

**JOHN DOE ORDER: A COGENT JURISPRUDENTIAL ACCOUNT OF JUDICIAL ENDEAVOURS?**

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**ABSTRACT**

*The Internet is a space with unlimited boundaries, and an immensely huge platform for content sharing as well. However, while providing varied scope for content creation and sharing, and various other types of activities it also offers limitless opportunities to impinge upon the rights of other content creators. On one hand, it expunges the territorial limitations of globalization and on the polar side; it spawns envisaged cyber irritants. "Internet Piracy" is one such ignominious effect of the internet. Since, the growth of Internet and it has excessively deepened in people's daily lives; piracy on the same has also proportionally grown. Illegal downloading of copyrighted work over the Internet has been a norm for people for quite some time now and they do not see anything wrong with such accessibility, therefore, making internet piracy all the more rampant. Both national and international organizations have been striving to curb this menace; however its persistence is inevitable. 'John Doe Order' is one such weapon developed by judicial systems of countries to detriment the potential infringers of copyright and creates a robust intellectual property infrastructure.*

*Reflecting upon the copyright infringement on the Internet, the authors have analysed the jurisprudence of John Doe Orders in India. Further, the authors essayed to analyse the recent trend of granting John Doe Orders by Courts in Bollywood cases while juxtaposing their counter effects on the innocent parties such as Induna. It has also been attempted to depict the likely jurisprudence of John Doe Orders in India through the examination of the recent judicial development of dynamic injunctions and its implications on the copyright infringements cases with respect to Joe Doe Orders. At the back drop of all these aspects, the granting of John Doe Orders has been critically analysed to test whether they impinge on the rights of certain innocent defendants as well, and certain recommendations to revamp the status quo with effective altered mechanisms have been made to ensure appropriate application of this mechanism.*

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## I. INTRODUCTION

By making anonymity a virtue, the Internet has exacerbated the issue of piracy. The proliferation of piracy has not only attracted legislative and judicial attention but also begotten numerous issues. The omnipresence of the Internet in people's life has brought diverse opportunities for people to grow. However, like two facets of everything, the Internet, on one hand, has connected people, while on the other, it has ruptured their privacy by becoming an inseparable part of their life.

Although the advancement in technology has brought the world closer, at the same time it has also escalated piracy on an enormous scale. Interestingly, in this world where people claim Internet freedom as part of their constitutional freedom,<sup>1</sup> at the same time they cast aspersions against the same unfettered Internet regime whenever their right is interfered with.

The internet has also revolutionized the traditional copyrights regime. Copyright is a manifestation of an individual's creation whereas the piracy is a dilution of that creation. Pertinently, online piracy is not just a legal problem but also an economic and service problem.<sup>2</sup> To get the remedy for the occurrence of any wrong, one has to identify the wrongdoer. Hence, "specificity" becomes a requisite to win any legal claim; but what happens to a wronged individual who is oblivious of the identity of the wrongdoer? Should he not be entitled to claim justice? Does the anonymity of the wrongdoer bar his remedy?

Deliberating upon these questions, the Delhi High Court came up with a mechanism called John Doe Orders or rolling Anton Pillar Orders, famously known as Ashok Kumar Orders in India.<sup>3</sup> John Doe Orders are a mechanism to provide pre-emptive rights to the plaintiff to secure the likely infringement of its rights.<sup>4</sup> They function on the principle of Quia Timet, meaning the wrongful acts which are imminent but are yet to commence.<sup>5</sup> These orders were initially meant to enable the plaintiff to claim protection against unknown defendants in cable piracy cases.<sup>6</sup> However, the Singham case,<sup>7</sup> wherein the Delhi High Court for the very first time made use of the deceptively innocuous term 'internet' and contacted several Indian Internet Service Providers ("ISPs") to block access to file sharing websites, has shifted the paradigm thereby, leading to the

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<sup>1</sup> Faheema Shirin.R.K v. State Of Kerala, WP(C).No.19716 OF 2019(L).

<sup>2</sup> Swaraj Paul Barooah, *Guest Post: Online Piracy – The Way Forward?*, SpicyIP (Jan. 11, 2015), <https://spicyip.com/2015/01/guest-post-online-piracy-the-way-forward.html>.

<sup>3</sup> Taj Television v. Rajan Mandal, [2003] FSR 22.

<sup>4</sup> Ajay Sharma, *John Doe Orders in Indian Context*, THE RMLNLU LAW REVIEW BLOG (Oct. 25, 2017), <https://rmlnlulawreview.wordpress.com/2017/10/25/john-doe-orders-in-indian-context/>.

<sup>5</sup> Aadya Chawla, *John Doe Orders: Prevention of Copyright Infringement of Cinematograph Films*, 2 ILLI LAW REVIEW 65 (2017).

<sup>6</sup> Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 JIPR, 351, 353 (2013); *see also Viacom 18 Motion Pictures v. Jyoti Cable Network and Ors.*, CS(OS) 2652/2011, *Taj Television Limited v Rajan Mandal*, [2003] FSR 22, *Sony Pictures Networks India Pvt. Ltd. & Anr. v. Home Cable Network Pvt. Ltd. & Ors.*, CS (COMM) 239/2017.

<sup>7</sup> *Reliance Big Entertainments v. Multivision Networks*, CS (OS) 3207/2011 (Delhi HC).

normalization of granting such orders in India. Notably, India has been the largest movie producer in the world for the last few years by releasing more than a thousand films each year.<sup>8</sup> However, India is also the country with the 4<sup>th</sup> highest number of users downloading pirated cinematograph films,<sup>9</sup> and most of these individuals remain untraced.<sup>10</sup>

There are quite a few questions that arise as a corollary to the exceeding normalization and popularity of John Doe Orders. How would the judicial system of the country deal with a scenario wherein every movie producer initiates invocation of John Doe Orders? How will the ISPs ensure that all the websites instructed to be blocked are not illicit websites? What will be the remedies available to the innocent parties impleaded as defendants in such John Doe suits? These questions are to be ruminated by Courts before granting a John Doe Order. However, this is not done because currently there exists no mechanism with the Courts to ensure that John Doe Orders will only be used against the actual wrongdoers and the rights of innocent parties would not be impinged upon.

Mulling over the above question the authors have analysed the, meaning and implications of John Doe Orders, their collateral impact on third parties, the likely jurisprudence of such orders in India, and, finally the authors provide certain recommendations to revamp the John Doe regime in India.

## **II. EMERGENCE OF JOHN DOE ORDERS**

The term John Doe Order may be constituted some decades ago however; the orders against the unidentified persons were used to be passed since the time of King Edward III.<sup>11</sup> With passage of time, these orders issued against the unidentified persons took the shape of orders, what we now commonly term as John Doe Order. Notably, John Doe is referred to an unidentified male. Similarly, different countries have ascribed different names for such unidentified persons such as Israel Israeli, Average Joe, Rudolf Lingens, Joe Shmoe, Mr. X, Blackacre, Multiple-use name, Nomennescio, Foo etc.

Pertinently, the genesis of John Doe Order can be traced in the landmark judgment of Anton Piller KG v. Manufacturing Processes Ltd.,<sup>12</sup> wherein the English Court of Appeal in the year 1976 permitted the plaintiff to search and seize the premises of the infringer

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<sup>8</sup> *Film Industry in India - Statistics & Facts*, STATISTA (DEC. 10, 2018), <https://www.statista.com/topics/2140/film-industry-in-india/>.

<sup>9</sup> *Supra* note 5.

<sup>10</sup> Douglas Heingartner, *Software Piracy Is in Resurgence, With New Safeguards Eroded by File Sharing*, The New York Times (Jan. 19, 2004), <https://www.nytimes.com/2004/01/19/business/software-piracy-is-in-resurgence-with-new-safeguards-eroded-by-file-sharing.html>.

<sup>11</sup> Payal Chatterjee, *What's in a name'... John Doe arrives in India*, [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/-What-s\\_in\\_a\\_name\\_-\\_John\\_Doe\\_arrives\\_in\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/-What-s_in_a_name_-_John_Doe_arrives_in_India.pdf).

<sup>12</sup> Anton Piller KG v. Manufacturing Processes Ltd [1976] 1 All ER 779 (Eng.).

with the intention of preserving the evidence that may be destroyed by the defendants. Pertinently, such orders, which required the search of the other party were not granted on a regular basis and passed with extreme caution thereby ensuring that the rights of the other party do not get impinged.<sup>13</sup>

With the passage of time and the rampant increase of piracy, there arose a need to extend the Anton Pillar Orders to the defendants who were unknown at the time of filing complaints. Consequently, in the landmark judgment of *Billy JOEL and Root Beer Rags, Ltd., Vs Various John Does, Jane Does and ABC Company*,<sup>14</sup> the Hon'ble Judge passed an injunction order against the unidentified infringers and held that, "Were the injunction to be denied, plaintiffs would be without any legal means to prevent what is clearly a blatant infringement of their valid property rights. While the proposed remedy is novel that in itself should not weigh against its adoption by this Court. A Court of equity is free to fashion whatever remedies will adequately protect the rights of the parties before it." And then arose the era of grating John Doe Orders or Rolling Anton Pillar Orders.

Thus, the justification for the John Doe Order stems from the legal maxim 'ubi jus ibi remedium' which literally means that where there is a right, there is a remedy. Notably, even before the John Doe Order's advent in India, there were many countries including Canada,<sup>15</sup> America,<sup>16</sup> Australia,<sup>17</sup> and United Kingdom,<sup>18</sup> which had welcomed this judicial demarche.<sup>19</sup> Interestingly, the order has already been officialised in the United Kingdom (Civil Procedure Act of 1997), Australia (Federal Court of Australia, Practice Notes).<sup>20</sup>

In other counties, John Doe Orders is not only restricted to intellectual property issues but also have been applied to other legal wrongs. In U.K., these order were used as an unexampled remedy against those individual who remained unidentified until they are found in possession with.<sup>21</sup> It covered both inspection and recovery of documents without the permission of defendant and had also been used as an interlocutory orders wherein instead of confiscating the goods the defendant was only directed to stop the

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<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Billy Joel and Root Beer Rags, Ltd., v. Various John Does*, 499 F. Supp. 791 (1980).

<sup>15</sup> *Fila Canada Inc. v. Doe*, (1996) 3 F.C. 493 (T.D.).

<sup>16</sup> Comparative Study on Enforcement of Intellectual Property Rights between United Kingdom, United States of America, Canada, Australia and New Zealand, [https://shodhganga.inflibnet.ac.in/bitstream/10603/172086/9/09\\_chapter%205.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/172086/9/09_chapter%205.pdf).

<sup>17</sup> Mr. Little, Tress Cocks and Maddox and ACME Merchandising, Transcript, p. 215.

<sup>18</sup> *E.M.I. Limited v. Pandit*, (1975) I W.L.R. 302; *see also* *EMI Records v. Kudhail*, (1985) FSR 36 (Eng.).

<sup>19</sup> *Supra* note 11.

<sup>20</sup> *Supra* note 11.

<sup>21</sup> *Cullom Machine Tool & Die Inc. v. Bruce Tile Inc.*, (1990), 34 CPR (3d) 296 (FCTD); *see also* *Nintendo of America, Inc. v. Coinex Video Games Inc.*, [1983] 2 FC 189 (CA).

pirated materials.<sup>22</sup> In Canada, these orders are called ‘rolling’ anton pillar orders because they are not against any specific defendant and even if some defendants are known they are not necessarily related to John/Jane Doe.<sup>23</sup> Appositely, Canada has very strict regulation and governance for such orders and requires a rigorous scrutiny and procedural conformity before granting such order.<sup>24</sup> In Canada, the plaintiff has to show very strong prima facie case and very serious potential damage by the defendant.<sup>25</sup> Furthermore, in U.S.A., these orders are helpful in countering bootlegging activities and have been used by Internal Revenue Service for knowing the unknown alleged tax evaders.<sup>26</sup> In U.S.A., these orders are also used in case of bank frauds, usage of malicious software and unauthorized interception of electronic communications, sexual exploitation investigation and are also implemented by Federal Bureau of Investigation (“FBI”).<sup>27</sup> Thus, the global use of the John Doe Order is not limited to IP case but also covers the criminal and constitutional law cases where the proper implement can be sought from a national authority like FBI.

### **III. INDIA'S JOHN DOE REGIME**

Had Christian Andersen’s famous quote, “Where words fail, music speaks” if elaborated further after keeping the status quo in mind, would have been “when technology escalates, piracy prevails”. Much like the story of corresponding rights-duties, the “right holder” and “infringer” are two obvious facets of any legal nodus wherein the presence of one’s right automatically effectuates a corresponding duty upon another to not infringe that right. John Doe Order, familiarly known as Ashok Kumar Order is not a statutory remedy given in Copyright Act. Rather, it is a gift by the Indian judiciary to copyright holder in India. Prior to the Taj Television case,<sup>28</sup> John Doe Orders were an outlander concept for Indian Intellectual Property (“IP”) legal framework and used to seize counterfeit goods in possession of an unknown person for infringement of trademark and copyright.<sup>29</sup> However, burgeoning use of internet and social media, has expanded its scope to movie industries and arisen a need to safeguard the interest of the movie producers. Notably, the untrammelled nature of internet and its anonymity aspect has sensitized this issue to such a level where the judiciary is impelled to grant pro-plaintiff orders. Resultantly, it has started perturbing the rights of other

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<sup>22</sup> E.M.I. Records Limited vs. Kudhail, [1985] F.S.R 36 (C.A.).

<sup>23</sup> *Supra* note 16.

<sup>24</sup> Nike Canada Limited vs. Jane Doe (2), (1999) 2 C.P.R (4th) 501 (F.C.T.D).

<sup>25</sup> Rank Film Distributors Limited vs. Video Information Centre, (1980) 2 All ER 273.

<sup>26</sup> *Court Authorizes Internal Revenue Service to Issue Summonses For Records Relating To U.S. Taxpayers Who Used Services of Sovereign Management & Legal Ltd. to Conceal Offshore Accounts, Assets or Entities*,

<https://www.justice.gov/opa/pr/court-authorizes-internal-revenue-service-issue-summonses-records-relating-us-taxpayers-who>

<sup>27</sup> United States of America vs. John Doe (1-13) United States District Court, District of Connecticut, No. 3:11 CV 561 (VLB), April 2011.

<sup>28</sup> *Supra* note 3.

<sup>29</sup> Luxottica S.R.L. Anr. v. Mr. Munny & Ors. (CS No. 1846 of 2009).

stakeholders especially intermediaries and defendants thereby, raising serious questions against fundamental ethos of natural justice and administrative law.

#### **IV. ANONYMITY: A VIRTUE?**

IP laws ascribe copyright for the work,<sup>30</sup> produced by a person by his intellect. In John Doe cases, the plaintiff i.e. a producer,<sup>31</sup> or a broadcaster,<sup>32</sup> possesses certain rights for his work which are protected under the Indian Copyright Act, 1957. However, in the existing Internet realm, such protection is an utopian expectation. Interestingly, Copyright theft and piracy are solid examples to justify the said expectations in the the current Internet paradigm. No country in the world has been able to completely immunize its IP right holders against piracy and its ill effects. The advent of the Internet has broadened the scope of piracy to include “Digital Piracy”, thereby exacerbating the problem. Copyright piracy can exist in both the online [such as music piracy, uploading movies on the pirated website, etc.] and the offline sphere [such as selling of DVDs or CDs of a movie, etc]. Interestingly, 22% of the global Internet width is used for online piracy.<sup>33</sup> Moreover, 70% of Internet users believe that there is nothing wrong with online piracy.<sup>34</sup> These users indicate the problem of free-riders of the market [movie industry] because they acquire content without paying any amount. Thus, the above data not only bolsters the perception of ‘free nature [cost free] of Internet’ but also demonstrates the free-rider problem of piracy.

Interestingly, the identity of the parties to any dispute or suit, is of utmost importance but the same has been cleared by the Internet. The identity of the plaintiff is known in every case because he/she is the one who approaches the Court but owing to the untrammelled nature of the Internet, it is not always possible to trace the infringers. Therefore, the threat remains imminent in the entire situation.

On one hand, Internet has widened the scope of the consumer base by eliminating the territorial boundaries and reducing the cost of circulation, whereas on the negative side, it poses serious threats by infringing their right within seconds, if not controlled appropriately.

#### **V. SHARPENING THE SHIELD**

In India, the origin of John Doe jurisprudence can be traced in Delhi High Court’s 2002 judgment in Taj Television Limited v. Rajan Mandal,<sup>35</sup> where the plaintiff sought a John Doe Order to restrain unlicensed cable television operators from illegally broadcasting the FIFA World Cup 2002. Interestingly, the case set a mark for the jurisprudence of ‘John Doe’ or ‘Ashok Kumar’ Orders in India. The underlying aim behind granting such

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<sup>30</sup> Section 2(y), The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>31</sup> Section 14, The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>32</sup> Section 39(a), The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>33</sup> *Online piracy in numbers – facts and statistics*, GO GULF (NOV. 1, 2011), <https://www.go-gulf.com/blog/online-piracy/>.

<sup>34</sup> Jooyeon Park, *The Effect of Online Piracy Deterrence on Self control and Piracy Intention*, <https://pdfs.semanticscholar.org/0c49/4e0dde0bdc25b68720c87366471f898976a3.pdf>.

<sup>35</sup> *Supra* note 3.

order was to curb the menace of 'online piracy'. Such orders are ex parte because of the anonymity of defendants.

Legitimizing the John Doe Orders, Delhi High Court reckoned at the idea that so long as the 'litigating finger' is pointed at a particular person, then the 'misnomer is not fatal.'<sup>36</sup> However, the honourable High Court missed out on the aspect that a case includes two parties and each has its own rights which can only be determined when the actual wrong takes place. Hence, granting such one-sided orders would not only jeopardize the rights of defendants but also question the fundamental tenets of the criminal justice system.

John Doe Orders were introduced in India through a conjoint reading of the provisions concerning inherent power of the Court and temporary injunctions enumerated under Section 151,<sup>37</sup> and Order 39 of Code of Civil Procedure, 1908 respectively. A plaintiff can get the John Doe Order by fulfilling the traditional three-pronged approach that governs temporary injunctions namely, the (i) prima facie case, (ii) irreparable injury, and (iii) balance of convenience.<sup>38</sup>

Appositely, in 2011, in the case of Reliance Big Entertainment v. Multivision Network and Ors., the plaintiff received a John Doe Order for its upcoming movie Singham by proving the abovementioned elements and thereby made a pathway for the other Indian movie producers to claim such pre-violation remedy for their threat. The present case underpinned the reasoning of the Taj Television case,<sup>39</sup> by including Internet piracy in the domain of John Doe Orders. Since then a lot of movie producers have successfully obtained John Doe Orders such as Bodyguard,<sup>40</sup> Speedy Singhs,<sup>41</sup> 3,<sup>42</sup> Don 2,<sup>43</sup> Happy New Year,<sup>44</sup> Players,<sup>45</sup> Mirattal,<sup>46</sup> Force 2,<sup>47</sup> Flying Jatt,<sup>48</sup> Azhar (2016),<sup>49</sup>

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<sup>36</sup> *Supra* note 3.

<sup>37</sup> Section 151, The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>38</sup> Dalpat Kumar v. Pralhad Singh, AIR 1993 SC 276 (India).

<sup>39</sup> *Supra* note 3.

<sup>40</sup> Reliance Big Entertainment v. Multivision Network & Ors., CS (OS) No. 2066 of 2011.

<sup>41</sup> Viacom 18 Motion Pictures v. Jyoti Cable Network & Ors., CS (OS) No. 2352 of 2011.

<sup>42</sup> M/s R K Productions Pvt. Ltd. v. BSNL & Ors., (2012) 5 LW 626.

<sup>43</sup> Reliance Big Entertainment v. Multivision Network and Ors., CS(OS) No. 3207 of 2011.

<sup>44</sup> Devika, *Happy New Year granted John Doe order ahead of its release*, SpicyIP (Oct. 18, 2014), <https://spicyip.com/2014/10/spicyip-tidbit-happy-new-year-granted-john-doe-order-ahead-of-its-release.html>.

<sup>45</sup> Viacom 18 Motion Pictures v. Jyoti Cable Network and Ors., CS (OS) No. 3288 of 2011.

<sup>46</sup> *Film 'Mirattal' gets copyright cover*, Times of India (Aug. 2, 2012, 06:58 IST), <https://timesofindia.indiatimes.com/city/chennai/Film-Mirattal-gets-copyright-cover/articleshow/15322447.cms>.

<sup>47</sup> Viacom 18 Media Private Ltd. v. Bharath Sanchar Nigam Limited, CS No. 877 of 2016.

<sup>48</sup> Keyur Seta, *A Flying Jatt producers secure order to temporarily block 830 websites*, CINESTAAN (AUG. 25, 2016, 2:01 PM), <https://www.cinestaan.com/articles/2016/aug/25/1892/a-flying-jatt-producers-secure-order-to-temporarily-block-830-websites>.

<sup>49</sup> Nikhil Pahwa, *Four John Doe orders for blocking websites in the last month alone*, MEDIANAMA (JUN. 16, 2016), <https://www.medianama.com/2016/06/223-john-doe-orders-india/>.

Housefull 3,<sup>50</sup> Waiting,<sup>51</sup> Veerappan,<sup>52</sup> Azhar,<sup>53</sup> Kyaa Kool Hain Hum 3,<sup>54</sup> Piku,<sup>55</sup> Bombay Velvet,<sup>56</sup> Hunterrr,<sup>57</sup> Gangs Of Wasseypur,<sup>58</sup> and Bang Bang,<sup>59</sup>.

#### **VI. BLOCKING A URL V. BLOCKING A WEBSITE**

In R.K. Productions Pvt. Ltd v. BSNL,<sup>60</sup> the Madras High Court narrowing the scope of John Doe Orders, held that only specific URLs should be blocked and not the entire website.

Similarly, in Eros International Media Limited v. Bharat Sanchar Nigam Limited and Ors.,<sup>61</sup> [the Dishoom Case] the Bombay High Court reaffirmed the above reasoning of the Madras High Court and came up with the guidelines to limit the unfettered scope of such orders. Here, the Court held that only the specific links listed out in the authenticated affidavit be blocked by the various ISPs who were impugned as defendants. Moreover, it required all ISPs to display a generic message stating the reasons for blocking, and other relevant information, and ordered for the email address of the nodal officer to be communicated.<sup>62</sup> This judgment also narrowed the validity of the block to 21 days, after which the plaintiff would be required to approach the Court and obtain an order for extension of the ban.

However, the abovementioned guidelines were not applied by other High Courts which led to a disparity among the decisions of the Court in granting John Doe Orders. Interestingly, some High Courts encourage blocking the entire websites whereas some favor the blocking of a particular URL. The same can be observed in Madras High Court's approach of blocking a large number of websites to impede unauthorized hosting of the

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<sup>50</sup> Sai Vinod, *John Doe orders for Blocking of Websites: Mad Dog without a Leash?*, SpicyIP (Jan 19, 2012), <https://spicyip.com/2012/01/john-doe-orders-for-blocking-of.html>.

<sup>51</sup> Chawla, *supra* note 5.

<sup>52</sup> Chawla, *supra* note 5.

<sup>53</sup> Sony Pictures Network India Private Limited v. www.Vimeo.com & Ors., CS (COMM) 523/2016.

<sup>54</sup> Balaji Motion Pictures Limited v. www.1337.Yootorrent.com & Ors., CS (COMM) 38/2016.

<sup>55</sup> Multi Screen Media Pvt. Ltd. v. www.Vimeo.com & Ors., CS (OS) 1230/2015.

<sup>56</sup> *Protection against piracy: 'Bombay Velvet' producers move HC*, The Economic Times (May 11, 2015), <https://economictimes.indiatimes.com/magazines/panache/protection-against-piracy-bombay-velvet-producers-move-hc/articleshow/47228966.cms>.

<sup>57</sup> Kiran George, *Shemaroo Entertainment Secures a Curious John Doe from Bombay HC*, SpicyIP (March 22, 2015) <https://spicyip.com/2015/03/shemaroo-entertainment-secures-a-curious-john-doe-from-bombay-hc.html>.

<sup>58</sup> JOHN DOE ORDERS ISSUED FOR GANGS OF WASSEYPUR, MEDIANAMA (June 18, 2012), <https://www.medianama.com/2012/06/223-gangs-of-wasseypur-torrent-block/>.

<sup>59</sup> Veera Mahuli, *The "Bang Bang" Order: 'Likely' Copyright Infringement Trumps Intermediary Immunity*, Tech Law Forum @ NALSAR (Oct. 7, 2014), <https://techlawforum.nalsar.ac.in/2014/10/07/the-bang-bang-order-likely-copyright-infringement-trumps-intermediary-immunity/>.

<sup>60</sup> *Supra* note 42.

<sup>61</sup> Eros International Media Limited v. Bharat Sanchar Nigam Limited, Notice of Motion (L) No. 2315 of 2016 in Suit No. 751 of 2016.

<sup>62</sup> Shamnad Basheer, *Narrow John Doe For Dishoom: New Balance?*, SpicyIP (July 26, 2016), <https://spicyip.com/2016/07/narrow-john-doe-for-dishoom-new-balance.html>.



film *A Flying Jatt*.<sup>63</sup> A parallel approach was adopted by the Delhi High Court in a case pertaining to the broadcast of the FIFA 2014 World Cup.<sup>64</sup> Similarly, in the case of *Department of Electronics & Information Technology v. Star India Private Limited*,<sup>65</sup> the division bench of the Delhi High Court held that the entire website of the defendants be blocked and not just the specific URL of the rogue websites.

On the other hand the Bombay High Court, favoured blocking specific URLs and links hosting the infringing material (not the entire websites), as was also the case in infringement suits in respect of the movies *Uda Punjab* and *Dishoom*.<sup>66</sup>

Pertinently, the primary aim behind John Doe Orders is to identify the real defendants. The Court is required to pass an ad interim remedy to the plaintiff when the defendant remains unidentified. Hence, the order is temporary in nature, and not of a permanent nature. However, eternal blocking of a website is not a kind of remedy which can validly be termed as a temporary remedy. There is contrariety of opinions among the Courts in blocking websites. The Bombay High Court,<sup>67</sup> has clarified the ban for 21 days whereas other Courts are still silent on this issue. Thus, the debate of blocking a website versus blocking a specific URL is open to be celebrated.

It is to be noted that both blocking a website and blocking a specific URL cause certain loss to the defendant. This loss is justified when the defendant was actually an infringer however, when blocked website/URL turns out to be of an innocent person, then this loss is to be compensated. Astonishingly, in the current regime there is no specific remedy when such John Doe Order goes wrong. Hence, it is imperative to encumber the Plaintiff with a duty to check whether websites/URL which are to be blocked are actually rogue website as defined in *UTV Software Communication Ltd v 1337X.TO and Ors*,<sup>68</sup> as websites which primarily or predominately make available infringing content. In absence of such duty, the innocent defendants such as *Induna* would always remain under threat to their business or enjoyment of their website. Hence, the status quo requires demands a cautious approach with respect to John Doe Orders.

#### **VII. PRINCIPLES OF NATURAL JUSTICE**

Natural Justice or Common sense Justice is the fundamental form of justice that protects against arbitrary exercise of power by ensuring fair play and shall not be negated to any person. Although there is no straight jacket formula to define natural justice yet it

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<sup>63</sup> Swati Deshpande, *Madras HC orders blocking of 830 sites to prevent online piracy of 'A Flying Jatt'*, The Times of India (Aug 24, 2016, 09:57 PM), <https://timesofindia.indiatimes.com/india/Madras-HC-orders-blocking-of-830-sites-to-prevent-online-piracy-of-A-Flying-Jatt/articleshow/53847473.cms>.

<sup>64</sup> *Multi Screen Media v. Sunit Singh and Ors.*, CS (OS) No. 1860 of 2014.

<sup>65</sup> *Department of Electronics & Information Technology v. Star India Private Limited*, FAO (OS) No. 57 of 2015.

<sup>66</sup> *Aprajita Nigam, India: John Doe Orders Bring Light in Dark Age Of Digital Piracy*, MONDAQ (NOV. 6, 2017), <http://www.mondaq.com/india/x/642974/Trademark/John+Doe+Orders+Bring+Light+In+Dark+Age+Of+Digital+Piracy>.

<sup>67</sup> *Supra* note 61.

<sup>68</sup> *UTV Software Communication Ltd. and ors. v. 1337 X.To*, 2019 (78) PTC 375(Del).

essentially involves rule against bias and right to fair hearing.<sup>69</sup> Notably, in all the cases where John Doe Orders are claimed, the plaintiff does not need to prove any real infringement or harm, rather a mere 'suspicion' or 'threat' to the plaintiff's right is enough to establish a cause of action. Appositely, these orders are also called quia timet actions as these injunctions are granted to restrain wrongful acts which are imminent but have not yet taken place.<sup>70</sup> Furthermore, even though the orders passed by the Bombay,<sup>71</sup> and Madras High Court,<sup>72</sup> are appreciated by other High Courts, they were not necessarily followed.

Hence, granting John Doe Orders is similar to providing the plaintiff with a carte blanche, giving unfettered power to stop the potential defendants. In furtherance of the same, once the order is granted to a plaintiff the power to block any website or a link shifts to him which makes him a judge in his own cause. Furthermore, such orders are ex parte orders and are granted without intimating the defendant. Thus, the opportunity of being heard also remains absent when such orders are passed. Hence, these orders do not stand true on the anvil of principles of natural justice.

Generally, a defendant is informed whenever an ex-parte order is passed against him. However, in John Doe Order cases, it is assumed that intimation would lead to distortion of evidence which would eventually enable them to escape the law.<sup>73</sup> Pertinently, it seems to be an endorsement of the utilitarian approach wherein the law strives to bring larger good to society by protecting the right of few copyright holders and restricting the potential defendants. However, it is to be understood in such cases that, under legal principles, a person is not wrong until he is proven to be guilty,<sup>74</sup> therefore, it will not be legitimate to treat him like a defendant.

#### **VIII. INTERMEDIARY'S CATCH 22 SITUATION**

In the cases where John Doe Orders are granted, there are three important stakeholders involved, namely the plaintiff (right holders), public, and suspected defendants and additionally, the ISPs are also a stakeholder in such cases. All the stakeholders' rights are at stake in these cases such as the plaintiff's exclusive right on their work, the defendant's freedom of expression including freedom of trade and business, and the public's rights to fair use.<sup>75</sup> Similarly, such orders are also likely to imperil the rights of the users of online services either by removing the work of the author of legal work or, by denying them access to a website that hosts legal content.<sup>76</sup>

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<sup>69</sup> 1978 SCR (2) 621.

<sup>70</sup> *John Doe* arrives in alliance with the principle of *Quia Timet*, PSA (April 2012), <http://psalegal.com/wp-content/uploads/2017/01/ENewslineApril2012.pdf>.

<sup>71</sup> *Supra* note 61.

<sup>72</sup> *Supra* note 42.

<sup>73</sup> *Anton Piller K.G. vs. Manufacturing process Limited*, [1976] Ch. 55 (C.A.).

<sup>74</sup> *Director of Public Prosecutions v. D. O'T*, [2003] 4 IR 286.

<sup>75</sup> Section 52, The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>76</sup> Divij Joshi, *Madras High Court Issues 'Ashok Kumar' Order to Block the Internet Archive + 2649 Websites*, SpicyIP (Aug. 10, 2017), <https://spicyip.com/2017/08/madras-high-Court-issues-ashok-kumar-order-to-block-the-internet-archive-2649-websites.html>.

In furtherance of the same, ISPs can be held secondarily liable under the Copyright Act, as was held in *Super Cassettes Industries v. Myspace Inc. &Anr.*,<sup>77</sup> for infringing copyrighted content. This liability stems from Section 51(a)(ii),<sup>78</sup> of the Copyright Act for permitting, any place for the communication of work for profit. However, the knowledge of the intermediary is essential to make it liable for infringement.<sup>79</sup>

Strangely, in such cases, ISPs fall into a catch 22 situation where on the one hand, they are abided by the Court's order to block the website/URL to protect the right [yet to be infringed] of plaintiff [which is de facto their legal duty under Section 79 of Information technology Act, 2000] and on the other hand, such act of the ISPs acts as an impetus to sacrifice their consumer's interest. Pertinently, Madras High Court's ruling in *RK Production v. BSNL*,<sup>80</sup> wherein several ISPs including Airtel were directed to block the entire website as a part of John Doe Order, resulted in a consumer complaint filed against Airtel. In this case, the District Consumer Redressal Forum at Shimoga, Karnataka directed Airtel to pay Rs. 20,000/- for deficiency in internet services owing to causing mental agony to the complainant.<sup>81</sup> Thus, in such situations the ISPs are left with only one remedy that is to block the website as asked by the plaintiff.

In long run, this situation would not only ossify the growth of information technology sector but also influence the investment in this sector thereby, affecting the growth of the economy. Surprisingly, even after its unpalatable situation, ISPs own no liability towards the innocent defendants who become victim of their court abidance. Thus, it suggests a need to place check on ISPs in order to avoid any unnecessary blocking.

#### **IX. CODE OF CIVIL PROCEDURE**

John Doe Orders attain their sanctity from Section 151 and Order 39,<sup>82</sup> Rule 1 and Rule 2 of the Code of Civil Procedure, 1908. Pertinently, there are two major issues with the procedural approach of such orders.<sup>83</sup> Firstly, it disregards Order 7, which requires the plaintiff to give details of every defendant, together with details of the cause of action, failure to do which is a ground for rejecting the plaint.<sup>84</sup>

Secondly, it misconceives the purpose of inherent powers of the Court which were clearly explicated by the Supreme Court in *Padam Sen v. State of Uttar Pradesh*,<sup>85</sup> so as to only supplement or regulate the procedure adopted by Courts, without any bearing

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<sup>77</sup> *Super Cassettes Industries v. Myspace Inc*, 2011 (48) PTC 49 (Del).

<sup>78</sup> Section 51(a)(ii), The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>79</sup> *Supra* note 77.

<sup>80</sup> *Supra* note 42.

<sup>81</sup> *Internet Service Provider Penalized for Takedown*, Technology Media and Telecommunication, TRILEGAL, August 2012, <http://www.techlaw.org/wp-content/uploads/2010/07/Trilegal-Internet-Service-Provider-Penalized-for-Takedown-August-2012.pdf>.

<sup>82</sup> Order 39 Rule 1 and Rule 2, CODE CIV. PROC., No. 5 of 1908, INDIA CODE (1908).

<sup>83</sup> Reddy Prashant T, *A critical analysis of the Delhi High Court's approach to ex parte orders in copyright and trademark cases*, 3 MIPR, 171 (2011).

<sup>84</sup> Order 7 Rule 11, CODE CIV, PROC., No. 5 of 1908, INDIA CODE (1908).

<sup>85</sup> *Padam Sen v. State of Uttar Pradesh*, AIR 1961 SC 218 (India).

on litigants' substantive rights for which Courts have to be specifically empowered. However, in John Doe Orders not only do the defendants remain absent but the right of innocent third parties are also at stake because the defendant [innocent] only gets to know about the court order when they have already become the victim of court's order and plaintiff's casual approach. It is to be noted that for granting ex parte order, CPC specifically requires the deliberate absence of the defendant under Order 9, rule 6(1)(a) unlike the Quia timet action or John Doe Order where the defendant remain completely oblivious. Under CPC it requires the presence of party and ex parte can be made only when the defendant is not made himself available in the court deliberately.

Hence, there arises a need to revisit the three-pronged test adopted by the Court while granting John Doe Orders.

#### **X. REVISITING THE THREE-PRONGED TEST**

The three-pronged approach adopted in John Doe Orders needs to be revisited because it portrays a pro-plaintiff scenario. These three steps involve prima facie case, irreparable damage, and, the balance of inconvenience as mentioned above. All the said factors are controversial in themselves but the third one, i.e. the balance of inconvenience is the most difficult to be comprehended and simplest to be proved by the plaintiff. But how does the Court determine that not granting an injunction to the plaintiff will eventually favour the defendant who is in fact yet to be known? In such cases even if the plaintiff shows that failure to have such order will cause him a loss of rupees 1 Crore [supposedly], how will the Court ensure that the loss caused to an innocent defendant [a victim of mere suspicion] would be less than 1 Crore or any other amount claimed by the plaintiff? Therefore, it is not reasonable for the Court to grant such blind pre-emptive remedies.

Pertinently, in the Great Grand Masti case,<sup>86</sup> an innocent website named Induna that sold legitimate movie CDs and DVDs was blocked by the ISPs while implementing the John Doe Order in favour of the producers of the movie Great Grand Masti. Resultantly, the website was delisted by Google and the administrators were issued a DMCA Complaint notice.<sup>87</sup> Similarly, Madaboutmovies.com, a website involved in movie reviews and discussion was blocked by several ISPs as a result of a Court order.<sup>88</sup> Thus, these Court orders not only lead to an economic cost to these innocent websites like Induna and Madaboutmovies.com, but also fetch an incalculable social cost by giving the tag of a 'pirate' to such websites. Furthermore, while granting John Doe Orders the Court also appoints a commissioner and arranges the help of the Station House Officer [SHO] of the local Police Station in the exercise of such order.<sup>89</sup> However, it does not

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<sup>86</sup> Balaji Motion Pictures Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors., 2016 (4) BomCR 485.

<sup>87</sup> Rahul Bajaj, *Bombay HC's Latest Ruling on John Doe Creates a Jurisprudence Doubt*, SpicyIP (July 17, 2016), <https://spicyip.com/2016/07/bombay-hcs-latest-ruling-on-john-doe-creates-a-jurisprudence-of-doubt.html>.

<sup>88</sup> Salman SH, *Balaji Motion Pictures gets a John Doe order against 830 websites: report*, MEDIANAMA (August 25, 2016), <https://www.medianama.com/2016/08/223-balaji-motion-pictures-john-doe-order/>.

<sup>89</sup> Satellite Singapore PTE Ltd. v. Star Cable Network & ors., FAO(OS) 211/2010.

define the extent of the power to be exercised by such officer. It is silent on whether the use of physical force is allowed if the defendant does not comply with the John Doe Order; minimum or maximum number of people accompanying SHO while implementing such order. Furthermore, it does not clarify the liability of a officer committing negligence while implementing the order. These clarification are imperative for the effective and efficient functioning of the John Doe Orders.

In furtherance of the same, the Courts have to be extra cautious while giving ex parte orders and in cases where the defendants are oblivious to such trial, the duty upon the Court increases. This was bolstered by the Delhi High Court in the case of, Indian Performing Right Society v. Badal Dhar Chowdhry and Ors,<sup>90</sup> wherein it was observed that, “before the injunction, the defendant ought to be made aware of the precise act which he is prohibited from doing.” Likewise, in the case of Ramrameshwari Devi & Ors. v. Nirmala Devi & Ors.,<sup>91</sup> the Supreme Court observed that the trial judge must carefully scrutinize, check and verify the pleadings and the documents filed by the parties. A meticulous application of this observation suggests that the judge has to verify whether the actual illicit websites are banned by the ISPs owing to their duty to abide by the John Doe Orders.

However, the Delhi High Court itself has failed to follow the precedence established by the same, in various cases. The classic example of such victimization of innocent defendants occurred in the cases of Lipstick Under My Burqa,<sup>92</sup> and When Harry Met Sejal,<sup>93</sup> wherein Internet Archive [a non-profit initiative which has been archiving online content like web pages, books, text, audio, video, images, and software since 1996], was blocked in the pursuit of blocking pirate websites. Similarly, in the case of Reliance Big Entertainment,<sup>94</sup> various file-sharing websites have been blocked, such as Megaupload and Filesonic. Thus, such unimpeded orders not only attract criticism from people but also fall foul on the maxim ‘actus curiae neminem gravabit’ which means that the act of the Court shall prejudice no one.<sup>95</sup>

In cable piracy cases, once the plaintiff receives the John Doe Order, he gets the assistance of the Court Commissioner and local police of the concerned area.<sup>96</sup> Such order allows the plaintiff to enter the premises of suspected defendants without any hurdle and confiscate the infringing material.<sup>97</sup> But this overlooks the possibility of an instance, wherein the suspected defendant is not actually a defendant but a mere victim of the plaintiff’s suspicion. In such a situation, the defendant of a John Doe Order is left with only one remedy i.e. to claim compensation from the plaintiff or/and ISPs which

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<sup>90</sup> Indian Performing Right Society v. BadalDharChowdhry, CS(OS) No. 1014 of 2004.

<sup>91</sup> Ramrameshwari Devi & Ors.v. Nirmala Devi, (2011) 8 SCC 249 (India).

<sup>92</sup> Prakash Jha Productions v. BSNL & Ors., CS No. 576 of 2017.

<sup>93</sup> Red Chillies Entertainments Pvt. Ltd. v. BSNL, CS No. 601 of 2017.

<sup>94</sup> *Supra* note 40.

<sup>95</sup> Jang Singh v. Brij Lal and ors., AIR 1966 SC 1631.

<sup>96</sup> *Supra* note 3.

<sup>97</sup> Sony Pictures Networks India Pvt. Ltd. & Anr. v. Home Cable Network Pvt. Ltd. & Ors., CS (COMM) 239/2017.

can be claimed only after the blocking of its site.<sup>98</sup> Thus, the remedy for the defendant still lies in doldrums for many Courts because in the said situation both ISPs and plaintiff are acted under the aegis of court order from the court order and cannot be punished.

### XI. CONSTITUTIONAL QUESTS

John Doe Orders are a de facto extension of Anton Pillar Orders,<sup>99</sup> therefore, they are called Rolling Anton Pillar Orders.<sup>100</sup> The former seeks to protect the plaintiff against unknown defendants whereas the latter enables the plaintiff to enter into the land of the known defendant and seize the infringed goods (if found).<sup>101</sup> Pertinently, these orders surmise that they are impeccable in every case and cannot cause any unnecessary harm to the defendant. However, it does not stand true on the anvil of instances where a mere threat became an impetus to block certain websites or file-sharing websites such as Google Docs, Google's URL shortened google, etc.<sup>102</sup> Furthermore, there have been cases where innocent sites like Vimeo have been banned owing to the indomitable nature of John Doe Orders.<sup>103</sup>

In such cases, these orders not only question the freedom of expression,<sup>104</sup> of the entity owning such websites but also the public's right to fair use enumerated under Section 52 of the Copyright Act, 1957.<sup>105</sup>

Although, it is true that freedom of expression which is enshrined under Article 19(1) of the Indian Constitution subsists however, the freedom is not absolute.<sup>106</sup> Under Article 19(2) an existing law or a law can be created even if it reasonably restricts the rights conferred under Article 19(1), if it is in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.<sup>107</sup> Interestingly, mere suspicion or threat of infringement of one's right is not covered under these exceptions of Article 19(2).

There is one obvious reason behind the disparity among the decisions of various High Courts i.e. the hierarchy of Courts because the guidelines laid down by the Bombay High

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<sup>98</sup> *Supra* note 92.

<sup>99</sup> *Supra* note 11.

<sup>100</sup> David R. Barron, *Roving Anton Pillar Orders: Yet to be born, dead, or alive*, 18(4) EIPR, 183-185 (1996).

<sup>101</sup> *Supra* note 11.

<sup>102</sup> Multi Screen Media Pvt. Ltd. v. Sunit Singh & Ors., CS (OS) 1860/2014.

<sup>103</sup> *Anti-piracy for FIFA: Delhi HC orders blocks 219 websites post Sony complaint*, FirstPost (July 08, 2014),

<https://www.firstpost.com/sports/anti-piracy-for-fifa-delhi-hc-orders-blocks-219-websites-post-sony-complaint-1606671.html>.

<sup>104</sup> INDIA CONST. art. 19(1)(a).

<sup>105</sup> Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 354 (2013).

<sup>106</sup> INDIAN CONST. art. 19, cl. 1.

<sup>107</sup> INDIAN CONST. art. 19, cl. 2.

Court to limit the scope of John Doe Orders are not binding on the High Courts of Delhi or Madras or others and vice versa.

Undoubtedly, the advent of John Doe Orders in India was aimed to combat the piracy and counterfeiting unlike its global usage where it is not limited to IP wrong. With such pious objective it is expected to protect the right of IP holders in order to fulfil the cardinal of IP law. However, its improper implementation without identifying the right stakeholders has turned it into a less effective and efficient remedy than it was envisaged to be. Pertinently, it involve more cost than their desired benefits. The primary flaw in these orders is in its procedure and the way they is granted. Then, there are procedural flaws with respect to its implementation. Thus, it will not be a gaffe to assert that such are more focused on the giving relief to the plaintiff than punishing the actual wrongdoer; making it a pro plaintiff approach. Resultantly, innocent defendants become the victim of these pro-plaintiff approach. Hence, the need is to revamp the status quo by encumbering certain duty on plaintiff, ISPs and Court or its authorized agent to protect the rights of innocent defendants.

### **XIII. DYNAMIC INJUNCTION: A STEP TOWARDS NEUTRALIZATION?**

It is indeed the task of the State to protect the rights of the copyright authors who invest their time and labour to bring something new in the market. In order to protect the copyright of authors, it is imperative to determine the pirates and determining the same is a mammoth task in this era of the Internet. Therefore, John Doe Orders are a defence mechanism developed by the Courts to protect the rights of the wronged individual and grant the apposite remedy.

However, it becomes a cumbersome process to move to Courts every time a plaintiff comes across a rogue website infringing its copyright content and plead for an injunction against the miscreants in order to obtain an order to issue blocking orders to ISPs. Henceforth, the Delhi High Court in the case of *UTV Software Communication Ltd. and ors. v. 1337X.TO and ors.*,<sup>108</sup> affirmed its obligation to protect the innocent victims of piracy. Consequently, the Delhi High Court formulated a new remedy of granting 'dynamic injunction', Under this remedy, the plaintiffs can directly approach the Joint Registrar to extend an injunction already granted against a website, where the miscreants have subsequently come up with mirror/alphanumeric/redirect websites to circumvent the injunction orders. The Court asserted that 'dynamic injunction' is limited to "hydra-headed" websites that are being created for the sole purpose to bypass the injunction.

Further, the Court mentioned that with regards to an application under Order 1 Rule 10 for impleadment, the plaintiffs need to file an affidavit that the impleaded website is a mirror/redirect/alphanumeric website with adequate evidentiary proof. The registrar, on being satisfied that the website(s) is merely a mirror/redirect/alphanumeric website(s) of the injuncted website(s) erstwhile, would issue directions to the ISPs to

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<sup>108</sup> *Supra* note 68.

remove access to such website(s).<sup>109</sup> Thus, it is not like a John Doe Order wherein the plaintiff gets the blocking power merely by his/her Court appearance.

Notably, the Delhi High Court cited the decision granted in the Singapore Court in the case of *Disney Enterprise v. Ml Ltd.*,<sup>110</sup> in which the Court held that “the applicant was not obligated to return to Court for an order with respect to every single IP address of the infringing URLs already determined by the Court”.

J. Manmohan aforesaid that “It is desirable that the Court is freed from constantly monitoring and adjudicating the issue of mirror/redirect/alphanumeric websites and also that the plaintiffs are not burdened with filing fresh suits”.

It was observed by the Courts that although a John Doe Order is granted to the plaintiffs, - it was not sufficient to stop the mirror websites that can be created. Thus, the decision given by the Delhi High Court is undoubtedly a boon [more like a shield to pre-empt] for the wronged individual who can directly approach the Joint Registrar to extend the injunction granted against “hydra-headed” websites but a bane for innocent defendants who create new websites because of the prior removal of their websites as a result of a John Doe Order.

It is pertinent to highlight that the Court did not pay heed to the previously granted injunctions nor did it ponder upon the issue of whether the blocked website is actually a rogue website. Thus, in a case where a party wrongly suffered from a John Doe Order, the Court would not take this fact into account while granting dynamic injunction; rather it would extend the order by further verification.

Interestingly, this new Indian legal endeavor ensures that second time websites would not be blocked as per the whims of the plaintiff however, remains silent on the prior satisfaction of granting injunction. Thus, there exists a need to revamp the status quo.

Notably, not every website alleged by the plaintiff is a rogue website. Appositely, rogue websites are those websites which are created for malicious or criminal purposes and includes counterfeit-selling sites, typosquatters and cybersquatters.<sup>111</sup> For Copyrighted work, rogue website are those websites which primarily or predominantly share infringing content/illegal work.<sup>112</sup>

These websites actively induce people to violate the copyright and commit an intentional infringement. There are certain factors that are to be taken into account while ascertaining a rogue website namely;<sup>113</sup>

- whether the primary purpose of the website is to commit or facilitate copyright infringement;

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<sup>109</sup> *Supra* note 68.

<sup>110</sup> *Disney Enterprise v. Ml Ltd.*, (2018) SGHC 206.

<sup>111</sup> Ryan Williams, *Rogue Websites and Cybersquatting*, RED POINT (Jul 5, 2018), <https://blog.redpoints.com/en/rogue-websites-and-cybersquatting>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*



- the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement;
- Whether the detail of the registrant is masked and no personal or traceable detail is available either of the Registrant or of the user.
- Whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement.
- Whether the online location
- makes available or contains directories, indexes or categories of the means to infringe, or facilitate
- an infringement of, copyright;
- Whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- 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;
- 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
- the volume of traffic at or frequency of access to the website; etc.

Hence, dynamic injunction would only be successful if granted after the satisfaction of the test of rogue website; otherwise it would worsen the situation by making defendants [innocent] more vulnerable. In Pre-UTV Software Cases, these factors were not necessarily taken into account while granting John Doe Orders, resultantly people suffered.

#### **XIV. REMODELLING THE STATUS QUO**

John Doe Orders are not problematic as far as they don't impinge the rights of innocent parties. However, if the current trend of John Doe Orders continues, it will lead to two major problems namely;

- (i) Arbitrary blocking of websites, and,
- (ii) Victimization of innocent alleged defendants (infringers).

In order to balance these competing rights, a remodelling of the existing mechanism is required. Copyright piracy has a direct nexus with John Doe Orders, thus, there can be two ways to overhaul the status quo. Firstly, to come up with a body which can revamp the mechanisms of John Doe Orders thereby improving the status quo and, secondly, to upgrade the content surveillance means by safeguarding the content itself.

### XV. CHECK AND VERIFICATION METHOD [CVM]

The primary problem with John Doe Orders is the absence of a verification mechanism to verify the websites to be blocked. Hence, it is imperative to verify the names of the websites provided by the plaintiff in order to improve this situation. The authors propose the adoption of a 'Check and Verification Method' [CVM] which is also professed by Prof. Shamnad Basheer,<sup>114</sup> and Kian Ganz.<sup>115</sup> The same has also been endorsed by the Bombay High Court in the case of Eros International Media Ltd. and Ors. v. Bharat Sanchar Nigam Ltd. and Ors. (Dishoom case).<sup>116</sup>

In a CVM or Neutral Verification Agency and Ombudsman [NVAO],<sup>117</sup> a list of the suspected websites/URLs provided by the plaintiff would be verified by a neutral party or ombudsman. The CVM would finally approve the list of websites and provide it to the ISPs for blocking. Even after the verification, if an innocent party's rights get infringed, then both the plaintiff and neutral agency would owe a duty to compensate such a defendant. With respect to the plaintiff's duty, the same was observed by the Supreme Court in Ramrameshwari Devi & Ors. v. Nirmala Devi & Ors.,<sup>118</sup> wherein it said that "In an exceptional case where the Court has to grant an ex-parte injunction it must record in the order that if the suit is dismissed the petitioner will have to pay full restitution, actual or realistic costs, and mesne profits." Such a penalty would encourage a plaintiff to remain cautious while noting the name of the alleged defendants.

A similar liability can be traced under Section 512(f)<sup>119</sup> of U.S. Code which states that "any person who materially misrepresents shall be liable to pay damages including costs and attorneys' fees, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it."

Furthermore, a layer of check would also be placed on the intermediaries who are the proximate cause of curtailment of the websites or URL. There should be proper guidelines made in this regard which are necessary to be followed by the intermediary to curtail the websites or specific URLs. These guidelines may include the imposition of liability on the intermediaries if any innocent website gets blocked. This will impel the ISPs to re-verify the list given by CVM in order to avoid the liability. Thus, such a tripartite verification method would create a robust check-balance mechanism which would be helpful in protecting the rights of third party innocent websites. Furthermore,

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<sup>114</sup> Shamnad Basheer, *Of Bollywood "Blocks" and John Does: Towards an IP Ombudsman?*, SpicyIP (August 24, 2016), <https://spicyip.com/2016/08/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman.html>.

<sup>115</sup> Kian Ganz, *The messy battle against online piracy*, Livemint (Aug. 12, 2016, 02:12AM), <https://www.livemint.com/Consumer/YtbRN9fv6ZgZCZOexcsWMI/The-messy-battle-against-online-piracy.html>.

<sup>116</sup> *Supra* note 61.

<sup>117</sup> *Supra* note 114.

<sup>118</sup> Ramrameshwari Devi & Ors. v. Nirmala Devi, (2011) 8 SCC 249 (India).

<sup>119</sup> 17 U.S.C. § 512(f) (2011).

a time limit can be imposed within which the entire process has to be completed which would pre-empt the likelihood of the distortion of evidence. Under this mechanism, the ISPs would verify the websites after the verification by CVM and the plaintiff. Therefore, they are at the final stage of verification and are very less likely to be liable. However, it does not help them to escape the liability.

The question as to how would the duty of the intermediaries would be ensured, can be resolved by submitting the final report of blocked websites/URLs to the CVM who would be empowered to punish them for their misfeasance. Pertinently, as per rule 3(9) of Draft Information Technology [Intermediary Guidelines (Amendment) Rules, 2018], the intermediaries are required to deploy technology based automated tools or appropriate mechanisms to identify and remove or disabling public access to unlawful information or content.<sup>120</sup> Hence, they would be under a self technical check to ensure that no unlawful content exits on them.

Thus, this mechanism will not only ensure the verification of impugned websites but also create deterrence against the plaintiffs who seek the blind application of such law.

#### **XVI. CONTENT SURVEILLANCE**

John Doe Orders are nothing but a mechanism to protect the exclusive right of the copyright holder. The underlying aim behind granting John Doe Orders is to stop the defendant from committing piracy thereby suggesting a relationship between piracy and John Doe Orders. Thus, considering this inexorable relationship between piracy and John Doe Orders, it can be asserted that the curtailment of piracy would eliminate or diminish the need for granting John Doe Orders. Therefore, in order to safeguard the interest of innocent websites, it is imperative to protect the work of producers.

The authors propose a Blockchain based digitised distribution of the movie. The usage of Blockchain for the distribution of work would not only revolutionise the copyright industry but also fortify the copyright enforcement mechanism. A Blockchain is a time-stamped series of an immutable record of data that is administered not merely by one unit but by a bundle of computers.<sup>121</sup> Information is stored in blocks, which possess an exclusive code and is generated on the basis of older blocks and a timestamp.<sup>122</sup> Interestingly, when the new data is stored or recorded, a block is connected to the chain of older blocks.<sup>123</sup>

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<sup>120</sup> Rule 3(9), Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018.

<sup>121</sup> Ameer Rosic, *What is Blockchain Technology? A Step-by-Step Guide For Beginners*, Blockgeeks (2016), <https://blockgeeks.com/guides/what-is-Blockchain-technology/>.

<sup>122</sup> Asis Panda, *99 Problems Of The Music Industry - Can Blockchain Technology Be A Panacea?*, MONDAQ (Dec. 18, 2018), <http://www.mondaq.com/india/x/765730/music+arts/99+Problems+Of+The+Music+Industry+Can+Blockchain+Technology+Be+A+Panacea/>.

<sup>123</sup> Dylan Yaga et al., NISTIR 8202 *Blockchain Technology Overview*, National Institute of Standards and Technology, <https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8202.pdf>.

Under this mechanism, the producer would deploy the private Blockchain technology,<sup>124</sup> for the dissemination of his work and issue a private key to the legitimate user. This digitized distribution would enable the copyright holder to grant a restricted use to them. Any change made across the network (including the key which authorizes the legitimacy of the transfer) is recorded.<sup>125</sup> Furthermore, if the content is infringed from any source, the genus can be traced back to that source by the original owner to find the perpetrator.<sup>126</sup> Thus, it would not only ensure the protection of the work of the producer but also provide the producer with a track record of the people who attempted to interfere with the work.

Notably, movies are first communicated to the public via theatres and later on via online streaming and other mediums, therefore requiring a contract between the producer and authorized users. The proposed mechanism would also create an impetus to adhere to the contract owing to the ability of the producer to trace the leak. Thus, it would disincentivize and deter middlemen and other authorised users [party other than the producer] to satiate their profiteering motives by derogating the contractual relationship.

Additionally, the Blockchain can also be used to release movies and facilitate automatic payment of royalties through 'smart contracts'.<sup>127</sup> Pertinently, a smart contract on a Blockchain can register and enforce distribution and release agreements between producers and distribution partners. This would help the producers in combating piracy by enabling them to know the market presence of the movie. Furthermore, the deployment of Blockchain for purchase and sale of tickets would enable the producer in monitoring the distribution of the work in the market and keeping a record of legitimate audience.

There are many Blockchain run software companies such as SingularDTV, OPUS, Custos Media, MovieCoin, White Rabbit, Cinezen, Vevue, Ara Blocks, FilmChain, BINGE, LiveTree ADEPT, and StreamSpace etc., which are becoming prevalent in the movie industry.<sup>128</sup> Illustratively, in the year 2015, British singer Imogen Heap's released her song "Tiny Human" on a Blockchain-powered site called Ujo Music which allowed users to purchase the song, as well as the key, tempo, and stem of the track using the Ether

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<sup>124</sup> Dominique Guegan, *Public Blockchain versus Private*, HAL, blockchain <https://halshs.archives-ouvertes.fr/halshs-01524440/document>.

<sup>125</sup> Michael McDonald, *Lawyers And Bitcoin And Blockchain*, ABOVE THE LAW (July 25, 2017, 6:59PM), <https://abovethelaw.com/2017/07/lawyers-and-bitcoin/>.

<sup>126</sup> Jaliz Maldonado, *Blockchain Technology May Help Artists with Copyright Protection*, PRACTICEPANTHER (Mar. 12, 2018), <https://www.practicepanther.com/blog/Blockchain-technology-may-help-artists-with-copyright-protection/>.

<sup>127</sup> Prasad Joshi, *How Blockchain can revolutionise the music and media industries*, YOURSTORY (Oct. 23, 2017), <https://yourstory.com/2017/10/how-Blockchain-can-revolutionise-the-music-and-media-industries/>.

<sup>128</sup> Oakley Anderson Moore, *Want to Distribute Your Film on the Blockchain? Here are 9 Companies That Can Make It Happen*, No Film School (November 26, 2018), <https://nofilmschool.com/2018/11/want-distribute-your-film-Blockchain-here-are-9-companies-can-make-it-happen>.

cryptocurrency.<sup>129</sup> A similar instance was observed in the year 2018, when a Hollywood movie named 'No Postage Necessary' was released via peer-to-peer video network app Vevue, running on Qtum which is a Blockchain platform.<sup>130</sup> Similarly, a company named Custos Media Technologies, allows media owners to trace a leak to its source in a decentralised way using cryptocurrency thereby providing a globally effective way to combat media.<sup>131</sup> Furthermore, this start-up identifies people responsible for uploading a media file to a piracy network after the content owners entrusted them with that file.

Although the proposed mechanism would not completely eradicate the piracy, yet it would certainly dilute the need of John Doe Orders. Hence, such better measures to diminish piracy would immediately reduce the need for granting John Doe Orders.

### XVII. CONCLUSION

Indian film industry produces 1,500-2,000 films every year in more than 20 languages and is the largest in the world in terms of number of films produced.<sup>132</sup> However, it fails to marvel the list of countries in terms of revenue generation.<sup>133</sup> As per the Deloitte Indywood Indian Film Industry Report, the gross box office realisations of Indian film industry are expected to reach \$3.7 billion by 2020, which is substantially less than box office realisation of the US and Canada which stand at \$11 billion with significantly lower number of films.<sup>134</sup> Every year Indian film industry incurs a loss of INR 190 billion.<sup>135</sup> Furthermore, India is among the top five countries in peer-to-peer downloading.<sup>136</sup> This data not only highlights the deleterious ramifications of online piracy but also underscores the need to have a robust IP infrastructure. Pertinently, there can be umpteen reasons behind this scenario such as high ticket prices, low income levels and cheap net infrastructure; however, awareness and enforcement are two broad reasons behind the normalization of online piracy in India.

Appositely, John Doe Order is one such judicial mechanism to protect the rights of IP holders. The arrival of John Doe Orders was not envisaged as a tool to curb online

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<sup>129</sup> Middlesex University London, *Music on The Blockchain, (Report No 1, July 2016)*, [https://www.mdx.ac.uk/\\_data/assets/pdf\\_file/0026/230696/Music-On-The-Blockchain.pdf](https://www.mdx.ac.uk/_data/assets/pdf_file/0026/230696/Music-On-The-Blockchain.pdf).

<sup>130</sup> AFP Relaxnews, *Hollywood's First Blockchain Movie Hopes to Produce End to Piracy*, NEWS18 (Apr. 3, 2018, 10:48 PM), <https://www.news18.com/news/movies/hollywoods-first-Blockchain-movie-hopes-to-produce-end-to-piracy-1706315.html>.

<sup>131</sup> *How Movie Piracy Works—and How to Use Blockchain to Prevent it*, Custos (February 14, 2019), <https://www.custostech.com/blogchain/how-movie-piracy-works-and-how-to-use-Blockchain-to-prevent-it/>.

<sup>132</sup> *Indian film industry realisations may reach \$3.7 billion by 2020: report*, LiveMint (September 25, 2016), <https://www.livemint.com/Consumer/O1rnlOwjF8cAn5w7k8CzBK/Indian-film-industry-realizations-may-reach-37-billion-by.html>.

<sup>133</sup> *Film Industry in India: New Horizons*, Ernst & Young, <http://producersguildindia.com/Pdf/Film%20Industry%20In%20India%20New%20Horizons.pdf>.

<sup>134</sup> *Indian Film Industry*, Indywood, Deloitte, September 2016, <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-indywood-film-festival-noexp.pdf>.

<sup>135</sup> *Id.*

<sup>136</sup> Lata Jha, *India among top five countries for peer-driven piracy*, LiveMint (August 21, 2018, 12:31 PM), <https://www.livemint.com/Consumer/MuPSerb5XHOhFQVhoql8JN/India-among-top-five-countries-for-peerdriven-piracy.html>.

piracy. Howbeit, the evolution of internet wrongs especially online piracy broadened its applicability to film industry. The present article presents a cogent understanding of John Doe Orders and evinces their likely future jurisprudence in India. The authors have argued that the terms 'plaintiff' and 'defendant' are merely legal nomenclatures without any attribution of final liability. Hence, it is incumbent on the Court to ascertain the liability before giving any decision [temporary or permanent]. Conversely, the Court grants John Doe Orders by merely relying on the claims of the plaintiff, thereby jeopardising the rights of innocent websites like Induna. This action of the Court is often justified by the argument that the actual defendant is likely to distort the evidence or circumvent the liability if a prior communication is made to the defendant. However, this argument fails to take the potential loss to the innocent defendants into account. It is to be observed by the Court that the spate of granting John Doe Orders in last few years not only indicates the pro-plaintiff approach of the Court but also questions the notions of justice and equality by legitimizing the arbitrary shut down of websites which form the fundamental ethos of the Indian Constitution.

In furtherance of the same, the authors have deliberated upon the understanding of copyright enforcement which is not only limited to the protection of the rights of a copyright holder but also includes detection of actual wrongdoers. It is true that detection of pirates has become a herculean task in the Internet era, however, it does not authorise the Court to derogate the rights of an alleged defendant.

On one hand, John Doe Orders are a judicial postulation of the protection of the rights of copyright holders. On the opposite side, they are an indication of failure of the state machinery to curb piracy. Thus, the authors argue that the normalization of copyright piracy has created a scenario wherein people have stopped considering it as a wrong, thereby a need to create IP awareness in India has arisen. Interestingly, John Doe Orders can be equated with a double-edged sword which on the one side protects the plaintiff's rights but on the other side, it cuts the rights of innocent alleged defendants. Currently, John Doe Order is a sharp sword under the cloak of a shield which is meant to protect the plaintiffs against the anonymous pirates. However, its routinization by Indian Judiciary has made it a sword to trim the rights of innocent defendants.

Thus, the article highlights the need to evangelize the current John Doe regime into a mechanism wherein competing rights can sustain without any tussle. The authors propose the creation of a Check and Verification Method [CVM] which will verify the list of unknown defendants given by the plaintiff. Furthermore, the liability of the intermediaries needs to be revisited considering the role of ISPs in blocking websites. Thus, the authors have proposed a tripartite verification mechanism wherein the list of the Ashok Kumar defendants will be first verified by the plaintiff himself, then by the CVM and final verification will be done by the ISPs. This would minimize the likelihood of infringement of the rights of innocent defendants. Secondly, the authors propose Content Surveillance through the deployment of Blockchain technology by the movie producers in distribution and dissemination of the work. Although the Blockchain does not present an end or full proof solution for eliminating piracy yet it certainly minimizes

the needs of grating John Doe and ensures an effective implementation of John Doe Orders. Thus, it would not only ensure the protection of the copyrightable work but also the maintains the rights of both the plaintiffs and the defendants but also secure the copyright work.