

## IP Hotline

June 13, 2023

### DELHI HIGH COURT HOLDS RIGHT TO PUBLICITY IS NOT ABSOLUTE; RULES ON USE OF LIKENESS OF SPORTS STAR IN ONLINE FANTASY SPORTS

- Violation of personality rights must be tested on the principles of tort of passing off.
- Violation of personality rights should be seen in the context of giving a false impression of having a connection to the celebrity or endorsement by the celebrity.
- Use of a player's name and data relating to on-field performance for online fantasy sports ("OFS") games is protected under the freedom of speech and expression under Article 19(1)(a).
- Trading of non-fungible tokens ("NFTs") of player cards on OFS platforms is incidental to the primary purpose of OFS game. Use of NFT technology would not change the primary nature of an OFS platform.

#### INTRODUCTION

- The Delhi High Court ("**Court**") recently adjudicated Digital Collectibles Pte Ltd and Ors. v. Galactus Funware Technology Pvt Ltd and Anr. ("**Suit**")<sup>1</sup> on the contours of the right to publicity, claim of passing off under common law, and their interplay with the right to privacy and the right to freedom of speech and expression. The Court passed the order ("**Order**") after considering an interlocutory application (IA) filed by the plaintiffs in the Suit<sup>2</sup> praying for an interim injunction claiming infringement of publicity rights.<sup>3</sup> It held that the use of a player's name, image, and other performance data in NFTs does not amount to infringement of their personality rights. The case of the plaintiffs was tested on the principles of passing off to come to the conclusion that the defendants' use of players' name, likeness and performance data does not give an impression of any endorsement of the defendants' product by such players.

#### BACKGROUND

- Digital Collectibles Pte. Ltd. (plaintiff no. 1 in the Suit), operating under the trade name "Rario" offers "Digital Player Cards" of cricketers that can be bought, sold, or traded by users on an online marketplace which is also offered by Digital Collectibles Pte. Ltd. ("**Rario**"). These Digital Player Cards are NFTs that use the names, photographs, and other personality attributes of players. Rario has obtained via exclusive player license agreements executed with players (who are plaintiff nos. 2, 3, 4, 5 and 6 in the Suit)<sup>4</sup> wherein such players have duly licensed and authorized Rario to exclusively use, inter alia, their names and photographs in NFTs on Rario's platform. The NFTs may also contain video moments or cricket artefacts.
- The counterparty, Galactus Funware Technology Private Limited (Mobile Premier League or "**MPL**") who is the defendant no. 1 in the Suit operates an app and the defendant no. 2 operates an app called Striker which is hosted on the MPL App. The defendants operate under the trade name "Striker Club" or "MPL" and similar to Rario, offer a marketplace where users can sell, purchase or trade Digital Player Cards in the form of NFTs. However, unlike Rario, the Digital Player Cards on MPL's platform only include a player's name/initials and an artistic rendition of the player's image. MPL had also not entered into any agreements with players for use of their names, photographs, likenesses, etc.
- Digital Player Cards i.e., the NFTs of Rario and MPL are used on their respective platforms in their respective OFS game formats offered on each platform. In both these OFS game formats, users pay an entry fee and use their skill and knowledge to select teams constituting various Digital Player Cards chosen by the user to maximize points and win awards.
- Rario alleged in the Suit that it became aware of MPL's Striker fantasy sports game in January 2023 and was aggrieved by the unlawful use of the player marks and attributes who have exclusively engaged with Rario. It was claimed that such unauthorized use amounted to (i) unfair competition (including passing off); (ii) unjust enrichment; (iii) tortious or unlawful interference with economic interest of the plaintiffs; and (iv) breach of personality rights of the players who were plaintiffs. Notably, the defendants also brought to the Court's notice that Rario also offered a game similar to MPL's Striker fantasy sports game called "D3.Club" wherein Rario's Digital Player Cards can be used to play in a fantasy sports game format.
- During the course of the proceedings, intervention applications were filed by All India Gaming Federation ("**AIGF**") and Winzo Games Pvt. Ltd.<sup>5</sup> claiming that the reliefs sought by the Plaintiffs would have an adverse impact on the whole OFS gaming industry in India.

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- The following arguments were made by the parties:

■ **Publicity rights and false endorsements:**

- The plaintiff nos. 2 to 6 (who are the players) claimed that they hold certain publicity rights in relation to their names, photographs and other attributes. By incorporating them in Digital Player Cards on the MPL platform without having specific authorization from the player, the defendants were argued to have infringed on these publicity rights. Rario also claimed that they hold the exclusive rights to use the players' names, surnames, initials and images or other attributes of their personality for their business and the defendants do not have any authorization or license for the same. Even if there is no express, statutory basis for the protecting the right to publicity, the plaintiffs referred to an order of the Court itself, D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.,<sup>6</sup> wherein the Court recognized separate torts of 'infringement of the right to publicity' and 'false endorsement leading to passing off' wherein an individual's persona or attributes are appropriated in an unauthorized manner for commercial gain. Relying on Titan Industries vs. Ram Kumar Jewellers,<sup>7</sup> Rario also submitted that the right to publicity extends beyond the traditional limits of false advertising.
- The defendants submitted that the right of publicity of a celebrity can only be protected to the extent of restricting false endorsements and advertisements. However, the right to publicity cannot be enforced where the information regarding the celebrity is publicly available. The defendants argued that the Digital Player Cards on the MPL platform contain only the name, an artistic rendition of the player's image and statistics of the player's performance, all of which are information available in the public domain. The defendants distinguished their NFTs from Rario's NFTs stating that Rario has the license to offer its users to purchase and own cricket moments such as videos, indicating that the license exclusivity applies to only such information/content that is not publicly available. Moreover, the fantasy sports game uses public information of all the players and hence it cannot be understood that only certain players are endorsing the fantasy sports game.
- The Intervenor submitted that the tort of passing off as laid down in common law is sufficient to deal with infringement of a celebrity's personality rights. It was also submitted that conceptually, there is no difference between regular OFS games and OFS games with Digital Player Cards which are NFTs.
- The Court held that a person's right to publicity is not expressly recognized under any statute. However, judicial interpretations in case laws such as D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors. have recognized that the right to publicity can be exercised by claiming a common law wrong similar to that of passing off. However, this right is not absolute and cannot infringe on the fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India. Relying on D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., the Court listed certain exceptions to the right to publicity such as lampooning, satire, parodies, art, scholarship, music, academics, news, etc. and noted that only where there is a likelihood of false endorsement, infringement of publicity rights may be claimed. The Court held that since the MPL's fantasy sports game format consists of Digital Player Cards with only publicly available information of all players, there is no confusion that the MPL fantasy sports game format is endorsed by any particular player. The Court held that, moreover, use of name, image, and on-field performance statistics of a player in fantasy sports game formats online would be protected speech.

■ **Unjust enrichment:**

- The plaintiffs argued that the value of the Digital Player Cards which are NFTs is derived from the player's attributes, likenesses, and personalities and not from the artistic renditions of the player's image or from real-world performance of the player (even though performance helps in that direction). Hence, the defendants were also claimed to be commercially benefiting by infringing on the publicity rights of the plaintiffs.
- The defendants argued that the value of the NFTs in a fantasy sports game depends upon the on-field performance of the players pertaining to such NFTs or Digital Player Cards. It is a well-settled industry practice in the business of fantasy sports games to use player identifiers such as name, images, basic details which are publicly available. It was argued that the defendants have not monetized any rights of the plaintiffs themselves by exploiting those player attributes and likenesses which are very specific, private to a player and can only be obtained via a license. Even the images of players have not been used and instead, artistic works derived from such public images are used. These may be original works protected by copyright law.
- The Court's noted that use of publicly available information about a celebrity would not infringe upon that individual's right to publicity. It further held that even if the defendants had gained commercial benefits from monetizing a player's name, image and statistics, the use of such information would still be permissible as a valid exercise of one's right to freedom of speech and expression, to the extent that it does not suggest any kind of endorsement or association with the concerned players. It also observed that the defendants were not projecting the Digital Player Cards as collectibles using the actual photograph/video moments of the players.

■ **Right to privacy:**

- The plaintiffs relied on KS Puttaswamy vs. Union of India<sup>8</sup> to submit that right to publicity has been recognized as a facet of right to privacy in India. Reliance was also placed on various judgments of the US courts in relation to the scope of right to publicity.<sup>9</sup>
- However, the Intervenor submitted that order of KS Puttaswamy vs. Union of India does not hold that right to publicity is a facet of right to privacy.
- While the right to publicity was touched upon in the said judgment, the Court observed that it does not hold that the right to publicity is a facet of the right to privacy under Article 21 of the Constitution of India. The

- The Court also laid down its findings on whether the Digital Player Cards, being NFTs, were positively required to be created only through licensed and authorized terms from specific players. Looking into the functionality of MPL's fantasy sports game format, the Court found that the Digital Player Cards being made non-fungible merely helped enhance the in-game experience of the users (such as ease in trading with other users). Other than this internal functionality enhancement, the Court observed that the use/application of NFTs in OFS games would not materially alter the nature of OFS games, and they would continue to be regulated as always.
- The Court also noted based on the evidence on record that the plaintiffs were aware of the cause of action before than that claimed and the current injunction was sought before the start of prominent cricket tournaments, which is also a popular period for fantasy sports game formats. Hence, finding that the balance of convenience would lie against the defendant if the injunction was granted and there being no irreparable harm, the Court dismissed the injunction application. The Court also observed that if the plaintiffs succeed in the suit, compensation can always be claimed from the defendants.

## CONCLUSION

While the observations of the Court are still prima facie findings for the adjudication of an interim injunction, the Order established a crucial legal principle that the right to publicity is not unrestricted and has exceptions. This may also be relevant in any sphere which depends on large-scale public information such as fantasy sports games, trivia platforms, tabloids, etc. At the same time, there is more guidance obtained on the permissible contours of freedom of speech and expression. A person may still be protected under permissible free speech and expression if they create works 'inspired' by public figures as long as the works are based on publicly available information and do not suggest any endorsement or association. This may open favorable opportunities for many creators in the media and entertainment industry too.<sup>10</sup>

Interestingly, the Court appears to indicate that the requirement of obtaining specific rights to create NFTs or any unique products linked to a celebrity does not arise if it can be demonstrated that the information was in the public domain, and that there is no misconception of specific endorsement created in the minds of the target audience. Not so long ago, India and the world over saw many celebrities inking exclusive deals with publishers to release NFT packs based on their persona.<sup>11</sup> However, there were also NFTs floated around as purportedly being backed by global celebrities, which turned out to be false.<sup>12</sup> Applying the Court's findings in the latter case, such NFTs in the latter case would likely not be permissible in the Indian context due to the false impression of endorsement associated with them, and may fall foul of the decision of the Court in D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.

Notably, the Order has been appealed and is being heard by a Division Bench of the Delhi Court.<sup>13</sup> The appellants have preliminarily reiterated their arguments on the protection of the right to publicity of players. This article may be updated in light of any new developments.

– Parva Khare, Purushotham Kittane & Aparna Gaur

You can direct your queries or comments to the authors

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<sup>1</sup>Digital Collectibles Pte Ltd and Ors. v. Galactus Funware Technology Pvt Ltd and Anr. CS (Comm) 108/2023 (Delhi High Court).

<sup>2</sup>I.A.3960/2023 in CS (Comm) 108/2023 (Delhi High Court on April 26, 2023).

<sup>3</sup>The Order has been appealed by the plaintiffs in Harshal Vikrambhai Patel and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 95/2023 (Delhi High Court); Digital Collectibles Pte Ltd and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 96/2023 (Delhi High Court); and Mohammed Siraj and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 97/2023 (Delhi High Court).

<sup>4</sup>As per news reports, players such as Harshal Patel, Arshdeep Singh, and Umran Malik have signed exclusive license agreements with Rario and are plaintiffs to the Suit. Please see <https://www.moneycontrol.com/news/business/delhi-hc-rejects-dream-sports-backed-rarios-plea-against-mpl-striker-on-nft-gaming-10480521.html> (accessed June 9, 2023).

<sup>5</sup>All India Gaming Federation and Winzo Games Pvt. Ltd. are collectively referred to as "Intervenors".

<sup>6</sup>D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors. CS(OS) 893/2002 (Delhi High Court).

<sup>7</sup>2012 SCC OnLine Del 2382.

<sup>8</sup>(2017) 10 SCC 1.

<sup>9</sup>Keller vs. Elec. Arts. Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268; Haelen Labs. Inc. vs. Topps Chewing Gum, Inc., 202 F.2d 866; Motschenbacher vs. R.J. Reynolds Tobacco Co., 498 F.2d 821; Midler vs. Ford Motor Co., 849 F.2d 460.

<sup>10</sup>For example, artists have garnered social media following solely based on their impersonation of celebrities. See <https://www.news18.com/news/buzz/mimicry-artists-impersonation-of-bollywood-actors-performing-garba-is-spot-on-6077395.html> (accessed May 31, 2023).

<sup>11</sup>See <https://economictimes.indiatimes.com/magazines/panache/from-big-b-to-rajinikanth-2021-was-the-year-of-nft-craze-for-indian-celebrities/articleshow/88524421.cms> (accessed May 31, 2023).

<sup>12</sup>See <https://finance.yahoo.com/news/tom-brady-kim-kardashian-top-list-of-most-impersonated-celebs-selling-nfts-report-175610682.html> (accessed May 31, 2023).

<sup>13</sup>Harshal Vikrambhai Patel and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 95/2023 (Delhi High Court); Digital Collectibles Pte Ltd and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 96/2023 (Delhi High Court); and Mohammed Siraj and Anr. v. Galactus Funware Technology Pvt Ltd and Ors. FAO(OS) (Comm) 97/2023 (Delhi High Court).

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