

# IT RULES, 2021: A REGULATORY IMPACT ASSESSMENT STUDY

VOLUME 2 | JULY 2023







# IT RULES, 2021: A REGULATORY IMPACT ASSESSMENT STUDY

Volume 2

Date of publication of this report is **17th July, 2023**.

**Recommended Citation:** Shreya, S., Rizvi, K., Tiwari, P. & Saxena, G. (2023, July 17). *IT Rules, 2021: A Regulatory Impact Assessment Study* (Vol. 2). New Delhi. The Dialogue and Internet And Mobile Association of India.



# AUTHORS



Shruti Shreya is a Programme Manager for the Platform Regulation vertical at The Dialogue. A lawyer by training with a Gold Medal from Symbiosis International University, she is engaged in conducting interdisciplinary research on varied aspects of social media governance and online safety.



Pranav Bhaskar Tiwari researches on intermediary liability and encryption. A lawyer by training, Pranav conducted research-based advocacy on privacy, platform regulation, and the future of work. A Gold-Medalist in international law and diplomacy from the Indian Society of International Law, Pranav likes to analyse international affairs from a globalisation perspective.



Kazim Rizvi is a policy entrepreneur and Founding Director of The Dialogue. He is a lawyer by profession and previous to starting The Dialogue, he worked with the British High Commission. A widely published columnist, he writes regularly on the intersection of technology, public policy and politics and is frequently sought after as a commentator on television.



Garima Saxena is a Research Associate at The Dialogue. She pursued her undergraduate degree from Rajiv Gandhi National University of Law, Punjab. Her prime interest lies in how our society interacts with technology and its impact on individuals. She actively advocates for privacy and digital freedom through her work.

## **Editors:**

**Sonali Dhir**, Director, Digital Publisher Content Grievance Council, IMAI

**Yash Razdan**, Manager, IMAI

## **Research Assistant:**

Vaishnavi Sharma

## **Copyeditor:**

Akriti Jayant

## **Designer:**

Diksha Kumari



# TABLE OF CONTENTS

<b>Index of Abbreviations</b>	<b>i</b>
<b>List of Figures</b>	<b>iii</b>
<b>List of Tables</b>	<b>iii</b>
<b>Acknowledgement</b>	<b>v</b>
<b>Executive Summary</b>	<b>vii</b>
<b>Research Methodology</b>	<b>xi</b>
i. Research Design	xi
ii. Scope	xii
iii. Stakeholder Universe	xiii
<b>Introduction</b>	<b>xv</b>
<b>1. Tracing the evolution of regulating OCC Platforms in India</b>	<b>01</b>
1.1 Regulating Cinema	02
1.2 Regulating Television	03
1.3 Arrival of Publishers of Online Curated Content in India	05
<b>2. Analysing Experiences from the ground - Part III of the IT Rules, 2021</b>	<b>11</b>
2.1. Learning from the IT Rules experience to ensure greater legislative competence in future	11
2.2. Reconsidering the definitions of objectionable content	12
2.3. Code of Ethics and Three Tier Grievance Redressal Mechanism	13
2.3.1 Self-regulating mechanism – Level 1	13
2.3.2. Self-regulating mechanism – Level 2	14
2.3.3. Oversight mechanism by the Central Government – Level 3	15
2.4. Powers to delete, modify or block information for public access	16
2.5. Review of the directions by the review committee	17
2.6. Age rating requirements	17
<b>3. Global Best Practices</b>	<b>19</b>
3.1 United States	19
3.2 Brazil	19
3.3 Singapore	20
3.4 Australia	20
3.5 Malaysia	21
3.6 New Zealand	21
<b>4. Analysing voices from India's creative industry</b>	<b>23</b>
4.1. What is the creative economy?	23
4.2. Significance of the creative industry in socio-economic growth	23
4.3. The Indian creative economy	24
4.4. Regulatory and policy challenges	24
4.5 Societal challenges	25
4.6 Policy interventions to promote Ease of Doing Business	26
<b>5. Policy Recommendations</b>	<b>29</b>





# INDEX OF ABBREVIATIONS

ACMA	Australian Communications and Media Authority
AIR	All India Radio
EoDB	Ease of Doing Business
FCC	Federal Communications Commission
IAMAI	Internet and Mobile Association of India
ICC	Indian Cinematograph Committee
IPC, 1860	Indian Penal Code, 1860
IT Act, 2000	Information Technology Act, 2000
IL Guidelines, 2011	Information Technology (Intermediaries Guidelines), 2011
Draft Intermediary Liability Rules, 2018	The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018
IMDA	Infocomm Media Development Authority
IT Rules, 2021	The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
MCMC	Malaysian Communications and Multimedia Commission
MeitY	Ministry of Electronics and Information Technology
MIB	Ministry of Information and Broadcasting
NCA	News and Current Affairs Content
OTT	Over-the-Top
OCC	Online Curated Content
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
VOD	Video-on-Demand



# LIST OF FIGURES

<b>Figure 1:</b> Research Design	xii
<b>Figure 2:</b> Stakeholder Universe	xiii
<b>Figure 3:</b> Data Collection Methods	xiii
<b>Figure 4:</b> Timeline   Evolution of Content Regulation in India	08
<b>Figure 5:</b> Three Tier Grievance Redressal Mechanism under Part III of the IT Rules, 2021	16

# LIST OF TABLES

<b>Table 1:</b> Key Findings and Recommendations of the Research	viii
<b>Table 2:</b> Key Insights from the Implementation Experience of Part III of the IT Rules, 2021 for Publishers of Online Curated Content	18
<b>Table 3:</b> Key Insights for Boosting the Creative Economy	27



## ACKNOWLEDGEMENT

We would like to thank all the stakeholders whose valuable inputs formed the basis of this report. We interviewed a total of 103 stakeholders as part of this research expanding across two volumes - with volume 1 focussing on Part II of the IT Rules, 2021 and the current volume 2 focussing on Part III of the IT Rules, 2021 and the creative economy. Out of the 103 stakeholders, 33 gave inputs specifically for this second volume.

We would also like to thank Mr Yash Razdan and Ms Sonali Dhir from IAMAI e for their continued support towards the completion of this research.

We also extend our gratitude to Ms Akriti Jayant, Head of Communications, The Dialogue for copyediting the report. Further, special thanks to Ms Diksha Kumari and Mr Shivam Kurushetra for the thematic design of the report.



## EXECUTIVE SUMMARY

The rise in the generation, transmission and consumption of online content and a thriving creative economy led to policy deliberations towards the need for a more formalised regulatory framework for online content regulation, leading to the enactment of The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules of 2021 (IT Rules, 2021). The IT Rules, 2021 envisaged the new regime governing content regulation across different kinds of platforms be it intermediaries or Publishers of Online Curated Content. Though intended to ensure effective regulation of online platforms, the lack of public consultation before the enactment of the Rules and the surprise inclusion of the Publishers of Online Curated Content within the remit of the regulation was highlighted as an infeasible step by some of the stakeholders. Accordingly, to determine the actual impact of the IT Rules, 2021 on Ease of Doing Business and digital rights, The Dialogue in collaboration with the Internet and Mobile Association of India (IAMAI) undertook this primary qualitative study.

The study has been conducted in two volumes - the first volume focussed on Part II of the IT Rules, 2021 envisaging the regulation of intermediaries while this volume focuses on Part III of the IT Rules, 2021 and its impact on Publishers of Online Curated Content. Based on the feedback received from the OCC platforms during the interviews, the scope of this report was extended to also gauge the critical concerns of the creative economy in the digital sector. For this, in addition to the OCC platforms, the authors spoke to creators, directors and producers of creative content. This helped us in unravelling the key expectations and the major pain points of the creative industry, including the need for decriminalisation of creative legislations, to boost artistic freedom. Several directors and producers highlighted during the interviews that the enormous number of petty complaints filed against the people from the creative economy undermines their economic rights and promotes disproportionate self-censorship. To tackle this, suggestions around removing criminal sanctions on content creators were made, along with strong policy measures by the government to discourage petty public complaints.

A total of 103 stakeholders were interviewed for this impact assessment study including both Volume 1 and Volume 2 of the report. Out of these, 33 stakeholders gave inputs specifically for this volume of the report. The key findings and recommendations of the research are as follows:



Table 1: Key Findings and Recommendations of the Research

## I. RE-EVALUATING DEFINITIONS

**Finding:** Majority of the experts highlighted the need to re-evaluate the definitions of objectionable content like half-truths, indecency, causing annoyance etc. under Part III of the IT Rules, 2021, to preserve online free speech and promote creative freedom. Moreover, they also stressed upon the need for greater emphasis on ensuring optimum use of grievance redressal mechanisms by the users.

**Recommendation 1:** Ensuring well-defined targeted principle-based regulation: Broad definitions of prohibited content open avenues for subjective interpretations and enforcement which can stifle civil rights and creative freedom. Zeroing in on the problems that the regulation aims to solve is a critical decision that must be enhanced with stakeholder inputs and technical expert consultations.

**Recommendation 2: Raising awareness regarding the existing grievance redressal processes:** Improving user awareness regarding the grievance redressal mechanisms established by the platforms is important to ensure optimum utilisation of the established processes for furthering user interests. It is paramount that the government, platforms and civil society work collaboratively to raise awareness and empower the users to use these mechanisms effectively for protecting their rights.

## II. REASSESSING EXECUTIVE INVOLVEMENT IN THE GRIEVANCE REDRESSAL MECHANISM

**Finding:** Most of the Publishers of Online Curated Content mentioned that the three-tier Grievance Redressal Mechanism prescribed in the Rules has been seamlessly operationalised by the industry. However, some experts expressed concerns about the degree of executive control at level 2. For instance, matters relating to deletion / modification of content, which directly impinge upon the freedom of speech and expression, must mandatorily be referred by the level 2 body to the oversight body at level 3. Further, the purely executive oversight at level 3, despite the quasi-judicial functions performed by the level 3 body, was highlighted as a pressing concern which ought to be redressed to ensure fair and proper adjudication on matters directly affecting the constitutionally enshrined freedom of speech and expression.

**Recommendation: Autonomous regulatory bodies with industry and community representation:** Executive dominance in tribunals (however diverse internally) has an adverse effect on both the freedom of expression and the principle of Separation of Power. Autonomy and independence of the regulatory bodies must be ensured in every regulatory framework envisaged for the OCC sector.

### III. MINIMISING POST PUBLICATION TAKEDOWNS

**Finding:** Experts pointed out that the lack of appropriate reasoning to justify the validity of the emergency blocking orders issued by the Ministry of Information and Broadcasting under the IT Rules, 2021 needs deliberation.

**Recommendation:** Building on the principles prescribed in the Shyam Benegal

**Committee Report:** The regulatory focus should be on providing a well-defined scope of prohibited content at the self-certification stage itself, without opening the doors for post-publication take-down. This will ensure the publication of legally permissible content and reduce the need for post-publication blocking and takedown.

### IV. INTERACTION OF THE RULES WITH BUSINESS INTERESTS AND INNOVATION

**Finding 1:** 2/3rd of the OCC platforms interviewed stated that Part III of the IT Rules, 2021 have been operationalised and apart from certain principle level concerns, the Rules have not caused any significant business hindrances.

**Finding 2:** 9/10th of the content creators, directors and producers noted that the petty complaints requesting ban and injunction on creative works, the multiplicity of complaints under different forums and criminal sanctions under creative laws may impact their Ease of Doing Business.

**Recommendation 1:** Recognising the channel under the IT Rules, 2021 as the singular and exclusive complaint redressal mechanism: Multiplicity of complaints under different Central and state level forums must be prohibited and a framework should be formalised for the various Central and State bodies that receive grievances to direct them to a singular channel. Towards this, the Self Regulatory Mechanism prescribed under the IT Rules, 2021 should be reformed to address the existing concerns and be made the exclusive singular channel for all forms of grievance redressal.

**Recommendation 2:** Decriminalisation of creative legislations to boost the creative economy and artistic freedom: Criminal sanctions on creative work not only undermine freedom of expression but also fail to satisfy the threshold of harm envisaged under criminal law jurisprudence. Penalties should be the norm for wrongs arising out of creative works rather than criminal proceedings. This will create a more stable and investment-friendly creative industry and encourage artistic freedom.



## RESEARCH METHODOLOGY

This study is an impact assessment research based on the intersection of the review of literature on the regulation of Publishers of Online Curated Content followed by extensive primary analysis in the form of Focus Group Discussions and One-on-one interviews to gauge the on-ground concerns of the sector. The sections below delineate the background and detailed methodology undertaken in this volume of the research.

### I. RESEARCH DESIGN

The promulgation of The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021) under the Information Technology Act, 2000 (IT Act, 2000) marked the inception of a new regime for the regulation of Publishers of Online Curated Content India. While certain provisions have been effective in addressing some of the critical challenges, many stakeholders voiced the need for expert consultation to address the concerns pertaining to executive overreach and potential censorship impacting the smooth implementation of the Rules. In response to this, The Dialogue in collaboration with IAMAI, conceptualised this research to study the impact of IT Rules, 2021 on the Ease of Doing Business (EoDB), free speech, and conflict resolution to explore evidence-based recommendations for envisioning a truly safe and equitable regulatory regime for platforms governed and users interacting with Part III of the IT Rules, 2021.

This study is primarily qualitative in nature. It entails a secondary analysis of existing literature under the Information Technology Act, 2000 (IT Act, 2000) and the IT Rules, 2021 made thereunder for the regulation of platforms governed by its Part III. This is complemented by an analysis of other municipal legislations that interact with the business of OCC players, such as the IPC, 1860 and the Cinematograph Act, 1952 among others, to gauge their impact on the creative economy. The secondary analysis played a pivotal role in shaping this research by not only identifying the key stakeholders for the study, but also providing valuable insights into the key challenges faced by these stakeholders. Moreover, secondary analysis helped the researchers to unravel the political economy of the sector, which further helped define the scope and boundaries of this research.



Figure 1: Research Design

## II. SCOPE

Scope of the study was limited to conducting an impact analysis of the IT Rules, 2021 on the entities it seeks to regulate. The first volume of this study analysed the implications on entities governed by Part II of the IT Rules, 2021. The second volume analysed the implications for entities regulated by Part III of the IT Rules, 2021 focusing on four core aspects:

- The compliance regime before and after the enactment of the IT Rules, 2021;
- Impact of the IT Rules, 2021 on EoDB and innovation;
- Impact of the IT Rules, 2021 on separation of power between the executive and judiciary;
- Best practices for governing the Publishers of OCC in India.

Based on the inputs of the stakeholders interviewed, the scope of the study was expanded to include the implications of a string of legislations and policy directives that regulate the creative industry (which includes entities governed by Part III of the IT Rules, 2021) to gauge its impact on the creative economy.

### III. STAKEHOLDER UNIVERSE

After conducting an extensive literature review, and analysing court judgements and committee reports, the research team embarked on defining the stakeholder universe under expert advice. Thereafter, questionnaires were prepared for all defined stakeholder groups.

The research team relied on maximum variation sampling within purposive sampling to seek primary inputs from a diverse set of stakeholders impacted by the IT Rules, 2021. The team also employed a snowballing approach, wherein the initial interviewees facilitated connections with other stakeholders for further insights and comments. A total of 33 stakeholders gave inputs specifically on the regulation of OCC platforms, including Part III of the IT Rules, 2021 and the other key concerns in the creative economy. This stakeholder distribution includes:



Figure 2: Stakeholder Design



Figure 3: Data Collection Methods



## INTRODUCTION

In the last few years, India's consumption of OCC has seen a rapid surge, allowing the sector to experience unprecedented growth.<sup>1</sup> According to the IAMAI report titled 'Internet in India', much of this growth is driven by rural India, with the usage of OCC platforms being at par in the urban and rural belts.<sup>2</sup> The sector has also witnessed a large number of new entrants, hoping to leverage the promise and foundation of growth in this space.<sup>3</sup> With an exponentially increasing number of OCC platforms, the conversation around the regulation of this sector has dominated the recent policy discourse.<sup>4</sup>

With the promulgation of the IT Rules, 2021, the focus of regulation of OCC publishers took a more mainstream turn. These Rules envisaged the new regime for governing the internet ecosystem which encompassed OCC and News and Current Affairs (NCA) platforms within their ambit. This development was a stark shift from the Draft Intermediary Liability Rules, 2018<sup>5</sup> which only intended to enhance the due diligence requirements of platforms falling under the category of an intermediary under the The underlying rationale in these Rules has been applaudable as it differentiates intermediaries from the newly scoped ones of NCA and OCC. However, for effective regulation through this framework, future amendments should deep dive into scoping the needs of users and industry players across all sectors. Such an approach would ensure a more holistic grasp of the diverse stakeholders involved and the evolving dynamics of the creative economy, thereby enabling the legislation to address their challenges and requirements for a more balanced and fair regulatory framework. Such a comprehensive perspective will also support the development of the creative economy in India by acknowledging the interconnectedness of different sectors in the creative economy and recognising the symbiotic relationship between cinema, television, and online curated content.

The first section of the report delineates the history of regulating publishers of OCC in India and how the framework has evolved over the years. The next section entails the impact assessment of Part III of the IT Rules, 2021 that governs the OCC platforms. This is followed by a discussion on the regulatory scenario in the other prominent jurisdictions of the world. The proceeding section is dedicated to the concerns plaguing India's creative economy on the whole which includes the key issues faced by not just the Publishers of OCC but also the creators and producers of creative content on these platforms. Like the first volume, the report closes with a set of policy recommendations based on the analysis of the key stakeholder expectations across the ecosystem.

<sup>1</sup> Confederation of Indian Industries & Boston Consulting Group. (2021, December). *Blockbuster Script For The New Decade Way Forward For Indian Media And Entertainment Industry*. Retrieved from <https://www.mycii.in/KmResourceApplication/77672.CIIBCBigPictureReport2021.pdf>

<sup>2</sup> *Rural India takes driving seat in India's internet usage growth: Report - ET BrandEquity*. ETBrandEquity. (2022). Retrieved 15 September 2022, from <https://brandequity.economicstimes.indiatimes.com/news/research/rural-india-takes-driving-seat-in-indias-internet-usage-growth-report/93182741>.

<sup>3</sup> Confederation of Indian Industries & Boston Consulting Group. (2021, December). *Blockbuster Script For The New Decade Way Forward For Indian Media And Entertainment Industry*. Retrieved from <https://www.mycii.in/KmResourceApplication/77672.CIIBCBigPictureReport2021.pdf>

<sup>4</sup> Mehta, S. (2021). *Isn't State-led Censoring of Content on OTT Platforms Rather Over the Top?*. The Bastion. Retrieved 15 September 2022, from <https://thebastion.co.in/politics-and/isnt-state-led-censoring-of-content-on-ott-platforms-rather-over-the-top/>.

<sup>5</sup> Ministry of Electronics and Information Technology. Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018. Retrieved 15 September 2022, from [http://meity.gov.in/writereaddata/files/Draft\\_Intermediary\\_Amendment\\_24122018.pdf](http://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf)





# 1. TRACING THE EVOLUTION LEADING TO THE REGULATION OF PUBLISHERS OF ONLINE CURATED CONTENT IN INDIA

Since the early 20th century to now, the way audiences consume content has undergone a remarkable change, transitioning from the era of bioscopes to the vast selection of titles available on streaming platforms. While television and cinema in India have acted as sources of entertainment and agent of change for a long time, the COVID-19 pandemic propelled the prominence of global and local streaming platforms among Indian audiences and allowed them to make a mark for themselves in the country.<sup>6</sup> India's television, movie and the emerging OCC industry have witnessed vibrant growth while having their fair share of ups and downs in the regulatory aspects.

To understand why a domain is being regulated in a particular fashion, it is quintessential to trace its origins and the underlying rationale that has shaped the current regulatory framework. To this end, this section traces the evolution of content regulation, starting from its origins in the context of television and cinema, and exploring how it has subsequently extended to encompass content regulation on streaming platforms.

Television, cinema and streaming platforms form a part of the broader media and entertainment landscape in India. However, with that being said it is essential to emphasise that they are distinct mediums with their own unique characteristics and regulatory requirements. While television has been a long staple of household entertainment in India where content is broadcasted and 'pushed' at scheduled times through television networks or cable/satellite channels, films are usually presented in a cinematic format to provide theatrical exhibition to the audience. OCC platforms have emerged as a result of the progression of technology, including the widespread availability of high-speed internet, the proliferation of smartphones and the development of streaming technologies. The most prominent characteristic that distinguishes the OCC platforms from the traditional television and film industry and justifies their differential regulatory needs is the on-demand pull model of content delivery on these platforms, where the users have the sole discretion to decide the content they want to watch, unlike traditional television which functions on the push model.

The pull model of content delivery on OCC platforms facilitates greater user autonomy and control by allowing the viewers to themselves choose the content they want to watch unlike the push model on traditional television where the viewers can only watch the content that is being broadcasted by the cable or satellite network. Accordingly, the objective behind discussing the regulatory frameworks associated with the cinema and television industry in this section is only to delineate the evolution of the content regulation jurisprudence in India without negating their functionally differential characteristics and policy requirements.

---

<sup>6</sup> HughesSystique. (2022). *Future of OTT in India*. NASSCOM Community | The Official Community of the Indian IT Industry. Retrieved 12 September 2022, from <https://community.nasscom.in/index.php/communities/digital-transformation/telecom-media-communities/future-of-ott-in-india.html>

## 1.1 REGULATING CINEMA

Cinema arrived in India in 1896 when the Lumiere Brothers' Cinematography exhibited six silent short films in Bombay followed by regular screenings of films by Clifton and Co.'s Meadows Street Photography Studio in 1897.<sup>7</sup> Around the same time, with cinema houses set up in Indian cities, other means to consume films such as film shows in tents, and touring cinemas, amongst others, were adopted by the audiences. India's first full-length feature film, *Raja Harishchandra*, was produced by Dada Saheb Phalke in 1913.

Recognising the growing popularity of the industry and the need to regulate it, the Cinematograph Act of 1918<sup>8</sup> was introduced by the government to govern the exhibition of films by mandating places of film exhibition to be licensed and certification of films as "suitable for public exhibition"<sup>9</sup>. This was followed by the establishment of Censor Boards in various provinces, assigned with the responsibility of determining the suitability of content based on the prevailing, socially recognised standards of morality.<sup>10</sup>

In 1928, the government constituted a committee to examine the censorship of cinematograph films in India and issues related to its production, distribution and exhibition. This scrutiny was prompted by the growing influence of cinema on Indian audiences. Known as "the most comprehensive document extant on the formation of a film industry in a non-Western country"<sup>11</sup>, the 1928 Report of the Indian Cinematograph Committee (ICC)<sup>12</sup> made recommendations to constitute a centralised body to avoid irregularities in the standards used by different boards across the states. It also recommended introducing the practice of issuing two classes of certificates, in this case, "universal" and "public", which was prevalent in Britain at that time.<sup>13</sup>

Post-independence from British rule, the Indian government introduced the Cinematograph Act in 1952 to replace the former Cinematograph Act of 1918. The new law addressed the capacity of the State to regulate films by nullifying the regional boards and empowering the Central Government to form a Central Board of Film Censors, consisting of a chairman and board members. A new rating system for certification of films for public exhibition was also introduced by repealing the Cinematograph Act, 1918. The 1952 legislation comprised new categories, including U (universal exhibition) and A (adult exhibition). It was in 1983 when two new categories- UA (unrestricted exhibition but with parental guidance recommended for children under 12) and S (exhibition to specialist audiences) – were also added to the law. Since its inception, the 1952 Act has been amended eight times.

<sup>7</sup> Hutchinson, P. (2013, July 25). *The birth of India's film industry: how the movies came to Mumbai*. The Guardian. Retrieved 15 September 2022, from <https://www.theguardian.com/film/2013/jul/25/birth-indias-film-industry-movies-mumbai>.

<sup>8</sup> Cinematograph Act, 1918.

<sup>9</sup> Sharma, M. (2009). Censoring India. *South Asia Research*, 29(1), 41–73. Retrieved 30 May 2023, from <https://journals.sagepub.com/doi/10.1177/026272800802900103>

<sup>10</sup> Heda, S. (2019). How to Regulate OTT Streaming Services in India. *Center for Media, Data and Society*. Retrieved 30 May 2023, from <https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf>

<sup>11</sup> Shoosmith, B., (1988) The problem of film: A reassessment of the significance of the Indian cinematograph committee, *Continuum*, 2(1), 74-89.

<sup>12</sup> Full text of "Report Of The Indian Cinematograph Committee 1927 1928". Retrieved 13 September 2022, from [https://archive.org/stream/reportoftheindia030105mbp/reportoftheindia030105mbp\\_djvu.txt](https://archive.org/stream/reportoftheindia030105mbp/reportoftheindia030105mbp_djvu.txt)

<sup>13</sup> Banerjee, A. (2010). Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis. *Drexel Law Review*, 2. Retrieved 13 September 2022, from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1672409](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672409)

One of the early developments in the film censorship regime in India was the case of *K.A Abbas v. Union of India*.<sup>14</sup> In this landmark ruling, the Supreme Court upheld the prohibitions on public exhibition laid out in the Cinematograph Act, 1952 while rejecting the petition that challenged the censorship powers of the Act. The case arose when the petitioner's film was denied an unrestricted public viewing certificate unless a scene deemed unsuitable for children was removed. It was argued by the petitioner that such prior censorship by the Act violated his right to freedom of speech and expression under Article 19(1)(a).

## 1.2 REGULATING TELEVISION

Television was introduced in India as an experiment in 1959 with the support of the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) and the Ford Foundation.<sup>15</sup> Initially, the programmes were broadcast for an hour twice a week on various themes including community health, traffic, and citizens' duties and rights. Subsequently, television was also extended to support middle and higher secondary school education as well as disseminate information to farmers through *Krishi Darshan*.<sup>16</sup> The programme used to air on Wednesdays and Fridays for 20 minutes each day and served 80 villages (around Delhi) provided with community television sets. Thus, in its early phase, public broadcasting via television was majorly used as a medium to educate citizens and spread awareness about crucial public welfare issues.

Subsequently, the need for a sustainable policy direction for the broadcast sector was realised which led to the constitution of the Committee on Broadcasting and Information Media or otherwise known as the Chanda Committee<sup>17</sup> constituted under the chairmanship of Ashok Chanda, the former Auditor General of India in 1964. The Committee was constituted by the Ministry of Information and Broadcasting (MIB) to examine the television broadcasting landscape in India. The report of the Committee raised concerns about the financial and administrative restrictions imposed by the State on radio and television.<sup>18</sup> It highlighted critical issues such as the lack of independence of All India Radio (AIR) due to executive interference and underfunding of radio and television.<sup>19</sup> The report recommended that the radio and television be controlled by the state while emphasising the need for greater funding for the industry including through advertising revenue. Resultantly, AIR's first commercial broadcasting service known as *Vividh Bharti* was started in 1967. Additionally, codes for commercial advertising were introduced by the government as a measure against objectionable advertisements and to "develop and promote healthy advertising practices on AIR."<sup>20</sup>

<sup>14</sup> *K.A Abbas v. Union of India*, (1970) 2 S.C.C. 780.

<sup>15</sup> Thomas, L., & Mariswamy, H. (2017). Impact of Globalisation on Indian Media: A Study of 'Credibility' of Indian News Channels. *Educational Research International*, 6(1). Retrieved 13 September 2022, from <http://www.erint.savap.org.pk/PDF/Vol.6.1/ERInt.2017-6.1-02.pdf>

<sup>16</sup> Singh, N. P., & Shingi, P. M. (1975). Rural Telecast for Development: An Impressionistic Model. *Economic and Political Weekly*, 10(36), 1433–1438. <http://www.jstor.org/stable/4537357>

<sup>17</sup> Kumar, K. (2003). Mixed Signals: Radio Broadcasting Policy in India. *Economic and Political Weekly*, 38(22). Retrieved 13 September 2022, from [https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab\\_segments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab_segments=&origin=&acceptTC=1)

<sup>18</sup> Ninan, S. (1997). History of Indian broadcasting reform. *Cardozo Journal of International and Comparative Law*, 5(2), 341-364.

<sup>19</sup> Azzi, M., & Sánchez, G. (2003). *Legislation on community radio broadcasting: comparative study of the legislation of 13 countries* (p. 48). UNESCO. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000130970>

<sup>20</sup> Prasar Bharti. Revised Code for Commercial Advertising on Doordarshan. Retrieved from <https://prasarbharati.gov.in/DDCommercialPDF/DDInfoPDF/complecode.pdf>

<sup>21</sup> Prasar Bharti. Revised Code for Commercial Advertising. Retrieved from <https://prasarbharati.gov.in/code-for-commercial-advertising/#152943088808-cdb5b52b-a5f95832-5043>

By the 1970s, with the opening up of television centres around the country, the management of television was taken away from All India Radio (AIR) in 1976. This led to the emergence of Doordarshan- the public service broadcaster.<sup>21</sup> Doordarshan played a significant role in the socio-economic development of the country by communicating useful and powerful messages to Indian audiences. The service acted as a means of social communication by providing information on issues such as health, vaccination, family planning, nutrition, and female foeticide, amongst others.<sup>22</sup>

The need for greater autonomy in the broadcasting sector was realised during the 1975 Emergency period owing to the questionable control of Doordarshan and AIR by the executive at that point.<sup>23</sup> The loss of credibility of these public services led to the formation of several committees including the Verghese Committee, 1978<sup>24</sup>, the Joshi Committee, 1985<sup>25</sup> and the Sen-gupta Committee, 1990.<sup>26</sup> The working group headed by B.G. Verghese highlighted the need for autonomy for broadcasters from restrictive governmental control and censorship, and recommended that a non-profit National Broadcasting Trust called Akash Bharati be formed for both AIR and Doordarshan.<sup>27</sup>

The following years witnessed the introduction of the Prasar Bharati (Broadcasting Corporation of India) Act in 1990 and the Cable Television Act in 1995 after several committees made a case for organisational restructuring of the broadcasting industry. While the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 was passed by the Parliament in 1990 and received presidential assent in the same year, it was in 1997 that the Act was implemented by the government. The Prasar Bharti (Broadcasting Corporation of India) Act, 1990 established the Broadcasting Corporation, laid down the composition, functions and powers of the corporation, and granted autonomy to both AIR and Doordarshan. The legislative intent and the objectives of this legislation are contained in Section 12. It mandates Prasar Bharti to ensure that broadcasting should always be conducted as a form of public service<sup>28</sup> and the objective of the corporation remains to gather news and not spread propaganda.<sup>29</sup>

*Prior to the implementation of the 1990 Act, the Supreme Court in the case of The Secretary, Ministry of Information and Broadcasting v. The Cricket Association of Bengal*<sup>30</sup>, had also directed the Central Government to introduce a law to bring the broadcasting media under the ambit of a public/statutory corporation, representative of all the sections and interests of the society.<sup>31</sup>

<sup>22</sup> Shitak, R. (2011). Television and Development Communication in India: A Critical Appraisal. *Global Media Journal – Indian Edition*, 2. Retrieved 15 September 2022, from <https://caluniv.ac.in/global-media-journal/Winter%20Issue%20December%202011%20Commentaries/C-1%20Sen%20Shitak.pdf>.

<sup>23</sup> Singh, I. (1980). The Indian Mass Media System: Before, During and After the National Emergency. *Canadian Journal Of Communication*, 7(2). Retrieved 13 September 2022, from <https://cjc.utpjournals.press/doi/full/10.22230/cjc.1980v7n2a248>

<sup>24</sup> Kumar. K. (2003). Mixed Signals: Radio Broadcasting Policy in India. *Economic and Political Weekly*, 38(22). Retrieved 13 September 2022, from [https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab\\_seg-ments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab_seg-ments=&origin=&acceptTC=1)

<sup>25</sup> Kumar. K. (2003). Mixed Signals: Radio Broadcasting Policy in India. *Economic and Political Weekly*, 38(22). Retrieved 13 September 2022, from [https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab\\_seg-ments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab_seg-ments=&origin=&acceptTC=1)

<sup>26</sup> Singh, M. (2016). The Dawn of Digital India- Television to Internet. *IOSR Journal Of Humanities And Social Science*, 27(1). Retrieved 13 September 2022, from <https://www.iosrjournals.org/iosr-jhss/papers/Vol.%2021%20Issue7/Version-1/G02107016366.pdf>

<sup>27</sup> Kumar. K. (2003). Mixed Signals: Radio Broadcasting Policy in India. *Economic and Political Weekly*, 38(22). Retrieved 13 September 2022, from [https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab\\_seg-ments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/4413630.pdf?refreqid=excelsior%3Ac6a790beafbb7834fd8344aa8f17301d&ab_seg-ments=&origin=&acceptTC=1)

<sup>28</sup> Section 12, The Prasar Bharti (Broadcasting Corporation of India) Act, 1990.

<sup>29</sup> Section 12, The Prasar Bharti (Broadcasting Corporation of India) Act, 1990.

<sup>30</sup> *The Secretary, Ministry of Information and Broadcasting v. The Cricket Association of Bengal*, 1995 AIR 1236, 1995 SCC (2) 161.

<sup>31</sup> *The Secretary, Ministry of Information and Broadcasting v. The Cricket Association of Bengal*, 1995 AIR 1236, 1995 SCC (2) 161.

Subsequently, the Cable Television Networks (Regulation) Act, 1995 was introduced to regulate the multiple cable network operators that were rapidly emerging in the country.<sup>32 33</sup> Under the Act, all programmes transmitted or re-transmitted through a cable service are required to adhere to the programme code and advertisement code prescribed under Rule 5 and Rule 6 of the Cable Television Network Rules, 1994, respectively.<sup>34</sup>

While the previous decade witnessed major events via television including the Asian Games of 1982, and the Cricket World Cup of 1983 and consumed domestic content such as soaps like Hum Log (1984), Buniyaad (1986), Byomkesh Bakshi (1993) and mythological dramas such as Ramayan (1987) and Mahabharat (1990)<sup>35</sup>, the next few years saw the arrival of global media conglomerates due to the economic reforms introduced by the government. Consequently, STAR and MTV were launched in India who started developing content which was local and more relatable to the Indian audiences<sup>36</sup> which brought a paradigm shift in the type of content that was consumed by the people. Other key players such as Discovery, National Geographic Channel etc. also started localising their content to access a larger audience and increase advertising revenue.<sup>37</sup>

## 1.3 ARRIVAL OF PUBLISHERS OF ONLINE CURATED CONTENT IN INDIA

OCC media services arrived in India in 2008. The first OCC platform was known as BIGFLIX and was launched by Reliance Entertainment.<sup>38</sup> Initially, the platform had 2000 HD movies in nine Indian languages, including Hindi, Telugu, Tamil, Punjabi, Malayalam, Gujarati, Marathi, Bhojpuri and Bengali and allowed users to stream and download movies on any Internet-connected device. OCC platforms started gaining more popularity in 2013 with the launch of Dittotv (Zee) and Sony Liv.<sup>39</sup> In the following years, India witnessed the launch of popular OCC platforms like Voot, Zee5, Planet Marathi, Hotstar, Netflix and Amazon Prime Video.<sup>40</sup>

The rise of OCC services in India progressively contributed to the economy by creating new jobs and attracting investment in Indian and regional content.<sup>41</sup> The OCC platforms diminished

<sup>32</sup> Cable Television Networks (Regulation) Act, 1995. Centre for Internet & Society. (n.d.). Retrieved September 15, 2022, from <https://cis-india.org/telecom/resources/cable-television-networks-regulation-act>

<sup>33</sup> Kumar, N. (2021). Electronic Media in the Global Age: A Study of Indian Television. *Transience*, 12(1). Retrieved 13 September 2022, from [https://www2.hu-berlin.de/transcience/Vol12\\_No1\\_44\\_62.pdf](https://www2.hu-berlin.de/transcience/Vol12_No1_44_62.pdf)

<sup>34</sup> Ministry of Information and Broadcasting. *Programme and Advertising codes prescribed under the Cable Television Network Rules, 1994*. Retrieved September 14, 2022, from <https://mib.gov.in/sites/default/files/pac1.pdf>

<sup>35</sup> Khanna, A. (2020, January 28). *The Changing Face of Media - Open The Magazine*. Open. Retrieved 15 September 2022, from <https://openthemagazine.com/lounge/books/changing-face-media/>

<sup>36</sup> Kumar, N. (2021). Electronic Media in the Global Age: A Study of Indian Television. *Transience*, 12(1). Retrieved 13 September 2022, from [https://www2.hu-berlin.de/transcience/Vol12\\_No1\\_44\\_62.pdf](https://www2.hu-berlin.de/transcience/Vol12_No1_44_62.pdf)

<sup>37</sup> Thussu, D. K. (2016). Privatizing the airwaves: the impact of globalisation on broadcasting in India. *Media, Culture & Society*. <https://doi.org/10.1177/016344399021001007>

<sup>38</sup> Laghate, G. (2017). *Anil Ambani's Reliance Entertainment to re-launch OTT platform globally*. The Economic Times. Retrieved September 14, 2022, from <https://economictimes.indiatimes.com/industry/media/entertainment/anil-ambanis-reliance-entertainment-to-re-launch-ott-platform-globally/articleshow/58355516.cms>

<sup>39</sup> *OTT platform catching up in India*. The Statesman. (2022, April 2). Retrieved September 14, 2022, from <https://www.thestatesman.com/entertainment/ott-platform-catching-up-in-india-1503056879.html>

<sup>40</sup> Tha, L. (2021, July 15). *Streaming market in India to be worth \$15 billion by 2030*. live mint. Retrieved September 15, 2022, from <https://www.livemint.com/industry/media/indias-streaming-market-to-be-worth-15-billion-by-2030-11626350404092.html>

<sup>41</sup> Jha, L. (2021, July 15). *Streaming market in India to be worth \$15 billion by 2030*. Mint. Retrieved December 1, 2022, from <https://www.livemint.com/industry/media/indias-streaming-market-to-be-worth-15-billion-by-2030-11626350404092.html>



language barriers and allowed the Indian audience to access a large pool of content.<sup>42</sup> This in turn also largely contributed to widening the perspectives of the audience while also pushing the regional content industry to create original content that appeals to consumers.<sup>43</sup> However, the increasing popularity of these platforms also started inviting demands for promulgating appropriate regulatory mechanisms. The government initially denied recommendations for content regulation measures due to concerns on the impact on the right to freedom of speech and expression. In 2016, as a response to an RTI application<sup>44</sup>, the Ministry of Information and Broadcasting clarified that it was not considering to create any regulatory framework to censor online content.

However, in due course with the need to oversee the rapid production and consumption of content the need for a suitable regulatory approach became relevant. In 2019, the legislature started working on amending the Cinematograph Act, 1952 taking into consideration the findings of the two committees- Mukul Mudgal Committee of 2014<sup>45</sup> and the Shyam Benegal Committee of 2016.<sup>46</sup> The Committees were constituted by the MIB to suggest ways to improve the regulatory mechanisms for cinema and content regulation.

In 2018, a PIL was filed in the Delhi High Court<sup>47</sup> against OCC platforms, arguing that there were no guidelines to regulate the content which was streamed by such platforms. The government clarified that the online platforms were not required to obtain any licence for displaying their content online given their on-demand nature of service which does not necessitate a similar level of scrutiny as publicly accessible broadcast media like TV or theatrical exhibition. The Court agreed with the government's reasoning and dismissed the petition while noting that there was no need for any guidelines or statutory regulation for online content and that the IT Act, 2000 contained necessary provisions and safeguards "for taking action in the event of any prohibited act being undertaken by the broadcasters or organisations in the internet/online platform."

However, as the Internet evolved and the industry grew, both globally and locally, India has also witnessed a rise in the number of streaming platforms, variety of content and the number of users.<sup>48</sup> This has also led to a rise in complaints against content based on various grounds such as national security, public order, obscenity, morality, etc., and the regulators wanting to envisage a robust regulatory framework for the sector.<sup>49</sup>

<sup>42</sup> Farooqui, J. (2021, August 3). *Regional OTTs on the rise as native audiences demand local language content*. Exchange4media. Retrieved December 2, 2022, from <https://www.exchange4media.com/digital-news/regional-platformsdriving-the-second-ott-wave-in-india-114698.html>

<sup>43</sup> *Global Entertainment & Media Outlook 2022–2026 perspectives report*. PwC. Retrieved December 1, 2022, from <https://www.pwc.com/gx/en/industries/tmt/media/outlook/outlook-perspectives.html>

<sup>44</sup> Deep, A. (2016). I&B Ministry: We are not considering censorship of Hotstar and Netflix | MediaNama. MediaNama. Retrieved 13 September 2022, from <https://www.medianama.com/2016/12/223-ib-ministry-not-considering-censorship-hotstar-netflix/>

<sup>45</sup> *Report of the Committee of Experts to Examine Issues of Certification under The Cinematograph Act 1952*. Mib.gov.in. (2013). Retrieved 13 September 2022, from [https://mib.gov.in/sites/default/files/Report\\_of\\_Expert\\_committee\\_0.pdf](https://mib.gov.in/sites/default/files/Report_of_Expert_committee_0.pdf)

<sup>46</sup> *Report of the Committee of Experts Chaired by Shyam Bengal to Recommend Broad Guidelines/Procedures for Certification of Films by the Central Board of Film Certification (CBFC)*. Mib.gov.in. (2016). Retrieved 13 September 2022, from [https://mib.gov.in/sites/default/files/Shyam\\_Benegal\\_committee\\_Report\\_compressed\\_0.pdf](https://mib.gov.in/sites/default/files/Shyam_Benegal_committee_Report_compressed_0.pdf)

<sup>47</sup> Mahajan, S. (2019, May 10). *SC issues notice in plea seeking regulation of content on online streaming platforms*. Bar and Bench - Indian Legal news. Retrieved September 14, 2022, from <https://www.barandbench.com/news/supreme-court-issues-notice-in-a-plea-regulate-online-streaming-platforms>

<sup>48</sup> Subramanian, B. (2022, March 22). *How India is 'Cutting the Cord' to drive an OTT revolution*. Business Insider. Retrieved 15 September 2022, from <https://www.businessinsider.in/advertising/media/article/how-india-is-cutting-the-cord-to-drive-an-ott-revolution/article-show/90347924.cms>

<sup>49</sup> Mathur, S. (2021). *Received lots of complaints against some shows on OTT platforms, govt to issue guidelines soon: Javadekar - Times of India*. The Times of India. Retrieved 13 September 2022, from <https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/we-will-soon-issue-guidelines-for-ott-platforms-says-prakash-javadekar/articleshow/80611531.cms>





## Evolution of Content Regulation in India

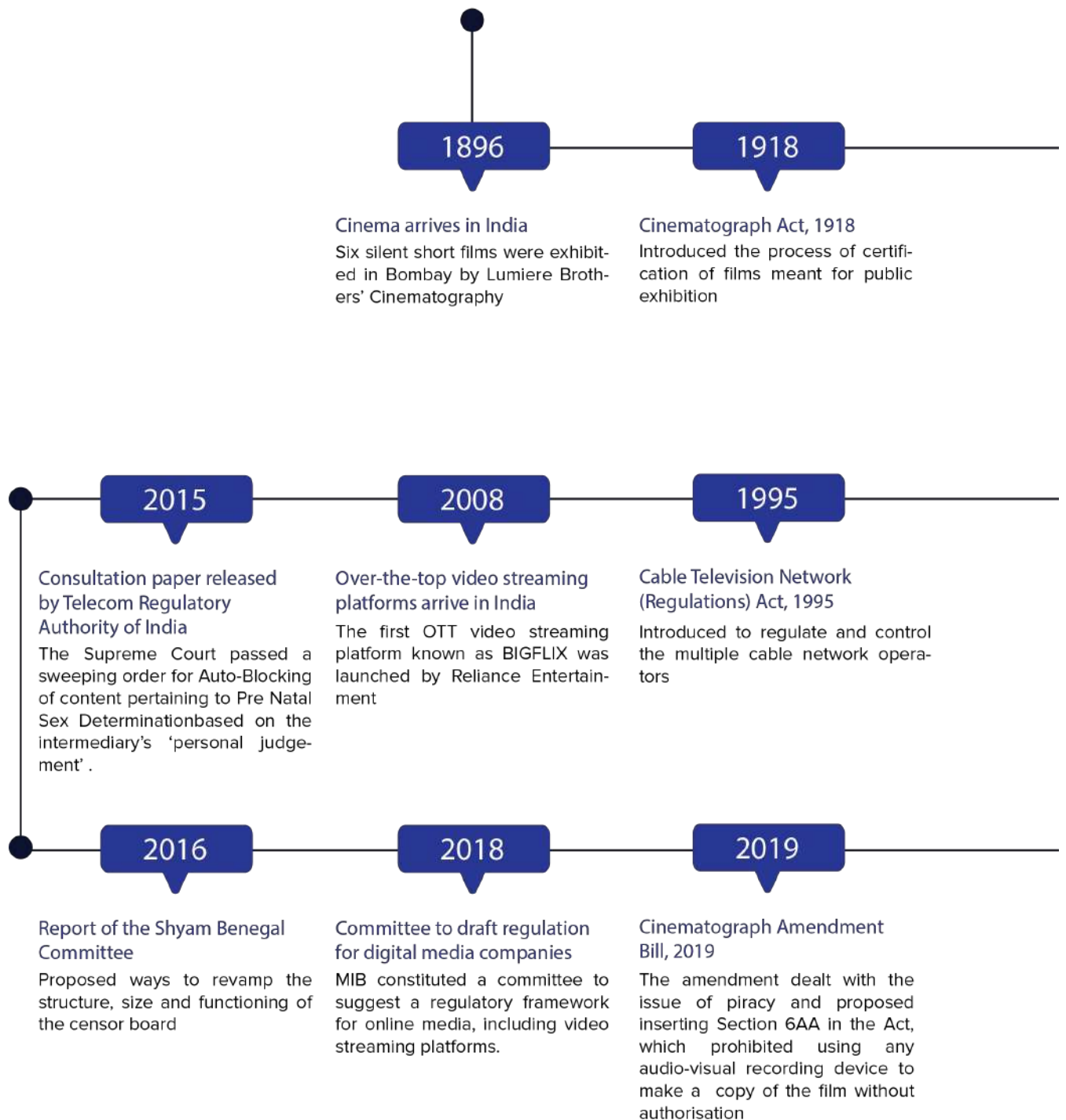
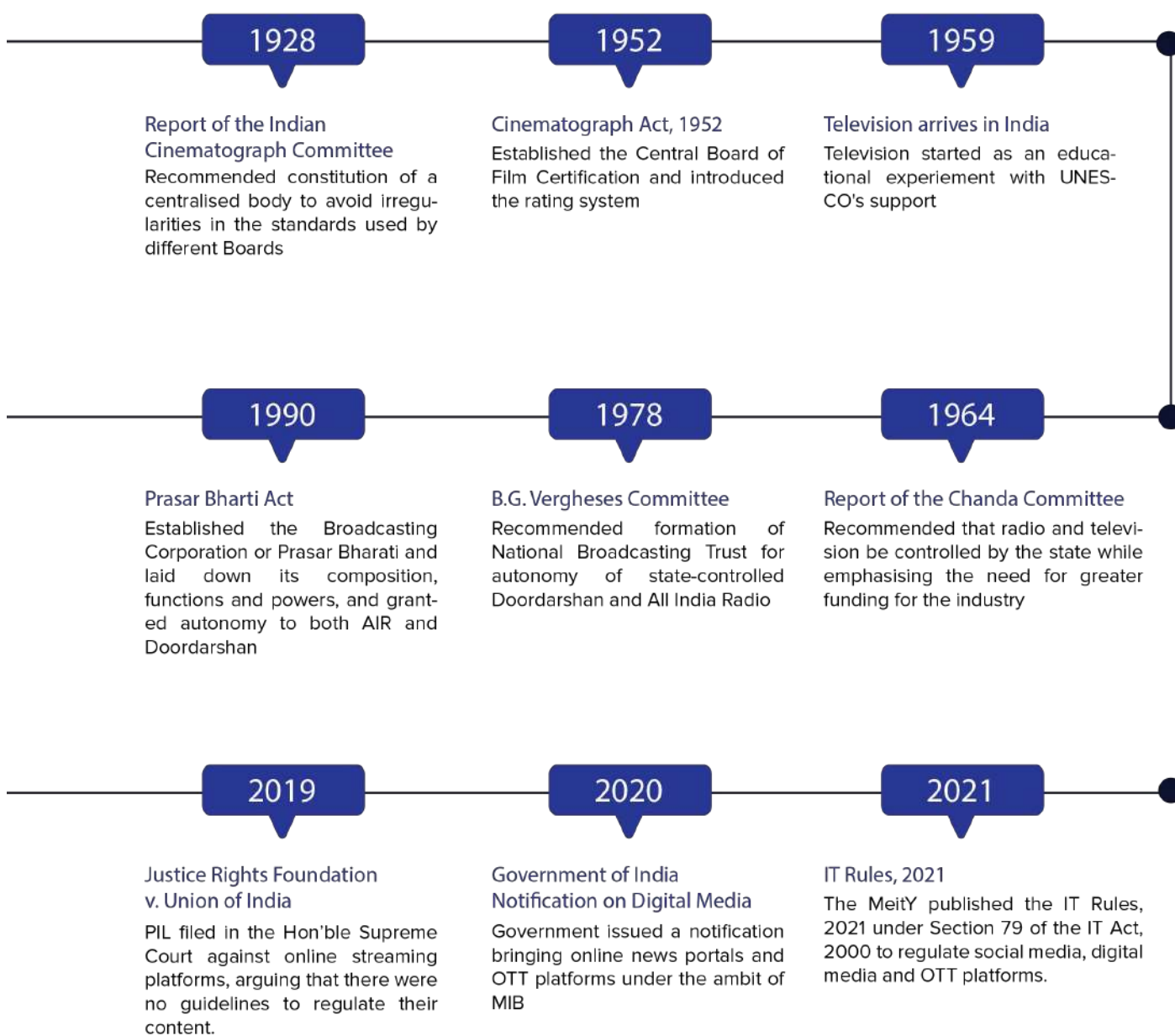


Figure 4: Timeline | Evolution of Content Regulation in India





## 2. ANALYSING EXPERIENCES FROM THE GROUND - PART III OF THE IT RULES, 2021

The previous section explains that around 2018, expectations to regulate OCC publishers started surfacing. However, there was an absence of clarity in terms of the form of such regulation. As the public awaited an announcement pertaining to the regulation of content on OCC platforms, the IT Rules, 2021 were published covering the content on such platforms, much to the surprise of experts. Part III of the IT Rules, 2021 deals with digital/online media, which as per the definitions in the Rules includes digital news media and OCC platforms.<sup>50</sup> The earlier set of rules placed for public consultation in 2018 did not mention these provisions.

The Rules provide that ‘publishers or intermediaries that transmit news and current affairs content’ shall be governed under these Rules and also under other existing laws such as the Press Council Act, 1978 and Cable Television Networks Regulation Act, 1995. Experts flagged their concern regarding the broad definitions of the regulated entities that may lead to its broader reach and regulation of even unintended entities. Secondly, in terms of OCC publishers, the Government through these rules laid an extensive code of ethics that are applied to the content hosted on such platforms.<sup>51</sup> In order to ensure that such a code is adhered to, the Government recommended a “three-tier” framework which includes self-regulation by covered entities, the establishment of a self-regulatory body for covered entities and final assessment by an Oversight Board established under the Central Government.<sup>52</sup>

This chapter analyses the experience of the OCC platforms regulated by Part III of the IT Rules, 2021 alongwith the views of expert stakeholders on these regulations. The inputs received from the platforms are analysed alongside the inputs from legal and public policy experts to determine the overall impact of the mandates in the digital ecosystem, their effectiveness in curbing concerns around publication of sexually offensive, nude or other forms of illegal or age inappropriate content and their interaction with goals of innovation and EoDB in this sector.

### 2.1. LEARNING FROM THE IT RULES EXPERIENCE TO ENSURE GREATER LEGISLATIVE COMPETENCE IN FUTURE

The IT Rules, 2021 have been framed under the Information Technology Act, 2000, wherein, MeitY is the nodal ministry to administer these rules. However, as per the IT Rules, Part III is administered by the MIB [Rule 8(1)].<sup>53</sup> While the noted the legitimate aim of the government to preserve the rule of law on the OCC platforms, this mechanism of regulation seemed unsuitable to them given the underlying legal questions.

<sup>50</sup> Part III, IT Rules, 2021.

<sup>51</sup> Code of Ethics, Appendix, IT Rules, 2021.

<sup>52</sup> Rule 9, IT Rules, 2021.

<sup>53</sup> Rule 8(1), IT Rules, 2021.

One of the respondents, who is a lawyer, explained that OCC platforms were not previously regulated under the IL Guidelines, 2011, envisaged under Section 79 of the IT Act. Section 79 is focused on the regulation of intermediaries and accordingly, the IT Rules, 2021 notified under the same provision that replaced 2011 guidelines does not possess the legal capacity to regulate OCC publishers. He further explained that Section 79 only provides competence to regulate intermediaries or technological platforms acting as conduits for third-party content / information. In return, the legislative bargain allowed the intermediaries to receive safe harbour protection - i.e. because of their role as amplifiers of ideas and content rather than creators of content. This is the assumption in the IT Act to deal with intermediaries who only operate as platforms that host or transmit user generated content, without technically having any control on the nature of the said content.

However, in the case of OCC publishers, this regulatory and legal logic seems unsuitable as OCC platforms are the actual publishers of the content unlike intermediaries where the users are the actual publishers.<sup>54</sup> User-generated or spontaneous unplanned content that provides the context of immediate harm and redress is not the case for OCC. Similarly, non-compliance with due diligence requirements under Section 79(2)(c) would result in the loss of the immunity provided by the IT Act but that immunity is not applicable to the Publishers of OCC at all.

Despite the legislative questions, publishers of OCC felt that the Rules have been successfully operationalised. Moreover, the institutionalised processes like those around self-ratings basis the age of the users and the three-tiered self-regulatory mechanism, especially Level 2 that ensures multi-stakeholder representation with a retired judicial expert as a chairperson, are working well. However, the issues flagged by the experts posit crucial takeaways for all future policy-making exercises, given that a strong legal foothold ensures both seamless operationalisation and smooth compliance.

Importantly, an offence under Section 66-A penalising content which is 'offensive' or causes 'annoyance' was struck down on the ground of vagueness, in *Shreya Singhal v. Union of India*.<sup>55</sup> However, the broad definitions of prohibited content envisaged under these Rules for OCC platforms, *like threatening or jeopardising state security or disturbing the public order*<sup>56</sup> pose concerns around revitalising some of the invalidated contours of Section 66-A. Accordingly, they might not only exceed the IT Act, but also contravene the Supreme Court's ruling,<sup>57</sup> and therefore may not be saved by any general rule-making power under Section 87(1) that is limited to implanting the provisions of the IT Act.

## 2.2. RECONSIDERING THE DEFINITIONS OF OBJECTIONABLE CONTENT

Rule 8 of the IT Rules, 2021 envisages that platforms which 'publish news and current affairs content or online curated content' shall qualify as applicable entities for being governed by Part III and apply existing laws such as the Press Council Act, 1978 and Cable Television Networks Regulation Act, 1995 to them. The norms of journalistic conduct under the Press Council Act, and the Programme Code under the Cable TV Act are extremely wide, covering within their ambit issues such as 'half-truths' 'good taste' and 'decency', which by their fundamental

<sup>54</sup> Part III of the IT Rules, 2021 have been challenged across India in multiple petitions including the cases of *Nikhil Waghre v. Union of India* and *TM Krishna v. Union of India* and in the Bombay and Madras High Courts respectively. The courts have stayed the operation of Rule 9(1) and 9(3) of the IT Rules, 2021, which mandate adherence to the Code of Ethics and prescribe a three-tier grievance redressal mechanism.

<sup>55</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

<sup>56</sup> Online curated content, Code of Ethics, Appendix, IT Rules, 2021.

<sup>57</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

Importantly, an offence under Section 66-A penalising content which is ‘offensive’ or causes ‘annoyance’ was struck down on the ground of vagueness, in *Shreya Singhal v. Union of India* [AIR 2015 SC 1523]. However, the broad definitions of prohibited content envisaged under these Rules for OCC platforms (such as, ‘*threatening or jeopardising state security or disturbing the public order*’),<sup>58</sup> pose concerns around revitalising some of the invalidated contours of Section 66-A. Hence, such broad prohibitions/restrictions might not only exceed the ambit of the IT Act, but also contravene the Supreme Court’s ruling in *Shreya Singhal*, and therefore may not be saved by any general rule-making power under Section 87(1) that is limited to implanting the provisions of the IT Act.

Accordingly, the OCC platforms and also experts across the board emphasised that definitions of objectionable content must be revisited and made more targeted and specific to obviate the concerns of pre-censorship and promote creative freedom. To achieve such specificity and address concerns pertaining to vague restrictions on creative speech and expression, it may also be prudent to: (a) clearly recognise and incorporate express carve-outs for various forms of creative speech and expression which are constitutionally protected, such as satire, parody, etc.; and (b) rely upon settled Indian jurisprudence which sheds light on various grounds cited to stifle free speech and expression, such as ‘obscenity’ (for instance, see Supreme Court’s interpretation in *K.A. Abbas v. Union of India*, (1970) 2 SCC 780), ‘public order’ (for instance, see *Brij Bhushan & Anr. v. State of Delhi*, 1950 SCC 449), etc.

## 2.3. CODE OF ETHICS AND THREE TIER GRIEVANCE REDRESSAL MECHANISM

Rule 9 of the IT Rules, 2021 mentions that OCC publishers are subject to a Code of Ethics. This code is laid down in the Appendix which sets out principles regarding content that can be created and display classifications. To enforce these codes and to address grievances from the public on their content, publishers are now mandated to set up a grievance system which will be the first tier of a three-tier “appellate” system culminating in an oversight mechanism by the Central Government.<sup>59</sup>

OCC publishers as well as public policy experts and academicians highlighted that the redressal mechanism in its present form provides the right to appeal to the aggrieved person, whereas the publisher does not have any right to appeal against the decision of the self-regulating body, the inter-departmental committee or any action of the Secretary of the Ministry. This deprives the publishers of any statutory remedy or access to an appellate body before which they can register their grievances. This leads to an incurrence of additional legal costs and an increase in judicial burden as the publishers are constrained to follow the formal court recourse.

### 2.3.1 Self-regulating mechanism – Level 1

The first level of the grievance redressal mechanism entails the setting up of a private portal under Rule 11 by all the publishers where people can file their complaints. All the OCC

<sup>58</sup> Online curated content, Code of Ethics, Appendix, IT Rules, 2021.

<sup>59</sup> Rule 9, IT Rules, 2021.

platforms interviewed by the research team stated that they have established this mechanism and have also appointed an Indian resident grievance officer<sup>60</sup> to monitor the complaints and ensure their timely redressal. Almost all the lawyers, academics and public policy experts noted that the constitution of the office of the grievance officer and the clear delineation of their duties under the Rules has ensured greater accountability from the platforms towards user welfare.

Another important aspect discussed was the 24-hour timeline for acknowledging grievances<sup>61</sup> and 15 days for their redressal at Level 1 of the three-tier mechanism.<sup>62</sup> Most of the platforms said that the timeline has not been problematic and they have been able to address the grievances within the prescribed duration. However, public policy experts highlighted that prescribing a straight-jacketed timeline for redressal across all grades of harmful content is not the ideal approach. The degree of risk posed by different groups of content varies and the timeline for response should accordingly be prescribed. This shall ensure that the platforms prioritise the complaints which require more immediate attention and their internal processes are not overwhelmed in any given situation even if the number of grievances increases in future.

### 2.3.2. Self-regulating mechanism – Level 2

Level 2 of the grievance redressal mechanism envisaged under Rules 12, entails a self-regulatory body constituted by the publishers or their associations. The body is headed by a retired judge of the Supreme Court or High Courts or an eminent expert from the media and broadcasting industry or a child rights or human rights expert.<sup>63</sup> The body can have a maximum of six members. The primary responsibility of this body is to oversee that the publishers adhere to the Code of Ethics and address appeals against the decision of the publishers.<sup>64</sup>

Eleven Self-Regulatory bodies have been approved by the MIB since the implementation of these Rules out of which two are for Publishers of OCC content. These include Digital Publisher Content Grievances Council affiliated to the IAMAI, and the Indian Digital Publishers Content Grievance Council.<sup>65</sup>

The constitution of these bodies indicates a progressive move towards institutionalising a more flexible and evolving model of self-regulation. All the platforms interviewed stated that they have acceded to the jurisdiction of one or the other regulatory bodies and the process in this tier is working well. However, many of the platforms stated that the degree of executive control over the constitution and decisions of the body requires re-consideration. The Ministry's approval is necessary for the constitution of the body.<sup>66</sup> While this is a legitimate norm to ensure that their formation takes place in accordance with the prescribed norms, it would be helpful if the Ministry codifies the parameters and requirements for the constitution of the

<sup>60</sup> Rule 11(2)(a), IT Rules, 2021.

<sup>61</sup> Rule 10(2), IT Rules, 2021.

<sup>62</sup> Rule 11(2)(c), IT Rules, 2021.

<sup>63</sup> Rule 12(2), IT Rules, 2021.

<sup>64</sup> Rule 12(4) & (5), IT Rules, 2021.

<sup>65</sup> Ministry of Information and Broadcasting. (2022). *Self Regulatory Bodies*. Ministry of Information and Broadcasting. Retrieved 12 September 2022, from <https://mib.gov.in/self-regulatory-bodies>

<sup>66</sup> Rule 12(3), IT Rules, 2021.



self-regulatory body as there are no guidelines towards an organisation's approval process. Moreover, the majority of experts highlighted that most of the significant powers of the body are executive-controlled leading to questions around its ability to function independently. If the publisher fails to comply with the orders within the specified time, the body has no independent powers to ensure compliance and needs to refer the matter to the Oversight authority. Further, in matters related to deletion or modification of content, which is an exercise directly impacting the right to free speech of the users, the body headed by a retired judge needs to refer the matter to the Oversight authority which is a purely executive-led institution.

### **2.3.3. Oversight mechanism by the Central Government – Level 3**

The third level envisaged under Rules 13 and 14 contains oversight by an inter-departmental committee. The Inter-Departmental Committee is predominantly entirely composed of Central Government bureaucrats, and it may hear grievances in respect of the decision of the self-regulating bodies at level 1 or level 2 or refer directly by the Ministry following which it can deploy a range of sanctions from warnings, to mandating apologies, to mandating deletion, modification or blocking of content.<sup>67</sup> The committee is headed by an Authorised Officer of the Government of India, and consists chiefly of serving officials from various Ministries like the Ministry of Information and Broadcasting, Ministry of Women and Child Development, Ministry of Law and Justice, Ministry of Home Affairs, etc.<sup>68</sup>

Some of the platforms mentioned that it is not a feasible policy approach to have a complete executive oversight at tier 3 as this might pose concerns for editorial freedom in the long run and propagate self-censorship by the platforms. Civil Society Organisations and academicians also highlighted that the entire executive-heavy composition raises questions about whether the committee meets the legal requirements for any administrative body undertaking a 'quasi-judicial' function, especially one that may adjudicate on matters of rights relating to free speech and privacy. Most of the platforms mentioned that the system has been running fairly smoothly and the ecosystem acknowledges the legitimate intent of the government behind the oversight. However, the fact that the other two levels are subjugated to the decisions of the oversight body raises questions about the self-regulatory nature of the entire framework. This is especially significant given that tier 2 is headed by a retired judge and has been working well, but the executive oversight puts a judicial officer subservient to the government for a function that is predominantly adjudicatory in nature.

---

<sup>67</sup> Rule 14(2), (3) & (5), IT Rules, 2021.

<sup>68</sup> Rule 14(1), IT Rules, 2021.



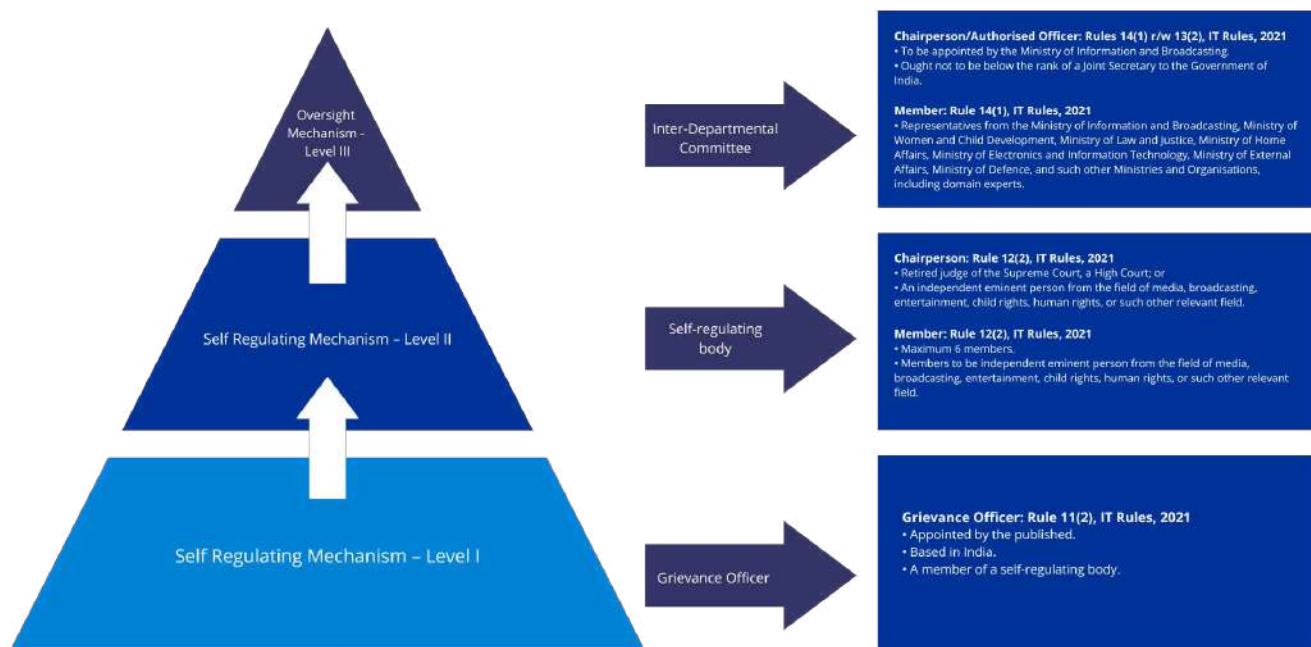


Figure 5: Three Tier Grievance Redressal Mechanism under Part III of the IT Rules, 2021

## 2.4. POWERS TO DELETE, MODIFY OR BLOCK INFORMATION FOR PUBLIC ACCESS

Rule 16 prescribes an ‘emergency power’ reserved with the Secretary of MIB, to pass interim orders blocking any content on grounds mentioned under Section 69-A without even giving the publishers an opportunity of hearing.<sup>69</sup> While Section 69-A of the IT Act (and Rules there-under) do include blocking powers for the Government, they only exist via intermediaries. However, Rule 15 has expanded this power to ‘publishers’. Further, Rule 16 allows for the passing of emergency orders for blocking information, including without giving an opportunity for a hearing for publishers or intermediaries. There is only a provision for such an order to be reviewed by the inter-departmental committee within 2 days of its issue.<sup>70</sup>

Many experts opinionated that executive-mandated takedowns have been inaccurate and opaque for intermediaries. This can hinder viewer access if implemented similarly for the OCC platforms. Further, Section 69-A of the IT Act is a limited and specific emergent power as described in the *Shreya Singhal* case, and blocking under this provision can only be invoked on grounds such as national security.<sup>71</sup> The provision does not empower the government to direct OCC platforms to delete content or make changes, especially on the subjective grounds stipulated under the Code of Ethics. Civil Society Organisations and legal experts pointed out that in the last few years, we have witnessed several blocking orders issued by MIB using powers under Rule 16. However, the lack of a well-defined explanation to justify the validity of the orders has been a major concern. In certain situations that involve sensitive issues, public availability of the order may lead to certain security concerns. However, the ambit of such

<sup>69</sup> Rule 16(2), IT Rules, 2021.

<sup>70</sup> Rule 16(3), IT Rules, 2021.

<sup>71</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

issues should be clearly delineated to prevent the abuse of this power and detailed orders with exact reasons for the blocking of content must be made public in all the other situations. This is critical to enable the citizens and the higher judiciary to meaningfully exercise their right to constitutional remedies and the power of judicial review respectively.

## 2.5. REVIEW OF THE DIRECTIONS BY THE REVIEW COMMITTEE

Rule 17 envisages a review committee to review any or all the directions, recommendations and orders issued by the inter-departmental committee. This review committee is the committee set up under Rule 419A of the Indian Telegraph Rules, 1951 ('Telegraph Rules'). The members include the Cabinet Secretary as the Chairman, and Secretary to the Government of India in-charge, Legal Affairs and Secretary to the Government of India, Department of Telecommunications as members.<sup>72</sup> This composition of the committee again posits questions around its ability to conduct independent reviews. As the members are representatives of the executive, this would essentially mean the same organ of the state evaluating the validity of its own orders. One of the public policy experts highlighted that this is one of the major issues identified both in the review committee constituted under the Telegraph Rules as well as in the Information Technology (Blocking Rules), 2009. It is essential that this issue is addressed at the earliest and the committees be reformed to include retired judges and members from the civil society in addition to the government representatives to ensure more judicious and independent review to enhance the trust of the citizenry in the state institutions. Moreover, several OCC publishers mentioned that in line with the aforesaid need for an appellate body which hears grievances of publishers, it would be appreciable if the review committee may be called upon to consider grievances of and inputs from the aggrieved publishers in relation to broad blocking orders passed under Rules 15 and 16.

## 2.6. AGE RATING REQUIREMENTS

The Code of Ethics prescribes a new set of content classification requirements for OCC platforms. The platforms have to rate the content into five age-based categories - U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (Adult).<sup>73</sup> Platforms are required to implement parental locks for content classified as U/A 13+ or higher, and reliable age verification mechanisms for content classified as "A". The OCC platforms have to prominently display the age rating specific to each content or programme together with a content descriptor informing the user about the nature of the content, and advising on viewer description (if applicable) at the beginning of every programme enabling the user to make an informed decision, prior to watching the programme.<sup>74</sup>

Most of the OTT platforms stated that they already had most of these age rating requirements in place and the directions have not led to any major operational modifications for them. However, civil society experts emphasised on the need to focus on greater capacity-building efforts to sensitise children and more importantly parents to ensure the fulfilment of the objective behind this Rule. Lawyers and public policy experts noted the significance of these norms to further child safety, while also highlighting the need to ensure judicious implementation of age verification and content monitoring techniques given the underlying privacy concerns.<sup>75</sup>

<sup>72</sup> Rule 419A (16), Telegraph Rules.

<sup>73</sup> Content Classification, Online Curated Content, Code of Ethics, Appendix, IT Rules, 2021.

<sup>74</sup> Display of Classification, Online Curated Content, Code of Ethics, Appendix, IT Rules, 2021.

<sup>75</sup> Allison, P. (2019). *Politics, privacy and porn: the challenges of age-verification technology*. ComputerWeekly.com. Retrieved 15 September 2022, from <https://www.computerweekly.com/feature/Politics-privacy-and-porn-the-challenges-of-age-verification-technology>

**Table 2: Key Insights from the Implementation Experience of Part III of the IT Rules, 2021 for Publishers of Online Curated Content**

## Key Insights and findings

- The majority of the respondents appreciated the legitimate aim of the government to preserve the Rule of law on the OCC and NCA platforms, however regulation under the IT Rules seemed unsuitable to them given the underlying legal and constitutional questions.
- The majority of the respondents appreciated the legitimate aim of the government to preserve the Rule of law on the OCC and NCA platforms, however regulation under the IT Rules seemed unsuitable to them given the underlying legal and constitutional questions.
- Majority of the experts highlighted the need to re-evaluate the definitions of objectionable content such as half-truths, decency, morality etc. under the Rules to adhere to the State's overall objective of ensuring soft-touch regulation.
- Several OCC platforms and lawyers highlighted the need to accord statutory remedy to publishers of OCC content as well against the decisions of the grievance redressal bodies and actions by the Central Government State secretary.
- Majority of the lawyers, academics and public policy experts noted that the constitution of the office of the grievance officer and the clear delineation of their duties under the Rules has ensured greater accountability from the platforms towards user welfare.
- The majority of platforms said that the timelines for grievance acknowledgement and redressal at level 1 of the Self Regulatory Mechanism have not caused any significant challenge to date. However, public policy experts and academics stressed that adopting a risk-based approach and providing timelines according to the degree of harm will be a more sustainable way forward.
- OTT platforms stated that the degree of executive control over the constitution and decision of the Self Regulatory body at level 2 of the grievance redressal mechanism requires re-consideration. Many civil society organisations highlighted that most of the significant powers of the body are executive-controlled leading to questions around its independent functioning.
- Some of the platforms and the majority of Civil Society Organisations and academicians highlighted the censorship concerns with purely executive oversight at level 3 of the grievance redressal mechanism, and the inconsistency of this mandate with the principles of 'Checks and Balances' and 'Separation of Power'.
- Several experts pointed out that the lack of appropriate reasoning to justify the validity of the emergency blocking orders issued by MIB under the IT Rules, 2021 needs deliberation.
- OCC platforms and Public Policy Experts emphasised on the need to reform the review committee that reviews the blocking orders. It was discussed that the committee must include retired judges and members from the civil society to ensure more judicious and independent decision-making.
- Most of the OCC platforms stated that they already had the content classification requirements in place and the directions have not led to any major operational modifications. Civil society experts emphasised on the need to focus on greater capacity-building efforts to sensitise children and more importantly, parents to ensure the fulfilment of the objective behind this Rule.
- 2/3rd of the OCC platforms interviewed stated that Part 3 of the IT Rules, 2021 have been operationalised by them and apart from a few principle level concerns, the Rules have not caused any significant business hindrances for them.

## 3. GLOBAL BEST PRACTICES

The OCC platforms have witnessed an exponential growth in positive demand across all regions in the world. The market is expected to grow from \$44.54 billion in 2021 to \$139.00 billion in 2028 at a CAGR of 17.7%,<sup>76</sup> owing to the rise in internet penetration, affordability of devices and low-cost subscription plans. The OCC platforms have exposed the audiences to varied and fresh content while contributing to the economy and also fuelling competition among other local and regional players.

As the OCC platforms continue to conquer traditional broadcasting methods, governments around the world are looking to regulate the space effectively. However, while it is essential to regulate the growing concerns around exposure to offensive or age appropriate content, it is also crucial to take into consideration that the digital rights of the users and ease of doing business of the platforms are not hampered. Globally, the OCC platform industry is still at a relatively nascent stage and policymakers have not arrived at established best practices.

As countries across the globe work towards regulating the OCC space with a diverse set of objectives, it is insightful to look at the international best practices adopted by the countries to come up with a balanced approach towards regulating the OCC space.

### 3.1 UNITED STATES

The Federal Communications Commission (FCC) is the primary authority regulating telecommunications law, regulation and technological innovation in the United States. While there is no specific legislation governing the OCC platforms, the FCC has some self-determined rules such as requiring programs shown on TV to be captioned when re-shown on the internet.<sup>77</sup> OCC platforms are also subjected to copyright laws in the country. The FCC has not clarified its stance on the regulation of OCC video and audio delivery in the future.

### 3.2 BRAZIL

While the South American country does not have a dedicated law for regulating OCC platforms, the Marco Civil Law of the Internet<sup>78</sup> broadly regulates the internet in Brazil. In order to protect the freedom of expression and prevent censorship, the law exempts internet application providers from the liability arising out of damages caused by third-party content. Internet application providers can only be subjected to civil liability if they fail to comply with a specific court order mandating the removal of unauthorised content. However, an exception applies in cases of nudity or sexual activities of private nature. In such cases, a court order is not required

<sup>76</sup> Over the top [OTT] services market size, share: Growth, 2028. Fortune Business Insights. (n.d.). Retrieved October 4, 2022, from <https://www.fortunebusinessinsights.com/industry-reports/over-the-top-services-market-100506>

<sup>77</sup> Regulation of Digital media and Intermediaries. Oxford Pro Bono Publico. (2021). Retrieved September 14, 2022, from [https://www.law.ox.ac.uk/sites/files/oxlaw/opbp\\_report-regulation\\_of\\_digital\\_media\\_and\\_intermediaries.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/opbp_report-regulation_of_digital_media_and_intermediaries.pdf)

<sup>78</sup> Marco Civil Law of the Internet, LAW No. 12.965 of 2014.

and the internet application provider is held liable for the breach of privacy in case they fail to take down contentious content after receiving notice by the participant or his/hers legal representative.

Moreover, the General Telecommunication Law<sup>79</sup> establishes a clear difference between the activities that add new features related to access, storage, presentation, handling or recovery of information to telecom services and the heavy telecom activities which include the “transmission, emission or reception, by wire, radio, optical means or any other electromagnetic process, of symbols, characters, signals, writing, images, sounds or information of any nature.”

### 3.3 SINGAPORE

OCC players in Singapore are regulated by the Infocomm Media Development Authority and both local and offshore OCC providers are required to comply with Class Licence Conditions, the Internet Code of Practice and the newly-issued Content Code for Over-the-Top, Video-on-Demand and Niche Services. The OTT Content Code requires OTT providers to adhere to and ensure that content on such platforms does not undermine public interest or order, national harmony, or good taste and decency. Service providers are also required to give disclosure to the audience on violence, nudity, sex, language, drug use and horror.

A classification method is also prescribed under the Code which requires services to classify their content according to the following categories: G (general), PG (parental guidance), PG13 (parental guidance for kids under 13 years), NC16 (not for children under 16), M18 (content for viewers above 18) and R21 (for those above 21 years). The Code also contains a list of do's and don'ts for the service providers are required to follow, including compliance with the prevailing laws of Singapore.

### 3.4 AUSTRALIA

While traditional media is regulated by the Australian Communications and Media Authority (ACMA), the “eSafety Commissioner” regulates digital media including OCC services. The content is required to be classified into the following categories: RC (refused classification) content which cannot be sold, advertised or imported in Australia; X 18+ (content restricted to adults); R18+ (content restricted to adults due to its high impact and may offend some sections of the adult community), or MA 15+ (content restricted to the people over the age of 15). Furthermore, the eSafety Commissioner is empowered to order content removal where it falls under the content categories governed by the Broadcasting Services Act 1992, Enhancing Online Safety Act 2015, Criminal Code Amendment (Abhorrent Violent Material) Act 2019, and the Online Safety Act 2021.<sup>80</sup>

---

<sup>79</sup> General Telecommunications Law, Federal Law No. 9,472 of 1997.<sup>80</sup> Rule 16(3), IT Rules, 2021.

<sup>80</sup> *Regulation of Digital media and Intermediaries*. Oxford Pro Bono Publico. (2021). Retrieved September 14, 2022, from [https://www.law.ox.ac.uk/sites/files/oxlaw/opbp\\_report-regulation\\_of\\_digital\\_media\\_and\\_intermediaries.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/opbp_report-regulation_of_digital_media_and_intermediaries.pdf)

## 3.5 MALAYSIA

The Malaysian Communications and Multimedia Commission (MCMC) is the key regulator of communications and multimedia in Malaysia and regulates the OCC space as well. There is no specific legislation regulating the OCC platforms and they are exempted from the licensing requirements, rate regulation, local content quota and “made in Malaysia” requirements.<sup>81</sup> More recently, the regulatory body also clarified that the content streaming on OCC platforms was a matter of users’ choice including the subscription, and that the platforms differ from traditional broadcasting services.<sup>82</sup> The Malaysian government is also planning to introduce an advocacy programme to educate users about ensuring maturity while selecting content on the platforms, and also encourage adoption of parental control practices.

## 3.6 NEW ZEALAND

While there is no specific law regulating the OCC space in New Zealand, the recently passed Film, Videos, and Publications Classification (Commercial Video On-Demand) Amendment Act in 2020, which requires OCC platforms to introduce clear and consistent ratings and classifications for the audiences in New Zealand.

---

<sup>81</sup> *Good practice policies for online video content services ('over the top' or OTT)*. Asia Internet Coalition. (2021). Retrieved October 4, 2022, from <https://aicasia.org/2021/11/12/good-practice-policies-for-online-video-content-services-over-the-top-or-ott/>

<sup>82</sup> Hazim, A. (2022, August 10). *Govt can only advocate, no law on censorship for streaming platforms*. The Malaysian Reserve. Retrieved October 4, 2022, from <https://themalaysianreserve.com/2022/08/10/govt-can-only-advocate-no-law-on-censorship-for-streaming-platforms/>





## 4. ANALYSING VOICES FROM INDIA'S CREATIVE INDUSTRY

### 4.1. WHAT IS THE CREATIVE ECONOMY?

The term 'creative industries' became popular in the research and development space since the inception of the 21st century. This can majorly be attributed to the foregrounding of knowledge and creativity as prominent resources for social wellbeing and economic growth. First used in the Australian report of 1994 titled 'Creative Nation', the term became more popular with the establishment of the Creative Industrial Task Force by the United Kingdom's Department of Culture, Media and Sport in 1997.<sup>83</sup> Thereafter, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>84</sup> can be argued to be the most prominent global effort towards recognising the significance of creative expression and taking crucial steps towards furthering the growth of cultural production and creativity as a critical limb of the sustainable development goals.

According to the UN's Creative Economy Report 2010<sup>85</sup> the creative industries:

- *are the cycles of creation, production and distribution of goods and services that use creativity and intellectual capital as primary inputs;*
- *constitute a set of knowledge-based activities, focused on but not limited to arts, potentially generating revenues from trade and intellectual property rights;*
- *comprise tangible products and intangible intellectual or artistic services with creative content, economic value and market objectives;*
- *stand at the crossroads of the artisan, services and industrial sectors; and constitute a new dynamic sector in world trade.*

However, the report mentions that this is an evolving concept as the number of fields that can come under the purview of the creative economy can keep growing.

### 4.2. SIGNIFICANCE OF THE CREATIVE INDUSTRY IN SOCIO-ECONOMIC GROWTH

The creative economy is a crucial means of addressing significant social and cultural needs.<sup>86</sup> It

<sup>83</sup> Department of Culture, Media & Creative Industries. (n.d.). The Birth of the Creative Industries Revisited. Retrieved September 14, 2022, from <https://www.kcl.ac.uk/cmci/research/the-birth-of-the-creative-industries-revisited>

<sup>84</sup> The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, United Nations Educational, Scientific and Cultural Organization.

<sup>85</sup> Creative Economy Report 2010: *A Feasible Development Option*. United Nations Conference on Trade and Development. (2010). Retrieved September 14, 2022, from [https://unctad.org/system/files/official-document/ditctab20103\\_en.pdf](https://unctad.org/system/files/official-document/ditctab20103_en.pdf)

<sup>86</sup> Mahmood, I. (2013). Influence and Importance of Cinema on the Lifestyle of Educated Youth: A study on University Students of Bangladesh. *IOSR Journal Of Humanities And Social Science*, 17(6), 77-80. <https://doi.org/10.9790/0837-1767780>



facilitates cultural inclusivity by presenting a wide range and diversity of human experiences. It is also valuable to the extent that its association with individual creativity implies that it often involves the creation of new knowledge, which creates wider benefits through spillovers to other sectors.<sup>87</sup> The intellectual property generated by the creative economy can make output in other sectors more distinctive and valuable to consumers.<sup>88</sup> For instance, customers buy consumer goods from clothes to cosmetics to food and beverage products which feature in their favourite TV shows and movies. It can also more directly enhance productivity in other sectors through creating new software tools in the IT industry or connecting new and innovative goods and services with customers through sales and marketing.<sup>89</sup> In all these ways, the creative economy increases the overall prosperity of the digital ecosystem.

### 4.3. THE INDIAN CREATIVE ECONOMY

The recent scholarship on India's creative economy reflects a keen interest in exploring the potential of this sector.<sup>90</sup> This interest is largely stemming from the perspective of economic growth presented by this sector, and also more recently from the potential of entrepreneurship and innovation as evidenced from the NITI Aayog's report of 2015.<sup>91</sup> The report stated that:

*“The committee proposes using digital platforms to encourage innovation, reforming the educational system to encourage creativity and upskilling workers to make them more employable, improving the ease of doing business, and strengthening intellectual property rights.”*

These observations reflect the interest in harnessing creativity to foster entrepreneurship and innovation. Further, it also reflects the idea of expanding the scope of such entrepreneurship and innovation to promote social inclusion and cross cultural collaboration. The report also highlights the need to improve Ease of Doing Business to encourage investments and expand the potential of the sector to make greater contributions to our cultural and economic prosperity.

### 4.4. REGULATORY AND POLICY CHALLENGES

Furthering Ease of Doing Business and preserving creative freedom necessitates both progressive regulations as well as social acceptance of individual autonomy. Currently there exists a range of legislations and policies governing different aspects of the creative economy with many of the regulations backed by stringent criminal sanctions.

In our interviews with content creators and film producers, the majority of them noted that the multiplicity of legislations not just leads to compliance uncertainties but also raises questions

<sup>87</sup> Deloitte. (2021, June). *The Future of the Creative Economy*. Retrieved September 15, 2022, from <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-future-creative-economy-report-final.pdf>

<sup>88</sup> United Nations Development Programme & UNESCO. (2013). *Creative Economy Report 2013: Widening Local Development Pathways*. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000224698>

<sup>89</sup> Deloitte. (2021, June). *The Future of the Creative Economy*. Retrieved September 15, 2022, from <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-future-creative-economy-report-final.pdf>

<sup>90</sup> Asian Development Bank, (2022). *Creative India: Tapping the Full Potential*. Retrieved June 23rd, 2023 from <https://www.adb.org/publications/creative-india-tapping-full-potential>

<sup>91</sup> NITI Aayog, (2015). *Report of the Expert Committee on Innovation and Entrepreneurship*. NITI Aayog.

around the authority of the multiple bodies that formulate these policies. While there already exists the traditional Indian Penal Code that defines a range of speech and content related criminal offences such as sedition<sup>92</sup>, obscenity<sup>93</sup>, defamation<sup>94</sup>, etc., there are also multiple other guidelines and directions issued by different sectoral bodies and even State governments in many instances.<sup>95</sup> Moreover, all these guidelines prescribe their own forum and process for grievance redressal. Multiple OCC platforms noted that this multiplicity of forums leads to overarching compliance burden and risk of double jeopardy where they may be punished under multiple regulations for the same issue. They stressed that this is as a deterrent factor where the OCC publishers may be deterred from publishing content which may raise concerns and complaints (irrespective of how frivolous such complaints may be), thereby stifling creative expression. Accordingly, there is an urgent need for harmonisation and consolidation of these directives into one singular framework.

The self regulatory framework envisaged under the IT Rules prescribes a well defined process for filing of complaints and seeking redressal. While there are concerns impacting the smooth functioning of the Rules, as discussed in the foregoing chapters, it will be beneficial that those concerns are addressed collaboratively and the framework is institutionalised as a singular mechanism for grievance redressal and the complaints received by any other government or statutory body is transferred the Grievance Redressal Body of the respective OCC platform. Majority of the content creators and producers as well as many of the OCC platforms also highlighted the infeasibility of criminal liability associated with creative laws. They noted that such provisions impact the creative freedom of the artists by promoting a culture of self censorship and also lead to economic burden for the producers and directors.

## 4.5 SOCIETAL CHALLENGES

The challenges emanating from the criminal provisions and multiple forums are aggravated by the societal sensitivities. All the content creators film directors and producers were unanimous in their opinion that the petty police complaints filed by individuals and groups against movies and online series is the most critical concern faced by them. The situation has worsened in the last few years with such societal resistance becoming a constant phenomenon for almost every content based on any sensitive issue like religion, sexual orientation, women rights etc.<sup>96</sup> Majority of the stakeholders from the creative industry highlighted that most of such actions are quashed by the courts for failure to pass the test of judicial scrutiny.

One of the producers explained that the creative industry undertakes extensive research and analysis at the self certification stage to assess the feasibility of creating any content. All the prominent societal and community based sensitivities are considered by the industry and the creative ideas of the artists are tailored accordingly. Further, an immense amount of executive

<sup>92</sup> Section 124A, IPC, 1860.

<sup>93</sup> Section 292, IPC, 1860.

<sup>94</sup> Section 499, IPC, 1860.

<sup>95</sup> India Today. (2018, January 16). *Padmaavat Ban: How many states have banned the Bhansali Film?* India Today. Retrieved September 15, 2022, from <https://www.indiatoday.in/movies/celebrities/story/padmaavat-row-states-ban-rajasthan-gujarat-himachal-pradesh-1144730-2018-01-1>

<sup>96</sup> Dutta, A. N. (2021, March 4). *Netflix, Amazon, Alt Balaji want protection from firs, time to classify shows based on age*. The Print. Retrieved December 1, 2022, from <https://theprint.in/india/netflix-amazon-alt-balaji-want-protection-from-firs-time-to-classify-shows-based-on-age/615994/>

hours and outsourcing costs are also invested into finalising the content. Many producers and OCC platforms stressed that it is practically impossible that any unlawful content gets clearance after such rigorous rounds of screening. Hence, the frequently reported instances of criminal complaints against directors and producers<sup>97</sup> and demands for injunctions<sup>98</sup> against the release of the content is an unreasonable restriction on their creative freedom and economic rights.

## 4.6 POLICY INTERVENTIONS TO PROMOTE EASE OF DOING BUSINESS

Despite the concerns delineated above, most of the platforms and content creators agreed that the Indian society has evolved over the years with the increased literacy rates and wider acceptance of individual autonomy and liberty. The creative industry has also played a major role in widening societal perspectives and making the audience more receptive to the conventional ideas and values.<sup>99</sup> However, this cultural growth needs appropriate policy interventions to cater to the key concerns faced by the industry and to ensure its continued growth and contribution to the country's cultural and economic development.

It is important to ensure preciseness of guidelines for governing online content and the platforms must ensure due compliance with the same at the stage of self certification itself. It is equally important to decriminalise the regulations binding the creative economy given their impact on freedom of expression and the consequent economic burden. The need for decriminalisation is further strengthened by the fact that the degree of harm emanating out of creative works does not fulfil the fundamental thresholds of guilt and wrongdoing envisaged under the criminal law jurisprudence.

These policy overhauls must also be complimented by the requisite capacity building efforts to sensitise the citizenry about the formal mechanisms of grievance redressal and the need to exercise greater discretion before initiating unwarranted legal recourse to restrict creative works.

It is equally important that MIB and the Ministry of Human Resource Development collaborate with the relevant government bodies such as the National Commission for the Protection of Child Rights and the National Commission for Women to nurture greater awareness on consumer protection, digital rights and responsible user behaviour to ensure a safe online environment. As discussed in the previous chapters, all the OCC platforms undertake content

<sup>97</sup> Deshpande, S. (2021, January 20). *Bombay HC Grants anticipatory bail to writer, director, producer of Tandav*. The Times of India. Retrieved September 14, 2022, from <https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/bombay-hc-grants-tran-sit-aba-to-writer-director-producer-of-taandav/articleshow/80366799.cms>; Padmaavat: Rajasthan HC quashes fir against bhansali after watching film. Hindustan Times. (2018, February 6). Retrieved September 14, 2022, from <https://www.hindustantimes.com/india-news/ra-jasthan-hc-quashes-fir-against-bhansali-after-watching-padmaavat-says-film-reflects-our-glorious-past/story-1gAznJjDVShkv9f69E087I.html>

<sup>98</sup> *Sc dismisses plea seeking stay on 'Gangubai Kathiawadi' release, calls it an 'artistic expression within parameters of Law'*. The Economic Times. (2022, February 25). Retrieved September 14, 2022, from <https://economictimes.indiatimes.com/magazines/pa-nache/sc-dismisses-plea-seeking-stay-on-gangubai-kathiawadi-release-calls-it-an-artistic-expression-within-parameters-of-law/article-show/89830293.cms?from=mdr>; NDTV. (2022, August 6). *Court to hear plea seeking injunction against movie 'Kaali' on August 29*. NDTV.com. Retrieved September 14, 2022, from <https://www.ndtv.com/india-news/court-to-hear-plea-seeking-injunction-against-movie-kaali-on-august-29-3230703>

<sup>99</sup> Chandra, G. & Bhatia, S. (2019). Social Impact of Indian Cinema – An Odyssey from Reel to Real. *Global Media Journal (Arabian Edition)*. Retrieved from <https://amityuniversity.ae/gmj-ae/journals/Sudha-Bhatia-Geetanjali.pdf>

classification in accordance with the IT Rules, 2021 to prescribe age appropriate content for different groups of users.

There are also Terms of Service published by all the platforms and the internal grievance redressal mechanisms institutionalised as per the IT Rules, 2021. However, there is a need to spread greater awareness about these dedicated and more formalised redressal channels and the content classification directions. This sensitisation will ensure appropriate use of these mechanisms and the child safety resources to ensure a safer online experience which is the fundamental aim of all these policy interventions. As the users become more aware, they will also be able to give better feedback on the existing mechanisms, the Terms of Service and the redressal provided by the platforms and ways to make it better. Needless to say, this shall ensure a more seamless regime with protecting the interests of all the stakeholders.

**Table 3: Key Insights for Boosting the Creative Economy**

### **Key Insights and findings**

- Majority of the content creators and producers noted that the multiplicity of legislations and directives not just leads to compliance uncertainties but also raises questions around the authority of the bodies that formulate these policies.
- Multiple OCC platforms noted that the grievance redressal forum prescribed under the IT Rules, 2021 must be the sole platform for filing complaints and all Central and State government authorities must be prohibited to prescribe any other forums for this purpose.
- Majority of the content creators and producers as well as many of the OCC Platforms highlighted the infeasibility of criminal liability associated with creative laws which leads to self censorship and unwarranted economic burden.
- All the content creators, directors and producers were unanimous that the petty police complaints filed by individuals and groups to ban movies and online series is the most critical concern faced by them.
- Many producers and OCC platforms stressed that the creative industry invests an immense amount of executive hours and outsourcing costs at the self certification stage to assess the feasibility of every content. Hence, the frequently reported instances of criminal complaints against directors and producers and demands for injunctions is nothing but an unreasonable restriction on their creative freedom and economic rights.
- **9/10th of the content creators, directors and producers noted that the petty complaints, multiplicity of forums for filing complaints and criminal sanctions under creative laws impacts their ease of doing business.**



## 5. POLICY RECOMMENDATIONS

Consistent updation of regulatory and technological prowess is crucial to secure national interest both in security and economic terms. However, with several experts flagging certain concerns, it is important to engage in meaningful dialogue and ensure adequate responsiveness on part of all the stakeholders to create a robust content regulation regime that harmonises the quest for economic empowerment while ensuring online safety and preservation of digital rights.

**These actions are even more paramount in the background of the ongoing deliberations to enact a new Digital India Act that will replace the current IT Act. The authors of this study recommend the following policy considerations for the upcoming law to create a digital India that is both innovation friendly and digital rights enabling.**

- Ensuring well defined targeted principle based regulation that protects online free speech:** Broad definitions of prohibited content like *half-truths*, *indecentcy*, *causing annoyance etc.* opens avenues for subjective interpretations and enforcement which can stifle civil rights and creative freedom. Moreover, these broad definitions also lead to take down and blocking of content in a manner which is ultra vires and inconsistent with the Shreya Singhal judgement. Zeroing in on the problems that the regulation aims to solve is a critical decision that must be enhanced with stakeholder inputs and technical expert consultations. Additionally, it is also crucial to build express carve outs under the law for conditions including (a) various forms of legitimate free speech and expression such as satire, parody, etc. and (b) for the principles put forth through years of jurisprudence on objections to the grounds of obscenity, decency etc. as prescribed in the cases like KA Abbas and Brij Bhushan.
- Autonomous regulatory bodies with industry and community representation:** Executive dominance in tribunals (however diverse internally) has an adverse effect on both the freedom of expression and principle of *Separation of Power*. This also undermines the faith of stakeholders in these processes leading to an increase in litigation, its associated costs and the overall judicial burden. Autonomy and independence of the regulatory bodies must be ensured in every regulatory framework envisaged for the OCC sector. This is important to ensure greater acceptance of these frameworks by the affected parties and their increased usage which will reduce the burden of the courts and ensure swifter grievance redressal
- Institutionalising a singular and exclusive complaint redressal mechanism:** Multiplicity of complaints under different Central and state level forums must be prohibited and a framework should be formalised for the various Central and State bodies that receive grievances to direct them to a singular channel. The Self Regulatory Mechanism prescribed under the IT Rules, 2021 should be reformed to address the existing concerns and be made the exclusive forum for grievance redressal.

- **Raising awareness regarding the existing grievance redressal process under the IT Rules, 2021:** Improving user awareness regarding the existing grievance redressal mechanisms is equally important to ensure the optimum utilisation of the established processes for furthering user interests. It is paramount that the government, platforms and civil society work collaboratively to raise awareness and empower the users to use these mechanisms effectively for protecting their rights.
- **Institutionalisation of statutory remedies or access to appellate bodies for the OCC publishers:** The IT Rules, 2021 in their current form devoids the publishers of any statutory remedy or access to an appellate body before which they can agitate their grievances, leading to the incurrence of additional legal costs and an increase in judicial burden as they are constrained to follow the formal court recourse. It is important that this concern is promptly addressed and a mechanism be carved out for the publishers to agitate their concerns against the decisions of the Self Regulatory Body, Review Committee etc.
- **Decriminalisation of creative legislations to boost creative economy and artistic freedom:** Criminal sanctions on creative work not only undermine freedom of expression but also fail to satisfy the threshold of harm envisaged under criminal law jurisprudence. Penalties should be the norm for wrongs arising out of creative works rather than criminal proceedings. This will create a more stable and investment friendly creative industry and encourage artistic freedom.





## Imprint

© 2022 The Dialogue™ and Internet & Mobile Association of India

**Recommended Citation:** Shreya S. & Tiwari P. (2022, July 4). *IT Rules, 2021: A Regulatory Impact Assessment Study* (Vol. 1). New Delhi. The Dialogue and Internet And Mobile Association of India.

The Dialogue™ is a public-policy think- tank with a vision to drive a progressive narrative in India's policy discourse. Founded in 2017, we believe in facilitating well-researched policy debates at various levels to help develop a more informed citizenry, on areas around technology and development issues. The Dialogue™ has been ranked as the world's Top 10 think- tanks to watch out for, by the Think-Tank and Civil Societies Programme (TTCSP), University of Pennsylvania in their 2020 and 2021 rankings.

[www.thedialogue.co](http://www.thedialogue.co)

The Internet & Mobile Association of India (IAMAI) is not-for-profit industry body registered under the Societies Act, 1896. Its mandate is to expand and enhance the online and mobile value added services sectors. It is dedicated to presenting a unified voice of the businesses it represents to the government, investors, consumers and other stakeholders.

[www.iamai.in](http://www.iamai.in)