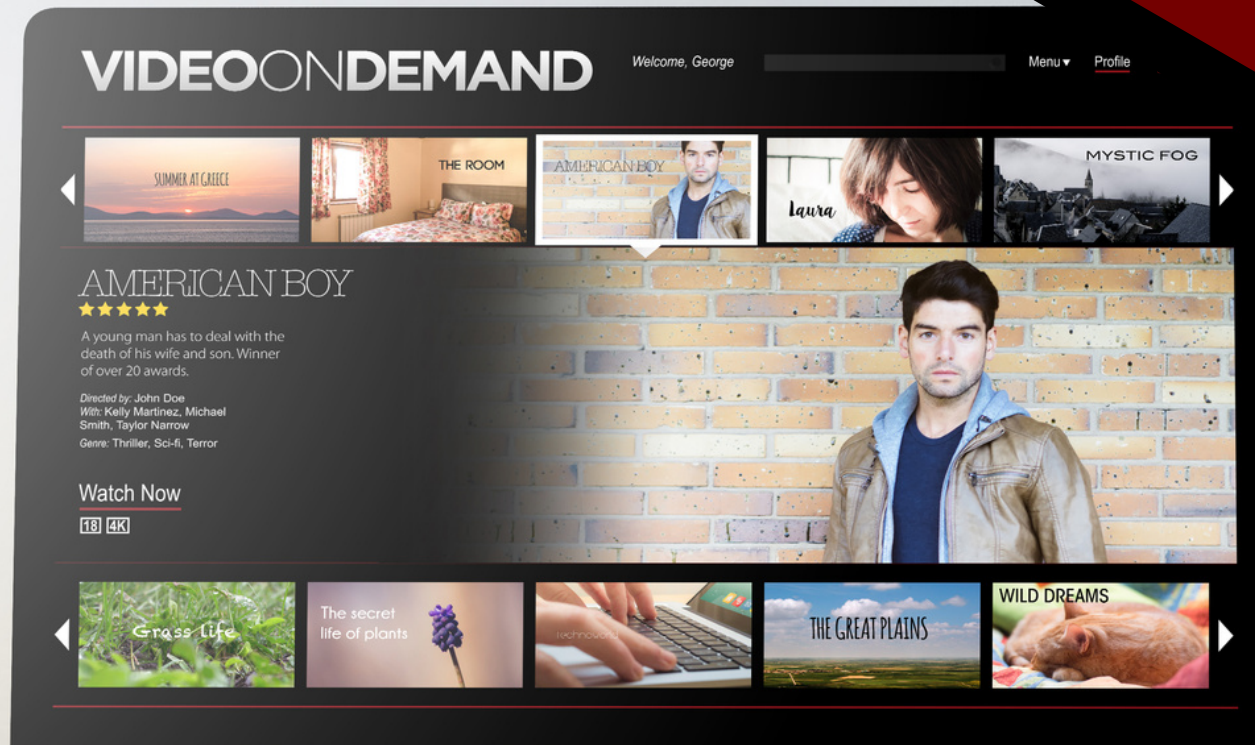


ARTICLE SERIES

AN EXAMINATION OF THE COPYRIGHT AND LICENCING REGIME FOR STREAMING VIDEO-ON-DEMAND PLATFORMS



INTRODUCTION

Over the last two decades, we have witnessed the increasing utilisation of the internet to transmit cinematograph/virtual content (“content”) to consumers and viewers as against the use of cable, satellite television or a broadcast platform. With the emergence of Video-on-Demand platforms (“VOD/s”) like Netflix, Amazon Prime Video, Hulu, YouTube, Showmax Africa and Hot Star, contents that were initially conventionally transmitted to viewers through satellite television, cable or via a broadcast platform (as earlier noted) are now being transmitted digitally i.e., via the internet, either for free or based on a subscription arrangement.

It is instructive to note that the contents transmitted or distributed by these VODs are of two types; they are either content produced by the VODs themselves or contents produced by other content creators/producers and distributed by these VODs. With respect to the distribution of content produced by other content creators, it must be noted that these contents are not outrightly distributed to viewers, as certain requirements must be fulfilled, and indices met, before these VODs can proceed to distribute such contents to their subscribers or viewers.

First, the authority of the content creator or producer must be obtained. This is because contents enjoy copyright protection which vests with the creator the exclusive right to produce, sell, rent, or redistribute a copy or copies of the same work for public consumption.

In practice, content creators, in this case movie or documentary producers, enter into licensing and distribution agreements with these VODs. This is, however, dependent on the type of distribution to be done, which may be theatrical or non-theatrical [1]. The common type of agreement used is known as a Digital Exploitation Agreement (“DEA”) or a Film Distribution Agreement (“FDA”), the purpose of which is to allow these VODs distribute or transmit contents produced, to their viewers or subscribers without infringing on the intellectual property rights (IPRs) of the producers [2]

The failure to obtain the needed licence or to enter a DEA will see such VOD become liable for copyright infringement. This is because as earlier noted, based on the relevant copyright laws, any cinematograph film which is original

[1] Featured Student Assignments (LawSikho) “How does Netflix obtain the rights for streaming movies” Published on April 26, 2021. (<https://blog.ipleaders.in/netflix-obtain-rights-streaming-movies/>).

[2] Ibid.

i.e., it is not a copy of an essential or substantial parts of another film, is automatically conferred with copyright protection. For example, in Nigeria, by virtue of Section 3 of the Copyright Act, copyright is conferred on any cinematograph film first published in Nigeria. This means that any party that distributes or transmits a cinematograph film without the authority of its author (the producer or content creator) is in breach of the Nigerian Copyright Act.

RELEVANCE OF THE DEA

It must be noted that apart from granting the VODs the right to distribute and transmit contents, a DEA also provides for the duration within which such distribution or transmission will take effect, and the extent or percentage of pecuniary benefits which the creator or producer will derive during the period of transmission or distribution. Also, in preparing a DEA, there are certain important clauses that must be outrightly captured, and they include the following:

a) The definition clause

This clause is relevant as it provides the meaning of important terms like “contents” “licence” “licence contents” “royalties” “payment” “term” “location” or “territory”.

b) The grant of rights/licence clause

The grant of rights/licence clause is used to grant to the VOD the right to distribute or transmit the content. What this clause achieves is the transfer of the right to distribute, and not an assignment of the right, to the said cinematograph film or content. The producer/content creator does not transfer or alienate his right in the cinematograph film to the VOD; rather what he transfers here is the right to rebroadcast the said content. All IPRs remain with the producer or content creator, for all purposes.

c) The consideration clause

The consideration clause determines the amount to be paid as licence fee, and the method of payment to be adopted by both parties during the period of the transmission or distribution [3].

[3] Ibid.

POLICIES MADE BY VODS TO CURB COPYRIGHT INFRINGEMENT ON THEIR PLATFORMS

The licensing regime for VODs appears to be quite an expensive one. Netflix for example, at the end of the year 2020, had \$25.4 billion worth of content assets on its balance sheet, with licensed content accounting for \$13.7 billion [4]. This, amongst other reasons, has propelled Netflix to spend more of its financial resources in developing its own movies and TV programs.

Notwithstanding the above expenses involved in licensing of content, most VODs have made policies (accessible on their websites) to curb copyright infringement.

For instance, Netflix operates a policy which enables persons that believe their work has been reproduced or distributed in a way that constitutes copyright infringement or persons that are aware of any infringing material available through the Netflix Service, to first notify Netflix by completing the Copyright Infringement Claims Form at netflix.com/copyrights.

The said form contains columns for such person's details and the rights that he or she has in the copyrighted work, details about the copyrighted work and the infringing copyrighted work. This is also followed by a verification that the person is the owner, or at least authorized to act on behalf of the owner of the copyright that is allegedly infringed.

Amazon Prime Video (Amazon) also has a similar position as Netflix. The copyright policy first, reinforces Amazon's respect for the IPRs of others. It goes further to provide that any person that believes that his or her work is copied in a way that constitutes copyright infringement, should follow its *Notice and Procedure for Making Claims of Copyright Infringement*. [5]

Despite the above policies that appears to be stringent, these VODs are still being challenged with various lawsuits on intellectual property claims. In 2021, Amazon faced an action for copyright infringement [6]. The said action was commenced by German businessman Ralf Hartmann, who alleged that Amazon made four films ("Austin Powers", "Drop Dead Gorgeous", "Commander Hamilton", and "After the Rain") available on its Prime Video platform for viewing,

[4] Kyle Guskie II "Netflix: A Meme-Stock Original" (April 27, 2021; <https://www.newconstructs.com/netflix-a-meme-stock-original/>).

[5] <https://amzn.to/3rtcaUK>

[6] *Hartmann v. Amazon.Com*, 20 Civ. 4928 (PAE), (S.D.N.Y. Aug. 19, 2021).

without obtaining the requisite licence. Ralf Hartmann's claim was that he was assigned the copyright for the said films in 2008 from Capella International, one of the producers (the production companies) of the movies. Amazon sought to dismiss the claims, in part, on the ground that Ralf Hartmann did not prove that he was the owner of the copyright registrations for the films. And this was because Ralf Hartmann did not directly cite registrations with the US Copyright Office; rather he cited a series of contracts showing that the rights to the said films were transferred to him. Though the US District Court for the Southern District of New York dismissed the other complaints, it allowed the complaints on copyright infringement to proceed.

Also, it is common practice for VODs, in a bid to produce their own content, to infringe the IPRs of other producers or content creators inadvertently or directly. They do this by copying either the story, the theme, the dialogues, sequence, plot or mood of an existing story, in their own production.

A classic case was that of *Irish Rover Entertainment, LLC v. Sims, et al.*, slip op [7] where Irish Rover Entertainment filed an action in a California Federal Court against Netflix with regards to Netflix's original web series "Stranger Things". The Plaintiff claimed that the Duffer Brothers and Netflix copied its theme, sequence, dialogues, mood, characters, plot, setting and copyrighted concept art from "Totem", a screenplay written by Jeffery Kenney, who claimed that he got the idea of the storyline *after the death of his childhood friend who suffered from seizures that sent him to an alternate universe where he would fight demons*. On the other hand, Netflix claimed that their story was based on the issues faced by teenagers *while fighting with fictional monsters or military personnel or evil scientists*. Netflix further asked the court for a motion to dismiss the said action, based on the Extrinsic Similarity Test wherein the Court objectively assesses the substantial similarities between two competing works [8]. For conducting this test, the Court sought additional evidence such as expert testimony and subsequently rejected Netflix's motion to dismiss.

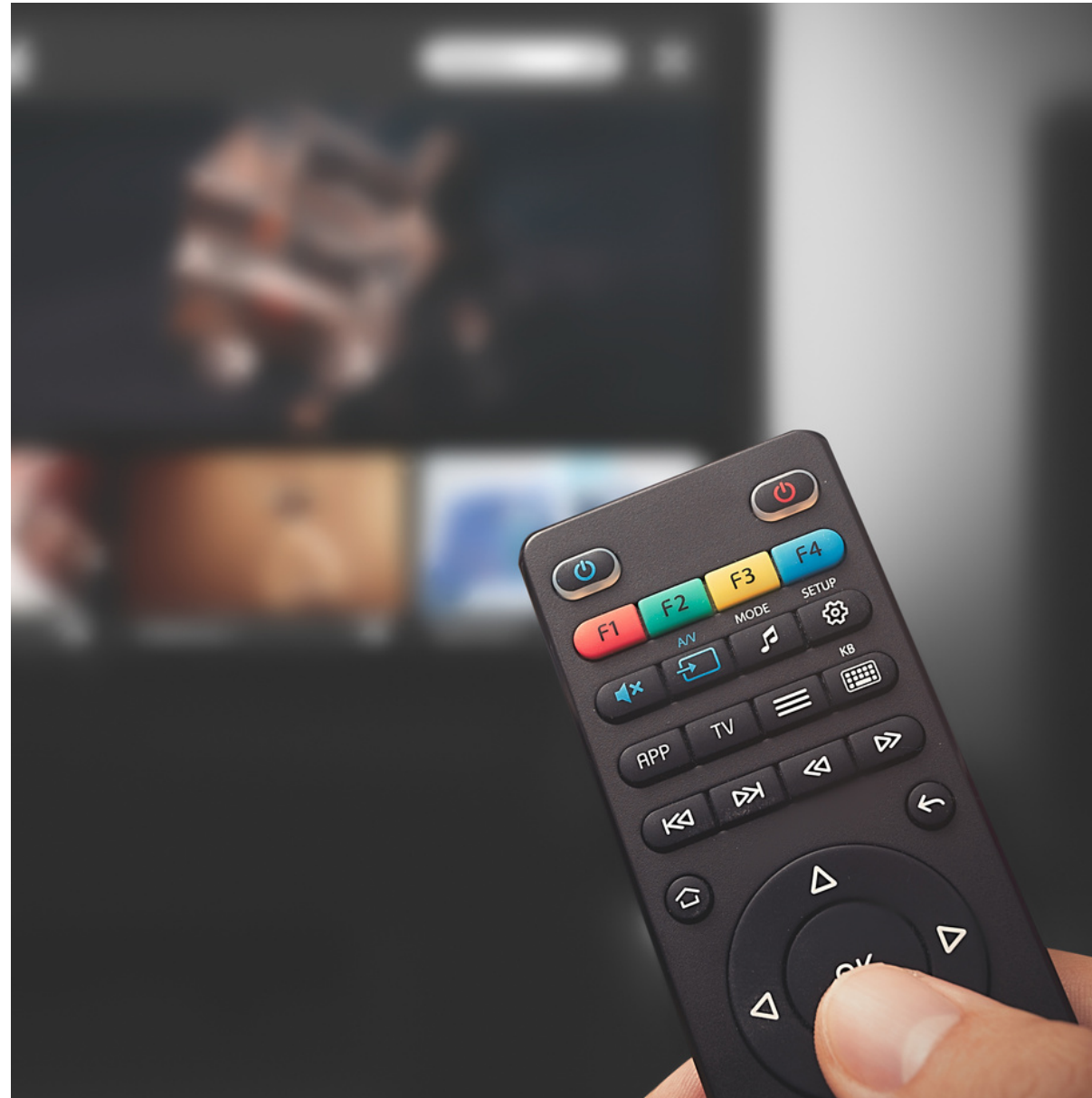
[7] *Irish Rover Entertainment, LLC v. Sims, et al.*, slip op Case No. 2:20-cv-06293 (CBM) (C.D. Cal. Jan. 21, 2021)

[8] Under the "Extrinsic similarity" test, the Court conducts an objective analysis of similarities between the competing works i.e., the Infringed and infringing work, particularly on their plots, themes, dialogue, settings, pacing, characters and sequence of events after filtering out non-protectable similarities (e.g., scenes-a-faire elements, historical facts and general ideas).

Consequently it appears it is not enough to have copyright protection policies; salient steps must also be taken to forestall the occurrence of copyright infringement, or where they occur, further steps are taken to ensure that they are hastily abated.

CONCLUSION

The evolution that led to the emergence of VODs is indeed a welcome development. This is particularly because content can now be easily accessed by viewers/subscribers. However, it is imperative for these VODs to adhere to copyright laws and policies governing their operations, particularly as it relates to the distribution of contents not originally produced by them. DEAs must be adequately used, with content creators properly compensated for their works. Also, it is not enough for policies to be made; stringent steps must also be taken to ensure that these policies are effected, and intellectual property issues do not arise.



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