

OTT Platforms: Impact of (Un) Regulated Presence in India

written by Deiya Goswami | September 3, 2020



Regulatory Norms for OTT Platforms: Entertainment Without Interruption or Without Regulation?

On 22nd-23rd January 2020, the Director-General, WHO convened an Emergency Committee (EC)^[1] to assess the public health emergency of international concern, while finally on 11th March 2020, COVID-19 was characterized as a pandemic^[2] due to the alarming increase of spread and severity. The world was clearly not ready to combat the precarious situation involving the closure of business and institutions alike.

As the world began working from home, the globe witnessed a hurried, drastic shift to online platforms starting from universities, schools, and companies. The world has seen a boom as almost everyone began interacting on electronic platforms using Skype, WhatsApp, Microsoft Teams, and for entertainment purposes, Amazon Prime, Netflix and Hotstar took precedence. The services provided by these platforms are commonly called 'Over-the-Top' services, or 'OTT'.

The Impact

Public access to the internet since 1980 has been a revolutionary step towards a digital world. The digital era has enabled us to keep the information is available on our fingertips. Technological developments such as TV, internet, telecommunication, etc. have become easy access to information and entertainment for the people around the world. Previously, only the youth was drawn towards the OTT platform but now, there has been a rapid increase in the viewership from all walks of life as well as from all age groups.

OTTs are service providers who neither operate, nor lease network capacity from a network operator to provide access to their services to consumers^[3], and are mostly free of cost. When they do charge for access, it is usually for premium content use of the applications, and with minimal costs attached^[4], so they do not burn a hole in consumers' pockets. It is appropriate to say that there exists no special Provision for OTT Platforms – just the general procedure of domain name and app registration.^[5]

Jurisdictional Challenges

The beauty of the OTT Platform is that it is not location-specific, which creates a huge challenge in deciding the jurisdictional concerns. At present, given to the unique nature of the OTT Platform, it is safe to assume that the

regulations to keep a check and maintain balance will also be equally unique. Another aspect of the OTT Platform is that it can be used both domestically and internationally, specifically to bridge the application of traditional territorial principles^[6].

Among other increased difficulty for law enforcement agencies, data privacy, criminal and taxation issues are a major cause for concern. In order to overcome these difficulties countries are required to enter into international agreements or treaties to prevent impinging on another country's sovereignty^[7].

The Present Regulation

Though OTT is controlled through the internet rather than satellite or wires, it has its own limitations and regulations imposed by the domestic law of the country. Usually, the OTT platforms are used to communicate in the form of movies, documentaries, news, or any such information or entertainment and the services are broadly providing three kinds of service: namely communication, application eco-systems and video/content^[8].

It is believed that OTTs have the potential to take over the traditional telecom sector, and Traditional Telecom Service Providers ("TSPs") which was accelerated due to this pandemic and has, in turn, raised alarm, eliciting the Telecom Regulatory Authority in India to publish a consultation paper for the regulation of OTTs in India, in 2015^[9].

In the 2015 Consultation Paper on Regulating OTT service providers, the TRAI identified several challenges and issues that arise from the evolution and growth of OTT services in India, which have been broadly categorized into three main issues: Impact on the Economy, Regulatory Imbalances, and Security Issues^[10]. In 2018, another consultation paper was released by the TRAI, further addressing and seeking suggestions on the regulation of OTTs services^[11].

Otherwise, they are largely unregulated, and with several cases coming up before the court seeking regulation over these platforms, and as recently as June 2020, it may be worth thinking about and formulating, especially in light of the current situation worldwide which has accelerated internet penetration and data usage especially for availing services provided by OTT platforms.

Effect on Censorship and Liability of Intermediaries

Censorship is an important aspect of any media regulation policy and India has a long history of strict censorship. The broadcasting agencies self-censor their content before approval from the Central Board of Film Certification (CBFC). What sets OTT apart from a mere movie broadcasting platform is the lack of power of the CBFC to certify its content. The CBFC can participate in the censorship of the movies broadcasting in the theatres only. The OTT platforms are free from CBFC censorship.

Nonetheless, it is subjected to the provisions of the Intermediary Guidelines^[12], which could penalize them under the Information Technology (IT) Act. Sections 67A, 67B and 67C of the IT Act penalize obscene and sexually explicit content, content depicting children in sexually explicit acts in the electronic platforms.

Further, Section 69A of the act empowers the Central Government to block public access of any information it deems necessary to be blocked. Moreover, Section 295A of IPC criminalizes the publishing of blasphemous content which may hurt religious feelings. Sections 499 and 500 of IPC criminalize

publishing of defamatory content. At present, the rule suggests that the intermediaries will not be liable for any third party information, data or communication link made available by them.

The IT Act extends “safe harbor protection” only to those instances where the intermediary merely acts as a facilitator and does not play any part in the creation or modification of the data or information. The provision also makes the safe harbor protection contingent on the intermediary removing any unlawful content on its computer resource on being notified by the appropriate Government or its agency or upon receiving actual knowledge.^[13]

The Imbalance

OTTs are set to largely disrupt the functioning of Telecom Service Providers, not to mention benefits accrued to them by way of un-regulation in areas such as taxation^[14]. At present, regulatory gaps allow OTT platforms to provide the same services as TSPs without requiring licenses or permissions from any regulatory body^[15]. Consequently, they are also not required to address consumer concerns such as quality of service, unsolicited communications, and so on^[16]. They are, however, being addressed to some extent through self-regulation.

OTT service providers (such as Netflix, Hotstar and others) signed a code of best practices in January 2019, under the aegis of the Internet and Mobile Association of India (IMAI)^[17]. Under this code, the signatories committed to “conducting themselves in a responsible and transparent manner^[18]” and seek to “empower consumers to make informed choices on age-appropriate content^[19]”, protect and safeguard the interest of consumers, content creators and artists, and also provide redressal mechanisms for any complaints that arise in relation to the content made available by the concerned service provider^[20].

The Conclusion

The need of the hour is a structured regulation for OTT service providers in order to overcome the legal lacunae. The approach taken by TRAI during 2015 and 2018 appeared to be more self-regulatory model in order to “encourage creativity^[21]”. But the primary question before the regulatory body would be whether or not leave the regulation of OTTs to market forces and hence letting the TSPs to evolve their business models to keep up with the changes brought by the new entrant^[22].

However, self-regulation is a voluntary but risky model, which may allow some big players to dominate and create monopoly in this new business segment. Although, if there are strict regulations being imposed then the new entrant in this field may not be able to survive and die before it could fully bloom.

[1] The International Health Regulations (IHR 2005)

[2] <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>

[3] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015) pg 8

[4] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015) pg 8

[5] TRAI, *Consultation Paper on Regulatory Framework for Over-the-Top (OTT) services*, 42-43 (March 27th, 2015)

[6] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory*

Framework for Over-the-top (OTT) services (Consultation Paper, 2018) pg 26

[7] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, 2018) pg 26

[8] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015) pg 11

[9] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015)

[10] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015) pg 42

[11] Telecom Regulatory Authority of India, *Information Note to the Press* (Press Release No. 109/2018)<<https://www.trai.gov.in/sites/default/files/PRNo10912112018.pdf>> accessed 25 July 2020

[12] Information Technology (Intermediaries Guidelines) Rules, 2011

[13] S. 79, Information Technology Act, 2000

[14] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, No 27/2015) pg 48

[15] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, 2018) pg 24

[16] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, 2018) pg 25

[17] Nayanika Singhal, *Netflix, Hotstar and other OTT platforms say no to censorship, yes to self regulation* (India Today, 17 January 2019)<<https://www.indiatoday.in/television/web-series/story/netflix-hotstar-and-other-ott-platforms-say-no-to-censorship-yes-to-self-regulation-1432970-2019-01-17>> accessed 24 July 2020.

[18] *Self Regulation For Online Curated Content Providers*, <<https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf>> accessed 25 July 2020

[19] *Self Regulation For Online Curated Content Providers*, <<https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf>> accessed 25 July 2020

[20] *Self Regulation For Online Curated Content Providers*, <<https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf>> accessed 25 July 2020

[21] Nayanika Singhal, *Netflix, Hotstar and other OTT platforms say no to censorship, yes to self regulation* (India Today, 17 January 2019)<<https://www.indiatoday.in/television/web-series/story/netflix-hotstar-and-other-ott-platforms-say-no-to-censorship-yes-to-self-regulation-1432970-2019-01-17>> accessed 24 July 2020.

[22] Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top (OTT) services* (Consultation Paper, 2018) pg 33

Contributed by - Deiya Goswami & Kaustubha Kalidindi
King Stubb & Kasiva,
Advocates & Attorneys
[Click Here to Get in Touch](#)
New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi
Tel: +91 11 41032969 | Email: info@ksandk.com