



*By Email*

15<sup>th</sup> January 2024

To,  
Shri Sanjiv Shankar,  
Joint Secretary (Broadcasting-I) and CVO,  
Ministry of Information and Broadcasting  
Email: [jsb-moib@gov.in](mailto:jsb-moib@gov.in)

Subject: **Ikigai Law's comments on Draft Broadcasting Services (Regulation) Bill, 2023**

Dear Sir,

Ikigai Law is a law and public policy firm in India with a sharp focus on technology and innovation. We at Ikigai Law are grateful to the Union Ministry of Information and Broadcasting (**MIB**) for the opportunity to provide our comments on the draft Bill, released for public consultation on 10 November 2023. We have provided detailed comments and suggestions on the clauses of the Bill in the table below, in line with the prescribed proforma provided in **Annexure III** of the draft Bill. We are also summarising our broad comments and recommendations on the Bill, below:

#### **A. Broad comments and recommendations**

1. **OTT streaming services should be kept outside the purview of the Bill:** The draft Bill introduces the term 'OTT broadcasting service' and brings OTT streaming services under the same regulatory umbrella as broadcasting services such as cable and radio broadcasting. However, there are fundamental differences between the two modes of content distribution. Broadcasting involves transmission of content which is from one-to-many and simultaneous. i.e. the same content is broadcast simultaneously for all viewers. This is different from a unicast, which is one to one transmission of content. For instance, on OTT platforms, any viewer can choose the specific content to watch, which will be streamed only to her, and not to everybody at large. Broadcasting follows a pre-determined schedule for all viewers, and the viewer can only watch the content being broadcast at a particular time. OTT streaming offers curated catalogue of content on-demand, where viewers have the freedom to choose what to watch. Thus, OTT streaming is considered as pull content, since the viewer chooses or pulls content from the platform's library of content whereas broadcasting is referred to as push content, since the viewer can only watch what is pushed to her. However, the Bill does not account for these differences and treats OTT streaming services at par with broadcasting services. Additionally, it is because of these distinctive features of OTT streaming services (freedom of choice, private viewing experience etc.), that OTT platforms have been subject to a light touch co-regulatory approach under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules). However, the draft Bill now brings OTT streaming platforms under the same regulatory bracket as broadcasting services and imposes similar compliances on them. This will create an onerous compliance regime for the OTT industry, create barriers to entry and stifle growth and innovation in the sector, ultimately reducing consumer choice. It will also pave the way for executive censorship of online content and threaten free speech and artistic freedom and expression. Further, adequate provisions already



exist under the Information Technology Act 2000 (IT Act) to regulate OTT streaming services. OTT streaming platforms have no place in a bill that aims to streamline the regulatory framework for the broadcasting sector. Hence, OTT streaming services should be kept outside the purview of the draft Bill.

2. **News and current affairs programmes should be kept outside the purview of the Bill:** The draft Bill includes within its scope, any person broadcasting news and current affairs programmes on digital mediums, including online paper, news portal, website, social media intermediary, or other similar medium. “*News and current affairs programme*” (NACP) has been broadly defined. Thus, the Bill includes within its scope not only organizations but even individual creators. Independent journalists or any individual posting about recent events of “*socio-political, economic or cultural nature*” will fall under the Bill. These persons will be subject to the same requirements as applicable to “OTT broadcasting network providers”, including complying with a prescribed Programme Code and Advertisement Code, subjecting themselves to a three-tier regulatory structure and getting their content certified from an in-house Content Evaluation Committee. This will have a chilling effect on free speech of the press, which is the cornerstone of a democracy and enshrined within Article 19 of the Constitution of India. It will impact journalistic freedom as well as the right to access diverse views and perspectives, fundamental to a democratic society. It could be a tool in the hands of the executive to censor not palatable with the government. It will create an environment where journalists or other news disseminators will always function under the looming threat of executive action. This also creates onerous requirements, especially for individual creators and increases costs of compliance. The penalties for non-compliance are the same as OTT broadcasters, and hence prohibitive for individuals. Hence, news and current affairs content should be kept outside the purview of this Bill.
3. **Have safeguards in place for broad and arbitrary powers of the executive:** The executive has been given wide ranging powers under the draft Bill, without safeguards. The central government has powers to delete/modify content, prohibit transmission of programme and even cease operations of a broadcasting service in public interest. It has powers to inspect, intercept, seize and confiscate equipment of broadcasting network providers. The wide powers granted under the Bill, coupled with vaguely drafted provisions and excessive delegation of these powers (to be prescribed), grants sweeping powers to the executive to exercise control over broadcasting services. It creates an environment where broadcasters will function under constant threat of executive action. This also runs contrary to the objective of the draft bill, which are to bring clarity and flexibility in the regulations, simplify compliance and promote ease of doing business and foster innovation. There should be procedural safeguards to check the powers of the executive.
4. **Reevaluate the excessive delegation to executive rule making:** Various important provisions of the draft Bill have been left to be implemented through rules to be made by the Central government. It is settled law that ‘essential legislative function’ cannot be delegated to the executive and must be carried out through acts of the legislature.<sup>1</sup> Essential legislative function has been held to include declaring legislative policy and laying down the standard that is to be enacted into a rule of law.<sup>2</sup> In *Delhi v. Birla Cotton Spg. and Wvg. Mills*,<sup>3</sup> the Supreme Court had held that the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act.<sup>4</sup> The task of subordinate legislation is simply to operationalize the legislative policy enunciated through statutes.<sup>5</sup> The legislature is constitutionally required

---

<sup>1</sup> *Delhi v. Birla Cotton Spg. and Wvg. Mills* (1968) 3 SCR 251.

<sup>2</sup> (1968) 3 SCR 251.

<sup>3</sup> (1968) 3 SCR 251.

<sup>4</sup> (1968) 3 SCR 251.

<sup>5</sup> *Ajoy Kumar Banerjee v. Union of India*, (1984) 3 SCC 127.



to keep in its own hands the essential legislative functions which consist of the determination of legislative policy and its formulation as a binding rule of conduct.<sup>6</sup> Excessive delegation of legislative function runs the risk of unconstitutionality. The draft Bill should reevaluate its reliance on excessive rule making by the executive, especially on essential aspects such as the Programme Code and Advertisement Code.

5. **Remove ambiguous and broad terminology:** The draft Bill is riddled with ambiguous and broad terminology which lack clarity and specify. This creates uncertainty in application of the law and impacts ease of doing business. This also runs contrary to the objective of the draft bill, which are to bring clarity and flexibility in the regulations, simplify compliance and promote ease of doing business and foster innovation. There should be definitional clarity and specificity introduced in the terms used in the Bill.

#### B. Specific clause wise comments and suggestions

Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
<b>Chapter I – Preliminary</b>		
1.	Clause 2(1)(h) – Definition of “Broadcasting network operator”	<p><b>Comment:</b> Includes OTT broadcasting service operator.</p> <p>The definition lists down different types of broadcasting operators such as radio, terrestrial, cable as well as “OTT broadcasting service operator”. It categorizes OTT streaming services as a type of broadcasting service and treats it at par with broadcasting services such as radio and cable, without considering the difference between the two services.</p> <p>(i) Broadcasting involves transmission of content which is from one-to-many and simultaneous. i.e. the same content is broadcast simultaneously for all viewers. This is different from a unicast, which is one to one transmission of content. For instance, on OTT platforms, any viewer can choose the specific content to watch, which will be streamed only to her, and not to everybody at large.</p>

<sup>6</sup> *Sidhartha Sarawgi v. Kolkata Port*, (2014) 16 SCC 248





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>(ii) Broadcasting such as cable and radio follows a pre-determined schedule for all viewers, and the viewer can only watch the content being broadcast at a particular time. OTT streaming offers curated catalogue of content on-demand, where viewers have the freedom to choose when and what to watch.</p> <p>(iii) Broadcasting is known as push content since the viewer can only watch programmes which are being broadcast or pushed at that time. On the other hand, OTT streaming platforms is considered pull content since viewers can pull or choose what they want to watch at what time and are not limited by any broadcasting schedule.</p> <p>(iv) Broadcasting is usually a community watching experience. However, OTT streaming is generally a private viewing experience. For instance, according to a report, 600 million smartphone users watch OTT content on personal devices as opposed to smart TVs/laptops.<sup>7</sup></p> <p>However, the Bill does not account for these differences and treats OTT streaming services at par with broadcasting services.</p> <p>Courts and tribunals have also observed the differences between OTT streaming platforms and other traditional modes of content distribution. A 2023 TDSAT order has observed that OTT platforms are not TV channels, do not need any permission/license from the Central government and are not subject to regulations under TRAI.<sup>8</sup></p> <p>In <i>Padmanabh Shankar v. Union of India &amp; Ors</i><sup>9</sup>, the Karnataka High Court had clarified that OTT platforms cannot be regulated in the way films are regulated under The Cinematograph Act 1952 because unlike films in theatres, there is no “exhibition” of content on OTT streaming platforms and the internet only contemplates transfer of files in response to requests made by users.</p>

<sup>7</sup> <https://telecom.economictimes.indiatimes.com/news/smartphones-drive-ott-streaming-explosion-in-india-5g-to-be-game-changer/90619461>

<sup>8</sup> Broadcasting Petition/217/2023, Order Dated 04 October 2023, Telecom Disputes Settlement & Appellate Tribunal.

<sup>9</sup> Writ Petition No. 6050 OF 2019 (C) PIL, High Court of Karnataka.



Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>It is because of these distinctive features of OTT streaming services (freedom of choice, private viewing experience etc.), that OTT platforms have been subject to a light touch co-regulatory approach under the IT Rules. Whereas on broadcasting services, since the viewer cannot choose the type of content being broadcast, the Government exerts some control on them, in the form of regulating the kind of content, price caps on channels, among others. However, the Bill seeks to bring OTT streaming platforms under the same regulatory umbrella as broadcasting services and impose similar compliances on them. This will create an onerous compliance regime, create barriers to entry and stifle growth and innovation in the sector, ultimately reducing consumer choice.</p> <p>Having OTT streaming platforms under the same regulatory bracket as broadcasting services under the Bill will also pave the way for executive censorship of online content and threaten free speech and artistic freedom which OTT streaming offers.</p> <p><b>Recommendation:</b> OTT streaming services should be kept outside the purview of the draft Bill.</p>
2.	Clause 2(1)(i) Broadcaster	<p><b>Comment-</b> Includes OTT within the ambit of a broadcaster</p> <p>For reasons explained in detail above, OTT streaming cannot be equated with broadcasting.</p> <p><b>Recommendation:</b> OTT streaming services should be kept outside the purview of the draft Bill.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
3.	Clause 2(1)(q) - “Internet broadcasting network”	<p><b>Comment</b> – Ambiguous and broad definition, includes OTT broadcasting services</p> <p>Internet broadcasting network is defined as a “<i>system for the delivery of broadcasting services and programmes using the internet, over a computer resource, or using Internet Protocol, to subscribers or viewers, and includes IPTV and OTT broadcasting services.</i>”</p> <p>The definition is vague and wide and could potentially bring other systems into the ambit of the Bill, beyond the intended objectives of the Bill and the MIB’s jurisdiction. For instance, Content Delivery Networks (<b>CDNs</b>), which are geographically distributed networks to enable faster web performance by locating copies of web content closer to users or facilitating delivery of dynamic content (e.g., live video feeds). CDNs could be perceived as “systems” that facilitates content delivery through a “computer resource” and brought within the scope of the Bill. This goes against the intended scope object of the Bill, which was to streamline the broadcasting sector.</p> <p>The definition also includes “OTT broadcasting services” within its ambit. OTT streaming cannot be treated as a type of broadcasting service.</p> <p><b>Recommendation:</b> The definition needs to have more specificity and clarity. OTT streaming services should be kept outside the purview of the draft Bill.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
4.	Clause 2(1)(v) - “News and current affairs programmes” (NACP)	<p><b>Comment</b> – Broad language and conflict with the IT Rules</p> <p>The definition of News and Current Affairs Programme is overly broad. Terms such as “<i>newly-received or noteworthy audio, visual or audio-visual programmes or live programmes</i>” or “<i>events primarily of socio-political, economic or cultural nature</i>” is overly expansive. It can be used to include a wide variety of content under the scope of the Bill.</p> <p>Further, both the draft Bill and IT rules include news and current affairs programmes within their ambit, however, the draft Bill prescribes also mentions the medium, ‘audio, visual or audio-visual programmes or live programmes.’ This means news and current affairs content that is not in these formats, such as news articles/reports/ etc. would be governed under the IT Rules. This may create a regulatory overlap and inconsistency as the same piece of NCAP will be subject to different regulations merely based on the format of the news i.e. whether it is written or is in audio/visual format.</p> <p><b>Recommendation:</b> For reasons explained in detail in Row No. 10, news and current affairs programme content should be kept outside the purview of the Bill. So the definition can be removed from the Bill.</p>
5.	Clause 2(1)(y)- Over-the-top broadcasting service” or “OTT broadcasting service	<p><b>Comment-</b> Includes OTT broadcasting service</p> <p>The draft Bill provides a definition of the term OTT broadcasting service. For reasons explained in detail above, the term broadcasting cannot be applied to OTT streaming services as they are both two different modes of content distribution.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p><b>Recommendation:</b> OTT streaming services should be kept outside the purview of the draft Bill.</p>
6.	<p>Clause 5(1)(f)- Providing information sought by the government</p>	<p><b>Comment-</b> Overbroad requirement</p> <p>Broadcasters can be asked to provide such information as sought by the Central or State Government or their authorised agencies. The Government officer/agency can also specify the time and form in which the information has to be provided. The clause does not have any safeguards. Thus the executive can ask for any kind of information.</p> <p><b>Recommendation:</b> There should be some checks and balances introduced in the clause. For instance, what kind of information can be sought, under what conditions.</p>
7.	<p>Clause 8 -Renewal of registration</p> <p>Clause 9- Suspension or revocation of registration</p>	<p><b>Comment-</b> Lack of clarity for OTT platforms</p> <p>The Central government has the power to cancel registration of a broadcaster. Further, the Registering Authority can suspend or revoke registration in case of failure to comply with terms of registration.</p> <p>Since, the definition of registration includes “intimation”, hence this provision may apply to OTT streaming platforms and NACP creators as well who are not required to register but provide an intimation of its operations. However, it is unclear how an “intimation” provided by the platform can be cancelled/revoked or suspended.</p>







Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p><b>Recommendation:</b> OTT streaming platforms and persons sharing NACP should be kept outside the purview of the Bill.</p>
8.	Clause 16- Intimation by Internet Broadcasting Network Operators	<p><b>Comment-</b> Lack of objective criteria</p> <p>Any person providing OTT broadcasting service in India, meeting a certain threshold of Indian subscribers/viewers, will be required to provide an intimation to the Central government. This requirement will also be applicable to persons sharing NACP on digital media. The threshold is left to be prescribed by the Central government.</p> <p>However, there is no objective criteria on how this threshold will be determined. Without this criterion in place, this threshold could be arbitrarily changed. Further, there is no clarity on how the threshold will be determined for individual persons sharing NACP.</p> <p><b>Recommendation:</b> OTT streaming platforms and persons sharing NACP should be kept outside the purview of the Bill. Hence this provision does not apply and can be removed.</p>
<b>Chapter III: Content standards, accessibility and access control measures</b>		
9.	Clause 19 - Program Code and Advertisement Code	<b>Comment</b> –Concerns of censorship





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>The draft Bill requires broadcasting content to mandatorily adhere to a Programme Code and Advertisement Code. This also applies to OTT streaming services.</p> <p>The draft Bill leaves the framing of the Codes entirely up to the central government. The Draft Bill does not provide any guidance or factors to be considered on how these Codes will be framed or interpreted. This may lead to executive censorship of online content. There have also been increasing number of cases where platforms are proactively censoring content under the threat of executive action. Subjecting online content to such government prescribed codes may lead to self-censorship of content not palatable to the Government.</p> <p>Subjecting OTT streaming platforms to codes similar to those broadcasting services will have a chilling effect on the fundamental right to freedom of speech and expression. For instance, the Programme Code applicable to cable broadcasters under the Cable Television Network Rules, 1994 (<b>CTNR</b>) contains ambiguous and wide restrictions leading to an over-bearing regulation of cable TV. This includes content which (i) offends against good taste or decency; (ii) contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truths; (iii) Contains anything affecting the integrity of the Nation. <sup>10</sup> Having such vague and overly-restrictions for OTT streaming platforms will adversely impact the creative and artistic freedom that OTT streaming platforms offers to artists and creators.</p> <p>Such onerous requirements will deter foreign players such as Netflix, Amazon Prime Video, Hotstar etc. from remaining in the Indian market and hinder the overall growth of the industry. This also runs contrary to the</p>

<sup>10</sup> Rule 6, the Cable Television Network Rules, 1994





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>objective of the MIB which was to foster growth and innovation and Union Minister Mr. Anurag Singh Thakur vision to make India a global hub of content creation.<sup>11</sup></p> <p><b>Recommendation:</b> OTT streaming platforms should be kept outside the purview of the Bill and not be subject to requirements such as complying with a Programme Code and Advertisement Code.</p>
10.	Clause 20 - News and Current Affairs Programmes (NCAP)	<p><b>Comment</b> –Ambiguous terms and violation of the fundamental right to free speech</p> <p>Persons broadcasting NACP through a digital medium (online paper, news portal, website, social media intermediary) “<i>as part of a systematic business, professional, or commercial activity</i>” would have to adhere to a Programme and Advertisement Code.</p> <p>The clause does not provide a definition or any clarity on what constitutes “<i>systematic business, professional, or commercial activity</i>.”</p> <p>Further, as per this provision, all requirements applicable to OTT broadcasters will also apply to any person broadcasting NACP. They would be required to adhere to a Programme Code and Advertisement Code and appoint an in-house Content Evaluation Committee to certify news before it is broadcast.</p>

<sup>11</sup> [https://www.business-standard.com/article/current-affairs/my-aim-is-to-make-india-global-hub-of-content-creation-anurag-thakur-122032801437\\_1.html](https://www.business-standard.com/article/current-affairs/my-aim-is-to-make-india-global-hub-of-content-creation-anurag-thakur-122032801437_1.html)





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>This will have wide ranging implications on journalistic freedom and expression and lead to censorship of the press, which is the cornerstone of a democracy and enshrined within Article 19 of the Constitution of India. This will also adversely affect the right of citizens of the country to access multiple and diverse points of views, which is recognised within the fundamental right to freedom of speech and expression. The Supreme Court in the matter of <i>Secy., Ministry of Information &amp; Broadcasting, Govt. of India v. Cricket Assn. of Bengal</i><sup>12</sup> held that- <i>The right of free speech and expression includes the right to receive and impart information. 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.</i><sup>13</sup></p> <p>In <i>Agij Promotion of Nineteenonea Media Pvt. Ltd. &amp; Ors v. Union of India &amp; Anr</i><sup>14</sup> various provisions of the IT rules were challenged, including the provisions that required “news and current affairs programme” to comply to the Programme Code prescribed under the Cable Television Network Act 1995 (CTNA). The Bombay High Court held that the programme Code may be relevant for cable service, but “cannot bind writers/editor/publishers of content on the internet to express views which may be against good taste or even may not be decent.” “If a writer/editor/publisher has to adhere to or observe the Programme Code in toto, he would necessarily be precluded from criticizing an individual in respect of his public life.” The Court went on to add that Rule 9 of the IT rules was in violation of Article 19 of the Constitution of India, since it subjected</p>

<sup>12</sup> (1995) 2 SCC 161.

<sup>13</sup> (1995) 2 SCC 161, Summary by the Supreme Court at para 201(3)(b).

<sup>14</sup> Writ Petition (L.) No.14172 of 2021, Order dated 14<sup>th</sup> August 2021





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p data-bbox="954 368 2150 432">publishers of news and current affairs to action under the Press Council Act and the CTNA. Accordingly, it issued an interim stay on the provision.</p> <p data-bbox="954 459 2150 552">A stay on Rule 9 was also issued by the Madras High Court, which had stated that an “oversight mechanism to control the media by the government may rob the media of its independence and the fourth pillar, so to say, of democracy may not at all be there.”<sup>15</sup></p> <p data-bbox="954 579 2150 738">The Supreme Court in the matter of <i>Brij Bhushan v. State of Delhi</i>,<sup>16</sup> had observed that pre-censorship of press would be a restriction on press freedom. The Supreme Court while dealing with the matter of <i>Romesh Thappar v. State of Madras</i><sup>17</sup> also noted that the freedom of speech and expression includes freedom of propagation of ideas, and that any law not in conformity with the restrictions given under Article 19(2), would be unconstitutional.<sup>18</sup></p> <p data-bbox="954 820 1272 847"><b>Implementation challenges:</b></p> <p data-bbox="954 932 2150 1125">The provision imposes on individuals the same requirements as applicable to broadcasting organizations. For instance, independent journalists/news and current affairs content creators would be required to be part of the three-tier regulatory structure prescribed under the draft Bill i.e. (i) self-regulation (by appointing a Grievance or similar officer), (ii) self-regulatory organization and (iii) inter-ministerial Broadcasting Advisory Council. They would also be required to appoint an in-house Content Evaluation Committee to get their content certified before sharing. This means every independent journalist or news and current affairs content creator would have</p>

<sup>15</sup> Writ Petitions No 13055 and 12515 of 2021, *TM Krishna v. Union of India*, and *Digital News Publishers Association v. Union of India*.

<sup>16</sup> 1950 SCC 499.

<sup>17</sup> 1950 SCC 436.

<sup>18</sup> 1950 SCC 436.





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>to form an in house- Content Evaluation Committee and appoint a Grievance Officer. These are extremely cumbersome and cost intensive requirements for individuals, which will hinder their growth. This will also deter smaller players from entering the market.</p> <p>Additionally, the First Schedule to the Bill provides for penalties for the contravention of the Programme and Advertisement Codes for OTT broadcasting network operators to be INR 20,000 for the first contravention, and INR 1,00,000 for subsequent contraventions. Independent journalists and news and current affairs content creators would be subject to the same penalties, which are extremely prohibitive for individuals.</p> <p><b>Recommendation:</b> NACP on digital medium should be kept outside the purview of this Bill, so this provision itself can be done away with.</p>
<b>Chapter IV: Regulatory Structure</b>		
11.	Clause 24 - Regulatory structure	<p><b>Comment</b> – Excessive oversight by the executive</p> <p>The provision establishes a 3-tier regulatory structure consisting of (i) self-regulation (by appointing a Grievance Officer), (ii) self-regulatory bodies and (iii) Broadcast Advisory Council.</p> <p>Though it appears that the provision promotes self-regulation, but it gives overbroad powers to the Central government (at the third tier of regulation) to govern content.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>In the case of <i>Union of India &amp; Cricket Association of Bengal</i>, the Supreme Court had held that broadcasting media should not be under the control of the government. It noted that the plurality of opinions that broadcast media can bring should not be under the control/monopoly of either the state or individuals/corporations.</p> <p>Further, a similar regulatory structure was introduced under Rule 9 of the IT Rules, to be administered by the MIB. However, the provision was challenged in various high courts, with an interim stay imposed by the Bombay and Madras High Court. The Bombay High had held that Rule 9 was an intrusion into the fundamental right to freedom of speech and expression under Article 19 of the Constitution of India.<sup>19</sup> The Madras High Court had stated that an “oversight mechanism to control the media by the government may rob the media of its independence and the fourth pillar, so to say, of democracy may not at all be there.”<sup>20</sup></p> <p>The draft Bill is now attempting to introduce the same regulatory structure, giving rise to concerns about its constitutional and legal validity.</p> <p><b>Recommendation:</b></p> <p>The regulatory structure in the Bill should have adequate procedural safeguards.</p>

<sup>19</sup> Writ Petition (L.) No.14172 of 2021, Order dated 14<sup>th</sup> August 2021 ; *Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors v. Union of India & Anr*

<sup>20</sup> Writ Petitions No 13055 and 12515 of 2021, *TM Krishna v. Union of India, and Digital News Publishers Association v. Union of India.*





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
12.	Clause 24(2) - Self-certification by the Content Evaluation Committee (CEC)	<p><b>Comment</b> – Concerns of censorship, violates the fundamental right to free speech</p> <p>The provision requires broadcasters to appoint an in-house CEC for self-certification of content.</p> <p><u>General concerns:</u></p> <ol style="list-style-type: none"> <li>i. The CEC is to comprise of people representing social groups such as women, child welfare, scheduled castes, scheduled tribes, minorities etc. These members may not have the expertise to certify content.</li> <li>ii. The Central government has the power to prescribe the number of members of the CEC, the required quorum and “<i>such other details to facilitate the formation of CEC and its smooth functioning</i>”. Thus, the executive has been given broad powers to decide the functioning of the CEC.</li> <li>iii. This requirement also creates barriers to entry for newer players and increases compliance costs for players who may not be able to direct limited resources towards this. This would limit the number of market players and ultimately limiting innovation, creativity and expression in the industry. The increased costs of compliance also means increased costs for consumers.</li> <li>iv. The requirement to mandatorily disclose names and other details of CEC members also poses a safety risk to these individuals.</li> </ol> <p><u>Concerns for OTT streaming platforms and persons sharing NACP</u></p>







Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>i. OTT streaming platforms are also required to comply with this requirement. Pre-certification of content on OTT streaming platforms will cause a chilling effect on free speech. This may also have negative impact on artistic and creative freedom. There have been several recorded instances of self-censorship by platforms fearing conflict with the Government.<sup>21</sup> Thus, the oversight of the Government over CEC could lead to executive censorship of content on such platforms.</p> <p>ii. Persons sharing NACP will also be required to certify content (i.e. news). Pre-certification of news is a gross violation of Article 19 of the Constitution of India. These aspects have been discussed in greater detail above in Row Number 10.</p> <p>iii. There are also implementation challenges with this requirement, especially for OTT streaming platforms with the large repository of content available on their platforms. Requiring the CEC to view and certify all such content, in multiple languages, is an unfeasible requirement. Amazon Prime Video alone has more than 4700 titles in its Indian library.<sup>22</sup> Jio Cinema has over 1 lakh+ hours of content. Netflix reportedly offers more than 6000 titles to its Indian audience as of 2023.<sup>23</sup></p> <p><b>Recommendation:</b> The requirement to pre-certify content should be done away with altogether. OTT streaming services and persons sharing NACP should be kept outside the purview of the Bill.</p>
13.	Clause 26 - Self-regulatory organisations of broadcasters and broadcasting network operators	<b>Comment</b> - Overlap with IT Rules

<sup>21</sup> <https://www.livemint.com/industry/media/the-slippery-slope-of-censorship-how-streaming-platforms-navigate-indian-sensibilities-with-international-content-11685125097433.html>  
<sup>22</sup> <https://www.comparitech.com/blog/vpn-privacy/amazon-prime-video-cost/>  
<sup>23</sup> <https://unogs.com/countrydetail>



Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>The second level of regulation is through self-regulatory organizations. The Bill notes that self-regulatory organization previously granted registration by the Central government under the rules made under the Cable Television Network (Regulation) Act, 1994 will be deemed to have registration. However, there is no reference to SROs created under the IT Rules (set up under Rule 12 of the IT Rules).</p> <p><b>Recommendation :</b> A clarification is necessary regarding the SROs established under the IT Rules to avoid an overlap.</p>
14.	Clause 27 - Broadcast Advisory Council	<p><b>Comment</b> – Overbroad powers of the executive</p> <p>The BAC is at the third tier in the regulatory structure. The Central government has control over appointing the members of the BAC as well as other details such as terms and conditions related to appointment, the manner of selection, tenure, performance etc. The BAC is to comprise of with 5 Government officials and 6 independent persons, all to be nominated by the Central government itself.</p> <p>The BAC has powers to recommend the Central government to delete/modify content or even take a channel off-air. Thus, there are concerns about the BAC’s independence as well as the excessive oversight of the executive over the BAC. This strengthens the executive’s control over content, without accompanying checks or safeguards.</p> <p><b>Recommendation:</b> The constitution of the BAC should be more independent. The Bill should prescribe safeguards on the BAC’s power to give recommendation to the Central government to censor content.</p>
15.	Clause 28- Functions of the Broadcast Advisory Council	<p><b>Comment-</b> Executive oversight over the BAC</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>The BAC can hear appeals against decisions of the SROs as well as matters referred by the Central government. The fact that the Central government can itself refer matters to the BAC which is appointed by the government itself raises concerns about the independence of the BAC and oversight of the executive.</p> <p><b>Recommendation:</b> There should be checks and balances in the Central government’s power to refer matters to the BAC.</p>
16.	Clause 29 - Constitution of review panels by Broadcast Advisory Council	<p><b>Comment</b> – Executive oversight over the review panels</p> <p>The review panels are to be constituted by the BAC which is a body with government oversight. The Central government also has the powers to make rules on how any appeal/reference will be made to the review panel. Executive control over functioning of the review panels raises similar censorship concerns as with the BAC. It is also unclear if the review panel will only hear appeals escalated from the BAC or can hear matters on its own.</p> <p><b>Recommendation:</b> There should be checks and balances in the form of procedural safeguards in the establishment and functioning of the review panels.</p>
<b>Chapter V: Inspections and Penalties</b>		
17.	Clause 30 - Power of Inspection Clause 31 - Power to seize and confiscate equipment	<b>Comment</b> – Broad powers granted to the Government





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
	<p>Clause 32 - Giving of opportunity to the operator of broadcasting network or broadcasting services of seized equipment</p> <p>Clause 35 - Penalty and measures for contraventions of Programme code and Advertisement Code</p> <p>Clause 36- Power to prohibit transmission of programme or operation of broadcaster or broadcasting network</p>	<p>Clause 30 of the Bill provides the Central government or any authorized agency or officer, the right to inspect broadcasting networks and services. On being directed, the operator of a broadcasting network will have to provide the necessary equipment, services and facilities at designated places for lawful interception or continuous monitoring, at its own cost.</p> <p>While Clause 30 provides for a reasonable notice to be given, the same can be waived off (at the discretion of the Central government or the authorized agency / officer). The provision does not provide for the reasons for waving off the reasonable notice to be recorded, rather only provides for the waving off to be exercised when such notice “<i>shall defeat the purpose of the inspection</i>”. Additionally, no prior permission or intimation is needed to exercise this power. Pertinently, the clause does not provide the possible grounds or reasons required for carrying out an inspection.</p> <p>As the grounds for carrying out the inspection under Clause 30 are not provided (which forms an essential part of the provision and acts as a check over the exercise of such powers), the powers under the Clause could be misused to exercise tacit control over broadcasters and broadcasting network operators.</p> <p>Clause 31 of the Bill further grants the power to seize and confiscate equipment of an operator of broadcasting network or broadcasting services, if any authorized officer has “reason to believe” that the provisions of the Bill, any rules or any guidelines under the Bill are being violated. The equipment seized will be confiscated unless the broadcasting operator shows compliance with the provisions of the Bill, within 30 days from the date of the seizure. This “reason to believe” is not required to be recorded or conveyed to the affected broadcaster.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>Though clause 32 provides that before an order of confiscation, a written notice be given to the broadcaster along with a reasonable opportunity of making a written representation or being heard in the matter. However, this is only after the equipment has already been seized. Further, while the decision of the authorised officer can be appealed before an Appellate court, it cannot be appealed any further. The court to which such an appeal may be preferred has also not been clarified by the Bill.</p> <p>There can arise a situation where seizure (which is discretionary and does not require the “reason to believe” to be recorded) is conducted as a means of tacit control, only to return the seized equipment after an expiry of 10 days (i.e., before the safeguard for confiscation in the form of written notice is required). Further, while the provision is only applicable over broadcasting network operators or services as specified under Second Schedule to the Bill, the Central government may include any other broadcasting network or service under its purview through notification in the official gazette.</p> <p>Under clause 35, in case of violation with the Codes, the Central government can direct broadcasters to delete or modify the content, issue or display an apology, impose financial penalties, direct a channel to be off-air for a specified time period or even cancel the registration of the broadcaster in case of repeated violation. There are no checks and balances in the provision with respect to the executive’s power such as an opportunity to be heard.</p> <p>Clause 36(1) empowers the Central government to prohibit the transmission of content on radio, cable, terrestrial and IPTV in “public interest” or for violation of the Codes or on grounds such as religion, caste etc. Clause 36(2) empowers the Central government to prohibit the operation of any broadcasting service/network operator in certain areas, under grounds of “public interest.” Clause 36(3) empowers the Central government to prohibit</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>content on any TV channel on grounds such as sovereignty, or integrity of India; security of India; or friendly relations with any foreign State; or public order, decency or morality.</p> <p>Such broad powers granted to the executive without sufficient safeguards could lead to a chilling effect on the free speech. Such provisions lead to an environment where the broadcasters as well as OTT streaming platforms and digital news creators will always function under the looming threat of executive action.</p> <p><b>Recommendation:</b> There should be procedural safeguards in place for the exercise of these powers by the executive. For instance, the requirement to issue a notice giving an opportunity to the entity to be heard, the opportunity to appeal a decision by the Central government etc.</p>
18.	Clause 33 - Punishment for contravention of provisions of this Act read with Schedule III – Offences and Punishments	<p><b>Comment</b> – Criminal liabilities and penal liability for individuals</p> <p>Clause 33(1) provides for criminal penalties in case a broadcaster is operating a broadcasting service without registration.</p> <p>Clause 33(2) also imposes criminal penalties upon persons in-charge of a company and responsible for its conduct of business. The director, manager, secretary or other officer of the company will be held criminally liable if it is proved that a contravention of the Bill took place with their consent or due to their negligence.</p>





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>Criminal penalties for wrongs of a civil nature impact ease of doing business and deter players from entering the market. This has been recognised in other statutes as well. For instance, various provisions of the Companies Act 2013 were decriminalised to help promote ease of doing business for MSMEs.<sup>24</sup> Further, subjecting individuals to criminal penalties for the actions of a company will also deter businesses from entering and remaining in the Indian market.</p> <p>This is particularly relevant in the case of OTT streaming platforms such as Netflix, Amazon Prime Video, Hotstar etc, which are foreign players. Such provisions will act as a barrier to entry or remaining in the market. and hinder the overall growth of the industry. This also goes against the object of the Bill which was to foster innovation and growth.</p> <p><b>Recommendation:</b> The draft Bill should remove criminal penalties.</p>
19.	Clause 43- Power to make rules	<p><b>Comment-</b>Excessive delegated rule making by executive</p> <p>Various important provisions of the draft Bill have been left to be implemented through rules to be made by the Central government., It is settled law that ‘essential legislative function’ cannot be delegated to the executive and must be carried out through acts of the legislature.<sup>25</sup> ‘Essential legislative function’ has been held to include declaring legislative policy and laying down the standard that is to be enacted into a rule of law.<sup>26</sup> In <i>Delhi v.</i></p>

<sup>24</sup> <https://www.financialexpress.com/business/sme-9-years-of-modi-govt-decriminalisation-of-companies-act-to-help-particularly-msmes-says-fm-nirmala-sitharaman-3171209/>

<sup>25</sup> *Delhi v. Birla Cotton Spg. and Wvg. Mills* (1968) 3 SCR 251.

<sup>26</sup> (1968) 3 SCR 251.





Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p><i>Birla Cotton Spg. and Wvg. Mills</i>,<sup>27</sup> the Supreme Court had held that the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act.<sup>28</sup> The task of subordinate legislation is simply to operationalize the legislative policy enunciated through statutes.<sup>29</sup> The legislature is constitutionally required to keep in its own hands the essential legislative functions which consist of the determination of legislative policy and its formulation as a binding rule of conduct.<sup>30</sup> ‘Excessive delegation of legislative function, runs the risk of unconstitutionality.</p> <p><b>Recommendation:</b> The draft Bill should reevaluate its reliance on excessive rule making by the executive, especially on key aspects such as the Programme and Advertisement Code</p>
20.	Clause 43- Power to make rules	<p><b>Comment-</b>Excessive delegated rulemaking given to the executive</p> <p>Various important provisions of the draft Bill have been left to be implemented through rules to be made by the Central government. It is settled law that ‘essential legislative function’ cannot be delegated to the executive and must be carried out through acts of the legislature.<sup>31</sup> Essential legislative function has been held to include declaring legislative policy and laying down the standard that is to be enacted into a rule of law.<sup>32</sup> In <i>Delhi v. Birla Cotton Spg. and Wvg. Mills</i>,<sup>33</sup> the Supreme Court had held that the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for</p>

<sup>27</sup> (1968) 3 SCR 251.

<sup>28</sup> (1968) 3 SCR 251.

<sup>29</sup> *Ajoy Kumar Banerjee v. Union of India*, (1984) 3 SCC 127.

<sup>30</sup> *Sidhartha Sarawgi v. Kolkata Port*, (2014) 16 SCC 248.

<sup>31</sup> *Delhi v. Birla Cotton Spg. and Wvg. Mills* (1968) 3 SCR 251.

<sup>32</sup> (1968) 3 SCR 251.

<sup>33</sup> (1968) 3 SCR 251.







Sl.	Particulars	Views/Comments/Suggestions/Remarks/Recommendations
		<p>implementing the purposes and objects of the Act.<sup>34</sup> The task of subordinate legislation is simply to operationalize the legislative policy enunciated through statues.<sup>35</sup> The legislature is constitutionally required to keep in its own hands the essential legislative functions which consist of the determination of legislative policy and its formulation as a binding rule of conduct.<sup>36</sup> Excessive delegation of legislative function, runs the risk of unconstitutionality.</p> <p><b>Recommendation:</b> The draft Bill should reevaluate its reliance on excessive rule making by the executive, especially on essential aspects such as the Programme and Advertisement Code.</p>

Kinds regards



Nehaa Chaudhari

Partner

Ikigai Law

<sup>34</sup> (1968) 3 SCR 251.

<sup>35</sup> *Ajoy Kumar Banerjee v. Union of India*, (1984) 3 SCC 127.

<sup>36</sup> *Sidhartha Sarawgi v. Kolkata Port*, (2014) 16 SCC 248.

