



July 2, 2021

Dhanpreet Kaur,
Director,
Ministry of Information and Broadcasting

Sub: Comments on the Draft Cinematograph (Amendment) Bill 2021

ALG India Law Offices LLP (“ALG”) submits these comments in response to the invitation for feedback on the Draft Cinematograph (Amendment) Bill 2021 prepared by The Standing Committee on Information Technology (hereinafter referred to as the ‘Committee’), proposed by The Ministry of Information and Broadcasting and published on June 18, 2021.

Our key comments and suggestions, discussed in detail in the enclosed Note, are summarized below –

1. Further bifurcation of the age-based certification to include age category U/A 4+.
2. Inclusion of definition to identify scope of “public exhibition”.
3. Pictorial representation and color coding of the certification.
4. Removal of revisional powers of the Central Government and re-instatement of the Film Certification Appellate Tribunal or establishment of a neutral body for grievance redressal
5. Amendments to the provisions related to piracy, including prohibition of unauthorized recording which includes copying from original storage media and replacement of the term “author” with “*owner of copyright*” to be more inclusive of the various right holders.

We appreciate the considerable effort that has gone into the Draft. We recognize the time pressures and challenges under which the Committee is working, particularly in COVID-19 times. We thank you for your time and consideration of these comments.

ALG India Law Offices LLP

Through

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NOTE CONTAINING ALG'S COMMENTS AND SUGGESTIONS ON THE DRAFT CINEMATOGRAPH (AMENDMENT) BILL 2021

1. Age-based sub-division of category U/A for categorization with regard to film certification to be followed

1.1. ALG's Observation

1.1.1. The proposed Bill rightly identifies the need for further sub-division of the category 'unrestricted public exhibition subject to' on the basis of age. Towards this the Bill identifies and proposes sub-division of U/A category into U/A 7+, U/A 13+ and U/A 16+ and consequent amendments to Section 4(1)(i) proviso [Examination of Films]; 5A(1)(a) [Certification of Films]; and 6(2)(b) [Revisional powers of the Central Government].

1.2. ALG's Recommendation

1.2.1. The age-based division for film certification should also include an additional age category, viz. U/A 4+. This will create a distinct category to cover younger group of children, between the ages of 4-7. This will give filmmakers more flexibility in terms of creating and tailoring their content to different age groups.

1.2.2. The amendment should also extend to Section 5C [Appeals], Section 7(1) and Section 7(3) [Penalties for Contravention].

2. Inclusion of definition to identify scope of "public exhibition".

2.1 ALG's Observation

2.1.1. The Bill identifies the categories of certification for 'unrestricted public exhibition'. However, the ambit of "public exhibition" is not defined.

2.2 ALG's Recommendation

We recommend insertion of the below italicized text in the definition clause of section 2 of the Cinematograph Act, 1952:

““public exhibition” shall include the audio or visual dissemination of a film or part thereof or making available a film or part thereof, through use of a public medium, to

persons not directly connected with the production, distribution, promotion or certification of that film.

Provided that exhibition caused by the producer of the film, by invitation, to a select class of members of the public for the purpose of ascertaining their opinions on or reactions to the film shall not be public exhibition in terms of this Act, where prior permission has been taken from the Chairperson.”

3. Pictorial representation and color coding of the certification.

3.1 ALG’s Recommendation

We recommend strong pictorial representation and color coding of the certificates for easy identification of the category of certification by a larger section of the audience. For instance, the U certificate could carry a green background, the A certificate a red background etc., as proposed by The Committee of Experts in 2013 and 2016, under the Chairmanship of Justice Mukul Mudgal.

4. Removal of revisional powers of the Central Government and re-instatement of the Film Certification Appellate Tribunal or establishment of a neutral body for grievance redressal

4.1. ALG’s Observations

4.1.1 The Bill has proposed to provide revisionary powers to the Central Government by adding a proviso to Section 6(1) which will empower the Central Government to direct the Chairman of the Central Board for Film Certification (CBFC) to re-examine a film already certified for public exhibition. This power can be exercised on account of violation of Section 5B(1) of the Cinematograph Act, 1952.

4.1.2 Conferring such power on the Central Government to revisit a film that has already been certified by CBFC goes against the essence of Supreme Court ruling in Union of India v. K.M. Shankarappa, [(2001) 1 SCC 582] wherein it had struck down the revisional powers of the Central Government under Section 6(1) extending to films already certified as unconstitutional. The Court in the aforementioned case held that -

“To permit the Executive to review and/or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial Board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the Executive. Under our Constitution the position is reverse. The Executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. The Legislature may, in certain cases, overrule or nullify the judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate legislation, the Executive or the Legislature cannot set at naught a judicial order. The Executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts and decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.”

4.1.3. While Freedom of Speech and Expression under Article 19(1)(a) of the Indian Constitution is not absolute and may be restricted in larger interest of state and public, such restrictions can only be made in accordance with the reasonable restrictions set out in Article 19(2) of the Indian Constitution. The reasonable restrictions as provided for under Article 19(2) have been reproduced in Section 5B(1) of the Cinematograph Act, 1952 and further pursuant to powers granted under Section 5B(2) of the Cinematograph Act, 1952, the Central Government has also issued guidelines to be followed by CBFC while sanctioning films for public exhibition. Accordingly, the CBFC, an autonomous body, is already empowered to refuse certification of film for public exhibition should such film be violative of Section 5B(1). Notably, the members of the CBFC, examining committee and advisory panels are directly appointed by the Central Government and the Act does not lay down any criteria or qualification for such appointment to ensure that suitable members are appointed. Appointment of members by the Central Government eliminates any requirement for additional overriding power to vest with the Central Government in this regard.

4.1.4. Revisionary powers with Central Government leaves scope for manipulation or stifling of free speech by the Government. Revisional power with the Central Government as suggested implies an additional layer of direct Government censorship that goes beyond the existing process run by the CBFC.

4.1.5. Introduction of the proposed proviso providing revisionary power to the Central Government would also lead to undue delay in the certification process given that the proposed amendment is silent on any mechanism or time-period to be followed in disposal of such matters. The proposed amendment is also silent on the consequence of certification in the event that the CBFC upon such direction arrives at the conclusion that no violation of Section 5(B)(1) has taken place.

4.2 ALG's Recommendations

4.2.1 We recommend that the amendment giving powers to the Central Government to revoke a film certificate be done away with since the existing provisions and guidelines for CBFC and the committees to follow during certification already squarely cover situations relating to violation of Section 5(B)(1). Social interest guides censorship so as to maintain values and standards of society, which are suitably provided for in the existing guidelines and responsibility placed on the CBFC and the committees under the Act.

4.2.2 In order to deal with complaints relating to film certification, the Film Certification Appellate Tribunal (FCAT) may be re-instated, or a separate grievance redressal mechanism be put into place to deal with grievances such as violation of section 5B for films that have been certified by CBFC etc. The need for such a mechanism stems from the fact that with the striking down of the FCAT, the only redress available is with the High Courts, which is more time consuming and costly to pursue. The body or redressal mechanism should be neutral, independent and autonomous and may function like the erstwhile FCAT. This will likely maintain transparency, remove burden from the Central Government and avoid concentration of power. Currently review is conducted by the first panel *i.e.* the examining committee and the second *i.e.* the revising committee. With the suggested grievance redressal body, if the revising committee also rejects certification, a filmmaker may approach the higher neutral body which will act as a third panel for the dispute resolution as opposed to a High Court.

4.2.3 The composition of the neutral body identified above should be a mix of individuals from different walks of life who by reason of their profession, qualifications or experience in the field of art, cinema, drama, law, literature, history, sociology, psychology, media, education, performing arts, or public administration are deemed fit to judge the effect of film on the public and also possess cinematic understanding. This ensures transparency and no unfettered power/overriding power to any one group of persons and will ideally be in the best interest of free speech while keeping a check and enforcement of reasonable restrictions. Suggested guidelines for composition is as follows:

- Members from all walks of life, recommended by the National Film Development Corporation to the Central Government – 20%
- Members of the general public recommended by the FFSI (Federation of Film Societies of India) - 20%
- Members recommended by the National Council for Protection of Child Rights (NCPCR) and National Commission of Women (NCW)- 20%
- Representatives of the local film industry, as recommended by FFI (Film Federation of India) – 20%
- Representation of diverse languages with at least two lady members – 20%.

5. Amendments to the provisions related to piracy, including prohibition of unauthorized recording which includes copying from original storage media and replacement of the term “*author*” with “*owner of copyright*” to be more inclusive of the various right holders.

5.1 ALG’s Observations

5.1.1 The provision to deter piracy rightly prohibits using an audiovisual recording device in a place to knowingly make or transmit or attempt to make or transmit or abet the making or transmission of a copy of a film or a part thereof. However, the punishment laid down for violation of the said sections appears to be insufficient to efficiently deal with the piracy menace rampant in India.

5.1.2 While the provision effectively covers piracy by means of audiovisual recording device, it fails to address other modes of piracy, primarily copying of data from original storage media and distribution. The Bill is short of other important provisions such as those included in Sections 64 and 65 of the Copyright Act, 1957 (Copyright Act).

5.1.3. The Bill specifies that acts which do not amount to infringement of copyright under Section 52 of the Copyright Act will not amount to a violation of Section 6AA. This implies that recording may still be permitted, if it is for any of the purposes as set out under Section 52 of the Copyright Act.

5.1.4 By inclusion of the proposed changes under this section, it appears that an aggrieved person will have remedy under two legislations, the Cinematograph Act and the Copyright Act. There exists a difference between the Bill and the Copyright Act as the latter continues to provide for lesser penalty than what is proposed in the Bill for the same offence.

5.2 ALG's Recommendations

5.2.1 We recommend insertion of the below italicized text in the prohibitory Section 6AA -

Notwithstanding any law for the time being in force, no person shall, without the written authorization of the author, be permitted to *use any form of recording which includes copying from original storage media using audiovisual recording hardware or software* or use any audiovisual recording device in a place to knowingly make or transmit or attempt to make or transmit or abet the making or transmission of a copy of a film or a part thereof.

5.2.2. The use of the term 'author' may also be replaced by "*owner of copyright*" to take into consideration the practice of assignment of work wherein the assignee of such rights then becomes the owner of copyright and becomes entitled to exercise those rights to the exclusion of the authors.

5.2.3 There should be clarity as to enforcement of punishment against offenders, including a distinction between those who commit the act of piracy and those who only access the pirated content. There should also be clarity as to the affixation of the chain of legal liability for contravention of the provisions *i.e.* liability among producer, distributor, exhibitor etc.

5.2.4. It is further suggested that the proposed provisions be brought in harmony with the related provisions of the Copyright Act. This may be done by introducing a comprehensive chapter on 'Piracy' which may refer to provisions of the Copyright Act [such as Section 64 – Power of Police to Seize Infringing Copies] for purposes of tackling piracy under the Cinematograph Act.

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