

Cinematograph (Amendment) Bill, 2021 – Analysis of Recent Developments

Introduction

There is rampant film piracy in India, especially after the COVID-19 pandemic, where it rose by 62% between February 2020 to March 2020¹ perhaps due to rapid digitization in this period. The government has proposed amendments to the Cinematograph Act, 1952 (**Cinematograph Act**) in 2010, 2018, 2019 and 2021 pursuant to the observations and the recommendations made in the Mukul Mudgal Committee (2013), Shyam Benegal Committee (2016) and the Standing Committee on Information Technology (2019-2020).

¹ White paper - 'COVID-19: The demand for content and a new dawn for discovery' Edition 2 May 2020 published by MUSO

Background

In 2010, a draft of the Cinematograph Bill, 2010 was first introduced and circulated by the Ministry of Information and Broadcasting (**MIB**) in an attempt to bring about a change in the system of the film certification to a classification process. To examine these issues, the Mukul Mudgal Committee (**MM Comm**) was set up in 2013. In the MM Comm Report in 2013 (**MM Comm Report**), recommendations on issues such as: (a) formation of advisory panels; (b) guidelines for certification; (c) portrayal of women, obscenity and communal disharmony; (d) classification of films; (e) treatment of piracy; and (f) jurisdiction of the appellate tribunal were made. For addressing the same, the MM Comm suggested: (a) setting up a screening panel instead of an advisory panel; (b) criminalizing the act of unauthorized copying of a film; and (c) appointing at least one-third of women on the screening panel with an intent of effectively addressing sensibilities of women in the films.

Subsequently, the Shyam Benegal Committee (**SB Comm**) was set up in 2016 and its report (**SB Comm Report**) was issued which sets out broad guidelines for certification within the ambit of Cinematograph Act. The SB Comm looked into: (a) improvements to be made in the administrative aspects of certification; (b) procedures to be followed by Central Board of Film Certification (**CBFC**); (c) the appointment of members that would constitute the CBFC and its advisory panel; and (d) the need for a separate rating for films with explicit scenes of sex and violence. This led to the introduction of the Cinematograph (Amendment) Bill, 2018 (**2018 Bill**). Although the 2018 Bill seemed to be in the right spirit², it missed a lot of important recommendations that were made in the MM Comm Report and the SB Comm Report. This further led to the introduction of the Cinematograph (Amendment) Bill, 2019 (**2019 Proposed Amendment**).

Proposed amendments - 2019

On 3 January 2019, MIB issued a notification seeking public comments to the 2019 Proposed Amendment. The 2019 Proposed Amendment prohibited a person from using a recording device to make a copy or transmit a film, without written authorization of the copyright owner of the film. It aimed to tackle film piracy by including the penal provisions for unauthorized cam-cording and duplication of films in an exhibition facility. The proposed penal provisions of the 2019 Proposed Amendment also sought to override all the provisions of law which were contrary to Section 7(4) of the 2019 Proposed Amendment including the provisions of the Copyright Act, 1957 (**Copyright Act**) (as applicable) with respect to piracy of a film.

In February 2019, the union cabinet approved and presented the Cinematograph Amendment Bill, 2019 (**Cinematograph Amendment Bill 2019**) issued by MIB³ to be presented for approval of parliament. The Cinematograph Amendment Bill 2019 was in the same vein as the 2019 Proposed Amendment albeit with some minor tweaks. The Cinematograph Amendment Bill 2019 prohibited a person from using a recording device to make a copy or transmit a film, without written authorization from the author of the film. The Cinematograph Amendment Bill 2019 proposed to make film piracy an offence punishable with an imprisonment for a term which may extend to 3 years or with fine that may extend to INR 1 million or both. However, the Cinematograph Amendment Bill 2019: (a) did not make a reference to piracy taking place in an exhibition facility; and (b) stipulated that the permission of the author of the film should be sought (as opposed to the copyright owner).

In March 2020, the standing committee on the information technology (2019-20) asked the MIB to revisit the Cinematograph Amendment Bill 2019 to inter alia: (a) ensure consistency with

² Details not included for the sake of brevity

³ <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1562975>

other laws; and (b) to increase the penalty proposed enhancing the maximum fine (from a maximum of INR 1 million as proposed under the Cinematograph Amendment Bill 2019) to a range of 5% to 10% of the audited gross production costs of a film to punish the offenders. In addition, the committee constituted by the MIB: (a) suggested that a “fair use” provision should also be included when the laws were amended to provide adequate safeguards to innocent people using film clips for non-commercial purposes; and (b) pointed out that there was no mention of the minimum period for imprisonment and the minimum fine in the revised draft of the Cinematograph Amendment Bill 2019.

Abolishment of the FCAT

Pursuant to the Intellectual Property and Media & Entertainment Tribunals Reforms (Rationalization and Conditions of Service) Ordinance 2021 (**Ordinance**) the Film Certificate Appellate Tribunal (**FCAT**) was abolished with effect from April 2021. FCAT was a statutory body set up by the MIB in 1983, under Section 5D of the Cinematograph Act, 1952. Its primary job was to hear appeals filed by the applicants who were aggrieved by the decision of the CBFC, under Section 5C of the Cinematograph Act. The FCAT was headed by a chairperson and had four other members, including a secretary appointed by the Government of India and headquartered in New Delhi. The abolition of the FCAT means filmmakers will now have to approach the High Court whenever they want to challenge a CBFC certification.

Additional amendments proposed in 2021

On 18 June 2021 MIB issued a notification seeking public comments to the Cinematograph (Amendment) Bill 2021 (**2021 Proposed Amendment**) proposing two further amendments to the Cinematograph Act than those already proposed in 2019. The additional amendments are as follows:

- > **Introduction of age-based categories for film certification:** The 2021 Proposed Amendment has proposed further division to the existing U/A category into age-based categories- U/A 7+, U/A 13+ and U/A 16+ for certification of films. This amendment seems to be in line with the age-based restrictions recently implemented for Over-The-Top content providers under the Information Technology (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021 (**Intermediary Rules**).
- > **Penal provisions imposed for film piracy:** The amendments with respect to prohibition of unauthorized recording of films without the prior consent of the author remain the same in the 2021 Proposed Amendment as put forth in the Cinematograph Amendment Bill 2019. However, the penal provisions have been amended slightly and the penalties for an offense of film piracy are: (a) imprisonment ranging from 3 months to 3 years; *and* (b) a fine of at least INR 3,00,000 which may extend to a sum of up to 5% of the audited gross production cost of the film.
- > **Revisional powers to the central government:** The 2021 Proposed Amendment provides the central government with revisionary powers to re-examine any certified film which has obtained a valid certificate from the CBFC on the ground that the certified film will prejudice India’s (a) sovereignty or integrity; (b) security; (c) relations with a foreign state; (d) public order, etc. under Article 19 (2) of

the Constitution of India⁴. The provisions of Article 19 (2) are extremely broad and provide discretion to the central government without any recourse to the film industry.

- > **Film certificate in perpetuity:** Currently, the Cinematograph Act mandates that a certificate once issued by the CBFC is valid only for ten years. The 2021 Proposed Amendment stipulates that once a certificate is issued for a film it will be valid for eternity.

Key observations & analysis

Overriding the Copyright Act; Exhibitor Recordings & Display; Penalties

Both Section 6AA introduced by the (a) 2021 Proposed Amendment; and (b) Cinematograph Amendment Bill 2019 do not have the same nuances as Section 7(4) of the 2019 Proposed Amendment. Under Section 7(4) of the 2019 Proposed Amendment a person was penalized for recording an original film or exhibiting a pirated film in an *exhibition facility*. Section 6AA of the 2021 Proposed Amendment provision removes the undefined term, '*exhibition facility*' on which the application of Section 7(4) of the 2019 Proposed Amendment depended, thus making the interpretation even more vague. Instead of statutorily defining exhibition facility, the scope has been broadened to recordings *in any place*. Further, what constitutes '*copy of a film or a part thereof*' is not defined, which could imply that making or transmitting a copy of *any length* and for *every purpose* is prohibited.

The 2021 Proposed Amendment also overrides all laws which are contrary to the provisions of Section 6AA to be inserted in the Cinematograph Act. The provisions of the Copyright Act, though not specifically mentioned here, would continue to be prohibited and one would have to see how the option of fair use, parodies, non-commercial

recordings is treated once the amendment is passed.

Further, the 2021 Proposed Amendment interestingly provides for authorisation from the author of the film as opposed to the copyright owner as set out in the 2019 Proposed Amendment. However, due to the nature of industry and various assignments through the course of the making, distribution and completion of the film, it is not necessary that the first author of the film as defined under the Copyright Act will be the copyright owner of such film. This should be considered and reflected correctly in any amendment to the Cinematograph Act.

The 2021 Proposed Amendment links the fine for an offence of piracy to the gross production cost of the film. This may lead to exorbitant penalties in case of high-budget films, which should serve well as a deterrent. The 2021 Proposed Amendment also fails to distinguish between first-time offenders and repeat offenders, something that the Copyright Act does by prescribing different penalties. Courts would have to bear these details in mind when imposing penalties.

Piracy is already a punishable crime under the Copyright Act. The 2021 Proposed Amendment introduces an additional and more onerous punishment to that of the Copyright Act. Perhaps it would be in good stead to include harmonious provisions in all relevant laws (akin to the standardized grievance redressal system being set up for OTTs, broadcasters and traditional news / digital news platforms) to avoid statute shopping and multiplicity of actions for the same offence.

Age Rating

The age rating has been harmonised in the 2021 Proposed Amendment and the Intermediary Rules. However, it is interesting to note, the Cable Television Network Rules, 1994 read with the Self-Regulatory Content Guidelines for Non-News and Current Affairs Channels issued by the Indian Broadcasting Foundation have not been harmonised vis-à-vis age ratings and a gap

the freedom of speech and expression "in the interests of... public order."

⁴ Article 19(2) of the Constitution of India authorises the government to impose, by law, reasonable restrictions upon

remains in uniformity. So though films and other OTT content is subject to this age classification, tv serials / shows do not currently have the same classification system under law.

Censorship by CBFC

Various concerns and suggestions on the 2021 Proposed Amendment were submitted to the MIB by July 2, 2021, some of which are available in the public domain. These submissions relied on SB Comm Report and the MM Comm Report and state that the CBFC is a certification body which should not have the power of censoring and cutting films for grounds other than age certification. They contended that the CBFC often censors movies based on religion, political opinions etc. which according to them was not the intent of the Cinematograph Act and rules thereunder. A suggestion was made by various producers, etc. that the role and the powers of the CBFC should be clearly set out in the law when the amendment is made.

Revisional power of the Central Government

In *Union of India v. KM Shankarappa*⁵ (KMS Case) the power to review a film after its approval by the CBFC has been struck down by the Supreme Court of India. The Supreme Court was of the opinion that, '*Once an expert body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law and*

order situation and so there would be no ground for the Executive to review or revise the decision of the Board/ Tribunal. However, if the same is permitted, it would amount to interference with the exercise of judicial functions.'

In the 2021 Proposed Amendment, the government has suggested amending Section 6 (1) of the Cinematograph Act which would give the central government revisional powers thus, allowing it to re-certify a film that has already been certified by the CBFC.

Section 6 (1) of the Cinematograph Act has already been struck down as unconstitutional in the KMS Case. The amendments in the provisions of the 2021 Proposed Amendment are contrary to the ruling of the Supreme Court of India in the KMS Case. If this provision becomes the law, it will be interesting to see how many film producers challenge the constitutionality of the laws and what views courts will subsequently take on its interpretation as a law is being enacted contrary to a Supreme Court decision.

In addition, the producers and the film industry in general are not in favor of such unfettered discretion in the hands of the central government for revisionary powers under Article 19 (2) of the Constitution of India due to its broad nature, especially due to recent incidents with respect to shows such as *Tandav*⁶, *Mirzapur*⁷, *Suitable Boy*⁸ and *Bombay Begums*⁹ to name a few. Netflix has

⁵ (2001) 1 SCC 582

⁶ In the matter of *Aparna Purohit Vs. the State of Uttar Pradesh*, the Allahabad High Court on 25 February 2021 rejected the anticipatory bail plea filed by India Head of Amazon Prime Video in the case registered against her in connection with the web series '*Tandav*'. The FIR was lodged against the India head and 6 other co-accused on the grounds that the content of this movie is affecting the image of the police of state of Uttar Pradesh adversely, the certain Gods and Goddesses have been depicted in a bad light with the intention of inciting communal sentiments and the caste and community related utterances in the series have been made deliberately so that it may affect public peace.

On 05 March 2021 (Order passed in SLP (Crl.) No. 1983/2021 – *Aparna Purohit Vs. the State of Uttar Pradesh*), a bench of the Supreme Court of India, while calling for a need to regulate the content on OTT platforms a day prior, granted relief from arrest to the India head in the ongoing investigation. The Supreme Court of India also observed that the Intermediary Rules notified by the MEITY are merely in the nature of guidelines and lack provision for any action against digital platforms.

⁷ In the FIR registered on 17t January 2021 (Case Crime No. 0016 of 2021), the producers of the web series '*Mirzapur*' were charged for allegedly hurting the religious feelings and

portraying a particular community as linked to crime. In addition to this, the series also displays illicit relationships, slangs, abuses and projects the judicial system as false and polluted

In furtherance of this, on 18 February 2021 a writ petition was filed (Criminal Misc. Writ Petition No. 1665 of 2021, *Karan Anshuman & Ors v. State of UP*) that granted a stay on the arrest of the writers and directors of *Mirzapur* by making it clear that the investigation will go on and the petitioners should cooperate in the investigation and non-cooperation on part of the petitioners may give reasons to the State to file application seeking vacation of the interim order.

⁸ On 23 November 2020 a FIR was registered against two executives of Netflix for allegedly hurting religious sentiments through the web show *A Suitable Boy*. The FIR was a result of a complaint filed by a BJP Youth Leader who claimed that the kissing scene of a Hindu and Muslim character promote love jihad. At present, no reply has been filed by Netflix on this

⁹ On 18 March 2021, the National Commission for the Protection of Child Rights (NCPCR) issued a legal notice to *Bombay Begums* asking Netflix to stop airing the show for its inappropriate portrayal of children. NCPCR added that content like *Bombay Begums* could pollute the young minds and thus, Netflix should take extra precautions while streaming any content.

been in the news for consistently censoring its content to comply with Indian laws through the years and recently chose not to release its anime series featuring Shiva. Press articles also indicate that Amazon Prime also recently dropped Vishal Bhardwaj's show¹⁰ on a hijacking and that Zee 5 and Hotstar have also censored some content prior to airing in India.

Based on the language in the 2021 Proposed Amendment it appears that the decision of the CBFC would not be binding on the central government. However, this should be clarified prior to enacting the law. Further, there seems to be lack of clarity in terms of the number of times a certified film would be re-examined by the central government.

Conclusion

We are living in interesting times indeed. There are many reforms being made to Indian laws which regulate the media & entertainment space which may directly affect the content made available in India. One would also have to see how effective the courts are in enforcing the amendments (when implemented) in a time sensitive fashion.

¹⁰ Following the controversies involving web series Mirzapur 2 and Tandav, press reports indicate that Amazon Prime for now has also stalled a show by filmmaker Vishal Bhardwaj. The show was on the hijacking of Indian Airlines flight IC 814.

Vishal stated that despite clarifying that the web series is a fact as it has happened in the history and it is not against the current government.

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