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PROMINENCE OF OTT PLATFORMS IN THE LEGAL LANDSCAPE

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Abstract-

OTT platform which is an abbreviation of the term” Over-the-top” Video platform is seen to have gained a lot of popularity amongst the youth of India and around the world. In the present times it has become a necessity as compared to the earlier times when it was a luxury. It is well known that every coin has two sides, the same goes for the OTT platforms. As a result of the reach of the internet and the broadband connections in every corner of the country, it has become more accessible. The OTT platform has become a part of the conventional entertainment industry. With such large reach it need to be regulated and any form of intellectual property infringement needs to be prevented. This paper aims to throw some light on the growth of the OTT platforms, legal insight on regulation of OTT platforms, intellectual property laws regarding OTT platforms.

Keywords- Growth of OTT platforms, OTT platforms, Regulation of OTT platforms, IPR and OTT platforms, IPR Infringement, Judicial trend

Introduction-

The presence of internet has helped people across the world to gain knowledge, to start their career, to be a tool for access to information, etc.². Earlier, the consumption of the movies and any other form of audio and video content was by way of mediums like theatre and television. As the technology has evolved, it made it very easy for the people to get access to the content by way what is known as direct to home(DTH) technology where the satellite and dish connectivity that brought high quality broadcast and on demand content directly to the consumer at home in TV. At present, as a result of the technological advancement, movies or watching TV has become more convenient via online streaming or the video on demand

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²MATICCHON, <https://www.maticchon.co.th/news/569451> (2017).

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services (VoD), (VoD) is streaming of the video content on the internet by the application of the over the top (OTT)³.

Consumers connect the devices like smartphone, TV, Tablet, desktop, computer, laptop, etc. to the internet. Once which was considered to be a luxury, now, is gaining popularity among the Indians because of which most of the population is shifting towards online streaming⁴. It is observed that out of five smartphone owners in India, four of the people watch the content in one of the OTT platforms⁵. It has become the most downloaded applications when compared to the social networking applications⁶. OTT platforms could one day become a necessity.

OTT Platforms-

OTT platform is an abbreviation of over-the-top services. It provides for media content through the unintended network that manages such services⁷. OTT platforms have taken over the traditional network devices such as the cable, television, broadcasting and satellite platforms⁸. OTT platforms provide a direct content to the consumer or the viewer when the internet is being used⁹.

There are three types of the OTT services, mentioned below-

I. OTT Messaging¹⁰-

It is known to be the service of instant messaging or online chatting which has been provided by the third parties. It is an alternative to the traditional text messaging services. The very example is of WhatsApp which is owned by Facebook. It has replaced the text messaging on the internet connected to the smartphone. Other such applications being We-chat, telegram, skype, etc.

³ Sundaravel E. & Elangovan N., *Emergence and Future Of Over-the Top (OTT) Video Services in India: an Analytical Research*, 08, IJBMSR, 489, 489-90, (2020).

⁴ Ibid.

⁵ News18.com, <https://www.news18.com/news/tech/four-out-of-five-smartphone-owners-in-india-use-atleast-one-ott-entertainment-app-2236955.html> (2019).

⁶ PWC INDIA., from <https://www.pwc.in/assets/pdfs/publications/2018/video-on-demand.pdf>. (Apr. 26th, 2022).

from <https://www.pwc.in/assets/pdfs/publications/2018/video-on-demand.pdf>.

⁷ Pawita Kakahai, *Legal Problems On Regulating Over-The Top(OTT) Services By National, Broadcasting and Telecommunications Commission(NBTC)*, 06,IRAJ, (2018).

⁸ Zisha Rizvi, *Online Streaming: A case of Broadcasting?*, SSRN, [Online Streaming: A Case of Broadcasting? by Zisha Rizvi :: SSRN](https://ssrn.com/abstract=3444444).

⁹ Supra note 6.

¹⁰ Ibid.

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II. OTT Voice Calling¹¹-

It is often called as VOIP, this facility has been provided by many, such as skype, We-chat, Viber and WhatsApp, where the internet network is used of the communication. VOIP has replaced the existing operator controlled services which has been offered by the mobile phone operators.

III. OTT Media¹²-

Which is also known as the online TV or internet television or the streaming. Here the signal is received by way of internet or through the phone network when compared to the television signal which comes from the satellite. The access to the online streaming is controlled by the video distributor in an application or a individual OTT dongles or box which are connected to the phone, television, of a PC. The OTT Platform includes Netflix, amazon, Hulu, YouTube, Hotstar, etc.

Uprise of OTT Platforms in the Entertainment Industry-

It can be seen that the American OTT market is coming close to the maturity and is shifting towards the other international markets¹³. Among the other countries, India is the fastest growing entertainment and media market¹⁴. The major reason that is driving the growth of the VoD market in India is due to the rise of the internet and broadband usage as a consequence of fall in the prices of internet and broadband connections. India comes second in order after China in respect to number of the internet users. The majority of them being the mobile phone internet users. Who are taking the advantage of the cheap alternative over the expensive landline connection¹⁵.

It is very much evident that internet is not merely a technology anymore rather, has become a market place where OTT platforms are blooming. One can also say that pandemic has also favoured the OTT platforms since viewers were not left with any option but to subscribe to these OTT Platforms in order to be entertained.

¹¹ Ibid.

¹² Ibid.

¹³ Supra note 2.

¹⁴ PWC INDIA, <https://www.pwc.in/press-releases/2019/global-entertainment-and-media-outlook-2019-2023.html> (Last Visited on Apr. 26th, 2022).

¹⁵ Supra note 2.

Amazon prime and Netflix are some of the platforms that have revolutionised the entertainment industry mainly at the time of pandemic as everything was shut, the traditional modes of entertainments such as the theatre, live concert, broadcasting on televisions, etc.

OTT platforms have seen tremendous growth in the past 2- 3 years and has led to the growth of the entertainment industry as the content was distributed through the internet and not from the traditional distribution modes.

Studies have proven that one of the primary reasons as to why people are choosing the OTT platform over the cable connections is prices of the OTT platform being cheaper. Platforms like Netflix and amazon prime are subscription-based video platforms where the viewers have to make payment regularly. Some of the video platforms such as YouTube, Hotstar, etc. allow the viewers to watch some of the selected movies for free¹⁶.

The second reason for the growth of these platforms being that there is a presence of the personalized content available to an individual. It has been reported by HIS Markit Research that about 76% of viewers are of the opinion that local content is available and about 74% of the viewers are of the opinion that international content is available with subtitles and dubbing in various other languages¹⁷.

Very frequently, the cable and the satellite providers offer packages of the many channels and then charge the consumers for those packages. Whereas, for the OTT platform users, viewers subscribe to only individual channels that they wish to watch and pay for those channels individually. This gives the viewers a chance to watch international content and the local content at a cheaper-prices and makes their viewing enjoyable experience¹⁸.

In the present world market, acquiring the viewer requires much more than advertising. With the advancement of the technology, obtaining the data analytics has become way more accessible and so the companies are easily able to gather the information and implement the plans in order to create a personalised experience for every viewer and the subscriber. Now, it can be said that with the development in the technology, machine learning and artificial intelligence will permit the OTT players to analyse and interpret the data which would give an insight on the viewers pattern of watching content. It is also evident that the social trend

¹⁶Ibid.

¹⁷ Ibid.

¹⁸Sunil Ambalavelil, Intellectual Property Rights in OTT Platforms, [INTELLECTUAL PROPERTY RIGHTS IN OTT PLATFORMS - TLR | The Clients Guide to the best legal practices and Law firms - The Law Reporters](#).

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and the ease of access and the use are also the reasons that have impacted in deciding the adoption of the online streaming over the use of cable TV¹⁹.

Regulation of OTT Platforms-

In India, the government has recently provided the rules for the regulation of the OTT Platform. In accordance to the new rule known as 'guidelines for intermediaries and digital media ethics code', the OTT platforms are required to classify the content into five categories which is solely age based, which are- U (Universal), U/A 7 years, U/A 13 years and A(Adult)²⁰.

It has made it mandatory for the OTT Platforms to make their content more secure for the children and providing them with parental lock system in such platforms²¹. A three-grievance redressal mechanism is to be established by the publisher. The first level of grievance redressal system is self-regulated by the publisher. The second is to be self-regulated by the self-regulating bodies of the publisher. The third is to be an oversight mechanism²².

General Provisions as to IPR-

The upsurge in use and popularity of OTT platform is a recent phenomenon. It's only in the recent years that the legal system in India had to deal with cases involving applicability of IPR in the cyber world. Judiciary's dealings with OTT platforms are even more scarce. Currently, the legal perspective with respect IPR rights in OTT platforms is in its nascent stage. We need to consider two aspects while analysing IPR in context of OTT platforms - IPR held by the OTT platforms and infringement of IPR by or through OTT platforms.

IPR Held by the OTT Platforms

OTT platforms are known for providing a large variety of content at a comparatively cheaper and affordable price. It allows the subscribers to stream any content available in its database. It must be noted that OTT platforms deal with texts, pictures, audios, audio visual contents, etc. which are dealt under the domain of Copyrights. So, how do OTT platforms acquire rights to use these Copyrighted materials.

¹⁹Lee, C. C. Nagpal, P. Ruane, S. G. & Lim, H. S., *Factors affecting online streaming Subscriptions*, 16, IIMA, [Factors Affecting Online Streaming Subscriptions \(csusb.edu\)](https://www.iima.ac.in/Portals/0/Research%20Publications/2017/Factors%20Affecting%20Online%20Streaming%20Subscriptions%20(csusb.edu).pdf).

²⁰ Sunil Gowda & Omprakash Mandge, *OTT and Growth of India's Ott Platform*, 07, IJARIT, 1246, 1249 (2021), [OTT and growth of India's OTT Platform \(ijarit.com\)](https://www.ijarit.com/).

²¹ Ibid.

²² Ibid.

The rights over content in any OTT platform may be acquired through two means - Copyright or through licensing. The most common way of acquiring content by OTT platforms is by obtaining licensing rights from the copyright holder to use and make available the copyrighted material on their platform. The other way is for the OTT platforms to co-produce with production house like Yashraj films to produce their original content. In this case, the rights over the work held by each party are clearly defined through a contract. For instance, the OTT platforms may hold majority of rights over the work like right to publication and medium of publication and publication house retains a percentage of monetary gains made through the work.²³

Infringement of IPR By or Through OTT Platforms.

We have talked about the legal rights of OTT, but what is the situation wherein there is violation of copyright laws by or through the OTT platforms? The piracy of copyrighted materials like music, cinematographic works by or through OTT platform has been on the rise and is emerging as a prominent issue jeopardizing the rights of Copyright holders.

Sometimes, the OTT platforms publish work without the permission of Copyright holders on their sites. But the most rampant violation of copyright occurs when the users of the site share, publish, copy, store, transmit pirated content by the way of these OTT platforms. For example, users in telegram are easily able to share any movies which they have illegally acquired without knowledge of the copyright holders. These infringement causes huge losses to the Copyright holders who have invested a lot of time, effort and money into developing their work.²⁴

Legal Provisions

There are some provisions which may be taken into consideration in the present scenario of infringement of Copyright in OTT platforms.

- The S51 of Copyright Act, 1957 states that any use of copyrighted material without the permission of the Holder will be infringement of Copyright.
- The S43(b) of the Information Technology Act, 2000 penalizes the download of copyrighted material from a website without permission of the Copyright holders.

²³Sunil Ambalavelil, *Intellectual Property Rights In OTT Platforms*, THE LAW REPORTERS, (28/4/2022, 16:00), <https://thelawreporters.com/intellectual-property-rights-in-ott-platforms#>

²⁴*Id.*

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- Additionally, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 provides that the internet service providers publish the guidelines in the website. It also requires the ISP to specifically prohibit the users from using, uploading, downloading, sharing, transmitting, etc. anything which infringes copyright. It informs them that their account may be blocked in such a case. Moreover, intermediaries also have a right to take down such content.²⁵

Legal Remedies

The Copyright holders can file both civil or criminal suit if copyright infringement occurs. Any issue concerning copyright not relating to copyright infringement of are dealt by the Registrar.

The district court is the lowest court handling copyright infringement cases. S55(1) of Copyright Act, 1957 entitles a Copyright holders to the remedy of injunction, and account of profit/damages. They can also demand John doe order if the identity of violators is unknown as is the case when users of OTT sites like telegram share infringing material.

The Criminal complaint must be filed before the metropolitan magistrate or judicial magistrate first class. They can punish the violators with imprisonment or fine as per provisions of S63 and S65 of the Copyright Act, 1957.²⁶

Judicial Trend-

We have discussed above that with the exponential rise in OTT users, the possibility of IPR Infringement over the internet has increased. The Court have also dealt with cases involving disputes arising from IPR Infringement over internet. But we will limit ourselves to the cases of infringement of IPR by or through OTT platforms.

UTV Software Communication Ltd. v. 1337X to and Ors²⁷

²⁵Sneha Tripathi, *Intellectual Property Rights in OTT Platforms :Restraining the Unrestrained*, NATIONAL JOURNAL FOR LEGAL RESEARCH AND INNOVATIVE IDEAS, (28/4/2022, 16:45)

<https://www.njlrii.com/2021/03/intellectual-property-rights-in-ott.html?m=1>

²⁶Georgina Pereira, *Copyright and Infringement*, LEGAL BITES, (28/4/2022, 17:00)

<https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.legalbites.in/cyber-law-and-intellectual-property-law-copyrights-and-infringement/&ved=2ahUKEwiU9eTAKbn3AhURCaYKHQvpA2QQFnoECDEQAQ&usg=AOvVaw3z2LVVH84tb2WWIDVXLyW9>

²⁷UTV Software Communication Ltd. v. 1337X to and Ors, CS(COMM) 724/2017 & I.As. 12269/2017

The Indian Judiciary has only in the recent years had to deal with OTT platforms and online piracy. There are only selective cases in which the judiciary has dealt with IPR Infringement in OTT platforms.

The present case deals with the issue of Infringement of IPR by the OTT platforms themselves. The Court held that the website would be directly liable for the Infringement of IPR if the website itself uploads any infringing material on to the website. The defence under S75 of the Information Technology Act, 2000 would not be available as it would not be considered as an intermediary.

Jagran Prakashan Limited v. Telegram FZ LLC²⁸

When looking at other OTT sources such as WhatsApp, Telegram, etc. there is prevalence of the users or subscribers of such platforms infringing IPR through the use of these platforms. In the present case, the court had dealt with copyright Infringement by users through the OTT platform – telegram. The facts of the case are narrated below:

Telegram allows anonymous creation of channels by its users and therefore identity of creators of channel remains unknown. It was observed by the plaintiff that some of the users of telegram were reproducing, adopting, distributing, transmitting and disseminating copyrighted newspapers of the plaintiff on their channel. The plaintiff sent a notice and reminders to telegram but received no reply. Therefore, the plaintiff filed a suit for Infringement of his copyright and trademark against both telegram and the anonymous creators of channels sharing infringing material.

There are three main points which can be derived by the judgement of the Hon'ble court in this case:

- The OTT platforms would not be exempted from liability as an intermediary under section 75 of the Information Technology Act, 2000 as they have not done the required due diligence.
- The Court directed that telegram must disclose the basic subscriber information of the users/creators of the channel circulating infringing material.
- The Court directed telegram to take down or block the channels involved in reproducing, distributing of the copyrighted material.

²⁸Jagran Prakashan Limited v. Telegram FZ LLC, CS(COMM) 146/2020

Therefore, we can observe that the court upheld the responsibility of Intermediaries - including OTT platforms like telegram- to maintain the required due diligence in case of Infringement of intellectual property rights.

The above mentioned judgements are a large step taken by the courts towards addressing Infringement of IPR through the use of OTT platforms or by the OTT platforms themselves.

CONCLUSION-

In the present times, OTT platforms have become the most successful pathway in respect to the consumption of the content. It gives an opportunity to watch the content beyond the territorial borders. The success of OTT platforms can be traced during the Covid-19 pandemic as everything was shut and there was no other source of entertainment. It offered varied content at cheap prices. This led to the rise of OTT platforms and contributed to the decline of traditional approach of the watching content that is on TV. They also have a better reach in the urban and the rural population as a result of the reach of the internet connection.

Earlier there was no particular Act that dealt with the regulation of the OTT platforms but now the government has taken the initiative and provided with the guidelines for the intermediaries and digital media ethics code, 2021 and therefore, has become important for the regulation of OTT platforms. However, it can be observed that all disputes involving IPR are governed by the various laws protecting IPR in India, even if one of the parties involved is OTT. The Information Technology Act, 2000 and Intermediary Guidelines, 2021 are also important laws which place duty on the OTT platforms to not infringe IPR and they also have a duty to perform due diligence to prevent IPR infringement by the users.

Moreover, it can be observed that the OTT platforms are gaining more and more prominence in the legal landscape of India. It is especially the case when such critical rights like IPR are involved. It can be observed that the Courts have started to deal with cases involving IPR in relation with OTT platforms. They have also started slowly take notice of the rise in IPR infringement by or through OTT platforms and are slowly but surely taking steps to set right the blatant lacuna in law addressing this area.