



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26.05.2023

Date of decision: 21.08.2023

+ **CS(COMM) 124/2018**

RMC PROJECT MANAGEMENT INTERNATIONAL, LLC

..... Plaintiff

Through: Mr.Shikhil Suri, Ms.Madhu
Suri, Ms.Jyoti Suri,
Ms.Mahima Aggarwal,
Ms.Wamika Chadha &
Ms.Nidhi Kapoor, Advs.

versus

**WHIZLABS SOFTWARE PRIVATE LIMITED AND
OTHERS** Defendants

Through: Mr.Trideep Pais, Sr. Adv. with
Mr.Shivam Sharma &
Ms.Sudakshina Prasad, Advs.

JUDGMENT

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This suit has been filed by the plaintiff praying for the following reliefs:

“(a) A decree of Permanent Injunction restraining the Defendants, their employees, subordinates, representatives, agents and all other persons claiming under them or acting in concert with them from infringing in any manner the Plaintiff's copyright in the said PM FASTrack software and literary works comprised in the said PM FASTrack software and from reproducing/copying/illegally using or substantially reproducing/copying/illegally using the PM FASTrack software and any part thereof and any of the literary work in the said PM FASTrack software and from issuing, circulating, distributing or in any manner disseminating infringing copies of the Whizlabs Software to any person, third party or the public;

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(b) A decree of delivery up, against the Defendants, their employees, subordinates, representatives, agents and all other persons claiming under them or acting in concert with them, for destruction/deletion all of the Defendant's Whizlabs software related manuals or documents which are a reproduction of or copy or a substantial reproduction or a copy of any of the manuals, documents or contents of the PM FASTrack software and literary work in the said PM FASTrack software belonging to the Plaintiff and infringing copies of the Defendant's Whizlabs software;

(c) A decree of payment of Rs.50,00,000.00 (Rupees Fifty Lakhs only) towards rendition of a true and faithful accounts of all the profits earned by defendants by using, transferring, divulging, selling, distributing the Whizlabs software, or reproducing/copying or substantially reproducing/copying in any manner any of the PM FASTrack software and the literary work in the said PM FASTrack software belonging to the Plaintiff, and the Defendants be further ordered and decreed to pay to the Plaintiff such amount as may be found due on such account being taken;

(d) A decree of damages be passed in favour of the Plaintiff and against the Defendants, on account of the loss of reputation, goodwill, prospective clientele and as and by way of exemplary or punitive damages;

(e) For costs of the suit; and”

CASE OF THE PLAINTIFF

2. It is the case of the plaintiff that Ms. Rita Mulcahy, the CEO and founder of the RMC Project Management Incorporated, the parent company of the plaintiff, authored a book titled ‘PMP Exam Prep’ (hereinafter referred to as the ‘PMP Test Book’), published in the year



considered the best-selling Project Management Certification review book in the world, and is listed on the popular e-commerce website, Amazon.com, in the section of top 500 in “All Books” since 2004. The copyright in the literary work in the current and previous editions of the PMP Test Book is validly registered in the USA by Ms.Rita Mulcahy and has thereafter, been assigned to the plaintiff.

3. The plaintiff asserts that based on the PMP Text book published in 1998, Ms. Rita Mulcahy developed a Project Management related software application called PM FASTrack (hereinafter referred to as the ‘PM Software’), which is designed to simulate the actual Project Management Institution’s PMP Certification exam in every detail. The first version of the PM Software was published in the United States on 03.10.2000. Thereafter, subsequent versions of the PM Software have been developed and published. The PM Software’s database of 1,400+ questions allows candidates to take examination by knowledge area, process group, keyword/concept, PMP and Super PMP simulation. Many of the questions and distracters in the PMP Test Book have been adapted in the PM Software's subsequent editions to capture new terms and hypothetical/situational questions. The plaintiff asserts that the PM Software is the best selling PMP examination simulation software worldwide in the field of Project Management.

4. The plaintiff claims that the questions and distracters contained in the PM Software have been developed by conducting extensive research; they contain unique terminology; and the same have not been borrowed or adopted from the previous examination materials of the Project Management Institute (in short, ‘PMI’), as the PMI’s Code of Ethics and Professional Conduct expressly prohibits the sharing of



that the questions and distracters in the PM Software have also not been borrowed or adopted from any common sources which are publically available. The plaintiff claims that the questions and distracters in the PM Software are original literary works under Section 2(o) of the Copyright Act, 1957 (hereinafter referred to the ‘Act’) and are therefore entitled to copyright protection under Sections 13 and 14 of the Act. They have been duly registered as copyright in the USA.

5. It is further asserted that Ms. Rita Mulcahy has assigned the copyright in the PMP Test Book and the PM Software to the plaintiff by way of the “Assignment of Work of Authorship” dated 21.03.2006. The plaintiff claims that in terms of the International Copyright Order, 1999 issued by the Central Government in exercise of power under Section 40 of the Act, the plaintiff is entitled to claim copyright protection in the PMP Test Book and the PM Software, as if had been published in India.

6. The plaintiff claims that the defendants are also engaged in the business of selling preparatory tools for aspirants desiring to obtain various certifications offered by the leading certification vendors in the field of Project Management, including PMI. The defendants have purportedly developed a software called Whizlabs PMP Certification Preparation Kit (hereinafter referred to as the “Whizlabs Software”). The Whizlabs Software comprises of 44 PDUs/Contact Hours, 5 Full Length Simulated Tests (Diagnostic Test, Final Test, Practice Exam 1, Practice Exam 2, and Practice Exam 3), 145 Questions Quiz, 180 Quick Revision Tips, detailed explanations with every question, Tips and Tricks and Comprehensive Reports.



7. The plaintiff states that on a detailed expert analysis of the Whizlabs Software's content, format, and layout, it was found that the questions and distracters in the Whizlabs Software are identical to the questions and distracters in the PM Software. The plaintiff claims that it was found that the questions and distracters in 30 out of 200 in the Diagnostic Exam, and 16 out of 200 in the Final Exam were verbatim copies of the questions and distracters in the PM Software. The plaintiff further claimed that the questions and distracters in 27 out of 200 in the Diagnostic Exam, and 33 out of 200 in the Final Exam were only slightly modified as compared to the questions and distracters in the PM Software. The plaintiff states that the choice of words and language in the questions and the distracters in the Whizlabs software was either verbatim or similar to the words and language in the questions and the distracters of the PM Software, and even where the similarities are not blatant, it is clear that the questions in the Whizlabs Software have been rewritten with minor changes based on the original questions and the distracters in the PM Software. The plaintiff claims that the resemblances in the questions and the distracters of the Whizlabs Software when compared to the PM Software are such that they lead to a conclusion that one is a substantial copy of the other or mainly borrowed from the other. The plaintiff has also annexed the chart relating to the degree of similarities between the PM Software and the Whizlabs Software, and corresponding screenshots of comparison of both the software(s) along with detailed explanation of the similarities, as Exhibits H, I, J, K & L to the plaint. The plaintiff has further annexed a report from Ms.Mary Lofsness, a purported expert, testifying to the above analysis

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8. The plaintiff claims that the defendants' work is without the exercise of any independent labour, skill and judgment and, therefore, the defendants are guilty of infringing the copyright of the plaintiff for the PMP Test Book and the PM Software.

9. The plaintiff claims that the plaintiff's PM Software is being sold at USD 299 (Rs.13,754/- approximately) while the defendants Whizlabs Software is being sold at Rs.2,591.04, clearly showing the *mala fide* intent on the part of the defendants to undercut the price and cause damage to the plaintiff.

CASE OF THE DEFENDANTS

10. The defendant no.1 filed its written statement to the plaintiff (same was later adopted by the remaining defendants) stating therein that the defendant no.1 was incorporated on 29.12.2000. The PMI had published a book on Project Management known as "A guide to the Project Management Body of Knowledge" (hereinafter referred as to 'PMBOK'). The book documents and standardizes the generally accepted project management information and practices and was released way back in August 1987, and since publishing the first edition of this book in 1996, PMI has been continuously updating PMBOK. The candidates who aspire to obtain the PMP Certification from PMI, base their preparation for the examination conducted by PMI on the syllabus and course content in the PMBOK. The plaintiff, the defendant no.1, and various similar players carry on the business of selling the practice mock examinations in the form of software for the PMP Certification Examination for aspiring candidates, for which, examinations are conducted through multiple choice questions. The



defendant no. 1, as well as similar players in the field, prepare their practice mock examinations in multiple choice format to simulate the PMI's examination environment. These questions are based on the contents of PMBOK.

11. The defendants state that both, the Plaintiff and the defendant no.1, are the Registered Education Providers (in short, 'REP') with PMI. The defendants further claim that the questions prepared by REPs in the examination tool kit would have to conform to the terminology and the language of PMBOK, and the REPs do not have a free hand in this aspect while setting the examination preparation kits. Due to the standard syllabus given in the PMBOK and the usual pattern of questions used by the PMI, the practice mock examinations offered by various players do not have much scope for variation, as they originate from and have to conform to one common source, namely, PMBOK, and follow the pattern set by the PMI over the years. The questions are framed based on the questions posted by various candidates on the internet based on their own experiences from PMI's examination taken by them. There are various websites where discussions regarding the questions asked by the PMI in its examinations are uploaded. These sites are free sites and the information is open to public.

12. The defendant no.1 further claims that in 2004, it engaged two persons, namely, Mr. Amitava Biswas and Mr. Sujit Senapati, who had obtained the PMP Certification from PMI, to prepare a set of practice mock examinations for the aspiring candidates based on the PMBOK. A set of practice mock examination was created by them and the copyright in the said work was assigned by them to the



software created by the defendant no.1. The defendant no.1 has been selling this software as Whizlabs Software since 18.07.2004 to the candidates aspiring to obtain the PMP Certification from the PMI.

13. The defendant no.1 further claims that in terms of Section 52 (h) of the Act, reproduction of a literary work in the course of instructions or as a part of the questions to be answered in an examination, is not an infringement of the copyright.

14. The defendant no.1 claims that its format and arrangement of the questions is entirely different to that of the plaintiff. The defendants further stated as under:

“15. Without prejudice to the above submissions, the Defendant No.1 further respectfully submits that it has not infringed the copyright of the Plaintiff in the PM FASTrack software or the contents of the practice mock examinations developed by the Plaintiff in any manner whatsoever. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the work claimed to be original. By the Plaintiff's own submission, the degree of similarity, if any, in the two works is minimal as there are in all 47 questions which are verbatim (though the Defendant No.1 submits that many of these are not verbatim), 65 are rephrased and 82 are slightly modified. In any event, it is respectfully submitted that rephrasing of a question itself changes its manner of expression and hence, there cannot be any question of copyright infringement. This leaves 47 out of 1000 questions which the Plaintiff claims is verbatim. Even assuming but not admitting that all the 47 questions are verbatim, this is less than 5% of the total questions in the Defendant's practice mock examinations, a very negligible percentage,



thereby ruling out any questions of similarity. A reading of the Defendant No.1's work after reading the Plaintiff's work does not and cannot give the impression that the Defendant's work is a copy of the Plaintiff's and, therefore, the Plaintiff has miserably failed to demonstrate that the Defendant's work qualifies the laid down test in copyright law for determining copyright infringement of literary works."

15. Apart from the above, the defendant no.1 generally denied all claims of the plaintiff made in the plaint.

PROCEEDINGS IN THE SUIT:-

16. This Court, by an *ad interim ex-parte* order dated 13.03.2009, restrained the defendants, their employees, subordinates, representatives, agents and all other persons claiming under them or acting in concert with them, from in any manner, infringing the plaintiff's copyright in the PM Software and/or substantially reproducing the PM Software.

17. On 16.07.2009, an undertaking on behalf of the defendant no.1, of Ms. Purvesh Sharma, the Director of the defendant no.1, was recorded to the following effect:

"I have been authorized by the defendant company, i.e. Whizlabs Software Private Ltd. vide Board of Directors Meeting dated 30.3.2009 for making statement before this Court.

I have gone through the paragraph nos. 11 and 12 of the plaint. I have also gone through more specifically second part of paragraph 11, in which the plaintiff has enlisted 197 questions, which according to the plaintiff form part of the software of the defendant



company either in verbatim form or in a substantially same form. Without prejudice to my defence on merits and without in any manner admitting the allegations, I am willing to withdraw all questions/answers enlisted in the said paragraph from the software of the defendant company.

I have also gone through the documents annexed with the plaint as Exhibits H, I, J, K and L, which are the detailed charts prepared by the plaintiff wherein according to the plaintiff's perception, there are degrees of similarities between the software of the plaintiff and that of the defendant. I undertake on behalf of the defendant company to ensure that in the revised software brought by the defendant company, the similarities pointed out in the documents (Exhibits H, I, J, K and L) shall be removed.

I undertake that in the revised software that will be brought by the defendant company, all alleged infirmities shall be removed, which are pointed out by the plaintiff."

18. Based on the above statement, this Court, vide its order dated 16.07.2009, withdrew the *interim* order dated 13.03.2003, while binding the defendants to the statement made.

19. In spite of opportunity granted, the plaintiff failed to file its replication and the original documents. This Court, therefore, vide its order dated 14.09.2010, while framing the following issues in the suit, closed the right of the plaintiff to file the replication and the original documents:-

ISSUES

“(a) Whether the plaint has been signed, verified and instituted by a duly authorized person? OPP

(b) Whether the plaintiff is the owner of the copyright in the literary work namely, the PM FASTrack Software and the 1400 mock



*question as alleged in para 6 and 7 of the
plaint? OPP*

*(c) Whether the literary work of the defendant
alleged to be infringing the plaintiff's
copyright fall under the fair dealing under
Section 52(h) of the Copyright Act, 1957?
OPD*

*(d) Whether the defendant no. 1 has infringed
the copyright in the plaintiff's literary work
consisting of the PM FAStack Software? OPP*

*(e) Whether the defendants have infringed the
Copyright in the plaintiff's literary work
comprised of 1400 mock questions? OPP*

*(f) Whether the plaintiff is entitled to any
damages as claimed, if yes, to what amount?
OPP*

*(g) Whether plaintiff is entitled to rendition of
accounts, if so to what effect? OPP*

*(h) Whether plaintiff is entitled to the relief of
permanent injunction? OPP*

(i) Relief."

20. The plaintiff, however, in spite of the closure of its right to file the replication, got the same placed on record. This was complained of by the defendants, and vide order dated 29.01.2014, this Court directed that the replication to be detached from the Court file and returned to the plaintiff.

21. In the course of the hearing, the learned counsel for the plaintiff has submitted that an application was filed by the plaintiff on 25.08.2011 vide diary no.124892, containing the original documents. The learned counsel for the plaintiff also handed over a printout of the "Case History" in support of his submissions. He submits that this



fact is also noted in the cross-examination of Mr. Tim Mulcahy, the President of the plaintiff, who was examined as PW1.

22. It is important to note here that neither the said application nor the original documents are on record. Therefore, no cognizance of the above submission can be taken by this Court. It was for the plaintiff to have taken appropriate steps to ensure that the said application was brought on record. Having taken no steps for the last 12 years, the plaintiff cannot now seek to take any benefit of its own default.

23. It is also relevant to highlight here that a formal admission and denial of the documents filed by the parties did not take place, and the parties proceeded to lead their respective evidence without this formal but important step/procedure being completed.

24. The plaintiff filed the affidavit of evidence of Mr. Tim Mulcahy, who was examined as PW1. He tendered his evidence by way of an affidavit, as Ex.PW1/A1. In his statement recorded on 28.09.2015, he stated that he relies upon the documents exhibited as Ex.PW1/A to Ex.PW1/R.

25. As none was present for the defendants to cross-examine him on the above date, the right of the defendants to cross-examine the witness was closed by the order passed on that day.

26. On an appeal filed against the said order, vide order dated 29.01.2016, passed with the consent of the learned counsel for the plaintiff, the right of the defendant to cross-examine the PW1 was restored.

27. At this stage, the defendant filed objections dated 04.10.2016 to the marking of the exhibits on the documents. PW1 was thereafter cross-examined in detail by the learned counsel for the defendants.



28. As far as the defendants are concerned, they filed the affidavit of evidence of Mr.Kapil Nakra, who was examined and cross-examined as DW1.

29. With the recording of the above statements of the witnesses, evidence of the parties was closed and matter was placed for final hearing.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PLAINTIFF

30. The learned counsel for the plaintiff submits that the questions and distracters in the PM Software are original literary work under Section 2(o) of the Act, and in terms of the International Copyright Order, 1999, issued by the Central Government in exercise of power under Section 40 of the Act, the plaintiff is entitled to seek protection of the copyright in India, as if the PMP Test Book and the PM Software was first published in India and met with the other requirements as stipulated in Section 13 of the Act.

31. He submits that the plaintiff is the assignee of the copyright in the PMP Test Book and PM Software from Ms. Rita Mulcahy, the original copyright owner. He submits that the assignment has been duly registered in the USA.

32. Drawing reference to Ex.PW1/H, Ex.PW1/I, Ex.PW1/J, Ex.PW1/K, Ex.PW1/L and Ex.PW1/M, he submits that the same would clearly show that the questions and distracters in the defendants' Whizlabs Software are either verbatim copy of or are only slightly modified copies of the PM Software. He submits that 30 out of 200 in Diagnostic Exams; and 16 out of 200 in Final Exams of defendant's software are verbatim copy, while 27 out of 200 in



submits that the choice of words and language of the questions and the distracters in defendant's software is also either verbatim or similar to the words/language of plaintiff's PM Software; the similarities are blatant and clearly show that they are the copies of the plaintiff's PM Software. He submits that the similarities were admitted by Mr. Purvesh Sharma, Director of the defendant no.1, in his statement recorded on 16.07.2009, when he undertook to remove all the questions and distracters complained of by the plaintiff in the above exhibits and to ensure that in the revised software brought by the defendant no.1, the similarities pointed out would be removed.

33. Drawing reference to the following answers given by the DW1 in his cross-examination, the learned counsel for the plaintiff submits that the witness admitted to the similarities in the two software(s):

"Q.39 I put it to you that defendant no.1's format and arrangement of questions is entirely the same as of plaintiff's software and not different?

Ans. It is correct. (Vol.) Globally same format is being followed to distribute multiple choice questions to users online. From design prospective including colour scheme, our software is entirely different from the plaintiff's software.

Q.40 I put it to you that there are thousand original model questions in the software of the plaintiffs under five heads namely diagnostic, practice one, practice two, practice three and finals?

Ans. I am still not sure whether the plaintiff is the original copyright of the questions present in plaintiff's software. No confirmation has been provided to us.

Q.41 I put it to you that all the thousand questions in defendants' software are absolutely similar and identical?



Ans. It is incorrect. (Vol.) Out of thousand in the defendants' software, 47 questions were verbatim and usually companies like defendant and plaintiff take clues of questions from discussions forums, where users are posting questions, they saw in the actual exam. The copyright of these 47 questions are yet not proven by the plaintiff."

34. The learned counsel for the plaintiff further submits that in spite of giving an undertaking that the defendants would remove the similarities in the Whizlabs Software with the PM Software, even in the new version of the defendants' Whizlabs Software, similarities still exist, and therefore, the defendants are, in fact, liable to be proceeded against for having breached their undertaking.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE DEFENDANTS

35. On the other hand, the learned senior counsel for the defendants submits that in the present case, the plaintiff has failed to prove that it is the owner of the copyright in the PM Software. He submits that neither the alleged PMP Test Book nor any version of the alleged PMP Software, are on record. Even the originals of the alleged Copyright Certificates or Assignment thereof in favour of the plaintiff, are not on record. He submits that though photocopies of the certificates were exhibited in the statement of PW1 recorded on 28.09.2015, the defendants had objected to the same by filing detailed objection on 04.10.2016, and as recorded in the order passed on that day. Placing reliance on the judgment of the Supreme Court in **Jagmail Singh & Anr. v. Karamjit Singh & Ors**, (2020) 5 SCC 178; and of this Court in **Sudir Engineering Company v. Nitco Roadways Ltd.**, 1995 (34) DRJ, he submits that mere marking of a document as

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an exhibit does not prove the said document; the document has to be proved in accordance with the Indian Evidence Act , 1872 (hereinafter referred to as the 'IEA'). He submits that the said documents can be proved only by filing the original thereof or by making out a case for proving the same through secondary evidence. He submits that in the present case, the plaintiff has not filed any application nor has set out a case for proving the said documents through secondary evidence. He submits that, therefore, no cognizance can be taken of the alleged Copyright Certificates and/or the alleged assignment deed in favour of the plaintiff.

36. He submits that the reliance of the learned counsel for the plaintiff on Section 65(e), 74, 76, 65(c), and 63(3) of the IEA and the oral testimony of PW1 is misplaced. He submits that Section 63(3) of the IEA stipulates that certified copies given under provision of Section 74 will be secondary evidence, and can be lead in evidence. Further, Section 65 of the IEA lists the cases where secondary evidence relating to documents may be given. He submits that in terms of sub-section (e) of Section 65 of the IEA, when the original is a public document within the meaning of Section 74, secondary evidence only in the form of its certified copy, can be proved in evidence. In case the plaintiff would have produced the certified/apostilled copies of the registration certificates, this Court would have accepted and relied upon the same. However, the plaintiff has not even produced the original apostilled copies of the Registration Certificates, but has produced photocopies of the apostilled copies of the Registration Certificates. The photocopies cannot be even called secondary evidence.



37. He submits that the plaintiffs' reliance on Section 65(c), claiming that the originals have been destroyed or lost, is also ill-founded. He submits that the plaintiff had ample opportunity, even after cross examination of PW-1 was over, to obtain fresh apostilled copies of the Registration Certificates and the Assignment Deed, and move an appropriate application to have them placed on record of the Suit. It is only in the rejoinder arguments, that the Plaintiff has taken a plea that it be permitted to place reliance on the secondary evidence. He submits that, therefore, the plaintiffs' plea is not tenable.

38. The learned senior counsel for the defendants further submits that in terms of Section 91 and 92 of the IEA, oral evidence of the contents of the documents, which have been reduced in writing, is not permissible.

39. He submits that the plaintiff has not even proved that the Suit has been validly instituted by its authorised representative. He submits that the plaintiff has failed to prove the power of attorney given by the plaintiff company to one Mr. Biju Nambiar, who has instituted the present suit on behalf of the plaintiff.

40. He submits that even the alleged charts of comparison of the plaintiffs' PM Software with the defendant's Whizlabs software also remain unproved in the absence of a certificate under Section 65B of the IEA. He submits that a certificate under Section 65B of the IEA is a mandatory requirement, as held by the Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.** (2020) 7 SCC 1.

41. He submits that the above charts are purportedly based on the examination of Ms. Mary Lofsness, whose affidavit was filed by PW1



witness and, therefore, no cognizance of her affidavit can be taken by this Court.

42. He submits that there is no admission of the contents of these charts by the defendants in their written statement or in the statement of Mr. Purvesh Sharma recorded on 16.07.2009. He submits that, therefore, reliance of the plaintiff on Section 58 of the IEA is misplaced. He submits that issue (g) framed by this Court on 14.09.2010, places the onus to prove copyright in the PM Software on the plaintiff and, therefore, reliance of the plaintiff on the purported admission of the defendants prior to that date is ill-founded.

43. On merit, the learned senior counsel for the defendants submits that though the plaintiff claims to have purchased defendant's software on 18.09.2007, the present Suit was filed only on 21.02.2009, that is, after a delay of 1^{1/2} years. The reason for this delay has not been explained by the plaintiff.

44. He submits that the plaintiff has pleaded that there are various versions of plaintiff's PM Software. The plaintiff has, however, failed to show the contents of their software, without which, the plaintiff's allegation of 47 questions in defendant's software being verbatim to those in plaintiff's software, remains unproved.

45. He reiterates that the questions in the defendants' software are based on open-source information, including Wikipedia. He submits that the plaintiff and the defendant are both REP with PMI and as such have to follow the work content as provided by PMI in PMBOK. They have to adhere to this common source and only a limited deviation is allowed. Due to common source, there is bound to be some similarities in the content of the software. The software is also based



examination taken by them. The plaintiff cannot, therefore, claim monopoly over them. Even the alleged stylisation is not unique to the plaintiff.

46. He submits that the defendants in their software also give explanation for the right answers. He submits that the defendants' software is based on the PMBOK and is really in the nature of a guide, which even otherwise, would be entitled to protection from a claim of infringement of copyrights, under Section 52(h) of the Act. He submits that even assuming but not admitting that the defendants have copied the questions from the plaintiffs' software or the PMP Test Book, the defendants have also expended their own labour, skill, and expertise in providing the reasoning/explanation in arriving at the correct answer to each question. Therefore, claim of infringement cannot sustain against the defendant. Placing reliance on the judgment of this Court in *The Chancellor Masters & Scholars of the University of Oxford v. Narendera Publishing House & Anr*, ILR (2009) II Delhi 221; and *Syndicate of the Press of the University of Cambridge on Behalf of the Chancellor, Masters and School v. B.D. Bhandari & Anr*, 2011 SCC OnLine Del 3215, he submits that a guide would itself be entitled to protection under the Act and to a defence under Section 52(h) of the Act.

47. He submits that the defendants had employed Mr. Amitava Biswas and Mr. Sujit Senapati to prepare the question paper. He, however, admits that except for a bank account statement showing the payment to these gentlemen, there is no other document to support the above submission, in form of any Agreement or Assignment Deed.



SUBMISSION OF THE LEARNED COUNSEL FOR THE PLAINTIFF IN REJOINDER

48. The learned counsel for the plaintiff, in rejoinder submits that the plaintiff had filed the original documents alongwith an application on 25.08.2011. As the same are not traceable, they are presumed to be lost, and in terms of Section 65(c) of the IEA, secondary evidence in form of copies of the said certificates of registration are entitled to be admitted in evidence.

49. He submits that the PW1 has also testified to the contents of the said certificates of registration and, therefore, the same would also be admissible in evidence in terms of Section 63(5) of the Act.

50. He submits that the registration certificates are public documents and can be verified from the US Copyright Office's Website. They are apostilled, and in terms of Article 1 of the Hague Convention to which India is a signatory, therefore, these documents are admissible in evidence in terms of Sections 63(1), 65, 74 and 76 of the IEA.

51. On the plea of the defendants that the original PM Test Book and/or the PM software are not produced on record by the plaintiff, the learned counsel for the plaintiff submits that the defendants in their written statement or at any stage of the suit, have not denied that the questions appearing in the screenshots exhibited as Ex.PW1/H to Ex.PW1/L are not the questions that appear in the PM Software and in the defendants' software. He submits that in view of Section 58 of the IEA, the facts which are admitted require no further evidence. He submits that a vague denial, in view of Order VIII Rule 5 of the Code of Civil Procedure, 1908, shall be treated as an admission.



52. On the plea, that Ex.PW1/H to Ex.PW1/L, being not supported with a certificate in terms of Section 65B of the IEA, are inadmissible in evidence, the learned counsel for the plaintiff reiterates that once there was no denial of these charts by the defendants, and the only defence raised by the defendants was that they are from a common source, no further proof of the same was and is required to be adduced.

53. On the defence of the defendants that the questions are from the common and open source, including the PMBOK, the learned counsel for the plaintiff submits that the PMBOK merely provides the basic standards and guidelines in the field of project management. There are no questions/distracters in the book. Therefore, the PMBOK cannot be considered as a source for the questions. He submits that the REPs are to evolve their own questions based on the PMBOK; this is where the skill/expertise, research and creative writing of the content writers become important and is entitled to protection as copyright.

54. On the defence of fair use, he submits that the questions and distracters of the plaintiff are not being reproduced by the defendant no.1 in the course of instructions by a teacher. The defendants have copied the literary work in the PM software for their commercial exploitation. Placing reliance on the judgments in ***Rupendra Kashyap v. Jiwan Publishing House Pvt. Ltd.***, 1993 SCC OnLine Del 660; and ***University of London Press v. University Tutorial Press***, [1916] 2 Ch 601, he submits that even if the questions are based on an open source and pre-existing knowledge, the questions themselves are entitled to a protection under the copyright law; the defendants cannot copy the same as that would amount to infringement of such copyright.



ANALYSIS AND FINDINGS

55. I have considered the submissions made by the learned counsels for the parties.

Whether the plaintiff can be allowed to prove the documents filed, through secondary evidence:

56. At the outset, the core question to be decided is whether the photocopies of the documents that have been filed by the plaintiff, in the absence of the originals thereof, can be considered as secondary evidence as defined in Section 63 of the IEA, and, under Section 65 of the IEA, can be taken into consideration as a proof of those documents.

57. Section 61 of the IEA states that the contents of the documents may be proved either by primary or by secondary evidence. Section 62 of the IEA states that the primary evidence means the document itself produced for the inspection of the Court.

58. Section 63 of the IEA defines secondary evidence as under:

“63. Secondary evidence.—Secondary evidence means and includes—
(1) Certified copies given under the provisions hereinafter contained;
(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
(3) Copies made from or compared with the original;
(4) Counterparts of documents as against the parties who did not execute them;
(5) Oral accounts of the contents of a document given by some person who has himself seen it.”

59. Section 64 of the IEA states that the documents, except in cases mentioned in the Act, must be proved by primary evidence.



60. Section 65 of the IEA gives the circumstances in which secondary evidence may be given of the existence, condition, or contents of a document. It is reproduced hereinunder:

“65. Cases in which secondary evidence relating to documents may be given.—

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved,

or of any person out of reach of, or not subject to, the process of the Court,

or of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.



In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

61. A reading of the above provisions would show that a document has to be proved primarily by primary evidence, that is, by production of the documents itself for the inspection of the Court, unless the party in question is able to make out circumstances mentioned in Section 65 of the Act for production of secondary evidence, as defined in Section 63 of the Act, to prove the existence, condition, or contents of a document.

62. One of the circumstances invoked by the plaintiff in the present case for permission to prove the Registration Certificates and the Assignment Deed through secondary evidence is that the original thereof have been destroyed or lost. The learned counsel for the plaintiff submits that the plaintiff had filed an application vide Diary no.124892 on 25.08.2011 to place on record the original documents. He submits that the said application, however, is not traceable and, therefore, it must be presumed that the original documents have been lost.

63. I am unable to accept the above submission of the learned counsel for the plaintiff.

64. As noted hereinabove, the plaintiff had not filed the original documents along with the plaint; only photocopies of the documents were filed. On 14.09.2010, the Court noted that in spite of opportunity



granted, the plaintiff had failed to file replication and the original documents. The right of the plaintiff to file the same was therefore, closed. The plaintiff thereafter, claims to have filed the above-mentioned application, however, took no steps to ensure that the same is listed before the Court, or even to keep a track on the whereabouts of the said application. The log report for the case only indicates that some application was filed by the plaintiff vide the above-mentioned diary number, on 25.08.2011. What was the nature of that application and what it contained cannot be ascertained only from the Log Report. The oral submission of the learned counsel for the plaintiff cannot suffice on this aspect. In any case, the onus was on the plaintiff to ensure that the said application is listed before the Court and permission granted to the plaintiff to place the original documents on record, especially when the Court by a specific order had already closed the right of the plaintiff to file the original documents. The plaintiff cannot claim benefit of its own neglect. In fact, Section 65(c) of the IEA requires that the party wanting to prove a document through secondary evidence stating the reason as destruction or loss of the document, should itself not be in default or neglect. The same cannot be said for the plaintiff in the facts and circumstances of the present case.

65. It is also relevant to reiterate here that the defendants raised specific objections to the marking of the exhibits on the documents, on the ground that the originals thereof had not been produced. The objections were filed on 04.10.2016. Even thereafter, the plaintiff took no steps to locate the alleged application or to file fresh certified copies of the documents of registration on record. As rightly



documents were marked as exhibit on 28.09.2015 in absence of the defendants. On the said date, the right of the defendants to cross examine PW-1 was closed. The same was, however, re-opened by an order dated 29.01.2016. The defendants before cross examining the PW-1, filed their objection to the marking of exhibits on the documents. In spite thereof, the plaintiff took no steps to have the originals of the certified copies of the documents placed on record, or even file an application as to why it should be permitted to prove the documents by secondary evidence. In ***H. Siddiqui (Dead) by LRs v A. Ramalingam***, (2011) 4 SCC 240, the Supreme Court held that a party cannot be allowed to rely on secondary evidence unless the circumstances stipulated in Section 65 of the IEA are satisfied by such party. The Supreme Court held that:

“12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.”

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66. In **Jagmail Singh** (supra), the Supreme Court on examination of the provisions of the IEA in relation to the proof of the documents by primary or secondary evidence, and on the question of marking of exhibits on the documents, has held as under:

“11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

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14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui (dead) by LRs Vs. A. Ramalingam, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.

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17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.”



67. In view of the settled law and in the facts of the present case, I am of the opinion that the plaintiff has been unable to make out a case for the grant of permission to prove the documents by way of secondary evidence.

68. Reliance of the plaintiff on Section 65(e) of the IEA is also ill-founded. Section 65(e) of the IEA states that secondary evidence may be given of the existence, condition, or contents of a document when the original is a public document within the meaning of Section 74 of the IEA. It further states that only a certified copy of such a document, and no other kind of secondary evidence, is admissible.

69. Section 76 of the IEA gives the manner of providing certified copies of the public documents. Section 77 of the IEA states that such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Section 74 and 77 of the IEA are reproduced herein below:

“76. Certified copies of public documents.—
Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees there for, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Proof of documents by production of certified copies.—Such certified copies may be



produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.”

70. In the present case, however, the plaintiff has not placed on record the certified copies of the Registration Certificates. The documents placed on record are the copies of the certified copies of such Registration Certificates. The same, therefore, do not satisfy the test of the Section 77 of the IEA.

71. The Suit, therefore, has to be considered on the basis of no documents having been filed by the plaintiff in support of its claim.

Consideration of issues framed:

Issue (a): Whether the plaint has been signed, verified and instituted by a duly authorized person?

72. The plaintiff has filed the present suit under the signatures of Mr. Biju Nambiar, claiming him to be the constituted attorney of the plaintiff. In the written statement filed by the defendants, the following plea was taken with respect to the authorization of Mr. Biju Nambiar to file the plaint on behalf of the plaintiff.

“B. Mr. Biju Nambiar, who has verified the plaint and the pleadings in the suit, is a lawyer representing the Plaintiff and has no personal knowledge of the day to day business activities of the Plaintiff nor does he have access to the Plaintiffs commercial and financial information. Accordingly, it is submitted that the plaint is not verified properly and is liable to rejected on this ground alone.”

73. A reading of the above averment in the written statement would show that the only ground of challenge to the authorization of Mr. Biju Nambiar to file the Suit on behalf of the plaintiff was that he has



no personal knowledge of the business activities of the plaintiff or its commercial and financial information. However, in the course of arguments, it was submitted by the learned senior counsel for the defendants that this issue should be decided in favour of the defendants as the original power of attorney in favour of Mr. Nambiar has not been filed on record by the plaintiff.

74. In my opinion, Issue (a) was not framed on the averment now contended by the learned senior counsel for the defendant. The issue has to be considered in light of the pleadings of the parties. The defendants never challenged the power of attorney in favour of Mr. Biju Nambiar; the only challenge was that he has no personal knowledge to affirm to the contents of the plaint.

75. Mr. Tim Mulcahy (PW-1) reaffirmed the fact of authorization of Mr. Biju Nambiar to file the plaint, and he further states that Mr. Biju Nambiar was aware of the facts and was duly authorized to sign and verify the plaint and to institute the suit on behalf of the plaintiff. The learned senior counsel for the defendant could not point out any question put to him during his cross examination on this issue.

76. Issue (a) is, therefore, decided in favour of the plaintiff and against the defendant.

Issue (b): Whether the plaintiff is the owner of the copyright in the literary work namely, the PM FASTrack Software and the 1400 mock question as alleged in para 6 and 7 of the plaint?

77. As noted hereinabove, it is the case of the plaintiff that Ms. Rita Mulcahy is the author of the PMP Exam Book. The plaintiff states that it was Ms. Rita Mulcahy who developed the subject PM FASTrack



PM FASTrack Software were also developed by Ms. Rita Mulcahy. Therefore, it is the own case of the plaintiff that Ms. Rita Mulcahy is the owner of the copyrights in the PMP Exam Book as also the PM software.

78. The plaintiff then claims that by an 'Assignment of Works of Authorship', Ms. Rita Mulcahy transferred her copyright in the PMP Exam Book and the PM software to the plaintiff company. However, as is noted hereinabove, in the absence of the original documents in this regard, mere assertion of the plaintiff of such Assignment in the plaint, or in the oral evidence of its witness Mr. Tim Mulcahy (PW-1), cannot suffice. Though an oral account of the content of a document given by some person who has himself seen it, is a secondary evidence under Section 63(5) of the IEA, as noted hereinabove, the conditions precedent for leading such secondary evidence as stipulated in Section 65 of the IEA has not been satisfied by the plaintiff. Section 91 of the IEA also bars such oral account of the document to be admitted in evidence.

79. The plaintiff claims that as it has been granted copyright registration in USA, and in terms of the International Copyright Order, 1999, issued by the Central Government under Section 40 of the Act, such work would be entitled to protection under the Act in India as well. However, here again, the registration certificates, in absence of the original or certified copies thereof, remain unproved in evidence.

80. Though registration under the Act is not a mandatory requirement to claim copyright in a literary work, as the plaintiff's own case is that Ms. Rita Mulcahy is the owner of the literary work in the PMP Book and the PM Software, it was essential for the plaintiff



by Ms. Rita Mulcahy, either by proving the Assignment Deed or the Registration Certificates in its favour. Ms. Rita Mulcahy is not the plaintiff in the Suit.

81. It is then to be seen whether there was any admission of the ownership of the copyright in favour of the plaintiff by the defendant in its pleading or evidence.

82. I could not find any such admission of the defendants in the written statement or in the evidence. As the defendant denied that the plaintiff had any copyright in the PMP Test Book or the PM Software, specific issue in form of Issue (b) was framed, placing the onus of proving the same on the plaintiff. The plaintiff has failed to discharge this onus.

83. Issue (b) is, therefore, to be decided against the plaintiff and in favour of the defendants.

Issue (c): Whether the literary work of the defendant alleged to be infringing the plaintiff's copyright fall under the fair dealing under Section 52(h) of the Copyright Act, 1957?

84. The defendants, relying upon Section 52(h) of the Act, have claimed that they are exempted from claim of infringement. Section 52(h) of the Act (prior to its amendment) is reproduced hereinbelow:

*52. Certain acts not to be infringement of copyright. —
(h) the reproduction of any work—
(i) by a teacher or a pupil in the course of instruction; or
(ii) as part of the question to be answered in an examination; or
(iii) in answers to such questions;”*

85. It is the case of the defendants that the defendant no.1 is a Registered Education Provider with PMI. The defendants further



claim that its practice mock examination in the Wizlabs software is based on standards and guidelines prescribed by PMBOK of the PMI, leaving little scope of variation of expression. The defendants claim that, therefore, there can be an overlap in questions between the plaintiff's software and the defendant's software, and that the defendant would be entitled to seek protection under Section 52(h) of the Act as it stood prior to its amendment.

86. I am unable to accept the above submission of the learned senior counsel for the defendants.

87. In *Syndicate of the Press of the University of Cambridge on Behalf of the Chancellor, Masters and School* (supra), a Division Bench of this Court, on analysing the provision of Section 52(1)(h) of the Act as it was then, held as under:

“65. It is clear from the reading of the aforesaid provision that this would not come to the aid of the respondents who have published the guide for commercial exploitation. In view of the law laid down in various cases, commercial exploitation will take the matter outside the ambit of ‘fair use’. The defence of ‘fair use’ as provided under Section 52(1)(h) of the Act is only available to the teacher and pupil to reproduce the literary work in the course of instructions or examination paper setter to reproduce the literary work as part of the questions or to the pupil to reproduce the literary work as answers to such questions. The respondents are neither teachers nor students nor a person giving or receiving instruction. The defence of ‘fair use’ under Section 52(1)(h) of the Act only provided to a teacher and pupil and not otherwise. If this defence is allowed to a publisher, then it would result in a situation where every publisher, without permission from the owner of copyright, would reproduce the ad verbatim literary text from the educational textbooks prescribed by the



University into their books and exploit the same for commercial gains and benefits and that too without giving any royalty or payment to the right owners towards such reproduction. This practice would obviously discourage creativity of authors who put their skill, labour, years of knowledge, expertise, etc. into these educational books and encourage infringers like the respondents to reproduce ad verbatim literary text from original publications into their infringing books on the pretext of 'fair use'. Obviously, therefore, Section 52(1)(h) of the Act has no application to the facts of this case."

88. The Division Bench of this Court has, therefore, held that the defence of 'fair use' in Section 52(1)(h) of the Act is available only to a teacher and pupil and not otherwise; it is not available to a publisher who exploits the literary work for commercial gains and benefits without giving any royalty or payment to the rightful owner towards such reproduction. Section 52(1)(h) of the IEA, as it was then, therefore, has no application in such facts.

89. Issue (c) is therefore, decided against the defendants.

Issue (d): Whether the defendant no. 1 has infringed the copyright in the plaintiff's literary work consisting of the PM FASTrack Software?; and

Issue (e): Whether the defendants have infringed the Copyright in the plaintiff's literary work comprised of 1400 mock questions?

90. For proving the above issues, the plaintiff has to prove that it is the owner of the copyright in the PMP Exam Book and/or the PM FASTrack Software. As noted hereinabove, the plaintiff has failed to prove the same.

91. Even otherwise, the plaintiff has not placed on record the PMP Exam Book or the PM software on record. This Court, therefore, has

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defendants, which also has not been placed on record, is an infringing copy of the PMP Test Book or the software of the plaintiff.

92. The learned counsel for the plaintiff, however, vehemently argues that the defendant has admitted that 47 out of 1000 questions contained in the defendant's software are verbatim copy of the plaintiff's PM Software; and many of them are rephrased or slightly modified. The plaintiff relies upon the charts prepared by Ms. Mary Lofsness in support of this submission.

93. At the outset, it is to be noted that Ms. Mary Lofsness has not entered the witness box, though her affidavit was filed by the plaintiff. No cognizance can, therefore, be taken of her affidavit of evidence.

94. The only question, therefore, to be determined is whether the defendant has admitted to the above averments of the plaintiff, and if so, the consequence thereof. In this light, it must be remembered that an admission is to be read as a whole; it cannot be bifurcated or truncated so as to delete therefrom the explanation or the condition on which it is made. In **Jagdish Prasad Patel (Dead) through LRs & Anr. v. Shivnath & Ors.**, (2019) 6 SCC 82, the Supreme Court has held that:

"15. Section 58 of the Evidence Act, no doubt, postulates that the things admitted need not be proved. However, the proviso to Section 58 of the Evidence Act gives full discretion to the court to require the facts admitted to be proved otherwise than by such admission. When the respondent-plaintiffs have filed the suit for declaration of their title, the respondent-plaintiffs cannot isolate few sentences in the written statement and take advantage of only those parts of the written statement which are favourable to them. The written statement filed by the appellant-defendants has to be read in toto..... In the light of the pleadings and the oral and



documentary evidence adduced by the defendants, notwithstanding the admission in the written statement, the burden lies upon the respondent-plaintiffs to prove that the patta-lease continues to be in their favour and that they are the holders of patta and that they are in continued possession of the suit properties. ”

95. The defendants, in relation to the above charts of the plaintiff, in their written statement have stated as:

“PRELIMINARY SUBMISSIONS

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13.It is submitted that the Plaintiff is not entitled to any of the reliefs prayed for or otherwise in the plaint and interim injunction application being I A No. 3334 of 2009 since the Plaintiff has made gross misrepresentations of facts and law before this Hon'ble Court in obtaining the said order. The Defendant No. 1 further respectfully submits that the Plaintiff has obtained the interim order of this Hon'ble Court by suppressing vital facts and making false claims and allegations against the Defendant No. 1. In particular, the Plaintiff is guilty of the following misrepresentations of facts and law as well suppression of the following vital facts from this Hon'ble Court while obtaining the said interim order:

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h) There is no violation of copyright in the PM FASTraek software of the Plaintiff by the Defendant as alleged. It is not the case of the Plaintiff that the Defendants have copied the order or arrangement of the questions in their practice mock examinations. In fact, the Defendant No.1's format and arrangement of the questions is different. It is submitted that the Defendant No.1 has divided the 1000 model questions in its practice mock examinations under five heads, namely Diagnostic, Practice 1, Practice 2, Practice 3 and Finals. The format of the Plaintiff, on the other hand, is entirely different. It is further submitted that even the appearance of the questions and



answers on the respective screens of the Plaintiff and the Defendant No.1 are entirely different.

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15. Without prejudice to the above submissions, the Defendant No.1 further respectfully submits that it has not infringed the copyright of the Plaintiff in the PM FASTrack software or the contents of the practice mock examinations developed by the Plaintiff in any manner whatsoever. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the work claimed to be original. By the Plaintiffs own submission, the degree of similarity, if any, in the two works is minimal as there are in all 47 questions which are verbatim (though the Defendant No.1 submits that many of these are not verbatim), 65 are rephrased and 82 are slightly modified. In any event, it is respectfully submitted that rephrasing of a question itself changes its manner of expression and hence, there cannot be any question of copyright infringement. This leaves 47 out of 1000 questions which the Plaintiff claims is verbatim. Even assuming but not admitting that all the 47 questions are verbatim, this is less than 5% of the total questions in the Defendant's practice mock examinations, a very negligible percentage, thereby ruling out any questions of similarity. A reading of the Defendant No.1's work after reading the Plaintiffs work does not and cannot give the impression that the Defendant's work is a copy of the Plaintiff s and, therefore, the Plaintiff has miserably failed to demonstrate that the Defendant's work qualifies the laid down test in copyright law for determining copyright infringement of literary works.

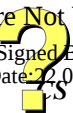
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12. *The contents of paragraph 12 of the Plaintiff are disputed and denied as incorrect, false and repetitive. It is specifically denied that the choice of words and language in the questions and the distracters of the Defendant's software were either verbatim or similar to the words and language in the questions and the distracters of the Plaintiff. In this connection, it is respectfully submitted that being REPs, the Plaintiff and the Defendant are constrained to use the specific prescribed terminology from PMBOK and accordingly the language and terminologies in the respective questions and distracters would have to be identical if not similar. In view of the same, the averments in the aforesaid paragraph are disputed and denied. In this connection, the Defendant wishes to refer to, and rely upon its preliminary submissions above.*

13. *The contents of paragraph 13 of the Plaintiff .are disputed and denied. It is specifically and vehemently denied that the presentation, arrangement and design layout of the Defendant's software y/as almost identical to that of the Plaintiff. It is respectfully submitted that the Plaintiff, Defendant and the similar players in the field of preparing examination tool kits for the PMP certification strive to simulate the PMI's PMP certification examination format as close as possible. Despite the same, the software employed by the Plaintiff and the Defendant are distinct and different as demonstrated by the documents being filed by the Defendant in these proceedings. In view of the same and in view of the preliminary objections and submissions above, the Defendant disputes and denies the averments in this paragraph."*

96. The above averments in the written statement cannot be read as an admission by the defendant of the fact that the defendant has infringed the copyright of the plaintiff in the PMP Test Book or the



97. I have already extracted the statement of Mr. Purvesh Sharma hereinabove. The same again cannot act as an admission of the defendant to the claim of the plaintiff. It clearly states that the statement made is ‘without prejudice to the defence of the defendants on the merit and without in any manner, admitting the allegations.’

98. I may also herein note that it is the case of the defendants that its software provides mock examinations for the students who are preparing for the PMI examination. The defendants have also claimed that its software is based on the PMBOK of the PMI. It has claimed that other services providers are also providing mock examinations with similar pattern and layout. It claims that the defendant’s software also gives the correct answers to the students and explains reasons for the same. What the defendants, therefore, offer is what can properly be called as a ‘guide’.

99. In *Syndicate of the Press of the University of Cambridge on Behalf of the Chancellor, Masters and School* (supra), the Division Bench of this Court has held that copyright can be claimed in such derivative work such as a Guide. I may quote from the judgment as under:

“78. It follows from the above discussion that when a published work is prescribed as text book, a ‘guide’ can be published provided it fulfils the test of a ‘derivative work’. At the same time, this guide book has to be materially different from the textbook. Guide book should not be verbatim reproduction of the text book. If a guide book reproduces the original work to a great measure without its contribution, it may amount to plagiarism and may infringe the copyright law of the person in original work. On the other hand, if guide book written in a different format, albeit, dealing with the subject matter which is contained in the original book, with a purpose to help, assist



and support the students, the problems given in the text book, then it would be a work different from the original work. The guiding principle is to see as to whether such guide book provides explanation and/or step by step process for reaching the answer, detailed analysis of any problem with the objective of making the task simpler in understanding the subject provided in the textbook. In writing this guide book, if the contribution of aforesaid nature is made, it may be treated as a work which is somewhat different in nature. This is the crucial test which is to be applied and has been characterized as the transformative character of the use by the American Courts. Therefore, the task would be to ascertain as to whether the purpose served by the guide book is substantially different from the purpose served by the textbook. If the guide book is different in character and not a mere substitute of the original work/textbook, it would be treated as transformative. However, the character must be substantially different and it is not sufficient that superficial changes are made with basic character of the textbook creeping in the guide book. In that eventuality, it would not qualify as a work of transformative character. If this directive work in the guidebook has assumed different character, it would not amount to infringement of the original work, though it would have been drawn, to certain extent, from the original work. And, in that sense, it would amount to 'fair use' as described in Amazon. Com. Inc. (supra).

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119. We have already formulated the test for ascertaining as to whether in a given situation publication of a guide book would be violative of a copyright in a textbook in detail while dealing with RFA (OS) No. 21 of 2009. It is not necessary to repeat the same. Suffice is to state that it will be permissible to publish a guide book if it qualifies the proper description of a guide book and becomes a derivative work of the author who has produced such guide book.



120. That apart, in the present case, it is to be borne in mind that the appellant's book is prescribed as textbook in Class XI in Jammu & Kashmir. Therefore, it would be permissible for a person to write, review, critic or guide book on the said work. Insofar as guide book is concerned, with which we are concerned, it is to be shown that it provides explanation, step by step process for reaching the answer to the mathematical problems. Thus, it would be permissible for the person writing the guide book to take the questions from the exercises prescribed at the end of each chapter in the appellant's book. At the same time, it is to be shown that the person writing the guide book has given step by step answer to the said questions which part is not present in the appellant's work and the same is done for facilitation of the students, particularly, weaker sections so that they are able to get the assistance from such guide book for easy and better understanding. When we apply this test to the present case, we come to the conclusion that the respondent's guide book has met this requirements/qualifications. It is rightly pointed out by the learned Single Judge that the appellant's text does not contain or describe the step by step process or arriving at solutions or answers whereas the respondent's guide book provides the same. The appellant's text book contains the theoretical or explanatory contents in respect of each chapter, that is not taken/adopted by the respondent in its book. There is no copy of these contents by the respondents. The respondent has simply used the questions and contribution of the respondents lies in providing step by step reasoning. This is for different purpose. Learned Single Judge has rightly remarked that many academics may not like these guide books and to a purist or one who delights in intellectual pursuits, such works may be distasteful or even offensive, nevertheless, such works/guide books are produced and designed to cater to weak category of students in their understanding of the subjects. The purpose and manner of the use of the questions, which are found in



appellant's text books by the respondent is, therefore, different. Once we qualify the work of the appellant entitled to copyright on the ground that it involves creativity, the same standard would apply to the respondent's work as well. There is a creativity attached in giving step by step solution to the questions. It is a matter of common knowledge that many Mathematical problems can be solved in the different manner. It is also equally a matter of common knowledge that even if there is only one manner of solving a particular Mathematical problem, it may be solved with fewer steps and for better and easy understanding, other person may evolve more steps."

100. In my view, the above judgment would be clearly applicable to the facts of the present case. Even assuming that there are 47 questions out of 1000 questions/distracters which are verbatim in the software of the plaintiff and the defendant, and assuming that the plaintiff is the copyright owner of its software, the software of the defendant gives the correct answer and also explains the reasons for the same. It is, therefore, entitled in its own right to a copyright protection being a derivative work which sources its information from various works.

101. At the same time, I cannot accept the plea of the defendant that it had developed its software through Mr.Amitabh Biswas and Mr.Sujit Senapati. No documentary proof thereof has been placed on record by the defendant. The only document relied upon by the defendant is a bank statement which shows certain payments being made to some persons. These entries, however, cannot be an evidence of payment being made for the Assessment of the copyright. However, the above would not be relevant to the facts of the present case



inasmuch as the onus of proving infringement is on the plaintiff, which it has failed to prove.

102. In view of the above, Issues (d) and (e) are decided against the plaintiff and in favour of the defendants.

Issue (f): Whether the plaintiff is entitled to any damages as claimed, if yes, to what amount? and

Issue (g): Whether plaintiff is entitled to rendition of accounts, if so to what effect? and

Issue (h): Whether plaintiff is entitled to the relief of permanent injunction?

103. As the plaintiff has failed to prove Issues (b), (d) and (e), it is not entitled to any relief under the Issues (f), (g) and (h). The said issues are, therefore, decided against the plaintiff and in favour of the defendants.

CONCLUSION:

104. In view of the above, I find no merit in the present suit. The same is dismissed.

105. The parties shall bear their own costs.

NAVIN CHAWLA, J.

AUGUST 21, 2023/Arya/RN/am/AS