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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ANALYSIS OF COPYRIGHT **INFRINGEMENT AND PIRACY VIS-À-VIS** **OTT PLATFORMS IN INDIA**

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ABSTRACT

With the advent of Information technology and the constant advancement and progress in the digital domain there is a rise in the unauthorized circulation and distribution of materials that are copyrighted on the internet. This unauthorized user and illegal downloading and sharing of copyrighted materials such as music, movies, software etc. has led to an increase in the piracy of copyrighted material on the internet and poses several problems of tackling the issues that are prevalent in the digital domain. The availability and access of internet today is very easy and cheap. Similarly, the number of gadgets such as mobile phones, tablets, laptops etc. have increased manifold and are available at cheap and high rates, both, therefore making the technology easily available by the masses. All of this has posed a threat of serious copyright infringement of content being illegally stored, distributed and accessed without authorization and such piracy also severely damages the interests of the copyrights holders and robs them of their business and revenue which is very unfair as it leads to their losses. The introduction of OTT platforms wherein audio and video content can be streamed has enabled a new area of infringement of copyright as their content is illegally being circulated on the internet without any costs that would have otherwise been incurred had they accessed the content on the OTT platforms themselves. This paper will assess the infringement of copyright via piracy of such music, videos and films available on the OTT platforms and will explore the liability under the Indian laws specifically the Copyright Act, 1957 and Information Technology Act, 2000.

INTRODUCTION

The current digital environment has greatly impacted our daily lives and has even brought an ease to it. Internet, computers and other electronic gadgets have opened new opportunities for online content such as movies, songs, short films etc. to be easily consumed, stored and shared; this, however has also brought the problem of duplication and unauthorized sharing of copyrighted material on the internet and the various issues in tackling it in the forefront. Copyright laws have always been influenced with the changing times and the introduction of new technologies and likewise the laws governing cyber space also keeps expanding with new issues of threat and piracy. The issues related with intellectual property and their infringement on the digital domain are vast, however, in our study we shall primarily focus on copyright violations and infringement due to piracy of Over-the-top (OTT) media content.

With the introduction of OTT platforms wherein viewers can stream audio, video and movies such as Netflix, Amazon, Hotstar, MX player, Spotify etc.; a new avenue for infringement of copyrighted materials has opened. Generally these streaming platforms are based on subscriptions and a certain amount for same is paid either monthly or yearly and all you need is a device and internet to use it¹. Through these platforms, original content is launched and streamed very often and is available immediately available to millions of people without any geographical boundaries and thus leads to increase in piracy and unauthorized copying and selling of such movies and web-series that are illegally circulated through applications and websites such as Torrent, Popcorn Time and file sharing social media platforms like Telegram². This copying, storing, selling and distributing copies on the internet without the knowledge and authorization of the original creator or owner of the copyright amounts to piracy³. The success of these OTT platforms depends on them being the “exclusive” providers⁴ of such movies and songs and when it is illegally available free of cost on infringing websites it results in a loss of revenue and infringement of their copyright. Such piracy is therefore a menace for content of OTT platforms.

¹ Krishna, *OTT PLATFORMS: How does Ott platform work?*, FRONTLINESMEDIA, (Aug 2020), <https://frontlinesmedia.in/ott-platforms-how-does-ott-platform-work-amazon-prime-netflix-zee5/>

² Lata Jha, *India's OTT industry loses upto 30% revenue to piracy*, LIVEMINT, (Feb 2021), <https://www.livemint.com/news/india/indias-ott-industry-loses-up-to-30-revenue-to-piracy-11613462460632.html>

³ Kalyani, *Online Piracy and Copyright Infringement: Issues and Challenges*, LATESTLAWS, (Sept 2019), <https://www.latestlaws.com/articles/online-piracy-and-copyright-infringement-issues-and-challenges-by-princess-kalyani/>

⁴ Video piracy: A threat to OTT/VOD content, MEDIAGURU, (Aug 2019), <https://www.mediaguru.com/video-piracy-a-threat-to-ott-vod-content/>

Copyright is an intellectual property right through which an original work of the author or creator is protected and the author of the work gets exclusive rights of distributing and reproducing the work⁵; unauthorized duplication or reproduction of someone's else's copyrighted work amount to infringement⁶. Section 2(m) of the Copyright Act, 1957 defines what would amount to 'infringing copy'. Today since there are so many OTT platforms with exclusive content, this has greatly consumed audiences as the access is also so easy. But a lot of times people do not wish to pay for all platforms or cannot afford it and thus they resort to pirated versions of these. Exposure to piracy on OTT platforms is much greater than that of content that is premiered in theatres, this is because as content releases it is available on screens of millions of people immediately as opposed to theatrical releases which takes time for their DVD's to be available and the only way for copying and distributing it is by recording it in theatres. Such piracy hampers the original creators and publishers of content creators on OTT platforms and should not be left unchallenged, specially, in the current times of the pandemic when everyone is sitting at home and consuming content at a rapid pace. Such piracy results in loss of revenue and the economic rights of the copyright owner and at the same time affects the economy⁷. Through this paper, we shall look into the two major laws governing the current problem of copyright infringement and video piracy on the digital domain i.e. The Copyright Act, 1957 and the liabilities under Information Technology Act, 2000 and subsequently we shall look at the issues and challenges attached to tackling such piracy on the internet and give some appropriate suggestions and recommendations.

LITERATURE REVIEW

The object of this paper is to understand the issue related to online piracy of copyrighted OTT content and understand the efficacy of Indian law in curbing this menace and addressing the typical issues that plague the digital domain such as liability, anonymity and jurisdiction problems. It is imperative to acknowledge that the existing literature has tremendously helped the researcher in developing an understanding of the laws that govern such copyright infringement in cyber space and the difficulties attached with tackling the issue; this makes it pertinent to review the recent as well as relevant body of knowledge.

⁵ Section 14, The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

⁶ Section 51, Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

⁷ Lata Jha, India's OTT industry loses upto 30% revenue to piracy, LIVEMINT, (Feb 2021), <https://www.livemint.com/news/india/indias-ott-industry-loses-up-to-30-revenue-to-piracy-11613462460632.html>

V.K. Ahuja's⁸ book on IPR is a commentary and helps the researcher in understanding the Indian Copyright Act, 1957 and various provisions that would be applied in case of infringement of copyright related to OTT content. Section 14 talks about the exclusive right of copyright owner to do certain acts in relation to their work. Section 65A and 65B of the Act which deal with piracy that takes place in the digital domain are also explained and helped the researcher in understating the provisions dealing with online piracy, however, the literature deals with the online piracy aspect only in brief without actually pointing out other issues such as jurisdiction, enforcing liability etc. in relation to copyright piracy online. Juhi Sarawat and Rekha Chaturvedi⁹ deals with various International treaties that set the framework for curbing online copyright piracy such as Anti-counterfeiting trade agreement (ACTA), WIPO Copyright Treaty (WCT), WIPO Performance and phonograms treaty (WPPT) and various obligations under them; they also suggest how India should become a signatory WCT and WPPT so as to obligate them to follow these international treaties to curb the online piracy menace and helps the researcher in understanding various international obligations, however, the gap in the study is that it does not deal with piracy of copyrighted OTT content in particular and completely fails to address the obligations of infringers who distribute pirated content under the Information Technology Act, 2000. Arpan Banerjee¹⁰ elucidates the piracy landscapes regarding films in India and suggests to target end-users for such piracy and discusses the legal issues related to website-blocking injunctions in relation to the online piracy that affects the Indian film industry and music industry; this helps the researcher in applying the same principles in their study of online piracy of OTT content. This study¹¹ however is limited only to the film industry and discusses their losses and fails to address the online piracy menace of the OTT content, which is equally if not more problematic. The OTT industry in India that includes SonyLIV and MX Player etc. face a 30% loss of revenue due to piracy¹². According to The Global Piracy Report (2018) by MUSO¹³ the online piracy environment had 190 billion pirate site visits, the introduction of OTT platforms have increased the rate of piracy further specially owing to the current pandemic situation and has led

⁸ V.K. Ahuja, *Law relating to Intellectual Property Rights*, 3rd ed. (2017).

⁹ Juhi Sarawat & Rekha Chaturvedi, Copyright protection in the Digital Environment: Indian perspective and International obligations, Vol. 22, *Journal of IPR*, 303-310 (2017).

¹⁰ Arpan Banerjee, *Contemporary Challenges of Online Copyright enforcement in India, Innovation, Economic development, and Intellectual property in India and China*, ARCIALA Series on Intellectual Assets and Law in Asia, SPRINGER, Singapore (2019).

¹¹ *Ibid.*

¹² Lata Jha, India's OTT industry loses upto 30% revenue to piracy, *LIVEMINT*, (Feb 2021), <https://www.livemint.com/news/india/indias-ott-industry-loses-up-to-30-revenue-to-piracy-11613462460632.html>

¹³ Robert Briel, Global piracy hits 190 billion visits in 2018, *BBTVNEWS*, (Mar 2019), <https://www.broadbandtvnews.com/2019/03/23/global-piracy-hits-190-billion-visits-in-2018/#:~:text=Global%20piracy%20numbers%20reached%20almost,to%20figures%20released%20by%20MU&text=Almost%2060%20of%20all%20piracy,13%25%20of%20piracy%20visit%20activity>.

to an increased circulation of pirate movies, videos and audio content which is illegal and infringes the rights of the copyrightowner¹⁴. Manisha Singh and Aprajita Nigam¹⁵ highlight the economic aspect of such online piracy of copyrighted content and elaborate that it not only affects the rights of the copyright holder but also hampers the economy which then leads to loss of revenue and jobs. It mentions the various policies and steps taken by the Indian government such as the National Intellectual Property Rights Policy, 2016 and the consequent establishment of the Cell for IPR Promotion and Management (CIPAM) and how they work in close relation with various Film and television guilds for promoting anti-piracy movement related to online piracy. It iterates that how WIPO praised Maharashtra Cyber Digital Crime Unit (MCDCU) for working in close coordination with the cyber policy and various players from the film and music organisations to fight piracy. The execution effort of MCDCU is commendable as they permanently shut down 200 pirated websites with a reduction of 172 million hits on them monthly. However, the article fails to address the issues with tackling such problems when laws of states in relations to copyright infringement on the digital domain is not the same and uniform and thus it creates delay and leads to lack of enforcing liability; the issue of jurisdiction also finds no mention in their article, which is a gap of the said literature.

Through this study, the present researchers aims to fill in the gaps and limitations of the previous studies and literature on the issue of copyright piracy of OTT content; it is observed that there is no comprehensive or holistic study exclusively on the said topic and many a times only film and television industry's piracy is studied while that of OTT industry is not dwelled upon. Thus, the study is scattered related to this issue and is not dealt with comprehensively for curbing the menace of piracy in the light of making the laws more stringent and specifying what the liabilities will be of different parties who are involved in such infringement like the intermediaries, the end-users, the advertisement companies etc. for eradicating the problem and protecting the interests of copyright holders in the digital domain.

¹⁴ Anjali, Internet broadcasting Under The Copyright Act, 1957, LEGALSERVICEINDIA, <http://www.legalserviceindia.com/legal/article-4851-internet-broadcasting-under-the-copyright-act-1957.html>

¹⁵ Manisha Singh and Aprajita Nigam, Combating Copyrights Online Piracy in India: Government's Initiatives and Judicial Enforcement, LEXOLOGY, (Mar 2020), <https://www.lexology.com/library/detail.aspx?g=795b374a-88d6-4399-bdbd-e5e1f593ccf7>

MEHODOLOGY

The approach of this this paper is a doctrinal to examine and suggest reforms of the legal issues involved in the present research. The doctrinal research has been assimilated for the current topic using publications such as magazine articles, scholarly journal articles, encyclopaedias, constituent assembly debates, commentaries, and textbooks. The relevant literature has been reviewed and the lack of comprehensive study addressing the problems of liability and jurisdiction on the digital domain with respect to violation of copyright is not done. The data for such literature review was obtained and analyzed from various academic articles and research papers of authors and jurists and relevant new articles and publications on the issue of copyright infringement in digital domain, specifically infringement related to OTT platforms.

Therefore, a consolidates approach has been adopted wherein various articles, statistics and data, news and papers, scholarly studies have been referred to give a systematic analysis of copyright infringement and piracy vis-à-vis OTT platforms in India and consequently suggest reforms and solutions to tackle the menace of piracy.

OBJECTIVES/RELEVANCE OF THE TOPIC

“Today, OTT’s real competition is piracy, as it competes against its own illegally distributed content.”

With OTT platforms making access of exclusive video and audio content online, piracy is also on the rise due to the accessibility; for instance, popular shows such as Ashram which premiered on MX Player had its pirated versions surfacing on the internet within half an hour of its launch¹⁶. Exclusivity of content is very integral for these OTT platforms for their success. But piracy hampers this exclusivity as various legal applications and unauthorized sites and pirated locations distribute this content and make it available to the masses. For instance, Game of Thrones which is a very popular show was premiered on Hotstar, however, 76.6% of the content was consumed through pirated locations¹⁷. Even during the lockdown (due to the ongoing pandemic) there was surge in piracy of such content as viewers wanted to watch it and it was easily available on pirated sites and through file sharing apps. Piracy directly hampers the business and revenue of these platforms as it robs them of potential customers by providing free and pirated downloads of these exclusive

¹⁶ Lata Jha, India’s OTT industry loses upto 30% revenue to piracy, LIVEMINT, (Feb 2021), <https://www.livemint.com/news/india/indias-ott-industry-loses-up-to-30-revenue-to-piracy-11613462460632.html>

¹⁷ Video piracy: A threat to OTT/VOD content, MEDIAGURU, (Aug 2019), <https://www.mediaguru.com/video-piracy-a-threat-to-ott-vod-content/>

content. It impacts the licensing of such copyrighted content also and the distributors suffer losses. Even OTT platforms which provide free content, lose their advertising and viewership revenue due to pirated versions which are free of cost and without advertisements. For instance, the CEO of MX Player claims that their content is watched by at least 15-20 million people via illegitimate means and results in loss of advertisement revenues¹⁸. Such subscription and advertising based online streaming services lose 30% of their revenue due to piracy each year. Thus through this study, the author aims to evaluate the current law governing such piracy and see if the law is adequate enough to solve the issue and the subsequent need for amendments shall be suggested. The issues related to piracy shall be discussed and the problem of tackling and curbing the issue of online piracy of such OTT content shall also be addressed while discussing appropriate case laws and finally giving adequate recommendations.

THE PROBLEM OF PIRACY OF CONTENT OF OTT PLATFORMS

With the increasing demand of the viewers for premium and exclusive content i.e. movies and web-series available on OTT platforms like Netflix, Hotstar, Sony Live etc.; piracy of such content is on the rise. This has widened the scope for a multitude of avenues wherein the viewers can watch the pirated version of the content that is originally a specific OTT media platform's property; there has been a great surge in such piracy owing to the pandemic also. To cite examples of such avenues that help in online piracy of such content, one must look at applications such as Telegram. Telegram is an instant messaging application which is cloud-based and is very common for peer-to-peer piracy wherein pirated download links or whole movies and episodes are shared and distributed among people. Another major player is BitTorrent and similar platforms¹⁹. Markscan, which is a firm that provides IP protection to companies involved in entertainment released a data that piracy on telegram shot up by a whopping 1092% (during the pandemic) which is 11 times more than usual²⁰. Such piracy seriously hampers a large part of the OTT platform's potential revenue.

¹⁸ Lata Jha, India's OTT industry loses upto 30% revenue to piracy, LIVEMINT, (Feb 2021), <https://www.livemint.com/news/india/indias-ott-industry-loses-up-to-30-revenue-to-piracy-11613462460632.html>

¹⁹ Don Jones & Kei Foo, Analyzing the modern OTT Piracy video ecosystem, SCTE-ISBE, Atlanta GA (2018)

²⁰ Gargi Sarkar, Den of Pirates: Why OTT should tackle telegram soon, INDIANTELEVISION, (Nov 2020), <https://www.indiantelevision.com/iworld/over-the-top-services/den-of-pirates-why-otts-should-tackle-telegram-soon-201130>

It becomes difficult to regulate such illegal activity because tracing the perpetrators is not easy, this illegal distribution is associated with negligible costs and once the content is pirated it is made into several copies making it difficult to ascertain and control the pirated content to be accessed by people. Piracy of OTT content on the digital platform is such a menace because the distribution on the internet is wide and often very easy, the fake copies are as good in quality as the original one's, infringed copy is distributed to unlimited number of people as such distribution has negligible costs, the threat of being traced is also less²¹. Virtual Private networks (VPN) further deepens the problem as it enables the consumers to freely access content according to their desire without the risk of being able to be traced via IP address and increases liability-free infringement²². Even after the individual who resorted to piracy has been determined, it is difficult to adjudicate as several countries may be involved and ascertainment of jurisdiction may pose problems. Another problem that plagues the digital domain is that identification of the wrongdoer is difficult and questions as to who the liability of such crime will rest upon is raised as from content being reproduced or copied to distributing various pirated versions involves a lot of people.

LIABILITY UNDER INDIAN LAWS

Such piracy of OTT content on the internet is primarily governed by two laws:

- The Copyright Act, 1957.
- The Information Technology Act, 2000.

The Copyright Act, 1957 talks about certain exclusive rights²³ of the copyright owner, it includes the right to store the work, reproduce the work or make copies, right to distribute or make the work public etc. and is covered by Section 14 of the Act. When any such act which is the exclusive right of the copyright owner is done by a third party without authorization amounts to copyright infringement as mandated by Section 51 of the Act²⁴; for instance third party storing the copyrighted content or distributing and reproducing it without copyright owner's permission and thus shall attract criminal and civil liability. To ensure that technological measures and rights management information are well protected, Section 65A and 65B have been introduced in the

²¹ Kalyani, Online piracy and copyright Infringement: Issues and challenges, LATESTLAWS, (Sept 2019), <https://www.latestlaws.com/articles/online-piracy-and-copyright-infringement-issues-and-challenges-by-princess-kalyani/>

²² Stephanie Minnock, Should Copyright Laws Be Able to Keep up with Online Piracy, 12 COLO. TECH. L.J. 523 (2014).

²³ Section 14, Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

²⁴ Section 51, Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

Act so as to check the infringement in the digital domain of copyrighted materials and the punishment for such infringement includes punishment upto 2 years and also includes fine²⁵.

Section 43 and section 66 of the Information Technology Act²⁶, 2000 deal with piracy as they make it punishable to share or distribute any copyrighted material in an unauthorized manner. When section 79 of the Act is read with Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(4)²⁷, it obligates the intermediary to perform its duties with due diligenceso that there is no publication of any material or information that infringes an individual's intellectual property rights. Intermediaries are also obligated to notify the users to not disseminate such information that violates the propriety rights of a third party and if someoneis caught resorting to such illegal means then the intermediary is empowered to terminate suchusers access. The Information Technology (Intermediary Guidelines (Amendment) Rules), 2018, Rule 9²⁸ talks about the liability of intermediary to deploy automated tools that are technology based for the identification and removal of unlawful content from public access.

Copyright owners who wish to get their content removed which are available on various platforms on the digital avenue have to prove to the court that such an application or website is helping facilitate copyright infringement. For platforms which are intermediaries or help in sharing such pirated content, the copyright owner can move to the court to issue directions forremoval of pirated content from their platform. By now it is evident that tracing and identifyingpeople involved in piracy of digital content is difficult and information about them may be difficult to access then in such cases John doe or Ashok Kumar orders can be resorted to. In the case of Taj Television & Anr vs Rajan Mandal & Ors²⁹., first John doe order was granted wherein the Commissioner could enter any cable operator's premise who was involved in airing the 2002 Football World Cup illegally. Such John Doe orders are useful in cases relatedto online piracy since identifying the infringer becomes difficult, the copyright holders can thenserve notice and can take action against any of such infringers who are involved in unauthorizedreproduction and distribution of their copyrighted materials³⁰; relief's such as blocking accessto the content or take down of content can

²⁵ Bhuvana S. Babu, Technological protection measures, BANANA IP, (2015), <https://www.bananaip.com/ip-news-center/tag/sections-65a-and-65b-copyright-act>

²⁶ Section 43 & 66, Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

²⁷ Information Technology (Intermediary Guidelines) Rules, 2011.

²⁸ The Information Technology (Intermediary Guidelines (Amendment) Rules), 2018.

²⁹ Taj Television & Anr v Rajan Mandal & Ors [IA NO. 5628/2002 in CS (OS) 1072/2002]

³⁰ Manisha Singh, Aprajita Nigam & Smrita, Combating copyright online piracy in India: government's initiatives and Judicial Enforcement, MONDAQ, (Mar 2020), <https://www.mondaq.com/india/copyright/901978/combating-copyright-online-piracy-in-india-government39s-initiatives-and-judicial-enforcement>

be ordered to stop piracy and protect the copyright owner's interests and stop such illegal distribution.

INTERMEDIARY LIABILITY FOR COPYRIGHT

INFRINGEMENT BY USERS

Section 2(1)(w)³¹ of the IT Act, 2000 defines intermediary as “*any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.*” Intermediary may be service providers, search engine or social media providers. Under the Indian law intermediaries are mandatorily required to resort to due diligence while they perform their duties according to the Section 79(2) (c) of the Act³² and follow appropriate guidelines of the government for discharging their duties, there is not much defined regarding what all would amount to due diligence and is interpreted by the courts according to the facts of the case and according to Rule 3³³ of Intermediary guidelines, intermediaries shall remove any content that is unlawful after receiving knowledge of such content within 36 hours and would include unlawful copyrighted content being circulated on their platform. However, section 79 acts as a safe harbour and intermediary is not to be held liable for any third party infringement according to Section 79 (2)(a)(b). In the case of *Shreya Singhal vs UOI*³⁴ interpretation of Section 79 of IT Act, was changed and now intermediary is not obligated to take down content based on individual complaints of notice and take down and can happen only on court orders in India now; no provision of notice and takedown anymore which is an accepted mechanism in other jurisdictions such as European Union under Electronic Commerce Directive, 2000³⁵ wherein person aggrieved made a complaint and intermediary takes it down, this was introduced by Section 79 in India however the scenario changed with *Shreya singhal* case. In USA, according to the Digital Millennium Copyright Act (DMCA)³⁶, there is notice and takedown mechanism in relation to violation of copyrights and if the aggrieved gives specific information regarding the infringement is given to the intermediary they are required to take down content on

³¹ Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

³² Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

³³ Information Technology (Intermediary Guidelines) Rules, 2011.

³⁴ *Shreya Singhal vs UOI* (2015) 5 SCC 1.

³⁵ Directive on electronic Commerce, 2000/31/EC European parliament and Council, 2000.

³⁶ Information Technology (Intermediary Guidelines) Rules, 2021.

receiving such actual knowledge and also have due diligence requirements in case of infringement of copyright on their platform which is very apparent and can take it down without complaints also. Therefore, in India, there should be such takedown mechanisms in place on receiving individual complaints like that practised in USA and EU and should not only be based on court orders. In 2021, new Information Technology (Intermediary Guidelines) Rules were formulated by the government and talks about that intermediary shall inform users to not host or publish information that infringes copyright and other proprietary rights under Rule 1(b)(iv)³⁷, however, such takedowns based on individual complaints has not been mentioned.

In *Jagran Prakashan Limited vs. Telegram FZ LLC & Ors.*³⁸ the High Court of Delhi directed the take down of channels to Telegram wherein reproduction and distribution of plaintiff's copyrighted content who was involved in the business of providing digit e-papers. The court also sought Telegram to give subscriber information of the users of those channels. However, the Indian courts have not got enough matters on the issue of intermediary liability with regard to facilitation of copyright infringement of OTT content in the digital domain and hence we shall refer to some foreign judgements to understand the extent at which intermediaries can be held liable.

In the case of *MGM Studios vs. Grokster Ltd*³⁹, the United States Supreme Court applied the 'Inducement Doctrine' according to which the defendants could be sued for contributory infringement as peer-to-peer (P2P) file sharing was done via their platform and could also be sued for direct infringement as they also vicariously profit from such acts and any denial to limit or stop such infringement will also make them liable. Thus, such intermediaries should develop such tools which filter or at least reduce such infringing activity. In this case, the court iterated that any third party infringement on their platform will make such software distributors liable; while noting that the Copyright Act had no express mention of such liability the court held that such secondary liability emerges from principles of common law.

In a later case of *Arista Records LLC vs. Lime Group LLC*⁴⁰ the US District court held Limeware liable for inducing copyright infringement with their P2P file sharing software. The court ordered a permanent injunction for shutting down the defendant's file sharing platform on the ground that

³⁷ Information Technology (Intermediary Guidelines) Rules, 2021.

³⁸ *Jagran Prakashan Limited vs. Telegram FZ LLC & Ors.* CS (COMM) 146/2020 & I.A. 4073/2020

³⁹ *MGM Studios vs. Grokster Ltd.* 545 U.S. 913, 125 S. Ct. 2764 (2005).

⁴⁰ *Arista Records LLC vs. Lime Group LLC* 784 F. Supp 2d 398 S.D.N.Y. (2011).

infringement was promoted by them and they profited from it by vicariously contributing to such infringement. Whereas in the case of *re Aimster Copyright Litigation*⁴¹, the court found Aimster which is a website operator to be liable secondarily as they facilitated digital copies of songs on the internet to be swapped via their platform. The court went on to apply the theory of vicarious or contributory infringement against the intermediary as it was impractical to enforce such rights against each infringer as they were large in number and anonymity was also a problem.

LIABILITY OF END-USERS

In India there are not many case laws that comprehensively discuss the liability of consumers of such infringing content or the end-user liability. However, there are ample case laws of other countries where end-users have been held liable. For instance, in the case of *A&M Records vs. Napster*⁴² the US court observed that users of Napster are not fair users and held such users to violate the distribution rights of copyright owner who uploaded names of files in their search index for other users to copy and also held that the users who downloaded such files that contained music that was copyrighted violated reproduction rights of the plaintiff.

The Australian Federal Court in the case of *Dallas Buyers Club vs. iiNet*⁴³ held that if a silver of a movie is downloaded by one IP address then it would amount to infringement of copyright as it hampers the plaintiff's communication rights of such content to the public. Indian courts should also take similar stance when addressed with such issues. "Graduate response" system has been developed by some countries as a mild way to target end-users and should be applied in Indian cases also. The working of such a scheme involves that service providers of internet (ISP) should actively take action against users who are suspected of infringement, this can be done by issuing warnings to them, making the owners of copyright aware of such infringement and lastly service termination in extreme cases⁴⁴. This approach seems a more feasible and cheaper approach rather than suing individual infringers.

The *UTV Software Communication Ltd. & Ors. v. 1337x. To. & Ors*⁴⁵ can be considered a landmark one in regards to curb online piracy in India wherein the court developed the concept of

⁴¹ *Re Aimster Copyright Litigation* 334 F. 3d 643 (7th Cir. 2003).

⁴² *A&M Records vs. Napster* 239 F. 3d 1004, 1014-5 (9th Cir. 2001).

⁴³ *Dallas Buyers Club vs. iiNet* (2015) F.C.A. 317.

⁴⁴ Suzor & Fitzgerald, *The Legitimacy of Graduated Response Schemes in Copyright Law*. *UNSW Law Journal* 34:1. (2011).

⁴⁵ *UTV Software Communication Ltd. & Ors. v. 1337x. To. & Ors.* 2019 (78) PTC 375 (Del).

‘dynamic injunction’ according to which copyright holders need not require a judicial order for blocking ‘rogue websites’ that hosted infringing content. However, the court noted that blocking websites can be tedious and hence such a policy should be framed by the government wherein viewers can be warned either through pop ups or emails to refrain from downloading such infringing content and if they still do it then such infringers shall face fines and penalties.

SUGGESTED MEASURES TO FIGHT THE PROBLEM

Software developers of such applications or websites should take an extra step to be vigilant so that such piracy of copyrighted videos and audios cannot be distributed on their applications and platforms and should take proactive steps in assuring that even end users don’t end up downloading such infringing content. This will also be in line with the UTV Software case⁴⁶ and will help in curbing online piracy of copyrighted content. Currently there are no express laws which place mandatory obligation on intermediaries for identifying if any content infringes copyright and subsequently block or remove such content from their channels; till then Indian courts should provide detailed guidelines relying on the stance taken by various international courts. The Draft E-commerce Policy⁴⁷ of 2019 also iterated certain anti-piracy measures, however it has not been approved. The policy suggests a measure wherein intermediaries are asked to take up such measures that prevent pirated content from being disseminated. It also talks about platforms and websites where pirated copyrighted content is circulated, to remove such content on being notified by the holder of copyright that his copyrighted content is being illegally circulated in their platform. The draft policy also talks about creating a body of stakeholders from the industry for the identification of rogue websites who shall then face consequences such as they will be added to “Infringing Website List” (IWL) which will empower the ISPs to disable their access and advertiser’s agencies shall also be prohibited from hosting any ads on such rogue websites. This is a welcome step to curb the menace of online piracy of OTT content in India, however, the Policy should be soon approved. Another issue is that State IPR laws in India are not in harmony and poses further difficulties in the implementation process, this is problematic as copyright infringement online has multiple people involved who can be residents of different states; for instance, some states have laws to ask ISPs to examine certain infringed material whereas other states may not have that power, this leads to delay and disharmony. Thus, laws at the level of

⁴⁶ Ibid.

⁴⁷ Manisha Singh, Aprajita Nigam & Smrita, Combating copyright online piracy in India: government’s initiatives and Judicial Enforcement, MONDAQ, (Mar 2020), <https://www.mondaq.com/india/copyright/901978/combating-copyright-online-piracy-in-india-government39s-initiatives-and-judicial-enforcement>

various states should be harmonized. Amendments should also be done in the Copyright Act, 1957 in line with WIPO Internet treaties so as to bring uniformity in laws of various countries so as to curb the menace of online piracy and there should be specific provisions as regards the matter of jurisdiction and there should also be explicit provisions dealing with liability and whom it will rest on under various circumstances in cases of copyright piracy on the internet.

CONCLUSION

With the increasing video on demand and digital audio and video content and the rise in such OTT platforms and streaming services for exclusive quality content, there is a consequent rise in piracy of such exclusive copyrighted content that was the property of the copyright owner and such distribution and reproduction of his exclusive content leads to infringement and loss of business, customer loyalty and revenue and hampers the economy too. The problem is severe and is only on the increase and saw an exponential surge during the current pandemic. Though the laws in India to some extent address the issue and have measure to tackle the problem but they are not ample and sufficient. Hence, there is a need for enactment of specific statutory laws and policies to tackle the online piracy issue and such laws should conform to standards of international treaties that have adequate enforcement mechanism to enforce liability and suggest proper implementation. This will help in protecting the rights and interest of the copyrights owners as well help curb the menace of piracy and the loss to the economy.

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