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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ANALYSIS OF NEW EMERGING TREND OF OTT PLATFORMS IN REFERENCE TO COVID 19 SITUATION

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KEYWORDS: Content regulation, Censorship, OTT platforms, Right to freedom of speech and expression

ABSTRACT:

The world has moved from traditional medium to modern medium, firstly people only gained information through theatres then from television and now from internet. Over-the-top (Herein referred to as OTT) platforms have created a parallel medium to disseminate information. This has left a void in policy as India does not have any guidelines for content regulation. Taking advantage of the gap in policy, the creators have been releasing their content online without any pre-censorship by the State. In this paper, I will deal with the following objectives.

OBJECTIVES

- 1-** Analysis of new emerging trend in the era of the Internet (OTT Platforms) and the future of the entertainment industry
- 2-** Critically examine the new guidelines by the government, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
- 3-** To examine the real nature of OTT about the Right to freedom of speech and expression.

METHODOLOGY

The methodology adopted for the research is doctrinal.

FINDINGS AND INTERPRETATION

It is pertinent to mention here that regulations and acts are not sufficient to balance government policies and the fundamental right of freedom of speech and expression. We need a solution where freedom of speech and expression not in a compromised situation because restrictions limit the work of creation. We live in a state where dissent is the lifeline of democracy where we should be allowed to do constructive criticism and my approach in this paper to provide a better solution regarding the balance between policies and fundamental rights.

RESEARCH IMPLICATIONS

OTT platforms often made a lot of content related to political and economic issues which are not mostly covered by mainstream films and TV due to censorship. By this research, I will be able to find a solution to how we can protect OTT content with reasonable restrictions. According to **India** Brand Equity Foundation, the **OTT** sector in **India** witnessed a rise from 22.2 million to 29 million, between March and July 2020 alone. With the increasing number of users, there is a huge need for balance.

ORIGINALITY

In this research paper, my contribution would be towards an interpretation of what will be the future of entertainment consumption, how it will affect our economy as well as income of theatres, how there we can establish a balance between theatre and OTT.

Introduction

What are OTT platforms?

OTT services do not have one universally accepted definition. The Internet Telecommunication Union (ITU) defines OTT service as: “An internet application that may substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services.” The Indian communications regulator, Telecom Regulatory Authority of India (TRAI), borrows the same definition though various stakeholders believe it to be limited in nature. (“Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services,” 2018)

OTT, or over-the-top platforms, are audio and video hosting and streaming services that started as content hosting platforms, but soon branched out into the production and release of short movies,

feature films, documentaries and web series themselves. These platforms offer a range of content and use artificial intelligence to suggest to users the content they are likely to view based on their past viewership on the platform. Most OTT platforms generally offer some content for free and charge a monthly subscription fee for premium content which is generally unavailable elsewhere. The premium content is usually produced and marketed by the OTT platform themselves, in association with established production houses that historically have made feature films.

India is currently the world's fastest-growing OTT (over-the-top streaming) market and is all set to emerge as the world's sixth-largest by 2024. The market is expected to grow at a CAGR of 28.6% over the next four years to touch revenues of \$2.9 billion. (PricewaterhouseCoopers, n.d.)

According to findings from the **Media and Entertainment Outlook 2020**, a report by multinational professional services network of firms, PricewaterhouseCoopers or PwC, OTT video, along with Internet advertising, video games and e-sports and music, radio and podcasts are the top four segments expected to see revenue growth in the country over the next four years.

While changing consumer behaviour may impact traditional sectors like cinema and print adversely, digital E&M (entertainment and media) spending, including OTT subscriptions and mobile data allowance, is being increasingly regarded as a utility and therefore, a non-discretionary expense, according to the report. India's total M&E revenue, however, is expected to grow at a robust rate of 10.1% to reach \$55 billion by 2024. (PricewaterhouseCoopers, n.d.) Overall though, global M&E revenues will contract by 5.6% in 2020 over 2019.

"The covid-19 pandemic has brought the growth of the M&E industry to a screeching halt and amplified shifts and digital disruptions that would have only happened in the years to come," Rajib Basu, partner and leader, entertainment and media, PwC India said. Basu added that the impact of the pandemic has not been felt equally across sectors, while movie theatres and live events, for instance, have taken a hit, covid has proven a boon for OTT.

Entertainment Consumption

As streaming video companies compete in the Indian market, set to grow 80 per cent to 300 million by 2022 from 170 million now, according to market research company RedSeer, OTT majors are spending crores on original podcasts and content to attract and retain subscribers. (Nair-Ghaswalla,

n.d.)

Arun Gupta, Founder and CEO of mobile tech company MoMagic Technologies concurs. He says OTT has become a marketing strategy for many tech companies “*with the possibility of generating additional revenue.*” Most players tend to rely on their original content, he adds, so as not to get embroiled in the territory streaming-rights battle.

Research by Ampere Analysis reveals online streamers have increased their spending budgets from \$2 billion in 2013 to \$19 billion in 2018. Though most of the streamers’ spending in the past was based on content acquisition, with Netflix and Amazon spending more than \$13 billion on content acquisition in 2018, original programming will now become a bigger part of their strategies. (Nair-Ghaswalla, n.d.)

The telecommunication services market in India

Reports had suggested that India’s Internet traffic will grow fourfold from 2016 to 2021, at a compound annual growth rate of 32 per cent (“India_2021_Forecast_Highlights,” 2016). It is seen that the total wireless data usage in India has already increased from 4.6 exabytes during the year 2016 to 20 exabytes during the year 2017. (“Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services,” 2018)

What is the right to freedom of speech and expression?

Article 19(1)(a) of the Constitution of India says that all citizens have the right to freedom of speech and expression. Freedom of Speech and expression means the right to express one’s convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one’s idea through any communicable medium or visible representation, such as gesture, signs, and the like. This expression connotes also publication and thus the freedom of the press is included in this category.

The freedom of speech and expression includes the liberty to propagate not one’s views only. It also includes the right to propagate or publish or broadcast the views of other people; otherwise, this freedom would not include the freedom of the press. Freedom to air one’s view is the lifeline of any democratic institution. Therefore, in any setup more so in a democratic setup like ours, broadcasting

of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the ambit of Article 19(2) of the Constitution.

Article 19(2) of the Indian Constitution authorises the government to impose, by law, reasonable restrictions upon the freedom of speech and expression “in the interests of... public order.” Clause (2) of Article 19 of the Constitution of India imposes certain restrictions on free speech under the following heads:

- Security of the State,
- Friendly relations with foreign states
- Public order,
- Decency and morality,
- Contempt of court,
- Defamation,
- Incitement to an offence,
- Sovereignty and integrity of India.

So here the question arises that whether these platforms are violated the restrictions of Article 19(2) of the Constitution of India or the government tries to curb freedom of speech and expression. The example of known Tandav case where an FIR registered against the owner of Amazon Prime. Reportedly, the charges include promoting enmity between different religious groups, race, place of birth, making destruction, damage, or defilement of a place of worship or an object held sacred. The charges further entail forgery for purpose of harming reputation, statements that could bring public mischief, intent to threaten the unity, integrity, security or sovereignty of India, and strike terror section of the people. (“Tandav web series: Tandav controversy: FIR filed against web series aired on Amazon Prime over promoting religious enmity—The Economic Times,” n.d.)

Another example, Madhya Pradesh Police had filed a case in November against two people, including the vice president of Netflix, for allegedly hurting religious sentiments after BJP members and Hindutva activists objected to a kissing scene, in *A Suitable Boy*, between the protagonists in a temple. There are many web series like, Pataalok, Sacred Games, Mirzapur, Aashram etc, which are in controversy. The main allegation is related to the hurt of religious sentiments.

The government envisages controlling hate speech which gets proliferated through these platforms and threatens national security. However, critics pointed that the question of stricter regulation of digital media will lead to restriction of free speech and undermining of democracy.

Director Vishnuvardhan who has worked in both the Tamil and the Hindi film industries says, “If there’s something truly objectionable in some story, I can understand [restrictions]. But at some level, I feel that entities such as a censor board are against the rights of an artist.”(Jha, 2021)

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Recently, the Ministry of Electronics and Information Technology has notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These new rules broadly deal with the regulation of social media and over-the-top (OTT) platforms and digital news.

Need for Digital Media Regulation

Ensuring Compliance to Domestic Laws: Major digital media platforms operating in India are of foreign origin. The rules emphasize the need for these social media intermediaries and online content providers, whether for entertainment or informative purposes, to strictly comply with the Constitution and domestic laws of India. **Setting Accountability:** It extends its approach to instil a sense of accountability against misuse and abuse by social media users and is the first of its kind to bring social media use under the regulatory framework of the Information Technology Act.

Bringing Uniformity: There are many laws to combat unlawful content that are already in place. The recent rules envisage bringing their uniform application.

Social Imperative: It lays a special emphasis on the protection of women against the progression of sexual offences on social media. It also envisages checking the proliferation of fake news and hate speech.

Associated Issues with the Rules Distortion of the Idea of Self-regulation:

- For digital publishers of news and current affairs as well as video streaming services, a three-tier structure for grievance redressal has been mandated.

- With an inter-ministerial committee of government officials in effect becoming an appellate authority over the self-regulatory exercise.
- This would be self-regulation by the media organization and the industry at the government's pleasure.

Three-Tier Redressal Mechanism

The notified rules set out an elaborate time-bound three-tier process whereby every such grievance:

- First handled at the level of the portal itself by its grievance officer.
- If not satisfactorily settled, it passes on to the self-regulatory body of the sector or industry.
- If yet not resolved, moves further up to an inter-ministerial oversight committee of the central government.

Critical Analysis

Compliance Burden: The sheer process of such grievance handling can impede the operations of a relatively smaller digital venture in the news and current affairs space. A measure like this, moreover, jeopardizes the very sustenance of the already financially straitened and functionally beleaguered digital news media.

Potential Misuse: Apart from imposing a compliance burden on digital publishers, this also opens the floodgates for all kinds of interventions. Any criticism of the ruling party or government could trigger an orchestrated avalanche of grievances. This is more worrisome in the already vitiated climate of political and religious majoritarianism.

Actor Vivaan Shah said “Actors, writers, directors — for them the artistic freedom that the OTT platforms gave them was a huge thing. These new guidelines will hurt the smaller guys, the independent creators the most. Politically conscious art does not materialise just like that: an entire industry has to grow and develop across decades for some people to find their voices. But we have set ourselves back by many years now.”(Jha, 2021)

Poses a financial threat: Monetisation avenues become scarce, and investors and brands run scared because of what they see as political considerations supervening upon business interests and a whimsical media policy regime in constant flux.

Arbitrary Powers: The notification gives the Secretary, Ministry of Information and Broadcasting, ad hoc emergency powers to block any content the government considers problematic even without such token procedure. Also, a negative list of content that shall not be published would be encountered under law as reasonable restrictions to free speech.

Eroding Pillars of Democracy: The freedom of the press is an implicitly prescribed fundamental right in Article 19(1)(a) of the Constitution of India. It gives every citizen the right to free speech and expression. These freedoms have in practice become constitutive and definitive of the fourth estate in the country. As any government presence could have a chilling effect on free speech and conversations, these rules weaken the dynamic relationship of checks and balances vis-à-vis the Media and other three pillars: the executive, the legislature, and the judiciary.

Problems in Tracking the First Originator: The rules require messaging apps such as WhatsApp and Signal to trace problematic messages to the originator. However, it raises uneasy questions about how such apps will be able to adhere to such orders, as their messages are encrypted end-to-end.

Suggestions

Deliberating with Stake Holders: The solution to ongoing criticism about these rules is to start afresh with the publication of a white paper. The white paper should clearly outline the harms that are sought to be addressed through regulation of online video streaming platforms and meaningful public consultation which is not limited to industry representatives.

Statutory Backing: After that, if regulation is still deemed to be necessary, then it must be implemented through legislation that is debated in Parliament instead of relying upon executive rule-making powers under Section 69A of the IT Act.

Expediting Data Protection Law: Making platforms share more information could prove counterproductive in a country where the citizens still do not have a data privacy law to guard themselves against excesses committed by any party. In this context, there is a need to expedite the passing of the personal data protection bill, 2019.

Independent Bodies: The bodies have to be independent, unlike the censor board which is a

mouthpiece of the government. There should be a body that has no political pressure so they can not curb our right to freedom of speech and expression in the name of public interest.

What's the fine balance?

The stance of the government will truly reflect on whether we are a democracy to be proud of. What's the point in granting democratic rights for people who would be too harassed if they dare exercise them! Rights with lopsided restrictions on public expressions are of little value if the authorities use them as a pretext to silence political critique.

Would the government impose stricter standards of artistic freedom to be applied to the OTT platform, considering – unlike broadcasting programmes, the OTT viewer has complete control of what to watch, where and how to watch. Thus, besides censorship standards, the convergence of regulation for different platforms is the need of today. How can media self-regulation be good for all stakeholders, be it the press, consumers or producers?

Some of the best practices followed by international media are:

Media self-regulation is an effort to lay down censorship standards, independent of political forces. It is also a transition from a state-controlled press to one owned and controlled by society. (“Moral Policing of OTT Platforms Is Only the Latest Episode in India's Saga of Censorship,” n.d.)

1. It can help in promoting standards that advance media's credibility with the public, particularly in a country like ours which still needs to evolve to get an independent press;
2. It can help develop confidence in the public that free media is not irresponsible while protecting the rights of journalists/producers to be independent;
3. It can help inculcate a professional culture to be judged for mistakes not by those in power but by colleagues.
4. It would help lessen pressure on the judiciary if violations of personal rights by the press are corrected with satisfaction by self-regulatory bodies.

Self-regulation can be set up both industry-wide and in-house and equally, interested stakeholders could be civil society's representatives like business owners and artists, retired judges, professionals, any other interest groups, besides, of course, individual members of the public.

CONCLUSION

OTT platforms are a new emerging trend in India, India is currently the world's fastest-growing OTT (over-the-top streaming) market, and is all set to emerge as the world's sixth-largest by 2024. The market is expected to grow at a CAGR of 28.6% over the next four years to touch revenues of \$2.9 billion. (PricewaterhouseCoopers, n.d.) By seeing this report, In my limited observation, I can say that no doubt that OTT platforms business will be one of the most higher revenue businesses and it will benefit the economy of India. On the other hand, Government imposes the new rules relating to OTT Platforms, Intermediaries, Digital Media that arises some concerns regarding the free flow of content as well as related to the right to freedom of speech and expression.

The right to freedom of speech and expression is a fundamental right under Article 19(1)(a) of the Constitution of India that gives every citizen to propagate their opinions and ideas irrespective of the violative of Article 19(2) of the constitution which talks about restrictions.

Although the freedom of the press per se is not an explicitly prescribed fundamental right in the Constitution of India, and is, rather, a derivative right from Articles 19(1)(a) and 19(1) (g) which give every citizen the right to free speech and expression, and to practice any profession respectively, these freedoms have in practice become constitutive and definitive of the fourth estate in the country. That fourth pillar of democracy must be in a dynamic relationship of checks and balances vis-à-vis the other three pillars: the executive, the legislature and the judiciary. It is a healthy tension among the four pillars that keeps the democratic edifice strong and vibrant. (Sashi Kumar, 2021)

There is a very thin line between balancing and dominating. OTT platforms have their qualities, their content shows reality related to political and economic. So there is a huge need for balance between rights and policies where on one hand we can provide a safe environment for creative things because creation takes place where freedom exists. On the other hand, there should be an implementation of reasonable restriction to curb content related to violence, nudity and hate.

“If sharp criticism disappears completely, mild criticism will become harsh. If mild criticism is not allowed, silence will be considered ill-intended. If silence is no longer allowed, not praising hard enough is a crime. If only one voice is allowed to exist, then the only voice that exists is a lie.” - Zhang Xuezhong (Chinese legal scholar)

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