

ANALYSIS OF COPYRIGHT INFRINGEMENT IN THE DIGITAL SPHERE IN INDIA

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ABSTRACT

Historically, it has been technological advancements that have led to the development of the law of Copyright. However today, it is technological advancement itself which is the biggest challenge to the enforcement of Copyright laws. Piracy in the digital age has become simpler than ever, due to the ease of unauthorised copying possible through technology in the form of digital copies. To curb such digital piracy which can happen in several ways, and to protect the rights of Copyright holders, the Copyright (Amendment) Act, 2012 introduced the protection for Technological Protection Measures and Rights Management Information. Further, besides such TPMs, the Courts have proactively taken steps and expanded the concept of Injunctions through various judicial pronouncements to protect Copyright holders against persons engaging in authorised use. While discussing these concepts, the current paper concludes while discussing contemporary issues pertaining to Copyrights and drawing a minor comparison to the DMCA.

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Introduction

The interplay between law and technology is one which has been delved upon by jurists and authors at great lengths, discussing the benefits and disadvantages that the technologies have brought into the legal framework that is in question. This interplay between technology and the legal framework can be best analysed as in the case of the effect of advancements in technology on the Copyright Law framework. On the one hand, it is the growth of technology that has facilitated Copyrights, and creation of more copyrighted works in the first place. However, on the flipside to the same technological advancement, it has been the growth of technology and the internet age which has led to an ever increasing threat to the framework of copyright protection and protection of copyright based works. The growth of technologies has made it easier to create and produce works, as well provide such work to the masses. But this has also led to a situation where infringement of such protected works has been made easier than ever before. Infringement has become an easy task with the growth of technology due to the ease of reproduction – both from a monetary aspect as well as from the aspect of the time required to make such copies, not to mention the near perfect nature of such copies created using digital means.¹

With the growth of the internet and the digital era, the roles of authors and publishers themselves are changing too. In the digital sphere, an author can very easily be the creator of the work but also carry on and publish the work through the medium of the internet. Further, traditional intermediaries such as libraries can transcend their role of an intermediary and also be termed as an information provider as well as a publisher. This raises an issue as to the protection granted to such individuals and the roles they carry in copyright and related rights within the protection framework.²

Through the course of this paper, the author will go on to explain what constitutes digital piracy

¹ Fareed Ahmad Rafiqi & Iftikhar Hussian Bhat, *Copyright Protection in Digital Environment: Emerging Issues*, 10.

² Nikita Hemmige, Piracy in the Internet Age, 18 *Journal of Intellectual Property Rights*, September 2013 457.

on the first hand. Moving forward, the author will analyse the framework for protection against digital piracy in India as well as in the United States. Finally, the author will compare the two different models of protection followed by the two countries and propose recommendations for India to incorporate within their framework for better protection against the digital piracy violations that may arise.

What is Digital Piracy?

With the growth of the internet and the copyrighted content available over the internet in the growing times, infringement of copyright taking place in a digital format has become very common and prevalent. As opposed to a physical format, identification of what constitutes an infringement in the case of a digital infringement is significantly tougher. In the case of a physical infringement, it is easier to identify any 'copy' made of the protected work in question as it is in a physical form and as discussed earlier, requires a higher degree of time as well monetary resources to copy which then makes it easier to identify such acts. However, in the case of digital piracy, the process of making such 'perfect copies' is a very easy one and does not require any intensive process, and on the same hand, is a relatively quick and a cheap process to carry out. Added to the same, the mere absence of a physical form of the copy makes it harder to identify such infringements, and the fact that such infringing material can be shared with a wide section of the public in the click of button.³

Having a plethora of kinds of content available over the internet including cinematograph films, music, books and journals, music etc, the internet makes all such protected copyrighted material available to the users of the internet at a minimal to no cost through unauthorised channels, which can as discussed above then lead to ease of copying for infringing purposes.

The term 'digital piracy' has not been defined under The Copyright Act, 1957⁴ under the definition clause explicitly. However, digital piracy can be defined very simply put as the infringement of any copyrighted material which happens through a digital platform over the internet. It is needless to mention that such digital piracy can be done only of that material

³ Sheetal Chopra, INADEQUATE PROTECTION AGAINST PIRACY: COPYRIGHT AMENDMENTS INADEQUATE, 5 INDIAN JOURNAL OF INTELLECTUAL PROPERTY LAW 20.

⁴ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

which exists in a digital format. Section 2 (ffb) of the Indian Copyright Act⁵ provides the definition of a computer. The Act lays down a broad definition which includes any electronic device which has the capability to store information on it. The benefit that a broad definition of computer under this Act has is that it includes within its ambit any device which could potentially be used as an infringing tool, and the same later could not escape liability on the basis of a mere terminology. Computer Programs are defined under Section 2 (ffc)⁶ and provided copyright protection under the Act, meeting India's obligation to the Agreement on the Trade Related Aspects of Intellectual Property which states that a computer program would be eligible for copyright protection. Section 14(b)⁷ provides for the rights afforded to a computer program whereas Section 63B⁸ provides for the punishment in case of infringement. Further, Section 43 of the Information Technology Act, 2000⁹ provides for copyright protection to a digital database, laying down the manner of protection of the same. The Act under Section 66¹⁰ also provide for penal sanctions in cases of violation.

A major concern that infringement of copyright in a digital sphere poses is that of deciphering what copies amount to a true infringement of the copyrighted material, whereas what use is made merely for the purposes of transmission of information from one system to the other. Also, it is equally cumbersome to trace the position of an infringing copy even if one is made, as it travels from one electronic device to the other and causes the before mentioned issue. It is thus difficult to prove whether publication of such infringing copy was made.¹¹

The act of copyright infringement in a digital sphere can happen in a few different ways. These are:

1) Posting the copyrighted content on a website without consent

In the case where any party uploads or posts a copyrighted material on any website over the internet without the prior consent of the copyright holder of the said work, such posting amounts to infringement of the copyright. Judicial pronouncements on this matter in the United States have adopted a more case by case approach.

⁵ *Id.* Section 2(ffb).

⁶ *Id.* Section 2(ffc).

⁷ *Id.* Section 14(b).

⁸ *Id.* Section 63B.

⁹ The Information Technology Act, 2000, S. 43, No. 21, Acts of Parliament, 2000 (India).

¹⁰ *Id.* Section 66.

¹¹ V K AHUJA, INTELLECTUAL PROPERTY RIGHTS IN INDIA (2e, 2015 ed.).

In the case of *Playboy vs. Frena*¹², the Courts held that a person creating and managing a bulletin board service (BBS) was liable for copyright infringement if a third party publishes any infringing material on the said bulletin board, opining that the intent of the creator of the BBS was not an essential to prove infringement. A digital bulletin board is merely a platform for users to share any form of messages, media, software or other forms of material which can henceforth be downloaded and used by other members having access to the BBS.

However, further in the case of *Sega vs. Maphia*¹³, the alleged infringer was again managing a bulletin board service for download and upload of pirated video games. In this case, the users were allowed to download video games off of the bulletin board only upon uploading a video game on to the bulletin board or after a payment. In this case, while holding such person liable for infringement stated that the infringement case could be made as there was express knowledge of the infringement available to the infringer, who in turn solicited such infringement and drew a profit from the same. A similar upholding was also made by the Courts in the case of *Playboy vs. Webb World*¹⁴, where direct financial interests of the individual were considered to make a case of vicarious liability for copyright infringement.

Finally, in the case of *Religious Technology Center vs. Netcom*¹⁵, the Court held that any material which violates a copyright posted by a subscriber on the bulletin board would not place liability on the internet service provider or the manager of the bulletin board by default if they had not participated in the infringing act through any means. Further, it was opined by the Courts that for a case of direct infringement of copyright to be made as against any party, it was necessary to prove a degree of causation that could be attributed to the party. This element was missing in the present case as against the ISP as well as the manager of the BBS. Therefore, Netcom here was not held liable for the actions of their subscribers on the platform.

2) File Sharing

Arguably the most common manner in which copyright infringement takes place in the digital sphere over the internet, file sharing refers to the use of Peer to Peer or P2P software for sharing

¹² *Playboy Enterprises Inc v. Frena*, 839 F. Supp 1552 (M.D. Fla 1993).

¹³ *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal 1994).

¹⁴ *Playboy Enterprises Inc v. Webb World Inc*, 986 F Supp. 1171 (N.D. tax 1997).

¹⁵ *Religious Technology Center v. Netcom On-line Communication Services Inc*, 907 F Supp. 1361 (N.D. Cal 1995).

of files between multiple devices. In a P2P file transfer, the devices communicate with one another without the specific need of any central server which relays information between such devices, as the information is transmitted between the devices connected over the internet directly.

In the *Napster Case*¹⁶, Napster being a P2P file sharing platform used for transmission of music files between users was sued for copyright infringement by publishers and record companies, claiming that Napster facilitated infringement of copyrighted music. On Napster, any user could upload such music onto Napster which could then be downloaded by other users. Therefore, Napster here acted as a repository or central server of sorts. The Courts in USA in this matter decided that a large number of users on Napster were using the platform for sharing copyrighted music in an unauthorised manner and were directly infringing the copyright of the producers. Further, Napster facilitating such infringement and being aware of such infringement taking place on their platform was also held accountable for contributory infringement. The Court in this matter also ordered for shutting down of the P2P music sharing service run by Napster.

Further in the *Grokster Case*¹⁷, a similar action was brought against Grokster and Streamcast for violation of copyrighted material by sound producers and cinematograph producers as they provided a P2P software for allowing such acts which would amount to direct violation of the copyrighted material. It was argued that the software was being widely used in order to carry out such copyright violations and share copyrighted music and films allowing users to download such works onto their device directly from the device of the other users, without such content being stored on any central server. The Courts in USA however held such software liable stating that the lack of action by Grokster to prevent infringing activities using their software would amount to fostering infringement, as they did not take any steps for the prevention of infringement in good faith. Therefore, in the present case, the Court held that Grokster, as well as Streamcast, would be held liable for contributory infringement for facilitating such direct infringement by the users of their P2P software.

The primary difference between the Napster and the Grokster cases as discussed above is the role played by such software. Napster provided a P2P software for sharing of music, which

¹⁶ A & M Records v. Napster, 239 F 3d 1004 (9th Cir 2001).

¹⁷ MGM Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764 (2005).

was stored onto a central server. Therefore, the users could download such infringing music from Napster's central servers. However, in the case of Grokster, only a P2P software used for directly sharing content between users was provided, and no central server was present. The content was uploaded from one device and downloaded onto another device directly over the internet without being stored on a central server.

3) Linking

Very plainly understood, linking is the process of creating an access to point in Webpage A to reach Webpage B. Linking allows the user to navigate to a webpage from within the original webpage they were visiting, without having to type out the URL of the destination webpage. Linking was interpreted by the Courts in USA in the case of *Universal City Studios v. Corley* where linking was described as “cross-reference ... appearing on one page that, when activated by the point-and-click of a mouse, brings onto the computer screen another web page”.¹⁸ Linking, however useful to the art of surfing over the internet, poses legal issues as to the using of a webpage within your own webpage providing a direct access to the same could be argued as an infringement of the copyright of the destination webpage.

4) Framing

Similar to linking, framing involves use Webpage A wrongfully using the contents of Webpage B without prior consent. However, as opposed to linking, in framing the content is incorporated directly into a window of their own website thereby causing a user to believe that the content is that of Webpage A itself, and not that of Webpage B. The content of Webpage B is used and resized into a frame of the framing website, passing off as their own content. In the case of *Futuredontics vs. Applied Anagramics*¹⁹, the Court held that the act of creating a work through framing without the authorisation of the copyright holder would amount to an act of infringement of the copyright.

5) Caching

Caching, unlike the forms discussed above, is a highly technical process. Caching refers to the process of storing a copy of any material onto a separate location on the device for a temporary period. This is done in order to reduce the load time of files, so that the files load faster when

¹⁸ *Universal City Studios v. Corley*, 273 F 3d 429, 455 (2nd Cir 2001).

¹⁹ *Futuredontics v. Applied Anagramics, Inc.*, 45 USPQ 2d (BNA) 2005 (CD Ca 1998).

a user tries to access the said files, and becomes highly beneficial in the case where such files are being recalled by the user multiple times for use. The location on the device where such files are stored temporarily is called cache. There are multiple types of caching where the data can be stored either on the local device or stored by the internet service provider to be able to furnish such data in a faster manner upon request by the users. The issues that caching can give rise to include the fact that upon a user's request to access such file, providing a cached copy rather than the original might lead to missing out on any recent updates made to the file since the time the cached copy was saved. Further, it can also affect the monetary rights of the copyright holder due to lesser traffic on the website thereby affecting advertisements.

6) Archiving

Similar to Linking and Framing, Archiving is a step further where all the contents of Webpage B are downloaded and incorporated within another Webpage A. Therefore, when the user accessing Webpage A clicks on the incorporated URL, instead of being taken to Webpage B as the user rightfully should, he is however taken to a different section of Webpage A itself where the content of Webpage B is made available without any reference to it. Understandably, the process of Archiving amounts to a direct infringement of the copyrighted materials of Webpage B by Webpage A, if the same is done without obtaining any prior authorisation or consent from the owner of such webpage.

Having understood the meaning of digital piracy, as well as the different types in which a copyright can be infringed by any third party digitally over the internet, we will now take a look at the framework of protection against digital piracy in India, and the manner in which the legislations have been amended in order to safeguard the rights of copyright holders over the internet, while analysing certain leading judgements pronounced on these issues by the Indian Judiciary.

Indian Framework for Protection against Digital Piracy

As discussed in the initial parts of this article, the rapid changes and growth in the technological sector push towards the need for a change in the existing framework for the protection of copyrighted content. India has made several amendments to the Copyright law to meet the rapid changes brought forth with the growth of technology over the years. These amendments had been brought out to ensure that the developing technologies do not affect the legitimate

interests and rights of the holder of a copyright, and that the legislation provides a comprehensive system of protection for such rights.

There have been major amendments that have been made to the Copyright Act since 1957 when it was originally brought into force. There were several amendments made in order to combat the threat due to technological advancements. These amendments happened in the years 1983, 1984 and 1994. Further, major amendments were also brought to the Act in the years 1992, 1999 and 2012. In the 1983 amendment, there were changes made to the act and provisions were added in order to tackle copyright issues through broadcasting technology and to prevent copying of copyrighted material of the right holder. The amendment brought forth in 1984 was brought again to deal with the infringement issues arising due to the reprography which came about as a consequence to the fast developing advancements in the field of printing, recording and the fixation of broadcasts. In 1992, the term of protection of a copyright was expanded from life of the author plus fifty years to life of the author plus 60 years. Going ahead, in 1994, amendments were brought into the Act in order to keep up with the rapid technological developments that could be seen in this phase. The 1999 amendment was brought out mainly to make the framework in India TRIPs compliant.

The Copyright Amendment Act, 2012²⁰ was the most comprehensive amendment made to the Copyright Act in India, bringing the copyright law framework in India in compliance with the provisions of the WIPO Internet Treaties: WIPO Copyright Treaty, 1996²¹ and WIPO Performances and Phonograms Treaty, 1996²². However, it was only in 2018 that India finally acceded to these international instruments under the aegis of WIPO. There were a plethora of amendments brought forth in the 2012 amendment, pertaining to Copyright Societies and Assignment, as well as major changes introduced for recognition of Performer's Rights to meet the standards provided under the WPPT. However, we will look at a select few changes introduced with regards to digital piracy and creation of a suitable framework for protection against the same.

1) Expansion of the definition of 'Communication to the Public'

²⁰ The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India)

²¹ WIPO Copyright Treaty, 1996

²² WIPO Performances and Phonograms Treaty, 1996

Under Section 2(ff)²³, the definition of communication to the public was expanded under the 2012 Amendment Act. This was done directly to include the application of this Section to the digital ecosystem. Therefore, as a result of this, any material circulated over the internet which infringes the copyright held by any party would amount to communication to the public within the meaning of this Section.

2) ***Inclusion of Section 65A for Technological Protection Measures***

Arguably the most important change brought into the Act with regards to prevention of copyright infringement within the digital sphere over the internet was the inclusion of Sections 65A²⁴ within the Copyright Act.

Section 65A provides for a mechanism to protect against the circumvention of Technological Protection Measures. Technological Protection Measures are certain digital tools that can be used by the holder of a copyright over the work in order to restrict and control the use, access and sharing of their work. These Technological Protection Measures work in a manner such that they can restrict any person unwilling to accept the terms and conditions laid down by the copyright holder or unwilling to pay the requisite amount for access to the work from being able to access such work. Not just mere access, such measures can be of a varied nature and can also restrict the functionality of any user having access to the work. Certain examples for better explaining Technological Protection Measures are: a) PDF documents which do not let the reader use copy and paste functionality to copy the content of the PDF; (b) encrypted documents that can only be accessed after inputting the correct password; (c) certain over the top media services platforms (OTT platforms) that restrict the functionality of a user to not be able to record the content using their device's inbuilt screen record functionality and screenshot functionality. These are just a few basic examples of how Technological Protection Measures function within the digital sphere. However, mere presence of Technological Protection Measures is not a fool proof mechanism. As is amply stated, there is a key for every lock. What this means is that merely the fact that the owner of the copyright in any work employs Technological Protection Measures to safeguard their work does not necessarily guarantee that no third person would be in a position where they could potentially circumvent such Technological Protection Measures and thereby gain unauthorised access to the copyrighted

²³ Supra note 3 Section 2(ff).

²⁴ Id. Section 65A.

work against the wishes of the copyright holder of such work.

The Act therefore, as under Section 65A, provides for a mechanism for the protection of Technological Protection Measures against their circumvention. This Section provides for monetary compensation by the infringer for the circumvention of any Technological Protection Measures and also provides for imprisonment which can extend up to a period of two years. There are, however, certain exceptions to this rule as provided under Section 65A (2).

This provision for the protection of Technological Protection Measures has been incorporated and inserted within the Copyright Act as a measure to meet the requirements prescribed under the WCT. Article 11 of the WIPO Copyright Treaty²⁵ provides for an obligation on Member Countries to insert provisions for the protection against circumvention of Technological Protection Measures in Copyrighted works. Article 18 of the WIPO Performances and Phonograms Treaty²⁶ also provides for a similar provision with respect to the rights of the performers and producers of phonograms.²⁷

3) Inclusion of Section 65B for Rights Management Information

Another highly important inclusion made into the Act with regards to prevention of copyright infringement within the digital sphere over the internet was the inclusion of Sections 65B²⁸ within the Copyright Act.

Section 65B provides for a mechanism to protect against the circumvention of Rights Management Information. Rights Management Information for an understanding in the context of protection of copyrighted works and material is a mechanism which attaches to a document and provides information pertaining to the document such as the name of the creator, serial numbers, producer, certain specific information etc. This is used to identify the work as that coming from the particular author and ensures that the type and nature of work which is copyrighted as well as information pertaining to the copyright holder is preserved with the document itself. The process through which this Rights Management Information is stored is through the metadata of the file. For the owner of the copyright over the said work to be able to track the sharing of the material over the internet, monitoring his said work and ensuring

²⁵ Article 11, WIPO Copyright Treaty 1996.

²⁶ Article 18, WIPO Performances and Phonograms Treaty 1996.

²⁷ Supra note 11.

²⁸ Supra note 3 Section 65B.

that unregistered/unauthorised users do not have access to the work is of utmost importance. It is essential in the digital realm that use of any copyrighted work is done only by authorised personnel, and that the agreed upon sum for the use or access to such copyrighted work is duly received by the person vested with the ownership of the copyright over the said work in question. This process of ensuring that the due owner of the copyright receives the sum and is able to restrict unauthorised use is done through the means of the Rights Management Information.

Therefore, as can be deciphered with ease, it becomes of utmost importance to ensure that such Rights Management Information that attaches itself to the document in the form of metadata is not removed by any user and also not distorted or be tampered with by any individual in the digital sphere. This is because such removal or distortion of the Rights Management Information would lead to a scenario where the owner of such copyrighted work would not get the rightful amount for use of his work and would lead to such work being distributed in an authorised manner, which could also be redirected to an unauthorised party circulating such work. Also, the removal or distortion of such information would also take away due credit from the copyright holder over his work.

This provision for the protection of Rights Management Information has been incorporated and inserted within the Copyright Act as a measure to meet the requirements prescribed under the WCT. Article 12 of the WIPO Copyright Treaty²⁹ provides for an obligation on Member Countries to insert provisions for the protection against circumvention of Rights Management Information in Copyrighted works. Article 19 of the WIPO Performances and Phonograms Treaty³⁰ also provides for a similar provision with respect to the rights of the performers and producers of phonograms.³¹

4) Changes to the Safe Harbour Provisions envisaged under Section 52

Section 52 of the Copyright Act³² provides for those cases where an act committed by an individual would not amount to an infringement of the copyright of the holder. There were several changes made to this Section under the 2012 amendment as can be seen under Section

²⁹ Article 12, WIPO Copyright Treaty 1996.

³⁰ Article 19, WIPO Performances and Phonograms Treaty 1996.

³¹ Supra note 11.

³² Supra note 3 Section 52.

52(1)(a)³³ with regards to the fair dealing exception. However, what we shall analyse are Sections 52(1)(b)³⁴ and 52(1)(c)³⁵ as amended by the Copyright Act.

Section 52(1)(b) provides for an exception in the case of transient storage on any computer network made merely for the purposes of broadcast of the telecast or the performance. The Act provides an exception in cases where the copyrighted content is stored for a few second (referred to as transient storage) which is essentially the delay between the live coverage and the time in which the broadcast reaches the viewer. Such storage would not amount to an infringement of the copyright of the holder, as the same is done as a mere technical or electronic process essential for the broadcast of the said performance in the first place. Section 52(1)(c) also provides for an exception where transient storage would not amount to an infringement of the copyright of the holder where such storage was to partake in activities that are not unauthorised. The application of both these Sections can be said to be overlapping with one another to an extent, where 52(1)(c) provides the reason as to why such transient storage was made in the first place. This Section could be construed to state that the legislature intended to protect intermediaries only from cases of contributory infringement in these cases, but not from any case of direct infringement.

Therefore, the Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012 incorporates within the Act all major provisions to bring India in compliance with the international instruments for copyright protection. The Act provides, on paper, a fair and actionable framework for the protection of copyright infringement which may take place in the digital sphere. In addition to the Copyright Act, Section 66 of the Information Technology Act provides for the punishment in the form of a fine which may extend to Rs. two Lakhs and imprisonment for a period of up to three years for circulation of any material digitally which violates the copyright of any individual. We shall now analyse a few judgements delivered by the judiciary which have further evolved the protection of digital piracy in India.

1) John Doe Orders

Over the internet, it is not always possible to know the exact infringing party for infringement of any intellectual property. For this reason, the concept of John Doe orders was adopted. Under this method, the Courts on request of the infringed party have the authority to grant a kind of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

injunction in rem where the plaintiff would be entitled to take action against an unknown party to ensure protection of their intellectual property. Therefore, a John Doe order passed by the Court allows the right holder to protect their concerned intellectual property when the infringing party is not known due to their identity being hidden through technological measures or if the same cannot be adequately traced.

The first case in India where the Courts granted a John Doe order was the case of *Tej Television vs. Rajan Mandal*³⁶. The Delhi High Court in the present case granted a John Doe Order for search and seizure of any device which might contain infringing material of the right holder. Such an order was granted against unknown defendants in the present case. This gave recognition to the principle of John Doe Orders that were first propounded in England³⁷. John Doe orders have further been granted in several cases such as *ESPN vs. Tudu*³⁸ which was a case of grant of John Doe Orders for capturing any individual involved in the unlawful distribution of the broadcasts of ESPN which were copyrighted content. The John Doe orders here were passed against unknown persons who were decrypting the broadcast signals of the 2011 Cricket World Cup which were the copyright of ESPN and being unlawfully distributed to viewers. Also, in the case of *Luxottica vs. Munny*³⁹, a John Doe order was passed against an unknown defendant manufacturing counterfeit sunglasses with the name “Ray Ban”. The procedure for grant of a John Doe order has been provided under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code, 1908⁴⁰ r/w Section 151⁴¹ and Part III, Specific Relief Act⁴².

John Doe orders can help curb digital piracy as the persons who upload such copyright infringing content over the internet cannot always be located and traced. Therefore, the applicability of a John Doe order would allow for preventive action to protect the copyrighted content by the owner.⁴³

Most recently, the Delhi High Court passed a John Doe order in favour of the producers of the cinematograph film *Brahmastra* against 18 ‘rogue websites’ restraining them from unlawful

³⁶ *Tej Television Ltd. v. Rajan Mandal*, (2003) FSR 22

³⁷ *EMI Records Ltd. v. Kudhail*, (1985) F.S.R. 36

³⁸ *ESPN Software v. Tudu Enterprises*, MANU/DE/1061/2011

³⁹ *Luxottica Group Limited v. Mr. Munny*, CS (OS) 1846/2009.

⁴⁰ The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India)

⁴¹ *Id.*

⁴² The Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963 (India)

⁴³ Ajay Sharma, *John Doe Orders In Indian Context*, THE RMLNLU LAW REVIEW BLOG (Oct. 25, 2017), <https://rmlnlulawreview.com/2017/10/25/john-doe-orders-in-indian-context/>

circulation and sharing of the movie in an unauthorised manner.⁴⁴

2) Dynamic injunctions

*UTV Software vs. 1337x TO*⁴⁵

The present case was an action brought by UTV and several other media houses creating and distributing media against certain P2P torrent websites providing a platform for the sharing of content which infringed the copyrights of the plaintiffs. The Court decided the matter ex-parte and issued dynamic injunctions as the defendants failed to be present before the Court.

In most cases of digital piracy, the Courts pass an order blocking certain websites providing specific URL/domain names which host content that violates and further infringes the copyright of the holder. However, soon after taking down of the website, many mirror websites (websites that are in essence the same but are hosted on a different domain name or IP address) pop up almost instantaneously. Dynamic Injunctions in the present case allow the holder of such an injunction to approach the Court and expand the scope of the injunction originally granted to include within its meaning any new mirror websites that may pop up as a result. The criteria for categorising what websites such injunction could be extended to was also provided for by the Courts and such websites were termed as 'rogue websites'. Similar orders to this were also passed in the *Disney*⁴⁶, *Warner Bros.*⁴⁷ and *Snapdeal*⁴⁸ cases.

However, a different view was taken by the Bombay High Court in the Eros case where the Court stated that for blocking of an entire website, it must be shown that the website in its entirety contains only infringing content and nothing else, which could only be determined by a three step test. Therefore, there are conflicting opinions on the concept of dynamic injunctions by the two Courts.

3) Global Injunction

⁴⁴ Star India Private Ltd. V. 7MOVIERULEZ.TC & Ors., CS(COMM) 604/2022.

⁴⁵ UTV Software Communication Ltd. & Ors. v. 1337X TO & Ors., (2019) LNIND DEL 1090.

⁴⁶ Disney Enterprises, Inc. & Ors. v. Kimcartoon.to & Ors., CS(COMM) 275/2020.

⁴⁷ Warner Bros. Entertainment Inc. v. <http://tamilrockers.ws> & Ors., CS(COMM) 369/2019.

⁴⁸ Snapdeal Private Limited v. Snapdeallucky - Draws.org.in & Ors., CS (COMM) No.264/2020.

In the case of *Ramdev vs. Facebook*⁴⁹, the Delhi High Court transcended jurisdiction and ordered Facebook, Twitter, Google as well as other online intermediaries to take down and block a list of domains and websites (URLs) which posted defamatory content as against the Plaintiff globally. The Court applying the powers under the IT Act⁵⁰ stated that Section 75 of the Act allowed for such global injunctions and that a ‘computer resource’ refers to the entire computer network and not merely a single device, as removal of defamatory content from one device would not benefit the aggrieved party. The Court stated that they would have jurisdiction as long as the content was uploaded from India or is present on a computer resource within India. The global injunction stated that all Indian domains carrying such content be taken down and any non-Indian domain carrying such content must be blocked from view within India.

The concept of Global Injunction can be used for the protection against infringement of copyrighted material such that the Courts could order taking down of such infringing material not just within India, but globally wherever such copyrighted is present on the computer network and is infringing.

New Frontiers and Conclusion

India has seen a development of the Copyright Laws since 1957 to meet the expanding needs in the protection of works against any challenges posed by the rapid growth of technology. Since the inception of the printing press to the growth of the internet in the 21st century, various amendments to the Copyright Laws have been made to afford adequate protection to works of authors. When compared to developed jurisdictions such as the United States, India has followed the developments made to the US Copyright Laws to ensure adequate protection within the Indian Framework. With the passing of the Digital Millennium Copyright Act, 1998⁵¹, USA became the first jurisdiction to implement the WIPO Internet Treaties within their framework thereby providing adequate protection to works over the internet.⁵² USA has also laid down the groundwork for the issue of jurisdiction within the Copyright Framework, extending applicability of the Copyright laws to a corporation even if it was a foreign establishment if it carried out substantial business in USA. India, on the issue of jurisdiction,

⁴⁹ *Swami Ramdev v. Facebook Inc.*, (2019) 263 DLT 689.

⁵⁰ *Supra* note 8 Section 75.

⁵¹ Digital Millennium Copyright Act, 1998 (USA).

⁵² Hrishita Mukherjee, Copyright Protection in Cyberspace-A Comparative Study of USA and India, 5 IJSR 1463 (2016).

has seen an evolution of the concept through various judicial pronouncements as discussed above. In India, post the *Banyan Tree*⁵³ holding, the Court established that considering the nature of the internet, any matter pertaining to the internet would provide the Courts with global jurisdiction.⁵⁴ However, 2 major areas where the Copyright Laws in India do not provide a comprehensive mechanism for protection and need certain clarifications are: 1) liability of intermediaries in the case of circulation of infringing material and; (2) the need for protection of the emerging frontiers under Copyright law.

With respect to liability of intermediaries for contributory infringement of Copyright, USA has a well-established law laid down under the DMCA and judicial pronouncements which have been developed with the *Napster* and *Grokster* case. However, India does not have a definite stand on the liability of intermediaries and ISPs currently within the Copyright Act. The recent Intermediary Guidelines on the contrary placed higher responsibility on the intermediaries. Further, India has a higher rate of software and media piracy as that of USA, with more subject matters covered in USA. However, concepts such as NFTs pose a question as to their protection and could be clarified under the Indian framework.

What can be concluded in this regard is that India has a copyright framework that is not as developed as USA. However, that being said, it is the opinion of the author that being a developing country as opposed to USA being a developed country, India's Copyright law is at a very respectable stage. India has acceded to and implemented all major international instruments on copyright law, as has the USA and implemented a TRIPs plus protection for copyright in India, being life of the author plus 60 years. The ability of Courts in India to interpret the law and incorporate principles for the betterment of the copyright regime is the need for a developing nation, facing the contours of technological advancements and facing newer means of infringement on a regular basis. The primary concerns that the law in India currently faces is that of liability of ISPs and protection of increasing subject matters such as NFTs which poses a dilemma as being a high value art form must be afforded protection but its unregulated nature makes the same difficult, as well as proper implementation of the current legal framework to reduce piracy in India.

⁵³ *Banyan Tree Holdings Ltd v. M Murali Krishna Reddy and Anr*, (2008) 38 PTC 288.

⁵⁴ *Supra* note 52.