

Super Cassettes Industries Limited vs Mr Chintamani Rao & Ors. on 11 November, 2011

Author: Vipin Sanghi

Bench: Vipin Sanghi

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 11.07.2011

% Judgment delivered on: 11.11.2011

+ I.A. No. 13741/2006 in CS(OS) 2282/2006

SUPER CASSETTES INDUSTRIES LIMITED Plaintiff
Through: Mr Amit Sibal with Mr Jagdish
Sagar, Advocates

versus

MR CHINTAMANI RAO & ORS. Defendants
Through: Ms Pratibha M Singh & Mr Deepak
Gogia, Advocates

AND

+ I.A. No. 13743/2006 in CS(OS) 2283/2006

YASHRAJ FILMS PRIVATE LIMITED Plaintiff
Through: Mr. Jagdish Sagar, Advocate

versus

MR CHINTAMANI RAO & ORS. Defendants
Through: Ms Pratibha M Singh & Mr Deepak
Gogia, Advocates

AND

+ I.A. No. 9900/2006 in CS(OS) 1706/2006

(INDIA TV) INDEPENDENT NEWS SERVICES PVT. LTD.
..... Plaintiff
Through: Ms Pratibha M Singh & Mr Deepak
Gogia, Advocates

versus

YASHRAJ FILMS AND ANR.

Through:

..... Defendants

Mr Amit Sibal with Mr Jagdish
Sagar, Advocates

CS(OS)Nos. 1706/2006 & 2282-83/2006

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CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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

JUDGMENT

VIPIN SANGHI, J.

1. By this order I propose to dispose of the aforesaid interim applications preferred under Order 39 Rules 1 & 2 CPC in the three suits mentioned above.

Introduction

2. CS(OS) 2282/2006 has been filed by Super Cassettes Industries Limited (hereinafter referred to as „Super Cassettes), which is engaged in the business of producing and marketing of audio cassettes, video cassettes, compact discs, televisions, CD players etc., The plaintiff is the proprietor of the T-series brand of music cassettes and CDs. The plaintiff claims copyright in cinematographic films and sound recordings in a large number of literary, musical and cinematographic works. The plaintiff claims that it gives licenses to other broadcasting organizations for use of the works in which it has copyright. The defendants in the suit are Shri Chintamani Rao, the Chief Executive Officer of defendant no.3 Independent News Services Pvt. Ltd. (India TV for short). Defendant no.2 Shri Rajat Sharma is the Chairman of defendant no.3. The plaintiff in the suit seeks a permanent injunction to restrain the defendants from, inter alia, engaging in public performance/communication to the public, reproduction, recording, distributing, broadcasting or otherwise publishing or exploiting any cinematographic films, sound recordings, literary works or musical works in which the plaintiff owns the copyright. The plaintiff has filed I.A. No. 13741/2006 under Order 39 Rules 1 & 2 read with Section 151 CPC to seek an interim injunction in the aforesaid terms, during the pendency of the suit.

3. CS(OS) 2283/2006 has been preferred by Yashraj Films Private Limited (hereinafter referred to as „Yashraj Films). The plaintiff states that it is a leading film producer in India. Its activities

extend to the small screen i.e., television and distribution of its musical works and sound recordings. It also distributes its cinematographic films and DVD format and its music in compact discs (CDs). The plaintiff also gives licences to other broadcasting organizations for use of the works in which it enjoys copyright. The defendants in this suit are the same as those in CS(OS) 2282/2006 namely Shri Chintamani Rao, CEO, Independent News Services (P) Ltd. (India TV), Mr Shri Rajat Sharma, Chairman, India TV and Independent News Services Pvt. Ltd. (India TV). The reliefs sought in this suit is that of a permanent injunction to restrain the defendants from recording, distributing, broadcasting or otherwise publishing or, in any other way exploiting the films "Bunty aur Babli" and "Salaam Namaste" or any song or other work or part thereof incorporated in the said cinematographic films, or doing any other act which could lead to infringement of copyright in the said films and the works incorporated there. A further injunction is sought to restrain the defendants from performing or communicating to the public, recording, distributing, broadcasting or otherwise publishing or in any way exploiting any cinematographic film, song or other work or part thereof, the copyright whereof is owned by the plaintiff or from doing any other act which could lead to infringement of the copyright in the works owned by the plaintiff. The plaintiff in this suit has preferred I.A. No. 13743/2006 under Order 39 Rules 1 & 2 read with Section 151 CPC to seek interim injunction in the same terms in which the final relief is sought. In neither of the aforesaid two suits and interim applications, the Court has granted any ad-interim order of injunction till date.

4. CS(OS) 1706/2006 has been filed by (India TV), Independent News Services Pvt Ltd against Yashraj Films (Defendant no.1) and Super Cassettes Industries Limited (defendant no.2) to seek a declaration and permanent injunction. The case of the plaintiff is that it runs a news channel called India TV. In its programme the plaintiff has used some of the cinematograph and musical works, the copyright wherein is claimed by the defendants. It is the case of the plaintiff that its use of the said works is permitted by Section 52 of the Copyright Act, 1957 as the law permits fair use, fair dealing and fair comment of or on, or with any literary, dramatic, musical or artistic work. The plaintiff seeks a decree of declaration that the use by the plaintiff of the works of the defendants constitutes fair use, fair dealing and fair comment, and does not constitute infringement of copyright. The plaintiff also seeks a declaration that the threats issued by the defendants are illegal and seeks a permanent injunction to restrain the defendants from issuing notices or interfering with the plaintiff's telecast of its programmes. The plaintiff in this suit has preferred I.A. No.9900/2006 under Order 39 Rules 1 & 2 read with Section 151 CPC to seek a restraint against the defendants from issuing notices to the plaintiff, or interfering with the plaintiff's telecast of its various programmes. This application was taken up for consideration on 05.09.2006 by the Court. This Court granted an ex-parte ad-interim order of injunction to the effect that the defendants (Super Cassettes and Yashraj Films) are prohibited from circulating or distributing the notices which they have issued, or may propose to issue to the plaintiff India TV, to the Media or any other third party.

5. During the course of arguments, India TV has not seriously disputed the claim of ownership of copyright made by Super Cassettes or Yashraj Films in the works mentioned in their respective suits, of which the said plaintiffs claim infringement by the defendant India TV.

6. To appreciate the controversy raised in these three suits, it would be necessary to first understand the manner in which India TV is accused of exploiting the copyrights of the two plaintiffs Super Cassettes and Yashraj Films.

Case of the Plaintiffs Super Cassettes & Yash Raj Films

7. The case of Super Cassettes is that between 07.04.2006 and 27.05.2006 the plaintiff had found on random monitoring that the defendant India TV had unauthorisedly broadcasted the sound recordings and/or telecast audio visual songs (video/cinematographic films) from various cinematograph films, the copyright in respect whereof vests with the plaintiff. The case of the plaintiff is that the plaintiff sent a notice dated 26.07.2006 to the defendant, India TV detailing the various instances of infringement of the plaintiff's copyright as randomly found between 07.04.2006 and 27.05.2006. In the said legal notice the plaintiff alleged infringement of the plaintiff's copyright in the following works:-

FULL SONG DETAILS FOR CHANNEL INDIA TV FROM 07/04/2006 TO 27/05/2006
DATE FILM/ALBUM SONG TIME DURATION PROGRAMME
7/4/06 ANURADHA PAYOJI MAINE RAM 1146 1 MIN 47 SEC BABA KA JADOO
PAUDWAL RATAN [S.S] CHAL GAYA 7/4/06 FAMILY PYAR BINA [AUDIO 1247 34 SEC FASHION KI TRACK] DHOOM 7/4/06 FAMILY PYAR BINA [AUDIO 1445 34 SEC SHOW TIME TRACK] 7/4/06 FAMILY PYAR BINA [AUDIO 1526 34 SEC NEWS TRACK] 7/4/06 ZINDA ZINDA HOON MAIN 1809 1 MIN 34 SEC SHOW TIME [SHIRANI KASHAP] S.S. 7/4/06 ZINDA ZINDA HOON MAIN 0037 1 MIN 34 SEC SHOW TIME [SHIRANI KASHAP] S.S. 8/4/06 JAWANI SINI NE [AUDIO 1424 17 SEC NEWS DIWANI TRACK] 8/4/06 JAWANI SINI NE [AUDIO 1446 17 SEC SHOW TIME DIWANI TRACK] 8/4/06 JAWANI SINI NE [AUDIO 1526 17 SEC NEWS DIWANI TRACK] 8/4/06 JAWANI SINI NE [AUDIO 1144 17 SEC NEWS DIWANI TRACK] 8/4/06 JAWANI SINI NE [AUDIO 1246 17 SEC NEWS DIWANI TRACK] 8/4/06 JAWANI SINI NE [AUDIO 1816 17 SEC SHOW TIME DIWANI TRACK] 8/4/06 COMPANY SNAP SHOTS 1955 32 SEC BOLLYWOOD KA GYANGSTAR 8/4/06 BHOOT SNAP SHOTS 2026 15 SEC CHAT MASALA 8/4/06 BHOOT SNAP SHOTS 2027 10 SEC CHAT MASALA 8/4/06 TEZAAB EK DO TEEN [AMIT 2303 1 MIN 40 SEC INDIA BEATS KUMAR] S.S 8/4/06 TRIDEV THIRCHI TOPIWALE 2352 1 MIN 27 SEC INDIA BEATS [AMIT KUMAR] S.S 8/4/06 JAWANI SINI NE [AUDIO 0047 17 SEC SHOW TIME DIWANI TRACK] 15/04/06 MR. INDIA MERA NAAM 2001 15 SEC CHAT MASALA CALENDER 15/04/06 TERE NAAM ODHANI ODHALI 2005 20 SEC CHAT MASALA 15/04/06 HUM AAPKE SNAP SHOTS 2006 33 SEC CHAT MASALA DIL MEIN R.HAI 15/05/06 ARYANS KEHATA HAI DIL [S.S] 2307 3 MIN 48 SEC INDIA BEATS 13/05/06 AKSAR LAGI [AUDIO T.] 2030 30 SEC CHAT MASALA 13/05/06 AKSAR LAGI [AUDIO T.] 2042 30 SEC CHAT MASALA 13/05/06 AKSAR MOHABBAT KI 2042 24 SEC CHAT MASALA 27/05/06 MISS SPICY PARDESIYA 2032 20 SEC CHAT MASALA MIX 27/05/06 MAIN HOON VIDEO CLIP 2035 16 SEC CHAT MASALA NA 27/05/06 MAIN HOON VIDEO + DIALOGUE 2036 15 SEC CHAT MASALA NA 27/05/06 EK

KHILADI EK ANKHIYA NA MAAR 2038 30 SEC CHAT MASALA HASINA
27/05/06 KAAANTE MAHI VE [S.S] 2106 3 MIN 04 SEC INDIA BEATS [per. Richa
Sharma] 27/05/06 KAAANTE VIDEO CLIP 2106 22+12 SEC INDIA BEATS [per.
Richa Sharma] 27/05/06 MUSAFIR RABBA [S.S] 2106 3 MIN 34 SEC INDIA BEATS
[per. Richa Sharma]

8. The plaintiff also states that the aforesaid list is not exhaustive.

According to the plaintiff Super Cassettes, the defendant India TV did not reply to the aforesaid notice and consequently, another notice was sent to the defendant on 05.09.2006.

9. The plaintiff Super Cassettes has filed alongwith the plaint, what it claims, is a non-exhaustive list of instances of illegal and unauthorized use of the various literary, musical works, sound recordings and cinematographic films, in which the copyright vests with the plaintiff, by the defendant India TV.

10. It is also the case of the plaintiff that the infringement of the plaintiff's copyright has taken place, inter alia, on India TV's weekly programmes "India Beats" which is one of the most popular programmes of the defendant's channel "India TV" and is purely an entertainment programme. The programme is recorded and aired at prime time on Saturday night at 9.00 pm and the broadcast is interspersed with heavy advertising. In this programme a popular singer or group of singers performs a medley of songs before a studio audience. The songs performed by the singers need not be new or recent releases, and do not necessarily date from any particular period. According to the plaintiff Super Cassettes, there is no spontaneity about these shows and they are set up by the defendant and arranged with a great deal of planning. The defendant India TV arranges the presence of musicians with musical instruments who, according to the plaintiff, have obviously rehearsed before hand to accompany the singer who performs the songs. The defendant India TV also arranges for live and choreographed background dancers who are dressed to accompany the main performers, who dance as they sing. The programme host/hostesses also dances along. The studio audience is repeatedly and actively encouraged by the singers and the host to participate in singing along by clapping and dancing. Very large portions of the songs are sung, which often last almost four minutes in duration. Where the song has been taken from the cinematographic film, visual clips of the film are often shown to accompany its performance. Stage is resplendent with bright lights and colours and it is conducted in the manner of live shows performed in public by singers and dancers associated with the Indian film industry. In between the performances, the singers answer, very briefly, general questions raised by the host regarding their life and career. The studio audience only participate by singing along with clapping and dancing, and there is no other input from the audience. The discussion between the singer and host comprises a minor proportion of the programs airtime. There is no genuine criticism or review of either the songs or the performances, nor is there any element of reporting current events in the performance of the songs.

11. By way of illustration, the plaintiff states that the "India Beats"

programme episode broadcast on 27.05.2006 on the defendant's channel namely "India TV" at 2100 hrs. featured Ms. Richa Sharma as the guest artist. Ms Sharma sang several songs including two in which the plaintiff Super Cassettes holds the copyright namely "Mahi Ve"

from the film "Kaante", which she sang for approximately 3 minutes 16 seconds and "Zindagi Mein" from the film "Musafir" which she sang for approximately four minutes. Of the total programme duration of one hour, approximately 24 minutes (40%) comprised of songs sung by the artist, approximately 17 minutes (28%) comprised of commercial advertisements and approximately six minutes (10%) comprised of advertisements of other India TV programmes, and approximately 2% comprised of summary advertisements or miscellaneous items. Only eleven minutes (18%) comprised of conversation with the artist. The plaintiff claims that this is a fairly representative sample of time allocation on the various episodes of the defendant's programme "India Beats". The plaintiff has placed on record the audio-video recording of the aforesaid programme apart from other episodes of the same programme.

12. The plaintiff further states that apart from broadcasting "India Beats" with infringing works in which the plaintiff holds copyright, the defendant regularly broadcasting audio-video songs and sound recordings from popular films and audio recordings in which copyright is owned by the plaintiff such as "Star Aur Style", "Chat Masala", "Fashion Ki Dhoom", "Tum Jiyo Hazaaron Saal" and their general news bulletin. It is stated that the defendant India TV runs a programme titled "Tum Jiyo Hazaaron Saal" on the birthdays of popular actors and actresses wherein they use the birthdays of the celebrities to freely and repeatedly broadcast video clippings, or audio-visual songs and audio clippings of sound recordings featuring the person whose birthday has been celebrated by featuring the voice of such celebrity.

13. Another example cited by the plaintiff Super Cassettes is that during the news bulletin broadcast by the defendant on 29.06.2006, the defendant, India TV featured a report on a controversy regarding actress Shefali Jariwala. During the bulletin, the defendant aired video clips for a duration of 47 seconds from the audio visual song "Kaanta Laga" featuring Shefali Jariwala, repeatedly, even though the controversy being reported had nothing whatsoever to do with the song, nor did the defendant engage in any criticism or review of the said song.

14. The plaintiff, Super Cassettes also states that the same audio visual/audio clips are repeatedly broadcasted by the defendant India TV several times in the span of an hour or few hours or days. Even in the case of relatively short clips, the cumulative effect is substantial.

15. The case of Yashraj Films is that the defendant India TV made infringing use of the song "kajarare" from the cinematograph film „Bunty or Babli" in order to promote their programme "Sab Gol Mal He". The second specific infringement allegedly committed by the defendant pertains to the act of the defendant in broadcasting excerpts from the cinematographic film „Salam Namaste" on 18.06.2008 during the defendant's programme India Beats, and throughout the day, for promoting the same episode of the said programme. The third specific act of alleged infringement is the recording and broadcasting of the performance of a substantial portion of a performance by Ms.

Vasundhara Das of the title song from the film „Salam Namaste in their programme India Beats, which was broadcasted on 18.06.2006. The plaintiff states that the programme was inherently so designed that Vasundhara Das would sing "some parts of her own songs out of her own choice. One of the songs was the title song from Salam Namaste." The plaintiff also points out that all the aforesaid alleged infringements are admitted by the defendant India TV in their own suit being C.S. (OS) No.1706/2006.

16. I may note that during the course of hearing before me, the defendant India TV has not raised any serious challenge to the factual claim of the plaintiffs Super Cassettes and Yashraj Films with regard to the use and exploitation of the literary and musical works, sound recordings and cinematographic films in which the said plaintiffs claim copyright.

Case of the Defendant India TV

17. The defence of India TV in the two suits filed by Super Cassettes and Yashraj Films is founded upon Section 52 of the Copyright Act which also forms the basis of its claim in its own suit being CS(OS) 1706/2006. According to India TV, the use of the copyright works by India TV is fair use, fair dealing and fair comment for the purpose of review and criticism and for reporting current events. India TV has filed its written statements in the two suits preferred by Super Cassettes and Yashraj Films. The two written statements are more or less identical in their material part. India TV claims that it launched its news channel India TV in March, 2004. Since its launch, it has become one of the leading Hindi News Channel in India. It is claimed that its channel has very high viewership ratings. It is claimed that its programmes such as India Beats, Jago India, Apki Adalat, Sab Golmaal Hai etc., raise issues of public importance. India TV further states that ".....for effective dissemination of news, current events and information to its viewers on some occasions uses small clips of movies produced by the plaintiff and also audios and/or videos of songs from movies produced by the plaintiff. The issue involved in the present suit is that the plaintiff claims that by such act the defendant no.3 infringes the copyright of the plaintiff while the defendants case is that section 52 of the Copyright Act which deals with and states in unequivocal terms that Fair Dealing and specially for the purposes reporting of news and current events of copyrighted works would not constitute infringement of copyright....."

18. India TV claims that Section 52 permits fair dealing with copyright works for the purpose of criticism or review, and for the purpose of reporting. As regards the issue of quantitative use of the plaintiff's works (i.e., the works of Super Cassettes and Yashraj Films) it is submitted that a Hindi cinematographic film is of duration of about 3 hours or 180 minutes, and the defendant (India TV) uses the same for a few seconds or at best for a minute or so. It is submitted that the defendant uses one or two clips of a movie only to unfold some moments to reflect upon the life of a celebrity. The said use by the defendant is in a totally different context and does not amount to quantitative copying. With regard to the use of the songs/musical works of the plaintiffs (Super Cassettes and Yashraj Films), it is submitted that the defendant's programme/interviews show the life and struggle and rise of a particular singer being interviewed. It is submitted that the singer's life is closely connected/knitted with songs, especially the works which were his/her first songs and the ones which made him/her famous, or some others which could be the singer's favourite because of

some reasons attached to it. It is unimaginable to interview a singer and not have the singer to sing the said song, or not to play his/her songs, so that the singer becomes comfortable and is able to reflect and answer questions which relate to the song. It is submitted that in a movie or an album the songs have a different context in the sense that they contribute to the story being told, while in the defendant's programme they have a different context altogether, i.e., it is reflection on the life of the singer. It is submitted that the defendant's (India TV's) use is actually covered by the permitted act of fair dealing. It is further submitted that the use of short cinematograph clips, or few seconds of any song (literary and musical works), or sound recording by the defendant (India TV) in its programmes is completely incidental to the main programme which is either a chat show or a news programme or a current affairs programme. It is also submitted that the defendant's use of the copyright works would not harm the business interest of the plaintiffs Super Cassettes and Yashraj Films, as the public, which is interested in music, will not stop listening to music or stop buying CDs and cassettes due to the defendant's usage.

19. In her oral submissions Ms. Pratibha Singh, learned counsel for the defendant India TV, has raised an impassioned plea that the singer who has recorded a song which has gone on to become a hit has a sense of ownership over such a song, and that it would be very unreasonable-to the point of being unfair and cruel to the said singer, to say that he/she cannot sing the said song in a TV or other interactive programme in front of an audience, only because the copyright in the underlying literary and musical works resides in some other person(s). She submits that there is a sense of belonging of the song to the singer who has first recorded the song, which has become popular and is identified with a particular singer. The said singer, she submits, cannot be denied the right to sing the said song in a public forum.

Discussion

20. By virtue of Section 13 of the Copyright Act, 1957, subject to the provisions of the said section and the other provisions of the Act, copyright subsists in the following classes of works, that is to say:

- (a) original literary, dramatic, musical and artistic work ;
- (b) cinematographic films and
- (c) sound recording

21. The content and gamut of copyright vested by the Act in relation to different kinds of works is defined in Section 14. Copyright means the exclusive right, subject to the provisions of the Act, to do or authorize the doing of any of the acts enumerated in sub-clauses (a) to

(e) in respect of the work, or any substantial part thereof. Therefore, the right conferred by Section 14 is subject to the other provisions of the Act, which would include Section 52. In relation to literary, dramatic or musical work, not being a computer programme, copyright means the exclusive right, inter alia, to reproduce the work in any material form, including the storage of it in any

medium by electronic means; to perform the work in public, or communicate it to the public; to make any cinematographic film or sound recording in respect of the work. In the case of a cinematograph film, the copyright, inter alia, means the exclusive right "to make a copy of the film including a photograph of any image forming part thereof;" or "to communicate the film to the public". The copyright in a sound recording entitles the copyright holder to the exclusive right to, inter alia, communicate the sound recording to the public.

22. Section 51 of the Act states when a copyright in a work is infringed. It, inter alia, states that "copyright in a work shall be deemed to be infringed-(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act, or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright," . Therefore, the question which arises for consideration is, whether, India TV has done anything, the exclusive right to do which is, by the Act, conferred upon the owner(s) of the copyright i.e., in relation to the literary and musical works which are embodied in songs, i.e., the sound recordings, and the cinematograph films in which the plaintiffs Super Cassettes and Yashraj Films own the copyright.

23. Copyright is a statutory right, and no person is entitled to claim copyright or any similar right in any work, otherwise than in accordance with the provision of the Act. (See Section 16). Therefore, whatever rights are claimed by the parties, must spring from the Act and there are no equitable rights which either party can claim under the law of copyright. I, therefore, have no hesitation in rejecting the argument of Ms. Pratibha Singh that the singer has an independent right to perform his/her recorded song on a public stage without obtaining the licence from the copyright holder in the original literary and musical works. There is no equitable right, which inheres in the singer of the song, to perform the song in a public forum, only because it may be the same singer who may have recorded the song initially, which may have become popular.

24. For the same reason, the defence of India TV that, the use by the defendant of the songs/sound recordings or cinematograph films- in which Super Cassettes or Yash Raj Films own the copyright, is not in the same context, or that it does not affect the business of the two plaintiffs is also rejected.

25. If the defendant India TV considers the performance of the songs, which embody the literary and musical works, or the playing of the sound recordings and cinematograph film necessary for the purpose of its programmes, either it should obtain the requisite licence from the copyright owners and then use the same, or establish that its use is saved by, and falls within the scope of the usage permitted by Section 52 of the Act. Without obtaining the requisite licence, only for making its programmes more enjoyable, informative, attractive and complete, the defendant India TV cannot unauthorisedly use either the songs(literary and/or musical works) or the sound recordings and cinematograph films in which the copyright vests in another person, unless, as aforesaid, such user can be brought under the exceptions contained in Section 52 of the Act.

26. Admittedly, the defendant India TV has not obtained any license from the plaintiffs Super Cassettes or Yash Raj Films. It is therefore clear that, prima facie, the defendant (India TV) would succeed in defending the two suits filed by Super Cassettes and Yashraj Films, and in its own suit CS(OS) 1706/2006, if it succeeds in making out a case falling either under Section 52(1)(a) or one falling under Section 52 (1)(b) of the Act. The relevant part of Section 52 of the Copyright Act reads as follows:-

"(1) The following acts shall not constitute an infringement of copyright, namely:-

(a) a fair dealing with a literary, dramatic, musical or artistic work (not being a computer programme) for the purposes of -

[(i) Private use including research;]

(ii) Criticism or review, whether of that work or of any other work;

.....

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events-

(i) in a newspaper, magazine or similar periodical; or

(ii) by [broadcast] or in a cinematograph film or by means of photographs.

[Explanation-The publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause;]"

27. Before I proceed to deal with the case law cited by the parties and examine the position on facts, I think it appropriate to make a few preliminary observations according to my understanding of the statutory position on a plain reading of Section 52 of the Act. What Section 52(1)(a) permits is that the literary, dramatic, musical or artistic work may be reproduced without fear of infringement of copyright in such works, if such reproduction is a fair dealing of the copyright work in question, for the purpose of criticism or review whether of that work or any other work. Therefore, firstly it has to be "fair dealing" of the work in question. This means that the dealing with the copyrighted work is not an unfair dealing. Only that part of the literary, dramatic, musical or artistic work may be utilized for the purpose of criticism or review, which is absolutely necessary, and no more. The purpose - ostensibly or obliquely, should not be to ride piggy back on the work of another. The focus of attention, and interest of the producer/author of the work and the viewer/listener should not be the work of another, but the work created by the person who may, bona fide be using the work of another for the specific purpose of criticism or review of that work, or of any other work. The work of another cannot be used for any other purpose. The copyright protected work of another cannot be used out of context. There has to be an intellectual input and an original mental exercise undertaken by the person bona fide lifting or copying the literary, dramatic, musical or artistic work, which should involve either the criticism or review of the lifted/copied work, or of any other work. Copying

of the work of another for any other purpose, such as, to make one's own programme more interesting, attractive or enjoyable is not permitted. The underlying theme and focus of; and, in substance, the new work should necessarily be an exercise to either criticize or review either the bona fide copied work, or any other work. A person cannot, in the name of "fair dealing", lift or copy literary, dramatic, musical or artistic work of another to such an extent that it ceases to be a "fair dealing"

and becomes a blatant act of copying the work of another.

28. Section 52(1)(b) saves from the charge of infringement, a fair dealing with literary, dramatic, musical or artistic work for the purpose of reporting current events, inter alia, by broadcast. As in clause (a), in clause (b) as well the expression "fair dealing" is used. Therefore, only so much of the work, as is absolutely necessary, can be used and no more. The literary, dramatic, musical or artistic works which are used, should have relevance to, and connection with the current event which is sought to be reported. Any such work, which is unrelated to the current event sought to be reported, cannot be made as an excuse to exploit the copyrighted work of another. The explanation to clause (b) which, inter alia, states that the publication of a compilation of speeches delivered in public is not a fair dealing of such work within the meaning of clause (b), is indicative of the legislative intent in evolving the yardstick to be applied in each individual case.

29. The issue hotly debated by the parties before me is whether sound recordings and cinematograph films also can be the subject matter of fair dealing for the purpose of criticism or review under Section 52(1)(a), or the subject matter of fair dealing for the purpose of reporting current events by broadcast under Section 52(1)(b). While it is the submission of the learned counsel for the plaintiffs Super Cassettes & Yash Raj Films that neither sound recordings, nor cinematograph films are covered by Sections 52(1)(a) or 52(1)(b), the submission of learned counsel for the defendant India T.V is to the contrary. I consider it appropriate to set out the submission of Ms. Pratibha Singh, counsel for India T.V first, and thereafter to set out the response of learned counsel for Super Cassettes and Yashraj Films on this aspect.

Defendant India TV's submission on Section 52 of the Act

30. The submission of learned counsel for India TV is that the purpose of copyright is to provide a limited monopoly to the authors/creators of work in order to encourage their efforts. Such monopoly is not unfettered especially when it conflicts with an overriding principle interest. She submits that copyright law, the world over, balances the rights of the authors/creators and casts a duty upon them to share the rights they reserve to use of their works - especially for the purpose of news reporting; for reporting of current events; for educational purposes; for private use, etc., subject to fair dealing provisions of each country. It is argued that cinematograph films and sound recordings are not original literary, dramatic, musical or artistic works. Reference is made to Section 13(1)(a) which uses the word „original“ before the words „literary, dramatic, musical and artistic works“ and a distinction is drawn with Clauses (b) & (c) of Section 13(1) of the Act. It is submitted that cinematograph films and sound recordings are based upon one or more pre-existing works which eventually can be categorized as „original“ works under Section 13(1)(a) of the Act.

Cinematograph films and sound recordings are „derivative works . Reference is made to Entertainment Network (India) Limited Vs. Super Cassettes Industries, (2008) 13 SCC 30, in support of this proposition and to submit that Clauses (b) & (c) of Section 13(1) protect derivative works. Reference is also made to the definition of the term „derivative works provided in the American Law which is defined to include, inter alia, motion picture version and sound recording.

31. After laying down the aforesaid foundation, the submission of the learned counsel for the defendant India TV is that the cinematograph films and sound recordings being derivative works of original literary, dramatic, musical or artistic works, though not specifically, but are impliedly included in Section 51(1)(a) and 52(1)(b) of the Act. The defendants logic for this submission is that original literary, dramatic, musical or artistic works cannot be granted lesser amount of protection than their derivatives.

32. It is next contended that the exclusion of „cinematograph films and „sound recordings from Section 52(1)(a) and 52(1)(b) of the Act would lead to absurdity and confusion. It is submitted that the Court should step into the shoes of the Legislature and give logical interpretation to these provisions. Reliance is placed in this regard on Entertainment Network (India) Limited (supra). It is argued that in this decision the Supreme Court held that only because a Statute is not clear and explicit, the Court cannot fold its hand and express its helplessness regarding it. It is submitted that when the literary meaning of a Statute leads to absurdity its literary interpretation should be avoided. It is also submitted that there is no legislative intent behind exclusion of these two classes of works from the concept of fair dealing. Reference is also made to Section 2(1)(i) of the Copyright Act, 1911, which deals with the aspect of fair dealing in relation to „any work .

33. Learned counsel for the defendant India TV has also sought to place heavy reliance on the Copyright (Amendment) Bill, 2010 which, inter alia, proposes to amend Section 52 of the Act to make the fair use defence available to all works including cinematograph films and sound recordings. The proposed amendment replaces the words „literary, dramatic, musical or artistic work used in Section 52(1)(a) and 52(1)(b) with the expression „any work . It is argued that the amendment is clarificatory and does not seek to make a substantive change in the law as it exists at present. It is argued that the primary purpose of Clause 31 of the Bill is to provide that works which are stored in an electronic medium for the purposes of fair use do not constitute infringing copies. The purpose of the amendment is to exclude the process of „caching from the charge of infringement.

34. Ms. Pratibha M. Singh has also submitted that India is a signatory to the Berne Convention and is, therefore, required to follow the basic standards of copyright protection, its enforcements and restrictions on the exercise of rights as laid down in this international treaty. Article 10(bis) of the Berne Convention, Clause 2 is relied upon, which reads as follows:

"(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent

justified by the informatory purpose, be reproduced and made available to the public."

35. It is argued that a principle country by way of legislation can determine conditions for such uses (such as issuance of compulsory licenses or by providing that de minimis or accidental use does not amount to infringement). It is submitted that to say Article 10 bis (2) takes cinematograph films and sound recordings out of the purview of the fair dealing would be absurd and illogical. Learned counsel for the defendant India TV submits that cinematograph films and sound recordings are covered by the fair dealing exception in various countries such as United States of America, United Kingdom, France, Australia, Canada, etc.

36. Ms. Singh further submits that Article 19(1)(a) of the Constitution of India provides the fundamental right to freedom of speech & expression. The Copyright Act, 1957 does not define the term „fair use or „fair dealing and the same should be understood keeping in mind the fundamental right to freedom of speech protected by Article 19(1)(a) of the Constitution of India. It would not be consistent with the Scheme of Article 19(1)(a) of the Constitution of India, if any incidental or de minimis use of the cinematograph films or sound recordings is not given the fair use defence. The right of news channels to use clippings of cinematograph films and sound recordings for the purpose of reporting news and current affairs is a part of the right conferred by Article 19(1)(a). Imposing of fetters in this right is prohibited, except in situations of national security, etc. Learned counsel for the defendant cites the following illustrations in support of her aforesaid submission:

"a. Song `X` displays or uses words which are impermissible and gets banned by a Censor body- as part of news, it would be permissible to use the least amount of the song only to identify the song to the viewer;

b. A cinematograph film is made which addresses a new theme and it wins a large number of awards- As part of the news reporting an award, it would be fair dealing to show a small clipping of the film."

37. It is argued that for usage of reporting current events, if news channels are obliged to obtain licenses, then the entire fair use doctrine would be set at naught. It is argued that fair use is a statutorily „permissible use. It is only for the impermissible use that a license needs to be taken. It is submitted that an interpretation of Sections 52(1)(a) and 52(1)(b) that cinematograph films and sound recordings are not covered under the fair use exception would lead to a situation where even a de minimis use of such works shall be subject to obtainment of licenses from the respective copyright owners. It is argued that the plaintiff's submission in favour of excluding cinematograph films and sound recordings from the scope of Sections 52(1)(a) and 52(1)(b) ignores public interest and conflicts with the whole purpose of copyright law. Reliance is placed on ESPN Star Sports vs. Global Broadcast News Ltd., (2008) 38 PTC 477 (Del.) (DB), to submit that fair dealing is a question of fact and has to be determined on case by case basis. It is submitted that this Court has held that news channels are within their rights to reasonably use footage of cricket matches for programmes based on cricket or cricket matches.

38. Reliance is placed on the following decisions of the American Courts to submit that the Courts have granted fair use protection to cinematograph films and sound recordings:

- (a) Campbell Vs. Acuff-Rose Music, 510 U.S. 569 (1994);
- (b) Sony Corp. of America Vs. Universal City Studios, Inc., 464 U.S. 417 (1984);
- (c) Monster Communications Inc Vs. Turner Broadcasting Sys. Inc., 935 F. Supp. 490 (S.D. N.Y. 1996); and
- (d) EMI Records Ltd. and Capitol Vs. Premise Media Corporation, L. P 2008 N.Y. Misc. LEXIS 7485 (N.Y. Sup.

Ct. Aug.8,2008) Plaintiffs Super Cassettes and Yash Raj Films submission on Section 52 of the Act.

39. On the other hand, the submission of learned counsel for the plaintiff Super Cassettes and Yashraj Films is that the exceptions to the exclusive rights of copyright owner in literary, dramatic, musical or artistic work which are provided, inter alia, in Section 52(1)(a) and 52(1)(b) of the Act, do not extend to the rights of the copyright owners in a cinematograph film and sound recording. It is submitted that Section 52(1)(a) & 52(1)(b) of the Act specifically limit the exceptions, inter alia, for criticism and review and for reporting current events to literary, dramatic, musical or artistic works (not being computer programmes). These exceptions do not extend to cinematograph films and sound recordings. The legislative intent is clear from the reading of Section 52 of the Act in its entirety. It is argued that the Act vests copyright in different kinds of work grouped into 3 different classes in Section 13(1) of the Act, namely:

- "(a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films; and
- (c) sound recording."

40. Under Section 14 of the Act, different rights subsist in respect of each kind of work, according to nature of the work and the means by which it can be exploited. Correspondingly, under Section 52 different exceptions are carved out for different situations affecting different kinds of work. The individual exceptions in Section 52 are not blanket exceptions extending to all works. It is argued that the exceptions in Section 52 are carefully crafted and are use-specific as well as work-specific; each clause makes clear both - the type/class over which it applies, and the particular exempted use of such work.

41. It is argued that the exceptions as stated in Section 52 are very specific, necessarily so to avoid ambiguity as between rights (which must be stated in broader terms), and exceptions.

42. It is argued that literary, dramatic, musical and artistic works fall under one of the three classes of works in which copyright subsists under Section 13(1) of the Copyright Act viz. the class referred to in Section 13 (1) (a). Cinematograph Films are a distinct class under Section 13(1) (b) and sound recordings a third, under Section 13 (1)

(c).

43. The exclusive rights conferred on each kind of work by Section 14 are tailored to match the possible means by which that kind of work can be exploited. For example, the rights of translation and adaptation cannot arise in the case of sound recordings and cinematograph films, hence are conferred only in respect of literary, musical and dramatic works. Similarly, the exceptions in respect of each kind of work are carved out according to the nature of the work, and the kinds of situation in which it may serve the public.

44. It is submitted that cinematograph films and sound recordings being derivative works, are not inferior class of work. Merely because they are derivative works it does not mean that such works can be used wherever the use of the underlying works is permitted by law. It is submitted that a sound recording is not merely a means of presenting the underlying literary or musical works, and nothing more. Similarly, a cinematograph film is not merely a means of presenting the underlying dramatic, literary and musical works. Each sound recording is independently created and the creation of the sound recording requires independent skill and expertise. It is submitted, similarly, the creation of a cinematograph film requires large investments and financial risks. It involves inputs such as casting, screening, photography, editing, music, etc. It is submitted that sound recordings are referred to and provided for in clauses (i) (j) (k), (z) and (za) of sub-section (1) of Section 52. In all these instances, except "(i)", the exception in question applies only to sound recordings and not to any other class of works. In other cases, sound recordings are not referred to. The omission of any reference to sound recordings in clauses (a) and (b) of the same sub-section is very clearly the policy of the legislature which is rational and justifiable; there is absolutely no reason to suppose it to be an inadvertent omission.

45. It is further submitted that cinematograph films are referred to in clauses (u) and (y) of Section 52(1). In these clauses, again, the exemption is created for the benefit of the film producer, not for users of the film. It is reasonable and explicable that the legislature has seen fit to restrict the exceptions in respect of cinematograph films so tightly, the investment in films being so high.

46. The plaintiffs further argued that the Copyright (Amendment) Bill, 2010 is yet to be enacted. Unless it is enacted, reliance thereon cannot be placed by the defendant India TV on account of the mere possibility that a future legislative decision may modify the existing legal position reflected in Section 52 of the Act.

47. The plaintiffs also place reliance upon Section 39 of the Act which was inserted in its present form by Amending Act No. 38 of 1994. This provision specifically provides exception to the broadcast reproduction right conferred by Section 37 of the Act. Section 37 was also introduced in the Act by the same amendment. Section 39, inter alia, provides that "No broadcast reproduction

right or performer's right shall be deemed to be infringed by (a) (b) the use, consistent with the 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) which do not constitute infringement of copyright under Section 52". It is further submitted that even though Section 52 was extensively amended by Amending Act 38 of 1994, yet no amendment was made to extend the fair dealing exception to cinematograph films and sound recordings. It is submitted that while interpreting a legislative provision, the Court only interprets a law and cannot legislate upon it. The Court would not read anything into a statutory provision or remit a provision which is plain & unambiguous. Attention must be paid to what has been said and also to what has not been said. Reference is made to *Nasiruddin Vs. Sita Ram*, (2003) 2 SCC 577. It is submitted that where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or altering the statutory provisions.

48. Learned counsel for the plaintiffs Super Cassettes and Yashraj Films submit that on the facts of the ESPN judgment [*ESPN Star Sports Vs. Global Broadcast News*, 2008 (38) PTC 477 (Del)] which the Defendants rely on, the issue considered was with respect to the exception contained in Section 39 to the broadcast reproduction right. It is submitted that in the case of broadcast of cricket matches, although the visual recording of the cricket match becomes a cinematograph film, it does not become the film of any underlying copyrighted work but only of certain events. In the present case, the Plaintiff's cause of action is the infringing use of its copyrighted works by the Defendants broadcasting of them, which is a completely different situation.

49. It is also argued that instances of foreign legislation in which sound recordings and/or films are covered under similar exceptions are of no relevance to the present suit or to the interpretation of the Indian statute.

50. It is submitted that this Court is under no obligation to apply any foreign statute.

51. Submissions have also been made by referring to and relying upon the International Copyright Order, 1999, the Berne Convention and the TRIPS Agreement. I am, however, not reproducing the same as they do not appear to be of any relevance for the present discussion.

52. Learned counsel for the plaintiff also submits that the defendants' arguments founded upon Articles 19(1)(a) or 19(1)(g) of the Constitution of India is misplaced. It is argued that licenses are freely available and the defendant India TV has been offered to obtain the licenses. The plaintiffs Super Cassettes and Yashraj Films have arrangements in place to issue licences for the use of its copyrighted works and provide such licenses on demand to all who require them. These constitute a significant and substantial part of the plaintiffs' business. The defendant India TV is also a commercial organization which earns substantial revenue from the exploitation of the intellectual property of Super Cassettes and Yashraj Films by, what it claims to be, criticism, review and news reporting. Articles 19(1)(a) or 19(1)(g) of the Constitution does not allow the defendant India TV to freely use the copyrighted works of the two plaintiffs, and does not oblige the two plaintiffs to grant license without payment of license fee for the use and exploitation of the plaintiff copyrights. The

restrictions imposed on the defendants right under Article 19(1)(a) and 19(1)(g) by the Copyright Act are reasonable restrictions.

53. Reference is placed to the decision of the English Court of Appeals in *Ashdown v. Telegraph Group Limited*, (2002) RPC 5, wherein the Court considered the conflict between the freedom of expression and the statutory obligation to obtain a license from a copyright owner by reference to Article 10 of the European Human Rights Declaration. It is also submitted that, in any event, for the purpose of „fair dealing , for the purpose of criticism, review and reporting of current events, it is not necessary to reproduce a substantial part of any work.

Discussion on Section 52 of the Act

54. As I have already observed herein above, copyright is a statutorily conferred right. Therefore, to the extent that it is specifically vested in the copyright holder, it cannot be denied by reference to some general principle, as contended by the defendant. Just as the extent of the copyright vested in a party is specifically prescribed in the Act, the exceptions thereto have also been specifically prescribed in the Act.

55. There is no quarrel with the proposition that cinematograph films and sound recordings are derivative works, which are eventually derived from original literary, dramatic, musical and artistic works. That does not make copyright in cinematograph films and sound recordings inferior. In *Entertainment Network (India) Ltd. (supra)*, in para 41, the Supreme Court has held that only because the term for holding copyright under section 27 (in relation to a copyright in sound recording) is different from the term of the copyright in relation to original literary, dramatic, musical and artistic works, the same would not mean that the right of the copyright owner in sound recordings is somewhat inferior. Even though the copyright in relation to derived work such as cinematograph films and sound recordings operate in a relatively restrictive field, when compared to the copyright in original literary, dramatic, musical and artistic works, to the extent that the said copyright in derived work is vested by the Act, the same operates with full force and vigour. The decision of the Supreme Court in *Entertainment Network (India) Ltd.* relied upon by the defendant, *India TV* in no way advances their submission that cinematograph films and sound recordings are covered by Sections 52(1)(a) and 52(1)(b) of the Act.

56. I do not accept the submission of Ms. Pratibha Singh that cinematograph films and sound recordings being derivative works of original literary, dramatic, musical and artistic works are impliedly included in Section 52(1)(a) and 52(1)(b) of the Act. There is no scope for any such implication being drawn in the light of the statutory scheme which emerges on a plain reading of Section 52 of the Act. Cinematograph films and sound recordings are recognized by Section 13 as separate classes of derived works, wherein copyright subsists. As submitted by the plaintiff, *Super Cassettes* and *Yashraj Films*, Section 52 carefully and exhaustively enlists various actions which would not constitute infringement of copyright in different classes of works and the limits on such use. Clauses (a) and (b) specifically deal with literary, dramatic, musical and artistic works and also specify the purposes for which they may specifically be put to use without inviting an action for infringement. Clauses (aa) (ab) (ac) and (ad) specifically deal with the use to which computer

programme can be put. The literary, dramatic, musical and artistic works are also dealt with in clauses (c) and (d). Pertinently, clause (e) only deals with literary, dramatic or musical works, but does not deal with artistic works. Clause (f) deals only with literary or dramatic works. The aforesaid clearly shows that the Parliament deliberately and consciously chose the class of works in relation to which it permitted the exploitation of the copyright for specific purposes only.

57. Similarly, in relation to sound recordings, it is only clauses (i), (j),

(k) and (za) which apply. There is merit in the plaintiff's submissions that exceptions in Section 52 are carefully crafted and are use-specific as well as work-specific. Each clause makes clear both - the type and class of work to which it applies, and the particular exempted use of such work. There is very good reason for not including cinematograph films and sound recordings in clauses (a) and (b) in Section 52(1) of the Act. Being derived works, cinematograph films and sound recordings involve much greater financial investment when compared to investment that may have been made in the creation of original literary, dramatic, musical and artistic work. The author of cinematograph films and sound recordings is not only required to obtain licenses from the owners of such original literary, dramatic, musical and artistic work before embarking upon the creation of the derived works, i.e., the cinematograph films and sound recordings, he is also required to undertake the exercise of putting together such works by employment of skilled artists, musicians, cameraman, producers and directors etc. It is to protect the financial investment that goes into making of cinematograph films and sound recordings - which enjoy far greater public appeal and attraction and, therefore, attract more eye balls and ears than the original literary, dramatic, musical and artistic works, that the Parliament does not permit an unlicensed use of such works even for the purpose of criticism or review or reporting of current events.

58. I also do not accept the submission of Ms. Singh, learned counsel for the India TV that the exclusion of cinematograph films and sound recordings from Section 52(1) (a) and 52 (1) (b) leads to absurdity or confusion. Neither there is any absurdity nor any confusion in the legislative scheme found in Section 52 of the said Act.

59. There is no merit in the submission of Ms. Pratibha Singh that the denial of an unrestricted right to use cinematograph films and sound recordings for the purpose of criticism or review of the said works, or of any other works, or for the purpose of reporting current events would infringe the defendant, India TV's fundamental right guaranteed under Article 19(1)(a) of the Constitution of India. i.e the right conferred on all citizens to the freedom of speech and expression. I fail to understand, by requiring that India TV obtains license for exploitation of cinematograph films and sound recordings from the copyright holders in such works, how is there any curtailment of the right of the defendant, India TV or its shareholders to the freedom of speech and expression? India TV is free to exercise its right to freedom of speech and expression, but that cannot mean that the defendant, India TV can infringe the fundamental rights vested by Article 19(1) and Article 19(1)(g) in others. The owners of the copyright in the cinematograph films and the sound recordings also have fundamental right under Articles 19(1)(a) i.e the right to freedom of speech and expression and under Article 19(1)(g) i.e to practice any profession, or to carry on any occupation, trade or business. The exclusive rights conferred by the Act on the copyright owners of cinematograph films and sound

recordings is entitled to as much protection as the right of the defendant India TV to its freedom of speech and expression.

60. In *Railway Board Representing The Union of India V. Niranjan Singh*, (1969) 1 SCC 502, the Supreme Court considered the issue whether the order of the General Manager which prohibited holding of meetings within the railway premises was violative of Article 19(1)(a) to (c) of the Constitution. The Supreme Court held that the said direction of the General Manager did not deprive the workers any of the freedoms guaranteed to them under Article 19(1) of the Constitution. It merely prohibited them from exercising any of them within the railway premises. The Supreme Court held that there was no fundamental right for anyone to hold meetings in government premises. The contents of freedoms guaranteed under Article 19(a), (b) and (d) of the Constitution do not include the right to exercise them in properties belonging to others. In *LIC vs. Professor Manubhai D. Shah*, AIR 1993 SC 171, while dealing with the right conferred under Article 19(1)(a) and the restriction imposed by Article 19(1)(2) of the Constitution of India, the Supreme Court held:

"8..... Every free citizen has an undoubted right to lay what sentiments he pleases before the public; to forbid this, except to the extent permitted by Article 19(2), would be an inroad on his freedom. This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest. It is manifest from Article 19(2) that the right conferred by Article 19(1)(a) to subject to imposition of reasonable restrictions in the interest of, amongst others, public order, decency or morality or in relation to defamation or incitement to an offence. It is, therefore, obvious that subject to reasonable restrictions placed under Article 19(2) a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Article 19(1)(a)."

61. Similarly, defendant India TV cannot seek to exercise its rights guaranteed under Article 19(1)(a) by encroaching upon or infringing the rights conferred by the Act upon the owners of copyright in cinematograph films and sound recordings. The defendant India TV is not prevented from airing its views by way of criticism or review or for reporting current events in relation to a cinematograph film or a sound recording without actually utilizing any part of it. However, if it wishes to, and chooses to utilize any part of the copyrighted works which are cinematograph films and sound recordings, it must comply with the provisions of the Act.

62. I may also note that the defendant India TV has not challenged the constitutionality of any provision of the Act either in its defence to the two suits filed by Super Cassettes and Yashraj Films or in its own suit. The obligation cast by the Act upon India TV to obtain licences for the use of copyrighted derivative works for the purpose of criticism, review of the works or for reporting current events cannot be labeled as a restriction, much less an unreasonable restriction on the exercise of the fundamental right guaranteed under Article 19(1)(a) or 19(1)(g) of the Constitution. In my view the argument founded upon Article 19(1)(a) advanced by Ms. Pratibha Singh is a red herring. I reject the same.

63. Pertinently, Section 31 of the Act entitles any person to approach the Copyright Board with a complaint, during the term of copyright in any Indian work (which includes, a cinematograph film or a sound recording made or manufactured in India), which has been published or performed in public, that the owner of the copyright in the work has, inter alia, refused to allow communication to the public by broadcast of such work (Section 31(1)(b)). Upon such an application being made, the Copyright Board, upon being satisfied, may direct the Registrar of Copyrights to grant to the complainant a licence to, inter alia, communicate the work to the public by broadcast on payment of compensation to the owner of the copyright.

64. In the present case the plaintiffs, Super Cassettes and Yashraj Films have expressed their willingness to grant licence to the defendant India TV for use of their copyrighted works, namely, cinematograph films and sound recordings. It is also their case that other broadcasters are, in fact, obtaining licences and it is only the defendant India TV which continues to use their copyrighted derivative works without obtaining any licence. It is not the case of the defendant India TV that the terms on which the plaintiffs, Super Cassettes and Yashraj films offer their licences are onerous to the extent that they tantamount to a virtual denial of the licences. Even if such were the case, the remedy for India TV lies in approaching the Copyright Board under Section 31 of the Act. The defendant India TV cannot seek to bypass the said procedure and use the derivative copyright works of the plaintiffs, Super Cassettes and Yashraj Films without obtaining a valid licence.

65. Reliance placed by Ms. Singh on the copyright (Amendment Bill, 2010) and in particular Clause 31 thereof (which proposes to amend Section 52 of the Act to provide for fair dealing with any work for purposes of, inter alia, criticism, review or reporting current events), in my view is misplaced. The said bill is yet to be enacted and after enactment, to be enforced. It remains to be seen whether or not the said bill, in its present form, is passed by both houses of Parliament; receives the assent of the President to become an Act; and, thereafter enforced. The provisions of the Act as it presently stands could not have been clearer. In my view there is absolutely no ambiguity and Sections 52(1)(a) and 52(1)(b), without doubt do not apply to cinematograph films and sound recordings.

66. Reliance placed by Ms. Singh on Entertainment Network (India) Ltd (supra) to submit that this Court should, if necessary, legislate so as to prevent absurd results arising from the interpretation of the statute is misplaced in the facts of the present case for the reasons, I have already indicated above. There is neither any ambiguity in the statute which is plain and clear upon the adoption of its grammatical meaning, nor can it be said that the adoption of the grammatical meaning results in any absurd consequences. The only consequence of adoption of the interpretation that I propose to adopt is that the defendant India TV would be compelled to obtain licences in relation to cinematograph films and sound recordings from the copyright holders before utilizing the same for the avowed purpose of criticism or review of the said works, or of any other works or for the purpose of reporting current events.

67. In Entertainment Network (India) Ltd (supra), the Supreme Court was interpreting Section 31 of the Act. The copyright holder in the sound recording had granted licence to one FM channel to broadcast the sound recordings. A similar licence claimed by another broadcaster was refused. The Supreme Court held that the grant of licence to one broadcaster does not preclude another

broadcaster to obtain a similar licence and the copyright holder in the sound recordings cannot deny the same licence to other broadcasters on the plea that it has already granted a licence to one broadcaster. It was in that context that the Supreme Court invoked *New India Assurance Co. Ltd V. Nusli Neville Wadia*, (2008) 3 SCC 279, wherein it was held that if literal interpretation gives rise to an anomaly or absurdity which must be avoided; the Superior Court to interpret a statute in a reasonable manner must place itself in the chair of a reasonable legislator/author.

68. However, as I have already discussed, there is neither any anomaly or absurdity in the interpretation that I propose to adopt in respect of Section 52(1)(a) and 52(1)(b) of the Act.

69. I may also refer to the decision of the Supreme Court in *J.P. Bansal v. State of Rajasthan*, (2003) 5 SCC 134, wherein it is held in paras 14 and 16 as follows:

"14. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so". (See: Frankfurter, *Some Reflections on the Reading of Statutes* in "Essays on Jurisprudence", *Columbia Law Review*, P.51.)"

"16. Where, therefore, the "language" is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here. (See: *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests* (AIR 1990 SC 1747 at p. 1752); *Shyam Kishori Devi v. Patna Municipal Corpn.* (AIR 1966 SC 1678 at p. 1682); *A.R. Antulay v. Ramdas Srinivas Nayak* (1984) 2 SCC 500, at pp. 518, 519)]. Indeed, the Court cannot reframe the legislation as it has no power to legislate. [See *State of Kerala v. Mathai Verghese* (1986) 4 SCC 746, at p. 749); *Union of India v. Deoki Nandan Aggarwal* (AIR 1992 SC 96 at p.101)"]

70. During the course of her submission, Ms. Singh made an impassioned plea that the interpretation adopted by this Court would even curtail the right of defendant India TV as a broadcasting organization to report current events such as cricket matches and important news related thereto by showing excerpts or clippings therefrom. I do not find any merit in this submission because such a right is specifically preserved under section 39(b) of the Act, provided the use is consistent to fair dealing.

71. I am also not impressed by the submission of Ms. Singh that, because the laws of various other countries permit the use of derivative works for purposes of criticism, review of the said works or of other works or for purposes of reporting current events without having to obtain a license from the concerned copyright owner, the same legal position should obtain in India. The Indian law as it presently stands is amply clear and does not admit of any ambiguity. The language used in the respective statutes of the aforesaid countries is starkly different from that used in the Act, which this Court is bound to implement. Therefore, the said laws cannot be brought in aid by the defendant, India TV. For the same reason, I do not consider it necessary to deal with the decisions of American Courts relied upon by the defendant, wherein the fair use defence in relation to cinematograph films and sound recordings has been upheld.

72. In *ESPN Star Sports (supra)*, a Division Bench of this Court held that this Court is not bound by WIPO or any other such agreements, and we must interpret the law in accordance with the legislative intent available from the Constitution of India or the statute enacted by the Indian Parliament. The Court may take resort to such conventions or agreements only when there is a vacuum in the domestic laws. Reference was also made to *Visaka Vs. State of Rajasthan*, AIR 1997 SC 3011.

73. I am also not impressed by the defendants submission that the proposed amendment in the Copyright Act, insofar, as, it proposes to extend the fair use/fair dealing exception to cinematograph films and sound recordings is merely clarificatory. I have already observed that on a plain reading of section 52(1)(a) and 52(1)(b), it cannot be said either cinematograph films and sound recordings are covered by those provisions.

74. Reliance placed on Clause 10 of the Berne Convention also appears to be misplaced. Article 10 bis. (1) of the Berne Convention, inter alia, deals with the aspect of broadcasting of articles published in newspapers or periodicals on current economic, political or related topics, and of broadcast works of the same character. The present cases do not fall in this category. A close scrutiny of Article 10 bis (2) shows that the same pertains only to literary or artistic works which may be seen or heard in the course of a current event, which event is reported by means of photography, cinematography, broadcasting or communication to the public by wire. Article 10 bis. (2) states that the countries of the Union shall legislate on the conditions under which such literary or artistic works may be reproduced to the extent justified by the informatory purpose. Therefore, clause 10 of the burn convention relied upon by the defendant has no application in the present context.

75. For the reason that cinematograph films and sound recordings are not at all covered by section 52(1)(a) and 52(1)(b), I am also not inclined to accept the submission of Ms. Singh that incidental or deminimise use of such derivative works should be permitted for the purposes of criticism, review and reporting of current events. It is not even the plaintiffs case that such derivative works cannot be used for purposes of criticism, review or reporting of current events. All that they say is that the defendant should not infringe their copyright by stoutly refusing to obtain the license from the plaintiff. By all means, the defendant India TV can obtain a license and use the copyrighted derivative work in terms of the license for purpose of criticism, review of the said works, or of any

other works and also for reporting current events.

76. Therefore, on a plain reading of Section 52(1)(a) and 52(1)(b) it would appear that the use of sound recordings or cinematograph films by the defendant India TV, the copyright wherein is owned by the plaintiffs Super Cassettes or Yashraj Films, in any of its programmes would constitute infringement of their copyright in the sound recordings or cinematographic films. The defence of India TV founded upon Clauses (a) and (b) of Section 52(1) of the Act, in any event, would be of no avail, as a sound recording cinematograph film cannot be used for the purpose of criticism or review, whether of the cinematographic film or of any other work, and it also cannot be used for the purpose of reporting current events.

77. The only exception to the protection of copyright subsisting in a cinematographic film is contained in Section 52(1)(i), which permits the performance, in the course of the activities of an educational institution, inter alia, of a cinematographic film, if the audience is limited to the staff and students of the educational institution, the parents and guardians of the students, and persons directly connected with the activities of the institution. That is not the case in hand.

78. For all the aforesaid reasons, since, admittedly, the defendant India TV has not obtained licenses from Super Cassettes and Yashraj Films, the plaintiffs in respect of the cinematograph films and sound recordings, admittedly, exploited by the defendant India TV, such user of the plaintiffs copyrighted works tantamount to infringement thereof. The same cannot be permitted to be perpetuated by the defendant India TV in future.

79. I may now proceed to deal with the argument that the use by the defendant India TV of the copyrighted works of the plaintiffs tantamount to "fair use" of such works. This submission has been made by the defendant India TV, and opposed by the plaintiffs dehorting the first submission of the plaintiffs that "fair use" defence is not available in respect of cinematograph films and sound recordings under sections 52(1)(a) and 52(1)(b) of the Act.

80. My learned brother Rajiv Shukdhya, J has considered this issue in the case of Super Cassette Industries Ltd. V. Hamar Television Pvt. Channel I.A. No.12926/09 in CS(OS) No.1899/2009 and Super Cassette Industries Ltd V. M/s Positiv Television Pvt. Ltd & Anr. I.A. 13058/2009 in CS(OS) 1906/2009 decided on 24.05.2010 reported as (2011) 45 PTC 70 (Del). While doing so, he has discussed a majority of the decisions cited before me by the parties. The factual background in these cases were more or less identical with that found in the present cases. Super Cassettes Industries Ltd, (which is a plaintiff in CS(OS) No.2282/2006 had alleged that the defendants in the aforesaid two cases, namely M/s Hamar Television Network Pvt. Ltd & Anr & M/s Positiv Television Pvt. Ltd were infringing the copyright of the plaintiff by copying the songs and cinematograph films in which the copyrights vested in the plaintiff. The defendants in the two suits had raised a similar defence of fair use and fair dealing founded upon Section 52(1)(a) and Section 52(1)(b) of the Act. The stand of the defendant Hamar Television was that the broadcast of the copyrighted works of the plaintiff ranged between 10 to 30 seconds except on a few occasions where the duration was more than 30 seconds. The maximum duration of the broadcast was 40 seconds and that too, not in a single stretch. The use of the copyrighted works of the plaintiff could not be dubbed as indiscriminate use

of copyright for commercial exploitation. The defendant placed reliance on the decisions reported as ESPN Star Sports V. Global Broadcast News Ltd & Ors.,(supra) and Hubbard & Anr. V. Vosper & Anr, (1972) 1 All. ER 1023. Apart from the aforesaid, the following judgments were also cited from both sides before the Court, which are also relied upon by the parties before me.

a. ESPN Star Sports vs Global Broadcast News Ltd. & ors. 2008 (38) PTC 477 (Del) b. Hubbard and Anr vs Vosper & Anr. (1972) 1 All ER c. Sony BMG Music Entertainment et al vs Jeol Tenenbaum Case No. 07cv11446-NG dated 07.12.2009. d. Hyde Park Residence Ltd vs Yelland (2000) R.P.C. 604;

e. Ashdown vs Telegraph Group Ltd (2002) R.P.C. 5 f. Associated Newspapers Group Plc vs News Group Newspapers Ltd & Ors (1986) R.P.C. 515] g. Fraser-Woodward Ltd vs British Broadcasting Corporation & Anr (2005) EWHC 472] h. Ladbroke (Football) Ltd vs William Hill (Football) Ltd (1964) 1 All. E.R.465].

i. Hawkes and Son (London) Ltd. vs Paramount Film Service Ltd. (1934) 1 Ch. 593;

j. Donald Irwin Robertson vs Batten, Barton, Durstine & Osborn Inc. et al 146 F. Supp. 795 k. Baxter vs MCA Inc. 812 F.2d 421 (9th Cir. 1987)].

l. The Chancellor Masters and Scholars of the University of Oxford PTC 385(Del);

m. Pro Sieben Media AG vs Carlton UK Television Ltd (1999) F.S.R. 610;

n. BDA Private Limited v. Paul P.John & Anr. 2008(37) PTC 569(Del.) o. Pfizer Enterprises & Anr. v. Dr.H.R.Manchanda & Anr. CS(OS) 641/2007 and IA 3995/2007 dated 16.07.2008 (Del).

81. After considering the said cases, the learned single Judge summarised the broad principles of law enunciated by the judgments cited before him on the aspect of fair use and fair dealing 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 to 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."

82. The Court then proceeded to consider the Indian judgments dealing with the aspect of infringements of copyright and the defence of fair dealing. From the decision in *M/s Blackwood and Sons Ltd and Others Vs. A.N. Parusuraman and Others*, AIR 1959 Mad 410, the Court deduced the following principles:-

(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".

83. The Court also considered the judgment in the Rupendra Kashyap vs Jiwan Publishing House, 1996 (38) DRJ 81, which related to the claim of copyright in the past years question papers for classes 10th and 12th examination conducted by CBSE. One of the issue which arose before the Court was whether the defence of fair dealing could be 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 paper 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 of private study. As regards the issue of public interest, the Court held that the said argument was not tenable as it could not be said that the examination papers of the past years were not placed in public domain. The plaintiff, being the exclusive licensee, had in the past published the papers and put them in the public domain on payment of royalty to CBSE. The Court in the passing made the following observations:-

"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."

84. The learned single Judge also dealt with Wiley Eastern Ltd & Ors vs. Indian Institute of Management, 61(1996) DLT 281 (DB). In this decision, the Division Bench had 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 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".

85. The learned single Judge added that the 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 provided in Section 52.

86. From *Eastern Book Company & Ors. Vs D B Modak & Anr.*, (2008) 1 SCC 1, the learned single Judge culled out the following broad principles enunciated in the judgment:-

"(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. vs. 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 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."

87. As to what constitute "substantial taking", the learned single Judge held that 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, i.e., 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 made in certain cases may 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".

88. I find myself in complete agreement with the view of brother Shakhdar, J. and I see no reason to disagree with the said view.

89. Learned counsel for India TV has placed reliance on various other decisions, which it appears were not relied upon by the parties before the court in the case of Super Cassettes Industries Vs. Hamar Television Private Limited (supra). I proceed to deal with them at this stage.

90. Campbell Vs. Acuff-Rose Music Inc., 29 USPQ 2d 1961, is an American decision, wherein it was held that the mere fact that the use of the earlier work is of commercial nature does not mean that such use of the copyrighted work is presumptively unfair. Copying of the original work, even of the "heart" of original work is not excessive, if such copying is necessary. The respondent- Acuff-Rose Music filed the suit against the petitioner, the members of a rap music group and their record company on the ground that their song "Pretty Woman"

infringes Acuff-Rose's copyright in Roy Orbison's rock ballad. "Oh Pretty Woman". The US Supreme Court, inter alia, held that the music parody may be a fair use within the meaning of Section 107 of the US Copyright Act. Section 107 provides that "the fair use of a copyrighted work.....for the purposes of such criticism or comment.....is not an infringement". It was held that parody, like other comment and criticism, may claim fair use. The inquiry in such cases is focused on whether the new work merely supersedes the objects of the original creation or whether, and to what extent, it is "transformative", altering the original with new expression, meaning or message. The more transformative the new work, the less the significance of other factors like commercialization, that might weigh against a finding of fair use.

91. Time Warner Entertainment Co. Ltd. Vs. Channel 4 Television Corporation PLC, 28 IPR 459, is a decision rendered by the Court of Appeal of United Kingdom. The plaintiffs were producers and distributors of films. In 1971, they produced a well-known film „A Clockwork Orange“. The film was about an anti-social individual which was prone of acts of mindless violence. Though it was an extremely successful film, in 1974 it was withdrawn for fear that it might incite violence. The defendant, a major television corporation, wished to produce a documentary on the reasons for the film's sociological impact. The Director of the film, however, declined several requests to participate in this venture. The defendant obtained a copy of the film from a video shop in France and made a documentary. The plaintiff obtained an injunction to restrain infringement of their copyright pending trial. Twelve clips from the films totalling over 12 minutes, which were used in the documentary, was admitted by the defendant to constitute a substantial part of the 30-minute documentary. However, they relied on the defence under Section 30(1) of the Copyright, Patent & Designs Act, 1988, which permits fair dealing of a copyright work for the purposes of criticism and review. The Court of Appeal after examining the case held as follows:

"(i) Criticism or review of a work already in the public domain which would otherwise constitute fair dealing will rarely be rendered unfair because of the means by which the work had been obtained. The way in which the defendants had obtained the film did not therefore affect the question of fair dealing.

(ii) It was not relevant to the question of fair dealing that the documentary might have misrepresented the film's content.

The program did not exceed the bounds of fair dealing by reason of the length of the extracts used.

(iii) There was no serious issue that the defendants' intention was not to review or criticise the work. Criticism of a work need not be of the work itself but may be of the thought and philosophy behind it."

92. In this decision, the Court of Appeal took note of an earlier decision in *Belloff Vs. Pressdram Limited*, (1973) 1 AER 241 at 263, where it had been held: "fair dealing is a question of fact and of impression". The Court observed "One has to consider whether the allegedly infringing material may amount to an illegitimate exploitation of the copyright holders' work".

93. *British Broadcasting Corporation Vs. British Sky Broadcasting Limited* (formerly *British Satellite Broadcasting Limited*), 21 IPR 503, is a decision of the Chancery Division. BBC transmitted throughout the UK live broadcasts of the World Cup football competition staged in Italy between June & July 1990. The BBC had acquired copyright in its broadcasts. The defendant-BSB was engaged in transmitting television programmes to the UK via satellite. It had five specialized channels each dedicated to a specific audience. Over the period of the World Cup finals, BSB included reports of the results of the matches in its "Sports Desk" programme together with film showing prominent features of the matches. This film was taken from the BBC's live broadcasts. BSB accepted that the BBC had copyright in its broadcasts and its use was, *prima facie*, an infringement of copyright. However, BSB relied on the defence of fair dealing for the purpose of reporting current events. The court dismissed BBC's application for injunction and damages by holding as follows:

(i) The quality and quantity of BBC copyright material used in each programme was consistent with the nature of a news report and no more than was reasonably requisite for a television news report of the results of an important match.

(*Hubbard v Vosper* [1972] 2 QB 84; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545, applied.)

(ii) There is no justification for limiting the statutory defence so as to apply only to reporting current events in a general news programme.

(iii) The reporting of current events must be done promptly. To have required BSB to postpone its use of the material until after the material had been used in the BBC's programmes would in

practice have barred the use of the material as an adjunct to the reporting of the World Cup matches as current events.

(iv) If a programme is a genuine reporting of current events, it is absurd to say that an endeavour to make the programme more attractive is an oblique motive.

(Belloff v Pressdram Ltd [1973] 1 All ER 241; Johnstone v Bernard Jones Publications Ltd [1938] 1 Ch 599, applied.)

(v) The fact that the other broadcaster is a commercial rival of the copyright owner does not, ipso facto, take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account.

(vi) The use of the BBC material, first, in a menu, secondly, in the main report, and thirdly, in a replay, was all for the purpose of reporting current events and was a fair use of the material for that purpose.

94. Wade Williams Distribution Inc. Vs. American Broadcasting Company Inc., 2005 U.S. Dist. LEXIS 5730, is a decision of the United States District Court for the Southern District of New York. The defendant-American Broadcasting Company (ABC) had programme "Good Morning America" on 06.07.1997 which focused on several news events with "outer space" themes. Amongst various films released on the subject of Aliens, a couple of films wherein the plaintiff claimed copyright were also featured which included a 4 second clip of the film "Monster". The defendant-ABC set up a defence of fair use. The discussion in this judgement on the aspect of fair use reads as follows:

"Fair Use ABC's use of the three movies in the July 10, 1997 Good Morning America segment was "fair use" within the meaning of 17 U.S.C. § 107. ... Section 107 of the Copyright Act of 1976 is a codification of the judicially created "fair use" doctrine as it previously existed in the case law. See *Folsom v. Marsh*, 9 F.Cas.342, F. Cas No.4901 (C.C.D. Mass. 1841) (No.4901). Under the Copyright Act, "the fair use of a research, is not an infringement of copyright." 17 U.S.C. § 107 (2005). In determining whether a particular use is a fair use, "[a] court is to apply an 'equitable rule of reason' analysis, guided by four statutorily prescribed factors." *Harper & Row Publishers, Inc. v Nation Enter.*, 471 U.S. 539, 588, 85 L.Ed 2d 588, 105 S. Ct. 2218 (1985). The factors are (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) The nature [*22] of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. These "four factors are not necessarily the exclusive determinants" of fair use, rather, a court may also consider other factors in its analysis. *Harper & Row*. 471 U.S. at 588. "The [fair use inquiry] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes,

calls for case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994). In each case, "all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright, "id., and "the burden of proof is on the [accused infringer] to prove that the use was fair." *Hofheinz v. Discovery Communications, Inc.*, No. 00 Civ. 3802, 2001 U.S. Dist. LEXIS 14752, *7 (S.D.N.Y. Sept. 10, 2001) (citing *Coleman v. ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991))."

95. The learned Judge also discussed the aspect of transformative use in the following manner:

"i. Transformative Use To be a fair use, the use of a copyrighted work should be "productive" or "transformative," thereby furthering the constitutional goal of promoting the progress of science and the useful arts. *Campbell*, 510 U.S. at 579; *Melville B.Nimmer & David Nimmer, Nimmer on Copyright* .13.05 [A][1][a] (2005). "Transformative use is not absolutely necessary for a finding of fair use,"but" the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at

579. A use is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Id.* (citing *Pierre N.Leval, Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).

The preamble of .107 informs the first factor by listing "purposes such as criticism, comment," and several other examples that "Congress most commonly found to be fair uses." *N4 Id.* At 577, it follows that one indicator of transformative use is that the use bears [*25] critically on the "substance or style" of the copyrighted work itself. *Id.* At 580. The Good Morning America segment at issue is a transformative comment on, and a criticism of, how filmmakers have portrayed aliens. Siegel used the films at issue as examples to demonstrate and support his commentary on twentieth century science fiction films. (J. Siegel Affidavit. PP4, 7) Early in the segment, Siegel presented his theme: "big or small, cute or icky, alien life as portrayed in pop culture inevitably shares some humanlike traits." (N. Siegel Decl. Exs. 3,4) He then showed his interview with Professor Helfand, who pointed out that in most films even "unhumanlike" alien creatures still tended to have eyes, mouths, and other physical traits in common with humans. (*Id.*) Professor Helfand clearly criticized the science fiction genre when he attributed the human traits of movie aliens to a lack of creativity." (*Id.*) Professor Helfand's comments were played in close proximity with the 3-second clip of *The Brain* from the Planet Arous, where the alien is depicted as a giant hovering brain with eyes. (N.Siegel Decl. Exs. 3, 9)."

96. The court agreed with the defendants submission that the use of the plaintiff's copyrighted works amounted to fair use for the purpose of criticism and review on the theme of outer space and aliens because it commented on and criticized the themes using short clips from them in a transformative manner which was not likely to harm the future marketability of the films.

97. Indian Performing Right Society Ltd. Vs. Eastern Indian Motion Pictures Association and Others, (1977) 2 SCC 820, is relied upon by Ms. Pratibha Singh to submit that the singer should be recognized by the copyright law as possessing some rights in his/her rendition. In paragraph 24 of this decision, V.R. Krishna Iyer J, observed as follows:

"A somewhat un-Indian feature we noticed in the Indian Copyright Act falls to be mentioned. Of course, when our law is intellectual borrowing from British reports as, admittedly it is, such exoticism is possible. „Musical work , as defined in Section 2(p), reads:

(p) musical work means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced. Therefore, copyrighted music is not the soulful tune, the superb singing, the glorious voice or the wonderful rendering. It is the melody or harmony to listen and be enthralled or enchanted by the nada brahma, the sweet concord of sounds, the raga, the bhava, the laya and the sublime or exciting singing. Printed music is not the glamour or glory of it, by and large, although the content of the poem or the lyric or the song does have appeal. Strangely enough, „author , as defined in Section 2(d), in relation to a musical work, is only the composer and Section 16 confines „copyright to those works which are recognised by the Act. This means has none.

This disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps, both deserve to be recognized by the copyright law. I make this observation only because art, in one sense, depends on the ethos and the aesthetic best of a people, and while universal protection of intellectual and aesthetic property of creators of „works is an international obligation, each country in its law must protect such rights wherever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right. Of course, law-making is the province of Parliament, but the Court must communicate to the law-maker such infirmities as exist in the law extant."

98. Prasara Bharti Vs. Sahara TV Network Pvt. Ltd. & Ors., 2006 (32) PTC 235 (Del.), is a decision rendered by the learned Single Judge of this court, wherein it had been held that news channels cannot be treated at par with commercial channels, and they must act in a larger interest of the public in ensuring that cricket news reaches all parts of the country or even overseas. BCCI had granted exclusive telecast rights to Prasara Bharti in relation to the India-South Africa cricket series.

99. From the said order it appears that it was made as an interim arrangement without deciding upon the rights of either party and without prejudice to rights and contentions of the parties as the parties had not seriously opposed the passing of interim directions. The court had directed that the news channels would be regulated in terms of the same clause as stated in the rules of the Prasara Bharti on record except to the extent that the maximum cap limit of 2 minutes shall stand extended to 7 minutes in 24 hours, and the use of this time shall only be for giving cricket news without any commercial programme, advertisements before, during and after the cricket news. However, the

defendant was at liberty to show any news or important events during that period as well. The court specifically observed that the directions had been issued keeping in view the peculiar facts of the case as an interim measure and they are not to be treated as a precedence.

100. The aforesaid decisions relied upon by the learned counsel for the defendant-India TV in no way contradicts any of the conclusions reached by this court in Super Cassette Industries Limited Vs. Hamar Television Private Channel (supra). It remains to be seen whether, on the facts found in these cases, the defendant is in a position to derive any benefit from the aforesaid decisions.

101. Chancellor Masters & Scholars of the University of Oxford v. Narendra Publishing House and Ors., 2008 (38) PTC 385 (Del) has been relied upon by the defendant to invoke the doctrine of "transformative work". According to the defendant, India TV, by use of the plaintiffs copyright works in its programmes, the defendant has transformed the plaintiffs works substantially and the user of the said works constitutes fair use.

102. In this case, the Court took note of the judgment of the Supreme Court in R.G. Anand v. M/s. Deluxe Films, 1978 (4) SCC 118, wherein it had been observed:

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

103. After considering a few other decisions, the Court in paras 33 and 34 held as follows:

"33. The doctrine of fair use then, legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use.

34. One crucial test, of the four-factor test, as developed by the American courts, is the transformative character of the use. The Courts should in cases like the present ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. The subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same, to be called transformative. This determination, according to the Court is closely knit with the other three factors, and therefore, central to the

determination of fair use. If the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work".

104. Learned counsel for the plaintiff Super Cassettes and Yashraj Films have relied upon the decisions in Roy Export Company Establishment of Vaduz, Liechtenstein, Black Inc. v. Columbia Broadcasting System Inc., 503 F. Supp. 1137; and, Bridgeport Music, Inc. Westbound Records, Inc. v. Dimension Films, Miramax Film Corp., decided by United States Court of Appeals, for the Sixth Circuit.

105. In Roy Export Co. (supra), the defendant produced a 13 minute film consisting of highlights from Charlie Chaplin film. According to the plaintiff, there were unauthorized scenes added in the film. The plaintiff, who held the copyright in the films of Charlie Chaplin, sued the defendant. One of the defences taken by the defendant was that its use constitutes news reporting of matter of intense public interest. The Court held that the defendant possessed an unfettered right to use any factual information about Charlie Chaplin. However, the defendant had, instead, used Chaplin's artistic works themselves. It observed that the fair use doctrine is not a license for corporate theft empowering a court to ignore a copyright, whenever it determines the underlying work contains material of possible public importance.

106. The defendants next defence founded upon the first amendment to American Constitution was also rejected by the Court by holding that the same was not applicable with reference to the film clips. The film clips were used by the defendant to illustrate Chaplin's artistic genius, not to communicate anything about the events depicted in the films, which were fictitious.

107. In Bridgeport Music (supra), the Court held that even when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled the sound recording, because it would - (1) save costs, or (2) add something to the new recording, or (3) both.

108. I have already narrated the respective cases of the parties in the opening part of this judgment. The plaintiff has also shown to the Court the recording of the excerpts of the programme „India Beats“, stated to have been telecasted on 27.05.2006. The popular singer Richa Sharma featured in this programme. The anchor poses a few questions to the singer which are personal in nature and relating to her family. She is asked about her experiences of past performances. The anchor talks to the audience and states that „Mahi ve“ is a very popular song of the singer. Thereafter the singer sings the song „Mahi ve“ from the film „KAANTE“. During the said performance, there are excerpts from the cinematograph film „KAANTE“ itself which are played. At the end of the song, the audience sitting in the studio applauds. As contended by the plaintiff, she sings the said song for over three minutes. There is a commercial break thereafter. When the programme resumes, the artist is asked about her experience of working with various music directors. The anchor then states that the singer has given a very good performance while singing the song „Tauba Tauba“. She is asked if she would like to sing the song. Thereafter the singer sings the said song. When the said

song is being sung, excerpts from the cinematograph film are also played on the screen. There is another commercial break after the said song. When the programme resumes, the anchor then states that the singer is singing beautiful songs and also asks which song she would like to perform next. She states that she would like to sing a Thumri from the film „ZUBEIDAA . The singer then performs the song „Saiya Chodo More Baiya from the film „ZUBEIDAA . She is thereafter asked questions about her family life. She is then asked what kind of performances she likes to give. She is then asked which song she would like to sing now. The performer then performs the song „Zindagi Me from the film „MUSAFIR , approximately for about four minutes. She also implores the audience to sing with her the said song. At the end of the song, there is applause from the audience. This is again followed by a commercial break. After the break, the anchor asks the performer to sing the song from another cinematograph film „SOCH which she sings. In all these songs she is accompanied by an orchestra present in the studio. She is asked about her work in Tamil songs. After she sings the said song for a while, she is asked what she would like to next sing. She states that she would like to sing the song from the latest film, „PYARE MOHAN . Thereafter she performs the song. This is again followed by a commercial break. After the commercial break, when the programme resumes, it begins with the performance of another song. She is then asked what sort of music she has grown up with. She is then asked about the projects on which she is working on. The anchor then asks her, before the close of the show, which song she would like to sing. The singer then performs another song.

109. Even if one were to assume that fair use in respect of the cinematograph films and sound recordings are permissible under Sections 52(1)(a) and 52(1)(b) of the Copyright Act, the usage resorted to by the defendant India TV of the plaintiffs copyright works, prima- facie, cannot be said to be a fair use, either for the purpose of criticism or review of the copyright works of the plaintiffs, or of any other work, or a fair dealing with the copyright works of the plaintiffs, namely cinematograph films and sound recordings for the purpose of reporting current events. There is absolutely no review or criticism of the sound recording or the cinematograph films, or of the literary, or musical works performed by artists during the course of the said programme. It is, out and out, an entertainment programme with some information about the performer sprinkled here and there. There is hardly any intellectual input, in the making of the programme, contributed either by the anchor or by the defendant, India TV. It is, plain and simple, a commercial exploitation of the copyright works of, inter alia, the plaintiffs Super Cassettes and Yashraj Films by the defendant. The "taking" is substantial, not only in quantity but even in quality. Even if one were to apply the test of transformative use and examine whether the work of the defendant is transformative; and whether the use of the plaintiffs copyright works is transformative, it is clear that the defendant, India TV does not pass the said test. What India TV has done is merely lifted the copyright works of the plaintiff, as aforesaid, without any change. So much so, there are no superficial changes made by the defendant and the basic character of the works of the plaintiff which have been lifted and used by the defendant remains the same. The identity of the plaintiffs copyright work has not undergone any change or transformation. The decision in Chancellor Masters (supra), therefore, does not come to the rescue of the defendant. The defendants have failed to meet the criteria culled out by this Court in Super Cassettes Industries Vs. Hamar Television Private Limited (supra) to claim that their use of the copyright works of the plaintiffs tantamounts to "fair use" as permitted under the Act.

110. I find the averments made by the plaintiffs in their respective complaints to be substantially corroborated by the video recordings produced by the plaintiffs. The averments of the plaintiff Super Cassettes set out in paras 10 and 11 appear to be fairly accurate narration of the way in which the defendant India TV has used and exploited the said plaintiffs' copyright works. The admitted position is that the song „Kajrare“ from the cinematograph film „Bunty Aur Babli“ was played for the promotion of the defendant's programme „Sab Golmaal Hai“. It is also not disputed and is rather the admitted position that excerpts from the film „Salaam Namaste“ were shown in the „India Beats“ programme. The taking of the plaintiffs' copyright works by the defendant is, prima-facie, substantial and the purpose of such copying of the plaintiffs' copyright works, in no way, appears to be for the purpose of criticism or review of the said works, or of any other works. The usage of the said copyright works of the plaintiff also cannot be said to be for the purpose of reporting current events, much less the said usage can be described as a fair dealing of the plaintiffs' copyright works.

111. As I have already noticed hereinabove the main plank of the defendant's rested not on a denial of the factual assertions of the two plaintiffs made in their respective complaints, but on the interpretation of Sections 52(1)(a) and 52(1)(b) of the Copyright Act.

112. For the reasons discussed hereinabove, I do not agree with the interpretation sought to be advanced by the defendant in relation to Sections 52(1)(a) and 52(1)(b) of the Copyright Act. Consequently, the plaintiffs have clearly made out a, prima-facie, case in their favour for grant of interim protection. The balance of convenience is also in favour of the plaintiffs inasmuch, as, they are entitled to protection of their copyright and the defendant can be permitted to infringe the same. The plaintiffs will suffer irreparable loss and injury if the defendant, India TV continues to infringe the plaintiffs' copyrights in their works, namely cinematograph films and sound recordings inasmuch, as, the plaintiffs obviously would have invested monies for producing the said copyright works for the purpose of commercial exploitation. The unlicensed user of the said copyright works of the plaintiffs by the defendant-India TV would not only deprive the plaintiffs of the revenues that they are entitled to earn, but unauthorised exploitation of the works would encourage others to follow suit and defy the rights of the plaintiffs.

113. For all the aforesaid reasons, I allow the interim applications, namely I.A. No. 13741/2006 in CS(OS) 2282/2006; I.A. No. 13743/2006 in CS(OS) 2283/2006; and dismiss I.A. No. 9900/2006 in CS(OS) 1706/2006. The interim order dated 05.09.2006 passed in this application stands vacated.

114. The defendant-India TV is restrained from either engaging in themselves, or from authorizing, the public performance / communication to the public, reproduction, recording, distributing, broadcasting or otherwise publishing or in any other way exploiting any cinematograph films or sound recordings or other work or part thereof that is owned by the plaintiff-Super Cassettes Industries Limited.

115. The defendant India-TV is also restrained from, distributing, broadcasting or otherwise publishing or in any other way exploiting the cinematograph films „Bunty Aur Babli“ and „Salaam Namaste“ or any sound recordings or part thereof incorporated in the said cinematograph films, or doing any other act that would lead to infringement of copyright in the said cinematograph films.

116. The defendant India-TV is also restrained from distributing, broadcasting or otherwise publishing or in any other way exploiting any cinematograph film, sound recordings or part thereof that is owned by the plaintiff-Yash Raj Films Private Limited.

117. Each of the plaintiffs, i.e. Super Cassettes Industries Limited & Yashraj Films Private Limited are entitled to Costs quantified at Rupees Two Lakhs each. The Costs be paid within one month.

(VIPIN SANGHI) JUDGE NOVEMBER 11, 2011 as/'BSR'/sr