



A CHRONICLE OF JOHN DOE IN INDIA

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Abstract: Indian media and entertainment industry has a rich and affluent history. Starting from black and white to today's colorful era with the newfangled digital platforms such as Over- the- top, Indian media and entertainment industry has crossed many leaps and bounds in its pathway. Being a sunrise sector for the Indian economy, it is on the cusp of being one of the biggest growing industries globally. Recent years of covid waves have shown an alarming increase of digital piracies which sabotage the growth of media and entertainment industry in India. To abate with the issue of online piracy, Courts often resort to passing of John Doe orders as a remedy to copyright infringement thereby protecting the rights of copyright owners. Though John Doe orders are passed, the cold war on the teeter totter board still continues between the copyright owners and infringers. The author in this paper tries to bring into picture a chronicle of John Doe orders passed by the High Courts of Delhi, Bombay & Madras and a remedy which would reduce the dosage of digital piracy in years to go.

Index Terms - media and entertainment industry, digital piracy, John Doe order, Copyright infringement.

I. INTRODUCTION

Internet has opened floodgates for movies, music, entertainment events, sports events etc., This has paved the way for sharing, uploading, downloading, copying, live streaming of music, movies and entertainment events without the authorization of the copyright owner. Due to shut down of theatres during Covid-19 breakdown, media industries have resorted to release movies in OTT (Over-the-Top) platforms. As copying and video recording of such films becomes easier in OTT platforms, this by way has led to the skyrocketed rise of online piracies. As per the report by Digital TV Research, the loss of revenue for OTT players on account of piracy in India is expected to hit USD 3.08 billion by 2022, while the cost of global online streaming piracy will reach USD 52 billion by 2022^[1]. Nowadays, even high-quality movies are accessible in online platforms which is in no way different to the original copyrighted films in quality. Peoples rather than going to theatres or watching movies on OTT platforms by subscription, they are resorting to download pirated copies of movies available on infringing websites. Pirates and media companies are engaged in a see-saw battle. When media companies find a technology to mitigate piracy, and within a few months, the pirates will find a backdoor or loophole in that tech^[2]. According to MUSO, a data company in London has collected the largest data set on piracy in the world^[3]. MUSO's latest data suggested an unprecedented spike in online piracies and reported that global piracy during lockdown has been increased to 33% and piracy in India shoots up to 63% globally. The second wave of COVID-19 has also accelerated digital piracy in India, which was already on the rise during the first wave of Covid^[4]. This film piracy amounts to mass copyright violation. These movies, music and events which are pirated are an asset of the copyright owner. This online piracy causes loss not only to the copyright owners and original content creators, it would in turn impair the growth of media and entertainment industry thereby hampering the economic development of the Nation.

II. LAWS GOVERNING PIRACY IN INDIA

Digital piracy is defined as the the practice of illegally copying and selling digital music, video, computer software, etc^[5]. Uploading, streaming, broadcasting, reproducing, downloading, selling or importing digital copies of copyright material without authorisation of the owner of the copyright material amounts to digital piracy. Universal Declaration of Human Rights provides that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author^[6]. The laws which govern digital piracy in India are The Copyright Protection Act,1957 and The Information Technology Act,2000 and The Information Technology (Procedure and Safeguards for *Blocking* for Access of Information by Public) *Rules*, 2009. The Copyright Protection Act affords protection to literary, dramatic, artistic, musical work, cinematographic film and sound recording^[7]. Where the copyright in any of such works has been infringed, the owner of the copyright shall be entitled to remedies by way of an injunction, damages, accounts and otherwise as may be conferred by law for the infringement of copyright^[8].

III. JOHN DOE OR ASHOK KUMAR ORDER

In Oxford dictionary, John doe has been defined as a name of the person whose name is not known or kept secret especially in the Court of Law^[9]. The idea behind issuing John doe order is to protect the intellectual property right of the owners from misuse and exploitation. John doe orders are usually issued by courts before or after the release of the film against unknown defendants who have copied and uploaded the pirated copies of the films or links of such films without the authorisation of the owner; issued against unknown persons who are selling boot leg DVDs or CDs; or against unidentified defendants who are broadcasting live streaming of contents without license from the owner of copyrighted materials who is having broadcasting

reproduction rights. This John Doe order is a quia timet action which is granted by the courts to protect the intellectual property rights of the owners. John Doe orders issued by the Courts is in compliance with the TRIPS obligation to protect and enforce all sorts of intellectual property rights. Justice G.S.Patel while granting an ex parte ad interim injunction in *Ernos International Pvt Ltd v BSNL* ^[10] said that John Doe order is a combination various jurisprudential innovations such as Anton pillar order of compelled compliance, Mareva Injunctions, Order 38 and 39 and Sec 151 of Civil Procedure Code.

In order to curb the menace of online piracy, most of the complaints for receiving John Doe order are instituted before the cause of action has been accrued on an apprehension that their copyrighted material would be exploited. But this by itself a ground for rejection of the complaint under Order VII Rule 11. The complaint should state the particulars of defendant's name, description, place of residence ^[11]. But suits for John Doe orders are instituted against unknown defendants. If on the basis of above, the complaint if rejected would result in irreparable injury or loss to the plaintiff which could not be compensated by money. In order to protect the rights of copyright owners it becomes necessary for the High court to invoke its inherent power under Sec 151 of the Code of Civil Procedure. In *Manohar Lal Chopra v Rai Bahadur Rao* ^[12], the Supreme Court held that the inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore, it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.

IV. ISSUED AGAINST WHOM

By invoking its inherent powers to issue injunction against the unknown defendants the courts should adopt a granular approach to balance the rights of the copyright owner and the website owner rights of internet, free trade and free speech. While granting an injunction, the Court should be primarily satisfied that the conditions laid down under Order 38 Rule 1 has been complied with. In a suit for John Doe, orders are issued

1. against the unknown defendants (website owners) to remove the illicit content.
2. To the internet service providers or telecom service providers to block the websites or URL having illicit content or pirated copyrighted material.
3. Directing the DOT or MEITY to issue a notification to the telecom service providers to comply with the court orders for blocking the content.

ISP and Government agencies are impleaded as defendants for the purpose of evolving an effective and balanced relief that adequately redress the plaintiff concerns ^[13]. There are no express provisions in Indian laws to implead intermediaries as defendants in a suit for obtaining John Doe orders. But Article 8.3 of 2001 Infosoc Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) provides rightsholders with a right to injunctive relief against intermediaries whose services are used by a third party to infringe copyright or related right. The preamble of the Infosoc Directive (recital 59) states that in the digital environment, the services of intermediaries may increasingly be used by third parties for infringing activities. In such cases intermediaries are best placed to bring such infringing activities to an end and therefore rightsholders should have the possibility of applying for an injunction against an intermediary who facilitates access to an infringing service. This is often referred to as the "no-fault based injunction".

The Information Technology Act provides power for the Central Government or any other officer specially authorised by it in behalf in the interest of the sovereignty, integrity, defence, security of the State, friendly relations with foreign state or public order or preventing incitement to commission of the cognizable offence may by order in writing direct any Government or intermediary to block access to the public ^[14]. The intermediaries such as telecom service providers, network service providers and internet service providers ^[15] are granted safe harbour protection ^[16] for the illicit or infringing contents or third party information data, communication, uploaded, streamed or broadcasted by the defendants owning websites.

To make intermediaries liable, Sec 79 and Sec 81 of IT Act, and Sec 51 (a)(ii) of Copyright Act has to be read harmoniously ^[17]. The intermediaries are not absolved from liability if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act ^[18]; and upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner ^[19]. The intermediary who fails to comply with the direction to block access shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine ^[20].

V. JOURNEY OF JOHN DOE IN INDIA

The sunrise of John Doe in India was first recognized in *Taj television v Rajan Mandal* ^[21] relying on the orders passed frequently in American, Australian, Canadian, UK and English courts. In the above case, the plaintiff is the owner of the Ten Sports channel who is having broadcasting reproduction right to broadcast world cup football which has begun on May 31, 2002. The plaintiff entered into an agreement with cable device networks (CDN) to broadcast Ten Sports channel. The cable device networks entered into license with 1377 cable operators to broadcast world cup football on Ten Sports channel. Due to this, a large number of operators began to transmit without receiving license from them. As the final phase of the world cup ends on June 30, 2002 it would demand highest viewership and high risk of rampant infringement by those who have not obtained license from them. So, a case was instituted in the Delhi High Court by the plaintiff on the apprehension that it would cause irreparable injury, loss and damage. The court granted John Doe order on the principle that "the litigating finger is directed at unknown defendants, the inability to identify him by name is a mere misnomer" ^[22]. The basis of this order is that even though the defendant's identity is not known or unidentifiable it should not be a hindrance to justice.

Viacom 18 Motion Pictures sought injunction against the film *Speedy Singhs* ^[23] and *Players* ^[24] which was to be transmitted or broadcasted on impugned websites. *Red Chillies Entertainment Pvt Ltd* ^[25], who are producers of the film sought injunction against the movie 'Dilwale' which is to be broadcasted or transmitted or made available for downloading or viewing on such impugned websites. Viacom18 has secured an interim John Doe order from the Madras High Court restricting over 1250

identified and 'all other unidentified' websites, which might be deemed to host links to pirated content, prior to the launch of its movie 'Force 2' ^[26].

The Bombay High Court has granted John Doe order for 115 links on impugned websites which leaked the Hindi movie 'Uda Punjab' ^[27]. File sharing websites have been blocked, as Phantom Films has been granted a John Doe order by the Bombay High Court for blocking sites which are used to pirate the movie 'Masaan' ^[28]. The Bombay high court granted John Doe orders to movies such as *Veerappan* ^[29], *Hunterrr* ^[30]. Viacom18 has received a John Doe order for the film *Gangs of Wasseypur* from the Bombay High Court ^[31].

The Madras High Court in *RK Production Pvt Ltd v BSNL* ^[32] granted interim injunction to block all the unauthorized web pages, websites, IP addresses allegedly showing content related to movie '3'. John doe orders are also passed by the Madras High Court for movies such as *Padmaavat* ^[33], *Pad man* ^[34], *Pari* ^[35], *Seema raj* ^[36]. John doe orders are also granted for movies such as *Don 2* ^[37], *Housefull* ^[38], *Azhar* ^[39], *Piku* ^[40] and *Dhammu* which are to uploaded on impugned sites.

The Delhi High Court directed Internet Service Providers to block websites that show movie Dhoom 3 ^[41]. The Delhi High Court issued a dynamic John Doe blocking order for websites which are distributing Disney contents illegally. The court ordered ISPs to block websites like Kiss Cartoon, Kiss Anime, and GoGoAnime, which have been showing Disney shows on their website ^[42]. In *Star India Pvt Ltd v Movies trunk .com & Ors* ^[43], the suit was filed concerning a cinematographic film Mission Mangal restraining the defendants to host, stream and making available to communicate or downloading by the public on rogue website. In *Sporta Technologies Pvt Ltd v John doe and others* ^[44] the Delhi High Court granted ex parte adinterim injunction to restrain the defendants from illegally streaming South African Cricket tour of West Indies 2021. Sony Pictures Networks India (SPN) has secured a dynamic John Doe injunction order for protection of infringement two international cricket series -India's tour of Sri Lanka in July 2021 and the India-England Men's International Series in August and September 2021 ^[45].

VI. ROGUE SITES:

There has been a severe flood of orders passed by High court without even considering the evidences such as screenshots of websites or screenshots of URL carrying such infringing materials. At the beginning, John doe orders are passed on the basis that the websites carrying infringing material are rogue websites.

The Delhi High court in *Star India Pvt Ltd v Haneet Ujjawal* ^[46] blocked 107 websites broadcasting India-England Series 2014; *Fox Star Studio India Ltd v John Ceedge* ^[47] blocked rogue websites carrying film Bang Bang ; *Star India Pvt Ltd v Roy ma* ^[48] blocked websites carrying India Srilanka Cricket Series 2014; *Star India Pvt Ltd v Sujith Jha* ^[49] blocked websites broadcasting India Australia Cricket Series; *Fox Star Studios India Ltd. V Speedplay.us* ^[50] blocked hindi movie Prem Ratan Dhan Payo available on rogue sites ; *Fox Star Studios India Ltd v MacPuler William* ^[51], blocked hindi movie Bombay Velvet available on rouge sites; *Balaji Motion Pictures Ltd v www.yootorrent.com* ^[52] blocked Hindi movie Kya Kool Hai hum available on rogue sites and *Star India Pvt Ltd v Kahalid Nasir Raja* ^[53] blocked websites broadcasting ICC world cup 2015.

The Madras High Court directed blocking of Hindi film Flying Jatt ^[54] on 830 rogue sites and cable TVs who claimed protection to curtail online and offline piracy. The court granted orders restraining the parties to stop from camcording /recording and allowing others to transmit, communicate or make available, display, release, upload and download of infringing copyrighted movies.

In *UTV Software Communication Limited v 1337X.TO* ^[55] the Delhi High Court have explained the meaning of rouge websites. In the opinion of this Court, some of the factors to be considered for determining whether the website complained of is a FIO/L/Rogue Website are: -

1. Whether the primary purpose of the website is to commit or facilitate copyright infringement;
2. The flagrancy of the infringement, or the flagrancy of the facilitation of the infringement;
3. Whether the detail of the registrant is masked and no personal or traceable detail is available either of the Registrant or of the user.
4. Whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement.
5. Whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright
6. Whether the owner or operator of the online location demonstrates a disregard for copyright generally;
7. Whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
8. Whether the website contains guides or instructions to circumvent measures, or any order of any court, that disables access to the website on the ground of or related to copyright infringement; and
9. The volume of traffic at or frequency of access to the website;
10. Any other relevant matter.

VII. URL BLOCKING V WEBSITE BLOCKING

The Division Bench of Delhi High Court ^[56] took a different view in URL blocking. It was urged by the respondent that defendants No 1 to 73 vary between 2 to 2026 URLs and the restrictive injunction granted by the learned single Judge would render the injunction infructuous. It is very easy to change the URL but it is difficult to change the domain name. The URL refers to particular location on the internet. A website consists of multiple webpages which can be opened when a user clicks a particular link. For every webpage on the website there would be corresponding URL. While URL of the rogue website is blocked the person can change a different URL easily as a password of an email id within a second. The Court was satisfied in blocking the whole website and opined that it is a gargantuan task for the respondent to keep on identifying the URL.

In *Enros International Media Ltd v BSNL* ^[57], the blocking order for the entire website would be passed if it is shown by the plaintiff that the found the entire website to contains only illicit and infringing material with no legitimate content whatsoever. Website blocking can be issued if the Court is satisfied that it is necessary and proportionate. The proportionality principle requires that there should be a fair balance between the fundamental rights i.e rights to intellectual property right and right to freedom of trade and freedom of expression. There is a serious concern associated with the blocking orders as it may prevent

access to legitimate content. There is a need for balance of approach and policies to avoid unnecessary cost or impact on others' rights and interest. The court order granting website blocking injunction must be effective, proportionate and dissuasive but must not create barriers to legitimate trade ^[58].

VIII. HYDRA HEADED ROGUE WEBSITES:

There are certain cases where the main websites on being blocked by the courts multiply and resurface as alpha numeric or mirror websites. These mirror websites circumvent the injunction orders issued by the courts. Therefore to avoid this menace and lacunae, dynamic injunction were granted to restrain infringing content on the mirror websites. These dynamic injunctions are issued by the courts to extend the main injunctions to all mirror /alphanumeric/redirected websites. These injunctions are issued where the same website becomes available immediately with a different IP address or URL and which if granted would reduce the procedure to obtain a new injunction ^[59].

The High Court of Singapore in a case of held that the applicant was not obliged to return to court for an order with respect to every single IP address of the infringing URL already determined by the court. The dynamic injunction doesn't require additional FIOs which have not been included in the main injunction. It requires the defendant to block additional domain name/URL s that provide access to the same websites which are the subject of the main injunction ^[60].

After issuing main injunction the plaintiff on application under Order 1 Rule 10 of CPC may implead websites which are mirror alphanumeric or redirect websites with sufficient supporting evidences. The Joint Registrar on being satisfied with the evidences issue directions to ISP to disable access to such websites ^[61].

IX. THREE STEP VERIFICATION PROCESS

Justice Patel while granting an exparte ad interim injunction ^[62] on July 26,2016 with an high standard of care, came up with a three step verification process in order to balance the public law rights and rights of the copyright owner. The Bombay High Court has raised doubts regarding the veracity of evidence filed by the plaintiff in that case because after a random check of evidence it was observed that some evidence was filed seeking blocking of resale of genuine CDs of a film. The three-step verification is

- 1.a verification and assessment by an external agency or third neutral party of the website or URL accompanied by a letter in writing.
2. 2nd level of verification by deponent of the affidavit along with plaintiff advocates.
- 3.affidavit on oath.

X. UGLY FACE OF JOHN DOE

There are instances where John Doe orders have affected innocent parties. Blanket orders have affected parties who were not actually involved in piracy or copyright infringement in the past. Reliance Entertainment after receiving John Doe order for *Don 2* ^[63] blocked Meghaupload and Filesonic and many other websites. It was alleged that blocking websites at ISP level is arbitrary and only DIT is empowered to issue orders to block website and DOT is allowed to block the websites ^[64]. Another instance where Madaboutmovies, a website involved in movie reviews and discussion was blocked by several ISPs. Similarly, induna.com, a website was blocked by ISPs after two different John Doe orders were issued by Justice Patel of the Bombay HC, but the website owners claimed that they are not indulged in piracy and the website sells only original DVDS ^[65].

XI. A NEED TO REVISIT JOHN DOE

There have been instances where many individuals are arrested based on the IP addresses for illegally watching pirated movies. The biggest hit in India happened when Kerala Anti-piracy team registered cases against 1010 individuals or websites for illegally copying or uploading the film Bachelor Party ^[66].The Andhra Pradesh Film Chamber of Commerce has an Anti-Video Piracy Cell, through which it claims that it have assisted the police officials in arresting 5201 individuals till December 2010 ^[67].To curb online piracy, there has been a deluge of John Doe orders passed against the unknown defendants as soon as the movie is released and as an when the producers of the movies approach the court for remedy. But in the last 19 years of its dawn of John Doe, the menace of online piracy has not been curbed and the shots of online piracy is increasing at a rapid rate. So ,in order to curtail online piracy punishment by way of fine is to be imposed in addition to blocking access to the infringing website. The author suggests that as the defendants are unknown, they can be added as known defendants by making domain registration stricter. Domain registration has become faster, simpler and cost efficient these days. The author suggests certain compliance procedures to be followed by domain name register and website owner to curb online piracy.

- 1.The domain name register shall sell a domain name only when the buyer of the domain name provides them with the name, contact address, mail id and proof of such identities. On compliance with the above procedure, a domain name and a domain name registration certificate shall be granted to the registrants.
2. The website owner who bought particular domain name should provide for display on the website his number of domain name registration certificate, his live email id and contact number in case of any queries or grievances by the users of the website or any person.
3. Each domain name registrant have a grievance redressal machinery and queries if any shall be answered by the website owners within 24 hours.

3. In case of any infringement of copyrighted material on the infringing website, a notice shall be sent to the website owners via mail. If not answered or if the response is not satisfied, the copyright owner shall resort to a Court procedure against the known defendants who are website owners as their identities are known from the domain name certification registration number.

The next issue which is to be revisited by the Courts while passing John Doe orders is the procedure which is followed. A verification and assessment by an external agency or third neutral party of the website or URL accompanied by a letter in writing which is one of the three-step verification process for arriving at a decision for passing John Doe needs better interpretation by the Courts. A verification by a third-party neutral agency or external agency is an opinion under Sec 45 of Indian Evidence Act, 1872. The author suggests that the screenshots of URL or websites which are used by the Courts to arrive at a conclusion for passing John Doe orders are electronic evidence under IT Act. So, the digital evidence in order to have its probative value, a procedure under Sec 65B and Sec 79A of Information Technology Act, 2000 has to be complied with.

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