

Infringement of Copyright by OTT Platform in India

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Abstract:

Since the human evolution, human constantly searched or researched for their betterment. This search for betterment took us from Stone Age to digital Age, which we are experiencing in as on date in 21st century. In this digital Age, the information which were in the books transferred to digital media, which now can be easily accessed all over the world through help of internet. The internet has successfully evolved universally on concept of free, fast, anywhere and anytime access.

Now, the speciality of internet is that it cannot be controlled by a single or group of persons. This feature of internet has positive as well as negative side. The one of the downside we will discuss in the paper is the infringement which also called using someone's work without permission of the author. This has led to copyright violation electronically. As, all of us are started using internet more and more, due to which internet became necessity of our life, the question of fair use has been arise. This necessity unknowingly reflects that how use of internet has changed the very approach of the copyright laws in India.

In this paper, we will further see evolution of OTT Platform, its meaning, origin and meaning of infringement, meaning of copyright and various Indian laws under which copyright infringement cases has been delt within India.

Keywords: Copyright, Digital Millennium, Infringement, IPR, MPDA, OTT.

1. Introduction

The year 1947, as we all call it The Indian Independence Year, where we all accepted the constitution of India with one voice, where the media revolution began with foundation of Press Trust of India (PTI) which is now largest news agency in India. After a decade, we had our first public broadcaster named "Doordarshan" or "DD" which is still the largest broadcasting organization for studio and transmitter infrastructure in India.

Since 2002, the impact of economic, technological policies and globalization, made India leader in Fourth Industrial Revolution which is also called "Technological Revolution", which achieved by projects initiated by Indian government such as BharatNet, Digital India and Startup India.

In 2016, the major push by mobile and data companies can be seen, which effected in introduction of 4G technology, which caused the internet data rates to be so cheap so that it can be afforded by rural India, along with this affordable mobile devices accompanied with 4G Technology gave boost to the online data consumption. These all development in India provided a perfect ecosystem for (Over the Top) OTT platform to flourish. Now, let's see briefly meaning of OTT Platform.

- **Meaning of OTT Platform:**

Over-The-Top (OTT) media service is any online content provider that offers streaming media as a standalone product. The term is commonly applied to video-on-demand platforms, but also refers to audio streaming, messaging services, or internet-based voice

calling solutions.¹The pioneer of Indian OTT Platform is Reliance Entertainment named “Bigflix”. Later Zee TV, Sony Liv, Amazon-Prime Video and Disney+Hotstar introduced OTT, which made India 2nd largest consumer of online video audience in the world. Next, India was introduced by online messaging services such as viber, WeChat, skype, telegram including voice calling feature of WhatsApp.

The OTT platform is a content service provider which, therefore involved in developing high quality, original programs with aim to serve its users with quality content at affordable prices. Now, to achieve this, first interest of original producer of content is needed to be protected globally and nationally. Now, let’s look at the meaning of infringement and its methods.

2. Meaning of infringement and its methods:

The protection is granted where the right is created as mentioned in one of the Latin Maxim named “*Ubi jus ibi remedium*”. The right will get automatically initiated when the right is breached; this breach is called in Latin “*infringo*” which we call it “**infringement**”. This means breach of violation, applied to the breach of a law or violation of a right, as of copyright². The word “**Copyright**” means the exclusive right given to the creator of literary, dramatic, musical and artistic works and producers of cinematography films and sound recording including right to reproduce, communicate to public, adaptation and translation of the work³. Now, the infringement can be done by following ways⁴:

If any person does anything which permits him/her to make profit by using the communication of the work to the public knowingly also, He/she does following Acts knowingly:

- (i) Makes a sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire
- (ii) Distributes for the purpose of trade
- (iii) By way of trade exhibits in public
- (iv) Import into India

3. Legal Provisions for Regulation of OTT:

Initially, OTT Platforms content were not regulated by any specific agency but under various laws it was indirectly regulated as follows:

- Article 19 of Constitution of India, where reasonable restrictions such as sovereignty and integrity of India are applied to OTT Platforms.
- Indecent Representation of Women (Prohibition) Act, 1986 prevents indecent representation of women in all forms.
- Protection of Children from Sexual Acts 2012, grants protection to child.
- Information Technology Act, 2000 penalizes electronic transmission of indecent material also The Information Technology (Intermediary Guidelines) Rules, 2011 also applicable to OTT platform for their role as intermediary⁵.
- Self-regulation for online curated Content Providers (2020 Code) by Internet and Mobile Association of India.

¹http://164.100.47.193/Refinput/New_Reference_Notes/English/16072021_150800_102120526.pdf

² Infringement meaning from Wharton’s Law Lexicon page 929

³ Section 14, Copyright Act, 1957

⁴ Section 2(l) or Section 51, Copyright Act 1957

⁵<https://www.wipo.int/edocs/lexdocs/laws/en/in/in099en.pdf>

4. Legal Provisions for Copyright Infringement:

The OTT Platform, streams the high quality content over internet where such content is created by involving intellect of various creators, so due to which OTT deals with Intellectual Property of certain people, due to which revenue is generated by the platform, due to such reasons OTT comes under Intellectual Property Laws. These various creators can be composer, producer, photographer or lyricist; their creations can be protected under various provisions of Copyright Act, 1957 where this Act grants bundle of rights. Now, let's see legal provisions regarding infringement of copyright.

4.1 Types of infringement Suits:

The rights granted under Copyright Act, 1957, when violated, the owner of the rights can sue for infringement by filing two types of suits in appropriate courts:

- a. A civil suit can be filled claiming injunctive reliefs and damages. Here the author need to seek interim injunction while pendency of the case. Such relief can be granted by court within 48 hours from initiation of suit. If under urgent condition, balance of convenience which means author/appellant can come under irreparable injury, which would be deprived him from his current position and hardship to author/appellant, appellant can get injunction in its favour. This may be related to script, musical works, remake rights, or distribution rights
- b. Criminal suit are also available in case of copyright infringement, which are typically related to piracy. Piracy of copyright is a universal problem and it is in the form of illegal distribution, exhibition, copying, downloading, or uploading. Piracy causes huge losses, not only to the owners of copyright but to the industry and the economy as a whole, unfortunately, India one of the top three countries in the world⁶.

4.2 Under Indian Penal Code, 1860:

Section 292-293 of Indian Penal Code, 1860 where sale of obscene material is prohibited, The Supreme Court OF India, in *Avnish Bajaj Case*, came with the judgement, where Delhi High Court found vicarious liability in under Information Technology Act, 2000 and Indian Penal Code, 1860, that vicarious liability cannot be applied to Avnish Bajaj under the Section 67, Information Technology Act, 2000 because provisions as the company was not prosecuted as an accused. This became landmark case, and the effect was such, Information Technology Act, 2000 was amended, which introduced Section 79(1) of the Information Technology Act, 2000. This section, subject to certain conditions, provides immunity / safe harbor to intermediaries (such as the Website) from the penalties under the IT Act for content made available on its platform by third parties⁷.

4.3 Under Maharashtra Prevention of Dangerous Activities (MPDA) Act, 1981:

The State of Maharashtra came up with an ordinance to curb audio-video piracy, with provision of preventive detention in The Maharashtra Prevention of Dangerous Activities (MPDA) Act, 1981. In this Act, Intellectual Property Rights pirates are brought with par to drug offenders. This provision of Act is to bring enforcement to Section 63, Copyright Act, 1957. The MPDA allows the police to place offenders in detention for as long as 3 months without bail, and up to a maximum of 12 months. This power of preventive detention has been found to be constitutional, but is subject to strict procedural safeguards.

⁶<https://dataprot.net/statistics/piracy-statistics/>

⁷<https://www.mondaq.com/india/it-and-internet/572042/the-bazecom-saga-unravelling-supreme-court-clarifies-intermediary-liabilities-for-hosting-obscene-content>

4.4 Under Dr. John Doe Orders:

When to identify unknown/nameless defendants, who have committed infringement, but that person's identity cannot be ascertained by the plaintiff then to resolve this issue and grant relief to plaintiff, "John Doe" or "Ashok Kumar" order is used. This provision of law is used to avoid delay in the process of justice due to anonymity of the defendant. This provision is enforced until such the defendant's identity is ascertained. Here, the plaintiff need to prove the existence of a prima facie infringement, balance of convenience in its favor and irreparable loss caused due to the illegal activities of the unknown defendant.

The *Ashok Kumar Order* is very beneficial when in cases of copyright infringement cases when it is not always possible for the copyright owner to identify and drag all infringers to court in time of hearing due to various reasons, especially where the infringement is on such a large scale. One such case where is Plaintiff is the producer of cinematograph film "*Reliance Big Entertainment v. Multivision Network and Ors. (Singham)*" and Plaintiff apprehends and pleaded to the court following which granted them injunction⁸:

"The said movie will be copied and DVDs/CDs thereof will be prepared, distributed in the market or in case the film is shown on cable and internet, by the persons who are not being authorized by the plaintiff to do so, cine goers may not go to theaters to see the film, resulting in huge financial losses to the plaintiff. It was contended that copying and distributing the film on CDs/DVDs/Blue-ray discs/VCD, etc., by such unscrupulous persons has been noticed in respect of new releases in recent past. Such films are shown by the cable operators. They have been collectively arrayed as defendant nos. 6 to 30 in the assumed name of "Mr. Ashok Kumar". It is contended that in this regard "John Doe", practice may have to be resorted which is well recognized not only in United States of America, Canada, England and Australia but also in India. Reliance has been placed on *Taj Television vs. Rajan Mandal and Ors.* 2003 FSR 22 and order passed by a Single Judge of this Court in CS (OS) No. 821/2011 in *UTV Software Communications Limited vs. Home Cable Network Ltd. and Ors*"

4.5 Under Digital Millennium Copyright Act (DMCA):

The Digital Millennium Copyright Act, or DMCA, is law passed in the United States Of America in 1998. This Act is the world's first legal provision recognising intellectual property on the internet. The object of this Act is to protect the intellectual property overseas. This Act is recognised by many member nations of the World Intellectual Property Organisation (WIPO) in 1996. One such case was occurred in India with Union Minister for Electronics and Information Technology and for Law and Justice Ravi Shankar Prasad.

Another case is with *Yahoo Inc. and Anr, C.S. (O.S.) Vs SCIL (Super Cassettes Industries Limited)* where the defendant i.e yahoo.com unauthorizedly streamed the SCIL's audio-video on their platform named "video.yahoo.com" which caused the copyright infringement. Then The Yahoo took defence under the Digital Millennium Copyright Act (DMCA) saying that they'll remove the infringing material when notified by copyright owners, but court passed an order restraining defendants streaming any content of plaintiff's website, without obtaining an appropriate license from the plaintiff.

4.6 Under Fair Use Policy of Copyright Act, 1957:

The Copyright Act, 1957 under Section 52 says "Certain acts not to be infringed of copyright". The one case on this was *Newslaundry v. Aaj Tak*, where Newslaundry which is founded in 2012 and only makes its report on their online YouTube channel. They have been alleged of copyright infringement and defamation by TV Today Network's Aaj Tak for 2 crore rupees, but finally you

⁸ I.A. No. 11242/2011 (under Section 151 CPC)
Tilak, G. (2019). Freedom of Expression in the Digital Age.

Tube said that under their definition of Fair Use, criticism is not an infringement of copyright. So let's look at SLAPP system of YouTube used to detect the infringement of copyright.

YouTube's copyright enforcement is based on *Strategic Legal Algorithms Against Public Participation* or "SLAPP". This helps owner of work to put a "legal takedown request" to YouTube to get protection for their content when used without authorization. If after this request, video is taken down then it is called "Strike". This strike is a warning to the defendant. If a user's account gets over three "Strikes" then his account is terminated, videos shall be removed, and that user will be prohibited from creating a new channel.

Conclusion:

The law in economics is very clear, "Where there is a demand, there is a supply", if we examine copyright infringement under this rule, we can see that there is a demand for such content over the internet, which is called "*business of infringement*". Now, if we see through a psychological perspective, such demand is created because it has no cost to be paid by the user. These two perspectives we can see that it's related to the economic purchasing power of the individual.

Now, due to such infringements, on one side, there is a lack of equality in viewers also such as some viewers cannot access and some can and on the other side, the viewers of infringed copyright content fail to understand that they are obstructing the creativity of many creators and their work is unable to give these creators the returns they are expecting.

If we look at the enforcement agencies in India, especially in South India i.e. State of Tamil Nadu, they have been appreciated for the work done by them in stopping copyright infringement in their state. Such a model can be implemented centrally and trained officers must be deployed to protect intellectual property rights in India, where swift action can be taken, due to which, the economy of the state shall not be hampered.

Finally, there is a tussle between law and technology. The technology is dynamic, gains momentum speedily but the laws are rigid and less flexible. These contrasting features created several legal issues for intellectual property rights. The protection of intellectual property is very important to us because it brings and encourages innovation and brings change in the lives of citizens. It is a right time to take appropriate steps to stop infringement of copyright over OTT platforms, due to which timely justice can be done with the authors in India.