

Beyond “Conventional” Free TV and Moviehouses: Proposing a Regulatory Framework for Video-on-Demand and Livestreaming Services Content Accessed Through the Internet, and Establishing Norms for Audience Empowerment and Sensitivity on Web-based Entertainment

*Eugenio H. Villareal**

*Katrina Monica C. Gaw***

I.	INTRODUCTION.....	124
II.	THE CONTENT PANORAMA.....	128
	A. <i>It’s a Wild, Wild Web: Regulating Content in the Vast Frontier of the Internet</i>	
	B. <i>Guiding Principles for Content Regulation</i>	
	C. <i>MTRCB: The Watchmen of the Film and Television Industries</i>	
III.	OVER THE TOP: THE FORMS AND FACES OF VOD AND LIVESTREAM SERVICE PROVIDERS.....	151
	A. <i>General Framework of Internet Economics</i>	
	B. <i>Zeroing In: VOD and Livestream Service Providers</i>	
IV.	CONTENT REGULATION.....	161
	A. <i>Content Regulation as a Balancing Act: How States Regulate Film and Broadcast Content</i>	
	B. <i>How the Philippines Currently Regulates Broadcast and Film Content</i>	
	C. <i>How Other Jurisdictions Regulate VOD and OTT Services Content</i>	
	D. <i>How VOD and OTT Service Providers Self-Regulate and Comply with Above Regulations</i>	
V.	A FRAMEWORK FOR PROVIDERS AND PARENTS ALIKE.....	183
	A. <i>Defining the Framework</i>	
	B. <i>Legal Foundations</i>	
	C. <i>Supporting Legal Theories and Concepts</i>	
	D. <i>Framework Proper</i>	
V.	LIMITATIONS.....	202
VI.	CONCLUSION.....	203

I. INTRODUCTION

Years back, broadcast television was arguably the prime source of entertainment for the household¹ — it was the way families watched the news, discovered trivia and information via documentaries, and enjoyed both regular programs and full-length pictures. Serving as entertainment excursions, on the other hand, would be trips to movie theaters — whether these be to the classic stand-alone cinemas of old, usually housed in art deco-styled buildings, or the more modern and compact cineplexes where, upon arrival, the moviegoer is instantly presented with a menu of films to choose from. However, with the rapid pace of technology, a new source for accessing an even wider variety of entertainment fare has emerged — the Internet.

While it has not totally replaced trekking to the cinema or watching broadcast television, the Internet has considerably altered the entertainment landscape and how entertainment is distributed in the Republic of the

* '88 LL. B., *with honors*, Ateneo de Manila University School of Law. As of this writing, the Author is the Chairperson of the Movie and Television Review and Classification Board (MTRCB), an attached agency of the Office of the President of the Philippines. He teaches Evidence, Sports and Entertainment Law, Philosophy of Law, and Legal Profession, among other subjects, at the Ateneo de Manila University School of Law. Aside from being Chairperson of the said law school's Department of Legal Profession, Ethics, Logic, Philosophy, and Theology, he is also a regular lecturer of Legal Ethics, Legal Writing, and Oral Advocacy, as well as Media and Entertainment Law, for the Mandatory Continuing Legal Education (MCLE) Program of the University of the Philippines (UP) Law Center. His previous works for the *Journal* were *Filipino Legal Philosophy and its Essential Natural Law Content (A Concurrence in the Absolute with Aquinas, Finnis, and Fuller)*, 50 ATENEO L.J. 294 (2005), *Offending Religion: Right or Liberty? (Walking Through the Right-Duty Dichotomy with Hohfeld, Finnis and May)*, 51 ATENEO L.J. 28 (2006), and *Schmaltz Anew: Pinoy-Style Community-Based Limited Partnership as a Socio-Legal Technique for Agricultural Development*, 52 ATENEO L.J. 269 (2007). This Article was prepared pursuant to grants by the Nippon Foundation and the Ateneo de Manila University Graduate Legal Studies Institute (GLSI). The latter is in connection with the development of Sports and Entertainment Law Studies in the Ateneo de Manila University School of Law.

** '18 J.D., *cand.*, Ateneo de Manila University School of Law. The Author is a member of the Board of Editors of the *Ateneo Law Journal*. She was the Associate Lead Editor for the fourth Issue of the same Volume.

Cite as 61 ATENEO L.J. 123 (2016).

1. James L. Gattuso, FCC: Over the Top on Internet TV, *available at* <http://www.heritage.org/research/reports/2015/11/fcc-over-the-top-on-inter-net-tv> (last accessed Aug. 31, 2016).

Philippines (the Philippines).² Easily coming to mind are over-the-top (OTT) services, which generally cover those that allow the distribution of content to the public via the Internet, making use of a broadband connection rather than existing cable or satellite systems.³ OTT services allow users almost unlimited access to video-sharing platforms, such as YouTube and Dailymotion, which enable users to upload, watch, and share original content.⁴ Online platforms providing video-on-demand (VOD) and livestreaming services, such as Netflix or the local iWant TV, afford viewers the opportunity to select and watch videos whenever they want.⁵ Access can be through laptops, tablets, smartphones, and even the television (TV) set through its digital reincarnation, the so-called “Smart TV.”⁶

The Philippines is a formidable consumer of entertainment media as a whole, and, interestingly enough, its consumption of OTT content is one of the highest in Asia.⁷ A Nielsen survey reveals that a little over eight in ten digital Filipino consumers report watching TV content and movies through online sources such as livestream and VOD services.⁸ The survey also states that 45% of Filipino digital consumers in the Philippines watch Internet TV daily.⁹ Early entrants in the Filipino market have thus been identified.¹⁰ In

-
2. Situationer: Notwithstanding the rise of online platforms, most Filipinos still look to broadcast TV to watch content, according to a 2016 Nielsen survey on VOD services. ABS-CBN News, TV still reigns supreme in PH — Nielsen survey, *available at* <http://news.abs-cbn.com/business/04/02/16/tv-still-reigns-supreme-in-ph-nielsen-survey> (last accessed Aug. 31, 2016).
 3. Saul Hansell, Time Warner Goes Over the Top, *available at* http://bits.blogs.nytimes.com/2009/03/03/jeff-bewkes-goes-over-the-top/?_r=0 (last accessed Aug. 31, 2016).
 4. YouTube, About, *available at* <https://www.youtube.com/yt/about> (last accessed Aug. 31, 2016) & Dailymotion, Terms of Use, *available at* <http://www.dailymotion.com/legal/terms> (last accessed Aug. 31, 2016).
 5. Netflix, Website, *available at* <https://netflix.com/ph> (last accessed Aug. 31, 2016) & iWantTV, Frequently Asked Questions, *available at* <http://www.iwantv.com.ph/about/faqs> (last accessed Aug. 31, 2016) [hereinafter iWantTV, FAQ].
 6. Rappler, Video on demand services surge dramatically, *available at* <http://www.rappler.com/business/industries/172-telecommunications-media/98478-subscription-video-on-demand-pldt-iflix> (last accessed Aug. 31, 2016).
 7. Jessica Bartolome, Filipinos still prefer watching TV, survey shows, *available at* <http://www.gmanetwork.com/news/story/561209/scitech/technology/filipinos-still-prefer-watching-tv-survey-shows> (last accessed Aug. 31, 2016).
 8. ABS-CBN News, *supra* note 2.
 9. *Id.*
 10. Rappler, *supra* note 6.

2015, the Philippine Long Distance and Telephone Company (PLDT) and Smart Communications, Inc. partnered with iflix, a regional Internet TV service provider, to have Filipinos subscribe to 11,000 hours of television and film content per month.¹¹ Globe Telecom, Inc., not to be outdone, has also partnered with Hooq Digital Philippines, Inc. (HOOQ), a Republic of Singapore (Singapore)-based online entertainment service provider, providing Internet TV access to its mobile users.¹² Just this year, Netflix, a global VOD services provider based in the United States of America (U.S.), with a reputation for creating original and compelling content, also launched its services in the Philippines.¹³

All these developments notwithstanding, the above-described digital media and entertainment services have not seen much government regulation.¹⁴ This includes the matter of *content*. In the current set-up, viewers are left to rely on self-regulatory ratings and advisories provided by content sources (if any are provided).¹⁵ Even as the Movie and Television

11. *Id.*

12. Fehl Dungo, Hooq Globe Review — Watch Unlimited Movies and TV Shows, *available at* <http://philpad.com/hooq-globe-review-watch-unlimited-movies-and-tv-shows> (last accessed Aug. 31, 2016). As of this writing, a related Philippine company, HOOQ Digital Philippines, Inc., is already registered as a media entity with the Philippines' MTRCB under Certificate of Registration No. 07-16-02291. Under the said company's Articles of Incorporation, its primary purpose is "to engage in the business of providing administrative support for [the] distribution of film or television programs to qualified distributors and operators, and providing of, and supporting, IT [(Information Technology)] and IT-enabled services, applications, and programs." *Cf.* HOOQ Digital Philippines, Inc., Articles of Incorporation, Reg. No. CS201508415, May 4, 2015 (on file with the MTRCB).
13. Rappler, Netflix launches nearly globally, including the Philippines, *available at* <http://www.rappler.com/technology/news/118195-netflix-philippines-global-launch> (last accessed Aug. 31, 2016).
14. When asked by media, the National Telecommunications Commission (NTC) stated that it would study any possible legal issues as to the entrance of players such as Netflix in the Philippines, making no definitive statement as to regulatory mechanisms that would be put in place. Other government agencies have not made any official statements on the matter. Daphne J. Magturo, Industry Weighs Netflix Impact, *Business World Online*, *available at* <http://www.bworldonline.com/content.php?section=TopStory&title=industry-weighs-netflix-impact&id=121136> (last accessed Aug. 31, 2016).
15. Theoretically, some content could have already been the subject of previous ratings by a classification body such as the Motion Picture Association of America (MPAA)'s Classification and Rating Administration (CARA), the Korea Media Rating Board (KMRB), or our own MTRCB. Such ratings are essentially derivative. In some cases, they are even vulnerable to effectivity limitations. For example, the MTRCB's standard Permit to Exhibit (Theatrical)

Review and Classification Board (MTRCB)¹⁶ has the unmistakable statutory authority to generally require television and film producers to submit their content prior to public exhibition,¹⁷ the extension of such authority to Internet-based content providers remains untested. A related concern is the extent to which these services may be treated as “limited audience” fare, in the sense that only those who subscribe to them are able to access their content. Still, it must be admitted that content made available to Internet users via livestream and VOD services can be accessed not only by adults, but also by children. These providers can thus potentially exhibit content that may not be suitable for all audiences.

This Article aims to propose “audience empowerment” mechanisms that will ensure that content made available by livestream and VOD service providers is subjected to more or less the same standards and classificatory schemes as in cinemas and television broadcasts. In doing so, however, it must necessarily consider the “limited audience” nature of livestream and VOD services. It hopes to provide an in-depth discussion of how this can be done by preliminarily considering how other jurisdictions regulate Internet TV, and later, see how much self-regulation as well as “co-regulation” can be done within the Philippine context. All these will hopefully lead to a realistic and integrated framework, consistent with law and with those fundamental principles, founded on that inviolable respect for human dignity, that animate it.

The Article will then integrate these ideas and discussions into a hopefully cohesive regulatory, and more importantly, “enabling” framework that can be implemented in the Philippines. Finally, it will explore possible

for films is valid for only five years. Rules and Regulations and Implementing Presidential Decree No. 1986 (as amended), ch. VIII, § 3 (A) [hereinafter MTRCB IRR]. The adoption of said ratings, though, must be done carefully. A good question to ask in this regard is whether or not a rating originally given to material intended for theatrical exhibition will automatically be reprised for purposes of Internet-based viewing. Will the classification be more “liberal,” or reverse, with respect to the latter?

16. Created under Presidential Decree No. 1986, the MTRCB is a review and classification body attached to the Office of the President of the Philippines. *See* Creating the Movie and Television Review and Classification Board, Presidential Decree No. 1986, § 1 (1985).
17. Presidential Decree No. 1986, § 4. Consistent, however, with the Board’s objective of promoting self-regulation, MTRCB Memorandum Circular No. 03-2012 allows serial television programs to just submit for prior review a “sample” episode belonging to the covered period applied for — “for daily telecast, [not to] exceed [20] episodes; and for weekly telecast, [not to] exceed [10] episodes.” *See* Presidential Decree No. 1986, whereas cl. & MTRCB, Memorandum Circular No. 03-2012 [MTRCB MC No. 03-2012] (July 19, 2012).

enforcement mechanisms, considering the limitations related to regulation for content made available online.

II. THE CONTENT PANORAMA

A. It's a Wild, Wild Web: Regulating Content in the Vast Frontier of the Internet

It may be hard to imagine now, but there was once a time when films were accessible only through theaters and, with the lapse of time after a regular run, the television. Television viewing was done through a relatively large wooden box housing a cathode ray tube (known as the “picture tube”).¹⁸ The media through which individuals could view entertainment content were thus very limited.¹⁹ The media industry, though, has since experienced a technical convergence.²⁰ This phenomenon has been described as

the use of different types of infrastructure or platform[s] to deliver the same service (e.g.,[.] the delivery of content over terrestrial TV, cable, satellite[,] and the Internet) or the delivery of a range of services by a single player, facilitated by regulation and digital delivery, (e.g.,[.] triple- or quadruple play offers giving consumers access to voice, data[,] and TV over the same platform or by the same player).²¹

Of the many types of media infrastructure, it is the Internet that appears to be the most versatile, the most “precarious” in terms of impact, and definitely, the most exciting. With more than 3.3 billion people, or approximately 40% of the world’s population, connected to the Internet²² — and all with almost unbridled access to its limitless contents (security and access restriction mechanisms notwithstanding) — there is no doubt as to its reach and sheer potential for influence. The Internet allows users to upload their own self-created content, to download shows and films in digital

18. John Kitzmiller, et al., *Industry and Trade Summary: Television and Picture Tubes and other Cathode-Ray Tubes*, available at https://www.usitc.gov/publications/332/pub2877_0.pdf (last accessed Aug. 31, 2016).

19. *See* Film Connections, *How the Internet has Changed the Landscape of the Movie Business*, available at <http://www.filmconnection.com/reference-library/film-entrepreneurs/how-the-internet-has-changed-the-movie-biz> (last accessed Aug. 31, 2016).

20. Gordon Moir, et al., *Digital Broadcasting and Online Content Delivery (A Discussion Paper Prepared for the 2013 Global Symposium for Regulators)* 1, available at <https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/Digital%20Broadcasting%20and%20Online%20Content%20Delivery.pdf> (last accessed Aug. 31, 2016).

21. *Id.*

22. Internet Live Stats, *Internet Users*, available at <http://www.internetlivestats.com/internet-users> (last accessed Aug. 31, 2016).

packets in a matter of minutes, and to share all these data with others, at minimal costs.²³

The Internet has been both a blessing and a “curse” to the entertainment industry.²⁴ It has created an entirely new frontier for films and television shows — one that penetrates every phase of the life cycle of production and distribution.²⁵ It also extends the lifetime of a cinematographic work in the memory of viewers and for subsequent generations. One can only recall the fulfillment of a viewer who suddenly discovers in YouTube “lost” or otherwise “hard-to-find” material during the pre-high speed Internet age, such as the late Philippine comedian Dolphy’s classic “Banayad Whiskey” sketch.²⁶ It also allows producers, actors, directors, and other players to connect with their audience directly and to feel the pulse of public perception.²⁷

Be that as it may, the Internet has also had a negative effect on certain aspects of the industry. In particular, it has made it difficult for film and television production companies to clamp down on piracy and the unregulated distribution of their produced content.²⁸ What is more, the Internet has allowed for the publication and distribution of content that traditionally has been more stringently regulated, or even declared as unprotected speech, i.e., those that smack of pornography, defamation, libel,

23. See Robert Levine, How the internet has all but destroyed the market for films, music and newspapers, *available at* <http://www.theguardian.com/media/2011/aug/14/robert-levine-digital-free-ride> (last accessed Aug. 31, 2016).

24. Film Connections, How the Internet Has Changed Movies: Infamous Ubiquity, *available at* <http://www.filmconnection.com/reference-library/film-entrepreneurs/infamous-ubiquity> (last accessed Aug. 31, 2016).

25. *Id.*

26. See djATCproduction, Video, Father & Son (1995) — BANAYAD WHISKY — Dolphy, July 15, 2012, YOUTUBE, *available at* <https://www.youtube.com/watch?v=7EdJBRj55F8> (last accessed Aug. 31, 2016). This sketch is part of the 1995 movie Father and Son, which was Dolphy’s (Rodolfo Vera Quizon in real life) RVQ Productions’ official entry to the 1995 Metro Manila Film Festival. Amanda Lago, A Toast of Banayad Whisky to the ‘King of Comedy’ from Pepper.ph, *available at* <http://www.gmanetwork.com/news/story/265220/lifestyle/food/a-toast-of-banayad-whisky-to-the-king-of-comedy-from-pepper-ph> (last accessed Aug. 31, 2016). Mr. Quizon was, and still is, acknowledged by many as the “King of Philippine comedy.” *Id.*

27. See Film Connections, *supra* note 24.

28. Levine, *supra* note 23.

gratuitous violence, and the like.²⁹ Such aberrational content is relatively easy to upload and download, as well as share, through the Internet.³⁰ It has therefore become urgent to ask if it is reasonable as well as feasible to apply classificatory frameworks traditionally imposed on broadcast television and film production companies to Internet content.³¹ This urgency, whether for or against such application, is underscored by the key attraction of the Internet as a medium for distributing content which is perceivably “unregulated, and, therefore, liberating.”³²

Indeed, the Internet appears to be easily within reach — most especially to the tech-savvy youth.³³ There are those who would argue though that this is not exactly the case, as accessing sites on the Internet involves various and distinct steps which include opening and using a search engine, logging into websites, and going through various links and filters (and always with the possibility of not proceeding or going to another site) before arriving at, say, a link featuring obscene material.³⁴ This notion of comfort may, however, be merely theoretical, if one considers what is happening on the

-
29. Cf. Nick Bilton, *Internet Pirates Always Win*, N.Y. TIMES, Aug. 4, 2012, available at <http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html> (last accessed Aug. 31, 2016).
 30. See, e.g., Mark Ward, *Web porn: Just how much is there?*, available at <http://www.bbc.com/news/technology-23030090> (last accessed Aug. 31, 2016).
 31. Steven E. Merlis, *Preserving Internet Expression While Protecting Our Children: Solutions Following Ashcroft v. ACLU*, 4 N.W.J. TECH. & INTELL. PROP. 117, 117-19 (2005) & Usman Qazi, *The Internet Censorship Controversy*, available at <http://courses.cs.vt.edu/professionalism/Censorship/notes.html> (last accessed Aug. 31, 2016).
 32. Ronald G. Atkey, *Technological Change and Canada/U.S. Regulatory Models for Information, Communications, and Entertainment*, 25 CAN.-U.S. L.J. 359, 360 (1999).
 33. Aaron Smith, *Older Adults and Technology Use*, available at <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use> (last accessed Aug. 31, 2016).
 34. This more or less supports the belief that regulating the Internet could lead to a chilling effect, such that any form of regulation limits the very liberality and anonymity that the Internet was designed for. See Thomas W. Hazlett & David W. Sosa, *Chilling The Internet? Lessons from FCC Regulation of Radio Broadcasting*, available at <http://www.cato.org/pubs/pas/pa-270.html> (last accessed Aug. 31, 2016) & William Fisher, *Freedom of Expression on the Internet*, available at <http://cyber.law.harvard.edu/ilaw/Speech> (last accessed Aug. 31, 2016). Coalitions in favor of Internet freedom have also been formed abroad. See Internet Freedom Coalition, Website, available at <http://internetfreedomcoalition.org> (last accessed Aug. 31, 2016).

ground.³⁵ Studies show that many of the children today are using the Internet at an age as young as three.³⁶ Online, children encounter content depicting “self-harm, violent pornography, animal cruelty[,] and eating disorders.”³⁷ One study shows that 58% of the surveyed children, ages 14–17, have seen pornography on the Internet, while 37% have received a link leading them to explicit sexual content.³⁸ In the United Kingdom of Great Britain and Northern Ireland (U.K.), children pretend to be older to be able to access sites that are not suitable for their age.³⁹ These children often access these materials without the knowledge of their parents.⁴⁰ Clearly, at peril here is the child’s formation in regard to saying and upholding what is true. Early on, youngsters become mini-masters of deception, so to speak.

Another study featuring the youth’s perception of ease of access to pornographic materials on the Internet, shows that eight out of ten 18-year olds think it is too easy for young people to accidentally see pornography online,⁴¹ while 46% of teenagers say “sending sexual or naked photos or videos is part of everyday life for teenagers nowadays.”⁴² The ease by which this type of content is accessed online has led to alarming behavior on the part of youths around the globe. For example, in the U.K., children as young as five years old have been found guilty of committing sex crimes

35. American Academy of Child and Adolescent Psychiatry, Internet Use in Children, *available at* http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-Online-059.aspx (last accessed Aug. 31, 2016). The American Academy of Child and Adolescent Psychiatry has warned against the misconception of some parents that their children require less monitoring when using the Internet as opposed to watching the television or reading books. According to their research, “[t]he ability to ‘click’ from one area to another appeals to a child’s natural impulsivity[,] curiosity[,] and needs for immediate gratification or feedback.” *Id.*

36. Victoria Ward, Children using internet from age of three, study finds, *available at* <http://www.telegraph.co.uk/technology/internet/10029180/Children-using-internet-from-age-of-three-study-finds.html> (last accessed Aug. 31, 2016).

37. *Id.*

38. Parents Television Council, Facts and TV Statistics, *available at* <http://w2.parentstv.org/main/Research/Facts.aspx> (last accessed Aug. 31, 2016).

39. Ward, *supra* note 36.

40. Sean Poulter, Children as young as five ‘using the internet without parental supervision,’ *available at* <http://www.dailymail.co.uk/sciencetech/article-1218581> (last accessed Aug. 31, 2016).

41. Tracy Parish, Studies shed light on sexual behavior of teenagers, *available at* http://www.burnet.edu.au/news/435_burnet_studies_shed_light_on_sexual_behaviour_of_teenagers (last accessed Aug. 31, 2016).

42. *Id.*

against fellow children.⁴³ Some of these 5,000 youths were influenced by pornographic material they were able to access online, depicting graphic sexual violence.⁴⁴

Governments have been grappling with how to properly regulate content available through the Internet for years.⁴⁵ It is an understatement to say that this task is challenging.

First, legislators and executive officials must deal with the rapidity by which technology evolves, develops, and reconfigures itself.⁴⁶ Such continuous morphing demands a happy mix of encouragement of innovation and enforcement-related flexibility, on the one hand, and incisive legal ordering and protection, on the other. Second, legislators must ensure that mechanisms and measures set in place do not conflict with the constitutionally sound protections of free speech and communication.⁴⁷ Third, government must also ensure that the inviolable dignity of the human person is not compromised, establishing a balance between the exercise of free speech and the legally-ordained protection of so-called “vulnerable” sectors in media and entertainment, e.g., women, children, persons with disabilities (PWDs), senior citizens, and indigenous peoples.⁴⁸ In dealing with these issues, governments with very stringent constitutional protections favoring free speech often encounter stumbling blocks when attempting to regulate Internet usage.⁴⁹

43. Wesley Johnson, Children, some aged five, commit thousands of child sex offences, *available at* <http://www.telegraph.co.uk/news/uknews/crime/9905727/Children-some-aged-five-commit-thousands-of-child-sex-offences.html> (last accessed Aug. 31, 2016).

44. *Id.* Studies also show that 88.2% of pornography shown online contain physical aggression, such as spanking, gagging, and slapping, while 48.7% of scenes contain verbal aggression. Perpetrators of aggression are usually male; meanwhile, targets of aggression are overwhelmingly female. Enough is Enough, Statistics on the Porn Industry, *available at* http://enough.org/stats_porn_industry (citing Ana Bridges, et al., *Violence Against Women*, 16 SAGE 1065, 1065-85 (2010)).

45. Electronic Frontiers Australia, Internet Censorship: Law & policy around the world, *available at* <https://www.efa.org.au/Issues/Censor/cens3.html> (last accessed Aug. 31, 2016).

46. Merlis, *supra* note 31, at 117.

47. *Id.*

48. This is necessary in light of certain provisions in the Philippine Constitution. PHIL. CONST. art. II, §§ 12, 13, 14, 22 & art. XV.

49. Merlis, *supra* note 31, at 117-18.

There is, for one, the issue of the Internet being a medium governed by separate “rules” than those relating to broadcast television, film, or radio.⁵⁰ Its nature as an “instant billboard,” where content is posted and shared at almost lightning-quick speed, lends to its arguably *sui generis* character.

Treating various types of media differently according to the way each penetrates the consciousness, as it were, of the recipient of information — whether intended or not — is nothing new. In 1978, the U.S. Supreme Court, in *Federal Communications Commission (FCC) v. Pacifica Foundation*,⁵¹ opined that each medium of expression presents special free speech problems.⁵²

In *FCC*, the U.S. Supreme Court was asked to rule on whether or not the FCC could regulate radio broadcast with allegedly obscene language, on the premise that children may be listening in.⁵³ Ruling in the affirmative, the U.S. Supreme Court held that, of all forms of communication, it is broadcasting that receives the most limited free speech protection.⁵⁴

The U.S. Supreme Court noted that broadcast has “established a uniquely pervasive presence in the lives of all Americans.”⁵⁵ As such, “[p]atently offensive, indecent material presented over the airwaves confronts the citizen [through the medium], not only in public, but also in the privacy of the home[.]”⁵⁶ The U.S. Supreme Court saw that broadcasts were often left to play while family members performed other activities.⁵⁷ This, it noted, could lead to unexpected exposure to unwanted program content —

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he [or she] hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.⁵⁸

The U.S. Supreme Court also emphasized that, since broadcasting is uniquely accessible to children, forms of offensive expression made available

50. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

51. *Id.*

52. *Id.* at 748.

53. *Id.* at 732.

54. *Id.* at 748.

55. *Id.*

56. *Federal Communications Commission*, 438 U.S. at 748.

57. *Id.*

58. *Id.* at 748-49.

through the medium “may be withheld from the young without restricting the expression at its source.”⁵⁹ As an example, it stated that bookstores and motion picture theaters could be prohibited from making indecent material available to children without violating free speech.⁶⁰ The concept would, however, require consideration of a host of variables, including the time of day when the show was broadcast, and the content of the program in which the language was used.⁶¹ It has to be added, at this juncture, that television, especially free TV, is traditionally considered as “equally pervasive” as radio.⁶²

Verily, as the above case demonstrates, a predilection for children and their welfare comes naturally to any society. Neil Postman, as chairman of New York University’s Department of Culture and Communication, relevantly explained that “childhood [is] guarded by ... a ‘sequence of revealed secrets.’”⁶³ Remarking that “innocence is priceless [and] an essential element of childhood and growing up,”⁶⁴ Postman stated that children are “routinely protected from information that they are not ready to understand.”⁶⁵

Consistently then, there remains an interesting query — how much regulation can there be on the Internet as a medium, given its level of accessibility vis-à-vis the youth? While there is no clear-cut jurisprudential answer to this question, there are cases that demonstrate how the U.S. Supreme Court has traditionally dealt with the issue of federal legislation in relation to limiting children’s access to explicit content on the web.

The U.S. Congress actually attempted to create laws that would limit the possibility of children accessing pornography websites over the Internet.⁶⁶ In two separate cases that reached the U.S. Supreme Court, the proposed statutes were ultimately declared unconstitutional for violating the constitutional mandate of free speech.⁶⁷

In *Reno v. American Civil Liberties Union*,⁶⁸ the U.S. Congress passed the Communications Decency Act of 1996,⁶⁹ which intended to protect minors

59. *Id.* at 749.

60. *Id.*

61. *See Federal Communications Commission*, 438 U.S. at 750.

62. *Id.*

63. JAMES P. STEYER, *THE OTHER PARENT: THE INSIDE STORY OF MEDIA’S EFFECT ON OUR CHILDREN* 15 (2002).

64. *Id.*

65. *Id.*

66. Merlis, *supra* note 31, at 119.

67. *Id.*

68. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

from harmful content accessible through the Internet.⁷⁰ One of its provisions essentially criminalized the “knowing” transmission of “obscene or indecent” messages to any minor.⁷¹ The same law prohibited the “knowing” sending or displaying to a person under the age of 18 any message that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs[.]”⁷² The U.S. Supreme Court struck down the law, as it lacked the precision that the First Amendment requires when a statute regulates the content of speech.⁷³ The U.S. Supreme Court observed that it would be difficult for Internet users themselves to be aware of the age of all those they communicated with over the web, granted that oftentimes, Internet users are able to maintain a level of anonymity when they access Internet sites.⁷⁴

Following the ruling in *Reno*, the U.S. Congress sought to pass another law that made use of more specific language — the Child Online Protection Act (COPA).⁷⁵ In *Ashcroft v. American Civil Liberties Union*,⁷⁶ the U.S. Supreme Court was asked to deliberate on the validity of an injunction granted by a U.S. district court against the enforcement of Section 231 (e) (6) of the COPA, which penalized the posting, for “commercial purposes,” of content that is “harmful to minors” on the Internet.⁷⁷ The provision defined what was considered “harmful to minors” as —

[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that[:]

- (a) [T]he average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- (b) [D]epicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

69. Communications Decency Act of 1996, 47 U.S.C. § 223.

70. *Reno*, 521 U.S. at 849.

71. *Id.* at 871 (citing Communications Decency Act of 1996, § 223 (a)).

72. *Reno*, 521 U.S. at 871 (citing Communications Decency Act of 1996, § 223 (d)).

73. *Id.* at 885.

74. *Id.* at 871-73.

75. Child Online Protection Act, 47 U. S. C. § 231 (e) (6) (1998).

76. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) [hereinafter *American Civil Liberties Union*].

77. *Id.* at 661 (citing Child Online Protection Act, 47 U. S. C. § 231 (e) (6)).

- (c) [T]aken as a whole, lacks serious literary, artistic, political, or scientific value for minors.⁷⁸

The U.S. Supreme Court sustained the injunction, holding that the statute was a likely violation of the free speech protections of the Federal Constitution.⁷⁹ It opined, too, that there were less restrictive measures that the government could have used to ensure child safety online.⁸⁰ It particularly suggested that the use of filtering software, where adults hoping to access sites with adult content would have to enter details to be able to enter, would be a less restrictive alternative.⁸¹

Reno and *American Civil Liberties Union* demonstrate the difficulty of regulating access to content that may not be appropriate for all on the Internet. In this connection, another case decided by the U.S. Supreme Court demonstrated the difficulty of deciding when content may be considered of prurient interest, and therefore, should be prohibited or restricted.⁸²

In the 2002 case *Ashcroft v. Free Speech Coalition*,⁸³ the U.S. Supreme Court was faced with problems involving the Child Pornography Prevention Act, a statute which sought to regulate the distribution of child pornography over the Internet.⁸⁴ Section 2256 (8) (B) of the Act provided that “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct” would be prohibited.⁸⁵ Section 2256 (8) (D) further provided that any sexually explicit image that was “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it depicts “a minor engaging in sexually explicit conduct” would also be banned.⁸⁶ The petitioners in the case claimed that the use of the terms “appears to be” and “conveys the impression” were overbroad, and would lead to a chilling effect on the production of works,

78. *Id.* at 661-62.

79. *Id.* at 660-74.

80. *Id.* at 661-62.

81. *Id.* at 662-63.

82. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) [hereinafter *Free Speech Coalition*].

83. *Id.*

84. *Id.* at 241.

85. *Free Speech Coalition*, 535 U.S. at 241 (citing Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (8) (B)).

86. *Free Speech Coalition*, 535 U.S. at 242 (citing Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (8) (D)).

ultimately violating the First Amendment right to free speech.⁸⁷ The U.S. Supreme Court sided with the petitioners, emphasizing that “[a]s a general principle, the First Amendment bars the government from dictating what [people] see or read or speak or hear.” Citing the landmark case of *Miller v. California*,⁸⁸ the U.S. Supreme Court further opined that the government, if it hoped to regulate the content created, published, and distributed by individuals on the ground of obscenity, must “prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.”⁸⁹ According to the U.S. Supreme Court, both Sections 2256 (8) (B) and 2256 (8) (D) were so overbroad that they covered under their scope artistic depictions of adults portraying children engaging in sexual conduct.⁹⁰

The *Reno*, *American Civil Liberties Union*, and *Free Speech Coalition* decisions depict what amounts to be a “the complex battle ... as society tries to balance the right to freely communicate through the Internet with society’s responsibility to look out for the best interest of its youth.”⁹¹ Though the U.S. Supreme Court agreed that the protection of minors was a serious and worthy cause for government, it also held that the government could not unduly restrict the creation and distribution of sexually-charged materials, especially where the content itself was meant to be accessible only to adults.⁹²

Thus, while there is a clear attempt by legislators to extend the norms of *Miller* to the digital sphere, the nature of the Internet as a wide and wild universe where users can liberally access and upload content, all the while maintaining anonymity, palpably frustrates such extension.

With the above, there is a need to ask — is it possible to create a framework for the Philippines that is positively regulatory and empowering (most particularly on the part of parents and other responsible adults for, after all, no government or even private agency or association could always be beside a young viewer when the latter selects and watches content over the web), yet at the same time protects younger viewers from using online websites to watch less-than-suitable television shows or films? It is a question that can, perhaps, be answered by exploring how domestic and international

87. *Id.* at 243.

88. *Id.* at 246 (citing *Miller v. California*, 413 U.S. 15 (1973)).

89. *Free Speech Coalition*, 535 U.S. at 246.

90. *Id.* at 247-58.

91. Merlis, *supra* note 31, at 117.

92. *Cf. Reno*, 521 U.S.; *American Civil Liberties Union* 542 U.S.; & *Free Speech Coalition*, 535 U.S.

laws on the rights of children and other vulnerable sectors can be reconciled with the idea of child-sensitive audience empowerment.⁹³

B. Guiding Principles for Content Regulation

Media content regulation is not a question of guesswork, nor is it an arbitrary mechanism that leans on unadulterated conservatism. It finds its grounding on fundamental and natural rights which are granted to special sectors of society, particularly, the youth and other vulnerable sectors.

The United Nations Convention on the Rights of the Child (UNCRC)⁹⁴ provides that State Parties “recognize the important function performed by mass media”⁹⁵ in ensuring that children have access to the right information, especially those which promote their “social, spiritual[,] and moral well-being and physical and mental health.”⁹⁶ Pursuant to this, State Parties are mandated to “[e]ncourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.”⁹⁷

The UNCRC also places heavy emphasis on the role of the parent in fostering the growth and development of his or her child. It provides that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child ... [and the] best interests of the child will be their basic concern.”⁹⁸

93. The Authors hasten to comment, at this juncture, that empowering families to determine the type of entertainment that children see almost naturally carries with it a corresponding regard for other media-sensitive sectors such as women and persons with disabilities (PWDs). In the case of women, for instance, a movie scene which graphically depicts a woman as a sex object and which is not complemented by any redemptive value elsewhere in the film will certainly not be fit for a young viewer to see. *See* An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710 (2009). *See also* MTRCB, Gender and Development Program, Memorandum Circular No. 03-2014 [MTRCB MC No. 03-2014], *whereas* cl. (Apr. 11, 2013).

94. United Nations Convention on the Rights of the Child, Sep. 2, 1990, 1577 U.N.T.S. 3 [hereinafter UNCRC].

95. *Id.* art. 17. The Philippines is a signatory to the UNCRC. Office of the High Commissioner for Human Rights, Regional Office for Southeast Asia, The Philippines and the Convention on the Rights of the Child, *available at* <http://bangkok.ohchr.org/news/crc.aspx> (last accessed Aug. 31, 2016).

96. *Id.*

97. *Id.* art. 17 (e).

98. *Id.* art. 18, ¶ 1.

Philippine law reflects the same values as the UNCRC. It heavily emphasizes the State's duty to aid in guiding the youth of the nation, pursuant to its role as *parens patriae*,⁹⁹ and the recognition of the vital role that parents play in the development of their children. In relation to this, the 1987 Constitution provides the following —

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. ... The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.¹⁰⁰

The State thus acknowledges that it is primarily the parents who influence what their children are able to watch and what content is allowed to be featured at home. Many families do not realize the extent by which media can influence and warp the minds of their children. While many parents teach their children not to talk to strangers, “strangers” in the form of unwelcome media content are actually “allowed” to enter the home. Rendered naught many times are what children are taught at an early age, e.g., modesty, respect for others, selflessness and service, etc. Through some media, children are led to believe that certain things are right and others are wrong when they are not.¹⁰¹ To the mind of the Authors, this sad reality heavily emphasizes the need to give to parents the proper tools that can empower them and their families to discern more carefully and to make the right choices for their children in regard to media consumption.

Aside from the youth, the State is also mandated to protect certain sectors of society from insensitive — if not outright offensive — media. The Magna Carta for Women “condemns discrimination against women in all its forms”¹⁰² and mandates non-discriminatory and non-derogatory portrayal of women in media and film.¹⁰³ Persons with disabilities (PWDs) and senior citizens are also recognized as sectors of society who are entitled to media that are “not offensive or injurious to their dignity and welfare.”¹⁰⁴

99. With wording similar to the UNCRC, the Constitution states that the State must promote and protect the “physical, moral, spiritual, intellectual, and social well-being” of the youth. PHIL. CONST. art. II, § 13.

100. PHIL. CONST. art. II, § 12.

101. As earlier cited in this Article, for example, some youth offenders, some of very tender age, commit heinous sex crimes because of sexual violence they see online. Johnson, *supra* note 43.

102. The Magna Carta of Women, § 5.

103. *Id.* § 19.

104. MTRCB, Revised Rules for Classification of Trailers and Publicity Materials, Memorandum Circular No. 04-2014 [MTRCB MC No. 04-2014], whereas cl.

While the above-mentioned laws are of more recent vintage, so to speak, they easily find support in the MTRCB.¹⁰⁵

C. MTRCB: The Watchmen of the Film and Television Industries

The MTRCB was created in 1985 as a regulatory body for film and television content, by Presidential Decree (P.D.) No. 1986.¹⁰⁶ However, its powers were never limited to reviewing and classifying films and television programs as well as publicity materials. The MTRCB was further mandated to “initiate [] plans and cooperate with the industry to improve, upgrade[,] and make viable the industry as one source of fueling the national economy[.]”¹⁰⁷

Pursuant to these aims, the MTRCB has several powers that aid it in regulating the film and television industry. Among them, particularly relevant are the following:

...

- (b) [] [S]creen, review[,] and examine all motion pictures ... television programs, including publicity materials such as advertisements, trailers[,] and stills, whether such motion pictures and publicity materials be for theatrical or non-theatrical distribution, for television broadcast[,] or for general viewing, imported or produced in the

105. The MTRCB actually has its roots in earlier government agencies, known or perhaps “feared” — rightly or wrongly — for their “censorship” bent. First, there was the Board of Censorship for Motion Pictures from 1929 to mid-1936. In June 1936, on the occasion of the establishment of the Philippine Commonwealth, the agency was renamed the Board of Review for Motion Pictures. June 1961 saw the rechristening of this Board as the Board of Censors of Motion Pictures (BCMP). Created under Republic Act No. 3060, the BCMP had the main function to disapprove or delete objectionable portions of films “which in its judgment [were] immoral, indecent, contrary to law and/or good customs[,] or injurious to the prestige of the Republic ... or its people.” Notably, the BCMP was to classify motion pictures as either “for general patronage” or “for adults only.” In November 1981, the controversial word “censors” was removed and television included within the agency’s scope. The agency thus came to be called the Board of Review for Motion Pictures and Television (BRMPT). Then, in 1985, with that much needed emphasis on direct participation in the review process of members of the film and television industries themselves, the present MTRCB was created under Presidential Decree No. 1861. ALFRED A. YUSON, *MTRCB: EMPOWERING THE FILIPINO FAMILY 6 & 11* (Alfred A. Yuson & Marra PL. Lanot eds., 2015) & An Act Creating the Board of Censors for Motion Pictures, Republic Act No. 3060, §§ 3 (a) & 3 (b) (1961).

106. Presidential Decree No. 1986.

107. *Id.* whereas cl. para 4.

Philippines, and in the latter case, whether they be for local viewing or for export;

- (c) [] [A]pprove or disapprove, delete¹⁰⁸ objectionable portions from and/or prohibit the importation, exportation, production, copying, distribution, sale, lease, exhibition[,] and/or television broadcast of the motion pictures, television programs[,] and publicity materials subject of the preceding paragraph, which, in the judgment of the board applying contemporary Filipino cultural values as standard, are objectionable for being immoral ... [;]
 - (d) [] [S]upervise, regulate, and grant, deny or cancel, permits for the ... production, copying, distribution, sale, lease, exhibition, and/or television broadcast of all motion pictures, television programs and publicity materials, to the end that no such pictures, programs and materials as are determined by the [Board] to be objectionable in accordance with paragraph (c) hereof shall be ... produced, copied, reproduced, distributed, sold, leased, exhibited[,] and/or broadcast by television;
 - (e) [] [C]lassify motion pictures, television programs[,] and similar shows into categories such as ‘G’ or ‘For General Patronage’ (all ages admitted), ‘P’ or ‘Parental Guidance Suggested[,]’ ‘R’ or ‘Restricted’ (for adults only), ‘X’ or ‘Not for Public Viewing[,]’ or such other categories as the [Board] may determine for the public interest;
- ...
- (k) [] [E]xercise such powers and functions as may be necessary or incidental to the attainment of the purposes and objectives of this Act, and to perform such other related duties and responsibilities as may be directed by the President of the Philippines.¹⁰⁹

The MTRCB has broad powers to ensure age-appropriateness of film and broadcast television content, with “contemporary Filipino cultural values”¹¹⁰ as its standard. Values here refer to those “absolute moral

108. The above phraseology notwithstanding, the MTRCB has adopted in recent years a “no-censorship policy,” in the sense that the MTRCB never commands the deletion of any content. Instead, applicants who hope to match a desired rating voluntarily delete or amend certain portions of their content as a measure of self-regulation. Applicants are also entirely free to submit for review “new” versions of their materials, while retaining those earlier rated. MTRCB IRR, ch. V, § 11.

109. Presidential Decree No. 1986, §§ 3 (b)-(e) & (k). To expediently address developments in the film and television industries, the lawmaker deemed it fit to have the ratings determined through administrative fiat. Here, the MTRCB will always be guided by the norms outlined in Section 3 (c) of Presidential Decree No. 1986, particularly “contemporary Filipino cultural values,” and of course, “public interest.” *Id.*

110. Presidential Decree No. 1986, § 3 (c).

principles which are ethically and socially binding to all human beings, at all times and in all places[.]”¹¹¹ While it is true that the standard evolves over time to match the current factual milieu, it always remains anchored on values that are innately Filipino. Herminio Ordoñez, a legend in the Philippine advertising industry, speaking of how media practitioners may integrate values in their professional work, sums up the idea of Filipino values succinctly —

When we speak of Filipino values, we are simply talking to ourselves in our own familiar language, interacting in our own familiar behavior, and gaining acceptance and respect with our fellow Filipinos.

...

In the past and up to the present, what we refer to as Filipino values have centered on family ties, religious practices, social covenants, [and] honor — values that give coherence and dignity to human life.¹¹²

The MTRCB is guided by this same respect for those fundamental Filipino values; hence, in all its decisions, and when issuing rules and regulations, it uses “contemporary Filipino cultural values” as its guide. Additionally, because of the law’s predilection for vulnerable sectors, the agency is similarly guided by the respect and dignity due to women, children, PWDs, senior citizens, indigenous peoples, and such other sectors that may be marginalized by offensive or undesirable conduct by others.¹¹³ Ultimately, the MTRCB aligns itself with those constitutional norms and policies that can bear on media and entertainment from time to time — guaranteeing the dignity of the human person and full respect for human rights;¹¹⁴ recognizing the sanctity of the family and protecting and strengthening it as a basic autonomous social institution,¹¹⁵ supporting the natural and primary right and duty of parents in the rearing of the youth for civic efficiency and development of moral character;¹¹⁶ promoting the vital role of the youth in nation-building and the promotion as well as protection

111. BERNARDO M. VILLEGAS, *BOOK OF VIRTUES AND VALUES* ix (Bernardo M. Villegas ed., 2015 ed.).

112. Herminio Ordoñez, *Filipino Values in Advertising*, in VILLEGAS, *supra* note 111, at 61.

113. As mentioned previously, while the duty to protect and respect marginal sectors is not expressly stated in Presidential Decree No. 1986, executive issuances by the agency and other laws, such as the Magna Carta of Women, and the Constitution itself, make it clear that such is still a duty of the MTRCB. PHIL. CONST. art. II, §§ 11-14 & 22; The Magna Carta for Women, §§ 5 & 19; & MTRCB MC No. 03-2014, whereas cl.

114. PHIL. CONST. art. II, § 11.

115. PHIL. CONST. art. II, § 12.

116. PHIL. CONST. art. II, § 12.

of their physical, moral, spiritual, intellectual, and social well-being;¹¹⁷ recognizing of the role of women in nation-building and ensuring the fundamental equality of men and women before the law;¹¹⁸ and recognizing and promoting the rights of indigenous cultural communities within the framework of national unity and development.¹¹⁹

The MTRCB examines each submitted material to the end that the audience, particularly parents and responsible adults, is empowered in determining the type of entertainment children see.¹²⁰ To a certain degree, the MTRCB, through its review committee, endeavors to identify those “contemporary Filipino cultural values” that are relevant to particular media content.¹²¹ It is almost second nature to identify such values, with the jurisprudential classic *Miller* and its “contemporary community standards” test. These standards are those that the average person would apply in judging whether or not “a work, taken as whole,” appeals to the prurient interest.¹²²

Relevantly, the Supreme Court of the Philippines (Supreme Court) has affirmed the power of the MTRCB to regulate and supervise the film and TV industries.¹²³ In *Soriano v. Laguardia*,¹²⁴ Eliseo F. Soriano, host of the “G” (General Audience)-rated religious television program *Ang Dating Daan* (with a 10:00 p.m. timeslot), was found to have uttered various cuss words pointing to one Michael Sandoval.¹²⁵ Sandoval, a host of a television program with another religious persuasion, was called by Soriano a “son of Satan,” “a liar,” and more.¹²⁶ After a preliminary conference with the MTRCB, in which Soriano was present, MTRCB preventively suspended the show.¹²⁷ The MTRCB eventually rendered a decision suspending *Ang*

117. PHIL. CONST. art. II, § 13.

118. PHIL. CONST. art. II, § 14.

119. PHIL. CONST. art. II, § 22.

120. See MTRCB IRR.

121. Presidential Decree No. 1986, § 3 (c).

122. SHERRI BURR, ENTERTAINMENT LAW IN A NUTSHELL 125 (2013 ed.) (citing *Miller*, 413 U.S. at 24).

123. See MTRCB v. ABS-CBN Broadcasting Corporation, 448 SCRA 575, 583 (2005) & Soriano v. Laguardia, 587 SCRA 79 (2009).

124. *Soriano*, 587 SCRA.

125. *Id.* at 86-87.

126. *Id.*

127. *Id.* at 87.

Dating Daan as well as Soriano.¹²⁸ His suspension, of course, prevented Soriano from appearing on television during the time directed.¹²⁹

The Supreme Court took time to discuss standards for considering a work legally objectionable and unprotected by any possible supervening constitutional norm.¹³⁰ Soriano argued that the suspension of the program violated his right to religious freedom, as well as his freedom of speech, but, quoting its decision in *Fernando v. Court of Appeals*,¹³¹ the Supreme Court reiterated the basic guidelines for determining whether or not a material is obscene —

There is no perfect definition of ‘obscenity’ but the latest word is that of [Miller] which established basic guidelines, to wit: (a) whether the average person, applying contemporary standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. But, it would be a serious misreading of *Miller* to conclude that the trier of facts has the unbridled discretion in determining what is ‘patently offensive.’ ... What remains clear is that obscenity is an issue proper for judicial determination and should be treated on a case[-]to[-]case basis and on the judges sound discretion.¹³²

Aside from providing the above criteria, the Supreme Court confirmed the MTRCB’s power to discipline by approving the Board’s decision to suspend the program *Ang Dating Daan* for Soriano’s obscene speech.¹³³ Conscious of the program’s “G”-rating (given, perhaps, because of the show’s religious theme),¹³⁴ the Supreme Court held that the suspension did

128. *Id.* at 88.

129. It should be noted, however, that the Supreme Court ruled that the MTRCB’s jurisdiction is over programs and thus, the latter had no authority or power to suspend a host or other personality. *Id.* at 121. This is without prejudice, though, to a program’s prerogative, if not duty (if warranted by the circumstances), to intentionally discipline a host or other personality through a fine, suspension, or other measure as a *form of self-regulation*.

130. *Soriano*, 587 SCRA at 100-05.

131. *Fernando v. Court of Appeals*, 510 SCRA 351 (2006).

132. *Soriano*, 587 SCRA at 100 (citing *Fernando*, 510 SCRA at 360-61). In this case, the Supreme Court also affirmed that the determination of the existence of the elements of obscenity could be quasi-judicial.

133. *Id.* at 119-21.

134. This is not to say that all so-called “religious” programs will merit a “G” rating. The “harmlessness” that may be expected of things spiritual can easily be overrun by doctrinal instruction that would necessarily require parental guidance. This applies most poignantly if the viewers belong to a different religious persuasion than the one featured in the program. *See* MTRCB,

not constitute prior restraint on speech.¹³⁵ Rather, it was a “permissible subsequent administrative sanction” for past speech.¹³⁶ The Supreme Court added that, in any case, the aforesaid measure was well within the incidental powers granted to the MTRCB to further its mandate as an administrative agency.¹³⁷ Given the accessibility and influence of television broadcasting, the Supreme Court was convinced the government had the right to impose more stringent regulations on the industry.¹³⁸

Interestingly enough, *Soriano* instructed that the MTRCB does not have jurisdiction over media personalities per se.¹³⁹ Thus, while the MTRCB had the power to suspend the television program, *Ang Dating Daan*, due to Soriano’s obscene speech, it could not suspend Soriano himself.¹⁴⁰ The Supreme Court affirmed the three-month suspension of the show *Ang Dating Daan*, but reversed the suspension of Soriano.¹⁴¹ This is to be expected, for after all, and as the Supreme Court pointed out, P.D. No. 1986 refers to “all motion pictures, ... television programs, [and] publicity materials” as objects of the MTRCB’s power of review and classification.¹⁴²

It should not be said, however, that the MTRCB alone carries the weight of ensuring the proper regulation of entertainment media. Consistent with the clarion call for *self-regulation*, as expressed in the sixth whereas clause of P.D. No. 1986,¹⁴³ media entities are required to “police” themselves. When it comes to television networks, they are required to create in-house regulatory bodies or mechanisms to monitor content that is broadcasted through their networks.¹⁴⁴ The MTRCB embodies the law’s desire for a fulfilling blend of freedom and responsibility, and does not generally review every serial episode that will be featured for an entire season.¹⁴⁵ This applies whether the series is weekly or daily.¹⁴⁶ Another hallmark of self-regulation is the privilege given to a program to re-classify to Strong Parental Guidance

Memorandum Circular No. 13-03 [MTRCB MC No. 13-03] (2003) (which requires religious programs to be submitted for review prior to telecast).

135. *Soriano*, 587 SCRA at 115.

136. *Id.*

137. *Id.*

138. *Id.* at 116.

139. *Id.* at 121.

140. *Id.*

141. *Soriano*, 587 SCRA at 122.

142. Presidential Decree No. 1986, §§ 3 (b) & 7.

143. *Id.* whereas cl. para. 6.

144. MTRCB IRR, ch. VIII, § 2.

145. *Id.* ch. V, § 9.

146. *Id.*

(“SPG”) an episode originally given a Parental Guidance (“PG”) rating without prior review and approval by the Board.¹⁴⁷ However, consistent with the norm of *parens patriae*, read together with other relevant laws covering so-called “vulnerable” sectors, materials originally classified as “SPG” cannot be classified down to “PG” without prior review and written approval by the Board.¹⁴⁸ Movie houses, on the other hand, must comply with the classification schemes provided by the MTRCB, and allow only those who reach the required age limit to enter theaters to watch a movie.¹⁴⁹

As it stands, the MTRCB is vested with dynamic powers to regulate the film and broadcasting industry, accessed through cinemas or television sets.¹⁵⁰ Particularly, the MTRCB’s implementing rules and regulations reads —

All motion pictures, television programs[,] and commercials intended for public exhibition in theaters and television, and related publicity materials and/or promotional materials, whether imported or produced in the Philippines, for the purpose of local viewing or for export, shall be subject to review and classification by the [Board] before they are exported, copied, distributed, sold, leased[,] and exhibited.¹⁵¹

The crux of this Article, however, is how to create a regulatory and, more importantly, an *empowering* framework particularly for the access of films and television through Internet websites, and not through the more traditional modes earlier considered. Evidently, there is that issue of whether or not it falls within the scope of the MTRCB to monitor content that is “broadcasted” through the Internet. It is admitted that the Internet, vast as it can be, is still not precisely a medium for “public exhibition.”¹⁵² Instead, it is a medium that puts a premium on choice, thereby decreasing “chance encounters” with unwanted information.¹⁵³ Internet users may type anything they want to see on search engines to be able to find it and view it, and they do so either by themselves or with friends. In terms of scope, Internet users are not limited to a select number of channels or films available in the local theater for them to watch; they can access any video they want, play it again and again if they wish, cancel it halfway through, and more. Videos on the Internet can be encrypted with certain codes which aid to filter content for

147. *Id.* ch. V, § 9 (f).

148. *Id.* ch. V, § 9 (g).

149. *Id.* ch. VIII, § 2 (f).

150. *See* Presidential Decree No. 1986, § 3.

151. MTRCB IRR, ch. III.

152. Markus Prior, *News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout*, 49 AM. J. POL. SCI. 577, 577 (2005).

153. *Id.*

users,¹⁵⁴ and at the same time, they may be available on a free-for-all basis, much like when content is uploaded on Facebook and automatically plays when scrolled over.

Inspired perhaps by a strained interpretation of the relevant definitions under Section 10 of Presidential Decree No. 1986, one may suggest that media content over the Internet may still be

[a] series of pictures projected in a screen in rapid succession, with objects shown in successive positions slightly changed so as to produce the optical effect of a continuous picture in which the objects move, whether the pictures be black and white or colored, silent or with accompanying sound, on whatever medium and with whatever mechanism or equipment they are projected, and in whatever material they are reserved on recorded for instant projection[.]¹⁵⁵

Such can also be considered as a “public showing” (perhaps, in the sense that it is offered to all for *potential* consumption) by “transmitting sounds and images by television or *similar equipment*, ... and *other limited audience distribution*.”¹⁵⁶ But then again, the previously discussed peculiarities, together with the fact that the Internet as the world knows it today was in all likelihood *not* within the contemplation of the lawmaker in 1985, easily outweigh any such “strained” approach. The Internet and particularly the video platforms therein that now play the role that “walk-in” cinemas and television sets used to exclusively play, can rightfully and prudentially be regarded as classes of their own — simply *sui generis*.

Given, however, its mandate to classify and regulate media content in general,¹⁵⁷ the MTRCB will naturally be the first choice to be granted the broader power to supervise and monitor OTT service providers, such as VOD and livestreaming services. At the very least, the Board should be allowed to set into motion an enabling legal framework — one that is more proactively participatory and more reflective of what may be called “institutionalized” self-regulation — to the end that families will be genuinely empowered to evaluate and determine the type of content media available through such services. At the same time, producers of content will always be called upon to wear the “parent’s hat,” so to speak. This would be consistent with the MTRCB’s current thrust, which emphasizes on empowering the Filipino family and enabling its members to exercise

154. Merlis, *supra* note 31, at 124 (citing *American Civil Liberties Union*, 542 U.S. at 702).

155. This is the definition of a “motion picture” provided by law. Presidential Decree No. 1986, § 10 (1).

156. *Id.* § 10 (2) (emphases supplied). This is the definition of “television broadcast” provided by law. *Id.*

157. MTRCB IRR, ch. III.

discerning viewership.¹⁵⁸ Without prejudice, then, to a more appropriate as well as catering name, the present Board created under P.D. No. 1986 can very well metamorphize into the “Movie, Television, and Online Review and Classification Board.”

It is a natural fit. To a great measure, material seen by means of the Internet will likely include films and television shows that were once only available either in the theater house or on the TV screen,¹⁵⁹ and which were already subjected to MTRCB review (this is without prejudice to so-called “exclusives” or “never-before-seen” material). And more fundamentally, content is content, regardless of the media through which it is viewed. The core competence, so to speak, is clearly there. The grant of such a power would also be consistent with the objectives of the MTRCB — to fulfill the State’s role as *parens patriae* with regard to media content.¹⁶⁰ Admittedly, though, this may require the promulgation of a new law expanding the scope of the MTRCB’s powers, so that it may be granted the authority to regulate content from VOD and livestream service providers.¹⁶¹

Due to the discouraging plight of direct regulatory intervention in the U.S.,¹⁶² and the need for more expedient ratings mechanisms not hobbled by legislative or administrative debate as to priority and economics (i.e., determining the manner and extent of allocation of government resources), it is worthwhile to look to a private sector-based solution. Bearing in mind

158. Eugenio H. Villareal, *Empowering All Stakeholders*, in YUSON, *supra* note 105, at 172-73 [hereinafter Villareal, *Empowering All Stakeholders*].

159. See, e.g., Netflix, *supra* note 5 (the media catalogue can be accessed by logging in) & iWantTV, Website, available at <http://www.iwantv.com.ph> (last accessed Aug. 31, 2016) (the media catalogue may be viewed by clicking “LATEST,” “POPULAR,” or by logging in).

160. MTRCB IRR, ch. II, § 5.

161. Some may argue that the newly-created Department of Information and Communications Technology (DICT) should handle any regulation of content by Internet VOD and livestream service providers, since DICT was created precisely to regulate information and communications technology (ICT) in the country. However, it is to be noted that the DICT does not have, for one of its purposes, the regulation of content that is available *through* ICT infrastructure. The DICT is instead mandated to focus on the improvement of accessibility of ICT technology to all, uplifting the lives of Filipinos through ICT, ensuring privacy and confidentiality in the digital age, and the promotion of digital literacy. As such, it is possible to retain the powers to regulate content on VOD and livestream providers with the MTRCB. See An Act Creating the Department of Information and Communications Technology, Defining its Powers and Functions and Appropriating Funds Therefor, and for Other Purposes [Department of Information And Communications Technology Act], Republic Act No. 10844, § 2 (2015).

162. Merlis, *supra* note 31, at 119.

the twin philosophies of self-regulation and participation, evident in P.D. No. 1986¹⁶³ and the industry-based model of the Motion Pictures Association of America (MPAA), such a solution should definitely be a matter for consideration.¹⁶⁴

The MPAA is an independent trade association of major Hollywood studios which, on their own initiative, created the advisory ratings system now used in the U.S.¹⁶⁵ Members of the MPAA agree to have all of their produced films and shows subject to the screening process of the MPAA's Classification and Ratings Administration (CARA), an independent division of the MPAA.¹⁶⁶ Though the MPAA is not a government agency, and there are no direct penal sanctions for failure to enforce its ratings system, the MPAA-CARA film ratings system has proven to be a successful voluntary mechanism in the U.S.¹⁶⁷ This type of body brings to light what perhaps is the ultimate aim of any ratings advisory system, when used as a tool for content regulation — it is meant to foster a healthy environment of private determination, where the audience is empowered in its choice of consumption as a result of the availability of well-displayed information which guides them in their choices.¹⁶⁸ Parenthetically, it is plain from the whereas clauses of P.D. No. 1986 that the MTRCB was envisioned as more of a prelude to industry-based self-regulation.¹⁶⁹

At its most basic, the MPAA-CARA film ratings system is a *matter of contract*.¹⁷⁰ While a film producer is perfectly free not to submit a film for review and classification, industry *realpolitik* “dictates” the extreme desirability to contract with the MPAA.¹⁷¹ Otherwise, realistically speaking, a film that will not be submitted for CARA review may not see the light of day in commercial theaters for major exhibitions, or be patronized by distributors or operators, that form part of the MPAA family.¹⁷² As in any

163. As earlier mentioned, the sixth whereas clause of Presidential Decree No. 1986 points to self-regulation as a desired objective of the law. The sixth clause, the seventh whereas clause, and Section 2 of that law ordain participation in the ratings system by the industry players themselves. See Presidential Decree No. 1986, whereas cl. paras. 6-7 & § 2, para. 2.

164. MOTION PICTURE ASSOCIATION OF AMERICA, THE MOVIE RATING SYSTEM: ITS HISTORY, HOW IT WORKS AND ITS ENDURING VALUE 2-3 (2010).

165. *Id.* at 5.

166. *Id.*

167. *Id.* at 5-6.

168. *Id.* at 6.

169. See Presidential Decree No. 1986, whereas cl.

170. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 6.

171. *Id.* at 3-5 (emphasis supplied).

172. *Id.*

other contractual arrangement, a film producer buys the opportunity to have his film seen by the multitude by abiding by the MPAA-CARA ratings procedure.¹⁷³ Here is then a core and simple embodiment of the Kelsenian-inspired legal mechanism called “private arranging technique.”¹⁷⁴

While the MPAA can be considered as a success within its sphere of influence, private arrangement or participation may not be perfect as a protection mechanism. Scant deliberation or lack of adequate study or research, plus the strong impact of many images and sound, necessitate a “tempering enabler.” This would be a gatekeeper or a prudent regulator that would help prevent any surprise on the unsuspecting viewer, or aid in maintaining a reasonable degree of sensitivity with regard to the more “vulnerable” sectors mentioned earlier in this writing. This is where an agency like the MTRCB comes in handily. In line with the musings of both Hans Kelsen and Robert S. Summers, it would be desirable and efficacious to complement private arrangement with legal techniques such as “administrative-regulatory”¹⁷⁵ and “public benefit conferral.”¹⁷⁶

173. *Id.*

174. This is a form of legal technique where the law provides an empowering framework which laymen may consult to determine their rights, duties, and liabilities; it is one where the law does not step in to penalize or fine, and instead allows the parties to regulate themselves. See JOHN H. FARRAR & ANTHONY M. DUGDALE, INTRODUCTION TO LEGAL METHOD 24 (3d ed., 1990). Coined by legal thinker, Robert S. Summers, the said technique is one of five techniques through which the law maintains social order. The others are: penal, grievance-remedial, administrative-regulatory, and public benefit conferral. Regarding the law as a means to effect social order was something that German Legal thinker Hans Kelsen inspired in Summers. *Id.* at 13-16 (citing Robert S. Summers, *The Technique Element in Law*, 59 CAL. L. REV. 733 (1971)).

175. This refers to the use by the government of regulatory bodies which create rules informing parties of their duties, taking steps to ensure compliance by involved entities. See FARRAR & DUGDALE, *supra* note 174, at 26-27.

176. This technique refers to the grant of benefits and services by the government to the people. *Id.* at 28-29. Theoretically, the “penal technique” may also be tapped into to deter as well as penalize undesirable conduct or omission. This may be deliberated upon as a matter of policy, since it may be more conducive to leave the said technique to the prosecution arm of the Executive and the Courts, rather than an “enabler.” *Id.* at 15-21.

III. OVER THE TOP: THE FORMS AND FACES OF VOD AND LIVESTREAM SERVICE PROVIDERS

A. General Framework of Internet Economics

Content distribution and regulation on the Internet may be better understood by examining the Internet's "value chain economics."¹⁷⁷ The chain consists of:

- (1) Content Rights — refers to rights over content of those who make their content available on the Internet, either for commercial purposes (e.g., television programming and movies), or as self-generated content by Internet users (e.g., original videos uploaded via YouTube);¹⁷⁸
- (2) OTT Services — these are services provided over the Internet, from communications services (e.g., Facebook) and search engine services (e.g., Google) to entertainment services (e.g., VOD and livestreaming services) and e-commerce (e.g., Amazon and Zalora);¹⁷⁹
- (3) Enabling Technology Services — refers to supporting technology (e.g., web-hosting), billing (e.g., PayPal), and advertising;¹⁸⁰
- (4) Connectivity Services — covers both fixed and wireless network providers, Internet service providers, and content delivery network services;¹⁸¹ and
- (5) User Interfaces — include the full range of devices now used to access the Internet (e.g., laptops, smart phones, and TVs), as well as applications.¹⁸²

177. A.T. Kearney, Internet Value Chain Economics: Gaining a deeper understanding of the Internet economy (A Document by a Global Management Consulting Firm) 1-2, available at <https://www.atkearney.com/documents/10192/a70da6a8-aa98-4e43-999b-3a83a58d1c80> (last accessed Aug. 31, 2016).

178. *Id.* at 2 & Moir, *supra* note 20, at 2.

179. A.T. Kearney, *supra* note 177, at 2.

180. *Id.*

181. *Id.* Essentially, connectivity services refer to providers of the infrastructure by which the Internet can be accessed. They should be distinguished from OTT service providers, which are services that are available online and which will require that the customer has an Internet connection. See A.T. Kearney, *supra* note 177, at 6 & 9.

182. *Id.* at 2.

Those who figure in the value chain sometimes have complementary, and sometimes, competing interests. For example, content owners such as Disney or Warner Brothers are keener on protecting their intellectual property interests;¹⁸³ they are also traditionally the ones that submit their produced material to classification boards.¹⁸⁴ Meanwhile, OTT service providers, like YouTube, maintain platforms through which content online may be found. As such, the latter are more concerned about improving the quality of their services (e.g., the functionality of their websites, the speed by which it may be accessed, etc.).¹⁸⁵ OTT service providers often interact and acquire exclusive rights from multiple content owners.¹⁸⁶ They also strive to find ways to use various user interfaces, so that they can maximize the accessibility of their services.¹⁸⁷

In terms of regulation, one interesting development is that governments around the world target not only content creators, but OTT service providers as well.¹⁸⁸ This is because while content creators only sell licenses

183. Eriq Gardner, Warner Bros. Fighting Over ‘Wizard of Oz’ Trademarks (Exclusive), *available at* <http://www.hollywoodreporter.com/thr-esq/wizard-of-oz-disney-warner-bros-289305> (last accessed Aug. 31, 2016).

184. *See* MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 5 & MTRCB IRR, ch. V.

185. A.T. Kearney, *supra* note 177, at 6-9.

186. *See, e.g.*, Clark Schultz, Netflix buys content from LeTV in an intriguing deal, *available at* <http://seekingalpha.com/news/2383996-netflix-buys-content-from-letv-in-intriguing-deal> (last accessed Aug. 31, 2016) & Ben Fritz & Joe Flint, *Netflix buys exclusive rights to Disney movies*, L.A. TIMES, Dec. 4, 2012, *available at* <http://articles.latimes.com/2012/dec/04/business/la-fi-ct-disney-netflix-20121205> (last accessed Aug. 31, 2016).

187. *See, e.g.*, Mindi Sue Sternblitz-Rubenstein, OTT & The User Interface, *available at* <https://www.parksassociates.com/blog/article/ott-and-the-user-interface> (last accessed Aug. 31, 2016); Dom Robinson, OTT Delivery: Creating Strategies for Video Streaming, *available at* <http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/OTT-Delivery-Creating-Strategies-for-Video-Streaming-97565.aspx> (last accessed Aug. 31, 2016) & Azuki Systems, Over-the-Top (OTT) Optimized Multi-Screen Video Delivery for Service Providers, *available at* http://www.ericsson.com/res/thecompany/docs/comp_facts/azuki-systems-white-papers/azuki-wp-ott-optimized-multiscreen-for-vsp-may2014.pdf (last accessed Aug. 31, 2016).

188. Interestingly, regulators in countries like the U.K. opine that the “editorial powers” of an Internet VOD service provider actually imply “general control over what [programs] are included in the range of [programs] offered to users; and over the manner in which the [programs] are organi[z]ed in that range[.]” As such, according to their rules, “the companies do not have to have control of content for individual VOD [programs] or over how they are broadcast or distributed in order to be deemed as editorially responsible for the material.” *See*

and rights to their content to service providers, it is actually the latter that delivers the service to wider audiences through the Internet.¹⁸⁹ Thus, OTT service providers, if so required by the State where they operate and wish to expand, follow advisory ratings systems and content regulation rules imposed by such jurisdiction¹⁹⁰ and comply with court orders for removal of content.¹⁹¹ However, OTT service providers are not the only ones, in theory, who deal with regulatory mechanisms of this nature. Those whose businesses offer connectivity services also have a part in regulating content that is available on websites accessible through their networks, since it is through these services that users may access all other Internet-based services.¹⁹² This is particularly true when they are owned by the State (e.g., State-owned telecommunications companies which offer Wi-Fi services and other network connectivity services) because they can block out sites on their networks.¹⁹³

All of these factors make for many possibilities in the realm of regulation.

B. Zeroing In: VOD and Livestream Service Providers

Given that their business is distributing films, television shows, and other clips available through their websites, VOD and livestream service providers

Out-Law.com, CAP sets out guidance on responsibility for advertising content within 'video-on-demand' services, *available at* <http://www.out-law.com/en/articles/2012/august/cap-sets-out-guidance-on-responsibility-for-advertising-content-within-video-on-demand-services> (last accessed Aug. 31, 2016).

189. *Id.*

190. *See, e.g.*, Reuters, Netflix struggles in Asia as it deals with content, regulation issues, *available at* <http://indianexpress.com/article/technology/tech-news-technology/netflix-struggling-asia-india-content-regulation-access-vpn> (last accessed Aug. 31, 2016) & Resty Woro Runiar, *Netflix blocked by Indonesia's Top Telecom Provider*, WALL ST. J., Jan. 27, 2016, *available at* <http://www.wsj.com/articles/netflix-blocked-by-indonesias-top-telecom-provider-1453896220> (last accessed Aug. 31, 2016).

191. *See, e.g.*, Jonathan Stempel & Dan Levine, Google ordered to remove anti-Islamic film from YouTube, *available at* <https://www.yahoo.com/news/google-ordered-remove-anti-islamic-film-youtube-165609763--sector.html?ref=gs> (last accessed Aug. 31, 2016) & Ketaki Gokhale & Pratap Patnaik, Google Removes Search, YouTube Content on Indian Court Order, *available at* <http://www.bloomberg.com/news/articles/2012-02-07/google-removes-search-youtube-content-from-india-domains-on-court-order> (last accessed Aug. 31, 2016).

192. A.T. Kearney, *supra* note 177, at 6-9.

193. Reuters, *supra* note 190 & Runiar, *supra* note 190.

are “into” OTT services.¹⁹⁴ They are concerned largely with ensuring the marketability of their platforms.¹⁹⁵ VOD and livestream providers charge either on a pay-per-view basis or through subscriptions and rentals.¹⁹⁶ Because of this, they must ensure that their users get their money’s worth. It is to be expected then that these players will not be so keen on limiting content accessibility to certain age groups, or on placing too many barriers or mechanisms that can be potentially irksome to users.

Both VOD and livestream services are considered as video streaming services, in the sense that they both make videos available through the Internet.¹⁹⁷ On one hand, VOD service providers allow videos that have already been produced and pre-recorded to be published online.¹⁹⁸ They maintain platforms that allow users to click on the videos they want to watch, and to stop and go at certain portions of the video.¹⁹⁹ The videos can also be viewed again and again, at home or on the road.²⁰⁰ Flexibility in this regard is what makes such services appealing to users, compared to simply watching shows and movies on television.²⁰¹ The latter is normally in one-time or on specific schedules, and thus, requires much more adjustment from the viewer. Livestream services, on the other hand, involve providing content online as it happens.²⁰² Similar to live television, these providers show current content without any time delays.²⁰³ The latter service is more expensive as it requires more equipment and staff, and often the quality of

194. Sahil Patel, WTF is OTT?, *available at* <http://digiday.com/platforms/what-is-over-the-top-ott> (last accessed Aug. 31, 2016).

195. See Alyssa Ideboen, OTT Service Fundamentals: 10 Components of a Successful Strategy, *available at* <http://www.piksel.com/2015/04/ott-service-fundamentals-10-components-successful-strategy> (last accessed Aug. 31, 2016).

196. Metrixtstream, Video on Demand Business Models, *available at* <http://www.metrixtstream.com/blog/Video.On.Demand.Business.Models> (last accessed Aug. 31, 2016).

197. GloCast, Live Web Streaming vs On-Demand Webcasting, *available at* <http://glocast.com/live-webstreaming-vs-on-demand-webcasting> (last accessed Aug. 31, 2016).

198. *Id.*

199. *Id.*

200. *Id.*

201. Margaret Boland, How subscription video on-demand services like Netflix are contributing to the demise of pay-TV, *available at* <http://www.businessinsider.com/viewers-are-changing-the-way-they-watch-content-here-are-the-winners-and-losers-2015-10> (last accessed Aug. 31, 2016).

202. Payton Sherry, Live Streaming vs Video On-Demand (VOD), *available at* <http://info.viddler.com/blog/cracking-the-code-on-video-live-streaming-vs-video-on-demand> (last accessed Aug. 31, 2016).

203. *Id.*

the video is lower than what would be available for VOD.²⁰⁴ It goes without saying though that livestream is preferred for covering news, events, and sports happenings live. The local University Athletic Association of the Philippines (UAAP) basketball and volleyball games, for instance, are available through livestream.²⁰⁵ This allows fans and the general audience to access the games from wherever they are through their devices, and virtually cheer for their teams.

VOD and livestream service providers both have a strong capacity to decide on their featured content on account of information on their users' preferences.²⁰⁶ They are easily able to obtain accurate data on their subscribers' viewing habits.²⁰⁷ VOD or livestream service providers can find out whether or not viewers finish a specific episode of a television show.²⁰⁸ They can track how many of their users skip the advertisements that are displayed before an episode plays.²⁰⁹ They can even identify the zip code of their viewers.²¹⁰ They can then use any such information gathered to change the displays and controls of their users, and to feature "recommended shows and films" on a user's home page, based on the latter's previous consumption pattern.²¹¹ With this data, service providers can more intelligently determine

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. How Netflix Uses Analytics To Select Movies, Create Content, and Make Multimillion Dollar Decisions, *available at* <https://blog.kissmetrics.com/how-netflix-uses-analytics> (last accessed Aug. 31, 2016).

209. *Id.*

210. *Id.*

211. *Id.* Significantly enough, local VOD and livestream service provider iWant TV, operated by ABS-CBN, provides the following in its Terms of Use —

ABS-CBN does not use or disclose sensitive personal information, such as race, religion, or political affiliations, without your explicit consent. ABS-CBN keeps track of your surfing and browsing of the Website and its linked sites, essentially logging information about the sections and web pages that you visit and the actions you undertake. ABS-CBN monitors these connections in order to determine what ABS-CBN services are most popular and use this data to deliver customized content and advertising within the Website to customers whose behavior indicates that they are interested in a particular subject area. Generally, ABS-CBN monitors your browsing behavior to give you — the customer — the most efficient service that ABS-CBN can provide. The foregoing notwithstanding, ABS-CBN, its Subsidiaries[,] and Affiliates can (and you authorize us to) disclose any information about you to private entities, law enforcement agencies[,] or government officials, as ABS-CBN, the Subsidiaries[,] and Affiliates, in

which shows and movies to license, balancing the cost of obtaining the licensing rights of the content and the popularity of the content offered.²¹² As for what is in the film or show which is to be featured by the service provider, this depends largely on the producer — generally speaking, VOD and livestream service providers merely purchase their licensing rights from content owners.²¹³ Disney, for example, features its produced content on Netflix and on Hulu through licensing contracts with both companies, despite the fact that the same content is already available on traditional television broadcasting.²¹⁴

Whether or not the VOD or livestream service provider *owns* its content is actually an important consideration. Those who do not own their own original content have to purchase global rights to provide media on their platforms.²¹⁵ Most VOD and livestream service providers serve purely as distributors of content. This is true, for example, for HOOQ.²¹⁶ It is a joint venture between the Singtel Group, Warner Brothers, and Sony Pictures Television.²¹⁷ While Warner Brothers and Sony Pictures are themselves content owners and contribute to HOOQ's content library, the latter remain the content owners and producers of their own content.²¹⁸ They merely use HOOQ as an additional distribution channel for their products.²¹⁹

their discretion, believe necessary or appropriate to investigate or resolve possible problems or inquiries, or as otherwise required by law, regulation, legal process[,] or governmental request, or to protect the security of other users of the Website, or the public.

iWant TV, Terms of Use, *available at* <http://www.iwantv.com.ph/about/terms> (last accessed Aug. 31, 2016) [hereinafter iWant TV, Terms of Use].

212. Patrick O'Rourke, This is how Netflix decides what's on Netflix, *available at* <http://o.canada.com/technology/personal-tech/this-is-how-netflix-decides-whats-on-netflix> (last accessed Aug. 31, 2016).

213. Rafe Needleman, Disney CEO: Disney.com to sort of compete with Netflix, Hulu, *available at* <http://www.cnet.com/news/disney-ceo-disney-com-to-sort-of-compete-with-netflix-hulu> (last accessed Aug. 31, 2016).

214. *Id.*

215. Michael Tegos, Here's what to expect when NetFlix arrives in Singapore, *available at* <https://www.techinasia.com/netflix-arriving-in-singapore-asia> (last accessed Aug. 31, 2016) (emphasis supplied).

216. Hongzuo Liu, HOOQ might just be Asia's answer to Netflix, *available at* <http://www.cnet.com/news/hooq-might-just-be-asias-answer-to-netflix> (last accessed Aug. 31, 2016).

217. *Id.*

218. *Id.*

219. *Id.*

Some VOD and livestream services providers, however, are also the producers or co-producers of content that they publish. As content owners, they are naturally concerned about piracy, distribution mechanisms, and government regulation, among others. This is true for Netflix.²²⁰ It is one of the biggest VOD and streaming media providers in the world, but it also produces original content, including web series like “The Unbreakable Kimmy Schmidt,” “Bloodline,” “Stranger Things,” and “Better Call Saul.”²²¹ But even if these shows are original to Netflix, it can happen that licenses to exhibit them may be sold to other distributors, especially in countries where Netflix does not have an established presence.²²² In the U.S., however, Netflix is the exclusive online distributor of its own shows, and the season launches of these shows are always online²²³ — it is precisely Netflix’s business model to produce original content and to have these available, at least initially, only on its site, in order to attract more viewers to its online platform.²²⁴ The popularity of these shows, as well as the exclusive nature of their availability, has helped to increase Netflix subscriptions.²²⁵

Interestingly, there are VOD and livestream service providers that cater primarily to Filipinos. One of these is The Filipino Channel (TFC), owned by ABS-CBN International, a subsidiary of ABS-CBN Corporation.²²⁶ TFC is popularly known in the U.S. and other parts of the world as a cable channel for Filipinos.²²⁷ Recently, however, it has launched its own VOD

220. Tatiana Mikhalkina, Netflix Business Model, *available at* http://www.cass.city.ac.uk/__data/assets/pdf_file/0017/220517/Netflix.pdf (last accessed Aug. 31, 2016).

221. *See* Felix Salmon, Why Netflix is producing original content, *available at* <http://blogs.reuters.com/felix-salmon/2013/06/13/why-netflix-is-producing-original-content> (last accessed Aug. 31, 2016). Some of the shows uploaded in Netflix are revivals of previous shows. Familiar examples include “House of Cards,” and “Arrested Development.” *Id.*

222. *See, e.g.*, For me, it’s TV 3, The Blacklist, Rake, House of Cards and more coming to TV3, *available at* <http://www.tv3.co.nz/The-Blacklist-Rake-House-of-Cards-and-more-coming-to-TV3/tabid/2983/articleID/94264/Default.aspx> (last accessed Aug. 31, 2016).

223. *See, e.g.*, Brian Stelter, *A Drama’s Streaming Premier*, N.Y. TIMES, Jan. 18, 2013, *available at* <http://www.nytimes.com/2013/01/20/arts/television/house-of-cards-arrives-as-a-netflix-series.html> (last accessed Aug. 31, 2016).

224. *See* Salmon, *supra* note 221.

225. *Id.*

226. The Filipino Channel, Terms and Conditions, *available at* <http://tfc.tv/Home/TermsAndConditions> (last accessed Aug. 31, 2016) [hereinafter The Filipino Channel, Terms and Conditions].

227. The Filipino Channel, TFC Cable, *available at* <https://www.tfc-ca.com/tfc-cable/> (last accessed Aug. 31, 2016).

and livestreaming service, one which aims to provide Filipino shows to Filipino families.²²⁸ As such, it streams for online users the same content that is available on its channel via broadcast television.²²⁹ As an example, the livestream service of TFC streams “It’s Showtime,” a popular afternoon variety show featuring popular stars such as Anne Curtis, Vhong Navarro, Billy Crawford, and Vice Ganda, live for Filipinos abroad.²³⁰ This allows them to watch variety fare at the same time as Filipinos in the country. After the live airing, the “It’s Showtime” episodes are archived in the site, so other viewers who missed a particular one can log on and find it again.²³¹ For its VOD services, TFC makes available online episodes of ABS-CBN’s latest primetime shows, such as “Till I Met You,” a 2016 romantic series featuring Nadine Ilustre and James Reid.²³² Also available are previously featured Filipino movies, such as “Ikaw Ang Mahal Ko” featuring Fernando Poe, Jr. and Vilma Santos.²³³

Another VOD and livestream service with a Filipino target market is iWant TV, an OTT platform also owned and operated by ABS-CBN.²³⁴ iWant TV features most of ABS-CBN’s broadcasted shows, as well as other television channels, such as the National Geographic Channel, the Food Channel, and CNN.²³⁵ It also features original content available exclusively on its platform.²³⁶ It can be accessed through two branches of user interfaces — its website and its mobile phone application of the same name.²³⁷ Of particular interest, however, is the way by which iWant TV users can pay for the service — via Subscriber Identity Module (SIM) Card. ABS-CBN developed the ABS-CBN Mobile SIM Cards to complement the iWant TV

228. The Filipino Channel, Terms and Conditions, *supra* note 226.

229. *Id.*

230. The Filipino Channel, It’s Showtime LIVE, *available at* <http://tfc.tv/Live/Details/87039/its-showtime-live> (last accessed Aug. 31, 2016).

231. The Filipino Channel, It’s Showtime — Episodes, *available at* <http://tfc.tv/Show/Details/855/its-showtime> (last accessed Aug. 31, 2016).

232. The Filipino Channel, Till I Met You, September 15, 2016, *available at* <http://tfc.tv/Episode/Details/109574/till-i-met-you-september-15-2016> (last accessed Aug. 31, 2016).

233. The Filipino Channel, Ikaw Ang Mahal Ko, *available at* <http://tfc.tv/Episode/Details/67952/ikaw-ang-mahal-ko-november-1-2014> (last accessed Aug. 31, 2016).

234. iWant TV, About Us, *available at* <http://www.iwantv.com.ph/About> (last accessed Aug. 31, 2016) [hereinafter iWant TV, About Us].

235. *Id.*

236. *Id.*

237. iWant TV, FAQ, *supra* note 5.

service.²³⁸ Mobile users who purchase ABS-CBN Mobile load also get free access to iWant TV for certain durations.²³⁹ Buying ₱ 20.00 worth of load, for example, entitles a mobile user to access to iWant TV for seven days.²⁴⁰ This user can then gain access to exclusive content, available only on iWant TV.²⁴¹ However, he or she must pay for additional load to be able to watch a program.²⁴² A popular example of such content is Pinoy Big Brother (PBB) Insider, a pay-per-view service that grants consumers an exclusive view of goings on inside the PBB house.²⁴³ ABS-CBN mobile users who hope to get all-day access to the PBB house are charged ₱ 5.00 for availing of the service, on top of the load they purchase for regular texting and calls.²⁴⁴ Synergistically, SKYCable and SKYBroadband subscribers are also given premium access to the livestreaming services of iWant TV.²⁴⁵

At this juncture, and with all the versatility in access described above, it is timely to ask if VOD and livestream content can be regulated in terms of age-appropriateness and audience sensitivity. The ease of technology and the rapid increase in proficiency in the use of media devices and gadgets on the part of even the young²⁴⁶ warrant this pause for thought and ultimately, action. The “pervasiveness” doctrine in *FCC v. Pacifica*²⁴⁷ instructs that the regulatory treatment of media should be case-to-case, taking into account how easy or hard a media consumer will be exposed to content.²⁴⁸

It will come as no surprise, then, that the MTRCB traditionally follows a slightly different approach with respect to cable television. Considering that it is accessible to only a “limited audience” — in the sense that one would have to subscribe to gain access — cable television is often given some

238. ABS-CBN Mobile, Best Value Loads, available at <http://www.abscbnmobile.com/loads> (last accessed Aug. 31, 2016).

239. *Id.*

240. *Id.*

241. iWant TV, About Us, *supra* note 234.

242. See, e.g., ABS-CBN Mobile, PBB Insider, available at <http://www.abscbnmobile.com/article/PBB-Insider-6> (last accessed Aug. 31, 2016) [hereinafter ABS-CBN Mobile, PBB Insider] & ABS-CBN Mobile, Kapamilya VIP, available at <http://www.abscbnmobile.com/article/Kapamilya-VIP-8> (last accessed Aug. 31, 2016).

243. ABS-CBN Mobile, PBB Insider, *supra* note 242.

244. *Id.*

245. iWant TV, About Us, *supra* note 234.

246. Merlis, *supra* note 31, at 118-19 (citing Russell B. Weekes, *Cyber Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 VA. J. L. & TECH. 4 (2003)).

247. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

248. *Miller*, 413 U.S. at 18-19 & 24-28.

latitude in cases of mature content.²⁴⁹ And given the sheer volume of cable television channels,²⁵⁰ programs therein are traditionally not made subject to the standard pre-broadcast review.²⁵¹ Instead, cable content is subject to “post review,” which is often triggered by complaints whether *motu proprio* or at the instance of one coming from the general public.²⁵² “Post review” may also be done at random to further both the Agency’s regulatory and developmental functions.²⁵³

Logically, then, because one needs to have a subscription or account for access, content coming from VOD and livestream service providers are less pervasive compared to those on free TV. Thus, latitude may be given to these providers in terms of exemption from prior review by an entity like the MTRCB in a particular territory.²⁵⁴ The fact will remain, though, that the State, whether directly or through empowerment mechanisms, will still have to care for the young and other easily vulnerable sectors as regards media and entertainment fare.

At the very least, then, there must be a basic as well as workable framework for classification as regards VOD and livestream content. It must be a framework that both acknowledges the modern-day convergence of technology, and the balance earlier mentioned between the protection of free speech, on the one hand, and protecting the youth and other vulnerable sectors, on the other.²⁵⁵ To put things simply, a framework is needed which affirms that every viewer is entitled, as a matter of basic fairness (which, incidentally, is another face of due process),²⁵⁶ to be informed about the

249. Rowena Tan, MTRCB chair airs concern over certain cartoon content, *MANILA BULL.*, Apr. 14, 2016, available at <http://www.mb.com.ph/mtrcb-chair-airs-concern-over-certain-cartoon-content> (last accessed Aug. 31, 2016).

250. See, e.g., MTRCB, MTRCB Registered Cable Television, available at <http://www.mtrcb.gov.ph/wp-content/uploads/2013/04/CATV-2013.pdf> (last accessed Aug. 31, 2016).

251. Tan, *supra* note 249.

252. *Id.*

253. MTRCB IRR, ch. V, § 9. See also MTRCB IRR, ch. XII, § 2 (1). A qualification must be made, however, with respect to so-called “must-carry” channels under current telecommunication laws, rules, and regulations. These are the fundamentally *free* VHF (very high frequency) or UHF (ultra-high frequency) TV channels that nevertheless find their way into cable channels offerings.

254. *Id.* ch. V, § 10. This form of latitude may especially apply to content that has already undergone prior review when previously exhibited in a more pervasive venue or media — as in the case of films previously classified by the MPAA-CARA or the Philippines’ MTRCB.

255. Merlis, *supra* note 31, at 131.

256. PHIL. CONST. art. III, § 1.

possible impact in terms of scene, theme, language, sex, and violence, of content that he or she is about to see.

IV. CONTENT REGULATION

A. Content Regulation as a Balancing Act: How States Regulate Film and Broadcast Content

Various jurisdictions all over the world have seen fit to regulate television and film content in different ways.²⁵⁷ The variations in this regard depend on historical context as well as cultural, social, and political factors.²⁵⁸ But as hinted earlier, regulation of entertainment media is very much dependent on the values that each society upholds, values being the “norms that make people’s behavior and relationship harmonious and pleasant, and to a certain extent, morally correct.”²⁵⁹ Furthermore, there will always be that question of balancing two competing interests, i.e., how does one ensure that the public and its most vulnerable members in particular are protected from harmful content, while making space for free speech and the right of choice?

This Section will discuss regulatory practices traditionally used by some States to regulate content. These factors will be particularly important in understanding how it is possible to establish a regime of empowerment and self-regulation for entertainment media providers while balancing free speech considerations.

1. From Censor to Advisor: The Evolving Role of Content Regulators

To maintain order and harmony, every society keeps and upholds values that permeate every aspect of life. These are the values that parents inculcate in their children, that schools teach their students, and that government hopes to protect.²⁶⁰ These values, on the other hand, are brought to life by virtues, such as justice or rendering to one what is due, fortitude, modesty, temperance, and prudence. It is no surprise, then, that since the dawn of motion pictures in the early 1900s, content regulatory bodies have attempted to regulate what is featured on the big screen to ensure that these are not

257. See, e.g., MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 2-5; Steven Pelton, Protecting Children and Future Strategy in Canada (A Presentation for the 2015 International Film Classification Forum) (on file with Authors); & Terra Media, British Film and video censorship and classification, available at http://terramedia.co.uk/reference/law/british_film_censorship.htm (last accessed Aug. 31, 2016).

258. See Ordoñez, *supra* note 112, at 59-60.

259. *Id.* at 59.

260. See FARRAR & DUGDALE, *supra* note 174, at 13.

contrary to societal values.²⁶¹ At first, most bodies chose to rely heavily on censorship and blanket disapprovals of films and shows that did not meet the criteria set out.²⁶² Over time, however, many of these bodies have shifted perspectives, realizing that, ultimately, it is each individual person's prerogative to dictate what he or she, and his or her children, see.²⁶³ Those falling in the latter category have chosen, essentially, to limit their role as censors to serve, instead, as advisors.²⁶⁴ The case that best illustrates this progression is the MPAA, which, as earlier mentioned, is the classification and rating body of the film industry in the U.S.

The early 1900s in the U.S. saw public outcry over the "morality crisis" in Hollywood.²⁶⁵ This led to the establishment of over 45 state and city censorship boards, each of which had their own standards and prejudices as to what should be allowed to feature on a film.²⁶⁶ This made it difficult for filmmakers, who had "to tailor their movies to meet the requirements of each individual board or face being banned on the market."²⁶⁷ Frustrated by this, but acknowledging that there was a need to set standards within the industry, major motion picture studios in the U.S. banded together to form the predecessor of the MPAA — the Motion Picture Producers and Distributors of America (MPPDA).²⁶⁸

The MPPDA produced a Production Code — known as the Hays Code — which provided an extensive list of rules that each member of the MPPDA had to follow if they hoped to be part of the industry at all.²⁶⁹ But

261. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 2.

261. *Id.*

262. *See, e.g.*, MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 2-5 & Terra Media, *supra* note 257. *See also* Ma. Rocio de Vega, *Concerns of a Censors Chief*, in YUSON, *supra* note 105, at 19-20.

263. Merlis, *supra* note 31, at 131.

264. *See, e.g.*, MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 2-5; de Vega, *supra* note 262, at 18-20; Villareal, *Empowering All Stakeholders*, *supra* note 158, at 172; Pelton, *supra* note 257; & Stefan Linz, *Age classification of audiovisual content in Germany: The current system and possible future developments (A Presentation for the 2015 International Film Classification Forum)* (on file with Authors). *But see* Runiar, *supra* note 190 & Reuters, *supra* note 190.

265. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 2.

266. *Id.*

267. *Id.*

268. Lea Jacobs, *Industry Self-Regulation and the Problem of Textual Determination*, in *CONTROLLING HOLLYWOOD: CENSORSHIP & REGULATION IN THE STUDIO ERA* 88 (Mathew Bernstein ed., 2000).

269. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 3.

the original standards formulated were very restrictive, and had a tendency to be rigid.²⁷⁰ It stated that produced content must feature only “correct standards of life.”²⁷¹ This meant that there should be no depictions of “‘lustful’ kissing or ‘suggestive’ dancing.”²⁷² Under the Hays Code, films were screened by the MPPDA board, then approved or disapproved, based on whether these films were “moral” or “immoral.”²⁷³ What was depicted on the screen was thus heavily regulated.

By the 1960s, however, more than a decade after the MPPDA was rechristened as the MPAA,²⁷⁴ this type of regulation was very much outdated.²⁷⁵ The system was “undone by society itself.”²⁷⁶ With the rise of the women’s liberation movement, as well as the crumbling of many social traditions, the idea of simply approving and disapproving films for release became difficult to sustain.²⁷⁷ The mechanism then seemed to run counter to the idea of freely expressing ideas through the medium of film.²⁷⁸ As such, the industry players of America convened again to figure out a system that worked best for all stakeholders.²⁷⁹ Out of these series of meetings came the system that is still used in the U.S. and in other parts of the world today — an independent ratings system hinged on the idea of giving “advance cautionary warnings to parents to help them make informed decisions about the movie-going of their young children.”²⁸⁰ This ratings system allows viewers to be well-informed, giving them a heads-up of what a film may contain.²⁸¹ Thus, there emerged a system that focused on empowering the viewer to make choices as to what he or she wants to see.

While the history of censorship and classificatory bodies differs per country, there is a more or less common consensus as to the necessity of a

270. *Id.*

271. *Id.*

272. *Id.* at 4.

273. *Id.*

274. CARL JENSEN & PROJECT CENSORED, CENSORED: THE NEWS THAT DIDN’T MAKE THE NEWS AND WHY — THE 1996 PROJECT CENSORED YEARBOOK 185 (1996).

275. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 4.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 5.

280. *Id.*

281. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 6.

ratings system²⁸² — one which, like the MPAA, advises the viewer in advance of the relevant depictions in a film in terms of sex, violence, language, and similar factors before the viewer must choose which movie to watch. The aim of such advisory bodies is not to limit the scope of free speech protections, nor to be “moral ogres.” Rather, their aim is to provide clear information to parents and other moviegoers as to a film or show’s content.²⁸³

2. The Rise of Co-Regulation and Self-Regulation

Historically, media regulation has been seen as a government function.²⁸⁴ This is true for the Philippines, which, for example, in the 1930s, had the Board of Review for Motion Pictures (BRMP).²⁸⁵ But owing to historical progression, and the acknowledged need to allow the film and television industries to thrive and develop its own internal checking mechanisms, many countries today choose to make use of co- and self-regulation in media content regulation.²⁸⁶

282. As such, there is actually an International Film Classification Forum, where representatives from various states, including Australia, Canada, Thailand, Germany, Singapore, and more, present their country’s ratings systems and discuss best practices. See Won Ho-jung, Global forum to debate content ratings for children, available at <http://www.koreaherald.com/view.php?ud=20151125001174> (last accessed Aug. 31, 2016). The MTRCB participated in the conference held in Busan, South Korea last 2015. One of the Authors presented to the forum the Philippine ratings and classification system and the developmental campaign for discerning viewership, *Matalinong Panonood para sa Pamilya at Bayan nina Juan at Juana*. Roughly translated from English to Filipino, the title is “Smart Viewership for the Family and Country of Juan and Juana.” Juan and Juana are names that typify the ordinary Filipino and Filipina. See SunStar Manila, Matalinong Panonood wows 2015 International Film Classification Forum, available at <http://www.sunstar.com.ph/manila/entertainment/2015/12/03/matalinong-panonood-wows-2015-international-film-classification> (last accessed Aug. 31, 2016).

283. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 6.

284. See, e.g., YUSON, *supra* note 105, at 6-7; MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 3; & Terra Media, *supra* note 257.

285. YUSON, *supra* note 105, at 6-7.

286. See, e.g., Office of Communications (Ofcom), Criteria for promoting effective co and self-regulation (Self-regulation Criteria of Ofcom, a the Government Communications Regulator in the U.K.) 3, available at http://stakeholders.ofcom.org.uk/binaries/consultations/co-reg/statement/co_self_reg.pdf (last accessed Aug. 31, 2016); Linz, *supra* note 264; & András Koltay & András Lapsánszky, Establishment of a new co-regulation system in the Hungarian media regulation (A Paper on Articles 190-202 of the Hungarian Media Act) 2, available at http://hunmedialaw.org/dokumentum/162/coregulation_summary_

Self-regulation, as best defined by the U.K. Office of Communications (Ofcom), refers to a system where there is a “complete absence of regulatory oversight.”²⁸⁷ There is self-regulation when players in a particular industry choose to band together and police themselves.²⁸⁸ The body creates its own rules and code of conduct that all members agree and adhere to.²⁸⁹ As such a body would not have the power to impose civil or criminal liability among its members, sanctions for violations are often more economic.²⁹⁰ For example, the body may make weekly publications which attract media attention to sanction those who violate its rules,²⁹¹ or its members may refuse to trade or deal with the violator.²⁹²

One clear example of a self-regulating body is the MPAA. The MPAA is composed of member-company studios which have “agreed to submit all theatrical product[s] for rating.”²⁹³ The members of this association, in partnership with those of the Independent Film and Television Alliance (IFTA), agreed that they would enforce the system by “asking identification and refusing admission to “R-rated” movies by unaccompanied children or to “NC-17” movies by children whether or not accompanied.”²⁹⁴ This move by the MPAA was precisely made to avoid having to deal with individual state censorship boards, as well as regulations from the U.S. Federal Government, leading to various versions of one film airing all over America.²⁹⁵ This type of organization brings to the fore what is the ultimate

final.pdf (last accessed Aug. 31, 2016). It is to be noted, however, that some governments still choose to regulate the film and broadcast industry themselves. An example would be Thailand, where industry players must submit their work to the Department of Cultural Promotion in the Ministry of Culture for ratings. See Glos Sawangwan, *Film Classification and the safeguarding of children and youth in Thailand* (A Presentation for the 2015 International Film Classification Forum) (on file with the Authors).

287. Ofcom, *supra* note 286, at 4 & Department for Culture, Media and Sport (DCMS) & Better Regulation Executive (BRE), *Self- and Co-Regulation: The Advertising Standards Authority* (A Brochure by Two Agencies in the Government of the U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31632/10-1279-self-co-regulation-advertising-standards-authority.pdf (last accessed Aug. 31, 2016).

288. *Id.*

289. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 5.

290. *Id.*

291. DCMS & BRE, *supra* note 287, at 2.

292. *Id.*

293. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 5.

294. *Id.*

295. *Id.* at 4.

aspiration of any advisory ratings system.²⁹⁶ It seeks to promote a healthy environment of private determination, under which the audience is empowered in its choice of media consumption.²⁹⁷ This springs from the availability of well-displayed information on content with indications, if warranted, on sensitive areas such as sex, violence, language, horror, or drugs.²⁹⁸

Co-regulation, on the other hand, has been referred to as “cooperation between professional organizations and the [government] [a]uthority for the sake of complying with statutory regulations.”²⁹⁹ There are variations to the forms of co-regulation, and the extent of control that remains with government.

Singapore’s Media Development Authority (MDA) is an example of a co-regulatory body.³⁰⁰ The MDA itself is a government body which regulates content across various platforms, including TV and radio broadcast, films, videos, video games, publications, arts, and the Internet.³⁰¹ It is considered co-regulatory in the sense that it simply formulates content codes and guidelines, and conducts dialogues with industry stakeholders, in order to develop a framework for community standards.³⁰² Another example is the Federal Republic of Germany’s (Germany) *Freiwillige Selbstkontrolle der Filmwirtschaft* (FSK).³⁰³ Industry players submit their films and shows to the FSK for assessment.³⁰⁴ As a sanction, films that do not undergo the ratings system cannot be shown in public exhibitions.³⁰⁵ Unlike the MPAA, however, which created its own rating mechanism, the FSK’s ratings are

296. *Id.* at 6.

297. *Id.*

298. *Id.*

299. Koltay & Lapsánszky, *supra* note 286, at 2.

300. Goi Choon Kiat, *Classification Across Media Platforms: Platform-Neutral or Medium Specific? (A Presentation for the 2015 International Film Classification Forum)* (on file with Authors) (citing Media Development Authority of Singapore Act 2002, Act 34 of 2002 (Sing.)).

301. *Id.*

302. *Id.* In a *de facto* sense, this is arguably what the MTRCB is shaping up to be. It must be admitted though that the presence of the word “delete” in Section 3 (c) of Presidential Decree No. 1986 gives the Philippine system what may be called a residual odor of “censorship.” See Presidential Decree No. 1986, § 3 (c).

303. Linz, *supra* note 264.

304. *Id.*

305. *Id.*

provided by the country's Youth Protection Law, and are legally binding to all involved.³⁰⁶

The Netherlands is another interesting example of co-regulation.³⁰⁷ It also makes use of the concept of self-classification.³⁰⁸ While it is the government that ensures the enforcement of the ratings generated, and the industry players are the ones funding the research behind the system, the ratings themselves are generated by a purely self-regulated mechanism, called the Kijkwijzer model.³⁰⁹ In this model, each and every media provider or distributor, regardless of the manner of distribution, regulates its own content, without having to submit the content itself to any governmental or other type of agency for rating.³¹⁰ Instead, each provider or distributor gets a questionnaire with strictly formulated questions regarding the content of the film or show that they will be rating.³¹¹ The questions are developed by experts, and are altered over time in congruence with feedback received.³¹² In theory, the questions are formulated so well that each person who uses them, regardless of background or personal opinions, would arrive at the same rating in the end.³¹³ The questionnaire, when filled up, is then brought to the government regulatory body in charge, the Netherlands Institute for the Classification of Audiovisual Media (NICAM).³¹⁴ The latter then calculates the results to arrive at the final rating for the content reviewed or examined.³¹⁵

306. Jugendschutzgesetz [JuSchG] [Youth Protection Act], July 23, 2002, BUNDESGESETZBLATT, TEIL I [BGBL I], at § 14 (Ger.).

307. The Netherlands Institute for the Classification of Audiovisual Media (NICAM), Kijkwijzer: The Dutch Rating System for Audiovisual Productions (A Primer on the Kijkwijzer Model Prepared by NICAM) 3, available at http://www.kijkwijzer.nl/upload/zijbalk2/50_NICAMkijkwijzerGB_02_Overview.pdf (last accessed Aug. 31, 2016).

308. *Id.*

309. *Id.*

310. *Id.*

311. Joachim von Gottberg, Kijkwijzer The Dutch Self-Classification System, available at http://en.fsf.de/data/hefte/ausgabe/Kijkwijzerheft_english/kijkwijzer-TVD_sw.pdf (last accessed Aug. 31, 2016).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

3. Age Ratings Segmentation and Classification

These days, most countries use ratings systems as their principal regulatory tool to ensure that only the proper audiences view films and shows.³¹⁶ These ratings systems consist of advisories that will guide parents and other viewers as to what can be seen and/or heard in a particular movie or program, so that they may be forewarned of possible violence, profanity, drug use, nudity, or mature content that may be present in a work.³¹⁷

As an enforcement mechanism for these rating systems, most countries, like the Philippines, the U.S., and South Korea, require theater owners to first check the age of those intending to watch a film for “restricted viewing” before selling a ticket or allowing one to be admitted to a screening.³¹⁸

In general, there are three methods of segmenting age ratings for younger audiences.³¹⁹ One may choose either to provide —

- (1) Ratings classified according to age;³²⁰
- (2) Ratings based on the level of parental guidance needed;³²¹
or
- (3) Only one classification, “General,” without providing for an option requiring parental supervision.³²²

Under the first method, age ranges are used to show which children may watch a particular show.³²³ In Germany, for example, which uses the first type of segmentation, age-based ratings, broken down as “0,” “6,” “12,” “16,” and “18,” are provided.³²⁴ This style of classifying, which highlights the age of those who are to watch a film or show, provides opportunities to

316. See, e.g., MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 9; MTRCB IRR, ch. IV; & Jeong Taeg Lim, A Development Plan of Movie Ratings for South Korea: Age ratings segmentation (A Presentation for the 2015 International Film Classification Forum) (on file with the Authors).

317. *Id.*

318. *Id.*

319. Lim, *supra* note 316.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* It must be qualified though that these methods are distinguished according to their dominant approach to classification. It can happen then that they have some aspects actually in common. *Id.*

324. Lim, *supra* note 316. For example, *Finding Nemo* is suitable for all ages, and represented by the number “0” as its symbol. Meanwhile, the *Hunger Games* is rated “12.” Linz, *supra* note 264.

consider the sensitivities of a particular age range, and to adjust accordingly.³²⁵ In Germany, the FSK created a ratings system inspired by Jean Piaget's four stages of cognitive development to come up with the proper age brackets for their classifications.³²⁶ Piaget's theory, developed at the beginning of the 1920s, observed and described the inner workings of a child's mind at different stages of his or her life.³²⁷

The second method of ratings segmentation is used by the Philippines, the U.S., Singapore, and Thailand.³²⁸ It is when the perspective of parents is primarily used in the film ratings — thus, the ratings are named as “General Audiences,” “Parental Guidance,” etc.³²⁹ As an example of this, the MPAA has a “PG-13” rating which stands for “Parents Strongly Cautioned”³³⁰ and entails that some material in the piece may be inappropriate for children under 13 years of age.³³¹ “PG-13” is a rating which applies as “a sterner warning by the [r]ating [b]oard to parents to determine whether children under age 13 should view ... as some material might not be suitable for them.”³³² This type of system thus acknowledges that the parent, being the vanguard of their child's interests, would be most interested in the rating of a film or show.³³³ Thus, with respect to the MPAA, the CARA is composed of parents,³³⁴ who “assign ratings to films that it believes reflect the rating a majority of their fellow parents would give each film.”³³⁵

The third method is the one used in South Korea at its most basic.³³⁶ There is only a “G” rating for all films, from those aged 1-17.³³⁷

325. *Id.*

326. *Id.*

327. Department of Psychology, University of Colorado Boulder (A Presentation on Piaget's Cognitive Theory) 1, available at <http://psych.colorado.edu/~colunga/P4684/piaget.pdf> (last accessed Aug. 31, 2016).

328. Lim, *supra* note 316; Kiat, *supra* note 300; Sawangan, *supra* note 286; MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164; & MTRCB IRR, ch. IV.

329. *Id.*

330. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 170, at 7.

331. *Id.*

332. *Id.*

333. See UNCRC, *supra* note 94, art. 14.

334. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 170, at 7. Parenthetically, though, it may be said that knowledge of the child's stages of cognitive development supports the norm to see things from a parent's perspective.

335. *Id.*

336. Lim, *supra* note 316.

B. How the Philippines Currently Regulates Broadcast and Film Content

With the landscape of content regulation outlined above, it is now possible to have a better grasp of how the Philippines currently regulates providers of film and broadcast content.

As has been noted earlier in the Article, the MTRCB serves as the primary government agency charged with the duty to aid movie and television viewers, especially families, in deciding what entertainment media to consume.³³⁸

From the 1930s all the way to the 1960s, the entertainment industry was regulated by censors boards which approved and disapproved the public exhibition of certain works.³³⁹ Since then, however, the MTRCB has dropped its “censors” orientation. It now makes use of a classification system principally centered on age-appropriateness, and with key regard for certain content aspects that can easily affect the sensitivities of a viewer, especially those who are young.³⁴⁰ Thus, like the MPAA, the MTRCB’s current thrust is towards becoming an advisor to parents, guiding them as the latter endeavor to teach and rear their children.

Presently, the Philippines makes use of the second method of segmentation, which primarily draws on a parent’s perspective. The ratings are made so that parents can easily figure out what scenes are depicted in the film or television show, enabling them to properly discern what is appropriate for their children.³⁴¹ The classifications for film are General Audience (“G”); Parental Guidance — 13 (“PG”); Restricted — 13 (“R-13”); Restricted — 16 (“R-16”); Restricted — 18 (“R-18”); and Not for Public Exhibition (“X”).³⁴² The police power of the State only comes in when restrictions as regards to admission, as a sure help to parents and other responsible adults, are enforced.

With respect to television programs, they can only be classified as — General Patronage (“G”); Parental Guidance (“PG”); Strong Parental Guidance (“SPG”); and Disapproved for Airing on Television (“X”).³⁴³ This

337. *Id.* It must be said though that there are still age brackets in the South Korean System — “0-11,” “12-14,” “15-17,” and “18+.” The turning point, though, is whether or not a child is accompanied by a parent. If a child is two years old, he can still be admitted to a “15-17” movie if accompanied by a parent. *Cf.* Lim, *supra* note 316.

338. MTRCB IRR, ch. II.

339. YUSON, *supra* note 105, at 6-7.

340. *Id.*

341. Kiat, *supra* note 300.

342. MTRCB IRR, ch. IV, § 1.

343. *Id.* § 2.

variation addresses the pervasiveness of TV (and more particularly, “free TV”), which, as highlighted by the *FCC* case,³⁴⁴ is so prevalently used at home. The pervasiveness of broadcast media has also been highlighted in a Philippine case, *Eastern Broadcasting Corporation v. Carreon*.³⁴⁵ Noting the “uniquely pervasive presence”³⁴⁶ of broadcast media, *Eastern Broadcasting Corporation* instructed that the freedom of both television and radio broadcasting is “somewhat lesser in scope than the freedom accorded to newspaper and print media.”³⁴⁷ At the time of this decision, the Supreme Court noted that “the transistor radio is found everywhere[.]”³⁴⁸ and “[t]he television set is also becoming universal.”³⁴⁹

Serial television programs, as mentioned earlier, are simply required to submit “sample episodes,”³⁵⁰ but without prejudice to the MTRCB’s power to do “post review,” whether in the course of its regular functions or under a requirement pursuant to administrative adjudication.³⁵¹ Live television programs, “such as noontime variety shows and talk shows” shall, at the very least, carry the “PG” advisory which shall be superimposed onscreen throughout the airing of the program, to continuously remind parents to be on the alert.³⁵² This is because such programs may contain material that may be inappropriate for children.³⁵³ Parenthetically, the Authors must always reiterate that, strictly speaking, “SPG” is not a rating separate and distinct from “PG.”³⁵⁴ It is one that simply calls for heightened alertness on the part of parents and other responsible adults in the house due to the following factors (translated into the television screen as descriptors) — theme, language, violence, sex, horror, and drugs.³⁵⁵ This is not to say, however, that an “SPG” rating is actually an “R-13,” as in the cinemas. Unless revised by the Board, the ceiling for television is still “Parental Guidance.”³⁵⁶ To

344. *FCC*, 438 U.S. at 748.

345. *Eastern Broadcasting Corporation (DYRE) v. Dans, Jr.*, 137 SCRA 628, 635 (1985).

346. *Id.*

347. *Id.*

348. *Id.* at 636.

349. *Id.*

350. MTRCB IRR, ch. IV, § 9.

351. *Id.*

352. *Id.*

353. See MTRCB IRR, § 2 & MTRCB MC No. 03-2012.

354. MTRCB IRR, ch. IV, § 2.

355. *Id.*

356. *Id.*

some extent, “SPG” is much closer to the MPAA’s “PG-13” rating.³⁵⁷ The latter “strongly cautions” parents for material that may be inappropriate for pre-teens.³⁵⁸

With regard to trailers, the rule before was that all trailers must conform to the “G” rating whether they are shown in theater or in television.³⁵⁹ In the last few years, though, the MTRCB received feedback from parents and even younger audiences that many trailers hardly conformed to the said ceiling.³⁶⁰ This was quite logical, though, since a trailer’s purpose is to highlight the “unique selling points” of the film. Necessarily, it would have to hint at some strong violence if the movie being promoted is an action movie. If it were a sexy romance feature, the trailer must be able to depict some indications of such theme. Thus, on 18 June 2014, the MTRCB promulgated Memorandum Circular No. 04-2014, containing the Revised Rules for Classification of Trailers and Publicity Materials.³⁶¹ With respect to trailers, the said Circular provides that trailers for theatrical exhibitions can be classified as either for General Audience (“G”) or Parental Guidance (“PG”) (with those not falling within any of the two aforesaid ratings being unfit for exhibition in any theater).³⁶² Trailers with a “G” rating may be shown prior to, or with, any motion picture, regardless of the latter’s rating.³⁶³ Trailers with a “PG” rating shall only be shown prior to, or with, motion pictures that have been classified as “PG,” “R-13,” “R-16,” and/or “R-18.”³⁶⁴ Trailers with a “PG” rating shall not be shown prior to, or with, a motion picture with a “G” rating.³⁶⁵ Meanwhile, trailers on television must still follow a “G” rating.³⁶⁶ These limitations shall also apply to any such other teasers and announcements intended for theatrical exhibition.³⁶⁷

In determining audience suitability for trailers, the MTRCB considers factors such as the subject and content of the material and its over-all impact on the intended audience; the literary, artistic, educational merit of the clip, and other redeeming social values; the dignity of significant sectors such as women, children, persons with disabilities (PWDs), and senior citizens; and

357. *Id.*

358. *Id.*

359. *Id.* ch. IV, § 3.

360. *See* MTRCB Memorandum Circular No. 04-2014, whereas cl.

361. *See* MTRCB Memorandum Circular No. 04-2014.

362. *Id.* art. III, § 3.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. MTRCB Memorandum Circular No. 04-2014, art. IV, § I.

the standards under Chapter IV, in relation to Chapter V, of the 2004 Implementing Rules and Regulations of P.D. No. 1986.³⁶⁸

In classifying content for trailers (which incidentally hold true for other materials as well), the MTRCB takes into consideration the treatment of the following factors: theme, violence, language, nudity, sex, horror, and drugs, without prejudice to other factors.³⁶⁹ Always, the MTRCB keeps in mind the standard of contemporary Filipino cultural values,³⁷⁰ balancing the State's concern in molding the character of the Filipino people as well as the freedom of artistic expression.³⁷¹

To enforce the ratings, the MTRCB requires all movies, television programs, and commercials intended for public exhibition, whether imported or produced in the Philippines, to undergo its review and classification before they are exported, copied, distributed, sold, leased, and exhibited.³⁷² Such materials are submitted to the MTRCB by the sellers, distributors, importers, lessors, or exporters of the film, keeping in mind that these cannot be broadcasted or publicly exhibited without a prior classification given by the MTRCB.³⁷³

The MTRCB is a government agency under the Office of the President, which coordinates and conducts meetings with industry players as well as other government agencies.³⁷⁴ As it is now structured and operated, the Philippine content regulation system is arguably co-regulatory, akin to that of Singapore's MDA (but, of course, with lesser scope as to content covered).³⁷⁵ Applicants must submit their materials to the Board for review.³⁷⁶ The process is that an applicant for exhibition is informed of the rating given by the relevant Review Committee, and the reasons therefor.³⁷⁷ Should the rating be higher than the one preferred by the applicant, the applicant may do voluntary deletions, or some editing, that would make the content conform to the desired content classification.³⁷⁸ This happens, for

368. This is without limitation to other factors, other significant sectors, and without prejudice to any other laws, rules, regulations, circulars, or guidelines. MTRCB MC No. 04-2014, whereas cl. para. 3 & MTRCB IRR, ch. IV.

369. MTRCB IRR, ch. IV.

370. *Id.* ch. II, § 1.

371. *Id.* ch. II, § 4.

372. *Id.* ch. III.

373. *Id.* ch. V, § 1.

374. *See* Presidential Decree No. 1986, § 1.

375. *Compare* Kiat, *supra* note 300 *with* Presidential Decree No. 1986, whereas cl.

376. MTRCB IRR, ch. V.

377. *Id.* ch. V, § 1.

378. *Id.* ch. V, § 11.

example, when the applicant would want a wider audience for the material.³⁷⁹ Other times, however, the applicant accepts the rating given, placing premium on the integrity of the work as an art form over audience coverage.³⁸⁰

Clearly, the MTRCB has a process that is tailor-fit for what it currently monitors. It is logically less than easy to simply transplant this entire mechanism and require it of VOD and OTT service providers. Certain aspects of it, however, may possibly be lifted — the super-imposition of ratings for live television shows aired through the Internet, for example, may be used on Internet media. The ratings and factors may be taken into consideration as well.

C. How Other Jurisdictions Regulate VOD and OTT Services Content

1. Content Regulation Approaches

Many observers and policy-makers agree that Internet content regulation is a matter of looking into the norms of each society;³⁸¹ that rules must be made to fit with a particular jurisdiction's cultural values, as reflected in the legal frameworks it has already established.³⁸² To have a more nuanced understanding of the options available for regulating VOD and OTT services content, it may be enlightening to see how other jurisdictions have chosen to regulate material over said media and the measure of success, if any, attained on their part.

Eli N. Noam³⁸³ observes that States take on six different approaches when tackling the advent of Internet TV in relation to general media

³⁷⁹. See MTRCB IRR, ch. V, § 11.

³⁸⁰. *Id.*

³⁸¹. Digital service providers such as iTunes often achieve regionalized option filters which take into account the culture and norms of each region where their services are made available. For example, one accesses a different range of music and movies when one logs onto an iTunes account in the U.S. as opposed to one in the Philippines, which again would differ from what is available in Europe. It is thus possible for these service providers to create a filtration system that is sensitive to the tastes of each region. It is thus also interesting to explore the possibility of these service providers creating advisory ratings systems that are sensitive to regional biases and regulatory mechanisms. See Apple, Change your iTunes Store country or region, *available at* <https://support.apple.com/en-us/HT201389> (last accessed Aug. 31, 2016).

³⁸². Peng Hwa Ang, How Countries Are Regulation Internet Content, *available at* https://www.isoc.org/inet97/proceedings/B1/B1_3.HTM (last accessed Aug. 31, 2016).

³⁸³. Noam is a professor of Finance and Economics at Columbia University, and is the director of the Columbia Institute for Tele-Information. See Eli M. Noam,

regulation.³⁸⁴ Of these, four are relevant to the discussion at hand: (a) the Internet/Print Model approach; (b) the Layer approach; (c) the TV-model approach; and (d) the Telecom Model approach.³⁸⁵ Countries currently make use of one, some, or all of the above approaches, depending largely on how the policy of each territory balances the interests of the various stakeholders (e.g., the service providers, families, vulnerable sectors, etc.) and free speech considerations.³⁸⁶

First, there is the Internet/Print Model approach, under which VOD and livestream content are treated similarly to print media — there is little to no regulation of content provided, to ensure no breach of free speech protections.³⁸⁷ This is similar to the model that is currently being used in the U.S. As they now stand, VOD and livestream providers in America are not covered by the MPAA, the FCC, or any other agency.³⁸⁸ This approach is “liberal,” and thus, may palpably fit the free-wheeling approach to Internet regulation of a generally libertarian society.³⁸⁹ This model would be difficult to adopt in the Philippine setting, as the country has special laws on sensitivity vis-à-vis media content (e.g., the Magna Carta of Women).³⁹⁰ In addition, this style of regulation may actually run counter to what has been

TV or Not TV: Three Screens, One Regulation?, *available at* <http://www.crtc.gc.ca/eng/media/noam2008.htm> (last accessed Aug. 31, 2016).

384. *Id.* The countries observed in the study include Canada, the U.S., Australia, the U.K., Italy, Malaysia, Brazil, Finland, and more. *Id.*

385. *Id.* The two other approaches — the Public Broadcast approach and the Film approach — are not discussed here because they do not deal with and would not affect the regulation of age appropriateness or sensitivity of content available online, at all. The Public Broadcast approach discusses *how* public broadcast service providers which provide their services on traditional media (e.g., the TV) also offer their services online; the Film approach talks of the competitiveness of the film industry online and how it can create new markets on that platform. *Id.*

386. *Id.* An interesting idea to explore — if a national ID system is actually implemented, can such ID number be used as a tool to ensure that younger viewers cannot access adult content? The age would be apparent from entering the code into the system of the service provider. Despite this, however, ratings should still be provided on VOD and livestream service providers, as what can pollute the mind of a young man may also pollute the mind of an old one. *Id.*

387. Noam, *supra* note 383.

388. The FCC, however, is contemplating subjecting these providers to its jurisdiction. BidnessEtc, Will FCC Regulate Online Web Services Next?, *available at* <http://www.bidnesstc.com/26621-will-fcc-regulate-online-web-services-next> (last accessed Aug. 31, 2016).

389. Noam, *supra* note 383.

390. The Magna Carta of Women, §§ 2 & 16.

observed as the “less right-oriented” legal philosophy that Filipinos have.³⁹¹ While the Western legal philosophy is more *right*-oriented (and thus, with strong notions of liberty and the pursuit of happiness), the Filipino frame of mind is commonly *duty*-oriented and would thus be guided by a sense of obligation that is moral in character.³⁹²

The second way is the Layer approach, which is marked by horizontal, rather than vertical regulation.³⁹³ This approach places the burden on regulators to *treat like content alike*. For example, whatever is available for reading on a physical newspaper which is available also on an online platform must be dictated by the same rules. In like manner, whatever rules applied to traditional TV as shown through the television screen should also be applied to the same material that is made available through the Internet.³⁹⁴ The premise here is that there is simply a change in conduit technologies, making both what is shown through conventional broadcast, and through the Internet, practically the same.³⁹⁵ At the end of the day, it is the same material; it has the same effect as regards age-appropriateness, audience, and consumer-sensitivity. As can be seen, the advantage of this method or approach is its simplicity.

The third approach, the TV-model approach, places the Layer approach a step forward.³⁹⁶ While the Layer approach only posits the application of the same general rules to providers who show television-like content on the Internet, the TV-model approach would impose exactly the same standards that are imposed on TV show content producers to Internet TV providers — thus, the latter must also obtain licenses, pay the appropriate fees, subject their material to pre- or post-review, and more.³⁹⁷ This model is used by quite a few jurisdictions. Singapore’s MDA adopts this approach for regulating Internet service providers such as VOD and livestream services.³⁹⁸ VOD and livestream service providers in Singapore must obtain a license, pay the appropriate fees, and comply with all regulations of the

391. Eugenio H. Villareal, *Filipino Legal Philosophy and its Essential Natural Law Content (A Concurrence in the Absolute with Aquinas, Finnis, and Fuller)*, 50 ATENEO L.J. 294 (2005) (citing LEONARDO N. MERCADO, *ELEMENTS OF FILIPINO PHILOSOPHY* (1993)).

392. *Id.* (emphases supplied).

393. Noam, *supra* note 383.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. Media Development Authority (MDA), TV and Radio, *available at* <http://www.mda.gov.sg/RegulationsAndLicensing/ContentStandardsAndClassification/Pages/TVAndRadio.aspx> (last accessed Aug. 31, 2016).

government.³⁹⁹ Furthermore, as Singapore adopts a mechanism of technological convergence, VOD and livestream providers use the same ratings as those used in films, videos, free-to-air TV, and pay TV.⁴⁰⁰

The fourth approach uses the so-called Telecom Model.⁴⁰¹ It seeks to capitalize on the unique features of the Internet as a medium.⁴⁰² It applies restrictions on the conduits of the information, i.e., regulation is focused on the delivery networks.⁴⁰³ Since content on the Internet actually consists of small packets of data, which, if properly identified, could actually be subject to regulation, it is possible to push regulation on the telecommunications companies that provide the service.⁴⁰⁴ The approach is as practical as it is radical, since there are very few telecommunications companies in each country, sometimes even only one.⁴⁰⁵ This is currently what is applied in Indonesia, where VOD and livestream service providers have to subject their content to the State's film censorship board, which may sanction them for carrying content which is inappropriately sexual or violent.⁴⁰⁶ When a service provider is unwilling to comply, the State-owned telecommunications company, PT Telekomunikasi Indonesia Tbk (Telkom), blocks access to them through its network.⁴⁰⁷ However, these VOD and livestream service providers are still accessible through other carriers, given that the latter are not State-owned.⁴⁰⁸

2. Types of Regulatory Bodies

Aside from looking at how each jurisdiction approaches content regulation, it is also worthwhile to consider whether or not a particular country, in attempting to regulate VOD and livestream service providers, deemed it

399. Broadcasting Act, G.N. No. S 306/1996, part IV, § 9, ¶ 4 (2004).

400. Compare MDA, Video-on-Demand Programme Code (Code Issued by the MDA), available at [http://www.mda.gov.sg/RegulationsAndLicensing/ActsCodesOfPracticeAndGuidelines/Documents/Acts,%20Codes%20of%20Practice%20and%20Guidelines/MDA%20Video-On-Demand%20Programme%20Code%20\(08%20July%202016\).pdf](http://www.mda.gov.sg/RegulationsAndLicensing/ActsCodesOfPracticeAndGuidelines/Documents/Acts,%20Codes%20of%20Practice%20and%20Guidelines/MDA%20Video-On-Demand%20Programme%20Code%20(08%20July%202016).pdf) (last accessed Aug. 31, 2016) with MDA, Films & Videos, available at <http://www.mda.gov.sg/RegulationsAndLicensing/ContentStandardsAndClassification/FilmsAndVideos/Pages/default.aspx> (last accessed Aug. 31, 2016).

401. Kiat, *supra* note 300.

402. Noam, *supra* note 383.

403. *Id.*

404. *Id.*

405. *Id.*

406. Reuters, *supra* note 190.

407. Runiar, *supra* note 190.

408. *Id.*

necessary to create an entirely new body, or if it chose to expand the jurisdiction of a government agency formerly already tasked with regulating film and television content. Interestingly enough, in regulating VOD and livestream service providers, most countries use a hybrid between co- and self-regulation.⁴⁰⁹ While there is supervision coming from a government authority, the industry players are generally allowed to regulate themselves, and to influence policies that pertain to their business.

In the U.K., regulations were issued by the Parliament for VOD services.⁴¹⁰ Ofcom, the government-approved regulatory body and competition authority for the media and telecommunications industry in the jurisdiction,⁴¹¹ was designated as the appropriate regulatory authority for VOD service providers. However, Ofcom was given the power to further designate this power to another body of its choice.⁴¹² This, Ofcom chose to do — it delegated its powers to a voluntary body of media companies, dedicated to self-regulating the industry in order to protect the rights of consumers of VOD services, referred to as the Association for Television On-Demand (ATVOD).⁴¹³ Ofcom and ATVOD had co-regulated the industry for a few years, focusing on key aspects of consumer rights protection⁴¹⁴ for Internet TV as provided for by their enabling legislation — these included ensuring that VOD service providers improved accessibility for the disabled, by providing screen captions and subtitles, among others, as

409. Some may say that with government involvement, there may be no real “self-regulation” in practical terms. It remains, however, true that there are broadcast aspects in which the content producer is entirely free; only that, as in every exercise of freedom, there comes the requisite responsibility. Thus, in the Philippine situation, a serial TV program originally rated “PG” can adopt the “SPG” rating for a particular episode, without MTRCB intervention, if it feels that there may be scenes that will be sensitive for young audiences. The program remains responsible, though, for any backlash from parents or other interested sectors who may feel that the content presented goes beyond “SPG.” See MTRCB IRR, ch. VIII, § 2 (f).

410. See The Audiovisual Media Services Regulation 2009 (U.K.), available at <http://www.legislation.gov.uk/uksi/2009/2979/regulation/2/made> (last accessed Aug. 31, 2016).

411. BBC News, Queen announces media shake-up, available at <http://news.bbc.co.uk/2/hi/entertainment/1398580.stm> (last accessed Aug. 31, 2016).

412. *Id.*

413. Association for Television On-Demand, Introduction, available at <http://www.bigbravedog.co.uk/the+association+for+television+on+demand> (last accessed Aug. 31, 2016).

414. This is a good thrust and an interesting way to look at the concept of media regulation, in general. It allows the model to be aimed at ensuring that the audience knows what it is getting.

well as ways of filtering content to make sure minors and other vulnerable groups would not be able to access harmful content.⁴¹⁵ In order to aid service providers, Ofcom and ATVOD have released various implementing rules interpreting the provisions of the Communications Act 2003, the latter being the main law that encompasses all forms of media in the U.K.⁴¹⁶ Recently, ATVOD turned over VOD regulation once more to Ofcom, in light of the increasing convergence of digital technologies accessible through the Internet, as well as European Union (E.U.) regulations which would have to be streamlined and applied in the U.K. as well.⁴¹⁷

The E.U. has several directives which set out a policy referred to as “Audiovisual without Frontiers.”⁴¹⁸ The policy essentially entails that there will be free movement of content within the Union, but also, that there will be minimum standards set for the regulation of television in general in the E.U.⁴¹⁹ Interestingly, the E.U. has also pushed for regulating VOD and livestream service providers so that they will be required to fund and feature more locally-produced content.⁴²⁰ With regard to developing classificatory mechanisms for content provided on the various entertainment platforms, the E.U. Directive provides only very general guidelines in relation to ensuring that content available online is fit for the consumption of children and other vulnerable sectors. Article 3 (h) of the Directive provides —

415. See The Audiovisual Media Services Regulation 2009, §§ 368D–368F, *available at* <http://www.legislation.gov.uk/uksi/2009/2979/regulation/2/made> (last accessed Aug. 31, 2016).

416. Ofcom, Rules and Guidance: Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS) (Rules and Regulations of Ofcom, the Government Communications Regulator in the U.K.), *available at* http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/rules_and_guidance.pdf (last accessed Aug. 31, 2016).

417. The Authors are aware that the U.K. has voted to “exit” the E.U., and as such, may no longer be bound to unify its media regulations with the rest of Europe; however, how the implementation of rules on media regulation are to be affected by the Brexit remains to be seen. Digital TV Europe, Ofcom to take over VoD regulation from ATVOD, *available at* <http://www.digitalteurope.net/443191/ofcom-to-take-over-vod-regulation-from-atvod> (last accessed Aug. 31, 2016).

418. European Commission on the Digital Single Market, New “Audiovisual without Frontiers” Directive, *available at* http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343 (last accessed Aug. 31, 2016).

419. *Id.*

420. Patrick Seitz, Europe Seeks To Regulate Content On Netflix, Other Streamers, *available at* <http://www.investors.com/news/technology/click/europe-seeks-to-regulate-content-on-netflix-other-streamers> (last accessed Aug. 31, 2016).

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental[,] or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services.⁴²¹

The same Directive also requires Member States to regulate and control commercials that are shown on various media platforms, in order to ensure that the content therein do not cause “physical harm or detriment to minors.”⁴²² In relation to this, Member States are also to encourage each service provider to develop its own code of conduct regarding “inappropriate audio-visual communication.”⁴²³

In Singapore, as earlier mentioned, the same regulatory body which also monitors pay TV, free-to-air TV, and broadcast TV similarly regulates VOD and livestream service providers.⁴²⁴ The same classification ratings used on traditional platforms are also used on VOD and livestream service providers.⁴²⁵ This makes it easier for parents to see the ratings, while making it easier for the industry to implement the ratings system, as it “allows cross-over of content across several platforms.”⁴²⁶

In Germany, the FSK allows service providers to create systems of classification by asking users to fill up “dynamic online questionnaires.”⁴²⁷ The answers provided are evaluated using an algorithm; the program then generates a classification.⁴²⁸ Thus, in the online context, the FSK only provides legal supervision, and does not itself participate in the rating of online content.⁴²⁹ FSK, however, still requires certain protocols to be followed online by the publisher (i.e., the service provider); the publisher is required to show the age label on its service as the video plays.⁴³⁰ It is also required to create a youth protection program, which entails that publishers must set up a system wherein the user must input a PIN code before he or she is able to access adult content rated “FSK-18.”⁴³¹

421. Audiovisual Media Services Directive, 89/552/EEC, art. 3 (h), Oct. 3, 1989.

422. *Id.* art. 3 (e).

423. *Id.*

424. Kiat, *supra* note 300.

425. *Id.*

426. *Id.*

427. Linz, *supra* note 264.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

D. How VOD and OTT Service Providers Self-Regulate and Comply with Above Regulations

Generally speaking, OTT service providers do not appear to have a standardized code for regulating or classifying their content. Each service provider has its own Terms of Use which contain varying degrees of rules and regulations pertaining to content that are available through their services.⁴³² It has been observed though that generally, VOD and livestream service providers aiming to have a wider market do attempt to create filters that allow parents and children to exercise proper discernment when viewing content online.⁴³³

While Netflix follows the rules and regulations provided by regulatory boards of the various jurisdictions it enters (whenever, that is, it is required to by State authorities), it has its own template of rules as well.⁴³⁴ One of these is found in the description boxes of each video that is clicked on the platform; Netflix provides a description and tags, which help a viewer see what could be expected in the video — sex, drugs, violence, and the like.⁴³⁵ Also, depending on the jurisdiction involved, Netflix has parental control mechanisms that allow parents to create a setting that will filter out inappropriate content for when their children use their Netflix accounts, if they so choose.⁴³⁶ There are also ways to set up a PIN Code verification requirement voluntarily, so that users must fill up certain details before accessing sensitive content (as compared to when governments, such as that in Germany, impose PIN Code verifications).⁴³⁷ In terms of ratings, Netflix follows the ratings systems provided by each country, whenever so required by the regulators in that jurisdiction, and displays it on the screen for users to see.⁴³⁸ Where a country does not regulate VOD or livestream service

432. See, e.g., Netflix Movies, Terms, available at <https://www.netflixmovies.com/i/terms> (last accessed Aug. 31, 2016); iflix, Terms of Use, available at <https://www.iflix.com/termsfuse.html> (last accessed Aug. 31, 2016); & The Filipino Channel, Terms and Conditions, *supra* note 226.

433. BBC News, *supra* note 411.

434. Tegos, *supra* note 215.

435. *Id.*

436. Netflix, How do I set parental controls on my Netflix account?, available at <https://help.netflix.com/en/node/264> (last accessed Aug. 31, 2016).

437. *Id.* See Netflix, How do I set a PIN for parental controls in Germany?, available at <https://help.netflix.com/en/node/22207> (last accessed Aug. 31, 2016) [hereinafter Netflix, Germany].

438. See, e.g., Netflix, Germany, *supra* note 437.

providers, however, Netflix makes use of its own default system, which has only three ratings — “Kids OK,” “Netflix Guidance,” and “Adult.”⁴³⁹

Service provider iflix also has parental control options, which allows parents to filter content based on its own default rating system.⁴⁴⁰ The iflix default rating system has four ratings, which are loosely based on the first method of age rating segmentation (i.e., classifying based on the age of the child). Their ratings are “Little Kids,” for children aged two to six, “Older Kids,” for those aged seven and up, “Teens” to entail that parents must be strongly cautioned, and “Adults,” for material which is restricted.⁴⁴¹ As in the case of Netflix, it is subject to governmental regulatory mechanisms if and when so required.⁴⁴²

Admittedly, though, the advisories provided by these multi-national VOD and livestream service providers leave much to be desired when looking at the sites themselves.⁴⁴³ For example, for iflix, the rating is shown briefly beside the name of the television show or movie in small colored boxes, but is not visible when the user clicks into the actual frame where the video is to be played.⁴⁴⁴ As an aside, any media content expert may, of course, sympathetically remark that the sustained appearance of any rating pictogram can affect the aesthetic appeal of the media. Having a “cinematic look,” blended here with mobility, will actually discharge a sustained pictogram, most especially when it comes to sizes and design. This issue could further be remedied by making the same smaller and smaller and less obstructive in design. The minimum could be advisories at the beginning, middle, and end, towards the last ten minutes or so with the feature.

For the TFC VOD and livestream service, as well as iWant TV, few mechanisms are in place. As a general rule, when one views a show on these platforms, no ratings are provided. Also, there are rarely any parental controls.⁴⁴⁵ For TFC, there is one section wherein there are advisories at the

439. Netflix, How does Netflix decide the maturity rating on movies and TV shows?, *available at* <https://help.netflix.com/en/node/2064> (last accessed Aug. 31, 2016).

440. iflix, Frequently Asked Questions, *available at* <https://www.iflix.com/frequentlyasked.html#xEb95ojQoZojTqxq.97> (last accessed Aug. 31, 2016).

441. *Id.*

442. *Id.*

443. *See, e.g.*, iflix, Scrubs, *available at* <http://play.iflix.com/play/2934/?type=show> (last accessed Aug. 31, 2016).

444. *Id.*

445. *See* iWant TV, Forever and More — Episode 1, *available at* <http://www.iwantv.com.ph/TV/Video/-Forever-and-More---Episode-1/3570/109196> (last accessed Aug. 31, 2016).

beginning of the films; this section, however, is the “sexy” section (i.e., the adult-rated section of the site).⁴⁴⁶ While this advance warning is appreciated, it is still suggested that TFC and iWant TV adapt an advisory ratings system that will complement “contemporary Filipino values,” and will take into account the needs of “vulnerable” sectors of society. It is also noted that the Terms of Use of TFC do contain a statement regarding the matter —

If you access any TFC.tv Product with adult or mature content, you represent that you are of legal age of majority in the applicable jurisdiction to access and view adult or mature content. You further warrant that you shall be responsible for ensuring that all persons viewing or accessing such the TFC.tv Products under your Right of Use and subscription will be of legal age as well.⁴⁴⁷

iWant TV’s Terms of Use provide a similar statement, stating that the user is primarily responsible for content that he or she accesses through its service.⁴⁴⁸

The above examples show that VOD and livestream service providers which make their services available in the Philippines self-regulate in a variety of ways. Considering all this, and all factors previously mentioned, it is now time to lay out a framework which will benefit both providers and parents alike.

V. A FRAMEWORK FOR PROVIDERS AND PARENTS ALIKE

A. Defining the Framework

Consolidating the insights gained from the previous Sections of this Article, a ratings system applied to VOD and livestream service providers must seek primarily to empower audiences (particularly parents and other responsible adults vis-à-vis the young) — to allow opportunity for “discerning viewership and dynamic self-regulation,”⁴⁴⁹ “for age-appropriate and audience-sensitive content,”⁴⁵⁰ and, ultimately, for “respect for the dignity of the human person.”⁴⁵¹ While the Internet is largely seen as a “free” space — one where stringent regulation and censorship is likely to be unappreciated — it is also a space children and other vulnerable sectors frequently access, and where they may, by chance, come across content that is inappropriate or

446. The Filipino Channel, *Sexy Trip*, available at <http://tfc.tv/Category/List/775/sexy-trip> (last accessed Aug. 31, 2016).

447. See The Filipino Channel, *supra* note 226.

448. See iWant TV, Terms of Use, *supra* note 211.

449. Villareal, *Empowering All Stakeholders*, *supra* note 158, at 173.

450. *Id.*

451. *Id.*

offensive.⁴⁵² It is thus necessary to consider the possibility that there are consumers of these new services who should be protected and must be informed in advance of what they might see. At the same time, there must be that constant looking-out for possible breaches of the constitutional rights of other viewers of appropriate age to access specific content online.

To the mind of the Authors, this balancing of interests is best achieved by requiring VOD and livestream service providers to adopt a ratings system that informs viewers in advance of what they may possibly see. With that, they are empowered to make their own choices as to what they watch on the Web. In the process, they will also be forewarned about possible content that may run afoul of laws specifically protecting special sectors such as children, women, and indigenous peoples.

Notably, a VOD or livestream service provider essentially offers a consumer product to the market, and is thus obligated, as a matter of law and equity, to properly disclose information regarding what it offers.⁴⁵³ The Consumer Act of the Philippines⁴⁵⁴ provides that a consumer is a “natural person who is a purchaser ... or prospective purchaser ... of consumer products, services[,] or credit.”⁴⁵⁵ The same law further provides that consumer products or services refer to “goods [and] services ... which are primarily for personal, family, household[,] or agricultural purposes, which shall include but [shall] not limited to food, drugs, cosmetics, and devices.”⁴⁵⁶ No doubt, VOD and livestream service providers fall within the ambit of the Consumer Act, for their principal business is the sale of their livestream and video services to the public at large.

One of the principal tenets of the Consumer Act is its policy of “protect[ing] the interests of the consumer, promot[ing] his general welfare and [] establish[ing] standards of conduct for business and industry.”⁴⁵⁷ Pursuant to this, the law mandates the State to implement measures that provide “information and education to facilitate sound choice and the proper exercise of rights by the consumer[.]”⁴⁵⁸ One of the means by which this is achieved is proper labeling; this means “the display of written, printed[,] or graphic matter on any consumer product ... for the purpose of giving information as to identify ... attributes, directions for use, specifications[,] and

452. See Merlis, *supra* note 31, at 118.

453. Consumer Act of the Philippines, Republic Act No. 7394, art. 74 (1992).

454. *Id.*

455. *Id.* art. 4 (n).

456. *Id.* art. 4 (q).

457. *Id.* art. 2.

458. *Id.* art. 2 (c).

such other information as may be required by law or regulations.”⁴⁵⁹ As such, the Consumer Act mandates service providers, including those that provide web-based entertainment, to properly inform their users of what they may encounter with the product or service they purchased.

And further to what was earlier discussed, co-regulation, but with heavy emphasis on content provider autonomy in certain aspects, turns out to be the most balanced and practical system for VOD and livestream services. At the same time, there will be given reasonable space for these service providers to regulate on their own (it will be “self-regulation within co-regulation,” with the latter animated by the State’s interest to always uphold the dignity of the human person, the protection of the family and other vulnerable sectors, as well as in the enjoyment and consumption of media and entertainment). Overarching these notions is the idea that service providers must focus on providing users with legal tools that will aid them as they explore the vast frontier of digital space.

The objective is to create a ratings system which has pre-determined norms, albeit with room for administrative rule-making as well as enforcement. The system must always promptly consider new developments in cultural values, reflecting the passage of laws to protect media-vulnerable sectors as well as sensitive issues like clashes between religious freedom and freedom of expression. How this is to be implemented by the MTRCB — or any agency that may, in the future, be created for this purpose — is laid out in detail below.

B. Legal Foundations

The framework which this Article envisions, as well as the current framework of the MTRCB, finds its footing in laws and legal principles already in place. In other words, it is basic that any system with legal significance, such as the co-regulatory system contemplated in this Article, must be animated by law and conform to its rule. First and foremost of these would be the Constitution, which is where every exercise of government power draws its strength. Other laws, however, serve to both supplement and implement the provisions of the Constitution, in a way that proves relevant to the present discussion.

Article 2, Section 11 of the Constitution provides that “the State values the dignity of every human person and guarantees full respect for human rights.”⁴⁶⁰ The law of the land thus puts primary emphasis on seeing the value and worth of each and every human being. This, too, is what the ratings system should aspire to implement — a system which empowers

459. *Id.* art. 4 (aq).

460. PHIL. CONST. art. II, § 11.

every person who accesses VOD and livestreaming sites, giving them the opportunity to make an informed choice.

The Constitution also puts a heavy emphasis on protecting the family and the youth. It sees the Filipino family as the “foundation of the nation.”⁴⁶¹ As such, it provides that the State must recognize and value “the sanctity of family life,” protecting and strengthening it as a basic autonomous social institution.⁴⁶² In relation to this, it also emphasizes that it is the “natural and primary right and duty of parents” to rear their children and to ensure their “civic efficiency and the development of [their] moral character.”⁴⁶³ All of this, too, squarely ties in with “the vital role of the youth in nation-building[.]”⁴⁶⁴ as they are the future of the country, and whatever values they uphold will, one day, come to define the Philippines as a nation. As such, the promotion as well as protection of their “physical, moral, spiritual, intellectual, and social well-being”⁴⁶⁵ is necessarily a concern of the State.

The State recognizes that, at the heart of every Filipino home, there is a family, huddled together before their television screens, consuming entertainment media as a collective entity, and that from there, Filipino children can absorb all kinds of themes, language, and perceptions. As such, laws such as P.D. No. 1986 and the Children’s Television Act of 1997⁴⁶⁶ further forward the State’s objectives in regard to the youth. These laws recognize “the importance and impact of broadcast media, particularly television programs[,] on the value formation and intellectual development of children[.]”⁴⁶⁷ Thus, the State is mandated to take “steps to support and protect children’s interests by providing television programs that reflect their needs, concerns[,] and interests without exploiting them.”⁴⁶⁸ Under the Children’s Television Act, the National Council for Children’s Television was established to implement, for the television broadcast industry, child-viewing hours; these are the hours “which are considered to be appropriate for children to watch television[,] taking into account other activities which are necessary or desirable for their balanced development.”⁴⁶⁹ Pursuant to

461. PHIL. CONST. art. XV, § 1.

462. PHIL. CONST. art. II, § 12.

463. PHIL. CONST. art. II, § 12.

464. PHIL. CONST. art. II, § 12.

465. PHIL. CONST. art. II, § 13.

466. Children’s Television Act of 1997, Republic Act No. 8370 (1997).

467. *Id.* § 2, para. 2.

468. *Id.*

469. *Id.* §§ 3 & 4. The National Council for Children’s Television (NCCT) is a government agency under the Office of the President. However, the Children’s Television Act provides the NCCT with an Advisory Committee composed,

this law, a minimum of 15% of the daily total airtime of each broadcasting network has to be allotted for child-friendly shows.⁴⁷⁰ These shows have to be integrated as part of the regular programming of all these networks granted franchises, as part of the renewal process of these networks.⁴⁷¹ These laws show the vital role of the State in rearing and safeguarding the youth. Although they generally make reference to the more traditional means by which media may reach children, it is easy to see how the same spirit may animate Congress when it comes to formulating a regulatory scheme for VOD and livestream service providers.

The Constitution also recognizes “the role of women in nation-building,” and the need to “ensure the fundamental equality before the law of women and men.”⁴⁷² Pursuant to this thrust, Congress has seen fit to pass the Magna Carta of Women. Its provisions, which mandate “non-discriminatory and non-derogatory portrayal of women in media,”⁴⁷³ reflect the fact that women are often objectified in media and in portrayals on film and television shows. As such, the Magna Carta also calls for the entertainment industry “to raise the consciousness of the general public in recognizing the dignity of women[,] and the role and contribution of women in [the] family, community, and [] society through the strategic use of mass media.”⁴⁷⁴

The Constitution also recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.⁴⁷⁵ This reminds regulators and media to pay special attention to possible sensitive issues that may come about in relation to their welfare.

When it comes to the private sector, the Constitution acknowledges its indispensable role in the community; private enterprise is to be encouraged.⁴⁷⁶ Thus, when it comes to regulating online service providers, the State is wary of giving them restrictions so stringent that they are no longer willing to invest in the Philippines. Instead, the law aims to provide for them opportunities to police themselves, to self- and co-regulate with government. This, too, is clear from the Constitution, which provides that the State “shall encourage non-governmental, community-based, or sectoral

among others, of the MTRCB Chairperson, the President of the *Kapisanan ng mga Brodkaster sa Pilipinas*, and a representative from the NTC. *Id.* § 6.

470. *Id.* § 9.

471. Children’s Television Act of 1997, § 9.

472. PHIL. CONST. art. II, § 14.

473. Magna Carta of Women, § 19.

474. *Id.*

475. PHIL. CONST. art. II, § 22.

476. PHIL. CONST. art. II, § 20.

organizations that promote the welfare of the nation.”⁴⁷⁷ Furthermore, the Bill of Rights grants to all the right to form associations not contrary to law.⁴⁷⁸

Furthermore, it is clear that the State has an interest in ensuring that it will preserve and develop its cultural treasures and the artistic works of its citizens. This, the Constitution itself provides when it states that the State must foster a dynamic evolution of a “Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.”⁴⁷⁹ Clearly, the law of the land supports the entertainment industry, particularly as a tool for the building of a national cultural identity.

Owing to technological convergence, and the idea that today, the same shows and films accessible through theaters and the TV set may now be accessed online, the same Constitutional and legal spirit will have to be injected into any discourse relating to the regulation of VOD and livestream service providers. Precepts that make up this “spirit” have to be present in all platforms regulating media entertainment. In this sense, there is here the application of Noam’s Layer approach, which provides that regulations should apply equally across all platforms.

C. Supporting Legal Theories and Concepts

1. “Self-Regulation” within a Broader Co-Regulatory Framework

Any regulation of VOD and livestream service providers must take into consideration several factors. A prime consideration is practicality — what is the best way to regulate service providers, such that there will be no serious difficulties in implementation, both on the side of government and on the private providers. It goes without saying that the most stringent of rules will be useless if the subjects thereof lack the capability to fulfill them. It must also be considered that VOD and livestream services constitute a relatively young, albeit fast-growing industry. Though it is booming, and likely, more entrants will penetrate the Philippine market in the next few years, there are still relatively few players at present. As such, it would not be practicable to create a new government agency to regulate the industry as of yet. This, however, should not hamper the government from creating a framework which allows for flexibility on both its part, and that of OTT service providers. It needs to be a framework which takes into account the liberal way by which the Internet is currently used, while acknowledging that vulnerable sectors may access the Web and find content not fit for them.

477. PHIL. CONST. art. II, § 23.

478. PHIL. CONST. art. III, § 8.

479. PHIL. CONST. art. XIV, § 14.

As discussed, one of the ways by which foreign jurisdictions have chosen to regulate VOD and livestream service providers abroad is the creation of a broad co-regulatory system. This is the practice both in Singapore and in Germany, where the media authority of their respective countries serves as a supervisor, ensuring that players comply with standardized rules of conduct.⁴⁸⁰ Within the co-regulatory system, however, players create an *industry association*, which they are able to regulate themselves — the industry players are the ones who meet and create the guidelines which they will follow. They need only to seek affirmation from the government agency charged with the industry’s supervision. Then, they can choose to create their own form of rating mechanism, figuring out how and where the materials they publish online are to be submitted, all while following the current classification scheme used by the MTRCB. The latter may then step in when there are issues with compliance. This is a highly desirable system, under which industry players are able to police themselves, and is consistent, too, with the objectives of what is presently the MTRCB.⁴⁸¹ The industry association, consistent with the norm of subsidiarity, can be the primary private sector party in a partnership towards dynamic content classification and regulation with government. It is “PPP,” i.e., public-private partnership, plain and simple.

The FSK is instructive in this regard. Each VOD and livestream service provider in Germany is tasked with creating its own online questionnaire, which viewers themselves answer.⁴⁸² The generated results of this survey form the basis for the ratings provided by the site, which follows the age rating segmentations generally followed in Germany (thus, “0,” “12,” etc.).⁴⁸³ This self-generating mechanism notwithstanding, the FSK remains a co-regulator with the service providers, not only because it facilitates industry discussion on the matter, but also because any failure to comply with displaying age rating segmentations may still lead to government-imposed sanctions rather than pure private remedies.⁴⁸⁴

Aside from the ratings system mechanism, however, an industry-wide association composed of VOD and livestream service providers in the Philippines can provide opportunities for the providers to eventually create their own code of conduct, imposing economic sanctions on non-compliant members, as is the practice of the MPAA.⁴⁸⁵ What easily comes to mind as a

480. Linz, *supra* note 264 & Kiat, *supra* note 300.

481. See Presidential Decree No. 1986, whereas cl. & § 2, para. 2.

482. Linz, *supra* note 264.

483. *Id.*

484. *Id.*

485. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 5.

model is the Code of Conduct of the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP).⁴⁸⁶

2. Balancing *Parens Patriae*, Sensitivity, and the Developments of New Media as an Industry

The State's role as *parens patriae* to the youth of the nation is well-established. Along with its duty to protect and uphold the rights of the vulnerable, and those who are often the subject of objectification in the media, the State has a considerable interest in ensuring that the entertainment industry takes into consideration the needs and sensitivities of several sectors in society.⁴⁸⁷ Any regulation put forward for VOD and livestream service providers that figure in the Philippines' corner of cyberspace will have to make use of the same standard that guides the present MTRCB — that of upholding "contemporary Filipino cultural values."⁴⁸⁸

At the same time, it is an acknowledged fact that the Internet is a medium that is meant to be liberating, one where there is space for exploring various interests. It is also true, as seen in *Reno* and *Ashcroft*, that the State, in order to impose restrictions on the use of the Internet, must ensure that no free speech rights are trampled upon, and that the right to use the Internet as one wills, is protected.⁴⁸⁹ Furthermore, it is necessary to consider that livestream and VOD service providers are part of a growing industry of digital services, one that will continue to rise as millions more gain access to the Internet.

The imposition of any regulatory framework, therefore, will need to balance these two factors — what can the State do to protect the youth and other vulnerable sectors, all while ensuring minimal interference in the digital frontier? The means by which this may be possibly done is made clearer by examining the applicable legal techniques in a situation where one attempts to impose a co- or self-regulatory framework.

3. Applicable Legal Techniques

While the law is traditionally used as a coercive tool — one that punishes with penalties to achieve order⁴⁹⁰ — those well-versed in legal technique

486. Kapisanan ng mga Brodkaster ng Pilipinas (the Association of Broadcasters of the Philippines), 2007 Broadcast Code of the Philippines, available at <http://www.kbp.org.ph/wp-content/uploads/2008/04/Broadcast%20Code%20of%202007.pdf> (last accessed Aug. 31, 2016).

487. This is covered in Chapters I and II of this Article.

488. Presidential Decree No. 1986, § 3 (c).

489. *Reno*, 521 U.S. at 871.

490. Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L.R. 75, 79-82 (1941).

know that law can be used to empower, and to enable as well.⁴⁹¹ Renowned jurist and legal philosopher Hans Kelsen, for example, observed that the punishment of criminals is only one aspect of the law; there is also administrative and civil law.⁴⁹² Building on this initial work, Robert S. Summers observed that law was actually made up of five legal techniques, not all of them involving State sanction.⁴⁹³ Of these techniques Summers identifies, three are of particular interest when one creates an advisory ratings system — the social benefit conferral technique, the administrative-regulatory technique, and the private arranging technique.⁴⁹⁴

The social benefit conferral technique posits that the conferral of social benefits, though often involving a question of policy, can be a question of law as well.⁴⁹⁵ It is a legal technique which places an emphasis on *how* benefits are conferred, *who* enjoys benefits, and *what* benefits are necessary for the proper functioning of society.⁴⁹⁶ The provision of a classificatory scheme for the entertainment industry is a conferral of social benefits, one meant to aid audiences as they choose which movies and television shows they will consume; it is meant to empower and to inform the everyday Filipino. The social benefit conferral technique also provides that the member of the public, as a “claimant against the [S]tate,” is entitled to the benefit conferred, and as such, it becomes the duty of the State to create the mechanisms by which the public is able to seek redress from authorities where there is failure on the part of service providers to comply.⁴⁹⁷

491. *Id.* at 82. In the words of Kelsen —

Now the question arises whether this social technique, the law as a social technique, is unavoidable. Perhaps it is only the peculiar content of a social order which makes it necessary to establish this order as a coercive order. Perhaps it is possible to give the social order such a content, to prescribe such conduct for the individuals that it will no longer be necessary to prescribe coercive measures as sanctions in case of contrary conduct, because the individuals would have no inducement to such contrary behavior. Perhaps there is a social order which would make possible a substitution of direct motivation, of voluntary obedience, for the specific technique of the law.

Id.

492. *Id.* at 81.

493. FARRAR & DUGDALE, *supra* note 174, at 14-15.

494. *Id.* & Robert S. Summers, *The Technique Element in Law*, 59 CAL. L. REV. 733, 735-36 (1971).

495. *Id.* at 29-30.

496. *Id.*

497. *Id.* at 30.

The administrative-regulatory technique, on the other hand, is one that exists “to regulate wholesome activity rather than [to] prohibit[] anti-social forms of behavior.”⁴⁹⁸ This technique entails that there is an administrative body that operates preventively rather than providing for a grievance mechanism. Thus, it entails that the body will create regulatory standards, communicate these to all stakeholders, establish a system of licensing and inspection, and provide, as remedy, possible cancellation of licenses or civil or criminal redress.⁴⁹⁹ This is the role currently played by MTRCB in the industry; it serves as a body that aims to prevent the misinformation of the public as regards the entertainment media they consume, by regulating industry players and ensuring that they are one with its vision of empowering the Filipino family.

The private arranging technique puts emphasis on private choice;⁵⁰⁰ it is applied in situations which require autonomy, and where little government regulation is expected or appreciated.⁵⁰¹ Examples would include marriage, family arrangements, or personal lifestyle choices.⁵⁰² Monitoring what children, women, PWDs, and the elderly watch would also fall more aptly under the private arranging technique.

When the State recognizes a situation where the private arranging technique is more applicable, it often chooses to use personal choice side by side with the law, so that the law is used as “an instrument to facilitate and effectuate those private arrangements that are their sources.”⁵⁰³ The law allows the arrangement to govern the relationship created, but creates rules of validation that specify steps to be taken to make the arrangement legally binding to all. This affirmative significance that the law accords will be binding to all involved, once steps for validity are taken.⁵⁰⁴ An example of this is the ATVOD of the U.K. prior to its dissolution — it was an organization created by private stakeholders that the law validated.⁵⁰⁵

Combining the three above-mentioned legal techniques — social benefit conferral, administrative-regulatory, and private arrangement — the Philippine government will be able to provide a regulatory framework which is informative and effective, without being invasive. It will grant to industry stakeholders the benefit of being able to discern what they are

498. FARRAR & DUGDALE, *supra* note 174, at 27.

499. *Id.*

500. *Id.* at 24.

501. *Id.*

502. *Id.*

503. *Id.*

504. FARRAR & DUGDALE, *supra* note 174, at 24.

505. Association for Television On-Demand, *supra* note 413.

viewing, while exercising minimum regulatory powers that are present only as a preventive measure, and not as a prior restraint on speech. Finally, it is a system which will allow for the voluntary creation of an organization by industry players, which, by themselves, may possibly decide on means of self-regulation; this agreement may then be validated and enforced by the State.

4. The Roots of the Age-Based Ratings System

Any acceptable age-based ratings system will have to be based on extensive research, data gathering, and evaluation. The FSK ratings system, for example, is based on Jean Piaget's Four Stages of Cognitive Development.⁵⁰⁶ The same consideration (i.e., the cognitive development of the child vis-à-vis the entertainment media he or she consumes) animates the MTRCB, as well as any future instrumentality or mechanism that will be legally created to regulate and further develop VOD and livestream service providers. For this sub-Section of the Article, the Authors ask for some space to expound on Piaget's theory, in order for readers to gain a deeper understanding of what forms the basis of any ratings classification system.

Piaget's theory essentially provides that a child is able to process and understand information in varying ways as he or she ages, something which those who create classification systems must keep in mind when formulating the proper age segmentations.⁵⁰⁷

According to Piaget, when a child is born, until he reaches the age of two, he or she is at the sensorimotor stage, which entails that his or her "knowledge develops primarily through his or her sensory or motor abilities."⁵⁰⁸ From the age range of two to seven years old, however, the child is at the preoperational stage, which means that his or her "knowledge is represented by language, mental imagery, and symbolic thought."⁵⁰⁹ Furthermore, from the age of seven to 12, children already learn to "reason logically about concrete objects and events."⁵¹⁰ At 12 years old and above, a child is already able to "think deeply about concrete events and [] reason abstractly and hypothetically."⁵¹¹ Based on these stages, as well as research through studies on the impact of feature films on minors, the FSK came up with ratings that would best reflect a child's understanding of the world, so that the final classificatory scheme is reflective of a child's cognitive

506. Department of Psychology, University of Colorado Boulder, *supra* note 327.

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

development.⁵¹² As such, its ratings start at “0,” meaning that all children may watch the program, to “2,” to “6,” to “12,” and then to “18.”⁵¹³ The FSK system thus looks at the film or show rating from the lens of a child, exploring how he or she may perceive a film, and giving a rating to meet that perception.⁵¹⁴

Juxtaposed against the Philippine ratings system, Piaget’s theory validates what is currently being implemented in the country. The general cut-off age for younger audiences — 13 years of age — reflects the time (in Piagetian thought) in a youth’s life when he or she starts to think more deeply, reason more abstractly, and understand hypothetical situations. An added dimension though in the country’s ratings is that content is seen from the lens of parents.⁵¹⁵ The ratings reflect how much parental guidance is needed for a particular film or television program.⁵¹⁶

A factor to consider, of course, would be the matter of pervasiveness, as earlier discussed. Free television is more pervasive than theater-based cinema. And notwithstanding the speed of access by which one may find content online (by the mere click of a few buttons, as it were), it can still be argued that the content over VOD and livestream service providers are less pervasive in general.⁵¹⁷ They necessarily involve more than one or two steps in regard to access, added to that is that measure of deliberation as to whether to go to a certain site, or follow a particular link. For convenience, then, the current ratings for films may be used on VOD and livestream

512. Linz, *supra* note 264.

513. *Id.*

514. Lim, *supra* note 316.

515. Marinel R. Cruz, MTRCB enlists help of parents, PHIL. DAILY INQ., Sep. 25, 2014, available at <http://entertainment.inquirer.net/153354/mtrcb-enlists-help-of-parents> (last accessed Aug. 31, 2016).

516. *Id.*

517. In this connection, the Authors are not oblivious to the Supreme Court’s observation in *Disini, Jr. v. Secretary of Justice* that “cyberspace is an incomparable, pervasive medium of communication.” *Disini, Jr. v. Secretary of Justice*, G.R. 716 SCRA 237, 328 (2014). The Authors, however, respectfully submit that the perils addressed by the said remark pertain more to those that abound in social media, e.g., instances of “cyber libel” emanating from Facebook or Twitter posts, including user-generated content. Ratings and classification pertain more to materially produced deliberately for entertainment, and in some instances, for discussions in public or current affairs (note that Section 7 of Presidential Decree No. 1986 excludes straight news, i.e., “newsreels,” from the MTRCB’s jurisdiction, but not public affairs). *Cf.* *MTRCB*, 448 SCRA at 582 & 585 (2005). This thinking is without prejudice to any future legislation precisely defining entertainment as well as “info-tainment” content over the Internet as “pervasive media.”

service providers as well. Thus, the following ratings will be used — General Audience (“G”); Parental Guidance — 13 (“PG”); Restricted — 13 (“R-13”); Restricted — 16 (“R-16”); Restricted — 18 (“R-18”); and Not for Public Exhibition (“X”).⁵¹⁸

D. Framework Proper

Now that the above considerations are set in place, the Authors proceed to discuss their proposed framework. The most important aim here is to aid and empower parents and responsible adults to properly discern what their children should be able to access on the Internet. The Internet has put a great emphasis on personal autonomy — it is the beholder and user of the content, who instantaneously becomes the judge as to what should be seen and heard, as well as shared or distributed. Parenthetically, “judgment” requires the application of norms, which, in the first place, should be “known” by its users, and understood by them. And with that comes responsibility. All these, in turn, are rooted in values. After all, “to say that something has value is to make a judgment or appraisal” in the context of what is *good* and *evil*.⁵¹⁹ The beholder and user of content, including the distributor or sharer, must be enabled such that he or she operates under a definitive ethical framework. That framework, or better still, foundation, necessarily demands “the affirmation of an objective world of values, that is to say, of moral good.”⁵²⁰ At the most basic, the Authors are impelled to fend off or negate any form of “relativism” — the latter being that which the “un-empowered” beholder, user, and sharer of media content is prone to embrace and practice.⁵²¹ The framework should thus be one that will focus on *audience empowerment* — giving the consumer of VOD and livestream service providers the power of discernment. The benefit to family members in this regard is not only limited to the here-and-now. Young people, through the example of adults, and the reflective manner by which they are exposed to age-appropriate content, are actually “formed” to become responsible consumers of media. They are, as it were, being trained thus to form and use criteria. The ratings system propounded by this framework should thus be well-researched, highly visible, and easy to understand.

First, in terms of having a broader framework, the approach of Singapore’s MDA is worth considering. Using the TV-model approach, the State can acknowledge that content that is available on television is now accessible online. As such, regulations applied to broadcasters are, as a general

⁵¹⁸MTRCB IRR, ch. IV, § 1.

⁵¹⁹RALPH GOMEZ, WHAT’S RIGHT AND WRONG IN BUSINESS? (A PRIMER ON BUSINESS ETHICS) 5 (2002 ed.) (emphasis supplied).

⁵²⁰*Id.*

⁵²¹*Id.* at 7.

rule, applied to VOD and livestream service providers. Of course, ratings for films shown in theaters still serve as a convenient template for those movies that will find their way online. Following the MDA's TV-model approach, the same regulatory body that monitors television and film content, the MTRCB, can also regulate VOD and livestream service providers.⁵²² It bears to repeat, though, that this will take legislative action owing to the *sui generis* nature of the Internet and the reasonable supposition that the lawmaker of P.D. 1986 could not have contemplated VOD or livestream content. VOD and livestream service providers will therefore be required to obtain licenses from the MTRCB to be able to offer their services in the country. The classification ratings, it goes without saying, can be amended from time to time to serve "public interest" or developments in "contemporary Filipino values."⁵²³ The norm shall always be that parents and other users of the platforms will understand and effectively use the ratings system applied online.⁵²⁴ The Authors hasten to add, however, that there will be values that will always be "contemporary," i.e., there at all times. These are those universal values founded on both natural and constitutional law — the right to life, the right to found a family, religious freedom, subsidiarity and participation, a legal system that hears before it condemns, etc.

Second, as mentioned, a dynamic co-regulatory approach can be applied. The MTRCB can function as a general supervisor over the VOD and livestream services industry. Following this, the industry itself may form an association or body, which itself creates a code of conduct that, ideally, all players agree to follow. Similar to the ATVOD in the U.K., the industry players may designate representatives in the body, in order to discuss the means by which content may be classified and the industry as a whole may be developed in terms of audience sensitivity and empowerment. This would include discussions on how vulnerable sectors and the youth may be better protected online. The objective would be to develop "best practices" as to how to balance freedom of expression, on the one hand, and age-appropriate as well as audience-sensitive content on the other. However, just like the FSK in Germany, the MTRCB will serve as an "enabling guardian" which, when prompted, may impose sanctions, including the revocation of licenses, when there are non-compliant VOD and livestream service providers.⁵²⁵ The MTRCB may also initiate and champion industry discussions as to the integration of measures that will increase audience-based sensitivity and audience empowerment mechanisms.

522. Kiat, *supra* note 300.

523. *Id.*

524. *Id.*

525. Linz, *supra* note 264.

Third, the ratings system currently used by the MTRCB can also be used by VOD and livestream service providers so that users may quickly comprehend the ratings used by the sites. However, instead of submitting online content to the MTRCB for classification, the service providers themselves may either choose to use the ratings already previously provided by the MTRCB (this can be covered by a memorandum of agreement or similar arrangement with legal significance), or, for new or original content which has not been subjected to the Board's scrutiny, the online service provider may devise a self-classificatory ratings system, similar to the one promoted by NICAM in the Netherlands or the FSK in Germany for VOD and livestream service providers. These would entail asking users to answer an online questionnaire about the content of the show or film watched and entering the scores obtained into an algorithm.⁵²⁶ The result of the latter will then be used as the basis for the rating of that particular piece of content. Alternatively, if the infrastructure necessary for the latter is too expensive for the players in the industry, the ATVOD-like association they will form may choose to create its own ratings board for the classification of original or new content. This Board, similar to the MPAA, may be composed of parents who will rate the film in a way that "reflect[s] the rating [they feel] a majority of their fellow parents would give each film."⁵²⁷ The MTRCB then provide administrative validation to ratings recommended by relevant players, through reportorial mechanisms, or it can simply exercise "post-review" regulation. It will make sense, though, that any misstep in the imposition of the ratings, as when a rating inappropriate to the age range of the audience is given, will be subject to administrative sanctions (at the very least).

Fourth, the ratings system to be implemented must lead to the effective and significant conferral of social benefits to be considered a success. For one, parents should be satisfied over the State's and society's support for the former's natural right and duty to rear and form their children. To ensure this, it is desirable that service providers make use of symbols, similar to those under NICAM's Kijkwijzer model. In that model, while there are still ratings which pertain to the appropriate age range for the content made available, there are also descriptive symbols for the type of sensitive content which may be seen by the viewer. To illustrate, below are the symbols used in the Kijkwijzer model⁵²⁸ —

526. *Id.*

527. MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 164, at 6.

528. The official descriptions for the Kijkwijzer symbols can be found on their website. Kijkwijzer, Kijkwijzer Explained, *available at* <http://www.kijkwijzer.nl/about-kijkwijzer> (last accessed Aug. 31, 2016).



Image 1. The Kijkwijzer Model.⁵²⁹

In the Netherlands, whenever a show contains themes not suitable for all audiences, NICAM requires that the appropriate symbol to be placed on posters or videos.⁵³⁰ The “injection” symbol, for example, is displayed when drugs or alcohol are featured in the film.⁵³¹ The “spider” symbol is for horror.⁵³² This type of symbol usage makes it much easier for parents, children, and the audience in general to see what content they may stumble upon in a particular film or show. The use of symbols, over and above more tests, easily makes the ratings system more dynamic and responsive. Quick recognition leads to quick responses. Of course, it is desirable that if ever symbols of this sort are used in the Philippines (and regardless of whether in VOD and livestream, or free TV, or cable, as well as satellite television), the symbols actually employed will be those more in keeping with Filipino culture.

Fifth, and as briefly mentioned earlier, the same classifications used in films will be used when regulating VOD and livestream service providers. This is because online service providers are not as pervasive as television, in the sense adopted in the *FCC* case, and thus, content featuring higher ratings should be allowed on these platforms, albeit only to viewers of the proper age for the material. Any rating provided will take into consideration the

529. Huis van Belle, *Leeftijdsgrens bij films — wat vind jij?*, available at <https://www.huisvanbelle.nl/wp-content/uploads/2013/03/kijkwijzer.gif> (last accessed Oct. 22, 2016).

530. The Netherlands Institute for the Classification of Audiovisual Media, *supra* note 307, at 3.

531. *Id.*


532. *Id.*

presence of themes, drugs, sex, nudity, language, violence, and horror which may be present in a particular feature.⁵³³ The ratings can be as follows⁵³⁴ —

Rating	General Description	Color
GENERAL AUDIENCE (“G”)	Viewers of all ages may watch the video. A “G” classification advises parents or supervising adults that the film is suitable for all audiences.	
PARENTAL GUIDANCE (“PG”)	Viewers below 13 years old must be accompanied by a parent or supervising adult when viewing this on an online platform. A “PG” classification advises parents or supervising adults that the film may contain any of the following — theme, language, violence, nudity, sex, and horror, the treatment of which is suitable for children below 13 years of age.	
RESTRICTED-13 (“R-13”)	Only viewers who are 13 years old and above can view the video. An “R-13” classification advises parents or supervising adults, as well as the would-be viewers themselves, that the film may contain any of the following — theme, language, violence, nudity, sex, horror, and drugs, the treatment of which may not be suitable for children below 13 years of age.	
RESTRICTED-16 (“R-16”)	Only viewers who are 16 years old and above can watch the video. An “R-16” classification advises parents and supervising adults that the film may contain any of the following — theme, language, violence, nudity, sex, horror, and drugs, may not be suitable for children below 16 years of age.	
RESTRICTED-18 (“R-18”)	Only viewers who are 18 years old and above can watch the video. An “R-18” classification advises viewers, parents, and	

⁵³³.MTRCB IRR, ch. IV, § 1.

⁵³⁴. The ratings provided, as well as the descriptors, are taken, with modifications, from the Implementing Rules and Regulations of the MTRCB. See MTRCB IRR, ch. IV, § 1.

Rating	General Description	Color
	supervising adults that the film may contain any of the following — theme, language, violence, nudity, sex, horror, and drugs, the treatment of which may not be suitable for children below 18 years of age. ⁵³⁵	

Sixth, information pertaining to the video being watched is displayed is important to keep consumers of VOD and livestream service providers well-informed as regards content. Proper “labeling” is a key to the success of this classification system, and is the hallmark of effective consumer protection. The ratings should be displayed beside the film when users peruse through the menu of options offered to them. This is already the case for some VOD and livestream service providers.⁵³⁶ In addition, the colors used by the MTRCB, as specified in the table above, may be used when displaying the ratings. Furthermore, the Kijkwijzer-like symbols should also be used side by side with the ratings, laid out in a neat line for viewers to quickly spot what type of content is featured on the video. Prior to the showing of any content, a pictogram accompanied by a full-screen written advisory showing the particular Kijkwijzer-like symbol and rating itself, shall be broadcast for at least three to five seconds immediately before the opening credits of the particular video. The text of the full-screen written advisory shall be written in font size 10, Arial-narrow, using a solid white color with black outline.⁵³⁷ Furthermore, while the video is playing, the pictogram advisory showing the MTRCB rating from Image 2 should be clearly superimposed at the upper right corner of the video screen throughout the entire showing of the

535. The rater can, of course, make a determination that content is not fit for exhibition even through VOD or livestream services, as when content constitutes unprotected speech. The norms under Section 3 (c) of Presidential Decree No. 1986 can serve as template for indicators of unprotected speech, alongside the time-honored test required under *Miller*. See Presidential Decree No. 1986, § 3 (c) & *Miller*, 413 U.S. at 24.

536. See, e.g., iflix, *Scrubs*, available at <http://play.iflix.com/play/2934/?type=show> (last accessed Aug. 31, 2016).

537. This is taken from the current pictogram used by the MTRCB for television shows. The Authors chose to use the television version of the pictogram because a screen for viewing online videos is more likely to follow the size and dimensions of a television screen as opposed to a movie screen. Furthermore, many families watch content from VOD and livestream service providers through their home television screens. See MTRCB IRR, ch. IV, § 2.

program, based on the program's classification.⁵³⁸ Meanwhile, the most appropriate Kijkwijzer-like symbol may also be placed side-by-side with the rating. For a demonstration of how this will appear on the screen, see the image below, taken from the official website of NICAM⁵³⁹ —



Image 2. A Sample of the Kijkwijzer Symbols Used on Television.⁵⁴⁰

Seventh, if it is technically possible, it is also suggested that PIN Code protection mechanisms shall be used for content that is restricted (i.e., for “R-13,” “R-16,” and “R-18”). This is already required by FSK to ensure that access is limited to those who are of the proper age.⁵⁴¹

Eighth, some VOD and livestream service providers, such as Netflix, allow for previews of episodes or films, as well as trailers, prior to the actual feature being played.⁵⁴² It is also recommended that there be a requirement that these trailers feature only “G”-rated content, just as television broadcasts are required to only show trailers which would not surpass a “G”-rating in terms of content.⁵⁴³ Though, as earlier mentioned, the ratings system to be used will follow that which is currently imposed on film, trailers, or previews available online, are, by the nature of the platform on which they may be viewed, more analogous to those that are available on television than those

538. This, too, is what is required on television programming. The placement, however, is moved from the bottom right to the upper right. This is because videos available online often have a subtitle feature. *Id.*

539. NICAM, Kijkwijzer, available at <http://www.kijkwijzer.nl/english> (last accessed Aug. 31, 2016).

540. *Id.*

541. Linz, *supra* note 264.

542. Jonathan O’Callaghan, Netflix adverts are coming: Company starts rolling out trailers that play before you start streaming shows, available at <http://www.dailymail.co.uk/sciencetech/article-3107315/Netflix-adverts-coming-Company-starts-rolling-trailers-play-start-streaming-shows.html> (last accessed Aug. 31, 2016).

543. MTRCB MC No. 04-2014, art. II, § 1.

in theaters. In a theater, the trailers played are supposed to be consistent with the main feature that one has paid to watch. Online, however, trailers or previews may play prior to even making a choice as to what one hopes to watch. Depending on the platform used, there are instances where simply hovering over a video will cause a preview to play; other times, a user may be watching a “G”-rated show, but a trailer with a higher rating is played prior to his or her selection. Owing to these possibilities, “G”-rated trailers would be more prudent and safer for VOD and livestream service provider consumers.

V. LIMITATIONS

It is acknowledged that there will be some difficulties immediately implementing any system, even a self-regulating one, simply because the digital infrastructure to put these mechanisms up will be difficult for newer VOD and livestream service providers. It will entail additional investments that may not easily coincide with the short-term plans and goals of younger players in the industry.

Also, as it stands, and as earlier mentioned, the scope of the MTRCB’s regulatory powers is limited to films, television program, and publicity materials essentially for public exhibition.⁵⁴⁴ These service providers, on the other hand, do not publicly exhibit their videos; precisely, customers come to them, and choose which videos they hope to watch in the privacy of their homes. Thus, the implementation of a ratings scheme may meet some opposition from these service providers, or even the consuming public (but then again, it can be argued that, from a consumer standpoint, the sheer availability of the products for consumers gives media content enough “public” character). Regulating online video service providers will also require additional budget, or such other relevant entity created or designated by law.

There is also the issue of navigating the fine line between “co-” and self-regulation. While it is ideal to create a system where there is only broad supervisory authority over a particular industry, the metes and bounds as to how this authority will be exercised will remain a constant challenge.

Nonetheless, with proper support mechanisms, and with the cooperation of the service providers themselves, as well as other stakeholders, it is certainly better to gradually introduce a legally and industrially sound framework rather than wait for a big “Magna Carta” moment which might not even come.

⁵⁴⁴MTRCB IRR, ch. III.

VI. CONCLUSION

*Matalinong Panonood para sa Pamilya at Lipunan nina Juan at Juana.*⁵⁴⁵ This is not only a campaign slogan for the MTRCB. It is a continuing program, grounded on both natural law and positive law, to promote and achieve discerning Filipino viewership. Indeed, what good is a ratings and audience sensitivity-based system if viewers do not fully understand and use the same. It is one that finds its strength in empowering the Filipino family, and allowing parents and responsible adults to make informed choices as to what is best for their children and for themselves. Parallel to this would be a regime of authentic and dynamic self-regulation on the part of the stakeholders. Stakeholders will always be prodded to self-regulate when they know that the audience is alert and discerning.

There will always be an audience in the media universe. The hope is that the humble “template” presented in this work could be the foundation for a dynamic ratings system, grounded on norms of sensitivity and respect for human dignity, for audiences for VOD and livestream content.

Through this Article, the Authors have presented some mechanisms that will allow families and individuals to protect and guard the youth’s consumption of entertainment media over the Internet. The Article has sought to create an audience empowerment-based framework, under which the MTRCB or any equivalent agency created by law will serve more as an “enabler” rather than an overbearing monitor, to the end that online consumers will have “free, prior, and informed consent” (to borrow the subsidiarity-based principle in Republic Act No. 8371)⁵⁴⁶ regarding the content that they will see.

There are many more digital frontiers that have yet to be discussed and addressed. Social networking sites are a key area of interest, as videos are often seen there, though such are often user-generated. But what will always remain is the State’s duty to step up to the challenge of protecting the youth and the more vulnerable sectors of society, fully aware that the consumption of entertainment media so affects their minds and beliefs, as well as the culture of society at large.

545. Villareal, *Empowering All Stakeholders*, *supra* note 158, at 172 (insertion supplied).

546. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating the Funds Therefor, and For Other Purposes [The Indigenous Peoples’ Rights Act of 1997], Republic Act No. 8371, § 3 (g) (1997).