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Self-Regulation by Over-the-Top Platforms: A Study in Context of Video Streaming Services in India

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ABSTRACT

The world has moved from films as a sole medium of dissemination of information to television & radios and now to the internet. Over-the-top (Herein referred to as OTT) platforms have created a parallel medium to disseminate information. This has left a void in policy as India does not have any guidelines for content regulation on the harmful and illegal content released online, leaving aside the Information Technology Act 2000 that has provisions regarding the intermediaries involved. Taking advantage of the gap in policy, the creators have been releasing their content online without any pre- censorship by the State. This paper sheds a light on content regulation and how the emerging content on OTT video streaming platforms should not be brought under state censorship as such model of regulation has proved to be a hindrance to the progress and development of the society. Rather, the recent step taken by the OTT streaming platforms to self regulate themselves should be encouraged by the government. This step would in fact promote the spirit of the right to freedom of speech and expression enshrined under Article 19 in the truest form in our Indian Constitution. Furthermore, it has become necessary to deliberate upon this question especially in view of the pandemic as content is being released online instead of on traditional mediums that were under the purview of regulation.

Keywords: *Content regulation, Censorship, OTT platforms, video streaming services, right to freedom of speech and expression, harmful and illegal content, public decency and morality, obscenity, Self-regulation, Code of best practices.*

I. INTRODUCTION

The technology advances in the audio visual field have occurred at a fast pace in the last century. The world has moved from films as a sole medium of dissemination of moving pictures to television and now to the internet. In a paper titled "How to regulate OTT streaming services in India"[2], the author has stated that, "There is a casual link between the changes in the medium used to disseminate audio visual content and the changes in society. The effect that a medium has on society forms the basis of its regulation by the state." American Sociologist

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[2] Shubhangi Heda, How to Regulate OTT Streaming Services in India (2019) (unpublished dissertation, Central European University in Budapest, Hungary) (on file with author).

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coined the term, "Technology determinism" and said that transformation in society s triggered by change in technology. The society needs to adapt by changing its rules and regulations as and when the technology changes. From this flows the theory of "media determinism" by Marshall McLuhan which says that "it is the medium through which content is communicated that impacts people rather than the content itself".

Films and audio-visual content have always been regarded as constituting a powerful medium of expression. It is judicially recognized that cinema is a form of speech and expression.[3] Justice Clark of the United States's Supreme Court said: "It cannot be doubted that motion pictures are significant medium for the communication of ideas. They may affect public attitudes and behaviour in a variety of ways."[4] Furthermore, In the case of Brij Bhushan v. State of Delhi[5], the Delhi high court made the grand presumption: "The treatment of motion pictures must be different from that of other forms of art and expression...the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses...the motion picture is able to stir up emotions more deeply than any other product...".

II. SCOPE OF THIS RESEARCH

Based on the kind of service they provide, there are basically three types of OTT apps:

(i) Messaging and voice services, (Communication services);

(ii) Application eco-systems (mainly non-real time), linked to social networks, ecommerce; and;

(iii) Video / audio content.

The focus and orientation of the present research work is ONLY with regard to the regulation of '**audio-visual content' on video streaming services** provided by OTT platforms. The term OTT platform/ service should only be construed to mean 'video streaming services' in the present research work. the **issues pertaining to the censoring of harmful and illegal audio-visual content** shown by OTT platforms with minimal focus on other issues like piracy and IPR violations. Furthermore, only the '**Indian Scenario'** has been taken into account.

Another thing to be kept in mind is that nowadays, the lines between Video on Demand (VoD) services and OTT video streaming services have been blurred as both have started performing the same functions. Hence, they can be said to be the same in spite of some minor differences

[3] Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230 (1915).
[4] Joseph Burstyn v. Wilson, 343 U.S. 495, 501 (1952).
[5] (1950) S.C.R. 605 (India).

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and are included in OTT platforms.

III. NEED FOR THIS RESEARCH

The world has moved from films as a sole medium of dissemination of information to television & radios and now to the internet. Over-the-top (Herein referred as OTT) platforms have created a parallel medium to disseminate information. **This has left a void in policy as India does not have any guidelines for content regulation on the harmful and illegal content released online**, leaving aside the Information Technology Act 2000 that has provisions regarding the intermediaries involved.[6] Taking advantage of the gap in policy, the creators have been releasing their content online without any pre- censorship by the State. This work sheds a light on **content regulation** and how the emerging content on OTT video streaming platforms should not be brought under **state censorship as such model of regulation has proved to be a hindrance to the progress and development of the society.** Rather, the recent step taken by the OTT streaming platforms to self regulate themselves should be encouraged by the government.

IV. RESEARCH QUESTIONS

Through this study, the author aims to find out:

i. whether content needs to be regulated or not?
ii. whether any reforms required in the current regulatory framework regarding content regulation or not? Is it sufficient?
iii. whether the recent code of best practices adopted by video streaming OTT platforms would be sufficient at addressing the concerns of content regulation online or not? and
iv. what are the other alternatives that can be resorted to by the government?

V. METHODOLOGY

The methodology adopted for the research is doctrinal. It involves study of case laws, books and commentaries particularly on the Media law and Constitutional law of India. The research mainly focuses on the primary sources like Statutes and Research Committee Reports and secondary sources like books, articles, journals, pending/decided cases, case controversies and news in magazines/web portals/newspapers and websites. Opinions of research scholars, professors, experts in respective fields who have dealt with this subjects relating to the present

[6] Shreya singhal v Union of India, (2015) S.C.C. 5 (India).

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topic on hand have been used in this work.

VI. CONCEPT OF OTT PLATFORMS

OTT services do not have one universally accepted definition. The Internet Telecommunication Union (ITU) defines OTT service as: "An internet application that may substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services." The Indian communications regulator, Telecom Regulatory Authority of India (TRAI), borrows the same definition though various stakeholders believe it to be limited in nature. As public internet that started in the 1980s has grown in scope over the last three decades, the OTT services have created a "parallel medium" to disseminate content. It refers to applications and services which are accessible over the internet and ride on operators' networks offering internet access services e.g. social networks, search engines. A major point to be noted is that Carriage is separated from content in internet networks, enabling OTT content and application service providers to deal directly with end users. Thus, telecom service providers (TSPs) are excluded from the said transactions, with no control over the content or the application. The characteristics of OTT services are such that TSPs realise revenues solely from the increased data usage of the internet-connected customers for various applications (henceforth, apps). On the other hand, OTT providers make use of the TSPs' infrastructure to reach their customers and offer products/services that not only make money for them but also compete with the traditional services offered by TSPs.[7]

VII. CONCEPT OF REGULATION

Regulation in the original sense refers to the arbitrary process of the State, usually centred in a (more or less) independent regulatory body established and governed by a STATE REGULATION. As matters of broadcasting regulation tend to be very complex, these bodies are soon overloaded with work and usually encourage self-regulation of the industry. This means that the actors are urged to solve problems among themselves, before turning to the state regulator. Such model of regulation is then called SELF REGULATION. As it usually reflects the interests of the industry to keep the State out of its affairs, it accepts this obligation. If the State and the private regulators co-operate in joint institutions, this is called 'CO-REGULATION'. If this type of self- regulation is structured by the State but the State is not involved the appropriate term is regulated self-regulation.

[7] TRAI, Consultation paper on Regulatory framework for over-the-top (OTT) services, at 11 (2015)

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VIII. EMERGENCE OF DIFFERENT FORMS OF MEDIUMS AND THEIR CONTENT REGULATION- HISTORICAL BACKGROUND

(A) CINEMA

British colonizers in India understood at the time that cinema as a medium had a different effect on people compared to print media. They brought their conflicting ideas of cinema control and censorship to India to control the spread of nationalist fervor and socialist ideas. During the Pre-Independence period in India, the first major legislative attempt to control cinema took place in 1918 when the Cinematograph Act, 1918 was enacted. In the immediate post-independence scenario as well, the government allowed regulation of films for exhibition and of cinemas themselves to be carried out under the provisions of the Cinematograph Act 1918, wherein power of certifying films for exhibition remained with the state governments.[8] Meanwhile, The Constitution of India was also adopted in 1950 which gave fundamental rights to the citizens including various freedoms under Article 19. The freedom of speech and expression was one of them. "Article 19(1)(a) says that: All citizens shall have the right to freedom of speech and expression."[9] This was subject to restrictions in article 19(2).[10] Audio visual content became judicially recognised as a part of freedom of speech and expression and hence it was in this state of affairs in 1952, that another State Regulation (herein referred to as the Cinematograph Act 1952) was passed to censor and regulate the information disseminated through the audio-visual content via motion pictures 'mainly' citing the issues of public decency, morality and obscenity as envisaged in the Indian Constitution under Article 19(2). The statement of objects and reasons for this Act states the protection and promotion of public decency and morality. **Hence, censorship laws were born for audio visual content.**

(B) TELEVISION

At that time, the social and moral fabric of the country was changing fast and only cinema existed for disseminating information through audio visual content. Meanwhile, technology kept on evolving and television and radio entered the broadcasting segment. They were initially used as an educational tool and for spreading the government's propaganda but after the introduction of satellite communications, masses started questioning the government's control

[8]Amandeep Singh, A Critical study of Film Censorship in India: A Study of post -independence period (2017), (unpublished thesis, RML National Law University, Lucknow), http://hdl/handle.net/10603/186551

[9] INDIA CONST. art. 19, cl. 1, sub cl. (a).

[10] INDIA CONST. art. 19, cl. 2, "Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law, or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.".

and regulation of the broadcasting sector. Thereafter, the government passed the Cable Television Networks (Regulation) Act,1995 which was inspired by the Cinematograph Act 1952 which regulated the broadcasting sector in our country.

(C) INTERNET

Another technological change that gained momentum was the advent of public internet in many households due to the popularity of smartphones and other telecommunication services. OTT platforms were established that used internet and already present infrastructure to provide their services to the public. As every coin has two different sides, the cyberspace established by the internet fell prey to cybercrimes and other criminal activities. Thus, the Information Technology Act was formulated in 2000 to give recognition to various electronic means and transactions and to regulate the cyber space. But it still did not solve the problem of filling up the void in policy when it came to regulating content on OTT platforms as neither The Cinematograph act 1952, Cable Television Networks (Regulation) Act,1995, nor The Information Technology Act 2000 had provisions regarding the same. Hence, audio visual content could be released online on video streaming services without any hassle of certification or censorship by the State, which is still the present case. This has led to situation where the same content might be censored in cinemas and on televisions, but not on streaming platforms. Such regulatory vacuum has led to complaints in court amidst self-regulatory action being taken by the industry players.

IX. EMERGENCE OF "THE CODE FOR BEST PRACTICES FOR ONLINE CURATED CONTENT PROVIDERS"

In 2019, the legislature was working on amending the Cinematograph act 1952 by taking the recommendations of the Mukul Modgal committee and the Shyam Bengal committee which were set up by the MIB to find ways to improve the existing regulatory framework regarding cinema and content regulation. The reports submitted questioned of the relevance of CBFC and the universal rating system in the digital age as technology allows the producers to release their content through online platforms without any hassles of censorship. Because of this policy vacuum, people resort to the judiciary when they have any concerns regarding the content released online.

In February 2019, a public interest litigation[11] was filed by Justice for Rights organization in the Delhi High Court seeking ban on online streaming platforms such as Netflix and amazon

[11] Justice for Rights Foundation vs. Union of India (2018), W.P.(C) 11164/2018, (India).

prime for showing uncertified, sexually explicit and vulgar content in shows like Sacred games, game of thrones, etc. It also claimed that most of the content was in violation of IPC and IT act but the court dismissed the plea on the ground that there was no licensing or guidelines required to be followed by such platforms. The Court agreed with the stand taken by the Ministry of Information and Broadcasting (MIB) and the Ministry of Electronics and Information Technology (MEITY) that the Information Technology Act is a robust enough legislation requiring no additional guidelines or regulation.[12] A similar matter[13] came before the Delhi High Court wherein the bench followed the earlier precedent and dismissed it. Other cases having similar subject matter are still sub judice before the delhi high court[14], Karnataka high court[15] and the Bombay high court[16] at the time of writing this article.

Prompted by the growing concerns, the Mobile and Internet Association of India had drafted "Code of Best Practices for online curated content providers" for the regulation of audio visual content on OTT platforms leading to the adoption of "Self Regulation Model" by OTT video streaming platforms in early 2019. It curbs the OTT video platforms from streaming content which is banned by Indian courts, disrespect the national emblem, outrages religious sentiments, promotes violence against the states or terrorism, or depicts sexual acts committed by children.

Self-Regulation

Hans J. Kleinsteuber in his paper titled "The Internet between Regulation and Governance" has discussed the concept of self regulation. He says "As matters of broadcasting regulation tend to be very complex, these bodies are soon overloaded with work and usually encourage self-regulation of the industry. This means that the actors are urged to solve problems among themselves, before turning to the state regulator. As it usually reflects the interests of the industry to keep the State out of its affairs, it accepts this obligation. A new field of industry self-regulation has emerged in relation to the Internet. This is based on codes of practice that regulate issues like respect for privacy, public decency, protection of minors, accuracy or the application of filtering software."

CODE OF BEST PRACTICES FOR ONLINE CURATED CONTENT PROVIDERS

Interestingly, upon a careful examination of the guidelines given on the official website of the

[12] Section 67, 67A, 67B and 69, Information Technology Act, 2000, Acts of Parliament, 2000, (India).
[13] Nikhil Bhalla v Union of India and Ors., (2018), W.P.(C) 7123/2018 & CM Appl. 27132/2018, (India).
[14] Un-canned Media v. Ministry of Information and Broadcasting & Ors, (2016), W.P. (C) No. 10724/2016, (India).
[15] Padmanabh Shankar v. Union of India & Ors, (2019) W.P. 6050/2019, (India).
[16] Divya Ganeshprasad Gontia v. Union of India (2018), PIL No. 127/2018, (India).

CBFC and the code drafted, it can be seen that the objectives of this code are put much in sync with what the government advocates for this industry, i.e., let the consumers decide. Furthermore, the things covered under the state regulation and already existent legislations have also been incorporated while giving more relaxation and scope to the Code to adapt to societal changes

It is believed that this code will help the platforms conduct themselves in a responsible and transparent manner while keeping the consumer's interest at the highest pedestal and protecting the freedom of speech and expression of the content creators at the same time. The whole idea is to avoid any other entity calling the shots on censorship given the fluid nature of the ideas and different mindsets. It empowers the consumers to make informed choices on age appropriate content. Furthermore, they can access the content as per their preference, time and convenience. It aims to safeguard and nurture the creativity of the artists and create an ecosystem to foster innovation. The Preamble to the Code states that, "Organizations that sign on to this Code, commit to making reasonable efforts and acting in good faith to ensure that content offered on their respective services in India is in line with the principles laid out herein."

The code also provides for a 'Grievance Redressal Department' which the signatories are supposed to set up internally by appointing a person who acts as a sole point of contact for such purpose. The functions of the department as well as the procedure for handling complaints has been provided for in the code. However, no penalty or consequence is mentioned for non compliance as compared to television and broadcasting. Due to this reason, some might call this code as a tiger without any teeth although a benefit also exists on the other side. Creators get the leverage to show certain content that might be ahead of its time or important to the theme of the content, letting the consumers decide for themselves if they are ready for it or not. The restrictions imposed by the signatories and the preconceived notions of ideas like morality would not hamper the creation of such content. Fear of penalty would not be a hindrance to the creative freedom and innovation of the content creators.

X. FINDINGS AND CONCLUSION

It is true that regulation exists in all forms everywhere but its degree determines whether it would be beneficial for the society or not. Clearly, the already present legislations regarding content regulation have failed to keep up with the changing times and technology. We have all seen censorship's grip on traditional platforms- TV, radio, newspapers, etc. A lot has been said and done in the name of public sentiments. The essence of the content is lost as a result and

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also leads to a decline in viewership and an increase in apprehension on the part of international players to enter the Indian market. The law of censorship whenever rigid, has only suppressed thought and dissent, instead of allowing progressive and rational thinking under the garb of promoting decency and morality. This has led to the failure of the State regulation enacted for this purpose, as any law which is not at par with the changes in the society becomes a hindrance to its progress and development. Ajay Chacko, co-founder and CEO of Arre, says that "just because there is a self-regulatory code for TV, it doesn't mean that there should be regulation for online content, in the name of parity. The lesson to be learned with the internet coming in is whether we should regulate TV, print, and film so strictly. Can we can deregulate [them] instead? The only reason that platforms have signed a self-regulatory code is because they're all practical people, and have chosen the lesser evil." Owing to the impact of audio visual content on the human minds, content regulation is a necessary step taken by the government but the answer to the present question of bringing the audio visual content released online under the purview of the state regulation is a big NO.

OTT streaming platforms have created a Parallel medium for disseminating information. Content which is censored on traditional modes can be released as it is on OTT platforms. Taking advantage of the gap in policy, the creators have been releasing their content online without any pre- censorship by the State amidst the debate spurred by a certain chunk of the society advocating that such uncensored content is eradicating indian values in today's youth and promoting western culture in our country. However, it should be realised that a difference will always exist between how certain content is perceived by the audience. Some might find the portrayal of a particular theme to be offensive while others might feel it to be necessary to describe the theme aptly. It is upon the mindset of the audience who is expected to make judgement like a prudent person would and take the content as the creator intended it to be taken. The entirety of the content should be seen rather than fussing about smaller details. Narrow and conservative approach of a few should not hinder the progress of the society at large.

The concepts of public decency and morality are not static in nature. The Kerala high court in the case of K P Mohammed v. State of Kerala and Ors[17] has observed that, "'decency' and 'morality' themselves are terms of wide and variable contents. Generally speaking, 'decency' connotes conformity to standards of good taste and morality. On a sensitive issue like this the Court would not make a dogmatic approach, as the concept of 'decency' and 'morality' are not

[17] (1984), Cri.L.J 745, (India).

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static, and are bound to change from place to place, from time to time and from people to people and from age to age. Limits of decency and morality should be judged by the standards and traditions prevalent in that times." The Madhya Pradesh High Court in the case of Brij Gopal Denga and Ors. v. State of Madhya Pradesh and Anr[18] has said that, "The word "morality" occurs in clauses (2) and (4) of article 19. By morality, in our opinion, here is mean the ideas about right and wrong which are accepted by the right thinking members of the society as a whole of the country. Morality is a fluid concept and its content will depend upon the time, place and stage of civilisation. A fluid concept of this nature naturally gives rise to the difficulty in its application."

Time and again there have been many cases where the validity of the state regulation as well as the decisions of the Central Board of film certification (CBFC) have been questioned before courts. The Supreme Court agreed with the observations of Justice Vivian Bose in Bhagwati Charan Shukla v. Provincial Government,[19] that: "The effect of the words must be judged from the standards of reasonable, strong minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view…If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers in religion."

Recently, regarding the controversy around the film PK, the Delhi High Court in Ajay Gautam v. Union of India[20] held: "Dissenters of speech and expression have no censorial right in respect of the intellectual, moral, religious, dogmatic or other choices of all mankind and the Constitution of India does not confer or tolerate such individualized, hypersensitive private censorial intrusion into and regulation of the guaranteed freedom of others. Seeing a film is of the own volition and conscious choice of the spectator and those offended by the content or the theme of the film are free to avoid watching the film." Another recent case where in the judiciary stepped in and whipped the CBFC on its overreach is that of the controversy surrounding the film Udta Punjab (2016). In this case, the Board refused to certify the film which is based on the drug menace prevailing in the state of Punjab. In addition to its refusal to certify, the board suggested almost 13 cuts in the movie as a mandatory measure to seek

[18] (1979) AIR(MP) 173, (India).
[19] (1947) AIR NAG 1, (India).
[20] (2015) 147 DRJ 514, (India).

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certification. However, on appeal by the filmmaker, the Bombay High Court criticised the CBFC for its conduct and poor way of handling the issue. The Court said, "the Board is not necessarily empowered to censor films. The word censor is not found in the Cinematograph Act. The board can make changes in the film but this power must be exercised in consonance with Constitutional Guarantee and Supreme Court orders. The High Court further clarified the role of CBFC. The court served a reminder that certification, and not censorship, is the real job of the CBFC."[21]

Former Chief Justice of Delhi High Court, AP Shah, has aptly observed: "Despite the power of regulating the content of films being vested in the Censor, the Central Board of Film Certification (CBFC) has often failed in the task entrusted to it by either stifling creativity or hijacking morality and trying to substitute it with the morality of certain vested interests. It is at times like these that the courts have to step in as the saviour of freedom, safeguarding different forms of expression against the censorial instincts of the state."[22]

Yaman Akdeniz in his paper titled 'Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation' says that "there should be more emphasis on promoting the Internet as a positive and beneficial medium and there is urgent need for awareness of Internet usage as far as the issue of children accessing such uncensored content is concerned. Governments and regulators should invest more in educational and awareness campaigns rather than promoting ineffective rating and filtering tools which only create a false sense of security for parents and teachers, while children quickly manage to find any loopholes. The advice to be given to concerned users, and especially parents, would be to educate your children rather than placing your trust in technology or in an industry that believes it can do a better job of protecting children than parents. The message is to be responsible parents not censors."

Christopher T. Marsden in his paper titled "Co- and Self-regulation in European Media and Internet Sectors: The Results of Oxford University's Study" has said that, "Technological progress brings about change and that self-regulation can respond more rapidly and efficiently than state regulation. There is no universally acceptable recipe for successful self-regulation, as regimes must be adjusted to the needs of each sector and different circumstances (technological changes, changes in policy in response, a country's legal system, case law of

[21] Rahul Bhasin, Don't be oversensitive, Bombay HC tells CBFC, clears Udta Punjab with one little cut, Indian Express, (2016), http://indianexpress.com/article/india/india-news-india/censor-wanted-13cuts-court-clearsudta-punjab-with-one-2850991/

[22] AP Shah, The most precious of all freedoms, The Hindu, (25 November 2011), http://www.thehindu.com/opinion/op-ed/the-most-precious-of-all freedoms/ article 2656995 .ece

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European courts, and so on). Though there is some concern with the development of codes that insufficient standards apply to both law enforcement/child protection and protection of freedom of expression rights. If these mechanisms are improperly structured, we can expect public harm to result in the medium term".

XI. SUGGESTIONS

The author feels that the adoption of the Code of Ethics and self regulation model is a good step that should be encouraged by the government in true spirit of the right to freedom of speech and expression. It should be legally recognised subject to certain amendments like providing penal action for the defaulters and compulsory membership by all the stakeholders, etc, so that the code is sufficient in regulation audio visual content on online video streaming OTT Platforms. Other alternatives that can be resorted to include:

1. Co regulation Model: regulated self regulation.

2. Convergence Model: single framework covering different platforms of dissemination.

3. Global Ratings: standard rating system for content and quotas for indigenous content on OTT platforms. However, at present, some platforms are already giving maturity ratings to the content though it differs country to country.

HENCE, the author would like to conclude by saying that though censorship exists in all forms everywhere, the true essence of the right to freedom of speech and expression can only be achieved by loosening up the grip of state censorship on audio visual content. Owing to the fluidity of ideas, the audience should be empowered to choose the content they want to watch. Government should realise the fact that the effect of the content can be controlled by making the audience aware on how to take the content in a positive manner. Rather than fussing about the smaller details, content should be perceived as the creator intended it to be. Curbing the freedom of the creators because of the conservative approach of a few will only result in hindrance to the society's progress at large. On the other hand, creators must practice self regulation and take the liberty of showing certain content which might be harmful according to some only if it is necessary to depict a true picture of the theme.

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