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September 20, 2019 New Delhi, INDIA

Regulation and Certification of Digital Media and Entertainment Platforms

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The Ministry of Information and Broadcasting (“MIB”) has sought to undertake the ginormous task of regularising and certifying the content available on various entertainment platforms and digital media in general, more particularly referred to as the over the top platforms (“OTT”). The Minister of MIB, Mr. Prakash Javadekar, during a conference with members of the Central Board of Film Certification (“CBFC”) and the Film Industry, on August 31, 2019, stated that the MIB would soon call for talks with the major stakeholders of the prevalent OTTs, including Netflix, Amazon Prime Now, Hotstar etc. as also with members of civil society, technical community, media and legal experts, in order to discuss and formulate a concrete mechanism of certification and regularisation of the content available on such OTTs.

This requirement for the MIB to formulate regulations to certify and regularise the content available on OTTs has stemmed from the displeasure of certain right-wing parties in relation to certain web series (which are currently being streamed on such OTT platforms) as ‘violent’ and ‘vulgar’. The High Court of Karnataka has also suggested to the Central Government to consider setting up a mechanism of certification and regularisation of the online content.

Regulatory Framework:

The certification and censorship of films in India is primarily undertaken by CBFC under the guidelines set out in the Cinematographic Act, 1952 (the “Act”) read along with the Cinematographic (Certification) Rules, 1983 and the guidelines issued by the Central Government from time to time. The Act strives to regulate and certify the films based on the content being analysed with the perspective of public order, morality and decency. It is pertinent to note however that this Act does not regulate the content that is available on digital media or electronic platforms. Therefore, CBFC, as of today, does have the right to monitor, certify or regulate any content which is so readily available on the OTTs.



In India, the Information Technology Act, 2000 (“IT Act”) is currently the key regulation that provides for punishment and penalty for publishing and transmission of any sexually explicit data in relation to children, obscene data and other sexually explicit material. The IT Act also empowers the Central Government to block access of public to any objectionable material on the electronic platform. Previously, there were many websites allowing online streaming and downloading of any kind of movies by way of torrents. The Central Government issued directives for blocking such websites as it had no way to regulate the content available for downloading on these websites. Further, the Information Technology (Intermediary Guidelines) Rules, 2011 provide for guidelines for the intermediaries to regulate the content available on such intermediaries which include electronic platforms and digital media.

The power of censorship of CBFC has been contested many times on the pretext that such discretionary power of the CBFC is violative of the artist’s freedom of speech and expression. The Supreme Court¹ has delved with this issue in detail and has held that the general public interest supersedes the requirement to protect the individuality and expression of any artists. The Supreme Court has however recognised that a specific standard of censorship is required to be formulated in this regard to not curb the growth of an artist’s individuality and freedom of expression. Several committees formed by the MIB have suggested that the CBFC should only be empowered to certify the films and not to censor the content of the films. The Individual should have the right to assess the content he wishes to watch. Considering the fact that OTTs like Netlix and Hotstar cater to crowds of various cultures, tastes and ethnicities, such OTTs have taken it upon themselves to regulate the content available on such platforms and have voluntarily adopted a self-regulatory Code of Best Practices under the Internet and Mobile Association of India. The guiding principle for these OTTs is to cater to the masses and to provide content conducive to the viewers in any specific jurisdiction.

Interestingly, the Supreme Court has already issued a notice in a petition seeking formulation of guidelines to regulate content on online streaming OTTs, on a petition filed by NGO Justice for Rights. The petitioner has argued that OTT platforms are not only displaying unlicensed, unregulated and uncertified content, but are also operating without being governed by any guidelines.

Analysis:

Internet is a vast and ever-changing landscape. Given the dynamic nature of the platform, innovators and experts find ways and means to get around regulatory frameworks if viewing of certain websites and certain content on any platform is blocked. For instance, when torrents were blocked on certain host websites, a proxy mechanism was developed as if such a website was being accessed from somewhere outside India, where such websites were not blocked, and this aided users to continue downloading content through torrents on these websites. Similarly, if certain content is not available or a censored version is available in India but uncensored versions of such content is available elsewhere, there are various aggregator applications which facilitate the viewing of such uncensored content in India.

Further, it is pertinent to note that currently there is no concrete regulatory framework under the Act, to censor the content available on OTT platforms or in relation to digital content. The IT Act only prohibits the publishing and transmission of sexually explicit or obscene material. The digital content available on the internet is immense and

creating a regulatory mechanism to certify and monitor such content seems to be a herculean task considering the implementation and enforcement issues.

In light of the above, it would be interesting to assess the guidelines proposed to be prepared by MIB in relation to the digital content. What maybe particularly challenging for MIB while drafting such guidelines or regulations would be the provisions in relation to enforcement. The creation of a regulation encompassing all present and future digital content and the platforms on which such content is available and attempting to monitor and enforce such regulations could be a huge challenge for any regulatory authority. Further, adherence to such regulations by OTTs could also be problematic as filtering such data for compliance and monitoring leakages could be tricky.

Endnotes:

^[1] KA Abbas v. Union of India, AIR 1971 SC 481

Feedback

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