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**CONTENT REGULATION AND CENSORSHIP: OTT PLATFORMS**

Under the Guidance and Supervision of

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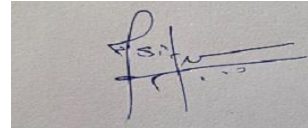
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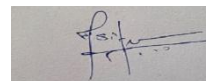
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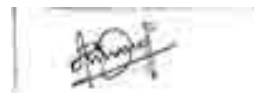
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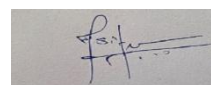
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## DECLARATION

I declare that this Dissertation titled “**Content Regulation and Censorship: OTT Platforms**” is researched and submitted by me to the National University of Advanced Legal Studies, Kochi, in partial fulfilment of the requirement for the award of the Degree of Master of Laws in International Trade Law, under the guidance and supervision of **Dr. Asif E**, Assistant Professor, and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.



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## **ABBREVIATIONS**

AIR	All India Reporter
AVOD	Advertising Video on Demand
BBFC	British Board of Film Certification
BJP	Bharatiya Janta Party
CAGR	Compound Annual Growth Rate
CBFC	Central Board of Film Certification
CEO	Chief Executive Officer
CINTA	Cine And TV Artistes' Association
DCCC	Digital Content Complaint Council
DMCA	Digital Millennium Copyright Act, 1998
DoT	Department of Telecommunications
DPCGC	Digital Publishers Content Grievances Council
E-Commerce	Electronic Commerce
E-Data	Electronic Data
EU	European Union
FIR	First Information Report
FTII	Film and Television Institute of India
HC	High Court
IAMAI	Internet and Mobile Association of India
IBF	Indian Broadcasting Foundation
IBDF	Indian Broadcasting and Digital Foundation
ICT	Information and Communication Technology
IMC	Inter-Ministerial Committee
IMDA	Infocomm Media Development Authority

IPC	Indian Penal Code
IPR	Intellectual Property Rights
IPTV	Internet Protocol Television
ISP	Internet Service Provider
IT	Information Technology
MEiTY	Ministry of Electronics and Information Technology
MHA	Ministry of Home Affairs
MIB	Ministry of Information and Broadcasting
NBA	National Board of Accreditation
OCCP	Online-curated Content Providers
OSP	Online Service Provider
OTT	Over the Top
PIL	Public Interest Litigation
RTUK	Radio and Television Supreme Council, Turkey
SC	Supreme Court
SLP	Special Leave Petition
SVOD	Subscription Video on Demand
TRAI	Telecom Regulatory Authority of India
TSP	Telecom Service Provider
TV	Television
TVOD	Transactional video on demand
UoI	Union of India
USSR	Union of Soviet Socialist Republics
VoD	Video on Demand
VOIP	Voice Over Internet Protocol

WP	Writ Petition
www	World Wide Web



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# CHAPTER 1: INTRODUCTION

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*“Content is King. Content is where I expect much of the real money will be made on the Internet, just as it was in broadcasting. When it comes to an interactive network such as the Internet, the definition of ‘content’ becomes very wide. No company is too small to participate. One of the exciting things about the Internet is that anyone can publish whatever content they can create. Over time, the breadth of information on the Internet will be enormous, which will make it compelling...” --- Bill Gates*

## 1.1: INTRODUCTION

The global entertainment industry has been witnessing a constant change over the past few decades owing to the era of digitalization. There is a societal transformation that has been triggered by the change in technology and this concept of ‘Technological Determinism’ has been described by Thorstein Veblen.<sup>1</sup> As a result, technology has become an inevitable part of our daily routine. The world has moved from films as a sole medium of dissemination of moving pictures to television and now to the internet<sup>2</sup>. The past five years have witnessed a boom in the industry with the entry of new technologies. This has resulted in enormous disruption of the traditional content delivery models of newspapers (first), and now broadcasters are being disrupted by digital content providers<sup>3</sup>.

The Indian Entertainment industry is a 1.82 trillion industry<sup>4</sup> and comprises of the digital sector, television, radio, print and cinema. The visual entertainment industry started off with Television channels and print media. For almost two decades, content available on TV remains unscathed with a few modifications here and there. This was followed by mobile phones and personal computers. The major changes began with the disruption of digital content, after smart-phones came into the picture. It is the era

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<sup>1</sup> Technological determinism is a reductionist theory that assumes that a society's technology determines the development of its social structure and cultural values. The term is believed to have originated from Thorstein Veblen (1857–1929), an American sociologist and economist.

<sup>2</sup> OTT STREAMING SERVICES - How to Regulate - BY SHUBHANGI,  
<https://www.readkong.com/page/ott-streaming-services-9919884>

<sup>3</sup> THE CHALLENGE OF MANAGING DIGITAL CONTENT, Paper for the ‘ITU-TRAI Regulatory Roundtable’, 21-22 August 2017, New Delhi, India.

<sup>4</sup> FICCI-EY Report, 2019.

of online videos and **Over the Top services (OTT)**, which enables users to consume content through the usage of internet.

While telecommunication players have been quick to respond to the rapidly changing advancements like the launch of cell phones and the internet, they appear to have been battling to keep up their pace with their latest competition, i.e., the OTT service providers. They are the youngest players in the market and have become the driving force in video consumption because of the rapid increase in the number of users across various platforms.

## **1.2 : MEANING OF OTT**

Over The Top or OTTs are the young, new players in the market of content exhibition and broadcasting. It indicates towards the services or applications accessible through the web, which does not require the support of any hardware. This refers to Internet-based content, applications or services that ride ‘over the top’ of networks and are accessed by the end-users via the internet. OTT platforms provide services to the end-user by bypassing the traditional operator’s network hence, dealing directly with the end-users.<sup>5</sup> These services are carried over a network that transit and deliver to users without the contribution of a service provider in the selling, provisioning and overhauling viewpoints. The Telecom Regulatory of India defines OTT Service providers<sup>6</sup> as: “*A service provider that offers Information and Communication Technology (ICT) services, but neither operates on a network nor leases network capacity from a network operator.*” In simple terms, Tata Consultancy Services defined OTTs as “*platforms that deliver film and television content, bypassing the conventional distribution streams of cable and satellite TV, from producer to consumer directly, an exchange driven by Internet.*”

Under its wide scope, OTTs include any sort of content, application, or service accessed via websites or mobile applications, including video streaming, e-commerce, messaging, social media, etc. The terminology ‘social media’ in itself is a wide term that includes a vast range of internet-based communication platforms like blogging,

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<sup>5</sup> Joshi Sujata and others, 'Impact Of Over The Top (OTT) Services On Telecom Service Providers' (2015) 8 Indian Journal of Science and Technology.

<sup>6</sup> Telecom Regulatory of India, 'Consultation Paper On Regulatory Framework For Over-The-Top (OTT) Services' (2020).

video-sharing, and social networking websites. Leading video streaming platforms like YouTube have over a billion unique viewers; Netflix subscriptions have reached over 118 million; Amazon Prime Video increased its base to over 36 million<sup>7</sup>. By delivering catch-up content, OTT platforms act as an auxiliary platform of monetization opportunities for a few conventional broadcasters. The introduction of OTT platforms has established a parallel system, increasing the quality as well as the quantity of the content pool. All leading platforms are launching lucrative content with attractive subscription offers to attract viewers and subscribers.

### **1.3: IMPACT OF OTT ON TELECOM SERVICE PROVIDERS**

Telecom Service Providers or TSPs are not included in the transmission of services provided by OTT platforms. Thus, they have no control over the application or the content such platforms provide. OTT's have introduced new patterns of content consumption due to the increase in accessibility, portability, and freedom of choice. A recent study depicts that telecom operators consider the building competition from OTT video streaming services a noteworthy concern<sup>8</sup>. Hence, TSPs are overwhelmed by the interference and presence of this humongous online environment, in the form of OTT services and their application. The increase in the quality of access network provided by the TSPs is the basic factor contributing to the growth of OTT platforms. Big players have entered the Indian OTT market and have designated a significant budget for creating exclusive content. Alongside a few numbers of OTT players, this has created a range of alternative choices and incentives for content creators, including financing sources, niche, and specific audience, and reach across countries<sup>9</sup>. India currently has 350 million online video viewers which are reckoned to reach 500 million by December 2020<sup>10</sup>. In India, any traffic of mobile data is projected to increase by CAGR 40% to reach 5.5 exabytes per month in 2021 and videos are estimated to lead 75 percent of the data traffic<sup>11</sup>.

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<sup>7</sup> Frost and Sullivan, 'Tuning Into OTT 2.0 -Making Digital Video As Good As Tv' (2020).

<sup>8</sup> Heavy Reading, 'Internet TV, Over-The-Top Video, & The Future Of IPTV Services' (2020).

<sup>9</sup> Deloitte, 'Technology, Media, And Telecommunications India Predictions' (2019).

<sup>10</sup> Streaming On Demand- Indian Infrastructure<

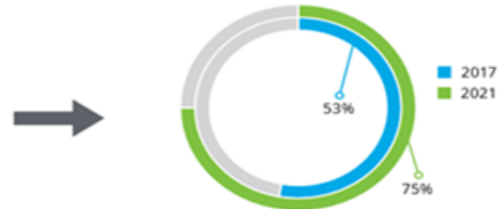
<https://indianinfrastructure.com/2019/03/04/streaming-on-demand/>> [Last accessed 21<sup>st</sup> July 2021].

<sup>11</sup> Deloitte, 'Economic Contribution Of The Film And Television Industry In India' (2018).

Mobile data traffic in India (exabytes per month)



Contribution of video to mobile data consumption



Source 1: Economic Contribution of the Film and Television Industry in India, A Report by Deloitte

The content on OTT Platforms is exceptionally diverse and caters to all sections of the masses. This ‘cutting edge’ technology is different from the current forms of mass communication available to us, and hence, the existing provisions of law and censorship fail to govern this system. There has been an upsurge in the spread of fake news, instances of the use of offensive language, pornography, derogatory and indecent contents and blatant disregard for religious sentimentalities through the Over The Top (OTT) platforms and social media<sup>12</sup>. This has led to a lot of controversies, and multiple litigations have been filed all across the country. Although the **OCCPs (Online Curated Content Providers)** adopted a Self Regulation model, there is a lot of discontent among the public, and the Apex Court directed the Centre to issue guidelines for the regulation of OTT content. On February 26, 2021 the **Ministry of Electronics and Information Technology (MeITY)**, under the powers conferred to it by Sections 69A(2), 79(2)(c) and 87 of the Information Technology Act, passed the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules)** for regulating the OTT services, social media platforms and digital media<sup>13</sup>.

*This study is an attempt to understand the growth and evolution of OTT platforms and aims to address the issue of censorship in video streaming services. It also tries to examine the loopholes within the Indian framework concerning the laws regarding*

<sup>12</sup> Online information from <https://blog.ipleaders.in/overview-ott-regulations-2021/>

<sup>13</sup> Ibid.



*regulation of these online platforms and provide suitable suggestions to overcome this challenge by analyzing the policies and legislation of foreign countries.*

#### **1.4: RESEARCH OBJECTIVES**

- To understand the types and categorization of OTT platforms based on various factors.
- To analyze how censorship plays an important role in governing OTT content.
- To understand the legislations/organizations governing conventional media and the internet in India.
- To analyze the situation of lack of regulatory framework over the video streaming OTT industry.
- To examine the legislations that regulates OTT content globally.
- To analyze the alternative of self-regulation adopted by the OTT industry.
- To analyze the newly introduced laws for regulation of OTT platforms.

#### **1.5: RESEARCH QUESTIONS**

- What are the factors leading to the sudden growth of OTT platforms in the country?
- Does the legal framework in India, pertaining to digital media, sufficient to regulate video content streaming on OTT platforms?
- How is OTT content regulated worldwide?
- Whether the self-regulation code is the best alternative available to the OTT Industry?

#### **1.6: HYPOTHESIS**

Currently, India does not have any policies/rules for content regulation on OTT services, which has resulted in a regulatory vacuum. However, there has been a lot of speculation regarding the introduction of legislation to govern OTT content and how it will affect the medium in the long run. It is imperative to balance the needs of the creators by protecting their freedom of speech and expression along with the

sentiments of the public, thus making self-regulation a better choice compared to government-imposed censorship.

### **1.7: OUTLINE OF THE STUDY**

1. INTRODUCTION
2. 360 DEGREE VIEW ON CENSORSHIP
3. ADVENT OF OCCP (ONLINE CURATED CONTENT PROVIDERS) IN INDIA
4. LEGISLATIONS GOVERNING DIGITAL CONTENT IN INDIA
5. REGULATORY ISSUES IN OTT PLATFORMS
  - CASE STUDIES
  - JUDICIAL INTERVENTION ON OTT CONTENT
  - SELF REGULATION CODE
  - ANALYSIS OF NEWLY INTRODUCED OTT RULES, 2021
6. REGULATION OF OTT CONTENT ON A GLOBAL SCALE
7. CONCLUSION

### **1.8: RESEARCH METHODOLOGY**

The researcher intends to follow the Doctrinal method.

### **1.9: LITERATURE REVIEW**

The concept of ‘content regulation’ has constantly evolved due to rapid modernization and advancement in technology along with changes in the economy, politics, culture, and institutions<sup>14</sup>. A modern society includes technical means of communication for reaching a mass audience, and censorship is a practice of prescribing regulations or determining the content based on political, economic, religious, and cultural circumstances that should or should not be disseminated<sup>15</sup>. Modification of content is also permitted under censorship so that its effect can be limited or ensuring the content is according to the prescribed guidelines. Content regulation was developed to

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<sup>14</sup> Online information from [www.etd.ceu.edu](http://www.etd.ceu.edu)

<sup>15</sup> Shubhangi Heda, 'How To Regulate OTT Services In India' [2019] Center for Media, Data and Society (CMDS).<<https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf>>[ Last accessed 02 September 2021.]

protect the masses from harm in the interest of public welfare<sup>16</sup>. In the words of **Pranesh Prakash**, “*The meaning of censorship solely depends upon the context. It relies on three factors which include – the reasons for censorship, the medium or parties subjected to it, and the means used for enforcing it*”<sup>17</sup>.”

In the words of **Fiss**, “*In most cases, censorship either involves the state actor prescribing laws and rules for content exhibition. This creates a framework for content dissemination. In other cases, it may be self-censorship wherein the content provider puts limitations on the content to be circulated based on certain factors*”<sup>18</sup>.”

**Daniel**, in the book ‘*Self-Censorship in Contexts of Conflict*,’ perceives censorship as “*a threat to the free speech regime, and as the technologies change, it brings different variations in the concept of content regulation*”. With the change in technology and the upcoming new medium of communication, a new form of censorship has developed in architectural censorship<sup>19</sup> and has reduced to form of physical medium.

As **Lessig** in his book ‘*Code and Other Laws of Cyberspace*’ claims, “*technology as a form of architecture introduces a new method, in which the physical medium can be regulated through an emphasis on both context and its surrounding environment. This regulatory framework should consist of laws, norms and prices. The role of technology as an ‘architecture of regulation’ is becoming increasingly important ,within the cyberspace*”<sup>20</sup>”. While technology plays a momentous role in forming regulations, this cannot be considered the sole factor, as different technologies are viewed and responded to differently in other societies. Therefore, in the views of **Whitley**, “*to understand the policy habitat of regulation, both technological and sociological factors need to be understood*”. To understand the framework for the

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<sup>16</sup> Ibid.

<sup>17</sup> Pranesh Prakash, *GLOBAL CENSORSHIP Shifting Modes, Persisting Paradigms* (Information Society Project, Yale Law School 2015) <[https://law.yale.edu/sites/default/files/area/center/isp/documents/a2k\\_global-censorship\\_2.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/a2k_global-censorship_2.pdf)>[Last accessed 02 September 2021].

<sup>18</sup> Owen Fiss, ‘State Activism And State Censorship [1991]Yale Law School<<https://digitalcommons.law.yale.edu/fss/11/>> Last accessed 02 September 2021].

<sup>19</sup> Daniel Bar-Tal, Rafi Nets-Zehngut and Keren Sharvit, *Self-Censorship In Contexts Of Conflict*

<sup>20</sup> Lawrence Lessig, *The Code In Law, And The Law In Code* (Berkman Center for Internet and Society 2000) <<https://cyber.harvard.edu/works/lessig/pcforum.pdf>>[Last accessed 02 September 2021].

future of regulation of content, it is essential to consider the role of technology in determining the relationship between the regulatory regime and society<sup>21</sup>.

**Bhowmik** realizes that “*within the Indian context, the films have been a powerful communication medium. Since the introduction of films in India, it has grown in its reach and its impact. During the advent of cinema in India, the policy of content regulation was largely based on the aim of the British to control the spread of nationalist fever, to curb the spread of socialist ideas*”<sup>22</sup>. Such intentions of a censorship policy are garbed under the concepts of public interest and morality.

Although even in the post-colonial context, many of these archaic ideas of censorship policy regarding protecting public morality have been taken forward in the future of legislation and policies<sup>23</sup>. **William Mazzarella** provides a very different approach to the understanding of film censorship in India. He states that cinema's effect as a medium in India is that it has completed the need for its censorship. The advent of cinema in India saw multiple concerns regarding the exhibition of Hollywood films in Indian Cinema. He relies on the concept of the “*performative dispensation which states cinema as a medium created the need for censorship, but censorship also reflects the reality of the society itself*”<sup>24</sup>. The debate regarding content regulation in India takes a new fever with technological development in the broadcasting sector. Although **Narayan** concludes that “*the legislation is always influenced by the ideals of public morality and cultural sensitivity within the Indian context.*”<sup>25</sup> **Taylor**, in his article, concluded that the coming up of ‘Web 2.0’ has revolutionized media from several aspects. Internet is seen as a new liberating force driving content across

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<sup>21</sup> Ian Hosein, Prodromos Tsiavos and Edgar A. Whitley, 'Regulating Architecture And Architectures Of Regulation: Contributions From Information Systems' (2003) 17 International Review of Law, Computers & Technology.

<sup>22</sup> Someswar Bhowmik, “From Coercion to Power Relations: Film Censorship in Post-Colonial India,” Economic and Political Weekly 38 (30): 3148–52, 2003

<sup>23</sup> Vernon J. Bourke, Moral Problems Related to Censoring the Media of Mass Communications, 40 Marq. L. Rev. 57 (1956).

<sup>24</sup> William Mazzarella, „Making Sense of Censorship: Censorium: Cinema and the Open Edge of Mass Publicity”, Duke University Press, (2013).

<sup>25</sup> Sunetra Sen Narayan „Regulation of the Broadcast and Cable Media,” Oxford University Press<<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198092360.001.0001/acprof->>,(2013).

borders and societies. This allows the consumers to select the type of content that they want to receive and view<sup>26</sup>.

**Powell** claims that *“the internet is a well of information and it cannot be controlled, the time of black and white television sets is gone. It has revolutionized communication and the exchange of information and has brought a new medium of expression to the forefront. The force of the internet has led governments and policymakers all around the world to rethink the way content can be regulated<sup>27</sup>”*.

There has been a proliferation of user-generated content all over online video portals. There has been an emergence of Over the Top Video streaming services. The Internet has introduced a new wave of content, that provides the consumers with the freedom for the reception of said content. Netflix, which is one of the world’s largest OTT platform, was developed in a movie rental format, but it has expanded in a new form of television<sup>28</sup>. The advent of video streaming services creates a more engaging environment. These growing trends establish the shift from cable television to OTT platforms. The regulators have been forced to think about how they want to perceive the new kind of broadcasting OTT media services. There is no one acceptable definition in case of OTT services. The Internet Telecommunication Union defines OTT services as:

*“Internet application that may substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services<sup>29</sup>”*.

Telecom Regulatory Authority of India (TRAI), which is the regulatory body of India, has borrowed the exact definition. There has been an enormous increase in the internet and mobile penetration in India, which has paved way for the availability of OTT services to the masses.<sup>30</sup> The media landscape has seen a tremendous rise in the digital subscription on the OTT services. The audio and video traffic penetration was expected to grow to 82% of the total digital traffic.<sup>31</sup> According to a report on the

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<sup>26</sup> Astra Taylor, *“The People’s Platform: Taking Back Power and Culture in the Digital Age”*, New York: Metropolitan Books, (2014)

<sup>27</sup> Christine Cooper, *“Television on the Internet: Regulating New Ways of Viewing,”* Information & Communications Technology Law”,(2007).

<sup>28</sup> Amanda D. Lotz, *„The Television Will Be Revolutionized“*, New York University Press, (2007).

<sup>29</sup> 'ICT Regulation Toolkit' (*ICT Regulation Toolkit*, 2020) <<http://www.ictregulationtoolkit.org/index>> [Last accessed 02 September 2021]

<sup>30</sup> Joshi Sujata and others, 'Impact Of Over The Top (OTT) Services On Telecom Service Providers' (2015) 8 Indian Journal of Science and Technology.

<sup>31</sup> Deloitte, 'Technology, Media, And Telecommunications India Predictions' (2019).

advent of OTT platforms in India, the user base of Netflix and Amazon Prime Video increased by 5.37 million and 12.64 million, respectively, in the year 2017.<sup>32</sup>

Further, as observed by **Rajkhowa**, the government and other regulatory bodies have not tried to reinvent their policies with respect to the change in technologies. The conversation has been oscillating between concepts of state censorship to self-regulation<sup>33</sup>. Currently, the dilemma that authorities face is subjecting the OTT media platform to the framework of broadcasting policy or films or broader contours of internet regulation.

One of the primary things that the above literature has pointed out is the lack of studies over the situation of the regulatory vacuum on OTT platforms in the country. Although the literature has shown multiple factors leading to the rise of OTT platforms in India, there are hardly any research papers from the regulatory viewpoint. They have also shed light on the factors that have affected content viewing on OTT platforms. However, questions still arise on whether that content over OTT platforms should be censored in any manner like its counterparts, cinema, or television. A detailed study is necessary to analyze the self-regulation framework that would be preferred by the VoD industry. This research paper tries to understand the self-regulatory framework adopted by the industry in India rather than the alternative of government-imposed censorship. Similarly, it also makes an attempt to analyze the newly introduced OTT laws<sup>34</sup> and how it will prove favourable in the current scenario.

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<sup>32</sup> Ibid.

<sup>33</sup> Arjun Rajkhowa, 'The Spectre Of Censorship: Media Regulation, Political Anxiety And Public Contestations In India (2011–2013)' (2015) 37 Media, Culture & Society.

<sup>34</sup> The Ministry of Electronics and Information Technology (**MeITY**), under the powers conferred to it by Sections 69A(2), 79(2)(c) and 87 of the Information Technology Act, passed the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules)** for regulating the OTT services, social media platforms and digital media.

# CHAPTER 2: 360 DEGREE ON CENSORSHIP

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## **2.1: INTRODUCTION**

Censorship is an amalgamation of multiple concepts that are interrelated, the most prominent one being free speech. It is the ability to express or articulate one's ideas freely without any limitation or interference<sup>35</sup>. The term 'censorship' goes back to the office of the censor established in Rome in 443 BC<sup>36</sup>. It is derived from the Latin term 'censere,' which means 'to give one's opinion or assess.'

This chapter examines the evolution of censorship and how India has tackled this concept over the years. It also dwells into the laws of the Constitution and the Cinematograph Act, 1952, followed by its amendments. This chapter confines itself only to the **audio-visual medium** and not the print media.

## **2.2: HISTORY AND EVOLUTION OF CENSORSHIP**

During the olden times, censorship enforced the prevalent orthodox customs in a community or area. Plato is given credit as the first thinker to have formulated a 'rationale for intellectual, religious, and artistic censorship'. His work 'The Republic' defines an 'ideal state,' and 'official censors would prohibit mothers and nurses from relating tales deemed bad or evil.' Plato's arguments in favor of censorship are two-fold: -

- i. Censorship as a tool to protect children from 'evil' influences;
- ii. Censorship is a tool to protect society.<sup>37</sup>

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<sup>35</sup> Priyanka Ghai, Dr. Arnind P Bhanu, 'CENSORSHIP IN INDIA VIS-À-VIS FREEDOM OF SPEECH: COMPARISON OF THE EXTENT OF CENSORSHIP LAWS IN INDIA AND ABROAD', Journal of Critical Reviews ISSN- 2394-5125 Vol 7, Issue 13 (2020).

<sup>36</sup> Someswar Bhowmik, Cinema and Censorship -The politics of Control in India (Orient Black Swan Delhi 2009)

<sup>37</sup> Plato's Ethics and Politics in *The Republic*, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/plato-ethics-politics/>

Plato believed that it is vital for the nation's survival. He expects the citizens “to maintain a higher level of moral standards to maintain a level of national pride, even if it means curbing those thoughts that undermine such values and morals.”

The very first incident of censorship was recorded was in 399 BC. Socrates was sentenced to death for his ‘corruption of youth and his acknowledgment of unorthodox divinities’.

During the 19<sup>th</sup> century, one of the most significant events was the French Revolution, and censorship was rampant back then. People were not educated, and they used pictures, art, and caricatures to express their ideas.

The shift in power dynamics witnessed the advent of newspapers and print media. The First World War followed by the Second witnessed censorship being given free rein, and newspapers communicated the events to the masses. They were used to boost the morale of the citizens and also to instill fear among the people.

The period of 1950-1980s, which was also known as the Red Scare<sup>38</sup>, saw the arbitrary use of censorship in film and media, and any deviation from a democratic or republican way of life resulted in the arrest of citizens. This era saw the two superpowers<sup>39</sup> greatly wield censorship as a weapon to impose control on the ideas and expression of citizens.

The use of censorship to limit the spread of information is continued to date, though it has been relaxed in democracies worldwide. However, State-imposed censorship is upheld in countries like China and the erstwhile USSR.

### **2.3: FILM CENSORSHIP IN INDIA**

India is an amalgamation of multiple cultures, races, religions, ethnic groups and is best described by ‘Unity in Diversity’. Censorship in India primarily remains an ‘instrument of state intervention, defined and governed by the parameters of the law’. The role of the state is to control through enactment and implementation of public policy.

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<sup>38</sup> A Red Scare is the promotion of a widespread fear of a potential rise of communism, anarchism or other leftist ideologies by a society or state. The name refers to the red flag as a common symbol of communism.

<sup>39</sup> United States of America and the Soviet Union (U.S.S.R)



Cinema has always been an integral part of our nation and is interwoven in the social fabric of our culture. It is defined as the art of colorful moving images<sup>40</sup>. This phenomenon started during British rule, wherein it was a show of state intervention in the social transactions among the members of the subject community<sup>41</sup>. During the Pre-Independence period in India, the first major legislative attempt to control cinema occurred in 1918 when the Cinematograph Act, 1918, was enacted. In the immediate post-independence scenario, the government allowed regulation of films to be carried out under the Cinematograph Act 1918, wherein the power of certifying films for exhibition remained with the state governments<sup>42</sup>.

As a fervent and potent tool of free ideas and expressions, cinema is considered as a touchstone of freedom of expression. As understood in its entirety, freedom of expression can encompass within itself a broad, inclusive list of multiple media. 'Expression' through the mediums of speech, art forms, literary work, music, etc., is considered one of the many wings of the idea of free thought. Besides these, cinema also serves as one of the most significant contrivances of free thought and reasoning.

The right of 'freedom of speech and expression' is one of the most sacred rights guaranteed under the Constitution of India<sup>43</sup>. Article 19(1)(a) of Part III of the Constitution states that all citizens shall have a right to freedom of speech & expression<sup>44</sup>. Cinema is widely accepted as a mode of expression that receives protection under Article 19(1)(a). Article 19(2) lists down a set of reasonable restrictions on the freedom guaranteed under Article 19(1)(a). These 'reasonable restrictions' include the interests of sovereignty and integrity of India, security of State, friendly relations with any of the foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense<sup>45</sup>. Cinema has the power to unite and divide people, irrespective of barriers like age and

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<sup>40</sup> Gabe Moura, What's Cinema, Elements of Cinema, [www.elementsofcinema.com/cinema/definition-and-brief-history](http://www.elementsofcinema.com/cinema/definition-and-brief-history), (August 30, 2021).

<sup>41</sup> Someswar Bhowmik, Cinema and Censorship -The politics of Control in India (Orient Black Swan Delhi 2009)

<sup>42</sup> Amandeep Singh, A Critical study of Film Censorship in India: A Study of post -independence period (2017), (unpublished thesis, RML National Law University, Lucknow), <http://hdl.handle.net/10603/186551>

<sup>43</sup> A CRITICAL OVERVIEW OF CENSORSHIP IN INDIAN CINEMA, <http://docs.manupatra.in/newslines/articles/Upload/AAA76064-887D-43A3-8EFB-A11D35C73C2F.pdf>

<sup>44</sup> The Constitution of India, 1950.

<sup>45</sup> Ibid.

other social constructs. Hence, the Supreme Court has also stated on multiple occasions that censorship is essential due to the wide range that cinema offers. The framers of our Constitution were of the belief that it was necessary to permit certain restrictions as they wanted to ensure a proper balance between the liberty guaranteed and the social interests specified in Article 19 (2)<sup>46</sup>.

The Cinematograph Act has also laid down similar restrictions and guidelines based on which film certification is to be done<sup>47</sup>. Similarly, the regulatory power over cinema is vested to the Union Parliament under Entry 60 of the Union List of the VII Schedule<sup>48</sup>. States enjoy limited jurisdiction regarding the regulation of motion pictures under Entry 33 of the State List<sup>49</sup>.

The landmark verdict of *KA Abbas v Union of India*<sup>50</sup> is based on censorship in films. The Apex Court deduced that “*a motion picture has the ability invoke emotions deeply compared to any other art form. A film can be censored on the grounds mentioned in Article 19(2) of the Constitution*<sup>51</sup>”. The Supreme Court stated that “*censorship of films, their classification according to the age groups and their suitability for unrestricted exhibition with/without excisions is considered a valid exercise of power in the interest of public morality, decency, etc*<sup>52</sup>. This is not to be construed as offending the freedom of speech and expression under Article 19<sup>53</sup>”.

#### **2.4: THE CINEMATOGRAPH ACT, 1952**

On 29 August 1949, a Film Enquiry Committee was created and named by the Government of India under the chairmanship of S.K. Patil. The committee’s instruction was:

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<sup>46</sup> Santokh Singh v. Delhi Administration, (1973) 1 SCC 659.

<sup>47</sup> Cinematograph Act, 1952

<sup>48</sup> Constitution of India, 1950

<sup>49</sup> Ibid.

<sup>50</sup> K.A. Abbas v. Union of India, (1970) 2 SCC 780

<sup>51</sup> Ibid.

<sup>52</sup> “Censorship in OTT Platforms: The Necessity”. <http://www.penacclaims.com/wp-content/uploads/2020/07/Sriram.pdf>

<sup>53</sup> Ibid.

- Examining the film industry’s organizational growth and giving directives for indicating the setbacks on which further development needs to be directed<sup>54</sup>;
- Examining the measure for adopting a practical instrument for promoting national culture, wholesome entertainment, and education<sup>55</sup>.

This Committee paved the way for the Cinematograph (Second Amendment) Act, 1949, which was created to make a centralized structure of the censorship of cinematographic films, which led to the birth of the Central Board of Film Censors (CBFC). The Cinematograph Bill was introduced in Parliament. The Bill received the President’s assent on 21st March 1952, after being passed by both of the Houses. It came into effect from July 28 1952<sup>56</sup>.

**Section 3** of the Cinematograph Act deals with the establishment of the Central Board of Film Certification, the purpose being to certify films that are explicitly intended for public exhibition.<sup>57</sup> The question of interpretation concerning this arises because the term ‘public exhibition’ has not been defined in the said Act or anywhere in its rules. The Delhi High Court, when dealing with this question in the case of *Super Cassettes Industries v. Central Board for Film Certification*<sup>58</sup>, held that: “*Even in cases where there is no audience gathered to watch a film in a theatre, but individuals or families are watching films in the confines of their own homes, such viewers would still do it as members of the public and at the point at which they view the film that would be an ‘exhibition’ of such film.*”

**Section 4** of the Act provides for the procedure in which films are to be examined. The Board has to watch and examine films and sanction their release. There is a pre-defined procedure that each film undergoes. The filmmakers must provide an application stating the intention to release the movie, after which screening is conducted, and the film is given its certification. A film is permitted to be released when it gets through multiple stages of screening and after necessary cuts that the

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<sup>54</sup> Online information from <https://www.cinemaazi.com/industry-information/committee-reports-the-film-enquiry-committee>

<sup>55</sup> Ibid.

<sup>56</sup> Indian Cinema: Censorship Laws, Freedom of Speech <https://legaldesire.com/wp-content/uploads/2020/11/LDIJL-ISSUE-23-VOL-23-84-123.pdf>

<sup>57</sup> The Cinematograph Act, No. 37 of 1952, A.I.R. Manual (6<sup>th</sup> Edition), Section 3.

<sup>58</sup> *Super Cassettes Industries v. Central Board for Film Certification*, (2014) Del. SCC 136.

Board prescribed. The sanction of the movie for ‘public exhibition’ can be restricted to members of any profession or any class of persons regarding the nature, content, and theme of the film.<sup>59</sup> Thus, the Act authorizes the Board to modify the movie to suit the audience and community guidelines. The Board also can restrict movies based on the audience's age (‘A’ rating) or even ban them.

“According to CBFC, the following are certain violations that agitate the minds of the public:

- a. exhibition of an ‘A’ certificate film to a non-adult;
- b. exhibition of an ‘S’ certificate film to audience other than those for whom it is intended;
- c. exhibition of a film in any form other than the one in which it was certified. Such violations are known as interpolations. Interpolations can be described as follows:
  - i. re-insertion of prints in a film for exhibition those portions which the Board deleted before certification of the film;
  - ii. insertion in prints of film portions which were never shown to the Board for certification;
  - iii. exhibition of ‘bits’ unconnected with the certified cinema.
- d. exhibition of films that was denied a certificate (banned);
- e. exhibition of uncensored films with forged or duped certificates of other films;
- f. exhibition of films without providing certificates by the censor board”.<sup>60</sup>

## **2.5: EVENTS THAT LED TO THE CHANGE IN THE CINEMATOGRAPH ACT**

The advent of liberalization witnessed a robust challenge in the form of satellite television. Satellite television was not subjected to censorship, and it provided viewers easy access to films and programs prohibited by the state. The film industry compounded this issue by pressing for more liberal censorship guidelines concerning sex and violence to compete with satellite television. The nineties saw a vigorous debate about how to compete with new forms of entertainment and protect the culture

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<sup>59</sup> Section 4(ii) of Cinematograph Act, 1952

<sup>60</sup> Online information from <https://www.cbfcindia.gov.in/main/certification.html>

and traditions of India from the onslaught of Western civilization and values represented in the new media.

There was a lot of public hue and cry over explicit sexuality, which started in the early nineties.<sup>61</sup> Certification of these movies was encountered by protests by various cultural groups, leading to multiple debates over censorship. The situation was that the labels ‘banned’ and ‘censored’ were dropped lightly, and they became advertising gimmicks to entice the global and local audience. The censorship fueled desire, resulting in an increase in revenue for filmmakers and film industries. All of this compelled the Government to revise and re-issue the censorship guidelines.

In the 1970s, films like ‘Aandhi’ and ‘Kissa Kursi Kaa’ were seen to have delineated the biography of the then-Prime Minister Indira Gandhi, for which one was denied a censor certificate and the other was withdrawn from the cinema halls. ‘Aandhi’ was re-released a few weeks later when Indira Gandhi herself cleared it after consulting some critics. On the other hand, ‘Kissa Kursi Kaa’ ended up being the most disputable film ever constructed in the history of Indian cinema. The film was accused of criticizing the functioning of the Government under Indira Gandhi. The then ruling party minister burned the film reel, and the film had to be re-shot. The film industry faced a troublesome time amid the Emergency that Gandhi plotted. Filmmakers and artists who refused to cooperate were blacklisted, and films were denied exhibition certificates by the Censor Board.<sup>62</sup>

The film industry was feeling suffocated by the existing legislation. Late Vijay Anand<sup>63</sup> proposed a review of the Cinematograph Act in the year 2002. He made several suggestions, including ‘granting the CBFC fiscal autonomy and selecting members of advisory panels on professional rather than political considerations. One of his suggestions also included introducing an ‘XA’ certificate that would legalize the screening of soft-core pornographic films in select cinemas because he believed that, unlike prohibition, certification would reduce desire in this regard.

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<sup>61</sup> Exhibition of movies like Khalnayak (1993), Bandit Queen (1994), Fire (1996) etc

<sup>62</sup> Madhavi Goradia Divan, Facets of Media Law (EBC Lucknow 2006)

<sup>63</sup> Ex- Chairman of CBFC and a well-known filmmaker.

On the contrary, T. Subbarami Reddy submitted an amendment to the Rajya Sabha in 2002 that called for ‘strengthening the restrictions against excess sex, vulgarity and violence’ which he said were “*corroding the morals and values of the people and thereby creating a negative impact on the minds of the people, especially the youth.*” This amendment sought to change not only the guidelines but also the structure of the boards. It noted that women had limited representation on the board and that their representation needed to be increased to police films that depicted women in a derogatory manner. All this led to a demand for restructuring of the CBFC, and the 2010 Draft Bill was framed.

#### **2.6: DRAFT CINEMATOGRAPH BILL, 2010**

The Ministry of Information and Broadcasting (MIB) prepared a Draft Cinematograph Bill of 2010 to replace the decades-old Cinematograph Act 1952. Some of the noteworthy changes proposed by the bill include:

- It widened the scope of the term ‘cinematograph,’ which defined it as: “*any apparatus, product or device, analog or digital or any other technology, used for the representation of moving pictures or series of pictures.*”
- It provided a new definition for ‘exhibition’ was defined as “*display of a cinematograph film or making available a cinematograph film to persons not directly connected with the production, distribution, promotion or certification of the film.*”
- Regarding the structure of the CBFC, the draft proposed that women constitute at least one-third of its members and the advisory panels. It also offered the introduction of professional credentials for the appointment of the Chairperson, members of the board, and advisory panels.
- Further, the draft bill suggested two new certification categories, ‘twelve and older’ and ‘fifteen and older,’ to replace the UA certificate following the British Board of Film Certification (BBFC).

#### **2.7: MUDGAL COMMITTEE REPORT, 2013**

In 2012, the controversy over the ban on ‘Vishwaroopam’ by the Tamil Nadu Government raised many questions on the implications for free speech. The Central Government thought it was time to update the Cinematograph Act, 1952. A

Committee was instituted under the able leadership of Justice Mukul Mudgal, retired Chief Justice of the High Court of Punjab and Haryana. Other members included Lalit Bhasin, Leela Samson (ex Chairperson of CBFC), and film personalities Sharmila Tagore and Javed Akhtar.<sup>64</sup>

The Committee proposed a model Cinematograph Bill in a report submitted to the Ministry of Information and Broadcasting. It had also made recommendations to constitute advisory panels to create guidelines for 'certification and issues such as the portrayal of women, obscenity, and communal disharmony; classification of films; treatment of piracy; and jurisdiction of the Appellate Tribunal.'<sup>65</sup>

However, this Report faced a lot of flak. The Committee had offered surprisingly little original thought and research into the fundamental and much-delayed reform of cinematograph law. Many of the 'new' provisions in the draft Cinematograph Bill are true 'cut-paste versions from the existing Cinematograph (Certification) Rules 1983. The Report did not discuss anything from the reports by earlier inquiry committees on film censorship.<sup>66</sup> Similarly, the Report missed the audience's perspective in its entirety. The report's tone is as if there are only two stakeholders in the entire scheme of cinematograph law, viz., the Central Government and the Film Industry.<sup>67</sup>

## **2.8: SHYAM BENEGAL COMMITTEE REPORT, 2016**

On January 1<sup>st</sup>, 2016, the Shyam Benegal committee was set up to lay down rules and regulations for film certification, and give adequate space for artistic and creative expression. The Committee had been set up to address a growing disquiet that the then CBFC chief Pahlaj Nihalani had overstepped his brief, censoring films instead of certifying them. The Report was submitted on April 29, 2016, but there has been very little progress on it so far. The Report says that the Central Bureau of Film Certification (CFBC) should primarily issue certification to the films depending on their content. It lists out the circumstances under which the body should be allowed to cancel certification, i.e., when any content contravenes the provisions of Section 5 (B)

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<sup>64</sup> Online information from <https://www.thehindu.com/news/national/mudgal-panel-submits-report-on-governing-cinema/article5218032.ece>

<sup>65</sup> Film Certification Appellate Tribunal (FCAT).

<sup>66</sup> Rangachariar Committee (1927-28), Khosla Committee (1969)

<sup>67</sup> Detailed Analysis on the Mukul Mudgal Committee Report, 2013 from <http://rtifoundationofindia.com/detailed-analysis-and-comments-report-sri-mukul-mu#.YS8C6o4zZPY>

1 of the Cinematograph Act. This covers material that goes against the interests of sovereignty and integrity of India, security of state, friendly relations with foreign countries, threatens public order, decency and morality, or involves defamation or contempt of court.

The Committee asked for amendment of several sections of the ‘archaic’ Cinematograph Act of 1952.<sup>68</sup> It also recommended “amendment of Sections 5A, 5C, 5E and 6 of the Act which talks about film certification categories, appeals, suspension, and revocation of films and the powers of the central government to revise a film respectively. They suggested that the revising committee draws from a Central Advisory Panel, which has ‘different criteria for selection’ against the Regional Advisory Panels.

The Committee lists out objectives to protect children and adults from potentially harmful or unsuitable content. In addition, it helps the audience to make a better-informed decision, and artistic freedom is maintained. The Committee made recommendations regarding the size of the Board and its functioning. It also mentions that the Chairman should only play the role of a guiding mechanism and not involve themselves in day to day activities of CBFC. The scope of CBFC should be restricted to categorizing the suitability of the film to audience groups based on age and maturity.

After the criticism that the Mukul Mudgal Committee Report received, it was hoped that the Shyam Benegal Committee would address all the necessary concerns. However, this Report also bailed all expectations and failed to create any essential impact.

## **2.9: STANDING COMMITTEE REPORT, 2019**

The Chairperson of the Committee was Dr. Shashi Tharoor. The Committee considered and adopted the Report at their sitting on 13 March 2020, in both houses. The Cinematograph (Amendment) Bill, 2019, as introduced in Rajya Sabha on

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<sup>68</sup> ‘Archaic’ Cinematograph Act of 1952 likely to be amended after Shyam Benegal headed committee’s recommendations”, Daily News & Analysis (DNA), 1 May, 2016, available online at <http://www.dnaindia.com/india/report-archaic-cinematograph-act-of-1952-likely-to-be-amendedafter-shyam-benegal-headed-committee-s-recommendations-2208104> (last accessed 30 August 2021).



12.02.2019, was referred by the Hon'ble Speaker<sup>69</sup> to the Standing Committee on Information Technology on 22.02.2019 for examination. The Committee, heard the views of the I&B Ministry on the proposed amendment, considered complications of the said Bill and they felt the need to have an in-depth examination of the Bill.

The Committee recorded evidence of multiple stakeholders. The Committee was mainly concerned with piracy causing severe financial harm to the film industry in India. It was not worried about issues of film certification since the Secretary of the I&B Ministry suggested segregating them and assured the committee that the latter would be dealt with separately. The Committee recommended prescribing a minimum punishment for the offense of piracy (penalty up to three years or a fine up to ₹10 lakh) to provide some deterrence. It seeks to introduce new sections to the 1952 Act to prohibit the recording of films in theatres. It also suggested defining the term 'knowingly' to prevent misapplication of the law. This led to the Cinematograph (Amendment) Bill, 2019.

#### **2.10: CINEMATOGRAPH AMENDMENT ACT, 2021**

On 18<sup>th</sup> June 2021, the I&B Ministry, sought comments from the public on the Cinematograph (Amendment) Bill, 2021, with the objective of amending the Cinematograph Act, 1952. The Bill *inter alia* aims to introduce age-based sub-categories of U/A certification, prohibit and penalize unauthorized recordings or transmission of a copy of a film during its exhibition, and grant the Central Government revisional powers over a film already certified for public exhibition by the CBFC<sup>70</sup>.

Some of the suggestions made by this committee found its way into the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, for regulating the content available on OTT digital platforms.

“The proposed amendments are as follows:

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<sup>69</sup> Smt.Sumitra Mahajan (16<sup>th</sup> Lok Sabha)

<sup>70</sup> Online information from <https://iprmentlaw.com/2021/07/01/controlling-piracy-or-expression-an-analysis-of-the-cinematograph-amendment-bill-2021/>

1. The category U/A will be subdivided based on age into U/A 7+, U/A 13+ and U/A 16+;
2. Empowering the Centre to direct the CBFC to reconsider its certificate to a film if they are of the view that it does not conform to the ‘Guiding Principles’ under Section 5B(1)<sup>71</sup>;
3. The Centre has also recommended adding Section 6AA targeting piracy. A minimum punishment of 3 months (can go up to 3 years) was accepted by the Government, after accepting the judgments of the Committee. A fine of 3 lakhs was also introduced while removing the 10 lakh cap. It may now be extended to 5% of the audited gross production cost or with both<sup>72</sup>.”

This amendment has also received a lot of criticism from members of the film industry. The proposed amendment does not introduce anything new except taking away the autonomous power of the CBFC and empower the Centre for further certification<sup>73</sup>. The biggest issue is that the legislature introduces more stringent punishments when the already existing ones are constitutionally challenged.

### **2.11: CONCLUSION**

To conclude, India is a country that has formulated a Constitution that allows great freedoms by adding reasonable restrictions to it. Censorship is one such tool used by the government to ensure peace and stability among people belonging to various strata of society. Initially, censorship was introduced to ensure that cine-goers enjoy films in their right spirit and not get enraged over any piece of content showcased to them. Still, eventually, the shift to global issues became necessary, and hence to regulate the same was an arduous task. The amendments from time to time were incorporated to

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<sup>71</sup> Under the section, CBFC cannot certify media content that goes against the “*interests of the sovereignty and integrity of the State, security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence*”.

<sup>72</sup> Online information from <https://www.deccanchronicle.com/nation/current-affairs/080721/explainer-cinematograph-act-amendment-all-that-you-need-to-know.html>

<sup>73</sup> Explainer | What is the Cinematograph Act amendment?  
<https://www.deccanchronicle.com/nation/current-affairs/080721/explainer-cinematograph-act-amendment-all-that-you-need-to-know.html>

ensure a mechanism followed to applaud the artistic creativity and meet up the moral, cultural, and religious norms in India.

The CBFC discharges its function of certification in accordance with the following provisions:

- The Cinematograph Act 1952
- The Cinematograph (Certification) Rules, 1983
- Cable Television Networks (Regulation) Act, 1995 read with the Cable Television Network Rules, 1994.
- Prevention of Cruelty to Animals Act, 1960.
- Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003.
- Emblems and Names (Prevention of Improper Use) Act, 1950.
- Prevention of Insults to National Honour Act, 1971.
- Drug and Magic Remedies (Objectionable Advertisements) Act, 1954.
- Indecent Representation of Women (Prohibition) Act, 1986.

Despite its apparent qualities, if applied too severely, censorship cannot be considered a good thing. It is essential to let individuals express themselves in a democracy. Stimulated by technological developments and globalization, new-age filmmakers are coming up with unconventional themes that nobody has dared to explore. With the penetration of the Internet, violence and other forms of questionable content of any degree can be easily accessed through smartphones, thereby challenging the credibility of any censorship. The Judiciary has also recognized that films are a powerful and an effective medium of speech and expression, the right people achieved after a long struggle for independence.

# CHAPTER 3: ADVENT OF OTT PLATFORMS IN INDIA

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## 3.1: INTRODUCTION

Digitalisation, concurrence of media and the advent of 'Prosumer'<sup>74</sup> culture on new media platforms has transitioned the way of Media; leading to the introduction of the most recent trend in the Media and Entertainment Industry- OTT Platforms. Services provided by OTT platforms tend to have a hybrid character as they combine both the aspects of passive consumption mode of television and the consumer choice of the web<sup>75</sup>.

This chapter examines the type of digital content available to users, factors that led to the evolution and growth of OTT platforms in India and the classification of various subscription models available to users.

## 3.2: DIGITAL CONTENT AVAILABLE TO CONSUMERS

India has a significant historical backdrop of producing huge volumes of video content, and now the demand for digital content in the country is expanding at an exponential rate. These platforms are being increasingly used for communication, video, and music streaming. OTT platforms advantage users by providing:

- An array of new internet-based services, like e-commerce, social media, banking, and insurance, e-government, online education, among others;<sup>76</sup>
- Customized and personalized video content in the form of online VoD sites like Hotstar, Hulu and Netflix which enables the users to modify and maximize their media consumption;<sup>77</sup>

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<sup>74</sup> The term 'prosumer' was first introduced by Alvin Toffler in his 1980 book, *The Third Wave*, and explores the idea that as society shifts towards the post-industrial age, the producer and the consumer have amalgamated into the 'prosumer'. The prosumer actively works to produce the services and goods they buy and consume.

<sup>75</sup> Chuck Tryon, "TV Got Better: Netflix's Original Programming Strategies and Binge Viewing." *Media Industries*

Journal 2 (2), 2015, see <http://dx.doi.org/10.3998/mij.15031809.0002.206>

<sup>76</sup> PWC, 'Video on Demand: Entertainment Re-imagined' (2018).

- Communication services at significantly lower costs, or even at no expense, essentially OTT VoIP and messaging applications, such as Skype, WhatsApp, Facebook Messenger, and FaceTime.<sup>78</sup>

For the purposes of further clear analysis, digital content available to consumers can also be divided into two categories depending on the source of content generation namely:

- **User-generated content** such as that available on networking platforms like Snapchat, Facebook, YouTube, etc.<sup>79</sup>
- **Commercial content** provided by broadcasters online, as well as OTT providers like Netflix, Amazon Prime Videos, Hulu, ZEE5 and other regional competitors.

The term OTT encompasses an overly broad category of services and applications. These can be divided into two categories:-

- **Messaging and Voice Services:** The global annual SMS traffic amounted to approximately 8.16 trillion message around 2013, compared to 18.3 trillion Apps/OTT compared to 18.3 trillion Apps / OTT players. This category includes services provided by platforms like WhatsApp, Hike, Skype, Viber, etc. The subscriber base of WhatsApp in India has risen to 70 million owing to its free of cost subscription model.<sup>80</sup>
- **Video and Audio content:** The introduction of this category of content has resulted in a significant drop in the number of viewers for regular TV services and cinematographic films. India's internet video subscriber base in 2015 was 15 million and is increasing rapidly.<sup>81</sup> Entertainment platforms like YouTube, Vimeo, Netflix, Spotify, Saavn, Voot, Hotstar, Amazon Prime are included in this category.

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<sup>77</sup> Ibid

<sup>78</sup> Ibid.

<sup>79</sup> Burroughs BE, „Streaming Media: Audience and Industry Shifts in a Networked Society“ Iowa Research Online (2015).

<sup>80</sup> Telecom Regulatory of India, 'Consultation Paper On Regulatory Framework for Over-The-Top (OTT) Services' (2020).

<sup>81</sup> Disha Rajkumar and others „A Study On Mobile Usage And Data Penetration In India Using Predictive Analytics“ (2017) International Journal of Latest Trends in Engineering and Technology.

TRAI has divided the services available over the internet provided by the OTT platforms under six heads which are as follows:-

- OTT Communications
- OTT Media
- Commerce
- Internet Cloud Services
- Social Media
- Web Content

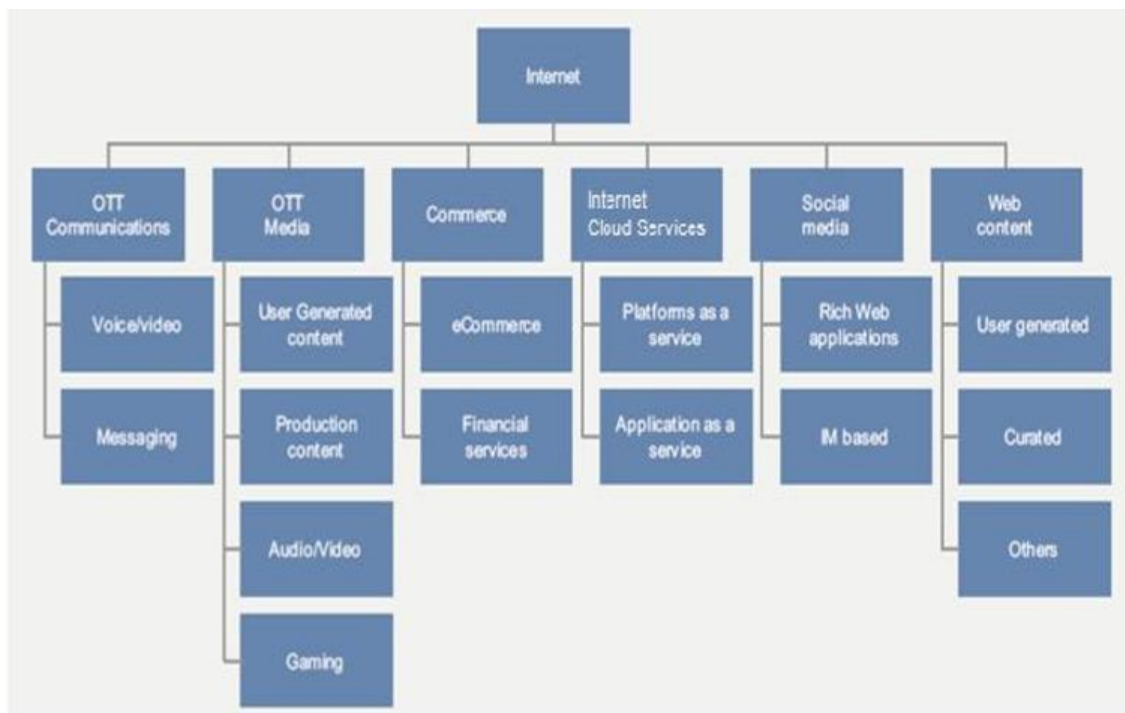


Figure 3.1: Division of Services over the Internet<sup>82</sup>

### **3.3: FACTORS LEADING TO OTT GROWTH IN INDIA**

OTT platforms' growth in India is at its inflection due to contributory factors such as:

➤ **Improving connectivity and fall in data prices**

With increasing competition in the telecom sector, industry leaders like Airtel, Vodafone- Idea, Jio, etc are improving their services along with

<sup>82</sup> Source: Consultation Paper on Regulatory Framework for Over-the-top services, TRAI

providing lucrative packages at competitive rates and providing internet access at a cheaper rate to attract customers. Access to affordable services has propagated a steep development in data usage and added to the move towards digital content in India. This new era of affordable data in the country began with the advent of Jio. Statistics show that after the introduction of Jio in 2016 the quarterly consumption of data increased approximately ten times. Its influence has made access to online content on OTT platforms effortless, straightforward and affordable, creating a latent demand for digital consumption by the Indian consumer.<sup>83</sup>

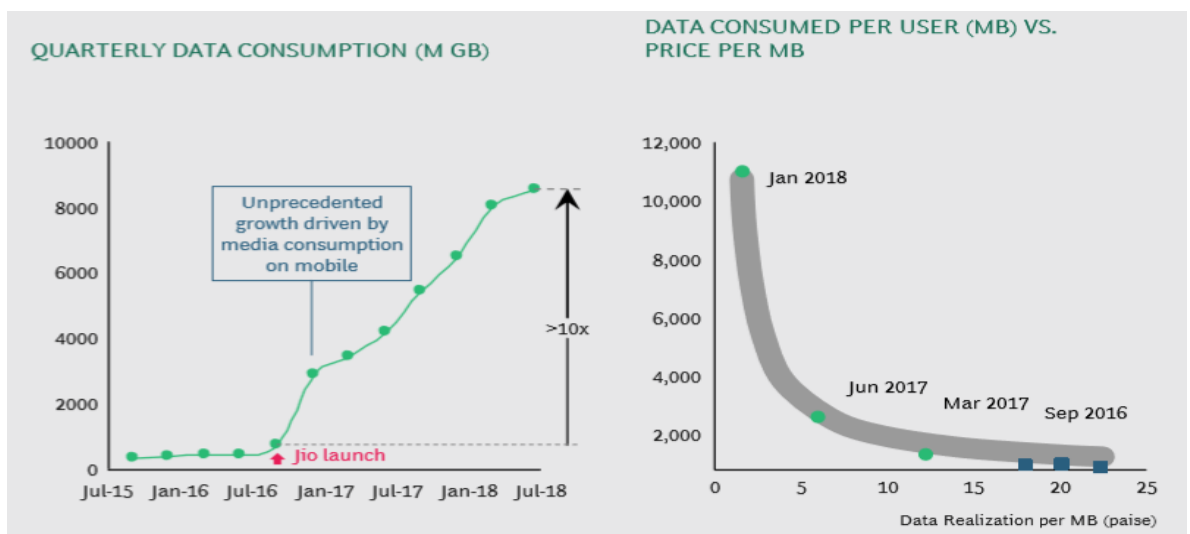


Figure 3.2: Impact of introduction of Jio on data consumption<sup>84</sup>

The telecom services providers like Vodafone-Idea, Jio, Airtel, use aggregator based models i.e., assembling content through various platforms and offering a payment interface. They are likewise providing access to numerous OTTs as a separating component to improve consumer retention and acquisition. For instance, Vodafone offers an exclusive subscription of

<sup>83</sup> The Boston Consulting Group, 'Entertainment Goes Online- A \$5 BILLION OPPORTUNITY' (2018).

<sup>84</sup> Source: *Entertainment Goes Online A \$5 Billion opportunity, A Report by Boston Consulting Group*

ZEE5 to all its users; Airtel offers a one-year exclusive subscription to Amazon Prime Videos to its postpaid consumers, etc.<sup>85</sup>

### ➤ Increased Smartphone penetration

With projected smart-phone penetration in the Indian economy and an increase in the purchasing capacity of the individual, OTT consumption in India has dramatically increased. This rise was more of an international phenomenon as smart-phones became an important part of every individual's life. As of now, there are approximately four billion smart-phones across the world, of which the Indian market accounts for over 450 million.<sup>86</sup>

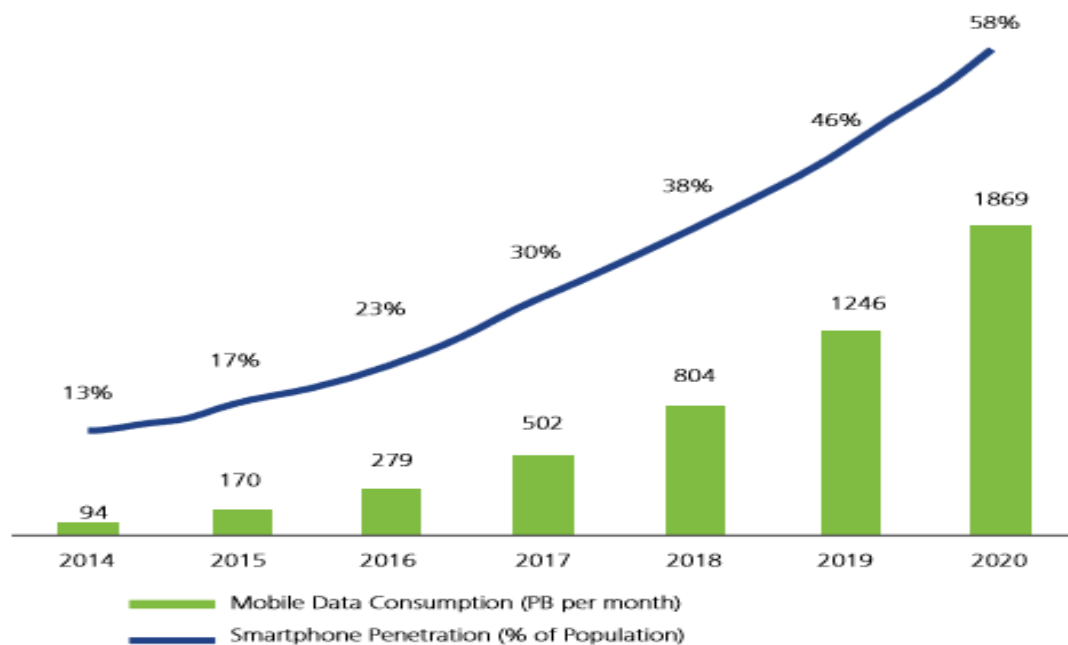


Figure 3.3: Projected Smartphone Penetration and Mobile data consumption in India<sup>87</sup>

### ➤ Favourable demographics

<sup>85</sup> 'India's Leading Provider Of Prepaid & Postpaid Mobile Services In India - Airtel.In' (Airtel, 2020) <<https://www.airtel.in/press-release/01-2018/airtel-and-amazon-join-hands-to-offer-one-year-of-amazon-prime-membership-with-airtel-infinity-postpaid-plans>> [Last accessed 23 February 2021]

<sup>86</sup> The Boston Consulting Group, 'Entertainment Goes Online- A \$5 BILLION OPPORTUNITY' (2018).

<sup>87</sup> Source : Economic Contribution of the Film and Television Industry in India, A Report by Deloitte



India is witnessing significant shifts in income distribution patterns with a rise in the 'affluent and elite' economic class. The penetration of Internet access into rural India has proven to be a favourable factor in the growth of OTT platforms in India. India influences OTT growth as most of the users of OTT services (75%) belong to the age group of less than 35 years<sup>88</sup>. Such factors combined with growing connectivity, improved networks, stronger internet access, multimedia service-capable mobile handsets and application development systems have contributed to a spurt in online content consumption.

➤ **Increase in supply of quality content**

These platforms are successful in the country as they have followed the mantra of 'content is the king'. OTT platforms when initially penetrated the Indian market began with catch-up shows. The arrival of foreign competitors such as Netflix and Amazon Prime Video, which carried with them an abundance of rich and original content, pushed the established Indian players to step beyond only catch-up, syndicated and licensed content. India is an extremely diverse environment and a one-size-fits-all solution would have dire consequences for companies. Historically, YouTube has set a trend for Indians to watch online content. The value of personalized community content was recognized by foreign OTT providers such as Netflix and Amazon Prime.<sup>89</sup> In order to remain on the Indian market and contend with local players including Hotstar and Voot, who have exposure to the vast regional and local content library of their respective parent companies, the foreign OTT players are creating unique local content such as Mirzapur, Jamatara, etc to attract the viewers. A vast variety of material accessible has drawn a huge number of users around the nation with differing sensitivities and preferences. Nearly all of India's major and popular broadcasters have introduced their own OTT platforms, e.g. Hotstar, Voot, Zee5, SonyLiv, etc. Such networks brought their vast collections of television content online, augmented by additional content by licenses and originals.<sup>90</sup>

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<sup>88</sup> Dentus Aegis network, 'DIGITAL ADVERTISING IN INDIA' (2020).

<sup>89</sup> Disha Rajkumar and others, "A Study On Mobile Usage And Data Penetration In India Using Predictive Analytics" (2017) International Journal of Latest Trends in Engineering and Technology.

<sup>90</sup> PWC, 'Video on Demand: Entertainment Re-imagined' (2018).

These players in India enjoy a powerful brand identity and audience recognition powered by their large libraries of television content. International OTT platforms like Netflix, Amazon Prime have expanded their services into India a few years back and are increasing rapidly in terms of the user base. While some OTT companies are operating effectively in the local area, other global players are taking steps to invest in local content including, Netflix which is planning to release at least 10 original shows and movies in India annually.<sup>91</sup> Due to its diversity, there is also a strong latent demand for regional content in the country. OTT players have tapped into this dimension and have introduced shows and content to cater to this demand and provide compelling content to the audience.

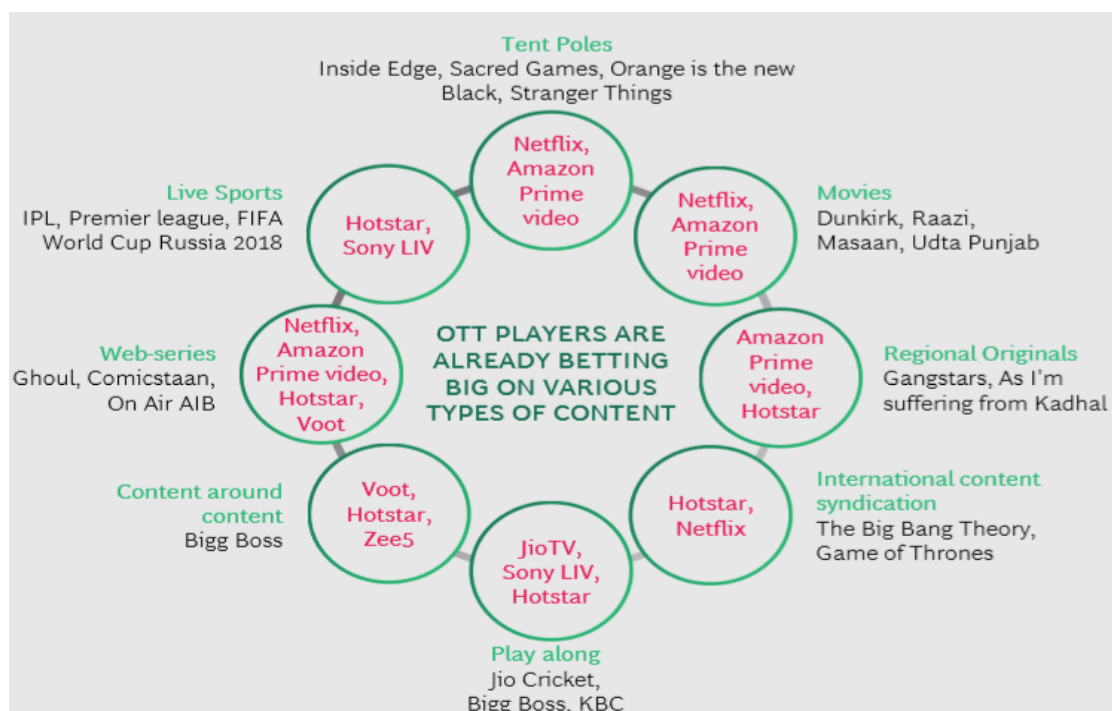


Figure 3.4: Different types of content developed and syndicated by Video streaming OTT platforms<sup>92</sup>

### 3.4: VIDEO STREAMING OTT PLATFORMS IN INDIA

In India, television has been one of the most preferred choices for entertainment, advertisement, and conveying information to the people in general. The utilization of video content has conventionally been through television or movies.

<sup>91</sup> Sohini Mitter, 'What India Watched On Netflix In 2019: The Most Popular Titles' (2019).

<sup>92</sup> Source: Entertainment Goes Online A \$5 Billion opportunity, A Report by Boston Consulting Group

Through advancement, it is now possible to add additional convenience by web-based access or Video on Demand services.OTT has changed the game by challenging the conventional mode of distribution like cable or broadcast television.

Media outlets as of late have step by step moved towards releasing content on streaming platforms such as Hulu, Netflix, Hotstar and Amazon Prime Video. In a recent report, consumer preferences were expressed which reveals a millennial's preference for online streaming compared to cable TV. The positive responses to series like Sacred Games and Mirzapur from critics and audiences show that the quality of content is the key factor influencing the move towards streaming services<sup>93</sup>. The popular video streaming OTT platforms in India include Netflix, Hotstar, Amazon Prime Videos, Voot, Alt Balaji, etc.

During the initial stages, India saw a boom of OTT platforms with few, yet big players; a maximum of them are existing traditional players like Voot by Viacom18, Alt Balaji by Balaji Productions, etc. The bustling schedule of the present generation, their longing for a convenient way of life and propensity for getting everything on their fingertips has bought extraordinary changes in their media devouring propensities as well<sup>94</sup>. The entertainment industry is witnessing a massive development towards digital formats. Customarily, television saw the highest video consumption by viewers however, the faster-growing internet penetration is providing a path to the emerging user segment that wants to consume on-demand multimedia content<sup>95</sup>. This has fostered a significant rise in video traffic consumption. In its present structure, VoD refers to the browsing of video content through the Internet or through applications normally alluded to as OTT platforms<sup>96</sup>. In particular, the television-watching scenario has been altered by the OTT video streaming platforms.

The attractive features of OTT video streaming services are:

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<sup>93</sup> Mohini Parghi, 'Emergence Of OTT Market In India: Regulatory And Censorship Issues'.

<sup>94</sup> KPMG, 'Media Ecosystem: The Walls Fall Down' (2018).

<sup>95</sup> Ritu Bhavsar, 'The Burgeoning Digital Media Consumption: A Challenge For Traditional Television And Advertising Industries –An Analysis' (2018) Amity Journal of Media & Communication Studies.

<sup>96</sup> Aki Hardarson and others, „The Future of Television: The Impact of OTT on Video Production Around the World“ (2016) Boston Consulting Group.

1. The users get access to a variety of national and international content at a faster rate and lower cost as compared to the conventional mediums<sup>97</sup>.
2. Recently, to keep up with the trend and to stay in the industry the conventional players like Star and Viacom18, Zee TV, Sony have complimented their existing system by using OTTs as a tool to engage the online audience, by exhibiting national and international digital content.
3. Independent artists and content creators are using the OTT platforms to create quality and original content at a relatively lower budget and with negligible barriers of censorship as lay down by the CBFC<sup>98</sup>.

### 3.4.1: CLASSIFICATION OF VOD OTT PLATFORMS

On the basis of the monetization model, VoD services are categorized as given below:-

1. **Advertising video on demand (AVOD):** It is an advertisement based business model that is similar to the traditional television services in the way that it provides streaming of content free of cost to the end-user. The source of revenue for such providers is through the advertisements put up in between the content.<sup>99</sup> The classic example of such a category is YouTube. The viewers watch the media content without paying any sort of fee while the platform earns through the advertisements shown to the viewers.
2. **Subscription video on demand (SVOD):** It is a subscription-based business model that is most commonly used in the global streaming industry owing to its popularity and success. It is based on the end-user 'subscribing' to the services provided by the platform for a predetermined time period with predetermined subscription fees.<sup>100</sup> It provides a recurring source of revenue for the platform with exclusive services to the

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<sup>97</sup> MICA and Communication Crafts, „Indian OTT Platforms Report“ (2019).

<sup>98</sup> Tejveer Singh Bhatia, 'OTT Services: To Regulate, Or Not To Regulate, That Is The Question'.

<sup>99</sup> KPMG, "The Digital First Journey" (2017)

<sup>100</sup> Burroughs BE, „Streaming Media: Audience and Industry Shifts in a Networked Society“ Iowa Research Online (2015).

subscriber. The classic examples of this category are Netflix and Amazon Prime Video.

3. **Transactional video on demand (TVOD):** This is a transaction-based model wherein the customers pay for the separate part of the video content they view. These services usually attempt to retain the consumers via offering lucrative prices on specific content, thereby expecting that users will refer to the service for their entertainment needs.<sup>101</sup> The classic example of this category is Apple iTunes.
4. **Freemium Model:** Platforms are moving towards this kind of monetization model which is inclusive of features of both AVOD and SVOD with a strategy to generate customer engagement with the platform and slowly attract those customers to avail premium services by subscribing to the exclusive platform.<sup>102</sup> One of the leading platforms in India, Hotstar follows this model with the standard conventional television content available for free while the latest movies and series famed foreign content like Game of Thrones, Modern Family, etc available only to the paid subscribers.<sup>103</sup>

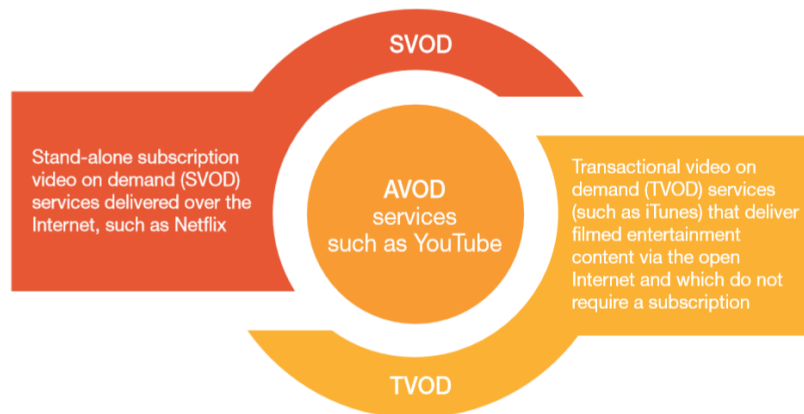


Figure 3.5: Key mediums of Monetization of Video Services<sup>104</sup>

<sup>101</sup> Kendra Chamberlain, *OTT Market Overview: The „Big Four“* (2017) <https://www.vindicia.com/sites/default/files/e-books/building-the-perfect-ott-pricing-model.pdf> [Last accessed 25 Feb 2021]

<sup>102</sup> KPMG, 'The Digital First Journey' (2017).

<sup>103</sup> Hotstar' (*Hotstar.com*, 2020) <https://www.hotstar.com/in/tv/game-of-thrones/s-510> [Last accessed 1 March 2021 }.

<sup>104</sup> Source: Entertainment Goes Online A \$5 Billion opportunity, A Report by Boston Consulting Group

### **3.5: CONCLUSION**

It is important to note that the year 2020 was a landmark victory for the OTT industry. The pandemic led to a worldwide shutdown, and theatres were also non-operational due to this move. Since the entertainment industry had to survive, they shifted focus to OTT platforms, not knowing how the films would fare financially. In April, NBC Universal took a significant risk and released the movie 'Trolls World Tour' over OTT before exhibiting it in the theatres. The movie surpassed all expectations and earned over 20 million dollars, encouraging other production houses to proceed with their content over OTT platforms.

The viewing habits of consumers have evolved a lot in the last few years. Short-form video content consumption on smart-phones and social media platforms has been rising, followed by binge-watching shows on various OTT platforms being prevalent simultaneously. The Indian OTT market is expected to increase from \$1.5 billion in 2021 to \$4 billion in 2025 and further to \$12.5 billion by 2030<sup>105</sup>. This result is expected to be achieved much earlier, considering the longevity of the pandemic.

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<sup>105</sup> Report by RBSA Advisors. Source <https://timesofindia.indiatimes.com/business/india-business/indias-video-ott-market-to-touch-12-5-bn-by-2030-report/articleshow/84517492.cms>

# CHAPTER 4: LEGISLATIONS GOVERNING DIGITAL CONTENT IN INDIA

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## 4.1: INTRODUCTION

This chapter is divided into three segments: the first section deals with an overview of regulations governing content streamed through cinemas and its judicial interpretation; the second section deals with television, and the third part of this chapter deals with legislation and its judicial interpretation governing the digital content, i.e., the content available on the internet in India.

## 4.2: CERTIFICATION OF FILMS

With its introduction in India, cinema has had a significant impact on all age groups of the Indian society. The Indian Cinematograph Act of 1952 instituted censorship to seemingly protect audiences from the immorality ideals portrayed in the films. The Act set up a Central Board of Film Certification ("CBFC"), which is responsible for regulating the public exhibition of films in India.<sup>106</sup> It certifies and classifies the films in the following categories:

- 'U' (unrestricted exhibition)
- 'UA' (unrestricted exhibition except for children below 12 years of age)
- 'A' (restricted to adults only) and
- 'S' (restricted to a specified class of persons)<sup>107</sup>

The Rules<sup>108</sup> guiding the CBFC in certification of movies include the criteria of decency, morality, defamation, and public order. While reviewing films, the Board must bear in mind the laws pertaining to the portrayal of smoking, the usage of narcotics and contraband substances, animal cruelty, the use of national emblems, among others. The objective of the Board is to make sure that certification is issued without curtailing the creative freedom and artistic expression of the makers involved. However, the Board is often criticized because it attempts to censor films rather than certify them and thus exceeds its power and attempts moral policing by stepping on

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<sup>106</sup> The Cinematograph Act 1952, Section 5D

<sup>107</sup> The Cinematograph Act 1952, Section 5A

<sup>108</sup> Cinematograph (Certification) Rules 1983.

the creative freedom of the industry. The Board has lately been criticized a lot over the refusal to screen movies like 'Padmaavat,' 'Lipstick under my Burkha,' 'Uda Punjab' and 'Fifty Shades of Grey'; and the list continues.

An accurate example of the overuse of authority by the CBFC would be the removals decided for the movie 'Uda Punjab'. An order was passed to remove the term 'Punjab' from the film in its entirety along with the reference of numerous cuss words. The film was granted an 'A' certificate. The producer challenged this order of the CBFC before the Bombay High Court, wherein they sought that the 'A' certification is granted without any conditions or cuts in the film as it would ruin the essence of the overall film viewing experience. The High Court held that "*the movie was not objectionable simply due to depiction of the use or sale of drugs in a specific state and the political references therein and observed that the film must be viewed in its entirety*"<sup>109</sup>". However, in a leading case, the Apex Court<sup>110</sup> was faced with the question of the authority of censorship by the CBFC, which has been disputed many times on the pretext that such discretionary power is violative of the artist's freedom of speech and expression. The Court viewed that "*the interest of the general public supersedes the necessity to safeguard the individuality and expression of artists.*" However, the Bench realized that 'a determined standard of censorship is necessary to be framed not to restrain the development of an artist's individuality and freedom of expression'. Committees formed by the I&B Ministry have suggested that the Board should only be empowered to certify films and not censor the films' content. Every individual should have the right to access the type of content he/she wishes to watch. The Mukul Mudgal Committee<sup>111</sup> formulated by the MIB in 2013 addressed the issue of the power of State Governments to defer a film from an exhibition in the relevant State. It suggested that "a suspension order should be passed only after or during public exhibition and not before"<sup>112</sup>". This recommendation was based on the Supreme Court's judgment in case of the film Aarakshan,<sup>113</sup> which was suspended from screening by the State Governments of Uttar Pradesh, Punjab, and Andhra Pradesh.

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<sup>109</sup> Phantom Films Pvt. Ltd. and Ors. Vs. The Central Board of Film Certification and Ors., 2016 SCC OnLine Bom 3862

<sup>110</sup> KA Abbas v. Union of India, AIR 1971 SC 481

<sup>111</sup> Government of India, Ministry of Information and Broadcasting vide Office Memorandum No.2/12/2004-FCAT(Vol.IV)

<sup>112</sup> Ministry of Information and Broadcasting, 'Report Of The Committee Of Experts To Examine Issues Of Certification Under The Cinematograph Act 1952' (2013)

<sup>113</sup> Prakash Jha Productions & Anr. Vs. Union of India & Others (2011) 8 SCC 372



The Supreme Court, quashed the decision of both state governments, held that “*once the CBFC has cleared the film, screening cannot be prohibited in the manner that is sought by relevant parties.*”

In 2016, another committee was established by the MIB under the chairmanship of Shyam Benegal<sup>114</sup> to recommend standards and procedures for the certification of movies by the Board and ensuring that the mechanism for the certification of films for public display is carried out in a standardized, non-discriminatory, and non-discretionary manner. It suggested that “*the scope of the CBFC should be limited to only decide who and what category of the audience can watch a particular film, without acting as a moral compass.*”<sup>115</sup> The categorization by the Board should be a sort of statutory warning for audiences of what to expect in a particular film. The act of viewing the film should be considered a consensual act by the viewers of that category.” It also recommended changes 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 societal changes and exposure of teenagers to a specific content in a moderate manner<sup>116</sup> and;
- (ii) the introduction of another category ‘A-C’ (*A with caution*) certification for films containing explicit material such as nudity or violence, helping the viewers make sensible choices<sup>117</sup>.

The suggestions put forth by both the Committees have not been acted upon by the Ministry yet, and thus the archaic Cinematographic Act continues to empower the CBFC to step on the creative expression of the artists and the fundamental right granted to an individual under the Constitution<sup>118</sup>.

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<sup>114</sup> Government of India, Ministry of Information and Broadcasting vide office Memorandum F. No. M-34016/3/2015-DO –(FC) Part -II

<sup>115</sup> Report Of The Expert Committee On CBFC (PRS Legislative Research 2016) <<https://prsindia.org/report-summaries/report-expert-committee-cbfc>> [Last accessed 11 May 2021].

<sup>116</sup> Shyam Benegal Committee Submits Its Report On Cinematograph Act/ Rules To Shri Jaitley' (Pib.gov.in, 2020) <<https://pib.gov.in/newsite/mbErel.aspx?relid=142288>> [Last accessed 11 May 2021].

<sup>117</sup> Ministry of Information and Broadcasting, 'Report Of The Committee Of Experts To Examine Issues Of Certification Under Tt{E Cinematograph Act 1952' (2013).

<sup>118</sup> Article 19 (1) of the Constitution of India, 1950.

The Apex Court recently dealt with the issue of the ban on the exhibition of the movie *Padmaavat*<sup>119</sup> ordered by the governments of Gujarat and Rajasthan. The Court maintained its position in the case concerning the film *Aarakshan*<sup>120</sup> by staying the orders of the State Governments and preventing other states from issuing such prohibitory orders. The Court observed that “*if intellectual prowess and natural/cultivated power of creation is tampered without the permissible facets of law, the concept of creativity paves way to path of extinction; and when creativity dies, values of civilization corrode*<sup>121</sup>”. They further held that it is the duty of a state to maintain law and order situation during the exhibition of a film, and this includes providing police protection to those involved in the film and also the audience, whenever necessary.

#### **4.3: INDIAN LEGAL FRAMEWORK ON TELEVISION CONTENT REGULATION**

The content on current affairs and news broadcasting channels is governed by a statute<sup>122</sup> and committee<sup>123</sup> framed by the MIB. Additionally, the industry has also developed and implemented certain self-regulations. The activities of television networks and related issues are regulated by the **Cable Television Networks (Regulation) Act, 1995** and by the underlining rules i.e. **Cable Television Networks Rules, 1994** which among other things, prohibits the transmission of any program that does not comply with the program code as set out in the Rules via a cable service.

The Program Code lists certain criteria for programs that can be transmitted through cable services<sup>124</sup>. The Code provides that a program being carried through a cable service should not offend decency, criticize friendly countries, or contain any attack

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<sup>119</sup> Viacom 18 Media Private Limited & Ors. vs. Union of India & Ors Writ Petition(s)(Civil) No(s).36/2018

<sup>120</sup> Prakash Jha Productions & Anr. Vs. Union of India & Others (2011) 8 SCC 372

<sup>121</sup> RELEASE OF CONTENT ON OVER-THE-TOP PLATFORMS-<https://www.linkedin.com/pulse/release-content-over-the-top-platforms-how-different-abhishek-p>

<sup>122</sup> Cable Television Networks (Regulation) Act, 1995

<sup>123</sup> The content is governed by the Programme and Advertisement Codes prescribed under the Cable Television Networks (Regulation) Act, 1995. As per an official order issued by the I&B Ministry in 2018, a committee was set up to frame and suggest a regulatory framework for online media/news portals including digital broadcasting and entertainment/infotainment sites and news/media aggregators. (Source: <https://www.indiatoday.in/education-today/gk-current-affairs/story/i-b-ministry-sets-up-a-committee-to-regulate-online-media-1206364-2018-04-06>)

<sup>124</sup> Censorship: The Current Regulatory Framework- <https://www.mondaq.com/india/broadcasting-film-tv-radio/757742/censorship-the-current-regulatory-framework-and-the-future-of-digital-content>

on religion or religious communities, including anything defamatory, obscene, deliberate, false, or suggestive innuendos. Significantly, it restricts broadcasters and cable service providers from transmitting any film unless certified by the CBFC under the 'U' category, suitable for unrestricted, public viewing in India. Furthermore, cable operators are entrusted with additional responsibilities, such as carrying programs that project women positively and ensuring children's programs do not contain foul language or violence. There are no pre-censorship requirements for the content transmitted through television, still they are required to adhere to the certain conditions set out under the law concerning the nature of content and advertisements that can be made available for public consumption.

The MIB has formed an Inter-Ministerial Committee ('IMC') to review the breach of the Code. The IMC can take action either *suo moto* or whenever a code infringement is brought to the MIB's attention. The Indian Broadcasting Foundation ('IBF') framed the Self-Regulatory Guidelines for Current affairs and Non News Television channels. Such guidelines set the standards and criteria for ethical practices that direct service providers in accordance with the Program Code. It provides that care and sensitivity should be observed to avoid offending the audience to protect the vulnerable minds of the minors. The Self-Regulation policies provide for setting up a 'Standards and Practices Department' at the individual TV channel level to handle the grievances received for the content broadcasted on its channels.

#### **4.4: REGULATION OF DIGITAL CONTENT AVAILABLE ON OTT PLATFORMS**

The Information Technology Act of 2000 (IT Act) is the primary legislation in the contours of cyberspace in India. As the OTT industry streams a variety of content across the internet, there is a presumption that this legislation is exclusively applicable to it. However, the IT Act does not apply to all the facets of the video streaming OTT platforms discussed below. It is only applicable to statutory offenses and does not regulate the content as the CBFC or IBF does.

To understand the application of the statute on digital content, it is essential to understand the concept of intermediaries under the IT Act. Section 2(1)(w) of the IT Act states that : "*Intermediary, with respect to electronic records, means any person*

*who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places, and cyber cafes*<sup>125</sup>.” An intermediary is a crucial link to the internet as it distributes, publishes, or transmits information and creates an ‘interactive’ world.<sup>126</sup> Depending on their functional attributes, they can be broadly classified as information sellers, information carriers, or information publishers. An information publisher may publish its in-house material and purchase or license from other content providers or third parties. Generally put, under Section 79<sup>127</sup> of the IT Act, these intermediaries can be held exempted for liability for a lot of offenses done through them.

The default position under Section 79 is that an intermediary is not to be held liable and responsible for any third-party data, links, information hosted on its website. Section 79(1) grants general exemption from liability, is further qualified by Section 79(2) and 79(3), which lay down specific conditions under which they claim protection. The intermediary is exempted under Section 79(2)(a), if it simply gives

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<sup>125</sup> THE INFORMATION TECHNOLOGY ACT, 2000

<https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>

<sup>126</sup> Azmat Ali, 'Regulation Of E-Commerce In India With Special Reference To Electronic Contract' [2016] Aligarh Muslim University.

<sup>127</sup> Section 79: Exemption from liability of intermediary in certain cases –

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) The intermediary does not–

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe on this behalf.

(3) The provisions of sub-section (1) shall not apply if–

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.–For the purposes of this section, the expression —third party information|| means any information dealt with by an intermediary in his capacity as an intermediary.

access to the third party or any temporary storage or hosting of the information. Section 79(3) establishes that the exemption under clause (1) will not apply to an active platform or to a forum that contributes to the commission of the activities prohibited under the law.

Hence Section 79 limits the exemption granted to only such intermediaries who do not aid, abet or induce the activities prohibited under the law. This statutory provision appears to be a safe harbor clause based on the European directives.<sup>128</sup> This provision is also similar to that of the US Laws<sup>129</sup> intermediaries, which clarifies that intermediaries who provide a forum will not be responsible and liable for what the user posts, however they ought to respond promptly to a notice informing them about a violation and have to take down the violating file to be exempted such liability. Such rules have significantly evolved since their enactment, partly through amendments of the underlying Act and Rules and partly through interpretation by the judiciary. The safe harbour protection under Indian law is available only to ‘passive intermediaries’; those who ‘act as conduits or passive transmitters of the records or information’<sup>130</sup>.

Thus, to claim this invulnerability, an intermediary is not expected to do anything which gives it information and power over user-generated data. The Delhi HC in *Christian Louboutin SAS v Nakul Bajaj and Ors*<sup>131</sup> provided clarity on what is meant by a ‘passive transmitter’ of data and information. It laid down an exhaustive list of functions that can be performed by an intermediary. The case further held that “*the more functions an intermediary performs the more likely it is to be termed as an active participant. It also viewed that the terms conspired, abetted, aided or induced, mentioned under Section 79(3) have to be tested on the basis on which it conducts its business and not on the basis of a mere claim by the platform itself.*”

The Intermediary Guidelines<sup>132</sup> provide primary Rules to which intermediaries need to adhere to avail the safe-harbor protection and exemption from liability. It laid down

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<sup>128</sup> EU Directive 2000/31.

<sup>129</sup> The Digital Millennium Copyright Act, 1998

<sup>130</sup> Christian Louboutin SAS vs Nakul Bajaj and Ors (2014 SCC OnLine Del 4932) para 43

<sup>131</sup> 2014 SCC OnLine Del 4932

<sup>132</sup> The Information Technology (Intermediary Guidelines) Rules, 2011

a due diligence process for the intermediaries who host or publish any sort of data on any computer resource. These provisions are also applicable to OTT platforms as they fall under the ambit of 'intermediaries' under the IT Act. In the case of *MySpace Inc. v. Super Cassettes Industries Ltd.*<sup>133</sup> the Delhi HC explained that, OTT platforms would under fall under the definition of 'intermediaries' because they are aggregators of video content, web-series and other films, are provided to the customers, when demanded by them and consideration is received by aggregators through a self-operated and self-designed subscription model<sup>134</sup>.

Intermediaries shall inform their users not to host, display, upload, modify the information which is specifically listed in the Rules<sup>135</sup> and shall takedown such information upon actual knowledge of such content within 36 hours.<sup>136</sup> The outcome of such Rules was that any individual aggrieved by any form of content displayed on an intermediary platform could simply send a written request to them to take down such content as it was unlawful. Within the next 36 hours, the intermediary would have to apply its judgment to determine whether the content was illegal or not.

Consequently, in cases where the intermediary feels that the content showcased by them is unlawful by any means, it would be compelled to take down the said content within 36 hours of receiving the written communication or risk losing the safe harbor protection.

Resultantly, the intermediaries opted to remove content upon requests by individuals to prevent risking the loss of protection under the safe-harbor provision.<sup>137</sup>

The Apex Court solved this situation in the case of *Shreya Singhal v. Union of India*<sup>138</sup>, which held that "an intermediary is bound to take down and unlawful content on its platform only upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) are going to be committed". 'Actual Knowledge' as referred to under

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<sup>133</sup> *MySpace Inc. v. Super Cassettes Industries Ltd.*, (2016) Del. SCC 6382; (2017) 236 DLT 478 (DB).

<sup>134</sup> *Ibid.*

<sup>135</sup> Rule 3 (2), The Information Technology (Intermediary Guidelines) Rules, 2011

<sup>136</sup> Rule 4, The Information Technology (Intermediary Guidelines) Rules, 2011

<sup>137</sup> Nikhil Pahwa, "NAMA policy on Safe Harbor: Should different sizes or categories of intermediaries be regulated differently".

<sup>138</sup> MANU/SC/0329/2015

Rule 3(4) was read as knowledge through the means of a court order. Consequently, an intermediary would no longer lose its safe harbor protection if it refused to take down content on its platform according to a written intimation by any party that the concerned content was unlawful. Thus, intermediaries are only bound to take down the content according to an order issued by the Court or upon being notified by the Government or its agency.

The other sections of the IT Act concerning the content applicable on the OTT platforms are Sections 67A<sup>139</sup>, 67B<sup>140</sup> and 67C<sup>141</sup> of the IT Act, which ensures penalty and imprisonment for publishing/ transmitting obscene material, sexually explicit material, and material depicting children in sexually explicit acts, in electronic form. The terms 'obscenity' and 'obscene' have not been explained in the Indian Penal Code.

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<sup>139</sup> Section 67A: Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.—Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

<sup>140</sup> Section 67B: Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.—Whoever,—

- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or
- (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or
- (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or
- (d) facilitates abusing children online, or
- (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form—

- (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is the interest of science, literature, art or learning or other objects of general concern; or
- (ii) which is kept or used for bonafide heritage or religious purposes.

Explanation—For the purposes of this section, —children|| means a person who has not completed the age of 18 years.

<sup>141</sup> Section 67C. Preservation and retention of information by intermediaries.— (1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.

It only provides that if any material taken as a whole is lascivious or appeals to prurient interest and tends to degrade and corrupt the people who consume the said matter contained will come under the ambit of obscenity. The **Indecent Representation of Woman (Prohibition) Act of 1986** also concerns the prohibition of such material. Nevertheless, what is meant by obscenity is established by the courts through various case laws.

The initial test for obscenity was laid down in English law in the case of *Regina v. Hicklin*<sup>142</sup>. On its application, a publication can be judged for obscenity based on the isolated part of the work considered out of the context. While applying Hicklin's test, the result is separated from the work in its entirety to see if that 'portion' is creating any influence on susceptible readers, which include children or weak-minded adults.

In 1957, a new test to judge obscenity was developed in the case of *Roth v. United States*<sup>143</sup>. It was held that “*only sex-related materials which have the tendency of inducing lustful thoughts were found to be obscene and this has to be judged from the perspective of an average person by applying contemporary community standards*”. This test is narrower than Hicklin's test because it does not isolate the 'alleged content' but confines itself to the dominant theme of the whole material. It also checks for any redeeming social value, if the material is taken as a whole.

The Indian judiciary dealt with questions related to obscenity in the landmark case of *Ranjit D. Udeshi v. State of Maharashtra*.<sup>144</sup> The Supreme Court observed that “the test of obscenity is to check whether the tendency of the alleged material that is charged as obscene is to deprave those whose minds are open to immoral influences. This test of obscenity must agree with the restrictions provided under Article 19 of our Constitution. Therefore, the concepts of sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more”.

The Apex Court realized that obscenity has been understood in the following terms:

- “That which corrupts those whose minds are open to such immoral influences;

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<sup>142</sup> LR 3 QB 360

<sup>143</sup> 354 U.S. 476

<sup>144</sup> AIR 1965 SC 881



- That which induces thoughts of a most impure and libidinous character;
- That which is hard-core pornography;
- That which has a substantial tendency to deprave by arousing lustful desires;
- That which tends to arouse sexual thoughts;
- That which passes permissive limits judged of from our community standards.”

In another case, *K.A. Abbas v. Union of India*<sup>145</sup>, the Apex Court validated the pre-censorship of content as an exception to the right under Article 19. However, the Court observed that "the ones who censor need to consider the value of art while making any decision. The artistic appeal of an episode robs it of its vulgarity and harm & also what may be socially good and what is not". In the case of *Bobby Art International & Ors. v. Ompal Singh Hoon*<sup>146</sup> the Supreme Court dealt with the issue of obscenity in the film *Bandit Queen* and ruled that the scenes depicting must not be seen in isolation. It viewed that "the so-called objectionable scenes in the film have to be considered in the context of the whole film and the context that the film is seeking to transmit in society”.

In another case of *Aveek Sarkar v. State of West Bengal*,<sup>147</sup> the Hon'ble Supreme Court disapproved of the Hicklin's test and adopted the Roth test. The issue revolved around a picture that was alleged to be obscene. The Court viewed that "the question of obscenity should be viewed in the context in which the photograph appears and the message it intends to communicate. The Court further said that the right test to determine obscenity would be the Community Standards Test (i.e. Roth test). The Court observed that in every case related to check on obscenity the material in question to be taken as a whole'. When the matter is taken as a whole and it is lascivious and tends to deprive the person who comes across that material, then it can be said to be obscene. It viewed that the community standards test is more adaptive to any changing society”. Furthermore, the Central Government has been empowered to

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<sup>145</sup> 1971 AIR 481

<sup>146</sup> (1996) 4 SCC 1

<sup>147</sup> (2014) 4 SCC 257

block public access to any information by issuing directions in such regards.<sup>148</sup> In 2015, the Department of Telecommunications (DoT) directed the intermediaries to disable over 800 websites containing pornographic material. However, it later clarified that those intermediaries which did not host child pornographic content were not required to disable such websites. Regarding the IT Act, although the purpose of the laws is to ensure that sexually suggestive and obscene material is not released online, their expansion and applicability to OTT media outlets is potentially a kind of censorship. However, it may be challenging for OTT media platforms to weed out sexually explicit content, given the variety of audience it caters to and the standards of morality which are subjective. This also raises questions on the different treatment of films in the context of censorship based on the mode of the exhibition – certification for the presentation of films in cinema halls and the concepts of self-regulation and censorship under the IT Act for films made available only on digital platforms.

#### **4.5: CONCLUSION**

There are no explicit statutory enactments or provisions that exclusively deal with regulating content and censorship of OTT platforms in the present scenario. An RTI was filed to the MIB in 2018, seeking information about the Licensing authority, Laws, Bye-Laws, Rules, and Standing Orders that govern and regulate the content on online web streaming platforms.<sup>149</sup> The IT Act, 2000 was considered as the regulating Act by the authority itself. In order to bring OTT platforms and their content under the ambit of the relevant sections of the IT Act, these platforms should come under the purview and scope of the definition of 'intermediaries' as stated above.

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<sup>148</sup> Section 69A. Power to issue directions for blocking for public access of any information through any computer resource.–(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section(2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

<sup>149</sup> *Justice for Rights Foundation v. Union of India*, Writ Petition (Civil) No. 11164/2018 (Delhi High Court).

It is important to note that OTT platforms stream third-party content along with self-generated content. The IT Act remains silent on the guidelines that will apply in such cases. For example, let us consider Netflix. As an intermediary, it streams movies that the CBFC already censors. At the same time, it streams original, self-produced, and exclusive content such as Sacred Games, Bombay Begums, among others, which does not come under the purview of the IT Act as it won't be acting in the capacity of an intermediary.

Coming to the Cinematograph Act, which essentially regulates the films in Theatres and Television, the content that is available online and it does not fall under the domain of the said Act. However, on a combined reading on the IT Act and the Cinematograph Act, it is understood that the third party content provided on Demand platforms has to maintain conformity and is under an obligation to follow guidelines prescribed by the Government as per Section 79 of the IT Act. Thus, the exhibition of films under the Act concerning the above judgment means 'exhibition to the public whether for public or private viewing' and therefore includes media content available on OTT platforms. Thus, under this interpretation, it falls under the ambit of the Central Board of Film Certification and the Cinematograph Act, 1951 in extension. However, keeping this aside, the MIB had made it clear that the Cinematograph Act doesn't apply to OCCPs<sup>150</sup> and has no control of content released by them<sup>151</sup>.

The Cable Television Network (Regulation) Act, 1995 is the legislation that governs the cable network operators, and they are required to ensure that the films which their viewers can access should be certified from CBFC. As mentioned earlier, with this understanding of 'exhibition,' films exhibited on OTT platforms would have to undergo the certification process under the Act<sup>152</sup>. Cable television networks are however different from OCCP in the way they operate. This is critical because cable television networks are defined under the Cable Television Network Act in terms of

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<sup>150</sup> Suneeth Katarki, Tanu Banerjee, Nikita Hemmige, *Censorship: The Current Regulatory Framework and the Future of Digital Content*, IndusLaw Publications, (November 2018) <<https://induslaw.com>> (Last accessed on 24th August, 2021).

<sup>151</sup> Right to Information application dated October 25, 2016, received online *vide* registration number MOIAB/R/2016/50541 and Ministry of Information and Broadcasting's response dated December 2, 2016.

<sup>152</sup> Cable Television Network (Regulation) Rules, 1994, G.S.R. 729 (E), Rule 6(n).

their operation<sup>153</sup>. They use satellite signals to distribute content to multiple subscribers while OTT platforms ride on the networks of telecom and internet service providers to provide the content to its users<sup>154</sup>. Thus, cable TV regulations cannot be applied in digital content either.

Therefore, it is safe to come to a conclusion that India has not developed an explicit statutory authority to govern, regulate or censor OTT content effectively. However, there have been multiple talks of introducing a Self- Regulation Code by the Online Curated Content Providers (OCCPs). The Central Government has also issued a new set of comprehensive guidelines titled ‘Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021’, which seek to regulate digital news media and video streaming platforms. They borrow heavily from the existing regulations and the television media structure, including the content codes and the grievance redressal structure, and will be examined in further chapters.

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<sup>153</sup> Baccarne, B., Evens, T. and Schuurman, D., *The television struggle: an assessment of over-the-top television evolutions in a cable dominant market*, Communications & strategies, (92), pp.43-61 (2013).

<sup>154</sup> Ibid.

# CHAPTER 5- REGULATION OF VIDEO CONTENT OVER OTT PLATFORMS IN INDIA

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## 5.1: INTRODUCTION

OTT services have dual characters that combine the passivity of television and the consumer choice of the web, creating a tremendous demand for it. Around 2016, the two major OTT players based in the USA<sup>155</sup> started their operations in India. After this, there has been an emergence of other players in the OTT space in India. OTT services have created a parallel dimension for similar content. This essentially means that the same content can be censored in cinemas or broadcasted on television. However, until very recently<sup>156</sup>, there was no proper regulation or code for such content on paid or subscription-based streaming services like AltBalaji, Voot, ZEE5, Netflix, etc. In the current Covid-19 pandemic, online platforms such as Netflix, Amazon Prime, Zee5, Hotstar, etc., have taken over mainstream television and are the most viewed platforms for movies and series.

From not having any laws or legislation to regulate the content to constructing a self-regulatory code to finally having a full-fledged set of rules to govern the same, India has indeed come a long way. This chapter examines the evolution of regulations that govern OTT content. The first part examines how the Judiciary stepped up to fill the legislative gaps and lay down certain path-breaking judgments that paved the way for the IT Rules, 2021. The second portion of the chapter analyzes the Self Regulation Code that all stakeholders of OTT platforms created to curb litigation. The last part of the chapter explores the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules).

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<sup>155</sup> i.e., Netflix and Amazon Prime Video

<sup>156</sup> New IT Rules 2021 have come into force from May 25<sup>th</sup> 2021. Online information from <https://bestmediainfo.com/2021/05/new-it-rules-come-into-force-many-social-media-and-ott-platforms-yet-to-comply/>

## **5.2: JUDICIAL INTERVENTION ON OTT PLATFORMS**

During the initial years, the OTT revolution in India had created a regulatory vacuum as India did not have any guidelines or policy framework for regulating the content over the OTT streaming services. This policy vacuum has led to complaints in the Court and self-regulatory action by the industry players. With this, the Government has tried to censor content on the grounds of public morality, communal harmony, protecting history, etc. These online applications and services have transformed traditional sectors and changed the economic landscape of the markets<sup>157</sup>. This increasing popularity of such apps and services brings new regulatory challenges for governments.

With the current legislative position of India, the censorship rules governing the online space are likely to apply to the content provided by the OTT service companies as such content is accessible over the internet. In the case of *Shreya Singhal vs. Union of India*<sup>158</sup>, the Supreme Court ruled that “*user-generated content cannot be censored online, but delegated the question of on-demand video content, as ones provided by OTT services, to the Information Technology Act of 2000. The Act has a content regulation provision that empowers the government to regulate intermediaries, including OTT platforms*”<sup>159</sup>.

Due to the policy vacuum on content regulation issues, people resort to the Judiciary when they have concerns related to the ‘controversial’ content available on such platforms.

In one of the first cases about censoring of content streaming on the OTT platforms, a Writ Petition was filed before the Delhi HC in the case of *Justice for Rights Foundation vs. Union of India*<sup>160</sup> seeking guidelines from Court (or, in the alternative, from the Government) to regulate online content and the platforms that tend to broadcast it<sup>161</sup>. The Petition aimed to control the content available on platforms

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<sup>157</sup> An Over-The-Top Approach to Internet Regulation, <https://www.eff.org/deeplinks/2017/10/over-top-approach-internet-regulation-developing-countries>

<sup>158</sup> Shreya Singhal v. Union of India, MANU/SC/0329/2015

<sup>159</sup> OTT STREAMING SERVICES - How to Regulate - BY SHUBHANGI, <https://www.readkong.com/page/ott-streaming-services-9919884>

<sup>160</sup> W.P.(C) 11164/2018

<sup>161</sup> Will Sacred Games 2 Be Sanitised? A Summary Of The Debate , <https://www.ikigailaw.com/will-sacred-games-2-be-sanitised-a-summary-of-the-debate-on-online-content-regulation-in-india/>

such as Netflix and Amazon Prime Video, amongst others, which may have offended a section of the viewership<sup>162</sup>.

Through an affidavit, the Ministry of Electronics and Information Technology responded that they do not regulate the content available on the internet. There is no provision for regulating/licensing an organization or establishment to publish content on the internet<sup>163</sup>. The High Court observed that specific provisions of the IT Act, 2000 are applicable, and the concerned statutory authority exercising jurisdiction under the said Act can take action by virtue of the powers available to them under the Act<sup>164</sup>.

However, in an *Appeal to the Supreme Court in the form of an SLP*<sup>165</sup>, the Petitioner contended that most of these platforms are streaming content across the nation containing abusive language, sexually explicit, and pornographic in nature, and depicts women in objectifying manner, without a license. A notice was issued by the Supreme Court to the Government who submitted an affidavit informing the Digital Content Complaint Council (DCCC).

In the case of *Nikhil Bhalla vs. Union of India*<sup>166</sup>, which was about the controversial show Sacred Games, a petition was filed in the Delhi HC against Netflix and Phantom<sup>167</sup> alleging that derogatory language has been used against former Prime Minister Rajiv Gandhi and demanded the removal of two ‘offensive’ scenes, and three ‘objectionable remarks’ (including subtitles) against the former Prime Minister and his family. The Petition further stated that the show “*incorrectly depicts historical events of the country which include the Bofors case, case of Shah Bano, Babri Masjid case and communal riots*”<sup>168</sup>.” The Petitioner requested the Court to issue guidelines to regulate OTT media service providers. The Centre, in its response, humbly submitted

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<sup>162</sup> Ibid.

<sup>163</sup> OTT Platforms brought under Government Regulation - Obhan ....

<https://www.obhanandassociates.com/blog/ott-platforms-brought-under-government-regulation/>

<sup>164</sup> IN THE HIGH COURT OF DELHI AT NEW DELHI.

[http://images.assettype.com/barandbench/import/2019/02/Justice-for-Rights-Foundation-vs-UOI\\_watermark.pdf](http://images.assettype.com/barandbench/import/2019/02/Justice-for-Rights-Foundation-vs-UOI_watermark.pdf)

<sup>165</sup> SLP(C) No.10937/2019

<sup>166</sup> W.P(C) 7123/2018

<sup>167</sup> Phantom Group is the producers of Sacred Games.

<sup>168</sup> Delhi HC to hear plea against Netflix show ‘Sacred Games ....

<https://indianexpress.com/article/india/delhi-hc-to-hear-plea-against-netflix-show-sacred-games-for-allegedly-defaming-rajiv-gandhi-5255196/>

that the Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith, and worship. It also says that India is ‘a sovereign, democratic republic’. Freedom of thought and expression is a cardinal value of paramount significance under our constitutional scheme. The Centre placed reliance on the mandate of the Constitution and the provision relating to the IT Act and Rules framed thereunder.

The Delhi High Court, in its order, placed reliance on the above *Justice for Freedom case*, especially concerning the provisions of the Information Technology Act, 2000 – especially Sections 67, 67A, 67B and 69, and dismissed the petition by viewing that there is no need for the writ of mandamus to issue and guidelines for the regulation of the content where the existing provisions under the IT Act and the rules framed therein are sufficient for the issue in consideration. The Court also observed that actors could not be held liable for enacting their characters, and a person was entitled to express his views, which might be right or wrong<sup>169</sup>.

Following the uproar against the variety of controversial content on the video streaming OTT platform, a writ petition was before the Karnataka HC in the case of *Padmanabh Shanka vs. Union of India*<sup>170</sup> on the issue of whether the transmission or broadcast of any films, cinemas, or serials and other multimedia content through the internet will come within the definition of ‘cinematograph’ under Clause (c) of Section 2 of the Cinematograph Act, 1952<sup>171</sup>. OTT platforms like Netflix, Amazon Prime, Hotstar were made Respondents in this petition. The Petitioner contended that online streaming platforms could not seek protection granted to intermediaries under Section 79 of the Information Technology Act, 2000 as Section 79 lays down a condition that the intermediaries will not be liable in case the intermediary has no power to select or modify the content so transmitted by them<sup>172</sup>. The Petitioner highlighted that the OTT platforms could choose and modify the content they share as they have a contract with the content creators. They have the power as to what would be broadcasted through their online video streaming platform<sup>173</sup>. Therefore, the

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<sup>169</sup> Ibid

<sup>170</sup> (W.P. 6050/2019)

<sup>171</sup> KARNATAKA HIGH COURT RULES THAT ONLINE CONTENT CANNOT BE ....

<https://iprmentlaw.com/2019/09/07/karnataka-high-court-rules-that-online-content-cannot-be-regulated-under-the-cinematograph-act-read-judgement/>

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.



Respondents cannot seek protection under the safe harbor provision of the Information Technology Act, 2000. The Petitioner prayed before the Court to bring online content under the purview of the Cinematograph Act, 1952, and set up an authoritative body to sanction the content broadcasted through such platforms. The Petitioner also sought a relief that till an authority is constituted, the CBFC should be certifying authority for all online content to be broadcasted on the internet and a direction to the video streaming platforms for obtaining a certificate from the CBFC before broadcasting/transmitting content<sup>174</sup>.

The Counsel for Respondents, while opposing the said Petition informed the Court that some of the Respondents have their corrective mechanism in the form of Code for Self-Regulation of Online-Curated Content Providers<sup>175</sup>. The Counsel further submitted that the objections and concerns of the Petitioner had been covered by the provisions of the Information Technology Act, 2000, and the provisions of the Information Technology Act override the provisions of the Indian Penal Code. The Court held that *“as far as the guidelines placed on the Code for Self- Regulation of OCCPs are concerned, we must note that the same does not create any enforceable right in favor of citizens and therefore, the same does not prevent the State from considering what safeguards and what regulations within the four corners of law can be provided as regards the grievance made by the Petitioner. The division bench observed that “the exhibition of films, serial and other content perhaps amount to transfer of files based on a request by the user as per the concept of internet and its operation. The said transfer cannot be brought under the purview of the Cinematographic Act.”*

In a similar PIL filed before the Bombay High Court<sup>176</sup> concerning the streaming of the show ‘Gandi Baat’ by AltBalaji, which according to the Petitioner, were offensive against women and the nudity, violence, and vulgarity of language in the show like Sacred Games, the Petitioner sought setting up of an independent body to pre-screen and regulate the content on the platforms. It also sought action against all media

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<sup>174</sup> Ibid.

<sup>175</sup> KARNATAKA HIGH COURT RULES THAT ONLINE CONTENT CANNOT BE ....  
<https://iprmentlaw.com/2019/09/07/karnataka-high-court-rules-that-online-content-cannot-be-regulated-under-the-cinematograph-act-read-judgement/>

<sup>176</sup> *Divya Ganeshprasad Gontia v. Union of India*, Public Interest Litigation No. 127/2018 (High Court of Judicature at Bombay, Nagpur Bench)

which broadcasted content that was ‘obscene, nude and vulgar’ and argued that it is a cognizable offense under the Cinematograph Act, Indian Penal Code, Indecent Representation of Women (Prohibition) Act, and Information Technology Act. Following the arguments, the Court issued notice to the MIB seeking their replies in light of this plea seeking regulation of such web series.

Another Petition was filed before the Madhya Pradesh HC by the Maatr foundation<sup>177</sup> relating to the regulation of content streaming on OTT platforms. The Petitioner based its petition on the view that the content is ‘obscene, unregulated, uncertified, sexually explicit, vulgar and legally restricted.’ The Petitioner raised a plea emphasizing that these content streamers objectify women and show them in a bad light and fill the minds with lascivious thoughts that are violative of their fundamental right to live with dignity. The Petitioner contended that the companies offering online streaming services are intermediaries for offenses under Sections 67, 67A, and 67B of the Information Technology Act 2000. They further alleged that the objectionable, obscene content on these platforms also fall afoul of Sections 292-294 of the Indian Penal Code, the Indecent Representation of Women (Prohibition) Act, and Articles 21 and 51A (e) of the Indian Constitution<sup>178</sup>. In a recent order, the High Court issued notices to such platforms seeking regulation over the uncensored, uncertified, or unregulated content.

### **5.3: SELF REGULATION MODEL**

Content across OTT platforms conveys unique and distinct thoughts that have been absent from the dominant media platforms like films and television. Content creators and writers have thought of the absolute most unfathomable story thoughts when not burdened under the cloak of censorship. Series like ‘Karenjit Kaur: The Untold Story’ and ‘Lust Stories’ have unique and explicit content and narratives of religious, political, social, and sexual inhibitions. This type of content comes under the garb of ‘inappropriate and sensitive content’ and is subject to censorship. No producer following the conventional mode delves into such narrative and passes the tests of ‘appropriate content’ in the eyes of the CBFC without changes and edits. The only reason such movies and shows are released on OTT platforms and not through the

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<sup>177</sup> (WP 18801/2019)

<sup>178</sup> OTT Regulations: MP HC Seeks Response From Govt, Netflix , <https://inc42.com/buzz/ott-regulations-mp-hc-seeks-response-from-govt-netflix-others/>

mainstream channels is the absence of a regulatory framework censoring content across these platforms<sup>179</sup>. OTT platforms allow the content creators to broaden their genres and experiment with the content and the narrative, often restricted in the mainstream media channels<sup>180</sup>. With no separate regulation or guidelines to oversee the video content on video streaming, OTT platforms like Netflix, Prime Video, Alt Balaji, self-regulation is the only immediate solution to regulate the controversial content streamed across the country.

Self-regulation alludes to responsibilities and duties laid down and assigned to the media administrators to implement and execute by themselves, which they voluntarily and intentionally decided. Such guidelines have the character of attractive goals, rules, or principles instead of mandatory and fixed standards to be accomplished<sup>181</sup>. A precise, systematic, self-policing-based methodology is desirable, particularly alluring because the alternate option – dependence on overbroad, profoundly stringent regulation, with laws varying across jurisdictional borders often yields short-term solutions due to rapid technological advancements<sup>182</sup>. Significant and compelling self-guideline gives the chance to adjust rapidly to the reviving specialized technical advancement across the globe and, when appropriately encased in collaboration with the Government, is desirable over compulsory regulations laid down by the legislature<sup>183</sup>. The general advantages of self-regulation incorporate effectiveness, expanded adaptability, expanded incentives for compliance, and diminished expense<sup>184</sup>. A carefully organized program underlining self-regulation is particularly agreeable and harmonious given the wide variety of content available across the OTT

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<sup>179</sup> Dr. Marcel Machill, *Self-Regulation Of Internet Content* (Bertelsmann Foundation, Gütersloh 2004) <<https://cdt.org/wp-content/uploads/speech/BertelsmannProposal.pdf>> [Last accessed 10 September 2021].

<sup>180</sup> Kevin McDonald, *The Netflix Effect: Technology And Entertainment In The 21st Century* (Wiley Periodicals, Inc 2017) <<https://doi.org/10.1111/jpcu.12615>> [Last accessed 10 September 2021].

<sup>181</sup> Shubhangi Heda, 'How To Regulate OTT Services In India' [2019] Center for Media, Data and Society (CMDS). <<https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf>> [Last accessed 12 September 2021].

<sup>182</sup> Monroe Price, *The Concept Of Self-Regulation And The Internet* (University of Pennsylvania 2000) <[https://repository.upenn.edu/cgi/viewcontent.cgi?article=1143&context=asc\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1143&context=asc_papers)> [Last accessed 12 September 2021].

<sup>183</sup> 'Netflix And Dilemma Of Content Regulation In Malaysia' (2019) 28 International Journal of Advanced Science and Technology <<http://sersc.org/journals/index.php/IJAST/article/view/1782>> [Last accessed 12 September 2021].

<sup>184</sup> Dr. Marcel Machill, *Self-Regulation Of Internet Content* (Bertelsmann Foundation, Gütersloh 2004) <<https://cdt.org/wp-content/uploads/speech/BertelsmannProposal.pdf>> [Last accessed 12 September 2021]

platforms<sup>185</sup>. An example of self-regulation methods (i.e.: Netflix) followed by OTT platforms is discussed below:-

Through its terms of use, Netflix informs the subscribers that they will view and use the content available on the platform for their personal use and will not commercialize it in any way. Through such terms, Netflix respects the Copyright laws of the territory. It has also designed a maturity rating categorization system that is visible while viewing the content. Netflix adheres to a specific set of ratings based on the age of the viewers for the television and films content:

- Little Kids: ALL
- Older Kids: 7+
- Teens: 13+
- Mature: 16+,18+

Every choice available on Netflix has the abovementioned maturity rating to assist the members and viewers in making well-informed choices.

### **5.3.1: SUMMARY OF THE CODE**

*"Self-regulation encourages creativity and makes content creators more responsive to its viewers. It's worked well for broadcast media, and there's no reason for it not to do so for curated video content."* - General Counsel, Sony Pictures.

In 2019, the leading OTT players of the video streaming industry drafted a Self Regulation code titled 'Code for Self-Regulation of Online Curated Content Providers' with the help of IMAI<sup>186</sup>. This code sets down the standards and guidelines about maturity ratings, grievance re-dressal framework, and general restriction over the content in accordance with a person's freedom of expressing its views and speech. With the growing risk of intervention by the government authorities to censor the content and the fear of curtailing the ever-increasing freedom of speech over these platforms, self-regulation seems to be the only immediate

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<sup>185</sup> Alli Smith, 'Netflix And Cope': Down Time As A Potential Form Of Coping And Self-Regulation' [2017] Southeastern Psychological Association <[https://www.researchgate.net/publication/315014802\\_Netflix\\_and\\_Cope\\_Down\\_Time\\_as\\_a\\_Potential\\_Form\\_of\\_Coping\\_and\\_Self-Regulation](https://www.researchgate.net/publication/315014802_Netflix_and_Cope_Down_Time_as_a_Potential_Form_of_Coping_and_Self-Regulation)> [Last accessed 12 September 2021].

<sup>186</sup> The **Internet & Mobile Association of India** (IAMAI) is not-for-profit industry body registered under the Societies Act, 1896.

solution. The objective behind self-regulation is to avoid any other entity calling the shots on censorship and limiting the diversity of content done to movies and television shows<sup>187</sup>.

The code places the obligation on the video streaming platforms for internal regulation and censorship over the content. The OTT players, including Netflix, Hotstar, Zee5, ALT Balaji Viacom18, Arre, Eros Now, Sony Pictures Networks, and Jio Digital Life, agreed to follow the model code or any similar rules for content regulation. However, the leading player, Amazon Prime, did not support the code arguing that the current position was adequate. The contents of the code can be divided broadly into two sections:

- Prohibition of content
- Transparent Disclosure and Grievance Redressal

### **Prohibition of Content**

The Code aims to place responsibility for the signatories with regards to the content shown on their platforms. It sets out the following principles, i.e., the guiding rules for censoring or regulating the content which the OTT services host on their platforms<sup>188</sup>:

- “Content that insults and does not respect the national flag or the emblem.
- Content that depicts a minor in any sexual activity or context.
- Content that purposely and in bad faith tries to hurt the religious feelings of any individual or community.
- Content that deliberately and with malicious objectives supports or encourages terrorist activities or any violence.
- Content that has been banned from distribution under any law or by any order of the court.”<sup>189</sup>

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<sup>187</sup> Nikhil Pahwa, 'IAMAI's New Code For Online Content Streaming Sets Up A Self-Regulatory Body' <<https://www.medianama.com/2020/02/223-iamai-content-code-dccc/>> [Last accessed 12 September 2021].

<sup>188</sup> Nikhil Pahwa, 'IAMAI's New Code For Online Content Streaming Sets Up A Self-Regulatory Body' <<https://www.medianama.com/2020/02/223-iamai-content-code-dccc/>> [Last accessed 12 September 2021].

<sup>189</sup> Ibid.

### **Transparent Disclosure and Grievance Redressal**

The Code places a responsibility on the video streaming platforms to inform the viewers about the kind of content being viewed on their platforms. This is done by laying down content categorization according to the age of the viewers and disclosing the provision of technical mechanisms for parental control. It requires the signatories to establish compliance and to acknowledge viewer complaints by appointing a person or institute a department. This department is required to address the grievance within three days from the receipt of the complaint.

The IMAI has proposed an adjudicatory body, Digital Content Complaint Council (DCCC) who will act as a governing council to nominate the members of this council with a retired Justice from either the Apex Court or the High Court as the chairperson and will have other members with experience from the media and entertainment industry. This Council will decide on issues related to age classification, content classification, and parental access control and may ask the content provider if it defaults in following the guidelines to re-classify the ratings of the content and may impose a financial penalty up to the limit of three lakhs.<sup>190</sup>

However, there has been discord in the industry regarding submission to the jurisdiction of DCCC under the chairmanship of the retired Justice A P Shah. However, Netflix, Amazon Prime Video, ALTBalaji, Zee5, Arre, and MX Player refused to comply and be a part of DCCC. The Information and Broadcasting Ministry instructed the industry to finalize a self-regulatory body and have a fixed code of conduct. This code was rejected by the Centre in September 2021, before the introduction of the new IT Rules.

#### **5.3.2: ANALYSIS OF THE CODE**

The principles laid down by the code for censoring the content are somewhat ambiguous. It does not define the ambit of the term ‘disrespect.’ A small act can be severely disrespectful for a staunch nationalist, and it might not be for another. This will lead to a subjective interpretation of the activities. The criteria of outraging religious sentiments put an unreasonable restraint on the fundamental rights of the artist and restrict the content creator’s artistic freedom, who wishes to produce a story

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<sup>190</sup> Ibid.

and is presumably questioning the overpowering notions of hegemonic ideas. The code needs to strictly explain the concept of hate speech to avoid its subjective interpretation, i.e., as an endeavor to target a specific community.<sup>191</sup>

Likewise, another question emerges: how can we establish the intention behind creating something ‘malicious’? How can we distinguish it from an effort to address the dynamics of two opposing sides? The Netflix original series ‘Fauda’ about an undercover Israeli army was praised for a balanced and fair portrayal of the Palestinian conflict. On the other hand, ‘The Family Man’ streaming on Amazon Prime Video, was mired in controversy for portraying a narrative that attempted to create and establish sympathy for terrorists and empathized with them trying to reason out why they picked up guns against the State. The Code does not clarify to the grievance redressal department the liability or penalty if it does not reply to the complaint within the specified period, nor does it specify the qualifications of a person who would be considered fit to be a member of the grievance redressal department. It also does not grant any power to the department to ensure that the rules are complied with.<sup>192</sup> The internet immensely changed the viewing habits of people in India. Once upon a time, ‘watching content’ meant sitting in front of the TV or visiting the cinema halls, but OTTs as a medium has brought portability and accessibility to consumers.

The CEO of Netflix<sup>193</sup> commented on the content regulation scenario of India and said as no one in the industry desires government regulation, self-regulation might be the key. He stressed that the web as a medium had provided the users the freedom to choose the content for themselves. The historical framing of the attitude of the Government points towards crossroads between state censorship and self-regulation. OTT content regulation tends to be influenced by film and television regulation as it garners in curated and quality content from both the mediums and original production. While the CBFC regulates the films, television content tilts towards self-regulation.

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<sup>191</sup> Namita Singh, 'IAMAI's Regulatory Code For OTT Platforms Outlining Principles And Seeking A Creation Of Grievance Redressal; Will It Lead To Self-Censorship? - Medianama' (*MediaNama*, 2020) <<https://www.medianama.com/2019/01/223-iamai-ott-regulation-video-platforms/>> [Last accessed 12 September 2021].

<sup>192</sup> Ibid.

<sup>193</sup> Reed Hastings, CEO of Netflix.

The introduction of movies in India established the effect motion pictures have on a person, which continues today.

The effect of the medium highlighted the need for regulation. In the post-independence period, when the cinema industry grew on a rampant scale, the Government justified its paternalistic role for film regulation to protect the ideals of public morality, considering cinema to be a powerful medium of exhibition having a more extensive appeal<sup>194</sup>. Judiciary played a pivotal role in forming a policy framework for content regulation of films and pointing out that India needs a liberal form of censorship to promote artistic expression.

One of the major concerns for content regulation in both television and films was the influence of foreign content. Initially, the committee assessing the film censorship had observed that the foreign content was beneficial for an Indian audience. Still, the committee exploring regulation of content for television presented the concerns regarding cultural insensitivities of foreign content & TV channels. This concern has now been aggravated with OTTs bringing in content from all around the world. The shift in medium from films to television and the transmission through satellites has now successfully expanded the scope of technology in the lives of people and this effect has triggered the Government to have a 'paternalistic influence' over the medium<sup>195</sup>.

The sociological factors then determined the way this 'paternalistic attitude' percolated within the content regulation policy. It includes cultural sensitivities in the form of concerns raised regarding the portrayal of sexually explicit, vulgar content; showcasing communal riots; economic policies include the allocation of budgets for expansion of television, liberalization policy with introducing foreign TV channels making their way in India; political environment like that of Emergency where mass media was continuously exploited by the Government<sup>196</sup>. This attitude of the Indian Government might lead it to frame a statutory basis for regulating content. Still, it

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<sup>194</sup> Shubhangi Heda, 'How To Regulate OTT Services In India' [2019] Center for Media, Data and Society (CMDS).  
<<https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf>> [Last accessed 13 September 2021].

<sup>195</sup> Ibid.

<sup>196</sup> MURKY W CONTENT REGULATION THE EMERGENCE OF OVER THE TOP SERVICES  
[http://www.etd.ceu.edu/2019/heda\\_shubhangi.pdf](http://www.etd.ceu.edu/2019/heda_shubhangi.pdf)



might rely on the existing regulatory model and might be willing to tilt towards self-regulation as it did with television. The Courts have nudged the Government towards introducing a policy framework that aligns with the need for a policy with technological change<sup>197</sup>.

Quality content is the basis of the success of video streaming OTT platforms in India. Self-censorship and self-regulation may be motivated by fear of the state, authority, and self-appointed defenders of morality rather than the ethics and culture of the society. The grip of censorship and its effects on conventional platforms are well known. Due to its paternalistic approach towards the content, a lot has been said and done in the name of public sentiments and societal culture. OTTs are the recent addition to the list of modes of mass communications and are at a nascent stage of development; censorship and self-regulation will only delay its growth. Thus, there is a massive risk that OTT will lose its enigma even before it rises. Self-regulation by the industry players will lead to dilution of content.

However, self-regulation is yet a better solution than censorship laid down by the Government, which is heavily criticized for putting unnecessary restrictions on the author's freedom of speech and expression and curtailing creativity under archaic notions of culture, morality unwarranted political influence. The OTT industry often pushes back the attempts made by the Government to censor the critical and comparatively strong content available over the internet. Channeling through such murky waters of content regulation and censorship, the OTT industry has lobbied for self-regulation over it and formulated a self-regulation code.

#### **5.4: OTT RULES, 2021**

In the press release by the I&B Ministry, it was observed that *“the increasing instances of misuse of social media by anti-national elements have introduced newer challenges for all law enforcement agencies. Currently, there is no robust complaint mechanism where the users of social media and OTT platforms can register their complaints and get them addressed within a clear timeline. Lack of transparency and*

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<sup>197</sup> Ibid.

*absence of grievance redressal mechanisms have left the users dependent on the whims and fancies of social media platforms<sup>198</sup>.”*

On 26<sup>th</sup> February 2021, the Ministry of Electronics and Information Technology (MeITY), passed the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules)**<sup>199</sup> for regulating the OTT services, social media platforms, and digital media<sup>200</sup>.

The rules are classified into three parts- Part I deals with the definitions, Part II contains the requirements of due diligence that have to be observed by the intermediary & implementation of the grievance redressal which will be administered by the Ministry of Electronics and Information Technology (MeITY)<sup>201</sup>, and the Code of Ethics and procedure for all kinds of digital medium which the Ministry of Information and Broadcasting will administer is laid down in Part III<sup>202</sup>.

**Part II of the Rules** explains the requirement of due diligence that is necessary for the intermediary and any other requirements that have to be followed by the significant social media intermediary<sup>203</sup>. Under Section 2(1)(w), an ‘intermediary’ means ‘a person who obtains, collects, or transfers the records/offers any service relating to that record & includes telecom, network, web-hosting service providers, cyber cafes, search engines, and online marketplaces’<sup>204</sup>. ‘Social media intermediary’ means a provider that allows users to interact online with other users using the providers’ platform.

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<sup>198</sup> Intermediary Guidelines and Digital Media Ethics Code, [https://ananova.com/news/story/sm\\_521148](https://ananova.com/news/story/sm_521148)

<sup>199</sup> under the powers conferred to it by Sections 69A(2), 79(2)(c), and 87 of the Information Technology Act,

<sup>200</sup> Overview of the OTT Regulations, 2021 - iPleaders. <https://blog.iplayers.in/overview-ott-regulations-2021/>

<sup>201</sup> India Tightens The Noose On Intermediaries And Social .... <https://www.mondaq.com/india/social-media/1042078/india-tightens-the-noose-on-intermediaries-and-social-media-platforms>

<sup>202</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules)

<sup>203</sup> Overview of the OTT Regulations, 2021 - iPleaders. <https://blog.iplayers.in/overview-ott-regulations-2021/>

<sup>204</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules)

**Part III of the Rule** applies to the publishers of news and publishers of online curated content<sup>205</sup>. These Rules establish a three levels of a grievance redressal mechanism for news publishers and OTT platforms and digital media<sup>206</sup>. “The structure of the three tiers will be:

- **Level I** – A publisher shall establish a grievance redressal mechanism and appoint a Grievance Officer. This Officer shall receive any grievance relating to the Code of Ethics. He/she shall be the point of contact for interaction with the complainant, the self-regulating body, and the Ministry<sup>207</sup>. This officer shall ensure that any complaint is resolved within 15 days. The online-curated content has to be classified in the categories as provided in the Schedule to the Rule.
- **Level II** – One or more self-regulatory bodies of publishers constitute an Independent body, headed by a retired judge of the Supreme Court or a High Court, or any person from the relevant media field<sup>208</sup>. This body shall register with the Ministry within 30 days from its establishment. The functions of the self-regulating body include overseeing and ensuring that the publishers follow the Code of Ethics; to guide or advise the publishers on various aspects and to ensure compliance with the Code of Ethics, and addressing grievances and hear appeals that have not been resolved within fifteen days.<sup>209</sup> They are empowered with issuing warnings, censuring, admonishing, or reprimanding the publisher.
- **Level III** – The I&B Ministry shall develop an Oversight Mechanism. The Ministry shall appoint an ‘Authorised Officer’ who acts as the Chairman of the Committee. The Committee shall hear all complaints or appeals regarding any violation or contravention of the Code of Ethics. Part III also require the

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<sup>205</sup> Ibid.

<sup>206</sup> Overview of the OTT Regulations, 2021 - iPleaders. <https://blog.iplayers.in/overview-ott-regulations-2021/>

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Overview of the OTT Regulations, 2021 - iPleaders. <https://blog.iplayers.in/overview-ott-regulations-2021/>

publishers to furnish information to the Government and disclose the grievance redressal”<sup>210</sup>.

According to the Code of Ethics that is specified in the Rules, the News shall follow all norms of Journalistic Conduct of Press Council Act, Programme Code of the Cable Television Act<sup>211</sup>. It also provides for certain principles to be observed by OTT platforms like Netflix and Amazon Prime Video.

The online-curated content shall not affect the ‘sovereignty and integrity of India’ and take into consideration the multi-racial and multi-religious content, and exercise caution accordingly<sup>212</sup>. The publishers have to classify their content into an age-based category, restriction of access to a child, and measures to improve accessibility by persons with disabilities<sup>213</sup>.

#### **5.5: CONCLUSION**

OTT streaming platforms have created “*a parallel medium for disseminating information.*” Content that is generally censored on any traditional mass media mode can be released as it is on OTT platforms. In his paper titled ‘*Co- and Self-regulation in European Media and Internet Sectors: The Results of Oxford University’s Study,*’ Christopher T. Marsden said, “Technological progress brings about change, and that self-regulation can respond more rapidly *efficiently than state regulation. There is no universally acceptable solution for successful self-regulation, as these regimes must be adjust to the needs of each sector and the different circumstances. Though there is some concern with the development of codes that insufficient standards apply to both law enforcement/child protection and protection of freedom of expression rights. If these mechanisms are improperly structured, we can expect public harm to result in the medium term*”.

Taking advantage of the gap in policy, the creators have been releasing their content online without any pre-censorship by the State amidst the debate spurred by a particular chunk of the society advocating that such uncensored content is

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

*“eradicating Indian values in today’s youth and promoting western culture in our country”*. However, it should be realized that a difference will always exist between how the audience perceives certain content. Some might find the portrayal of a particular theme offensive, while others might feel it necessary to describe the theme aptly. It is the audience who is expected to make a judgment like a prudent person would and take the content as the creator intended it to be taken. The entirety of the content should be focused on rather than fussing about more minor details. The narrow and conservative approach of a few should not hinder the progress of society at large. But, the introduction of the new IT Rules, 2021, has raised many eyebrows among social media companies. These new rules provide a lot of control to the Central Government to act, direct, block, and delete the contents published on these platforms. It will be interesting to see how the implementation of these rules pans out in the long run.

# CHAPTER 6- REGULATION OF OTT CONTENT ON A GLOBAL SCALE

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## **6.1: INTRODUCTION**

With the immense proliferation of affordable smartphones and increasingly ubiquitous wireless broadband networks, there has been an enormous disruption of traditional content delivery models of Newspapers, broadcasters; both being replaced by digital content providers around the world.<sup>214</sup> Due to the vast cultural and socio-political differences, it becomes challenging to formulate a uniform code of content regulation globally. Hence, each country can develop laws that are suitable to the needs and requirements of the citizens. India has begun deliberations on various approaches to censor content on OTT platforms due to rising court cases and police complaints against offensive content<sup>215</sup>. It becomes crucial to understand the models that other nations follow. This can help us understand how the newly developed Rules by the Central Government are better or can be improved to suit the requirements of our country.

It is important to note here that very few countries were taken for comparison, as the countries with the most information were considered. Therefore, the study covers only a few countries, including India. Regulation of OTT platforms is a broad area of research, and due to time constraints, this study does not cover this topic to the maximum extent.

## **6.2: OTHER COUNTRIES THAT REGULATE OTT CONTENT**

### **1. CHINA**

The regulation model of China can be the first example. The size of the online video market was estimated to be 596 million at the end of June 2017. This represents 76% of the online population, emphasizing that online video viewing is one of China's

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<sup>214</sup> Guha, R., *India after Gandhi: The history of the world's largest democracy*, Pan Macmillan (2017).

<sup>215</sup> Economic Times, Netflix and Amazon face censorship threat in India: Source, 18 October 2019, available at: <https://economictimes.indiatimes.com/industry/media/entertainment/netflix-and-amazon-face-censorship-threat-in-india-source/articleshow/71636063.cms>

most common online activities.<sup>216</sup> In 2007, the State Administration of Press, Publication, Radio, Film, and Television, an executive agency which is in charge of the administration and supervision of enterprises engaged in the Radio and Television Industries, issued the Administrative Provision of the Internet Audio-Video Program Service which came into effect in 2008 and was later amended in 2015.<sup>217</sup> All platforms must possess an Internet Audio-Video Program Transmission License to distribute any content online. Due to the strict criteria for obtaining this, a substantial amount of platforms and content providers are entering into partnerships with, merging, or even acquiring companies that already possess the license<sup>218</sup>. China also imposes strict restrictions on any foreign content that is streamed via an online platform. Each separate title would require a separate permit, and to obtain that permit, the entire show or film must be submitted to the Regulators for review and approval<sup>219</sup>. This is one of the main reasons digital content is released in China much later compared to the rest of the world, and as a result, there has been a steep increase in the circulation of pirated content.

Sites such as Twitter, Google, and WhatsApp are blocked in China, and their services are provided instead by Chinese providers such as Weibo, Baidu, and WeChat<sup>220</sup>. China has hundreds of thousands of cyber-police appointed by the Government. They regularly monitor all available social media platforms and screen messages deemed to be politically sensitive to ensure that all laws of the land are complied with.

## 2. SINGAPORE

Singapore has taken a straightforward approach in terms of content regulation. In Singapore, the Minister for Communications and Information in 2018 proposed an amendment to the Films Act and the Broadcasting Act to clarify the application of

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<sup>216</sup> Online Video Industry China Executive Summary, Asia Video Industry Association (2018) <<https://asiavia.org>> (Last accessed on 23<sup>rd</sup> August, 2021)

<sup>217</sup> Congressional-Executive Commission on China, Annual Report (2018) <<https://www.cecc.gov>> (Last accessed on 23<sup>rd</sup> August, 2021)

<sup>218</sup> Feng, L., *Online video sharing: an alternative channel for film distribution; Copyright enforcement, Censorship, and Chinese independent cinema*. Chinese Journal of Communication, 10(3), pp.279-294 (2017)

<sup>219</sup> Huang, H. and Yeh, Y.Y., *Information from abroad: foreign media, selective exposure and political support in China*, British Journal of Political Science, pp.1-26 (2017).

<sup>220</sup> Online information from <https://www.etvbharat.com/english/national/bharat/social-media-status-and-laws-from-around-the-world/na20210226055323397>.

content regulation OTT subscribed video-on-demand platforms.<sup>221</sup> The Infocomm Media Development Authority (IMDA) is an independent body in Singapore responsible for the same.

“Service providers are required to classify their content on the same basis as offline films –

- G: for general,
- PG: for parental guidance,
- PG13: for parental guidance for children below 13,
- NC16: for no children below 16 years of age,
- M18 for mature audiences (18 and above) only, and
- R21 for content restricted to people of 21 years and above only.”

This would mean that strict broadcasting standards such as censoring nudity, references to homosexuality, and harsh language will apply to global players in that market.<sup>222</sup> The Code strictly mentions the do’s and don’ts which all service providers should follow, and they should ensure that the programs hosted by them comply with the prevailing laws of Singapore and do not undermine national or public interest and national or public security and do not undermine racial or religious harmony among others<sup>223</sup>.

### 3. TURKEY

In Turkey, The Radio and Television Supreme Council (RTUK) is the primary body tasked with regulating and supervising radio, television, and on-demand media services in the country.<sup>224</sup> They issue licenses to OTT platforms for ten years, enabling the Government to monitor audiovisual feeds.

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<sup>221</sup> Content Code for Over-The-Top, Video-On-Demand and Niche Services, Infocomm Media Development Authority of Singapore (2018) <<https://www.imda.gov.sg>> (Last accessed on 23<sup>rd</sup> August, 2021).

<sup>222</sup> Kelly N. G., *Broadcasting Act to be updated amid challenges In Media ccene*, Today (2<sup>nd</sup> June 2019) <<https://www.todayonline.com/singapore/>> (Last accessed on 23<sup>rd</sup> August, 2021).

<sup>223</sup> OTT content regulation across the globe: Will India follow suit?<<https://www.themobileindian.com/news/ott-content-regulation-across-the-globe-will-india-follow-the-suit-34688>

<sup>224</sup> Online information from <https://www.themobileindian.com/news/ott-content-regulation-across-the-globe-will-india-follow-the-suit-34688>



#### 4. AUSTRALIA

The Broadcasting Services Act, 1992 (BSA) is the principal legislation authority for OTT content<sup>225</sup>. It is regulated through a complaints-based system introduced on 1 January 2000, known as the online content co-regulatory scheme. The BSA covers both content that have been classified and also content that has not been classified.

“The scheme deals explicitly with content which has been classified as<sup>226</sup>:

- RC (refused classification), given to any type of content that cannot be sold, advertised, or imported in Australia;
- X 18+, given to content that is restricted to adults due to its sexually explicit nature;
- R 18+, given to content that is restricted to adults because of its high impact. Some people may find this offensive, or;
- MA 15+ is given to content restricted to people over 15 years of age because of its high impact<sup>227</sup>”.

Apart from classification of content, this scheme restricts access to certain groups of content<sup>228</sup>. The scheme prohibits hosting of and access to RC content. Further, it restricts access to content that has been classified as X 18+, R 18+, or MA 15+.<sup>229</sup>

So far, the Australian Classification Board has been classifying content into both online and offline categories. Recently though, after a two-year pilot test, Netflix got the approval to self-classify its content using its tools<sup>230</sup>. The tool is expected to help

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<sup>225</sup> Ibid.

<sup>226</sup> Department of Communication and the Arts, Online content regulation, available at: <https://www.communications.gov.au/policy/policy-listing/online-content-regulation>

<sup>227</sup> Department of Communication and the Arts, Online content regulation, available at: <https://www.communications.gov.au/policy/policy-listing/online-content-regulation>

<sup>228</sup> Schedule 5, Part 5, Division 3, Section 60(1)(c)-(e), the BSA

<sup>229</sup> Schedule 7, Part 2, Division 1, Section 20, the BSA

<sup>230</sup> Australian Classification, Australia leading the way with Netflix on classification, 15 November 2019, available at: <https://www.classification.gov.au/about-us/media-and-news/news/australia-leading-way-netflix-classification>.

Netflix classify content and issue suitable advisories quickly to premier its content in Australia without any significant delays<sup>231</sup>.

## 5. UNITED KINGDOM

In 2018, the Director-General of the British Broadcasting Corporation (BBC) called for a regulatory mechanism on video streaming services<sup>232</sup> like Netflix and Amazon.<sup>233</sup> Despite the absence of specific rules covering online videos, the British Board of Film Certification announced a partnership with Netflix. This allowed the streaming giant to set its ratings for film and television programs.<sup>234</sup> This partnership would enable the board will help to allow Netflix to set their ratings for all the content available on their platform. After that, the UK government released a paper on the threat that was posed by unregulated online content and sought closed consultation on how it could be dealt with.<sup>235</sup> This is only concerned with user-generated content at the moment. It proposes a new regulatory framework to ensure the online safety of British citizens.<sup>236</sup> “The functions of this regulator will include the following:<sup>237</sup> –

- a. to oversee and enforce the regulatory framework,
- b. to set out codes of practice,
- c. to oversee user redressal mechanisms,
- d. to promote education and awareness about online safety, and
- e. to commission and undertake research to improve standards of online security, among others.”<sup>238</sup>

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<sup>231</sup> Ibid.

<sup>232</sup> OTT content regulation across the globe: Will India follow suit?  
<https://www.themobileindian.com/news/ott-content-regulation-across-the-globe-will-india-follow-the-suit-34688>

<sup>233</sup> The Guardian, Tony Hall: regulate video streaming services or risk ‘killing off’ UK content, 16 September 2018, available at: <https://www.theguardian.com/media/2018/sep/16/tony-hall-regulate-video-streaming-services-or-risk-killing-off-uk-content>

<sup>234</sup> The Guardian, Netflix to set its own age ratings for film and television programmes, 14 March 2019, available at: <https://www.theguardian.com/media/2019/mar/14/netflix-to-set-its-own-age-ratings-for-film-and-television-programmes>

<sup>235</sup> UK Department for Digital, Culture, Media & Sport, Online Harms White Paper, 8 April 2019, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/793360/Online\\_Harms\\_White\\_Paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf)

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

“The proposed regulatory framework will include<sup>239</sup> –

- a. a duty on the companies to take reasonable measures to keep their users safe,
- b. a mandate on companies to tackle illegal and harmful activities on their service,
- c. a requirement of releasing transparency report by the company, annually; and
- d. a mandate on the company to have a practical and easy-to-access user complaints function<sup>240</sup>.”

In 2020, the UK Government issued legislation enforcing the EU Electronic Communications Code (EECC) standards in the UK under the Brexit transitional framework.<sup>241</sup> The UK Government is working on strict regulations to regulate OTT platforms.

## 6. UNITED STATES

In the United States, many parts of the video market are heavily regulated, and they have specific regulations governing Television broadcasters, cable operators, and even satellite providers.<sup>242</sup> However, they have not formulated laws regarding the OTT space because the content provided on these platforms is not regulated. Matters such as licensing and pricing aren't handled either.<sup>243</sup> This system in the United States is beneficial because it restricts the creation of a monopoly as it encourages new platforms to be created and enter the market, which benefits the consumer itself due to competitive pricing.<sup>244</sup> This is evident as cable networks such as NBC<sup>245</sup> and the BBC are creating OTT platforms to enter the market.<sup>246</sup>

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<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Online information from <https://blog.iplayers.in/ott-platforms-regulation/>

<sup>242</sup> Yanich, D., *Does ownership matter? Localism, content, and the Federal Communications Commission*, *Journal of Media Economics*, 23(2), pp.51-67 (2010).

<sup>243</sup> Ebru T. B., *Methodology for the Regulation of Over-the-top (OTT) Services: The Need of A Multi-dimensional Perspective*, *International Journal of Economics and Financial Issues*, 8(1), 101-110. (2018).

<sup>244</sup> Ibid.

<sup>245</sup> Frank Pallotta, *NBC Universal is getting in the streaming business*, *CNN Business* (14<sup>th</sup> January, 2019).

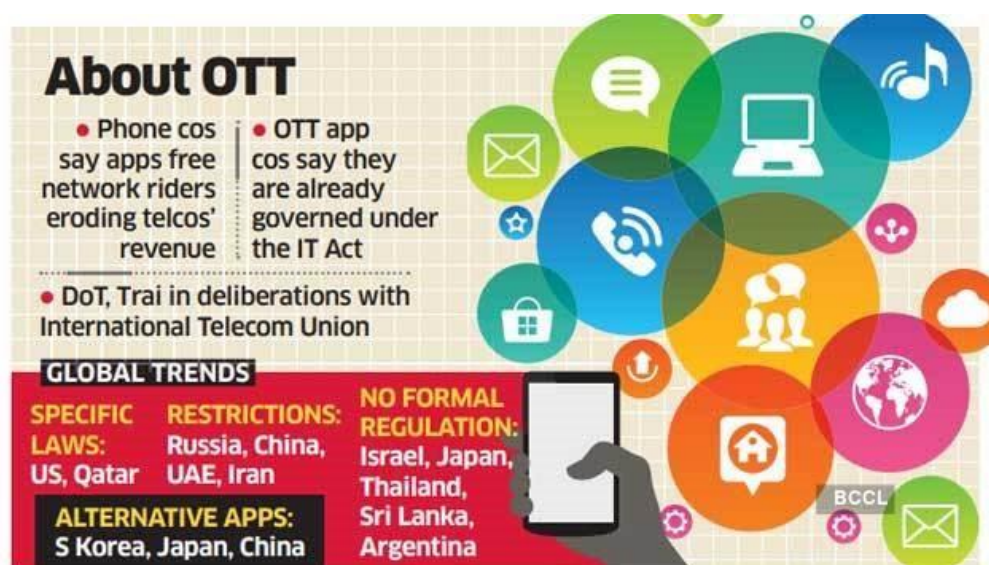
<<https://edition.cnn.com>> (Last accessed on 20<sup>th</sup> January, 2020).

<sup>246</sup> *BBC to launch US online subscription service next year*, *The Guardian*, International Edition (17<sup>th</sup> September, 2015)

## 7. INDONESIA

In 2016, Telkom<sup>247</sup> blocked Netflix for not complying with the local censorship laws<sup>248</sup>. Subsequently, Indonesia's Ministry of Communication and Information Technology gave Netflix some time to comply with local regulations. Subsequently, Netflix entered into a partnership with the said operator, after which the latter unblocked user access.<sup>249</sup>

The Indonesian Broadcasting Commission (KPI), the state body monitoring all broadcasting content, announced on 7 August 2019 that it would release rules which would enable it to watch digital media content such as that hosted by YouTube, Netflix, and other social media.<sup>250</sup> The laws came into force within a year but have been met with a lot of criticism.



Source: InsightIAS

<sup>247</sup> Indonesia's biggest telecom operator

<sup>248</sup> BBC, Netflix blocked by Indonesia in censorship row, 28 January 2016, *available*

*at:* <https://www.bbc.com/news/technology-35429036>

<sup>249</sup> The Drum, Indonesia's largest telco Telkom unblocks Netflix after new partnership, 12 April 2017, *available at:* <https://www.thedrum.com/news/2017/04/12/indonesia-s-largest-telco-telkom-unblocks-netflix-after-new-partnership>

<sup>250</sup> The Jakarta Post, Indonesia's broadcasting watchdog to monitor Netflix, YouTube, 7 August 2019, *available at:* <https://www.thejakartapost.com/news/2019/08/07/broadcasting-watchdog-to-monitor-digital-media.html>

### **6.3: INDIA'S NEWLY DEVELOPED APPROACH TO REGULATE OTT CONTENT**

2020 witnessed the Ministry of Information and Broadcasting (MIB) discussing and consulting with several stakeholders on any form of regulation of OTT platforms to make this newly developed sector more efficient. As a result, the Central Government has set rules and frameworks for regulating social media companies, streaming service providers, and digital news publishers<sup>251</sup>. The newly developed Information Technology (Guidelines for Intermediates, Digital Media Ethics Code) rules, 2021 will bring online organizations under a three-tier regulatory framework, which is as follows:

**Level I** - will be governed by the company itself. This essentially means that each company will appoint a grievance redressal officer and publish their details on their websites. Social media companies need to select a Chief Compliance Officer, a Nodal Contact Officer, and a Grievance Officer.

**Level II** - is referred to by the Government as 'self-regulatory bodies of applicable institutions.' As such, industrial enterprises will consider complaints against organizations under them. However, when the term 'self-regulation' is used, the law stipulates that the grievance redressal mechanism of an enterprise must be headed by a retired judge empaneled by the Government and must have 'experts'. The Rules state that "*the self-governing body referred to in sub-rule (1) shall be chaired by a retired judge of either the Supreme Court or the High Court, who shall be appointed from a panel, with no other members exceeding six, and shall specialize in the fields of media, broadcasting, technology, and entertainment.*"

**Level III** is government control through an inter-departmental level government committee appointed by the Ministry of Information and Broadcasting. The committee may decide to include other ministries and organizations, including the Ministry of Information and Broadcasting, the Ministry of Women and Child Development, the Ministry of Law and Justice, the Ministry of Home Affairs (MHA), the Ministry of Electronics and Information, the Ministry of Technology, the Ministry of External Affairs, the Ministry of Defense, the Indian Computer Emergency Response Team and the domain experts.

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<sup>251</sup> Banerjee Tanu, Johrilshan & Kedia Garima, 2021 "New Rules for OTT Platforms: Regulation or Restriction?"

According to the new rules, complaints against OTT content must first be made to the OTT platform complaint officers<sup>252</sup>. They must resolve the complaint within 15 days. If the complainant is not satisfied with this solution, they can go to the grievance committee of the industry body, which will give them 15 days. The Ministry can be approached directly if the complainant is not satisfied with the decision. The removal of content, issuing apologies, final warnings, and content ratings are all actions that can be performed under each level. The final decision rests with the Level III Inter-Ministerial Government Body<sup>253</sup>.

The content rating system prescribed under the new rules already exists as part of the Cinematograph Act 1952. It is similar to the rating criteria prescribed under the Internet and the Self-Control Codes issued by the Mobile Association of India.

#### **6.4: COMPARISON BETWEEN INDIA AND OTHER COUNTRIES**

In India, OTT platforms are directly controlled by the Central Government. The Central Government has issued a three-tier regulatory framework for which self-regulation has been proposed. The OTT platforms in Singapore and Turkey are governed by an independent body. The Infocomm Media Development Authority (IMDA) in Singapore and The Radio and Television Supreme Council (RTUK) in Turkey regulate OTT platforms. Similarly, Australia also follows an Act (i.e., the Broadcasting Services Act 1992) to regulate OTT platforms.

While comparing countries like Singapore, Turkey, Australia, and the UK, the law enacted for OTT control is more effective in India than in the abovementioned countries. Apart from India, Australia is the only country that regulates OTT platforms through law enforcement. Compared to India, the law made by Australia is precise. Australia's regulation is mainly based on two articles in the Broadcasting Act, but the Indian Government has formulated a new law to regulate the OTT platform.

Compared to other countries in this study, India is the only country that promotes self-regulation, whereas other countries use government regulation for censorship of OTT platforms. India promotes two methods effectively. India has not developed any unique bodies for the regulation of OTT platforms, so the Government directly

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<sup>252</sup> (Oommen Paul & Karthikeyan Ragamalika, 2021, "Explained: Union govt's new IT rules for social media, OTT platforms & digital news")

<sup>253</sup> Ibid

regulates OTT platforms and provides another means of self-regulation for the benefit of OTT platform companies.

While the I&B Ministry advised using the BCCC<sup>254</sup> as a model, the minister (Prakash Javedekar) has been reported to have cited the Chinese model of OTT content regulation as an example to OTT Platforms<sup>255</sup>. In China, local sites such as Tencent Video have accepted the terms of regulation imposed by the Chinese National Radio and Television Administration while the more significant players such as Netflix and Amazon Prime remain banned<sup>256</sup>. This is similar to the Chinese model of regulation of encryption where players such as Telegram and WhatsApp are banned. In contrast, local agencies such as We Chat remain in business after a substantial compromise on citizens' privacy<sup>257</sup>.

Thus, while OTT regulation is desirable, the Indian Government needs to agree to a higher standard of guidelines than that of Singapore and China, according to its constitutional values promoting online speech and artistic liberties.

## **6.5: CONCLUSION**

To sum up, the OTT content market is still in a very nascent stage across the globe. Most countries are witnessing a sudden spike in the number of consumers in the OTT space, especially after the global lockdown. Most nations have laws to regulate content available on various OTT platforms, whereas other countries are on their way to construct a legal framework for the same. Different countries follow different models of regulation based on their socio-political climate. Countries like China and UAE follow a rigorous regime, whereas the United States follows no explicit censorship laws. Countries like Singapore and Qatar also follow a moderate approach with specific regulations that have been expanded to accommodate online content.

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<sup>254</sup> The Broadcasting Content Complaints Council (BCCC) is the grievance redressal system established under the aegis of the IBF which gives binding decisions based on complaints against non-news broadcasted content.

<sup>255</sup> Malvika Gurung, 5 March 2020, Government Gives 100 Days to Netflix, Amazon & Other OTTs to Form Self-Regulation Rules, China Type Regulation in India? , <https://trak.in/tags/business/2020/03/05/govt-gives-100-days-to-netflix-amazon-china-type-regulation-in-india/>.

<sup>256</sup> Online information from <https://globalfreedomofexpression.columbia.edu/updates/2021/01/government-of-india-to-regulate-ott-platforms/>

<sup>257</sup> Ibid.

While the role of the State has been paternalistic in dictating what should and should not be allowed for consumption by the masses<sup>258</sup>, the State should also consider the changing nature of the industry as it begins to prepare a code for OTT platforms.

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<sup>258</sup> Online information from <https://techlawforum.nalsar.ac.in/regulation-of-content-on-ott-platforms-an-explainer/>



# CHAPTER 7: CONCLUSION

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## **7.1: INTRODUCTION**

Through the research conducted for this thesis, the author has sought to evaluate the situation of lack of exclusive regulation on the content available on the video streaming OTT Platforms. This need was felt due to the controversies arising in the nation on various shows streaming over these platforms. The thesis discusses the crucial factors that have adjusted to the shift towards the OTT platforms, especially in the entertainment industry, to emphasize the paternalistic role of the state and the policy vacuum situation. The Judiciary, Government, and the attitude of the industry have shown a light on the impact of a medium on the viewers. The advent of OTTs has brought a significant shift in the viewing habits of individuals; however, the most significant issue is the infrastructure within which these platforms function.

The open internet infrastructure makes it challenging for the legislature to have regulations. The internet has enabled anyone with access to a digital gadget to have access to content. Hence, the accessibility and portability provided by the technology have made similar content available on different mediums, the only difference being possible censorship over it.

Netflix has created its brand as ‘TV got better,’ which is being proved correct to an extent. With the current policy vacuum created through the venture of OTT platforms, the Judiciary is recommending the Government to address the issue of censorship over such platforms. While the Telecom Regulatory Authority of India (TRAI) has framed a consultation paper and committees were set up to look into the issue of online content regulation, the Government has no final measures yet. The industry has attempted to have a draft code of ethics in the form of Self Regulation Code, followed by a new set of IT Rules.

## **7.2: FINDINGS**

**Chapter 1** of this thesis introduces OTT platforms and the services prevailing across the nation. These platforms do not require access to any operator to function and are accessible to the users directly. This characteristic of OTT platforms has impacted the telecom service providers to a large extent. A review of the literature available on the

thesis topic and that has been referred to by the author during her research is also elaborated in this chapter. The chapter also includes the research questions and the hypothesis drafted by the researcher.

**Chapter 2** focuses on the concept of censorship of audio-visual medium in detail and analyses how India has tackled the issues effectively over the years. The author believes that with the penetration of the Internet, violence and other forms of questionable content can be easily accessed through smartphones, thereby challenging the credibility of any censorship laws and concludes the chapter on the ground that, despite its apparent qualities, if applied too severely, censorship cannot be considered a good thing.

**Chapter 3** makes an in-depth analysis of the categorization created under the services provided over the internet along with the categorization of OTTs based on the services or applications. Owing to various advantages associated with them, these platforms have become tremendously successful in India. Factors like quality content, increase in smartphone usage, affordability of data connection; have contributed to the growth of such platforms in India. While analyzing the video streaming OTT platforms, the author also points out that India has seen a dramatic rise in viewer base across all platforms, be it on user-generated content-based platforms like YouTube or commercial content showcasing platforms like Amazon Prime Videos, Hotstar, Hulu, etc.

Further, **Chapter 4** analyzes the legislation governing the country's video content across various mediums (films, television, and digital content). India has regulations to certify and censor the entertainment content broadcasted through cinema and television. However, the IT Act is the exclusive legislation with jurisdiction over digital content regarding OTT platforms. The OTTs that qualify as intermediaries must follow a set framework to be exempt from liability of unlawful activities. It should be noted that there is currently no exclusive regulatory framework under the Act to censor the content accessible on OTT platforms. The IT Act only bans the publishing and distribution of sexually explicit or obscene material. The digital content available on the internet is enormous, and establishing a legislative framework for certifying and monitoring such material seems to be an arduous task given the regulation and compliance issues.

An assessment is made in **Chapter 5** on the existing regulatory imbalance in the video streaming OTT-business on the aspect of content regulation. This chapter establishes that India is somewhat an intolerant nation in terms of public morality and culture. It is a politically volatile and sensitive state, and any content that is not appropriate in the eyes of citizens or political parties are generally considered anti-national and disrespectful'. The author then studies the intervention of the Judiciary on the subject of recent judicial pronouncements that the existing legislation censoring and regulating content like films and televisions do not apply to the video content streaming across the Internet. The only legislation applicable to these platforms is the Information and Technology Act. The courts have brought the Centre into the picture by issuing notice to see into the subject. Furthermore, the author analyses the self-regulatory framework adopted by the industry and concludes that the policy of self-regulation is yet a better solution than censorship laid down by the Government, which is heavily criticized for putting unnecessary restrictions on the author's freedom of speech and expression and curtailing the creativity under archaic notions of culture, morality, and unwarranted political influence. The author concludes this chapter by providing an insight into the New IT Rules, 2021, which was introduced exclusively to govern digital content.

**Chapter 6** deals with the regulation of OTT content on a global scale. This chapter examines the current position of countries like China, the USA, Singapore, Australia, etc., and tries to compare their laws with the newly introduced IT Rules, 2021. The author attempts to analyze how the Indian model is better than the other countries and what India can adopt from such models to introduce into its regulatory framework. The author concludes the chapter on the grounds that different countries follow different models of regulation based on their socio-political climate. States should consider the changing nature of the industry as it begins to prepare a comprehensive code for OTT platforms.

### **7.3: OBSERVATIONS AND SUGGESTIONS**

Initially, the objective of the IT Rules 2021 was to regulate social media content. However, the guidelines currently cover OTT platforms that are “*publishers of original content, including news networks.*” It may be convenient for regulators and lawmakers to extend the scope of the domain under one set of rules, as it is

exceptionally confusing and prohibitive for both OTT players and their respective consumers.

The new rules are only applicable to those platforms with over 50 lakh users. Generally, OTT Platforms cater to a vast audience even though they are relatively small, which clearly shows that a large consumer base does not ensure the company can afford higher expenses. Regional level OTT players like Manorama Max, Hoichoi, Sun NXT, Planet Marathi, and their consumers will face the brunt.

Furthermore, increasing the number of restrictions will incentivize piracy by a considerable margin. Piracy is already one of the significant issues that the entertainment industry has dealt with for over a decade. Legitimate OTT players are already losing up to 30 percent of their annual revenue to piracy<sup>259</sup>. Chasing those who deliver ‘pirated content’ is not a viable option because those who deliver such content can change their online addresses within seconds, and it becomes challenging for them to be traced. Thus, they escape penalization.

Regulations play an essential role, but they need to follow a ‘feather-touch’ approach for a new industry like OTT. One of the biggest criticisms that the IT Rules, 2021 faced was that the rules had come into force from the date it was issued. This seemed a little rushed as the stakeholders were not given enough time to accommodate those changes or make necessary arrangements for their incorporation. The Central Government should have provided a little room for the stakeholders to plan budgets, hire more people and make changes to their platforms.

The newly introduced ‘grievance redressal forum’ to censor OTT platforms tends to infringe the artist's freedom of speech and expression. While publishers are expected to self-regulate at the first tier, the provisions of the Rules are too onerous for self-regulation to be complied with effectively. There is excessive governmental control over OTT content. This mode of ‘dual censorship’ will limit the production of original content, resulting in monetary loss to the entertainment industry. Similarly, the Central Government has also equipped itself with arbitrary power to take down any online content that it deems problematic without any formal procedure. This is a

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<sup>259</sup> Ibid.

clear breach of freedom of speech and expression provided under Article 19 of the Constitution.

The author feels that any regulation concerning OTT platforms should have been made as primary legislation focusing solely on the technology itself rather than a supplementary rule to the IT Act. Introducing an Act in Parliament would have allowed it to be debated by both the Houses and the public. Issuance of Rules undermines the power of the Opposition as it has been introduced without proper engagement.

Before the IT Rules, 2021 came into force, 15 OTT platforms signed a self-regulation code introduced by the IMAI. The Government rejected this in September 2021. The same Government later introduced the three-tier censorship mechanism, which includes both self-censorship along with government-regulated censorship.

The author recommends that to develop and reap the benefits of technological development, India must come out of the veil of the paternalistic censorship mode and truly accept the self-regulatory method adopted by the platforms. If the goal of state-imposed censorship is to restrict the content that Indians consume, it is a never-ending battle. One of the examples for this would be the ban on porn sites imposed by the nation a few years back. Over 3500 porn websites were banned by the Central Government, but India continues to remain the world's third-largest consumer of porn with no sign of letting go<sup>260</sup>. Similarly, we also have access to various VPN (Virtual Private Networks) and Proxy servers which can bypass any form of governmental control. For the OTT industry to grow, develop and empower its consumers, and simultaneously protect the internet as a medium from the garb of political ideologies and scrutiny and ensure freedom of expression, the Government must have an open and broad mindset towards content streaming on these platforms.

The author realizes that state institutions have struggled to save themselves from dilution with every technological tipping point. One of the significant concerns that could be traced within the evolution of content regulation policy and resulting policy vacuums from time to time is a lack of a technology-centric approach towards

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<sup>260</sup> Online information from <https://www.thehindubusinessline.com/opinion/it-rules-2021-over-the-top/article34238342.ece>

formulation of any new policy. The general observation is that the internet as a medium makes it significant to formulate a policy-making technology as the ‘architecture of regulation’. Thus, it is recommended that the effect of the medium on a listener must be a primary consideration while framing laws for regulation of content over the internet. The right of freedom of speech and expression must be enforced in the light of the medium through which expression is disseminated to avoid inconsistency in its application.

The author strongly feels that the growing reach of OTTs presents the question of self-regulation as a solid alternative to state censorship. Self-censorship models are adopted due to dissatisfaction in the existing legal framework, and establishing government-regulated censorship will only lead to suppression of critical content, creating a chilling effect for artistic expression, creativity, discourse, and public exhibition.

From a jurisprudential perspective, Professor Michael C. Douglas posited a theory under which he established conditions that might uphold the concept of ‘self-regulation’ over ‘control by any government or federal agencies’<sup>261</sup>. First, the theory emphasizes “special knowledge of the industry members” to introduce the self-regulatory codes. It is more effective for the Government to depend on the collective expertise from the industry than to try and replicate it at the agency level. In an Indian context, this position of expertise can be provided by bodies such as *FTII* (‘Film and Television Institute of India’) and [CINTA](#) (‘Cine And TV Artistes’ Association’)<sup>262</sup>.

While the code of ethics adopted by some OTT players was a great start towards private censorship, it directly puts their policies affecting the audience in India. The commercial content streaming VoD platforms like Amazon Prime Video, Netflix, Hulu, etc., have a detailed term of use policy that enlists the scope of the subscription. The subscribing audience has complete control over viewership, and thus, the viewer himself makes a well-informed choice. The maturity ratings and the disclaimers provided by these platforms inform the viewers about the type of content, thus helping

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<sup>261</sup> Vishwajeet Deshmukh and Mustafa Rajkotwala, Self-Regulation of Over-The-Top (OTT) Content under the Indian Regime: A Missed Opportunity?, <https://www.jurist.org/commentary/2021/03/%E2%80%8Bdeshmukh-rajkotwala-self-regulation-of-ott-content/>

<sup>262</sup> Ibid.

the viewer decide whether to watch the content. India is rapidly developing into a technology-friendly nation, and any government-regulated censorship will only hamper its growth.

#### **7.4: CONCLUSION**

It is important to note that the the current position of online content, appears to be unbridled, and the creators are exercising their creative liberties to the fullest. The likes of shows like Tandav, Sacred Games, Mirzapur, Bombay Begums, Leila, 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 entirely unregulated or free from any form of censorship, solely on the ground that there is no explicit regulatory framework 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. The existing and newly formulated laws and the self-regulation code lay down sufficient guidelines for the OTT platforms.

*Although most of the OTT Platforms' have complied with the new Rules, they have strongly expressed their displeasure on the grounds that the industry in itself should have had the freedom to decide on the working and composition of the self-regulatory bodies. This has led to a divide among OTT platforms, who have set up two self-regulatory mechanisms<sup>263</sup>:*

- i. The Digital Publishers Content Grievances Council (DPCGC) that comprises of at least 10 OTT platforms which including Netflix, Amazon Prime Video, ALT Balaji, and MX Player under the Internet and Mobile Association of India (IAMAI)<sup>264</sup>;
- ii. The Indian Broadcasting and Digital Foundation (IBDF) comprises platforms like Disney + Hotstar, Zee5, SonyLIV, Voot, Sun NXT, Discovery+, and Jio

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<sup>263</sup> Explained: Why Centre's new rules for digital media face, <https://timesofindia.indiatimes.com/india/why-centres-new-rules-for-digital-media-face-legal-test/articleshow/84396534.cms>

<sup>264</sup> Ibid.

TV<sup>265</sup>.

Jawhar Sircar<sup>266</sup> in his article in ‘The Wire’, criticized the new IT Rules and called it ‘*a hodgepodge of hamfisted regulations*’. The OTT market has just begun to take off in India. The new rules seem to act as speed-breakers on a runway- perhaps making it almost impossible, to achieve the goal of smooth take-off<sup>267</sup>. A much better approach would help the Indian OTT market achieve its projected potential of a \$2.9 billion market by 2024<sup>268</sup>.

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<sup>265</sup> Explained: Why Centre’s new rules for digital media face  
<https://timesofindia.indiatimes.com/india/why-centres-new-rules-for-digital-media-face-legal-test/articleshow/84396534.cms>

<sup>266</sup> Former Culture Secretary, Government of India

<sup>267</sup> IT Rules 2021 — Over the top? - The Hindu BusinessLine.

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