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Regulation Of Web-Based Entertainment In India: Evaluating Self-Regulation Over Censorship As A Mechanism For Regulating Ott Platforms

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Abstract

This article attempts to study the recent debate over censorship of entertainment content produced and disseminated over several Over-the-Top (OTT) Platforms so as establish a parity between regulation of theatrical cinema and entertainment content over these platforms. The prime objective of this study is to analyse the difference between Certification and Censorship of Films so as to justify the demand for Self-Regulation by various OTT platforms. Further, the study proposes recognition of Right to say No and Right of Choice as social freedoms in the context of nature of entertainment content is sought to be viewed by the consumers. This shall further the peaceful exercise of right to free speech and expression of producers of content and every such OTT platform where such content is broadcast. With the Government releasing "The Information Technology (Intermediary Guidelines and Digital Media Code of Ethics) Rules 2021", several questions pertaining to self-regulation of OTT platforms have emerged. This research discusses if censorship of OTT platforms may curtail their right to free speech and expression, and therefore evaluates the need for self-regulation over the former as a method of grading the nature, quality and appropriability of content available over these platforms. The research concludes that the censorship is a misnomer and cannot be applied to OTT platforms as the nature of content between cinema and web-based entertainment is completely different. This is the result of India gradually becoming an 'experience economy' where the viewer's choices and web-based entertainment content have garnered a much wider demand than theatrical cinema.

Keywords: *Over-the-Top Platforms, Self-regulation, Censorship, Film Certification, Free speech and expression, Web-based Media, Entertainment*

1. INTRODUCTION

Right to free speech and expression is an important aspect of the fundamental rights of the citizens of India. The right to free speech

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includes the right to freely distribute and disseminate information by the media and press. However, the reasonable restrictions under the Constitution limit the exercise of the said right for reasons of public law and order and obliging to the standards of decency and morality. Entertainment and Media Industry is a private sector enterprise in India and hence, determining their boundaries in terms of liberty to create and distribute content may be difficult. Recently, Over-the-Top (OTT) Platforms have come under radar due to debate over "The Information Technology (Intermediary Guidelines and Digital Media Code of Ethics) Rules 2021" providing for self-regulation of content. This sparked debate over questions including if self-regulation should be considered over censorship as a form of regulating entertainment content over OTT platforms, as this would safeguard Constitutional freedoms of right to free speech and expression.

The Covid19 lockdown forced everyone to stay indoors thereby making people befriend the internet-based entertainment content that is transmitted to us by way of several OTT platforms. The Over-the -top platforms offer entertainment content in a digitized format to the viewers by way of internet or broadband connectivity. Since OTT Platforms have very recently entered the Indian Entertainment business, they are not bound to comply with the provisions under Cinematograph Act, 1952 pertaining to obtaining a certificate by the Central Board of Film Certificate. Consequently, the nature of content and its suitability for certain sections of public has frequently been debated both behind closed door and on various social media platforms. One such episode was when the Twitter trend to boycott the web-series 'Tandav' began, apparently over a specific scene which was deemed as showing Indian gods in bad light. The issue ended with apology by Amazon Prime video, the publisher & producer of the series Tandav, after a police complaint was filed by the UP and Maharashtra government. Another such incident was the open apology tendered by Anil Kapoor and Netflix India to the Indian Armed forces for 'unintentionally hurting the sentiments' with the showcasing of a few scenes in *Ak v. AK* web-series. These controversies have brought forth the intervention of the government directly into regulating the OTT platforms and raising doubts over the so-called self-regulation which the OTT platforms had promised before they ventured into business in their respective terms and policy conditions pertaining to their operations and content telecast.

There were cases where the production house and publisher were mandated to obtain NOC from the concerned authority, especially the defence forces, in case the content was based on story plots revolving around the defence personnel. This was after Gunjan Saxena movie that was aired on Netflix. Though on paper the OTT platforms were governed by the Information and Broadcasting Ministry, there were no direct interventions or regulations by the I&B Ministry for the OTT platforms until February 2021 with the Code of Ethics to be followed by several digital content creator entities and media. In *Shashank Shekhar Jha v. Union of India W.P.No.2390/2015 (2021)*, the Supreme Court directed the government to overtake the platform be governed by the Ministry of Information and Broadcasting.

In respect of this debate, a few questions are required to be discussed and highlighted. Whether self-regulation is enough for regulating the content over OTT platforms or a censorship board be constituted for OTT platforms as well? Whether the guidelines under Code of Ethics are sufficient to ensure regulation of the nature of content or whether they are just a formality which the I&B Ministry has issued under the garb of regulating and controlling the OTT content? Whether censorship or a comprehensive regulation policy would drive away the viewers interest from subscribing to various OTT mediums, as there is considerable change in the viewer mindset regarding the nature of content that they wish to watch in the present times? Is the oppositions' criticism that OTTs are exploiting their unlimited freedom justified? Whether the examples of the incidents mentioned above indicate an over-sensitive or over-reactive section of population who have qualms with the modus operandi of OTT platforms which have come to control the market demand-supply chain in the recent past? Whether all of these issues can simply be put to rest by every viewer exercising their 'Right to say No' as if they find any controversial aspect in the content they are watching? On these lines, this paper discusses the emergence of OTT as a new age media and its business aspects respectively. It discusses the existing legal provisions pertaining to regulation of cinema vis-à-vis the feasibility of its verbatim application to OTT media in the context of an apparent violation of right to free speech and expression of the publisher/producer on one hand and the constitutional considerations of decency, morality and public order on the other hand. Further, the difference between regulation, censorship and certification vis-à-vis its application to OTT platforms and its implications therefore is also being dealt with. The paper also undertakes a comparative analysis of the regulatory mechanism in place in other jurisdictions vis-à-vis India and concludes with an analysis that self-regulation is a better option for OTT content in view of the availability of right to choose and refuse subscription to a certain platform. This is also because of the changing trends in viewership demands with respect to the kind of content as opposed to the choices that are brought at their disposal in a traditional theatrical cinema business model. The paper concludes with affording the Right to Choose and Right to say No to viewers as a social freedom since India as a country is gradually developing as an 'experience economy'. Thus, it is reasonable and rational to uphold self-regulation by way of self-certification as a mechanism for grading the nature of content over various OTT platforms in business instead of censorship.

2. THEORETICAL FRAMEWORK & LITERATURE REVIEW

With the enormous development in technology in the media and telecommunication industry, the media consumption habits and patterns of the consumers/viewers of info-tainment content has seen significant shifts in terms of content mediums and modes of accessing the content (Gupta & Singharia, 2021). High speed internet accessibility and internet enabled smart phone devices has made entertainment affordable for an average earning consumer by facilitating vide-streaming and downloading facilities (Das 2019). The adoption of various OTT platforms by consumers is indicative of intrinsic relation between mass media and its impact on the social fabric of the society (Sharma, 2020). Indian Television and Cinema are changing due to new online platforms and how youth is using these new digital platforms for video content watching with Disney+Hotstar, Netflix, Joi and Amazon Prime topping the charts chronologically. Studies have indicated a direct relation between consumer shift from TV to OTT platforms on one hand and customer engagement, Quality of Service Experience, Satisfaction, Habit and Willingness to continue to subscribe (Singh, 2019). Concepts like Binge-watching is also being related to Binge-serving as the OTT platforms provide to the viewers a plethora of entertainment content to choose from and thereby converting subscriptions to OTT channels a preferred choice of consumers, who now look at it as a commodity rather than a luxury (Narayan, 2021). There are several factors including- content availability of at all times, supply of content at an on-demand pr pay-per-view basis, accessibility over various devices including TV, smartphones, laptops etc., declining data charges, personalisation of content and option to download and watch later- that are attributable to the sudden shift in the Indian consumer preferences to web-series from TV shows. There is also a direct relation between the consumer willingness to pay and capacity to pay with their engagement in piracy or subscription mooching techniques for viewing content that is otherwise accessible on payment of their subscriptions. (Gupta, 2021). There is an ongoing debate on censorship of the several OTT platforms (Samriti & Sharma, 2020). However, considering that right to choose and right to say no to any content are social freedoms that an adult person of reasonable understanding may exercise, self-regulation is considered as an appropriate regime for OTT platforms.

Also, the nature and variety of the content which is made available to the consumers, it is seen as a much more reasonable decision over censorship (Deshmukh & Rajkotwala, 2021).

3. RESEARCH METHODOLOGY

The paper seeks to address the following:

1. To analyze the emergence of OTT platforms as New Age Media and study the several business models which assist in commercialization.
2. To analyze the current legal framework on regulation of media and entertainment content in India.
3. To differentiate certification and censorship from self-regulation vis-à-vis constitutional freedoms.
4. To understand the legal complexities surrounding right to censor and right to say no.
5. To undertake a comparative study of OTT regulations in India with those across other jurisdictions notably UK, Australia and Turkey.

4. RESEARCH & DISCUSSION

4.1. Emergence of OTT Platforms as New Age Media

Industrial revolution 2.0 has manifested a technological revolution of its own kind in so far as New Age Media Entertainment is concerned. Proliferation of internet has transformed the concepts of “access to and control of creative content”. A consequent development of this is the ease at which any form of Creative Entertainment Content can be Created, Curated, Distributed and Disseminated. With the OTT platforms bringing multitude of options at the viewers disposal, the frequency of content distribution and revenue generation models adopted by stakeholders in the Entertainment business have reformed the Entertainment Business largely.

Advent of Internet has transformed the traditional notions of distribution and dissemination of creative content over a variety of mediums and platforms. This development has brought about a paradigmatic shift in the Film and the Entertainment Industry business models. The Audio-visual Industry at present has expanded its boundaries to cater to consumers at three diverse markets: Cinema, Television and the Web (Torre, 2014). Mass distribution of creative content and broadcasting it to the viewers of entertainment content is no more the prerogative of Cable TV networks. Content Creation, Curation, Distribution and Dissemination has obtained synonymity with ‘digitized entertainment’, thereby emerging as a lucrative contributor to the global economy.

Over-the-Top Entertainment, or Bundled Entertainment Packages is the outcome of the 4G revolution which has made access to

entertainment content relatively convenient and local for a major section of the population. Cinema and Films were earlier categorised into Feature and Fiction/Documentary Films. However, the recent market of entertainment goods available on the web is a mixed bag of a variety of entertainment content- ranging from fictional and non-fictional formats to reality shows, web-series, web-talks, viral videos and vlogs. This set of entertainment package is popularly called Home Video or Video/Service-on-Demand (VoD/SVoD). Internet and digital technologies have facilitated the direct transmission and broadcasting of entertainment content with the flexibility of it being consumed via multiple mediums at spaces and times as per the convenience of the viewers. Initially, OTT began as a medium of "content hosting" platform, but eventually expanded its scope with the releasing of short films, feature films, web-series, other entertainment content and also indulged in production. It is managed through Artificial Intelligence (AI) which identifies the interest of the public on the basis of search history and then recommend the content based on viewers search patterns. The OTT conduct its business on the basis of TRAIL and FREEMIUM basis where the common content which is available on the other sites can be availed for free of cost and exclusive content of the platform is chargeable (Pandey, 2021).
The OTT platforms have recently been termed as the New Age Media because of several reasons pertaining to convenience, cost, accessibility & content. Though OTT cannot be a displacement factor against theatrical visits by viewers, however, the pandemic has made OTT emerge as a more convenient and cost-effective source of entertainment, irrespective of the number of members that may be there in a particular family. The viewers are not only able to enjoy their favourite shows within comfortable spaces of their choice, but are also provided with a plethora of options to choose from in terms of the genre of content they might prefer watching. Popularity of OTT is also attributable to the various mediums over which the content is available for streaming and downloading. From Television sets and computer desktops to smart phones, laptops and notepads- OTT streaming is a reality. At the same time, multiple members of the same family have the facility to watch content of their preference on different mediums with a single subscription window.

4.2. BUSINESS ASPECTS OF OTT PLATFORMS: MEANING AND CONCEPT

The proliferation of technology has given an impetus to the creative processes and business models involved in the making and distribution of a film. Industrial Revolution 4.0 has led to the emergence of parallel entertainment, thereby reforming the foundations of the traditional business models of the film industry which initially were limited to Theatrical and Television releases

/premiere of films. Content dissemination and distribution is now a separate business model which has come to be adopted by the Film Industry with Over-the-Top content creating industries entering the consumer-service enterprise. This new change is equally a threat to the traditional models of revenue generation and distribution in the entertainment business industry. However, the value that was attributable to the creativity and quality of content remains unchanged till date.

'Digitized Entertainment' has enormously spiked the online video in data consumption, which is expected to continue to grow in the near future (Klynveld Peat Marwick Goerdeler, 2017). Globally, OTT monitoring and compliance market revenue is expected to grow at $149.7 million in 2024, with a compound annual growth rate (CAGR) calculated at 15.8 percent (Centre for Media and Entertainment Studies, MICA 2019). The reports of FICCI-EY on Media and Entertainment Industry's growth suggest that access to online videos through telecom bundles is to touch 399 million of the total 818 million online video consumers by 2023. The share of the OTT video segment in the entertainment and media sector is expected to increase from 2.4 percent in 2019 to 5.2 percent by 2024 (Verma, 2020). Further Telecom giants are strategizing to offer multiple streaming services to entertainment viewers at the same time, via mobile and broadband connections over smart phones and Television sets (Jha, 2021). This has brought a paradigm shift in the entertainment content distribution and consumption platforms, and at the same time reformed the viewers consumption habits, choices and preferences. Originally, the OTT platforms only included applications like nexGTv and Sony Liv, however, they could not stand out against the competition from reality shows on Television. However, with the OTT platforms choosing to provide its viewers a bundle of joy- 'bundled telecom services with OTT packages' (MTM and Amdocs Media, 2020), users realised that they were actually saving on the expenses by availing both telecom and internet data with entertainment content from one single source.
The advent of OTT began in the year 2008 in India with Reliance Entertainment launching the first OTT platform, BigFlix. Thereafter, in 2013 Ditto(TV) and Sony Liv were considered as On-Demand or SvoD media. Finally in 2015 Disney Hotstar and 2017 Netflix took over the market with large number of subscribers, increasing every year (Pandey, 2021). At present, the popular stakeholders include Disney+Hotstar, Amazon Prime Video, Netflix, Voot, SonyLiv, AltBalaji, Jio Cinema and Zee5.

There are various formats of business models that these platforms have adopted. While there are a few popular broadcasters that have launched their own platforms including Hotstar, Voot, SonyLiv and Zee5, others global giants like Netflix, Hulu, Hoichoi, AltBalaji, Lionsgate, Firework TV, MX Player, Hungama TV, Amazon PrimeVideo have extended their services in India as Independent Platforms. In addition to this, telcos like Airtel, Jio and Vodafone-Idea have emerged as aggregator platforms providing content and payment interface facilities (Samtani and Jindal, 2018). The former is regulated and controlled under the policies drafted and implemented by Indian Broadcasting and Digital Foundation (IBDF) whereas the latter has sided with Internet and Mobile Association of India (IAMAI) which is a self-regulatory body and has introduced Digital Publishers Content Grievance Council to entertain and resolve complaints from consumers relating to nature of content that is created and distributed (Chaudhuri, 2021).

OTT is a "common definition of service that is delivered over a digital network, of which the infrastructure of the network is owned by a digital network operator but the workability as well as the benefit arrangements resulting from the service are not directly involving the network operator". The International Telecommunication Union (ITU) defines OTT service as "a service or application which is provided to a user over the internet". OTT services may take the forms of voice, audio, video, telecommunication, news, conference, data centre, cloud, networking, game, mobile message and many others (Ramli, 2021). The term.

OTT platforms refer to "all the communication services such as voice calls, instant messaging, video streaming applications and are not under the direct control of the government or any telecommunication company and are thus differently that is over the top of the traditional networks that have to comply with the regulatory laws of the cable or satellite networks" (TRAI rules out to regulate OTT, 2020).
There are four different formats of OTT markets on the basis of the manner in which content is made available to the viewers: Advertising Video on Demand (AVOD), Subscription Video on Demand (SVOD), and Freemium & Transactional Video on Demand (TVOD). Though AVOD is highly recommended to increase advertising revenue, the SVOD is growing significantly. Direct-to-Digital Releases and pricing strategies enable OTT platforms to increase customer base. In addition, OTT platforms offer affordable plans and custom language packs. Although most platforms focus on local content, the OTT Streaming Global Market Report is segmented (The Business Research Company, 2022):

- Device Type: Smartphones, Smart TVs, Laptops, Desktops and Tablets, Gaming Consoles, Set-Top Box, Others
- Revenue Source Type: AVOD, SVOD, TVOD, Others
- User Type: Commercial, Personal
- End-User Type: E-commerce, Media and Entertainment, Education and Training, IT and Telecom, Health and Fitness, Others.

The economics of OTT platforms and their business aspects may also be studied in the content of Porters' Five Forces Theory. Further, such analysis shall facilitate understanding the future of OTT platforms vis-à-vis Television and cinema releases. OTT platforms function within the purview of Porters Five forces in the following way:

- Threat of new entrants: The greater number of OTT platforms joins the business; the stronger competition is faced by existing platforms that are already serving at the mercy of the viewers choices and their capacity to spend over a specific platform. Further, television and theatrical visits shall never be displaced, irrespective of the zenith of success that these OTT platforms may attain with time.
- Suppliers Bargaining power: Every OTT platform has liberty in deciding the nature of content that they would be make available to the viewers and the price at which the same shall be made available. This is how they maintain a bargaining power as suppliers and the viewers mostly give into their demands by consenting to subscribe to a specific platform at a non-negotiable price. The viewers have less or rather no bargaining power in terms of the cost at which entertainment shall be made available to them.
- Internal Competition and rivalry: Where there are several stakeholders at the disposal of the viewers to choose from, rivalry among former is a relatable consequence.
- Threat of Substitutes: This is similar to threat of new entrant and in the case of OTT platforms may at some point be substituted with theatrical visits by viewers. However, this may be subject to various conditions including convenience and cost. Also, there may be a change in the number of people who may be willing and intending to resort to only watching content available on OTT platforms over theatrical visits owning to several reasons including entertainment expenses and convenience.

Content dissemination and distribution by the OTT platforms can be categorized under three levels:

1. Original Content that these OTT platforms produce (Amazon & Netflix Originals)
2. Content which is licensed by production houses to these platforms for the purpose of being made available to the consumers. These

are mostly film content or web-series. (Films under the banner of Dharma Production, AjayDevgan Film, YashRaj Films, etc).

3. Content that is co-produced by the Film Industry production houses and the OTT platforms. These include recent association between Shah Rukh Khan's Red Chillies Production and Dharma Productions digital wing Dharmatics' deal with Netflix, for producing both web-series and films content.

These three forms of content distribution strategies are governed and regulated under the various commercialization strategies including- content differentiation, content localization, service optimization, partnership, revenue enhancement and envelopment strategy (Sungwook, et al., 2019).

4.3. Existing Legal Parasol for Regulation of Media & Entertainment Content in India

Media and Entertainment is an umbrella terms that includes within its ambit the Audio-Visual Industry- Television, Cinema, Web & Radio. Media has essentially been unregulated in India, except the constitutional reasonable restrictions, that urge the media to be responsible and accountable in order to maintain public order and social security. Cinema and Television connects reel-life with real-life people and society. Cinema mirrors the society and hence viewers expect cinema to be righteous and fair. OTT platforms are a very recent development of traditional cinema culture. The content that is provided by OTT platforms is essentially what Television and Cinema individually and separately provided originally, but on a more expressive and liberal paradigm.

The content on Television may further be categorized as- non-news and entertainment content; news and current affairs; advertisements; and cinema. The content which falls under the non-news or entertainment TV affair is regulated by the Cable television Networks (Regulation)Act, 1995 containing the program and advertisement code which all content transmitted and re-transmitted on television must comply with. The Ministry of Information and Broadcasting has constituted the Inter-Ministerial Committee and Electronic Media Monitoring Centre to check violations and monitor content of various TV channels. This is effected by the Broadcast Content Complaints Council (BCCC) constituted by the Indian Broadcasting Foundation (IBF).

Unlike the Press Council of India, which regulates news in the print media, the news on TV is a self-regulatory process and the News and Current Affairs on TV are regulated under News Broadcast Association

(NBA) which functions as per the NBA Code. Seeking to protect the rights of citizens as consumers, the Advertising Standard Council of India has been formulated to regulate the content of Advertisements in India. Apart from these, the content of films and cinema is regulated under the provisions of Cinematographic Act, 1952 (Kumar, 2018).

The Indian Cinematographic Act, 1952, under Section 3 provides for constituting the Central Board of Film Certification (CBFC) as a statutory body vide its powers under the Ministry of Information and Broadcasting. The Board is essentially tasked with regulating the public exhibition of films under the provisions of the Cinematograph Act 1952. In addition to this, at the State level, there is Broadcasting Corporation of India, popularly called the Prasar Bharti established vide the Prasar Bharti Act, 1990, which performs the dual function of public broadcasting to inform, educate and entertain the public thereby ensuring a balanced development of broadcasting on TV and provides for the establishment of a Broadcasting Council to receive complaints related to nature of content aired on these channels.

Issues pertaining to violations of rights in the cyberspace are at its peak with widespread dissemination of internet. Information Technology Act, 2000 comes to resolve the controversies pertaining to use of internet and information dissemination over the internet in cyberspace. Section 67A, 67B and 67C of the Act provides to penalize publication or transmission of any lascivious or obscene and sexually explicit material and those depicting children in these acts on any electronic medium. Section 69A of the IT Act, the Central Government has been empowered to issue directions to block public access of any information (Pandey, 2021). Further, these provisions are supplemented with Section 295A and 499 dealing with penalty for hurting religious sentiments and defamation under Indian Penal Code, 1860 and Indecent Representation of Women (Prohibition) Act, 1986.

As far as OTT platforms are concerned, there is no specific law in place to regulate the nature of content and requirement to seek permissions and approval for publication of content yet, except the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule, 2021. These rules have been notified by the Ministry of Information and Broadcasting under its powers vide Section 87(2) of the IT Act, 2000 for keeping a check on the extent of freedom of speech that is exercised vide the content showcased on these platforms. The government has come to designate these rules as 'Soft-Touch Regulatory Architecture' as they are softer means for the government to ensure content control on these platforms (Devargatla, 2021). These rules were framed post the Supreme Court ruled that the code of conduct established by the OTT platform through the Internet and Mobile Association of India (IAMAI), and Digital Curated Content Complaints Council (DCCC) were insufficient and ill-drafted. As per the new rules, complaints against content aired on OTT platform must be made to the OTT platform complaint officer, who is obliged to resolve the complaint within 15 days. After this the complainant, if satisfied, is offered an opportunity to approach the grievance committee of the industry body, which will give him 15 days. If the complainant is still dissatisfied, he maya go directly approach the Ministry. Content removal, apology, warning, and content rating are all actions that can be performed under each level. The final decision rests with the Level III Inter-Ministerial Government Body. Though the nature of complaints is not specified and therefore there may be various subjective reasons for filing a complaint.

4.4. Regulation or Censorship: OTT platforms Right to Freedom of Speech and Expression

Censorship and Regulation of Content are two very diametrically opposite connotations, especially in the context of entertainment content, TRPs' and viewership charts. To a great extent, the entertainment business relies on viewer's choice and preference, rather than authenticity or realism that a specific content seeks to bring out for the general public. Commercialization and Marketing strategies that any business enterprise adopts is based on consumer experiences and expectation. Entertainment goods fall under this category. The success or failure of production houses and content creators is intuitively based on viewers expectations of the kind of content they may prefer watching and the viewers reaction post the release of a specific content. These are, among others, important factors that decide the future of a conglomerate in the entertainment business. Consumer is a king is a reality when it comes to entertainment business in terms of viewership rates and charts for a specific type of content.

Censorship means curtailing parts of a content owing to reasons of violence, language, and/or sexual content. This is in order to maintain and uphold the constitutional considerations of maintaining public order. The constitutional standards set 'for decency and against obscenity' are to be met under censorship of films. The Oxford dictionary defines obscenity as something "offensive or disgusting by accepted standards of morality and decency". India has taken from the famous Hicklins Test (*Regina* v. *Hicklin,* 1868) which defined 'obscenity' to mean and include all material tending "to deprave and corrupt those whose minds are open to such immoral influences, irrespective of its artistic or literary merits". The Central Board of Film

Certification has been constituted for the purpose of curtailing film or portions of films which fail to meet the standards of decent publication and dissemination of entertainment content.

The Preamble of the Cinematograph Act, 1952 in India, reflects the intention behind the legislation to "make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs". Under Section 3 of Cinematographic Act, 1952, the CBFC as a body has been entrusted with the powers of issuing certificates to cinematograph films. The CBFC was authorized to certify the nature and contents of the film in terms of rightful viewership as per age. Under Section 5B(1) of the said Act, it is also empowered to deny certification, if in their opinion, the content of the film is against the sovereignty and integrity of India, is against public order, decency or morality, affects the friendly relations of India with other countries and/or if involves defamation or contempt of court or is likely to incite the commission of any offence. However, over time the Board took to itself the power to order 'edits and cuts' in a film, owning to reasons ranging from maintaining social order and public welfare to decency and morality.

It is this regulation that has come to be interpreted as Censorship. Pranesh Prakash (2015) quotes *"The meaning of censorship solely depends upon the context. It relies on three factors which include – the reasons for censorship, the medium or parties subjected to it, and the means used for enforcing it"*'.

According to Fiss (1991) "*In most cases, censorship either involves the state actor prescribing laws and rules for content exhibition. This creates a framework for content dissemination. In other cases, it may be self-censorship wherein the content provider puts limitations on the content to be circulated based on certain factors"*.

Hence, it can be concluded that in the context of right to broadcast or communicate information, censorship may be called 'the act of supervising and prohibiting information on ideas which are otherwise deemed as offensive or objectionable'. It was on these lines the Apex Court in of the country *K.A. Abbas v. Union of India, (1970) 2 SCC 780* remarked that

"*A motion picture has the ability invoke emotions deeply compared to any other art form*. *A film can be censored on the grounds mentioned in Article 19(2) of the Constitution. Further, censorship of films, their classification according to the age groups and their suitability for unrestricted exhibition with/without excisions is considered a valid exercise of power in the interest of public morality, decency, etc. This* *is not to be construed as offending the freedom of speech and expression under Article 19*."

Therefore, censorship was never an objective of the either the Act or the Board. It always intended to bear a positive connotation, and rather the intention was in line with the reasonable restriction under Art 19(1)(a) in reference to free speech and expression only. However, with changing concepts of 'permitted standards of regulation of entertainment and media', censorship as a term was endowed a relatively negative connotation with always being synonymously juxtaposed with curtailment of right to free speech and expression.

Answering the first question in the order in the affirmative, it can undoubtedly be concluded that irrespective of the fact that censorship is a form of regulation, both of these concepts are remarkably different in terms of their contextual application and interpretation. Whereas, censorship contains and curtails the expression of what may otherwise be indecent or obscene- in order to justify the standards of public order and morality; regulation may merely be enforced by- separating the right from wrong, acceptable from what may not acceptable with the authority to make our own decisions and owning up the responsibility for consequences of our respective choices.

Self-regulation as a policy has been adopted by all the OTT platforms in terms of affording the viewer with the option of choosing to regulate and make decisions regarding the nature of the content that they would like to watch. Every OTT platform has an in-built mechanism of seeking permission from the viewer and duly informing the latter about nature of the content that they are watching with specific disclaimer against being viewed by children. Moreover, the fact that each of these platforms are subscription based, the viewer is ultimately given the right to decide if they would like to subscribe to a specific channel at the cost of their understanding of what may be a sensitive and controversial content.
Under the aegis of Ministry of Electronics & Information Technology, the Government of India released the Intermediary Guidelines and Digital Media Ethics Code Rules 2021, which provides rules for regulating digital media and online curated content publishers affording them in-house self-regulation mechanism. These rules have been framed keeping in mind the differences in viewership expectations and experiences from watching entertainment content in a theatre and television from that on Internet. A provision for compliance with due-diligence for taking down of content based on revenge-porn and to responsibly act in case of receipt of grievance

from the users pertaining to inappropriate content is the underlying principle behind notifying these rules. Under 2(p) of the Code, 'on-demand' as "a system where the user or viewer is enabled to access, at a time chosen by such user, any content in electronic form, which is transmitted over a computer resource and is selected by the user". Further Section 2(q) of the Code defines 'online curated content' as 'audio-visual content, other than news and current affairs content, which is owned by, licensed to or contracted to be transmitted by a publisher of online curated content, and made available on demand, including but not limited through subscription, over the internet or computer networks, and includes films, audio visual programmes, documentaries, television programmes, serials, podcasts and other such content'. These guidelines also obligate the OTT platforms to define and classify the contents on the basis of 5-age based categories- Universal (U), U/A 7+, U/A 13+, U/A 16+, and A (Adult). The platforms are to also prove a parental lock and age verification mechanism for contents classified as U/A 13+ and A respectively. In addition to this, the Guidelines issued by the Ministry of Electronics and Information Technology pertaining to Safeguarding User's Rights, Ensuring Responsible Internet Freedom requires the publishers are also required display description and viewer rating of the content at the beginning of every program (2021).

Now the question is- whether these are being guidelines realized both in letter and spirit? Meaning thereby, do these self-regulation guidelines have an effective implementation in so far as content delivery and access to the end user or viewer is concerned. Theoretically speaking, the answer to this is in the affirmative as all the OTT platforms have adopted the self-regulation mechanisms as part of their content distribution policies whereby all the guidelines have been verbatim implemented as against the user of any of these OTT platforms. However, practically speaking, these mandates are not really being fulfilled. This is so because- no matter how effectively these guidelines may be followed by the platforms, the nature of the content doesn't change and neither does its access to persons below the permissible age may be stopped. Technology provides ample routes to circumvent a protective mechanism or a parental lock that may be set. Also, it may be difficult to regulate and check the real-time credentials of an account user of such OTT platforms. Nonetheless, self-regulation as a principle is very subjective and hence every person is also accorded the right to say no or choice to decide the nature of the content that they may be 'willing and intending' to watch or pay for, irrespective of what the content publishers may be following and providing for the varied category of the masses they are catering to. It is in this respect, that the successful implementation and enforcement of the guidelines have to be analyzed and therefore, it may be said that censorship as a form of regulation may not be a reasonable option for viewers in the age of On-demand or Pay-per-View entertainment. The fact that technology has afforded the viewers with the liberty and freedom to spend as per their choices, curtailing the right of the publisher to create and curate content ostensibly under censorship would be a definite violation of constitutional principles of freedom, liberty and occupation. Moreover, the OTT platforms are also reasonably fulfilling the competition law principles whereby the viewers are provided with a plethora of options to choose from, thereby creating an environment for healthy competition and ruling out all possibility of abuse of dominance by any one entity in the OTT Entertainment business. Hence, under these circumstances it may not be an ideal decision to trying to curb or censor the OTT platforms content distribution policies by intervention of a statutory body as in the case of films and cinema. Another reason why censorship is not a good idea for OTT platforms is related to the discussion and debates that surrounded the series of Amendments that followed under the Cinematographic Act, 1952.

This dichotomy between censorship and certification was also picked up by the Shyam Benegal Committee in 2016. This was set up by the Ministry of Information and Broadcasting to re-examine and reform the prevailing norms of film certification. While it suggested changes to the different categories of certification and called for separate guidelines for different aspects of certification, it specifically asked for a limit on the powers of the CBFC. Keeping in line with the statutorily granted authority, it recommended that the CBFC should only enjoy discretion to decide which category of audience can watch the film and nothing more. The committee further said that acting as a ‘moral compass’ would constitute a transgression of CBFC’s powers and alterations, if any, to the film should only be made by the rights owner or with his consent as only he enjoys the complete rights over the film (Agarwal and Shankar, 2021).

4.5. OTT Regulation in other Jurisdictions

In the UK, very recently the concept of ‘content rating’ has been introduced as a result of a mutual decision taken by British Board of Film Certification in association with Netflix with respect to every content available on its platform. The UK government issued a notification and sought the adherence of its constituent states to EU Electronic Communications Code (EECC) in 2020. Apart from this there is no strict regulatory mechanism that governs OTT content. Under the ECCC if OTT services offer access to “publicly assigned numbering resources”, they are subject to similar rules as the traditional telecommunications operators. On the other hand, if they only offer "number-independent interpersonal communications services", they will be subject to a new and lighter regime (Mikalef and Toubol, 2021).

In Singapore content regulation is undertaken by Infocomm Media Development Authority (IMDA) which issues a code of conduct for regulating the OTT platforms. It is known as Content Code for Over-The-Top, Video-On-Demand and Niche Services (2019). IMDA is empowered to issue and review codes of practice relating to programmes and advertisements. In Singapore too, the concept of content ratings is followed. A parental code for the content that is made available to the age group of 16 and 21 is also in place. In case the content is made only for the age group of 16 and above, then proper parental code shall be provided whereas in cases where the content is made available for the age group of 21 and above it shall only be unlocked after proper verification. Vide the provisions under the Broadcasting Act, (Cap. 28) Code of Practice for Television Broadcast Standards (2015), a Content Code is in place to regulate the Over-the-Top ("OTT"), Video-on-Demand ("VOD") and Niche Services and ensure that it is not against public interest or order, or national harmony, or offend good taste and decency. The IMDA, under the Broadcasting Act, 2015 (Cap. 28), may also impose sanctions, including the imposition of financial penalties, on any broadcaster or service provider which contravenes the Code. Service providers can offer any content which is restricted for viewership to persons of 21 years of age and above (R21), only if they implement a 'reliable age verification mechanism'. All R21 content shall remain locked by default, and should only be accessible to users on a Pay-per-View basis and not for free. The classification criteria of IMDA are based on following considerations and principles- acceptable norms and values, protecting the young minds, racial and religious harmony, public order and national interest. Film assessment procedure involves taking in to consideration the following seven elements- theme & message, violence, sex, nudity, language, drug & substance abuse, horror vide the Infocomm Media Development Authority Film Classification Guidelines (2019). Once a film is classified, an appropriate consumer advice may be sought to highlight the stronger elements in the content elements within the film. This serves to provide the consumers with an opportunity to make an informed decision of whether to watch to content on not. It is through this that the parents also get to decide the suitability of a film content for their children.

Similarly, the Broadcasting Service Act, 1992, in Australia is responsible for monitoring the content which is classified or not classified. The unclassified content is classified through ratings. The content that cannot be sold, published, advertised or imported is designated as Refused Classification or RC. The content restricted for viewership only to the adults for containing forms of the sexually explicit material is classified as X18+. The classification R18+ is also restricted to the adult community. MA15+ classification is for content that is restricted for the age group till 15 years. X 18+, R 18+ or MA 15+ is also designated for other content where viewership needs to be restricted for a considerable age. Further, under the Broadcasting Services Act, 1992 ('BSA') a provision for complaints-based mechanism is also provided whereby complaints can be registered by Australian residents about illegal or offensive online content. Australian Communications and Media Authority ('ACMA') then investigates the valid complaints and undertakes appropriate action on such "prohibited content" or "potential prohibited" content. Under the Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021 recently passed There is an interesting development that has recently undertaken in Australia with the constitution of Online Safety Youth Advisory Council in April 2022, comprising of 25 council members in the age group of 13-24 years old. Under Schedule 5 and Schedule 7, of Online Safety (Transitional Provisions and Consequential Amendments) Act 2021, the eSafety Commissioner has the power to ban certain types of content from being hosted on sites located within Australia. Such content can either be referred to the commissioner through the complaints process (which places the Commissioner under an obligation to investigate the content in question and determine whether it does in fact pertain to prohibited content), or it can be found and investigated by the Commissioner using their own initiative.

The Radio and Television Supreme Council (RTUK) in Turkey regulates OTT platforms along with television and radio. The Radio and Television Supreme Council was constituted in 1994 as an administratively and financially autonomous and impartial public legal authority for the regulation and supervision of radio, television and on demand media services which are under the jurisdiction of the Republic of Turkey. RTUK issues licenses to OTT platforms for 10 years under which government monitors visual and audio feeds. The Supreme Council essentially undertakes to rule out precautions for securing the freedom of expression and information, diversity of opinion, media pluralism, competition environment for avoiding media concentration and protecting public interests. RTUK does not provide any specific control codes for OTT platforms.

5. CONCLUSION:

Economies across the world are gradually getting converted into an 'experience economy' where experiences of the consumers are considered as the Fourth commodity- separate and distinct from goods, services and combination of both. (Pine & Gilmore, 2013). This conceptual analogy may also be applied in case of India, where web-based media and entertainment content is topping the viewer's choice charts. Especially the post-covid situation seems to be witnessing an inclination towards web-based entertainment instead of theatrical cinema. In fact, a considerable number of production houses seek to choose OTT platforms as a suitable exhibition window for their content. Hence, consumer expectations and demands for a variety of genre-based content has led to the emergence of a demand-supply relation between the viewers and OTT platforms. It is in this context that the viewers wish to exercise their Right of Choice and decide against watching a certain category of content which they might consider as being age-inappropriate, violent or otherwise provocative. It is on these grounds that Self-Regulation by OTT Platforms over their web-based media and entertainment content seems to be a much reasonable, responsible and rational measure to certify and grade the content for viewers before they may choose to watch it. The discussion in the previous sections too, clarifies that India is following the same mechanism in so far as regulation of OTT platforms are concerned, as is followed in other major countries. Beyond this, transferring arbitrary powers to the Central Government for regulation or censorship, shall curtail the right to free speech and expression of OTT publishers and viewers right to freedom of choice in terms of the nature of the content that they wish to watch. Further, since the nature of cinema and web content and their intention to cater to viewer preferences is different, censoring the OTT platform content may not be a reasonable idea, even to justify the constitutional mandate. The fact the OTT platforms are working on a subscription-based modality, the benefit of doubt must be accorded to a certain section of people who may be willing and confirm to the guidelines of OTT operators. For others section of the society who may feel that a certain content type is lascivious or offensive, privilege to say no to watching such content and registering a complaint by following the regulatory mechanism in place shall be an ideal option. There have been instances in the past, including those witness before the release of films like Padmaavat and Udta Punjab, where it has been seen that the CBFC, under a blanket power to restrict exhibition of the said films, have gone to the extent of ordering completely deleting certain scenes, which they felt would trigger or violate public sentiments, based on popular public demands. These were unjustified. Under all these circumstances the difference between censorship, regulation and mere powers pertaining to content certification must continually be referred to, in the broad context and meaning assigned to free speech and expression in a democracy.

REFERENCES

1. Agrawal, A. and Shankar, R. (2020). No Objections: Constitutional Analysis of Censorship & Film Certification on OTT Platforms. SSRN Electronic Journal https://dx.doi.org/10.2139/ssrn.3768466
2. Anonymous. (2020) TRAI rules out to regulate OTT. Economic Times, https://telecom.economictimes.indiatimes.com/news/trai-rules-out-need-to-regulate-ott-players/78103860
3. Chaudhuri, A. (2021). Do OTT Platforms Deserve a Separate Regulation? Centre for Research & Analysis in Finance Technology & Law Working Paper No 2/2021. https://www.researchgate.net/publication/354543099_Centre_for_Research_Analysis_in_Finance_Technology_Law_Working_Paper_Series-_Draft_1_%27Do_OTT_platforms_deserve_a_ separate _regulation
4. Das, D. Automated Security Testing Framework for Validating Content Rights on Video Streaming Devices, 2019 IEEE Region 10 Conference (TENCON 2019)
5. Devargatla, R. (2021). The 'Soft touch Self-regulatory mechanism' for Digital Media Strikes a Perfect Balance Between Regulation and Creative Freedom. The Pulse. https://the-pulse. in/the-soft-touch-selfregulatory-mechanism-for-digital-media-strikes-a-perfect-balance-between-regulation-and-creative-freedom
6. Dixit, A. et.al. (2017) The digital First Journey: How OTT platforms can remain on-demand ready. KPMG FICCI Report. https://assets.kpmg/content/dam/kpmg/in/pdf/2017/10/The-Digital-First-journey.pdf>
7. Fiss, O. (1991). State Activism and State Censorship: Yale Law School.
8. Jha, L. (2021). Teleco Bundles to contribute 50% to online viewers by 2023. The Mint. https://www.livemint.com/industry/media/telco-bundles-to-contribute-50-to-online-viewers-by-2023-11617951858986.html
9. Gupta, P. The factors effecting shift of Indian customers from T.V series to web series:The Future of OTT services in India, EPRA International Journal of Multidisciplinary Research (IJMR), 7(2), February 2021, (DOI: 10.36713/epra2013)
10. Gupta, G. & Singharia, K. Consumption of OTT Media Streaming in COVID-19 Lockdown: Insights from PLS Analysis, Vision 25(1) 36–46, 2021 (10.1177/0972262921989118
11. Kini, S. et.al. (2019). Indian OTT Platforms: Indian Trends 2018-19. Centre for Media and Entertainment Studies Report, MICA. https://communicationcrafts.in/wp-content/ uploads/2019/12/Indian_ott_report2019.pdf
12. Kumar, P. (2018). Regulation of Television Content in India. iPleaders. https://blog.ipleaders.in/television-content-regulation/
13. Malewar, S. & Bajaj, S. Acceptance of OTT video streaming platforms in India during COVID19: Extending UTAUT2 with content Availablity, Journal of Content, Community & Communication, 12(6), 2020 [ISSN: 2395-7514] (DOI: 10.31620/JCCC.12.20/09)

14. MIEITY (2021) Safeguarding User's Rights, Ensuring Responsible Internet Freedom. Ministry of Electronics and Information Technology, Government of India. https://transformingindia.mygov.in/wp-content/uploads/2021/ 02/IT-Intermediary-Guidelines.pdf
15. Mikalef, W. and Toubol, F. (2021). Why has EU adopted a new regulatory framework of the European Electronic Communications Code. Lexology https://www.lexology.com/library/detail.aspx?g=19b65695-bd 68-4873-80fb-c02dfdcb8b4c
16. Narayan, B. et.al., Binge Watching to Binge Serving in India: Revolution, Regulation and Restriction of Over-the-Top (OTT) Platform, Rupkatha Journal on Interdisciplinary Studies in Humanities, 13(4), 2021, 1-15 (DOI: https://doi.org/10.21659/rupkatha.v13n4.14)
17. OTT Streaming Global Market Report (2022) https://www.thebusinessresearchcompany.com/report/ott-streaming-global-market-report
18. Pandey, P. (2021). Guidelines for OTT Platforms and Social Media: Regulation or Restriction. 24 Supremo Amicus 729. https://supremoamicus.org/wp-content/uploads/2021/06/POORVA - PANDEY.pdf
19. Park, S. Kwon, and Youngsun. (2019, June16-19). Research on the Relationship between the Growth of OTT Service Market and the Change in the Structure of the Pay-TV Market, [Conference Session]. 30th European Conference of the International Telecommunications Society (ITS): Towards a Connected and Automated Society, Helsinki, Finland, http://hdl.handle.net/10419/205203
20. Pine, Joseph, and Gilmore, James, (2013). The experience economy: past, present and future In Handbook on the experience economy. Edward Elgar Publishing, https://www.elgaronline.com/downloadpdf/edcoll/9781781004210/9781781004210.00007.xml
21. Prakash, P. (2015). Global Censorship, Shifting Modes, Persisting Paradigms. Information Society Project: Yale Law School. (https://law.yale.edu/sites/default/files/area/center/isp/documents/a2k_global-censorship_2.pdf)
22. Ramli, T. (2021). Copyrighted Content Commercialization on OTT Media in Indonesia. 26(6) Journal of Intellectual Property Rights. http://nopr.niscair.res.in/bitstream/123456789/59058/1/JIPR%2026%286%29%20351-356.pdf
23. Sadana, M. & Sharma, D. How over-the-top (OTT) platforms engage young consumers over traditional pay television service? An analysis of changing consumer preferences and gamification, YOUNG CONSUMERS, 22(3) 2021, pp. 348-367, Emerald Publishing Limited, ISSN 1747-3616 (10.1108/YC-10-2020-1231)
24. Samtani, K. and Jindal, G. (2018) Entertainment Goes Online. Boston Consulting Group, https://www.bcg.com/en-in/entertainment-goes-online-a-5-billion-opportunity

25. Sharma, G. et al., Role of Covid as a catalyst in increasing adoption of OTT in India: A study of evolving consumer consumption patters and future business scope, Journal of Content, Community & Communication, 12 (6), December - 2020 [ISSN: 2395-7514] (DOI: 10.31620/JCCC.12.20/28)
26. Singh, P. New Media as a Change Agent of Indian Television and Cinema: A study of over the top Platforms, Journal of Content, Community & Communication, 9(5), June - 2019 [ISSN: 2395-7514] (DOI: 10.31620/JCCC.06.19/18)
27. Torre, M. (2014). The Economics of the audiovisual industry: Financing TV, Film and Web. Palgrave Macmillan London. https://doi.org/10.1057/9781137378477
28. Verma, M. (2020). India set to become the 6th largest OTT market by 2024: PwC. The Hindu. https://www.thehindubusinessline.com/info-tech/india-set-to-become-the-sixth-largest-ott-market-by-2024-pwc/article32919127.ece
29. White Paper. (2020) Delivering next-generation OTT bundles: CSP integration challenges and opportunities. MTM and Amdocs Media. https://www.amdocs.com/sites/default/files/2021-07/MTM%20 White-Paper-Delivering-Next-generation-OTT-Bundles.pdf.