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REGULATION OF OTT PLATFORM: IS THERE A NEED FOR CENSORSHIP?

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ABSTRACT

In today's generation, people prefer to stream OTT contents more than watching contents that are streamed on Indian television. One major reason for this shift is that the OTT contents are more diversified and explicit as creators have more creative freedom when it comes to OTT contents, unlike contents meant to be streamed on Indian televisions or theatres which strictly regulated and censored by the Indian Government. Until very recently, the major players in the OTT business followed a self-regulation system which gave more room to content creators to experiment and diversify their contents, but in 2021, the Indian Government introduced the "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021" which gives empowers the government to regulate and censor the contents meant for streaming on OTT Platforms. This 2021 IT Rules has stirred a huge debate regarding whether the Indian government is trying to step over its legislative boundaries. This article analyses the validity and need of the "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021" in light to the fundamental freedoms guaranteed under the Indian Constitution, various international standards, etc.

Keywords: OTT, Censorship, Online Content regulation provisions in India, IT Law, Censorship regulation

INTRODUCTION

During recent times, we have been witnessing a paradigm shift in the music and entertainment industry, where viewers have been demanding more diversified contents through various platforms like television, movies, radio, publishing, music, etc. where the viewers have the

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option to choose and select the contents they would prefer. Nowadays contents on OTT platforms have become more explicit and uncensored, where the makers focus more on the message that is to be delivered through the content, and not specifically what and how explicit the contents are. Catering to the demands of the viewers, the entertainment industry is aiming to reach the “organizational quality and benchmark of other industries' best-in-class organizations”.² Recently the Central Government, in the year 2021 notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which basically talks about regulation and censorship of OTT contents. This notification steered a huge debate about whether this censorship and regulation of OTT content should be done or not, and whether it is a boon or a bane with some arguing in favor of the censorship and some against on the ground that this regulation takes away the viewers right to choose.

The advertising and media industry of India is growing rapidly and is presently the second fastest advertising market in Asia, with only China ahead of us.³ Presently, the use of internet has increased manifold, and now we users can do anything and everything via internet. With the highly increased usage of the internet where the users can find every aspect of details about any service or product etc., the worth and demand of the OTT platform has increased logarithmically. OTT actually means “over the top”, and OTT platforms can be simply defined as “any streaming service that delivers content over the internet”.⁴ Some of the major OTT service providers in India are Netflix, Hotstar, Amazon Prime, etc. Given the fact that the increase in the usage and demand of the OTT contents is a recent phenomenon, the issue regarding censorship and regulation of such OTT content has also garnered a lot of attention recently, owing to which the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 came into existence, and had been a hot topic of debate and discussion ever since.

Most of the OTT content providers and streaming platforms as well as many viewers objected to this IT Rules of 2021 which talks about relation and censorship of OTT content. The main cause of this disapproval and objection can be the fact the biggest advantage that worked in favour of OTT contents was that it was uncensored, and contents provided on OTT platforms were more explicit and in accordance with the general international standards rather than the conservative approach of the Indian television and entertainment industry, and the 2021 IT Rules, takes away

² Divya Samriti, Priyank Sharma, *OTT Existing Censorship Laws and Recommendations*, (November 21, 2020). Available at SSRN: <https://ssrn.com/abstract=3735027> or <http://dx.doi.org/10.2139/ssrn.3735027>

³ *Media and Entertainment Industry Report 2021*, India Brand Equity Foundation, (November 2021), Media and Entertainment Industry in India, Indian Media Industry (ibef.org)

⁴ *Marketing on OTT Services*, Glossary, <https://www.adjust.com/glossary/ott-over-the-top/>

that advantage in a way. So now the question that we face is “can the OTT content be regulated and if so how and to what extent?”.

EXISTING LAWS FOR OTT CONTENT REGULATION PRIOR TO THE IT RULES, 2021

With the increased usage, gradually the OTT service providers have been implementing voluntary codes for self-regulation of contents that are being streamed on their platform. In fact, in the year 2019 in January, some big OTT service providers like Hotstar, Alt-Balaji, Netflix, etc. signed a “Code of Best Practices for Online Curated Content Providers” with the objective to encourage and motivate viewers to make schooled choices regarding age- appropriate content and “to protect consumers’ interests in selecting and viewing, at their owntime and convenience, the content they want to watch.”⁵

We do have rules and regulations, censorship laws, and bodies to regulate content that is shown in India like the Programme Code, etc. but OTT content did not come under the ambit of these laws and regulations. Moreover, in the year 2016, an RTI application was filed, and in its reply the ministry of information and broadcasting clearly stated that the CBFC i.e. the Central Board of Film Certification has the authority to certify and censor contents meant for theatrical release only and it has no authority over OTT contents.⁶ Having said that, the OTT contents were not completely unregulated, before the 2021 IT Rules, we had the Information Technology Act, 2000, The Indian Penal Code, 1860, Cinematography Act 1952, etc. which are applicable to OTT content as well. Owing to the fact that some people and organizations believed that the existing legal framework is not sufficient to ensure that the OTT content is regulated, a plethora of cases were filed in this regard in various courts of India. The first case for OTT content regulation and censorship was filed in 2018 in the Delhi High Court by the Justice for Rights Foundation which demanded for the formulation of guidelines to regulate and censor OTT contents streamed on Netflix, Amazon Prime, etc. In this case, the Delhi High Court upheld that the provision of the Information Technology Act, 2000 are enough and sufficient for preventing any prohibited action from happening on the online platform. The next case was Padmanabh Shankar vs. Union

⁵ Divya Samriti, Priyank Sharma, *OTT Existing Censorship Laws and Recommendations*, (November 21, 2020). Available at SSRN: <https://ssrn.com/abstract=3735027> or <http://dx.doi.org/10.2139/ssrn.3735027>

⁶ RTI application dated October 25, 2016, received online vide registration number MOIAB/R/2016/50541 and MIBs response dated December 2, 2016.

of India⁷ wherein the Hon'ble bench was of the opinion that even if a person is watching or streaming a content online within the four walls of his house, the content needs to be certified by the Central Board of Film Certification. In this case, the learned bench also referred to the case of Super Cassette Ltd vs. Board of Film Certification⁸ wherein the court had a similar opinion.

OPINION ON CENSORSHIP AND OTT CONTENT REGULATION

The biggest pillar of the media, advertising and entertainment industry is the right to freedom of speech and expression which is guaranteed under Article 19(1)(a) of the Indian Constitution and it is also an integral part of the democratic structure of our country. The Hon'ble Supreme Court has also reiterated in one of its cases that "maintenance of a system of free expression is necessary as it is assuring individual self-fulfillment, means of attaining the truth, method of securing participation by the members of the society socially and politically, decision-making, and maintaining the balance between stability and change in society."⁹ Having said that, it is also a fact that this right is not absolute, it comes with the reasonable restrictions provided under Article 19(2) of the Indian Constitution. In this regard, in the case of Sanskar Marathe vs. The State of Maharashtra, the Bombay High Court held that "Censorship is permitted mainly on social interest specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society. Therefore, the censorship by prior restraint must necessarily be reasonable that could be saved by the well accepted principles of judicial review."¹⁰

According to India Brand Equity Foundation, 66% (170 million) of households reportedly owned a TV set in 2019, while by July 2020 paid subscriptions on OTT platforms grew to 29 million.¹¹ From this statistic we can understand the impact the film and media especially contents being streamed on OTT platforms has on the people of the Indian society, and the same immense popularity of the OTT platforms is which attracted attention towards the need of regulation and censorship of OTT contents.

To analyze OTT censorship and regulation, we need to understand the reason why the right to free speech and expression is guaranteed and why it needs to be protected. In the words of John

⁷ Padmanabh Shankar vs. Union of India, W.P. No. 6050/2019.

⁸ Super Cassette Ltd. vs. Board of Film Certificate, W.P.(C) No. 10552/2009.

⁹ Union of India vs. Naveen Jindal, (2004) 2 SCC 510.

¹⁰ Sanskar Marathe vs. The State of Maharashtra, (2015) SCC Online Bom 587.

¹¹ Sakshee Saxena, Regulation of OTT Platforms- Bringing the Under-controlled Under Control, (July 13, 2021), Indian Review of Advanced Legal Research. Available at: <https://www.iralr.in/post/regulation-of-ott-platforms-bringing-the-uncontrolled-under-control>

Stuart Mill, “free speech is pertinent in the truth-seeking endeavour and the idea of lending the freedom of speech and expression to every citizen is to strive for knowledge and empowerment.”¹² Nevertheless our Constitution recognizes that this right to free speech and expression is self-limiting and is subjected to reasonable restrictions of morality, public order, dignity, national security, as well as cordial relations with other States.¹³ Presently the issue is that time and time again it has been highlighted that it is very difficult to demarcate a concreteline between what comes under the ambit of right to freedom of speech and expression and which comes under reasonable restrictions. In this regard, the Hon’ble Supreme Court stated that “it is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience. That is its obligatory duty to preserve and protect the freedom of expression”.¹⁴

It should be mentioned here that on 7th September 2020, the major OTT platforms in India signed the Self-Regulation Code wherein it was stated that the OTT service providers will themselves regulate the contents that are to be streamed on their platform where they intended to include advance feature of parental control, proper content description, age classification etc. but later on in time, the government refused to support this Self-Regulation Code, following which the government came up with the IT Rules of 2021 for regulation and censorship of OTT contents which places power in the hands of the government, subjecting the OTT contents to the censorship standards that are set by the government. But the difference between the quality of the content that streamed on Television that has been subjected to government’s standards of censorship for a long time, and that of the contents streaming on OTT platforms is very different. People are more inclined towards OTT content because of the diversity of subject, more detailed content, etc., in other words the creators had more creative freedom when it comes to contents of OTT platforms, so the threat right now is that with the help of the IT Rules 2021, is the government trying to curtail the creative freedom of the content creators? Since the ‘creative freedom’ was that one thing that lured the viewers of consumers to OTT platforms, now the regulation and censorship by the government might have an adverse effect on the rapid growth of the industry.

¹² John Stuart Mill, *On Liberty* (1947) 61

¹³ Shivani Pattnaik, *OTT Platforms: To Regulate or Not to Regulate?*, (February 21, 2021), Indian Review of Advanced Legal Research. Available at: <https://www.iralr.in/post/ott-platforms-to-regulate-or-not-to-regulate>

¹⁴ S. Rangarajan Etc vs P. Jagjivan Ram, 1989 SCC (2) 574

CONCLUSION AND SUGGESTION

Even though India had a more pro self-regulatory approach with respect to regulation and censorship of OTT content prior to the 2021 IT Rules, if we look at other countries such as Singapore, Australia and United Kingdom, they have a legal framework for regulation of contents streaming on OTT platforms, but at the same time some of the states are still pro self-regulatory framework. It can be said that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 is encircled by apprehensions of censorship outmaneuver. It is true that a need was felt to keep a check and tab on contents that are being streamed by the people on OTT platform as visual media has a greater influence on people than any other forms of media such as print media or audio media, it is a popular medium through which a message is conveyed to the people, and the masses form an opinion based on the contents that are streamed by them, but at the same time it is needless to mention that this need of the hour does not call for the government to step over the legislative boundaries with an intention to eliminate controversial media according to their own convenience. The government should rather focus on prescribing the point where the line needs to be drawn in order to strike a fine balance between the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) and the reasonable restriction mentioned under Article 19(2) of the Indian Constitution.

In my opinion, the healthiest approach to regulation and censorship of OTT content would be for the government to set up broad standards and then to leave it upon the stakeholders, precisely the OTT service providers to regulate the contents that are being streamed on their platforms. Owing to the dynamic, changing and robust standards of obscenity, racism, decency and communalism, regulation of OTT content in India can refer to the demarcation that has been provided by the Supreme Court of India on the particular subject matter. In the case of KA Abbas vs. Union of India, the Hon'ble Supreme Court upheld that "the test that would be applied to determine obscenity must be judged by the standards of reasonable, strong and firm-minded men who possess ordinary common sense and prudence and not by an out of the ordinary or hyper-sensitive mind."¹⁵ Hence, as a concluding remark, I would like to mention that even though OTT regulation is desirable, the Indian Government should formulate a method which is more in line with the constitutional values of India, respecting the freedoms that have been guaranteed by the Indian Constitution, specifically the creative freedom of the content creators at the same time,

¹⁵ K A Abbas vs. Union of India, AIR 1971 SC 481.

rather than using OTT regulation and censorship as a tool to eliminate constructive criticism of the government or in other words controversial contents.