



ILLE

MONTHLY REVIEW

VOLUME 1 AND ISSUE 5 OF 2023

INSTITUTE OF LEGAL
EDUCATION



ILE MONTHLY REVIEW

(Free Publication and Open Access Journal)

Journal's Home Page – <https://mr.iledu.in/>

Journal's Editorial Page – <https://mr.iledu.in/editorial-board/>

Volume 1 and Issue 1 (Access Full Issue on – <https://mr.iledu.in/category/volume-1-and-issue-5-of-2023/>)

Publisher

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Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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CONTENT REGULATION IN OTT PLATFORMS

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Best Citation - Gaurika Singh, CONTENT REGULATION IN OTT PLATFORMS, ILE Monthly Review, 1 (5) of 2023, Pg. 31-36, ISBN - 978-81-961828-8-5.

Abstract

Two years have passed since the Ministry of Information and Broadcasting (I&B) issued the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules which were meant for content regulation of online and OTT platforms. India's regulatory approach can be characterised as a "light-touch" co-regulation model, in which the industry engages in self-regulation while the Ministry provides a final oversight mechanism.

The regulations incorporate provisions for a mechanism to address complaints and a set of ethical standards. It is required that access control mechanisms, such as parental locks, be implemented for content that has been classified as U/A 13+ or higher. Additionally, a dependable age verification mechanism must be established for programmes that have been classified as 'A' (18+).⁴⁸

Even after two years, there is no clarity on these rules and regulations. Various High Courts have stayed the implementation the Rules because they infringe Article 19 of the Constitution. Therefore, the content on OTT Platforms continues to be unregulated. The objective of the paper is to look at ways in which the implementation of the Rules can be improved so that the artistic freedom of creators does not get curtailed. Moreover, it discusses the need for these provisions and compares them with OTT Regulation Laws in Singapore and other jurisdictions.

Keywords

OTT Platform, Content Regulation, Social Media, IT Rules 2021, Code of Ethics

Introduction

The legal profession is ever-changing. The law changes as society does in response to new discoveries and advancements. In the 1950s, no one could have foreseen the development of the Internet. However, India currently has 692 million people that are actively using the internet. By 2025, India will have 900 million internet users, according to the "Internet in India" research from IAMAI.⁴⁹

Internet is primarily being used in areas like e-commerce, online transactions, entertainment, and gaming. Platforms like Prime Video, Hotstar, and Netflix are becoming essential parts of our daily lives and a major source of entertainment. We are connected to the entire world through services like WhatsApp and Twitter, which also give us a forum to voice our ideas.

But because everything has two sides, platforms like these have grown to be a haven for obscenity and criminal activity, which has an impact on the general public. Children may be significantly impacted by the obscenity displayed in the OTT shows.⁵⁰ Numerous court petitions seeking to impose limits on the content presented on such platforms have been filed since the content displayed there is uncontrolled. Pre-screening of OTT content is currently not governed by any such laws or authorities. Therefore, there is an urgent need to discuss content regulation on OTT platforms.

⁴⁸ Akansha Singh, *Regulating the Unregulated: Stories of OTT Platforms in India*, OBHAN & ASSOCIATES (Apr. 18, 2023, 10:34 PM), <https://www.obhanandassociates.com/blog/regulating-the-unregulated-stories-of-ottplatforms-in-india/>.

⁴⁹ Biranchi Narayan, *Binge Watching to Binge Serving in India: Revolution, Regulation and Restriction of Over-the-Top (OTT) Platform*, 20 ITER 3, 8 (2021).

⁵⁰ Justice for rights foundation v. Union of India, 2019 SCC OnLine Del 10962.

Literature Review

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

were released by the Ministry of Electronics and Information Technology in February 2021. The Information Technology (Intermediaries Guidelines) Rules, 2011, were replaced by these regulations. The aforementioned regulations were put in place to control the obscene content that was displayed to the general public as well as social media and OTT content.⁵¹

This was in response to Supreme Court's statements in the case of **Prajwala NGO v. Union of India**. The court directed the central government to develop and formulate necessary guidelines and rules to eliminate child pornography, rape and gangrape images, videos, and websites from content hosting platforms and other such applications. The court observed that such content has a traumatic impact on the victims, and steps must be taken to prevent its dissemination on the internet. The court also directed the government to set up a dedicated nodal agency to monitor and investigate the dissemination of such content and take necessary action against the offenders.⁵²

Additionally, the new IT regulations provide for a three-tier regulatory system for OTT platforms and digital news media. According to the regulations, OTT platforms must follow the domestic law of India and not stream any material that impairs public order or violates India's integrity and sovereignty. Additionally, the platforms have taken into account different racial and religious practices and beliefs.⁵³

They are required by the rules to set up a three-tiered system of dispute resolution. The platforms themselves will construct the first-tier

grievance processes. The second level consists of a self-regulatory body that will be presided over by a retired Supreme Court or High Court judge or another distinguished individual. An inter-ministerial committee (IMC) will be created by the government to act as the third tier's "oversight mechanism".⁵⁴

However, the Rules encourage more subtly censored content, following the CBFC practice of requesting film changes before providing the certificate. The three-tier regulatory structure is also not independent. The Inter-Departmental Committee, the third tier, is completely composed of bureaucrats; neither the legal system nor civil society are represented, casting doubt on the legitimacy of the regulations.⁵⁵

Regulations can guarantee that the content is not illegal, but censorship, whether applied freely or in response to outside pressure, blurs or eliminates politically sensitive content or abuse. External platform regulation may result in self-censorship and reduce creative freedom. Moreover, the Supreme Court stayed the petitions which were filed in High Courts contesting the regulations.⁵⁶

The Rules also laid down a Code of Ethics to be followed by OTT Platforms. In actuality, the Code of Ethics already specifies guidelines for appropriate material, content classification, etc. But many High Courts have put a stayed both of these provisions as a result of legal challenges. Therefore, OTT platforms are currently not legally obligated to observe the Code of Ethics or have a three-tiered grievance redressal procedure.⁵⁷

The Bombay High Court has issued a stay on the implementation of Rules 9(1), 9(3), and 2, on the grounds that they are a violation of the

⁵¹ Vandana Kaniya, *Regulations on OTT Platforms-A perplexity*, KHURANA & KHURANA (Apr. 18, 2023, 12:41 PM), https://www.khuranaandkhurana.com/2022/09/28/regulations-on-ott-platforms-a-perplexity/#_ftn1.

⁵² *Prajwala NGO v. Union of India*, (2018) 2 SCC 791.

⁵³ 4Nidhi Sinha, *Regulating 'Films Released Online': A Critical Analysis of Film Certification and Censorship in the Digital Age*, 8 GNLU L. Rev. 64, 64-72 (2021).

⁵⁴ Akansha Sahoo, *Over-the Top Regulation in India: A Dire Need of the Hour*, 5 Int'l J.L. Mgmt. & Human.

⁵⁵ Rahul M & Dr. S. Dinesh Babu, *A Comparative Study on Ott Platform Censorship and Policies in India*, 25 ANNALS OF R.S.C.B, 11161, 11161- 11167 (2021).

⁵⁶ Himi Singla, *Self-Regulation by Over-the-Top Platforms: A Study in Context of Video Streaming Services in India*, 3 IJLMH, 1631, 1630-1633 (2020).

⁵⁷ Sarvesh Mathi, *Government Ready To Amend Rules For OTT Platforms To Curb Obscenity: India's I&B Minister*, MEDIANAMA (Apr. 18, 2023, 12:57 PM), <https://www.medianama.com/2023/03/223-ott-rules-obscenity-profanity/>.

constitutional right to freedom of speech and expression as guaranteed by Article 19(1)(a).⁵⁸ The court has deemed these rules to be an affront to this fundamental right.

Furthermore, it has been noted that the enforcement of the Code of Ethics as envisioned under IT Rules is not feasible, and therefore, akin to journalistic norms, it should serve as a set of guiding principles. Otherwise, it could potentially have a detrimental impact on the right to freedom of speech and expression for publishers, editors, and writers. This was similarly confirmed by the High Court of Madras.⁵⁹

Research Methodology

The author has used doctrinal research methodology in this research paper. The paper is based on secondary sources like commentaries, articles, blogs, books, case laws, legal journals, and research papers. The existing laws have been analysed to reach the present conclusion.

Research Question/Issues

The following issues will be addressed in this research paper-

- The paper seeks to establish whether the 2021 Rules are really needed. Moreover, it looks at how they will be regulated and implemented.
- The paper discusses the constitutionality of the Rules, in view of the fact that various High Court have ordered stays on them.
- The paper discusses solutions to the problems posed by pre-screening mechanisms
- The paper has highlighted the OTT regulation norms in other countries and discusses whether they can be followed in India.
- The paper discusses the issue of making people aware about the new rules

- The paper looks into how transparency can be assured in the entire process of content regulation

Comparative Analysis

In most of the countries, especially the ones in Asia, the laws governing OTT platforms are getting reformed. The national practices of countries like UK, Saudi Arabia, Singapore, Turkey, Thailand, Canada, range between lenient and strict.

Australia

The regulation of Over-The-Top (OTT) services in Australia, similar to that of India, represents a recent development. Following careful examination, the regulation of OTT platforms has been brought under the purview of the Broadcasting Service Act of 1992, which ensures that online and offline content are regulated at an equivalent level. This system cannot be implemented in India because of the offline mode of content regulation in which films and other related media are regulated by the Cinematography Act.⁶⁰

United Kingdom

Prior to 2018, there was no discourse regarding over-the-top (OTT) regulations in the United Kingdom. In 2018, the government released a white paper that identified the potential hazards associated with the absence of regulation for these platforms. This study presents a novel regulatory mechanism aimed at facilitating effective regulation. Currently, the state of the United Kingdom bears resemblance to that of India.⁶¹

Singapore

The regulatory framework for Over-The-Top (OTT) services in India is comparable to that of Singapore. However, unlike Singapore, the regulations in India are ambiguous and

⁵⁸ INDIA CONST. art. 19, cl.1.

⁵⁹ Ameet Naik, *Regulation of OTT Platforms: Challenges and Solutions*, WION (Apr. 18, 2023, 01:05 PM), <https://www.wionews.com/opinions-blogs/regulation-of-ott-platforms-challenges-and-solutions-567573>.

⁶⁰ Ms. Ezhiloviya S.P et al., *The Legal Provisions that regulated online content before Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*, 1 IJLRA 12, 12-18 (2021).

⁶¹ Bhagavatula Naga Sai Sriram & Sandhya K, *Censorship in OTT Platforms: The Necessity*, 11 PEN ACCLAIMS 3, 3-10 (2020).

inadequate to facilitate effective regulation without the government's intervention.

The Infocomm Media Development Authority (IMDA) is an autonomous statutory agency responsible for media regulation in Singapore. It has established a mandatory code, known as Code 24, which all Over-The-Top (OTT) and Video-On-Demand (VOD) platforms are required to comply with since March 1st, 2018.

The regulatory framework offers comprehensive guidance for the management of over-the-top (OTT) and video-on-demand (VOD) platforms in Singapore, facilitating a thorough comprehension of the subject matter. The aforementioned code provides a comprehensive understanding of the permissible and impermissible actions on the over-the-top (OTT) platform. Additionally, it serves to govern the operations of OTT and video-on-demand (VOD) platforms within the jurisdiction of Singapore.⁶²

First, the code presents a detailed depiction of the pertinent context that pertains to national and public interest, which must be taken into consideration when overseeing the content that is exhibited on OTT platforms. In addition, the aforementioned code incorporates provisions aimed at governing content featuring flashing images and subliminal messaging which are not currently addressed within India's self-regulatory codes.

The current state of self-regulation codes in India can be deemed inadequate in terms of clarity of expression, which may result in potential misinterpretation by the Ministry of Indian Broadcasting. This is due to the structure of the grievance redressal mechanism established by the 2021 Rules.

In contrast to India, Singapore has implemented a system whereby access to M18-rated content

is restricted through a default parental lock feature that utilises a secure age verification method employed by service providers. India also offers a parental lock; however, it is optional for the user to activate and not mandatory. This feature enables unrestricted access to the content for all users.⁶³

Suggestions/ Hypothesis

A. Regulatory Mechanism

A potential solution to the problem of content regulation could be the implementation of a hybrid governance model. The implementation of pre-screening mechanisms would pose a significant challenge. Therefore, one option would be to establish an autonomous, self-governing entity consisting of industry stakeholders tasked with addressing grievances and complaints pertaining to over-the-top (OTT) content. This entity would operate under a specific set of principles that reflect the values and norms of contemporary society.

There would be an option to appeal the self-regulatory entity's directives before an appellate committee constituted by the same entity. The committee would be composed of impartial members. A potential avenue for regulatory advancement involves the establishment of a quasi-judicial entity, consisting of both industry specialists and judicial personnel, whose order would be binding.

This framework has the potential to expedite dispute resolution and alleviate the workload of the courts, which are currently overwhelmed with a considerable number of seemingly trivial litigations pertaining to OTT content. The efficacy of the suggested system is contingent upon the autonomy of self-governing entities, the underlying principles, its constituents, and other minor details.⁶⁴

⁶² SUMIT SAXENA, *NEW RULES ON OTTS SIMILAR TO STRICTURES IN AUSTRALIA, SINGAPORE, EU: CENTRE, BUSINESS STANDARD* (Apr. 18, 2023, 9:58 PM) [HTTPS://WWW.BUSINESSSTANDARD.COM/ARTICLE/CURRENT-AFFAIRS/NEW-RULES-ON-OTTS-SIMILAR-TO-STRICTURES-IN-AUSTRALIASINGAPORE-EU-CENTRE-121032300592.1.HTML](https://www.businessstandard.com/article/current-affairs/new-rules-on-otts-similar-to-strictures-in-australiasingapore-eu-centre-121032300592.1.html).

⁶³ IMDA, *Content Code for Over-The-Top, Video-On-Demand and Niche Services*, <https://www2.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT>.

⁶⁴ Himi Singla, *Self-Regulation by over-the-Top Platforms: A Study in Context of Video Streaming Services in India*, 4 INT'L J.L. MGMT. & HUMAN 121, 133 (2020).

B. Awareness

Even after 2 years of notification, there exists a limited level of awareness among the general public regarding the OTT Rules. In numerous instances, the information pertaining to the redressal of complaints is either not disseminated or disseminated in a format that poses challenges for users to readily discern. The regulations could incorporate guidelines regarding the style, content, linguistic expression, and frequency of presenting crucial data. It is suggested that the OTT industry associations should be obligated to conduct regular campaigns through both print and electronic media to promote awareness of the grievance redressal mechanism.

It is suggested that the language used for age rating (such as UA 13+) and content descriptors (such as 'violence') in videos be translated into local languages as well, in addition to English. This would be similar to legal provisions that exist for the purpose of exhibiting anti-smoking and tobacco messages in movies.

Moreover, it is suggested that age classifications and content descriptors be displayed conspicuously in full-screen view for a mandated minimum duration, rather than being exhibited on the screen only for a few seconds. Similar regulation is in place for movies governed by the Cinematograph Act. The regulations could potentially establish unambiguous directives to guarantee that the classification or rating of a film is conspicuous and easily readable in promotional materials and advertisements of over-the-top (OTT) content in both electronic and print media.⁶⁵

C. Need for Transparency

It is recommended that an independent entity conduct periodic assessments of the presence and effectiveness of the age restriction and access control measures, as well as the grievance redressal mechanism, for each over-the-top (OTT) platform. Although the Rules

mandate that self-regulating bodies and publishers should disclose details of grievances, the reporting formats solely record the quantity of complaints received and resolved. It is suggested that the complete record of grievances received by over-the-top (OTT) service providers and self-regulatory entities, along with their corresponding verdicts, be made available to the general public.

It is suggested that the Ministry may contemplate the provision of a specialized comprehensive website that would serve as a centralized platform for the dissemination of pertinent information such as relevant regulations, content guidelines, advisory notices, and channels for lodging complaints and appeals.

It is suggested that the self-regulatory and appellate bodies should be mandated to disclose the particulars of complaints and remedial actions taken, which will be accessible to both the general public and governmental entities. This methodology will facilitate the improvement of transparency. The extant regulations stipulate that the ultimate level of authority is vested in the Inter-Departmental Committee (IDC), which is composed of designated officials from diverse departments of the Central government, as well as subject matter specialists.⁶⁶

The process entails that the IDC provides a recommendation regarding the appropriate course of action for violations related to OTT content, while the final decision-making authority rests with the Secretary of the Ministry. The establishment of a statutory body for content regulation has been emphasised by both the Supreme Court and High Courts. Until the establishment of a legal regulatory body for the media, it is recommended that the IDC's membership be expanded to include a more diverse and inclusive representation, with a guarantee of job security.

⁶⁵ Priyesh Pathak, *Privacy and Data Protection Issues in over-the-Top (OTT) Platforms: An Analysis*, 6 Int'l J.L. Mgmt. & Human. 31, 40 (2022).

⁶⁶ Umesh Bose, *Binge-watching: A matter of concern*, 2 Indian J Psychol Med 18, 20-21 (2022).

There should be a provision for publishing warnings or apologies on the platforms. This suggestion could potentially be integrated into the existing set of rules. It is recommended to impose financial penalties on entities that have committed errors. In the contemporary age of media convergence, it is imperative that a standardised set of regulations be developed for content, violations, age ratings, classification, and other related aspects to ensure consistent governance of content across various platforms.⁶⁷

Conclusion

The OTT regulatory framework in India aims to be a successful fusion of self-regulation and governmental support. This follows the general trend of the world. India's OTT legislation would elevate India at a global level and become a role model for other countries. This will become possible when attempts are made to improve media literacy and transparency, as well as the increase the effectiveness of "self-regulation" and the empowerment of millions of OTT users.

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⁶⁷ Ravi Kiran Edara, *Towards transparency in OTT regulation*, THE HINDU (Apr. 18, 2023, 01:18 PM), <https://www.thehindu.com/opinion/op-ed/towards-transparency-in-ott-regulation/article66556360.ece>.