

O.A.No.502 of 2018
in
A.Nos.4609 and 4699 of 2018
in
C.S.No.330 of 2018

C.V.KARTHIKEYAN, J.

C.S.No.330 of 2018 had been filed by the plaintiffs, M/s.Fermat Education, represented by its Partner Mr.Rajesh Balasubramanian and by Mr.Rajesh Balasubramanian in his individual capacity against M/s.Sorting Hat Technologies Pvt Ltd., represented by its Co-Founder and CEO, Mr.Gaurav Munjal and 13 others. The suit had been filed under Sections 51, 54, 55 and 62 of the Copyrights Act, 1957 and the Copyright (Amendments) Act, 2012 read with relevant provisions of Code of Civil Procedure and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2016 seeking a judgment and decree restraining the defendants from using the literary works of the plaintiffs in the 2IIM CAT question either in the literary form or video form and also for a decree for Rs.25,00,000/- (Rupees Twenty Five Lakhs) as damages for infringement of the plaintiffs' copyrights and for a preliminary decree to remove the infringing materials from the website www.unacademy.com; and for a preliminary decree

directing the first defendant to render accounts of profits earned through such alleged infringement and for cost of the suit.

2.The 13 other defendants, who had been impleaded, are educators, who according to the plaintiffs had copied literary works of the plaintiffs from its CAT question bank. The first defendant is a Company incorporated in India and operated a website, www.unacademy.com. The 2 to 14 defendants are paid educators of the first defendant. They offer course materials, which are uploaded by the first defendant in the web site. The first plaintiff is a registered Partnership Firm. The second plaintiff and his wife are the partners. The first plaintiff is involved in providing coaching to students to train them to face competitive exams. The first plaintiff provides coaching to graduates and school going students by offering two difference courses, namely, 2 IIM-CAT preparation to take CAT (Common Admission Test), to pursue Post Graduation in Management and Piverb, which is a Mathematics online course for school students.

3.The first plaintiff started to give classroom CAT coaching

in Chennai in 2014. It commenced online CAT preparation course in 2016. It evolved into an E-learning platform. The second plaintiff is the Founder-Director of the first plaintiff. The course materials are exclusively created by the second plaintiff. He is well qualified for the same. More than 5000 students have benefited from the courses. There are three coaching centres. The second plaintiff had created the contents for the online courses including practice exams, study materials and online mock test. They also train the teachers. The second plaintiff handles at least 50% of all topics for all the batches. He is the only person, who teach Geometry and Number Theory. In the plaint, achievements of the second plaintiff had been given in detail.

4.It had been stated that the course materials offered by the plaintiffs consists of CAT question bank and solution to all questions in a very simple and easy to understand manner. They also offer 20% of course materials free on their website for the benefit of the students. Free access of study materials had also been facilitated. The plaintiffs are service oriented. The free contents of the question bank has 600 plus free question with

detailed solutions. The standard is also very high. They produced materials in printed form and also in Audio-Video visual form. The materials are easy to understand. The materials are not featured in any other course materials. The plaintiffs are vigilant in protecting their intellectual property rights.

5. It had been stated in the plaint that in February'2018, it had come to the knowledge of the plaintiffs that more than 200 questions / videos containing questions of the plaintiffs were uploaded in the website www.unacademy.com, of the first defendant. The first defendant had been provided with course materials by the 2 to 14 defendants. The plaintiffs brought to the knowledge of the first defendant the infringing nature of the content in their website. It had been stated in the plaint that the first defendant had stated that they upload the materials only after verifying the accuracy. However, the plaintiffs stated that the course materials in the website of the first defendant are exact copied versions of questions of the plaintiffs. They have reproduced the videos created by the plaintiffs. They have converted the questions as video presentation without any

addition. It had, therefore, been stated that the materials in the website of the first defendant, www.unacademy.com, contains infringing materials. Moreover, they were also passing off of the materials as theirs, though it had actually been prepared by the plaintiffs.

6. The first defendant on receiving complaint from the plaintiffs had admitted infringement. They had also banned some of the educators. However, the 2 to 14 defendants continued to infringe the materials of the plaintiffs. Even though the first defendant admitted the infringement, they have not removed the materials. According to the plaintiffs, the first defendant should have changed the contents of their course materials. Instead of deleting the materials, the first defendant made defamatory comments about the second plaintiff. The first defendant offered the second plaintiff a sum of Rs.5,00,000/- (Rupees Five Lakhs) to settle the issue. The email correspondences in this regard had been extracted in the plaint. The plaintiffs had therefore, instituted the present suit for injunction and for damages and other reliefs.

7. Along with the plaint, the plaintiffs also filed O.A.No.502 of 2018 seeking order of interim injunction restraining the defendants from using the literary works of the plaintiffs in 2IIM-CAT questions in literary form or in video form amounting to infringement of the plaintiffs' copyrights over 2IIM-CAT questions and video presentation. This application came to be considered by this Court on 17.05.2018. The first defendant had also entered appearance as caveator. After hearing both sides, the following order was passed:

“5. Upon consideration of the materials, I am satisfied that a prima facie case has been made out for grant of interim injunction. Accordingly, there shall be an order of interim injunction as prayed for till 14.06.2018. Order 39 Rule 3(a) CPC to be complied with.

6. Notice to the respondents 2 to 14 returnable by 14.06.2018. Private notice is also permitted. List on 14.06.2018.”

8. Subsequently, the injunction has also been extended and is force as on date.

9.The 14th defendant, Deepak Misra, filed in A.No.4609 of 2018 to set aside the interim order dated 17.05.2018. In the affidavit filed in support of the application, the 14th defendant stated that he is a degree holder in B.E (Civil) and had also done his MBA. He is associated with a private University as a tutor. His qualification had also been given in the affidavit. He stated that he taught students about the concept of aptitude through lecture videos. He is stated that he did not know the plaintiffs and had never interacted with them. He further stated that the plaintiffs claimed that they uploaded coaching sessions for qualifying for CAT examinations and for admission to MBA courses. However, his lecturers were for persons aspiring to qualify in SSC exams and Bank PO examinations. He, therefore, stated that the target students / courses by the plaintiffs and by him are entirely different. He had further stated that the plaintiffs did not have any cause of action against him. Under these circumstances, he stated that the interim order must be vacated.

10.The 1st defendant, M/s.Sorting Hat Technologies Pvt Ltd,

filed an application in A.No.4699 of 2018 to vacate / set aside the interim order dated 17.05.2018. In the affidavit filed in support of the application, the authorised signatory of the first defendant stated that the first defendant is operating an online education platform under the name of "Unacademy". They have collaboration with independent tutors. They upload online tutorial videos. It had been stated that in a span of six months, over 3 lakhs students have benefited from over 2,400 online lessons. They also have their own website, <http://unacadomey.com>. They stated that 95% of the material is available for free access. They also have terms and conditions for uploading materials in the website. It had been stated that they are protected under Section 52(1)(i) of the Copyrights Act, 1957. They have also stated that fair use is protected under the said provisions. It had been further stated that the plaintiffs must prove that they have copyright over the contents claimed by them. It had been stated that the first defendant is an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000. They are exempted from liability or any third party complaint under Section 79 of the Act. It had been stated that the plaintiffs cannot be granted any

order of injunction and it had been stated that the interim order must be vacated.

11.The plaintiffs had filed their counter to both the applications. In the counter for A.No.4609 of 2018, it had been stated that the 14th defendant had contributed the contents containing copyrights works of the plaintiffs. The plaintiffs had also filed documents along with plaint to substantiate the allegation of infringement. The 14th defendant had admitted that he had uploaded materials and videos in the website of the first defendant. He is a necessary party to the proceedings. The mathematical questions, which had been prepared by the plaintiffs are unique. The 14th defendant had infringed upon the materials of the plaintiffs. It had been stated that no substantial ground has been urged to vacate the order of injunction.

12.In the counter affidavit filed for A.No.4699 of 2018, it had been stated that the contents uploaded by the first defendant contained infringing materials. It was denied that the first defendant is exempted for charge of infringement and are protected under Section 52(1)(i) of the Copyrights Act, 1957. It

was stated that the proprietary rights of the materials vested with the plaintiffs. It had been further stated that the first defendant had admitted infringement. It had also been stated that the first defendant was not an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000. It had been stated that the interim order of injunction must be made absolute.

13. Along with the plaint, the plaintiffs have filed documents including the email correspondences between the second plaintiff and the first defendant, and also screen shots to prove that the defendants have copied the course materials of the plaintiffs in literary form and video form. They have also, subsequently, filed the terms and conditions of the website of the first defendant. The first defendant also filed their terms and conditions of the website, www.unacademy.com and also the terms and conditions of the website of the plaintiffs, www.2iim.com. They have also filed the true copy of the plaint filed in O.S.No.3811 of 2018, which is pending before the Principal City Civil Court at Bengaluru.

14. Heard arguments advanced by Ms.S.Suba Shiny, learned Counsel for the plaintiffs and applicants in O.A.No.502 of 2018 and Mr.Yashod Vardhan, learned Senior Counsel for Mr.Bharadwajaramasubramaniam, the learned Counsel for the 1st defendant and applicant in A.No.4699 of 2018 and Mr.Diwaagar, learned Counsel for the 14th defendant and applicant in A.No.4609 of 2018.

15. The plaintiff, M/s.Fermet Education and Rajesh Balasubramanian, partner of the M/s.Fermet Education have filed the suit seeking an order of permanent injunction restraining the defendants, M/s.Sorting Hat Technologies Pvt., Ltd., represented by its Co-Founder and CEO, Mr.Gaurav Munjal and 13 others, from infringing or using the literary works of the plaintiff in the 2IIM-CAT question either in literary form or video form. The plaintiffs have also sought consequential reliefs of damages and decree to remove the infringement materials and decree to render accounts of profits earned and for costs of the suit. The first defendant provides an online platform for uploading study materials in literary and video form and the 2nd and 14th defendants have taken advantage

of that space and have uploaded their coaching materials. The plaintiffs claim that these coaching materials infringed their own materials, which they have uploaded in their website.

16. The second plaintiff and his wife Tmt. Ranjeetha Shivakumar are the partners of the first plaintiff. The first plaintiff originally provided coaching for students through class room sessions and later diversified into an e-learning platform. The specialise in coaching the students who take Common Admission Test-CAT to secure admission in management courses. The second plaintiff claims to be the author of the contents of the course materials. He has claimed experience in teaching. He started conducting class room coaching and at later expanded by providing an e-learning platform through webstie. According to the plaintiffs, more than 5,000 students have benefited from the courses provided by the first plaintiff.

17. The first defendant, M/s. Sorting Hat Technologies Pvt Ltd., started an online based platform under the name of “unacademy”, collaborating with individual teachers, who published online their tutorial videos in the website of the first

defendant, namely, <http://unacadomey.com> They also used video sharing service provider, such as Youtube to make available the contents generated by their educators. It is claimed by the first defendant that about 95% of the contents are available for free access. The first defendant claims that it is an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000. Section 2(1)(w) of the Information Technology Act, 2000, defines the word 'Intermediary' as follows:

“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 cafers”

18.The first defendant have their terms and conditions, which bind to the educators who contribute user contents. It also binds any person who utilises the user contents created by the educators. The 2 to 14 defendants in the suit are the educators, who had provided online materials and which have been uploaded by the first defendant in the website www.unacademy.com. The second plaintiff has claimed that

these materials have infringed upon his copyright in similar study materials uploaded by him in the website of the first plaintiff. The plaintiffs have complained that the materials provided by the 2 to 14 defendants and uploaded by the first defendant have directly infringed, both in literary form and video form the works of the second plaintiff.

19. Claiming that this infringement has caused much loss to them, the plaintiffs have filed the present suit. They also filed O.A.No.502 of 2018 seeking an order of interim injunction. The First defendant had entered appearance as caveator, However, this Court, on 17.05.2018, had though it fit to grant an interim order of injunction. The first defendant had filed I.A.No.4699 to vacate the interim order of injunction. The primary contention raised by Mr.Yashodvandhan, learned Senior Counsel for the first defendant is that the first defendant as an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000, is entitled to consequential protection under Section 79 of the said Act. Section 79 of the Information Technology Act, 2000, reads as follows:

“79. 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-

(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 on that resource without vitiating the evidence in any manner.

Explanation. -For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.”

20. In addition to this, the learned Senior Counsel for the first defendant has also claimed protection under Section 52(1)(i) of the Copyrights Act, 1957. Section 52(1)(i) of the Copyrights Act, 1957, reads as follows:

“(i) the production of any work-

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

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

(iii) in answers to such questions;

21. Apart from the above defences taken by the first defendant, in the application, namely, A.No.4609 of 2018, the 14th defendant had stated that the 14th defendant is an educator providing videos with study materials, which had been uploaded in the first defendant's website only for Staff Selection Commission examination and Bank Probationary Officer Examinations. The materials are not for management courses as provided by the plaintiff. The learned counsel for the 14th defendant, Mr.Diwaagar, had further stated that the 14th defendant is not aware as to the materials post by the first defendant.

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22. On the other hand, Ms.S.Suba Shiny, learned Counsel for the petitioners had advanced arguments on the ground that the first defendant is not an intermediary and consequently, cannot claim protection under Section 79 of the Information

Technology Act, 2000. The learned Counsel pointed out that the terms and conditions of the first defendant itself read as a whole would imply that the first defendant cannot be categorised as a intermediary.

23. The terms and conditions of the first defendant had been provided by the both plaintiffs and the first defendant. As stated above, the terms and conditions would apply to educators and to any person, who utilises the user contents. Section 2(1)(w) of the Information Technology Act, 2000 reads as follows:

“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”

24. Services provided by the first defendant are as follows:

“Services :- The Website and/or App is an online platform that supports and facilitates the online creation of educational vides/or tutorials, by the Users of the Website and/or App (“services”).

You may create a video, audio clip or tutorial by using our Services. Such content developed through the use of our Services or otherwise submitted to us for uploading on our Website and/or App shall hereinafter be referred to as “User

Content”

Subject to compliance with these Terms and use, Unacademy grants You a personal, non-transferable, non-exclusive, limited privilege to use this Website and/or App”.

25. This has been interpreted by the learned Counsel for the plaintiffs, who had pointed out the words “content developed through the use of our Services”, and pointed out that contents uploaded are also developed with the help of the first defendant. On the other hand, the learned Senior Counsel for the first defendant relied on the words “or otherwise submitted to us for uploading” and stated that the first defendant only uploads materials. It is the contention of the learned Senior Counsel that the first defendant receives materials and uploads them simpliciter in the website, www.unacademy.com.

26. A further reading of the terms and conditions of the first defendant shows that there is a clause relating to termination / suspension of account and it would apply if:

“2. You are in breach of any Applicable Law, that is applicable to you”

27. This has been relied upon by the learned Senior Counsel

for the first defendant, who claimed that when ever it is pointed out that the contents posted by the educators are in breach of any law including also the Copyrights Act, 1957, then, the account will be terminated / suspended. The learned Senior Counsel pointed out that a huge number of materials are being uploaded in the website of the first defendant and it would be very difficult for the first defendant to identity whether any material is actually in breach of any copyright and it was for the holder of the copyright to inform the first defendant about the such infringement. The learned Senior Counsel stated that on receiving such information, the first defendant would always terminate or suspend the account. As a matter of fact, even protests were raised by the plaintiffs over various others materials and they have always been responded positively by the first defendant.

28. Under the clause user obligations in the terms and conditions, the first defendant had provided as follows:

“You are entitled to create User Content by using our Services/tools/software. You hereby agree that, before publishing Your User Content, You shall be required to submit a demo video to Unacademy. Unacademy reserves its right to approve or disapprove the said User, on the basis of such User's demo video. Only unacademy approved User(s), can submit User

Content to Unacademy, by writing at teach@unacademy.com. The User is expressly prohibited from uploading any user content on our Website and/or App by itself/himself. Unacademy may as its sole discretion publish/upload Such User Content onto the Website and/or App. Further, Unacademy may in its sole discretion, choose to review certain portions of a User Content, from time to time. It is hereby clarified that Unacademy does not review, all the User Content uploaded/published on the Website and/or App and shall thereby not be held liable for the same. The User shall exercise their own discretion, while choosing to view/rely on User Content.

For the content created by You and approved and uploaded by Unacademy, You may be paid a fee/consideration with respect to Your content uploaded on the App and/or Website. The above mentioned payment shall be on the basis of such criteria, deemed fit by Us, and shall be intimated to You, by Us, prior to payment of such fee to You. It is hereby clarified that You shall not become entitled to any fee/consideration on the basis of upload of User Content, and such payment shall always remain at the sole discretion of Unacademy.”

29. The above clause reveals that contrary to the stand taken by the first defendant, they retain a right to disapprove a demo vide submitted for uploading and also pay a fee / consideration to the tutors. This clause runs contrary to the definition of the intermediary. The materials are not uploaded simpliciter. They are uploaded as per discretion of the first defendant. Moreover, the first defendant also pays consideration to the tutors, who upload their materials. This payment is also as per the discretion of the first defendant.

Again this act of paying consideration draws the first defendant further away from the definition of the an intermediary.

30.It is true that there is a clause placing an obligation on the tutors to ensure that the materials they uploaded do not violate any copyright. The clause is as follow:

“You hereby undertake to ensure that such material is not offensive and in accordance with Applicable Laws. Further, You undertake not to:

.....

4.Submit to upload files that contain software or other material protected by applicable intellectual property law unless You own or control the rights thereto or have received all necessary consents.”

31.But there is an exclusivity clause in the terms and conditions. The exclusivity clause is as follows:

“Once the User Content is submitted to us for being uploaded on our Website and/or App, the User is hereby expressly prohibited from uploading and/or using such content on any other online or offline mode or any other parallel media channel, including but not limited to Youtube. If the User, in contravention of this, uploads and/or uses the same content elsewhere, Unacademy reserves the right to request the User to remove such content from such mode. In case where the User refuses to adhere to such request by Unacademy, Unacademy reserves the right to exercise the IPR assigned to it hereunder.

The user may however, upload such content elsewhere only subject to prior written consent of Unacademy.”

32. Again it is seen that this clause would not categorise the first defendant as an intermediary. There is yet another clause relating to intellectual property rights and it had been provided as follows:

“Unacademy owns all IPR to and into the trademark “UNACADEMY”, and the Website and/or App, including, without limitation, compilation of all content, software, any and all rights, title and interest in and to copyright, related rights, patents, utility models, designs, know-how, trade secrets and inventions (patent pending), goodwill, images, audio clips, digital downloads, data compilation, and software, source code, meta tags, databases, text, content, graphics, icons, logos and hyperlinks.

Unacademy expressly reserves all IPR in all text, programs, products, processes, technology, content, software and other materials, which appear on this Website and/or App. The compilation (meaning the collection, arrangement and assembly) of the content on the Website and/or App is the exclusive property of Unacademy.”

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33. This exclusivity clause draws the first defendant further and further away from the definition of an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000.

34. It has been further provided as follows:

“All names, logos and images on Unacademy constitute trademarks and/or copyrights of Unacademy or the respective content owners. Content shall not be reproduced in any form. Any production or editing by any means mechanical or electronic without the explicit written permission of the respective author/owner of the content and Unacademy is expressly prohibited. You acknowledge and agree that the content, software, materials and other components (including but not limited to our logos, graphics, videos, music, button icons, and page headers) available on the Website and/or App are the property of Unacademy and/or its affiliates, subsidiaries, or licensors and are protected by copyrights, trademarks, service marks, or other proprietary rights and laws. You agree not to sell, licence, rent modify, distribute, copy, reproduce, transmit, publicly display, publicly perform, publish, adapt, edit, or create derivative works from content or materials on the Website and/or App. Use of the content and materials for any purpose not expressly permitted in these Terms of Use, is prohibited. We are not liable for any infringement of copyrights, trademarks, or other proprietary or IPR arising out of content posted on or transmitted through the Website and/or App, or items advertised on the Website and/or App, by our other users. Further, You agree not to download any material/content/User Content (including the User Content submitted by You) from the Website and/or App.”

35. With respect to the IPR in user content, it had been

provided as follows:

“IPR in User Content

You hereby understand and agree that any user Content created using the Services on our Website and/or App, shall be uploaded on our Website and/or App by the mechanism stated hereunder. Unacademy shall, in its sole discretion, upload the User Content, which is submitted to us by You.”

36. From the above terms, it is clear that the first defendant, who controls the materials, which are uploaded is the authority to examine the materials. they had a further discretion to reject the materials, which are forwarded. They also pay the educators for providing such materials and they retain copyright over such materials. When such materials violate or infringe the copyright hold by the plaintiffs, then certainly, it is only reasonable that the plaintiffs entitlement for an order of interim injunction.

37. However, it would have to be examined whether Section 79 of the Information Technology Act, 2000, would give protection to the first defendant. The learned Senior Counsel for the first defendant contended that the first defendant only provides access to platform to upload materials. They observe

due diligence. The learned Senior Counsel also pointed out that the provision under Section 52(1)(i) of the Copyrights Act, 1957, and claimed that there can be no copyright over materials relating to education. However, the learned Counsel for the plaintiffs countered this on fact stating that having received consideration for such content, the contents moved away from being exempted under Section 52(1)(i) of the Copyrights Act, 1957.

38. The learned Counsel for the 14th defendant also contended that the materials provided for being uploaded by the first defendant had been exclusively designed and formulated by the 14th defendant and stated that there has been no violation of the contents of the plaintiffs.

39. I have carefully considered the rival arguments. The first defendant relied on a judgment of a Honourable Division Bench of the Delhi High Court, reported in **MIPR 2017 (1) 0039**, in the case of **Chancellor, Masters & Scholars of the University of Oxford and others vs Rameshwari Photocopy Services and another**, wherein, a learned Single of the Delhi

High Court had examined the issue of copyrights with respect to the books publication by Oxford University Press, the Cambridge University Press and the Taylor & Francis Group, particular portion from the text books were taken photocopies and bound as a separate book for reference of the students. The learned Senior Counsel for the first defendant drew a parallel with the facts in this case, where the first defendant propagates education by uploading videos online course prepared by the defendants 2 to 14. The learned Senior Counsel held that in that case in Delhi, where, the book publishers sought an order of injunction, Section 52(1)(i) of the Copyrights Act, was examined and following observations were made with respect to the imparting education:

“There is no reason to interpret Section 52(1)(i) as providing for an individual teacher and an individual pupil and which, neither at the time of inclusion thereof in the statute nor now exists in the society... Merely because imparting of education by teachers today is as part of an institution as the defendant no.2 University and it is the defendant no.2 University which on behalf of its teachers is reproducing any copyrighted work by making photocopies thereof, would not mean that Section 52(1)(i) would not be applicable.”

40.The facts in the present case are totally different. The first defendant retails a discretion to upload, edit and reject the materials. They also pay consideration. They are engaged in a commercial activity with profit being the motivating factors. It

was pointed in the said judgment that the word publication was used in Section 52(1)(b) of the Copyrights Act, 1957, and the word reproduction was used in Section 52(1)(i) of the Copyrights Act, 1957.

41. The learned Senior Counsel for the first defendant also heavily relied on a judgment report in **2016 SCC Online Del 6382**, in the case of **Myspace Inc. vs. Super Cassettes Industries Limited**, wherein, the provisions under Sections 79 and 81 of the Information Technology Act, 2000 had been discussed in detail. In that case, granting of interim injunction in favour of the plaintiff was challenged by the defendant, M/s. Myspace. The plaintiff therein was involved in the business of recording audio and video cassettes. They own and control copyright in more than 1 lakh songs in various languages. They grant licences to a user base, which include restaurants, TV and radio station, public performers, etc. They regularise and protect the use of their intellectual property. The defendants, who were the appellant before the Honourable Division Bench, M/s. Myspace was another cassette service provider and they claimed to be an internet intermediary. They operated a social

network providing entertainment video in www.myspace.com. They uploaded music works, entertainment videos and cinematography works without paying any fee. These can be accessed by users without paying any fee. They provided a free of cost platform to the users. This judgment was strongly relied on by the learned Senior Counsel for the first defendant. In the said judgment, the Honourable Division Bench observed that M/s.Myspace uploads contents through website created by them. There are potentially 1000 of subscribers / viewers. If a song or video attains popularity, the number of hits would increase. The Honourable Division Bench had examined Section 51(A)(II) of the Copyrights Act, 1959 and held as follows:

"37. The question of deemed or constructive notice, in the opinion of the court, cannot be on the basis of any generalization, without inquiry into circumstances: it is a fact dependent exercise. For instance, in the context of even a "deemed" notice about existence of encumbrance by way of statutory charge, under Section 3 of the Transfer of Property Act, the Supreme Court held that -There is no principle of law imputing, to all intending purchasers of property in municipal areas where municipal taxes are a charge on the property, constructive knowledge of the existence of such municipal taxes and of the reasonable possibility of those taxes being in arrears. It is a question of fact or a mixed question of fact and law depending on the facts and circumstances of the case.?(Cf. Ahmedabad Municipal Corporation v Haji Abdulgafur Haji HussienbhaiAIR 1971 SC 1201). Likewise, it was emphasized in a later decision that -A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.?"

(R.K. Mohammed Ubaidullah v Hajee C. Abdul Wahab 2000 (6) SCC

402). Knowledge is to be therefore placed in pragmatically in the context of someone's awareness (i.e a human agency); a modification on the technical side by use of software would per se not constitute knowledge. Nevertheless, if the software requires some kind of approval or authorization from a person or authority as opposed to a computer system then knowledge can be attributed. This however has to be seen at the stage of trial and is beyond the purview of this appeal.

38. In this case, SCIL claims to have sent MySpace several notices describing the infringing works. Despite this MySpace did not take down the content. MySpace counters that SCIL had supplied to it more than 100,000 songs and works in which it held copyright. MySpace performed a scan and found that several of these works listed SCIL's notice, were uploaded by distributors or performers. This presented two impossibilities, one that the list provided by SCIL did not point to specific works nor did it provide the location where the works were accessible; the list was vague and general and listed every work that SCIL produced without showing whether it was available on the appellant's site and importantly, that it completely ignored the "fair use" aspect. In the peculiar circumstances, this court agrees with MySpace's contentions. SCIL is under a duty to specify the works in which it owns copyright. Merely giving the names of all content owned by it without correspondingly stating those, which MySpace is prima facie FAO(OS) 540/2011 Page 30 infringing, is contrary to the established principles of copyright law. It is only when a specific work is mentioned can it be said that MySpace possesses knowledge of a work being infringed on its website. Providing long lists of all works, tasking MySpace with identifying and removing infringing content is not enough. It is only when MySpace has specific or actual knowledge or when it has reasonable belief, based on information supplied by SCIL and if despite such knowledge or reasonable belief it fails to act can it be held liable for infringement. It would be crucial here to highlight a grey area, with respect to knowledge, e.g when a genuine licensee uploads works of SCIL. In the absence of a notice containing specific works there is possibility whereby MySpace makes a general search to identify the plaintiff's copyrighted work, it may come across works uploaded by authorized distributors/ promoters. The general notice would constrain it to blindly remove the content, which can lead to disputes. In some other instances, a licensed performer may upload a video which is a combination

of two songs or a remix- where rights in one half originally vest with SCIL and the owner of the second could be some person other than SCIL, makes it impossible for MySpace to discern the nature of rights and whom it finally vests with. There could be still other cases, where a copyrighted work may be adapted in the form of another creation, based on the original. 6 In such cases, requiring removal would result in prejudice and injury. 7 In the absence of specific titles and locations it would be impossible for MySpace to identify and remove such content. In such cases it becomes even more important for a plaintiff such as MySpace to provide specific titles, because while an intermediary may remove the content fearing liability and damages, an authorized individual's license and right to fair use will suffer or stand negated. In other words, an indiscriminate and blind acceptance of SCIL's entire list to run a general filter and "take down" all content would result in grave damage and result in likely multifarious disputes: with up-loaders, many of whom are original creators in their own right and might have used a miniscule quantum of the copyrighted content in "adaptation" is defined as "(iv) in relation to a musical work, any arrangement or transcription of the work" in the [Copyright Act](#).

For an Indian Classical Carnatic instrumental version of Adele's album -Hello? has been posted by one Mahesh Raghvan on YouTube (<https://www.youtube.com/watch?v=wPTgMrOQ7fk> accessed on 20 December 2016). The video was viewed over 1.1 times. The title of the song is Hello, identical to the original title. Yet, it is a complete adaptation as the work is in a new format.

FAO(OS) 540/2011 Page 31 their larger original creation; with distributors, who might hold genuine licenses and with others who create versions, remixes or original titles which may have little content; still there may be other content uploaders whose material only superficially resembles with the titles owned by SCIL, because of the lyrics or titles but is otherwise genuine creation with its independent copyright. The remedy proposed by SCIL and accepted by the single judge in such cases results in snuffing out creativity. This court holds that in the context of the prima facie conclusion that there was no direct infringement by MySpace, the finding by the single judge of constructive knowledge and "secondary" infringement, is incongruous and not tenable. For the foregoing reasons, this court concludes that prima facie there was no knowledge on the part of MySpace,

with respect to allegations of infringement of the plaintiff-SCIL"s works.

42.The learned Senior Counsel had also relied on the observation in paragraph 40, which was as follows:

"40. In the USA, DMCA was signed into law in 1998 to give effect to the 1996 Internet treaties and it created a system imposing limitations on the liabilities of internet service providers when found engaging in certain types of activities. These activities carried the immunity known as "safe harbor". Such safe harbor provisions apply as long as (i) the intermediary establishes, publicizes and implements a "Notice and Take Down" regime for removing content once a copyright owner sends a notice to the intermediary; (ii) there exists a system for identifying repeat offenders and removing them from the system and (iii) to make provisions for technical protection measures. Similarly in the European Union including United Kingdom, Internet Service Providers are given immunity under the European Copyright Directives (ECD). Here the range of enterprises covered under "ISP" is much larger and includes not just traditional service providers but also include hosting services, e-commerce merchants, social networking sites, cloud computing services, mobile hosts etc. Under the ECD, to maintain immunity, the ISP must not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission; similarly the intermediary is not liable for cached material as long as the above factors are complied with. Immunity is also subject to the ISP taking down cached content once it receives actual knowledge that the original source of the information has been removed or access to it disabled, or removal or blocking of access has been ordered by a competent court or authority. A hosting defence is also available to service providers which limits liability which may accrue on providing information storage services as long as the service provider does not have actual knowledge of unlawful activity or that upon receiving such knowledge fails to act expeditiously to remove or disable access to such information. Around the globe, similar regimes are prevalent especially in China and Korea."

43.The learned Senior Counsel pointed out that similarly in the present case also, it would be highly impossible for the first defendant to detect whether materials uploaded infringes the copyright of any holder.

44.With much respect to the learned Counsel for the first defendant, there are distinguishing facts in the present case. In the circumstances of instant case, the second plaintiff is the author and creator of the education materials. Documents had been filed along with the plaint to show that he is the author. Moreover, documents had been filed along with the plaint to show that his materials have been directly infringed by the materials uploaded by the first defendant. The Honourable Division Bench of the Delhi High Court had held that the defendant can only upload a song as it is. They had no occasion to edit any song or cut out any song.

45.On the other hand, the first defendant herein retains the exclusive privilege to examine the contents retain the discretion to deny uploading any material forwarded and also very importantly pays consideration for such a material. There are

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significant distinguishing factors, which distinguishes the instant case from the case relied on by the first defendant and referred to above. Here, the contents are in literary form. The first defendant could very well easily examine whether the contents violate the copyrights of the plaintiffs or of any other similarly placed copyright holder. They placed this obligation on the educators to see that the contents also not violate of any copyrights infringement. A similar obligation is placed on them, particularly, when the contents which they upload, violate the copyright of any other person.

46. Section 52(1)(i) of the Copyrights Act, 1957 cannot be pressed into service since the first defendant uploads materials for consideration. Once consideration is paid for uploading materials, then it becomes a business venture and a responsibility is imposed on the defendants to ensure that they do not infringe the copyright of any another person. The defendants cannot enjoy the fruits of infringed materials prepared by the plaintiffs. The originality of the plaintiff will have to be protected. Screen shots have also been filed along with plaint to establish infringement. At the interlocutory stage,

a prima facie case also is determined.

47.As a matter of fact, documents have also been filed along with the plaint, wherein the first defendant has admitted that the materials uploaded are exactly similar to that of the plaintiff. The plaintiff as the author of the materials has a right to be protected. I hold that there was no infirmity in the order granting interim injunction in favour of the plaintiffs. As a matter of fact, when the interim order was granted, the learned Counsel for the first defendant had also appeared as caveator. But, still the learned Single Judge, on 17.05.2018, thought it fit to grant interim order. The materials produced along with the plaint established that the materials of the defendants had been directly copied from the materials uploaded by the first plaintiff. This had been done in spite of the fact that the first defendant claims that they have a right to examine and reject the materials. The first defendant cannot plead ignorance, innocence and seek indulgence from this Court.

48.Insofar as the applications filed by the 14th defendant

are concerned, the materials uploaded by the 14th defendant, if found to have infringed the copyright of the plaintiff, then they will also have to suffer the same plight. There is an existing contract between the first defendant and the 14th defendant and it is for them to protect their rights and products. I hold that no reason to interfere with the order of interim injunction already granted on 17.05.20018.

49.In the result, for the reasons stated above, O.A.No.502/2018 is allowed. No Costs. A.No.4609 of 2018 and 4999 of 2018 are dismissed. No costs.

13.08.2018

cmr

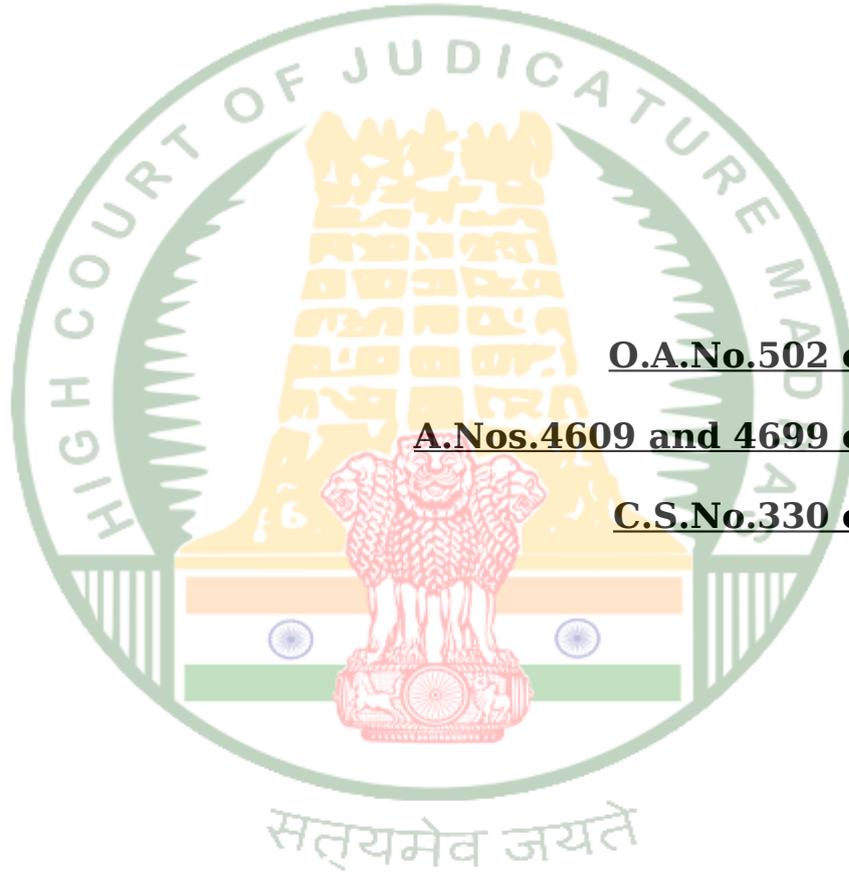
Note to office:
Issue on 16.08.2018

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C.V.KARTHIKEYAN, J.

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O.A.No.502 of 2018

in

A.Nos.4609 and 4699 of 2018

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