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Analysis of Dynamic Injunction in Digital Copyright Infringement

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Digital piracy has created havoc for the artistic community and various artistic industries incur huge losses each year due to piracy. Misusing or infringement of trademarks and copyrighted material can also lead to harm to innocent users. The Internet is filled with numerous websites that host infringed content and the majority of these websites only have copyright infringed content or illicit content. These websites do not provide any contact information and domain owner information is also masked or anonymised. A permanent injunction is the most sought remedy against these ‘rogue websites.’ However, by using mirrored websites, and creating new websites with slight alphanumeric alteration in domain names, these injunctions are circumvented by rogue website creators. To grapple with such incidents’ courts have formulated a new form of injunction called a ‘dynamic injunction.’ This article attempts to trace the evolution of the concept of dynamic injunction. Indian courts have adopted these dynamic injunctions to curb digital piracy and have formulated a framework to implement these dynamic injunction orders. Injunctions on any website conflict with various individual freedoms and the notion of the freedom of the internet. Further, permanent injunction as well as dynamic injunction fell short of effectively blocking such websites to protect intellectual property rights holders’ interests. This article aims to analyze dynamic injunctions from a techno-legal point of view to address deficiencies in the current dynamic injunction framework.

Keywords: *dynamic injunction, copyright infringement, trademark infringement, digital piracy.*

INTRODUCTION

On 9th August 2023 Delhi High Court ordered a dynamic injunction order against various websites in *Universal City Studios v Dotmoies. Baby*.¹ The suit was brought by 6 plaintiffs who are well-established international studio houses based in the USA. Plaintiffs had identified 16 parties who maintained a content distribution website and served 'content' copyrighted by plaintiffs without their express permission. Each infringer ran multiple websites with slight alphanumeric changes in domain names and the identities of website creators were not identifiable except for email addresses present on the websites. Infringer also displayed advertisements and earned revenue through such advertisements. After considering the matter Hon'ble Delhi High Court directed Internet Service Providers (ISP) and Department of Telecommunication (DoT) and the Ministry of Electronics and Information Technology (MeitY) to block those websites and any websites created with similar domain names. With technological advancement, there is an increase in digital piracy and website creators create several parallel websites to serve content illegally with similar domain names. With different rules in different regions for domain name registrations, the identity of such website creators is masked or anonymized and it becomes difficult to get damages caused by such infringement. Such incidents gave rise to the concept of 'dynamic injunction'.

EVOLUTION OF DYNAMIC INJUNCTION

In *L'oreal v eBay* Court of Justice of the European Union² held that under Art. 11 of Directive 2004/48/EC court has the power to order injunction from future infringement of intellectual property rights. In another case decided by the Singapore High Court in *Disney v M1 Ltd*³ granted the dynamic injunction in favor of Disney observing that to give full effect under copyright protection laws injunction needs to be granted to future incidents of the creation of 'Flagrantly Infringing Online Locations' with similar domain names and same is provided by old Sec. 193DDA of the Copyright Act⁴ of Singapore. In the UK Court of Appeal in the case,

¹ *Universal City Studios LLC. And Ors v Dotmovies.Baby and Ors* CS (COMM) 514/2023

² *L'Oréal SA And Ors. v eBay International AG and Ors* C-324/09

³ *Disney Enterprises, Inc and Ors. v M1 Ltd and Ors* [2018] SGHC 206

⁴ Singapore Copyright Act 1987, s 193DDA

*Cartier International v British Sky Broadcasting*⁵ held that “An important feature of all of the orders made under s 97A has been that they have included a provision for the rights holders to notify additional IP addresses or URLs to the ISPs in respect of the websites which have been ordered to be blocked. This has allowed the rights holders to respond to efforts made by the website operators to circumvent the orders by changing their IP addresses or URLs.”

The abovementioned foreign cases observed that when rogue infringers of intellectual property rights circumvent injunction orders by creating parallel web locations with similar web names, to protect copyright holders it is necessary to block such newly created web locations as soon as they come to notice

IMPLEMENTATION OF DYNAMIC INJUNCTION IN INDIA

In April 2019 the question of dynamic injunction came before the Delhi High Court in *TATA Sky v NIXI*⁶, and the court agreed with TATA Sky’s contention for the necessity for a dynamic injunction on the registration of domain names, but as necessary government bodies were not parties in the suit, the court left the question open to taken up by the appropriate authority. Subsequently, the Delhi High Court considered matters of digital piracy and copyright infringement and analyzed various technical aspects, foreign laws and case laws, and remedies available in Indian laws and created a definite framework for granting a permanent and dynamic injunction in the *UTV Software* case⁷. From the text of the judgment, the following framework can be deduced:

- a. When deciding whether a website is a ‘rogue website’ or not, a qualitative approach should be adopted and not a quantitative approach as laid down in *Eros International*⁸ by Hon’ble Bombay High Court.
- b. In determining the qualitative approach following parameters shall be considered:-

⁵ *Cartier International AG and Ors v British Sky broadcasting Ltd and Ors* [2016] ECWA Civ 658

⁶ *TATA Sky Limited v National Internet Exchange of India Nixi and Ors* (2019) 79 PTC 119

⁷ *UTV Software Communication Ltd and Ors v 1337x To and Ors* 2019 (78) PTC 375

⁸ *Eros International Media Ltd. And Anr v Bharat Sanchar Nigam Ltd and Ors* CS No 620/2016

- Whether such websites host copyrighted content without the consent of copyright owners.
- Whether legitimate contact information including contact number, email, or contact person name is absent. Whether the domain owner's name is masked or anonymized. Whether the domain is registered in a safe haven.
- Presence of a convenient user interface, and sophisticated search tools including a search bar, indexing, alphabetical orders, and tabs to facilitate easier access to infringed content.
- Whether the website creators themselves provide instructions to circumvent blocking or avoid detection of activity on the said website.
- The volume of traffic attracted by such websites.
- Whether such websites are already blocked by competent courts in various foreign jurisdictions.
- When giving an order for website blocking, which type of blocking is necessary shall be decided by striking a balance between individual freedom, internet freedom, and the interest of the copyright owner.

Various methods of blocking access to websites are:

DNS Name Blocking: DNS name blocking involves ISP modifying entries relating to a particular domain name and corresponding IP address. This method is a low-cost method.

IP Address Blocking: In this ISP discards any traffic from a particular IP address. It involves marginally incremental costs.

Deep Packet Inspection Blocking: This method involves ISP monitoring traffic and blocking specific packets based on content, keywords, or image search. It incurs larger costs as monitoring and identifying involve significant algorithm development and processing power.

For dynamic injunction, plaintiffs can under Sec. 151 of CPC and Order I Rule 10 of CPC give the list of occurring mirror, redirected, or similar domain name websites with sufficient evidence supporting the same to the registrar and the registrar shall issue directions to ISPs to block those newly created websites.

In the Indian Copyright Act, there is no provision to add defendants or different domains or give the order to block all future instances such as in the Copyright Law of Singapore cited in Disney. But Delhi High Court in UTV in its inherent power under Sec. 151⁹ empowered the registrar to accept applications from the plaintiffs to block newly created websites that mirror the defendant's websites or have slightly altered domain names of the defendant's websites and direct ISPs to block the same websites under O. I r. 10¹⁰.

In a recent case *Universal City Studios v Dotmoies Baby*,¹¹ Delhi High Court along with the remedy laid down in UTV added one more remedy that Domain Name Registrars shall lock and suspend domain names and furnish details relating to such domain names including KYC, credit cards, mobile numbers etc. also shall be provided to plaintiffs.

DEFICIENCIES IN THE CURRENT DYNAMIC INJUNCTION FRAMEWORK

Cost of implementing blocking order:

Blocking websites burdens ISPs with some cost and this cost varies as per the mode of website blocking. Indian courts have been silent regarding who shall incur the cost of blocking the websites. The cost incurred by ISPs to implement a few orders of blocking can be absorbed by them. With increasing technological advancement, and the adoption of new modes of piracy, requests for blocking websites have been increasing in recent years. In earlier UK cases court imposed the cost of blocking websites on ISPs. In *Cartier International v British Sky Broadcasting*,¹² court held that ISPs should bear the cost of blocking. The injunction order is passed against all ISPs so they can collectively decide to recover the cost from subscribers or they can individually decide to either reduce their profit to get a competitive advantage or recover it from subscribers. But UK Supreme Court has adopted a different approach regarding the cost incurred in implementing the blocking order in *Cartier International v British Telecommunications*.¹³ The court held ISPs are entitled to be indemnified by right holders and

⁹ Code of Civil Procedure 1908, s 151

¹⁰ Code of Civil Procedure 1908, Or I r 10

¹¹ *Universal City Studios LLC. And Ors v Dotmovies.Baby and Ors* CS (COMM) 514/2023

¹² *Cartier International AG and Ors v British Sky Broadcasting and Ors* [2014] EWHC 3354 (Ch)

¹³ *Cartier International AG and Ors v British Telecommunications PLC and Anr* [2018] UKSC 28

the court gave reason that *“Website-blocking injunctions are sought by rights-holders in their commercial interest. They are wholly directed to the protection of the claimant's legal rights, and the entire benefit of compliance with the order inures to the rights-holder. The protection of intellectual property rights is ordinarily and naturally a cost of the business that owns those rights and has the relevant interest in asserting them. It is not ordinarily or naturally a cost of the business of an ISP which has nothing to do with the rights in question but is merely providing a network which has been abused by others.”*

With rising suits for injunction orders, there is a need to determine whether intermediaries shall bear the cost of blocking websites or whether ISPs are liable to incur the cost as a cost of doing business. ISPs do not benefit or suffer loss whether infringement content remains accessible or not. ISPs are not responsible in any way for the abuse of their network services by some third party. However intellectual property rights holders have a significant interest in blocking the rogue website. If such websites are not blocked right holders would suffer significant losses and blocking such websites would benefit right holders. For the Information Technology Act, 2000 (hereinafter IT Act) ISPs are intermediaries. Sec. 72¹⁴ of the IT Act provides that intermediaries shall not be liable for any third-party data or communication link hosted by them if:

- The intermediary's role was limited to providing access to communication systems, or
- The intermediary did not initiate or modify the communication or select the receiver of the communication.

In the Indian legal system in my view cost of implementing the blocking of the website shall be borne by intellectual property rights holders as they are subject to profit from the blocking and ISPs have no role to play in the infringement of intellectual property rights.

Technical inadequacy of injunction: The Internet has removed territorial boundaries in the flow of information, a website built in any part of the world can be accessed by users. Injunction orders by the courts whether it is a permanent injunction or dynamic injunction have territorial limitations and ISPs operating in India only can be compelled to block the rogue websites. But

¹⁴ Information Technology Act 2000, s 72

using Virtual Private Network (VPN) users residing in the territory of India can still access websites through foreign domain name servers or VPN tunnels.

Conflict with Internet freedom and freedom of speech and expression: The Internet revolution has truly materialized freedom of speech and expression in reality. Free flow of ideas, information, and knowledge is possible because of free and open internet. The Internet has given access to knowledge to people residing in even the remotest part of the world. Completely blocking any website is in complete contravention of the notion of the free and open internet. Blocking websites also amounts to taking away people's right to freedom of speech and expression.

Unclear evidentiary requirements: In dynamic injunction by giving an option to right holders of giving an application to the registrar to block websites Hon'ble courts have circumvented the stage of appreciating the evidence and determining whether such websites are rogue or not. Courts in granting dynamic injunction have from time to time upheld the qualitative approach in determining whether such websites are rogue websites. A qualitative approach is a subjective test and without any specified evidentiary requirements laid down, there runs a danger that non-rogue websites may also be blocked completely without due scrutiny.

Absence of communication or a step to object blocking of any website: Though High Courts' orders are published from time to time on High Court websites or law journals which websites are blocked through original judgment is a public information and accessible information. But, for websites blocked by a dynamic injunction order, there is no publication of domain names that were blocked. In the original plaint for blocking the website, domain name holders have a chance to protest or interested parties could join such a suit but when a website is blocked in compliance with a dynamic injunction order there is no step to object such blocking.

REMEDIES TO OVERCOME DEFICIENCIES

To overcome the deficiencies enumerated above following are some suggestions that could be implemented:

Creating a framework regarding cost burden: The question of cost burden shall be determined when granting injunction itself and, in my opinion, ISP shall not be burdened with the complete cost of implementation of blocking the website. Courts or legislators shall formulate a generalized guideline regarding the cost burden that should be followed in every injunction order for blocking websites for digital infringement of intellectual property rights.

Constructive international approach for implementing injunction: Blocking IP addresses, DNS Name blocking or Deep Packet blocking are effective only in specific territories which can be circumvented using VPN. A collective effort from all nations is required to achieve the effect of blocking the website in its entirety. Another mode is suspending the domain name by the registry which has registered the particular domain. However, permanent blocking of a domain is not practically possible. The Internet Assigned Numbers Authority (IANA) acts as an umbrella authority for five Regional Internet Registries (RIRs). Within such RIRs, top-level domain registries are established for the management of individual 'root zone database' e.g., '.in' is managed by the National Internet Exchange of India. Commercial domain provider or accredited registrar sells domain to the public or reseller. e.g. GoDaddy. In such a complex setup even if a particular domain is blocked after the expiry of the registration period and any specified cool off period such domain name will be available to various other registrars operating globally. Bombay High Court in *Hindustan Unilever Limited v Endurance Domains*¹⁵ has observed the same and dropped domain registrars and resellers GoDaddy, Endurance, and Porkbun from the suit as defendants. Though a permanent block on domain names is not feasible a temporary suspension of such domains till the end of their registration period is also an effective remedy that will deny rogue website holders any benefit of infringement in all jurisdictions. But even to implement such orders global cooperation is required as the domain can be registered with any registrar in the world. And when passing such orders courts need to be very cautious and considerate as the effect of suspending a domain is far graver than merely blocking a website for a particular jurisdiction.

¹⁵ *Hindustan Unilever Limited v Endurance Domains Technology LLP And Ors* 2020 SCCOnline Bom 809

Specifying evidentiary requirement when granting dynamic injunction: When an order blocking injunction is passed it not only upholds the rights of intellectual property holders but also tramples upon the right to free internet, knowledge and information of internet users, and the right of trade of such website holders. When granting a dynamic injunction, courts should specify what kind of evidence needs to be produced with the registrar for impleading subsequently created mirrored or similar domain name websites. In *Eros International*¹⁶ Bombay High Court for granting an injunction in anticipation of prospective infringement incident provided for a three-step verification process. First, a letter stated by a third-party agency verifying website contains illicit and infringed contents only. Second, the affidavit was verified by the deponent and the plaintiff's council. Third, all the material is placed on the affidavit and oath. A similar framework can be instituted for granting dynamic injunctions for blocking future incidents of mirrored websites or websites with similar domain names.

Publishing details and providing a platform for entertaining objections: A list of blocked websites and additional website addresses received for blocking under a dynamic injunction shall be regularly published. Additional received website addresses shall not be blocked immediately, but sufficient time after publication of domain names shall be given to any aggrieved person or entity to raise its objections to the blocking.

CONCLUSION

Digital piracy poses a great threat to the artistic world and various industries including music, cinematography, photography, etc. incur huge losses every year. With evolving technology methods of piracy are constantly changing as well as ease of distributing pirated content and reach has been improved. The websites hosting pirated content generally create mirrored websites, and create several domain names that are almost similar with slight alphanumeric changes. This makes injunction orders ineffective. Subsequently, courts have devised a new injunction framework named 'dynamic injunction' which can address blocking subsequent incidents arising due to mirrored websites or similar domain name websites. Website blocking

¹⁶ *Eros International Media Ltd. and Anr v Bharat Sanchar Nigam Ltd. and Ors CS No 620/2016*

though protects the rights of intellectual property holders it infringes the right of freedom of speech and expression, the right of free internet, the right to free internet, and the website owner's right to trade. In granting an injunction order court shall be cautious and choose the appropriate blocking mode by considering the necessity of the situation. When granting dynamic injunction orders courts should specify who shall bear the cost of blocking the websites and a complete burden of cost shall not be placed upon ISPs. In case of dynamic injunction, a general framework shall be instituted regarding evidentiary requirements for subsequent website blocking, publishing a list of blocked websites and domain names received for subsequent blocking and a step shall be created for objecting subsequent blocking of websites. To effectively implement website blocking and truly protect intellectual property holders a collective global approach is necessary to refrain users from circumventing territorial blockings by using technologies like VPN.