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ANTITRUST IN INDIAN FILM DISTRIBUTION INDUSTRY AND ESSENTIAL LEGAL REFORMS

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Abstract

The author looked at the aspect of Competition in the Indian Film Distribution Industry, the production industry being a part of it, and has tried to cover aspects like market trends, geographical differences, market features, legal challenges through legal disputes and judgements. The Primary and Secondary material is collected through law libraries, Internet, Journals and Periodicals. The research work is empirical in nature with essence of doctrinal method being used. The article identified the on ground issues related to Antitrust and recommends suitable bases of improvements to sustain competition in the market.

I. Introduction

Since the inception of the film industry in India or rather the film distribution Industry in 1896. Indian market has largely been unconsolidated with increasing number of studios who are the producers in the market working independently of each other and different distributers being naturally prominent in their own area of operation. But in the recent times, more specifically after the Covid era, which allowed for a drastic growth in the numbers of regular consumers in digital entertainment which has a significant component of media and entertainment, more players have entered the market both at the producer level as well as the distributer level with OTT platforms gaining popularity in not only the youth population but all age groups. This growing market is getting digitized at the same time. The primary purpose of this study is to understand the competition situation of the market as a whole and to identify the issues related to competition in the film distribution market at the same time suggesting corrective measures which may further help to maintain a power balance in the market and contribute to protecting the interest of all the stakeholders of the industry.

The Film industry can be Separated from Film Distribution Industry due to the fundamental focus and positions of players in the market. they demonstrate an interplay between competition and monopoly as a produced film has the producer's copyright over it which in turn make it a monopoly. However, when the distribution process starts, multiple films are transacted forming a field of economic activities which are competitive in nature.

The Bare structure of the film distribution industry includes three levels which are production, Distribution, And exhibition.

- Production is the first part which is the name suggests Is the first step in the market that is Converting the story into a screenplay. Producers are the individuals Associated with the production house who cultivate and/or Avail multiple activities like directing, casting, Editing etc. Data required to convert the write up of a story into a screenplay in the form of a recording.[2435]
- Distribution is the second step in the film distribution industry Which generally includes the task of marketing a film and making sure that the produced film/content reaches the final stage of distribution.

[2435]Jehoshua Eliashberg, Anita Elberse, and Mark Leenders, "The Motion Picture Industry Marketing Science 25(6), pp. 638–661, 2006 INFORMS.

- Exhibition is the last step in the process which enables the consumers to view the product i.e. The screenplay. In India there are three channels of exhibition which are Theatrical, Television, and Digital. Other exhibition channels that exist worldwide are video on demand, Blu-ray and Pay-Tv subscriptions.

Largely, the article may cover the influence of associations in the region-based bifurcations of the industry like Hindi, Tamil, Telugu and Malayalam film industries. The study will also attempt to identify the possible horizontal and vertical arrangements that exist between different stakeholders in the film distribution industry which may have adverse effect on the competition. Revenue sharing arrangements can be an asymmetric consequence of differences in bargaining power between entities working on different vertical levels of distribution. The study will also cover arrangements relating to tie in agreements, Exclusive dealing agreements Which are the primary factors of the exhibition level. The study will also address the impact of traditional industry practices on the development of cinema in India. The data collected is primarily based on market studies conducted by the competition commission of India and different surveys and market analysis conducted thereof.

II. Market Trends and Features

While understanding the basic market structure of the Film distribution industry, the level of integration between different steps of the value chain is the primary component which can be broadly off two kinds, Horizontal integration and Vertigo integration. A horizontal integration can be Signified as a merger or exclusivity agreement between two or more producers, Distributors or exhibitors like the PVR-Inox merger that was announced in 2022. Vertical integrations are agreements between firms at different levels of the value chain for example a merger between producer and distributer. The recent trends of the industry show a boost in the set-up of in-house distribution services by the production houses. Almost 32.8 % of the total number of producers in India already provide distribution services. The primary reason behind this is the reduced cost of distribution. While, almost 18% of the entities have integrated all three levels of the value chain. If this trend is looked into in more specificity, vertical integration across these levels is seen more commonly in South Indian Industries and very uncommon in Bollywood.

Coming to the theatrical segment of the exhibition level, there is considerably high horizontal consolidation, with only Three major entities accounting for approximately 79% of total multiplexes in the country. The Indian cinema is grossly under-screened as compared to other major economies like the United States AND China. While the number of movies released more than twice the movies as compared to US. India had around 9,601 screens in 2022 as compared to 55,623 in the US.[2436] The primary reason for this is the lack of penetration in Teir 2/3 cities, which signifies that there is even more yet to be discovered potential for exhibitors. Multiplexes are the beneficiaries of institutional incentives and they actually account for the largest share in revenue from theatrical exhibition. At the time of liberalization, Many Indian states exempted these multiplexes from entertainment tax and other regulations to attract these businesses in their territories.[2437]

The film industry through its different segments has shown year on year growth in revenue, study shows that the three segments generated a total of INR 930 million in FY2019, which was even before covid, the estimated revenue of 2024 is INR 1.55 billion.[2438] This growth is mainly attributed to:

- changes in the demand and supply factors, the increase in disposable income, increment in the number of TV channels,

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[2436] https://www.plindia.com/resreport/multiplex-24-9-19-pl.pdf (accessed on 28 May, 2024).

[2437] Athique, A. (2009). Leisure capital in the new economy: the rapid rise of the multiplex in India. Contemporary South Asia, 17(2), 123–140. https://doi.org/10.1080/09584930902860843.

[2438] Deloitte, "Economic Impact of the Film, Television, and Online Video Services Industry in India, 2019".

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internet becoming more reachable by even the rural population, streaming platforms being developed in accordance with the Indian audience, and changing consumption patterns are the major factors.

- Accessibility of smartphones more specifically devices with screen size more than 6 inches has become easier. These are available in Indian market for less than USD 100 or less.
- Cost of Internet is also a big factor as a wide range of consumers have internet connectivity due to affordability.

As mentioned earlier combination of monopolistic and competitive factors govern the film market: movies aren't perfect replacements of each other, and every value chain involved in the film industry has the ability to set prices and devise marketing plans. To clarify, a movie is considered a monopoly because it has the legal status of a copyright. On the other hand, it is categorized with other movies, and these combined create a competitive industry or sphere of economic activity. Consequently, the easiest way to understand the value of a movie as a copyright product is as a monopolist seeking to maximize profit in a market where supply and demand competition dominates and equilibrium is mostly determined by these factors.

The main Focus that is there in the short run is profit maximization because the dealing with copyright products is inherently risky. There are three factors that make the film industry inherently risky:

- The product in question is non-rivalrous and partially excludable, The extent of ring fencing or virtual barriers against theft and other leakage of value is limited. For instance, one subscription of any OTT platform Can be used by multiple people by sharing credentials.
- Piracy has become more Prominent with the growing market and it has become more convenient than ever before to opt for pirated films instead of paying for the original content.
- The demand side of the market is unpredictable, This is due to the fact that consumer preferences are dynamic. There are only few ways to make an estimate of how a film will perform before production. It sometimes get so difficult to Break even the revenue and cost. There are multiple instances where even big budget movies with well known casts do not perform well overall.[2439]

Due to the inherent risk in the industry, The stakeholders are compelled to focus on recovery of investment As soon as possible and risk mitigation, for this, Some of the business models are being developed:

- **Dynamic pricing** Enables the players to charge customers according to the value linked to the product/ Content. Dynamic pricing can also be linked to special occasions, Days of the week etc. Thus it enables the distributors and the exhibitors to come as close to meeting the consumer's demands while mitigating the risk of the film business.
- **Tier-wise offering** Like Entertemporal Price discrimination, Where the films are priced higher in the first week than the coming weeks. This leads to higher revenues for the stakeholders in the value chain as in general sense the demand for a film is very high At the time of release of the movie and diminishes rapidly afterwards Due to further releases by other players. Another technique can be variable pricing, Which constitutes higher pricing for more features, Flight instance, A film recorded in 3D formats, Tickets for which would be available for lower price In normal print while it will be higher for the 3D print.
- **Micro-scheduling** The edge studios coordinate release dates to avoid too many competing movies from being released at the same time. It ensures maximum profit for the production houses. Exhibitors may consider shifting the original release date to a more opportune date. This was identified in the case of Shri Kshitiz Arya & Anr. vs. Viacom18 Media Pvt. Ltd & Ors.[2440]

[2439] Arthur De Vany, Hollywood Economics: How Extreme Uncertainty Shapes the Film Industry (London and New York: Routledge, 2005)

[2440] CCI Case No. 03 of 2018

- **Theatrical holdback** Is also widely used as a clause in an agreement between a producer and an exhibitor for exclusive exploitation rights that are generally time bound. It involves Imposing exclusive temporal limits within specified regions to enable producers to exploit their copyright in order to recoup their investment first. It exclusively gives the exhibitors an incentive to take risk by allowing it to showcase a movie while it is not available on other mediums. Generally, The holdback. In India is between one to three months while In other markets like in the UK, It can be 6 to 24 months.[2441] Exclusivity allows stakeholders in the film industry to recoup their investment in a film, be it the cost of production or the cost exhibiting a particular film (as opposed to another).

While it may be seen that the different mediums of exhibition are competitive in between themselves but it is not the actual situation. Different mediums are curtailed to meet the demand of different use cases and consumers. These mediums play a complementary role rather than a competitive role. Television and theatre are both push-based mediums, which means that consumer does not control the timing or type of content shown. OTT, On the other hand is a pull-based system, that means consumer can choose what they want to watch and when they want to watch it, While being versatile, The actual experience generally does not match with other two mediums. This also helps to counterbalance the inherent risk of film production business where is in a situation where one medium faces shortfall, The other medium keeps the continuous content creation intact and reduces the losses.[2442] A very effective example of this Can be the period of COVID pandemic where, on one hand the theatrical business saw a shortfall in revenues, On the other hand OTT platforms received a boost in India, Protecting the interest of production houses.

III. Challenges to Competition and Recommendations

A. Challenges

The issues in this competitive monopolistic market arises in cases of disparity in bargaining power while it comes to revenue sharing agreements between distributors and producers or exhibitors and distributors. Films and media content are not markets in themselves, their distribution chains can compete with each other forming a market, that means the products depend upon distributors and exhibitors to realize value. Therefore, even if a producer has copyright over a movie that is monopolistic in nature, they still need to rely upon products and services that are essential complements of a film.

In *FICCI Multiplex Association of India Vs United Producers/Distributors Forum*[2443], roducers/distributors associations came together to bargain with multiplexes for a larger share from box office collections. CCI found that UPDF engaged in cartel-like behaviour to make exhibitors accede to their demands. In the other case, Cinemax alleged that FDA is acting as a cartel to decide the rates at which Malayalam films will be provided for exhibition. Further, Cinemax argued that it will lead to absence of competition among distributors, drive it out of the market with other Malayalam film exhibitors, and harm consumers who will have to pay higher prices. CCI found that FDA's conduct in unilaterally raising prices violates Sections 3(1), 3(3)(a), and 3(3)(b) of the Competition Act. A similar situation was there in Cinemax vs Film distributors association. In the matter of Unilazer Ventures Private Limited ('Unilazer') vs. PVR Ltd. & Ors., The respondents had Formed a non-negotiable standard revenue sharing agreement While dealing with the producers, Although the informant was not

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[2441] Kehoe, K., & Mateer, J. (2015). The Impact of Digital Technology on the Distribution Value Chain Model of Independent Feature Films in the UK. International Journal on Media Management, 17(2), 93–108. https://doi.org/10.1080/14241277.2015.1055533.

[2442] Times of India, "Here's why 'Drive' got demoted from a theatrical release to a digital platform", Times of India, September 20, 2019, https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/heres-why-drive-got-demoted-from-a-theatrical-release-to-a-digital-platform/articleshow/71223069.cms (accessed on 28 May 2024)

[2443] Central Information Commission Case No. 01 of 2009.

able to demonstrate that the revenue sharing agreement was a function of anti-competitive conduct by the respondents. If you look at the outset of the condition, A non-negotiable revenue sharing agreement is clear misuse of dominant position as in the current case, PVR Limited holds almost 40% of the Indian cinema business.

The placement of stakeholders at different level of distribution value chain also plays a considerable role while it comes to bargaining power. There are a vast number of producers in the market as compared to exhibitors or even distributors. Matter of the fact is that three multiplex companies account for around 79% of the multiplex screens in the country.[2444] Revenue sharing between multiplexes and distributors typically follows a sliding scale arrangement. Under this arrangement, distributors and multiplexes agree on the minimum playing time for a movie and the share of box office receipts for either party. The share of distributors/producers progressively reduces in favour of the exhibitor. As a result:

- It can be seen that there is relatively a lower percentage of revenue shared in the first week of box office release. Hindi producers or distributors get around 50% of box office revenues in the first week of release. This is keeping in mind that multiplexes also account for other services like food and beverages and advertisements, Which account for more than 40% of the revenue.[2445] Reduces on the other hand fully rely on the revenues generated through content sales through all the three mediums. The only chance of leverage producers can gain is when the movies are exceptionally in demand, is only when producers have a higher bargaining power than multiplexes.
- Some regional producers corroborated that they too have limited negotiating power with multiplexes. Telugu film producers indicated that they can only call the shots when they have a big star attached to their film, but this just accounts for 10 per cent of the productions. Tamil film producers indicated that there are very few multiplexes in their state. It is Also a general practice that the promoters must also pay for all the in-theatre promotions as well as Other promotional events through the share revenue they have collected. This in turn creates an entry barrier for the smaller producers to enter the theatrical exhibition market.

The practice of exhausting the bargaining power goes far into leading to reduced customer choices and higher prices, which seems to be an emerging recent trend as the average price of tickets in theatres has increased by 35% in the last four years. It is indicated that consolidation in the multiplex sector may even prompt some producers to step away from making films and gravitate towards web series or other forms of programming, where there is less risk. Conversely, multiplexes indicated that consolidation will permit them to add more screens.

There are basically three different types of revenue-sharing agreements that exist between distributors and producers. The first type of agreement is a minimum guarantee (MG), in which the distributor promises the producer a certain amount that must be paid in instalments. Producers can reduce their risk thanks to these agreements, which also give distributors a bigger share of the profits that flow downstream. In southern India's regional film sub-segments, MG arrangements are more typical. It has been seen that larger production houses and distributors commonly enter into such type of arrangement.

There was also a trend of partiality given to small budget films in terms of screen time. To counter this, In April 2021, the Tamil Film Producers Council established a Release Regulation Committee to "de-clutter release and ensure that small-budget

[2444] PVR, "PVR Cinemas, Celebrating 700 Screens Investor Presentation", PVR Cinemas, March 2019.
[2445] n 9.

films get adequate screen time".[2446] As per a news report, the rules only permit one big release along with two or three small-budget movies. Also, in XYZ vs. Tamil Film Producers Council & Ors.,[2447] the findings in the Investigation Report stated that the "voluntary regulation of release of movies by the producers does not raise competition concerns". However, the Council relaxed the rules to allow producers to release any number of

movies during the 2021 Christmas and Pongal seasons. Bigger pictures get more screens, leaving small- to medium-budget films out. It is likely that the situation is temporary, given the backlog of pictures created by the pandemic. Thus, this situation must be evaluated on a case by-case basis, especially as there seems to be a mechanism in place to give smaller budget movies a fair shot at getting into theatres in Tamil Nadu.

Coming to digital cinema which was introduced to overcome the inefficiencies of the traditional theatrical medium. Conversely, the digitization of cinema offered a way for producers to have wider releases, concomitantly enabling smaller cinemas to partake in first releases and provide greater access of films to consumers. There were some intricacies with digital cinema that were raised by all the stakeholders suggested by CCI. These include lack of trust in new technology, Lack of financial incentive to switch, there was no clear case of indication of how it would help to grow the business, there was a component of piracy. Digital cinema players were able to overcome industry resistance to digitization on the basis of two deals with industry stakeholders. The first was establishing a nexus with smaller cinemas that had an irregular supply of content. Certain digital cinema players provided these cinemas with projectors and servers and shouldered the responsibility of serving as a content pipeline to the latter. In Unilazer Ventures ('Unilazer') vs PVR Ltd. & Ors ('PVR-O'),[2448] Unilazer alleged that PVR-O, which comprised major multiplex chains and their primary industry association, continued to charge VPF despite the expiry of a sunset period for such charges. PVR-O contended that it had made significant investments in equipment and also incur an annual maintenance charge for the same. It further highlighted that digitization significantly brought down the cost of film distribution and mitigated piracy to a considerable extent. CCI noted that there was no evidence to show that PVR-O colluded with other multiplexes to impose VPF on Unilazer. CCI also noted that there was evidence that PVR-O "appeared to be willing to mutually negotiate the concerns of" Unilazer.

The most prevalent issue related to competition in the film industry was related to associations. There have been multiple cases where associations were found to engage in anti-competitive activities like requiring members to deal only with members of the associations, Setting restrictive holdback periods, As was seen in the case of *Reliance Big Entertainment ('RBE') vs Karnataka Film Chamber of Commerce ('KFCC'),* RBE alleged that KFCC compels distributors to accept holdback restrictions for periods ranging from a few months to a few years, by providing anundertaking to this effect. They said that a breach of such conditions sometimes entails penalties, bans, or distribution of a certain percentage of the income on the basis of the prevalent realizable ratio. RBE provided examples of how the membership forms of various film trade associations facilitate such a practice. CCI observed that a long holdback period could potentially prevent a producer-distributor from recovering their costs and can cause losses. CCI also held that such holdbacks led to a restriction on the supply of films on media other than theatres and violated Section 3(3)(b) of the Act. CCI made similar observations in the matter of *Eros Ltd. vs CCCA*

[2446] https://www.thehindubusinessline.com/news/variety/small-film-producers-finding-it-tough-to-get-screen-time/article25719182.ece (accessed on 28 May 2024)
[2447] CCI, Case no. 07 of 2018.
[2448] Unilazer Ventures vs. PVR Ltd. & Ors. (Case No. 10 of 2019) http://www.cci.gov.in/sites/default/files/11-of-2020.pdf .

& Ors. *In Cinergy vs. Telangana*, CCI held that associations should not put any condition regarding holdback period for the release of films through other media, such as like CD, satellite, etc. These decisions should be left to the concerned parties. It is important to note that holdbacks negotiated between parties are acceptable, but not acceptable when they are unreasonable and imposed by an association or a group of associations that are not parties to a transaction. Other activities involved banning and boycotting films, Setting restrictive terms in their memorandum of association, Price fixation, Directing members to withhold payments, Discriminating against non-regional films etc.

Bands and boycotts are still a prevalent form of anti-competitive conduct. there are instances where cinema chains do not exhibit a producer's film unless screen dates or times have been closed with other chains as well. Cases where CCI found that associations engaged in bans and boycotts include Reliance Big Entertainment and Ors. v Karnataka Film Chamber of Commerce and Ors. (Case No. 25 of 2010); Reliance Big Entertainment Pvt. Ltd v Tamil Nadu Film Exhibitors' Association (Case No. 78 of 2011); Kerala Cine Exhibitors' Association v Kerala Film Exhibitors' Federation and Ors. However, there was no clarity on whether this conduct was through an association or some other group of individual entities. Content creators are sometimes threatened with boycotts by theatres if they opt for an OTT release for their film. Citing the example of the actor Dulquer Salmaan, the Film Exhibitors United Organisation of Kerala, an apex body of theatre exhibitors in the state, boycotted the actor and his production house after he released his movie Salute on an OTT platform. The theatre owners noted that Salmaan had violated an agreement with them.[2449]

B. Recommendations

In light of these prevalent practices in the negotiation of deals between producers and multiplexes, the recommends are as following:

- Producers should choose not to use templates for standard contract. Instead of using pre-made templates, agreements between producers and multiplexes may be drafted according to the kind of content being exhibited. This way, smaller projects that draw larger audiences in the following weeks can also be profitable for the producers of those projects. Aggregate agreements, in which multiplexes and producers share the aggregate, can be an alternative to sliding scale arrangements in this context.
- Fair and reasonable terms to producers for promotions, by sharing the costs of promotion, may be considered by multiplexes.
- Deal-making by multiplexes should be negotiable rather than multiplexes deciding terms unilaterally to upstream players.
- Multiplexes should refrain from any restraint on trade in exhibition that may impinge on producers' freedom of trade.

Associations must refrain from engaging in bans and boycotts and prohibiting industry from working with non-members. In addition, associations should not engage in any of the other conduct that has previously been found to be anti-competitive by the Commission. Associations must consider how alternate dispute resolution mechanisms such as mediation can be institutionalized to address any disagreement between stakeholders. Associations are advised to conduct events educating their respective members about the awareness on competition law and the consequent need for competition compliance. Agreements that are entered into between DCE service providers must ensure that leveraging, if any, should not be to the detriment of other service providers and block entry of newer entities. The exclusive tie-up arrangements and even bundling may have some inherent advantages, but overall, it should not become a tool for benefitting a few at the cost of other stakeholders.

[2449] Entertainment Bureau, "Dulquer Salmaan Banned By Kerala Theatre Owners After Salute Goes To OTT," News18, March 15, 2022, https://www.news18.com/news/movies/dulquer-salmaan-banned-by-kerala-theatre-owners-after-salute-goes-to-ott-4878398.html.