

REGULATION OF OTT SERVICES: AN INTERNATIONAL PERSPECTIVE*

Abstract

The role and function of internet cannot be undermined in today's times. Gone are the times where television was the only medium of entertainment now the OTT are the new medium for streaming all the live programs with many more features. An OTT service are the services provided through internet rather than the provider's managed network. This particular shift to the OTT platform has also triggered an impact on the economy, which calls on taking significant regulatory steps for this mechanism. The article is an attempt to analyse the regulation of OTT services from an international perspective. For the regulation of OTT ecosystem, it is important to firstly realise the constituents that require regulation. The debate concerning additional regulations on OTT is still underway as from the side of OTT it is realized that the sector is devoid of any telecom regulatory framework and therefore, it should be regulated while the other side argues that the services provided by OTT are distinct from that of traditional operators and therefore, they should be exempted. The issue needs to be determined in accordance with the social welfare principle which is the summation of consumer welfare and producer welfare and therefore, an international comparative study is made to substantiate the issue at hand.

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Introduction

Revolutionary technology has played an immense role in today's life that the internet has become a crucial part of our lives. It is nearly impossible to imagine a world when there is no internet. The internet content, applications, and services are evolving at such a rapid rate that it is creating a hallmark to and benefits the consumers which eventually drive the essential economic growth and also supports the free flow of information. In today's world, the time has come where people are dissociating themselves with the traditional television sets and associating themselves with the new 'Over the Top' or OTT platforms. Now the question arises with respect to the regulation of the OTT platforms. A point of immense significance is that in today's times the entry barriers to the creation of new services which are delivered online are comparatively lower than in the case of traditional media and communication markets. This eventually led to vigorous competition and innovation taking place across the entire market.¹ There is one school of thought which propounds that OTT providers should also be subjected to licensing and regulatory obligations which are similar to those imposed on traditional network operators. However, this article tries to argue that such a regulatory approach would have some unintended negative consequences considering the entire broader internet ecosystem which is inclusive of technologies that do not yet exist.

It is pertinent to note that over the past decade, contemporary literature has addressed some of the emerging factors which in a way influence the new economy of these platforms. The sign of growth that is taking place in the sector of OTT platforms and its use to develop into the discussion was to determine the best possible and the most appropriate regulatory approach that should be undertaken. Keeping in mind the circumstances it is essential that a multi-dimensional process for the OTT regulations should be undertaken. This particular type of multidimensional outlook is inclusive of some of the new and current influential factors such as business impact, infrastructural requirements, and areas of regulations based on a cooperative approach; this particular outlook describes a balanced regulatory framework that is more effective for the regulation of OTT. A point of contention is that in Turkey, attributing the factor of low penetration rates and lack of cooperative approach between the service providers and the telecom companies.

¹ It is important to note that a wide variety of terms are used to signify OTT content, Applications and other content services on varied digital platforms. However, it is important to note that OTT implies the delivery mode and does not cover technical aspects of technologies which is involved henceforth.

It is important to note that effective regulation and authorization of OTT services by the national authorities and the regulatory bodies are yet to be established and are in the discussion phase in many nations. A greater need is to analyze the fragments and constraints which are prevalent in encountering OTT regulations. In addition to this, it is imperative to note that some of the key factors like in the instant case are the technological development, and the business areas as identified should also be taken into consideration while aiming to regulate the platform.

Is Cinematograph Act, 1952 applicable to the internet?

In the case of *Padmanabh Shankar v. Union of India*,² the Karnataka High Court was confronted to decide the issue of whether broadcast or transmission of any film, cinema, serial and multimedia content through the internet within the four walls of house or office tantamount to public exhibition under the Cinematograph Act, 1952.

The Court held that the issue at hand is different in nature the functioning and working of the internet which essentially is a system of interconnected networks across the globe is different than the traditional system. Through the medium of the internet, there is a plethora range of movies and serials transmitted, and therefore, in consideration of how the operation of the internet took place, it is not possible to accept the contention that it should be treated equally with that of films and serials under cinematograph Act. The functioning of the internet contemplates the transfer of relevant files on account of the request of the users and hence the merit of Petitioners in the present case was dismissed.

Why Traditional Regulatory Frameworks are not applicable?

The OTTs are an essential and significant element of the broadband value chain. It can be noted that the innovation which is taking place in the OTTs has eventually led to a richer and more diverse internet which has in a way stimulated the consumer demand for broadband internet access which in turn is a key factor for network operators to upgrade and eventually expand the networks. This particular field requires due consideration because any attempts to impose further or additional regulations on it would definitely create business and certainty and low economic growth as well as investment. Also, if these regulations or rules come out as a result of ambiguity,

² Padmanabh Shankar v. Union of India (2019) W.P 6050 of 2019 (C) PIL.

unnecessary or misapplication of these rules hamper the innovation and will pose significant jurisdictional challenges for the matter of enforcement.

- The additional rules and regulations which will be formulated will certainly have the effect to cause potential harm to the global internet and innovation attributed to the fact that the matter of the internet is that of a global element which can affect another Nation from one particular nation in terms of impact, innovation, and availability of services. If this particular trend is followed then it definitely will lead to fragmentation of the internet which is opposed to the very basic character of the internet and it would be against the internet's openness as well as innovation.
- Through these particular additional rules and regulations, the entire compliance, as well as enforcement process, becomes tedious. The nature of the internet is essentially devoid of any borders and therefore the Complaints, as well as an enforcement mechanism for its regulation, becomes difficult, if not impossible. The point which is of immense significance is the fact that the OTT providers themselves don't know who access their applications and where those users are located specifically. Hence, the need is to strengthen the monitoring aspect of user's access to OTTs however the question of privacy can pitch in too and it would definitely impose a significant cost on the government as well as the providers and could restrict the free flow of information thus, infringing certain basic Human Rights including freedom of speech and expression.

The Conundrum of Additional Regulations

The members who are in support of additional regulations on OTT services place a critical argument that the rules on OTT service providers are essential so as to build a platform of equal footing with the others. This is because OTT derives an unfair advantage because they don't pay any telecommunication sector regulatory fee as well as the taxes in order to provide their services in addition to this there are no significant costs which are related to telecommunications regulatory compliance under the name of OTT. However, the veracity of this particular claim is seen not to be general in nature because the OTT providers do not offer the same services like that offered by the traditional operators.³ This is because there is a lack

³ It is imperative to distinguish between pure OTT and VoIP and messaging apps (e.g., Google Talk, FaceTime, Viber and WhatsApp) and apps that tend to interconnect like for instance, Skype-up this is because the interconnection involves regulatory compliances from the respective nations.

of critical infrastructure for OTT and they face a much more competitive Marketplace than the traditional operators. In addition to this, the nature of the internet is mainly global in nature as compared to that of the traditional telecommunication services that are basically offered from a region-to-region basis or a country-to-country basis.⁴

The point of consideration is that the OTT platforms are also in a symbiotic relationship with the traditional telecommunication service providers because the new OTT services grow consumer and business demand for the data communication and as the telecommunication providers emerged themselves in the notion of innovation and the further try to develop a large internet ecosystem. Therefore, the school of thought runs behind the idea that due to the imposition of unnecessary regulations on OTT the provider should not be affected by irregularity parity and the policymakers instead should consider the situation of facilitating or streamlining the regulatory obligations to promote investment, innovation as well as broadband access.⁵

Functioning of OTT: Argument against Free Riders

There is essentially a proposition which is made for the OTT providers stating that the OTT providers use the operator's networks to deliver their services and therefore going through this packed it implies that the order TV service providers are getting something for nothing whilst on the other hand, the network operators were all costs with no compensation at all. However, this simply is untrue because of the following reasons-

1. That is a heavy investment in the field of infrastructure by OTT providers and in this context, the price for the hosting as well as bandwidth services also increases which is imperative to deploy their content. Now, it is important to understand that this increase in payments benefits the entire internet ecosystem which is also inclusive of the network operators.⁶
2. It is also contended that there is a magnificent increase in the operator's network due to OTTs and it contributes to its growth for using OTT platforms, cloud services, video

⁴ OBSERVACOM, '*Pointers for the democratic measures for OTT Services in order to ensure protection of Digital rights and Freedom of Speech and Expression*' Sept, 2017 Issue.

⁵ *Ibid.*

⁶ MASON, '*Analysis on Report of benefit benefacting between the partnership of Content Application Providers and Service Providers.*'

streaming, and video conferencing they are bound to pay higher payments to utilise the facilities like manufacturing and preparing a content which drives huge consumer demand and this, in turn, increases the demand of consumer for more broadband services and this for speed and a large amount of bandwidth is usually priced as a premium by respective operators.

3. The particular imposition of ‘cost-sharing obligations’ on OTT providers would only curtail the development of new and improved content, applications as well as services. In addition to this, the additional costs of doing business would be burdensome for some well-established OTT platforms and this particular impediment would be an insurmountable task for the startups. Therefore, supporting this motion, it has been contended that the policymakers should not implement regulations to protect the revenue of any particular entity because such measures are not conducive as a social regulatory measure and the overall economic growth could be hampered because of regulatory constraints.⁷

Tyranny of Single Regulation

From the point of view of providing transparency as well as protection of consumer rights, it is equally important to emphasize that there are certain factors of the regulations that should be shared by all the services with the users and the customers and this particular duty is an intricate part and it should not be bypassed in any manner. However, passing single legislation for regulating all the OTT service providers seems to be unjustifiable because this particular sector is composed of a diverse spectrum. In a similar vein, the important principles concerning Public Interest that underpin the regulation of similar services should adequately be taken into consideration because these rights are to be protected in a differentiated and particular manner. The essential services such as the services offered by Financial Institutions, property rentals all those which indulge in services of providing local transports which essentially constitutes public services should not be regulated in the same manner because the modus operandi of both the areas of operations are different in nature.

To substantiate the fundamental aspect of the internet, it is important to note that the protection of human rights is mainly in the form of freedom of speech and expression lies at the heart of the internet. The technical support of the internet should also be taken into consideration in

⁷ *Ibid.*

terms of procedures and tools which are instrumental in building a per digital environment. For instance, irrespective of the platform the child protection lock must be maintained even though the day time protection programming which is worldwide recognised as an appropriate measure for Open TV does not apply to certain services of the internet.⁸ Also, special attention should be provided to the sphere where both the linear as well as nonlinear audiovisual services and activities are taking place because according to UNESCO these cultural goods and services are not simply commodities that are subjected to general rules of trade concerning cultural diversity. These measures are undertaken to promote the national audio-visual industries and cultural diversity and not the right of a particular state in question so this is more of an obligation. The European Union's efforts concerning the regulation of video on demand imply the significance as well as restrictions attached to it.

OTT Services not beyond Domestic Laws

The regulation of OTT services becomes very critical because the role of national governments crucial challenge concerning the regulation because the activities which take place this year are more of a global operation than limited to a particular nation. After all, the internet is a global common device and it is not restricted to a particular state it can be accessed from anywhere anytime. The challenge posted through this particular difficulty does not provide a justification for its service providers to operate outside of the legal national or supranational framework that each state decides to adopt. In a global environment, the party and issue about National jurisdiction to ensure that sovereignty is maintained. With respect to the issue of taxation, there is no other way to establish an effective mechanism for the rights of the people without adequately solving this issue, because if this particular issue is solved the nature of the conundrum can be looked into. This particular issue also mandates respect for the local laws on the matters which begins with the formal registration of the company in a particular country where it offers its services while on the other hand these issues also demand some global solutions to the global problems. Therefore, a straitjacket regulation cannot be viable but an option to blend self-regulation, co-regulation, and regulation by nation-states and multi-sectoral forums which essentially involves the participation of various civil society organisations as well as international agreements and commitments.

⁸ OBSERVACOM, '*Pointers for the democratic measures for OTT Services in order to ensure protection of Digital rights and Freedom of Speech and Expression*' Sept, 2017 Issue.

The form of multi-stakeholder environments better relates to the global internet governance because it involves the principles of Democratic participation of representatives of different interests and therefore, through this particular approach the characteristics of the global nature of the internet comes into the picture and mitigate possible violations and abuses for the same because of the views that come from various stakeholders. This particular process is also congruent with the recommendations of the special rapporteur of the IACHR and UNESCO.⁹ Moreover, it has been observed that there is a dire need for joint action which should be taken amongst the countries of the regions to obtain negotiation and enforcement capacity *vis a vis* private corporation that function at the global level. Like the entire discourse is developed on the fact that the internet is a global issue and therefore there is a dire need for Joint Action which should be taken into consideration with all the states and regions to negotiate to enforce operations that function at the global level. Analyzing the situation concerning the digital economy, it is important to note that Latin America is discussing the option of various initiatives in the light of regional agreements for Joint Action regarding the same subject matter.

Net Neutrality: A Fundamental principle of Internet

The regulation essentially is a critical activity because it enables to guarantee certain rights. In these times of technological advancements, it is essential for the companies that provide OTT services in the face of possible abuses by states or other actors in the digital ecosystem.

The principle of net neutrality is considered to be of paramount importance and it is stated that it should be expressly included in all the national legal frameworks with the scope and limitations recognised by this particular body concerning the rights concerning freedom of speech and expression because net neutrality in a way strives to maintain a balance between the freedom of speech and expression and the freedom to use a particular content. This principle was recognised as a significant condition regarding freedom of speech and expression on the Internet which essentially guarantees free access and choice of the user to use, send, receive or offer any lawful content as well as an application.

The operators of physical networks that are basically the Internet service providers are also subjected to this particular principle so as to ensure that they don't offer any discriminatory

⁹ *Ibid*

potential treatment to the OTP service providers in exchange for marketing agreement or any other reason.¹⁰

International Regulation

It is worthwhile to note some of the points regarding the international position to the regulation of OTT content regarding Indian aspect too. The OTT sector which is prevalent in India is comparatively less regulated than its offline counterparts consisting of the films and television sphere. It can be attributed that there is innovation in technology that is disruptive in terms of Technology and media-related aspects. Initially, there was a time of print media and radio which was later taken over by the television sector which in turn was later developed by setup boxes and now there is a time and demand for OTT content. Therefore, due to the changes in the platforms and the demand of the consumers, it is important to regulate the newly introduced sector of OTT. This particular journey can be viewed as flexibility which allows creative freedom to connect creators which fundamentally enables the OTT platforms to cater to the tastes and preferences of a wider audience also attributed to the global nature of the OTT.¹¹ One of the significant reasons behind the popularity of these particular platforms is attributed to the fact that there is the convenience of accessing the OTT platforms anytime from anywhere. However, it also has certain negative effects since the nature of the internet is global and therefore, everyone can access the content which is available online and this particular issue becomes problematic for various reasons. This particular problem demands regulation of some kind for the OTT sector.

In 2015, the German court held G-mail as a regulated telecom service.¹² This particular decision laid down the question as to how and whether to what extent the communication services are considered for regulation of OTT under European law. There also has been regulation of OTT services from the point of view of public security, now this term being wider the OTT platforms fear the arbitrariness of the same. Therefore, the aim is essentially to strike a balance between convenience or ease of doing business for OTT and regulating them in a sphere of legitimate means.

¹⁰ Liu, C.J., Chuang, Y.F. (2015), From sluggish to brisk: An analysis of Taiwan's cable TV digitalization policy. *Telecommunications Policy*, 39(11), 980-995.

¹¹ *Ibid.*

¹² Grünwald A and Nüssing C (2015).

Position in Singapore

It is important to know that the nature of laws on the regulation of OT content in Singapore is direct. It is fundamental to note that the regulatory body of Singapore basically issues the court practices which are applicable for audit and video-on-demand services that were required to be followed.¹³ Going through this particular manner, the code of conduct mandates that the service providers should classify their content in accordance to a characteristic order which is enumerated as below a) G for general, b) PG for parental guidance, c) PG13 for parental guidance for children below 13, d) NC16 for no children below 16 years of age, e) M18 for mature audiences above 18 years of age and f) R21 for content restricted two people of 21 years and above only.¹⁴

Subsequently, going through this particular characterization the service providers are allowed to offer content that is rated NC 16 and above only if provided for parental lock function on the particular platform. In furtherance to this, the use of content R21 can only be utilised if there is a default lock and the provider manifestly implements a reliable age verification mechanism for the utilisation of the same. Under the provisions of the code, it particularly mandates that the service providers should display the reviews as well as ratings and the elements in the content which form the same like for instance violence, language, horror which eventually leads to the rating of the particular platform needs to be displayed visually and significantly to the view was so that they are well informed of the nature of the content.¹⁵ The code essentially tries to strike a balance between the views with regards to the current policy, news and it adopts measures to maintain the accuracy of facts and the platforms.¹⁶

Position in Australia

To govern the OTT sector that is the Broadcasting Services Act, 1992 which is the principal legislation for the same subject matter.¹⁷ It is interesting to know how it is regulated through this particular principal legislation so it is regulated through a complaints-based mechanism which was introduced in the year of 2000s as the online content core regulatory scheme.¹⁸ The Act essentially covers both the content which has been classified and also the content which has not been

¹³ IMDA: '*Content code for OTT, Video-on-Demand and niche services.*'

¹⁴ *Ibid*, Classification (Part 1).

¹⁵ *Ibid*, Classifiable content elements (Part 5).

¹⁶ *Ibid*, Considerations underlying additional content (Part 6).

¹⁷ Department of Communication and the Arts, Regulation of Online Content.

¹⁸ Department of Communications, IT and the Arts, '*Schedule 5 to the Broadcasting Services Act 1992: Review of Operation,*' May 2004.

classified. It is important to know that the content which has not been classified is treated *at par* with the rating it is most likely to get if it is classified.¹⁹ As stated in the Singapore model there is a categorization of the schemes of the content that is restricted to the adults as well as children in addition to the content classification the scheme also appears to restrict access to certain kinds of content. Insofar as it can be stated that the Australian Classification Board has been classified both the line as well as online content using its tools and mechanism. With the use of Netflix, a monitoring program stated that the presence of a tool helps Netflix to segregate its content with a significant level of accuracy for the targeted audience without further delays.²⁰

Conclusion

It has been observed that across the globe, the content market pertaining to the OTT is still in its nascent stage and therefore it requires further development. During the pandemic, it has been observed that most countries are witnessing a sudden rise in the number of consumers in the platform concerning OTT. For the regulation of this particular platform, there are diverse views for its regulation some countries believe that the law is necessary and has become a mandate to regulate the space. However, the countries are also witnessing certain lacunas with respect to the implementation and regulation of law for the OTT platforms are mainly based on the internet. The countries like Australia appear to come up with the concrete regulator design for the online players which is in a similar way regulate the offline players that mean the country like Australia does not want to differentiate between the online and offline space and therefore it mandates law to govern both the spheres in a similar manner.

On the other hand, countries like Kenya and Indonesia aim to create a strict censorship regime warranting increased government interference. The laws which are legislated seem to have an objective of heavy government monitoring because of a simple reason that the excessive government interference could be detrimental. In a country like Singapore, it is trying to combine the ideas of both the school of thought wherein they are planning to protect their citizens from potentially harmful and misleading content and at the same time, they want to bring the online players under the same regulatory framework.

¹⁹ Submission by the Australian Communications and Media Authority to the Australian Law Reform Commission Inquiry into Serious Invasions of Privacy in the Digital Era – Issues Paper 43, November 2013.

²⁰ Department of Communications, Information Technology and the Arts, Review of the operation of schedule 5 to the Broadcasting Services Act 1992, May 2004.