

Technology Law Analysis

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ROGUE OR NOT? –DELHI HIGH COURT GRANTS ITS FIRST DYNAMIC INJUNCTION TO CURB ONLINE PIRACY

- To curb the menace of online piracy and hydra headed Rogue Websites/ Flagrantly Infringing Online Locations the High Court at Delhi has introduced the crafty remedy of Dynamic Injunctions and has also blocked over 30 infringing websites;
- Dynamic Injunctions allow the copyright owners to approach the Joint Registrar of the court to extend an injunction order already granted against a website to another mirror/redirect/alphanumeric website with the same content of an already blocked website;
- The court also recommended the DoT and MEITY to frame a policy to issue warnings using different technology to the consumers watching infringing content. In the event such warnings are not heeded to, and the viewers/subscribers continue to view/access such pirated/infringing content, then a fine maybe levied on such viewers/subscribers.

BACKGROUND

UTV software Communications Limited and Twentieth Century Fox Film Corporation (collectively “**Plaintiffs**”) had filed this suit before the High Court of Delhi (“**DHC**”) against several infringing websites. The defendants in this suit were:

- owners of 30 identifiable website;
- John Doe defendant’s i.e. unknown parties who are engaged in the unauthorized communication of the plaintiffs copyrighted works including the registrants of such websites, uploaders of content on such websites and the creators of the redirect/mirror/ alphanumeric websites;
(Websites in points ‘a’ and ‘b’ are collectively referred to as “**Defendant Websites**”)
- the internet service providers (“**ISP**”) who enable users to access such Defendant Websites; and
- the Department of Telecommunications (“**DOT**”) and the Ministry of Electronics and Information Technology (“**MEITY**”), who were impleaded to assist in notifying the ISPs to disable access to the Defendant Websites within India.

The Plaintiffs contention was that the Defendant Websites, were without their permission or authority hosting and providing access to their copyrighted works. This culminated into an infringement of their rights under the Copyright Act, 1957 (“**Copyright Act**”). The owners of the Defendant Websites, did not respond to any summons, presumably since they were hosted outside of India.

The reliefs sought by the plaintiffs were:

- Permanent injunction restraining the defendants from hosting, communicating, making available, etc. the original content of the Plaintiffs on their website;
- Order directing ISPs to block access to the Defendant Websites; and
- Order directing registrars of the Defendant Websites to disclose the contact details and other relevant details of the registrants of the Defendant Websites.

ISSUES

As detailed below, the DHC dealt with seven issues in this case:

Issue I: Whether an infringer of copyright on the internet is to be treated differently from an infringer in the physical world?

For the purpose of this issue, the DHC discussed

- The approach of Internet exceptionalists, such as the Electronic Frontier Foundation:

According to the Internet exectionalists, since the Internet is exceptional, most rules that apply to the offline space should not apply to the online space. Followers of this school believe that the Internet is the about individual freedom and not about collective responsibility. The followers of this school of thought acknowledge that online piracy comes at the cost of legal sales. They rationalize this loss by stating that it only hurts the profits of content firms implying that if the choice if between infringement that rewards consumers with free content versus legality that helps corporations, then the former is to be preferred.

- How the pirates make money through advertising;

The DHC recognized that the majority of piracy websites are not for any ideological reasons of providing free access

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to content but are present to make money. Such providers in addition to any infringing content also host several advertisements on their website which helps generate the revenue.

Upon an analysis of the above, the DHC concluded that online infringers should not be treated differently as there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinctions.

Issue II: Whether seeking blocking of a website dedicated to piracy makes one an opponent of a free and open internet?

The DHC opined that, advocating limits on accessing illegal content online does not violate open Internet principles.

The DHC further stated that, the key issue is about internet freedom, therefore, it is not whether the Internet is and should be completely free or whether the Governments should have unlimited censorship authority. The question should rather be where the appropriate lines should be drawn and how they are drawn and implemented.

Issue III: What is a “Rogue Website”?

The DHC recognized that, one of the key issues around digital piracy is the importance of distinguishing between accidental and intentional piracy. The orders should not go too far whereby they also block sites which have any accidentally pirated content. Thus, the identification of what amounts to a Rogue Website or as Flagrantly Infringing Online Locations (FIOL) (a term borrowed from the Singapore Supreme Court) is the crux of this case. As per the DHC, Rogue Website/FIOLs are those which “primarily or predominantly share infringing content”.

The DHC provided the below non-exhaustive indicative list of factors which help determining if a website is a Rogue Website:

- a. Whether the primary purpose of the website is to commit or facilitate copyright infringement?
- b. The flagrancy of the infringement, or the flagrancy of the facilitation of the infringement.
- c. Whether the detail of the registrant is masked and no personal or traceable detail is available either of the Registrant or of the user?
- d. Whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement?
- e. Whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright?
- f. Whether the owner or operator of the online location demonstrates a disregard for copyright generally?
- g. Whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement?
- h. Whether the website contains guides or instructions to circumvent measures, or any order of any court, that disables access to the website on the ground of or related to copyright infringement?
- i. the volume of traffic at or frequency of access to the website; and
- j. any other relevant matter.

The DHC further clarified that the above list does not apply to intermediaries as they are governed by the Information Technology Act, 2000 which functions in a different manner.

Issue IV: Whether the test for determining a ‘Rogue Website’ is a qualitative or a quantitative one?

DHC referred to the division bench case of the DHC in the *Department Of Electronics and Information Technology v. Star India Pvt. Ltd¹* (“**Star India Case**”). In this case, it was held that, blocking the entire website is the best solution since continuously identifying each offending URL would be a gargantuan task and at the same time would be useless as the rogue website would just change the URL within seconds and again emerge. Further, the DHC in this case opined that, if the test to declare a website as a Rogue Website is that it should contain only illicit or infringing material, then each and every rogue website would add a small percentage of legitimate content and pray that it be not declared an infringing website!

Consequently, the DHC in the present case held that the real test for examining whether a website is a Rogue Website is a qualitative approach and not a quantitative one.

Issue V: Whether the defendant-websites fall in the category of ‘Rogue Websites’?

After looking into the various ‘factors’ listed above under Issue III, regarding when can a website be termed a Rogue Website, the DHC answers this question in the affirmative.

For this purpose, the DHC examined the facts of the Defendant Websites as a part of the “qualitative test” and noted that:

- a. The Defendant Websites do not provide any legitimate contact details, they hide behind veil of secrecy and are located in safe-havens and rarely comply with requests for takedown.
- b. The Defendant Websites facilitate infringement by providing features such as indexing, detailed search functions, categorization, etc. which make it very convenient for a user to search and download illegal content.
- c. The sample evidence filed by the Plaintiffs is consistent with the criterion adopted globally by various courts to direct blocking of such websites, such as in Singapore and in Australia.
- d. The Defendant Websites encourage a user to circumvent detection or blocking orders by providing detailed instructions on how to avoid detection or access a blocked website.
- e. The rogue nature of these Defendant Websites has already been accepted by courts in other jurisdictions inter alia in Australia. Consequently, the question of whether the Defendant Websites are indeed rogue websites and deserving a blocking order have already been dealt with by competent courts in other jurisdictions.
- f. Sample evidence has been filed considering the volumes of content of the Defendant Websites and in order to avoid making it an impractical, costly, ineffective, non-fruitful and time consuming exercise.

g. The volume of traffic to these websites is also indicative of their rogue nature.

The DHC also recognised that it is getting difficult to curb online piracy initiated outside India and highlighted the need to work with Internet intermediaries to curb this menace like other countries do.

Issue VI: Whether this Court would be justified to pass directions to block the 'Rogue Websites' in their entirety?

For this purpose, the DHC opined that the extent of website blocking should be proportionate and commensurate with the extent and nature of infringement. Thus, a court should pass a blocking order only if it is satisfied that the same is "Necessary" and "Proportionate".

The DHC explained

- i. 'necessary' to mean '*a particular measure is essential to achieve that aim, i.e. whether there are other less restrictive means capable of producing the same result*'; and
- ii. 'proportionate' to mean 'it must be established that the measures do not have an excessive effect on the defendant's interest'. The DHC also discussed the "proportionality principle" which requires that a "fair balance" be struck between the right to intellectual property and the right to trade and freedom of expression.

Thus, the DHC concluded that while passing a website blocking injunction order, it would have to consider i) whether disabling access to the online location is in the public interest, ii) proportionate response in the circumstances; and iii) the impact on any person or class of persons likely to be affected by the grant of such injunction. Further the DHC also held that such an order must be effective, proportionate and dissuasive, but must not create any barriers to legitimate trade.

Consequently, while not discussing the exact facts and reasoning, the DHC concluded that the blocking of the Defendant Website strikes a balance between preserving the benefits of a free and open Internet and the efforts to stop crimes such as digital piracy.

The DHC also opined that, it has the power to order ISPs and the DoT as well as MEITY to take measures to stop current infringements as well as if justified by the circumstances prevent future ones.

The DHC has further also examined the approach adopted in 45 countries and noted that these countries have ISP blocking mechanism either through court order or administrative order; before such orders, courts and administrative agencies review the evidence to ensure that websites engaged in predominantly legal activities are not blocked.

These studies demonstrate that site-blocking in those countries greatly contributed to:

- a. reduction of usage of infringing websites to which access has been blocked
- b. reduction of overall usage of infringing websites.

Issue VII: How should the Court deal with the 'hydra headed' 'Rogue Websites' who on being blocked, actually multiply and resurface as redirect or mirror or alphanumeric websites?

The DHC observed that Rogue Websites on being blocked actually multiply and resurface as alphanumeric or mirror websites. To block such websites, another suit would need to be filed. The DHC recognized practical difficulty in implementing the recourse available to copyright owners (i.e. filing a suit), and stated that, the plaintiff should not be required to file multiple suits every time a new mirror/redirect/alphanumeric websites crops up.

Internationally, to curb this menace, a "Dynamic Injunction" has been granted to the mirror websites of Rogue Websites. While the Copyright Act does not have any provision to handle such dynamic injunctions, the relevant provisions of the Code of Civil Procedure, 1908 ("CPC")² has wide powers to permit the Plaintiffs to implead the mirror/redirect/alphanumeric websites as these websites merely provide access to the same websites which are the subject of the main injunction.

Reading into the provisions of the CPC, the DHC as a pleasant relief held that, in such situations of hydra headed Rough Websites emerging:

- a. *Plaintiff needs to file an application under Order I Rule 10 for impleading the new websites with an affidavit confirming and providing sufficient supporting evidence that the newly impleaded website is a mirror/redirect/alphanumeric website of the injuncted Rogue Website(s) and merely provides new means of accessing the same primary infringing website.*
- b. *On being satisfied with such fact, the Joint Registrar of the court shall issue directions to ISPs to disable access in India to such mirror/ redirect/ alphanumeric websites in terms of the orders passed.*
- c. *The Joint Registrar in this case will act under delegated power from the court and his order will be appealable.*

JUDGMENT

The DHC passed a decree:

- a. of permanent injunction restraining the Defendant Website, its owners, partners, proprietors, officers, servants, employees, and all others in capacity of principal or agent acting on their behalf from hosting, streaming, reproducing or making available/communicating in any manner to the public the copy written works of the Plaintiff;
- b. directing the ISPs to block the Defendant Websites;
- c. directing the DoT and MEITY to issue a notification asking the various internet and telecom service providers registered under it to block access to the Defendant Websites;
- d. allowing the Plaintiffs to implead the mirror/redirect/alphanumeric websites as detailed in Issue VII above; and
- e. granting the Plaintiffs, actual costs of the litigation including the lawyers' fees and court fees.

Since website blocking is a cumbersome exercise and majority of the viewers / subscribers accessing such content are uninformed youngsters, the DHC recommended that DoT and MEITY should frame a policy to issue warnings to the consumers watching infringing content. In the event such warnings are not heeded to, and the

viewers/subscribers continue to view/access such pirated/infringing content, then a fine maybe levied on such viewers/subscribers.

ANALYSIS

The copyright owners along with the governments and courts worldwide are trying to curb internet piracy. However, viewers continue to watch such content which encourages such sites to keep emerging. The suggestion by the court to penalize the viewer, however, may not practically work. The DHC observes that the most effective way to curb the internet piracy is by way of blocking.

This judgment provides a roadmap to determine which websites would be Rogue Websites and also offers a progressive step towards curbing internet piracy through Dynamic Injunctions. Whether other High Courts in India also will adopt the same approach or not will have to be tested with time.

In Maharashtra, the Maharashtra Cyber Digital Crime Unit was formed in 2017, which in association with industry through NIXI (being .in registrar) has been successful in blocking several pirated websites.

With the guidance provided in this judgment to identify rogue websites, a robust administrative mechanism could be established that is not cumbersome and time consuming to identify and block the rogue websites without every time approaching the court.

– Pooja Kapadia & Gowree Gokhale

You can direct your queries or comments to the authors

¹ Suit No. FAO(OS) 57/2015

² Section 151 (*inherent power of court*) read with Order 1 Rule 10 of CPC (*addition of party in certain cases*)

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