

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.05.2010

IA No. 12926/2009 in CS(OS) 1889/2009

SUPER CASSETTES INDUSTRIES LTD. PLAINTIFF

Vs

HAMAR TELEVISION NETWORK PVT. LTD. & ANR. DEFENDANTS

IA No. 13058/2009 in CS(OS) 1906/2009

SUPER CASSETTES INDUSTRIES LTD. PLAINTIFF

Vs

M/S POSITIV TELEVISION PVT. LTD. & ANR. DEFENDANTS

Advocates who appeared in this case:

For the Plaintiffs : Mr Jagdish Sagar, Mr K.K. Khetan & Ms Geetanjali Visvanathan, Advocates
For the Defendants: Mr Abhishek Kr. Rao & Mr Shailash Suman, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to Reporters or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

RAJIV SHAKDHER, J

IA No. 12926/2009 (O. 39 R. 1&2 of CPC) in CS(OS) 1889/2009

IA No. 13058/2009 (O. 39 R. 1&2 of CPC) in CS(OS) 1906/2009

1. I propose to dispose of the captioned applications in the abovementioned suits being: CS(OS) No. 1906/2009 and 1889/2009 by a common order for the reason that parties in the two suits are common [save and except M3 Media Pvt. Ltd. which is impleaded as defendant no. 2 in CS(OS) No. 1906/2009; and similarly, Hamar Television Network Pvt. Ltd. (hereinafter referred to as 'Hamar TV'), which is impleaded as defendant no. 1 in CS(OS) 1889/2009]; the pleadings are identical except for minor differences; and lastly

though not the least, the issues and submissions made before me are common. Thus, except for the fact that relief is directed against parties which are not entirely identical, there is substantial commonality of parties, issues, pleadings and also reliefs.

2. Coming to the applications: the plaintiff, which carries on its business under T Series Brand of music cassettes, claims to be an owner of a large repertoire of musical works. Therefore, by way of the captioned applications the plaintiff has sought an injunction pending trial of the suit, against infringement of its copyright in musical works, by the defendants.

2.1 Notably in the written statement filed, while there is no assertion by the defendants that they have a copyright in the concerned musical works; they have, as is the usual defence, put the plaintiffs to notice that they have to provide proof of their rights in the repertoire of musical works they claim to possess. More importantly, a defence of substantiality is also taken – in as much that the alleged takings of the plaintiff's musical work does not constitute “substantial” takings, therefore, no case for infringement is made out. Furthermore, it is stated that if the takings are construed as substantial, even then their act cannot be construed as an infringement as they have made a “fair use” of the concerned musical works. In other words, they have invoked the statutory defence of “fair dealing” as provided in Section 52(1)(a)(ii) and Section 52(1)(b)(ii) of the Copyright Act, 1957 (hereinafter referred to as ‘Copyright Act’).

3. In this context let me advert to facts which, in my view, are necessary for the purpose of disposal of the captioned applications.

3.1 The plaintiff, as noticed above, is engaged in the business of manufacturing and marketing audio cassettes under the brand name “T Series Music Cassettes”. The plaintiff also asserts that it has a large repertoire of cinematographic films and sound recordings. It claims that its repertoire of music includes collection of over 20,000 Hindi non-film songs and around 50,000 songs in regional languages. The plaintiff also claims that it has launched and/or promoted some of the biggest, and most talented as also well known artists of the likes of Anuradha Paudwal, Sonu Nigam, Udit Narayan, Kumar Sanu, Abhjit, Manoj Tiwari etc. In order to protect its rights the plaintiff asserts that it has acquired copyright of

literary, musical and other works, which it commissions and manages by entering into contracts whereby, the copyright vested in the authors or other prior owners in the said musical works is assigned to it. In its capacity as a purchaser, that is, sound recording company, it claims to be a corporate author and the first owner of the copyright in the sound recording and audio visual works (cinematograph films) which are produced at its initiative and responsibility. The plaintiff also claims that it has executed licenses with various broadcasters which use its work, in which, it enjoys copyright. The plaintiff further asserts that in view of its entire business model being pivoted on the intellectual property right it has acquired in the aforementioned works, it diligently monitors, infringement of its rights by taking appropriate actions. It is towards this end that it has filed the present action.

3.2 In so far as the defendants are concerned it is, specifically, averred in the plaint that defendant no. 1 through its channel Hamar TV, which is primarily dedicated to Bhojpuri language caters to the demand for regional television market. Defendant no. 2, it is stated is primarily engaged in the business of electronic media, and is thus successfully running news and entertainment channels under the name of Positiv Media Group including Hamar TV. It is alleged that in March, 2009 the plaintiffs came to know that the defendants were broadcasting its copyrighted works without due permission. In this connection a meeting was set up with one Ms Neelanjana, Deputy Managing Director of the defendants. At this meeting the representative of the plaintiff stressed the need for the defendants to obtain a license from the plaintiff if it was desirous of legitimizing its business; as otherwise unauthorized broadcast of its copyrighted works violated its rights. The said meeting was followed by a letter dated 04.03.2009 wherein, the fee payable by defendant no. 1 was mentioned. Since defendant no. 1 continued to infringe the plaintiffs' copyright, a legal notice dated 06.04.2009 was issued to defendant no. 1, by the plaintiff through its advocate, calling upon defendant no. 1 to cease and desist broadcast of its copyrighted work, without license. In the said legal notice reference was made to specific instances of infringement of plaintiff's repertoire which had come to its notice, including programmes such as *Naino Ke Jadoo*, *Aarti Sung by Anuradha Paudwal* and *Qayamat Se Qayamat Tak*. It appears that defendant no. 1 replied to the said notice vide its reply dated 16.04.2009. In

reply, apart from denying the plaintiffs' allegation of infringement, defendant no.1 specifically stated that since its channel was on test trials from 12.03.2008 to 06.03.2009, the contents of the plaintiffs' repertoire may have been used by it. Realising the enormity of the problem at hand defendant no.1 on the same day also filed a caveat in the District Court at Noida, U.P.

3.3 The plaintiff followed the aforementioned legal notice with a reminder dated 11.05.2009 wherein, it sought to clarify that the infringement in the previous notice were actually for the period 24.03.2009 to 26.03.2009 and, therefore, much after the launch of its channel by defendant no. 1; on 07.03.2009 which was the date indicated in its reply of 16.04.2009. The plaintiff has averred in the plaint that in order to take the investigation further it deputed one of its employees, one Mr Deepak Kamlesh Pania. The affidavit of Mr Deepak Kamlesh Pania dated 07.07.2009 adverts to the fact that defendant no. 1 has infringed the plaintiffs' copyright in the concerned musical works between period 19.06.2009 to 22.06.2009. In the plaint it has been specifically averred that the defendant continued to infringe the plaintiffs' copyright. To establish the same, compact discs (in short 'CD') containing the infringement for the period 19.06.2009 to 25.06.2009 have been filed as a document in the present proceedings.

3.4 Based on the aforesaid facts the plaintiffs averred that there has been an infringement of :

- (i) its rights under Section 14(e)(iii) of the Copyright Act in respect of sound recordings incorporated in films;
- (ii) underlying musical and literary works;
- (iii) violation of its rights under Section 14(d)(iii) of the Copyright Act in respect of audio visual recordings from the films which are broadcasted by defendant no. 1; and
- (iv) violation of its rights under Section 14(a)(iv) of the Copyright Act, in as much as the defendants' act of recording musical work owned by the plaintiff by other means before its broadcast. This last action according to the plaintiff tantamounted to

creation of a cinematograph film of the performance thereby, infringing the plaintiffs' exclusive rights in the musical works.

SUIT NO. 1906/2009

4. In so far as this suit is concerned the pleadings are substantially same except for a small variation. These being as follows: The allegation of violation against defendant no. 1 Positiv Television Pvt. Ltd., is that it is running various news and entertainment channels under the name of Positiv Media Group including its own channel "Focus TV". Specific instances of infringement are indicated in paragraph 24 of the plaint, which includes programs such as E! Martini. This programme includes copyrighted works belonging to plaintiffs' repertoire, from movies, such as Ghajini, Main Aisa Hi Hoon and Slumdog Millionaire.

4.1 In rebuttal, defendant no. 1 in suit no. 1889/2009, i.e., Hamar TV has denied that there is any infringement of copyright by defendant no. 1. In paragraph 9 of the written statement under the heading Preliminary Objections and Submissions, it is stated that the plaintiffs on their own showing have alleged that broadcast ranges between 10 to 30 seconds except on a few occasions where the duration is more than 30 seconds. It goes on to aver that it is clear from the allegations of the plaintiff that the maximum duration of broadcast is 40 seconds, that too not at a single stretch and, therefore, the alleged broadcast for duration in the range of 10 to 40 seconds cannot be dubbed as indiscriminate use of copyright for commercial exploitation. It relies upon the judgment of this Court in *ESPN Star Sports vs Global Broadcast News Ltd. & ors. 2008 (38) PTC 477 (Del)* to invoke the test of "fair dealing" to decide as to whether the alleged broadcast would amount to violation of the copyright. In support of its defence based on the principle of 'fair dealing' it relied upon the provisions of Section 52(1)(a)(i) and (ii) to contend that the alleged broadcast are in the nature of "review", "preview", "news", special programmes and interviews. These programmes, according to defendant no. 1, are in the nature of criticism or review to educate the viewing public. Reliance was also been placed on the judgments of the English Court in *Hubbard and Anr vs Vosper & Anr. (1972) 1 All ER 10231*. A challenge has been laid to the competence of Mr Deepak Kamlesh Pania in regard to his education, qualification and

expertise to undertake a technical task of recording broadcast of a programme made by a channel. It also averred that there is nothing on record to show that the alleged recording by Mr Deepak Kamlesh Punia was not tampered with. While the receipt of the legal notice and the reply dated 16.04.2009 is not denied; there are averments made explaining the purported contents of the reply dated 16.04.2009. Similarly, there is no denial of the reminder dated 11.05.2009 sent by the plaintiff. Defendant no. 1 has, however, denied the veracity and the truthfulness of the contents of the CDs filed by the plaintiff purportedly containing the record of infringement for the period 09.09.2009 and 15.09.2009.

5. In support of their respective cases both counsels made briefly following submissions: Mr Sagar, appearing for the plaintiff submitted that the plaintiff has an exclusive rights as copyright owner under Section 14 of the Copyright Act in respect of “any work or any substantive part of the work”. The defendants i.e., Hamar T.V. and Positiv Television Network Pvt. Ltd. have been broadcasting copyrighted work of the plaintiff without a licence and, therefore, defendants have violated the provisions of Section 51(a)(i) of the Copyright Act as also the provisions of Section 51(a)(ii) of the Copyright Act for permitting the infringing broadcast. It was contended by Mr Sagar that the defence of “fair dealing” under Section 52 was not available to the defendants as the same was not a defence raised with bonafide intentions. He stressed the fact that the infringing broadcasts were made on 24th, 25th and 26th March, 2009. In response to the plaintiff’s legal notice of 06.04.2009, defendant no. 1/Hamar T.V., vide its reply dated 16.04.2009, had falsely averred that they might have used the plaintiff’s repertoire for its broadcast prior to the formal launch of its channel. This defence was set up by stating that the channel of defendant no. 1/Hamar T.V. was launched only on 07.03.2009. This was obviously a false defence. Mr Sagar further contended that as is demonstrable from the CDs filed that defendant no. 1/Hamar T.V. continued to infringe the plaintiff’s copyrighted works. The defence of fair dealing set up is vague and no specific instances have been given which would bring it within the statutory exception of permitted use as engrafted in Section 52 of the Copyright Act, that is, for the purposes of criticism, review or news reportage etc. For

this purpose he cited judgments of *Sony BMG Music Entertainment et al vs Jeol Tenenbaum Case No. 07cv11446-NG dated 07.12.2009*. Mr Sagar went on to submit that the provisions of the Copyright Act have to be read in consonance with and interpreted consistently with binding international conventions. In this particular case the Berne Convention and the TRIPS Agreement, to which India is a party would have to be considered. It was contended by Mr Sagar that Article 13 of the TRIPS Agreement and Article 9.2 of the Berne Conventions provided for certain indices to deal with the defence of 'fair dealing' These being:

- (i) For certain Special Cases: a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach;
- (ii) It ought not to conflict with a normal exploitation of the work: A possible conflict with a normal exploitation of a particular exclusive right cannot be counter-balanced or justified by the mere fact of the absence of a conflict with a normal exploitation of another exclusive right.
- (iii) Not unreasonably prejudice the legitimate interests of the right holder: The notion of 'interests' is not necessarily limited to economic value or detriment. 'Not unreasonable' connotes a slightly stricter threshold than 'reasonable'. The prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.

5.1 It was next contended that the infringing use cannot be justified by merely saying that it does not 'compete' with other uses like theatre exhibition, distribution of DVDs/CDs etc.; and that licensing also forms part of normal exploitation. In other words, it was Mr Sagar's contention that licensing of the plaintiffs' repertoire is part of normal exploitation of its copyrighted works. Based on the aforesaid, it was submitted that the exceptions given in the Copyright Act should not be so interpreted to upset the normal existing commercial practices on which the plaintiff's revenue depend.

5.2 Mr Sagar next contended that the English decision ought to have a greater persuasive value than the U.S. decisions as the provisions of Section 52(1)(a) and (b) of the Copyright

Act are similar to provisions of the English Act on the aspect of permitted or fair uses of copyright work.

5.3 It was the submission of Mr Sagar that the test evolved for reporting “current events” was whether the particular use was necessary, and did it report current events. (See *Hyde Park Residence Ltd vs Yelland (2000) R.P.C. 604; Ashdown vs Telegraph Group Ltd (2002) R.P.C. 5 and Associated Newspapers Group Plc vs News Group Newspapers Ltd & Ors (1986) R.P.C. 515*)

5.4 With regard to criticism and review he contended that the essential test applied was that of necessity. [See *Associated Newspapers (supra) and Fraser-Woodward Ltd vs British Broadcasting Corporation & Anr (2005) EWHC 472*]

5.5 Mr Sagar distinguished the judgment in the case of *ESPN Start Sports (supra)* on the ground that the decision was rendered in the context of news reporting of cricket matches.

5.6 The learned counsel went on to say that the test of substantiality is a qualitative test and not quantitative test. [See *Ladbroke (Football) Ltd vs William Hill (Football) Ltd (1964) 1 All. E.R.465*]. It was his contention that the test of substantiality tests what part of the plaintiffs work is taken, and therefore, the defendants cannot contend as part of their defence, that the plaintiffs work comprises only a small part of the defendants’ works. In so far as musical work is concerned the substantiality test is one of recognition. Listeners know a tune by a few notes. [See *Hawkes and Son (London) Ltd. vs Paramount Film Service Ltd. (1934) 1 Ch. 593; Donald Irwin Robertson vs Batten, Barton, Durstine & Osborn Inc. et al 146 F. Supp. 795 and Baxter vs MCA Inc. 812 F.2d 421 (9th Cir. 1987)*]. Similarly, in the case of cinematograph films even a single screen shot is substantial. (See Section 14(d)(i) of the Copyright Act). The test is of a cumulative effect. The defendants use of plaintiff’s repertoire daily in almost all programs is a relevant consideration.

6. The learned counsel for the defendants largely adhered to the stand taken in the pleading. The principal defence was based on the provisions of Section 52(1)(a)(i) and (ii). Considerable reliance was placed on the judgment of this court in *ESPN Star Sports (supra)* case. In addition Mr Abhishek Kumar Rao cited the following judgments:

The Chancellor Masters and Scholars of the University of Oxford PTC 385(Del); Hubbard & Anr. v. Vosper & Anr. (1972) 2 Q.B. 84; Pro Sieben Media AG vs Carlton UK Television Ltd (1999) F.S.R. 610; BDA Private Limited v. Paul P.John & Anr. 2008(37) PTC 569(Del.) and Pfizer Enterprises & Anr. v. Dr.H.R.Manchanda & Anr. CS(OS) 641/2007 and IA 3995/2007 dated 16.07.2008 (Del).

7. In the background of the above, it perhaps becomes important to draw up the contours of the law on the subject.

Hubbard and Anr vs Vosper and Anr (supra)

7.1 This was a case where plaintiff was the Church of Scientology which sought an injunction against one Mr Vosper, who published a book with the title ‘The Mind Benders’ which was critical of the cult of scientology. The book of Mr Vosper had extracts from the books of Mr Hubbard on scientology, of course with acknowledgements. In the first instance an ex-parte injunction was granted which was continued and confirmed. In appeal the injunction was vacated. Lord Denning M.R. in his judgment while accepting the fact that a substantial part of the book written by the plaintiff – Mr Hubbard was extracted in the defendant’s book ‘The Mind Benders’, the defence of ‘fair dealing’, however, in his view was arguable and, therefore, on a balance injunction deserved to be vacated. There was a fair amount of discussion on what would constitute ‘fair dealing’ as also in what situation information received in confidence would not be accorded protection of the law. On the first issue the observations of Lord Denning M.R. being apposite are extracted hereinbelow”

“It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the

law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be “fair dealing”.

7.2 Lord Denning also dealt with the issue as to whether right to criticize and review a literary work could also bring within its ambit the right to criticize and review the underlying doctrine or philosophy. Lord Denning observed in the following words:

“Mr Pain took, however, another point. He said that the defence of “fair dealing” only avails a defendant when he is criticizing or reviewing the plaintiff’s literary work. It does not avail a defendant, said Mr Pain, when he is criticizing or reviewing the doctrine or philosophy underlying the plaintiff’s work..... I do not think that this proviso is confined as narrowly as Mr Pain submits. A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of “fair dealing” both can be criticized. Mr Vosper is entitled to criticize not only the literary style, but also the doctrine or philosophy of Mr Hubbard as expounded in the books.”

7.3 The other issue pertaining as to what is protectable as confidential information, was also dealt with by the learned Judge. The learned Judge even at the interlocutory stage held that: from what was placed before the court demonstrated that, even though the information was confidential, it ought not to be suppressed by Court intervention as there was an element of public interest, which required that the activities of the cult which were alleged to be dangerous had to be allowed unimpeded articulation. As to the factors which a court should weigh when considering a plea for an injunction the learned Judge made the following pertinent observations, and in doing so, disagreed with the earlier judgments which seemed to suggest that for the plaintiff to seek injunction at an interlocutory stage he has to do two things: First, he must establish a strong prima facie case that he “owns the copyright” and, second, having done so he need only show that he had an “arguable case” against the defendant who has infringed his copyright or is about to infringe it. Disagreeing with Goff J. approach in *Harman Pictures N.V. vs Osborne (1967) 1 WLR 723*, he observed as follows:

“We are told that practitioners have been treating these cases as deciding that, if the plaintiff has an arguable case, an injunction should be granted so that

the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.

*I would like to say at once that I cannot accept the propositions stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance, in *Fraser V. Evans* (1969) 1 Q.B. 349, although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary.”*

Pro Sieben Media AG vs Carlton UK Television Ltd (supra)

7.4 The next case cited before me was again an English case. Briefly facts were that the plaintiffs had broadcast a programme which included interview of a lady who was pregnant with eight foetuses. This interview formed part of the plaintiff's programme TAFF. TAFF programme was broadcast via satellite for German audience, however, it could also be received in English households by having an appropriate satellite dish. The defendant conceived and thereupon broadcast a programme entitled 'selling babies' as part of their programme 'Big Story' which in the defendant's words was a programme dealing with current affairs. The plaintiff filed an action for infringement of copyright primarily in relation to use of thirty second excerpt by the defendants in their programme from plaintiff's work, and also for taping the entire TAFF programme. The action was defended on the ground that the entire programme was directed to criticize 'chequebook journalism'. The Court of Appeal while vacating the injunction touched upon several important aspects: (i) a Judge's conclusion on an issue of fair dealing ought not to be disturbed unless he proceeded on some error of principle or were otherwise clearly unsustainable. (ii) that the extent of review was relevant to the defence of fair dealing but its relevance would depend upon circumstances of the case. (iii) criticism should not only be of the style but also of the idea which are found in the work and its social and moral implications. (iv) The criticism could be expressed strongly, and be unbalanced without forfeiting the fair dealing defence; and the

author's remedy for malicious and unjustified criticism lay in the law of defamation, if at all, not copyright. (v) the mental element on the part of the user was of little importance. However, the intention and motives of the user of another's copyright material were highly relevant on the issue of fair dealing. A sincere but misguided belief that the user was criticizing a work or reporting current events was not enough for the defence to be made out. (vi) A liberal view had to be taken of the expressions "criticism" or "review" and 'reporting current events'. However, the nearer the user was to the original material, less likely was there a chance of the user succeeding in his defence of 'fair dealing'. In determining the actual purpose of the user in using and accessing copyright material weight had to be given to the programmes likely to impact the audience.

Hyde Park Residence Ltd. vs Yelland (supra)

7.5 This case was concerned with the publication of pictures in the daily The Sun of lady Diana and Mr Dodi Fayed's visit to his home in Paris, i.e., Villa Windsor. The pictures were obtained by the reporter of The Sun from an ex-employee of the plaintiff's company Hyde park Residence Ltd. which was entrusted with the job of providing security at Villa Windsor. The visit of Lady Diana and Dodi Fayed one day before the unfortunate car crash, in which both died, were published to allegedly nail the lie of Mr Mohamed Al Fayed, the father of Dodi Fayed, that lady Diana and Mr Dodi Fayed had visited Villa Windsor in Paris one day before their accident (which, however, Mr Fayed liked to term as assassination) for more than two hours as they intended to get married. The pictures which bore the date and time of entry and exit were used to demonstrate that the two, i.e., Lady Diana and Mr Dodi Fayed were in the house together only for 28 minutes and not for two hours, as claimed by Mr Fayed. The plaintiff claimed copyright in respect of the said pictures. The court of first instance, had refused the injunction which propelled the plaintiff to approach the Court of Appeal. The Court of Appeal while agreeing with the plaintiffs discussed issues pertaining to the defence of 'fair dealing'. It is important to note that, the plaintiff had sought a summary judgment against the defendants. The Court of Appeal held that since many allegations had been made by the defendants, which were in dispute, the issues of fact could not be resolved, on the basis of written evidence the matter ought to

have been tried. That while determining whether the use of the copyrighted material had been for the purpose of reporting a current event what has to be seen is that ‘fair dealing’ must involve fair dealing for an “approved purpose”, and not a dealing which might be fair for some other purpose or fair in general. The court made a brief reference to the observations made in *Pro Sieben Media (supra)* that motives of the user were relevant when considering whether the dealing was fair. *The learned Judge went on to say that “I believe it right, that it is appropriate to take into account the motives of the alleged infringer, the extent and purpose of the use and whether the extent was necessary for the purpose of reporting the current events in question. Further if the work had not been published or circulated to the public that is an important indication that the dealing was not fair..... Thus the court must judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work, in the manner that The Sun did, for the purpose of reporting the relevant current events, in this case the published untruthful statements of Mr Al Fayed....”* In paragraphs 40 and 41 of the judgment the court made the following observations on the extent of use of the photographs of The Sun:

“To describe what The Sun did as fair dealing is to give honour, to dishonor. Further the extent of the use was excessive. The only part of the driveway stills relevant to the alleged purpose was the information as to the timing of arrival and departure. That information could have been given in the articles by Mr Thompson stating that he had seen the photographs which proved the Princes and Mr Dodi Fayed only stayed at the Villa Windsor for 28 minutes. If he needed confirmation he could have relied upon the statement by Mr Cole. Despite that The Sun used the driveways stills so that they covered over one third of page 4. The information as to the time of arrival and departure did not establish that Princess Diana and Mr Dodi Fayed were not going to be married nor that the other statements made by Mr Al Fayed, that are said to be untrue, were false.

The suggestion that the use of the driveway stills was a fair dealing or the purposes of reporting the events of August 30, 1997 is, to draw upon the words of Henry L.J. in Time Warner Entertainments Co. vs Channel Four Television Plc (1994) E.M.L.R. 1 at 14, an attempt to dress up the infringement of Hyde park’s copyright in the guise of reporting an event. In my view the judge came

to the wrong conclusion and the allegation of fair dealing by the defendants could not provide them a defence to the action.”

7.6 Notably the Court of Appeal drew a distinction between a defence of public interest where an obligation of maintaining confidence is sought to be enforced and when such a defence is taken in an action for infringement of copyright. The observations of the Court in paragraph 64 to 67 being relevant are extracted hereinbelow:

“64. I have pointed out earlier in this judgment that the basis of the defence of public interest in a breach of confidence action cannot be the same as the basis of such defence to an action for infringement of copyright. In an action for breach of confidence the foundation of the action can fall away if that is required in the public interest, but that can never happen in a copyright action. The jurisdiction to refuse to enforce copyright, which I believe has been recognized comes from the court’s inherent jurisdiction. It is limited to cases where enforcement of the copyright would offend against the policy of the law. The Lion Laboratories case was such a case. Loin Laboratories sought to obtain an interlocutory injunction to restrain publication of documents which showed that they had suppressed information leading to or which might lead to the wrongful conviction of motorists. The action was based upon documents which in the circumstances reeked of turpitude. As Lord Mansfield C.J. said in Holman vs Johnson (1775) 1 Cowp. 341 at 343:

‘No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’

65. To rely upon copyright to suppress documents which could exonerate motorists convicted of drink driving or which might lead to their acquittal is, in my view, to found a cause of action upon an immoral act.

66. The circumstances where it is against the policy of the law to use the court’s procedure to enforce copyright are, I suspect, not capable of definition. However, it must be remembered that copyright is assignable and therefore the circumstances must derive from the work in question, not ownership of the copyright. In my view a court would be entitled to refuse to enforce copyright if the work is:

- (i) Immoral, scandalous or contrary to family life;*
- (ii) Injurious to public life, public health and safety or the administration of justice;*
- (iii) Incites or encourages others to act in a way referred to in (ii).*

67. Mr Spearman’s submission that the driveway stills needed to be published in the public interest to expose the falsity of the statements made by Mr Al Fayed has

no basis in law or in logic. Perhaps the driveway stills were of interest to the public, but there was no need in the public interest in having them published when the information could have been made available by the Sun without infringement of copyright and was in any case in the public domain after the statement of Mr Cole on behalf of Mr Al Fayed. The driveway stills contained nothing, nor was there any circumstance relating to them which could require the court to refuse to enforce the statutory property right provided by the 1988 Act. The only possible defence in respect of the copyright work, of which the driveway stills were part, was fair dealing.”

Associated Newspapers Group PLC vs News Group Newspapers Ltd. & Ors (supra)

7.7 This judgment reiterated the point that in dealing with the defence of fairness the motive of the user is material. The following extracts of the judgment of the Walton J. being instructive is extracted hereinbelow:

“Let us just see what might be fair. I do not think it depends upon any one criterion, , that is to say, whether large chunks of the copyright material have been used as opposed to small chunks; probably it does not depend upon the precise ratio of the chunks used to the surrounding material, although I must point out that in the present case the matters of which complaint is made represent no less than one-third of the totality of the material that the Sun has put out relating to the letters. The question of fairness must at bottom depend upon the motive with which the material has been copied. I can imagine (I do not think that this has happened but as I do not read the Times I may be wrong) that The Times could have had a long article devoted to commenting on the education afforded to monarchs of the house of Windsor utilizing a great many extracts from the letters to demonstrate how, or how not, they have received adequate instruction in English grammar, spelling, orthography, and modes of expressing themselves. That would be a perfectly fair use of the material. It really would be a perfectly fair use of the material because the material would not be used to attract readers to The Times. The article itself might of course enhance the reputation of The Times for printing material of that nature and quality; but the extracts which would be taken from the letters, however extensive and they might well be very extensive indeed, would merely be as illustrations of the theme.

I can similarly imagine that an extreme left-wing paper might print large extracts from the letters to make it perfectly plain to their readers that those who are Dukes and Duchesses are at bottom exactly the same as members of

the proletariat. Once again the aim would not be to attract readers by means of the extracts from the letters; it would be to ram home a political message.....

..... That seems to me to be exactly what has happened in the present case. There is no blinking the fact that the Sun is trying to attract readers by means of printing these letters or extracts from these letters. That seems to me not to be fair. Without attempting any overall definition of what is not fair dealing, because I think it is as I have by the two perhaps extreme and absurd examples given demonstrated, something which depends on all the facts of the case.”

Fraser-Woodward Ltd vs British Broadcasting Corporation & Anr (supra)

7.8 The facts briefly were as follows: An action for infringement of copyright in photographs concerning the Beckham family was instituted by a company namely Fraser-Woodward Limited. Mr Jason Fraser, photographer, who had taken the photographs of Beckham family, which included David Beckham, a well-known English footballer, his wife Victoria Beckham a member of pop group ‘Spice Girls’ also known as Posh Spice and their two children Brooklyn and Romeo. During the course of the case the Beckham’s had a third child as well. The Chancery Division, while dealing with the defence of ‘fair dealing’ reiterated the test of motives of the user’ (i) that ‘fair dealing’ was a matter of ‘impression’ (ii) excessive use can render a use unfair in ascertaining as to whether the copyrighted works has been dealt with fairly, court will have regard to the actual purpose of the work. An attempt to dress up infringement of another’s copyright in the guise of criticism and, therefore, profit from the same, be discouraged. (iii) substantiality will be an element which will be taken into consideration to determine whether what has been done amounts to a fair dealing or not. The court will be alive to this aspect – where long extracts of the copyrighted work are taken which are accompanied with number of comments. The test should be applied keeping in mind the medium which is used while replicating the copyrighted works. For example when the test of substantiality is applied where the medium is television and a comparative analysis is made by using copyrighted work it may make sense in certain cases to show the entire work for the comparison to be meaningful. Even so it may lead to a conclusion of fair dealing, other things being equal, that notwithstanding substantial portion of the copyright work having been taken it was made

use for the purpose of review and criticism bearing in mind that in case of a television programme the exposure is normally neither continuous nor permanent as compared to printed material. Reproduction of the work in which copyright is claimed should not unreasonably prejudice the other or a conflict with others normal exploitation of work. The court also rejected the plea that any commercial use of copyrighted work would make it unfair. The test was to ascertain the motive behind user of the copyrighted work, i.e., it was a case of genuine criticism or review.

Ashdown vs Telegraph Group Ltd (supra)

7.9 This is a case where the Court of Appeal was called upon to determine as to whether the Human Rights Act, 1998 had impacted on the protection afforded to owners of copyright by the Copyright, Designs and Patents Act, 1998. This issue arose in the following background: In the General Election held on 01.05.1997 the Labour Party won by a landslide margin. Discussions had been held with Liberal Democrats prior to the election for a possible review of the voting system, by introducing some form of proportional representation. After the Election it appears that meetings on this aspect had been held, and one such meeting was held at the British Prime Minister's residence. The record of the minutes of the meeting was kept by the leader of the Liberal Democrats, i.e., Mr Paddy Ashdown. Mr Ashdown, it appears, kept a diary in which the concerned minutes had also been entered. The meeting in issue was held amongst Mr Ashdown, the then Prime Minister and three other persons. The minutes of the meeting were dictated after the meeting by Mr Ashdown to his secretary. Only two copies of the minutes were made; one of which was kept in Mr Ashdown's diaries, the other was read by his closest advisers, and thereafter shredded. The diary and the minutes were treated by him as confidential. It appears that Mr Ashdown intended to publish his diary. These minutes of the meeting were shown by him only to some individuals who were representatives of the newspapers of publishing houses. Considerable interest was shown by Sunday Telegraph but no contract was executed with Sunday Telegraph before publication of the minutes. Before Mr Ashdown could publish his diary a copy of the minute in issue reached the editor of The Sunday Telegraph. The Sunday Telegraph had not paid for the minutes acquired by them.

The editor of The Sunday Telegraph also knew that the document was a confidential. He, in the newspaper article, described it as “leaked document’ and a ‘secret record’. An action was instituted by Mr Ashdown, wherein claims for breach of confidence and copyright infringement were made. Injunction and damages, and in the alternative, account of profits were sought in the claim. An application was made by Mr Ashdown for summary judgment on the ground that the defendant The Sunday Telegraph had no realistic chance of successfully defending the action and hence, there was a compelling reason that the claim should not go to trial. The court, in the first instance, granted an injunction against the defendant for further infringement. It also directed the defendant to disclose the information to enable him to elect between damages and account of profits. While analyzing the rights conferred under the Human Rights Act and those under the English Copyright Act the court made the following crucial observations:

39. We have already observed that in most circumstances the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another’s literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected. Strasbourg jurisprudence demonstrates, however, that circumstances can arise in which freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another.....

.....40. Fressoz and Roire was not a copyright case, but it illustrates a general principle. Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.....

.....45. For these reasons, we have reached the conclusion that rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, in so far as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary

for the court to look closely at the acts of individual cases (as indeed it must whenever a “fair dealing” defence is raised). We do not foresee this leading to a flood of litigation.

46. *The first way in which it may be possible to do this is by declining the discretionary relief of an injunction. Usually, so it seems to us, such a step will be likely to be sufficient. If a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another’s work.*

7.10 On the aspect of public interest the court disagreed with the view of Aldous L.J. in **Hyde Park** (*supra*) and approved the concurrent judgment of Mance L.J. in the same context while making the following observations:

“58. In the light of these judgments, we do not consider that Aldous L.J. was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion of Mance L.J. that the circumstances in which public interest may override copyright are not capable of precise categorization or definition. Now that the Human Rights Act is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the Copyright Act. In such circumstances, we consider that Section 171(3) of the Act permits the defence of public interest to be raised.

59. We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches. We would add that the implications of the Human Rights Act must always be considered where the discretionary relief of an injunction is sought, and this is true in the field of copyright quite apart from the ambit of the public interest defence under Section 173(3).”

7.11 On the aspect of fair dealing the comments of the authors of Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* were cited with approval. These being:

“It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the

most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorized copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

Hawkes & Son (London) Ltd vs Paramount Film Service Ltd. (supra) and Ladbroke (Football) Ltd vs William Hill (Football) Ltd (supra)

7.12 In these two American cases the principle laid down was the same. In *Hawkes & Sons (supra)* the issue was of substantiality. The stress was that substantiality had to be ascertained especially in musical works not always from a quantitative point of view but also from a qualitative point of view by examining as to whether the replicated part was an essential part of the original work. Similarly, in *Ladbroke (Football) (supra)* the *Hawkes & Sons (supra)* case was followed wherein the court observed that in deciding whether there is infringement of copyright in a literary compilation, what requires ascertainment is: firstly, whether the work as a whole is entitled to copyright, and, second, whether the part produced by the defendant is a substantial part of the whole. It would not be a correct approach to dissect the work into fragments if, fragments are not entitled to copyright. In determining whether there has been a substantial appropriation of the copyrighted work quality and not the quantity may be determinable factor.

Baxter vs MCA Inc (supra)

7.13 This was a case where one Baxter had composed seven songs which were intended to invoke or represent emotions. These songs were published in the form of an album entitled 'The Passions'. Joy, one of the composition of the album was used by the defendant in his composition "***Theme From E.T.***". The plaintiff Mr Baxter submitted that the ***Theme From E.T.*** was largely copied from his copyrighted song ***Joy***. The plaintiff accordingly filed an action for infringement and demanded a jury trial. The defendants, on the other hand, moved for summary judgment on the ground that as a matter of law, the song ***Theme from E.T.*** was not substantially similar to protectable expression in ***Joy*** and, therefore, there was no case for infringement. The court, after reviewing the submitted evidence granted defendants' motion for summary judgment. Matter was carried in appeal to the Court of Appeal 9th Circuit. The court observed in order to establish successful claim for copyright infringement the plaintiff must prove (i) ownership of copyright (ii) 'copying' of protectable expression by the defendant (iii) the determination of substantial similarity of expression are subtle and complex. The test to be applied is an 'intrinsic' one by this court, which depends not upon external criteria, but instead upon the response of the ordinary reasonable person to the works. Analytic dissection and expert testimony are not called for; the gauge of substantial similarity is the response of the ordinary lay hearer. Since substantial similarity is usually an extremely close issue of fact, summary judgment is disfavoured on such an issue as a general rule. At the stage of summary judgment the test to be applied is whether reasonable minds could differ as to the absence of substantial similarity of expression as between Joy and Theme from E.T. Since reasonable minds could differ on the issue, summary judgment was not occasioned. Even if copied portion is relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity. The earlier view in the case of ***Robertson (supra)*** was applied.

Sony BMG Music Entertainment, et al vs Jeol Tenenbaum (supra)

7.14 This was a case where the defendant was arraigned as a party in a copyright infringement action for using file-sharing software, as a college sophomore, to download and distribute 30 copyrighted songs belonging to the plaintiffs. The defence set was that

file-sharing constitutes fair use under the copyright act. In this context the court gleaned five factors in order to determine whether a fair use of the copyrighted material has been made:

- (i) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (ii) The nature of the copyrighted work;
- (iii) The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (iv) The effect of the use upon the potential market for or value of the copyrighted work; and
- (v) Whether and to what extent the new work is ‘transformative’.

7.15 The first four factors are articulation of 17 U.S.C. Section 107. In respect of the fifth factor which the court articulated that is, as to whether and to what extent the new work is ‘transformative’ the court went on to observe “when an alleged infringer alters the original work in a way that adds to its literary or artistic value, he engages in precisely the activity that copyright works seeks to promote. The Act encourages others to build freely upon the ideas and information conveyed by a work. In these instances, the injury to the original copyright holder is offset by the public’s gain. As a result when evaluated in combination with the other factors, a transformative use may often be deemed fair. The central purpose of this investigation is to see, whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or character, altering the first with new expression. Fair use guarantees “breathing space within the confines of copyright” for transformative works. Copyright law balances the ‘interests of authors’ with society’s competing interest in the free flow of ideas, information, and commerce. If the potential market for the work is relatively undisturbed, then the tie goes to fair use. The defendant’s submission in the case that his use was non-commercial and hence, he was entitled to presume a fair use notwithstanding the defendant’s usual burden to

prove an affirmative defence, was rejected. The court held that the burden of this affirmative defence lay with the defendant.

8. If I may summarise the broad principles of law which have enunciated in the judgments cited before me on the aspect of “fair dealing”. These appear to be as follows:-

- (i) It is neither possible nor advisable to define the exact contours of fair dealing;
- (ii) It is a question of fact, degree, and at the end of the day overall impression carried by the court;
- (iii) In ascertaining whether extracts taken from copyrighted work have been put to fair use, the extent and the length of the extracts may be relevant. Long extracts followed by short comments may in certain circumstances be unfair, while short extracts followed by long comments may be fair. In certain circumstances even small extracts, which are taken, on regular basis may point to unfair use of the copyrighted work.
- (iv) The right to make fair use or to deal fairly with the copyrighted work includes the right to criticize not only the style, but also as the underlying doctrine or philosophy of the copyrighted work. In this regard criticism could be both “strong” and “unbalanced”. Such criticism by itself will not result in forfeiture of the defence of fair dealing. Malicious and unjustified criticism may give to the aggrieved party a cause for instituting an action for defamation but it would certainly not confer a right founded in copyright.
- (v) In ascertaining as to what would constitute reportage of “current events” or would fall within the ambit of “criticism” or “review”, Courts ought to adopt a liberal approach;
- (vi) In discerning as to whether a person has made fair use of copyrighted work, the standard employed ought to be that of a “fair minded” and “honest person”. In the case of musical works the test would be that of a “lay hearer”;
- (vii) While examining the defence of fair dealing, the length and the extent of the copyrighted work which is made use of, as indicated in clause 3 above, is important, however, it cannot be reduced just a quantitative test without having regard to the qualitative aspect. In other words, enquiry ought to be made as to whether the impugned extract forms an essential part of the work of the person in whom inheres the copyright. This may be

particularly true in the case of musical works where a few notes may make all the difference;

(viii) Even though copyrighted work may contain confidential information, the courts would desist from injuncting the use of such work if it is in public weal. Though there is a difference between a breach of confidence as against infringement of copyright, the Court would not grant an injunction in favour of the person in whom inheres the copyright if it is contrary to public policy, that is, is:

(a) immoral;

(b) scandalous;

(c) contrary to family life ;

(d) injurious to public life, public health, safety or, is inimical to administration of justice; and

(e) incites an action which endangers (c) and (d) above.

(ix) The principle of freedom of expression will protect both information and ideas. Freedom of expression includes the right to publish and receive information. Public interest may in certain circumstances be so overwhelming that courts would not refrain from injuncting use of even “leaked information” or even the right to use the “very words” in which the aggrieved person has copyright, as at times, public interest may demand the use of the “very words” to convey the message to public at large. While the courts may desist from granting injunction based on the principle of freedom of expression, this would, however, not necessarily protect the infringer in an action instituted on behalf of the person in whom the copyright vests for damages and claim for an account of profits;

(x) Public interest and what the interests the public need not be the same;

(xi) The motive of the user shall play an important role in assessing as to whether injunction ought to be granted;

(xii) Commercial use of copyrighted work cannot simplicitor make it unfair; and

(xiii) Lastly, “transformative use” may be deemed in certain situations as fair use of copyrighted work;

9. Let me also refer to few Indian decisions to illustrate the position that the courts in India have broadly taken with respect to infringement of copyright and the defence of fair dealing. In *M/s Blackwood and Sons Ltd. and Others vs. A.N.Parasuraman and Others*, *AIR 1959 Mad 410*, amongst various other questions, the question which arose before court was: whether guides published by the defendants of two books; the first one being “The Return of the Native” by Thomas Hardy, and the other a collection of stories by Rabindranath Tagore violated the copyright claimed by the plaintiffs in the said book, and if it was so, whether the defendants had made a fair use of the extracts taken from the copyrighted work. On facts, the court found in respect of the first issue that since the reproduction of the original work was substantial there had been an infringement. As regards the second issue, the court found that defence of the fair dealing could be appreciated only in the context of the specific exceptions provided in the statute i.e., Section 2(1) of the Copyright Act, 1911. The defendant in that case had invoked the defence of fair dealing on the ground that the work was a work of “research”. Certain principles which are deducible from the said judgment are:

- (i) An infringement of copyrighted work would occur only when there is a substantial re-production of the original work. (see paragraph 70 at page 424).
- (ii) What is protected is not original “thought” or “information” but the “expression of thought” or “information” in some concrete form. The defendant would be liable for infringement if he has made unlawful use of the form in which the thought or information is expressed. (see paragraph 67, where an extract from Copinger on Copyright has been cited with approval). Also see *R. G. Anand vs M/s Delux Films & Ors (1978) 4 SCC 118*.
- (iii) In ascertaining as to whether a substantial part of the work has been reproduced it cannot be dependent solely on the “bulk” or “length of the extract”. “Not only quantity but also the value” is required to be looked at. The ultimate test is: whether there is an “appropriate” or more appropriately “misappropriation” of the labour of another in the matter of expression? An infringement of copyright is in the nature

of invasion of a right to property and therefore the intention of the infringer is irrelevant, provided there is an infringement. (see paragraph 67 where the observation of Lord Cottenham in *Bramwell Vs. Halcomb, 1836-3-My. And Crl 737-738* have been cited with approval).

- (iv) In considering whether the reproduction by the infringer is substantial, the effect of defendant's publication on the competition is only one of the factors which is to be taken into account. If there is extraction of "something of value" to an "appreciable degree" it is immaterial whether the copying is or is not likely to compete with the copyright work. The extent of copying by itself would "negative the fairness". "The motive to compete" would determine as to whether the infringer has dealt with the original work fairly. If there is motive to compete then the dealing would obviously be unfair.
- (v) If "substantial" and "vital" part of the works are reproduced the intention to appropriate on the part of the infringer the labour of others for his own profit having been made out, the court need not look to "proof of any independent oblique motive".

9.1 In the case of *Rupendra Kashyap v. Jiwan Publishing House 1996 (38) DRJ 81*, the plaintiff came to the court seeking an injunction against the contesting defendant against publishing and printing past years' question papers of class X and XII examination conducted by Central Board of Secondary Education (in short 'CBSE') on the ground that he had exclusive licence for publishing the past papers and hence, was the owner of copyright under Section 54 of the Copyright Act, 1957. One of the issues which the court was required to consider was the defence of fair dealing raised by the defendants on the ground that they were dealing with literary work for the purposes of "research" or "private studies". The other question which came up for consideration was that the denial of right to the contesting defendants to publish examination papers would create a monopoly in favour of the plaintiff and hence, would not be in public interest. In respect of the defence of fair dealing the court applied the test of "commercial exploitation" and observed that if a

publisher commercially exploits the original work and in doing so infringes the copyright, the defence of fair dealing would not be available to such a publisher even if the book published by him is used or meant to be used for research or private study. As regards the other issue the court held that the argument of public interest was not tenable as it was not as if the examination papers of the past years were not in public domain. The plaintiff, being the exclusive licensee, had in the past by publishing the papers, put them in the public domain on payment of royalty to CBSE. The court in the passing, however, observed as follows:-

“Moreover, the law as to copyright in India is governed by a statute which does not provide for defence in the name of public interest. An infringement of copyright cannot be permitted merely because it is claimed to be in public interest to infringe a copyright.”

9.2 In ***Wiley Eastern Ltd & Others vs. Indian Institute of Management 61 (1996) DLT 281 (DB)***, the Division Bench of this court was called upon in appeal to consider the correctness of the order passed by the learned Single Judge, whereby the plaint was returned. During the course of the arguments, the plaintiff was also permitted to argue as to whether the court had the jurisdiction to reject the plaint under the provisions of Order 7 Rule 11 of the CPC in the absence of cause of action. In that context the court observed that Section 51 speaks of what is infringement of copyright. If a particular act is not an infringement falling within any of clauses of Section 51, then the act cannot be an infringement. Section 51 being exhaustive as to what is infringement of copyright, resort to Section 52 is not permissible. Section 52 gives examples of fair dealing with regard to literary, dramatic, musical or artistic work for the purposes of research or private study, or for purposes of criticism or review, or a fair dealing for purpose of reporting current events in a newspaper, magazine or periodical or by broadcast or in a cinematograph film. These are constituted as not amounting to infringement of copyright. The court went on to observe that if, use made by the infringer is not fair, in the context of purposes set out in Section 52, it would not ipso facto fall under Section 51; and if, it amounts to defamation, then the remedy of the person may be in the form of damages. Crucially, it was observed that the “basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of

the Constitution of India so that the research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what is an “infringement”. I may only add that approach to be adopted is really whether the impugned action results in an infringement, if it does then one would only look at the gateways in Section 52.

9.3 The Supreme Court in the case of *Eastern Book Company & Others vs. D.B. Modak & Another, (2008) 1 SCC 1* was called upon to adjudicate as to whether the appellants before it (Eastern Book Company) could claim copyright in copy-edited versions of the judgments delivered by the Supreme Court. In other words, could the copy edited judgments of the Supreme Court, which were derivative work, be treated as the original work of the author and, therefore, accorded protection under the Copyright Act, 1957. The broad principles enunciated in the judgment are:

- (i) Copyright protection is based on fair play. A person is not permitted to make a profit out of the skill and labour of the original author. (See paragraph 40).
- (ii) Copyright law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. There is no copyright in facts *per se* as facts are not created nor have they originated with the author of any work which embodies these facts. The issue of copyright is closely connected to that of commercial viability, and commercial consequences and implications.
- (iii) To constitute original work under the Copyright Act, the work must originate from the author and not be copied from another work and it must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment should not be “trivial”, though creative work by definition being original are protected by copyright.
- (iv) The court approved the dicta in the judgment of Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada 19 (2004) 1 SCR 339 (Canada)* in the following words:-

“The ‘sweat of the brow’ approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner’s right, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious – concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy of the objectives of the Copyright Act. Thus, the Canadian Supreme Court is of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.”

9.4 In *ESPN Star Sports* (*supra*) the test of substantiality in the context of ‘fair dealing’ was stressed. The learned counsel for the defendant had laid particular emphasis on observations at page 500 placetum e to g and placetum a to d. In the case of *The Chancellor Masters and Scholars of the University of Oxford vs Narendera Publishing House and Ors (2008) 38 PTC 385* the court in a lucid discussion of the law on the subject of infringement of copyright relied upon the ‘transformative work’ test to determine as to whether there was fair use of the copyrighted work.

10. Having considered the broad principles of the English, American and the Indian cases it appears to me that the Copyright Act, 1957, as amended from time, has incorporated most of the principles enunciated by courts across various jurisdictions. However, in the Indian context the right flows from the statute. In this context it may be, therefore, necessary to advert to some provisions of the Copyright Act to the extent they are relevant. Sub-section (1) of Section 13 of the Copyright Act provides that subject to the provisions of this Section and other provisions of the Copyright Act, copyright shall subsist throughout India in the following classes of works which includes (i) original literary, dramatic, musical and artistic works; (ii) Cinematograph works; and, (iii) sound recordings. Section 14 states that copyright means the exclusive right to do or authorize the doing of the acts in respect of a work or any substantial part thereof as provided in classes (a) to (e) enunciated therein. The rights of the copyright holder are subject to other provisions of the Copyright Act. Section 17 recognizes the fact that the author of the work shall be the first owner. This

again is subject to the other provisions of the Copyright Act. Section 19 provides the methodology by which an author can assign his rights in a copyrightable work. Similarly, Section 30 recognizes the right of the owners of copyright to execute a licence in respect of their works. Section 31 provides for compulsory licenses in respect of works which are unreasonably withheld from public. The power in this respect has been given to the Copyright Board. Section 51 alludes to actions which would result in infringement of copyright. As to the actions which will not constitute infringement of copyright are provided in Section 52 of the Copyright Act. The definition of an infringing copy is provided in Section 2(m).

10.1 For the purposes of the controversy which has arisen in the present case, it may be relevant to refer to Sections 52(1)(a) and 52(1)(b) as also Section 39(b). These provisions set out the gateways against the action for infringement of copyright. The gateways being: the publication or broadcast of copyright work for the purposes of criticism, review of reportage of current events.

10.2 A reading of the aforesaid provisions and the pleadings filed in the case would show that prima facie the plaintiff has a copyright in the works referred to in the plaint. As noted hereinabove, the defendant has, however, put the plaintiff to proof in that regard; which, according to me is an issue that would be finally determined at the trial of the suit. For the purposes of the captioned application, it may perhaps be relevant to allude to the submissions made. The defendant before me, has argued that apart from the fact that there are no “substantial takings” of the plaintiff’s work, the extracts taken, in any event, have been made ‘fair use’ of as they were used for “criticism”, “review” and/or for reporting “current events”. In this case, I examined the CDs filed by the plaintiff. An examination of at least the following CDs demonstrated that the purpose for which they were used did not fall within the exceptions carved out in Section 52(1)(a)(ii) or Section 52(1)(b)(ii) or Section 39(b) of the Copyright Act. The musical works in respect of which the plaintiff claims copyright had no relevance to the programme telecast by the defendant. This is quite evident from the following descriptor in respect of at least some of the programmes given hereinbelow.

HAMAR TV							
Date	File/ Album	Song	Track	Time (Hrs.)	Dur. (sec.)	Prog.	Comment- Musical score played in the background which has no relevance to the content/report
10.09.2009	Tezab	Jeena Nahin	Audio + Video	19:49	30	Hamar Mumbai	Report on attempt to suicide and murder in Mumbai.
12.09.2009	Taaren Zameen Par	Maa	Audio track	19:53	76	Khabar 7 Baze	Programme on abandoned child.
02.09.2009	Fashion	Jalwa	Audio + Video	17:03	27	Fashion	Entertainment show based on the fashion industry.
03.11.2009	Delhi 6	Genda Phool Remix	Audio track	08:53	18	Hamaar Khabar	Clippings of Khadi fashion show.
04.11.2009	Don	Main Hoon Don	Audio track	14:46	10	Hamaar Khabar	Report on fake manure scam.
08.11.2009	C Kkompany	Khokha	Audio track	15:47	10	Hamaar Khabar	Report on the Koda Scam in Jharkhand.
03.12.2009	Luck	Aazma Luck	Audio track	08:42	56	Hamaar Zarkhand	News report covering elections in Jharkhand.
FOCUS TV							
02.12.2009 & 03.12.2009	Paa	Teaser	Audio + Video	19:26	10	News	Report on progeria patients.
03.11.2009	Delhi 6	Genda Phool Re-mix	Audio track	20:18	12	Focus 8 Baje	Clippings of Khadi Fashion Show.
05.11.2009	Golmaal Returns	Golmaal	Audio track	15:53	40	Focus Future	Song played in the background showing children playing.
09.11.2009	Shool	UP Bihar	News	8:46	47	Breakfast with Focus	An entertainment programme on engagement of Shilpa Shetty and her sister's absence.

11. The first issue, therefore, which arises is: did the defendant take substantial extracts from the plaintiff's work. In my view, there is a complete convergence on the issue as to what constitutes "substantial takings". The law in India on this issue does not seem to be any different from that in England or in USA. Therefore, while the extent of extract, that is, the "quantitative" test has its part to play in determining infringement of a copyrighted work the "quality" is equally important. This is especially so, in the case of a musical work. A single note may in certain cases lead to an infringement if it forms an "essential" part of the

copyrighted work. The test will have to be that of a “lay hearer”. Applying this test to the material filed prima facie leads me to a conclusion that the extracts taken are substantial.

11.1 The next question which arises is: was the use of the extract “fair”. As indicated hereinabove, a defendant can rely upon the gateways carved in Section 52 or 39 only if he is able to demonstrate that the copyrighted work is used for purposes indicated therein. If the defendant has an arguable defence the court will refuse an injunction. In the instant case, out of a large number of allegedly infringing material produced before me most of them did not fall within the exceptions provided in Section 52(1)(a)(ii) or Section 52(1)(b)(ii) of the Copyright Act. They were neither used for the purposes of criticism or review nor shown to be necessary for the purpose of reportage of current events. I have carefully alluded to the extreme instances out of the material filed before me to demonstrate the point.

12. The question, however, remains as to what would be nature of the interim order which the court can pass in a case like this. The defendant is in the business of running T.V. channel. Each infringement, if it occurs, supplies a fresh cause of action. The plaintiff in the suit, apart from seeking a permanent injunction, has also sought rendition of accounts of profits and a resultant decree in respect of amounts found due. In my opinion it is not possible to anticipate an infringement by the defendant from here on. The defendant would do well in refraining from using the copyrighted work of the plaintiff contrary to principles of “fair dealing” referred to hereinabove. In the event it is found at the stage of trial that the defendant continued to use the plaintiff’s copyrighted work there would possibly be a cause for grant of aggravated damages.

13. The applications are disposed of with the aforementioned observations.

RAJIV SHAKDHER, J

MAY 24, 2010

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