

Date: July 2, 2021

To,
Director (Films)
Ministry of Information and Broadcasting
Room No. 122C, 'A' Wing, Shastri Bhawan,
Dr Rajendra Prasad Road,
New Delhi - 110001

Dear Sir,

Subj: Public comments sought on the Cinematograph (Amendment) Bill 2021

This submission is in response to the public comments sought by the Ministry of Information and Broadcasting on the Cinematograph (Amendment) Bill 2021. We, the undersigned filmmakers, academics, researchers, programmers, students, technicians, lawyers and civil society, thank the Ministry for the opportunity to comment on the Bill. We believe that public consultations, such as this, are important in ensuring that all stakeholders are engaged and involved in the process of law making. In this document, we provide suggestions to the draft bill along with substantive reasoning. Our intention is to share constructive feedback with the Ministry and to strengthen the Cinematograph Act.

The following is a short summary of our suggestions:

1. The Cinematograph (Amendment) Bill 2021 must clearly define the role of the Central Board of Film Certification (CBFC) as a body which certifies film content for public exhibition and not as a censoring body.
2. We recommend that the amendments giving powers to the Central Government to revoke a film certificate must be dropped. We agree with the spirit of the Supreme Court decision which held that this would violate the separation of powers in our democracy.
3. While we agree that film piracy poses real challenges to filmmakers, the proposed amendments do not address this concern effectively merely by introducing a penal provision. If introduced, sufficient exceptions on fair use, *de minimis* use and derivative work specific to films must be created. Systemic solutions to genuinely counter piracy must be introduced.

4. We recommend that the Film Certification Appellate Tribunal (FCAT) be reinstated, as it enables affordable and accessible remedies to filmmakers.
5. The Cinematograph Act must be amended to include a clear definition of 'public' exhibition and bring under its purview only commercial films with substantive capital investment and revenue models tied to theatrical exhibitions.

Before we address our specific concerns with the proposed amendment bill, we would like to draw attention to the history of censorship in India. The Cinematograph Act was first introduced in 1918 to exert control over the colonies, and was premised on the perception that Indian masses were illiterate, unruly, and prone to be incited into passion by the influence of cinema. More than a century later, India now stands as one of the leading producers of films in the world. However our censorship laws continue to view the audiences through a paternalistic lens exerting tight control over our cinematic practices. In the last 12 years, there have been two committees - under Justice Mukul Mudgal, and veteran filmmaker Shyam Benegal - that have made progressive recommendations to upgrade the certification process of our country and bring it in line with the changing attitudes, needs and demands of the 21st century. However, the much needed overhaul of the entire approach to censorship has not taken place. Instead of devising a cohesive strategy, governments so far have functioned in a piece-meal fashion that have failed to conclusively arrive at a policy that can be empowering for both the film fraternity as well as the audiences.

We sincerely hope the Ministry will take cognisance of the suggestions in this document while making amendments to the Cinematograph Act. We undertake to be available if called upon to present our submissions to the Ministry.

Thank you.

Annexed: List of signatories

This document is divided into two parts. In part A, we provide our specific suggestions to each of the proposed amendments. In part B, we provide substantive reasoning in support of our suggestions.

Part A: Suggestions to the proposed amendments

S. No	Text from the proposed Cinematograph Act Bill 2021	Suggestions
1.	<p>An Expert Committee under the Chairmanship of Justice Mukul Mudgal was constituted in 2013 to examine the issues of certification under the Cinematograph Act, 1952. Another Committee of Experts was set up under the Chairmanship of Shri Shyam Benegal in 2016 to evolve broad guidelines for certification within the ambit of the Cinematograph Act and Rules. The recommendations made by both the Committee of Experts have been examined in the Ministry and efforts have been made to consider all the relevant issues through internal reviews of the Act in consultation with various stakeholders.</p>	<p>The Central Board of Film Certification, as the name suggests, should only be a body that grants certification and not be authorized to dictate excision, modifications and amendments to films under review.</p>
2.	<p>i. Removal of the provisions struck down by the Hon'ble Court in sub- section (1) of section 6 in the principal Act.</p> <p>ii. Adding a proviso to sub-section (1) of section 6 for granting revisionary powers to the Government on account of violation of Section 5B(1) of the Act: Since the provisions of</p>	<p>We recommend that this amendment be dropped, and s.6(1) of the Cinematograph Act remain as read down by the Supreme Court in <i>Union of India v. K.M.Shankarappa</i>, and further that no new proviso be added granting revisionary powers to the Government.</p>

	<p>Section 5B(1) are derived from Article 19(2) of the Constitution and are non-negotiable, it is also proposed in the Draft Bill to add a proviso to sub-section (1) of section 6 to the effect that on receipt of any references by the Central Government in respect of a film certified for public exhibition, on account of violation of Section 5B(1) of the Act, the Central Government may, if it considers it necessary so to do, direct the Chairman of the Board to re-examine the film.</p>	
<p>3.</p>	<p>To tackle the menace of film piracy, The Cinematograph (Amendment) Bill, 2019 was introduced in the Rajya Sabha on 12.02.2019 after getting Cabinet approval on 06.02.2019, wherein it was proposed to insert a new section 6AA and a new sub-section (1A) in Section 7 of the Act. The Standing Committee on Information Technology (2019- 20) presented the 9th Report on Cinematograph (Amendment) Bill, 2019 in the Rajya Sabha and Lok Sabha on 16.03.2020. The observations/recommendations made by the Standing Committee on Information Technology in the Report have been examined and it is proposed to suitably revise the clauses in the</p>	<p>We welcome the move to address piracy related concerns but suggest that given that existing law penalises piracy, there is no need to introduce further penal provisions. If introduced, the provision must be worded in such a way as to avoid misuse. The punishment section must provide guidelines on the extent of punishment which can be imposed under different circumstances. Sufficient exceptions on fair use, <i>de minimis</i> use and derivative work specific to films must be crafted. Further, the offence must be made non-cognizable and bailable.</p> <p>We further urge the Ministry to evolve creative and effective means of tackling piracy in a systematic manner and not be limited to introducing a penal provision.</p>

Cinematograph (Amendment) Bill, 2019 based on the recommendations made by the Committee.

i. Insertion of new section 6AA - Prohibition of unauthorized recording

“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 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.

ii. Insertion of new sub-section 1A in section 7 – Penalties for contravention of this part

7(1A). If any person contravenes the provisions of section 6AA, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to three years and with a fine which shall not be less than three lakh rupees but which may extend to 5% of the audited gross production cost or with both.

Provided also that, any act mentioned in Section 52 of the Copyright Act, 1957 (Act 14 of 1957) is not an infringement

	of the provision of Section 6AA of this Act.”	
	Additional Suggestions	<p>1. We strongly recommend that the Film Certification Appellate Tribunal (FCAT) be reinstated so that aggrieved filmmakers have a chance to file an appeal before going to the High Court.</p> <p>2. The Cinematograph Act must be amended to include a clear definition of ‘public’ exhibition and bring under its purview only commercial films with substantive capital investment and revenue models tied to theatrical exhibitions.</p>

Part B: Reasoning in support of suggestions

<p>Index:</p> <p>Black text - Text of the Cinematograph Amendment Bill, 2021</p> <p>Blue text - Discussion</p> <p>Red text - Suggestion</p>
--

Role of the Central Board of Film Certification:

An Expert Committee under the Chairmanship of Justice Mukul Mudgal was constituted in 2013 to examine the issues of certification under the Cinematograph Act, 1952. Another Committee of Experts was set up under the Chairmanship of Shri Shyam Benegal in 2016 to evolve broad guidelines for certification within the ambit of the Cinematograph Act and Rules. The

recommendations made by both the Committee of Experts have been examined in the Ministry and efforts have been made to consider all the relevant issues through internal reviews of the Act in consultation with various stakeholders.

While the Cinematograph Amendment Bill 2021 states that it has taken into account the observations and recommendations made by the Shyam Benegal Committee 2016, **it rejects the core recommendation of the committee - that the Central Board of Film Certification, as the name suggests, should only be a body that grants certification and not be authorized to dictate excision, modifications and amendments to the film under review.**

“The Committee is of the view that it is not for the CBFC to act as a moral compass by deciding what constitutes glorification or promotion of an issue or otherwise. The scope of the CBFC should largely only be to decide who and what category of audiences can watch the depiction of a particular theme, story, scene etc...The CBFC categorization should be a sort of Statutory Warning for audiences of what to expect if they were to watch a particular film. Once the CBFC has issued this statutory warning, film viewing is a consensual act and up to the viewers of that category.” (5.2 pg. 7)

This is also in line with the observations made by the Mudgal Committee Report of 2013, which registered several complaints made by stakeholders regarding the inability of the members of the examining and advisory committees of the CBFC to make judgement on creative and artistic works. The report categorically noted their lack of both a cinematic understanding as well as a nuanced approach to determine the effects of cinema on audiences.

“they perceive their role to be that of a Censor Board to cut and chop scenes and in some cases being affiliated to some political, religious or social group, impose without restraint, such political, religious or personal opinions upon content permissible in a film. As by way of a few examples, the Committee came across complaints where panel members had objected to the use of words such as "boyfriend" or "kiss" used in a scene or even the uncharitably humorous representation of a political figure etc.” (pg 5)

While both the committee reports have different recommendations with regard to the appointment of these committee members, in order to avoid political allegiance, cases of corruption etc, which the Cinematograph Amendment Bill 2021 must address, it is important to note that their interference with the film itself by way of cutting dialogues, songs and scenes at their own whims and fancies must to be curtailed completely.

The Cinematograph (Amendment) Bill 2021 must clearly define the role of the Central Board of Film Certification (CBFC) as a body which certifies film content for public exhibition and not as a censoring body.

Revisional powers of the Central Government for certified films:

The Ministry of Information and Broadcasting proposes to introduce the Cinematograph (Amendment) Bill, 2021 which will make the process of sanctioning of films for exhibition more effective, in tune with the changed times and curb the menace of piracy. The important changes proposed are as follows:

c) Amendment of sub-section(1) of section 6 regarding 'Revisional powers of the Central Government': In the existing Act under section 6, the Central Government has been empowered to call for the record of proceedings in relation to certification of a film which is pending or has been decided by the Board and pass any order thereon. This, in other words, means that the Central Government, if the situation warranted, has the power to reverse the decision of the Board. However, the Hon'ble High Court of Karnataka in KM Shankarappa Vs. Union of India case stated that the Central Government cannot exercise revisional powers in respect of films that are already certified by the Board. This has also been upheld by the Hon'ble Supreme Court vide judgment dated 28/11/2000 in Civil Appeal 3106 of 1991. The Hon'ble Supreme Court has also opined that the Legislature may, in certain cases, overrule or nullify the judicial or executive decision by enacting an appropriate legislation. In this regard, it is stated that sometimes complaints are received against a film that allude to violation of Section 5B(1) of the Cinematograph Act, 1952 after a film is certified. Article 19(2) of the Constitution imposes reasonable restrictions upon the freedom of speech and expression 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 of any offence. Therefore, the following amendments are proposed in the Draft Bill:

- i. Removal of the provisions struck down by the Hon'ble Court in sub- section (1) of section 6 in the principal Act.
- ii. Adding a proviso to sub-section (1) of section 6 for granting revisionary powers to the Government on account of violation of Section 5B(1) of the Act: Since the provisions of Section 5B(1) are derived from Article 19(2) of the Constitution and are non-negotiable, it is also proposed in the Draft Bill to add a proviso to sub-section (1) of section 6 to the effect that on receipt of any references by the Central Government in respect of a film

certified for public exhibition, on account of violation of Section 5B(1) of the Act, the Central Government may, if it considers it necessary so to do, direct the Chairman of the Board to re-examine the film.

It is an established principle of constitutional law that the legislature cannot reverse a judicial decision, **unless the very basis of the infirmity or illegality pointed out by the court has been removed.**¹ These particular amendments do not in any way alter the fundamental illegality that the Supreme Court and the Karnataka High Court pointed out in the *Shankarappa* case, which is that once a tribunal/court has taken a view regarding the granting of a certificate *after* complying with the mandate under s.5B of the Cinematograph Act, the Government cannot revoke this certificate. Such an act is “a travesty of the rule of law which is one of the basic structures of the Constitution,”² as it would amount to the Executive sitting in appeal over a judicial decision. Multiple courts have reiterated and supported the reasoning adopted in the *Shankarappa* cases.³

It must be noted that the Mudgal Committee report considered even the power of suspension of films, recognised in s.6(2) of the Cinematograph Act, to be an overused and unnecessary part of the certification process. Its rewriting of s.6 is a more legally and constitutionally sound version; **it recognises the right of suspension only as a means of last resort, and only when there has been or there is likely to be an imminent breach of public order as recognised by the Supreme Court.**⁴ When the right to suspension has been regarded with such caution, providing for the more expansive power of the Central Government to reopen the question of certification is clearly against existing wisdom on the mechanisms of the Cinematograph Act.

We agree with the reasoning in *Uoi v. K.M.Shankarappa* that once a film has been certified after complying with the requirements under the Act, there cannot and should not be any further interference, especially by the Government. This would amount to an additional level of censorship, over and above the certification process, in gross violation of Article 19 of the Constitution of India and the principle of separation of powers.

We strongly recommend that this amendment be dropped, and s.6(1) of the Cinematograph Act remain as read down by the Supreme Court, and further that no new proviso be added granting revisionary powers to the Government.

¹ *PUCL v. Uoi*, Writ Petition (Civil) 490 of 2002.

² *Uoi v. K.M.Shankarappa* [Appeal (Civil) 3106 of 1991].

³ The Supreme Court in *Prakash Jha v. Uoi*, Writ Petition (Civil) No.(s). 345 OF 2011; the Delhi High Court in *Sai Cine Productions v. CBFC and Ors.*, W.P.(C) 674/2015 & CM No. 1181/2015.

⁴ *S. Rangarajan v. P.Jagjivan Ram*, 1989 SCC (2) 574.

Piracy:

Film Piracy, particularly release of pirated version of films on internet, causes huge losses to the film industry and government exchequer. In most cases, illegal duplication in cinema halls is the originating point of piracy. At present, there are no enabling provisions to check film piracy in the Cinematograph Act, 1952 making it necessary to have a provision in the Act to check film piracy. Therefore, the following amendments are proposed in the Draft Bill:

i. Insertion of new section 6AA - Prohibition of unauthorized recording

“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 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.

Explanation.- For the purposes of this subsection, the expression “author” shall have the same meaning as assigned to it in clause (d) of section 2 of the Copyright Act, 1957.’.

ii. Insertion of new sub-section 1A in section 7 – Penalties for contravention of this part

7(1A). If any person contravenes the provisions of section 6AA, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to three years and with a fine which shall not be less than three lakh rupees but which may extend to 5% of the audited gross production cost or with both.

Provided also that, any act mentioned in Section 52 of the Copyright Act, 1957 (Act 14 of 1957) is not an infringement of the provision of Section 6AA of this Act.”

While we agree that piracy requires concerted efforts in order to protect the interests of filmmakers, the proposed amendments fail to address these concerns. Piracy is already an offence in India, and introducing another penal provision, will only create confusion. Section 63 of the Copyright Act of 1957 penalises piracy, as do state specific legislations such as the Goonda Acts of Karnataka, Maharashtra, Tamil Nadu, among others. The Information Technology Act of 200 and the Information Technology (Intermediary Guidelines) Rules of 2011 extend copyright protection to films over the digital media. The interplay between these various penal provisions has to be clearly defined to ensure that (a) they are effectively enforced and (b) persons are not booked under different statutes and subjected to multiple punishments. The

proposed amendment has the potential of being misused against individuals, without being able to address the systemic issues that enable piracy to thrive.

The punishment provision is too vague and overbroad, especially with respect to the fine. The circumstances in which a higher fine may be levied requires to be more clearly defined as it has the potential to be misused. 5% audited gross production can be an exorbitant amount, and in the absence of a clarity in sentencing, can lead to gross penalisation. The Standing Committee on Information Technology (2019-20) also suggested that the sentencing provisions require further rationalisation such as treating first time offenders differently from habitual offenders.

In the event that s.6AA and s.7(1A) are retained, there is a need to consider exceptions of fair use in greater detail. While s.52(1) of the Copyright Act covers some instances of fair dealing, film-specific exceptions must be crafted in order to ensure that innocent and harmless acts of individuals are not penalised. For instance, the Standing Committee's **suggestion of exempting non-commercial use of copyrighted material to protect the general public who forward film clip/ short extracts of movies as memes, jokes etc.,** has also not been taken into account.

“In the present era when a large chunk of the population is active on social media, the Committee would like the Ministry to ensure that unreasonable restrictions are not imposed on them. Therefore, the committee urge the Ministry of I & B to revisit the Bill and consider inclusion of ‘Fair Use’ provision to provide adequate safeguards to the innocent viewers lest it should lead to confusion and misuse of the proposed provision in the Bill and related harassment of the innocent people for using film clip for non-commercial and other such purposes. **The Bill should not inadvertently make criminals out of ordinary citizens.**”⁵

Further, filmmakers themselves are subject to copyright infringement suits on account of using small portions of films/songs/images, despite such use being protected by the principle of *de minimis*, as it causes no commercial damage to the original makers.⁶ It is possible that these new provisions can be invoked against filmmakers themselves if adequate safeguards are not built in.

We welcome the move to address piracy related concerns but suggest that given that existing law penalises piracy, there is no need to introduce further penal provisions. If introduced, the provision must be worded in such a way as to avoid misuse. The punishment section must

⁵ Pg.28-29, Ninth Report of the Standing Committee on Information and Technology on the Cinematograph Amendment Bill 2019, published in March 2020.

⁶ *India TV Independent News Services v. Yashraj Films Pvt. Ltd.*, FAO(OS) 583/2011, decided by the Delhi High Court on 21 August 2012.

provide guidelines on the extent of punishment which can be imposed under different circumstances. Sufficient exceptions on fair use, *de minimis* use and derivative work specific to films must be crafted. Further, the offence must be made non-cognizable and bailable. We urge the Ministry to evolve creative and effective means of tackling piracy in a systematic manner and not be limited to introducing a penal provision.

Additional Suggestions:

1. The dissolution of the FCAT through the Tribunals Reforms Ordinance passed in April 2021 has left filmmakers with no options to resolve matters through the appeal processes under the Cinematograph Act. The ordinance was passed without public consultation or debate. While earlier, as per Section 5C of the Act, filmmakers were able to represent themselves before the FCAT they will now necessarily need to employ the services of lawyers to represent them in the High Court. The legal costs incurred by the filmmakers would be much higher than the nominal fee of the FCAT. This would adversely affect early career and independent filmmakers and those working with low budget productions. Further, the FCAT was a specialised tribunal to consider these cases on a priority basis, which will not be the case before the High Courts which are already overburdened with pending caseload.

We strongly recommend that the Film Certification Appellate Tribunal (FCAT) be reinstated so that aggrieved filmmakers have a chance to file an appeal with the CBFC before going to the High Court.

2. It is requested that the Bill clearly state what is meant by 'public exhibition' and consider only those venues that cater to mass publics, such as cinema halls and theaters, where big-budget films with substantial capital investments, revenue and resource models are screened. In its definition of 'public' the Bill must not include sites where non-commercial videos are screened for educational and informational purposes such as, and not limited to, private cultural centres, exhibitions for scientific purposes, research seminars, neighborhood film clubs, film festivals, archives, libraries, classrooms and outreach programs organised by NGOs. It must be noted that these venues do not gather mass crowds, nor do they operate through fee and revenue structures.

The Cinematograph Act must be amended to include a clear definition of 'public' exhibition and bring under its purview only commercial films with substantive capital investment and revenue models tied to theatrical exhibitions.