
ONLINE MEDIA CONVERGENCE AND INTELLECTUAL PROPERTY RIGHTS IN OTT PLATFORMS

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ABSTRACT:

The radicalization of the modern media environment, brought by the scalding development of Over-the-Top (OTT) solutions has brought the concept of broadcasting, telecommunication, and online content delivery into a single digital platform. This kind of convergence of technology has raised complex legal and regulatory issues, particularly with respect to the control of Intellectual Property Rights. OTTs are regulated in India in a fragmented regulatory environment which is a combination of the Copyright Act, 1957, the Information Technology Act, 2000, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Despite the growing significance of the digital economy, the legal framework of the activity of these platforms is not clear.

OTT services may be involved in the content value chain in the digital environment in a number of ways. They generate original content, license copyright, distribute audiovisual media in multiple jurisdictions, as well as sometimes hosting user generated content. This complex position obscures the legal difference between intermediaries, publishers, and broadcasters. Moreover, despite the regulation of telecommunications companies in the context of the liberalization paradigm of the Indian Telegraph Act, 1885. OTT platforms seem to be mostly unregulated, which generates a gap in regulation.

This paper discusses two issues: the Convergence of Online Media and Intellectual Property Rights in the OTT industry in India. It explores the topic of the governance of copyright, intermediary liability, regulation of digital media, and how courts respond to piracy. In this paper, it is argued that India should have a coherent, convergence based regulatory approach which would provide a balance between protection of intellectual property, technological innovation, and freedom of expression.

Keywords: Online Media Convergence, OTT Platforms, Intellectual Property Rights, Intermediary Liability, Digital Media Regulation.

I. INTRODUCTION:

The establishment of digital communication technologies has radically changed the business model of media production, distribution, and consumption. One of the most remarkable changes in this turnaround is the emergence of Over-the-Top (OTT) services, which deliver audio visual and multimedia to consumers by using internet connectivity, without the use of traditional broadcasting infrastructure.¹ Such platforms have upset the traditional broadcasting and telecommunications markets by consolidating various media delivery types into one digital ecosystem.²

This change is also referred to as media convergence, it entails the convergence of broadcasting, telecommunication, and computing technology.³ Convergence has not only increased access to information but has also led to innovation in the digital economy and has underscored the weaknesses of the current regulatory structures. Most of the legal regimes that control communication technologies were formulated in the past technological eras and as such they were not designed to control integrated digital platforms.⁴

India is a very notable case of such challenges. The media and communication regulation in the past has evolved independently of the law. The Indian Telegraph Act, 1885⁵ was used to regulate telecommunications services and it was the main regulative of the communication infrastructure by means of state licensing. The regulation of broadcasting was based on the issues of spectrum shortage and the need to fulfill the interests of people. The Information Technology Act, 2000⁶ on the other hand, came into place with the main intention of supporting electronic commerce and acknowledging digital transactions.

All these areas are used by OTTs at the same time. They fund and produce their own content, sell copyrighted content, run online libraries, sell the media across national borders, and in some instances carry user created content. Therefore, the intellectual property law of OTT services poses various complicated issues related to copyright ownership, the use of licensing

¹ OECD, *The Evolution of OTT Services* (OECD Digital Economy Papers, 2014).

² UNESCO, *Media Convergence and Digital Media Regulation* (2019).

³ Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press, 2006).

⁴ Wolfgang Schulz & Thorsten Held, *Regulated Self-Regulation as a Form of Modern Government* (John Libbey Publishing, 2006).

⁵ The Indian Telegraph Act, 1885.

⁶ The Information Technology Act, 2000.

model, intermediary liability, and digital enforcement of intellectual property.⁷

The protection of copyrights holds the primary place in the economic activity of OTT platforms. The main foundation of their business model is the acquisition and exploitation of the copyrighted works.⁸ The doctrines of traditional copyright have, however, been formulated in a restrictive environment in terms of territory and technology. Internet based distribution puts these foundational assumptions into challenge due to the global and instantaneous nature of it.

This paper explores how the convergence of online media has transformed the genre of intellectual property governance of the Indian OTT ecosystem. It focuses on the interaction between copyright law and intermediary liability, the OTT regulation, and the telecommunications policy, as well as evaluates their effects on digital innovation and constitutional liberties, which are more broad.

II. OTT Media Convergence and the Form of Platform Structures:

Media convergence is the integration of communication systems that used to be distinct into unified technological and institutional systems.⁹ In the past, broadcasting, telecommunications, and computing had different technological settings and policies. Broadcasting was based on the model of one to many transmission that was limited by the lack of spectrum resources, whereas telecommunications allowed point to point communication using licensed infrastructure. On the other hand, computing technologies supported by digital information processing and sharing.

Internet enhancement has successfully consolidated these functions into a single networked digital platform.¹⁰ This has seen the delivery of services that were formerly technologically differentiated being offered on one platform.

OTT platforms are the best example of such convergence. The services share movies, television shows, music, podcasts, and other multimedia materials via internet access, thus avoiding the traditional broadcasting and cable delivery systems.¹¹ The growth of OTT platforms has

⁷ Graeme Austin, *Copyright Law and Digital Media* (Cambridge University Press, 2010).

⁸ The Copyright Act, 1957.

⁹ Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press, 2006).

¹⁰ Manuel Castells, *The Rise of the Network Society* (Wiley-Blackwell, 2010).

¹¹ TRAI, Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Communication Services

consequently and essentially changed the fabric of media distribution.

The OTT ecosystem may be broadly conceived in the form of three layers. The production layer entails the funding and creation of original content. Most OTTs have become production studios, commissioning exclusive content and having editorial control over the development of content. The distribution layer deals with streaming and organizing content, and directs the viewers to the most relevant content. The infrastructure layer comprises telecommunications networks, which allow the delivery of content and internet connectivity.

OTT platforms are not legally comparable to telecommunications service providers, in spite of the fact that they are highly dependent on telecom infrastructure. This institutional divide causes serious regulatory issues, especially regarding intellectual property regulation and digital competition.

III. OTT Economy and Intellectual Property Rights:

The legal framework of the OTT business model is based on copyright law.¹² Streaming services generate their revenue through the procurement, licensing, and dispensing of copyrighted data like cinema, sound documents, scripts, and other audio visual information. Copyright ownership has undergone massive changes due to the introduction of OTTs to the industry of production and distribution of such products.

Original programming that is commissioned by OTTs is often founded on a contractual basis in which the platforms obtain exclusive control over the work to be delivered and executed. This may be in the format of global streaming rights, reproduction rights, and adaptation rights.¹³ On the one hand, these deals provide authors with access to capital and a global following, and, on the other hand, can even accumulate long term management of creative works in huge online sources.

OTT catalogues are still important in the number of licensed content. Platforms tend to sign licenses with movie studios, film houses, and creators. These agreements outline the term of the license, territory, and how the license is to be utilized, i.e., streaming and digital

(2018).

¹² The Copyright Act, 1957.

¹³ Tanya Aplin & Lionel Bently, *Global Mandatory Fair Use* (Cambridge University Press, 2020).

downloading.

However, copyright is more territorial than the global online sphere of OTT services.¹⁴ To address this issue, platforms apply technologies of geo blocking and territorial licensing. These systems are, however, usually compromised through cross boundary access and web piracy.

IV. User-Generated Content and Intermediary Liability:

Certain OTT platforms offer users the ability to create, share, or communicate on their platforms, and this creates an opportunity for copyrighted content to be spread without the consent of the rights holder. Under these conditions, the issue of intermediary liability is fundamental to the protection of intellectual property rights in the digital setting. Because online platforms involve handling massive volumes of user generated content, it is a critical regulatory issue to establish whether they bear any liability for infringing content or not.

Section 79 of the Information Technology Act, 2000¹⁵ is the main statute that governs the application of intermediary liability in India. This clause offers conditional safe harbour to third party content hosting or transmitting intermediaries. According to this model, the intermediaries will not be taxed with the illegal content uploaded by the users as long as they follow the due diligence principles as instructed and take immediate action in case they become aware of the illegal or infringing content. This clause is meant to strike a balance between developing digital platforms and offering accountability to illegal activities in the virtual world.

Judicial interpretation has been very instrumental in explaining the extent of intermediary protection under Indian law. In *MySpace Inc. v. Super Cassettes Industries Ltd.*¹⁶ the Delhi High Court had to address the question of the possibility of online intermediaries to be held liable on infringement of copyright caused by user generated content. The Court ruled that intermediaries do not have to actively monitor all user uploads for possible infringement of copyright. Such a requirement would be unrealistic for digital platforms and would be a great hindrance to the operation of online services.

Similarly, in *Shreya Singhal v. Union of India*,¹⁷ the Supreme Court further explained the

¹⁴ World Intellectual Property Organization (WIPO), *Copyright in the Digital Environment* (2017).

¹⁵ The Information Technology Act, 2000, s. 79.

¹⁶ *MySpace Inc. v. Super Cassettes Industries Ltd.*, 2016 SCC OnLine Del 6382.

¹⁷ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

criteria for ascertaining intermediary liability. The Court ruled that intermediaries bear liability when they obtain actual knowledge of illegal content by way of a court order or government notification. The interpretation serves to prevent arbitrary takedown requests and in order to make sure that intermediaries are not required to take down material on the basis of individual complaints alone.

All of these legal interpretations create an equitable legal framework that ensures the protection of intellectual property rights while, at the same time, safeguarding freedom of expression and the further development of online platforms in the changing online media landscape.

V. Governing OTT Platforms as Regulated by the IT Rules, 2021:

In 2021, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹⁸ provided a framework of regulation of digital media platforms in India.. These Rules were initiated as a result of the increased power of digital intermediaries and publishers of online materials in the quickly evolving digital ecosystem. The Rules prescribe on platforms having to deal with content classification, grievance remedies and regulation, where the intention is to make platforms more responsible and answerable regarding the distribution of online content.

The publishers of online curated content under these Rules are obligated to categorize their content under age based categories, which include U, U/A 7+, U/A 13+, U/A 16+, and A. This classification system is expected to regulate what viewers watch and what age group should watch to avoid engaging in irresponsible viewing behaviours. Moreover, digital platforms are required to put in place internal grievance redressal mechanisms where users can make complaints on illegality, harm, or any other objectionable content available on the platform. The Rules also introduce a three level regulation framework that includes self regulation of digital platforms, self regulation by self regulatory organizations consisting of industry players, and government, self appointed bodies on the top.

In spite of the fact that the Rules are more concerned with the problems of content regulation than the sphere of intellectual property law, they can also have an indirect effect on copyright protection in the digital world. The grievance redressal mechanisms can also be resorted to by rights holders in case of reporting unauthorised or infringing content on the digital platforms.

¹⁸ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

However, there can be some overlaps in the procedures as copyright regulation initiatives have been introduced together with platform generated grievance systems. This may cause over protective or over cautious censorship by platforms, which are afraid of potential liability, which may cause proportionality and protection of legal online expression.

VI. OTT Services: Telecommunications Regulation:

The Indian Telegraph Act, 1885¹⁹ developed a licensing policy that controls telecommunications in India, and which is managed by the TRAI.²⁰ Under this regulation, telecom service providers must acquire government licences prior to providing communication services to the public. These licences impose a number of regulatory requirements on operators, such as the observation of service standards, the payment of licensing fees and spectrum fees, and the observation of government regulations concerning national security, consumer protection, and legal interception.²¹ The licensing system reflects the conventional perception of telecommunications infrastructure as a vital public facility that must be carefully supervised by regulations.

However, Over-the-Top (OTT) platforms do not fall under this traditional licensing regime, in spite of the fact that they provide services that could displace or substitute some traditional telecommunications services. OTT services offer audio visual, voice, and messaging services, dependent on the internet connectivity, rather than the regulated infrastructure of the telecom. As a result, these platforms do not require having telecom licences or share the same regulations of telecommunications providers. This regulatory difference has raised a great deal of policy debate on whether digital communication services that have similar functions should be regulated in a similar manner.²²

Telecom operators have often claimed a regulatory advantage over OTTs, as OTTs offer communication services without incurring the costs of a telecom licence and telecom infrastructure regulation. On the other hand, digital platforms argue that applying telecom type licensing to internet based services will interfere with technological innovation and the growth

¹⁹ The Indian Telegraph Act, 1885.

²⁰ Telecom Regulatory Authority of India Act, 1997.

²¹ *Id.*

²² Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Communication Services (2018).

of the digital economy.

Judicial interpretation has also played a role in explaining this regulatory difference. In *Cellular Operators Association of India v. Telecom Regulatory Authority of India*,²³ the Delhi High Court held that communication services based on the internet do not necessarily fall within the statutory definition of telecommunications services under the law. Therefore, OTT services remain regulated mostly as digital media intermediaries, but not as licensed telecom operators. This regulatory asymmetry has remained a consistent issue in current debates on the appropriate legal framework to be used to regulate converged digital communication services in India.

VII. Court Intervention in Response to Digital Piracy:

Internet piracy remains a very big threat to the security of intellectual property in the OTT ecosystem. Copyrighted content that is streamed on such platforms is often reproduced, distributed, and broadcast on unauthorised websites without the knowledge of the rights holders.²⁴ The easy accessibility to high speed internet and digital file sharing technology has enabled infringing content to spread fast across various platforms on the web. Consequently, creators, producers, and digital streaming platforms tend to lose a significant amount of money because of the unlicensed sharing of copyrighted content.²⁵

The Indian courts have responded to this increasing threat by embracing radical judicial solutions to enhance the protection of copyright in the digital world. Among the most notable developments in this connection is the case of *UTV Software Communications Ltd. v. 1337x.to*.²⁶ In this case, the Delhi High Court accepted the idea of rogue websites, which is the type of web site that is mainly used to allow the possibility of the great amount of copyright infringement. The Court permitted the application of dynamic injunctions, whereby rights holders can block the original infringing site, as well as mirror, redirect, or alphanumeric versions that may arise subsequent to the issue of the first blocking injunction.

Dynamic injunctions have since become a significant legal development in dealing with the

²³ *Cellular Operators Association of India v. Telecom Regulatory Authority of India*, W.P.(C) 11855/2015 (Delhi High Court).

²⁴ World Intellectual Property Organization (WIPO), *World Intellectual Property Report* (2022).

²⁵ United Nations Office on Drugs and Crime (UNODC), *Global Report on Intellectual Property Crime* (2020).

²⁶ *UTV Software Communication Ltd. v. 1337x.to*, 2019 SCC OnLine Del 8002.

dynamic nature of online piracy. Considering that there is a tendency to restart infringing websites using different domain names or slightly modified addresses, traditional injunctions are not always effective. Dynamic injunctions are a more practical and superior way to protect the copyright content within the digital streaming environment since they allow the courts to use injunction on newly made mirror or redirect websites.²⁷

VIII. CONCLUSION:

The intersection of the online media has entirely changed the interaction between digital technologies, content distribution, and legal regulation. OTT services are currently functioning at various levels of the media value chain, since they entail content creation, licensing, distribution, and digital streaming under one technology platform. This transformation has greatly changed conventional patterns of media dissemination and has given digital entertainment and information services wider audiences across the world.

Although intellectual property rights stand at the heart of maintaining this ecosystem, the regulatory system in India remains disintegrated and discipline based. Copyright law, intermediary liability legislation, OTT regulation, and telecommunications policy operate under different sets of legal regimes that were initially formulated in different technological settings. These models were not meant to represent the state of converged digital media platform, in which production, delivery, and consumption of content occur concurrently over the same digital infrastructure.

Judicial intervention has been significant in solving some of these emerging challenges. Courts have assisted in the formulation of legal principles of intermediary liability and have introduced novel remedies, including dynamic injunctions, to deal with online piracy. Nevertheless, tradition based judicial adjudication, which depends on case by case adjudication, should not replace broad scale legislative transformation that may respond to structural shifts brought about by technological convergence.

A new regulatory framework towards convergence is therefore required in order to provide effective regulation of OTT platforms and digital media services. Such a framework must balance intellectual property protection with technological innovation and still take a moderate

²⁷ Apar Gupta, "Dynamic Injunctions and Online Copyright Enforcement in India", *Indian Journal of Law and Technology*, Vol. 16 (2020).

approach to regulation. Simultaneously, regulatory control should not be inconsistent with the constitutional right to freedom of expression and the protection of creative autonomy in the constantly changing digital space.

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