

Use of Mediation For Resolution of Copyright Infringement Disputes on OTT Platforms In India.

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Abstract

OTT platforms are getting flooded with new, creative content which is accessed by many people. Most of the work on the OTT platforms is in audio-visual form. When there is any work in which copyright subsists like Cinematographic film, Musical work, Audio recording etc, it must get protection as per intellectual property rights laws.

When there is copyright infringement, one must get remedy and enforcement of his/her rights. In India, judicial remedies are provided as per Copyright Act 1957, Information Technology Act, 2000 etc, but ordinary litigation process is not time and cost effective and so we should look for alternative dispute resolution mechanisms like mediation.

Indian scenario and legal framework regarding use of ADR in Intellectual property disputes like infringement of copyright need more attention and exploration. There is need to explore and search utility, hurdles and legal framework regarding use of mediation in resolving copyright infringement issues on OTT platforms which is attempted through this research.

Keywords: Copyright infringement, Mediation, IPR, ADR, OTT.

Research Methodology

As the research focuses on various laws, legislations, precedents regarding mediation and copyright infringement, “Doctrinal” research methodology is used for this research.

Introduction

Globally, Intellectual Property Rights (IPR) are increasing and interestingly OTT platforms are on the lead in this regard. As OTT platforms have tremendous amount of content worldwide, they contain huge IPRs especially Copyrights and Trademarks. But, as many of the OTT platforms are operating in multiple countries and legal systems, it is very difficult for them and IPR holders to manage and enforce their IPRs. Advertising and subscription-based OTT platforms are facing between 25% to 30% of loss of revenue, as they lose views and subscribers to illegal platforms which pirate content. According to a recent KPMG projection, the digital and over-the-top (OTT) content industry in India is estimated to grow at 17% over FY21 to touch a revenue of ₹33,800 crore by FY22. This includes OTT platforms that make available a variety of content including television shows, films and even original OTT content.

Alternative Dispute Resolution (ADR) mechanism is very useful for resolution of disputes amicably and they aim to decrease the case/litigation burden on courts and their spatiality is that, they can easily operate without barriers of separate legal systems. But in India, awareness about use of ADR mechanisms for resolution IPR disputes is needed and we have to focus on legal framework and practical feasibility of it.

Direct infringement of OTT content is considered a copyright infringement pursuant to the Copyright Act. Copyright Act defines an infringing copy under Section 2 (m) and gives exclusive rights on the creator or author of the work. When the content is offered on a platform that could result in civil and/or criminal liability under Section 51 of the Copyright Act and if there is unauthorized reproduction or deliberate storing of the infringed work it will be considered as an infringement. The offence of infringement carries a minimum imprisonment of six months with a maximum of three years and fine not less than ₹50,000, which can extend up to ₹2,00,000.

Also, the Information Technology Act, 2000 considers the unauthorized distribution of copyrighted content as an offence, and adds responsibility on the intermediaries like OTT platforms as well, when read with the Intermediary Rules of 2011, to make sure that no infringing content gets posted on their platforms.

The procedure to be followed in suits for infringement of copyright is contained in Section 26 to 35A of the Civil procedure Code and the rules of procedure in the First Schedule. The District Court having jurisdiction or the High Court having original jurisdiction have the power entertain the copyright infringement suits.

For claiming the copyright in the work, following tests are applicable in the court-

- (1) In which works the plaintiff is claiming copyright?
 - (2) Whether each of such work original or not.
 - (3) Was there copying from that work? And if yes, has a substantial part of that work been copied?
- Plaintiff has to establish the facts regarding how infringement is or being done. Also, because of that infringement what kind of damage is suffered by the plaintiff. Usually, plaintiffs pray to court for-
- 1) Declaration as to plaintiffs' right
 - (2) permanent injunction and the nature of the injunction sought,
 - (3) damages/ compensation
 - (4) accounts of profits,
 - (5) delivery of infringing copies used or intended to be used
 - (6) costs of the suit.¹

However, once an infringing copy is found on any platform, generally, Cease and Desist notices do the job, making the intermediaries like OTT platforms stop posting or remove the concerned content on their websites. To identify such websites and prevent them from offering or making available pirated copies, courts have developed effective mechanisms by issuing dynamic injunctions or John Doe orders that prohibit not only the identified websites, unidentified infringers, and also the intermediaries. The Civil Procedure Code along with the Specific Reliefs Act, allows courts to grant such temporary injunctions.²

Since there is no definitive law on online copyright infringements yet, which affects OTT platforms' incentives and revenue derived out of their work, as their labour continues to get stolen, India needs to modernize its IP Laws to adapt to these new forms of infringement.

What is Mediation?

Mediation is a process in which third party, independent person/authority facilitates for resolution of dispute between parties. The main feature of Mediation is Party Autonomy. Parties can decide about who can be the mediator, how process will follow and most importantly, they can opt out of mediation at any stage before the final mediation agreement.

Usually, mediator takes 2 types of processes for mediation. Firstly, mediator meets and communicates with disputing parties separately in private sessions where he understands the parties' grievances and submissions individually. In second part, common sessions with all the disputing parties is taken together where parties can submit their views directly in front of mediator and other parties. Generally, mediation consists- Introduction and Opening Statement, Joint Session, Caucus or Separate Session and Closing.

During this mediation process, parties negotiate and try to settle their dispute and mediator will act only as facilitator for it. That means, mediator is often acts as link of communication between

¹ The Procedure to file copyright infringement case in court, available on- <https://www.legalserviceindia.com/copyright/how-to-file-a-copyright-infringement-case.htm> , accessed on 29/03/2022 at 9.20 am

² Available on- <https://thelawreporters.com/intellectual-property-rights-in-ott-platforms#:~:text=A%20direct%20infringement%20of%20OTT,the%20creator%20of%20the%20work>. Accessed on 25/03/2022 at 7.30 pm

disputing parties. At the end of the mediation, if parties finalize and agree for the settlement, mediator will reduce the settlement agreement between the parties in writing and all the disputing parties will sign it. If mediation fails and parties do not agree on settlement, mediator will make such remark and parties can opt for judicial or any other remedy.

Which matters can be resolved by the mediation?

Usually, all the rules and principles applicable to other ADR mechanisms also apply to mediation. So, all the matters of civil nature, Contractual nature and compoundable offences can be referred to mediation. Cases involving right in rem are not subject to mediation but cases involving right in personam can be resolved using mediation³. In case of copyright infringement, mediation can be done.

Whenever it appears to the Court that there exist elements of settlement, the Judge may refer the case to mediation and also whenever both the parties desire for it, they may seek reference to mediation.⁴ There are certain statutes which provide for mediation as a mode of settlement of disputes between the parties. Such statutes comprise of, but not limited to the following:

1. Section 4 of the Industrial Disputes Act, 1947
2. Section 89 read with Order X Rule 1A of the Code of Civil Procedure, 1908
3. Order XXXIIA of Civil Procedure Code, 1908
4. Legal Services Authority Act, 1987 read with Section 89 of CPC
5. Section 442 of the Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016
6. Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006
7. 129th Law Commission of India Report.
8. Section 12A of the Commercial Courts Act, 2015
9. The Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018
10. Mediation and Conciliation Rules, 2004.

Advantages of Mediation in Copyright infringement disputes in OTT platforms-

1. Expertise- In disputes like copyright infringement, there are many technicalities involved. For that matter, parties can choose expert in the field of OTT, Copyright matters so that, dispute could be settled easily with the help of expert.
2. Party Autonomy- In mediation, parties have great power and they can put forth their views and they can decide about venue, applicable laws, appointment of mediator, fees of mediator etc. on their own.
3. No hurdle of Legal system- As OTT platforms operate in many nations and legal systems simultaneously, it becomes difficult for IPR holders and OTT platforms to file and follow litigation process in ordinary courts. Mediation of a dispute in any country or legal system can be resolved with the mediation.
4. Cost effective- Mediation is much more cost effective than that of ordinary litigation in India. It bypasses court fee; litigation costs and it requires less lawyers' fees and other evidence costs.
5. Consumes less time- Where ordinary court litigation in India may take few years for final decree, mediation operates very fast due to party autonomy.
6. Better relation between parties- As disputing parties in one copyright infringement dispute could be the future partners or involve in commercial relations later or simultaneously in other matters, it becomes important for them that they maintain good business and personal relations with other party. For this, mediation is much better as it aims for resolution of dispute amicably and with consent of parties. In ordinary court litigation process, relations between parties usually gets affected.

³HDFC Bank v. Satpal Singh Bakshi, 2013 (134) DRJ 566

⁴ Available on- <https://districts.ecourts.gov.in/mediation-3>, accessed on 28/03/2022 at 4.50 pm

7. Less Complexity- In mediation process, complex filing and litigation process is absent. Evidence Act, Civil Procedure Code etc do not apply for mediation.
8. Confidentiality- In mediation process, confidentiality is maintained by the mediator and anything said, submitted in mediation could not be used in any proceeding or case. In case of copyright, this confidentiality is very useful. In open court anything put on record becomes part of public domain and so, further infringement is possible but in mediation parties can submit their work freely without any worry.
9. Enforceability- When a dispute is resolved with mediation through mediation agreement between parties, it is binding on the involved parties and it can be enforced with the help of court/judiciary.
10. In OTT platform related copyright infringement disputes, injunction orders which are usually passed by courts are very inconvenient as huge amount of money and reputation is involved. If such copyright infringement disputes are resolved with the use of mediation, it is very convenient for parties.

Problems in mediation of copyright infringement disputes on OTT platform-

1. Mutual consent and willingness of the parties is the prime consideration for mediation. When a dispute arises, generally parties tend to enter conflict mode and it becomes difficult for them to communicate with other parties. So, entering mediation becomes difficult.
2. Also, in India experts in mediation are less in number as compared to other developed countries especially in the context of Copyright infringement in OTT platforms.
3. There is lack of awareness about ADR mechanisms like mediation and usefulness of it in India.
4. Appointment of mediator is very crucial step and many times parties do not agree on mediator. In this regard, many times it is not known to parties that they can take help of court for appointment of mediator.
5. People tend to rely more on court's verdict/order than that of mediation agreement.
6. When parties outside India are involved in mediation, enforcement of mediation agreement becomes bit difficult in India as there are no specified rules, legislations related to it.
7. Mediation agreement is binding on the parties which are involved in dispute and doing mediation only. Mediation agreement is not binding on third parties. So, whenever there is question of declaration of right or right in rem, mediation is not useful.
8. In India there is lack of structured mediation centers where parties can approach of mediation.

Conclusion

Though mediation saves time, money, reputation and relations between parties, it must be understood that we need more awareness in this regard. Also, India needs to prepare policy for OTT platform regarding protection and enforcement of IPRs. As World Intellectual Property Organization has developed standard rules for mediation of IPR, Copyright disputes, India can develop rules, regulations and structured permanent mediation centers on similar grounds.

Copyright law should also precisely speak about use of ADR techniques like mediation for resolution of IPR disputes like copyright infringement.

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Mahratta