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THE CHOPPY WATERS FOR CANONS OVER OTT PLATFORMS

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ABSTRACT

With the increase in internet penetration especially in India, there is also a climb in the range of the presence of OTT platforms. However, the regulation mechanism of these platforms i.e. the New IT rules, 2021 is at a fairly nascent stage and essentially lacks the reference to the framework for content regulation and censorship regime, which already exists in India. This research article by means of various judgments of the High Courts and the Supreme Court, journal articles and statistics from various sources, aims to paint the entire picture regarding the OTT platforms. This article aims to answer questions regarding the ambit of the Cinematograph Act, 1952 and attempts to analyze the effectiveness of a self-regulatory body. Further, the article also provides an analysis of the regulatory framework existing in different countries in comparison to India. Furthermore, the paper will endeavor to highlight and analyse the recent contemporary changes. The method of research will be doctrinal.

I. Introduction

The digital revolution has swept not only specific corners of the world but has intrigued individuals over time. India, particularly, has recently faced a digital revolution due to lower costs and easier access to services. This has bought more and more on people on the internet, for consuming content, connecting with each other, making digital payments etc. however, with this growing technology, there are several diverse challenges pertaining to its legal regime in the country.

Time and again, legislators have introduced laws to deal with several issues and arenas which were earlier unknown to the past un-digitalised era and hence posed several challenges as well. One of these challenges that this article will primarily focus upon, is the censorship of content of online streaming mode. With the growth of technology, the question of censorship of OTT

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(over the top) platforms has emerged. These OTT platforms can be defined as Online Audio/Video Streaming Services whose services can be availed by paying a premium and Consume the Content available on Demand. They include Amazon Prime, Netflix, Hotstar, Alt Balaji and several others.

One of the major challenges for regulating these OTT platforms is that while Cinema is subjected to pre-censorship, which is a requirement imposed via The Cinematograph Act, 1952 i.e. a film is ought to obtain a certificate from CBFC (Central Board of Film Certification) before “public exhibition”, the expression “public exhibition” has nowhere been defined in the Act which brings anonymity regarding censorship of OTT platforms.

Freedom of Speech and Expression as enshrined under Article 19 (1) (a) read with Article 19 (1) (g). Even though these rights are not absolute and are subject to reasonable restrictions as per article 19 (2) and Article 19 (6) respectively of the Indian Constitution, the Cinematograph Act, 1952 does not apply to online movie streaming services as held in several judgements of High Courts.

In response to this dilemma, several Amendment Bills have come to the picture, the latest being the Cinematograph Amendment Bill, 2019, which was introduced in Rajya Sabha on February 12th, 2019 and Standing Committee Report came on March 16, 2020. This Bill addresses issues like penalties for offences like the exhibition of film that has not been certified for public exhibition or tampering with a film after it has been certified, unauthorized recording and penalty on persons who make copies of a film without authorisation. Although, in 2019, the Ministry of Information and Broadcasting (MIB) stated that it provides a “negative list” or a list of some prohibited content that would be “non-negotiable”, to video streaming services. MIB also urged OTT platforms to come up with a self-regulatory body akin to the News Broadcasting Standards Authority (NBSA). The Ministry, as is evident from conduct, was not attempting censorship on content on streaming platforms but was keen on prohibitions on some “basic things”, like depicting the Indian map incorrectly and or indecent representation of women or rather in a “denigrating” manner as stated in a report².

Internet and Mobile Association of India (IAMAI), a not-for-profit industry body, was also setting up a self-regulatory body to keep an eye on the content of OTT platforms. Information and Broadcasting Minister Prakash Javadekar in March 2020, gave the industry a hundred days

² Soumyarendra Barik, “MIB to Issue List of Prohibited Content to OTT Platforms: Report – Medianama”, *MediaNama*, Oct. 21, 2019, available at: <https://www.medianama.com/2019/10/223-ott-content-regulation-mib/> (last visited on Feb 15, 2022).

to these streaming bodies to set up an adjudicatory body and finalise a code of conduct.³

However, a discredit to all these discussions and agreements towards a self-regulatory body was expressed by the government through a new set of rules which were released by the Ministry of Electronics and Information Technology, under Section 87 of Information Technology Act, 2000⁴. These new rules now govern the operation of these platforms, by setting up a 3 Tier system of grievance and complaint redressal with government oversight and also prescribing a model of conduct which they will also have to adhere to.

The present article will delve into the question of the requirement of such regulations and whether such regulations, independent of the government's control would have been ideal. Further, it will deal with plausible repercussions that might spring from these government-imposed regulations and self-imposed regulation and will also endeavour into the issue of 'political-taste streaming'.

II. The roots of Cinematograph Act, 1952

After independence i.e., in 1952, new legislation came into existence known as the Cinematograph Act, 1952⁵ (CG Act). The Indian Legislators enshrined the principles of The Indian Constitution in the Guiding Principles of Certification of Films. Section 5B of the CG Act is a replica of the reasonable restrictions laid down in article 19(2) of the Constitution of India and was added in the year 1959. The constitutional validity of these guiding principles as well as the validity of censorship as a whole was challenged in the Supreme Court in the case of *K. Abbas v. Union of India*⁶. Hon'ble Justice Hidayatullah highlighted that the censorship which is imposed on such media is essential for the interest of the society, and the guiding principles mentioned in section 5B are the same as the restrictions laid down in article 19(2). Hence, The Court held that censorship of a film is not a restriction on the artwork, as a film has a very different artistic nature. This was explained through an example, reading Kamasutra or viewing a book of the erotic tableaux of our ancient temples is one thing but viewing a documentary on Kamasutra with a practical sexual guide would be abhorrent. However, it was added that themes like rape, prostitution or murder should not attract a censor board but the actual context

³ Sweta Dutta, "Curb Your OTT Instincts: Government Gives 100 Days to Set up an Adjudicatory Body and Finalise a Code of Conduct", *Mumbai Mirror*, Mar. 3, 2020, available at: <https://mumbaimirror.indiatimes.com/mumbai/cover-story/curb-your-ott-instincts/articleshow/74449516.cms> (last visited on Feb 17, 2022).

⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

⁵ The Cinematograph Act, 1952 (Act 37 of 1957).

⁶ (1970) 2 SCC 780.

and how the filmmaker handled the said theme should be of concern.

III. Assessment of the Possibility of OTT Platforms within the Purview of Cinematograph Act, 1952

Netflix is considered to have paved the way for other OTT platforms in India when it launched its services for the Indian market in 2016. Other platforms like Amazon Prime, Hotstar and Alt Balaji also made their place in the Indian OTT market soon after. It was the very first time that filmmakers and producers could create content that did not need to go through the traditional channels of censorship and film certification as laid down in the CG act and the Cable Television regulation act. However, the content of certain shows sparked waves of debates and outrage in certain sects of society. Shows like 'Leila'⁷ and 'Sacred Games' sparked some issues relating to conflicting political ideology and allegedly portrayed certain religions in an objectionable way, while on the other hand, shows like 'Game of Thrones' and 'Spartacus' became problematic because of the presence of certain sexually explicit content and nudity. Various right-wing organizations and NGOs filed various petitions against the platforms highlighting the aforementioned issues, however, most of them either were dismissed or are still pending trial.

One such example is the case of Justice for Rights Foundation⁸, where the said NGO filed a PIL before the Hon'ble Delhi High court, against Netflix and Amazon prime video, praying that the Court shall issue the Writ of Mandamus, directing the Government to frame Guidelines and Regulations for the content that is published on these platforms. However, the said PIL was dismissed, as the court stated that neither do these platforms fall under the control of the Ministry of I&B nor are they supposed to get any licenses from the same. Furthermore, the court held that the Information Technology Act, 2000⁹, applies over the content that is published on these platforms and is sufficient enough to be taken as 'the directives' or 'the guiding principles' when such content is published on the platforms. However, an SLP¹⁰ against the very same order of the High Court has been filed in the Supreme Court and a notice, seeking a reply from the government, has been issued by the registrar court.

⁷ ANI, "'Deep-Rooted Hinduphobia": Sena Member Files Case Against Netflix", *NDTV*, Sep. 4, 2019, available at <https://www.ndtv.com/india-news/shiv-sena-files-case-against-netflix-says-deep-rooted-hinduphobia-2095280> (last visited on Feb. 15, 2022).

⁸ Justice For Rights Foundation v. Union of India [2019] High Court of Delhi, WP(C) 11164/2018

⁹ The Information Technology Act, 2000 (Act 21 of 2000).

¹⁰ Justice For Rights Foundation v. Union of India [2020] Supreme Court of India, SLP(C) No 10937/2019.

In this context, where there are many pending litigations and talks for a separate self-regulatory body, there was a need to clarify that what position does an OTT platform hold in this country. To answer this question, broadly, there existed two possibilities. First, the OTT Platforms come under the purview of the Cinematograph Act, 1952 and secondly, they do not come under the purview. Furthermore, if they do not come under the purview, then there exist two further possibilities where either a self-regulatory body is established for the platforms, which regulates the content on these platforms or there is separate legislation that governs their operation, which is what the government of India essentially did by releasing the New Intermediary Guidelines.¹¹

The play of fundamental rights along with reasonable restrictions form the basis of various provisions of the CG Act, 1955, such as section 5B¹² of the Act and Section 20(2) of the Cable Television Networks (Regulation) Act, 1995¹³, which are the guiding principles for the certification of films and tv programs.

However, to understand whether the application of these reasonable restrictions is even possible or not, on the OTT platforms, one needs to, collectively, look at the events that have happened so far.

Timeline 2006: Ministry of Information & Broadcasting defined “IPTV” and laid down guidelines for the same

- Ministry of I&B defined “IPTV”¹⁴ (Internet Protocol Television) as, television services that are available through the internet or using the similar infrastructure as the internet uses, which may require a set-top box. The ministry also laid down the guidelines defining the working of the said IPTV.
- After an analysis of these guidelines, it becomes evident that what the ministry has defined as IPTV and how it shall be operated, is poles apart from how the OTT platforms operate.
- For example, according to the section “i” and “ix” of the notification¹⁵, the telecom access service providers, internet service providers etc. are the providers of the IPTV and the content through IPTV which is fundamentally different from what OTT platforms contain.

¹¹ *Supra* note 4.

¹² *Supra* note 7, s.5B.

¹³ The Cable Television Networks (Regulation) Act, 1995 (Act No. 7 of 1995).

¹⁴ “Guidelines for Provisioning of Internet Protocol Television Services issued Ministry of Information and Broadcasting, India”, available at: https://mib.gov.in/sites/default/files/ilovepdf_merged_1.pdf (last visited on February 21, 2022).

¹⁵ *Ibid.*

The OTT platforms operate like any other website on the internet like blogging websites, image-based websites, e-commerce platforms etc. which just provide their services at certain charges.

- This is the fundamental reason why such platforms cannot be called or termed 'IPTV', even though the definition has a wide scope of interpretation.
- To access any media streaming platform in India, the ISP's do not need any license or certificate as prescribed by the Ministry to provide it to the customers or their subscribers, because it is not a service that they provide, explicitly as stated in section 1 of the guidelines. This very fact puts OTT platforms outside the purview of the definition of IPTV and hence, outside the purview of subsection 'ix', which directs the IPTV service providers to abide by the "Programme Code" and "Advertisement Code" of Cable Television, Network (Regulation) Act, 1995¹⁶.

2010: The case of M/s Super Cassettes v. Board of Film Certification

- This particular case¹⁷ was based on a certain factual premise, where CD's and DVD's were circulated to the general public which had certain films that were not certified from the Central Board of Film Certification 'CBFC'
- The main issue, Hon'ble Delhi High Court, came across while analyzing this particular case was, "what amounts to public exhibition under section 4 and section 5 of the CG Act, 1956".
- The petitioners contended that CD's and DVD's which were meant for private viewing cannot be defined as audio-visual material which requires censorship and a certificate by CBFC under section 5 of the CG act. They also added that including the said A/V content, which was meant for private viewing, under the purview of the CG Act, would be impractical, absurd and "an unauthorised and impermissible restriction on the freedom of speech and expression under Article 19(1) (a) read with Article 19(2) of the Constitution of India¹⁸."
- However, The Hon'ble Court of Justice S. Murlidhar disagreed with the contentions presented by the petitioners. The court explained that mere 'labeling' or 'stating' a video is

¹⁶ *Supra* note 14.

¹⁷ *Super Cassettes Industries Ltd v. Board of Film Certification* (2010) 175 DLT 163.

¹⁸ *Ibid*.

meant for private viewing and not for commercial purposes does not mean that it shall be exempted from the Certificate under section 5 of the CG Act.

- Furthermore, the court added that even the Delhi Cinematograph Rules, 1986 define “Public Exhibition” as exhibitions for ‘Considerations’.
- The court further added that for the purposes of the CG act, what constitutes to ‘public exhibition’ is no longer limited to, or just means, a showcase of A/V content in the movie theatres. The Court even went on to say, that even if the viewer’s watching the content in the confines of their homes, with their family and at their own convenience, they would still be considered as members of the public and the same would amount to ‘Public Exhibition’.

3. 2019: Padmanabh Shankar v. Union of India & Ors.

- A writ petition¹⁹ was filed before the Hon’ble High Court of Karnataka, praying to declare the broadcast and transmission of content on OTT platforms to come under the ambit of the CG Act. The issue arose as the petitioner felt a need to bring into the light the issue of ‘no regulatory framework’ of these platforms, which allowed them to broadcast certain objectionable content, which could be impressionable for a young audience as well.
- However, the main question remained the same i.e., whether the transmission of content over the OTT platforms would be covered in the definition of ‘cinematograph’ of the CG Act, 1952.
- The Court took under record various judgments presented by both the parties. The petitioners also relied upon the judgment of *M/s Super Cassettes v. Board of Certification*²⁰ and various other judgments from the Apex Court and hence, presented the submissions that were consistent with the law laid down and stated that broadcasting content via the internet would attract the provisions of the act.
- However, the courts went on discussing a different aspect where they did not discuss public exhibition but rather discussed the definition of ‘cinematograph’. The same is defined under section 2(c) of the CG Act, where a ‘cinematograph’ includes any apparatus that is used for the representation of moving pictures or series of pictures. The Court held that ‘Internet’, due to its inherent nature cannot be considered as a ‘cinematograph’ and hence, a broadcast

¹⁹ Padmanabh Shankar v. Union of India [2019] High Court of Karnataka, WP(C) No 6050 of 2019.

²⁰ *Supra* note 20.

via the internet cannot come under the ambit of the CG act and held that 'Internet' is not a cinematograph. The second prayer, which was whether content on these streaming platforms should be certified by CBFC for public exhibition, consequentially fails as well.

Analysis

To understand the nuances of the situation, the following conclusions can be drawn out from the timeline:

- The IPTV directives released by the ministry of I&B²¹ explain that delivery of television services by the means of 'Internet' will be known as 'IPTV'. Furthermore, as per section 6 of the directives, it will be governed by The Cable Television Networks (Regulation) Act, 1955²². However, the OTT platforms cannot be considered as IPTV because the directives point otherwise.
- The same Act i.e., the Cable TV Act, as per its section 21, operates in addition to the provisions of the Cinematograph Act, 1952. Therefore, both of them operate hand in hand in terms of interpretations and definitions.
- The Delhi High Court Judgment²³ settles the question of what amounts to 'public exhibition' i.e., a person consuming the content even with their families and in the comfort of their homes, shall be considered as Public Exhibition as well.
- Therefore, if an individual watches or consumes any A/V content by the means of these OTT platforms on their laptops or any other device, it shall amount to the public exhibition. The fundamental idea behind these platforms is the convenience of watching at home and On-Demand Services. One not only consumes the content by their choice and but also pays a certain consideration as a subscription fee as well. The completely falls within the ambit of what Justice Murlidhar defined as 'Public Exhibition' and even falls within the content because the definition was created to articulate and find out whether watching content at their convenience amounts to the public exhibition or not.
- However, that is not the case. One cannot consider the aforementioned scenario based on that judgment and the definitions, in isolation. The Karnataka High Court does not agree with the above contention as the said A/V content broadcasted by the means of the internet

²¹ *Supra* note 17.

²² *Supra* note 16.

²³ *Supra* note 20.

can be considered defined in the CG act, as 'Internet' due to its infrastructure is not a cinematograph. While, this statement is contrary to the regulations and definitions laid down by the Ministry of I&B, which explains how the internet is just a mode of transmission of data, which uses the technology for computer networks instead of traditional setups, to deliver television services. To articulate it even further, one can understand the Internet as Just a vessel and due to Fast Moving and developing world of technology, this vessel is also the carrier. Selecting a title on an OTT platform and thereafter watching it on the television is the same as putting a DVD on the tray of a DVD player or putting a Cassette in the VCR and then watching it on the television. The fundamental idea or the concept of how media is consumed remains the same, only the medium through which the Television is able to receive the content is different.

If the transmission of content on OTT platforms (which is done via the internet), is considered an act of 'public exhibition' and we consider the Internet as the 'Cinematograph' as per the definition in section 2(7) of the Act, the OTT platforms come under the purview of the Act and all the debate goes away. This could have been a very real possibility, but the OTT platforms were destined to face a different reality.

Consequences of application of Cinematograph Act, 1952 on the content of OTT platforms

In India, censorship is based on reasonable restrictions under Article 19(2), which are spelt out in a very broad manner. It licenses the censors to remove the "objectionable" scenes from the films based on their subjective whims. Bringing OTT under Cinematograph Act will have countless consequences:

- The censors will have a de facto right over censoring the content that is exclusively present on the platform.
- It would affect the creative freedom of the creators, who currently are subjected to a virtually nonexistent form of censorship on the platforms.
- There would be a serious influence on the opinions of the larger public on the political scenario, economic policies and general situation of society in the country.
- Furthermore, if state bodies decided to apply the act retrospectively, significant infrastructural problems would arise as it would be difficult to review, certify and censor the content that is exclusively present on the platforms. For example, Netflix released 371 titles

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of original content²⁴ in 2019 alone and there are more than 850 titles of exclusive content that can only be viewed on Netflix.²⁵ The time, resources and manpower which would be spent in implementing the regulations with a retrospective nature would be unimaginable, difficult and costly.

- However, there would be certain advantages to the implementation of such challenges such as it would protect the members of the society with impressionable minds from images of violence, drug abuse and sexually explicit content.

Today, on one hand, the platforms are getting complete freedom to broadcast and showcase whatever they wish (until and unless subjected to certain self-regulatory code or voluntary censorship), while on the other hand, they are facing several pending litigations in various states challenging the same freedom they exercise and hence, demanding a change.

IV. OTT Platforms: The Self-Regulation regime

The experience of television- viewing has been revolutionized by OTT services. India's very first OTT platform was BigFlix launched by Reliance Entertainment in 2008. After the gradual growth in technology, smart phones, rural internet penetration, average mobile data speed and internet accessibility in general, available to a wide range of population, several media giants joined the OTT market which has only grown over the years. The 'policy vacuum' in the regulation of OTT platforms was responded to via self-regulation as a feasible solution.

As a consequence of this, there was a looming fear amongst the OTT platforms of the government cracking a whip through regulations via the Cinematograph Act, 1952 or some other government-imposed regulations. The Ministry of Information and Broadcasting (MIB) even urged content creators to come up with a self-regulatory model.²⁶ It has also been stated that 'the Ministry is not attempting censorship of content on streaming platforms, but there will be prohibitions on some "basic things," like depicting the Indian map correctly and not

²⁴ "Netflix Released More Originals In 2019 Than the Entire TV Industry Did In 2005", *available at*: <https://variety.com/2019/tv/news/netflix-more-2019-originals-than-entire-tv-industry-in-2005-1203441709/> (last visited on February 24, 2022).

²⁵ "Netflix Originals | Netflix Media Center", *available at*: <https://media.netflix.com/en/only-on-netflix#/all?page=1> (last visited on February 23, 2022).

²⁶ Lata Jha, "Looking at Self-Regulation Model for OTT Industry: I&B Secretary Amit Khare", *Livemint*, Nov. 14, 2019, *available at*: <https://www.livemint.com/news/india/looking-at-self-regulation-model-for-ott-industry-i-b-secretary-amit-khare-11573717192417.html> (last visited on February 24, 2022).

portraying women in a “denigrating” manner, the report continues’.²⁷ Thereafter, under the aegis of the Internet & Mobile Association of India (IAMAI), a self-regulatory code was adopted by players. This code namely, ‘Code of best practices for Online Curated Content Providers’ applies to all such Online Curated Content Providers (OCCPs) from the date of signing by that OCCP, or the OTT platforms. This code was later revised and the revised version came in the year 2020 namely, ‘Self-Regulation of Online Curated Content Providers’. This revised code sets up an industry self-regulatory body called the Digital Content Complaints Council (DCCC) and also incorporates penalties which the former code lacked. However, there was little consensus on this new code and hence never saw the light of the day. With the completion of hundred days, the consensus amongst the players was required but the new regulations made all the efforts of the industry towards achieving a consensus, pointless

V. Regulation of Digital Media/OTT platforms with Governmental Oversight

The last optimal solution for the regulation of Digital Media or the OTT platforms would be to create a completely new body and system which incorporates Governmental Oversight. Consequentially, this was the solution chosen by our government to regulate the OTT and the following notifications explain the current status quo.

The notification of 9th November 2020

While this notification²⁸ was insignificant in hindsight and didn’t bring about many changes it, becomes important to discuss this Gazette notification as it raises some really serious concerns for the Online Content Providers/OTT and as well as gives an insight into the attitude of the government towards the Online Content Providers/OTT.

On September 4th 2020, the 15 OTT platforms finally came to a consensus upon a self-regulation code²⁹, which provided a framework for age classification and content descriptions for titles as well as access control tools. However, the press release by the Cabinet Secretary,

²⁷ Soumyarendra Barik, “MIB to Issue List of Prohibited Content to OTT Platforms: Report”, *MediaNama*, available at: <https://www.medianama.com/2019/10/223-ott-content-regulation-mib/> (last visited on February 24, 2022).

²⁸ Government of India (Allocation of Business) Three Hundred and Fifty Seventh Amendment Rules, 2020.

²⁹ Aroon Deep, “IAMAI’s Self-Regulation Code For Online Curated Content Platforms”, *Medinama*, Sept. 5 2020, available at: <https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/> (last visited on February 26, 2022).

which defines a new ambit of the Ministry of Information and Broadcasting, had the power to potentially change the entire scenario of this entire Audio-Visual Ecosystem on the Internet.

This notification released by the cabinet secretary, adds “Digital/Online Media” to the list of businesses that were to be handled by the Ministry of Information and, mentioned in the second schedule of the Government of India (Allocation of Business) Rules, 1961. It defines online/digital media as:

1. Films and Audio-Visual programmes made available by online content providers
2. News and current affairs content on online platforms

By these new entries and the definition mentioned in the notification, it becomes abundantly clear that this “Digital/online media” will now be governed by the Ministry of Information and Broadcasting. Consequentially, this could have meant that the legislation, which is also mentioned in the same list, shall apply to these entries. Hence the Two Legislations which primarily guide the laws of censorship in India, i.e. The CG Act³⁰ and The Cable Television Networks (Regulation) Act³¹, for every piece of Audio-Visual Media, shall now also apply to these “Digital/online Media” as defined.

Furthermore, a closer look at the definition of these Entries draws attention to the words “Programmes” and “Online Content Providers”. Since these terms aren’t specifically defined in this notification, one has to look towards the definitions provided by the aforementioned Legislations, which now apply to these new Entries.

Section 2(g) of The Cable TV networks (Regulations) Act, defines “Programmes” or “programme” as any television broadcast and includes—

- (i) exhibition of films, features, dramas, advertisements and serials
- (ii) any audio or visual or audio-visual live performance or presentation

Furthermore, the word “Film” can be defined as the representation of pictures or moving pictures, as defined in this paper previously as well.

These definitions, add further clarity to the definition of “Digital/Online Media” by adding a new dimension to the same and explaining what the terms could mean. The new dimensions don’t specify the nature of how a particular piece of media was produced, i.e., whether if it was professionally produced or if it was an amateur production, but rather provides an inclusive list

³⁰ *Supra* note 8.

³¹ *Supra* note 16.

of categories of Audio-Visual media. Therefore, every kind of Audio-Visual content which is created can be described as a part of the ambit of the definition of a “Programme” as mentioned under the category/entry of ‘Digital/Online Media’. However, by this logic, every audio-visual content, even which is produced on social media platforms could be bought under the ambit, which is very dangerous. This would essentially mean that the individuals who upload content on social media platforms like Facebook and YouTube would have to follow the code of regulations laid down in the Cable TV Regulations Act or the CG Act and in their adjoining rules and subsequent amendments as well.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

These new rules³² issued under section 87 of the Information Technology Act, 2000 (21 of 2000), included the rules for the Digital Media/OTT i.e., the OCCPs and Online News and Current affairs providers.

By specifically observing the definitions of the ‘publishers of online curated content’ it becomes clear that this inclusive definition essentially includes everyone who plays a significant role in providing online curated content (which essentially includes every type of audio-visual content) except the people who do not create content for commercial or business activity. The broad definitions read alongside each other and comparing it in the present context will also include individual content creators who create content on social media platforms and audio-video platforms as these individuals take significant measures in enabling the users in watching their content by adding hashtags, search engine optimization, clickbait etc., in fact, the platform itself teaches and promotes the creators in adding additional tags and working their way around the recommendation algorithm for more views.

Platforms like YouTube³³, Spotify podcasts³⁴, Facebook³⁵ and Instagram which provide the creators with ads revenues that are played during the video or options for a monthly paid subscription or promotional content or different brands, can easily be termed as platforms that enable an Individual creator to create their successful business venture where they earn through and with the platforms. Platforms like Twitch, Dlive, YouTube live and Facebook Gaming,

³² *Supra* note 4.

³³ “YouTube advertising formats”, available at: <https://support.google.com/youtube/answer/2467968> (last visited on February 26, 2022).

³⁴ “Tools to Power any podcast”, available at: <https://anchor.fm/features#sponsorships> (last visited on March 27, 2022).

³⁵ “How can I make money on Facebook?”, available at: <https://www.facebook.com/business/learn/lessons/how-make-money-facebook> (last visited on February 28, 2022).

where people watch content that is presented Live and where the viewers can donate to support the creator, can be also be included in the above-stated category of a platform that enables an Individual in setting up their business venture. In these situations, the platform is not only an intermediary but rather shares a much crucial relationship with the creator. The platform and the creator are co-dependent in terms of generating revenue and building a larger revenue.

The above discussion about individual creators being included in the definition is relevant as the procedure for regulation set up by these new rules is quite extensive, where an individual content creator will have to follow the same rules of regulations as a big player like Netflix with unlimited resources would. These new regulations include a 3-level structure of grievance redressal mechanism. The third level of grievance redressal sets up an interdepartmental committee consisting of bureaucrats, where this committee would recommend modifying or taking down any content against which grievance is received, in the interest of the law or even as a precautionary measure i.e., to prevent the commission of a cognizable offence. On the basis of this recommendation, the Ministry of Information and Broadcasting can issue the appropriate orders relating to the publishing of the content in question.

Furthermore, the decisions of these officers and committees will predominantly be based on the Code of ethics, which have also been provided by these rules. These codes of ethics define what can and cannot be shown on the platforms and how the content should be restricted through age classification as well.

Being easier for big platforms to implement, the code of ethics, if applied to the individual creator, could potentially stifle the entire ecosystem of content creators and YouTube, where the creative processes and freedom of speech would die out under the weight of excessive regulatory compliances. These rules are also completely against the idea of what the government and their various ministries have been stating in their various interviews and statements. A governmental oversight through an inter-departmental committee of bureaucrats over the online content is just a new age method of implementation of Censorship, which is also the complete opposite of what the Idea of the Internet is.

While there is a precedent for the government where they have previously created rules for the Intermediaries i.e., the Intermediary Rules of 2011³⁶, the fact that Ministry of Electronics and Information Technology, created the rules for the Digital Media under the IT act, 2000 after the notification stating that Ministry of Information and Broadcasting now govern this subject

³⁶ The Information Technology (Intermediaries Guidelines) Rules, 2011.

matter, is also very concerning. To understand the issue of extent of required regulation, it is beneficial to gain an insight into the legal position on this issue in other countries.

VI. Comparative Study of OTT Platforms of Other Countries

The voice for regulation of OTT platforms is not limited to India itself but has been a growing concern in several other countries as well.

China

It has banned global OTT platforms, including Netflix, Amazon Prime and others. Although, Chinese OTT platforms like Tencent Video, Youku and IQiYi are regulated. China's National Administration of TV and Radio (NATR), a newly formed Chinese media regulator, published a draft way back in 2018 whose objective is to support the domestic entertainment industry. Also, to control the content consumed by people in China. It also aims at minimizing the import of foreign content by broadcasters and thereby, supporting local production.

Singapore

It has a media regulatory body namely, Infocomm Media Development Authority (IMDA) which has issued a code of practices i.e., "Content Code for Over the top, Video-on-Demand and Niche Services"³⁷ for streaming platforms and on-demand video services in 2018. This requires them to classify their content as:

- (a) G: for General,
- (b) PG: for Parental Guidance,
- (c) PG 13 for Parental Guidance for children under 13,
- (d) NC 16 for no for children under 16,
- (e) M 18, which is restricted to audiences above 18 and
- (f) R21 is restricted to audiences above the age of 21.

In addition to this, it requires OTT platforms to display ratings and the elements in the content including theme, violence, nudity, drug use, sex, language and horror. Part 4 of the Code gives out 'General Principles' that the programmes must:

- (a) comply with the prevailing laws of Singapore;
- (b) not undermine national interest, national security, public interest, public security or public order;

³⁷ "Content Code For Over-The-Top, Video-On-Demand And Niche Services", *Imda.gov.sg*, available at: <https://www.imda.gov.sg/-/media/imda/files/regulation-licensing-and-consultations/codes-of-practice-and-guidelines/acts-codes/ott-vod-niche-services-content-code-1mar2018.pdf?la=en> (last visited on March 03, 2022).

- (c) not be detrimental to Singapore's relationship with other countries;
- (d) not contain extremist or anarchic messages, such as advocating or promoting the use of violence.

Part 4 also provides that the programmes must be secular and also, mandates avoidance of racial and religious stereotyping. Accordingly, as per a report titled "Environmental Social Governance by Netflix" in 2019, Singapore is the streaming platform's most censored market as it has the highest number of pull out requests made by any country. Five shows were taken down in Singapore – the highest among all the countries that requested for pull-outs.³⁸

United Kingdom

Tony Hall, Director-General of British Broadcasting Corporation (BBC), called for video streaming services such as Netflix and Amazon in September 2018 to be regulated to the same extent as traditional broadcasters of the UK as they fear it will kill off distinctive British content.³⁹ After this, UK Culture Secretary Jeremy Wright hinted that video streaming services should face the same kind of scrutiny as other public service broadcasters.⁴⁰ There remains an absence of specific regulations concerning OTT platforms. Despite this, the British Board of Film Certification (BBFC) announced a partnership with Netflix under which it will rate its material and then use the official British age rating symbols on all its contents.⁴¹ Consequently, the UK government released a white paper⁴² on the threat of illegal and unacceptable content and activity that unregulated content posed and sought consultation as to how they can be dealt with as such activities not only harms individual users but also, threaten the way of life in the UK. This White paper gave a brief of a new regulatory framework for online safety which will establish a new statutory duty of care to make companies more responsible for the safety of their users and tackle the harm caused by content or activity on their services and such

³⁸ Gayatri Vinayak, "Bringing OTT Platforms Under Government Regulations: What India And Other Countries Are Doing", *In.news.yahoo.com*, Mar. 12, 2020, available at: <https://in.news.yahoo.com/bringing-ott-platforms-under-government-regulations-what-india-and-other-countries-are-doing-080730665.html> (last visited on March 04, 2022).

³⁹ "Tony Hall: Regulate Video Streaming Services Or Risk 'Killing Off' UK Content", *The Guardian*, available at: <https://www.theguardian.com/media/2018/sep/16/tony-hall-regulate-video-streaming-services-or-risk-killing-off-uk-content> (last visited on March 05, 2022).

⁴⁰ Max Goldbart, "Netflix and Amazon Could Face More Regulation in UK, Hints Culture Secretary", *Screendaily.com*, available at: <https://www.screendaily.com/news/netflix-and-amazon-could-face-more-regulation-in-uk-hints-culture-secretary/5137492.article> (last visited on March 09, 2022).

⁴¹ Jim Waterson, "Netflix to Set Its Own Age Ratings for Film and Television Programmes", *The Guardian*, available at: <https://www.theguardian.com/media/2019/mar/14/netflix-to-set-its-own-age-ratings-for-film-and-television-programmes> (last visited on March 10, 2022).

⁴² "Online Harms White Paper", *Assets.publishing.service.gov.uk*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf (last visited on March 11, 2022).

compliance with this duty of care will be overseen and enforced by an independent regulator.⁴³ The White Paper proposes a regulatory framework to apply to user-generated content at the moment.⁴⁴ The regulatory framework will include:

- a duty of care on the companies to take reasonable steps to keep their users safe,
- a mandate on the companies to tackle illegal and harmful activity on their service,
- a requirement of releasing an annual transparency report by the company, and
- a mandate on the company to have an effective and easy to access user complaints function among others.⁴⁵

The functions of the regulator will include:

- Setting out what companies need to do to fulfill the duty of care, including through codes of practice.
- Establishing transparency, trust and accountability framework, backed by information-gathering powers, to assess companies' compliance with the duty of care and their relevant terms and conditions.
- Providing support to start-ups and SMEs to help them fulfill their legal obligations proportionately and effectively manner.
- Overseeing the implementation of user redress mechanisms.
- Taking prompt and effective enforcement action in the event of non-compliance (as set out in Chapter 6).
- Promoting education and awareness-raising about online safety to empower users to stay safe online.
- Promoting the development and adoption of safety technologies to tackle online harms.
- Undertaking and commissioning research to improve our understanding of online harms and their impacts on individuals and society.⁴⁶

The white paper has invited responses from the respective companies and stakeholders over questions based on issues around transparency, accountability and trust⁴⁷, redressal of

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 49.

⁴⁵ *Id.* at 41.

⁴⁶ *Id.* at 53.

⁴⁷ *Id.* at 45.

complaints⁴⁸ among others. As of now, the white paper seems to be analysing the feedback that it had received and this paper will pronounce how the content displayed online is to be regulated in the UK in future.

It appears that the regulation of the OTT content market is at a nascent stage around the globe. Moreover, countries are observing a quick and large growth in the number of consumers in this market. Therefore, the call for regulations becomes all the more necessary to tackle offensive and misleading content. The comparative study presents an image of different degrees of regulations that each government seeks to impose. For example, China decides what its citizens should consume and at the same time, bans foreign content completely whereas the government of Singapore is trying to regulate this space. While UK is at the level wherein they want the OTT players to come under some sort of regulatory framework and also protect their citizens from offensive content and misinformed content. Likewise, the UK has invited responses from stakeholders.

Similarly, India sought responses from players and then, rolled out the new rules. This reflects that some sort of regulation is required on the OTT content but of 'what kind' is a question that has to be determined after looking at the whole scenario and the distinctive factors involved in the country as the object is also to regulate the content and protect the citizens and at the same time, make sure that the regulatory regime is not excessively strict to restrict the OTT platforms from having their creative freedom and favouring paternalistic attitude of the State and thereby, discouraging the OTT platforms from operating in a particular country.

VII. Conclusion

Indians are in a very peculiar position in the context of OTT platforms. It has become a part of many daily households and has even replaced Television. There are very good reasons behind the same which include affordability along with various offers, inclusivity on almost every new television set and set-top box, regional-based and language-based content with mainstream content amongst others enables these platforms to reach a larger audience as well.

With this new format of content consumption, other than traditional TV and movie theatres, a lot of content that is published on the platform goes unchecked or is self-rated by the platforms. This content often includes sexually explicit material, nudity, drug abuse, suicidal undertones, abusive language, gruesome violence etc. which might be harmful to certain members of the

⁴⁸ *Id.* at 46.

society and which have impressionable minds such as young, drug and alcohol addicts going through rehabilitation etc. Furthermore, with the absence of a regulatory or certification body, there is an additive risk towards the communal harmony of the country with a history of communal tension.

This study highlights that as per the interpretation of the Cinematograph Act, and various courts it is not clear that whether the said act is capable enough to govern the OTT or digital media platforms and neither the guidelines by the Ministry of I&B, regarding IPTV, provide any insight towards the same. However, on further analysis, the paper also provides an insight as to how applying the act would be quite big a challenge and hence, not an ideal solution as well.

Therefore, the paper moves further to explore other possible avenues such as self-regulation or a separate system of regulation by the government. However, the efforts of reaching a consensus on guidelines relating to self-regulation were thrown away since MeITY released a new set of guidelines for Digital Media and introduced a new set of rules for their operations and grievance redressal. These rules, which have a huge ambit of operation, can also be considered as something which was not expected by the industry and especially not from the MeITY, by the means of IT Act, 2000.

While the Online Content providers enjoyed autonomy over their content creation and publishing, the new rules go completely against what their idea of a Self-Regulatory Body should have been. Big players like Netflix outrightly rejected the proposal of DCCC, as they believed the system was similar to the system followed by news broadcasters and the same cannot be applied to their platforms as the way the customers consume their content is different. The new rules fly completely in the face of these non-signatories of DCCC, as they not only define the structure of grievance redressal but rather implement a governmental oversight which will be handled by bureaucrats and will essentially allow them to remove/modify any content on any platform.

As the new rules came into force on 26th May 2021, the future of India's Digital Media streaming space will remain uncertain. One can speculate if the implemented process would work or push India towards the era of Digital Censorship as is the case of India's neighboring nations.