

JOHN DOE ORDERS FOR ONLINE PIRACY: EXAMINING THE JUDICIAL TREND IN INDIA

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ABSTRACT

The need to safeguard individual expression has seen the judiciary devise various novel stratagems; one such strategy being the passage of John Doe orders by courts. Although copyright owners have constantly faced the threat of piracy, the speed at and extent to which piracy can take place over the internet is rather perturbing, particularly owing to the facelessness of copyright infringers in such cases. Inventive mechanisms such as John Doe orders are thus necessary, as they aim to protect copyright owners from infringement by both known and unknown offenders, in a timely manner. Through this paper, the author traces the judicial trend in India vis-à-vis the passage of John Doe orders on the online platform. The paper highlights their immense importance in law, while also analysing the disparate harm that may be caused by them. These orders being passed ex parte necessitate adequate judicial caution, regardless of the circumstances leading to their passage. The existing judicial trend adopted by the Delhi High Court however, has been otherwise, consequently curbing legitimate internet usage. The Madras High Court, on the other hand, is moving in the right direction, accomplishing the primary purpose of their introduction; a necessary step forward in today's times.

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I. INTRODUCTION

Copyright protection has necessitated a proactive approach by the legislature and the judiciary, with several strategies being devised to safeguard this vital expression of an individual's thought.¹ With the advent of digital technology and its sudden advancement, the opportunities being made available to copyright owners have rapidly increased; this owing to the reduction of territorial barriers and costs of circulation, as well as the expansion of their customer base, to name a few. The other side to the coin, however, is that unless controlled appropriately, digital technology exposes the same copyright owners to the risk of their works being blatantly infringed across different mediums, particularly the internet. Despite the fact that piracy has always been ominous to owners of copyrights, the sheer ease with which infringement can take place online in a matter of seconds, across jurisdictions, is worrying. To make matters worse, the internet also creates a situation wherein the copyright infringer is often unknown. In such scenarios, the copyright owner is sometimes reasonably certain of his copyright being infringed by potential infringers, whose exact identities he is unable to ascertain, although he is able to describe them as being members of a specific distinguishable class.² Such complex cases mandate adequate copyright protection, which requires innovative enforcement mechanisms for the implementation of legal provisions.³ One such mechanism employed extensively by the Indian judiciary in recent times is a John Doe order, which covers both known and unknown defendants.⁴

This paper will attempt to analyse the aforementioned mechanism of enforcement by briefly touching upon its role in law, proceeding then to specifically analyse the use of John Doe orders on the online platform, in the Indian context. The aim of the paper will be to examine the trends of the Indian judiciary with respect to their passage, particularly the issues arising from the manner of their wording and subsequent implementation in India. The paper will hence go on to determine whether or not John Doe orders have succeeded in achieving their goal of protecting copyrighted content on the internet and how problematic this is on many levels.

¹ Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 JIPR, 351-359 (2013).

² *Id.* at 351.

³ Manisha Singh Nair & Priya Anuragini *Digital copyright enforcement and the relevance of John Doe orders*, CBLJ, 80-81 (2014).

⁴ *Id.* at 80.

II. JOHN DOE ORDERS: THEIR MEANING AND FUNCTION

The facelessness provided by the internet to its users, combined with its speed and influence, has led to the creation of an industry whose beneficiaries remain hidden behind a garb of anonymity; the owners of copyrights either being unable to identify them, or the identification being so late that it lacks utility. This is where John Doe orders or ‘Rolling Anton Piller’⁵ orders are effective; these orders allowing copyright holders to file *ex parte* infringement suits against unknown entities belonging to a specific class,⁶ who upon being identified are given the opportunity to defend themselves in a manner akin to any other civil proceeding.⁷ By providing expeditious remedy to copyright owners, as also being enforceable against unknown entities only upon actual execution of acts of infringement, John Doe orders can safely be considered an innovative and judicious strategy for copyright protection, as they balance the interests of both parties concerned.⁸ These orders therefore, not only ensure prohibition of alleged infringing activities by unknown persons, but also prevent potential infringement from taking place by enjoining all unknown classes of persons from carrying out the infringing activity. They also aid in circumventing delays resulting from the indeterminacy of violators by allowing for immediate action by copyright owners in instances wherein the infringement is brought to fore after the court order. The copyright owner is now only required to serve the copy of the John Doe order upon the erring entity, rather than file a new suit seeking an injunction while infringement continues to take place.⁹ Copyright infringement flourishes on anonymity and fast-paced reach, thus highlighting the importance of John Doe orders in contemporary times.¹⁰

III. THE JUDICIAL TREND IN INDIA

John Doe orders entered India back in 2002, in the case of *Taj Television v. Rajan Mandal*,¹¹ nearly 6 years after they received recognition in the UK¹² and USA.¹³ The Delhi High Court affirmed

⁵ Anton Piller orders allow a plaintiff to enter the premises of a known defendant to search and seize goods without notifying them of the same prior to doing so, in order to preserve essential evidence which could otherwise be destroyed. Such orders granted against unknown defendants are labelled as ‘Rolling Anton Piller’ orders; David R. Barron, *Rolling Anton Piller Orders: Yet to be born, dead, or alive*, 18(4) EIPR, 183-185 (1996).

⁶ Gordon W. Hayhurst, *Ex parte Anton Piller Orders with John Doe defendants*, 9(9) EIPR, 257-260 (1987).

⁷ Jillaine Seymour, *Injunctions enjoining non-parties: Distinction without difference?*, 66(3) CLJ, 605-624 (2007).

⁸ Gupta, *supra* note 1.

⁹ Nair & Anuragini, *supra* note 3.

¹⁰ Tanushree Sehgal, *Piracy in the media and entertainment industry in India: Stemming the menace*, 20(3) ELR 82-83, (2009).

¹¹ *Taj Television v. Rajan Mandal*, (2003) F.S.R. 22, decided on 14 June 2002

their legitimacy by stating that “*such orders may be enforced against persons whose identities are unknown at the time of instituting the suit, but whose activities fall within the scope of action; if litigating finger is directed at unknown defendants, the inability to identify him by name is a mere misnomer*”.¹⁴ The principle behind the order is founded upon the idea that so long as the ‘litigating finger’ is pointed at particular person, then the ‘misnomer is not fatal.’¹⁵ Labelled as ‘Ashok Kumar Orders’ in India, John Doe orders in the country involve a conjoint reading of the provisions concerning ‘temporary injunctions’¹⁶ and ‘inherent powers’¹⁷ in the Code of Civil Procedure, 1908. Hence, by using the traditional three-pronged approach that governs temporary injunctions- (i)prima facie case, (ii)irreparable injury and (iii)balance of convenience- the plaintiff contended that since the events in the case were bound by time and unlicensed transmissions by cable operators was a common practice, the passage of a John Doe order in this situation was necessary to avert huge losses in revenue.¹⁸ Movie producers owning exclusive copyright in films, too, file for such orders on the basis of the same three-pronged approach, by stressing upon the short duration of movies in theatres, as also the high rate of piracy of these films, rather than seeking injunctions only after specific identification of the infringers, by which time losses would have already been incurred.¹⁹

Despite the first John Doe order being passed in India in 2002, it is only in recent years that the Indian judiciary has started granting these orders regularly, especially due to the rampant piracy taking place on the internet. Several such orders have been granted as *quia timet* actions²⁰ prior to the release of new films, against a bunch of file-sharing websites and other unidentified potential infringers.²¹

¹² The first case in which a John Doe copyright injunction was granted in the UK was EMI Records Ltd v. Kudhail, (1985) F.S.R. 36, decided on 15 June 1983.

¹³ The first case in which a John Doe copyright injunction was granted in the USA was Billy Joel et al. v. Various John Does, Jane Does and ABC Company, 499 F. Supp. 791 (1980), decided on 18 July 1980 .

¹⁴ *Supra* note 11.

¹⁵ Gupta, *supra* note 1.

¹⁶ Order XXXIX, Rule 1, Code of Civil Procedure, 1908.

¹⁷ Section 151, Code of Civil Procedure, 1908.

¹⁸ Gupta, *supra* note 1.

¹⁹ *Want to combat piracy? Go for John Doe order*, THE DECCAN HERALD, May 25, 2012, <http://www.deccanherald.com/content/252129/want-combat-piracy-go-john.html>.

²⁰ Quia Timet actions refer to injunctions granted to restrain wrongful acts which are imminent but have not yet taken place.

²¹ Nair & Anuragini, *supra* note 3.

In *Reliance Big Entertainment v. Jyoti Cable Network*²² (henceforth, the “Singham case”), Reliance made use of the three-pronged approach to obtain a John Doe order from the Delhi High Court, in order to prevent the illegal broadcast or streaming of its upcoming film Singham. Irrespective of the fact that one can empathise with the apprehensions of the plaintiff, owing to the widespread piracy of films taking place due to the far reach of the internet, some of it even prior to the film’s release, the same empathy starts to fade once the ambiguity of the order is highlighted. The Delhi High court in the Singham case, for the very first time made use of the deceptively innocuous term ‘Internet’, failing to further qualify it in any manner. Since then, the ‘Internet’ has been time and again used in future orders, without any sort of definition being provided by the courts.²³ In the Singham case, on obtaining the order, the plaintiff sent a list of file-sharing websites to Internet Service Providers (ISPs), asking them to stop the websites from engaging in piracy of the films. The ISPs finding it impossible to monitor websites to identify infringing URLs, simply blocked entire websites, thus preventing a majority of the legitimate users from accessing them; thereby hindering their legitimate usage.

That it is necessary for injunctions to be specific so as to prevent defendants from having to face the negative implications of vague injunctions, was a principle stressed upon by the Delhi High Court itself in one of its earlier decisions,²⁴ not too long before John Doe orders started to be generously handed out by it. The same court seems to have forgotten its own opinion, with it now handing out vague John Doe orders to prevent copyright infringement over the ‘internet’, in a series of judgments in cases concerning the films *Bodyguard*²⁵, *Speedy Singhs*²⁶, *3*²⁷ and *Don 2*.²⁸ These judgments have led to the indiscriminate blocking of websites, even prior to any infringing content being uploaded on them. Rather than specific pages that contain the infringing content being removed or blocked, the indirect influence exerted upon ISPs, and lately the impleading of ISPs as

²² *Reliance Big Entertainment Pvt Ltd v. Jyoti Cable Network & Ors*, CS(OS) No. 1724 of 2011, decided on 20 July 2011.

²³ Gupta, *supra* note 1.

²⁴ *The Indian Performing Right Society Ltd v. Mr Badal Dhar Chowdhry*, CS(OS)1014/2011, decided on 5 April 2010.

²⁵ *Reliance Big Entertainment v. Multivision Network & Ors*, CS(OS) No. 2066 of 2011, decided on 19 December 2011.

²⁶ *Viacom 18 Motion Pictures v. Jyoti Cable Network & Ors*, CS(OS) No. 2352 of 2011, decided on 14 May 2012.

²⁷ *M/s R K Productions Pvt Ltd v. BSNL & Ors*, CS(OS) No. 208 of 2012, decided on 29 March 2012.

²⁸ *Reliance Big Entertainment v. Multivision Network & Ors*, CS(OS) No. 2066 of 2011, decided on 19 December 2011

primary parties to the suit, has led to entire video or file sharing websites, peer-to-peer systems and legitimate streaming services being arbitrarily blocked.²⁹

The ISPs seem to have found themselves caught in a critical and unattractive situation in this rift between the copyright owners and internet users. Since the copyright owners have unjustifiably shifted the burden of implementation of the orders to the ISPs, the ISPs are on one side under pressure to abide by the Court's orders to escape potential liability for contempt of court, while on the other side they are ending up sacrificing interests of their consumers by blocking entire websites, and are hence risking losing out on business. Nevertheless, the role played by the ISPs in diverting this judicial trend in the right direction cannot be undermined. Owing to a clarification sought by a conglomerate of ISPs regarding the extent of the John Doe injunction granted for the film 3, the Madras High Court in *RK Productions v. BSNL*,³⁰ narrowed down the scope of its initial broadly worded order by limiting the injunction granted to include only specific URLs that host the pirated content and not entire websites. The Court also transferred the burden of implementing the order upon the copyright owner (movie producer) who was now responsible for informing the ISPs about the infringing URL within 48 hours.³¹ This led to a positive development, with the John Doe order granted for the movie *Mirattal*³² specifically finding mention of the URLs which contained the movie.³³

During the 2014 FIFA World Cup, however, the Delhi High Court banned a large host of websites and also prevented any person/body/organisation from using the internet to provide access to and/or communicate to the public the broadcast of FIFA world cup matches, thus in effect ordering that the ISPs block entire websites instead of simply URLs. Moreover, the Court did so by relying solely on the list provided to it by the plaintiffs, without requiring any further proof of infringement.³⁴ The order therefore, deviates from the Madras High Court order in *RK Productions* which tried to prevent the copyright holders from using their own discretion to mandate the

²⁹ Nikhil Pahwa, *Block & Lock Brigade*, THE SUNDAY GUARDIAN, May 27, 2012, <http://www.sunday-guardian.com/artbeat/block-a-lock-brigade>.

³⁰ M/s R K Productions Pvt Ltd v BSNL & Ors, CS(OS) No. 208 of 2012, decided on 29 March 2012.

³¹ TNN, *Web piracy: HC says block links, not websites*, THE TIMES OF INDIA, June 22, 2012, <http://timesofindia.indiatimes.com/tech/tech-news/Web-piracy-HC-says-block-links-not-websites/articleshow/14327632.cms>

³² TNN, *Film 'Mirattal' gets copyright cover*, THE TIMES OF INDIA, August 2, 2012, <http://timesofindia.indiatimes.com/city/chennai/Film-Mirattal-gets-copyright-cover/articleshow/15322447.cms>

³³ Gupta, *supra* note 1.

³⁴ *Multi-Screen Media v. Sunit Singh and Others* CS(OS) 1860/2014 decided on June 23, 2014.

blocking of select websites. Despite its order having adversely affected internet freedom, the Delhi High Court reaffirmed its severe stand in *Star v. Haneeth Ujwal*,³⁵ where it directed the blocking of more than 100 infringing websites, stating that simply blocking URLs containing infringing content was insufficient, as websites could easily override the court's order by merely changing one character in the old URL to create a new one, thus invalidating its sanctity.³⁶

Although John Doe orders are indispensable tools for enforcing copyright in times of flagrant internet piracy, they must be used in a manner which ensures that they do not affect legitimate interests of innocent users. If the blocking of whole websites is required, taking into account reasons given by the court in *Star v. Haneeth Ujwal*, website owners should be sent a judicial notice allowing them to remove infringing content within a specified time, failing which the website may be blocked. If this is not done, it will lead to a gross misrepresentation of the basic rationale behind John Doe orders which are enforceable only against specific acts of infringement on their occurrence, and once the infringer has been identified. Even all the content on "rogue websites"³⁷ may not be infringing in nature, and all website users may not be accessing infringing content, but instead may be reliant upon the websites for other essential services. The lack of safeguards in John Doe orders has not only affected innocent Internet usage which is not even remotely connected to the piracy in question, but has also entrenched upon consumers' fair use rights under Section 52 of the Copyright Act, 1957 and has denied them access to content that is often uploaded for the sole reason of sharing.³⁸ Another aspect that needs attention is the fact that considering these orders are passed against unnamed websites, their implementation should not be left in the hands of copyright holders or ISPs, but should be instead be supervised by a commissioner appointed by the Court.³⁹ These orders bring into question the basis upon which ISPs and/or copyright holders exercise their discretion in determining which websites to block and the duration of the same; and it is pertinent that this practice be stopped altogether so as to prevent abuse of the same.

³⁵ *Star India Pvt. Ltd. & Anr. v. Haneeth Ujwal & Ors.* CS(OS) 2243/2014 decided on 28 July, 2014

³⁶ *Id.*

³⁷ A term used by the Delhi High Court to describe websites that predominantly host illegal content.

³⁸ Prabhala Achal & Liang Lawrence, *A Ludicrous Ban*, THE OPEN MAGAZINE, June 2, 2012, <http://www.openthemagazine.com/article/nation/a-ludicrous-ban>

³⁹ Nair & Anuragini, *supra* note 3.

IV. CONCLUSION

It can be concluded that irrespective of how essential John Doe orders are and their immense importance to copyright holders in curbing online piracy, they are being passed by the courts and implemented at a rather unbalanced social cost. Since the nature of these orders is *ex parte* and the other side is not even heard prior to the order's passing, they mandate utmost judicious implementation, irrespective of the situation under which they are churned out. The current judicial trend, particularly the judgments being passed by the Delhi High Court, is not only indiscriminate in nature but can also be termed illogical. This trend can prove to have extremely negative implications on the country's copyright protection regime in the future. In this regard, the trend being followed by the Madras High Court assumes immense significance because it is moving towards ensuring that John Doe orders fulfil their true purpose, apart from preventing ISPs from being reduced to scapegoats and legitimate internet usage being blocked; a reform that is much needed in current times.