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# INTERPLAY BETWEEN THE ROLE OF DYNAMIC INJUNCTIONS AND COPYRIGHT INFRINGEMENT, WITH SPECIAL REFERENCE TO CINEMATOGRAPHY WORK: A COMPARATIVE JURISDICTIONAL APPROACH

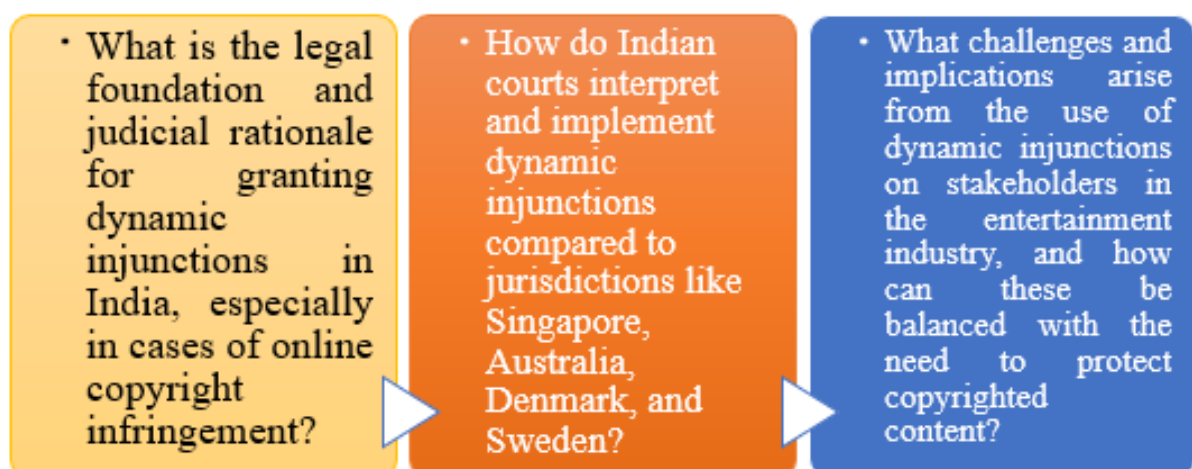
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## Research Objective

This research seeks to conduct a comprehensive and critical examination of the theoretical foundations and judicial application of dynamic injunctions within the Indian legal system, with a particular focus on the safeguarding of intellectual property rights with reference to Copyrights, in the context of the internet era. The paper aims to take into consideration and evaluate the evolution of dynamic injunctions as a legal solution to tackle issues arising from online piracy, unauthorized distribution, and the proliferation of mirror and redirect sites. This study seeks to examine the impact of these injunctions on the film and entertainment sector, with a specific focus on cinematographic works. The study seeks to perform a comparative law review of the approaches taken by various countries, including Singapore, Australia, Denmark, and Sweden, in addressing similar issues.

## Research Questions



## Introduction

The Indian Film industry experienced considerable growth, attaining formal recognition as an industry by the year 2000. Notwithstanding the substantial box office revenues generated by numerous Bollywood films, apprehensions regarding privacy violations and copyright infringements have remained prevalent. Between the years 2006 and 2013, Indian high courts issued a series of injunctions, amounting to a total of 238, in the cases concerning “John Doe or Ashok Kumar” and the play of Dynamic injunctions.<sup>1</sup>

*Dynamic injunction* allows a right-holder to seek judicial intervention for the expansion of the primary injunction to encompass any mirror websites that enable access to the same infringing online locations specified in the primary injunction. Injunctions can be enforced in instances where a website resurfaces in a brief timeframe following the filing of the injunction, utilizing an alternate IP address or URL

The current framework of copyright law is perceived as insufficient in providing adequate protection, resulting in an increased vulnerability to violations<sup>2</sup>. As a result, while Bollywood experiences a notable increase in revenue, there is simultaneously a rise in legal disputes concerning violations of intellectual property rights and breaches of contract. In an example, the creators of the movie *Slumdog Millionaire* applied to seek injunction, prior to release of the film.

The narrative of the film is fundamentally rooted in the allegations directed towards the producers’ concerning violations of copyright law. The presence of producers was essential in court during the entirety of the premiere's preparatory proceedings<sup>3</sup>. In scenarios where an injunction is pursued as a remedy before the distribution of the film, the producers are likely to face significant financial losses, particularly considering that the film has already reached completion.

In various cases, the notable ‘John Doe or Ashok Kumar’ order has been pronounced, as delineated by J. Dalveer Bhandari in the matter of *Taj Television v. Rajan Mandal*<sup>4</sup>. The

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<sup>1</sup> K. Bavan “And Action! Role of IPR in Cinema, 2 LAW ESSENTIALS J. 57 (2021)

<sup>2</sup> Shubham Shakti & Vanshika Jhakhnadia, Copyright and Entertainment Industry: An Overview, 4 INT’L J.L. MGMT. & HUMAN. 5313 (2021).

<sup>3</sup> K. Bavana, And Action! Role of IPR in Cinema, 2 LAW ESSENTIALS J. 57 (2021)

<sup>4</sup> Taj Television v. Rajan Mandal [2003] F.S.R. 22

standards applicable to this category of injunction, although comparable to those delineated in Order 39, Rules 1 and 2 of the C.P.C<sup>5</sup>., have unequivocally proven to be effective as a measure of last resort in these situations.

The necessity for judicial creativity has emerged as a critical response to these actions, given that traditional injunctions aimed at blocking websites have proven to be ineffective.

### Judicial Pronouncements

The European Commission vide deliberations with the parliament dated November, 2017, provide directives as follows”

*"Injunctions which can be issued for instance in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL and which is drafted in a way that allows to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction."*<sup>6</sup>

As a result, numerous courts on the national level, across Europe have issues injunctions, that are dynamic in nature. In the case of “*Disney Enterprise v. MI Ltd*”<sup>7</sup>., the High Court of Singapore addressed the rising issuance of a dynamic injunction. The Court determined that the applicant was not obligated to return for a separate order regarding each specific IP address associated with the infringing URLs that had already been identified by the Court.

In a recent ruling, ruled by a single bench at the High Court of Delhi, in the case of “*Universal City Studios LLC and Ors. v. Dotmovies.baby and Ors.*”<sup>8</sup> proceeded to issue an ex parte, ad interim injunction. This decision effectively expands the validity and scope of dynamic injunctions to include future works. The premise of a Dynamic Injunction has been introduced, highlighting the necessity for immediate protection of copyrighted works upon their creation. This urgency arises from the potential for unauthorized websites to publish these works without delay, which could lead to irreparable damage to the rights of the artists involved.

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<sup>5</sup> Code of Civil Procedure, 1908, Act No. 5 of 1908, Act of Parliament, 1908 (India)

<sup>6</sup> The European Commission, in its communication to the European Parliament dated 29.11.2017 providing guidance on Directive 2004/48/EC

<sup>7</sup> Disney Enterprise v. MI Ltd (2018) SGHC 206

<sup>8</sup> Universal City Studios LLC and Ors. v. Dotmovies.baby and Ors CS(COMM) 514/2023

The High Court of Bombay, in the case of “*Salim Khan v. Sumeet Prakash Mehra*”<sup>9</sup>, examined the legal question of whether the scriptwriters of the renowned film Zanjeer, known as the duo Salim-Javed, possessed the authority to obstruct the producers from launching a remake of the film. The ruling of the Court favored the producer in this matter. In light of the legal principles articulated in the “*Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures*”<sup>10</sup>, the Court concluded that the act of incorporating a literary and/or musical work into a film result in the film's producer acquiring primary ownership of the copyright for that work, barring any existing agreements to the contrary between the authors of the work and the film's producer.

The High Court of Delhi, in the case of “*RDB & Co. (HUF) v. HarperCollins Publishers*”<sup>11</sup>, rendered a decision that favored the scriptwriter, Satyajit Ray entered into a contractual agreement with RD Bansal to undertake the writing and directing of the script for the film Nayak. The script subsequently underwent a transformation into a book, which was published by HarperCollins. In response, RDB initiated legal proceedings seeking an injunction against the publisher. The High Court dismissed RDB's assertion of copyright ownership over the film and its underlying works, which encompass the script and screenplay.

The same court further, in the matter of “*Sholay Media and Entertainment Pvt. Ltd. v Parag Sanghavi and Ors*”<sup>12</sup>, scrutinized the allegations of copyright infringement, particularly addressing the defendants' attempts to reproduce the renowned film "Sholay." The Delhi High Court observed that specific iconic phrases, including "*Jo dargaya, samjho mar gaya*," "*Ai Chammia*," and "*Kitne Aadmi the*," have attained a level of lasting significance and persist in their ability to connect with audiences across different time periods. The principal characters—"*Gabbar Singh*", "*Jai*", "*Veeru*", "*Basanti*", "*Radha*", and "*Thakur*"—are essential to the narrative and meet the requirements of both the “*Especially Distinctive Test*” along with the “*Story Being Told Test*,” thus establishing their eligibility for copyright protection. The court determined that multiple components of Sholay, such as its music, lyrics, background score, and dialogues, fall under the protections afforded by the Copyright Act. The protection granted to the producer of the original Sholay establishes exclusive rights for the utilization and authorization of the exploitation of these components. The foundational literary works, as well

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<sup>9</sup> Salim Khan v. Sumeet Prakash Mehra SUIT (L) NO. 283 OF 2013

<sup>10</sup> Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures 1977 AIR 1443

<sup>11</sup> RDB & Co. (HUF) v. HarperCollins Publishers (2023) DHC 3551

<sup>12</sup> Sholay Media and Entertainment Pvt. Ltd. v Parag Sanghavi and Ors. CS (OS) 1892/2006

as the lyrics included in the music recordings, receive protection under relevant legal statutes. Artistic creations, which include featured settings and costumes, as well as dramatic works such as cinematic lines, are afforded protection under Section 14(a) of the Act.<sup>13</sup>

## Comparative Analysis

### Australia

The Australian Federal Court at Sydney, in August 2019 rendered a significant ruling by issuing Australia's inaugural Dynamic Injunction, targeting a collective of 35 Streaming, Torrent and such related proxy websites. This represents the inaugural occurrence of a rights holder deliberately pursuing legal action against proxy sites. In 2018, Australia enacted a modification to its copyright legislation that authorized the implementation of dynamic injunctions. This legislative change also expanded the scope of enforcement to include websites that predominantly enable access to pirated content, alongside more overt and central piracy platforms. Dynamic orders are permissible only in instances where Internet Service Providers do not present an objection<sup>14</sup>.

### Singapore

“In July 2020, the courts of Singapore rendered a dynamic injunction aimed at 15 websites that were found to be egregiously infringing upon copyright protections associated with content from the English Premier League, Discovery, BBC, La Liga, and TVB. The collaborative efforts of the courts in Australia, the European Union, India, and the United Kingdom, alongside the evolution of Singapore’s dynamic injunction framework, underscore the court’s thorough deliberations. This presents a significant precedent for other jurisdictions that are evaluating comparable website blocking issues. The influence of international jurisprudence on Singapore manifests in various dimensions. The methodology employed by the Singapore High Court largely aligns with that of English courts, as evidenced in the cases of *Twentieth Century Fox v. British Telecommunication*<sup>15</sup>. The Court clearly dismissed the methodology employed by the Federal Court of Australia in the case of *Roadshow Films v. Telstra*

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<sup>13</sup> The Copyright (Amendment) Act, 1992, Section 14(a), No. 13, Acts of Parliament, 1992 (India).

<sup>14</sup> Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147 (November 1998).

<sup>15</sup> Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc | [2011] EWHC 1981 (Ch)

*Corporation*<sup>16</sup>, which refused to allow for the implementation of dynamic blocking under the condition of judicial oversight. In juxtaposition to the "right balancing analysis" employed by the Delhi High Court, the Singapore High Court in *Disney Enterprises* adopted a "means/ends analysis."<sup>17</sup>

## Denmark

Denmark has established itself as a leader in the implementation of website blocking measures aimed at enforcing copyright protections. In the year 2006, Denmark established itself as the inaugural nation worldwide to authorize the practice of website blocking as a mechanism for the enforcement of copyright laws. In the year 2019, Rights Alliance undertook the action of blacklisting a total of 141 websites identified as engaging in piracy. The data indicates a significant reduction in the number of visitors to pirate sites, reflecting a 40 percent decrease in 2019 when juxtaposed with the figures from 2018. In April 2019, the Court of Frederiksberg issued a ruling that established Denmark's inaugural dynamic blocking injunction.<sup>18</sup>

## Sweden

Following the trend across the globe, courts in Sweden granted or rather, issued an order for Dynamic Injunction, as their initial move. In December 2019, the Patent and Market Court of Sweden rendered a decision that established the precedent of the first dynamic injunction. Internet Service Providers are obligated to adopt "reasonable measures" to limit customer access to identified illegal file-sharing services. This responsibility encompasses more than designated domain names and web addresses, as required by a distinct conventional blocking injunction that is effective immediately. This rule remains in effect for three years regarding domain names and websites exclusively designed to provide access to these unlawful file-sharing services. On June 29, 2020, the court upheld and elaborated on this significant ruling, thereby instituting the application of dynamic injunctions for the enforcement of copyright in Sweden.<sup>19</sup>

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<sup>16</sup> *Roadshow films pty ltd v. telstra corporation ltd* 2016 fca 1503

<sup>17</sup> Carolina Saez, *Enforcing Copyrights in the Age of Multimedia*, 21 RUTGERS COMPUTER & TECH. L.J. 351 (1995).

<sup>18</sup> K. J. Greene, *Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief*, 31 RUTGERS L.J. 173 (Fall 1999).

<sup>19</sup> Khaliunaa Garamgaibaatar, *The Anti-Counterfeiting Trade Agreement: Copyrights, Intermediaires, and Digital Pirates*, 20 COMMLAW CONSPECTUS 199 (2011).

## Critical Analysis

### Copyright Infringement with respect to Cinematography

The act of copyright infringement refers to the unauthorized utilization of a person's protected intellectual property. As a result, this action represents an infringement upon the exclusive rights granted to the copyright holder, thereby breaching the rights to reproduce, distribute, display, or perform the protected work without proper authorization. Copyright infringement constitutes the unauthorized utilization of a creator's protected intellectual property. Consequently, this situation entails the unauthorized utilization of a person's copyrighted work.<sup>20</sup> The copyright statute confers upon the author or creator a comprehensive set of rights pertaining to the development and management of their intellectual property. This suggests that the creator possesses the legal authority to duplicate their original works. Infringement constitutes the unauthorized utilization, replication, or dissemination of a work by a party other than the original producer or creator.

### Play of Copyright Act

Section 51<sup>21</sup> of the Act delineates the parameters of copyright infringement, defining it as the unauthorized engagement in activities that are exclusively reserved for the copyright holder, absent a license from the copyright owner, as outlined by the provisions of the Act. Furthermore, Section 2(m) articulates the parameters that constitute 'infringing copy'.<sup>22</sup> In order to substantiate a claim of infringement, the copyright holder is required to provide evidence of two essential elements: (a) ownership of a valid copyright, and (b) unauthorized use by the infringer of one or more of the holder's exclusive rights, which include the rights to reproduce, publicly distribute, perform, exhibit, or alter the copyrighted work.

### Dynamic Injunctions' Role in the Parenthesis

Dynamic injunctions have been employed as a form of legal relief within the jurisdiction of India. The High Court of Delhi, in August 2020, issues In August 2020, ex-parte, ad interim injunction in favor of *Disney Enterprises, Inc.*<sup>23</sup>, targeting multiple torrents and rogue websites

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<sup>20</sup> K. Bavana, And Action! Role of IPR in Cinema, 2 LAW ESSENTIALS J. 57 (2021)

<sup>21</sup> The Copyright (Amendment) Act, 1992, Section 51, No. 13, Acts of Parliament, 1992 (India).

<sup>22</sup> The Copyright (Amendment) Act, 1992, Section 2(m), No. 13, Acts of Parliament, 1992 (India).

<sup>23</sup> Disney Enterprises, Inc. & Ors vs Kimcartoon.To & Ors, CS(COMM) 275/2020

that were enabling the unauthorized downloading of Disney's copyrighted films and entertainment programs. The aforementioned websites are expressly barred from engaging in the hosting, streamlining, reproduction, distribution, or public dissemination of any materials associated with Disney. The injunction extends to encompass mirror, redirect, and alphanumeric websites created by the Defendants, which serve to enable access to the infringing websites. The pertinent federal Ministry and Department, particularly Telecom, were instructed to notify the assigned Internet Service Providers (ISPs) to obstruct access to the specified illegal websites, including their mirror, redirect, and alphanumeric versions.<sup>24</sup>

Nevertheless, dynamic injunctions have a more substantial historical foundation in India. The remedy in question was initially granted in India in 2017 by the High Court of Delhi, following a petition submitted by “*UTV Software Communication Ltd*”<sup>25</sup>. This petition sought to prevent the Defendant-websites from distributing its original content without authorization and to mandate Internet Service Providers to limit access to these websites. The court issued a dynamic injunction, citing the precedent established by the ruling in Singapore. The petitioner received authorization to approach the Joint Registrar of the Court with a request for an extension of the previously issued injunctive order. This extension aims to encompass analogous 'mirror/redirect/alphanumeric' websites that offer content identical to that of the original website.<sup>26</sup>

### **Play of Section 38B: Extended Approach**

Section 38B<sup>27</sup> establishes that a performer maintains the entitlement to be recognized as the individual responsible for their performance. This right persists irrespective of any transfer of rights, either fully or partially, unless the omission of such identification is warranted by the specific context in which the performance is utilized. The performer maintains the authority to impose limitations or pursue compensation in instances of any alteration, distortion, or analogous actions that adversely affect his interests.

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<sup>24</sup> Viraj Sudhir Thakur, Analysis of Dynamic Injunction in Digital Copyright Infringement, 4 JUS CORPUS L.J. [216] (September-November 2023)

<sup>25</sup> UTV Software Communication Ltd. And Ors vs 1337X.To And Ors CS(COMM) 724/2017

<sup>26</sup> Viraj Sudhir Thakur, Analysis of Dynamic Injunction in Digital Copyright Infringement, 4 JUS CORPUS L.J. [216] (September-November 2023)

<sup>27</sup> The Copyright (Amendment) Act, 1992, Section 36B, No. 13, Acts of Parliament, 1992 (India).



## **Conclusive Analysis and Recommendations**

The issue of copyright in the film industry presents a multifaceted challenge, involving various stakeholders, including screenwriters, composers, producers, and performers. The producer is recognized as the owner of the cinematographic film; however, the rights to the underlying works, including screenplays, music, and performances, may vary according to contractual stipulations and applicable legal frameworks.

As a result, dynamic injunctions appear to serve as an effective mechanism for addressing the challenges posed by illicit websites and their mirror versions. It is imperative to establish a balance that ensures these injunctions do not obstruct the unrestricted dissemination of non-infringing materials. The notion of an ombudsman seeks to mitigate this challenge; however, it simultaneously introduces additional apprehensions regarding the potential for non-judicial entities to exercise adjudicatory authority.

The divergent viewpoints articulated by the two leading IP High Courts in the country underscore the necessity for additional examination and clarification. With the progression of digital piracy and the corresponding evolution of the internet, it is anticipated that Indian courts will face increasing pressures to innovate judicially.

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