

-* THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 13.03.2013

**+ CS (OS) No. 2722/2012
CS (OS) No. 3232/2012
CS (OS) No. 2780/2012**

**1. CS (OS) No. 2722/2012 & IA 16485/2012, 19780/2012 &
2846/2013.**

STAR INDIA PVT. LTD.

.....Plaintiff

Through: Mr. Parag Tripathi, Sr. Adv.
with Mr. Saikrishna Rajagopal,
Mr. Sidharth Chopra, Ms. Sneha
Jain, Advocates.

Versus

PIYUSH AGARWAL & ORS.

.....Defendant

Through: Mr. Sudhir Chandra, Sr. Adv.
with Ms. Gayatri Roy, Mr.
Thomas George, Mr. Udit Sood,
Advs. For D1 & D2.

Mr.Amit Sibal, Adv. with
Ms.Radha Rangaswamy,

Mr.Prateek Chadha, Mr.Raman
Kumar, Advocates for
D3/BCCI.

2. CS (OS) No. 3232/2012 & IA 20275-78/2012 & IA 506/2013

STAR INDIA PVT. LTD.

.....Plaintiff

Through: Mr. Abhishek Manu Singhvi, Sr.
Adv. with Mr. Saikrishna
Rajagopal, Mr. Sidharth Chopra,
Ms. Sneha Jain, Advocates.

Versus

IDEA CELLULAR & ANR.

.....Respondent

Through: Mr.Rajiv Nayyar, Mr. Neeraj
Kishan Kaul, Sr. Advs. with
Mr.Navin Chawla, Ms.Sonali
Jaitley, Ms.Subha Chauhan, Ms.
Mehak Khajuria, Mr.Rohan
Jaitley, Mr.Bhuvan Mishra,
Mr.S.Qureshi, Advs. for D1.

Mr.Amit Sibal, Adv. with
Ms.Radha Rangaswamy,

Mr.Prateek Chadha, Mr.Raman
Kumar, Advocates for
D2/BCCI.

3. C.S. (O.S.) No. 2780/2012 & IA 16834/2012

STAR INDIA PVT. LTD.

.....Petitioner

Through: Mr. Maninder Singh, Sr. Adv.
with Mr. Saikrishna Rajagopal,
Mr. Sidharth Chopra, Ms. Sneha
Jain, Advocates.

Versus

ONMOBILE GLOBAL LTD. & ANR.

.....Respondent

Through: Mr. Sanjay Jain, Sr. Adv. with
Mr. Hardeep Singh Anand, Ms.
Vandana Sehgal, Mr. Rohan
Thawani, Ms. Noor Anand, Ms.
Kriti Singh, Ms. Prabsahay
Kaur, Advs. For D1.

Mr.Amit Sibal, Adv. with
Ms.Radha Rangaswamy,
Mr.Prateek Chadha, Mr.Raman

Kumar, Advocates for
D2/BCCI.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. The plaintiff, Star India Pvt. Ltd. (STAR), filed three cases against Piyush Agarwal (Cricbuzz), Idea Cellular (IDEA) and OnMobile Global Ltd. (ONMOBILE). Though the Board of Cricket Control in India (BCCI) has been arrayed as the common defendant in all the three cases, it is supporting the plaintiff, claiming paramount rights over all information emanating from a cricketing event by virtue of organising and promoting the sport of cricket in India. The common case of STAR and BCCI is that the latter, by an agreement dated 10.08.2012, has assigned a 'bouquet of rights' exclusively to STAR. Two of such rights, are regarding 'Mobile Rights' and 'Mobile Activation Rights'. The plaintiff has sought an interim injunction against the defendants alleging that the latter has violated those rights, which as per the agreement with BCCI, were exclusively assigned to the plaintiff.
2. The defendants have disputed these claims of STAR *inter alia* that that there is no such right as claimed by the plaintiff. In the absence of a legal right, the same cannot be enforced and no relief as prayed

by the plaintiff maybe granted making the suit liable to be dismissed under Order VII Rule 11 of the Code of Civil Procedure (CPC) for the lack of a cause of action. A brief summary of the contentions of both parties is as follows.

3. STAR and BCCI contend that the dissemination of match information through live score cards, match updates and score alerts via Short Messaging Service (SMS)/Mobile Value Added Services (MVAS), by the contesting defendants constitutes the tort of 'unfair competition' and 'commercial misappropriation/unjust commercial enrichment'. It is their case that the plaintiff spent a sum of Rs. 3581 Crores (Rupees Three Thousand Five Hundred and Eighty One Crores only) to successfully bid for the Media Rights Agreement dated 10.08.2012; whereas, the defendants have neither participated in the bid nor acquired any license from the plaintiff to disseminate any match information. It is pertinent to note that the plaintiff is seeking a remedy in these suits under common law, de hors the Copyright Act, 1957.
4. The defendants contend that the plaintiff cannot seek any remedy under common law because Section 16 of the Copyright Act, 1967 precludes the plaintiff from claiming a copyright or any other similar right, other than those which are provided in accordance or under the Act. Alternatively, the defendants contend that they only publish the match information after it has come into public domain and that the information arising from the match is purely factual in

nature and acquires the position of news. The defendants have also submitted that their actions do not amount to free-riding on the efforts of the plaintiff because they neither copy the actual content of the broadcast nor provide access to audio or visual footage of the broadcast. Alternatively, the defendants also contend that they are exonerated under Article 19(1)(a) of the Constitution whereby they have the freedom to carry on trade by dissemination of information to the public and such rights can only be subject to the reasonable restrictions under Article 19(2) and not by common law.

5. The non-contesting defendant, BCCI has contended that as the organiser of cricket in India, it has the exclusive rights in relation to the content generated during a cricketing event, including the right to commercially exploit all content arising from such event. In furtherance of this contention, BCCI has submitted that it is a not-for-profit organisation, registered under the Tamil Nadu Societies Registration Act, 1975. And that it is recognized as the defacto apex body which deals with the promotion and organisation of cricketing events in the country by the Government of India, but it does not get any funding from the Government. And that it funds everything relating to cricket, right from setting up of the stadium to starting training academies for umpires, scorers etc., all by itself. The main source of funding for the BCCI is claimed to be from monetizing the content arising from cricket matches, such as sponsorships and commercial advertisements. The revenue received

from the sale of match tickets is contended to be negligible. Out of the revenue generated, BCCI contends that 85% is ploughed back into promoting the game of cricket in India. Whereas, it contends that the defendants do not contribute their revenue or a part thereof for the purpose of promoting the game of cricket in India. The BCCI and the plaintiff claim that defendants are eating away into the mobile and internet rights, without sharing the profit gained by them; thereby indulging in unfair competition and unjust commercial enrichment.

6. In furtherance of this contention, the plaintiff and BCCI have primarily relied upon the legal principle enunciated in landmark decision of the United States Supreme Court in the case of ***International News Service vs. Associated Press*, 248 U.S. 215, 39 S.Ct.68 (1918) (INS Case)** i.e. ‘he who has fairly paid the price should have the beneficial use of the property’. In the *INS Case*, both the complainant and defendant were publishers of newspapers and were competitors in the gathering and spreading of news. The case was filed to restrain the pirating of complainant’s news by the defendant, *inter alia* by copying news from news bulletin boards and from early editions of complainant’s newspapers and selling it, either bodily or after rewriting it. The complainants contended that they had ‘proprietary right’ under common law over all the news gathered by them, since they were employing their own means and resources. The U.S. Supreme Court, observing that the question,

‘what is unfair competition in business’ must be subjectively determined in particular reference to the character and circumstances of each business, held:

“The defendant’s acts of taking material acquired by the skill, organisation and money of the complainant and appropriating it and selling it as its own, is trying to reap where it has not sown and would thus constitute unfair competition. The underlying principle behind the tort of ‘unfair competition is that ‘he who has fairly paid the price should have the beneficial use of the property’.” (emphasis supplied).

7. It is also pertinent to note that this principle enunciated in the *INS Case* with respect to ‘unfair competition’ and ‘unjust commercial enrichment’ has been followed in other cases regarding dissemination of updates/alerts arising from sporting events. In the case of *Pittsburgh Athletic Co. et.al vs. KQV Broadcasting Co., 24 F.Supp. 490 (Pittsburgh Case)*, the District Court of Pennsylvania in the year 1938 dealt with a case where the plaintiff prayed for a preliminary injunction to restrain the defendants from broadcasting play-by-play reports and description of baseball games played by the plaintiff’s baseball team. The defendant admitted to the broadcasting of play-by-play news of the plaintiff’s games and asserted its intention to continue doing so. In a similar case, *National Exhibition Company vs. Martin Fass, 143 N.Y.S.2d 767, (National Exhibition Case)* the Supreme Court of New York County was also faced with a prayer for injunction against the defendants who were listening to the broadcast of play-by-play

descriptions of baseball games organised by the plaintiff and sending out simultaneous teletype reports of the games to radio stations for immediate broadcast. The same Court in the year 1937, was faced with a prayer for injunction against the defendants from interfering with the exclusive right of the plaintiffs to broadcast a description of certain boxing exhibition in the case of *Twentieth Century Sporting Club Inc. and Ors vs. Transradio Press Service Inc. and Anr.*, 300 N.Y.S. 159 (*Twentieth Century Fox Case*). In all the three cases, the Courts granted the injunction following the ratio of the *INS Case*. The plaintiff and BCCI contend that these precedents have a large persuasive value due to the similarity in the factual matrix, specifically with respect to play-by-play updates being analogous to the ball-by-ball updates provided by the defendants.

8. The plaintiff also sought to rely on the decision of the Madras High Court in the case of *Marksman Marketing Services Pvt. Ltd. vs. Bharti Tele-Ventures Ltd. & Ors.*, O.A. No. 78/2006 (*Marksman Case*), which dealt with nearly identical facts as the instant case. In the *Marksman Case*, the Pakistan Cricket Board (PCB) had assigned its exclusive rights over a cricket series between India and Pakistan in the form of television rights, audio rights, internet rights, SMS rights and other rights to several persons on global basis for a valuable consideration. M/s VECTRACOM Pvt. Ltd., a company incorporated under the laws of Pakistan had entered into

an agreement with the PCB, dated 29.12.2005 with respect of SMS rights in India's Tour of Pakistan. The Plaintiff prayed for an injunction under Sections 55 and 61 of the Copyright Act, 1957, restraining the defendants from disseminating information relating to scores, alerts and updates through SMS technology on wireless and mobile phones by means of transmission to handheld mobile phones in respect of the matches.

9. The Madras High Court, relying on the decision of the New York District Court in the case of *National Basketball Association and NBA Properties Inc. v. Sports Team Analysis and Tracking Systems Inc.*, **939 F.Supp. 1071** (NBA-1 Case) held –

“The right of providing scores, alerts and updates is the result of expenditure of skill, labour and money of the organisers and so the same is saleable only by them. The sending of score updates and match alerts via SMS amounts to interference with the normal operation of the Organisers business. The defendant's act of appropriating facts and information from the match telecast and selling the same is nothing but endeavoring to reap where the defendants have not sown.”

10. In response, the defendants' primary contention is that, the 'proprietary rights' as claimed by the plaintiff/BCCI do not exist as they are not recognized under any law or statute enacted by the Parliament because, Section 16 of the Copyright Act, 1957 precludes the plaintiff and BCCI from claiming any other right except as provided under the Act. In furtherance of this argument, they have relied on judgments of this Court in the cases, *Time*

Warner Entertainment Co., L.P. & Ors. v. R.P.G. Netcom & etc., AIR 2007 Del 226; and *Super Cassettes Industries Ltd. v. Mr. Chintamani Rao & Ors.*, 2012 (49) PTC 1 (Del), in which it was held that the appellants/plaintiffs cannot claim copyright and sue for infringement of copyrights de hors the Act because copyright exists and can be only in accordance with the provisions of the Act or under any law which was in force at the time when the Act was enacted. Common law rights under copyright law were held to be abrogated by Section 31 of the erstwhile Copyright Act, 1911.

11. The defendants also contended that since there is a preclusion (or preemption) under Section 16 of the Act, the plaintiff and the BCCI are 'fishing for' a right under common law by claiming 'quasi-property rights'. And only torts such as defamation and breach of confidentiality are recognized by the common law of India and that the tort of 'unfair competition' is not recognized. They have contended that reliance must not be placed on the *Marksman Case*, because the decision of the New York District Court in the *NBA-1 Case*, upon which the Madras High Court relied, had been reversed by the United States Court of Appeals, Second Circuit in, *National Basketball Association and NBA Properties Inc. v. Motorola Inc.*, 105 F. 3d. 841 (1997) (*NBA-2 Case*). The defendants have also relied upon *Barclays Capital Inc., Merrill Lynch, Pierce, Fenner & Smith Inc. & Morgan Stanley & Co. Inc. v. Theflyonthewall.com Inc.*, 650 F.3d 876 (*Theflyonthewall Case*),

which has followed the decision of the appellate court in the *NBA-2 Case* and held:

*“INS itself is no longer good law. Purporting to establish a principle of federal common law, the law established by INS, was abolished by **Erie Railroad Co. v. Tomkins**, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which largely abandoned federal common law.”*

12. The defendants contend that the above decision of the U.S. Courts represents a digression from the ‘Hot-News Doctrine’ laid down in the *INS Case* by citing various other foreign decisions. To start with, the defendants have submitted that the Court of Appeals decision in the *NBA-2 Case* represents the preemption of state law claims that enforced rights “equivalent” to exclusive copyright protections, when the work to which the state claim fell within the area of copyright protection; analogous to the preclusion (or preemption) under Section 16 of the Copyright Act, 1957. The other decisions relied by the defendants to substantiate the judicial digression from the reasoning in the *INS Case* are *Triangle Publications Inc. v. New England News Paper Publishing Co.*, 46 F.Supp. 198 (1942) and *Compco Corp v. Day Brite Lightning Inc.*, 376 U.S. 234 (1964) by the Courts in the U.S.; and *Cadbury-Schweppes Pty. Ltd. & Ors. v. Pub Squash Co. Pty. Ltd.*, [1981] 1 W.L.R. 193 and *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd.*, 156 CLR 414 by the Courts in Australia.

13. Alternatively, the defendants also contend that the plaintiff and BCCI at best, can only claim broadcasting rights and copyright over the cinematograph film of the cricket match or audio recording of the commentary etc., to the extent it is recognized under the Act. And that the defendants' action does not amount to free-riding because, they neither copy the actual content of the broadcast, nor provide access to audio or visual footage of the broadcast. In any event, the defendants contend that they are legally entitled to disseminate the score updates/match alerts to the public and consequently generate income. Firstly, because the information emanating from the cricket match such as score updates/match alerts amounts to 'facts' which cannot be owned or afforded copyright protection. Secondly, even if it were afforded copyright protection, the score alert/match update has already entered the public domain and therefore, can be freely used by the defendants. And finally, because the Constitution under Article 19(1)(a) confers them the freedom to disseminate information to the public.

14. In support of their first argument, the defendants have relied upon the decisions in *Victoria Park Racing and Recreation Grounds Co. Ltd vs. Taylor*, 58 CLR 479b (*Victoria Park Case*) and *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (*Feist Publications Case*). In the *Victoria Park Case*, the plaintiff carried on the business of conducting race meetings at a racecourse owned by it. The plaintiff did not permit any description

or information concerning the races to be broadcast. The defendant, an owner and occupier of a piece of land on the opposite side of the racecourse allowed the other defendant, Commonwealth Broadcasting Corporation, to observe and broadcast the race. The plaintiff sought an injunction against such broadcasting contending that since its efforts and expenditure was spent on organising the race, it has quasi-property rights in the race. The Court held that the law of copyright did not give any person an exclusive right to describe a particular set of facts. Just because a person announces for the first time, that a particular horse won the race or any fact, it would not prevent others from describing the same event. Similarly, in the *Feist Publications Case*, the plaintiff sought to copyright a compilation of telephone numbers, which was denied by the Court on the ground that it was merely a different presentation of facts and did not possess ‘originality or creativity’, which is the *sine qua non* of copyright.

15. The defendants have also contended that match information was not a result of the ‘originality or creativity’ of the plaintiff. And that the test of ‘originality or creativity’ has been followed by Indian Courts to grant copyright. In furtherance of this argument, the defendants have cited the case of *Servewell Products Pvt. Ltd. & Anr. v. Dolphin, 2010 (43) PTC 507 (Del)*, in which this Court had observed,

*“The Supreme Court has recognized the shift in **Eastern Book Company v. DB Modak**, following the approach laid down by the Canadian Supreme Court in **CCH Canadian Ltd. v. Law Society of Upper Canada**, (2004) SCC 13, rejected the “sweat of the brow doctrine” (which conferred copyright on works merely because time, energy, skill and labour was expended), 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, the work somewhat different in character, is produced by the author.” Thus, in India, the test for creativity establishes a higher threshold than the “sweat of the brow” doctrine, but not as high as ‘modicum of creativity’.”*

16. In support of their ‘public domain’ argument, the defendants have cited the decision of the Apex Court in case of **Eastern Book Company & Ors v. D.B. Modak & Anr**, (2008) 1 SCC 1 (*EBC Case*). In this case, the plaintiff claimed copyright over the judgments published in its journals and sought a temporary injunction against the defendants who were allegedly copying the judgments published by the plaintiff and republishing under their own name. Observing that plaintiff company could not claim copyright in a judgment under the heading ‘literary work’ because it had already entered the public domain, the Apex Court only granted an injunction limited to the headnotes, footnotes and editorial notes authored by the plaintiff and allowed the defendant to sell their CD-ROMS with the text of judgments.

17. With respect to the free speech argument, the defendants contend that the information arising from a cricket match is public property and that the score updates/match alerts were being disseminated in

public interest. And since, the defendants were employing their own infrastructure, efforts and skill to disseminate the information in public interest; they contend that they are entitled to the profits. In support of this argument, the defendants have placed reliance on the landmark decision of the Apex Court in the case of ***Tata Press Limited vs. Mahanagar Telephone-Nigam Limited & Ors.***, AIR 1995 SC 2438 (*Tata Press Case*). The Apex Court held,

“Examined from another angle, the public at large has a right to receive the ‘commercial speech’. Article 19(1)(a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech... The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech.” (emphasis supplied)

18. Further, the defendants have also sought to rely on the decision of the Single Bench of this Court in the case of ***ICC Development (International) Ltd. & Anr. v. New Delhi Television Ltd.***, C.S. (O.S.) No. 2416/2012 where it was held,

“The score of the match is in public domain and can be broadcasted by any channel as a part of its right to report current news and events.”

19. In a rejoinder, the Plaintiffs have reiterated that they were seeking a remedy de hors the Copyright Act, 1957 and therefore, contended that most of the authorities cited by the defendants were irrelevant to the instant case. Further, they have contended that they do not intend to prevent the information arising from cricket matches from

entering the public domain. On the contrary, they have argued that it is in the best interest of the game of cricket in India that the information arising from a cricket match permeates the public domain to its fullest extent. Ld. Senior Counsel appearing for the plaintiff submitted that the instant dispute is not between a commercial entity and the public, but between two commercial entities and hence there is no substantial question of public policy. In essence, he has contended that it is not the intention of the plaintiff to prevent the defendants from disseminating match information to the public, but to ensure that the defendants share their revenue with the plaintiff by obtaining a license for such dissemination.

20. In furtherance of this argument, the plaintiff has relied on the decision of the Apex Court in the case of *Secretary, Ministry of Information and Broadcasting, Govt. of India & Ors. v. Cricket Association of Bengal & Ors.*, (1995) 2 SCC 161 (MIB Case) in which, the Hon'ble Supreme Court, finding the BCCI to be a non-profit making organization, which controls officially organised game of cricket in India, observed that –

“[B]eing the organisers of the event had a right to sell the telecasting rights of the event to any agency... [I]t has the right to choose the best method to earn the maximum revenue possible. In fact, it can be accused of negligence and maybe attributed improper motives, if it fails to explore the most profitable avenue of telecasting the event, when in any case, in

achieving the object of promoting and popularizing the sport, it has to endeavor to telecast the cricket matches.”

21. In response to the argument regarding match information already being in public domain, the plaintiff has emphasized upon the time-sensitive nature of the information emanating from cricketing events with specific reference to score updates/match alerts. It is their argument that match information does not completely enter public domain for a particular span of time. For instance, a person who has access to television/radio will be updated about the status of a cricket match in real-time. Whereas, persons who do not have access to a television/radio, such as persons inside office or even courtrooms may not be updated about match status contemporaneously.

22. Before proceeding to arrive at a conclusion in the instant case, I find it pertinent to take note of the word of caution from the oft-cited Justice Oliver Wendell Holmes, who delivered the dissenting judgment in the *INS Case*,

“The unwritten law possesses capacity for growth and has often satisfied new demand for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But, with the increasing complexity of the society, the public interest tends to be omnipresent; and the problems presented by new demands for justice cease to be simple. When the creation or recognition by courts, of a new private right, may work serious

injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitation and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice, incident to a rapid changing civilization, resort to legislation has latterly been had with increasing frequency.”(emphasis supplied).

23. At this juncture, it is necessary to identify the stake holders in this case. The non-contesting defendant, BCCI, a not-for-profit singular governing body which has conceptualized, created, developed and promoted the game of cricket in India. The plaintiff, STAR, who is the assignee of the ‘bouquet of rights’ and has been chosen by the BCCI to maximize the monetization of all the information emanating from cricketing events organised by the BCCI. The Defendants, who are providers of contemporaneous alerts and match updates to the public, proclaiming to be the only player in the SMS/MVAS market facilitating such information dissemination. However, it is pertinent to note that they do not do it gratuitously. And last but not the least, the cricket crazy public, who have created the demand for real-time or contemporaneous score updates/match alerts. In fact, the presence of overwhelming public interest cannot be ignored. Although the suit is regarding the right to monetize information arising from a cricket match, it is imperative for this Court to remain conscious of whether the general public will have

access to the information arising from cricket matches, more so in a cricket crazy nation such as ours.

24. Keeping this in mind, I find that the following issues arise before this Court for consideration:

- a. Whether BCCI has the right to monetize the information arising from a cricket match organised by it.
- b. Whether the defendants are free-riding on the efforts of the plaintiff/BCCI
- c. Whether the score alert/match updates are already in public domain.
- d. Whether the defendants have a freedom under Article 19(1)(a) to disseminate contemporaneous match information.
- e. Whether the public interest needs to be kept in mind before considering the rival claims.
- f. Whether the plaintiff is entitled to an interim injunction.

25. With respect to the first two issues, the contention of the defendants that the plaintiff and the BCCI are not entitled to copyright or any other similar rights under the Act, is misplaced. There is no dispute regarding the fact that the plaintiff has approached this court de hors the Copyright Act, 1957. It is amply clear that the plaintiff, as the assignee of BCCI is not claiming copyright (or any other similar right) over information arising from a cricket match. In this regard, I find that the decisions in the *Feist Publications Case*, *Victoria*

Park Case, *Theflyonthewall Case* and *EBC Case*, cited by the CS (OS) Nos. 2722/2012, 3232/2012 and 2780/2012

defendants in furtherance of this argument to be irrelevant. I also do not consider it relevant to examine if match information is a product of the ‘originality or creativity’ of the plaintiff. Besides, it is a well settled principle of Copyright Law, that ‘facts’ cannot be copyrighted.

26.Regarding the defendant’s contention that common law rights are abrogated (precluded or preempted) under Section 16 of the Copyright Act, it is essential to keep in mind the legislative history of Section 16. As observed by the Division Bench of this Court in *Time Warner Case*, Section 16 in the 1957 Act is a derivative of Section 31 of the erstwhile Copyright Act, 1911. The provision as it stood in the erstwhile enactment is as follows:

Section 31. Abrogation of common law rights.-No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

The Division Bench also noted that the aforesaid provision had the effect of abrogating all common law rights as they existed. A person, therefore, was entitled to copyright only under the provisions of the said Act and any other statutory enactment in force when the Copyright Act, 1911 was enacted. Section 16 of the

Act has to be read in the light of Section 31 of the Copyright Act, 1911.

27. In light of the above observation, it is pertinent to note certain aspects which were taken into consideration by the Parliament before enacting the 1957 Act. In the Statement of Objects and Reasons to the 1957 Act, the Parliament observed that during the preceding 4 decades, new and advanced means of communications like broadcasting, litho-photography, etc. called for certain amendments in the existing law. Therefore, the Parliament rearranged the main principles of the existing law and introduced several new features including a provision for certain rights akin to copyright such as broadcasting rights and performer's rights.

28. Moreover, it is amply clear from the provisions of Section 16 that it applies to 'work' alone. The term 'work' is defined under Section 2(y) of the Act to be (i) a literary, dramatic, musical, or artistic work; (ii) a cinematograph film; (iii) a sound recording. The definition is exhaustive and not inclusive, thereby clearly specifying the parameters of Section 16. In other words, Section 16 does not apply to anything which is not a work. The scope of Section 16 is further limited by Section 39A of the Act, because this provision belongs to the Chapter of the Act which deals with 'neighboring' or 'related rights'. Section 39A of the Act is as follows –

39A. Other provisions applying to broadcast reproduction right and performer's right – Sections 18, 19, 30, 53, 55, 58,

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

Provided that where copyright or performer's right subsists in respect of any work or performance, that has been broadcast, no license to reproduce such broadcast shall take effect without the consent of the owners of rights or performer, as the case maybe, or both of them. (emphasis supplied)

29. This Section enumerates those provisions of the statute that apply to copyright would also apply, *mutatis mutandis* to the neighboring rights (eg. Performer's rights, Broadcasting reproduction rights). However, it is pertinent to note that Section 16 is not enumerated under Section 39A of the Act. Moreover, the Copyright Act creates several rights besides copyright. These rights include the rights of broadcasting organisations under Section 37, the rights of performers under Sections 38 and 38A, and the moral rights of authors which are recognized under Section 57; which are all distinct from copyright. This has also been noted by the Division Bench of this Court in the case *ESPN Star Sports v. Global Broadcast News Ltd. & Ors.*, 2008 (38) PTC 477 (Del.) (DB) (*ESPN Case*),

*“Satellite broadcasting rights are treated as separate rights and the said rights are recognized throughout the world as independent rights as held in **Raj Video Vision v. M/s Sun TV, 1994 (2), Madras Law Weekly 158** which has also been approved in **AA Associates versus Prem Goel AIR 2002 Del***

142. A similar view has been taken in M/s Video Master v. M/s Nishi Productions, 1998 (18) PTC 117.”

30. Despite there being an array of rights which have been recognized under the Copyright Act, 1957, it is unmistakable, that the preemption under Section 16 of the Act, only applies to copyright or any similar right only with respect to ‘works’ and cannot be extended to the other rights in any manner whatsoever. In the instant case, it is amply clear that score updates/match alerts do not constitute a ‘work’ as defined under the Act, and therefore, cannot be said to fall within the purview of the preemption under Section 16. In any event, the BCCI and the plaintiff are not seeking a creation of copyright or a similar right from this Court, but have merely approached this Court to find a remedy in common law against the tort of ‘unjust commercial enrichment’.

31. Although the defendants have contended that the tort of ‘unjust commercial enrichment’ is not recognized in India, the Apex Court in the case of *Mahabir Kishore & Ors. v. State of Madhya Pradesh, 1989 SCR (3) 596* has observed that the Courts in England have formulated the doctrine of unjust enrichment in certain situations where it would be ‘unjust’ to allow the defendant to retain a benefit at the plaintiff’s expense. The Court has held,

“The principle of unjust enrichment requires; first, that the defendant has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff" and thirdly, that the retention of the enrichment be unjust. This justified restitution. Enrichment may take the form of direct

advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.” (emphasis supplied)

32. In the instant case, it is unnecessary to determine whether the plaintiff has absolute proprietary rights under common law over all the information which arises from a cricket match. The plaintiff is only seeking the declaration of a right to generate revenue by monetizing the information arising from an event, which has been conceptualized, developed, created and organised by the sole efforts and expenditure of the BCCI; as its assignee. Admittedly, in order to monetize the expense, effort and skill employed in organising cricket matches in India, the BCCI conducted an auction in April 2012 to assign exclusive rights such as television rights, audio rights, internet rights and mobile rights, for all BCCI events. Besides, it has also been submitted that the ‘Mobile Rights’ and ‘Mobile Activation’ rights were also available on an ‘a la carte’ basis at a cost of Rs. 50 lacs per match. Applying the test of unjust enrichment as observed in the *Mahabir Kishore* case, it is amply clear that the defendants are enriching themselves at the cost of the plaintiff.

33. With respect to the defendant’s arguments regarding lack of direct competition between the parties, I find that the action of the defendants directly competes with the plaintiff. This is because both the plaintiff and defendant are seeking to generate revenue by way of providing contemporaneous score updates/match alerts. The

plaintiff in the instant case has successfully bid for the entire ‘bouquet of rights’ which also included ‘mobile rights’ and ‘mobile activation rights’. The Media Rights Agreement defines –

*“**Mobile Activation Rights** means the right to make available any form of BCCI-branded schedule; match and score alert and application exploited via SMS, MMS or any other form of Mobile Communications Technology or Mobile Wireless Technology; It is clarified that no other form of exploitation would be permitted such as competition, game, fantasy event, predictor game, application or other activation which are expressly prohibited.*

***Mobile Rights** means the Mobile Activation Rights and the right to deliver or provide access to the Feed or Footage, the Audio Feed, any Unilateral Commentary and Unilateral Coverage in the Territory during the Rights Period, for reception and viewing in an intelligible form on a Mobile Device where the communication link(s) used in such delivery comprises, at least in part, Mobile Communications Technology and/or Mobile Broadcast Technology but excluding Television Delivery and Internet Delivery.”*

34.If the plaintiff did not intend on generating revenue by exploiting these ‘mobile rights’ and ‘mobile activation rights’, it could have resorted to bidding only for selective rights since they were also available on an ‘a la carte’ basis. It is amply clear that the plaintiff’s grievance is not infringement of its exclusive rights over the footage of the cricket match, but specifically regarding the right to raise revenue by disseminating match information contemporaneously via SMS/MVAS by exploiting the ‘mobile rights’ and ‘mobile activation rights’ exclusively assigned to it in

the 'Media Rights Agreement' dated 10.08.2012. Therefore, the element of direct competition clearly exists specifically with respect to contemporaneous score updates/match alerts.

35.The defendants have contended that the decision of the Madras High Court in the *Marksman Case* is bad in law, because it has erroneously relied on the decision of the District Court in the *NBA-1 Case*, which was subsequently reversed by the Court of Appeals in the *NBA-2 Case*. I do not find this contention relevant in the instant case because, as observed earlier, the plaintiff herein has sought a remedy de hors the Copyright Act, 1957. Whereas, in the *Marksman Case*, the plaintiff/claimant had filed the suit under Sections 55 and 61 of the Act. However, it is pertinent to take note of the ratio decidendi of the Court of Appeals in the *NBA-2 Case*.

36.The Court of Appeals, in the *NBA-2 Case* has recognized that certain 'hot-news' INS like claims survives preemption and is limited to cases where,

“(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”

37.Though the Court in the *NBA-2 Case* may have watered down the applicability of the 'hot news doctrine' from the *INS Case* due to

the 1976 amendments to the Federal Copyright Law in the U.S., it has retained the primacy of the fundamental principles on unjust enrichment as evidenced in prongs (i), (iii) and (iv) of the test mentioned above. Besides, the exclusive right of an Organiser to monetize his own event need not find its source in any statutory enactment, because it is a fundamental principle of equity as observed in the *INS Case*,

“The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts – that he, who has fairly paid the price, should have the beneficial use of the property.”

This reasoning has been followed in other cases regarding dissemination of updates/alerts arising from sporting events such as the *Pittsburgh Case*, *National Exhibition Case* and the *Twentieth Century Fox Case*.

38. Moreover, it is clear, that match information is generated because of the cost incurred by the BCCI in organising the cricket as a sport in India. It is undisputed, that BCCI plays the cardinal role in all aspects of cricket in India. Right from remunerating the players, umpires and other match officials, to arranging sponsors for the cricket match itself. It is also undisputed that the only source of income for the BCCI is from monetizing the cricketing events organised by it. In such a circumstance, the defendants would have had a legitimate right to disseminate contemporaneous match information, had they obtained a license by either participating in

the bid conducted by the BCCI or by obtaining a sub-license from the plaintiff. The argument that expenditure is being incurred by the defendants to set-up infrastructure and employ personnel has no merit, because such expenditure is incurred upon the process of dissemination and not towards the organization of the sport or in the process of legitimately obtaining the information from the plaintiff or BCCI. Therefore, I find that the action of the defendants cashing upon the efforts of the plaintiff/BCCI constitutes free-riding.

39. With respect to the third issue, regarding the match information already being in public domain, it is pertinent to observe the peculiar nature of the information itself. Firstly, I have already stated that this suit is de hors the Copyright Act and since the plaintiffs are not seeking a copyright of the score updates/match alerts, there is no question of the information entering the public domain as envisaged under the Act. However, if we may use the term 'public domain' to connote the information becoming freely available to the public (emphasis supplied), it can be said that the information emanating from a cricket match, enters the public domain at different moments of time i.e. is becomes freely available to the public at different moments of time. To elucidate through an example, the outcome of the first ball bowled in a cricket match, enters the public domain instantly qua the spectators in the stadium. The same information enters the public domain after a delay of a few seconds (or micro-seconds) subject to the time-lag in

transmission of such information over a live telecast through television/radio. As a corollary, the information has still not entered the public domain qua the persons who do not have any access to a source of contemporaneous information i.e. TV or radio.

40. There is a great demand for knowing ball-by-ball progress of a match as opposed to the match-summary at the end of the match. This is evidenced by the fact that customers of such SMS/MVAS are willing to pay between two to three rupees per alert/update. There is no merit in the argument that the match information has entered public domain i.e. available to the public, the very instance it is broadcasted by the plaintiff. It is similar to saying that the plot of a book or movie has entered the public domain as soon as it is released. Therefore, I find that match information has not entered 'public domain' i.e. is not readily available to the class of persons who do not have access to TV/radio, who also happen to be the target consumers of the both the parties.

41. However, there is considerable merit in the defendant's arguments that they have a fundamental right to disseminate such information as demanded by the public. At this juncture, it is imperative for this Court to balance the right of the organiser of an event to monetize his own event as against the right of the public to receive information regarding such event and the right of the media to provide access to such information demanded.

42. Firstly, it must be noted that all consumers of cricket information cannot be treated equally. There are different classes of public who are consumers of cricket information in the sense that the persons who have purchased tickets to watch the match live at the stadium consists a class in itself, as opposed to those who have decided to stay at home and follow the match on their TV/radio. Similarly, the class of public who have chosen their work, vocation or any other engagement instead of going to the stadium or sitting in front of the TV cannot be considered and treated at par with those who have. This distinction is essential because defendants are targeting the third class of persons and are claiming that these persons have the right to receive match information at par (or almost at par) with the first two classes of persons. However, this argument needs a closer inspection.

43. The Supreme Court has made it amply clear in cases such as *Tata Press* that the public's right to receive information is within the ambit of Article 19(1)(a) of the Constitution. The Courts have held that the freedom of speech and expression was available to the press to disseminate such information but a line has to be drawn in cases where the power is misused. For instance, in the case of *New Delhi Television Ltd v. ICC Development (International) Ltd. & Anr.*, **FAO (OS) 460/2012** (*NDTV Case*), a division bench of this Court examined whether using the footage of a match while airing special 'expert-analysis' programs by the news channel was considered

‘reporting’ and therefore, justified under the principle of ‘fair dealing’ and also exonerated under Article 19(1)(a) of the Constitution. The Court observed that the freedom of speech and expression was available to the press to disseminate information, but a line had to be drawn in cases where the freedom is misused.

44. Although the matter before the Division Bench of this Court in the *NDTV Case* was pertaining to the infringement of copyright and reproduction rights in the broadcast of cricket matches, there are certain relevant observations in the context of the instant case. Firstly, the Division Bench has determined the parameters of what constitutes ‘reporting’ in the case of a sporting event. The Court observed,

*“In other words, pertaining to sports, reporting of an event or an affair would be to give a coverage which is result oriented. This view was cited with approval in **Media Works NZ’s case** (supra), which decision was followed by the Division Bench of this Court in **ESPN Star Sports Case.**”* (emphasis supplied)

45. Secondly, with specific reference to cricket, the Division Bench observed,

“How does it translate to an event of sports (cricket)? Each match would be an event. Thus, the span of the match as an event being news would span the entire duration of the match. But, within this period of match, the fall of a wicket; the achievement of a milestone in the career of a player : to wit (sic.) 1000 runs scored, 2000 runs scored etc. or 100 wickets taken, 150 wickets taken or the 50th catch taken would be events, spanning a momentary duration, and being news when the event takes place.”

46. In cases where the offending activity does not qualify as reporting, the Division Bench observed,

“If the offending activity fails to qualify ‘reporting’ as understood aforesaid i.e. is not result oriented but is by way of analysis or review that would be the end of the matter. Question of further considering whether the use of the footage is fair or unfair does not arise because law permits a broadcaster or a performer to be used for reporting a current event or an affair and thereafter places restrictions in the use of acquiring the same in a fair manner.”

47. Finding that raising revenue under the garb of ‘reporting’ was not in consonance with the spirit of Article 19(1)(a), the Division Bench observed,

“Thus, the cry in the media or the press, which we may possibly hear tomorrow after our opinion is pronounced, that freedom of the media and the press to disseminate information has been curtailed by us, if at all, is set at rest by us by noting that the freedom of the press and the media to disseminate information was recognized by the society keeping in view the press and the media which existed in the 19th and the 20th Century i.e. as organs of thought, of empowerment, of culture and of refinement. Not as organs of entertainment and revenue generation; least of all as an organ offering on its back, a piggy ride for commercial entities i.e. business houses to advertise their products by commercializing the goodwill of others.” (emphasis supplied).

48. In the same breath, the Division bench also observed –

“Stale news is no news. Law permits current events and affairs to be reported i.e. recognizes that stale news is no news and thus must be reported currently. That is the reason why an archival footage acquires the status of being archaic after 24 hours... Now, is the problematic area! When does an event or an affair become news? Does news has a gestation period to mutate into

history? If yes, what would be the gestation period? Questions which are easy to pose, but extremely difficult to answer with empirical precision.”

49. In the instant case, it is pertinent to note that ‘news’ or ‘noteworthy information’ arising from a cricket match is very different from the ball-by-ball or minute-by-minute information. For instance, who won the toss and chose to bat/bowl, whether the batsman has scored a century, or a bowler has taken a hat-trick, or a new world record being set constitutes news in the realm of a cricket match. To substantiate with an example, a news channel ‘reporting’ a cricket match would not engage in the contemporaneous dissemination of ball-by-ball or minute-by-minute match information. A news channel would only report selective excerpts from the match which is news worthy. This characterization of news is in consonance with the observation of the Division Bench in the *NDTV Case*.

50. Therefore, it is amply clear that the dissemination of the ball-by-ball or minute-by-minute updates at a premium cannot be exonerated under the freedom of speech and expression as guaranteed under Article 19(1)(a). Meanwhile, all noteworthy information arising from a cricket match constitute ‘news’, and the ‘reporting’ of such noteworthy information would be protected under Article 19(1)(a).

51. With regards to the last two issues, which is the operative part of this judgment, it is settled law that before granting an interim injunction under Order XXXIX Rules 1 & 2, the Court is required

to identify a prima facie case, determine the balance of convenience and ascertain if there would be irreparable injury to the plaintiff. In addition, Courts are also required to keep in mind the public interest before granting an injunction, as observed by this Court in *Patel Energy Ltd. v. Union of India & Anr.*, LPA No. 718/2012. Following the rule laid down by the Apex Court in Cases such as *Ramniklal N. Bhutta v. State of Maharashtra*, (1997) 1 SCC 134 and *Baitarani Gramiya Bank v. PallabKumar*, (2004) 9 SCC 100, this Court observed,

“The courts have now, besides the three elements of prima facie case, irreparable injury and balance of convenience, also added the element of public interest in the matter of grant of interim relief, and interim relief can be denied if the grant thereof would be against the public interest.”

52. I am convinced that the plaintiff has made out a prima facie case.

This also necessarily implies that the defendant's application under Order VII Rule 11 for the rejection of the plaint due to lack of cause of action would have no merit. I have also found that by free-riding upon the efforts of the plaintiff, the defendants are eating into the revenue which the plaintiff would have made, thereby causing the plaintiff irreparable injury. With respect to the balance of convenience, I find that it lies with the plaintiff only to a certain extent. On one hand, while recognizing the right of the plaintiff to monetize and earn revenue from the information arising from a cricket match, it must be borne in mind that such recognition should not amount to a conferral of blanket rights upon the plaintiff, to the

prejudice of the other stakeholders observed earlier. On the other hand, the defendants while having their fundamental right of trade and free speech, including the dissemination of match information to the public, cannot be permitted to have a free ride or reap what they have not sown. Concurrently, both the contesting parties venturing into commercial activities cannot deprive the public of its valuable right to have the information of news and events.

53. Meanwhile, the public also cannot, as a matter of right, claim the access to contemporaneous score updates/match alerts, equal to those who are enjoying rights at a premium, by buying the tickets at the stadium or watching it live on TV. While recognizing the right of the general public to have score updates/match alerts at their convenience on mobile phones via SMS/MAS, and in view of the conflicting rights of the contesting parties, it would be just and reasonable for the defendants to either obtain a license and gain equal rights to their subscribers, or make them wait for some time, in order to not prejudice the right of the plaintiff to earn revenue from the match information.

54. It is gathered that, as it is, about 3-5 minutes are taken for gathering, compiling and disseminating the score updates/match alerts by the defendants. In such a circumstance, I am of the opinion that those who do not obtain a license from the plaintiff, may not disseminate the score update/match alert before 15 minutes from the moment such score update/match alert is telecasted/broadcasted by the

plaintiff. A question might arise as to why the lag is only 15 minutes and not 2/3 minutes or 30 minutes or more?

55.If the time lag was 2/3 minutes, it would be more or less contemporaneous with the live telecast/broadcast of the match. If it is 30 minutes or more, as observed by the Division Bench in the *NDTV Case*, the information becomes irrelevant, and it would deprive the public of their right to that information. By specifying a 15 minute lag, it is ensured that the defendants are not providing ball-by-ball or minute-by-minute score updates/match alerts contemporaneously with respect to the live telecast/broadcast of match. Considering the time-sensitive nature of the information, after a span of 15 minutes, there is no longer a direct competition between the parties to provide contemporaneous match information to the customers who demand it. This maintains a balance between the right of the plaintiff to monetize the cricket match and the right of the public to receive such information, and also prevents the defendants from free-riding on the efforts of the plaintiff.

56. The contemporaneous dissemination of score updates/match alerts, without payment, but en-cashing the labour and expenditure of the plaintiff would amount to ‘unjust commercial enrichment’, which would not be fair on the part of the defendants. To reiterate again, if the defendants are doing so gratuitously, then they enjoy the absolute right of transmission, contemporaneously with respect to

the telecast/broadcast of the plaintiff, because there is no instance of free-riding or unjust commercial enrichment in such a circumstance.

57. With respect to 'reporting' news worthy events, I am once again drawn to the reasoning of the Division Bench in the *NDTV Case* wherein the Court observed the limited shelf-life of news worthy events arising out of a cricket match thus -

“[T]he span of the match as an event being news would span the entire duration of the match. But, within this period of match, the fall of a wicket; the achievement of a milestone in the career of a player : to wit (sic.) 1000 runs scored, 2000 runs scored etc. or 100 wickets taken, 150 wickets taken or the 50th catch taken would be events, spanning a momentary duration, and being news when the event takes place. The latter i.e. a wicket falling, a century being scored (by a player or by the team), would be events which on the principle of stale news is no news and analogy with biology (sic.), would require it to be held that to put an embargo on reporting said event at a cricket match by putting the time restriction 30 minutes would amount to not permitting news to be reported but history to be reported, for the reason the news element content of such an event i.e. a wicket falling or the century being scored is momentary.”

58. Before concluding and passing an operative order, I must reiterate that there is a difference between contemporaneous dissemination of match information in the form of ball-by-ball or minute-by-minute score updates/match alerts and reporting noteworthy information or news. In light of the above mentioned observations, I hereby order the following:

- a. A limited interim injunction restraining the defendants from disseminating contemporaneous match information in the

form of ball-by-ball or minute-by-minute score updates/match alerts for a premium, without obtaining a license from the plaintiff.

- b. There shall be no restriction upon the defendants to report ‘noteworthy information’ or ‘news’ from cricket matches (as discussed in paragraph 49), as and when they arise, because ‘stale news is no news’.
- c. There shall be no requirement for the license if the defendants do it gratuitously or after a time lag of 15 minutes.

59. In view of the above, the application of the plaintiff under Order XXXIX Rule 1 & 2 of CPC is allowed to the extent indicated above, whereas the application of the defendant under Order VII Rule 11 stands dismissed.

M.L. MEHTA, J.

MARCH 13, 2013

kk/rmm