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**1<sup>ST</sup> MEMORIAL DRAFTING COMPETITION BY METACEPT  
IN PARTNERSHIP WITH MEMO PUNDITS**

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**IN THE HON'BLE HIGH COURT OF NEW TELLY**

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**IN THE MATTER OF**

**ORIGINAL CIVIL JURISDICTION**

**C.S (O.S.) No. \_\_\_\_/2020**

**(U/S 20 OF CODE OF CIVIL PROCEDURE, 1908 r/w S. 5 OF DELHI HIGH COURT  
ACT, 1966 AND S. 134 OF TRADE MARKS ACT, 1999)**

**M.S. DHENIER & VIRAT KELLY.....PLAINTIFFS**

**~VERSUS~**

**AVENGERS MEDIA and ENTERTAINMENT Pvt. Ltd. ....DEFENDANT**

**AND**

**ORIGINAL WRIT JURISDICTION**

**WRIT PETITION (CIVIL) NO. \_\_\_\_/2020**

**(UNDER ARTICLE 226 OF THE CONSTITUTION OF INTIA)**

**M.S. DHENIER & VIRAT KELLY.....PETITIONERS**

**~VERSUS~**

**UNION OF INTIA & OTHERS.....RESPONDENTS**

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**UPON HUMBLE SUBMISSIONS BEFORE THE HON'BLE CHIEF JUSTICE OF  
NEW TELLY AND HIS COMPANION JUSTICES OF  
THE HIGH COURT OF NEW TELLY**

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**MEMORANDUM SUBMITTED ON BEHALF OF THE DEFENDANT & RESPONDENTS**

**1ST MEMORIAL DRAFTING COMPETITION BY METACEPT IN PARTNERSHIP  
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**LIST OF ABBREVIATIONS**

<b>ABBREVIATIONS</b>	<b>EXPANSIONS</b>
S.	SECTION
v.	VERSUS
&	AND
Art.	ARTICLE
U.O.I	UNION OF INDIA
Govt.	GOVERNMENT
Para.	PARAGRAPH
AIR	ALL INDIA REPORTER
S.C.	SUPREME COURT
SCC	SUPREME COURT CASES
SCR	SUPREME COURT REPORTER
Anr.	ANOTHER
Ors.	OTHERS
AP	ANDHRA PRADESH HIGH COURT
Cal.	CALCUTTA HIGH COURT
Gau.	GAUHATI HIGH COURT
Ker.	KERALA HIGH COURT
M.P.	MADHYA PRADESH
MP	MADHYA PRADESH HIGH COURT
Mad.	MADRAS HIGH COURT
W.B.	WEST BENGAL
Ed.	EDITION
ILR	INDIAN LAW REPORTER
Bom.	BOMBAY HIGH COURT
Vol.	VOLUME
p./ Pg.	PAGE NUMBER
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12.	C.B.C. Distribution & Marketing v. MLBAM	505 F.3d 818 (8 <sup>th</sup> Cir. 2007)	1
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1.	WILLIAM CORNISH, Cases and Materials on Intellectual Property (5 <sup>th</sup> Edition)	Passim
2.	P. NARAYANAN, Intellectual Property Law, (Eastern Law House, 3 <sup>rd</sup> Edition)	Passim
3.	DR. S.V. DAMODAR REDDY, Intellectual Property Rights, Law and Practices, (Asia Law House, 1 <sup>st</sup> Edition)	Passim
4.	RAMA SARMA, Commentary On Intellectual Property Laws, (Lexis Nexis, 1 <sup>st</sup> Edition)	Passim.
5.	DR V K AHUJA, Law Relating to Intellectual Property Rights, (Lexis Nexis, 3 <sup>rd</sup> Edition)	Passim

**IV. LIST OF ONLINE DATABASES**

SL. NO.	ONLINE DATABASES
1.	Westlaw ( <a href="http://www.westlawindia.com">www.westlawindia.com</a> )
2.	Manupatra ( <a href="http://www.manupatra.com">www.manupatra.com</a> )
3.	SCC Online ( <a href="http://www.sconline.in">www.sconline.in</a> )
4.	JSTOR ( <a href="http://www.jstor.org">www.jstor.org</a> )
5.	The Judgement Information System ( <a href="http://www.judis.nic.in">http://www.judis.nic.in</a> ) (Supreme Court of India Official)

**STATEMENT OF JURISDICTION**

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**M.S. DHENIER & VIRAT KELLY**

**v.**

**AVENGERS MEDIA and ENTERTAINMENT Pvt. Ltd.**

**THE PLAINTIFFS HAVE APPROACHED THIS HON'BLE HIGH COURT OF NEW TELLY U/S 20 OF CODE OF CIVIL PROCEDURE, 1908 R/W S. 5 OF DELHI HIGH COURT ACT, 1966 AND S. 134 OF TRADE MARKS ACT, 1999. THE DEFENDANT HUMBLY SUBMITS TO THE JURISDICTION OF THE HON'BLE COURT WHICH HAS BEEN INVOKED BY THE PLAINTIFFS. HOWEVER, THE DEFENDANT RESERVES THE RIGHT TO CHALLENGE THE SAME.**

**M.S. DHENIER & VIRAT KELLY**

**v.**

**UNION OF INTIA & OTHERS**

**THE PETITIONERS HAVE APPROACHED THIS HON'BLE HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION OF INTIA, 1950<sup>1</sup>. THE RESPONDENTS HUMBLY SUBMIT TO THE JURISDICTION OF THE HON'BLE COURT WHICH HAS BEEN INVOKED BY THE PETITIONERS. HOWEVER, THE DEFENDANT RESERVES THE RIGHT TO CHALLENGE THE SAME.**

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

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<sup>1</sup> Constitution of Intia, 1950 is *pari materia* to the Constitution of India, 1950.

**STATEMENT OF FACTS**

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- 1. DEVELOPMENT OF APL & VISION 11:** Anticipating a growth in the domain of ‘fantasy games’, Mr. Tony Stark, CEO of Avengers Media and Entertainment Pvt. Ltd. (APL) developed a game called Vision 11, an online multi-player fantasy cricket game playable in mobile in which users act as managers of their own team, select and build their own virtual cricket team. A winner of a Vision 11 round is the user whose team gets the highest points. Each user is charged with a fixed administrative fee for participation in each round.
- 2. APPROACH TO BCCI & THEIR DENIAL:** APL wanted to use pictures/figures/names of real-life players and logos of the tournament/leagues and teams for Vision 11’s script and therefore approached BCCI, cricket boards of other jurisdictions and the relevant cricket leagues for license to use their logos. It also approached other Indian and foreign players for use of their name. However, APL was refused license and permission of any kind.
- 3. APL’s CREATION OF ITS OWN TEAMS AND LOGOS:** APL after receiving refusal and denial resorted to make its own team and logos for 10 International teams and IPL(Intia Pro League). Instead of real-life images or pictures, it used illustrations of players which were created by skilled digital sketch-artists who are APL’s employees and therefore APL claimed copyrights over the illustrations. It used initials of player’s name and their jersey number for a player code. For instance, player code of M.S. Dhenier was MS7 and Virat Kelley was VK18. APL used statistic in different stadia, current form and other causative factors for playing. APL made sure no official team names, logos or brand logos were used.
- 4. LAUNCH OF APL & ITS POPULARITY:** After APL was finally launched, within a span of three months it had over one lakh registered users and to promote the game, APL used an one-line catcher. “*Come and Play with MS7 & VK18 on our app.*” It was promoted in various social media platforms and newspapers, hoardings in several cities.
- 5. INSTITUTION OF CASE BY M.S. DHENIER & VIRAT KELLY:** These posters caught BCCI’S attention and being informed by BCCI, the legal departments of M.S. Dhenier and Virat Kelly initiated a case with respect to the infringement of their personality rights and passing off and in addition to injunctive relief, they sought Rs. 2 Crores in the form of damages. They also filed a PIL challenging the legality of APL and urged that it amounted to gambling under the Public Gambling Act, 1867. Since, both the case were connected, the Court clubbed the cases for a joint hearing.

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**ISSUES RAISED**

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**~ISSUE I~**

WHETHER APL'S USE OF THE PLAYER ILLUSTRATIONS IN CONJUNCTION WITH  
THE PLAYER CODES AMOUNTS TO INFRINGEMENT OF M.S. DHENIER AND  
VIRAT KELLY'S PERSONALITY RIGHTS AND PASSING OFF?

**~ISSUE II~**

WHETHER, VISION 11 AMOUNTS TO GAMBLING UNDER THE PUBLIC  
GAMBLING ACT, 1867?

**SUMMARY OF ARGUMENTS**

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**ISSUE I: WHETHER APL'S USE OF THE PLAYER ILLUSTRATIONS IN CONJUNCTION WITH THE PLAYER CODES AMOUNTS TO INFRINGEMENT OF M.S. DHENIER AND VIRAT KELLY'S PERSONALITY RIGHTS AND PASSING OFF?**

It is most humbly and respectfully submitted before this Hon'ble High Court that APL's use of the player's illustrations in conjunction with the player codes does not, in any case, amounts to infringement of personality rights and passing off because APL's use of the players' illustrations and players' codes doesn't infringe petitioner's personality rights; The petitioners have failed to establish the test of validity and identifiability; APL has copyright over the illustrations of MS7 and VK18 and several other player's illustrations used in Vision 11; The APL has complied with the doctrine of "*modicum of creativity*"; The Vision 11 fantasy game complies with the "*doctrine of transformative use*"; The Vision 11 app is protected under the "*doctrine of nominative fair use*"; The "*functionality doctrine*" brings the case in favour of the defendant-company; The APL has not infringed petitioner's right of Passing off; The Personal Information allegedly used by the defendant-company are present in Public Records and The Plaintiffs are not entitled to get any protection under Trademark Act and Copyright Act.

**ISSUE II: WHETHER, VISION 11 AMOUNTS TO GAMBLING UNDER THE PUBLIC GAMBLING ACT, 1867?**

It is most humbly and respectfully submitted that the Vision 11 is not conducting any illegal operation of gambling/betting/wagering in the guise of "online fantasy sports gaming" and doesn't amount to gambling under the Public Gambling Act, 1867 because The users have to enter into a mandatory agreement and accept the contractual terms and conditions before using the app; The Vision 11 app is preponderantly a game of "skill" rather than "chance"; Material and considerable skills are required by the user in 'drafting' of a virtual team and 'playing' fantasy sports game; The element of skill is the dominating factor in determining the result of the game; The Vision 11 app comes under the ambit of 'game of mere skill'; The instant fantasy cricket game passes the 'dominant factor test', or 'predominance test'; The points are attributed in a transparent and verifiable manner; The users are charged with a fixed administrative fee for participation in each round and The element of equal chance of gain or loss is absent

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**ARGUMENTS ADVANCED**

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**ISSUE I: WHETHER APL'S USE OF THE PLAYER ILLUSTRATIONS IN  
CONJUNCTION WITH THE PLAYER CODES AMOUNTS TO INFRINGEMENT OF  
M.S. DHENIER AND VIRAT KELLY'S PERSONALITY RIGHTS AND PASSING  
OFF?**

It is most humbly and respectfully submitted before this Hon'ble High Court that APL's use of the player's illustrations in conjunction with the player codes does not, in any case, amounts to infringement of personality rights and passing off because:-

**[I.A] APL's use of the players' illustrations and players' codes doesn't infringe  
petitioner's personality rights.**

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It is humbly contended that the APL's use of the player's illustrations and players' codes doesn't infringe petitioner's personality rights because:-

**[I.A.1] The petitioners have failed to establish the test of validity and identifiability.**

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[¶.1] It is humbly asserted that to attract and to determine the liability for infringement of the 'right to publicity' which is analogous to the **personality rights**, the Hon'ble Delhi High Court in the case of *Titan Industries*<sup>2</sup> has laid down two basic elements i.e. **test of validity and identifiability**. The test of validity states that the plaintiff should own an enforceable right in the identity of persona of a human being and the test of identifiability states that the celebrity must be identifiable from defendant's unauthorized use. Further, in the case of *C.B.C. Distribution & Marketing v. MLBAM*,<sup>3</sup> the Hon'ble Court held that the use of the player's performance records and the name in conjunction with a fantasy sports league did not violate the player's right to publicity. It was contended that the player's names and statistics were being used without the player's consent. However, the Court opined that it wasn't used to a commercial advantage as such advantage is *de minimis* and the use of the players' name and statistics were not a symbol of the player's identity.

[¶.2] The actual names of real-life cricketers weren't used in the fantasy cricket game offered by Vision 11. Rather, it used a player code for each cricketer which was a combination of initials of the real-life cricketer and their jersey numbers. APL also made sure that no official

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<sup>2</sup> *Titan Industries v. M/S Ram Kumar Jewellers*, MANU/DE/2902/2012: 2012 (50) PTC 486 (Del), ¶ 14 (III).

<sup>3</sup> *C.B.C. Distribution & Marketing v. MLBAM*, 505 F.3d 818 (8<sup>th</sup> Cir. 2007)

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team names, team logos or brand logos were used.<sup>4</sup> Therefore, in the instant case, the petitioner's good will and reputation isn't jeopardised or commercialised and the facets of the test of validity and identifiability are not fulfilled as certainly MS7 and VK18 are not their identifying features because the players' name and statistics are not a symbol of the player's identity.

**[I.A.2] APL has copyright over the illustrations of MS7 and VK18 and several other player's illustrations used in Vision 11.**

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**[¶.3]** It is humbly submitted that the illustrations of the cricketers as used by APL were created by skilled digital sketch artists who are APL's employees and therefore would come under the ambit of "**artistic work**" which shall include a painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possesses artistic quality, a work of architecture, and any other work of artistic craftsmanship as stated in the **Section 2(c)** of the Copyright Act and therefore the copyright shall subsist in this original artistic work as per **Section 13 (1) (a)** of the Act and hence the APL would be the first owner of this copyright being the author of the work as provided under **Section 17** of the Act which stipulates that the author of the work shall be the first owner of the copyright therein. As APL has already obtained copyright over the illustrations of cricketers<sup>5</sup> after adhering to the due registration process as mentioned in **Chapter X**, it would be highly unreasonable, unjustified and vexatious to claim that APL's adoption of the illustrations is *mala-fide* rather it is vice versa.

**[I.A.3] The APL has complied with the doctrine of "*modicum of creativity*".**

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**[¶.4]** It is humbly contended that as the APL holds copyright over the cricketer's illustrations as already discussed above, it can be safely inferred that APL has absolutely complied with the doctrine of '*modicum of creativity*'<sup>6</sup> which prompts '**creative originality**' and stipulates that originality subsists in a work where a sufficient amount of intellectual creativity and judgment has gone into the creation of the work.

**[¶.5]** Further, the Hon'ble Supreme Court of India in the case of *Eastern Book Company v. D.B. Modak*,<sup>7</sup> has introduced the notion of "**flavour of minimum requirement of creativity**" and held that to establish copyright, the creativity standard applied is not that something must

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<sup>4</sup> Moot Proposition, Pg. 2, ¶ 3.

<sup>5</sup> Moot Compromis, Pg. 2, ¶ 3; Clarification, Q.10's answer.

<sup>6</sup> *Feist Publication Inc. v. Rural Telephone Service*, 499 U.S. 340, 345 (1991).

<sup>7</sup> (2008) 1 SCC 1.



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be novel or non-obvious, but some amount of creativity in the work i.e., a minimum level of creativity is required for creativity protection and to claim a copyright.

**[I.A.4] The Vision 11 fantasy game complies with the “*doctrine of transformative use*”.**

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[¶.6] It is humbly asserted that in the case of *Ryan Hart v. Electronic Arts Inc.*<sup>8</sup> the Hon’ble United States Court Of Appeals for the Third Circuit while relying upon a dictum of the Hon’ble Supreme Court of the United States in *Brown v. Entertainment Merchants Association*<sup>9</sup> has accepted the ‘*transformative use test*’ which was first introduced by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>10</sup> and has held that the works that are deemed to possess significant transformative elements are less likely to interfere with the individual’s economic interest, and thus are not violative of their image rights or publicity rights. When the test relies on the word "transformative", it uses the same sort of terminology used by the courts in the analysis of the first of four factors relevant under § 107<sup>11</sup> for the standard “*fair use*” defence test in copyright law.<sup>12</sup>

[¶.7] Further, the ‘*doctrine of transformative use*’ balances the First Amendment rights (freedom of expression) of a defendant against a celebrity’s right of publicity by deciding whether a new work supersedes the objects of the original work creations and it effectively restricts the right of publicity claims to a very narrow universe of expressive works. The main test that was laid down was “whether a product containing a celebrity’s likeness is so transformed<sup>13</sup> that it has become primarily the defendant’s own expression, meaning or message.”

[¶.8] Furthermore, after placing reliance on the intricate meaning of the ‘*doctrine of transformative use*’ as enunciated by the above mentioned case laws, it can be safely concluded that the illustrations of the cricketers and player codes for such illustrations as created by APL (Avengers Media and Entertainment Pvt. Ltd.) possess significant transformative elements and is less likely to interfere with the petitioner’s economic interest. Therefore, the illustrations and player codes are in accordance with the ‘*transformative use test*’ and would come under the ambit of ‘*fair use*’. Hence, the alleged illustrations and player codes are not violative of petitioner’s image rights or publicity rights.

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<sup>8</sup> *Ryan Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3<sup>rd</sup> Cir. 2013).

<sup>9</sup> *Browns v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

<sup>10</sup> *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)

<sup>11</sup> Copyright Act of 1976, 17 U. S. C. § 107.

<sup>12</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141-43 (2d Cir. 1998).

<sup>13</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9<sup>th</sup> Cir. 2001); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937-38 (6<sup>th</sup> Cir. 2003)

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**[I.A.5] The Vision 11 app is protected under the “doctrine of nominative fair use”.**

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[¶.9] It is humbly submitted that the use of the illustrations of cricketers and the player codes for them can evade legal liability as it comes under the ambit of ‘*nominative fair use*’. The Hon’ble Madras High Court in the case of *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*<sup>14</sup> while referring the cases of *New Kids on the Block v. News Am. Publishing Inc.*<sup>15</sup>, has held that, “A use is considered to be a permitted nominative fair use, if it meets three requirements, viz., (i) the product or service in question must be one not readily identifiable without use of the trademark; (ii) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (iii) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. Further, the Third Circuit Court of U.S.A in the case of *The Century 21 Real Estate v. Lendingtree Inc.*<sup>16</sup> laid down the factors that are needed to be considered for nominative fair use. They are (i) Degree of consumer care; (ii) Length of time defendant has used plaintiff’s mark without evidence of actual confusion; (iii) Intent of the defendant in adopting the mark and (iv) Evidence of actual confusion.<sup>17</sup>

[¶.10] Furthermore, **Section 30 (2) (d)** of the Trade Mark Act, 1999 provides that a nominative fair use of a trademark by a third party is not an infringement of a registered trademark. However, in the instant case the illustrations and player codes are not registered by the petitioners as trademark and their use by APL is at worst nominative in nature as the app in question is not at all readily identifiable without them and to boost its social and print media promotion, it decided to design posters of its two most popular illustrations of which it had copyright and had a one-line catcher phrase- “Come and play with MS7 & VK18 on our app”<sup>18</sup>, which qualifies as a reasonable necessity to identify the app and promote the game. Also, their use by APL doesn’t, in any circumstances, suggest that the Vision 11 app is sponsored or endorsed by the petitioners and they are associated with it. Moreover, the APL has not used any official logos, cricketers’ real names, or their pictures<sup>19</sup> and there is no evidence of actual confusion on record to show that the consumers were confused by the APL’s use of player codes and illustrations and have exercised substantial care while using the app. Therefore, without any evidence of confusion in the minds of the users and normative fair use, it can be

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<sup>14</sup> (2010) 6 CTC 813.

<sup>15</sup> 971 F.2d 302 (9<sup>th</sup> Cir. 1992)

<sup>16</sup> *The Century 21 Real Estate v. Lendingtree Inc.*, 425 F.3d 211, No. 03-4700 (3rd Cir., October 11, 2005).

<sup>17</sup> *Playboy Enterprises Inc. v. Welles*, 279 F.3d 796 (9<sup>th</sup> Cir. 2002).

<sup>18</sup> Moot Proposition, ¶4.

<sup>19</sup> Moot Proposition, Pg. 2, ¶ 5.

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safely concluded that the petitioner's claim of violation of personality rights and right of passing off doesn't, in any case, sustain.

### **[I.A.6] The “*functionality doctrine*” brings the case in favour of the defendant-company.**

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[¶.11] It is humbly contended that the ‘**functionality doctrine**’ bars protection for something that is essential to the use or purpose of the article or which affects its cost or quality, to avoid an adverse effect on competition and to promote competition by protecting a company's reputation, from inhibiting legitimate competition by allowing a producer to control a useful product feature. With respect to the functionality doctrine it has been observed generally that, a product feature is functional, and cannot serve as a trademark, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article,<sup>20</sup> indicating that exclusive use of the feature would put competitors at a significant disadvantage unrelated to their reputations and if the trademark law were to protect such functional features, “the original producer would be able to establish a monopoly in useful goods.”

[¶.12] Further, in India this doctrine finds mention in **Section 9(3) of the Trade Marks Act, 1999** and nobody can claim monopoly or trademark in player codes for each cricketer which is a combination of the initials of the real-life cricketer and their jersey numbers as this is a functional feature of the fantasy cricket game and is essential to the use and purpose of it and without which the cost and quality of the game will be affected. Furthermore, the exclusive use of such feature by other competitors and unreasonable restriction on the use of it will put the respondent-company in a disadvantageous position and therefore the use of player codes (MS7 & VK18) by APL is protected under functionality doctrine and should be unrestricted in any manner and hence doesn't violate the personality right of the petitioners.

### **[I.2] The APL has not infringed petitioner's right of Passing off.**

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[¶.13] It is humbly asserted that the Passing off means that the defendant by making a false representation sells goods, with the intention to deceive the purchaser and the plaintiff believes that the goods being sold by are of the defendant. The three fundamental elements often referred to as the Classic Trinity as restated by the House of Lords in the case of ***Reckitt & Colman Products Ltd v. Borden Inc.***<sup>21</sup> were (i) Goodwill owned by a trader; (ii) Misrepresentation and (iii) Damage to Goodwill. Lord Diplock in the case of ***Erven Warnink v. Townend***<sup>22</sup>, gave the

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<sup>20</sup> *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995); *Trafix Devices v. Mktg Displays*, 532 U.S. 159 (1995).

<sup>21</sup> *Reckitt & Colman Products Ltd v. Borden Inc.*, HL 1990.

<sup>22</sup> *Erven Warnink v. Townend*, (1979) AC 731.

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modern characteristics of a passing off action which are (i) Misrepresentation; (ii) Made in the Course of trade by a person; (iii) The ultimate consumers of goods or services or to prospective customers of his or supplied by him; (iv) that is calculated as such to injure the goodwill or business of another trader; (v) that causes actual damage to the goodwill or business of the trader by whom the action is brought.<sup>23</sup>

[¶.14] However, the above stated ingredients to claim an action of passing off are not attracted in the present case as there is nothing on record to prove that the defendant-company is trying to pass-off its Vision 11 app as one owned by the petitioners as there is no representation of both the petitioners to the public, be it their picture, photo or even poster, both in the defendant's fantasy game app as well in its social media pages, so as to cause any confusion in the minds of the public that the petitioners are associated with the Vision 11 fantasy cricket game.<sup>24</sup> Further, neither did the plaintiff cricketer's names were commercialised, nor were there any loss of goodwill in their field. Although, in the instant case, famous personalities and widely known public figures are involved, unless unjust enrichment on a celebrity's Personality<sup>25</sup> Rights are proven, the suit would fail to stand the test of "publicity rights". Furthermore, publicly known facts and images of public figures are not protected.<sup>26</sup>

### [L.3] The Personal Information allegedly used by the defendant-company are present in Public Records.

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[¶.15] It is humbly submitted that the Hon'ble Supreme Court in the case of *Raj Gopal v. State of Tamil Nadu*<sup>27</sup> has held that the citizen has the right (also described as the 'right to be let alone) to safeguard the privacy of his own, his family, marriage, procreation, child-bearing and education among others and that nothing concerning these could be published without consent, except if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records. Further, protection of personal information from non-state third parties has not been adequately addressed in Indian jurisprudence.

[¶.16] Furthermore, the 'Canadian PIPEDA' is a good source to draw inspiration from with regard to a statutorily protected right of personal information. It defines 'personal information'

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<sup>23</sup> *Cadila Health Care Ltd. v. Cadila Pharmaceuticals*, 2001 PTC 541 (SC).

<sup>24</sup> *Gautam Gambhir v. D.A.P and Co. and Ors.*, (13.12.2017 - DELHC) : MANU/DE/5440/2017, ¶ 9.

<sup>25</sup> *ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*, 2003 (26) PTC 245.

<sup>26</sup> *Bala Krishnan v. R Kanagavel Kamaraj and others*, (2000) (3) Ar L R 622; *Phoolan Devi v. Shekar Kapoor and others*, (1995) P T C 46.

<sup>27</sup> (1994) 6 SCC 632, ¶ 28.

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as "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization"<sup>28</sup>.

[¶.17] In the instant case the Vision 11 fantasy cricket game has used the cricketers' statistics to create new data that is customized to its leagues and these statistics are not used to attract attention to the fantasy league, rather they are used to compute data. Since the statistics are transformed to create new data the fantasy sports could take the defence of modicum of creativity standard test to establish the novelty and innocuous nature of their work. Therefore, the statistics of the players used by Vision 11 would **neither fall under the category of copyright violation nor under trademark violation** as they are easily available in public domain and hence the petitioners cannot claim the violation of their personality rights and remedy of passing off.

**[I.4] The Plaintiffs are not entitled to get any protection under Trademark Act and Copyright Act.**

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[¶.18] It is humbly contended that vide **Section 13** of the **Indian Copyright Act, 1957**, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recordings. Statistics of players, in all probability, would not find expression the way copyrightable works under the Copyright Act, 1957 would thus making it difficult to bring statistics of players within the fold of copyright law. In *Sim v. Heinz & Co. Ltd.*<sup>29</sup>, the Hon'ble Court said that copyright is neither granted to voice, likeness nor other identifiers of a persona. For the petitioners to pursue an action for copyright infringement, an individual must be able to show the ownership of a copyright in the image and copying of that image. Similarly, it is difficult to challenge a violation of the personality rights on the basis of the consumer confusion rationale, which remains central to trademark law<sup>30</sup> as **Section 2 (1)** of the **Indian Trade Marks Act, 2000**, allows registration of any 'sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numeral and shape of goods or their packaging' as trademark<sup>31</sup> but not to the initials of a name and Jersey Number and therefore cannot provide any protection to them as they are not registered.

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<sup>28</sup> Personal Information Protection and Electronic Documents Act, S.C. 2000, ch.5, §2 (Can.).

<sup>29</sup> *Sim v Heinz & Co Ltd*, [1959] 1 WLR 313 1959.

<sup>30</sup> *Nestle India v. Mood Hospitality*, (2010) ILR 3 (Del.) 560.

<sup>31</sup> *Hem Corporation v. ITC Limited*, 2012 (52) PTC 600 (Bom.).

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**ISSUE II: WHETHER, VISION 11 AMOUNTS TO GAMBLING UNDER THE  
PUBLIC GAMBLING ACT, 1867?**

It is most humbly and respectfully submitted that the Vision 11 is not conducting any illegal operation of gambling/betting/wagering<sup>32</sup> in the guise of “online fantasy sports gaming” and doesn’t amount to gambling under the Public Gambling Act, 1867 because:-

**[II.A] The users have to enter into a mandatory agreement and accept the contractual terms and conditions before using the app.**

[¶.19] It is most humbly contended that the fantasy cricket game offered by Vision 11 through the mobile application has published a detailed set of terms and conditions to govern the user's account and interaction with the app and the services offered by it. A user's affirmative acceptance and agreement to abide by the Terms and Conditions of the Vision 11 app is a pre-condition for the user's registration of an account with this fantasy cricket game. Therefore, Vision 11 is transparent and open in its interaction with its users and this can be inferred from the fact that the game in a span of three months had over one lakh registered users and it clearly means that the users have to go through a mandatory registration process before using the app and it is not deceiving its users.<sup>33</sup>

**[II.B] The Vision 11 app is preponderantly a game of “skill” rather than “chance”.**

It is most respectfully asserted that the Vision 11 app is preponderantly a game of skill<sup>34</sup> because:-

**[II.B.1] Material and considerable skills are required by the user in 'drafting' of a virtual team and 'playing' fantasy sports game.**

[¶.20] It is most humbly contended that in Vision 11 fantasy cricket game, users evaluate, select, build and act as managers of their own virtual cricket teams<sup>35</sup> and points are attributed to each user on the basis of the real cricketer’s selection<sup>36</sup> and therefore a user's virtual team cannot be entirely or substantially consists of cricketers from a single real-world team. This stipulation ensures that the user has to exercise greater skill in acquainting himself with the

<sup>32</sup> Section 65 B (15) of the Finance Act, 1994; Public Prosecutor v. Veraj Lal Sheth, AIR 1915 Mad 164.

<sup>33</sup> Moot Compromis, Pg. 2, ¶ 4.

<sup>34</sup> Babu Bhai and Ors v. State of Raj. and Ors., S.B. Cr. Misc. Pet. No. 508/97 decided on 9.11.1997.

<sup>35</sup> Moot Compromis, Pg. 1, ¶ 2.

<sup>36</sup> Moot Compromis, Pg. 1, ¶ 2 (b).

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cricketers of both participating real-world teams in a single match and prevents a user from creating a circumstance resembling the act of betting on the performance of a single team to win the match/league.

[¶.21] Further, the drafting of a virtual team involves the exercise of superior knowledge, judgement and attention as the users are expected to consider, keeping aside any bias for an individual or a team, the current form of the cricketer, his relative worth as well as his strengths and weaknesses. Users are given access to anticipated and real time statistics of the cricketers' performance from past matches, which has to be assessed in the light of factors such as age, statistical trends, current form, injuries, the cricketer's statistics in various stadia and against different opponents, and other material causative factors that will have a bearing on the cricketer's performance as a whole.<sup>37</sup> Selection of '*captain*' and '*vice-captain*' is crucial in the success of the virtual team as double of the points accumulated by the designated Captain and 1.5 times of the points accumulated by the designated Vice-Captain are added to the overall points-tally of such user's virtual team.<sup>38</sup>

[¶.22] Therefore, the user must develop and devise a strategy to create a team that is balanced in manner consistent with the user's overall strategy with a focus on winning fantasy points. Hence, the platform require material and considerable skills in terms of 'drafting' and 'playing' which are the determinative factors in the results of the game and winning outcomes thereby.<sup>39</sup>

### **[II.B.2] The element of skill is the dominating factor in determining the result of the game.**

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It is most respectfully contended that the element of skill is the dominating factor in determining the result of the game because:-

#### **[II.B.2.i] The Vision 11 app comes under the ambit of 'game of mere skill'.**

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[¶.23] It is humbly submitted that the concept of '*game of mere skill*' is enunciated in **Section 12 of Public Gambling Act, 1867**<sup>40</sup> ("Central Gambling Act") & **Section 13 of Delhi Public Gambling Act, 1955**<sup>41</sup>. Section 12 of the Central Gambling Act creates a distinction between betting on 'games of chance' and 'games of skill'<sup>42</sup> and exempts the application of the said Act

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<sup>37</sup> Moot Compromis, Pg. 1, ¶ 2 (a).

<sup>38</sup> ¶ 20, Varun Gumber v. Union Territory of Chandigarh, 2017 Cri.L.J. 3827.

<sup>39</sup> Boardwalk Regency Corp. v. Att'y Gen. of N.J., 457 A.2d 847, 850 (N.J. Super. Ct. Law Div. 1982).

<sup>40</sup> Act No. 3 of 1867.

<sup>41</sup> Act No. 9 of 1955.

<sup>42</sup> Rex v. Fortier, 13 Q.B. 308; Commonwealth v. Club Caravan, Inc., 571 N.E.2d 405, 406-7 (Mass. App. Ct. 1991).

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to “any game of mere skill”. As per the **Seventh Schedule** to the Constitution of India (**Entries 34 and 62 of List II**), the state governments have been authorised to make laws on betting and gambling.<sup>43</sup> Therefore, the New Telly<sup>44</sup> by way of the **Delhi Public Gambling Act, 1955** and **Section 13** inserted for applicability to the National Capital Territory of Telly which provides exemption of **games of mere skill**. If even a scintilla of skill is required for success<sup>45</sup> the competition could not be regarded as of a gambling nature.<sup>46</sup>

[¶.24] The broader and clearer definition and interpretation of the word ‘mere skill’ was articulated by the *Venkatarama Ayyar J.* of the Hon’ble Supreme Court in the case of *R.M.D. Chamarbaugwala v. Union of India*<sup>47</sup> wherein the Hon’ble Court interpreted the phrase ‘*game of mere skill*’ to mean “*preponderantly a game of skill*” in detailed orders and has held that despite there being an element of chance, if a game is “*preponderantly a game of skill*”, in essence, the skill dominates over the element of luck/chance it would nevertheless be a game of mere skill.<sup>48</sup>

[¶.25] The instant issue of legality of fantasy sports game in India has been squarely dealt by the Punjab and Haryana High Court in the case of *Varun Gumber v. Union Territory of Chandigarh*<sup>49</sup>, the High Court of Bombay in the case of *Gurdeep Singh Sachar v. Union of India & Ors.*<sup>50</sup> and the High Court of Rajasthan in the case of *Chandresh Sankhla v. State of Rajasthan*<sup>51</sup> wherein the Hon’ble Courts have considered the similar question with respect to the game “Dream 11” and have held in favour of the respondent – company that “Dream 11” game does not involve any commission of offence of 'gambling' or 'betting' or 'wagering' even if the definition contained in the **Finance Act, 1994**<sup>52</sup> is taken into consideration. Further, unlike betting, winning or losing in fantasy sports is not dependent on any particular team winning or losing in the real world. A challenge was filed against Varun Gumber’s Case order

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<sup>43</sup> Constituent Assembly Debates, Official Report, Vol IX, Sixth Reprint, Reprinted by Lok Sabha Secretariat, New Delhi, 2014; *H. Anraj v. State of Maharashtra*, AIR 1984 SC 781.

<sup>44</sup> New Telly is a fictitious territory with laws in *pari materia* with the National Capital Territory of Delhi, India.

<sup>45</sup> *R v. Kelly*, [2008] 2 All ER 840; MANU / UKCR / 0006 / 2008.

<sup>46</sup> *Philip D. Murphy, Governor of New Jersey v. National Collegiate Athletic Association etc.* (case no. 16-476 and 16-477) decided by the Supreme Court of the United States on 14.05.2018.

<sup>47</sup> AIR 1957 SC 628; 1957 SCR 930, ¶ 3.

<sup>48</sup> *Andhra Pradesh v. K. Satyanarayana*, AIR 1968 SC 825, ¶ 12; *Dr. K.R. Lakshmanan v. State of Tamil Nadu*, (1996) 2 SCC 226, ¶ 17.

<sup>49</sup> 2017 Cri.L.J. 3827; 2017 (4) RCR (Criminal) 1047; Judgement dated 18 April 2017 in CWP No. 7559 of 2017.

<sup>50</sup> MANU/MH/1451/2019, ¶s 8 & 17; Judgment dated 30 April 2019 in Criminal P.I.L. No. 22 of 2019.

<sup>51</sup> 2020 SCC OnLine Raj 264, ¶s 05, 06, 10 & 12; Judgment dated 14 February 2020 in D.B.C.W.P. No. 6653 of 2019.

<sup>52</sup> Act No. 32 of 1994.



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and the same was dismissed by the Supreme Court on September 15, 2017.<sup>53</sup> The issue of the legitimacy of fantasy sports is no longer open for debate and therefore is no more *res integra*. [¶.26] Therefore whether a fantasy sport game is a game of chance or a game of skill<sup>54</sup> is a question of fact based on the modalities of each game<sup>55</sup> and to be decided on the basis of facts<sup>56</sup> and circumstances of each case.<sup>57</sup> The facts and circumstances enunciated above evidently and patently show beyond doubt that the fantasy cricket game i.e., Vision 11 is a game of mere skill as the success in this fantasy game depends on a considerable<sup>58</sup> and substantial degree (mathematically, more than 50%) of skill<sup>59</sup> and therefore doesn't come under the ambit or purview of the regulations prohibiting gambling<sup>60</sup> and hence it is legal to offer and play paid fantasy sports games in India.<sup>61</sup>

**[II.B.2.ii] The instant fantasy cricket game passes the 'dominant factor test', or  
'predominance test'.**

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[¶.27] It is respectfully submitted that the Hon'ble Supreme Court in the cases of *Andhra Pradesh v. K. Satyanarayana*<sup>62</sup> and *Dr. K.R. Lakshmanan v. State of Tamil Nadu*<sup>63</sup> has recognized that no game is a game of pure skill alone and almost all games involve an element, albeit infinitesimal, of chance and has by and large adopted the test followed by the U.S. courts known as the '**dominant factor test**'<sup>64</sup>, or '**predominance test**'<sup>65</sup> which requires assessment and determination of whether chance or skill is the dominating factor in determining the result of the game<sup>66</sup>. Courts have used the '*predominance of skill test*' to determine that **horse**

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<sup>53</sup> Supreme Court of India Order dated September 15, 2017, Record of Proceedings in SLP Diary No. 27511/2017.

<sup>54</sup> *Pleasantime Products v. Commissioner of Central Excise, Mumbai-I*, (2010) 1 SCC 265.

<sup>55</sup> *Commonwealth v. Two Elec. Poker Game Machines (Two Elec.)*, 465 A.2d 973, 977 (Pa. 1983)

<sup>56</sup> *MJ Sivani v. State of Karnataka*, (1995) 6 SCC 289; AIR 1995 SC 1770.

<sup>57</sup> *Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, AIR 2005 Mad 261.

<sup>58</sup> *Bimalendu De and Ors. v. Union of India (UOI) and Ors.*, MANU/WB/0232/2000, ¶ 12.

<sup>59</sup> *Coles v. Odhams Press Ltd.*, (1936) 1 KB 416; 1935 All ER Rep 598.

<sup>60</sup> Section 12, the Public Gambling Act 1867.

<sup>61</sup> *Dr. K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153, ¶ 23; *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108 (U.S. Ct. App. 2002).

<sup>62</sup> (1968) 2 SCR 387; AIR 1968 SC 825.

<sup>63</sup> (1996) 2 SCC 226, ¶s 18 & 19.

<sup>64</sup> *State v. Gupton*, 30 N.C. 271; *In re Allen*, 377 P.2d 280, 281 (Cal. 1962).

<sup>65</sup> *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995).

<sup>66</sup> *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904).

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racing<sup>67</sup>, card games such as rummy<sup>68</sup>, poker<sup>69</sup>, foot racing, boat racing<sup>70</sup>, football<sup>71</sup>, motorbike racing and baseball<sup>72</sup> are ‘games of mere skill’<sup>73</sup> and judgment and not a game of chance.<sup>74</sup>

[¶.28] Further, the fantasy game of Cricket as provided by Vision 11 is not entirely a game of chance or luck because it requires a preponderant amount of skill<sup>75</sup>, judgment and discretion of the participants while drafting their fantasy team<sup>76</sup>. Furthermore, the users draft teams based on their knowledge of cricket (gathered through systematic research), attention, training, experience and adroitness regarding the game. Therefore, the game provided by Vision 11 passes the ‘dominant factor test’, or ‘predominance test’ as skill is the dominating factor in determining the result of the game<sup>77</sup> and it should be held to be “*mainly and preponderantly a game of skill*”. The fantasy cricket game provided by the Vision 11 possess the element of skill which has a much greater and predominant influence<sup>78</sup> on the outcome of the fantasy cricket game than any incidental chance and hence doesn’t amount to gambling<sup>79</sup> or betting under the ambit of Public Gambling Act, 1867. The Vision 11 fantasy cricket game is neither ‘*malum in se*’ nor ‘*malum prohibitum*’.

### (II.C) The points are attributed in a transparent and verifiable manner.

[¶.29] It is humbly submitted that in Vision 11 fantasy cricket game, the points are attributed in a transparent and verifiable manner to the virtual analogues of real world cricketers on the basis of, amongst others, the real-worlds player's selection in the starting eleven of the real-

<sup>67</sup> Dr. K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226), ¶s 20 & 21; People v. Monroe, 85 A.L.R. 605; Edward J. Rohan v. Detroit Racing Assn., 166 ALR 1246 SW 2d 987; Commonwealth v. Kentucky Jockey Club, 38 SW 2d 987; Smith et al. v. Commonwealth of Kentucky, 275 U.S. 509; Utah State Fair Assn. v. Green, (1926) 68 Utah 251; Panas v. Texas Breeders & Racing Assn. Inc., Tex Civ App 80 SW 2d 1020; State v. Thompson, 60 SW 1077; Engle v. State of Arizona, (1939) 53 Ariz 458; Stoddart v. Sagar, 64 LJ MC 234; Caminada v. Hulton, (1891) 60 LJ MC 116; Section 30 of Indian Contract Act, 1872; Encyclopedia Britannica, 15th Edition, Volume 5 at pg. 105.

<sup>68</sup> State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825; Director General of Police, Chennai & Ors. v. S. Dilibabu, 2018 CriLJ 1842; The Director General of Police State of Tamil Nadu Chennai and Ors. v. Mahalakshmi Cultural Association, MANU/TN/0741/2012.

<sup>69</sup> Kizhakke Naduvath Suresh v. State of West Bengal, W. P. No. 13728 (W) of 2015.

<sup>70</sup> Tote Investors Ltd. v. Smoker, (1967) 3 All ER 242; (1967) 3 WLR 1239; (1968) 1 QB 509.

<sup>71</sup> Nat'l Football League v. Governor of Del., 435 F. Supp. 1372, 1384 (D. Del. 1977); Elderton v. Totalisator Co. Ltd., (1945) 2 AER 624; The Sikkim Online Gaming (Regulation) Act, 2008.

<sup>72</sup> Attorney General v. Luncheon and Sports Club Ltd., 1929 AC 400; 1929 All ER Rep Ext 780; Grant v. State, 44 S.E.2d 513, 515 (Ga. Ct. App. 1947).

<sup>73</sup> Lewis v. State, 189 S.E. 566, 566 (Ga. Ct. App. 1937).

<sup>74</sup> Tulsi Ram vs. State of Rajasthan, (24.01.2002 - RAJHC): MANU/RH/1404/2002, ¶ 16.

<sup>75</sup> Fanduel, Inc. v. Madigan, No. 15 MR 1136 (Ill. Cir. Ct. Mar. 16, 2016).

<sup>76</sup> Varun Gumber v. Union Territory of Chandigarh, 2017 Cri.L.J. 3827, ¶ 19.

<sup>77</sup> Moore v. Elphick, (1945) 2 All ER 155 (CA).

<sup>78</sup> People v. Schapiro, 77 N.Y.S.2d 726, 728

<sup>79</sup> Bimalendu De v. Union of India, AIR 2001 Cal 30; Black's Law Dictionary, 6th edn.at 679.

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world team, number of runs scored, wickets taken, catches taken, stumpings/run-outs caused, batting strike rate and bowling economy rate with additional bonus points for boundaries hit, maiden overs bowled and similar other laudable performance events.<sup>80</sup>

**[II.D] The users are charged with a fixed administrative fee for participation in each round.**

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**[¶.30]** It is humbly contended that the Vision 11 limits its fees and charges for such participation to an administrative fee. This entire amount of the administrative fee is collected and held by Vision 11 in trust of the game and is, upon announcement of the results of the fantasy cricket game, distributed in a transparent and objective manner on the basis of the final points-tally of participating users in the fantasy game.<sup>81</sup> The payment of entry fees does not constitute illegal wagering under law when the entry fees are paid unconditionally and the prizes do not depend on the number of participants.<sup>82</sup> The fantasy sports are games of skill<sup>83</sup>, depending on the fantasy participant's skill in selecting players for his or her team<sup>84</sup>, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.<sup>85</sup>

**[II.E] The element of equal chance of gain or loss is absent.**

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**[¶.31]** It is respectfully submitted that as is the case with any game of skill<sup>86</sup>, greater experience and training in Vision 11 fantasy cricket game provides a user with greater insight into strategies for success and a better understanding of the game's dynamics and operational constraints, and in itself heightens and attunes the element and exhibition of skill on the user's part and thereby has an material influence on generating a successful winning outcome in favour of the user. The report<sup>87</sup> argues that it is highly unlikely that the difference in average win rates between top performers and average performers can be explained solely by chance. The ability to consistently find players who over-perform when compared to their salary value is a critical element denoting the skill involved in fantasy sports games.

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<sup>80</sup> Moot Compromis, Pg. 1, ¶ 2 (b); Varun Gumber v. Union Territory of Chandigarh, 2017 Cri.L.J. 3827, ¶ 19.

<sup>81</sup> Moot Compromis, Pg. 2, ¶ 2 (c).

<sup>82</sup> State v. Am. Holiday Ass'n., 727 P.2d 807, 812 (Ariz. 1986); Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 87 (Nev. 1961); Humphrey v. Viacom, Inc., 2007 BL 38423 (D.N.J. June 20, 2007).

<sup>83</sup> Saligram v. Emperor, AIR 1933 Calcutta-8.

<sup>84</sup> Seattle Times Co. v. Tielsch, 495 P.2d 1366, 1367 (Wash. 1972).

<sup>85</sup> Standerly R. Lyngkhoi v. State of Meghalaya, (07.09.2011 - GUHC): MANU/GH/0714/2011.

<sup>86</sup> Ruben v. Keuper, 127 A.2d 906, 907 (N.J. Super. Ct. Ch. Div. 1957); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

<sup>87</sup> FanDuel v. Schneiderman, N.Y. Sup. Ct., 161691/2015 available at: <http://www.legalsportsreport.com/wp-content/uploads/2015/11/DK-Oppn-to-PI.pdf>.

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[¶.32] The wagering/ gambling/ betting is based on chance.<sup>88</sup> And therefore it is necessary that both parties should get an equal chance of winning and mutual opportunity must be given to both the parties to gain or lose to the result of an uncertain event<sup>89</sup>. However, if winning or losing is completely based on skill and the result is in the hands of one party then there is no wagering/ gambling/ betting<sup>90</sup> and the argument of immorality<sup>91</sup> of the activity does not survive.<sup>92</sup> Hence, the element of equal chance of gain or loss is absent in this instant fantasy cricket game.

**[II.F] The Vision 11 is a legitimate business activity protected under Article 19 (1) (g)  
and Article 301 of the Constitution of India.**

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[¶.33] It is respectfully asserted that the Vision 11 fantasy cricket game is a legitimate business activity protected under **Article 19 (1) (g)** (fundamental right to practice any profession or to carry on any occupation, trade or business) and **Article 301** (freedom of trade, commerce and intercourse throughout the territory of India) of the Constitution of India and cannot be excluded by using the **doctrine of *res extra commercium***. The Supreme Court has also authoritatively held that conducting of skill games<sup>93</sup> does not amount to “gambling”<sup>94</sup> but a commercial activity and therefore entitled to constitutional protection.<sup>95</sup>

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<sup>88</sup> Rahke v. United States, 180 F. Supp. 576, 578 (Ct. Claims 1960).

<sup>89</sup> Babasaheb Rahimsaheb v. Rajaram Raghunath Alpe, (1931) 33 BOMLR 260; Bassoon v. Tohersey, (1903) I. L. R. 28 Bom. 616; Shoolbred v. Roberts, [1899] 2 Q. B. 569.

<sup>90</sup> Dayabhai Tribhovandas v. Lakhmichand Panachand, (1885) ILR 9 Bom 358.

<sup>91</sup> Gherulal Parakh v. Mahadeodas Maiya & Ors., AIR 1959 SC 781.

<sup>92</sup> S. Khushboo v. Kanniammal, AIR 2010 SC 3196.

<sup>93</sup> M/s. B.R. Enterprises v. State of U.P. & Ors., AIR 1999 SC 1867.

<sup>94</sup> Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153, ¶ 22.

<sup>95</sup> State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699, ¶ 35; R.M.D. Chamarbaugwala v. Union of India, AIR 1957 SC 628: 1957 SCR 930, ¶ 5.

**1ST MEMORIAL DRAFTING COMPETITION BY METACEPT IN PARTNERSHIP  
WITH MEMO PUNDITS**

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**PRAYER**

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Wherefore in the light of the facts stated, issues raised, authorities cited, and arguments advanced, it is most humbly prayed before this Honourable Court that it may be pleased to adjudge and declare:

1. That the APL's use of the player illustration in conjunction with the player codes does not amount to the infringement of Plaintiff's personality rights and the plaintiffs are not entitled to the remedy of passing off;
2. That in view of the circumstances mentioned hereinabove, a decree for permanent injunction in favour of the plaintiff and against the defendant should not be passed;
3. That the Vision 11 fantasy cricket game does not amount to gambling under the Public Gambling Act, 1867;
4. That the present Public Interest Litigation is a gross abuse of the process of the Court and should be dismissed.

**And/Or,**

*To grant any other order in favour of the defendant and respondents which the Hon'ble Court may deem fit in the eyes of Justice, Equity and Good Conscience.*

*All of which is respectfully submitted and for such act of kindness the defendant and respondents shall be duty bound as ever pray.*

Place: New Telly

S/d \_\_\_\_\_

Date: 25/07/2020

**COUNSELS ON BEHALF OF THE DEFENDANT &  
RESPONDENTS**