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THE RECAP

A ROUND-UP OF MEDIA, ENTERTAINMENT & GAMING INDUSTRIES' LEGAL UPDATES

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INTRODUCTION

Søren Aabye Kierkegaard was a 19th century Danish philosopher, theologian, and cultural critic. His writings are said to have had a major influence on existentialism and on Protestant theology in the 20th century and many consider him to be the first existentialist philosopher. An abridged excerpt from his philosophical writings translates as: *"Life can only be understood backwards, but it must be lived forwards"*.[1]

We cannot agree more as we bring to you the fourth edition of *The Recap* and the first one of 2022. The first two months of the new year have elapsed but only by looking back, recapping and contemplating its events can we understand what lies ahead in 2022 for the gaming and media & entertainment ("**M&E**") industries in India.

This edition covers legal updates from the months of January and February 2022 and is similar in layout to the previous editions and yet different, too. Like its predecessors, this edition is also an eclectic mix of suits, complaints, affidavits, orders and judgments. However, this edition also contains a special Budget Capsule which provides a crisp note on some key developments from the ongoing Budget Session of Parliament.

1. Søren Kierkegaard, Journalen JJ:167 (1843), Søren Kierkegaard Research Center, Copenhagen, 1997, vol. 18, page 306

MEDIA & ENTERTAINMENT

FIR filed against Google CEO Sundar Pichai and YouTube India MD Gautam Anand in a copyright infringement case

A First Information Report ("**FIR**") has been registered against Google's CEO Sundar Pichai and YouTube India's MD Gautam Anand by the Mumbai Police pursuant to a Magistrate's order on a private complaint filed by producer Suneel Darshan. The producer has alleged that his 2017 film *Ek Haseena Thi Ek Deewana Tha* has been illegally uploaded on YouTube and that Google has allowed unauthorized persons to do so. He contends that he has not assigned the rights in his movies to anyone, and that Google and YouTube were illegally generating millions of dollars in advertising revenue. The FIR has been registered under Section 63 and Section 69 of the *Copyright Act, 1957*. In his order, the Magistrate observed that commercial exploitation under the garb of fair use needs to be prevented. No statement has been made yet by Google or YouTube in the matter.

You can read more on this as reported by India Today here.

Live channels on OTT apps case: TRAI files reply to petitions questioning jurisdiction

*[Readers of **The Recap** will recall that the IndusLaw TMT team is keenly following the developments in the broadcasters v/s TRAI standoff in relation to the availability of linear channels on OTT platforms. The Recap's previous edition (January 2022) carried this story as the lead media & entertainment update. You can access a copy of the said edition here]*

The Telecom Regulatory Authority of India ("**TRAI**") has filed its affidavit in reply to the petitions filed by the broadcasters before the Telecom Disputes Settlement and Appellate Tribunal ("**TDSAT**") challenging TRAI's letter seeking information about the mode and infrastructure through which linear Television ("**TV**") channels are being offered to broadcasters' own as well as third-party over-the-top ("**OTT**") platforms.

TRAI's letter to all major broadcasters was issued after TRAI received complaints from Direct-to-Home companies ("**DTH**") and Multi-System Operators ("**MSOs**") that the availability of live TV channels on OTT is denting their paid subscriber base.

While TRAI is of the opinion that such availability is in violation of Clause 5.6 *Policy Guidelines for Downlinking of Television Channels 2011*,[2] broadcasters contend that they are not employing infrastructure regulated by TRAI to deliver linear content on OTT platforms and hence TRAI lacks jurisdiction to make such an inquiry.

In its reply, TRAI has asserted that the information is being sought from the broadcasters which are regulated by TRAI and not from OTT platforms owned by these broadcasters and thus, the appeals should be dismissed as they lack merit.

You can read more on this as reported by E4M here.

Copyright societies: new application for registration and a new tie-up

Pahari Performing Rights Association ("**PPRA**") has filed an application with the Copyright Office under Section 33 of the *Copyright Act, 1957* for registration as a copyright society for carrying out the business of issuing or granting licenses in respect of musical and literary works. The PPRA is an association registered in Solan, Himachal Pradesh. The Copyright Office has advertised for objections/ comments from the public to be submitted on or before March 20, 2022.

Presently, the Indian Performing Right Society ("**IPRS**") is the only registered copyright society in India involved in the business of issuing licenses in musical works and associated literary works. In a recent development, IPRS announced that they have entered into an agreement with Glance Digital Experience ("**GDE**") pursuant to which GDE's entertainment and short-form content platform *'Roposo'* will gain access to publishing rights for IPRS' repertoire. The deal is expected to benefit composers, lyricists and owner publishers of music in terms of exposure and royalties because of Roposo's vast user volume.

You can access the Copyright Office's public notice regarding PPRA's application here.

You can read more on the IPRS-GDE deal as reported by Economic Times here.

SC dismisses plea seeking stay on release of Alia Bhatt-starrer *'Gangubai Kathiawadi'*

On February 24, 2022, the Supreme Court of India ("**SC**") dismissed an appeal filed against the Bombay High Court ("**Bombay HC**") order refusing to stay the release of Sanjay Leela Bhansali's film titled *'Gangubai Kathiawadi'* ("**Film**").

Earlier, the petitioner, Babuji Rawji Shah, claiming to be the adopted son of Gangubai (since deceased) had filed a suit and interim application before the Bombay HC

2. Policy Guidelines for Downlinking of Television Channels 2011, here

for a temporary injunction against the makers of the film citing defamation of his family members and a violation of his right to privacy, self-respect, and liberty. By its order dated July 30,2021, the Bombay HC had refused to stay the release of the Film stating that the principle of tort, "an action dies with the person" will apply to this defamation proceeding. Aggrieved by the Bombay HC order, the petitioner moved the SC in appeal. While deciding the appeal, the SC observed there is an absence of proof to support the petitioner's claim that he is the adoptive son of the deceased Gangubai. Upholding the Bombay HC's reliance on the principle of tort, the SC further observed that mere hurting of sensibilities, when the person's reputation has not been lowered in character or credit in eyes of others would not give rise to a case of defamation.

You can access an official copy of the Bombay HC Order here.

You can access an official copy of the SC Order here.

You may also read our update on the Bombay HC Order in our first volume of Recap *here.*

ASCI frames advertising guidelines for virtual digital assets and services

The Advertising Standards Council of India ("**ASCI**") has released a twelve-point guideline for the advertising and promotion of virtual digital assets ("**VDAs**") and related services ("**ASCI VDA Guidelines**"). Some of the notable points in the ASCI VDA Guidelines are:

- All VDA products and related services on all mediums should carry the disclaimer, *"Crypto products and NFTs are unregulated and can be highly risky. There may be no regulatory recourse for any loss from such transactions"*.
- Advertisements should not carry words such as *"currency"*, *"securities"*, *"custodians"*, and *"depositories"* as consumers tend to associate these terms with regulated products.
- Advertisements must not make statements guaranteeing future increase in profits.
- Advertisements should contain the name of the advertiser and their contact details (phone number or email) which should be presented in a manner easily understood by consumers.
- Minors, or someone appearing to be in a minor must not appear in an advertisement directly dealing or talking about the product and celebrities/ prominent personalities who appear in such advertisements must conduct due diligence on the truthfulness of the claims made in such advertisements.

The Guidelines will apply to advertisements of all VDAs and related services starting from April 01, 2022. For advertisements already in circulation, advertisers and media owners are required to ensure compliance by April 15, 2022. It is pertinent to note that the ASCI VDA Guidelines only mention "Virtual Digital Assets" to mean digital assets commonly referred to as crypto or Non- Fungible Tokens products and do not explicitly extend the scope of the ASCI VDA Guidelines to any other digital assets.

Surprisingly, the ASCI VDA Guidelines do not refrain VDAs from being advertised as an income or alternative employment option on the lines of a similar mandate under the *'ASCI Guidelines for Online Gaming and Real-Money Winnings'*.

You can access an official copy of the ASCI guidelines here.

Centre says search engines are not 'publishers' under IT Rules 2021

The central government, through its affidavit in reply filed through the Ministry of Information & Broadcasting ("**MIB**"), has informed the Delhi High Court in response to a writ petition[3] that search engines like Google are not 'publishers' under Part III of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* ("**IT Rules 2021**").

The writ petition in which this clarification came relates to an FIR filed by the Central Bureau of Investigation ("**CBI**") in 2017 after allegations of impropriety arose in the answer-sheet scanning process of the UGC-National Eligibility Test examination of that year. The petitioner, currently working as a Director (IT & Projects) with the Central Board of Secondary Education was one of the accused named in CBI's FIR. Subsequently, when the CBI concluded the investigation, it found no wrongdoing on the petitioner's part and the closure report filed by it was accepted by the CBI court.

The petitioner filed the present writ petition seeking a direction from the court to Google India to remove all links from its search results pertaining to the CBI FIR against him with immediate effect. The petitioner claimed that his reputation has been damaged due to these links appearing in the search results and that Google India has refused to remove the links without a court order to that effect. The Union of India through the MIB was also arrayed as a respondent in the writ petition.

Responding to the petition, the MIB submitted that search engines like Google are not publishers within the definition of 'publishers' appearing under Part III of the IT Rules 2021 and are not administered by the MIB. The MIB further stated that the petitioner should have instead arrayed the Ministry of Electronics and Information Technology ("**MeitY**") since search engines come within the purview of MeitY and

3. *Antariksh Johri v Union of India & Anr.* [Writ Petition (civil) No. 14360/2021]

are governed by the provisions of the Information and Technology Act, 2000 ("**IT Act 2000**") and Part II of the IT Rules 2021.[4]

Broadcasters and TRAI attempt to mitigate their differences over NTO 2.0

[The Recap's previous edition (September 2021) carried the story on the on-going litigation between TRAI and broadcasting houses regarding TRAI's Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020. You can access a copy of the said edition here]

The Indian Broadcasting and Digital Foundation ("**IBDF**") has withdrawn the petition it had filed before the SC challenging the New Tariff Order ("**NTO 2.0**") introduced by TRAI in January 2020. IBDF has reportedly withdrawn the appeals pursuant to TRAI's assurance that it will come out with a consultation paper on NTO 2.0 and address policy grievances of multiple stakeholders. While the withdrawal has come after consultations with TRAI, IBDF has done so without prejudice to its right to raise, in future proceedings, all issues, questions of law as well as the questions of interpretation of the constitutional/statutory provisions should TRAI fail to address their concerns surrounding the NTO 2.0. The NTO 2.0 has multiple provisions which the broadcasters have found to be problematic, especially those which relate to pricing of TV channels in bouquets and on an *a-la-carte* basis. The broadcasters also fear that adoption of NTO 2.0 would permit TRAI to micromanage the sector more minutely.

You can read more on this development in this report by The Hindu Business Line here.

You can access the copy of the Supreme Court order here.

4. Part II of the IT Rules, 2021 refers to 'Due Diligence by Intermediaries and Grievance Redressal Mechanism'.

BUDGET CAPSULE

The 2022 Budget was a mixed bag for the gaming and M&E industries. While pushing for the setting up of a promotion taskforce for the Animation, Visual Effects, Gaming and Comic sector, the central government also proposed an all-encompassing definition for "virtual digital asset" which is wide enough to cover in-app purchases in games, in-game tokens and even game enhancements – with the resultant tax implications. The Budget Session was also important for some of the responses provided by the central government in reply to questions asked by parliamentarians regarding several aspects of the Media & Entertainment and Gaming sector. We list below some of the key queries and responses.

1. Pursuant to broadcasters' decision to remove popular channels out of existing bouquets and pricing them separately between INR 15 – 25 per month, inquiry was made as to whether the government would fix maximum prices for channels which are kept outside the bouquet: The central government responded that as per the *New Regulatory Framework 2017*, TRAI had afforded broadcasters the flexibility to ascertain the price of their channels on an *a-la-carte* basis and also refrained from fixing the maximum retail price for channels which are kept separate from the bouquet. The government has stated that these provisions have not been amended in the *New Regulatory Framework 2020* and therefore, remain valid and applicable as on date.

2. Inquiry regarding the proposed merger of Films Division, National Film Archive of India, Children's Film Society of India and Directorate of Film Festivals with National Film Development Corporation ("**NFDC**") and whether the bodies that are being merged would continue to perform their present activities or be shut down: The central government responded that this merger comes after an expansion of the Memorandum of Articles of Association of NFDC which now includes undertaking all mandates performed by the four media units. The central government added that since all activities carried out by the four film media units would be carried out by NDFC after the merger, the bodies would be shut down.

3. Inquiry regarding the steps employed by MIB to oversee OTT platforms' observance of sensitivity towards India's multi- racial and multi- religious diversity: The central government responded that the IT Rules 2021 already stipulate a Code of Ethics ("**CoE**") with general guidelines to be followed by the OTT platforms in dealing with India's diverse cultures, beliefs, and practices. The CoE also offers a grievance redressal mechanism to investigate grievances/complaints alleging violation of the CoE.

4. Inquiry regarding the details of the central government rules, if any, that have sanctioned online gaming operators and if the government is planning on completely banning or partially regulating online games: The government responded that MIB has already issued an advisory to all private satellite television channels to not display advertisements that project online gaming as an alternate income opportunity. On the question of regulation, MeitY clarified that while state governments have the power to enact laws on betting and gambling in their respective states, there is a distinction between online games and gambling. Online gaming operators are classified as intermediaries[2] under the IT Act 2000 and IT Rules 2021 and therefore, regulated by MeitY. However, MeitY has clarified that it does not play any role in sanctioning or licensing online gaming platforms in India.

5. Inquiry regarding the central government's intention to frame a specialized policy on fantasy gaming and whether there have been any directions from a court of law on fantasy sports: The government clarified that they have not received any directions from any court and NITI Aayog's draft paper on *Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports in India* has been shared with various central ministries, including the Ministry of Youth Affairs and Sports, for their consideration.

You can access the questions and responses in the Rajya Sabha on M&E here, here and here.

You can access the questions and responses in the Lok Sabha on gaming here, here and here.

You can access the questions and responses in the Rajya Sabha on gaming here.

GAMING

Karnataka HC quashes ban on real-money online skill gaming as unconstitutional

In a huge relief to the online skill-gaming industry, the Karnataka High Court ("**Karnataka HC**") quashed substantive provisions of the *Karnataka Police Amendment Act 2021* ("**KP Amendment Act**") as being unconstitutional and lifted the blanket ban which had been imposed on real-money online skill gaming in the state. The KP Amendment Act, introduced in October 2021 to amend the *Karnataka Police Act 1963* (the act for regulating the policing activities and preventing gambling in the state), banned all games when played for stakes regardless of the medium (online or offline) over which they are played. Pursuant thereto, multiple writ petitions were filed in the Karnataka HC by skill gaming operators and industry associations challenging the constitutional validity of the KP Amendment Act and the legislative competence of the state for enacting such a law on games of skill, the offering of which is constitutionally protected by a catena of SC judgements.[5]

The Karnataka HC observed that Entry 34 of the State List in the Seventh Schedule to the Constitution empowers the state to legislate on *'betting and gambling'*. However, since the terms 'betting' and 'gambling' are not defined under the Constitution, the Karnataka HC applied principles of judicial interpretation to ascertain their meaning and application and held that, *'betting' and 'gambling'*, must be read conjunctively to only mean betting on gambling activities as betting takes colour from the word gambling. Therefore, Entry 34 is only limited to betting on games of chance and not skill. The Karnataka HC also made a novel observation that games bring out our feelings and emotions which are an extension to an individual's fundamental right to freedom of speech and expression.

The Karnataka HC observed that even after reading the proposed amendment to Section 176 of the *Karnataka Police Act 1963* ("**Karnataka Police Act**"), the provision continues to exclude the applicability of penal provisions to games of skill, thus causing inconsistencies within the *Karnataka Police Act*. The Karnataka HC further held that by prohibiting all games under a single definition of gaming, irrespective of their skill quotient, the KP Amendment Act is regulating more than what it is meant to. The court observed that an absolute embargo is not the solution and that a regulation should include technological solutions to make gaming safer instead.

Consequently, barring an enhanced quantum for certain punishments, the KP Amendment Act has been struck down in all other respects. It is pertinent to note that the judgement does not prohibit the state from re-introducing an appropriate legislation pertaining to Entry 34 of the State List (as interpreted in the judgement).

You can read a copy of the judgement here.

You can read our crisp note on the key takeaways from the judgement as an IndusLaw Infolex NewsAlert *here.*

Match fixing is not cheating, sports betting is not an offence under Karnataka Police Act, 1963 says Karnataka High Court

The Karnataka HC recently acquitted players and a franchise owner of a local T20 cricket tournament ("**KPL**"), who were charged under the Indian Penal Code 1860 ("**IPC**") and *Karnataka Police Act* for match fixing and betting on KPL matches.[6] The Karnataka HC noted that although match fixing indicates dishonesty, indiscipline, and a mental corruption of a player, it does not amount to cheating[7] under Section 420 of the IPC.

In their defense, the accused had contended that the elements of (i) deception; and (ii) dishonest inducement of a person to deliver property, which are necessary to constitute the offence of cheating under the IPC, were not made out in the chargesheet filed by the police. The accused claimed that even if they were guilty of match fixing it would only amount to a breach of Board of Control for Cricket in India ("**BCCI**")'s Anti-Corruption Code[8] and neither the BCCI nor the state cricket board had taken any disciplinary action against them.

On the contrary, the prosecution argued that a spectator buys a ticket to visit the stadium to watch a fair match between the two teams and if the result is pre-determined, there is no fair game and the spectators are cheated. They are dishonestly induced into parting with their property i.e., money to purchase the ticket. The prosecution also charged an alleged bookmaker with betting on cricket matches which, the prosecution claimed, is contrary to the prevention of gaming provisions, specifically, Sections 78 and 80 of the *Karnataka Police Act*.

5. *RMD Chamarbaugwalla v. Union of India* (1957 AIR 628); *State of Bombay v. RMD Chamarbaugwalla* (1957 AIR 699); *Dr. KR Lakshmanan v. State of Tamil Nadu* (1996 2 SCC 226); *State of Andhra Pradesh vs. K. Satyanarayana & Ors.* (1968AIR 825).
6. *Abrar Kazi v State of Karnataka & Ors.* (Criminal Petition. No. 2929/2020)
7. Section 420 of the IPC - Cheating and dishonestly inducing delivery of property.—*Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
8. BCCI Anti-Corruption Code available here

The Karnataka HC disagreed with the prosecution and observed that spectators are not induced but voluntarily spend their money to purchase a match ticket. It also observed that a general feeling amongst the spectators of being cheated does not amount to the criminal offence of cheating under the IPC. On the charges of betting against an accused bookmaker, the Karnataka HC held that the definition of gaming[9] under the *Karnataka Police Act* is for games of chance which does not include an athletic game or sport.[10] Since cricket is a sport, even if betting takes place in relation to the sport of cricket, it cannot be brought within the definition of gaming under the *Karnataka Police Act*.

You can access the official copy of this Karnataka HC order here.

Courts ask state governments to clarify their stance on poker and fantasy sports

A Public Interest Litigation ("**PIL**") has been filed before the Bombay HC against the state of Maharashtra and online poker operators[11] seeking an order to ban the operators from offering poker to residents of the state. In the PIL, the petitioner claims that playing poker for stakes amounts to gambling under the *Maharashtra Prevention of Gambling Act, 1887* ("**Maharashtra Gambling Act**") since the outcome of each round of poker is purely dependent on luck with no element of skill involved.

In a separate development, a fantasy sports operator has recently approached the Delhi High Court ("**Delhi HC**") seeking relief from alleged oral threats being made by the Delhi Police to book the petitioner for gambling under the *Delhi Public Gambling Act 1955* ("**Delhi Gambling Act**"). The petitioner has prayed for the Delhi HC to direct the respondents not to create any hindrance or impose any unauthorized restriction on their business activity. The fantasy sports operator has argued that there are sufficient precedents of various courts of law upholding online fantasy sports as a game of skill and not a game of chance or gambling.

Both, the Maharashtra Gambling Act and Delhi Gambling Act, define "gaming"[12] to include wagering or betting except on a horse race. Without defining the terms wager or bet, both legislations prohibit gaming in any place within the state except for games of skill.[13] The Bombay HC and Delhi HC have ordered the respective state governments to clarify their stance under their respective state gaming acts.

You can access a copy of the Bombay HC & Delhi HC orders here and here.

You can read more on the Bombay HC case as reported by the Hindustan Times *here.*

You can read more on the Delhi HC case as reported by The Print *here.*

Madhya Pradesh and Rajasthan look to enact laws to regulate online gaming

The Home Minister of Madhya Pradesh and the Chief Minister of Rajasthan have announced their respective government's decision to introduce new regulations for online gaming in their states. Like most other states, their rationale for a new law is to prevent youngsters from getting 'addicted' to the so-called 'trap' of online games. In 2020, a PIL was filed before the Madhya Pradesh High Court[14] wherein the state sought time to decide its stance on online gaming and gambling. Similarly, Rajasthan had proposed a bill in March 2021 to amend the *Rajasthan Public Gambling Ordinance, 1949* but the bill was not tabled. Currently, gaming laws of both states prohibit games of chance being played for stakes but exempt all games of skill wherever played.[15]

You can read more on this development as reported by India Today here.

You can access the official copy of the Rajasthan Chief Minister's budget speech calling for a new gaming law here.

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9. Section 2(7) of the Karnataka Police Act, 1963 – *"does not include a lottery but includes all forms of wagering or betting in connection with any game of chance, except wagering or betting on a horse-race run on any racecourse within or outside the State, when such wagering or betting takes place…"*
10. Explanation to section 2(7) - game of chance *"includes a game of chance and skill combined and a pretended game of chance or of chance and skill combined, but does not include any athletic game or sport;"*
11. Baazi Mobile Games Pvt. Ltd., Ninestacks Gaming LLP, and 'Pokerwala'
12. Section 3 of the *Maharashtra Prevention of Gambling Act 1887* and Section 2(1) of the *Delhi Public Gambling Act, 1955*
13. Section 13 of the *Maharashtra Prevention of Gambling Act 1887* and *Delhi Public Gambling Act, 1955.*
14. *Abhijeet Malviya v State of Madhya Pradesh & Ors* (Writ Petition No. 18426 of 2020)
15. Section 12 of the *Madhya Pradesh Public Gambling Act, 1867* and *Rajasthan Public Gambling Ordinance, 1949*

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