

---

**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

---

**WHETHER OTT PLATFORMS BE REGULATED BY LAW IN INDIA?**- Dropta Hudda<sup>1</sup>**ABSTRACT**

Over-the-top (OTT) media platforms have seen an increase in viewership since the world community has been hit by COVID-19. The Indian government notified rules regulating the content available on these platforms in February 2021. India, by issuing these regulations, has joined the league of many other countries, including Turkey, Singapore, and Australia, which already have regulations in place to keep a check on online streaming content. These regulations are in consonance with the regulations governing the TV and print media.

This paper seeks to evaluate the need for such regulations by the government in light of the universal self-regulatory code brought in by the Internet and Mobile Association of India (IAMAI). The contended impact on autonomy and the variety of content offered on such platforms have been discussed.

Using India as a case study, this paper attempts to answer the question of whether these regulations amount to censorship on account of the right to freedom of speech and expression enumerated in Article 19 of the Indian constitution. If so, then would state censorship hinder the progress and development of society? The paper concludes by giving the answer to these questions in the affirmative, but at the same time emphasizing a blend of statutory regulation and self-regulation to bring about the desired outcome.

**CONCEPT OF OTT PLATFORMS**

Over-the-top (OTT) platforms have witnessed a skyward rise in India owing to growing internet penetration and 4G data speed, cheaper smartphones and cheaper data prices. The Internet Telecommunications Union (ITU) defines OTT services as "*any Internet application that can be used in place of or in addition to traditional telecommunications services, ranging from voice calls and text messaging to video and broadcast services.*" India's communications regulator, the Telecom Regulatory Authority of India (TRAI), uses the same definition.<sup>2</sup>

The advancement in technology has brought about many changes in the medium of

---

<sup>1</sup> Student at Campus Law Centre, Faculty of Law, University of Delhi

<sup>2</sup> Consultation Paper On Regulatory Framework for Over-the-top (OTT) services, TRAI, available at [https://www.trai.gov.in/sites/default/files/CPOTT12112018\\_0.pdf](https://www.trai.gov.in/sites/default/files/CPOTT12112018_0.pdf) (accessed on 28th May, 2021)

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

dissemination, from radios to TVs, and now to the internet. There is an interconnection between technological changes and societal changes. Audio-visual content is mainly regulated on the basis of the effect it has on society through the medium through which it is disseminated.<sup>3</sup>

Films and audio-visual content have a greater impact on society. This impact was discussed at length by the Delhi Court in the case of *BrijBhushan v. State of Delhi*<sup>4</sup>, where the court made the presumption that the motion picture is capable of evoking emotional responses more intensely than any other medium due to the instantaneous appeal of the motion picture, its versatility, verisimilitude (often surrealism), and its visual and aural-sense coordination.

### **HISTORY OF CONTENT REGULATION IN INDIA**

Censorship has always been an integral part of India's audio-visual content history. The state has always functioned as a paternalistic state, regulating content since the inception of cinema in India. During the pre-independence era, the broadcasting sector was regulated by the Cinematograph Act, 1918, in conformity with generally accepted social standards of morality, public good, and decency. Censorship was primarily implemented to constrain Indians' nationalist sentiments. Numerous films based on nationalistic ideals have been censored<sup>5</sup>.

The enactment of the Indian constitution in 1950 conferred many rights on citizens. Article 19 (1) (a)<sup>6</sup> guarantees Indian citizens the right to freedom of speech and expression. It is a fundamental right granted by the constitution of India. Additionally, Article 19 (2)<sup>7</sup> imposes limitations on the freedom conferred by Article 19 (1) (a). It was against this background that the government passed the Cinematograph Act in 1952. This new act paved the way for censorship through a system of age-rating of content for films in the post-independence era.

The Cable Television Networks (Regulation) Act, 1995 was formed on the line of the Cinematograph Act of 1952, for the purpose of regulating the medium of television. However, for the last two decades, the television industry has been self-regulated. The Indian Broadcasting Foundation (IBF), founded in 1999, is an industry body responsible for regulating

---

<sup>3</sup> "How to Regulate OTT Streaming Services in India", available at, <https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf> (accessed on 25th April, 2021)

<sup>4</sup> (1950) S.C.R. 605

<sup>5</sup> "Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis", Drexel Law Review, available at, <https://drexel.edu/law/lawreview/issues/Archives/v2-2/banerjee/> (accessed on 19th April, 2021)

<sup>6</sup> Indian Constitution, Article 19, cl 1, sub cl. (a)- "*All citizens shall have the right to freedom of speech and expression.*"

<sup>7</sup> Indian Constitution, Article 19 (2)- "*Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*"

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

television entertainment content. It adheres to the guidelines proposed by the Information and Broadcasting Ministry in 2008 and collaborates closely with the ministry to avoid censorship emanating from external sources. It implemented Self-Regulatory Content Guidelines in 2011 covering non-news channels. The IBF functions as a self-censorship body in response to complaints received by its grievance redressal body, the Broadcasting Content Complaints Council (BCCC).

## **THE EMERGENCE OF OTT PLATFORMS AND THE CONTROVERSIAL DEBATE OVER THEIR REGULATION**

OTT platforms are a highly liberated medium for content creation. They, being of recent origin, are free from formulaic content generation and accepted public morality standards. In the 1980s, the public internet enabled the emergence of OTT platforms. Their popularity as a source of entertainment has raised concerns relating to regulatory inconsistencies and compromised consumer privacy as well as cyber security.

Answering the much contested issue of regulating content on these platforms, in *ShreyaSinghalvs Union of India*<sup>8</sup>, the Supreme Court ruled that the OTT platforms should be governed by the content regulation provided in the Information Technology Act, 2000, which empowers the government to regulate intermediaries.

All provisions enacted for the purpose of content regulation by the government were object-specific and thus fell short of filling the cavity in policy regarding regulation of OTT platforms. It led to a situation in which these platforms were not bound to obtain any licensing or adhere to any guidelines. Consequently, it created a scenario where the same content was banned from cinemas and television but was unreservedly available on online streaming platforms, such as Netflix and Amazon Prime. The most accurate assessment of the current status quo can be found in Netflix's catchphrase, "*TV got better*".<sup>9</sup>

Due to this policy void, individuals resorted to the judiciary to voice their concerns relating to vulgar content available on these platforms. In 2019, a public interest litigation<sup>10</sup> was filed in the Delhi High Court by Justice for Rights Foundation seeking a ban on online streaming platforms such as Netflix and Amazon Prime Video for allegedly showing vulgar and sexually

---

<sup>8</sup> (2013) 12 SCC 73

<sup>9</sup> WIRED BRAND LAB, Netflix: TV Got Better, available at, <http://brandlab.wiredinsider.com/portfolio/netflix-tv-got-better/> (accessed on 25th May, 2021)

<sup>10</sup> Justice for Rights Foundation vs. Union of India, W.P. (C) 11164/2018

For general queries or to submit your research for publication, kindly email us at [editorial@ijlr.in](mailto:editorial@ijlr.in)

explicit content. The organization made reference to television shows such as "*Sacred Games*", "*Vikings*", and "*Game of Thrones*".

The court, however, denied the plea, stating that the government lacks the authority to regulate content available on the internet. It backed the position taken by the Ministry of Information and Broadcasting (MIB) and the Ministry of Electronics and Information Technology (MeitY) that the provisions contained in sections 67, 67A, 67B, and 69 of the Information Technology Act are sufficiently robust and do not require the adoption of additional guidelines or regulations. Amit Khare, secretary of the MeitY, highlighted the importance of OTT platforms banding together and instituting self-regulation without any governmental intervention.<sup>11</sup>

The Internet and Mobile Association of India (IAMAI) released three drafts of self-regulation codes in the form of private censorship between January 2019 and September 2020. All three, however, were rejected by the government.<sup>12</sup>

In contrast to its previous position on the adequacy of a self-regulation regime for OTT platforms, the government disapproved the draft Self-Regulation Code<sup>13</sup> developed by 15<sup>14</sup> significant OTT platforms, including Netflix, Amazon Prime Video, and Disney+ Hotstar. It provided for the setting up of a Digital Content Complaint Forum ("DCCF") at Tier-I and at Tier-II a Digital Content Complaint Council ("DCCC"). Additionally, it endorses age-based categorization and content description. The code requires members to censor content that promotes or inspires disrespect for India's sovereignty and integrity, violence, contains material about child sexual abuse, endorses violence against the states or terrorism, or is banned by a court of law.

This code, however, could not get the government's approval. It cited lack of independent third-party monitoring, poor drafting and ambiguous criteria for classifying prohibited content as the reasons for rejection.

---

<sup>11</sup> "Netflix, Amazon Prime, MX Player Reject OTT Council To Regulate Streaming Content", available at, <https://inc42.com/buzz/netflix-amazon-prime-mx-player-reject-ott-council-to-regulate-streaming-content/> (accessed on 28th May, 2021)

<sup>12</sup> "Summary: IAMAI's Self-Regulation Code for Online Curated Content Platforms", <https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/> (accessed on 26th May, 2021)

<sup>13</sup> <https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf> (accessed on 26th May, 2021)

<sup>14</sup> "OTT Regulations In India: Digital Platforms Fear Impact On Business", available at, <https://www.forbes.com/sites/swetakaushal/2020/10/31/ott-regulations-in-india-digital-platforms-fear-impact-on-busines/?sh=6e21e0a0548d> (accessed on 28th May, 2021)

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

Thereafter, on November 9, 2020, the government issued a notification<sup>15</sup> declaring that all online curated content providers (OCCPs), including OTT platforms, will be regulated by the Ministry of Information and Broadcasting and not by MeitY. It incorporated the following categories into the Ministry of Information and Broadcasting (MIB) regulatory framework-

- news and current affairs publishers;
- online curated content providers.

Producers of news on digital media platforms will now have to adhere to the Press Council of India's Norms of Journalistic Conduct and the Cable Television Networks Regulation Act's Programme Code, which have previously been followed by print and TV, respectively.

The government issued guidelines citing the authority conferred upon it by Section 87 (1)<sup>16</sup> of the Information Technology Act, 2000. It backed the move by citing the objective of levelling the playing field for all platforms of entertainment and news dissemination. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021<sup>17</sup> will now regulate OTT platforms. The rules include a robust three-tier grievance redressal mechanism. The Information Technology Minister, Ravi Shankar Prasad, and the Information and Broadcasting Minister, Prakash Javadekar, have termed these regulations as a "*soft-touch self-regulatory architecture*."

The first tier provides for self-regulation by the platform through the appointment of a grievance redressal officer based in India, who will be required to respond to complaints within 15 days. The second tier of regulations includes an institutional self-regulatory body representing various OTT platforms and led by a retired judge of the Supreme Court or High Court or a renowned personality in the pertinent field. These platforms are now required to self-classify their content on the basis of the viewer's age, context, themes, and target audience of such content. It requires classifying content into five age-based categories (the five categories being U, U/A 7+, U/A 13+, U/A 16+ and A) and providing mechanisms for controlling access to content classified as U/A 13+ or higher. Content descriptions also need to be provided along

---

<sup>15</sup>The Notification, available at, [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-384486.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-384486.pdf) (accessed on 24th May, 2021)

<sup>16</sup> IT Act, 2001, S 87 (1)-"*The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act*".

<sup>17</sup>[https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf) (accessed on 28th May, 2021)

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

with the age classifications so as to give consumers an opportunity to make informed choices before watching the program.

The third tier calls for the establishment of an oversight mechanism to ensure compliance with the Code of Ethics. It requires the MIB to constitute an inter-departmental committee tasked with ensuring that the OTT platforms follow the guidelines.<sup>18</sup> This committee will have the authority to remove objectionable content pertaining to an OTT release. These regulations give the government an overriding power to step in and underline its power to block objectionable content. The code of ethics mandates that OTT platforms ensure that content does not jeopardize India's sovereignty and integrity, the state's security, amicable ties with foreign countries, or public order, or that it does not pertain to incitement to a felony linked to the above or in relation to rape or sexually overt material. Additionally, the rules provide for a minimum of five years in prison for disobedience of the aforementioned criteria-based regulations. In the event of any incriminating content, this self-regulatory body also has "censuring" powers.<sup>19</sup>

The rules do seek to maintain a balance between self-regulation and state censorship. The provision that the inter-departmental committee may hear the complaints referred to it directly gives the government an upper hand in content regulation on OTT platforms. Furthermore, registration of a self-regulatory body at the second tier is contingent on MIB's approval of its constitution and adherence to the rules.

The regulations have elicited a variety of reactions. Reed Hastings, Netflix's CEO, opined in 2019 that self-regulation is the way to go, not only because government regulations are highly undesirable, but also because of the fact that the internet provides users with complete liberty to choose the content they want to watch.<sup>20</sup> According to Karan Bedi, CEO of MX Player, individual OTT platforms are best equipped to establish the nature of content and the sort of restrictions required.<sup>21</sup>

The Internet Freedom Foundation has criticised the rules for their excessive ambiguity and

---

<sup>19</sup>[https://prsindia.org/files/bill\\_track/2021-02-25/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://prsindia.org/files/bill_track/2021-02-25/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf)

<sup>20</sup> "Netflix CEO Describes Why Self-Regulation Is Better Than Alternative," available at <https://gadgets.ndtv.com/entertainment/features/netflix-india-self-regulation-online-censorship-reliance-jio-red-hastings-interview-2009865> (accessed on 27th May, 2021)

<sup>21</sup> "A self-regulatory model similar to old media may work for OTT firms: Govt tells SC", available at <https://tech.economictimes.indiatimes.com/news/internet/a-self-regulatory-model-similar-to-old-media-may-work-for-ott-firms-govt-tells-sc/74409136> (accessed on 27th May, 2021)

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

warned of potential collateral damage to the free speech and privacy of citizens.<sup>22</sup>

### **THE NEED FOR REGULATIONS: AN ANALYSIS**

The paternalistic role of the state in regulating content has undergone a change with the introduction of economic liberalization in India in the late 20<sup>th</sup> century. The presence of foreign television channels in the Indian audio-visual sector has tilted the regulatory pendulum in favour of regulation by private bodies in comparison to government ministries.

The censorship regime adopted by the state is much criticised for its adverse impact on the amount and quality of content displayed. On the other hand, the OTT platforms cannot be allowed to serve whatever content they like under the garb of freedom of creativity. As most of the OTT platforms operate from outside the country, the cultural sensitivity and diversity of India becomes vulnerable to the content displayed on these platforms. The issue of content regulation on OTT platforms is crucial because of their high and relatively young and vulnerable consumer base.

Like a coin, the OTT platforms too have two aspects attached to them. The internet has proved to be a boon for small and medium content creators who could not get access to cinema halls due to financial barriers. In the form of OTT media platforms, it has given them access to a large and growing consumer base at a cheaper rate. This has also helped to bring to the fore creative and diverse work. Many issues hitherto neglected, such as bureaucratic corruption, honour killing, etc., have been brought to the notice of society on these platforms.

Thus, the OTT platforms do need regulations considering their popularity among young people, but censorship is an extreme step affecting creative freedom and freedom of expression. The government and other stakeholders must come together to find a suitable way to regulate the content to be disseminated. A model that incorporates both censorship by the state and self-regulation is consistent with India's regulatory tradition. A system of co-regulation and a multiple stakeholder approach could prove to be the most efficient way of regulating content on OTT platforms.

While framing regulations, the primary focus must be placed on the influence that the medium has on viewers and on society at large. The state must strive to maintaining harmony between

---

<sup>22</sup> "Regulating social media and OTT services: Comparing rules from around the world", available at, <https://www.theweek.in/news/biz-tech/2021/02/25/indias-new-social-media-laws-comparing-regulations-around-the-world.html> (accessed on 26th May, 2021)

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

the cultural sensitivities of the people and the constitutionally guaranteed right to freedom of speech and expression and artistic freedom. Owing to the vast reach of the OTT platform, decisions regarding regulations must be made keeping in mind the effect that it would have on the future of content regulation, the free speech regime, and the progressiveness of society.

The government might form broad guidelines given the dynamic nature of morality, decency, obscenity and cultural sensitivities. The Supreme Court in *KA Abbas v Union of India*<sup>23</sup> held that reasonable restrictions may be imposed on the right to free speech and expression to preserve the interests of the public. Contemporaneous societal changes must be acknowledged while framing regulations.

### CONCLUDING REMARKS

State control or censorship has been justified since the early days of the film exhibition industry, as films have always been treated as an impactful medium influencing society at large. Content premiered by the cinema has always been regulated in Indian history because of cultural sensitivities.

Indian society has progressed remarkably in terms of socially acceptable notions. The opinion adopted by the Indian Cinematograph Committee (ICC) in 1928 on the suitability of censorship of films in India on the ground of undeveloped public opinion and the resulting disability to determine what was appropriate or not appropriate for society, cannot be accepted as right in the present context.

The regulations formulated by the government do not include the concept of pre-censorship, as in the case of theatrical releases. Thus, these can be called a kind of softer intervention. The true nature and efficacy of these guidelines, however, will be revealed in the near future, depending upon their practical implementation. While implementing the guidelines, India should draw on the experience of other countries and adopt what suits Indian conditions the best, as is the case with the Indian constitution.

The judgements delivered by various courts are also important in this regard. The Supreme Court in *S Rangarajan v P. Jagjivan Ram*,<sup>24</sup> while acknowledging the profound influence a movie has on the audience, held that the right to freedom of speech and expression through the

---

<sup>23</sup> 1971 SCR (2) 446

<sup>24</sup> 1989 (2) SCC 574

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

audio-visual mode cannot be restricted merely because it contains open criticism of government policies and operations. It held that if the content is against public morality and decency, then freedom of expression should be subject to reasonable restrictions.

The court in *Bobby Art International & Ors. v Om Pal Singh Hoon & Ors.*<sup>25</sup> held that films based on socially relevant themes should be subjected to the least amount of censorship because adult citizens can be trusted to comprehend the underlying message that such films intend to deliver.

Thus, the task for OTT platforms is to accommodate the grievances of content consumers and the cultural and social sensibilities of people while retaining their freedom to serve the content of their choice.

## REFERNCES

- Government of India to Regulate OTT Platforms, available at <https://globalfreedomofexpression.columbia.edu/updates/2021/01/government-of-india-to-regulate-ott-platforms/> (accessed on 18th April, 2021).
- *Netflix and Chill: Online Content Regulation in India*, available at <https://www.jurist.org/commentary/tag/author-vrinda-bhardwaj-and-ankur-rana/> (accessed on 18th April, 2021).
- Regulatory Framework of OTT Services in India, available at <https://www.itu.int/en/ITU-T/Workshops-and-Seminars/bsg/201609/Documents/OTT%20in%20India.pdf> (accessed on 24th April, 2021).
- <https://www.thehindubusinessline.com/info-tech/new-guidelines-for-social-media-ott-and-digital-news-platforms/article33931507.ece> (accessed on 28th May, 2021).
- OTT Platforms Report 2018, MICA, available at, <https://www.mica.ac.in/indian-ott-platforms/indian-ott-platforms> (accessed on 19th April, 2021).
- Consultation Paper by the Government On Regulatory Framework for Over-the-top (OTT) services, available at [https://www.trai.gov.in/sites/default/files/CPOTT12112018\\_0.pdf](https://www.trai.gov.in/sites/default/files/CPOTT12112018_0.pdf) (2018) and <https://www.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf> (2015) (accessed on 28th May, 2021).
- International Journal Of Law Management & Humanities, available at, <https://www.ijlmh.com/wp-content/uploads/Self-Regulation-by-Over-the-Top->

<sup>25</sup>(1996) 4 SCC 1

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

Platforms-A-Study-in-Context-of-Video-Streaming-Services-in-India.pdf(accessed on 18th April, 2021).



For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>