

# Dominance of OTT And Infringements Under IPR: An Analysis

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## Abstract

The Copyright Registry recently consulted with industry stakeholders on revising the Copyright Act 1957, acknowledging that the creative "industry is expressing and developing in response to changes brought about by Internet use, digitisation and an increasingly globalised digital content market." As a result, India has an opportunity to refocus on its goals of online creative content creation and distribution under a stable legal framework.

Online material consumption in India is steadily increasing. According to the International Federation of the Phonographic Industry's 2018 Music Consumer Insights Report, nearly 95% of Indian consumers listen to music via on-demand streaming. OTT services are also becoming increasingly popular with consumers to watch movies and TV shows. OTT platform subscriptions doubled in 2019, according to FICCI-EY's 2020 media and entertainment research. Their share of overall digital division revenue climbed from 3.3% in 2017 to 13% the following year. This shift in consumer behaviour is due to high internet penetration, low data pricing, and a surge in smartphone users. In addition, the Covid-19 pandemic has accelerated the transition to digitisation and has reignited questions about internet copyright.

**Keywords:** Copyright, OTT, Information Technology

## The Dominance of OTT and Infringements under IPR: An Analysis

Intellectual property rights are legal rights granted to authors of creative works (IPRs). The purpose of intellectual property rules is to protect the rights of creators and their intellectual property. However, not all of these benefits are inalienable. They must be legally recognised. The Copyright Act of 1957 is one of many Indian statutes that protect the intellectual property rights of creators.

Copyright is the exclusive legal right of the owner to use the print, publication, performance, sound recording and musical content of his work for a certain period. When someone uses someone else's copyrighted work without permission, it's copyright infringement. The term "copyright infringement" is widely used in today's online media age. The term "OTT" refers to media platforms that distribute video, movies, series, audio and other types of content. Over-the-top (OTT) media is growing in popularity. It is critical to understand copyright infringement challenges on such platforms and the rules that protect them from infringement. This article covers copyright infringement and related rules for OTT platforms based on the recent *Raymond Pirtle v Netflix, Inc*<sup>1</sup>. (2021) case, in which the plaintiff claimed to have infringed his trademark and copyright in the name "Skate Girl." This includes what some intellectual property attorneys think about copyright infringement.

However, advances in information and communication technologies are pushing the boundaries of creative possibilities in previously unimaginable ways, questioning the core foundations of intellectual property law. OTT players like Google, Skype, Viber, WhatsApp, Netflix, Amazon, and Hulu have made paying for international calls problematic. Many of these services are

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provided for free. OTT services are sources of audio-visual content that can be viewed on a variety of devices for free or at moderate prices, making it easier and less expensive to stay connected.

The term "OTT platform" refers to any communication service that is not directly controlled by the government or any telecommunications, such as voice calls, instant messaging and video streaming applications, and is therefore distinct from the top layer of traditional networks. Instead, comply with the laws governing cable or satellite networks.

### **IP Rights and OTT Platforms**

The evolving concept of intellectual property has successfully adapted the law to the online community through the Internet Protocol for quite some time. Intellectual property has been able to leave such an imprint in the digital environment as corporate assets are increasingly reflected in knowledge rather than physical characteristics. As our lives become increasingly reliant on the Internet, challenges surrounding intellectual property rights and their protection come with them.

The Internet started as a scientific and social experiment but has grown into a business network, constantly developing new business models and offering new services to consumers. While the nature of the right to limit the exploitation of individual creativity and innovation has remained the same, the road has always been revolutionary. The manner in which these rights are communicated and transferred continues to evolve as technology advances. Telephones, tape recorders, television, radio and cable networks, satellite communications, tape recorders, compact discs, and the Internet are all examples of communication technologies that significantly impact intellectual property law. While traditional media formats such as film and television have established guidelines, OTT content has not yet been subject to specific legislation and oversight.

### **Protection Under Copyright Act and Information Technology Act**

Since no unique regulatory bodies or regulations can apply to OTT content, anyone attempting to remove OTT content from the platform must rely on existing legal mechanisms provided by other relevant laws. To be legally removed or removed from an OTT platform, the targeted OTT content must be declared illegal and meet the standards of applicable law. Furthermore, the measures must be appropriate and sufficiently feasible to take delisting action against an OTT service provider. The Copyright Act, 1957 and the Information Technology Act, 2002 are two such statutes mentioned here. In addition, both the Copyright Act of 1957 and the Information Technology Act of 2000 include safeguards against the threat of piracy.

Under the Copyright Act, most OTT content can be classified as audiovisual, musical, cinematic or broadcast and protected by copyright. Copyright is an intellectual property that gives the creator of an original work full control over its reproduction and distribution. When a person copies or reproduces the work of another person who owns the copyright in work without his consent, it is called copyright infringement. Making an "infringing copy" is defined in Section 2(m) of the Copyright Act 1957. Copyright is defined in Section 14 of the Copyright Act, which explains the many exclusive rights a copyright owner has, including the reproduction, reproduction and storage of work. Any purposeful storage of works and unauthorised reproduction and distribution is considered copyright infringement and is subject to civil and criminal sanctions under Section 51 of the Act. Sections 65A and 65B combat copyright infringement in the digital age by guaranteeing the preservation of technological measures and rights management information. With the advancement of technology and the introduction of the Internet, copyright infringement has become a multidimensional problem. In recent months, one of the most contentious issues under Indian copyright law has been whether online internet platforms are covered under Section 31D of the Copyright Act 1957. This question seems to have a simple answer for Section 31D, but it is quite complicated.

When copyright owners wish to block or remove their copyrighted content from various digital platforms, they must prove that the site or other platform primarily contributes to widespread copyright infringement to the courts' satisfaction. For digital platforms and applications that act as

intermediaries to disseminate pirated content, aggrieved parties can go to court and request the necessary instructions to remove the infringing content from the website. Due to the nature of OTT content, there are two main ways of copyright infringement: (1) OTT service providers directly infringe; (2) OTT platform users infringe through user-generated content (UGC).

Sections 43 and 66 of the Information Technology Act 2000 outline the scope of piracy, which makes it illegal to distribute copyrighted content online. Under Section 79 of the Content Technology Act, intermediaries are obliged to meet their due obligations and ensure that they do not host or publish any information that infringes the intellectual property rights of individuals or companies. Read rule 3 and sub-rule 4 of the Information Technology (Guidelines for Intermediaries) Rules 2011. The intermediary is responsible for notifying users not to publish any information that may infringe personal property rights. If such illegal acts are found, the intermediary has the right to terminate the user's access or use rights. In addition, the 2018 Information Technology [Intermediary Guidance (Amendment) Draft Rules] requires intermediaries to use technology-based automated methods to identify and remove or prevent public access to illegal information.

### Liability for Copyright Infringement by its Users

In a recent decision of the Delhi High Court, *Jagran Prakashan Limited v Telegram FZ, LLC & Ors*<sup>2</sup>. The court also ordered Telegram to disclose basic subscription information of channel users. As there are not many cases in Indian courts, the next paragraph will refer to overseas judgments. U.S. courts use the "inductive principle" to address the issue of intermediary liability. The U.S. Supreme Court ruled in *MGM Studios v Grokster Ltd*<sup>3</sup>. that defendant companies can be sued for intellectual property infringement under this doctrine because their platforms facilitate peer-to-peer file sharing, encourage direct infringement, and also substitute monetisation for such infringement.

The U.S. District Court in *Arista Records LLC v Lime Group LLC*<sup>4</sup> issued a permanent injunction to stop the defendants' file-sharing service, alleging that the intermediary facilitated and indirectly facilitated the infringement for profit. Because of the large number and anonymity of infringers, it is impractical to enforce rights against the infringers alone, and the US District Court in the *in re Aimster* copyright used the "contributory or vicarious infringement theory" to impose indirect liability on the intermediary litigation.

### New Regulatory Rules for OTT Platforms

Digital media has been largely deregulated, giving content producers full creative license. The increased content consumption by the Indian audience has led to a substantial increase in the number of OTT platforms developed in India to cater to the varying sensitivities of the Indian audience. However, this has sparked a series of debates, with countless Indian and foreign shows embroiled in debates over issues of obscenity, defamation, religious sentiments and more. Over the past year, the Ministry of Information and Broadcasting (MIB) has highlighted the need for some form of regulation of OTT platforms to streamline the industry and has held meetings with various parties. With this in mind, the MIB has published the Information Technology (Guidelines for Intermediaries and Code of Ethics for Digital Media) Rules 2021. (rule).

The new guidelines require OTT platforms to have a comprehensive three-tier grievance redress system. The OTT platform itself will provide the initial level of supervision through the ombudsman. The second tier is a self-regulatory entity composed of content publishers and their groups. This self-regulatory group will be comprised of industry experts, led by former Supreme Court/High Court judges/well-known figures in the field. An interagency committee established by the MIB at Level 3 will oversee and hear appeals of decisions at Level 2, or if MIB refers a complaint to the Interagency Committee.

<sup>2</sup> 2020 SCC OnLine Del 615, decided on 29-05-2020

<sup>3</sup> 545 U.S. 913

<sup>4</sup> 715 F. Supp. 2d 481 (S.D.N.Y. 2010)

The code of ethics for the rule establishes rules for classifying material based on the age, subject, content, tone and influence of the audience, and target audience; it also requires OTT platforms to consider India's sovereignty, security, and friendly relations, among others. Content rating categories are "U" (for all ages), U/A 7+ (for ages 7 and up), U/A 13+ (for ages 13 and up), U/A 16 + (for ages 16 and up) and "A" (for ages 16 and up) (adults only). For U/A 13+ or above content, the OTT platform must provide access control technology.

These content classifications are not new; they are included in the Cinematography Act of 1952 and are similar to the classifications recommended in the Self-Regulatory Rules of the Internet and Mobile Association of India. On the other hand, categorisation of content based on subjective criteria will be difficult as such categorisation will actually be based on the sensitivity of each OTT platform person. In the event of an emergency, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, give the I&B secretary the authority to authorise the restriction of public access to certain content.

Current TV media rules and institutions, such as content codes and grievance redress systems, have considerable influence on guidelines for trying to control digital news media and video streaming platforms. For example, digital news media will be subject to the programming codes of the Cable Network Regulation Act and the Press Council of India Code of Conduct for Journalism, which govern what is transmitted on television and in print.

The OTT platform will not broadcast any content that violates national sovereignty and integrity, endangers national security, damages India's international relations or may incite violence or disrupt public order. The platforms must also reflect India's multi-racial and multi-religious environment and use caution and judgment in promoting the activities, beliefs, practices or opinions of any racial or religious group in accordance with standards. They will be forced to implement a three-tiered grievance mechanism.

These platforms will design a grievance redress process as a first tier. The second tier will be overseen by self-regulatory bodies led by former Supreme Court or High Court judges or prominent personalities. The third tier is a government-led "oversight mechanism" that includes the creation of an Inter-ministerial Committee (IMC) similar to the television industry. Complaints about programming code violations are decided by self-regulatory industry groups in the television industry, such as the BCCC (Broadcast Content Complaints Commission) for non-news channels and the NBSA (News Broadcasting Standards Authority) for news channels.

Individual violations are at the discretion of the IMC, who may recommend some sanctions, including taking the channel off the air for a period of time. On the other hand, the new restrictions call into question the global self-regulatory code signed by 17 OTT providers last year. Although the government rejected the code, the Internet and Mobile Association of India (IAMAI) created an "implementation toolkit" to address these issues. The print explains how the proposed grievance redress mechanism will work and how this new content code for OTT platforms and digital media will help regulate their material. Meanwhile, executives from several video streaming companies told The Print that IAMAI will soon meet to discuss the government's policy and next steps.

### **Digital Journalism has a Three-Tiered Restitution System**

The government decided against developing a separate content code for digital news platforms because content requirements for television and print media are already in place. As a result of the new standards, all online news content will be governed by these current codes. Any complaint about a violation of the platforms' content will be attempted to be resolved at the company level first. According to the rules, every digital news organisation must build up a grievance redressal structure and establish a 'Grievance Officer' based in India.

The organisations must ensure that this officer makes a judgement on every grievance received within 15 days, and that the decision is communicated to the complainant within that time frame. If the complainant is not satisfied with the company's response, the issue can be raised to a self-

regulatory organisation as an appellate layer. There may be one or more self-regulatory bodies, according to the rules. This will be a self-governing body made up of publishers or their associations.

The self-regulatory organisation will also be led by a retired Supreme Court or high court judge, or an independent prominent person from the fields of media, broadcasting, entertainment, child rights, human rights, or other related sectors. The body, which will have a total of six members, must register with the I&B Ministry within 30 days of its formation.

It will deal with complaints that the publisher within the 15-day deadline has not handled. It will have the authority to give a warning, censure, rebuke, or reprimand the publisher, as well as to demand an apology and a warning card or disclaimer from the publisher. In addition, suppose this body determines a need to delete or amend content to prevent incitement to commit a cognisable offence relating to public order or others. In that case, it can report the content to the minister for review by the oversight mechanism.

The oversight system will comprise a government-formed inter-ministerial committee, the third and final layer of the grievance redressal structure. Suppose a publisher does not comply with the self-regulating body's recommendations or advisories within the stipulated time. In that case, the latter has the authority to refer the situation to the government's oversight mechanism within 15 days of the specified date.

The government will also create a charter for self-regulating entities, including Codes of Practices, as part of the third layer or supervision system. The self-regulatory body will hear complaints, report unresolved complaints to the committee, provide publishers with relevant information and recommendations, and make orders and directives to ensure that the Code of Ethics is followed.

The inter-ministerial committee can issue warnings, censures, admonishments, or reprimands to a publisher or other entity, as well as demand an apology, delete or modify content to prevent incitement to commit a cognisable offence relating to public order, or recommend action such as blocking a specific piece of content. The panel's judgement will be finalised by the I&B secretary, after which an authorised officer will direct the publication to delete, amend, or block the information in question.

### **What will be the regulatory framework for OTT platforms?**

OTT platforms will be required to abide by the country's basic rules when broadcasting content. They must also establish a three-tier grievance process, similar to that used by digital media companies. Self-regulatory authorities can force publishers to reclassify relevant content ratings, make appropriate adjustments to content descriptions, age classifications, and access control measures, and update relevant content summaries in the case of online curated material.

Regulations force OTT platforms to classify their content into five age groups: U (Universal), U/A 7+, U/A 13+, U/A 16+ and A (Adult), and install parental controls and trustworthy Age verification method for content designated as "A". According to the guidelines, platforms must provide additional access controls and highlight the classification rating assigned to each item or program, as well as content descriptors that inform users of the nature of the content. Under the new rules, digital news outlets and OTT companies operating in India are obliged to notify the I&B Ministry of details of their entities and to publish monthly compliance reports describing complaints received and details of actions taken under the legislation.

### **'It's critical that the industry band together.'**

An executive at a major video streaming platform said the new law is now binding on the platforms and the industry must create a self-regulatory group on government advice to avoid IMC becoming a second layer.

"If the government is not satisfied with the industry's self-regulatory body, the IMC may step in to fill the vacancy. So the industry must come together as soon as possible to form this body," said the CEO. Another executive from the streaming platform Allegedly, the platforms themselves are

delaying the creation of self-regulatory codes because they are not all online. "Therefore, creating a void for government intervention and regulation of online content," the executive continued.

### **Combating online piracy – from John Doe to dynamic injunction**

In layman's terms, John Doe is referring to a lawsuit brought by producers in anticipation of mass piracy. However, suppose the producer does not know the individual's identity who will cause the violation but has reason to suspect that the law will be violated. In that case, the order is called a John Doe order.

While many media companies and content creators have addressed piracy through complaints, piracy is a challenge for the entire media and entertainment industry. The Delhi High Court has granted Sony Pictures Networks India (SPN) a dynamic John Doe injunction to protect copyright infringement in two of its cricket products. As a result, the India-Sri Lanka Men's International Series will be held in July, and the India-England Men's International Series will be held in August and September.

According to the company, Dynamic John Doe will protect SPN from unauthorised and illegal IP distribution on the Internet and other social media platforms. "If SPN finds other ISPs (Internet Service Providers) and websites infringing its copyright, it can also win injunctions against other ISPs (Internet Service Providers) and websites. In addition, at the request of SPN, the court has appointed two local The Commissioner investigates and reports to the court if the multi-system operator (MSO) and the local cable operator (LCO) distribute or transmit unauthorised or illegal cricket matches.

Since, their identities and other personal information may not be known, it can be difficult to identify people involved in online video piracy. The Indian judiciary uses the John Doe Order, also known as the Ashok Kumar Order, to hold these people accountable. *Taj Television & Anr. v Rajan Mandal & Ors.*<sup>5</sup> were the first to use it. The John Doe order allows intellectual property owners to protect their work by posting notices and taking legal action against anyone who violates the owner's rights but remains anonymous. Article 39 Rules 1 and 2 of the Civil Procedure Act 1908, as well as Article 151 of that Act and Part III of the Special Relief Act 1963, deal with the ability of the court to grant an interim injunction that can become permanent.

A person must meet certain requirements in order to receive a John Doe order, which are as follows:

- 1) The individual seeking an injunction must prove to the court that his rights have been violated by proving previous infringements and sporadic infringements by known and unknown parties.
- 2) Before granting any relief, the person must convince the court that a prima facie case exists.
- 3) The individual must demonstrate that he will suffer financial or irreparable harm if the John Doe order is not issued.

When the court determines that the plaintiff meets all requirements, it issues a John Doe order, which may include a temporary ban on access to the material, depending on the remedies sought. Plaintiffs may then choose to issue a notice for the benefit of John Doe defendants explaining the key features of the order. The defendant or any other wronged party may also petition the court to vary or vary the order. John Doe orders are particularly useful in online piracy cases, where the identity of the perpetrator is often unknown. Such orders have become more common in recent years because they enable copyright owners to assert their rights and prevent their works from being illegally distributed.

### **Conclusion**

The increase in the number of streaming services available on the Internet and the resulting growth in content has only fuelled the piracy of these services. While the current law has some measures to address this, more detailed guidelines need to be developed based on international standards and strictly enforced. This will protect the rights of creators of copyrighted works, while

<sup>5</sup> [IA NO. 5628/2002 in CS (OS) 1072/2002

also curbing OTT video piracy. India is expected to give copyright holders statutory protection in the event of copyright infringement on OTT platforms. As online media platforms become more popular, protecting the rights of authors as well as user data and trust is more important than ever.

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