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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 AND 16781/2018

UTV SOFTWARE
COMMUNICATION LTD. AND ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

1337X.TO AND ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Tanvir Nayar, Advocate with Mr. Ramnish Khanna, Advocate for D-8.
Mr. Abhishek Bakshi, Advocate for defendant No.10.
Ms. Suruchi Thapar, Advocate with Mr. Ajay Kumar, Advocate for defendant No.19.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. Ruchir Mishra, Advocate with Mr. Mukesh Kr. Tiwari, Advocate for defendants No.25 and 26.

WITH

\+ CS(COMM) 768/2018 & I.As. 4329/2018, 4331/2018, 10396/2018 AND 16782/2018

UTV SOFTWARE COMMUNICATIONS LTD.& ORS. ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

BMOVIES.IS AND ORS. ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd.-D-6.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.11.
Mr. A.P.Sahay, CGSC with Mr. Suraj Kumar, Advocate for UOI.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.20.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.

AND

\+ CS(COMM) 770/2018 & I.As. 4358/2018, 4360/2018, 10402/2018 AND 16785/2018

UTV SOFTWARE COMMUNICATIONS LTD & ORS. ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

FMOVIES.PE AND ORS. ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd./D-6.
Mr. Ajay Digpaul, CGSC with Ms. Madhuri Dhingra, Advocates for Union of India.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.9.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.
Mr. Vineet S. Shrivastwa, Advocate for defendant No.18.

AND

\+ CS(COMM) 776/2018 & I.As. 4546/2018, 4548/2018, 10404/2018 AND 16779/2018

UTV SOFTWARE COMMUNICATIONS LTD. & ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

RARBG.IS AND ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd./D-6.
Mr. Vivek Goyal, Advocate with Mr. Pawan Pathak, Advocate for UOI.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.9.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.18.

AND

\+ CS(COMM) 777/2018 & I.As. 4549/2018, 4551/2018, 10405/2018 AND 16786/2018

UTV SOFTWARE COMMUNICATIONS LTD. & ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

THEPIRATEBAY.ORG AND ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd./D-6.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.9.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.18.
Mr. Akshay Makhija, Advocate with Mr. Ankit Tyuagi, Advocate for defendants No.24 and 25.

AND

\+ CS(COMM) 778/2018 & I.As. 4552/2018, 4554/2018, 10406/2018 AND 16783/2018

TWENTIETH CENTURY FOX FILM CORPORATION & ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

YTS.AM AND ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd./D-6.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.10.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.20.

AND

\+ CS(COMM) 799/2018 & I.As. 4914/2018, 4916/2018, 10401/2018 AND 16780/2018

UTV SOFTWARE COMMUNICATIONS LTD. & ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

EXTRATORRENT.AG & ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd./D-6.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.9.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.18.
Ms. Shiva Lakshmi, CGSC with Mr. Siddharth Singh, Advocate for UOI.

AND

\+ CS(COMM) 800/2018 & I.As. 4917/2018, 4919/2018, 9732/2018 AND 16784/2018

UTV SOFTWARE COMMUNICATIONS LTD. & ORS ..... Plaintiffs

Through: Mr. Saikrishna Rajagopal, Advocate with Ms. Suhasini Raina, Ms. Gitanjali Mathew and Ms. Disha Sharma, Advocates

versus

TORRENTMOVIES.CO & ORS ..... Defendants

Through: Mr. Hemant Singh, Advocate as Amicus Curiae with Ms. Mamta Jha, Advocate.
Mr. Ramnish Khanna, Advocate for Bharti Airtel Ltd.
Mr. Ajay Digpaul, CGSC with Ms. Madhuri Dhingra, Advocates for Union of India.
Mr. Tanvir Nayar, Advocate with Mr. Abhishek Bakshi, Advocate for defendant No.9.
Mr. K.R. Sasiprabhu, Advocate with Mr. Aditya Shandilya and Mr. Tushar Bhardwaj, Advocates for Reliance Jio Ltd.
Mr. Vineet S. Shrivastawa, Advocate for defendant No.18.
Mr. T.N. Durga Prasad, Advocate with Mr. Gagan Kumar, Advocate for Atria Convergence Technologies.

Reserved on : 26th February, 2019

% Date of Decision: 10th April, 2019

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

"Whoops! The web is not the web we wanted in every respect"

Tim Berners-Lee, Inventor of Web.

1. It is rare that in an ex-parte matter questions of law of general public importance arise for consideration. However, in the present batch of ex-parte matters the following seminal issues arise for consideration:-

(A) Whether an infringer of copyright on the internet is to be treated differently from an infringer in the physical world?

(B) Whether seeking blocking of a website dedicated to piracy makes one an opponent of a free and open internet?

(C) What is a '*Rogue Website'* ?

(D) Whether the test for determining a *'Rogue Website'* is a qualitative or a quantitative one?

(E)Whether the defendant-websites fall in the category of *'Rogue Websites'*?

(F) Whether this Court would be justified to pass directions to block the *'Rogue Websites'* in their entirety?

(G) 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?

BRIEF FACTS

2. The present eight suits have been filed by the plaintiffs primarily seeking injunction restraining infringement of copyright on account of defendants communicating to the public the plaintiffs' original content/cinematographic works without authorization. The reliefs sought by the plaintiffs can broadly be classified as under:-

a) Permanent injunction restraining the defendants from hosting, communicating, making available, etc. the original content of the plaintiffs on their website.

b) Order directing Internet Service Providers (hereinafter referred to as **"ISPs"**) to block access to the websites of the defendants.

c) Order directing Registrars of the defendant-websites to disclose the contact details and other relevant details of the registrants.

3. The plaintiffs are companies, who are engaged in the business of creating content, producing and distributing cinematographic films around the world including in India.

4. Four classes of defendants have been impleaded in the present matters, namely:-

i. ***Certain identifiable websites*** that are unauthorizedly publishing and communicating the Plaintiffs' copyrighted works. In the present batch of eight suits filed by the plaintiffs, thirty websites have been arrayed as defendants. The list of identifiable infringing websites arrayed as defendants in the present suits are:-

UTV Software Communications Ltd. & Ors. V. 1337x.to and Ors. CS(COMM) 724/2017

Domain	Uniform Resource Locator **(URL)**	Internet Protocol **(IP)** Address
1337x.to	http://1337x.to https://1337x.to	104.31.16.3.104.31.17.3
Torrentz2.eu	https://torrentz2.eu	104.27.134.181 104.27.135.181

UTV Software Communications Ltd. & Ors. v. Bmovies.is CS(COMM) 768/2018

Domain	URL	IP Address
bmovies.to	https://bmovies.to	104.31.86.38 104.31.87.38
bmovies.is	https://bmovies.is	104.24.98.151
fmovies.is	https://fmovies.is	87.120.36.22
fmovies.se	https://www1.fmovies.se/	104.31.17.3
fmovies.to	http://fmovies.to	87.120.36.22
bmovies.se	https://bmovies.se	104.24.112.4 104.24.113.4

UTV Software Communications Ltd. & Ors. Fmovies.pe and Ors. CS(COMM) 770/2018

Domain	URL	IP Address
fmovies.pe	https://fmovies.pe	104.24.18.88 104.24.19.88
fmovies.io	http://fmovies.io	192.162.138.17

fmovies.taxi	http://fmovies.taxi	104.27.143.24 104.27.142.24
bmovies.pro	https://bmovies.pro	104.31.71.201 104.31.70.201
bmovies.ru	http://bmovies.ru	104.24.108.89 104.24.109.89
fmovies.world	http://fmovies.world	104.27.131.168

UTV Software Communications Ltd. & Ors. v. Rarbg.is CS(COMM) 776/2018

Domain	URL	IP Address
rarbg.is	https://rarbg.is	185.37.100.123
rarbg.com	http://rarbg.com	185.37.100.121
rarbg.to	https://rarbg.to	185.37.100.122
rarbgproxy.org	http://rarbgproxy.org	104.31.78.172

UTV Software Communications Ltd. & Ors. v. thepiratebay.org and Ors. CS(COMM) 777/2018'

Domain	URL	IP Address
thepiratebay.org	https://thepiratebay.org	104.27.216.28 104.27.217.28
thepiratebay.se	http://thepiratebay.se	2002:6709:4c08::1

UTV Software Communications Ltd. & Ors. v. Yts.am & Ors. CS(COMM) 778/2018

Domain	URL	IP Address
yts.am	https://yts.am	104.25.56.102 104.25.55.102
yts.ag	https://yts.ag	217.23.11.96
yts.tw	https://yts.tw	104.24.114.185 104.24.115.185
yts-yify.gold	http://yts-yify.gold	104.31.65.94 104.31.64.94
yts.altorrente.com	http://yts.altorrente.com	104.24.101.34 104.24.100.34
yts.gy	https://yts.gy	104.24.108.74 104.24.109.74
yify.is	http://yify.is	104.31.66.177 104.31.67.177

UTV Software Communications Ltd. & Ors. V. Extratorrent.ag & Ors. CS(COMM) 799/2018

Domain	URL	IP Address
extratorrent.ag	https://extratorrent.ag	104.27.186.160 104.27.187.160
torrentz.ht	http://torrentz.ht	104.28.14.154 104.28.15.154

UTV Software Communications Ltd. & Ors. v. Torrentmovies.pe CS(COMM) 800/2018

Domain	URL	IP Address
torrentmovies.co	http://torrentmovies.co./	104.28.30.70

ii. ***John Doe Defendants*** who are hitherto unknown parties engaged in the unauthorized communication of the plaintiffs' copyrighted works and include the registrants of the defendant-websites, uploaders, creators of the redirect / mirror / alphanumeric websites etc.

iii. ***ISPs*** that provide internet access, enabling users to visit any website online, including the defendant-websites.

iv. ***Government Department/Agency***, namely Department of Telecommunication (hereinafter referred to as **"DoT"**) and Ministry of Electronics & Information Technology (hereinafter referred to as **"MEITY**") who have been impleaded to assist in notifying ISPs to disable access to defendant-websites within India and implementing the orders passed by this Court.

5. Even according to the plaintiffs, the ISPs and the Government Agencies are not involved in committing any infringement but have been impleaded for the purpose of evolving an effective and balanced relief that adequately redresses the plaintiffs' concerns and also protects the public interest, if any.

6. Keeping in view the fact that the contesting defendants had been proceeded ex-parte and substantial question of law of general public

importance arose for consideration, this Court deemed it appropriate to appoint Mr.Hemant Singh, who is a regular practitioner in IPRs cases, as the learned Amicus Curiae to assist the Court.

ARGUMENTS ON BEHALF OF LEARNED COUNSEL FOR PLAINTIFFS

7. Mr. Saikrishna Rajgopal, learned counsel for the plaintiffs stated that the infringing websites named in the present batch of matters allow 'streaming' and 'downloading' of copyrighted content of the plaintiffs, enabling the users to watch, download as well as share copies of such works. According to him, the defendants' business model is supported by revenue generated through advertisements, which are displayed on their websites.

8. Learned counsel for the plaintiffs pointed out that the plaintiffs had engaged the services of an investigator Mr. Manish Vaishampayan, who works as Manager of Content Protection at Motion Picture Distributors Association, Mumbai. The said investigator had filed affidavits in all the suits in which he stated that he had monitored the defendant-websites in respect of some of the copyrighted movies of the plaintiffs. The evidence that had been collated in the form of screenshots and printouts from the infringing websites had been provided to the plaintiffs via a cloud link in conformity with Section 65B of the Indian Evidence Act, 1872. The investigator in his affidavit had further stated that the defendant-websites act in the following manner:-

- Allow direct download of the plaintiffs' copyrighted content and they provide searchable indexes along with curated lists of top movies, television shows etc.
- The plaintiffs' copyrighted content was available on the websites.

- The dates of upload of the content were unknown.
- Identities of the said websites were masked under the garb of privacy.
- Indexes of hyperlinks redirect the end-user to the host site in order to facilitate streaming or downloading of copyrighted content of the plaintiffs.

9. Mr. Saikrishna Rajagopal, learned counsel for plaintiffs contended that the substantial purpose of the defendant-websites is to infringe or facilitate the infringement of copyright of the plaintiffs.

10. It is also the case of the plaintiffs that if one impugned websites is blocked, several other mirror websites are created which contain the infringing content. In some cases, the names of these websites are very similar to the blocked websites, enabling and encouraging easy identification and access. The details of registrants/ operators of these websites are unknown and therefore the plaintiffs have arrayed them as 'John Doe' defendants.

11. He stated that in such circumstances courts in different jurisdictions have passed injunction orders blocking the primary website. Mr.Saikrishna handed over a Note on law prevalent in foreign jurisdictions in relation to website blocking. The Note handed over by him is reproduced hereinbelow:-

LAW RELATING TO WEBSITE BLOCKING PREVALENT IN FOREIGN JURISDICTIONS

- **European Union**

- Article 8.3 of 2001 Infosoc Directive (*Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*) provides rightsholders with a right to

injunctive relief against intermediaries whose services are used by a third party to infringe copyright or related right.

- The preamble of the Infosoc Directive (recital 59) states that in the digital environment, the services of intermediaries may increasingly be used by third parties for infringing activities. In such cases intermediaries are best placed to bring such infringing activities to an end and therefore rightsholders should have the possibility of applying for an injunction against an intermediary who facilitates access to an infringing service. This is often referred to as the "no-fault based injunction".
- Further, Section 5, Articles 9 and 11 of the Directive on the Enforcement of Intellectual Property Rights (*Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*) support and are consistent with the goals as laid down in Article 8.3.
- Website blocking has been implemented across Europe and remedies both judicial (e.g. UK, Belgium, Spain, France, The Netherlands, Germany, Denmark, Norway, Ireland, Italy, Greece, Austria, Lithuania, Iceland and Sweden) and administrative (Italy, Spain, Portugal and Greece) are available in Europe.
- There are many European Court orders wherein websites have been ordered to be blocked by different methods. The precedent that blocking orders are proportionate and reasonable remedies has been established both at the national level and by the European Court of Justice (CJEU). The CJEU decisions constitute the highest legal precedent across all member states of the European Union and some of the relevant decisions are reproduced hereinbelow:-

  (i) The CJEU in the 2014 ***UPC Telekabel Wien v. Constantin Film Verleih*** (*Court of Justice of the European Union, Case C-314/12, March 27, 2014*) case held:

- Providing link to copyright protected content, without the consent of the rightholder, constitutes an infringement.
- the ISP is an "inevitable actor in any transmission of an infringement over the internet" and that its services are therefore used to infringe copyright.
- the fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet access provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders (...)

(ii) In a more recent judgment passed by the CJEU in the matter of ***StichtingBrein v Ziggo BV and XS4ALL Internet BV (C-610/15)***, it was held that the well known user submitted link/torrent Piratebay website directly infringes copyright in the EU. The Court found that Piratebay does communicate, goes beyond the mere provision of physical facilities, and plays an essential role in making the works available as, without the website, the sharing of works would be more complex. This was a key decision reiterating the validity of blocking of pirate websites throughout the EU.

➢ **France**

- Article L.336-2 of the French Intellectual Property Code: gives power to a regional first instance criminal Court, to order any measure to prevent an infringement of copyright or related rights against any person that can contribute to remedying the situation, on receiving an application for such order by the holders of the rights in the copyrighted works and subject-matters.

- This provision has been used by rightsholders to obtain blocking orders against illegal streaming websites in France. The

Tribunal de Grandes Instances de Paris (TGI) issued a judgment requiring ISPs to block access to 16 unlicensed streaming sites. [28 November 2013, No.11/60013]. The Court held that the injunction was compatible with fundamental freedom of expression. The Court of Appeal confirmed the findings and reiterated that the measures to block websites by ISPs do not violate rights of freedom of expression and are compliant with the principle of proportionality. [Paris Court of Appeal judgment of 15 March 2016 [No 040/2016].

- This decision by the Paris Court of Appeal was upheld by the French Supreme Court [15 March 2016 (RG No. 040/2016)] wherein it held that only in the instance where the blocking measure would compromise the viability of the business model of intermediaries, that the cost of such measure would be borne by the rightsholders.

- In *Société Francaise du Radiotéléphone et al. V Orange et al., Case No.14/03236, France, Paris Court of First Instance* (04 December, 2014) it was held that "while it is correct that any blocking measures can be circumvented by some internet users, on the one hand it has not been established that the large majority of internet users, who are attached to the free-of-charge nature of communications and numerous services on the internet, have the firm intention to participate in globalised and large-scale piracy and, on the other hand, the measures sought are aimed at the majority of users who do not necessarily have the time and skills to research means of circumventing the law, which specialists find and store in their memory."

- In *SFR and Others v Association of Cinema Producers and Others, Cour Cass, Civ 1, 6 July 2017, No 16-17.217, 16-18.298, 16-18.348, 16-18.595, ECLI:FR:CCASS: 2017:C100909 (Allostreaming)* decided on July 6, 2017, by the French Supreme Court (Cour de

cassation), established two very important precedents. The French Supreme Court) confirmed the decision of the Paris Court of Appeal in March 2016 (RG No.040/2016) which held that Internet intermediaries must bear the costs for implementing blocking measures against illegal streaming websites of copyright content; and confirmed that search engines qualify as intermediaries under Article 8.3 of the EU InfoSoc Directive, meaning they can be subject to orders to delist websites ordered for site blocking under Article 8.3.

- In *Federation Nationale Des Distributeurs De Films and Others v S.A. Orange and Others, 25 May 2018:* On 25 May 2018, the Paris District Court ordered 6 new infringing streaming sites to be blocked and deindexed in France (including their future alternative domains). The case was filed by French right holders FNDF, SEVN, API and UPC – with the intervention of SPI and government body CNC – against search engine Google LLC and ISPs Bouygues Telecom, Free, Orange Numericable and SFR. The Court confirmed that costs have to be borne by the intermediaries provided that such imputation participates to the material and financial contribution to be made by the intermediaries whose services are used by a third party to infringe IP rights in order to remedy this infringement, and respects a fair balance between the copyright protection and the freedom of enterprise of the intermediaries. With regard to search engines, a de-indexing order is imposed for any result leading to the targeted sites, so not limited to currently known domains. Keys in the December 2017 judgment were:-

    - **Subsidiarity:** No prior action is required against site operators, hosting providers or even registrars before seeking site blocking or delisting.

- **Proportionality:** Site blocking/deindexing measures are proportionate as they are targeted (target the infringing sites and French territory), limited in time (1 year) and implemented by the ISPs via the technical means of their choosing. They are also strictly necessary with respect to freedom of speech and communication – in accordance with French Constitutional Council decision nr. 2009-580 DC – as Internet users can still access the content through legal channels.
- **Search engines are intermediaries:** The Court confirmed that Google is an intermediary under Art.8.3 of Copyright Directive as its search engine is a means for Internet users to access infringing content.
- **Complementary nature of de-indexing to site blocking:** The Court confirmed that deindexing measures are complementary to blocking measures as they improve the effectiveness with respect to Internet users who may not know the direct links to the infringing sites.
- **De-indexing of entire sites:** The Court stated that if deindexing measure are not applied to the entire site, this would be an overly restrictive interpretation of Art.11 and Recital 24 of the Enforcement Directive.
- **Costs:** Referring to the objectives of the Copyright Directive (Receitals 4, 10, 16, 58, and 59), the Enforcement Directive (Recital 23, Artt. 3 and 11) and Art.12.3 of the E-Commerce Directive, the Court stated that the intent of those texts is to disconnect the safe harbor regime from the measures taken under Art.8.3 of the Copyright Directive, as a result rejecting the argument from the intermediaries that the safe harbor

regime, the absence of causal role, or even their quality of third party, would exempt them from covering the implementation costs of the blocking measures.

➢ **Germany**

- **Third Act to Amend the Telemedia Act, Part 3, Section 7(4):** provides that in case a Telemedia service was used by a user to infringe the intellectual property right of a third party and if there is no other remedy against the infringement for the owner of this right, the owner of the right may request the service provider according to Section 8 sub-section 3, the blocking of information to prevent repetition of the rights infringement.

- The German Court of Appeal in the case of ***Constantin Film Verleih GmbH v. Vodafone Kabel Deutschland GmbH, 29 U 732/18 (June 2018)***, granted a blocking order against the Kinox.to site. The Court considered whether reasonable effort had been made by the rightsholder to effect legal action against the operator of the service and its service providers. The Court held in this case reasonable effort had been made and the rightsholder could not be expected to pursue even more time-consuming measures against the infringers that are often based in foreign countries and difficult to reach. The Court specifically noted that the blocking order will also apply to variances (additional domains, IP addresses, URLs) of the pirate service. The Court also clarified that the imposed site blocking measures "do not relate to the domain "Kinox.to" but to the overall service "Kinox.to", which is offered under that company name, irrespective of the respective domain." The appeal against this decision was rejected by the Court of Appeal of Munich (14 June 2018).

- The German Federal Court of Justice laid down requirements to obtain injunctions against ISPs in order to make them block access to

infringing websites. (BGH, decisions dated 26 November 2015, case nos. I ZR 3/14 and I ZR 174/14). Although in this case injunction was not granted, it provided guidance on the requirements for obtaining blocking injunctions against ISPs. The Court accepted that ISPs can contribute to infringements of third parties but the blocking injunction against ISPs is to be considered as a last resort i.e. the interest of the rightsholders, access provider and the consumers must be well balanced.

- The Court of Appeal summarily denied Vodafone's appeal in this case in June 2018.

➢ **<u>United Kingdom</u>**

- Section 97A of the Copyright, Designs and Patents Act, 1988 empowers the High Court to grant an injunction against the service provider once it is established that the service provider has actual knowledge of the infringement of copyright through its service. In terms of this provision, right owners have to establish that:
    - Service providers have actual knowledge of infringement of copyright through its service.
    - They had issued a notice with details such as the right owner, work in question, details of infringement.

- Most importantly, Section 97A only entitles a right owner to get a no-fault injunction against a service provider. It does not entitle a right owner to allege liability for infringement itself. Section 97A provides the conditions under which such an injunction may be granted.
- Courts have interpreted "actual knowledge" as follows [***20th Century Fox & Ors. v British Telecommunication PLC [2011] EWHC 1981 (Ch)***]:

- Requirement of actual knowledge should not be interpreted restrictively.
- It means the service provider should have knowledge of use of the service to infringe, rather than have knowledge of the infringements thereby.
- What must be shown is that the service provider has knowledge of one or more persons using its service to infringe copyright.
- It is not essential to prove actual knowledge of a specific infringement of a specific copyright work by a specific individual.

- While granting orders for blocking of a website, Courts have taken the following factors into consideration:

  - Merely because granting of an injunction may open the floodgates for similar website blocking requests in the future, is not a sufficient ground to deny such block orders.
  - Because not all the content available on the website belonged to the plaintiffs.
  - And lastly, the Court considers the efficacy of passing the order i.e. the extent of users willing to circumvent the blocking.

➢ **Singapore** – Copyright Act, Section 193DDA, 193DDB and 193DDC

- Singapore amended its Copyright Act to enable Courts to make an order that would require ISPs whose services have been or are being used to access an online location to infringe copyright of rightsholders, to block access to a "flagrantly infringing online location"; thereby, giving rightsholders a more effective tool to disable access to pirate websites.

- Section 193DDA gives the High Court the power to disable access to flagrantly infringing online location. In order to determine a flagrantly infringing online location, the High Court is to consider the matters as listed out under Clause 2 of Section 193DDA:
    - the primary purpose of the online location being copyright infringement and whether the online location contains indexes or categories of the means to commit infringement;
    - whether the owner or operator of the online location demonstrates a disregard for copyright generally;
    - whether the online location has been blocked previously by any Court of any jurisdiction for copyright infringement and circumvention of such measure/Court orders by the online location;
    - the volume of traffic at or frequency of access to the online location.
- Before making an application for a Court order the owner of copyright must send a notice to the owner of the websites and also notify the ISPs of their intentions as per Section 193 DDB.
- The High Court may also vary the order made depending on material changes in the circumstances and on being satisfied on a few points as laid out under Clause 2 Section 193DDC.
- In 2016, at the request of the plaintiffs, the Singapore High Court ordered ISPs to disable access to Solarmovie.ph, finding the website to be flagrantly infringing intellectual property (*Developments in Site Blocking, Singapore Law Gazette, April 2017*).

- On 26 April 2018 the High Court in the case of ***Disney Enterprises, Inc. & Ors. v M1 Limited & Ors., HC/OS 95/2018***, ordered ISPs to block access to 53 piracy websites.

- In furtherance of the above order, on July 12, the Court granted an order to block "variances" when the pirate services changes online location to evade the blocking order. This allows for flexible site blocking orders in Singapore for additional domains resolving to the same "online location" already ordered blocked. This precedent also bolsters flexible variance orders as an international best practice in site blocking, and mirrors the process that has been adopted in the United Kingdom, whereby rights holders periodically inform ISPs of additional domains, IP addresses, or URLs that resolve to the same online locations already ordered blocked.

➢ **Australia**

- Section 115A of the Copyright Act allows rightsholders to apply to the Federal Court for an injunction directing ISPs to block access to websites that infringe copyright content. The Court considers the following factors before granting an injunction:
    - the geographical origin of the website is located outside Australia; and
    - the 'primary purpose' of the website is to infringe copyright.
- The law further provides that the owner of the copyright is to send notice to the ISPs and owner of website of the making of an application for injunction under this section.
- The Court considers certain factors to determine whether or not to grant an injunction such as ownership and subsistence of copyright, whether access has been provided outside Australia, infringement of copyright and primary purpose of website being infringement and

discretionary factors where the Court feels there is blatant disregard for the rights of the copyright owners.

- In recent rulings by the Australian Federal Court, the ISPs have been ordered to block access to 59 websites and 127 web domains that carry pirated film and TV content on applications made by Roadshow Films and Foxtel. This was following a Federal Court decision in December 2016, ***Roadshow Films v Telstra Corporation Ltd [2016] FCA 1503***, which were the first blocking injunctions in Australia.
- In a more recent decision, ***Roadshow Films Pvt. Ltd. v Telstra Corporation Ltd [2018] FCA 582***, the facts were different being that the online locations did not host a website containing illegal content, rather they were specific online locations accessible via three apps installed and operated through the Android operating system on a TV smart box. The Federal Court granted the blocking injunctions against the illegal TV subscription services holding that the requirements under Section 115(A) were met as in the previous website blocking cases.
- The ***Roadshow*** cases also provide an avenue for quick applications to add additional domains, IP addresses and URLs used by the target online pirate service already ordered blocked, without the need for a further hearing.

➢ **<u>Legal Authorities and Statistics in Key Countries</u>**:

Countries Adopting (or Obligated to Adopt) Site Blocking, Legal Authorities, #of Sites Blocked, Efficacy Research (as of May 2018)				
	Country	Law	Sites Blocked (Approx)	Efficacy Research
1	Argentina	1933 Copyright Act; Unlawful enrichment civil law articles. Abuse of Rights doctrine.	1 site blocked	

2	Australia	Copyright Act, Section 115A	82 sites blocked	Incopro study finds significant drop in visitation to blocked sites (>50%) and 25% decrease in piracy overall. (*Incopro, Site Blocking Efficacy, Australia, December 2017*)
3	Austria	Copyright Act, Article 81	10 sites blocked	
4	Belgium	Code of Economic Law, Article XVII. 14	128 sites blocked	
5	Brazil	Article 195 of the Industrial Property Rights Act no. 9.279/96; Article 19, XIII and 162, Para 2 of the Organization of Telecommunication Services Act no. 9.472/97; Article 300 of the New Code of Civil Procedure	1 site blocked	
6	Denmark	Copyright Act Para 411 and Para 413; voluntary Code of Practice	128 sites blocked	
7	Finland	Copyright Act, Article 60c	2 sites blocked	
8	France	Intellectual Property Code, Article L 336-2	12 sites blocked	
9	Germany	Doctrine of Storerhaftung (derived from Articles 823 (liability in damages) and 1004 (claim for removal and injunction) of the German Civil Code (BGB))	1 site blocked (*Constantin Film Verleih GmbH v. Vodafone Kabel Deutschland GmbH (2017) (Case Number: 7 O 17752/17).*	

10	Greece	Law 2121/1993 Copyright, Related Rights and Cultural Matters, Article 64A	2 sites blocked	
11	Iceland	Copyright Act No. 73/1972, Article 59 a	2 sites blocked	
12	Indonesia	Copyright Law No. 28 of 2014, Articles 54-56; Regs. Nos. 14 and 26 (2015)	444 sites blocked	MPA study found sharp reductions in piracy visitation due to four waves after site blocking implementation, with reductions in traffic of 74% -94% at six months post-block. *(Motion Picture Association, Impact of Site Blocking in Indonesia (2017). This study also concludes that there was a 9 to 24% overall increase in piracy traffic due to the emergence of two piracy site groups: Ik21 and indoxxi.)*
13	Ireland	Copyright and Related Rights Act, 2000 Sections 40 (5A), 205 (9A)(a)	14 sites blocked	
14	Israel	Section 75 of the Courts Act	2 sites blocked	
15	Italy	Copyright Act, Article 156, 163(1); AGCOM Regulation, Criminal Code	703 domains blocked *(Orders in Italy are issued on a per domain basis)*	
16	South Korea	Act on the Establishment and Operation of Korea Communications Commission, Act No. 8867, Feb. 29, 2008 (2015), Art. 21; Act on Promotion of Information and Communication Network Utilization	456 sites blocked	MPA studies demonstrate visits to blocked sites in South Korea declined over the 18 waves of site blocking between June 2015 and March 2017 by between 65% and 100% in the six months following each wave, with an average

		and Information Protection (2009), Art. 44-7		decline of 87% in the six months following site blocking (*Motion Picture Association, Impact of Site Blocking in South Korea (2017) (following up on MPA Study on Site Blocking Impact in South Korea (2016)*)
17	Lithuania	Law on Copyright and Related Rights, Article 78(1)	1 site blocked	
18	Malaysia	Communications and Multimedia Act 1998, Section 263	198 sites blocked	MPA study found traffic to blocked sites was reduced in every wave of site blocking examined, ranging from reductions of 67% and 74% six months after waves 4, 5 and 6 of Malaysia site blocking. *(Motion Picture Association, Impact of Site Blocking in Malaysia (2017)*
19	Mexico	Ley Federal del Derecho de Autor, Precepto 177	1 site blocked	
20	Netherlands	Dutch Copyright Act Section 26d and The Neighbouring Rights Act 1993, Section 15e	1 site blocked	
21	Norway	Copyright Act, Section 56c	21 sites blocked	
22	Portugal	Code of Copyright and Related Rights, Articles 210-G(1), 210-H (2), General Inspectorate of Cultural Activities ('IGAC') Competence Legislation	824 domains blocked (*Orders in Portugal are issued on a per domain basis*)	Research demonstrates site blocking in Portugal has resulted in an overall 69.7% drop in usage to the sites affected by the first 8 administrative blocking waves ordered in the country and resulted in a 9.3% decrease in piracy

				overall in Portugal to the top 250 piracy sites (blocked and unblocked). (*Incopro, Site Blocking Efficacy in Portugal September 2015 to October 2016 (2017), http://www.incorproip.com/wp-content/uploads /2017/07/Site-Blocking-and-Piracy-Landscape-in-Portugal-FINAL-pdf.*)
23	Russia	Civil Code, Article 1250, Internet Law	265 sites blocked	
24	Singapore	Copyright Act, Section 193A, DDA, DDB, and DDC	54 sites blocked	
25	Spain	Copyright Act, Article 138	16 sites blocked	
26	Sweden	Act on Copyright in Literary and Artistic Works Article 53b	2 sites blocked	
27	Thailand	Computer Crime Act (2016), Section 20(3)	1 site blocked	
28	Turkey	Law on Intellectual and Artistic Works 5846 Supplementary Item 4/3	22 sites blocked	
29	United Kingdom	Copyright, Designs and Patents Act, Section 97A	172 sites blocked	
30	Uruguay	Ley 9.739, art. 46(a); Ley 17.616; Ley 17.520, arts. 1 and 2.	1 site blocked	
31	Bulgaria	Law on the Copyright and Related Rights, Article 96f	No case law to date	
32	Croatia	Copyright and Related Rights Act, Article 185	No case law to date	
33	Cyprus	Copyright Act, Article 13(4)	No case law to date	

➢ **<u>Other countries that have adopted site blocking</u>**:

- In Malaysia, the Malaysian Communications and Multimedia Commission (MCMC) may order its "licensee" to "prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence" including copyright infringement.

- In Indonesia, the Minister Directorate General of Intellectual Property Rights (DGIPR) may, "[i]n case there is sufficient evidence to be found" of "copyright and/ or related rights infringement through electronic systems for Commercial use"... "recommend to the Minister of Telecommunications and Informatics to block some or all of the content infringing the Copyright in the electronic system or make the electronic system service inaccessible."

- In Thailand, the Minister of Digital Economy "may submit a motion together with evidence to the competent Court to order discontinuation of dissemination or deletion of [computer data which is a criminal offense under the intellectual property laws] from the computer system."

- In Korea, the Korea Copyright Protection Agency (KCOPA), in consultation with the Ministry of Culture, Sports and Tourism (MCST) oversees the blocking of sites which infringe copyright, based on organizing statutes including the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc."

12. During the course of the arguments, Mr. Saikrishna extensively referred to an Article written "*How Website Blocking Is Curbing Digital Piracy Without "Breaking the Internet*" published in Information

Technology & Innovation Foundation (ITIF) in August, 2016 by Mr. Nigel Cory, Associate Director, Trade Policy, ITIF. The relevant portion of the said Article is reproduced hereinbelow:-

> *"Many countries ask domestic Internet service providers (ISPs) to block access to websites engaged in illegal activities—such as those facilitating cybercrime, child pornography, or terrorism—because this is one of the few means available to respond to illegal materials hosted abroad. However, when it comes to addressing other legitimate public policy objectives, such as curbing digital piracy, some of these same countries are reluctant to ask ISPs to block websites dedicated to distributing illegal copies of movies, music, and other copyright-protected works. As a result, online piracy continues unabated. But where countries are using website blocking to fight digital piracy, the record shows it has been effective in driving users from illegal to legal sources of copyrighted material online.....*
>
> *xxx xxx xxx*
>
> *There are three key methods for website blocking: Internet Protocol (IP) address blocking, Domain Name Server (DNS) blocking, and Uniform Resource Locator (URL) blocking. While there may be ways for users and piracy site operators to circumvent these methods, it is important to remember that the aim of website blocking, like other online enforcement methods, is not to eliminate online piracy altogether, but to change consumers' behavior by raising the cost—in terms of time and willingness to find alternatives sites and circumvention tools—to make the legal sources of content more appealing.*
>
> ***Internet Protocol (IP) Address Blocking***
>
> *Every computer has an IP address, similar to a street address or telephone number. When a user connects to the Internet, every packet of data sent or received over the Internet (e.g., for emails or to view websites) carries this IP address as does every destination on the Internet. Since ISPs act as central clearing houses for users' access to the Internet, they can modify their network settings equipment to discard user requests to access IP addresses for blocked sites. The costs of this process are low as the list of IP address is maintained centrally by the ISP.(Lukas Feiler, "Website Blocking Injunctions under EU and US Copyright Law: Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law" (working paper no. 13, Transatlantic Technology Law Forum (TTLF), Stanford University Law School and University of Vienna School of Law, 2012), http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/203758/doc/slspublic/feiler_wp13.pdf.). Many ISPs and Internet backbone operators already use this process for security reasons (to fight malware) and to fight spam. (Lukas Feiler, "Website Blocking Injunctions under EU and US Copyright Law: Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law" (working paper no. 13, Transatlantic Technology Law Forum (TTLF), Stanford University Law School and University of Vienna School of Law,*

2012), http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/203758/doc/slspublic/ feiler_wp13.pdf.).

There are a few ways that IP blocking can be circumvented, but these are cumbersome, and most Internet users do not have the sophisticated technical skills (and motivation) to sidestep blocking. Website operators can circumvent IP blocking by obtaining new IP addresses and reconfiguring their domain names so that users go to these new IP addresses, but this is also cumbersome, especially if it has to be done repeatedly.(Ofcom, "'Site Blocking' to Reduce Online Copyright Infringement: A Review of Sections 17 and 18 of the Digital Economy Act" (London: Ofcom, May 27, 2010), http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf.). Users can circumvent IP address blocks by using software (such as an encrypted virtual private network) to relay their Internet connection via a server that is with a different ISP or via a different Internet backbone operator that is not affected by the block, but most users are not this sophisticated.

A disadvantage of IP blocking is that IP addresses can be quickly changed. IP blocking can also impact non-infringing websites, as a single IP address can host multiple websites.(Benjamin Edelman, "Web Sites Sharing IP Addresses: Prevalence and Significance," Berkman Center for Internet and Society, Harvard Law School, last modified September 12, 2003). However, the focus of copyright enforcement and website blocking is on sites that facilitate large-scale copyright infringement—such as those that have many full-length movies, TV shows, and songs—so even if the IP address used by a piracy site hosts non-infringing pages or files, the legitimate content that is blocked is small, and not reason enough to avoid shutting down the website. If The Pirate Bay or KickAssTorrents facilitated access to a small amount of content that had a creative commons license, and was therefore able to be shared, this would not change the fact that it is a piracy site worth shutting down.

Domain Name System (DNS) Blocking

DNS blocking targets the process that converts website domain names into a corresponding IP address, which is then used to communicate with other servers. The DNS system effectively serves as the phone book of the Internet and is used by virtually every piece of software or hardware on the Internet, from web browsers and email applications to game consoles and streaming video devices.

An ISP can block an entire domain by making configuration changes at its DNS server. When a user asks to access a particular website, such as www.maindomain.com, the DNS server of the customer's ISP recognizes the domain as a blocked site, does not allow it to be translated into an IP address, and responds to the user that the domain does not exist or redirects to an informational webpage. DNS blocking is quick to implement, as existing systems can be easily adapted, and would only

require a modest incremental investment for ISPs. (Ofcom, "Site Blocking.). Critics claim that DNS blocking, like IP blocking, will cause "collateral damage" due to the risk of over-blocking, as a single domain can host many websites through website extensions. (Internet Society, "Internet Society Perspectives on Domain Name System (DNS) Filtering" (Internet Society, May 30, 2012), 202, http://www.internetsociety.org/internet-society-perspectives-domain-namesystem-dns-filtering-0; Steve Crocker et al., "Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill" (technical white paper, May 2011), https://stupid.domain.name/files/2011/05/PROTECT-IP-Technical-Whitepaper-Final.pdf.)

However, this risk can be addressed by implementing DNS blocking at the subdomain level (e.g. www.piracysite.maindomain.com instead of www.maindomain.com). Furthermore, like IP blocking, if the main domain hosts a site that has the primary purpose of facilitating illegal access to copyrighted material, then it is a legitimate target for online enforcement.

A website operator that hosts copyright infringing material would only be able to circumvent the DNS block by using another domain name, but like IP blocking, this becomes cumbersome. Users are able to circumvent this process by using another domain name server (e.g., users could use a virtual private network to connect to an alternative DNS server not subject to the blocking orders). However, like IP blocking, it would be a mistake to assume that the average Internet user has the above-average technical skills necessary to do this. Many, if not most, consumers have low levels of computer literacy and certainly are not sophisticated enough to understand how to manipulate the DNS settings in the network configuration of their computers, mobile phones, and other Internet-connected devices. Furthermore, users who switch DNS servers can expose themselves to many security risks if they cannot trust the responses from these servers. For example, while the alternate servers may reliably return the correct IP address for a Russian file-sharing site, they might not return the correct address for Bank of America. (Paul Vixie, "DNS Changer," Circle ID, March 27, 2012, http://www.circleid.com/posts/20120327_dns_changer/; U.S.Attorney's Office, Federal Bureau of Investigations, "Manhattan U.S. Attorney Charges Seven Individuals for Engineering Sophisticated Internet Fraud Scheme That Infected Millions of Computers Worldwide and Manipulated Internet Advertising Business," new release, November 9, 2011, https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-seven-individuals-for-engineering-sophisticated-inernet -fraud-scheme-that-infected-millions-of-computers-worldwide-and-manipulated-internet-advertising-business). How many users are willing to risk their identity and financial information just to download a few songs?

Finally, circumvention software (such as encrypted virtual private networks) probably will not be adopted by many, as studies show that few users use these types of tools in countries where the government restricts access to certain websites. For example, a study by the Berkman Center for Internet and Society at Harvard University found that "no more than 3 percent of Internet users in countries that in engage in substantial filtering

use circumvention tools. The actual number is likely considerably less."(Hal Roberts et al., "2010 Circumvention Tool Usage Report" (report, The Berkman Center for Internet & Society, Harvard Law School, Cambridge, MA, October 2011), https://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2010_Circumvention_Tool_Usage_Report.pdf.).

Uniform Resource Locator (URL) Blocking

URL blocking requires the ISP to examine both the headers of IP packets (which contain the source and destination IP addresses) and the contents of the IP packet. This is done through "shallow" or "deep" packet inspection (DPI) that examines the contents of the packet in transit, rather than simply the IP address of the source and destination devices. Shallow packet inspection is focused on IP addresses and technical specifications, such as port and protocol combinations. Deep packet inspection examines the packet for specific characteristics or values. When a packet matching the blocked site IP address, destination host, or even a particular keyword passes through a DPI device, the network connection can be terminated. These inspections can be performed by the ISP's router or a proxy that all traffic is forced through in order to access the Internet (such proxy servers are common in schools and businesses, as they cache content, block inappropriate sites, and provide some security).

This process can block specific websites (e.g., www.itif.org) or website addresses (e.g., www.itif.org/events/upcoming). Given this capability, URL blocking is the most precise method, thereby avoiding over-blocking.(Ofcom, "Site Blocking".). URL blocking combines the advantages of both DNS and IP blocking. (Feiler, "Website Blocking Injunctions Copyright Law."). To be effective, URL blocking needs to be designed so that it only targets specific types of network traffic, whether this is related to sites that actively facilitate terrorism, child pornography, or copyright infringement.

Network Functions Virtualization and Software-Defined Networks Can Make Blocking Cheaper, Easier, and More Effective

Software-Defined Networks (SDN) and Network Functions Virtualization (NFV) will fundamentally change how telecommunications carriers manage network operations and enable flexible new tools to block websites.(Fujitsu, "Technical Report: Carrier Software Defined Networking" (technical report for Ofcom, Fujitsu, Tokyo, March 2014), http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/SDN_Report.pdf.). These technologies, already used in many data centers, will eventually become key components of virtually all wide-area carrier networks for the simple reason that they offer powerful new tools and significant cost savings.(For example, Arthur Little and Bell Labs estimate operating expense savings of 30 to 50 percent. Arthur D. Little, "Reshaping the Future with NFV and SDN" (report, Bell Labs, Murray Hill, NJ, May 2015), 9, http://www.adlittle.com/downloads/tx_adlreports/ADL_BellLabs_2015_Reshapingthefuture.pdf.). These advantages are spurring surprisingly quick adoption of these techniques by industry. For example, AT&T plans for 30 percent of its

network to use SDN and NFV by the end of 2016 and 75 percent by 2020. (Sean Michael Kerner, "AT&T to Virtualize 75 Percent of Its Network by 2020," Enterprise Networking Planet, March 15, 2016, http://www.enterprisenetworkingplanet. com/netsp/att-pledges-to-virtualize-75-percent-of-its-network-by-2020.html.).

SDN separates the control of the network from the forwarding of information, offering network operators global control over switches and routers through software separate from the underlying hardware. This in turn allows networking applications, such as DNS, firewalling, and intrusion detection, to run in virtual systems installed on generic hardware whereas traditional network infrastructure relied on dedicated, fixed-function networking hardware. Combined, SDN and NFV allow greater network flexibility, easier introduction of new services, improved network manageability, and reduced costs. ("Data Plane Performance: A Key Enabler of SDN," 6Wind, accessed August 11, 2016, http://www.6wind.com/software-defined-networking/6windgate-sdn/.). In line with this, these changes in network management will make it much easier and cheaper to implement website-blocking mechanisms. For example, blocking could be achieved on the fly through software updates rather than individualized hardware configurations.

The Costs of Website Blocking

The costs of website blocking vary according to the type of blocks used and the country implementing them. More intensive processes, such as deep packet inspections, cost more. All website-blocking processes involve technical support costs for administering the blocking process within an ISP's network and in fielding calls from users about why they cannot access certain sites. There are hosting costs for the landing page that users trying to access blocked sites are redirected toward, as required in many countries. Cost estimates for initial website blocking injunctions are likely to be high, given the legal costs involved in landmark court cases that a legal process for rights holders to use. However, once a website-blocking process is up and running, parts of it can be automated in order to minimize costs. For example, a centrally maintained register (with digitally signed lists of IP addresses) could be used by all ISPs in a country to update their settings to ensure that all necessary sites are blocked.

The United Kingdom's communications regulator, Ofcom, ranked the costs of different blocking techniques:

- *IP address blocking: low cost;*
- *DNS blocking: marginal incremental cost;*
- *Shallow packet inspection: low cost if implemented only on routers, costly if implemented on firewall devices;*

- *Deep packet inspection: relatively costly given the inspection of network traffic; and*

- *URL blocking: potentially costly given hardware and software configurations, but this will change as ISPs move to software-defined networks.(Ofcom, "Site Blocking.")…..*

Website Blocking Is Used as a Legitimate Tool by Many Countries

Many countries have turned to website blocking to apply existing and new legislation to a range of legitimate public policy goals that involve the Internet. Examples of the types of websites that are blocked:

- *Child pornography (many countries)*

- *Malware (e.g. Australia) (Claire Reilly, "AFP Using Site Blocking Laws to Target Malware," CNET, October 22, 2014, http://www.cnet.com/au/news/afp-using-site-blocking-laws-to-target-malware/.)*

- *Investment fraud (e.g. Australia) (Josh Taylor, "FOI Reveals ASIC's IP-Blocking Requests," ZDNet, July 1, 2013, http://www.zdnet.com/article/foi-reveals-asics-ip-blocking-requests/.)*

- *Online gambling (e.g. Singapore and Quebec, Canada) ("Approach to Regulating Content on the Internet," Media Development Authority Singapore, August 11, 2016, http://www.mda.gov.sg/RegulationsAndLicensing/ContentStandardsAndClassification/Pages/Internet.aspx.)*

- *Pornography (e.g. India and others) ("Banned: Complete List of 857 Porn Websites Blocked in India," Deccan Chronicle, updated January 10, 2016, http://www.deccanchronicle.com/150803/nation-current-affairs/article/porn-ban-complete-list-857-porn-websites-blocked-india.)*

- *Prostitution (e.g. India) ("174 Escort Services Websites to Be Blocked: State to Bombay High Court," dna India, April 21, 2016, http://www.dnaindia.com/mumbai/report-174-escort-services-website-to-be-blocked-state-to-bombay-high-court-2204387.)*

- *Terrorism (the United Kingdom, Australia, France, and India) (For example, in 2015, France introduced a law that allows government agencies to order the blocking of websites that advocate acts of terrorism or contain images of child abuse. The legislation was brought in by revisions to the Loppsi Act, and an anti-terror bill passed by the French senate in 2914, but can now be used by the general directorate of the French police's cybercrime unit to force French internet service providers to block sites within 24 hours, without a court order. In the United Kingdom the government and ISPs have agreed to implement a system of blocks, similar to that used to keep child abuse material off the internet, for websites espousing terrorism related extremist views. Samuel Gibbs, "French law blocking terrorist and child abuse sites comes into effect," The Guardian, February 9, 2015, https://www.theguardian.com/technology/2015/feb/09/french-law-blocking-terrorist-and-child-abuse-sites-comes-into-effect. the United Kingdom.)*

- *Copyright-infringing content (at least 25 nations).....*

SITE BLOCKING CAN HELP FIGHT ONLINE PIRACY

Some proponents of weak copyright argue that site blocking does no good, as content thieves will just find other sites to go to. In practice, this appears to be wrong. A new Carnegie Mellon University (CMU) study shows that the latest expansion of website blocking in the United Kingdom has been effective in fighting digital piracy. This study, released in April 2016, uses consumer data to analyze the impact of a court order for ISPs to block 53 websites in the United Kingdom in November 2014. This study shows that website blocking, when done on a large enough scale, can shift consumers from accessing copyright infringing material to consuming legal content online.....

*The latest CMU study analyzed the impact that blocking 53 piracy websites in the United Kingdom in November 2014 had on the behavior of 58,809 users, comparing user visits three months before the blocks against user visits in the three months after the blocks (see Appendix B for the study's descriptive statistics). (Danaher, Smith, and Telang, "Website Blocking Revisited.")**. In both studies, the British Phonographic Industry (the trade association that represents the British record industry) was responsible for compiling and submitting to the court the list of websites for blocking. (Mark Sweney, "Record Labels Win ISP Blocks on 21 Filesharing Sites," The Guardian, October 29, 2013, https://www.theguardian.com/business/ 2013/oct/29/record-labels-isp-piracy-block-music-filesharing.)**. The court orders covered the six biggest ISPs, who collectively provide Internet services to over 90 percent of the United Kingdom.("Facts and Figures," Ofcom, accessed August 11, 2016, http://media.ofcom.org.uk/facts/.)**.....*

The results clearly showed that the website blocks were effective in changing consumer behavior. (Also see Appendix B.) To estimate the impact of the blocks, the study determined the difference between the observed activity by users after the blocks were enacted and the estimated counterfactual (as if the blocks had not been enacted) for these users' visits to piracy, ad-supported video, and subscription-based websites. The study found that:

- *The blocking of these websites was effective, causing a 90 percent drop in visits to the blocked sites by users in the study sample (from 86,735 visits to blocked sites to 10,474), while causing no increase in usage of unblocked piracy websites.(The result was not 100 percent as some ISPs may have delayed enacting the blocks (into December), usage of virtual private networks to circumvent the blocks, and the order does not target some of the smaller ISPs.)*

- *The blocking of these websites had a significant impact on piracy, leading to a 22 percent decrease in total piracy for all users affected by the blocks (relative to the counterfactual estimate for how much they would have pirated if not for the blocks). The study is able to analyze the broader piracy universe as the 53 sites that*

were blocked were only a portion of the total piracy sites tracked in the study. *(The causal change in total piracy was computed differently. The study assumes that the drop was a result of the blocks. Noting that the regression showed no causal increase in usage of unblocked piracy sites, the study calculated for each segment the total piracy before the blocks and assumed in the post-block period that, if nothing else changed except for the blocks, it would have been the same number less 90 percent, based on the study results. From this, the study calculated the causal change in piracy in each segment.)*

- *These blocks changed consumer behavior. The study estimated that the blocks caused a 10 percent increase in user visits to legal ad-supported streaming sites such as the United Kingdom's BBC and Channel 5.* *(The analysis of the results for access to ad-support and subscription video services was based on an analysis of coefficients from a regression analysis and showed that the estimate for the change in access to ad-supported video site was measured with 95 percent confidence, while the estimate for access to subscription services was measured with 75 percent confidence.).* *It also caused an estimated 6 percent increase in visits by users in the study to paid legal subscription-based streaming sites such as Netflix. This contrasts with the 12 percent increase in visits to subscription-based sites in the study of the 2013 blocks.....(The study into the website blocks of 2013 did not have data on visits to ad-supported legal content sites.).*

- *Relatively few users circumvented the website blocks. The study estimates that access to VPN sites increased 30 percent after the blocks, but this is likely off a relatively small base. The descriptive statistics show usage of VPN services is small relative to visits to other sites. For example, users in the study made 86,735 visits to the piracy sites before they were blocked, but only 1,688 to VPN sites (see descriptive statistics in Appendix B).*

- *The blocks had the biggest impact on the heaviest users of piracy sites. The study estimates that the blocks caused the heaviest piracy users in the study sample to reduce their use of pirated material by 28 percent, while leading to a respective 48.1 percent and 36.9 percent increase in their purchases of legal ad-supported and subscription services.*

In summary, the study shows that while website blocking will not solve online piracy—no single tool, law, or practice will—it does reduce it while increasing the consumption of legal content. It then falls to other policies to target different parts of the piracy process and environment, which the United Kingdom does through a graduated response system for ISPs to notify users of reported infringement, funding for education campaigns about accessing legal and illegal content, and a specialized Police Intellectual Property Crime Unit to investigate and tackle copyright infringement. All these measures, when combined with ongoing service and technology innovations, help tip the balance back toward the digital

creators that rely on intellectual property to support and protect their creations and away from the rampant piracy that undermines their creativity.

Normal Rules Do Not Apply to the Internet

.....The CMU study also shows what other studies on the effectiveness of online enforcement have made clear—that the impact depends on public awareness and consistent and credible enforcement and implementation.....

Some opponents of website blocking have seized upon reports of governments misusing intellectual property enforcement measures for unrelated means, such as the Russian police raid on advocacy groups and opposition newspapers in the name of searching for pirated software. (Clifford J. Levy, "Russia Uses Microsoft to Suppress Dissent," The New York Times, September 11, 2010, http://www.nytimes.com/2010/09/12/world/europe/12raids.html.). However, such cases are rare and would not stand up to the type of scrutiny that is involved in the hundreds of cases where website blocking has been used to fight online piracy in recent years. Online intellectual property enforcement is far from alone in being a public policy that could be misused in order to pursue unrelated and illegitimate objectives. In each case, what matters is the actual intent and the integrity of the process involved in administrating these policies.

Opponents of website blocking, including some ISPs, believe that the costs of website blocking are high enough to make the practice untenable. Internet exceptionalists fill the void created by the lack of detailed information about website blocking costs to paint the policy as unfeasible and unfair to both ISPs and consumers. However, these claims should not be taken at face value. The fact that we have not heard any uproar over the costs of website blocking of sites that actively facilitate child pornography or terrorism shows that enacting these blocks is not prohibitively expensive. In line with this, UK courts noted that ISPs have already made much of the necessary investment in relevant technology, processes, and staff in response to other law enforcement requirements.

As discussed above, website blocking costs look reasonable, especially when compared against total ISP operating revenue and investments. The UK government and judges presiding over website-blocking cases have stated that IP address-blocking would require ISPs to make additional investment in network hardware, but that these costs were not substantial, in many cases had already been made (to abide by other law enforcement decrees), and therefore would not present a barrier to IP blocking. Furthermore, in a similar process to what is required for website blocking, some DNS software vendors already offer customers an

add-on to DNS systems that blocks malicious domains.(Ofcom, "Site Blocking."; Ron Moscona, "Website Blocking Orders - A New Tool in the Fight Against Online Trade in Counterfeit Goods," Dorsey, October 24, 2014, https://www.dorsey.com/newsresources/publications/2014/10/website-blocking-orders--a-new-tool-in-the-fight__.).

Critics claim that any measure to fight digital piracy will be abused by rights holders and that even the potential for such abuse is reason enough not to pursue online enforcement in the first place. This is why legislation and court orders in Australia, the United Kingdom, and elsewhere have built-in safeguards to ensure that only rights holders with high-quality cases—those involving websites that are dedicated to copyright infringement—are granted an injunction.....

CONCLUSION

As with any law-enforcement initiative, efforts to reduce digital piracy involve balancing costs and benefits. For example, while street crime could be reduced by doubling the number of police officers, communities seek an equilibrium where the marginal cost of an additional police office does not outweigh the benefits from a corresponding reduction in crime. Regarding digital piracy, it is hard to argue that this equilibrium has been reached—there remains a lot of societal benefit to be gained through better efforts to stop digital piracy. The extent of digital piracy is so large, and the costs of additional enforcement are so reasonable, that it is clearly in the public interest to take more aggressive steps to fight digital piracy.

There is a reason why website blocking is being used in a growing number of countries: It can be a reasonable and useful tool to reduce piracy and encourage consumption of legal content. For it to be effective and workable, it needs to be predictable, transparent, accountable, low-cost, and quick to implement.....

Many opponents focus on the fact there are technical ways to circumvent website- blocking orders. However, the CMU study and others show that these users make up a relatively small proportion of total Internet users—certainly not enough to render website-blocking orders ineffective. Some critics would say that if blocking a website is not effective all of the time, then it should not be used at all. This is the same weak argument used against virtually every type of countermeasure. Why bother locking a door, when it is possible for sophisticated thieves to pick the lock? The answer, clearly, is that most thieves are not that sophisticated.

Complex problems with no single solution benefit from multilayered solutions. The standard for effectiveness should not be, as

some opponents claim, elimination of all piracy. Reduction is an important goal, and on this point, the CMU study shows that website blocking can certainly help achieve this goal."

ARGUMENTS ON BEHALF OF LEARNED AMICUS CURIAE

13. Mr. Hemant Singh, learned Amicus Curiae stated that the first and foremost issue before this Court was to determine whether the websites complained of fell within the category of "*Flagrantly Infringing Online Locations*" (hereinafter referred to as 'FIOL'). He contended that the Court should not pass any orders against a website containing legitimate content and thus, the onus was on the plaintiff who was seeking site-wide blocking injunction to produce such evidence before the Court, which confirmed that the website complained of was only operating for sharing / downloading infringing/ pirated content and was not limited to the plaintiffs' contents but also third parties' content.

14. He stated that caution had to be undertaken as there could be a website which could have both infringing content of plaintiff and legitimate content of third parties. According to him, the FIOL would be only such website where there was no legitimate content and if the evidence produced before Court was not of such nature, then prayers of wide ramification, interfering with legitimate content should not be granted.

15. Learned Amicus Curiae stated that upon assessing the injuncted and blocked website www.bmovies.pro, he had been redirected to www4.fmovies.to, a mirror website, which showed that 29,485 movies/ TV series were arranged in an alphabetical manner. He stated that each alphabet depicted the total number of movies/TV series available e.g. under alphabet

'A', 1935 movies/TV Series were available, under alphabet 'B', 1913 movies/TV Series were available, under alphabet 'C', 1584 so on and so forth.

16. He pointed out that there were at least 122 other movies of the plaintiffs on www4.fmovies.to. Learned Amicus Curiae stated that the plaintiffs had not fully checked their own movies on the said website, let alone third-party content. He contended that the least due diligence expected of the plaintiffs was to provide evidence of at least all of their own movies, if not of third parties (though expected) that were illegally available on the impugned websites.

17. He submitted that the "three-step verification" test evolved by the Bombay High Court in ***Eros International Media Vs. BSNL, Suit No. 751 of 2016***, which consisted of verification by an independent entity, extensive documents being placed on record and an affidavit on oath, was not satisfied in the present case. He contended that the evidence of the nature envisaged by courts was lacking in the present case. The relevant portion of the orders in ***Eros International Media*** (supra) relied upon by Mr. Hemant Singh are reproduced hereinbelow:-

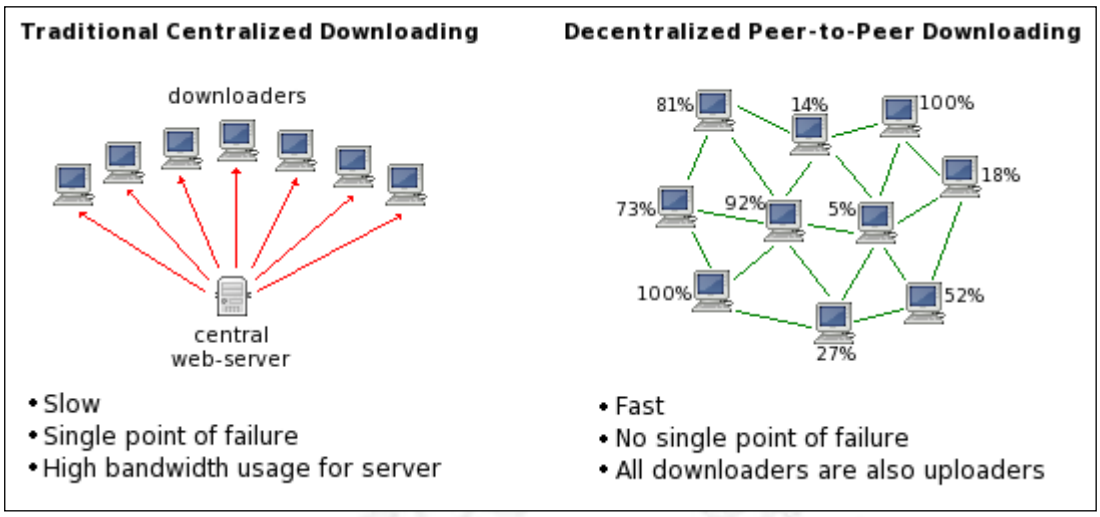
a) Order dated 22nd July, 2016

> *"2. I am making it clear that I will not grant an injunction or order to block URLs that point to websites unless it is demonstrated that the entirety of the website contains, and contains only, illicit material. Without that being attested to and established on Affidavit, I will not consider an order that results in the blocking of an entire website."*

b) Order dated 26th July, 2016

> *"14. Thus, what I have before me now is a three-step verification. First, a verification and an assessment by Aiplex* (Plaintiff). *This is accompanied by their letter in writing. There is then a second level of verification that is said to have been done by the deponent of the Affidavit along with the Plaintiffs' Advocates; and finally all of this material is placed on Affidavit and is now on oath. I think this is sufficient material on which to base an order."*

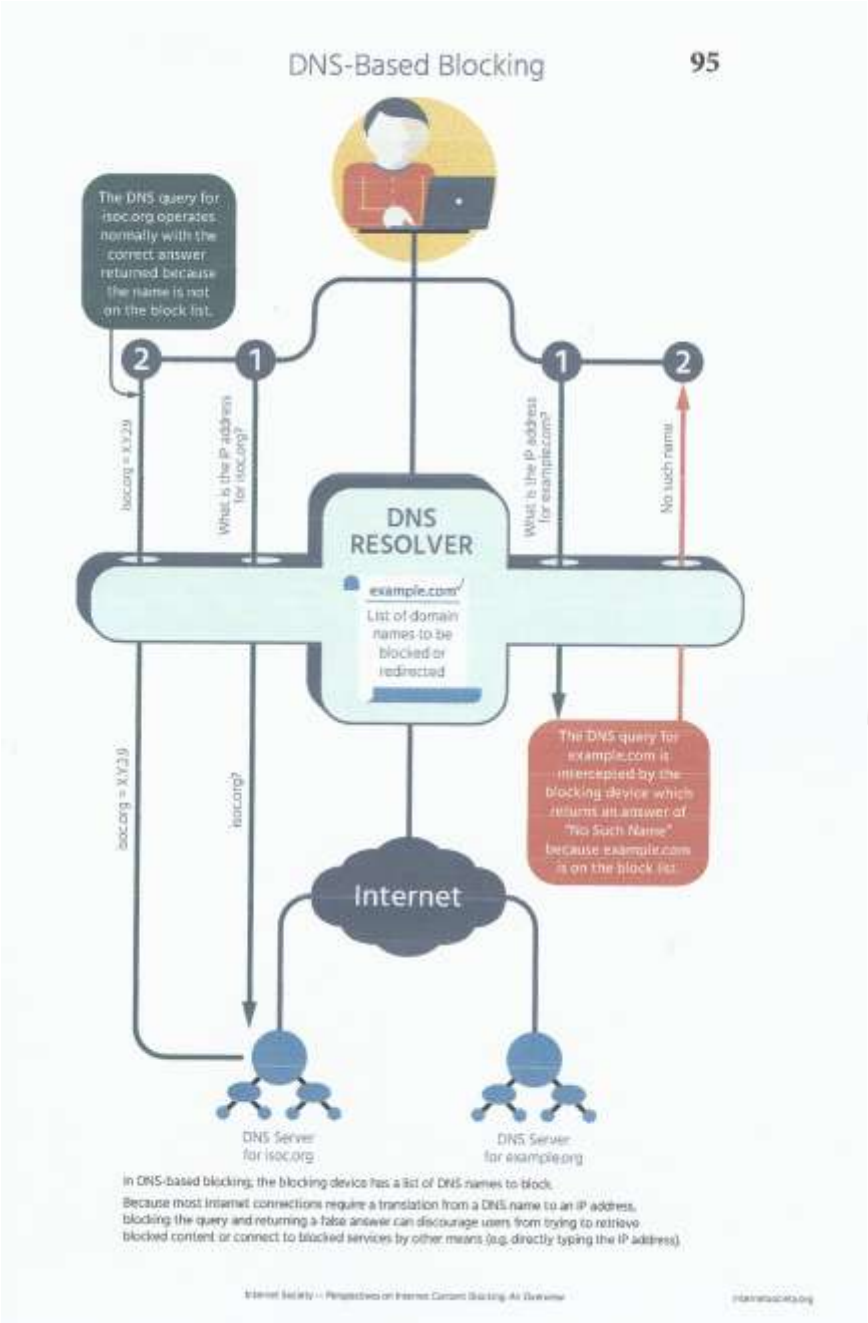
18. However, Mr. Hemant Singh, learned Amicus Curiae admitted that online piracy was a menace. He stated that the problem was compounded due to high end technology that was used by FIOL. He pointed out that certain FIOLs like Torrents do not have a centralized server whereupon files are stored. Instead, users download freely available specialized software, which once connected to the Internet, connects the user's computer into a Peer to Peer (P2P) network of other computers using the same software. He stated that a torrent is a file that allows a user to download bits and pieces of the content from several sources at the same time, which is assembled into the final complete copy onto the user's system. The content/data is stored on these systems (either completely or in bits or parts) and is made available for download through the specialized software. Given the scattered nature of the content as well as the inadvertent complicity of many persons, it becomes extremely difficult to pin-point the exact source of the content and for right-holders to take action. A helpful illustration of the P2P infrastructure, prepared by learned Amicus Curiae, is reproduced hereinbelow:



19. He pointed out that the courts across the world have grappled with devising appropriate mechanisms to prevent the menace of FIOL which largely included blocking of the specific URLs or the website in general. Some of the technical measures which had been employed to block, according to him, are reproduced hereinbelow:-

a. **DNS Name Blocking:**

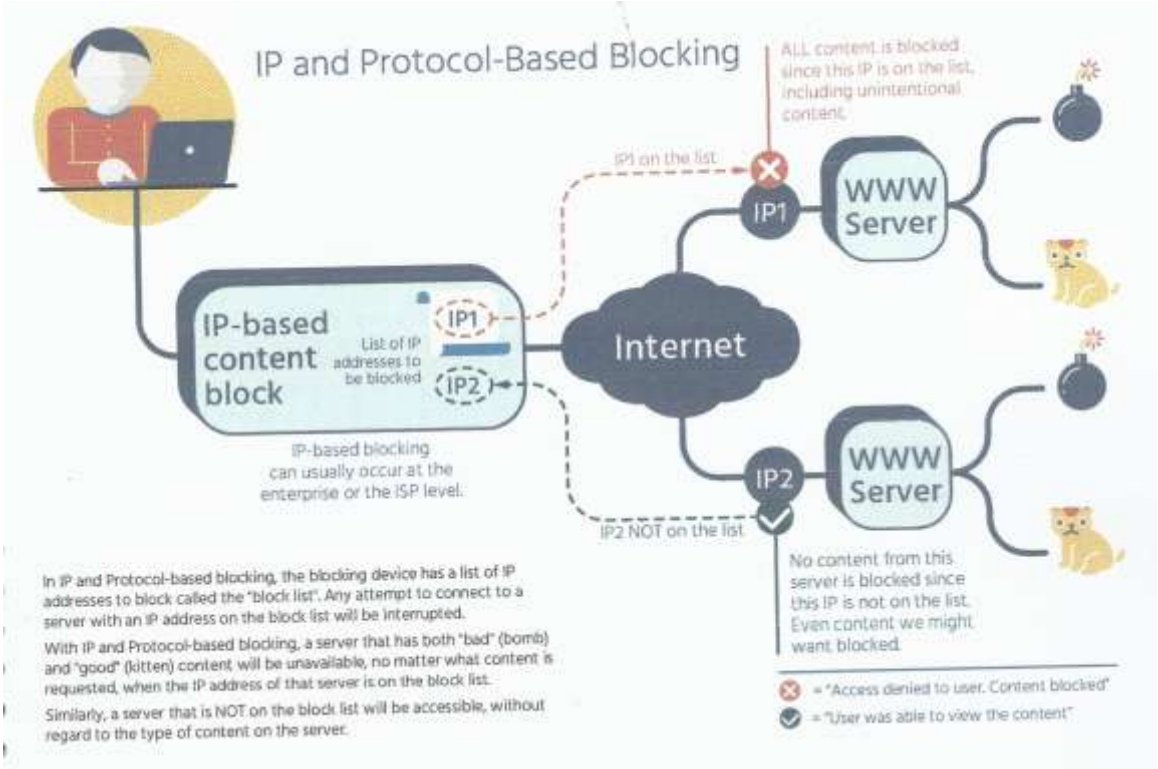
The 'Domain Name System' [DNS] is the system which associates the colloquial name of a website (www.example.com) to the IP address of the site's web server, whereupon the website is hosted. DNS name blocking involves an ISP removing or modifying its records of the IP address for a particular Domain Name, thus ensuring that requests for such domain name are rendered void.



b. **IP Address Blocking (IPB):**

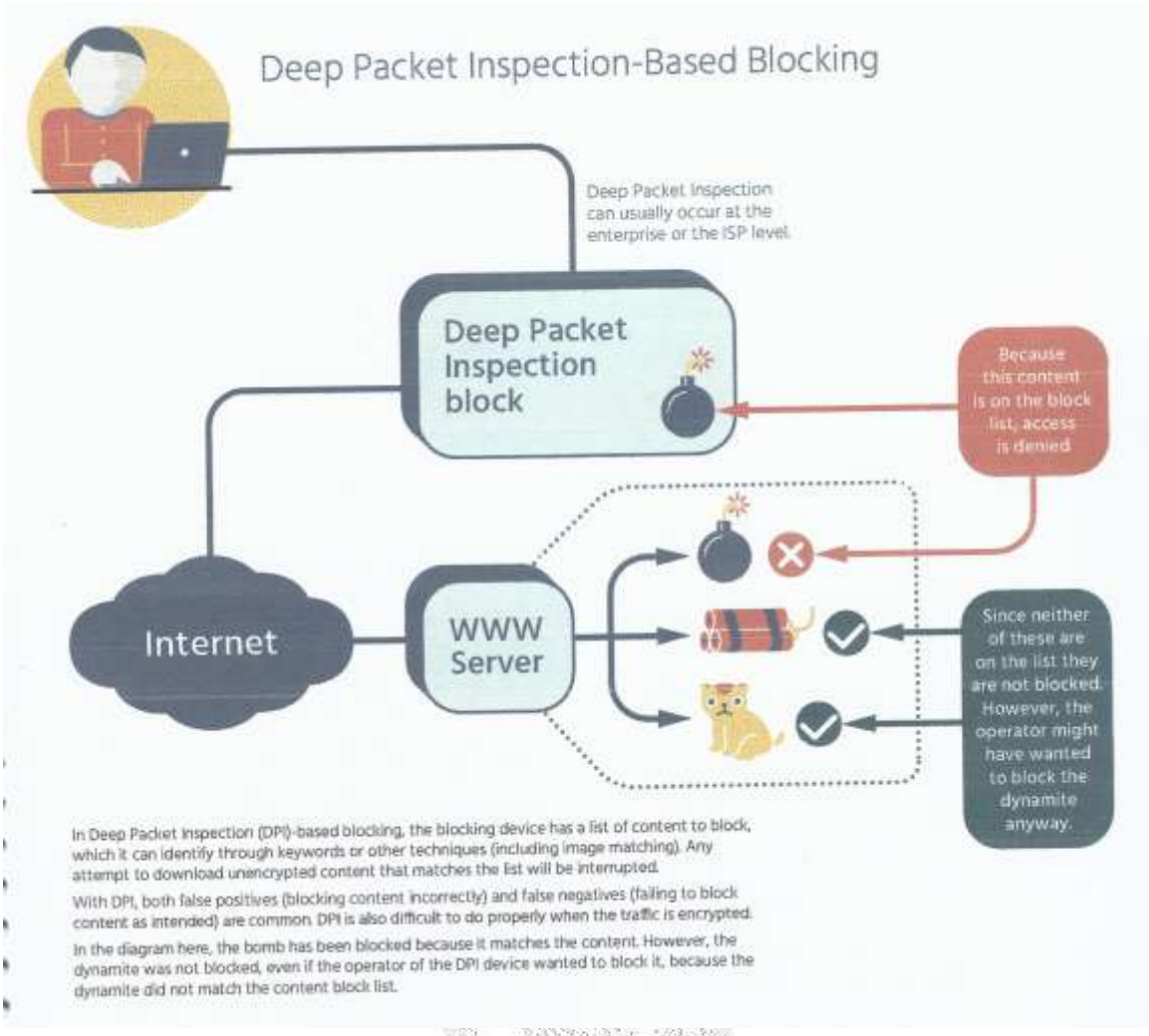
IP Address blocking involves ISPs discarding any traffic received from impugned IP address, as opposed to the website name. As several websites may be hosted on one server with a unique IP

address, each of them, no matter what their name, would be blocked in case the IP address is blocked.



c. **Deep Packet Inspection (DPI) based Blocking:**

This technique involves examining the data received as part of the internet traffic and filtering out specific content, patterns, or application types. DPI can be made on the basis of keywords or even image search. In case the data is found to contain the blocked content, the ISP shall block such content.



20. He admitted that the aforesaid measures of DNS, IPB and DPI blocking face challenges such as legitimate contents being blocked, invasion of privacy, high cost of deployment etc. He submitted that there was a serious concern associated with blocking orders that would prevent access to legitimate content in the cases of copyright.

21. According to him, Courts all over the world have considered the effect of over-blocking and have held that in order to ensure proper balance between the implementation of blocking injunctions and rights of the third-parties, it is essential to make sure that these blocking injunctions are

proportionate. The proportionality principle, according to him, is designed to ensure that interferences with rights is justified as being no more than necessary to protect the rights or to achieve other legitimate goals. The learned Amicus Curiae relied upon the following case law:-

A) ***Scarlet Extended SA v. Societe Belge des Auteurs Cornpositeurs et Editeurs SCRL, [Case C 70/10]:*** *The ECJ, when talking about a proactive blocking order that would involve pre-filtering of content by ISPs for an indefinite period, held that such an injunction would be inconsistent with the prohibition on monitoring with respect to E-Commerce Directive and would be a disproportionate interference with the right to protection of personal data and freedom of Internet users to receive and impart knowledge, particularly considering the likelihood of over-blocking. It was also held that the costs involved in establishing a filtering system will fail to strike a fair balance between the rights of the copyright holders and the ISPs' freedom to conduct its business since an ISP is a mere connectivity provider as opposed to a hosting provider and thus has a passive, neutral role. Therefore, proactive blocking orders in the nature of pre-filtering were considered contrary to law.*

B) ***UPC Telekabel v. Constantin Film, [Case C-314/12]:*** *The ECJ addressed the proportionality of an injunction ordering an ISP to block access to an identified website, but the order failed to specify the measures to be taken by an ISP. The ECJ held that an injunction must be 'strictly targeted', so as to strike a balance between preventing third-party infringements and protecting freedom of information. The Court refuted the claim that an injunction can only be proportionate if it leads to a complete cessation of infringements. It was held that as blocking orders can always be circumvented, and as an injunction against one site cannot prevent infringing content from being available elsewhere, accepting an 'absolute effectiveness' standard would mean that an injunction could never be justified. Thus, targeted injunction is permissible even where it does not lead to complete cessation of copyright infringement, provided that there is no*

unnecessary deprivation of possibility of lawfully accessing information and it makes access difficult or seriously discourages internet users from accessing the targeted sites.

C) ***Austria/CJEU (2014): UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and WegaFilmproducktionsgesellschaftmbH (Telekabel), Case C-314/12, 27 March 2014****: This case decided in March 2014 established "no fault" site blocking injunctions under Article 8.3 of the EU InfoSoc Directive, opening the way for broader implementation of site blocking throughout the European Union.*

- *Specifically, questions were posed by the Higher Regional Court, Vienna, Austria, essentially as to: 1) whether Article 8(3) of the EU InfoSoc Directive is to be interpreted as meaning that a person who makes protected subject-matter available on the internet without the rightholder's consent is using the services of the Internet service providers, and therefore, the Internet service provider is an "intermediary" within the meaning of Article 8(3); and 2) whether it is compatible with EU law to prohibit an internet access provider from, allowing its customers access to a certain website when the material available on that website is provided exclusively or predominantly without the rightholder's consent.*

- *The Court answered in the affirmative and the Court of Justice of the European Union laid the groundwork for national Courts to (as the Court had in Newzbin 2) issue a broad injunction against an Internet service provider to block websites. The CJEU found that an injunction would not infringe upon the fundamental right to conduct business because the ISP was free to decide upon the measure to be put in place to protect against this type of copyright infringement. The injunction would also allow Telekabel to avoid liability by showing that it has taken all necessary precautions, essentially confirming a "no fault" injunction approach in the EU.*

D) ***Germany (2015): GEMA v Deutsche Telekom, BGH, Urteile v. 26 (GEMA), November 2015 - I ZR 3/14 und I ZR***

***174/14**: Germany's Federal Constitutional Court (BGH) in late 2015 confirmed that site blocking does not breach privacy rights under both German and EU law, and is consistent with the German Constitution.*

- *In analyzing whether site blocking can be consistent with Article 10(1) of the German Constitution (right of privacy of telecommunications), the Court noted, "[t]he starting point for the protection in Art. 10 (1) ... is always the non-public exchange of specific communications of participants; in contrast, communications addressed to the general public are not covered by this provision."*

- *The Court found, "a site providing links to downloads on the internet directed at an unspecific number of addressees does not constitute confidential individual communication; rather it is, a public offering, not covered by the scope of protection of Art. 10 (1) ...." The Court also concluded that DNS blocking "does not affect the confidentiality of communication protected under Art. 10 (1)...." The Court weaves a path for IP or URL blocking as well,[13] but is more emphatic about DNS blocking's conformity with the German Constitution, noting DNS blocks are inherently unproblematic in this basic point as the establishment of connections is simply prevented - without access to IP addresses. According to the Court, offering files for public download and accessing those files does not constitute an individual communication protected by Article 10 of the German Constitution.*

- *Further, "[t]he fact that access to a public offer of a download occurs in each case through means of individual technical communications. connections does not justify a classification as communication within the meaning of Art. 10 (1) German Constitution, because a mere technical communication does not exhibit the specific risks for the privacy of the communication which that provision protects.... Such access actually constitutes a public form of communication comparable to the use of mass media....."*

- *Importantly, and addressing one of the key objections to site blocking, the Court further concluded, "the (automated) obtaining of knowledge, on the part of the provider, of the circumstances of communication is limited to that necessary to interrupt the communication." This is consistent with prior rulings that there is no interference with the fundamental right to privacy "in the case of the recording of telecommunications events, provided they are recorded purely using technical means, anonymously and without trace and are immediately filtered out without any interests of the authorities in gaining knowledge, thereof." The Court also examined site blocking in light of the EU's strict privacy rights provisions, and the EU Charter of Fundamental Rights, finding site blocking to be consistent with both. Specifically, the Court concluded that site blocking does not breach Article 7 of the EU Charter of Fundamental Rights, since the purpose of the right - protecting " the confidentiality of communication which is directed at particular addressees and not at the public" - is not affected by the blocking of public offerings of downloads or access to them." This is consistent with site blocking decisions in other EU jurisdictions. While the case itself did not result in the first site block in Germany, it can be said the GEMA case paved the way for the Constantin decision to come.*

E) ***Germany (2018): Constantin Film Verleih GmbH v. Vodafone Kabel Deutschland GmbH (2018) (Case number: 7 O 17752/17) (Constantin)****: In this landmark decision handed down in February 2018, the Munich District Court ordered site blocking in Germany for the first time.*

- *The Court ruled that Vodafone had to bear the implementation costs (and had to pay rights holder Constantin's legal costs). In arriving at its decision, the Court applied the German Telemedia Act, and applied the secondary liability doctrine of Storerhaftung, and the Court's decision is consistent with Germany's obligations under Article 8.3 of the EU InfoSoc Directive.*

- *Vodafone appealed the decision in March, but on June 14, after an oral hearing before the Court of Appeal Munich, the three-judge panel denied the appeal unanimously.*

22. Mr. Hemant Singh lastly contended that if the obligation of an ISP is limited to particular domain names, it would make the whole issue of granting blocking injunctions pointless, since there exists high likelihood of the infringers operating under a different domain name as soon as or even during the time the injunction is granted. He pointed out that recently, the Milan Court of First Instance *[http://ipkitten.blogspot.com/ 2018/08/milan-court-issues-dynamic-blocking.html]* ruled that Dynamic Injunctions are compatible with the E-commerce Directive. He submitted that this Court can exercise powers under Section 151 CPC to pass dynamic injunction limited to the mirror/re-directed FIOL. He, however, stated that caution of supervision needed to be exercised to prevent misuse and overreach. He suggested that the Court should direct the plaintiffs to file detailed affidavits before the learned Joint Registrar who may examine whether the website sought to be included in the affidavit is a mirror FIOL or not. He stated that once the learned Joint Registrar is satisfied, such orders may be extended.

NEITHER THE ISPs OR DoT OR MEITY ADVANCED ANY ARGUMENTS

23. Neither the DoT nor MEITY advanced any arguments before the Court. Even the ISPs to maintain their neutrality did not advance any arguments. Learned counsel for ISPs as well as DoT and MEITY stated that they would abide by any order passed by this Court.

THOUGH THIS COURT IS SATISFIED THAT THERE IS NO FACT WHICH NEEDS TO BE PROVED IN VIEW OF THE DEEMED ADMISSION BY THE DEFENDANTS UNDER ORDER VIII RULE 10 CPC, YET KEEPING IN VIEW THE SEMINAL ISSUES THAT ARISE FOR CONSIDERATION, THIS COURT DECIDES TO PEN ITS OPINION

24. Despite being served through the contact information provided in the Whois details and/or other publicly available information, none of the defendant-websites have chosen to rebut or challenge till date any of the factual assertions or the evidence placed by plaintiffs in support of their claims. Though this Court is satisfied that there is no fact which needs to be proved in view of the deemed admission by the defendants under Order VIII Rule 10 CPC, yet keeping in view the seminal issues that arise for consideration, this Court decides to pen its opinion.

COURT'S REASONING

THE GENERAL INDUSTRY EVIDENCE APPEARS CONSISTENT WITH A HYPOTHESIS THAT DIGITAL PIRACY HAS HURT THE MOVIE INDUSTRY. IN FACT, ONLINE PIRACY HAS HAD A VERY REAL AND TANGIBLE IMPACT ON THE FILM INDUSTRY AND RIGHTS OF THE OWNERS.

25. According to the report *'The Economic Impacts of Counterfeiting and Piracy'* prepared for BASCAP and INTA, *the general industry evidence appears consistent with a hypothesis that digital piracy has hurt the movie industry*. Revenues for sales and rentals of pre-recorded movies in the U.S. declined by more than 20% between 2005 and 2010 after having increased steadily until then. Box office revenues have remained relatively constant during the same period although a gradual 47% rise over the decade leading

upto 2002 might have suggested an upward trend if it were to continue at the same pace.

26. In fact, the introduction of BitTorrent in 2003-04 has coincided with the turning point in the revenues of the film industry. This statement is based on the fact that the ease with which copyrighted material can be copied and shared online across jurisdictional borders makes it challenging for right holders to protect their works as they do in the offline world where customs agents can typically intercept physical goods, such as CDs and DVDs, that contain illegal copies of songs, movies, TV shows and other content. It is estimated that by the end of 2022 (*See https://cdn.iccwbo.org/content/uploads/ sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf*), the loss of legitimate revenue on account of film piracy would reach $289-644 billion.

27. Mr. Nigel Cory in his Article "*How Website Blocking Is Curbing Digital Piracy Without "Breaking the Internet"* (supra) points out that a 2016 study by the European Union's Intellectual Property Office highlights the size and scale of the piracy. It estimated that the European music industry lost €170 million in sales revenue in 2014 as a consequence of digital piracy. This equals a loss of 5.2 percent of its total annual sales (both physical and digital) to piracy. When indirect economic impacts are included, digital piracy is estimated to lead to €336 million in lost sales in the European Union, which leads to an estimated 2,155 lost jobs. This has real economic consequences, as approximately 39 percent of total economic activity and 26 percent of all employment in the European Union is in intellectual property-intensive industries, with another 9 percent of jobs supported by the economic activity of these industries.

28. It is estimated that in India, while the film industry earns around $2 billion from legitimate sources such as screening at theaters, home videos and TV rights, piracy earns 35 per cent more at $2.7 billion (*See:home.kpmg.com/in/en/home/events/2017/03/kpmg-india-ficci-media-entertainment-report-2017.html*). According to the Irdeto Global Consumer Piracy Threat Report 2018, India is one of the top five countries with the highest P2P downloads taking place, as close to 965 million P2P downloads took place in India between January 2017 and May 2018.

29. It is important to realise that piracy reduces jobs, exports and overall competitiveness in addition to standards of living for a nation and its citizens. More directly, online piracy harms the artists and creators, both the struggling as well as the rich and famous, who create content, as well as the technicians–sound engineers, editors, set designers, software and game designers–who produce it and those who support its marketing, distribution and end sales. Consequently, online piracy has had a very real and tangible impact on the film industry and rights of the owners.

THE INDIAN COPYRIGHT ACT CONFERS A BUNDLE OF EXCLUSIVE RIGHTS ON THE OWNER OF A "WORK" AND PROVIDES FOR REMEDIES IN CASE THE COPYRIGHT IS INFRINGED. THIS COURT IS OF THE OPINION THAT IT HAS AMPLE POWERS TO MOULD THE RELIEF TO ENSURE THAT THE PLAINTIFFS' RIGHTS ARE ADEQUATELY PROTECTED.

30. The Indian Copyright Act, 1957 ("the Copyright Act") confers a bundle of exclusive rights on the owner of a "work" and provides for remedies in case the copyright is infringed. The relevant portion of

Statement of Objects and Reasons of the Copyright (Amendment) Act, 1994, is reproduced hereinbelow:-

> *"Effective copyright protection promotes and rewards human creativity and is, in modern society, an indispensable support for intellectual, cultural and economic activity. Copyright law promotes the creation of literary, artistic, dramatic and musical works, cinematograph films and sound recordings by providing certain exclusive rights to their authors and creators…."*

31. Section 2(y) of the Copyright Act defines "work" as including a cinematograph film, which is defined under Section 2(f). The said sections read as under:-

> *"2(y) "work" means any of the following works, namely:-*
>
> *(i) a literary, dramatic, musical or artistic work;*
> *(ii) **a cinematograph film**;*
> *(iii) a sound recording;*
>
> *2(f) **"cinematograph film" means any work** of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films*;"

32. Section 14 specifies the exclusive rights of the owners. Section 14(d) provides that communication to the public of a cinematograph film or any substantial part thereof is one such exclusive right. The relevant portion of the said Section is reproduced hereinbelow:-

> *"14. **Meaning of Copyright***
>
> *For the purposes of this Act, **"copyright" means the exclusive right** subject to the provisions of this Act, to do or authorise the doing of any of the following acts **in respect of a work or any substantial part** thereof, namely:-*

xxxx xxxx xxxx xxxx

(d) ***in the case of a cinematograph film****,--*

(i) ***to make a copy of the film, including****-*

(A) a photograph of any image forming part thereof; or

(B) storing of it in any medium by electronic or other means;

(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;

(iii) ***to communicate the film to the public****."*

33. Section 2(ff) defines "**communication to the public**". It reads as follows:-

> *"2(ff) "**communication to the public" means making any work** or performance **available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion** other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.*
>
> *Explanation.— For the purposes of this clause, **communication through satellite or cable or any other means** of simultaneous **communication to more than one household or place of residence** including residential rooms of any hotel or hostel **shall be deemed to be communication to the public**;"*
>
> (emphasis supplied)

34. The above definitions make it clear that making any work available for being seen or heard by the public whether simultaneously or at places chosen individually, regardless of whether the public actually sees the film, will constitute communication of the film to the public. The intent was to include digital copies of works, which would include within its scope digital copies of works being made available online (as opposed to the physical

world). Communication can be by various means such as directly or by display or diffusion. In this context, definition of "broadcast" is also relevant which identifies communication to public by wireless diffusion or by wire. Thus, making available of a film for streaming or downloads in the form of digital copies on the internet is within the scope of "communication to the public".

35. It is pertinent to note that the definition of "communication to the public" was first added in the Copyright Act by the 1983 Amendment and was as follows:-

> *"Communication to the public" means communication to the public in whatever manner, including communication though satellite".*

36. Subsequently, as is evident from the Statement of Objects and Reasons of the 1994 Amendments, various amendments were brought to incorporate the technological advances. The 1994 Amendments substituted a more expansive definition of "communication to the public" in order to address various technological advances, which was as follows:-

> *2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.*
>
> *Explanation.— For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;*

37. The Copyright Act was further amended in 2012 to partially implement obligations under the 1996 WIPO Internet Treaties (WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), in light of the substantial developments in technology with the aim of protecting copyright in the digital context.

38. Section 51(a)(i) provides that copyright is infringed when any person, without authorisation of the copyright owners, does anything of which the exclusive right lies with the owner of copyright. Thus, the defendants' websites, which are communicating the films to the public by making the films available for being seen or heard or enjoyed through their websites, are infringing the plaintiffs' copyrights in the film.

39. Additionally, Section 51(a)(ii) imposes liability on owner of a place when such owner permits his place to be used for communication of the film to the public for profit, without authorisation of the copyright owner. Such liability can be avoided only if the owner of the place is able to establish that he was not aware and had reasonable ground to believe that the communication of the work in his place was not an infringement.

40. Section 52(1)(c) of the Copyright Act exempts from liability, any transient or incidental storage of a work for the purpose of providing access to content where such access has not been expressly prohibited by the copyright. Thus, ISPs are exempt from liability of copyright infringement under Section 52(1)(c) for any transient or incidental storage of a film. However, the proviso to this section mandates that if a complaint is received, an ISP shall restrain access to content for a period of twenty-one days or upon receiving a competent court order. Pertinently, if no such order

is received by the ISP within twenty-one days, the proviso permits the ISP to reinstate access to the stored film.

41. In the present cases, no defendants' website has appeared before this Court or answered any notice claiming a limitation of liability under any provision including Section 52(1)(c) of the Copyright Act.

42. The Information Technology Act, 2000 ("IT Act") incorporates the defence of safe habour for the intermediaries. It defines an intermediary under Section 2(1)(w), as including ISPs. The IT Act, under Section 79, creates a safe harbour for all intermediaries from liability for any third-party data, information or communication link that is made available by the ISP. Such exemption applies when the function of ISPs is limited to providing a communication system over which third party information is transmitted or temporarily stored. However, copyright is not included in the activities to be covered under the IT Act, so is generally inapplicable to this batch of matters.

43. Further, while dealing with Section 79 and the issue of extent of knowledge of an intermediary for it to act and take down content, the Supreme Court in ***Shreya Singhal vs. Union of India, (2015) 5 SCC 1*** has held that the requisite knowledge which obligates an intermediary to act is when it receives a Court order directing the blocking of access. Mere receipt of notice does not obligate the intermediaries to act and take down content. The relevant portion of the judgment of ***Shreya Singhal vs. Union of India*** (supra) is reproduced hereinbelow:-

> *"121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by*

a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).''

44. Subsequently, a Division Bench of this Court in ***Myspace Inc. v. Super Cassettes Industries Ltd., 2016 SCC OnLine Del 6382*** has held that though Section 79 grants a measured privilege to an intermediary, yet that does not mean that the rights guaranteed under the Copyright Act are curtailed in any manner. All that Section 79 does is to regulate the liability in respect of intermediaries, while the Copyright Act grants and controls rights of a copyright owner.

45. In any event, the plaintiffs herein do not seek to block Websites based on mere notices, although, with respect to mirrors and redirects (additional domain names, IP addresses, and URLs discovered to provide access to the same FIOL complained of), the plaintiffs contend that this Court may issue an order providing that plaintiffs may, by notification to the ISPs, add such additional means of accessing the FIOL's to the original orders.

46. Section 69A of the IT Act creates an administrative remedy empowering the Central Government to block access to any information on the grounds of-

(i) Interest of sovereignty and integrity of India

(ii) Defence of India

(iii) Security of State

(iv) Friendly relations with foreign States, or

(v) Public order

47. Copyright infringement does not fall within the suo motu powers of the Central Government to direct blocking. To be fair to the plaintiffs, they also did not seek to invoke the Government's powers under the IT Act. Rather the claim of the plaintiffs is based on this Court's jurisdiction to issue orders under the Copyright Act.

48. In the opinion of this Court, the defendant-websites are liable for copyright infringement under Section 51 of the Copyright Act. They cannot claim the exemption of Section 52(1)(c) as they are not entities that transiently and incidentally store the plaintiffs' films. They further cannot claim the exemption under Section 79 of the IT Act as they are not intermediaries.

49. Section 55 of the Copyright Act provides civil remedies to the rights holders which includes entitlement to an injunction order on approaching the Court. Consequently, the Court has ample inherent powers to mould the relief to ensure that the plaintiffs' rights as copyright owners are adequately protected.

WHETHER AN INFRINGER OF COPYRIGHT ON THE INTERNET IS TO BE TREATED DIFFERENTLY FROM AN INFRINGER IN THE PHYSICAL WORLD ?

50. However, many believe that Internet is a unique highway or a separate space (i.e. Cyberspace) to be left totally free i.e. unrestricted. They believe that this space should be left free to be used by an infringer or by a law abiding individual simultaneously. Internet exceptionalists, such as the Electronic Frontier Foundation, are defined by the belief that because the Internet is exceptional, most rules that apply offline should not apply online. Followers of this school of thought believe that the Internet is first and foremost about individual freedom, not about collective responsibility. Their view is that the Internet's chief function is to liberate individuals from control by, or dependence on Government and Corporations. They believe in the maturity of the public. The followers of this school of thought acknowledge that online piracy comes at the cost of legal sales, but they rationalize this loss by saying that it only hurts the profits of content firms, implying that if the choice is between infringement that rewards consumers with free content versus legality that helps corporations, then the former is to be preferred.

51. However, this Court finds that the majority of piracy websites are in it not for any ideological reason but for one reason: to make money. Modern digital piracy is a multibillion-dollar international business. (Only a small fraction of sites are supported by ideologies which believe that piracy is a social good.) For example, the owners of The Pirate Bay were earning $3 million a year, according to Swedish prosecutors. More recently, U.S. law enforcement stated that one of the world's most popular piracy sites—KickassTorrents—was making $16 million annually in advertising.

52. Business models differ, but the majority of piracy sites make money via advertising, or to a lesser degree, through subscriptions that provide premium access to content without advertising. The Digital Citizens Alliance's Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business report showed that 589 of the largest piracy sites generated more than $200 million in advertising-driven revenues in 2014. Another report showed that 80 percent of the top piracy websites (550 of 622) in Europe carried advertising, showing how easy it is for piracy sites to profit from online advertising and how profit-driven these sites are. Piracy sites take advantage of the fact that the online economy has become more complex and easier to exploit. There are many intermediaries that aggregate ad space—known as an ad exchange—from a range of websites (both legitimate and illegitimate) for advertisers to use. This makes it easy for websites hosting illegal content to gain advertising revenue, including from legitimate brands and businesses, which may be several steps and organizations removed from the host site.

53. Also should an infringer of the copyright on the Internet be treated differently from an infringer in the physical world? If the view of the

aforesaid Internet exceptionalists school of thought is accepted, then all infringers would shift to the e-world and claim immunity!

54. A world without law is a lawless world. In fact, this Court is of the view that 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 distinction.

WHETHER SEEKING BLOCKING OF A WEBSITE DEDICATED TO PIRACY MAKES ONE AN OPPONENT OF A FREE AND OPEN INTERNET ?

55. If the views of Internet exceptionalists were to be accepted, then a boon like Cyberspace would turn into a disaster. Further, just as supporting bans on the import of ivory or cross-border human trafficking does not make one a protectionist, supporting website blocking for sites dedicated to piracy does not make one an opponent of a free and open Internet. Consequently, this Court is of the opinion that advocating limits on accessing illegal content online does not violate open Internet principles.

56. The key issue about Internet freedom, therefore, is not whether the Internet is and should be completely free or whether Governments should have unlimited censorship authority, but rather where the appropriate lines should be drawn, how they are drawn and how they are implemented.

WHAT IS A 'ROGUE WEBSITE'?

57. One of the key issues around digital piracy is the importance of distinguishing between accidental and intentional piracy. Some experts are apprehensive that anti-piracy orders can go too far, sweeping in the former

when they should be more focused on the latter. There are risks that cleverly drafted plaints could intentionally harm sites that are largely focused on legal material and that diligently work to limit infringing material. But one also knows that doing nothing contributes to further piracy. In the opinion of this Court, finding this balance does not mean abandoning efforts to go after international piracy.

58. Music and film piracy are primarily facilitated on the net by FIOLs or Rogue Websites. They are those websites which primarily and predominantly share infringing/ pirated content or illegal work (*See: Para 2 of Order dated 29.07.2016 in DEITY Vs. Star India Pvt. Ltd, FAO (OS) 57/2015*). Either these websites, themselves allow streaming of content or provide a searchable database with links to third-party FIOLs. The Registrant details of these websites are unknown and any or all contact information is masked/blocked. Even the Ad Networks employed on these websites are not run-of-the-mill popular networks, but obscure Ad Networks, with equally anonymized credentials. These websites invite consumers for watching free movies/contents. Although, some of these websites feebly claim to only provide links to third-party websites and not host content on their servers, yet their entire module/interface is premised on allowing users to watch pirated releases/movies by way of links, and which account for all the content available on their sites.

59. In the opinion of this Court, some of the factors to be considered for determining whether the website complained of is a FIOL/Rogue Website are:-

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; and
i. the volume of traffic at or frequency of access to the website;
j. Any other relevant matter.

60. This Court clarifies that the aforementioned factors are illustrative and not exhaustive and do not apply to intermediaries as they are governed by IT Act, having statutory immunity and function in a wholly different manner.

WHETHER THE TEST FOR DETERMINING A ROGUE WEBSITE IS QUALITATIVE OR A QUANTITATIVE ONE?

61. This Court finds that globally, Courts examine whether the primary purpose and effect of the website is to facilitate infringement as opposed to examining purely the quantity of infringing content on the website.

62. Indeed, in the case of ***Eros International Media Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors., Suit No.751/2016***, as suggested by the learned Amicus Curiae, a learned Single Judge of the Bombay High Court held that for a blocking order to be passed against the entirety of a website, it must be shown by the plaintiffs that they have found the entire website to contain only illicit and infringing material with no legitimate content whatsoever. The Bombay High Court in the said case had raised certain doubts regarding the veracity of the evidence filed by the plaintiffs in that case because after a random check of the evidence, it was observed that some evidence was filed seeking blocking of resale of genuine CDs of a film as well. It was in this context that the Court formulated a three step verification process, which the Court directed ought to be followed in future matters where blocking orders are sought. The three-steps included:

a. A verification and assessment by an external agency of the web links and URLs that are infringing, accompanied by a letter in writing;
b. A second level of verification by the deponent of the Affidavit along with the Plaintiffs' Advocates; and
c. The said Affidavit is on Oath.

63. However, in the case of ***Department of Electronics and Information Technology v. Star India Pvt. Ltd., FAO(OS) 57/2015,*** a Division Bench of this Court followed a qualitative approach instead of the quantitative approach suggested by the Bombay High Court by observing that the rogue websites are overwhelmingly infringing and therefore prima facie the stringent measure to block the website as a whole was justified. It further held that blocking of specific URLs will not be sufficient due to the ease with which a URL can be changed. The task of continuously identifying each offending URL would be a gargantuan task and at the same time would be useless as the rogue websites could change these URLs within seconds. Relevant portion of the Division Bench judgment is reproduced hereinbelow:-

> *"11. The steps to change a URL would require, to firstly access the source code of the infringing website and then change the alpha-numeric character string of the URL. This could be as easy as changing the password of one's e-mail ID. This would mean that if the URL of a rogue website is blocked, the operator can simply log into the website source code and change the URL akin to a person changing one's password. To give an example, a rogue website www.abc.com whose URL is www.abc.com/india-v-pakistan, can simply log into the website source code and insert the letter 's' after the letter 'v' and change the URL to www.abc.com/india-vs-pakistan. Thus, if the URL www.abc.com/inidia-v-pakistan is blocked, the infringer can start operating on the URL www.abc.om/india-vs-pakistan within a few seconds. But, if a domain name itself is blocked, to continue with the infringing activity becomes a cumbersome, time consuming and money spending exercise. A new domain name has to be created and purchased apart from purchase of a fresh hosting server space. The entire exercise of creating a website has to be undertaken.*

12. Suffice it to sate that where infringement on the internet is not in dispute, a judicial response must factor in the comparative importance of the rights that are engaged because the very act of infringement is the justification for interfering with those rights. Therefore, the availability of alternative measures which are less onerous need to be considered. The cost associated with the measures which would include the cost of implementing the measures, also has to be taken into account. The efficacy of the measures which are ordered to be adopted by the ISPs have also to be kept in mind.

13. Now, an ISP could argue that the lesser measure to block the URL would suffice. This argument stands to logic and reason, but would have no content where the offending activity by the rogue website is to carrying on hardly any lawful business and in its entirety or to a large extent, piracy is being resorted to.

14. The respondent has placed enough material in the suit to show that the rogue websites are indulging in rank piracy and thus prima facie the stringent measure to block the website as a whole is justified because blocking a URL may not suffice due to the ease with which a URL can be changed, and as noted above, the number of URLs of the rogue websites range between 2 to 2026 and cumulatively would be approximately 20,000. It would be a gargantuan task for the respondent to keep on identifying each offending URL and especially keeping in view that as and when the respondent identifies the URL and it is blocked by the ISP, the rogue website, within seconds can change the URL thereby frustrating the very act of blocking the URL."

64. The aforesaid Division Bench judgment, which is a binding judgment, is subsequent in time to the Bombay High Court order.

65. Moreover, the Bombay High Court order was passed in a *quia timet* action for an injunction order against the potential infringement of a movie that was yet to be released. The evidence that was filed, related to past

infringements connected with other films of the plaintiffs. In such an instance, the learned Single Judge felt it was imperative to strictly follow the above three-step verification. However, the present case is based on actual infringement and not *quia timet* action.

66. Further, in the opinion of this Court, if the standard of proof proposed by the learned Amicus Curiae were to be applied, the burden on every right owner would be disproportionate and onerous as it would have to first identify the owners of each of the content available on a website (which could be thousands in number) and thereafter, seek a declaration from each of the owners that the content being provided is illegal and unauthorised. Such a test would virtually ensure that no website would ever be eligible for a takedown/blocking order and would render the right owners remediless.

67. In fact, the analysis of the learned Amicus Curiae of the defendant-websites is based purely on alphanumeric variation website which became alive subsequent to the blocking order and which re-directed one to the primary infringing website – a fact itself shows the rogue nature of the website.

68. This Court is also of the opinion 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!

69. Consequently, the real test for examining whether a website is a Rogue Website is a qualitative approach and not a quantitative one.

WHETHER THE DEFENDANT-WEBSITES FALL IN THE CATEGORY OF ROGUE WEBSITES ?

70. In the present batch of matters, there is sufficient evidence on record to show that the main purpose of each of the thirty websites (arrayed as defendants) is to commit or facilitate copyright infringement and the defendants' websites provide access to a large library of films, including films of the plaintiffs without their authorisation. The websites had been designed to facilitate easy access to cinematograph films, including the subject films, in breach of the copyright in those films. They contain indexes of the films, which are categorised including by quality, genre, viewership and ratings. Instructions to circumvent measures taken to disable access were also found on a number of these websites, as evidenced by screenshots of posts, which show the owner or operator of the websites informing users of a change of domain name for the websites. In fact, the infringing nature of the defendants' websites is apparent from the fact that their WHOIS detail is masked and no personal or traceable detail is available either of the Registrant or of the user; DMCA (Digital Millennium Copyright Act) declaration is an eyewash as despite receipt of legal notice from plaintiffs, infringing content is still being played and access to the online location had been disabled by orders of another country on the ground of copyright infringement. A chart showing the infringing nature of the defendant websites is reproduced hereinbelow:-

UTV Software Communications Ltd. & Ors. V. Bmovies.is CS(COMM) 768/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is	a) WHOIS detail is	@4

	copyright infringement	masked and no personal or traceable detail is available either of the Registrant or of the user. b) DMCA (Digital Millennium Copyright Act) declaration an eyewash as despite receipt of legal notice from plaintiffs, no action taken. c) Infringing content was still being played after receipt of legal notice	@145 & 158 @72
2.	Index/directories	Indexes/categories	@60 (homepage)
3.	Disregard for copyright	DMCA declaration not given effect to	@145
4.	Court Orders (International)	a) Australia	@259 and @ 265 [@263 & 272 also websites in suit]

UTV Software Communications Ltd. & Ors. V. Rarbg.is CS(COMM) 776/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright	a) WHOIS detail is masked and no	@5

	infringement	personal or traceable detail is available either of the Registrant or of the user. b) Legal Notices c) Content Playing after Legal Notice	 @ 175 @58
2.	Index/directories	Indexes/categories	@46
3.	Disregard for copyright	a) Legal Notices b) Content Playing after Legal Notice	@175 @58
4.	Court Orders (International)	a) Portugal b) Australia	@142-154
5.	Circumvention of court orders	Advertisement to unblock blocked websites	@18

UTV Software Communications Ltd. & Ors. V. Extratorrent.ag & Ors. CS(COMM) 799/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright infringement	a)WHOIS detail is masked and no personal or traceable detail is	@5

		available either of the Registrant or of the user. b) DMCA (Digital Millennium Copyright Act) declaration an eyewash as despite receipt of legal notice from plaintiffs, no action taken. c) Legal Notices d) Content Playing after Legal Notice	 @64 @158 @86
2.	Index/directories	Indexes/categories	@10
3.	Disregard for copyright	DMCA/VPN	@64
4.	Court Orders (International)	a) Portugal b) Australia	@168 to 175
5.	Circumvention of Court orders	DMCA/VPN	@64

UTV Software Communications Ltd. & Ors. V. Yts.am & Ors. (COMM) 778/2018

1.	Primary purpose is copyright infringement	a)WHOIS detail is masked and no personal or traceable detail is available either of	@5

		the Registrant or of the user. b) Legal Notice c)Content available after legal notice	@190 @88
2.	Index/directories	Indexes/categories	@ 23 (source page)
3.	Disregard for copyright	a) Legal Notice b) Content available after notice c) VPN	@190 @88 @161
4.	Court Orders (International)	a) Portugal b) Australia	@164 @166
5.	Circumvention of Court orders	VPN	@161

UTV Software Communications Ltd. & Ors. V. thepiratebay.org & Ors. CS(COMM) 777/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright infringement	a) WHOIS detail is masked and no personal or traceable detail is available either of the Registrant or	@5

		of the user. b) Legal Notices c) Content Playing after Legal Notice	 @130 @71
2.	Index/directories	Indexes/categories	@10
3.	Disregard for copyright	a) Legal Notices b) Content Playing after Legal Notice	@130 @71
4.	Court Orders (International)	a) Portugal b) Denmark	@116-117 @118, 120
5.	Circumvention of Court orders	VPN	@112

UTV Software Communications Ltd. & Ors. V. Fmovies.pe & Ors. CS(COMM) 770/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright infringement	a) WHOIS detail is masked and no personal or traceable detail is available either of the Registrant or of the user.	@4

		b) DMCA(Digital Millennium Copyright Act) declaration an eyewash as despite receipt of legal notice from plaintiffs, no action taken. c) Legal Notices d) Content Playing after Legal Notice	@149 @152 @34
2.	Index/directories	Indexes/categories	@34 @102-103
3.	Disregard for copyright	a) DMCA b) Legal Notices c) Content Playing after Legal Notice d) VPN	@149 @152 @34 @64

UTV Software Communications Ltd. & Ors. V. Torrentmovies.pe CS(COMM) 800/2018

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright infringement	a) WHOIS detail is masked and no personal or	@5

		traceable detail is available either of the Registrant or of the user. b) DMCA (Digital Millennium Copyright Act) declaration an eyewash as despite receipt of legal notice from plaintiffs, no action taken. c) Legal Notices d) Content Playing after Legal Notice	 @130 @149 @53
2.	Index/directories	Indexes/categories	@53-54
3.	Disregard for copyright	a) DMCA a) Legal Notices b) Content Playing after Legal Notice	@130 @149 @53

UTV Software Communications Ltd. & Ors. V. 1337x.to & Ors. CS(COMM) 724/2017

S.No.	Criteria	Particulars	Page No.
1.	Primary purpose is copyright	a) DMCA (Digital Millennium	@182

	infringement	Copyright Act) declaration an eyewash as despite receipt of legal notice from plaintiffs, no action taken. b) Legal Notices c) Content Playing after Legal Notice	 @213 @517 (Vol.3)
2.	Index/directories	Indexes/categories	@230
3.	Disregard for copyright	a) DMCA b) Legal Notices c) Content Playing after Legal Notice	@182 @213 @517 (Vo.3)
4.	Court Orders (International)	a) Portugal	@171

71. Consequently, in the present cases, the aforesaid "qualitative test" is satisfied for the following reasons:-

a) The rogue 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 rogue 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 rogue 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 websites has already been accepted by courts in other jurisdictions such as in Australia and the Plaintiffs have duly filed such orders before this Court. Consequently, the question of whether these 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 website and in order to avoid making it an impractical, costly, ineffective, non-fruitful and time consuming exercise.

g) The list of movies provided in the Plaint are admittedly an illustrative list and not an exhaustive one.

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

72. Accordingly, for the foregoing reasons, it is held that the defendant-websites are rogue websites.

IT IS VERY DIFFICULT FOR INDIA OR OTHER COUNTRIES TO BRING CASES AGAINST FOREIGN DIGITAL PIRACY SITES. ABSENT CHANGE IN ATTITUDE OF GOVERNMENTS OF SCOFFLAW NATIONS, INDIA LIKE OTHER COUNTRIES, WILL NEED TO WORK WITH INTERNET INTERMEDIARIES AS THE MAIN SOLUTION.

73. However, fighting digital piracy gets much harder at the international level. This is because many countries that are home to digital piracy sites have governments that will not or cannot shut them down, whether because there are weak or non-existent intellectual property protections or for geopolitical reasons. From a multilateral legal perspective, it is very difficult for India or others to bring cases against foreign digital piracy sites. To succeed, India requires the cooperation of the foreign governments where the site is hosted, and despite the fact that virtually every nation that acts as a haven for piracy sites is in the World Trade Organization and is a signatory to the multilateral agreement protecting intellectual property–the Trade related Aspects of Intellectual Property Rights (TRIPS) agreement– many nations refuse to address digital piracy in their own jurisdictions. But, does that mean that as IPR laws are territorial, they can be violated with impunity by an infringer/intellectual property infringer just because he has committed infringement through a server hosted abroad.

74. Governments across the world have grappled to find the most effective ways to address the issue of piracy of copyrighted works online. This Court is in agreement with Mr. Nigel Cory's view that absent changes to the WTO, or a change in attitude of governments of scofflaw nations, India like other countries will need to work with Internet intermediaries as the main solution.

WHETHER THIS COURT WOULD BE JUSTIFIED TO PASS DIRECTIONS TO BLOCK THE 'ROGUE WEBSITES' IN THEIR ENTIRETY ?

75. Website blocking has emerged as one of the most successful, cost effective and proportionate means to address this issue. As pointed out by the learned Amicus Curiae, website blocking can be of various kinds namely, Internet Protocol (IP) Address Blocking, Domain Name System (DNS) Blocking and Uniform Resource Locator (URL) Blocking.

76. In the opinion of this Court, the extent of website blocking should be proportionate and commensurate with the extent and nature of the infringement. In fact, a Court should pass a website blocking order only if it is satisfied that the same is *'necessary'* and *'proportionate'*.

77. While 'necessary' means a particular measure is essential to achieve that aim, i.e. whether there are other less restrictive means capable of producing the same result; 'proportionate' means it must be established that the measures do not have an excessive effect on the defendant's interest.

78. The proportionality principle requires that a '*fair balance*' be struck between competing fundamental rights, i.e., between the right to intellectual property on the one hand, and the right to trade and freedom of expression on the other. A Division Bench of this Court in ***Myspace Inc. v. Super Cassettes Industries Ltd.*** (supra) has observed as under:-

> *"... A further balancing act is required which is that of freedom of speech and privatized censorship. If an intermediary is tasked with the responsibility of identifying infringing content from non-infringing one, it could have a chilling effect on free speech; an unspecified or incomplete list may do that... In order to avoid contempt action, an intermediary would remove all such content, which even remotely resembles that of the*

content owner. Such kind of unwarranted private censorship would go beyond the ethos of established free speech regimes."

79. In fact, keeping in view the proportionality principle, the Courts have refrained from passing orders requiring pre-filtering and proactive monitoring of the Internet.

80. In the opinion of this Court, while blocking is antithetical to efforts to preserve a "free and open" Internet, it does not mean that every website should be freely accessible. Even the most vocal supporters of Internet freedom recognize that it is legitimate to remove or limit access to some materials online, such as sites that facilitate child pornography and terrorism. Undoubtedly, there is a serious concern associated with blocking orders that it may prevent access to legitimate content. There is need for a balance in approach and policies to avoid unnecessary cost or impact on other interests and rights. Consequently, the onus is on the right holders to prove to the satisfaction of the Court that each website they want to block is primarily facilitating wide spread copyright infringement.

81. It is pertinent to mention that this Court in ***Dr. Shashi Tharoor v. Arnab Goswami and Anr: 2017 SCC OnLine Del 12049***, has held that in India, the Courts have the power to pass the pre-publication or pre-broadcasting injunction, provided the two-pronged test of necessity and proportionality is satisfied.

82. One can easily see the appeal in passing a URL blocking order, which adequately addresses over-blocking. A URL specific order need not affect the remainder of the website. However, right-holders claim that approaching the Court or the ISPs again and again is cumbersome, particularly in the case of websites promoting rampant piracy.

83. This Court is of the view that to ask the plaintiffs to identify individual infringing URLs would not be proportionate or practicable as it would require the plaintiffs to expend considerable effort and cost in notifying long lists of URLs to ISPs on a daily basis. The position might have been different if defendants' websites had a substantial proportion of non-infringing content, but that is not the case.

84. This Court is of the view that while passing a website blocking injunction order, it would have to also consider whether disabling access to the online location is in the public interest and a proportionate response in the circumstances and the impact on any person or class of persons likely to be affected by the grant of injunction. The Court order must be effective, proportionate and dissuasive, but must not create barriers to legitimate trade. The measures must also be fair and not excessively costly (See: ***Loreal v. Ebay, [Case C 324/09]***).

85. In ***Cartier International AG vs. British Sky Broadcasting Limited, [2014]EWHC 3354 (Ch)***, it has been held by the Hon'ble Mr Justice Arnold that alternate measures are not effective and not a complete answer to rampant piracy. The relevant portion of said judgment is reproduced hereinbelow:-

> *"Availability of alternative measures*
>
> *197. The ISPs' arguments and evidence in the present case focussed heavily on the availability of alternative measures…*
>
> *198. Action against the operators. The first step which Richemont could take, and have taken, is to send cease and desist letters to the named registrants of the domain names as identified by a WHOIS search. Unsurprisingly,*

these letters were simply ignored…. Accordingly, I do not consider that this is a realistic alternative measure.

199. Notice and takedown by hosts. The second step which Richemont could take, but have not taken, is to send notices to the hosts of the Target Websites demanding that the Target Websites be taken down…

xxx xxx xxx

201. More importantly, Richemont contend that notice and takedown is ineffective because, as soon as an offending website is taken down by one host, the almost invariable response of the operator is to move the website to a different host…. Accordingly, I consider that, while Richemont are open to criticism for not even having attempted to use this measure, it is unlikely that it would be effective to achieve anything other than short-term disruption of the Target Websites.

xxx xxx xxx

204. …. I accept that website blocking has advantages over notice-and-takedown. Accordingly, I am not persuaded that, overall, notice-and-takedown is an equally effective, but less onerous, measure….

205. Payment freezing. A third measure which Richemont could adopt, but have not adopted, is to ask the payment processors used by the Target Websites, such as Visa, MasterCard and Western Union, to suspend the operators' merchant accounts…..

206. …..there are two problems with this approach. The first is that, although it may diminish the circulation of counterfeit goods, it leaves the offending website untouched. Thus at least the first category of infringement will continue until such time as the website

is so starved of funds that it ceases operation, assuming that that time does come. The second is that, as with notice-and-takedown, the websites simply shift to alternative payment methods…..

207. *My conclusion….it is unlikely that this would be effective to achieve more than some degree of disruption to the Target Websites. Again, therefore, I do not regard the availability of this alternative measure as a complete answer to Richemont's application…..*

208. *Domain name seizure. A fourth measure which Richemont could adopt, but have not adopted, is to seize the domain names of the Target Websites by invoking the dispute resolution procedures ("DRPs") of the registrar through which the domain names have been purchased….. Again, however, the problem is that the website operator can simply pick a new domain name and start again. Accordingly, I am not persuaded that this is a realistic alternative measure in general, although there may be particular cases where it has some value.*

xxx *xxx* *xxx*

210. *De-indexing. A fifth measure which the ISPs contend that Richemont could adopt, but have not adopted, is to send notices to search engine providers such as Google requesting them to "de-index" the Target Websites. This would have the effect of removing the website from the search engine's search results….*

xxx *xxx* *xxx*

212. *…..there are three problems with this approach. The first is that search engine providers are not willing to de-index entire websites on the basis of alleged intellectual property infringements without a court order….*

213. The second problem is that, whereas some search engine providers like Google…..do not have an equivalent policy for URLs which infringe third party trade marks.

214. The third problem is that, even if search engine providers de-index the URL or even the entire website, it will remain accessible on the internet. In particular, it would remain accessible to consumers who had previously visited the website and either had it bookmarked or could remember its domain name…..

215. Accordingly, I conclude that, as matters stand, this is not a realistic alternative measure for Richemont.

216. Customs seizure. A final measure is that of customs seizure…..The first is that it only tackles the imports of the counterfeit goods themselves. It does not affect the Target Websites. The second is that it is impossible for customs to inspect anything more than a small fraction of the large volume of small parcels…..

217. Conclusion……I am not persuaded that there are alternative measures….which would be equally effective, but less burdensome…..Nevertheless, I do accept that the availability of some of the measures discussed above is a factor to be taken into account in assessing the proportionality of the orders sought by Richemont."

(emphasis supplied)

86. Consequently, website blocking in the case of rogue websites, like the defendant-websites, strikes a balance between preserving the benefits of a free and open Internet and efforts to stop crimes such as digital piracy.

87. This Court is also of the opinion 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.

AT LEAST FORTY-FIVE COUNTRIES HAVE EITHER ADOPTED AND IMPLEMENTED, OR ARE LEGALLY OBLIGATED TO ADOPT AND IMPLEMENT, MEASURES TO ENSURE THAT ISPS TAKE STEPS TO DISABLE ACCESS TO COPYRIGHT INFRINGING WEBSITES.

88. At least forty-five countries have either adopted and implemented, or are legally obligated to adopt and implement, measures to ensure that ISPs take steps to disable access to copyright infringing websites. These countries include the UK, Australia, Singapore, Portugal, France, Germany and India (*Site Blocking in the World, MPA Study on Site Blocking Impact in South Korea, June 2016*). Around the world, ISPs receive directions to block websites either from Courts or from administrative agencies/other competent authorities. The majority of governments where such relief is available have adopted the judicial approach, which involves ISPs blocking specific websites pursuant to criminal and civil Court orders, e.g. most EU Member States (including the UK), India, Singapore and Australia. A few additional countries like South Korea, Portugal, Italy, Malaysia and Indonesia have adopted an administrative approach where government agencies direct ISPs to block specific piracy services. In both these methods the approach is similar, whereby right owners establish that the target website provides access to infringing content. Courts and administrative agencies review the evidence to ensure that websites engaged in predominantly legal activities are not blocked. Following such assessment, directions are issued by the Court or administrative agency to ISPs to block specific infringing websites.

89. This Court is also of the view that it can take a cue from the years of experience of dozens of governments/ jurisdictions that have successfully adopted website blocking regimes primarily by directing the ISPs to permanently block the identified websites. In the United Kingdom, blocking orders directed at 19 major online infringing sites in October/November 2013 not only led to significant decrease in total piracy, but also led to significant increase in the usage of legal streaming sites. (*Danaher, Brett and Smith, Michael D. and Telang, Rahul, The Effect of Piracy Website Blocking on Consumer Behaviour (November 2015), https://ssrn.com/abstract=2612063*).

90. In the Asia-Pacific region, research results of South Korea's administrative site-blocking regime demonstrated the same positive impacts that the studies conducted in Europe showed. Visits to blocked sites declined significantly within three months of access being blocked. As website blocking in South Korea was heavily concentrated on peer-to-peer (P2P) sites, overall visits to infringing P2P sites (not just those sites blocked) showed a 51% decline three-months after the three rounds of website blocking. (*Motion Picture Association, MPA Study on Site Blocking Impact in South Korea (2016) (http://www.mpa-i.org/wp-content/uploads/2018/01/MPAA_Impact_of_Site_Blocking_in_South_Korea2016.pdf*).

91. Most recently, research conducted by INCOPRO released in 2018 demonstrated that site-blocking in Australia had also had a significantly positive impact upon the usage of blocked infringing sites. Tracking Alexa data recorded usage reduction of 53.4% of blocked sites, usage of the top-50 infringing sites in Australia decreased by 35.1% since October 2016, usage of the top-250 infringing sites in Australia decreased by 25.4% from October 2016 to November 2017.(*Incopro, Site Blocking Efficacy-Key Findings-Australia*

(February 2018) (https://www.creativecontentaustralia.org.au/_literature_ 210629/2018_Research_-_Incopro_Study)).

92. These studies demonstrate that site-blocking in those countries greatly contributed to: (1) reduction of usage of infringing websites to which access had been blocked; and (2) reduction of overall usage of infringing websites. As a consequence, there is every reason to believe that the same results of website blocking measures would hold true in India.

93. Undoubtedly, website blocking is *'no silver bullet'* in the fight against digital piracy, but it should at least be one of the lead bullets, alongside other measures such as partnering with Internet ad companies, domain seizures, and other efforts to prosecute owners of pirate sites.

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 ?

94. Now, the question that arises for consideration is how should courts deal with '*hydra headed*' websites who on being blocked, actually multiply and resurface as alphanumeric or mirror websites. In the present batch of matters though this Court had injuncted the main website by way of the initial injunction order, yet the mirror/alphanumeric/redirect websites had been created subsequently to circumvent the injunction orders.

95. It is pertinent to mention that in Greek mythology the Hydra also called Lernaean Hydra is a serpent-like monster. The Hydra is a nine-headed serpent like snake. It was said that if you cut off one hydra head, two more would grow back.

96. Critics claim that website blocking is an exercise in futility as website operators shift sites–the so-called *"whack-a-mole"* effect.

97. Internationally, there has been some recent development to deal with the aforesaid menace in the form of a *"Dynamic Injunction"* though limited to mirror websites.

98. The High Court of Singapore in the case of ***Disney Enterprise v. Ml Ltd., (2018) SGHC 206*** has after discussing the cases of ***20th Century Fox v. British Telecommunications PLC, (2012) 1 All ER 869*** and ***Cartier International AG v. British Sky Broadcasting*** (supra), held that the applicant was not obligated to return to court for an order with respect to every single IP address of the infringing URLs already determined by the Court. The Court held as under:-

> *"38 I found that the court has the jurisdiction to issue a dynamic injunction given that such an injunction constitutes "reasonable steps to disable access to the flagrantly infringing online location". This is because the dynamic injunction does not require the defendants to block additional FIOLs which have not been included in the main injunction.* ***It only requires the defendants to block additional domain names, URLs and/or IP addresses that provide access to the same websites which are the subject of the main injunction and which I have found constitute FIOLs (see [19] - [29] above). Therefore, the dynamic injunction merely blocks new means of accessing the same infringing websites, rather than blocking new infringing websites that have not been included in the main injunction****.*
>
> *39 In fact, under the dynamic injunction applied for in the present case, the plaintiffs would be required to show in its affidavit that the new FQDNs provide access to the same FIOLs which are the subject of the main injunction before the*

defendants would be required to block the new FQDNs (see [6] above) ...

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42. In relation to S 193DB(3)(d) of the Copyright Act, ie, the effectiveness of the proposed order, the dynamic injunction was necessary to ensure that the main injunction operated effectively to reduce further harm to the plaintiffs. This is due to the ease and speed at which circumventive measures may be taken by owners and operators of FIOLs to evade the main injunction, through for instance changing the primary domain name of the FIOL. Without a continuing obligation to block additional domain names, URLs and/or IP addresses upon being informed of such sites, it is unlikely that there would be effective disabling of access to the 53 FIOLs."

(emphasis supplied)

99. Though the dynamic injunction was issued by the Singapore High Court under the provisions of Section 193 DDA of the Singapore Copyright Act, and no similar procedure exists in India, yet in order to meet the ends of justice and to address the menace of piracy, this Court in exercise of its inherent power under Section 151 CPC permits the plaintiffs to implead the mirror/redirect/alphanumeric websites under Order I Rule 10 CPC as these websites merely provide access to the same websites which are the subject of the main injunction.

100. It is desirable that the Court is freed from constantly monitoring and adjudicating the issue of mirror/redirect/alphanumeric websites and also that the plaintiffs are not burdened with filing fresh suits. However, it is not disputed that given the wide ramifications of site-wide blocking orders, there has to be judicial scrutiny of such directions and that ISPs ought not to be tasked with the role of arbiters, contrary to their strictly passive and neutral role as intermediaries.

101. Consequently, along with the Order I Rule 10 application for impleadment, the plaintiffs shall file an affidavit confirming that the newly impleaded website is a mirror/redirect/alphanumeric website with sufficient supporting evidence. On being satisfied that the impugned website is indeed a mirror/redirect/alphanumeric website of injuncted Rogue Website(s) and merely provides new means of accessing the same primary infringing website, the Joint Registrar shall issue directions to ISPs to disable access in India to such mirror/redirect/alphanumeric websites in terms of the orders passed.

102. It is pertinent to mention that this Court has delegated its power to the learned Joint Registrar for passing such orders under Section 7 of the Delhi High Court Act, 1966 read with Chapter II, Rule 3(61) read with Rule 6 of the Delhi High Court (Original Side) Rules 2018. The said provisions are reproduced hereinbelow:-

> *"3.* ***Powers of the Registrar****- The powers of the Court, including the power to impose costs in relation to the following matters, may be exercised by the registrar:*
>
> *(61) Such other application, as by these Rules are directed to be so disposed of by the Registrar, but not included in this Rule and any other matter, which in accordance with orders or directions issued by Court, is required to be dealt with by the Registrar.*
>
> *6.* ***Delegation of the Registrar's Power*** *– The Chief Justice and his companion Judges may assign or delegate to a Joint Registrar, Deputy Registrar or to any officer, any functions required by these Rules to be exercised by the Registrar.*

103. In the event, any person is aggrieved by any order passed by the Registrar, the remedy for appeal is provided and may be availed of under Rule 5 of Chapter II of the Delhi High Court (Original Side) Rules, 2018 reproduced hereinbelow:-

> *"5. **Appeal against the Registrar's orders**.- Any persons aggrieved by any order made by the Registrar, under Rule 3 of this Chapter, may, within fifteen days of such order, appeal against the same to the Judge in Chambers. The appeal shall be in the form of a petition bearing court fees of Rs.2.65."*

SUGGESTION

104. This Court is of the view that since website blocking is a cumbersome exercise and majority of the viewers / subscribers who access, view and download infringing content are youngsters who do not have knowledge that the said content is infringing and / or pirated, it directs the MEITY/DOT to explore the possibility of framing a policy under which a warning is issued to the viewers of the infringing content, if technologically feasible in the form of e-mails, or pop-ups or such other modes cautioning the viewers to cease viewing/downloading the infringing material. In the event the warning is not heeded to and the viewers / subscribers continue to view, access or download the infringing/pirated content, then a fine could be levied on the viewers/subscribers.

105. This measure, in the opinion of this Court, would go a long way in curbing the pirated content and the dark-net as well as in promoting the legal content and accelerating the pace of 'Digital India'.

THIS COURT PLACES ON RECORD ITS APPRECIATION FOR THE SERVICES RENDERED BY LEARNED AMICUS CURIAE AS WELL AS LEARNED COUNSEL FOR PLAINTIFFS

106. This Court places on record its appreciation for the services rendered by Mr. Hemant Singh, learned Amicus Curiae as well as Mr. Saikrishna Rajagopal and the team of Advocates assisting them. They not only handed over innumerable notes, charts and articles, but explained with great patience certain technologies that this Court was not familiar with.

RELIEF

107. Keeping in view the aforesaid findings, a decree of permanent injunction is passed restraining the defendant-websites (as mentioned in the chart in paragraph no. 4(i) of this judgment) their owners, partners, proprietors, officers, servants, employees, and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under it, from, in any manner hosting, streaming, reproducing, distributing, making available to the public and/or communicating to the public, or facilitating the same, on their websites, through the internet in any manner whatsoever, any cinematograph work/content/programme/show in relation to which plaintiffs have copyright. A decree is also passed directing the ISPs to block access to the said defendant-websites. DoT and MEITY are directed to issue a notification calling upon the various internet and telecom service providers registered under it to block access to the said defendant-websites. The plaintiffs are permitted to implead the mirror/redirect/alphanumeric websites under Order I Rule 10 CPC in the event they merely provide new means of accessing the same primary

infringing websites that have been injuncted. The plaintiffs are also held entitled to actual costs of litigation. The costs shall amongst others include the lawyer's fees as well as the amount spent on Court-fees. The plaintiffs are given liberty to file on record the exact cost incurred by them in adjudication of the present suits. Registry is directed to prepare decree sheets accordingly.

MANMOHAN, J

APRIL 10, 2019
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