



Navigating Creative Expression In The OTT Era: Striking A Balance Between Artistic Freedom And Censorship

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Abstract

Amidst a swiftly changing landscape, Over-the-top platforms have revolutionized India's media and entertainment sphere. As the global approach to content creation, curation, distribution, and consumption undergoes a paradigmatic shift, the significance of OTT platforms for Indian viewers remains paramount. Their distinct value was especially highlighted during the pandemic and has continued to be embraced by audiences. Over-the-top (OTT) platforms are not just reshaping the digital terrain but also revolutionizing Indians' outlook on entertainment. Long-running traditional TV series are being supplanted by shows on platforms like Netflix, and Amazon Prime, signalling a shift in market dynamics from conventional to technological paradigms. In light of their growing significance and impact on society, concerns related to censorship also arise. Censorship is deeply rooted in our country's history. Be it movies we do not like, paintings we find offensive, books that break our religious beliefs, etc. Censorship has always been in existence in various media including theatres, print, television, etc and the sword of censorship is now come to hang in the heads of OTT platforms as well. The authors of this paper aim to provide an extensive analysis of existing laws relating to the regulation of online content that has been produced or created by OTT players in India and also analyse how other countries are regulating the OTT platforms. The objective of the paper would be to assess how restricting content on OTT platforms affects artistic freedom. Lastly, this paper also outlines how the typical concept of censorship ignores the fact that in addition to being used to legally restrict legitimate hate speech and obscenity, censorship can also be abused to hide facts and truths.

Keywords: Over-The-Top Platforms, Regulation, Censorship, Obscenity, Artistic Freedom.

I. INTRODUCTION

In the last century, we have witnessed immense technological advancement in the field of the audio-visual world which is ever-growing at a very rapid rate. We have seen a change in the way the dissemination of films from television to the internet is because of the technological advancement in the audio-video field. In Asia, India is only after China when it comes to the media and advertising industry and it is growing as the second fastest advertising market in the Asian continent. With the increase in the number of internet users, it is seen that the internet is being used in daily life at a very rapid rate. The video industry made its official foray into the digital realm in 2007. Netflix pioneered the concept of internet-based video delivery, thus laying the groundwork for the emergence of Over-the-Top (OTT) media. In 2008, Reliance Entertainment launched India's inaugural OTT platform, "Bigflix," marking a significant milestone. Eight years later, both Netflix and Amazon entered the Indian market. Since then, numerous digital platform companies have introduced their own applications, ushering in an era of unprecedented flexibility and abundance in entertainment options. With the existence of the telecom industry, we have seen the foothold of OTT increase at an exponential rate. The people of India are inclining more and more towards Over-The-Top (OTT) platforms, so the question of issues related to the overall monitoring of OTT Platforms also arises. OTT means all such applications and services that provide media and entertainment content online, for example, social media sites, Netflix, Amazon Prime etc. In India, the major OTT services are Amazon Prime, Netflix and Hotstar. There are three types of OTT applications which range from Visual and Audio content to services related to social media and e-commerce to services regarding Communication. In recent times, India has witnessed the emergence of over 40 OTT providers, encompassing both domestic and international entities such as Netflix, Amazon Prime, Disney+ Hotstar, Zee5, and Eros Now, among others. The number of OTT subscribers more than doubled between August 2019 and August 2020, with screen time experiencing a threefold increase. According to a study by PwC, as of early August 2020, Disney+ has accumulated 60.5 million users. In comparison, Netflix had 167 million subscribers by the end of 2019, but had a significant increase in worldwide subscriptions to almost 183 million in April 2020. This number continued to rise, reaching over 193 million by July 2020¹.

The adoption of direct-to-digital distribution and innovative pricing strategies has facilitated OTT platforms in expanding their customer base. Leading OTT services prioritize investing in locally relevant content to captivate their subscribers, while also experimenting with live video streams and interactive features to engage viewers.

¹ Meenakshi Verma Ambwani, India set to become the 6th largest OTT market by 2024: PwC, BL, *The Hindu* (New Delhi 22 October 2020), <https://www.thehindubusinessline.com/info-tech/india-set-to-become-the-sixth-largest-ott-market-by-2024-pwc/article32919127.ece>, accessed 12 March, 2024



For instance, Disney+ Hotstar's introduction of Watch N Play during the 2019 IPL season allowed audiences to participate in predicting scores during live matches, offering incentives for participation. As a result, OTT platforms are anticipated to become increasingly competitive over the next 4-5 years². This growth trajectory has undoubtedly been propelled by the widespread availability of 4G networks, the rise in broadband penetration, and the enhanced technological accessibility afforded to OTT platforms³. Some OTT platforms offer subscription plans that permit users to bypass ads, providing them with an uninterrupted viewing experience. Moreover, OTT platforms are cost-efficient, as many applications are available for free to users. Furthermore, with certain subscriptions, users can stream content on multiple devices simultaneously, enhancing their value proposition.

In the year 2020, the world was struck by the Covid-19 pandemic which changed how things are done in a lot of sectors the world cinema was also deeply impacted by it and thus, the OTT platforms also underwent a huge transformation which was previously incomprehensible. As the world was under lockdown, many movies which were supposed to be released in the theatres had to be released on the OTT platforms with fear of how they will fare on these platforms. In April 2020, NBC Universal released their Movie "Trolls World Tour" on the OTT platform which to their surprise earned more than 20 million dollars thus giving huge encouragement to all the other production houses to release their movies over the OTT platforms. India was also not far behind in releasing a lot of movies on platforms like Netflix, Amazon Prime, Hotstar etc. With a variety of new films and shows, these platforms are positioning themselves as dependable companions that will keep the consumer entertained. Movies like Gheraiyaan, Mixmatched Season 2, and Radhe were released on OTT platforms.

Currently, India boasts itself as the fastest-growing market for OTT (over-the-top) services globally and supposedly would become the sixth-largest market by 2024⁴. Nonetheless, the content and language on OTT platforms are raising significant concerns about their impact on the country's cultural and ethical values. There is growing apprehension that recent criminal activities have been influenced by digital streaming, with perpetrators reportedly emboldened by web series aired on OTT platforms. There has been a lot of controversy regarding the content which is being shown on these OTT platforms which are regarded by a large class of people in India as obscene and vulgar. While these OTT platforms have been growing rapidly, a notable part of them has not been supervised properly. Thus, the question of regulating the OTT platform arises as to date the OTT platforms are not required to undergo censorship of any kind and they have been functioning with little to no regulation and checks at all. This has raised a lot of debate over the requirement of regulating the OTT space and whether such regulation would eventually invade the freedom provided by Art. 19(1)(a).

II. REGULATION OF THE OTT PLATFORM

Reliance Digital's BIGFlix was India's first OTT platform back in 2008. Today, platforms like Netflix and Amazon are becoming primary sources of entertainment and an integral part of our daily lives. However, everything has two sides, these platforms have turned into hotbeds for crime and obscenity, which has a great impact on the general public. The rising cases of obscene vulgar content on the OTT platform have ultimately led to questions regarding the regulation of these platforms.

OTT platforms were out of the purview of regulation for a longer period. India does not have any legislation in place to govern OTT sites. And in the absence of any legislation, the OTT players are broadcasting content that is obscene, vulgar, and sometimes hurts the religious sentiments of the people. However, with the growing public concern over the content shown in web series like Sacred Games, ghou, Paatal Lok, etc a need to regulate OTT platforms arose. In the case of Padmanabh Shankar vs. UOI & ors⁵, the Karnataka High Court has explicitly said that the Cinematography Act of 1952 does not extend its jurisdiction to banned content that is streamed on platforms of the likes of Netflix, Hotstar, Amazon, and many others. The court determined that the user specifically sought the content on these websites, and hence its connection to the internet cannot be considered within the scope of the Cinematography Act⁶

² Pragati Khare, India's OTT Market: Witnessing A Rise In Number Of Paid Subscribers, (*IBEF*, 15 October 2020), <https://www.ibef.org/blogs/india-s-ott-market-witnessing-a-rise-in-number-of-paid-subscribers> accessed 13 March, 2024

³ Mihir Rale, Regulating OTT: Between Freedom and Responsibility, (*CREATIVE FIRST*, 24 April 2021), <https://creativefirst.film/regulating-ott-between-freedom-and-responsibility/> accessed 13 March, 2024

⁴ Lata Jha, India is the World's Fastest Growing OTT Market: PwC Report, *MINT* (New Delhi 22 October 2020), <https://www.livemint.com/news/india/india-is-the-world-s-fastest-growing-ott-market-pwc-report-11603355739242.html> accessed 13th of March, 2024

⁵ Padmanabh Shankar vs. union of India, WP (C) No. 6050/2019.

⁶ A&A, OTT platforms: Self-regulation Code and its impact, (Ahlawat & Associates, 15 March 2021) <https://www.ahlawatassociates.com/blog/ott-platforms-self-regulation-code-and-its-impact/> accessed 22nd January 2024



In 2018, a PIL was filed by the Justice for Rights Foundation⁷ asking for guidelines for the regulation of content broadcasted by OTT platforms and for the issuance of a writ of mandamus to the respondents to formulate the guidelines to regulate the contents that were broadcasted by the OTT platform. After the Delhi High Court issued a notice, the Information and Broadcasting Ministry (MIB) submitted a thorough response stating that neither a licence from the ministry is required for OTT platforms to show their content nor are the contents produced by them subject to regulation by the ministry. In addition to this, the Ministry of Electronics and Information Technology (MeitY) also clarified that the ministry does not control the content which is broadcast online, and OTT platforms are not required to seek a licence to broadcast their content online. Provisions of The Information Technology Act of 2000, (IT ACT) however, are applicable, and the responsible authority with jurisdiction over the matter can take the required action by using the authority granted to them by section 69 of the IT ACT. This provision provides for the “*power to issue directions for interception or monitoring or decryption of any information through any computer resource*”. In addition to section 69, the OTT platforms would also be subject to sections 66A, 67, 67A, 67B, and 68 of the IT ACT, which outline the penalties in case of any violations by the OTT platforms. So, a very lenient approach was shown in this case when it came to the regulation of content being broadcast on the internet. Even the Delhi High Court in its ruling acknowledged that the IT ACT 2000 had established a thorough procedural safeguard in case any prohibited content was to be broadcast by OTT platforms. In addition to the provision of the IT ACT, the provisions outlined in THE BHARATIYA NYAYA SANHITA, 2023 (BNS), also apply to the OTT platforms. OTT platforms must comply with section 297 of the BNS, which makes it illegal to intentionally and maliciously offend religious sentiments. Furthermore, sections 292, 293, and 294 explicitly forbid the sale of obscene materials or objects to minors, as well as engaging in any lewd behavior in public spaces with the intent to disturb others. This includes singing, reciting, or uttering any vulgar songs, ballads, or words. These regulations also extend to over-the-top (OTT) platforms. Indecent Representation of Women (Prohibition) Act, of 1986 under Sections 3 and 4, enforces a comprehensive ban on the production, dissemination, or circulation of any material that is deemed obscene, regardless of its format, including print, electronic, or other media is also applicable to the OTT Platforms. The objective is to mitigate the objectification and exploitation of women across diverse forms of media. Noncompliance with the aforementioned act may result in penalties such as fines and imprisonment⁸. Moreover, the act of selling and disseminating child pornography is unlawful according to the POCSO (Protection of Children from Sexual Offenses) Act of 2012.

Although Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression, under Article 19(2), the same may be restricted in certain circumstances if the content is harmful to the well-being of the state, the public interest, international relations, or is intended to incite criminal activity. Further, the Supreme Court, through its various rulings, has asserted the necessity of censorship due to the extensive range of expression involved. The portrayal of a film undeniably influences the minds of audiences, regardless of age. Films thus serve as a medium for expressing ideas freely, a right typically protected under Article 19 (1) (a) of the Constitution. However, it is important to recognize that films differ from traditional mediums like magazines, books, or newspapers due to their expansive and impactful nature. Consequently, restrictions, such as those outlined in Article 19(2), are deemed essential for safeguarding the broader interests of society and ensuring national security. With the judiciary recognizing the internet as a fundamental right in the *Faheema Shirin R.K. v State of Kerala*⁹ case, technology has progressed to the extent that individuals now have a multitude of platforms available for accessing content through their devices, such as smart TVs, Roku, computers, tablets, mobile phones, and gaming consoles. The concept of Over-the-Top platforms entails delivering television, film, and entertainment content over the internet to meet the specific demands of individual consumers, implying that content providers offer additional services beyond what is already accessible on the Internet. Hence, the need for the regulation was felt.

In 2019, a self-regulatory code was signed by fifteen online curated content providers, such as Netflix, Hotstar, and Amazon, under the Internet and Mobile Association of India (IAMAI). This code delineated a set of guiding principles for content on these platforms and prohibited five types of content: disrespecting the integrity and sovereignty of India, child pornography, promoting terrorism, inciting religious intolerance, and content expressly forbidden by law or court.

The OTT platforms that are signatories to the self-regulation code have also agreed to individually classify all the content that is made available on their platforms and to categorise them according to the kind of content that fits into the following classification;

- *“General/Universal viewing.*
- *Content that requires parental guidance.*
- *Content that is solely meant for age-appropriation audiences (such as 12+, 15+, etc.)*

⁷ Justice for rights Foundation vs. Union of India, W.P. (C) No. 11164/2018.

⁸ Indecent Representation of Women (Prohibition) Act, 1986

⁹ Faheema Shirin RK v. State of Kerala and Others (WP (C) No 19716 of 2019 (L)

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- *Content which is meant solely for mature audiences/adults (18+)*.¹⁰

However, in September 2019 the Information and Broadcasting Ministry rejected the self-regulation guidelines proposed by the Internet and Mobile Association of India for OTT platforms because they lacked provisions for an impartial third-party monitoring system. It also lacked appropriate and clearly stated ethical codes. Furthermore, the proposed code lacked a mechanism for identifying any kind of prohibited content.

Further, A three-judge Supreme Court bench led by the Chief Justice of India issued a notice to the centre in October 2020 while hearing a public interest litigation filed to regulate OTT platforms, calling for the establishment of an autonomous body to oversee digital content providers¹¹. Subsequently, the following types of digital content have been brought under the purview and jurisdiction of the MIB by the Government of India through its notification dated November 9 2020:

- Audio-visual programs and films that have been made available by the online content providers; and
- News and current affairs that are made available on online platforms¹²

III. ANALYSIS OF THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHIC CODE) RULES 2021 (HEREINAFTER REFERRED TO AS 2021 RULES)

In the year, 2021, the MeitY under section 87(2) of the IT ACT 2000 which empowers the central government to make rules framed by 2021 rules. The 2021 rules superseded the Information Technology (Intermediaries Guidelines) Rules, of 2011. The 2021 rules required the OTT platforms to create a grievance redressal mechanism so that any user who had a problem with any of the platform's content may address the problem directly with the state platform and get a prompt resolution.

There are three parts to the 2021 Rules. The definition of the words used in the rules is provided under Part I. The provisions relating to the grievance redressal mechanism are covered under Part II, which deals with the due diligence mechanism that the intermediaries must follow. The final part (part III) outlines the code of ethics and procedures as well as numerous safeguards in relation to digital media. Further, publishers of news content, current affairs articles, and online curated content are all subject to part III of the 2021 regulations. A three-tier grievance redressal mechanism for news publishers, digital media companies, and OTT platform providers has been established by the 2021 rules. The following is a three-tier structure:

- *Level I: Self-regulation to be done by the publisher.*
- *Level II: Constitution of an Independent Body by the Publisher.*
- *Level III: Oversight mechanism by the Central Government*¹³.

Considerable sections of people are against the 2021 Rules. According to them the negative aspects of the rules outweigh the negative ones. The 2021 rules were considered as the "Soft Touch Oversight Mechanism" by the government. However, according to Divij Joshi, a Bengaluru-based lawyer *"The guidelines claim to be 'self-regulatory', but they feed into a regulatory system that can substantially expand the government's power to censor content, this is done by tying the guidelines to the [IT Act's] Section 69A requirement to block content. The regulations thus give the government overriding powers to step in."*¹⁴ additionally, the 2021 rules reduced the freedom of the OTT platforms to regulate and display their content by enlarging the scope of the intermediary oversight mechanism. The rules also confer power upon the government that if the government is dissatisfied with the content broadcasted on the OTT platforms, then the government has the power to take down the content from the OTT platform and this provision of the 2021 rules has ultimately led to a question concerning the restriction imposed on the artistic freedom. Further the 2021 rules were also criticised because of the excessive delegation of power by the government. The 2021 rules stipulate the establishment of a non-judicial dispute adjudicatory mechanism to address complaints stemming from content published by digital news media and OTT platforms. Additionally, they require the establishment of an adjudicatory body known as

¹⁰ Aroon Deep, Summary: IAMAI's self-regulation code for Online Curated Content Platforms, (Medianama, 5 September 2020), <https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/> assessed 22nd January 2024.

¹¹ Rishika, Regulation of OTT platforms and digital news media in India, (The legal journal on technology, 23 September 2021) <https://www.thelegaljournalontechnology.com/post/regulation-of-ott-platforms-and-digital-news-media-in-india> assessed 22 January 2024)

¹² Cabinet Secretariat, Notification Dated 9 November 2020, (LiveLaw) https://www.livelaw.in/pdf_upload/pdf_upload-384486.pdf, assessed 22 January 2024.

¹³ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 9, 2021

¹⁴ Aditya Mani Jha, New Information Technology rules threaten the creative freedom enjoyed by OTT platforms, *The Hindu* (New Delhi 14 March 2021) <https://www.thehindu.com/entertainment/movies/new-information-technology-rules-threaten-the-creative-freedom-enjoyed-by-ott-platforms/article34051111.ece> assessed 23 January 2024



the "oversight committee" to monitor the activities of these intermediaries. However, these measures lack legal backing from the IT ACT, 2000, and thus represent an overextension of delegated authority by the government. The 2021 Rules propose various effective and practical measures for regulating online platforms. However, concerns have been raised by legal experts regarding the lack of sufficient deliberation prior to the formulation of these rules. There was minimal involvement of digital platform experts in the process. When the draft was presented by the MeitY in 2018 and public comments were invited, only 181 comments were received. Critics argue that the ministry failed to adequately notify or disseminate information about the draft, resulting in limited feedback. Consequently, these rules primarily reflect the government's perspective rather than that of the public. They grant the government the authority to instruct intermediaries to remove or censor any content deemed inappropriate, potentially compromising users' freedom of expression. Such discretionary powers could impede the free flow of information on social media platforms to some extent.

Part III of the 2021 rules carries significant ramifications for the freedom of speech and expression within the realm of Digital News Media and OTT Platforms, as well as for citizens' access to information. These rules institute a Code of Ethics enforced by an Inter-Departmental Committee comprised solely of government officers. This committee holds the authority to advise the MIB to censor, remove, or alter content produced by Digital News Media and OTT platforms. Consequently, the Central Government now assumes the exclusive role of determining permissible speech and expression as outlined in the Rules. As a result, the publisher's fundamental freedom of artistic expression and the citizen's access to diverse perspectives are impacted, as publishers may feel obligated to create only content that aligns with the guidelines set by the Central Government. While the Rules aimed to regulate content on OTT platforms, their clauses are highly contentious and raise numerous concerns regarding privacy, freedom of speech, and expression. The lack of clear legislative support means their implementation closely resembles the functions of the MIB in terms of TV regulations. Such stringent regulations could potentially fuel the growth of a black market.

IV.ANALYSIS OF BROADCASTING SERVICES (REGULATION) BILL, 2023

Recently, The MIB unveiled a draft bill on November 10, 2023 consolidating regulatory measures for diverse broadcasting services within a unified legislative framework. this bill will replace the decades old Cable Television Networks (Regulation) Act of 1995. This bill encompasses over-the-top (OTT) broadcasting platforms, such as Disney+Hotstar, Netflix, and Amazon Prime, within its regulatory purview. According to the new regulations, OTT service providers are required to notify the central government within one month of the bill's notification or upon reaching a specified threshold of subscribers/viewers in India. The objective of the Bill is to streamline regulatory processes, expand its coverage to include Over-the-Top (OTT) content and digital news and provide contemporary definitions and standards for developing technologies. The proposal suggests the establishment of Content Evaluation Committees and a Broadcast Advisory Council for self-regulation. It also includes different program and advertisement codes for various Broadcasting Network Operators, measures to ensure accessibility for individuals with disabilities, and legal penalties, among other provisions. The Bill consists of six chapters, 48 sections, and three schedules, providing a complete framework for governance in this field.

Key Features of the Draft Bill

- **Registration:** No person is permitted to offer broadcasting services or manage a broadcasting network unless they are registered or have submitted an intimation (for internet broadcasting network operators) as stipulated by the Bill. Nevertheless, any person who has been granted registration or permission for broadcasting services under the Cable Television Networks (Regulation) Act of 1995, the Telegraph Act of 1885, and other relevant guidelines/rules outlined in Section 41 of the draft Bill shall be considered registered under the draft Bill, subject to the Central Government's request for a notification to certify their compliance with the Bill's provisions¹⁵.
- The Bill seeks to meet a long-standing need by consolidating and updating the regulatory measures for various broadcasting services, such as satellite, terrestrial, internet, and radio, under a single legislative framework. The regulatory scope is expanded to encompass control of broadcasting over-the-top (OTT) material, digital news, and current affairs, which are currently regulated under the IT ACT, 2000.
- To guarantee adherence to the stipulations outlined in the draft Bill, especially regarding compliance with the programme and advertising codes, the Bill has implemented a self-regulatory framework comprising:
 - ❖ **Self Certification by Content Evaluation Committee**¹⁶: Broadcasters and operators of broadcasting networks must establish a Content Evaluation Committee (CEC) for the self-certification of programs. Only programs that have been properly certified by the CEC may be broadcasted.

¹⁵ The Broadcasting Services (Regulation) Bill, 2023, Section 41.

¹⁶ The Broadcasting Services (Regulation) Bill, 2023, Section 24(2)



❖ Self Regulation by Broadcasters and Broadcasting Network Operators¹⁷: Broadcasters and broadcasting network operators are required to ensure compliance by (a) appointing a grievance officer; (b) joining self-regulatory organizations (SROs); (c) establishing and maintaining effective mechanisms for the submission and resolution of complaints; and (d) disclosing information regarding complaint resolution mechanisms.

❖ Self Regulatory Organizations¹⁸: Broadcasters and broadcasting network operators are required to establish a Self-Regulatory Organization (SRO) and complete registration with the Central Government within a period of 90 days. These SROs will be responsible for managing complaints and adjudicating appeals lodged against broadcaster decisions as outlined in Section 25 of the Bill, and will also issue guidelines for compliance.

❖ Broadcast Advisory Council¹⁹: The council comprises a chairperson acting independently, alongside government officials and impartial experts. Its primary function involves addressing grievances pertaining to breaches of the programme or advertisement code, evaluating them, and subsequently advising the Central Government. Following this advice, the Central Government will proceed with suitable directives and actions. The council holds the power to enlist extra members possessing specialized knowledge, though they won't possess voting privileges. Additionally, it has the mandate to draft the bill and provide compliance directives.

- The Bill states that the Central Government is authorized to issue directives to broadcasters for categorizing their programs, taking into consideration factors like context, theme, tone, impact, and target audience. The appropriate classification must be visibly displayed at the outset of the program, as specified. Additionally, it mandates broadcasting network operators to enforce access control measures, as prescribed, for programs categorized as suitable for restricted viewing.

- The Central Government possesses the authority to examine broadcasting networks and services to guarantee adherence to the provisions outlined in the Cable Television Networks (Regulation) Act of 1995. Inspections must be conducted with prior notification, unless situations arise where providing such notice would undermine the inspection's intent²⁰. The Central Government is also empowered to exercise seizure authority according to Section 31 of the Bill. Should an authorized officer suspect any violations of the Bill's provisions, rules, or guidelines, they may confiscate the equipment of the designated broadcasting network or broadcasting services outlined in the Second Schedule of the Bill.

- Section 23(1) of the Bill stipulates that broadcasters or broadcasting network operators may be obligated to implement specific mandatory measures according to the Accessibility Guidelines (as defined in Section 2(1)(a) of the Bill) and certain additional measures to enhance the accessibility of broadcasting services for individuals with disabilities. These measures may encompass, among other things, the provision of subtitles, audio-description, and sign language translation for video programs. The Central Government will appoint a disability grievance redressal officer to handle complaints regarding any breaches of the Accessibility Guidelines, adhering to the specifications outlined in said guidelines.

- The Bill stipulates statutory consequences such as advisory notices, censure, warnings, or financial penalties, including fines of up to fifty lakhs rupees for initial violations and one crore for subsequent violations, applicable to operators and broadcasters. Moreover, to maintain fairness, fines and imprisonment, ranging up to two years for initial breaches and up to five years for subsequent breaches, are reserved for serious offenses only. The bill also addresses any further violations, along with offering increased penalties, and incorporates measures for registration suspension or cancellation. Moreover, the introduction of an appeals process guarantees a fair and transparent procedure, preventing potential misuse of authority.

Drawbacks of The Broadcasting Services (Regulation) Bill, 2023.

- Several laws, including the IT Act of 2000, apply to the Bill under Section 42, with potential conflicts arising due to Section 21, which allows for self-classification. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules, 2021"), established under the IT Act, 2000, already include a Code of Ethics with similar guidelines. However, its enforcement has been halted by the Bombay High Court in the case of *Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. vs. Union of India*²¹, where Rule 9(1) and Rule 9(3) of the IT Rules, 2021 were stayed. This decision was recognized to have a nationwide impact by the High Court of Madras in the matter of *Digital News Publishers Association and Mukund Padmanabhan vs. Union of India*²² and other Connected Matters. The Code of Ethics already outlines guidelines for the classification of curated content, including restrictions, the display of classification, and other

¹⁷ The Broadcasting Services (Regulation) Bill, 2023, Section 25

¹⁸ The Broadcasting Services (Regulation) Bill, 2023, Section 26

¹⁹ The Broadcasting Services (Regulation) Bill, 2023, Section 27

²⁰ The Broadcasting Services (Regulation) Bill, 2023, Section 30

²¹ *Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. vs. Union of India*, W.P. (L.) No. 14172 of 2021

²² *Digital News Publishers Association and Mukund Padmanabhan vs. Union of India*, W.P. NOS. 13055 AND 12515 of 2021.



relevant factors influencing such classification. This could potentially lead to disagreement as the draft Bill suggests that the Central Government might establish guidelines for categorizing programs, a task already covered by the IT ACT, 2000 for news and current affairs publishers and online curated content providers, thus making it redundant. Additionally, it remains unclear which statute, in the event of a conflict with any statute referenced in Section 42 of the draft Bill, would take precedence

- The proposed bill prompts questions regarding whether its primary emphasis lies on serving the public interest or on augmenting government oversight and regulation. There are worries that the Bill could heighten governmental authority over digital infrastructure and the choices available to citizens in their viewing preferences

- The necessity for broadcasters to obtain certification for their content from the CEC, excluding programs mandated by the Central government, sparks worries regarding artistic freedom and the level of governmental influence on content. Moreover, although the draft Bill includes a self-regulatory mechanism aimed at bolstering accountability and responsibility among broadcasters and networks for the content they deliver to the public, its successful execution relies heavily on the clarity and practicality of the regulatory framework. It must ensure an improvement in content quality without suppressing creative expression.

India is now examining the complexities of its broadcasting legislation through the proposed Broadcasting Services (Regulation) Bill, 2023. It is important to carefully assess the subtleties and potential disadvantages of this Bill. Although the government's endeavor to update regulations and adjust to industry shifts is viewed as progressive, it is essential to strike a careful equilibrium between oversight and safeguarding democratic principles. The issues highlighted by advocates of digital rights, legal experts, and technology policy analysts underscore the necessity for a more comprehensive and open strategy. Achieving the appropriate equilibrium entails formulating regulations that recognize the variety of broadcasting platforms, uphold the principle of freedom of speech, and offer clear and precise guidelines to mitigate unintended repercussions. As various stakeholders participate in the continuous public discourse, a joint endeavor is essential to enhance the preliminary legislation, guaranteeing that the regulatory structure not only adapts to changes in the industry but also promotes innovation, imagination, and the democratic ethos of the digital era.²³

V. REGULATION OF OTT AT THE INTERNATIONAL LEVEL

Countries such as the US, EU, Singapore, Malaysia, South Korea, and Australia are enthusiastic about adopting the concept of 'self-regulation'. Conversely, in the UAE, foreign online platforms must collaborate with licensed telecom companies. Singapore mandates obtaining a license before offering services within its jurisdiction. Australia has established the "eSafety Commissioner" to oversee electronic media matters, including content restrictions. The European Union is contemplating measures to track illegal digital content, particularly concerning national security, minors, and hate speech. The US is in the process of implementing a regulatory framework to address online content harmful to society. Various countries employ different methods to regulate online streaming content. However, the underlying objective for all, including India, is to ensure societal well-being through regulation²⁴. Let us analyse the regulatory approaches in specific countries for a comparative perspective.

Australia

The regulation of the OTT sector falls under the purview of the Broadcasting Services Act of 1992, which serves as the primary legislation governing this area. It's intriguing to understand how this legislation oversees the sector, primarily through a complaints-driven system established in the 2000s as part of the online content regulatory framework. This Act comprehensively addresses both classified and unclassified content. It is important to know that the content which has not been classified is treated *at par* with the rating it is most likely to get if it is classified. Utilizing Netflix, a monitoring program highlighted that the inclusion of a tool enables Netflix to effectively categorize its content with notable precision, catering to the specific audience without undue delays.²⁵

Singapore

Around the world, numerous countries boast rich cultures and thriving media industries, and Singapore is no exception. Cinema holds immense significance in Singapore's cultural landscape. During the vibrant era of the

²³ Yadul Krishna, Devil in the details: Breaking down the Draft Broadcasting Services (Regulation) Bill, *Times of India* (New Delhi 9 February 2024) <https://timesofindia.indiatimes.com/blogs/neetivichaaram/devil-in-the-details-breaking-down-the-draft-broadcasting-services-regulation-bill/> assessed 12 March 2024.

²⁴ Agrima Singh, Different Ways of Regulating the OTT Platforms, (*JUS CORPUS LAW JOURNAL* 23 November 2021), <https://www.juscorpus.com/different-ways-of-regulating-the-ott-platforms/> assessed 13 March 2024.

²⁵ Broadcasting Services Act 1992

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1960s, it earned the illustrious reputation as the 'Asian Mecca for film production,' embodying the essence of glitz and glamour in Asia. Notably, the Shaw Organisation, prominent movie distributors in Singapore, took the pioneering step of organizing and launching the inaugural Asia-Pacific Film Festival, marking a significant milestone in Asian cinema history.

Singapore is no stranger to the digital revolution in cinema, and it stands out as one of the select few countries with specific legislation tailored for OTT media platforms. The nation is governed by the Infocomm Media Development Authority, tasked with content regulation. According to the guidelines issued by this authority, emphasis is placed on responsible viewing choices, underscoring the importance of parental guidance.

All content must adhere to the Film Classification Guidelines, which classify content into six categories: "General (G), Parental Guidance (PG), Parental Guidance for Children below 13 (PG13), No Children Below 16 years of Age (NC16), Mature 18 (M18), and Restricted to Persons 21 years and above (R21)". Additionally, service providers are permitted to offer R21 content only if they employ a robust age verification mechanism. This content should be locked by default and accessible solely through an R21 PIN. Furthermore, R21 content cannot be provided free of charge. Moreover, any content that is prohibited under relevant laws, regulations, codes, or license conditions in Singapore is strictly prohibited from being offered.

The Code issued by the regulatory authority is comprehensive, covering a wide range of aspects. It encompasses everything from the screening and classification of content to the guidelines for displaying categorized content. Furthermore, it addresses various facets related to advertising categorized content and outlines general principles that content creators must adhere to. Additionally, Part 5 of the Code delves into seven significant content-related concerns.²⁶

Kenya

Netflix was banned by the Kenya Film Classification Board (KBFC) two weeks after its premiere in Kenya. The KBFC justified the ban by claiming that the service posed a risk to moral values and national security. KBFC later declared its plans to enact laws that would require persons to get filmmaking permits to publish and broadcast their content on the internet. Nevertheless, as a result of substantial public protest, KBFC ultimately overturned its decision. Kenya is currently in the last phases of developing a framework to apply fees on international over-the-top (OTT) services such as YouTube and Netflix, however specific information about the licensing procedure is still scarce. This implies that the government may require some type of regulatory supervision for these services to be permitted to function.

VI.A BALANCE BETWEEN THE ARTISTIC FREEDOM AND CENSORSHIP

The freedom of artistic expression is essential for the vitality of society, enabling artists to convey their ideas and feelings, push against established norms, and spark dialogue on significant matters. Art serves as a gateway for us to delve into, question, and envision alternative perspectives of our surroundings. Artistic freedom stands as a potent catalyst for nurturing creativity, igniting transformation, and nurturing a rich tapestry of cultures.

However, censorship presents a substantial hurdle to artistic freedom. It entails the regulation of artistic expressions considered offensive, controversial, or divergent from established norms. While proponents of censorship argue it safeguards society from detrimental or objectionable content, it frequently impedes creativity, constrains artistic experimentation, and encroaches upon personal freedoms. Achieving equilibrium between upholding societal values and safeguarding artistic liberty is a multifaceted and contentious matter.

In India, the battle between freedom of speech and expression and reasonable restriction is ongoing, particularly in the entertainment industry. Ever since the Supreme Court first examined the issue of pre-censorship of cinematograph films in regard to the basic right to freedom of speech and expression granted by Article 19(1)(a) of the Indian Constitution in the early 1970s, there has been a conflict between censorship and artistic freedom. Currently, the OTT platform is at the receiving end when it comes to the content that has been broadcasted on their respective platforms. The moment a new show on an OTT platform is a hit you can be fairly assured that very soon there will be a litany of complaints over something or the other that has been a part of the show. We seem to be becoming a very sensitive society and it has apparently become much easier to immediately run to the closest police station to file a First Information Report (FIR) if we do not like a scene or any kind of connotation in a show than just switching the channel.

We live in an era of having entertainment on the go. We have a wide range of content just a click away. However, these platforms have been facing the anger of the government. The government was of the belief that the creative independence of the platforms needs to be brought under the purview. The platform realizing the threat to artistic freedom tried to fix its own game by framing a self-regulatory code. In line with the self-

²⁶ Content Code for Over-The-Top, Video on Demand and Niche Services (IMDA), <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>, assessed 13 March 2024.



regulatory framework, OTTs are basically forced to censor their own content. However, the rules of the game are not the same for everyone. In most of the cases what people find “offensive” are the things that make them uncomfortable. Whereas some problematic things get a pass. For example, the stories of the recent controversy of the content broadcasted on OTT platforms of Amazon’s original web series “Taandav”, this political thriller was accused of mocking the Hindu gods and hurting Hindu’s religious sentiments. The makers and the OTT platform were forced to apologize after they got a legal notice and the scenes and dialogues deemed offensive were deleted or shortened. Netflix’s series ‘Sacred Games’ also faced criticism for its portrayal of India’s political history, particularly for its depiction of Gandhi’s alleged involvement in purchasing Swedish ammunition for the Indian army, leading to a major scandal, and accusations of Gandhi appeasing Muslims in a divorce case. The second season was also scrutinized for a scene where Saif Ali Khan’s character disrespects the religious ‘Kada’ worn by Sikhs. Similarly, another Netflix series ‘A Suitable Boy’ sparked protests over a kissing scene set against the backdrop of a temple depicted in the series²⁷. However, another OTT release, “Pati Patni aur Panga” was not met with the same fate, despite it being transphobic and putting across a problematic perspective on the trans experience. So the question that arises is are religious sentiments getting hurt more “offensive” than denigrating the lived experiences of gender minorities? Shows like Bombay Begum were sent legal notices for showing what is the urban reality in India, whereas problematic narratives like Indian Matchmaking that reinforce gender stereotypes get away scot-free.

The Supreme Court of India has consistently emphasized the importance of upholding unwritten principles of maturity and humanity to limit constraints on freedom of expression in literature and films. In the case of KA Abbas vs. Union of India²⁸, the Supreme Court ruled that obscenity should be evaluated based on the standards of reasonable, strong, and sensible individuals with ordinary common sense and prudence, rather than by those with extraordinary or hypersensitive sensibilities

Article 19(1)(a) which provides for freedom of speech and expression is subjected to reasonable restriction provided under Article 19(2). As a result, the censorship or restriction of offensive content on OTT platforms functions within the ambit of Morality, decency, public order, etc. which means any content which is obscene, or has the tendency to hurt the sentiments of people will be restricted by the government in the name of censorship. However, there is a very fundamental question regarding what constitutes decency, morality, and public order because something that was frowned upon ten years ago may not be accepted, and what is offensive now may not be offensive in the future. Also, we are in a time when new ideas and cultures are emerging, and different societies have different attitudes toward the concept of obscenity. what is vulgar to one person might not be to another. Because of the disparity in how people view the world, it is challenging to determine what constitutes obscenity and what does not. For example, a kissing scene was unimaginable in cinemas in the 1950s but today it is nothing unusual. Also, let us not forget that we have come a long way from watching TV together as a family time. We now watch things in our ways and in our own time and space. While everyone seems to be discussing the advantages of censorship, the negative effects or what allegedly could have been of non-censorship are generally overlooked. The concept of censorship can be misused to conceal information and truths in addition to being used to legally prohibit valid hate speech and obscenity. Many allegedly inappropriate broadcasts on the OTT platform can also send a positive message to society as well. Films, movies, and shows help to depict the aspects of life forms in their authentic form, altering them simply implies false notions. Although censorship serves to protect societal values, it’s crucial to find a middle ground that promotes artistic freedom. This balance can be attained through careful regulation and open communication among artists, policymakers, and the public. Transparency and accountability in the censorship decision-making processes are essential to prevent its misuse in stifling dissenting views or controlling the artistic sphere.

VII.CONCLUSION

As technology progresses, the landscape of artistic freedom undergoes continual transformation, presenting both challenges and opportunities. The rising significance of online platforms in the distribution and availability of art brings forth new hurdles in content regulation. Policymakers, artists, and proponents must adjust to these shifts and safeguard artistic freedom in the digital era. Censorship basically means a complete restriction of any artistic or creative expression that does not run well with the select few in power. The battle to ensure that artistic freedom extends to people continues despite efforts made otherwise. A healthy democracy needs to have the freedom to express one’s thoughts by giving space and an environment for creative ideas, discourses, and debate. The curtailment of entertainment forms is not justified. The outcome of censoring the content on an OTT platform would mean silencing the progressing content, which means what we will be left with is boring

²⁷ Anubhooti Shaw, Censorship and OTT Platforms: Critical analysis, (*Latest Laws* 7 July 2021) <https://www.latestlaws.com/adr/articles/censorship-and-ott-platforms-critical-analysis/>, assessed 13 March 2024

²⁸ KA Abbas vs. Union of India, 1971 AIR 481, 1971 SCR (2) 446
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and sanitized content. The filmmaker and the OTT platforms are forced to go through every part of their films or web series with a fine tooth comb to weed out anything that might meet with the same kind of fate which was faced by the other web series/ movies. How much this will distort the original vision and dilute the impact of the movies/series we will never know and it is very unfortunate that talented filmmakers are forced to amputate their work in a preemptive move to prevent any kind of controversy. It is very hard to predict what would trigger the next controversy in an increasingly sensitive India. Under this circumstance, the filmmakers and creators of movies/series should take inspiration from the Chinese and Iranian filmmakers and create what actor Ethan Hawk called "Trojan Horse art."²⁹ This means content that is subversive and provocative but seems standard genre fare on the surface. Some examples where the filmmakers/directors cleverly camouflaged their message are *Stree*, *Get Out*, and *Rise the Red Lantern*, etc. There are numerous examples in Film history that demonstrate how censorship and political repression can result in great art. What is required is more refined storytelling.

²⁹ Anupama Chopra, Censorship and My Hopes for storytelling on OTT, (*Film Companion* 16 February 2021) <https://www.filmcompanion.in/features/tandav-controversy-the-family-man-season-2-delay-amazon-prime-video-censorship-and-my-hopes-for-ott-saif-ali-khan-manoj-bajpayee-anupama-chopra>, assessed 24 February 2024.