

JOHN DOE ORDER – BOON OR BANE?

Anagha Vijay Huse*

ABSTRACT

Intellectual property rights are equally important to be safeguarded as those other physical proprietary rights. In the era of advanced technology, these rights become more vulnerable to infringement. Due to the complex nature of technology along with the ease of accessing it, in most cases, such infringers are not identifiable easily. Thus, these infringers get the advantage of the nature of a digital world, to hide behind anonymity. Therefore, the practice of passing John Doe orders against unknown infringers becomes a saviour for protecting the interest of intellectual property holders. However, these orders are been criticized as it has the capacity to affect the internet use of the world at large. This article discusses the elements of this order and analyses the need of the hour. Further, it highlights the factors of this order, which has the capacity to impede the rights of innocent users. This article has tried to study the factors which can help to maintain a balance between the protection of the rights of IP holders and the protection of the rights of the world at large. Though the protection of both rights is equally important, the protection of intellectual property rights cannot be put at a lower hand merely by citing the violation of other rights. Rather it becomes important to regulate the use of e-content, and its legitimate use to reduce digital piracy. Therefore, John Doe's orders are necessary to be passed in the interest of justice by analyzing situations, which would negate the negative impacts

Keywords: John Doe order, Temporary injunction, Intellectual property rights.

INTRODUCTION

‘John doe order’ is a relief of preventive nature, i.e. a relief of injunction. This type of injunction is not specifically provided by any statute or legislation but has evolved through judicial precedents. This type of order is also known as the ‘Ashok Kumar order’. The nature of this type of order makes it a very interesting concept of ‘injunction’ and the names attached to it make it even more unique.

However, the impacts of this order are seen to be very wide, including the possibility of infringing free speech, which is one of the reasons, why it has also been seen as a criticized concept. This article tries to discuss the basic understanding of this concept, and the inception

*LAW GRADUATE.

of this order and also tries to analyze the need of adopting this practice. What are its positive and negative impacts on the world at large? And how can those be reduced to make it more advantageous?

WHAT IS A JOHN DOE ORDER?

John Doe's order is usually passed as an ex-parte ad-interim relief, passed against unnamed or unidentified defendants.¹The name 'John Doe' merely specifies such unidentified defendants who have caused or who would possibly cause the infringement over the plaintiff's rights. Commonly, such type of order is passed in favour of intellectual property holders. When the Plaintiff's IPR is violated by several defendants, but all such infringers are unknown or anonymous or not within the knowledge of the plaintiff or cannot be found easily at the time when legal action is initiated by him, in such urgent cases, Plaintiff adds such defendants by naming them as 'John does', and thereby seeks an injunction against them². In the future whenever the identity of infringers becomes known to the plaintiff, those 'John does' in the order are replaced by the known defendants, and thus that Order becomes applicable to those defendants also.

Besides, the 'Quia-timet John Doe Order'³ is passed, when Plaintiff seeks such an order based on the apprehension of infringement of his rights.

WHAT IS THE NEED FOR A JOHN DOE ORDER?

Specific Relief Act, 1963⁴ provides for types of injunction and their duration, and the Code of Civil Procedure, 1908⁵ provides for various circumstances under which the temporary injunction can be sought by the Parties. It also impliedly provides that, it can be granted to and against the parties to the suit. It means that the relief of Injunction is a relief-in-personam.

But in the cases wherein the defendants infringing the rights of the Plaintiff are anonymous, there is no explicit provision providing relief to the sufferer. Therefore, the Indian Courts

¹MadhuGadodia, *et. al.*, 'History And Development Of John Doe Orders in India' (*Live Law*, 04 February 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689>> accessed 07 April 2023

²MadhuGadodia, *et. al.*, 'History And Development Of John Doe Orders in India' (*Live Law*, 04 February 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689>> accessed 07 April 2023

³MadhuGadodia, *et. al.*, 'History And Development Of John Doe Orders in India' (*Live Law*, 04 February 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689>> accessed 07 April 2023

⁴ Specific Relief Act 1963, s 36, s 37

⁵ Code of Civil Procedure 1908, r 1 ord 39, r 2 ord 39

have adopted the practice of John Doe orders against such unidentifiable infringers, to protect the rights of the Plaintiff and to meet the ends of justice.

Furthermore, violation of IPRs leads to the damage of one's skill, talent, and attached revenue, and also it is an exploitation of the efforts and hard work done by the intellectual property holder. India is part of the TRIPS agreement⁶, therefore more effective enforcement of IPR protection becomes the duty of the Indian legislature and Courts. Thus, the John Doe orders are needed, which by its nature strengthens the IPR protection.

ARE THE INDIAN COURTS EMPOWERED TO PASS JOHN ORDERS?

Though the Code of Civil Procedure, 1908⁷ provides for the circumstances for granting a temporary injunction, it is not exhaustive. Thus it leaves the scope for the Courts to pass TI in other circumstances which are not covered by the Code of Civil Procedure, 1908⁸. But in respect of injunction against 'anonymous infringers', it is nowhere specified explicitly or impliedly.

However, the inherent powers of Courts⁹ are sufficient enough to keep the John Doe orders within the ambit of the powers of Courts. The scope of inherent powers of Courts is been discussed by Indian Courts in a series of judgments. In *Manohar Lal Chopra v. Raj Bahadur Rao*¹⁰, the Hon'ble Supreme Court has held that the inherent powers of the Court are complementary to the powers already conferred by CPC. Thus, the exercise of inherent powers when not in conflict with such already conferred powers or does not act against the intention of the legislatures, such exercise of powers cannot be said to be ultra vires or beyond the powers of the Courts.

Therefore, when the peculiar set of facts warrants the Court to invoke its inherent powers to meet the ends of justice, John Doe's orders remain within the powers of the Court.

INCEPTION OF THIS ORDER

Anton Pillar's order appears to be the initial phase of John Doe's orders, though both are different in a certain way. Anton pillar order allows an authority to search and seize the material by entering into the premises of infringers, thereby facilitating the discovery of the

⁶'Trade-Related Aspects of Intellectual Property Rights' (WTO)
<https://www.wto.org/english/tratop_e/trips_e/trips_e.htm> accessed 07 April 2023

⁷Code of Civil Procedure 1908 (n 5)

⁸Code of Civil Procedure 1908, r 1 ord 39, r 2 ord 39

⁹ Code of Civil Procedure 1908, s 151

¹⁰*Manohar Lal Chopra v Raj Bahadur Rao*(1961)AIR 527

material, and reducing the threat of destruction of evidence¹¹. However, it was not sufficient to solve the situation of unknown infringers and was also limited for the purpose of evidence.

In the Indian legal system, considering the provisions of the Code of Criminal Procedure¹², this type of order was passed in many instances, such as *Pramod Kumar Bhandari v. State*¹³. For the first time in Civil proceedings, in *Taj Television v. Rajan Mandal*¹⁴, the Hon'ble Delhi High Court discussed the concept of the John Doe Order and the powers of Courts for it. However, it did not pass this type of order specifically¹⁵. Whereas, in *ESPN Software Pvt. Ltd. V. TuDu Enterprises &Ors.*¹⁶, Hon'ble Delhi High Court specifically passed the John Doe Order against unnamed or unidentified defendants.

FACTORS FOR GRANTING JOHN DOE ORDER

As this order involves an impact on the internet usage of the world at large, it warrants more caution while passing it. Only when there is no other effective way to protect the plaintiff's rights, the Court is expected to pass John Doe's orders.

Which factors are necessary to be proved for the satisfaction of the court, is been established through various judgments. Those factors are as follows¹⁷:

- The claim of the Plaintiff is a Bonafide and prima facie case exists in his favour.
- Frank disclosure of the circumstances has been made by the Plaintiff, in respect of, receiving his infringed rights, circumstances led to the violation of those rights.
- Infringement caused or may cause is uncontrolled or widespread.
- An irreparable loss would cause to Plaintiff if relief is not granted.
- Balance of convenience is in favour of Plaintiff.

However, when the case demands 'Quiatimet John doe order', the burden on the Plaintiff of proving these factors is comparatively higher¹⁸.

¹¹Daniel S. Drapeau and Michel W. Drapeau, 'The Taming of John Doe by Federal Courts of Canada' (2001)17 C.I.P.R. 545.

¹²Code of Criminal Procedure 1973, s 93, s 94

¹³*Pramod Kumar Bhandari v State*(1997) CriLJ 1015

¹⁴*Taj Television v Rajan Mandal*(2002)LA NO. 5628/2002 CS(OS) No. 1072/2002

¹⁵*ESPN Software India Pvt. Ltd. v M/s. TuDu Enterprises & Ors*(2011), CS(OS) 384/2011 (27)

¹⁶*ESPN Software India Pvt. Ltd. v M/s. TuDu Enterprises & Ors* (2011), CS(OS) 384/2011(27)

¹⁷Madhu Gadodia (n 1)

¹⁸MadhuGadodia, *et. al.*, 'History And Development Of John Doe Orders in India' (*Live Law*, 04 February 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689>> accessed 07 April 2023

IS IT A BOON OR A BANE?

In the era of advancing technology, available IPR legislations appear to fall short of the situations, wherein the infringement has been caused by several entities, whose identity becomes difficult to ascertain in a short period, and the loss caused appears to be huge. In such situations, where the loss is huge, but cannot afford to wait till the identity of the infringer confirms, the John Doe order acts in the interest of justice for the Plaintiff and becomes immensely advantageous for him, as it saves further loss by preventing the infringers from causing similar damages.

However, this type of order is been criticized for a lot of time, based on the following points¹⁹:

- Huge discretion if remains unguided, can impede the internet usage of innocent users.
- It bypasses the requirement set up by the CPC for passing interim injunction, i.e. the identity of the defendants.
- Blanket bans on websites can also block access to legitimate material on websites.

The negative impacts witnessed in various cases have imposed a stricter burden of proof upon the Plaintiff. For regulating such negative impacts of John Doe's orders, Courts have discussed tests and different approaches, for analyzing the situations and blocking of websites by John Doe's orders.

1. In *Eros International Media Ltd. v. BSNL*²⁰, the quantitative approach was discussed. This approach focuses on the quantity of infringing material to block the website entirely²¹. This was discussed with a view that legitimate content of the websites should not become inaccessible for internet users.
2. In *Department of Electronics and Information Technology v. Star India Pvt. Ltd*²², the Qualitative approach was discussed. According to this, blocking rogue websites entirely is justified, when the substantive part of the website includes infringing matters. Though the portion of the content is illegitimate, the quality of the website has to be analyzed by observing the conduct and purpose of the website. Disregarding

¹⁹MadhuGadodia, *et. al.*, 'History And Development Of John Doe Orders in India' (*Live Law*, 04 February 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689>> accessed 07 April 2023

²⁰*Eros International Media Ltd. &Anr.v Bharat Sanchar Nigam Ltd. &Ors.*(2016) NM (L) No. 2315/2016 in Suit(L) No. 751/2016

²¹*UTV Software communication v 1337x TO &Ors.* (2019)CS(COMM)724/2017 [62]

²²*Department of Electronics and Information Technology v Star India Pvt. Ltd* (2016) R.P.131/2016 in FAO (OS) 57/2015

the notice, or secrecy in mentioning details on the website shows the purpose of encouraging the infringement of IPR, thus blocking the website is considered to be justified.

3. In *UTV Software Communication v. 1337x*²³, the Court further adopted the qualitative approach. It also analyzed the potential of blocking websites by alternate means, such as the seizure of domains, de-indexing websites, blocking IPs, URLs, and payment freezing, which may have a less stringent impact.

From the analysis of the Court²⁴, a measure of blocking entire websites appears to have a long and proportionate impact as compared to other means of blocking websites. It leaves a great impact on the digital world, by encouraging legitimate content and by dispiriting digital piracy.

However, the decision of blocking websites has to be made by following the test of necessity and proportionality. Test of necessity requires the examination as to achieving the aim of protection with any other lesser strict means. And the test of proportionality requires the analysis of the range of infringement and the impact of blocking on the defendant's interest.²⁵ Thus, the order made should be proportionate to the nature and extent of the infringement.

This test appears to be the blend of both approaches, as it also includes the examination of the extent of the infringement. Such tests and approaches become necessary, as the protection of one's interest should not generate any hurdle for legitimate trade. Thus, curbing down the negative impacts of website blocking by these means, John Doe's order results in more a boon than a bane.

CONCLUSION

The John Doe Order seems to be more advantageous for IPR protection, however, critique also involves valid points of consideration. Analyzing the situation with both approaches and tests, it has the capacity to limit the negative impacts of the John Doe order, which can provide a win-win situation for all legitimate businesses.

Certainly, blocking orders come along with grave consequences on the legitimate subject and material. Therefore, it demands a balanced and fair approach while passing the John Doe

²³*UTV Software communication v 1337x TO &Ors*, (2019) CS(COMM)724/2017

²⁴*UTV Software communication v 1337x TO &Ors*, (2019) CS(COMM)724/2017 [85], [86]

²⁵*UTV Software communication v 1337x TO &Ors*, (2019) CS(COMM)724/2017 [76]-[78]

orders. However, it cannot be the single-handed task of the Judiciary to control the negative impacts of the John Doe order. This order acts as a protector in its essence, but to curb the negative impacts, the involvement of all stakeholders of the society is necessary, including policymakers, parties approaching the Court, and internet users.

Policymakers can take measures by providing disclaimers regarding the infringing content on the website²⁶. This furthers the duty of internet users of refraining from visiting such an illegitimate website. This would lead to an effective and long way of controlling these rogue websites. The authorities must not have a single-handed task of blocking websites, as it may result in arbitrary actions, and would be against their actual role as neutral intermediaries²⁷.

It is equally important for the Plaintiff to come with clean hands and discharge the strict onus imposed on it in respect of showing fundamental conduct of the target website outspreading IPR infringement.



²⁶*UTV Software communication v 1337x TO &Ors*, (2019) CS(COMM)724/2017 [104]

²⁷*UTV Software communication v 1337x TO &Ors*, (2019) CS(COMM)724/2017 [100]