



Intellectual Property Attorneys

I N D I A

# IP UPDATE

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**K&S Partners wishes all its clients and associates  
a very happy and peaceful 2009!**

## CASE LAW UPDATE

### “HARRY POTTER” v. “HARI PUTTAR”?



*Warner Brothers Entertainment Inc. v Harinder Kohli*, raised before the High Court of Delhi the question whether the defendant’s film titled “Hari Puttar” visually and phonetically similar to the plaintiff’s registered trademark “Harry Potter” in respect of goods in classes 9, 25, 28 and 41. “Hari” is a common first name in India and “Puttar” in the Punjabi language means “son”. “Hari Puttar” when translated would, therefore, mean “Hari, the son”. The defendant’s film “Hari Puttar” was, therefore, about the heroic deeds of Hari, the young son of a Punjabi couple portrayed in a humorous fashion.

The plaintiff, Warner Brothers Entertainment Inc alleged that the publicity surrounding the defendant’s motion picture by repeated references and allusion to its trademark “Harry Potter” was creating immense confusion and deception in the minds of the potential audience of the plaintiff’s film, resulting in dual torts of unfair competition and passing off. Further, the plaintiff also raised the doctrine of Initial Interest Confusion that infringement could be based upon confusion that created initial customer interest, even though no actual sale was finally completed as a result of the confusion.

However, in its eagerness to get an interim injunction against the defendant, the plaintiff made contradictory statements in its pleading regarding the date of knowledge of the defendant’s film, thereby exposing it to a successful defense by the defendant of misrepresentation of facts to mislead the court.



Even otherwise, the court was not convinced about the potential of the defendant’s mark to cause confusion and deception among the purchasing public. The court, therefore, held that even assuming that there was any structural or phonetic similarity between “Harry Potter” and “Hari Puttar”, what deserved not to be overlooked was that the Potter films were targeted to meet the entertainment needs of an elite and exclusive audience who were adept at discerning the difference between a film based on a Harry Potter book and a film which was a Punjabi comedy, the chief protagonist of which was called “Hari Prasad Dhoonda”. The court further held that necessarily, the yardstick also must differ, bearing in mind the fact that a consumer product such as a soap or even a pharmaceutical product may be purchased by an unwary purchaser or even an illiterate one, but the possibility of an unlettered audience viewing a Harry Potter movie was remote. Based on the aforesaid reasoning and the course of conduct of the plaintiff, the court rejected the interim injunction application.

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## ***Fashion couture that dodged the Section 15 defense***

The copyright law jurisprudence in the field of fashion is slowly evolving in India. The decision of a Single Judge of the Delhi High Court in *Microfibers Inc. v. Giridhar & Company* in 2006 (reported in IP Update, Vol. V, Issue 2, April 2006) assumes particular significance for the Indian fashion industry which is known for producing only limited editions of a particular design as opposed to mass production by the general couture industry. The said decision clarified that the intent of creating designs is to put them to industrial use and that under Section 15(2) of the Copyright Act, 1957 ('Copyright Act'), the copyright in any design which is capable of being registered under the Designs Act, 2000 (Designs Act) but which has not been so registered shall cease to exist, if reproduced more than fifty times by an industrial process by the owner. The decision held that copyright did not exist in the upholstery textile designs of the plaintiff as the same was commercially reproduced (more than fifty times) on an industrial scale.



The issue that arose for consideration in *Tahiliani Designs Pvt Ltd V Rajesh Masrani*, which was an action for infringement of copyright, was whether the couture designs of the plaintiff, consisting of high-end garments targeted at a very small, exclusive clientele were infringed by identical designs of the defendant, a relatively unknown manufacturer and vendor of fashion items, serving a less exclusive market than the plaintiff.

In its defense, the defendant sought to rely on the ratio of *Microfibers* and argued that the plaintiff had no right to claim protection under the Copyright Act since the 'artistic work' for which copyright was alleged to exist in the plaintiff's designs were actually designs relating to textile products falling within the ambit of the Designs Act. It was claimed that as these alleged designs were not registered under the Designs Act, the plaintiff was not entitled to protection under the Designs Act and that the said textile designs did not constitute 'artistic works' under the Copyright Act thereby rendering these ineligible for protection under Section 14(c) of the Copyright Act. The defendant, therefore, argued that the suit of the plaintiff was liable to be dismissed under the

provisions of Section 15(2) of the Copyright Act under which no copyright subsisted in any design which was registrable under the Designs Act.

However, the said defense was successfully countered by the plaintiff by relying on the copyright in the drawings, being artistic works within the meaning of Section 2(c)(i) of the Copyright Act, used for developing the garments and thereby establishing that the disputed designs were produced not more than twenty times. Thus plaintiff's rights were exempted from the defense under Section 15 (2) of the Copyright Act.

While confirming the ex parte order of interim injunction, the court observed as follows:

*"To sum up, there are designs and designs. Some may fall within the ambit and scope of the definition of works of art or "artistic work" as defined in the Copyright Act. Others may be mundane, even inartistic to the creative eye. Some may be unique, elegant and classy, others pedestrian, prosaic and uninspired. An artistic work, per se denotes creativity, innovativeness, elegance, exclusivity and the like. To compare apples and oranges may perhaps be neither prudent nor palatable. The plaintiff, in my view, has, therefore, made out a strong prima facie case for the confirmation of the ex parte injunction granted in its favour."*

This decision was subsequently appealed to a Division Bench of the High Court of Delhi which has since upheld the order of the Single Judge.

## ***Scrabble loses copyright claim but wins trademark***

*Mattel Inc v. Jayant Agarwala* decided by the High Court of Delhi raised dual issues of copyright and trademark rights of the plaintiff.



Mattel Inc., the plaintiff in this case, is a leading manufacturer of toys, games and consumer products. It owns the trademark "SCRABBLE" under which it has been selling the well-known word-based board game. The game was invented in 1932 and the trademark was adopted in 1948 and had been in use since then. The plaintiff owned two registrations for the mark SCRABBLE in India in classes 9 and 28 from 1999 and 1978 respectively. The plaintiff's game was so popular that the Oxford English Dictionary defined

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‘scrabble’ as the ‘proprietary name of a game in which the players use tiles displaying individual letters to form words on a special board’.



The first and second defendants were brothers and partners in the third defendant, a firm engaged in providing IT solutions. The genesis of the suit was the launch by the defendants of an online version of the plaintiff’s board game under the mark SCRABULOUS as an application available through the popular networking website [www.facebook.com](http://www.facebook.com). This on-line version was also promoted through the defendants’ websites [www.scrabulous.com](http://www.scrabulous.com), [www.scrabulous.info](http://www.scrabulous.info) and [www.scrabulous.org](http://www.scrabulous.org).

The allegation of the plaintiff in the suit was two fold: first, that the defendants’ aforesaid activities amounted to infringement of the plaintiff’s trademarks as well as passing off and, secondly, that the defendants had infringed its copyright in the game board and the rules.

In their defense against the trademark claim, defendants contended that the word ‘SCRABBLE’ was a generic term that had become the description of the game and was a non-distinctive mark. As regards the copyright claim, the defendants alleged that the copyright in relation to the game board was not maintainable since the board, which was a three dimensional article was not copyrightable. Further, they alleged that the shape and configuration of the board can be registered as a design, and, therefore, under Section 15(2) of the Copyright Act, 1957, the monopoly over the copyright in the said design was extinguished the moment more than fifty copies of the same were produced commercially. As regards the rules of the game, the defendants alleged that since there is no copyright registration no injunction could be claimed.

The court first addressed the copyright query whether the plaintiff’s claim to copyright in respect of the game boards with the diagonal crisscross design and the placement of double word, triple word, double and triple letter values as well as rules of the game was a valid claim. In arriving at a conclusion, the court relied upon the ruling of the Supreme Court in *Eastern Book Company v. D B Modak* [(2008) 1 SCC 1], which rejected the ‘sweat of the brow’ doctrine and held that the work must be original “in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained

in the work, a work, somewhat different in character is produced by the author”. Accordingly, the court found that not every effort or expending of skill, resulted in copyrightable work, but only those which created works that were somewhat different in character, involving some intellectual effort and involved certain degree of creativity could be protected and that this standard of originality, was now applicable in respect of the plaintiff’s claim to copyright in various aspects of the game.

Further, the court applied the doctrine of merger which postulated that where the idea and expression were inextricably connected, it would not be possible to distinguish between the two. Applying this test, courts have refused to protect the expression of an idea which could be expressed only in a very limited manner, thereby conferring monopoly over ideas. By applying the said doctrine to this case, the court held that the color scheme on the game board of the plaintiff could be expressed only in a limited number of ways and if the plaintiff’s arrangement were to be avoided, it is not known whether the idea of such a word game could be played at all. Relying on the decisions of American courts in *Allen v. Academic Games League of Am* [89 F.3d614] and *Atari Inc v. North American Philips Consumer Electronics Corporation* [672 F.2d 607], the court held that copyrightability of a game was hit by the doctrine of merger as games consisted of abstract rules and play ideas over which no monopoly must be conferred. If the rules of the game, which formed the only method of expressing the underlying idea were to be subjected to copyright, the idea in the game would be given monopoly, a result unintended by lawmakers, who only wanted the expression of ideas to be protected. Accordingly, the High Court of Delhi found that, *prima facie*, the copyright claim of the plaintiff should fall to the ground.

As regards the trademark claim in the mark ‘SCRABBLE’, the court found that it was not *per se* descriptive of the word game, unlike MONOPOLY or CROSSWORD. Court observed that while evaluating the competing claims of the defendants and the plaintiff, it could not be unmindful of the fact that language was an evolving and organic system, which assimilated all kinds of usage, customs and convenient descriptions of objects, processes, systems, places and persons. It pointed out that etymological adventurism by the court should not

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lead to loss of distinctiveness of a mark which was a part of the popular lore. Further, the court found that the defendants' mark SCRABULOUS is too close, phonetically and semantically to plaintiff's mark SCRABBLE. Accordingly, the defendant was enjoined from using the infringing mark SCRABULOUS.

The decision in respect of the adverse copyright finding is currently under appeal before a Division Bench of the High Court of Delhi.

### ***Can a copyright collection society sue for infringement?***

Under Section 33 (3) of the Copyright Act, 1957 ('the Act'), the Central Government, having regard to the interests of the authors and owners of rights under the Act, the interest and convenience of the public and in particular of the groups of persons who are likely to seek licenses in respect of the applicants, has the power to register an association of persons as a copyright society. In India, there are two such societies, one being the Indian Performing Rights Society (IPRS) authorized to administer the performance rights of lyricists and composers and the other being the Phonographic Performance Limited (PPL) authorized to administer performance rights of owners of sound recordings.

IPRS has in the past obtained injunctions against defendants who were playing music without a license from them on the ground of copyright infringement. In the case of *Phonographic Performance Limited v. Hotel Gold Regency*, PPL sued the defendant, who was carrying on business as a hotel, restaurant and bar, for copyright infringement of PPL's sound recordings. The defendant in turn filed an application for rejection of the plaint on the ground that being a mere licensee as opposed to an exclusive licensee, PPL did not have the right to sue. The arguments of the defendant in the said application may be summarized as follows:

- ◆ The first proviso to Section 33(1) of the Act retained the rights of an owner of copyright in a work, in his individual capacity, to continue to have the right to grant licenses in respect of his works consistent with his obligations as a member of the society. Hence, PPL was not an exclusive licensee.
- ◆ Section 34 of the Act only permitted the grant

of exclusive authorization by the owner to a society for grant of licenses, collection of fees and distribution thereof amongst the owners. These rights did not include the right to sue for infringement and, therefore, PPL could not bring a suit for infringement.

PPL opposed the application on the following grounds:

- ◆ The business of PPL under Section 33(1) was one of issuing and granting licenses in respect of rights under the Act and such business would include legal enforcement of such rights.
- ◆ The word 'business' was a very wide term and included the right to institute a suit for enforcement and protection of rights granted to PPL by its members.
- ◆ Further the words "authorisation" and "administer any rights in the work" in Section 34(1)(a) of the Act have wide amplitude and, instituting suits to protect the rights was part thereof.
- ◆ Reliance was placed on one sample contract entered into by PPL with the owner of a sound recording which had a provision authorizing PPL to sue defaulters on behalf of the owner of copyright.

Having considered the arguments advanced by both the parties, the court held as follows:

- ◆ Section 34 of the Act only permitted grant of exclusive authorization by the owners of copyright for grant of licenses, collection of fees and distribution thereof among members. There was no right to sue under the said section or section 55.
- ◆ As for the agreements, the parties could only agree to do what the law permitted them to do and if they agreed on something beyond the authority of law, the agreement to such an extent would be unenforceable.
- ◆ There was a distinction between a party with whom the society had entered into an agreement for collection of license fees and a party who had no such agreement with the society. While it was permissible for the society to take legal actions against those defaulting licensees as permitted by the agreement, the society would not have such

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right or authority to file suits against persons who were not their licensees either for infringement or for recovery of fee.

- ◆ In a situation involving non-licensees of the society, it was open to the owners to sue for infringement and other consequential civil remedies.

### ***When does an assignee of a registered trademark acquire title to the mark?***

The moot question that came up before the High Court of Delhi in *Sun Pharmaceuticals Industries Limited v. Cipla Limited* for consideration was whether the assignee in a registered trademark could claim rights to the same only after the assignment was formally recorded by the Registrar of Trademarks or merely by way of signing the deed of assignment.

The disputed mark was THEOBID acquired by the plaintiff vide an assignment. The plaintiff, thereafter, applied for recordal of its ownership under Section 45(1) of the Trade Marks Act, 1999. While the said request was still pending, the plaintiff initiated a suit for infringement against the defendant for use of the mark THEOBID-D in respect of identical products. The defendant raised a defense that when the plaintiff was not yet recorded as the owner of the trademark in the Trademark Register, it was not entitled to maintain an action for infringement.

Rejecting the above defense and allowing the plaint, the court held that immediately on assignment in writing, the assignee acquired title to the registered trademark. Moreover, it was held that in a case like the present one, where the registered owner and another were both claiming rights over the mark, the balance of convenience would be in favour of the registered owner.

### ***Guidelines for appointment of local commissioner in software infringement and piracy cases***

An order for appointment of a local commissioner to visit the premises of a defendant is very crucial to the remedies claimed in a suit for copyright infringement of software by a plaintiff. The job of a local commissioner in such cases is to ensure that all the incriminating evidence pointing towards copyright infringement and piracy is not only collected but also preserved for the eventual trial of the case. Being intangible objects and highly susceptible to swift deletion and destruction, the visit

by a local commissioner to confiscate such evidence is indispensable to such actions. However, refusal by the court to grant such an order is a nightmare for copyright litigators in India since such a refusal could seriously impair the claims in such actions. The plaintiff/ appellant in the instant case of *Autodesk Inc v. AVT Shankardass*, therefore, made a request before a Division Bench of the High Court of Delhi to lay down some important guidelines for appointment of local commissioners in such cases so as to end the existing contradictory views on the same. After considering the issues in depth, the Division Bench has laid down the following guidelines:

- ◆ The object of appointment of a local commissioner in software piracy matters is not so much for collection of evidence but for preservation and protection of infringing and incriminating evidence. In the absence of appointment of a local commissioner, such evidence that can be collected only from the premises of the defendant could be lost, removed or destroyed.
- ◆ Request for appointment of a local commissioner in such cases is intended to subserve the ends of justice as it is imperative to have an element of surprise so that the actual position is not altered.
- ◆ The test of reasonable and credible information regarding the existence of pirated software should not be subjected to strict proof at the initial stage itself. Rather it has to be tested on the touchstone of pragmatism and the natural and normal course of conduct and practice in trade.
- ◆ Since any attempt by a plaintiff to obtain any admission by employing decoy customers and gaining access to the defendant's premises has the potential of alerting the defendant and causing a possible disappearance of the evidence, courts must not insist on such visits as a precondition. Further, any reports by private investigators engaged by the plaintiff need not be disregarded on partisan grounds and should be analysed objectively.
- ◆ In cases where there is no definite and cogent information regarding existence of pirated software, or where court has an element of doubt, it may consider asking the plaintiff to deposit costs in the court so that in case the pirated software or incriminating evidence is not found, the defendant could be suitably compensated.

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## INSIGHT

### **Broadcast reproduction right distinct from copyright: High Court of Delhi**



The High Court of Delhi recently had an occasion to distinguish broadcasting reproduction right and copyright provided under the Indian Copyright Act, 1957 ('the

Act') in *ESPN Star Sports v. Global Broadcast News Ltd* [2008 (2) CTMR 494 (Delhi) (DB)].

The case was filed by ESPN Star Sports (ESS) against various news channels, in which ESS complained that its exclusive rights to televise various cricket matches, the rights to which were obtained from Cricket Australia (CA), were violated by certain Indian news channels by excessive usage of the said broadcast in the form of news and by way of repeated telecast. A Single Judge of the High Court of Delhi refused the interim injunction application of ESS on the ground that the suit was not maintainable for non-compliance of Section 61(1) of the Act which stipulated that in every civil suit for copyright infringement instituted by an exclusive licensee, the owner of copyright shall, unless the court otherwise directs, be made a defendant. The reasoning of the Single Judge was that CA was the owner of the copyright and was not made a party to the suit under section 61(1). The Single Judge further rejected the plea of ESS that repeated use of the footage of the matches by the defendants did not fall under fair dealing and amounted to copyright infringement. Accordingly, the suit was dismissed for lack of compliance of Section 61(1) of the Act.

Aggrieved by the above, ESS filed an appeal before the Division Bench of the High Court of Delhi which set aside the order of the Single Judge and restored the suit and placed it for disposal before the Single Judge.

In the appeal, the arguments of ESS were three-fold:

◆ First, the appellant argued that the 'broadcasting reproduction rights under the Act were distinct and different from 'copyright'. In support of this argument, the appellant relied on Article 14 of the TRIPS Agreement which read as under:-

### **“Article – 14 – Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations**

(3) *Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization –*

*The fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).”*

The appellant argued that being a signatory of TRIPS Agreement, India amended its copyright law in 1994 so as to incorporate Section 37 thereof. However, even after the aforesaid amendment of the Act, the definition of 'copyright' under section 14 was not amended to include 'broadcast reproduction rights' unlike that in the United States of America, the United Kingdom and New Zealand where 'broadcast reproduction rights' had been specifically included within the meaning of 'copyright'. The appellant argued that countries such as France, Germany and India provided for a special right known as 'broadcasting reproduction right' which was a related right and was different from 'copyright'. Accordingly, the appellant asserted that 'broadcast reproduction right' was different from 'copyright' under the Act.

◆ The second main argument of the appellant was that Section 61 (1) of the Act which stipulated that an exclusive licensee must make the owner of the copyright a defendant in every copyright infringement suit did not apply to the provisions relating to 'broadcast reproduction rights' under Section 37. To buttress this argument, the appellant relied on the statement of objects and reasons of the Act which provided that "certain rights akin to copyright are conferred on the broadcasting authorities in respect of programmes broadcast by them." The appellant argued that this sufficiently brought out the difference between the two rights in the Act. The

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appellant further argued that such a distinction is further demonstrated by Sections 51 and 37(3) of the Act which dealt with ‘acts constituting infringement of copyright’ and ‘acts constituting infringement of broadcast reproduction right’ respectively. Reliance was also placed by the appellant on various precedents that stipulated that satellite broadcasting rights were treated as separate rights under the Act. Accordingly, the appellant argued that broadcast reproduction right, which was different from copyright vested with the broadcasting organizations which were causing the broadcast to be communicated to the public under their logo by any means of wireless diffusion or by wire. Section 61(1) was, therefore, not applicable in a proceeding for infringement of broadcasting reproduction right as that provision was only limited to cases where the exclusive licensee of ‘copyright’ instituted a suit for infringement of copyright.

- ◆ Lastly, the appellant contended that the use by the defendant of the appellant’s broadcast did not fall within the fair dealing exceptions under the Act. Acts amounting to fair dealing of a broadcast reproduction right were given in section 39. The duration of coverage of the appellant’s footage by the respondents ranged up to 30 minutes and, therefore, it was not a mere case of fair dealing by reporting current news under Section 39(d); rather it was done with the object of attracting the audience to view the particular news channel and to enhance its viewership. Further, to make an entire programme of half an hour revolving around cricket events and repeatedly broadcasting the same would certainly amount to commercial exploitation especially when the fact of the programme being aired later in the day was constantly advertised and announced by the respondent channels. The appellant argued that this would amount to a direct competition with its broadcast. It was further argued that in the facts and circumstances of the instant case, the court could decide what amounted to fair dealing in the case of broadcasting the material pertaining to the coverage of a cricket match which was of national interest in the course of a news programme.

The counsel for the respondents argued as follows:-

- ◆ Section 61 of the Act was mandatory in its application and its effect and operation were neither excluded nor limited by any non-obstante clause. Countering the argument of the appellant that Section 39A, which specifically listed those sections of the Act that applied to broadcast reproduction right did not include Section 61, the respondent argued that section 39A provided that these sections were to apply “with any necessary adaptations and modifications”, thereby implying that Section 61 could be counted as applicable.
- ◆ The broadcast reproduction right was a species of copyright and did not exist *de hors* copyright.
- ◆ Section 55 of the Act which dealt with civil remedies for infringement of copyright referred specifically to “owner of copyright” which by its own operation makes Section 61 applicable in case an action was brought by an exclusive licensee.
- ◆ Fair dealing could not be pre-judged and that no injunction or restraint order could be made on the basis of mere apprehensions of unfair dealing.
- ◆ Section 39(b) of the Act specifically excluded from the ambit of infringement the use of excerpts of a broadcast for reporting current news or for review. Further for television journalists, it was their fundamental right under Article 19(1) (a) of the Constitution of India to report all the important current news and happenings and disseminate information. The use of the footage for this purpose was, therefore, the respondents’ right under the freedom of speech and expression guaranteed by the Constitution of India.

Having considered the various arguments of the parties, the court held as follows:-

- ◆ Under Section 37 of the Act broadcast reproduction right has been defined as a special right and the term ‘broadcast’ has been separately defined under section 2(dd) of the Act. It was, therefore, evident that there could be both copyright and broadcast reproduction right which could separately coexist.

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- ◆ Further Sections 51 and 37 (3) of the Act dealt with ‘acts constituting infringement of copyright’ and ‘acts constituting infringement of broadcast reproduction rights’ respectively. Further, Section 39A provided that sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall with necessary adaptations and modifications apply in relation to the broadcast reproduction right, thereby clearly showing the legislative intent as to which provision of the Act would apply to both copyright and broadcast reproduction right.
  - ◆ Evidence placed on record showed that the eventual product telecast by the appellant had its own distinct identity and a separate right, as it was distinct and different in many significant respects from the original feed of the host broadcaster. Accordingly, this would give rise to a separate right available to the appellant itself in the eventual telecast bolstered by the input of the experts and the other technological innovations employed by the appellant. Accordingly, even if Section 61 was held to apply, the copyright of the modified feed would belong to the appellant alone and not CA or its host broadcaster.
  - ◆ The appellant had employed a lot of efforts and had invested considerable amount of money to bring the live feed of the match on television. The benefits of bringing the live feed of the match ought not to be reduced by the respondents’ repeated telecast of the important portions of the match thereby adversely affecting the commercial viability of the appellant’s telecast.
  - ◆ The principal use of the footage of the cricket match in such a format as produced by the respondents prima facie appeared to create a visually engaging and commercially profitable programme, which extensively used the appellant’s footage. Hence prolonged and repeated footage of the broadcast by the defendants beyond what was permissible by the concept of fair dealing, may unfairly affect the appellant’s exploitation of its rights.
  - ◆ The appellant’s broadcast reproduction rights may be affected by indiscriminate use of its substantial footage without its permission. Further, this may amount to commercial exploitation of the appellant’s footage in the guise of fair comment, while purporting to telecast news bulletins. Being a broadcasting organization as envisaged in Section 37 of the Act, the appellant was well within its rights to seek a legal remedy to ensure that its broadcast was not commercially exploited by a third party without its permission and without acknowledging its rights.

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