
VIITH SURANA & SURANA AND SHAASTRA
INTELLECTUAL PROPERTY LAW MOOT COMPETITION, 2023 – 2024



BEFORE,
THIS HON'BLE COURT OF HILED

SAMAY SINHA **PLAINTIFF**

V.

EPIONA PRIVATE LIMITED **DEFENDANT**

[MEMORANDUM ON BEHALF OF THE PLAINTIFF]

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LIST OF ABBREVAITIONS

LLMs	Large Language Models
Hon'ble	Honourable
Pvt.	Private
Ltd.	Limited
SCC	Supreme Court Cases
IntCPM	Interactive Creative Pre-Conditioned Metamorphoser
CPM	Creative Pre-Conditioned Metamorphoser
API	Application programming interface
Anr.	Another
i.e.	That is
Etc.	Et Cetera
Ors.	Others

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STATEMENT OF JURISDICTION

The Hon'ble High Court of Hiled has the jurisdiction to hear this present matter under Section 20 of the Code of Civil Procedure, 1908.

Section 20, Code of Civil Procedure, 1908 is as follows:

“20. Other suits to be instituted where defendants reside or cause of action arises: -

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or

(c) The cause of action, wholly or in part, arises.”

STATEMENT OF FACTS

1. The Plaintiff, Samay Sinha, is an influential author who began his career in 1999. Subsequently, he continued to produce an extensive body of literature, garnering the interest of multiple age groups and demographics and spanning various genres. The Defendant, EPIONA, is a developer and seller of artificial intelligence products, and primarily creates LLMs, such as IntCPM, including CPM - 1, CPM -2, CPM - 3 and CPM - 4.
2. EPIONA, in its development of the IntCPM, utilized training datasets consisting of numerous unpublished books and copyrighted works, including that of the Plaintiff. In furtherance of the same, the Plaintiff issued a Cease-and-Desist Notice to EPIONA on 16th November, 2023, claiming that EPIONA used a substantial portion sourced from copyrighted works, without due credit, authorization or compensation in any form. Additionally, the Plaintiff claimed that EPIONA's controversial practice extends to sourcing books from shadow libraries, known to aggregate books illegally and make them available through torrent systems. The Plaintiff's primary contention was that when IntCPM was prompted to summarize books he authored, it produced accurate summaries based on unauthorized ingestion of his copyrighted materials.
3. On 14th December 2023, EPIONA issued a Reply Legal Notice stating that copyright only protected the manifestation of an idea and excluded protection for the underlying concept itself. The notice also stated that a tool extracting information about the original work did not constitute copyright infringement, as it did not replicate the protected expression. One of EPIONA's main contentions was that its use of copyrighted materials amounted to fair use and hence did not qualify as copyright infringement. On 4th January 2024, Samay Sinha filed a lawsuit in the High Court of Hiled, in response to EPIONA's unauthorized use of his registered copyright materials, violating the Indian Copyright Act, 1957.

STATEMENT OF ISSUES

The following issues are presented before this Hon'ble Court for its consideration:

~ISSUE I~

WHETHER THE HON'BLE HIGH COURT OF HILED CAN EXERCISE JURISDICTION
OVER THIS ISSUE?

~ISSUE II~

WHETHER EPIONA CAN BE HELD LIABLE FOR COPYRIGHT INFRINGEMENT?

~ISSUE III~

WHETHER THE USE OF COPYRIGHTED MATERIAL BY EPIONA AMOUNTS TO
FAIR USE?

~ISSUE IV~

WHETHER THE COPYRIGHTED WORK REPRODUCED BY EPIONA IS LIABLE TO
ATTRACT INJUNCTIONS AND DAMAGES?

SUMMARY OF ISSUES

ISSUE I: Whether the Hon'ble High Court of Hiled can exercise jurisdiction over this issue?

It is humbly submitted that the Hon'ble High Court of Hiled can exercise jurisdiction over this issue by virtue of Section 20 of the Code of Civil Procedure, 1908, in the following ways: a) the 'cause of action', i.e., the copyright infringement, occurred online; b) EPIONA's virtual presence is extraterritorial; and c) users across the country, including Hiled, had access to EPIONA's IntCPM.

ISSUE II: Whether EPIONA can be held liable for copyright infringement?

It is humbly submitted before this Hon'ble Court that EPIONA can be held liable for infringing the copyright held by Mr. Samay Sinha. As outlined under Section 51 of the Copyright Act 1957, EPIONA must be held liable for violating the copyright of literary works on the following grounds: (i) the use of literary works for training IntCPM has not been authorised and; (ii) the commercial nature of EPIONA's work is unjust to the authors and is further not maintainable by law.

ISSUE III: Whether the use of copyrighted material by EPIONA amounts to fair use?

The counsel submits that the reproduction of Samay Sinha's unpublished work by EPIONA does not qualify as fair use under the 'fair use' or 'fair dealing' doctrines. The submission emphasizes that the utilization exceeds permissible boundaries, considering factors such as the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the potential market for the original work.

ISSUE IV: Whether the copyrighted work reproduced by EPIONA is liable to attract injunctions and damages?

The counsel argues that EPIONA's reproduction of copyrighted work violates the author's rights under the Copyright Act, leading to infringement. As a result, EPIONA is deemed liable for both compensatory and pecuniary damages and is susceptible to an injunction order. Cases such as *My Space Inc. vs Super Cassettes Industries Ltd.*, emphasizing that injunctions have been granted to prevent further dissemination and profits derived from copyrighted material.

ARGUMENTS ADVANCED**~ISSUE I~****This Hon'ble High Court has the jurisdiction to entertain this particular issue**

1. Section 20 of the Code of Civil Procedure, 1908¹, lays down the following:

Other suits to be instituted where defendants reside or cause of action arises: -

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or

(c) The cause of action, wholly or in part, arises.

2. The Plaintiffs humbly contend this Hon'ble High Court of Hiled has the jurisdiction to entertain the suit filed by the Plaintiffs, and the same is maintainable under law. It is to be noted that as per the provisions of Section 20 (c) of the Code of Civil Procedure, 1908², a suit can be instituted in a Court having jurisdiction within whose limits the cause of action wholly, or in part, occurs.

3. It is humbly contended that in the present case, the Plaintiff filed a suit of copyright infringement against EPIONA, the developer and seller of IntCPM. EPIONA, by making use of copyrighted materials to train IntCPM, including works of the Plaintiff, Samay Sinha, has infringed the copyright

¹ Code of Civil Procedure 1908, s20

² Infra

of the author, without due credit or authorization. In furtherance of the same, it is to be noted that the infringement of copyright, thus, occurred online, and not within the territorial jurisdiction of any particular state. Moreover, it is also humbly submitted that the extent of IntCPM's online reach was extraterritorial, i.e., it was not limited to users specific to a geographical location. Technically, users all across the country had access to EPIONA's IntCPM.

4. It is humbly contended that with respect to Section 20 (c) of CPC 1908³, 'cause of action', in the present case refers to the copyright infringement. There was infringement of copyright on the work reproduced by EPIONA's IntCPM online. Furthermore, this reproduced work was accessible to users across the country. In light of the above facts, it is humbly contended that the 'cause of action' arose wholly on the internet, the contents of which were accessible by users all across the country, including Hiled. In furtherance of the same, it is contended that the High Court of Hiled has the appropriate jurisdiction to entertain this suit.

5. To substantiate the above submissions, the following case laws are submitted before this Hon'ble Court. In the case of *Indian Performing Right Society Ltd. v. Sanjay Dalia*⁴, it was held that if the plaintiff is residing or carrying on business in a place where the cause of action, wholly or in part, has also arisen, he has to file a suit at that place. Furthermore, in *Icon Health and Fitness Inc. v. Sheriff Usman and Anr.*⁵, the issue which arose for consideration was whether the Court had territorial jurisdiction to try the suit since the defendants are residing in United Arab Emirates and whether there was material to establish that the defendants were carrying on business from Delhi. Though the defendants were not residing in Delhi, however, the defendants were offering their fitness apps and bands through App Store, Google Play Store and e-commerce portals like www.amazon.in which can be accessed and operated from all over the country, including from

³ Infra

⁴ *Indian Performing Right Society Ltd. v. Sanjay Dalia* [2007] SCC OnLine Del 1164

⁵ *Icon Health and Fitness Inc. v. Sheriff Usman and Anr.* [2016] CS(COMM) 216/2016

Delhi. Thus, it was held that the defendants were carrying on business or working for gain at Delhi and this Court has territorial jurisdiction to try and decide the present suit.

6. The Supreme Court, in *Dhodha House v. S.K. Maingi*⁶, interpreted that "carrying on business" and "personally works for gain" are two distinct phrases. This is because the phrase "carrying on business" does not necessarily involve the presence of a man at a particular place. The court held that "carrying on business" essentially means not only having an interest in a business at a particular place but also a voice in what is done and a share in the gain/loss. Further, it was held that three conditions need to be satisfied for an entity, not physically present within the said jurisdiction, to "carry on business" under Section 62(2) of the Copyrights Act⁷ and Section 134(2) of the Trade Marks Act⁸. These conditions are as follows:

- a. The agent who the entity acts through it must be a special agent who exclusively attends to the business of such entity and acts in its name.
- b. Such an agent must be an agent in a strict sense of the term.
- c. The essential part of the business must be taken place within the jurisdiction in question

7. In light of the above submissions, it is clear that a) EPIONA was a business that had a virtual presence; b) outputs that were reproduced by EPIONA amounted to copyright infringement; and c) that 'cause of action' in the present case occurred over the internet, accessible to users across the country, including Hiled.

8. Thus, based on the above submissions, it is humbly contended that this Hon'ble High Court has the jurisdiction to entertain the suit, and the same is maintainable by law.

~ISSUE II~

⁶ *Dhodha House v. S.K. Maingi* [2006] 9 SCC 41

⁷ Indian Copyright Act 1957, s 62(2)

⁸ Trademarks Act 1999, s 134(2)

EPIONA can be held liable for infringement Copyright held by Samay Sinha

9. It is most humbly submitted before this Hon'ble Court that EPIONA can be held liable for copyright infringement. The Plaintiffs respectfully contend that EPIONA, in its training and functioning of the IntCPM model, has violated the copyright of various literary works held by authors. As outlined in Section 51⁹ of the Copyright Act, 1957, EPIONA can be held liable for infringing the copyright held by Mr. Samay Sinha. The Plaintiffs seek to substantiate this contention on the following grounds:

2.1. Unauthorised use of copyrighted work for training IntCPM

2.2. Commerciality of OpenAI

2.1. Unauthorised use of copyrighted work for training IntCPM

10. The underlying rationale behind the granting of Intellectual Property Rights is to foster creativity and innovation. The aim is to create an environment within which authors, musicians, artists, scientist, designers, etc have the scope to create and improve, as well as ensure economic growth. The copyright protection given to literary, musical, and other creative works is aimed at protecting the work of creators and encourage growth in various spheres. In India, copyright protection is governed by the Copyright Act, 1957.

11. Copyright protection grants exclusivity to the creators, and gives them the sole right to make copies, translations, adaptations, or to reproduce in any form¹⁰, their original creations. It has long been established that the guiding force of Copyright is to shelter creators and ensure that their works are economically and morally secure. In the present case, EPIONA is acting in gross violation of the copyright protection afforded to authors.

12. It is humbly submitted before this Hon'ble Court that EPIONA's Interactive Creative Pre-Conditioned Metamorphoser or IntCPM is, as suggested by the name, pre-conditioned or pre-trained by largely copying texts from various sources. It is a Large Language Model which is reliant upon the input training material in order to assemble a text output. Its interactive interface consumes the information and expression of the datasets that it is trained on, and its output is adjusted to closely resemble the sequences of words and expression which are copied from the training dataset.¹¹ It is respectfully put forth that many copyrighted works form a part of the datasets upon which IntCPM is

⁹ Indian Copyright Act 1957, s 51

¹⁰ Indian Copyright Act 1957, s 14

¹¹ Moot proposition, para 2

trained, including books written by the Plaintiff in this case.¹² The Plaintiffs contend that, when prompted, IntCPM can produce an accurate summaries of books written by the Plaintiff. The accuracy of the outputs and summaries produced by Int CPM is indicative of the fact that it has ingested and trained on the copyrighted works of the Plaintiff.

13. It is the respectful contention of the Plaintiff that the training of IntCPM on the copyrighted works of authors is wholly unauthorized and illegal. Section 14(a)¹³ of the Copyright Act, 1957 clearly outlines that the owner of the copyright has the exclusive right to reproduce or make copies, translations, adaptations, etc of the work. Further, it is outlined that any copies made in the *process* of, or in relation to an adaptation of the work would be protected by the copyright as well¹⁴.

14. The Plaintiff wishes to highlight before the Hon'ble Court that all the action taken by EPIONA in its training of IntCPM is violative of the abovementioned provision of the Copyright Act. In the process of training, copies of the literary works are made. The procedure for training IntCPM includes copying various literary works and feeding these copies into the model. This is essentially what constitutes a training dataset as being used by EPIONA. The material being used by EPIONA for training is effectively being copied without any form credit, consent, compensation, or due authorization.

15. It is further submitted before this Hon'ble Court that the output, or the work being done by IntCPM is inherently a derivative in nature. The output of IntCPM is unauthorized derivative works or adaptations of copyrighted material. The summaries being produced by IntCPM are consequential to the ingestion of the expressive work written by authors. As outlined in Section 14 of the Copyright Act, the owner of a copyright holds the right over any of the processes in relation to a derivative work, such as creating copies. In this case, EPIONA has not obtained the permission of the authors of any of the literary works upon which their output is based.

16. For a work to be classified as "original" under copyright law, it needs to have a certain degree of creativity in its application. When a literary creation is taken as inspiration by a human being, any output that they create will have an element of their own creativity and interpretation. However, an analysis of expressive works by a generative AI model such as IntCPM is done as a copying and analysing a literary work. Thereby, there will be now new addition of originality or novelty in the output created.

¹² Moot proposition, para 3

¹³ Indian Copyright Act 1957, s 14

¹⁴ Indian Copyright Act 1957, s 14 (a)(vii)

17. Therefore, the contention put forth by the Plaintiff is that the unauthorized training of IntCPM by EPIONA is infringing the copyright held the authors of literary works such as Mr. Samay Sinha.

2.2. Commerciality of OpenAI

18. The Plaintiffs humbly submit before this Hon'ble Court that the contention being put forth is that allowing generative Artificial Intelligence (AI) to be trained on copyrighted works is inherently unjust to the creators of these works.

19. It is the submission of the Plaintiffs that the rationale behind Intellectual Property Rights is to protect creators and promote and foster innovation. The power and rights of the creators is sought to be secured. As discussed in the previous point of contention, the training of generative AI such as IntCPM is sourced from copyrighted works. Large companies such as EPIONA are engaged in the creation of AI software. The rate of advancement of AI at the hands of the technological giants in the digital age is a major threat to the creators of literary works.

20. The use of large amounts of data is done on a wide scale. Text and Data Mining (TDM) is a process by which large amounts of information is analysed, thereby allowing for the detection of patterns, connections, and other discoveries. TDM, similar to the training of AI, is another threat to copyright, since a large amount of the data to be analysed might be protected by copyright.

21. However, many jurisdictions such as the United Kingdom and the European Union have allowed for the incorporation of Text and Data Mining as an exception to copyright protection. The benefits of TDM in terms of development and discoveries is weighed against the rights of the creators of these literary works. It is integral to note, however, that these exceptions are granted to TDM only under specifically outlined circumstances.

22. For instance, in the United Kingdom, the exception for TDM provided under Section 29A¹⁵ of the Copyright, Designs and Patents Act, 1988, clearly outlines that the exception is applicable only in cases where a person has *lawful access* to the work, and the analysis of such work is done for the sole purpose of research for a *non-commercial use*. "Lawful access" in this provision highlights that the copies made in the TDM process must be *authorised* by the owner of the copyright. Additionally, there is an emphasis on the use of such data for the purpose of non-commercial research only, and thereby the exception will not be applicable in cases where the data is used with a commercial or *profit-making motive*.

¹⁵ Copyright, Designs and Patents Act 1988, s 29 (a)

23. The Directive on Copyright in the Digital Single Market¹⁶ was an attempt made by the European Union to harmonize the approach of European member states in the matters of copyright. This directive also addresses the issue of Text and data Mining. The exception for TDM provided for is extended only to *educational or research institutions and institutions of cultural heritage*. Emphasis is laid on the public benefit that can be derived by these specific institutions when they are excluded from copyright infringement. It is stated that this exception cannot be afforded to those institutions or firms which do not act in public benefit.

24. It is most respectfully submitted by the Plaintiffs even by adhering to international standards, the actions of EPIONA cannot be justified.

25. EPIONA is an inherently commercial company which is generating financial gains from the use of the software IntCPM. It must be considered that there is no exception provided for Text and Data Mining or for machine learning within Indian Law. However, even if an international standard such as that of the United Kingdom or the European Union is applied, the unauthorized training of IntCPM would still amount to copyright infringement.

26. EPIONA is a company which functions for the purpose of generation of profits. If the unauthorized training of IntCPM on copyrighted works is allowed to be done without compensation or consent, it can be detrimental to the authors of these works. Once trained on the expression and overall interpretation of an author's work, IntCPM will be fully equipped to reproduce a new creation in the same way as the author.

27. The speed, scale and accuracy of reproduction by IntCPM would put all authors at an inherent disadvantage as compared to the software. The use of a creation of an author would be aiding in the strengthening of the AI. The authors would be inadvertently contributing to their own competition. This is a gross injustice to creators and goes against the basic tenets of Intellectual Property Rights.

28. This issue is one which has been, or is being faced by creators and authors all over the world. The *Thomson Reuters v. Ross Intelligence Inc.*¹⁷ is one of the primary cases in the United States District Court in Delaware.

29. *Tremblay v. OpenAI, Inc.*¹⁸ and *Silverman v OpenAI, Inc.*¹⁹ are two prominent cases filed in the United States which aim to argue questions which are similar to the ones that are due before this

¹⁶ Directive (EU) 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019]

¹⁷ *Thomson Reuters Enter. Ctr. Gmbh v. Ross Intelligence Inc.* [2023] 1:20-cv-613-SB

¹⁸ *Tremblay v. OpenAI, Inc.* [2023] 3:23-cv-03223-AMO (N.D. Cal. Nov. 9, 2023)

Hon'ble Court. Various class action lawsuits have been filed on this very matter, which is indicative of the fact that this is an issue of serious concern to creators all over the world.

~ISSUE III~

The copyrighted work of Samay Sinha reproduced by EPIONA does not amount to fair use

30. The counsel humbly submits before this Hon'ble Court, the assertion that the utilization of the unpublished work of Samay Sinha by IntCPM, involving a considerable portion of reproduced content that qualifies as copyrighted material, does not align with the principles of 'fair use' doctrine or the 'fair dealing' doctrine. It is firmly contended that the utilization in question exceeds the permissible boundaries set by these legal doctrines, which are designed to safeguard intellectual property rights and promote equitable use of creative works.

3.1 EPIONA's utilization does not align with the 'fair use' criteria established by international precedents

31. The counsel humbly submits that, over the course of decades since the establishment of protection of various categories of work under the Copyrights Act, the chief purpose has been to promote creativity and innovation²⁰. The doctrine of Fair Use²¹ (as referred to in the US legal system) or 'fair dealing'²² (as referred to in English and Indian law), the fundamental principle of Copyright law equated to this doctrine plays a crucial role in distinguishing between lawful and genuine fair uses of a work from dishonest and outright copies of the same.

32. The counsel further submits the cases of *Hubbard v Vosper*²³ and *Folsom vs. Marsh*²⁴, which are the leading cases that established eligibility under 'Fair use' in UK and USA respectively. Section 107 subsequently enumerates four factors to be considered in assessing whether the use of a work in a specific instance qualifies as fair use i.e. (1) The purpose and character of the use, (2) The nature of

¹⁹Silverman v. OpenAI, Inc. [2023] (3:23-cv-03416)

²⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, World Trade Organisation [1995]

²¹ Justice Story's 1841 Judgment in *Folsom vs. Marsh*. F. Cas. 342

²² Copyright, Designs and Patents Act 1988, s 29 (Eng.); The Copyright Act 1957, s 52

²³ *Hubbard v Vosper* [1972] 2 Q.B. 84

²⁴ *Folsom vs. Marsh* [1841] F. Cas. 342

the copyrighted work, (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole, (4) The effect of the use upon the potential market for or value of the copyrighted work²⁵. The counsel will further elucidate as to how the reproduction of Samay Sinha's work does not amount to fair use under the above-mentioned factors.

3.1.1 The purpose and character of the use

33. The counsel contends that, in the first factor, courts take into account a variety of considerations, including whether the defendant's use was *commercial/ non-commercial* and whether that use was "transformative"²⁶ - A transformative work, in the fair use sense, is one that imbues the original "with a further purpose or different character, altering the first with new expression, meaning, or message"²⁷. In this particular case before this Hon'ble Court, the reproduced work is a mere summarisation of the original work, therefore there is no element of 'transformation' apart from the compilation of the historical work in a lesser number of words. Hence, determining transformativeness involves more than gauging the extent of difference between two works; instead, it requires an evaluation of the intent and significance underlying those distinctions. That lack of modifications is concerning when the purposes of the works are similar²⁸.

34. The counsel further submits that, the degree of transformitiveness is also integral to claim 'fair use doctrine', if the transformation is '*minimal*'; constitutes '*partly*' or '*somewhat*' transformative, there can be no attraction of fair use.²⁹ Considering how the reproduced work consisted of elements of the book that could only be known if one read the book, the degree of transformation is close to minimal.

35. Similarly, repackaging the work in a different format or medium qualify as transformative,

²⁵ Copyright Act of 1976, 17 U.S.C, s 107

²⁶ Campbell v. Acuff-Rose Music, Inc. [1994] 510 U.S.

²⁷ *Id.* at 26.

²⁸ Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc. [1997]109 F.3d 1394 (9th Cir. 1997)

²⁹ Gulfstream Aerospace Corp. v. Camp Systems Intl [2007] 405CV018 (S.D. Ga. Aug. 30, 2007)

absent a different expressive purpose in doing so³⁰. Therefore, the summarization does not constitute ‘transformitiveness’.

36. The counsel also humbly submits the test of ‘*expressive purpose*’³¹ as well as ‘*interpretive purpose*’³² i.e. the purpose with which the Plaintiff produced the work distinguished from the purpose with which the work was reproduced also indicate a level of transformativeness (Expressive purpose); the purpose the reader or audience interpret from the original as well as the reproduced work contributes to the recognition of transformation (Interpretive purpose). In this case, the counsel contends that, while the expressive purpose of EPIONA is ambiguous and vast, the contention that the purpose of both the parties are not the same cannot be made. Similarly, from the perspective of an “*ordinary & reasonable person*” there can be a clear overlap in the interpretive purpose³³.

3.1.2 The nature of the copyrighted work

37. The counsel humbly submits that the courts have typically distilled the “nature” of the work into two more tractable considerations: whether the plaintiff’s work is creative as opposed to informational³⁴ and whether the work is unpublished, as opposed to published³⁵. In this case, there is not significant ‘creative shift’ in the reproduced work by IntCPM, although the conclusion that the reproduced work is informational cannot be made, the conclusion that the work is ‘creative’ can definitely not be made; keeping in mind the reproduced work is a summary of the original book.

38. Similarly, the unpublished nature of work, can weigh against a finding of fair use. In 1985, a majority of the Supreme Court declared in *Harper & Row, Publishers, Inc. v. Nation Enterprises* that “under ordinary circumstances, the author’s right to control the first public appearance of his

³⁰ Soc’y of the Holy Transfiguration Monastery, Inc. v. Denver [2012] 689 F.3d 29, 2012 Copyright L. Dec. (CCH) 30297, 103 U.S.P.Q.2d (BNA) 1585 (1st Cir. 2012); Infinity Broadcasting Corp. v. Kirkwood [1999] 63 F. Supp. 2d 420 (S.D.N.Y. 1999)

³¹ Bill Graham Archives v. Dorling Kindersley Ltd. [2006] 448 F.3d 605, 615 (2d Cir. 2006); Warren Publ’g Co. v. Spurlock [2009] 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009)

³² Twentieth Century Music Corp. v. Aiken [1975] 422 U.S. 151, 156

³³ Laura A. Heymann, Everything Is Transformative: Fair Use and Reader Response, [2008] 31 COLUM. J.L. & ARTS 445, 449

³⁴ Leadsinger, Inc. v. BMG Music Publ’g [2007] 512 F.3d 522, 531 (9th Cir. 2007)

³⁵ Harper & Row, Publishers, Inc. v. Nation Enters. [1985] 471 U.S. 539, 564

undisseminated expression will outweigh a claim of fair use”³⁶Hence, the rights of the original creator under *‘first use’* is attracted in this case. Hence, the reproduction of the ‘unpublished’ books will negate protection under ‘fair use’.

3.1.3 The amount and substantiality of the portion used

39. The counsel humbly submits that Courts, over decades, have employed both quantitative and qualitative methods to evaluate the extent and significance of the portion used. The assessment involves questions such as "what proportion of the original work is utilized" and "is the portion used of substantial importance to the work"? While there are no specific benchmarks for quantity, a higher percentage of the original work used tends to lean against fair use. Even if the percentage is relatively modest, if the material used holds pivotal importance to the overall work, this factor may still weigh against fair use³⁷. Hence, the reproduced work containing elements of the original book, that constitutes integral parts of the book will not attract the ‘fair use’ doctrine.

3.1.4 The effect of the use upon the potential market for or value of the copyrighted work

40. The counsel further submits, in the past three decades according to investigations conducted by Beebe³⁸, fair use cases have been heavily influenced by either *“Market Centered Paradigm”* or *“Transformative Paradigm”*. The market-centered paradigm treats fair use as an anomalous exception to the copyright owner's exclusive rights, applicable only in cases of irremediable market failure. It owes its origin to Professor Wendy Gordon's highly influential law review article, in which Gordon argued that fair use should be available only when the defendant meets the heavy burden of proving both that high transaction costs pose a very high obstacle to copyright licensing and that the use serves an identifiable public benefit that would outweigh any harm caused to the copyright

³⁶ *Id.* At 16

³⁷ Copyright and Fair Use: A Guide for the Harvard Community, Harvard Edu. [2023]; S.K. Dutt v. Law Book Co. And Ors. [1953] AIR 1954 All 570; Blackwood and Sons Ltd. And Ors. v. A.N. Parasuraman and Ors. [1958] AIR 1959, 410

³⁸ Braton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019 [2020]

owner by granting fair use³⁹. The question that arises before this court with respect to market harm, is whether the summarization of the original work, creates a '*alternative market*', hence creating a competition for the sales of the original work of the Plaintiff. The answer to this question is in the affirmative, as the readers of the work reproduced by EPIONA will not require reading the entire work in order to obtain information elucidated in the book, hence creating an alternate market and driving away the possible consumers of the Original Historical work of Samay Sinha.

3.2 EPIONA's utilization does not align with the 'fair use' criteria established by National precedents

3.2.1 Section 52 of the Copyright Act of 1957

41. The counsel submits that, in India, established exemptions or defences against copyright infringement are outlined in Section 52 of the Copyright Act, 1957. The concept of fair dealing ensures that for a reproduced work to be considered 'fair,' its purposes must align with the statutorily defined objectives of private use, research, criticism, and review⁴⁰. The fair dealing exception is not explicitly defined in the Act but originates from the '*principles of equity*'⁴¹. Which signifies that it validates the unauthorized use of a copyrighted work based on the specific facts and circumstances of a given case. 42. Drawing a parallel between the factors established by sec.107 of the Copyrights act of USA as well as sec. 52 of the Indian Copyright Act, cases such as *Wiley Eastern Ltd. And Ors. vs Indian Institute of Management*⁴², *R.G Anand vs M/S. Delux Films & Ors*⁴³, *S.K. Dutt vs Law Book Co. And Ors*⁴⁴ and *ESPN Stars Sports v Global Broadcast News Ltd and Ors*⁴⁵, elucidate the degree of transformativeness as well as the purpose of reproduction will not attract 'Fair dealing' if the work is a mere summarization without any element that sets the work apart from the original. In

³⁹ Gordon, Wendy J, Fair Use as Market Failure: A Structural and Economic Analysis of the 'Betamax' Case and Its Predecessors, Columbia Law Review 82, [1982]

⁴⁰ The Copyright Act 1957, s 52

⁴¹ Harper & Row Publishers v. Nation Enterprises [1985] 471 US 539

⁴² Wiley Eastern Ltd. And Ors. vs Indian Institute of Management [1996] DLT 281

⁴³ R.G Anand vs M/S. Delux Films & Ors. [1978] AIR 1613

⁴⁴ S.K. Dutt vs Law Book Co. And Ors. [1953] AIR 1954 All 570

⁴⁵ Espn Stars Sports v. Global Broadcast News Ltd. [2008] SCC OnLine Del 1766

this case before this Hon'ble court, the counsel contents that the actions of EPIONA while consuming unpublished works of Samay Sinah to provide summaries that consist of integral elements of the Historical work cannot attract protection under the Doctrine of 'Fair use' as established by the precedents argued above.

~ISSUE IV~

The Copyrighted Work reproduced by EPIONA is liable to attract injunction and Pay

Damages

43. The counsel humbly submits, that the protection under copyright emerges when the work becomes tangible. Hence, Samay Sinha in this case is protected by the Copyright Act under Sections 14⁴⁶, 17⁴⁷, 51⁴⁸, 55⁴⁹ and Section. 2(ff)⁵⁰, which refers to 'first use' rights as well as "communication to public". Considering as to how the rights to communicate to the public, which lies with the author has been violated by the reproduction, it amounts to infringement and EPIONA in this case is liable to not only pay damages (Compensatory & Pecuniary) but also attracts an order of Injunction.

44. The counsel humbly submits the cases of *My Space Inc. vs Super Cassettes Industries Ltd*⁵¹., *Yash Raj Films Pvt Ltd vs Sri Sai Ganesh Productions & Ors*⁵² and *Microsoft Corporation vs Mr. Yogesh Papat and Anr*;⁵³ Where the interim injunction so granted resulted in a Permanent injunction so as to prevent the Defendant from continuing to provide public access to the copyrighted material and prevent any further profits the defendant can reap from the dissemination.

45. The counsel would like to submit the cases of *Microsoft Corp. v. Rajeev Trehan*⁵⁴, *Microsoft Corporation v. Deepak Raval*⁵⁵, *Larsen and Toubro Limited v. Chagan Bhai Patel*⁵⁶ and *Time*

⁴⁶ The Copyright Act 1957, s 15

⁴⁷ The Copyright Act 1957, s 17

⁴⁸ The Copyright Act 1957, s 51

⁴⁹ The Copyright Act 1957, s 55

⁵⁰ The Copyright Act 1957, s 2(ff)

⁵¹ *My Space Inc. vs Super Cassettes Industries Ltd.* [2016] SCC Online Del 6382 [2016]

⁵² *Yash Raj Films Pvt Ltd vs Sri Sai Ganesh Productions & Ors* [2019] C.S (Comm). No. 1329 of [2016]

⁵³ *Microsoft Corporation vs Mr. Yogesh Papat and Anr.* [2005] DLT 580 [2005]

⁵⁴ *Microsoft Corp. v. Rajeev Trehan*, [2014] CS(OS) 130[2008]

⁵⁵ *Microsoft Corporation v. Deepak Raval*, [2007] MIPR (1) 72 [2007]

*Incorporated v. Lokesh Srivastava and Anr*⁵⁷, all of which reiterate the fact that, in cases when the exact monetary losses cannot be accounted for, illegal profits have been gained by the defendant which has led to actual loss of revenue for the Author. Beyond proving the case, the discretion lies in the hands of the court to order for payment for compensatory as well as pecuniary damages so as to discourage the wrong doer from breaking the law which will result in losses to the defendant as well.

⁵⁶ *Larsen and Toubro Limited v. Chagan Bhai Patel* [2009] MIPR 2009 (1) 194.

⁵⁷ *Time Incorporated v. Lokesh Srivastava and Anr* [2005] (30) PTC 3 (Del)

PRAYER

Wherefore, in light of the issues raised, authorities cited and arguments advanced, the Hon'ble High Court of Hiled be pleased to:

Hold that there was Copyright Infringement on the part of the Defendant.

1. Grant an Interim injunctive relief as well as Final Injunctive relief to prevent further unauthorized use of Plaintiffs' copyrighted materials.
2. Grant an award of Compensatory damages for the copyright infringement;
3. Grant accounts of profits derived from the unauthorized use of Plaintiffs' copyrighted materials, including attorneys' fees and costs incurred in bringing this action; or
4. Any further relief the Court deems just and proper

AND/OR

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience.

All of which is most humbly and respectfully submitted.

Counsel on behalf of the Plaintiffs

Sd/-

