

Espn Star Sports vs Global Broadcast News Ltd. & Ors. on 26 September, 2008

Author: Mukul Mudgal

Bench: Mukul Mudgal, V. K. Shali

IN THE HIGH COURT OF DELHI AT NEW DELHI
RFA (OS) No.25/2008

ESPN STAR SPORTS	Reserved on	th
Through	: August 29 , 2008	
	Date of Decision : September 26th , 2008	
 Appellant	
	Mr. C. A. Sundaram, Senior Advocate with	
	Mr. N. Ganpathy, Advocate.	
versus		
GLOBAL BROADCAST NEWS LTD. & ORS. Respondents	
Through	Mr. Soli Sorabjee, Senior Advocate with	
	Mr. Anup Bhambhani and	
	Ms. Nisha Bhambhani, Advocates for	
	respondents No.1, 3 and 5.	
	Ms. Pallavi Langar,	
	Ms. Amrita Bhattacharya and	
	Mr. Prithvi Sidhu, Advocates, for	
	respondent No.2.	
	Ms. Pratibha M. Singh and	
	Mr. Sudeep Chatterjee, Advocates, for the	
	respondent No.4.	

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE V. K. SHALI

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

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JUDGMENT

26 .09.2008 : MUKUL MUDGAL, J.

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1. This Regular First Appeal arises out of the judgment dated 18 February 2008 delivered by a learned Single Judge of this Court, where in the first part deals with interlocutory relief and second part deals with the non-maintainability of the suit. The learned Single Judge had dismissed the entire suit of the appellant/plaintiff for non-compliance of Section 61 of the Copyright Act, 1957 (hereinafter referred to as the "Act").

2. After the arguments were heard in this appeal, both the parties including News Broadcasters Association, agreed to attempt to arrive at a broad consensus on the question of 'fair dealing' in light of the existing guidelines framed by Prasar Bharti and accordingly requested this court to defer the delivery of this judgment. However, even after giving ample opportunity, the parties have failed to arrive at a settlement for consensus on the question of fair dealing, consequently, we are delivering this judgment as requested by the Counsels on 29th of August 2008 as this judgment would affect several pending cases before the Original side of this Court.

3. The facts of the case briefly stated are as follows:

(a) The appellant ESPN Star Sports (hereinafter referred to as the "ESS") has obtained the sole and exclusive rights/license from various sports bodies including Cricket Australia (hereinafter referred to as the "C.A."), to televise in India various sporting events including the India versus Australia test matches, One Day International (ODI) matches and the solitary T20 cricket match to be played in Australia from December 26, 2007 onwards till March 8, 2008 and therefore, no other person, entity and/or Cable Operators could broadcast/telecast in India, the Cricket Matches without a license from the Appellant or its sole and exclusive distributor ESPN Software India Private Ltd. The appellants had granted licenses to over 5000 cable operators in India to transmit their channels on their cable networks.

(b) The respondent no.1 Global Broadcast News Ltd. is a Broadcaster having a number of news channels by the name of CNN-IBN and IBN7. The respondent no.2, TV Today Network Pvt. Ltd. is a Broadcaster which has news channel(s) by the name of "Aaj Tak" and "Headlines Today". The respondent no.3 Media Content and Communications Services India Pvt. Ltd. is a Broadcaster having a news channel by the name of "STAR News". The respondent no.4, Zee News Ltd. is a Broadcaster having a news channel by the name of "Zee News". The respondent no.5, New Delhi Television Ltd. is a news channel by the name of "NDTV 24x7".

(c) After the commencement of the Cricket Matches, the field staff of the appellant's distributor in various locations had noticed that the news channels owned by the respondents/defendants had been unauthorizedly telecasting the signals of the Cricket Matches in a manner which was inconsistent with their primary obligation of being news based channel(s) showing scheduled news bulletins and/or current affairs programmes. The respondents had indulged in using/appropriating without authority, substantial portions of the footage of the appellant's channel namely Star

Cricket which had telecast the test matches exclusively from December 26, 2007 to January 28, 2008 for creating programmes which they were commercially exploiting.

(d) The appellant thereafter filed a suit for permanent injunction seeking orders restraining the respondents from utilizing their transmission and/or using the footage for any television programme except for the usage of regularly scheduled news bulletins provided such usage would not be for more than two minutes per day.

4. The pleas of the respondents were as under:

(a) The suit was not maintainable on the ground that in every action claiming infringement, the owner of copyright should necessarily be made a party to the proceedings in terms of Section 61(1) of the Copyright Act, 1957 and that since C.A. had not been made a party to the suit, the suit ought to be dismissed as not maintainable.

(b) In every action claiming infringement, the owner of copyright should necessarily be made a party to the proceedings. The counsel for the respondents also questioned the credibility of the appellant being an exclusive licensee of C. A. on the ground that the license Agreement dated July 26, 2002 produced in Court redacted crucial sections of the Agreement, particularly, those dealing with the content of the license.

5. The counsel for the appellant withdrew the suit CS(OS) No.146/2008 with the liberty to refile. The appellants filed a suit bearing CS (OS) No.219/2008.

6. The learned Single Judge after hearing all parties to the proceedings, dismissed the suit as not maintainable for non-compliance of Section 61(1) of the Act holding that C.A. being the owner of the copyright had not been made a party to the suit under Section 61(1) of the Act. The Court also dismissed the application for injunction holding that the action of the appellant in not disclosing the full license agreement weighed against the appellant in the matter of grant of ad interim relief.

7. The learned Single Judge in his judgment dated 18th February, 2008 held as follows:

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

statute must be read as a whole and the legislature should be deemed to have intended application of each part for the situations intended. If the plaintiff's contentions were accepted, Section 61 would operate only in some situations and not all, even though non express provision manifests such intention nor can it be drawn by necessary implication. The requirements of Section 61, procedural in nature, apply with equal vigor to all nature of rights that are subject matter of the Act.

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

42. For these reasons, it has to be held that the mandate of Section 61(1) applies in case of claims for infringement of broadcast reproduction rights; the non-impleadment of the owner of copyright is fatal to the maintainability of the suit. Similarly, the non-joinder of owner of the copyright renders the suit liable to be rejected. The proviso to Order 1, Rule 9 Civil Procedure Code enacts that a suit can fail for non-joinder of a necessary party. In *Udi Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar* 1963 Supp (1) SCR 676 pointed out to the distinction between "necessary party" and "proper party". The Court held that:

"The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings."

The failure to implead the owner of copyright in the present case has resulted in keeping out a party whose presence is necessary for a final and complete decision on the question involved in the proceedings. Thus, apart from the suit being not maintainable due to Section 61 (1) of the Act, it is also bad for mis-joinder of a necessary party.

43. Coming now to the first aspect, i.e., whether the plaintiff has disclosed a cause of action, this Court had noticed in the previous section of the judgment while dealing with the claim for temporary injunction, that the plaintiff had not disclosed the entire agreement, which was a relevant factor for the exercise of discretion in granting or refusing ad-interim relief. However, the same standard cannot be applied while considering whether the plaint has to be rejected as not disclosing a cause of action. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence

(Raptakos Bret -vs-Ganesh Property 1998 (7) SCC 184). As long as the plaintiff discloses some cause of action that has to be determined by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaintiff. Therefore, the non-

disclosure of the entire agreement at this preliminary stage is not such irregularity as to warrant rejection of the plaintiff, for reason of its not disclosing a cause of action.

44. In view of the findings on Section 61, this suit is not maintainable, it is therefore, dismissed.

The parties are left to bear their own costs."

8. Shri C. A. Sundaram, the learned Senior counsel appearing for the appellant while contending that the impugned judgment and order dated 18th February 2008 be set aside, raised his arguments on a three fold basis.

(i) Broadcasting reproduction rights visa-a-vis Copyright in the Indian Copyright Act, 1957.

(ii) The ownership of Cinematographic Copyright in the Cricket Matches telecast in the present case.

(iii) Defence of fair dealing.

9. While submitting the first of his three fold argument, the learned senior counsel for the appellant raised the following contentions:

(A) Status of Broadcasters before the 1994 amendment of the Copyright Act and after the amendment.

(a) Before the 1994 amendment of the Copyright Act, the only broadcaster in India was Doordarshan (DD) which used to telecast free to air channels that could be captured by an antenna installed on rooftops and was connected to the television sets by a wire. With the opening of the Indian markets in 1991, several players involved in broadcasting came into India.

(b) The process of relay of Programs by way of cables is a complex relay of feeds. The feed is first uplinked from the venue of the event (for a live event) or a studio which can be located anywhere in the world. The feed is then down linked in the concerned territory by cable operators. Such cable operators then transmit the feed to cable homes by way of network of cables. As a natural consequence it was considered necessary to protect broadcasters from against unauthorized receipt by the cable operators of their services without a contract permitting such receipt.

(c) Since existing definition of the copyright in the statute of most countries did not provide any protection to the broadcasters on the basis that there was no copyright in their broadcast of a live event or, studio shows and the like, the need to protect the

broadcasters from unauthorized reception of their feed by cable operators was felt globally. This issue was discussed during the Uruguay round of the WTO Agreement of Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1994. Recognizing the need to protect the rights in broadcasts, Article 14 (3) was incorporated into the TRIPS Agreement. It reads as under:

Article Protection of Performers, Producers of Phonograms (Sound recordings) and Broadcasting organizations.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971) (emphasis supplied).

(d) India being the signatory to the TRIPS Agreement accordingly amended the Copyright Act in 1994 so as to incorporate Section 37. The amendment came into effect from May 10, 1995.

(e) He contended that it is important to note that even after the aforesaid amendment of the Copyright Act, the definition of 'copyright' under Section 14 was not amended to include 'Broadcast reproduction right', as has been the case in some countries such as the United States of America, United Kingdom and New Zealand, where Broadcast reproduction right had been specifically included within the meaning of copyright. Some countries such as France, Germany and India have given a special right known as 'Broadcasting Reproduction Right' which is a related right and is different from copyright. (B) Copyright versus Broadcast Reproduction Rights' under the Copyright Act 1957 - Applicability of section 61.

(a) From the reading of Section 37 of the Copyright Act as well as the Statement of Object and Reasons, it is evident that the definition of 'copyright' under Section 14 of the Copyright Act did not provide any protection to the broadcasters. The statement of Object and Reasons itself provides that "Certain Rights akin to copyright are conferred on the broadcasting authorities in respect of programs broadcast by them." This sufficiently brings out the difference between the two rights in Indian Copyright Act, 1957. The amendment Act of 1994 extended such rights to all Broadcasting Organizations apart from more clearly crystallizing the nature of such rights.

(b) The fact that such a distinction exists is demonstrated by Section 51 of the Copyright Act which deals with acts constituting infringement of a copyright, whereas there is a separate section, i.e., Section 37(3) that deals with acts constituting infringement of broadcast reproduction rights. From the above mentioned references it is clear that the idea of the legislature was to provide a separate and distinct right to the broadcasting organizations to help them protect their rights in their broadcasts against third parties.

(c) Satellite broadcasting rights are treated as separate rights and the said rights are recognized throughout the world as independent rights as held in *Raj Video Vision v. M/s Sun TV*, 1994 (2), *Madras Law Weekly* 158 which has also been approved in *AA Associates versus Prem Goel* AIR 2002 Del 142. A similar view has been taken in *M/s Video Master v. M/s Nishi Productions*, 1998 (18) PTC 117.

(d) Thus, section 13 and 14 of the Copyright Act, makes it clear that copyright will subsist only in work. 'Work' does not include 'broadcast'. As a result there will only be a broadcasters right in the telecast of live events communicated to the public as provided under Section 37 of the Copyright Act, which as explained above, is separate and distinct from copyright. Therefore, what emerges from the above is that the Broadcast Reproduction Right, which is different from Copyright, is with the Broadcasting Organization which is causing the Broadcast to be communicated to the public under their Logo by any means of wireless diffusion or by wire, i.e., the Appellants in the present case, as per the Definition of Broadcast under Section 2 (dd) and the definition of the Communication to Public under Section 2 (ff) of the Act. As such Section 61 is not applicable in a proceeding for infringement of Broadcasting Reproduction Right as that provision is only limited to the cases where an exclusive licensee of a copyright institutes a suit or proceeding for infringement of copyright.

10. The learned counsel for the appellant further contended as follows:

A. Cinematographic copyright vests in the recording of the event in a cricket match. As per the Agreement dated 26.7.2002, the C.A which was hosting the cricket match permitted ESS the appellant to :

a. Receive the live feed from the Host Broadcaster (Channel 9) and to broadcast such feed after making their own additions/alternations etc. b. In order to do so ESS has the following: OB Vans, Studio, their own Cameras, Hawkeye Cameras, Satellite equipment etc on the ground.

B. Thereafter, what ESS did was the following:

1. Pre-match coverage.
2. Live match coverage.
3. Change of innings show.
4. Post Match show.

C. From the above it can be seen that the recording of the final mix as telecast

would have given rise to an independent copyright to ESS in such a final recording. This copyright is separate and distinct from the satellite broadcast made of the mix by the ESS which would give rise to a broadcast reproduction right. By the very

definition of cinematograph under Section 2(f), the satellite broadcasting per se would not amount to a cinematography, which necessarily requires recording of the same. Therefore, the broadcast through a satellite, of a live coverage of a match would give rise to a broadcast reproduction right but not necessarily a cinematographic right, since the latter would arise only if there is an actual recording of what has been broadcast and not when it has been merely broadcast through satellite without also recording the same.

D. This distinction is being brought out only to show that even if it is claimed that what is broadcast also amounts to a copyright in a cinematography, the owner of such cinematography copyright would only be ESS. This is an alternate argument taken since the primary contention of ESS is that their broadcast reproduction right is an independent right which is being infringed. He further contended that assuming it is held that Section 61 is applicable as broadcasting right fall within copyright there is also an infringement of a copyright in the cinematography work, i.e., the recorded form of the broadcast as:

(a) These are two separate, distinct rights giving rise to two distinct causes of action.

(b) Even otherwise the copyright in the cinematograph work in this case would belong to ESS who would be the owner thereof and therefore, ESS would not be an exclusive licensee of the copyright in terms of Section 61.

(c) ESS would be the owner of the copyright in the recorded material of what is broadcast by them even assuming a substantial portion of it may be the live feed received from from channel 9.

11. The learned counsel for the appellant on the question of fair dealing contended that:

a. At the outset, it may be pointed that there is no concept of fair dealing in the infringement of copyright in a cinematographic film and therefore if it is to be held that what is broadcast by ESS amounts to a copyright work then the defence of fair dealing is not available at all. Fair dealing is available as a defence in the case of a broadcast reproduction right by virtue of Section 39. b. On the defence of Fair dealing he submitted that if any form of commercial exploitation is sought to be obtained through the use of the material of the plaintiff, this would ipso facto give rise to a presumption of commercial exploitation thereby negating the plea of fair dealing. For example, if under the guise of news reporting, the defendants were to announce that they would be showing the highlights of the cricket match or something that transpired therein and preceded the same with a commercial break or immediately follow such broadcast with a commercial break, it would ipso facto point to a reasonable inference that a specific attempt at commercial exploitation is being made. It shows the duration of such coverage as being of footage taken from ESS's broadcast ranging upto 30 minutes. This again would clearly indicate that it is not a

mere case of fair dealing by reporting current news but indicates the object of attracting the audience to view the particular news channel with a view to enhance its viewership. He further submitted that if the object is to get the audience to watch the news channel for such extended coverage rather than to impart news and events, it would ipso facto militate against the concept of fair dealing. Equally to make an entire programme of say half an hour by all the channels revolving around a cricketing incident may not be faulted, but if the visual of the programme is the repeated telecast of what was actually broadcast by ESS, such telecast would certainly amount to commercial exploitation especially when the factum of the programme being aired later in the day is constantly advertised / announced by that news channel and such programme is also liberally interspersed with commercials. This would also amount to a direct competition with ESS since ESS also comes out with sporting news. c. He submitted that while fair dealing cannot be defined but would have to be considered in the facts and circumstances of each case, in the facts and circumstances of the instant case this court could decide what could amount to fair dealing in the case of telecasting the material pertaining to the coverage of a cricket match which is of national interest in the course of a news programme. He further submitted that it would be wholly within the jurisdiction of this Court to decide as to what would amount to fair dealing in the case of news coverage of a cricket match.

12. The learned Senior Counsel for the respondent, Mr. Soli Sorabjee, contended as follows: -

a. Section 61 of the Copyright Act, 1957 is mandatory. Its effect and operation are not excluded nor limited by any non-obstante clause or by making the said section subject to any other provisions of the said Act, the non-mention of Section 61 in Section 39-A cannot by "implication" curtail the operation of Section 61. The significant words in Section 39-A are "with any necessary adaptations and modifications", that is the reason why some provisions of the said Act have been specifically mentioned in Section 39-A. b. "Broadcast reproduction right" is a species of copyright. This right is akin to Copyright as per Clause 11 of the Statement of Objects and Reasons of the Copyright Act 1957. The said two rights are not mutually exclusive. Broadcast reproduction right, a "special" right, does not exist de hors copyright; it is merely a special strand amongst the several other strands of copyright. Broadcast reproduction right is an "add-on" right that can only exist on the bed-rock of copyright. In many essential respects broadcast reproduction right is treated on a par with copyright.

c. Section 55 of the said Act mentioned in Section 39-A, without which a broadcast reproduction right holder would have no civil remedy, refers specifically to "owner of copyright"; which by its own operation makes Section 61 applicable in case an action is brought by an "exclusive licensee". Thus a person complaining of infringement of broadcast reproduction right has to go through the route of Chapter XII. Hence, he has to comply with the provisions of that Chapter including Section 61 which is mandatory. All other provisions of the said Act are applicable proprio vigore to

broadcast reproduction right as and when a situation arises.

d. The rationale for Section 61 is to obviate the possibility of any rival claim from the owner of copyright or other allied rights and to avoid multiplicity of litigation. This possibility exists equally in the case of broadcast reproduction right. Notes on Clauses with reference to Section 61 reads as follows:

"Clause 64 - This clause provides that in any suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall be made a party. This provision has been made to enable the owner of the copyright to dispute the claim of the exclusive licensee."

It would be anomalous if the owner of the copyright is bound to comply with Section 61 yet the owner of a species of copyright can maintain his suit without complying with Section 61.

e. The counsel for the respondent submitted that the C.A. is a necessary party to the suit and on account of its non-impleadment to the suit, the appellant's rights, including its right to sue and its precise rights as an exclusive licensee cannot be decided except with reference to the rival claims and rights of the licensor C.A. and C.A. is therefore a necessary party to the suit. f. He further submitted that in reference to the Agreement dated 26th July, 2002 between the appellant and the C.A., it appears ex-facie that the appellant/plaintiff is not the owner of broadcast reproduction right but merely a licensee of C.A.. From a combined reading of the provisions of the said Agreement, including Part 1 of the Schedule thereto, it is clear that the "host broadcaster" as referred to in the Schedule is an entity different and distinct from the licensee, namely the appellant. Since the appellant is not the owner of "broadcast reproduction right" the Appellant cannot seek enforcement of a broadcast reproduction right in relation to what is not "its broadcast" as required under Section 37 of the said Act. In fact, the Appellant has not even claimed that it is the "owner" of broadcast reproduction right.

g. The counsel for the respondent further contended that it is incumbent upon the Appellant to disclose the full agreement, which it has not done. It may be noted that the total number of pages of the agreement is 55, out of which 16 pages are totally blank and 15 pages are partially obscured. This includes clauses which are crucial, for example, Clause 5.6(c) which states that the exclusive right guaranteed to Appellant is subject to Clauses 5.2, 5.6(a) and 5.6(b). Nonetheless Clause 5.2 and 5.6(a) are totally blank.

h. This fatal infirmity cannot be overcome by enclosing the said Agreement in a cover and handing it over to the appellate Court. It is an elementary principle in the administration of justice that whatever documents are purported to be shown to the Court such documents must be made available to the other side, unless requisite privilege in accordance with the law is claimed regarding the suppressed contents. He submitted that by its aforesaid conduct the Appellant has disintitiled itself to grant of any equitable relief. i. Fair dealing cannot be pre-judged, and of necessity can only be decided on a case-to-case basis. The counsel for the Respondent submitted that no injunction or other restraint order can be made on the basis of a mere apprehension of unfair dealing. Fair

dealing is purely a question of fact and no order can possibly be made in relation to fair dealing, except after a full-dressed trial of issues alleging breach of fair dealing.

j. There is no law, rule or regulation applicable to the answering respondents that lays down any limit on the length of footage that may be used by broadcasting organizations reporting upon /covering any sporting event. There is no basis or warrant for the Plaintiff's prayer that the respondents cannot utilize the footage in excess of 30 seconds per bulletin and a total of 2 minutes per day. k. Furthermore, Section 39 of the said Act specifically excludes from the ambit of infringement the use of excerpts by a broadcaster for reporting on current events or for review. Moreover as television journalists it is their fundamental right under Article 19(1)(a) of the Constitution of India to report on all important current events and happenings and disseminate information. Cricket is an extremely popular and sought after sport in India, and accordingly dissemination of cricket news is of great importance to the viewers who also have the fundamental right to receive the information.

l. The use of footage for this purpose was therefore the respondents' right under the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. The footage was used for bona fide reporting, which is clearly in public interest. Breach of the mandate of fair dealing in Section 39(b) of the said Act is eminently capable of being compensated in damages, and as per the settled position of law, an injunction cannot be granted on mere allegations of apprehended violation of fair dealing, where such violation can in any case be fully compensated in damages.

m. The learned counsel for the respondent relied upon paragraph 77 of the judgment of M.S. Gill vs. Chief Election Commissioner, (1978) 1 SCC 405, to ascertain that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specified, it is otiose. There is no such sequitur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. However, we are not able to place reliance on the above judgment as independent nature of the broadcasting rights are specifically laid down in a separate Chapter VIII of the Act which has been enacted.

13. Mr. Sundaram submitted that at this juncture, he is not pressing for interim relief since this court is hearing the appeal on the question of maintainability.

14. In our view, the conclusion of the learned Single Judge pertaining to Section 61(1) to the effect that non-compliance of the Section made the suit not maintainable cannot be sustained in view of the fact that the rights of the broadcasting organization and its performers which figure in Chapter VIII of the Act are not covered by the conditions imposed by virtue of Section 61 which is found in Chapter XII providing for civil remedies. Section 61 of the Act reads as follows:

Section 61 - Owner of copyright to be party to the proceeding - (1) In every civil suit or other proceedings regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to

dispute the claim of the exclusive licensee.

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

15. It is to be noted that before the 1994 amendment of the Copyright Act, the only broadcaster in India was Doordarshan (DD) and Chapter VIII of the Act only afforded protection of the broadcasting reproduction rights to the Government and the broadcasting authority. The objects and reasons of the Copyright Act has recognized such a right as a right akin to a copyright. The Uruguay round of the WTO Agreement of 1994 and the relevant portion of the said Agreement reads as follows:-

"3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)."

(emphasis supplied) Consequent to the agreement, the Copyright Act, 1957 was amended in 1994 so as to incorporate definitions under Sections 2(dd) and 2(ff) and the relevant provisions relating to Broadcasting Reproduction right in Section 37, Section 39 and Section 39 (A) in Chapter VIII.

The definition of Broadcast under Section 2 (dd) reads as follows:

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

- (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or
- (ii) by wire,
and includes a re-broadcast;]"

The definition of the "Communication to the Public" under Section 2 (ff) of the Act reads as follows :

2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made

available."

Section 37 of the Act reads as follows:

"Section 37 - Broadcast reproduction right - (1) Every broadcasting organization shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.

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

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

- (a) re-broadcasts the broadcast; or
- (b) causes the broadcast to be heard or seen by the public on payment of any charges; or
- (c) makes any sound recording or visual recording of the broadcasting; or
- (d) makes any reproduction of such sound recording or visual recording where such initial

recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or

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

Section 39 of the Act reads as follows:

Section 39 - Acts not infringing broadcast reproduction right or performer's rights - No broadcast reproduction right or performer's right shall be deemed to be infringed by -

- (a) The making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or
- (b) the use, consistent with fair dealing, of excerpts of a performance or review, teaching or research; or
- (c) such other acts, with any necessary adaptations and modifications, which do not

constitute infringement of copyright under section

52."

Section 39-A of the Act reads as follows:

"Other provisions applying to broadcast reproduction right and performer's right -

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

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, on license to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them."

16. It is to be seen that the genesis of the broadcasting reproduction right lies in the Statement of Objects and Reasons of the original 1957 Act which clearly stated as follows:-

"(11) Certain rights akin to copyright are conferred on Broadcasting authorities in respect of programmes broadcast by them."

Thus, the Legislature itself by terming broadcast rights as those akin to copyright clearly brought out the distinction between the nature of two rights in Indian Copyright Act, 1957. This was a clear manifestation of the legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. Further, it is to be seen that the Amendment Act of 1994 while amending the Act not only extended such rights to all Broadcasting Organizations, but also clearly crystallized the nature of such rights. Hence, in our view, the contention of the respondent that the broadcast reproduction right as a special right, does not stand de hors copyright and that the two rights are not mutually exclusive, cannot be sustained as it is clearly seen from the legislative intent that the two rights though akin are nevertheless separate and distinct.

17. Furthermore, under Section 37 of the Act, broadcast reproduction right has been defined as a special right available to every broadcasting organization qua its broadcasts. The term "broadcast" has been separately defined under Section 2(dd), as a communication to the public. It is thus evident that there could be both copyright and broadcasting reproduction right which could separately co-exist. As an example the copyright of cinematography film being broadcast on a satellite channel vests with the producer of the film whereas the broadcast reproduction right for the same vests with the broadcaster channel itself. The recording of such movie and unauthorized re-telecast by cable operators could thus result in violation of two separate rights. The first being the copyright which vests with the producer and second the broadcast reproduction right which vests with the broadcaster channel. These rights may vest with two different persons or even with the

single person which is evident from the Act. Section 51 of the Copyright Act deals with acts constituting infringement of a copyright and Section 37(3) separately deals with acts constituting infringement of broadcast reproduction rights. Emphasis have been placed upon Section 39-A which provides that Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall with any necessary adaptations and modifications apply in relation to the Broadcast reproduction right in any broadcast. This clearly showed the legislative intent as to which provision of the Act would apply to both copyright and also broadcast reproduction right and by necessary implication Sections not so specifically provided would not ipso facto apply to the broadcast reproduction right. Sections 13 and 14 of the Copyright Act make it clear that copyright will subsist only in 'work' and that does not include 'broadcast'. This clearly demonstrates that the broadcast rights particularly in respect of telecast of live events are separate and distinct from copyright available in Chapter XII of the Act. The definition of 'broadcast' under Section 2(dd) and the definition of 'communication to the public' under Section 2(ff) of the Act further emphasize the fact that Section 61 is not applicable to the proceeding for infringement of Broadcasting Reproduction Right and that application of Section 61 is limited to the cases where an exclusive licensee of a copyright institutes a suit or proceeding for infringement of copyright.

18. The learned counsel for the respondent Shri Soli Sorabjee has contended that Section 61 of the Act is mandatory. Its effects and operation are neither excluded nor non-limited by any non obstante Clause or by making said Section subject to any other provision of the Act. The non-mention of Section 61 in Section 39-A cannot by "implication" curtail the operation of Section 61. The significant words in Section 39-A are "with any necessary adaptations and modifications". However, the very fact that Section 61 from Chapter XII has been specifically left out of the provisions which with necessary adaptations and modifications apply in relation to the Broadcast reproduction rights, clearly shows that the legislative intent was not to apply Section 61 to the broadcast reproduction rights. This view of ours is strengthened by the specific mention of Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 as the provisions which apply to broadcasting rights with necessary adaptations and modifications. Consequently, it is open to the broadcaster to initiate the suit for infringement of such rights without joining the original licensee as Section 61 does not apply to broadcast reproduction rights. Section 61(1) and (2) demonstrate that said Section is really for the benefit of the copyright owner so as to prevent any claim to a right or title adversarial or contrary to the interest of the owner of the copyright. We are thus unable to agree with Mr. Sorabjee's plea that Section 61 would by necessary implication apply, because it is not as if the Legislature had provided that relevant provisions of the Chapter XII would apply with necessary modifications and adaptations to the broadcasting reproduction rights. In the present case, the Legislature has picked out such of the provisions of Chapter XII and various other Chapters which would apply. This indicates the legislative intent to apply only such specified provisions in particular Chapters of the Act to Broadcasting Reproduction right and when certain provisions of the Chapters are applied then it necessarily indicates that the other provisions of the Chapter are not to be applied.

19. Thus, in our view the above distinction clearly indicates that the Parliament clearly intended to provide separate and distinct rights to the broadcasting organisations to protect their rights against third parties. Satellite broadcasting rights are treated as separate rights and the said rights are recognized throughout the world as independent rights. This is also entirely in keeping with several radical technological advances in the field of telecommunications which could not have been

contemplated when the 1957 Act was enacted.

20. The following position of law laid down in following judgments strengthen the above conclusions:-

a. In the case of Raj Video vision v. M/s Sun TV, 1994 (2) Madras Law Weekly 158 it was held as follows:

"12. The copyright for broadcasting or telecasting the film through satellite, cable, wire wireless or through any other system or any other form, means and modes other than through Doordarshan terrestrial Primary Channel without restriction of geographical area is a separate right. Satellite right is new, separate and distinct specie or right hitherto not visualized and this cannot be said to be included under the agreements relied upon by the plaintiff's in any event. In fact cassettes are used for home TV, whereas 'U' tapes are used for Satellite Transmission.

13. On a careful consideration of the arguments advanced by the learned counsel appearing on either side, I am of the view that the Satellite television broadcasting right is an independent right for which the plaintiff cannot claim any copyright.

.....

15. Thus, looked at from any angle, satellite TV broadcasting rights are independent rights and the same have to be assigned specifically and so far as such rights have not been assigned in favour of the applicant/plaintiff specifically, the plaintiffs cannot claim any copyright in the same or seek any order of injunction on the ground of alleged infringement by the defendant. The plaintiff/applicant therefore, in my opinion have no prime facie case." (emphasis supplied) b. In A.A. Associates v. Prem Goel, AIR 2002 DEL 142, this Court held as follows:

18. Reference in this connection can well be made to the decision from the Madras High Court in Raj Video Vision v. M/s Sun TV, 1994-2- LW.158. Somewhat a similar question came up for consideration in that court. It was held that intention of the parties have to be determined to find out as to whether it included all other rights or it was confined to features or television or satellite. The Madras High Court held that Satellite television broadcasting right is an independent right for which a copyright could not have claimed.

19. The attention of the court has also been drawn towards the decision of the Bombay High Court in the case of Video Master v. Nishi Productions 1998, PTC (18) 117. The Bombay High Court referred to the differences and clauses/species of the communication and held that theatrical rights include the right to exhibit the cinematograph film in theatres, terrestrial rights is the right to exhibit the film on Doordarshan and satellite broadcasting rights is the right to exhibit/communicate

the film by satellite signals to public with or without cable and through the satellite medium. While the cable TV right is right to exhibit a film by cable originated programme.

20. One finds itself in respectful agreement of these pleas as projected by the defendants."

(emphasis supplied) c. In *M/s Video Master v. M/s Nishi Productions*, 1998 (18) PTC 117 @ 123 it was held as follows:

"The satellite rights involve preparation of Umatic tapes and exclusive rights for Satellite TV broadcast is entirely different from Cable TV rights. The Satellite television differs from ordinary Terrestrial Television (TV). Thus, as per learned Judge of Madras High Court satellite broadcasting rights are different rights. In the present case, there is no dispute before me that satellite broadcasting rights are independent rights. There is also ample material brought on record by defendants, which clearly indicates that satellite broadcasting rights must be treated and are treated as separate rights and the said rights are recognized throughout the world as independent rights."

(emphasis supplied)

21. According to the appellant, an agreement was reached between the C.A. which was hosting the cricket matches and the appellant ESS permitting ESS to receive the live feed from the host broadcaster i.e. Channel 9 and to broadcast such feed after making their additions/alterations etc. Thereafter the ESS utilizes the original feed from C.A. as under:-

i. Pre-match covering : ESS covers about one hour of programmes before the start of the match which includes expert analysis about composition of the team, about the likely performances of the key players, conditions such as weather & pitch & stories with regard to the history of previous matches played on the ground, spectator relations etc. If further includes the pitch report, interviews with manager/coach/players & the toss. ii. Live match coverage : When the match starts, the cameras of the host broadcaster along with the independent cameras of the ESS start transmitting the live images of the match. These are received in the OB van of ESS where there is a Director of production, who decides on what is to be transmitted by mixing the same together with the ESS own graphics including details of live scores, player's statistics, inputs from the speed gun, other visual representation such as wagon wheel showing the areas which the batsman has scored runs, partnership analysis, bowling analysis etc. Replays & slow motion replays would be received in the ESS's OB van as part of the images from the host broadcaster. However, ESS in their own OB van also has equipment known as Electronic Video Storage (EVS) which separately generates slow motions & replays from the cameras on this ground. The Hawkeye images would also be separately generated only by ESS as and when

ESS's director in the OB van deems fit. ESS has its own commentary team of six commentators, statistician & scorers continuously showing images of the commentators. These images go directly to the ESS's OB van in contrast to the output from the channel 9, which go to the the host broadcaster's commentary box which would go directly to their OB van.

iii. Change of innings show: In a One Day International when the team batting first concludes its innings, and before the second team begins its batting, ESS does an exclusive 45 minutes live programme on various aspects of the match including analysis etc. from the studio of ESS at the ground.

iv. Post Match : There is an one hour show after the match which includes analysis, highlights, sponsored programmes such as master blaster, super fours, super sixes, wickets, catches and post match presentation etc. produced from ESS studio at the ground which is exclusive ESS's broadcast and such features are not to be found in the C.A. broadcast.

22. An analysis of the above inputs to the parent feed of channel 9 received by the appellant from the C.A. demonstrates that the final transmission done by the appellant is substantially different, particularly in the non-live portion of the telecast. The inputs such as the speed gun, wagon wheel and select part of the replays of deliveries and the slow motion replays, not originally received from the host broadcaster, are also instrumental in shaping the final telecast. One important constituent of the television broadcast is the input of the Commentators, statisticians and other support staff. The appellant has a separate team of commentators while commenting on the live feed received from the host broadcaster. In addition, before and after the match and during the change of innings, a distinct telecast as compared to that put out by the host broadcaster takes place. The presence of different expert commentators, many of whom are famed former cricketers, and the other inputs such as the speed gun, wagon wheel, hawk-eye and select part of the replays and the slow motion replays, originally not a part of the live feed received from the host broadcaster, clearly demonstrates a substantial difference between the original host broadcaster's live feed, and that broadcast by the appellant after the addition of its own inputs. In our view, thus, it is evident that not only in law are the broadcasting rights differently treated by Section 37, but in fact also, the telecast eventually done by the appellant is distinct from that of the host broadcaster except in the portions where the live action of the match is being telecast. However, even the live ball to ball feed is interspersed with the separate commentary of ESS and the other technical inputs such as hawk-eye and slow motion images etc. This clearly gives rise to an independent copyright in the modified feed whether it be treated and termed as broadcasting reproduction right or copyright. It is to be seen that even when the live action of the match is being telecast, the inputs of the appellant do make a meaningful difference to the eventual telecast. In a situation where crucial decisions like LBW, run out, caught behind or stumping are concerned, the role played by the expert employed by the broadcaster is of considerable importance, as a reputed former player is able to give his expert opinion on a controversial decision. The lay viewer constantly looks forward to the expert voice on controversial incidents. It is significant to note that that Cricket, unlike Soccer and hockey is not a continuous game. Between every delivery there is a pause, as the ball is fielded and relayed back to

the bowler, who returns back to his mark. In this period in particular, the inputs of the Commentators and experts become relevant and the contribution in no small measure makes the eventual telecast more interesting and more meaningful to the viewing public. Thus, the viewer would eagerly look forward to an input of a famous ex-cricketer on an interesting development in the field of play. The expert analysis of a caught behind or LBW appeal, upheld or denied by the umpire is bolstered with the help of slow motion replays, stump vision and the hawk-eye images. This makes the television viewing, in many respects, even more interesting and convenient than watching the match live. It is, thus, evident that the eventual product telecast by the appellant has its own distinct identity and a separate right, as it is distinct and different in many significant respects from the original feed of the host broadcaster. Accordingly, this would give rise to a separate right available to the appellant itself, in the eventual telecast bolstered by the input of the experts and the other technological innovations mentioned above. Accordingly, even if Section 61 was held to apply, the copyright of the modified feed would belong to the appellant alone and not C.A. or its host broadcaster, channel 9 and even on this count, the dismissal on the ground of non-compliance of Section 61 by the learned Single Judge is not sustainable.

23. Therefore, a lot of effort entailing considerable expenditure is undertaken by the broadcaster to bring the live feed of the match on television and the benefits of bringing the live feed of the match ought not to be reduced by the repeated telecast of the important portions of the match by a channel in a special programme which may adversely affect the commercial viability of the appellant's telecast. It is the broadcasting reproduction right of the broadcaster which is an exclusive right, including an independent copyright and any reproduction of any such work in any form and for excessive durations may amount to infringement of its rights. Excessive usage of the telecast of the appellant in the form of news, in a given case may amount to the infringement of the right of the broadcaster, which has the exclusive monopoly to broadcast the live feed of the match or any reproduction of it or of any programme before the start of the match or after the match is over. It is also noteworthy that if such a right of the broadcaster is not protected then the whole concept of an exclusive broadcaster producing a telecast or live feed of the event would become futile, diluted and uneconomical and thus, the rights of the broadcaster under such circumstances need to be protected. The principal use of the footage of the cricket match in such a format as produced by the respondents prima facie appears to create a visually engaging and commercially profitable programme, which deals exhaustively using the footage of the Appellant. Thus, the prolonged and repeated footage of the broadcast of the cricket match in the news channels, beyond what is permissible by the concept of fair dealing, may unfairly affect the appellant's exploitation of its rights. The appellant's goodwill, its relationship with the advertiser and its commercial prospects could be substantially damaged by this competition. Hence, the broadcasting reproduction rights of the appellant needs to be protected.

24. The learned counsel for the appellant has also relied upon the Statement of WIPO which are as follows:-

"Whereas the rights provided by copyright apply to authors, "related rights", also known as neighboring rights" concern other categories of owners of rights, namely, performers, the producers of phonograms and broadcasting organizations. Related

rights are the rights that belong to the performers, the producers of phonograms and broadcasting organizations in relation to their performances. Phonograms and broadcasts respectively. Related rights differ from copyright in that they belong to owners regarded as intermediaries in the production, recording or diffusion of works. The link with copyright is due to the fact that the three categories of related rights owners are auxiliaries in the intellectual creation process since they lend their assistance to authors in the communication of the latter's works to the public. A musician performs a musical work written by the composer; an actor performs a role in a play written by a playwright; producers of phonograms - or more commonly "the record industry" -- record and produce songs and music written by authors and composers, played by musicians or sung by performers; broadcasting organizations broadcast works and phonograms on their stations"

While no doubt the WIPO statement indicates that the rights of the broadcasting organisations are independent rights, nevertheless, this Court is not bound by WIPO or any other such agreements and we must interpret law in accordance with the legislative intent available from the Constitution of India or a Statute enacted by the Indian Parliament. The Court may take resort to such Conventions or Agreements only when there is a vacuum in the domestic laws as observed by the Hon'ble Supreme Court in the case of Vishaka vs. State of Rajasthan AIR1997 SC 3011 wherein it was held as under: -

"...Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law....".

However, in the present case, the Copyright Act of 1957 and the amended Act of 1994 enacted by the Indian Parliament form a complete legislation to deal with matters relating to Broadcast reproduction rights distinctively. The WIPO agreement is only mentioned in the context of the historical perspective, because in our view, what is to be considered while deciphering the Legislative intent is the statute itself and this Court would not be bound by WIPO or such other agreement unless incorporated in the statute by the Indian Parliament or if utilization of such covenant fell within the scope of the law laid down in the case of Vishaka (supra).

25. Even if we accept the respondent's plea on the presumption that copyright includes broadcasting rights and section 61 applies, since we have found the eventual telecast of the appellant to be distinct and different from as received by the host broadcaster, the independent copyright owner of the modified product is the appellant itself and not C.A. and the dismissal of the suit on the ground of maintainability by application of Section 61 of the Act is thus not warranted. This issue does not find mention in the learned Single Judge's judgment and we have therefore, dealt with it on the existing pleadings. It is amply clear from the Act itself, as the proviso to Section 39A in Chapter VIII relating to broadcasting reproduction rights specifically lays down, that where copyright subsists in respect

of any work or performance that has been broadcast, no license of the reproduction of such broadcast will be permitted without the consent of the owner of the Rights. The Legislative intent can be clearly discerned from the proviso to Section 39A which specifically mentions various Sections of the Act which apply to broadcasting rights with necessary modifications and adaptations and the proviso specifically mentions that where in any case an element of copyright subsists in respect of any work that has been broadcast, the license to reproduce such broadcast will take effect only with the consent of the owner of the right. In our view, in the present case the copyright owner of the new product, after additions/alterations, which makes the appellant's telecast significantly different from the original feed of the cricket match as received from the host broadcaster, Channel 9, on behalf of Cricket Australia (C.A.), can only be the appellant and not the C.A. or channel 9. Thus, any unauthorized and prolonged telecast/replay of the cricket match or portion thereof falling beyond the concept of fair dealing without the permission of the appellant, amounts to infringement of the broadcasting reproduction right, the monopoly of which belongs to the appellant as above. However, we make it clear that this position of law does not apply to news coverage falling within the ambit of 'fair dealing' by the respondent T.V. Channel.

26. The counsel for the respondent had contended that no restraint order can be made on the basis of mere apprehension of unfair dealing. Fair dealing is purely a question of fact which cannot be prejudged and of necessity can only be decided on case to case basis. The counsel for the appellant contended that there is no concept of fair dealing in the infringement of a copyright in a cinematographic film and therefore if it is to be held that what is broadcast by ESS amounts to copyright then the defence of fair dealing is not available at all as referred in Section 52B of the Act. Fair dealing is available as a defence in the case of a broadcast reproduction right by virtue of Section 39(b). The learned Single Judge relying on the judgment in the case of *Habburd & Anr. v. Vosper*, (1972) 1 All ER 1023l, held that the court finds it difficult to accept that a 30 second limit or a 7 minutes cap for the news channels can apply 'across the board' in all contingencies. The court thus cannot universalize any rule or any standard and cases have to be decided on the peculiar facts. However, in our view the application for interim relief ought not to have been rejected merely by holding that 30 seconds or 7 minutes cap cannot be a universal rule. The Court was, nevertheless, required to go into the facts and examine the extent and nature of the coverage to decide whether such coverage fell within the ambit of fair comment. The learned Single Judge is right in holding that such a 30 seconds/7 minutes cap cannot apply across the Board. For example, if there is coverage of the Olympics which contains several sports disciplines compressed in a short period of about 10 days, imposition of such a 30 seconds/7 minutes cap, would obviously be unjust and unreasonable. Similarly, in covering an event like the Football World Cup when simultaneously on a day 2/3 matches are played at different venues then the said cap of 30 seconds/7 minutes may not apply. In the circumstances of this case, it can be said that the appellants have prima facie shown sufficient materials in the form of the aggregate length of the clippings used by the respondents in their news programmes and sports reviews, to require consideration by the learned Single Judge to conclude whether such use amounted to unfair dealing. In our view the aggregate timing is a vital component of fair dealing and the question has to be decided on merits in each case. The learned Single Judge therefore was required to deal with the issue of what tantamounts to fair dealing after examining the facts and circumstances of the present case.

27. The question of fair dealing can only be judged on the facts and circumstances of each case as noted by Justice Winkelmann in the case of Media Works NZ Limited and Anr. vs. Sky Television Network Limited in the High Court of New Zealand (Auckland Registry) decided by judgment dated 18th September, 2007 wherein he held as under: -

"71. In British Broadcasting, the Judge had regard to guidelines a representative of BSB had provided to the producer of the programme. Those guidelines noted that fair dealing meant that the extract must be brief, and should be considered in the context of the length of the recording. For World Cup broadcasts, in relation to any one match, an extract of not more than 60 seconds duration was thought to be acceptable, repeated no more than 4 times in one day. The extracts had to be used within 24 hours of the event for it to amount to a "current event", and was only to be used in a programme that reported current events, e.g. not in a review of a player's career to date. The Judge referred to these as "fair and proper" guidelines, noting that a fair dealing defence may still be available even if one or other of the guidelines had not been strictly observed. However, the preparation and observance of the guidelines were considered to provide a solid foundation for a fair dealing defence for the purposes of reporting current events.....

[76] The rate of repetition of TV3's footage by Sky is in itself an unfair dealing with the material. It will erode to some extent at least, TV3's position as the exclusive broadcaster of the World Cup. The level of access to footage shown by Sky is such that for some viewers it will be enough to satiate, rather than whet their appetite for more coverage.....

[114] Having weighed these matters I consider that the balance of convenience favors the grant of an injunction. At this point I take a step back and consider where the overall justice lies. It lies with TV3. At considerable cost it bought the exclusive rights to broadcast Rugby World Cup matches. It has structured its business planning, investment and programming around that acquisition. TV3 has a strong case that Sky's use of its footage is beyond what might reasonably be necessary for reporting current events. Its use is likely to compete directly with TV3's own exploitation of its rights. TV3's goodwill (its brand, its audience, its relationship with advertisers) could be substantially damaged by that competition, but the damage would be difficult to adequately quantify." (emphasis supplied) We approve of and adopt the above reasoning and are of the view that the test laid down in the above judgment must of necessity be applied when determining the claim of 'fair dealing'.

In relation to the facts and circumstances of the case, to rely on the defence of fair dealing for the extended use of the sports footage beyond an acceptable period, may not be sustainable. The broadcasting rights of the cricket rests exclusively with the appellant and any form of commercial deployment of the footage in excess of 30 seconds per bulletin and a total of 2 minutes per day may negate the plea of fair defence. However, this may depend on the facts of the case, which the learned Single

Judge while dealing with the application for interim relief is required to consider. The plea of the respondent that a full fledged programme running upto 30 minutes, interspersed with commercial advertisements may not go beyond permissible limits of fair dealing is required to be considered in granting interim relief by the learned Single Judge by employing the tests laid down above by the New Zealand Court in *Media Works (NZ)* (supra) and those laid down by us, such as the departure in events such as the Olympics which may inquire larger coverage by the news channels. The respondents under the guise of news reporting could certainly show significant events such as a century/fall of wicket/attainment of landmark achievement in cricket and a scoring of a goal, grant/denial of a penalty and sending off a player in Football and Hockey. They may also show a controversial incident which occurred in the match. However, such events could not be shown to an extent where fair comment transpires itself into a commercially profitable programme showing several minutes of footage of the appellant or its report in a programme centered around a discussion. The reporting of news is undoubtedly a fundamental right vested in the news channel by way of Article 19(1)(a) of the Constitution but, however, repeated and prolonged telecast by the respondents of what was actually broadcast by the appellant, especially in a form of a special programme, may amount to commercial exploitation not protected by Article 19(1)(a), especially when the factum of the programme being aired later in the day is constantly advertised and announced by the news channel and such programmes are liberally interposed with commercials. In addressing the issue of fairness, it is necessary to look at the totality of the footage of the broadcast of the cricket match as shown by the respondents. The appellant contended that through the number of programmes and the rate of repetition of those programmes, the respondents are achieving an intensive level of broadcasting of the appellant's distinct and exclusive footage in direct competition with the appellant's telecast. It is also evident that such telecast by the news channels are in commercial competition with the appellant's telecast because of the amount and importance of the work which has been utilized. In light of these principles as noted above, we are of the view that the appellant's case, that the use by the respondents of the repeated broadcast of the cricket match in the various footage is not fair dealing, is certainly required to be considered by the learned Single Judge while disposing of the interim relief application. The learned Single Judge further held as under:

".....Judged from this standpoint, the court finds it difficult to accept that a 30 second limit or 7 minute cap can apply "across the board" in all contingencies. Similarly, the court cannot universalize that recourse to advertisements before or after broadcast of such clippings would be unfair. In the circumstances of this case, the plaintiffs have not shown sufficient materials, barring the aggregate length of the clippings used by defendants in their news programmes and sports review, to say that it amounted to unfair dealing. In any case, there is no imminent threat or danger of legal injury of such kind that damages or a claim for money cannot compensate. Even if the defendants' use of the clippings were, or partly were to be found as unfair use, the plaintiff can be adequately compensated in damages. On the other hand, the

nature of injunction sought is of such a broad nature that the court would well be drawn into details, while attempting to supervise it - a course of action hardly desirable if not entirely unfeasible.

35. For the above reasons, the plaintiff cannot be granted the ad-interim injunction sought for. The application is dismissed."

Furthermore, the finding that the injunction is incapable of supervision and enforcement is no longer valid and sustainable in view of the modern technological advances which can instantly capture and report within a short period, the nature and extent of the alleged infractions.

28. The learned Single Judge in paragraph 28 of his judgment had observed that "the right which the plaintiff claims is not as a copy right holder, but as an exclusive licensee. Now a licensee, exclusive or otherwise, has to conform to provisions of law". However, this is an error in the findings of the learned Single Judge as it is categorically contended in the plaint as well as the appeal before us that exclusive broadcast right has been granted to the appellant to broadcast/ telecast in India, the cricket matches between India and Australia. The relevant averments in the plaint reads as under:-

"The Plaintiff's principal production facility is located in Singapore. A total of 12 channels are broadcast from the Plaintiff's Singapore facility to about 26 countries. Plaintiff's production facility comprises 60,000/- square foot state-of- the-art broadcast operations including an array of studios, videotape libraries, graphics facilities, a complete earth station including eight up and down linking parabolic antennas, edit suites and all other equipment and infrastructure necessary for the purposes of production and telecasting of live international sporting events including cricket,. Plaintiff has 35 dedicated, fulltime, award winning professionals, staffing four non- linear, high end, server based edit suites and a critically acclaimed, national sports news gathering operation all over the world including India. Plaintiff retains three dedicated leased satellite lines from London. All live programming feeds originating in the western hemisphere are received in 'Singapore via these dedicated leased lines. The Plaintiff has engaged the services of the world class commentators such as Harsha Bhogle, Ian Chappel, Wasim Akram, Sunil Gavaskar, Ravi Shastri and Alan Wilkins etc. It would be relevant to mention that in the course of a cricket match, the Plaintiff creates the live feed by deploying the range of 18-26 cameras on the ground apart from software such as Hawk eye, Snickometer, virtual spectator and super slow motion etc. apart from the team of technicians, cameramen, editors, ground staff, producers, statistician and commentators apart from anchors like Gautam Bhimani. This vast team contracted/employed by the Plaintiff produces the entire feed of a cricket match which is transmitted/telecast by a satellite through the Plaintiff's facilities including leased satellite space to the various homes through different modes of transmission such as DTH and cable. It is in respect of this composite package/programme that the plaintiff claims broadcast reproduction right." (Emphasis supplied) Since not even a written statement was filed

controverting the above assertions, and only a reply to the application for interim relief was filed, the learned Single Judge erred in holding that the appellant was suing as an exclusive licensee. The pleadings clearly show that the claim was not as an exclusive licensee but for the infringement of broadcast reproduction right in the eventual telecast.

29. It has also been averred in the plaint that the respondents have unauthorizedly telecast the signals of the cricket match in a manner which was inconsistent with their primary obligation of being news-based channels. It was further averred that the respondents have indulged in using/appropriating without authority, substantial portion of the footage of the appellant's channel which had telecast the test matches exclusively from December 26, 2007 to January, 2008 for creating programmes which they were commercially exploiting. The action of the respondents, being inconsistent with the concept of fair dealing, was alleged to be violative of the appellant's broadcast reproduction right. Thus, what has been contended by the appellant earlier in the plaint and presently in the appeal is the fact that the broadcasting reproduction right of the appellant has been infringed and the appellant seeks legal remedy for the same. It is thus, apparent that the plaintiff in the plaint and the appellant herein, was suing as an owner of broadcasting right and not as a exclusive licensee, either of copyright or broadcasting right.

30. The learned Single Judge in paragraph 32 of his judgment had quoted the following: -

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

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

The Test indicated in Ashdown was based on the Textbook rd "The Modern Law of Copyright and Designs (3 edn. 2000)"

by Laddie, Prescott and Vitoria. The court held that:

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

However, in spite of quoting the 3 tests laid down in *Ashdown vs. Telegraph Group Ltd.*, [2001] 4 All ER 666, the learned Single Judge did not apply the impact of such tests on the facts and circumstances of the present case. The repetition of the appellant's broadcast of the cricket match (already published) by the respondents in the guise of various programmes, is clearly in the nature of commercial competition with the owner's work and it is to be considered whether it amounts to unfair commercial exploitation by the respondents by taking into account the amount and importance of the appellant's telecast of the appellant's rights to broadcast the cricket matches.

However, this above position of law expressed by us in this judgment should in no manner be construed as curbing the news channel's rights to have special programmes based on cricket/cricket matches. Indeed such a right is an inalienable part of the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. If, therefore, there is a cricket based programme involving discussion, analysis, interaction with the audience and other allied features without utilization of unreasonably excessive footage from the appellant's telecast, such right is in our view is fully protected. Indeed, in the facts of the case such analysis could certainly include the footage already telecast by news channels under the rights available to it, subject of course to the limitations imposed by the concept of fair dealing.

31. The learned Single Judge in his judgment had held that the mandate of Section 61 (1) applies in case of claims for infringement of broadcast reproduction right and the non-impleadment of the owner of the copyright is fatal to the maintainability of the suit. Similarly, the non-joinder of the owner of the copyright was held to render the suit liable to be rejected. However, we are unable to approve the view taken by the learned Single Judge. Section 39A of the Act relating to "other provisions applying to broadcast reproduction right and performer's right" has not expressly included Section 61 which deals with owners of the copyright to be made party to the proceedings. The inclusion of specific Sections of the Act in Section 39A and making them applicable to Broadcast Reproduction Right and Performer's Right clearly shows that the broadcast reproduction right is separate and distinct from copyright in a work. Thus, the Special Broadcast Reproduction Right conferred under Section 37 in Chapter VIII of the Act is a distinct and separate right conferred on every broadcasting organization and independent of the right of an owner of a copyright and the omission of Section 61 in Section 39A of the Act makes this position amply clear. The appellant's broadcast reproduction rights may be affected by indiscriminately using a substantial footage of the appellant's broadcast without the appellant's permission and may amount to commercial exploitation of the appellant's footage in the guise of fair comment, while purporting to telecast news bulletins. Thus, in our view the appellant is a broadcasting organization as envisaged in Section 37 of the Act and it was well within its right to seek a legal remedy to ensure that its broadcast was not commercially exploited by any other entity without its prior permission and without acknowledging its rights.

32. We also do not deem it necessary to discuss the impact of the Agreement dated 26th July, 2002, as we have found that the broadcast reproduction right in respect of telecast of live event like a Cricket match are separate and distinct right as from the copyright and as such Section 61 is not applicable to broadcast reproduction right. Even assuming that a copyright includes broadcast reproduction right and Section 61 applied, we are of the view that the eventual telecast by the

appellant being different and distinct from the telecast of the host broadcaster, the independent copyright owner of the eventual product is the appellant itself. In light of the above observations, it is not incumbent upon us to rely on the above said Agreement or go into the effect of suppression of its portions.

33. Thus, to sum up after considering the various aspects of the satellite broadcasting:-

A. We hold that the broadcast reproduction right as contended by the appellant are to be treated as separate, distinct and independent rights. We are therefore, unable to agree with the interpretation of the impact of Section 61 of the Act, which the learned Single Judge has preferred to adopt. B. We are also unable to subscribe to the view taken by the learned Single Judge that non-compliance of Section 61 of the Act leads to the legal position in the present case where the suit of the appellant warranted dismissal of the suit on account of not making the original owner Cricket Academy (C.A.) a party as per the mandate of Section 61 of the Act.

C. In our view, Section 61 of the Act having been specifically left out by the Legislature by virtue of Section 39-A of the Act specifying the applicable provisions of Chapter VIII of the Act to broadcast reproduction rights, clearly rules out the applicability of Section 61 of the Act and the learned Single Judge's view therefore does not commend itself for approval by us. D. We also hold that even if we assume that Section 61 of the Act were to apply, the dismissal of the suit was not justified in view of the independent copyright owned by the appellant in the eventual telecast comprising of vital inputs by the appellant.

34. Accordingly, the appeal is allowed. We have laid down the position of law and not passed any order on the interim relief application as this application was not pressed due to the impugned telecast already being over. However, we have laid down the law in respect of future broadcast/telecast. The learned Single Judge's impugned judgment dated 18th February 2008 is set aside and the suit shall be restored and placed for disposal before the learned Single Judge on 31st October 2008 subject to the orders of the Judge-in-charge (Original Side).

(MUKUL MUDGAL) JUDGE (V.K. SHALI) JUDGE September 26th, 2008 dr/sk