Journal of Intellectual Property Rights
Vol 30, May 2025, pp 314-323
DOI: 10.56042/jipr.v30i3.9732

Rights of Internet Broadcasters in India

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Received: 19th March 2024; revised: 23rd December 2024

The paper aims to explore whether the current Indian copyright law regime accommodates and protects the rights of internet broadcasters. Internet broadcasting presents complex legal issues regarding copyright. Extending licenses beyond traditional broadcast mediums may prove to be cumbersome. Nevertheless, these issues need to be addressed so that both rights holders and end users can benefit from emerging technologies.

This paper will delve into the legal intricacies surrounding internet broadcasting in India. It will examine the Indian as well as international framework to explore how digital media's rapid growth has compelled lawmakers to revisit existing legislation. It will also analyse the meaning, scope and applicability of broadcasting, reproduction, distribution and making available rights. Accordingly, this paper will discuss the rights of broadcasters under the Indian Copyright Act and analyse whether internet broadcasting can be included within the current framework and the need for such inclusion.

Keywords: Copyright, Broadcasting, Internet, Online Streaming, OTT Platforms, Radio, Television, Broadcasters' Rights, Statutory Licensing, Making Available

What is the modern day idea of entertainment? Listening to BinacaGeetmala on the radio or Netflix and chill? The idea of entertainment has certainly broadened, if not changed, due to the advent of technology. Gone are the days when one had to wait until 8 pm to watch their favourite television program or hope that a movie they had missed watching in the theatre would be broadcasted on television on a sunny afternoon. Over-the-top ("OTT") platforms such as Netlfix, Amazon, Hulu et cetera have made entertainment available to the public at the click of a button, in the comfort of their homes and at a time they choose. Similarly, now one is not dependent on radio and music channels on television to listen to their favourite songs. Music streaming platforms such as Spotify, Wynk and internet radio have made music portable. However, are these platforms same as television and radio? Are these platforms broadcasters under Indian law?

Internet has revolutionized the way content is created, distributed, and accessed. At the same time, the rise of "internet broadcasting" has brought about unprecedented challenges for the Indian legal regime. In India, the Copyright Act of 1957 was amended in the year 2012 to address these emerging issues surrounding technology, internet and broadcasting. The said amendment introduced Section 31D to provide for statutory license for radio and television broadcasters. However, with the advancement of technology there emerged online streaming platforms such as internet radio and other over-the-top platforms on which creative works are made available. Thus, debates on the adequacy and ambit of the said provision ensued.

Crucial Terms and Definitions

Before we delve into the discussion on whether the current legal regime accommodates internet broadcasting or not, we need to look at certain terms and definitions that are crucial to our present discourse.

As we know, copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings.[1] It can also be said to be a bundle of rights including, *inter alia,* rights of reproduction, communication to the public, adaptation and translation of the work. This also includes the right to broadcast.

Section 2 (dd) of the Copyright Act of 1957 defines broadcast as follows:

"broadcast" means communication to the public— (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast;]

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The above definition makes it clear that broadcast is a subset of "communication to the public". But what exactly is communication to the public?

Per Section 2 (ff) of the Copyright Act,1957 *"communication to the public" means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available. Explanation.— For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;]*

The above definition implies that communication to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion.[1] Interestingly, it is not considered necessary that any member of the public actually sees, hears or otherwise enjoys the work so made available.[1] For example, a cable operator may transmit a cinematograph film, which no member of the public may see. Still it is a communication to the public.[1]The fact that the work in question is accessible to the public or made available to the public is enough to say that the work is communicated to the public.[1]Now, the term "making available", though not defined under the Copyright Act, has been interpreted by scholars as making a work available by uploading it for interactive access irrespective of whether it is streamed or downloaded.[2]

Another point that stands out in the definition is that the communication to the public can be simultaneous or at places and times chosen individually. This implies that communication is not limited to traditional television viewing or radio listening inasmuch as a viewer or a listener does not necessarily have to wait for a slot to watch or listen to their favourite program. In fact, they can watch or listen to it per their convenience in their car/public transport/office and of course, in the comfort of their home. Tata Play Binge is a popular example of this- a viewer can watch their choice of movie or television program at any time. OTT platforms such as Netflix and Amazon Prime also provide the same ease of viewing, thus, can we say these platforms communicate works to the public and are broadcasters? We shall explore this question in the following sections.

It is pertinent to note that the definition of "communication to the public" excludes display or diffusion of a work by way of distributing or issuing physical copies of it. This is because the same is included in the right of reproduction. The right of reproduction commonly means that no person shall make one or more copies of a work or of a substantial part of it in any material form including sound and film recording without the permission of the copyright owner.[2]

Legal Status of Television & Radio Broadcasting

The right to broadcast is often linked to the fundamental right to speech and expression. In 1995, in *The Secretary, Ministry of Information & Broadcasting,* v *Cricket Association of Bengal &Anr.*, the Hon'ble Supreme Court of India held that airwaves or frequencies are a public property.[3] Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property.

Thus, both radio and television broadcasting are regulated in India.

The Cable Television Networks (Regulation) Act of 1995 serves as the primary legislation overseeing content on linear broadcasting, including cable networks. Radio broadcasting is covered under the provisions of the Indian Wireless Telegraphy Act, 1933 which regulate the possession of wireless telegraphy apparatus. However, there is no such legislation till now which caters to "internet broadcasters".

The Government of India enacted the Cable Television Networks (Regulation) Ordinance on 29 September, 1994 that set down rules for registration of Cable TV Operators and introduced the Programming Code & the Advertisement Code. Subsequently this ordinance was converted into the Cable Television Networks (Regulation) Act 1995.[4]DTH or Direct-to-Home broadcasting service was opened up in the country in 2001. On 15 March, 2001, the Government issued the "Guidelines for obtaining licence for providing Direct-to-Home (DTH) broadcasting service in India".

It is imperative to note that traditional broadcasting organizations require a license under law to operate and are accordingly, recognized as "broadcasters".

For radio broadcasting services using wireless communication, a broadcasting company needs to take two licenses - i) Permission granted by the Ministry of Information and Broadcasting; and ii) A Wireless Operating License (WOL) from the Wireless Planning and Coordination (WPC) Wing of the Ministry of Communication and Information Technology under the Wireless Telegraphy Act, 1933.[5] For obtaining such license, an applicant is required to pay prescribed fee to WPC.[5] An annual license fee also has to be paid to the Ministry of Information and Broadcasting (MIB) by the applicant as prescribed in the respective license/permission.

It is pertinent to note that broadcasting licences are limited in their territorial coverage and are subject to censorship or regulation of content.

With the advent of technology, we have streaming platforms, OTT platforms which make works available to the public by way of streaming and/or downloading content. To elaborate, when you watch a programme online, either live or on demand, this is known as streaming while downloading is saving the programme to your device temporarily and watching it when you're not connected to the internet.[6]This is known as "internet broadcasting".

OTT platforms or streaming platforms arenot requiredto have a license under law, as ofdate. In view of the aforesaid, can we even call OTT platforms or music streaming platforms "broadcasters"? What is the legal status of such platforms? It is only the Information Technology Act, 2000 and related rules that provide guidelines for regulation of online content providers to a certain extent.

Rights of Broadcasters under Indian Law

Position of Broadcasters under Copyright Act, 1957

Broadcasting organizations have a reproduction right which allows them to reproduce or re-broadcast their work. This right is provided under Section 37 of the Copyright Act, 1957 and reads as follows-

"Section 37. Broadcast reproduction right.— (1) Every broadcasting organisation shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,—

(a) re-broadcast the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

(e) sells or gives on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provision of section 39, be deemed to have infringed the broadcast reproduction right."

The above section was introduced to the Copyright Act by way of an amendment in 1994. The "broadcast reproduction rights", also known as neighbouring rights, are designed to protect the signals that are transmitted by the electromagnetic waves.[7]As laid down in *ESPN Star Sports* v *Global Broadcast News Ltd. & Ors.*, rights protecting what broadcasters transmit over the airwaves are not the same as copyright protecting original creative works, and are thus, separate rights.[8]Thus, broadcast reproduction rights are separate rights conferred upon the broadcasters. All traditional broadcasters enjoy this right, in addition to their copyright, if any.

Subsequently, in the year 2012, Section 31 D was introduced to the Copyright Act. Section 31D provides for a statutory licensing scheme, per which any "broadcasting organisation" desirous of "communicating to the public"by way of a broadcast or by way of performance of a literary or musical work and sound recordingmay obtain a statutory license to do so, provided they pay the royalty rates to the copyright owners, at rates fixed by theAppellate Board, as it existed then.

This provision was introduced in compliance with Articles of the Berne Convention, TRIPS Agreement, and Rome Convention, and deals with statutory licensing for broadcasting of literary and musical works, and sound recordings.

At the time of introducing Section 31D to the Copyright Bill, 2010, Shri Kapil Sibal, then Human Resource Development (HRD) Minister, stated[9]:

"*The Copyright Board, as a matter of law, under the statute will actually decide on the quantum of money that will be required to be paid by the TV companies to the music companies who have bought over those rights. Therefore, there was some debate as to whether it should be limited only to radio, and TV should be kept out of it. But ultimately, we decided that TV should be included in it."*

The above excerpt evinces that the question was whether Section 31D should be limited to radio only or should include television as well. There seems to have been no mention of inclusion or exclusion of internet broadcasting.

Further, the legislature, while introducing Section 31D noted that the system of statutory licensing had been proposed to ensure that the public had access to musical works over the FM radio networks and at the same time, the owner of copyright works was also not subject to any disadvantage.[10]It further noted that this system would work in favour of users of copyright works who would then not be subject to lengthy, expensive and monopolistic negotiations by the owners of the work.[10]

Section 31D of the Copyright Act, 1957 reads as follows:

"31D. Statutory licence for broadcasting of literary and musical works and sound recording.—(1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the [Commercial Court].

(3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the [Commercial Court] shall fix separate rates for radio broadcasting and television broadcasting.

..."

Clause 3 of the above provision indicates that statutory license pertains to radio and television broadcasting only. Furthermore, Rule 29 of the Copyright Rules, 2013 specify that separate notices shall be given for communication to the public by way of radio broadcast or television broadcast or by way of performance of a literary or musical work and sound recording which has already been published.[11]Further, inter alia, such notice shall mention the name of the channel, mode of the proposed communication to the public, i.e. radio, television or performance, territorial coverage, details of time slots, duration and period of the programme in which the works are to be included et cetera. All these factors collectively appear to imply that the statutory license scheme provided under Section 31D of the Act pertains to radio and television broadcasting only and not to internet broadcasting.

This issue was addressed at length by the Hon'ble Bombay High Court in *Tips Industries Ltd.* v*Wynk Music Ltd.*[12]where the court rejected the claim that online streaming services are eligible for being granted statutory licenses for broadcasting under Section 31D of the Copyright Act.

The parties, Tips Industries Ltd.,a music label in India, and Wynk Music Ltd.,an online music streaming platform/application, entered into a license agreement in 2016 where Tips licensed its significant repository of music toWynk. Upon expiry of the license in 2017, both parties attempted to renegotiate the licensing terms for allowing Wynkto utilise music owned by Tips on its platform. However, negotiations failed and consequently, Tips requested Wynk to remove Tips' entire repertoire from its platform. Wynk did not pay heed to this request and insteadinvoked Section 31D of the Copyright Act to assert its rights as a broadcaster. In response to this, Tips approached the Hon'ble Bombay High Court.

Tips challenged Wynk's invocation of Section 31D, and sued Wynk for infringement of their exclusive copyright in sound recordings, under Section 14(1)(e) of the Copyright Act. The Ld. Single Judge decided in favour of Tips and found Wynkguilty of copyright infringement on the following two grounds:

(i) For "selling" or "commercially renting" works under Section 14(1)(e)(ii), by way of permitting downloading and offline listening of Tips' works. ; and

(ii) under Section 14(1)(e)(iii) for communicating Tips' works to the public through their streaming service.

The court further clarified that Section 31D does not cover "downloading/purchase" of works. It observed that Wynk's feature of making songs available for downloading and storing permanently amounted to sale and not communication to the

public, and therefore, did not constitute a "broadcast" for the purpose of Section 31D. Furthermore, it is imperative to mention herein that the 227th Report of the Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010 also categorically stated that sale/downloading of sound recordings through the internet does not fall within the scope of communication to the public.

Wynkargued that Section 31D contemplates online broadcasting, and Wynk's streaming service is included within "radio broadcasting". Wynk relied, upon an office memorandum issued by the Department for Promotion of Industry and Internal Trade (DPIIT)in 2016, which stated that Section 31D included 'internet broadcasting'. However, the court did not agree with this position.

It held that Section 31D must be strictly interpreted- Section 31D(3), as well as the rules framed under it evince that statutory licensing was intended to cover only "radio" and "television" broadcasting, and not internet broadcasting. The court pertinently considered the legislative intent also. It held that while introducing Section 3D the legislators were fully aware of the technological advancements, trends and digital technology like streaming and downloading. So if internet broadcasters were not included in the section 31D by the legislature, it was done so deliberately.

The court further noted that the statutory scheme under Section 31D, including Rules 29, 30 and 31 of the Copyright Rules, clearly indicate that the prior fixation of royalty rates by the erstwhile IPAB was essential for the invocation of a statutory license under Section 31D. However, the IPAB did not have jurisdiction to fix rates for 'internet broadcasting'.

This judgment of the Ld. Single Judge was appealed against by Wynk. The Hon'ble division bench of the court upheld the judgement of the Ld. Single Judge. The bench observed "*The distinguishing factor however between online radio-type services and online services such as Wynk is not whether they are 'streaming' or not. Technically, both might well be called streaming services. That expression only means that packets of data are being transmitted digitally over the internet and being reassembled at the destination for audio reproduction. The expression 'streaming' is not a point of distinction. The real distinction is whether a service does or does not give users a choice of what is being played and what is being heard. Internet FM radio is also streaming, but without the user-control of services such as Wynk, Spotify, etc."*[13]

The court further noted that "*Wynk is not a service that is available to the public. It is available to those who sign up for Wynk: many are 'members of the public' but are not Wynk subscribers, paid or free. There is simply no public interest dimension to Wynk's private profit goals. Wynk has paid subscribers. It receives money from them (apart from other sources of funding). There is, therefore, no question of Wynk attempting to obtain a statutory licence for its private profit motives in this fashion. That is a perversion of the statutory intent. It was not what Section 31D was intended to achieve at all*."[13]

The court supplemented the language of Section 31D with the legislative intent to say that, *inter alia*, Wynk's services were not in public interest and not available to the "public" per se and thus, it could not invoke Section 31D claiming to be a broadcaster. It appears that the court construed the term "public" rather narrowly inasmuch as it distinguished between subscribers and non-subscribers of the Wynk application. It is pertinent to note that the court noted that many members of the public are not Wynk subscribers whether paid or free. This raises questions, as the same reasoning must then be applied to both television and traditional radio as well. Not every member of the public has access to television or radio but still both modes of broadcast are included under Section 31D. Furthermore, the existing laws on broadcasting include IPTV etc for which a viewer, in addition to having a television, must also become a paid subscriber of the network operator in order to avail the services. This is similar to Wynk's application which allows for both paid as well as free subscribers. Therefore, this interpretation of "public" and "public interest" must be reconsidered.

Position of OTT Platforms & other Internet Broadcasters under Indian Law

As is evident from the decision in *Tips* v*Wynk*, streaming platforms on the internet are not included in the definition of broadcasters and hence, cannot avail broadcast reproduction rights or rights provided for broadcasters under Section 31D of the Copyright Act. The question that arises then is which law governs such platforms?

Until 2021, online streaming platforms were construed to be "intermediaries" as defined under Information Technology (IT) Act of 2000. Per section

2(w) of the Act, "*intermediaries with respect to any particular electronic records, means 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;]"*

Basically, an intermediary facilitates data on the internet by means of infrastructure for means of communication. They can also be said to facilitate trade or interaction between buyers and sellers such as Amazon, Flipkart et cetera. However, an intermediary is neither supposed to own any content nor have any control over it. Due to this qualification, amongst others, an intermediary can seek safe harbour under Section 79 of the IT Act, 2000.

The intention behind introducing Section 79 is for providing safe harbour for intermediaries who should not held liable unreasonably. However, the above definition evinces that the exemption is not absolute. To avail the defense of non-liability under Section 79(2)(a), the intermediary should restrict its functions to transmitting, hosting and temporarily storing content on its platform and also observe due diligence in this regard.

Subsequently, Information Technology Rules were notified in 2021[14]by the government to help regulate content on online platforms, specifically OTT platforms which provide on-demand audio-visual content over the internet. Interestingly, these Rules seemingly defined OTT platforms and other online streaming platforms as "publishers of online content".[15] Rule 2(u) of the 2021 Rules defined "*publisher of online curated content" as any publisher who makes available to users, on demand, audio-visual content (that is owned or licensed by the publisher) via a computer resource over the internet*." Therefore, now OTT platforms and other online streaming platforms could not be said to be intermediaries under the IT Act and accordingly, not seek refuge under Section 79 of the IT Act.

Further, these guidelines required OTT platforms to comply with a "code of ethics" covering principles such as age classification of content. Further, the said guidelines introduced a three-tiered grievance redressal structure which includes the following:

(a) Self-regulation by the OTT platform

(b) Self-regulating bodies of publishers or their associations and

(c) Oversight mechanism by central government.

Several concerns were raised about overregulation, potential self-censorship, vague language, unclear standards, and increased government oversight and how the rules could potentially impact artistic expression on OTT platforms. Nevertheless, these Rules were the first concrete step towards an attempt to regulate online content.

Attempts to Include Internet Streaming Platforms within the Ambit of Section 31D

The Department for Promotion of Industry and Internal Trade (DPIIT)issued a memorandum datedSeptember 5, 2016 which clarified that Section 31D of the Copyright Act is not restricted to radio and television broadcasting only but covers "internet broadcasting" also.[16] The DPIIT referred to Section 2(ff) of the Act in this regard, which provides that essentially "communication to the public", includes internet transmissions as well.

The clarification did not settle the debate as it was criticised on the ground that it went beyond the intended scope of law and rules associated with it. Another critique of the same was that the government was not authorised to issue such a memorandum and it exceeded its authority by doing so. Only the courts and legislature have the authority to issue such clarification on the law. The same was also recently withdrawn bythe DPIIT.[17]

Subsequently, another attempt was made to include internet broadcasters within the ambit of Section 31D. The Draft Copyright (Amendment) Rules were proposed in the year 2019 that intended to replace the words "radio and television broadcast"/"radio and television broadcasting" with "each mode of broadcast" in rules 29, 30 and 31 of the Copyright Rules.[18]This proposed amendment seemingly intended to broaden the scope of Section 31D by including all modes of broadcast. However, the said rules were eventually not notified.

Thereafter, in November 2020, Government of India (Allocation of Business) Rules, 1961 were amended to include "Films and Audio-Visual programmes made available by online content providers" within the ambit of the Ministry of Information and Broadcasting.

It is evident from the foregoing that despite little success, the legislature and executive made constant efforts to bring internet broadcasters within the ambit of Section 31D.

Another step in this direction was the 161st report of the Rajya Sabha Standing Committee on IPR 2021.[19] The Committee suggested that section 31D should be amended to include "internet or digital broadcasters" such as OTT platforms, music platforms, etc under the ambit of statutory licensing, like other traditional broadcasters.[19]The committee made this recommendation to ensure equal opportunity by making content accessible on similar terms to both traditional and internetbroadcasters alike.

The most recent and concrete step in this direction is the draft Broadcasting Services (Regulations) Bill of 2023.[20]The bill recognises that the broadcasting landscape has undergone significant changes in India and technological advancements have introduced new platforms such as DTH, IPTV, OTT.The Broadcasting Bill, if converted into an Act of Parliament, seeks to replace The Cable Television Networks (Regulation) Act, 1995 as well as other policy guidelines currently governing the sector. It is imperative to note that the bill aims to cover the Over-the-Top(OTT) content and digital news,restructures regulatory processes, and introduces new provisions for emerging technologies.

For instance, Section 2(g) of the bill defines "broadcasting network" as a system used for the transmissionof programmes, including cable broadcasting networks, satellitebroadcasting networks, internet broadcasting networks, radiobroadcasting networks and terrestrial broadcasting networks. [20]

Similarly, Section 2(i) of the bill provides that "Broadcaster" means a person who provides programming services and has been provided a registration under Section 11 for uplinking or downlinking of programmes, and in relation to Radio, OTT and Terrestrial broadcasting network, means the operator of such service.

Further, Section 2(q) of the bill defines "internet broadcasting network" as a system for the delivery ofbroadcasting services and programmes using the internet, over acomputer resource, or using Internet Protocol, to subscribers orviewers, and includes IPTV and OTT broadcasting services.

This bill, if enacted, will end the debate around inclusion of internet broadcasters under Section 31D as it categorically recognizes OTT platforms and other internet broadcasting networks as "broadcasters" like traditional radio and television broadcasting. However, this bill also comes with concerns of regulation and censorship of content.

For instance, RituKapur, CEO of The Quint, criticised the ambiguity and scope of the broadcasting bill's content evaluation committees, which pose significant challenges for the news media. "There is a reason news organisations have editors. Why do we need this content evaluation committee?"[21] Similarly, Journalist Anna M.M. Vetticad expressed her concern about the trend of self-censorship in the Hindi entertainment industry and particularly, the broadcasting bill which requires broadcasters to self-certify content before publication.[21]She also noted that content evaluation committees (CECs) serve as an additional layer of censorship.

It will be interesting to see the fate of this legislation and how it will be implemented.

International Framework on Rights of Internet Broadcasters

In view of the present discussion, it will be helpful to understand the international framework on the rights of broadcasters in general and internet broadcasters in particular.

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)

The Rome Convention is the first international legal initiative that recognizes and addresses broadcasting rights. The Convention provides for protection of performers in performances, phonogram makers in phonograms, and broadcasting organisations in broadcasts.

Article 3(f) of the treaty defines "broadcasting" as the transmission by wireless means for public reception of sounds or of images and sounds.

It further defines "rebroadcasting" under Article 3(g) as simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

The treaty also lays down the rights of a broadcasting organization. Article 12 provides that broadcasting organizations have the right to authorize or prohibit certain acts, like the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

However, the treaty does not include internet or internet broadcasters.

The Berne Convention, 1979

The Berne Convention deals with the protection of literary and artistic works and the rights of authors. Article 11bis of the treaty provides broadcasting as an exclusive rights of authors. However, it does not deal with broadcasting in detail unlike the Rome Convention.

WIPO Internet Treaties, 1996

WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty are together known as the "Internet Treaties".[22]The said treaties are extremely relevant to our discussion because the same provide an international framework to safeguard the rights of copyright owners when their works are disseminated through the internet.Therefore, the treaties clarified that existing rights continue to apply in the digital environment.

For instance, Article 8 of the WIPO Copyright Treatyprovides for the important right of making available. It reads as follows:

"Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11(1)(i) and (ii), 11(1)(ii), 14(1)(ii) and 14(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Agreed Statements concerning Article 8: It is understood that the mere provision of physical facilities for enabling or making communication does not in itself amount to communication within the meaning of this Treaty or Berne Convention."

A bare perusal of the above provision shows that on-demand, interactive communication through the internet is also covered under "communication to the public". Further, the above provision appears to be similar to the definition of "communication to the public" as provided under the Indian Copyright Act, 1957. The above definition implies that both pull and push mediums amount to communication to the public, i.e. a service which does give users a choice of what is being played and what is being heard as well as a service which does not give users such a choice both amount to communication to the public.The distinction does not matter. Television broadcasters offer programs at a fixed time for viewers to watch and services such as Tata Play Binge give viewers the opportunity to view their favourite programs at a time individually chosen by them. The latter option of viewing is also offered by OTT platforms such as Hulu, Netflix et cetera.

Looking at subsequent developments in the international arena, after the internet treaties, the broadcasters took cognizance of the new broadcasting technologies and accordingly, demanded further protection of their rights.[23]

Resultantly, in the year 2011, WIPO's Standing Committee on Copyright and Related Rights, which is responsible for the broadcasting negotiations, agreed to come up with a new draft treaty to address the following issues of the members.

Broadcasters demanded protection for all types of signal transmission, covering new technologies including services over the internet. This protection, known as "technology-neutral" protection, was envisaged to extend to new technologies such as on-demand video services and IPTV ("Internet protocol TV" or Internet TV) which could transmit programmes not only to televisions but also to computers and mobile phones.23This was another step towards acknowledging technological advancement in the broadcasting arena.

Standing Committee on Copyright and Related Rights-Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty, 2023

Since 1997, WIPO hosted several meetings, consultations, and negotiating sessions, and considered multiple reports and drafts relating to broadcasting. However, discussions on the treaty stalled from 2008 to 2013 due to negotiations on new treaties for performers and persons with disabilities.24 The discussions again gained momentum from 2014 onwards.

The second revised draft text for the WIPO Broadcasting Organizations Treaty, 2023 is the most recent development in this regard. The draft recognizes the impact of technological advancement which has given rise to increasing possibilities for unauthorized use of the programme-carrying signals of broadcasting organizations both within and across borders.

Article 2.13 Item (h) defines "stored programmes" which aims to be used to cover the programme-carrying signals in the context of making available to the public of the online services, such as the video on-demand and catch-up services of the broadcasting organizations. [25]

Thus, the draft treaty recognizes "online services" as part of broadcasting.

The draft treaty aims to enhance the international system of protection of broadcasting organizations by creating a balance between the rights of the broadcasters and right of the creators. However, it is pertinent to state that the draft treaty aims to ensure that its provisions do not affect the Contracting Parties' national regulatory framework for broadcasting activities.

All of the above international legal instruments imply that the international arena recognizes the rights of broadcasters with respect to internet and is also focused on addressing issues that come with internet broadcasting.

Considerations for Inclusion or Exclusion of Internet Broadcasters from the Broadcasting Regime in India

At this point, it is imperative to consider certain factors to decide whether internet broadcasters should be included in the broadcasting regime in India.

Regulation and Censorship

Regulation of content and censorship is a prevalent issue in India. Since OTT platforms or other streaming platforms do not fall within the ambit of traditional broadcasters, they do not have a formal regulation machinery in place. While the IT Rules of 2021, as discussed in the preceding sections, do require OTT platforms to follow a "code of ethics" and self-regulate their content, the content on OTT platforms as such remains unregulated and uncensored to a great extent perhaps because the said rules provide a lot of discretion to such platforms. This is the reason why content creators seem more inclined to create content for the web since they feel it gives them more "creative liberty and freedom".

Given that the internet knows no bounds, a strong legislative system would guarantee clear and comprehensive regulation and censorship mechanism to reduce ambiguity around such issues. Further, inclusion of such streaming platforms in the broadcasting regime would make them more accountable.

Technological Neutrality

The principle of technological neutrality in copyright must be applied to digital activities, including that of streaming platforms. This principle essentially implies that similar activities involving different technologies should be treated equally. This means that when faced with a legitimate choice between an interpretation that produces different outcomes depending on which technology is being used and one that does not, the court should prefer the one that does not.[26]For a broadcaster to exercise the broadcast-related rights, enabling lending the same content in digital format as it can broadcast through traditional modes, should not trigger an additional obligation. Otherwise, growth of technology would be stunted and innovative and efficient methods to provide information and entertainment to the public would be jeopardized.

In *Théberge*v*Galeried'Art du Petit Champlain Inc*., the Supreme Court of Canadaobserved that technological neutrality is presented as a means by which law strives to maintain a balance between copyright owners and end users in the digital environment. It implies that attributing insufficient weight to technological neutrality can result in more a beneficial situation for the copyright owners, to the detriment of the public interest.

Equal Protection of Rights of Internet Broadcasters

The rapid growth of OTT and streaming platforms has revolutionized the way content is distributed and consumed globally making it important to safeguard the rights of internet broadcasters on par with traditional broadcasters. Equal protection of their rights ensures that all broadcasters, irrespective of their medium, have the opportunities, access, and most importantly, legal safeguards. Presently, online streaming platforms have very limited rights as they are not accorded the status of "broadcasters". This means essentially they can only exercise contractual rights *vis-à-vis* the parties with whom they enter into license and other agreements. This exposes them to larger infringement and regulation-related issues. Furthermore, this makes such platforms more susceptible to exorbitantly high license fees as the content creators or owners of copyright have the leverage of demanding high fees from them owing to the ambiguous status of OTT platforms. In such situations, OTT platforms can only apply for a compulsory license, which has its own challenges of proving that the works are being withheld from the public. However, the legislature protects the rights of the traditional broadcasters under Section 31D of the Copyright Act by providing that any broadcasting organisation desirous of communicating works to the public can apply for/invoke a statutory license.

Another issue that OTT and other streaming services may face is the issue of "double royalty". Technically, if

a work is made available for downloading, the person making it available might be liable for reproduction of the work, while if the work is made available for streaming, the person might be liable for communication of the work to the public.However, if OTT and other streaming platforms are not accorded equal legal rights,they may be charged twice for licensing the same work. This basically means that since such platforms often make works available to the public through streaming and/or downloading, copyright owners may demand double royalty or separate royalty for each activity for licensing a single work. This will severely jeopardise the rights of such platforms and may potentially prevent them from making works available to the public.

The reasons stated hereinabove are only among the few reasons that call for equal protection of the rights of internet broadcasters.

Conclusion

In view of the foregoing, it is clear that online streaming or OTT platforms are not recognized as "broadcasters" under the current Indian legal regime and therefore, are not covered within the ambit of Section 31D of the Copyright Act. Several attempts have been made to read "internet broadcasting" into the said provision but the law will have to be amended to include it expressly so as to end the ambiguity around it. While it is correct that the current legal framework does not expressly include "internet broadcasting", we cannot ignore the fact that technological advancements, industry practice as well as the international legal framework support and rather compel its inclusion.

In conclusion, we must assess the pros and cons of inclusion as well as exclusion of OTT and other streaming platforms under the legal regime for broadcasters. Some of the factors discussed in this paper might be helpful in this regard.

We must appreciate that the digital realm is in a constant flux with advancements being made in content delivery, distribution, and streaming methods. A progressive approach towards internet broadcasting ensures that copyright regulations remain relevant and adaptable to technological advancements, fostering an environment in the law that encourages creative activity.

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