

# Syndicate Of The Press Of The Universtiy ... vs B.D. Bhandari & Anr. on 3 August, 2011

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**Bench: A.K. Sikri, Suresh Kait**

## REPORTABLE

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA (OS) No.21 of 2009  
FAO (OS) No.458 of 2008

Reserved On: May 23, 2011.

% Pronounced On: August 03, 2011.

(1) RFA (OS) No.21 of 2009

SYNDICATE OF THE PRESS  
OF THE UNIVERSTIY OF  
CAMBRIDGE ON BEHALF OF  
THE CHANCELLOR,  
MASTERS AND SCHOOL

. . . APPELLANT

through : Mr. A.S. Chandhiok, Sr.  
Advocate with Ms. Jyoti  
Taneja, Advocate and Mr.  
Saurabh Kirpal, Advocate.

## VERSUS

B.D. BHANDARI & ANR.

. . .RESPONDENTS

through: Mr. S.K. Dubey with Ms.  
Sangeeta Goel, Mr. Mohit Goel  
and Mr. Sidhant Goel  
Advocates.

(2) FAO (OS) No.458 of 2008

THE CHANCELLOR MASTERS  
AND SCHOLARS OF THE  
UNIVERSITY OF OXFORD

...APPELLANT

through : Mr. V.P. Singh, Sr. Advocate  
with Mr. Rajiv Bansal, Mr  
Saurabh Sinha and Mr. Harshit  
Agarwal, Advocates.

VERSUS

NARENDRA PUBLISHING HOUSE AND ORS. . . .RESPONDENT

through: Ms. Prathiba M. Singh with Mr.  
Sudeep Chatterjee,  
Advocates.

RFA (OS) No.21 of 2009 and FAO (OS) No.458 of 2008

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CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The present appeal is filed against the judgment by the learned Single Judge in CS (OS) No. 1274 of 2004, whereby the Hon`ble Single Judge dismissed the suit filed by the appellant herein to restrain the defendants therein (respondents in this appeal) from selling books published by them and titled MBD English Guide B.A./B.Sc./B.COM Part I (Guru Nanak Dev University), MBD English Guide B.A./B.Sc./B.COM Part II (Guru Nanak Dev University) and MBD English Guide B.A./B.Sc./B.COM Part III (Guru Nanak Dev University).

2. The appellant, Cambridge University Press, the printing and publishing house integratedly attached to the University of Cambridge is one of the oldest printing and publishing houses of the world. □Advance English Grammar by Martin Hewings , one of the leading publications of the appellant and the subject matter herein, has been prescribed and used by many universities all over the Globe including India. This work is also prescribed in Guru Nanak Dev University, Amritsar, Punjab for the students of B.A. Part I, II, III. The grievance of the appellants is that the respondents are publishing and selling books, as titled aforementioned, which do contain illegal and unauthorized ad verbatim reproduction of literary content of the grammar exercises and keys thereto given in units 1 to 120 of the appellants' publication titled □Advance English Grammar by Martin Hewings .

3. Raising this grievance, the appellant filed the aforesaid Suit on the Original Side of this Court to restrain the respondents herein from selling books published by them entitled MBD English Guide B.A./B.Sc./B.Com Part-I (Guru Nanak Dev University), MBD English Guide B.A./B.Sc./B. Com Part - II (Guru Nanak Dev University) and MBD English Guide B.A./B.Sc./B. Com Part - III (Guru Nanak Dev University) on the premise that these books contained illegal and unauthorized reproduction of literary content of the appellants' publication titled □Advance English Grammar by Martin Hewings . Along with the Suit, the appellants also filed application under Order 39 Rule I and II

seeking an interim injunction.

4. The appellants succeeded in obtaining an ex parte interim injunction to restrain the respondents from utilizing and incorporating the ad verbatim text from the appellants' work, which was later on also confirmed during the pendency of the Suit. On the basis of pleadings, the following issues were framed in the Suit:

1. Whether plaintiff No.1 is the owner of the copyright of the literary work titled □Advance English Grammar ? OPP

2. Whether the defendants have reproduced verbatim plaintiffs' work titled □Advance English Grammar in their three publications titled □MBD English Guide one each for B.A., Part I, II and III? If yes, whether complete set of exercises and answer keys, scheme of exercises, answers and placement of topics have been all reproduced?

3. Whether reproduction of plaintiffs' work by the defendants amount to infringement of the plaintiff's copyright in the said work?

4. Whether plaintiffs are entitled to the relief of permanent injunction?

5. Whether plaintiffs are entitled to claim of damages against the defendants? If yes, to what amount of damages, the plaintiffs are entitled to?

6. Whether plaintiffs are entitled to rendition of accounts of profits?

7. Whether plaintiffs are entitled to delivery up of all infringing material including plates?

8. Whether the activities of the defendant fall under the concept of fair dealing under the Copyright Act, 1957? OPD

9. Relief.

5. Though the respondents participated in the proceedings upto this stage and by filing the written statement and contesting the interim relief prayed for by the appellants, with effect from 01.03.2007, they stopped appearing and specific order dated 29.04.2008 was passed whereby defendants were proceeded ex parte. The appellants filed evidence by means of affidavit of three witnesses. The averments in these affidavits remained uncontroverted as the respondents did not come forward to cross-examine the said witnesses. In these circumstances, the counsel for the appellant was heard by the learned Single Judge. However, the Suit has been dismissed as the learned Single Judge had taken a view that there was no originality or invention displayed in composing grammar sentences or exercises and hence the appellant's work does not constitute original literary, dramatic, or artistic works. It is also held that the appellant's work not only touches the boundaries of □public domain but also when a book is prescribed by some University, the

questions and the answers along with keys thereto become questions to be answered in an examination and therefore, the work in question falls within the scope of section 52(1)(h) of the Indian Copyright Act (hereinafter referred to as 'the Act'), which provides for doctrine of fair dealing.

6. It would be of some significance to point out at this stage itself that in the written statement filed by the respondents, they had really not contested the copyright of the appellant. Their defences, however, were altogether different. It has been claimed by them that they are in the business inter alia of publication guides (which is described by the learned Single Judge as Kunji or Dukki, an epitaph given to such guides in this part of this country). According to them, by means of these guides, the respondents were merely facilitating the students better understanding of the subject matter as the book of the appellant was prescribed by Guru Nanak Dev University. It was also their contention that the two publications were different; the illustrations in the textbook of the appellants were not existing in the publication of the respondents; while the answerers in the appellants publication were at the end of the book, the questions and answers were together in the publication of the respondents; while the appellant's publication contains two choices of answers for most of the questions, the respondents publication gave only one answer. In nutshell, the defence put by the respondents was that the appellant's publication being a course book of the University, the respondents had merely published a guide book, which was different from the appellant's course book and if in these guides, the respondents had published the answers as in the appellant's book that was but natural, as there could not have been different answers. That by itself did not amount to copying the work of the appellant and the format of two books was different. Moreover, the publication of the respondents was protected by the provisions of Section 52(1) (h) of the Act, as it amounted to 'fair use', more so when the appellants' book had been brought in public domain because of its prescription by a University. The learned Single Judge accepted this defence of the respondents, which led to the dismissal of Suit.

7. Though various issues were framed as highlighted above, on the basis of arguments advanced by the learned counsel for the parties, we feel it apposite to crystallize the area of controversy. Succinctly stated, the issues, as emerging from the detailed submissions of the appellants are:

- (i) Whether the appellants' work in composing grammar sentences and exercises constitute original literary work or not and consequently there subsists any copyright in the appellant's work or not?
- (ii) If there subsists any copyright, then whether the prescription by the University, in the light of facts and circumstances of the present case, has an eroding effect on this copyright vested in the appellant?
- (iii) If not, or upto a certain extent yes, then whether the work of the respondent in publishing the guides amounts to infringement of the appellant's copyright over the aforementioned English Grammar book.

ISSUE No: 1

8. It has been submitted on behalf of the appellants that the observations of the learned Single Judge that "the exercises and answers thereto, which have been copied are to teach grammatical use of words, tense, etc. sentences, sometimes with blanks which have been framed for the said purposes. The same, in my opinion also do not constitute original literary, dramatic or artistic works. is contrary to Section 13 of the Act.

9. The appellant has contended before us that the appellant's subject work as well as its author are internationally well renowned and the subject work is the result of years of research, knowledge, experience, creativity, labour, skill and ingenuity employed and invested by the author Dr. Martin Hewings, who is a Senior Lecturer at the University of Birmingham, and has been teaching English Grammar to the international students. It is argued that the learned Single Judge is incorrect to hold that there is no originality or invention in composing Grammar sentences or exercises, because the author has put great efforts, creativity, research, skill etc. in shaping and designing the subject work and its contents thereof so as to make it most effective, efficient and user friendly. The author has employed unique methods to simplify and explain the concepts of English Grammar like blank passages and letters, incorrect sentences with hints thereto and it is well established principle of copyright that if sufficient labour, skill and judgment have been exercised in devising the arrangement of the whole work, that can be a decisive element in deciding whether the work is protected by copyright. Moreover, the copyright law is not concerned with the originality of idea but that of the expression and the expressions employed by the author in drafting and arranging exercises and keys thereto are unique to the author. The uniqueness of the same can also be inferred from the fact that there are innumerable ways to explain the concepts in questions and different expressions concerning the same concepts have been employed by the other well reputed authors. The appellants have further contended that the impugned judgment, in wider implications, has exposed all the books of English Grammar to copyright infringement on the ground that there subsists no copyright in the same. To substantiate the above submission, on the point of originality and available copyright protection thereto, the appellants have placed reliance mainly upon following judgments:

1. Educational testing Service Vs. John Katzman Federal Circuit 793 F. 2D 533 (3rd Cir. 1986);
2. V. Govindam Vs. E.M. Gopalkrishna Kone and Another (AIR 1955 Madras 391)
3. University of London Press Ltd. Vs. University tutorial Press Ltd. (1B IPR 186)
4. R.G. Anand Vs. Delux Films (AIR 1978 SC 1613)

10. It was argued by the learned counsel for the respondents that the subject work of the appellant lacks originality and therefore, was not entitled to copyright protection. He stressed that traditional "sweat of the brow doctrine" had given the way of "modicum of creativity" standard. There is no quarrel about this which has already been highlighted above. However, argument of the learned counsel was that there is no creativity involved in the present case. He relied upon the judgment of a learned Single Judge of this Court in the case of The Chancellor of Masters and Scholars of the

University of Oxford Vs. Narendra Publishing House & Ors. 2008 (38) PTC 385 (Del) was seized with similar facts as to the present case and the learned Single Judge refused to grant relief to the appellants' citing the abovementioned law laid down by the Supreme Court and Courts worldwide and observed that the work of the appellants lacked the originality required by law under the new legal regime and thus was not a copyrightable subject matter. The Court in the abovementioned case observed as under:

Our Supreme Court has also signified a shift; in *Eastern Book Company v. D.B. Modak* 2008 (1) SCC 1..... it rejected the sweat of the brow doctrine (which conferred copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour), and held that work must be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author....In education, the dictates of the learning content are such that each level demands a curve. These learning content and learning curve elements are inherent in the syllabi evolved by examination bodies such as J & K Board or the CBSE. The plaintiff therefore, had to show how it evolved an arrangement so unique that the scheme is entitled to copyright protection, independent of the dictates of the Board. The involvement of the Board, in the creation of the syllabus, negates such originality. This is not to suggest that there can be no creativity such schematic arrangement; the court merely infers that prima facie there is no material in support of it; the plaintiffs have made no attempt to show this creativity, apart from placing the textbooks on the record. For those reasons, this Court prima facie is of the opinion that the plaintiffs' claim of copyright in questions, answers, and their requiring or arrangement, is insubstantial. The same observation has been rendered by this Court in the case of *Mattel Inc. & Ors. Vs. Mr. Jayant Agarwalla & Ors.* 2008 (38) PTC 416 (Del). It was also submitted by the learned counsel for the respondents that in the present case the learned Single Judge was seized of appellants claims of copyright protection over grammatical questions and answers and the same was answered in the negative against the appellants in view of the law of the land stated in all the abovementioned cases. The learned Single Judge observed that the grammatical use of tenses, words, etc., do not constitute original literary work. Admittedly, the subject work of the appellant, i.e., *Advanced English Grammar* by Martin Hewings was composed of exercises based on day-to-day use of simple English Language and therefore the learned Single Judge correctly observed that no originality was displayed in the same. It is submitted that in view of settled law on the subject, the contention of the appellants of mere schematic arrangement and selection of exercises leading to copyright protection does not measure up to the test of originality, post the *Eastern Book Company* (supra) case and the other cases cited above. Even otherwise, the creative expression, if any, is minimal and does not warrant copyright protection. The case of *University of London Press Vs. University Tutorial Press Ltd.* (1916) 2 SC 601 repeatedly cited by the appellant in the appeal holds no good law. The law on principle of originality has undergone a sea change which is reflected by the decisions cited above.

11. We have considered the submissions of both sides on this aspect. In the present era of globalization, the issue as to the protection of copyright, a species of Intellectual Property Rights, has gained much momentum. The Copyright and related rights protect the rights of authors, performers, producers and broadcasters, and contribute to the cultural and economic development of nations. This protection fulfills a decisive role in articulating the contributions and rights of different stakeholders and the relation between them and the public. In India this copyright protection has been provided under Section 13 of the Act. It reads as under:

"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) Records.

12. The legislative text, which has the bearing upon the issue involved therein, is "ORIGINAL LITERARY". In order to reach at any conclusion in this regard, it is necessary to examine the requirement of originality under abovementioned Section and concerned tests developed under the IPR jurisprudence by Indian as well as foreign authorities and the courts.

13. Black's Law Dictionary (7th ed.) defines originality as "the quality or state of being the product of independent creation and having a minimum degree of creativity. It further says that although originality is a requirement for copyright protection but this is a lesser standard than that of novelty in patent law. Justice Frank in *Alfred Bell & Co. Vs. Catalda Fine Arts, Inc.*, [191 F.2d 99, 102 (2d Cir. 1951)] observed that "original in reference to a copyrighted work means that the particular work owes its origin to the author." No large measure of novelty is necessary. J A L Sterling in his celebrated work titled "World Copyright Law" clearly summarizes the English position on the issue of originality as below:

"Although a number of interpretations have been given to the term, there are certain points on which agreement seems to have been firmly established. Primary among these points are two basic concepts, First that the work must not be merely a copy of a previous work, and secondly that the work is the result of the investment of individual skill, judgment or labour [Page 303, 2nd ed.]

14. In the United States, originality is the constitutional requirement under the copyright clause of the constitution and is a sine qua non of the copyrightability. Earlier, in the United States, the judicial trend, to trace out the elements of originality in a given work was to focus on the "Sweat of the brow" test or the industriousness. However, there has been a consistent shift from this approach towards a test based on "creativity". *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), is a glaring example of this shift wherein the Supreme Court of the United States

was categorical to observe that "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.

15. The Supreme Court of Canada in the matter of CCH Canadian Ltd. Vs. Law Society of Upper Canada 2004 (1) SCR 339 (Canada) has noticed the competing views on the meaning of "original" in copyright law wherein some courts have held that a work which has originated from an author and is more than a mere copy of a work, is sufficient to give copyright.

16. The Supreme Court of India has found many occasions to reiterate that the test of originality in India is same as in the UK which is based on the "skill, judgment and labour". In Eastern Book Company and Ors. Vs. D.B. Modak and Anr. (AIR 2008 SC 809), the Indian Apex court was categorical to observe that:

"Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity.

17. This requirement of originality, under the Copyright Act, 1957, is that of expression and not of idea. In University of London Press Limited v. University Tutorial Press Limited [1916] 2 Ch 601, J. Peterson observed that:

"The word "original" does not in this connection mean that the work must be the expression of original or innovative thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The originality which is required relates to the expression of thoughts. But the Act doesn't require that the expression must be in the original or novel form, but that the work must not be copied from another's work- that it must originate from the author.

18. The abovementioned UK approach has become a standard all over the globe in the process of judicial determination regarding whether a work is copyrightable or not. The Indian Supreme Court, in Eastern Book Company and Ors. (supra) cited the aforementioned judgment with approval and categorically observed that "The Copyright Act is not concerned with the original idea but with the expression of thought.

19. In the instant case, to adjudicate upon the issue as to whether the finding of the single judge that there subsists no copyright in the work of the appellant because of there being no originality or invention in composing grammar sentences or exercises, is sustainable or not, we need to view it from two perspectives. Firstly, whether the appellant's work satisfies the "originate from the author" test coupled with the requirement of "skill, judgment and labour" and secondly, whether the grammar sentences and exercises in question are copyrightable expressions evolved upon the un-copyrightable ideas pertaining to the knowledge of grammatical constructs of the English language.



20. At the very outset, it would be of interest to note that in the United States, a major impetus for copyright protection enactment, as indicated by Thomas B Nachbar in his *Constructing Copyright's Mythology* (6 Green Bag 2d 37, 43- 44 (2002)), was Noah Webster's desire for protection of his nearly completed, or, as was the case in some states, both completed and published spelling and grammar book.

21. Adverting to the first facet, it would be of interest to note that as observed by the learned Single Judge himself in the impugned order "the defendants did not really contest the copyright of the plaintiff". Obviously, because of this reason, no issue is carved out thereupon, viz., whether the appellant had copyright in its publication. However, still this issue arises for consideration before us and detailed arguments were advanced in view of the following observations contained in Para 13 of the impugned judgment:

"13. The exercises and answers thereto, which have been copied are to teach grammatical use of words, tense etc. Sentences, sometimes with blanks have been framed for the said purposes. The same, in my opinion also do not constitute original literary, dramatic or artistic works. No originality or invention is displayed in composing the said exercises based on day to day use of simple English language and meant for learning thereof. The plaintiffs' cannot claim any monopoly in the same. The Apex court in *Eastern Book Company* (supra) (though confining to the decision to judgment of courts only) has held that collection of material and addition of inputs in the raw text does not give work a flavor of minimal requirement of creativity, as skill and judgment required to produce the work are trivial. To establish copyright, the creativity standard applied is not that something must be novel or non obvious, but some amount of creativity in the work to claim copyright is required. In that case selection and arrangement was viewed as typical and at best result of labour, skill and investment of capital, lacking even minimal creativity, which did not as a whole display sufficient originality so as to amount to an original work of the author. It was further held, to claim copyright there must be some substantive variation and not just a trivial variation, not the variation of the type where limited ways of expression available and author selects one of them. The court held the inputs by publishers of Supreme Court cases in copy edited judgments to be minimal. The Apex court in that case also applied the principle/test of public domain and reiterated that once the work is in public domain, its reproduction or publication would not constitute infringement of copyright.

22. Normally, when the respondent virtually accepted the copyright of the appellant in its publication "Advance English Grammar by Martin Hewings" and in the absence of any issue on this aspect, the learned Single Judge was supposed to proceed on the basis that the appellant had a copyright in the said work.

However, it appears that the aforesaid observations came to be made and findings arrived at, at a particular juncture when the learned Single Judge was examining the pattern and use of two books,

viz., that of the appellant and the guide books of the respondents. There is no dispute that insofar as the text of the appellant's work is concerned, the appellant can legitimately claim copyright therein. It is the questions which are given by the author at the end of each chapter, which was the limited facet dealt with by the learned Single Judge holding that no originality or invention was displayed in composing exercises/questions based on day to day use of simple English language and meant for learning thereof. It is, therefore, this part which needs to be examined when we are discussing the question of copyright of the appellant in its book as to see whether there is any creativity, skill and judgment in devising those exercises/questions at the end of each chapter of the book.

23. To answer this facet and to judge as to whether the approach of the learned Single Judge is in conflict and we feel it appropriate to first state the flavour of the book authored by Martin Hewings. Complete title of this book is as under:

Advanced English Grammar A self-study Reference and Practice book for Advanced  
sought asian students WITH ANSWERS Martin Hewings

24. It is, thus, an English Grammar book for students undertaking higher studies. The author had specifically in mind South Asian students for whom he undertook the project, i.e., to produce a study reference and practice book. Specific stress is laid in the title itself that this book is WITH ANSWERS. There are introductory messages TO THE STUDENT as well as TO THE TEACHER explaining them as to what the book about and how it is to be used. It is specifically mentioned that the book is written mainly as a self-study, but it can also be used in a class with a teacher. There are 120 units in the book, each dealing with a particular area of Grammar. It would be relevant to extract the portion of How the book is organized and How to use the book, which reads as under:

How the book is organized There are 120 units in the book. Each one looks at a particular area of grammar. Some sections within each unit focus on the use of a grammatical contrasts, such as whether to use would or used to to report past events, or when we use because or because of. The 120 units are grouped under a number of headings such as Tenses and Modals. You can find details of this in the Contents on pp. iii-vi.

Each unit consists of two pages. On the left-hand page are explanations and examples; on the right are practice exercises. The letters next to each exercise show you which sections of the left-hand page you need to understand to do that exercise. You can check your answers in the Key on page 289. The Key also comments on some of the answers. Four Appendices tell you about passive verb form, quotation, irregular verbs and Typical Errors (see below). To help you find the information you need there is an Index at the back of the book. Although terms to describe grammar have been kept to a minimum some have been included, and you can find explanations of these terms in the Glossary on page 265.

On each left-hand page you will find a number of symbols. These are included to show the kinds of mistakes that students often make concerning the grammar point being explained. These Typical Errors are given in Appendix 4 on page 246, together with a correction of the error, and an explanation where it is helpful.

The symbol is used to show you when it might be useful to consult a dictionary. On the explanation pages it is placed next to lists of words that follow a particular grammatical pattern, and on the exercise pages it is used, for example, to show where it necessary to understand what particular words mean in order to do the exercise. Good English - English dictionaries include the Cambridge International Dictionary of English, the Longman Dictionary of Contemporary English, the Oxford Advanced Learner's Dictionary, and the Collins Cobuild English Language Dictionary.

How to use the book It is not necessary to work through the units in order. If you know what grammar points you have difficulty with, go straight to the units that deal with them. You can use the Index to help you find the relevant unit or units. If you are unsure which units to study, use the Study Guide on page

280.

You can use the units in a number of ways. You might study the explanation and examples first, do the exercises on the opposite page, check you answers in the key, and then look again at the explanations if you made any misstates. If you just want to revise a grammar point you think you already know, you could do the exercises first and then study the explanations for any you got wrong. You might of course simply use the book as a reference book without doing the exercises.

A number of Additional Exercises are included for further practice of particular areas of grammar. (emphasis supplied)

25. It is clear from the above that while structuring the book, the author had given equal importance to the practice exercises, which form integral part of the book. Even additional exercises are included for further practice of particular areas of grammar. Some messages given to the teachers as well who could usefully made use of the book for supplementing and supporting their class room teachers.

26. As is clear from the above introductory narration, each unit dealing with particular area of grammar is in two pages. On the left page, that area of grammar is explained as study book. On the opposite page exercises are provided which he is supposed to undertake to find out whether he has understood that particular area of grammar or not. To ascertain as to whether he has correctly solved the exercise □Key is provided at the end. Thus, in the scheme of things devised by the author to teach grammar to more advanced students of English as a self-study, he has made these exercises inseparable part of the book. In such a scenario, it is difficult to accept the rationale of the learned Single Judge that no creativity, skill or judgment has gone into while devising the exercises. It would clearly be a matter of skill and judgment to decide as to what type of questions be put in the exercise

portion to ensure that by solving such questions, the student has understood that particular area of grammar. Creativity is writ large in devising these exercises coupled with great deal of skill and judgment that is required to produce such a work. This would become manifest when we take note of one of the units explaining a particular area of grammar. We have chosen Unit 36 dealing with Verbs with and without objects at random. This consists of two pages like any other Unit. Left page explains such subject and on the right page, exercises are there. These two pages read as under:

# –UNIT 36

Verbs with and without objects

A Study the sentence in this table:

subject + verb parts	Object	Other
Did you see your sister		at the weekend?
He described the new building.		
They arrived		three hours late.
He coughed.		

Some verbs (e.g. see, describe) are followed by an object. These are called transitive verbs.

Other verbs that are transitive in their most common meanings

include arrest, avoid, do, enjoy, find, force, get, give, grab, hit, like, pull, report, shock, take, tell, touch, want, warn.

Some verbs (e.g. arrive, cough) are not followed by an object. These are called intransitive verbs. Other verbs that are intransitive in their most common meanings include appear, come, fall, go, happen, matter, sleep, swim, wait.

If a verb can't be followed by an object, it can't be made passive (see Unit 29)

## Exercises

36.1 Correct this text by adding an appropriate object or completion (a phrase beginning with a preposition or adverb) only where necessary. (A, B & C)  
Sandra is being questioned by a barrister in court.

BARRISTER: Could you begin by telling what happened on the evening of the 26th July.

SANDRA: Yes, I was walking home from work when I saw someone who I thought was my friend, Jo. I went up to her and touched on the arm. But when the woman turned round it wasn't Jo at all. I just said, –I'm sorry, I

mistook you.

BARRISTER: And could you describe in detail.

SANDRA: Well, to be honest, her face shocked. She reminded of a witch from a children's story - a long nose and staring eyes. When I tried to walk, she stood. I couldn't avoid. She grabbed and prevented from escaping. I struggled, but she pulled into a car parked nearby. She forced to give my purse and she wanted to give my ring, too. But I wasn't going to let her take. So I hit with my bag and leapt. Then I just ran.

Verbs with and without objects.	At first I could hear her following, but then she disappeared. After than I ran into the town centre and reported to the police. They took a statement, and then they drove me and warned to lock my doors and windows. Later that night they phoned to say that they had arrested.
B Some verbs can be both transitive and intransitive. Compare: I closed the door. and The door closed	
Verbs like this are often used to talk about some kind of change. Other examples are break, burn, empty, increase, open, shut, spoil.	36.2 Complete these sentences with one of these phrases + an appropriate preposition. (C)
Some transitive verbs can have their objects left out when the	my children his calculation my ladder the idea my students

meaning is clear from the context: 1. At the beginning of term I supply ..... a list of books He has smoked I want them to read.

(cigarettes) since he was 2. A company wants to build a

10. huge new wildlife part outside She plays (the Huddersgate, but local people saxophone) beautifully. regard ..... ridiculous.

3. I tried to interest .....

Other verbs like this include answer, ask, cook, dance,	washing my car, without success.
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drink, eat, fail, phone, read, 4. He based ..... Government sing, wash, win, write. statistics.

5. I lent ..... my next door C After some verbs we typically neighbour.

or always add a completion - a phrase which completes the Now complete these sentences meaning of the verb - which can with an appropriate preposition + be an adverb or prepositional one of these phrases. phrase. Compare:

He paused for a few moments. or He paused. (no completion needed)	a vaccine to prevent the disease being called English London and Sydney my mother
--	--

The disease originated in public recognition  
Britain. (not The disease

originated.) (completion 6. The location of the film needed) alternates .....

7. Their years of research have Some verbs which are typically or culminated ..... always followed by a completion 8. Although he aspired ..... he are intransitive in their most remained relatively unknown. common meanings: 9. She objects ..... as she I'm sure that blue car was actually born in Scotland. belongs to Matthew. 10. I had to care ..... when We had to contend with she became seriously ill. hundreds of complaints.

(not We had to contend.)

Here are some more examples together with prepositions that commonly begin the completion: alternate between, aspire to, care for, culminate in, object to.

36.3 These idiomatic phrases contain transitive verbs. However, the objects can be left out because the expressions are normally used in contexts in which it is clear what is meant. In what context are they used? What objects are missing? (B)

Other verbs which are typically or 1. You wash and I'll dry. always followed by a completion 2. Are you ready to order? are transitive in their most 3. Do you drink?

common meanings: 4. Who scored?

5. It's your turn to deal.

I always associate red 6. I'll weed and you can wine with France. (not I want. always associate red wine).

She put the report on the floor. (not She put the report.) Here are some more examples together with prepositions that commonly begin the completion:

base..on, compare...with,  
interest...in, lend...to,  
misstate...for, prevent...from,  
regard...as, remind...of,  
supply...with.

27. The exercises depict originality, as it has originated from the author. It is nobody's case that the author has copied these exercises from other source. It also satisfies the test of skill, judgment and labour as laid down in Eastern Book Company and Ors. (supra).

28. We may also draw sustenance from the judgment of the House of Lords in the case of *Ladbroke (Football), Ltd. Vs. William Hill (Football), Ltd.* [1964] 1 All ER 465. That was a case where the respondents were well-known bookmakers who had done business for many years in fixed odds football betting sending out to their clients each week during the football season a fixed odds football coupon. The coupon was a sheet of paper on which were printed sixteen lists of matches to be played each week; each list was headed with an appropriate name and offered a variety of wagers at stated odds and contained explanatory notes. One of the lists contained the full list of matches to be played at the end of the week this list being determined by the Football League who owned the copyright in it. The other lists were shorter lists of matches selected by the respondents from the full list. Altogether the coupon offered 148 varieties of wager at widely differing odds. A great deal of skill, judgment, experience and work had gone into devising the coupon for the respondents had to select from the very great variety of possible wagers those that would appeal to the punter while being profitable to the respondents, and had then to arrange and describe the selected wagers in an attractive way on the coupon. The respondents had not altered their coupon since 1951, though the selection of matches in the lists was necessarily changed each week. Some of the wagers offered by the respondents were commonly offered by other bookmakers. The appellants, who were also well-known bookmakers, decided to enter the field of fixed odds football betting in 1959, and in devising their coupon for the 1960/1961 season they copied from the respondents' coupon fifteen out of the sixteen lists arranging them in the same order as they appeared in the respondents' coupon, in many cases with the same headings and almost identical varieties of wager, and with similar explanatory notes. They did not copy the odds offered by the respondents but worked these out for themselves and since the respondents' and the appellants' coupons were published simultaneously each week there was no copying of matches selected by the respondents. The respondents claimed copyright in their coupon and alleged infringement by the appellants. By the Copyright Act, 1956, Section 2(1) copyright subsisted in every "original literary work, a literary work including, by virtue of Section 48(1), compilation. Under Section 2(5)(a) and Section 49(1), copyright gave the exclusive right to reproduce a substantial part of the work in any form. Though the appellants admitted copyright in the respondents' selection of matches and statement of odds (neither of which they had copied) they denied copyright in the rest of coupons. It was not disputed that, as regards a compilation (such as the coupons), the originality requisite to render a work original of the purpose of Section 2(1) was a matter of degree depending on the amount of skill, judgment or labour that had been involved in making the compilations. It was held that for the purpose of determining whether the respondents' coupon had the originality requisite to render it original work within Section 2(1) of the Copyright Act, 1956, it was right to take into account the considerable skill, judgment and labour expended by the respondents in the selection of types of wagers, for the production of the coupons was an object of the work so done and that work was preparatory work which could not properly be excluded. Moreover (per Lord Evershed) after the work of deciding the wagers had been done, there still remained the further task, requiring considerable skill, labour and judgment, of expressing and presenting the chosen wagers for the eye of the customer. Accordingly, there was copyright in the respondents' coupon.

29. Giving the quotation of Peterson, J. in *University of London Press Ltd.* (supra), which is already extracted above, the Court held that it was an original work worthy of copyright protection. Lord Reid, in his opinion, remarked as under:

On the present case, if it is permissible to take into account all the skill, judgment and labour expended in producing the respondents' coupon, there can be no doubt that it is original. But the appellants say that the coupon must be regarded as having been produced in two stages: first, the respondents had to decide what kind of business they would do - what kinds of bets they would offer to their clients - and then they had to write these out on paper. The appellants say that it is only the skill, judgment and labour involved in the latter stage that can be considered and that that part of their operation involved so little skill, judgment or labour that it cannot qualify as original. In fact the respondents did not proceed in that way. Their business was to devise a coupon which would appeal to the betting public, and its form and arrangement were not something dictated by previous decisions about the nature of the bets to be offered. The appellants likened the coupon to a trader's catalogue of his wares, and argued that in considering whether a catalogue is entitled to copyright one must disregard the trader's skill and work in deciding what wares he will stock for sale and only consider the skill and labour involved in the actual preparation of the catalogue. I do not think that that is a true analogy. Even in the case of a catalogue there may be a question whether the work in deciding what to sell and the work in deciding how to sell it are not so inter-connected as to be inseparable. Copyright in a catalogue in no way prevents honest competition - any other trader can decide to stock and sell any or all of the catalogued articles, and he can thereafter make a new catalogue of his own wares. What he must not do is simply to copy the other traders' catalogue.

30. On the application of legal principles on the facts of this case, inescapable conclusion would be that there is a copyright of the appellant in the exercises contained in the book.

31. Before we proceed towards this question, it would be pertinent to discuss an ancillary issue thereto. The issue involves interplay between the concepts of public domain and fair use.

32. The learned Single judge in his judgment has taken the view that one of the reasons why the ad-verbatim reproduction of the plaintiff's work in the guides published by the respondents was falling within the ambit of fair use was that the appellant's work was in public domain as it is a prescribed text book by the University. The appellant has contended before us that the term public domain and fair use are distinct from each other and once a work comes within the ambit of public domain then there is no question of involvement of the fair use doctrine because the term public domain means there is no copyright protection is available at all to the concerned work.

33. From jurisprudential point of view, intellectual property rights work as a two way sword. On the one hand, there is a growing awareness that such protection is a sine-qua-non of the motivational factor underlying the creation of an intellectual work; however, on the other hand, granting an absolute protection to the intellectual work can be detrimental to the further progress of humanity. In order to balance the rights of the author on the one hand and the society on the other hand certain limitations have been made a part and parcel of the IPR statutes around the globe. In the realm of copyright laws, one of the more important limitations is the doctrine of fair use. This



doctrine of Fair dealing/Fair use is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work and it allows limited use of copyrighted material without acquiring permission from the rights holders.

34. Black' Law Dictionary 7th ed. defines "Fair Use" as "A reasonable and limited use of a copyrighted work without the author's permission, such as quoting from a book in a book review or using parts of it in a parody. Thus use of a work, without any prior permission of the author of that work, does not amount to infringement of copyright if the said use can be encapsulated within the ambit of the doctrine of Fair Use. There are four non-exclusive factors that determine whether any particular use counts as fair use or an infringement. These four factors are:

- (i) The purpose and character of the copyright use, including whether such use is of a commercial nature or is largely for nonprofit educational purposes;
- (ii) The nature of the copyrighted work itself;
- (iii) The substantiality of the portion used in relation to the copyrighted work as a whole; and
- (iv) The effect of the use upon the potential market value of the copyrighted work. A court examines these factors in judging the assertion of infringement by the copyright owner on the one hand and the assertion of fair use by the alleged infringer on the other.

35. The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 52 of the Copyright Act, 1957 as under:

Section 52:

- (1) The following acts shall not constitute an infringement of copyright namely -
  - (a) A fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of -

.  
. .  
. .  
. .  
. .

(h) The reproduction of a literary, dramatic, musical or artistic work-

(i) By a teacher or a pupil in the course of instruction, or

(ii) As part of the questions to be answered in an examination, or

(iii) In answers to such questions .

.

.

36. The appellant has contended before us, and rightly so, that these two concepts, as discussed above, are distinct from each other. There can be no dispute that the doctrine of fair use is an exception to the copyright protection as the opening line of section 52 uses the expression "The following acts shall not constitute an infringement of copyright namely - (a) A fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of . This expression implies the without the fair use protection the use shall constitute an infringement of copyright. However, on the other hand, when we say that the work is in public domain it means that no copyright protection is available to the concerned work and everyone is free to use that work in whatsoever manner he wishes to.

37. It is, thus, clear that when a work is in public domain, the natural consequence is that it does not enjoy copy right and question of violation thereof would not arise at all inasmuch as anybody and everybody has right to use and/or copy the same. On the other hand, when we talk of "fair use", it would in the context that there is someone enjoys copyright in that work, but the user thereof comes within the domain of eventualities provide under Section 52 of the Copyright Act. Thus, all the cases of fair dealing are infringements, but the law examines the same based on the principles of "modicum of creativity", access and affordability based on social, economic, educational, industrial, etc. considerations of society.

38. What follows from the above is that the two concepts, viz., 'public domain' and 'fair use' work in altogether different fields. When the defence is taken that a particular work is in public domain, the question for consideration would arise as to whether the appellants enjoys copyright therein or not. On the other hands, when plea of fair use under Section 52 of the Copyright Act is adopted by the respondents what is expected from the Court on the application of the provisions of Section 52 of the Act is not to examine whether the activity is infringement is not, but to examine whether the conditions stated in a particular clause of Section 52 of the Act invoked by the respondents is satisfied or not.

39. However, since the respondent herein has taken umbrage under both, viz., public domain and fair use, we would proceed to discuss both of them independently each other albeit on the premise that these are the pleas taken in the affirmative. PUBLIC DOMAIN:

40. If the work of the appellant falls within the public domain, then it would not have any copyright therein and no further discussion is needed thereafter. For this reason, we deal with this aspect before addressing fair use plea taken by the respondents.

41. We have already held, while deciding the issue No.1, that there is an element of creativity in the work of the appellant involving skill, judgment, endeavour and it is an original work warranting copyright protection. Notwithstanding, the argument of the public domain is founded on the premise that all the materials prescribed by the university in their syllabus are by their very nature the property of public at large i.e., it lies in the public domain, and nobody has the right to appropriate such matter for one's own exclusivity. Therefore, in the strict sense, the copyright work of the appellant has come into public domain. Since no copyright, if at all, remained with the appellant, the question of infringements does not arise. The learned counsel for the respondent has submitted that suit and the present appeal both instituted by the appellant, have been instituted based on an ordinary/general understanding of cases, which have been successfully instituted in the past for infringement of copyright. However, the appellants while instituting both the proceedings have forgotten or intentionally ignored the fact that the present case is a special case and therefore, involves a scrutiny of special facts and circumstances and hence, the general rules applicable to infringement of copyright cases cannot be applied to the instant case.

42. It would be pertinent here to have a close look into this concept as used in the copyright jurisprudence, before we proceed to appreciate and discuss the contention of the respondents' counsel.

43. Firstly, let's deal with the term 'public domain'. Legally speaking, the term "public domain" refers to creative materials that are not protected by intellectual property laws such as copyright, trademark or patent laws. Black's Law Dictionary 7th ed. defines "public domain" as 'realm of publications, inventions, and processes that are not protected by copyright or patent. Things in the public realm can be appropriated by anyone without liability for infringement'. On the jurisprudential side, although, the issue as to what is the nature of 'Public Domain' is somehow gray. There have been intellectual debates as to whether the public domain is simply whatever is left over after various tests of legal protection have been applied. Is it the mere "background," the "negative" of whatever may be protected? Or is there something about the public domain, some compelling public policy or legal principle, that gives it a life of its own, that would tend to attribute positive aspects to it that would make it something of the form instead of just the background? Whatever it may, here, for our purpose, it would be legally safe to rely on the negative definition. There are three common ways under which a work can be attributed as a work in 'public domain':

(i) No copyright protection available: copyright law does not protect this type of work. Section 13 of the Indian Copyright Act provides for the works in which copyright subsists. Section 14 further provides that 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 any other law for the time being in force. When a work falls within the ambit of section 13 no further action is mandatorily needed to make it copyright protected.

(ii) Dedication: the owner of a work may deliberately place it in the public domain. Section 21 of the Indian Copyright Act provides that an author may relinquish his copyright by giving a notice to this effect to the registrar of copyright if he wishes so.

(iii) Expiration of copyright: the copyright has expired.

Section 22 of the Indian Copyright Act provides that the copyright in a work shall subsist within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.

44. Wikipedia, the free encyclopedia, describes the term "public domain" in the following manner:

"The public domain is a range of abstract materials - commonly referred to as intellectual property - which are not owned or controlled by anyone. The term indicates that these materials are therefore, "public property", and available for anyone to sue for any purpose. The public domain can be defined in contrast to several forms of intellectual property; the public domain in contrast to copyrighted works is different from the public domain in contrast to trademarks or patented works. Furthermore, the laws of various countries define the scope of the public domain differently, making it necessary to specify which jurisdiction's public domain is being discussed.

The public domain is most often discussed in contrast to works whose use is restricted by copyright. Under modern law, most original works of art, literature, music, etc. are covered by copyright from the time of their creation for a limited period of time (which varies by country). When the copyright expires, the work enters the public domain. It is estimated that currently, of all the books found in the world's libraries, only about 15% are in the public domain, even though only 10% of all books are still in print; the remaining 75% are books which remain unavailable because they are still under copyright protection.

The public domain can also be defined in contrast to trademarks. Names, logos, and other identifying marks used in commerce can be restricted as proprietary trademarks for a single business to sue. Trademarks can be maintained indefinitely, but they can also lapse through disuse, negligence, or widespread misuse, and enter the public domain. It is possible, however, for a lapsed trademark to become proprietary again, leaving the public domain.

The public domain also contrasts with patents. New inventions can be registered and granted patents restricting others from using the inventions without permission from the inventor. Like copyrights, patents last for a limited period of time, after which the invention covered by them enter the public domain and can be sued by anyone. It is clear from the above that in the context of copyright, the term indicates that the materials which are in public domain are "public property" and available for anyone

to use for any purpose.

45. The question would be as to when the creation of a work by an individual becomes ☐public property ? Normally, whenever a work is created by an author, he gets copyright therein automatically by virtue of Section 13 of the Act and certain rights are granted to such a copyright owner as stipulated in Section 14 of the Act. It is for this reason that in the aforesaid narration provided by Wikipedia, it is explained that public domain is discussed in contrast to works whose use is accepted by the copyright. That would imply that once the work is protected by copyright law, it cannot be treated in public domain. Again, it is for this reason that in Wikipedia, example of public domain is given in a case where copyright expires by virtue of limited period, protection given under copyright law. Then it enters ☐public domain . Because of this reason, we have opined above that in order to ascertain whether a work is in public domain or not, we have to rely on the negative definition. Three examples are given by us above when a particular work would not enjoy copyright protection and would, therefore, be attributed as a work in ☐public domain . It is this yardstick, which has to be applied in the present case.

46. Section 13 of the Indian Copyright Act provides for the works in which copyright subsists. We again repeat that while deciding the Issue No.1, we have arrived at a finding that in the given work, the protection under Section 13 of the Act subsists. Section 14 of the Act, thus, confers a right upon the appellant by putting a restraint on word at large not to copy this work, otherwise then under and in accordance with the provisions of Copyright Act or any law for the time being in force. The term of this copyright has also not expired under Section 22 of the Act.

47. The only question, therefore, would be as to whether the prescription of this book by Guru Nanak Dev University would mean that the owner, i.e., the appellant has relinquished its copyright by dedicating the same in public domain. Section 21 of the Act provides for procedure which needs to be adopted for such a dedication. It reads as under:

☐21.Right of author to relinquish copyright:- (1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1).

48. The owner of the copyright can, thus, relinquish his rights by giving notice in the prescribed form to the Registrar of Copyrights. Now, such notice given by the appellant manifests its intention to relinquish its copyright. It would naturally follow that merely because the book in question

prescribed by the University for its students would not mean that the author is snatched of its copyright.

49. It would be useful to refer to the judgment of the United States Court of Appeals in the case of *Lawrence Golan & Ors. Vs. Alberto R. Gonzales & Ors.* 501 F.3d 1179 (2007) wherein copyright sequences from the stage when the work is created by an author giving him copyright to the stage when it reaches public domain:

□Copyright Sequence Although the specific requirements for perfecting a copyright have changed over the years, the process has always begun when an author generates an original expression. The 1909 Copyright Act required an author seeking protection to attach notice to any distributed copies of his or her work. Moreover, the author could not initiate an infringement action or apply for a renewal unless he or she had formally registered the work with the copyright office. The 1986 Act removed many of the consequences for failure to register or attach notice, and, in 1989, the United States effectively abandoned all formalities as a condition of compliance with the Berne Convention. Thus, today, [HN 10] a limited copyright attaches at the moment a work is created. When the copyright expires at the end of the statutory period, the work becomes part of the public domain. Until Section 514, every statutory scheme preserved the same sequence. A work progressed from 1) creation; 2) to copyright; 3) to the public domain. Under Section 514, the copyright sequence no longer necessarily ends with the public domain; indeed, it may begin there. Thus, by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence.

3. An author must still include notice in order to defend against □innocent infringer[s]. *GORMAN*, supra, ii. Public Domain [HN 11] The significance of the copyright sequence, combined with the principle that no individual may copyright a work in the public domain, is that ordinarily works in the public domain stay there. See *Country Kids „N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1287 (10 th Cir.

1996) (holding that a dress design could not be copyrighted because it was characterized by □typical paper doll features found in the public domain ); *Lipton v. Nature Co.*, 71 F. 3d 464, 470 (2d Cir. 1995) (□Facts are considered to be in the public domain and therefore not protectable under copyright law... ); *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir. 1995) (holding that certain flowers could not be copyrighted □because these same flowers already existed in the public domain ); *United States v. Hamilton*, 583, F.2d 448, 450 (9th Cir. 1987) (noting that □a map which represents a new combination of information already in the public domain lacks any element worthy of copyright protection ); *M.M. Bus Forms Corp. v. Uarco, Inc.*, 472 F.2d 1137, 1140 (6th Cir. 1973) (Elementary legal words and phrases are in the public domain and no citizen may gain monopoly thereover to the exclusion of their use by other citizens. ); *Amsterdam v. Triangle Publ ns, Inc.*, 189 F.2d 104, 106, (3d Cir. 1951) (□The location of county lines, township lines and municipal lines is information within the public domain, and is not copyrightable. ); *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9 th Cir. 1945) (□The outline map of the United States with state

boundaries is in the public domain and is not copyrightable. ) (internal quotation marks omitted); *Meade v. United States*, 27 Fed. Cl. 367, 372 (1992) (holding that [defendant's] LOVE stamp could not be copyrighted because it :exist[ed] in the public domain ); see also *Toro Co. v. R&R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1990) (If the disputed work is similar to a pre-existing protected work or one in the public domain, the second work must contain some variation recognizable as that of the second author. ) In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 52 (2d Cir. 1936), aff'd, 309 U.S. 390, 392, 60 S. Ct. 681, 84 L. Ed. 825 (1940), Judge Learned Hand, luminary in the field of copyright law, illustrated this principle when he stated that If by some magic a man who had never known it were to compose a new Keats's Ode on a Grecian Urn, he would be an 'author', and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats. *Sheldon*, 81 F.2d at 54. As Judge Hand observed, Keats's poems remained in the public domain - free for anyone to copy - even if someone copyrighted the identical language. Section 514 contravenes this principle.

50. In *Rupendra Kashyap Vs. Jiwan Publishing House* 1996 (38) DRJ 81, a learned Single Judge of this Court, after relying upon various judgments held that a question paper set for the purpose of conducting examination of CBSE can form subject matter of copyright. It was also held that as per Section 17 of the Act, first owner of the copyright would be the author of the said work, viz., papers setters and merely because the paper was set for the CBSE, the CBSE does not become the owner thereof. Similar view was expressed by Allahabad High Court in the case of *Agarwala Publishing House Vs. Board of Higher Secondary & Intermediate Education & Ors.* AIR 1967 All 91 holding that copyright of question papers vests in paper setters unless same has been assigned to Board or Government. To similar effect is the judgment of Patna High Court in the case of *Jagdish Prasad Gupta Vs. Parmeshwar Prasad Singh and Ors.* AIR 1966 Pat 33. In that case, the Patna High Court stated the same principles noted in the aforesaid judgments and explaining the manner in which such a copyright in favour of the author can be relinquished under Section 21 of the Act. This is what the Court observed in the said context:

[9]. Section 21(1) of the Copyright Act, 1957, provides that the author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the provisions of Sub-section (3), cease to exist from the date of the notice. Subsection (2) lays down that on receipt of a notice under Sub-section (1), the Registrar of Copyrights shall cause it to be published in the official Gazette and in such other manner as he may deem fit. It was thus open to the author of a work, and in these cases the paper-setters of the question papers, to relinquish their copyrights in favour of the Board and the attention of the learned Magistrate has not been drawn to this provision. Section 18 of the Copyright Act, 1957, no doubt deals with an assignment of the copyright and the assignment has to be in the manner provided in Section 19, but apart from assignment there could be relinquishment as provided in Section 21. The question as to whether there was relinquishment by the author has to be gone into and it can be preferably enquired into at the time of trial.

51. Two things follow from the aforesaid discussions, viz.,

(i) The appellant has a copyright in a work in question also for the reason that the copyright exists even in the question paper set for the examiner, i.e., the Board or the Government.

(ii) Once a work is prescribed from the creation to conferring of copyright in the said author, the period for which such copyright is protected is provided in the statutes and it goes in the public domain only after said period expires. In the context of Indian Copyright Act as per the provisions of Section 22, copyright remains for a period of 60 years after the death of the author.]

52. Admittedly, second eventuality has not arisen so far and therefore, copyright has not entered the 'public domain'.

53. When this is the position in law merely because permission is given by the appellant to the University, tacit or otherwise, would not take his work in public domain. First of all, no act on the part of the appellant is placed or proved or record which would show that the appellant has relinquished its rights. Secondly, the appellant, if at all has allowed University to use the work as a course book for students of B.A. (English). That may not amount to relinquishing his copyright in the said work. It may be relevant for the purposes of 'fair use' and whether this fair use defence is available to the respondents herein or not would be seen at the appropriate stage. Certainly, it cannot be said that because of that reason, the work has entered in public domain.

54. In fact, the learned counsel for the respondents bolstered his submissions of public domain based on the judgment of Allahabad High Court in the case of Mohamed Abdul Jalil Vs. Ram Dayal [AIR 1916 All 216]. The following discussion by the High Court was made use of by the learned counsel for the respondent:

□We think that when the plaintiff as a member of the Board of Studies, laid the results of his skill and experience before the Board, and then joined with the other members of the Board in preparing the syllabus for the examinations to be conducted in the Persian language in the year 1914, he placed the results of his labours unreservedly at the disposal of the university authorities. He may have desired that those Authorities should either remunerate him for his labours or take suitable measures to protect the copyright in the selections themselves. But when the University authorities published their syllabus they surrendered any copy right which may or may not have existed owing to the skill, learning, experience and labour expended on the preparation of these lists of passages from standard authors, unreservedly into the hands of the general public. The avowed intention of the university Authorities was that any enterprising firm of publishers which considered it a remunerative speculation should bring out the passages in question in book form. They were of opinion, that the interest of the public, and of the general body of the student, would best be served by allowing free competition in this matter. We think these facts need only be set forth in order to make it clear that the plaintiff retains no copyright in the selections as such.



55. The aforesaid dicta were followed by Jammu & Kashmir High Court in the case of Romesh Chowdhry & Ors. Vs. Ali Mahomed Nowsheri & Ors. AIR 1965 Jammu and Kashmir 101, which reads as under:

¶7. Apart from this, it seems to us that once the original authors of the books allowed these books to be published by the university in their syllabus and the university in its turn published these books as part of the syllabus prescribed for the students, the matter went into the hands of the public and no copyright in the strict sense of the term remained with the complainant. It was open to any member of the public to publish a review, or a criticism or a guide to these books which having been published by the university, became more or less public property. I am fortified in my view by a decision of the Allahabad High Court reported in AIR 1916 All 216, Mahomed Abdul Jalil v. Ram Dayal.....

56. No doubt, when a book becomes the part of the syllabus prescribed for the students, it becomes the subject matter of review or criticism. That may be a case even if a particular book is not prescribed by the University for its students as there can be critique, analysis, review or criticism of any published work. Whether a guide to the said book can be published or not and if such guide is to be published, what are the parameters to be followed shall be discussed by us separately. However, what we want to point out that by itself does not bring the work in public domain when we understand the concept of public domain appropriately in the manner discussed by us above. Therefore, these would be of no relevance insofar as defence of public domain is concerned and we are of the view that the appellant's copyright work in question was neither relinquished nor, in law, it entered the public domain.

#### FIAR USE DEFENCE:

57. The learned Single Judge accepted this defence of 'fair use' in the following words:

¶5. Section 52 (1) (h) also provides that reproduction of even literary work as part of questions to be answered in an examination or in answers to such question shall not constitute infringement of copyright.

16. In my view, once the book of the plaintiffs was prescribed by the university, the questions and answers given in the exercises and key therein, became questions to be answered in an examination and fall in Section 52(1)(h) aforesaid. They thus, fell in public domain.

58. Thus, the learned Single Judge is of the view that since the book of the appellant prescribed by the University, the matter would fall in Section 52(1)(h) of the Act as questions and answers given in the exercise and key in the book became questions and answers in the examination.

59. Mr. A.S. Chandhok, learned Senior counsel and Mr. Kirpal, Advocate for the appellant questioned the aforesaid conclusion by laying stress on the fact that the so-called use was not by any

teacher or pupil in the course of instruction or by students as part of questions to be answered in an examination or by students in answers to the questions put to them in the examination and therefore, Section 52 (i) (h) has no application. They were emphatic in their submission that in the instant case, the work was copied by the respondent purely as a commercial exploitation in mind for the purpose of its business, which act was neither protected under Section 52(1)(h). It was a simplicitor business venture, which could not be denied by the respondent as the guides were published with view to sell them and to earn profits. This commercial exploitation took the matter out of the ambit of 'Fair use' contemplated in Section 52 (1) (h) of the Act.

60. Referring to the judgment of Federal Court of Australia -

General Division in the case of *De Garis and Another v. Neville Jeffress Pidler Pty Ltd.* 18 ITR 292, he submitted that fair dealing principle would not apply as the material from the appellant's book was used by the respondent not for the purpose of research or study and rather it was a beaten copy for commercial purpose.

61. We find force in the aforesaid submissions of the appellant and hold that Section 52 (i) (h) of the Act would not apply.

62. Section 52(1)(h), which make following reading:

Section 52. Certain acts not to be infringement of copyright. - (1)

(h) the reproduction of a literary, dramatic, musical or artistic work -

(i) by a teacher or a pupil in the course of instruction; or

(ii) as part of the questions to be answered in an examination; or

(iii) in answers, to such questions;

63. It is clear from the reading of the aforesaid provision that this would not come to the aid of the respondents who have published the guide for commercial exploitation. In view of the law laid down in various cases, commercial exploitation will take the matter outside the ambit of 'Fair use'. The defence of 'Fair use' as provided under Section 52(1)(h) of the Act is only available to the teacher and pupil to reproduce the literary work in the course of instructions or examination paper setter to reproduce the literary work as part of the questions or to the pupil to reproduce the literary work as answers to such questions. The respondents are neither teachers nor students nor a person giving or receiving instruction. The defence of 'Fair use' under Section 52(1)(h) of the Act only provided to a teacher and pupil and not otherwise. If this defence is allowed to a publisher, then it would result in a situation where every publisher, without permission from the owner of copyright, would reproduce the ad verbatim literary text from the educational textbooks prescribed by the University into their books and exploit the same for commercial gains and benefits and that too without giving any royalty or payment to the right owners towards such reproduction. This practice would

obviously discourage creativity of authors who put their skill, labour, years of knowledge, expertise, etc. into these educational books and encourage infringers like the respondents to reproduce ad verbatim literary text from original publications into their infringing books on the pretext of 'fair use'. Obviously, therefore, Section 52(1)(h) of the Act has no application to the facts of this case.

64. So far so good. It brings us to the other facet which arises in the context of 'Guides' published by the respondents.

65. Coming to that, we would like to point out that in the penultimate para, i.e., para 17 of the learned Single Judge has also remarked that the respondents have also compiled their books with sufficient labour and it cannot be said that they have merely copied the books of the appellant and are thus, granting the same to the detriment of the appellant. This is what is precisely stated in Para 17, which reads as under:

¶7. I also find that the books of the defendants won't be a substitute for the book of the plaintiff, for a serious student as is the intent of infringers. The defendants have also compiled their books with sufficient labour. It cannot be said that the defendants, without any effort or input of skill merely copied the books of the plaintiff and marketing the same to the detriment of the plaintiff. ¶

66. The aforesaid observations have emboldened the respondents to argue that their work qualified as the original copyright and does not infringe the work of the appellant. Dilating on this submission, it was argued by the learned counsel for the respondents that the use of questions and answers by the respondents is for a different purpose. The appellant admits that the work of the respondents consists of 1875 pages within which they are concerned with 185 pages. The appellant's contention that the 'price, purpose, standards of quality, etc.' are not the criteria to determine infringement of copyright is false and incorrect and such statements have been made in total ignorance of settled law on the subject. Though to a purist or one who delights in intellectual pursuits, such works may be distasteful, even offensive, there is no gainsaying that they neither pretend to be textbooks, nor reproduce all that are contained in them. They are designed to cater to a category of students 'weak' in their understanding of the subject. To appreciate this argument, we would like to elaborate and focus attention on the nature of Guide Books, in the first instance.

ISSUE No. 3 - GUIDE BOOKS:

67. 'Guide' as defined in Oxford English Dictionary is 'a manual or book of instruction on a specified subject'. Webster Dictionary defines a guidebook as 'something that offers basic information or instruction'. A true nature of guide book is to help, assist, support the students to understand any problem given in a prescribed publication. A guide book provides explanation, step by step process for reaching the answer, fine points, detailed analysis of any problem, etc. The guide book is a kind of commentary based on the original work to enable students to give effective answers to questions set in examinations. Such a guide book would be the original creation even if it were regarded as part abridgment and part commentary upon the original work. In E.M. Forster & Ors. Vs. Parasuram [AIR 1964 331], it has been laid down that the guide book was a kind of commentary based upon the original work to enable students to give effective answers to questions set in

examinations. In *Kelly Vs. Morris* [1866 LR 1 Eg. 697], which is also referred to with approval by the Supreme Court in *Eastern Book Company (supra)*, it was laid down that the compiler of a directory or guidebook, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous work on the same subject. In *V. Ramaiah Vs. K. Lakshmanaiah* [1989 PTC 137], the defendant published *Sri Vidya Excellent Guide: for the BA, B.Com. and B.Sc. students with respect to Telugu textbooks* *Girija Kalyanam*. The learned Single Judge of the Andhra Pradesh High Court held as follows:

4. The question, therefore, is whether the act of the respondent in writing the guide is an infringement of the copyright of *Girija Kalyanam*.....

6. In this case the Court below considered in extenso the question at issue. I have gone through the guide consisting of three portions. The first portion gives meaning to difficult words in the book written by the author Ramakrishnaiah; the second portion consists of annotations, illustrations of the meanings and the circumstances under which the theme has been used.

The third part consists of four probable questions and answers that may be likely to be prescribed by the examiner from the topic *Girija Kalyanam*. Merely because the author of the guide, viz., the respondent used the language couched in the text-book his conduct does not necessarily mean that he pirated the words. It is only a guide and was written to help the students to understand the meaning, significance and answers that have to be written for the questions therein or the answers to be given to the words used by the author.....

7. .... I do not find any justification to hold that the respondent-defendant pirated the language used or the subject used ad nauseam so as to come within the meaning *Infringement* .....

68. In *Nag Book House Vs. State of West Bengal & Ors.* [AIR 1982 Cal. 245, the West Bengal Board of Secondary Education issued guidelines for authors of textbooks on Mathematics containing instructions regarding syllabus for Class 6 and 7 students. Textbooks were prepared as per the syllabus. The question was as to whether the Board could stop other private publishers' textbooks from being printed for other syllabus and it was held that the Board cannot claim any such monopoly on the syllabus or guidelines.

69. In *West Publishing Co. Vs. Mead Data Central* [1986 US App. Lexis 29211], the United States Court of Appeals for the 8th Circle has held that an author's rights in a copyrighted work protect, the author not only against infringing works less expensive than the original, but against more expensive infringement as well.

70. Textbooks/guidebooks, by their very nature, are *derivative works* and the standard to protect derivative works has been laid down authoritatively by the Supreme Court in *Eastern Book Company (supra)*. The Apex Court in Paras 37, 38 & 39 has laid down the test of originality in a derivative work is higher than the *Sweat of the brow* principle in the following words:

¶37. In *Kelly v. Morris*, (1866) LR 1 Eq. 697, School of thought propounded is that, at least in respect of compilations, only time and expenses are necessary which is industrious collection.

The plaintiff was the owner and publisher of the first directory. The defendant came out with another directory. The plaintiff sought an injunction against the defendant to restrain the publication of the defendant's directory on the allegations that the defendant was guilty of appropriating the information contained in the plaintiff's directory and obtained the benefit of many years of incessant labour and expense. The defendant, on the other hand, contended that there had been no unfair or improper use of the plaintiff's work. Information which was given in the plaintiff's directory was entitled to be used and adopted as long as he did not servilely copy it. The defendant had bestowed his independent time, labour and expense on the matter and thus had in no way infringed the copyright of the plaintiff. Granting injunction, the Court held that in the case of a directory when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly discovered island he must go through the whole process of triangulation just as if he had never seen any former map, and, generally he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. The compiler of a directory or guidebook, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and re-publishing the information contained in previous works on the same subject.

38. In the case of *Parry v. Moring and Gollancz*, Cop Cas (1901-1904) 49, the plaintiff, after obtaining permission from the representatives of the owner of certain letters, updated, chronologically arranged and translated them into modern English for their inclusion in his book. Later, the defendant published, as one of the series, an edition of the letters prepared by the plaintiff. The plaintiff, therefore, brought an action against the defendant alleging infringement of his copyright. The plaintiff maintained his copyright in his version of the text apart from the copyright in the text. It was held that there is copyright in the work of editing the text of a non-

copyright work. The editor of a non-copyright work is not entitled to take the text from the edition of a rival editor and use it as a copy for the purpose of his own work.

39. In *Gopal Das v. Jagannath Prasad and Another*, AIR 1938 All. 266, the plaintiffs were the printers and publishers of the books. The book titled *Sachitra Bara Kok Shastra* was printed for the

first time in 1928 and had run into four editions since. The defendants printed and published another book titled Asli Sachitra Kok Shastra in 1930. The plaintiffs case was that the book published by the defendants was a colorable imitation of their book and an infringement of plaintiffs copyright. It was held by the Court that the plaintiffs compiled their book with considerable labour from various sources and digested and arranged the matter taken by them from other authors. The defendant instead of taking the pains of searching into all the common sources and obtaining his subject matter from them, obtained the subject matter from the plaintiffs book and availed himself of the labour of the plaintiffs and adopted their arrangement and subject matter and, thus, such a use of plaintiffs book could not be regarded as legitimate. It was held that a person whose work is protected by copyright, if he has collected the material with considerable labour, compiled from various sources of work in itself not original, but which he has digested and arranged, the defendant could not be permitted to compile his work of like description, instead of taking the pains of searching into all the common sources and obtaining the subject-matter from them and to adopt his arrangement with a slight degree of colourable variation thereby saving pains and labour which the plaintiff has employed. The act of the defendant would be illegitimate use. The Court held that no one is entitled to avail himself of the previous labour of another for the purpose of conveying to the public the same information, although he may append additional information to that already published.

71. Here in this context, we have to examine whether publication of such a guidebook amounts to 'fair use'. Internationally, the concept of fair use in derivative works has been considered in a large number of cases including the Google case, Perfect 10, Inc. Vs. Amazon.com Inc. [508 F.3d 1146]. The use by Google of various keywords and thumbnails were held to be non-infringing and the US Court of Appeal of the 9th Circuit held as follows:-

..... A work is 'transformative' when the new work does not 'merely supersede the objectives of the original creation' but rather 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.....

As noted in Campbell, a 'transformative work' is one that alters the original work 'with new expression, meaning, or message..... We conclude that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial usages of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances. Sony, 464 U.S. at 431-32, 104 S.Ct. 774; id. At 448 n. 31, 104 S. Ct. 774 (Section 107) endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. (quoting H.R. Rep. No.94-1476, p. 65-66 (1976), U.S. Code Cong. & Admin. News 1976, p.5680). We are also mindful of the Supreme Court's direction that 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.....

72. In *Hubbard & Others* (supra), the Court laid down certain yardsticks to measure fair dealing in the following manner:

It is impossible to define what is fair dealing. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair.

Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extract and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright.....

73. We may also usefully refer to the following passage from the judgment of the Supreme Court of United States in the case of *Luther R. Campbell aka Skyywalker, et al. Vs. Acuff-Rose Music, Inc.* 510 US 569 (1994):

The first factor in a fair use enquiry is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. This factor draws on Justice Story's formulation, the nature and objects of the selections made. *Folsom v. Marsh*, supra. The enquiry here may be guided by the examples given in the preamble to section 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see section 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely supersedes the objects of the original creation, *Folsom v. Marsh*; accord, *Harper & Row*, supra (supplanting the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative. Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony*, supra, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e.g., *Sony*, supra, at 478-480 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

74. The breadth of the fair use doctrine use was put to test in *Harper & Row Vs. Nation Enterprises* 471 US 539 (1985) where the Court noted that there are four factors relevant in determining whether the use was fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on

the potential market for or value of the copyrighted work and proceeded to test the facts on each of these grounds.

75. The contours of the fair use standard shifted somewhat with the decision in *Campbell Vs. Accuff-Rose Music* (supra). The Supreme Court unanimously upheld the claim of the defendants in the abovementioned case that their parody to the plaintiff's song "Oh, Pretty Woman" was covered by the fair use exception. It was uncontested that the defendant's song amounted to infringement but for the 'fair use' exception. The Court held that all the traditional four factors employed to reach a conclusion of fair use are to be treated together, no in isolating and no undue preference can be given to anyone of them. In relation to the first factor, it was held that Court must look into the nature of the use, i.e., whether it was for educational purposes or for review or criticism. The central enquiry was to see if the work merely supersedes and supplants the original work or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; in other words, whether and to what extent the new work is 'transformative'. Transformative works, the Court held, have a greater chance of falling within the fair use defence and such 'works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright. If one may put it differently, the question to be addressed would be, is there a value addition, which alters the original work in a significant measure. The second factor which evaluates the nature of the copyrighted work, is intended to find out if the work actually merits copyright, i.e., whether copyright law was intended, at its core, to cover such works. However, the Court cautioned that this factor is not likely 'to help much in separating the fair use sheep from the infringing goats', in cases where the subsequent work is transformative. The third factor, which deals with the extent of copying, the Court explained, citing *Sony Corp. of America* (supra) that it does not entail that the reproduction of the entire work would militate against the finding of fair use. There could be cases where the copying could be substantial and the Courts observe fair use, at the same time there could be cases where the copying through insubstantial could be held as infringement. Lastly, the Court observed that in the fourth factor, the Courts have to 'consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market'.

76. It follows from the above discussion that when a published work is prescribed as text book, a 'guide' can be published provided it fulfils the test of a 'derivative work'. At the same time, this guide book has to be materially different from the textbook. Guide book should not be verbatim reproduction of the text book. If a guide book reproduces the original work to a great measure without its contribution, it may amount to plagiarism and may infringe the copyright law of the person in original work. On the other hand, if guide book written in a different format, albeit, dealing with the subject matter which is contained in the original book, with a purpose to help, assist and support the students, the problems given in the text book, then it would be a work different from the original work. The guiding principle is to see as to whether such guide book provides explanation and/or step by step process for reaching the answer, detailed analysis of any problem with the objective of making the task simpler in understanding the subject provided in the textbook. In writing this guide book, if the contribution of aforesaid nature is made, it may be treated as a work which is somewhat different in nature. This is the crucial test which is to be



applied and has been characterized as the transformative character of the use by the American Courts. Therefore, the task would be to ascertain as to whether the purpose served by the guide book is substantially different from the purpose served by the textbook. If the guide book is different in character and not a mere substitute of the original work/textbook, it would be treated as transformative. However, the character must be substantially different and it is not sufficient that superficial changes are made with basic character of the textbook creeping in the guide book. In that eventuality, it would not qualify as a work of transformative character. If this directive work in the guidebook has assumed different character, it would not amount to infringement of the original work, though it would have been drawn, to certain extent, from the original work. And, in that sense, it would amount to 'fair use' as described in *Amazon. Com. Inc. (supra)*.

77. Interestingly, counsel for both the parties were *ad idem* on the aforesaid narration about the doctrine of fair use and the judgments cited above were referred to by both the parties. Its application on this principle on the facts of the present case where the perception of the two sides differ and we have to ascertain as to who is correct.

78. Keeping in view the aforesaid parameters, we may discuss the work of the respondents in the form of guidebook produced by them. We repeat that while looking into this aspect, we keep in mind that the guide book, by its very nature, is a derivative work and it would qualify for protection if this work meets the test laid down by the Supreme Court in *Eastern Book Company (supra)* as well as in other cases taken note of above. On that basis, it is to be found as to whether the work of the respondents is transformative in nature and add something new, with a further purpose or different character, altering the first work of the appellants.

79. The guidebook of the respondents is not confined to Grammar (which is the sole subject matter of the appellant's book), but also includes English literature, novel, poem, comprehension and letter writing as well. The respondent's guidebook is in three volumes, which is priced at `600 as against the textbook of the appellant with a price tag of `95/-. Though this price is alone is not a determinative factor, what we emphasize is that the aim of producing guidebook is altogether different. It has dealt with various aspects. Further even in respect of the Grammar portion, the respondents have given their own introduction to some of the Units.

80. The respondents have specifically omitted questions which though have been included by the appellant which evidences an effort to select only those portions which were essential as a study material for the students and that may be most likely to be prescribed by the examiner from the prescribed course book *Advanced Grammar in Use by Martin Hewings*.

81. Moreover, taking the two works together and considering them as a whole, there is no infringement of the copyright. The purchasers, whether of the original work or of the guide, are most unlikely to be illiterate, or unacquainted with English. It would be perfectly clear to a student or any customer that they were acquiring for themselves not the original work i.e. *Advanced Grammar in Use by Martin Hewings*, but a guide for students, which is the publication of the respondents. The above can also be conclusively established by the fact that the titles of the two works are completely different. The guide of the respondents is in the form of a review of the original work,

designed to enable the University students to give effective answers to questions that may be set in the University Examination.

82. The pattern of use of the two books is different and while the appellants' book is meant for a student to educate himself and understand the nuances of English Grammar first by reading the text on the left hand page and then practice with exercise on the right hand page, the respondents have given only the exercises along with answers. One the exercises are given in a text book prescribed by the University, the same could not be changed by the respondent. Had the intent of the respondents been to merely copy the book of the appellant, the respondents would have also copied the theoretical portion on the left hand page and the appendices and additional exercises also in the appellant's book. The respondents only wanted to provide to the students one single book of cracking the English paper instead of separate books for text, poetry, essay writing, grammar, etc.

83. Each volume of the respondents' book deals, besides with grammar, also with the texts prescribed for each year, English prose, comprehensions, poem, paragraph writing, plays, essay writing, etc. The said books are structured on the pattern of question paper of English for each year. The books, at the beginning, contain syllabus for each year and also contain translation from English to Hindi and Punjabi. Before reproducing some of the exercises, the respondents have given their own introduction to the units. The respondents have given the same answers, as in the key at the end of appellant's books, at the end of each exercise itself.

84. We are of the opinion that the learned Single Judge has correctly concluded that the pattern of use of the two books is different and while the appellant's book is meant for a student to educate himself and understand the nuances of the English grammar first by reading the text on the left hand page and then practice with exercise on the right hand page, the respondents have given only the exercise along with answers. Once the exercises are given in a text book prescribed by the university, the same could not be changed by the respondent. Had the intent of the respondents been to merely copy the book of the appellant, the respondents would have also copied the theoretical portion on the left hand page and the appendices and additional exercises also in the appellants' book. The respondents only wanted to provide to the student one single book for cracking the English paper instead of separate books for text, poetry, essay writing, grammar, etc. The respondents in the grammar section of such book have to naturally give the same exercise as prescribed by the university and cannot be expected to give a different exercise.

85. Thus, Mr. Dubey is right in his submission that the intention of the respondents in authoring and publishing these notes was to merely provide a guide to the students to understand the books prescribed by the University. Furthermore, there is no attempt on the part of the respondents to represent to the public that any portion of the appellant's book is a work of the respondent. The above submission is further established by the fact that the respondents have only incorporated that portion of the appellants' work, which has been prescribed by the University in their syllabus, and have left out those portions, which constitute what can be termed as purple patches of the original work.

86. Such a use of an original work by a person thereby creating another work of distinctive character would be protected as held in the following cases:

(i) In the case of *V. Ramaiah Vs. K. Lakshmaiah*, 1989 PTC 137 (AP), it was observed that the mere use of language couched in the text book does not necessarily lead to piracy/infringement of the work particularly when the guide was written to help the students to understand the meaning, significance and the answers that have to be written for the questions and there was further an acknowledgement to the authorship of the text book.

(ii) Similarly, in the case of *E.M. Forster & Anr. Vs. A.N. Parasuram* AIR 1954 Mad. 331, the Court observed that the purchasers, whether of the original work or of the guide, were most unlikely to be illiterate or unacquainted with English and it would be perfectly clear to them from the words enclosed in brackets as a sub-title that they were acquiring, not the original work but □guide for University students .

(iii) In *Civil Chandran Vs. Ammini Amma* 1996 (16) PTC 670 in which the Court relying upon the cases of *Hubbard & Others Vs. Vosper* and *RG Anand* (1972) 2QB 84 held that when the alleged infringing work is not a market competitor to the subject work, and the former itself constituted a literary work with some amount of originality, it would constitute fair dealing.

87. Coupled with these aspects, when we keep in mind that the book of the appellant is a prescribed textbook for the University and on the one hand, and respondents wanted to bring out an all-comprehensive guidebook for the help of the students in all the courses of English and not limiting it to Grammar alone, the purpose of this guidebook produced by the respondents would be materially different and it would satisfy the guiding test laid down by the Supreme Court in *Eastern Book Company* (supra).

88. In the ultimate analysis, since Issue No.3 as framed in the Suit is to be decided in favour of the defendants/respondents and against the plaintiff/appellant, the Suit fails. Thus, we are of the view that it was rightly dismissed by the learned Single Judge by affirming the said decree/judgment.

89. This appeal is accordingly dismissed.

90. This appeal is preferred by the appellant/plaintiff against the interim order dated 17.09.2008 passed by the learned Single Judge whereby ex parte injunction granted in favour of the appellant vide orders dated 05.12.2005 has been vacated. As is clear from the Cause Title itself, the appellant is trading as Oxford University Press (hereinafter referred to as 'The Press'), which was established in 15th Century by the University of Oxford and has innumerable publications with worldwide circulation. It is inter alia claimed that the Press has become household name through a diverse publishing programme that includes scholarly works in all academic disciplines, Bibles, music, school and college textbooks, children's books, materials for teaching English as a foreign language, business books, dictionaries, reference books, journals and electronic publishing. It is also claimed

that it has developed substantial reputation and goodwill not only in England, but also in all parts of the world including India where it first set up its establishment in the year 1912 in Bombay (now Mumbai). Led by a team of highly qualified and committed editorial, market research, design and production professions, the Educational Division of Oxford University Press, India offers a wide range of books/resources from Kindergarten through to grade twelve in various disciplines such as English language, Science, Mathematics, Environmental Studies, Social Sciences, General Knowledge, Computer Education, Value Education, Humanities, Economics, Art and Craft. The complete range of books prescribed by various School Education Boards such as CBSE, ICSE and other State Boards is an added feather to the appellant's growing list of titles. The present case concerns one such Mathematics book prescribed by the Jammu and Kashmir State Board of Education for Class XI. It is governed by stringent quality parameters for which the appellant is well-known all over the world. The Press textbooks are published and revised after a thorough survey of the market for current syllabus, trends and curriculum changes in various disciplines as per the guidelines prescribed by the various examination bodies, such as the CBSE, ICSE and various State Boards. This is done to ensure conformation both to the requirements of the various examining bodies and to the changing times. This is achieved, inter alia, by tapping the modifications required in the existing courses and gathering first-hand feedback on the existing courses from teachers, educators and decision makers. The books of the appellant/Press not only incorporate and reflect the latest teaching methodologies on the basis of the inputs of teachers, but also ensure effective classroom application, inasmuch as it takes into account the views of both teachers and need of the students. It may be worth mentioning the Press brings authors and teachers together to share theories and ideas and to give sound advice based on a real understanding of teaching needs and helps create better textbooks by a combined and concerted effort of all.

91. In the present case, we are concerned with two books of the appellant titled □Oxford Mathematics Part A and □Oxford Mathematics Part B (hereinafter referred to as □the subject works'). These textbooks meant for the students of Class XI following the course structure prescribed by the Jammu & Kashmir State Board of School Education.

92. According to the appellant, the subject works have been published by the appellant in and after consultations and discussions with experts and in cooperation with the Jammu & Kashmir State Board of Schools Education and their approval. The appellant and the Jammu & Kashmir State Board of School Education entered into an agreement dated 26.08.2003 for the purpose of publication of the subject works for the students of Jammu & Kashmir State Board of School Education. The copyright of the subject works vests in the appellant. The subject works are specially adapted editions of the CBSE Mathematics XI Part A and Part B authored by Dr. A.K. Roy, of which the copyright vests in the appellant vide agreement dated 10.09.2003. The author of the subject works, Dr. A.K. Roy was the Head of the Department of Mathematics at Birla Higher Secondary School, Kolkata. He is a very well-known and respected figure among mathematicians and mathematics teachers in India. He has employed great efforts, research, ingenuity, time, expression and investment in shaping and designing the subject works so that they become effective tools for self study; efficient and useful, for the students pursuing advance study and understanding of Mathematics. The scheme and order of chapters, scheme and order of exercise and the scheme and order of problems within those exercises along with their answers in the subject works are unique to

the appellant and are a result of years of research, classroom teaching, concerted intellectual effort put together by authors, publishers and teachers, hard work, practice and the standard followed by esteemed institutions all over the world. The units in any given chapter have been so arranged so that each unit becomes integral and complimentary to each other. The subject works are dynamic books which have made the learning of mathematics by the students much more systematic and at the same time much more fun and pleasurable. The subject works are authoritative with integrated syllabus and motivating topics, focused tasks combines with real understanding of what works in the classroom. They make for effective teaching and effective learning. The contents of the subject works have been compiled in order to suit the specific needs and requirements, selection of the particular class of users, involving the application of substantial skill, judgment, labour and investment of time and money. The units are streamlined for faster progress. The text of the books is upto date with global appeals. The subject works have maximum clarity with fresh modern designs. The subject works instill logical and methodical thinking and develop problem-solving skills through a set of graded solved problems. The key features of the books are that they have been designed to enable the learner to develop a thorough understanding of basic mathematical principles and processes. The concepts in the book move, in the opinion of the author from simpler ones to more difficult and complex ones, thus making a learning curve which is perfect in the opinion of the author. It is noteworthy that in the arrangement of the chapters, exercises and problems in the subject works, the author has exercised his judgment and skill. Introduction to each chapter reviews the concepts learnt earlier. Graded solved examples develop problem-solving techniques. Short exercise drills interspersed within a chapter after each major topic. Miscellaneous exercises have been provided at the end of each chapter. Even Model Test papers have been provided at the end of the books to provide the students a feel of the examination. Excellent layout and design make the books visually attractive and increase readability. The books qualify for copyright protection as original literary works within the meaning of the Copyright Act, 1957.

93. The grievance of the appellant is that knowing the importance and imperative need of the subject works to the students in Jammu & Kashmir and knowing that a copy of the prescribed book would sell well in the market, the respondents have in complete violation of the appellant's copyright in the subject works and in with a view to make substantial illegal and unearned profits, conspired and published □Teach Yourself Mathematics (Fully Solved) Part A and □Teach Yourself Mathematics (Fully Solved) Part B (hereinafter referred to as □the infringing books'), the contents of which the defendants have brazenly copied, reproduced and incorporated from the subject works. The infringing books copies in toto the exercises given in the subject works. The infringing works contain only those exercises and problems which are contained in the subject works and have been copiously copied therefrom. Neither do they bring any new problems/exercises in the infringing works, nor do they take the minimal effort of making ostensible changes in the order/arrangement of those problems and exercises. It may be relevant to mention at this stage that the arrangement of pre-available text is a subject matter of copyright even on the very high touchstone of the modicum of creativity.

94. As per the appellants, they have tended to give extreme importance to the exercises at the end of each chapter mentioning that Mathematics is a discipline where exercises assume much greater significance than the theory they are based on. Once a theorem is explained, the many facets and

methods by which the same can be applied is fundamental to a book of mathematical exercises. It may not be wrong to state that exercises are the operative parts of a mathematics book. On this basis, it is the case of the appellant that by copying various exercises of the works in the appellants' book by the respondent No.1 in its aforesaid two books (hereinafter referred to as 'the guide books'), they have infringed the copyright of the appellant in the subject books.

95. Laying this foundation, the appellants served legal notice dated 05.11.2005 upon the respondents calling upon them to immediately cease and desist from publish, reproducing, storing in retrieval system or transmitting in any manner the subject works or any part thereof and/or offering for sale, advertising, and distributing the books under the title 'Teach Yourself Mathematics (Fully Solved) Part A'. The respondents were also called upon to render true and correct account of profits made by them by selling the guide book. According to the appellant at that time, the appellant was not aware of Part B of the book published by the respondents as well and on coming to know of the same, another notice dated 10.12.2005 was sent to the respondents in respect of that book as well.

96. The respondents refused to accede to the demand of the appellants and refuted the claim of the appellant vide reply dated 28.11.2005. In these circumstances, the appellant filed CS (OS) No.1658 of 2005 seeking decree or permanent injunction, decree for delivery of all the infringing books lying in stock with the respondents and decree for rendition of accounts of profit along with costs. This Suit was accompanied by application under Order XXXIX Rules 1 & 2 and another application under Order XXVI Rule 9 read with Order XXXIX Rule 9 and Section 151 of the Code of Civil Procedure, 1908 seeking ex parte injunction as well as appointment of Local Commissioner.

97. The learned Single Judge of this Court vide order dated 05.12.2005 ordered that the plaint be registered and summons be issued to the defendants therein. The learned Single Judge on a perusal of the two books (being the subject works therein and the infringing work therein) came to the conclusion that the questions and their answers are the exact replica of the appellants' book and hence granted an interim injunction. The learned Single Judge was further pleased to inter alia appoint a Local Commissioner to visit the premises of respondents take inventories of the infringing works and taken into custody all such infringing works. The respondents filed their written statements on 02.01.2006 contending, inter alia, that there was nothing unique in the subject works and that the use of the subject works by the respondents amounted to fair use. The respondents also filed an application under Order XXXIX Rule 4 for vacation of the injunctions granted by the learned Single Judge vide order dated 05.12.2005. The appellant filed its reply to the applicant under Order XXXIX Rule 4 on 17.01.2006.

98. The plaint was, thereafter, amended to incorporate relief in respect of Part B which according to the appellant, it came to know on the visit of the Local Commissioner. The amendment was allowed.

99. After completion of pleadings, arguments were heard on the application for interim injunction on which ex parte injunction was granted which led to passing the orders dated 17.09.2008, vacating the interim injunction granted earlier vide orders dated 05.12.2005. The learned Single Judge came to a prima facie conclusion that the subject works do not conform to the minimum

degree of creativity mandated by Indian law. The learned Single Judge was further pleased to hold that the 'learning curve' and 'learning content' in the scheme of arrangements in the subject works is negated by the fact that the syllabus has been prescribed by the Board. It has been further observed that the step-by-step manner of solving the problems given in the appellants' works, which is not available in the said subject works, has been given in the respondents' works. It was further held that the revisiting of the questions and assisting the students to solve them amounted to review, which is fair use of subject works.

The Tenor of the Impugned Order:

100. Perusal of the impugned order of the learned Single Judge reveals that the main case set up by the plaintiff was that it enjoyed copyright in the subject works, which was a result of years of research, hard work, practice and standard followed by the reputed institutions the world over. The contents of the textbooks involves of substantial skill, judgment, labour and investment of time and money. The author, Dr. Roy had specifically assigned the copyright in favour of the appellants and therefore, all rights in the subject works rested in the appellant. It was further pleaded that the guide books of the respondent had brazenly violated plaintiff's copyright, and reproduced contents of the plaintiff's books, which had immensely hampered not only the sale of the plaintiff's subject work but has also gravely prejudiced the interest of the students at large. Specific allegation that the defendant/respondent reproduced the exercises and their solutions/answers from the subject work and thus made their infringing publication a poor and degrading substitute to the plaintiff's subject work. It was pointed out that there was word to word copying of the questions in the text books. The questions, their arrangement and the sequencing, in the defendants' guides are identical to the plaintiff's textbooks. According to the appellants, these questions form a valuable and central part of the work, and their substantial copying by the defendants amounts to violation of the plaintiff's copyright.

101. The defence of the respondents was that their guide books amounted to 'fair use'. Preparation of a guide book, which independently contains the working of every mathematical problem and steps for solving them, cannot be termed as infringement of the textbook. The respondents pleaded that the appellants' book does not have any step-by-step working for the various sums at the end of each chapter and the respondents have not copied the contents of each lesson or chapter whereas the respondents' publication was guide books, the appellants' publications are textbooks and these guide books were independent creation by Prof. Harish Sharma who is a well-known Mathematics teacher. It was also pleaded by the respondent that even the appellants' books contained at least 101 questions, which were questions which were copied or reproduced from the work of another well-known author, Mr. R.D. Sharma and therefore, the appellant should not claim copyright in those questions/exercises.

102. The learned Single Judge proceeded with the matter on the premise that the outcome of the case depended upon the two issues, which were to be gone into, viz:

- (i) Whether that part of the work of the plaintiff (questions/exercises), which the defendants had reproduced, prima facie, merits copyright protection?

(ii) If it does, have the defendants sufficiently made out a 'fair dealing' or a 'fair use' defence at this stage?

103. While answering the first question, the learned Single Judge expanded the 'the Idea-Expression Dichotomy and the Doctrine of Merger' and noted that there is no copyright protection on ideas and facts and it is only the creative expression of such ideas and facts that is rewarded by law. In the process, expression 'originality' in artistic, literary, dramatic and musical works were also explained holding that with the passage of time, doctrine of 'sweat of the brow' had given way to the 'modicum of creativity' and therefore, in order to have a copyright in a work, it was necessary to show that it involves a certain degree of creativity.

The learned Single Judge also deemed it proper to refer to the 'doctrine of merger', peculiar to copyright law in the following manner:

¶8. An aspect peculiar to copyright law, is the doctrine of merger, which is involved in this case. This doctrine posits that where the idea and expression are intrinsically connected, and that the expression is indistinguishable from the idea, copyright protection cannot be granted. Applying this doctrine courts have refused to protect the expression of an idea that can be expressed only one manner, or in a very restricted manner, because doing so would confer monopoly on the idea itself. The decision in *Herbert Rosenthal Jewelry Corporation v. Kalpakian*, 446 F.2d 738(1971) is illustrative in this regard. In that case the plaintiffs sued the defendants asking them to refrain from manufacturing bee shaped jewel pins. The Court held that the jewel shaped bee pin was an idea that anyone was free to copy, the expression of which could be possible only in a few ways, therefore, no copyright could subsist in it.

104. On the application of the aforesaid doctrines, the learned Single Judge opined that the test of creativity in the work of appellant had not been satisfied and no copyright could be claimed therein, as is clear from the following discussion in the impugned order:

¶20. In the present case, the plaintiff's claim concerns mathematical questions and answers. Besides asserting the work put in by Dr. Roy, and the effort in arranging such questions at appropriate stages, chapters or units in the textbooks, the plaintiff do not show how such effort is original to conform to the minimum degree of creativity mandated by Indian law, post *Eastern Book Company* (supra). Mathematical questions are expression of laws of nature. The 'discovery' of such laws cannot confer monopoly to those who describe it. The reason is that language is a limited medium, which enables description of such laws of nature - in only a few ways. Recognition of copyright as inhering in the questions themselves (as the plaintiff suggest the court to do), without existence of the 'creative' element of originality would deny access to ideas, thus robbing one of the primary objectives of copyright law (promotion of creativity) of vitality, thereby stifling intellectual growth. Interestingly, section 3 (k) of the Patents Act, 1970 explicitly denies any form of



patent protection to a mathematical method or algorithms. Prima facie, Parliament could not have intended that innovations such as new mathematical questions, denied benefit of patent protection--which if granted is of restricted duration--could be refused, but a wider protection in time, by way of copyright, could have been granted.

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

105. Adverting to the issue of the 'fair use' defence, the learned Single Judge referred to Clauses (a) and (h) of Section 52 of the Copyright Act and on the interpretation thereof, relying upon few judgments of the Courts in United States with more emphasis on the decision in the case of *Luther R. Campbell aka Skyywalker, et al. Vs. Acuff-Rose Music, Inc.* (supra) and some judgments of English Courts as well as Indian Court, the law on 'fair use' doctrine has been summed up by the learned Single Judge in the following manner:

32. Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could be immediately be summoned are the idea-expression dichotomy and the doctrine of 'fair use' or fair dealing. Public interest in the free flow of information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw. At the same time, as Judge Leval observes, all creativity is in part derivative, in that, no creativity is completely original; each advance stands on building blocks fashioned by prior thinkers (Bernard Shaw expressed it by saying that Shakespeare was a 'tall man', but he (Shaw) was taller as he stood Shakespeare's shoulders). Judge Leval further observed that most important areas of intellectual creativity like philosophy, literature and sciences are referential, and require continuous reexamination of existing theses.

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

Resort, must, therefore be made to the principles enunciated by the courts to identify fair use.

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

106. After spelling out the aforesaid tests, as laid down in various judgments, the learned Single Judge applied the same to the present case and held that the respondent's work could be said to be transformative amounting to review under Section 52(1) (a)(ii) of the Copyright Act. We may reproduce this discussion as well verbatim:

35. In the present case, this court has considered the plaintiff's textbooks, as well as the defendant works. The following aspects stand out; (a) The plaintiff's textbooks, so far as they contain the theory portions, have not been copied; (b) The plaintiff's books do not contain the steps, or process aiding the solutions (or answers) to the questions/ problems, in each chapter. The learner is expected, on the basis of the text and the theory, to apply his mind, and solve such problems (c) The defendants' copies do not contain the text and the theory portions, analyzing the problems; (d) The defendants' copies contain the questions as well as answers, which are found in the plaintiffs' textbooks; (e) The defendants provide the problem solving step-by-step method to arrive at answers to the questions.

36. A careful analysis of the above would show that whereas the plaintiffs' texts do not contain or describe the step-by-step process of arriving at solutions (answers), the defendants' books provide them. The defendants' books do not contain the theoretical or explanatory content- they are present in the plaintiffs' textbooks. The

use of questions and answers by the defendants, who provide the step-by-

step process of reasoning, is for a different purpose. Though to a purist or one who delights in intellectual pursuits, such works may be distasteful, - even offensive - there is no gainsaying that they neither pretend to be textbooks, nor reproduce all that are contained in them. They are designed to cater to a category of student 'weak' in their understanding of the subject.

37. The purpose and manner of use of the questions found in the plaintiff's textbooks, by the defendants is thus different; additionally, in their books, missing in the plaintiff's works are the steps or process of problem solving. Thus, the defendants' works can be said to be 'transformative' amounting to 'review' under Section 52 (1) (a) (ii) of the Act. Here, the term 'review' has to be interpreted in the context. The plaintiffs claim to copyright is premised the work being a 'literary' one. The review - or commentary, of a part of such mathematical work - too would have to be seen in the background of this claim.

38. 'Review' according to the Shorter Oxford Dictionary (Fifth edition) means 'view, inspect or examine a second time or again.. In the context of a mathematical work a review could involve re-examination or a treatise on the subject. In that sense, the defendants' revisiting the questions, and assisting the students to solve them, by providing the 'step by step' reasoning prima facie amounts to a review, thus falling within the 'fair dealing' provision of Section 52 (1) (a) (ii) of the Act.

107. On the basis of the aforesaid discussion, the learned Single Judge concluded that the appellants had not any prima facie case and in any event, the publication of the respondents were safe by 'fair use' doctrine. As the consequence, the interim injunction application filed by the appellants has been dismissed and application of the respondent under Order XXXIX Rule 9 of Code of Civil Procedure praying for vacation for the interim order has been allowed.

108. It is, in these circumstances, the appellant had approached the Division Bench of this Court by present intra-Court appeal.

109. As already taken note of above, the learned Single Judge has, in the impugned order, formulated two issues and answered the same. Arguments were addressed by the learned counsel for the parties on those issues. For the sake of convenience, we reproduce the same here again:

(i) Whether that part of the work of the plaintiff (questions/exercises), which the defendants had reproduced, prima facie, merits copyright protection?

(ii) If it does, have the defendants sufficiently made out a 'fair dealing' or a 'fair use' defence at this stage?

ISSUE No.(i)

110. On this issue, the learned Court has prima facie held that the test of creativity in the work of appellant had not been satisfied and no copyright could be claimed therein. This proceeds on the reason that mathematical questions are expression of laws of nature. The discovery of such laws cannot confer monopoly to those who describe it. The reason is that language has a limited medium, which enables description of such laws of nature - in only a few ways. With respect, we are unable to subscribe to the aforesaid view of the learned Single Judge. It is the Mathematics which is the expression of laws and nature. However, there can be different ways of explaining and touching this subject. If a person writes a book on Mathematics adopting his own innovative methods in making the subject easily understandable, such a work would be the result of his/her creative thinking and would become a subject matter of copyright protection. It is nobody's case that a textbook written on Mathematics would not qualify for copyright protection. It would be equally a matter of creativity to devise and think of such questions in the field of Mathematics that may give better understanding of the subject to the readers/students. Therefore, according to us, doctrine of 'modicum of creativity' is present when even Mathematical questions are framed by the author of the book to test the knowledge and understanding of the students. In the area of Mathematics itself, a particular topic can be in the course at different level. For example, topic can be in CBSE course and at the same time, it may be taught at Graduation or Post Graduation level to the students of Mathematics. However, whereas for CBSE students, easier aspects of the topic would be dealt with but for graduates/post graduate, the final and more difficult nuances of the same subject would be taught. How this very topic is to be taught to the students at lower level and higher level would itself be a matter of challenge and creativity for author. Much skill, labour and dexterity would be required to even devise questions that may be required to be framed for students of two different levels. In such a case, it cannot be said that since Mathematics is the law of nature, a person who has developed different question banks for each exercise, the same is not the result of his creativity. It is claimed by the appellant that the author of the appellant's work, now deceased, was a renowned Mathematics teacher and he made the present book out of his extensive experience, exercising his judgment and skill in addition to his labour. That he had the requisite skill, that of a Mathematics scholar and teacher, for the creation of the subject work and the existence and exercise of his judgment in creating the book cannot also be doubted. It is submitted by the appellant that the late author exercised his judgment in the placement of chapters in the book, the placement of topics within those chapters and also placement of questions in each unit - all three being inextricably linked to the author's idea of a learning curve by which, in the estimation of the author, the student will appreciate the contents of the syllabus better. It is also claimed that the appellant's book does not blindly follow the syllabus provided by the State Board. A bare perusal of the index and its juxtaposition with the syllabus would amply demonstrate that the author altered the scheme of chapters in the book and made a deviation from the sequence prescribed by the syllabus. This deviation was made in accordance with the author's idea of a better structure for teaching. The mere existence of a syllabus does not denude a book, which is otherwise subject to copyright protection, of such status. The Supreme Court in *State of Madhya Pradesh Vs. Ram Raghubir Prasad Agarwal* [(1979) 4 SCC 686] had held that syllabus is to convey sufficient information for those concerned to know generally what courses of instruction are broadly covered under the heading mentioned, so that they may offer textbooks for such courses. If syllabus is only a broad indication of the topics to be covered in a text book, then the mere existence of a syllabus ought not to leave a book devoid of copyright protection. It is trite law that 'expression' as opposed to 'idea' is the subject matter of

copyright. There are many other authors who have compiled and created other books, some even very successfully, on the same syllabus and have still managed to bring about a book materially different in terms of structure, form and substance from the appellant's book. All such other books will have valid and subsisting copyrights in the manner of expression adopted by them.

111. We agree with the submissions of Mr. V.P. Singh, learned Senior Counsel for the appellant that the notion of originality discussed in *Eastern Book Company (supra)* is that a derivative work qualifies to become original when such work is a result of skill, labour, capital and a minimum degree of creativity. That is sufficient to acquire original creativity. Once we examine the appellant's work applying this test, we are convinced that the work of the appellant qualifies the test of ☐minimum degree of creativity ☐Originality with regard to a new work that is a primary work does not emanate from creativity. Creativity is inherent in a new work. We have already elaborated this aspect in detail hereinabove while dealing with RFA (OS) 21 of 2009 and there is no reason to repeat the same.

112. Thus, we hold that, in principle, even in creating such arithmetical exercises, the author will have copyright.

113. Coming to the facts of this case, one very crucial and significant aspect needs to be dealt with before arriving at a conclusion as to whether the appellant will have copyright in the work in question. We are posing this question having regard to a very strong and formidable plea put forth by the learned counsel for the respondents, viz. the appellant cannot claim copyright in the questions in the textbook as most of these questions are ad verbatim reproduction of other textbooks like R.D. Sharma, S. Chand Publication & Laxmi Publication. Here, we find some merit in this submission. The respondents have been able to show that a large number of questions which were part of the appellant's textbook, of which infringement was being claimed, were in fact, verbatim reproduction from other textbooks. A list of sample questions which are identical/verbatim to questions available in earlier textbooks is available at Volume III, Page. 251 to 272 of the appeal paper book. It is possible that there may be more questions contained in the appellant's textbooks which are verbatim reproduction from an earlier textbook. This is to be established at the stage of trial. The factum of lifting and commonality of questions in the appellant's textbook and in R.D. Sharma, S. Chand, Laxmi Publications, etc. is not even disputed by the appellant.

114. The only explanation put forth by the appellants is that such copyright questions are not many. However, at this stage, when only an interim application under Order 39, Rule I and II filed by the appellant is under consideration and the respondents are able to demonstrate that many questions are copied from other works and possibility of many more such questions copied by the appellant from other textbooks cannot be ruled out, it is difficult to accept the claim of the appellant that the questions incorporated in the appellant's work is original work of the author. What is highlighted is that the respondents have been able to expose that the work of the appellant is not entirely original and it has drawn on the existing work of so many other persons raising sufficient doubt as to the ownership of such copyrights.

ISSUE NO.2

115. We have already formulated the test for ascertaining as to whether in a given situation publication of a guide book would be violative of a copyright in a textbook in detail while dealing with RFA (OS) No.21 of 2009. It is not necessary to repeat the same. Suffice is to state that it will be permissible to publish a guide book if it qualifies the proper description of a guide book and becomes a derivative work of the author who has produced such guide book.

116. That apart, in the present case, it is to be borne in mind that the appellant's book is prescribed as textbook in Class XI in Jammu & Kashmir. Therefore, it would be permissible for a person to write, review, critic or guide book on the said work. Insofar as guide book is concerned, with which we are concerned, it is to be shown that it provides explanation, step by step process for reaching the answer to the mathematical problems. Thus, it would be permissible for the person writing the guide book to take the questions from the exercises prescribed at the end of each chapter in the appellant's book. At the same time, it is to be shown that the person writing the guide book has given step by step answer to the said questions which part is not present in the appellant's work and the same is done for facilitation of the students, particularly, weaker sections so that they are able to get the assistance from such guide book for easy and better understanding. When we apply this test to the present case, we come to the conclusion that the respondent's guide book has met this requirements/qualifications. It is rightly pointed out by the learned Single Judge that the appellant's text does not contain or describe the step by step process or arriving at solutions or answers whereas the respondent's guide book provides the same. The appellant's text book contains the theoretical or explanatory contents in respect of each chapter, that is not taken/adopted by the respondent in its book. There is no copy of these contents by the respondents. The respondent has simply used the questions and contribution of the respondents lies in providing step by step reasoning. This is for different purpose. Learned Single Judge has rightly remarked that many academics may not like these guide books and to a purist or one who delights in intellectual pursuits, such works may be distasteful or even offensive, nevertheless, such works/guide books are produced and designed to cater to weak category of students in their understanding of the subjects. The purpose and manner of the use of the questions, which are found in appellant's text books by the respondent is, therefore, different. Once we qualify the work of the appellant entitled to copyright on the ground that it involves creativity, the same standard would apply to the respondent's work as well. There is a creativity attached in giving step by step solution to the questions. It is a matter of common knowledge that many Mathematical problems can be solved in the different manner. It is also equally a matter of common knowledge that even if there is only one manner of solving a particular Mathematical problem, it may be solved with fewer steps and for better and easy understanding, other person may evolve more steps.

117. On this ground, we agree with the ultimate conclusion of the learned Single Judge in dismissing the application under Order XXXIX Rule 1 & 2. We, thus, dismiss this appeal.

(A.K. SIKRI) JUDGE (SURESH KAIT) JUDGE AUGUST 03, 2011 pmc