

COPYRIGHT ENFORCEMENT: EVALUATING THE HARDSHIPS CAUSED BY 'ANTON PILLER' AND 'JOHN DOE' ORDERS IN INDIA

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ABSTRACT

Recently, Anton Piller and John Doe orders are coming forward as primary tools to fight Copyright infringement in India as most of such cases do not see the light of trial and are either settled outside the court before the conclusion of the trial or withdrawn. Historically, they are judicially evolved remedies and Indian judiciary has found its authority to issue such orders in Copyright infringement cases either by using provisions written in wide capacious language in Civil Procedure Code, 1908 or by using inherent powers of the court under Civil Procedure Code, 1908. Due to this they lack safeguards or restrictions, giving courts a lot of discretion to play around with. The result of this is that exploitative characteristics have crept into these orders that are causing injustice to a lot of people. The objective of the note is to point out these characteristics and resulting hardships caused by these characteristics. Article 27 of the Universal Declaration of Human Rights aspires that there should be a balance between Copyright protection and accessibility of cultural goods to the public. Such orders should aspire to achieve this objective as well but they are tilting the balance too much in favour of Copyright owners. The main suggestions are as follows: the need for uniform practice imbued with safeguards, courts must remember the origins and objectives of the order ensuring that order doesn't tilt the balance too much in favour of plaintiff, there must be a balance between freedom of speech and expression and Copyright protection, one must realize that law will always lag behind technology so better technological measure rather than court orders would be a better solution to deal with infringements, whole websites shouldn't be blocked and newer solution such as better business models for movie industry should be adopted.

INTRODUCTION

Generally, when we think about legal instruments to be used for enforcement of Copyright, instruments such as injunctions, damages, costs, Mareva injunctions etc., are what comes to our minds. In recent years though, new kinds of remedies have been evolved called '*Anton Piller*' and '*John Doe*' orders. It is rare to find knowledge about '*Anton Piller*' and '*John Doe*' orders outside the legal circle, the reason being these remedies have been judicially evolved. There has been an increase in use of such orders as they stop the alleged Copyright infringement at the very interim stage without the conclusion of trial. This is an advantage when most of the Copyright infringement cases do not reach the trial stage as either the parties come to out of court settlement or the case is withdrawn.

Historically, their origins don't lie in any statutes but wits of judges in case laws, even though they have been incorporated in some statutes later on¹. The purpose of *Anton Piller* orders as explained by Lord Denning while issuing the order for the very first time was the preservation of evidence from destruction² granted on *ex parte* application. It primarily allows the applicant to enter into the premises of the defendant and inspect documents, remove and seize allegedly infringing goods, restrain the defendant from disclosing contents of the injunction to third parties etc. On the other hand, *John Doe* orders³ which are also called '*rolling Anton Piller*' orders allow the applicant to take action against defendants that are unknown at the time of filing of the petition and such orders identify the defendants only by way of some description. *Anton Piller* orders are often used together with *John Doe* order and Mareva injunction (which is used to restrain defendants from removing assets from the jurisdiction of the Court). So, orders inspired by traditional *Anton Piller* orders passed against unknown defendants are labeled as '*Rolling Anton Piller*' orders.⁴

The problem is that these orders being judicially evolved remedies lack clear directions and safeguards on when and how to use such remedies, this results in injustice in a lot of situations. With no practice directions present the issuance of such orders is coming down to the complete

¹ Trade Marks act, 1999; The Geographical Indication of goods (Registration and Protection) act, 1999

² *Yousuf vs Salama* (1980) 3 All ER 405 at 406

³ Also known as Ashok Kumar orders in Indian judicial parlance

⁴ Barron David R, *Roving Anton Piller orders: Yet to be born, dead, or alive*, European Intellectual Property Review, 18 (4) (1996) 183

discretion of each judge. In recent years the judicial tendency has been to pass such broad orders frequently and easily. The courts are passing such orders on likelihood or possibility of infringement on minimal standard of evidence and without thorough analyses of such evidence⁵. Lack of strict guiding principles and safeguards is resulting in orders causing injustice to the defendants Even in the United States of America where comparable orders to *Anton Piller* are given in a statute⁶ questions of abuse and constitutional validity arise⁷, so we can imagine the problems that can arise when judges use these orders unguided by any legislation. So, although we need '*Anton Piller*' and '*John Doe*' orders to combat piracy they have a lot of exploitative characteristics which are needed to be solved.

Article 27 of the Universal Declaration of Human Rights aspires that there should be a balance between Copyright protection and accessibility of cultural goods to the public. Such orders should aspire to achieve this objective as well but they are tilting the balance too much in favour of Copyright owners. These problems listed below are not isolated from each other each of them is interlinked with one another and can contribute towards unpleasant exploitation of the defendants.

SEARCH AND SEIZURE ORDERS DISGUISED AS ANTON PILLER ORDERS?

The analysis of these research questions requires us to trace a little bit of their historical origins in terms of under what circumstances the order evolved, as that will help us find why, when and how courts should use them. The historical origins of '*Anton Piller*' orders can be traced to the case of *EMI v Pandit*⁸ but it got recognition and name due to the case of *Anton Piller KG v. Manufacturing Processes Ltd.*⁹ Which was related to trade secrets that allegedly were to be traded by defendants, it was imperative that plaintiff search the premises of defendant without any prior notice and seize the materials so that evidence cannot be destroyed. Lord Denning even at time of passing such an order was concerned about the effects of such order could have.

⁵ Star India v Sujit Jha CS(OS) 3702/2014.

⁶ Section 503 (a) U.S.Copyright act, 1976

⁷ Warner Bros Inc v Dae rim Trading Inc 877 F.2d 1120 58 USLW 2042.

⁸ (1975) 1 All ER 418.

⁹ [1976] 1 All ER 779.

He called these orders as extraordinary and pointed out that in England citizens have right to privacy of their own homes and a man was considered the king of his own home. He also clarified that these orders weren't same as "search warrants" and didn't allow plaintiffs to use force to enter into the premise. Defendant can refuse to allow access to the plaintiff, though this will be treated as contempt of Court. Lord Ormond & Lord Denning enumerated four prerequisites for making the application of such order. *Firstly*, there should be a strong prima facie case against the defendant. *Secondly*, there should be a potential or actual damage done to the plaintiff by the defendant is serious in nature and irreversible. The *Third* requirement is two folds there should exist clear evidence that the defendant has necessary and relevant documents or articles or goods or items in his possession and there should be a real possibility that the defendant might destroy such crucial concerns before any inter party's application made in respect of the same. The *Fourth* factor is that if such an order is made it would do no real harm to defendant or his case, but Lord Denning himself didn't give it much weight¹⁰. After this case *Anton Piller* orders were sought and granted in many cases, but skepticism was shown towards such orders in a lot of cases.¹¹

In India Trade Marks Act, 1999, The Geographical Indications of Goods(Registration and Protection) Act, 1999 contain specific provisions allowing *Anton Piller* Orders, while for Copyright purposes the Court uses Order 39, Civil Procedure Code, 1908. An important case on *Anton Piller* orders in India is *Bucyrus Europe ltd v Vulcan Industries Engineering Co Pvt Ltd*¹² which is related to Designs Act, 1911. It reiterated the situations and safeguards evolved by English Courts under which such an order can be passed. Following the *Anton Piller* KG case¹³ the first three prerequisites were accepted by the Court with additional observations. *First*, that the purpose of *Anton Piller* order is the preservation of evidence. *Secondly*, the *mala fide* in asking for *ex parte* interim order will devoid the plaintiff of such order. Hence, utmost good faith is required. *Thirdly*, Courts should take undertakings from plaintiff to compensate the defendant for losses he might wrongly suffer due to the order.

¹⁰ *Yousuf v Salama* (1980) 3 All ER 405 at 406 Lord Denning remarked "the Anton piller order can do no harm to defendant, as if he is honest he will produce the documents in any case. If he is dishonest, that is all the more reason why the order should be made."

¹¹ *Systematica Ltd v London Computer Centre Ltd and Idnani* (1983) FSR 313; *Columbia Picture industries Inc. v. Robinson* (1986) 3 W.L.R. 542; *Universal Thermosensors Ltd v. Hibben and Others* (1992) 1 W.L.R. 840

¹² 2005 (30) PTC 279.

¹³ [1976] 1 All ER 779.

The possibilities of abuse of *Anton Piller* orders come in the form of their enforcement, the trend in the industry shows that they are being used to disrupt the businesses or invade the privacy of the defendants¹⁴. Theoretically the defendant can refuse the plaintiff entry into his premise but practically the defendants either lack knowledge about such a right or lack resources to fight a well-funded plaintiff which usually is a multinational corporation. Even when the foundations of *Anton Piller*¹⁵ clearly differentiated it from 'search warrants' and stated that force is not to be used for entering in the premise, Courts have been ordering Police assistance¹⁶ in enforcing the order, which can pressurize the defendant and act as indirect force. Also the plaintiff's lawyer who accompanies the commissioner for enforcing the order cannot be expected to act in an unbiased way and explain to defendant's rights. Such orders go directly against the dictum of Supreme Court that clearly states civil Courts are not to acquire evidence forcefully¹⁷, presence of police, commissioner and biased plaintiff's lawyer can indirectly have such effect. Due to lack of knowledge the defendants aren't allowed to make backup copies of the data even when they have right to do so, there have been cases where whole computers were sealed and seized even when the order allows seizure of storage device. Legal Scholars who have worked in the field note that since the business means of such small businesses are taken away using these order the defendants become desperate and in order to avoid further loss in business become vulnerable to exploitative settlement terms. Courts unguided by any safeguard allow extreme search and seizure practices, they have confused the objective of *Anton Piller* which is preservation of evidence with seizure of evidence. The objective can be achieved even by taking 'mirror copies' of hard disks in appropriate cases, but Courts favour seizure of all equipments¹⁸. There have also been cases where plaintiffs have exceeded the orders of the Court in hope of pressurizing the defendant to agree to settlement¹⁹.

¹⁴ Shamnad Basheer, Ghost post on IP(software) Raids: Court Sponsored Extortion?, March 30, 2009.

¹⁵ *Anton Piller KG v. Manufacturing Processes Ltd.* [1976] 1 All ER 779.

¹⁶ *Autodesk Inc. v. Rajiv P. Gandhi CS (OS) No. 366 of 2009* before the High Court of Delhi.

¹⁷ *Padam Sen and Anr. v. The State of U.P.* AIR 1961 SC 218.

¹⁸ *Autodesk v. Shankardass CS (OS) No. 419 of 2008* before the High Court of Delhi.

¹⁹ *Autodesk Inc. v. Mr. Kumar Sam Prahlad CS (OS) 2375 of 2007* before the High Court of Delhi.

JOHN DOE ORDERS: THE MODERN DAY HARDSHIPS

The term '*John Doe*' originated out of a British legal process called 'action of ejectment'²⁰. Even though the exact case where '*John Doe*' or its various forms were first used are not known, some trace it to the reign of British King Edward III²¹. The term was used to refer to unidentifiable defendants, the Court names the defendant as '*John Doe*' until such time the defendant is identified. After the advent of *Anton Piller* orders in 1976 it didn't take time to combine '*John Doe*' with *Anton Piller* in IP matters specifically as such orders aid Copyright owners to avoid procedural delays caused by the anonymity of defendants²². This has become extremely important in this virtual age where tools for Copyright infringement evolve every day like file sharing websites, torrents etc these mediums of Copyright infringement perpetrate anonymity, lack geographical contours, and provide extreme speeds.

The first case granting *John Doe* order in a Copyright matter in the USA was *Billy Joe et al. v Various John Does, Jane Does and ABC Company*²³ decided in 1980, and in the UK was *EMI Records Ltd v. Kudhail*²⁴ decided in 1983. In India first *John Doe* order was used in the case of *Taj Television v Rajan Mandal*²⁵ which dealt with the action against known and unknown unlicensed cable operators broadcasting FIFA world cup, 2002. The Court found the matter unique enough to issue such search and seizure orders against unnamed cable operators, as waiting for the plaintiff to find specific cable operators would lead to injustice to the plaintiff. Court relied upon the combined reading of Order 39, Civil Procedure Code, 1908(temporary injunctions) and Section 151, Civil Procedure Code, 1908(inherent powers of the Court). The plaintiffs relied upon *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*²⁶ which had said that inherent powers of the Court are complementary to those provided in the Code and can be used as long as they do not conflict with Code's provision and legislative intent. So the

²⁰Matt soniak, *Why are unidentified people called John or Jane Doe?*

Mental Floss, (<http://mentalfloss.com/article/29996/why-are-unidentified-people-called-john-or-jane-doe>) (the landlord instead of bringing the action against the illegal tenant or squatter used to bring in the action of ejectment suit on behalf of fictitious tenants against another fictitious person who evicted the landlord, for this name like *John Doe* and richard roe were often used).

²¹ Paul Dickson, *What's in a name?:Reflections of an irrepressible name collector*, Merriam webster, 1996.

²² EMI Records Ltd v Kudhail (1985) F.S.R. 36.

²³ 499 F. Supp.791 (1980).

²⁴ (1985) F.S.R. 36.

²⁵ CS(OS) No. 1072 of 2002 before the High Court of Delhi.

²⁶ AIR 1962 SC 527.

John Doe order was granted on the satisfaction of same grounds²⁷ as normal injunctions i.e., (i) *Prima facie* case (ii) Irreparable injury (iii) Balance of convenience. Again Court appointed a commissioner and allowed police assistance. The decision has been criticized as the Court did not consider various procedural aspects²⁸: such as the fact that it has been enunciated by Supreme Court²⁹ that the inherent powers of the Court cannot affect substantive rights of plaintiffs unless the Court has been specifically empowered to do so, they can only supplement the procedure. The provision Order VII, Civil Procedure Code, 1908 which mandatorily requires the plaintiff to identify each and every defendant, his/her address and cause of action and failure to do so can result in rejection of plaint.

Now we know that the journey of *John Doe* orders started with the *Taj television case*³⁰ (even though the legitimacy of the Court's reasoning can be questioned³¹) and for a while, the Courts granted the orders in similar kinds of cases relating to the broadcaster's right³². While we can dwell on the past and the defects of the *Taj Television case*³³, the effects *John Doe* orders are presently having are more disconcerting. Slowly the Courts started modifying the orders and started applying it to 'Internet' as well³⁴. These orders have been passed against a wide range of persons like Cable operators³⁵, Internet Service Providers³⁶, Publishers³⁷, Street vendors³⁸. This evolution has led us to the stage of banning of whole websites, not just specific Web pages

²⁷ Dalpat Kumar v Prahlad Singh, AIR 1993 SC 276.

²⁸ Reddy Prashant T, A critical analysis of the Delhi High Court's approach to ex parte orders in copyright and trademark cases, Manupatra Intellectual Property Reports, 3 (2011) 171.

²⁹ Padam Sen v State of Uttar Pradesh, AIR 1961 SC 218.

³⁰ CS(OS) No. 1072 of 2002 before the High Court of Delhi.

³¹ T. Prashant Reddy, *A Critical Analysis of the Delhi High Court's Approach to ex parte Orders in Copyright and Trade Mark Cases*, MIPR, 171 195-196, 2011.

³² MSM Satellite Singapore Pvt. Ltd v. Star Cable Networks and Others, FAO (OS) No. 211 of 2010 before the High Court of Delhi; ESPN Software India Pvt. Ltd. v. Tudu Enterprise & Others CS (OS) No. 384 of 2011 before the High Court of Delhi; UTV Software Communications Ltd. v. Home Cable Network Ltd. & Anr. CS (OS) No. 821 of 2011 before the High Court of Delhi.

³³ CS(OS) No. 1072 of 2002 before the High Court of Delhi.

³⁴ Reliance Big Entertainment Pvt. Ltd. v. Jyothi Cable Network & Ors CS (OS) No. 1724 of 2011 before the High Court of Delhi; CS (OS) No. 2066 of 2011 before the High Court of Delhi. (Singham order)

³⁵ UTV Software Communications Limited v Home Cable Network Ltd. and Ors. CS (OS) No.821/2011 before the High Court of Delhi; Satellite Singapore PTE Ltd. v. Star Cable Network & others FAO (OS) No. 211 of 2010 before the High Court of Delhi.

³⁶ Reliance Big Entertainment Pvt Ltd vs Jyoti Cable Networks & Ors in CS(OS) No. 2066/2011; Reliance Big Entertainment Pvt Ltd vs Jyoti Cable Networks & Ors in CS(OS) No. 1724 of 2011; Reliance Big Entertainment Pvt Ltd vs Multivision Network and Ors in CS(OS) No. 3207/2011; Viacom 18 Motion Pictures vs Jyoti Cable Networks & Ors -CS (OS) 2912 of 2012; RK productions Pvt. Ltd. Vs BSNL and Ors in CS No. 208 of 2012

³⁷ Bloomsbury Publishing Plc, JK Rowling v. Newsgroup Newspapers Limited & Ors HC 03 C01725 dated 23rd May, 2003.

³⁸ Ardath Tobacco Co. Ltd. v. Munna Bhai and Ors CS (OS) 141/2004, 2009 (39)PTC 208 (Del.) .

even on the basis of dormant links which can cause piracy in future³⁹. Pranesh Prakash policy director at Center for internet and society had commented on such phenomenon saying "it's like shutting down a public library just because someone may go there and leave a book about bomb-making"⁴⁰. Parul Sharma an analyst at NLU's Center for Communication Governance says "people who are blocked are often really small players who don't have money or knowledge to go against large studios".

Such Websites aren't given a right to be heard and blocked for an indefinite time period⁴¹. The person trying to access the website doesn't know what's being blocked and the website owner doesn't know why he's being blocked. Usually, the list of URLs submitted to Court are compiled by anti-Copyright agencies like Aiplex Software Pvt Ltd or Markscan, it cannot be said that their work is accurate all the time and their employers the Copyright owners don't mind over-blocking of websites⁴². Courts never check or practically could check the accuracy of such lists, hence pass orders without scrutiny.

The implementation of the order is very weird in itself as the case is brought by the Copyright owner against the ISPs who don't have any incentive to fight the case while the parties against whom the action is being taken i.e., the websites don't get to represent themselves. So the one-sided orders are passed against ISPs, who to avoid any liabilities block anything reported by the Copyright owner as infringing content⁴³.

An interesting study by Ananth Padmanabhan⁴⁴ points out that in typical *John Doe* order cases interim injunction is granted against unknown infringers but when it comes to permanent injunction the Court requires identified defendants⁴⁵. In website blocking cases it seems that

³⁹ Reliance Big Entertainment Pvt Ltd vs Jyoti Cable Networks & Ors in CS(OS) No. 2066/2011; Reliance Big Entertainment Pvt Ltd vs Multivision Network and Ors in CS(OS) No. 3207/2011; Viacom 18 Motion Pictures vs Jyoti Cable Networks & Ors -CS (OS) 2912 of 2012; RK productions Pvt. Ltd. Vs BSNL and Ors in CS No. 208 of 2012.

⁴⁰ Geetha Hariharan, *The legal validity of internet Bans*, Centre for Internet Society, 2015.

⁴¹ Kunal Dua, Confusion Reigns as Indian ISPs Block Vimeo, Torrent Websites, NDTV (May 17, 2012), <http://gadgets.ndtv.com/internet/news/confusion-reigns-as-indian-isps-block-vimeo-torrent-websites-223340>

⁴² Pankhuri Agarwal, *Injured Induna Comes to Patel's Court in John Doe Matter*. SpicyIP, August 25, 2016

⁴³ Rishabh Dara, Report: *Intermediary liability in India-Chilling effects on Free expression on the internet*, CIS Google Policy fellowship, 2011

⁴⁴ Ananth Padmanabhan, *Can Judges Order ISPs to Block websites for copyright infringement?*, 2014 (<http://cis-india.org/a2k/blogs/john-doe-orders-isp-blocking-websites-copyright-1>).

⁴⁵ Ardath Tobacco Co.Ltd v Munna Bhai and Ors (2009) (39) PTC 208 (Del); 3M Company v A. Patel MANU/DE/1991/2009.

the Courts are granting permanent injunctions (banning websites for unlimited time) without identifying defendants.

There is a lot of literature criticizing such orders by IP experts and Indian Courts do realize that they are passing overarching orders. So, various High Courts have started to give directions that would reduce such above-mentioned defects. Historically, Courts around the world have granted *John Doe* orders only for specific instances of infringements not for wider application⁴⁶, along with various safeguards while being vary of its potential abuse. In India though this wasn't practiced till recently, scholars called it paradigm shift in the *John Doe* jurisprudence when in 2016 Justice Patel referred to articles written by IP experts like Prof. Basheer and refused to act against whole websites and asked for specific links⁴⁷, he asked the Copyright owner to file sworn affidavit in Court about accuracy of the URLs, he also said only individual URLs could be blocked for up to 21 days by ISPs⁴⁸ after which banning them would require extension from Court⁴⁹. Additionally, Every page blocked by ISP should contain a notice on blocked page giving information about suit no. and the date, Court that blocked the page, under what law and how can the website owner act against such block, also the room was given for non-parties affected by order to seek relief by calling them 'non-John Doe *John Doe*'⁵⁰. After this orders banning some websites were passed⁵¹, but they were passed after scrutiny. Justice Patel also clarified that hosting P2P torrent files wasn't protected by Section 52(1)(c) Copyright Act, 1957 and 'transient' or 'incidental' storage must be read broadly to include illicit P2P sites⁵².

⁴⁶ Billy Joel v Various John Does 499 F. Supp. 791 (1980).

⁴⁷Rahul Bajaj, *Breaking news: SpicyIP Gets cited in Latest John Doe Orders*, 2016 (<http://spicyip.com/2016/07/breaking-spicyip-gets-cited-in-bombay-hc-john-doe-orders-Court-recognizes-need-for-sufficient-safeguards.html>).

⁴⁸ Section 52(1)(c) Copyright act, 1957

⁴⁹ Eros international v BSNL order no. 2147 of 2016; Balaji Motion Pictures Ltd and Anr v BSNL and Ors. Motion no. 1940 of 2016.

⁵⁰*ibid.*

⁵¹ legally India, *Bombay HC blocks 110 filesharing websites completely after changed mind about SpicyIP blog arguments*, 2016 (<http://www.legallyinida.com/the-bench-and-the-bar/bombay-hc-blocks-110-filesharing-websites-completely-after-changed-mind-about-SpicyIP-blog-arguments>).

⁵² Balaji Motion Pictures Ltd and Anr v BSNL and Ors. Motion no. 1940 of 2016.

A problem with such directions is the effectiveness of their implementation⁵³. Practically we'll have to consider whether an average Website owner can approach Court every time his website gets blocked wrongfully, whether ISPs have technological means to identify thousands of infringing URLs and display different notices. Different ISPs use different approaches towards blocking and their compliance with the directions isn't satisfactory, in the above case⁵⁴. The directions were interpreted wrongly by ISPs and they displayed a message that even viewing banned URL is a punishable offence though it is not.

Another problem is the variations in these directions from High Court to High Court. Such directions by Bombay High Court have been appreciated but different High Courts at their levels are coming up with different directions while issuing such orders, what's required at the moment is a uniform practice in such directions which it seems cannot be achieved without directions by Supreme Court or Legislature. Madras High Court held that the interim injunction is granted only in respect of a particular URL not in respect of the entire website⁵⁵. Contrary to the above approach by Bombay High Court, the division bench of Delhi High Court allowed wholesale blocking of entire websites without any directions in anticipation that these websites might infringe Copyright (even when the sports event for which the order was sought had gotten over)⁵⁶. They were convinced by the argument that a URL can be changed by changing a single character hence it would be impossible for Copyright owner to keep applying for blocking each URL. What was not argued was that the same thing can be said about websites as well. For example when Kickass Torrents owner was arrested within days all the content and URLs were copied by another website and the piracy continued⁵⁷. In the same order, the Court asked the government to assist ISPs in enforcing the order and made it a party, even though there seems to be no legal provision allowing it to do so. The Court order used wide capacious language saying "websites entirety or to a large extent indulging in piracy" should

⁵³ Pankhuri Agarwal, *The end of the Dishoom Saga: Better blocking message and neutral ombudsman*, 2016 (<http://spicyip.com/2016/09/the-end-of-the-dishoom-saga-better-blocking-message-and-neutral-ombudsman.html>).

⁵⁴ *Ibid.*

⁵⁵ *Vodafone v. R.K. Productions* (2013) 54 P.T.C. (Mad. H.C.) 149

⁵⁶ *Star India Pvt. Ltd. vs Sujit Jha* CS(OS) 3702/2014

⁵⁷ James Vincent, *KickassTorrents resurfaces online, as all piracy sites do*, The Verge, 2016 (<https://www.theverge.com/2016/7/22/12255426/kickasstorrents-alternate-sites-spring-up>)

be banned, what amounts to a large extent is left open and can be used by the Copyright owner to force ISPs to read order widely blocking entire websites.

The problem is when we think of P2P sites or torrents only illegal content comes to our minds but this is not true. For instance, Project Gutenberg uses P2P as an option, various online games use BitTorrent to send updates, applications like Mozilla, Steam, NeoOffice, OpenOffice make themselves available at P2P sites, Facebook and Twitter use BitTorrent internally, even NASA used BitTorrent to make available 2.9GB image of earth, distributing any openly licensed content⁵⁸. Sites like Sendspace allow GBs of images to be shared easily, Vimeo a video sharing website provides a platform for user-generated content. Such Blanket directions can cause problems for as block all file sharing sites deprives the users of legitimate content.

Paul Coelho, the famous author who has written a lot of bestsellers like *The Alchemist* pirated his own books on Bittorrent. He explained the logic behind his actions as "people download but don't read, people think that they will read it someday but when they really want to read they buy books", so when he made available his books on torrent websites the sales of books in markets where people didn't used to buy his books increased as they could read the book and decide for themselves whether they want to read it further and buy a copy. He claims that free ignites sales. Same thing can be said about the emerging artists, writers, movie directors and producers etc who could get the wide audience they desire through such sites by making their contents available on P2P sites. It can hardly be said that they will lose any money from audience they wouldn't have got in first place. Wrongful usage of *John Doe* orders infringe the freedom of speech and expression of such people.

The most prominent user of *John Doe* orders is the Indian movie industry, since movies in theatres have a brief lifespan. It is no hidden fact that Indian Film industry has been the greatest lobbying power behind Copyright law⁵⁹. Movie producers are getting such orders as they believe that more people will go to movie theatres instead of watching it on the internet, but there have come into light instances of abuse of such orders. There have been instances where movies have been uploaded by the movie producers themselves on video-sharing websites and

⁵⁸ Chrish Hoffman, *8 Legal uses for BitTorrent: You'd be surprised*, MUO, 2013.

⁵⁹ Prashant Reddy T., *The Background Score to the Copyright (Amendment) Act, 2012*, 5NUJS L. Rev. 469 (2012)

then act against those websites. The most used example is of the song 'Kolaveri Di' becoming an overnight internet sensation when the makers of the film '3' released the song and its video online on illegal file sharing sites days before the release of the movie. They allowed mass downloading, distribution and sharing of the song, but before the release of the movie obtained *John Doe* order⁶⁰.

Some researchers believe that we don't need *John Doe* orders to fight online movie piracy as online piracy doesn't affect the viewership of movies most of the time one ends up watching the movies just because it is available and never intended to watch it in any other case. Some radical researchers have also found that consumers of pirated movies are actually consumers residing abroad, and this shows the failure of Indian film industry to identify potential markets⁶¹. The study questions the data film industry relies on to prove online piracy is extensive in India. It also points out that the Indian film revenues(which have constantly increased) do not show any correlation with increased faster internet connections. It also point out that most of the revenue of the pirating sites come from viewers abroad in US Dollars, not Indian rupees. Such factors should force the movie industry to enter into new markets and use new platforms to release movies like Netflix and Hotstar instead of using *John Doe* orders to maximize profits of failing business models. Industry could collaborate with the infringing online platforms to reach impossible to access markets hence further increase the revenue. Any new business model is met with opposition, for instance theatres threatened to boycott the movie "vishwaroopam" when producers tried to release on DTH along with theatres and that plan had to be scrapped.

Some scholars⁶² believe such matters should be dealt with by a neutral third party instead of Courts which would identify and block the infringing links. Such body should be funded by Copyright owners and ISPs. The idea was endorsed by Court as well⁶³.

Then there is the non-legal question of effectiveness of these orders at all, as there are various technological measures like VPN and Tor Browser that make futile any blocking efforts. Any

⁶⁰ Prabhala Achal and Liang Lawrence, *A ludicrous ban in The Open Magazine*, 2012.

⁶¹ Arul George Scoria, *Online Piracy of Indian Movies: Is the Film Industry Firing at the Wrong Target*, 21 Mich. St. J.Int'l L. 647, 2013.

⁶² Shammad Basheer, *Udta Punjab: of Courts, cuts, copyrights and conflicted counsels*, SpicyIP, June 27, 2016 (<http://spicyip.com/2016/06/udta-punjab-linking-Courts-cuts-copyrights-and- conflicted-counsels.html>)

⁶³ Balaji Motion Pictures Ltd and Anr v BSNL and Ors. Motion no. 1940 of 2016.(Great Grand Masti case)

efforts made towards prevention of Copyright is met with technological advancement to commit Copyright infringement. This is the result of the phenomenon of 'law lag'- legislations and jurisprudence not being able keep up with the pace of technology. So practically the best solution for any Copyright owner would be to monetize his product using such websites and stop using such orders, but that era currently is far away. In the meantime, to avoid problems caused by such orders legislative intervention is needed, we need an overarching nationwide framework which would incorporate uniform practice for the Courts to follow, restrictions on blocking the whole websites, having time limit fixed for blocking, making separate government agency to deal with such matters.

JURISDICTIONAL ISSUES SPOILING THE BROTH

Another factor that makes these orders exploitative tools is the jurisdictional provision Section 62 of the Copyright Act, 1957⁶⁴ which allows the Copyright owner to sue before the Court within whose jurisdiction these plaintiffs (companies or persons) are residing or carrying on business. In the absence of Section 62, Section 20 of CPC, 1908 would have applied which allows Plaintiffs to sue only where the subject-matter of the dispute is located, or where the cause of action arises or where the Defendant resides. Till recently using the ambiguity of these provisions the plaintiffs used to sue at a place which would cause hardship to the plaintiff and force him to enter into settlement. For instance. Even when the cause of action arose in Mumbai and plaintiff has his Principal office in Mumbai, still if Plaintiff has other offices elsewhere like Delhi, he would file case in Delhi just to cause inconvenience to the defendant forcing him to agree to exploitative terms of settlement. This used to give these orders nationwide application. Such phenomenon was somewhat resolved in the case of Indian Performing Rights Society Ltd v Sanjay Dalia⁶⁵ Supreme Court held section 62 of the Copyright act and section 20 Civil procedure code are to be read together. In the end what has resulted from this complex interpretation⁶⁶ is that plaintiffs in Copyright suits have got additional forums in the jurisdiction of plaintiff due to Section 62 Copyright act, 1957 but they are available only when the cause

⁶⁴ Same issue exist under Trade Marks Act, 1999 due to Section 134.

⁶⁵ Indian Performing Rights Society Ltd. vs. Sanjay Dalia and Ors. (01.07.2015 - SC) MANU/SC/0716/2015.

⁶⁶ Thomas J Vallianeth, *Shedding Light on IPRS v. Sanjay Dalia*, Spicyip, 2015 available at <https://spicyip.com/2015/07/guest-post-shedding-light-on-iprs-v-sanjay-dalia.html>.

of action doesn't overlap with those forums. Still if the plaintiffs don't have offices in the places where the cause of action arose the plaintiff could sue in his jurisdiction and claim *Anton Piller* and *John Doe* orders from such a Court far away from the reach of the defendants. This gives him a chance to cause defendants hardship, which traditionally has been used to force defendants to enter into settlements.

CONCLUSION AND SUGGESTIONS

The solution to these hardships is that courts must adopt uniform practices and practical directions. For *Anton Piller* orders courts must remember the origins and objectives of the order so as to ensure that order doesn't tilt the balance too much in favour of plaintiff. In today's digital world these orders make sense for some kinds of infringements but not for others, courts must evaluate in each case the question: whether these orders will be appropriate remedies and actually prevent infringement or not? Only if on careful evaluation the orders feel appropriate the courts should use them. When courts are already overburdened with work *John Doe* orders for cinema industry should be reduced, this step will force Indian film industry to move on from its old stagnant business model and adopt new ways to distribute content. We know that law will always lag behind technology, so better technological measure rather than court orders would be a better solution to deal with infringements. Government could impose responsibilities on each website to ensure that there is a complaint mechanism given in website that can be used to inform the website about infringing content on it. This would prevent whole websites from being blocked and the free flow of information won't be disrupted. Only after the website mechanism fails to deal with the infringement courts should be approached. So, even though these orders cannot be done away with for protecting copyright there use can be reduced to the field they are actually effective.