

CENSORSHIP: THE CURRENT REGULATORY FRAMEWORK AND THE FUTURE OF DIGITAL CONTENT**1. INTRODUCTION**

The media and entertainment industry has consistently grown and continues to grow at a global level, particularly with the advent of new mediums for distribution, supported by dynamic technological advancements. The Indian market has not only followed this global trend over the years but has also demonstrated enormous potential. In the recent past, the Indian media and entertainment industry has witnessed a paradigm shift, both, in the volume and *demand* for varied content as well as in the *mediums* opted by viewers to access content.

With the rise in digitisation in India and greater access and affordability of the internet, digital media and entertainment platforms, also known as over-the-top (“OTT”)¹ platforms, have become popular with viewers of *all* age groups and categories. OTTs are perhaps on the verge of replacing the conventional television box and the availability of a wide range of content on a *single* platform, catering to the needs and tastes of a varied audience base, adds to the OTT entertainment platforms being more attractive for viewers.

Further, since *digital content* is not subject to censor certification applicable to films and television programs, the creators of such content enjoy ample creative freedom. At the same time, viewers have the freedom of choice in terms of the content they want to watch at any given time. The scope of this freedom and availability of a wide range of content for viewers could also be a significant factor for increasing viewership of online content and OTT platforms. However, as a consequence of *minimal* regulation and *uncensored* content being available on OTT platforms, the debate on the need for censorship of content beyond films and television has surfaced.

In this article we aim to outline the current regulatory framework for the certification of films, compliances for television programs and also the trends in regulation for OTT media platforms.

2. CERTIFICATION OF FILMS

The applicable law concerning pre-censorship of films in India has historically been tested on the basis of freedom of speech and expression for the reason that it is the heart of any artistic expression. In the earliest instance, when censorship of films was challenged on the grounds that it violated freedom of speech and expression, the Supreme Court² held that the social interest of people overrides individual freedom and thus justified the censorship of films on the basis that it is a powerful medium of expression. However, in the same judgment the Supreme Court also recognised the importance of setting a standard for censors to ensure

¹ OTT service providers provide different services to end users over the internet. Based on the nature of services provided by an OTT service provider, the OTT platforms can be broadly categorized into -- platforms providing communication services (such as *Whatsapp, Skype etc.*), platforms providing aggregating services (such as *Ola, Uber etc.*) and in the context of media and entertainment, platforms providing audio and/or audio video streaming services (such as *Netflix, Hotstar, Amazon Prime*).

² KA Abbas v. Union of India, AIR 1971 SC 481.

that a substantial allowance is made in favour of artistic freedom, thus leaving a vast possibility and opportunity for creativity.

As it currently stands, the censorship of films in India is undertaken by the Central Board of Film Certification (the “**CBFC**”) set up under the Cinematographic Act, 1952 (the “**Act**”). The Act along with the Cinematographic (Certification) Rules, 1983 and the Central Government’s guidelines dated December 6, 1991, issued pursuant to Section 5B of the Act (the “**Censorship Laws**”), set out the manner in which films are to be certified for exhibition in India.

At present, under the Act, the CBFC is required to certify films under any of the following categories:

- (a) “U” (*unrestricted exhibition*);
- (b) “UA” (*unrestricted exhibition except for children below 12 years of age*);
- (c) “A” (*restricted to adults only*); and
- (d) “S” (*restricted to specified class of persons*).

The principles guiding the CBFC in the certification of films include assessing the film from the perspective of public order, morality, decency and defamation. Additionally, the CBFC is also required to consider laws relating to the depiction of cigarettes and tobacco, the use of drugs and substances, the prevention of cruelty to animals, the use of national emblems and names and other matters of national honour.

The objective of the CBFC is to ensure certification without curbing artistic expression and creative freedom. While the nomenclature is indicative of censorship, the core of the CBFC’s function is in fact the certification of films and not the censorship of content. Filmmakers have often criticised the CBFC for acting beyond its powers of certification and taking upon itself the task of moral policing.

An apt illustration of this would be the deletions ordered by the CBFC to the film *Udta Punjab*, which included directions for the deletion of the names of Indian states, references to several *cuss* words, and inexplicably, the deletion of a name of a dog: ‘*jacky chain*’. The film was granted an ‘A’ certificate and this decision of the CBFC was challenged by the producers of the film before the Bombay High Court,³ wherein the producers sought that the ‘A’ certification be granted without any conditions or cuts in the film. The Bombay High Court examined each of the deletions proposed by the CBFC, and sensibly held that the film was not objectionable merely due to depiction of the use or sale of drugs in a particular state and the political references therein and opined that the story must be viewed in its entirety.

Separately, in April 2018, the CBFC issued a notification regarding the certification of subtitles. The CBFC in its notice stated that several films were certified without subtitles and therefore applicants should submit an undertaking that the final version includes subtitles and that no subtitles will be added after a film has been certified. This notification has been challenged by the Indian Motion Picture Producers Association and is currently pending before the Bombay High Court.

³ Phantom Films Pvt. Ltd. and Ors. v. CBFC and Ors., Writ Petition (L) No. 1529 of 2016 decided by the Kerala High Court on June 13, 2016.

3. SHYAM BENEGAL COMMITTEE'S REPORT

Recognising the need to re-examine the rationality of the prevailing film certification norms, the Ministry of Information and Broadcasting (the “MIB”) has in the recent past set up expert committees to examine not only the issues of certification of films but also the provisions of the Act.

In January 2016, the MIB constituted an expert committee chaired by the Indian film maker, Mr. Shyam Benegal (the “Committee”). The primary objective of the Committee was to recommend broad guidelines and procedure for certification of films by the CBFC and to ensure that the process of certification of films for public exhibition is carried out in a uniform, non-discriminatory and non-discretionary manner.

The Committee submitted its report in April 2016. However, the recommendations of the Committee have not been acted upon by the MIB yet. Some of the key recommendations made by the Committee are as follows:

- (a) Alterations and changes to films should be made *only* by the rights owner or with his consent, since the rights owner has complete rights over the film.
- (b) The scope of the CBFC should be *limited* to only decide who and what category of audience can watch a particular film, without acting as a moral compass. The CBFC categorisation should be a sort of statutory warning for audiences of what to expect in a particular film, and thereafter the viewing of the film should be considered a consensual act, and upto the viewers of that category.
- (c) A change in the categorization of films, including: (i) a further sub-categorization of films under the “UA” category into “UA 12+” and “UA 15+” in light of the sociological changes and exposure of teenagers to certain type of content in a moderate manner; and (ii) the introduction of the additional “A-C” (*A with caution*) certification for films that may contain explicit material such as nudity, or violence, helping audiences make distinct choices.
- (d) Overhauling of the existing guidelines based on which films are certified to ensure that the CBFC is not responsible for ensuring the *aesthetic composition* of a film or *clean and healthy* entertainment. The Committee recommended that there should be separate guidelines for different aspects of certification, such as, general guidelines for every film, issue related guidelines that outline issues and concerns in a society which apply in varying degrees to all categories of certification and category specific guidelines that lay down the approach for certification of different categories of films.
- (e) *Recertification* of films for the purpose of exhibition on television, since currently only “U” certified films can be exhibited on television, thus resulting in loss of revenue for films certified otherwise. Hence, for exhibition on television, the rights owner of a film may modify the film in order to qualify for the “U” category.
- (f) Categorization of films should be limited to *public exhibition* and should not have a bearing on entertainment tax levied by state governments.

The Committee also proposed amendments to various provisions of the Act complementing its recommendations.

Prior to the Committee, the MIB had also constituted a “Committee of experts to examine issues of certification under the Cinematograph Act, 1952” which was chaired by the Honorable Justice Mukul Mudgal, former Chief Justice of the Punjab and Haryana High Court (the “Mudgal Committee”).

One of issues to be addressed by the Mudgal Committee was the power of state governments to suspend a film from exhibition in the relevant state. The Mudgal Committee recommended that an order of suspension should only be passed after or during a public exhibition and not before as the ‘suspension of exhibition’ implies that exhibition has taken place or is ongoing.

This recommendation was further to the Supreme Court’s judgment in case of the film *Aarakshan*,⁴ which was suspended from screening by state governments in Punjab, Andhra Pradesh and Uttar Pradesh. The Supreme Court, while quashing the decision of these state governments, held that once the CBFC has cleared the film for public viewing, screening cannot be prohibited in the manner sought by the relevant parties, and that it is the responsibility of each state to maintain law and order. Several other findings and recommendations of the Mudgal Committee were incorporated in a model Cinematograph Bill, a suggested replacement for the Cinematograph Act, 1952. However, the MIB has not acted upon it yet.

The Supreme Court also recently dealt with the issue of the prohibition on exhibition of the film *Padmaavat*⁵ ordered by the state governments of Gujarat and Rajasthan. The Supreme Court reiterated its position in the case concerning the film *Aarakshan*, staying the orders of the state governments of Gujarat and Rajasthan and restrained other states from issuing any orders prohibiting the exhibition of the film.

The Supreme Court further observed that: “if intellectual prowess and natural or cultivated power of creation is interfered without the permissible facet of law, the concept of creativity paves the path of extinction; and when creativity dies, values of civilisation corrode.” It also held that it is duty of a state to sustain the law and order situation during exhibition of a film, which included providing police protection to those persons involved in the film and also the audience watching the film, whenever necessary.

4. PROGRAM AND ADVERTISING CODE FOR TELEVISION

The operation of television networks, television broadcasters and related matters are governed by the Cable Television Networks (Regulation) Act, 1995 and Cable Television Networks Rules, 1994 (the “Cable Television Laws”), which among other things, restrict transmission through a cable service, of any program that is not in conformity with the *program code* (the “Program Code”), and of any advertisement that is not in conformity with the *advertising code* (the “Advertising Code”) set out in the Cable Television Networks Rules, 1994.

The Program Code lays down a list of criteria for programs that can be transmitted through cable services. For instance, it provides that a program being carried through a cable service should not offend good taste

⁴ Prakash Jha Productions & Anr. vs. Union of India & Ors., (2011) 8 SCC 372.

⁵ Viacom 18 Media Private Limited & Ors. v. Union of India & Ors, Writ Petition (Civil) No.36/2018, Order dated January 1, 2018.

or decency, contain criticism of friendly countries, contain any attack on religions or communities, contain anything obscene, defamatory, deliberate, false or suggestive innuendos.

Significantly, it also restricts broadcasters and cable service providers from transmitting any film, whether produced in India or abroad, unless it has been certified by the CBFC under the “U” category, being suitable for unrestricted public exhibition in India.

Furthermore, cable operators are also entrusted with additional responsibilities such as striving to carry programs which project women positively and ensuring children’s programs do not contain bad language or violence.

With respect to advertisements, the Advertising Code (which is largely similar to the Program Code) among other things, provides that all advertisements should be in conformity with applicable law and should not offend morality, decency and religious sentiments of subscribers.

Accordingly, even though there are no *pre-censorship* requirements for content transmitted through television, as in the case of films, broadcasters and cable operators are required to adhere to the requirements set out under the Cable Television Laws with respect to the nature of content and advertisements that can be made available to the public through cable services.

5. THE SCOPE OF INFORMATION TECHNOLOGY RELATED LAW

It is pertinent to highlight that Sections 67A, 67B and 67C of the Information Technology Act, 2000 (the “IT Act”) provide for penalty and imprisonment for publishing or transmitting obscene material, sexually explicit material and also material depicting children in sexually explicit acts, in electronic form. Further, under Section 69A of the IT Act, the Central Government is empowered to issue directions to block public access of any information. In this context, it is relevant to highlight that the Department of Telecommunications (the “DoT”) in 2015 had directed⁶ intermediaries to disable over 800 websites containing pornographic material and later clarified that intermediaries were not required to disable such websites which did not have child pornographic content. The Uttarakhand High Court in a recent order⁷ referred to the DoT’s earlier notification in this regard and directed that ISPs should be required to block the publication or transmission of obscene and sexually explicit material and material depicting children in any sexually explicit act or conduct. Following this order, the DoT directed intermediaries to take immediate action in blocking such websites.

The Information Technology (Intermediary Guidelines) Rules, 2011 (the “**Intermediary Guidelines**”) notified by the Department of Electronics and Information Technology, provide a *due diligence* framework to be observed by *intermediaries* in respect of the information being hosted or published on any computer resource of the intermediary. The framework and provisions under the Intermediary Guidelines may also be applicable to OTT platforms, which qualify as intermediaries under the IT Act.

⁶ Notification dated July 31, 2015.

⁷ Order dated September 27, 2018, Writ Petition No. 158 of 2018.

6. REGULATION OF ONLINE CONTENT

While films are subjected to certification rules and broadcasters of programs on television are required to adhere to the Program Code and the Advertising Code, the rights owners of web series, films and other content exhibited only online or on digital platforms (*such as Netflix, Amazon Prime, Hotstar*) are currently free from the hassle of censorship or any code, subject of course, to provisions of the IT Act, discussed above. This position was confirmed by the MIB in a response to a query filed under the RTI Act, 2005, wherein the MIB stated the CBFC only certifies films for theatrical release and has no control over content appearing on the internet.⁸

Given the rising popularity and demand for online content in comparison to television and films, the MIB set up a committee early this year to suggest a regulatory framework for digital media companies, including online media, news portals and infotainment sites.

The committee was later dissolved. since the '*committee on national investment in critical national infrastructure and digital broadcasting*' set up by the Ministry of Electronics and Information Technology (the "**MeitY**") was also tasked with addressing similar issues and also matters which were beyond the scope of the MIB. The details of the committee and their activities are currently not available on MeitY's official website.

In addition to the above, there have also been suggestions to include online content explicitly within the ambit of the Indecent Representation of Women (Prohibition) Act, 1986, which currently prohibits indecent representation of women in advertisements, books, films, paintings, and writings. An amendment has been proposed in the Indecent Representation of Women (Prohibition) Amendment Bill, 2012, which among other things, seeks to widen the scope of the legislation to include new forms of media.

Interestingly, certain OTT players have considered self-regulation of content on their respective platforms by way of a voluntary code for online content, specifically in relation to language, violence and sex. In fact, some OTT players on their own account display censorship certificates before a film begins, provide disclaimers in scenes depicting consumption of tobacco products and alcohol, provide details for user discretion based on the age and the nature of the content, though they are not currently mandated by any law for online content.

This need for self-regulation stems from various factors, which include suiting local and regional sensibilities in India, avoiding legal action arising from offensive content and also pre-empting any other form of regulation which could potentially curb the creative freedom that online content providers enjoy.

However, the digital content industry appears to be divided in its view on the need for a voluntary code. This is because most OTT players do not want to self-impose any code or regulation on their operations and maintain their freedom of creating content for their online platforms. It therefore appears that certification or any form of censorship norms for online content may see a backlash from stakeholders.

⁸ RTI application dated October 25, 2016, received online *vide* registration number MOIAB/R/2016/50541 and MIB's response dated December 2, 2016.

7. CONCLUSION

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. The likes of *Angry Indian Goddess*, *Romil and Jugal*, *Sacred Games* and *Lust Stories* may have otherwise never made it to a big or small screen in India. However, it may not be accurate to conclude that OTT platforms are completely unregulated or free from any form of censorship, solely on the ground that there is no regulatory framework specifically setting out the manner of censorship or certification of the online content or guidelines outlining dos and don'ts for the creators of online content.

Also, in terms of the IT Act, while the intent of the provisions is to ensure that sexually explicit and obscene content is not published online, its extension and applicability to OTT media platforms is arguably a form of censorship. However, it may be a challenge for OTT media platforms to weed out sexually explicit and obscene content given the varied audience they cater to and the subjective standards of morality. This also raises questions on the different treatment of films in the context of censorship based on the mode of exhibition – certification for exhibition of films in theatres and, self-regulation and censorship under the IT Act for films made available only on digital platforms.

There are mixed trends from industry stakeholders as well as the general public in terms of the censorship of both online content and films. There are arguments for freedom of speech and expression on the one hand and petitions seeking pre-censorship of online content and the removal of content for violating some sentiment or sensibility, or another, on the other hand.

Given the increasing viewership of content on digital platforms and the corresponding impact on revenues, not only for owners of digital platforms, but also telecom operators providing internet data services, a regulatory framework for the operation of the OTT platforms does seem to be on the horizon. Also, in the event that OTT platforms qualify as *intermediaries* under the IT Act, they will also be required to comply with the Intermediary Guidelines.

What remains to be seen is whether such regulations will also include any form of censorship and whether they will have an impact on the existing censorship norms for films and television, which need to be revisited to strike a balance between creative freedom and the general interests of the society.

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