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VII<sup>TH</sup> SURANA & SURANA AND SHAASTRA  
INTELLECTUAL PROPERTY LAW MOOT COMPETITION, 2023 – 2024

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*BEFORE,*  
THIS HON'BLE COURT OF HILED

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SAMAY SINHA

..... PLAINTIFF

V.

EPIONA PRIVATE LIMITED

.....DEFENDANT

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[WRITTEN SUBMISSIONS ON BEHALF OF THE DEFENDANT]

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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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**INDEX OF AUTHORITIES**

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1. Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy, 2009 SCC OnLine Del 3780.
2. Impresario Entertainment & Hospitality Pvt. Ltd. v. S & D Hospitality, [2018] MANU/DE/0002/2018
3. RG Anand v. M/s Delux Films & Ors [1978] AIR 1613, 1979 SCR (1) 218
4. Aarur Tamilnadan v. S. Sankar [2023] SCC OnLine Mad 3930

**II. FOREIGN CASES**

1. Folsom v. Marsh [1841] 9. F. Cas. 342.
2. Hubbard v Vosper [1972] 2 Q.B. 84.
3. Andersen v. Stability AI Ltd. [2023] 23-cv-00201-WHO (N.D. Cal. Oct. 30, 2023)
4. Authors Guild v. Google, Inc. [2015] 804 F.3d 202, 116 U.S.P.Q.2d (BNA) 1423 (2d Cir. 2015)
5. Harper & Row Publishers Inc. v. Nation Enter. [1985] 471 U.S. 539, 549
6. Campbell v. Acuff-Rose Music, Inc. [1994] 510 U.S. 569, 577
7. Blanch v. Koons [2006] 467 F.3d 244, 253 (2d Cir. 2006)
8. Perfect 10, Inc. v. Amazon.com [2007] Inc., 508 F.3d 1146 (9th Cir. 2007)
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17. Eldred v. Ashcroft [2003] 537 U.S. 186
18. Cartoon Network v. CSC Holdings [2008] 536 F.3d 121 (2d Cir. 2008)

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2. Tushnet, Rebecca, "Content, Purpose, or Both?" [2015] Georgetown Law Faculty Publications and Other Works, 90 Wash. L. Rev. 869-892
3. Sag, Matthew, Predicting Fair Use [2012] Ohio State Law Journal, Vol. 73:1 47-91

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6. Quang j, 'Does Training AI Violate Copyright Law?' Vol. 36:1407 Berkeley Technology Law Journal [2023]

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2. Lionel Bently and Brad Sherman, Intellectual Property Law (3rd edn, Oxford University Press) [2020]
3. Pamela Samuelson, Internet Copyright Law (4th edn, Aspen Publishers) [2023]
4. T.R Srinivas Iyengar, Iyengar's Commentary on The Copyright Act (Universal Law Publishing co. Pvt. Ltd., [2010]
5. Melville B. Nimmer, Nimmers on Copyright, (Matthew Bender Elite Products) [2023]

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**STATEMENT OF JURISDICTION**

The Defendants humbly contend that this Hon'ble High Court does not have the jurisdiction to entertain this present matter. The Defendants reject the maintainability of the suit before this Hon'ble High Court of Hiled, as contended by the Plaintiffs.

## STATEMENT OF FACTS

1. Samay Sinha, the Plaintiff, 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, some of which happened to include that of Samay Sinha. In furtherance of the same, Samay Sinha 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. 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. Further, the notice also stated that there was no substantial similarity between the two works, and hence it failed to qualify as a 'copy' or a 'derivative work.' Moreover, 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.



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**STATEMENT OF ISSUES**

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

**~ISSUE I~**

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

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**~ISSUE II~**

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WHETHER EPIONA CAN BE HELD LIABLE FOR COPYRIGHT INFRINGEMENT?

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**~ISSUE III~**

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

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**~ISSUE IV~**

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

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**SUMMARY OF ISSUES**

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**ISSUE I**

The Defendants humbly contend that the Hon'ble High Court of Hiled does not have jurisdiction to entertain the Plaintiff's suit. As per Section 62(2) of the Indian Copyright Act, 1957<sup>1</sup>, the appropriate jurisdiction lies with the District Court within whose jurisdictional limits the plaintiff resides or carries on business.

**ISSUE II**

It is humbly submitted before this Hon'ble Court that EPIONA cannot be held liable for infringing the copyright held by Mr. Samay Sinha. The Defendants contend that (i) the training of IntCPM is maintainable by law and does not violate the copyright of authors and; (ii) the output produced by IntCPM is not comparable to the literary works of the authors and does not bear substantial similarity to the same.

**ISSUE III**

The counsel submits that EPIONA's reproduction of Samay Sinha's historical work qualifies as fair use under the 'fair use' and 'fair dealing' doctrines. Citing international precedents and legal principles, the counsel contends that the summarization serves various purposes. The submission addresses factors such as transformativeness, creative shift, and the impact on the market, asserting that the reproduction aligns with fair use criteria.

**ISSUE IV**

The counsel argues against the grant of injunction and payment of damages for the copyrighted work reproduced by EPIONA. By citing relevant cases, the counsel emphasizes the need to satisfy a four-factor test for injunctive relief, asserting that all factors are not met in this case.

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<sup>1</sup> Indian Copyright Act 1957, s 62(2)

**ARGUMENTS ADVANCED****~ISSUE I~****The Hon'ble High Court of Hiled cannot exercise jurisdiction over this issue**

1. Section 62 of the Indian Copyright Act, 1957<sup>2</sup> [hereinafter, 'the Act'] states the following:

Jurisdiction of court over matters arising under this Chapter. —

(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a “district court having jurisdiction” shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908)<sup>3</sup>, or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

2. According to the provisions of Section 62 of the Act<sup>4</sup>, it is clear that the section demands territorial jurisdiction of a district court having the jurisdiction. It also explicitly mentions that at the time of institution of the suit, the person instituting the suit will have to do so in a court having appropriate jurisdiction.

3. In the present case, the Plaintiff, Samay Sinha, currently lives in Kolkata, in the State of West Bengal.<sup>5</sup> According to the provisions of this Act, the appropriate court having the jurisdiction to entertain this suit would be the District Court within local limits of whose jurisdiction the Plaintiff voluntarily resides and/or carries on business.

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<sup>2</sup> Indian Copyright Act 1957

<sup>3</sup> Code of Civil Procedure 1908, s 20

<sup>4</sup> Indian Copyright Act 1957, s 62(2)

<sup>5</sup> Moot Proposition

The Plaintiff, by failing to approaching the appropriate District Court having jurisdiction, has not abided by the provisions of Section 62 of the Indian Copyright Act, 1957<sup>6</sup>. Furthermore, the Plaintiff, Samay Sinha, by directly instituting the proceedings in the High Court of Hiled, has grossly violated the provisions of this Act.

4. In *Banyan Tree Holding Pvt. Ltd. v. A Murali Krishna Reddy*<sup>7</sup>, the Supreme Court analysed the position of law in determining the 'cause of action' as well as the jurisdiction of a court where a) the passing off and/or infringement happens on a website and b) neither of the parties were located within the territorial jurisdiction of the court.

In determining the same, the Supreme Court came up with the following observations:

- i) Mere interactivity of the defendant's website that is accessible in the forum state would not give jurisdiction to the court.
- ii) The plaintiff would have to prove that the defendant "purposefully availed" the jurisdiction of the forum court.
- iii) The plaintiff would have to prove that the defendant specifically targeted the consumers of the forum state for commercial transactions, thereby causing harm/injury to the plaintiff in the forum state. Further, the plaintiff would have to prove that accessibility of the defendant's website had an injurious effect on the plaintiff's reputation/business/goodwill.
- iv) The plaintiff would have to prove that such commercial transactions are real commercial transactions and not "trap transactions" set up by the plaintiff.

5. The Defendants humbly contend that as per the Supreme court's holdings in the *Banyan Tree case*<sup>8</sup>, the mere interactivity of the website that is accessible in the forum state would not give jurisdiction to the court. Thus, the Plaintiffs will be wrong in law to claim that merely due to the fact that their website is accessible to users in Hiled, they are right to approach the High Court of Hiled as the appropriate court of justice.

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<sup>6</sup> Supra

<sup>7</sup> *Banyan Tree Holdings Ltd. v. M. Murali Krishna Reddy*, [2008] SCC OnLine Del 1740

<sup>8</sup> Id.

6. To substantiate the aforementioned contention, the Defendants would like to submit the case of *Impresario Entertainment & Hospitality Pvt. Ltd. v. S & D Hospitality*<sup>9</sup>, which upheld the decision laid down in the *Banyan Tree case*<sup>10</sup>. In the aforementioned case, it was held that a 'mere accessibility of the defendant's website by the consumers in the forum state and a "passive website" that does not specifically target the consumers of the forum state cannot give jurisdiction to the court'. It is humbly submitted that emphasis is to be given to this holding of the Supreme Court, because this holding lays emphasis on two important concepts. Firstly, it upholds the decision in the *Banyan Tree case*<sup>11</sup> by stating that a mere accessibility of the defendant's website in the forum state is not enough a criterion on its own to attract jurisdiction of the court in the forum state. Secondly, and more importantly, it lays down that a 'passive website' cannot grant jurisdiction to the court. It is to be noted that for the purpose of this judgement, a 'passive website' is one which does not specifically target consumers of a particular state, and does not entertain any interactional activity on its website.

7. The Defendants humbly contend that their LLM, IntCPM, is accessible to users throughout the country, and is not limited to any specific geographical location. In furtherance of the same, the Defendants would like to humbly contend that the appropriate court which would have the jurisdiction for the aforementioned case would be the District Court which has the jurisdiction within local limits of where the plaintiff resides, or carries on business. Thus, with respect to the above case, the District Court of Kolkata would have the appropriate jurisdiction to entertain the Plaintiff's suit, as the Plaintiff currently lives in Kolkata, West Bengal.<sup>12</sup>

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<sup>9</sup> *Impresario Entertainment & Hospitality Pvt. Ltd. v. S & D Hospitality*, [2018] MANU/DE/0002/2018.

<sup>10</sup> *Supra*

<sup>11</sup> *Id.*

<sup>12</sup> Moot Proposition

8. Thus, the Defendants humbly contend that the High Court of Hiled does not have the appropriate jurisdiction to entertain this suit, and the Plaintiff's suit will not be maintainable.

**~ISSUE II~**

**EPIONA cannot be held liable for infringing the copyright held by Samay Sinha**

9. It is humbly submitted before this Hon'ble Court that EPIONA cannot be held liable for infringing the copyright held by Mr. Samay Sinha. This contention is sought to be substantiated on the following grounds:

2.1. The training of IntCPM as done by EPIONA is maintainable by law.

2.2. There is no substantial similarity between Samay Sinha's work and the output reproduced by EPIONA.

**2.1. The training of IntCPM as done by EPIONA is maintainable by law**

10. It is respectfully put forth before this Hon'ble Court that the contention of the Plaintiffs in this case is not sustainable on law or facts.

11. It is alleged by the Plaintiffs that the training of IntCPM by EPIONA is violative of the copyright held by Mr. Samay Sinha. The contention put forth by the Plaintiffs is that such a training done by IntCPM is illegal in nature. It is put forth by them that the expressive work of authors and creators is being appropriated by EPIONA. The Defendants wish to humbly put forth that the training of IntCPM as done by EPIONA is maintainable by law, and does not infringe the copyright held by the creators of these works.

12. It is the humble submission of the Defendants in this case is that copyright protection is afforded to the specific manner of expression of an author or creator. There is no protection afforded to concepts, ideas, themes, and data in general. The rationale of Intellectual Property Rights is foster creativity and innovation. The exclusion of these larger ideas from the ambit of copyright protection is to ensure sustainable growth and development.

13. In case protection is granted to overarching themes, concepts and ideas, no future creator would be able to innovate on the same. As an alternative, they will face great costs to be able to create within that sphere. The basis for Intellectual Property Rights and likewise copyright, is to ensure economic and innovative advancement.

14. It cannot be contended by any creator under the Indian Copyright Act, 1957<sup>13</sup> that they hold a copyright over a specific genre of writing or creative expression. In the seminal judgement of *RG Anand v. M/s Delux Films & Ors*<sup>14</sup>, a three-judge bench of the Hon'ble Supreme Court of India held that there can be no copyright in principle, subject matter, themes, plots or historical or legendary facts. Violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.<sup>15</sup>

15. It is humbly submitted before this Hon'ble Court that the contention of the Plaintiffs in relation to copyright infringement would be maintainable only if general plots, themes, ideas and concepts were copyrightable. However, since they are not copyrightable, the contention lacks merit.

16. The Defendants seek to substantiate this claim with a submission about the working of the training system of IntCPM. Training of the model of IntCPM is done solely to extract ideas and patterns from data, which is unprotectable by law. During the ingestion and training of IntCPM, the primary process which is underway is an analysis and understanding of larger patterns, connections, ideas, concepts, and themes, which is thereby internalised by the artificial intelligence (AI).

17. Under copyright law, there is a stark distinction between the *creative expression* and *unprotectable ideas*. It is the humble submission of the Defendants that the expressive data is not being analysed and utilized for its expressive purpose, rather it is being used for a

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<sup>13</sup> Indian Copyright Act, 1957

<sup>14</sup> *RG Anand v. M/s Delux Films & Ors* [1978] AIR 1613, 1979 SCR (1) 218

<sup>15</sup> *Id*

*functional* or non-expressive use. The distinction between these two modes of use is seen by the nature of the output being created after the training of IntCPM. The data internalized by IntCPM is not being utilized for a specific expressive purpose such as the writing and creating of new literary works. There is an analysis being carried out in relation to the larger ideas related to the literary texts, based upon which a summary may be created.

18. Word frequencies, syntactic patterns and thematic markers within the said works is analysed in the process of training and research of IntCPM. Algorithms are trained to identify patterns from data and understand statistical and other objective information from literary works. Technical or non-expressive use and analysis of literary works included in the training of IntCPM is done on the basis of larger, non-copyrightable ideas, and does not make use of the expressive aspect of the works.

19. It is humbly submitted by the Defendants that the law does not recognise the claim of the Plaintiffs insofar as it aims to claim copyright over all aspects of a literary work. Copyright law is intended to protect creative and expressive work. The functional ideas within these expressive works are the basis of analysis of IntCPM.

**2.2. There is no substantial similarity between Samay Sinha's work and the output reproduced by EPIONA**

20. It is respectfully argued before this Hon'ble Court that the contention of the Plaintiffs as regards the derivative nature and substantial similarity of the works is not maintainable.

The Defendants humbly put forth that there is no substantial similarity and is it contended that the two works must be compared in an objective manner. Primarily, it is the contention of the Defendants that all elements of the work which are *not* copyrightable in nature, such as the theme, idea, concept, etc. be disregarded from this analysis. This principle has also been



put forth in a number of cases such as *Andersen v. Stability AI Ltd.*<sup>16</sup> Following this, the remaining parts which are eligible for protection must be viewed in isolation to exhibit substantial similarity. It is humbly contended that the expressive work contained in the literary works themselves and the summaries produced by IntCPM are not substantially similar in any sense.

21. As held in the *RG Anand*<sup>17</sup> case, when the same concept developed in different manners, there are bound to be some similarities. However, there should be a substantial similarity in the fundamental aspects of expression of the contested works.

It is contended before this Hon'ble Court that IntCPM is functioning as a tool for extracting information, but does not replicate the creative expression of any of these works.

Additionally, it is most respectfully submitted that the purpose of the creation of the two contested works is radically different. It must be kept in mind that while the works of authors such as Mr. Samay Sinha are aimed at literary innovation and progress, the works of IntCPM in summarizing these works is purely analytical in nature.

The works of these authors are being used for the furtherance of Artificial Intelligence and for the education of the public in general. Various international jurisdictions have acknowledged the importance of AI in the advancement of science and technology. The European Union, the United Kingdom, the United States of America and other prominent IPR jurisdictions are making provisions to allow for the improvement and growth of AI in a balance with copyright law.

22. In the case of *Authors Guild v. Google, Inc.*<sup>18</sup>, a court in the United States of America held that allowing for a balance between AI and copyright law is beneficial since the ultimate goal of copyright is to expand public knowledge and understanding. Thereby, it is

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<sup>16</sup> *Andersen v. Stability AI Ltd.* [2023] 23-cv-00201-WHO (N.D. Cal. Oct. 30, 2023)

<sup>17</sup> *Supra*

<sup>18</sup> *Authors Guild v. Google, Inc.* [2015] 804 F.3d 202, 116 U.S.P.Q.2d (BNA) 1423 (2d Cir. 2015)

respectfully contended before this Hon'ble Court that the larger impact of this balance between AI and copyright laws is highly integral to be considered.

**~ISSUE III~**

**Samay Sinha's work as reproduced by EPIONA amounts to fair use**

23. The counsel humbly submits before this hon'ble court, the assertion that the reproduction of the work of Samay Sinha by IntCPM, involving summarisation of the historical work, does align with the principles of 'fair use' doctrine or the 'fair dealing' doctrine. It is firmly contended that the utilization of the work for the purpose of summarization falls within the facts established under the doctrine as the objective of protection under copyrights is to foster creativity for various uses and to maintain an environment where innovation is not restricted.<sup>19</sup> Preventing IntCPM from utilising information from books, such as that of Samay Sinha's will not curtail the access of information to the public but also the multiplicity of uses the consumers of IntCPM are deriving from the LLM.

24. The uncertainty surrounding the applicability of protection under copyright has reportedly led to art historians avoiding writing historically oriented texts, a perceived decline in academic freedom and self-censoring among editors<sup>20</sup>, which goes against the fundamental principle of copyright i.e. to foster creativity.

**3.1.1. EPIONA's utilization does align with the 'fair use' criteria established by international precedents**

25. The counsel humbly submits the case of *Hubbard v. Vosper*<sup>21</sup>. In the United Kingdom, Chapter 3 of the Copyright Act deals with the 'fair dealing' doctrine, which provides various exceptions for the purposes of private study, research, educational purposes, use in libraries

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<sup>19</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, World Trade Organisation, 1995.

<sup>20</sup> Sites, Fair Use and the New Transformative [2016] 39 COLUM. J.L. & ARTS 513

<sup>21</sup> *Hubbard v Vosper* [1972] 2 Q.B. 84

and archives etc, and *Folsom vs. Marsh*<sup>22</sup>, which are the leading cases that established eligibility under 'Fair use' in UK and USA respectively. In the United States, the criteria mentioned in Section 107 of the United States Code, serve as the foundation for evaluating 'fair use.' Despite appearing to be objective criteria, they are highly subjective, and the determination of whether a specific use is fair largely relies on the factual circumstances of each case.<sup>23</sup> In the case of *Campbell v. Acuff-Rose Music, Inc.*<sup>24</sup> It was established that the courts should avoid bright – line rules so as to determine 'fair use' rather the interpretation should be in light of the purposes of the original as well as the reproduced work. Hence, in the case before this hon'ble court, the counsel contents that the facts of the case, under these circumstances must be given heed to.

26. The counsel submits Section 107<sup>25</sup> 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 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 work<sup>26</sup>. The counsel will further elucidate as to how the reproduction of Smay Sinah's work does attract protection under the doctrine of 'fair use'.

### **3.1.2. The purpose and character of the use and the nature of the copyrighted work**

27. The counsel humbly submits that, in considering the initial factor, including whether the use was commercial or non-commercial and whether such use was "transformative" in nature. As established under *Campbell*<sup>27</sup>, as long as the reproduced work provides social benefit by

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<sup>22</sup> *Folsom v. Marsh* [1841] 9. F. Cas. 342

<sup>23</sup> *Harper & Row Publishers Inc. v. Nation Enter.* [1985] 471 U.S. 539, 549

<sup>24</sup> *Campbell v. Acuff-Rose Music, Inc.* [1994] 510 U.S. 569, 577

<sup>25</sup> Copyright Act of 1976, 17 U.S.C, s 107

<sup>26</sup> *Id.* at 7

<sup>27</sup> *Campbell v. Acuff-Rose Music* [1994] Inc., 510 U.S. 569, 579

shedding light on an earlier work, and, in the process, creating a new one, the degree of transformativeness is satisfied. In the case before this Hon'ble court, it cannot be attested as to the purpose the reproduced work is serving, as the consumers of IntCPM might be using it for various requirements, whether it be entertainment, personal research, investigation, general knowledge or any other such purposes. Therefore, the contention that the reproduction by IntCPM does not fall under the excepts as elucidated under Section 107<sup>28</sup> i.e. *"for purposes such as criticism, comment, news reporting, teaching, scholarship, or research"* cannot be stated with certainty.

28. The counsel further submits that Transformativeness can be categorised into **"content transformativeness"** and **"purpose transformativeness,"**<sup>29</sup> content transformation relates to the physical transformation of a work while adding or subtracting information, the counsel submits that case of *Blanch v. Koons*<sup>30</sup> where a work was transformative where several aesthetic changes were made to the original. However, some uses need not alter the original work at all for the second use to be deemed transformative<sup>31</sup>. A series of courts have held that *using an original in a searchable database was transformative even where the work was unaltered*<sup>32</sup>. The reason for these cases to have been held as 'fair use', there were three limbs to the argument; **Firstly, these uses were at least partially for a different purpose than the original use**, as contended before the purpose of the users while deriving information cannot be stated with certainty. **Secondly, the new reproduced work was generally beneficial to the public**, in this case access to free information to the individuals is generating some form of public benefit. **Finally, the uses were expression ambivalent because they were "completely unrelated to the expressive content"** in the originals. Similarly, Purpose

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<sup>28</sup> Supra

<sup>29</sup> Tushnet, Rebecca, "Content, Purpose, or Both?" [2015] Georgetown Law Faculty Publications and Other Works, 90 Wash. L. Rev. 869-892

<sup>30</sup> *Blanch v. Koons* [2006] 467 F.3d 244, 253 (2d Cir. 2006)

<sup>31</sup> *Authors Guild, Inc. v. Hathi Trust* [2014] 755 F.3d 87 (2d Cir. 2014)

<sup>32</sup> *Perfect 10, Inc. v. Amazon.com* [2007] Inc., 508 F.3d 1146 (9th Cir. 2007)

transformations that fall in a preamble category—such as news reporting, historical reference, and parodying an original, etc.—are classic fair use and are often accepted by courts post-Campbell. Similarly, purpose transformations that are expression-neutral, such as using originals in a database to help find works or detect plagiarism, are also often found not to threaten the central market of a work.<sup>33</sup> Arguably IntCPM does not care what the texts say rather they are concerned only that they continue to act as fodder for the database that produces natural language responses.

29. The Counsel further contends that there is a significant '*creative shift*' in the purpose that is sought by the author and the purpose of summarisation of the Historical works. Creativity Shift where the plaintiff's work is creative and the defendant's is informational, or vice versa amounts to transformative use. In such cases, the defendant has not just created a new work but has also created a work in a different category. This shift in category should almost always entail a fundamental change in purpose, which is the hallmark of transformative use.<sup>34</sup>

30. Similarly, *Warner Bros. Entertainment Inc. v. RDR Books*<sup>35</sup> also elucidates on the purpose being sought by the reproduced work. Hence, the reproduced work by EPIONA shall be brought under the protection of 'Fair Use'.

### **3.1.3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole**

31. The counsel humbly submits that the fair use doctrine was predicated on the author's implied consent to "**reasonable and customary**" use when he released his work for public consumption, fair use traditionally was not recognized as a defence to charges of copying from an author's as yet unpublished works<sup>36</sup>, however, this was tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent

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<sup>33</sup>*Brownmark Films, LLC v. Comedy Partners* [2012] 682 F.3d 687 (7th Cir. 2012) (parody); *Nunez v. Caribbean Int'l News Corp.* [2000] 235 F.3d 18 (1st Cir. 2000) (news reporting).

<sup>34</sup> Sag, Matthew, *Predicting Fair Use* [2012] *Ohio State Law Journal*, Vol. 73:1 47-91

<sup>35</sup> *Warner Bros. Entm't Inc. v. RDR Books* [2008] 575 F. Supp. 2d 513, 540–51 (S.D.N.Y. 2008)

<sup>36</sup> *American Tobacco Co. v. Werckmeister* [1907] 207 U.S. 284, 299, 28 S.Ct. 72, 77, 52 L.Ed. 208

through *de facto* publication or **dissemination of a work may tip the balance of equities in favour of prepublication use**<sup>37</sup>. In this particular case, **there was dissemination of Samay Sinha's work through other sources such as Library Genesis (LibGen), Z-Library (Bok), Sci-Hub, and Bibliotik**. Although the contention that the some of the reproduced work was unpublished by the author, they were however in the public domain through these sources. Consequently, the parts of the summary that were reproduced by IntCPM, are elements of the historical work that are integral to provide a comprehensive summary<sup>38</sup> and the law being, historical facts cannot be protected under copyright<sup>39</sup>. Therefore, information disseminated to the public in a form not constituting a technical "publication" should nevertheless be subject to fair use.<sup>40</sup>

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

32. The counsel further submits that, according to Beebe's research<sup>41</sup>, fair use cases have been significantly shaped by either the "Market-Centered Paradigm" or the "Transformative Paradigm." The market-centered paradigm views fair use as an exception to the copyright owner's exclusive rights, applicable primarily in instances of irreparable market failure. In this case, the transaction cost of possibly obtaining the permission for reproduction is extremely high<sup>42</sup>, hence proving that the process of licensing acts as an obstacle that curtails

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<sup>37</sup> Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U.S. Copyright Law, [1963] 88th Cong., 1st Sess., 27 (H.R. Comm)

<sup>38</sup> Nunez v. Caribbean Int'l News Corp. [2000] 235 F.3d 18 (1st Cir. 2000)

<sup>39</sup> Aarur Tamilnadan v. S. Sankar [2023] SCC OnLine Mad 3930

<sup>40</sup> Nimmer MB and Nimmer D, Nimmer on Copyright (1978) <<https://lawcat.berkeley.edu/record/81179?ln=en>> accessed 10 December 2023

<sup>41</sup> Beebe, Barton, An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019 [2020] 10 NYU Journal of Intellectual Property & Entertainment Law 1

<sup>42</sup> Gordon, Wendy J, Fair Use as Market Failure: A Structural and Economic Analysis of the 'Betamax' Case and Its Predecessors [1982] Columbia Law Review 82, no. 8

the further production of work, promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it<sup>43</sup>.

33. The counsel further contents that, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression<sup>44</sup>. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. Therefore, the possible market that is created by the summarisation will only go on to benefit the author as well. Similarly, Publication need not be for the benefit of or available to or meant for reading by all the members of the community, a targeted audience would also be a public<sup>45</sup>, hence substantiating that the 'market harm' so caused outweighs the benefit of the reproduction to the public.

**3.2 EPIONA's reproduction, being an instance of a work generated by a search engine, falls under the category of 'Fair Use.'**

34. The counsel humbly submits the cases of Hathi Trust<sup>46</sup> and Google Books<sup>47</sup>, the courts addressed claims stemming from millions of books being scanned into databases that fuelled search engines and related projects. The courts held that the use of full copies of books in such search engines served a different purpose than the books' original uses. Similarly, in *Eldred v. Ashcroft*<sup>48</sup>, the court has interpreted the act to provide far reaching immunity to service providers such as YouTube<sup>49</sup>, which currently acts as a hub for infringed materials. Essentially holding that a service provider such as YouTube has not itself publicly distributed the copied programmes with the search made by the users. Hence, in this case, IntCPM

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<sup>43</sup>Bill Graham Archives v. Kindersley Ltd. [2006] 448 F.3d 605, 608 (2d Cir. 2006) (quoting Castle Rock Entm't., Inc. v. Carol Publ'g. Grp., Inc. [1998] 150 F.3d 132, 141 (2d Cir. 1998)).

<sup>44</sup> Mazer v. Stein [1954] 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630

<sup>45</sup> Masters & Scholars of University of Oxford v. Rameshwari Photocopy Services [2016] SCC OnLine Del 6229

<sup>46</sup> Authors Guild v. HathiTrust, 755 F.3d 87 [2d Cir. 2014]

<sup>47</sup> Authors Guild v. Google, Inc. [2015] 804 F.3d 202 (2d Cir. 2015)

<sup>48</sup> Eldred v. Ashcroft [2003] 537 U.S. 186

<sup>49</sup> Cartoon Network v. CSC Holdings [2008] 536 F.3d 121 (2d Cir. 2008)

reproduces work at the request of the user making an input in the software requesting for a summarisation. The mere collection of data by the software does not amount to infringement.

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**4. The copyrighted work reproduced by EPIONA is liable to attract Injunction and pay**

**Damages:**

1. The counsel Humbly submits the case of *Kashinath Sansthan v. Srimad Sudhindra Thirtha Swamy*<sup>50</sup> and *eBay Inc. v. MercExchange LLC*<sup>51</sup>, which have established various criteria that need to be fulfilled in order for a grant of interim injunction. The counsel contents that, in the recent years there has been a shift in the degree of burden that needs to be proved by the Plaintiff in order to receive an injunctive order. The mere presence of Prima facie or possibility of success on merit is not cause enough for the grant of injunction. Hence, Plaintiff should prove that they suffered an irreparable injury for which money damages would not be adequate; the balance of the hardships among the parties tips in favor of issuing the injunction; and the public interest would not be disserved by an injunction (Four Factor Test). In the case before this court, all four factors are not satisfied by the plaintiff.

2. The counsel also contends that in the case of *Mandati Ranganna v. T. Ramachandra*<sup>52</sup>, the Hon'ble Court stated that grant of injunction is an equitable relief and hence all the other factors need to be satisfied as the granting of injunction will curtail the freedom of the other party. Hence, since injunction is such an 'extraordinary remedy', the degree of burden on the plaintiff also remains extraordinary. Hence, the counsel argues that since there is no copyright infringement on the part of the Defendant as argued under Sec. 52

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<sup>50</sup> *Kashinath Sansthan v. Srimad Sudhindra Thirtha Swamy*, [2009] AIR 2010 SC 296 [2009]

<sup>51</sup> *eBay Inc. v. MercExchange LLC*, [2006] 547 U.S. 388 [2006]

<sup>52</sup> *Mandati Ranganna v. T. Ramachandra*, [2008] AIR 2008 SC 2291 [2008]



of the copyright act, similarly the parties will also not attract an injunction or will not be held liable to pay damages.

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**PRAYER**

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

1. Hold that there was NO Copyright Infringement on the part of the Defendant.
2. Hold that the Defendant's utilization of the Plaintiff's does attract protection under the Doctrine of 'Fair use'
3. Hold that the Defendant is not liable to attract an Injunction in any from or duration of time.
4. Hold that the Defendant is not liable to pay Damages in any form.

**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 Defendants

**Sd/-**



