

DIGITAL COPYRIGHT LAWS FOR OVER-THE-TOP (OTT) PLATFORMS: COMPARATIVE ANALYSIS OF INDIA AND THE UNITED STATES

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ABSTRACT

The India Copyright Registry has consulted stakeholders to revise the copyright regulations in light of the rapid growth the creative industry is witnessing. With the vast growth of technology and its development the boundaries of creation have extended to multiple limits. The Generative Artificial Intelligence creations, Non-Fungible Tokens, Gaming Graphics, etc. challenge the essential tenants of copyright law. Intellectual Property plays a strategic role in the creative industry. Along with the arrival of Digital Copyrights, the main source of communication for entertainment to the public has also become the Over-the-top platforms. Online consumption is at an all-time high, and Indian market is steadily growing. According to Music consumer insight report 2018 and audio OTT economy in India report 2019, 86% of the consumers globally are listening to music through on demand streaming platforms. Indian consumers spend 21 hours per week listening to online streaming music. Subscriptions to OTT platforms offering audio and video content has doubled since 2019. The shift of consumer is due to high internet penetration and increased usage of smartphones. Audiences have migrated to these digital streaming services, the services offer a buffet of entertainment options to the customers and protect the copyright of right holders which was earlier infringed through illegal internet streaming or downloads. Digital copyright subject matters are the main commodity for the OTT- platforms.

At the same time the massive shift also raises questions about how digital copyright can be protected on OTT platforms? To answer the question, the author has done a comparative study of Indian copyright law, cyber laws which include the Information Technology Act rules of 2011, 2013 and 2021 and the United States legislations specifically the Digital Millennium Copyright Act (DMCA). The paper is an attempt to deal with the question that how different stakeholders in a creative industry having specific interest will be impacted by digitalization of copyright. The paper in its first part delve into the aspects of digitalization of the copyright subject matter and how the regulatory framework is dealing with the shift of the subject matter. The second part of the paper compares the legislations and provisions in India with that of United States. The author has used descriptive analytical approach in writing this paper, through secondary data. The conclusion shows that the transition to digital copyright is happening at a rapid scale and Indian legislation is to accelerate its protections from conventional objects to different sorts of digital copyright. A sui-generis system can be adopted where cyber laws and copyright laws are combined together for digital protection.

Keywords: Digital Copyright, OTT, DCMA, Information Technology.

INTRODUCTION

The technological advancement has removed strict borders between the physical and digital worlds. There are significant changes that can be seen especially with the advent of the

creation of generative artificial intelligence. The penetration of the internet has fueled the creators. The Global Digital Report 2024 reported 5.44 billion Internet users, which is more than 67% of the world's population. In India, 751.5 million internet users are there, where internet penetration stood at 52.4 percent.¹ Within the OTT Video market, the number of users is projected to reach 487.1m users by 2029.² The impact of the extension and penetration of the Internet is extensive. The convergence is based on three major variables that are telecommunication, multimedia content, and informatics. The laws in these domains are still developing, for various kinds of management of rights and streamlining violations that occur in cyberspace. The subject matter of copyright law can also be seen interacting with the digital space. Music, films, reels, e-books, audiobooks, scheduled broadcasts, OTT, etc. A study of Baldry divides online services into a few categories, as depicted in Figure 1 (Baldry et al., 2014). The majority of the services are part of OTT communication and Media. In this paper, we will be discussing challenges related to OTT media.

The digitalization has made a major impact on the creators of copyright. In comparing the countries based on the aggregate level of digitalization, India ranks as the third largest digitalized country in the world, behind the US and China, and ahead of the UK, Germany, and Japan³. Along with the evident benefits that digitalization brings in there are many challenges that also arise. Copyrighted work now can be accessed from any part of the world almost instantly, especially with the emergence of OTT streaming services cinematographic films, musical content, series, etc. are available anywhere and anytime. OTT is a form of streaming service that is delivered through the internet across various network operators to connected devices. In 2011 the CRTC defined OTT as “it considers internet access to program independent of facility or network dedicated to delivery”⁴. Federal Communications Commission (FCC) of the United States defines OTT as “linear video services that travel over the public internet and that cable operators do not treat as managed video services on any cable system”. Linear means that it is scheduled virtually and simultaneously supported for transmission. The platform is also a solution to the rampant issues of infringement of copyright content as it ensures royalties to the right holders (Sihombing et al., 2021). There are two major divisions of streaming under the OTT platforms that is live streaming and pre-recorded streaming. The services have offered a more convenient way for consumers to access content legally at a relatively cheaper cost as compared to theaters and buying a DVD. There is no international classification for internet based services, Figure 1 describes the classification based on applications on the internet (Baldry et al., 2014).

The Indian Government has also supported the digitalization of cable systems which previously existed⁵ to set up boxes in the year 2013. The government has also introduced the Broadcasting Services (Regulation) Bill 2023 to address the long-standing need to consolidate the legal framework for broadcasting services and especially to have a regulatory purview on OTT services. TRAI has also recommended interoperability of set-up boxes⁶ and the government is also making efforts to have built-in satellite tuners in televisions to offer easy access to channels remotely. The set-up boxes allow the conversion of digital networks to televisions and hence OTT can also be supported through the same medium. The technological advancements in the field of OTT are not a new phenomenon but the unexpected rise of OTT platforms was seen after the Covid-19 pandemic, according to the Global Video Index the number of viewers in the entertainment sector increased by 30% as compared to 2019⁷. In India, the growth was exponential the year subscriptions increased by 42% in the FY 2021 as compared to the last year (Nijhawan & Dahiya, 2020). With the influx of consumers, there is an increased need to regulate the platforms, especially in the use of copyrighted subject matters and objects including challenges of infringement. There is a need for further examination in the field of copyright (Figure 1).

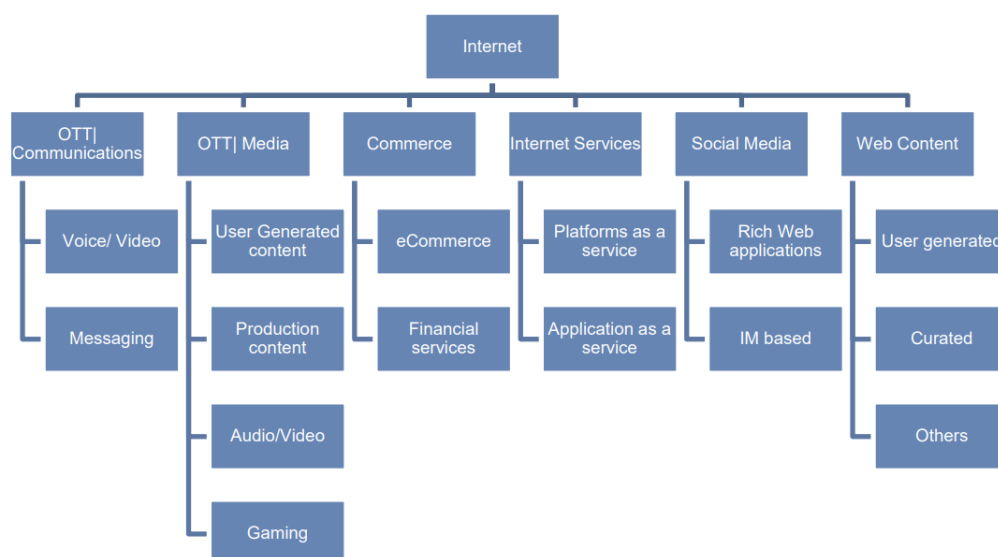


FIGURE 1
CLASSIFICATION OF ONLINE SERVICES

In the international domain copyright protection has existed strongly since the Paris Convention⁸ followed by the Bern Convention⁹. In India the adoption of Copyright Act was in 1957 and the law does not recognize “digital copyright,” which is an amalgamation of copyright protection with technology, and the amendments done the Information Technology Act 2000 was also not sufficient in including digital copyright into the law. Internationally, the copyright protection in consonance with the technological advancement was covered by the WIPO Copyright Treaty¹⁰ along with WIPO Performance and Phonograms Treaty (WPPT), 1996. The treaties are referred as “WIPO Internet Treaties”. In the United States (US) there is also a specific regulation that protects digital copyright – the Digital Millennium Copyright Act (DMCA), 1998 which adapts copyright law with the e-media. DMCA has also set the founding stones of protections implemented by the largest OTT platforms globally like, Netflix, YouTube etc.

This paper discusses the protection of digital copyright in the age of OTT streaming platforms within the Indian context. The main focus is on the use of cinematographic films on these media services. The comparison is made to the United States DMCA Act, which has already adopted the concept. An overview on the use of digital copyright practices applied by OTT platforms will be given.

THE FUNCTIONALITY OF DIGITAL COPYRIGHTS IN THE OTT STREAMING PLATFORMS

Regulatory Framework for OTT Streaming Services

With the advancement in technology and aspects of internet the home television sets have become old broadcasting players in the market. The audio-visual industry is increasingly shifting to OTT services which is grouped as:

1. Services provided on the internet by the network operators or managed networks (IPTV): These essentially include analog and digital broadcasting, satellites, cable, etc.
2. OTT (over-the-top) services which are available from the open internet, “on top” of the existing infrastructure like telephone networks, wireless, broadband, etc.

The laws regulating OTT have not grown at the same pace, following is the comparison made based on the obligations imposed on the telecom service providers and OTT services (Table 1):

S.N	Obligations under the Indian Laws	Applicability on licensed telecom service providers	Applicability on OTT platforms
1	Indian Telegraph Act, 1885	Yes	No
2	The Telecommunications Act, 2023	Yes	No
3	Licensing/ License Agreements	Yes	No
4	Regulatory Fee	Yes	No
5	Spectrum based charges	Yes	No
6	Telecom Regulatory Authority of India (TRAI) directions	Yes	No
7	Information Technology Act, 2000 – body corporate regulations or Intermediaries rules	Yes	Yes

The advancement in the services, network capabilities, the speed of the connections, etc. is closely related to the change in patterns of consumer behaviour. Both the breakthroughs in telecommunication and liberalization have influenced the emergence of OTT in India. According to the ASEAN ITU report,¹¹ OTT refers to “a form of services delivered via the Internet which bypass the traditional network service provider, compete with services offered by the telecom operators, and/or affect the quality of networks and service.” It is clear from the definition that we are creating a clear distinction between OTT and conventional broadcasters. It is also important to note that the revenue in the OTT Video market in Southeast Asia is forecasted to reach US \$ 4.42bn in 2024. In India, the growth of the telecommunication services sector can also be seen in cases including the Internet of Things, automated systems, smart education, health, agriculture, etc. The consumption of wireless access in India has gone through significant growth from 2013 to 2024. The total number of internet subscribers increased from 936.16 million at the end of Dec-23 to 954.40 million at the end of Mar-24 with a quarterly rate of growth of 1.95%.¹²

The telecom service providers (TSPs) have demanded for regulations for OTT platforms since 2015¹³, and is as recent as 2024¹⁴ while the OTT service firm maintain that there is a difference and the services are not comparable with telecom. The demand of level playing field for all technologies has been addressed by TRAI, response it can be seen in Figure 2. In India, regarding regulations like licenses, regulatory fee, etc. for the platform, the mechanism and framework are yet to be finalized. There are certain restrictions and obligations for privacy, confidentiality, etc. for OTT as introduced under the Information Technology Act, 2000 (Intermediary Guidelines) Rules 2021. The guidelines also introduced self-regulation for content classification for OTT platforms by establishing a grievance redressal mechanism (Figure 2).

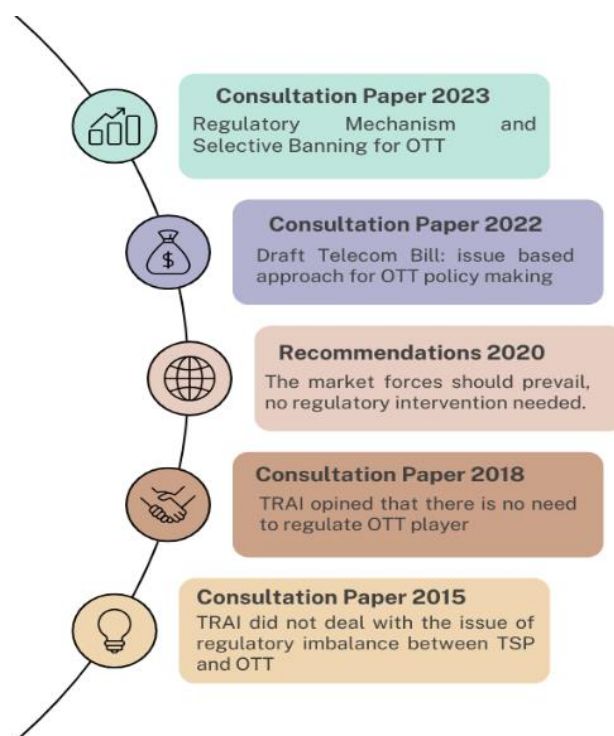


FIGURE 2
TIMELINE OF TRAI'S MEASURES TO REGULATE THE OTT PLATFORMS.
(AUTHOR'S)

Digitalization of Copyright Subject Matters

History has a normative contemporary need to justify the values, proprietaries, etc. that individuals enjoy. Copyright law has been developed since the 15th century in the world, but only in the 17th century do we observe that the history of copyright becomes a necessary inquiry. Copyright history magnified its presence in the jurisprudential aspects of literary property, especially in the 19th century. (Bowrey and Handler n.d.) With author's rights, and publisher's rights the international framework was adopted by many countries in 1886. The idea of protection of copyright was never for just an idea but for the physical medium of the idea. The tangible assets associated with the intangible thoughts enjoyed protection,¹⁵ one of the foundational rules of protection of copyright. The protection is a reward to the creator usually of written works, literature, artistic works, music, films, dramatic works, scientific works, photographs, etc.¹⁶

Technological developments now support "digital creative works" and "digitalization" of the works. The former is defined as "Original work created specifically for a digital medium, which embodies research and increases knowledge and/or advances understanding across the research spectrum, primarily in design and the creative arts." Examples can include multi-dimensional models, digital outputs of architectural and design projects, interactive computer applications, games, and visual artworks (Unni, 2015). The latter is a process of converting information available in the real world to a series of codes and producing it in the form of text, image, video, etc. on any electronic medium (Debnath, 2022). The results of both these formations will be protected by "Digital Copyright". Digital copyright refers to the set of exclusive rights granted to creators and owners of content that is produced and distributed in digital formats, multimedia, or digital platforms, digital media.¹⁷

Digital content which are subject matter of copyright can easily move places through intangible mediums like broadcasting or internet networks.

Digital copyright stimulates the renewal of the regulatory aspects that create protection of copyright objects in the digital era, for the creators and to enable the public at large to benefit and have access to copyrighted works along with ensuring legal certainty. Creative digital works also need technical protection along with copyright rights. Hence, law and technology must go hand in hand. One such medium where digitalization and digital creative works meet is the OTT streaming platforms. The platforms provide active and personalized consumption, since 2005 with the first video on YouTube (Singh, 2022) the services have continued to grow exponentially. With the introduction of OTT content, the structure of content distribution, business models, production, etc. has completely changed, and the legal framework must work around the same.

APPLICATION AND PROTECTION: COPYRIGHT LAWS FOR OTT SERVICES

The OTT services are entirely dependent on the content they showcase on the platforms, and there is a “race to content”. Exclusive content is what makes these platforms viable economically (Sihombing et al., 2021). This race to exclusive content has caused the content owners to tighten their intellectual property rights and the non-regulation of the platform as opposed to the alternative broadcasting services (Galway, 2005) has raised constant demands of separating the markets for them. As a result, the OTT services have developed the following strategies:

- a. Acquisition of broadcasting rights: Acquiring broadcasting rights is a fundamental strategy for OTT platforms to expand their content libraries and attract subscribers. This involves securing licenses to stream films, TV shows, sports events, and other media across various regions. Which provides the platforms global reach, desired negotiated content, and competitive edge.
- b. Financing in house content production: Investing in original content production is another vital strategy for OTT services. By creating proprietary shows and films, platforms can differentiate themselves from competitors and reduce reliance on third-party content, builds brand identity and it is a long-term investment.
- c. Marketplace or Platform model: The marketplace or platform model refers to the approach where OTT services act as intermediaries between content creators and consumers, allowing for a diverse range of offerings.

These strategies have removed any physical barriers for the streaming platforms, and it is now way easier for creators to distribute the copyrightable work and simultaneously create a new challenge for the rights, the potential to infringe copyright is also substantially increased by not just humans but also Generative AI (Kramarsky 2001). The technologies that support the creators can essentially be divided into two parts:

- i. Technology that has the functioning of digital locks to the subject matter of copyright
- ii. Rights management systems that communicate, record, and transmit data with a licensing and payment method.

World Intellectual Property Organisation (WIPO) took the initiative to include international protection for technology measures through two treaties known as WIPO internet treaties were reached to consensus. The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT).¹⁸ The US enacted the Digital Millennium Copyright Act (DMCA), 1998 just after the WIPO treaties were finalized. The Act was specially designed to address the challenges posed by the internet and digital technology to traditional copyright laws. There are three major developments in the DMCA namely the:

- a. Anti-circumvention: These provisions make it illegal to circumvent technological measures that control access to copyrighted works, such as digital rights management (DRM) systems. This includes both bypassing these measures and trafficking in tools designed for circumvention, regardless of whether actual copyright infringement occurs.

- b. Safe harbor doctrine: The central objective of the DMCA is to balance rights for creators, operators, internet users, and electronic systems. The safe harbor conditions allow electronic systems to be immune from any third-party liability.
- c. Takedown procedure: This system allows copyright holders to send a notice to internet service providers (ISPs) or online service providers (OSPs) requesting the removal of infringing content. The provider must comply, they are protected from liability for that infringement i.e. they are protected under the safe harbor provisions of the Act, provided they follow specific procedures. There is no step to verify the status of the claimed copyright content in this procedure.

The copyright law in India is one of the oldest legislations enacted during British rule. The first act goes back to 1847, 100 years before India celebrated its independence. The Copyright Act of 1914 later came in which was adapted from the British Copyright Act of 1911. Post-independence the act remained enforced until 1958 when the Indian Copyright Act, (ICA) 1957 was enacted. Since then, many attempts have been made to modernize the act from time to time and hence the act has seen multiple amendments like that of 1983, 1984, 1999, and 2012 to make it more comprehensive towards technological advancements. The last amendment of 2012 had relevant provisions to deal with copyright management in the era of the internet and technological advancements and Technology protection measures (TPMs). India officially acceded to the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) on 4th July 2018.

The protection of rights under copyright law can be categorized into two main rights: economic rights and moral rights. Copyright law stipulates that the management of copyright information and electronic information are embedded in digital works. The presence of a digital medium in copyright regulation was recognized by the 2012 amendment. among other things, the amendment introduced the definition of “communication to the public” to make it applicable to digital environment [Section 2(ff)] and introduced provisions relating to Technological Protection Measures (Section 65A) and Rights Management Information (Section 65B), Moral Rights of Performers (Section 38B), Exclusive Rights of the Performers (Section 38A) and Safe Harbour provisions over electronic medium (Section 52 (1) (b) and (c)). The digital copyright protection on OTT streaming content in India is essentially covered by two legal regimes that are copyright law and the Information Technology Act, of 2000 or the cyber law. Under the cyber law regime, there are certain provisions for the protection of IPR created in the IT Act of 2000¹⁹. Safe harbor provisions are part of Section 69A, 79, Information Technology Act, (IT) 2000.²⁰(Table 2)

No.	Area of Regulations	India- Copyright Law and Cyber Law	United States - DMCA
1	Anti-circumvention	Section 65 A, Indian Copyright Act, 1957 added by 2012 amendment. ²¹ prohibits the circumvention of technological protection measures (TPMs) that protect copyrighted works. This means that any attempt to bypass protective mechanisms designed to prevent unauthorized access or copying of works is illegal.	1201(a)(1) DMCA ²² it is illegal to circumvent access controls or protections on copyrighted works. This provision is similar to India's Section 65A and reflects a strong stance against unauthorized access to protected content.
2	Safe Harbor	Section 79, IT Act, 2000 ²³ : intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by them. The Intermediary Guidelines Rules,	512 (c) (1) (A) Online Copyright infringement liability Limitation Act (OCILLA) ²⁵ : protects OSPs from liability for infringing

		particularly those introduced in 2021 ²⁴ and updated in 2023, have further clarified the obligations of intermediaries. These rules emphasize: The necessity for intermediaries to publish their policies regarding user content and compliance with laws. Enhanced due diligence requirements that intermediaries must follow to maintain their safe harbour status.	content uploaded by users, provided they do not have actual knowledge of infringement or are not “aware of facts or circumstances” that would make infringing activity apparent.
3	Takedown Procedure	Section 81, IT Act Section 79 (1) (c), IT Act <i>My Space Inc. V. Super Cassettes Industries</i> ²⁶ Section 79 (3) read with rule 3(4) of the intermediary guidelines rules, 2011 Rule 75 of Copyright Rules, 2013 – takedown process John Doe or Ashok Kumar Orders if the infringer is unknown.	512 (c) (3) (A) OCILLA ²⁷ the DMCA establishes a formal process for copyright holders to submit takedown notices to service providers. These notices must include specific information about the infringing content and are designed to facilitate quick removal.

The digital protection of copyright for the OTT service providers like Netflix is unique, because of implementation of the respective countries laws and policies where the company is providing its services. If the principles of ‘the place of incorporation’ is applied the company is subjected to the laws where it is established, and the implementation of the copyright laws is done territorially. Netflix as per its headquarters in US follows the DMCA, the content providers and partners of Netflix enter into agreements with the copyright holders to distribute the content on its platform or the company produces their own content which is known as the Netflix Originals. A licensing agreement and purchases then allow the company to serve the content for viewing during specified time in specified regions. Only the certain countries which have the license or permit can broadcast the shows. In India for example Netflix will purchase a license of a film running in theatre from film production company for broadcasting it on Netflix for some years and for specific countries especially in the Asia Pacific Region or worldwide. In this way the owners of the content or the copyright holders of the content collect royalties on films through that purchase of license. Although there is no collective management of the collection of royalties, and it is independently managed by selling licenses from producers to Netflix. The compliance with DMCA is to be considered in the following three parts:

a. Use of the Technological Protection measures (TPMs)

To protect the content showcased on Netflix the company is utilizing two main technologies:

1. Multi digital rights management (DRM) (Galway, 2005): It refers to the access and control technology used by the copyright holders to restrict the digital media use. The essence of this is to control access, duplication, or conversion of copyrighted material into other formats.
2. Forensic watermarking (Galway, 2005): this allows the insertion of the user information and content, so that the content can be tracked in the event of illegal distribution from the users.

b. The Safe Harbour Regulations

The safe harbour provisions require the operators to carry out a reliable, safe and responsible electronic system operations. The standards in India which is given under the IT Act can be met under several conditions:

1. The service providers must adopt and implement the regulations fairly. The users must be notified about the policy.
2. The service providers should accommodate the standards technical measures copyright holders use to identify and protect copyrighted works
3. The service providers do not directly benefit from the infringing materials

Revenue of Netflix is majorly earned through subscription fees the third provision regarding financial gains is inevitably satisfied if any copyright infringement is detected (Vogel, 2020). The first point of accountability will be on Netflix if they were not aware about the possible violation. This can be fulfilled by providing opportunity to the users to report copyright infringement and by responding to the reports. And secondly, technology can be used to identify and protect copyrighted works.

c. Takedown Procedure

Under DMCA takedown of the questionable work can be requested by anyone by providing the signature of the person complaining, identification of the material, which is infringing the copyrighted content, information of the reporter, a statement that such reporting is made in good faith, and statement of accuracy. In India, on the other hand Section 79 (1)(c) of the IT Act, 2000 read with rule 3 (d) of the Intermediary guidelines 2011²⁵ provides that the intermediary shall observe due diligence and ensure there is no infringement of patent, copyright and trademark. An intermediary on receiving 'actual knowledge' by affected person in writing through email must act within 36 hours, if the intermediary is unable to act then the safe harbour can be denied. Rule 75²⁸ of the Copyright rules, 2013 establish the procedure of takedown and the process of delivering notice. The information should include description of the work, to identify the product, anyone cannot complaint against the infringed material, either the owner or the exclusive licensee can file the complaint and must establish their identity, details also have to be provided that the usage of the work is not falling under the purview of fair use, fair dealing under Section 53 of the Copyright Act²⁹. The details of the location of the infringement are to be given by the complainant and if the person who has infringed the work is known their details should also be shared. The most unique feature of the Indian law is an undertaking that the complainant will file a suit of infringement against the infringer in the competent authority within a period of 21 days from the date of receipt of notice. Apart from the owner or authorised licensee the government of India also enjoys the right to issue notices under Section 79. Recently the Ministry of home affairs in India has also empowered the Indian Cyber Crime Centre (14C)³⁰ to issue direct takedown order under Section 79(b) (3) of the IT Act.³¹

India recently has also introduced a guideline for regulating the content on OTT platforms by introducing Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.³² Under this rules, the OTT providers must comply with certain obligations:

- a. OTT providers must appoint a chief compliance officer (CCO) who will be held accountable in case the guidelines are not followed.
- b. The CCO has to manage and oversee company's compliance initiatives and ensure adherence to the laws.
- c. OTT platforms must follow the Rules of Engagement, which includes adhering to a moral code of conduct. This code outlines instructions on prohibited material, material classification, and access controls.
- d. Grievance Redressal Mechanism has to be establish for resolving complaints related to content.

These provisions are common provisions for any sort of cyber-crime and is not specific to copyright infringement.

CONCLUSION

With the technological advancements the challenges to the implementation of the copyright law has become complex. This can be observed by the amount of objects which are digitized now including copyright objects. One such example is the emergence of the OTT streaming services which provide platforms to the digital copyright objects, in multiple forms one of which is also cinematographic works. When a comparison is made for digital copyright protection in India and the United States, there are frameworks which emerge like the rules under Copyright law and IT Act, DMCA respectively. The three main points of intervention of these regulation are, anti-circumvention, safe harbour, and take down procedure. Compared to U.S, India have similar provisions in the copyright and cyber law regime. The two main disadvantages of the Indian system as compared to the U.S is the need to file a suit of copyright infringement, if such matters can be handled by the platforms, it would create an ease of access, the need to provide an undertaking of filing a suit seems unnecessary creates burden on the complainant to seek same remedy at different forum and filling a law suit also creates financial cost which discourages the parties to report potential infringing materials. Secondly, only the owner or authorised licensee has the right to actually raise objection about the material which restricts the audiences to raise flags in case they recognise the material as infringing. These two limitation in the India law restricts potential reports of copyright infringement.

There must be more legal certainty to enact and implement legislations with specific digital copyright objects. Currently, there is a lack of coordination between the platform stakeholders, the government and the users because of wide range of provisions. The provisions under the IT Act is also applicable to many types of content for example – abusive content, or sexually abusive of children etc. and not just to copyright and hence the needs of copyright infringement take a back seat compared to other serious crimes through internet. Hence, a more robust copyright law has to be made to equip the protection of digital copyrights rather than relying only on the cyber laws, both the legislations have to be read together in creating such a robust framework for protection of digital copyrights in India.

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