

THE INDIAN STORY OF THE JOHN DOE COPYRIGHT REGIME

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INTRODUCTION

The advance of technology, especially the expansion of internet services, along with developments in the capabilities of the computer has brought into existence a global market for the creative industry. The content created by these creative industries, which fall under the purview of Intellectual Property is arguably one of the most widespread and important types of property in today's world.²⁹⁷ However, corresponding to the rapid development of Intellectual Property is the ever increasing theft of the same. Technological progress, with its positive effects has also, on the other hand furthered the infringement of Intellectual Property Rights (IPR) by a class of infringers who are unnamed and unidentified.²⁹⁸ Hence, the requirement for protection of Intellectual Property, though extremely crucial, is equally challenging.

One such mechanism to protect IPR is the John Doe (an anonymous party) order. The aim of these John Doe orders are to enable people who own the copyright of various content to file ex parte infringement suits against infringers of such copyright whose identity is unknown at the time of filing, yet belong to an identifiable class.²⁹⁹ Simply put, a John Doe order is an ex parte interim injunction, which allows for the party filing the suit to add to the list of infringers even after the suit has been filed.³⁰⁰ It is however enforceable against the likely infringer only if:

The act of infringement has actually been committed.

The identity of the concerned John Doe(s) has/have been established.

In the digital world of today copyright protection systems and rules are continuously being circumvented by newfound methods of content sharing across platforms. To further complicate matters for copyright machineries, this sharing is often done anonymously and with

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²⁹⁷ ITU, Intellectual Property Rights in Today's Digital Economy, www.itu.int/net/itunews/issues/2011/07/038.aspx (Last accessed 28th December, 2015).

²⁹⁸ Payel 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 (Last accessed 28th December, 2015).

²⁹⁹ Seymour Jillaine, Injunctions enjoining nonparties; Distinction without difference?, 66(3) Cambridge Law Journal (2007), pp.607-608.

³⁰⁰ Jatindra Kumar Das, Law of Copyright, 1st ed. 2015, p.489.

unimaginable rapidity. In such a scenario, a John Doe order can be regarded as a seemingly innovative and prudent method of safeguarding copyright.³⁰¹

JOHN DOE LANDS ON INDIAN SOIL

The case of *Taj Television v. Rajan Mandal and Ors.*³⁰² First saw the issuance of John Doe (also known as Ashok Kumar) orders in India. This order was passed against both identified as well as unidentified cable operators infringing the copyright held by other cable operators to broadcast sporting events. Waiting for identification of all the infringing cable operators before passing of an order by the Court would result in huge, irrevocable losses to the operator legitimately holding the copyright. The copyright holders used the three-step test while arguing for a John Doe order in their favour:

- 1) Prima facie case
- 2) Irreparable injury
- 3) Balance of convenience

Keeping in mind this test, along with the various other case specific factors, the Court passed a John Doe order, based on a legislative manipulation involving a joint reading of Order 39 Rule 1 and 2 of the Civil Procedure Code, 1908 (CPC), which enables a Court to pass a Temporary Injunction and Section 151 of CPC and Part III Chapter VII of the Specific Relief Act 1963 which deals with Permanent Injunctions.³⁰³

Since the case of *Taj Television*, the passing of John Doe orders by Indian courts have become so widespread of late, that they could be classified as a trend. With specific reference to the copyright held by movie production houses, John Doe orders have in passed in favour of the producers of 7 Khoon Maaf, Singham, Bombay Velvet, Don 2, Thank You, Speedy Singhs, Happy New Year and most recently, Masaan, to name just a few.³⁰⁴ This sudden outburst of John Doe orders is, however riddled with numerous complexities primarily due to their improper implementation, and consequently the Internet has emerged party most adversely affected.

³⁰¹ Juhi Gupta, "John Doe Copyright Injunctions in India", 18 *Journal of Intellectual Property Rights* (2013), pp.351-352.

³⁰² *Taj Television & Anr v Rajan Mandal & Ors*, IA NO. 5628/2002 in CS (OS) 1072/2002.

³⁰³ Dinesh Pednekar, Lavin Hirani and Rajni Singh, "The Curious Case of John Doe", <http://www.manupatrafast.in/NewsletterArchives%5Clisting%5CHariani%5C2015%5CJan/THE%20CURIOUS%20CASE%20OF%20JOHN%20DOE>.pdf (Last accessed 28th December, 2015).

³⁰⁴ "John Doe Copyright Injunctions in India", *Supra* note 5, p. 353.

THE MURKY TALE OF JOHN DOE IN INDIA

Recently, Phantom Films were granted a John Doe injunction by the Bombay High Court to prevent infringement of its copyright and piracy of its film *Masaan*. The Court passed the order simply on the apprehension or the possibility of *Masaan* being pirated. The links submitted to the Court were not analyzed, but only said to be disclosed. This Court order seems to be reflective of a trend which has gripped the Indian judiciary of late. Courts have been seen passing John Doe orders only on the basis of a likelihood of a film being pirated, and copyright thereby infringed. These orders are based on not only very little evidence, but also a minimum examination of this evidence. Despite the nature and analysis of the evidence, the John Doe orders passed by the Indian courts allow for the whole website being blocked, rather than only the specific Uniform Resource Locator (URL) hosting the disputed content.³⁰⁵ As a result of this, the users of the Internet who required access to these websites for its legitimate content were denied the same. Passing of an order blocking access to the whole website appears to be an out dated, and short term method of curbing online piracy since it not only curbs our freedom of speech and expression, but also encourages the development of new methods of piracy. These Court orders have also ignored the foundations of the John Doe order, which allow for it to be enforced only after identification of the concerned parties and only after the actual act of infringement has been committed.³⁰⁶ Another complexity which arises with regard to the John Doe orders is a question of jurisdiction. Often, in a case the defendants are named only using their IP addresses, some of which may lie in foreign territory and many a time outside the jurisdiction of the Court passing the John Doe order. As a corollary to this, a further issue arises as to whether the same suit can be filed against parties who fall under various jurisdictions.³⁰⁷ Consumers emerge as the primary victim of these John Doe orders since their legitimate right and freedom to access the Internet is curbed due to the blanket ban on the whole website, rather than the URL only. Subsequently, open license content that has been uploaded on these sites to be shared by Internet users cannot be accessed. Entire file sharing sites are blocked due to these orders, and such blanket bans are also in violation of one's Fair Use rights under Section 52 of the Copyright Act, 1957.³⁰⁸

³⁰⁵ Kartik Chawla, *The Trend and Tumour that is a John Doe Order*, <http://spicyip.com/2015/07/the-trend-and-tumour-that-is-a-john-doe-order.html> (Last accessed 29th December, 2015).

³⁰⁶ "John Doe Copyright Injunctions in India", *Supra* note 5, p.353.

³⁰⁷ "The Curious Case of John Doe", *Supra* note 7.

³⁰⁸ "John Doe Copyright Injunctions in India", *Supra* note 5, p. 354.

Another complexity which emerges out of the John Doe order regime is related to the Internet Service Providers (ISPs). In India, the blocking of access to a website requires a directive passed by the Department of Information Technology. However, ISPs often block websites without the backing of such sanctions, and argue in favour of the same on the basis of a provision of law which is not applicable. These ISPs are often pressurised by movie production houses, and also made a party to the court proceedings in an attempt to persuade them to block the entire website hosting infringing content. In such a situation the ISPs are left with no option but to restrict access to the whole website since it is practically impossible for them to monitor the content that is being hosted on the website. Due to this, once again it is the consumer, and the Internet which takes a brutal blow.³⁰⁹

CONCLUSION

In a clarification released by the Court with regard to the case of Dammu, the Court mentioned that the John Doe order was binding only on the URL and not the website in its entirety. The Court also stated that it was the responsibility of the production houses to acquaint the ISPs with the URLs which hosted infringing content within a span of forty eight hours. In light of this clarification, a John Doe order regarding Mirattal, mentioned only the URL hosting pirated content, thereby proving that the Indian judiciary is on the correct path as far as refining its John Doe copyright orders goes.³¹⁰

While it is true that John Doe copyright injunction regime has its positive side, it is the implementation of the same which is inherently problematic. The fact that the public is denied access to and deprived of its legitimate right to access websites (not hosting any infringing content) is reflective of the need for the Indian judiciary to further develop and fine tune its John Doe regime keeping in mind the interests of all parties involved. Further, since a large number of these orders are passed ex parte, without paying heed to the concerns of the other parties, the requirement for their prudent application is of paramount importance.

³⁰⁹ “John Doe Copyright Injunctions in India”, *Supra* note 5, pp.353- 354.

³¹⁰ “John Doe Copyright Injunctions in India”, *Supra* note 5, p. 354.