

Super Cassetes Industries Ltd. vs Myspace Inc. & Another on 29 July, 2011

Author: Manmohan Singh

Bench: Manmohan Singh

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HIGH COURT OF DELHI : NEW DELHI

Judgment pronounced on: 29.07.2011

+ IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008

SUPER CASSETES INDUSTRIES LTD. Plaintiff

Through: Mr Amit Sibal, Adv. with Mr Harsh
Kaushik, Mr Rahul Ajatshatru,
Mr Siddharth Silwal and Mr Shravanth
Shankar, Adv.

Versus

MYSPEACE INC. & ANOTHER Defendants

Through: Mr Rajender Kumar, Adv. with
Ms Latha R. Nair and Mr Prashant
Gupta, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. By this order, I shall dispose of the following applications:

a) IA No.15781/2008 under Order 39 Rule 1 & 2 the Code of Civil Procedure, 1908
(hereinafter referred to as the CPC).

b) IA No.3085/2009 under Order 39 Rule 4 CPC.

2. The Plaintiff has filed the instant suit for restraining infringement of copyright, damages etc. The plaintiff claims to be the owner of the copyright in the repertoire of songs, cinematograph films, sound recordings etc. The plaintiff claims to have over 20000 Hindi Non film songs and around 50000 songs in regional languages.

3. The plaintiff further states that the business of the plaintiff which is film producing, music distribution etc is largely dependant upon the exploitation of its copyright. The said copyright exploitation enables the plaintiff to sustain its creative activities thereby giving opportunities to many talents including composers, artists, singers, etc. The plaintiff states that the monetary gains arising from copyright exploitation further empowers it with financial strength to carry on its business of film making. The infringements of such works of the plaintiff, thus, causes royalty losses to the plaintiff and are responsible for the loss in the business of the plaintiff.

4. The plaintiff claims that the copyright exploitation of the works is done by the licensing system whereby the plaintiff gives public performance licences to the parties who in turn give the plaintiff the necessary royalty. The plaintiff has filed the catalogue in which the plaintiff has claimed copyright and also filed the documents to the effect of showing its licencing scheme.

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5. The defendant No. 1 is stated to be a social networking and entertainment website which offers a variety of entertainment applications including sharing, viewing of music, images, cinematograph works having its base in the United States of America. The defendant No. 2 is the owner of the defendant No. 1 which is stated to be a division of News Corporation, Fox Interactive media which is offering, border free online network that caters to consumers by giving them platform or tools.

6. As per the plaintiff, the defendant No.1 describes the website as a place for friends and projects its website as a place to upload pictures and videos. The said website myspace.com provides country specific content and is one of the most popular social networking and content sharing website in the world. The plaintiff contends that the defendants basic point of attraction in running this website is to make available the multimedia content including songs, pictures, clips which can be seen and shared by the user over the internet space. The said website of defendant No. 1 not only includes recently released infringing material but also the material which has not yet been released or is authorized for broadcast through the authorized distribution channels.

7. The features of the website are being described as that the user or visitor need not subscribe to the website in order to enable him to search and view the video on the same. But for the purposes of uploading IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.3 of 132 a video on to the website, the user is required to subscribe and create a user profile. It is also pointed out in the plaint that when a user in India visits the said website the said user is immediately forwarded to India centric version of the website namely in.myspace.com which is catering to the Indian community.

8. The plaintiff states that the website of the defendants contains the additional features and instructions which encourages the users and enables them to learn how to share videos. These additional functions create additional unauthorized copying, electronically store, transmit the content that infringes the rights of the others including the plaintiff.

9. The website of the defendants is stated to also generate revenue by offering of this illegal content/ infringing works. The said revenue is made through the medium of advertisements being displayed on each webpage. The whole business of the defendant No. 1 is specifically depends upon authorizing free uploading and then distributing the content through downloading or streaming content to end users.

10. The complaint of the plaintiff emerges from the kind of business model adopted by the defendants wherein it states that the songs, cinematograph works including the ones which are for new movies or upcoming movies distributing which the plaintiff earns its revenue and completes its cost of film making gets deprived due to illegal IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.4 of 132 dissemination of the songs, cinematographs works by the defendants on internet whereby the defendants encourages and authorizes the users to share these contents and the end users are benefitted with the said songs and films free of charge by in turn distribution by the defendants to the public at large.

11. The plaintiff has also explained the operation of the website of the defendants in the following manner:

User MySpace sends the streaming Simultaneously, a copy of the video and audio content from chosen video and/or sound MySpace s servers to the user s recording is downloaded from computer or other device where it the MySpace website to the can be seen and heard. user s computer.

User clicks on preferred search result.

MySpace provides for users a search and indexing function which allows users to search for the video/sound recording and provides a list of thumbnails search results in response to the search. MySpace makes a copy of the uploaded video or sound recording in its own software format, and stores it on its own servers. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.5 of 132 Subscriber uploads video recording (cinematograph film) or sound recording on MySpace website using facility provided by MySpace.

12. The plaintiff has stated that in the year 2007 a non disclosure agreement was signed between the plaintiff and the defendants and thereafter there were in talks with the defendants whereby the defendants were called upon to take the licences from the plaintiff. But, the talks broke down and the defendants rather offered the plaintiff to go for registration of rights management tool programme by way of email dated January 18, 2008. However, the plaintiff then gave a legal notice on 20.2.2008 informing the defendants about its rights. The reply to the notice of the plaintiff by the defendants was issued on 12.3.2008 wherein the defendants assumed that the content of the plaintiff copyright has been taken down and also that the same shall not be made available on the website in future.

13. However, in December 2008, it was realized by the plaintiff that the defendants have not removed the said infringing material from the website. The said infringing material despite the assurance of the defendants was still available on the website of the defendants. The plaintiff has enumerated the infringing material as on December 2008 in the plaint which can be outlined as under:

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LANGUAGE SUB-GENRE TITLE SINGER/ARTIS EXPECTED RELEASE DATE
PUNJABI ALBUM Punjaban Pammi Bai 17th Dec 2008 PUNJABI ALBUM As Kudiye
Labh Janjua, 17th Dec 2008 Kuldeep Sandhu, Karan Mahi, Onkar Onki, Vicky Bhoi
and Kulwinder Singh HINDI ALBUM Hari Om Hari Haran 18th Dec 2008 PUNJABI
ALBUM Bottle Wargi Ravinder Grewal 18th Dec 2008 PUNJABI ALBUM Don t
Mind Aman Riar 24th Dec 2008 HINDI FILM JAANE TU YA IMRAN KHAN,
12.12.08 JAANE NA GENELIA D SOURZA, MANDHRI PADHNIS, AIYAZ KHAN &
OTHERS HINDI COMPILATIO 2008 IT S 12.12.08 N ROCKING (SET) OF TWO
CD, MC-SINGLE) HARYANVI RAJA NARENDRA 16.12.08 HARISHCHAND
KAUSHIK, RA MEENAKSHI PANCHAL PUNJABI ALBUM DEEWANA SANDEEP
18.12.08 TERA SANDHU PUNJABI ALBUM SARDAR GARY HOTHI 22.12.08
BHOJPURI FILM SWARG JAISAN DHEERAJ 26.12.08 GHAR SANSAR- PANDIT,
MILI PART 1 & 2 PRIYA, SUBHASH BHARGAV, VANDANA, KSHITIJ PRAKASH,
RENU MISHRA, VIJAI RAI

14. Thereafter, the plaintiff filed the present suit feeling dissatisfied with the assurances of the defendants and sought the interim reliefs from this court to the following terms:

"(i) grant an order of permanent injunction
restraining the defendants, their officers,

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employees, agents, servants and representatives and all others acting on their behalf and in active concert or participation with them or any of them from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise infringing in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the

plaintiff owns exclusive, valid and subsisting copyright(s);

(ii) grant an order of permanent injunction restraining the defendants, their officers, employees, agents, servants and representatives and all others acting on their behalf and in active concert or participation with them or any of them from causing, contributing to, inducing, enabling, facilitating or participating in the infringement of the cinematograph films, sound recordings and/or the underlying literary or musical works in which the plaintiff owns exclusive, valid and subsisting copyright(s) on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise; and

(iii) grant an order of rendition of accounts by the defendants to the plaintiff;

(iv) grant an order requiring the defendants jointly and severally to pay damages as stated hereinabove to the plaintiff;

(v) grant costs of the instant suit to the plaintiff; and

(vi) pass any other such order(s) in favour of

the plaintiff and against the defendants as may be deemed fit and proper by this Hon ble Court in the interest of justice and equity."

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15. The matter was first listed before this court on 19.12.2008 when the defendants also appeared as caveators and this court was passed the following order :

"I.A. No.15781/2008 (u/O 39 R 1 and 2 CPC)Notice. Counsel for the defendants accepts notice. He seeks and is granted four weeks time to file a reply to the application, with an advance copy to the other side, who may file a rejoinder thereto, if any, before the next date of hearing.

In the meantime, as an interim measure and without prejudice to the rights and contentions of the respective parties, the Plaintiff agrees as a gesture of goodwill, to handover the copies of the albums mentioned in para 47 of the plaint to the defendants, for the defendants to ensure that the copyright of the Plaintiff in any of the aforesaid audio visual, songs, sound recordings and literary and musical works is not communicated to the public through/on/via the website of the Plaintiff www.myspace.com.

The Plaintiff shall also furnish an updated catalogue of its works in which it has a copyright, to the defendants. The defendants shall make an endeavor to ensure removal of the infringing contents in which the Plaintiff have a copyright, from its aforesaid website and file an affidavit of compliance in this regard before the next

date of hearing....."

16. The said order was challenged before the Hon ble Division Bench, wherein the Hon ble Division Bench passed the following order with the observation that the said order is an interim measure and will not come in the way of the Learned Single Judge in deciding the interim IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.9 of 132 applications. The said order of Learned Division Bench is reproduced hereinafter:

"In our view the prayer in the respondent's plaint is general in nature. It does not refer to specific titles in respect of which infringement has taken place. The catalogue when printed out gives the name and title of songs and films in which the Plaintiff claims copyright. The plaint does not state that all of the songs/films have been uploaded on the appellant's web-site. However, the scope and nature of the plaint is left to be determined in the suit. In light of this fact, we are of the view that as and when the respondent provides details of its songs and films which have been uploaded on the web-site of the appellant, the appellant shall immediately take remedial measures to remove the same from its website not later than one week from the date of such communication. In our view, if such requisitions of the respondent are complied with within a week by the appellant, it would constitute sufficient protection of the respondent's rights as an interim measure, and would demonstrate the endeavour of the appellant to comply with the Order dated 19th December, 2008. We, however, make it clear that nothing said in this order would come in the way of the decision of the learned Single Judge."

17. The defendants have filed its written statement and replied to the application seeking interim injunction. The defendants have also filed an application under Order 39 Rule 4 seeking modification of the order passed on 19.12.2008. The defendants have also amended the written statement and in the amended written statement they have raised the following defences :

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a) This court does not have territorial jurisdiction to entertain and try the present proceedings on the grounds:

The defendant No.1 is a foreign national and is carrying on business outside the jurisdiction of this court in US.

No part of cause of action has occurred within the territorial jurisdiction of this court.

The defendant No.1 is not amenable personally to jurisdiction of this court and therefore cannot be compelled to be under the jurisdiction of this court.

The website of defendants cannot close the jurisdiction to this court as it does not pass the tests laid down in the case of *Banyan Tree Vs. A. Murali Krishna Reddy & Anr*, 2010 (42) PTC 361 (Del).

The exercise of jurisdiction by this court would mean that the court is giving extraterritorial effect.

b) That the suit is not maintainable as the prayers made in the suit are non specific and if granted it will impose impossible burden upon the defendant No. 1. The plaintiff has failed to specify in respect of which works, it is seeking injunction order and thus the suit is not maintainable.

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c) The prayers made in the suit are open ended and the blanket injunction of the kind cannot be granted by the court. No qua timet action is maintainable in suit for copyright infringements

d) The plaintiff has made certain misrepresentations about the facts which according to the defendants were not mentioned in the legal notice in the year 2008 and the defendants have clarified all the aspect work wise.

e) The acts of defendants are those of intermediary providing free of cost platform to the users without any actual or direct knowledge of the content being uploaded and has no role in selection of the content so uploaded. The defendants have no control over the said content being uploaded as the portal of the defendants is such where it cannot exercise any such control.

f) The acts of the defendants are those of intermediary and are protected under the provisions of Section 79 of Information Technology Act, 2000. The said provision will act as safe harbor provisions of US Digital Millennium Copyright Act ("DMCA") whereby the liability of the defendants shall be exempted by operation of Section 79 of IT Act, 2000.

g) The agreements or the assignments which are placed on record by the plaintiff are defective. The said agreement reveals that the rights of the movies vest with the producers and they have retained IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.12 of 132 the said rights including internet rights. Thus, the rights which are asserted by the plaintiff actually do not belong to the plaintiff.

h) The defendants only provides a means for file sharing where the acts which are performed may or may not be infringing and thus mere providing of means is no infringement under the eyes of the law.

i) The acts of the defendants are protected under the provisions of Digital Millennium Copyright Act ("DMCA") of United States.

j) The defendants have provided the term of use agreement with users which reads as under:

"8. Content / Activity prohibited. The following are examples of the kind of Content that is illegal or prohibited to post on or through the MySpace Services. MySpace reserves the right to investigate and take appropriate legal action against anyone who, in MySpace's sole discretion, violates this provision, including without limitation, removing the offending content from the MySpace Services and terminating the Membership of such violators. Prohibited Content includes, but is not limited to Content that, in the sole discretion of MySpace:

.....

8.8. constitutes or promotes an illegal or unauthorized copy of another person's copyrighted work, such as providing pirated computer programs or links to them, providing information to circumvent manufacturer-installed copy-protect devices, or providing pirated music or links to pirated music files.

.....

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.13 of 132 8.16 Violates the privacy rights, publicity rights, copyrights, trademark rights, contract rights or any other rights of any person"

Thus, the defendants themselves require their users to respect the copyright of the others and have all intention to remove the infringing content whatsoever from its website.

k) The defendants do not derive the monetary gains against the advertisement in the user generated content. The advertisements may exist on the same page as on User Generated Content but they are not really against the user generated content but against the licensed content.

l) The defendant No. 1 acts as merely a licensee of the user wherein it takes a limited license from the user to add, delete or modify the content so that the same is befitting to its website to make it viewable. But the said defendant does not have any other license to sell those works or make it public outside its services.

Vide clause 6.1 of the User Agreement, the said defendant binds its users to grant it a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and distribute such UGC solely for the purposes of the website.

The said clause reads as under:

"6.1 MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.14 of 132 works of authorship, applications, or any other

materials (collectively, "Content") that you post on or through the MySpace Services. After posting your Content to the MySpace Services, you continue to retain any such rights that you may have in your Content, subject to the limited license herein. By displaying or publishing ("posting") any Content on or through the MySpace Services, you hereby grant to MySpace a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such Content solely on or through the MySpace Services, including without limitation distributing part or all of the MySpace Website in any media formats and through any media channels, except Content marked "private" will not be distributed outside the MySpace Website. This limited license does not grant MySpace the right to sell or otherwise distribute your Content outside of the MySpace Services. After you remove your Content from the MySpace Website we will cease distribution as soon as practicable, and at such time when distribution ceases, the license will terminate. If after we have distributed your Content outside the MySpace Website you change the Content's privacy setting to "private," we will cease distribution of such "private"

Content outside the MySpace Website as soon as practicable after you make the change."

m) The uploaded content can be identified only by way of URL (Uniform Resource locator) as an address and the defendants cannot thus segregate the infringing or non infringing works.

n) The defendants have installed a notice and take down procedure in compliance of Digital Millennium Copyright Act ("DMCA") of US same as earlier one wherein, any proprietor who has a reason to believe that the copyrighted content has been posted on the website, can issue notice and ask to take down the request and the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.15 of 132 defendants will immediately take the corrective measures to take down and remove the said content.

o) The defendants have also provided three safeguards on its own:

The Hash Block Filter

Take Down stay Down

Rights management tool

The Hash Block filters prevents the deleted content from being reposted by taking finger print of the content.

The Take Down stay down contents also prevents the repetitive reposting of the file containing identical content. Thus, the said filter is also a useful identifier for preventing repetitive infringement.

The third tool has been explained by the defendants in detail which is as under:

The most powerful filtering tool that defendant No.1 makes available to copyright owners is the free RMT Copyright Filter. The defendant No.1 allows any copyright owner to register for and use this tool at no charge subject to a single registration agreement. A copy of the standard RMT Registration Agreement applicable in this behalf has been filed along with the list of documents. To take advantage of the RMT, all that the copyright owner needs to do is, IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.16 of 132 register with the defendant No.1 and then create "fingerprints" of its audio or audio visual content (using the free software that the said defendant makes available through its filtering vendor called Audible Magic). The copyright owner submits the fingerprints to the defendant's filtering vendor with associated business rules, e.g., the copyright owner can decide to block all of its content or rather allow users to post certain pieces of content that it is trying to promote.

Thereafter, if the copyright owner instructs that all of its content should be blocked, the defendant No.1's RMT Copyright Filter will be set to block all content uploaded by users that matches the copyright owner's content. This means if any piece of content is uploaded that matches any 30 seconds of the copyright owner's content, it would be blocked (the 30 seconds of matched content is the technical limit for the filtering technology). If the copyright owner, therefore, submits fingerprints to the RMT Copyright Filter, it can avail themselves of extremely broad copyright protection on its website. Upon signing up for the RMT (as well as signing Audible Magic's own short agreement regarding the use of its signature generation software), the content owner need not ever part with its content to receive the benefits of filtering. Rather, the content owner need only itself create the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.17 of 132 fingerprints of its content, by using Audible Magic's free software, and then send such fingerprints to Audible Magic with appropriate usage instructions (i.e., "block" or "allow"). The defendant No.1 also periodically runs the filter retroactively over its website, again at its own cost, over all the content that has already been posted on its website. Accordingly, if content was uploaded by a user before a copyright owner was able to add it to Audible Magic's reference database of fingerprints, the filter will catch such previously uploaded content and remove it.

Thus, as per the defendants all these measures are nothing but safeguards to prevent infringement and sufficiently demonstrates their bonafides and non involvement in the infringing acts.

p) The defendants have launched their India operations in December 2007 and immediately informed all the music companies about its right management tool so that the infringement can be minimized and the plaintiff cannot blame the defendants for its own reluctance to subscribe to such facility and for the resulting

infringements due to its non subscription.

q) That the interim arrangement recorded in the Hon ble Division Bench s Order dated March 6, 2009 embraces the "notice and take down" protocol set forth as a legal norm in the laws across the world including the laws of India to deal with the issues of on-line IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.18 of 132 liability. Consequently, the said interim order represents the only feasible answer to the grievance of the Plaintiff, if found to be well founded in law and fact.

r) The Plaintiff has made misrepresentation of facts that the defendants do not have any control over the content posted on their website by the users. Further, the defendants do not target Indian customers. The advertisements that may appear along with the thumbnails are a result of an automated process carried out by a search engine, which is term centric and not content centric.

18. The applications came up for hearing from time to time and clarifications were also sought from the parties after reserving the matter for orders.

19. Learned counsel Mr. Amit Sibal appearing on behalf of the plaintiff has made his submissions which can be enunciated as under:

a) Firstly, learned counsel Mr Sibal has submitted that the acts of the defendants wherein the defendants have used the copyrighted works of the plaintiff without licence or any authority, amounts to primary acts of infringement. Learned counsel has placed reliance on the provisions of Section 51 (a) (i) of the Copyright Act, 1957 (herein after referred as to as „Act) and argued that the defendants are communicating the works of the plaintiff to the public without IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.19 of 132 authority or licence and thus causing royalty losses in addition to making the work available to the public which only owner of the work is entitled to do. Therefore, the present case is a squarely a case of primary act of infringement as provided under Section 51

(a)(i) of the Act.

b) Secondly, learned counsel Mr Sibal has argued that the present case comes within the purview of Section 51 (a) (ii) of the Act as the defendants by providing a space to the users and enabling them to communicate the work to the public for the defendants own profit are actually permitting the place for infringement for their profit which is an infringement prescribed under Section 51 (a) (ii) of the Act. Mr. Sibal argued that providing webspace to the user is amounting to permitting the place. The expression "place" has to be interpreted to subsume not merely physical place or space but also space at the virtual world of internet. It is also pointed by the learned counsel that the defendants has not, in the pleadings, contested that

MySpace website is a "place" within the meaning of Section 51 (a) (ii) of the Act.

c) Further it is explained by Mr Sibal that the defendants have not disclosed to the court that the defendants' acts are not totally without consideration in providing the space to the users. But, actually the defendants have purely and largely have commercial IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.20 of 132 interest in operating this kind of arrangement. As per Mr Sibal, it would not be unapt to call this as purely a commercial model as the defendants are reaping profits from all the advertisers by putting the advertisements along side the sound recordings and the cinematographs works of the plaintiff. By doing all this, the defendants are permitting a place to be used for infringement for profit. The same is an act of infringement under Section 51 (a) (ii) of the Act.

In order to support his contention Mr. Sibal relied upon the following judgments:

Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd. (AIR 2004 SC 3540) Super Cassette Industries Ltd. v. Nirulas Corner House (P) Ltd.148 (2008) DLT 487 is relied upon to contend that the similar argument like in the present case that the defendant business in the website includes the usage of space for infringing as well as non infringing purposes by the various users, was raised in that case wherein the court was concerned with usage of the infringing works by the Hotels/ the defendants therein who took the stand that the hotel anyways charge the customers for viewing the television whether it is an infringing work or otherwise, thus the defendants therein sought to justify that the said acts does not come within the purview of Section 51 (a) (ii) which is permitting the place for profit for infringement purposes. The court as per the learned counsel for the plaintiff has rejected the said argument in the following words:

"22. The plaintiff has been able to show that the defendants are using cable connection and extending facilities of television to their patrons in the hotel IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.21 of 132 rooms, for payments are received. In this view, prima facie, the content of songs and videos broadcast are communications to the public....."

d) Learned counsel Mr. Sibal submitted that the case of the defendants do not fall within the exception provided under Section 51 (a) (ii) of the Act as the defendants are doing the infringement with knowledge and also they have a reason to believe that such acts would amount to infringement of copyright.

Mr. Sibal has provided following reasons whereby it can be said that the defendants' acts of communicating the work are coupled with knowledge:

Clause 9 of The Terms of Use Agreement of MySpace with the user itself makes it evident that MySpace itself reminds its users not to upload content which can

infringe anyone's copyright on MySpace.

In paragraph 29 of the Written statement the defendant No. 1 itself has listed various tools that it is supplying to copyright owners to deal with the infringement taking place on the MySpace's website.

e) Learned Counsel Mr. Sibal submitted that the argument of the primary infringement can be strengthened by looking at Section 14 of the Act wherein copyright means right to do or authorize the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.22 of 132 doing of the act. Thus, the said acts are the acts of the owner and the defendants while providing a space at the internet is authorizing the communication of the work to the public by which large segment of public is able to hear, listen and watch the cinematograph and musical works of the plaintiff without its authorization. Thus, the defendants' acts amounts to authorizing the infringement which itself is a separate infringement by way conjoint reading of Section 14 read with Section 51.

Mr. Sibal has referred to extensive English case laws included the ones decided in Australia on the subject of authorizing the infringement which can be enlisted as under:

University of New South Wales v. Moorhouse (1975) CLR 1 Universal Music Australia Pty Ltd. and Ors. v. Sharman License Holdings Ltd. and Ors Australasian Performing Right Association v. Jain, (1990)18IPR663 Roadshow Films Pty. Ltd v iiNet Limited, [2010] FCA Arista Records, Inc. v. Flea World, Inc. 2006 WL 842883 (D.N.J.).

Thus, it is the submission of Mr. Sibal that the defendants' acts are nothing less than providing means to an infringement for profit which is equally considered to be an infringement. The said infringement also gets established when the defendants' exercises full control over and above the user generated content and other IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.23 of 132 determinative factors which are well settled by the new line of decisions as mentioned above.

f) Learned counsel Mr. Sibal vehemently argued that the "notice and take down" alternative which has been suggested by the defendants do not mitigate the wrongs of the defendants and is not a sufficient safeguard for an infringement which occurs on day to day basis.

This has been explained by Mr. Sibal by informing that the new musical and cinematograph works are made from time to time, as and when there are promotions of new movies. The availability of the said trailers or musical works on internet would mean sharing the same with public at large. Notice and turn down provisions which provides the aggrieved party to get the defendants to notice the already occurring infringement and thereafter the defendants remove the contents on internet. The said procedure is inappropriate and does not remedy the infringement, as by the time notice to turn down is given by the plaintiff to the defendants, infringement is already caused whereby the works of the plaintiff are already circulated to the public at large.

Thus, the procedure suggested by the defendants to first make the infringing work available and then to delete on request is IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.24 of 132 bad and puts to the plaintiff into irretrievable harm by causing infringement of each and every new work of the plaintiff and enough damage is already done prior to making such turn down request. As per Mr. Sibal, the question has to be seen from the perspective as why the defendants should be at all allowed to cause infringement of the plaintiff works at the first place and more so when the said acts are the conscious acts where the defendants are also getting benefitted.

g) It is also the contention of Mr. Sibal that the defendants, refuge under the safe harbor provisions of the law will not be applicable to the present case. The present case is to be decided upon the existing legal position and the law of the land and not as per the US Digital Millenium Copyright Act. The said act and provisions under the said act does not extend to India and neither there is any provision under the existing laws which provides such safe harbor provisions and in the absence of the same, the discussion relating to the same in relation to infringement of the plaintiff's works in India becomes irrelevant. In short, the Digital Millennium Copyright Act ("DMCA") is not applicable to the present dispute.

By making the above submissions, Mr. Sibal argued that the plaintiff has prima facie case as there is no denial to the title of the works owned by the plaintiff and there are infringing activities IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.25 of 132 being carried on the internet without authorization of the plaintiff. Further, the defendants are doing the same deliberately and causing the plaintiff royalty losses. The balance of convenience also lies in favour of the plaintiff and they are more inconvenient in the event of non grant of injunction as their works are continuing to be infringed on internet. On the other hand, the defendants can still continue their acts without displaying the works of the plaintiff's on the web.

The plaintiff is put to irretrievable harm due to the illegal acts of the defendants and its extensive royalty losses due to the same and the defendants have nothing to loose, except, the illegal earnings arising out the infringing activities. Thus, as per the learned counsel Mr Sibal, the present case warrants the grant of injunction as per the prayers made in the injunction application and the order dated 19.12.2008 which has been modified by the Division bench further records that the same shall not come in the way of the learned single judge to decide the injunction application and thus this court can conveniently grant and extend the injunction in terms of the injunction application.

20. Per contra, Mr. Rajinder Kumar, advocate, appearing on behalf of the defendants has resisted the injunction application and also submitted that the present case does not warrant the grant any injunction IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.26 of 132 at all. Learned counsel Mr. Kumar has made the submissions which can be outlined in the following terms.

a) Mr. Kumar firstly submitted that this court lacks necessary territorial and personal jurisdiction to entertain and try the proceedings against the defendants who are carrying on business, residing and personally works for gain in the United States of America. Mr. Kumar in order to buttress his submissions relied upon the following :

The defendants are operating, carrying on its business, working for again outside the territories of India. The defendants are not personally amenable to the jurisdiction of this court.

This court can exercise jurisdiction only to the extent of the applicability of the law in India and not otherwise. This court cannot grant any orders which would have the effect to extending the same outside the territories of India. The present case lacks territorial jurisdiction in view of the well settled law by this court in the case of *Banyan Tree (Supra)* wherein this court has extensively dealt with the subject of jurisdiction in the cases involving websites. The said case falls within the observations of *Banyan Tree* IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.27 of 132 (*Supra*) and thus this court does not have territorial jurisdiction to entertain and try the present proceedings.

Even if the web-site of the defendants is interactive, the same by itself is not sufficient to clothe jurisdiction upon this court.

The defendants web-site, which is accessible and available to all and sundry from any part of the world, is not specifically targeted at users in India. The Plaintiff has not shown or pleaded *prima facie* that the defendant No.1 „purposefully availed itself of the jurisdiction of this Hon ble Court; that the nature of the activity indulged in by the defendants by the use of their web-site was with an intention to conclude a commercial transaction with the web-site user (since the defendant No.1 s services are completely free of charge); and that the specific targeting of this forum state by the defendants have resulted in an injury or harm to the Plaintiff within this forum court. The Plaintiff has pleaded that the defendants web-site is a highly interactive web-site which not only permits users to access the contents thereof but also to subscribe to the services provided by the defendants by "signing up" for such services, including, the uploading and downloading of IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.28 of 132 videos available on the web-site. The plaint and the documents filed by the Plaintiff no-where show that the defendants use of its web-site is with an intention to conclude a commercial transaction with its users. On the contrary, the subscription to the services offered on defendants web-site is free and does not involve any future payment.

Even for the purposes of Section 20(c), CPC, in order to show that some part of the cause of action has arisen within the jurisdiction of this Hon ble Court by the defendants use of the internet, the Plaintiff must show and prove that not only the defendants specifically targeted viewers within the jurisdiction of this Hon ble Court but also that some commercial transaction using the web-site was entered into by the defendants with a user of its web- site within this forum resulting in an injury or harm to the Plaintiff within the jurisdiction of this Hon ble Court. No such material has been placed on record by the Plaintiff that the defendants have entered into commercial transactions with the users of its web-site in Delhi or anywhere in India for that matter.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.29 of 132 Further, the Plaintiff has sought to establish jurisdiction on the basis of certain print-outs from the defendants

web- site to purportedly show availability of the Plaintiff's works on the said web-site for public performances, display and communication of the same to the public. No details of the users involved have been provided anywhere in the plaint. These print-outs seem to indicate that the Plaintiff has set-up its own people to access the defendants' web-site and engineer the search results to suit its convenience. As held by the Hon'ble Division Bench in the case of *Banyan Tree (Supra)*, it would have to be a real commercial transaction that the defendants have with someone not set-up by the Plaintiff itself. The *Banyan Tree (Supra)*, opinion further holds that if the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The Plaintiff in the present case has failed to aver in the plaint and place along with it any supporting material to Thus, as per Mr. Kumar, learned counsel for the defendants, this court lacks the territorial jurisdiction due to the above said IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.30 of 132 reasons and this court should reject the plaint or return it to be presented before the appropriate forum.

b) Mr. Kumar learned counsel for the defendants has argued by explaining the meaning of copyright in the cinematograph films that the copyright in any work can be infringed when the infringer actually indulge into the said act of infringement. The infringement cannot occur for the acts which the said defendants may indulge in future or which are not even entered into occurrence. It is the contention of learned counsel for the defendants that the plaintiff is seeking the general kind of injunction which is impermissible in law as there must be specific acts complained of for infringement to happen and the court to prevent those.

Mr. Kumar has drawn analogy from Trade Marks Act, 1999 wherein the language of provision under the chapter of infringement uses the wordings "Likelihood of confusion" which according to him means permitting the plaintiff to sue for future wrongs, however the as per the learned counsel no such language subsists in the Copyright Act and in that event of the matter, it is inappropriate for this court to consider the grant of injunction for the future wrongs.

c) Learned counsel thereafter started explaining the working of the defendant's website by showing the technical background of the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.31 of 132 internet and how it emerged. Learned counsel has taken pains to explain the meaning of the word internet by citing some English judgments. Counsel has then submitted that the defendants' website is premised on the newer and the latest version of web 2.0 which permits interactive interface with the users using it which includes, media, games, songs, pictures and other multimedia.

d) Learned counsel further argued that there is a difference between the infringement of the copyright happening in the physical form or the tangible form and the acts which are done in the virtual world of the internet which are not available in the physical form. As per the learned counsel, that makes a lot of difference. As per the learned counsel, there is a world wide debate over the management of communication on the internet. There are two international covenants entered into by the countries who are members of World Intellectual property Organisation which are known as WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT).

Learned counsel argued that the court should consider the provisions of these two treaties though India has not even ratified these conventions in order to consider the provisions relating to communications made over internet and its impact. Learned counsel in order to support his contention also relies upon the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.32 of 132 judgment passed by the Apex court in Entertainment Network (India) Ltd vs. Super Cassetes Industries, 2008 (9) SCALE 69 wherein the apex court has expressed its opinion about the Application of International Conventions in India in the following words.

"79. It is for the aforementioned limited purpose, a visit to the provisions of International Conventions would be necessary.

80. In interpreting the domestic/municipal laws, this Court has extensively made use of International law inter alia for the following purposes :

- (i) As a means of interpretation;
- (ii) Justification or fortification of a stance taken;
- (iii) To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;
- (iv) To reflect international changes and reflect the wider civilization;
- (v) To provide a relief contained in a covenant, but not in a national law;
- (vi) To fill gaps in law. "

Mr. Kumar thus submitted that the Article 8 of the said convention may be read into by this court in order to find favour in the defendant's stand that the mere act of facilitating over internet does not amount to infringement.

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e) Learned counsel has argued that the defendants by providing online space to the subscribers enabling them to share media online is acting as an intermediary within the meaning of Section 79 of the Information Technology Act (as amended in the year 2009) and the acts of the defendants are thus saved by the Information Technology Act 2000 wherein its acts are without knowledge of the infringing nature of the communication.

f) Learned counsel further argued that this court should interpret the provisions of the Copyright Act and information technology Act harmoniously wherein the IT Act will come into play in the same manner as that of the safe harbor provisions of US statute which saves the liability of the defendants. The argument which has been raised by the learned counsel for the defendants is that it cannot be said that on one hand the IT Act saves the intermediaries from the liability and on the other hand the same intermediaries are exposed to strict liability provisions of the Copyright Act. Both should operate simultaneously and the safeguard under IT Act, thus, must also shield the defendants from the liability under the Copyright Act as well which is no different from its operations on the internet.

Learned counsel has further explained the preceding argument in detail by enumerating the working process of the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.34 of 132 defendants on the internet which establish that the defendants are no more than an intermediary who is doing this without knowledge and despite due diligence the content cannot be known to the defendants at the first instance. Learned counsel submitted that defendant No. 1 is predominantly a service provider/ intermediary, providing a free of cost platform to its users and offering an interactive user submitted network of friends, personal profiles, blogs, groups, photos, music, video, instant messaging services, mobile services and videos. It is further submitted that the said defendants do not directly upload any content on its website (except for content that it licenses and creates which constitutes a very small portion of the content on its website), but merely provides a platform to its users for uploading content under certain terms and conditions.

Thus, as per the learned counsel for the defendants, the acts of the defendants are purely of the kinds of intermediary and the defendants are just facilitating the space and cannot be held to be within the knowledge of the content which is being uploaded by third party unless the right holder brings it to the notice of the defendants.

g) Learned counsel further submitted that it is not merely without the knowledge of the defendants but also impossible to monitor each IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.35 of 132 and every content which is being uploaded on the website. The same is, therefore, the compulsion of the defendants while operating on internet as the internet portal is open to world at large and due to the nature of the portal which is such that anyone can upload anything. The defendants being a facilitating entity cannot be held responsible due to its impossibility of monitoring each and every content over the internet unless the active participation of the defendants is established.

h) Learned counsel for the defendants further submitted that the defendants are not gaining any monetary benefits arising out the user generated content. But rather the advertising as per the learned counsel for the defendants is no doubt a business model of the defendants but is against the licensed content.

Further it has been argued that the advertisements may also appear automatically as the user types keywords and search for the same. This is usually a part of "Adwords" which are in the nature of

hints or options given by the search engines as and when the user asks any query from search engine. The example of the same is given that supposingly if the user is typing Punjaban. The song may appear and along side the same some options of Punjabi matrimonial may appear automatically which happens due to the search engines exercise and not due to the acts of the defendants. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.36 of 132

j) Learned counsel submitted that indeed it is correct that the defendants takes the licence from the user to use, add, delete from or publicly perform or publicly display, publicly perform, reproduce and distribute the said content for the purposes of the website. However, the said licence is a precautionary step to avoid any objection from any users of the defendants. Learned counsel also states that the same does not mean that the defendants requires the licence for such reformatting.

k) Learned counsel for the defendants further submitted that the defendants have already ensured that its website has measures to remove or prevent copyright infringements. The said measures are taken in consonance with the Digital Millennium Copyright Act of USA. The said procedure is explained by the defendants below :

"In pursuance of the above stated categories contemplated in the DMCA, the Defendant No.1 has installed a "notice and take down procedure" as prescribed in the DMCA and offers the same free of cost to all copyright holders, who in their perception are likely to be affected by transmission/uploading of content by the users. Accordingly, if a copyright owner believes that his or her work has been copied and posted on the Defendant No.1's website in such a way that constitutes copyright infringement, the Defendant No.1 has provided information in the Frequently Asked Question (FAQ) section on its website to enable the copyright owner to file an infringement notice. Towards this end, the Defendant No.1 has provided details of its copyright agent in the User Agreement so that such copyright agent may be IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.37 of 132 notified of the claim of infringement, consisting of the following information: (i) an electronic or physical signature of the person authorized to act on behalf of the owner of the copyright interest; (ii) a description of the copyrighted work that the copyright owner claims to have been infringed; (iii) a description of where the material that the copyright owner claims to have been infringed is located on the said Defendant's website [providing the URLs of the claimed infringing material]; (iv) the address, telephone number, and email address of the copyright owner; (v) a written statement by the copyright owner that he/she has a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; (vi) a statement by the copyright owner that the above information in its notice is accurate and, under penalty of perjury, that he /she is the copyright owner or authorized to act on the copyright owner's behalf.

The defendant No.1 also automatically, and, at its own initiative and expense, takes two additional steps to hinder users from reposting that same content. The defendants records the "hash" of the file that has been removed which is a unique

identifier for that file. The defendants also create a "fingerprint" of the content that has been removed, which is a unique identifier for the content. The defendant No.1 uses both the hash and the fingerprint to achieve the goal of preventing the same content that has been removed from being re-posted. After a copyright owner requests that user-posted content be removed from the defendant No.1's website, it automatically adds the hash to the Hash-Block IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.38 of 132 filter and fingerprint to the Take Down Stay Down Filter.

If any user tries to repost the same exact file, it should be blocked by the Hash-Block Filter, which will recognize the same file. If any user tries to repost the identical content (even if the file is different because the content comes from a different source), the Take Down Stay Down filter will recognize the identical content and block it from being reposted. These are both precise filters, because the goal is to take the copyright owner's specific take down request and apply it prospectively to all new content being posted. Copyright owners often have policies to allow users to post shorter pieces of content, but not the entire piece of content. Further, certain content may be protected under fair dealing protections or authorized by copyright owners themselves. In such situations, the defendant No.1 does not presume to know what the copyright owner might want done with different or shorter portions of the content. But, for content that the copyright owner has already removed, the Take Down Stay Down Filter will automatically block any new content that the filter recognizes as the identical content. The defendant No.1 employs these two filters automatically after receiving a take down request from a copyright owner, and the copyright owner need not take any action on its own to get the benefits of these two filters. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.39 of 132 The most powerful filtering tool that defendant No.1 makes available to copyright owners is the free RMT Copyright Filter. The defendant No.1 allows any copyright owner to register for and use this tool at no charge subject to a single registration agreement. A copy of the standard RMT Registration Agreement applicable in this behalf has been filed to take advantage of the RMT, all that the copyright owner needs to do is register with the defendant No.1, and then create "fingerprints" of its audio or audio visual content (using the free software that the said defendant makes available through its filtering vendor called Audible Magic). The copyright owner submits the fingerprints to the defendants' filtering vendor with associated business rules- e.g., the copyright owner can decide to block all of its content or rather allow users to post certain pieces of content that it is trying to promote.

Thereafter, if the copyright owner instructs that all of its content should be blocked, the defendant No.1's RMT Copyright Filter will be set to block all content uploaded by users that matches the copyright owner's content. This means, if any piece of content is uploaded that matches any 30 seconds of the copyright owner's content, it would be blocked (the 30 seconds of matched content is the technical limit for the filtering technology). If the copyright owner, therefore, submits fingerprints to the

RMT IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.40 of 132
Copyright Filter, it can avail itself of extremely broad copyright protection on its website. Upon signing up for the RMT (as well as signing Audible Magic's own short agreement regarding the use of its signature generation software), the content owner need not ever part with its content to receive the benefits of filtering. Rather, the content owner need only itself create the fingerprints of its content, by using Audible Magic's free software, and then send such fingerprints to Audible Magic with appropriate usage instructions (i.e., "block" or "allow"). The defendant No.1 also periodically runs the filter retroactively over its website, again at its own cost, over all content that has already been posted to its website. Accordingly, if content was uploaded by a user before a copyright owner was able to add it to Audible Magic's reference database of fingerprints, the filter will catch such previously uploaded content and remove it"

21. Learned counsel states that once the defendants themselves vigilant about the right holders right and at their own expense are operating the measures to cure or filter the infringement. In these circumstances, the defendants cannot be said to be those who are indulging in the infringement when they have no connection whatsoever with the content of the works in question.

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22. By making these aforementioned submissions, Mr. Rajinder Kumar resisted the grant of injunction and also pressed for the vacation of the earlier order of Division bench by urging that the defences raised above prima facie establish that the defendants could not be held liable for any act of infringement of the copyright being an intermediary. The defendants already have a provision to remedy the grievance of the plaintiff which does not require any further orders as it is within the policy of operation of the defendants that it is required to delete the works which are infringing in nature. Further, the said acts are without knowledge sufficiently are not covered by the second part of the provision of Section 51(a) (ii) read with the provisions of IT Act and therefore no liability of infringement can be attributed against the defendants. Thus, the order passed by Division Bench is liable to vacated and injunction application filed by the plaintiff is to be dismissed. Although during the course of the arguments the defendants' counsel admitted that the order passed by the division bench can be confirmed and the same is also stated to be the only answer in the written statement.

23. I have gone through the plaint, written statement and records of the proceedings and also noted the submissions of the parties. However, before commenting upon the submissions of the parties, I deem it fit to first discuss the law on the subject.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.42 of 132 Law Relating To Copyright And Its Relation With Internet Computing

24. Copyright is a bundle of rights which is meant to encourage creativity. The said rights are negative rights in as much as the same are prohibiting others from using the copyrighted works. The traditional concept of the copyright has undergone a drastic change as traditionally, the law relating

to copyright was meant to encourage the original literary, books and also to help the poor authors. But, due to advent of the new technologies, its scope has extended manifolds. Now, the modern law of copyright encompasses musical works, cinematograph works, computer programs, performers rights, broadcasting rights. 24.1 The copyright has now become part of the business of the big organization more specifically in film industry where the major chunk of money is reaped out of the royalties arising out of the licensing and assignment of copyrights in the respective works. Rather, it would not be out of place to state that the royalties have become the backbone of the film making machinery. The companies like the plaintiff and other musical companies on one side earning royalties and thereon investing the same funds in making the films.

24.2 One more stage of complexity has been attained by the copyright law due to emergence of the virtual world of internet. The internet computing has also brought many changes in our lives in stages. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.43 of 132 The era in 1990s saw the beginning of the computing internet, wherein, the TCPIP internet and windows interface which was so user friendly due to which we became conversant with the emails and network navigation. Thereafter, in the year 2000 and later the type of computing changed and it has been refined and set the benchmarks, there has been a sudden rise in the markets of software be it accounting, designing, photo printing, office using like notepads, gaming, chatting, user to user protocol, music sharing programs like napster, kazaa etc.. All these software development have further taught us that there is much more than emails and typing on the computer and internet is very vast by which one can navigate in several spheres of subjects and can share the data with other users. 24.3 The third and more advance stage of computing which we are witnessing at this stage is the one wherein the level of internet computing is established and there is a tendency to conduct business online. There is a large segment of business models which are growing over the internet wherein the users are participating actively and thereon the companies are earning solely on the basis of the internet services by facilitating users to share their contents which are attractive (which includes pictures, motion pictures, films, songs, graphics, trailers, private communications amongst the eminent personalities, scam disclosures etc) so as to make it common to all and enabling them to view it easily by sitting at home. The more prominent examples of this advance stage is utube, myspace, IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.44 of 132 facebook etc. This is really an advance stage and there is no hesitation in saying that it is a remarkable development wherein one can see motion pictures with high quality graphics on internet which includes filming and other mode of entertainment .

24.4 While facilitating the said sharing process over the internet, the companies like the defendants are gaining business in the nature of advertising, sponsorships, other like businesses which makes them popular and run their show. This can be said to be one more way of conducting business which is comparatively new in its field. The problem however crept in when the content which is a subject matter of sharing on the website operated by the companies are someone else's copyright or proprietary material and not owned by the person or the user supplying them. The question then arises, as to whether the said company by providing the medium of sharing to the users and also gaining commercially alongside the same can be said to have infringed the copyright of the right holder. This court is faced with the similar kind of situation wherein the defendants' said website operator and the plaintiff is the right holder and the court is called upon to answer the said question

by applying the copyright law accordingly to this another mode of doing business which has been innovated by the defendants in the virtual world of internet.

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25. Copyright and its meaning has been provided under Section 13 and 14 of the Act. The infringement of the copyright has been defined under Section 51 of the Act. The said provisions are reproduced hereinafter for the ease of reference:

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

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

(b) cinematograph films, and

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

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

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

(iii) In the case of [work of architecture], the work is located in India Explanation- In the case of a work of joint authorship, the conditions conferring copyright IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.46 of 132 specified in this sub section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

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

(b) In any [sound recording] made in respect of a literary, dramatic or musical work, it in making the [sound recording], copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a [sound recording] shall not affect the separate copyright in any work in respect of which a substantial part of which, the

film, or as the case may be, the [sound recording] is made.

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

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

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

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) to issue copies of the work to the public not being copies already in circulation;
- (iii) to perform the work in public, or communicate it to the public;

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- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation of the work;
- (vi) to make any adaptation of the work;
- (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to (vi)

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

- (i) to do any of the acts specified in clause (a)
- (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme

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

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

- (i) to reproduce the work in any material form including depiction in three dimensions of a

two dimensional work or in two dimensions
of a three dimensional work;

- (ii) to communicate the work to the public;
- (iii) to issue copies of the work to the public not being copies already in circulation;
- (iv) to include the work in any cinematograph film;
- (v) to make any adaptation of the work;
- (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub clauses (i) to (iv);

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(d) In the case of a cinematograph film-

- (i) to make a copy of the film, including a photograph of any image forming part thereof;
- (ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the film to the public

(e) In the case of a sound recording-

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

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

"51. When copyright infringed - Copyright in a work shall be deemed to be infringed -

(a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any conditions imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.49 of 132

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or]

(b) When any person -

(i) makes for sale on hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) Distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) By way of trade exhibits in public, or

(iv) Imports [***] into India, any infringing copies of the work:

[Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work, for the private and domestic use of the importer.] Explanation - For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

26. From the bare reading of the Section 51, it becomes apparent that the infringement is, doing of any act by a person who is not authorized by the owner, which the owner is conferred to do under the provisions of the Act or permitting any place for profit for infringement of the copyright is also an infringement under the Act. The said two provisions are disjunctive in as much as that there shall be an IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.50 of 132 infringement even if the acts are done which are of the owner or in the alternative the acts of permitting any place for profit.

27. At this stage, it becomes relevant also to examine that the wordings of Section 51 (a) (ii) which provide permitting "any place" for profit. The use of the words "any place" would include common public place or library or any other kind of place. The wordings do not put any embargo of the kind of the place which is required to be permitted for profit in order to establish an infringement. But rather the wordings used in the sub section are "any place" so as to subsume physical place or place at the internet or webspace. The reference is invited to the provisions of UK Copyright Act, 1956 which are similar in nature to Indian Copyright Act in this respect which brings more clarity on this aspect. The said provisions are reproduced hereinafter:

"Section 5 (5) The copyright in a literary, dramatic or musical work is also infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of copyright in the work :

Provided that this sub section shall not apply in a case where the person permitting the place to be so used -

a) was not aware, and had no reasonable grounds for suspecting, that the performance would be an infringement of copyright, or

b) gave the permission gratuitously or for a consideration which was only nominal or (if more than nominal) did not exceed reasonable estimate of IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.51 of 132 expenses to be incurred by him in consequence of the use of the place for the performance.

(6) In this section "place of public entertainment"

includes any premises which are occupied mainly for other purposes, but are from time to time made available for hire to such persons as may desire to hire them for purposes of public entertainment"

28. I am also comparing the provisions of UK Copyright Act, 1988 (CDPA) which has been passed in the year 1988 repealing the earlier law. The said provisions are:

"Section 25 : Secondary Infringement: permitting use of premises for infringing performance.

(1) Where the copyright in a literary, dramatic or musical work is infringed by a performance at a place of public entertainment, any person who gave permission for that place to be used for the performance is also liable for the infringement unless when he gave permission he believed on reasonable grounds that the performance would not infringe copyright.

(2) In this section "place of public entertainment" includes premises which are occupied mainly for other purposes but are from time to time made available for hire for the purposes of public entertainment.

Section 26 : Secondary Infringement: provision of apparatus for infringing performance, etc (1) Where copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for -

(a) playing sound recordings,

- (b) showing films, or
- (c) receiving visual images or sounds conveyed by electronic means, the following persons are also liable for the infringement.

(2) A person who supplied the apparatus, or any

substantial part of it, is liable for the infringement if when he supplied the apparatus or part-

- a) he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright, or
- b) in the case of apparatus whose normal use involves a public performance, playing or showing, he did not believe on reasonable grounds that it would not be so used as to infringe copyright.

(3) An occupier of premises who gave permission for

the apparatus to be brought onto the premises is liable for the infringement if when he gave permission he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright.

(4) A person who supplied a copy of sound recording or film used to infringe copyright is liable for the infringement if when he supplied it he knew or had reason to believe that what he supplied, or a copy made directly or indirectly from it, was likely to be so used as to infringe copyright."

29. By comparing the situation as exists in 1956 Act of UK and 1957 Act of India in the provisions, it becomes amply clear that the wordings used in the Section of UK Act are "place of public entertainment" but in Indian Act, the wordings used are "any place"

which reflects the intention of the legislature which is to provide a IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.53 of 132 provision for permissive infringement wherein it is not merely a place of public entertainment which is included but any place wherein the infringement is facilitated would be covered by the provision of the Indian Copyright Act, 1957.

30. The situation becomes more clear as one further sees carefully the later enactment of same nature in the UK CDPA Act of 1988 which provides two kinds of infringements separately which are that the "place of public entertainment" and "infringement caused by use of an apparatus". This fine distinction which is present in the later Act of UK is not present in the Indian Act. This would demonstrate that UK legislature was conscious about the kinds of the infringement which are going to be caused in the light of the development in the technology and mere provision of facilitating the infringement at public place of entertainment would not sufficiently cover the protection and the apparatus infringement must be provided separately under the separate head. Therefore, in the light

of the same, the provision relating to providing means by way of apparatus is further introduced in addition to the already existing provision which relates to infringement relates to place of public entertainment in the 1988 Act.

31. In the sharp contrast, our Indian Act which has been amended number of times i.e. in 1984, 1994, 1999 which although provided for several crucial amendments including computer programmes as a subject IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.54 of 132 of copyright under the head of literary work but has not provided any separate infringement by way of an apparatus under the separate head or separately and the provision relates to the facilitating infringement is the same as it stood in the 1957 Act. In absence of such amendment in the Indian Act and in view of the loosely worded provision which is "any place", the same can be given a wider connotation so as to include the place on the internet not confining it to place of entertainment but to extend it to other places also.

32. It is now well settled that when there are new technological inventions or change in circumstances which was not in contemplation at the time when the statute was enacted, the said invention or technological advancement may be included in the same enactment if they are falling within the same genus provided in the existing enactment.

33. The reference in this respect is invited to the decision of House of Lords in Comdel Commodities Ltd vs. Siporex Trade SA, (1990) 2 All ER 552, wherein Lord Bridge has said "When a change in social conditions produces a novel situation which was not in contemplation at the time when a statute is first enacted, there can be no a priori assumption that the enactment does not apply to the new circumstances. If the language of the enactment is wide enough to extend to those circumstances, there is no reason why it should not apply." IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.55 of 132 On the same principles, general words are construed as to include new inventions and technological advances not known at the time when the act was passed. The Photograph copy is held to be a copy under the Engraving Copyright Act, 1734 in the case of Gambart v. Ball (1863) 32 LJCP 166. Similarly telephone was not invented in 1869, even then the telephone was held to be a telegraph under the provisions of Telegraphs Act 1863 in the case of A.G. vs. Edison Telephone Co of London (1880) 6 QBD 244 referred in The Senior Electric Inspector vs. Laxminarayan Chopra & Ors., AIR 1962 SC 159.

34. More Recently Hon ble Supreme Court in State of Maharashtra vs. Praful B Desai (Dr.), (2003) 4 SCC 601, has accepted the evidence by way of video conferencing as a valid one where the person being tried will satisfy the requirement of Section 273 of Code of Criminal Procedure, 1973 when the technique of video conferencing was not even developed.

35. In view of the same and also the fact that the provision provides for permitting "any place" which itself is loosely worded and is unfettered by any qualification, the said words "any place" have to be construed widely so as to include the place at the webspace or internet in order to give effect to the provision to be operative in cases of newer kind of the infringements being caused at the webspace. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.56 of 132

36. This is more so, in the absence of the specific provision relating to infringement by way of apparatus, the law in that situation cannot remain static witnessing the infringements which can be otherwise covered under the Act. The provisions which can conveniently cover the said acts must also be interpreted to include those new acts to make the provision workable for the newer kinds of infringement to the extent the wordings permit so. Therefore, the wordings "any place" under Section 51 (a) (ii) of the Act includes the place at the webspace in order to cover the infringements or the wrongs caused at the webspace.

37. The proposition which emerges from the above discussion is that there is an express provision under the Act which prohibits a person from permitting any place including webspace for profit unless the said person is having no knowledge or reason to believe that the communication of the work is infringing in nature.

38. There is, however, another way of approaching the similar kind of proposition which is popularly known as infringement by way of authorization. This is done by interpreting Section 51 (a) (i) read with Section 14 of the Act. The said Sections are reproduced hereinafter:

"51. When copyright infringed - Copyright in a work shall be deemed to be infringed -

(a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.57 of 132 conditions imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or....."

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

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

39. By reading these provisions together, it can be seen doing the acts of owner of copyright without permission or licence amounts to infringement. The acts of owner are defined under Section 14 which include doing or authorize doing the acts. Thus, by virtue of conjoint reading one can say that the infringement of copyright can also be in the cases where there are acts of authorizing the infringement by anyone without permission.

40. The said concept of authorizing the infringement has been succinctly discussed by Copinger & Skone James on Copyright (Fourteenth Edition by Kevin Garnett M.A., Jonathan R. James, MA.

LLB, Gillian Davies, Ph.D., 1999 Edition, London, Sweet & Maxwell), who is an authority on the subject in the following words:

"7-151 Meaning of "authorize", Authorization means the grant or purported grant which may be express or implied, of the right to do the act complained of, whether the intention is that the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.58 of 132 grantee should do the act on his own account or only on account of the grantor. An expression which has been often used as equivalent to the word "authorize" is "sanction, approve, or countenance" but this must be treated with caution particularly in so far as the word "countenance" is equivalent to the word "condone". Thus, in general an authorization "can only come from someone having or purporting to have authority and an act is not authorized by someone who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act."

41. It is noteworthy to mention that the said concept of authorizing the infringement although looks akin to Section 51 (a) (ii) of the Act but the said authorization does not coincide with the permitting the place for profit. The concept of authorizing the infringement is rather bigger and cannot be equated with merely facilitating the place for profit which is the express provision of the law, which may be said to be one its facets. The act of authorizing is something more than merely providing means with knowledge and require further active participation of the person than that of the permitting the place for infringement. This is due to the reason that the grant of means to an infringement is different than the granting the right to do the act of infringement. 41.1 Sometimes the infringement is not done directly but is done indirectly by the authority of some person for instance where a person handovers a pirated CD to a friend and also asks him to make number of copies and sell them to the public on behalf of the former. In that IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.59 of 132 situation, the former is authorizing infringement which he is doing through another person. Both are parties to an infringement due to their direct or active involvement. In this example, the person retains his control where he can say to his friend to do or not to do the same on his behalf. Besides that, the former person also has knowledge about the pirated nature of the CD which is also relevant. Thus, it is an authorization and it is not merely providing a means for infringement but rather more than the same which is doing the infringement along with the co infringer or under the authority of a person.

41.2 The act of authorizing infringement is premised on the concept of joint tort feasons wherein the person is held liable for commission of equal wrong when there is apparent clear establishment of his involvement in the wrong along with the other person committing the same. The active participation, inducement, approval or countenance, are thus necessary ingredients of authorization may not be sine qua non for the establishment of permission of place for profit. The knowledge of the fact that the acts are going to be infringing is again different from the active participation or any kind of inducement.

41.3 The knowledge is the starting point for authorization which is going to be established unless the clear active participation or reasonable degree of control is proved besides knowledge. But on the

other hand the same may not be true with permitting the place for profit wherein there is IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.60 of 132 only knowledge which is sufficient and the further state of affairs may remain irrelevant. Therefore, the onus of proof for establishing the authorization is more onerous than that of the establishing facilitation for profit.

41.4 This distinction between the two concepts is necessary in order to better comprehend the subject which will make the evaluation of arguments raised by the parties easier.

42. Now, I shall deal with the contentions of the parties raised by them relating to the authorization and the applicability of Section 51 (a)

(ii) of the Act.

43. It is the contention of learned counsel for the plaintiff that the acts of providing the space over the internet and thereafter continuously doing the same ever after coming to know about the plaintiff's proprietary interests amounts to authorization as the defendants are aware that the said space is going to be used for infringement purposes. As per the learned counsel, the said acts become authorization as the defendants retain the control and power to further distribute or communicate the work to the public. The said thing is done by the defendants with knowledge coupled with that of its own participation wherein it is offering the works of the plaintiff to the public at large by enlisting the works of the defendants in their search engine in such a way that when someone types the name of a song or a movie, the same is easily IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.61 of 132 available on the search results. Mr. Sibal has narrated the factors by which the defendants are authorizing the infringement which can be enumerated as under:

- a) The defendants provide a search facility which enables anyone who visits its website to locate audio-visual or audio files amongst those uploaded by other users, which files are copied by the defendants and stored on their servers.
- b) The defendants prescribe the terms of use which must necessarily be subscribed to by a User for becoming a defendant's User.
- c) A person has to necessarily be a registered User with the defendant/MySpace to use the uploading facility (which ultimately leads to infringement).
- d) MySpace /defendant can without anybody's approval reject, refuse to post or delete any content for any or no reason uploaded on its website.
- e) Defendants take license from the User for the content uploaded and can modify, delete from and add to the said content.

All these factors as per Mr. Sibal are evidence of the degree of control which the defendants can exercise and thus, the authorization gets established once the defendants are found to be controlling

the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.62 of 132 infringing activities and has its say in preventing them or controlling them.

44. Mr. Sibal has also made submissions that the said acts amounts to infringement as per the provision of Section 51 (a) (ii) of the Act due to aforesaid reasons.

45. On the other hand, Mr. Kumar resisted the same by stating that neither the said acts are authorization and nor the same are falling under Section 51 (a) (ii) due to the following reasons:

a) The defendants are having no control over the works which are uploaded on the websites everyday and thus they are no privy to any such works which are infringing in nature.

b) The defendants are not having any knowledge about which are the works which are infringing or non infringing. It is only subsequent to uploading and thereafter when the proprietor brings it to their notice, it becomes clear that the works are infringing in nature.

Therefore, once it is without knowledge coupled by no control over the works, the defendants cannot be held liable for infringement.

c) The defendants have cited the safe harbor provisions of US law and lot of cases decided under English law (which has been commented on later in the judgment as at this stage, the issue of infringement is decided).

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d) It is well established, that merely providing means for doing the acts which may be infringing, the person cannot be held liable for authorization and therefore, the defendants in the absence of clear establishment of its role in doing or promoting the infringement cannot be held liable for infringement.

e) There are several measures or safeguards like notice and turn down and many more are already undertaken by the defendants and therefore, the defendants are not infringers.

46. I have examined the submissions of the parties carefully and have gone through the plaint, written statement and documents filed by the parties and after doing so, I am of the opinion that the acts of defendants of providing the space on internet or webspace for profit are prima facie infringing in nature. The reasons for my prima facie observations can be discussed as follows:

a) Firstly, it would be wise to reiterate three proposition which I have already discussed earlier.

The provision of Section 51 (a) (i) and Section 51 (a) (ii) of the Act are disjunctive in nature in as much as the word "or" between the two makes it clear that even on satisfaction of one provision, there would be an infringement of copyright.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.64 of 132 The infringement by way of authorization would fall within Section 51 (a) (1) read with Section 14 of the Act as against the act of permitting the place for profit which is separately provided under Section 51(a) (ii) of the Act. There is a distinction between the concept of authorization as well as the concept of permitting the place for profit and the essential ingredients for establishing the same are also different.

Keeping these three propositions in mind, I have no hesitation to state that the acts of the defendants whereby they are offering the space over the internet, getting the works uploaded through users, thereafter saving in their own database with the limited licence to add, amend, or delete the content and thereafter communicating the said work to the public by providing some advertisements alongside the work or in the alternative gaining advertisements or sponsorships on the said basis thereafter would prima facie tantamounts to permitting the place for profit for infringement as envisaged under Section 51 (a) (ii) of the Act.

b) The said acts of the defendants are certainly falling within the realm of an infringement under Section 51(a) (ii) of the Act. This is due to the reason that the defendants are permitting the place which is place at webspace to the users at large. The said place is IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.65 of 132 not for the profit of the users only but also for the private profits or gains of the defendants. The defendants do not dispute that they are running the advertisement but their stand is that some advertisements are automatically appearing due to the search engines or key words which are typed by the users. The defendants although state that they are not advertising anything or earning anything due to the same. But, I am afraid that it is not the truth, the advertisements which are attached to movie clips or are displayed prior to the starting of the clip or after the movie clip is ended, are not the user provided or automatically emerging ones but are sponsored. There are third kind of advertisements which website and is ready to play, the said advertisements keep the user busy upto the user reaches the definite target which is intended movie song or movie clips. All this happens only when the defendants permit this to happen and to the advantage of the defendants. Thus, the defendants are certainly earning profits or gains and not doing anything mistakenly or bonafidely without notice as contended by them. There is certainly complete element of commerce attached to it to increase the bandwidth of the users/customers and sponsorship and/or adds. Thus, the defendants are permitting the place for profit.

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47. Now, the submission of the defendants that their acts are without knowledge or no reasonable belief of infringement are, therefore, would not fall within the Section 51 (a) (ii) but would be protected by the later part of the Section is also meritless. It is also not difficult now to answer the question of knowledge or reasonable belief which can be immediately discerned due to following factual situations:

Firstly, the defendants are themselves providing the safeguards in the event of the infringing activities being carried upon their website which means that the defendants have atleast reasonable apprehension or belief that the acts which are being carried on the website may infringe someone else's copyright including the plaintiff.

The defendants could immediately turn and say that the said provisions are made to prevent the infringement as per the international laws more specifically Digital Millennium Copyright Act ("DMCA") of US. However, the said fact does not preclude this court from drawing any inference as to the reasonable belief of the defendants that the activities upon their website are infringing in nature. Perhaps the legislature in US is more conscious of these frequent infringements on the internet and that is the reason it has enacted the special Act for IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.67 of 132 these purposes for providing curative measures and thereby giving such acts a legitimate effect by balancing the two interests one of internet infringer and another of the proprietor by providing that the post infringement curative measures as sufficient safeguards for the purposes of infringement and protecting any such infringement liability. But the same may not be legal in the Indian scenario absents such situation. Therefore, this Court can infer the reasonable amount of knowledge by the defendants about the infringing nature of the acts which are going to be carried on the defendants' website when the defendants on their own provide with these measures. Certainly, there is a reasonable belief by the defendants that the acts are infringing in nature. Secondly, the reasonable belief or knowledge specifically to that of the plaintiff works is also present in this case. This is due to the reason that the plaintiff has already notified its company name and lists of the titles owned by it. The defendants have also been dealing with the plaintiff prior to the institution of the suit. Thus, the defendants cannot be said to be totally oblivious to the fact that the Bollywood songs which are going to be IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.68 of 132 uploaded on their website may not belong to the plaintiff. Rather the defendants on its own states that while launching India centric operations, the defendants have informed all the music companies about their tools. Furthermore, when the defendants have been notified time and again by the plaintiff about updated works and the defendants are hard pressed to remove those contents. In these circumstances, the defendants' stand at this stage that they are totally unaware of the situation is not correct. There is complete knowledge to the defendants of the infringing nature of acts which are going to be carried on their website and rather it would not be out of place to say that the defendants are also aware that the plaintiff's works are available on the website which are infringing in nature.

Thirdly, the knowledge and reasonable belief for infringement to the defendants can be seen when one examines the mechanism of working of the defendants. The defendants take the limited licence to amend or delete or modify the works suitably from the user. This itself makes it evident that before uploading on the website or

making it available on the website, the works IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.69 of 132 in question go into the servers or the computers of the defendants where the programmers modify the said contents or amend the said contents suitably. Rather the said modification also goes to the extent of adding advertisements prior to the clips or after the clips embellishing them, adding logos of the companies.

All this is nothing but knowledge about the content what the defendants are displaying, showing, exhibiting. Thus, the defendants stand that they are totally unaware at the time of uploading what is going on and they should be protected being unconnected with anyone is also ex- facie bad. On the contrary at the time of uploading and till the time the said work is made available to the public on search engine form by the defendants, there are sufficient steps including modification (which has a major role) wherein the knowledge of the defendants can be seen.

Fourthly, the knowledge and reasonable belief of infringement is also apparent on behalf of the defendants when the defendants indulge into India centric operation as contended by the plaintiff. It is also stated that the defendants have whole office dedicated to Indian IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.70 of 132 works which caters the Indian consumers. The modifications of the works, India centric offices or operations, adding advertisements of the same language, seeking licences from users to modify or alter the works, informing the major copyright owners about its tool anticipating actions by them or preventing need for licences, all these makes the knowledge more apparent on the face of the record.

Thus, clearly due to complete satisfaction of the provision of Section 51 (a) (ii), the acts of defendants are prima facie infringing in nature, which are violative of Section 51 (a) (ii) of the Act.

48. So far as the act of authorization is concerned, The said act requires sanction, approval or countenance which are the wordings used in English Judgments which are more than the mere act of knowledge. I have already distinguished the authorization which would fall within Section 51 (a) (i) from that Section 51 (a) (ii) of the Act which expressly provides knowledge or reasonable belief as only tests for satisfaction. I shall now examine and test the acts of defendants on the principles of authorization.

The principles for satisfaction of authorization are laid down IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.71 of 132 in various cases which are cited at bar. However, for the sake of brevity the same can be culled out as follows:

1. The authorization requires countenance or sanction or approval from that of the person authorizing the said act.

This means that the said action of sanction or approval requires more to be shown than mere knowledge (Kindly see C.B.S. Inc. & C.B.S. United Kingdom v. Ames Records & Tapes Limited; (1981) RPC 407 (decided on 13th February, 1981) where court used sanction and approval as the test).

2. The authorization has to be targeted to the identified persons so that the clear case is made out. (Although Copinger(Supra) differs from this view).

3. The authorization requires that the person must have the authority to permit the infringement in as much as the person giving the authorization must retain a control over the subject matter in order to call it as authorization. (Kindly see C.B.S. Songs Limited & Others vs. Amstrad Consumer Electronics Plc. & Another (House of Lords), (1988) RPC 567) IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.72 of 132

4. Merely providing means for infringement does not establish control and therefore the person cannot be said to have approved or countenanced such act.

49. Broadly English Courts have tested all the cases on these very principles while attributing the liability over the infringers or in alternative rejecting the case of infringement. Mostly, in cases relating to newer means like tape recorder or in the cases of jukebox which are mere means for providing recordings of songs, the courts in England or common law have rejected the claims of infringement on the ground that these are merely new means for recording and nothing more unless the participation of providing the means must be shown towards the infringement. Let me now examine the acts of the defendants on these principles.

50. It was the contention of the defendants that no clear establishment of their involvement is made out as the portal of the defendants is such wherein every day there is much of data which is being uploaded and thus the defendants could not be held liable for authorization.

Further, it has been said on behalf of the defendants that the defendants are themselves cautious by putting notices on the internet by calling upon to users not to upload infringing contents. It is also said that the defendants are providing notice and turn down features which shows IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.73 of 132 that the said acts are not emanating from the defendants. It is not the defendants who are promoting those acts.

51. I have gone through the rival submissions of the parties. While testing the acts of the defendants on the threshold principles available under the common law, the doubts can be expressed at the prima facie stage whether the plaintiff has completely discharged its onus of proving as to whether the acts of communicating the musical works, sound recordings are actuated by the countenance, approval or not. Mr. Sibal has taken pains to inform this court that there is an element of control which has been exercised by the defendants. However, I am not fully satisfied whether the said factors enumerated by the Mr. Sibal would sufficiently establish at this prima facie stage such degree of control by the defendants which can also be called as approval or countenance or sanctioning. No doubt, I have arrived at the prima facie view that there is knowledge which is clearly present at this

stage wherein the defendants are aware what they are communicating. But the act of approval or sanction requires, the defendants' participation, exercise of control besides knowledge which I feel is a question which can be determined only at the time of trial as at this stage it is not clearly emerging from the documents as to the state of affairs after the knowledge which may be relevant for establishing the authorization. This is also more so because the approval or sanction is required to be IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.74 of 132 established particularly towards the present acts of infringement which is difficult to comment upon at this stage.

52. In addition to the above, one more thing which needs to be considered is that the defendants plead that the acts of the defendants are not authorization, to which I have already answered the same at this stage. However, once the plaintiff informs about the works owned by it to the defendants, the said defendants thereafter attain knowledge not only of the means to be used for infringement but also the knowledge about the rights of the plaintiff. The necessary consequence which follows from the same is that once the defendants are put to notice about the rights of the plaintiff in relation to the particular works, thereafter the defendants cannot continue to do the said acts in relation to the works for which the details have been provided without the permission of the plaintiff. In that event, the defendants after putting to notice immediately step into the shoes of the ordinary infringer under Section 51 (a) (i) of the Act who is aware of the rights of the plaintiff (copyright owner) and then the question of authorization becomes irrelevant and the acts are to be adjudged from the standpoint of ordinary infringement.

53. The defendants have already stated in the written statement that the arrangement done by the Division Bench is the possible solution to this proposition arising in the present case. The defendants' counsel has also stated that he would have no objection if the order passed by the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.75 of 132 Division Bench is continued. Thus, the defendant's acts are infringing in violation of Section 51 (a) (i) of the Act once the defendants are put to notice about the plaintiff's rights in the respective works and in the event the defendants do not turn down the same or allow the repetition to happen.

54. In these circumstances, I am of the view that though the acts of the defendants are prima facie infringing in view of the satisfaction of provision of Section 51 (a) (ii) of the Act but the question of the authorization requires further proof of participation which has to be tested at the time of trial. Nevertheless, the defendants are infringing the plaintiff's work as their acts are falling within the alternative or disjunctive requirement for infringement under Section 51 (a) (ii) of the Act. Further, the defendants' act may become infringing if the defendants do not turn down or allow the repeated uploads to happen after put to the notice about the plaintiff's rights in the said works. Re: Jurisdiction

55. Now I shall deal with other submissions of the parties point wise including the issue relating to jurisdiction. At the threshold, I would like to state that I have held that this court has the jurisdiction and therefore proceeded to decide the aspect of copyright infringement first. I shall now discuss the reasons for arriving at the conclusion that this Court has necessary territorial jurisdiction which are as under:

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.76 of 132 55.1 Firstly, the present case relates to infringement of copyright wherein the remedies are conferred under the special statute. The said suit for infringement of copyright can be filed and initiated at the place wherein the plaintiff carries on business, or personally works for gain etc. This is by virtue of non obstante clause provided under Section 62 (2) of the Act which reads as under:

"62. Jurisdiction of court over matters arising under this Chapter. (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personal works for gain."

55.2 By mere reading of the provision of Section 62(2) of the Act, it becomes amply clear that the suit for infringement can be filed at the forum where the plaintiff resides or carries on business. The opening words of the provision provides "Notwithstanding anything contained in the code of civil procedure" which means that the said provision will operate in addition to what has been provided in the Code of Civil IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.77 of 132 procedure. Thus, the said provision enables the suit to be filed at the place of the plaintiff which is the additional ground for attracting the jurisdiction of the court.

55.3 This question is no longer res integra and put to rest by the Supreme Court while examining the said provision in the case of Exphar SA & Anr vs Eupharma Laboratories Ltd. & Anr, (2004) 3 SCC 688 wherein the Hon ble Court observed.

"It is, therefore, clear that the object and reason for the introduction of sub-section (2) of Section 62 was not to restrict the owners of the copyright to exercise their rights but to remove any impediment from their doing so. Section 62(2) cannot be read as limiting the jurisdiction of the District Court only to cases where the person instituting the suit or other proceeding, or where there are more than one such persons, any of them actually and voluntarily resides or carries on business or presently works for gain. It prescribes an additional ground for attracting the jurisdiction of a Court over and above the 'normal' grounds as laid down in Section 20 of the Code."

Therefore, the plaintiff while it has initiated the said suit at the forum where it is carrying on business has rightly initiated the suit in compliance of the provision of Section 62(2) of the Act

which is the additional ground for attracting the jurisdiction. In these circumstances, by operation of non-obstacle clause, the principles relating to defendants carrying on business or part of cause of action or subject matter becomes irrelevant as the present case falls under the special provisions prescribed IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.78 of 132 in the special statute. The said provisions under Section 62 are in addition to and not in derogation or conflict with the general law as envisaged in the Code of Civil Procedure. Thus, the recourse of the defendants' counsel in relation to the principles of general law is misplaced. 55.4 The personal amenability of the defendants are therefore, not relevant in case of suit for infringement wherein the jurisdiction is sought to be invoked by way of provisions of the special enactment when it provides for non-obstacle clause. The said non-obstacle clause thus operates to its full extent and it cannot be said that there is a separate question of personal amenability of the defendants to be in the forum state which is still to be considered.

55.5 It is true that to sue a foreign defendant in this country, the foreigner either must be resident and or carry on business within the jurisdiction of forum court. These are the principles applicable in private International law. The only exception is if such party submits to the jurisdiction. However the operation of this rule is not absolute but is subject to the municipal law.

55.6 It is now well settled that when the municipal law provides otherwise or overrides the private international law, then the municipal law prevails over and above the principles of private international law. The said principle has been comprehensively decided by Karnataka High Court in Airbus Industries Vs. Laura Howell Linton, ILR 1994 KAR IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.79 of 132 1370 wherein the Court has stated that even the provisions of Section 20

(c) of the Code of Civil Procedure which provides cause of action wholly or in part overrides the private international law.

The Madras High Court in Swaminathan v. Somasundaram AIR 1938 Mad 731 in considering whether the Indian Courts have jurisdiction over non-resident foreigners, it was held that even with respect to non-resident foreigners, the Courts in British India have jurisdiction in personam in suits based upon a cause of action arising in British India.) 55.7 Thus, in the present case also even assuming that the rules of private international law may have any role to play, the same stands overridden by the express provision of the special act which is Copyright Act, 1957 which speaks otherwise and entitles the plaintiff to sue at the place of its own forum.

55.8 Secondly, the argument was advanced by the defendants about the commission of torts outside India. The said argument is also rejected as meritless. The commission of tort in the present case is in India. The website of the defendants is one which is engaged in the online business of providing and exhibiting the songs and cinematograph films worldwide including India. The said website is usually accessed by Indians for downloading the songs of upcoming movies from the website of the defendants. The plaintiff has substantiated the cause of action by IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.80 of 132 showing some instances of infringements which has been caused in relation to the specific works. Thus, the said commission of the tort has occurred or

occurs in India wherein the Indian user goes to the website, the defendants through its search engine exhibits the said works and the work is communicated to the public by sending the work to him and facilitating downloading or reaching to the computer of Indian user. Similarly, conversely, when the Indian user shares the infringing work with the defendants website which goes into the servers of the defendants and saved there after the uploading. The said actions are sufficient to constitute part of cause of action under Section 20 (c) of the Code of Civil Procedure.

55.9 In the first case, the tort or civil wrong is caused in India as the aspect of downloading to the computer has been occurred in India when the said work is communicated to Indian users without the permission of the plaintiff. In the second case too, the initiation of the tort or part of the same has occurred in India as the infringing work without the authority of the plaintiff is communicated to the defendants with a limited licence to further modify and communicate further. The said commission of the acts or the part of the overt acts constitutes the part of cause of action within the meaning of Section 20 (c) of the Code of Civil Procedure.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.81 of 132 55.10 Section 20 (c) of the Code confers jurisdiction where the cause of action wholly or in part arises. Thus, the court where the part of cause of action will arise would have the jurisdiction to entertain and try the proceeding like in the present case. So seeing from any standpoint be from special act or general code of civil procedure, this court has necessary territorial jurisdiction to entertain and try the proceedings. However, the discussion to Section 20 (c) of the Code becomes merely academic as the special act itself confers jurisdiction on this court by operation of non obstante clause. Still, I have deemed it fit to discuss the same in view of the categorical objections raised by the defendants on jurisdiction.

55.11 Thirdly, the reliance of the judgment of the Division Bench in *Banyan Tree* (Supra) is equally misplaced by the defendants and thus does not aid the case of the defendants at all.

55.12 It is a well settled principles the judgment is an authority of what it decides and not for the proposition which can be logically deduced therefrom. [The said proposition has been laid down by the Supreme Court in *Bharat Forge Co. Ltd. v. Utam Manohar Nakate* (2005) 1 LLJ 738 SC ; *M.P. Gopalakrishnan Nair and Anr. vs. State of Kerala & Ors.*: AIR 2005 SC2053] IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.82 of 132 55.13. In *Banyan Tree* (Supra), the Hon ble Division Bench has rightly reframed the issue in the following manner:

"For the purposes of a passing-off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible web-site by the defendants lends jurisdiction to such court where such suit is filed ("the forum state")?

56. By mere reading of the question answered by the Hon ble Division Bench, it becomes patently clear that the Hon ble Division Bench was concerned with the question wherein a passing off action, whether the jurisdiction of the court can be conferred by way of website operation of the

defendants or not, or the case of infringement where the plaintiff is not carrying on business within the territorial jurisdiction of the court. The apparent distinguishing features which make Banyan tree case inapposite to the present case are outlined as under:

a) Firstly, the case of Banyan Tree (Supra) was a case of passing off, however, the present case is a case of infringement wherein plaintiff invokes the jurisdiction on the basis of carrying on his business at the forum court. It needs no further mention that it is now well settled that the tests of conferring jurisdiction on the court in the case of the passing off and the infringement are totally different. Whereas, the jurisdiction in infringement cases is IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.83 of 132 governed by the provisions of special act like Section 62(2) of the Copyright Act. On the other hand, in the passing off cases, it is governed by the ordinary law of civil procedure. Thus, the case of plaintiff carrying on business or working for gain which is a relevant and significant consideration in the present case in view of operation of special statute was absent in the case of Banyan Tree (Supra) and that was the sole reason the court had difficulty in assuming the jurisdiction in Banyan Tree (Supra) which lead to referral to division Bench for the question to be answered.

b) Secondly, The Division Bench in Banyan Tree (Supra) also observed that if the case of Banyan Tree (Supra) would have been of infringement, then the court would have had jurisdiction and the special provisions of Section 62(2) of Copyright Act, 1957 as well as Section 134(2) of the Trade Marks Act are those of the kinds of the long arm provisions in the limited sense. The relevant excerpt from the Banyan Tree (Supra) dicta is reproduced hereinafter:

"8. At the outset it needs to be noted that the present suit is not one for infringement by the defendants of the Plaintiff's trademark and the Plaintiff carries on business within the jurisdiction of the court. If it were, then in terms of Section 134 (2) of the Trademarks Act 1999 (TM Act) this court would have jurisdiction to entertain the suit although the defendants do not reside or carry on business within its jurisdiction. Section 134 (2) of the TM Act (like and Section 62 (2) of the Copyright Act, 1957) is therefore a „long arm“ IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.84 of 132 provision in a limited sense, confined to infringement actions by Plaintiffs carrying on business within the jurisdiction of the forum court. The present suit is an action for passing off in which neither the Plaintiff nor any of the defendants voluntarily resides or carries on business within the local limits of Delhi. Consequently, neither Section 20 (a) nor Section 20(b) CPC applies.

The Plaintiff seeks to find the territorial jurisdiction of this Court in terms of Section 20(c) CPC. In other words, according to the Plaintiff the cause of action, wholly or in part, arises within the jurisdiction of this Court. This, according to the Plaintiff is on account of two factors. One, that the website of the defendants is accessible in Delhi; it is not a passive website but used for soliciting business in Delhi. Second, that there was at least one instance of the defendants' brochure being

sent to a Delhi resident for the purposes of sale of property."

Thus, the said distinction and the caveat expressed by the Division Bench itself is sufficient to exclude the present case from that of the operation of *Banyan Tree Judgment* as it stands a good law which it decides and cannot be extended to infringement cases which are governed by special provisions.

c) Thirdly, assuming that the judgment of *Banyan Tree (Supra)* may be applied to the present case, even then the difference in the factual matrix further takes out the present case from the application of the said dicta. This is due to the reason in *Banyan Tree's case (supra)*, the court was concerned with the hotel services wherein there was tendency of booking online in the hotel from every place and thus the mere act of booking cannot be held IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.85 of 132 to clothe jurisdiction on this court unless it forms a part of cause of action in the case whereas in the present case concerns with the activities of the defendants which are primarily web based which are interactive due to media presence, downloading, uploading and nothing else. The court propounded doctrine of purposeful availment in *Banyan Tree's case (supra)* to show the nexus of the transaction with cause of action in the suit. In the sharp contradistinction to the same, the defendants in the present case are offering to show and communicating the Indian works to the Indian public with the interactive media inside and the user is able to view the same online, download it and use it and further communicate to public. The plaintiff has also substantiated the same by providing download of the sample infringement which are also forming part of cause of action. Thus, there is sufficient interactivity in the website which is aiming at the Indian users and shows nexus with the complaint with the suit where the plaintiff is directly aggrieved. The present case would be therefore, different from the case of Trade Mark infringement wherein some online transaction or a trap order is shown to clothe cause of action for the purposes of invoking jurisdiction.

The present case relates to complaints arising directly out of the online acts and thus cannot be rejected on the counts of IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.86 of 132 unconnected cause of action. Therefore, the *Banyan Tree's case (supra)* is inapplicable in the present case and rather if the tests laid down in the same are applied, the present case sufficiently qualifies the tests of *Banyan Tree (Supra)*.

57. Hence, for all these aforesaid reasons, this court will have jurisdiction to entertain and try the proceeding.

58. The related argument as to jurisdiction was also raised by the learned counsel for the defendants that this Court cannot exercise the extra territorial jurisdiction as assuming jurisdiction would in this case would mean exercising extra territorial jurisdiction. The said argument is rejected as baseless and the reasons for variance are outlined as under:

a) Firstly, this Court has already arrived at the finding that the court has assumed the jurisdiction on the basis of the part of cause of action which has arisen in India and the infringement is being caused in India. Thus, this court would have jurisdiction to

entertain and try the proceedings for infringements which has been caused in India.

b) Secondly it is merely the apprehension of the defendants that there will be some effect of extra territorial for which this court is not concerned, it is neither the case of the plaintiff to give this as an extra territorial effect and nor this court is giving any such effect as contended by the defendants. Rather, the court is exercising the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.87 of 132 jurisdiction on the basis of the law of the land which is Copyright Act of India, 1957.

c) Thirdly, it has already been observed that the commission of tort of infringement has occurred in India which is prima facie infringing in nature, the said acts are prohibited under the Copyright Act and thus this court is proceeding to do what is permissible under the law. This court is not concerned with any incidental effects which the defendants are apprehensive of due to the exercise of the jurisdiction of the Court and that cannot come in the way of exercise of jurisdiction of this Court.

d) There are lots of cases cited on Article 245 of the Indian Constitution wherein it has been observed about the parliamentary power to enact the extra territorial laws. The said reliance of judgments is equally misplaced as in the present case, this court is not concerned with the legislative competence of the any extra territorial laws. The said judgments are not applicable to the present case as the court is exercising the jurisdiction on the basis of Indian law having force in India and thus the concerns are mere apprehensions of the defendants which this court cannot take care of.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.88 of 132 PROBABLE EFFECT OF AMENDMENTS UNDER THE IT ACT 2000 (AS AMENDED ON 2009) ON THE REMEDIES PRESCRIBED UNDER COPYRIGHT ACT 1957.

59. Now I shall discuss another aspect of impact of the amended provisions of Information Technology Act 2000 on the provisions of the Copyright Act in turn on the present case as it is the defendants' contention that the provisions of IT Act relates to internet related wrongs and thus their acts are protected under the IT laws of India.

60. The submission has been advanced by the defendants that the amendments made in 2009 in the IT Act, 2000 will have great impact on the satisfaction of this Court for the purposes of grant or non grant of the injunction against the defendants. The relevant sections of amended Act relied upon by the defendants which according to the defendants will enable the defendants to escape the liability of infringement are reproduced hereinafter:

"Section 79 of IT Act, 2000 reads as under :

"Exemption from liability of intermediary in certain cases -

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if -

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(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not -

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if -

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material or that resource without vitiating the evidence in any manner.

Explanation: For the purposes of this section, the expression "third party information"

means any information dealt with by an intermediary in his capacity as an intermediary." Section 81 of IT Act, 2000 reads as under :

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.90 of 132 Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding

anything inconsistent therewith contained in any other law for the time being in force.

[Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)]."

Section 2(w) of the IT Act defines intermediary as :

"Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

61. The submission advanced by the learned counsel for the defendants is that the acts of the defendants are protected under Section 79 of the Act even if this court is not convinced by the argument of safe harbor provisions of the Digital Millenium Act of US as the provision saves the liability of the intermediaries like the defendants. Thus, the defendant s acts of providing means of infringement and all other acts communicating the works to the public are mitigated by way of operation of Section 79 of Information Technology Act, 2000 (as Amended on 2009). The provision according to the defendants counsel is non obstante clause and thus will override the other acts. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.91 of 132

62. Per contra, learned counsel Mr. Sibal has advanced the argument that the provision of Section 79 of Information Technology Act, 2000 cannot be read in isolation and has to be read along with Section 81 which provides for the overriding effect of the Act. The said provisions also enacts the proviso which is also inserted by way of amendment which states that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 or the Patent Act, 1970. Thus, as per Mr. Sibal, the IT Act may override any other law, but by way of operation of the proviso to Section 81, the rights of the copyright owner cannot be curtailed by applying any other provision of the IT Act.

63. I find that the provisions of Section 79 of the IT Act will have no bearing on the liability of infringement on the defendants due to the reasons entailed hereinafter:

a) Firstly, I find merit in the submission of Mr. Sibal that conjoint reading of Section 79 and Section 81 makes it amply clear that the proviso to Section 81 prevents any provisions of IT Act to act as restriction on exercising of the rights by the copyright owner. This makes it clear when read the Section 81 which provides for the overriding effect of the IT act over other laws.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.92 of 132 The proviso appended to the said section provides that nothing contained in this act shall restrict the exercising of right by any person under the Copyright Act. The said proviso carves out an exception to the main enactment which is under the head of overriding effect of the IT Act.

64. The scope and ambit of the proviso to the enactment has been succinctly discussed by the Apex Court in *State of Rajasthan v. Leela Jain* (1965) 1 SCR 276, wherein the Apex court has held :

"So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part."

64.1 In the case of *Sales Tax Officer, Circle I, Jabalpur v. Hanuman Prasad* : [1967]1SCR831 , Hon ble Bhargava, J. observed :

"It is well-recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded."

64.2 Thus, the combine effect of reading Section 81 and the proviso is that the provisions of IT act may override other laws for the time being in force but the cannot restrict the rights of the owner under the Copyright Act and the Patent Act. In other words, the rights of the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.93 of 132 owners under the Copyright Act, 1957 and/ or Patent Act, 1970 shall remain unfettered by any of the provisions of IT Act. 64.3 Accordingly, Section 79 cannot restrict the rights of the copyright owner by saving the liability of the defendants of the infringing acts caused under the provisions of Section 51 (a) (ii) of the Act by operation of proviso to Section 81 of the Act.

b) Secondly, I am also doubtful that even if the provision of Section 79 of the IT Act is applied to the present case, whether the defendants qualifies to get the benefit of the same under the IT Act. This is due to the reason that Section 79 although is a non obstante clause but is subject to Section 79 (2) and Section 79 (3) which provides the conditions of applicability and non applicability of the Section.

The said Section 79 (2) (a) states that the Section will apply if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not -

(i) initiate the transmission,

(ii) select the receiver of the transmission, and IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.94 of 132

(iii) select or modify the information contained in the transmission;

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

64.4 The use of the wordings "or" between (a) and (b) makes them disjunctive, although (c) has to coexist with (a) or (b) whichever is applicable. In the present case, the provisions of Section 79 (2) (a) is not fulfilled as the function of the defendants is not confined to only provide an access to communication system where the third party information is stored, transmitted or hosted. But rather the defendants provides access only after a limited licence to add or modify the work and thereon by adding advertisements to the said works, modifying the works which means permitting the place for profit with knowledge. The said acts are thus of not those kinds prescribed under the provision of Section 79 (2)

(a) which are of a limited role of merely providing an access to system containing storage medium or transmission of the third party information.

65. The acts of the defendants also may not fall with Section 79 (2) (b) as the said situation prescribed in the provision has to be satisfied conjunctively or collectively as the word used between the (i), (ii), (iii) is "and" which means all the situations must be satisfied else, the said IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.95 of 132 conditions in the provision are not met with. In the present case, the defendant s acts do not satisfy the criteria of modification of information. The defendants have attained the licence to modify the works provided by the users suitably. The complaint of the plaintiff is that adding the advertisement also infringes their rights. Thus, the act of modification of the works by the defendants also excludes the defendants from the purview of Section 79 (2) (b) of the Act.

66. The third condition of due diligence is also doubtful as the due diligence is required while discharging his duties. Thus, if the defendants are put to notice about the rights of the plaintiff in certain works, the defendants should do preliminary check in all the cinematograph works relating Indian titles before communicating the works to the public rather than falling back on post infringement measures. The due diligence is also not satisfied when the defendants uploads the contents of the user on their server and then modify the same as per the limited licence to amend from users. This means that the defendants have the chances to keep a check on the works which defendants avoid so to the reasons best known to them. The due diligence is thus also doubtful although defendants contend for the satisfaction of due diligence.

67. From the above, it is also clear that the applicability of Section 79 is also not satisfied although by operation of proviso to Section 81, the discussion on Section 79 is not really important. I do not IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.96 of 132 also find my agreement with the submission of the defendants that there will be harmonious construction

between Copyright Act and IT Act if the provision of Section 79 will save the liability of the copyright infringement of the intermediaries like the defendants. I think rather accepting the submission would lead to apparent disharmony or conflict between the provisions of two Acts. This can be explained as follows:

68. Firstly it is well settled canon of construction that the court should adopt the mode of construction which upholds the provisions of the Act and make them workable and the interpretation which makes any provision of the Act otiose must be eschewed.

68.1 In High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors. [2003] 2 SCR 799 , the Supreme Court held as under :

"35. The Court while interpreting the provision of a statute, although, is not entitled to rewrite the statute itself, is not debarred from "ironing out the creases". The court should always make an attempt to uphold the rules and interpret the same in such a manner which would make it workable.

36. It is also a well-settled principle of law that an attempt should be made to give effect to each and every word employed in a statute and such interpretation which would render a particular provision redundant or otiose should be avoided."

68.2 If Section 79 of the IT Act is allowed to operate as an embargo or restriction upon the exercise of the right of right holder by IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.97 of 132 saving the liability of the copyright infringement, the said interpretation will render proviso to Section 81 of the IT Act otiose or unworkable. The said interpretation thus leads the purpose of the proviso as redundant. On the contrary, if the gamut of the Section 79 is allowed to remain confined and subject to the proviso of Section 81 which is intended to be so by the legislature, both the provisions can stand and work in their respective fields.

68.3 Section 79 is, thus, meant for all other internet wrongs wherein intermediaries may be involved including auctioning, networking servicing, news dissemination, uploading of pornographic content but not certainly relating to the copyright infringement or patent infringement which has been specifically excluded by way of proviso to Section 81. This can be only possible harmonious construction between the two Acts which makes both the Acts workable.

68.4 Secondly, besides making proviso to Section 81 otiose, the interpretation canvassed by the defendants lead to conflict between two acts and also leads to absurd results. This is due to the reason that the Copyright Act, 1957 itself provides for an infringement as well as the exceptions of the infringement. Once the infringement is established, the remedies to the same are prescribed by Section 55. In that situation and given the fact that there is an express proviso excluding the copyright infringement from the purview of IT Act if not applied leads to IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.98 of 132 unnecessary adding further restrictions on the copyright infringements which is impermissible and therefore leads to absurd results negating the statutorily prescribed remedies for copyright infringement. 68.5 Further the provisions of

authorization or permitting the place for profit requires knowledge or reasonable belief and other common law requirements for establishing the infringement as discussed above. Thus, the said act of authorization and/or permitting the place for profit itself requires knowledge and reasonable belief of infringement which are inbuilt exception to the infringement, The operation of Section 79 to exempt the liability of the intermediary except in cases of knowledge is rather repetition of the same provision and if the same is allowed to operate in the way of infringement which itself requires knowledge and reasonable belief or countenance or approval in respective cases would lead to anomalous situations and would lead to absurd results. 68.6 Thirdly, there is no legislative disharmony by operation of the proviso to Section 81 and rather adding of proviso to Section 81 by way of amendment put the unrest into an end. If Section 79 would have application to the copyright infringement which saves absolutely the liability of the intermediary without insertion of the proviso by the legislature under Section 81, then there would have been apparent conflict between the acts of infringement by way of permitting the place for profit provided under Section 51 (a) (ii) and Section 79 which saves IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.99 of 132 the liability of the intermediary. Thus, without insertion of the proviso to Section 81, there would have been two laws, one, providing the acts of intermediary or facilitator as infringement and another saving the liability. 68.7 In *Dwarka Prasad v. Dwarka Das Saraf* [1976] 1 SCR 277. Hon ble Krishan Iyer, J. speaking for the Court observed thus:

There is some validity in this submission but if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case...."

68.8 The adding of proviso is rather not only exclusionary but also clarificatory in nature which clarifies that the provisions of IT Act may not restrict the rights under Copyright Act or Patent Act as its tries to create and confer harmony between two laws and enactments so that they can operate in their respective fields. Thus, there is harmony by adopting the proviso rather than negating it.

69. In view of the above discussion, I find that there is no impact of provisions of Section 79 of IT Act (as amended on 2009) on the copyright infringements relating to internet wrongs where intermediaries are involved and the said provision cannot curtail the rights of the copyright owner by operation of proviso of Section 81 which carves out an exception cases relating to copyright or patent infringement.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.100 of 132 IMPACT OF PROVISIONS OF DIGITAL MILLENIUM ACT OF US AND OTHER ENGLISH LAW

70. Now I shall deal with the possible impact of Digital Millennium Copyright Act ("DMCA") of US and the other English judgments cited by the parties.

71. The great stress has been laid on the judgments passed by US courts in following cases which are passed on analyzing the provisions of Digital Millennium Copyright Act ("DMCA"):

(i) IO Group, Inc v. VEOH Networks (Case 5:06-cv-03926 HRL)

(ii) UMG Recordings v. VEOH Networks (Case 2:07-cv-

05744-AHM-AJW)

(iii) Viacom Inc. v. Youtube, Inc & ors (07 Civ. 2103 LLS)

72. I have gone through the decisions passed by US Courts under the US Digital Millennium Copyright Act ("DMCA") and I am of the firm view, that there is no corresponding law which is in pari materia to that of Digital Millennium Copyright Act ("DMCA"). The said Act specifically addresses the issues relating internet related wrongs, however our existing law of Copyright Act, 1957 does not provide any such safe harbor provisions and rather the later enactment of IT Act, 2000 and its new amendment in 2009 speaks otherwise which I have already examined Section 81 of IT Act (as amended in 2009), proviso to which excludes the operation of the IT law in cases of copyright infringement. IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.101 of 132

73. It is trite that the court cannot re legislate or add words into the statute. this has been followed in Association for Development vs. Union of India & Others, 2010 (115) DRJ 277 wherein this court approved the literal rule and observed that "It is not the duty of the court to enlarge the scope of the legislation when the language of the provision is plain and unambiguous. The court cannot recast or reframe the legislation for the very reason it has no power to legislate. The court cannot add words to a statute or reads words into it which are not there".

74. It is also well settled that the laws and the provisions which are not pari materia cannot be compared. This has been followed in the decision of the Apex Court in the case of Babu Khan vs. Nazim Khan (2001) 5 SCC 375). The following conclusion of Their Lordships is relevant: (para 5) "5.....It is true that the courts while construing a provision of an enactment often follow the decisions by the courts construing similar provision of an enactment in pari materia. The object behind the application of the said rule of construction is to avoid contradiction between the two statutes dealing with the same subject. But in the present case, what we find is that the Madhya Bharat Land Revenue and Tenancy Act contains one integrated scheme providing for remedy to a pucca tenant claiming restoration of possession under Section 91 and 93 of the Act. The Madhya Bharat Land Revenue and Tenancy Act was repealed by the M.P. Land Revenue Code. In the repealing Act i.e. M.P. Land Revenue Code we do not find any provision like Section 93 of the Act. We are, IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.102 of 132 therefore, of the view that Sections 91, 92 and 93 of the Act are not in pari materia with the provision of Section 250 of the M.P. Code. It is not a sound principle of construction to interpret a provision of an enactment following the decisions rendered on a similar provision of an enactment when two statutes are not in pari materia"

(emphasis supplied)

75. The adoption and drawing aid from the said provisions in the present scenario would thus mean adding provisions into the statute when the existing law says otherwise. Thus, in absence of any such law similar to Digital Millennium Copyright Act ("DMCA"), the reliance of the provisions and judgments passed under the said law is of no avail to the defendants and this court under existing law cannot be convinced by the reliance of the provisions of Digital Millennium Copyright Act ("DMCA") of US.

76. The same view was taken by constitutional bench of Supreme Court in *R.L. Arora vs. State of UP*, [1962] Supp(2) SCR 149 while rejecting the reading of American constitution 5th Amendment due to inconsistent provisions wherein the court observed as under:

"20. It seems that there has been controversy in America as to the meaning of the words "public use" used in the above amendment and there are two views prevalent. The older view was, and it is still held in some States, that "public use" means "use by the public - that is, public employment - and consequently that to make a use public, a duty must devolve on the person or corporation holding property appropriated by the right of eminent domain to furnish the public with the use intended, *IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.103 of 132* and that there must be a right on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is condemned". The later view is that "public use" means "public advantage, convenience, or benefit, and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new resources for the employment of capital and labour contributes to the general welfare and the prosperity of the whole community and giving the Constitution a broad and comprehensive interpretation, constitutes a public use" (see *American Jurisprudence. Vol. 18. pp. 661-62*). In one State, where the older view is still held, the court pointed out that "if public use were construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit to the right to take private property, that it would not be difficult to show that a factory, hotel, etc., the erection of which was contemplated, would result in benefit to the public, and that, under this power, the property of the citizen would never be safe from an invasion." (see *ibid. p. 664*) It is the later view prevalent in some States in America for which the respondents are contending, and the result of that would be the same as pointed out above. But we do not think it necessary to examine the American cases cited before us because the words in our statute are not *pari materia* with the words used in the fifth amendment to the American Constitution." (Emphasis Supplied)

77. Likewise, the defendants as well as the plaintiff in order to support the arguments on authorization have placed reliance on the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.104 of 132 number of cases which are decided by the UK Courts and the other courts of common law jurisdiction some granting the injunction and some refusing the same depending upon the facts and circumstances of the case. The said cases are enlisted as under:

C.B.S. Inc. & C.B.S. United Kingdom v. Ames Records & Tapes Limited (decided on 13th February, 1981) (1981) RPC 407.

C.B.S. Songs Limited & Others vs. Amstrad Consumer Electronics Plc. & Another (House of Lords), (1988) RPC 567) Ong Seow Pheng & Ors. v. Lotus Development Corp. & Another [1997] 3 SLR.(Singapore Court) CCH Canadian Ltd vs. Law Society of Upper Canada (2004 SCC 13) [Supreme Court of Canada]

78. No doubt the judgments passed by the UK Courts and in other common law jurisdictions are relevant to take into consideration on the tests laid down by the courts in order to arrive at the conclusion as to whether the acts of the defendants amount to authorization or not. I have already paraphrased the said tests while examining the aspect of authorization in the preceding paragraphs. Beyond that, I feel the conclusions set out in each of all those cases are of less value due to the following reasons:

a) The provisions of UK Act of 1956 and Indian Act 1957 and also further CDPA Act 1988 are not same. The wordings in the Sections are although similar with variations but are not identical.

Like in UK Act of 1956, permitting the place of public IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.105 of 132 entertainment for profit is an infringement while in Indian Act of 1957, permitting any place for profit are the wordings under Section 51 which has made the differences in the interpretation as discussed above.

Similarly, in UK CDPA Act of 1988, there are separate infringements provided for place for public entertainment for profit in the form Section 25 and infringement by way of apparatus in the form of Section 26. Further in UK Act of 1988 there are statutory indicators which excludes the liability of the persons under certain circumstances in cases of infringement by way of Apparatus. However, Indian Act of 1957 remains the same with no such provisions.

Thus, there is difference in provisions and the wordings which may ascribe difference meaning. This is also the reason for the English court to rely more on the concept of authorization. In the absence of *pari materia* provisions, the complete reliance on these decisions may not be useful.

b) I have not based my conclusion regarding infringement on authorization (although I have analysed the tests relating to the same) as I have found that the same may require active

participation besides knowledge which is a matter of trial and I have found that still the acts of the defendants are hit by the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.106 of 132 provisions of Section 51 (a) (ii) of the Act. In these circumstances, the decisions on authorization may become of less aid as the acts of the defendants are squarely covered under the express legislative provision.

Accordingly, principally, I accept the decisions rendered on authorization and tests laid down in the same and the same can be taken into consideration for the purposes of deciding the acts of authorization but may not be helpful in the cases involving the permitting the place for profit which is a statutorily prescribed infringement. RELIANCE ON INTERNATIONAL COVENANTS

79. Now, I shall be dealing with the submissions advanced by the learned counsel for the defendants on the reading of International covenants and adopting the same in interpreting the copyright law and especially the internet related wrongs which is The WIPO Copyright Treaty and its Article 8.

It is also equally well settled that the international law and covenants can be taken recourse of in the municipal law to the extent they are not inconsistent with the municipal law and to fill the gaps in the existing law. {This has been accepted by Supreme Court in *Visakha & Ors. vs. State of Rajasthan*, (1997) 6 SCC 241} IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.107 of 132

80. In the present case, the defendants themselves have informed the Court that India has not even ratified the said convention. Thus, the reliance on the said convention into Indian law is thus misplaced. Further, The answer to this can be traced if one reads the judgment of *Entertainment Network (Supra)* more carefully wherein the court discusses the extent to which the international covenants can be read into the national law. The relevant paragraphs of the judgment are reproduced hereinafter:

"While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-a-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions."

"It is for the aforementioned limited purpose, a visit to the provisions of International Conventions would be necessary. In interpreting the domestic/municipal laws, this Court has extensively made use of International law inter alia for the following purposes:

- (i) As a means of interpretation;
- (ii) Justification or fortification of a stance taken;

(iii) To fulfill spirit of international obligation which IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.108 of 132 India has entered into, when they are not in conflict with the existing domestic law;

(iv) To reflect international changes and reflect the wider civilization;

(v) To provide a relief contained in a covenant, but not in a national law;

(vi) To fill gaps in law."

"Beginning from the decision of this court in *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225], there is indeed no dearth of case laws where this Court has applied the norms of international laws and in particular the international covenants to interpret domestic legislation. In all these cases, this court has categorically held that there would be no inconsistency in the use of international norms to the domestic legislation, if by reason thereof the tenor of domestic law is not breached and in case of any such inconsistency, the domestic legislation should prevail."

"However, applicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized. Where International Conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof."

"Those Conventions to which India may not be a signatory but have been followed by way of IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.109 of 132 enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible."

81. From the reading of the aforesaid, it is clear that the international covenant wherein India is a signatory state can be utilized for limited purposes of bridging the gap between national law and international to the extent it is not repugnant with the national law. I am doubtful as to whether any of the tests laid down by Supreme Court are fulfilled in the present case in order to enable this court to consider the international covenant relied upon by the defendants. Firstly India has not ratified the said convention as per the defendants, thus there is no international obligation which is to be respected in the present case. Secondly, the defendants' counsel wants this court to read into the following statement to their benefit:

"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of

this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a contacting party from applying Article 11 bis (2)."

82. There is no disputing this proposition and I have in the preceding paragraphs of my judgment laid down this proposition that merely providing means does not amount to authorization. But this statement as such cannot be read into due to the non fulfillment of IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.110 of 132 principles which enables this court to read into the international covenants.

83 This statement is neither bridging any gaps in the law and is rather part of the statute in India where permitting the place for profit is an infringement and not providing mere means. The reading of this statement itself may not aid the case of the defendants in any event and, thus, I am not convinced and also not sure as to what aid the defendants intend to draw from reading of this article from the convention. This also does not affect the invocation of the provision of Section 51 (a) (ii) of the Act basing upon which I have found prima facie view of the infringement.

84. The submission has been made by the learned counsel for defendants that the defendants acts of providing the tools relating to notice and turn down provisions are sufficient safeguards and amounts to due diligence which should be considered to be a mitigating factor against the grant of the injunction as the defendants are taking curative measures against the possible infringement.

85. I have gone through the submission advanced by the learned counsel for the defendants and I reject it being meritless. This is due to following reasons I find that the said post infringement measures may not be prima facie sufficient safeguards for the infringements:

a) Firstly, I wish to again discuss Section 51 (a) (ii) of the Act read with Section 55 proviso, the wordings of which nowhere permits IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.111 of 132 any room for due diligence to be exercised by the infringer and only provides an exemption for mistaken infringement on the count of lack of knowledge or the person was not aware of the said infringement. Under these circumstances, permitting this kind of due diligence post infringement would mean reading the words into the statute which would be impermissible under the canons of construction when the statute does not provides so.

b) Secondly, I have already concluded separately that provisions of IT Act would not curtail the remedies under the Copyright Act and Patent Act by virtue of the proviso of IT Act. In these circumstances, the provisions of Section 79 cannot also allow to militate against the case of established infringement under Section 51 and Section 55 of the Act.

c) Thirdly, there are no safeguards provided under the Copyright Act for the infringement in the cases like the present one wherein there is a knowledge and exercise of due diligence post infringement. Rather, the conjoint reading of Section 51 of the Act and proviso to the Section 55 of the Act makes it clear that the knowledge or no notice of the infringement can only assist the

defendants in resisting the damages and not the injunction. However, in some cases like the present one under Section 51 (a) (ii) of the Act, lack of knowledge can save the liability of infringement as the same is IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.112 of 132 the ingredient of the Section. But certainly, there is no provision which can save the liability when there is an apparent knowledge and exercise of due diligence post infringement. I have already formed an opinion that the defendants are aware and has reasonable belief of infringement and thus the exercise of due diligence after the infringement cannot operate in favour of the defendants to escape the liability.

d) Fourthly, if there is any due diligence which has to be exercised in the event of absence of any provision under the Act, the said due diligence must be present at the time of infringement and not when the infringement has already occurred so that the infringement can be prevented at the threshold and not when the same has already occurred. The post infringement measures like the ones informed by the defendants which are in compliances of US statute may hold good in US due to the legislative measure but the same are not operative in India. Such post due diligence on the ground of some inherent helplessness which the defendants are pleading only because they are sitting on internet or cyberspace may not be correct as the law does not exclude cyberspace from its purview to do infringements there. The defendants have sufficient means to modify the work by taking licenses from the users, adding advertisements to the works of the plaintiff. Consequently, the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.113 of 132 effective means for pre infringement enquires are also necessarily have to be performed by the defendants only. If the defendants state that there no means to do so due to some impossibilities, the defendants must take preliminary measures at the time of modification of the works and prior to making them available to the public so as to ensure that the same does not infringe any ones copyright.

86. It gives me no hesitation to state that the compulsion which the defendants are pointing out of lack of corrective measures at the first instance due to multiplicity of the works or uploads and also the diversified business of the defendants is not only the plea taken by the defendants for the first time in any infringement action relating to copyright infringement. It is rather applicable to any case of infringement. Take for instance, the case of music library or shop selling movies for hire wherein the defendants take the plea that due to multiplicity of numbers or titles, one cannot identify the pirated ones from the originals. But this kind of argument or plea cannot preclude the labour or burden which the defendants ought to have exercised while taking into the possession the pirated titles by enquiring as to whether they are belonging to the owner or emanating from owner or not. The situation will become more complex when the same movie seller or person giving for hire will IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.114 of 132 start keeping the international titles like Hindi Movies, English Movies, French Movies and Pakistani titles. The said labour then increases manifold and the said justification also gains more strength when he says that the due to several sources, it becomes virtually impossible to keep a hold of the each and every title whether original or duplicate. Even if the said person states that once it is brought to his notice by the customer or the owner that it is an infringement, he immediately removes the said title from the library or the shop. The said acts cannot save him from the liability of the infringement.

87. Likewise in the present case, the labour or the due diligence is the enquiry by the defendants themselves to be exercised. The nature of portal due to which the defendants feels helpless is of less avail to mitigate the liability unless there is a statutory exemption to that effect (like in Digital Millennium Copyright Act ("DMCA")). The defendants can do many things to stop this, first that it can enquire at the stage when the defendants modify the works, at that time the defendants can enquire about the titles of the work and about ownership, secondly at the time of the uploading by the user, the content should not immediately made the available to the public, the defendants can put them to the halt subject to enquiries of the titles or authentication of the proprietor and thereafter make them available to the public.

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88. There is no reason to axiomatically make each and every work available to the public solely because user has supplied them unless the defendants are so sure that it is not infringement. If the defendants cannot exercise diligence of this nature, the necessary inferences can be drawn is that the defendants are making itself liable for infringement by its inactions to enquire about the source of the works at the appropriate stage.

89. Thus, even if the post infringement measures which may be acceptable in certain legal systems due to the specific legislations may not be hold good in India when the statute in India does not culls out any such exception as mitigating factor.

90. Now I shall be discussing the argument raised by the counsel for the parties on the reliefs. The extensive submissions have been made at the Bar about the nature of the relief.

91. Mr. Sibal has submitted that the present case warrants complete interim injunction in terms of the prayers made in interim application wherein the defendants can be restrained from communicating the plaintiff's works to the public as the current arrangement as directed by Division Bench is not sufficiently protecting the rights of the plaintiff. Mr. Sibal states that the current arrangement enables the infringement to first happen and then comes corrective action which is belated in cases of internet wrongs therefore, the plaintiff seeks more directions from this Court so that the defendants do not infringe the works of the plaintiff. Mr. Sibal submits that even the order of Division Bench itself states that the same is tentative and cannot come in the way of deciding the injunction application.

92. On the other hand, Mr. Kumar has submitted that the injunction in terms of the prayers made in the interim application cannot be granted due to following reasons:

- a) That there cannot be injunction of general nature wherein the plaintiff has not pointed out what are the specific infringements against which the plaintiff intended to secure protection and there can be injunction only to the extent of specific infringement and not in cases of infringements of future.

b) That there cannot be any quia timet action in copyright infringement. This is as per the learned counsel due to difference in the language of the trade mark act and the Copyright Act wherein the trade mark law protects likelihood of confusion but the Copyright Act does not provide any such infringement. Thus, the principle of quia timet is not applicable in copyright infringement.

c) That the injunction of general nature cannot be granted as the same is also barred under the provisions of Specific Relief Act, 1963 wherein Section 14(1) (d) read with Section 41(e) prevents any such kind of injunction.

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d) That the term of the order granting an injunction should be such that it is quite plain what it presents and what it prohibits. An order which merely prohibits a man from doing what he has no authority to do, without showing him what the limits of his authority are, and leaves him to find what is forbidden and what is allowed, is irregular.

e) That in the present matter, the relief of omnibus injunction as sought by the Plaintiff is not only impossible to comply with by the defendants due to the existing technological limitations, but this Hon ble Court will not be able to enforce the same unless the legitimate website of the defendant No.1 is shut down. Besides, this Hon ble Court would require continuous monitoring of the defendant No.1 s website, which is neither feasible nor in the spirit of law.

f) That the relief of the general injunction cannot be granted as the plaintiff has not shown the title on the copyright on each and every work. The defendants also dispute the assignments of the copyright being not in order. Further, the defendants allege that the assignment in every work pertains to several restrictions such as restriction as to terms, restriction as to home viewing etc. Thus, till the time the assignment deeds are examined. The plaintiff is not IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.118 of 132 entitled to the relief of injunction much less the omnibus injunction.

Thus, the defendants contend that the injunction of such nature is difficult to comply which necessitates non grant of such order which cannot be enforced.

93. I have examined the submissions of the parties on the issue of grant of wider relief which has been mentioned in the Interim application. I am of the opinion that the court is not powerless to protect the interest of the party in cases involving civil wrongs when it involves recurring infringements or infractions. I shall now proceed to discuss the reasoning to this effect:

93.1 Firstly, the defendants concern that the plaintiff has not substantiated the cause of action by certainly providing the infringements against which it requires

prohibitory relief. The said submission of the defendants do not aid their case as indeed the plaintiff has been able to procure the sample infringements which are entailed in the plaint out of the mass infringements which are occurring over the internet on day to day basis. It is the case of the plaintiff s that it is the owner of repertoire of the musical works and sound recordings. Out of this repertoire, if the plaintiff is able to show some sets of infringements and is also able to show that the defendant s acts are such which amounts to permitting the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.119 of 132 place for profit for infringement purposes and there is a complete certainty of future infringements. There is no reason why this court should continue to allow the defendants to use that place for profit of the defendants against the infringement of the plaintiff works which includes current works and future works of the plaintiff. 93.2 It would be wrong understanding of the law to state that the infringements can be prohibited only when the torts are perfected. The principle of quia timet is not only confined to the trade mark infringements as propounded by the learned counsel for the defendants.

The said submission is also misplaced and rejected as meritless. 93.3 The principle of quia timet is applicable to any tortious liability wherever there is an apprehension of infringement likely to happen. This can be seen even in the cases of trespass where the injunctions are sought even when there is threat of invasion in the property of someone. The principle of quia timet has been explained by John George Woodroffe in his book "The Law Relating to Injunctions"

in the following words :

"9. Relief. Whether it be given by the issue of an Injunction or the appointment of a Receiver, is granted general upon the principle quia timet; that is, the Court assists the party who seeks its aid, because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. So the remedy by temporary Injunction being preventive IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.120 of 132 in its nature, it is not necessary that a wrong should have been actually committed before the Court will interfere, since if this were required it would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which the complainant seeks to restrain. And satisfactory proof that the defendants threaten the commission of a wrong (which is within their power) is sufficient ground to justify the relief."

93.4 Likewise, Hugh Laddie in his book titled as "The Modern Law of Copyright" by Laddie, Prescott & Victoria at p. 405 observes about the nature of relief which can be sought in relation to infringements by way of authorization like in the present case in the following words:

"Relief can be sought in appropriate circumstances on quia timet basis even before the tort is perfected by the commission of the infringement authorized"

93.5 In *Fletcher v Bealey*, [1885] 28.Ch.D.688 the principles that should be followed by a Court when dealing with an application for an injunction quia timet when infringement of the plaintiff's rights is only apprehended were succinctly laid down by Pearson, J. who said as follows at page 698:

"I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.121 of 132 imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action."

93.6 Thus, the submission that this court cannot prevent future wrongs on the basis of quia timet injunction is also not correct as it is equally applicable to infringement of copyright like in any other tortuous act. Accordingly, the plaintiff is entitled to relief on the basis of quia timet action as the defendant's nature of activities is such where the plaintiff's works is liable to infringe and more so when the defendants are notified about the plaintiff's several works. The said danger of infringement is imminent risk of substantial damages with certainty as the defendants have already done several infringements and will continue to do so in the light of the continuous acts of the defendants. The plaintiff's interest is also to be protected against such infractions which are possible by way of injunction and any court jurisdictionally competent can grant the relief prayed for quia timet action. 93.7 Secondly, the submission of the defendants that the injunction order of the nature wherein the defendants are restrained from infringing the plaintiff's works in general cannot be granted as the defendants must know for what the defendants are restrained is also not correct. If the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.122 of 132 defendants at this stage are already notified about the plaintiff's works for the purposes of notice and turn down provisions and is also conscious of the fact that the plaintiff owns most of Hindi movie titles and its copyright, there cannot be anything specific than stating that the defendants are restrained from using the works of the plaintiff. 93.8 It is only the apprehension of the defendants that they could not trace out the ownership of the plaintiff in each and every work. However, if one sees carefully the application of the notice and turn down facility provided by the defendants wherein the owners are chasing the infringers for turning their infringements down from the website as against the infringers chasing the owners, the problem of infringement can be resolved by applying the same conversely wherein infringers must legitimize the acts with the owners prior to committing any such infringements. This can be done only by the order of the court of prohibitory nature wherein the prior notice to the owners and steps to find ownership can be taken by the defendants by taking preventive actions prior to infringements.

93.9 These apprehensions of the defendants about inability of enforce or implement the order of this court are unfounded. Further, the concern of the defendants that their website hosts the acts which are infringing as well as non infringing and it is difficult to segregate all this IA Nos.15781/2008 &

3085/2009 in CS(OS) No. 2682/2008 Page No.123 of 132 and rather impossible is also unmeritorious. Such concerns are taken care by the courts while granting injunctions in copyright infringements. 93.10 In Garware Plastics and Polyester Ltd. and Ors. etc. v. Telelink and Ors. etc.; AIR 1989 Bom 331 wherein Hon ble Bombay High Court had examined this kind of concern wherein the court observed that it is true that there are certain places like hotels where there are private viewings as well as public viewings, some of which are infringement and some are not. But still, the court proceeded to grant the injunction against the defendants from infringing the plaintiff's works in respect of which the plaintiff is the owners and/or assignees of copyright without obtaining an assignment of the same from such owners and assignees or a licensee under the Copyright Act, 1957. 93.11 Similarly in the cases involving mass infringements like the cases instituted by Performing Rights Society, Phonographic Societies which not only espouse the cause of one copyright owner but is a collective action, the mere fact of non crystallization of all the infringements does not preclude the courts from granting the injunctions basing on the prima facie ownership of the plaintiff's works and sample infringements. All these injunctions are being granted by this court from time to time. Thus, this concern of the defendants has no meaning and the injunction of the nature asked by the plaintiff cannot be faulted with considering the acts of the defendants which are infringing in nature and IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.124 of 132 the equal level of certainty with which the future infringement may arise. 93.12 Thirdly, the submission that this court cannot grant injunction in view of the Section 14 of the Specific Relief Act, 1963. I am of the opinion, that the Section 14 of the Act puts no embargo for the grant of the relief in the present case. This is due to the following reasons:

Firstly Section 14 read with Section 41(e) of the Act would lead to conclusion that the contracts which are not specifically enforceable, the injunction in negative enforcing those contracts cannot be granted. However, the present case does not fall within the purview of enforcing by way of injunction the contracts which cannot be enforced by way of operation of Section 14 of the Act. The present case rather relates to statutory injunction prescribed by the special law which is Copyright Act. The said injunction is sought under code of civil procedure by way of statutory remedy provided under the Act. Thus, the said analogy of enforcing the contract by way of injunction cannot be applicable to the present case.

The present dispute relates to remedy which is statutorily prescribed by the special law of Copyright. I have already stated that quia timet action can be maintained in the IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.125 of 132 appropriate cases as permissible by the law. Thus, in the present case, the remedies prescribed by the special law will also operate over and above the remedies prescribed under the general law relating to contracts. Section 14 (d) of the Act has been greatly stressed by the counsel for the defendants has also no applicability in the present case. However, in the present case, it would be incorrect to assume that the court cannot supervise the infringement of copyrights of the plaintiff's works in the event the court directs the defendants to take pre infringement measures to cut down infringement of the plaintiff's work. If the defendants are guilty of non performance or implementation of the order, the court can call for the records of the cache on the

internet and downloads from the relevant sources whereby it can supervise whether the defendants have complied with the said order or not.

94. More importantly, if the plaintiff files separate suits for number of infringements, the moot question is whether the said acts can be monitored in that case or not. The answer to my knowledge is in affirmative. If that is, so then it can be monitored now also by directing IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.126 of 132 the defendants not to do the infringing acts. It would be rather futile exercise to relegate the plaintiff to file separate suits after perfection of infringements and allowing the defendants to continue to ride over the works of the plaintiff till that time.

95. The challenge to the assignment deeds which has been made by the defendants are only confined to the defects in the respective assignment pointed by the defendants. The said defects in the assignments are disputed by the plaintiff by stating that the said assignments are proper and are in order which can be furnished before the court. All this is more of a question of trial at the time of evidence. At this stage, for the purposes of forming a prima facie opinion, the assignments filed with documents are taken as correct as no contrary or no cogent evidence to disprove the same has been placed on the record by the defendants. On the basis of the documents, it can be stated that the plaintiff is the owner of copyright, otherwise no one would have executed the assignment deeds. Therefore, the title of the ownership of the plaintiff is sufficient to form prima facie view.

Accordingly, this court is not precluded from passing interim order in terms of the prayers made in IA No.15781/2008 whereby the defendants can be restrained from infringing the copyrighted works of the plaintiff online by permitting place for profit. No further submission remains unanswered.

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96. The principles for the grant of temporary injunction have been succinctly discussed in Dalpat Kumar & Anr. vs. Prahlad Singh & Ors.; AIR 1993 SC 276 wherein the apex court has stated that for the purposes of grant of temporary injunction, the court must test the case of the parties on threefold tests:

- a) Prima Facie Case
- b) Balance of Convenience
- c) Irreparable Damage

97. The plaintiff has been able to make out a prima facie case as the plaintiff is the owner of the copyright in the works enumerated in the plaint. The plaintiff has also been able to establish prima facie that the acts of the defendants are infringing in nature as the same are permitting the webspace or place on internet for profit. The prima facie case thus is in favour of the plaintiff. The balance of convenience lies in favour of the plaintiff as the defendants would be less inconvenienced if they are directed to not to infringe the plaintiff's works as it is their own case is that the defendants are

doing business from multifarious jobs on internet and the works of the plaintiff is no means of profit. As against the same, the plaintiff is totally dependants upon its works for the purposes of royalties, reaping fruits of its copyright for further investments etc. thus, the plaintiff would be more inconvenienced if its works are continued to IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.128 of 132 be exploited for profit without its permission. The irreparable loss would also ensue to plaintiff if the works of the plaintiff are allowed to be made public for permitting the place on internet for profit as against the defendants who will loose nothing more than users on internet which as per themselves are trivial part of their business model.

98. Consequently, the present case warrants the grant of interim injunction for the purposes of prevention of infringement of the plaintiff s works. However, this court is not precluded from granting the interim relief in the moulded form so that the infringement can be prevented which is in fact the relief asked by the plaintiff in its interim application. Accordingly, the following interim directions and orders are passed:

a) The defendants, their agents, representatives, servants, their officers or any person on their behalf are restrained from modifying the works (more specifically the works of the plaintiff), by adding advertisements to the said works of the plaintiff adding logos and/ or sponsorships to the works, or earning profit otherwise in any manner in relation to the said works consequent upon uploading to their website/webpace of www.myspace.com or in.myspace.com without making endeavours to enquire the ownership of the plaintiff (as at that stage of modification, the defendants have all means to enquire about the same) and thereby making them available IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.129 of 132 to the public either by displaying (or playing or exhibition) of on the website or allowing the downloading from their website or otherwise of the said works in the modified form which will lead to permitting the place for profit within the meaning of Section 51 (a) (ii) of the Act and causes infringement of copyright of the plaintiff.

b) In relation to the future works of the plaintiff to be uploaded by the users other than those which are mentioned in (a), it has been stated by defendants fairly in the written statement that the order passed by the division bench is only possible solution and have also during the course of the arguments agreed that the defendants would not be inconvenienced if the order passed by learned division bench is continued.

Accordingly, the defendants shall delete the works of the plaintiff as and when the plaintiff provides the details of its songs and films which have been uploaded on the web-site of the defendants, the defendants shall immediately take remedial measures to remove the same from its website not later than one week from the date of such communication.

c) Further the defendants are also directed to verify from the plaintiff independently without waiting the direction under

(b) to be complied with by the plaintiff on their own by IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.130 of 132 other means continuously or through its India centric operations about the ownership status or updations in the works of the plaintiff and shall do their honest endeavours on their own to remove the offending content or infringing works immediately after the gaining the said knowledge.

d) In relation to the works of the plaintiff which are already turned down once by the defendants, the defendants are restrained from further allowing the continuation of the uploadings or its existence on its website of the same works which have already been turned down/ deleted by the defendants at the behest of the plaintiff request. This has been already stated by the defendants by explaining their various tools for preventing infringement wherein the defendants possess the necessary tools and the technology which identifies and prevents the repetitions in infringements after its first posting and deletion. Accordingly, the defendants are directed to ensure the deletions and the preventions of repetitions on their own after putting to notice by the plaintiff about the works by availing their own tools and not by the calling the plaintiff to do this by some subscription.

IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.131 of 132 In this way, the parties in the interim can prevent the infringements and its occurrence on the website of the defendants till the disposal of the suit. The orders passed in the interim applications are tentative in nature and does not come in the away of the court at the time of hearing of the matter after the completion of the trial.

99. Consequently, the plaintiff's application being IA No.15781/2009 (U/o 39 R 1 & 2 CPC) is allowed and defendants' application being IA No.3085/2009 (U/o 39 R 4 CPC) is dismissed with cost of Rs.20,000/-.

100. IA No.15781/2009 and IA No.3085/2009 are accordingly disposed of.

List on 16th August, 2011 for direction.

MANMOHAN SINGH, J JULY 29, 2011 IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 Page No.132 of 132