

# Legal Stakes in Gaming

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A Primer on Indian Laws

January 2014

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# The Gaming Laws of India

Games are enjoyed by people of all age groups across the globe for its pure entertainment value. In fact, gambling, irrespective of its many vices, has been a part of the Indian culture since time immemorial. Even before the six side dice was invented, Indians used the nuts of the *Bibhitaki* tree as dice. References of gambling can be traced to one of oldest mythological epics of India, *Mahabharata*, in which the opponents' skills at board and dice games were tested rather than by waging wars.

Till recently, the terms gaming, gambling, betting or wagering and the like have been considered synonymous with the act of playing games in a physical premise. However, the gaming industry has witnessed a paradigm shift with the evolution of television, digital and online gaming models. As the internet expanded in mid 1990s from its early roots in the academic world to general population, the Internet-based online games started becoming popular. The popularity of online gambling is best manifest by the rapid growth of the virtual casino industry, which is yet to be tapped in the Indian market.

Mobile and online models received further impetus in India owing to the telecom revolution and penetration of internet and cable in substantial parts of the country, and increasing popularity of new media with the masses. This huge size of the potential market in India has led to a surge in the number of online gaming sites over the last few years. The impact is evident

by the rise in demand for quality game content, game developers, game developing companies and gaming industry in general. Gaming as a whole is gaining increasing significance as a major source of income and a profitable business venture worldwide. According to the FICCI-KPMG Indian Media and Entertainment Industry Report 2013, the Indian gaming industry was valued at INR 15.3 billion in 2012 and is expected to grow at a CAGR of 22.4 percent, to INR 42.1 billion by 2017.

Given the high growth potential of the gaming industry in India, many foreign entities are exploring possibilities to set up operations here. Similar trends are reflected in many industry related research reports which say that several global gaming firms have opened India offices or signing distribution agreement with leading Indian mobile game developers to distribute their products in India. While operating gaming business is easier in some countries of the world<sup>1</sup>, where gaming is legalized, the situation is not so easy in India where the laws are stringent.

In this paper, we discuss the scope of the gaming laws of India and the evolution of the gaming industry in India (for simplicity, we use the term 'gaming' interchangeably with 'gambling').

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1. A few examples include Macau, Nepal, U.K etc

# 1. Overview of the Legal Framework Regulating the Gaming Industry

## I. Physical Gaming & Sports Betting

Under the Constitution of India, the State Legislatures have been entrusted with the power to frame state specific laws on *'betting and gambling'*.<sup>2</sup> The Public Gambling Act, 1867, is a central enactment on the subject, which has been adopted by certain states of India. The other states in India have enacted their own legislation for regulating gaming activities within its territory ("Gaming Legislations"). Most of these Gaming Legislations were enacted prior to advent of virtual gaming and therefore primarily regulate physical gaming and gambling in physical premises defined as "gaming or common gaming houses".

Some Gaming Legislation regulating physical gaming and sports betting are as follows:

- » Assam Gaming and Betting Act,1970
- » Bombay Prevention of Gambling Act, 1887
- » Goa, Daman and Diu Public Gambling Act, 1976
- » Karnataka Police Act, 1963
- » Madhya Pradesh (C.P) Public Gambling Act,1867
- » Madhya Bharat Gambling Act,1949
- » Orissa Prevention of Gambling Act, 1955
- » Public Gambling Act, 1867 (applicable to Uttar Pradesh, Punjab, Delhi and Madhya Pradesh)
- » Punjab Public Gambling Act,1867
- » Sikkim Online Gaming (Regulation) Act, 2008
- » Tamil Nadu City Police Gaming Rules, 1949
- » Tamil Nadu Gaming Act,1930
- » The Andhra Pradesh Gaming Act,1974
- » The Andhra Pradesh Gaming Rules, 1976
- » The Delhi Public Gambling act, 1955
- » The J. & K. Public Gambling Act, 1977
- » The Kerala Gambling Act,1960
- » The Meghalaya Prevention of Gambling

Act,1970

- » The Pondicherry Gaming Act,1965
- » The Rajasthan Public Gambling Ordinance, 1949
- » The West Bengal Gambling and Prize Competitions Act,1957
- » The West Bengal Gambling

## II. Online Gaming

The State of Sikkim is the only state in India which has enacted a law for online gaming and sports betting. 'The Sikkim Online Gaming (Regulation) Act, 2008' was passed on June 28, 2008 with an object of controlling and regulating online gaming through electronic or non-electronic formats, and to impose a tax on such games, in the State of Sikkim. The Sikkim Online Gaming (Regulation) Rules, 2009, were subsequently passed on March 4, 2009 (and the same have been amended from time to time) ("Sikkim Online Gaming Laws"). Other states such as Goa are contemplating enacting laws on similar lines.

## III. Prize Competitions

Many popular games and contests in India are in the form of cross- word prize competitions, missing- word prize competitions, picture prize competition etc. in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures. These competitions are regulated under the various prize competition laws in India including the Prize Competition Act, 1955 ("Prize Competition Act") which is a central legislation. Only some of the states of India have passed resolutions to give effect to this law, being the states of Andhra Pradesh, Maharashtra, Tamil Nadu, Orissa, Uttar Pradesh, Madhya Pradesh,

2. Constitution of India, Seventh Schedule, List II, Entry No. 34.

Punjab and Gujarat.<sup>3</sup> Some of the states have also enacted separate laws for regulating prize competition in their respective states e.g. West Bengal. But all these state enactments define prize competition more or less similar to the Prize Competition Act.

## IV. Casinos

The Gaming Legislations regulate casinos in India. The Gaming Legislations of Goa, Daman & Diu<sup>4</sup> and Sikkim<sup>5</sup> allow gaming to a limited extent, under a license, in Five Star Hotels. In Goa, the law also allows casino on board of an offshore vessel.

## V. Lotteries

Under the Constitution of India, the central legislature has the power to enact laws with respect to lotteries.<sup>6</sup> Lotteries have been expressly excluded from the purview of the Gaming

Legislations and are governed by the central law Lotteries (Regulation) Act, 1998 under which the Lottery (Regulation) Rules 2010 (“Central Lottery Laws”) and state specific rules have been framed (“Lottery Laws”). The Central Lottery Laws allow the state governments to organize, conduct or promote a lottery, subject to the conditions specified in the Central Lotteries Laws. The state governments may appoint an individual or a corporate as a “distributor or selling agent” through an agreement to market and sell lotteries on behalf of the organizing State. However, Lottery is banned in certain states in India, for example Madhya Pradesh.

In this paper we have discussed the legal framework affecting the different genres of games separately and in detail.

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3. The list of states provided herein is states as they stand today and not the states as on the date of passing of the resolutions.
  4. The Goa, Daman and Diu Public Gaming Act, 1976.
  5. Sikkim Casinos (Control and Tax) Act, 2002 read with Sikkim Casino Games commencement (Control and Tax) Rules, 2007 and Sikkim Casino Games (Control and Tax) Amendment Rules, 2011
  6. Constitution of India, Seventh Schedule, List I, Entry No. 40.

## 2. Physical & Internet Gambling

The most common form of gaming in India for time immemorial are the many versions of the card games like teen patti (akin to flush), poker, rummy and bridge and sports betting. With the dawn of technology, these games have effectively extended their reach and popularity via the digital medium. Most popular online gaming sites of India are card games sites hosting Rummy and Poker tournaments.

The Gaming Legislations were enacted when digital media and internet were uncommon and its reach was not as intense as it is today. The Gaming Legislations deal with gaming in a physical medium, termed as common gaming houses. Therefore, when these Gaming Legislations are read in the context of online and digital gaming, it may be argued that most of the restrictions are not applicable to such gaming.

Since most of the Gaming Legislations do not expressly cover online and digital gaming, this lacuna in law has given rise to many ambiguities and uncertainties on the one hand and opportunities on the other hand to create online gaming businesses in India, through creative lawyering and smart business tactics.

### I. Meaning of Gaming

'Gaming' as per most Gaming Legislations is understood to mean "the act of wagering or betting" for money or money's worth.

Gaming under the Gaming Legislations however does not include (i) wagering or betting upon a horse-race/dog-race, when such wagering or betting takes place in certain circumstances, (ii) games of "mere skill" and (iii) lotteries (which is covered under Lottery Laws).

### II. Games of Skill-Outside the Purview of Gaming

The Gaming Legislations provide that the restrictions would not apply to games of "mere skill".

The Supreme Court of India ("SC") has interpreted the words "mere skill" to include games which are preponderantly of skill and have laid down that (i) the competitions where success depends on substantial degree of skill will not fall into category of 'gambling'; and (ii) despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of "mere skill".<sup>7</sup> Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case.<sup>8</sup> The judicial view has been very strict in this regard.

Thus, it may be possible that games which satisfy the test of skill versus chance are not regulated under the Gaming Legislations and may be legally offered through the physical as well as virtual medium (including internet and mobile), throughout India.

In the case of *State Of Andhra Pradesh v K. Satyanarayana & Ors*<sup>9</sup> ("Satyanarayana Judgment"), the SC specifically tested the game of Rummy on the principles of skill v chance and held that Rummy is not a game entirely of chance like the 'three-card' game (i.e. 'flush', 'brag' etc.) which are games of pure chance. It was held that Rummy is mainly a game involving preponderance of skill rather than chance. The SC based its conclusion on the reasoning that Rummy requires certain amount of skill as the fall of the cards needs to be memorized and the building up of Rummy requires considerable skill in holding and discarding cards. The chance element in Rummy is of the same level as that involved in a deal at a game of bridge. In all

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

8. Manoranjithan Manamiyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.

9. 1968 AIR 825.

games in which cards are shuffled and dealt out, there exists an element of chance, because the distribution of the cards is not according to any set pattern, but is dependent upon how the cards find their place in the shuffled pack. In this judgment the SC has also passingly observed that bridge is a game of skill. Presently, there has been no case in India where the games (except Rummy) have been tested against the principle of skill versus chance.

Like in most jurisdictions, even in India, the growing popularity of Texas Hold'em Poker cannot be doubted. In September 2011, the world gaming series was hosted in Goa in which poker was one of the biggest games played.<sup>10</sup> Though there is a lack of clear jurisprudence on this subject in India presently, there appears to be an increasing trend internationally to consider Texas Hold'em Poker as a game preponderantly of skill and not a game of chance alone. There have been some recent reports that a group of individuals intend to file a suit for declaration of Texas Hold'em Poker as a skill based game in India.<sup>11</sup>

### III. Concept of Common Gaming Houses

Under the Gaming Legislations (except Orissa where gaming per se is an offence), most offences and prohibitions are in relation to a common gaming house.

Generally, under the Gaming Legislations, to qualify as a "common gaming house", there should be (a) an enclosed physical premises such as a house or a tent; and (b) "instruments of gaming" kept or used in such enclosed physical premises for the purpose of accrual of profit or gain to the person owning, occupying, keeping such enclosed physical premises or using any such instrument of gaming in the enclosed physical premises; and (iii) profit or gain by way of charge for use of the same enclosed premises or instruments of gaming or otherwise. However, there are certain States like Delhi where it may not be necessary for such "profit or gain"

to the person owning, occupying or keeping such premises for qualifying as a common gaming house for certain purposes / games only.

*"Instruments of gaming"* means any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming. In today's context, there is one school of thought who believes that computer terminals used for gaming and servers on which gaming takes place and related e-records are maintained also constitute instruments of gaming.

On analysis of the definition of common gaming house in general under the Gaming Legislations, it seems that the intention is to impose restriction on use of a physical enclosed premises for the purposes of making "profit or gain" from the use of such premises.

Thus, a private house should ideally not be a Common Gaming House, if there is lack of intent on the part of the owner to derive any profit or gain from the use of his house for gaming purposes. Extending the same analogy to the digital world, when a person is accessing online gaming websites from his house, it would not be a "common gaming house".

The situation may however be different where such gaming activities are carried out in places such as clubs or cyber café where the cyber cafes derive profits by allowing the use of the computer terminals (which may be caught within the scope of "instruments of gaming").

### IV. Offences, Offenders & Penalties

Most gaming legislations prohibit the act of:

- Owning, keeping, occupying or having care and

10. <http://www.pokerguru.in/live-updates/World-Gaming-Festival/World%20Gaming%20Festival/WGF%20Poker%20Tournament/2011-09-24>

11. <http://www.mid-day.com/news/2011/oct/251011-Move-on-to-make-Poker-legal.htm>

- management of a gaming house / common gaming house;
- Advancing or furnishing money for the purposes of gaming to persons frequenting any such gaming house;
  - Gaming in common gaming house or present for the purpose of gaming in Common Gaming House;
  - Gaming or suspected of gaming in any public street, place or thoroughfare;
  - Printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gaming.
  - Gaming per se (This is not applicable to every state. Only the Gaming Legislation of states like Orissa prohibit the act of gaming itself)

The liability for offences under the Gaming Legislations usually vests upon:

- Owner of the gaming / common gaming house;
- Person keeping or having charge of the gaming / common gaming house'
- Person gaming or possessing instruments or records of betting or suspected of gaming or possessing such instruments

All Gaming Legislations prescribes penalties which are more or less similar. The Bombay Prevention of Gambling Act 1887 imposes fine and imprisonment for offenders. A first offence is punishable with a fine and imprisonment of at least INR 500 and 3 months respectively; a second offence with a fine and imprisonment of at least INR 1,000 and 6 months respectively and a third or subsequent offence with a fine and imprisonment of at least INR 2,000 and imprisonment for one year respectively.

## V. Licenses for Physical & Online Gaming & Sports Betting

While all the above legislations prohibit gaming in common gaming houses, there are certain state legislations that have legalised some form of gaming and issue specific licenses to the gaming establishments. For instance, the West Bengal Gambling & Prize Competition Act, 1957 specifically

12. *Supra note.9.*

excludes 'games of cards like Bridge, Poker, Rummy or Nap' from the definition of "gaming and gambling" and allows the organizing of such games on procuring a permit from the Commissioner of Police in Calcutta or the District Magistrate or the Sub-divisional magistrate when such game is played in any place where the public may have access.

Further, under the Sikkim Gaming Laws, an interested person can obtain a "license" for the purpose of conducting online games such as such as Roulette, Black-jack, Pontoon, Puntobanco, Bingo, Casino Brag, Poker, Poker dice, Baccarat, Chemin-de-for, Backgammon, Keno and Super Pan 9 and sports betting, including its organization, management or promotion or negotiation or receipt of bets. Further, a licensee can take the prior approval of the State government to offer any other / addition online games under the license.

## VI. Collection of a Stake from Players Playing Games

Another important issue that arises is whether the owners of gaming houses can collect stakes or derive profits from the players. In the *Satyanarayana Judgment*<sup>12</sup>, the Supreme Court inter alia observed that clubs usually charge an extra amount for anything they supply to their members because the extra payments are used to manage the club and provide other amenities' and observed that merely charging an extra fee for playing cards (unless excessive) will not amount to the club making a profit or gain so as to render the club a common gaming house. The court has laid this principle in general and has not particularly applied it to games of skill like Rummy.

The courts of India have also held that while it is the right of the clubs to have recreational activities which are not prohibited, the authorities have the right to take appropriate proceedings against illegal games of betting, wagering, etc. Thus, the owners of clubs need to be careful about the manner in which and services against which fee /

stakes can be legitimately collected from players to avoid falling under the penal provisions of the Gaming Legislations.

In a subsequent case<sup>13</sup> before the High Court of Andhra Pradesh, the court stated that penal statutes should be strictly construed and benefit of any loophole in the statute is to be given to the accused. Therefore, it is for the legislature to intervene and amend the law, laying down that playing Rummy with stakes would also be 'gaming' within the meaning of the law. However, recently the Madras High Court in the matter of Director General of Police, Chennai v. Mahalakshmi Cultural Association<sup>14</sup> interpreted the Satyanarayana Judgment differently in the context of a statute in pari materia and held that rummy played with stakes would amount to gambling. This new judgment has unsettled a rather settled position of law. Different interpretations by different high courts would give rise to ambiguities on the position of law on collection of stakes from the game of rummy. However this matter is in appeal before the Supreme Court which currently temporarily stayed the operation of the aforementioned part of the order.

The question of whether games of skill can be offered for money on the virtual platforms recently came up for consideration before the Delhi District Court<sup>15</sup> where the petitioners had filed a petition under Order 36 of the Code and Civil Procedure

Code ("CPC") for seeking the opinion of the Hon'ble court on inter alia the question of whether there was any restriction on taking stakes from games of skill on websites making profit. The Court opined that when skill based games are played for money in virtual space, the same would be illegal and observed that the degree of skill in games played in a physical form cannot be equated with those played online. The court seems to have assumed that degree of chance increases in online gaming; and there is a possibility of manipulation including randomness, cheating, collusion in the online space. However, the factors relied on by the court can be addressed by building in adequate fraud control checks in the systems.<sup>16</sup> This is a standard practice globally and also helps address anti-money laundering issues that plague these websites.

It is important to note that this particular judgment is only binding on the parties to the matter and that it has already been appealed before the Delhi High Court. While the nature of the petition precludes the High Court from staying the order of the lower court, the High Court has stated that if state takes any action against the petitioners, then the petitioners are at liberty to approach the court. This matter is currently pending before the Delhi High Court and is next listed before the court in October 2013.

13. *D. Krishna Kumar and Anr. v. State of A.P.*, 2003 CriLJ143

14. W.A.No. 2287 of 2011

15. *M/S Gaussian Networks Pvt Lts ("Petitioners") v. Monica Lakhanpal and State of NCT.*

16. Since this judgment was given by the Court as a result of a petition made under Order 36 of CPC, it is binding on the parties inter se and not generally. Thus, this opinion does not necessarily by itself alter the position of law in India as regards offering of skill based games for stakes through online portals.

### 3. Prize Competitions

Prize competitions are competitions where a person is rewarded monetarily or with any other reward for solving a puzzle or a crossword or answering questions.

Traditionally one would find a prize competition in a local newspaper or announced on the radio. However, in recent times with the growing number of media, prize competitions have begun to feature in different forms e.g on TV shows in the form of a puzzle, crossword or a picture prize competition and the viewers would subsequently send the solutions to the organizer by way of SMSes or calls. Also, there have been a growing number of SMS driven competitions and online prize competitions.

The Prize Competition Act prohibits prize competition(s) in which the total value of the prize or prizes (whether in cash or otherwise) offered in any month exceeds one thousand rupees; and prize competition(s) where the number of entries exceed two thousand. Further any person intending to conduct such prize competitions has to obtain a license to engage in such activities and the details for obtaining such licenses to be given in the rules made there under. Any person conducting competitions falling within the purview of the Prize Competition Act does not obtain a license is punishable with imprisonment up to three months, or with fine which may extend to one thousand rupees (USD 20), or with both. Prize competition has been defined by the Prize Competition Act as any competition in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.

In the case of *Bimalendu De v. Union of India (UOI) and Ors*,<sup>17</sup> the legality of the popular show *Kaun*

*Banega Crorepati* was in issue. A public interest litigation was filed in the Calcutta High Court requesting that the game shows *Kaun Banega Crorepati* and *Jackpot Jeeto* should be prohibited from being telecasted on TV on the grounds that the same was a game that amounted to gambling prohibited under the laws. In the *Kaun Banega Crorepati (KBC)* program the format is based on the celebrated game show "*Who wants to be a Millionaire*".

The court reviewed the provisions of the West Bengal Gambling and Prize Competition Act, 1957 (which has an analogous provision to the Prize Competitions Act) and held that game show does not fit within the definition of a prize competition.

While the prize competitions are regulated under the Prize Competition Act and the state specific prize competition laws, depending on the facts and circumstances of each case, the Gaming Legislations may also get attracted to such competitions. However, if the competitions fall outside the scope of the Prize Competition Act, Gaming Legislations and related state laws, such competitions will not be regulated under gaming laws of India.

The Tamil Nadu Prize Schemes (Prohibition) Act, 1979 regulates "prize schemes" in the State of Tamil Nadu. Under this enactment, there is a prohibition to conduct or promote a prize schemes.<sup>18</sup> The applicability of this provision is purely determined on the facts and circumstances of each case. If the game format includes (i) purchase of goods; and (ii) draw of lots to select the prize winner from amongst the persons who have purchased the product, then such a game format would fall within the ambit of this enactment. Under the said

17. AIR 2001 Cal 30.

18. "Prize Schemes" has been defined as follows:

"prize scheme means any scheme by whatever name called whereby any prize or gift (whether by way of money or by way of movable or immovable property) is offered, or is proposed to be given or delivered to one or more persons to be determined by lot, draw or in any other manner from among persons who purchase or have purchased goods or other articles from shops, centers or any other place whatsoever specified by the sponsors of the scheme or on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in relation to such purchasers."

enactment, there is no express exemption given for skill based (or preponderantly skill based) games / prize schemes.

Though the Prize Competition Act does not expressly cull out an exception for skill based games, the Supreme Court in the case of *R. M. D. Chamarbaugwalla vs. The Union Of India* laid down the principle that skill based or preponderantly skill based competitions were not sought to be regulated under the Prize Competition Act 1955. The Supreme Court looked at *inter alia* intention of the legislators, the mischief that they sought to address under the legislation and the history before the legislation was brought into force.

However, under the Tamil Nadu Act this position has not been clarified. Therefore, till the time the courts or the legislature specifically clarifies the legal position under the Act *vis-à-vis* skill based games / prize schemes, depending upon the risk appetite, companies hosting such games / prize schemes have been taking either of the interpretations. In view of the same some entities in their terms and conditions for the games, expressly carve out the players from the state of Tamil Nadu.

## 4. Casual Gaming

Casual games typically refer to games like puzzles, adventure themed games, sports and action games, arcade games, card or board games etc. This is a separate category of games than those which fall within the scope of the Gaming Legislations and where the objective is not to bet or wager.

Casual games have always been one of the popular means of entertainment for the masses. Video games introduced the audience to a whole new experience of gaming compared to the traditional board games and today such gaming businesses thrive on the online and mobile platforms too. Multiple player interface and ease of interactions with players online has enabled casual games to carve a niche for themselves in the market. The popularity of such games is quite evident from how a simple game like 'Angry Birds' had an overwhelming number of downloads within 24 hours of its release on the Android and Apple App Store market.

Another type of casual gaming is through social media ("Social Gaming") Social games such as Farmville, Cityville have impacted the way consumers use social networks and Facebook is reckoned as one of the world's largest online gaming platform.

The nomenclature 'casual' does not do away with the fact that there are laws to regulate casual games. Some such laws are:

### I. Prize Competition Laws

Since certain casual games may also be based on building up, arrangement, combination or

permutation, of letters, words, or figures, the provisions of the Prize Competition Act and related prize competition laws may get attracted to such games. We have elaborated the provisions and applicability of the prize competition laws in Chapter III (Prize Competitions) of this paper.

### II. Pornographic and Obscenity Laws

Many games and gaming websites in India include content which may be categorized as objectionable under the pornographic and obscenity laws of India. For instance, some of the popular websites offer games which have animated caricatures of human beings, including women, depicted in a manner which may be construed as offence as per the moral standards of India.

#### A. Indian Penal Code, 1860 and the Information Technology Act, 2008

The Indian Penal Code ("IPC") and the Information Technology Act, 2008 ("IT Act") penalize publication, distribution and transmission of obscene content. The IPC *inter alia* prohibits the sale, hire, distribution, exhibition, circulation of any obscene object and also penalizes any person who engages or advertises or promotes or offers or attempts to do any obscene activity.<sup>19</sup> The IT Act *inter alia* penalizes the transmission of any obscene content<sup>20</sup> or sexually explicit material in electronic form<sup>21</sup> including child pornographic content.<sup>22</sup>

As per the IPC and the IT Act, any material which is lascivious or appeals to the prurient interest or

19. Section 292 and 294 of the IPC.

20. Section 67 of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall on first conviction be punished with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment or a term which may extend to five years and also with fine which may extend to ten lakh rupees.

21. Section 67 A of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

22. Section 67B of the IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

which may deprave and corrupt persons would be considered obscene. In determining whether or not the games and the images depicted in the games are lascivious or appeals to the prurient interest, the court would take into consideration factors such as - (a) whether the work taken as a whole appeals to the prurient interest; (b) whether the work is patently offensive; (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. The court would also take into account other factors depending on the facts and circumstances of the case - Director General, Directorate General of Doordarshan & Ors vs Anand Patwardhan & Anr (Appeal (civil) 613 of 2005 of Supreme Court).

Under both these legislations, liability could be in the form of imprisonment or fine or both<sup>23</sup>, which may increase in case of repeat offenders. Further, under the IPC liability is attracted when obscene material is made available to young persons, (that is, below the age of twenty).<sup>24</sup>

## B. Indecent Representation of Women

The Indecent Representation of Women (Prohibition) Act, 1986 prohibits any indecent representation of women i.e. the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals<sup>25</sup>; through advertisements or in publications, writings, paintings, figures or in any other manner and provides for penalty in connection with the same. The mode of transmission of advertisements is not specified; as such it may be construed that

such advertisement may also be transmitted through the electronic form. This act also penalizes the circulation of any material (including a film, any writing or drawing) containing any indecent representation of women and may get attracted if the casual games represent women in the manner stated hereinabove.<sup>26</sup>

## III. Laws Affecting Action Based and Violent Games

Many popular casual games are action based games which specifically appeal to young gamers such as the Grand Auto Theft. The provision of the Young Persons' (Harmful Publications) Act, 1956 assume relevance in such case which makes it an offence to print, publish or otherwise be involved in the printing, distribution or selling of any publication portraying the commission of offences, acts of violence or incidents of a repulsive nature in such a manner as would tend to corrupt young persons (that is, a person under the age of twenty years). The liability could be in the form of imprisonment or fine or both.<sup>27</sup>

## IV. Intellectual Property Rights Issues

Casual games are often theme based in nature and use pictures, musical notes, figures, characters etc. to add to the appeal of the games. Since all such works are subject to copyright protection in their own individual sense, the use of such copyrighted material in the games without taking adequate permissions / licenses from the owner of copyrighted material can trigger copyright infringement issued under the Copyright Act, 1957. The owner of the copyright can take civil<sup>28</sup> or

23. Supra n. 16 to 19 & Infra n. 21.

24. Section 293 of the IPC provides that on first conviction, the offender shall be punished with imprisonment for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees.

25. Section 2 (c) of the Indecent Representation of Women (Prohibition) Act, 1986.

26. Any person who contravenes the provisions of the act shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees.

27. Penalty shall be imprisonment which may extend to six months, or with fine, or with both.

28. Such as injunction, suit for damages or account of profits.

criminal action against the infringer.<sup>29</sup>

Popular titles may also be protected under the trademark law of India. More often than not, competitors may try to piggy back on the popularity of film titles or series titles (titles for a series of games). Titles can be registered and protected as trademarks under the Trademarks Act 1999. Unregistered titles which are popular may be protected under common law if they have acquired a secondary meaning in the judgment of the target customers. The owner of the trademarks can take civil<sup>30</sup> or criminal action against the infringer.

In India, a user of an unregistered trademark cannot sue another party for infringement of its trademark but may institute only a passing off action against the defaulting party. However, to successfully defend a passing off action, the proprietor of the title will need to prove that the titles of the games (especially popular games), or get-up of the title logos is distinctive and the public identifies these with the proprietor, which would not be required if the trademark is registered. The proprietor will also need to prove that the defaulting party has been using the marks deceptively and passing off their goods or services as that of the former.

## V. Personality Right Issues

Many games, in order to attract gamers, use the caricatures, likeness, voice, reputation or popularity of a celebrity for a commercial benefit without authorization from the celebrity. This may result in violation of the celebrity's personality rights which is a combination of privacy and publicity rights of a person. A violation of such rights would result in the court passing an order restraining the company or person owning the game from displaying / exhibiting these games or using the image of the celebrity in such games and/or award damages to the celebrity for harm caused to the reputation of the celebrity.

29. Copyright infringement or abetment of the same is punishable with imprisonment for a term which may vary between 6 months to 3 years and fine which may vary between Rs 50,000 to Rs 2,00,000.

30. *Supra note. 25.*

## 5. Telecom Laws Applicable to Social Gaming

A recent study by market research<sup>31</sup> firm Nielsen provided an interesting insight into the usage of mobile phones in India. As per the study, voice calls and texting accounted for only 25% (twenty five percent) of smartphone usage whereas multimedia, games, apps and Internet browsing made up the rest. Importantly, games were the most popular category among paid apps, with nearly three out of five users (58%) paying for games. There are certain telecom laws that are particularly important to consider by the gaming companies while evaluating their business models.

### I. SMS Related Laws

In light of various complaints made against spam calls and SMSes, the Telecom Regulatory Authority of India ("TRAI") issued the Telecom Commercial Communications Customer Preference Regulations, 2010 ("Regulations") which seeks to prohibit Unsolicited Commercial Communications ("UCC").

These Regulations prohibit the transmission of SMSes to subscribers who have elected not to receive such messages. Under these Regulations, subscribers have been given the option of registering either under the fully blocked category or the partially blocked category depending on their preferences.

In the fully blocked category, a subscriber opts not to receive any type of commercial communication, while the partially blocked category enables subscribers to receive commercial communications only in the categories they have chosen. Therefore, in the event that a subscriber has registered under the fully blocked category, he will not receive any type of promotional / commercial messages / calls.

Whereas, subscribers under the partially blocked scheme may choose from a selection of categories including: banking, insurance, financial products

and credit cards; real estate; education; health; consumer goods and automobiles; communication, broadcasting and entertainment; IT; and tourism.

However, certain SMSes do not need to adhere to the above mentioned restrictions and may be sent to any subscriber. Such messages are known as transactional messages, i.e. messages that represent a transaction undertaken by the subscriber, for example, messages regarding banking transactions, ticket reservations etc. since these SMSes are generated pursuant to a request made by the subscriber himself.

Interactive games modeled around SMSes typically face the following embargos:

- The Regulations lay down that only an entity registered with the TRAI ("Telemarketer") may send commercial communication and that no other entity shall send commercial communication.
- There are other restrictions placed on commercial communication, such as, these messages can only be sent from 9AM to 9PM and no commercial communication can be sent thereafter.

Therefore, interactive SMS based games need to be structured carefully so that SMSes qualify as transactional messages.

Further, telemarketers sending commercial communication have been prohibited from receiving incoming messages. This poses a challenge when the interactive game requires responses to be sent via SMS by the subscriber. However, we have observed that most interactive games in India are now structured in a manner that the number which the participant needs to respond to is included in the body of the text with instructions to reply to the designated number instead.

31. <http://www.nielsen.com/us/en/newswire/2013/smartphones-keep-users-in-india-plugged-in.html>

## II. Activation of Value Added Services

After various complaints regarding the activation of value added services (“VAS”) without the authorization of subscribers and the consequent deduction in balance of the subscribers, the TRAI enacted specific regulations to ensure that consumers are not charged incorrectly / excessively for any VAS.

The TRAI has imposed various obligations on telecom operators including:

- Informing the consumer, through SMS, on activation of a VAS, the validity period of such service, the charges for renewal and the procedure for the consumer to unsubscribe from the service;
- Before subscribing to a VAS, the operator must obtain confirmation from the consumer via a SMS within twenty four hours of activation of the VAS. The consumer must be charged only if such confirmation is received, failing which, the VAS must be discontinued;
- In case a VAS is offered via WAP or mobile internet, explicit consent of the consumer is required via an online consent gateway as is detailed in TRAI’s directions.

Though the TRAI has placed all these obligations on telecom operators we have observed that most VAS agreements between the game developers and telecom operators typically involve the telecom operator passing on its obligations to the VAS provider. Further, telecom operators typically also require the VAS provider to comply with all applicable laws and further indemnify the telecom operator in the event of any loss / penalty.

Therefore, in the event that an interactive game is designed centered around regular SMSes being activated on a subscriber’s handset, the game developer must be mindful of such obligations that may be applicable to such games.

## 6. Other Laws Affecting the Gaming Industry

### I. Foreign Direct Investment & Foreign Technology Collaborations in Gaming Industry

Under the Foreign Direct Investment Policy (FDI Policy) of India issued by the Ministry of Commerce & Industry, Government of India, Foreign Direct Investment (FDI) is prohibited in entities involved in

- » 'lottery, including government, private lottery, online lotteries, etc; and
- » gambling and betting including casinos etc.

The terms '*lottery, gambling and betting*' have not been defined under the FDI Policy. Hence, one may rely on the statutes in *pari materia*, judgments (both domestic and foreign), dictionaries etc. for the meaning of these terms.

Further, the FDI Policy also prohibits foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract for lottery business and gambling and betting activities. Thus, any arrangement between Indian and foreign entities for conducting gaming business needs to be carefully structured to avoid risks under the FDI regulations. For violating the FDI Policy, one may have to pay a penalty of up to thrice the sum involved where such amount is quantifiable, or up to INR 200,000 (approx. USD 4000) where the amount is not quantifiable, and where the contravention is a continuing one, further penalty which may extend to INR 5,000 (approx. USD 100) for every day after the first day during which the contravention continues.

### II. Restrictions Under Exchange Control Regulations

Under the Foreign Exchange Management (Current Account Transaction) Rules, 2000, remittance of income from winnings from lottery, racing /

riding or any other hobby is prohibited. Though in letter remittance for the purpose of betting is not prohibited, keeping in view the spirit of this provision, remittance for the purpose of betting may be construed as prohibited under these rules.

### III. Duty of Internet Service Providers (ISP) Under the New Rules Notified Under the Information and Technology Act, 2000 (IT Act)

In April 2011, new guidelines for intermediaries have been notified under the IT Act, which require the intermediaries like ISPs to inter alia observe necessary due diligence and publish rules and regulations and user agreement for access or usage of the bandwidth provided by the ISP. Such rules and regulations and user agreement need to include terms which inter alia inform the users of the bandwidth not to host, display, upload, modify, publish, transmit, update or share any information, that is relating or encouraging gambling, etc. or otherwise unlawful in any manner whatever. It appears that the rule has been included to discourage any activity of gaming / gambling that may be unlawful under the Gaming Legislations in the country. We understand that as an industry practice the ISP's have already been including such terms in their user agreements and other policies and have been either temporarily or permanently been blocking the gaming websites as and when they receive any take down notices from the authorities or others. The Registrar accredited with the ICANN has also been blocking the websites on its own. However, since the law expressly imposes inserting such terms as an obligation on the ISP, the ISPs may increasingly block such websites *suo motu* or on notices from the Department of Telecom ("DOT") or similar authorities. Since the rules have been recently notified, the practical impact on the ISPs is yet to be tested.

## IV. Anti-Money Laundering Laws

In India, Prevention of Money Laundering Act, 2002 (“PMLA”) constitutes the law relating to anti-money laundering. Entities carrying out the activities for playing games for cash or for kind (including online gaming sites and casinos) (“Gaming Entity”) are also required to adhere to the provisions of the PMLA and related rules (“Rules”).<sup>32</sup>

As per Section 12 of the PMLA, the following documents are required to be maintained by Gaming Entities:

### A. Record of all Transactions

The requirement to maintain records arises only in the following cases:

- All cash transactions<sup>33</sup> of the value of more than INR 10,00,000 (approx. USD 20,000) or its equivalent in foreign currency; or
- All series of cash transactions integrally connected to each other which have been valued below INR 10,00,000 (approx. USD 20,000) or its equivalent in foreign currency where such series of transactions take place within one calendar month; or
- All suspicious transactions whether or not made in cash and including, inter alia, credits or debits into from any non-monetary account such as demat account.

The Rules prescribes that the records for such transactions should mention about nature of the transactions, the date on which the transaction was conducted, amount of the transaction and the currency in which it is denominated. These records have to be maintained for a period of ten years from the date of the transaction between a client and the Gaming Entities.

### B. Records of the Identity of the Clients 34 Which are Required to be Maintained

As per the Rules, the Gaming Entities should also maintain records of the identity of their clients from the date of cessation of the transactions between the client and them for KYC purposes. Thus, the Gaming Entities have to verify and maintain a record with the following details at the time of opening of an account or execution of any transaction with its client:

- » identity of the client;
- » current address of the client including the permanent address;
- » nature of business of the client; and
- » financial status of the client.

32. *The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005*, prescribes the nature and value of transactions for which records are required to be maintained by a financial institution.

33. The term ‘transaction’ is defined to include “deposit, withdrawal, exchange or transfer of funds in whatever currency, whether in cash or by cheque, payment order or other instruments or by electronic or other non- physical means.”

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## NDA Insights

TITLE	TYPE	DATE
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Public M&A's in India: Takeover Code Dissected	M&A Lab	26 November 2012
Copyright Amendment Bill 2012 receives Indian Parliament's assent	IP Lab	25 May 2012
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Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines"*. These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

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