

# An Empirical Study on Conundrum Of Regulating Over-The-Top (OTT) Platforms In India

Shruti Das<sup>1\*</sup>, Dr. Deepshikha Sharma<sup>2</sup>

<sup>1\*</sup>Assistant Professor, Department of Law, Vishwakarma University, Pune

<sup>2</sup>Assistant Professor, Department of Law, Vishwakarma University, Pune

**Citation:** Shruti Das, Dr. Deepshikha Sharma, (2024), An Empirical Study Conundrum Of Regulating Over-The-Top (OTT) Platforms In India, Educational Administration: Theory And Practice, 30(4), 8617-8626

Doi: 10.53555/kuey.v30i4.2794

ARTICLE INFO	ABSTRACT
	<p>The internet's rapid spread has changed trade, communication, and media. Top advancements include Over-the-Top (OTT) systems, which offer content, services, and apps via high-speed internet. This article examines OTT platforms' regulation, stakeholder disputes, and changing legal frameworks in India.</p> <p>India has the second-largest internet user population, therefore OTT platforms will grow. The lack of restrictions raises serious doubts regarding their operation in the country. Telecom providers, regulators, and traditional media platforms face income loss, regulatory imbalance, and free speech difficulties.</p> <p>Different governments view OTT platforms differently, making definition difficult. No unanimity complicates regulatory efforts, making platform classifications and oversight questionable. Content restriction, cultural sensitivity, and kid protection raise questions regarding regulation and the balance between free speech and social standards. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, govern content classification and self-regulation. Privacy, free expression, and fair competition concerns remain, underscoring the need for comprehensive regulation.</p> <p>Recent rulings by the Telecom Disputes Settlement and Appellate Tribunal highlight OTT platform jurisdictional issues. The 2023 Broadcasting Services (Regulation) Bill expands regulatory jurisdiction and standardises content regulations to address these issues. This article discusses consumer views on OTT content and censorship from a poll. It emphasizes reconciling regulatory requirements with artistic expression and consumer interests. The article provides suggestion on balancing OTT platform regulation and consumer protection. The changing dynamics of digital media consumption in India require clear standards, stakeholder participation, and legislative adaptation.</p> <p><b>Keywords:</b> OTT Platforms, Broadcasting Services (Regulation) Bill, Censorship, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, TRAI</p>

## Introduction:

'Internet' being one of the most significant aspects of our day-to-day lives has affected us on several occasions. The development shown in the public Internet bandwidth is incredible as we can call a taxi in only a few seconds today. It has evolved so fast that in other fields, such as commercial activities (e-commerce), communications, and media, it has brought about a paradigm change. Technology advances and the shift towards the usage of intellectual resources make it possible for us to access a rising number of services online. Various utilities are delivered over the internet and multiple business models work over it. The most recent which are of utmost importance especially in information and communication technology industries are called Over-the-top (OTT). It basically refers to content, service or an application which is provided via a high-speed public Internet connection rather than a cable or satellite provider. This means that it is a medium or a method of provision rather than a service. The platforms using this method of providing the services are herein called 'OTT platforms and the services are referred to as 'OTT Services'.

There isn't actually a generally agreed description of OTT facilities. Governments, regulatory bodies, foreign organisations and other fora have introduced various concepts based on their meaning. OTT networks

providing content such as voice calls and texting compete with telecom service providers' (TSP's) systems. But the reach of OTT services is vast and consists of OTTs delivering many different types of services, and can often include other resources than voice calls or messages.

India has the world's second highest number of internet users after China, with around 570 million internet subscribers, growing at a rate of 13% annually. With this growing speed of Internet penetration in India, the rise and growth of OTT platforms is certain and the question, whether they can operate in India without a particular set of regulations is crucial to consider.

One of the most significant factors behind OTT platforms considerable growth is that they have uncontrolled material, the bulk of which is free and readily available. They often have no geographical limits when they use the Internet, which is not controlled by anybody and which is boundless and borderless.

Over-the-top (OTT) network penetration has the ability to affect established industry leaders such as networks, DTH providers, multi-system providers and cable companies offering television services. Various operators and broadcasters have been governed under the Cable TV Control Act, 1995 and the TRAI Act, 1997, which mandate them to comply with the laws and regulations enacted by the authorities concerned. There is no legislation for OTT providers as far as the OTTs are concerned and they are allowed to publish their material without any limitations or licenses.

This leads to conflicts between various stakeholders. The concerned stakeholders are Telecom service providers (OTTs go over the network of TSPs to provide their services), their concerned regulating authorities, platforms like Television, Cinema which provide similar services as OTTs but have to face many regulations including censorship which violates their freedom of speech and expression. Among other issues, loss of revenue, the other, difference in regulatory compliances and laws for platforms providing same services. With respect to OTT platforms, there is no regulation regulating the services but the broadcasters and other operators have to seek licenses, pay carriage/license fee. With regard to the revenue, OTT platforms generate revenue by advertisements/subscriptions but due to regulatory constraints Direct-To-Home (DTH) and other operators cannot collect revenue from other sources like OTT platforms. The issues include violation of freedom of speech and expression of the content creators, net neutrality, etc.

### **Definition of Over-The-Top (OTT) Platforms:**

There have been various contemplations regarding the use of the term 'OTT over-the-top' and whether the same is appropriate to be used. In a sense, it is appropriate to agree mainly because now it is already popular and used that way across the globe and also, it does go over-the-top of the other platforms like cable and DTH operators and provides content and other services through internet without actually setting down its own physical network.

The term OTT has been defined and used differently across many countries depending on the purpose and use and the existing system in the particular regions making it difficult to come to a globally accepted definition.

The definition of OTT in EU revolves around the meaning of the term 'Electronic Communication Services' and its definition is:

"Electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks."

In India, there is no particular body which governs these platforms but the body which governs the telecom sector in India, The Telecom Regulatory Authority of India which under the TRAI Act does not have the authority to actually regulate OTT is the authority which is being considered for looking into the matter. Mainly because OTT compete with Telecom Service Providers and there are a lot of issues regarding non-level playing field, imbalance of a regulatory system.

The TRAI therefore, in the year 2015 started considering various issues and came up with a consultation paper in which it defined OTT provider. TRAI defines 'OTT provider' as:

"a service provider offering ICT (Information Communication Technology) services, but neither operates a network nor leases network capacity from a network operator. Instead, OTT providers rely on the global internet and access network speeds (ranging from 256 Kilobits for messaging to speeds in the range of Megabits (0.5 to 3) for video streaming) to reach the user, hence going "over-the-top" of a telecom service provider's (TSP's) network."

### **Freedom of Speech and Expression and OTT Platforms**

The Media and Entertainment industry is flourishing at a very good pace and it is possible only when there exists enough creative freedom to be able to make new and different content. That creative freedom is guaranteed by Article 19 of the Indian Constitution which provides for freedom of speech and expression.

Article 19 (1) (a) provides those freedoms, it goes like,

"(1) All citizens shall have the right—

(a) to freedom of speech and expression;..."

The important aspect to consider here is that these freedoms are not absolute. There are certain restrictions which are put upon these freedoms. Article 19 (2) provides for those restrictions and it states that:

“(2) Nothing in sub-clause (a) of clause (1) shall affect 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 interests 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.”

The creative faculty and the media sector have the backing of this provision and also they have the reasonable restrictions which need to be followed under the same provision. During the independence of India, in the December of 1946, the objective resolution guaranteed the freedom of speech and expression and out of 7 sub-committees of the Constituent Assembly, one was on Fundamental Rights and they included freedom of speech and expression as a fundamental right. It was also discussed in the Constituent Assembly debates whether Freedom of speech and expression be absolute and it was answered negatively by Dr. B.R. Ambedkar. The next crucial finding from CAD is that there was a demand of giving special rights to the Press and that also was denied with the viewpoint that no special rights can be given to the press and the writer and editor of the press already enjoys the freedom as an individual and the same is enough.

In the times where Cinema and Television are regulated and censored and the question of regulation and censorship of OTTs is being considered, it is of utmost requirement that the same is analyzed while considering the freedom of speech and expression and any restrictions which might be put must be under the purview of Article 19 (2).

In a democracy like India, the concept of freedom of speech & expression opens up channels of free discussion of issues. Freedom of speech plays a very important role in the formation and the showcasing of the public opinion on social, economic & political matters throughout the country. It includes:

1. Right to Telecast and Broadcast
2. Commercial Advertisements

In *K. A. Abbas v. Union of India*, the plaintiffs challenged censorship on the grounds that it violated their First Amendment rights. Nevertheless, the Cinematograph Act's pre-censorship was upheld by the Supreme Court under Article 19(2), since films evoke deeper emotions than other forms of art and so require special handling. As a result, movie ratings began to be assigned, with 'A' being reserved for mature audiences and 'U' for all audiences. Moreover, the Supreme Court preserved the verdict of the Appellate Tribunal under the Cinematograph Act, which followed norms and awarded a picture a 'A' certificate, in the case of *Bobby Art International, Etc. v. Om Pal Singh Hoon & Ors.*

Finding a middle ground is critical, as these legal concepts are vital for over-the-top (OTT) platforms. In today's digital age, censorship of digital content is a major concern. The preservation of free speech and the safeguarding of public interests are two sides of the same coin.

### **Current Regulation of OTT**

India presently does not possess a specialised regulatory framework for supervising over-the-top (OTT) services. Since 2015, the Telecom Regulatory Authority of India (TRAI) has published multiple consultation papers regarding this matter. Notwithstanding these endeavours, no explicit suggestions or rules have been put into effect. TRAI has intermittently shown a preference for a market-oriented approach instead than relying on regulatory action. Nevertheless, the ongoing discussion regarding the regulation of OTT platforms appears to have come to an end, as the Ministry of Information and Broadcasting intends to submit legislation to govern them.

The regulations governing OTT platforms in India are specified in the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The classification of digital media is based on three categories: news providers, intermediates, and OTT platforms. OTT platforms are required to adhere to regulations on content classification, age ratings, and self-regulation. They must designate individuals responsible for removing information and ensuring compliance, as well as create systems for addressing complaints. Under extraordinary circumstances, the government have the power to restrict or censor content. Although certain intermediates are required to have the ability to trace the originators, this rule could have broader consequences.

These regulations represent a notable achievement in the oversight of OTT platforms, with the goal of establishing a framework and measures to ensure content regulation and user safety. Nevertheless, they have encountered scrutiny over potential obstacles associated with privacy and freedom of speech. Their objective is to establish a more equitable environment for TSPs

In India, telecommunication service providers (TSPs) are subject to multiple rules, fees, and quality standards. In contrast, OTT platforms that offer identical services frequently encounter fewer limitations. This disparity results in an inequitable competitive environment, which has the potential to affect the revenue sources of TSPs. Telecom providers contend that the money derived from over-the-top (OTT) platforms is intricately linked to the utilisation of their networks. Therefore, there is a widespread belief that over-the-top (OTT) platforms should contribute in proportion to infrastructure expenses, promoting a fairer collaboration.

It is definitely sensible to proceed with the regulation of OTT platforms in India, which is now governed by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules") in conjunction with the Information Technology Act, 2000 ("IT Act"). As to the IT Act, a 'intermediary' refers to entities that transport electronic records or offer services linked to electronic records on behalf of others. This includes telecom service providers, network service providers, internet service providers, web-hosting service providers, and similar entities.

The Telecom Disputes Settlement and Appellate Tribunal, New Delhi (TDSAT), issued a ruling on October 4, 2023, stating that Over-The-Top (OTT) platforms cannot be subjected to regulation under the Telecommunication Authority of India (TRAI) Act of 1997. Instead, they are governed by the Information Technology (IT) Act and the IT Rules.

This verdict originated from a legal dispute between the All India Digital Cable Federation ("AIDCF") and Star India Private Limited ("Star"). AIDCF accused Star of breaching Regulation 3(2) of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ("TRAI Regulation"). This regulation mandates broadcasters to offer television channel signals to distributors without any discrimination. AIDCF said that Star provided consumers with free access to stream Star Sports channel programming on other OTT platforms, while simultaneously charging AIDCF for the identical content. AIDCF contended that OTT platforms should be classified as 'distribution platforms' according to TRAI Regulations, therefore subjecting them to the authority of TDSAT.

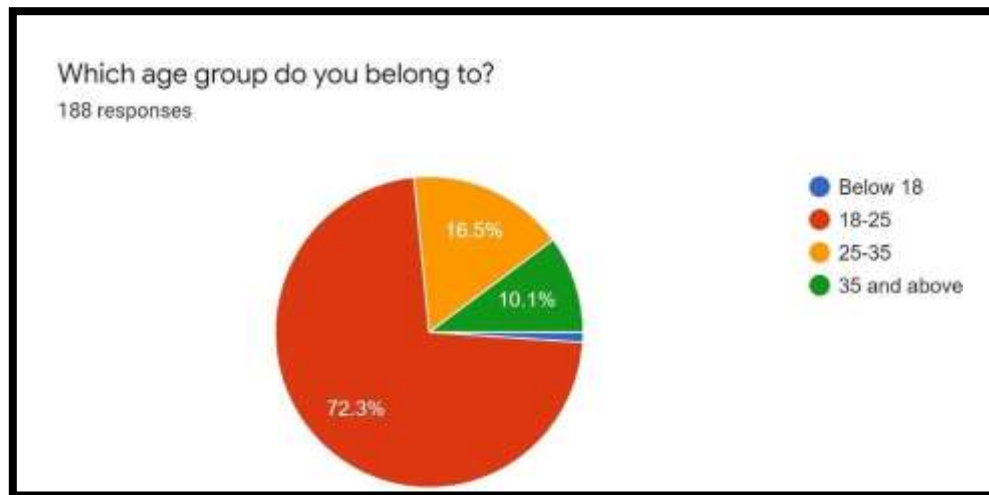
The TDSAT, in assessing the petition's eligibility, concluded that OTT platforms are not classified as television stations and so do not need authorization or a licence from the Central Government. Hence, the oversight of Over-The-Top (OTT) platforms falls outside the jurisdiction of the Telecom Regulatory Authority of India (TRAI) and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

The proposed Broadcasting Services (Regulation) Bill, 2023 aims to update India's broadcasting legislation by expanding its jurisdiction to encompass OTT platforms and digital news services. The Ministry of Information and Broadcasting (MIB) is taking a respectable and beneficial move by leading this attempt to regulate OTT platforms. Section 20(2) of the proposed Bill categorises news and current affairs programmes as being part of a systematic business, professional, or commercial activity, so treating them similarly to OTT Broadcasting Network Operators. However, the section also recognises that there may be practical distinctions between the two.

Nevertheless, the main point of contention rests in determining the scope of OTT broadcasting services and distinguishing them from other types of services. Financial influencers may be required to comply with the same standards as an over-the-top (OTT) broadcaster according to the proposed Bill. Consequently, social media intermediaries such as YouTube may be exempt from complying with the Act. Nevertheless, platforms like YouTube Premium, which need a paid membership, may be considered an over-the-top (OTT) broadcasting service and hence be subject to the regulations outlined in the Bill. The differentiation between journalistic content and user-generated content on social media poses a difficult issue, overseen by the MIB and the Ministry of Electronics and Information Technology (MeitY) in their respective roles of regulation. Therefore, the lack of clarity arises from the unclear categorization of platforms and the allocation of regulatory power over different types of content and services. The absence of clearness poses challenges to efficiently implementing the suggested regulations. In order to address these difficulties, it is crucial to have explicit standards that establish a precise framework for ensuring compliance and regulation in the digital domain.

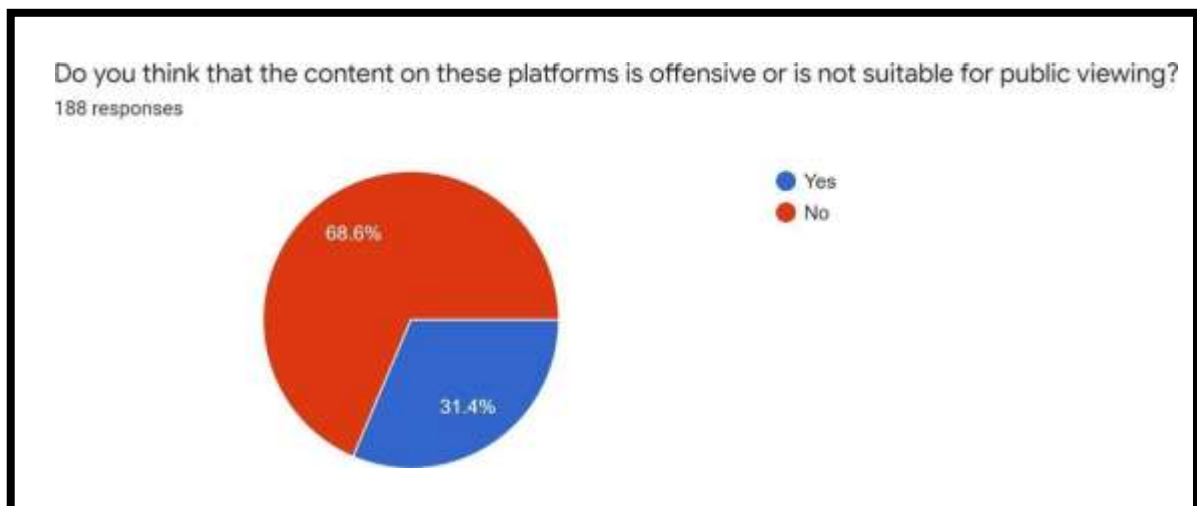
### **Censorship Survey for OTT Platforms:**

This survey was conducted taking into account various factors to make it inclusive of various agegroups, people watching different types of content on different OTT platforms providing video- on-demand services. The following heading will cover all the questions put in the survey along with the analysis. The survey was not anonymous and the names were collected during the survey which increases the credibility of the research and the survey. The names will not be revealed herefor the purposes of maintaining the privacy of the respondents. The initial questions reveal a trend of which platforms are used and by which age group. It reveals that it is a majority of the people from the age group of 18 to 25 which use these platforms but the number for other age groups is also pretty impressive and shows a trend that even people above age group of 35 watch online content. The same is important to understand when we consider the effect of this content on children and regulating the content for the same purpose. Although the research is restrictive to around 200 people, it is an important issue to be considered.



The above survey shows that Netflix is the most used platform in India followed by Amazon PrimeVideo and it is pertinent to note that there are many other platforms as well which are coming into the market and they show increasing scope of acquiring the market share. The question had multiple options to select, so the numbers don't add up because people use multiple platforms as well.

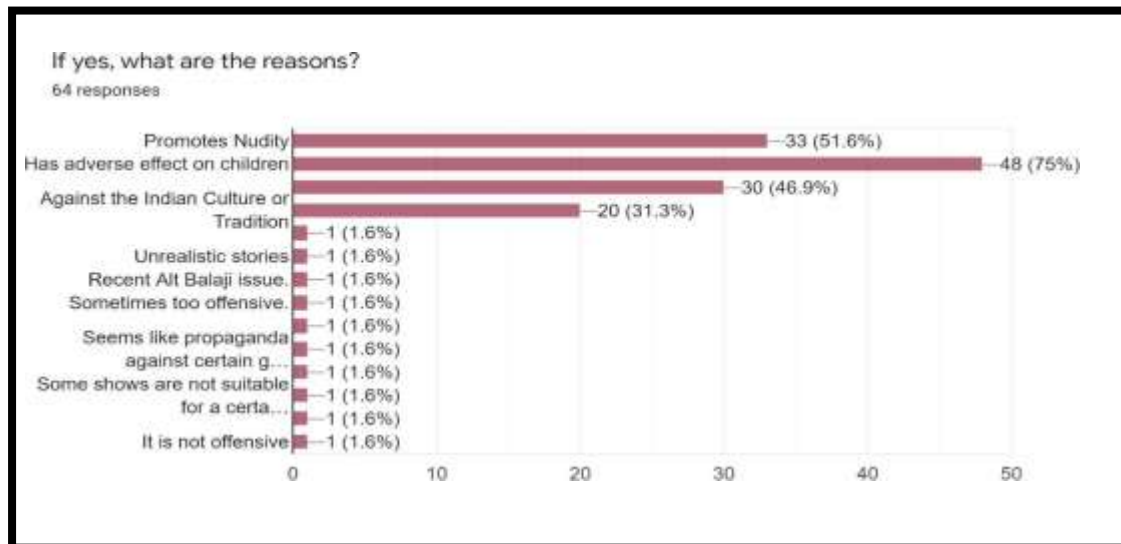
The important point to be considered here is that the new self-regulation code is not signed by few of the major players which occupy a decent number of market shares.



According to this question, it is surprising to see that around 69% of the respondents feels that the content is not offensive, which means that the same is suitable for public viewing and the question of whether the content is offensive is answered negatively here. The same needs to be considered while deciding the regulation part.

But however, the difference in numbers is not that huge and there are a number of people which think that yes, the content shown is offensive and the next question asked to them was why do they think the content is offensive?

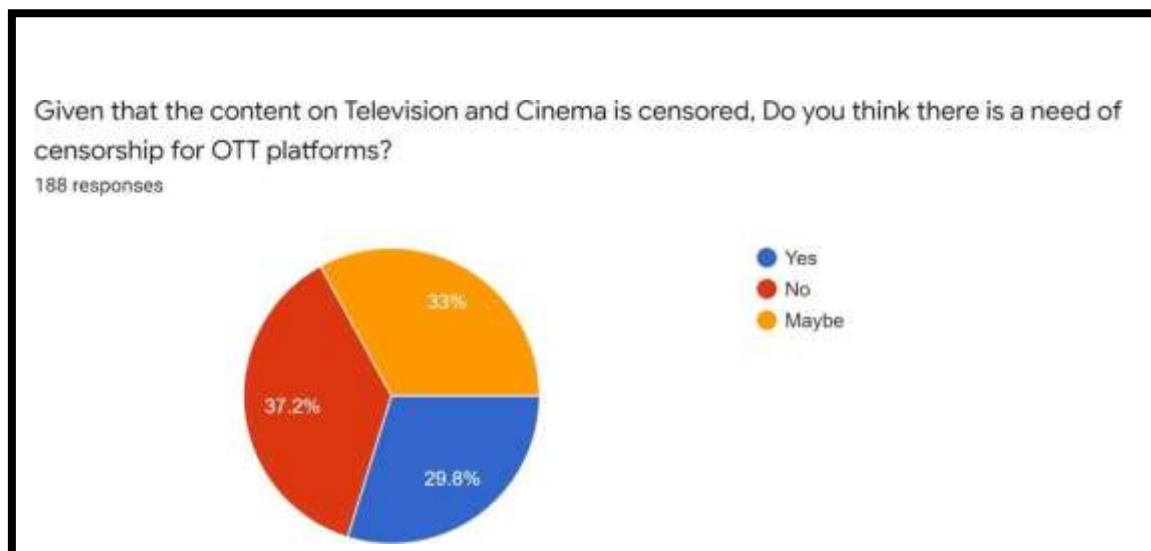




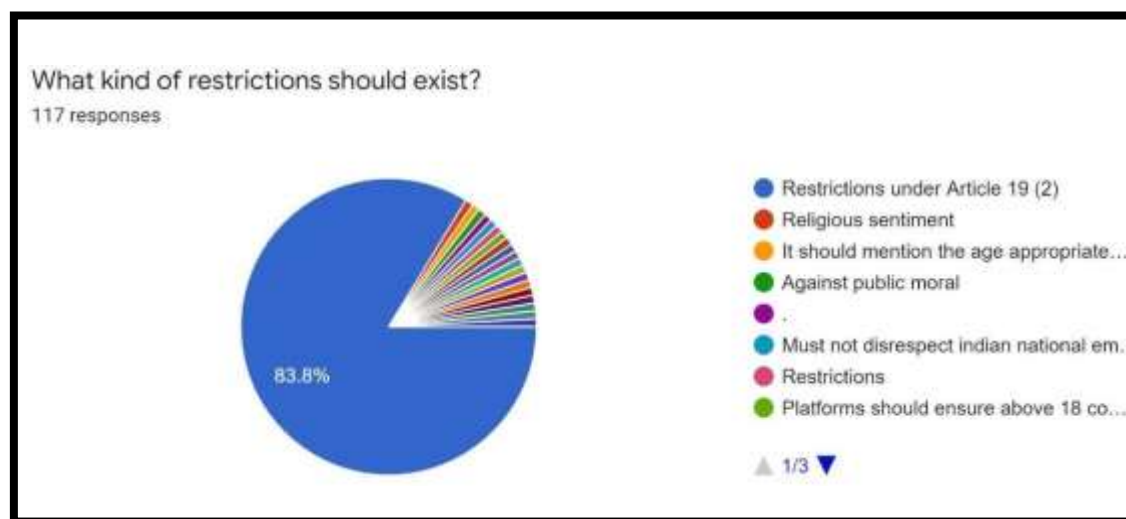
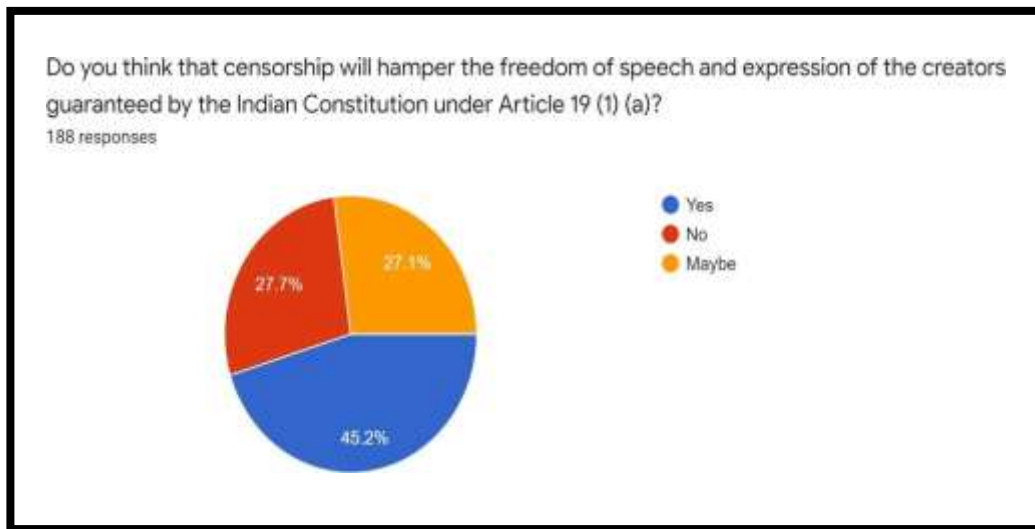
The above image shows various reasons why people think that the content shown is offensive or for some reason is not suitable for public viewing. The analysis shows that they had multiple reasons as well. The majority of people thought that the content shown has adverse effect on the children and that the same content promotes nudity. It was followed by the point that the same is against the Indian culture and tradition and that's why it is not suitable to be shown on these platforms.

The issue of having adverse effect on children can arguably be solved by having an age verification mechanism and filtration of content according to the age. The same can also be addressed by having effective parental controls which can have an impact on access to the material which is not suitable for children to view.

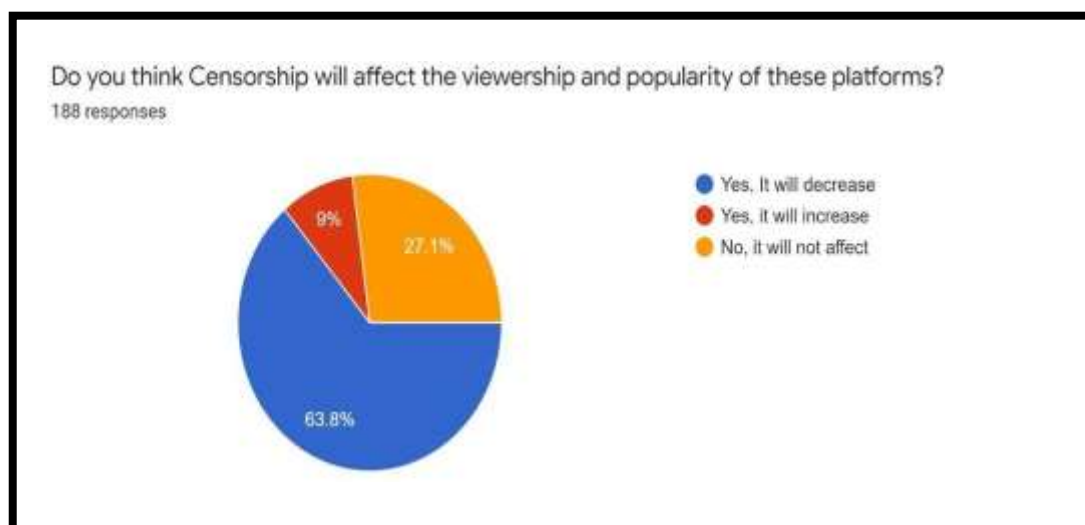
The point that it promotes Nudity and is against the Indian culture is subjective and the same can be debated. It is upon us as a society which needs to decide the approach we want in this progressive developing world. The point that it is subjective is my personal opinion and the same needs to be seen as a choice of how we want to take it forward. The freedom of artistic liberty also needs to be considered while deciding the same.



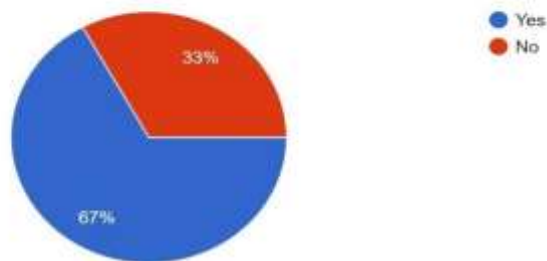
The current question does not yield any conclusive results as the views are divided and 33% are not sure whether censorship is required. The previous chapter where censorship was dealt needs to be considered with the current question and also with the following questions regarding censorship.



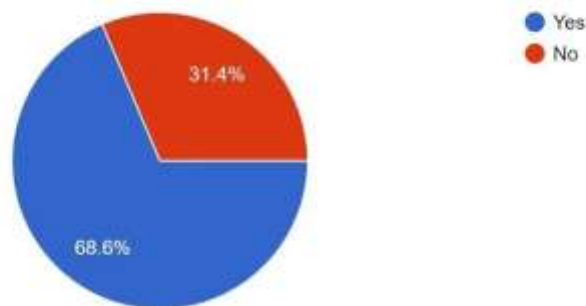
The above two questions clearly show that about 45 percent people feel that the censorship will hamper the freedom of speech and expression and the only restrictions which should be put are the same under Article 19 (2). The question is important to see whether in self regulations, all the aspects under Article 19 (2) are covered. If yes, they are good to go and if not, changes are definitely required to be made. The other questions asked were:



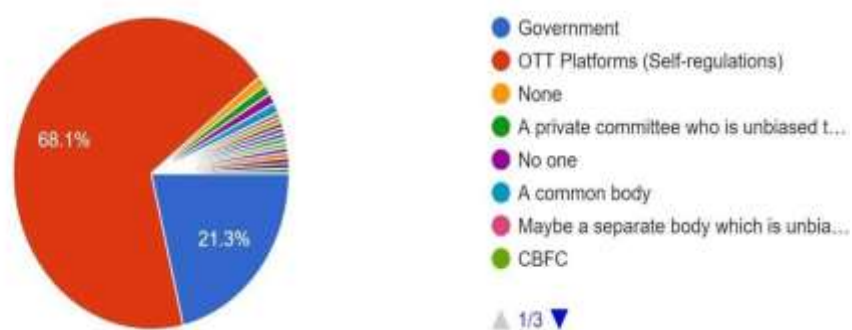
Do you think censorship will increase the activities of online piracy and illegal downloads?  
188 responses



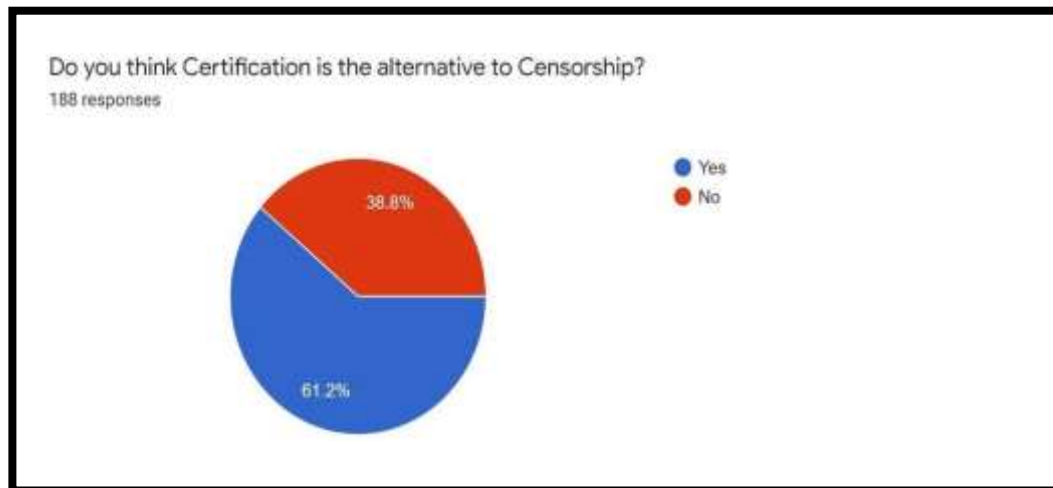
Do you think India should have a separate legislation for regulation of online content?  
188 responses



Who do you think should censor the content?  
188 responses







The above questions need to be considered while deciding the questions of why the regulations are required and till what extent. The questions are to be read along with the respective chapters and sub-chapters in the research and a sound conclusion is to be made which is balanced.

### Conclusion

The discussion revolves around contrasting viewpoints regarding the regulation of OTT platforms. One perspective highlights concerns about the influence of media on individuals' behavior and advocates for stringent regulations to control content across various mediums. In contrast, another viewpoint suggests granting flexibility to content owners to foster the growth of the OTT industry, allowing consumers to access a wide range of content.

Regarding the regulation of OTTs providing non-communication services, the current approach is deemed inadequate, with a suggestion for a self-regulatory model supplemented by legal frameworks for enforcement. The appropriate ministry for overseeing OTT content is debated, with considerations for the Ministry of Information and Broadcasting or the Ministry of Electronics and Information Technology. Suggestions are made for amending the Information Technology Act to define OTT services and platforms and establishing a new authority under the appropriate ministry for licensing. The importance of maintaining a level playing field for both OTT platforms and traditional telecommunication service providers is emphasized, with proposals for a light licensing regime and the incorporation of basic requirements such as data localization and security.

Overall, the discussion underscores the need for a comprehensive regulatory approach to address the evolving landscape of OTT platforms while ensuring consumer protection and industry growth.

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