

Competition Law Concerning The Film Industry In India

written by Deiya Goswami | June 24, 2019

In the entertainment Industry, cinema remains amongst the most popular form of art and in many countries appears to be one of the most widely practiced cultural activity. Every day there are technological advancements and much is yet to come in this regard.

Over more than one hundred years after its conception, a critical period has been reached where, different questions from those seen so far are likely to be raised as far as competition is concerned, questions linked to the horizontal concentration and vertical integration of companies operating in film distribution markets along with the promotion of development of the industry.

The Indian Film industry in order to discipline itself had set up self-disciplinary association or agencies. The associations are either societies or companies under Section 8 of the Companies Act. These associations or companies formulate bye-laws and work as a dispute resolution agency for disputes between exhibitors, producers and the distributors/exhibitors. In this manner, the pecuniary interests of the exhibitors were protected. This is being done firstly, by registering the name of the film with one of the associations. Such registration protects two films from having the same release at the same time.

Secondly, whenever a producer enters into an agreement with a distributor for a certain zone, the same needs to be registered by an association. This is being done with the idea that a producer does not sell the same movie rights to another distributor in the same area to obtain further finance. Moreover, when the film being produced involves a large amount of finance, another distributor is usually appointed for a zone or two distributors would form a joint venture to finance the film.

Now, with the advent of new technology, migration of the Indian community to different countries and due to other such reasons, the demand for Indian films extended in various countries. This created the opportunity for the producers to sell the rights in the entire world, DTH and satellite rights, internet rights etc. of the film. The new technology also led to an increase in breach of piracy and reduction in the earnings of the producers. These factors have led to the closure of many single screen exhibitors all over India.

India is one of the largest producer of movies in the world with over 1,300 films released each year. With respect to theatre density, however, India ranks poorly with 12 screens per million as opposed to 117 per million in the USA.

As a result of this huge infrastructural deficit, an industry survey estimates a

poor volume of 4 billion ticket sales each year across 12,000 odd theatres. In

fact, that has led to the trend has emerged where film digital rights (such as satellite, home video, VOD, PPV, DTH and webcast) are being negotiated and sold

much ahead of the theatre release. One might argue that simulations release could enable easy piracy, which would eat up revenues from legitimate streams.

This view fails for the simple reason that consumers of 'pirated' (for lack of

better word) goods do not appreciate pricing mechanism of the legitimate market. Between picking up a DVD at a street corner for a mere fifty rupees, and purchasing it from an authorized dealer (if there is one in their town) for

five times that amount, no consumers would bother purchasing an original disc.

One

such incident is where the Competition Commission of India (CCI) intervened after receiving information about anti-competitive practices against certain film distributors and exhibitors of blockbuster film, Vishwaroopam in relation

to the simultaneous direct-to-home (DTH) release by actor-producer Kamal Hassan. Since the contents of the film was controversial so was initially banned in one state but since the dispute was of a manner that had a wider implication for the entire film industry so Raj Kamal Films approached the CCI

for a ruling on the Association for restraint of trade.

The

question that the CCI had to answer was upto what extent a competition regulator such as CCI can intervene in disputes within an artistic industry. In

this information before the CCI, it was alleged that there was an abuse of dominance and cartelization against the film distributors and exhibitors, resulting in the disruption of the DTH release. In response the distributors have stated that Hassan has violated an informal understanding in the industry

to release films exclusively on theatres. Although Section 3(5) of the Competition Act excludes agreements made in furtherance of exploitation of an IP right. As long as the terms of license are 'reasonable', IP owners are free

to impose any measure. In other words, an informal pact for exclusivity in distribution of films does not stand valid before a court of law.

The Competition Commission¹⁷ ruled as follows –

'The

facts discussed above prima facie show that the resolution of OP was in the nature of an agreement among the members of the association and was intended to

limit and control the market of exhibition of movies as well as innovative use

of technical development in exhibition of feature films and thus, prima facie

appeared to be in contravention of the provisions of Section 3 of the Act.' In

Hassan's information to CCI the distributors' and exhibitors' associations did

eventually succeed in deferring the DTH release with their threats to boycott screening. This decision to boycott is likely to violate the following provisions of the Competition Act :

- Refusal to deal: The threat of the distributors has an effect of restricting the 'classes of persons to whom goods are sold or from whom goods are brought' which is prohibited under sub-clause (d) of Section 3(4).

- Denial of market access: Section 4(2) (c) prohibits dominant entities from indulging in 'practices resulting in denial of market access in any manner'. It is likely that the DG might find a valid claim against the associations which control theatre distribution in Tamil Nadu for denying home-video market to the actor.

In a nutshell, the cultural and linguistic issues limits the applicability of the competition laws to the entertainment industry. Also the products of the entertainment industry specially films and cinemas are singular goods and the CCI does not have the technical know-how to assess the non-market consequence of the market competition. Another problem is that the cultural segment focuses on a long term individual consumer whereas the market argument focuses on short term individual consumer welfare effects.

Moreover, recently in 2017, the CCI has passed decision in order to provide further clarity and to emphasise the position in certain national and regional trade associations of film artists and producers for engaging in practices of controlling/limiting the supply of services and market sharing. That Mr. Vipul

Shah, the producer of films, filed an information against Artists' Associations, comprising the All India Film Employees Confederation, Federation

of Western India Cine Employees (FWICE) and its affiliated associations as well

as Producers' Associations, comprising the Indian Motion Picture Producers Association, the Film and Television Producers Guild of India, and the Indian Film and Television Producers Council stating that there was Memorandum of Understanding (MoU) regarding wages and rates of member artists and there were

restrictions on engaging non-members also there was a committee which was entrusted with the vigilance of the said MoU.

The main contention in this case was that such acts have been held to be in contravention of Sections 3(3) (b) and 3(3) (c) read with Section 3(1) of the Competition Act, 2002. The CCI in this case reiterated the decision of Supreme Court

and observed that the even trade unions fall within the preview of the scrutiny

of antitrust laws in India, although they are not directly the part of trade unions but are part of the production chain. Further there was a clarity provided that under the provided circumstance, where these bodies acted as operating member in the trade union does not fall within the horizontal agreement.

Conclusion

To conclude, the market concerned should be defined and the degree of concentration of that distribution activities needs to be determined.

Secondly, it must be found whether there are regulations or practices which prevent market entry. Further such barriers co-exist with high concentration, there will be high risk of exercise of market power, which will make further horizontal concentration and, in some cases, vertical integration, threatening to competition. Also in a diversified country like India, where there are more than 19,500 languages and 22 official languages the Competition Commission will often be confronted by cultural and linguistic disputes presented before CCI. Further CCI has to formulate clear-cut rules that can be applied to the entertainment industry.

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