



PA Legal

Ashok Kumar
Orders:
Curbing Online
Piracy of
Bollywood Movies

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Ashok Kumar Orders: Curbing Online Piracy of Bollywood Movies

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Introduction

The past two decades have seen a rapid development of intellectual property in India. This may be attributed to progressive legislative measures that have provided effective protection to the intellectual property of a creator, thereby, preserving and promoting his incentive to produce. Cinematographic films is one such industry, which has flourished by leaps and bounds in this period. This is evidenced by the fact that the Indian film industry has become the largest producer of feature films in the world and its revenue has multi-folded.¹

However, at the same time internet piracy of these cinematographic works has escalated to unprecedented heights. In a recent report, India was ranked 4th highest in the list of the number of users downloading pirated cinematographic works.² The situation has been aggravated by unabashed access to these works provided by a plethora of websites coupled with the usage of technologies that hide the identity of the user of such work. Thereby, both identity of the facilitator and the user of such works remain under garb of anonymity. This warrants for a dynamic legal remedy to protect the economic rights of the creator from these severe encroachments.

Such issues with cinematographic works have led to importation of Anton Piller Orders in IP jurisprudence by the Indian courts, which permits the plaintiff's counsel to enter the infringer's premises and seize the evidence of an infringement.³ These orders prevent the infringer from continuing further with such illegal activity. However, soon it was realized that remedy through these orders is inadequate since it fails to deal with infringements made by unknown or unidentified infringers. In light of this background, John Doe Order, also commonly known as Ashok Kumar Order was introduced in India⁴.

¹ Eros International Media Limited v. Bharat Sanchar Nigam Limited, NMSL 2147 of 2016 in Suit (L) No. 755 of 2016.

² Motion Picture Association, "Online Piracy a Genuine Threat to the Indian Film & Television Industry", (Dec. 15, 2009), available at: http://mpa-i.org/index.php/news/online_piracy_a_genuine_threat_to_the_indian_film_television_industry/%20 (last visited on April 4, 2020).

³ Daniel S. Drapeau and Michel W. Drapeau, The Taming of John Doe by Federal Courts of Canada, 17 C.I.P.R. 545, [1976] 1 All E.R. 55 (C.A.).

⁴ David Barron, "Roving Anton Piller Orders: Yet to be Born, Dead or Alive", 18 EIPR 183, (1996).

Origin of John Doe Orders

‘John Doe’ order was developed in the reign of England’s King Edward III. The word ‘John Doe’ is used to refer to an unidentifiable or unknown defendant who has allegedly committed a wrong. This equitable remedy was created by the courts to avoid delay and render justice until the defendant is identified.⁵ On the identification of the defendant, ‘John Doe’ is replaced by the name of the defendant.⁶

John Doe Order is a civil remedy granted in the form of an ex-parte interim injunction, which allows the plaintiff to personally enter the premises of the defendant and seize the evidence of crime.⁷ It is considered as a shield-like protection since the IP holder can serve the order to persons who are found infringing. Those who receive the order must comply with the order, otherwise, failure to comply would amount to contempt of court.⁸

John Doe Order was imported into Indian jurisprudence through celebrated case of *Taj Television v. Rajan Mandal*⁹ back in the year 2002. In this case, the plaintiff was exclusive owner of broadcasting rights of FIFA World Cup, 2002. He brought a suit for infringement of his copyright under Section 37 of the Copyright Act, 2012¹⁰ against 6 known and 14 unknown cable-operators who were broadcasting the FIFA World Cup, 2002 without seeking any authorization from him. The plaintiff argued that due to unstructured nature of the cable industry it was impossible to identify the infringers. Further, as duration of the World Cup was very short, identification of such unknown infringers may not be possible in a timely fashion. This in itself is likely to cause an irreparable injury to them in the form of huge loss in revenues.

The Delhi HC read Order 39 Rule 1, 2 of Code of Civil Procedure, 1908 along with inherent powers of the court under section 151 of the Code of Civil Procedure and held that Indian

⁵ Payal Chatterjee, ‘What’s in a name’... *John Doe arrives in India*, NISHITH DESAI ASSOCIATES.

⁶ Nike Canada Ltd. v. John Doe, 2 C.P.R. (4th) 501, at 503-4 (F.C.T.D.).

⁷ Anton Piller KG v. Manufacturing Processes Ltd, [1976] 1 All E.R. 55 (C.A.).

⁸ Aadya Chawla, *John Doe orders: Prevention of copyright infringement of cinematographic films*, ILI LAW REVIEW, Volume II, 2017.

⁹ Taj Television v. Rajan Mandal, I.A NO. 5628/2002 in CS (OS) 1072 of 2002.

courts reserve the power to grant John Doe orders to meet the ends of justice. Court elucidated that such order may be enforced against persons when-

1. their action falls within the scope of infringement
2. identity of such persons remains unknown at time of institution of the suit.

It reasoned that unknown identity of the defendant is merely a misnomer in the proceedings. Hence, an inability to identify such unknown identity is not fatal as long as 'litigating finger' is pointed at a particular person.¹¹ Accordingly, in the present case, the court granted authorization to plaintiff accompanied by the commissioner to enter premises where infringement may be happening.¹²

John Doe orders are granted only after satisfying the classic three-pronged test of granting an interim injunction under Order 39 of CPC i.e.:

1. Existence of a prima facie case;
2. Irreparable harm or injury; and
3. Balance of inconvenience in the favour of the party seeking such remedy.

Moreover, there is another requirement of full and frank disclosure by the party seeking such remedy as to the existence his right, previous instances of such infringement and anticipation of large-scale infringement.

John Doe order has emerged as an effective remedy for film producers and creators to protect their work from piracy against unknown infringers. The producers protect their works from infringement by filing application for such orders, stressing upon the high piracy rate of the film and the short duration of its screening. Time is an essence for such works, hence these applications are filed promptly rather than after the identification of such infringers. This prevents producers from incurring losses during the period when the defendant is being identified.

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

12 *Taj Television v. Rajan Mandal*, I.A NO. 5628/2002 in CS (OS) 1072 of 2002.

Foreign Jurisprudence

The practice of granting John Doe order has an international presence and its scope even goes beyond an application in intellectual property in some jurisdictions. It has been also adopted in the form of legislative enactments in the United Kingdom (Civil Procedure Act of 1997), Australia (Federal Court of Australia, Practice Notes), (New Zealand Rules Committee)¹³. A bird's eye view of the development of John Doe jurisprudence across major jurisdictions is laid down as follows:

United Kingdom

The usage of John Doe orders became popular in the UK courts after 1975, where it was used for inspection and removal of documents from the possession of alleged infringer. These orders are passed in UK by invoking the inherent jurisdiction of the court.¹⁴ In *EMI Records Limited v Kudhail*¹⁵, Court of Appeals passed a John Doe order whereby it ordered to discontinue the distribution of pirated materials rather than ordering the search and seizure of defendant's premises.¹⁶ The same trend was followed in *Bloomsbury Publishing Plc, JK Rowling v. Newsgroup Newspapers Limited*¹⁷ wherein the court ordered to enjoin the unknown defendants from offering the book 'Harry Potter' to any newspaper without prior authorization of the plaintiff. Hence, John Doe orders are utilized both for personal search and seizure by the plaintiff and enjoining the defendant from unauthorized use of intellectual property of the creator.

¹³ Judicature Act 1908 No 89 (as at 01 February 2009), Public Act, Act by section, Schedule 2 High Court Rules, Part 33 Search orders, New Zealand Legislation: Acts, Consulted on May 7, 2009.

¹⁴ Daniel S. Drapeau and Michel W Drapeau, The taming of John Doe Orders by the Federal Court of Canada, 17 C.I.P.R., 2001 at pg 545.

¹⁵ *E.M.I. Records Limited vs. Kudhail* [1985] F.S.R 36 (C.A.).

¹⁶ *Ibid.*

¹⁷ *Bloomsbury Publishing Plc, JK Rowling v. Newsgroup Newspapers Limited* [2003] EWHC 1087.

Canada

John Doe order has a much more nuanced and rigid application in Canadian courts. Various guidelines have been carved out for effective enforcement of the order.¹⁸ Canadian courts have perceived these orders as the nuclear weapon of civil remedies as they are abrasive and may amount to a serious breach of privacy.¹⁹ Accordingly, courts have set a higher standard of scrutiny and series of pre-conditions that are to be satisfied before granting a John Doe order.²⁰ Further, to show urgency of the matter, a time frame has also been devised for applications seeking this order.²¹ As an additional layer of security and protection, the federal court has also suggested the appointment of “Amicus Curiae” for supervising the implementation.²²

The major pre-conditions to be satisfied to obtain a John Doe order are as follows:-

1. Extremely strong prima case.²³
2. Potential or actual damage is very serious.
3. The defendant is most likely to have an incriminating evidence in his possession.
4. A real apprehension that such incriminating evidence may be destroyed before the discovery.

¹⁸ Prof. Jeff Berryman, *Thirty Years After: Anton Piller Orders and the Supreme and Federal Courts of Canada*, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY, Vol2. Issue 3, (2007).

¹⁹ *Fila Canada Inc. v. Doe* [1996] 3 F.C. 493 (T.D.).

²⁰ John Doe Orders, A Boon for IP protection available at <http://www.legalera.in/Front-Page/john-doeorders-a-boon-for-ip-protection.html>, last visited on March 4, 2020.

²¹ *Fila Canada Inc. v. Doe*, [1996] 3 F.C. 493 (T.D.).

²² *India Manufacturing Limited et al. vs. Lo et al.*, (1996) 110 F.T.R 201.

²³ *Rank Film Distributors Limited vs. Video Information Centre*, (1980) 2 All ER 27.

United States

The applicability of the John Doe order has a wider scope in US courts. Its primary is to seek remedy against even unidentified defendants. However, it is also used creatively for two purposes:

1. For relief in statutory limitation period for serving notice

US Civil Procedure rules provide that plaintiff has to serve notice to the defendant within a fixed period of time. The relaxation for this limitation is allowed in only exceptional circumstances. The plaintiffs seek John Doe orders as an exceptional circumstance for circumventing the statutory limitation requirement for serving notice to defendants.²⁴

2. John Doe order as a pseudonym to protect a party's identity

In some cases plaintiff was interested in keeping his identity anonymous.²⁵ This interest arose out of fear of public stigma, personal safety and economic retribution. Illustratively, in *Poe v Ullman*²⁶, the plaintiffs challenged the birth control laws by using the pseudonyms “Paul”, “Pauline” and “Jane Poe”. This was also acknowledged later by the United States Supreme Court.²⁷

Its scope has been increased in recent years from intellectual property regime to cover even matters like bank frauds, unauthorized electronic interceptions, usage of malicious software, money laundering²⁸ and computer intrusions. This remedy has been very creatively sought and granted in a myriad of cases. Illustratively, the Internal Revenue Service (IRS) has sought John Doe order from the courts to pierce the bank's duty of confidentiality and get access to the

²⁴ Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. Pitt. L. Rev. 883 (1996).

²⁵ Joan Steinman, Public Trial, Pseudonym Parties: When should litigants be permitted to keep their identities Confidential?, HASTINGS LAW JOURNAL, 37th edn (1985).

²⁶ *Poe v. Ullman*, 367 U.S. 497 (1961).

²⁷ *Ibid.*

²⁸ *United States of America vs. John Doe*, 18 U.S.C 1956 (b) (4)

accounts of taxpayers at HSBC bank who are evading taxes.²⁹ The courts have utilized the Federal Bureau of Investigation (FBI) for execution and enforcement of the orders.³⁰

Australia

Australian courts have used the terminology “Rolling Anton Piller injunctions” instead of “John Doe orders” for pointing the litigating finger at an unidentified defendant. In a similar fashion as in the Canadian jurisprudence, John Doe orders are granted reluctantly and only after the satisfaction of various strict requirements.³¹ This reluctance arise out of the opinion that such orders turn out to be a very expensive affair.³²

Australian courts utilize surveillance, investigative as well as forensic activities for implementing such orders.³³ Generally, these orders are granted along with a restriction upon the extent to which it is enforceable. This restriction is in parlance to the period for which such order will be enforceable, specific territorial jurisdiction where it will be enforceable, the method of service of such orders to the defendant and the search and seizure procedure to be undertaken.³⁴ This is in contrast to Canadian jurisprudence, wherein the courts have granted such orders combining the same with Anton Piller orders and extended its application throughout the jurisdiction as a part of inherent jurisdiction of the courts.³⁵

²⁹ Department of Justice-Office of Public Affairs, Justice Department Asks Court to Allow IRS to Seek HSBC India Bank Account Records. April 7, 2011 available at <http://www.justice.gov/opa/pr/2011/April/11at-439.html> last visited on March 4, 2020.

³⁰ United States of America vs. John Doe (1-13) United States District Court, District of Connecticut, No. 3:11 CV 561 (VLB), April 2011

³¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Cracking down on copycats: Enforcement of copyright in Australia, Commonwealth of Australia 2000.

³² *Ibid.*

³³ *Ibid.*

³⁴ Jeff Berryman, The Anton Piller Order- A Civil Search Warrant, <http://www2.americanbar.org/calendar/section-of-international-law-2011-springmeeting/Documents/Thursday/Searching%20for%20the%20Truth%20and%20Seizing%20the%20D%20e%20ceit%20ul/The%20Anton%20Piller%20Order%20%E2%80%93%20A%20Civil%20Search%20Warrant.pdf>, last visited on April 4, 2020.

³⁵ *Ibid.*

New Zealand

In *Tony Blair*³⁶ case, Justice Anderson observed that the fact that a person cannot be identified at the relevant stage of proceeding should not be a bar to relief to persons who may be identified at the relevant time and accordingly held that John Doe orders may be granted by the courts. This position is primarily because John Doe order may amount to a serious encroachment upon the privacy of an individual. It is justified only because it helps to meet with the externalities of modern commerce.³⁷

The courts grant these orders, primarily for seizing the infringing material and restraining the sale of pirated copyrighted materials.³⁸ New Zealand courts have followed the similar trend as the Australian courts while granting John Doe orders. In a similar fashion as Australian courts, courts have used the terminology “Rolling Anton Piller injunctions” for granting such orders. They have also followed the trend of limiting the extent of enforceability of rolling Anton Piller orders.

³⁶ *Tony Blair Pty Ltd. Vs. Splain* [1993] 3 N.Z.L.R 185 (High Ct.) and *Tony Blair Pty. Ltd. Vs. Jamison* (1993) 41 F.C.R 414 (F.C.T.D)

³⁷ *Ibid*

³⁸ *Ibid.*

Evolution of Ashok Kumar Orders to Combat Online Piracy in Bollywood Cases

Although Ashok Kumar orders became a part of the Indian Jurisprudence in 2002, their incorporation in Bollywood cases came years later as a result of rampant movie piracy on the World Wide Web with *Singham* case³⁹ marking its beginning.

Delhi HC in the *Singham* case granted a very vague Ashok Kumar order to the plaintiff whereby all infringing content on the ‘Internet’ was to be blocked. The plaintiff sent an inventory of websites to respective Internet Service Providers (hereinafter “ISPs”) for enforcing the order and stopping such websites from sharing infringing content on the Internet. Thereafter, those ISPs blocked the entire websites to stop them from hosting infringing content since the task of keeping a watch on such websites to spot infringing content seemed nearly impossible to them. A shortcoming of this action was that the use of these websites by legitimate users was also hindered.

The Delhi High Court in a previous case, *IPRS v. Badal Chowdhary*,⁴⁰ categorically held that it is imperative that these injunctions be limited to specific boundaries in order to ensure that defendants are not prejudiced by such vague injunction. Unfortunately, the Delhi HC itself did not follow this holding in subsequent cases. The court, thereafter, granted vague and wide sweeping Ashok Kumar orders to prevent online piracy in a plethora of cases with respect to the bollywood movies namely *Bodyguard*,⁴¹ *Don 2*,⁴² *Speedy Singhs*⁴³ and *Singham*.⁴⁴ As a result of these vague orders, various websites were blocked even prior to infringing content being shared on them.

³⁹ *Reliance Big Entertainment v. Jyoti Cable Network*, MANU/DE/7635/2011.

⁴⁰ *Indian Performing Right Society Ltd v. Badal Dhar Chowdhry*, 2012 (50) PTC 376 (Del).

⁴¹ *Reliance Big Entertainment v. Multivision Network Limited and Ors*, MANU/DE/7639/2011.

⁴² *Reliance Big Entertainment v. Jyoti Cable Network*, MANU/DE/7635/2011.

⁴³ *Viacom 18 Motion Pictures v. Jyoti Cable Network and ors*, CS(OS) 2352/2011.

⁴⁴ *Supra* note 39.

Website Shaming or Url Blocking?

In the case concerning the movie ‘3’, the Madras HC⁴⁵ passed the order of blocking entire websites on whose webpages the infringing content was hosted. However, the court later modified its previous order and restricted application of the Ashok Kumar order by blocking only those specific URLs, which were hosting infringing content instead of blocking entire websites.

In *Star India v. Sujit Jha*,⁴⁶ the Delhi HC highlighted a serious problem regarding URL blocking in its pre-emptive order. The court stated that-

“It is extremely easy for the website to provide access to the blocked content through another URL since a mere change of a character in the URL string will result in a completely new URL.

Consequently, it is extremely easy for a website to circumvent and thus nullify any order that directs blocking of specific URLs since such websites can very easily provide access to the same content by merely changing one character in the URL string. Thus, unless access to the entire website of the named and unnamed defendants is blocked, there is no alternate and efficient remedy that is open to the plaintiff.”

Although the court later modified this order and restricted the scope of order to specific URLs, the pre-emptive order seriously questioned the efficacy of Ashok Kumar orders which provide for URL blocking. However, the issue as highlighted by the pre-emptive order was resolved to a great extent by the introduction of Section 65A in the Indian Copyright Act by 2012 Amendment.

Section 65A provided for protection of technological measures and stated that any person circumventing an effective technological measure protecting any rights conferred by this Act with the intention of infringing such rights shall be liable for a criminal offence. Hence, if the

⁴⁵ *M/s R K Productions Pvt Ltd v. BSNL & Ors.*, CS(OS) 208/2012.

⁴⁶ *Star India v. Sujit Jha & Ors.*, CS(OS) 3702/2014.

website owner changes the URL to re-upload such infringing content, he shall be liable under Section 65A of the Copyright Act.

Later, in the *Dishoom* case,⁴⁷ the Bombay HC took a proactive stance in regulating the use of Ashok Kumar orders for blocking websites and URLs hosting the infringing material.

The court also introduced a three-step verification test so as to ensure that Ashok Kumar orders do not lead to over blocking of URLs.

1. Firstly, the copyright holder must verify a list of the URLs hosting infringing content by a letter before posing a request to block before the court,
2. Secondly, the attorney representing the plaintiff must verify such list and
3. Thirdly, this material is to be placed as Affidavit on oath before the High Court.

Moreover, the Court while passing such order must itself verify and assess the authenticity of such inventory of webpages to be blocked or delegate it for assessment and verification to a neutral third party. Furthermore, the injunction, once granted, would only be valid for a period of 21 days post which the plaintiff will have to approach the Court for extension of the injunction.

Justice G. S. Patel also observed that such orders for blocking entire websites and not specific URLs should not be granted as general rule. They may be granted only if it is demonstrated that entirety of the website contains only illicit or infringing material. This observation by Justice Patel can be understood as laying down the principle that even entire websites can be blocked subject to the condition that entire website contains only illicit material.

⁴⁷ *Eros International Media Ltd. and Another v. Bharat Sanchar Nigam Limited & Others*, CS(OS) 751/2016.

Remedy Against Ashok Kumar Orders

The most critical issue with respect to Ashok Kumar orders and why they are not granted in other jurisdictions is that the defendants, that is the website owners, never really get a chance to be heard before such orders are enforced against them and this leaves a wide latitude for abuse. However, the website owners should be given an opportunity for expeditious disposal of their issues against the Ashok Kumar order.

Hence, in *Udta Punjab* case⁴⁸, the Bombay HC laid down a protocol with respect to execution of Ashok Kumar orders against ISPs. The plaintiff was directed to provide sufficient service to infringing party by making a public notice stating the order of injunction and the essence of the case. The defendant was to be given a term of 4 days for moving against such injunction.

In the *Dishoom* case⁴⁹, the Bombay HC further instructed the ISPs to display the following on the blocked URL webpages-

1. Relevant provisions of the Copyright Act, 1957 that prescribe penalties for offences of copyright violations (mentioning specific sections, prison term and amounts).
2. The relevant order by its date, suit number and details of the present suit. It is not necessary to reproduce the entire order but essence of it stating that blocking of such URL has been mandated by the Court is sufficient.
3. Address of the Plaintiff's Advocates
4. A statement that any person aggrieved by such order may approach the court with at least 48 hours' notice to the Plaintiff's Advocates

⁴⁸ *Balaji Motion Pictures Limited v. Bharat Sanchar Nigam Limited & Others*, CS(OS) 693/2016.

⁴⁹ *Supra* note 47

Need For Neutral Verification Agency and Ombudsman (NVAO)

In the *Dishoom* case, Justice Patel also highlighted the need for a neutral party and advised delegation of assessment and verification of the list of webpages to such neutral party.

The need for creation of a Neutral Verification Agency and Ombudsman (NVAO) was also brought into spotlight by Late Prof. Dr. Shamnad Basheer.⁵⁰ A similar set up already exists in the United Kingdom called the Ombudsman Services to deal with consumer complaints related to copyrights, which was set up in 2002, wherein their object is to deliver neutral and independent decisions. The aggrieved person still has a remedy to approach civil courts if he remains unsatisfied with decision of the Ombudsman.

The primary function of the NVAO would include verifying that the plaintiff is the true owner of the copyright over the infringed content and verifying the list of webpages that are to be blocked. Moreover, the NVAO could also perform the function of an ombudsman and settle disputes between stakeholders involved in Ashok Kumar orders expeditiously.⁵¹

It will act as a third-party mediator for resolution of disputes between stakeholders at the first instance, help in expeditious resolution of disputes and even if the dispute eventually reaches Court, NVAO's fact finding shall also benefit the court.⁵² Moreover, it can also advise Courts as to technical issues taking into regard the technological technicalities involved in such cases with which the Hon'ble Courts might be unable to stay up to date.

⁵⁰Kian Ganz, The messy battle against online piracy, Live Mint, <https://www.livemint.com/Consumer/YtbRN9fv6ZgZCZOexcSWMI/The-messy-battle-against-online-piracy.html>, last accessed April 8, 2020.

⁵¹ Shamnad Basheer, Of Bollywood "Blocks" and John Does: Towards an IP Ombudsman?, Spicy IP, <https://spicyip.com/2016/08/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman.html>, last accessed April 8, 2020.

⁵² *Ibid.*

The NVAO shall comprise of website owners, ISPs' representatives, civil societies and copyright content owners with no stakeholder holding a share sufficient to affect the neutrality of the NVAO.

Concluding Remarks

On a conjoint reading of the judgments by various High Courts, it can be concluded that only specific URLs of website are to be blocked by way of an Ashok Kumar order unless the entire website is hosting only illicit and infringing content. However, the question that yet remains unanswered is that whether blocking of specific URLs amounts to sufficient protection and effective enforcement of the Ashok Kumar order or whether it defeats the entire purpose of the order as such URLs can be fixed by just changing a character in the URL as highlighted by the Delhi HC in *Star India v. Sujit Jha* even though circumventing the same has been made a criminal offence by the Copyright (Amendment) Act, 2012.

It is high time that the Hon'ble Supreme Court of India brings light in this era of darkness in the Ashok Kumar jurisprudence as there seems to be an imperative need for cogent guidelines as to how to proceed in cases wherein Ashok Kumar orders are claimed. Moreover, a Neutral Verification Agency and Ombudsman should be set up to ease the burden of the judiciary with respect to technical aspects such as the verification and assessment of the inventory of the webpages claimed to be infringing and for effective and expeditious resolution of Online Piracy disputes since time is the very essence of such cases.