

## Education Sector Hotline

October 04, 2018

### EDTECH PLATFORM HELD LIABLE FOR HOSTING INFRINGING CONTENT

In a recent judgement, the Madras High Court held that:

- Platforms hosting user content and retaining control over the content, by exercising their right to modify and refuse uploads, cannot claim safe harbour protection under Section 79 of the Information Technology Act, 2000 (“**IT Act**”).
- An infringer cannot seek protection under the fair use provisions of the Copyright Act, 1957 (“**Copyright Act**”) against claims of copyright infringement when use of the copyrighted works is commercial in nature.

Recently, Fermat Education (“**Plaintiff**”) filed a suit<sup>1</sup> against Sorting Hat Technologies Pvt. Ltd. and 13 others (“**Defendants**”) in the Madras High Court (“**Madras HC**”) claiming infringement of copyright and seeking damages and a permanent injunction restraining the Defendants from using the literary works of the plaintiffs. The dispute revolved around the copyright in question banks created for Common Admission Test (“**CAT**”) exams by the Plaintiff. These questions were available on the Plaintiff’s online platform. It is the case of the Plaintiff that these questions were copied by third party educators and uploaded on the online educational (“**Edtech**”) platform of the Defendant - www.unacademy.com (“**Unacademy**”). The Madras HC considered the issues of copyright infringement and intermediary liability and found Unacademy liable for infringement.

#### TIMELINE

- 2014 - The Plaintiff started conducting coaching classes for preparation for the CAT.
- 2016 - The Plaintiff commenced online training for CAT preparation and developed an E-learning platform. The content on the Plaintiffs’ online platform consisted mainly of CAT question banks and solutions. This content was developed by the Founder Director of the Plaintiff.<sup>2</sup> 20% of this content, consisting of about 600 questions with detailed solutions, was available for free to the students.
- February 2018 - The Plaintiff learned that more than 200 questions and solutions from the Plaintiffs’ free content have been uploaded by third party educators on Unacademy. This content included question banks as well as videos created by the Plaintiff.
- The Plaintiff wrote to Unacademy informing them of the infringement. According to the plaint, on receiving notice of infringement, Unacademy accepted that the material on their website was infringing content but failed to take down such content.
- May, 2018 - Plaintiff filed a suit claiming infringement of copyright against Unacademy and the 13 third-party educators responsible for uploading the infringing content<sup>3</sup> (collectively “**Educators**”).
- May 17, 2018 - The Court granted an interim injunction restraining Unacademy and the Educators from using the literary works of the Plaintiff.
- Unacademy and one of the Educators thereafter filed applications before the Court seeking to set aside the injunction granted vide order dated May 17, 2018
- August 13, 2018 – The Court dismissed the applications and refused to vacate the injunction already in force.

#### ARGUMENTS

The Plaintiff contended that the educational content uploaded on Unacademy’s platform by the Educators infringed their copyright in the question banks and answers published on their own online platform.

In its defence, Unacademy relied on the following:

- *Safe Harbour under the IT Act*: Unacademy argued that it cannot be held liable for infringing content uploaded by users on its platform since it is an “intermediary”<sup>4</sup> under the IT Act and was therefore protected by the safe harbour provision under Section 79.<sup>5</sup> It was contended that Unacademy received material and uploaded it *simpliciter* on its platform. Unacademy also contended that on account of the volume of content uploaded on its platform, it was impossible to actively monitor copyright infringement before content was uploaded.
- *Fair use under Section 52(1)(i) of the Copyright Act*: Unacademy relied on the fair use provision under Section 52(1)(i) which provides that reproduction of any work by a teacher or a pupil in the course of instruction does not constitute infringement of copyright in such work. It was argued that Unacademy’s use of the Plaintiff’s original works constituted fair use since the literary works were reproduced educational purposes. Unacademy placed reliance on Delhi High Court’s (“**Delhi HC**”) judgment in *University of Oxford v. Rameshwari Photocopy Services* and Anr.<sup>6</sup> where the Delhi HC noted that a situation where teachers are imparting education as part of an institution and the institution is reproducing educational material on behalf of the teachers may be covered under the fair use provision envisaged under Section 52(1)(i). Drawing a parallel, Unacademy argued that the

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Unacademy was publishing education content on behalf of the Educator for educational purposes and hence was protected by Section 52(1)(i).

## DECISION

The Madras HC considered (i) whether Unacademy qualified as an “intermediary” under the IT Act and could claim protection under the safe harbour provision - Section 79 of the IT Act; and (ii) whether Unacademy’s unauthorised use of original literary works of the Plaintiff for educational purposes was “fair use” under the provisions of the Copyright Act and therefore did not amount to copyright infringement.

The Court rejected the arguments made by Unacademy and refused to set aside the injunction for the following reasons:

### 1. Unacademy exercised control over content uploaded to the website and could not claim protection under Section 79 of the IT Act

The Court considered the following clauses of the Unacademy’s Terms and Conditions (“Terms”):

- a. *User Obligations clause* – Users were required to submit a demo video before their content was published on the platform. Unacademy reserved the right to approve or disapprove the content based on their review of the demo video.
- b. *Consideration for content* – The Terms provided that users may be compensated for the content that they create for the website.
- c. *Exclusivity Clause* – The Terms prohibited users from uploading content that is uploaded on Unacademy’s platform on other platforms

On the issue intermediary liability under the IT Act, the Madras HC refused to grant protection to Unacademy under Section 79 of the IT Act since it retained control over the content uploaded and was not acting as an intermediary.

In its analysis, the Madras HC considered the landmark Delhi HC decision in *Myspace Inc. vs. Super Cassettes Industries Limited*,<sup>7</sup> where the Delhi HC interpreted the provisions of the IT Act to hold that MySpace<sup>8</sup> and other entities that did not manually edit/review content before it was uploaded were intermediaries under the IT Act and were protected by the safe harbour provision under Section 79. The Delhi HC clarified that intermediaries may still implement automatic modification processes that resulted in modification of only format and not the content. Based on the clauses in Unacademy’s Terms, the Madras HC drew a distinction between the facts in this case and in *MySpace* and noted that Unacademy did not upload the videos simpliciter but played a more active role in monitoring the content on the website. For this reason, Unacademy could not claim exemption from liability under Section 79 of the IT Act.

### 2. Unacademy’s use of the Plaintiff’s works did not constitute fair use

Unacademy’s Terms provided that users may be compensated for the content that they create and upload on the website. The Court held that Unacademy’s actions here constituted a commercial activity with profit being the motivating factor. Thus, on the issue of copyright infringement and fair use, the Madras HC held that since Unacademy was uploading educational content for consideration and thereby engaging in a commercial activity, its use of Plaintiff’s literary works was outside the scope of fair use under the Copyright Act.

## IP PROTECTION LESSONS

With the growth of technology, more content is now being consumed through online media and Edtech is one such growing online business. This means more copyrighted material being created in the form of videos, tutorials, written material et al.

While such new-age platforms take care of their regular compliances, often critical issues such as how to protect and safeguard their intellectual property (brand, copyright etc.), and ensuring proper documentation such as terms and conditions of websites, user agreements, proper assignment agreements are overlooked. This, then, tends to become an issue from a long-term perspective, and more so at the time of investments, when investors realize that the entity has done little to protect its intellectual property (IP), its key asset.

This judgement is therefore an eye opener for the Edtech sector as it underlines the importance of sensitizing content creators on issues such as copyright infringement. It passes on a message that entities should, in addition to content creation and monetization, focus on training programmes to educate content creators on how to identify IP, and protect IP. Further, entities should also set up internal processes so that content creators understand the basic do’s and don’ts when creating content, such as what constitutes copyright infringements, and steps that should be immediately taken if notice of claim is received. While this is being done, care should also be taken by the entities that the agreements (including terms and conditions) are in sync with what the entity projects it to be, i.e. whether it is an intermediary or not. If the Edtech entity manually controls and modifies the content before it is uploaded, then it cannot claim safe harbour immunity and could be held liable as a publisher of content. In such a case, the Edtech entity has a duty to not only act on receiving actual knowledge of infringement, but also actively prevent hosting of infringing content.

– **Aparna Gaur, Aarushi Jain & Vivek Kathpalia**

You can direct your queries or comments to the authors

<sup>1</sup> Madras High Court, CS No 330 of 2018, judgment dated 13.08.2018

<sup>2</sup> Impleaded as Plaintiff No. 2 in the suit

<sup>3</sup> Impleaded as Defendants 2 -14 in the suit

<sup>4</sup> Section 2(1)(w) of the IT Act defines an intermediary with respect to any particular electronic records, as any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

<sup>5</sup> Section 79 of the IT Act provides immunity or a safe harbour to an intermediary from liability for any third-party information, data, or communication link made available or hosted by the intermediary if:

a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or  
b) the intermediary does not-  
(i) initiate the transmission,

(ii) select the receiver of the transmission, and  
(iii) select or modify the information contained in the transmission;  
c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

<sup>6</sup> *Chancellor, Masters & Scholars of the University of Oxford and others vs Rameshwari Photocopy Services and Anr.*, MIPR 2017 (1) 0039

<sup>7</sup> *Myspace Inc. vs. Super Cassettes Industries Limited*, 2016 SCC Online Del 6382

<sup>8</sup> Myspace is an online platform where users can upload and share content including photos, music, videos, etc. with other users

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