

# THE SUPREME COURT CASES

(2008) 1 SCC

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## (2008) 1 Supreme Court Cases 1

(BEFORE B.N. AGRAWAL AND P.P. NAOLEKAR, JJ.)

EASTERN BOOK COMPANY AND OTHERS . . . Appellants;

*Versus*

D.B. MODAK AND ANOTHER . . . Respondents.

Civil Appeals No. 6472 of 2004<sup>†</sup> with No. 6905 of 2004<sup>†</sup> and Contempt  
Petition (C) No. 158 of 2006 in CA No. 6472 of 2004,  
decided on December 12, 2007

**A. Intellectual Property — Copyright Act, 1957 — Ss. 13 and 2(o) —  
Derivative or secondary literary work produced from pre-existing material  
in the public domain — Test and standard of “originality” for, so as to  
qualify for copyright protection — Rejection of the “sweat of the brow” and  
the American creativity test — Adoption/enunciation of Indian-Canadian  
test of “skill and judgment with flavour of creativity”**

— Held, to claim copyright in a derivative work, the author must  
produce the material with exercise of his skill and judgment with a flavour  
of creativity which may not be creativity in the sense that it is novel or non-  
obvious, but at the same time it is not a product of merely labour and capital  
— The copyright work which comes into being should be original in the  
sense that by virtue of selection, coordination or arrangement of pre-  
existing data contained in the work, a work somewhat different in character  
is produced by the author — To support copyright, there must be some  
substantive variation and not merely a trivial variation, not the variation of  
the type where limited/unique ways of expression are available and an  
author selects one of them which can be said to be a garden variety

**B. Intellectual Property — Copyright Act, 1957 — S. 13 — Copyright in  
law reports/journals publishing judgments of courts — Portions protected  
by copyright and not open to others to reproduce without permission of  
copyright holder**

<sup>†</sup> From the Final Judgment and Order dated 27-9-2002 of the High Court of Delhi at New Delhi  
in FAOs (OS) Nos. 43 and 45 of 2001 : 2002 PTC 641

— Headnotes, editorial notes and footnotes appearing in law report — Copyright protection granted by High Court, not having been challenged before Supreme Court, affirmed by Supreme Court

— Further held, inputs put in the original text by the appellants in paragraph numbering, paragraphing, internal paragraph numbering, internal referencing, introducing phrases like “concurring”, “partly concurring”, “partly dissenting”, “dissenting”, “supplementing”, “majority expressing no opinion”, etc., require knowledge, sound judgment and legal skill — The exercise and creation of these inputs has a flavour of the minimum amount of creativity required for copyright protection — Therefore in these inputs put in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilise the same — Hence, appellants entitled to this protection in addition to the protection granted by the High Court to appellants’ headnotes, editorial notes and footnotes appearing in SCC

C. Intellectual Property — Copyright Act, 1957 — Ss. 13, 52(1)(q)(iv), 2(k) & 17(d) — Copy-edited text of judgments of courts as published in law reports/journals viz. judgments published with various inputs made by the publisher to enhance readability and user-friendliness of the text — Subsistence of copyright, if any in such copy-edited text — Test and standard of “originality” for — Rejection of the “sweat of the brow” and the American creativity test — Adoption/enunciation of Indian-Canadian test of “skill and judgment with flavour of creativity”

— Held, copyright would not be found to subsist in copy-edited judgments merely by establishing amount of skill, labour and capital put in the inputs of the copy-edited judgments — To secure copyright for copy-edited judgments it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one — To support copyright in the copy-edited judgment, there must be some substantive variation and not merely a trivial variation, not the variation of the type where limited/unique ways of expression are available and an author selects one of them which can be said to be a garden variety — Though the creativity standard, which is applicable, does not require something novel or non-obvious, but some minimal degree of creativity is required — Appellants claiming copyright in the copy-edited version of the text of judgments of the Supreme Court as published in their law report — Tenability of claim — Held, no doubt the appellants have collected the material and improved the readability and user-friendliness of the judgment and arranged it in their own style, but that does not give the flavour of minimum requirement of creativity — The various inputs set out in para 13 (other than the ones listed in Shortnote B, above) put in by the appellants in the copy-edited judgments do not reach the standard of creativity required for copyright — The aforesaid inputs would enjoy copyright protection if the principle had been accepted (which principle has not been accepted) that anyone who by his independent skill and labour creates an original work of whatever character, shall enjoy an exclusive right to reproduce that work

**D. Intellectual Property — Copyright Act, 1957 — Ss. 52(1)(q)(iv) and 13 — Principle that “no man is entitled to steal or appropriate for himself the result of another man’s brain, skill or labour”, held, is inapplicable in case of judgments of courts as there is no copyright therein — Hence, resorting to common source i.e. obtaining the certified copy of the judgment is not required for publishing or reproducing judgments**

**E. Intellectual Property — Copyright Act, 1957 — S. 13 — Works in which copyright subsists — Facts — Held, there is no copyright in the facts per se**

**F. Intellectual Property — Copyright Act, 1957 — S. 13 — Works in which copyright subsists — Facts/expression dichotomy — Discovery/expression dichotomy — Ideas/expression dichotomy — Expression of facts or discoveries or ideas — When not protected — Unique/limited ways of expressing the fact, discovery or idea**

**G. Intellectual Property — Copyright Act, 1957 — S. 13 — Literary works — Classes of — Primary or prior works distinguished from secondary or derivative works**

**H. Intellectual Property — Copyright Act, 1957 — Ss. 13, 14, 17 and 52 — Acquisition/subsistence of copyright — Requirement of — Held, in the first place the work should qualify as “original” under the provisions of S. 13 for subsistence of copyright**

**I. Intellectual Property — Copyright Act, 1957 — Ss. 13, 14, 17 and 52 — Nature and scope of copyright in India — Held, copyright is purely a creation of statute under the 1957 Act — What rights the author has in his work by virtue of his creation, are defined in Ss. 14 and 17 — Though referred to as exclusive rights, there are various exceptions listed in S. 52**

**J. Intellectual Property — Copyright — Meaning of “copyright” — Copyright Act, 1957, S. 14**

**K. Intellectual Property — Copyright — Object and justification of copyright — Balancing of public and private interests — Role of the requirement of “originality” in — Copyright Act, 1957, S. 13**

**L. Intellectual Property — Copyright Act, 1957 — Object of, held, is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others**

The appellants are involved in the printing and publishing of various books relating to the field of law. One of the well-known publications of Appellant 1 Eastern Book Company is the law report “Supreme Court Cases” (“SCC”). The appellant publishes all reportable judgments along with non-reportable judgments of the Supreme Court of India in SCC. Yet another category included in SCC is short judgments, orders, practice directions and records of proceedings. The law report SCC was commenced in the year 1969 and had been in continuous publication ever since. The name “Supreme Court Cases” had been coined by the appellants and they had been using the same continuously, exclusively and extensively in relation to the law reports published by them.

For the purpose of publishing the judgments, orders and proceedings of the Supreme Court, the copies of judgments, orders and proceedings are procured directly from the office of the Registrar of the Supreme Court of India. After the initial procurement of the judgments, orders and proceedings for publication, the appellants make copy-editing inputs wherein the judgments, orders and records

of proceedings procured, which is the raw source, are copy-edited by a team of editorial staff and various inputs are put in the judgments and orders to make them user-friendly by making an addition of cross-references, standardisation or formatting of the text, paragraph numbering, verification and by putting other inputs. The appellants also prepare headnotes comprising two portions, the short-note consisting of catch/lead words written in bold; and the long note, comprised of a brief discussion of the facts and the relevant extracts from the judgments and orders of the Court. Headnotes are prepared by Appellant 3, Surendra Malik.

As per the Appellant 3 (Plaintiff 3 in the suits filed in the High Court), the preparation of the headnotes and putting of the various inputs in the raw text of the judgments and orders received from the Supreme Court Registry requires considerable amounts of skill, labour and expertise and for the said work a substantial amount of capital expenditure on the infrastructure, such as offices, equipment, computers and for maintaining extensive library, besides recurring expenditure on both the management of human resources and infrastructural maintenance, are incurred by the appellant-plaintiffs.

As per the appellants, SCC is a law report which carries case reports comprising of the appellants' version or presentation of those judgments and orders of the Supreme Court after putting various inputs in the raw text and it constitutes an "original literary work" of the appellants in which copyright subsists under Section 13 of the Copyright Act, 1957 ("the Act") and thus the appellants alone have the exclusive right to make printed as well as electronic copies of the same under Section 14 of the Act. Any scanning or copying or reproduction done of or from the reports or pages or paragraphs or portions of any volume of SCC by any other person, is an infringement of the copyright in SCC within the meaning of Section 51 of the Act.

Respondent 2-defendant, Spectrum Business Support Ltd. (in Civil Appeal No. 6472 of 2004) had brought out a software called "Grand Jurix" published on CD-ROMs and Respondent 2-defendant, Regent Data Tech Pvt. Ltd. (in Civil Appeal No. 6905 of 2004) had brought out a software package called "The Laws" published on CD-ROMs. As per the appellants, all the modules in the respondent-defendants' software packages had been lifted from the appellants' work; the respondents had copied the appellants' sequencing, selection and arrangement of the cases coupled with the text of the copy-edited judgments as published in the appellant-plaintiffs' law report SCC, along with and including the copy-editing, paragraph numbers, footnote numbers, cross-references, etc.; and that such acts of the respondent-defendants constituted infringement of the appellant-plaintiffs' exclusive right to the same.

The appellant-plaintiffs moved the High Court for temporary injunction against both the parties filing applications in Suit No. 758 of 2000 against Spectrum Business Support Ltd. and in Suit No. 624 of 2000 against Regent Data Tech Pvt. Ltd. before a Single Judge. The interim orders of injunction were passed in the suits from time to time. However, the respondent-defendants filed application for vacation of the stay order. By a common judgment dated 17-1-2001, the Single Judge of the High Court dismissed the appellants' applications for interim injunction and allowed the respondents' application for vacation of stay. However, before the Single Judge, the respondents conceded that the appellants have copyright in the headnotes and as such they undertook not to copy these headnotes in their CD-ROMs.

Aggrieved by the said order dated 17-1-2001 refusing to grant interim injunction, the appellants preferred appeals before a Division Bench of the Delhi High Court and the applications praying for interim relief were also filed in both the appeals. The applications praying for the interim relief were disposed of by a Division Bench on 9-3-2001 directing that during the pendency of the appeals the respondents will be entitled to sell their CD-ROMs with the text of the judgment of the Supreme Court along with their own headnotes which should not in any way be a copy of the headnotes and the text of the appellant-plaintiffs.

On filing of contempt petitions for non-compliance with the abovesaid order of the Division Bench dated 9-3-2001, another Division Bench of the High Court heard the interim appeals and by the impugned order dated 27-9-2002 held that the appellants could not claim copyright in the text of the judgment by merely putting certain inputs to make it user-friendly.

The Division Bench of the High Court, however, held that there is originality and creativity in preparation of the headnotes, and, therefore, there would be copyright in the headnotes to the judgments prepared by the appellants. The Division Bench also held that so far as footnotes and editorial notes are concerned, it could not be denied that these are the publisher's own creations and based on the publisher's own research and thus the appellants had copyright over them.

By the impugned order, the Division Bench modified the judgment of the Single Judge in favour of the appellants by directing that the respondents would be entitled to sell their CD-ROMs with the text of the judgments of the Supreme Court along with their own headnotes, editorial notes, if any, which should not in any way be copy of the headnotes of the appellants. That the respondents shall also not copy the footnotes and editorial notes appearing in the journal of the appellants.

However, the Division Bench did not grant injunction protecting the copy-edited text of the appellants. Hence they filed these appeals by special leave.

Before the Supreme Court the appellants claimed that the copyright subsists in SCC as a law report as a whole based cumulatively and compendiously on all the substantial contributions of skill, labour and capital in the creation of various parts of SCC i.e. headnotes, editorial notes, footnotes, the version of the copy-edited text of judgments as published in the appellants' law report SCC, the selection of cases as published in SCC, the sequence and arrangement of cases as published in SCC and the index, table of cases, etc. which are published in each volume of SCC, that give the SCC volumes and thereby the complete SCC set, its character as a work as a whole.

The appellants also claimed that the copyright subsists in the copy-edited version. The appellants did not claim copyright in the raw text of the judgments, certified copies of which are obtained from the Registry. The appellants did not claim a monopoly in publishing judgments of the Supreme Court; they were being published by other publishers also without copying from each other's publications. The appellants claimed copyright in the copy-edited version of the text of judgments as published in SCC which is a creation of the appellants' skill, labour and capital and there are contributions/inputs/additions of the appellants in creating their version of the text of judgments as published in SCC.

The appellants placed before the Court their contributions/inputs to the text of the judgments received by them from the Registry. The appellants asserted

that originality inheres in such aspects (twenty-seven aspects as set out in para 16) of its editorial process which are selected, coordinated and arranged in such a way that the resulting work as a whole constitutes an original work of the appellants.

The questions that arose before the Supreme Court were:

(1) What shall be the standard of originality in the copy-edited judgments of the Supreme Court which is a derivative work and what would be required in a derivative work to treat it the original work of an author and thereby giving a protected right under the Copyright Act, 1957 to the author of the derivative work? and

(2) Whether the entire version of the copy-edited text of the judgments published in the appellants' law report SCC would be entitled for a copyright as an original literary work, the copy-edited judgments having been claimed as a result of inextricable and inseparable admixture of the copy-editing inputs and the raw text, taken together, as a result of insertion of all SCC copy-editing inputs into the raw text, or whether the appellants would be entitled to the copyright in some of the inputs which have been put in the raw text? That is, whether by introducing certain inputs in a judgment delivered by a court it becomes "original copy-edited judgment" and the person or authority or company who did so could claim to have embodied the originality in the said judgment and the judgment takes the colour of original judgment having a copyright therein of its publisher?

Partly allowing the appeals, the Supreme Court

*Held :*

Copyright protection finds its justification in fair play. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit out of the skill and labour of the original author and it is for this reason that the Copyright Act, 1957 gives to the authors certain exclusive rights in relation to the certain works referred in the Act. The object of the Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. (Para 14)

Copyright is a right to stop others from exploiting the work without the consent or assent of the owner of the copyright. A copyright law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. One of the key requirements is that of originality which contributes, and has a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in public domain. It is a well-accepted principle of copyright law that there is no copyright in the facts per se, as the facts are not created nor have they originated with the author of any work which embodies these facts. The issue of copyright is closely connected to that of commercial viability, and commercial consequences and implications. (Para 15)

Copyright is purely a creation of the statute under the 1957 Act. What rights the author has in his work by virtue of his creation, are defined in Sections 14 and 17 of the Act. These are exclusive rights, but subject to the other provisions of the Act. In the first place, the work should qualify under the provisions of Section 13, for the subsistence of copyright. Although the rights have been referred to as exclusive rights, there are various exceptions to them which are listed in Section 52. (Para 18)

For copyright protection, all literary works have to be original as per Section 13 of the Act. Broadly speaking, there would be two classes of literary works:

(a) Primary or prior works: these are the literary works not based on existing subject-matter and, therefore, would be called primary or prior works; and

(b) Secondary or derivative works: these are literary works based on existing subject-matter. Since such works are based on existing subject-matter, they are called derivative works or secondary works. (Paras 20 and 21)

The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. (Paras 57 and 60)

The Canadian Supreme Court in *CCH Canadian case*, (2004) 1 SCR 339, held that to be original under the Copyright Act the work must originate from an author, not be copied from another work, and must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. Creative works by definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment and it is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximising the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious—concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy of the objectives of the Copyright Act. Thus, the Canadian Supreme Court is of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital. (Para 55)

On the face of the provisions of the Copyright Act, 1957 the principle laid down by the Canadian Supreme Court in *CCH Canadian case* would be applicable to copyright in the judgments of the Supreme Court. (Para 57)

As provided for under Section 52(1)(q)(iv) the judicial pronouncements of the Supreme Court would be in the public domain and their reproduction or publication by any number of persons would not be infringement of the copyright of the first owner thereof, namely, the Government, unless it is prohibited. This being the position, the copy-edited judgments would not satisfy the copyright merely by establishing amount of skill, labour and capital put in

the inputs of the copy-edited judgments and the original or innovative thoughts for the creativity are completely excluded. Accordingly, original or innovative thoughts are necessary to establish copyright in the author's work. To secure a copyright for the judgments delivered by the court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author. On this touchstone, the inputs put by the appellants in their journal "SCC" shall be considered. (Paras 26, 27, 55 to 58 and 60)

The principle where there is common source the person relying on it must prove that he actually went to the common source from where he borrowed the material, employing his own skill, labour and brain and he did not copy, would not apply to the judgments of the courts because there is no copyright in the judgments of the court, unless so made by the court itself. (Para 56)

It is made clear that this decision would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments. (Para 57)

*CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004) 1 SCR 339 (Canada), *relied on*

*Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 499 US 340 : 113 L Ed 2d 358 : 111 S Ct 1282 : 18 USPQ 2d 1275 (1991); *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F 3d 674 (2d Cir 1998); *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F 2d 509 (2d Cir 1991); *Macmillan and Co. v. K. and J. Cooper*, (1923-24) 51 IA 109 : AIR 1924 PC 75, *considered*

*Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1964) 1 WLR 273 : (1964) 1 All ER 465 (HL); *Walter v. Lane*, 1900 AC 539 : (1900-1903) All ER Rep Ext 1666 (HL); *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, (2000) 1 WLR 2416 (HL); *University of London Press Ltd. v. University Tutorial Press Ltd.*, (1916) 2 Ch 601; *Kelly v. Morris*, (1866) LR 1 Eq 697; *Parry v. Moring and Gollancz*, Cop Cas (1901-1904) 49; *Gopal Das v. Jagannath Prasad*, AIR 1938 All 266; *V. Govindan v. E.M. Gopalakrishna Kone*, AIR 1955 Mad 391; *C. Cunniah & Co. v. Balraj & Co.*, AIR 1961 Mad 111; *Agarwala Publishing House v. Board of High School and Intermediate Education U.P. Allahabad*, AIR 1967 All 91; *Gangavishnu Shrikisondas v. Moreshvar Bapuji Hegishte*, ILR (1889) 13 Bom 358; *Rai Toys Industries v. Munir Printing Press*, 1982 PTC 85; *Macmillan v. Suresh Chunder Deb*, ILR (1890) 17 Cal 951; *Hogg v. Scott*, 1874 LR 18 Eq 444, *distinguished*

The appellants have added in the copy-edited version the cross-citations to the citation(s) already given in the original text; added names of cases and cross-citations where only the citation of the case is given; added citation and cross-citations where only name of the case is given; inserted citation in case history where only the title and year of the impugned/earlier order is given; presented in their own style the cases when they are cited/repeated in the judgment; provided precise references to the quoted matter in the judgment by giving exact page and paragraph number as in the original case source/treatise/reference material; added margin headings to quoted extracts from statutes/rules, etc., when they are missing from the original text of the judgment; added the number of the section/rule/article/paragraph to the extract quoted in the original text; added the names of Judges on whose behalf opinion given by giving expressions such as "for



himself and Pathak, C.J.”, etc.; done verification of first word of the quoted extract and supplied emphasis on such verification; added ellipsis “...” to indicate breaks in quoted extract; provided and supplied the matter inadvertently missed in quoted extracts in the original text of the judgment; completed/corrected the incomplete/incorrect case names or citations; renumbered correctly the clauses/sub-clauses in terms of the questions framed which were numbered in terms of answers to questions framed by learned Judge; changed the text as per corrigenda issued, which has been issued upon SCC Editor’s request and suggestions; done compressing/simplification of information relating to the case history; followed certain norms at SCC for giving case names; omitted the words like “Section”, “Sec.”, “Rule”, etc. and given only the number of the section/rule at the beginning of the quoted extract; made margin heading and the first clause/sub-section or initial matter of section/rule, etc. to run-on instead of being let to start from a fresh line; done compressing of unquoted referends and use of \*\*\* for parts; replaced the series of dots in the raw text with ellipsis; removed abbreviations such as sec., R., cl. and substituted them with full word i.e. section, rule, clause; added hyphenation after the section/rule numbers which have alphabets suffixed to them; applied indentation of quoted extracts; removed full stops or word “No.”; and given full forms of abbreviations to enhance readability and clarity. In addition to the above, capitalisation and italicisation is also made wherever necessary in the raw text; and punctuation, articles, spellings and compound words are also checked and corrected, if required, in the original text.

(Paras 58 and 13)

The aforesaid inputs put by the appellants in the judgments would have had a copyright had the principle been accepted that anyone who by his or her own skill and labour creates an original work of whatever character, shall enjoy an exclusive right to copy that work and no one else would be permitted to reap the crop what the copyright owner had sown. No doubt the appellants have collected the material and improved the readability of the judgment by putting inputs in the original text of the judgment by considerable labour and arranged it in their own style, but that does not give the flavour of minimum requirement of creativity. The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterised as purely a work which has been brought about by putting some amount of labour by the appellants.

(Para 59)

[Ed.: But see also *R.G. Anand v. Deluxe Films*, (1978) 4 SCC 118 at para 15.]

Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity. Arrangement of the facts or data or the case law is already included in the judgment of the Court. Therefore, creativity of SCC would only be addition of certain facts or material already published, case law published in another law report and its own arrangement and presentation of the judgment of the Court in its own style to make it more user-friendly. The selection and arrangement can be viewed as typical and at best the result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality so as to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely a trivial variation, not the variation of the type where limited/unique ways of expression are available and an author selects one of them which can be said to be a garden variety. Novelty or invention or innovative idea is not the requirement for

protection of copyright but it does require minimal degree of creativity. The aforesaid inputs put by the appellants in the copy-edited judgments do not touch the standard of creativity required for copyright. (Para 60)

However, the inputs put in the original text by the appellants in (i) segregating the existing paragraphs in the original text by breaking them into separate paragraphs or clubbing together separate paragraphs in the original judgment; (ii) adding internal paragraph numbering within a judgment after providing uniform paragraph numbering to the multiple judgments; and (iii) indicating in the judgment the Judges who have dissented or concurred by introducing the phrases like “concurring”, “partly concurring”, “partly dissenting”, “dissenting”, “supplementing”, “majority expressing no opinion”, etc., have to be viewed in a different light. The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read. Often legal arguments or conclusions are either clubbed into one paragraph in the original judgment or parts of the same argument are given in separate paragraphs. It requires judgment and the capacity for discernment for determining whether to carve out a separate paragraph from an existing paragraph in the original judgment or to club together separate paragraphs in the original judgment of the Court. Setting of paragraphs by the appellants of their own in the judgment entailed the exercise of the brain work, reading and understanding of subject of disputes, different issues involved, statutory provisions applicable and interpretation of the same and then dividing them in different paragraphs so that chain of thoughts and process of statement of facts and the application of law relevant to the topic discussed is not disturbed, would require full understanding of the entire subject of the judgment. Making paragraphs in a judgment could not be called a mechanical process. It requires careful consideration, discernment and choice and thus it can be called as a work of an author. Creation of paragraphs would obviously require extensive reading, careful study of subject and the exercise of judgment to make paragraph which has dealt with particular aspect of the case, and separating intermixing of a different subject. Creation of paragraphs by separating them from the passage would require knowledge, sound judgment and legal skill. This exercise and creation thereof has a flavour of minimum amount of creativity. (Para 61)

The said principle would also apply when the editor has put an input whereby different Judges’ opinions have been shown to have been dissenting or partly dissenting or concurring, etc. It also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilise the same. (Para 62)

The appeals are partly allowed. By the impugned order the High Court has already granted interim relief to the appellant-plaintiffs by directing that though the respondent-defendants shall be entitled to sell their CD-ROMS with the text of the judgments of the Supreme Court along with their own headnotes, editorial notes, if any, they should not in any way copy the headnotes of the appellant-plaintiffs; and that the respondent-defendants shall also not copy the footnotes and editorial notes appearing in the journal of the appellant-plaintiffs. It is further

directed that the respondent-defendants shall not use the paragraphs made by the appellants in their copy-edited version for internal references and their editor's judgment regarding the opinions expressed by the Judges by using phrases like "concurring", "partly dissenting", etc. on the basis of reported judgments in SCC. The judgment of the High Court is modified to the extent that in addition to the interim relief already granted by the High Court, the abovementioned additional reliefs are being granted herein to the appellants. (Para 63)

*Eastern Book Company v. D.B. Modak*, 2002 PTC 641, partly affirmed and partly reversed

**M. Intellectual Property — Copyright — Statutory history of copyright law in India, traced** (Para 19)

D-M/37057/C

Advocates who appeared in this case :

Raju Ramachandran, Senior Advocate (Sudeep Malik, Ms Anitha Shenoy, Saurab Sinha, Rishad Ahmad Chowdhury, Raj Shekhar Rao, M.R. Vij, Nitin Ramesh, Advocates) for the Appellants;

P.N. Lekhi, Senior Advocate (Samar Bansal, S.K. Mohanty, Lokesh Kumar, M.K. Garg, Advocates) for the Respondents in Civil Appeal No. 6472 of 2004;

Ms Pratibha M. Singh, Gaurav Sharma, Bishwajit Dubey, Ms Shruti Kakker, Sumeet Bhatia and Maninder Singh, Advocates for the Respondents in Civil Appeal No. 6905 of 2004.

<i>Chronological list of cases cited</i>	<i>on page(s)</i>
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4. 499 US 340 : 113 L Ed 2d 358 : 111 S Ct 1282 : 18 USPQ 2d 1275 (1991), <i>Feist Publications Inc. v. Rural Telephone Service Co. Inc.</i>	106a
5. 945 F 2d 509 (2d Cir 1991), <i>Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.</i>	108c
6. 1982 PTC 85, <i>Rai Toys Industries v. Munir Printing Press</i>	102e-f
7. AIR 1967 All 91, <i>Agarwala Publishing House v. Board of High School and Intermediate Education U.P. Allahabad</i>	101e-f
8. (1964) 1 WLR 273 : (1964) 1 All ER 465 (HL), <i>Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.</i>	95f, 97a-b
9. AIR 1961 Mad 111, <i>C. Cunniah &amp; Co. v. Balraj &amp; Co.</i>	101c
10. AIR 1955 Mad 391, <i>V. Govindan v. E.M. Gopalakrishna Kone</i>	100e-f
11. AIR 1938 All 266, <i>Gopal Das v. Jagannath Prasad</i>	100a
12. (1923-24) 51 IA 109 : AIR 1924 PC 75, <i>Macmillan and Co. v. K. and J. Cooper</i>	108g
13. (1916) 2 Ch 601, <i>University of London Press Ltd. v. University Tutorial Press Ltd.</i>	98d, 109f-g
14. Cop Cas (1901-1904) 49, <i>Parry v. Moring and Gollancz</i>	99f-g
15. 1900 AC 539 : (1900-1903) All ER Rep Ext 1666 (HL), <i>Walter v. Lane</i>	97c-d
16. ILR (1890) 17 Cal 951, <i>Macmillan v. Suresh Chunder Deb</i>	103a-b, 103d-e
17. ILR (1889) 13 Bom 358, <i>Gangavishnu Shrikisondas v. Moreshvar Bapuji Hegishte</i>	102a-b
18. 1874 LR 18 Eq 444, <i>Hogg v. Scott</i>	103c-d
19. (1866) LR 1 Eq 697, <i>Kelly v. Morris</i>	99a-b

**SUMMARY OF ARGUMENTS**

- I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants.  
II. Mr P.N. Lekhi, Senior Advocate, on behalf of the respondents in Civil Appeal No. 6472 of 2004.  
III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004.

*I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants*

**1. FACTUAL CLAIMS*****1.1. Copyright subsists in SCC as a law report as-a-whole***

**Claim 1.1.1:** *Copyright subsists in SCC as a law report as-a-whole based cumulatively and compendiously on all the substantial contributions of skill, labour and capital in the creation of various parts of SCC, that is, (i) the Headnotes (not contested anymore; impugned order in Appellants' favour, at SLP paper book pp. 30-31, 43-44, 45), (ii) the Editorial notes and Footnotes (not contested anymore; impugned order in Appellants' favour, at SLP paper book pp. 31, 44-45), (iii) the **version** of the copy-edited text of judgments as published in the Appellants' law report SCC, Supreme Court Digests and SCC-Online Supreme Court Case Finder Full Text, (iv) the Selection of cases as published in SCC, (v) the Sequence and Arrangement of cases as published in SCC, and (vi) the indexes, tables of cases, etc. which are published in each volume of SCC, that give the SCC volumes and thereby the complete SCC set, its character as a **work as-a-whole**.*

***1.2. What the Appellants' case is NOT***

*The Appellants DO NOT claim copyright in the raw text of judgments (certified copies), copies of which are obtained from the Registry. This is clearly so stated at various places in the complaints (Rejoinder paper book pp. 800-01, 857-58) the written submissions before the Division Bench (Rejoinder paper book, pp. 886-87) and in the SLP (SLP paper book p. D, para 4 and pp. 62-63), and recorded by the Division Bench and Single Judge. The Appellants do not want to, and in fact cannot, create a monopoly in publishing judgments of the Supreme Court, as many other publishers publish judgments of the Supreme Court in healthy and vigorous competition, without copying from each other.*

***1.3. Copyright subsists in the SCC version of the text of the judgments***

**Claim 1.3.1:** *Copyright subsists in the copy-edited **version** of the text of judgments as published in SCC and SCC-Online Supreme Court Case Finder Full Text.*

***1.4. Skill, labour and capital expended by the Appellants in creating SCC version of text is substantial***

**Claim 1.4.1:** *Skill, labour and capital is applied by the Appellants in creating the copy-edited SCC **version** of the text of judgments, and it is substantial, and not trivial.*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

**Claim 1.4.2:** *The Division Bench has not given sufficient weight to the skill and labour of the Appellants by not considering most of the contributions/inputs/ additions of the Appellants in creating their **version** of the text of judgments as published in SCC.*

The (unabridged) *Oxford English Dictionary* in Twelve Volumes defines “copy” to mean “*In printing, ‘manuscript (or printed) matter prepared for printing.’*” It defines “copy-editor” to mean “one who edits the ‘copy’ for printing”. Hence “copy-editing” describes a technical publishing process: the word “copy” is a technical publishing term for the manuscript—so “copy-editing” is the term used for the editing of the manuscript for publication. In this case the manuscript is the raw text of the judgment as received from the Registry of the Supreme Court. On a summary of the different kinds of copy-editing inputs/contribution made by the Appellants to the raw text of judgments to create their *version* of the text as published in SCC, there are about Twenty-seven different inputs made by the Appellants, **without** including typographical corrections and insertion of commas and full stops.

**1.5. SCC has a set and evolving House style of copy-editing**

**Claim 1.5.1:** *Evolution in the set SCC House style of copy-editing the text of judgments over a period of over 30 years does not imply that there is no set SCC House style.*

**Claim 1.5.2:** *A few bona fide and inadvertent errors/omissions/discrepancies/inconsistencies in application of the SCC House style of copy-editing the text of judgments over a period of over 30 years does not imply that there is no uniform or set SCC House style.*

**1.6. Copying by the Respondents is well established**

**Claim 1.6.1:** *Appellants’ claim that Respondents have copied SCC in their CD-ROMs is not “specious”, as held by Division Bench in impugned order.*

**2. LEGAL PROPOSITIONS****2.1. Purpose of copyright law**

**Proposition 2.1.1:** *What is protected is the result of the application of independent skill, labour and capital: one man may not appropriate to himself what has been produced by the skill, labour and capital of others.*

“[T]he law of copyright ... does not impinge upon freedom of trade; it protects property. It is no more an interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another’s labour, whether they are tangible or intangible.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 291 lines 2-9, per Lord Devlin.

“In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So the protection given by such copyright protection is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 291 lines 13-5 (from bottom), per Lord Pearce.

Prof. Cornish has stated it thus (in *Intellectual Property*, 3rd Edn., Sweet & Maxwell, para 10-9, p. 335): “*here copyright is being used to compensate for lack of a roving concept of unfair competition*”.

**Other cases laying down the same principles**

*Walter v. Lane*, 1900 AC 539 (HL), 545

*Designers Guild v. Russell Williams*, (2000) 1 WLR 2416 (HL), 2418, lines 1-4

*Bookmakers v. Wilf*, 1994 FSR 723, 731, 735

*Govindan v. Gopalakrishna*, AIR 1955 Mad 391, 393 (para 10), 394 (para 13)

**2.2. Requirements of originality in Section 13 of the Copyright Act, 1957**

**Proposition 2.2.1:** *The requirements of “originality” in Section 13 of the Copyright Act, 1957 for a work to qualify for copyright protection, are that*

**(i) the work originates from the author, and**

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 277 lines 6-3, 289 lines 15-12 (from bottom), p. 291 lines 24-25,

*Agarwala Publishing House v. Board of High School and Intermediate*, AIR 1967 All 91, p. 92, para 5,

*Bookmakers’ v. Wilf*, 1994 FSR 723, 731,

*University of London Press Ltd. v. University Tutorial Press Ltd.*, (1916) 2 Ch 601, 608-09

**(ii) the work is the result of application of independent skill, labour and capital by the author, and**

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 289 lines 15-12 (from bottom)

*Agarwala Publishing v. Board of High School*, AIR 1967 All 91, 92, para 5,

*Cunniah v. Balraj*, AIR 1961 Mad 111, 112, para 5

(Case law relied on under Proposition 2.3.1, below is relevant.)

**(iii) the work has not been copied from some other work.**

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 277 lines 6-3, 291 lines 24-25

*Agarwala Publishing v. Board of High School*, AIR 1967 All 91, 92, para 5

*Bookmakers v. Wilf*, 1994 FSR 723, 731

*Jagdish Prasad v. Parmeshwar Prasad*, AIR 1966 Pat 33, 35

*University of London Press v. University Tutorial Press*, (1916) 2 Ch 601, 609

**(iv) However, there is no requirement of originality of ideas or inventive or novel thought.**

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 277 lines 13-5 (from bottom), p. 291 lines 23-25

*Agarwala Publishing v. Board of High School*, AIR 1967 All 91, 92, para 5

*Bookmakers v. Wilf*, 1994 FSR 723, 731

*Cuisenaire v. South*, (1967) 54 CPR 1, 8

*Cunniah v. Balraj*, AIR 1961 Mad 111, 112, para 5

*Jagdish Prasad v. Parmeshwar Prasad*, AIR 1966 Pat 33, 35

*University of London Press v. University Tutorial Press*, (1916) 2 Ch 601, 608-09

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)****Treatises**

Prof. W.R. Cornish, *Intellectual Property*, 3rd Edn., Sweet & Maxwell, paras 10-8, 10-9, pp. 334-35

**2.3. Requirements of copyright protection for “secondary works”/“derivative works”**

**Proposition 2.3.1:** *To qualify for copyright protection, a derivative literary work created from pre-existing material in the public domain, requires the exercise of independent skill, labour and capital in its creation, by the author of such work. The amount of labour and skill required to support successfully a claim of copyright cannot be defined in precise terms and is a question of fact and degree in every case. However, the exercise of skill, labour and capital required to produce the derivative work must not be trivial or negligible.*

*Ladbroke v. Hill*, (1964) 1 WLR 273, p. 277 line 1 (from bottom), p. 278 lines 1-5, p. 289 lines 15-12 (from bottom), p. 291 lines 13-5 (from bottom), p. 292 lines 23-21 lines (from bottom)

*Football League v. Littlewoods*, (1959) 1 Ch 637, 651, 656

*Bookmakers v. Wilf*, 1994 FSR 723, 731

*Rai Toys v. Munir*, 1982 PTC 85, 87

[It is submitted that the above test evaluates the *amount* of skill, labour and capital actually expended on creating the work: whether it was more than negligible or trivial. The test does not evaluate the literary merit or quality of the result produced. This is submitted as Proposition 2.3.2. below.]

**Proposition 2.3.2:** *To qualify for copyright protection a derivative literary work created by the expenditure of independent skill, labour and capital from pre-existing work(s) in the public domain need not have any literary merit, and, courts cannot evaluate the significance and quality of such derivative work. Courts can only evaluate whether the skill, labour and capital actually employed in creating the work is not trivial or negligible.*

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 281 lines 28-30, p. 285 lines 23-25, p. 291 lines 18-21

*Walter v. Lane*, (1900) AC 539 (HL), 548-549, 551-552, 558

*Agarwala Publishing v. Board of High School*, AIR 1967 All 91, 92, para 5

*Burlington v. Chibber*, 1995 PTC (15) 278, 283, para 11.3, per Lahoti, J.

*Cuisenaire v. South*, (1967) 54 CPR 1, 8

*Football League v. Littlewoods*, (1959) 1 Ch 637, 651, 656

*Govindan v. Gopalakrishna*, AIR 1955 Mad 391, 393 (para 10), 394 (para 13)

*Jagdish Prasad v. Parmeshwar Prasad*, AIR 1966 Pat 33, 35

*University of London Press v. University Tutorial Press*, (1916) 2 Ch 601, 609-610

[approved in *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), 279 lines 24-25, 288 lines 14-6 (from bottom), 293 lines 2-1 (from bottom)-294 lines 1-2.

*Victoria Park v. Taylor*, (1937) 58 CLR 479, 511 (Australian High Court)

Section 2(o), Copyright Act, 1957 defines “literary work” to include “compilations”.

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)****2.4. Derivative work to be considered as-a-whole for determining copyright protection**

**Proposition 2.4.1:** *In deciding whether a derivative work qualifies for copyright protection it must be considered as-a-whole; it is not correct to dissect the work into fragments and consider the copyrightability of each such fragment piecemeal and individually, apart from the whole.*

“One test may be whether the part which [the defendant] has taken is novel or striking, or is merely a commonplace arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiffs’ work as a whole is ‘original’ and protected by copyright, and then to inquire whether the part taken by the defendant is substantial.

A wrong result can easily be reached if one begins by dissecting the plaintiffs’ work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be.” *Ladbroke v. Hill*, (1964) 1 WLR 273, p. 276 lines 3-1 (from bottom), p. 277 lines 1-16.

**Case law in favour:**

*Ladbroke v. Hill*, (1964) 1 WLR 273, p. 276 lines 23-28, p. 276 lines 3-1 (from bottom), p. 277 lines 1-16, p. 285 lines 12-6 (from bottom), p. 290 lines 21-17 (from bottom), p. 291 lines 21-16 (from bottom)

*Infoseek v. KLT*, 2006 (4) KLT 311

*Industrial Furnaces v. Reaves*, (1970) RPC 605, 624

*Nouveau Fabrics Ltd. v. Voyage Decoration Ltd.*, (2004) EWHC 895, paras 13-14

*Powerflex v. Data Access* (1997) 37 IPR 436, 455

**2.5. Uniformity not a requirement of “originality” in derivative works**

**Proposition 2.5.1:** *In order for a version of pre-existing work(s) in the public domain, created by the application of skill, labour and capital to the said pre-existing work(s), to qualify for copyright protection, it is not necessary that the alterations/additions made by such application are as per a uniform or consistent style.*

**Proposition 2.5.2:** *Evolution of a uniform style of making alterations/additions to pre-existing work(s) in the public domain over a period of time (about thirty years), does not imply that there is no uniform style, or that*

**Proposition 2.5.3:** *A few bona fide and inadvertent errors/omissions/discrepancies/inconsistencies in application of a uniform style of making alterations/additions to pre-existing work(s) in the public domain over a period of time (about thirty years), does not imply that there is no uniform style.*

[The claim that the alterations/additions must be made as per a uniform style for the derivative work to qualify for copyright protection, is another way of



**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

claiming that the derivative work must have literary merit or a certain level of quality, which, as submitted in Propositions 2.3.1. and 2.3.2. above, is not a requirement for obtaining copyright protection for such works as per settled law.]

**Case law in favour:**

[The case law in favour of the above propositions is the same as that which supports Proposition 2.3.2., above, and may pl. be referred to.]

**2.6. Copyright subsists in the text of judgments as published in law reports**

**Proposition 2.6.1:** *Copyright subsists in the copy-edited versions of the text of judgments of courts as published in law reports, which have been created by the application of skill, labour and capital which is not trivial or negligible.*

**Case law in favour:**

*Govindan v. Gopalakrishna*, AIR 1955 Mad 391, 393 (para 10), 394 (para 13)  
*ICLR v. Green*, (1911-16) Cop Cases 54  
*Butterworth v. Robinson*, 5 Ves. Jun. 708  
*Infoseek v. KLT*, (2006) 4 KLT 311

**2.7. Reproduction or publication of public domain materials: obligation to take recourse to the public domain/common source**

**Proposition 2.7.1:** *An entity which wishes to reproduce or publish work(s) already in the public domain is obligated to go to the public domain/common source of such works rather than misappropriating the effort and investment of another by copying the version of such works, which version has been created by such other by the independent expenditure of skill, labour and capital.*

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 291 lines 2-14 and lines 13-5 (from bottom)  
*Walter v. Lane*, (1900) AC 539 (HL), 545, 552  
*Designers Guild v. Russell Williams*, (2000) 1 WLR 2416 (HL), p. 2418 lines 1-4  
*Bookmakers v. Wilf*, (1994) FSR 723, p. 731 lines 27-29, 735  
*Cox v. Land*, (1869) LR 9 Eq 324, 332  
*Gangavishnu v. Hegishte*, ILR 13 Bom 358, 363  
*Gopal Das v. Jagannath Prasad*, AIR 1938 All 266, 270  
*Govindan v. Gopalakrishna*, AIR 1955 Mad 391, 393, paras 10-11, 394, para 13  
*Hogg v. Scott*, (1874) LR Eq 444, 458  
*Kelly v. Morris*, (1866) LR 1 Eq 697, 701-2  
*Macmillan v. Suresh Chandra Deb*, ILR 17 Cal 952, 961  
*Morris v. Ashbee*, (1868) LR 7 Eq 34, 40-41

Even the learned Single Judge has held the same, at pp. 145-46, SLP paper book.

Prof. Cornish has stated it thus (in *Intellectual Property*, 3rd Edn., Sweet & Maxwell, paras 10-9, p. 335):

*“here copyright is being used to compensate for lack of a roving concept of unfair competition”*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

**Proposition 2.7.2:** *The author of a derivative work is not obligated under any law to indicate specifically where in the derivative work, at each place, or collectively, he has made additions, inputs and alterations to create his version. The publication of a copyright notice, as is the usual practice with all copyrighted works, is sufficient to put the world at large at notice of the right claimed in the work.*

**Pleadings:**

The SCC copyright notices were mentioned in the complaints (Rejoinder paper book, para 41, pp. 837-38 and para 31, p. 876.)

**2.8. Mandate of Section 52(1)(q)(iv), Copyright Act, 1957 does not bar the recognition of copyright in the copy-edited versions of the text of judgments of courts as published in law reports**

**Proposition 2.8.1:** *Section 52(1)(q)(iv), Copyright Act, 1957, which is an enabling provision, merely provides that any person wanting to reproduce or publish judgments (i.e. certified copies available from Registries of courts) would not infringe the copyright of the Government. But Section 52(1)(q)(iv) does not imply that in case a person has expended independent skill, labour and capital on judgments of courts to create and publish his version of the judgments, any other person is free to copy that person's version of the judgments, substantially or in its entirety.*

**Proposition 2.8.2:** *Recognising and granting copyright protection to the copy-edited text of judgments of courts would not hinder the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority as enabled under Section 52(1)(q)(iv), Copyright Act, 1957 as the copies of the same would continue to be available for reproduction or publication on being obtained from the Registries of the courts concerned, especially if it is a court of record, which the Supreme Court of India is, under Article 129 of the Constitution.*

**2.9. Addition of additional matter or mixing of copied and original material by the defendant does not absolve him from liability for copying a copyrighted work**

**Proposition 2.9.1:** *The mere addition of additional material or mixing of copied and original material does not absolve a party, who has entirely or substantially copied a copyrighted work, from liability.*

**Case law in favour:**

*Gangavishnu v. Hegishte*, ILR 13 Bom 358, 363-64

*Mawman v. Tegg*, (1829) 2 Russ. 390

*Gopal Das v. Jagannath Prasad*, AIR 1938 All 266, 270

*Parry v. Moring*, (1903) Cop Cases (1901-04) 49, 50

**2.10. Medium on which the reproduction has been done has no bearing on copyright infringement: mandate of Section 14(a)(i), Copyright Act, 1957**

**Proposition 2.10.1:** *In light of the clear and unambiguous language of Section 14(a)(i), Copyright Act, 1957, the fact that a copyrighted work exists*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

*in the print medium but has been copied in the electronic medium, on CD-ROMs, is not relevant in the determination of copyright infringement.*

**3.1. Classes of literary works – What are “derivative works”**

**Proposition 3.1.1:** *Broadly, there are two classes of literary works:*

**I. “Primary or Prior works”:** *These are literary works not based on existing subject-matter. Therefore they are called “primary” or “prior” works.*

*Eg. Poems, novels, plays, songs, raw judgments, etc.*

**II. “Secondary or Derivative works”:** *These are literary works based on existing subject-matter. Since such works are based on **existing** subject-matter, that is to say, since they are “derived” from existing subject-matter, they are called “derivative works” or “secondary works”.*

*Eg. Tables, databases, compilations including anthologies, collections of poems or essays, abridged versions, value-added–user-friendly–enhanced-readability versions of existing work, etc.*

**3.2. Requirements for availability of copyright protection for all literary works**

**Proposition 3.2.1:** *For copyright protection, all literary works, be they primary or prior works or be they secondary or derivative works, have to be “original” as per Section 13, Copyright Act, 1957.*

**Proposition 3.2.2:** *For a primary or prior literary work to qualify as an “original literary work” under Section 13, Copyright Act, 1957, the test that has to be met as per the well-settled Indian and English law is stated as per Proposition 2.2.1.*

**Proposition 3.2.3:** *For a secondary or derivative literary work to qualify as an “original literary work” under Section 13, Copyright Act, 1957, the test that has to be met as per the well-settled Indian and English law is stated as per Propositions 2.3.1. and 2.3.2.*

**3.3. SCC is a “secondary or derivative work” — What exactly are the Appellants claiming copyright in — Each copy-edited judgment published in SCC as an “original literary work”**

**Proposition 3.3.1:** *Copyright is claimed in the version of the copy-edited text of judgments as published in the Appellant-plaintiffs’ law report SCC. That is, copyright is being claimed in each copy-edited judgment published in SCC as an “original literary work”.*

**Proposition 3.3.2:** *Copyright is being claimed in the resulting inextricable and inseparable admixture of the copy-editing inputs and the raw text, taken together, that results on the insertion of the all 27 SCC copy-editing inputs into the raw text. It is this admixture that has been called the SCC version of copy-edited judgments, which may characterised as the resulting “sugar and salt solution” of the copy-editing inputs mixed in with the raw text.*

**Proposition 3.3.3:** *Copyright is not being claimed in each copy-editing input individually or in all 27 SCC copy-editing inputs collectively apart from the*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)**

*raw text, but only in the resulting admixture of the copy-editing inputs and the raw text, taken together.*

The inputs and insertions become an inextricable part of the SCC version and the two cannot be separated: *it is like adding sugar to a glass of water. The SCC copy-editing inputs are like the sugar: the sugar completely dissolves into the water and the two cannot be easily separated.* Another analogy is that *the insertion of the SCC copy-editing inputs to the raw text of the judgments is like sculpting the judgment or giving it a particular form.* It is this resulting form that is unique to SCC, and is a result of the application of tremendous amounts of skill, labour and capital by the Appellants to the raw text. A sculpture may be made of marble. If the marble is removed, nothing will be left, but copyright protection is still given to the sculpture. Copyright is being claimed in the text which is recast and transformed, which is made more readable and user-friendly as per the SCC House style by the 27 copy-editing inputs.

**3.4. Reply to the respondent's contentions that:**

(1) ***"The copy-editing inputs of the appellants are only discoveries/facts so they cannot be the subject of copyright protection."***

(2) ***"Thus, the fact that there are limited ways/unique of expressing the various copy-editing inputs means that no copyright can subsist in such limited/unique expression."***

**Proposition 3.4.1:** *No copyright is being claimed, nor can be claimed in the fact or information discovered. So the Appellants do not claim copyright in respect of any facts or discoveries in themselves, that may be involved in implementing the 27 SCC copy-editing inputs.*

**Proposition 3.4.2:** *The correct application of the principle that there is no copyright in facts or information discovered is that it is not open to a later author to appropriate the fact or information plus the expression of the earlier author. The later author is only permitted to glean the fact or discovery from the work of the earlier author, without taking the expression of the earlier author. The later author is not permitted to copy the expression.*

Thus the later author can get the information that the reference to a particular case is incomplete. How the complete reference is to be given in the text is a *matter of expression* which is protected by copyright and the later author is obliged to expend his independent skill, labour and effort in devising a House style or expression to give that complete reference. That there would be difference in expression between independent publishers can be seen from the following two instances:

<i>Raw text</i>	<i>SCC</i>	<i>AIR</i>
Janaki Prasad (CV-1 p. 8)	<i>Janki Prasad Parimoo v. State of J&amp;K</i> , (1973) 1 SCC 420	Janaki Prasad (AIR 1973 SC 930)

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...in our earlier *Janata Dal v. H.S.* : (reported in 1991 (3) order dated 27-8-1991 *Chowdhary*, (1991) 3 SCC 756) SCC 758 : 1991 SCC (Cri) 933

**Proposition 3.4.3:** *Not all SCC copy-editing inputs can be characterised as involving discoveries. They are not in the nature of facts or information.*

*A. Matter added per se to the raw text of the judgments*

\* \* \*

*III. SCC style of presenting (repeatedly) cited cases*

\* \* \*

*VII. "dissenting", "concurring", etc. — phrases like "concurring", "partly concurring", "partly dissenting", "dissenting", "supplementing", "majority expressing no opinion", etc. are added to the original text.*

This is an inference derived on reading of the entire opinion, by application of skill, judgment and labour. A difficult choice being between characterising the opinion as "partly concurring" or "partly dissenting".

SCC	AIR
KHALID, J. (NATARAJAN, J. concurring)	KHALID, J. 51. (On behalf of himself and NATRAJAN, J.) (Majority view)
VARADARAJAN, J. (dissenting)	VARADARAJAN, J. (Minority view)
SABYASACHI MUKHARJI, J. (partly dissenting)	SABYASACHI MUKHARJI, J. (Minority view)
VENKATARAMIAH, J. (concurring with the majority judgment)	VENKATARAMIAH, J. (Majority view)

\* \* \*

*IX. Paragraph numbering*

\* \* \*

*C. Other additions/insertions made to the raw text*

*I. Compressing/simplification of information relating to case history*

*II. SCC case name style – there are certain norms followed at SCC for giving case names.*

*III. SCC style of presenting extracts from statutes/rules, etc.*

*IV. SCC style of presenting references to sections/rules in text*

*V. SCC style of presentation of breaks/end of quoted matter*

*VI. Indentation*

*VII. Removal of full stops or removal of word "No."*

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VIII. Giving full forms of abbreviations to enhance readability and clarity

IX. Capitalisation

X. Punctuation, articles, spelling, compound words

XI. Italicisation

**Proposition 3.4.4:** *Of the SCC copy-editing inputs that may be characterised as involving facts or information the Appellants are only claiming copyright in their particular mode and manner of expressing the said facts or information.*

**Proposition 3.4.5:** *There are three, but only these three, SCC copy-editing inputs which involve the expression of a fact that can be expressed only in one way. All the other twenty-four SCC copy-editing inputs can be expressed in a minimum of 6 to 8 or 10 different ways, as has been shown in detail under Propositions 3.4.2. and 3.4.3., 3.4.8. and 3.5.2. and the different possible expressions shown have been shown as illustrations only and are not meant to be exhaustive of all possibilities.*

*The three inputs are:*

B. II. “[T]he”, “[i]n” – verification of first word of quoted extract

B. III. Ellipsis “...” added to indicated breaks in quoted extract

B. IV. Matter inadvertently missed in quoted extracts supplied

*If these three were the only three copy-editing inputs made by SCC to the raw text, then it may have been difficult for SCC to maintain a claim to copyright in its copy-edited version. However, not only does SCC implement its twenty-four other copy-editing inputs to the raw text to create its version, SCC does not claim copyright in each input individually, but claims copyright in the manner of looking at the whole work as an admixture of the copy-editing inputs and the raw text as claimed in Proposition 4.3.2. Therefore the extreme case considered in Proposition 4.4.5. is really not relevant to the question of law involved in this case.*

**Proposition 3.4.6:** *Even for SCC copy-editing inputs that can be characterised as involving discoveries, there are several, if not many ways of expressing each individual input which involves a discovery.*

**Proposition 3.4.7:** *If the SCC copy-editing inputs are taken collectively as being part of a House style, there are a large number of permutations and combinations possible, where two or three elements of House style between two law reports may be similar, but other elements would diverge significantly. Thus, the number of permutations and combinations that are possible in selecting amongst the various possible ways in which all the elements of a House style can be expressed by a particular law report, gives scope to a law report, new or old, to choose from a very large if not infinite number of House styles, when determining the choice of House style encompassing the expression of all the various possible kinds of inputs.*

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Thus the assertion of the learned counsel for the Respondents in this Hon'ble Court to the effect that if "two reports have different styles, the third one will have to follow one of them" is patently untenable. It is submitted that there will be as many styles as there are law reports willing to devise and create an independent House style. It is only copyists like the Respondents who will copy the style of an existing law report. Furthermore, the test stated in *Matthew Bender (1)* that "selection from among two or three options ... is insufficient" is inapplicable in the case of copy-editing of judgments by law reports, as Proposition 3.4.7., above, shows that the choice open to an existing or prospective law report is not "from among two or three options" but from "a very large, if not infinite number of House styles".

**Proposition 3.4.8:** *To choose which particular permutation or combination will best enhance the readability and user-friendliness of copy-edited text is further a matter of skill, and especially judgment since it requires a choice to be made amongst a huge number of possibilities due to the almost infinite number of permutations and combinations possible. Furthermore, this is not a one-time exercise, but as the editors of a law report grow, mature and acquire expertise and experience there is always further scope for refinement and improvement of the House style, which may involve experimentation with various permutations and combinations. This imports an element of dynamism into the choice of House style and requires continuing and continual expenditure of skill, and especially judgment.*

This is manifestly evident on comparing the way in which other law reports such as AIR, SCR, ITR, ELT, STC, All ER, WLR and others have expressed, as per *their* unique House styles, the very same information/discovery that has been expressed in SCC as per *its* unique House style. This has been brought out in great detail in Convenience File-5. Some instances are extracted below:

SCC	AIR	LLJ
341 US 494 : 95 L Ed 1137 (1951) 343 US 495 236 US 230	(1950) 341 U.S. 494 (1951) 343 US 495 (1914) 236 US 230	
(1962) 1 LLJ 302	(1962) 1 Lab LJ 302 (SC)	[1962-1 L.L.J 302]

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SCC	AIR
Lord Reid at p. 1296	1964 AC 1254, Lord Reid at page 1296

: (SCC pp. 774-75)

(At Pp. 728 and 729 of AIR) :—

SCC	AIR	WLR	All ER
“(emphasis supplied)”	“(Emphasis supplied)”	“(Emphasis added)”	“(My emphasis)”
<p><i>Copinger and Skone James</i>, 15th Edn. (2005), pp. 13-14, paras 1-31, 1-32, p. 119, para 3-127 pp. 371-72, para 7-13</p> <p><i>Law of Copyright and Industrial Designs</i> by P. Narayanan, 4th Edn. (2007),</p> <p><i>R.G. Anand v. Delux Films</i>, (1978) 4 SCC 118, p. 127 para 14, p. 133, para 24, p. 137, para 37, p. 140, para 46, pp. 151-52, paras 65-66</p> <p><i>CCH Canadian v. Law Society of Upper Canada</i> (Fed. Ct.), 2002 FCA 187, para 75 [must read]</p> <p><i>Sawkins v. Hyperion</i>, [2005] RPC 32 (C.A.), paras 29-31</p> <p><i>IBCOS Computers v. Barclays Mercantile</i>, 1994 FSR 275</p>			

**3.5. Skill and labour expended in making the discovery cannot be separated from skill and labour expended in expressing the discoveries**

**Proposition 3.5.1:** *The skill and labour expended in the preparatory work or research leading up to the final expression, or the skill and labour expended in making the discovery has to be counted along with the skill and labour expended in writing out the final expression. The stages cannot be separated and the entire skill and labour expended must be looked at as a whole in evaluating whether the skill and labour expended in the expression is not-trivial or not-negligible.*

**Proposition 3.5.1-A:** *It is a matter of fact and degree in every case whether a line can be drawn between the skill, judgment, labour and effort expended in discovering facts, and the skill, labour and effort expended in writing out those facts. The factors that will determine whether such a line can be drawn would depend (i) first, on the relationship between the preparatory work and the final work: if the preparatory work and final work are closely related or inextricably related then such a line cannot be drawn; and (ii) second, it will depend on the object of the preparatory work. If the preparatory work and the final work are closely related, and one object of the preparatory work done is the creation of the final work, then such a line cannot be drawn. This would be true a fortiori in case the sole or whole object of the preparatory work is the creation of the final work. It is submitted that the test for whether the said line can be drawn or not cannot be whether the skill, labour and capital expended in writing out the expression is sufficient, since that would defeat the very purpose of the principle sought to be established in this Proposition.*



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**Proposition 3.5.2:** *The skill, judgment, labour and capital that must be counted to satisfy the test of originality laid down in Proposition 2.3.1. consists not only of the skill, labour and capital involved in writing out or formulating the expression of the SCC copy-editing inputs. The skill, judgment, labour and capital that must be counted also includes all the skill, judgment, labour and capital involved in each of the following stages: (i) first, in the preparatory work involved in recognising the need and scope of the input, (ii) second, the preparatory work required to reach or discover that information or fact, (iii) third, in having devised and chosen a House style in the first place for expressing the various inputs from many possible options, and (iv) lastly, in continually evolving the Appellants' House style so as to constantly enhance the readability and user-friendliness of the SCC text.*

Thus the skill, judgment, labour and expenditure involved in the research for the missing/incomplete information in the raw text for the purposes of verification, and the capital invested in the resources (herein the library) for such research cannot be separated or excluded in evaluating whether the skill, labour and capital expended in producing the SCC version of the raw text is not negligible or not trivial. The skill, labour and capital expended in doing such research/preparatory work is to be cumulatively evaluated with the subsequent use of skill, labour and capital for giving form and expression in print to the fact or information so discovered by the said research/preparatory work.

An instance that can be taken here is of the reference to the “great American Judge” in *Union Carbide case*. The first thing that was required in this case was the knowledge that the saying in question was incomplete. Then to know who the “great American Judge” might be. Then to have an awareness of his various works. Then would be the research to confirm the quote from that book. Then the next stage would be to be able to have access to the work itself. Then would arise the choice as to how the reference might be expressed. SCC has chosen to express it as “Oliver Wendell Holmes: *The Common Law* (1881)”. A later law report can safely glean the fact that the “great American Judge” concerned was Mr Justice Oliver Wendell Holmes, and the quote concerned is from his work *The Common Law*, but there are a number of ways of expressing it:

O.W. Holmes: *The Common Law* (1881)  
 Justice Holmes: *The Common Law* (1881)  
 Justice Oliver Wendell Holmes: *The Common Law* (1881)  
 Holmes, Oliver Wendell: *The Common Law*  
 Oliver Wendell Holmes: *The Common Law*  
 Holmes, J.: *The Common Law*  
*The Common Law* (1881) by Justice Holmes  
*The Common Law*: O.W. Holmes (1881)

Another instance is the case of finding the precise reference to a quotation from the *Constituent Assembly Debates* (CAD). There are eleven volumes with no index, and various prominent speakers who are oft-quoted

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like Dr. B.R. Ambedkar and Pt. Nehru have participated in the Debates at many places. The quotation usually has no reference to where it might be from. Since the editors at SCC have the knowledge, developed aptitude and practised ability in finding the exact source for quotations, and the entire CAD is available in the SCC library, they are able to locate the same after considerable expenditure of their skill and labour, sometimes requiring them to spend 3-4 days on the task, the capital already having been expended in obtaining the CAD volumes. The precise reference to CAD may then be stated in the following possible ways:

(CAD Vol. 5, pp. 33-38) (SCC style)

(Pp. 33-38, CAD, Vol. 5)

(Constituent Assembly Debates, Vol. 5, pp. 33-38)

(See pp. 33-38, Constituent Assembly Debates, Vol. V)

(Constituent Ass. Deb., Vol. V at pp. 33-38)

(Vth Vol., at pp. 33-38 of *Constituent Ass. Debs.*)

(Vol. 5 at pp. 33-38 of CAD)

(At pp. 33-38, Vol. V, CAD)

*Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), p. 278 lines 3-31, p. 287 line 15, p. 288 line 4, p. 289 line 11 (from bottom), p. 290 line 9 (from bottom), p. 292 line 24, p. 293 line 18

*Football League v. Littlewoods*, (1959) 1 Ch 637, p. 651 lines 2-10, lines 13-7 (from bottom), p. 652 lines 22-34, p. 654 lines 5-21, p. 655 line 10 (from bottom), p. 656 lines 1-11

*Sawkins v. Hyperion*, (2005) RPC 32 (CA), paras 22-25

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), p. 593(iv)

*Autocaps v. Pro-Kit*, (1999) FCA 1315 (FCA), paras 39-42

**Proposition 3.5.2-A:** *Firstly, the whole and sole object of the preparatory work or research done by the Appellants is to create a user-friendly and value-added SCC version of the raw text. In respect of the SCC inputs that involve the discovery of facts or information, the form and scope of the expression of the fact or information discovered is determined by the result of the research or preparatory work, the depth and seriousness with which the research is conducted and the context which warranted the discovery in the first place. There is thus an inextricable relationship between the preparatory work and the final work. Thus, since the results of the research are what finally determine the form and scope of the expression that is put down in writing and print, the preparatory work involved in discovering the fact is not a task which is independent of the task of devising the expression itself. Therefore, the skill, judgment, labour and capital expended in the preparatory work cannot be seen to be independent and separable from the skill, judgment and labour involved in actually devising and writing the expression.*

**Proposition 3.5.2-B:** *When it is stated in Proposition 3.4.1. that no copyright is claimed in respect of any fact or information discovered, it is submitted that this is not an admission that the skill, labour and effort expended in the preparatory work leading up to the discovery of facts or information is not to*

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*be counted. The skill, labour and capital expended in the preparatory work is something different from the fact or information itself that is discovered, and this skill, labour and capital is certainly to be taken into account in applying the test of originality as per Propositions 3.5.1. and 3.5.2.*

**Proposition 3.5.3:** *Simplicity of expression not a bar to copyright protection.*

*Copinger and Skone James, 15th Edn. (2005), p. 120, para 3-128*

*British Northrop v. Texteam Blackburn, 1973 FSR 241*

**3.6. Reply to the Respondents' contention that recognising copyright in copy-edited versions of law reports would amount to giving the Appellants a monopoly in judgments of courts which is against intendment of Section 52(1)(q)(iv) and would defeat the purpose of putting judgments in the public domain**

**Proposition 3.6.1:** *Copyright law does not grant a monopoly since identical works can each receive copyright protection. Copyright law only grants protection against copying of a work. Each person must create/produce the work independently and therefore under copyright law identical works will each have their own copyright as long as each is independently produced. On the other hand, patent law grants monopoly. In patent law only the first invention in time is protected—the second invention in time is not protected even if it is independently created.*

**Proposition 3.6.2:** *Monopoly can arise in a copyright context only if the recognition of copyright in a work will enable the copyright owner to stop another person from making the same or similar work even if it is made wholly independently and without copying.*

Thus, the Respondents' insistent and repeated claim that recognising copyright in copy-edited versions of law reports would grant existing law reports a monopoly in the publication and reproduction of older judgments would only be true if the Appellants and/or other existing law reports *could somehow prevent the Respondents from independently creating their own version of the judgments from the raw text obtainable from the Registry.*

**Proposition 3.6.3:** *Recognising copyright in copy-edited versions of judgments as published in law reports would not cause the raw text of such judgments to go out of the public domain. Thus it would not go contrary to the intention of putting the raw text of judgments in the public domain as per the enabling provision contained in Section 52(1)(q)(iv), Copyright Act, 1957. Since by definition the copy-edited version of a judgment is not the same as the raw text, recognition of copyright in the copy-edited judgment would only affect the right of reproduction of the copy-edited version. It would have no effect whatsoever on the right of reproduction of the raw text. The Appellants do not, cannot, and have not at any stage of the proceedings ever claimed copyright in the raw text of judgments which is in the public domain, and shall remain in the public domain regardless of whether or not copyright is recognised in copy-edited versions of judgments as published in law reports.*

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The argument of the Respondents, the holding of the impugned judgment [SLP Paper book pp. 34-35] and of *Matthew Bender (I)* court [Resp Comp, p. 212] to the same effect, that recognising copyright in copy-edited judgments of law reports would somehow prevent others from publishing or reproducing the same judgments, that is “[i]f the right of persons like the appellant, who are merely reporting the judgments of the Courts, is stretched to this extent, then after a judgment is reported by a particular Journal, others would be barred from doing the same and the very purpose of making these judgments in public domain, therefore, would be frustrated”, it is submitted are all based on the following three *fallacious* sub-propositions:

*Sub-proposition A:* That there are very limited ways of expressing the facts or discoveries that law reports are likely to insert in the raw text to create their copy-edited versions.

*Sub-proposition B:* That due to these very limited ways of expressing the facts or discoveries, protecting the expression would *effectively* amount to granting copyright in the fact or discovery itself.

*Sub-proposition C:* Hence, this indirect or effective recognition of copyright in the facts or discoveries that law reports are likely to insert, would confer a monopoly on the first law report that discovers the facts, effectively precluding others from creating their own versions of the raw text, thus taking judgments out of the public domain.

Propositions 3.4.5., 3.4.6. and 3.4.7., above establish that there are a very large number, if not infinite options open to law reports for expressing facts and discoveries. These propositions therefore show that *Sub-proposition A* is false. Proposition 3.4.5. states the legal position that even if there is a unique way of expressing a fact or information, copyright can be claimed in that expression, as long as each author expresses that fact or information independently. Therefore Propositions 3.4.6., 3.4.7. and 3.4.5. taken together show that *Sub-proposition B* is false. Since *Sub-proposition C* is based on *Sub-propositions A* and *B*, as these two propositions have been shown to be false, it follows that *Sub-proposition C* is also false. Thus it has been shown that this claim of the Respondents and the holdings of the impugned judgment and *Matthew Bender (I)*, to the effect that granting copyright in copy-edited judgments would effectively bar others from creating their own versions, and thus take the raw text of judgments out of the public domain are patently untenable.

**Proposition 3.6.4:** *Recognising copyright in copy-edited versions of judgments as published in law reports would not lead to the grant of a monopoly direct or indirect to these law reports in the publication of judgments. The law reports that meet the test that might be laid down by this Hon’ble Court would only acquire the exclusive right to prevent others from copying their copy-edited versions of the judgments only. They would acquire no rights whatsoever to prevent anyone else from publishing or reproducing*

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*or creating their own independent version of the raw text of judgments or reproducing the raw text as such. This is demonstrated by the fact that several law reports other than SCC, such as AIR, JT, Scale, SCJ, ITR and others are independently obtaining the raw text of judgments from the Registry and are in no way prevented from publishing **their** versions of the judgments by the publication of the Appellants' **version** in SCC. Recognition of copyright in the Appellants' **version** of judgments as published in SCC would in no way change the other law reports' position vis-à-vis SCC since all these law reports resort to the common source, namely, the Supreme Court Registry and then publish them. It is only those like the Respondents who have slavishly copied the Appellants' law report who would be affected.*

**Proposition 3.6.5:** *Recognising copyright in copy-edited versions of judgments as published in law reports would not amount to granting an indirect monopoly over old judgments to established law reports since the claim of the Respondents that judgments of the Supreme Court are practically difficult to obtain from the Registry is patently untenable. To show that judgments of the Supreme Court are freely available for the entire period 1950 to 2000 from the Supreme Court Registry, and to falsify the claims of the Respondents to the contrary, the Appellants in August 2005 applied for a sample of about SIXTY judgments, randomly selected, right from 1950 till 2000. The certified copies of about SIXTY judgments were supplied by the Registry without any difficulty within a short time-frame, on average of about 7-10 days. The cost at which the judgments are supplied by the Registry is extremely nominal, being RUPEE ONE only per page, regardless of the size of the judgment. Copies of the judgments so obtained are being filed as Convenience Files 6 & 7.*

It is admitted by the respective Respondents that the "Grand Jurix" CD-ROM product was launched in 1993 and "The Laws" CD-ROM product was launched in 1994. If this submission of practical difficulty of the Respondents is bona fide, how is it that they have copied completely from the Appellants' law report SCC even for the period 1993/1994 to the date of filing of the suits in 2000?

In any case, the Supreme Court Registry is under a constitutional obligation to maintain a record of all judgments of the Supreme Court, as the Supreme Court is a court of record under Article 129 of the Constitution. Any person under the Supreme Court Rules, 1966 can apply for and obtain copies of any judgment or order since 1950.

**Proposition 3.6.6:** *What the Respondents really want to appropriate is the goodwill and reputation associated with the Appellants' law report. The excuse of practical difficulty in obtaining the raw text from the Registry is merely a smokescreen and cover-up argument to cover their misdeeds.*

**Proposition 3.6.7:** *The proper method for obtaining judgments from existing law reports would be to license the same.*

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**Proposition 3.6.8:** *An earlier entrant in any market can acquire an advantage from having set up shop first. This advantage will accrue only if the earlier entrant has served his market well, has been innovative both in terms of products and service and has sold quality products at competitive prices. There is nothing unfair or inequitable about such an advantage since firstly, it would have been acquired only on the basis of investment over the years, and secondly the earlier entrants cannot prevent the new entrant from setting up shop and independently creating and selling his products. That is, as long as there is free and vigorous competition.*

**3.7. Maintenance of quality requires protection of the investment made to create the quality version**

**Proposition 3.7.1:** *The better is the quality of the version that is chosen to be created by a particular publisher, the greater is the investment of skill, labour and capital required. The better the quality of the version that is sought to be created, the greater and bigger the library, the more highly trained and skilled and expensive the copy-editors, legal editors, proof-readers, compositors, etc. etc. that are required. The quality is what makes a particular version worth copying, and therefore worth protecting. If the quality has to be retained and maintained, it has to be protected. Otherwise it will no longer be viable to invest in that quality, because the pirated copy will undercut and destroy the publisher creating the high quality version. So quality cannot survive unless protected. Piracy strikes at the very root of the creation of quality versions.*

**Proposition 3.7.2:** *There is a public interest in protecting law reports which go to the original source and protecting the investment of painstaking skill, labour and capital that they have made over the years in quality law reporting.*

Law reports have been called the “Heralds of the Law”. There is a public interest in protecting the investments made by such law reports over the decades in obtaining, selecting and finalising judgments for publication according to their unique house styles, all of which involve some extent of copy-editing. If this Hon’ble Court does not protect the copy-edited *versions* of texts of judgments as published in law reports, then no law report will have any incentive to do that copy-editing, or to do any value addition.

**3.8. Fundamental duty of the Appellants: pursuit of excellence**

**Proposition 3.8.1:** *The Appellants feel obliged by the fundamental duty in Article 51-A(j) of the Constitution of India “to strive towards excellence in all spheres of individual ... activity”. The skill, labour and capital of the Appellants expended in enhancing the quality and accuracy of their version in SCC deserves protection under the laws of the land.*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)****3.9. How the various SCC copy-editing inputs require expenditure of substantial amounts of skill, judgment, labour and capital****Proposition 3.9.1:** *Summary of copy-editing inputs and insertions made in SCC version of text of judgments*

- A. Matter added *per se* to the raw text of the judgments
- B. Matter added upon verification
- C. Other additions/insertions made to the raw text

**A. Matter added *per se* to the raw text of the judgments**

*I. Cross citations: added to the citation already given in the original text.*

*II. Full case reference* — full names and citations of cases added where either only appeal number and/or date of the case, partial name, or quoted matter is given in the original text, without its full name and citation.

*III. SCC style of presenting (repeatedly) cited cases*

*IV. Precise references to quoted matter:* the exact page and paragraph number as in the original source is inserted.

(a) precise references to quoted matter *from judgments*

(b) precise references *to treatises/reference material*

*V. Margin headings added to quoted extracts from statutes/rules, etc.* When missing.

*VI. Number of the section/rule/article/paragraph added to the extract quoted in the original text.*

*VII. ‘dissenting’, ‘concurring’, etc.* — phrases like ‘concurring’, ‘partly concurring’, ‘partly dissenting’, ‘dissenting’, ‘supplementing’, ‘majority expressing no opinion’, etc. are added to the original text.

*VIII. Judges on whose behalf opinion given:* expressions such as “for himself and Pathak, C.J.”, or “Fazal Ali and Ranganath Misra, JJ.”, etc. are added.

*IX. Paragraph numbering*

(a) *new paragraphs:* existing paragraphs in the original text broken up and separate para number given

(b) *internal referencing:* use of para numbering for internal referencing within a judgment

**B. Matter added upon verification**

*I. Emphasis supplied*—on verification

*II. “[T]he”, “[i]n”* — verification of first word of quoted extract

*III. Ellipsis “...”* added to indicated breaks in quoted extract

*IV. Matter inadvertently missed in quoted extracts supplied*

*V. Incomplete/incorrect case names or citations completed/corrected*

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*VI. Other information/corrections*

***C. Other additions/insertions made to the raw text***

*I. Compressing/simplification of information relating to case history*

*II. SCC case name style* — there are certain norms followed at SCC for giving case names.

*III. SCC style of presenting extracts from statutes/rules, etc.*

*IV. SCC style of presenting references to sections/rules in text*

*V. SCC style of presentation of breaks/end of quoted matter*

*VI. Indentation*

*VII. Removal of full stops or removal of word “No.”*

*VIII. Giving full forms of abbreviations to enhance readability and clarity*

*IX. Capitalisation*

*X. Punctuation, articles, spelling, compound words*

*XI. Italicisation*

**Proposition 3.9.2:** *The various about 27 elements of SCC copy-editing that go into creating the SCC version of the text require the application of substantial amounts of “skill”, that is, “the use of one’s knowledge, developed aptitude or practised ability” and of “judgment”, that is, “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options”, to use the definition of “skill” and “judgment” laid down by the Canadian Supreme Court in CCH Canadian case.*

**A. MATTER ADDED PER SE**

**I. Addition of cross-citations:** This task requires skill, that is, “knowledge” of law reports, of modes of citations, of sources to find cross-citations and “developed aptitude” in being able to do research to locate the cross-citations and “practised ability”, since what is imperative is authenticity and precision in this task. Mistakes in the insertion of cross-citations in SCC, even of a small percentage, would render the entire task valueless, and render the law report unreliable in the eyes of its users. Further, this task requires judgment for sometimes there are errors in the raw text and the name of the case given and citation may not match or the wrong citation may have been given. If the editor concerned did not have “knowledge” and “capacity for discernment”, such editor would not even be able to identify the mistakes. Further, to rectify the mistake requires legal aptitude and training, for the editor concerned may have to do legal research to locate the correct case which was intended to be referred to, from an understanding of the context in which the case has been cited. So this task does not merely involve a mechanical addition of cross-citations from a pre-prepared database, but application of “knowledge, developed aptitude and discernment” by editors and law editors as described



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above, to ensure that the correct case has been cited, and that the citations given are correct. All this is assuming that the cross-citations or citations to be given are easily accessible. Sometimes, merely to find the same requires painstaking research and even acquisition of new legal materials.

**II. Insertion of full case reference when partial information is given in text:** This task requires the application of all of the skill and judgment described in Task I, above, and more, since the information available in the raw text as to the case that has been referred to is partial. Either the partial name of the case is given, or just the date of decision, or just the citation is given without other details. Hence all the claims made above as to the application of skill and experience by editors and law editors are true *a fortiori*.

**III. SCC style of presenting (repeatedly) cited cases:** This task also requires skill and experience.

**IV. Precise page and para references to quoted matter:** This task again requires skill and experience as the editor concerned must carefully compare the extracted quotation with the judgment or treatise/reference material from which it is quoted. The exercise of judgment comes in when the quoted extract is not actually from the source indicated in the raw text. In that case, legal research needs to be conducted, and the correct judgment from which the quoted extract is taken is to be identified and the correct precise page and para reference is inserted for the same. The application of “knowledge” and judgment comes in when no indication at all is given as to the source of the quoted extract. In that case the editors concerned must conduct (legal) research to the best of their ability to try and identify wherefrom the quoted extract has been taken.

**V. & VI. Insertion of margin headings and number of quoted statutory extract:** This task again requires skill and experience, and familiarity with statutory materials, so as to extract the relevant margin heading and number keeping in view the facts of the case and amendments in the provisions.

**VII & VIII. Insertion of “partly dissenting”, “partly concurring”, “supplementing”, etc., and information as to Judges on whose behalf opinion given:** This task requires expert legal judgment and knowledge. It may be relatively easier to indicate that an opinion is wholly “dissenting” or “concurring”, since often the learned Judges indicate the same in their opinions. But what requires much exercise of judgment and discretion is when a learned Judge agrees and disagrees in part. Firstly, there is the choice between characterising his opinion as “partly concurring” or “partly dissenting”, which is merely a difference in emphasis, for both can mean the same thing, being a glass half-full or a glass half-empty. Then there is the choice between characterising the opinion as wholly “dissenting” or “partly dissenting” even though on many legal propositions the learned Judge has agreed with the majority, he has disagreed completely on the conclusion on

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facts. This matters enormously since characterising any opinion as wholly “dissenting” usually shears the same of all precedential value.

**IX. Paragraph numbering:** This task requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted, and how a judgment of a court of law must read. Different law reports can have different paragraph numbering for the same case.

It is submitted that even if the paras are already divided in the raw text, it does not render the addition of para numbers a mechanical exercise. Rather, the editor who is inserting the para numbering must still read the text and make sense of it as he goes along identifying separate arguments or issues discussed in the text. It is submitted that not every existing indentation of the raw text will receive a para number once the copy editor has made sense of the judgment. There are many numbered paras in a judgment that contain more than one un-numbered clause. So even without the merger or separation of paras as already divided in the raw text, the editor must apply skill and judgment in assigning the para numbers as per the considerations discussed above.

**B. MATTER ADDED UPON VERIFICATION**

**I. Indication of whether emphasis has been supplied or was present in the original:** Often the raw text contains quoted extracts from judgments, wherein the author of the raw text has emphasised certain words in the quoted extract without an indication as to (i) whether emphasis has in fact been supplied or the words have been emphasised erroneously, and (ii) if emphasised, then whether the emphasis has been supplied in the raw text or was present in the original judgment. Hence the task of indicating whether emphasis has been supplied and whether it was present in the original requires skill and judgment.

**II, III & IV. Square brackets [T], [W]; ellipsis “...”; and missing matter inserted into quoted extracts:** This task requires skill since this is a highly technical task which requires great precision.

**V. Correction or editing of incomplete/incorrect case names:** It requires knowledge and experience in the first place to even discern that a case name is incomplete. It is only then that the editor concerned would be put on notice that there is something to be rectified. Then it requires further knowledge, developed aptitude and practised ability for the editor concerned to do the research to locate the case from its original source, and then to supply its correct or full name.

**C. OTHER ADDITIONS/INSERTIONS MADE TO THE RAW TEXT**

**Tasks in respect of Elements I to XI:** These tasks are all stylistic changes that require the application of skill and judgment. They require judgment, that is “the use the capacity for discernment or ability to form an opinion or evaluation by comparing different possible options” since in the first place a

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House style that must be applied must be determined, wherein there is an wide range of alternatives possible from which choices must be made as to the manner in which things that repeatedly occur in judgments are to be presented, as per a consistent style. All the elements that are enumerated in *Tasks I to XI* above, which have not been reiterated here to save space, are things that occur repeatedly in judgments which, if a law report is conscious of quality, ought to be presented as per a consistent style. The end result of such consistency is to facilitate ease of reading and comprehension and reduce the burden on the reader of wading through pages and pages of case law which is not well-arranged.

Secondly, judgment is involved in evolving a House style, for a particular style chosen may not ultimately achieve the result as was envisaged, and a better style is thought up, which would achieve the result better. Furthermore, a House style may need to evolve to render consistency in respect of new elements that repeatedly start occurring in judgments, or there may be new realisation that certain elements should be rendered consistent. A practised and detailed knowledge of the House style is required to be able to execute it. If it were a mean, mechanical task, as sought to be trivialised, there would be no room for error, and all that would be required is to write a computer program that could execute it mechanically.

**3.10. *CCH Canadian, (2004) 1 SCR 339 is distinguishable on facts***

The Canadian Supreme Court applies the correct legal test to the law reports of the Respondents in *CCH Canadian case*. However, a reading of para 35 reveals that of the only six kinds of inputs made by the Respondents in that case (as against twenty-seven made by the Appellants in this case) it is quite apparent that only *one*, namely, the adding of parallel citations or cross-citations is in common with the *twenty-seven* copy-editing inputs implemented by the Appellants in creating their version of the copy-edited text. The other five inputs claimed by the Respondents in *CCH Canadian* are such that the Appellants have not even sought to describe them before this Hon'ble Court. The finding on facts in *CCH Canadian* by the Canadian Supreme Court was based on only *one* common input, namely, adding cross-citations. Therefore such a finding on facts cannot apply to the facts of the present case where *twenty-seven* inputs are involved. Hence the finding of the Supreme Court of Canada regarding copyright in the text of the judgments of the Respondents before it in *CCH Canadian* is restricted to the facts before it, and is thus clearly distinguishable on facts.

*CCH Canadian v. Law Society of Upper Canada (Sup. Ct.)*, (2004) 1 SCR 339, para 35

**3.11. *Object of copy-editing***

**Proposition 3.11.1.** *The object of copy-editing is the creation of an authentic, accurate and user-friendly law report.*

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**Proposition 3.11.2:** *A private law report survives on its credibility as being an authentic and accurate report and so will copy-edit and make only such inputs which enhance its readability, accessibility and ease of understanding.*

The Appellants realise the value of judgments. A report of a judgment is the record of the judgment for perpetuity. The idea is to create an authentic permanent record, not to make quick money. As is well known many English cases from the 1600s are still good law. Hence the need for creating an authentic and accurate law report of the Hon'ble Supreme Court of India. A further object of copy-editing is to facilitate easier, better and faster understanding of the judgment. Copy-editing is done only to enhance the readability and increase user-friendliness of the text. It is in the interest of the law report, to promote these aspects *in addition* to accuracy and authenticity, while however *scrupulously maintaining* the accuracy of the text.

Copy-editing is done by all reputed law reports, e.g. ILR, AIR, All ER, WLR, etc. so it is the norm. What is in the law report's interest is to promote itself as the authoritative and authentic source of case law. SCC's slogan is "prompt, accurate and complete." *SCC prides itself on its authenticity.*

#### 3.12. Need for copy-editing in India: contrast with US position

(1) The US Supreme Court only hears 100 matters in a year – Judges are not overburdened, so they have sufficient time to go over minutiae of judgments and review drafts.

(2) Supporting editorial stenographical staff available to Judges, are better trained and their native language is English. Further, the US has a long standing practice of Judges being assisted by full-time law clerks and paralegal staff who render invaluable assistance to the Hon'ble Judges.

(3) It can almost be said that in the US copy-editing *happens automatically*, due to the existence of extremely detailed style manuals like *The Bluebook* the following of which is mandatory in the US legal system, right from law school to internships to working as juniors to rising in the profession and being elevated to the Bench. There is a systematised emphasis on ensuring a standardisation of all forms of legal writing, including judgments, right from the law school stage up to the US Supreme Court. This fact has been taken into account in *Matthew Bender (1) v. West Publishing*, 48 USPQ 2d 1560 [*Matthew Bender (1)*] to deny copyright to West Publishing in respect of the various inputs made by West to the law reports published by them, though the main reason that in *Matthew Bender (1)* court denied West Publishing copyright was due to the standard being the creativity standard, as discussed under Proposition 4.13., below.

*The Bluebook*

*Matthew Bender (1) v. West Publishing*, 48 USPQ 2d 1560

#### 3.13. *Matthew Bender (1)* is distinguishable on law and facts

In *Matthew Bender (1)*, the test applied is the US test of creativity, not the skill and labour test. In fact the Federal Appeals Court in *Matthew Bender*

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(1), despite the existence of a Bluebook and its use by West Publishing is constrained to observe the fact that copy-editing/law reporting on the part of West Publishing required considerable amounts of skill and labour by concluding that “*West’s editorial work entails considerable scholarly labour and care, and is of distinct usefulness to legal practitioners*”, but “unfortunately” cannot grant it work copyright protection because of the peculiar requirement of creativity under US law. It was even admitted by the learned counsel for the Respondents before this Hon’ble Court while citing this passage from *Matthew Bender (1)* that “They [that is the Federal Appeals Court] recognise the skill and labour of West.”

In India the Copyright Act, 1957, as discussed in Proposition 4.5. below, specifically protects tables, compilations and databases and therefore anything that passes the test of originality as formulated in Propositions 2.2.1., 2.3.1. and 2.3.2. would be protected. Therefore, the ruling in *Matthew Bender (1)* is distinguishable on law since it applies a legal standard that is not the applicable legal standard in India. Furthermore, *Matthew Bender (1)* is distinguishable on facts since the amount of editorial work as claimed by West Publishing at p. 205, only amounts at most to about two out of the about twenty-seven inputs made by the Appellants in their law report.

*Matthew Bender (1) v. West Publishing*, 48 USPQ 2d 1560

**3.14. Reply to “Concept of court recorders/law reporting in England is different, so case law, literature pertaining to law reporting in England is not relevant in Indian context: ‘SCC is not a law reporter in the classic English style’ ”**

The recent clarificatory letter of the Assistant Clerk of the Records of the House of Lords in Parliament dated 9-5-2007 contradicts the contention of the Respondents that for the period for which case law has been cited by the Appellants, no written judgments were then delivered. Pl. see Annexure 3 for a copy of this letter. In respect of House of Lords’ judgments the said letter says: “we have manuscript judgments created by Parliament [viz. the Judicial Committee of House of Lords] from the 17th century onwards”.

*Letter from Assistant Clerk of Records dt. 9-5-2007, Parliamentary Archives, Houses of Parliament, London*

*Printout from U.K. Courts Service website*

*Printout from the House of Lords Judicial Office website*

*Printout from the Incorporated Council of Law Reporting website*

### **4. WHY SUPREME COURT SHOULD NOT DEPART FROM SETTLED INDIAN AND ENGLISH COPYRIGHT LAW ON MEANING OF “ORIGINALITY”**

#### **4.1. Legal system and ethos prevailing in India**

**Proposition 4.1.1:** *The entire emphasis in the Indian copyright law for more than the last one hundred years, following the English position, has been on the protection of property, based on the moral basis that “thou shalt not*

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*steal*”, which has been affirmed by the Supreme Court of India in *R.G. Anand in 1978*.

This is clear from the rulings of the House of Lords in *Ladbroke, Walter v. Lane* and *Designer Guild* cases, of the Supreme Court of India in *R.G. Anand* and the “go to common source” (Proposition 2.7.1.) and “mixing of additional matter” (Proposition 2.9.1.) cases. This is also the view taken by Parliament as per the Statement of Objects and Reasons of the 1984 and 1994 Amendments to the Copyright Act, 1957. *Walter v. Lane*, 1900 AC 539 (HL) has been reiterated six decades later in *Ladbroke* by the House of Lords, and eight decades later in *R.G. Anand* by the Supreme Court of India, which can be observed as follows:

“My Lords, I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and appropriate to himself the labour, skill and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by this skill, labour and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act.” *Walter v. Lane*, 1900 AC 539 (HL), p. 545 per Lord Halsbury.

“[T]he law of copyright ... does not impinge upon freedom of trade; it protects property. It is no more an interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another’s labour, whether they are tangible or intangible.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at p. 291, per Lord Devlin.

“In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So the protection given by such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), 291 per Lord Pearce.

“[I]t seems to us that the fundamental idea of violation of copyright or imitation is the violation of the Eighth Commandment: ‘Thou shalt not steal’ which forms the moral basis of the protective provisions of the Copyright Act of 1911. It is obvious that when a writer or a dramatist produces a drama it is a result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour.” *R.G. Anand v. Delux*, (1978) 4 SCC 118, p. 127 para 15, per Fazal Ali, J.

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The argument for protecting intellectual property is the same as for protecting all sorts of property. For, only if people feel fully assured that they will be able to enjoy and retain the fruits of their labours, do people have an incentive to work and create. If people do not feel secure about their property rights, there will be very little incentive to produce or generate new property including intangible intellectual property and so India as a whole will be the loser. Furthermore, commercial success for an author or publisher of a literary work is not a reason to deny him copyright protection. Rather, it is *due* to copyright protection from piracy that bona fide authors and publishers of literary works have the incentive to create them in the first place.

SOR to Copyright (Second Amendment) Act 28 of 1994,

SOR to Copyright (Amendment) Act 65 of 1984,

*Law of Copyright and Industrial Designs* by P. Narayanan, 4th Edn. (2007),

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, paras 23-25

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, paras 41-42, 59

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), pp. 596-97

*Copinger and Skone James*, 15th Edn. (2005), pp. 1-2 paras 1-01, 1-02, 26, para 2-04, 27 para 2-05

**4.2. Indian and English copyright law and ethos is fundamentally and completely different from US copyright law**

**Proposition 4.2.1:** *The foundation of Indian copyright law, which is of English origin and provenance has a moral basis, and is based on the Eighth Commandment, “thou shalt not steal” [as held by the Supreme Court of India in R.G. Anand case (1978)]. The fundamental objective of Indian and English copyright law has always been the protection of the fruits of a man’s skill, labour and effort from appropriation by others. Thus in Indian and English law the quality and nature of the end product is irrelevant. It has been the consistent position for over one hundred years that whether the end product is “wise or foolish” [Walter v. Lane (1900)] or “utter rubbish” [Sawkins v. Hyperion (2005)] is of no consequence in determining whether it is “original”. Thus the quality of the work is totally irrelevant. The only relevant criteria for according copyright protection, given the moral emphasis and objective of Indian and English copyright law, are whether (i) first, the work is not copied and originates from the author (this may be called the “origination strand”), and (ii) second, whether more than trivial or negligible skill, labour and capital were expended in the creation of the work (this may be called the “productive-inputs strand”). The most striking feature of Indian and English copyright law is that it simply does not contemplate any evaluation of the quality of the end product in testing whether it is original or not. It only looks at the process of creation and evaluates the quantum of inputs, that is, skill, labour and capital that were expended in creating the work. This dichotomy may be called the “inputs vs.*

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*end-product dichotomy”. This dichotomy is fundamental to Indian and English copyright law.*

**Proposition 4.2.2:** *The foundation of US copyright law on the other hand is their peculiar constitutional provision which contains the mandate “to promote the Progress of Science and useful Arts”. The fundamental objective of US copyright law has thus been to carry out this constitutional mandate, and it has therefore developed along completely different lines and has acquired a different language and ethos altogether from Indian and English law. Given that the objective of US copyright law is constitutionally mandated, the US Supreme Court in **Feist** (1991) held that the existence of a “modicum of creativity” or a “creative spark” in the end product is an essential condition, which is constitutionally mandated, for a work to qualify as “original” under US copyright law. Thus an evaluation of the end product becomes the central feature of the test of originality in US law. Thus the fundamental difference between US copyright law and Indian and English copyright law has nothing to do with the amount of intellectual effort that is required for a work to be considered original as characterised by the Respondents, but relates to the substratum to which the test of originality is applied. The significance of the “inputs vs. end-product dichotomy” discussed above now becomes obvious. In Indian and English copyright law, in determining the originality of a work, the end product is irrelevant and only the process of creation is relevant. In stark contrast, in US copyright law, the process of creation is irrelevant and only the end product is relevant since its objective is “to promote the Progress of Science and useful Arts”. Thus US law clearly distinguishes between aesthetic works and functional and utilitarian works, and requires therefore that there be an aesthetic element in the end product before it can qualify as original. Thus there is a further dichotomy between Indian and English law on the one hand and US law on the other. This is the “aesthetic vs. functional & utilitarian dichotomy”. Both, (i) the “inputs vs. end-product dichotomy” and (ii) the “aesthetic vs. functional & utilitarian dichotomy” are the two fundamental differences between Indian and English law on the one hand and US law on the other.*

This is especially borne out by the insertion of the very functional and utilitarian works (*tables, compilations and computer databases*) into the definition of “literary work” in S. 2(o), Indian Copyright Act, 1957 by the 1994 Amendment by the Indian Parliament which would most likely fail or not meet the US creativity test.

**Proposition 4.2.3:** *The statutory provisions providing for the subsistence of copyright in literary works, and the definition of “literary work”, are in pari materia across the Commonwealth, despite successive Copyright Acts having been enacted over the last hundred years, right from Canada, England, India to Australia, all having been inspired by and being founded in English law. There is this commonality of principle across the Commonwealth wherein functional and utilitarian works enjoy as much protection as aesthetic works.*



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*In fact, the Commonwealth is even unanimous in rejecting the US creativity test.*

*Section 13 of the Indian Copyright Act, 1957 which provides for “Works in which copyright subsists” by providing that “copyright shall subsist in— (a) original literary, dramatic, musical and artistic works” is in pari materia with*

(1) Section 1, English Copyright Act, 1911 which by importation into India was also Section 1, Indian Copyright Act, 1914, which provide that “copyright shall subsist ... in every original literary, dramatic, musical and artistic work...” ; and

(2) Section 2, English Copyright Act, 1956 which provides that “Copyright shall subsist... in every original literary, dramatic or musical work...” ; and

(3) Section 1, English Copyright Act, 1988 which provides that “Copyright is a property right which subsists in... —(a) original literary, dramatic, musical or artistic works...” ; and

(4) Section 5, Canadian Copyright Act, 1985 which provides that “Subject to this Act, copyright shall subsist in Canada ... in every original literary, dramatic, musical and artistic work...” ; and

(5) Section 32(2), Australian Copyright Act, 1968 which provides that “where an original literary, dramatic, musical or artistic work has been published: (a) copyright subsists in the work...”

***The definition of “literary work” in Section 2(o), Indian Copyright Act, 1957, that “literary work” “includes computer programmes, tables and compilations including computer databases” is in pari materia with***

(1) Section 35(1), English Copyright Act, 1911 which by importation into India was part of the Indian Copyright Act, 1914, which provides that “ ‘Literary work’ includes maps, charts, plans, tables, and compilations”

(2) Section 48(1), English Copyright Act, 1956 which provides that “ ‘literary work’ includes any written table or compilation”

(3) Section 3, English Copyright Act, 1988 which provides that “ ‘Literary work’ means any work other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a table or compilation—other than a database,
- (b) a computer program,
- (c) a preparatory design material for a computer program, and
- (d) a database”;

(4) Section 10(1), Australian Copyright Act, 1968 which provides that a “Literary work” includes “(a) a table or compilation, expressed in words, figures or symbols (whether or not in a visible form)...”, and

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which prior to its amendment in 1984 included “a written table or compilation”, the omission of the word “written” extending the definition to compilations stored in electronic form.

*But neither Section 13 nor Section 2(o), Indian Copyright Act, 1957 are in pari materia with the equivalent provisions in the US Copyright Act, 1976.*

**4.3. No need for departure from more than 100 years’ settled position in Indian copyright law unless there be compelling reasons to do so**

**Proposition 4.3.1:** *It is neither warranted nor desirable for the Supreme Court of India to depart from the settled position in Indian copyright law which adopts the English skill, labour and capital test for the meaning of “originality” in Section 13, Copyright Act, 1957.*

**Proposition 4.3.2:** *Importing the US creativity test of “originality” would create utter chaos and confusion in Indian copyright law, and would completely unsettle the settled position. The decisions, both Indian and English, following and applying the skill, labour and capital test, provide adequate instances or illustrations for future courts, which valuable case law would be rendered useless as impliedly overruled. New case law would have to be developed around the test of creativity.*

*Burden lay heavy on the Respondents to show that the Supreme Court of India should depart from settled Indian copyright law, for more than a 100 years [Gangavishnu (Bombay High Court, 1889), Macmillan (Calcutta High Court, 1890) right up to Burlington v. Chibber (Delhi High Court, 1995) and R.G. Anand (Supreme Court of India, 1978)], and import the American creativity test laid down in Feist (1991) into the definition of “originality” under Section 13, Copyright Act, 1957.*

*It is striking that there is absolute unanimity amongst the Indian High Courts and the Supreme Court of India, apart from the impugned Single Judge and Division Bench decisions, as to the applicable law in India. The cases cited by the Appellants show no difference in opinion at all amongst the Indian High Courts as to the applicable test being the English skill, labour and capital test. The Respondents have not been able to cite a single Indian judgment which detracts from this position.*

Thus, the question that squarely falls for determination before this Hon’ble Court is *whether it is proper and necessary to induct the US test of “creativity” in preference to the settled position of Indian law based on English law.* But for the impugned DB decision and the Single Judge before that, the test of creativity laid down in *Feist* has never been followed or considered by the Indian courts. Recently in the Kerala High Court judgment in *Infoseek case*, 2006 (4) KLT 311 in a similar matter involving reproduction of a law report, held *Feist* to be inapplicable.

Hence, it is submitted that insofar as the test of originality is concerned there must be very good reason for the Hon’ble Supreme Court to depart from the settled position of law, as enunciated by all High Courts of India

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unanimously, without exception, and applied by a three-Judge Bench of the Hon'ble Supreme Court itself in *R.G. Anand case*, (1978) 4 SCC 118.

***Adopting the creativity test would amount to going against/be inconsistent with view of three-Judge Bench of Supreme Court of India in R.G. Anand***

*R.G. Anand v. Delux Films*, (1978) 4 SCC 118, p. 127, para 15, pp. 151-52 paras 65-66

***Supreme Court should not unsettle the settled position without compelling reason***

*Nandkumar Krishnarao Navgire v. Jananath Laxman Kushalkar*, (1998) 2 SCC 355, p. 357, para 5

*Ajitsinh Gaekwad v. Dileepsinh Gaekwad*, 1987 (Supp) SCC 439, para 1

*Mahant Dhangir v. Madan Mohan*, 1987 (Supp) SCC 528, p. 534, para 13

*Bishamber Dass Kohli v. Satya Bhalla*, (1993) 1 SCC 566, p. 571, para 11

*Gangeshwar Ltd. v. State of U.P.*, (1995) 6 SCC 85, p. 86, para 3

***4.4. Need for the creativity test in US is because of the peculiar requirements as to copyright law in the US Constitution and the US Copyright Act, 1976 — Indian Constitution and Copyright Act, 1957 have no such requirements — Rejection of US creativity test across the Commonwealth***

The creativity test is peculiar to the US because of the language of Article 1 Section 8 Clause 8 of the US Constitution, which stresses the progress of the “useful Arts and Science”, etc.

Article 1 Section 8 Clause 8: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

The Indian Constitution contains no such specific mandate relating to copyright law. The relevant provision in the Constitution of India is Schedule VII List I Entry 49 which read with Article 246 merely provides that Parliament alone has the legislative competence to legislate in regard to

“49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.”

The corresponding provision in the Australian Constitution is almost identical being Section 51(xviii), which confers powers on the Australian Parliament to make laws with respect to:

“51. (xviii) Copyrights, patents of inventions and designs, and trade marks.”

Repelling the contention that the said provision of the Australian Constitution has the same directory character as Article 1 Section 8 Clause 8 of the US Constitution, the Federal Appeals Court of Australia in *Desktop v. Telstra*, (2002) 119 FCR 491 (FCA) relying on the Australian Apex Court decision in *Grain Pools v. Commonwealth*, (2000) 202 CLR 479 held as follows:

“[T]here were important textual differences between the two constitutional provisions [viz. the US provision and the Australian

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provision]. Their Honours noted, especially, the absence of the “purposive element” to be found in the introductory words of Article I Section 8 Clause 9 (“To promote the progress of Science and the useful Arts”) and said that Section 51(xviii), unlike its [US] counterpart, is not to be “constricted” by this purposive element.”

Hence in India also the entire field as to the copyright law has been left to the wisdom of the Indian Parliament without any directory constitutional mandate whatsoever as in the US. And as shown under Proposition 5.5., the Indian Parliament has clearly chosen to follow the English law, and has explicitly conferred copyright protection on those very works (*tables, compilations and computer databases*) by their insertion into the definition of “literary work” in S. 2(o), Copyright Act, 1957) which are most likely to fail the US creativity test.

**Absence of creativity requirement in tests of originality**

*R.G. Anand v. Delux Films*, (1978) 4 SCC 118, p. 127, para 15, (emphasis on labour and effort) pp. 151-52, paras 65-66

*Data Access v. Powerflex Services*, (1999) 202 CLR 1 (Australian Apex Court), pp. 16, 41-42

**Peculiarity of US law: protection of aesthetic works *only* and not functional and utilitarian works**

Constitution of the United States, Article 1 Section 8 Clause 8

*Feist Publications v. Rural*, 18 USPQ 2d 1275

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), pp. 595-97

*IBCOS Computers v. Barclays Mercantile*, 1994 FSR 275

**Explicit rejection of US law/creativity test by Canada and Australia**

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, paras 15-16, 24-25

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, paras 28, 41-42, 51-52

*Telstra v. Desktop Marketing*, 2001 FCA 612 (FCA), paras 84, 85

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), pp. 496, 595-97

**4.5. Indian Parliament has rejected American creativity test by choosing to give copyright protection to works which would by their very nature fail (or do not meet) the American creativity test**

**Proposition 4.5.1:** *The Indian Parliament has explicitly granted copyright protection to those very works, that is, tables, compilations and computer databases, which are most likely to fail the US creativity test. In fact “computer databases” were added in addition to tables and other compilations in the definition of “literary work” in S. 2(o), Copyright Act, 1957 specifically by amending Act 38 of 1994, which is after the Feist decision in 1991. Thus, it can be said that the Indian Parliament has rejected the American creativity test. In such circumstances to import the US creativity test into the meaning of “originality” in Section 13, Copyright Act, 1957 would be to render the definition of “literary work” in S. 2(o) otiose and redundant.*

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We must take guidance from the language of our statute alone. Most tables and computer databases and programmes would not meet or pass the US creativity test. But they would pass the established skill, labour and capital test of Indian law based on English law. Therefore the test of “originality” in Indian copyright law should remain such that it confers copyright protection to literary works which are purely practical, functional or utilitarian even though they may be devoid of any aesthetic value or merit. *Burlington v. Chibber*, 1995 PTC (15) 278 at pp. 564, 565, per R.C. Lahoti, J. was decided in 1995 and applied the Indian Copyright Act, 1957 as it stood *after* the amendment by Act 38 of 1994 and after *Feist* was decided, and granted copyright protection to a database consisting of addresses of the plaintiff’s clients on the basis that the plaintiff had devoted “time, money, labour and skill” in developing the compilation of addresses “though the sources [were] commonly situated”. It would seem that this is a clear rejection of *Feist* by the learned Judge. This fact has been noticed by the Australian Federal Court of Appeals which made the following remark in *Desktop v. Telstra*, (2002) 119 FCR 491 at p. 534:

“[A]nd the recent Indian case, *Burlington v. Chibber*, in which the Delhi High Court, not following *Feist*, held that a computer database of mail order customers (names, addresses, telephone and fax numbers) was protected as a compilation within the definition of literary work.”

#### Statutory interpretation relevant in this context

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, para 9

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, para 28

*Bishop v. Stevens* (Sup. Ct.), [1990] 2 SCR 467, para 18

English statutory provisions:

Canadian statutory provisions:

Australian statutory provisions:

#### Protection of the functional and the utilitarian in addition to the aesthetic

Statement of Objects and Reasons, Copyright (Second Amendment) Act 28 of 1994,

*Data Access v. Powerflex Services*, (1999) 202 CLR 1 (HCA), 16, 41-42

*IBCOS Computers v. Barclays Mercantile*, 1994 FSR 275

*Burlington v. Chibber*, 1995 PTC (15) 278, 284 para 12, per Lahoti, J.

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), pp. 491-92, 593

#### 4.6. Arbitrariness, vagueness, subjectivity and temporal variance involved in American creativity test

**Proposition 4.6.1:** *Creativity is a standard that varies from person to person depending on their subjective taste and personal views. Due to the subjectivity involved in determining creativity, and the lack of any definition in Feist or any American case subsequent thereto of what the “creativity” standard requires, it is almost impossible for the author of a work to predict*

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*in advance what is creative or not. Only on adjudication by a court would an author know if his work satisfies the “creative spark” test required by American law. The greatest drawback of the creativity test is that it involves a subjective evaluation of the qualitative merits of the resulting work, leaving a party dependant on the subjective personal views of the Judge concerned. On the other it is more definite to tell whether something requires skill or not, whether it requires labour or not, and whether it requires capital or not. Furthermore, the Indian and English skill and labour test involves an objective quantitative evaluation of the quantum of inputs (the skill, labour and capital) expended in producing the resulting work is “not trivial or negligible”, which can be proved by a party by adducing evidence. The skill and labour test does not evaluate the quality or literary merit of the resulting work (the “inputs vs. end-product” dichotomy), hence doing away with the need for a subjective evaluation by a Judge. The law should be clear and certain as a guide to human behaviour. No attempt should be made to unsettle the law unless there is compelling reason. Importing the creativity test into Indian law would lead to a great deal uncertainty in the law, and so the certainty, which has been disturbed by the impugned judgment, must to be restored to the law, by the Supreme Court affirming the English skill and labour test in Indian law, and rejecting the American creativity test.*

#### Arbitrariness/Subjectivity involved in US creativity test

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, para 24

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, paras 56-59

*Telstra v. Desktop Marketing*, 2001 FCA 612 (FCA), paras 75-77

“Urinal survives art attack” – *The Hindu*, 8-1-2006,

#### Confusion and chaos in the US itself

In addition to the uncertainty in the application of *Feist* in later US decisions, as pointed out by the Federal Court of Australia in *Telstra v. Desktop Marketing*, 2001 FCA 612 (FCA), at paras 75-77, confusion itself can be seen amongst the second highest US courts, which have differed in their result in applying the creativity test whilst dealing with the identical subject-matter of star pagination in law reports. The Federal Appeals Court (Eighth Circuit, 1986) in *West Publishing v. Mead (Mead)* and the Federal Court (District of Minnesota, 1996) in *Oasis v. West Publishing (Oasis)* held that such star pagination was entitled to copyright protection. On the other hand in *Matthew Bender (2) v. West Publishing [Matthew Bender (2)]* the Federal Appeals Court (Second Circuit, 1998) held that such star pagination was not entitled to copyright protection on *identical* facts relating to the *identical* publisher in the other two cases. Thus on the one hand are *Mead* (though pre-*Feist*, but found to be consistent with *Feist* in *Oasis*) and *Oasis* (post-*Feist*) both upholding copyright protection as claimed by West Publishing in all three cases, while on the other hand is *Matthew Bender (2)* case denying such copyright protection.

*West Publishing v. Mead*, 799 F. 2d 129 (8th Cir. 1986), pp. 1226-27,

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*Oasis Publishing v. West Publishing*, 924 F. Supp 918 (D.Minn 1996), pp. 920-24

*Mathew Bender (2) v. West Publishing*, 158 F. 3d 693 (2nd Cir. 1998), pp. 695-97, 699

*Key Publications v. Chinatown Today*, 945 F. 2d 509 (2nd Cir. 1991)

**4.7. The test of originality in Indian and English law needs to be reiterated and clarified**

**Proposition 4.7.1:** *There are two interconnecting strands involved in the Indian and English test of “originality”. The first strand is that the work must “originate” from the author, in the sense that it must not be copied from another work. This may be called the “origination strand”. The leading English authority and the locus classicus on the origination strand is University of London Press v. University Tutorial Press, (1916) 2 Ch 601. The second strand involved in the English test is, whether or not the author in the creation of his work based on common source material expended more than negligible or trivial skill, labour and capital in the creation of the work. This may be called the “productive-inputs strand”. The leading English authority on the productive-inputs strand is the decision of the House of Lords in Ladbroke v. William Hill, (1964) 1 WLR 273, wherein all five Law Lords who delivered concurring opinions have stated that expenditure of more than negligible or trivial skill, labour and capital in the creation of the work qualifies the work for copyright protection, in each of their opinions.*

“Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.

\* \* \*

And it is not disputed that, as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at pp. 277-78, per Lord Reid.

“Thus, commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at p. 285, per Lord Hodson.

“The requirement of originality means that the product must originate from the author in the sense that it is the result of a substantial degree of skill, industry or experience employed by him.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at p. 289, per Lord Hodson.

“So in each case it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at p. 292 per Lord Pearce.

“[A]n ‘original’ work under the Copyright Act is one that originates from the author and is not copied from another work. That alone,

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however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise." *CCH Canadian v. Law Society of Upper Canada*, (2004) 1 SCR 339, per McLachlin, C.J, para 25.

Both these interconnecting strands of the English test have been stated as *Propositions 2.2.1., 2.3.1. and 2.3.2.* As the English and Indian case law shown to this Hon'ble Court clearly shows, the said cases always speak of skill *and* labour—in not a single case cited by the Appellants did the English courts or Indian High Courts *not* speak of skill and speak only of protecting the fruits of labour alone. Thus it can be seen from a comparison of the rulings from *Ladbroke* and *CCH Canadian* above, that the test of originality in *Ladbroke* and *CCH Canadian* is almost identical, and Professor Ricketson cited in para 19 of *CCH Canadian* and relied on by the learned counsel for the Respondents to equate English law with the sweat of the brow principle, was obviously mistaken in concluding that England had adopted the sweat of the brow principle. It can be seen from a comparison of the rulings above, that in *CCH Canadian* the Canadian Supreme Court has basically reiterated the law laid down in *Ladbroke* without noticing the legal position in *Ladbroke*.

The following extract from *Macmillan v. K.J. Cooper*, AIR 1924 PC 75 (*Cooper*) (which case primarily dealt with abridgments and selection) cited by the Respondents cannot be read in isolation and needs to be read with the other rulings of law laid down in that case: [AIR p. 81, Column 1, lines 11-4 (from bottom)]

"To secure copyright for [the end] product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material."

The above statement lays down the same test as laid down in *Ladbroke* [Proposition 2.3.1. at p. 5 of Written Submissions (WS)] and merely suggests that the end product must contain some "quality or character", namely, some feature or aspect which may be seen as evidentiary proof of the requisite input of more than a trivial quantum of skill, labour and capital in the creation of the end product [Proposition 4.8.2. at p. 50 of WS]. This is borne out by the following rulings of law in the same judgment:

Firstly, the law has been stated in the following terms in *Cooper*: (AIR p. 86 Column 1, para 1)

"What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in



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precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.”

Secondly, Their Lordships in *Cooper* reiterated and adopted the definition of “original literary work” as laid down by Peterson, J. in *University of London Press v. University Tutorial Press*, namely, that (AIR p. 85, Column 2, paras 2-4):

“Mr Justice Peterson, dealing with the meaning of the words ‘original literary work used in Section 1 sub-section (1),’ of the Act of 1911, at p. 608 says:

“The word “original” does not in this connection mean that the work must be the expression of original or inventive thought .... the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.’

*In Their Lordships’ view this is the correct construction of the words of Section 1 sub-section (1), and they adopt it.”*

(emphasis supplied)

The Appellants in the present case have consistently, categorically and emphatically maintained the distinction between the raw text and the SCC version (the admixture) at every stage of the proceedings, right from their pleadings in the Plaint. When the defendant-respondents in *Cooper* sought to confuse the raw material with the end product it was clarified in *Cooper* that: [AIR p. 81, Column 1, lines 19-12 (from bottom)]

“It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material ... upon which the labour and skill and capital of the first have been expended.”

And further in *Cooper*: (AIR p. 82, Column 2, para 2)

“[The cited decision] brings out clearly the distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and learning; which product, though it may be neither novel nor ingenious, is the claimant’s original work in that it is originated by him, emanates from him, and is not copied.”

The ruling of the Calcutta High Court in *Macmillan v. Suresh Chandra Deb*, 1890 ILR 17 Cal 952 which lays down that each must go to the common source [Proposition 2.7.1. at p. 8 of WS] has been affirmed by Their Lordships in *Cooper* in the following words: (AIR p. 84, Column 2, para 2):

“It is clear, therefore, that (*Macmillan v. S.C. Deb*) was approved of and acted upon by the Court of Appeal in this case and treated, as in Their Lordships’ view it deserved to be, as a sound decision.”

Lastly, paraphrasing *Walter v. Lane* it has been stated in *Cooper*: [AIR p. 85, Column 1, lines 12-4 (from bottom)]

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“[In *Walter v. Lane*, Lord Halsbury] seems to express the view that if the skill, labour and accuracy of which he speaks be exercised to reproduce in writing spoken words in a book form, it is, as far as copyright in the written words is concerned, immaterial whether they be wise or foolish, accurate or inaccurate, of literary merit or of no merit at all.”

It is further noteworthy that in *Ladbroke* the House of Lords upheld the law stated in *Cooper* by stating:

“So in each case it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.” *Ladbroke v. Hill*, (1964) 1 WLR 273 (HL), at p. 292 per Lord Pearce.

**Proposition 4.7.2:** *Walter v. Lane and Ladbroke are good law despite the contention of the Respondents to the contrary. Walter v. Lane and Ladbroke have been followed/relied on even by the Indian Supreme Court and Canadian & Australian courts, and recently in the latest cases by the English courts themselves without any doubt as to their being good law.*

In *Sawkins v. Hyperion*, 2005 RPC 32, in paras 33 to 36 wherein the unanimous *Court of Appeal in England* has not only held that *Walter v. Lane* is still good law, but has applied the same to the facts, making it the ratio decidendi of that case.

*R.G. Anand v. Delux Films*, (1978) 4 SCC 118, p. 131 para 20

*Sawkins v. Hyperion*, 2005 RPC 32 (CA), paras 9, 10, 13, 15, 16, 22 to 24, 33 to 36, 48, 49

*Telstra v. Desktop Marketing*, 2001 FCA 612, para 85

*Express Newspapers v. News*, 1990 FSR 359, pp. 355-56

*Nouveau Fabrics Lt v. Voyage Decoration Ltd*, 2004 EWHC 895, paras 13-14,

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, para 33

*Desktop Marketing v. Telstra*, (2002) 119 FCR 491 (FCA), p. 492 at (4),

**4.8. Why the Supreme Court of India must adopt the tests of originality laid down in Propositions 2.2.1., 2.3.1. and 2.3.2.**

**Proposition 4.8.1:** *The skill and labour test as stated Propositions 2.2.1., 2.3.1. and 2.3.2., above embodies existing, available and consistently applied tests, which are in consonance with the Indian statutory framework, as sought to be established in Proposition 4.5., above. The said skill and labour test provides objective criteria susceptible to evidentiary proof. It is the vagueness and subjectivity involved in determining whether a work is “original” or not which ought to be minimised. This is where the skill and labour test is most appropriate—it does not look at the quality of the work at all, yet provides a safeguard against the author being overcompensated for his work and has been called the “workable, yet fair standard” in CCH Canadian case by the Supreme Court of Canada. The test laid down in Propositions 2.3.1. and 2.3.2. minimises the subjective element in the following three ways: (a) by restriction of the enquiry by the trial Judge to*

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*the quantum of inputs expended in producing the work; (b) by explicitly ruling out a qualitative assessment of the resulting work by the trial Judge; and (c) by proposing that the skill, labour and capital expended should “not be negligible or trivial”*

The Canadian Supreme Court has precisely and consistently enunciated the skill and labour test in three places in *CCH Canadian* in the following words, “[t]he exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise” (paras 16 and 25); and “a work ... must be the product of the exercise of skill and judgment that is more than trivial”. It is submitted that “originality” ought to be interpreted in a manner which completely minimises the subjective element in the same manner as the Canadian Supreme Court has done so as to provide a “workable, yet fair standard”. Furthermore, it may be noted here that in English law the word “skill” is used more broadly and compendiously in most cases than has been used by the Canadian Supreme Court, which has differentiated “skill” from “judgment” while defining both terms quite precisely and narrowly in para 16. Sometimes the English cases refer to labour, skill *or* judgment being required. However, in most English cases “judgment” is treated as being an aspect of the “skill” required for creation of a work.

*R.G. Anand v. Delux Films*, (1978) 4 SCC 118, p. 127, para 15

(emphasis on labour and effort) pp. 151-52 paras 65-66

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, paras 16, 25, 28

The *quantum of inputs* that have been expended to create a work is susceptible to objective evidentiary proof. It is objectively possible to prove whether not-negligible or not-trivial amounts of skill are required to produce a work. For example, to show that more than trivial skill has been expended, the author of the work may lead proof as to his qualifications, or as to the experience or expertise that he has acquired in a field over the years. Further, again evidence can be adduced to show that not-trivial or not-negligible amounts of labour and capital were involved in producing the work. The court may also look at the resulting work itself, *as a piece of evidence*, to see whether it is a work that must have required not-trivial and not-negligible amounts of skill, labour and capital in its production.

*CCH Canadian v. Law Society of Upper Canada* (Sup. Ct.), (2004) 1 SCR 339, para 24

**Proposition 4.8.2:** *While for conferring copyright protection based on the skill, labour and capital test the quality of the work produced is irrelevant, the examination of the work can serve as providing evidentiary proof of the quantum of skill, labour and capital used. Thus the work in the subjective opinion of a court may be of very inferior or of no quality, but the court may still conclude that it took a great deal of skill, labour and capital to produce the work, and hence it is worthy of copyright protection (e.g. tambola tickets, railway timetables, almanacs, etc.).*

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)****4.9. The Policy choice: Indian law must confer copyright protection based on its unique standard keeping in view its own legal framework and social and economic factors****Proposition 4.9.1:** *Indian law must confer copyright protection based on an interpretation of the requirement of “originality” in Section 13, Copyright Act, 1957 which best suits the socio-economic conditions and legal system and ethos prevailing in India.***Proposition 4.9.2:** *The social and economic factors that are peculiar to India are:*

*Culture of piracy is rampant in India*—this is recognised by the Statements of Objects and Reasons of the Amendment Acts of 1984 and 1994, and by the Indian author on copyright law, P. Narayanan. One does not have the spectre of pirated books, videos, DVDs being sold openly on kerbs and pavements or railway platforms in the United States.

*Intellectual property is India’s inexhaustible goldmine*—so encouragement of the creation of intellectual property of all sorts for India’s prosperity and poverty eradication. The value of computer software in incorporating computer programmes, factual compilations and databases is inestimable. Human resources are the resources bequeathed to India in abundance. Protecting one man’s intellectual property does not deter another from creating his own intellectual property, rather it encourages more and more people to create their own intellectual property. Importation of the creativity test into Indian law will jeopardise the works of a large number of Indian companies. As observed by the Madras High Court in *Govindan case*, AIR 1955 Mad 391:

*“In modern complex society, provisions have to be made for protecting everyman’s copyright, whether big or small, whether involving a high degree of originality, as in a new poem or picture, or only originality at the vanishing point”.*

**4.10. The skill and labour test infringes far less on personal autonomy**

The creativity test also infringes on personal autonomy – the author is at the mercy of the court that his work contains the “creative spark” or a “modicum of creativity” or not, based on a subjective evaluation of the qualitative value of the work, based on the Judge’s personal taste and opinion. A person may spend his whole life exercising huge amounts of skill, labour and capital, believing all the while that what he is doing is creative and worthwhile. And then along comes a copyist and the court says that yes you applied substantial skill, labour and capital, but unfortunately, in my considered opinion, your work lacks that creative spark, that modicum of creativity—so the copyist is free to copy your life’s work. It is submitted that such a result cannot be right or just.

*CCH Canadian v. Law Society of Upper Canada* (Fed. Ct.), 2002 FCA 187, paras 56-59

**Summary of Arguments****I. Mr Raju Ramachandran, Senior Advocate, on behalf of the appellants (contd.)****4.11. Supreme Court of India in case of ambiguity in law or conflict prefers the English position to the American position****Proposition 4.11.1:** *If there is a conflict in the legal positions taken in England and America, the Supreme Court of India usually prefers to adopt the English position rather than the American.***Proposition 4.11.2:** *If there is an ambiguity in Indian law, then the Supreme Court of India prefers to be guided by the English position.**Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831, p. 861, paras 102-05*Common Cause v. Union of India*, (1999) 6 SCC 667, p. 695, para 24*S.R. Chaudhuri v. State of Punjab*, (2001) 7 SCC 126, p. 139, para 22*Sterling General Insurance v. Planters Airways*, (1975) 1 SCC 603, p. 607, para 9*Joseph Kuruvilla Vellukunnel v. RBI*, (1962) Supp (3) SCR 632, p. 698*Registrar of Trademarks v. Ashok Chandra Rakhit*, (1955) 2 SCR 252, pp. 259-60*Godhra Borough Municipality v. Godhra Electricity*, (1968) 3 SCR 481, p. 486*Sachinanda Benerji, Asst. Collector of Customs v. Sitaram Agarwala*, (1966) 2 SCR 1, p. 17**II. Mr P.N. Lekhi, Senior Advocate, on behalf of the respondents  
in Civil Appeal No. 6472 of 2004**

1. Copyright is a fact to be proved after evidence is led. It is not a pure question of law which could be resolved, either way, only by legal arguments.

2. The expression “copyright” is not defined in the Copyright Act, 1957, hereinafter referred to as “the Act”. Section 14 of the Act only provides, copyright meant the exclusive right to do or to authorise to do the acts in respect of any work or any substantial part of a work as set out in Clauses (a) to (e) of aforesaid Section 14.

So what is of importance is to first understand the meaning of the expression “work” in the Act.

3. The expression “work” is defined in Section 2(y) of the Act. Section 2 of the Act refers to two kinds of works, “government work” [Section 2(k)] and “Indian work” [Section 2(l)].

4. The judgments of courts are not “Indian works” as defined by the Act—as judgments are not the type of works referred to in Section 2(l) of the Act. Government work is not protected by the Act.

5. What is meant by judgment? Reference is made to sub-section (9) of Section 2, Code of Civil Procedure or sub-section (1) of Section 353, Code of Criminal Procedure. There cannot be any improvement made to any judgment pronounced by a court.

6. Judgment is only a type of “government work” as defined in Section 2(k)(iii), qualified by what is specifically provided for in Section 17(d), read with Section 52(1)(q)(iv) of the Act.

7. The judgments of Supreme Court are published under the direction and control of the Court. Any person can report the judgment of the Court.

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Probably the first ever matter relating to copyright and judgments of courts was the decision of US Supreme Court referred to as 8 L Ed 1055 *Wheaton v. Peters*.

**8.** The impact of the Court's opinion in *Wheaton* was sudden and extensive. Where case reports had once been scarce because of the inflated prices charged by the owners of copyrights in the volumes of law reports, publishers in the US raced to put out their own, presumably lower-priced editions. The law was thus more readily available to the citizenry than ever before. *Wheaton* laid the foundation for the Court's "bedrock policy ... that the public should have maximum access to the law.

**9.** There is the unreported judgment (42 USPQ 2d 1930 *Matthew Bender & Company v. West Publishing Company and others*) of the trial court in the United States of America regarding similar grievance as made by Eastern Book in the present case that West:

- (i) checked statute citations and changed them,
- (ii) contacted the Judge/Court for possible corrections when error found,
- (iii) gave alternate or parallel citations also which the court had not included,
- (iv) West, not the Judge made changes,
- (v) according to the style set up by West, so it was the author,
- (vi) made changes in the title of the judgment,
- (vii) added names of attorneys,
- (viii) added the Judge line,
- (ix) added parallel cites to a statute to the US Code, and
- (x) inserted parenthetical information such as "cert denied" and footnotes.

Evidence was led on all these points. The Court held changes that West made to uncopyrightable judicial decisions lacked requisite originality to qualify for copyright protection.

**10.** Martin, J. determined: (read from opening page, highlighted in the annexed unreported judgment).

This matter went right up to the US Supreme Court and the findings of the trial court were upheld. "Cert" was denied by the Apex Court.

**11.** Originality requires independent creation plus a modicum of creativity. The changes wrought by West did not substantially vary the judicial opinion as issued by Court. The changes were related to pre-existing work. They were minuscule variations.

The same conclusion is reached when the matter is considered keeping in view the definition of judgment under our laws, already referred to earlier above.

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**II. Mr P.N. Lekhi, Senior Advocate, on behalf of the respondents in Civil Appeal No. 6472 of 2004 (contd.)**

**12.** The expression “infringing copy” is defined in Section 2(m) of the Copyright Act. The action complained of by the Petitioner does not bring the act within the mischief of Section 2(m).

**13.** Section 16 of the Act is clear—there is no copyright except as provided for in the Copyright Act.

**14.** Counsel for the petitioner has first to establish, if the judgment of this Court is a work which is entitled to copyright under and in accordance with the provisions of the Copyright Act, 1957? That is a mixed question of fact and law. Evidence has still to be lead.

Secondly, it has to establish, if Petitioner is the “first owner” of the reported judgment as defined in Section 17 of the Act. This is a pure question of fact. The Petitioner appears to be unwilling to lead evidence. It has twice been burdened with costs. It has not paid costs. It has straight rushed to this Court.

Thirdly, the Petitioner has to prove that the so-called copy-editing was not a mere derivative work (i.e. a work which is based upon one or more pre-existing works, such as a known citation, translation, musical arrangement, dramatisation fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted) but involved sufficient originality of authorship, and that the work resulted from independent creation so as to amount to original work of authorship, and that original work required copyright protection.

**15.** The grievance of the Petitioner is the so-called copy-editing done by SCC in its reports are bodily lifted by others whereby it is losing business.

**16.** The central point is if copy-edited enjoys copyright.

**17.** The word “copy-edit” is not found in any English Dictionary. Copy means reproduce. Edit means to put forth or to remove unwanted material. If both words are joined together the invented word “copy-edit” would mean nothing more and nothing less that it is an exercise to put forth a composition by removing unwanted material.

**18.** The process of copy-editing as done by SCC is given at page B. It is, according to the Petitioner, the “insertions” made in the original text, which is the judgment written by this Hon’ble Court, and is a “government work” as defined by Section 2(k)(iii), Copyright Act, 1957, metamorphosed or convert the “government work” into an original work authored by editors of Eastern Book Company.

**19.** There is no reported judgment either of this Court or of the House of Lords/Court of Appeal of United Kingdom or of the Superior Courts of United States of America which has ruled copy-editing changes or converts a judgment of a Court into an original work of a private party.

**20.** The Act provides for conferring copyright protection to adaptation as defined in Section 2(a).

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**II. Mr P.N. Lekhi, Senior Advocate, on behalf of the respondents in Civil Appeal No. 6472 of 2004 (contd.)**

**21.** The copy-editing as done by editors of Supreme Court Cases are not such which would come within mischief of Section 2(a)(iv) read with Section 14(a)(vi) of the Act because neither any rearrangement nor alteration of the government work is involved.

**22.** Patents and copyrights are terms which have long since become technical as referring, the one to inventions, the other to the writings of authors.

**23.** An author is one who by his own intellect, applied to the materials of his composition, produces an arrangement or compilation which is new in itself. The matter to be protected must be original.

**24.** If there is one way of expressing an idea, then that is not the subject of copyright. Filling the blanks or gaps by providing names of the parties or citations of the judgment [refer to Sections 2(k) read with Section 52(1)(g)] both of which are well known and unchangeable parts of that idea are not original work. These are not creative at all to warrant copyright protection, either singly or in combination. It is well known, the names and citations are inseparable from the judgment. They are not authored or invented by the editors of Supreme Court Cases. Those are not copyrightable either individually or collectively.

**25.** The additions made in the reported judgment by editors of the Supreme Court Cases are only the well-known extensions of the reported decision. These extensions lack even the minimal degree of author's creativity or originality or intellectual labour. These additions do not create additional knowledge, the protection of which is the very basis of copyright protection.

**26.** Suppose the Court in its judgment writes that was the law as decided in *Purushottam Jog Naik case*. The citation is not mentioned. The editors provide that citation and the name of the learned Judge who delivered the judgment. And thus supplies “-\*AIR 1952 SC 317 para 17 *State of Bombay v. Purushottam Jog Naik* [per Bose, J.—Bench of 5 Judges]”, what is the original creation of the editors in the additional information? Neither the citation nor are the names creation of the editors. These were public property and therefore not copyrightable. This is like census date which is uncopyrightable. See *Feist Publication case*, 113 L Ed 2d 358.

**27.** If the idea embodied in the Petitioner's work is sufficiently *general the mere taking of the idea would not involve* infringement of copyright.

**28.** Section 16 of the Act provides there is no copyright except as provided in the Copyright Act.

**29.** The expression “author” in accordance with the Act means any person who created literary [Section 2(o)], dramatic [Section 2(h)], musical [Section 2(p)], artistic [Section 2(c)], photographic [Section 2(s)] or cinematographic film [Section 2(f)] or sound recording [Section 2(xx)] work [Section 2(y)]. The Petitioner is not any such author of any of the works as is protected by the Act.



**Summary of Arguments****II. Mr P.N. Lekhi, Senior Advocate, on behalf of the respondents in Civil Appeal No. 6472 of 2004 (contd.)**

Refer to Section 13 of the Act which provides for the works in which copyright subsists.

**30.** The word “original” qualifies what follow i.e. literary, dramatic, musical and artistic.

***Who may sue for infringement of copyright?***

**31.** Refer to Chapter XII of the Copyright Act, 1957.

(i) The owner of copyright. Eastern Book Company is not the owner of the judgments. (See Section 17(d), Copyright Act, 1957.)

(ii) The assignee of the owner in conformity of the Act. (Sections 18 and 19, Copyright Act, 1957)

(iii) An exclusive licensee, in case the owner has granted the exclusive licence. (Sections 18 and 19, read with Section 61, Copyright Act, 1957)

(iv) A legatee, in case of testamentary transmission (Section 20 Copyright Act, 1957)

(v) In case of anonymous work, the publisher of the work, unless the identity of the author is disclosed as provided by Section 54(b) of the Copyright Act, 1957. (See Section 23, Copyright Act, 1957.)

Eastern Book does not come within mischief of any of these provisions. It is avoiding leading evidence.

**32.** The consensus of judicial opinion is clear to the effect that in order to succeed in infringement of copyright the party has to show that it is the originator in the sense that the concept emanated from him, and further that the given design or get up or style has become distinctive of its goods to the extent that the trading public associates its goods exclusively with the given design or get up.

**33.** This is a question of fact. Evidence has to be led in Court. The Petitioner is avoiding leading evidence.

***III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004***

**1.** The questions that arise for consideration in the present civil appeals are as follows:

*I.* What is the test of originality under the Copyright Act, 1957 for a derivative work?

*II.* What is the effect and intent behind making judgments as works in the public domain?

*III.* Whether the alleged copy-edited inputs by the Appellants to the text of the judgment of the Hon’ble Supreme Court result in an original work so as to afford copyright protection?

**Summary of Arguments**

**III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

***I. What is the test of originality under the Copyright Act, 1957 for a derivative work?***

2. History of copyright statutes in India is as under:

Copyright statutes in India can be traced to the Copyright Act, 1911 of the United Kingdom which was made applicable to India. (P. 292 of Respondent's Compilation) (hereinafter referred to as RC). The said Act under Section 1 provides that copyright subsists in every *original literary*, dramatic, musical and artistic work. This Act was followed by the Indian Copyright Act of 1914. The said Act of 1914 incorporated the 1911 Act with few modifications. Section 1, however, of the 1911 Act continued to apply.

3. The Copyright Act, 1957 was first introduced in the form of Bill in 1956. A Joint Parliamentary Committee was constituted. The said Bill contained Clause 13(1)(a) which reads as follows:

“13. (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of work, that is to say,—

- (a) *original literary*, dramatic, musical and artistic works;
- (b) cinematograph films; and
- (c) records...”

4. It is noticeable that the word “original” qualifies only literary, dramatic, musical and artistic work and not cinematographic films and records. This is because films and records embody within them various original, literary, dramatic, musical and artistic works.

5. In the present case, the only category of works where the Appellant can seek to classify its work is “original literary work”.

**6. *Literary Works v. Derivative Works***

Any work created for the first time is a primary original literary work. However, copyright recognises a second class of literary works, namely, derivative works or compilations. These works are derived from pre-existing works, works in public domain or from facts itself. The most well-known categories of these works are telephone directories, betting coupons, various sport charts and tables, etc. Even a Panchang which is based on facts including various astrological timings, etc. qualifies for protection under this category of works.

7. In the present case the journals of the Appellant contain judgments of the Hon'ble Supreme Court of India. The journals are printed and published on the basis of pre-existing judgments. Journals are therefore derivative works.

8. The term “journals” has been used in contrast with the term “reports” in order to bring out the distinction between law reports as understood in England and law journals as printed in India. In the present case, the Appellant's journal is not a law report in the strict sense inasmuch as the

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

Appellant's journal reproduces the judgment of the court verbatim along with inputs. However, a law report known in the traditional English sense is when a law reporter is present in the court who would record in his own words and language the arguments of counsel give a summary of facts incorporate into the said report his transcript of the speech of the Judge. Thus, for the purposes of the present submissions, the Appellants' work is referred to as a law journal.

***Test of originality***

**9.** For the purposes of the present case, the test of originality is discussed with reference to the various jurisdictions of the world inasmuch as the test especially in relation to derivative works has been expressed differently in different jurisdictions though the underlying intent and the result of the application of all the various tests finally appears to be the same.

**10.** *UK* — (P. 358 RC) — Derivative works and compilations are not defined under any of the Copyright Acts in England. It has been held that a person who exercises skill, judgment and labour upon an already existing work may acquire a copyright; Examples—quoted by Professor William R. Cornish (who was the Professor of IPR laws in the University of Cambridge) include an encyclopædia, an anthology or a law report headnote. He however further writes as follows:

“... *The activity must involve some intellectual effort in the fields protected by copyright, but account will also be taken of collateral aspects, such as the commercial skill involved in making a selection.*” (At p. 360 RC) (emphasis added)

**11.** The UK Act of 1911 also protects only original literary work. The said word “original” was conspicuous by its absence in the Copyright Act of 1842 in UK.

**12.** *Copinger & Skone James*, (a leading Copyright law commentary in the UK) on the law of copyright in derivative works clearly states as follows:

“4-14. *Derivative works.*—In many cases a work is derived from an existing work. Common examples are a translation of a work, the dramatisation of a novel, a photograph of a painting and an arrangement of a musical work, but a derivative version can take many forms, even a simple revision of the earlier work. *Whether in such cases a new copyright work is created will depend on whether sufficient skill and labour was expended upon it but, assuming that it was, the person who was responsible for that skill and labour will be the author of the new work.* So where A's work is independently translated by B, B is the author of the translation. A of course remains the author of his original work but he is not the co-author or joint author with B of the translation. The same is true where B simply revises A's work, for example, by correcting and improving it. *The final position will depend on the amount*

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

*and value of the corrections and improvements. If the independent skill and labour expended by B is such as to create a new copyright work, then he will be the author of it. If not, there will be no new copyright work and A will remain the author of the original work. B will have been the author of the alterations but their nature will not have been such as to attract any protection under the law of copyright. If B's contribution was substantial in the above sense and it was the result of collaboration with A and the contributions of each were not distinct, then they will have been joint authors."* (emphasis supplied)

**13.** Thus, in UK the position is therefore clear i.e.

- Skill, judgment and labour is essential;
- Intellectual effort is essential;
- Commercial skill can be taken into consideration;
- Overriding factor is whether a new work is created.

**14.** *US* — The law in the US differed from State to State and from case to case in derivative works. However, the position in the US prior to the decision of *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 18 USPQ 2d 1275 (at p. 41 RC) is not material inasmuch as in this judgment, the Supreme Court of the US, has settled the test of originality in derivative works. This is good law in the US till today. The test laid down is as follows: (*sic*)

**15.** Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copies from other works), and that it possess at least some minimal degree of creativity. (At p. 44 RC)

"The originality requirement is constitutionally mandated for all works ...

\* \* \*

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts *id.*, \$2.11 [A], p. 2-157. This is because facts do not owe their origin to an act of authorship. *The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.* To borrow from Burrow — Giles, one who discovers a fact is not its 'maker' or 'originator'. 111 US, at p. 58. 'The discoverer merely finds and records.'" (emphasis supplied)

**16.** This judgment in *Feist* was followed by *Matthew Bender v. West Publishing* (2nd Cir. 1991) (District Court judgment and Court of Appeal judgment of the year 1998). This judgment specifically deals with law journals and the extent of protection to be afforded to them. The relevant extracts of the judgment are reproduced hereinbelow:

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

“It is true that neither novelty nor invention is requisite for copyright protection, but minimal creativity is required.

(4) We need not categorise West’s case reports as either derivative works or compilations in order to decide this case. Copyright protection is unavailable for both derivative works and compilations alike unless, when analysed as a whole, they display sufficient originality so as to amount to an ‘original work of authorship’... As West and HyperLaw seemingly agree, the question presented is whether West’s alterations to the case reports, when considered collectively, demonstrate sufficient originality and creativity to be copyrightable.”

“(5) ... The ‘originality’ standard requires that the work results from ‘independent creation’ and that the author demonstrate that such creation entails a ‘modicum of creativity’.”

“*FN4, West initially claimed some creativity in its corrections to the text of opinions, but it has abandoned this claim, presumably because these corrections either are trivial (i.e. punctuation or spelling), or else (nearly always) approved by the courts by order or informal means.*”

“Thus when it comes to the selection or arrangement of information, creativity inheres in making non-obvious choices from among more than a few options.... However, selection from among two or three options, or of options that have been selected countless times before and have become typical, is insufficient. *Protection of such choices would enable a copyright holder to monopolise widely-used expression and upset the balance of copyright law.*” (emphasis supplied)

One way of saying that West’s “choices” are obvious and typical is that a competitor would have difficulty creating a useful case report without using many of the same citations. Affording these decisions copyright protection could give West an effective monopoly over the commercial publication of case reports (at least those containing supplemental citations).

“West’s editorial work entails considerable scholarly labour and care, and is of distinct usefulness to legal practitioners. Unfortunately for West, however, creativity in the task of creating a useful case report can only proceed in a narrow groove. Doubtless, that is because for West or any other editor of judicial opinions for legal research, faithfulness to the *public domain original is the dominant editorial value, so that the creative is the enemy of the true.*” (emphasis added)

From this it is obvious that applying the test of *Feist*, the judgment of *Mathew Bender* brings text of judgments outside the purview of copyright protection. The reasoning of *Mathew Bender* supports the Respondents in the present case and is of enormous persuasive value inasmuch as most of the findings of the Court of Appeal in the said judgment hold good even in relation to SCC.

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

**17. Australia** — Under Australian law the test of originality is not discussed in relation to judgments at all. Test of originality is only discussed in relation to some derivative works. However, the judgment of the Federal Court of Australia in *Desktop Marketing v. Telstra*, (2002) 119 FCR 491 throws some light in this regard. The Australian Federal Court in relation to a telephone directory containing white pages and yellow pages, etc. laid down the test for originality:

“The test of originality is whether the work was not copied, but originated from the putative author.” (At p. 763, Compilation of Cases, Vol. 5 filed by Appellants.)

“This test is not an ‘all or nothing’ one but raises a question of fact and degree as to the extent of the putative author’s contribution to the making of the particular literary work in question, in the present case a compilation.” (At p. 763, Compilation of Cases, Vol. 5 filed by Appellants.)

From the test laid down in the above judgment it is clear that Australia follows a much less stringent principle than UK. However, one major similarity is the fact that in Australia, judgments are copyrightable and the copyright vests in the Government as in the UK. The Australian Federal Court quotes with approval the test of House of Lords laid down in *University of London Press v. University Tutorial Press* [(1916) 2 Ch 601] in which it was held that the precise amount of knowledge, labour, judgment or literary skill or test cannot be defined. It further went on to state that it largely depends on the facts of each case and in each case it must be a matter of degree.

**18. In Australia**, they upheld the principle of industrious collection and sweat of the brow as the test for originality.

**19. Canada** — Under Canadian law there is no specific provision under the Copyright Act which grants copyright on derivative works although some works like compilations are referred to in the Act. However the principle applicable in Canada is that a work will be protected if it is an original literary work. If the author has put one’s own skill or ingenuity on existing material an original work is created. With respect to law journals and reports the recent judgment of the Canadian Supreme Court holds the field in Canada.

**20. CCH Canadian v. Law Society of Canada** (2004 Carswell Natt 446)

The Canadian Supreme Court noted that there are competing views on the meaning of “original”. It also notices the test laid down in *University London Press case* in UK, namely, the sweat of the brow i.e. industrious standard of originality as well as the test in *Feist v. Rural*, and the Court held as under:

“16. I conclude that the correct position falls between these extremes. For a work to be ‘original’ within the meaning of the Copyright Act, it

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce 'another' work would be too trivial to merit copyright protection as an 'original' work."

"Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach in deciding what is original, common law countries such as England have 'depart[ed] from the spirit, if not the letter, of the [Berne] Convention' since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection ...."

"23. As mentioned, in *Galerie d art du Petit Champlain inc. c. Theberge*, supra, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply shows industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation.

See J. Litman, 'The Public Domain' (1990), 39 *Emory I.J.* 965, at p. 969, and C.J. Craig, 'Locke, Labour and Limiting the Author's Right; A Warning against a Lockean Approach to Copyright Law' (2002), 28 *Queen's L.J.* 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

"25. For these reasons, I conclude that an 'original' work under the Copyright Act is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

be characterised as a purely mechanical exercise. While creative works will by definition be ‘original’ and covered by copyright, creativity is not required to make a work ‘original.’”

**21. Conclusion on Issue I**

The test of originality in India for derivative works ought to follow the test laid down as far back as in 1924 by the Privy Council in *Macmillan v. K.J. Cooper*, AIR 1924 PC 75. The Privy Council in the said judgment quoted with approval an earlier judgment from the UK. The said test reads as under:

“I think it is clear that it will not create copyright in a new edition of work of which the copyright has expired merely to make a few amendments of the text or to add a few unimportant notes. *To create a copyright by alterations of the text these must be extensive and substantial practically making a new book.* With regard to notes, in like manner they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book true and real value over and above that belonging to the text.”

**22.** The only jurisdictions in the world which have given pronouncements on law journals as we understand in the modern world are USA and Canada. The authorities in the UK on law reports which are relied upon by the Appellant are distinguishable on three grounds:

(i) That all the said authorities are under the old 1842 Copyright Act in the UK wherein the word ‘original’ was conspicuously missing in the statute.

(ii) None of those orders give any detailed reasoning on the basis of which law reports were given protection.

(iii) The law reports as conceived in those authorities are reports wherein there is transcription of arguments and the judgment by court reporters and are not verbatim judgments reproduced in the journals.

**23.** Thus in the modern context there are two lines of authorities, namely, the US line of authority in *Matthew Bender v. West* and the Canadian line of authority in *CCH Canadian Ltd. v. Law Society of Upper Canada*.

**24.** Under Indian law “originality” is a precondition for protection. The test of originality even in UK is as to whether a new product is created. (Please see *Copinger & Skone James on Copyright* quoted at p. 4, para 11 of the submissions and also annexed hereto as ANNEXURE X). The test of originality therefore is one that should consist of skill, labour and judgment coupled with some intellectual effort or in the words of Feist “a modicum of creativity”. Under either of the tests, texts of judgments are not protectable.

**II. What is the effect and intent behind making judgments as works in the public domain?****25. International position**



**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

In relation to judgments which are considered as government works in most jurisdictions, the law is almost unanimous. A review of the legal position across the world from various jurisdictions reveals the following two positions:

(i) Judgments are in public domain and no copyright can be claimed in the same.

(ii) Judgments are copyrightable. Copyright in it vests with the Government or the Crown.

India has adopted the former position while drafting the 1957 Copyright Act.

**26. Australia** — Under the Copyright Act, 1968 the Crown enjoys prerogative rights in the Acts of Parliament and statutory instruments. Insofar as judgments in Federal Court are concerned, the same is ambiguous.

“While it is clear that prerogative rights of the Crown exist in Acts of Parliament and statutory instruments of the Commonwealth and of the States, it is debated whether or not such rights exist in judgments of the State and Federal Courts.”

**27. Canada** — Section 12 of the Copyright Act in Canada preserves “any rights and privileges of the Crown” and thus simply going by the statute the Crown may exercise prerogative over judicial decisions. However, since 1997 the Reproduction of Federal Law Order specifically provided that decisions and reasons for decisions of Federal Court and Administrative Tribunals can be reproduced without any charge so long as the same is not reflected as an official version. The Preamble of this Order specifically recognises that:

“fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law”.

**28. China** — In China, Article 5 of the Copyright Act provides that copyright does not cover laws, regulations, resolutions, decisions, orders of State organs, other documents of legislative, administrative and judicial nature and official translations of such works.

**29. Czech Republic** — Official works (equivalent to government work as understood in common parlance) which include legal text and decisions, public documents and official records are excluded from copyright protection under Section 2(2) of the Copyright Act.

**30. France** — Although creations and works of public servants and government officials are protected by copyright; Legislative, Administrative texts, Judicial Decisions and Official Acts fall outside the scope of the copyright.

**31. Germany** — Section 5 of the Copyright Act excludes official works including official decisions from the scope of copyright protection.

**32. Hong Kong** — The United Kingdom principle is followed and Section 39(2) entitles the Crown to copyright on government works.

**33. Italy** — The protection of Copyright Act does not cover official acts, like statutes, laws, regulations, judicial decisions which are in public domain.

**Summary of Arguments**

**III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

**34. Japan** — Article 13(iii) of the Copyright Act excludes judgments, decisions, orders and decrees of Courts of Justice, rulings and decisions of administrative agencies rendered through proceedings similar to judicial proceedings, from the scope of copyright protection. *The purpose for the exclusion of the same is that such categories of documents require wide dissemination among citizens at large.*

**35. Spain** — Article 13 of the Copyright Act excludes laws, decrees, regulations, draft bills, judicial decisions and Acts, deliberations and enactments of public bodies and official translations of such material from protection of copyright.

**36. Switzerland** — Article 5(1) of the Copyright Act exempts laws, decisions, records and reports of authorities and public administrations from the scope of copyright protection.

**37. United Kingdom** — In the UK the position on judgments is reflected at p. 361 of RC. The current Act which is in operation is the Copyright, Designs and Patents Act, 1988. Crown enjoys copyright of published material like statutes, Parliament Debates etc. A General Notice, however, sets out the type of material in which copyright will be claimed exceptionally and this includes Parliamentary papers, delegated legislations, debates, ordinances, etc. However, it does not include law reports. The copy of the General Notice is attached herewith as ANNEXURE Y.

**38. United States** — Case laws as far back as 1888 has held that States cannot restrict the dissemination of State judicial opinion. Therefore, in United States law is clear that judicial opinions are in public domain and are outside the purview of copyright protection.

**39. Indian Position**

The gazette notification of the Copyright Act, 1956 records that a Joint Committee of both Houses of Parliament was set up to discuss the amendments to the Copyright Act. Within this a Committee on Special Sub-Committee was set up in relation to government works. The terms of reference of this Sub-Committee were as under:

*“Terms of reference.—To consider the nature and extent of protection to be given to the works made or published by or under the direction or control of the Government, the legislatures and the courts or other judicial authorities in India.”*

**40.** A specific discussion took place on 26-10-1956 in a meeting on the Sub-Committee and it was specifically noticed as under:

*“The Sub-Committee resumed discussion of the matter not concluded on 2nd October, 1953 and decided that the definition of ‘government work’ should be as proposed by the amendment of Dr. M.M. Das but felt that some government works which are of obvious public interest should be placed in the public domain.”*

(emphasis supplied)

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

41. Thereafter, judgments were specifically made part of an exception to copyright infringement and thus find place in Section 52(1)(q) of the Copyright Act. The underlying purpose is that it is in public interest to place judgments in public domain.

**III. Whether the alleged copy-edited inputs by the Appellants to the text of the judgment of the Hon'ble Supreme Court result in an original work so as to afford copyright protection?**

42. The copyrightability inputs which are claimed by the Appellants in the present case can be broadly categorised in the following two categories:

- (a) Actual inputs into the text;
- (b) Uniform styling.

43. Under Category (a) above, following are the various inputs claimed by the Appellants (p. 858 Vol. IV, SLP paper book, para 15 of the plaint):

- (i) Typographical/typing/clerical/spelling errors some of the corrections made in this category are made after confirmation with the Hon'ble Judge.
- (ii) References to statutory materials are cross-checked with the actual source.
- (iii) Every citation in the judgment is cross-checked, corrected and correct citations are also provided.
- (iv) The quotations in the judgment are scrutinised and cross-checked and particular references are provided.

**44. Uniform styling**

Under this category, the following elements claimed by the Appellants have been dealt with in the compilation filed by the Respondent titled "Discrepancies in Uniform Styling". Insofar as Category (a) is concerned, all the inputs which are made by the Appellant can be broadly described in the category of discovery of facts and are hence not copyrightable. Facts themselves, despite any amount of effort may be put in the same are not copyrightable. Insofar as the claim of uniformity in style is concerned the chart and the annexures filed therewith clearly establish that the claim of uniformity in style is actually incorrect. There is no uniformity as was claimed. This is also a finding by the learned Division Bench of the Hon'ble Supreme Court. (See p. 18 of the impugned order.)

45. The Respondent relies on the following observations in *Mathew Bender case* and *CCH Canada case*. The same are as under:

*Mathew Bender v. West**(a) Captions, Courts & Date information*

"The format of the party names — the caption — is standardised by capitalising the first named plaintiff and defendant to derive a 'West digest title' and sometimes the party names are shortened ...

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

They also set forth a uniform system for abbreviating certain words, which is not original or copyrightable .... We do not think that the District Court committed clear error in finding that these changes are insubstantial, unoriginal and uncreative. Reference to a case by the names of the first plaintiff and the first defendant is a garden variety decision....”

*(b) Attorney information*

“... Here again we agree with the District Court that West’s decisions lack a modicum of creativity ... West’s claim illustrates the danger of setting too low a threshold for creativity or protecting selection when there are two or three realistic options....”

*(c) Subsequent history*

“... The actual text of any amendments to opinions or new opinions issued with the denial of rehearing will always be the court’s. But West points to the following available options for reflecting these changes, and claims that its choice from among these options is creative ... Almost never will these decisions present more than one or two realistic or useful options....”

*(d) Parallel or alternate citations*

“... As the District Court recognised, the element of West’s case reports that raises the closest question as to creativity is West’s amending of the citations, as follows... The District Court concluded that in most instances the determination of which parallel citations to include... reflects no level of originality and that the selections made tend to conform to the standard of the legal profession and appear consistent with those recommended in A Uniform System of Citation... We cannot find that the District Court’s conclusion was unreasonable. West claims that it exercises careful judgment as to which sources are most useful to legal practitioners. However, almost every one of West’s decisions relating to citation alterations is *inevitable, typical, dictated by legal convention, or at best binary*....”

**46.** On the copy-edited text of judgments, the Supreme Court of Canada in *CCH judgment* laid down as under:

“35. This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; The publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and

**Summary of Arguments****III. Ms Pratibha M. Singh, Advocate, on behalf of the respondents in Civil Appeal No. 6905 of 2004 (contd.)**

additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterised as a mere mechanical exercise. *As such, the reported reasons, when disentangled from the rest of the compilation—namely the headnote—are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons....”*

47. By applying the test of originality it is clear that the text of the judgment remains the text of the judgment. *Irrespective of all the additions which may have been made by the Appellant, the text does not become a new work.* If the copy-edited text does not become a new work it is not copyrightable. The judgment of the Division Bench is thus liable to be upheld.

48. Texts of judgments have not been afforded copyright protection in any of the jurisdictions of the world. Most lawyers, Judges, reporters do put their own inputs and styling to publish the journals. Such styling and inputs made by them may make them a commercial success but that by itself would not be sufficient to give monopoly by giving copyright on the text of the journal.

***Claim of copyrightability is vague and ambiguous & hence not protectable***

49. The contribution claimed by the Appellants is too vague to claim copyright. No copyright can be claimed till there is certainty as to the element on which copyright is being claimed. This principle has been very recently upheld in a recent judgment relating to the book and film *Da Vinci Code Baigent v. Random House Group Ltd.*, 2006 IPR 143 at p. 169. The extract from the said judgment is reproduced hereinbelow:

“155. However as part of the assessment of the level of abstraction it seems to me clear that there must be certainty in the subject-matter of such monopoly given by copyright in order to avoid justice to the rest of the world see *IPC Media* para 7 referring to *Green v. Broadcasting Corporation New Zealand*, 1989 RPC 700.

156. The claimants criticised that submission (see para 57 of their closing submissions). I do not accept the criticism is valid. What the defendants are saying is that if what is asserted to be infringed is so general that it cannot be certain that would lead to a conclusion that it is such a level of abstraction that no protection should be afforded to it. It is important to appreciate the context in which the defendant raised this issue, namely, the uncertainty created by the claimants’ own inability clearly to state what the Central Theme is by reason of their changes of the Central Theme. The point is that if the claimants do not know with certainty what their Central Theme is how can anybody else possibly know?”