

A COMPREHENSIVE ANALYSIS OF LEGAL PARASOL FOR ONLINE STREAMING PLATFORMS

Perna Dhingra *

ABSTRACT

Minuscule theatres!

This is precisely the word that I may use to describe digital streaming platforms that shook the age-old foundation altogether and took us all by surprise! When the pandemic induced lockdown shut the doors of theatres for us, a new window reflected a new perspective into most of our lives and altered the position as it stood before. However, there certainly cannot be unrestrained freedom for these online streaming platforms, popularly called the “OTT” (over-the-top) platforms.

To quote Lord Acton, “Power corrupts and absolute power corrupts absolutely”. This line will never fall into disuse for all times and situations to come; the arena of digital streaming is no different.

The research article henceforth is a comprehensive analysis of legal parasol for online streaming platforms in India with all its spectators awaiting a concrete solution.

TRACING THE JOURNEY OF OTT PLATFORMS IN INDIA

OTT refers to “video, voice and other services provided over the Internet rather than solely over the provider’s own managed network” (OECD, 2013, p. 20). Many definitions have been proposed for OTT services, a simple one being “services carried over the networks, delivering value to customers, but without any carrier service provider being involved in planning, selling, provisioning, or servicing them – and of course without any traditional telco booking revenue directly from them” (Wedge & Lancaster, 2007, online).¹

*BA LLB, FOURTH YEAR, VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES (VIPS), DELHI.

¹ Dr. Krishna Jayakar, Penn State University, & Dr. Eun-A Park, University of New Haven; “Emerging frameworks for regulation of Over-The-Top services on mobile networks: An international comparison”; available at: <https://poseidon01.ssrn.com/delivery.php?ID=8371170250991241231240660190720000740240590640030400011208002812309209802611609109800103203512110900903902709511606508506800305202006403808311>

Over-The-Top (OTT) platforms are audio and video hosting platforms, which earlier started as content hosting platforms but eventually branched out to production and short movie releases, feature films, web-series, documentaries, sports, and other entertainment forms. The first Indian OTT platform was BigFlix, which was launched by Reliance Entertainment in 2008. OTT gained momentum in India in 2013 when Ditto TV (Zee) and Sony Liv were launched. Disney Hotstar was launched in the year 2015, and it is one of the highest watched OTT platforms in India. Soon after, Netflix began its operations in India in the year 2016. It is one of the most recognized and prominent global OTT segment players.² In 2018, the Indian OTT industry was pegged at ₹ 21.5 billion.³ As of July 2020, it has more than 300 million active users.⁴

NEED FOR OTT CONTENT REGULATION- A PRISM VIEW

In order to ensure artistic freedom embedded and envisaged as a constitutional ideal within Article 19 (1) (a) that guarantees the right to freedom of speech and expression in the Constitution of India, the government had proposed self-regulation and had said that the OTT entities should get together, evolve a code and come up with content classification so that a mechanism is evolved to preclude non-adults from viewing adult content, the regulation so formed will thus be able to keep online obnoxious content at bay.⁵

Things will become self-explicable if I may just first facilitate an inter-country analysis regarding the stance that different countries hold as far as the regulation of content on OTT

[6089124087108071071065019092042003090002025001127121123093118115065100002072099095119003006006102001000069067&EXT=pdf&INDEX=TRUE](https://www.juscorpus.com/ott-platforms-in-india-what-is-the-future-of-indian-hotstar-netflix/)

² Hitesh Singh, "OTT Platforms in India – What's Future of Indian Hotstar, Netflix?"; available at: <https://tradebrains.in/ott-platforms-india-whats-hotstar-netflix/#:~:text=The%20first%20Indian%20OTT%20platform,watched%20OTT%20platforms%20in%20India.> (December 4, 2020)

³ "The Rise of OTT: Why 2020 was a game-changer for streaming aces like Netflix and Amazon Prime Video"; available at: <https://indianexpress.com/article/entertainment/opinion-entertainment/why-2020-was-a-game-changer-for-streaming-aces-like-netflix-and-amazon-prime-video-7105424/> (Last Updated on December 17, 2020 5:31:26 pm)

⁴ Supra note 3

⁵ A. Surya Prakash, "No tech free-for-all: Centre's new IT rules were much-needed to ensure online platforms are subject to law of the land", Indian Express Newspaper Print Edition; available at: <http://14.139.58.147:8080/jspui/bitstream/123456789/3571/1/213.pdf> (27 February, 2021); also available at <https://indianexpress.com/article/opinion/columns/digital-space-social-media-regulation-govt-control-it-act-7206572/> (March 19, 2021)

platforms is concerned. Prima facie, Singapore is one such country having a concrete body called the Infocomm Media Development Authority (IMDA) that requires service providers to obtain a license; while OTT services have a content code that ensures classification and ratings, and a detailed list of prohibited content of which flouting of the norms results in withdrawal of content by the agency and imposition of penalties.⁶ Furthermore, Australia has an 'eSafety Commissioner' for digital media. The content in the country is regulated by the Broadcasting Services Act, 1992 that has detailed guidelines, a complaint mechanism, and a "refused classification" to be prohibited.⁷

After having briefly glanced at the regulatory framework of digital streaming platforms in other countries, another important question that arises is- why can't the existing framework of laws be applicable to OTT as well? The task would then simply be to implement the existing laws in the digital arena. But, is it feasible? Should we adopt a pure "copy-paste" approach just to save time and money that may be invested in the probable formulation of laws? Well, let us look at the bigger picture now!

One of the main arguments that proponents of additional OTT regulation as contradistinguished from the traditional regulatory framework for these platforms is that, the OTT providers are not on the same level playing field as those of traditional operators; in the sense that critical infrastructure is not controlled by them and there is a stiff competition amongst various OTT platform providers. Porter's Diamond Model can be used to substantiate another line of argument- that the OTT industry feeds other related industries like the data service providers, due to the ever-rising demand for high-speed internet. It is also to be noted that additional OTT regulation would fragment the global Internet, resulting in irrevocable harm to the Internet's openness and innovation. It could also severely threaten basic human rights, including freedom of speech and expression. Also, OTT services are inherently global in nature, compared to traditional telecommunications services that are offered on a country-by-country basis. Traditional licensing and regulatory frameworks are ill-suited to the dynamic and emerging services available. Thus, rather than imposing

⁶ "How are countries regulating OTT Platforms"; available at: <https://economictimes.indiatimes.com/industry/media/entertainment/how-are-countries-regulating-ott-platforms/singapore/slideshow/80670086.cms> (February 03, 2021)

⁷ "How are countries regulating OTT Platforms"; available at: <https://economictimes.indiatimes.com/industry/media/entertainment/how-are-countries-regulating-ott-platforms/australia/slideshow/80670068.cms> (February 03, 2021)

outdated and unnecessary regulatory obligations on OTT providers in an effort to force regulatory parity, policymakers should instead consider eliminating or streamlining regulatory obligations on network operators in order to promote investment, innovation, and access to broadband.⁸

Another way to look at the situation is this- Additional OTT regulation endangers the global Internet by fragmenting access to OTTs and imposing burdens on OTT providers that are almost certainly insurmountable. Countries with additional OTT regulation would face economic, social, and political costs of extraterritorial monitoring and enforcement, assuming such mechanisms could even function. Such regulation also poses a real risk of stifling traditional and incumbent telecommunications providers' efforts to develop their own OTT services. For these reasons, additional regulation is a short-sighted proposition that should be avoided in order to protect the Internet's ongoing innovation and growth.⁹

However, no concrete farsighted conclusion as to formulation and implementation can be drawn unless a regulatory framework is prepared and put to critical analysis. Thus, it is crucial to analyze the law so formulated in India as to the regulation of OTT Platforms.

INFORMATION TECHNOLOGY (GUIDELINES FOR INTERMEDIARIES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021: ANALYSIS

At the first blush, the Information Technology (Guidelines For Intermediaries and Digital Media Ethics Code) Rules, 2021 are formulated under the powers conferred by Section 79(2)(c)¹⁰, Section 69A¹¹ read with Sections 87(1)¹², 87(2)(z)¹³ and 87(2)(zg)¹⁴ of the

⁸ Asia Internet Coalition, "Smart Regulation for OTT Growth", available at: https://aicasia.org/wp-content/uploads/2015/10/AIC-White-Paper-on-OTT_Final2.pdf

⁹ Id.

¹⁰ "79. Exemption from liability of intermediary in certain cases... (2) The provisions of sub-section (1) shall apply if- ... (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf."

¹¹ "69A. Power to issue directions for blocking for public access of any information through any computer resource -

(1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

Information Technology Act (IT Act), 2000. They were unveiled at a joint press conference by Information Technology Minister Ravi Shankar Prasad and Information and Broadcasting Minister Prakash Javadekar.¹⁵

The new rules establish a three-tiered grievance redressal framework. One will be at the OTT provider level. Each complaint must be resolved within 15 days. If the complaint is not satisfactorily addressed, the complainant may escalate it to a self-regulatory body established collectively by the OTTs. This body will be headed by a retired judge of the Supreme Court, a High Court, or an independent eminent person from the field of media, broadcasting, entertainment, child rights, human rights, or other relevant fields. This self-regulatory body also has "censuring" authority in the event of any incriminating content.¹⁶ The rules say, "In case of any content where it is satisfied that there is a need for taking action to delete or modify the content for preventing incitement to the commission of a cognizable offence relating to public order." To top it all off, the government has given itself overriding powers in the form of an "oversight mechanism" at the third tier. This function will be performed by an inter-ministerial committee, which will largely have the same powers as the OTTs' collective self-regulatory body.¹⁷

Above and beyond all of this, the government has armed itself with "emergency" powers. The rules state, "in case of emergency nature" the Secretary, Ministry of Information and

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

¹² "87. Power of Central Government to make rules -(1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act."

¹³ "87. Power of Central Government to make rules- (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely.... (z) the procedure and safeguards for blocking for access by the public under sub-section (2) of section 69A"

¹⁴ "87. Power of Central Government to make rules- (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely.... (zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79"

¹⁵ Sobhana K. Nair, "Government to monitor OTT content", available at: <https://www.thehindu.com/news/national/centre-frames-guidelines-for-ott-platforms-digital-media/article33932444.ece> (February 25, 2021)

¹⁶ Ibid.

¹⁷ Ibid.

Broadcasting may, “if he is satisfied that it is necessary or expedient and justifiable” give orders to block public access of any information. The rules state that he or she has to record the reason for doing so in writing and it will be an interim measure. Importantly, such orders can be released “without giving an opportunity of hearing” to the publishing platform.¹⁸

Moreover, OTT platforms will be required to self-classify content into five age groups: U (Universal), U/A 7+, U/A 13+, U/A 16+, and A. (Adult). Platforms would be required to implement parental controls for content rated U/A 13+ or higher, as well as reliable age verification mechanisms for content rated “A.”¹⁹

As a part of the new rules, digital media will have to observe Norms of Journalistic Conduct of the Press Council of India and the Programme Code under the Cable Television Networks Regulation Act.²⁰

The Hon’ble Supreme Court made a significant observation on the Rules formulated for regulation of content on digital platforms. A bench comprising of Justices Ashok Bhushan and R Subhash Reddy was hearing the anticipatory bail plea of Amazon Prime India head Aparna Purohit in the “Tandav” case; observed that the rules recently framed by the Centre to prevent misuse of social media and OTT platforms may not be effective as they lack penal provisions and have “no teeth”, the Supreme Court asked the government to consider framing more stringent regulation.²¹

CONCLUSION

It is to be earmarked that the regulation of content is perceived as censorship on the exercise of freedom of speech and expression. However, no freedom should be unrestrained for it tends to have devastating consequences for the entire fraternity at large. To equate “censorship” and “regulation” is a blunder that we must not commit whilst ensure that

¹⁸ Ibid.

¹⁹ Id.

²⁰ “India's new rules for social media, OTT platforms: 7 important things to know”, available at: <https://tech.hindustantimes.com/tech/news/indias-new-rules-for-social-media-ott-platforms-7-important-things-to-know-71614260212306.html> (February 25, 2021)

²¹ “Centre's guidelines for social media, OTT platforms have 'no teeth': Supreme Court”, available at: <https://timesofindia.indiatimes.com/india/centres-guidelines-for-social-media-ott-platforms-have-no-teeth-sc/articleshow/81345705.cms> (March 06, 2021)

censorship is not garbed under the veil of regulation to seriously impair our freedom of speech and expression.

We must not shackle the minds of individuals that rub against innovation and creativity!

