

# **CENSORING ONLINE STREAMING SERVICES IN INDIA:**

## **A PRACTICAL APPROACH**

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### **ABSTRACT**

*With the advent of new and faster communication technologies, there has been a rampant rise in the number of over-the-top video streaming services in India. Currently, the online video streaming industry in India is growing at 22% Compound Annual Growth Rate<sup>1</sup> and the number of online streaming services has doubled in the past 2-3 years on the account of lower data tariffs and rise in Smartphone penetration among Indians.<sup>2</sup> These streaming services host a bunch of content including cinematographic movies, television programs and native content, both produced by the users themselves and purchased from the content creators. With faster adoption rates and more content being generated on these platforms because of lower costs and lack of regulatory frameworks, these services have come under public scrutiny in recent times due to the content being published by them. For instance, Netflix came under the spotlight for airing a web series titled 'Sacred Games' which had several explicit scenes including frontal nudity and similarly ALT Balaji, another leading video streaming website, came under the scanner for airing a web series that contained similar explicit scenes. Therefore, there is a need for content regulation. As of now, there are no regulatory bodies that deal with the regulation of these websites like the Central Board of Film Certification (hereinafter CBFC), which is a statutory body that certifies films for theatrical release. The provisions of the Information Technology Act, 2000; namely Section 67A, 67B and 67C bring under their ambit these websites and provide for penalties with regards to publishing sexually explicit material. Moreover, the Information Technology (Intermediary Guidelines) Rules, 2011 contains certain guidelines relating to intermediary liability. Further, certain online streaming websites in collaboration*

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<sup>1</sup> 'India's Entertainment and Media Industry to Clock over INR 451,373Cr by 2023: PwC Report' (PWC India, 6 June 2019) <[www.pwc.in/press-releases/2019/global-entertainment-and-media-outlook-2019-2023.html](http://www.pwc.in/press-releases/2019/global-entertainment-and-media-outlook-2019-2023.html)> accessed 7 December 2019.

<sup>2</sup> *ibid.*

*with the Internet and Mobile Association of India have developed a new code that seeks to regulate the content by certifying content and creating separate departments to engage with redressals from the public. The objective of this article is to understand the existing regulations relating to online streaming websites, analyse the pros and cons of self-regulation as well as to regulate it by a statutory body and suggest a suitable mechanism.*

**Keywords: online streaming services, regulation, censorship, online content, over the top media.**

## INTRODUCTION

Online entertainment services have been one of the primary beneficiaries of the ongoing data war in the telecom industry. The online streaming services' over the top streaming services' stream content is made by third party producers, stream documentaries and users. The online video on demand/over the top streaming services is projected to grow at nearly 22% year after year, till 2023<sup>3</sup> and this raises a lot of concerns regarding the regulation of these streaming services. The question for regulating these services has arisen because of the recent public uproar against the content being aired by these streaming services. For example, Sacred Games, a Netflix produced show, has come under the radar for its explicit content<sup>4</sup> and the same has been the case with other streaming services such as ALT Balaji, Amazon Prime etc. Currently, India does not have any law or regulation to filter on-screen content that is being shown on these services and with several petitions being filed before various Courts in the country, a notice has been issued to the Central Government by the Apex Court, concerning a plea seeking regulation of online streaming services.<sup>5</sup> Meanwhile, streaming services have come forward with a plan to address this problem by adopting a self-regulation code in partnership with the Internet and Mobile Association of India.<sup>6</sup> The code named 'Code of Best Practices for Online Curated Content Providers' was signed by nine streaming services and seeks to curb certain subjects from being shown on their sites.<sup>7</sup>

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<sup>3</sup> Lata Jha, 'India's Video Streaming Industry to Grow at 22%: PWC Report' (*Livemint*, 06 June 2019) <[www.livemint.com/industry/media/india-s-video-streaming-industry-to-grow-at-22-pwc-report-1559806416120.html](http://www.livemint.com/industry/media/india-s-video-streaming-industry-to-grow-at-22-pwc-report-1559806416120.html)> accessed 1 September 2019.

<sup>4</sup> Imana Bhattacharya, 'Netflix, but No Chill' *Deccan Chronicle* (Mumbai, 9 September 2019) <[www.deccanchronicle.com/lifestyle/viral-and-trending/090919/netflix-but-no-chill.html](http://www.deccanchronicle.com/lifestyle/viral-and-trending/090919/netflix-but-no-chill.html)> accessed 09 September 2019.

<sup>5</sup> 'SC Issues Notice to Centre to Regulate Netflix, Amazon Prime Content' (*India Today*, 10 May 2019) <[www.indiatoday.in/television/top-stories/story/sc-issues-notice-to-centre-to-regulate-netflix-amazon-prime-video-content-1521635-2019-05-10](http://www.indiatoday.in/television/top-stories/story/sc-issues-notice-to-centre-to-regulate-netflix-amazon-prime-video-content-1521635-2019-05-10)> accessed 5 September 2019.

<sup>6</sup> Internet and Mobile Association of India, 'Code of Best Practices for Online Curated Content Providers' (Internet and Mobile Association of India) <[www.viacom18.com/pdfs/Self-Regulation\\_of\\_Online\\_Curated\\_Content\\_Providers.pdf](http://www.viacom18.com/pdfs/Self-Regulation_of_Online_Curated_Content_Providers.pdf)> accessed 4 September 2019 ("Code of Best Practices").

<sup>7</sup> 'Online Content Providers Sign a Voluntary Code of Best Practices for Self-censorship' (*The Hindu*, 17 January 2019) <[www.thehindubusinessline.com/info-tech/online-content-providers-sign-a-voluntary-code-of-best-practices-for-self-censorship/article26016945.ece](http://www.thehindubusinessline.com/info-tech/online-content-providers-sign-a-voluntary-code-of-best-practices-for-self-censorship/article26016945.ece)> accessed 7 September 2019.

With various other countries also mulling over this issue and some already having a few regulations in place to regulate online platforms<sup>8</sup>, it is necessary to understand the need for such regulations, especially in a country like India due to its diverse population and culture. Hence, the underlying questions that will be addressed in this article are whether or not these services must be subjected to censorship and if so which type of regulation will be better suited to them i.e. self-regulation or regulation by statutory bodies like CBFC. Further, the article will also throw light and analyse critically, the present framework/regulations related to online streaming services in India and other jurisdictions to suggest a suitable mechanism for India, which will strike a balance between one's creative freedom guaranteed under Article 19 of the Constitution on one hand and public sentiment on the other.

## **EXISTING FRAMEWORK SURROUNDING CONTENT REGULATION IN INDIA**

For the purpose of this article, emphasis will be placed on the content that is being aired through the following three mediums,

1. Theatres/cinema halls,
2. Satellite/cable televisions,
3. Online streaming services.

In case of content being shown at theatres/cinema halls, the main laws that are to be complied with are the Cinematograph Act, 1952,<sup>9</sup> the Cinematograph (Certification) Rules, 1983<sup>10</sup> and the guidelines formulated by the Central Government.<sup>11</sup> With respect to satellite/cable television, they are The Cable Television Networks (Regulation) Act, 1995<sup>12</sup> and Cable Television Network Rules, 1994<sup>13</sup> among others. Although there is no direct legislation in place with regards to

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<sup>8</sup> Mariah Ahmed, 'Netflix's Global Platform: Finding the Balance Between Censorship and Access' (*North Carolina Journal of Law & Technology*, 2019) <<http://ncjolt.org/netflixs-global-platform-finding-the-balance-between-censorship-and-access>> accessed 8 September 2019.

<sup>9</sup> The Cinematograph Act 1952.

<sup>10</sup> The Cinematograph (Certification) Rules 1983.

<sup>11</sup> Central Board of Film Certification Guidelines 1978.

<sup>12</sup> The Cable Television Networks (Regulation) Act 1995.

<sup>13</sup> The Cable Television Networks Rules 1994.

online streaming services, certain provisions of the Information Technology Act, 2000<sup>14</sup> shall be applicable to it; particularly Section 67, Section 67A and Section 67B along with the Information Technology (Intermediary Guidelines) Rules, 2011.<sup>15</sup>

To broadly explain this, any film that is set for theatrical release shall go through with the process of public exhibition only after receiving a certificate from CBFC. Such a certificate categorises films as per their suitable viewership, for example, A, U/A, U. The question as to whether content on online streaming platforms can be brought within the ambit of the Cinematograph Act may be answered in the negative based on:

1. An RTI response by the Ministry of Information and Broadcasting, wherein the Ministry has made it clear that the CBFC only oversees films that are seeking for theatrical/movie release and it does not apply to films that are being aired on online streaming services.<sup>16</sup>

2. The decision of the Karnataka High Court in the case of *Padmanabh Shankar v Union of India*,<sup>17</sup> wherein the issue as to whether the broadcast of any content through the internet will come within the ambit of ‘cinematograph’ under the Cinematograph Act, 1952 was raised. The Petitioner had relied on the case of *Super Cassettes Industries Ltd v Board of Film Certification*,<sup>18</sup> in which the Court brought films available on DVDs and VCDs under the ambit of cinematograph on the ground that regardless of whether the members of public view such films in their private space or otherwise, it would still amount to “public exhibition” and the Act would become applicable. The Court held that films/serials/ the like, transmitted or broadcasted through the internet cannot be considered as ‘films’ under Section 2(dd) of the Cinematograph Act if the concept of internet and how it operates is taken into consideration. Further, the Court went on to hold that there is no ‘exhibition’ of films either, as the service done by Online streaming platforms amounts to transfer of files as a response to a request that may be made by the person who uses it.

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<sup>14</sup> The Information Technology Act 2000.

<sup>15</sup> The Information Technology (Intermediary Guidelines) Rules 2011.

<sup>16</sup> Aroon Deep, ‘I&B Ministry: We are Not Considering Censorship of Hotstar and Netflix’ (*Medianama*, 13 December 2016) <[www.medianama.com/2016/12/223-ib-ministry-not-considering-censorship-hotstar-netflix/](http://www.medianama.com/2016/12/223-ib-ministry-not-considering-censorship-hotstar-netflix/)> accessed 7 September 2019.

<sup>17</sup> *Padmanabh Shankar v Union of India* WP No 6050/2019.

<sup>18</sup> *Super Cassettes Industries Ltd v Board of Film Certification* WP(C) No 2543 of 2007.

In cases of television programmes, the Cable Television Networks (Regulation) Act, 1995 read with Cable Television Network Rules, 1994 provides for a ‘programme code’ and ‘advertising code’ that extensively deal with the type of content that should not be aired on television and the contravention of which, may result even in imprisonment. Further, after the amendment dated 8<sup>th</sup> September 2000 made to the Cable Television Networks Rules, 1994<sup>19</sup>, only movies that are rated ‘unrestricted public exhibition’ can be aired on satellite/cable television.<sup>20</sup>

As the scope has been narrowed down to films that are being publicly exhibited (‘public exhibition’) in the case of Cinematograph Act, 1952<sup>21</sup> and ‘programmes’ that are only televised in the case of Cable Television Networks (Regulation) Act, 1995,<sup>22</sup> there seems to be a vacuum in law when it comes to the type of content that can be shown on streaming services, except for the provisions under the Information Technology Act, 2000 Section 67, Section 67A, Section 67B that deal only with respect to obscene material, sexually explicit content and content depicting children in a bad taste, respectively, and the Indian Penal Code, 1860, particularly Section 293,<sup>23</sup> which again deals with sexually explicit materials. The other guidelines that are formulated under Section 79(2) of the Information Technology Act, 2000 namely the Information Technology (Intermediary Guidelines) Rules, 2011<sup>24</sup> lists down certain types of content that has to be restricted such as hate inducing content, blasphemy, etc.<sup>25</sup>

In *Justice for Rights Foundation v Union of India*,<sup>26</sup> wherein the petitioner had approached the Court to issue a Mandamus directing the Government to frame guidelines/legal provisions to regulate ‘online platforms and contents broadcasted on the online platforms’, the Hon’ble High Court of Delhi held that the provisions of the Information Technology Act and the rules formed thereunder are applicable in such cases and no direction can be passed for framing guidelines when there are already stringent provisions in place. It was further held by the Court that the Statutory authority exercising jurisdiction under the Act can take action under Section 69 of the Act when complaints of publishing or transmitting material in any electronic form prohibited

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<sup>19</sup> The Cable Television Networks Rules 1994.

<sup>20</sup> The Cable Television Networks Rules 1994, r 6(1)(o).

<sup>21</sup> The Cinematograph (Certification) Rules 1983, pt II.

<sup>22</sup> The Cable Television Networks (Regulation) Act 1995, s 2(g).

<sup>23</sup> The Indian Penal Code 1860, s 293.

<sup>24</sup> The Cable Television Networks (Regulation) Act 1995.

<sup>25</sup> The Information Technology (Intermediary guidelines) Rules 2011, r 3(2).

<sup>26</sup> *Justice for Rights Foundation v Union of India* WP(C) No 11164/2018.

under Section 67, 67A, 67B and 68 of the Act as delineated above, are received. The same was upheld in the case of *Nikhil Bhalla v Union of India*,<sup>27</sup> wherein the petitioner had prayed for framing guidelines regarding contents published on online platforms that may be offensive and vulgar in response to certain dialogues portraying the former PM Rajeev Gandhi in a bad light, in the Netflix Series ‘Sacred Games’.

In the case of *Raksha Jyoti Foundation v Union of India*,<sup>28</sup> the Court issued a direction to the Ministry of Information and Broadcasting to formulate a framework in order to regulate content, which is released online but would have otherwise been censored if released in any other medium. In 2018, the Ministry of Information and Broadcasting set up a special committee to frame rules for all kinds of online content.<sup>29</sup> However, the committee is yet to come up with any rules. In 2011, the Communication Convergence Bill, which provided for a framework for content regulation across different medium was introduced but was not enacted by the Parliament.<sup>30</sup> In 2015 and 2018, TRAI floated a consultation paper for the regulation of Over the Top services but no consensus was reached on the framework.<sup>31</sup> In 2013 and 2016, two Committee reports, led by Mukul Mudgal and Shyam Benegal, respectively, suggested amending the Cinematograph Act so as for it to be in line with the digital age and also backed the introduction of a universal rating system to cover the release of the films made through online platforms.<sup>32</sup>

Presently in place, apart from the provisions of the Information Technology Act, and the rules framed therein, it is the voluntary code of ethics, framed by the India Mobile and Internet

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<sup>27</sup> *Nikhil Bhalla v Union of India* WP(C) No 7123/2018.

<sup>28</sup> *Raksha Jyoti Foundation v Union of India* CWP No 1322 of 2016 (O&M).

<sup>29</sup> ‘I&B Sets up a Committee to Regulate Online Media’ (*India Today*, 6 April 2018)

<[www.indiatoday.in/education-today/gk-current-affairs/story/i-b-ministry-sets-up-a-committee-to-regulate-online-media-1206364-2018-04-06](http://www.indiatoday.in/education-today/gk-current-affairs/story/i-b-ministry-sets-up-a-committee-to-regulate-online-media-1206364-2018-04-06)> accessed 9 December 2019.

<sup>30</sup> Siddhartha Menon, ‘India’s Convergence Policy Within its Communication Sector: A Long Road Ahead’ (2004) 21(3) Government Information Quarterly 740.

<sup>31</sup> ‘Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services’ (Department of Telecommunications TRAI 12 November 2018)

<[https://main.trai.gov.in/sites/default/files/CPOTT12112018\\_0.pdf](https://main.trai.gov.in/sites/default/files/CPOTT12112018_0.pdf)> accessed 9 December 2019.

<sup>32</sup> Shubangi Heda, ‘Murkey Waters in Content Regulation: The Emergence of Over the Top Video Streaming Services in India’ (MA Public Policy thesis, Central European University 2019)

<[www.etd.ceu.edu/2019/heda\\_shubhangi.pdf](http://www.etd.ceu.edu/2019/heda_shubhangi.pdf)> accessed 1 January 2020.

Association of India which has received support and consent from 9 Over-the-top (*hereinafter* OTT) services.<sup>33</sup> Part B of the Code broadly provides for three major things:

1. Content that is prohibited,
2. Age inappropriate or sensitive content and
3. Constitution of Complaints Redressal Forums internally and procedure for filing complaints to the same.

The only shortcoming to this kind of self-regulation is that it does not cover all the OTT service providers and hence there is unequal treatment. However, the following chapters will point out how even those who have not signed it, end up self-regulating themselves.

To sum up this chapter, it is understood that only ‘cinematography films’ for ‘public exhibition’ i.e. theatrical/cinema release have to go through CBFC and seek certification. Likewise, in the case of satellite/cable television, a framework has already been put in place namely, the ‘programme code’ and ‘advertising code’ that prohibits certain types of content from being aired. In the case of web streaming services, there is nothing specific similar to the above.

## **ONLINE CONTENT REGULATION IN OTHER JURISDICTIONS**

Under this chapter, the regulations in the Republic of Turkey and the United Kingdom are discussed as the development of online regulations in other countries is at a nascent stage.

The Republic of Turkey was one of the first countries to make a concrete effort in bringing in a new regulation relating to online streaming services.<sup>34</sup> The Radio and Television Supreme Council (*hereinafter* RUTK), the state agency that oversees broadcasting services has recently been empowered by the Grand National Assembly of Turkish by way of an amendment to the

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<sup>33</sup> ‘Online Content Providers Sign a Voluntary Code of Best Practices for Self-censorship’ (*The Hindu*, 17 January 2019) <[www.thehindubusinessline.com/info-tech/online-content-providers-sign-a-voluntary-code-of-best-practices-for-self-censorship/article26016945.ece](http://www.thehindubusinessline.com/info-tech/online-content-providers-sign-a-voluntary-code-of-best-practices-for-self-censorship/article26016945.ece)> accessed 7 September 2019.

<sup>34</sup> Ali Kucukgocmen and Kenneth Li, ‘Netflix Applies for License under Law Turkish Broadcasting Rules’ (*Reuters*, 3 September 2019) <[www.reuters.com/article/us-netflix-turkey/netflix-applies-for-license-under-new-turkish-broadcasting-rules-idUSKCN1VO14R](http://www.reuters.com/article/us-netflix-turkey/netflix-applies-for-license-under-new-turkish-broadcasting-rules-idUSKCN1VO14R)> accessed 7 September 2019.



2011 Act on the Establishment of Radio and Television Enterprises and their Media Services.<sup>35</sup> Online streaming services are defined under Article 3 of the said statute as - on demand services and include such services in which a catalogue of programmes (both audio and video) may be picked by the user upon his/her wish. Turkey has a strict regulatory regime post the amendment. For instance, it includes a licensing fee, which the streaming services have to pay in order to receive a license.<sup>36</sup>

There is strict scrutiny over the content being streamed on these websites post the Amendment. Chapter III, Article 8 deals with the principles that media service providers shall follow and provide for an exhaustive list which contains the things that may constitute obscene content, content relating to terrorism, discrimination based on sex, language, race among others.<sup>37</sup> There is also a special provision relating to online streaming services, which directs them to take measures to protect minors from all such content which may impair their mental, physical or moral development.<sup>38</sup> Further, these operators also have to pay 0.5% of their annual turnover to the government.<sup>39</sup> Article 32 and 33 provide for sanctions in case of non-confirmation with the laws and provides for hefty fines and penalties in some cases, which may even extend to the revocation of licenses or in some cases imprisonment.<sup>40</sup>

In the United Kingdom, the Communications Act, 2003<sup>41</sup> (*hereinafter* the Act) deals with the framework relating to broadcasting and by way of an amendment in the year 2009, also extends to online streaming services. But there are certain factors (like, if it airs television like programmes, if access to it is on-demand, if there is a person who has editorial responsibility etc.) that are required before an online streaming service can be considered to be an on-demand

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<sup>35</sup> The Establishment of Radio and Television Enterprises and their Media Services Law No 6112 (TU) 2011.

<sup>36</sup> The Establishment of Radio and Television Enterprises and their Media Services Law No 6112 (TU) 2011, art 27.

<sup>37</sup> Umar Farooq, 'Turkey Extends Censorship Rules to Streaming Services: Critics say Political Dissent is the Real Target' (*Los Angeles Times*, 21 August 2019) <[www.latimes.com/world-nation/story/2019-08-20/turkeys-censorship-laws-against-immoral-material-set-to-include-streaming-services](http://www.latimes.com/world-nation/story/2019-08-20/turkeys-censorship-laws-against-immoral-material-set-to-include-streaming-services)> accessed 7 September 2019.

<sup>38</sup> *ibid*; The Establishment of Radio and Television Enterprises and their Media Services Law No 6112 (TU) 2011, art 8(2).

<sup>39</sup> Thomas Seibert, 'New Internet Regulations in Turkey Stoke Censorship Fears' (*The Arab Weekly*, 7 September 2019) <<https://the arabweekly.com/new-internet-regulations-turkey-stoke-censorship-fears>> accessed 8 September 2019.

<sup>40</sup> Emir Aksoy, 'RTUK is Now Entitled to Supervise Online Media Service Providers' (*ASY Legal*) <[www.asylegal.com/rtuk-is-now-entitled-to-supervise-online-media-service-providers/](http://www.asylegal.com/rtuk-is-now-entitled-to-supervise-online-media-service-providers/)> accessed 8 September 2019.

<sup>41</sup> Communication Act 2003 (UK).

programme service as given under the Act.<sup>42</sup> Therefore, once it is found that they satisfy the above factors, they would be subject to the jurisdiction of Ofcom (office of communication) which is the regulatory authority. Currently, all these services have to be registered with the authority but Netflix has not registered since it does not air television like programmes in its service.<sup>43</sup>

Part 4A deals with these services and Section 368E lists down harmful material that is prohibited from airing on online streaming services that include any content that may incite hatred based on religion, nationality or sex. Further, two classifications are made, namely, ‘prohibited material’ and ‘specially restricted material’ (based on the certification received from the classification authority) which are both prohibited (in the latter’s case it is not prohibited if it contains mechanisms to prevent minors from viewing it) from being aired on these streaming websites. In addition, a provision relating to a mechanism to prevent minors from viewing specially prohibited content is provided for.<sup>44</sup> Section 368J, 368K, 368L, 368M deal with the penalty procedure under which the authority may take actions ranging from financial penalties to suspension and revocation of the license to continue their business.

To conclude, the regulations in place in the Republic of Turkey are full-fledged and cover all online streaming services under it, whereas in the United Kingdom, only on-demand programme services are regulated as per section 368A; but the definition provided by the Legislature in this regard is wide and there is no clarity as to what constitutes an on-demand programme.<sup>45</sup> Furthermore, as per the Audiovisual Media Services Directive Regulations 2010, streaming services that are not based in the UK will not be regulated (for example Netflix based in the Netherlands).

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<sup>42</sup> Communication Act 2003 (UK), s 368A.

<sup>43</sup> ‘List of Regulated Video on Demand Services’ (Ofcom) <[www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/67710/list\\_of\\_regulated\\_video\\_on\\_demand\\_services.pdf](http://www.ofcom.org.uk/__data/assets/pdf_file/0021/67710/list_of_regulated_video_on_demand_services.pdf)> accessed 9 September 2019.

<sup>44</sup> ‘Procedures for the Consideration of Statutory Sanctions Arising in the Context of On-demand Programme Services’ (Ofcom 18 December 2015) <[www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0034/68794/revised\\_sanctions\\_procedures.pdf](http://www.ofcom.org.uk/__data/assets/pdf_file/0034/68794/revised_sanctions_procedures.pdf)> accessed 10 September 2019.

<sup>45</sup> ‘Guidance Notes on Who Needs to Notify an On-demand Programme Service to Ofcom’ (Ofcom 18 December 2015) <[www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0028/71839/guidance\\_on\\_who\\_needs\\_to\\_notify.pdf](http://www.ofcom.org.uk/__data/assets/pdf_file/0028/71839/guidance_on_who_needs_to_notify.pdf)> accessed 10 September 2019.

## SELF-REGULATION OR STATUTORY REGULATION? THE WAY FORWARD

One might ponder as to why these streaming services have to be subjected to regulations. This is because, in a country like India, films have a great bearing on society. Several political leaders emerge from the film industry due to their popularity, and further political leaders often seek their support to garner votes.<sup>46</sup> The Supreme Court of India in the case of *S Rangarajan v P Jagjivan Ram*<sup>47</sup> observed that

*“The movie cannot function in a free market place like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focusing of intense light on a screen with the dramatising of facts and opinion makes the ideas more effective.”*

Therefore, there needs to be some amount of control over the content that is being shown to the public as it influences their actions. There are two aspects that the judgment places emphasis on while explaining the necessity of censorship:

1. movies and videos have far more influence on the public, and;
2. catering to a mass audience not selective about what they watch which is more important in the context of this paper.

The second aspect namely ‘catering to a mass audience not selective about what they watch’ is lacking in the case of online streaming services as they are on-demand, i.e. the people can pick and choose what they want and this marks a distinction from satellite television and cinema halls. Further, they will also have a bearing on the decisions being taken up regarding regulating the online streaming services.

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<sup>46</sup> Sara Dickey, ‘The Politics of Adulation: Cinema and the Production of Politicians in South India’ (1993) 52(2) *The Journal of Asian Studies* 324.

<sup>47</sup> *S Rangarajan v P Jagjivan Ram* (1989) 2 SCC 574.

Before going further, the sort of regulation, which is sought for when it comes to online streaming websites, must be identified, i.e. whether it needs a comprehensive set of code like the satellite/cable television code or it needs a separate board for certifying the content being aired by them like the CBFC or if self-regulation would suffice. Self-regulation means a particular sector or an industry or a profession laying down its own set of rules or code of conduct for its functioning without any interference by the State and creating its own body for the enforcement of such regulations as laid down by them for any redressals<sup>48</sup>; whereas in both the other types of regulations mentioned above there is interference by the state.

One of the primary arguments that is laid down by proponents of self-regulation is that the participants in such organisations have much better knowledge than outsiders and therefore it will be more efficient, cost-effective and more flexible.<sup>49</sup> It is also viewed that self-regulation will be followed more effectively by organisations in a particular sector, as these regulations are formulated by the organisations themselves.<sup>50</sup> It is also the case that certain types of regulations, if formulated by the state, can lead to constitutional issues.<sup>51</sup> For example, advertisements pertaining to tobacco, *pan masala* if banned would lead to trade associations challenging such provisions on the basis of their freedom to carry on trade and profession, whereas if the same rule is made as a result of self-regulation, such instances can be avoided. If a board such as the CBFC is to oversee the content on the streaming websites, it would cast a huge burden on the creators as the cost of certification is high, for example, for a 30 minute video the creator will have to pay around Rs. 6,000/- as fees.<sup>52</sup> The time required for certification must also be taken into consideration as under the Act, a maximum of 68 days is given to the authority to certify a film.<sup>53</sup> Even if applying a similar set of regulations as in place for satellite/cable televisions, there needs to be an authorised officer who has to initiate a complaint against such content before the relevant authority under the Cable Television Networks (Regulation) Act, 1995.<sup>54</sup>

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<sup>48</sup> Angela J Campbell, 'Self-regulation and the Media' (1999) 51(3) *The Federal Communications Law Journal* 1207.

<sup>49</sup> Douglas C Michael, 'The Use of Audited Self-Regulation as a Regulatory Technique' (1995) 47 *Administrative Law Review* 171.

<sup>50</sup> Deep (n 16).

<sup>51</sup> Jerry Kang, 'Information Privacy in Cyberspace Transactions' (1998) 50(4) *Stanford Law Review* 1193.

<sup>52</sup> 'FAQs' (*Central Board of Film Certification*) <[www.cbfcindia.gov.in/main/](http://www.cbfcindia.gov.in/main/)> accessed 8 September 2019.

<sup>53</sup> The Cinematograph (Certification) Rules 1983, r 41.

<sup>54</sup> The Cable Television Networks (Regulation) Act 1995, s 18.

The author feels that the present framework relating to satellite/cable televisions, and theatres/cinema halls will not be appropriate to online streaming services, as one has to clearly understand that the former category is showcased to an audience at large, i.e. in case of theatres/cinema halls, there has to be ‘public exhibition’ of ‘cinematograph films’ and in case of satellite/cable televisions, the viewers have to watch what the broadcaster airs. The reason it won’t be applicable has already been substantiated in the above chapters.

Whereas, in the case of internet streaming services, the audience has a choice to view the sort of content he/she wants to watch, as in, it is his/her prerogative to view a certain programme from the list of curated content that the streaming services provide. Therefore, the amount of scrutiny that has to be imposed has to be lesser than that of the other transmission channels. Therefore, an alternative to the above i.e. having a self-regulatory practice is more efficient and better suited for online streaming services.<sup>55</sup> The recent ‘Code of Best Practices for Online Curated Content Providers’<sup>56</sup> that has been introduced in India is a promising code that has listed down contents that are prohibited and has also brought in more technological tools to control and restrict age-inappropriate content.<sup>57</sup> There is also a mandate on the providers to constitute a Complaints Redressal Forum to oversee complaints raised by the public.<sup>58</sup>

Another argument in support of self-regulation is that even before the inception of this code, internet streaming services have been subjecting themselves to self-regulation.<sup>59</sup> Amazon Prime, one of the streaming services in India, airs a programme named ‘The Grand Tour’ which is a show that focuses on automobiles. In one of the episodes, the cars used were made using animal meat and skeletons. The episode was trimmed in India to nearly half its run-time.<sup>60</sup> Likewise, another programme titled ‘American Gods’ was also censored in the Indian version and has

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<sup>55</sup> Jagmeet Singh, ‘Netflix CEO Reed Hastings on Censorship in India: Self-Regulation Better than Alternative’ (*NDTV Gadgets*, 19 March 2019) <<https://gadgets.ndtv.com/entertainment/features/netflix-india-self-regulation-online-censorship-reliance-jio-red-hastings-interview-2009865>> accessed 9 December 2019.

<sup>56</sup> ‘SC Issues Notice to Centre to Regulate Netflix, Amazon Prime Content’ (*India Today*, 10 May 2019) <[www.indiatoday.in/television/top-stories/story/sc-issues-notice-to-centre-to-regulate-netflix-amazon-prime-video-content-1521635-2019-05-10](http://www.indiatoday.in/television/top-stories/story/sc-issues-notice-to-centre-to-regulate-netflix-amazon-prime-video-content-1521635-2019-05-10)> accessed 5 September 2019.

<sup>57</sup> Code of Best Practices (n 6) Prohibited Content.

<sup>58</sup> Code of Best Practices (n 6) Part-B, Complaints Redressal.

<sup>59</sup> Aroon Deep, ‘Streaming Services Censor Themselves in India, Even Though They Don’t Need to’ (*Medianama*, 6 July 2017) <[www.medianama.com/2017/07/223-streaming-censorship-india/](http://www.medianama.com/2017/07/223-streaming-censorship-india/)> accessed 7 September 2019.

<sup>60</sup> Jack Shepherd, ‘The Grand Tour Episode 4: Amazon Heavily Censor Jeremy Clarkson Show in India due to Use of ‘Cow Organs’ (The Independent, 18 December 2016) <[www.independent.co.uk/arts-entertainment/tv/news/the-grand-tour-episode-4-india-censorship-cow-organs-a7482536.html](http://www.independent.co.uk/arts-entertainment/tv/news/the-grand-tour-episode-4-india-censorship-cow-organs-a7482536.html)> accessed 7 September 2019.

blurred nudity.<sup>61</sup> As stated above, all streaming services in India are evolving themselves and complying with their own code as their brand and goodwill are at stake and therefore, they are conforming to public sentiments and morals in order to survive in the Indian market. This serves yet another reliable argument for allowing self-regulation as these streaming services have even more responsibility towards the public now. The acceptance of the Self-regulation Code by the Online Streaming services further substantiates this argument. Although Amazon Prime refused to sign the Code opining that the existing laws in India were sufficient for dealing with disapproved content,<sup>62</sup> it still ensures that self-regulation is done in its own terms for the above reason alone i.e. to ensure its survival. Hence, even if some OTTs may not be signatories to the Code, they still end up self-regulating.

Not only has this phenomenon occurred in the online streaming space but also in other sectors, such as in the fast food sector. McDonald's, Burger king etc. have all refused to sell beef as part of their menu and this highlights and further strengthens the argument that businesses value cultural morals and sentiments.<sup>63</sup> However, this argument may not be very useful when it comes to protecting the minority's cultural values and sentiments

## CONCLUSION

The current market for online streaming services is still at a very nascent stage when compared to other countries and certain isolated incidents have led to public outcry and want of regulations for regulating their actions. It is important to understand that online streaming services fall under a different category and must not be treated as every other traditional entertainment medium such as satellite/cable television or theatre/cinema halls. Treating them as the same and regulating them in the same manner would prove futile, as in the case of online streaming services complete autonomy and choice is given to the consumer, unlike other mediums and most of the online streaming services run on a subscription model. Therefore, the question of minors watching

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<sup>61</sup> Akhil Arora, 'Amazon Prime Video Censorship Evolves with an 'Indian Version' of American Gods' (*NDTV Gadgets*, 10 May 2017) <<https://gadgets.ndtv.com/entertainment/news/amazon-prime-video-american-gods-censorship-beef-cow-killing-male-nudity-1691691>> accessed 7 September 2019.

<sup>62</sup> James Hale, 'Netflix Signs Indian Content Code Banning Offensive Material, Agrees to Self-regulate' (*Tube Filter*, 17 January 2019) <[www.tubefilter.com/2019/01/17/netflix-code-best-practices-india-digital-content-regulation/](http://www.tubefilter.com/2019/01/17/netflix-code-best-practices-india-digital-content-regulation/)> accessed 9 December 2019.

<sup>63</sup> IANS, 'Why Global Burger Joints Want No Beef with India' (*India Today*, 27 May 2015) <[www.indiatoday.in/business/story/burger-mcdonald-burger-king-beef-hindu-254461-2015-05-24](http://www.indiatoday.in/business/story/burger-mcdonald-burger-king-beef-hindu-254461-2015-05-24)> accessed 10 September 2019.

harmful content is also minimised. Justice Thurgood Marshall in the case of *Stanley v Georgia*<sup>64</sup> observed that “a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”, and this case has also been cited by the Supreme Court of India in the case of *District Registrar & Collector, Hyderabad v Canara Bank*.<sup>65</sup> This has to be taken as a word of caution before delving into regulating such streaming websites, as an individual’s choice is also being affected along with a creator’s right to express his freedom.

A compelling argument does arise in favour of censorship and certification of the content online if the judicial precedents on why the medium of motion pictures (audio-visual) have more appeal and thereby require more censorship than any other form of expression is considered. It was in the case of *KA Abbas v Union of India*<sup>66</sup>, that the restrictions under the Cinematograph Act and guidelines under it were challenged under Article 19(1)(a) of the Constitution. The judgment authored by the then Chief Justice of India, Justice Hidayatullah opined that it was only the films that are required to be scrutinised by a censor board prior to its release and not books or other print media. The rationale behind the same is that films carry a better appeal in comparison to other forms of art or expression as they are truer to life and are capable of stirring deeper emotions than any other form. Further, they have a greater effect on the children and youth as they are more vulnerable to the influence of films. However, at the same time, the fact that these online streaming services are on-demand, must be taken into account before drawing a framework. As stated above, the rationale behind the *Rangarajan judgment*<sup>67</sup> is that the movie/cinemas are contents that are consumed by an audience who is not selective about what they watch.

To conclude, self-regulation among online streaming services would be apt at the present stage and with companies undergoing cutthroat competition from their competitors, it would not be a wise decision for them to face the wrath of the public by streaming content that violates society’s sentiments. As seen earlier, the case of Amazon Prime can be a very good example for the above as it cut more than half of its run-time as the episode contained scenes that would hurt the sentiments of the Indian society. Although the Supreme Court of India has sent a notice to the

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<sup>64</sup> *Stanley v Georgia* 394 US 557 (1969).

<sup>65</sup> *District Registrar & Collector v Canara Bank* (2005) 1 SCC 496.

<sup>66</sup> *KA Abbas v Union of India* (1970) 2 SCC 780.

<sup>67</sup> *Bhalla* (n 27).

Government in a plea concerning this issue but the stand of the government can be seen clearly from its earlier responses; it is leaning towards self-regulation.