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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: July 09, 2012
Judgment Pronounced on: August 21, 2012

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FAO(OS) 583/2011

INDIA TV INDEPENDENT NEWS
SERVICE PVT. LTD. & ORS.

...Appellants

Represented by: Ms. Pratibha M. Singh, Advocate
with Ms. Ujjwala Jeremiah and
Ms. Chandrika Gupta, Advocates

versus

YASHRAJ FILMS PVT. LTD.

...Respondent

Represented by: Mr. Pravin Anand, Advocate
with Ms. Geetanjali Visvanathan,
Advocate.

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CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Application(s) seeking interim injunction pending disposal of the suit(s) have been decided by the learned Single

Judge vide impugned order dated November 11, 2011. In the two appeals we are concerned with only two suits.

2. Eschewing reference to the facts of CS(OS) No.2282/2006 filed by Super Cassette Industries vs. Mr.Chintamani Rao & Ors., for the reason no appeal has been filed before us pertaining to the impugned order insofar the defendants of said suit have been injuncted in terms of the interim relief prayed for, the facts pertaining to the other two suits i.e. CS(OS) No.2283/2006 and CS(OS) No.1706/2006 are that the defendants, in one suit had used the first line of the lyrics of a hit song in the cinematographic film '*Bunty Aur Babli*': '*Kajra Re Kajra Re Tere Kare Kare Naina*' in an advertisement broadcasted during a TV programme and in the other programme, during a chat show: *INDIA BEATS*, a budding singer, on the threshold of fame, during course of the chat sang nine stanzas, either in full or in part, from songs which had made the young artist famous; when the artist sang five out of nine times, clippings from the cinematographic film concerned were displayed with intervals in the background. The learned Single Judge has found this to be objectionable and has thus restrained the defendants from doing so during the pendency of the two suits.

3. At the outset we may note that Ms.Pratibha M.Singh, learned counsel for the appellants/defendants conceded that without obtaining a license from the owners of the cinematographic films her clients were in the wrong when the clippings from the cinematographic films were broadcasted in the background when the young budding singer, during course of the chat show sang, in full or in part, from nine stanzas of songs which were originally sung by her.

4. The issue before us was debated on the remainder acts of the defendants i.e. use of the sound recording (only one line) from the song '*Kajra Re Kajra Re Tere Kare Kare Naina*'; and the singer who had lent her voice to the lyrics when the sound recordings of the nine songs were recorded, sang at a chat show, in full or in part, nine stanzas from nine songs; seven of which were from different cinematographic films.

5. In a nutshell, the learned Single Judge has held that other than with the permission of the owner of a copyrightable work, it is only Section 52 of the Copyright Act 1957 which privileges use of copyrightable works and that the said section does not include derivative copyrightable works and cinematographic films, and thus has concluded, by opining that a derivative copyrightable work such as a sound recording cannot be appropriated, even in the minutest part, by any person for whatsoever purpose it may be. Needless to state, the two offending acts being, either a small part of a sound recording being physically lifted or a singer singing from parts of songs i.e. sound recordings, the injunction followed. The learned Single Judge has also considered the argument: whether the use was fair use, probably for the reason even this aspect of the matter was extensively argued before the learned Single Judge. Noting various decisions but by highlighting the opinion in the decision reported as 401 F. 3d 647 (6th Cir. 2004) *Bridgeport Music Inc v. Dimension Films* in which the view taken was that howsoever small it may be, copyright law prohibits a physical lifting from a sound recording, has held; and the reasoning of the learned Single Judge is not clear, that the fair use defence was not attracted.

The reasoning of the learned Single Judge appears to be on both counts of the issue i.e. that the fair use defence was not available to a sound recording and also that the uses in question were not a fair use. We may highlight that the learned Single Judge appears to have dovetailed the issue of a part of a sound recording being used i.e. *de minimis* with the fair use defence.

6. On the subject of fair use the learned Single Judge has noted the decisions reported as (2011) 45 PTC 70 *Super Cassette Industries Ltd. v. Positiv Television Pvt. Ltd. & Anr.*, 2008 (38) PTC 477 (Del) *ESPN Star Sports vs Global Broadcast News Ltd. & Ors.*, (1972) 1 All.ER 1023 *Hubbard & Anr. Vs. Vosper & Anr.*, (2000) R.P.C. 604 *Hyde Park Residence Ltd. Vs. Yelland*, (2002) R.P.C. 5 *Ashdown Vs. Telegraph Group Ltd.*, (1986) R.P.C. 515 *Associated Newspapers Group Plc Vs. News Group Newspapers Ltd. & Ors.*, (2005) EWHC 472 *Fraser-Woodward Ltd. Vs. British Broadcasting Corporation & Anr.*, (1964) 1 All.ER 465 *Ladbroke (Football) Ltd. Vs. William Hill (Football) Ltd.*, (1934) 1 Ch.593 *Hawkes & Son (London) Ltd. Vs. Paramount Film Service Ltd.*, 146 F.Supp. 795 *Donald Irwin Robertson Vs. Batten, Barton, Durstine & Osbrom Inc*, 812 F.2d 421 (9th Cir. 1987) *Baxter Vs. MCA Inc*, PTC 385 (Del) *The Chancellor Masters & Scholars of the University of Oxford*, (1999) FSR 610 *Pro Sieben Media AG Vs. Carlton UK Television Ltd.*, and 2008 (37) PTC 569 (Del) *BDA Pvt. Ltd. Vs. Paul P.John & Anr.*, and has culled out the principles of law pertaining to fair use in the various decisions and we may only add that what has been culled out are the four well-known factors, as per statute, in the United States of America i.e. (i) the purpose and the character of the use, including whether such use is of

a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. And in respect of which, as we would be noticing herein after, even in India fair use is determined on the same four factors.

7. But we find no discussion in the impugned judgment with reference to the application of the legal maxim: *de minimis non curat lex*.

8. The offending material in one case is the physical lifting and the use of half a line from the popular song *Kajra Re Kajra Re Tere Kare Kare Naina* from the cinematographic film *Bunty and Babli*. Only the lyrics: '*Mera Chain – Vain Sab Ujhda*' with the musical score in the backdrop pertaining to the said words have been used. Only a three seconds audio recording has been physically lifted.

9. The allegedly infringing material comprises of it being used in an advertisement broadcasted by India TV in the course of its broadcasts. The advertisement may be described as follows:-

The scene opens to a setting of a small provision shop (kiraane ki dukaan), displaying various common household items such as razor blades, cereals and ghee on the shelves. A shop attendant is dusting items on display in the shop to the background music '*Mera chain-vain sab ujhda*' playing on the radio in the shop. The song plays in the background for only 3 seconds of the advertisement, and at the beginning. The song thereafter becomes muted and fades into the background as the camera focus shifts towards the shopkeeper, who is seen sitting, with one elbow on the table and the chin resting on the knuckles; in a

state of reflection. The shop attendant continues to dust the wares, while the shopkeeper fans himself with a newspaper. The attendant then dejectedly turns toward the shopkeeper and queries: *Arrey Sethji, ab koi grahak nahi aane waala. Meri baat maano toh, gaaon ka ticket katwa lo. (Sir, believe me, we are not going to get any customers now. Take my advice and go back to your village).* In a state of despair, the shopkeeper replies: *Arrey Bhayo! Main toh lut gayo, barbaad ho gayo! Ab toh dhanda band karne ki naumat aa gayo, ab laagyo kaahe ki dhande mein golmaal! (Oh God! I have lost everything! I have no other option but to shut shop. Why did I ever try to swindle people!).*

The commercial ends with a background message stating: *Milaawat karne waalon ka yehi hoga haal. Aap dekhte rahiye 'Sab Golmaal Hai', har Shanivaar sham 7 baje. (This is the plight of those who resort to adulteration. Keep watching 'Sab Golmaal Hai', every Saturday at 7 p.m.)*

10. The offending i.e. the infringement alleged in the second case arises out of a programme 'INDIA BEATS' broadcasted by India TV. A live orchestra is present to give the musical score, if required, when an artist during interview sings the lyrics from songs sung by her. Vasundhra Das, a young and a budding singing sensation is being interviewed. The overall focus of the broadcast is to bring out the childhood days of Vasundhra Das, her college days, her friends and social circle, how music fascinated her, and how she got a break in life and what were the milestones achieved by her. Needless to state, being a singer, Vasundhra Das would be expected to be called upon to sing couple of lines or may be a stanza from songs which became popular and in which she had enriched the sound recording with her voice. The programme commences with the Emcee introducing Vasundhra Das and

after pleasantries are exchanged, and as Vasundhra Das just about speaks about herself, barely a minute into the broadcast, the Emcee, requests her to sing a few lines from a song '*Shakalaka Baby*' sung by her in the movie *Nayak* because the song had become popular and was associated by the public with Vasundhra Das because of the rich voice lent by her which infused life to the lyrics and the musical score. She sings a stanza for 1 minute and 33 seconds. The orchestra performs live to give the musical score to her voice and interspaced in the backdrop are short clips from the movie *Nayak*. The talk continues with Vasundhra Das speaking about her involvement in the famous movie *Lagaan* in which she had lent her voice to the popular song '*O Ri Chori*', which became famous because of the infusion of her voice to the lyrics and the musical score. She informs a feature of the song which hithertofor was not to be found in the Indian cinema. The introductory portion of the song was sung in English. She then sings only that portion of the song which was sung in English for a few seconds only, of course with the orchestra providing the musical score in the background. But, no clippings at the backdrop from the movie *Lagaan* are shown. The discussion continues about her life and her achievements, her friends and her personal and social life till another milestone achievement i.e. the song '*Rabba Rabba*' from the movie *Aks*, which she had sung and which also became famous, was discussed and Vasundhra Das sings a few lines from the song for about a minute, with the orchestra providing the musical score, and in this singing there is a 17 seconds clip from the movie *Aks* shown in the background. Thereafter, she sings a few lines from another popular song '*Soni Soni*' from her album *Meri*

Jaan and needless to state the song being from an album, no movie clip is shown in the background. She proceeds then to discuss her childhood and in said context sings a few lines from another popular song '*Chaleyan Jaise Hawaein*' sung by her from the movie *Main Hoon Na* with the orchestra giving the musical score and for short durations clippings from the movie *Main Hoon Na* being broadcasted. The conversation turns towards her days in college and she sings a few lines from another popular song '*Salam Namaste*' in the movie of even name, with the live orchestra providing the musical score and this time clippings of short duration from the movie are played in the background. She then speaks about her days spent in Spain where she learnt flamenco music and she sings a Spanish song for about a minute and ten seconds, and in respect of which song the plaintiffs claim no sound recording rights. As would be expected, the love life a celebrity is wanted to be known by one and all and the discussion turns romantic with Vasundhra Das speaking of her romantic days and in between she sings a few lines from the popular song '*Salaamey*' sung by her in the movie *Dhoom*. No movie clip is shown in the background this time. Towards the end of the interview/broadcast she sings a few lines of another song which became a hit: '*It's the time to disco*' from the movie *Kal Ho Na Ho* with the movie clipping shown in the backdrop. And this is the last few lines sung by her. The programme ends.

11. Of the nine songs from which Vasundhra Das sang a few lines each, the plaintiffs claim copyright in the sound of seven songs, which pertained to the seven movies noted by us herein above.

12. Neither learned counsel disputed the proposition that a copyrightable work can be exploited, during her lifetime, by the owner of the work and unless a permission/license/authorization is obtained from the copyright holder, an appropriation of the work would be a wrong; save and except such use which is permitted by Section 52 of the Copyright Act 1957. With respect to Section 52 of the Copyright Act 1957 as in force prior to it being amended vide Act No.27 of 2012, the point of variance between the parties was: Whether Section 52(1)(b), in the context of reporting current events, justified India TV broadcasting songs sung by Vasundhra Das during the chat show. In other words, what would be *reporting current events*. Except for arguing that the life time achievements of a budding artist would be current events, Ms.Pratibha M.Singh, learned counsel for the appellants could take the argument no further. We reject her submission with respect to the facts of the said case inasmuch as the programme in question by no stretch of imagination can be labeled as one reporting current events. The live audience is present. There is fun and humour in the dialogues. Merely because the young artist speaks about herself and if we may say summarizes a pen-profile of her life, it would not be reporting current events.

13. We note that Ms.Pratibha Singh, learned counsel for the appellants had conceded that while broadcasting the programme India Beats, her clients could not have used the clippings from the cinematographic films without the permission from the owner of the cinematographic films.

14. Thus, the debate centered around only sound recordings. The debate in the appeal was on two distinct

areas. The first was the appropriation of a fragment of the sound recording, where the musical score and the lyrics limited to '*Mera Chain Vain Sab Ujhda*' were used in the advertisement in question which we have described in paragraph 9 above, and Vasundhra Das sang parts of seven songs from movies and two other songs, the sound recording rights whereof were not hers and she having sung a few lines from each song for durations between half a minute to up to one minute.

15. We note that although the learned Single Judge has noted various decisions where the maxim *de minimis non curat lex* has been referred to, but has not discussed the application thereof as a defence in copyright violation, and for which it appears that certain features of the use of the said maxim in Copyright Law have escaped the attention of the learned Single Judge; probably his attention not being drawn thereto. The rich debate which took place before us in the appeals which we heard spread over four days, and for which we place on record our gratitude to the learned counsel who appeared in the matter, threw light on an area of Copyright Law which appears to be not well illuminated and we must put on record that after the rich debate was heard by us in Court and while reflecting upon the same in our chambers, equally enriching assistance was rendered to us by Mr. Prashant Sivarajan, Law Researcher attached to us who was able to make neat packets of the decisions which we would be noticing hereinafter, and his able assistance helped us in understanding the nuances, and the confusion, in the field of Copyright Law on the subject of *de minimis*.

16. We begin our discussion by noting that as compared to other areas of the law, copyright invites the maximum trivial violations. Mundane activities such as clicking a picture of a sculpture or the waiters and the waitresses singing *'Happy Birthday To You'* at a child's birthday party at a restaurant, are ready examples of the frequency with which minor violation of copyright takes place, day after day, place after place, all over the world.

17. In the past, copyright owners, perhaps felt that a legal dispute was not worth the effort and hence we do not find much case law on the subject till the early 90s of the 20th Century, but of late, increasing number of trivial copyright violations are reaching the Courts.

18. One obvious solution to trivial copyright violation is to apply the legal maxim *de minimis non curat lex*, often shortened to *'de minimis'*; a legal maxim commonly used to privilege trivial violation in the area of the law.

19. *De minimis* is translated as: (i) The law does not concern itself with trifles; (ii) The law doth not regard trifles; and (iii) The law cares not for small things.

20. To put it simply. The maxim basically means that law will not resolve petty or unimportant disputes.

21. But, what qualifies as a trifle? And, when can *de minimis* apply? Applying *de minimis* as an adjective and giving it the meaning: trifling, unimportant or insufficient, Courts have held that trifling, unimportant or insufficient violations would be treated as minor legal violations and hence would either be non-actionable or would be a good defence to an action for violation of a legal right.

22. In most areas of the law no difficulty has been found in applying *de minimis*, of course, on facts, Courts may have reached different conclusions with respect to: Whether on a particular given set of facts, the violation was trifling, unimportant or insufficient, but as we would be noticing, in the law of Copyright there is considerable confusion and if we may, with apology use the expression: Has wreaked jurisprudential havoc.

23. Three different paths are discernible in various judicial pronouncements in the field of the Copyright Law with respect to the application of *de minimis*; only one of which conforms to the path of *de minimis* in other areas of law. The first path evolved by the Courts with respect to use of *de minimis* is in the *substantial similarity analysis*; an integral part of a copyright violation claim. The second path evolved by the Courts is in the *fair use analysis*. The third path is the same as treaded by the Courts in the other areas of the law i.e. simply applying *de minimis* where the violation is found to be trifling, unimportant or insufficient.

24. Let us highlight the three road maps chartered by Courts in various judicial pronouncements.

25. It is trite that the pre-requisite to copyright infringement is a *demonstrable* copying of the copyrighted work. But since not all copying is infringement, there must be *substantial similarity* between the two works. Courts have identified two types of *substantial similarities*: (i) Comprehensive non literal similarity; where Courts have strived to identify the '*fundamental essence of the structure*', and it being copied, even where *specific expression is not copied*. (ii) *Fragmented literal similarity*, in which bits of

specified expressions are copied, but the overall structure is not. It is in the latter, that Courts have employed *de minimis*; holding that substantial similarity is present only if the amount of literal expression copied is more than *de minimis*. Thus, *de minimis* used in these cases is simply the opposite of ‘*substantial similarity*’ i.e. to say that the use is *de minimis* is to say that the alleged infringing work is not substantially similar to the original. This approach is to be found in the opinion reported as 307 F.Supp. 2d 928 *Neal Publications v. F&W Publications Inc.*, a case where the defendant had copied a few phrases from the plaintiff’s guide; the opinion reported as 388 F. 3d 1189 (9th Cir. 2004) *Newton v. Diamond*, where the notes were sampled by the Beastie Boys and the average audience was opined not to recognize the appropriation.

26. But the problem with this approach is that walking on the same path, Courts have reached different destinations. In the opinion reported as 867 F.Supp. 1009 *Epic Metals Corp. v. Condec Inc.*, copying two out of twelve photographs from a brochure was held to be not attracting *de minimis*, but in the opinion reported as 137 F.Supp. 2d 768 *Compaq Computer Corp. v. Ergonone Inc.*, it was opined that copying a few phrases from a computer ergonomics handbook was *de minimis*.

27. The problem appears to be the determination: Whether the average audience would recognize the appropriation – an ambiguous concept of *de minimis*!

28. Whereas the incorporation of the *notion of observability* into *substantial similarity* determination appears to be good in theory, it is capable of being contradictory in its application, and *Newton’s* case (supra) illustrates this

dichotomy. Three copied notes, constituting a small portion of the plaintiff's work, undoubtedly prominent in the work of the defendant, was opined to be not a case of substantial similarity, on the reason that the average audience would not recognize the appropriation. We wonder!

29. Perhaps, to avoid the pitfalls in this pathway, at least in the context of visual copyright works, Courts appear to have attempted a different path.

30. In the opinion reported as 126 F. 3d 70 (2d Cir. 1997) Ringgold v. Black Entm't Television Inc, the artwork of the plaintiff was fully and clearly visible in the background of several scenes in the television programme of the defendant. So clearly visible was the work of the plaintiff that it would normally be sufficient for a finding of substantial similarity, but as concerned the '*observability*' of the copied works – as a qualitative component of substantial similarity – the Court hedged the factors of: (i) the length of time the copied work is observable, (ii) focus, (iii) lighting, (iv) camera angles, and (v) prominence.

31. On facts, Ringgold held that defendant's use of plaintiff's works was not *de minimis*.

32. But, we find a contradiction in the path chartered by Ringgold. Whilst, it may make sense to consider the observability of the copyrighted work in the offending work, but factor such as length of time the copyrighted work is displayed is an awkward fit in the *substantial similarity analysis*; this consideration may be relevant mainly to the question of how much harm the copying does, and not whether copying has been done.

33. However, one thing needs to be noted. The reasoning in Ringgold introduces, albeit in a subtle manner, in the substantial similarity test: the traditional *de minimis focus* i.e. on the amount of harm done.

34. The opinion reported as 401 F. 3d 647 (6th Cir. 2004) Bridgeport Music Inc v. Dimension Films, interestingly, adopted the *bright – line rule* and negated application of either *de minimis* or/nor substantial similarity. A physical lifting of a mere two seconds of the plaintiff’s sound recording for a rap song was held to be an infringement on the reason that a physical lifting lacked intellectual input, and thus the need for a *bright – line rule*. Its logic was that by not paying, the defendant was unjustly enriched, and secondly, there existed a market for sample licenses.

35. No doubt, in Bridgeport, the Court took pains to note that its analysis applied only to sound recording; but the logic of the analysis belies this claim, for the reason, the reasoning and the logic in Bridgeport is equally capable of application in all copyright infringements.

36. With humility, while giving an apparently good reason to eliminate ‘substantial similarity’ test, Bridgeport gives no good reason why even *de minimis* is to be excluded.

37. It may be difficult for us to know the reason for certain, but one reason we may guess. It could be the confusion regarding what role *de minimis* plays in the substantial similarity analysis.

38. The decision reflects a lack of theoretical clarity in applying *de minimis*, in substantial similarity analysis.

39. Another path chartered by the Courts, is to apply *de minimis* to the fourth of the four factors pertaining Fair Use.

This is to be found in the opinions reported as 464 US 417 *Sony Corp. of America v. Universal City Studio Inc* (Popularly known as the *Betamax case*); 82 F.Supp. 1044 *Amsinck v. Columbia Pictures Indus*; an unreported 6th Cir. decision, to be found in the unpublished tabled decisions 1993 WL 460 787, titled *Mihalek v. Michigan*; and the decision reported as 606 F.Supp. 1526 *Hustler Magazine Inc v. Moral Majority Inc.*

40. Four factors, as per the statute in the United States determine whether it is a case of Fair Use. These are: (i) the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. And we may simply highlight that even in India, Fair Use is determined on the same four factors: AIR 1959 Mad. 410 *M/s.Blackwood & Sons Ltd. v. Anparasuraman* where the purpose for which a copyrightable material was used was considered while determining Fair Use, 1978 (4) SCC 118 *R.G.Anand v. Deluxe Films & Ors.* where the opinion of the spectator or the reader after seeing or reading the works i.e. nature of the copyrighted work was considered, 2008 (38) PTC 385 Del *The Chancellor Masters and Scholars of the University of Oxford v. Narendera Publishing House & Ors.* where the quantum and value of the matter taken was considered as also the fourth factor i.e. the effect on the market share of the prior work was considered.

41. In *Sony* and *Amsinck*, while considering the fourth Fair Use factor, the Courts '*partially married the doctrine of fair*

use with the legal maxim de minimis non curat lex by highlighting that the little copying which had been done had caused no demonstrable harm to the right of the copyright owner.

42. Mihalek case (supra), considered whether retaining two photocopies was a copyright violation. The Court ruled that the activity could qualify as either Fair Use or *de minimis*; but notably the discussion on facts is not with reference to any one or the more of the four Fair Use factors, and perhaps one may say that the said decision probably applies *de minimis* by way of defence and probably in conjunction with a Fair Use. Hustler case (supra) adopts a totally different approach. The defendant therein had used the plaintiff ad parody for fund raising purpose. Referring to the decision in Betamax's case (supra) and the language of *partial marriage between de minimis and fair use*, but unlike Mihalek's case (supra), where the Court used *de minimis* as a defence on an issue of fair use, the Court used *de minimis* with reference to the effect of the use in question on the market for the original.

43. Thus, two distinct theories of the applicability of *de minimis* in fair use analysis are discernible from the said four decisions. Firstly, the maxim can be used as an alternative to fair use in cases where the damage done is trifling. Secondly, as a help to describe the conclusion with respect to a factor of fair use.

44. One may say that even this approach has some kind of an inconsistency inasmuch as we find two distinct theories emerging.

45. Besides, we find, in a well researched article published by Prof. David Nimmer titled '**FAIREST OF THEM ALL**

AND OTHER FAIRY TALES OF FAIR USE', the learned author having analyzed 60 judicial decisions in which the four factors on which fair use is determined have been indexed in columns, with the learned author opining that no discernible trend was emerging as to what led a particular learned Judge to reach the conclusion that the use was fair or not. As per the learned author the reason stems from the malleability of the four fair use factors.

46. In the opinions reported as 147 F. 3d 215 (2d Cir. 1998) Sandoval v. New Line Cinema Corp., and 345 F. 3d 922 (6th Cir. 2003) Goldon v. Nextel Communications, the photographs of the plaintiffs appeared sufficiently but inconspicuously in the background of the defendant's film in the former, and a fleeting and out of focus to the quality, use of plaintiff's dental illustration in the defendant's infomercial, in the latter, were held uses qualifying for *de minimis* treatment. These two decisions charter the third path i.e. of applying *de minimis* as applied in other areas of the law.

47. The need to apply *de minimis* as applied in the other areas of the law to the law of copyright, stands aptly described in the opinion reported as 246 F. 3d 152 (2d Cir. 2001) On Davis v. Gap Inc in the following words:-

"Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the de minimis doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a letter from a friend to show another friend, or of a favourite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on Jose De Creeft's Alice in Wonderland sculpture. We record television programmes aired while we are out, so as to watch them at a more convenient hour.

Waiters at a restaurant sing 'Happy Birthday' at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the de minimis doctrine, in trivial instances of copying, we are in fact not breaking the law."

48. We cannot restrain ourselves to note that despite making an eloquent reference to the need of applying *de minimis* as applied in other areas of the law to the Copyright Law, the Court did not ultimately rely upon *de minimis*.

49. Shri Pravin Anand, learned counsel for the respondents had referred to the treatise by Prof. Nimmer: NIMMER ON COPYRIGHT where Prof. Nimmer had concluded that *de minimis* is not a viable copyright infringement defence. The said conclusion has perhaps been arrived at by Prof. Nimmer with reference to various paths attempted to be walked upon by Courts while applying *de minimis* in the Copyright Law and reaching different destinations to convince Prof. Nimmer to conclude that *de minimis* is not a viable copyright infringement defence.

50. In our opinion, the lack of consistency in the judicial opinions is no ground to conclude that *de minimis* is not a viable copyright infringement defence. A particular approach may be criticized and a particular approach may be opined to be the best, but certainly not to say that the lack of consistency would be a ground to hold that *de minimis* is not a viable copyright infringement defence.

51. What should be the way forward?

52. The Rule of Law loses its meaning if it does not run close to the Rule of Life. Trivial prima facie violations of copyright are commonplace and are well summarized in the

opinion in On Davis case (supra), relevant passage whereof has been extracted by us in para 31 above.

53. Three features of the Copyright Law are largely responsible for this. First, any type of work that is fixed and contains even a modicum of creativity is copyrightable. Second, copyright attaches to these works automatically without the need for registration. Third, the statutory rights of copyright owners are wide. Thus, every photograph taken by a tourist which includes an advertisement or an artwork would technically be a copyright violation. Even singing Happy Birthday at a restaurant would be a copyright violation. Absent fair use, all these people would be violating the law.

54. It is not in society's best interest to adjudicate these copyright disputes because ultimate compensation paid would not justify public expenditure in the adjudicatory process.

55. Secondly, new technologies are emerging which increase the importance of amateur creative production and mix and match creativity. Today amateurs produce creative works of the highest professional quality. Creativity has to be encouraged and this would be in the interest of the society.

56. In our opinion, the use of *de minimis*, as applied in other areas of the law, without any modification or without having any marriage of convenience, has three significant advantages in the field of Copyright Law. Firstly, the Fair Use concept would be a bad theoretical fit for trivial violations. Secondly, *de minimis* analysis is much easier. Thirdly, a *de minimis* determination, is the least time consuming, and needless to state it is in the interest of the parties as also the

society that litigation reaches its destination in the shortest possible time.

57. After all, the factors commonly considered by Courts in applying *de minimis* are well listed. They are five in number: (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violated legal obligation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer.

58. Reverting to the facts and the TV advertisement Sab Golmaal Hai, suffice would it be to state that what has been physically lifted from the sound recording are the first five words with the musical score at the backdrop from a popular song of the movie *Bunty Aur Babli* i.e. the words with the musical score at the backdrop are *Mera Chain Vain Sab Ujhda*. The scenic setting is as noted by us in paragraph 9 above. Let us apply the well-known five factors considered by Courts in applying *de minimis*. The size of the harm is the use of mere five words from a song having five stanzas, some of which are repeated twice in the song. The intent of the defendant is not to steal. The intent is to create the scene in a small kirana shop, and who has not heard radio blaring in the kirana shops. We think we all have. For how would the small kirana shop owner keep himself busy all day with stray customers trooping in now and then. It is not a departmental store in a shopping mall where customers walk in by the thousands. It is a consumer awareness advertisement, and where else would we find a consumer being cheated, if not a kirana shop. Indeed, the advertisement brings out the dejection of the kirana shop owner who is not able to sell adulterated and counterfeit goods and is being told by the

shop attendant to pack up and return to the village. He regrets having tried to swindle the people. The intent of the alleged wrongdoer is to educate the public. The purpose of the allegedly violated legal obligation i.e. infringement of a sound recording is to prevent a wrongful gain to oneself by appropriating the work of the other, and suffice would it be to state that the advertisement being a consumer awareness advertisement would not be of any personal financial gain to the advertiser. We do not also have any evidence whether the advertisement was a paid advertisement or the defendant was discharging the social corporate responsibility, and who says that corporates do not render charity. It may be true that the five words from the song appear conspicuously and prominently at the beginning of the advertisement, but so powerful are the dialogues and the expressions in the remainder advertisement that the ordinary viewer would remember the advertisement for its socially educative trust and not the song used. Incidentally, on the subject of the cost of adjudication, we had asked Shri Pravin Anand, learned erudite counsel who appeared for the respondents that if the maker of the advertisement would have approached his clients for appropriating half a line from the sound recording and had told the purpose of the advertisement i.e. consumer awareness and consumer education, what would his clients had charged. Learned counsel fairly conceded that probably nothing, but if the advertisement was found to be of a commercial value, learned senior counsel said that his clients would have probably charged around ₹10,000/-. This would be too trivial a sum vis-a-vis the social cost of adjudication.

59. Applying the five well-known factors commonly considered by Courts in applying *de minimis*, prima facie we are satisfied, unless evidence is led at the trial to prove to the contrary, that the infraction is trivial and attracts the defence of *de minimis*.

60. As regards the interview with Vasundhra Das, she is the performer who gave the performance by lending her voice to the lyrics and the musical score when the sound recordings were made. Of course, she took her price to lend her voice and thus the broadcasting rights in the sound recordings are not hers. But would that mean that on analogous principles consistent with fair dealing, and we are not to be understood that we are bringing in the right under Section 52 of the Copyright Act 1957 as it stood when the dispute arose i.e. prior to the Copyright Amendment Act 2012, she would be denuded from using excerpts of her performance for all times to come? Prima facie, the answer has to be 'No', for the reason if a performer is to give a chat show or an interview, surely '*Einstein's Theory of Relativity*' or the discovery of the '*Boson Particle*' would not be the subject matter of discussion. The life and the achievement of the performer would be discussed. The law pertaining to privilege, privacy and libel would guide us that for public figures even their personal affairs could be a matter of public interest and as against common citizens, weaker defences are available to public figures and celebrities in relation to their personal affairs. In other words, a discussion or an information or a talk in which public has an interest in which a celebrity participates would entitle the celebrity, if she happens to be a performer, while speaking about herself, her life, her friends, her passion, her successes

and failures, to refer to the milestones achieved by her in her life: the heights to which she rose and/or the pits/depths she fell. We cannot separate from the life of the performer her performances and if in the natural setting of a chat show she were to sing more than a wee bit, but not substantially the full songs, as long as the singing duration is limited to a minute or so at a time, it would be a case of *de minimis* use and hence the appropriation of the lyrics would not constitute an actionable violation of the copyright in the sound recording. Here again we would like to caution that if the programme has a very little chat and the major part is consumed by the performer singing, it may be a different situation inasmuch as it could then be said that the so called chat show is a ruse and the real intent is to broadcast the sound recording to the public. Thus, the facts of each chat show, its theme, its setting and the participation by the live audience at the show are all factors which have to be kept in mind. We remind ourselves of a quote from the decision of the US Supreme Court in the decision reported as 471 US 539 Harper & Row Publishers Inc v. National Express:-

“Perhaps no more precise guide can be stated than Joseph McDonalds clever paraphrase of the Golden Rule: Take not from others to such an extent and in such a manner that you would be resentful if they so took from you. This equitable Rule of Reason permits Courts to avoid rigid application of the Copyright Statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”

61. The chat show in question is of 45 minutes duration, out of which Vasundhra Das has sung, at different

intervals of the chat show, only nine songs and the total time consumed in the singing is less than 10 minutes. Applying the five principles of *de minimis* we find that the intention was not to appropriate something belonging to the other. The intention was to inform the viewers how Vasundhra Das was introduced into music and what milestones she achieved in her life. The viewer of the programme would not remember the programme for the songs sung by Vasundhra Das but would remember the programme as one encapsulating the life journey of Vasundhra Das, hardly any harm would be caused to the copyright owner of the sound recording. Thus, unless at the evidence led to the contrary at the trial, prima facie, the defence of *de minimis* would be available even to Vasundhra Das as also India TV in relation to the programme *India Beats*.

62. We accordingly allow the appeals and after setting aside the impugned order dated November 11, 2011 we dismiss the applications filed seeking interim relief filed by the respondents, but making it expressly clear that no visual clippings from any cinematographic films would be displayed.

63. Before bringing the curtains formally down we would also note that with the amendment to the Copyright Act as per the Copyright Amendment Act 2012, with effect from June 07, 2012, Section 52 of the Copyright Act stands amended and the defence of fair dealing is now available even to derivative copyrightable works, but would hasten to add that consistent with our opinion herein above, the issue of trivial violations would be preferably adjudicated upon with reference to the *de minimis* principle inasmuch as the various paths chartered by Courts on the subject of fair dealing are fairly confusing as has been brought out by us herein before.

Lastly, the mantra: Nothing said by us would be construed as an expression on the merits of the rival claims which have to be determined in the light of the evidence led at the trial and whatever facts we have used are limited to our discussion to decide with respect to interim relief.

64. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

August 21, 2012
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