

REGULATION OF OTT PLATFORMS IN INDIA: *CONCURRENCES AND CONTRASTS*

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ABSTRACT

The Media and Entertainment Industry is at the forefront of the digital revolution. Major players are turning to the internet to cater to the diverse entertainment needs of the ever-increasing netizen population. This revolution birthed the need for Online Video-on-Demand platforms. Through this article, we attempt to present a “holistic study” of the Video-on-Demand- OTT Industry in India. We shall also debate the sufficiency of the self-regulatory code and the taxation system of the OTT industry, through market study and comparative analysis of the regulatory standards used in parallel legal jurisdictions. The entire research culminated into the set of recommendations presented at the end of the article, wherein we establish that there is an urgent need for bringing regulatory uniformity into the governance of Video-on-Demand OTT Platforms, by balancing the needs of the users with the interests of the content creators.

INTRODUCTION

It has always been believed in marketing parlance, that “Customer is King”. This is precisely how OTT platforms make their subscribers feel, by providing them full autonomy over the content they choose to view. Over the years, mediocre content has been “pushed” towards the ordinary Indian consumer, but not anymore.

The recent surge of innovations in the Telecom Industry has resulted in the increase of widespread connectivity of the internet in India. This, coupled with the relatively young age of the populace, lifestyle choices, decreasing prices of data and greater internet speeds have pushed India to become the world’s 5th largest Media and Entertainment (M&E) market.

According to the KPMG Media and Entertainment Report 2018, OTT revenue in India is expected to grow and reach a massive Rs. 13,800 Crore by the end of fiscal year 2023. Major International OTT Media houses, such as “Netflix” and “Amazon Prime Video” are viewing

India as a big market due to its large viewer base.²⁰¹³ Consumers too, are shifting to modern methods of consuming entertainment, and are increasingly choosing OTT platforms due to the massive amount of choices they offer due to their video inventories, flexibility and the convenience of on-demand content. The pandemic times have proven to be a boon for OTT - Video-on Demand Platforms. Due to the closure of malls and multiplexes, there is uncertainty surrounding the release of movies on the silver screen. Hence, big ticket films such as ‘GulaboSitabo’ starring Amitabh Bachchan and Ayushmaan Khurrana and ‘Shakuntala Devi’ starring Vidya Balan will premier exclusively on OTT Platforms. This has led to huge surge in the business of these digital platforms, increasing their subscriber base like never before.²⁰¹⁴

Therefore, due to the growing user base and market power of the video streaming platforms, we must acknowledge the fact that there is a need for proper laws to govern the functioning of the OTT -Video-on Demand platforms, lest the industry could be prey to “Media Imperialism”.

This paper analyses the need for regulation of OTT Video-streaming platforms, describing Content-related Regulations as well as Revenue-related regulations in detail. The national laws and policies must be such that they cement a well-rounded legal background for the OTT industry, so that the consumers, industry players and the Indian economy flourish.

THE DEFINITION OF VIDEO-ON-DEMAND “OTT” PLATFORMS

“OTT” stands for “Over-The-Top” and generally refers to any service we use over the network, i.e. the online media services through the open internet. It normally describes broadband delivery of video and audio services without a multiple system operator being involved in the control or distribution of the content. OTT communications are those delivered by an application that is run over-the-top of another carriage service, and can be accessed using any compatible internet access device.²⁰¹⁵

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²⁰¹³ IBEF: Media and Entertainment Industry Report: last accessed at: <https://www.ibef.org/industry/media-entertainment-india.aspx>; last accessed on: 12th July 2020.

²⁰¹⁴ Sweta Kaushal, Contributor, Forbes, OTT Platforms In India See Subscriber Bases Surge Up To 80% Amid Coronavirus Lockdown, last accessed at, <https://www.forbes.com/sites/swetakaushal/2020/05/26/good-news-amid-lockdown-ott-platforms-register-60-80-surge-in-subscription-base/#4166e74e413a>; last accessed on 12th July, 2020.

²⁰¹⁵ “The benefits and challenges with the use of Over the Top Platform”; last accessed at: https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/tmt/Over_The_Top_Communications; last accessed on: 12th July 2020.

There are various applications we use in our day-to-day life, which are “OTT” in nature, namely: OTT messaging applications, such as WhatsApp, Telegram, etc; OTT broadcasting applications, such as Tata Sky Mobile, and OTT Video-On-Demand Platforms such as Netflix, Amazon -Prime, Alt-Balaji, etc.

For the purposes of this research article, “OTT” platform refers to the OTT Video-On-Demand platforms as specified above.

Video-On-Demand OTT providers are not the Content Owners but the Network Operators, and are different from Network Carriers. Content from OTT devices is made available on various devices and also on multiple screens, and provide the user with a different experience than the traditional modes such as Cable-TV and Multiplexes. This is because, it is based on a “pull” model and the user is provided with autonomy to view the content of his choice. This makes it a unique industry, and its rapid spread poses novel challenges to law and public policy.

CONTENT-REGULATION OF OTT PLATFORMS

In India, statutory Content regulation rules exist for all types of parallel Visual media in India, including Cinema²⁰¹⁶ and Television²⁰¹⁷. Hence OTT, being a rapidly emerging sector, should also not be an exception.

What we need to realize, is that regulation of content does not amount to the stifling of the Freedom of Speech and Expression, as envisaged under Article 19 of the Constitution of India. The presence of central law for governing the content of OTT platforms is only a way for the facilitation of the aforementioned Fundamental Right. The aim of the regulations should always be to maintain the balance between the liberty given under the article, and the reasonable restrictions.

The OTT Industry in India is currently governed by a Self-Regulation Code, but there is no central Law in place. Therefore, we shall understand through comparative analysis, about the efficiency of the present OTT-Content regulation system in India vis-à-vis the Laws prevailing in parallel international jurisdictions.

REGULATION OF OTT PLATFORMS IN PARALLEL INTERNATIONAL JURISDICTIONS

²⁰¹⁶ Cinematography Act, 1952

²⁰¹⁷ Cable Television Networks (Regulation) Act, 1995; Prasar Bharati Act, 1990.

Various countries have felt the need to regulate the OTT space, for a variety of reasons. This reasoning sets the base for the formulation of appropriate laws, which can be classified into the following “Schools of Thought”, which can be viewed as a broad spectrum:

- The Liberal Approach: OTT laws enacted by Countries such as Australia and Turkey sought to bridge the “regulation gap” between online and offline players in the video-streaming field.
- Surveillance Approach: Seeking more governmental control and surveillance, Kenya, Indonesia and Saudi Arabia chose to enforce a strict Censorship regime with a heavy hand of state monitoring.
- Balanced Approach: Nations such as Singapore and the USA seem to implement the best of both worlds by ensuring the placement of a regulatory framework over the OTT sector as well as protecting their citizens from harmful and misleading content.

The following 3 countries are representative of the abovementioned categories, due to the characteristics of their respective laws. We shall study them in detail to understand the prevailing schools of thought in OTT content regulation:

Australia- Liberal Approach:

The Broadcasting Services Act, 1992, is the singular law which regulates and provides certification standards for both online and offline films. The “Online Content Scheme”²⁰¹⁸, a general law applicable to online content accessible on all devices, is responsible for regulation of illegal and offensive content, and functions through a complaints-based mechanism.

The Scheme is designed to protect consumers, particularly children, from exposure to inappropriate or harmful material. The scheme places equal obligations and compliances on domestic and international OTT platforms.²⁰¹⁹

The Australian Communications and Media Authority (ACMA) is an Australian Government statutory body under the Communications portfolio, which oversees telecommunications, broadcasting, radio communications and the internet. As there are no specific regulation codes for OTT services, the ACMA still regulates content matters.

²⁰¹⁸Section 5 and 7 of Broadcasting services Act, 1992.

²⁰¹⁹Australian government: “Online content regulation”; last accessed at <https://www.communications.gov.au/policy/policy-listing/online-content-regulation> ; last accessed on 9th July 2020.

The ACMA specifically deals with content which has been classified as

1) RC (or refused classification); 2) X 18+; 3) R 18+ 4) MA 15+.

The Broadcasting Services Act is also applicable to content which has not been classified, in order to resolve certain disputes, un-classified content is treated with the rating it is most likely to receive if it were to be classified.

Children's E-Safety Commissioner (the Commissioner) has the authority to direct OTT platforms to remove the content which is against the standards from their service.

Australia's provisions are liberal in nature because it gives the OTT platforms a chance to self-regulate through the usage of AI (Artificial Intelligence). In 2016, after a two-year pilot test, Netflix got the approval to self-classify its content using its own tools in Australia. A monitoring program revealed that Netflix's tool can assess and classify content with 94% accuracy as the real board. This ensures faster classification of content and speedier online releases for the consumers. Whether the same system can be replicated in India, wherein the socio-economic conditions are diverse, is an unanswered question.

Singapore- Moderate Approach:

Singapore is the streaming platform's most censored market as it has the highest number of pull out requests made by any country. i.e. Five.²⁰²⁰The Info COMM Media Development Authority (IMDA) is the statutory Media Regulatory body of Singapore. It is responsible for the issuance of the Code of Regulations which are to be followed by the OTT platforms. The Broadcasting Act (Chapter 28) is the governing Act which bestows powers upon the IMDA and is a comprehensive guide in the following matters:

- Content Certification is done on the same basis as offline films, just like the Australian films, and has the following categories: G, PG, PG 13, NC 16, M 18 and R-21;
- Content for certain matured audiences, such as 16+ and above, if aired on any OTT platform, must mandatorily come with a "Child Lock" put on the content, restricting access to persons who are unable to produce the appropriate age-verification;

²⁰²⁰Bringing OTT platforms under government regulations: What India and other countries are doing ; last accessed at: <https://in.news.yahoo.com/bringing-ott-platforms-under-government-regulations-what-india-and-other-countries-are-doing-080730665.html> ; last accessed on 12th July 2020

- The codes issued by IMDA also contain information on how certain types of sensitive content is handled, such as: content on controversial issues, content containing religious elements, content containing news and facts²⁰²¹.
- Ratings of content, genre, trigger warnings and information about any other disturbing elements are required to be prominently displayed before the content for noticeable period of time, for the user to comprehend the nature of the content he is about to view, and help him make conscious choices.

Content advertising and promotion rules are also issued by the IMDA. The IMDA requires that advertisements and movie trailers shown on the OTT platforms must also be edited according to the level of the certification achieved by the content before which it is shown.

IMDA offers licenses which are free of cost, are for purposes of registration of OTT platforms. The license is valid for 5 years and can be renewed after expiration.²⁰²²

Saudi Arabia: - Extreme Approach:

Saudi Arabia's Anti-Cyber Crime Law (ACCL) is a sweeping law which is made applicable for all internet-related things. The seemingly short legislation uses wide language to give overreaching powers to the country to censor internet activity. While the country does not have any laws which specifically deal with OTT content, The Communications and Information Technology Commission recently used Article 6 of the ACCL and requested Netflix to remove an episode of 'Patriot Act', which is a comedy show starring Hasan Minhaj, as the show was critical of Crown Prince Mohammed bin Salman and the murder of journalist Jamal Khashoggi, and the content thereby violated the country's anti-cybercrime laws.

Netflix complied with the request, and as a result, it attracted criticism for giving-in to the country's severe restriction on freedom of expression.²⁰²³

GENERAL LAWS GOVERNING ONLINE CONTENT IN INDIA

²⁰²¹IMDA: CONTENT CODE FOR OVER-THE-TOP, VIDEO-ON-DEMAND AND NICHE SERVICES, 13th July, 2020. Last accessed at: <https://www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf>; last accessed on: 11th July, 2020

²⁰²²IMDA, "Over-the-top (OTT) TV (Niche) Licence" last accessed at" <https://www.imda.gov.sg/regulations-and-licensing-listing/Over-the-top-TV-Niche-Licence> ; last accessed on 11th July, 2020

²⁰²³"Content regulation: how is it done in other parts of the world"; last accessed at: <https://www.ikigailaw.com/online-content-regulation-how-is-it-done-in-other-parts-of-the-world/#acceptLicense> ; last accessed on 12th July, 2020.

We have to acknowledge the fact that there is no single legislative Act or law that has been made by the Parliament for the purpose of regulation of the OTT platforms.

The OTT platforms are governed by provisions of various laws of the country, as follows:

The Right to Freedom of Speech and Expression, as enshrined in Article 19(1)(a) of the Constitution of India is a Fundamental Right and provides liberty to artists to project their work in the form of videos, online and offline. However, the right is not an absolute one; it is not an unbridled horse. It is subject to the reasonable restrictions imposed by the State, namely: security of the state, sovereignty and integrity of India, friendly relationship with foreign countries, public order, decency and morality, contempt of court and defamation.²⁰²⁴

Sections 67A, 67B and 67C of the Information Technology Act are provisions which provide for the imposition of penalty and imprisonment for publishing or transmitting of obscene material, sexually explicit material, and also prohibit dissemination of material depicting children in sexually explicit acts, in electronic form. Further, under Section 69A of the IT Act, the Central Government has been empowered to issue directions to intermediaries and platforms to block public access of any information.

Provisions of the Indian Penal Code, 1860 (“IPC”) are also applicable to the OTT platforms. Online platforms are subject to section 295A of IPC that criminalizes deliberate and malicious acts intended to outrage religious feelings, and Section 499 and 500 of the IPC which make the defamation of persons through dissemination of information a criminal offence.

In addition to the above, there have also been suggestions to include online content explicitly within the ambit of the Indecent Representation of Women (Prohibition) Act, 1986, which currently prohibits indecent representation of women in advertisements, books, films, paintings, and writings etc.²⁰²⁵

Similar to other media arenas, the Copyright Act 1957 is also applicable to content published on OTT platforms. The Act gives the definitions of “cinematographic film” in Section 2(f), “communication to public” in Section 2(ff), “infringing copy” in Section 2(m). Section 13 provides for the works in which copyright includes which contains cinematographic films.

²⁰²⁴The Hindu: “Clamping down on Creativity” <https://www.thehindu.com/opinion/op-ed/clamping-down-on-creativity/article17739798.ece>; last accessed: 7th August, 2020

²⁰²⁵Ashima Obhan ; “India: Regulating The Unregulated: Stories Of OTT Platforms In India”; last accessed at: <https://www.mondaq.com/india/broadcasting-film-tv-radio/848724/regulating-the-unregulated-stories-of-ott-platforms-in-india> ; last accessed on 11th July, 2020

Section 14 defines “copyright”, wherein sub- clause (d) provides for copyrights powers for cinematographic films. Section 26 gives for the term of copyright as being for sixty years from the start of the calendar year next following the year in which the film was published which shall subsist in a cinematographic film. Section 51- 53 of the Act contains provisions on “infringement of copyrights”.

Last, but not the least, The Competition Laws are also applicable to the market of OTT Platforms. Section 3 of the Competition Act, 2002 Act talks of the Anti-Competitive Agreements which are prohibited, Section 4 talks of the Abuse of dominant position and Section 5 lays down regulations relating to the Regulation of Combinations.

There are three potential competition problems which can occur, with respect to OTT platforms: market power due to the collection of user data (personal or otherwise) on the advertiser side, possible anticompetitive bundling of valuable ad space with technology used for buying online ad space, and possible abusive terms and conditions of platforms towards content suppliers.²⁰²⁶

In cases such as the PIL filed by Mr. Padmanabh Shankar in the Karnataka HC²⁰²⁷ and PIL filed by NGO called Justice for Rights Foundation at the Delhi HC²⁰²⁸, the courts have repeatedly opined that the abovementioned laws are sufficient for the regulation of OTT Platforms in India, but the Government and the Industry players think otherwise. Hence, the Self-Regulatory Code was introduced to the OTT Industry.

UNDERSTANDING THE CONCEPT OF “SELF-REGULATION”

It is widely believed that placing regulations on OTT video streaming platforms would result in the “Stifling of creative expression” of content creators, be it user-created content or content censored by various OTT platforms.²⁰²⁹ The media’s role in the democratic society is twofold: it is a platform for the exchange and free expression of ideas, and the government watchdog.

Self- regulation is the choice of the industry because; regulation should never be at the expense of innovation or investment in new services or products. Rather, the increase in competition and choice for consumers should enable a lessening of the regulatory burden

²⁰²⁶OECD Policy roundtables: “Competition Issues in Television and Broadcasting 2013 “ Last accessed at: <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>; last accessed on: 4th August, 2020.

²⁰²⁷ Padmanabh Shankar V. Union of India Writ Petition NO. 6050 OF 2019 (C) PIL

²⁰²⁸ Justice for Rights Foundation V. Union of India W.P.(C) No. 11164/2018.

²⁰²⁹“understanding self-regulation debate” last accessed at: <https://www.investindia.gov.in/team-india-blogs/understanding-self-regulation-debate-over-top-platforms-india> last accessed on 12th July, 2019

across fixed and wireless platforms. Also, the introduction of the self- regulation mechanism paves the way for a less prescriptive and more flexible regime that can better and more rapidly adapt to the evolving market, in which content is driven by consumer demand, and the consumer is ultimately the king.²⁰³⁰ Therefore, self- regulation is touted to be the best practice to ensure the freedom of the content creators as well as ensuring the welfare of consumers.

THE CURRENT SELF-REGULATORY CODE: THE STORY SO FAR

Here is a timeline which showcases the journey of the implementation of Self- Regulatory Code in India:

January, 2019: Initial Self-Regulation Code was signed by 9 platforms:

Internet and Mobile Association of India (IAMAI) drafted a code of self-regulation for video streaming OTT platforms on January 17, 2019. Titled 'Code of Best Practices for Online Curated Content Providers', providing a guiding principle for Online Curated Content Providers (OCCPs) i.e. OTT platforms. Certain content was prohibited by the code, such as Content which disrespects the national emblem or national flag' Representing a child engaged in real or simulated activities or any representation of the sexual parts of a child for sexual purposes, Content which deliberately and maliciously intends to outrage religious sentiments of any class, section or community, Content which deliberately and maliciously intends to outrage religious sentiments of any class, section or community, Content which deliberately and maliciously promotes or encourages terrorism and other forms of violence against the State (of India) or its institutions and Content that has been banned for exhibition or distribution by online video service under applicable laws or by any court with competent jurisdiction.²⁰³¹ Also, the code puts the onus on the OTT platform to practice transparency when it comes to the categorization of content for age -appropriate audiences. Grievance redressal was left to the signatories to handle, by setting up an internal forum, wherein the complaints filed by the users are acknowledged by the OTT body within 3 days and are responded to within 10 to 30 working days. Complaints could be forwarded from the Ministry

²⁰³⁰Communications Alliance Ltd contribution to the ITU CWG-Internet: Online Open Consultation Public Policy considerations for OTTs: Australia ; last accessed at <https://www.itu.int/en/Lists/consultationJune2017/Attachments/64/Comms%20Alliance%20ITU%20public%20policy%20considerations%20for%20OTT%20submission.pdf>; last accessed on 11th July, 2020.

²⁰³¹IAMAI-“ the old CODE OF BEST PRACTICES FOR ONLINE CURATED CONTENT PROVIDERS”. Last accessed at: https://www.viacom18.com/pdfs/Self-Regulation_of_Online_Curated_Content_Providers.pdf ; last accessed on: 12th July, 2020

of Information and Broadcasting and Ministry of Electronics & Information Technology to the OTT platform.²⁰³²

October, 2019: MIB issued a list of prohibited content to OTT platforms, which included pointers such as the incorrect depiction of the Indian Map, portraying women in a “denigrated” manner, etc. to which creative justifications cannot be given. However, the content creators were assured that this won’t prohibit them from making content critical of the government.²⁰³³

February 2020: IAMA released a revised Self-Regulation Code: In this new code, the sections were mostly rearranged or elaborated upon, but the major addition to the new code was the section relating to the set-up of a two-tier dispute resolution system.²⁰³⁴ At the OTT platform level, a Digital Content Complaint Forum (DCCF) is to be set up by all the signatories to the code at institutional/ internal level to address consumer complaints, and DCCC (Digital Content Complaint Council) has to be instituted at the industry level.

In case of the new code, the timeline for the internal sorting of the consumer disputes by an OTT platform has been shortened. In Digital Content Complaint Forum, (i.e. the internal forum), the OTT platform needs to acknowledge the complaint within 3 days and respond to it within 10 working days. If more time is required, then they’ll have to inform the complainant, but they cannot take more than 30 working days to respond. If there’s a violation, they’ll need to inform the complainant about the action taken.

At the Industry level, the Digital Content Complaint Council (DCCC) is to be constituted with the “OCCP Governing Council” formed by the representatives of the parties who are signatories to the Code, through the proposed “OCCP governing Charter”. The DCCC would consist of 8 members and 1 chairperson, who is required to be a retired High Court or Supreme Court Judge. The term, jurisdiction, procedures have been outlined in the code. It

²⁰³² Namita Singh–“IAMAI’s regulatory code for OTT platforms outlining principles and seeking a creation of grievance redressal; will it lead to self-censorship? “ Last accessed at : <https://www.medianama.com/2019/01/223-iamai-ott-regulation-video-platforms/> ; last accessed on: 10th July, 2020.

²⁰³³ : Soumyarendra Barik; “MIB to issue list of prohibited content to OTT platforms: Report” last accessed at : <https://www.medianama.com/2019/10/223-ott-content-regulation-mib/> ; alst accessed on 10 th July, 2020.

²⁰³⁴ “Centre gives OTT platforms 100 days to put self-regulatory code in place”; last accessed at : <https://www.thehindubusinessline.com/info-tech/centre-gives-ott-platforms-100-days-to-put-self-regulatory-code-in-place-report/article30969669.ece>; last accessed on: 11th July 2020.

can take up complaints not resolved at the Tier-1 (DCCF) level, or take up complaints “suo moto”. It can also accept complaints from the government. Complaints pertaining to those who haven’t signed the code will be returned to the complainant, with a request to contact the content provider. The DCCC will only look into complaints related to Content, age classification, descriptors and/or parental access controls. The decisions of the DCCC will be by a simple majority, and they will meet twice a month at the IMAI office.²⁰³⁵

Also, there is a financial penalty of rupees 3 lakh imposed on violators of the code’s rules. The new code states that signatories shall institute tools to ensure parental/access controls or adopt measures such as PIN/Password to access/restrict access to content meant for mature audiences/adult viewing. but this obligation is not binding on them, and they are to make the “best efforts” to do so.

March 2020: Government gives 100 days for OTT platforms to adhere to new Self-Regulation Code by setting up an adjudicatory body (DCCC) along with standardising a code of conduct.

July 2020: I &B Industry is set to regulate the Online Video Streaming industry through the Ministry of Information and Broadcasting (I&B), and take the mantle from the Ministry of Information and Technology (IT).

Regulatory regimes in India are developed on as per the development in the platforms in the industry, and there are no regulations for upcoming media such as the OTT players. Out of the five different kinds of media: Print, radio, TV, films and OTT, OTT is the only one left unregulated.

The need of the convergence of OTT platform with the I&B ministry, as opposed to the IT ministry is, related to Adjusted Gross Revenue (AGR). Telecom operators are required to pay licence fee and spectrum charges in the form of ‘revenue share’ to the Centre. The revenue amount used to calculate this revenue share is termed as the AGR.²⁰³⁶ Amit Khare, Secretary

²⁰³⁵IAMAI; “SELF REGULATION FOR ONLINE CURATED CONTENT PROVIDERS; Last accessed at” <https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf> ; last accessed on 11th July, 2020

²⁰³⁶“Explained: What is AGR? How will it impact Airtel, Vodafone Idea?” last accessed at: <https://indianexpress.com/article/explained/explained-what-is-agr-how-will-it-impact-airtel-vodafone-idea-6086416/>; Last accessed on: 11th July, 2020

for Ministry of I&B suggests that there should not be two different AGR rates for Telecom sector and M&E sector, for DTH providers to adhere to.²⁰³⁷

INEFFICIENCIES OF THE SELF-REGULATION SYSTEM AND THE NEED FOR A STATUTORY REGULATION

- Media accountability can only be achieved when the players agree to cooperate and develop a fair and efficient system of self-regulation, which benefits not only their interests, but is in the interests of the citizens as well. It has not been explicitly been made mandatory for all the platforms to sign the code. The self-regulation code serves no purpose if all the players in the market don't adhere to it²⁰³⁸, for e.g.: Key streaming services like Amazon Prime, TVF Play, Yupp TV, Hungama Play had not signed the previous version, nor had YouTube (which has YouTube Red) and Facebook (which has Facebook Watch), as they are not penalized for not following the regulations strictly.
- There is rarely any seriousness in the penalties or corrective measures that are imposed by the so-called regulatory bodies because individual members of these bodies might choose to ignore the outcome of such proceedings, or quit the body altogether.
- The framework advocated by the Self-regulation Codes showcase the absence of an unbiased legal framework, i.e. a framework which is neither completely controlled by the government/ministry nor by lobbying bodies created by major business houses.
- Such regulatory bodies might not entertain third-party complaints related to other OTT platforms, if they are not a part of their body.
- The code lacks in giving proper definitions, with respect to the categories of content which are made available on the platforms and their nature, and classification.

Omission of defining of crucial terms will only lead to more confusion and chaos. For instance, the new code omitted the clause which prohibited content which was racially and religiously sensitive. The code needs to tightly define the idea of "hate speech" or

²⁰³⁷ Radhika Kajarekar—"Govt Determined To Censor Netflix, Amazon Prime, Hotstar, Zee5, AltBalaji & Other OTTs In India" last accessed at <https://trak.in/tags/business/2020/07/09/govt-determined-to-censor-netflix-amazon-prime-hotstar-zee5-altbalaji-other-otts-in-india/>; last accessed on: 11th July, 2020

²⁰³⁸ See: <https://theprint.in/india/netflix-differs-with-hotstar-sonyliv-as-self-regulation-body-divides-streaming-industry/381717/>, last accessed on 11th July, 2020.

“obscenity” and other such types of terms which could have ambiguous interpretations.

NEED FOR REGULATION

Indians themselves, are open to regulation of OTT platforms, as per a survey. 57 per cent of Indians believe that censorship of streaming platforms such as Netflix, Hotstar and Amazon Prime Videos are required, as revealed the survey by YouGuv.²⁰³⁹ There has also been a steady stream of complaints against the content which is displayed on OTT platforms, which have repeatedly shown certain communities in the bad light, such as the issues raised after the release of Sacred Games, Paatal Lok and Leila²⁰⁴⁰

We support a level playing field for regulation to ensure that all service providers are treated equally in the same market and that any regulation is applied proportionately when considered with its costs. Regulatory frameworks must adapt to the market by recognising new competitors and being competitively neutral. Like services should be regulated alike, to provide fairness and clarity for competing industry participants and to avoid the regulatory gaming and economic distortions that arise if similar services delivered via different technologies are regulated differently. As noted, regulation must create or maintain a level playing field. This is not always the case, but it is essential to avoid creating commercial disincentives or an anti-competitive environment.

Since OTT VOD is a nascent business arena, more and more edgy and disturbing content could be put up by the OTT platforms, in order to gain subscriptions. The OTT will not even face any action and get away with it if it is not a signatory to the self-regulatory code. This might even induce the already-signatories to leave, in order to protect their subscriber base.

SUPERVISION AND REGULATION OF THE MONETARY ASPECTS OF OTT PLATFORMS

The most distinguishing feature of OTT Video-On-Demand platforms is that they are not geographically confined and often operate from abroad. Hence, it is a tough task to apply regulatory policies to them.

²⁰³⁹ “Bringing OTT platforms under government regulations: What India and other countries are doing” last accessed at:

<https://in.news.yahoo.com/bringing-ott-platforms-under-government-regulations-what-india-and-other-countries-are-doing-080730665.html> ; last accessed on 12th July, 2020

²⁰⁴⁰ “Boycott Netflix’ Trends On Twitter After Outrage Over Alleged ‘Hindu phobic’ Content” ; accessed at: <https://inc42.com/buzz/boycott-netflix-trends-on-twitter-after-outrage-over-alleged-hinduphobic-content/> ; last accessed on 12th July, 2020

These businesses proliferate through the networks offered by the local telecom companies of the country whose market they have targeted, and have known to ride on the successes of such telecoms. For example, Netflix had tweeted the phrase “Thank you Jio” after Reliance launched its large-scale and cost-efficient telecom services in India, showing that it was ready to enter the Indian market, owing to the cheap data prices. Since OTT platforms are not specifically taxed in India and many other countries, they expand their business activities in such “tax havens”, without having to spend huge sums of money on spectrum acquisition or network infrastructure. The telecoms companies, on the other hand, face tough competition from OTT players while being burdened with regulatory norms and taxes. They also bear the burden of network congestion caused by the increased use of such OTT VOD platforms, and have to invest huge sums in network capacity enhancement, while reducing their text and voice profits.

Adding too much to their profits without having to pay any taxes has proven to be a boon to the OTT industry, which is slowly destroying competition from traditional media and also the allied sectors. Therefore, there is a need to regulate the revenue-related aspects of OTT Platforms.

BUSINESS MODELS OF OTT PLATFORMS: METHODS OF REVENUE GENERATION

A business model is the surest way for any entrepreneur to chart a proper plan for the capturing the market. It usually defines the source of revenue for the business and contours the customer base among other things. OTT platforms in India have experimented with the different types of business models, which can be categorized on the basis of the revenue-generation method it uses, which are as follows:

1. **SVOD-** Subscription Video-On-Demand: here the major chunk of the revenue is collected as the subscription fees paid by the viewers. Netflix and Amazon Prime are classic examples of this category.
2. **AVOD-** Advertising Video-On Demand: here the revenue is collected from the advertisement shown on their platforms, and is balanced with the costs to acquire films and shows. For example, the Youtube interface, MX Player, Voot, etc.
3. **TVOD-** Transaction Video-On-Demand: Transactional Video on Demand” model is another type of model where the viewers pay for accessing each piece of content

which they consume on the OTT Platforms, the receipts from such transactions become is the revenue. E.g: Movies on Google Play, iTunes, etc.²⁰⁴¹

4. **Broadcasting model:** In this case, the users pay to exclusively access the broadcast of any live event, such as, a sport, or a TV program. E.g.: Hotstar offers a sports-only subscription to its users, as it has identified that its maximum user base comes from its sports viewers. Also, Tata Sky Binge and Airtel XStream offer T.V. programs on mobile and laptop.
5. **Hybrid Model:** A combination of any of these abovementioned models. For E.g: Hotstar and Youtube.²⁰⁴²

Each and every revenue-earning business model as specified above, should ideally be separately regulated and taxed.

TAXATION OF OTT PLATFORMS IN INDIA: PRESENT SCENARIO

There is no tax or income-related regulation which is specifically applicable to OTT platforms in India.

Telecommunications, broadcasting, and information supply services have a separate Tariff code Heading/Category under the Goods and Service Tax (GST), and include categories such as Radio Original Broadcast and Channel programmes, TV Original Broadcast and Channel programmes, Broadcasting Services, and Home Program Distribution Services.²⁰⁴³ It is still unclear as though why OTT platforms are not taxed under any of the aforementioned categories, even though most of the models offer similar services.

The government has attempted to take the “Income Tax” route to charge the overseas digital tech giants, which also include OTT platforms such as Netflix and Amazon Prime. The “Equalization Levy” or more commonly known as the “Google Tax” was introduced by the Narendra Modi government in 2016, under Section 165 of the Income Tax Act, 1961. It created a charge of 6% on online advertising revenues.²⁰⁴⁴

²⁰⁴¹ Marketing mind: “Wonder How Different OTT Different Make Money? Here Are Their Revenue Models” last accessed at:

<https://www.marketingmind.in/wonder-how-different-ott-different-make-money-here-are-their-revenue-models/>; Last accessed on 7th August, 2020.

²⁰⁴² Finology: “OTT Platforms: Their revenue model and rise” last accessed at: <https://blog.finology.in/investing/ott-platform-revenue-model>; last accessed on 7th August, 2020.

²⁰⁴³ See: GST Rates: <http://gstcouncil.gov.in/gst-rates>; last accessed on 7th August, 2020.

²⁰⁴⁴ Taxes without borders: Govt revises tax on digital transactions, but ambiguities remain, last accessed at: <https://theprint.in/opinion/expanded-digital-tax-is-creative-response-to-covid-crisis-but-govt-must-properly-define-it/433603/>; last accessed on 7th August, 2020.

The passage of the Finance Act, 2018 saw the insertion of Section 165A into the Income Tax Act, and the concept of “Significant Economic Presence” was added. This provision is being used to tax foreign businesses on the basis of revenue and local user-based thresholds. This provision is yet to come into effect.²⁰⁴⁵

The Government faced heavy backlash over this rule, as the costs of advertising on sites such as Google and Facebook had dramatically shot up, hurting small Indian Businesses who were unable to bear the additional costs passed on to them because of the levy.

The Finance Act, 2020 included a controversial change to the Equalization Levy: 2% levy shall now be charged on gross payments received or which are receivable by overseas e-commerce entities through online provision of Goods and Services. The new levy shall be applicable to overseas businesses whose turnover is greater than 2 Crore Rupees in the preceding financial Year.²⁰⁴⁶ The provision is specifically aimed at non-resident businesses which do not have any taxable presence in India.²⁰⁴⁷

This change is in effect since 1st April 2020, and the deadline to pay the levy for the first quarter was 7 July 2020, which has been unheeded by the foreign tech giants such as Netflix and Amazon as a sign of protest against the new tax. They are also demanding clarifications and some additional time from the Government, so as to set up PAN and other compliances in India, during the COVID-19 pandemic.²⁰⁴⁸

Looking at the abovementioned developments, it can be inferred that there is a need for a unified taxation system for each of the revenue-earning aspects of OTT platforms.

REGULATION OF REVENUE OF OTT PLATFORMS: INTERNATIONAL PERSPECTIVES

The Organisation for Economic Cooperation and Development (OECD) -

The OECD is an international economic organisation mandated to foster world trade and economic progress. In the past few years, the OECD has been working on a model taxation law for the digital economy, which is to be discussed as a part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) Primarily, the model law and policy

²⁰⁴⁵ ID at 33.

²⁰⁴⁶ Section 166 of the Income Tax Act, 1961.

²⁰⁴⁷ Daniel Bunn: “India Pushes Digital Tax in a Difficult Time”; Last accessed at: <https://taxfoundation.org/india-digital-tax-in-a-difficult-time/>; Last Accessed on: 7th August, 2020.

²⁰⁴⁸ Bhumika Khatri: “Equalization Levy On Ecommerce Poses Challenges For Sector: IAMAI” last accessed at: <https://inc42.com/buzz/equalization-levy-on-ecommerce-poses-challenges-for-sector-iamai/>; last accessed on 7th August, 2020.

propose to allocate the primary right to tax digital entities to the country from which the digital revenue generates, i.e. where the transaction takes place, rather than the country in which the investment is made or where the platform is hosted. The report is still awaited at the time this article was written²⁰⁴⁹.

States in the US have felt the need to adapt their tax regimes to the shift in consumer behaviour. The state tax laws have traditionally only covered tangible goods and services. The ever-increasing demand of consumers for video and music streaming services has led them to update their tax laws accordingly, or risk eroding their tax revenue. Therefore, Twenty-two states plus the District of Columbia currently tax streamed video or audio media. Chicago has also levied a similar city tax since 2015.²⁰⁵⁰

Colombia was the very first country in Latin America to specify taxes for OTT players, through a 19% value-added tax (VAT) for digital services accessed over telecommunications networks. The country overcame the difficulty of taxing OTT players based abroad by charging the institutions that process payments for these services. The reform came after the Telecom companies raised the issue of unfair treatment from the tax authorities, citing the fact that they had to pay full taxes locally, while OTT players based in other countries could get away with tax-free profits.²⁰⁵¹

Some countries like Poland, on the other hand, are trying to charge OTT giants in order to give an impetus to their home-grown cinema. Among the new tax measures is a 1.5% tax on the revenue of video-on-demand (VOD) platforms, with the funds being used to bolster the Polish Institute of Film and Art (PISF). The payments are expected to boost the institute's coffers by 15 million zloty in 2020 and 20 million zloty annually in coming years.²⁰⁵² The movies produced by the institute shall then be shown on the VOD platforms, increasing home-grown content.

²⁰⁴⁹For more, see: "OECD releases global tax reporting framework for digital platforms in the sharing and gig economy"; last accessed at: <http://www.oecd.org/tax/exchange-of-tax-information/oecd-releases-global-tax-reporting-framework-for-digital-platforms-in-the-sharing-and-gig-economy.htm>; last accessed on 31st July, 2020.

²⁰⁵⁰Greg Iacurci: "The Netflix and Spotify tax: States are making streaming services more expensive" – 24th Feb 2020; last accessed at : <https://www.cnbc.com/2020/02/24/states-are-imposing-a-netflix-and-spotify-tax-to-raise-money.html>; last accessed on 7th August, 2020.

²⁰⁵¹Vipul Babbar: "Tax reforms aimed at OTT players are a positive step toward levelling the playing field for telcos" 29 Mar 2018; last accessed at: <https://www.omidia.com/resources/product-content/tax-reforms-aimed-at-ott-players-are-a-positive-step-toward-leveling-the-playing-field-for-telcos>; last accessed on : 7th August, 2020.

²⁰⁵²Polish government seeks to introduce 'Netflix' tax for video-on-demand platforms
Last accessed at: <https://corporatedispatch.com/polish-government-seeks-to-introduce-netflix-tax-for-video-on-demand-platforms/> last accessed on 7th August, 2020.

RECOMMENDATIONS

- 1) Setting up of an Independent Statutory Regulator: A regulator can be set up on the same lines of the Competition Commission of India or the Intellectual Property Appellate board. It shall have two wings: The Quasi-Judicial Body and the Administrative wing.
- 2) Quasi-judicial function of the Independent Statutory Regulator: The regulator shall have original as well as appellate jurisdiction to receive complaints from consumers, industry players as well as individuals of the public. The appellate jurisdiction to this body shall lie after it has been observed that the complaint has not been satisfactorily solved by the internal dispute resolution body of the OTT platform. The composition of the body shall be similar to that of DCCC under the new Code, but the qualified persons shall be appointed by the central government.
- 3) Administrative functions of the Independent Statutory regulator: The function shall be two-fold:
 - Registration of OTT Platforms: All national or international streaming platforms must register themselves with the proposed regulator and compulsorily establish offices in India. Amount shall be charged for the registration, which shall be useful for the running of the regulatory body. The registration is useful for keeping a record of all the OTT platforms in India.
Also, incentives for home-grown OTT Platforms or content can be given by the government, by waiving the registration fee for such platforms which host Indian produced content as more than 50 percent of its total content, to support “make in India” and “Vocal for Local”.
 - Certification of content on OTT platforms: It makes no logical sense if online content is not regulated the same way as offline content is regulated and certified. Therefore, the certification criteria must be the same as used by CBFC.
- 4) Other functions of the Regulator:
 - To make sure that OTT companies are exercising the duty of care and are enforcing the terms and rules.
 - It also has the power to take suo-motu action and issue fines and penalties against players who breached their duty of care, by holding the senior members of the management of the OTT platform liable.

- The power to hear out OTT companies if they have problems with the rules and regulations issues by the Regulator and have a discussion and debate with the aggrieved companies to understand what alternative methods or rules could be imposed, to balance the interests of the OTT companies and the society. Because, since the Industry is dynamic, the rules must be dynamic too.
 - The regulator must be allowed to compulsorily require the OTT platforms to submit annual reports containing information as prescribed by the regulator, such as – the data related to the algorithms they use, the data related to internal dispute resolution, etc.
 - Regulator can direct the companies to provide data to independent researchers subject to certain restrictions, to facilitate transparency in the study of market dynamics.
 - The regulator shall have a legal duty to pay due regard to innovation and protect the user's rights, and taking particular care not to infringe upon privacy or freedom of expression, and should not police the truth.
 - To ensure a level-playing field between the national, international, new and old players through appropriate rules and regulations.
 - Must collaborate with companies and give its inputs, involve specialists for the development of technologies such as: mandatory safety parental lock on content accessible to 18 plus persons.
- 5) Uniform Taxation System for OTT Companies: The E-Commerce Tax Levied under the Income Tax Act, 1961 is discriminatory and is straining international relations. Therefore, OTT platforms must be taxed, not on the basis of country of origin, but on the basis of their revenue-earning methods and Annual Turnover.
- The International OTT companies must compulsorily have Indian subsidiary companies and a registered office in India, so that they can have a taxable presence in India. They must invoice from the Indian subsidiary. Further, GST categories can be introduced for each type of OTT platform.

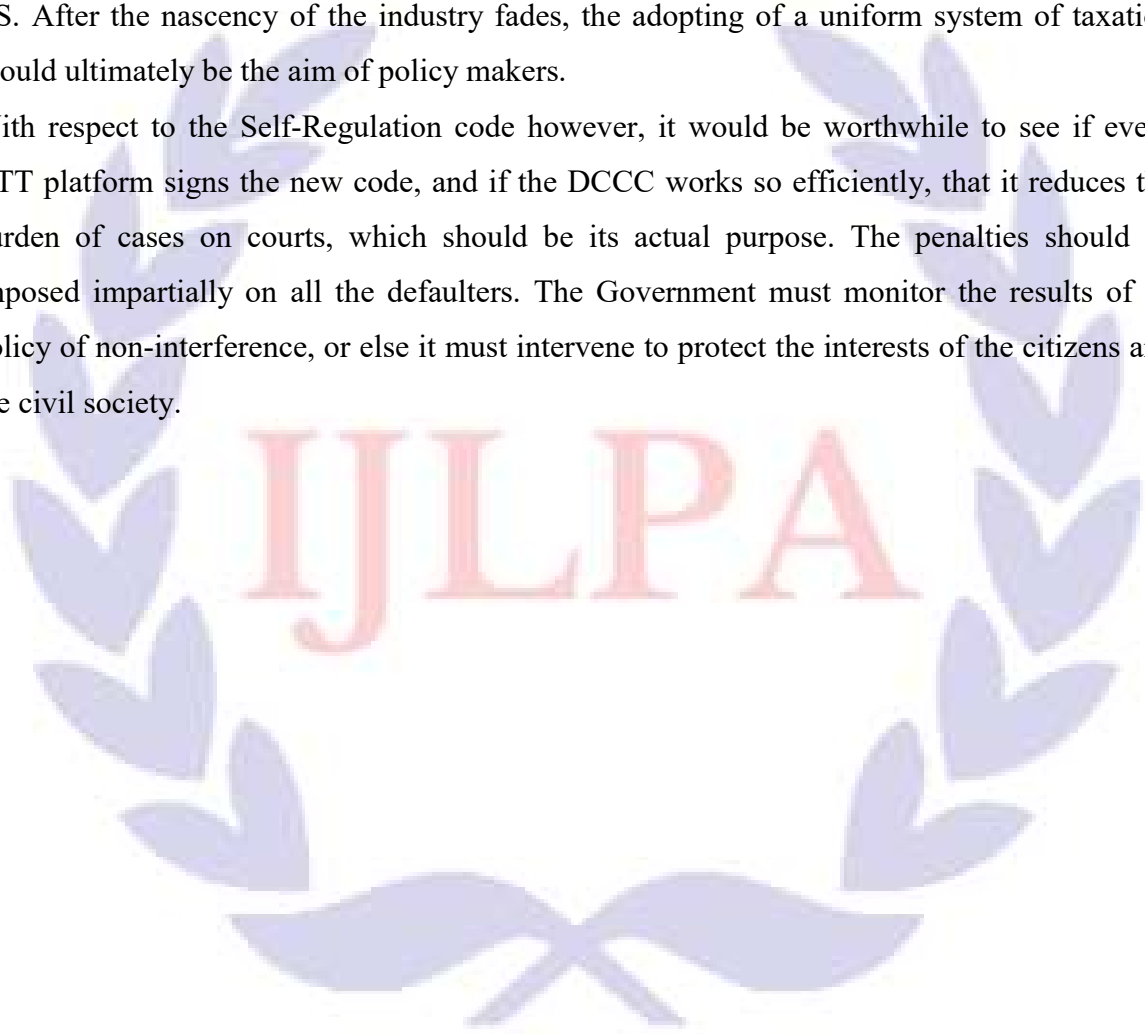
FINAL DELIBERATIONS

The regulation of OTT platforms is a complex and novel area for public policy considerations. We suggest that the govt remains committed to a multi-stakeholder model of internet governance as the best way to ensure a free, open and secure internet. All

stakeholders from industry, civil society and government have a responsibility to help address legitimate online harms.

The Government must be applauded for making serious efforts to extract a portion of the revenues earned by overseas OTT – tech giants in the form of “Google Tax”, but this worsens the state of international relations with the home countries of such OTT platforms, such as the US. After the nascency of the industry fades, the adopting of a uniform system of taxation should ultimately be the aim of policy makers.

With respect to the Self-Regulation code however, it would be worthwhile to see if every OTT platform signs the new code, and if the DCCC works so efficiently, that it reduces the burden of cases on courts, which should be its actual purpose. The penalties should be imposed impartially on all the defaulters. The Government must monitor the results of its policy of non-interference, or else it must intervene to protect the interests of the citizens and the civil society.



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