

Discussion Paper: Online Curated Content Regulation

Strategic and legal issues

October 2019

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Disclaimer

This paper was first presented at the ‘Seminar on Film Certification and Regulation of Online Content’ organized by the Ministry of Information and Broadcasting, Government of India at Mumbai on October 10 and 11, 2019. This Discussion Paper has been prepared by us for the benefit of the readers, with a view to provide a brief background of the subject, the issues, and the laws that concern online curated content provider platforms today. The objective of this paper is to facilitate a meaningful deliberation in relation to online curated content issues. The contents of the paper are for discussions and reference only and should not be construed as a legal opinion or advice.

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1. Discussion Paper: Online Curated Content Platforms: Regulation or not ?

Online curated content platforms have changed the landscape of entertainment industry in a manner which is unprecedented and unforeseen. The variety of content, and the convenience of watching the content as per one's option and choice, have added to the popularity of online curated content platforms ("OCCPs"). Such curated content is not a *'one size fit all'*. OCCPs provide different genres of content to choose from, and thus have added to plurality of expression. This is of utmost importance in a democratic country.

Driven by falling data costs, low cost smartphones, increased broadband penetration; the digital video streaming in India is set to grow to INR 11,977 crore by 2023 at a CAGR of ~22%.¹

The pre-certification law (i.e. Cinematograph Act, 1952) does not apply to online curated content.² However, several laws as illustrated in this paper do apply to online content. Absence of pre-certification has resulted in general perception that online curated content is unregulated. This has led to filing of a number of public interest litigations (PILs)³ in courts demanding content regulation for OCCPs. In this regard, broader questions that need to be considered are:

1. Should there be pre-certification of curated content available on online platform?
2. Are OCCPs unregulated today? If not, what are the laws applicable to OCCPs and unlawful content on platforms?
3. If curated platform content is regulated under existing laws, is there a requirement for any additional laws?

4. Since curated platform content is pull/on-demand and subscription-based, can content issue be resolved in a manner other than enacting additional laws?
5. What should be the role of regulator in this changing eco-system? How can the Government support the new technological environment and play an enabling and guiding role?

Our discussion paper has been prepared with the objective of facilitating deliberation on this subject before arriving at a decision on regulating curated content available on online platform.

I. Pre-Censorship / certification of Curated Content on Online Platforms

1. For the purpose of this paper, we have divided content broadly into: entertainment content that is made available by OCCP on its own platform ("**Curated Content**") and content uploaded by users on third party platform ("**User Generated Content/UGC**"). The platforms that make available news and current affairs content, are not being discussed this paper.
2. OCCP chooses and controls the Curated Content that is made available on its platform. This content may be owned by the OCCP, which it produces or acquires from third parties, or licensed by it (exclusive or non-exclusive basis). OCCP could be held liable in case of illegality of the content, since the OCCP is itself uploading the content on its platform.
3. User Generated Content can be viewed by users or subscribers of the relevant platforms. In this case, the online content platforms do not exercise control over

1. <https://www.livemint.com/industry/media/india-s-video-streaming-industry-to-grow-at-22-pwc-report-1559806416120.html>.

2. *Mr. Padmanabh Shankar v Union of India & Ors* Writ Petition No.6050/2019

3. *Justice for Rights Foundation v. Union of India* W.P.(C). No. 11164 of 2018; *Mr. Padmanabh Shankar v Union of India & Ors* Writ Petition No.6050/2019; *Divya Gontia V. Union of India* PIL No. 127 of 2018

the UGC and would normally not be held liable for such content, subject to their compliance of relevant provisions under the Information Technology Act, 2000 (“IT Act”).

4. OCCPs typically work on a subscription model – which could be free, or fee based. In either case, the user has to register with the relevant OCCP. The content is provided on a “pull basis” rather than a “push basis”. This means that the user has to request the OCCP for content, to which OCCP system responds, by providing the content on demand. This is unlike traditional linear television where content is “pushed” to the user.
5. Most of the pre-certification laws apply to public exhibition. It is important to assess whether online content should be considered as ‘public exhibition’ or private exhibition of content. When content is made available in theatre or by broadcast on television, it is available to the public at large. This can be differentiated from a OCCP scenario where the viewing is on-demand / pull basis and confined at a given point in time to the relevant user. Thus, viewing online content on OCCP may not qualify as public exhibition. In this regard, technological measures could be adopted, some of which have been listed in Section D of the paper.
6. It can also be argued that subjecting only OCCPs to any pre-censorship regulations would discriminate them against UCG. Hence, any law that is implemented vis-a-vis Curated Content will have to be tested on the equality principles under Article 14 of the Constitution of India.

II. Content Laws applicable to OCCPs in India

- I. Some content laws are medium specific, i.e they only regulate content appearing on specific mediums. For example, the Cinematograph Act, 1952 provides for

the certification of cinematograph films for public exhibition only. The Cable Television Networks (Regulation) Act, 1995 only applies to content appearing on cable television. Uplinking and downlinking guidelines apply to satellite television. These legislations do not apply to online content.

2. However, there are laws which are content agnostic and apply to online content as well. For example:
 - i. Anti-National Content
 - a. The Indian Penal Code, 1860 (“IPC”) prohibits the use of words either spoken or written, signs, visible representations, or otherwise, which bring or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards the Government established by Law in India.⁴
 - b. The Unlawful Activities (Prevention) Act, 1967 prohibits taking part in ‘unlawful activities.’ An ‘unlawful activity’ has been defined as any action taken by an individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise), which is intended to bring about the cessation of a part of the territory of India, which disclaims, questions or disrupts the sovereignty or territorial integrity of India, or which causes or is intended to cause disaffection against India.⁵
 - ii. Obscene Content
 - a. The IT Act punishes anyone who publishes or transmits any material which is lascivious or appeals to the prurient interests of a person such as to deprave and corrupt the person.⁶

4. Section 124, IPC

5. Section 13, Unlawful Activities (Prevention) Act, 1967

6. Section 67, IT Act

- The IT Act also prohibits publishing or transmitting material containing sexually explicit acts.⁷
- b. The IPC makes it an offence to sell, distribute, import, export, exhibit, advertise, circulate, etc. such obscene content.⁸
 - c. The Protection of Children from Sexual Offences Act, 2012 punishes any person who stores for commercial purposes any pornographic material in any form.⁹
- iii. Defamatory Content
- a. The IPC prohibits any person from defaming another.¹⁰ The IPC lays down that a person defames another if he, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person.
3. The content that is considered illegal offline will also be illegal online. Thus, content on OCCPs is not completely unregulated and is subject to applicable laws.
 4. At times, where two different laws apply to or regulate or penalize a particular type of offence, the question of which law to apply can also arise. The Supreme Court's judgment in *Sharat Babu Digumatri v. Government of NCT of Delhi*¹¹ clarified this for online platform by stating that if the IT Act specifically covers an offence, only the IT Act would apply to such offence even though it may be also be punishable under other existing laws. To illustrate, if the content on the platform is considered obscene, the provisions of the IT Act prohibiting the publication/transmission of obscene content would apply. The offender would not be liable under similar provisions of the IPC prohibiting and penalizing publishing obscene content.
 5. Further, time and again the courts have held that any law that regulates content, would need to be drawn up in compliance with Article 19 of the Constitution of India, i.e. Right to Freedom of Speech and Expression. Therefore, any restrictions on this right would need to fall within the four corners of constitutional restrictions under Article 19 (2) and not go beyond.
 6. The Supreme Court in the case of *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*¹² has observed that “*For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them.*”
 7. In fact, the Supreme Court of India in the matter of *Shreya Singhal V. Union of India*,¹³ has recognised that there cannot be any additional embargos on online speech and consequently, declared Section 66A of the IT Act, which imposed additional restrictions on online speech, as unconstitutional. The court further stated that “*the Court order and/or the notification requesting takedown by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2).*”

7. Section 67 A, IT Act

8. Section 292, IPC

9. Section 15, Protection of Children from Sexual Offences Act, 2012

10. Section 499 read with Section 500, IPC

11. *AIR 2017 SC 150*

12. *AIR1995SC1236*

13. *AIR2015SC1523*

III. Laws Regulating OCCP Conduct

1. As per the Government of India (Allocation of Business) Rules, 1961, the Ministry of Electronics and Information Technology (MeiTY) has jurisdiction over the internet, information technology, and information technology-enabled services. Thus, MeiTY is the regulator for internet and the issues emanating from it. The platforms that host UGC qualify as intermediaries¹⁴ under the IT Act. If there is illegal or unlawful content available on, such UGC platforms, the same can be asked to be taken down either under Section 69A or 79 of the IT Act. We have discussed these provisions in detail in **Annexure A**.
2. While the OCCP could be held liable for illegality of the content on their platforms, the present take down process under the IT Act does not apply to OCCPs, since they are not intermediaries like UGC Platforms. Criminal courts also don't seem to have the power to seek take down / removal of content from such OCCPs.
3. Thus, at present, only through court orders (in PILs or otherwise), it may be possible to get a take-down order for illegal or unlawful content available on any OCCP. This gap may be plugged by appropriately amending the IT Act, where MeiTY can be given power to send take down requests for illegal content on relevant OCCP subject to procedural safeguards such as under 69-A of the IT Act, where the OCCP is given an opportunity of being heard before ordering taken-down.

14. Under Section 2(w), IT Act "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes

IV. Other Mechanism for Regulating Online Content

1. Considering the difference in the nature of exhibition of online content, the requirement of maintaining equality before law, and preservation of fundamental right of Indian citizens to express, and have access to information; a balanced approach needs to be taken.
2. The benefits of self-regulation have been discussed by the Delhi High Court in the matter of *Indraprastha People & Anr. v. Union of India & Ors.*¹⁵ in the following paragraph-
"65. Some of the Advantages of self-regulations could be:
 - i. *Self-regulation preserves independence of the media and protects it from partisan government interference;*
 - ii. *It leads to more efficiency since the media understand their own environment better than an external agency;*
 - iii. *As the media environment becomes global (through the development of the internet and digital platforms) questions of jurisdiction become complex in an external adjudicatory system. The self-regulatory system can fill the resulting gap;*
 - iv. *It is beneficial to the society in terms of money because the tax payer is not burdened and the industry bears the cost;*
 - v. *Peer pressure is believed to be the best self-regulatory form of discipline.*
 - vi. *Self-regulation can also drive up professional standards by requiring organizations to think about and even develop their own standards of behaviour."*
3. In view of the above, some suggestions as a way forward are as follows:

15. *Indraprastha People v. Union of India*, 2015(1)RCR(Civil)24

A. For the Government

- i. Amendment of IT Act as discussed in Section C above, to introduce take-down provision for illegal content on OCCPs.
- ii. For reasons stated above, OCCPs have to be looked at with a different lens vis-à-vis television and other traditional platforms which have their own inherent restrictions because of genre specifications, mass-reach and push nature of the content. Certain technological measures can be adopted in case of OCCPs as discussed below.
- iii. The Central Government could publish the summary of relevant laws that apply to online content for reference of the online platforms. The list should be updated from time to time.
- iv. Guidelines which set out basic standards to be maintained by OCCPs, with do's and don'ts can be formulated by the Central Government to guide the industry. One such example is the Guidelines for Approval of Online Travel Aggregators (OTA) issued by Ministry of Tourism, which are voluntary in nature. Just like OCCPs, OTAs have also curated and disrupted the travel industry. While traditional tourism service providers and tourist agents are regulated, OTAs are not. The government has only issued voluntary guidelines, which could be considered as guidance at best.
- v. The role of the Government is also moving from that of an 'inspector' to a 'facilitator', to facilitate the ease of business. A recent example is India's new Code on Wages, 2019, which provides for the appointment of an 'Inspector cum Facilitator,' to carry out inspections and provide information to employers and employees for better compliance. The government should consider such a facilitator approach to promote OCCPs and such new age businesses in the country

B. For the OCCPs

- i. OCCPs should take active steps to ensure that illegal or unlawful content is not made available on their platform. They can review laws published by government for guidance on this point and work with the government to develop a set of guidelines.
- ii. For protection of children and vulnerable members of public, following steps could be considered by OCCPs:
 - a. Age rating based on common set of principles to be evolved by the industry and government that can act as guidance for the industry. This could be in the nature of categorization of content.
 - b. Appropriate synopsis of content and warning notices and disclaimers about the nature of the content (e.g. violence, nudity) to be displayed before the viewer can choose to "play" the content. Thus, before the consumer pulls the content, the consumer will have full disclosure of the nature of content. Such information could be made available in as many local languages as possible.
 - c. Age gating and parental controls should be implemented by adopting appropriate technology.
 - d. Taking active steps for consumer awareness, where they are informed about the abovementioned initiatives.
4. In addition to the above, government and OCCPs should also consider setting up a body which would be empowered to administer the compliance of aspects mentioned above.

2. Conclusion

The digital media sector is poised to grow only bigger and is an integral part of the Indian economy. It is important to ensure that the sector is able to grow with the least amount of friction and with stability. For this, regulatory certainty is most critical. A number of laws are

currently already applicable to regulate the functioning of OCCPs and the content made available by them. In light of the challenges associated with regulating online content, it is advisable to adopt a co-regulatory model.

Annexure - I

- i. Section 69 A of the IT Act authorizes the Central Government to authorize the blocking of access to content over the internet. Section 69A of the IT Act provides very limited grounds under which the appropriate government authority (usually the MEITY) can issue the take down requests. These grounds are (i) in the interest of sovereignty and integrity of India, (ii) defence of India (iii) security of the state, (iv) in the interest of friendly relationship with foreign states, (v) for public order and (vi) for the prevention of any cognizable offence in relation to the above. Such take down requests also have to be issued as per process under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (“**Blocking Rules**”). Blocking of content under Section 69 A of the IT Act is mandatory in nature as failure can result in penal consequences.¹⁶
- ii. Section 79 of the IT Act, read with the judgement of the Supreme Court of India in the case of *Shreya Singhal v. Union of India*¹⁷ (“**Shreya Singhal case**”) requires that an intermediary, upon notice received by means of a court order or the order of a competent government authority take down the impugned content referred to in the notice. As per *Shreya Singhal* case, the intermediary can only be required to taken down content if it is in line with the reasonable restrictions on the freedom of speech and expression enshrined under Article 19 (2) of the Constitution of India. The government authorities for the purposes of this provision are understood to mean police authorities, the MeITY or a court of law. The Information Technology (Intermediaries Guidelines) Rules, 2011 (“**Intermediaries Rules**”) prescribe the time period within which content has to be taken down by intermediary. Separately, under Intermediary Guidelines the platforms are required to include in their terms and conditions that users should not upload illegal content. Failure to comply with take down requests under this section could also make the platform liable as publisher or abettor of content.

16. As per Section 69 A (3) of IT Act, an intermediary who fails to comply with the direction issued shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine

17. AIR2015SC1523

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