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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 17th October, 2023*

+ CS(COMM) 244/2022

HULM ENTERTAINMENT PVT. LTD.

& ORS.

..... Plaintiffs

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Sudeep Chatterjee, Mr. Tejveer Bhatia, Mr. Rohan Swarup and Mr. Kiratraj Sadana, Advocates

versus

FANTASY SPORTS MYFAB11 PVT. LTD.

& ORS.

..... Defendants

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Ankur Sangal, Mr. Sucheta Roy, Ms. Asavari Jain and Mr. Raghu Sinha, Advocates for D-1.

CORAM:**HON'BLE MS. JUSTICE JYOTI SINGH****JUDGMENT****JYOTI SINGH, J.**

I.A. 5896/2022 (under Order XXXIX Rules 1 and 2 CPC, by Plaintiffs) and **I.A. 6308/2022** (under Order XXXIX Rule 4 CPC, by Defendant No.1)

1. This judgment will dispose two applications, one under Order XXXIX Rules 1 and 2 CPC filed by the Plaintiffs and the other under Order XXXIX Rule 4 CPC preferred by Defendant No. 1, seeking vacation of *ex parte ad interim* injunction granted vide order dated 13.04.2022, restraining the Defendants *inter alia* from making available for downloads or in any manner unauthorizedly using Plaintiffs' copyrighted work through MYFAB11 App or any other



similar App using the impugned application or computer programme so as to result in infringement of Plaintiffs' copyrighted works. Vide order dated 13.04.2022, this Court had granted *ex parte ad interim* injunction in favour of the Plaintiffs' and the operative part of the order is as follows:

“33. *Having heard learned Senior Counsel for the Plaintiffs, this Court is of the view that Plaintiffs have made out a prima facie case for grant of ex parte ad-interim injunction. Balance of convenience lies in favour of the Plaintiffs and they are likely to suffer irreparable harm in case the injunction, as prayed for, is not granted.*

34. *Accordingly, Defendants, their Directors, Assignees, Partners or anyone acting for or on their behalf, inter alia are restrained from making available for downloads or in any manner unauthorizedly using the Plaintiffs' copyrighted works through the MYFAB11 App or through any other similar App using the impugned application/computer program on Smart Phones, Tablets, Smart TVs, Laptops, Computers or any other digital gadgets or any other application, so as to result in infringement of Plaintiff's copyrighted works.*

35. *Defendants their subsidiaries, agents, distributors, advertising agencies, developers, partners, acting for or on their behalf are further restrained from making available to the public for downloading the copyrighted content of the Plaintiffs on all electronic medium including App Store, on any electronic devices through any medium or download via any applications like "software update" (i.e. Defendant's partner app) or through any social media like youtube.com, facebook.com, Instagram, Telegram etc. so as to result in acts of infringement of the Plaintiffs' copyright.*

36. *Defendant No. 6 its subsidiaries, agents, distributors, advertising agencies, developers, partners, acting for or on their behalf are restrained from making available to the public for downloading the copyrighted content of the Plaintiffs on all electronic medium including on any electronic devices through any medium, or download via any applications like "software update" (i.e. Defendant's partner app) or through any social media like youtube.com, facebook.com, Instagram, Telegram or through their Web Hosting Services including the cloud, etc. so as to result in acts of infringement of the Plaintiffs' copyright.*

37. *Defendants No.4, its directors, partners, proprietors, officers, affiliates, servants, employees, and all others in capacity of*



principal or agent acting for and, on its behalf, or anyone claiming through, by or under it, are directed to suspend the domain name registration of myfab11.com which infringe the Plaintiffs' exclusive rights.

38. Defendants No. 5 its directors, partners, proprietors, officers, affiliates, servants, employees, and all others in capacity of principal or agent acting for and, on their behalf, or anyone claiming through, by or under it are directed to remove Defendant No. 1's mobile App MYFAB11 from its listings."

2. Thereafter, an application was filed by Defendant No.1 seeking vacation of the *ex parte* injunction order in which notice was issued on 25.04.2022 and upon a statement made on behalf of Defendant No.1 that without prejudice to its rights and contentions it had removed the stock feature, directions issued to Defendants No.6, 4 and 5 in paragraphs 36 to 38 respectively, vide order dated 13.04.2022 were suspended till the next date.

3. I.A. 5896/2022 has been filed by the Plaintiffs seeking injunction against Defendants No.1, 2 and 3 (hereinafter referred to as 'Defendants') predicated on their claim that Plaintiffs are developers and operators of the unique Fantasy Sports Mobile Application EXCHANGE22 which incorporates features of Fantasy Sports League and Stock Market. Plaintiff No.1 has been recognized as a start up by Start Up India, an initiative under the Government of India, which assists entrepreneur platforms to network, access free tools and resources and participate in programs and challenges. Plaintiff No. 2 first came up with the unique idea of integrating the features of a Fantasy Sports League and Stock Market in the year 2010. Over the years, Plaintiffs No. 2 and 3, with hard work and toil, developed their idea into a tangible form and finally launched beta version of their



application in August, 2019 to test the mobile app on the website <https://exchange22.com/>. Plaintiff No. 1 Company was incorporated on 16.09.2019 and on 21.11.2019, EXCHANGE22 mobile App was officially launched.

4. As described in the plaint, fantasy sports are played online and the general way to play is that a user creates a virtual team of his own, depending upon his own analysis of the performance of the players, prior/during an ongoing sporting match and/or a sporting league. As and when the matches are played, users' team competes against the other users' team to find its place in the points ladder. Such games are played either for fun or prize or even money. These are games of skill where a user, with his analytical skill puts together a virtual team of real sports persons and success depends predominantly upon superior knowledge, training, attention, experience and adroitness of the player. User earns points based on how his own analysis is close to the actual, real life performance of the sports person. Fantasy Sports are prevalent in various sports *albeit* predominantly in football, baseball, cricket, etc.

5. Plaintiffs claim that they have formulated their own Fantasy Sport Mobile App which differs from the prevalent Fantasy Games Leagues. Plaintiffs' Fantasy Sports Game is registered under the Copyright Act, 1957 (hereinafter referred to as the 'Act 1957') and being literary/dramatic work, the copyright work includes detailed working of the fantasy game including 'Object of the Game' and the 'Components', which explain each and every step that a user experiences on its mobile application, such as the components of the 'Home page', 'My Portfolio page', 'My Balance page', the process of



verifying the account, a detailed point system, rules and regulations. Plaintiffs' work also contains steps to add/withdraw money to/from the 'Wallet' through multiple payment options.

6. It is averred in the plaint that Plaintiffs have devised a 'first of its kind' fantasy league gaming platform for cricket, football, basketball and kabaddi and what sets it apart from the other fantasy gaming Apps, where the users play like a real game but virtually, is that EXCHANGE22 incorporates the unique traits of 'share market trading' which allows the user to buy/sell the players in the same manner as one would buy/sell shares. User can buy any number of shares of a player upto a maximum of 22 players in one match going on anywhere across the world. The App is therefore an amalgamation of features of Fantasy Sports League and Stock Market Trading. Plaintiffs have developed a detailed 'concept note' and an attractive 'Graphical User Interface' ('GUI') with unique program structure and placement of information, which is easy to access with investment of labour and money and have also applied for a patent registration for the invention.

7. It is further averred that an in-house team of designers and developers of Plaintiff No.1 has worked extensively to design the GUI of the Mobile App. Huge sums of money have been expended on product development, advertising and media costs in developing the brand name and EXCHANGE22 Mobile App. After its launch, for the period 2019-2022, the expenditure incurred on software development and maintenance has been close to Rs.96,00,912/- and with respect to advertising, promotions, etc. Plaintiffs have incurred an expense of Rs.7,79,56,657/-. Popularity of the app can be seen from the huge



revenues earned from platform fees paid by users, which are to the tune of Rs.138,112,327/- for the year 2021-2022.

8. Plaintiffs further claim that on the date of approaching the Court they had about 4,57,911 users with about 32,000 daily active users at any given point of time with an average engagement of 1.10 hours. In a short span of 3 years, Plaintiffs have carved a distinct niche for themselves in the world of fantasy gaming leagues and are entitled to protection against unlawful use by third parties including the Defendants.

9. It is pleaded by the Plaintiffs that Defendant No.1 has introduced a new update on its Fantasy Sports League Mobile App MYFAB11 in the form of a new feature titled 'STOCKS' and Defendants have copied not only the concept but also its working, features and execution of Plaintiffs' buy/sell interface and it was one day before launch of Indian Premier Leagues' first match on 26.03.2022, that Defendants launched the new version. This, according to the Plaintiffs, amounts to exploiting their success, goodwill and reputation and infringement of the copyright. Plaintiffs thus allege infringement of the copyright in the GUI and concept note, in addition to data theft of their curated data and unfair competition.

10. On the contrary, in I.A. 6308/2022, seeking vacation of stay, it is averred that Defendant No.1 started as a proprietorship firm on 31.03.2019 and later incorporated as a Private Limited Company on 24.01.2020 by Defendants No.2 and 3. Defendant No.1 operates a mobile application under the trademark 'MYFAB11' as a real-money fantasy gaming business model. The application is a flagship product of Defendant No.1, where lakhs of participating users simultaneously



create virtual teams comprising of real world athletes engaged in participating in a sport event and compete against teams drafted by other participating users in a game contest. The application offers game formats not only for cricket but other sports. The modalities include allowing one to choose a team based on his preference and sports knowledge before the match starts. Based on the performance of the players during the actual match, the user accumulates points and gets ranked at the end of the game. If a user participates in a game with money, it goes to a common pool and user gets the winning amount based on the rank after deduction of the applicable service fee. Recently, on 25.03.2022, Defendant No.1, introduced the concept of trading which allows users to “kharid(buy)/bech(sell)” a particular player, in order to add a dimension to the application and provide a new medium of entertainment and revenue generation for the users. The application has become a house-hold name, which is reflective from the revenue generated as well as millions of users. It is pleaded that the “kharid/bech” pricing is based upon each player’s stats and the formula used to calculate the same has no relation to any other platform and is premised on business strategy and vision of Defendant No.1, based on recent performances of the players. This is analogous to the credits of players that are used in daily fantasy format. Defendants’ App MYFAB11 has accumulated 39,36,952 users and is downloaded by over 5 million users with average engagement time of each user, everyday, being 8 minutes. Defendant No.1 has earned total revenue of approximately Rs. 8 crore in Financial Year 2020-2021 which increased to Rs.55 crores in Financial Year 2021-2022. Defendant No.1 has made a name for itself in the market and has



engaged Indian cricketers as brand ambassadors. The advertisements are broadcasted on various popular TV channels and huge sums of money have been spent on advertising on reputed OTT Platform – MXP Media India Ltd (MX Player) during IPL 2020. Approximately Rs.1.5 crores has been spent in affiliate marketing every month in addition to Rs.50 lakhs in digital advertising during ongoing IPL 2022. Defendant No.1 also engages in philanthropic activities and has donated to various charities.

11. It is further stated in the application that Plaintiffs have concealed and suppressed from this Court that the offending “kharid/bech” feature in Defendants’ application forms only a small part of the application whereas the primary feature is one which allows its users to select players and build a team like many other Fantasy League Applications, which are prior known and existing. Plaintiffs have also not disclosed that the domain name of the rival parties has nothing in common and yet sought suspension of the domain name www.myfab11.com. Most importantly, Plaintiffs have misguided the Court and not disclosed that the concept is not new and has existed in Fantasy Sporting market for decades. Plaintiffs are not the first to come up with the idea of combining Fantasy League with Stock Market (dynamic pricing of players) and there are many third parties who have created applications on similar concept, internationally and in India. Plaintiffs have failed to establish ‘originality’ in the concept, which is a *sine qua non* for claiming infringement under the copyright regime. Concepts and ideas, even otherwise, cannot be protected under the Act 1957, as only ‘expression of ideas’, is granted protection. Misrepresentation has



been made by the Plaintiffs by stating that there is similarity between the User Interface in the rival apps which ground is even otherwise unsustainable, as after receipt of the legal notice from the Plaintiffs and without prejudice to the rights and contentions as well as to avoid unnecessary conflict, Defendant No.1 has changed the UI to “kharid/bech” feature, which makes the two applications wholly dissimilar. Defendant No.1 urges that the *ex parte* injunction order is not only affecting the reputation of Defendant No.1 on account of bad publicity generated by the Plaintiffs on various platforms regarding the injunction order, but is also causing huge financial loss and therefore the injunction order be vacated.

12. Contentions raised by Mr. Akhil Sibal, learned Senior Counsel on behalf of Defendant No.1 can be encapsulated as follows:

- a) Plaintiffs issued a legal notice to the Defendants on 26.03.2022, to which a reply was sent by Defendant No.1 on 31.03.2022, denying copyright infringement and bringing forth that there can be no copyright in a concept of a game. Being in communication with the Defendants, Plaintiffs chose to file the suit on 12.04.2022 after waiting for 11 days expressing false urgency to claim exemption from advance service so that an *ex parte* order could be obtained by false averments and misrepresentation. As a consequence of the *ex parte* injunction, Defendant No.1 was unable to operate the trading feature of its application during the most lucrative period i.e. the IPL Season, resulting in financial loss in addition to damage to its reputation on account of



wide publicity of the interim order by the Plaintiffs in the media and other social networking platforms.

- b) Plaintiffs are guilty of gross suppression and concealment of material facts and misrepresentation, which led to the passing of the *ex parte* injunction order and the order deserves to be vacated on this ground alone. In the plaint, particularly, paragraphs 7 and 11 thereof, Plaintiffs have falsely averred that they are the originators and proprietors of the concept and expression of their gaming platform which amalgamates the features of fantasy sports leagues and stock market trading and this unique feature sets them apart from all other existing fantasy gaming Apps. This submission of the Defendants finds reflection in paragraph 23 of the order dated 13.04.2022. The averment is totally false and contradictory to the documents filed along with the plaint which contain a categorical admission that Plaintiffs are not the first to originate this idea and that the app is 'India's first sports stock exchange'. Implicit in this statement is an admission that Plaintiffs' app is not unique.
- c) Plaintiffs have concealed the fact that they are not the first ones to come up with the idea of combining features of Fantasy Sports League with stock market as there are many third parties who have created applications on similar concepts, such as Sixer, World Cup Cricket Stock Market APK by Mastishq Technologies, GSX.com, CricStocks, PlayerSX, Prediction Strike, JockMKT, Trade Stars, TradeFan, etc. To show the commonality of features



between the third party Apps and the App of the Plaintiffs, documents have been filed and as an illustration one can see that the App Sixer allows users to *“buy and sell fantasy stocks in cricket players. The better the player plays on the pitch, the price goes up and vice versa.”* *“The prices are determined by player performance”*. The owner of the App claims to be *“World’s First Cricket Stock Market. Buy and Sell Stocks in Cricketers”*. Application also has ‘Buy’ and ‘Sell’ Buttons and a page titled ‘Your portfolio’. Stock price goes up when the player performs on the pitch. Documents such as the Wayback Machine dated 23.08.2018, WhoIS dated 08.05.2018, Facebook Page and Copyright Notice below the website indicate that the application was created prior to that of the Plaintiffs’ Mobile App. Similar documents have been filed with respect to other applications aforementioned.

- d) Additionally, there are other websites which create white label Fantasy Sports applications that can be used directly by an entity seeking to build a mobile application with the said concept. ‘Uber Like App’ introduces the fantasy sports stock trading App that turns the sports from just a spine-tingling time pass into remunerative investments and sports fans can couple their knowledge in sports into stock trading in one shot. ‘App Dupe’ is an application where players and teams become stocks in a stock market and the stocks can be bought and sold and it allows the users to acquire the earnings based on their statistics.



- e) Article titled 9 Apps dated 17.06.2019, details the features required for creating fantasy sports mobile Apps like Dream11, which belies the stand of the Plaintiffs that their App EXCHANGE22 has unique features and is the original work of the Plaintiffs. In fact, even the point system followed by the Plaintiffs is not original and the same system was followed in Dream11 as far back as in September, 2018 as per the Wayback Machine. In view of the similarity of features with several pre-existing Apps, copyright asserted by the Plaintiffs over the concept fails on account of lack of originality, which is a *sine qua non* under the copyright regime, to allege infringement.
- f) Faced with the obvious deception, Plaintiffs after reading the present application filed by Defendant No.1, have now shifted their stand to contend that there are differences in the features of their App and other Apps, which is an admission that the initial stand taken to obtain injunction was false. Significantly, the new position adopted by the Plaintiffs, is only by way of filing a List of Documents, without an amendment to the pleadings to co-relate them and should not be accepted, in law. Plaintiffs cannot be permitted to set up a case beyond the pleadings in the plaint to shift the goal post after their misrepresentation and dishonesty is discovered. It is settled law that the correctness of the injunction order can be tested only on the averments made at the time when the order was passed and not on a new or improvised stand, Plaintiffs must be called upon to discharge the onus of



proving that they are the originators of the trading/stock feature in their Fantasy Sports App, in the absence of which, the stay must be vacated. This argument is without prejudice to the legal issue that no copyright exists in ‘features’ or ‘functionality’ of a mobile application.

- g) Even otherwise, case of the Plaintiffs falls to the ground for the simple reason that Plaintiffs have misleadingly attempted to claim copyright in the ‘concept of combining Fantasy League with Stock Market’, predicated on copyright registration dated 11.02.2022. Plaintiffs allege copyright infringement of their ‘concept note’, registered as a literary/dramatic work, but there is no attempt in the plaint or any other document to demonstrate how the Defendants’ App is a substantial reproduction of the registered literary work. The only comparison shown is between the screenshots of the User Interface of the Plaintiffs’ App, which is not registered and the screenshots of the Defendants’ App. It is a settled law that concepts and ideas cannot be protected under the Act 1957 and it is only the expression of the ideas that are granted protection.
- h) Plaintiffs are essentially seeking to distinguish their App by contending that: (i) Plaintiffs App allows users to buy/sell players only for the duration of the match; (ii) price of the players is governed by their performance; and (iii) the ‘buy’ and the ‘sell’ price are different. Each of these distinguishing features are entirely unoriginal and existed prior to Plaintiffs’ App and moreover the distinctions were not even



pleaded in the plaint. Instead, what is pleaded is that Plaintiffs gave birth to the idea of the fantasy sport league with a stock feature, which is wholly incorrect and false. Assuming that these distinguishing features exist and are relevant, even then Plaintiffs have no case inasmuch as Defendants' App allows users to buy/sell players even during the match which feature is missing in the Plaintiffs' App and even on this touchstone, there can be no infringement.

- i) In order to make out a case for infringement of copyright, Plaintiffs must show violation of an exclusive right of copyright under provisions of Sections 14 and 51 of the Act 1957. There is no pleading in the plaint claiming that the work of the Plaintiffs is an 'artistic work' within the meaning of Section 2(c) of the Act 1957. Plaintiffs are attempting to allege infringement in the functionality of the App, which is impermissible in law. Asserting a right of copyright in a concept note without showing that the said note constitutes 'literary work' cannot take the case of the Plaintiffs any further.
- j) In the oral submissions, Plaintiffs are now raising a new point that their mobile app is an 'adaptation of the work' in terms of Section 14(a)(vii) of the Act 1957 and therefore a mobile app can infringe a literary work, without substantially reproducing the text of the literary work. There is no such pleading claiming 'adaptation' in the plaint and in any event, the argument is misconceived as 'adaptation' in



relation to a literary work, as defined in Section 2(a)(ii) and (iii) would not include a mobile application.

- k) Plaintiffs' assertion of copyright infringement in the Graphical User Interface (GUI) of their app is wholly misconceived. The only comparison, as evident from the plaint, is between the GUI of the Plaintiffs' app and Defendant's app. GUI is not a 'work' under the Act 1957 and therefore, in terms of Sections 13 and 16 of the Act 1957, there can be no copyright in a GUI, *per se*. A GUI combines three elements viz. a computer programme which enables the functionality and appearance of the GUI; the artistic/graphic elements of the visual display of the GUI; and the text/literary works contained in the GUI, which are visible to the user. There can be copyright in a computer programme, literary work and/or artistic work contained in a GUI but there cannot be a copyright in the GUI itself. There is no pleading claiming copyright in any artistic work and therefore no copyright can be claimed in the graphic elements of the visual display of the GUI. Similarly, there is no claim in the pleading with respect to copyright in the 'computer programme'. Plaintiffs have not identified in the plaint which text in the GUI is the original literary work for which they claim copyright, which averment is essential to test whether the identified literary work is 'original' as required under Section 13 of the Act 1957.
- l) Without prejudice to the aforesaid arguments, even otherwise on a bare comparison, the GUI of the Defendants'



App is substantially different. The visual displays of the two apps use different colour schemes, graphics, text and placement of the elements. While comparing the two interfaces, the idea/expression dichotomy and the Doctrine of Merger would apply and thus where an idea can only be expressed in a limited number of ways, there can be no copyright protection even in the expression of that idea as that would confer monopoly on the idea and would be against the settled law.

m) Plaintiffs have misleadingly claimed proprietary rights over the system/formula which sets the price of any player on their mobile app and have alleged that Defendants have copied the same, without indicating even the basis on which the proprietary right is claimed. Firstly, proprietary rights over the system/formula of determining the price can only be claimed through patent registration and not under the Act 1957. Plaintiffs have applied for a patent registration for trading a value of a player, which is pending. Secondly, Defendant No.1 uses its own algorithms based on publicly available data/statistics which would be common to the Plaintiffs. Since the Defendants' point system is 4 to 8 points higher than the Plaintiffs' system, there is a consequent variation in the buy/sell price of 6 to 8 points, which is purely coincidental. The fantasy points are set according to the recent performance of the players and have nothing to do with the price set by the Plaintiffs' application. Incidentally,



there is no allegation of theft with respect to the points assigned to the players.

n) Reliance was placed on the following judgments:-

- i) ***Mattel, Inc. & Ors. v. Mr. Jayant Agarwalla & Ors., 2008 SCC OnLine Del 1059***, where the Court while dealing with the game of scrabble and relying on the idea/expression dichotomy and Doctrine of Merger rejected the claim of copyright infringement in the board game and the rules. Plaintiff had pleaded ownership of copyright in the game board as an ‘artistic work’ and in the rules as ‘literary work’.
- ii) ***Sanjay Kuamr Gupta & Anr. v. Sony Pictures Networks India P. Ltd. and Others, 2018 SCC OnLine Del 10476***, where it was held that there cannot be a copyright in a concept or an idea and copyright can only subsist in an identified ‘work’ as also that there can be no copyright outside the Act 1957.
- iii) ***Twentieth Century Fox Film Corporation v. Zee Telefilms Ltd. & Ors., 2012 SCC OnLine Del 3524***, where also the Court held that there can be no copyright in idea, concept, principles or discovery and rejected the claim for copyright in presentation techniques/format.
- iv) ***Samir Kasal v. Prashant Mehta and Others, 2022 SCC OnLine Del 184***, where the case concerned an international cricket league made of retired cricket legends in a test format of two innings of 10 overs each. Relying on the judgment of the Supreme Court in ***R.G.***



Anand v. Delux Film and Others, (1978) 4 SCC 118, the Court held that there can be no copyright in an idea and rejected the copyright claim on the format.

- v) Plaintiffs placed heavy reliance on the decision in *Broderbund Software, Inc. v. Unison World, 648 F. Supp. 1127 (N.D. Cal. 1986)*, a judgment by the US District Court but what was not placed before the Court is the relevant statutory framework within which the said decision was rendered, which differs from the Indian Copyright Act. Under the relevant US Statute, the subject matter of copyright is an inclusive category unlike the provisions of Sections 13 and 16 of the Indian statutory regime besides the fact that the former provides for copyright in ‘audiovisual works’, for which there is no copyright in the Indian Act. Significantly, even in the said judgment, the Court does not render a finding that copyright exists in GUI *per se* and a plain reading of the judgment makes it clear that the Court was concerned with the claim for ‘audiovisual’ copyright infringement and ‘audiovisual displays of the computer program’, none of which are the subject matter of the present case. Reliance placed on the decisions in *Reckitt Benkiser India Ltd v. Wyeth Ltd, 2013 SCC OnLine Del 1096* and *Videocon Industries Limited v. Whirlpool of India Limited, 2012 SCC OnLine Bom 1171*, is also misplaced as the said cases are under The Designs Act, 2000. Unlike the Copyright Act, 1957, where copyright in a



defined 'work' arises through authorship, design rights under the Designs Act, 2000 are conferred by registration, the validity of which can be challenged in accordance with the provisions of the said Act. Copyright Act does not mandate registration for a copyright to subsist nor does registration confer any legal rights. Reliance on the decision of the House of Lords in *Ladbroke (Football) Ltd. and William Hill (Football) Ltd., (1964) 1 All ER 465*, is also erroneous as the question that arose in the said case was whether copyright subsists in 'coupons' as an 'original literary compilation'. Relying on Section 2 of the English Copyright Act, wherein a 'literary work' includes any written table or 'compilation', the coupon was held to be a 'compilation' in which copyright could subsist as literary work. Court also agreed that there was substantial reproduction of the literary work in contrast to the facts of the present case where the only pleading by the Plaintiffs in respect of literary work is with regard to the registered concept note and there is nothing to even remotely indicate any reproduction of the said literary work by the Defendant.

13. Contentions raised on behalf of the Plaintiffs are as follows:-
 - a) Plaintiffs are the developers and operators of a unique mobile application EXCHANGE22, which incorporates the features of Fantasy Sports League and Stock Market. The idea first originated in 2010 and over the years, with hard work and toil developed into something tangible.



Finally, beta version of the application was launched in August, 2019 to test the mobile app on its website <https://exchange22.com/>. Upon getting a positive response from the public, Plaintiff No.1 Company was incorporated on 16.09.2019 and the mobile app was officially launched on 21.11.2019.

- b) Plaintiffs' fantasy sports game is registered under the Act 1957 while registration for the detailed work named EXCHANGE22 has been applied for as a literary/dramatic work. The concept note which is the registered copyright work details working of the fantasy game including 'Object of the Game' and the 'components' therein explaining every step that a user experiences on its mobile application such as the Home page, My Portfolio page, My Balance page, the process of verifying the account and a detailed Point System with Rules and Regulations.
- c) Contention of Defendant No.1 that Plaintiffs' app is not unique or original is misplaced. The unique features of the app are :-
- i) Plaintiffs give a separate price for Buy and Sell for each player, as the game allows users to sell a player even without having purchased the player first;
 - ii) The user can trade the players like a stock;
 - iii) The user can buy or sell the players;
 - iv) A player can be bought and sold multiple times for a match like a share and this can be repeated for multiple players;



- v) The prices are pre-determined as per the analysis of the in-house analysts on a match-to-match basis;
 - vi) Users play on a match-to-match basis;
 - vii) Buying and selling is only *qua* that particular match and there is no carry forward;
 - viii) There is a separate price for each player for buying and selling which is determined by the app and is not controlled or influenced by the market forces unlike in the stock market where companies do not declare the prices and the market forces are the determining factors;
 - ix) Buy/Sell price is fixed for every player for a particular match, 24 hours prior to the start. The price determination is very significant and requires to be correct/accurate so as to attract the users and ensure that it is lucrative to the Plaintiffs. Alike to the said requirements, a team of analysts of Plaintiff No.1 collects, analyses and curates immense amount of data with regard to player performances, playing style, previous record including factors such as pitch, weather, calibre of the opposition team etc.
- d) Plaintiffs' mobile application is a creative expression of its concept note which is a literary work that describes the components, objectives, elements and rules of Plaintiffs' mobile app or can be stated to be an adaptation of its literary work. Courts have recognized that a concept note is an evidence of original/novel idea and the creative expression



of the literary work is protected under the Act 1957. Reliance was placed on the judgments in *Zee Entertainment Enterprises Ltd. v. Gajendra Singh & Ors.*, 2007 SCC OnLine Bom 920 and *Anil Gupta & Anr. v. Kunal Dasgupta and Ors.*, AIR 2002 Del 379.

e) Section 2 of the Act 1957 starts with the phrase ‘*unless the context otherwise requires*’ and thus the definitions given thereunder including for the word ‘adaptation’ under Section 2(a) are not exhaustive and therefore a restricted meaning ought not to be given. As a principle of statutory interpretation, the interpretation which furthers the object underlying the statute should be preferred by the Court. The Scheme of the Act 1957 is to protect the expression of original ideas by restricting their use in exact form, from adaptation or alteration. Reliance was placed on the following judgments:-

- i) *State of Gujarat v. Chaturbhuj Mangalal*, (1976) 3 SCC 54.
- ii) *Kanwar Singh and Others v. Delhi Administration*, (1965) 1 SCR 7.
- iii) *N.K. Jain & Others v. C.K. Shah & Others*, (1991) 2 SCC 495.

f) Plaintiffs seek protection of their copyright in GUI of the mobile application. GUI is an ‘artistic work’ and capable of protection under the Act 1957. Government of India’s stated position is that GUI is protectable as an artistic work which is evident from the website of Ministry of Electronics and Information Technology (‘MEITY’), wherein it is stated that



the ‘look and feel’ of a GUI is protectable under the Act 1957. *Arguendo*, even if GUI is taken as a component of a computer programme, it is an underlying artistic work which exists independently. Each frame, image, arrangement of icons, menus, etc. exists as an independent artistic work and even the structure, sequence and organization of Plaintiffs’ App is protectable under the Act 1957. Reliance was placed on the following judgments :-

- i) ***Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222.***
 - ii) ***Broderbund Software, Inc. v. Unison World, 648 F. Supp. 1127.***
 - iii) ***Maraekat Infotech Ltd. v. Mr. Naylesh V. Kothari and Others, 2016 SCC OnLine Bom 2369.***
- g) Defendants have substantially copied the GUI, which is evident from the screenshots produced by the Plaintiffs and have deceitfully not produced screenshots of some pages selectively such as ‘Portfolio Page’, ‘Buy Player Page’, ‘Sell Player Page’, which on being viewed together makes it clear that Defendants have substantially copied the GUI of the Plaintiffs.
- h) Plaintiffs have expended huge sums of money on product development, advertising and media costs in developing their brand name and the mobile app EXCHANGE22. Expenditure incurred on software development and maintenance is Rs.96,00,912/- and that on advertising etc. is Rs.7,79,56,657/- for the years 2019-2022. Plaintiffs’ app has 4,57,911 users as in May, 2022 and new users keep getting



added everyday with about 32,000 daily active users at any given point of time with an average engagement of 1.10 hours. In a short span of three years, Plaintiffs have carved out a distinctive niche for themselves in the world of fantasy gaming leagues.

- i) Defendants, on the other hand, a day before the launch of the IPL on 25.03.2022, launched an updated version of their Fantasy Sports League Mobile App MYFAB11 in the form of a new feature titled 'STOCKS' by not only copying the concept but also the working, features and execution of Plaintiffs' Buy/Sell interface. Defendants are also engaged in unauthorized and illegal act of accessing and misappropriating the information/data in Plaintiffs' mobile app to cause wrongful loss to the Plaintiffs by diverting the traffic, without their consent. In fact, Defendants brazenly copied the Buy/Sell price of each player for each match by adding a pre-determined random number. This is evident on comparing the Buy/Sell price of a player. Plaintiffs make their Buy/Sell portal available for use 24 hours before the actual match is scheduled. The *modus operandi* adopted by the Defendants is that they change the match statistics on their app a few hours after the Plaintiffs update their data pertaining to the players, according to a set standard pattern, which requires no application of mind, skill, expertise, expenditure or analysis and this pattern is repeated for every player. Defendants merely pick up the Plaintiffs' player index, add flat rates across the board and release the index



on their app. They have neither the manpower nor the skill to formulate and apply the algorithm as the Plaintiffs and thus they never release their own index before the Plaintiffs. The only response to the illegal activities in the application filed under Order XXXIX Rule 4 CPC is that the Buy/Sell price is merely co-incidental. It is unbelievable that the co-incidence occurs for all players and all matches.

- j) Stand of Defendant No.1 that the Plaintiffs have no copyright in the GUI of its mobile app is misconceived. GUI is an artistic work and Defendants have substantially copied Plaintiffs' GUI, which is evident from the screenshots produced by the Plaintiffs, comparing the two applications. As an illustration, the 'Point System' has nine parameters, all of which have been copied by the Defendants. As for the 'Rules', Defendants have copied Rule 5(a), (b), (c), (e), (i), (k), (l) and (q) verbatim while Rule 5 (d), (h) and (m) have been copied with minor variations. Additionally, Defendants have copied the manner of depicting matches, time left, abbreviations of the names, including the icons at the bottom. Defendants' attempt to come as close as possible to Plaintiffs' application is to gain unfair advantage and is dishonesty. It is true that copyrights not dependent on registration, however, the moot point is that honesty/dishonesty is the fundamental principle that guides the law in the field of intellectual property rights, be it the trademarks law, where similarity/deceptive similarity is seen or the Designs Act, where the test is copy of the registered



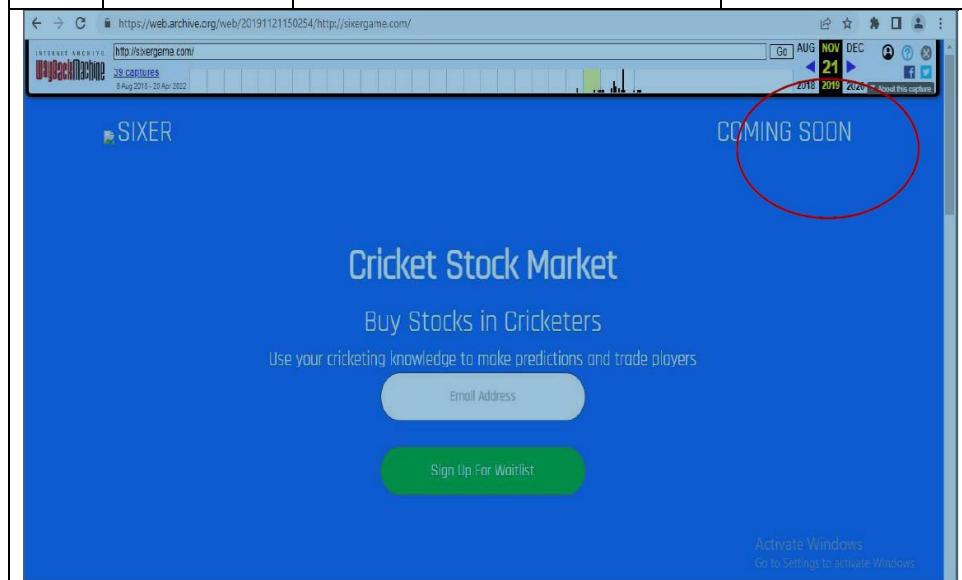
design or passing off action wherein misrepresentation is frowned upon. Dishonesty is a species of unfair competition and in case the Court comes to a conclusion that the act of the Defendants is dishonest, an equitable order of injunction must follow. The present case is a classic case of dishonesty of the Defendants and thus copyrights of the Plaintiffs ought to be protected.

- k) It is vehemently denied that Plaintiffs have made any misrepresentation in the plaint or otherwise to obtain the *ex parte* injunction order. Defendants are misleading the Court by reading a single sentence or a stray averment in the Plaint, totally out of context, to create a wrong impression. Plaintiffs have clearly described their App as first of its kind and unique and this is in the context of its unique features, which do not exist in any other Mobile App i.e. having different Buy/Sell prices for the same player. Pleadings must be read, interpreted and construed as a whole and not dissected. Defendants have wrongly averred that there are various gaming platforms which existed prior to the Plaintiffs. Out of the nine platforms, referred to by the Defendants, applications like Sixer, JoinMKT, Trade Stars and Prediction Strike are subsequent to the launch of the Plaintiffs' App. Websites such as PlayerSX, TradeFan, Wall Street Sports, GSX.com did not have a mobile application and Cricstocks App although a .apk file cannot be accessed and therefore, it cannot be determined whether it followed a similar concept. These differences from the third party apps



have been detailed by the Plaintiffs in a tabular form for a comparison and are as follows:-

S. No.	Third Party App	Distinguishable features from the Plaintiffs' App	Remarks
1.	Sixer	<p>In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.</p> <p>In the said app, there is only one value of the player. Whereas the Plaintiffs' app has different prices for Buy and Sell.</p> <p>Defendants' reliance on the screenshot from Wayback Machine to show that the app was available in 2018 is wrong. As on 21.11.2019 the website www.sixergame.com showed that the app is 'Coming Soon'. Reference is placed on the screenshot below.</p>	The Sixer app was launched in the year 2020, subsequent to the Plaintiff.





2.	Join MKT	In the said app, all the players are initially valued at \$1 and later the price of the player is guided by the market forces of demand and supply. Whereas Plaintiffs' Buy and Sell value of the players are predetermined by the Plaintiffs' in-house team.	The Join MKT app was launched on 10.09.2020 on iOS, subsequent to the Plaintiff.
3.	Trade Stars	<p>In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.</p> <p>In the said app, there is only one value of the player. Whereas the Plaintiffs' app has different prices for Buy and Sell.</p>	The Trading Layer of the Trade Stars was launched in August 2021, subsequent to the Plaintiff.
4.	Prediction Strike	In the said app, all the players are initially valued by the developer and thereafter price of the player is guided by the market forces of demand and supply. Whereas the Plaintiffs' Buy and Sell value of the players are predetermined by the Plaintiffs' in-house team on a match to match basis.	The Prediction Strike app was launched in September 2019, subsequent to the Plaintiff.
5.	Player SX	In the said website, all the players are initially valued by the developer and thereafter price of the player is guided by the market forces of demand and supply. Whereas the Plaintiffs' Buy and Sell value of the players are predetermined by the Plaintiffs' in-house team on a match to match basis.	There is no mobile app for this website. A user has to log in to the website to access the services. Additionally, the website is only available for NHL and NFL games.



6.	TradeFan	The users have to build a team in this website and the users can join a tournament anytime, even after the start of the same. Whereas a user does not have to build a team in the Plaintiffs' app and there is no concept of a tournament in the Plaintiffs' app.	There is no mobile app for this website. A user has to log in to the website to access the services. Additionally, the website is only available for NHL, NBA, MLB and NFL games.
7.	Wall Street Sports	In the said website, all the players are initially valued by the developer and thereafter price of the player is guided by the market forces of demand and supply. Whereas the Plaintiff's the Buy and Sell value of the players are predetermined by the Plaintiff's in-house team on a match to match basis.	The Wall Street Sport was sold to Sandbox.com and the game Wall Street Sports ceased in the year 2002. There was no mobile app for this website.
8.	World Cup Cricket Stock Market (CricStocks)	In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.	The app was built only for Cricket World Cup 2015. The app cannot be accessed as on 4.05.2022.
9.	TheGSX.com	In the said website, the user can hold the stock for a player a whole season of IPL. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.	The said website is not accessible. There was no mobile app for this website.

- 1) Unauthorized misappropriation of Plaintiffs' data amounts to an act of unfair competition, which is the overarching concept flowing through the entire gamut of intellectual property rights, including copyright. Paris Convention, to



which India is a signatory, offers definition of unfair competition as does the Geographical Indications of Goods Act, 1999. Defendants cannot be permitted to make unauthorized use of Plaintiffs' efforts and use it as a 'spring board' to gain an unfair competitive advantage over the Plaintiffs.

m) Plaintiffs had made out a prima facie case for grant of *ex parte ad-interim* injunction and after hearing them and examining the documents, *ex parte* injunction was rightly granted by the Court. Balance of convenience lies in favour of the Plaintiffs as the stock feature on the Plaintiffs' app existed prior to Defendants' stock feature, which the latter launched only on 25.03.2022. Defendant No. 1 has attempted to create a false sense of urgency on account of the IPL matches without apprising the Court that their application offers the stock and the regular fantasy sports features for every professional cricket match played in a calendar year with few exceptions and it is Defendant No. 1's own admission that stock feature is a small part of its application, which is mainly concerned with fantasy sport element. For all the aforesaid reasons, the *ex parte* injunction order deserves to be confirmed and the application seeking vacation of stay deserves to be dismissed.

14. I have heard learned Senior Counsels for the parties and examined their rival contentions.



15. Being developers and operators of Fantasy Sports League Mobile App EXCHANGE22, Plaintiffs approached this Court seeking injunction against Defendants from infringing their copyrighted work, amongst other reliefs. The claim to fame by the Plaintiffs is that they have devised a first of its kind fantasy league gaming platform for cricket, football, basketball and kabaddi, where the user plays the game as a real game with additional unique trait of share market trading, which allows the user to buy/sell the players like shares in the market.

16. Before proceeding further, one would need an insight into the concept of 'Fantasy Sports'. From a collective reading of articles in the public domain, judicial precedents and the pleadings in the plaint, it emerges that Fantasy Sports are digital sports engagement platforms based on real life sports matches i.e. online gaming on the internet which allows the users or fans of the sport concerned to build virtual teams based on real players participating in the upcoming matches. The events/leagues are centred around real world sporting events based on statistical data of the performance of the sports persons. This allows the users to emulate the role of a coach or a manager of a team so as to be able to change the player by adding or dropping as per choice. Participation in the fantasy sports games entails payment of an entry fee, after which the user enters the arena of the online event and earns points and eventually may win or lose. The idea of fantasy games *albeit* originated in India in the mid-1990s, in USA the idea goes back to 1960s.

17. As this matter also concerns the GUI, a little backdrop to this concept is also imperative. GUI is a digital interface in which a user



interacts with graphical components such as icons, buttons and menus. GUI is a visual component different from the underlying codes i.e. source code and object code and is a feature in various devices such as computers, smart phones etc. In other words, ‘user interface’ refers to the underlying non-graphic code of a software programme, while the term ‘GUI’ or ‘graphical user interface’ refers to the visual elements, i.e., the ‘look’ of the program. Upon interacting with a GUI i.e. the graphics on the screen, the GUI instantly communicates through the software’s underlying code, which then performs the desired function and from the time the user interacts and executes a command to the moment the computer performs the function, there are multiple layers of interactions taking place within the software.

18. Broadly understood, case of the Plaintiffs, as argued, is that they are developers and operators of a unique Mobile Application EXCHANGE22, which incorporates features of a Fantasy Sports League and stock market and it is the share market trading unique trait which sets the gaming application apart from the prevalent fantasy gaming applications and is therefore first of its kind Fantasy League Gaming Platform for cricket, football, etc. Plaintiff No.2 developed a detailed ‘concept note’ which includes features for working of the fantasy games such as ‘object of the game’, ‘components’, ‘home page’, ‘my portfolio page’ and the concept note is registered under the Act 1957 being a Literary/Dramatic work. Plaintiffs also claim protection in the GUI of their application as an ‘artistic work’ besides theft of their curated data and allege unfair competition by the Defendants. In the alternative, it is argued that even if GUI is taken to be a component of a computer programme, it is an underlying artistic



work, which exists independently as each frame, image, arrangement of icons, menus, etc. are independent artistic works.

19. Defendants, on the other hand, have sought vacation of the interim injunction order on multifarious grounds by arguing that there is gross suppression of material facts and misrepresentation in the plaint as Plaintiffs have predicated their case on being originators of a unique idea of trading of sports players which sets them apart, which is contrary to their own admission that they are 'India's first sports stock exchange' while documents filed by Defendants show that trading sports players as part of fantasy gaming existed in public domain long before Plaintiffs' application. It is also urged that after the stand of the Defendants came on record, Plaintiffs have repeatedly tried to shift their stands and are now attempting to bring out alleged differences in the features of their app qua Defendants' mobile app. Plaintiffs are also setting up a new case of infringement with respect to 'functionality' of Defendants' app on the basis of functionality in the registered literary work, which is impermissible in law, as there is no copyright in an idea. There are no pleadings in the plaint as to how Defendants' app is a substantial reproduction of the registered literary work i.e. concept note and the only comparison that is repeatedly drawn is by taking screenshots of the User Interfaces of the apps of the rival parties. It was also emphasised that GUI is not 'work' under the Act 1957 and therefore, in terms of Sections 13 and 16 of the Act 1957, there can be no copyright in a GUI *per se*. As a desperate attempt, a case was also set up during arguments that Plaintiffs' mobile app is an 'adaptation of the work' in terms of Section 14(a)(vii) of the Act 1957, which is wholly outside the pleadings and



in any event, is an argument beyond the provisions of the Act 1957, since adaptation in relation to literary work as defined in Section 2(a)(ii) and (iii) of the Act 1957 shows that a mobile app is not envisaged as an adaptation of literary work.

20. In order to appreciate the arguments of the parties, it would be first necessary to discuss the provisions of the Act 1957 and the judicial precedents on the subject. Relevant provisions are as follows:-

“2. Interpretation –

(ff) “computer programme” means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result;”

(o) “literary work” includes computer programmes, tables and compilations including computer [databases];”

(y) “work” means any of the following works, namely:—

(i) a literary, dramatic, musical or artistic work;

(ii) a cinematograph film;

(iii) a sound recording;”

13. Works in which copyright subsists.—*(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—*

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) [sound recording].”

14. Meaning of copyright.—*For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely: —*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;



(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,-

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,-

(i) to reproduce the work in any material form including—

(A) the storing of it in any medium by electronic or other means; or

(B) depiction in three-dimensions of a two- dimensional work; or

(C) depiction in two-dimensions of a three- dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film; (v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);”

Section 51: When Copyright infringed. – Copyright in a work shall be deemed to be infringed –

(a) when any person without a license from the owner of the copyright, or the Registrar of Copyright, or in contravention of



the conditions of a licence granted or any conditions imposed by a competent authority under the Act:

(i) does anything, the exclusive right to do which is conferred upon the owner of the copyright, or

(ii) permits for profit any piece to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright.”

21. The Supreme Court in ***Eastern Book Company and Others v. D.B. Modak and Another, (2008) 1 SCC 1***, analysing the aforesaid provisions observed that subject to Section 13 and other provisions of the Act 1957, there shall be a copyright throughout India in original literary work, dramatic, musical and artistic work, cinematographic films and sound recordings and for copyright protection, all literary works have to be original. Broadly speaking, there would be two classes of literary works: (a) primary i.e. works not based on existing subject matter; and (b) secondary or derivative works i.e. works based on existing subject matter. ‘Literary work’ also includes computer programmes including computer databases. The word ‘original’ was also subject matter of interpretation by the Supreme Court and it was observed that the expression ‘original’ does not mean that the work must be expression of original or inventive thought since Copyright Act is not concerned with originality of ideas but is concerned with expression of thought and in case of literary work with the expression of thought in print or writing. The Act 1957 envisages that while the work may not be novel but must not be copied from another work i.e. it should originate from the author. Relevant paragraphs are as follows:-



“20. Subject to the provisions of Section 13 and the other provisions of the Act, there shall be a copyright throughout India in original literary work, dramatic, musical and artistic works, cinematograph films and sound recording, subject to the exceptions provided in sub-sections (2) and (3) of Section 13. For copyright protection, all literary works have to be original as per Section 13 of the Act.

21. Broadly speaking, there would be two classes of literary works: (a) Primary or prior works: these are the literary works not based on existing subject-matter and, therefore, would be called primary or prior works; and (b) Secondary or derivative works: these are literary works based on existing subject-matter. Since such works are based on existing subject-matter, they are called derivative works or secondary works.

22. Work is defined in Section 2(y) which would be a literary, dramatic, musical or artistic work; a cinematograph film; and a sound recording. Under Section 2(o), literary work would include computer programs, tables and compilations including computer databases.

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32. The word “original” does not mean that the work must be the expression of original or inventive thought. The Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation. The words “literary work” cover work which is expressed in print or writing irrespective of the question whether the quality or style is high. The commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright. The word “original” does not demand original or inventive thought, but only that the work should not be copied but should originate from the author. In deciding, therefore, whether a work in the nature of a compilation is original, it is wrong to consider individual parts of it apart from the whole. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is



entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. In each case, it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.”

22. The Supreme Court, relying on the most cited judgment in ***University of London Press Limited v. University Tutorial Press Limited***, [1916] 2 Ch 601, in the context of ‘originality’ held as follows:-

“36. University of London Press Ltd. v. University Tutorial Press Ltd. [(1916) 2 Ch 601] is perhaps the most cited judgment regarding originality. Originality was held to be not required to be novel form but the work should not be copied from other work, that is, it should be original. The judgment was based on the following facts: certain persons were appointed as examiners for matriculation examination of the University of London on a condition that any copyright in the examination papers should belong to the University. The University assigned the copyright to the plaintiff company. After the examination, the defendant company brought out a publication containing a number of the examination papers, including three of which had been set by two examiners appointed by the University. The plaintiff company brought a case of copyright infringement against the defendant company. It was argued that since the setting of the papers entailed the exercise of brainwork, memory, and trained judgment, and even the selection of passages from other author's work involved careful consideration, discretion and choice they constituted original literary work. On the other hand, the defendants claimed that what they had done was fair dealing for the purposes of private study which was permissible under the law. The Court agreed that the material under consideration was a literary work. The words “literary work” cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word “literary” seems to be used in a sense somewhat similar to the use of the word “literature” in political or electioneering literature and refers to written or printed matter. With respect to the originality issue, the Court held that the term “original” under the Act does not imply original or novel form of ideas or inventive thought, but the work must not be copied from another work—that it should originate from the author.”



23. It is trite that there can be no copyright and hence no exclusivity or monopoly in an idea and only an expression of an idea, which is original, can be protected. This aspect of discussion cannot be complete without relying on the most cited judgment on the idea-expression dichotomy in the case of **R.G. Anand (supra)**, relevant paragraphs of which are as follows:-

“34.Similar observations were made in the case of Twentieth Century Fox Film Corporation v. Stonesifer [140 F 2d 579 (1852)] which are as follows:

“In copyright infringement cases involving original dramatic composition and motion picture productions, inasmuch as literal or complete appropriation of the protected property rarely occurs, the problem before the court is concrete and specific in each case to determine from all the facts and circumstances in evidence whether there has been a substantial taking from an original and copyrighted property, and therefore an unfair use of the protected work.... The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator.... We find and conclude, as did the court below, that the numerous striking similarities in the two works cannot in the light of all the evidence be said to constitute mere chance. The deduction of material and substantial unlawful copying of appellee's original play in appellant's motion picture is more in consonance with the record and with the probabilities of the situation therein disclosed.”

This authority lays down in unmistakable terms the cases where an infringement of the copyright would take place and as pointed out that before the charge of plagiarism is levelled against the defendant it must be shown that the defendant has taken a substantial portion of the matter from the original and have made unfair use of the protective work. The two works involved must be considered and tested not hypercritically but with meticulous scrutiny.”

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45. Thus, the position appears to be that an idea, principle, theme, or subject-matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person. It is always open to any person to choose an idea



as a subject-matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo and Juliet, Julius Ceasar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of his dramas constitute a masterpiece of English literature. It has been rightly said that “every drama of Shakespeare is an extended metaphor”. Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.

46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.



2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negate the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.”

24. Relying on the judgments of the Supreme Court in **R.G. Anand** (*supra*) and **Eastern Book Company** (*supra*), this Court in **Institute for Inner Studies and Ors. v. Charlotte Anderson and Ors., 2014**



SCC OnLine Del 136, culled out the propositions laid down in the said judgments on the idea-expression dichotomy and some of the observations in the judgment which are relevant to the present case are as follows:-

“67. *The broad propositions which have been laid down by the courts in India after following the position of law in UK and other common law countries are enlisted below for the understanding:*

- *In University of London Press Limited v. University Tutorial Press Limited [1916] 2 Ch 601, J. Peterson observed that : The word original does not in this connection mean that the work must be the expression of original or innovative thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The originality which is required relates to the expression of thoughts. But the Act doesn't require that the expression must be in the original or novel form, but that the work must not be copied from another's work-that it should originate from the author. (The said definition of originality has been followed by the Privy Council in India in the case of Macmillan and Company Limited v. K. and J. Cooper. AIR 1924 Privy Council 175, which is often quoted in various judgments in India)*

- *In the case of Macmillan v. Cooper (supra), the learned Privy Council had also observed that no precise definition can be given the amount of skill, labour and judgment required to constitute originality in the work, it is question of fact and degree which has to be evaluated from case to case basis. In the words of privy council, it was observed thus:*

*“What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. **In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.** But their Lordships have no hesitation in holding that there is no evidence in the present case to establish that an amount of these several things has been applied to the composition of the text of the appellants' book, as distinguished from the notes contained in it, to entitle them to the copyright of it. As to the notes it is altogether different. Their Lordships do not take the view that these notes are trifling in their nature or are useless.” (Emphasis supplied)*



- *In the case of Eastern Book Company v. DB Modak, (2008) 1 SCC 1, The Supreme Court again revisited the entire case law on the subject of the originality and proceeded to observed thus:*

*“The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterized as purely a work which has been brought about by putting some amount of labour by the appellants. **Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity.** Arrangement of the facts or data or the case law is already included in the judgment of the court. **The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterized as purely a work which has been brought about by putting some amount of labour by the appellants. Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity.** Arrangement of the facts or data or the case law is already included in the judgment of the court. (Emphasis Supplied)*

- *In the case of R.G. Anand v. Delux Films, 1979 SCR (1) 218, The Hon'ble Supreme Court proceeded to lay down some tests after analyzing the case laws decided in UK, India and US which somehow define the scope of the protection of the copyright in law in general. The said propositions are:*

I. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by title author of the copy-righted work.

II. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once



leads to the conclusion that the defendant is guilty of an act of piracy.

III. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

IV. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

V. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negate the intention to copy the original and the coincidences appearing in the two words are clearly incidental no infringement of the copyright comes into existence.

VI. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by decided cases.

VII. Where however the question is of the violation of the copyright of a stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the Idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

68. The said tests laid down by the Supreme Court in *R.G. Anand (supra)* throw some light on the significant aspect of no protection of idea and but only to the form of expression under the laws of copyrights and also defines the aspects relating to substantial nature of copying and all other necessary tests required to prove infringement in the case of copyright.

- There are other cases which have been decided in India relating to copyright infringement but broadly the said cases take the similar line of reasons as laid down by the Supreme Court in the case of *RG Anand (Supra)*, *Eastern Book (supra)* and *Privy council in the case of MacMillan (supra)* and proceed to decide the cases by describing the kind of the originality



required for conferring copyright in the work and then sometimes deciding the question of infringements and sometimes holding that the defendants have merely taken an idea and not the manner of expression.

69. *The said propositions of law laid by the courts in India till date are helpful in understanding the concepts like originality, substantial nature of copying required for infringement, non availability of the protection to ideas but only the manner of expression of ideas which are not provided under the written law i.e. Copyright Act, 1957 and rightly so as they are more or less question of facts and degree present in each case.*

70. *The enquiry of originality of the work from the author and passing the test of originality in each case relating to copyright infringement where it is a disputed question is a basic thrust on which the copyright claim of the party rests. The said concept of originality has an immediate nexus with another limb of enquiry which is significant in each case that is the distinction between the idea and expression of an idea. This is due to the reason that the copyright vests not in an idea but in an original expression of an idea. In short, what is protected in the copyright law is not merely an idea but the original way or manner of presentation of an idea.*

71. *We have seen cases in India as stated above where the courts have been able to identify the difference between ideas and expression promptly without any overlap between the two like plots, themes of the play as against the manner of the presentation of the plays where such distinctions are clearly evident without any further enquiry. On the other hand, there are the cases where the courts have to draw the line between the ideas and expression of an idea by themselves by indulging into the depth enquiry into the work in order to identify first as to what may constitute idea in a particular work and what is an expression of idea where the originality resides in order to delineate the scope of the protection of work and dissecting it from the ideas. Such a kind of enquiry by courts in copyright cases is more commonly known as idea and expression dichotomy.*

72. *The said concept of idea expression problem has been evolved firstly by the courts in US and recently has also been recognized by the courts in UK. India is still in the process of accepting the said proposition as the courts are in the process of facing the factual situations wherein the dividing line between idea and expression is blurred though some cases in India shed some light on the subject by quoting the international cases relating to idea expression problems but do not clearly spell out the problem relating to idea and expression in so many words as laid down in the said judgments in US and in UK.*



73. I find that this case is an opportune time to discuss in detail the said concept of idea and expression dichotomy as the present case seek to prevent the implementation of facts and narrations stated in the book which are Asanas of Yoga on the premise that the said facts and narrations, descriptions of Asanas and techniques stated in Books authored by master are his copyright and thus the performance of the said works in physical form actions or performing such Pranic Healing Yoga Asanas must result in the copyright infringement. On the first blush, the argument is seemingly convincing considering the provisions of the Act and in the manner they are worded so as to include the performance of the work in public or communication of the work to the public unguided by the exposition of law relating to idea and expression. But once the said argument is tested from the glasses of idea expression distinction which sometimes the courts have to make in a given case, the answer becomes clearer and the shadow of doubt which exists in the mind proceeds to obliterate.

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75. The idea expression problem faced by the courts has been aptly explained by the House of Lords in UK recently in the case of *Designers Guild Ltd v. Russell Williams (Textiles) Ltd.*, [2001] F.S.R. 11, by Lord Hoffman in his speech in the context of artistic works. In the words of Lord Hoffman, it was observed thus:

*“It is often said, as Morritt L.J. said in this case, **that copyright subsists not in ideas but in the form in which the ideas are expressed.** The distinction between expression and ideas finds a place in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ([1994] O.J. L336/213), to which the United Kingdom is a party (see Article 9.2: “Copyright protection shall extend to expressions and not to ideas ...”). **Nevertheless, it needs to be handled with care. What does it mean?** As Lord Hailsham of St Marylebone said in *L.B. (Plastics) Ltd v. Swish Products Ltd* [1979] R.P.C. 551 at 629, **“it all depends on what you mean by ‘ideas’”**.*

(Emphasis Supplied)

*24 **Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work, but the distinction between ideas and expression cannot mean anything so trivial as that.** On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one*



colour and brush technique rather than another, and so on. The expression of these ideas is protected, both as a cumulative whole and also to the extent to which they form a “substantial part” of the work. **Although the term “substantial part” might suggest a quantitative test, or at least the ability to identify some discrete part which, on quantitative or qualitative grounds, can be regarded as substantial, it is clear upon the authorities that neither is the correct test.** *Ladbroke (Football) Ltd v. William Hill (Football) Ltd [1964] 1 W.L.R. 273* establishes that substantiality depends upon quality rather than quantity (Lord Reid at 276, Lord Evershed at 283, Lord Hodson at 288, Lord Pearce at 293), and there are numerous authorities which show that the “part” which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to have been copied in this case. **Or to take another example, the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work.**

(Emphasis Supplied)

25 **My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own : see *Kleeneze Ltd v. D.R.G. (U.K.) Ltd [1984] F.S.R. 399.* The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work.** *Kenrick & Co. v. Lawrence & Co. (1890) 25 Q.B.D. 99*, is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff’s work. At that level of



abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection.”

(Emphasis Supplied)

99. Upon the meaningful reading of Lord Hoffman's speech in the case of Designers Guild (supra), I find para 25 of the judgment summarizes the idea expressions problem faced and recognized by the courts in England with clarity. Thus, it would not be out of place to state there may arise sometimes the cases or instances where within a work, what is appears to be an expression because of its presence in the work as a whole is merely an idea and the protectable area which is the manner of expression lies somewhere else. The courts have attempted to distinguish such expressions of idea which are unrelated to copyright which in the opinion of the court are falling within the broader ambit of idea itself from that of the expression of ideas where originality resides in copyright sense. The former are not protected but the later do. This is emerging from the Speech of Lord Hoffman in Designers Guild (supra).

100. The reading of the Lord Hoffman's speech in para 25 also makes it clear that this kind of problem more than often arises in cases where literary work describes a system or invention as such which supports my conclusions above as it touches aspect between the patents and copyright and sometimes raises the concern relating to discovery of fact vis a vis creation of fact and challenges the originality quotient of the work.”

25. Section 51 of the Act 1957 enumerates acts, which are deemed to constitute infringement of a copyright, while exceptions are provided in Section 52. From the aforesaid judgments, it emerges that pre-requisite to copyright infringement is ‘copying of the copyrighted work’ but this is not a general or an abstract statement of law as not all copying is infringement. Division Bench of this Court in ***India TV Independent News Service Pvt. Ltd. and Others v. Yashraj Films Pvt. Ltd., 2012 SCC OnLine Del 4298***, reiterated the position of law that in order to constitute infringement, there must be ‘substantial’



similarity between the two works and also reaffirmed that there are two types of substantial similarities. Relevant paragraph is as follows:-

“27. It is trite that the pre-requisite to copyright infringement is a demonstrable copying of the copyrighted work. But since not all copying is infringement, there must be substantial similarity between the two works. Courts have identified two types of substantial similarities: (i) Comprehensive non literal similarity; where Courts have strived to identify the ‘fundamental essence of the structure’, and it being copied, even where specific expression is not copied. (ii) Fragmented literal similarity, in which bits of specified expressions are copied, but the overall structure is not. It is in the latter, that Courts have employed de minimis; holding that substantial similarity is present only if the amount of literal expression copied is more than de minimis. Thus, de minimis used in these cases is simply the opposite of ‘substantial similarity’ i.e. to say that the use is de minimis is to say that the alleged infringing work is not substantially similar to the original. This approach is to be found in the opinion reported as 307 F.Supp. 2d 928 Neal Publications v. F&W Publications Inc, a case where the defendant had copied a few phrases from the plaintiff’s guide; the opinion reported as 388 F. 3d 1189 (9th Cir. 2004) Newton v. Diamond, where the notes were sampled by the Beastie Boys and the average audience was opined not to recognize the appropriation.”

26. This Court in ***MRF Limited v. Metro Tyres Limited, 2019 SCC OnLine Del 8973*** and the Calcutta High Court in ***Shree Venkatesh Films Pvt. Ltd. v. Vipul Amrutlal Shah & Ors., 2009 SCC OnLine Cal 2113***, have emphasized on the principle of substantial similarity in the competing works as a pre-requisite to infringement of copyright. In fact, the ‘substantiality test’ is found in the opening words of Section 14 itself which reads as follows:-

*“14. Meaning of copyright.— For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or **any substantial part** thereof, namely:-”*
(Emphasis supplied)



27. The question that now posits an answer is whether Plaintiffs have made out a *prima facie* case of infringement of copyright in the concept note and GUI by the Defendants and the answer to this question would determine whether the interim injunction order deserves to be confirmed or vacated. The pleadings in the plaint and the application under Order XXXIX Rules 1 and 2 CPC with respect to copyright in the ‘concept note’ are that Plaintiffs’ registered copyright work comprises of detailed working of the fantasy game including object of the game and the components therein explaining each and every step that the user experiences on its mobile application such as ‘Home page’, ‘My Portfolio page’, ‘My Balance page’ etc., the process of verifying the account, detailed point system, rules and regulations as also steps to add/withdraw money to/from the ‘Wallet’ through multiple payment options. Uniqueness in the application is claimed on account of several features such as separate price for Buy and Sell for each player; trading of players like stock; player can be bought and sold multiple times for a match *akin* to shares; prices are pre-determined; and users play on a match-to-match basis. In a nutshell, the claim is that the stock/trading feature is the ‘original feature’ which is substantially copied by the Defendants, resulting in infringement of the copyright. Added to this are the pleadings with respect to GUI stating that Plaintiffs have developed an attractive GUI with unique programme structure with the help of an in-house team of designers and developers with immense effort and investment of huge sums of money and Defendants have brazenly copied the User Interface. Screenshots of GUIs of respective parties have been extracted in the body of the plaint in a tabular form for the purpose of



comparison. It is essentially on these two scores i.e. originality of the stock feature and substantial copy of the GUI, the *ex parte ad interim* injunction was granted in favour of the Plaintiffs. It is here that the Defendants join issue both on merit and gross suppression and misrepresentation of facts.

28. The entire tone and tenor of the pleadings put forth by the Plaintiffs and the arguments canvassed, point to a claim that the trading/stock feature in their gaming application is original and first of its kind which, in my *prima facie* view, is factually incorrect, as pointed out on behalf of the Defendants. Before proceeding further, I may refer to the averments in the plaint to this effect and paragraphs 7 and 11 of the plaint are as follows:-

“7. The Plaintiff No. 2 first came up with the unique idea of integrating the features of a Fantasy Sports League and the Stock market in the year 2010. Over the years, the Plaintiff No. 2 and 3 with much hard work and toil, developed their idea into something tangible and finally launched the beta version of their application in August, 2019 to test the mobile App on its website <https://exchange22.com/>. Upon getting a positive response from the users/public, the Plaintiff No. 1 company was incorporated on 16.09.2019 and on 21.11.2019 EXCHANGE22 mobile App was officially launched.

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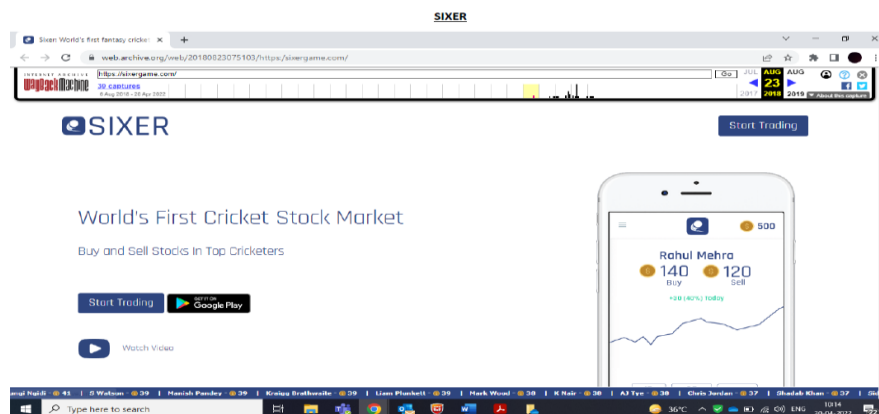
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11. The Plaintiffs have devised a first of its kind fantasy league gaming platform for cricket, football, basketball, and kabaddi. What sets it apart from the prevalent fantasy gaming apps, wherein the users play it like a real game but virtually, the Plaintiffs' EXCHANGE22 incorporates the unique traits of the share market trading which allows the user to buy/sell the players in the same manner that one would buy and sell shares. In the Plaintiffs' App EXCHANGE22, the user can buy any number of shares of a player, maximum up to 22 players in one match going on anywhere across the world. Prior to the match starting in real time, the user can trade the shares of the players in a manner similar to stock exchange market, that is buy and sell a player. In fact, the Plaintiffs' tagline is “Sports ka Stock Market”. Once the match starts the buy and sell



option is paused, and the user will then have to wait to see the results of his skill, after the performance of the player in the match.”

29. Be it noted that while a claim is laid in the plaint that Plaintiff No.2 first came up with a unique idea of integrating features of Fantasy Sports League and the stock market in the year 2010, however, no material has been placed on record to substantiate the plea, despite labouring on filing written submissions, additional documents repeatedly. To counter the arguments on originality asserted by the Plaintiffs, Defendants have placed on record documents to show that several gaming applications such as SIXER, World Cup Cricket Stock Market APK, PlayerSX, JockMKT, TradeFan, Trade Stars, CricStocks, Prediction Strike and TheGSX.com, were launched prior to Plaintiffs’ app, incorporating the stock/trading feature. In the context of SIXER app, the documents include screenshots of Wayback Machine dated 23.08.2018, WhoIs dated 08.05.2018, Facebook page claiming SIXER to be India’s first Fantasy Cricket Stocks Game created in 2017 and a copyright notice below the website reflecting ‘Copyright 2017-2021 SIXER GAME’. Screenshots placed on record to support this plea are extracted hereunder for ready reference:-







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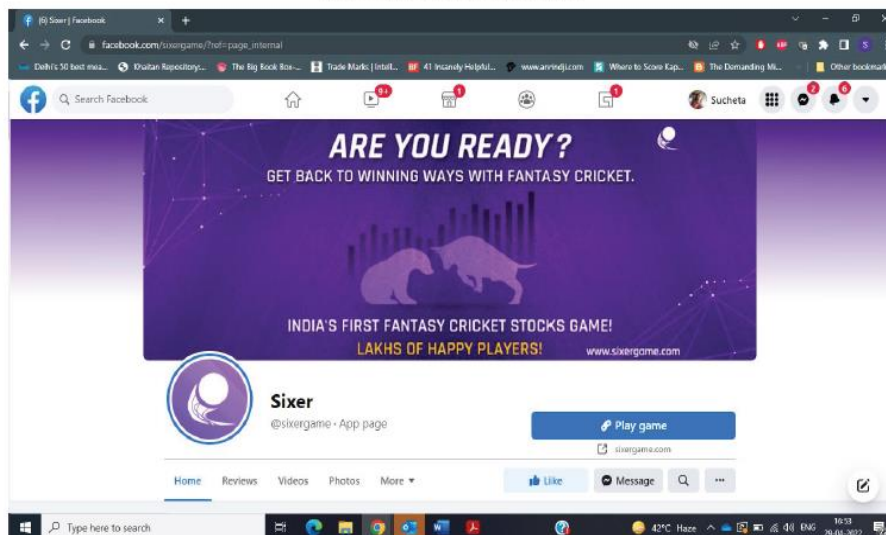
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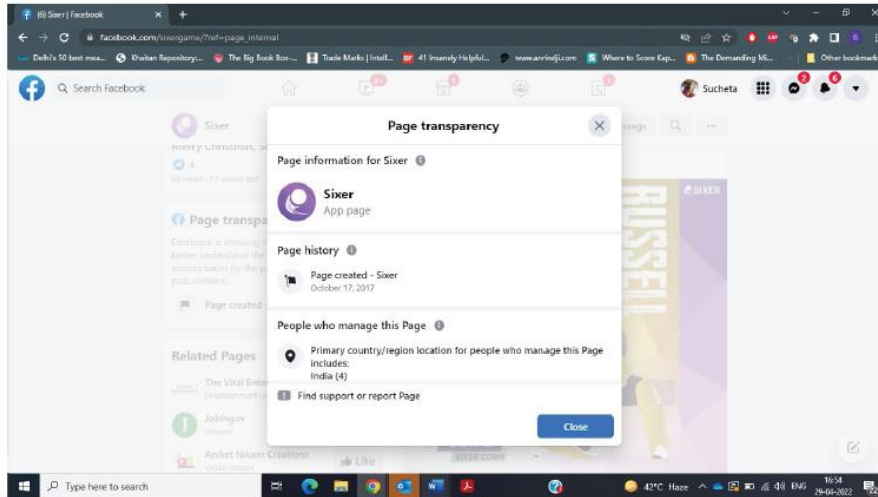
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30. Similar documents in the nature of website details, Facebook posts, WhoIS and Wayback Machine screenshots have been filed by the Defendants with respect to some of the other apps to demonstrate that these apps were created and existed prior to that of the Plaintiffs. Wayback Machine is a tool offered by the website “Internet Archive” that provides access to a digital library of internet sites in digital form and the said service makes it possible to serve the records of saved URLs on the web archives of internet archives. In order to avoid burdening the judgment, this Court is not extracting the screenshots of the said documents, but as is *prima facie* evident from the afore-extracted screenshots in respect of app SIXER, gaming mobile apps containing the stock market feature, permitting buying and selling of players, existed prior to Plaintiffs’ app. For the sake of completeness, I may only refer to a few features brought out by the Defendants, with respect to the other mobile apps and which the Defendants have shown to exist prior to that of the Plaintiffs. ‘World Cup Cricket Stock Market APK’ as admitted by the Plaintiffs was an application created for cricket world cup, 2015 *albeit* the stand is that the application cannot be accessed as on 04.05.2022, when the written note was filed. The distinguishing feature according to the Plaintiffs is the feature in EXCHANGE22, which allows the player to buy/sell stocks only for the duration of the match. Defendants claim that screenshots show listing of players with ‘price’ and users are allowed to buy and sell stocks of their favourite cricket players and see the value rise and fall based on real life performance during cricket world cup 2015. In respect of ‘Prediction Strike’ while Plaintiffs claim that it



was launched in September, 2019 i.e. subsequent to Plaintiffs' launch and have attempted to highlight the feature that players are initially valued by the developer and thereafter prices are guided by market forces of demand and supply, Defendants urge that the WhoIs dated 19.05.2018 and Wayback Machine dated 11.10.2018 show the launch prior to that of Plaintiffs' app and the commonality in the feature is buy and own shares of favourite players as a real stock and value depends on their performance and supply and demand. Screenshots of the application show 'number of shares', 'total holdings', 'portfolio' and 'account'. In the same fashion, Defendants have pointed out the launch of applications Trade Stars, TradeFan, CricStocks etc. prior to EXCHANGE22 and have placed on record supporting documents. It is thus *prima facie* evident and needs to be reiterated that from the documents filed by the Defendants, particularly, the screenshots of the Wayback Machine and WhoIs data that some of the applications of the third parties, as referred to above, were launched prior to EXCHANGE22 and do incorporate the trading/stock features, whereby players could be bought and sold by the user. As a further illustration, I may refer to 'Prediction Strike', which has the feature of "*Buy and own 'shares' of your favourite players just like you would a real stock*", the value of players depends on their performance as well as supply and demand. Screenshot of the app showing 'number of shares', 'total holdings', 'portfolio' and 'account', as placed on record by the Defendants, is as under:-



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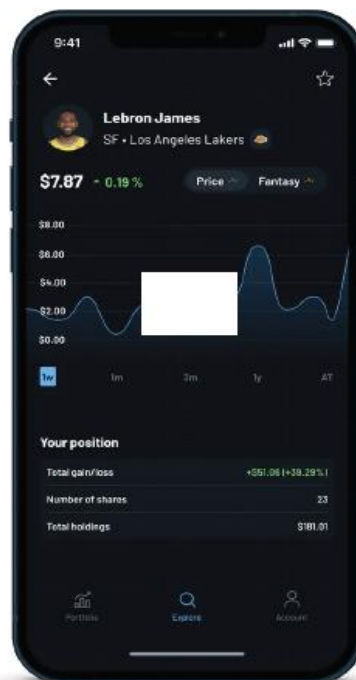
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31. Originality though not novelty, is the underlying feature for claiming injunction predicated on copyright infringement and in view of the documents referred above, at least at this stage, the claim of originality asserted by the Plaintiffs is certainly dented. Therefore, this Court is unable to hold in favour of the Plaintiffs that their gaming application is an original expression of an idea, so as to grant



proprietary rights or monopoly and injunct the Defendants from using the impugned application.

32. Defendants are also *prima facie* correct in their argument that Plaintiffs misrepresented that their gaming application is the first of its kind with a unique stock market feature. Reading of the order dated 13.04.2022 shows that one of the factors which weighed with the Court was that Plaintiffs had devised a first of its kind Fantasy League gaming platform for Cricket etc. with unique trades of share market as is reflected in paragraph 23 of the order. It is a settled law that a party which approaches the Court for a discretionary and equitable relief must come to the Court with clean hands and truthfully disclose all material facts having a bearing on the merits of the case. The present application for vacation of injunction order has been filed by the Defendants under Order XXXIX Rule 4 CPC. First proviso to Order XXXIX Rule 4 CPC stipulates that if in an application for temporary injunction or in an affidavit supporting such application a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless it considers it not necessary to do so in the interest of justice. Injunction is an equitable remedy and one who seeks equity must act in a fair and equitable manner. An inequitable conduct is breach of Applicant's duty of candor and good faith. Plaintiffs have made incorrect averments in the plaint and have also annexed documents to support them and are thus not entitled to an equitable relief of injunction.



33. It is held by this Court in ***Wheels India v. S. Nirmal Singh & Anr., 2009 SCC OnLine Del 3251***, that injunction orders obtained by suppression of material facts are liable to be vacated on the ground of suppression alone. I may refer to paragraph 18 of the judgment as follows:-

*“18. The plaintiff, therefore, has disentitled itself to the equitable relief of injunction on account of deliberate suppression of material facts in the plaint as well as suppression of documentary evidence from the scrutiny of this Court. Concealment of material facts or documents deserves to be seriously viewed, for one who comes to the Court owes a duty to the Court to disclose all facts and documents to the Court. The contention of the plaintiff in the instant case that it had disclosed in the plaint that it was purchasing goods from the defendants is neither here nor there. The plaintiff deliberately and intentionally, in my view, hid from the Court the fact that the defendant No. 2. M/s. **Prince** Auto Industries had been dealing with the same goods, viz. wheel covers and auto accessories and had made a mark in its field of activity well before the plaintiff got registered the trademark ‘**Prince**’. The plaintiff also hid from the Court the exact relationship between the plaintiff and the defendants and that there were written agreements to ensure the smooth working of the said relationship duly executed by the parties and registered with the statutory authorities. The reason for suppression of such material facts is clearly discernible. Had the plaintiff stated in the plaint that the defendant No. 2 had been in the same field of activity from the year 1998 under the trade name ‘**Prince Automobile Industries**’ and had the plaintiff further stated in the plaint that it had been working as the authorised stockist of the plaintiff from the year 2001 to the 15th of September, 2004, the plaintiff, in my view, may not have succeeded in obtaining an ex parte ad interim injunction from this Court, which is enuring to the benefit of the plaintiff till date, though with some modification.”*

34. In ***KENT RO System Limited and Another v. Gattubhai and Others, 2022 SCC OnLine Del 791***, again this Court held as follows:-

*“23. Furthermore, a party that approaches the court for a grant of discretionary relief has to come with clean hands and disclose all material facts, which would have a bearing on the merits of the case. It has been held in *Wheels India v. S. Nirmal Singh* [*Wheels India v. S. Nirmal Singh, 2009 SCC OnLine Del 3251*] and *Seemax Construction (P) Ltd. v. State Bank of India* [*Seemax Construction**



(P) Ltd. v. State Bank of India, 1991 SCC OnLine Del 668 : AIR 1992 Del 197] , that the orders granting injunction, which are obtained on account of deliberate suppression of material facts, are liable to be vacated on the ground of suppression and concealment alone.....”

35. It is thus clear that a party that approaches the Court for an equitable relief must do so with clean hands and disclose all material facts, which may have a significant bearing on the merits and in my view, this onus is heavier at this stage when the opposite party is yet to appear and *ex parte* relief is sought. The existence of prior apps with similar stock market feature enabling an option to buy/sell players, *prima facie* belies the position adopted by the Plaintiffs of being ‘*first of its kind Fantasy League Gaming platform for cricket, football, basketball and Kabaddi*’. On this ground alone, the *ex parte* injunction deserves to be vacated in favour of the Defendants and against the Plaintiffs.

36. Interestingly, faced with the predicament that the Defendants have been able to bring forth documents to show existence of prior similar apps, a desperate attempt was made to shift the goal post from claiming to be original to contending that there were several differences between the applications referred to by the Defendants.

37. There can be no dispute with the legal proposition that copyright is not concerned with novelty of ideas as that is the subject matter of the Patents Act, 1970, but what the copyright law concerns is the expression of thought in a concrete form i.e. ideas, themes, etc. being common property cannot be subject matter of copyright but they can be developed and given expression by treating them differently to claim copyright as held in ***R.G. Anand (supra)***. Relying on the said



judgment, this Court in *Bright Lifecare Pvt. Ltd. v. Vini Cosmetics Pvt. Ltd. and Another*, 2022 SCC OnLine Del 1953, reiterated that there can be no exclusivity in an idea and only expression can be protected. This position is aptly highlighted by the Supreme Court taking the example of the plays authored by the great poet and dramatist Shakespeare and I may only refer to the following passage in this context:-

“45. Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Jullius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance, elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of the dramas constitutes a master-piece of English literature. It has been rightly said that “every drama of Shakespeare is an extended metaphor”. Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the



original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.”

38. Therefore, the onus was on the Plaintiffs to show that despite the existence of earlier apps containing the stock market/trading feature, the gaming mobile app of the Plaintiffs in question was developed in a manner that the expression of the idea made it distinct from the rest. The question is whether the Plaintiffs only adopted the pre-existing idea or reproduced the idea in a different form, tone or tenor so as to give it a new expression and infuse new life into the idea. In this backdrop, if the mobile app of the Plaintiffs is examined, Plaintiffs have failed to discharge the onus. The comparison of the features of the prior existing third party apps with Plaintiffs’ mobile app, fortifies the stand of the Defendants that the distinguishing features are not enough for the Plaintiffs to cross the threshold of idea-expression dichotomy to claim originality and consequently protection in the gaming app and copyright infringement. For the ease of reference, the comparative features are as follows:-

Third Party App	Plaintiffs’ Submissions	Defendants’ Submissions
Sixer	<p>1. In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs’ app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player’s portfolio is empty again.</p> <p>2. In the said app, there is only one value of the player.</p>	<p>1. The Application allows users to "buy and sell fantasy stocks in cricket players. The better the player plays on the pitch, the price goes up and vice versa". Further, it is stated that "prices are determined by player performance".</p> <p>2. Claims itself to be "World's First Cricket Stock Market. Buy and Sell Stocks in Cricketers".</p>



	<p>Whereas the Plaintiffs’ app has different prices for Buy and Sell.</p> <p>3. Defendants’ reliance on the screenshot from Wayback Machine to show that the app was available in 2018 is wrong. As on 21.11.2019 the website www.sixergame.com showed that the app is ‘Coming Soon’.</p>	<p>3. Price of the stock price goes up when the player performs on the pitch.</p> <p>4. The Application also has ‘Buy’ and ‘Sell’ Buttons, and a pg titled ‘Your portfolio’ at least since 23 August 2018.</p>
Join MKT	<p>In the said app, all the players are initially valued at \$1 and later the price of the player is guided by the market forces of demand and supply. Whereas Plaintiffs’ Buy and Sell value of the players are predetermined by the Plaintiffs’ in-house team.</p>	<p>The Application "allows users to buy and sell shares of athletes in real time."</p>
Trade Stars	<p>1. In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs’ app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player’s portfolio is empty again.</p> <p>2. In the said app, there is only one value of the player. Whereas the Plaintiffs’ app has different prices for Buy and Sell.</p>	<p>1. The Application “is a Fantasy Sports Game where users can trade digital assets that represent athletes' real life performances”.</p> <p>2. Daily fantasy contests are hosted by the Application.</p>
Prediction Strike	<p>In the said app, all the players are initially valued by the developer and thereafter price of the player is guided by the market forces of demand and supply. Whereas the Plaintiffs’ Buy and Sell value of the players are predetermined by the Plaintiffs’ in-house team on a match to match basis.</p>	<p>1. "Buy and own “shares” of your favourite players just like you would a real stock". The Value of players depends on their performance well as supply and demand.</p> <p>2. Screenshot of app showing 'number of shares', 'total holdings', 'Portfolio' and 'Account'.</p>
Player SX	<p>In the said website, all the players are initially valued by the developer and thereafter price of the player is guided by</p>	<p>1. The website states that the users can "buy, sell or trade your favourite athletes just like stocks on a stock market. Season-long,</p>



	the market forces of demand and supply. Whereas the Plaintiffs' Buy and Sell value of the players are predetermined by the Plaintiffs' in-house team on a match to match basis.	daily and other playing option with crossport trading available. Can be match by match basis or for the entire season." 2. Share prices are directly related to a player's actual scoring performance.
TradeFan	The users have to build a team in this website and the users can join a tournament anytime, even after the start of the same. Whereas a user does not have to build a team in the Plaintiffs' app and there is no concept of a tournament in the Plaintiffs' app.	The website states that the users can participate in daily tournaments and trade their players. One of the reviews on the website is: "it's the ultimate mix between two of my favourites thing, Fantasy Sports & Wall Street."
World Cup Cricket Stock Market (CricStocks)	In the said app, the user can hold the stock for a player for more than one match. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.	1. New feature – CricStocks introduced in the game. Now you can buy and sale stocks of your favourite Cricket stars only on https://apps.facebook.com/twentypredict " 2. "The best fantasy Betting Game on Facebook.Bet on Cricket..."
TheGSX.com	In the said website, the user can hold the stock for a player a whole season of IPL. Whereas the Plaintiffs' app allows the players to buy/sell stocks only for the duration of the match. At the end of the match the player's portfolio is empty again.	The Application "is an online sports stock exchange, which allows you to buy and sell shares of a particular player, just like the real stock market. Cricketers have a certain number of shares assigned to them which can be brought or sold by the trader.... Buy good players and sell the bad ones" Further, it is stated that "a player is evaluated on the runs scored, wickets taken, his strike rate, past performance and so on."

39. Insofar as alleged infringement of 'concept note' is concerned, pleadings in the plaint reflect that the stand of the Plaintiffs is limited to stating that '*Defendants have copied concept, workings, features and execution of Plaintiffs' buy/sell interface*' and '*... the concept,*



*expression and the user interface of the new update is a substantial reproduction of the Plaintiffs' registered copyright'. In fact, the only comparison sought to be made is between the screenshots of the user interface of the two applications. Insofar as the 'concept note' is concerned, there are divergent views of this Court. In **Anil Gupta (supra)**, this Court has held that a concept can be subject matter of copyright where the issue was with regard to the concept of a serial 'Swayamvar' on television, however, in a later judgment in **Sanjay Kuamr (supra)**, this Court held that there can be no copyright in a concept under the Act 1957, unless the concept is transformed into literary or dramatic or artistic work, etc. Be that as it may, taking at the highest that Plaintiffs have a copyright in the concept note, the question would be whether Plaintiffs have succeeded in *prima facie* showing that the concept is an original work in view of Section 13(1) of the Act 1957 and *prima facie*, the answer is in the negative. As mentioned above, Defendants have demonstrated the existence of gaming applications both in India and abroad with the trading/stock feature prior to the launch of EXCHANGE22 and therefore, no originality can be claimed in the concept note and consequently, there can be no monopoly and infringement of the copyright therein. Pertinently, in the context of the concept note, it is not even pleaded how the concept note had been copied, much less substantially copied and thus, no further deliberation is required at this stage on this issue.*

40. Coming to the issue of alleged infringement of the copyright in GUI, first and foremost, Plaintiffs have only compared the GUIs of the two rival applications by taking respective screenshots of the various features incorporated therein. The skeletal pleadings on this aspect do



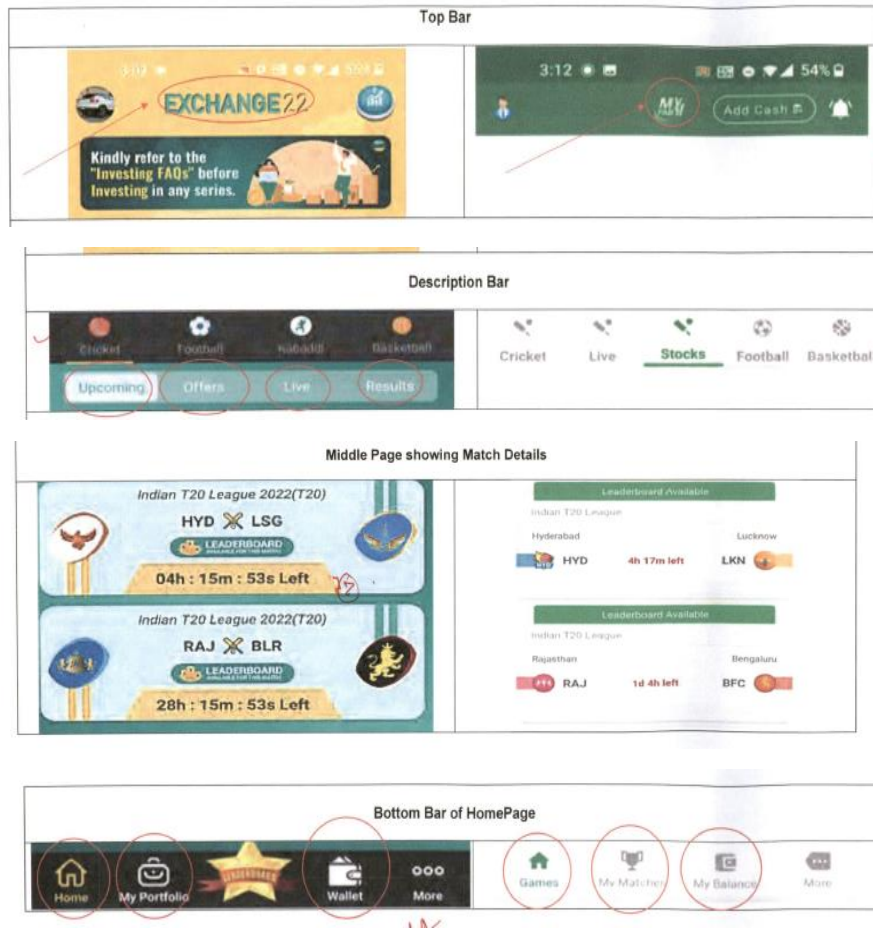
not highlight in which element of the GUI Plaintiffs claim copyright and is thus infringed. A Graphical User Interface combines three elements, a computer programme which enables functionality and appearance of the GUI, the artistic/graphic elements of the visual display and the text/literary works in the GUI, which are visible to the user. There is no pleading in the plaint claiming copyright in ‘artistic work’ and therefore, no claim can be laid to a copyright in the graphic elements of the visual display of GUI. Likewise, there is no pleading claiming copyright in a ‘computer programme’ and therefore, no monopoly can be sought over the functionality or the visual display occasioned by a computer programme. As regards ‘literary work’, the only context is the concept note for which, as noted above, there are no pleadings of how the gaming application of the Defendants substantially copies the concept note.

41. Even otherwise, the claim of the Plaintiffs cannot *prima facie* succeed for infringement pertaining to the GUI. The principles elucidated by the Supreme Court to test infringement of copyright are broadly: (i) “If the Defendant’s work is nothing but a literal imitation of the copyrighted work with some variations here and there, it would amount to violation of copyright”, and (ii) “one of the surest and safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or viewer after having read or seen both the works is clearly of the opinion and gets and unmistakable expression that the subsequent work appears to be a copy of the original”. As laid down in *Twentieth Century Fox Film Corporation v. Stonesifer*, 140 F. 2d 579, the two works have to be tested not hypercritically or with meticulous scrutiny, but by



observations and impressions of an average reasonable reader and spectator. In *K.R. Venugopala Sarma v. Sangu Ganesan, 1971 SCC OnLine Mad 342*, it was held *albeit* in case of a film that degree of resemblance, which is to be judged by the eye, must be such that the person looking at one's work gets the suggestion that it is of the other, i.e. it is a substantial copy.

42. Having carefully perused the comparative of the screenshots of the GUIs of the respective parties, this Court is unable to come to a conclusion even *prima facie* that there is a substantial copy by the Defendants. While it cannot be denied that there are a few similarities but those are insignificant and the dissimilarities outweigh the trivial similarities. In *R.G. Anand (supra)*, the Supreme Court observed that the Courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. In *Dorsey v. Old Surety Life Ins. Co., 98 F. 2d 872*, Phillips, J. observed that the right secured by a copyright is not the right to use of certain words, nor the right to employ ideas expressed thereby. Rather it is the right to that arrangement of words which the author has selected to express his ideas, and to constitute infringement in such cases a showing of appropriation in the exact form or substantially so, of the copyrighted material is required. Applying the said principle and comparing the two applications, it is evident that the rival user interfaces have different colour schemes, graphics, texts, placement of elements, icons, bottom bar, etc. As an illustration, the top bar/description bar/middle page and bottom bar of home page are extracted hereunder, which would demonstrate the distinctions:-



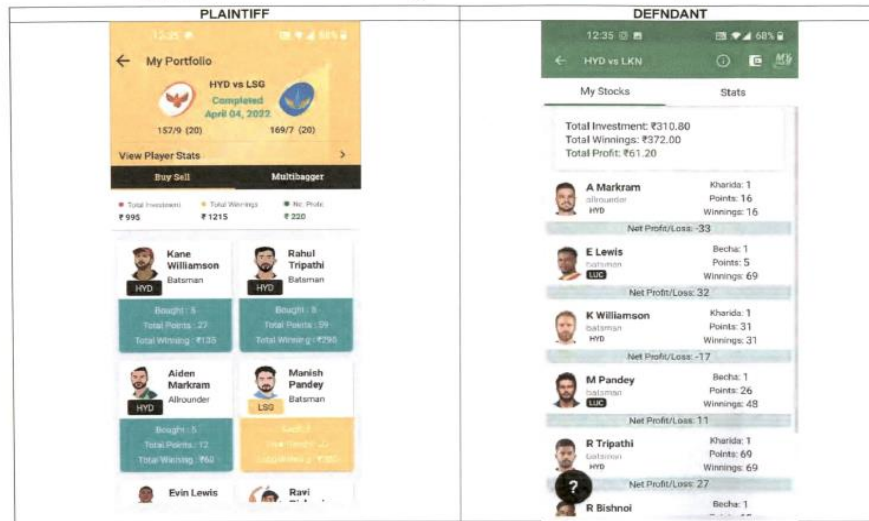
43. Furthermore, a comparison of the buy/sell page and final result pages would also *prima facie* show the difference in the two applications as follows:-

Comparison between the Buy/Sell Page of the Plaintiff and the Defendant's Applications

PLAINTIFF	DEFENDANT

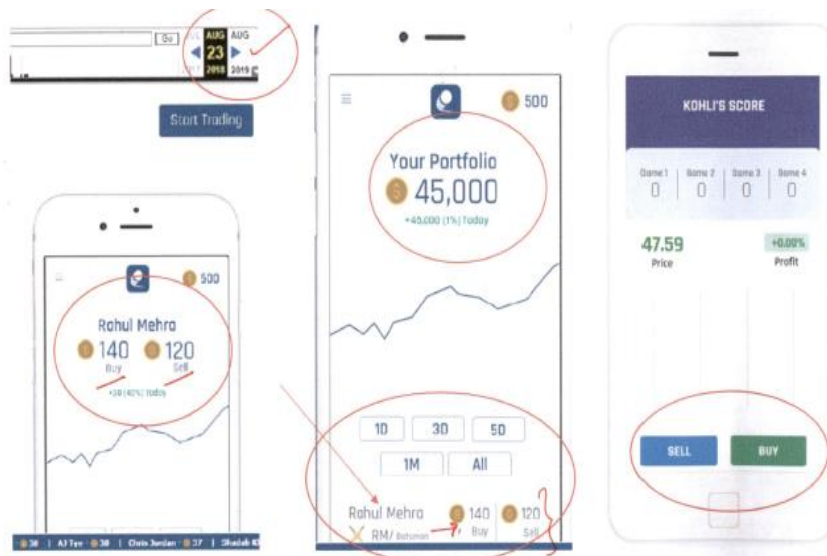


Comparison Between Final Result Pages of Plaintiff's and Defendant's Applications



44. Additionally, the screenshots will further substantiate similarities between Plaintiffs' application and third parties and this demonstrates that for a fantasy sports app for a game of cricket some commonalities are bound to exist as the basic format of the game will remain unchanged and thus Defendants cannot be held guilty of substantial copy and consequentially, infringement. The screenshots are as follows:-

SIXER

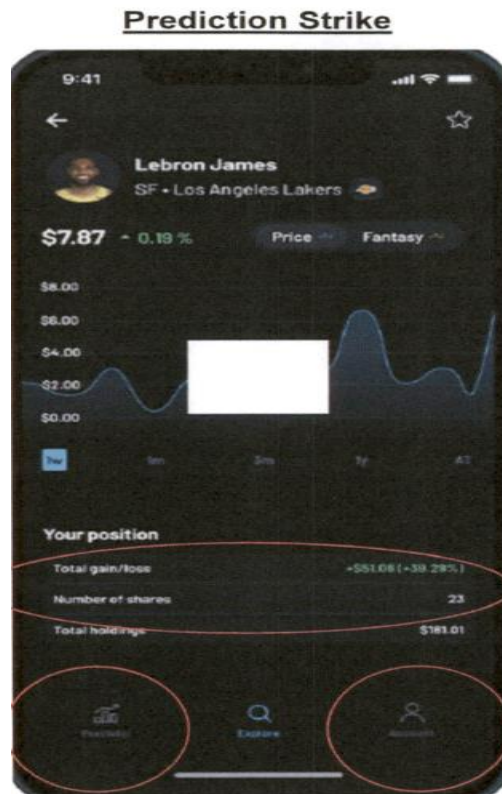




WORLD CUP CRICKET



PREDICTION STRIKE



45. In comparing the rival apps, this Court has analysed the individual elements as this exercise is permissible in law, besides the



fact that the learned senior counsels had, during the course of arguments taken the Court through an elaborate exercise of comparing individual elements, after filing comparative charts. In ***Apple Computer, Inc. v. Microsoft Corporation, MANU/FENT/ 0825/1994***, the challenge to the order of the District Court, amongst other grounds, was to the methodology of dissection of the elements adopted for the purpose of comparison, to come to a conclusion of infringement of copyright, in a dispute between Apple and Microsoft Corporation and the relevance of the case to the present case is that one of the issues involved therein was with respect to the Graphical User Interface and the Court held as follows:-

“[30] It is not easy to distinguish expression from ideas, particularly in a new medium. However, it must be done, as the district court did in this case. Baker v. Selden, 101 U.S. 99, 25 L.Ed. 841 (1879).[fn11] As we recognized long ago in the case of competing jeweled bee pins, similarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market. Herbert Rosenthal Jewelry Corp. v. Kalpakian, MANU/FENT/0484/1971 : 446 F.2d 738, 742 (9th Cir. 1971). Apple cannot get patent-like protection for the idea of a graphical user interface, or the idea of a desktop metaphor which concededly came from Xerox. It can, and did, put those ideas together creatively with animation, overlapping windows, and well-designed icons; but it licensed the visual displays which resulted.

[31] The district court found that there are five other basic ideas embodied in the desktop metaphor: use of windows to display multiple images on the computer screen and to facilitate user interaction with the information contained in the windows; iconic representation of familiar objects from the office environment; manipulation of icons to convey instructions and to control operation of the computer; use of menus to store information or computer functions in a place that is convenient to reach, but saves screen space for other images; and opening and closing of objects as a means of retrieving, transferring and storing information. Apple V, 799 F. Supp. at 1026. No copyright protection inheres in these ideas. Therefore, substantial similarity of expression in unlicensed elements cannot be based on the fact that the Lisa, the Finder, Windows 2.03, 3.0 and NewWave all have windows, icons



representing familiar objects from the office environment that describe functions being performed and that can be moved around the screen to tell the computer what to do, menus which give easy access to information or functions without using space on the screen, or objects that open and close.

[32] *Well-recognized precepts guide the process of analytic dissection. First, when an idea and its expression are indistinguishable, or "merged," the expression will only be protected against nearly identical copying. Krofft, 562 F.2d at 1167-68; Kalpakian, 446 F.2d at 742. For example, in this case, the idea of an icon in a desktop metaphor representing a document stored in a computer program can only be expressed in so many ways. An iconic image shaped like a page is an obvious choice.*

[33] *The doctrine of scenes a faire is closely related. As we explained in Frybarger v. International Business Machines Corp., MANU/FENT/0579/1987 : 812 F.2d 525 (9th Cir. 1987), when similar features in a videogame are " 'as a practical matter indispensable, or at least standard, in the treatment of a given [idea],'" they are treated like ideas and are therefore not protected by copyright. Id. at 530 (quoting Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., MANU/FEVT/0272/1982 : 672 F.2d 607, 616 (7th Cir.), cert. denied, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 145 (1982)). Furthermore, as Frybarger holds, "the mere indispensable expression of these ideas, based on the technical requirements of the videogame medium, may be protected only against virtually identical copying." Id.; see also Data East, 862 F.2d at 209 (visual displays of karate match conducted by two combatants, one of whom wears red shorts and the other white as in the sport, and who use the same moves, are supervised by a referee and are scored alike as in the sport, are inherent in the sport of karate itself and as such are unprotectable). In this case, for example, use of overlapping windows inheres in the idea of windows. A programmer has only two options for displaying more than one window at a time: either a tiled system, or an overlapping system. As demonstrated by Microsoft's scenes a faire video, overlapping windows have been the clear preference in graphic interfaces. Accordingly, protectable substantial similarity cannot be based on the mere use of overlapping windows, although, of course, Apple's particular expression may be protected.*

[34] *Apple suggests that scenes a faire should not limit the scope of its audiovisual copyright, or at least that the interactive character of GUIs and their functional purpose should not outweigh their artistry. While user participation may not negate copyrightability of an audiovisual work, see, e.g., Midway Mfg. Co. v. Artic Int'l, Inc., MANU/FEVT/0028/1983 : 704 F.2d 1009, 1011-12 (7th Cir.), cert.*



denied, 464 U.S. 823, 104 S.Ct. 90, 78 L.Ed.2d 98 (1983); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982), the district court did not deny protection to any aspect of Apple's works on this basis. In any event, unlike purely artistic works such as novels and plays, graphical user interfaces generated by computer programs are partly artistic and partly functional. They are a tool to facilitate communication between the user and the computer; GUIs do graphically what a character-based interface, which requires a user to type in alphanumeric commands, does manually. Thus, the delete function is engaged by moving an icon on top of a trash can instead of hitting a "delete" key. In Apple's GUI, the ability to move icons to any part of the screen exemplifies an essentially functional process, indispensable to the idea of manipulating icons by a mouse.

[35] To the extent that GUIs are artistic, there is no dispute that creativity in user interfaces is constrained by the power and speed of the computer. See *Manufacturers Technologies, Inc. v. Cams, Inc.*, 706 F. Supp. 984, 994-95 (D.Conn. 1989) (denying protection to formatting style of plaintiff's screen displays because of constraints on viable options available to programmers). For example, hardware constraints limit the number of ways to depict visually the movement of a window on the screen; because many computers do not have enough power to show the entire contents of the window as it is being moved, the illusion of movement must be shown by using the outline of a window or some similar feature. Design alternatives are further limited by the GUI's purpose of making interaction between the user and the computer more "user-friendly." These, and similar environmental and ergonomic factors which limit the range of possible expression in GUIs, properly inform the scope of copyright protection.

[36] Originality is another doctrine which limits the scope of protection. As the Supreme Court recently made clear, protection extends only to those components of a work that are original to the author, although original selection and arrangement of otherwise uncopyrightable components may be protectable. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, MANU/USSC/0089/1991 : 499 U.S. 340, 348-51, 111 S.Ct. 1282, 1289-91, 113 L.Ed.2d 358 (1991). Apple's argument that components should not be tested for originality because its interface as a whole meets the test, see *Roth Greeting Cards v. United Card Co.*, MANU/FENT/0348/1970 : 429 F.2d 1106, 1109 (9th Cir. 1970) ("[T]he originality necessary to support a copyright merely calls for independent creation, not novelty."), is therefore misplaced. Beyond that, Apple admits that it borrowed heavily from the iconic treatments in the Xerox Star and an IBM Pictureworld research report but disputes several of the district court's individual determinations. For instance, Apple claims that its



file folder and page icon designs are original. Even if they are, these particular icons add so little to the mix of protectable material that the outcome could not reasonably be affected.

[37] In sum, the district court's analytic dissection was appropriately conducted under the extrinsic portion of our test for whether sufficient copying to constitute infringement has taken place. We are not persuaded to the contrary by Apple's arguments that the district court shouldn't have dissected at all, or dissected too much; that it "filtered out" unprotectable and licensed elements instead of viewing the Macintosh interface as a whole; and that it should have recognized protectability of arrangements and the "total concept and feel" of the works under a substantial similarity standard.

[38] First, graphical user interface audiovisual works are subject to the same process of analytical dissection as are other works. We have dissected videogames, which are audiovisual works and therefore closely analogous, see, e.g., Data East, 862 F.2d at 208-09 (performing analytic dissection of similarities to determine whether similarities resulted from unprotectable expression); Frybarger, 812 F.2d at 529-30 (district court correctly concluded that similar features in videogames were unprotectable ideas and that no reasonable jury could find expressive elements substantially similar), and we have dissected nonliteral elements of computer programs, which are somewhat analogous, see, e.g., Brown Bag, 960 F.2d at 1475-77 (rejecting argument similar to Apple's about propriety of analytic dissection of computer program components such as screens, menus and keystrokes); Johnson Controls, Inc. v. Phoenix Control Sys., Inc., MANU/FENT/0802/1989 : 886 F.2d 1173, 1176 (9th Cir. 1989) (noting special master's detailed analysis of similarities). Other courts perform the same analysis, although articulated differently. See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706-11 (2d Cir. 1992) (adopting "abstraction-filtration-comparison" test for analyzing nonliteral structure of computer program, relying in part on our own approach); Gates Rubber Co. v. Bando Chem. Indus., MANU/FETT/0477/1993 : 9 F.3d 823, 834, 841 (10th Cir. 1993) (adopting Altai test, but suggesting that comparison of works as a whole may be appropriate as preliminary step before filtering out unprotected elements); Engineering Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1342-43 (5th Cir. 1994) (adopting Gates Rubber/Altai test to analyze scope of copyright protection for user interface, input formats and output reports); Lotus Dev. Corp. v. Borland Int'l, Inc., 788 F. Supp. 78, 90, 93 (D.Mass. 1992) (describing similar three-part test); cf. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1236 (3d Cir. 1986) (defining idea of utilitarian work as its



purpose or function, and everything not necessary to that purpose as expression), cert. denied, 479 U.S. 1031, 107 S.Ct. 877, 93 L.Ed.2d 831 (1987).

[39] *Nor did the district court's dissection run afoul of the enjoinder in such cases as Johnson Controls, 886 F.2d at 1176, Krofft, 562 F.2d at 1167, and Roth, 429 F.2d at 1110, to consider the "total concept and feel" of a work. Here, the court did not inappropriately dissect dissimilarities, and so did nothing to distract from subjectively comparing the works as a whole. See Aliotti v. R. Dakin & Co., MANU/FENT/0768/1987 : 831 F.2d 898, 901 (9th Cir. 1987) (indicating that as the concern of Krofft).*

[40] *As we made clear in Aliotti, the party claiming infringement may place "no reliance upon any similarity in expression resulting from" unprotectable elements. Id. (emphasis added) (similarities between competing stuffed dinosaur toys on account of posture and body design, and being cuddly, stem from the physiognomy of dinosaurs or from the nature of stuffed animals and are thus unprotectable). Otherwise, there would be no point to the extrinsic test, or to distinguishing ideas from expression. In this case, it would also effectively rescind the 1985 Agreement. This does not mean that at the end of the day, when the works are considered under the intrinsic test, they should not be compared as a whole. See McCulloch v. Albert E. Price, Inc., MANU/FENT/0346/1987 : 823 F.2d 316, 321 (9th Cir. 1987) (contrasting artistic work at issue, where decorative plates were substantially similar in more than the one unprotectable element (text), with factual works which have many unprotectable elements and very little protectable expression). Nor does it mean that infringement cannot be based on original selection and arrangement of unprotected elements. However, the unprotectable elements have to be identified, or filtered, before the works can be considered as a whole. See Harper House, 889 F.2d at 207-08 (reversing because "total impact and effect" test of jury instruction did not distinguish between protectable and unprotectable material, thereby improperly making it possible for jury to find copying based on unprotected material instead of selection and arrangement); see also Pasillas, 927 F.2d at 443 (copyright holder could not rely on unprotectable elements to show substantial similarity of expression); Frybarger, 812 F.2d at 529 (to extent that similarities between works were confined to ideas and general concepts, they were noninfringing).*

[41] *The district court's conclusion that the works as a whole are entitled only to limited protection and should be compared for virtual identity follows from its analytic dissection. By virtue of the licensing agreement, Microsoft and HP were entitled to use the vast majority of features that Apple claims were copied. Of those that*



remain, the district court found no unauthorized, protectable similarities of expression in Windows 2.03 and 3.0, and only a handful in NewWave. Thus, any claim of infringement that Apple may have against Microsoft must rest on the copying of Apple's unique selection and arrangement of all of these features. Under *Harper House and Frybarger*, there can be no infringement unless the works are virtually identical.

[42] Apple, however, contends that its audiovisual work with animation and icon design cannot be analogized to factual works such as game strategy books, see *Landsberg v. Scrabble Crossword Game Players, Inc.*, MANU/FENT/0388/1984 : 736 F.2d 485, 488 (9th Cir.) ("[S]imilarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed."), cert. denied, 469 U.S. 1037, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984), accounting systems, see *Selden*, 101 U.S. at 104, 25 L.Ed. 841 (copyright in book describing new accounting system not infringed when defendant copied ledger sheets used in system), or organizers, see *Harper House*, 889 F.2d at 205 (as compilations consisting largely of uncopyrightable elements, plaintiff's organizers entitled only to protection against "bodily appropriation of expression"), which are afforded only "thin" protection because the range of possible expression is narrow. See *Feist*, 499 U.S. at 349, 111 S.Ct. at 1289-90. Rather, it submits that the broader protection accorded artistic works is more appropriate. See, e.g., *McCulloch*, 823 F.2d at 321 (artistic work like a decorative plate receives broader protection because of endless variations of expression available to artist).

[43] Which end of the continuum a particular work falls on is a call that must be made case by case. We are satisfied that this case is closer to *Frybarger* than to *McCulloch*. See also *Atari Games Corp. v. Oman*, MANU/UDCC/0245/1992 : 979 F.2d 242, 245 (D.C. Cir. 1992) (analogizing audiovisual work like a videogame to compilation of facts). Accordingly, since Apple did not contest summary judgment under the virtual identity standard on the merits, judgment was properly entered.

[44] Apple also argues that the district court improperly confined the rule in *Shaw*, 919 F.2d at 1361, that if a work passes the extrinsic test it should go to the jury, to literary works. See *Kouf v. Walt Disney Pictures & Television*, MANU/FENT/0232/1994 : 16 F.3d 1042, 1045-46 (9th Cir. 1994) (applying *Shaw*'s rule to motion picture screenplay and holding that plaintiff failed to satisfy extrinsic test); *Brown Bag*, 960 F.2d at 1476 (declining to limit *Shaw* as a matter of law to literary works because at least some computer programs are similar to literary works). But see *Pasillas*, 927 F.2d at 442-43 (limiting *Shaw* to literary works and affirming summary



judgment on competing "Man in the Moon" masks for lack of substantial similarity of protectable expression). We don't have to resolve whether audiovisual works such as GUIs are more similar to Man in the Moon masks than to scripts, however. Apple could have gone to the jury under a virtual identity standard, but elected not to.

[45] We therefore hold that the district court properly identified the sources of similarity in Windows and NewWave, determined which were licensed, distinguished ideas from expression, and decided the scope of Apple's copyright by dissecting the unauthorized expression and filtering out unprotectable elements. Having correctly found that almost all the similarities spring either from the license or from basic ideas and their obvious expression, it correctly concluded that illicit copying could occur only if the works as a whole are virtually identical."

46. On a careful analysis of the GUIs of the rival apps and their elements, this Court *prima facie* holds that User Interface of the Defendants is not a substantial copy of the GUI of Plaintiffs' app. This is more so because, after the legal notice sent by the Plaintiffs, Defendants have made substantial changes in their app. In ***R.G. Anand (supra)***, the Supreme Court has held that similarity of the alleged infringing work to the authors' or proprietors' copyrighted work does not of itself establish copyright infringement, if the similarity results from the fact that both works deal with the same subject or have the same common source. It was also held that appropriation must be substantial. Relevant paragraphs are as follows:-

"18. In the American Jurisprudence also it is pointed out that the law does not recognize property rights in abstract ideas, nor is an idea protected by a copyright and it becomes a copyrighted work only when the idea is given embodiment in a tangible form. In this connection the following observations are made:

"Generally speaking, the law does not recognize property rights in abstract ideas and does not accord the author or proprietor, the protection, of his ideas, which the law does not accord to the proprietor of personal property.



In cases involving motion pictures or radio or television broadcasts, it is frequently stated that an idea is not protected by a copyright or under the common law, or that there is no property right in an idea, apart from the manner in which it is expressed.

When an idea is given embodiment in a tangible form, it becomes the subject of common-law property rights which are protected by the courts, at least when it can be said to be novel and new.”

It was also pointed out in this book as to what constitutes colourable imitation. In this connection, the following observations have been made:

“Infringement involves a copying, in whole or in part, either in haec verba or by colorable variation ‘copy’ as used in copyright cases, signifies a tangible object which is a reproduction of the original work.”

The question is not whether the alleged infringer could have obtained the same information by going to the same source used by the plaintiff in his work, but whether he did in fact go to the same source and do his own independent research. In other words, the test is whether one charged with the infringement made an independent production, or made a substantial and unfair use of the plaintiff's work.

“Intention to plagiarize is not essential to establish liability for infringement of a copyright or for plagiarism of literary property in unpublished books, manuscripts, or plays. One may be held liable for infringement which is unintentional or which was done unconsciously.

Similarity of the alleged infringing work to the author's or proprietor's copyrighted work does not of itself establish copyright infringement, if the similarity results from the fact that both works deal with the same subject or have the same common source.... Nevertheless, it is the unfair appropriation of the labour of the author whose work has been infringed that constitutes legal infringement, and while identity of language will often prove that the offence was committed, it is not necessarily the sole proof; on the other hand, relief will be afforded, irrespective of the existence or non-existence of any similarity of language, if infringement in fact can be proved.

The appropriation must be of a ‘substantial’ or ‘material’ part of the protected work... The test is whether the one charged with the infringement has made a substantial and unfair use of the complainant's work. Infringement exists when a study of two



writings indicates plainly that the defendant's work is a transparent rephrasing to produce essentially the story of the other writing, but where there is no textual copying and there are differences in literary style, the fact that there is a sameness in the tricks of spinning out the yarn so as to sustain the reader's suspense, and similarities of the same general nature in a narrative of a long, complicated search for a lost article of fabulous value, does not indicate infringement."

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38. *K.R. Venugopala Sarma v. Sangu Ganesan [1972 Cri LJ 1098] was a case of infringement of copyright in picture and it was held that an infringement of the copyright was complete even though the reproduction was not exact, but the effect on the mind by study of the two pictures was that the respondent's picture was nothing but a copy of the plaintiff's picture. The Court while applying the various tests observed as follows:*

"Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondents' picture must get the suggestion that it is the appellant's picture One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction."

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45. *Thus, the position appears to be that an idea, principle, theme, or subject-matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person. It is always open to any person to choose an idea as a subject-matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo and Juliet, Julius Ceasar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great*



playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of his dramas constitute a masterpiece of English literature. It has been rightly said that “every drama of Shakespeare is an extended metaphor”. Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.”

47. There is yet another aspect to the matter. One of the well recognized doctrines is the doctrine of merger i.e. where there are only very few ways to express a given idea and to refer to the observations of this Court in *Mattel, Inc. (supra)*, the doctrine postulates that where the idea and expression are inextricably linked or connected, it would not be possible to distinguish between the two. In other words, expression should be such that it is the idea and *vice versa* resulting in an inseparable merger of the two. Applying the doctrine of merger, Courts have refused to protect the expression of an idea through copyright where it can be expressed in a limited manner as doing so would confer monopoly on the idea itself. Relevant paragraphs from the judgment are as follows:-

“22. In the realm of copyright law the doctrine of merger postulates that where the idea and expression are inextricably connected, it would not possible to distinguish between two. In other words, the expression should be such that it is the idea, and vice-versa, resulting in an inseparable “merger” of the two. Applying this



doctrine courts have refused to protect (through copyright) the expression of an idea, which can be expressed only in a very limited manner, because doing so would confer monopoly on the idea itself. The decision in Herbert Rosenthal Jewelry Corporation v. Kalpakian, 446 F.2d 738 (1971) is illustrative in this regard. The plaintiffs there sued the defendants asking them to refrain from manufacturing bee shaped jewel pins. The Court held that the jewel shaped bee pin was an idea that anyone was free to copy, the expression of which could be possible only in a few ways; therefore, no copyright could subsist in it. In Nichols, Judge Learned Hand spoke about the famous “abstractions” test which the courts must follow, when confronted with the idea/expression dichotomy:

“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended. Holmes v. Hurst, 174 U.S. 82, 86, 19 S. Ct. 606, 43 L. Ed. 904; Guthrie v. Curlett, 36 F.(2d) 694 (CCA. 2).”

23. *The case of Allen v. Academic Games League of Am., 89 F.3d 614 (9th Cir. 1996) is worth noticing at this stage. The plaintiff in that case contended that the rule books published by the defendants to play the games developed by the him, violated his copyright over the tournament rulebooks developed by him. The court rejected the plaintiffs claim and held that:*

“A copyright only protects a particular expression of an idea and not the idea itself Mazer v. Stein, 347 U.S. 201, 218 (1954). Thus, ideas contained in a copyrighted work may be freely used so long as the copyrighted expression is not wholly appropriated. This is often the case with factual works where an idea contained in an expression cannot be communicated in a wide variety of ways. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984), cert. denied, 469 U.S. 1037 (1984). Consequently, the notions of idea and expression may merge from such “stock” concepts that even verbatim reproduction of a factual work may not constitute infringement. Accord See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977); Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987).



This doctrine of merger is particularly applicable with respect to games “since they consist of abstract rules and play ideas.” Midway Mfg. Co. v. Bandai-America, Inc., 546 F.Supp. 125, 148 (D.N.J. 1982); see also Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F.2d 296, 300 n.l. (9th Cir. 1979). A similar logic has been applied to rules of a contest where most subsequent expressions of an idea of a rule are likely to appear similar to the words of a related rule. See Morrissev v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Affiliated Hospital Products, Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188-89 (2nd Cir. 1975). Here, Allen has not shown that it is possible to distinguish the expression of the rules of his game manuals from the idea of the rules themselves. Thus, the doctrine of merger applies and although Allen may be entitled to copyright protection for the physical form of his games, he is not afforded protection for the premises or ideas underlying those games. To hold otherwise would give Allen a monopoly on such commonplace ideas as a simple rule on how youngsters should play their games.”

24. *The doctrine of merger was also applied in Atari Inc v. North American Philips Consumer Electronics Corp, 672 F.2d 607, (1982 US App. LEXIS 21341) to deny wider protection to elements in the video games. The US Court of Appeals (Seventh Circuit), speaking through a panel of three judges, said:*

“...copyright protection does not extend to games as such. Chamberlin v. Uris Sales Corp, 150 F.2d. 512 (2d. Cir. 1945); see also Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F. 2d. 296, 300 n. 1 (9th Cir. 1979)...”

The above formulation is not meant to foreclose copyright protection to all games; indeed, there can be certain distinctive elements, or patterns, innovated or created by its author, which, though intrinsic to the game, can claim independent copyright protection.

25. *In India, in relation to games, rules and schemes (for playing) are not protectable under the Patents Act, 1970; they are not deemed inventions under the Act. Section 3 of the Patents Act, provides as follows:*

“3. WHAT ARE NOT INVENTIONS.

The following are not inventions within the meaning of this Act,—

xxxxxxxxxxxxxxxxxxxxxxxx

(m) a mere scheme or rule or method of performing mental act or method of playing game;...”



An untenable patent claim-as rules of a game are-cannot transmigrate into a wider, longer lasting copyrightable expression. Such rules, in the absence of clear segregation of the expression from the idea, cannot be granted copyright protection. The expression, in this case is the idea itself.

26. *The plaintiffs' claim to copyright is in respect of the three game-boards, with the diagonal criss-cross design with placement of the double word, triple word, double and triple letter values, as well as rules of the game. Every literary or artistic work, to be afforded protection, should be "original" under the Act. The content of what is 'original' has undergone considerable change from the previously applicable "sweat of the brow" doctrine spelt out in University of London Press (supra) to the 'modicum of creativity' standard put forth in Fiest Publication Inc. v. Rural Telephone Service, 199 US 340 (1991). Our Supreme Court has also signified a shift; in Eastern Book Company v. DB Modak, (2008) 1 SCC 1, following the approach of the Canadian Supreme Court in CCH Canadian Ltd. v. Law Society of Upper Canada, (2004) 9 SCC 13, it rejected the sweat of the brow doctrine, (which conferred copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour), and held that the work must be original "in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author". Our Supreme Court noticed that the two positions i.e. the sweat of the brow on the one hand, and "modicum of creativity"-were extreme; it preferred a higher threshold than the doctrine of "sweat of the brow" yet, not as high as "modicum of creativity". Thus, our law too has recognized the shift, and mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity. This standard of originality, is now applicable in respect of the plaintiffs' claim to copyright in various aspects of the game.*

27. *So far as the collocation of lines on the game board are concerned; the diagonal colour scheme with values for words, and the combination thereof, the element of modicum of creativity has not been shown, to measure up to the test of "originality", post Eastern Book Company. Even otherwise, the creative expression, if any is minimalistic not to warrant copyright protection. Furthermore, and most importantly, the application of the doctrine of merger would mean that the colour scheme on such a board can be expressed only in a limited number of ways; if the plaintiffs' arrangement were to be avoided, it is not known whether*



the idea of such a word game could be played at all. Similarly, the reasoning in Allen and Atari, as far as copyrightability of rules of a game are concerned apply squarely, in this case. This doctrine of merger is applicable with respect to games as (according to those decisions) “they consist of abstract rules and play ideas.” By way of illustration, the arrangement of colours, values on the board, the collocation of lines, value for individual alphabetical tiles, etc have no intrinsic meaning, but for the rules. If these rules-which form the only method of expressing the underlying idea are to be subject to copyright, the idea in the game would be given monopoly: a result not intended by the lawmakers, who only wanted expression of ideas to be protected. Thus, this court concludes, prima facie, that the copyright claim of the plaintiff cannot be granted.”

48. In this context, I may also allude to passages from ***The Chancellor Masters & Scholars of The University of Oxford v. Narendera Publishing House & Anr., 2008 SCC OnLine Del 1058,*** as follows:-

“20. In the present case, the plaintiffs claim concerns mathematical questions and answers. Besides asserting the work put in by Dr. Roy, and the effort in arranging such questions at appropriate stages, chapters or units in the textbooks, the plaintiff do not show how such effort is original to conform to the minimum degree of creativity mandated by Indian law, post Eastern Book Company (supra). Mathematical questions are expression of laws of nature. The “discovery” of such laws cannot confer monopoly to those who describe it. The reason is that language is a limited medium, which enables description of such laws of nature - in only a few ways. Recognition of copyright as inhering in the questions themselves (as the plaintiff suggest the court to do), without existence of the “creative” element of originality would deny access to ideas, thus robbing one of the primary objectives of copyright law (promotion of creativity) of vitality, thereby stifling intellectual growth. Interestingly, section 3(k) of the Patents Act, 1970 explicitly denies any form of patent protection to a mathematical method or algorithms. Prima facie, Parliament could not have intended that innovations such as new mathematical questions, denied benefit of patent protection—which if granted is of restricted duration—could be refused, but a wider protection in time, by way of copyright, could have been granted.

21. As far as the sequencing and schematic arrangement of the questions - in the various chapters is concerned - the plaintiff say



that the textbook conforms to the specifications and requirements of the J & K Board. Here, the plaintiffs had to show original effort, unique to their schematic arrangement or sequencing. In education, the dictates of the “learning content” are such that each level demands a “curve”. These “learning content” and “learning curve” elements are inherent in the syllabi evolved by examination bodies such as J & K Board or the CBSE. The plaintiff therefore, had to show how it evolved an arrangement so unique that the scheme is entitled to copyright protection, independent of the dictates of the Board. The involvement of the Board, in the creation of the syllabus, negates such originality. This is not to suggest that there can be no creativity the such schematic arrangement; the court merely infers that prima facie there is no material in support of it; the plaintiff have made no attempt to show this creativity, apart from placing the textbooks on the record. For those reasons, this court prima facie is of the opinion that the plaintiffs’ claim of copyright in questions, answers, and their requiring or arrangement, is insubstantial.”

49. On the same analogy is the judgment of this Court in ***Samir Kasal (supra)***, where the case of the Plaintiff was that it had conceptualized an International Cricket League with some novel features and shared the same with Defendant No.2 in confidentiality and in breach thereof, there was infringement of copyright of the concept, developed by the Plaintiff. Disagreeing with the Plaintiff, the Court held that there could be no copyright in the concept since the ideas in the concept of the Plaintiff such as retired cricketers playing a T-10 test format, etc. were not new and were known concepts. The Court observed that fundamentally there will be similarity since what was in question was ‘game of cricket’ on which no one could claim a copyright and over the years several permutations and combinations in the format of playing the game had been evolved. Even assuming that some combination was exclusive, the differences set out were enough to take the case out of infringement of copyright. Applying the doctrine to the present case, there is no gainsaying that a game of



cricket even through a gaming application can only be played in a limited manner with a certain number of players constituting the team; two contesting teams; concept of overs; rules of the game; scores/points, etc. As held by the Court in *Mattel, Inc. (supra)*, if these fundamental commonalities in the game or rules of the game, which form the only method of expressing the underlying idea are to be subject to copyright, the idea in the game would be given monopoly, a result not intended by law makers, who only wanted expression of ideas to be protected. Applying these principles, there can be little doubt that a game of cricket can only be played in a limited manner and format and if the commonality in the two rival applications touch upon the concept of overs, constitution of teams, scores, points etc., it cannot be held that the second party has infringed the copyright of the first party in these features. Taking a clue from this judgment, there is a little doubt that even in the fantasy sports online gaming applications' regime, the game of cricket can only be played in a limited format and therefore, the Defendants cannot be held guilty for copyright infringement, save and except, if they had copied any original trait of Plaintiffs' app. The claim of uniqueness by the Plaintiffs lies in the stock trading feature, however, once this claim is not substantiated, no monopoly can be granted in the other features of the app, which concern the general rules/format of the game of cricket, entitling the Plaintiffs to confirmation of the interim injunction order dated 13.04.2022.

50. Judgments relied upon by the Plaintiffs do not come to their aid for manifold reasons. First and foremost, this Court has come to a finding *albeit prima facie* that there were prior-existing gaming apps



with stock trading feature, which dents the Plaintiffs' claim to originality in the alleged unique feature of stock trading and therefore, no monopoly and consequent protection can be granted. This Court has also found that Plaintiffs have misrepresented that they have launched '*first of its kind Fantasy League Gaming platform for cricket, football, basketball and Kabaddi*', which formed the basis of the *ex parte* injunction order, a relief in equity. Secondly, even on merits on a *prima facie* view, there is no substantial similarity in the User Interface by the Defendants and the concept note lacks originality. In *Broderbund Software, Inc. (supra)*, the relevant statutory framework in which the US Court rendered its decision was different from the Indian Copyright Act and in the said case, the Court was concerned with 'audio visual' copyright infringement and 'audio visual displays of the computer program', none of which are subject matter of the present case. In *Ladbroke (Football) Ltd. (supra)*, the question that arose before the Court was whether copyright subsisted in 'coupons' as an 'original literary compilation' and the Court answered the question in the affirmative, relying on Section 2 of the English Copyright Act wherein a 'literary work' includes any written table or compilation and the coupon was held to be a compilation in which copyright could subsist as literary work. Court also came to a finding that there was substantial reproduction by the opposite party of the literary work in contrast to the finding rendered by this Court in this case. Reliance on *Reckitt Benkiser India Ltd (supra)* and *Videocon Industries (supra)*, is also misplaced as the said cases fall under The Designs Act, 2000. Unlike the Copyright Act, 1957 where copyright in a defined 'work' arises through authorship, design rights



under The Designs Act are conferred by registration, the validity of which can be challenged in accordance with the provisions of the Act. Copyright Act does not mandate registration for copyright to subsist nor does registration confer any legal rights, as rightly contended by the Defendants. While Plaintiffs subtly urged in the pleadings that Defendants are guilty of unfair competition, the issue was not seriously pressed during the course of hearing and therefore, the judgment referred to by Plaintiffs in *International News Service v. The Associated Press, 248 U.S. 215 (1918)*, cannot rescue them at this stage. None of the other judgments aid the Plaintiffs for the reasons stated above and in the given facts and circumstances of this case.

51. In view of the aforesaid, this Court is of the *prima facie* view that there is no copyright infringement by the Defendants and the *ex parte* injunction order dated 13.04.2022 as modified by order dated 25.04.2022 is thus vacated. Accordingly, I.A. 6308/2022 under Order XXXIX Rule 4 CPC filed by Defendant No.1 is allowed and I.A. 5896/2022 filed by the Plaintiffs under Order XXXIX Rules 1 and 2 CPC is dismissed, with a usual caveat that the observations and findings in the present judgment are only *prima facie* and will not effect the adjudication of the case on merits.

52. Applications are disposed of in the aforesaid terms.

JYOTI SINGH, J

OCTOBER 17, 2023
Shivam/kks/KA