

# IP Hotline

September 19, 2022

## INDIAN COURTS CAN DIRECT INTERMEDIARIES OPERATING IN INDIA TO DISCLOSE COPYRIGHT INFRINGERS' INFORMATION, DESPITE SERVER BEING OUTSIDE INDIA: DELHI HIGH COURT

In a recent order<sup>1</sup> ("Order"), the Delhi High Court ("Court"):

- Directed Telegram FZ LLC ("Telegram") to disclose the details of persons that are infringing copyright of the Plaintiffs through various channels on Telegram.
- Held that Indian courts have jurisdiction over copyright infringement claims arising in India and can direct such disclosures, despite the servers holding data of infringers being located outside India.

### BACKGROUND

The Order was passed in a copyright infringement suit filed by Ms. Neetu Singh (Plaintiff No. 1) and K.D. Campus (Plaintiff No. 2). Plaintiff No. 1 is a renowned author of books for various competitive examinations, and Plaintiff No. 2 is an entity founded by Plaintiff No. 1 for running coaching centres for these competitive exams. The suit has been filed against Telegram (Defendant No. 1), incorporated in the UAE, which operates the Telegram platform and unknown persons that operate the infringing channels on the Telegram platform (Defendant No. 2).

Plaintiffs approached the Court contending that the Plaintiffs' copyrighted works – books, online lectures, and other works were being shared on various Telegram channels at discounted rates. Prior to filing the suit, the Plaintiffs reported this to Telegram via email and Telegram took down the channels reported. Plaintiffs contended that new channels kept coming up where infringing content was being shared regularly.

The Plaintiffs therefore filed the suit seeking, *inter alia*, a permanent injunction restraining Defendants and all persons acting on their behalf from distributing, circulating and unauthorized use of the literary works, lectures, notes, videos, and any other original work of the Plaintiffs on the Telegram platform. An ad-interim injunction was granted by the Court, directing Telegram to take down the infringing channels as mentioned in the Plaintiff's submission to the Court (whether the channels were private or public).

The Plaintiffs filed an interim application under Order XI, Rule 10 of the Code of Civil Procedure, 1908, seeking discovery of the details of the persons operating these channels, in order for Plaintiffs to avail remedies including damages against such persons for copyright infringement. The Order has been passed in relation to this interim application.

### PLAINTIFFS CONTENTIONS

The Plaintiffs argued that Telegram ought to provide the identities of persons disseminating the infringing materials on these channels, so that the Plaintiffs can avail remedies including damages against the persons for copyright infringement, in line with Telegram's privacy policy that permits such disclosure.

### DEFENDANT CONTENTIONS

1. The main contention was that Telegram's servers are based in Singapore, and decryption of data is not permitted except under Singapore law – the Personal Data Protection Act, 2012 ("PDPA"). The PDPA allows disclosure of certain information on the direction of a "court", and since "court" here would mean a Singapore-based court, an Indian court cannot direct such disclosure.
2. The interim order for taking down the channels is sufficient to protect the Plaintiffs' interests.
3. The privacy policy of Telegram does not allow disclosure of identity of users unless the person is a terror suspect.
4. Telegram also contended that such disclosure violates the infringers' right to privacy recognized and guaranteed under Article 21 of the Indian Constitution and recognized by the Supreme Court of India in *Justice K.S. Puttaswamy v. Union of India & Ors*<sup>2</sup>.
5. As per Rule 4 of the Information Technology (Intermediary Guidelines and Digital Media Ethics) Rules, 2021 ("Intermediary Guidelines"), disclosure of information can be sought only in cases of an offence related to the sovereignty, integrity or security of India, friendly relations with foreign states, public order, incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, and only when there are no other less intrusive and effective means to identify the originator of information; none of the situations above are satisfied in the present case.

The Plaintiffs filed a rejoinder to submit that reliance on Singapore law is not appropriate, as the Court has the

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jurisdiction to pass directions in this case, as the Telegram platform is operating in India. It was further submitted that while Singapore laws may apply in case of a private party request for disclosure to Telegram, it would not apply to an order of the Court.

## QUESTION FOR CONSIDERATION

The question considered by the Court was whether Telegram could be directed to disclose the identity of the infringing channels' creators, that unauthorizedly and illegally disseminate the Plaintiffs' copyrighted works.

## JUDGMENT

The Court held that:

1. Jurisdiction: The Court has competent jurisdiction to entertain a copyright infringement suit under Section 62 (2) of the Copyright Act, 1957 ("**Copyright Act**"). Section 62 (2) defines the "district court having jurisdiction" as the district court in the jurisdiction where any person instituting the suit/ other proceedings resides, carries on business or works for gain.<sup>3</sup> Here, the Plaintiffs reside and carry on business in Delhi, infringement occurred in Delhi as copyrighted works were circulated in Delhi, and the infringers may be based out of India. The jurisdiction of the Court could not be ousted merely because the Telegram app retains data outside India on its servers.
2. Copyright infringement and remedies: Telegram did not dispute that infringement was occurring on the platform. However, the Court held that repeated blocking of infringing channels by Telegram was not sufficient to curb infringement, as new channels were hydra-headed and were created with secret chat features almost immediately after infringing channels were taken down.

Circulating copyrighted materials of the Plaintiffs' works on Telegram channels is "communication to the public" under Section 2(ff) of the Copyright Act, and the copies circulated on the Telegram channels are infringing copies under Section 2(m) of the Copyright Act. Therefore, the Plaintiffs' copyright in these study materials has been infringed on the Telegram platform.

The Copyright Act provides both civil and criminal remedies for infringement. Under civil remedies, apart from injunction, damages, and accounts, Section 58 of the Copyright Act deems infringing copies and all plates used / intended to be used for the production of such infringing copies as the property of the copyright owner, who may take proceedings for the recovery of possession thereof. The Copyright Act defines "plate" under Section 2 (t) as "any stereotype or other plate, stone, ... or other device used or intended to be used for printing or reproducing copies of any work" (emphasis added).

Therefore, the Court held that electronic devices including smart phones, computers, servers, and such other devices, through which the infringing copies are shared on the Telegram platform, would undoubtedly fall under the definition of "plate". Therefore, seeking information of those in possession of such electronic devices is permitted under the Copyright Act.

3. Damages: Court held that the grant of injunction without commensurate damages or monetary deterrents does not constrain the infringers from creating new infringing channels and profiting off of infringement. Thus, until the identity of the operators of these channels – who are ex facie infringers of the Plaintiffs' copyright – are disclosed, the Plaintiffs cannot recover damages.
4. Servers of Telegram located in Singapore: For the following reasons, Telegram cannot escape liability or orders by Indian courts with competent jurisdiction, merely for the reason of servers being located outside India:
  - The Telegram platform is one of the most popular messaging applications in India with a subscription base of millions,
  - Infringement has continued in India and courts are entitled to pass orders for protection of the rights of copyright owners,
  - Since the copyrighted material is for Indian examinations, the infringing channels are in all likelihood created and operated from India, and
  - Telegram did not argue that the devices used to circulate the infringing material were outside India, but only the servers holding the data were outside India. Further, these servers are accessible from other jurisdictions as these are on cloud servers (as mentioned in Telegram's privacy policy).

Additionally, the PDPA recognizes violation of law as an exception for privacy. Singapore is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, 1886 ("**Berne Convention**") and a World Trade Organization member. The Berne Convention provides for reciprocal protections to authors who can enjoy rights across the world without seeking registrations. Therefore, the Plaintiffs' works would enjoy protection under the laws of Singapore. The PDPA cannot be an excuse for Telegram to justify the non-furnishing of the infringing information, as such dissemination is violative of Singapore's copyright law as well.

5. The Information Technology Act, 2000 and the Intermediary Guidelines: Rule 3 (1) (b) and 4 of the Intermediary Guidelines do not obviate the duty of the Telegram platform from taking all effective steps required to protect copyright owner rights.

This was discussed and held by this Court's division bench in *My Space Inc. v. Super Cassettes Industries Ltd.*<sup>4</sup> – the privilege granted under Section 79 of the Information Technology Act, 2000 ("**IT Act**") (that provides intermediaries safe harbour if it takes certain actions and observes due diligence in its actions) does not mean that the rights guaranteed under the Copyright Act are curtailed. The intermediary is to be granted safe harbour, so long as it complies with the requirements of law. The provisions of the IT Act and the rules made therein have to be construed harmoniously with the rights and remedies provided to the copyright owners under the Copyright Act.

The Court noted that it cannot perpetually supervise infringements. Thus, the origin and source of the infringing material has to be traced and such devices or persons ought to face consequences under law, including being held liable for damages. That would not be possible if the details of the infringing channels are not disclosed by

Telegram. It was also noted that producing infringer details is not a comment on Telegram's liability and does not derogate from safe harbour provisions. In fact, it is aligned with the view of Telegram's claimed role as an intermediary, which claims to act as a conduit of information.

6. Right to privacy: The *K.S. Puttaswamy* judgment mentioned in the Defendant's arguments has held that if there is a law in existence to justify information disclosure and there is a need for disclosure considering the nature of encroachment of right, then privacy cannot be a ground to justify non-disclosure, as long as it is not disproportionate.

The Court finally ordered Telegram to disclose to the Court a list of existing and new infringing channels, if any, and the details of the channels/devices, mobile numbers, IP addresses, email addresses, etc., used to upload the infringing material.

### COMMENTS / KEY TAKEAWAYS

This Order comes at a time when the Indian government is expecting big tech companies to assume more responsibility in relation to unlawful activities on their platforms. In fact, this is not the first time Telegram has come under the scanner in India for dissemination of infringing content on its platform. In a 2020 case of *Jagran Prakashan Limited vs. Telegram FZ LLC & Ors.*,<sup>5</sup> the Telegram platform was used for dissemination of Dainik Jagran PDFs for free. While Dainik Jagran offered a free to read e-newspaper on its website, the feature to download it as a PDF was not free. The plaintiff sought an injunction to restrain such channels on Telegram, stating that the Plaintiff's copyright and trademark rights in the newspaper are violated. The Court granted an ad-interim injunction in favour of the Plaintiff, directing Telegram to take down all infringing channels and disclose the basic subscriber information/identity of the users/owners of the channels.<sup>6</sup>

Foreign intermediary platforms often argue that their local laws do not allow disclosure of information without orders from their local courts, or without ensuring other compliances provided in their local laws.

In a case before the Orissa High Court,<sup>7</sup> Google Inc. (headquartered in the US) argued that it could not disclose information pertaining to its subscribers to law enforcement agencies in India without such agencies following the formal procedure as provided under the Mutual Legal Assistance Treaty ("MLAT") between India and the US. Google Inc. argued that any such disclosure would be in derogation of US law, i.e. *Electronic Communication Privacy Act, 18 U.S.C. g 2702(a)*. The Orissa High Court recognized the inability of a corporation incorporated in the US to provide data/ information to Indian law enforcement agencies and affirmed the view that the information request should be sent as per the MLAT.

This Order may lead to more information requests being made to foreign entities for information connected with users in India. However, it has to be noted that this Order only relates to copyright infringement. A major factor for allowing disclosure in this case has been the presence of reciprocal protection of copyright under the Berne Convention. In cases where copyright issues do not arise, this Order may not be applicable and foreign players may be able to defend information requests and may be able to argue that the process under MLAT must be followed.

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<sup>1</sup> *Neetu Singh and Anr. v. TelegramFZ LLC and Ors.*, CS (COMM) 282/2020

<sup>2</sup> AIR 2017 SC 4161

<sup>3</sup> "Section 62. Jurisdiction of court over matters arising under this Chapter.

(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

<sup>4</sup> (2017) 236 DLT 478 (DB)

<sup>5</sup> MANU/DE/1190/2020

<sup>6</sup> An order in this case was passed on July 21, 2022, stating that one of the issues that may arise in this case has been heard by the Delhi High Court bench of Justice Prathiba Singh (it is presumed that this refers to the *Neetu Singh and Anr. v. Telegram FZ LLC and Ors.* Order.), and this case judgment should be reserved until the order by Justice Prathiba Singh is passed.

<sup>7</sup> *Kamalakanta Tripathy v. State of Odisha and Ors.*, 2021 CriLJ 855

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