

Akuate Internet Services Pvt. Ltd. & ... vs Star India Pvt. Ltd. & Anr. on 30 August, 2013

Author: S.Ravindra Bhat

Bench: S. Ravindra Bhat, Najmi Waziri

* IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 07.05.2013

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PRONOUNCED ON: 30.08.2013

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FAO(OS) 153/2013, CM APPL. 4665/2013
AKUATE INTERNET SERVICES PVT. LTD. & ANR Appellant
Through: Mr. Sudhir Chandra, Senior Advocate
with Ms. Gayatri Roy, Mr. Thomas
George and Mr. Udit Sood,
Advocates.

versus

STAR INDIA PVT. LTD. & ANR. Respondents

Through: Mr. Parag Tripathi, Senior Advocate with Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra, Ms. Sneha Jain, Mr. Nidhiram and Mr. Krishna Mohan, Advocates.

Mr. Abhinav Vashisht, Senior Advocate with Ms. Radha Rangaswamy, Mr. Prateek Chadha and Mr. Anirban Sen, Advocates for BCCI.

FAO(OS) 160/2013, CAV 265/2013, CAV 266/2013, CM APPL. 4880/2013, CM APPL. 4881/2013, CM APPL. 4882/2013 ONMOBILE GLOBAL LIMITED Appellant Through: Mr. Dushyant A. Dave, Senior Advocate, Mr. Sanjay Jain, Senior Advocate with Mr. Hardeep Singh Anand, Ms. Vandana Sehgal, Mr. Rohan Thawani, Ms. Kriti Singh Gehlout, Ms. Noor Anand and Ms. Ruchi Jain, Advocates.

versus

FAO(OS) Nos.153, 160 & 161/2013

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STAR INDIA PRIVATE LIMITED & ANR. Respondents

Through: Mr. Parag Tripathi, Senior Advocate
with Mr. Saikrishna Rajagopal, Mr.
Sidharth Chopra, Ms. Sneha Jain, Mr.
Nidhiram and Mr. Krishna Mohan,
Advocates.
Mr. Abhinav Vashisht, Senior

Advocate with Ms. Radha
Rangaswamy, Mr. Prateek Chadha
and Mr. Anirban Sen, Advocates for
BCCI.

FAO(OS) 161/2013, CAV 267/2013, CAV 268/2013, CM APPL.

4883/2013, CM APPL. 4884/2013

IDEA CELLULAR LTD. Appellant
Through: Mr. Navin Chawla, Ms. Sonali Jaitley
and Mr. Eshan Manchanda,
Advocates.

versus

STAR INDIA PVT. LTD. & ANR. Respondents
Through: Mr. Parag Tripathi, Senior Advocate
with Mr. Saikrishna Rajagopal, Mr.
Sidharth Chopra, Ms. Sneha Jain, Mr.
Nidhiram and Mr. Krishna Mohan,
Advocates.
Mr. Abhinav Vashisht, Senior
Advocate with Ms. Radha
Rangaswamy, Mr. Prateek Chadha
and Mr. Anirban Sen, Advocates for
BCCI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

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MR. JUSTICE S.RAVINDRA BHAT

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1. These three interlocutory appeals seek interference with the common order of the learned Single Judge, dated 13.03.2013, whereby he granted an ad-interim order, and issued a "limited interim injunction restraining the defendants from disseminating contemporaneous match information in the form of ball-by-ball or minute-by-minute score updates/match alerts for a premium, without obtaining a license from the plaintiff."

SINGLE JUDGE S FINDINGS

2. The present case had a chequered history. A learned single judge had by the earlier order (dated

08-11-2012) rejected the three suits, holding that they were barred. A Division Bench set aside the learned single judge's order, and directed that the application for ad-interim injunction should be heard on its merits. Thereafter, the learned single judge, by the impugned order, granted the ad-interim injunction in the manner described earlier. The facts are that Star India Pvt. Ltd. (Star) filed three suits against Piyush Agarwal (Cricbuzz), Idea Cellular ("Idea") and OnMobile Global Ltd. ("ONMOBILE"). The Board of Cricket Control in India (BCCI) was arrayed as the common defendant in all the three cases. BCCI, however, supported Star, claiming paramount rights over all information emanating from cricketing events as the organizer and promoter of that sport in India. Star and BCCI contended in the suit that the latter (BCCI) by agreement dated 10.08.2012 had assigned a „bouquet of rights“ exclusively to Star. These included „Mobile Rights“ and "Mobile Activation Rights", and Star alleged that the defendants had violated those rights and consequently filed the suits currently in question for permanent injunction and damages. Star also FAO(OS) Nos.153, 160 & 161/2013 Page 3 moved interim injunction applications against the defendants alleging that they had violated those rights which were exclusively assigned to Star. The defendants resisted Star's claims and asserted that such rights claimed by it did not exist, and as there was no question of enforcement of a non-existent right, no relief could be granted. Before the learned Single Judge, the defendants' contentions were rejected and the ad-interim injunction sought was granted.

3. Before the learned Single Judge, Star and BCCI argued that unauthorized dissemination of match information through live score cards, match updates and score alerts through Short Messaging Service (SMS)/Mobile Value Added Services (MVAS), by the appellants constituted „unfair competition“, commercial misappropriation or unjust commercial enrichment. Star claimed to have spent Rs. 3581 Crores to acquire these rights, through the Media Rights Agreement dated 10.08.2012. The appellants had no license for such rights from Star or BCCI to disseminate match information.

4. The Appellants had argued that Star's claim was barred by Section 16 of the Copyright Act, 1957 which precluded it from claiming copyright or other similar un-enumerated, rights. The Appellants claimed to have published match information, after it entered the public domain; that it was purely factual and amounted to news. They claimed that their actions did not amount to free-riding on the efforts of the plaintiff as they did not copy the content of the broadcast or provide access to audio or visual footage of the broadcast. The defendant/ appellants further argued that dissemination of information through SMS was in exercise of their free speech right under Article 19(1)(a) of the Constitution. Their right also extended to freedom to FAO(OS) Nos.153, 160 & 161/2013 Page 4 carry on business in dissemination of information to the public; both these rights could be restricted through reasonable restrictions enacted through law, which fell under Article 19(2) and not by common law.

5. BCCI contended before the Single judge, that as the organizer of cricketing events in India, it owned exclusive rights in respect of content generated during a cricketing event. These included the right to commercially exploit all event content. BCCI claimed that it is a not-for-profit organisation, registered under the Tamil Nadu Societies Registration Act, 1975, recognized as the de-facto apex body which deals with promotion and organisation of cricketing events in the country by the

Government of India. It is not funded by the Government. It funds all cricket related activities, from setting up of the stadium to starting training academies for umpires, scorers etc. Its main source of funding is by monetizing content arising from cricket matches, such as sponsorships and commercial advertisements. The revenue received from sale of match tickets is negligible. Of the revenue generated, BCCI claims to plough back 85% into promoting the game of cricket in India. The defendants on the other hand do not contribute their revenue or a part thereof for the purpose of promoting the game of cricket in India. The BCCI and the plaintiff claim that defendants are eating away into the mobile and internet rights, without sharing the profit gained by them; thereby indulging in unfair competition and unjust commercial enrichment.

6. Star and BCCI based their arguments upon the principle underlying the decision of the United States Supreme Court in *International News Service vs. Associated Press*, 248 U.S. 215, 39 S.Ct. 68 (1918) (hereafter FAO(OS) Nos.153, 160 & 161/2013 Page 5 "INS") to the effect that one who fairly pays the price should have beneficial use of the property. Reliance was also placed on the judgments in other cases regarding dissemination of content through updates/alerts arising from sporting events, i.e. *Pittsburgh Athletic Co. et. al v. KQV Broadcasting Co.*, 24 F. Supp. 490 ("Pittsburgh Case"), and *National Exhibition Company vs. Martin Fass*, 143 N.Y.S. 2d 767, ("National Exhibition Case"); the decision in *Twentieth Century Sporting Club Inc. and Ors vs. Transradio Press Service Inc. and Anr.*, 300 N.Y.S. 159 ("Twentieth Century Fox Case"). In all three cases, the Courts granted injunction following the ratio in the INS Case. The plaintiffs stated that these precedents had great persuasive value due to the similarity in the circumstances, especially with respect to play-by-play updates being analogous to the ball-by-ball updates provided by the defendants. The plaintiffs also relied on the decision of the Madras High Court in *Marksman Marketing Services Pvt. Ltd. vs. Bharti Tele-Ventures Ltd. & Ors.*, O.A. No. 78/2006 ("the Marksman Case"), which dealt with nearly identical facts as the present case. In the Marksman Case, the Pakistan Cricket Board (PCB) had assigned its exclusive rights over a cricket series between India and Pakistan in the form of television rights, audio rights, internet rights, SMS rights and other rights to several persons on global basis for a valuable consideration. M/s. VECTRACOM Pvt. Ltd., a company incorporated under the laws of Pakistan had entered into an agreement with the PCB, dated 29.12.2005 with respect of SMS rights in India's Tour of Pakistan. The Plaintiff prayed for an injunction under Sections 55 and 61 of the Copyright Act, 1957, restraining the defendants from disseminating information relating to scores, alerts and updates through SMS technology on wireless and mobile phones by means of FAO(OS) Nos.153, 160 & 161/2013 Page 6 transmission to handheld mobile phones in respect of the matches. Relying on *National Basketball Association and NBA Properties Inc. v. Sports Team Analysis and Tracking Systems Inc.* 939 F. Supp. 1071 ("the NBA-1 Case") the High Court held that:

"The right of providing scores, alerts and updates is the result of expenditure of skill, labour and money of the organisers and so the same is saleable only by them. The sending of score updates and match alerts via SMS amounts to interference with the normal operation of the Organisers business. The defendant's act of appropriating facts and information from the match telecast and selling the same is nothing but endeavouring to reap where the defendants have not sown."

7. The plaintiff also relied on Secretary, Ministry of Information and Broadcasting, Govt. of India & Ors. v. Cricket Association of Bengal & Ors., (1995) 2 SCC 161 where the Supreme Court, held that BCCI was a non-profit making organization, which officially controls the organised game of cricket in India and had held that BCCI's duty was to explore the most profitable avenues of telecasting the event. Underlining the need to protect time sensitive information emanating from cricketing events specifically score updates/match alerts the plaintiffs position was that match information did not enter public domain for a particular span of time. A distinction was drawn between those having access to television or radio and their ability to be informed about match status in real-time and those who do not have such access (like those in office or courtrooms etc) who cannot have instant access to match status.

8. The appellant's argument, in defence, was that the „proprietary rights“ claimed in the suit were not recognized under any law or statute. Reliance FAO(OS) Nos.153, 160 & 161/2013 Page 7 was placed upon Section 16 of the Copyright Act, 1957 to claim that any right other than what was provided under the Act was barred. The appellants relied on Time Warner Entertainment Co., L.P. & Ors. v. R.P.G. Netcom & etc. AIR 2007 Del 226; and Super Cassettes Industries Ltd. v. Mr. Chintamani Rao & Ors. 2012 (49) PTC 1 (Del) where the court had held that claim for enforcement of rights beyond the Act can only be in terms of a law which was in force at the time when the Act was enacted. Common law rights under copyright law were held to be abrogated by Section 31 of the previous Copyright Act, 1911. The appellants also contended that torts such as defamation and breach of confidentiality are the only ones recognized by the law in India and that the „unfair competition“ is not a recognized tort. Strong reliance was placed on the United States Court of Appeals, Second Circuit ruling in National Basketball Association and NBA Properties Inc. v. Motorola Inc. 105 F. 3d. 841 (1997) ("the NBA-2 Case"). Reliance on Barclays Capital Inc., Merrill Lynch, Pierce, Fenner & Smith Inc. & Morgan Stanley & Co. Inc. v. Theflyonthewall.com Inc. 650 F. 3d 876 ("The flyonthewall Case") was also placed.

9. The appellants contended that the U.S. Courts decisions represented a departure from the „Hot-News Doctrine“ enunciated in the INS Case. They argued that the NBA-2 Case was contexted on the pre-emption of state law claims that enforced rights "equivalent" to exclusive copyright protection, when the work to which the state claim fell within the area of copyright protection. This is similar to Section 16 of the Indian Copyright Act, 1957. The appellants also relied on decisions of Triangle Publications Inc. v. New England News Paper Publishing Co., 46 F. Supp. 198 (1942) and Compco FAO(OS) Nos.153, 160 & 161/2013 Page 8 Corp v. Day Brite Lightning Inc. 376 U.S. 234 (1964), given by the US courts. They also relied on Cadbury-Schweppes Pty. Ltd. & Ors. v. Pub Squash Co. Pty. Ltd., (1981) 1 W.L.R. 193 and Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd., 156 CLR 414 by the High Court of Australia. Further to these contentions, the appellants argued that Star and BCCI could legitimately claim broadcasting rights and copyright over the cinematograph film of the cricket match or audio recording of the commentary to the extent it is recognized under the Act. Their (the appellant's) activity was not the result of "free-riding" because they did not copy the broadcast content or provide access to audio or visual footage of the broadcast. The appellants contended that they were legally entitled to disseminate the score updates/match alerts to the public and consequently generate income. Such information, emanating from the cricket matches i.e. score updates/match alerts, were „facts“ over which there cannot be copyright monopoly. In support,

reliance was placed on *Victoria Park Racing and Recreation Grounds Co. Ltd. vs. Taylor*, 58 CLR 479 ("the Victoria Park Case") and *Feist Publications, Inc. V Rural Telephone Service Co.*, 499 U.S. 340 (1991) ("Feist"). The score update had entered the public domain and therefore, could be freely used by anyone. Finally, the Constitution under Article 19(1)(a) confers upon them the freedom to disseminate information to the public. It was submitted that for any kind of copyright protection, or protection akin to those rights, the claimant should show originality (*Servewell Products Pvt. Ltd. & Anr. v. Dolphin*, 2010 (43) PTC 507 (Del) and *Eastern Book Company v. DB Modak* 2008 (1) SCC 1 which has approved the „modicum of creativity test). The latter judgment was also used to say that the cricket scores and updates had entered the public domain. To support the right to free speech argument, the appellants relied upon *Tata Press Limited vs. Mahanagar Telephone-Nigam Limited & Ors.* AIR 1995 SC 2438 where the Court held that "Article 19(1)(a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech."

10. The learned single judge formulated the following issues for consideration:

- a. Whether BCCI has the right to monetize the information arising from a cricket match organised by it?
- b. Whether the defendants are free-riding on the efforts of the plaintiff/BCCI?
- c. Whether the score alert/match updates are already in public domain? d. Whether the defendants have a freedom under Article 19(1)(a) to disseminate contemporaneous match information? e. Whether the public interest needs to be kept in mind before considering the rival claims?
- f. Whether the plaintiff is entitled to an interim injunction?

11. The learned single judge said that the appellants' contention that the plaintiffs were disentitled to copyright or other similar rights under the Act was "misplaced". The Court stated that the plaintiffs premised their claim outside of provisions of the Copyright Act, 1957; he therefore held that the decisions in *Feist*, *Victoria Park*, *Theflyonthewall* and *Eastern Book Company* to be irrelevant. He declined to examine "if match information is a product of the „originality or creativity of the plaintiff." He however said that "under Copyright Law, „facts cannot be copyrighted".

12. The Court then proceeded to reject the appellants' contention that any FAO(OS) Nos.153, 160 & 161/2013 Page 10 rights analogous or similar to copyrights, were excluded by reason of Section 16. In doing so, it was held that Section 16 applies to „work", which is defined under Section 2(y) of the Act as (i) a literary, dramatic, musical, or artistic work; (ii) a cinematograph film; (iii) a sound recording. The learned single judge held that the definition is exhaustive and not inclusive, signifying the parameters of Section 16. Section 16 consequently was held inapplicable to "anything which is not a work". The impugned order also held that Section 16 stood further limited by Section 39A as the latter provision belonged to the Chapter of the Act which deals with „neighbouring or

„related rights . It enumerates provisions of the statute which apply to copyright would also apply, mutatis mutandis to the neighbouring rights (eg. Performer s rights, Broadcasting reproduction rights). Section 16 is not enumerated under Section 39A of the Act. Under the Copyright Act, rights besides copyright are created; they include rights of broadcasting organisations under Section 37, rights of performers under Sections 38 and 38A, and the moral rights of authors which are recognized under Section 57. They are distinct from copyright. The single judge relied on ESPN Star Sports v. Global Broadcast News Ltd. & Ors. 2008 (38) PTC 477 (Del.) (DB) (ESPN Case). In view of these, it was held that "pre-emption under Section 16 of the Act, only applies to copyright or any similar right with respect to „works and cannot be extended to the other rights in any manner whatsoever." The learned single judge said that the plaintiffs "have merely approached this Court to find a remedy in common law against the tort of „unjust commercial enrichment". Reliance was placed on the judgment of the Supreme Court in Mahabir Kishore & Ors. v. State of Madhya Pradesh, 1989 (3) SCR 596 to hold that "Courts in England have FAO(OS) Nos.153, 160 & 161/2013 Page 11 formulated the doctrine of unjust enrichment in certain situations where it would be „unjust to allow the defendant to retain a benefit at the plaintiffs expense."

It was observed that:

31. In the instant case, it is unnecessary to determine whether the plaintiff has absolute proprietary rights under common law over all the information which arises from a cricket match. The plaintiff is only seeking the declaration of a right to generate revenue by monetizing the information arising from an event, which has been conceptualized, developed, created and organised by the sole efforts and expenditure of the BCCI; as its assignee. Admittedly, in order to monetize the expense, effort and skill employed in organising cricket matches in India, the BCCI conducted an auction in April 2012 to assign exclusive rights such as television rights, audio rights, internet rights and mobile rights, for all BCCI events. Besides, it has also been submitted that the „Mobile Rights and „Mobile Activation rights were also available on an „a la carte basis at a cost of Rs. 50 lacs per match. Applying the test of unjust enrichment as observed in the Mahabir Kishore case, it is amply clear that the defendants are enriching themselves at the cost of the plaintiff.

32. With respect to the defendant s arguments regarding lack of direct competition between the parties, I find that the action of the defendants directly competes with the plaintiff. This is because both the plaintiff and defendant are seeking to generate revenue by way of providing contemporaneous score updates/match alerts. The plaintiff in the instant case has successfully bid for the entire „bouquet of rights which also included „mobile rights and „mobile activation rights . The Media Rights Agreement defines-

Mobile Activation Rights means the right to make available any form of BCCI-branded schedule; match and score alert and application exploited via SMS, MMS or any other form of Mobile Communications Technology or Mobile Wireless Technology; It is clarified that no other form of exploitation FAO(OS) Nos.153, 160 & 161/2013 Page 12 would be permitted such as competition,

game, fantasy event, predictor game, application or other activation which are expressly prohibited.

Mobile Rights means the Mobile Activation Rights and the right to deliver or provide access to the Feed or Footage, the Audio Feed, any Unilateral Commentary and Unilateral Coverage in the Territory during the Rights Period, for reception and viewing in an intelligible form on a Mobile Device where the communication link(s) used in such delivery comprises, at least in part, Mobile Communications Technology and/or Mobile Broadcast Technology but excluding Television Delivery and Internet Delivery.

33. If the plaintiff did not intend on generating revenue by exploiting these „mobile rights and „mobile activation rights , it could have resorted to bidding only for selective rights since they were also available on an „a la carte basis. It is amply clear that the plaintiffs grievance is not infringement of its exclusive rights over the footage of the cricket match, but specifically regarding the right to raise revenue by disseminating match information contemporaneously via SMS/MVAS by exploiting the „mobile rights and „mobile activation rights exclusively assigned to it in the „Media Rights Agreement dated 10.08.2012. Therefore, the element of direct competition clearly exists specifically with respect to contemporaneous score updates/match alerts."

It was further observed that:

"36. Though the Court in the NBA-2 Case may have watered down the applicability of the „hot news doctrine from the INS Case due to the 1976 amendments to the Federal Copyright Law in the U.S., it has retained the primacy of the fundamental principles on unjust enrichment as evidenced in prongs (i), (iii) and (iv) of the test mentioned above. Besides, the exclusive right of an Organiser to monetize his own event need not find its source in any statutory enactment, because it is a fundamental principle of equity as observed in the INS Case, The underlying principle is much the same as that which lies at FAO(OS) Nos.153, 160 & 161/2013 Page 13 the base of the equitable theory of consideration in the law of trusts-that he, who has fairly paid the price, should have the beneficial use of the property.

This reasoning has been followed in other cases regarding dissemination of updates/alerts arising from sporting events such as the Pittsburgh Case, National Exhibition Case and the Twentieth Century Fox Case.

37. Moreover, it is clear, that match information is generated because of the cost incurred by the BCCI in organising the cricket as a sport in India. It is undisputed, that BCCI plays the cardinal role in all aspects of cricket in India. Right from remunerating the players, umpires and other match officials, to arranging sponsors for the cricket match itself. It is also undisputed that the only source of income for the BCCI is from monetizing the cricketing events organised by it. In such a circumstance, the defendants would have had a legitimate right to disseminate contemporaneous match information, had they obtained a license by either participating in the bid conducted by the BCCI or by obtaining a sub-license from the

plaintiff. The argument that expenditure is being incurred by the defendants to set-up infrastructure and employ personnel has no merit, because such expenditure is incurred upon the process of dissemination and not towards the organization of the sport or in the process of legitimately obtaining the information from the plaintiff or BCCI. Therefore, I find that the action of the defendants cashing upon the efforts of the plaintiff/BCCI constitutes free-riding."

13. The Appellants' argument that match information was in the public domain was brushed aside; the impugned order held that as the plaintiffs did not seek copyright of the score updates, there was no question of information entering the public domain. The term public domain, according to the learned single judge, had different connotations, as match facts did not enter the public domain simultaneously with the events, due to the time lag of few seconds as a result of time taken for transmission. "As a corollary, FAO(OS) Nos.153, 160 & 161/2013 Page 14 the information has still not entered the public domain qua the persons who do not have any access to a source of contemporaneous information i.e. TV or radio." The court went on to hold that facts relating ball by ball progress of the match were in great demand and consequently it could not be said to be available immediately after the event.

14. The court found merit in the Appellant's argument that they have a fundamental right to disseminate such information as demanded by the public; yet it felt that the Court had "to balance the right of the organiser of an event to monetize his own event as against the right of the public to receive information regarding such event." The impugned judgement also sought to categorize and classify members of the public into three categories, i.e. those who attended the event after purchasing tickets; those who watch the event being telecast live and those who depend on reporting of the event. After analysing the decision in New Delhi Television Ltd. v. ICC Development (International) Ltd. & Anr., FAO (OS) 460/2012, it was observed that the freedom of speech and expression was available to the press to disseminate information, but a line had to be drawn in cases where the freedom is misused. The Court quoted approvingly, observations from the Division Bench ruling that reporting of such news with the motive of profiting did not amount to exercise of freedom of speech. It was held that reporting of the cricketing event was quite different from providing a ball-by-ball account of the match, for a consideration, through SMS alerts. The court held that the protection of right to freedom of speech did not extend to such activities:

"49. Therefore, it is amply clear that the dissemination of the FAO(OS) Nos.153, 160 & 161/2013 Page 15 ball-by-ball or minute-by-minute updates at a premium cannot be exonerated under the freedom of speech and expression as guaranteed under Article 19(1)(a). Meanwhile, all noteworthy information arising from a cricket match constitute „news“, and the „reporting“ of such noteworthy information would be protected under Article 19(1)(a)."

In light of the observations, and findings, the learned Single Judge ordered:

"a. A limited interim injunction restraining the defendants from disseminating contemporaneous match information in the form of ball-by-ball or minute-by-minute

APPELLANTS CONTENTIONS

xxxxxxxxxxxxxx Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or FAO(OS) Nos.153, 160 & 161/2013 Page 17 of the circumstances under which news gathered by a private agency should be deemed

affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear."

Learned counsel further argued that INS was acknowledged as not capable of generally creating a property right, since that is a legislative prerogative. For this, Justice Learned Hand's observations in *Cheney Bros. v. Doris Silk Corp.* [1929, Court of Appeals] were relied upon:

"In the absence of some recognized right at common law, or under the statutes and the plaintiff claims neither- a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure. Of the cases on which the plaintiff relies, the chief is *International News Service v. Associated Press* 248 U.S. 215. Although that concerned another subject-matter- printed news dispatches- we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did. While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to FAO(OS) Nos.153, 160 & 161/2013 Page 18 suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter... It appears to us incredible that the Supreme Court should have had in mind any such consequences. To exclude others from the enjoyment of a chattel is one thing; to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over his fellows vastly greater, a power which the Constitution allows only Congress to create...

xxxxxxxxxx xxxxxxxxxxxxxxxxxxx Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture."

17. Learned senior counsel stated that barring few instances where such so-called rights were recognized through judicial decisions, there is more or less unanimity of judicial opinion in courts around the world, i.e. such claims cannot be allowed without a statutory framework. Counsel stressed that especially in Courts of English Common Law jurisdictions have emphatically rejected the existence of such "property rights" and stated that giving relief based on such so called "created" rights would be an instance of judicial legislation. Reliance was also placed on the judgment of this

Court in Emergent Genetics India Pvt. Ltd v. Shailendra Shivam [2011 (47) PTC 494 (Del)], especially the following observations were cited:

FAO(OS) Nos.153, 160 & 161/2013 Page 19 "in the absence of a statutory regime (as is urged by the Plaintiff) is that the Courts of law would be at one fell stroke, not only make policy choices which would impact livelihoods of millions, but would be ordaining, unwittingly, legislation, which cannot be tested for its reasonableness. An inventor or innovator undoubtedly should be provided a fair regime which protects his creative efforts, and rewards him. But in the absence of thought out policies, which weigh the advantages as well as the drawbacks, that may manifest in the unhindered enforcement of such impulses, there is a danger of imperilling the right to occupation, guaranteed by Article 19 (1) (g) and the right to livelihood, so emphatically held to be an intrinsic part of Article 21 of the Constitution of India, by our Courts."

The appellants counsel also relied on the judgment of the High Court of Australia in Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor [58 CLR 479 (1937)] and Moorgate Tobacco Co. v. Philip Morris [156 CLR 414 (1984)]. Moorgate was particularly stressed upon to say that the broad tort of unfair competition cannot be resorted to in order to prevent legitimate business in an activity of the kind indulged in by the appellants.

18. Counsel argues that it is hard to conceive that someone or some entity can "own" an event; one may be an organizer. Certain aspects or features of an event may be capable of ownership. In support of this contention, i.e. inability to own facts, reliance is placed on the judgment in Eastern Book Company v Modak 2008 (1) SCC 1. The sporting event as a whole is incapable of ownership. The mere expending of money or effort would not render the underlying facts relating to sporting events property, capable of protection. What is conceivable, counsel submitted, is that the organizer of an event can have certain rights which flow from (a)his ownership/control over the venue i.e. land; and/or (b)statute. In this context, the following FAO(OS) Nos.153, 160 & 161/2013 Page 20 observations in Victoria Park (supra) were relied on:

"Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere..."

It was stated that not only the plaintiffs, but also others had the right to "monetize" the facts and information, over which there could be no monopoly. It is also argued that the plaintiffs contentions are inconsistent, because their rights self professedly are not asserted against the world at large, which is contrary to the principle underlying the property rights, which exist in rem. The appellants argue that the concept of "offtube reporting" is well recognized and is not actionable unless it can be shown that the off tube broadcaster is holding himself out to be the official broadcaster (i.e. a case of passing off). To quote from the decision of the High Court of Justice Chancery Division in British Broadcasting Corporation v Talksport Ltd [(2001) F.S.R. 6]:

"Talksport Ltd, the defendant before me, is a licensed United Kingdom radio broadcaster. As its name implies, its broadcast output is very heavily focused on sports coverage... [Talksport] has resorted to another means of covering the event. It does so "offtube"; i.e. from a television screen outside the stadium where the match in question is being played Off-tube coverage is a well-known broadcasting technique. The commentator sits in front of an ordinary television set watching the event as transmitted by some other organisation, and describes to the radio listener what he can see from the screen in front of him. The commentator's awareness of what is going on at the match, being confined to FAO(OS) Nos.153, 160 & 161/2013 Page 21 what he sees on the television screen, is necessarily more limited than that of the commentator viewing the event with his own eyes from within the stadium itself. Whereas the commentator in the stadium can pick up and comment on events away from the scene of play which he happens to notice elsewhere in the stadium, the off-tube commentator can only comment on what the producers of the television broadcast which he is watching choose to screen... What prompted these proceedings was Talksport's advertising of its Euro 2000 coverage as being "live". The BBC objected to this. It considered that by representing that it was providing live radio coverage, Talksport was representing falsely that its coverage would be by commentators from within the stadium describing what they see with their own eyes as distinct from what they see on the television monitor alone, together with ambient sound from the matches themselves. Believing correctly that, as a broadcaster without the right to provide live coverage from within the match stadia, Talksport's coverage would be off-tube with ambient sound provided by pre-recorded sound effects, the BBC complained that Talksport was incorrectly representing the nature of the coverage it was providing, and incorrectly representing itself to be the holder of live broadcasting rights."

19. It is submitted that the concept of unjust enrichment is embodied only in Section 72 of the Contract Act, which extends to pre-existing contractual or quasi contractual relationships. Learned senior counsel also relied on *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd* [(1916) 2 K.B. 880] *Cadbury-schweppes Pty Ltd and Others v Pub Squash Co Pty Ltd*. [(1981) 1 W.L.R. 193] and *Hodgekinson Corby Ltd v Wards Mobility Services Ltd* [1994 Ch. 1564]. *Sports and General Press Agency Ltd.* was relied on to state that the organizer of an event cannot grant a license or an exclusive license to a right (here the right to FAO(OS) Nos.153, 160 & 161/2013 Page 22 photograph) that does not exist. The organizer of an event, by virtue of being in control of premises, can impose any restrictions he wishes by contract. But there is no such proprietary right in common law so as to proceed against third parties. It was held there that:

".....It is quite true that, as they were in possession of the spot where it would probably be convenient to Place the camera for the purpose of photographing, they had the advantage, so far as the land in their possession was concerned, of being the only persons who could conveniently take photographs, but that is a very different thing from saying that they had the sole right to photograph anything inside the show. If any person were to be in a position, for example from the top of a house, to

photograph the show from outside it, the association would have had no right to stop him. In my judgment no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful. Those rights do not exist."

20. Learned counsel for the appellants next argued that property rights always exist in rem. In this context, what STAR and BCCI assert is a property right which, does not exist "against the world at large". It is admitted that there is no exclusive property right against persons who carry on the same activities gratuitously. In this context, it is stated that STAR admits that it cannot have any cause against one using a satellite positioned above a stadium and broadcasts an on-going match free of cost. It is also conceded that no cause of action would lie against the present defendants if they were to continue operating without charging a premium. These, submit the appellant militate against the concept of property right and the entitlement to sue in tort.

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21. The respondents submit that what is asserted is not an intellectual property right, or a copyright. It is a unique property right, which stems out of a negative obligation of the appellants, who secure match related information contemporaneously, not to use it commercially for a short duration. Whereas the right of the members of the public - who witness the event, having paid for the tickets or millions of television viewers who subscribe and watch paid channels, which cover the event, to share it on a non-commercial basis cannot be denied, yet the obligation of a third party not to commercially exploit it is self evident.

22. The respondents insist that the narrow scope of this case involves protection of Property Rights in contemporaneous/ almost instantaneous dissemination of Match Information through Mobile SMS updates to those class / market of persons who have no access to television, radio or internet and have access to Match Information only through mobile phones. It is asserted that match information does not pass into public domain upon broadcast / telecast of the match for third parties to freely and commercially exploit. There is a clear distinction between the information passing into public domain and information being available to the public. Exploitation of Match Information through one mode of communication (such as television / radio broadcast) does not imply that BCCI has foreclosed / abandoned its right to exploit Match Information through all other modes of communication (such as mobile, internet). Modes of access to a match have evolved from stadium to radio to TV to internet and mobile. The advent of mobile technology provides an additional FAO(OS) Nos.153, 160 & 161/2013 Page 24 independent market of cricket lovers who are not in a position to follow the progress of a cricket match either through television, internet or radio.

23. The respondents cited the instance of someone in a meeting or in a trek in the jungle for whom match information would not be in public domain, despite telecast or broadcast of the match. Contemporaneous dissemination of match information is targeted at exploiting the high curiosity of a cricket lover to receive instantaneous information of an on- going match. Thus, Match Information is time-sensitive and has commercial value only so long as it is disseminated while it is fresh i.e.

"Hot". Moreover, match information would be commercially worthless if it is stale or dated. As long as the mobile user remains unaware of the on- goings of the Match and is willing to pay a premium fee to quench his curiosity to know, Match Information has commercial value, and has all the trappings of "hot news". Dissemination of match information through SMS updates has high commercial value.

24. Dr. A.M. Singhvi, learned senior counsel, argues that in terms of first principles, it is the person who has brought into existence a product which has a demand in the market, who is entitled to the exclusion of all others to exploit the revenue streams arising out of such product and realize the fruits of its product (in this case, a cricket match). A usurper (like the appellant) cannot set up a case that there exists other equally lucrative revenue opportunities (like broadcast rights) for the organizer of an event and consequently the mobile value added service market should be abandoned by the organizer. Counsel argued that Star does not FAO(OS) Nos.153, 160 & 161/2013 Page 25 assert a Property Right against the members of the public at large, who are free to provide SMS updates of Matches gratuitously. It is however being asserted against competitors who are commercially exploiting such Match Information by disseminating it contemporaneously / almost instantaneously through SMS alerts, for a premium fee.

25. BCCI claims, and its counsel Shri Abhinav Vashisht argues, that it owns property rights in the match information, subject only to public interest considerations like gratuitous dissemination by public, Mandatory Sharing of Feed, etc. which are not relevant to this case.

26. Learned counsel submitted that denying a basis in common law and equity for Star to assert its property rights / ownership in dissemination of Match Information through SMS updates, is contradictory and paradoxical. In this context it is argued that this would lead to denial of all property rights / ownership claims in the cricket match itself; furthermore, the entire structure of rights in sports event, including broadcasting rights, audio rights, internet rights, stadium rights etc. would be rendered nugatory. Counsel also stated that if ownership is partially or fully conceded even for one of the rights, then all incidents and insignia of ownership must follow in respect of the entire bundle of rights vesting in the BCCI.

27. It is asserted that a Division Bench of this Court has recognized the distinction between general content on the one hand, and newsworthy content generated from a special event on the other and observed that the organizer is entitled to appropriate the newsworthy information/value of FAO(OS) Nos.153, 160 & 161/2013 Page 26 such special events. Counsel submitted that the rights claimed and sought to be enforced are not absolute, in that not all factual information is the subject matter of protection, but only a limited property right - the right to generate revenue by monetizing Match Information through the new platform / medium of Mobile services.

28. The respondents refute the argument that learned Single Judge failed to address the primary question mentioned in the Division Bench order dated 03.12.2012, i.e. whether a fact is capable of being owned by the Respondents, is erroneous. The Division Bench specifically stated that it had not dealt with the merits of the matter. The Bench also categorically noted that the questions raised by them were "just a food for thought for the learned Single Judge and not to be treated as an

expression of any opinion by the Division Bench."

29. Learned senior counsel submitted that the observations and findings of the learned single judge are unimpeachable, because the nature of the rights, are not proximate to copyright; they really emanate out of broadcasting, which is covered by a separate Chapter of the Copyright Act. Even the rights claimed in this case are not covered as broadcasting rights. It was argued that the best argument could have been that Section 16 precluded any rights akin to copyright. However, the rights flowed out of broadcasting rights, and not copyrights; further, counsel contended, a crucial element was that Section 16 stood excluded in respect of broadcasting rights. Relying on the ESPN case, it was submitted that if Parliament had intended Section 16 to apply in respect of broadcasting rights, it would have said so. The omission was conscious and deliberate, FAO(OS) Nos.153, 160 & 161/2013 Page 27 which meant that only those provisions of the Copyright Act mentioned in Section 39A would apply, nothing else. The findings of the Single judge were therefore, justified.

30. It was submitted that a sporting event itself is the end result or product of exercise of considerable managerial effort and use of finance. The performance itself is the subject matter of recordings which constitute "work"; they are also simultaneously broadcast. These activities are also protected as "broadcasting rights". Under the circumstances, the right to use any other activity or aspect, capable of monetization inheres only with the sports organizer or owner of the content, such as the BCCI and Star. Learned senior counsel submitted that even reportage of match content through telecasts, in the same form, i.e. rebroadcast of the event of howsoever short a duration, would be subject to the legal regime, i.e. the promotion or license of the content or things owner would have to obtain. In these circumstances, the valuable rights, such as mobile rights cannot be seen in isolation. Star and BCCI would have exclusive rights of such information which can be disseminated commercially only with their consent upon satisfaction of the terms which may be imposed in that regard. Learned counsel further emphasized that the existence of mobile rights of the kind which are subject matter of present case have been clearly established by custom and usage across the world and are capable of enforcement.

31. It was argued by learned senior counsel for the respondent that property rights evolve and are to be viewed contextually. The ownership of some rights need not be based on the ability of the proprietors to exclude FAO(OS) Nos.153, 160 & 161/2013 Page 28 the entire world but from its enjoyment for all times or absolutely; it can be a limited one as in the circumstances of the present case. Just as property need not be tangible, the exclusivity need not be absolute at any point of time or against absolute in other time or as regards the object, i.e. the entire world. So long as the one who asserts the right can establish exclusivity that he, as creator or one having exclusive rights to the underlying events that constitute the fact can successfully prevent commercial dissemination, the Courts would enforce the monopoly - a limited one, having regard to the context of the case, i.e. the typical nature of the cricket scores - as a negative restraint upon those who seek to appropriate and commercially gain from it. In support of this submission that the Courts have recognized technological developments and the given fact to appropriate rights contextually, learned counsel relied upon the judgment of the Supreme Court reported as Jay Laxmi Salt Works (P) Limited v. State of Gujarat 1994 (4) SCC 1.

32. Learned counsel further relied upon *Jilubhai Nanbhai Khachar, Etc. v. State Of Gujarat and Another* AIR 1995 SC 142 and *Vikas Sales Corporation v. Commissioner of Commercial Taxes* AIR 1996 SC 2082 to say that the expression "property" has been construed broadly rather than in a narrow fashion. Reference was also made to the proposed changes to Section 52 of the Transfer of Property Act, 1882 in the report of the 157th Law Commission of 1998.

33. It was argued that existence of statute law in regard to activity related to or arising from the subject matter in question would not, by itself, bar common law remedy. It was thus submitted that the tort of passing-off exists *FAO(OS) Nos.153, 160 & 161/2013* Page 29 and damages can be legitimately recovered upon proof of the necessary requisites, irrespective of the law relating to registered trademarks and their infringement. Learned counsel relied upon the judgment reported as *Ellora Industries v. Banarsi Dass Goela*, AIR 1980 SC 254 (Del).

34. It was argued that the appellants cannot claim an unrestricted right to free speech, to clothe their otherwise illegal activities. The right to free of speech and Expression, submitted learned counsel, is not unrestrained, but subject to reasonable restriction under Article 19(2) itself. Learned counsel relied upon the judgments reported as *Railway Board v. Niranjan Singhi*, 1969 (1) SCC 502 and *Life Insurance Corporation of India Limited v. Manubhai*, AIR 1993 SC 172. Learned counsel further submitted that the "hot news" doctrine and the Court's authority to injunct its misappropriation has been recognized as evident from the ruling of the Madras High Court in *Marksman Marketing Services Private Limited v. Bharti Televentures Limited* [OA No. 78/2006]. In that case too, inter alia, SMS rights were assigned by the content owner. The Court held that sending score updates through SMS would amount to interference with the normal functioning of the "organizer's business" and the resultant misappropriation should be injuncted. Lastly, it was argued that the appellant's submissions are unfounded because the BCCI is under a mandate to ensure that dissemination of match information is optimized commercially for the greater public good. Concomitantly, the mobile rights too have to be monetized to promote the sport of cricket in India. In support of this submission, learned counsel relied upon the judgment reported as *Secretary, Ministry of Information and Broadcasting v. Cricket Council of Bengal* 1995 (2) SCC 161. Learned counsel lastly relied upon the ruling of *FAO(OS) Nos.153, 160 & 161/2013* Page 30 the Division Bench in *New Delhi Television Limited v. ICC Development (International) Limited and Another* [FAO(OS) 460/2012] and submitted that the limited protection by way of injunction of a finite duration granted to preserve the sanctity of "hot news" on the basis of the "unfair competition" and "unjust enrichment" doctrine was warranted by the facts and circumstances of the case.

35. Before discussing the merits of the rival contentions, it would be necessary to extract certain provisions of the Copyright Act, 1957. Though Star and BCCI assert that the rights on which the suit is premised are not based on copyright, the appellants claim that even such rights are precluded

(a) by Section 16 of the Act and (b) independent of Section 16, the nature of rights under that Act. The relevant provisions are extracted below:

Provisions of the Copyright Act "2(dd) "broadcast" means communication to the public-

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

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

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

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(q) "performance" includes any mode of visual or acoustic presentation including by any such presentation by the exhibition of a cinematograph film, or by means of radiodiffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture.

FAO(OS) Nos.153, 160 & 161/2013 Page 31 Section 2 (gg) - "performer" includes an acrobat musician, singer, actor, juggler, snake charmer, a person delivering lecture, or any other person who makes a performance.

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

(a) Original, literary, dramatic, musical and artistic works,

(b) cinematograph films, and

(c) sound recordings (2) Copyright shall not subsist in any work specified in sub section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless-

(i) In the case of published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India,

(ii) In the case of an unpublished work other than [work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) In the case of work of architecture, the work is located in India Explanation- In the case of a work of joint authorship, the conditions conferring copyright specified in this sub section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

(a) In any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) In any sound recording made in respect of a literary, dramatic or musical work, it in making the sound recording, FAO(OS) Nos.153, 160 & 161/2013 Page 32 copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which a substantial part of which, the film, or as the case may be, the sound recording is made.

(5) In the case of a work or architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods or construction.

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

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

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

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

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

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

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

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

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

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

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

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

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

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(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

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

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

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

(d) In the case of a cinematograph film-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public

(e) In the case of a sound recording-

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) To communicate the sound recording to the public Explanation - For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

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

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"37. BROADCAST REPRODUCTION RIGHT.

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

(2) The broadcast reproduction right shall subsist until twenty-

five years from the beginning of the calendar year next following the year in which the broadcast is made.

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

(a) re-broadcasts the broadcast; or

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

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

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

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

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"39. ACTS NOT INFRINGING BROADCAST
REPRODUCTION RIGHT OR PERFORMER S RIGHT.

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

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

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

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

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

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

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

36. As is evident from the above discussion, the facts are not in dispute;

the cricketing events (i.e. the matches) are organized by the BCCI on each occasion. It has granted exclusive broadcasting rights to Star to disseminate the information/content emanating from the event; other copyrights emanating from recording of the live event too have been assigned to Star. These include the right to record, reproduce, broadcast etc. the actual event with other related rights. Among these are "mobile distribution" rights, which is the bone of contention in these proceedings. The plaintiffs assert that these rights enable only Star, to the exclusion of all others to FAO(OS) Nos.153, 160 & 161/2013 Page 36 disseminate time sensitive match information, i.e. almost contemporaneous news such as the result of a ball bowled, milestones achieved by the player, the score, fall of a wicket, etc. through SMS alerts. The appellants (defendants) assert that once the event occurs, it is a "fact" over which no one can claim monopoly. The reporting of such facts cannot be restrained and doing so, through courts would abridge free speech. The defendant argue that there is no such "hot-news" principle which can be enforced by courts in India; that such

non-statutory common law rights, founded on so- called notions of unfair competition or unjust enrichment, are unenforceable. They also rely on Section 16 of the Copyright Act.

Is the plaintiffs' claim precluded by Section 16 of the Copyright Act

37. The first principle of copyright law (for any copyright inhering in works, i.e. literary, dramatic, musical or artistic work, sound recordings or cinematographic films) is that it is in respect of expression of ideas, not the underlying facts or the ideas themselves. This was put neatly in Feist (supra) by the US Supreme Court as follows:

"This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that "no author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)."

The idea was expressed succinctly by Justice Holmes, when he described copyrights, in While-Smith Music Pub. Co. v. Apollo Co. 209 U.S. 1 (1908) as restraining "the spontaneity of men where but for it there would be FAO(OS) Nos.153, 160 & 161/2013 Page 37 nothing of any kind to hinder their doing as they saw fit." He went on to describe the right as follows:

"It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree. The ground of this extraordinary right is that the person to whom it is given has invented some new collocation of visible or audible points, - of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised."

38. The Feist requirement of some creativity has been accepted as the standard governing copyrightability of works in India, in Eastern Book Co (supra) by the Supreme Court. There, the court there held that mere copy- edited portions of judgments (which contained the basic facts) did not entitle the publisher copyright protection as they did not amount to "minimum requirement of creativity". That the appellant expended some skill, labour and money did not entitle them the protection: "The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterized as purely a work which has been brought about by putting some amount of labour." This ruling, in the Court's opinion, is an important mile stone in the development of law in India, because the Court veered away from the

previous copyright FAO(OS) Nos.153, 160 & 161/2013 Page 38 protection standard indicated in University of London Press, Ltd. v. University Tutorial Press, Ltd., [1916] 2 Ch. 601, i.e. the claimed work being "the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product, it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess and which differentiates the product from the raw material."

(Extract from Eastern Book Co, supra).

39. Copyright protection is thus not afforded to a work, merely because it is the "product of the labour, skill and capital". Here, the plaintiff/respondents say that they are not claiming copyright protection (which is an extremely wide right, but finite in time) but a narrower right. Copyrights for a long time did not extend to rights of performers like musicians, singers, actors, acrobats, etc. It is in the wake of „livelihood threatening technological changes that the law intervened. The Copyright Act was amended in 1994; the amendment introduced the recognition of the rights of the performer through Performers rights. Section 38 of the Copyright Act confers rights to performers like actors, dancers, jugglers, acrobats etc. Likewise, broadcasting rights were not given statutory protection. It was only through the same 1994 amendment that broadcast rights were afforded protection. The traditional understanding of copyrights therefore, was altered in 1994, with the introduction of broadcast reproduction rights in Chapter VIII. This type of work, according to Laddie, Prescott and Vitoria, Modern Law of Copyright and Designs Paragraph 7.32 FAO(OS) Nos.153, 160 & 161/2013 Page 39 (2nd edn., Butterworths, 1995) (hereinafter "Laddie, Prescott and Vitoria"):

"may be copyright even though it is wholly devoid of originality. The statutory monopoly arises even though the author expended no mental skill, labour or ingenuity in its preparation"

Crucially, however, this copyright in the broadcast - which is protected purely by the fact of being a broadcast, absent determinations of originality or expense - is distinct from the underlying creative content, "which may well be protected aliunde." (Laddie, Prescott and Vitoria, supra, paragraph 7.32). The plaintiffs contention in these cases is not that their broadcast rights under the Copyright Act have been violated, but that the defendants are engaging in wrongful conduct in disseminating the underlying facts. To offer an example (again Laddie, Prescott and Vitoria, supra, paragraph 7.33):

"A television broadcaster acquires the results of the day's football matches from a press agency and keys them into a computer. This is then used to generate a teletext signal:

viewers with the right equipment see the football results displaced on their screens. It is clear that the text regarded as a literary work may be copyright but that copyright will belong to the news agency, not the broadcaster. The broadcaster does acquire a

copyright in his broadcast, but this is a narrow one. Thus, it would be an infringement of it if another broadcaster captured the signals and re-transmitted them. But it would not be an infringement (of the broadcasting copyright) if someone copied down the results from his television screen and published them in a newspaper. He is copying the underlying text but not the signals." (emphasis in original).

40. Accordingly, what determines that the appellants' acts are wrongful or not is whether the underlying match information is protected in law. Given this, match information - which are essentially facts occurring as against the public at large - do not per se have any claim to protection under the FAO(OS) Nos.153, 160 & 161/2013 Page 40 Copyright Act, as the plaintiffs admit. Further, taking an argumentum a contrario approach in specifically excluding facts and information from the scope of protection under the Copyright Act, the Parliament has specifically denied protection to such claims.

41. The plaintiffs/respondents today contend that such a right exists in common law. Accepting this argument would be an act of judicial law making in a domain occupied by a statutory prescription, i.e. the Copyright Act. Unlike the Designs Act and the Trademarks Act which draw from pre-

existing common law rights, in the case of the Copyright Act, "except under the provisions of the Act, there cannot be a copyright under the common law." (ref. Eastern Book Company and Others v. Navin J. Desai and Another, AIR 2001 Delhi 185, paragraph 39). Indeed, "Section 16 ... makes it clear that there shall be no copyright except as provided in the Act. Copyright, therefore, is a creation of the statute." (Manjeh Cine Productions v. A. Sundaresan and Another, AIR 1975 Mad 22). Similar observations have been made in Time Warner Entertainment Co., L.P. & Ors. v. R.P.G. Netcom & etc. (AIR 2007 Del 226); and Super Cassettes Industries Ltd. v. Mr. Chintamani Rao & Ors. 2012 (49) PTC 1 (Del). To this, Star argues that the pre-emption under Section 16 does not apply to broadcast and neighbouring rights under Section 39A, which is in question in the present case.

42. Apart from the reasons discussed above, i.e. that to claim an established statutory right, some enacted standards are to be fulfilled, in the form of the work having to consist of limited or minimum creativity, to qualify for copyright protection, the fact remains that the plaintiffs' stated premise for protection here is the mere expending of resources and skill - a FAO(OS) Nos.153, 160 & 161/2013 Page 41 preconditions which existed to fulfil the copyright protection standard prior to Eastern Book Co. That standard no longer holds good. The plaintiffs' argument about the inapplicability of Section 16, by reason of the language of Section 39A has facial appeal. A deeper analysis, however, would reveal that by Section 39A those provisions of the Copyright Act which effectuate the rights created by Parliament for copyright protection, i.e. enabling, assignment and mode of assignment of rights (Sections 18 and 19); licensing and mode of licensing (Section 30); customs authorities' right to seize imported copies (Section 53); remedies for infringement (Section 55) and coercive powers of law enforcement authorities (Section 64, 65 and 66) have been extended

to broadcasting rights. That cannot exclude applicability of other provisions, (that do not find express mention under Section 39A). The wording of Section 16 - and very importantly, Section 63 (which create offences) refer to "other rights". By Section 16, "copyright or any similar right" (in a work) apart from what is created by the Act is precluded. No doubt, the expression "work" limits the exclusion. However, equally, while the text of the Copyright Act does not prescribe what the rights referred to in the words "other similar rights" - other than copyright - are, this must necessarily allude to, inter alia, broadcasting rights. This is clear from the following reasons: Section 63 - which creates offences (and yet is not included in Section 39A as applicable to broadcasting rights) states that infringement of (a) copyright in a work, or (b) "any other right created by this Act" would be punishable with imprisonment. Similarly, expressions which are not defined by Chapter VIII are used; their meaning (i.e. words such as sound recording, visual recording, fair dealing, etc.) can be only construed with reference to other provisions of the Copyright Act. In other FAO(OS) Nos.153, 160 & 161/2013 Page 42 words, though there is no express reference to Section 16 in Section 39A, its underlying premise, i.e. preclusion of rights other than those spelt out in Chapter VIII, by common law, would apply. In ESPN, the Division Bench even while holding that the express omission of Section 61 in Section 39A did not render that suit fatal, held that broadcasting rights are "akin" to copyrights. The decision consequently cannot be said to conclude the issue as to whether such non-statutory and common law rights related, or arising from subject matter of broadcasting rights (which are statutory) exist, and are enforceable.

43. A settled canon of statutory construction is that Parliament or the concerned legislature is deemed to be aware of existing laws when it enacts a new legislative measures (Syndicate Bank v. Prabha D. Naik, (2001) 4 SCC 713). Chapter VIII was introduced due to a felt need to give limited protections to broadcast rights akin to copyright (since its absence meant that those rights were precluded by Section 16). The nature of copyright protection available to performers in addition to performers rights was consciously preserved by Proviso to Section 39A:

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

Thus, all those limitations that apply to copyrights (such as no protection to ideas or facts or underlying information, the idea expression merger doctrine, etc.) would apply in the case of copyrighted works which are also the subject of broadcast rights. If Parliament had intended to give protection to facts, "time sensitive information" or events (such as match information), FAO(OS) Nos.153, 160 & 161/2013 Page 43 there would have been conscious protection of those rights by express provision. Therefore, the exhaustive nature of the regime in Chapter VIII precludes, by its very nature, any claim for protection over and above what is expressly granted by its provisions. It is worth noticing that broadcasting of the event, for which broadcasting rights have been created have a restricted term of 25 years, i.e. half of the term of copyrights. What the plaintiffs seek is the protection of the widest amplitude (in respect of not preventing reproduction of content of the broadcast), but the facts underlying the broadcast, is facially untenable. Such rights have long been held to be barred as they are "similar" to copyright protection (Ref Donaldson v Beckett 1 ER 837

(1774); Section 31 of the Copyright and Designs Act, as well as Section 46 (5) of the UK Copyright Act, 1956 (repealed) and Section 171 (2) of the UK Copyright Designs and Patents Act, 1988).

44. As a result of the above discussion, it is held that the rights claimed by the plaintiffs, over and above the broadcasting rights, i.e. to prevent others from publishing or sharing match information or facts, for irrespective of commercial or non-commercial use, is precluded by Section 16 of the Copyrights Act; it is also precluded because of the provisions of Chapter VIII of the said Act. If Parliament had intended such rights to exist, they would have been enacted, with suitable mechanisms for their enforcement and effectuation.

The "Hot News" doctrine and its application in India

45. The so-called "hot news" doctrine, in support of the content misappropriation claim, which is the leitmotif of the plaintiff's case, was premised on unfair appropriation of a quasi-property right; which was FAO(OS) Nos.153, 160 & 161/2013 Page 44 propounded in INS (supra). The US Supreme Court in that instance, by its majority opinion, evolved the hot news doctrine. It would be essential to recount, howsoever briefly, the facts presented before the Court. For comprehensive news coverage and minimizing costs, consenting news organizations formed editorial consortiums, excluding those who did not contribute. Associated Press (AP) and International News Service (INS) were parties to one such arrangement; they were in competition between themselves in the distribution of news. The value of their news distribution businesses depended heavily on the timeliness of the news reaching their paying audiences. AP alleged that INS copied news from bulletin boards and from early editions of AP members' newspapers and passed the news off as its own to INS customers. The time period of the alleged misappropriation - World War I - made this difficult to AP since, like other news agencies, it spent large amounts reporting world affairs across the Atlantic Ocean. The questions posed before the Court were whether a property right in news existed to prohibit such misappropriation, and, if so, whether such a property right should be limited in time to balance the competing interests. Chief Justice Pitney's opinion held that the information found in the AP news was not copyrightable as "the information respecting current events contained in the literary production is not the creation of a writer but is a report of matters that ordinarily are publici juris; it is the history of the day." Nevertheless, the same opinion went on to propound the "hot news"

doctrine. The bedrock of the opinion was that:

"This defendant . . . admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is saleable by complainant for money, and that defendant in FAO(OS) Nos.153, 160 & 161/2013 Page 45 appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a

material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

46. The US Supreme Court was not unanimous; there were three dissenters; two renowned jurists, i.e. Holmes, J and Brandeis, J dissented. Specifically, Justice Brandeis remarked, in his opinion that:

"Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency..."

47. The next decision, this one relied on by the Appellant, is *Cheney Brothers v Doris Silk Corporation* 35 F.2d 279. Here, the Second (Appellate) Circuit Court, speaking through Chief Judge Learned Hand narrowed the application of the INS ruling, holding that:

FAO(OS) Nos.153, 160 & 161/2013 Page 46 "Of the cases on which the plaintiff relies, the chief is *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. Although that concerned another subject-matter-- printed news dispatches-- we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did. While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter.

Qua patent, we should at least have to decide, as *tabula rasa*, whether the design or machine was new and required invention; further, we must ignore the Patent Office whose action has always been a condition upon the creation of this kind of property. Qua copyright, although it would be simpler to decide upon the merits, we should equally be obliged to dispense with the conditions imposed upon the creation of the right. Nor, if we went so far, should we know whether the property so recognized should be limited to the periods prescribed in the statutes, or should extend as long as the author's grievance. It appears to us incredible that the Supreme Court should have had in mind any such consequences. To exclude others from the enjoyment of a chattel is one thing; to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over

his fellows vastly greater, a power which the Constitution allows only Congress to create."

48. Indeed, the most damaging decision undermining the INS doctrine was by the Supreme Court itself in *Errie Railroad v Tompkins* 304 US 68.

FAO(OS) Nos.153, 160 & 161/2013 Page 47 The INS court's jurisdiction (to declare the "hot news" doctrine) was underpinned on a federally existing "common law" in an area concededly which fell in the states' legislative domain. No state (or federal) statute existed. That doctrine was discredited and the previous rulings upholding the federal common law principle overruled. Here, Brandeis, J spoke for the court which overruled the federal common law doctrine:

"The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is „a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts „the parties are entitled to an independent judgment on matters of general law :

„But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * * „The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word. Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, „an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."

FAO(OS) Nos.153, 160 & 161/2013 Page 48 Justice Brandeis thus was prescient, when in his (now famous) dissent he foresaw the Court's overreach in "creating" law.

49. Subsequently, *NBA (1998)* was a case where Motorola manufactured and sold the SportsTrax paging device; STATS supplied game information transmitted to the pagers. SportsTrax's pager operated in four basic modes including the "current," one. In the current mode, SportsTrax displayed information on NBA games in progress: (i) the teams playing; (ii) score changes; (iii) the team in possession of the ball; (iv) whether the team is in the free-throw bonus; (v) the quarter of the game; and (vi) time remaining in the quarter. The information was updated every two to three minutes, with more frequent updates near the end of the first half and the end of the game. There was a time lag of about two or three minutes between events in the game itself and when information appeared

on the pager screen. The SportsTrax's operation relied on a "data feed" supplied by STATS reporters who watched games on television or listen to them on the radio. The reporters keyed into a personal computer changes in the score and other match information such as successful and missed shots, fouls, etc. The information was relayed by modem to STATS's host computer, which compiled, analysed, and formatted data for retransmission. The information was uploaded via satellite to various FM radio networks which in turn emitted signals to individual SportsTrax pagers.

50. NBA's complaint concerned the SportsTrax device; it also offered evidence at trial concerning STATS's America On-Line ("AOL") site. Users, who accessed STATS's AOL site, were provided with more comprehensive and detailed real-time game information than was displayed FAO(OS) Nos.153, 160 & 161/2013 Page 49 on a SportsTrax pager. NBA asserted six claims for relief: (i) state law unfair competition by misappropriation; (ii) false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a); (iii) false representation of origin under Section 43(a) of the Lanham Act; (iv) state and common law unfair competition by false advertising and false designation of origin; (v) federal copyright infringement; and (vi) unlawful interception of communications under the Communications Act of 1934, 47 U.S.C. Statute 605. Motorola counterclaimed, alleging that the NBA unlawfully interfered with Motorola's contractual relations with four individual NBA teams that had agreed to sponsor and advertise SportsTrax. The NBA court rejected that there could be any copyright in sporting events:

"Sports events are not "authored" in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run.

What "authorship" there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering."

51. The NBA court refused to hold as unlawful the defendant's activity of collecting, collating and disseminating match information through pagers, FAO(OS) Nos.153, 160 & 161/2013 Page 50 almost contemporaneously with the event. Along the way, its judgment dealt with Section 301 of the Copyright Act, 1976 which had brought about a paradigm shift in the law after INS defining what was pre-empted by federal law and what was not. The Circuit court refused to upset the findings of the trial court, after evolving and applying the narrow confines of the "Hot News" doctrine. It was held that:

"We therefore find the extra elements--those in addition to the elements of copyright infringement--that allow a "hot news"

claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.

2. The Legality of SportsTrax [10] We conclude that Motorola and STATS have not engaged in unlawful misappropriation under the "hot-news" test set out above. To be sure, some of the elements of a "hot-news" INS claim are met. The information transmitted to SportsTrax is not precisely contemporaneous, but it is nevertheless time- sensitive. Also, the NBA does provide, or will shortly do so, information like that available through SportsTrax. It now offers a service called "Gamestats" that provides official play- by-play game sheets and half-time and final box scores within each arena. It also provides such information to the media in each arena. In the future, the NBA plans to enhance Gamestats so that it will be networked between the various arenas and will support a pager product analogous to SportsTrax. SportsTrax will of course directly compete with an enhanced Gamestats. However, there are critical elements missing in the NBA s attempt to assert a "hot-news" INS-type claim. As framed by the NBA, their claim compresses and confuses three different informational products. The first product is generating the information by playing the games; the second product is transmitting live, full descriptions of those games; and the third FAO(OS) Nos.153, 160 & 161/2013 Page 51 product is collecting and retransmitting strictly factual information about the games. The first and second products are the NBA s primary business: producing basketball games for live attendance and licensing copyrighted broadcasts of those games. The collection and retransmission of strictly factual material about the games is a different product: e.g., box- scores in newspapers, summaries of statistics on television sports news, and real-time facts to be transmitted to pagers. In our view, the NBA has failed to show any competitive effect whatsoever from SportsTrax on the first and second products and a lack of any free-riding by SportsTrax on the third. With regard to the NBA s primary products--producing basketball games with live attendance and licensing copyrighted broadcasts of those games--there is no evidencethat anyone regards SportsTrax or the AOL site as a substitute for attending NBA games or watching them on television. In fact, Motorola markets SportsTrax as being designed "for those times when you cannot be at the arena, watch the game on TV, or listen to the radio ..."

The NBA argues that the pager market is also relevant to a "hot-news" INS-type claim and that SportsTrax s future competition with Gamestats satisfies any missing element. We agree that there is a separate market for the real-time transmission of factual information to pagers or similar devices, such as STATS s AOL site. However, we disagree that SportsTrax is in any sense free-riding off Gamestats. An indispensable element of an INS "hot-news" claim is free riding by a defendant on a plaintiff s product, enabling the defendant to produce a directly competitive product for less money because it has lower costs. SportsTrax is not such a product. The use of pagers to transmit real-time information about NBA games requires: (i) the collecting of facts about the games; (ii) the transmission of these facts on a network; (iii) the assembling of them by the particular service; and (iv) the transmission of them to pagers or an on-line computer site. Appellants are in no way free-riding on Gamestats. Motorola and STATS expend their own resources to collect purely factual

FAO(OS) Nos.153, 160 & 161/2013 Page 52 information generated in NBA games to transmit to SportsTrax paggers. They have their own network and assemble and transmit data themselves.

xxxxxxxxxxxxxxxxxxxxxxxx SportsTrax and Gamestats are each bearing their own costs of collecting factual information on NBA games, and, if one produces a product that is cheaper or otherwise superior to the other, that producer will prevail in the marketplace. This is obviously not the situation against which INS was intended to prevent: the potential lack of any such product or service because of the anticipation of free-riding.

For the foregoing reasons, the NBA has not shown any damage to any of its products based on free-riding by Motorola and STATS, and the NBA's misappropriation claim based on New York law is pre-empted."

The Federal Pre-emption clause (Section 301) reads as follows:

"301. Preemption with respect to other laws (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to-- (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or ... (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106."

FAO(OS) Nos.153, 160 & 161/2013 Page 53

52. The ruling in NBA has received recent approval and its ratio was applied in *The Flyonthewall.com Inc v Barclays Capital Inc* 2011 WL 2437554 (2d Cir. June 20, 2011) by the Second Federal (Appellate) Circuit Court. The Plaintiffs were three financial services firms which regularly prepared research reports on publicly traded companies. The reports sometimes made stock recommendations. Every trading day, before the stock market opened, the firms used to disseminate the research reports and recommendations to their clients and potential clients, but not to the general public. The firms' stock recommendations usually result in increased trading activity in that stock. The firms benefited from this increased trading activity because they received commissions when clients placed trade through them. The firms contended that clients were far more likely to place their trades through one of them if they learned about a recommendation directly from that firm. The defendant,

Flyonthewall.com ("Fly"), obtained the recommendations before they were available to the general public and before the market opened. Fly would provide the recommendations to its own subscribers. As a result, the firms' clients and others would learn about the recommendations from Fly and, according to the firms, were less likely to place their trades through the firms, which in turn sued the Fly, contending that the latter was guilty of content misappropriation, relying on the Hot-news doctrine evolved in INS. The trial court applied the hot-news doctrine, and held that the Fly had misappropriated content; it granted relief to the firms. On appeal, the Second Circuit reversed the trial court ruling. The INS decision was described, in *The Flyonthewall* as :

FAO(OS) Nos.153, 160 & 161/2013 Page 54 "Some seventy-five years after its death under *Erie*, INS thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action ..."

The court put to rest the "unfair" result theory rather forcefully, in the following terms:

"No matter how "unfair" Motorola's use of NBA facts and statistics may have been to the NBA -- or Fly's use of the fact of the Firms' Recommendations may be to the Firms -- then, such unfairness alone is immaterial to a determination whether a cause of action for misappropriation has been preempted by the Copyright Act. The adoption of new technology that injures or destroys present business models is commonplace. Whether fair or not, that cannot, without more, be prevented by application of the misappropriation tort. Indeed, because the Copyright Act itself provides a remedy for wrongful copying, such unfairness may be seen as supporting a finding that the Act pre-empts the tort."

53. It would thus be seen that the INS decision, propounding "time sensitive" hot-news-misappropriation doctrine, based on unfair dealing and unfair competition, had its sceptics from inception. The majority judgment in INS acknowledged that even such time sensitive information was not copyrightable (as it was *publici juris*). Cheney saw its foundations being questioned by the Appellate Circuit Court. *Errie Railroad*, a later decision of the Supreme Court, undercut the constitutional legitimacy of the Court's assumption to weave doctrines, i.e. the jurisdiction to discover and enforce federal "common" law. In *NBA*, the Second Circuit, post the 1976 Copyright Act, interpreting a federal pre-emption provision (Section 301, which enjoined States from enacting or giving effect to copyright-like acts or rights) held that the hot news doctrine survived in a severely curtailed FAO(OS) Nos.153, 160 & 161/2013 Page 55 manner. Importantly, the "free-riding" or misappropriation claim, it was held, survived only if the plaintiff was able to show that the defendant was in direct competition with it in the same activity. The Court observed that the event organiser owned "primary products--producing basketball games with live attendance and licensing copyrighted broadcasts of those games"

and there was "no evidencethat anyone regards SportsTrax (defendant's pager) or the AOL site as a substitute for attending NBA games or watching them on television.

In fact, Motorola markets SportsTrax as being designed "for those times when you cannot be at the arena, watch the game on TV, or listen to the radio ..."

54. The preceding discussion underscores the meandering course, the rise and diminution of the hot-news doctrine, and the narrow confines of its present existence. The present avatar ("ghostly presence" a.k.a The Flyonthewall.com) is narrowed to injuncting time sensitive news where both parties are "direct competitors" and not merely where the plaintiff's primary service or product is not hot news dissemination, but match organisation or broadcasting of those events. This critical aspect is absent in the present case, as neither Star, nor BCCI engage themselves primarily in match news dissemination through SMS.

55. The tenuous basis of the "hot-news" doctrine in the country of its origin apart, the Australian High Court has rejected its applicability to common law countries repeatedly. In Victoria Park (supra) it was held that:

"If English law had followed the course of development that has recently taken place in the United States, the "broadcasting rights" in respect of the races might have been protected as part of the quasi-property created by the enterprise, organization and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trademarks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization. In dissenting from a judgment of the Supreme Court of the United States by which the organized collection of news by a news service was held to give it in equity a quasi-property protected against appropriation by rival news agencies, Brandeis J. gave reasons which substantially represent the English view and he supported his opinion by a citation of much English authority (International News Service v. Associated Press(1)). His judgment appears to me to contain an adequate answer both upon principle and authority..."

Similarly, later in Moorgate Tobacco Co. v. Philip Morris [156 CLR 414 (1984)], the High Court of Australia upheld the Victoria Park Judgment and held:

"the decision in International News Service, which was hailed in the United States as a "landmark" in the law of unfair competition, has been seen even in that country to be more properly described as an island. Indeed, in a recent United States case...the "legal concept" of unfair competition was described as a "child of confusion" which has "spawned a body of law that lacks in judicial definition and scope... The notion of a general action for "unfair trading" or "unfair competition" has received little

encouragement in either the House of Lords or this Court..."

FAO(OS) Nos.153, 160 & 161/2013 Page 57 In the United Kingdom, similar contentions were rejected (ref. Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd 1916 (2) K.B. 880; and Cadbury-Schweppes Pty Ltd and Others v Pub Squash Co Pty Ltd. 1981 (1) W.L.R.

56. Creating property (or quasi-property) rights in information - which is what the plaintiffs (Star and BCCI) request the Court to do in this case - stands to upset the statutory balance carefully created by the legislature through the Copyright Act. In a domain where Parliament has stepped in to create a statutory regime, an exercise of creating „supplementary rights in common law would well result in obstructing the legislative scheme, as would be the case here. The argument of BCCI that it is under a duty (by relying on the Supreme Court judgment in Secretary, Ministry of Information and Broadcasting) to monetize broadcasting and other rights, and is doing exactly that, by permitting Star to monetize hot-news by licensing mobile rights is misconceived, to put it mildly. One can "monetize" or license only that over which one has property rights. Neither Star nor BCCI can be permitted to say that mentioning "mobile" rights and auctioning them, would ipso facto legitimize the parcelling away of right to disseminate information, without first establishing that the right or exclusive domain over such rights existed in the first instance. Similarly, the plaintiff's reliance on New Delhi Television (supra) is of no avail. The Division Bench, in that case, had to deal with broadcast of sporting events by a news channel. The Court had to deal with whether the defendant's conduct amounted to fair use.

57. In this context, the Court recollects that the Supreme Court has held, when "[i]n our constitutional scheme ... statute monopoly is not encouraged FAO(OS) Nos.153, 160 & 161/2013 Page 58 (and) [k]nowledge must be allowed to be disseminated", (Entertainment Network India Ltd. v. Super Cassettes Industries Ltd., 2008 (13) SCC 30) it is inapt that the courts create a monopoly over facts which the Parliament has deemed fit to exclude from protection under the Copyright Act. The plaintiff has not been able to show, in the opinion of the court, how it has proprietary rights over the facts and information it seeks to protect - even for a limited duration. A telling aspect of the present case is that the plaintiff is willing to state that the moment the event occurs, i.e. any ball is bowled or a wicket falls, the fact or information passes into the public domain, as far as viewers and subscribers (i.e. both the spectators at the venue, as well as the tens of millions of television viewers) are concerned. However, it does not somehow become part of the public domain, if any one or some of them chose to relay the underlying facts, in the course of commerce. This aspect completely undermines the plaintiff's case about it possessing proprietary rights for very limited duration, in respect of such facts. For the reasons discussed above, it is held that the plaintiff cannot claim any exclusive property or other such rights to injunct the publication of match information, or hot-news, as claimed by it, irrespective of whether the object of such third party is to publish such information for commercial gain or without any such motive.

Plaintiff/Respondents' claim for injunction based on unfair competition

58. Star and BCCI assert that the Appellants' actions amount to unfair competition which entitles them to bring the present suit. They cite the common law as the source of the court's power to grant relief, including the equitable relief of injunction. The court has difficulty in accepting this FAO(OS) Nos.153, 160 & 161/2013 Page 59 submission. In doing so (i.e. accepting that there exists a doctrine of unfair competition or „hot news), the Courts would be granting protection to certain intangibles (in this case, match information) not covered under the specific statutory regimes. The opinion in *L. Oreal SA and Others v. Bellure NV and Others*, [2007] EWCA Civ 968 at paragraph 141 rightly explains that:

"... the basic economic rule is that competition is not only lawful but a mainspring of the economy. The legislator has recognized that there should be exceptions. It has laid down the rules for these: the laws of patents, trademarks, copyrights and designs have all been fashioned for the purpose. Each of them have rules for their existence ... each has their own justification. It is not for the judges to step in and legislate into existence new categories of intellectual property ..."

In fact, on being asked whether it was open for the Courts to create such judicial remedies to remedy what the Courts consider „unfair (the semantic vagueness of that term often escaping all attempts at careful and precise formulation), Lord Justice Jacob noted, and rightly so, that "I do not think it open to the Court to legislate in this way." (paragraph 159). Similarly, in *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. and Another* (No. 2), (1984) 156 CLR 414, the Australian Federal Court noted that "[t]he rejection of a general action for "unfair competition"

involves no more than recognition of the fact that the existence of such an action is inconsistent with the established limits of the traditional and statutory causes of action which are available to a trader in respect of damage caused or threatened by a competitor. Those limits, which define the boundary between the area of legal or equitable restraint and protection and the area of untrammelled competition, increasingly reflect what the Respondent Parliament or Parliaments have determined to be the appropriate balance between competing FAO(OS) Nos.153, 160 & 161/2013 Page 60 claims and policies. Neither legal principle nor social utility requires or warrants the obliteration of that boundary by the importation of cause of action whose main characteristic is the scope it allows, under high-sounding generalizations, for judicial indulgence of idiosyncratic notions of what is fair in the market place." (emphasis supplied)

59. In fact, the recent trend internationally to accord protection to rights in information - in varying degrees - or to accept the doctrine of „unfair competition , especially in the European Union, is pursuant to legislative action by the European Council, and not as a judicial extension. To the contrary, similar proposals for extending the scope of protection judicially was rejected in a line of cases, most notably, *Cadbury-Schweppes Pvt. Ltd. v. Pub Squash*, [1981] 1 WLR 193.

60. Denying the claim about the tort of unfair competition does not betray the Court's reticence to protect rights in intangibles or to ensure „fairness in commercial dealings, but rather, reflects

sound judicial restraint, to defer to the Parliament's policy decisions represented in the various intellectual property rights statutes. Equally, once we recognize that mere information cannot be the subject matter of protection under common law, it becomes apparent that other means continue to remain available to protect such information: by way of an action for breach of the common law duty of confidence, which is a right in personam against an individual who has come across such information under confidence, and crucially, is distinct from a proprietary right in such information itself opposable in rem. In the circumstances of the present case, that eventuality does not arise.

61. Moreover, there exists another cogent reason for denying the FAO(OS) Nos.153, 160 & 161/2013 Page 61 existence of any general misappropriation or „unfair competition“ theory - i.e. that it would create a non-existent distinction between „copying“ (or reproduction) (which is the wrongful act/actionable trigger under the Copyright Act) and „appropriation“ (or misappropriation) (which is the wrongful act/actionable trigger under the doctrine of unfair competition). Under the Copyright Act, the copying or reproduction of match information

- the information we are concerned with in the present case - is permitted. To say, now, that the doctrine of unfair competition prohibits the misappropriation of match information would either mean that misappropriation under common law can supplant the Copyright Act (which cannot be the case, as discussed above), or that copying and misappropriation refer to two distinct acts, which would be a distinction without a difference. As Nimmer explains, "it is difficult to see any substance in (this) asserted distinction ..." Thus, it must be:

"concluded, then, that in this context, misappropriation is but another label for reproduction, and as such, is a pre-empted right within the general scope of copyright ..." (Nimmer & Nimmer, Nimmer on Copyright (Indian Reprint) p. 1-47, Vol. I (Lexis Nexis, 2010) (hereinafter "Nimmer"). Accordingly, unless a qualitatively different element is purported to be included in the doctrine of „unfair competition“ as compared to a copyright claim, the pre-emption under Section 16 would apply to such claims, as is the case here. Star claims that the unauthorized dissemination of match information (i.e. „misappropriation“ of its quasi-property) is unlawful, though in reality, once scaled down to the essence of the claim, it appears to be a claim for unauthorized „copying“ of facts, which are not copyrightable. Thus, for example, claims that assert passing off, or a fraudulent element, or FAO(OS) Nos.153, 160 & 161/2013 Page 62 indeed, a question of information disclosed in confidence (as specifically mentioned in Section 16), each having a distinct qualitative element from a mere copyright may survive Section 16 pre-emption, but not otherwise. A contrary reading would allow for claims based on alternate common law remedies that Section 16 considers to be the sole domain of the statute. At the same time, the Court ought to be cautious of the scope of pre-emption under Section 16 to not restrict independent claims "merely because ... (it) relates to intellectual property (or specifically, copyright) ..." (Aronson v. Quick Point Pencil Co., 440 US 257, p. 262) Rather, if the "nature and degree" of the right asserted by Star is such that it conflicts with the scheme of the Copyright Act (Kewanee Oil Co. v. Bicron Corp., 416 US 470 (1974)), thus offering "the equivalent of a (copyright) monopoly" (Sears, Roebuck and Co. v.

Stiffel Co., 376 US 225, p. 233) that the Act itself does not recognize, its claim must be pre-empted by Section 16. Quite clearly, in this case, according protection to match information would provide Star - in substance - a copyright in information/facts, a conclusion that Indian jurisprudence under the Copyright Act strongly militates against and equally, one that upsets - to say the least - the carefully crafted scheme of copyrightability under the Act. In fact, in *Bonito Boats v. Thunder Craft Boats*, 489 US 141, the United States Supreme Court considered a similar question of pre-emption under patent law. In holding that the protection sought to be granted by the State law was pre-empted by federal law, the Court held as follows:

"A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception which has been freely disclosed by its author to the public at large FAO(OS) Nos.153, 160 & 161/2013 Page 63 impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy. Moreover, through the creation of patent-like rights, the States could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years."

62. In the present case, the creation of copyright-like rights that protect match- information, which is otherwise available freely, transgresses the limits of the Copyright Act. Thus, the tort of unfair competition cannot aid the plaintiff in its effort to seek equitable relief by way of injunction.

The plaintiff's claim based on unjust enrichment

63. Coming to the question of unjust enrichment, the plaintiff's claim for an interim injunction on that basis cannot survive for three distinct reasons. First, the claim of unjust enrichment here is similarly pre-empted as the doctrine of „unfair competition“ is. The question, in cases of whether a statute pre-empts a claim, is whether the two can be regarded as "equivalent rights" (Nimmer, p. 1-51), i.e. whether, in terms of Section 16, the right sought to be asserted is a "copyright or any similar right in any work". (emphasis supplied). Indeed, such preclusion, and the test of equivalence, must necessarily be the import of Section 16 to give effect to the words "any similar right". This demonstrates clear textual support for a reading that any right claimed which either a copyright itself, or a right "similar" to a copyright (the question of what is similar or not forming an independent inquiry that the Court must undertake) is precluded by the Copyright Act.

64. In this case, and generally, as far as copyright subject matter is concerned, the claim for unjust enrichment is whether the defendants were „unjustly enriched“ by the dissemination of match information, which is FAO(OS) Nos.153, 160 & 161/2013 Page 64 identical to a claim for the defendant's infringement of the match information over which Star asserts rights. Thus, for example, claims of unjust enrichment against a tabloid for publishing Elvis Presley's photographs inspired by the plaintiff's collection (*Curtin v. Star Editorial Inc.*, 2 F. Supp. 2d 670 (E.D. Pa. 1998), and a similar claim against a studio for building a replica of the plaintiff's home in a movie sequel (*Tavormina v. Evening Star Productions Inc.*, 10 F. Supp. 2d 729 (S.D. Tex, 1998)), were considered to be pre-empted, amounting to (in essence) copyright claims though dressed up under alternate

heads of common law. In *Tavormina*, the Court specifically noted that it:

"agrees with the Defendants that the Plaintiff's claim for unjust enrichment is pre-empted because it involves the same conduct that would fall under the scope of the Copyright Act. In this claim, Plaintiffs allege that Defendants should not benefit from reproducing and displaying their house in the film without compensating Plaintiffs or obtaining Plaintiffs' permission. This claim thus invokes the same rights that Plaintiffs would invoke under a cause of action for copyright infringement."

In other words, the Court must see whether the plaintiff alleges any misconduct incorporating elements other than those subsumed within the claim of copyright infringement. The answer to that question is a clear and unambiguous „no“.

65. Equally, the rationale behind federal law pre-emption in the United States that claims falling (in substance, though parties may choose to address them under various heads) under federal copyright law pre-empt similar claims arising under state law is akin to the pre-emption under Section 16 of the Copyright Act. This is that the purely statutory FAO(OS) Nos.153, 160 & 161/2013 Page 65 monopolies created by the Copyright Act exclude all other claims that "invoke the same rights ... (as) under a cause of action for copyright infringement" (*Tavormina*, supra). Particularly, this conclusion is supported by a clear rationale: that the doctrine of free acceptance under the law of unjust enrichment - that an individual who freely accepts the benefits of the services of another must - on account of such unjust enrichment - restate the other - runs into difficulty in copyright claims. This is because a copyright infringer "always "accepts" the benefit of a copyrighted work"

(*Nimmer*, p. 1-52, emphasis supplied), and thus, a claim for copyright infringement would in no way differ qualitatively from an unjust infringement claim over copyright subject matter that is not covered under the Copyright Act. Indeed, a contrary conclusion would mean that for all copyright infringement claims that fail for want of copyrightability, the plaintiff would also have - as a means to bypass the exhaustive statutory scheme - a claim for unjust enrichment. If allowed, this would run counter to the Section 16 pre-emption, which would exclude the claim of unjust enrichment as well to ensure no protection is granted for facts, ideas and expressions de hors the Copyright Act.

66. The second reason why the plaintiff's argument on unjust enrichment cannot prevail here is because even if the claim of unjust enrichment is to be seen on merits, (assuming that it is not pre-empted by Section 16), such a claim cannot - by definition (with limited exceptions as noted below) - injunct or prohibit the defendants from disseminating match information, but rather, only be the basis for a restitutionary award. Importantly, the property interest claimed by the plaintiff under the hot news doctrine/doctrine of FAO(OS) Nos.153, 160 & 161/2013 Page 66 unfair competition is conceptually distinct from the claim of unjust enrichment. Whereas the former (if considered to be a valid claim) provides an interest that injuncts the defendants from disseminating match information (thereby classifying the defendant actions as wrongful), the latter does not contain any finding of wrongdoing, but rather, is a purely restitutionary remedy that requires the

defendant to return the profit (the principle being to "disgorge" the defendant of its profits, rather than compensate the plaintiff for any right violated). That restitution for unjust enrichment (relied on by Star) is distinct from restitution for wrongdoing is a well-settled proposition affirmed recently by the Canadian Supreme Court in *Kingstreet Investments Ltd. v. New Brunswick*, [2007] 1 SCR 3:

"There are at least two distinct categories of restitution: (1) restitution for wrongdoing; and (2) restitution for unjust enrichment"

The (then) UK House of Lords in *Sempra Metal Ltd. v. HMRC*, [2007] UKHL 34 (Lord Nicholls, paragraph 116, Lord Scott, paragraphs 132-146; Lord Mance, paragraphs 230-1) approved the same view:

"In the modern terminology these are instances of restitution for wrongdoing as distinct from restitution for unjust enrichment."

"If the distinction between claims for compensation for loss on the one hand and claims for restitution on unjust enrichment grounds on the other hand is not recognised, incoherence of legal principle will, in my opinion, be the result."

"... a claim for "relief from the consequences of a mistake" - and is not a claim for "restitutionary" damages or restitutionary relief consequent on a wrong. The distinction is important. It was a corner stone of the late Professor Birks *FAO(OS)* Nos.153, 160 & 161/2013 Page 67 QC's last work, *Unjust Enrichment* (2nd ed.) (2005). He observed at p. 11, "The most important feature of mistaken payments is the absence of contract and wrong", and it is necessary to "isolate" and draw "a careful line" around cases of unjust enrichment which are "not manifestations of consent and are not wrongs". Professor Burrows in *The Law of Restitution* (2nd Ed.) (2002) draws the same distinction. He deals in chapter 1 with the "unjust enrichment principle and its four essential elements" and, quite separately, in chapter 14 with "restitution for wrongs" where he discusses all of the cases identified in the previous paragraph of this opinion which had been decided by 2002. His introduction to chapter 14, at p 455, points out that "the distinction between restitution for wrongs and unjust enrichment by subtraction [i.e. enrichment "at the expense of the claimant"] reflects different moral ideas."

This is not to say that unjust enrichment serves only to reverse an accrual and never prevent it (see, Burrows, *A Restatement of the English Law on Unjust Enrichment* 40 (Oxford University Press, 2012). However, those limited circumstances - as exceptions to the rule - do not arise in this case.

67. Finally, even if we were to consider the unjust enrichment claim on the facts before the Court, Star's claim is *prima facie* untenable. A claim for unjust enrichment rests - as is beyond question - on three prongs: (a) enrichment of the defendant, (b) "at the expense" of the claimant, (c) an "unjust factor" in allowing the retention of such benefit. (see, Burrows et. al., *A Restatement of the English Law of Unjust Enrichment* 44 (Oxford, Oxford University Press, 2012)); Birks, *An Introduction to*

the Law of Restitution 16-8 (Clarendon Press, Oxford 1989)).

68. Accepting this formulation, in *Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs*, (2005) 3 SCC 738, the Supreme Court elaborated upon the aspect of unjust enrichment stating:

FAO(OS) Nos.153, 160 & 161/2013 Page 68 "31. Stated simply, "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.

32. The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity ..."

This position was also approved in *Godfrey Phillips India Ltd. & Anr. v. State of U.P & Ors.* (2005) 2 SCC 515, where the Court held that:

"It was, therefore, submitted that if the appellants are allowed to retain the amounts collected by them towards luxury tax from consumers, it would amount to „unjust enrichment by them. In our opinion, the submission is well founded and deserves to be upheld. If the appellants have collected any amount towards luxury tax from consumers/customers after obtaining interim orders from this Court, they will pay the said amounts to the respective State Governments."

Most recently, this was accepted the Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*, 2011 (7) SCALE 768 at paragraphs 169-173 (as the Supreme Court notes, "a person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust"). Equally, the decision relied on by the plaintiff/respondents, i.e. *Mahabir Kishore*, is one example of the restitutionary nature of the unjust enrichment principle recognised in India, where it is invariably used to recover money. The appellant had paid over Rs. 54,000/- as "mahua" over and above the auction money to the State government. This was despite such extraction or recovery having been declared illegal; the appellant filed a writ petition for its recovery. The FAO(OS) Nos.153, 160 & 161/2013 Page 69 Supreme Court upheld the claim, stating that:

"The principle of unjust enrichment requires; first, that the defendant has been „enriched by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff" and thirdly, that the retention of the enrichment be unjust. This justified restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved..."

In all these cases, however, the Court did not have the opportunity to delve into the question of the precise boundaries of what such „unjust factors could be. Here, the observations of Lord Goff in *Lipkin Gorman v. Karpnale Limited*, [1991] 2 AC 548 are crucial:

"But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle. It is therefore necessary to consider whether Mr. Lightman's submission can be upheld on the basis of legal principle ..."

In failing to provide any clear unjust factor, as also in not addressing whether the benefit gained by the defendants was „at the plaintiff's expense", (both crucial legal requirements for a claim of unjust enrichment, as opposed to a broad reference to the fairness and justness of the plaintiff's claim), the approach of the Learned Single errs in its findings on this issue.

69. If one were to deal with this issue afresh - two questions arise: first, have the defendants, though undeniably benefiting from the dissemination of FAO(OS) Nos.153, 160 & 161/2013 Page 70 match information, been so benefited "at the expense of" Star; and secondly, if so, does the retention of such benefit present any unjust factor? On the first question, Star must demonstrate that the defendants' enrichment is at its expense. This remains a well-established and indeed, unchallenged, proposition of law (see, Burrows et. al., A Restatement of the English Law of Unjust Enrichment 44 (Oxford, Oxford University Press, 2012). In this case, the defendants' dissemination results purely from resources invested by them in this business, and in no way results from Star's conduct or any expense incurred by it. Star's acquisition of broadcast and related rights from the BCCI, nor Star's conduct in any manner, assists, let alone results, in the defendant's gain. Indeed, even applying the "but-for test", though considered unduly harsh in such cases (Burrows, supra, p. 46), does not lead to a positive conclusion that „but for Star's acquisition of broadcasting and related rights, the defendants would have been able to operate the services they currently do. Thus, as the benefit gained by the defendants cannot be said to be „at the expense of Star, the claim for unjust enrichment is not tenable. Given this, the Court need not consider the question of whether there exists an „unjust factor in the retention of such benefit by the defendants.

70. Here, in the present case, the principle of unjust enrichment is sought to be relied upon as a claim entitling the plaintiffs to the equitable remedy of injunction. Apart from the reasons discussed above, i.e., preclusion of such claims on account of a specific statutory copyright regime, and the absence of any merit in such plea, the court notices that no authority relied upon by the plaintiffs supports the view they propound approving the grant of such injunction. Even the Marksman case does not support the view that in such FAO(OS) Nos.153, 160 & 161/2013 Page 71 cases, the publication of such information, amounts to the third party unjustly enriching itself at the broadcaster (or broadcasters' licensee's) expense.

71. Grant of injunctions can be to secure an object protected by law. It can also be to restrain the defendant from engaging in conduct injurious to the plaintiffs' property. In some circumstances, the relationship or past relationship of parties (status, such as matrimony, or contractual such as agent, employee, partner, etc.) may entail that either of them refrain from disclosing facts or

information - which can in turn be based upon the terms, express or implied governing such relationship (a claim in contract, or as in this case, tort (of unfair competition), and finally, unjust enrichment). Sections 38 and 39 of the Specific Relief Act empower the civil court, in exercise of its jurisdiction, to issue injunctions. Although, textually, Section 39 talks of mandatory injunction and does not advert to statute based rights, it speaks of such remedy being available to "prevent the breach of an obligation" existing in favour of the claimant. While the last two illustrations to the Section 38 suggests that obligations not spelt out in express terms and not found in either contract or statute, but arising out of the relationship or the peculiar conditions are enforceable through injunction, as is clear from the above discussion, none of those conditions exist to entitle the plaintiff to the injunction.

72. Accordingly, for the above reasons, this court is of opinion that the plaintiffs cannot claim an injunction based on either the doctrine of unfair competition or unjust enrichment.

73. The above discussion would have been dispositive of the issues which arose for consideration in this case. However, it would be appropriate that FAO(OS) Nos.153, 160 & 161/2013 Page 72 this court deals with one aspect which was brushed aside by the learned single judge. The Appellants had argued that their right to freedom of speech and expression and their right to freedom of trade under Article 19 (1) (a) and (g) could not be interfered with in the absence of any law. This submission was rejected by the learned single judge, saying that reasonable restrictions can be imposed upon such rights. However, as a concluding note, it is important to remember the broader context in which Courts decide such disputes. The creation of any right or indeed defining the contours of a right through judicial intervention is an exercise with implications that travel beyond the peculiar facts of the case before the Court. While pronouncing upon a principle of law (especially one as potent as the doctrine of „unfair competition), the Court must keep in mind the constitutional implications of the right sought to be created, in this case, upon the right to freedom of speech. Recognizing the doctrine of unfair competition would inevitably restrict the defendants (as also others rights in future cases) ability to disseminate information, undoubtedly a crucial component of Article 19(1)(a). This is not to say that the doctrine of „unfair competition is to be rejected in Indian law on account of an Article 19(1)(a) violation, nor to say that the defendant s freedom of speech cannot be curtailed by the doctrine under any circumstance, but only to make the limited, but crucial, point that Courts must be cautious in creating doctrines and rights that have such clear implications for constitutional rights, better leaving such matters to the law- making domain of the legislative branch, that may result in a coherent legislation that creates a framework within which any curtailment of Constitutional rights is to take place. Indeed, in such cases, it is open for any FAO(OS) Nos.153, 160 & 161/2013 Page 73 aggrieved party to question that legislative action as against Part III of the Constitution, and against the entire range of constitutional rights, by approaching the courts. But it is that path - of a legislative action open to review by the Courts as against specific and limited negative covenants imbibed in the Constitution - which best represents the mechanism for creation of rights that have constitutional implications, rather than judicial indulgence in entering that exercise itself. Indeed, restraint as a judicial policy neither does nor should translate into a symbol of reticence, but rather one of wisdom in recognizing the important role that courts must play within the sphere allotted to them. In other words, the Constitution visualizes that restrictions, saved by virtue of Articles 19 (2) and 19 (6) are in terms of enacted law,

and not judge-declared fiats Doing what the plaintiff invites this court to do would be to enclose from the public match facts and information which are not protectable in any manner known to law. Such an injunction would tend to insidiously, and in a creeping manner, denude the fundamental right to free speech and dissemination of topical information to members of the public.

74. In view of the above discussion, it is held that the plaintiffs claim for ad interim injunction on all counts, i.e. ownership of facts based on the "hot news" principle and the claims for unfair competition and unjust enrichment cannot be granted. Prima facie, it is also held that claims so made are statutorily precluded. Consequently, the impugned judgment and order of the learned Single Judge has to be and is set aside. The three appeals i.e. FAO (OS) No.153/2013, FAO (OS) No.160/2013, and FAO (OS) No.161/2013 are therefore allowed. All pending applications stand disposed FAO(OS) Nos.153, 160 & 161/2013 Page 74 off. In the circumstances, there shall be no order as to costs.

S. RAVINDRA BHAT (JUDGE) NAJMI WAZIRI (JUDGE) AUGUST 30, 2013 FAO(OS) Nos.153, 160 & 161/2013 Page 75