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Analysing developments impacting business

OTT PLATFORMS AND DIGITAL NEWS MEDIA – NEW REGULATOR (AND PERHAPS A LEGAL REGIME OVERHAUL)

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INTRODUCTION

The Central government has, with effect from 9 November 2020, brought under the jurisdiction and control of the Ministry of Information and Broadcasting (MIB): (a) films and audio-visual programmes made available by online content providers; and (b) news and current affairs content on online platforms. This change in the regulatory landscape for Over-The-Top (OTT) platforms and digital media news aggregators have been introduced through the notification of the Government of India (Allocation of Business) Three Hundred and Fifty Seventh Amendment Rules, 2020 (Amendment Rules).

The OTT content market in India has been constantly growing at a rapid pace. A recent report by Boston Consulting Group in November 2018 has projected the OTT content sector in India to reach USD 5 billion in size by 2023. With mounting popularity/viewership and the potential to permeate every nook and cranny in the country which vaunts a workable internet connectivity, OTT platforms have been in the crosshairs of the government for some time now with the government voicing concerns around unfiltered content and lack of regulation. In fact, news articles in October 2019, had indicated that the government will come out with a “negative” list of don’ts for OTT platforms and had also urged the industry players to form a self-regulatory body.

With the hope of warding off any threat of external control and censorship over the content, around 15 (fifteen) OTT platforms in September 2020 signed the Universal Self-Regulation Code for Online Curated Content Providers (Self-Regulation Code). It was well-defined in the Self-Regulation Code that the Information Technology Act was the “primary governing statute” for online content. Further, the Self-Regulation Code stated that the internet and the content over the internet was guided by the principles of ‘Right to Freedom of Speech of Expression’ as enshrined under Article 19 of the Constitution of India. The Self-Regulation Code further emphasised that any framework for the online content industry should restrict the ‘Right of Freedom of Expression’ only within the contours of the constitutional restrictions as prescribed under Article 19 (2) of the Constitution of India.

The Self-Regulation Code had, amongst other things, also contemplated that there should be: (a) a framework for age classification (with the Online Curate Content Providers (OCCPs) classifying their content in a manner to ensure consumers are guaranteed maximum choice and control); (b) appropriate content descriptions (with there being a content descriptor or a guidance message specific to each content/programme that indicates and informs the viewer about the nature of the content and advise on viewer discretion, if applicable); and (c) appropriate access controls (with the OCCPs instituting relevant technological tools and measures for

access control such as a PIN/password to restrict/control access to certain categories of content). The Self-Regulation Code had also set out a stage-based grievance redressal and escalation mechanism to be followed by the OCCPs comprising of either: (i) an internal committee and an advisory panel; or (ii) a consumer complaints department, internal committee and an advisory panel.

However, the Self-Regulation Code was rejected by the government and in a letter to the Internet and Mobile Association of India (IAMAI), MIB had responded that *“the proposed self-regulatory mechanism lacks independent third-party monitoring, does not have a well-defined Code of Ethics, does not clearly enunciate prohibited content and at the second and third-tier level there is an issue of conflict of interest”*. MIB had further observed that there was a conflict of interest as the second tier advisory panel constituted of the OCCP itself rather than having an independent organisation and advised IAMA to look at the self-regulatory structures adopted by the Broadcasting Content Complaints Council (BCCC) and News Broadcasting Standards Authority (NBSA) for guidance.

COMMENTS

OTT platforms (such as Netflix, Amazon’s Prime Video, Voot, Hotstar and Zee5) and digital news media aggregators (such as Daily Hunt, Helo, UCNews, Opera News, Inshorts and Newsdog), which hitherto were operating under the jurisdiction of the Ministry of Electronics and Information Technology, will now be regulated and governed by the same nodal ministry that regulates print media, broadcasting and FM radio players in the country. Given this, the Amendment Rules are being hailed by some players in the TV broadcasting and print media industries as an auspicious decision that will help create a level playing field for all in the media sector. While OTT platforms and digital media companies in the country were effectively operating without any specific regulatory or legal regime, traditional print and television including entertainment and news media were regulated by the Press Council of India and Cables Networks Regulation Act 2005 respectively. With the Amendment Rules, the legislative intent seems to be amply clear that all similar media formats henceforth should be treated at par with each other.

In the backdrop of significant costs that have already been invested by the OTT platforms towards the creation and production of India focused content or the global projects that are in the pipeline for the Indian market, the government’s move to bring OTT platforms within the jurisdiction of MIB (and the potential threat of content censorship) has created much uncertainty amongst the OTT platforms. It is unclear whether the government will: (i) direct the OTT platforms to adopt a code of conduct or content censorship rules that is enacted by the government; or (ii) (on the other hand) would simply come out with a broad framework (which is effectively modelled on the self-regulatory structures that are adopted by BCCC and/or NBSA) within which OTT platforms and digital news aggregators can adopt their own self-regulatory code.

While the government’s intent to regulate content on OTT platforms has been known for a while, if MIB does decide to notify its own rules in this regard, the scope and extent of the censorship and the ensuing impact of the change in the legal regime for the video streaming sector will become clear only once these rules are notified by MIB.

Separately, there is also the question of how the Amendment Rules will affect the digital new aggregators. Would there be any additional implications or entry barriers from a regulatory/compliance perspective for digital news aggregators? How would these implications specifically play out vis-à-vis OTT platforms that stream new channels?

While many players in the industry concede to the fact that online content must adhere to some prescribed rules and ethics so as to remain unbiased and that given the ubiquitous outreach of the internet some filtration of the content is also justified; however, in the same breath, concerns are also being raised that unlike other mediums,

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online content should not be over-regulated so that it does not stifle the freedom of speech and expression that has become synonymous with this medium.

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