

Written Comments

RECOMMENDATIONS ON THE DRAFT BROADCASTING REGULATION SERVICE BILL, 2023



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INTRODUCTION

The Draft Broadcasting Services (Regulation) Bill, 2023 (the Bill) marks a significant stride in the evolution and integration of the legal framework that governs the broadcasting sector in India. Acknowledging the seminal role played by the Cable Television Networks (Regulation) Act of 1995, it is imperative to note that the landscape of media consumption has undergone transformative changes, propelled by technological advancements and the emergence of digital platforms.

The Bill aims to establish a comprehensive legal structure for the broadcasting sector, extending its governance to include the increasingly influential realms of OTT service providers. The Bill introduces concerning provisions, notably the establishment of Content Evaluation Committees for adherence to Programme and Advertisement Codes, the formation of a Broadcast Advisory Council, and the implementation of a nuanced penalty system correlated with the financial capabilities of the entities involved. It is commendable that the Bill also incorporates progressive measures to enhance accessibility for persons with

disabilities, thereby aligning with the government's vision of inclusivity.

This clause-by-clause analysis of the Bill offers insights and recommendations aimed at optimizing its effectiveness. These recommendations are based on in-depth research and stakeholder engagement by The Dialogue. Our analysis addresses critical aspects of the Bill, including the necessity for precise definitions, the imperative to protect privacy and editorial independence, the need for clear and objective programming and advertising codes, and the importance of fair and equitable penalty structures.

The core concern emanating from the Draft Bill is its approach to regulating OTT platforms alongside traditional broadcasters, despite their inherent structural, functional, and technical disparities. These differences necessitate a nuanced approach to regulation, recognizing the unique characteristics and requirements of OTT services as distinct from traditional broadcasting mediums. The clause-by-clause recommendations on the Bill are presented below.

CLAUSE-WISE RECOMMENDATIONS

S. No.	Particulars	Views/ Comments/Recommendations
1.	Clause 2(1)(h)- Definition of Broadcasting network operator	<p>Recommendation: Exclude Over-The-Top (OTT) Broadcasting Services Operator from the definition of broadcasters covered under this law, given their structural, technical, and functional differences from traditional broadcasters.</p> <p>Analysis: In its current iteration, this proposed bill would encompass traditional cable and satellite television networks and extend its reach to OTT platforms. This inclusion warrants re-evaluation. We commend the government’s initiative in adapting legislation to encompass modern technologies. However, OTT platforms should be exempted from the purview of the Bill due to the following distinctions between traditional broadcasters and OTT services.</p> <ul style="list-style-type: none"> ● Structural Difference: Traditional broadcasting operates on a ‘push model,’ where content is disseminated via cable or satellite networks according to a predetermined schedule.¹ In contrast, OTT platforms make curated content available to consumers over the Internet, consumed by a subscriber or viewer with an account with the service provider.² This model enhances user autonomy, offering a more personalised and controlled viewing experience. ● Technical Difference: The technical landscape of traditional broadcasting and OTT platforms is marked by differences, particularly in the realms of content transmission, network utilisation, and user experience. Traditional broadcasting, which encompasses satellite, cable, and terrestrial networks, relies on a heavy infrastructure footprint. This includes the use of broadcast towers, satellites, and extensive cable networks, all designed to transmit content in a one-to-many format. This fixed infrastructure ensures a consistent quality of service but is limited by its physical and technological constraints.³ <p>In contrast, OTT platforms are a paradigm shift, building on top of the existing infrastructure to stream content. This method is not anchored to a specific physical broadcast system; instead, it leverages data centres and cloud-based solutions for content storage and distribution. The key here is using</p>

¹ Chalaby, J. K., & Plunkett, S. (2020). Standing on the shoulders of tech giants: Media Delivery, streaming television, and the rise of global suppliers. *New Media & Society*, 23(11), 3206–3228. <https://doi.org/10.1177/146144482094668>

² Asia Video Industry Association. A Governance Framework for Online Curated Content (OCC) Services. <https://avia.org/wp-content/uploads/2020/11/A-Governance-Framework-for-Online-Curated-Content-Services.pdf>

³ A handy guide to satellites used for broadcasting DTH Signals in India. TelecomTalk. <https://telecomtalk.info/a-handly-guide-to-satellites-used-for-broadcasting-dth-signals-in-india/141807/>

Content Delivery Networks (CDNs), which are pivotal in reducing latency and enhancing streaming quality.⁴ CDNs, a network of distributed servers, facilitate the efficient and speedy delivery of content, adapting to the geographic location of each user.⁵ This starkly differs from traditional broadcasting, which does not typically use CDNs.

Another crucial aspect is the Quality of Service (QoS) and bandwidth requirements. Traditional broadcasting transmits a continuous signal with fixed bandwidth, ensuring a steady but limited quality defined by the transmission technology (like standard or high definition). OTT services, however, navigate the variable nature of internet bandwidth and user connection quality.⁶ They employ adaptive bitrate streaming, a technology that dynamically adjusts video quality in real time based on available bandwidth and device capability.⁷ This adaptability is absent in traditional broadcasting.

Interactivity and data utilisation present another point of divergence. Traditional broadcasting offers limited interactivity, mainly providing content for passive consumption. It lacks the means to collect or utilise user interaction data for content personalisation. OTT platforms, on the other hand, excel in interactivity. They enable user feedback and content recommendations and personalise viewing experiences by analysing user data. This data-driven approach helps understand viewer preferences, enhancing content discovery and engagement.⁸

Lastly, device compatibility and accessibility are also key areas of distinction. Traditional broadcasting is predominantly accessed through television sets equipped with the necessary hardware like satellite dishes or cable connections.⁹ OTT platforms, however, are designed for multi-device compatibility, allowing users to access content across various internet-connected devices such as smartphones, tablets, computers, and smart TVs. This flexibility significantly expands user accessibility and choice, offering a viewing experience unbound by the limitations of traditional broadcast methods.¹⁰

⁴ Chalaby, J. K. (2023). The Streaming Industry and the Platform Economy: An Analysis. *Media, Culture & Society*. <https://doi.org/10.1177/01634437231210439>

⁵ K, H., & D.H, M. (2011). Peer-to-Peer Live Streaming and Video on Demand: Design Issues and Its Challenges. *International Journal of Peer-to-Peer Networks (IJP2P)*, 2(4).

⁶ Tran, H. T., Won, Y., & Kim, J. (2016). An efficient hybrid push-pull methodology for peer-to-peer video live streaming system on mobile broadcasting social media. *Multimedia Tools and Applications*, 76(2), 2557–2568. <https://doi.org/10.1007/s11042-016-3249-x>

⁷ Menon, D. (2022). Purchase and continuation intentions of over-the-top (OTT) video streaming platform subscriptions: A uses and gratification theory perspective. *Telematics and Informatics Reports*, 5, 100006. <https://doi.org/10.1016/j.teler.2022.100006>

⁸ *Ibid.*

⁹ *A handy guide to satellites used for broadcasting DTH Signals in India*. TelecomTalk. <https://telecomtalk.info/a-handly-guide-to-satellites-used-for-broadcasting-dth-signals-in-india/141807/>

¹⁰ Chalaby, J. K., & Plunkett, S. (2020). Standing on the shoulders of tech giants: Media Delivery, streaming television and the rise of global suppliers. *New Media & Society*, 23(11), 3206–3228. <https://doi.org/10.1177/1461444820946681>

- **Functional Difference:**

The functional landscape of traditional broadcasting and OTT platforms is characterised by fundamental differences in content delivery, programming structure, and user interaction. Traditional broadcasting, encompassing cable, satellite, and terrestrial networks, operates on a relatively linear and predetermined programming schedule. This model dictates specific times for broadcasting particular shows and channels, with viewers tuning in at set times to watch their desired content.¹¹ This linear approach results in a passive viewing experience where the audience has little control over what is being broadcast.¹² The content is predefined, and the viewers' choices are limited to selecting among available channels at given times.¹³

In stark contrast, OTT platforms function on the on-demand model. These platforms provide a vast library of content, including web series, documentaries, short films, full-length movies, and increasingly, original productions exclusive to the platform.¹⁴ This on-demand nature allows users to select and view content at their convenience, in variance with the fixed schedule of traditional broadcasters. The OTT model is distinct owing to its flexibility and user-centric model.¹⁵

Furthermore, the level of interactivity and personalisation offered by OTT platforms significantly enhances the user experience. Unlike traditional broadcasting, where the interaction is minimal, and viewers have little control over the content, OTT services offer personalised recommendations and user profiles. These features are driven by sophisticated algorithms that analyse viewing habits and preferences. As a result, users are presented with content suggestions tailored to their tastes, leading to a more engaging and satisfying viewing experience. This personalisation extends to creating multiple user profiles within the same account, allowing different members of a household to have their customised viewing experiences.¹⁶

- **Innovative models in the digital economy:**

In the past few years, the OTT media landscape in India has witnessed an incredible surge, and the Indian market has a huge potential for the growth

¹¹ Nishith Desai Associates. (2019, October). Discussion Paper: Online Curated Content Regulation. Retrieved 12 January 2024, from https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Online-Curated-Content-Regulation.pdf

¹² A handy guide to satellites used for broadcasting DTH Signals in India. TelecomTalk. <https://telecomtalk.info/a-hand-y-guide-to-satellites-used-for-broadcasting-dth-signals-in-india/141807/>

¹³ Nishith Desai Associates. (2019, October). Discussion Paper: Online Curated Content Regulation. Retrieved 12 January 2024, from https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Online-Curated-Content-Regulation.pdf

¹⁴ Dasgupta, S., & Grover, P. (2019). Understanding Adoption Factors of Over-The-Top Video Services Among Millennial Consumers. *International Journal Of Computer Engineering Technology*, 10(1). <https://doi.org/10.34218/ijcet.10.1.2019.008>

¹⁵ Farooqui, J. (2022, December 8). *OTT Companies Are Spending More on Original Shows*. The Economic Times. Retrieved 12 January 2024, from <https://economictimes.indiatimes.com/industry/media/entertainment/ott-companies-are-spending-more-on-original-shows/articleshow/96065775.cms?from=mdr>

¹⁶ *Over the top (OTT) streaming: The media and entertainment industry enters the age of data*. Capgemini. (2020, November 6). Retrieved 12 January 2024, from <https://www.capgemini.com/insights/research-library/ott-streaming-wars-raise-or-fold/>

		<p>of OTT content.¹⁷ As per PWC’s Global Entertainment & Media Outlook 2023–2027: India Perspective report,¹⁸ OTT video is expected to continue to get its boost from regional content focus, and continued development and enhancement of 5G technology and broadband infrastructure can open up bigger markets for the players.¹⁹ The OTT industry has contributed to the economy through revenue generation, job creation, and market expansion while providing users with enhanced accessibility, better quality, and more diverse content offerings. The growing significance of the OTT space cannot be undermined²⁰. Therefore, it is crucial to take a balanced approach that appreciates the divergent regulatory requirements of these services and promotes creativity and innovation while ensuring responsible content creation and protection of user interests.</p> <p>Each model has its unique characteristics and challenges that need to be addressed specifically, and it would be more appropriate to have distinct regulatory frameworks that consider each model’s specificities to promote growth and innovation in the respective sectors.²¹ <i>Firstly</i>, regulations tailored for traditional broadcasters might not be suitable or adaptable to the unique characteristics of OTT platforms and may lead to regulatory mismatch. <i>Secondly</i>, applying stringent regulations to a space as dynamic as the OTT landscape could also impact their flexibility and innovation and hamper the ease of doing business (EoDB) for content creators. <i>Thirdly</i>, including OTT platforms within the definition of broadcasting services may affect user experience by limiting the diversity of content available. <i>Fourthly</i>, excessive or misaligned regulations could stifle the growth of OTT platforms, impacting the digital economy and job creation within the sector.²²</p>
2.	<p>Clause 4(5) - Requirements for Broadcasters and</p>	<p>Recommendation: Revise Clause 4(5) to provide a clear and specific definition of ‘services other than broadcasting services’. The clause should be tailored narrowly to</p>

¹⁷ (2022, January 11), India’s OTT market is the fastest growing, has potential to become largest in the world. *The Telegraph*. Retrieved 12 January 2024, from <https://www.telegraphindia.com/entertainment/indias-ott-market-is-the-fastest-growing-has-potential-to-become-largest-in-the-world/cid/1847092>

¹⁸ PWC. (2023, July). *Global Entertainment & Media Outlook 2023–2027: India perspective Recharging growth*. Retrieved 12 January 2024, from <https://www.pwc.in/assets/pdfs/industries/entertainment-and-media/global-entertainment-and-media-outlook-2023-2027-india-perspective-v1.pdf>

¹⁹ Kalra, M. (2023, August 6). Significance of OTT in promoting and propelling the growth of regional content. *Outlook India*. Retrieved 12 January 2024, from <https://www.outlookindia.com/art-entertainment/significance-of-ott-in-promoting-and-propelling-the-growth-of-regional-content-news-308627>

²⁰ Cyrill, M. (2023, April 11). *OTT video segment in India Records Upward Growth Post-pandemic*. India Briefing News. Retrieved 12 January 2024, from <https://www.india-briefing.com/news/india-ott-video-segment-growth-trends-investments-27681.html/>

²¹ Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thediologue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>

²² As per a report by EY, the need for dubbing, titling, formatting, etc. services to make content mobile is expected to increase in India due the rise in regional OTT content in India, thereby creating more jobs in the economy. *See here*, EY & FICCI. (2021, March). *Playing by new rules: India’s Media & Entertainment sector reboots in 2020*. Retrieved 12 January 2024, from https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf

	<p>Broadcasting Network Operators</p>	<p>prevent the inadvertent inclusion of OTT and similar digital media services under the traditional broadcasting regulatory framework.</p> <p>Analysis: Clause 4(5), as currently framed, grants an inordinately broad mandate to govern services that are not strictly broadcasting in nature but are deemed “intricately linked” to broadcasting networks or services. The lack of precision in defining what constitutes “services other than broadcasting services” and the parameters for being “intricately linked to broadcasting services” poses a significant risk of over-inclusiveness.²³ Such a sweeping delegation of regulatory authority could encompass a myriad of related services, including, but not limited to, advertising, marketing, and content production studios.</p> <p>This expansive interpretation carries the risk of engendering a stifling regulatory environment.²⁴ Furthermore, this could lead to a chilling effect on the development of novel and creative services in the broadcasting and digital media landscape.</p> <p>The provision, in its current form, also raises concerns regarding the principles of legal certainty and transparency. The absence of clear guidelines on the scope of “services other than broadcasting services” may lead to arbitrary and unpredictable application of the law, undermining the legal predictability essential for a healthy business environment.²⁵ Such vagueness could deter investment in the media and entertainment sector, as stakeholders might be apprehensive about navigating an uncertain regulatory landscape.</p>
<p>3.</p>	<p>Clause 5(1) - General obligations of broadcasters and broadcasting Network Operators</p>	<p>Recommendation: Revise the Clause 5(1) to clearly define the scope and limits of information requests, incorporate stringent safeguards for privacy and confidentiality, and establish oversight mechanisms to prevent misuse, ensuring compliance with constitutional principles and protection of broadcasters.</p> <p>Analysis: From a constitutional standpoint, the broad discretion to demand information</p>

²³ *Om Kumar v. Union of India*, (2001) 2 SCC 386.

²⁴ Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thedialogue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>

²⁵ Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thedialogue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>

		<p>can pose a threat to the right to privacy.²⁶ This right, implicitly enshrined under Article 21 of the Indian Constitution, encompasses the protection of personal and sensitive information. The provision’s lack of specificity regarding the nature and scope of information that can be demanded, coupled with the absence of stringent safeguards against misuse, may potentially allow for the arbitrary and indiscriminate gathering of information,²⁷ rendering it susceptible to legal and constitutional challenges.</p> <p>In the context of administrative law, this provision raises concerns about the principles of reasonableness and proportionality.²⁸ The requirement for broadcasters to provide information upon request, without clear guidelines or thresholds, could result in unreasonable and disproportionate demands.</p> <p>Furthermore, from a procedural law perspective, the provision lacks adequate safeguards to ensure the confidentiality and proper handling of sensitive business information. Broadcasters and network operators often deal with proprietary data and commercially sensitive content, the disclosure of which could jeopardise their competitive standing and intellectual property rights.²⁹ The absence of explicit protections against unauthorised use or disclosure of such information could deter innovation and risk the economic interests of these entities.</p> <p>Additionally, the mandated disclosure of information could inadvertently lead to self-censorship among broadcasters, impacting editorial independence and the diversity of content available to the public. The fear of legal liability and potential penalties under the Act may compel broadcasters to shy away from content that is critical, controversial, or unconventional, thereby stifling free speech and undermining the democratic principle of free and independent media.</p>
4.	<p>Clause 19- Programme Code and Advertising Code.</p>	<p>Recommendation:</p> <p>Ensure that the Programme Code and Advertising Code are precise and objective, reflecting contemporary social norms and technological advancements. Exempt OTT and News and Current Affair (NCA) platforms from these codes, recognising their distinct operational and structural characteristics. For other broadcasters, apply the codes cautiously to safeguard creative freedom and editorial independence.</p>

²⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 2019 (1) SCC 1.

²⁷ Section 6(1), Digital Personal Data Protection Act 2023.

²⁸ *Union Of India v. Hindustan Development Corporation*, 1993 SCR (3) 128.

²⁹ Khan, A. (2023, May 5). *From taboo topics to IPR: How OTT platforms can avoid and manage potential legal pitfalls*. Bar and Bench. Retrieved 12 January 2024, from <https://www.barandbench.com/columns/from-taboo-topics-to-ipr-how-ott-platforms-can-avoid-and-manage-potential-legal-pitfalls>

Analysis:

From a Constitutional perspective, the paramount concern in drafting these Codes is to avoid the pitfalls of over-regulation and vagueness. The fundamental right to free speech and expression, protected under Article 19(1)(a) of the Indian Constitution, is subject to certain restrictions but requires that any curtailment be specific, clear, and justified.³⁰ The Shreya Singhal judgement, which invalidated Section 66A of the IT Act for its vagueness and overbreadth, sets a crucial precedent.³¹ It underscores the imperative for any regulatory code to be precise, narrowly tailored, and transparent to avoid arbitrary interpretation and application.³² The issue of subjectivity in content regulation was also discussed in the Report of the Standing Parliamentary Committee on IT on the Review of Functioning of the Central Board of Film Certification (CBFC), which recommended the Ministry of Information and Broadcasting (MIB) and CBFC to increase objectivity parameters for determining categories for film certification.³³ While the recommendations in the Report were made solely for film certification, it can be viewed as a representation of the broader challenges in content regulation and how overbroad and vaguely defined standards can lead to impingement on the fundamental rights of content creators as well as users.

Furthermore, based on the previously elucidated distinctions in function³⁴ and structure³⁵, it is clear that OTT and NCA platforms should not fall under the purview of this legislation. Given their unique characteristics, applying the Programme Code and Advertising Code to these platforms would be inappropriate and potentially detrimental. Therefore, it is recommended that OTT and NCA platforms be explicitly exempted from these regulatory codes.

For other broadcasting services, these codes should be tailored cautiously, ensuring they are precise, clear, and mindful of the fundamental right to free speech. Such tailoring is necessary to avoid overreach and to ensure that these codes do not become instruments of censorship or undue restriction on content diversity and editorial independence.

³⁰ *Halvi v. State of Kerala*, WP (C) .No. 16349 of 2020. Retrieved 12 January 2024, from https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/02/Halvi_KS_vs_The_State_of_Kerala_and_Ors_20082020_KE2020270820154416219COM274485.pdf

³¹ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

³² Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thediologue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>

³³ Committee on Communications and Information Technology. (2023, August 1). *Forty-Seventh Report On The Subject "Review Of Functioning Of Central Board Of Film Certification (CBFC)" Relating To The Ministry Of Information And Broadcasting*. Retrieved 12 January 2024, from https://eparlib.nic.in/handle/123456789/2505168?view_type=browse

³⁴ Menon, D. (2022). Purchase and continuation intentions of over-the-top (OTT) video streaming platform subscriptions: A uses and gratification theory perspective. *Telematics and Informatics Reports*, 5, 100006. <https://doi.org/10.1016/j.teler.2022.100006>

³⁵ Chalaby, J. K. (2023). The Streaming Industry and the Platform Economy: An Analysis. *Media, Culture & Society*. <https://doi.org/10.1177/01634437231210439>

<p>5.</p>	<p>Clause 23- Accessibility Guidelines for Persons with Disabilities</p>	<p>Analysis:</p> <p>We appreciate the government’s intention to include Accessibility Guidelines for persons with disabilities under the Draft Bill as it exemplifies a commitment to inclusivity and equal access. These guidelines, aligning with constitutional principles³⁶ and legal precedents, can play a crucial role in fostering a more accessible and user-friendly environment content for individuals with diverse needs and abilities.</p> <p>Digital accessibility was identified as an inherent aspect of the verdict of <i>Akshat Baldwa v. Yash Raj Films</i>³⁷, wherein the Supreme Court directed all film producers to ensure that films are accompanied with audio description, subtitling and closed captioning for hearing and visually-impaired persons. The Court made reference to <i>State of H.P. v. Umed Ram Sharma</i> case,³⁸ which recognised the State’s obligation to take positive measures to ensure that in reality persons with disabilities are enabled to exercise those rights.</p>
<p>6.</p>	<p>Clause 24- Regulatory structure Self-certification by the Content Evaluation Committee (CEC)</p>	<p>Recommendation:</p> <p>Reconsider the mandate for CECs to review content from digital news broadcasters and OTT platforms, recognising the impracticality and potential infringement on editorial freedom and timely news dissemination.</p> <p>Analysis:</p> <p>For digital news broadcasters, the mandate to have every content piece vetted by a CEC poses significant challenges. The essence of digital news is its immediacy and fluidity, with content constantly being updated and published in real-time to respond to unfolding events.³⁹ This dynamic nature of digital news makes it practically unfeasible to subject every article, report, or update to a committee’s review. Such a process could severely hamper the timely dissemination of news, undermining the very role of digital news media as a prompt source of information. Additionally, this requirement could lead to significant backlogs, bureaucratic inefficiencies, and potentially, a dilution of the news content’s relevance and immediacy.</p> <p>When considering OTT platforms, the concerns revolve around the objectivity and consistency of CECs. OTT platforms feature a wide array of content, ranging from entertainment to documentaries, often dealing with complex and sensitive subjects.⁴⁰ The diverse nature of this content necessitates a nuanced understanding and interpretation, which might not</p>

³⁶ Article 14, Article 21, Article 41, Article 46, Constitution of India, 1950.

³⁷ *Akshat Baldwa v. Yash Raj Films*, 2023 SCC OnLine Del 195.

³⁸ *State of H.P. v. Umed Ram Sharma*, (1986) 2 SCC 68.

³⁹ Omar, B., Al-Samarraie, H., & Wright, B. (2020). Immediacy as News Experience: Exploring its Multiple Dimensions in Print and Online Contexts. *Online Information Review*, 45(2), 461–480. <https://doi.org/10.1108/oir-12-2019-0388>

⁴⁰ EY & FICCI. (2022, March). *Tuning into Consumer - Indian M&E rebounds with a customer-centric approach*. Retrieved 12 January 2024, from

https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2022/ey-ficci-m-and-e-report-tuning-into-consumer_v3.pdf

		<p>be uniformly achievable across different CECs. There is a risk that the subjective judgments of committee members, influenced by their personal, cultural, or social viewpoints could lead to inconsistent and potentially restrictive content evaluations. This inconsistency could stifle creative freedom and lead to a homogenised content landscape, which is contrary to the diverse and exploratory nature of OTT platforms.⁴¹</p> <p>Furthermore, the composition of CECs, while aiming for inclusivity and representation of various social groups, raises questions about the expertise of committee members in media, content creation, and digital platforms. The lack of specialised knowledge could result in evaluations that do not adequately appreciate the complexities and subtleties of content creation and digital broadcasting.</p>
<p>7.</p>	<p>Clause 25- Self-regulation by broadcasters and broadcasting network operators.</p>	<p>Recommendation: Given the unique nature and dynamics of digital content platforms, Clause 25 should not be applicable to OTT and NCA platforms.</p> <p>Analysis: While self-regulation is a positive step towards ensuring accountability, the applicability of the Draft Bill to the OTT and the NCA landscape should be re-examined. The regulatory challenges faced by cable and traditional broadcasters differ substantially from those encountered by online entities. Considering that the Draft Bill has traditionally regulated cable and satellite broadcasting networks, it is not feasible to regulate evolving forms of digital media under the same law as it may fail to consider the unique characteristics of and challenges associated with the same.</p> <p>Moreover, over the last few years, OTT and media organisations in India have taken initiatives to establish self-regulatory mechanisms. In India, media is self-regulated and has several ‘autonomous’ self-regulatory authorities, namely the News Broadcasters and Digital Association (NBDA), which also subsumes the News Broadcasting and Digital Standards Authority (NBSA)⁴², and the News Broadcasters Federation (NBF), which recently formed Digital News Federation (DNF)- an organisation to uphold the editorial freedom and ensure business interests of online news platforms.⁴³ In 2019, the Internet</p>

⁴¹ Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thediologue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>

⁴² The News Broadcasters & Digital Association. Retrieved 12 January 2024, from <https://www.nbdanewdelhi.com/>; see also, Singh, R. (2022, October 28). *What is the News Broadcasting & Digital Standards Authority, which has fined a TV channel over the hijab issue coverage?* The Indian Express. Retrieved 12 January 2024, from <https://indianexpress.com/article/explained/news-broadcasting-digital-standards-authority-which-fined-tv-channel-over-hijab-issue-coverage-8233764/>

⁴³ *NBF announces launch of Digital News Federation*. Exchange4media. (2023, January 2). Retrieved 12 January 2024, from <https://www.exchange4media.com/digital-news/nbf-announces-launch-of-digital-news-federation-124545.html>

		<p>and Mobile Association of India (IAMAI) drafted a code for self-regulation,⁴⁴ which was agreed upon by several OTT platforms and has developed over the years in line with regulatory requirements. Rather than introducing new regulatory measures, it would be more prudent to work on strengthening these initiatives to establish standards for content creation and distribution in the digital space.</p>
<p>8.</p>	<p>Clause 27- Broadcast Advisory Council.</p>	<p>Recommendation: Given the significant potential for negative impacts on free speech and the creative economy, Clause 27 should not be applied to OTT and NCA platforms.</p> <p>Analysis: In consideration of the Draft Bill's Clause 27, it is imperative to recognise the unique challenges and dynamics inherent in OTT and NCA platforms. These platforms, characterised by their digitally curated content that is constantly evolving, would find it impracticable to conform to a regulatory framework designed for traditional media. This concern is particularly acute when considering the oversight role assigned to an executive body.</p> <p>The clause proposes that the Chairperson of the Council,⁴⁵ despite being designated as an independent member, is appointed by the executive branch. This arrangement, unfortunately, raises apprehensions regarding the potential for executive dominance. Such a structure might lead to regulatory overreach, resulting in a disproportionate regulatory burden on OTT platforms when compared to their traditional counterparts.⁴⁶</p> <p>Moreover, the BAC's mandate to adjudicate violations or contraventions of the Programme Code or Advertisement Code introduces another layer of complexity.⁴⁷ The use of indeterminate and broadly defined terms within these Codes risks impacting free speech.⁴⁸ This is of particular concern for journalists and content creators on these platforms, who may find themselves subject to scrutiny by authorities for content that lacks clear definitions and boundaries.</p> <p>Additionally, the composition of the Council, predominantly executive, raises legal questions regarding its authority to make judgements on content legality, free speech, and artistic freedom. The Hon'ble Supreme Court in</p>

⁴⁴ Code of Best Practices for Online Curated Content Providers. (2019). Internet and Mobile Association of India (IAMAI). Retrieved 12 January 2024, from <https://iprmentlaw.com/wp-content/uploads/2019/01/Code-on-OCC-Providers.pdf>

⁴⁵ Clause 27(1)(a), Draft Broadcasting Regulation Service Bill, 2023.

⁴⁶ Nishith Desai Associates. (2019, October). Discussion Paper: Online Curated Content Regulation. Retrieved 12 January 2024, from https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Online-Curated-Content-Regulation.pdf

⁴⁷ Clause 28(1), Draft Broadcasting Regulation Service Bill, 2023

⁴⁸ Penney, J. (2017). *Internet surveillance, regulation, and chilling effects online: A comparative case study. Regulation, and Chilling Effects Online: A Comparative Case Study.* (2017) 6(2) Internet Policy Review.

		<p><i>Shreya Singhal v. Union of India</i>⁴⁹ emphasised that the determination of content illegality should rely on actual knowledge,⁵⁰ obtainable either through a judicial order or government notification. These actions must be consistent with the reasonable restrictions outlined in Article 19(2) of the Constitution. However, the BAC’s authority under the Draft Bill to assess OTT and NCA content for compliance with the Codes may not align with these legal standards and the jurisprudential framework established in this realm. The regulatory regime under this Bill would also overlap with the three-tier mechanism established by the IT Rules, 2021. Industry has reported that despite some principle level concerns, they have operationalized the three-tier mechanism without any significant business hindrances.⁵¹</p> <p>Therefore, while the intention behind Clause 27 is acknowledged, its current form may not adequately respect the unique characteristics of digital content platforms nor align with established legal principles concerning free speech and expression. Therefore, a more nuanced approach, balancing regulatory oversight with preserving creative and journalistic freedom, is recommended.</p>
<p>9.</p>	<p>Clause 29- Constitution of review panels by Broadcast Advisory Council.</p>	<p>Recommendation: Given the potential for negative implications on free speech and artistic expression, Clause 29 should not be applied to OTT and NCA platforms.</p> <p>Analysis: The delegation of functions from the BAC to review panels, as envisioned in the proposed framework, presents several legal concerns. Firstly, this shift in adjudicative authority on matters pertaining to the Programme Code or Advertisement Code, particularly concerning OTT and NCA platforms, risks regulatory overreach and excessively stringent regulation. Such a transfer of functions might lead to ambiguity and a dilution of accountability, especially in sensitive areas such as free speech and artistic expression.</p> <p>In the Indian legal context, the constitutional validity of delegating powers has been critically examined.⁵² The judiciary has consistently highlighted the imperative for delegation to be underpinned by comprehensive guidelines and safeguards.⁵³ These measures are necessary to avert arbitrary or discriminatory application of the law, thereby upholding the principles of</p>

⁴⁹ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

⁵⁰ Section 79(3)(b), The Information Technology Act, 2000.

⁵¹ Shreya, S., Tiwari, P., Rizvi, K., & Saxena, G. (2023, July 18). *IT Rules, 2021: A Regulatory Impact Assessment Study (Vol. 2)*. The Dialogue and Internet And Mobile Association of India. Retrieved 12 January 2024, from <https://thedialogue.co/wp-content/uploads/2023/07/IT-Rules-2021-Analysis-Volume-2.pdf>; see also The Week. (2023, November 7). Justice A.K. Sikri Former Judge of the Supreme Court of India Kickstarts Self Regulatory Body DPCGC’s Nation Wide Campaign to Create Awareness on Responsible OTT Content Viewing. Retrieved 12 January 2024, from <https://www.theweek.in/wire-updates/business/2023/11/07/dcm92-iamai.html>

⁵² *Delhi Laws Act, 1912, In Re*, 1951 SCC 568.

⁵³ *Raj Narain Singh v. Chairman Patna Administration Committee*, 1955 SCR 290.

		justice and fairness in administrative action. ⁵⁴ This aspect necessitates a thoughtful approach to the proposed delegation, ensuring that it aligns with constitutional mandates and judicial precedents.
10.	Clause 30- Power of Inspection.	<p>Recommendation: Instil adequate guidelines and safeguards in Clause 30.</p> <p>Analysis: Clause 30, while crafted with the intent to uphold compliance and security standards, raises several concerns for OTT and NCA platforms. Firstly, the imposition of continuous monitoring at the platforms' expense⁵⁵ could disproportionately burden these entities, particularly smaller or emerging platforms, with significant financial obligations. This requirement not only imposes a compliance cost but also may impinge upon operational efficacy, potentially disrupting the seamless delivery of content and services.</p> <p>Secondly, while the provision allows for inspections with reasonable notice, the discretionary provision for exceptions where notice may be counterproductive, introduces ambiguity.⁵⁶ This could lead to potential misuse of inspection powers, thereby weakening the trust between regulators and digital platforms. Moreover, the absence of explicit guidelines on the frequency and scope of these inspections may result in subjective interpretations, leading to arbitrary application and possibly infringing upon the operational autonomy of these platforms.</p> <p>Therefore, the provision should be revisited to incorporate more definitive guidelines and safeguards. These should aim to balance the regulatory objectives with the operational realities and rights of OTT and NCA platforms, ensuring a fair and transparent regulatory environment.</p>
11.	Clause 31- Power to seize and confiscate equipment.	<p>Recommendation: Incorporate checks and balances in Clause 31 and overtly exempt OTT and NCA platforms from the rigours of this provision.</p> <p>Analysis: Clause 31 endows the authority to seize and confiscate equipment in cases of non-compliance. While Clause 31 is currently applicable to only cable broadcasting networks and radio broadcasting networks, the Government retains the power to bring any broadcasting network or service within the scope of Clause 31 by notifying the same in the official gazette. Particular</p>

⁵⁴ *A.K. Kraipak v Union of India*, AIR 1970 Supreme Court 150.

⁵⁵ Clause 30(2), Draft Broadcasting Regulation Service Bill, 2023.

⁵⁶ Clause 30(3), Draft Broadcasting Regulation Service Bill, 2023.

		<p>attention must be paid to its potential application to OTT and NCA platforms. The distinct nature of these platforms, predominantly rooted in digital infrastructure and reliant on internet-based content delivery, stands in stark contrast to traditional broadcasting models that utilise radio waves or cable/satellite networks. Hence, the practicality of the Draft Bill’s provisions in the context of OTT and NCA platforms is questionable. Furthermore, the broad discretionary powers, potential for operational disruption, and the reversal of the burden of proof principle as outlined in the provision raise concerns about the potential for arbitrary enforcement, impact on service delivery, and operational feasibility, particularly for digital-centric platforms. The Supreme Court recently noted that the seizure of media professional’s digital devices is a serious concern, and the government must come up with guidelines to protect the interest of the professionals.⁵⁷ A more nuanced approach, recognising the unique characteristics of these platforms and incorporating specific guidelines and safeguards, is essential for fair and effective regulation.</p>
<p>12.</p>	<p>Clause 33- Punishment for contravention of provisions of this Act.</p>	<p>Recommendation:</p> <p>To safeguard the sanctity of freedom of speech and creative expression against the rigours of Bill, it is imperative that punitive measures be confined to monetary fines, avoiding the inclusion of imprisonment as a punitive recourse.</p> <p>Analysis:</p> <p>Clause 33 of the Act, prescribing punitive measures for violations, including imprisonment and fines as detailed in the Third Schedule, serves to enforce accountability among broadcasters. However, it is crucial to consider the potential implications of such criminal sanctions on the creative autonomy and business environment of OTT platforms. The diversity and innovation in content that has been a hallmark of OTT platforms in India might be stifled under the weight of stringent criminal liabilities. It is advisable to pivot towards civil penalties for transgressions stemming from creative content, aligning with global best practices and fostering a more conducive environment for artistic freedom and investment. This approach echoes the recommendations of the Alliance of Digital India Foundation, advocating for the decriminalisation of non-serious complaints against company heads against frivolous complaints, emphasising the need for a balanced approach to avoid undue harassment and reputational damage to companies.⁵⁸</p>

⁵⁷ Das, A. (2023, November 7). Seizure of journalists’ digital devices a serious matter, better guidelines needed to protect media professionals: Supreme Court to Centre. Live Law. Retrieved from <https://www.livelaw.in/top-stories/supreme-court-guidelines-search-seizure-digital-devices-241799?infinitemscroll=1>; see also Foundation for Media Professionals v. Union of India and others, WP (Cr.) No. 395 of 2022.

⁵⁸ Alliance of Digital India Foundation. (2022, November 30). ADIF advocates ‘Ease of Doing Business’ reforms to reduce frivolous criminal cases against company’s senior executives. Retrieved from <https://blog.adif.in/p/adif-advocates-ease-of-doing-business>

		<p>Thus, a shift towards civil penalties for creative content-related wrongs can cultivate a more stable and investment-friendly creative industry in India, in line with efforts to decriminalise provisions in the Companies Act, 2013, and the Legal Metrology Act, 2009⁵⁹. This transition will not only uphold artistic freedom but also promote a more favourable Ease of Doing Business climate, resonating with global norms and bolstering India’s digital creative sector.</p>
<p>13.</p>	<p>Clause 35. Penalty and measures for contraventions of Programme Code and Advertisement Code.</p>	<p>Recommendation: Recalibrate regulatory measures within Clause 35, and delete sub-clauses (c), (d), and (e), to harmonise the government’s objective of ensuring accountability with the crucial imperatives of safeguarding free expression and maintaining the operational integrity of digital platforms.</p> <p>Analysis: Clause 35, while well-intentioned in its effort to regulate broadcasters, exhibits a critical lack of specificity in aligning penalties with the gravity of violations. The current breadth of penalties, ranging from public apologies to suspending broadcast services, without a clear correlation to the severity of infractions, may lead to inconsistencies and subjective enforcement. Such ambiguity could unjustly impinge on the freedom of expression and creativity, fostering a climate of apprehension amongst content creators due to the fear of disproportionate repercussions. Medianama reported how the creative expression in the sensational series called Sacred Games would be impacted by the TV Content Code.⁶⁰</p> <p>Furthermore, the provision’s potential for excessive infringement upon rights, ostensibly in the pursuit of content regulation, may unduly burden broadcasters. Mandating public apologies or on-air acknowledgements, for example, could significantly tarnish the reputation and credibility of the concerned entities, adversely affecting their professional standing. Additionally, the stipulation of off-air periods could disrupt services, leading to substantial viewership and revenue losses.</p> <p>Accordingly, to uphold the principles of fairness, transparency, and proportionality in regulatory enforcement, it is recommended that sub-clauses (c), (d), and (e) under Clause 35 be reconsidered for deletion. This modification would better balance the government’s aim of ensuring accountability with the fundamental rights of free expression and the operational viability of digital platforms.</p>

⁵⁹ Mayall, G. & Agarwal, A. (2023, November 2). *Jan Vishwas Amendments And Its Impact On The Legal Metrology Act 2009*. Livelaw. Retrieved 12 January 2024, from <https://www.livelaw.in/law-firms/law-firm-articles/-jan-vishwas-amendments-legal-metrology-act-2009-ahlawat-and-associates-241409?infinitemscroll=1>

⁶⁰ Deep, A. (2019, October 4). In 8 Scenes, How A Sacred Games Episode Would Change Because Of The TV Content Code. Medianama. Retrieved from <https://www.medianama.com/2019/10/223-sacred-games-censored/>

14.	<p>Clause 36- Power to prohibit transmission of programme or operation of broadcaster or broadcasting network.</p>	<p>Recommendation: Refine Clause 36(2) to align precisely with Article 19(2) of the Indian Constitution, ensuring constitutional compliance and safeguarding the fundamental rights of content creators and consumers. Instil specific exemptions for OTT and NCA platforms from the rigour of this provision.</p> <p>Analysis: Clause 36(2), aimed at promoting public well-being and interests, has the potential to infringe upon the freedom of speech and expression of content creators and consumers. While the Constitution permits reasonable restrictions on fundamental freedoms for well-defined reasons like national security and public morality, the Clause 36(2) endows the Central Government with broad latitude under the undefined criterion of “public interest” – a concept not explicitly aligned with the reasonable restrictions outlined in Article 19(1)(a).⁶¹ This broad discretion risks arbitrary application and could significantly impact free speech and expression. It is, therefore, recommended to refine the provision, ensuring that any imposed restrictions are precisely tailored to align with the grounds specified in Article 19(2), thereby protecting the constitutional rights of both content creators and consumers. Furthermore, a specific exemption for OTT and NCA platforms from the rigours of this provision is crucial, given their unique role and contribution in the media landscape, to prevent undue regulatory encumbrances on these burgeoning sectors.</p>

⁶¹ Kaushal Kishore vs. State of Uttar Pradesh & Ors. (2023) 4 SCC 1; see also (2023, January 3). *Additional Restrictions Not Found In Article 19(2) Cannot Be Imposed On Right To Free Speech : Supreme Court*. Livelaw. Retrieved 12 January 2024, from <https://www.livelaw.in/top-stories/supreme-court-free-speech-mp-mla-article-192-restrictions-exhaustive-217925>

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