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# **POLICY REPORT**

## **Proposed Regulation of OTT Platforms and Digital Content in India: Implications and the Way Ahead**

**LEXQUEST FOUNDATION  
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### **About the Organisation:**

LexQuest Foundation (LQF) is an independent, non-profit, research and action organisation, established in 2014, in New Delhi. We are striving to create, advocate and implement effective solutions for a diverse range of development issues.

To endorse participative governance, we engage with a broad spectrum of stakeholders, from various sections of the society, to ensure that policy-making remains a democratic process. We utilize pragmatic and futuristic research to disseminate actionable knowledge to decision-makers, experts and the general public.

Our key activities include capacity and skill-building workshops, policy advisory programs, public outreach, and stakeholder consultations. We collaborate with the government, other organizations and individuals for impactful policy formulation and execution.

By employing sustainable and equitable solutions through our multidisciplinary, intersectional initiatives and programs, we are constantly working towards creating empowered communities.



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### Background

The COVID-19 pandemic has confined people across the world to their homes for indefinite periods. The stoppage in industrial activity and consumer demand has hampered growth in many industries. But, one industry that is **likely to see accelerated change in its landscape is entertainment & media** particularly due to consumption patterns **shifting online**. This is not altogether surprising given the immense growth of digital media **in India** and across the world over past years. India is predicted to become the **6th largest market for OTT (Over-the-top) platforms by 2024, with digital media reaching a valuation of \$5.1 billion by 2021 alone**. This growth can be credited to several factors including **record low internet prices** and the proliferation of **mobile devices**. This massive and undeniable change in the media landscape raises, perhaps inevitably, the issue of the integration of digital media into a broader policy landscape. The dialogue surrounding the regulation of digital media in all its forms has been steadily gaining momentum globally and in India. The question of content regulation in particular has proven to be a complex and nuanced issue with different stakeholders such as the government and media entities representing varied perspectives.

It is in the backdrop of this discourse that the President of India on 9th November, 2020, issued a **notification** amending the Government of India (Allocation of Business) Rules, 1961 such that, an addition was made to the Second Schedule of the Rules, adding the new head of “Digital/Online Media” under the Ministry of Information and Broadcasting. “Digital/Online Media” consists of the following 2 entries-

“22A. Films and Audio-Visual programmes made available by online content providers.

22B. News and current affairs content on online platforms.”



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This notification effectively has brought digital news and entertainment, which previously was mostly free of government mandated regulation, within the regulatory purview of the Ministry of Information & Broadcasting (I&B). In this Policy Report, the author explores the implications of this notification on the overall status of regulation of digital media in India specifically in terms of content regulation.



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## **The Regulation of Digital Content in India**

Thus far, digital media in India, for the most part, has lacked a specific framework focusing on content regulation. However, certain existing legislations and policies do govern online content. For instance, sections of the **Information Technology Act, 2000 (IT Act)** can be used to **takedown** online content on various grounds. These include Section 69A which allows **blocking of public access to information *inter alia* on the grounds of sovereignty, defence and friendly relations with other States**. Section 79 provides grounds based on which an intermediary can be held liable for online content. Sections 67, 67A, 67B and 67C also make the transmission of obscene material punishable and require retention of specified information by intermediaries. In addition to this, the Ministry of I&B has **previously stated that** streaming services are “intermediaries” where they deal with third party content under the IT Act, thereby likely making the **Information Technology (Intermediary Guidelines) Rules, 2011** applicable to certain digital content providers. It is worth noting that **there does not exist a universally acceptable definition of ‘OTT’** at this stage. It is colloquially used to refer to streaming services which provide audio/visual content. As per a **consultation paper** different jurisdictions have variances in defining the scope of the term. It may generally be understood to mean platforms which provided communication services or application ecosystems or video/audio content.

Parallel to above mentioned legal regime, online content has also been governed by the self imposed regulation codes and practices of digital media providers. Several OTT platforms in India, have over the years attempted to perfect a **self regulation code** in conjunction with the Internet and Mobile Association of India (IAMAI), which would set the parameters of acceptable content and censorship on the internet. Such a Code **came into effect** on August 15th, 2020 and was signed by 15 prominent OTT players including Netflix, Amazon Prime among others. As per a **summarization** of the Code it *inter alia* recognizes the **IT Act as the primary governing statute for online content, details procedures for age**



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**rating and sets up a 2 tier complaint redressal system.** However, it is important to note that the Ministry of I&B has subsequently cited various issues with the Code and **withheld** its endorsement of the same. Apart from the abovementioned, digital players have also taken **independent censorship calls** such as Disney backed Hotstar **pulling down** an episode of the show 'Last Week Tonight with John Oliver' concerning the Indian Prime Minister Narendra Modi.

Regardless of these procedures and regulations, the calls for censorship of online content have been persisting since at least 2018 when the I&B Ministry **released a circular** (which was ultimately withdrawn) allowing for suspension of press accreditation of journalists against whom there were complaints of propagation of fake news. Various individual complaints have also been filed before the Courts and the **police** objecting against portrayls of violence or sex etc., in online content. Last year, the Delhi High Court **dismissed** a PIL filed by the NGO Justice for Rights seeking regulation of online content on streaming platforms (an appeal is currently pending before the Supreme Court). A few weeks before the notification in question, the government in an affidavit filed in the **Sudarshan TV case** informed the Supreme Court that if it (the Supreme Court) wished to regulate media, it should begin first with online/digital news content. It is therefore, not altogether surprising that the government has finally taken a step to acquire administrative authority over online content in the form of the aforementioned notification.



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## **The Implications of the Notification**

### **I) The short term implications of the notification**

As established above, this notification is in fact a departure from the existing regime of online content regulation which thus far has been governed by certain existing legislations such as the IT Act and self regulation codes and practices, largely propelled by individual complaints. In terms of the immediate impact of the notification which came into effect upon publication, it has been **opined** that the I&B Ministry now has the authority to issue press notes, circulars, clarifications and executive instructions in other forms with regards to digital/online media. The Ministry of I&B has already begun issuing **clarifications** regarding previous policies about FDI announced in 2019 and is reportedly about to seek a **transfer** of all cases against OTT platforms to the Supreme Court. Thus in the short term, the Ministry has begun taking administrative initiative on all matters concerning the governance of online content.

### **II) The long term implications of the notification**

What remains concerning is the lack of clarity surrounding the long term implications of this notification and in particular its impact on freedom of speech and expression online. As mentioned before, currently, a specific legislation does not exclusively govern online content, however this move may be seen as **indicative** of the government's intent to create the same. This is a cause for great concern as the internet has proven to be a space where free speech in the form of journalism and artistic expression has thrived. This is seen in the number of independent digital only news platforms which have emerged online, many of which strive to depend only on viewer subscriptions for funding. Creators both established and new have also created content for online streaming services and platforms free of the restrictions imposed on TV or film. **The internet has provided immense opportunity to creators and journalists to publish content freely as well as expanded the choice for consumers to find news and entertainment.** The concern of many creators/stakeholders is that



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government **regulation of content would hamper the ability to report news and create content freely without fear of seemingly unfair retribution.**

While many may argue for the need to have a regulatory framework, it is important to understand the context within which the notification has been enacted and the consequent concerns that have arisen. India in the past few years has had a notoriously **high number** of internet shutdowns. This is coupled with rising **instances** of arrests of journalists. A **report** in the New York Times claims various instances of suppression of specific media houses and independent media and other questionable actions on the part of the government as regards journalism in India. These instances of restrictive practices and the perceived motives behind them make the possibility of future regulations worrisome for many.

In the interest of specificity the concerns surrounding regulatory practices and their impact on freedom of speech can be understood as follows:

- ❖ **The problem of accommodation of diverse stakeholders within a regulatory framework-** Inherent in the very nature of the internet is the diversity of people who access and use it to both consume and publish content. The nature and kind of publishers posting content online is highly varied. It is inclusive of traditional/legacy media companies who also have an online presence such as the digital news websites of newspapers and broadcast news channels, streaming companies and platforms such as Netflix, some of which are themselves a part of an existing media company with a presence in broadcast or film such as Zee5 which is associated with Zee Entertainment Enterprises Ltd, and independent media companies which are digital only and are not associated to a 'legacy' establishments. It is- at the outset- **worth questioning whether all these diverse entities should be considered to be within the scope of the notification.** The notification, as mentioned before, includes- "Films and Audio-Visual programmes made available by





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online content providers” and “News and current affairs content on online platforms.” It is **unclear whether platforms such as Youtube and Facebook which are considered to be “intermediaries” and host user generated content will now be governed by the Ministry of I&B.** These platforms host news and current affairs related content through user posts and channels/pages of established news organisations & independent journalists and can arguably fall under the term “online platform”. The matter is further complicated by the fact that platforms such as Youtube also provide original programming. Thus some clarity is also required regarding whether social media platforms and intermediaries will be included within the scope of the notification or will they continue to be governed by the Ministry of Electronics Information & Technology as has been suggested by **some**.

It is also true that these players have different sets of priorities, goals, interests, requirements and grievances which are often conflicting in nature. For instance, the 26% cap on foreign investments in digital news media was **welcomed** by an association formed of traditional media houses- the Digital News Publishers Association (DNPA)- but was **criticized** by heads of digital only media portals. Presumably, for traditional media houses, this lessens competition whereas the latter group views it as a move which increases government control over digital news. It is thus **imperative to recognize the unavoidable differences in the structure, liabilities, editorial powers of different players in the market and how regulations can have vastly different effects across the spectrum.**

- ❖ **Concerns surrounding the possibility of arbitrary implementation of any future regulation-** Stemming from the abovementioned diversity are also the concerns surrounding the possibility of arbitrary implementation of future regulations. This is in part **due to the sheer vastness of content available on the internet which in the absence of a licensing regime is nearly impossible to track or monitor.** Even so, it may result in selective



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implementation of norms such that only those websites or publishers that upset authorities are punished. As per an [article](#), if the enforcement body is unable to identify the subject of applicability of rules, it will inevitably be arbitrary and subjective. It is not surprising then that this may be viewed as a move which will stifle platforms which are critical of the government.

- ❖ **The question of parity in treatment with other forms of media-** One of the main arguments for regulation is that, online content is an exception to prevailing regulatory norms that apply to other forms of media such as television, print and film. This argument is based on the assumption that there should be parity in treatment. However, an argument can be made that digital media is fundamentally different from broadcast or film. As was explained in a [discussion](#), this difference exists in terms of the barrier to entry. Transmission on television is contingent on obtaining prior [permissions](#) under the Cable TV Network (Regulation) Act, 1995 and films are subject to pre-censorship by the Censor Board. In contrast to this, **the barrier to entry on the internet is negligible if not non-existent and is not necessarily dependent on the government.** Furthermore, there exists a difference in the classification of the way content is consumed on the internet as opposed to television. The Karnataka High Court recently [held](#) that viewing on OTT platforms cannot be deemed as 'public viewing' under the Cinematograph Act, 1952. Given that **watching content on the internet is 'private viewing' chosen by the consumer, the question arises-** should and can it be subjected to the same level of restriction without impeding artistic impediment?



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### Recommendations

- **Ensuring dialogue with all stakeholders-** As mentioned above, the digital space is occupied by a variety of stakeholders with diverse requirements and interests. As such, any future regulation should be made through a process where this diversity is represented. DIGIPUB, which is an association of 11 digital only news organizations, in its [statement](#) urged the government to adopt a more consultative process as well.
- **Understanding the root cause of ‘online harms’ as a precursor to policy creation-** It may be beneficial to acknowledge the uniqueness of the online space and adopt a process which identifies the actual cause of problems of misinformation or fake news before the creation of a policy regime on the same. A [paper](#) suggests that instead of leaning towards criminalization as a solution to the problem of misinformation online, the correct approach would be to examine the reason behind the commission of such acts in that, punishing the medium alone may prove to not be effective in the long run. The United Kingdom for instance, as a precursor to creating a policy framework has commissioned a [white paper](#) exploring the broad spectrum of ‘online harms’.
- **Creating a structurally unique regime-** To create regulatory norms which prioritise freedom of expression and artistic/journalistic integrity, it may be necessary to step away from existing regulatory structures and create a framework which is not agnostic to the promises of technological development. This may be done by bolstering the self regulation practices in a manner that lets online entities take the lead in collectively defining and enforcing their limits- with the government stepping in at a later stage. A [paper](#) also proposes a ‘design focused’ approach wherein instead of imposing editorial liability on aggregators, regulations should focus on creating duties related to the design of the platform itself.



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- **Redefining the priorities of a regulatory structure-** It has been suggested that instead of the government focusing on moderating content, a more balanced approach may be to focus on encouraging transparency instead whereby, **online entities should be required to disclose content regulation policies and decisions**. Making data regarding content regulation procedures available publicly would allow technical and policy experts to better understand the impact of different moderation procedures and algorithms. It has been acknowledged that given the variety of operators and content available online a 'one size fits all' approach for a diverse range of online content providers, is unlikely to be beneficial. In light of the complexity of the task, the availability and analysis of such data may **ultimately allow for the creation of more nuanced, responsive and dynamic regulatory frameworks in the future which prioritise the preservation of freedom of expression online and lean away from direct content regulation beyond existing restrictions**. At minimum, such an approach may be a useful preliminary intervention.

Another extended facet which has been suggested is the creation of a separate body representative of different stakeholders including the government, human rights experts, technical experts etc. which may decide on/be responsible for ensuring the veracity of said policies and their implementation and to which such entities may be publicly answerable. It may be worth noting at this stage that various legislative restrictions and penal provisions against publishing or transmitting obscene and/or offensive content in electronic form already exist under the IT Act. Creating obligations focused on transparency which act as an extension of these existing restrictions and call for online entities to disclose to authorities, regulatory bodies, experts and the public, the procedures put in place to prevent/identify these portrayals or dissemination of 'harmful' information may reap more long term benefits as opposed to creating further prohibitions.



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## **The Way Forward**

While there exist legitimate concerns over harmful portrayals in online content, misinformation and fake news- the **possibility of a restrictive regulatory regime threatens the existing standards of free speech and expression on the internet**. Given the complexity of the nature of online players and the vastness of content available- it is worth questioning how a future regulatory regime will accommodate the wide variety of stakeholders in the market in a manner that does not lead to arbitrary implementation of norms and the stifling of journalistic and artistic expression online.

Working in line with the recommendations enlisted above can lead to the creation of regulatory frameworks which are structurally unique, accommodating and responsive to the promises of technological advancements. While, it is still 'early days' with regards to the regulation of online content in India, there exists an opportunity to create a unique model from the ground up which prioritises the constitutional guarantee of freedom of speech and expression.



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