

(2022) 06 DEL CK 0075

In the Delhi High Court

Case No : Civil Suit (COMM) No. 367 Of 2019, I.A. No. 9854, 9856 Of 2019,
6469 Of 2022

Warners Bros Entertainment Inc

APPELLANT

Vs

[Https://Otorrents.Com](https://Otorrents.Com) & Ors

RESPONDENT

Date of Decision : 01-06-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 8 Rule 5, Order 1 Rule 10
Copyright Act, 1957 — Section 2(f), 5, 13(1), 13(2), 51

Citation : (2022) 06 DEL CK 0075

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Sidharth Chopra, Suhasini Raina, Disha Sharma, Anjali Agrawal,
Sanidhya Rao, Nidhi Raman, Zubin Singh

Final Decision : Allowed

Judgement

Navin Chawla, J

1. The plaintiff has filed the present suit inter-alia praying for the following reliefs:

"50. In light of the foregoing, it is most respectfully prayed that this Hon'ble Court may be pleased to:

i. Issue an order and decree of permanent injunction restraining the Defendant No. 1 (and such other mirror/redirect/alphanumeric websites discovered to provide additional means of accessing the Defendant Website, and other domains/domain owners/website operators/entities which are discovered to have been engaging in infringing the Plaintiff's exclusive rights), its 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 Plaintiff has copyright,

ii. Issue an order and decree directing the Defendant Nos.2-10, their directors, partners, proprietors, officers, affiliates, 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, to block access to the Defendant No. 1 website identified by the Plaintiff in the instant suit (and such other mirror/redirect/alphanumeric websites discovered to provide additional means of accessing the Defendant Website, and other domains/domain owners/website operators/entities which are discovered to have been engaging in infringing the Plaintiff's exclusive rights),

iii. Issue an order directing the Defendant Nos. 11 and 12, to issue a notification calling upon the various internet and telecom service providers registered under it to block access to the Defendant No. 1 website identified by the Plaintiff in the instant suit (and such other mirror/redirect/alphanumeric websites discovered to provide additional means of accessing the Defendant Website, and other domains/domain owners/website operators/entities which are discovered to have been engaging in infringing the Plaintiff's exclusive rights);

iv. Issue an order directing the Domain Name Registrars of the Defendant Website identified by the Plaintiff in the Plaint to disclose the contact details and other details about the owner of the said websites, and other such relief as this Hon'ble Court may deem fit and proper;"

2. The plaintiff claims itself to be a global entertainment company under the laws of the State of Delaware, the United States of America, and as being engaged in the business of creation, production and distribution of motion pictures. The plaintiff has also received certain reputed awards, such as the Academy Award for 'Best Motion Picture' for 'Argo' in 2012.

3. It is the contention of the plaintiff that the motion pictures produced by the plaintiff, being works of visual recording and which include sound recordings accompanying such visual recordings, qualify to be a 'cinematograph film' under Section 2(f) of the Copyright Act, 1957 (in short, 'the Act'). The plaintiff claims this Court has jurisdiction by virtue of Section 13(1) read with Sections 13(2) and 5 of the Act, since the plaintiff's cinematograph films are released in India, the cinematograph films of the plaintiff would be entitled to all the rights and protections granted under the provisions of the Act.

4. The claim of the plaintiff is premised on the allegation of illegal and unauthorised distribution, broadcasting, re-broadcasting, transmission and streaming of the plaintiff's content by the defendant nos. 1 and 51 (hereinafter referred to as the "rogue websites"). It is the case of the plaintiff that as a result of the unauthorised transmission of their content, the rogue websites infringe the copyright of the plaintiff in the original works produced by it, which have been granted protection under the provisions of the Act.

5. The plaintiff has impleaded various Internet Service Providers (in short, 'ISPs') as the defendants nos. 2 to 10 and concerned departments of the Government of India as the defendants nos. 11 and 12. The ISPs and the concerned departments have been impleaded for the limited relief of compliance with any directions of this Court granted in favour of the plaintiff.

6. The plaintiff has alleged that the defendant Nos. 1 and 51 are the rogue websites. The plaintiff, vide an investigation conducted by an independent investigator, learnt of the extent of the infringing activity of the rogue websites, inasmuch as the rogue websites have infringed the plaintiff's copyright under the provisions of the Act in the original content by streaming or hosting and/or by facilitating the use of the rogue websites, inter alia by downloading and streaming the plaintiff's original cinematograph films in which copyright vests.

7. It is also the case of the plaintiff that a cease-and-desist notice was served on the rogue websites calling upon them to cease from engaging in their infringing activities. Despite the legal notice, the rogue websites continue to infringe the rights of the plaintiff in its original content.

8. The learned counsel for the plaintiff presses only for prayers (i), (ii) and (iii), as noted hereinabove, of the plaint. The other reliefs as made in the plaint are not pressed.

9. The learned counsel for the plaintiff relies upon the judgment passed by a Co-ordinate Bench of this Court in a batch of petitions dated 10.04.2019, including UTV Software Communication Ltd. & Ors. v. 1337X.to & Ors., 2019 SCC OnLine Del 8002, which deal with the determination of rogue websites.

10. The plaintiff has filed I.A. 6469 of 2022 under Order XIII A of the Code of Civil Procedure, 1908 (in short, 'CPC'), as applicable to commercial disputes, seeking a summary judgment.

11. Vide order of this Court dated 28.04.2022, notice was issued in the above application. After notice was duly served on the defendants, the plaintiff has filed its affidavits of service on 16.05.2022 and 31.05.2022.

12. Despite having been duly served, the defendants have neither filed replies nor their written statement in the present suit contesting the averments made in the plaint. Therefore, service and pleadings are deemed as complete in the present application.

13. The grounds for filing the present application, as enumerated by the plaintiff in the same, are as follows:

a. That all the defendants have been duly served by the plaintiff, however, only the defendant nos. 7, 9, 11 and 12 have entered appearance before this Hon'ble Court.

b. That the defendant nos. 1 and 51 are the rogue websites that are illegally streaming the plaintiff's content on their websites and even after being duly

served by the plaintiff, have decided not to contest the present suit.

c. That the defendants have no real prospect of successfully defending the claim of copyright infringement under Section 51 of the Act and have further not chosen to contest the said claim.

d. Additionally, there is no other compelling reason why the present suit should not be disposed of before recording of oral evidence particularly in view of the fact that there is no dispute regarding the illegal activities of the defendant nos. 1 and 51 and in any event, in the absence of any challenge or opposition to the factual allegations made in the plaint, in view of provisions of Order VIII Rule 5 of the CPC, there is no occasion for recording of oral evidence in the present matter.

14. The learned counsel for the plaintiff has relied upon Clause 3 of Chapter XA of the Delhi High Court (Original Side) Rules, 2018 which states the grounds under which a Court can pass a summary judgment.

15. The learned counsel for the plaintiff has drawn my attention to two affidavits filed by Mr. Manish Vaishampayan, who conducted the investigation with regard to the aforesaid websites on the instance of the plaintiff, to contend that the said websites need to be treated as rogue websites. With respect to this contention, reliance is placed on the following documentary evidence in support of each of the aforesaid websites:

S.No.

Particulars

Court File

Pagination along with Volume No.

1.

Print of Contact Details of various websites as available on WHOIS (primary domains):

a. Otorrents.com

Folder IV Pages 226-228 (Vol. 2)

a. Otorrents.unblockproject.red

IA 18416 Pages 47 - 49

2.

Copies of proof of ownership of movie titles

a) Aquaman (Warner)

Folder IV Pages 25 - 26

(Vol. 1)

3.

Screenshots of Homepage of various websites (primary domains):

a. Otorrents.com

Folder IV Pages 208-212

(Vol. 2)

b. Otorrents.unblockproject.red

IA 18416 Pages 34 - 39

4.

Printout of proof of infringement by websites (primary domains):

a. Otorrents.com

Folder IV Pages 215-225 (Vol. 2)

5.

Printouts of the DMCA, FAQ, etc. pages, evidencing infringing nature of the Defendant Websites:

a. Otorrents.com

Folder IV Pages 213 - 214

(Vol. 2)

16. I have heard the learned counsel for the plaintiff.

17. In UTV Software (supra), a Co-ordinate Bench of this Court, as far as rogue websites are concerned, identified the following illustrative factors to be considered in determining whether a particular website falls within that class:

"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.

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

18. This Court, in UTV Software (*supra*), further held as under:

"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.

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.

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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 through satellite".

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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.

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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.

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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: L'Oréal v. eBay, [Case C 324/09]).

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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.”

19. Vide order dated 24.07.2019, this Court had granted an ex-parte ad-interim injunction against the defendant no. 1 and other such domains/domain owners/website operators/entities which would have been discovered during the course of the proceedings and found to have been engaging in the infringement of the plaintiff's exclusive intellectual property rights, 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, restrained them from, hosting, streaming, reproducing, distributing, making available to the public and/or communicating to the public, or facilitating the same, in any manner, on their websites, through the internet any cinematograph work/content/programme/ show in relation to which plaintiff has copyright.

20. Vide the same order, this Court had directed the defendant nos. 2 to 10 to block the domain name 'Otorrents.com' and its URL <https://otorrents.com> with the IP address 185.112.157.243. This Court further directed the defendant nos. 11 and 12 to suspend the abovementioned domain name registration of the defendant no. 1 and issue requisite notifications calling upon various internet and telecom service providers registered under them to block the aforementioned website identified by the plaintiff.

21. The learned counsel for the plaintiff submits that pursuant to the ex-parte ad interim order dated 24.07.2019, the defendant no. 11 has issued a notification. The learned counsel for the plaintiff further states that the defendant nos. 2 to 10 have blocked the defendant nos. 1 and 51's websites.

22. On 07.12.2021, the learned Joint Registrar (Judicial), passed the following order:-

“Defendant no.51 was to file written statement, but not filed. The plaintiff has filed the affidavit of service qua all the defendants.

All of the contesting defendants against whom substantial relief has been sought by the plaintiff have been served, however they have not preferred to appear to contest this case or to file written statement and affidavit of admission/denial of documents. In this regard, law shall take its own course.

Pleadings are complete.

List the matter before the Hon'ble Court for further directions on 11.01.2022."

23. Since the defendant nos.1 and 51 are not appearing, despite notice, in my opinion, the suit can be heard and decided summarily. The defendants have no real prospect of successfully defending the claim of copyright infringement and have further not chosen to contest the said claim. The present matter is mainly concerned with enforcement of the injunction orders which are passed against the rogue websites who do not have any defence to the claim of copyright infringement but use the anonymity offered by the internet to engage in illegal activities, such as copyright infringement in the present case. On basis of the evidence placed on record, and keeping in mind the factors identified by this Court in UTV Software (supra), I find that there is sufficient evidence to hold that the defendant no. 1 and 51 websites are "rogue websites" and that this is a fit case for passing a summary judgment invoking the provisions of Order XIII A of CPC, as applicable to the commercial disputes.

24. In UTV Software (supra), the Court also examined the issue of grant of dynamic injunctions and permitted subsequent impleadment of mirror/redirect/alphanumeric websites which provide access to the rogue websites, by filing an application under Order I Rule 10 of the CPC before the Joint Registrar (Judicial) alongwith an affidavit with supporting evidence, confirming that the proposed website is mirror/redirect/alphanumeric website of the injuncted defendant websites. At the request of the counsel for the plaintiff, the same directions are liable to be made in this case also.

25. Accordingly, I.A. No. 6469 of 2022 under Order XIII A, as applicable to commercial disputes, seeking a summary judgment is allowed. All the pending applications are also disposed of.

26. The suit is, therefore, decreed in terms of prayers (i), (ii) and (iii) of the plaint. The plaintiff is also permitted to implead any mirror/redirect/alphanumeric websites which provide access to the defendants nos. 1 and 51's websites by filing an appropriate application under Order I Rule 10 of the CPC, supported by affidavits and evidence as directed in UTV Software (supra). Any website impleaded as a result of such application will be subject to the same decree. Decree sheet be drawn up accordingly.