

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 2

2022

© 2022 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any suggestion or complaint, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Over The Top Platform' Regulations: Is an Abuse of Fundamental Rights

ANKIT¹

ABSTRACT

It is critical to establish an optimal regulatory structure capable of balancing transportation and content on the online digital media needs. Unlike the traditional liberal establishment, offences related to Article 19 of the Indian Constitution are recognised as primarily active and appropriate restraints as a single limitation. Digital/online media will alter the landscape. The regulatory framework for content available on O.T.T. platforms has been discussed. The extent and applicability of regulatory measures are no longer determined by Indian courts. It would be unfair to have the Ministry of Electronics and Information Technology run the entire show. However, current regulatory mechanisms are not burdensome, particularly when applied to traditional media such as television and film. These rules must be initiated by courts and ministries to be successful. Consider whether the regulatory system's goal and the consistency of the law governing traditional media content are linked.

Keywords – regulatory, constitution, courts, legislation.

I. INTRODUCTION

The availability of public internet access was initiated in the nineteenth century and has grown in popularity throughout the years. Overall, it provides telecom users with access to practically all of the services they require for information, education, and entertainment, among other things, while also changing the traditional marketplace which result in the proliferation of wireless technologies. Although this expansion has changed in primary industries such as telecommunications and television. Further, the shift has occurred since networks were previously constructed around specific uses like access to the Internet or pay Television. Because of this, the expansion of voice, video, and Over-The-Top [O.T.T.] application services over networks is accelerating at an exponential rate. What do you mean by it? Over-the-top platform (O.T.T.) is a collection of software applications and services accessible via the Internet. It relies on the networks of internet service providers like Airtel, Vi, Jio, BSNL, and others to provide internet access services to their customers. O.T.T. platform can be divided

¹ Author is a PhD Student at Sharda University, School of Law, Greater Noida, India.

into three categories: [i]. WhatsApp, Facebook Messenger, Skype, Instagram, Telegram, and Signal are all examples of communication [messaging and voice service] applications. [ii]. The use of video and audio content, such as Apple T.V., the Amazon Fire Stick, the Xbox 360 and the Sony PlayStation, Netflix, Amazon Prime, Hotstar, etc. [iii]. Application Eco-Systems [most of which are not real-time and are tied to social networks and e-commerce], such as those operated by Flipkart and Amazon. In, Healthkart, Myntra, Nayka, and others.

A few months back, the Government took an opinion about all online media platforms such as Netflix, Amazon Prime Video, Hulu, Mx Player, Zee5, Disney Hotstar, Alt Balaji, and T.V.F. Player, WhatsApp, Facebook, Instagram, Flipkart, Amazon.in, Health kart, Myntra, Nayka, etc., come under the Ministry of Information & Broadcasting [M.I.B.], the consequences of these initiatives are... on 9TH November 2019, the Government published an official gazette notification for the regulation of O.T.T. platforms, which is known as Information Technology [Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, for their interest and benefits...which is headed by the Ministry of Information & Broadcasting. However, there is no such legislation and regulations for O.T.T. platforms. But imagine the situation where legislation and regulation will come into force, then which ministry will govern? The Ministry of Information and Broadcasting stated that it does not register or regulate any online portal in response to a Right to Information application with registration number MOIAB/R/2019/50364, filed in response to the inquiries. This R.T.I. application was then moved to the Ministry of Electronics and Information Technology [MEITY] for further consideration –

[Question]. How does one find out which government agency or body is responsible for overseeing and policing the content available on these online streaming services?

[Answer]. The Ministry of Electronics and Information Technology does not censor or monitor any content on the Internet.

[Question]. How much is due diligence performed when these streaming services for video content in India are registered?

[Answer]. As defined in Information Technology Act 2000, Intermediaries have to follow due diligence as prescribed in the Information Technology [Intermediaries Guidelines] Rules, 2011.

[Question]. When it comes to the material that these service providers supply, does the Government intend to improve the accountability and responsibility of these providers so that they exercise caution?

[Answer]. The Cyber Law and Cyber Security Group of the Ministry of Cyber Law and Cyber Security do not have any information available.

So, what will happen next? There might be nervousness; for *instance*, in the year December 2019, Government announced the consultation through the Ministry of Information & Broadcasting, i.e., India puts a new Bill on the Registration of Press and Periodicals Bill, 2019 ['R.P.P. Bill'] for regulating media up to public consultation and seeks to replace the Press & Registration of Books [hereinafter, P.R.B.] Act, 1867 which put it into consultation. In P.R.B. Act 1867, any newspaper media have to register them so that Government will regulate the advertisement or give the excess to the Press Card. Section 2 (K) of the Registration of Press and Periodicals Bill defines News on digital media as News in a digitized format that can be transmitted over the Internet, computer, or mobile networks and includes text, audio, video, and graphics. Thus, there is a requirement to register the online News Media like Scroll.in, The Wire, The Quint, The Lallantop, etc., several questions will arise like The New York Times; The Washington Post also writes about India. Will they come for the registration under the P.R.B. Act, or if they will not, Will the Government block these Digital News Media channels?

For instance, a committee on Fake News was being established and failed to work on it. Nevertheless, in the true sense, the Government wants to get control over the Digital/Online News Media because as we look into the Online News Media... they sometimes raise specific questions that ordinary newspapers can't do. So, what happens next... after the announcement of publishing an official gazette notification for regulating these O.T.T. platforms, public opinion is being distributed into two parts... As per a survey by YouGov², 57% of people [1005, approximately.] stated that this is a good initiative because, in their opinion, uncensored content is being played on O.T.T. platforms; for instance, Motion Picture should get censorship certification before publication. Similarly, T.V. News should get the censorship certification for O.T.T. platforms. Now the question is, why not Register Digital News Channel also? The rest of people stated that some content, some movies, while on Television, Cinema or on the Internet... is being unregulated *for an example* if we put any News on the Internet or any Digital Media there must be some responsibility like if things get posted on Online, anybody writes or comment anything but if we see the Economic Pattern of Creation, Distribution, and Consumption of Digital News is different from the ordinary Newspaper because for printing a Newspapers we do need Press and a

² <https://in.yougov.com/en-hi/news/2019/10/30/more-half-indians-think-online-streaming-platforms/>

massive amount of capital but for the Online Journalism all we do need a Smart Phone with Internet Connectivity. Thus, the capital investment is very minimum. But some norms for the Digital Media are totally in violation of the fundamental right of speech and expression... *for instance, the Press Registration of Books Act, 1867, which Britishers imposed for the preservation of copies of books and periodical content of News printed in the territory of India so that they have control over the pamphlets which was being published in the name of Independence. Secondly, one copy must be sent to the Government so that there is an archd. While in the age of the Internet, there is an automatic archd. So, we have to go with the appearance of rationality.*

On the other hand, this is the only behaviour of the Government to get censored everything like online content, motion pictures, and web series in which the Government is being criticized or questioned. In an actual sense, Government wants to regulate all the contents. Thus, the existence of Online Media is very vulnerable. In the present, almost all the News Channel Reporter sits on the Government's lap and is governed by them. Nevertheless, The Validity of Rule 4 (2) of the Information Technology [Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 on the grounds are –

- i. Violation of the fundamental rights of freedom of speech and expression and to privacy guaranteed under Article 19 and Article 21 of the Constitution of India.
- ii. *Ultra vires* the Information Technology Act, 2000 ["I.T. Act"] the parent statute under Rule 4 (2)

While there will be a harmful impact on the innovation, freedom of speech & expression, and cultural aspect of the Indian Entertainment Sector.

II. THE CONTENT-BASED REGULATION

There should be legislation and regulation based on sound public policy and evidence. While, even if the Government wants to control some sector like if we run a scalable business on the digital/online media, then there are several steps to be followed, meaning thereby these precise details should be obtained, like... Bank Account, Business Identity Registration, Tax Appliances, Hiring Employees, so that if there is any irregularities consequence occurs then it is easy to identify it. Further, as per the Information Technology Act, 2000 – Section 67A, Section 67B, and Section 67C of the Act provide penalties and imprisonment for publishing or transmitting obscene material, sexually explicit material, and material depicting children in sexually explicit ways acts in electronic form. Furthermore, under Section 69A of the Act, the Central Government has been empowered to issue directions to block public access to any

information.

Also, the Indian Penal Code, 1860 provisions are also applicable to the O.T.T. platforms. For instance, online platforms are subject to Section 295A of I.P.C., which criminalizes deliberate and malicious acts intended to outrage religious feelings. Section 499 and Section 500 of the I.P.C., which criminalize the dissemination of defamatory content.... *for example*, F.I.R. was filed in Madhya Pradesh against Alt Balaji [Ekta Kapoor] for the web series "XXX" for having the controversial scene, was removed. Hight Court held no-cause notice. The criminal investigation of obscene material on the O.T.T. platform held in recourse... meaning thereby, there must be evidence if there is any regulation. Thus, new digital policy should be de-regulated instead of more regulation. *Another example* is that Ramalinga Raju claims he is not a fraudster and gets a stay on Bad Boy Billionaire on the Indian Web Series at Netflix. The Court granted the injunction and reversed the decision after watching the content. So, there is already an existed remedy, but due to registration costs, compliance and entry barrier will increase. This is the mere core functionality and benefit of the Internet that many people do without any registrations. Similarly, the question related to O.T.T. platforms is a giant one because the O.T.T. platforms like Netflix, Amazon Prime Video, Hulu, Mx Player, Zee5, Disney Hotstar, Alt Balaji, T.V.F. Player, etc., as we watch cinema, needs regulation only done when there is a communal way of watching... i.e., around 200-300 people seated in the cinema hall and T.V. regulation also came into existence because, in the early 90s, T.V. channels came with liberalization such as Doordarshan and other private broadcasters... there is a very costly T.V. set. So, many people put 2 to 3 T.V.s in the Mohalla [street] jointly and can watch with the entire Mohalla [street]. But nowadays, most people use mobile phone devices and smartphones for watching content, movies, and news media. Thus, this type of living is very private and hence not communal. The second thing is that we are the only ones who can select what to watch or not at the very fingertip/touch; in fact, we can choose the window of content or close the window.

III. NEED TO REGULATE O.T.T. PLATFORMS/SERVICES OR NOT?

If the legislation and regulation exist, the worst condition is that podcasts will change into Radio; Online Streaming converted into Television; Digital/Online News Media into Television and newspapers. Interestingly, all these norms have to think strongly to the people because the same people who say that the content is being treated differently. *For example, on Netflix, in 'The Social Dilemma,' people start talking about how social media collect our data and play with our psychological emotions only for their benefit. Thus, content is driven by the*

choice of restrictions. A Public Interest Litigation was filed under Article 226 & Article 227 of the Constitution of India for *mandamus* and *certiorari* and/of *prohibition* and any other like writ, in order or direction by the Justice for Rights Foundation N.G.O. in the Delhi High Court in the case law *Nikhil Bhalla v. Union of India & Ors ...*³ praying for order in discharging its statutory duties and seeking directions to the Government to frame guidelines to regulate the said online platforms and contents broadcasted on the online platforms. The Hon'ble Court established the capacity of the I.T. Act to regulate online content through its provisions with no need for external regulations. The Justice for Rights Foundation filed a special leave petition in the Supreme Court of India. The appeal is yet to be heard by the Supreme Court. Generally, online content, as it stands today, appears to be unbridled, and the creators of such content are exercising their creative liberties to the fullest. However, it is not accurate to conclude that O.T.T. platforms are unregulated or free from censorship only because their existence no regulatory framework categorically setting out the manner of censorship or certification of the online content or guidelines outlining do's and don'ts for the creators of online content.

Nevertheless, The Ministry of Information and Broadcasting established an interdisciplinary group on April 4, 2018, to investigate the regulatory frameworks for online broadcasting and social media content. Since then, O.T.T. platforms have been subjected to induced pressure to self-censor content containing obscenity and blasphemy. The panel will comprise secretaries from the ministries of I&B, Law, Home, and Telecom and representatives from the Press Council of India, News Broadcasters Association, and Indian Broadcasters Federation to develop laws for online broadcasting and news portals. The following were included in terms of reference for this committee –

[i]. To describe the area of online information distribution that needs regulation, like the rules that apply to print and electronic media distribution.

[ii]. To make suggestions about making policy for online media/news portals and online content platforms, like digital broadcasting, which includes entertainment/infotainment and news/media aggregators.

[iii]. To use the best practices, it is important to look at the international landscape regarding existing regulatory frameworks.

The content on these streaming video sites is often of social significance, and they use a code for self-regulation on them. There are a lot of big problems that we have to deal with. Further, it is essential to work with its legal system and set some rules to avoid setting up a corrupt

³ (WPC No. 1164/2018)

foundation. There are gaps in current law that need to be filled by the law. The public should be compensated for this. As a result, it is more important than ever to develop an ideal regulatory framework that balances the interests of everyone involved in the industry while also focusing on both carriage and content. Further, it becomes more flexible in the absence of content-related violations, with Article 19 being the most active provision and reasonable restrictions being recognized only as occasional constraints. Digital is transforming the world and demonstrating its ability to be a game-changer on a massive scale. There are two competing positions in the debate over online streaming service regulations. One of the most important things to remember while discussing anti-censorship is that at least one person is bound to be offended by the topic at hand. As a result, if we continue down the regulatory route, we will be compelled to control practically everything we do now... Because there is no distinction between media and communication, content and opinion, or any other sort of content, each individual is accountable for developing and managing their content. At the time, it does not appear that India is making significant progress toward enforcing its legal system... There is no doubt that our options are unrestricted in terms of censorship certificates? Because of the shift from push to pull, people can better make sense of the information they're exposed to. However, with the help of A.I. coding, we can make better decisions. Private and public users should be separated in an appropriate setting when accessing content.

IV. CONCLUSIONS

Since the public Internet's reach has grown in scope during the nineteenth century, new norms for its regulation have been developed. However, establishing an ideal regulatory structure capable of balancing the needs of the sector in terms of transportation and content becomes even more critical. Constitutional conventions are shifting away from the traditional liberal establishment, with offences relating to the text of Article 19 of the Indian Constitution being viewed as primarily active and appropriate constraints being regarded as a single constraint, as opposed to the traditional liberal establishment. The landscape will be altered as a result of digital/online media. There have been two opposing viewpoints on the regulatory framework for material available on O.T.T. platforms. It is crucial to remember, especially for people opposed to censorship, that there will always be something that will upset at least one person. Those that choose the regulatory path, on the other hand, will be required to regulate nearly everything. The distinction between the media, communication content, and commentary are thus eliminated. As a result, there is a greater emphasis on separating everything and controlling it independently. For example, *there is an advertisement encouraging breast cancer awareness. However, the term "breast cancer" has been replaced with "chest cancer" due to*

the use of the sensor filter.

Although, none of the O.T.T platforms falls within the purview of intermediaries as defined by the Information Technology Act. Further, when it comes to establishing the scope and applicability of regulatory measures, Indian courts are in a terrible position right now. The Ministry of Electronics and Information Technology would be unjust if they were to take over the entire operation. The primary question is whether the information broadcast on such digital streaming channels infringes on the fair constraints outlined in Article 19 (2). It is crucial to remember that the current regulatory systems are far from onerous, particularly when considering that they apply to conventional media like Television and cinema. For these regulations to be effective, the courts and ministries must take the initiative and decide their purpose. It is worthwhile to consider whether there is a relationship between the purpose of the regulatory system and the consistency of the law governing traditional media content.
