvt. Ltd.
N.Y.	New York
Del.	Delhi
Mad.	Madras

P&H	Punjab and Haryana
Bom.	Bombay
Ltd.	Limited
Pvt.	Private
PIL	Public Interest Litigation
PGA	Public Gambling Act
Hon'ble	Honourable
SCC	Supreme Court Cases
Cri LJ	Criminal Law Journal
AIR	All India Reporter
U.S.C.	United States Code
Vol.	Volume
Supp.	Supplementary
PTC	Patent & Trade Marks Cases
DLT	Delhi Law Times
ECR	Early Case Resolution

STATEMENT OF JURISDICTION

THE RESPONDENT (ALSO REFERRED AS DEFENDANT) HUMBLY SUBMIT THIS MEMORANDUM IN RESPONSE TO THE PETITION FILED BY THE PETITIONERS BEFORE THIS HONOURABLE COURT UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, 1950.

THE RESPONDENT ALSO SUBMIT THIS MEMORANDUM IN RESPONSE TO THE SUIT FILED BY THE PLAINTIFFS IN THE INSTANT CASE UNDER SECTION 20 OF THE CODE OF CIVIL PROCEDURE, 1908 READ WITH SECTION 134 OF THE TRADE MARKS ACT, 1999. THE RESPONDENT IS FILING HIS REPLY IN THE RESPONSE TO THE PLAINT FILED BY THE PLAINTIFFS.

IT SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

STATEMENT OF FACTS

BACKGROUND

Sports plays a very significant part in the country of India. With the accessibility to the technology and internet, the sports have evolved and has achieved virtual gaming popularity too, which has motivated the mass to participate in fantasy sports games.

FORMATION AND EVOLUTION OF APL (FANTASY LEAGUE GAMING CO.)

Mr. Tony Stark, CEO of APL, a company incorporated under the Companies Act, 2013, has its registered office at 5th Floor, Commercial House, Connaught Place, New Tolly. He called up for development of online multi-player fantasy cricket game, named Vision 11. The game allows the participants to create and manage their own cricket teams but the results will solely depend upon the performance of real-life cricketer's. The requisite steps of the game include – *first*, drafting of the team, primarily depending upon assessment of cricketers' performance from past matches and other materials. *Second*, attribution of points to the participants based on the real cricketer's selection, runs scored, wickets and catches taken, and similar commendable performance event. *Third*, payment of fees for participation in each round and distribution of prize money in a transparent and objective manner to the participants.

APL also approached to BCCI and various cricketers to use their pictures/figures/names but the permission was granted by none. Further, the company created illustrations of cricketers and claimed copyright over them.

SUIT AGAINST APL

BCCI, upon noticing the illustrations and unauthorized usage of initials and jersey numbers of the cricketers, sent a legal notice to APL asking them to refrain from operating Vision 11, considering their practice to be gambling. APL in reply to legal notice argued that they have the copyright over the illustrations and the participants need to have specific skill set for analysis of players' performance, knowledge of their current form etc. The cricketer's, whose initials and jersey numbers were used, filed a suit for infringement of their personality rights and passing off, and asked for Rs. 2 crores as damages because they felt that APL intends to ride upon the real-life cricketer's good will and reputation and it was giving off an impression that the players are associated with an illegal game which is in derogation of their public image as well as the spirit of Indian cricket. They simultaneously filed a PIL, claiming that the online game is mere a game of chance and not of skill, and is gambling under the Public Gambling Act, 1867.

STATEMENT OF ISSUES

- [1.] WHETHER APL'S USE OF THE PLAYER ILLUSTRATIONS IN CONJUNCTION WITH THE PLAYER CODES AMOUNTS TO INFRINGEMENT OF M.S DHENIER AND VIRET KELLY'S PERSONALITY RIGHTS AND PASSING OFF?
- [2.] WHETHER VISION 11 AMOUNTS TO GAMBLING UNDER THE PUBLIC GAMBLING ACT, 1867?

SUMMARY OF ARGUMENTS

[1.] APL'S USE OF THE PLAYER ILLUSTRATIONS IN CONJUNCTION WITH THE PLAYER CODES DOES NOT AMOUNTS TO INFRINGEMENT OF M.S DHENIER AND VIRET KELLY'S PERSONALITY RIGHTS AND PASSING OFF.

It is humbly submitted that use of the player illustrations in conjunction with the player codes does not amounts to infringement of M.S Dhenier and Viret Kelly's Personality Rights and Passing off because there is no breach of privacy and personality rights of the players, The counsel would base its argument majorly on four premises. In the instant case, APL holds copyright over the illustrations which were designed by a skilled digital sketch artist with sufficient amount of labour. The combination of illustrations along with the player codes does not amount to passing off as there is no misrepresentation on the part of APL that it is in any way associated with M.S Dhenier and Viret Kelly reputation and goodwill.

[2.] VISION 11 DOES NOT AMOUNTS TO GAMBLING UNDER THE PUBLIC GAMBLING ACT, 1867.

It is humbly submitted before the Hon'ble High Court of New Telly that Vision11 is a game of skill and games of skills doesn't come under the ambit of gambling. The game is predominantly skill game as it depends on the skills of the users, experience in choosing players for his or her side, adding and removing players throughout the season, and determining who will start from among his or her players and which players will be put on the bench. Users are more likely to win by applying analysis, skills and awareness of the games acquired by them on the basis of statistics, performance, scores and achievements of real life cricketers. Moreover, APL has a legitimate business activity and would be granted protection under Article 19(1)(g) of the Constitution of India.

ARGUMENTS ADVANCED

I. APL’S USE OF THE PLAYER ILLUSTRATIONS IN CONJUNCTION WITH THE PLAYER CODES DOES NOT AMOUNTS TO INFRINGEMENT OF M.S DHENIER AND VIRET KELLY’S PERSONALITY RIGHTS AND PASSING OFF.

1. The Counsel on behalf of the Respondent (*hereafter*, “*defendant*”) humbly submits before this Hon’ble New Telly High Court that use of the player illustrations in conjunction with the player codes does not amounts to infringement of M.S Dhenier and Viret Kelly’s Personality Rights and Passing off. The counsel would base its argument majorly on four premises, *first*, that there is no breach of Personality rights vis-à-vis Publicity Rights or Right to Privacy of petitioners [1.1]; *second*, APL created the illustrations and holds Copyright over it [1.2]; *third*, using combination of the cricketer’s name and jersey numbers does not amount to infringement of Trade Marks Act [1.3]; and *last*, using of combination does not amounts to passing off.

[1.1] NO BREACH OF PERSONALITY RIGHTS VIS-À-VIS PUBLICITY RIGHTS OR RIGHT TO PRIVACY.

2. It is most humbly submitted before this Hon’ble High Court of New Telly that in the case *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*,¹ the Hon’ble Court defined personality rights as an offshoot of the common law right of privacy,² in the context of sports for the first time. In this regard, a person’s identity means anything which is expressed in his likeness, images, or personality,³ and rights over one’s image, trait,⁴ and the extension of his personality.⁵
3. The Hon’ble Supreme Court of Missouri in the case of *Doe v. TCI Cablevision*,⁶ has observed that the identity or persona of a person is protected under publicity law but not just “a mere use of a name”. It is contended here, that the use of statistics, image and combination of their name and jersey numbers i.e., MS7 and VK18 are being used to

¹ 202 F.2d 866 (2d Cir. 1953).

² Justice KS Puttuswamy v. Union of India, (2017) 10 SCC 1; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 576 (1977); William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960).

³ Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

⁴ ICC Development v. Arvee Enterprises, (2003) 26 PTC 245 (Del.).

⁵ Tabrez Ahmad and Satya Ranjan Swain, *Celebrity Rights: Protection under IP Laws*, 16 J. Intellect. Prop. Rights 7-16 (2011).

⁶ 110 S.W.3d 363 (Mo. 2003).

identify players. It is also pertinent to note that Vision 11 do not use players' names or statistics to promote their leagues but using mere use of codes in an authorised manner.

4. Further, the game uses the same players and statistics, and the information is not being used to promote one league over another, as they are only used by users for drafting their teams in a 'fair way'.⁷ The statistics have no bearing on the marketing of fantasy leagues; rather they are used strictly as raw data that is computed to develop the league standings.
5. In arguendo, Vision 11 do not have an adverse effect on the commercial value of cricketer's and 'impermissible purpose',⁸ because the statistics are already in the public domain and can be used by anyone which do not violate the players' right to publicity,⁹ or right to privacy.¹⁰ Also, in fact, an empirical studies suggest that fantasy sports actually increases the commercial value of players because users will more likely to watch games on TV to keep track of the players' and on their team.¹¹
6. It is submitted that illustration which have been transformed are in worst nominative in nature and have an original identity over it.¹² Additionally, the use of 'Predominant Test' and 'Transformative Elements',¹³ are not violating any commercial value or expressive values of their personality rights or right to privacy.¹⁴ In the case of *Kirby v. Sega of America Inc.*,¹⁵ the court held that if the use a player is transformative in nature because and with the context of Vision 11, APL transformed the identity into illustrations unlike real-life images of the plaintiff(s) (*hereafter*, "petitioner").¹⁶
7. It is submitted that by considering the factual matrix of the case and by application of the above rulings in the case, it is contended that Vision 11 did not use the players' name and only used their real time statistics of the cricketers' performance from past matches and

⁷ *Comedy III Prods. Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁸ *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 928 (6th Cir. 2003).

⁹ *CBC Distribution and Marketing v. Major League Baseball Advanced Media*, 443 F. Supp. 2d at 1084-1085.

¹⁰ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1992).

¹¹ *CBC Distribution and Marketing v. Major League Baseball Advanced Media*, 443 F. Supp. 2d at 1091 n.20. *see also*, John A. Fortunato, *The relationship of fantasy football participation with NFL television ratings*, 3(1) *Journal of Sport Administration & Supervision* 74-90 (2011).

¹² *Parks v. LaFace Records*, 329 F.3d 437, 452 (6th Cir. 2003).

¹³ DEBORAH E. BOUCHOUX, *INTELLECTUAL PROPERTY THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS AND TRADE SECRETS* 274-275 (4th ed. 2012).

¹⁴ *Doe v. TCI Cablevision*, 110 S.W. 3d. 374 (Mo. 2003); *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 868 (2d Cir. 1953).

¹⁵ 144 Cal App 4th 47 (2006).

¹⁶ *Id.*

illustration which is at worst nominative in nature while drafting a team.¹⁷ In addition, the use of the combination and statistics did not involve the personality, character, physical appearance, or reputation of the players and do not equate to the players' persona and thus not a symbol of his identity. Thus, 'policy rationale' for Personality Rights Vis-à-Vis Publicity Rights or Right to Privacy does not apply in the case of fantasy sports (Vision 11).

[1.2] APL CREATED THE ILLUSTRATIONS AND HOLDS COPYRIGHT OVER IT.

8. The definition of Artistic work as laid down under Section 2 of The Copyright act, 1957, is fairly comprehensive and descriptive. Copyright shall subsists in any original artistic work comprising of paintings, sculptures, graphics, an engraving or a photograph, whether or not any such 'work' possesses artistic quality.¹⁸ In the present situation, APL used a skilled digital sketch artist to create illustrations which is indeed a degree of creativity.¹⁹
9. The copyright Act says that Images, whether of a celebrity or otherwise, are copyrightable in India as artistic work under the Copyright Act if original,²⁰ and which is capable of distinguishing goods or services of one undertaking from those of the goods or services of another undertaking shall be considered for the purposes of registration "Work capable of being used in relation to goods or services" such as logos, Cartoons, etc.
10. Going by the factual matrix of the case, it is humbly submitted that the petitioner's argument is flawed to contend that the illustrations created and used by the defendants is breach of their personality rights. Instead, the illustrations which are being used in the game of Vision 11 is created by a skilled digital sketch artist,²¹ which is a work of skill, labour, and capital that is more than a copy of an original work,²² and due to which they hold copyright over the illustrations.²³
11. In this connection, copyright on literary work which subsists in the form of promotional material (taglines or catchphrases), being fairly used by the APL.²⁴ In other words, the

¹⁷ The Moot Proposition, ¶2 (a).

¹⁸ The Copyright Act, 1957, No. 14, Acts of Parliament, § 2(c)(i) read with 2(y)(i).

¹⁹ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

²⁰ The Copyright Act, 1957, No. 14, Acts of Parliament, §13(a) read with §2(c). *see also*, 17 U.S.C. § 102(a) (2000).

²¹ The Moot Proposition, ¶3.

²² Eastern Book Company & Ors. v. DB Modak & Anr., (2008) 1 SCC 1, at ¶8.

²³ The Moot Proposition, ¶4.

²⁴ Jayashri Suresh, *SPORTS – Intellectual Property has got your back!*, SELVAM & SELVAM (Feb. 18, 2016), <https://selvams.com/blog/sports-intellectual-property-has-got-your-back/>.

media promotion by designing posters bearing the copyrighted illustrations and a one-liner catch phrase- “*Come and Play with MS7 & VK18 on our app*”,²⁵ shows the media promotion of cricketer’s is in honest and rightful manner.

12. According to the factual matrix of the case, the APL’s use of players’ code, image and statistics were not used by Vision 11 with the intent to obtain a ‘commercial advantage’,²⁶ because there is nothing about Vision 11 fantasy game which suggests that any Cricket player is associated with Vision 11 game or that any player endorses or sponsors the game in any way.

[1.3] USING COMBINATION OF THE CRICKETER’S NAME AND JERSEY NUMBERS DOES NOT AMOUNT TO INFRINGEMENT OF TRADE MARKS ACT.

13. According to Section 29 of The Trade Marks Act, 1999 states *inter alia* that a registered trademark is infringed when a person, (i) not being a registered proprietor or a permitted user (ii) uses in the course of trade a mark which is identical or similar or deceptively similar trade mark in relation to the goods or services in respect of which the trade mark is registered (iii) and in such manner as to render the use of the mark likely to be taken as being used as a trademark.²⁷
14. On the contrary, Section 29 is about ‘Registered Trademarks’ but APL used the player codes for each cricketer which is a combination of the initials of the real-life cricketer’s and their jersey numbers i.e., MS7 and VK18 are not registered and does not comes under the ambit of Section 29.²⁸
15. In Arguendo, even if MS7 and VK18 are registered trademarks, the APL’s use of their mark in Vision 11 is only for the purpose of identifying goods or services as those of the proprietor in accordance with honest practice (*bona fide*) and not such as to take ‘unfair advantage’ of or be detrimental to the distinctive character or repute of the trade mark.²⁹
16. Moreover, the Hon’ble Madras High Court in the case of *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*,³⁰ relied upon two U.S. Ninth Circuit judgments,³¹ and held that for any unauthorized use of the trademark to be considered defence of ‘nominative fair use’ must

²⁵ The Moot Proposition, ¶4.

²⁶ FREDERICK W. MOSTERT, FAMOUS AND WELL-KNOWN MARKS (2nd ed. 2004).

²⁷ The Trade Marks Act, 1999, No. 47, Acts of Parliament, § 29.

²⁸ The Moot Proposition, ¶3.

²⁹ The Trade Marks Act, 1999, No. 47, Acts of Parliament, § 30 (1) (a) & (b).

³⁰ *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*, 2013 (54) PTC 578 (Mad.).

³¹ *New Kids on the Block v. News Am. Publishing Inc.*, 971 F.2d 302 (9th Cir. 1992); *Caïms v. Franklin Mint Co.*, 292 F.3d 1139, 1153-55 (9th Cir. 2002).

meet with three requirements: *first*, the product or service in question must be one not readily identifiable without use of the trademark; *secondly*, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and *thirdly*, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

17. Going by the factual matrix the three requirements are being fulfilled by the APL in the present case: the product and service provided by using player illustrations for each cricketer in the game Vision 11 is not ‘readily identifiable’ without their player codes which is a combination of the initials and their jersey numbers.
18. In the case of *Tata Sons Limited v. Greenpeace International & Anr.*,³² Greenpeace had launched a game called ‘Turtle v. TATA’ and depicted TATA as antagonists which had to be destroyed by the turtles. The Hon’ble Delhi High Court held that “there will be no infringement if the user’s intention is to focus on some activity of the trademark owners, and is “denominative”, drawing attention of the reader or viewer to the activity. In this respect, the use of the trade mark by APL in Vision 11 is ‘reasonably necessary’ in order to indicate that the goods or services,³³ provided by the company to users through mobile application.
19. After contextualising the above definitions and applying the same into the factual matrix of the case, the player codes used by APL are only used to identify players are in good faith. Moreover, use of these codes were the only practical way to refer cricketers to the users.³⁴ Thus, APL’s using of player codes for each cricketer is ‘*bona fide*’ and ‘Nominative Fair Use’ in nature and does not cause any harm to their reputation.
20. It is humbly submitted that the concept of ‘Dilution’ will only be placed when the use of a mark should have affect to diminish or weaken the strength and identification value of the mark,³⁵ or detriment to the distinctive character or repute of the registered trademark or cause consumer confusion.
21. In the case of *Tata Sons Limited v. Manoj Dodia & Ors.*,³⁶ the Hon’ble Court held whenever use of some mark is not causing confusion amongst the consumers as to the source of goods or services it becomes necessary to evidence a change in the economic behavior of

³² 178 (2011) DLT 705.

³³ The Trade Marks Act, 1999, No. 47, Acts of Parliament, § 30 (2) (d).

³⁴ *Century 21 Real Estate Corp. v. LendingTree, Inc.*, 425 F.3d 211 (3rd Cir. 2005). *see also*, Regulation (EU) 2015/2424 of The European Parliament And of The Council, art. 12.

³⁵ *Caterpillar Inc. v. Mehtab Ahmed & Ors.*, 99 (2002) DLT 678.

³⁶ *Tata Sons Limited v. Manoj Dodia & Ors.*, 2011 (46) PTC 244 (Del.).

consumers of goods and services for which the earlier mark was registered.³⁷ Similarly, in the present case Vision 11 is not taking any ‘unfair advantage’ or causing any dilution “detriment to the character or repute of trademark or consumer confusion”, as the display of matches on mobile application gives accurate information and result of the real match played and in no way detrimental to the character or disparages the reputation of trade marks. Thus, the use of trademark is in no way tarnishing the public image of either the players or the Intian Cricket Fraternity.

22. Further, in the case of *Pioneer Bakeries (P) Ltd. v. Kraft Jacobs Suchard Ltd.*, while rejecting opposition it was held that registration of trademark shall not be refused when there is no ‘likelihood of confusion’.³⁸ Therefore, element of ‘likelihood of confusion’ is improbable in the present case of fantasy sports game operators because it does not in any manner suggest endorsement of Vision 11 fantasy sports game by the cricketer’s, and is being used only for the functional purpose of identifying cricketer’s.
23. In *Arguendo*, the use of a registered trademark would constitute an infringement only if it indicates a connection in the course of trade between the person and his goods or services, irrespective of his intention.³⁹ However, the goods or services being provided by APL is only for the ‘functional’ purpose of identifying the players, teams and matches. It may be noted here, that almost all fantasy sports game operators’ use the same players for drafting teams and to organise their fantasy sport games. It is, therefore, highly unlikely for a man of ordinary intelligence to believe or to get confused that any “Nominative” use Proprietor of a registered trademark,⁴⁰ would be associated with, endorse or sponsor each and every fantasy sports game operator.
24. In the same context, the Hon’ble Court in the case of *Tata Sons Limited v. Manoj Dodia & Ors.*, held that though the use of a mark may not cause confusion amongst the consumers when the source of goods or services are for different purposes. Conclusively, a mere usage of a trade mark by APL would not, *ipso facto*, amount to infringement because APL using the trade mark in relation to an entirely different set of goods or services.⁴¹

³⁷ Intel Corp. v. CPM UK Limited, 2008 ECR.

³⁸ 1998 PTC (18) 502.

³⁹ Hem Corporation v. ITC Limited, 2012 (52) PTC 600 (Bom.).

⁴⁰ *Supra* Note 31. *see also*, *Supra* Note 32.

⁴¹ Rana Steels v. Ran India Steels Pvt. Ltd., 2008 (102) DRJ 503 (Del.).

[1.4] USING OF COMBINATION DOES NOT AMOUNTS TO PASSING OFF UNDER THE TRADE MARKS ACT.

25. The counsel on behalf of the defendant humbly submits before the Hon'ble High Court of New Telly that the use of players codes with the combination of their jersey numbers does not amount to passing off as there was no intention on the part of APL to create an impression to relate the player codes in relation to M.S Dhenier and Viret Kelly. The counsel would base its argument majorly on two sub-premises, *first*, the elements of passing off are not being established in the present case [1.4.1]; and *last*, combination of cricketer's name and jersey numbers are 'Bona fide' and 'Nominative' in nature [1.4.2].

1.4.1 Elements of Passing off are not being established in the present case.

26. It is pertinent to note that The Trade Marks Act, 1999 does not have any explicit provision in relation to the passing off but it includes the similar mark which may create a conundrum amongst the public. The principle passing off has emerged from the fundamental concept "A man is not to sell his goods under the pretence that they are the goods of another man".⁴² Passing off (also referred to as palming off) arises when one party tries to pass off the (usually inferior) goods on the grounds that they are goods of another.⁴³ Passing off is a remedy to protect from the unfair competition by misrepresentation.⁴⁴

27. The elements of passing off was established in the case, *Reckitt & Colman Ltd. v. Borden Inc.* are misrepresentation, goodwill, and damage (also known as "classical Trinity").⁴⁵ In the case at hand, the 'mere use' of codes like MS7 and VK18 are only deemed to provide for identification and does not establish any 'likelihood of deception',⁴⁶ or misrepresentation in the minds of people about the players and their source from which it emanates.⁴⁷

28. However, to establish passing off, there has to be some reasonable and actual damage to the party. It was observed in the case of, *D.M. Entertainment Pvt. Ltd. v. Baby Gift House & Ors.*,⁴⁸ it was held that the 'mere use' of the name of a celebrity did not result in a claim

⁴² Perry v. Truefitt (1842) 6 Beav. 66. *see also*, N.R. Dongre v. Whirlpool Corporation, (1996) 5 SCC 714.

⁴³ SREENIVASULU NS: LAW RELATING TO INTELLECTUAL PROPERTY 95 (2nd ed. 2018).

⁴⁴ The Lanham Act of 1946 § 43(a), 15 U.S.C. § 1125.

⁴⁵ (1990) RPC 341 (HL).

⁴⁶ KC KAILASAM, LAW OF TRADEMARKS AND GEOGRAPHICAL INDICATIONS 343 (2nd ed. 2005). *see also*, Laxmikant V. Patel v. Chetanbhai Shah, 2002(24) PTC 1 (SC).

⁴⁷ Bi-Rite Enterprises, Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983); Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd., (1901) AC 217.

⁴⁸ D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., 2010 CS (OS) 893 of 2002.

of endorsement or promotion, as long as no overt act was credited to the defendant in which he sought to give representation to some person or public at large that the restaurants were owned or sponsored by the petitioner(s).⁴⁹

29. According to Section 32 of the Trademark Act, 1999 states that “*it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration and before commencement of any legal proceedings challenging the validity of such registration, acquired a distinctive character in relation to the goods or services for which it is registered*” which indirectly talks about the secondary and distinctive meaning,⁵⁰ thereby claiming that when a trademark which is unregistered but is distinctive of the good which is registered can take will not be rendered invalid.⁵¹

30. In the landmark judgement of *B.S Ramappa v. V.B Monappa & Anr.*,⁵² it was given that if the goods and services are distinctive and the use and honest, then it can be covered under Section 32 of Trademark Act, 1999. Similarly, in reference to the case in hand, APL’s use of player codes can be referred as the secondary meaning,⁵³ and rather distinctive, due to which the reputation and goodwill of players’ are not diminished.

31. According to the factual matrix of the present case, the usage of team players and logos is solely for the creation of teams by the users of fantasy sports. Moreover, APL is in no way giving impression that the players or the teams are endorsing Vision 11 as they are required for the sole purpose of identification which is not similar in nature with petitioners.⁵⁴ All the elements of Passing off are not in compliance with the rights of M.S Dhenier and Viret Kelly’s accusations, therefore, no Passing off is established.

1.4.2 Combination of cricketer’s name and jersey numbers are ‘Bona fide’ and ‘Nominative’ in nature.

32. It is most humbly submitted that under Section 30(2)(d) of the Trademark Act, 1999,⁵⁵ which includes prominently three elements as given in the case *Consim Info Pvt. Ltd v.*

⁴⁹ B.S Ramappa v. V.B Monappa & Anr., AIR 1970 Mad 156.

⁵⁰ Kanungo Media Pvt Ltd v. RGV Film Factory, 138 (2007) DLT 312.

⁵¹ The Trade Marks Act, 1999, No. 47, Acts of Parliament, § 32.

⁵² AIR 1970 Mad 156.

⁵³ Rober G. Bone, *Hunting Goodwill: A History of the concept of Goodwill in Trademark law*, 86 Boston Univ L Rev 547-576 (2006).

⁵⁴ Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., AIR 2001 SC 1952; Dunlop v. Dunlop, (1889) 16 RPC 12.

⁵⁵ The Trade Marks Act, 1999, No. 47, Acts of Parliament, § 30 (2) (d).

Google India Pvt. Ltd.,⁵⁶ (a) that the product must not be readily recognisable without the trademark, (b) reasonable use of trademark to identify the goods and services, (c) the user with the product must not indicate to any endorsements or sponsorship by the trademark holder.

33. Further, APL's using of combination of cricketer's name and jersey numbers are not in any unethical manner or use them in a fashion that is harmful to the registered trademark. Their use is primarily 'denominative' in nature and does not create uncertainty in the minds of sports fans.⁵⁷ In the case of *Tata Sons Limited v. Greenpeace International & Anr.*⁵⁸, it was held that there will be no violation if the user's intention is to concentrate on some action of the trademark owners and is "Denominative", drawing the reader or public's attention to the activity.
34. In the case at hand, the use is reasonable without the identity of the players, it is not *prima facie* recognisable that it is any circumstances sponsored by M.S Dhenier and Viret Kelly. The combination of player codes and jersey numbers used by APL albeit being used in a very different and unique way to identify players and draft a team and depicted in a way as to have no connection whatsoever with the M.S Dhenier and Virat Kelly.⁵⁹ In addition, Vision 11 as established by APL concentrated upon the game and how it is played. It is a game of skill as proved under the issue 2; therefore, the user's primary focus is on the skills and judgement based on the player in the game.
35. In arguendo, even MS7 and VK18 are registered trademarks in logos and names. The fantasy sports game operators can also be provided by support of a nominative equal use or a denominative use. Thus, Vision 11 using MS7 and VK18 are 'Nominative' and 'Descriptive' in nature and are only used to identify them in the mobile application.
36. In addition to this, the raised contention of injunction should not be granted. As Perpetual Injunction is primarily based on 3 elements – (a) *prima facie*, (b) balance of convenience and (c) irreparable loss. In the present case, the combination for making player code i.e., MS7 and VK18 conveys the idea only for the construction of a compromise of identification of players. In arguendo, In *Dart Industries Inc. v. Techno Plast*,⁶⁰ it was held that for seeking even *prima facie* protection there should be material disclosing that the

⁵⁶ *Supra* Note 30.

⁵⁷ *Supra* Note 32.

⁵⁸ *Id.*

⁵⁹ *Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories*, AIR 1965 SC 980.

⁶⁰ 2016 (67) PTC 457 (Del).

general public associating it with the petitioners as their distinctive mark. In contrast, the combination used only for users to identify their players.

37. Further, APL has secured over 1 Lakh registered users so APL will suffer comparably greater loss so balance of convenience goes in the favour of APL. It can also be seen that there is no irreparable loss to M.S Dhenier and Viret Kelly in the present case and on the other hand, APL will suffer irreparable loss and the *status quo* shall not be changed for there is no irreparable loss as given in the case of *Sri Shyam Sunder Kayal v. Mist Valley Binimoy Pvt. Ltd.*⁶¹
38. Therefore, there is no passing off, vis-a-vis, injunction and damages to M.S Dhenier and Viret Kelly should not be granted. Also, there is no harm to the reputation and trademark of M.S Dhenier and Viret Kelly as the use is honest,⁶² and *bona fide*,⁶³ therefore, injunction, perpetual or otherwise should not be granted to the petitioners.
39. The petitioners claim to claim damages is unsustainable in the facts of the present case as there is no passing off, otherwise also it may not be granted as they have not established the bifurcation of 2 Crores damages they are stressing for. Critics of civil jury have established that the concern of the damage is capricious and unpredictable, and that there shall be bifurcation of the compensation and the punitive damages by the petitioners.⁶⁴ Therefore, it is humbly submitted before the Hon'ble court that there is no passing off and the claim of damages and injunction are vexatious and therefore, against the nature of equity of law.

II. VISION 11 DOES NOT AMOUNTS TO GAMBLING UNDER THE PUBLIC GAMBLING ACT, 1867.

40. The Counsel on behalf of the Defendant humbly submits before this Hon'ble New Telly High Court that the Vision 11 is a game of skill and does not amounts to gambling under the Public Gambling Act, 1867. The counsel would base its argument majorly on two premises, *first*, analysis of skill under the Public Gambling Act, 1867 [2.1]; and *last*, Vision 11 does not come under the ambit of Public Gambling Act[2.2].

⁶¹ 3 CALLT 560 HC (2007).

⁶² Manoj Plastics v. Bhola Plastic, (1983) PTC 368.

⁶³ Century 21 Real Estate Corp. v. LendingTree, Inc., 425 F.3d 211 (3rd Cir. 2005); The Lanham Act of 1946 § 33, 15 U.S.C. § 1115.

⁶⁴ Greene, E., Woody, W.D. & Winter, R., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law Hum Behav 187-205 (2000).

[2.1] ANALYSIS OF SKILL UNDER THE PUBLIC GAMBLING ACT, 1867.

41. It is pertinent to note that a game, whether of game or chance is decided on the basis of facts and circumstances of the particular game.⁶⁵ Moreover, by cases, courts have recognised that no game is a game of pure skill and involve an element of chance in it. If any game is ‘predominantly of skills’ than chance, then it will be a game of skill and vice versa.⁶⁶
42. In the landmark judgement of *State of Andhra Pradesh v. K. Satyanarayana*,⁶⁷ it was held that ‘dominant factor test’, or ‘predominance test’ which requires assessment and determination of whether chance or skill is the dominating factor in determining the result of the game. Similarly it was declared that rummy is game of skill as the fall of cards and building up of rummy needs skill of the person and thus is predominantly a game of skill.
43. Likewise, in the case of *Dr. K.R. Lakshmanan v. State of Tamil Nadu*,⁶⁸ game of horse racing was considered as a game of skill as while placing the bet, the condition, statistics and fitness of the horse is assessed, it therefore, is a game of skill and hence valid.

2.1.1 Vision 11 is a game of skill and not a game of chance.

44. It is humbly submitted that in the instant case, Vision 11 is a fantasy sports game which is played online. Users pay an entrance fee to enter a tournament and are collected for distribution to users upon removal of a service/administrative charge by fantasy sports game providers. Users build their teams on the basis of their application of expertise (collected by rigorous research), interest, experience and skill in the related sport.⁶⁹
45. In the case of *Humphrey v. Viacom*,⁷⁰ plaintiff’s claim about the legality of online fantasy sports game and claimed that participants constitute a wager and therefore, is a game of ‘predominance of chance’. In arguendo, the court held that fantasy sports are ‘skill games’, depending on the skills of the participant, experience in choosing players for his or her side, adding and removing players throughout the season, and determining who will start from among his or her players and which players will be put on the bench.

⁶⁵ Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.

⁶⁶ State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699.

⁶⁷ AIR 1968 SC 825.

⁶⁸ AIR 1996 SC 1153.

⁶⁹ The Moot Proposition, ¶2.

⁷⁰ 2007 BL 38423 (D.N.J. 2007).

46. Further, the evidence presented in the expert study prepared by Prof. Zvi Gilula revealed how mathematical research shows that fantasy sports games are skill-based games.⁷¹ The three premise were made for the fantasy sports game, (a) player has a direct effect on the result, (b) statistics tell how good a skilled and well informed person does better than the rest, (c) a person is more likely to win by applying analysis, skills and awareness of the games acquired by them.
47. In a landmark decision on fantasy sports games, the Hon'ble P&H High Court in the case of *Shri Varun Gumber v. Union Territory of Chandigarh & Ors.*,⁷² ruled, *inter alia*, that the fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing provided by the fanciful sports game operator who was a party to the case were 'games of ability' under Intian law and did not constitute gambling. Consequently, the Court also recognised the offering of fantasy sports games as a legitimate business activity protected under the Constitution of India.
48. The principle of 'Functional Equivalence' is to be noted while in online gaming. Judicial precedents used tests and principles set out in the offline context, such as the preponderance factor test and the unfair prize scheme test, on a functional equivalence basis to assess the dynamics of games and the procedure of online and tele-operated games.⁷³ Similarly, legislative and judicial authorities have treated an online game portal as a 'functional equivalent' of the offline gaming house,⁷⁴ and would thereby subject the online game operator to legal strictures and restrictions prescribed on an offline game organiser.
49. In the landmark case of *CBC Distribution and Marketing v. Major League Baseball Advanced Media*,⁷⁵ it was held that success of fantasy games depends on drafting of players by the users which is crucial to winning a league.
50. It is submitted that in the present case, the users must first determine the relative importance of the players in Vision 11. Accordingly, selecting captain and vice caption is crucial part of the game as they give extra points to user. This evaluation must also factor in the player's current performance history and trends, fitness level and injury record, history against a particular opposition and at a particular venue, environmental conditions and the player's

⁷¹ FanDuel v. Schneiderman, 2015 N.Y. Misc. (Sup. Ct. N.Y. Dec. 11, 2015).

⁷² 2017 Cri LJ 3827.

⁷³ Bimalendu De v. Union of India, AIR 2001 Cal 30.

⁷⁴ Gaussian Networks v. Ms. MonicaLakhanpal, Suit No. 32 of 2012.

⁷⁵ 443 F. Supp.2d. 1077.

performance history is also important. Hence, it can be established that Vision 11 is a game of skill and not a game of chance.

[2.2] VISION 11 DOESN'T COME UNDER THE AMBIT OF PUBLIC GAMBLING ACT.

51. The Public Gambling Act (*hereafter*, "PGA") criminalises any gambling activity in a public forum and keeping of gambling common house. It was noted that, in the case of *State of Bombay v. R. M. D. Chamarbaugwalla*,⁷⁶ the Hon'ble Bombay High Court examined the historic treatment of gambling as an abominable and pernicious vice. It was established that the game of 'mere skills' include the games which are 'predominantly of skill' and even if there is a sliver chance factor, if the game is predominantly of skill, it still will be the game of 'mere skills'.⁷⁷
52. Further, Section 12 of the PGA, says that "*nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played*".⁷⁸ Thus, while the Act effectively prohibits organised gambling in India, it creates a distinction between betting on 'games of chance' and 'games of skill'.
53. In this regard, M.S Dhenier and Viret Kelly claims of Vision 11 being the 'game of chance' and thus 'illegal' is false. In the present case results of the rounds are based on statistics, scores, achievements and the performance of real life cricketer's which are selected by users on assessing various factors. Moreover, there is no common gaming house in the present case i.e., Poker. Hence, by the application of the PGA to the factual matrix of the case it can be concluded that Vision 11 is a game of skill and hence does not come under the PGA.

2.2.1 APL operation is legal and not against Public Policy.

54. It is most humbly submitted that Right to Occupation- Article 19(1)(g) of the Constitution of India provides right to practise any profession, or to carry any business or trade or occupation.⁷⁹ The Court in the case *State of Bombay v. R.M.D Chamabaugwalla*,⁸⁰ held that it found it difficult to agree that practices which fostered a spirit of casual inclination for easy benefit by lot or chance could be treated as legitimate company or commercial

⁷⁶ AIR 1957 Bom 699.

⁷⁷ *Id.* See also, Law Commission Reports - Report No. 276 (July, 2018) Legal Framework: Gambling and Sports Betting Including in Cricket in India

⁷⁸ The Public Gambling Act, No. 3, Acts of Parliament, § 12.

⁷⁹ INDIA CONST. art. 19(1)(g).

⁸⁰ *Supra* Note 76.

undertakings and, therefore, could be considered legal to be entitled to protection as part of the constitutional right to trade and practice provided under Article 19(1)(g) of the Constitution of India.

55. In the landmark judgement of *Shri Varun Gumber v. Union Territory of Chandigarh & Ors.*, the Hon'ble P&H High Court held that the offering of fantasy sports games on Dream11.com is a legitimate business activity and would be granted protection under Article 19(1)(g) of the Constitution of India.⁸¹ Going by the factual matrix, APL should not face any restrictions on the business flexibility on their fantasy sports games and they have right to profit from their legitimate business activity. Hence, being the legitimate business it is very unnecessary to evaluate the business model of APL.

56. Further, the money placed in the game is for the happening and non-happening of the event where the real interest of the player lies, therefore, it is a contingent agreement.⁸² The analogy of this fantasy sports games can very well be seen as Stock Trading which is a speculation activity where the skills of the person is required to assess the workings of the company to invest. It is a legal activity and encouraged in the market. Hence, in the present case, APL game Vision11 is legal and not against the public policy as it does not comes under the ambit of gambling.

⁸¹ *Supra* Note 72.

⁸² The Indian Contract Act, 1872, No. 9, Acts of Parliament, § 31.

PRAYER

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsel on behalf of the Defendant/Respondent humbly pray before this Hon'ble Court that it may be pleased to adjudge and declare that:

1. APL's use of the player illustration in conjunction with the player codes does not amounts to infringement of M.S Dhenier and Viret Kelly's Personality Rights and Passing off.
2. Vision 11 does not amounts to gambling under the Public Gambling Act, 1867.

Or may pass any other order that the Court may deem fit in the light of equity, justice and good conscience.

And for this act of kindness of Your Lordships Defendant/Respondent shall as duty bound ever pray.

Sd/- _____

COUNSEL FOR DEFENDANT/RESPONDENT