

# **Espn Stars Sports vs Global Broadcast News Ltd. And Ors. on 18 February, 2008**

**Equivalent citations: MIPR2008(2)75, 2008(36)PTC492(DEL)**

**Author: S. Ravindra Bhat**

**Bench: S. Ravindra Bhat**

## **JUDGMENT**

S. Ravindra Bhat, J.

LA No. 1469/2008 (Under Order 39 Rules 1 and 2 CPC)

1. The plaintiff has sought permanent injunction against the defendants to restrain them from utilizing the footage of plaintiff, in the matches played, and to be played during the India-Australia test matches, 2020 series and the tri-series One day internationals involving Sri Lanka, India and Australia, without obtaining its prior permission and in violation of the plaintiff's terms and conditions and from utilizing the footage from the television for any television programme, except for regularly scheduled news bulletin, in excess of 30 seconds per bulletin and a total of two minutes per day and from carrying any advertisements before, during and after such footage. An ad-interim injunction to the same effect has also been sought.

2. The plaintiff, ESPN Star Sports is a general partnership under the laws of the State of Delaware, United States of America. Its beneficial owners are Star Group Limited (50%) and ESPN, Inc (50%). The latter is a subsidiary of the Walt Disney Group. The Plaintiff has its office in Singapore; it is engaged in the production and the telecasting of sports channels under the name of ESPN, STAR Sports and STAR Cricket (referred to as 'Channels') among others, in India. It's principal production facility is located in Singapore. It broadcasts 12 channels from that facility to about 26 countries. It claims to have the services of 35 dedicated, fulltime, award winning professionals. It retains three dedicated leased satellite lines from London. The Plaintiff has engaged the services of world class cricket commentators. It creates live feed by deploying the range of 18-26 cameras on the ground apart from software such as Hawk eye, Snickometer, virtual spectator and super slow motion etc.

3. The plaintiff avers that it has obtained the sole and exclusive rights/license from various sports bodies including but not limited to Cricket Australia to televise sporting events including the India versus Australia cricket test matches, One Day International (ODI) matches and the solitary T20 cricket match to be played in Australia from December 26, 2007 onwards till March 8, 2008 (hereafter referred as the 'Cricket Matches'). Therefore, no other person or entity can broadcast/telecast those cricket matches in India without license from the Plaintiff or its sole and

exclusive distributor ESPN Software India Private Limited.

4. That Defendant No. 1, Global Broadcast News Limited, is a Broadcaster having a number of news channels by the name of 'CNN-IBN' and 'IBN7'. The Defendant No. 2, TV Today Network Pvt. Ltd., is a Broadcaster which has news channels by the name of 'Aaj Tak' and 'Headlines Today'. The Defendant No. 3, Media Content and Communications Services India Pvt. Ltd., is a Broadcaster having a news channel by the name of 'STAR news'. Defendant No. 4, Zee News Ltd., is a Broadcaster having a news channel by the name of 'Zee News'. Defendant No. 5, New Delhi Television Ltd, is a news Channel by the name of 'NDTV 247'.

5. The plaintiff avers that it entered into an exclusive license Agreement dated 26th July 2002 (valid for the period 1st May 2002 to 30th April, 2008) with Cricket Australia (CA) whereby the former was granted exclusive rights to make live and/or delayed and/or pay broadcasts of feeds of the cricket matches by terrestrial television, cable television and/or satellite television in India and other specified countries. The cricket matches started at Melbourne, Australia from December 26, 2007 and the test matches got over on January 28, 2008. The Twenty20 cricket match and the ODIs would continue till March 8, 2008. It is claimed that after the cricket matches began, the plaintiff's distributor's field staff, in various locations noticed that the Defendants were unauthorizedly telecasting the signals of such matches, which was inconsistent with their primary obligation of being news based channels(s), beaming news bulletins or current affairs. The defendants allegedly used, without authority, substantial portions of the plaintiff's footage of its Star Cricket channel, which had telecast the test matches exclusively, from December 26, 2007 to January 28, 2008. It is alleged that the defendants used the footage for creating programmes which they commercially exploited. This it is claimed by the plaintiff is impermissible in law and inconsistent with the concept of fair dealing and is violative of the Plaintiff's broadcast reproduction rights.

6. The Plaintiff avers to issuing notices through their distributor on January 10th, 2008 to the Defendants calling upon them to cease and desist from extensively using the Plaintiff's footage of India versus Australia cricket test matches. The Plaintiff, agreed through its distributor, to offer all the Defendants permission to use the footage, provided the Defendants requested for permission, and agreed to confine the use of such footage to not more than 2 (two) minutes each day and in certain situations to seven (7) minutes in the course of twenty four hours. The Defendants did not reply to the notice despite receiving it.

7. To ensure that its footage was not unauthorizedly utilized, the Plaintiff's distributor also appointed M/s TAM Media Research Private Limited (TAM), a reputed media industry organization to monitor the telecasts by various channels and prepare a report. The reports received from TAM, it is averred, indicate that the defendants were utilizing footage of the matches for generating cricket match programmes, broadcasting programmes other than scheduled News Bulletins, and using excess secondage during news bulletins. The Defendants also booked advertisements in respect of the said programmes. Such advertisements were telecast before, during and after the use of cricket match footage. These actions, it is claimed violate the Plaintiff's broadcast reproduction rights.

8. The Plaintiffs claim to have noticed various violations of their broadcast reproduction rights by the Defendants. These allegedly include the following:

(a) The Defendant No. 1 on its channel CNN IBN aired a programme by the name of 'LOC : Love of Cricket' and 'Shame on Bucknor' where it extensively used the Plaintiff's footage of the India Australia cricket test match at Sydney.

(b) The Defendant No. 2 in its channel "Aaj Tak" used the Plaintiff's footage of an interview of Mike Proctor, the match referee for the Sydney test match, in their programme titled 'Yeh cricket kuch kehta hai'. It is alleged that Aaj Tak, the news channel could have interviewed Mike Proctor on its own without using substantial portions of the Plaintiff's footage of the interview. Headlines Today and Aaj Tak the two channels owned by Defendant No. 2, too allegedly used the plaintiff's footage extensively in their news bulletins; it cannot be considered to be fair dealing.

(c) (i) The Defendant No. 3, i.e. Star News, in their programme 'Wah cricket' exclusively sponsored by M/s Airtel created the programme based mainly on the Plaintiff's footage.;

(ii) Defendant No. 3 extensively and unauthorizedly used the Plaintiff's footage in an array of programmes like 'Faisle Par Sawaal', 'Harbhajan par Pabandi' and 'Bucknor Tisre Test se Bahar'.

(d) Defendant No. 4 i.e. Zee News extensively and unauthorizedly used the Plaintiff's footage and telecast for three days in various programmes like 'Dono Umpire Baimaan', 'Sydney Ke Villain', 'Beimaani ka Test', 'Kangaruon ka Kala Khel' and 'Bucknor Be Bakabak'.

(e) Defendant No. 5, i.e. NDTV 24x7, did not make specific programmes, but in the course of its news broadcast extensively and unauthorisedly used the plaintiff's footage in an alarming ratio over three days.

(f) The Defendants also broadcasted from time to time the old/archival footage of the Plaintiff, which cannot be construed as news and other current affairs programme. It is unlawful and violative of the Plaintiff's broadcast reproduction right.

9. The plaintiff alleges that the data concerning the India-Australia test cricket matches between 26-12-2007 and 28-1-2008 from TAM showed that the Defendants blatantly utilized the Plaintiff's footage unauthorisedly from January 6, 2008 to January 8, 2008. The Defendants utilized and continue to utilize the Plaintiff's footage of the four test matches, apart from the utilization of the plaintiff's footage of live and exclusive programming of Australia Open Television which was broadcast on Star Sports. It is alleged that during the period, TAM was requested to monitor and report the defendant's activities. Defendant No. 4 unauthorisedly utilized the Plaintiff's footage to the extent of 16 hours 16 Minutes and 47 seconds. The Defendant No. 4 also generated a programme

by the name of 'Bucknor Tune Kya Kiya' wherein it unauthorisedly utilized 1117 seconds (18 minutes 37 seconds) of the footage of the match. The Defendant No. 3 unauthorisedly utilized the Plaintiff's footage of the cricket match to the extent of 11 hours 30 minutes and 19 seconds. The Defendant No. 2 unauthorisedly utilized the footage to the extent of 9 Hours 24 minutes and five seconds. Defendant No. 1 unauthorisedly utilized footage to the extent of 9 hours 33 minutes and 12 seconds and also generated a programme 'Interviews/Portraits/Discussions'. The Defendant No. 5 unauthorisedly utilized the footage to the extent of 9 hours 4 minutes and 40 seconds.

10. The defendants were on caveat. They were represented through counsel. They raised preliminary objections regarding maintainability of the suit and also addressed on the merits of the application under Order 39, Rule 1 and 2.

11. Mr. Dushyant Dave, learned senior counsel for the plaintiff-applicant submitted that the court should on an overall conspectus of the materials on record placed before it and the contentions made, grant an ad-interim injunction restraining the respondents from telecasting unauthorized footage of the plaintiffs.

12. Learned Counsel extensively relied upon the report of the Media Consultant, TAM Media Research Private Limited, forwarded to the plaintiff on 23rd January, 2008. A copy of the same had been produced in the record, in support of the suit. Learned Counsel submitted that each of the defendants exceeded the 30-second time limit for each program/news bulletin and use of footage for up-to almost two minutes on such occasions. Learned Counsel relied upon the report to say that the duration almost invariably exceeded 30 seconds in each case. He pointed out that in many instances the plaintiff's footage was repeated over and over again in successive programs and that credit was never given for such footage.

13. According to learned Counsel, the plaintiff had clear and exclusive rights in terms of the agreement between it and the ACB. He relied upon Clause (1) to say that the license was exclusive. Part-I of the Schedule to the license was also relied upon, to say the definition of 'programme' meant television coverage of Cricket events in Appendix "A" and also other materials, as well as the assurance that each programme of the events would be available in the form of a continuous international 'live' signal at the venue of the event. The license period, according to the clause 3.1 is 1.5.2004 to 30.4.2008. Clause 5.1 defines nature of the exclusive rights, it extends to all forms of television media including Free to Air Transmissions; Satellite Television, Cable Television, Satellite Cable Television, MMBS, SMA T.V., Closed Circuit T.V. It was submitted with reference to Appendix "A" to the Schedule that the events for which the exclusive license extend, include the Three Test India-Australia Series, Fifteen ODI Triangular Series between December 2007 and February 2008. Counsel also relied upon a certificate issued by the licensor's agent i.e. Octagon CSIC International Holding that the plaintiff was granted sole and exclusive rights to broadcast/telecast through all means of television in the territory of India. The India tour of Australia comprises two warm-up matches, Four Test Matches, Fifteen One-Day Internationals and a Twenty20 International, played between December 2007 and March 2008. A copy of the certificate dated 20th December, 2007 was relied upon for this purpose.

14. Learned Counsel submitted that broadcast reproduction rights are a special class of rights, recognized under Part VIII of the Copyright Act, 1957 (hereafter 'the Act'). He relied upon Section 37 for the purpose. According to counsel, Section 37(3) provides, in clauses (a) to (e) acts deemed to be infringement of broadcast reproduction rights. According to the counsel, the unauthorized telecast of footage belonging to the plaintiff, by the defendants, amounted to re-broadcast under Section 37(3)(a) and also reproduction of the event under Section 37(3)(d). Learned Counsel submitted that the only exception recognized under Chapter VIII of the Act was the use, consistent with fair dealing, excerpts of any programme, in the broadcast of current event or bona fide review for teaching and research, embodied in Section 39(b). It was submitted that the use of footage for hours at an end aggregating to between 10 to 16 hours in a span of 3-4 days, as indulged by the defendants, can never be considered as fair dealing and was in any event is not bona fide.

15. Mr. Dave, learned Counsel submitted that the special nature of broadcast reproduction rights, can be clearly gathered by Section 39A which makes only few provisions of the Act applicable with suitable adaptation, having regard to the nature of the broadcast rights. According to the counsel, the express reference to certain provisions in Section 39A rules out the application of all other provisions of the Act in respect of broadcast reproduction rights which are a species of copyright and for which Chapter VIII constitutes a complete Code. It was, therefore, submitted that technical requirements such as the need to implead the owner of the Copyright in this case, (i.e the ACB), in terms of Section 61(1), therefore, were inapplicable.

16. Learned Counsel relied upon the Broadcast Code published by the British Broadcasting Corporation (BBC) and BSkyB, dated 29.2.2006. It was submitted that in such documents, concepts such as 'footage', 'primary service provider', 'sporting events' and 'permitted duration of extracts' etc. are clearly spelt out. These disclose that clear caps in terms of time have been indicated in news item reporting of specified sporting events. Generally, they do not exceed 90 seconds per sport events within the specified events. Learned Counsel also relied upon Minutes of the meeting and usage of cricket events events telecast by Doordarshan, by other T.V. Channel held on 9.12.2005. In its terms, no single news channel is permitted to use more than 30 seconds of fresh footage in a half hour news bulletin; this too is subject to a cap of seven minutes in one day i.e. 24 hours. This 30 second cap, is relaxed in exceptional cases to report landmark achievements or outstanding performances and not in any other circumstances.

17. Counsel relied upon an order of this Court in *Prasar Bharti v. Sahara T.V. Network Pvt. Ltd.* dated 25.11.2005 CS(OS) 1523/2005 where the Court had tacitly approved the seven minute cap in 24 hours for exhibition of footage and also directed that use of such time shall be only for giving cricket news without any commercial programmes, advertisements during and after the cricket news. He also relied upon *Hubbard and Anr. v. Vosper* [1972] 1 All ER 1023, to submit that if extracts or footage are used as a basis for comment, criticism or review, that may be a fair dealing, whereas if they are used to convey the same information as the copyright owner's right, for a rival purpose, that may be unfair. Similarly, use of long extracts and attaching short comments may be unfair. He also relied upon the decision in *Ashdown v. Telegraph Group Ltd.* [2001] 4 All ER 666, to submit that the defense of fair dealing depends on three factors: (1) whether the alleged fair dealing is in commercial competition with the owner's exploitation of work/instance of the owner of the

copyright copyright; (2) whether the work/ performance has already been published or otherwise exposed to the public and (3) the amount and importance of the work, copyright of which has been taken.

18. It was contended that if the injunction sought for is not granted, the plaintiff would be gravely prejudiced and the defendants would merrily keep infringing its broadcast rights as well as copyright in terms of exclusive license rights. In order to ensure that the plaintiff's rights are secured and that its exclusivity is adequately protected, the defendants should be suitably restrained through an ad interim order and that in the event of failure to do so, plaintiff's losses cannot be compensated in material terms or sufficiently, through damages on a later date.

19. Mr. Harish N. Salve, learned senior counsel submitted that the suit itself is defective and had to be rejected. He relied upon Section 61(1) of the Copyright Act to say that in every action, claiming infringement, the owner of copyright should necessarily be made a party to the proceedings. The plaintiff deliberately chose to exclude the owner of the copyright i.e. ACB from the proceedings. In the circumstances, the suit is not maintainable and had to be rejected at the threshold.

20. Learned Counsel next urged that the nature of the plaintiff's license has not been disclosed to the Court, raising questions about credibility of the its claim to being an exclusive licensee of the ACB. He submitted that the copy of the license dated 26th July, 2002 produced in Court in support of the plea of exclusive license conferred upon the plaintiff, raises grave questions about the plaintiff's rights. He submitted that crucial sections of the agreement, particularly, those dealing with the content of the license, and exceptions of the exclusive rights, have been withheld from the Court. It was, therefore, submitted that the suit does not disclose the plaintiff's cause of action to maintain a claim for infringement.

21. Learned Counsel also urged that on the existing materials, even if the maintainability of the suit were to be assumed, no interim injunction can be granted. It was urged by Mr. Salve that the nature of the injunction sought pre-supposed a 30 second or a two minute cap for reporting of each event. According to the counsel, there is no law, regulation or provision in any statute which places such a limit or restriction. Counsel submitted that even a fair reading of the decisions cited on behalf of the plaintiff would clarify that, what constitutes fair dealing would depend entirely upon on the circumstances of each case. It was submitted that reportage of sporting events or episodes in some instances can well justify the enlargement of the so-called 30 second rule. He dwelt at some detail with the nature of the controversies surrounding the Harbhajan Singh and Steve Bucknor episode, which according to the counsel, shook the cricketing world, generally, and Indian spectators and cricket lovers in particular. It was submitted that the episode was not merely a sporting event but something larger; in a society which is cricket crazy a news channel would be well justified in exceeding the so-called 30 second or two minutes rule, in such a background. Counsel submitted that in any event it would be fanciful and artificial to attempt placing such restrictions, especially in the case of panel discussions etc. which essentially deal with report of such events, as well as reporting of current events. Counsel submitted that the interim order in the Prasar Bharati case was given in the peculiar circumstances of that case and had to be limited for that instance alone. He read the said order to submit that the Court did not consciously evolve a principle for general

application and even recorded that the said 7 minutes rules in 24 hours with the further restrictions upon advertisement for that duration, was directed in view of the lack of opposition by counsel appearing for the parties in that case.

22. Learned Counsel urged that an important factor which the Court has to bear in mind while considering the grant of interim relief, is the feasibility and practicability of supervising such injunction. It was submitted that the first relief sought, i.e., restraint order in respect of the test match series is incapable of being granted as that series had ended by the time, the suit was filed. Counsel submitted that if the injunction were to be granted in respect of the One Day International Series or even the Twenty20 series as sought for, the Court would be called upon to supervise on a virtual day-to-day basis whether the defendants are complying with it; if not, to what extent. In these circumstances, the plaintiff can well calculate the degree of harm likely to ensue in monetary terms, for the alleged infraction of its rights. It can sue and recover damages. The court should not grant an inchoate injunction incapable of enforcement. Learned Counsel further submitted that the so-called license agreement relied upon by the plaintiff does not even refer to the Twenty20 series thus raising grave concerns about the so-called exclusive nature of the rights conferred.

23. Ms. Pratibha Singh, learned Counsel for one of the defendants adopted the submissions advanced on behalf of the first defendant and additionally urged that the nature of the rights claimed by the plaintiff are what are popularly known as 'neighbouring rights', i.e. adjunct to those of the primary copyright holder. It was submitted that the claim of exclusive operation of the provisions of Chapter VIII of the Act cannot be sustained because broadcast rights, which are sought to be protected are only a species of copyright and do not stand apart from other provisions such as Section 30 (which deals with the rights of licensee) and the provisions in Sections 18 and 19 (which mandate the procedure for assignment of copyright). It was submitted that even Section 39A (c) recognizes this reality as is evident by the express reference to Section 52 which contains the whole bundle of details as to what constitute fair dealing. In fact the concept of fair dealing is borrowed from Section 52 and Section 39A cannot be read as limiting those rights. If these provisions are read harmoniously the question of excluding applicability of Section 61(1) can never arise. Counsel submitted that in the circumstances, the deliberate omission to implead the primary owner of the Copyright, the ACB, i.e. the alleged licensor is fatal to the suit and it has to be dismissed.

24. Mr. Manmohan, learned Counsel for the other defendants submitted that this Court should not maintain the suit also for the reason that M/s. ESPN Software Private Ltd. had approached this Court by another suit, CS(OS) 146/2008 claiming the same rights and also the same relief; yet that suit was withdrawn on 29.1.2008 upon the present defendants objecting to its maintainability due to non-compliance with Section 61(1) and not impleading the licensor/ACB. Leave to file the suit in accordance with law was sought, the same was granted upon those objections and the suit was permitted to be withdrawn on 29.1.2008. Nevertheless, the plaintiff filed this suit without complying with the terms of Section 61.

25. Before a discussion on the merits of the submissions made by the parties, it would be necessary to extract the relevant provisions of the Act; they are as follows:

## Provisions of the Copyright Act

2. (dd) "broadcast" means communication to the public-

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast;

(j) "exclusive license" means a license which confers on the licensee or on the licensee and persons authorised by him, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work, and "exclusive licensee" shall be construed accordingly;

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### 16. NO COPYRIGHT EXCEPT AS PROVIDED IN THIS ACT.

No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

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### 18. ASSIGNMENT OF COPYRIGHT.

(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression ``assignee'' as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.





The provisions of Sections 19 and 19A shall, with any necessary adaptations and modifications, apply in relation to a license under Section 30 as they apply in relation to assignment of copyright in a work.

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### 37. BROADCAST REPRODUCTION RIGHT.

(1) Every broadcasting organisation shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-

(a) re-broadcasts the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or

(e) sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d), shall, subject to the provisions of Section 39, be deemed to have infringed the broadcast reproduction right.

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### 39. ACTS NOT INFRINGING BROADCAST REPRODUCTION RIGHT OR PERFORMER'S RIGHT.

No broadcast reproduction right or performer's right shall be deemed to be infringed by-

(a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or

(b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or

(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52.

### 39A. OTHER PROVISIONS APPLYING TO BROADCAST REPRODUCTION RIGHT AND PERFORMER'S RIGHT.

Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work:

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no license to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

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### 55. CIVIL REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that to the author or the publisher, as the case may be, appears on copies of the work published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the court.

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61. ownerS OF COPYRIGHT TO BE PARTY TO THE PROCEEDING.

(1) In every civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.

(2) Where any civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceeding in respect of the same cause of action shall lie at the instance of the owner of the copyright.

26. Section 16 provides that there is no copyright except in terms of provisions of the Act. Assignment of copyright is dealt with under Section 18; an assignee of copyright becomes owner entitled to copyright to the extent of assignment. Section 19 deals with the mode of assignment; Section 30 empowers grant of license to licensees; this has to be in terms of Section 19, by virtue of Section 30A. Chapter VIII deals with broadcasting rights. These are, by Section 37 defined as 'special rights'. Section 37(3) prescribes that if during the continuance of a broadcast reproduction right in relation to any broadcast, any person without the license of the owner of the right does any acts of broadcast or any substantial part thereof, i.e. re-broadcasts the broadcast; makes any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording is deemed, subject to the provisions of Section 39, to have infringed the broadcast reproduction right. Section 39(b) provides that excerpts of a performance or of a broadcast in the reporting of current events or for bonafide review or for research, is not deemed to be an infringement.

27. The entire case hinges on the plaintiff's allegation about its exclusive broadcast reproduction rights. The defendants object to the extent of the license; it is contended that in the absence of a copy of the entire license, the court should not assume that the plaintiff possesses the rights claimed by it. The copy of the documents filed by the plaintiff in this regard are the license agreement dated 26th July 2002 entered into with Cricket Australia's agent and a certificate issued by M/s Octagon International. The agreement does mention grant of exclusive rights, for events or 'programme' defined as meaning television coverage of cricket events in Appendix 'A'. Each programme of the events is made available in the form of a continuous international 'live' signal at the venue of the event. The license period, according to the clause 3.1 is 1.5.2004 to 30.4.2008. Clause 5.1 defines nature of the exclusive rights, it extends to all forms of television media including Free to Air Transmissions; Satellite Television, Cable Television, Satellite Cable Television, MMBS, SMA T.V., Closed Circuit T.V. It was submitted with reference to Appendix 'A' to the Schedule that the events for which the exclusive license extend, include the Three Test India-Australia Series, Fifteen ODI Triangular Series between December 2007 and February 2008. Yet, intriguingly, the entirety of the document has not been revealed. Some of the salient features which can be gathered from the document placed on record, may be summarized below: 1) The expression 'exclusive' according to

clause (1) of the agreement means what is defined in Part 5 of the schedule. The entire part of the schedule has not been disclosed. 2) According to clause 5 (Part 5) disclosed, the licensee has the exclusive right to exhibit programmes in part or whole during the period specified, subject to other terms in the agreement, including the rights not granted. This includes all modes of television coverage, wireless transmission, broadband rights, etc; the rights excluded however, are mentioned in Clause 5.1 (1) to (5) 3) Clauses 5.2 (b) and 5.6 (a), 5.7, 5.8, 5.9, 5.10 and 7.0 to 7.9; 8 and 9.0 to 9.4; 11.6, 11.8, 11.10 and 11.13 have not been disclosed; those conditions have been 'blanked out' from the copy filed in court. 18 pages of the 55 page-copy are completely blank; in addition, six pages contain portions which are not disclosed and conditions which are disclosed in part. 4) The agreement, in the schedule relating to programmes, mentions the 3 test match series and the one day international series; yet the plaintiff claims exclusive rights in respect of the 'warm up matches' in Australia, and the Twenty20 match. The basis of this claim is a certificate, issued by M/s Octagon. No attempt has been made to disclose how these rights were acquired, and through what document or agreement.

28. The resultant position is that the plaintiff is today claiming a restraint order against the defendants on the basis of incomplete documents. It is not as if this is a technicality; the omission, according to this Court, goes to the heart of the claim itself. The right which the plaintiff claims is not as a copy right holder, but as an exclusive licensee. Now a license- exclusive or otherwise, has to conform to provisions of law. By virtue of provisions of Sections 30 and 30A (the former being expressly referred to in Section 39A) the provisions of Sections 19, as far as they deal with the procedure for assignment, i.e. the requirement to be in writing, etc, apply with equal vigor. Thus, a broadcast right holder (i.e. the performer or primary holder of copyright) has copyright in the programme; in case he wishes to assign it, that should be in accordance with Section 18-19; in case a license is to be created, that has to conform to the requirements of Sections 30 and 19/Section 19A.

29. It is well settled that injunction, even an ad-interim one, is an equitable remedy (Ref M/s Power Control Appliances and Anr. v. Sumeet Machines ; Gujarat Bottling Co. Ltd. v. Coca Cola etc. He who seeks equity should come with clean hands; he should also make full disclosure of the extent of the right asserted. In the context of this case, the disclosure has to be as to the full extent of the license claimed, with all its limitations and exceptions. The non-disclosure of the entire agreement is thus an important factor which weighs against the grant of ad-interim relief.

30. It would be necessary to examine the other arguments made on behalf of the plaintiff, for grant of temporary injunction. It has been held that the object of an interim injunction '...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies.' (Ref Wander Ltd. v. Antox India P. Ltd. 1990 (Supp) SCC 726)

31. The entire case averred and pleaded was that the defendants' conduct is not consistent with fair dealing; it is not bona fide. The defendants, on the other hand, urge that there is no universal standard in this regard; each case has to be judged on its merits. It is additionally urged for them that the plaintiff's claim for relief amounts to seeking an injunction incapable of supervision, which the court should desist from granting.

32. The Court of Appeal, in Vosper (*supra*) held:

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 a 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.

The test indicated in *Ashdown* was based on the Textbook "The Modern Law of Copyright and Designs (3rd edn, 2000)" by Laddie, Prescott and Vitoria. The court held that:

the authors suggest that the success or failure of the defense depends on three factors: (1) whether the alleged fair dealing is in commercial competition with the owner's exploitation of work, (2) whether the work has already been published or otherwise exposed to the public and (3) the amount and importance of the work which has been taken.

33. What the plaintiffs suggest is that any clipping of the sport event exceeding 30 seconds per news bulletin and exceeding seven minutes in any twenty four hours, amounts to unfair dealing. Reliance has been placed upon a broadcast code evolved by Prasar Bharti, as well as an order of this Court in CS (OS) No. 1523/ 2005 *Prasar Bharti v. Sahara TV Network Pvt. Ltd. and Ors.* The court did, no doubt indicate that limit; yet what cannot be ignored is that the standard was evolved with consent of the parties to the litigation. Here, no such consensus appears to be forthcoming; on the other hand, the defendants contest that their use was unfair. It is urged on their behalf that the controversies covered and debated in shows and programmes amounted to reviews and discussions, and also that the nature of the events discussed had rocked the cricketing world as a whole, thus rendering the so called 30 second 7 minute rule inapposite.

34. As observed in Vosper, whenever a court has to see whether a particular conduct is 'fair dealing' or not, the context, the length of the original work borrowed, and the purpose, can never be ignored. No universal rule or standard exists; cases have to be decided on the peculiar facts. What may be unfair in one context may be perfectly fair in another and vice versa. There is a certain amount of elusiveness in evolving a thumb rule. Judged from this standpoint, the court finds it difficult to

accept that a 30 second limit or 7 minute cap can apply 'across the board' in all contingencies. Similarly, the court cannot universalize that recourse to advertisements before or after broadcast of such clippings would be unfair. In the circumstances of this case, the plaintiffs have not shown sufficient materials, barring the aggregate length of the clippings used by defendants in their news programmes and sports reviews, to say that it amounted to unfair dealing. In any case, there is no imminent threat or danger of legal injury of such kind that damages or a claim for money cannot compensate. Even if the defendants' use of the clippings were, or partly were to be found as unfair use, the plaintiff can be adequately compensated in damages. On the other hand, the nature of injunction sought is of such a broad nature that the court would well be drawn into details, while attempting to supervise it a course of action hardly desirable if not entirely unfeasible.

35. For the above reasons, the plaintiff cannot be granted the ad-interim injunction sought for. The application is dismissed. CS (OS) 219/2008

36. The defendants questioned the maintainability of the suit on the ground that the plaintiff's cause of action has not been disclosed and also that in the absence of the owner of the copyright, under Section 61(1) the suit has to fail.

37. The first limb of the objection pertains to the non disclosure of the plaintiff's claim for exclusive license. Here, the argument of the plaintiff is that it is exclusive licensee; reliance has been placed upon the license granted in 2002. The defendants, on the other hand, submit that the withholding of the full document, claimed as the license on the basis of which this suit is founded, is fatal, as it reveals that the plaintiff's assertion is suspect.

38. The second objection is that failure to implead the owner of the copyright, ACB is fatal to the suit. The plaintiff's response to this argument is that the said provision, i.e. Section 61 has no application to Chapter VIII, which deals with broadcast rights. Only specific provisions of the Act are applicable; they have been expressly indicated in the statute.

39. The second objection can be taken up first. Now, Section 61(1) creates an absolute standard in the case of civil action for infringement of a copyright; it prescribes that in every suit for infringement of a copyright filed by an exclusive licensee, the owner of the copyright has to be, unless the court otherwise directs, made a defendant and where such owner is so impleaded, he can ('has the right') to dispute the claim of the exclusive licensee.

40. No doubt, Chapter VIII deals with a species of rights known as broadcast reproduction rights. The content and extent of that right has been defined in Section 37. Section 39A of the Act refers to certain provisions of the Act; it has inspired an argument that the absence of a reference to Section 61 means that the requirement of impleading the owner of copyright in a sporting event does not apply to broadcast rights and that such rights are 'special'. Facially, the argument seems logical; yet a careful examination would reveal several flaws in it. Firstly, there is no legislative intention to elevate 'broadcasting rights' to a special status, whereby the Chapter dealing with it operates in a special zone within the statute, immune from the operation of the other parts of the Act. If such intention were there, Parliament would have used legislative devices such as non-obstante clauses,

exclusions, etc. Secondly, the argument flies against well established canons of legislative interpretation that a statute must be read as a whole and the legislature should be deemed to have intended application of each part for the situations intended. If the plaintiff's contentions were accepted, Section 61 would operate only in some situations and not all, even though no express provision manifests such intention nor can it be drawn by necessary implication. The requirements of Section 61, procedural in nature, apply with equal vigor to all nature of rights that are subject matter of the Act.

41. The third reason why the plaintiff's argument is unacceptable is that though Section 39A refers to a few sections, and applies them with suitable modifications, yet, there is express reference to copyright in Section 39; similarly, there is reference to application of what is meant by fair dealing under Section 52, over and above what is enacted under Section 39, in relation to copyright. It is not as if the plaintiff says that Cricket Australia does not have copyright in the content of the broadcast; what is argued is that such owner is not necessary party to these proceedings. Section 39-A proviso also negatives the plea, because it clearly refers to the copyright of a performer or owner of copyright, where reproduction of a broadcast is involved.

42. For these reasons, it has to be held that the mandate of Section 61(1) applies in case of claims for infringement of broadcast reproduction rights; the non-impleadment of the owner of copyright is fatal to the maintainability of the suit. Similarly, the non-joinder of owner of the copyright renders the suit liable to be rejected. The proviso to Order 1, Rule 9 Civil Procedure Code enacts that a suit can fail for non-joinder of a necessary party. In *Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue Bihar* 1963 Supp (1) SCR 676 pointed out to the distinction between "necessary party" and "proper party". The Court held that: "The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding." The failure to implead the owner of copyright in the present case has resulted in keeping out a party whose presence is necessary for a final and complete decision on the question involved in the proceeding. Thus, apart from the suit being not maintainable due to Section 61(1) of the Act, it is also bad for mis-joinder of a necessary party.

43. Coming now to the first aspect, i.e. whether the plaintiff has disclosed a cause of action, this Court had noticed in the previous section of the judgment, while dealing with the claim for temporary injunction, that the plaintiff had not disclosed the entire agreement, which was a relevant factor for the exercise of discretion in granting or refusing ad-interim relief. However, the same standard cannot be applied while considering whether the plaint has to be rejected as not disclosing a cause of action. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence. *Raptakos Brett v. Ganesh Property*. As long as the plaint discloses some cause of action that has to be determined by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. Therefore, the non-disclosure of the entire agreement, at this preliminary stage is not such irregularity as to warrant rejection of the plaint, for reason of its not disclosing a cause of action.



44. In view of the findings on Section 61, this suit is not maintainable. It is, therefore, dismissed. The parties are left to bear their own costs.