FICCI CAM

Entertainment Law Book 2020

FICCI

cyril amarchand mangaldas
advocates & solicitors

preface

preface

It is an honour and a privilege to present this report on the legal and regulatory issues impacting the Media and Entertainment (M&E) sector, as FICCI Frames 2020's knowledge partner. With this report, we endeavour to present to you a bird's eye view of all important and relevant developments in the past year, encompassing the entire gamut of the M&E sector. I am hoping that it would prove to be a useful ready reference for the readers.

The M&E sector has been witnessing high growth over the last decade, and the past year was no exception. On the legal and regulatory front, there were significant developments. To name a few, in January 2020, the Telecom Regulatory Authority of India (TRAI) made substantial amendments to the New Tariff Order, leading to a complete overhaul of the regulatory framework roughly 10 months after the 2017 regime came into effect. On the Foreign Direct Investment (FDI) front, in the absence of clarity on FDI in digital media, many online publishing houses and news streaming companies have witnessed 100% FDI under the automatic route. However, with the release of Press Note No. 4 on September 18, 2019, the government has restricted FDI in digital media at 26%. Further, the Finance Bill 2020 has reduced the 10% basic custom duty imposed by the Finance Bill 2019 to 5% on newsprint and lightweight coated paper. The change was brought in after several representations were made to reduce the additional burden on the print media as it was already going through a difficult phase.

Apart from this, the digital sector has seen a drastic change in the way content is being consumed by viewers in India. Over-The-Top (OTT) service providers such as Netflix, Hotstar and Amazon Prime, to name a few, are becoming the primary or preferred mode of content consumption. Some OTT platforms have also signed the Code on Self-Regulation, drafted by the Internet and Mobile Association of India (IAMAI), in a bid to establish standards to self-regulate OTT content.

This report presents regulatory developments in the field of TV broadcasting and distribution, music, radio, filmed entertainment and other segments in the M&E space. In addition to the aforementioned, the report also includes several thought provoking articles on diverse topics, dealing with the issues in the M&E sector. I have no doubt that this report will prove to be an interesting read.

I would like to thank FICCI Frames for choosing us as a knowledge partner and all those who have contributed their time and valuable insights in making this report a possibility. I would like to acknowledge the contribution of our Media & Entertainment Practice Head - Bharat Vasani and his team members. I would also like to acknowledge all partners & team members from other practices who have been instrumental in making this report a success.

I hope, as readers, you will find this report insightful and enjoyable.

CYRIL SHROFF
MANAGING PARTNER
Cyril Amarchand Mangaldas
cyril.shroff@cyrilshroff.com
April 2020

preface

preface

The Indian Media & Entertainment (M&E) industry is at an inflection point with the eyes of the world upon us as we progress towards achieving our "Make in India" dream. India is witnessing a significant change in content generation with the emergence of varied platforms, distribution mechanisms and marketing strategies playing a vital role in redefining the reach of Indian content globally.

Technological revolution, that we are currently witnessing across content generation and the emergence of different platforms, along with the advent of globally distributed Over-The-Top (OTT) platforms, have proven to be very impactful in increasing accessibility especially with the increased use of sub-titling and dubbing capabilities. With the large pool of talent and a very strong back-end system, India is on its way to being recognised as a hub of content creation and ideation. In the coming years, the M&E industry is bound to be recognised as one of the key contributors to the Indian economy with several lucrative opportunities presenting themselves to further strengthen the industry. India has the potential of becoming a high quality and cost-effective content creation hub for the world.

With larger scope, complex business models and the rise of digital media as a front-runner in defining the M&E industry, fresh awareness of the laws and regulations that govern the sector and a round-up of existing ones are once again the focus of this comprehensive FICCI – Cyril Amarchand Mangaldas Report.

The articles in this Report are aimed at stimulating a discussion on the extant policy and regulatory issues for the M&E sector and the challenges and opportunities therein. With the dynamically changing understanding of privacy, there is a chapter titled "The PDP Bill 2019: A Perspective for Media Businesses" on the soon to be introduced Personal Data Protection Bill, 2019 and its impact on the M&E sector. A chapter on the New Tariff Order, titled "Dawn of New Tariff Order 2.0" aims to highlight the speedily changing regulatory framework. With OTT media growing to be one of the biggest mediums of consumption, a chapter titled "Content Regulation for OTT Platforms" sheds light on what stakeholders could expect in the coming years on a regulatory front.

The Report touches upon some vital aspects that are playing an influential role in charting the way for the future of the M&E industry and will prove to be a very interesting read for all.

At FICCI, we would like to express our appreciation to Cyril Amarchand Mangaldas and the members of the FICCI Media & Entertainment Committee for presenting the 2020 edition of this Report. This issue lays strong foundations of the possible framework and solutions to developing the laws that will in time, govern the Media & Entertainment industry, in our country.

DILIP CHENOY
SECRETARY GENERAL
FICCI
April 2020

Contributors to the

FICCI FRAMES

Articles and Report

EDITORS

- BHARAT VASANI
- DEVIKA GHOSH
- JHINI PHIRA

CONTRIBUTORS

- AKILA AGARWAL
- ARUN PRABHU
- BHARAT VASANI
- DAKSHA BAXI
- JAYA SINGHANIA
- INDRANIL DESHMUKH
- MEKHLA ANAND
- RADHIKA GAGGAR
- RAMGOVIND KURUPPATH
- RISHI GAUTAM
- SHANEEN PARIKH
- ANAND MOHAN
- ANKIT NAMDEO
- CHIRAG SHAH
- ESHA HIMADRI
- JEET SHROFF
- MOLLA HASAN
- MOLSHREE SHRIVASTAVA
- NAYANA DASGUPTA
- SAMEER AVASARALA
- SAMHITA MEHRA
- SAMIKSHA PEDNEKAR
- SAMRAAT BASU
- SHAISHAVI KADAKIA
- SHIVAM GARG
- SHREYA TEEWARI
- SOUMITA BASU
- SOURAV BISWAS
- SURAJ KUMAR SHETTY
- VIDYA SUNDERAM

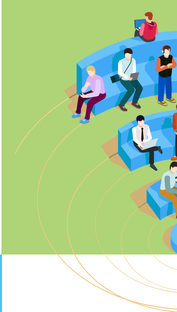
Table of *CONTENT**

01 | 10

Legal & Regulatory Developments in the ***Media and Entertainment Sector***

02 | 20

Dawn of the ***New Tariff Order 2.0***



The PDP Bill 2019 ***A Perspective for Media Businesses***

05 | 34

Surveillance in the ***Post-Puttaswamy Era***

06 | 38

Estate ar

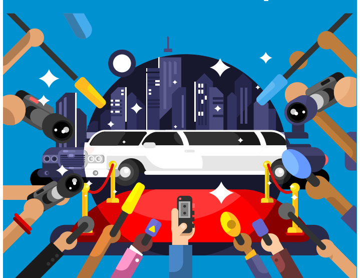
En

P

10 | 50

Online Gaming: of blue Ocean and Grey regulations

11 | 54



Celebrities and Personality rights: ***What's in a Name?***

Online Games ***GST's New Playground***

15 | 70

Penalising ***Expression***

16 | 74

03 | 26

Content Regulation of *OTT Platforms*

04 | 30

FDI in *Digital*

07 | 42

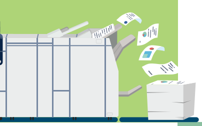
d Succession planning for *Media & tertainment roffesionals*

Bollywood, Copyright and the *Last Minute Injunction in Films*

08 | 46

Effectiveness of *John Doe orders in the Media Industry*

12 | 58



Print media in India *Standing the Test of Time?*

13 | 62

Tax challenges in respect of *Digital Media & Characterisation of Income in the Industry*

14 | 66

16 | 78

To Bet or *Not to Bet*

***DISCLAIMER:**
The information and/or observations contained in this book is for informational purpose only and do not constitute legal advice and should not be acted upon in any specific situation without appropriate legal advice. The views expressed do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas on the issues reported herein and should you have any queries in relation to any of the issues reported herein or on other areas of law, please contact Mr. Bharat Vasani, Partner & Head – Media & Entertainment Practice at bharat.vasani@cyrilshroff.com.

Legal & Regulatory
Developments in the

Media and Entertainment Sector

I. Recent major Developments in the Media and Entertainment Sector

1. Foreign Direct Investment (**FDI**) restricted to 26% in Digital Media

On August 28, 2019, the Press Information Bureau reported that the Union Cabinet had approved the proposal for a review of FDI in various sectors and that a decision was taken to permit 26% FDI under the government approval route for uploading/ streaming of news and current affairs through digital media. This was followed by release of Press Note No. 4 (2019 Series) on September 18, 2019 which formally brought about the aforesaid change. Subsequently, on December 5, 2019, the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 were also amended which notified the changes. A government approval route would essentially give power to the ministries to selectively approve FDI proposals at their discretion. This took the digital media news industry by surprise which was until now operating without any such FDI restrictions.

Under the extant FDI policy in India, FDI was capped at 49% for broadcasting companies and 26% for print media companies, under the government approval route. In the absence of clarity on FDI in digital media, many online publishing/ streaming of news and current affairs companies have seen 100% FDI under the automatic route.

2. The Ministry of Information and Broadcasting (**MIB**) seeks suggestions on Cable TV Networks (Regulation) Amendment Bill, 2020

The MIB vide a notice dated January 15, 2020, proposes to amend the Cable Television Networks (Regulation) Act, 1995. Some of the proposed changes are as follows:

a. Insertion of negative list for registration as cable operator.

b. Deletion of Section 4(3) dealing with non-registration of cable operators who do not transmit or re-transmit channels in an encrypted form through a digital addressable system in view of complete digitalisation.

c. Addition of 'Additional District Magistrate' in the definition of "authorised officer" under Section 2(a).

The proposed amendment, amongst others, has introduced higher monetary penalties and punishments for the violation of the Programme Code and the Advertisement Code.

II. Television - Broadcasting and Distribution

1. The Telecom Regulatory Authority of India (**TRAI**) amends the New Tariff Order on January 1, 2020

The amendments have been made after TRAI issued two Consultation Papers on "Tariff related issues for Broadcasting and Cable services" and "Issues related to Interconnection Regulation, 2017" in the months of August and September, 2019 respectively. Some of the major issues identified by TRAI were the INR19 price ceiling on channels that can form a bouquet, the cap on maximum discount permissible to broadcasters while forming a bouquet, number of channels permitted in Network Capacity Fee (**NCF**), applicable NCF for multi-TV homes, flexibility to DPOs in offering long-term subscription plans and carriage fee payable by broadcasters to DPOs.

An amendment has been carried out to the following Acts:

a. Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017,

b. Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017, and

c. Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017.

The following key amendments have been carried out by TRAI:

a. TRAI has re-introduced the "Twin-Condition" to address the issue of huge discounts in the formation of bouquets by broadcasters vis-à-vis sum of a-la-carte channels to ensure that price of a-la-carte channels does not become illusionary.

   I. *the sum of the a-la-carte rates of the pay channels (MRP) forming a part of a bouquet shall under no circumstances exceed one and a half times the rate of the bouquet of which such pay channels are a part; and*

   II. *the a-la-carte rates of each pay channel (MRP), forming a part of a bouquet, shall under no circumstances exceed three times the average rate of a pay channel of the bouquet of which such pay channel is a part.*

b. Additionally, the maximum retail price per month of a pay channel cannot exceed the maximum retail price per month of the bouquet containing that pay channel.

c. Only those channels priced at INR 12 or less will be permitted to be part of the bouquet offered by broadcasters.

d. Number of free channels under NCF of INR 130 (plus taxes) has been increased to 200.

e. Channels declared mandatory by the Ministry of Broadcasting will not be included while calculating the 200 channels in point (d).

f. DPOs cannot charge more than INR 160 per month for providing all channels available on their platform.

g. In case of a multi-TV home, where more than one TV connection is registered in the name of one person, a maximum fee of 40% of the declared NCF will be charged for the second and additional connections.

h. DPOs may offer discounts on connections for six months or more.

i. To address the concerns of broadcasters regarding huge carriage fee being charged by DPOs, TRAI has mandated MSOs, Heads in the Sky (**HITS**) operators, IP TV service providers will not have target market bigger than States or Union Territory, as the case may be. Additionally, TRAI has proposed a cap of INR 4 lakh per month on carriage fee payable by a broadcaster to a DPO for carrying a channel.

j. In order to provide more flexibility to DPOs to place TV channels on the Electronic Programme Guide (**EPG**), TRAI has mandated that channels offering programmes in a particular language under a genre must be clubbed together. The EPG layout is to be mandatorily reported to TRAI and no subsequent change can be made without TRAI's approval.

The amendments have significantly changed the regulatory framework and a challenge to the same has been filed in the Bombay High Court by the Indian Broadcasting Federation and other stakeholders in January 2020. As of now, the outcome of the litigation is awaited.

2. TRAI issued a Consultation Paper on platform services offered by Direct to Home (**DTH**) operators

On August 28, 2019, TRAI issued a Consultation Paper titled "Platform Services offered by DTH Operators". The Consultation Paper has been issued in response to a reference by the MIB vide a letter dated 02 July 2019, wherein it sought TRAI's recommendations on various issues related to platform services with reference to the DTH guidelines.

All TV channel DPOs, i.e., Multi-System Operators (**MSO**), DTH and HITS operators, operate certain kind of programming services which are specific to each platform and are not obtained from broadcasters. All these platform specific services being offered by DPOs, but not obtained from broadcasters, have been referred to as Platform Services (**PS**). DPOs use PS to offer innovative services and product differentiation. It also acts as unique selling proposition for DPOs and also helps them in meeting the specific needs of their subscribers. Provisioning of such services also results in an additional source of revenue for the DPOs as they earn revenue not only from their subscription but also from the advertisements transmitted along with such PS. TRAI sought views of stakeholders on issues related to PS in order to introduce a regulatory framework for the same.

3. TRAI releases the Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements and All Such Other Matters Regulations, 2019

On September 4, 2019, TRAI introduced the Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements and All Such Other Matters Regulations, 2019 (**Register of Interconnect Regulations**). The primary objective of the Register of Interconnect Regulations is to formulate the contours of a reporting system for the service providers so that they can report details of interconnection agreements including commercial details to the relevant authority. It would enable the authority to maintain a Register of Interconnect as per the provisions of the TRAI Act. These Regulations have been challenged before the Delhi High Court and the Kerala High Court by the Indian Broadcasting Federation and the All India Digital Cable Federation in December 2019 and January 2020, respectively. The matters are set to be heard in February 2020.

4. TRAI issued a Consultation Paper on Entry Level Net-Worth Requirement of MSOs in Cable TV Services

The MIB vide a reference dated May 16, 2018 had requested TRAI to provide recommendations on the appropriate levels for fixing of entry level net-worth of MSO to operationalise cable TV digitization across the country. The Consultation Paper dated April 9, 2019, deliberates whether there is a need to fix entry level net worth requirement for MSOs in cable TV services. The Consultation Paper also seeks suggestions regarding the documents and method to assess the net-worth of an applicant, if a minimum value is prescribed.

5. MIB issued advisory to channels over portrayal of children in dance reality shows

The MIB vide an advisory dated June 18, 2019, has cautioned TV channels from telecasting dance reality shows which portray children in obscene, vulgar and evocative fashion. The advisory came after the MIB noticed that children are performing age-inappropriate dance moves which may have a negative impact on them. The advisory noted that all private satellite TV channels are expected to abide by the provisions contained in Programme and Advertising Codes prescribed under the Cable Television Networks (Regulation) Act, 1995 and the Rules framed thereunder. The advisory prohibits all TV channels from telecasting content that denigrates children in any manner, and not encourages them to not showcase vulgar language or violent scenes in programmes which are meant for children. The MIB has further advised TV channels to show maximum caution and mindfulness while televising reality TV shows.

6. MIB advises all private TV satellite channels to carry programmes with sign language interpretation for persons with disabilities

In response to concerns raised by the Department of Empowerment of Persons with Disabilities regarding the lack of assistive technology in TV programmes, the MIB vide a notification dated February 7, 2019 has advised all private satellite TV channels to carry TV programmes with sign language interpretation for access by differently abled people. All TV channels, News Broadcasters Association, Indian Broadcasting Foundation and Association of Regional Television Broadcasters of India were requested vide an advisory dated June 13, 2016, to carry the same language captions and audio description along with the programmes and news reports by TV channels for accessing by differently abled people. However, since the advisory was not previously adhered to, the MIB has re-issued a similar advisory.

7. TRAI issued a Consultation Paper on Review Of Television Audience Measurement and Ratings In India

Television Audience Measurement has been in a developing phase with advanced technologies being used and updated to maintain transparency and improve credibility of the system. Over the years, new issues have emerged which need to be addressed and several concerns relating to neutrality and reliability of the existing rating system have been raised by stakeholders, which necessitated a need to review the existing Television Audience Measurement and Ratings system in India. Further, issues relating to panel expansion and panel tampering have also surfaced. Since July 28, 2015, the Broadcast Audience Research Council (**BARC**) has been the sole provider of TV rating services on commercial basis.

The objective of the Consultation Paper dated December 03, 2018 is to solicit the views of stakeholders on regulatory initiatives/measures to be taken to make TV rating services more accurate and widely acceptable. The Consultation Paper also explores the possibilities of using new technologies to enhance credibility, transparency, neutrality and fairness in the TV rating in India.

8. MIB advises TV Channels to run scroll to report objectionable advertisements

The MIB advisory dated January 24, 2019 requires all programmes and advertisements telecast on TV channels, transmitted and retransmitted through the cable TV network to adhere to the Programme and Advertising Codes prescribed under the Cable Television Networks (Regulation) Act, 1995 and rules framed thereunder. Rule 7(9) of the Cable Television Networks Rules, 1994 states that "No advertisement which violates the Code for self-regulation in advertising, as adopted by the Advertising Standards Council of India (**ASCI**), Mumbai for public exhibition in India, from time to time shall be carried in the cable service." In order to create mass consumer awareness about the self-regulatory mechanism of ASCI and for immediate and effective steps towards this goal, all TV channels are advised to run a scroller as follows:

"Objectionable *ads?*

Complain to The Advertising Standards Council of India (ASCI) s 7710012345 ascionline.org"

III. Digital Media

1. Over-the-top (**OTT**) platforms sign IAMAI Code for Self-Regulation

Netflix, Hotstar, Reliance Jio, Zee5, AltBalaji, Sony-Liv, Viacom18 and Arre are some of the online video streaming platforms who have signed the Code on Self-Regulation drafted by the Internet and Mobile Association of India (**IAMAI**). The "Code for Best Practices for Online Curated Content Providers" drafted by the IAMAI aims to act as self-guiding principles for Online Curated Content Providers. In February 2020, the MIB has asked OTT content players to set up an adjudicatory body and finalize a code of conduct within 100 days.

IV. Filmed Entertainment

1. MIB seeks to amend Cinematograph (Certification) Rules, 1983 for mandatory display of title, castings, and credits in the language of the dialogues of the film

On account of directions given by the Committee of Petitions, Rajya Sabha to enforce the use of Hindi and other regional languages for display of credits and castings in films, the MIB on December 13, 2019 proposed to make an amendment to Rule 22(3) of the Cinematograph (Certification) Rules, 1983 for mandatory display of title, castings and credits in the language of the dialogues (Hindi/ Regional language) in the Film. In addition, the same may be displayed in any other language also. The current practice of showing title, castings and credits of Hindi and regional language films in English language only, tends to deprive people who are not conversant in English of crucial information related to the cast and crew of a film.

2. MIB sets up 'Film Facilitation Office' in National Film Development Corporation (**NFDC**) as the single window clearance and facilitation mechanism for film shootings

The MIB vide a letter dated May 30, 2019, has informed the film fraternity members that the MIB has set up the Film Facilitation Office in the NFDC as the single window clearance and facilitation mechanism, with a view to promote and facilitate film shootings by both domestic and foreign filmmakers in India and to enhance India's positioning in the global market as an ideal filming destination. In this regard, the Film Facilitation Office has also set up the web portal www.ffo.gov.in which allows submission of online film shooting applications from both domestic and international filmmakers.

3. The Supreme Court of India directs the government of West Bengal to pay INR 20 lakhs compensation to producer of Bengali film "Bhobhishyoter Bhoot" which suffered unofficial ban

The Supreme Court of India vide an Order dated April 11, 2019 passed a landmark Judgement in ***Indibility Creative Pvt Ltd. v. Govt. of West Bengal***, directing the West Bengal Government to pay compensation of INR 20 lakhs to the producer of the film ***"Bhobhishyoter Bhoot"***, which had to face an ***"unofficial"*** ban in the state. Justice Chandrachud and Justice Gupta had deliberated on the matter stating that once a movie is certified by the Central Board of Film Certification, it is not open to any authority to issue formal or informal directions preventing the producer from having the movie screened.

V. Print Media

1. MIB proposes to replace Press and Registration of Books Act, 1867 (**PRB Act, 1867**) by Registration of Press and Periodicals Bill, 2019 (**RPP Bill, 2019**)

The regulation of printing presses and newspapers printed in India and their registration is currently governed by the PRB Act, 1867.The MIB has released a draft RPP Bill, 2019 dated November 25, 2019 and sought public comments aiming to replace the PRB Act, 1867. Through the draft RPP Bill, 2019, the MIB has proposed to bring digital media in the ambit of the new registration regulations, and do away with prosecution provisions of imprisonment of publishers and to simplify implementation of the registration process through a Press Registrar General. Some of the main features of the RPP Bill, 2019 includes:

a. Registration of publishers of news on digital media with the Registrar of Newspapers of India.

b. Incorporating a simple system of registration of e-papers.

c. Central Government and State Governments can frame appropriate rules/ regulations to regulate the criteria/ conditions for issuing Government advertisements in newspapers, accreditation of newspapers and such other facilities for newspapers.

d. Doing away with the existing procedure of furnishing of declaration by publishers/ printers before the District Magistrate and its subsequent authentication.

e. Doing away with the earlier provision under the PRB Act, 1867 of prosecution of publishers.

2. Increase in import duty on newsprint

Union Finance Minister while presenting the Union Budget for 2019-20 in Parliament stated that the government would be imposing 10% customs duty on newsprint and 5% on printed books. This move was brought to encourage the domestic publishing and printing industry. The duty would be levied on both the uncoated paper used for printing of newspapers and lightweight coated paper used for magazines. Prior to this move, no import duty was levied on newsprint. This was subsequently reduced to 5% in the Budget 2020.

VI. Radio

1. The Delhi High Court bars 100 radio channels from streaming audio of World Cup 2019

Channel 2 Group Corporation filed a case in the Delhi High Court to prohibit other radio stations, internet and telecom service providers, and websites from broadcasting audio of the ICC World Cup 2019. The Delhi High Court passed an Order dated June 03, 2019 restricting 64 websites, 4 private radio stations, and 36 internet and telecom service providers from broadcasting the audio. However, it held that the platforms may relay the scores of the cricket matches with a 15-minute time-lag.

2. Advisory to all FM radio channels to give wide publicity to Intensified Mission Indradhanush 2.0

The MIB issued an advisory dated November 27, 2019 requesting all FM channels and private satellite TV to give adequate publicity to Intensified Mission Indradhanush 2.0 as part of their corporate social responsibility activity. Mission Indradhanush 2.0 is an initiative by the Government to ensure that not a single child in the country has missed out on vaccination with a special focus on improving coverage in the areas with "low" immunization. FM radio channels could be used to offer support, assistance and contribution in order to make this mission a success.

VII. Music

1. TRAI releases Consultation Paper on Reserve Price for auction of FM radio channels

The Consultation Paper dated October 16, 2019 sought comments to finalise the methodology for setting reserve prices for the auction of FM radio channels. The Consultation Paper also raises the following questions:

a. Is the methodology used in TRAI's recommendations dated March 15, 2015 for valuation FM Radio channels appropriate or could alternative approach/ methodology could be suggested?

b. Can the Phase-III policy i.e. the highest bid price received for a city in Phase-II continue to be the reserve price for the existing cities? If so, should the inflation be accounted for? If no, what approach/ methodology for existing cities could be suggested?

c. Can the various technical changes, behavioural changes among the listeners, availability of devices to listen to FM Radio be duly captured by the variables – Population, Per Capita Income, listenership of FM Radio, and Per Capita Gross Revenue (**GR**) earned by existing FM Radio operators, as recommended by TRAI in 2015, for valuation of FM radio channels in new cities? If not, what additional/ alternative variables should be considered for truly reflecting the valuation of FM radio channels in new cities?

d. How should the present listenership of FM Radio in each state be estimated?

e. In case methodology as recommended by TRAI in 2015 for determining reserve price for FM Radio channels in new cities is adopted, should the reference price be taken as the average of successful bids received in Phase-III auction held in 2015 and 2016? If no, what alternative proposal could be suggested?

f. Can the proposed reserve price for FM Radio channels in a new city be set equal to 0.8 times of the valuation of FM Radio channels in that city?

g. Should the auction of remaining FM channels of Phase-III be done delinking it from technology adopted for radio broadcasting? If so, whether FM Radio broadcasters who adopt digital technology be permitted to broadcast multiple channels on single frequency?

VIII. Online Gaming

1. Law Commission Of India issued Press Note on the legal framework for Gambling and Sports Betting

The Law Commission of India subsequent to its report titled ***'Legal Framework: Gambling and Sports Betting including Cricket in India'*** (**Report**) dated July 05, 2018 issued a Press Note dated July 06, 2018 clarifying that the Report strongly recommended that legalising betting and gambling was not desirable.

The Press Note further clarified that in the current scenario if it is not possible to enforce a complete ban in order to prevent unlawful activities then effective regulation remains the only viable option to control gambling.

The Report also sets out a number of guidelines and safeguards that the Central Government or State Governments may consider if they decide to regulate gambling and sports betting.

2. Supreme Court quashes Reserve Bank of India's (**RBI**) Circular banning cryptocurrency

   The Supreme Court of India vide its Judgment dated March 04, 2020 in the case of IAMAI v. RBI quashed the RBI Circular dated April 06, 2018 imposing the ban on cryptocurrency. RBI had issued the circular prohibiting all entities regulated by it from dealing in Virtual Currencies. IAMAI, among other stakeholders, had challenged the prohibition before the Supreme Court by way of writ petition. The Supreme Court held that the RBI Circular was liable to be set aside on the ground of proportionality. Moreover, it was also held that RBI has not found the activity of exchanging Virtual Currency to have any adverse impact on the functioning of entities regulated by the RBI.

IX. Other Important Regulatory Changes Impacting The Media And Entertainment Sector

1. The Copyright Office allows online submission of the literary, artistic and dramatic work-related document

   The Copyright Office vide an Order dated January 17, 2019 has allowed applicants to upload soft copies of literary, artistic and dramatic work related documents on its online portal. This move has been initiated to facilitate seamless registration of works. In addition, a manual explaining the process to upload an applicant's documents has been showcased on the website of Copyright Office. The documents can be uploaded in their original colour scheme after paying the requisite fees.

2. MIB constitutes three member committee for implementation of Supreme Court guidelines on content regulation of government advertising

   The MIB in compliance with the Supreme Court of India's directions dated May 13, 2015 has constituted a three member committee to address the issues related to content regulation in government advertising. As per the terms of reference, the committee would address complaints from the general public of violation on the implementation of the guidelines set out by Supreme Court. The committee would also take suo motu cognizance of any violation / deviation of the guidelines of Supreme Court and recommend corrective action to the Ministry / Department.

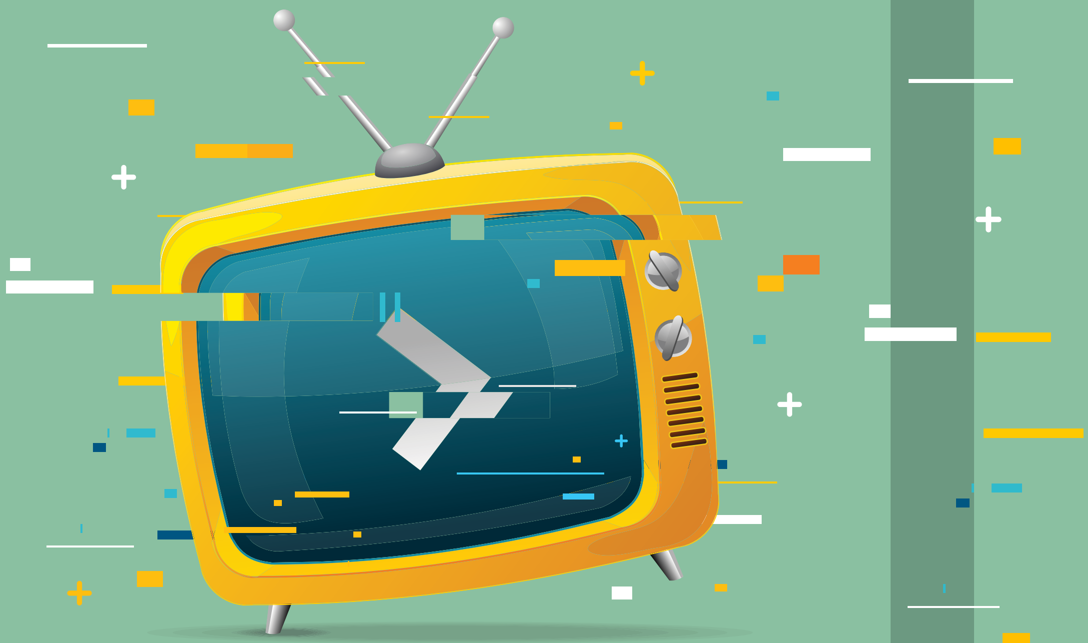
3. The Delhi High Court passes an Order on global take-down orders

   The Delhi High Court in an Order dated October 23, 2019 in Swami Ramdev & Anr v. Facebook & Ors affirmed that Indian Courts can issue global take-down orders to internet intermediaries like Facebook, Google and Twitter for illegal content published by users of their platforms. The Court held that once content was uploaded 'from India' and was made available globally, the removal of such content shall also be world-wide and not just restricted to India. The Court ordered the intermediaries to take down the content globally, provided they were uploaded from India. For contents that are uploaded from outside India, the Court ordered platforms to ensure that they use appropriate geo-blocking measures, so that users having Indian IP addresses were unable to access the content.

4. TRAI issued a Consultation Paper on Cloud Services

   In response to a request by the Department of Telecommunication, TRAI has issued a Consultation Paper on Cloud Services dated October 23, 2019 to seek comments on the terms and conditions of industry body, eligibility, entry fee, period of registration and governance structure. This comes subsequent to recommendations issued by TRAI on 'Cloud Services' in August 2017 which covered the legal and regulatory framework for the services, provided a comprehensive framework for data protection, interoperability and portability etc.

NEWS
LIVE



Dawn of the

New Tariff Order 2.0

The telecom industry watchdog TRAI notified the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017, the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017, and the Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017 (collectively referred to as the New Tariff Order or NTO) on March 3, 2017. It came into effect on February 1, 2019.

TRAI on January 1, 2020, amended the NTO to significantly change the regulatory framework, merely 10 months after it came into effect. The amendment was brought about after TRAI issued two Consultation Papers, namely, "Tariff related issues for Broadcasting and Cable services" on August 16, 2019 and "Issues related to Interconnection Regulation, 2017" on September 25, 2019. These papers sought comments and suggestions from various stakeholders on certain tariff and interconnection -related issues, which TRAI felt required some changes and were important to achieve the overall objective of the regulatory framework notified in March 2017 [1]*.*

This article aims to address key concerns of stakeholders in the media and entertainment industry by providing a holistic view on the impact of NTO.

Understanding the New Tariff Order (2017 Framework)

The regulatory regime for TV broadcasting had different Tariff Orders and Regulations for the analogue and addressable systems. This created multiple avenues for stakeholders to arbitrage. It also made the sector highly prone to disputes. To remove multiplicity of regulations and to create an enabling environment for orderly growth of the television broadcasting sector in light of digitisation and various developments related to technology in the sector, TRAI had initiated the process of revamping the regulatory framework in 2016.

Accordingly, the NTO was notified in 2017. It sought to give consumers more choice and make the value chain transparent. Some of its key features were:

a. A uniform maximum retail price of INR 19 per TV channel.

b. Any TV channel that is individually priced at more than INR 19 cannot be added to a collection of channels or bouquets, and hence, can only be offered on a-la-carte basis or standalone basis.

c. A bouquet of channels shall not be priced at less than 85% of the sum of the a-la-carte prices of channels forming a part of the bouquet.

d. The sum of discount on channels and the distribution fee paid by broadcasters to a distributor of television channels should not exceed 35% of the maximum retail price of the television channel.

e. Channels cannot be priced differently for different distribution platforms.

f. Channels of one broadcaster cannot be offered by another broadcaster in their bouquet of television channels, even after obtaining due authorisation.

g. Promotional schemes (i) can only be offered on a-la-carte prices for offering television channels and not on bouquet prices, (ii) cannot exceed 90 day at a time, (iii) can be offered only twice a year.

---

01. Press Release No. 01/2020 dated January 1, 2020, Telecom Regulatory Authority of India.

h. High definition channels and standard definition channels cannot be in the same bouquet.

i. Pay channels and free- to- air channels cannot be in the same bouquet.

In Star India Private Limited v. Department of Industrial Policy and Promotion (**DIPP**)[2], the lack of authority on TRAI's part to issue Regulations and Tariff Orders was challenged in the Madras High Court. The division bench delivered a split decision, with one judge striking down majority of the clauses that were challenged, while the other judge upheld their validity as being in consonance with the Telecom Regulatory Authority of India Act, 1997 (**TRAI Act**). However, the division bench found the 15% cap on bouquet discount to be unenforceable and accordingly struck it down. The case was referred to a third judge, who held the Regulations and the Tariff Order to be within the scope of TRAI's powers.

An appeal[3] was filed in the Supreme Court of India (**Supreme Court**) against the Madras HC judgment, wherein the Supreme Court affirmed the High Court's judgment and TRAI's power to regulate on the subject matter. It was the contention of the appellant that the NTO has the effect of regulating programmes and television channels, their pricing, marketing, and bundling, causing overreach of the regulating body's power. Further, it was also argued that the TRAI Act allowed it to only regulate the carriage and means of transmission, but not the content that is being transmitted. It was alleged that the above key features, in effect, resulted in regulating the content of the broadcast. However, the Supreme Court was of the view that the TRAI Act protected interests of both service providers and consumers. Therefore, TRAI has the power to not only regulate the terms of carriage but also the terms of interconnectivity between participants i.e. consumer, broadcaster, distributor or operator, to ensure that broadcasters and consumers are both at a level playing field. The Supreme Court established that one of the purposes of the TRAI Act was to ensure proper and fair competition while promoting consumer interest.

Understanding the New Tariff Order (Post-January 1, 2020)

As mentioned above, the amendment to the NTO was brought about after TRAI issued the two Consultation Papers on "Tariff related issues for Broadcasting and Cable services" and "Issues related to Interconnection Regulation, 2017" in the months of August and September 2019, respectively. Some of the major issues identified by TRAI were the cap on maximum discount permissible to broadcasters while forming a bouquet, number of channels permitted in NCF applicable NCF for multi-TV homes, flexibility to DPOs in offering long-term subscription plans and carriage fee payable by broadcasters to DPOs.

The following amendments have been enacted by TRAI:

a. TRAI has re-introduced the "Twin-Condition" to address the issue of huge discounts in the formation of bouquets by broadcasters vis-à-vis sum of a-la-carte channels to ensure that price of a-la-carte channels does not become illusionary.

   I. the sum of the a-la-carte rates of the pay channels (MRP) forming a part of a bouquet shall under no circumstances exceed one and a half times the rate of the bouquet of which such pay channels are a part; and

   II. the a-la-carte rates of each pay channel (MRP), forming a part of a bouquet, shall under no circumstances exceed three times the average rate of a pay channel of the bouquet of which such pay channel is a part.

b. Additionally, the maximum retail price per month of a pay channel cannot exceed the maximum retail price per month of the bouquet containing that pay channel.

c. Only those channels priced at INR 12 or less will be permitted to be part of the bouquet offered by broadcasters.

d. Number of free channels under NCF of INR 130 (plus taxes) has been increased to 200.

e. Channels declared mandatory by the Ministry of Broadcasting will not be included while calculating the 200 channels in point (d).

---

02. W.P. Nos.44126 and 44127 of 2016
03. Civil Appeal Nos 7326-7327 and 7328-7329 of 2018

f. DPOs cannot charge more than INR 160 per month for providing all channels available on their platform.

g. In case of a multi-TV home, where more than one TV connection is registered in the name of one person, a maximum fee of 40% of the declared NCF will be charged for the second and additional connections.

h. DPOs may offer discounts on connections for six months or more.

i. To address the concerns of broadcasters regarding huge carriage fee being charged by DPOs, TRAI has mandated MSOs, HITS operators, IP TV service providers will not have target market bigger than States or Union Territory, as the case may be. Additionally, TRAI has proposed a cap of INR 4 lakh per month on carriage fee payable by a broadcaster to a DPO for carrying a channel.

j. In order to provide more flexibility to DPOs to place TV channels on the EPG, TRAI has mandated that channels offering programmes in a particular language under a genre must be clubbed together. The EPG layout is to be mandatorily reported to TRAI and no subsequent change can be made without TRAI's approval[4].

Prior to the 2017 Framework, broadcasters were making channels available to DPOs at a wholesale level. The tariff order dated October 4, 2007, recognised the relationship between a-la-carte rates of channels forming a part of a bouquet and bouquet rates provided by broadcasters to distributors at the wholesale level. The Twin-Condition under the 2007 Tariff Order was prescribed to ensure that an effective a-la-carte choice was made available to distributors without being limited by tenacious pricing of bouquets. The conditions of the erstwhile Twin-Conditions were:

a. The sum of the a-la-carte rates of the pay channels forming a part of such a bouquet shall under no circumstances exceed one and half times the rate of that bouquet of which such pay channels are a part; and

b. The a-la-carte rates of each pay channel, forming a part of such a bouquet, shall under no circumstances exceed three times the average rate of a pay channel of that bouquet of which such a pay channel is a part.

The above-mentioned methodology was in effect for approximately 10 years prior to its substitution with the 15% cap on discount on bouquets. As mentioned above, the Madras HC declared the 15% cap to be arbitrary and unenforceable, requiring TRAI to review the bouquet pricing mechanism. TRAI adopted the Twin-Condition again mutatis mutandis, given its acceptability within the industry and stated that its adoption will not affect the flexibility of broadcasters to form bouquets and decide on the MRP of channels.

Additionally, TRAI has mandated that broadcasters should not be allowed to price a bouquet at less than the a-la-carte price of any of its constituent channels. This is to address the concern that the price of bouquets is often lesser than the price of the a-la-carte channels forming a part of the bouquet, leading to subscribers naturally opting for the bouquet instead of the a-la-carte channels.

Impact of The New Tariff Order

Over a period of 15 years, TRAI has issued more than 36 tariff orders and ancillary regulations to exercise greater control on news and entertainment broadcast content, which is believed to be the cheapest globally.

---

04. The Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 & The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020

The change in the NTO framework has undoubtedly attracted mixed reaction from stakeholders, given the significant nature of the amendments. As mentioned above, the amendment has been introduced barely 10 months after the 2019 Framework came into effect.

The Indian Broadcasting Foundation (**IBF**) has expressed its disapproval against the amendment because the previously notified framework was in the works for just 10 months. Yet, it had necessitated an absolute overhaul of the distribution ecosystem. To put things into perspective, there are approximately 200 million TV households (or 800 million plus TV viewers) in India, who had just adapted themselves to the now erstwhile NTO framework. The IBF believes that the amendments will severely impair the broadcasters' ability to compete with other unregulated platforms and adversely affect the viability of the pay TV industry. The IBF is also of the opinion that the amendment runs contrary to the objective of NTO, which is "ease of doing business" and in effect only benefits the interests of DPOs as they are permitted to charge as much as INR 160 for channels that are intended to be free.

At a time when content is king and broadcasters are investing significant amounts of money into providing content, which the consumer will enjoy and appreciate, providing bouquets allows broadcasters the opportunity to provide an assortment of genres at an economical price. The recent amendment that has reduced the price threshold from INR 19 to INR 12 will require broadcasters to drastically alter their current bouquets and will also require them to re-determine the prices of channels. It is an established fact that one of the key drivers for any economy is predictability. Since 2017, the industry has only been subjected to constant change, resulting in the economic environment not being viable. It may also result in a lot of channels closing shop and a consequential rise in unemployment. A challenge to the amendment has been filed in the Bombay High Court by IBF, along with a few broadcasters and The Film and Television Producers Guild of India. Sun TV has filed a separate writ in the Madras High Court; All India Digital Cable Federation, the apex body of MSOs, too, has filed a petition in the Kerala High Court; the Maharashtra Cable Operators' Foundation has filed a case against TRAI for capping NCF in the amended NTO; and lastly, a group of consumers has filed a case against TRAI in the Gujarat High Court.

On the other hand, many stakeholders believe that the TRAI amendments have empowered customers and introduced transparency in the previously opaque framework. It is also contended that subsequent to the amendment, subscriber is king and will now be able to exercise a higher level of freedom of choice.

The TRAI amendments seem to be focused on consumer satisfaction, by providing absolute choice and at low prices. However, it is pertinent to note that over-regulation often leads to disappearance of market players and niche broadcasters from the industry due to reduction in economic viability of continuing the business.

The DPOs are also seemingly unsatisfied with the new framework as certain contours of the regulation arbitrarily and without any basis isolates them, leading to higher costs. It may be noted that the new framework does not provide for any cap on broadcasters for pricing their a-la-carte channels, as long as the channel is not included in a bouquet. It means, a broadcaster may prescribe an a-la-carte price of INR 200 for a channel, but if the channel is to be a part of a bouquet, it must be priced at INR 12 or lower. However, the pricing for DPOs and able services has been limited to INR 130 -160 under the new framework. DPOs invest a large amount of capital to constantly upgrade and further innovate their services. A limitation of such a nature may affect the ability of DPOs to continuously improve their services. Additionally, TRAI should also consider that notwithstanding the pricing cap, DPOs will continue to competitively price their services as it will not be possible for them to survive in a highly -competitive market.

An analysis of the new framework pertaining to the cap on the pricing of multi-TV homes seems arbitrary as the cost incurred by the DPO for the second or third connection will remain constant. However, they are now compelled to provide their services at a maximum fee of 40% of the declared NCF, for every connection subsequent to the first. TRAI may appreciate that a household that can afford multiple connections may not need any discount.

Lastly, under the DPO licencing regime, DTH operators are required to pay a licence fee amounting to 10% of their gross revenue to the Ministry of Information and Broadcasting annually.

Conclusion

Predictability in any regulatory framework is the foundation of any sector performing at its optimum level. Therefore, it is of utmost importance for TRAI to take a pragmatic approach to the ground realities of the industry before revising the regulatory framework. The significant amendments to the nascent tariff order have increased vulnerability of stakeholders in the industry and TRAI needs to be mindful of the business environment its decisions create.

The broadcast, cable and satellite industry is estimated to be valued at INR 714 billion and is expected to grow at 11% to reach INR 1,215 billion in 2024. In order to encourage the industry's significant contribution to the Indian economy, the potential impact of further regulatory intervention must be very well analysed. For instance, the NTO 2019 regime itself saw a reduction of channel availability across households from 315 to 265, and a consequent loss of 12-15 million subscribers.

Being the regulatory watchdog, TRAI is entrusted with the duty of improving ease of doing business in the country. It may be useful for TRAI to undertake a scientific impact analysis study or regulatory sandboxes before introducing any new regulations.

Content Regulation for

OTT Platfroms

OTT Platforms

The average digital video consumption in India has grown phenomenally in a span of just three years is a testament of the massive potential the Indian OTT Industry. In accordance to a report by RedSeer, an Indian media market research group, the Indian OTT market is projected to grow 80% from 170 million in 2019 to 300 million by 2022. Venture capitalist Mary Meeker's report states that more than half the world's population is active on the internet, with India accounting for about 12% of total users. This can be attributed to smartphones which have been the driving force for video consumption in India and inexpensive 4G net services which have facilitated entry of OTT platforms. Adding to this, 5G will further draw in users to adopt OTT services. With increasing internet penetration, there will be growth in demand for online regional content on these OTT platforms. In a country like India, where the number of smartphones is more than the number of smart TVs, these OTT platforms have been successful in capturing young subscribers. The growth of the OTT industry has not only created opportunities for content creators, but also for advertisers and brands in the digital consumer market. Innovations in OTT industry such as voice tags, augmented and virtual reality, 360-degree viewing, and blockchain technology are also getting intensely explored. Therefore, it could be stated that the OTT industry will be a game-changer in India given the potential employment it will create. While Hotstar, Netflix, Zee5 and Amazon Prime have become established names in the industry, new entrants such as AppleTV+ and Flipkart Videos are soon to mark their debut.

Based on the nature of the service and the origination of media content, OTT platforms can either be those who curate the content completely or those who partially curate their content, that is user generated. Sources of revenue for these OTT platforms can either be the conventional way of using advertisements in between videos or the subscription model wherein the viewer pays an amount upfront and watches the content available on that OTT platform. While making such content available, OTT platforms need not obtain certifications which may be required for broadcasting same content on traditional platforms such as movie theatres or television. Traditional platforms need to obtain certification with Central Board for Film Certification or comply with guidelines such as the Indian Broadcasting Foundation (Content Code & Certification) Rules, 2011 to broadcast content. However, currently, there exists no such requirements for OTT platforms. Since, OTT platforms fall out of the purview of public exhibition, there is no statutory pre-screening checks or certifications required with respect to the content being generated or circulated. Also, viewing content on OTT platforms vis-à-vis the medium of traditional television is different as the viewers in the former medium can chose the content that they wish to watch rather than being able to watch what has been subjected to network scheduling.

Content Regulation Framework under the IT Act

The definition of 'information' under the Information Technology Act, 2002 (**IT Act**) includes data, text, images, sound, voice and microfilms. Therefore, restrictions under the IT Act apply to all audio, video and textual content shared by OTT platforms. Provisions of the IT Act have an overriding effect over other statutes.

The IT Act prescribes penal consequences for circulation or sharing of content that is offensive, obscene, entails sexually explicit acts or children indulging in such acts, results in the violation of privacy of any person or causes cyber terrorism. As per Section 75 of the IT Act, the circulation of such information by OTT platforms situated outside India is an offence if the commission of the offence involves a computer, computer system or a computer network located in India.

The term 'intermediaries', under the IT Act, is defined on a non-exclusive basis, to include web-hosting service providers and search engines, thereby bringing OTT platforms under its ambit. The Supreme Court in the case of Sharat Babu Digumatri v. Govt. of NCT of Delhi clarified stating that if the IT Act specifically covers an offence, only the IT act shall apply to such an offence even though it is maybe punishable under other laws.

The Central Government, the State Government or any of their authorised officers may *suo motu* direct any government agency to intercept, monitor or decrypt any information in circulation, in the interest of protecting the sovereignty, security, public order and friendly relations of the State. Further, a request for blocking any content may be made on similar grounds as those mentioned above, by any person to a Nodal Officer appointed under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, subsequent to which the Central Government or its authorised officers may issue orders for blocking such reported content. In the case of Shreya Singhal v. Union of India, the Supreme Court held that the court order and/ or notification requesting takedown by the appropriate government or its agency must strictly conform to the subject matters laid down under Article 19(2) of the Constitution. Additionally, provisions of the Indian Penal Code, 1860, Unlawful Activities (Prevention) Act, 1967, Indecent Representation of Women (Prohibition) Act, 1986 are also applicable to the OTT platforms.

Recent Developments

On concerns on content shared by OTT platforms, Justice for Rights Foundation, a Delhi-based NGO, filed a petition at the Delhi High Court, seeking a regulatory framework for OTT services. The Delhi High Court dismissed this petition on February 08, 2019, on the ground that procedural safeguards, provided under the IT Act, for OTT platforms are sufficient. A special leave petition was subsequently filed at the Supreme Court against the Delhi High Court's dismissal and in its order dated May 10, 2019, the Supreme Court issued notice to the relevant authorities. However, subsequent to the Supreme Court order, a number of petitions have been filed at various high courts on censorship and certification of content on OTT platforms and appointing a regulatory authority for the same. This special leave petition (SLP (C) 10937/2018) is likely to be taken up for hearing in early 2020.

In another development, it was clarified by the Karnataka High Court that films, serials, and other multimedia contents being transmitted, broadcasted or exhibited through internet platforms like YouTube, Google India, and online streaming platforms like Hotstar, Amazon Prime, Netflix and Alt Digital, cannot be regulated under the Cinematograph Act, 1952. The court observed that these films, serials and multimedia content is based on user requests and these transfer of files and its facilitation through the internet cannot be construed to be brought under the purview of the Cinematograph Act.

Madhya Pradesh High Court has issued notices to the Central Government and ten OTT platforms after NGO Maatr Foundation filed a petition alleging that the uncertified available content on the OTT platforms are unregulated, obscene, vulgar, sexually explicit and legally restricted. The petitioner also contended that these OTT players should be brought under the definition of intermediaries under hence be liable for offences under IT Act and Indian Penal Code, 1860. The matter is posted for hearing in early 2020.

It was also clarified by the Ministry of Information and Technology and the Ministry of Electronics and

Information Technology through an RTI Application that, currently, neither of them register or regularize any online portal.

With the aim to provide a regulatory code for video streaming platforms, the IAMAI had released a document called "Code of best practices for online curated content providers" in January 2019 which was signed by OTT platforms such as Netflix, Hotstar, Voot, Zee5, Arre, SonyLIV, ALT Balaji, Eros Now and others. Post the Code, IAMAI released its second online curated content provider code in which it stated that it will set up a body called the Digital Curated Content Complaints Council (**DCCCC**), which will take up complaints of viewers that have not been resolved at the Tier-I level namely the Digital Content Complaint Forum (**DCCF**). The DCCF, which will be acting as a single point of contact for all complaints from users, will provide guidance to the platform on the classification of content and descriptors.

On November 14, 2019, Amit Khare, Secretary, Ministry of Information and Broadcasting, had announced at the Confederation of Indian Industry's (**CII**) Big Picture Summit in Delhi, the change in stance of the government for shifting from a government-imposed regulation to a self-regulatory regime.

Content Regulation in other jurisdictions

In the United Kingdom, services accessible on demand (providing content), which is also available on television and is edited and distributed by any person or platform, are classified as On Demand Programme Services (**ODPS**). Therefore, OTT platforms streaming audio-video content will be required to adhere to content censorship guidelines under the Communications Act, 2003 and the Statutory Rules and Non-Binding Guidance for Providers of ODPS (**Guidelines**). While the Guidelines do not mandate pre-screening checks, they mandate the censorship of sensitive or age-inappropriate content, the nature of which is required to be determined based on the guidelines of the British Board of Film Classification. Consequently, ODPS/ OTT platforms are encouraged to control access to content through age verification in the form of checks on credit card ownership, account ownership, databases, etc. The Guidelines additionally lay down regulations in relation to the content of sponsorship advertisements, a matter that is yet to be evaluated in the Indian scenario.

The way ahead

In jurisdictions such as the UK, which have sought to specifically define and regulate ODPS/OTT platforms, there appears to be a tendency to rely on statutory certification standards for censorship of content. In India, while self-regulation of OTT platforms has been encouraged due to the inclusive definition of 'intermediaries', OTT platforms may be required to undertake due diligence for sharing of third party content under the IT Act and its rules. Therefore, besides self-governance of content, OTT platforms may consider suitably categorising sensitive content, display relevant information (such as genre, age appropriateness, summary and suitable caveat) in relation to any content made available on such platform for the benefit of its users and employ technological measures to control accessibility of content to sensitive users such as minors. There is also a need for Complaints Redressal Council to address the grievances of the consumers with respect to the content available on OTT platforms. It is therefore critical that the industry, through a framework, is able to balance the needs of carriage as well as content. Increase in demand of smartphones, cheaper smart TVs, cheaper data, fresh content, and liberty of convenience, the industry is bound to grow leaps and bounds.

FDI in

Digital Media

The Digital World

We live in an era where the internet is all pervasive. The digital world has brought about an incredible change in the manner in which information is accessed, be it news or entertainment. Gone are the days when there were limited options for accessing information such as through newspapers, magazines, books, television and radio. Today, whether we are at home, workplace or are travelling, we can, with a click of a button, access latest news from across the globe on our fingertips.

The Indian Digital News Story

Traditional news media such as newspapers and television channels e.g. Times of India, Hindu, Economic Times, Business Standard, Times Now, NDTV, Aaj Tak etc., have caught up with the changing times and almost all of them stream their news channels and/or publish news articles online, in real time. Additionally, there are many independent news companies and start-ups like HuffPost India, TheWire, The Print, Quint, VC Circle, Editorji, etc that have online presence only. Lately, news aggregating websites too have gained in popularity. Websites like Flipboard, DailyHunt, InShorts etc use software that skims through various news websites to pick news items, and string them all on one page for the reader. Even websites such as Google, Yahoo etc. have similar news aggregation features. This feature is very handy for the millennials who consume news online, possibly on the smartphone, thus giving newspapers or news channels a miss.

The Indian News Media Story

Most countries have stringent laws governing FDI in news media to prevent manipulation of news and current affairs. While some countries like Russia, North Korea and China control news dissemination with an iron grip, others like the United States of America, Canada, European Union countries and United Kingdom are more liberal. The Indian story is somewhere in the middle.

Under the extant FDI rules in India, FDI is capped at 49% for news broadcasting companies and 26% for print media companies, under the government approval route. In August 2019, the Union Government announced 26% FDI in the digital media sector through the government approval route. This was an unexpected move by the government as prior to that FDI caps existed only for the Indian print media at 26% and news broadcast television companies at 49%. However, there was no such cap on digital media.

In the absence of clarity on FDI in digital media, many online publishing/streaming of news and current affair companies, which have 100% FDI investment are facing an uncertain situation. These online digital media platforms have large investment from global investors. Some examples include, news aggregation sites such as Bloomberg Quint, Dailyhunt and VC Circle that have 100% FDI. Other sites such as Newslaundry (funded by Omidyar Network), Scroll.in, The Ken, Quartz India, Huff Post India and Vice India have substantial foreign investment.

On August 28, 2019, the Press Information Bureau reported that the Union Cabinet has approved proposal for a review of FDI in various sectors and that a decision was taken to permit 26% FDI under the government approval route for uploading/streaming of news and current affairs through digital media. This was followed by release of Press note no. 4 (2019 Series) on September 18, 2019 which formally brought about the aforesaid change. Subsequently, on December 5, 2019, the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 were also amended which notified the amendments. A government approval route would essentially give discretionary power to the ministries to selectively approve FDI proposals. This took the digital media news industry by surprise which was until now operating without any such FDI restrictions.operating without any such FDI restrictions.

Impact of the Restrictions

The amendment appears to have been made in a rush without any prior consultation with the public or the industry experts. There are glaring shortcomings which is bound to create more confusion in the digital news industry.

Firstly, a blanket FDI cap has been imposed on all entities engaged in uploading / streaming of digital news content. Though one may argue that there should be restrictions, similar to TV channels and print publications, on digital news publishers, a distinction ought to have been made between entities who create content and publish online and those who are merely online news aggregators / intermediaries. If we look at the traditional media space, FDI caps are applicable on TV news channels – but there is no FDI restriction on DTH/ MSOs who aggregate different news channels and make them available for viewing. The law, as it currently stands, restricts FDI even into entities which are purely online news aggregators / intermediaries, such as Flipboard and DailyHunt. Such websites neither create news nor have any editorial control over the news content that they stream but merely offer their subscribers a choice of news feeds just like what DTH and Cable operators do with linear news channels. It is illogical to restrict FDI in such companies. In the recent past, several news aggregators such as DailyHunt and InShorts have been receiving funding from private equity funds. The December 5 notification will significantly impact their valuations, future funding and expansion plans.

There are also various news websites and mobile apps which operate from outside India and make news content available to users in India. There are search engines such as Google and Yahoo which either collect news from various news services or offer links to news sites and make them available to their users on demand. Though one can restrict entities which have legal presence in India, the December 5 amendment will not extend to entities operating from overseas. Consequently, it can lead to a discriminatory approach vis a vis online news websites operating from India and could also lead to online news websites shifting their base out of India.

Secondly, the rationale for having a blanket 26% FDI cap is not clear. If a TV news channel (where FDI up to 49% is permitted) intends to operate in the digital space, it cannot do so as its FDI is above 26%. It will then have to either restructure its business vehicles or reduce its FDI levels to have an online presence. Thus, for the same content, a differential FDI limit of 49% (for TV channels) and 26% (for digital media) has been prescribed. Such differentiation seems absurd especially if the digital arm of the TV news channel merely streams the news that originates from the channel.

Similarly, FDI limit of 26% for news aggregators / intermediaries is highly restrictive since they do not create news content. There is no justification in placing them on par with news publications (original content creators). It is also baffling why FDI cap is set at 26% similar to print media and not at 49%, which is applicable for TV channels.

Thirdly, there is no clarity if the companies that have set up shop prior to the amendment will be excluded. If one takes the view that the current FDI levels have to be brought down, there is no clarity on any time frame within which it has to be achieved. It is difficult for foreign investors to find suitable domestic buyers at appropriate valuations. Further, start-ups will find it difficult to raise funds in the future, which will consequently have an overall negative impact on the digital news industry. Many existing traditional media companies which also have online presence will have to radically change their holding structures. One can only speculate as to what the lawmakers intended, as many companies who relay news through both TV channel as well as the digital media space and have over 26% FDI, are already in breach as a result of the amendment.

It appears that the government has not thought this through while bringing in the FDI cap for news in digital media. This has created more confusion and ambiguity in a sector which was hitherto operating without any restriction.

Recommendations

The legislature's approach to equating digital media platforms with print media is misplaced. It will not only significantly impact the existing holding structures and business models adopted by several companies engaged in uploading/ streaming of news and current affairs through digital media but also stifle their growth. The government should consider amending the law and bringing further clarity in the following ways:

a. Bring about a clear distinction between entities that (i) create and have editorial control over original news content and /stream on TV channels and/or publish in newspapers as well as in the online space; (ii) create and have editorial control over original news content and upload/stream through the online space only; and (iii) are merely online news aggregators;

b. For entities creating original news contents to air on TV channels and/or publish in newspapers, permit them to continue with their existing sectoral FDI caps for online publishing/streaming also.

c. Set FDI caps on those who create original news content to only upload/stream online. This cap could be the same as the existing 49% cap applicable for TV channels;

d. Permit 100% FDI in entities operating only as online news aggregators / intermediaries;

e. Clarify that this sectoral cap will not have any impact on existing investments and only new investments (i.e. those made after December 5, 2019) will have to comply with the revised FDI caps or introduce a grandfathering provision and set a reasonable timeline for the companies to comply with the FDI cap.

Conclusion

While the government is trying to simultaneously promote FDI, digital India and start-ups an amendment of this nature is likely to clip the wings of the digital news world. Unless the government brings about an amendment to the amended FDI policy soon, the present regressive move will have a dampening effect on the online news industry.

The PDP Bill 2019

A Perspective for Media Businesses

The Personal Data Protection Bill, 2019 (**PDP Bill**) was introduced in the Lok Sabha in December 2019. The Bill seeks to devise mechanism to protect personal data by setting up a watchdog Data Protection Authority of India

While the PDP Bill will have a far reaching consequences on the operations of a variety of businesses across sectors, it is the media businesses -- ranging from OTT platforms and other streaming services, broadcasters, content producers, news & non-news companies, as well as research and marketing companies – that will see a disproportionate impact on their data handling practices.

In this article, we examine some of the elements in the PDP Bill that may prove critical for media businesses.

Upon its enactment, the PDP Bill will govern the processing (which will include actions from collection, storage, structuring and adaptation to erasure) of all personal data, i.e. information relating to a natural person, who is directly or indirectly identifiable from such data[1].

Much of the consumer information upon which media companies rely, including names, ages, addresses, IP addresses, photographs, viewership patterns, consumption patterns and usage patterns may potentially constitute Personal Data.

The PDP Bill will govern all such processing: (a) within India; (b) by Indian entities, authorities or persons; and (c) outside India if such processing is in connection with business, or the systematic offering of goods or services to persons, or their profiling within India, or the profiling of persons in India[2].

The PDP Bill also defines specific personal data that reveals or is related to financial data, health data, official identifiers, sexual orientation, caste or tribe, or religious or political beliefs or affiliations that are "sensitive"[3].

While most customer facing businesses collect personal data in one form or another, content centric businesses including OTT and streaming platforms are likely to have access to richer and more granular data including viewing preferences, behaviour, appetite for specific types of content and other information. Several of these items would prima facie run the risk of potentially being classified as sensitive personal data.

Additionally, interactive platforms which allow users to post playlists, reviews, comments or responses may potentially possess information pertaining to additional categories of sensitive personal data.

The PDP Bill envisages a fiduciary relationship between the entities which collect and process personal data (the **Data Fiduciaries**[4]) and the individuals whose personal data is being processed (the **Data Principals**[5]). Consequently, Data Fiduciaries are required to process data for a valid purpose, in a fair and reasonable manner that ensures the privacy of the Data Principal[6], and to ensure that such data is complete, accurate, not misleading, and has been updated having regard to the purpose for which it is processed[7].

Consent

Largely, personal data can only be processed under the PDP Bill for a purpose consented to by the Data Principal or purposes reasonably incidental or connected thereto.

Consent is required to be obtained after providing a consent notice which satisfies specified criteria, and is required to be free, informed, specific and clear[8]. In case consent is needed for the processing of sensitive personal data, it would be obtained by providing explicit, and granular[9] details including informing the Data Principal of any significant harm that may arise from processing.

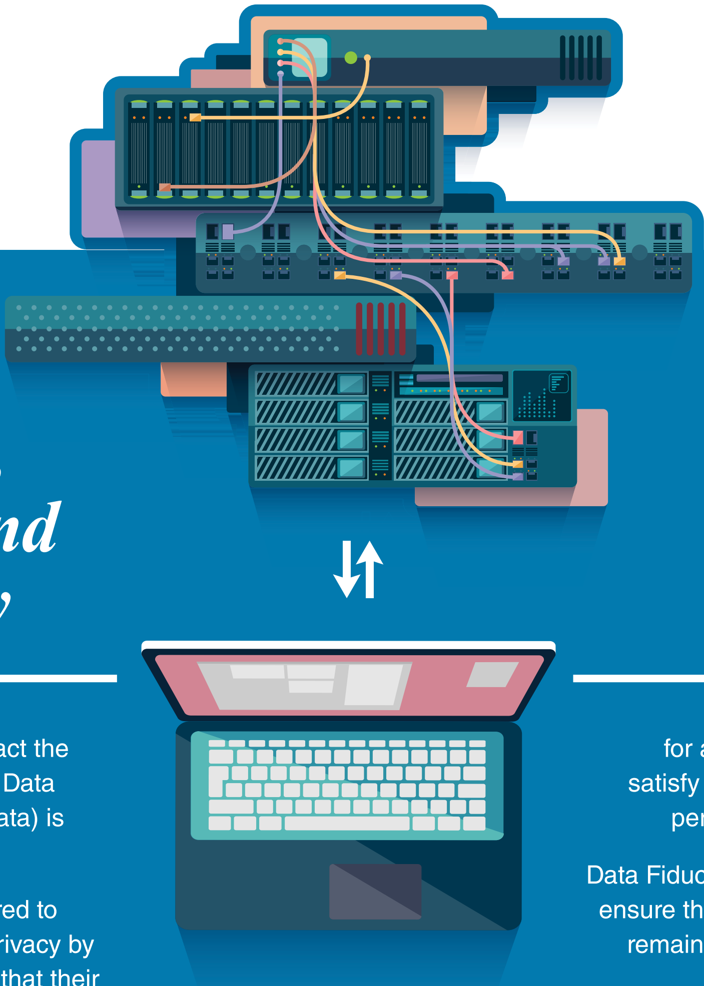
Data Fiduciaries are required to show they have obtained valid consents, and are not permitted to make the performance of any services conditional on processing of Personal Data[10]. When any personal data is ceases to be relevant, the PDP Bill provides for a right to seek its erasure[11].

---

01. Section 3(28), PDP Bill. Personal Data means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling.
02. Section 2, PDP Bill.
03. Section 3(36), PDP Bill.
04. Section 3(13), PDP Bill. Data Fiduciary means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data.
05. Section 3(14), PDP Bill. A Data Principal means the natural person to whom the personal data relates.
06. Section 5, PDP Bill.
07. Section 8(1), PDP Bill.
08. Section 11, PDP Bill.
09. Section 11(3), PDP Bill.
10. Section 11(4) and 11(5), PDP Bill.
11. Section 18, PDP Bill.

Importantly, it is possible to withdraw a given consent[12]. Consequently, businesses which rely on processing personal information will need to put in place a system permitting individuals to withdraw their consent, and to case processing of their information right away.

Enabling the withdrawal of consent and providing for a right to erasure have both proved to be complex and expensive from a compliance perspective elsewhere in the world[13].



Retention, Storage and Portability

The PDP Bill will also impact the manner in which Personal Data (and Sensitive Personal Data) is dealt with once collected.

Data Fiduciaries are required to prepare and implement "Privacy by Design" policies to ensure that their managerial, organizational and business practices are designed to anticipate, identify and avoid harm to the Data Principal[14]. These policies, which can potentially be certified by the Data Protection Authority, will govern the operations of the Data Fiduciaries to a large extent[15].

Data Fiduciaries can only collect personal data to the extent required and necessary for the purposes of processing[16], and thereafter can only store such data for as long as is necessary to satisfy that purpose or for longer periods on limited grounds[17].

Data Fiduciaries are also required to ensure that personal data collected remains accurate and updated[18].

In such cases where Data Fiduciaries process personal data through automated means or provide insights of an individual via automated processing, the individual user has a statutory right under the PDP Bill to receive extensive data-sets relating thereto in a structured, commonly used and machine-readable format. Additionally, the individual user also has the right to compel the Data Fiduciary to transfer the aforementioned data-sets to another entity of their choosing[19].

---

12. Section 11, PDP Bill.
13. Section 11(2)(e), PDP Bill.
14. Section 22, PDP Bill.
15. Section 22, PDP Bill.
16. Section 6, PDP Bill.
17. Section 9, PDP Bill.
18. Section 8, PDP Bill.
19. Section 19, PDP Bill.

Categorization of Data Fiduciaries

Under the PDP Bill, certain Data Fiduciaries can be classified as 'significant' by the Data Protection Authority on the basis of various factors including the volume and sensitivity of data, they process, the risk of harm associated with such processing, or their use of innovative technology.

Media businesses holding or processing large volumes of personal data, including sensitive personal data, may qualify as significant data fiduciaries and will be subject to additional obligations including being subject to privacy audits[20] and data protection impact assessments[21], record keeping obligations[22] and requirements to obtain a data protection officer[23]. Stringent penalty will be imposed in case of non-compliance[24].

Specific social media intermediaries[25] which have more than a specified number of users, and whose actions are likely to impact electoral democracy, security of the state, public order, sovereignty or integrity of India may also be classified as notified significant data fiduciaries[26]. In addition to fulfilling all the other requirements applicable to significant data fiduciaries, such notified social media intermediaries will also be required to enable users ---who register for or use their services from India --- an option of verifying their accounts. Following this exercise,, such accounts will be indicated as verified to all users[27].

Media businesses that operate commercial or online services (including video streaming or e-learning) targeted at children or otherwise process large volumes of personal data of children may be classified as guardian data fiduciaries with an obligation to verify age and obtain consent prior to processing personal data[28] of children. Guardian data fiduciaries are restricted from tracking, behaviorally monitoring, offering targeted advertising or engaging in activities that can cause significant harm to children[29]. This may have the effect of restricting the ability to offer many services. A question arises here as to whether a more nuanced restriction (for instance, only one against causing significant harm) would not suffice.

Journalistic Exemption

News and media businesses may qualify for a specific exemption which has been carved out for entities that process personal data for a journalistic purpose[30]. This will enable such organizations to avoid costs related to complying with a majority of data protection obligations as specified in the PDP Bill.

Non-Personal Data

Section 91 of the PDP Bill empowers the Central Government to direct any Data Fiduciary to provide non-personal data and anonymized personal data in their possession to the Government for certain purposes including improving delivery of services and formulation of evidence-based policies. This will likely prove to be a cause for concern as media businesses may be forced to potentially part with intellectual property (in the nature of copyright protected databases), or other proprietary or business critical information which has been collected and organized after expending significant amounts of time and capital. In the absence of clear provisions for fair compensation or restrictions on disclosure to third parties, including state-run commercial organizations including media and broadcasters, such sharing of non-personal data or anonymized personal data may result in erosion of substantial value for media businesses.

Conclusion

It is evident that the current draft of the PDP Bill, may restrict the ability of media businesses to offer certain types of services or otherwise monetize and protect valuable proprietary information. The avoidance of these restrictions so as to minimize disruption to business and build in adequate safeguards around intellectual property ownership of private entities will encourage continued investment and growth in a key sector for India's economy.

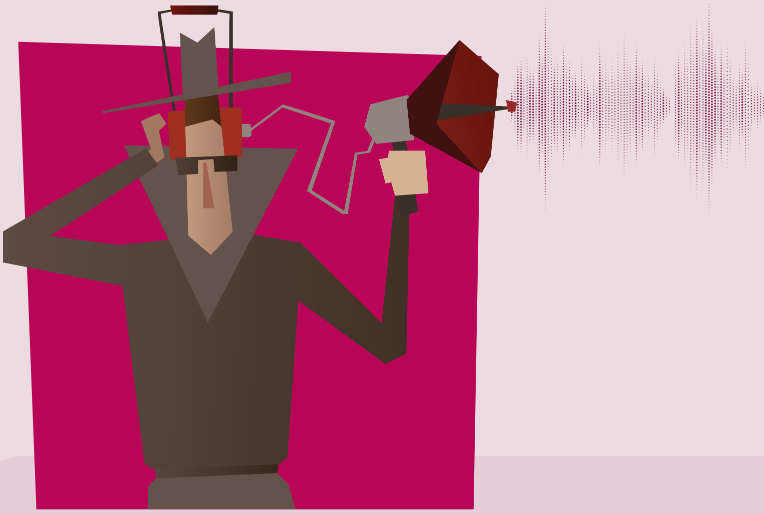
While the PDP Bill has been sent to a joint parliamentary committee and will be subject to further changes, the broad obligations and principles are likely to remain the same. Therefore, media businesses would be well-advised to factor the PDP Bill and implementation into their future designs and policies for the collection, storage and processing of data.

---

20. Section 29, PDP Bill.
21. Section 27, PDP Bill.
22. Section 28, PDP Bill.
23. Section 30, PDP Bill.
24. Section 57, PDP Bill.
25. Section 26(4), PDP Bill. These are entities which primarily or solely connect users enabling them to create, modify, upload, share, disseminate or access information. Search engines, e-commerce entities, internet service providers, email and storage services, and online encyclopedias are expressly excluded from this definition.
26. Section 26(4), PDP Bill.
27. Section 28 (3) and 28(4), PDP Bill.
28. Section16(2), PDP Bill.
29. Section 16(5), PDP Bill.
30. Section 36(e), PDP Bill.

Surveillance in the

Post-Puttaswamy Era



In 1997, the Supreme Court pronounced its judgment in the case of People's Union for Civil Liberties (**PUCL**) v. Union of India (SC, 1997) (**PUCL Case**), which laid the groundwork for the right to privacy in the context of telephonic surveillance (i.e. wiretaps) and constitutional freedoms.

This article analyses the Supreme Court's stance on the right to privacy in the PUCL Case, which was upheld in the 2017 landmark judgment by the nine-judge bench in KS Puttaswamy v. Union of India (SC, 2017) (**Puttaswamy Case**) that declared privacy a fundamental right. The applicability of the right to privacy has recently received further validation in the context of wiretaps in the October 2019 judgment in Vinit Kumar v. Central Bureau of Investigations and Ors (Bom HC, 2019) (**Vinit Kumar Case**), wherein the Bombay High Court outlined the ambit of the State's power to surveil its subjects particularly on matters that do not fall within the category of 'public emergency' or 'in the interest of public safety'.

Background

To set things in context, it is worth referencing the constitutional history of the 'right to privacy'.

Prior to 2017, the Supreme Court's view on right to privacy in India was somewhat ambivalent. In ***M.P Sharma v. Union of India (SC, 1954)*** an eight-judge bench of the Supreme Court held that there is no right to privacy enshrined within the Constitution of India. The same view was given by a constitutional bench of six judges in ***Kharak Singh (SC, 1963).***

However, there were decisions of smaller benches of the Supreme Court, such as, ***Gobind Sharma v. Union of India (SC, 1975)*** and ***R. Rajagopal v. Union of India (SC, 1994)***, in which the right to privacy has been held to be a constitutionally protected fundamental right and it was in this milieu that the PUCL Case bears relevance.

Wiretapping and the PUCL Case

In 1990, Mr. Chandra Shekhar alleged that the Government was illegally tapping telephones of 27 politicians, including his own[1]. Subsequently, an investigation of the Central Bureau of Investigation (**CBI**) revealed widespread wiretapping undertaken by the Government. The matter reached the Supreme Court through a public interest petition filed by the People's Union for Civil Liberties.

The impugned legislation in the PUCL Case was section 5(2) of the Indian Telegraph Act, 1885 (**IT Act**), which permits interception on the occurrence of a public emergency, or in the interest of public safety.

The Supreme Court, while rejecting the argument that the said provision is ultra-vires the Constitution of India, held that the two statutory pre-conditions, namely, the occurrence of any 'public emergency' or in the 'interest of public safety', have to be satisfied. Since the terms hadn't been defined under the IT Act, the Supreme Court interpreted them to mean "*the prevalence of a sudden condition or state of affairs affecting the people at large calling for immediate action", and "the state or condition of freedom from danger or risk for the people at large", respectively.*

Insofar as wiretaps and their infringement of constitutional rights were concerned, the Supreme Court laid down the following touchstones:

1. The right to privacy *"is a part of the right to 'life' and 'personal liberty' enshrined under Art. 21 of the Constitution".*

01. India Today, Scandalous Revelations: Secret Report by CBI contains shocking details of phone tapping ordered by Congress (I) Govts, February 28, 1991, available at http://indiatoday. intoday.in/story/secret-report-by-cbi-contains-shocking-details-of-phone-tapping-orderedby-congressi-govts/1/317946.html (Last visited on May 24, 2014

2. The right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy" since telephonic conversations are often of an intimate and confidential nature.

3. Any right enshrined under Art. 21 cannot be curtailed except according to the procedure established by law, which has to be just, fair and reasonable[2] – the Supreme Court went on to issue guidelines to curb administrative overreach.

Following the judgment, the guidelines were codified in Rule 419(A) of the Indian Telegraph Rules, 1951 in 2007. As per Rule 419(A), a direction for interception under Section 5(2) may be issued only by the Union Home Secretary at the Centre, or the State Home Secretary or in unavoidable circumstances, by another authorised officer.

Given the legal framework established by the PUCL Case and subsequent to the codification of the guidelines, one may think that the issue of illegal wiretapping was significantly curbed if not altogether dealt with. However, that doesn't seem to have been the case.

Time and again there has been alleged arbitrary use of the power of surveillance. For instance, the Radia tapes controversy in 2009, followed by the 2012 scandal – where a change of Government in Himachal Pradesh, brought to light that the previous Government had targeted 1,371 telephone numbers for tapping and recording, with prior approval by the State's Home Secretary for only two telephone numbers, and lastly, the 2019 phone-tapping scandal involving the State Government of Karnataka.

Right to Privacy:
The Puttaswamy Case

In August 2017, a nine judge bench of the Supreme Court in the Puttaswamy Case gave legitimacy to the 'right to privacy' under the Constitution of India and overruled the M.P Sharma case and the Kharak Singh case in relation to the guarantee of the right to privacy under the Constitution, and, therefore, made its derogation subject to the highest level of judicial scrutiny.

Premised on the principle that "Privacy is the ultimate expression of the sanctity of the individual", the Supreme Court affirmed the reasoning and judgment given in the PUCL Case and held that:

1. The violation of privacy with regard to arbitrary state action would be subject to the "reasonableness" test under Art. 14.

2. Privacy invasions that implicate Art. 19 freedoms would have to fall under the restrictions of public order, obscenity etc.

3. Intrusion of one's life and personal liberty under Art. 21 will attract the just, fair and reasonable threshold.

4. Phone tapping not only infringes Art. 21 but also contravenes Art. 19 freedoms. Such a law would have to be justifiable under one of the permissible restrictions in Article 19(2), in addition to being "fair, just and reasonable" as required by Article 21, and as was held in the PUCL Case. It would also need to be subject to a higher threshold of "compelling state interest".

5. The 'proportionality and legitimacy' test was also established – which is a four-fold test that needs to be fulfilled before state intervention in the right to privacy. The state action must be sanctioned by law.
ii. In a democratic society there must be a legitimate aim for action.
iii. Action must be proportionate to the need for such interference.
iv. And it must be subject to procedural guarantees against abuse of the power to interfere.

---

02. Chaitanya Ramachandran, "PUCL v. Union of India Revisited: Why India's Surveillance Law Must Be Redesigned For The Digital Age", Manupatra. Available on: http://docs.manupatra.in/newsline/articles/Upload/E90FA90F-0328-49F2-B03F-B9FBA473964F.pdf

Vinit Kumar Case and Its Relevance

The Bombay High Court (**High Court**) in 2019 was presented with the opportunity to adjudicate upon the law pertaining to phone tapping and surveillance in the post-Puttaswamy era, applying the principles in relation to the right to privacy to section 5(2) of the IT Act.

In this case, a businessman who was alleged to have given bribes to bank employees to avail himself of credit, challenged certain CBI orders that directed interception of his telephone calls on the grounds that such orders were ultra-vires of section 5(2) of the IT Act.

At the outset, the High Court reiterated that an order for interception as per Section 5(2) of the IT Act, can be issued only in two circumstances: public emergency or public safety. The impugned orders were given on the basis of 'public safety'.

The Supreme Court in an earlier case dealing with section 5(1) of the IT Act has held that the precursors of "public emergency" and "interest of public safety" to an order of interception are to be read as a whole and take colour from each other. Further, it held "public emergency" to include the interest of public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, or the prevention of incitement to the commission of an offence. Further, the Supreme Court has also recognised that economic emergency does not qualify as "public emergency"[3] and, therefore, interception for economic offences, which do not meet the very high threshold of "public emergency" or "public safety", are not permissible under the law.

Drawing from these settled positions, and since this related to an economic offence, the High Court was of the opinion that there is no apparent public safety interest to substantiate the said Orders or satisfy the test of "principles of proportionality and legitimacy" as laid down in the Puttaswamy Case.

To summarise, the High Court in the Vinit Kumar Case, in the question of interception, held:

1. An order of interception under section 5(2) of the IT Act can only be given in situations of 'public emergency' or 'public safety'.
2. If interception has been undertaken in contravention of Section 5(2) of the IT Act, it is mandatory for the said intercepted messages to be destroyed.
3. Evidence procured in violation of Section 5(2) and the rules made thereunder, is not admissible in court.

The key takeaways are that for an interception under section 5(2) of the IT Act, the high threshold of "public emergency" and/or "public safety" need to be met and compliance with the rules and guidelines made thereunder are mandatory. Even a slight deviation from the process will lead to the evidence being inadmissible in court.

The Vinit Kumar Case is useful in according protection to fundamental rights and making sure that the power of phone surveillance is not misused by authorities to target specific persons for economic offences or without following the procedure established by law. It does appear that this is a judgment whose relevance will be tested over and over again in the troubled times we live in.

03. Hukum Chand Shyam Lal v. Union of India, AIR 1976 SC 789.

Estate and Succesion planning for

Media & Entertainment Proffesionals

‘The artist never dies’

‘The artist never dies’ wrote the great American poet H.W. Longfellow, and indeed, artists live on through their work long after they have departed. Beyond the metaphorical world of poetry though, artists are mortal and, like everyone else, need to plan for both – the preservation and enjoyment of their fortune during their lifetime as well as its smooth transition post their demise.

In fact, the common adage *‘failing to plan is planning to fail’* acquires greater significance for professionals in the media and entertainment industry (**M&E Professionals**). This article seeks to explain why that is so, and addresses the what, how and when of estate and succession planning for M&E Professionals.

Why to plan

A bespoke estate and succession plan is key for all wealth creators to ensure that their wealth is protected from external risks, is readily available for their enjoyment, and can be passed on to the heirs of their choice. For M&E Professionals, given the multiple hats that they typically don in the real world, ranging from professional artist, entrepreneur to content creator, planning acquires certain additional dimensions:

- Their wealth and income streams may take a wide variety of forms, including conventional asset classes such as real estate and shares as well as unconventional asset classes such as intellectual property rights (**IPR**);
- Given the increasing crossover of Indian M&E Professionals with international collaborators and growing engagements abroad, they could have assets offshore, necessitating a global estate plan;
- Many M&E Professionals acquire considerable wealth at a younger age than corporate professionals, thereby needing to plan with greater prudence, taking a long term view.

Absence of such a multi-dimensional estate and succession plan could well result in destruction of wealth over time, bitter disputes and a tarnished legacy.

What Assets need to be planned for:

A comprehensive bespoke estate plan for an M&E Professional would need to address each of their myriad asset classes, including:

- Real estate;
- Shares, whether in business entities such as production or distribution companies or portfolio investments in listed companies or angel investments in start-ups;
- IPR:
  a. Copyright is a bundle of rights granted to creators of certain classes of original works such as artistic work, dramatic work (e.g. scripts/screenplays), literary work (e.g. song lyrics), cinematographic films, sound recordings, and musical work. Copyright in a work is granted for a period of 60 years from its publication or after the death of the author, depending on the nature of the work.
  b. Trademarks include brand names, domain names, slogans and logos (for example, logo of a production brand). Trademarks which are registered with the Registrar of Trade Marks are afforded greater legal protection than unregistered trademarks. The registration of a trademark operates for a period of ten years and has to be renewed every ten years thereafter.
- Prized memorabilia, collectibles and archives including award statuettes, film scripts, costumes

and other items retained from movie/television sets (e.g. actress Olivia Newton John's ensemble from the movie Grease which was recently auctioned for nearly half a million dollars).

- Valuables such as jewelry, antiques and artwork.

How to plan

1. Wills

The primary tool for estate and succession planning is a Will. A Will is a legal document in which an individual can give instructions on the manner in which his property is to be distributed after his demise. Notably, each of the assets including IPR noted above are capable of being bequeathed under a Will.

The benefit of a Will is that it grants the freedom to choose one's heirs (exceptions being Muslims governed by Sharia law). In the absence of a Will, the estate of the deceased will be divided amongst his/her heirs as per defined legal rules which may be contrary to the desire of the deceased and could lead to division of assets. Unfortunate disputes may also arise amongst heirs - Bob Marley, the legendary singer, died intestate in 1981 resulting in a legal battle amongst his heirs over his estate which lasted more than 30 years. Likewise, Prince died intestate in 2016 triggering disputes over ownership of his published and unpublished music compositions and recordings.

Moreover, systematic bequests of IPR can ensure that future generations can enjoy the fruits of the creativity of the author/proprietor; apart from receiving royalty, heirs can seek legal remedies for infringement of the IPR by way of plagiarism, passing off or otherwise.

If IPR is to be bequeathed, the following should be borne in mind:

a. Copyright

If any published work is bequeathed under the Will, the bequest should expressly provide that it also extends to the copyright in the said work, to avoid ambiguity.

On the other hand, if an unpublished work is bequeathed under a Will, the law presumes that the bequest will include the copyright in the work, unless the Will specifies otherwise. Therefore, if the intention is to bequeath a work without the concomitant copyright, the Will should clarify the same.

b. Trademark

If a registered trademark is bequeathed, the heir must complete the legal formalities after the demise of the holder of the trademark by applying to the Registrar to register himself as the proprietor of the trademark.

2. Trusts

While Wills serve as tools for succession planning post the demise of the person, Trusts are attractive tools for lifetime estate planning. A Trust is an entity created by a person (called Settlor), who transfers property owned by him/her to another person (called Trustee), to hold such property for the benefit of an identified person (called Beneficiary).

Trusts can offer many benefits such as:

- Consolidation of wealth/avoidance of fragmentation across generations;
- Protection of minors and dependents;
- Asset protection from third party claims;
- Avoidance of legal formalities on demise.

Transfer of assets to Trusts would require an analysis of the cost implications of the same. Specifically, transfer of real estate assets to a Trust would incur considerable stamp duty and registration fees, and is typically avoided. It is more cost effective to transfer movable property as stamp duty is either exempt or is reduced.

Transfer of IPR can be done by assigning it to the Trust represented by the Trustee. For this purpose, an assignment deed would have to be executed. Stamp duty payable on assignment deeds varies across states and in some states, the stamp duty is exempt for certain types of IPR.

Planning globally

With the growing global outreach of Indian M&E Professionals, it is possible that they may hold bank accounts and other assets abroad. They may also enjoy IPR protection in jurisdictions outside India.

Planning considerations for a global estate are more expansive than for an estate which is concentrated in India, and include:

- Whether to prepare separate Wills for each relevant jurisdiction or a global Will for worldwide assets;
- Compliance with Indian exchange control regulations which restrict cross-border transactions;
- Tax considerations in relevant jurisdictions including estate duty/inheritance tax (which are not levied in India, but are levied in certain offshore jurisdictions);
- Given that IPR protection is jurisdiction specific, analysis of the IPR legal regime in each jurisdiction to ascertain the mechanism for inheritance and assignment of IPR.

Each of the above would have to be considered while planning for an M&E Professional with an offshore nexus.

When to plan

For M&E Professionals, it is never too early to plan given that as a class they are becoming younger and acquiring significant wealth at a very early age. Take the example of 8-year-old Ryan Kaji, who is reportedly YouTube's highest grosser in 2019 with earnings exceeding USD 26 million[1].

As a result, estate and succession planning which was once regarded as an activity to be undertaken post retirement, has now become essential at an earlier age. Planning young, though, necessitates that the plan be reviewed periodically to account for major developments such as marriage and parenthood, so that it continues to be relevant.

While it is understandably difficult to prioritise planning for a distant eventuality, M&E Professionals would be best advised to plan their estate with the same vigour as they plan their careers; or as we say, prioritise both… *'Netflix and Will'*.

01. https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it/#71fdfd7838cd

Bollywood, Copyright and the

Last Minute Injunction in Films

Recent litigation strategy on intellectual property rights involving cinematograph films can be summarized in three words: *last minute injunctions.*

All films are ultimately made up of a bundle of literary, dramatic, musical, artistic and cinematographic works. The release of almost every major Bollywood movie seems to be preceded by last minute (and often frivolous) litigation by plaintiffs alleging grievous infringement of some alleged intellectual property rights. These alleged rights range from copyright infringement, to infringement of trademark, or a more remote allegation of disparagement of a product or defamation.

Inevitably and typically, on the cusp of release of a big-ticket film, a plaintiff claiming that it is most aggrieved, files for an urgent interlocutory injunction against release of the movie. The perceived benefit of such a strategy is two-fold: first, in view of the imminent release of the film, a court may be persuaded to decide on priority, the plaintiff's application for 'ad interim' relief (i.e. relief granted before a fulsome hearing of the application), on the baiss of a preliminary or prima facie case; and second, if the plaintiff is able to make out a basic prima facie case of infringement, the court may be persuaded to grant a short injunction on the film's release.

Although an ad-interim is supposed to be operative only for a short time, until a proper hearing of the interim application, quite naturally it disrupts all the well-paid plans of the producers and studios who have invested huge amounts of time, effort and money into the film and very carefully calculated (including through astrologers' recommendations), the release date. Apart from such investments, timing of a release in 'Bollywood' is critical too. Pushing the release date further by even a week can have disastrous results, not just because theatres may have been booked and other third party contracts have been entered into, but also because the later release, or the timing is inopportune for any other reason.

The injunction holder gets immense bargaining power, allowing him to effectively extort, a costly monetary settlement from the producers who can ill-afford such an injunction.

Of course, it is not every plaintiff that takes advantage of such a situation. A diligent plaintiff with a robust case, who files his case well in advance, say immediately after the release of the film's publicity material which enables identification of any infringement, may also obtain an injunction. Such an injunction, granted after due consideration, may protect the plaintiff's rights and can give the producer enough time to take corrective action (say for instance, modification of a particular scene(s)/dialogue(s)).

The recent blockbuster film, ***Bala,*** produced by Dinesh Vijan's Maddock Films, exemplifies the last minute injunction approach. The film created a lot of buzz as the concerned plaintiffs fought hard in court for a last minute injunction on the basis of alleged infringement, while the producers refused to cave in. Ultimately, the film released in Dubai first, while the hearing for ad interim relief was going on before the Bombay High Court.

This was not the only litigation filed – the brouhaha around *Bala* exemplifies the kind of litigations that may ensue and issues related to property rights in cinematograph films.

Bala tells the story of a prematurely balding man. The protagonist, 'Bala' regards his baldness as a serious shortcoming and spends much of his time seeking a cure and hiding his baldness in a society obsessed with arbitrary standards of beauty. A dark skinned girl helps Bala realise that physical appearance is unimportant and that it is character and personality that wins the day.

While the plaintiffs in various proceedings filed against *Bala* claimed infringement owing to the fact that their films / stories / synopsis, also dealt with bald men as protagonists, it all boiled down to a basis question: could the mere fact that the protagonists were bald (and unhappily so), import an assumption of copyright infringement? Does copyright exist in an idea or theme, shorn of all detail? The short answer is no, as explained below.

Copyright does not subsist in an idea:

Indian copyright law on this point is now well settled. There can be no copyright in an idea or concept. The devil is in the detail – as is copyright, which exists in the form, manner, arrangement and expression of the idea by the author of an original work. The copied expression of the idea must be material and substantial, the copying of which would lead to an immediate conclusion that the defendant is guilty of an act of piracy. The Supreme Court clarified this decades ago, in *R.G. Anand v. M/s. Delux Films [1978]*, ruling that the surest test to determine whether there is any infringement is to ascertain whether the reader or viewer of the original and subsequent works "*gets an unmistakable impression that the subsequent work appears to be a copy of the original*". This decision was followed by several courts, including the Bombay High Court in *Sakshi Punjabi v. Shobha Kapoor [2016]*, and the Delhi High Court in *MRF Ltd. v. Metro Tyres Ltd. [2016]*. In *Sanjay Kumar Gupta & Anr v. Sony Pictures Networks India P Ltd. [2018]*, in which the Delhi High Court reiterated that copyright protection extends only to a concrete expression of a concept, not to the underlying concept or idea itself.

The standard is therefore a high one. Ideas or themes that are similar, say of a bald/ balding man who struggles with baldness, or the idea of a live quiz show (as in the *Sony Pictures case*), cannot of themselves, constitute copyright infringement.

Infringement of music rights

Bala was also singled out by a music distributor, which filed a suit and applied for an urgent injunction, claiming Bala's producers had infringed its copyright in one of the songs used in the film. Suffice to say, Bala's producer disputed the allegation and no injunction was granted. Ultimately the parties settled the matter, neither of them having the appetite (sensibly), for a long drawn-out litigation. Where infringement is established, this can obstruct a film's release, or worse, force a modification in the final version, which burdens the producer with additional costs.

Infringement of Trademarks / Disparagement of Products

Proceedings were also instituted (and settled), on complaint of infringement by virtue of unauthorized use of certain trademarks. A cause of action may accrue to the owner of a trademark where its use is unauthorised – either with intent to leverage its goodwill or recognition in the market, or by virtue of depiction of a trademark / product in a disparaging manner.

Apart from films, such proceedings are commonly filed in cases of comparative advertising. While comparison in itself is not prohibited by law, the advertiser must steer clear of disparagement of another brand or product. A deliberate attempt to portray the product in a disparaging or inferior light would amount to infringement. The test is whether a reasonable person watching the film / ad, would conclude that the product being shown was inferior or not up to snuff. If so, the plaintiff would be entitled to an injunction restraining release or continuance of showing the film / ad, and consequent damages for any loss suffered.

Defamation:

While not related to intellectual property rights, but certainly related to grant of injunctions, another litigation trend that has become popular in India relates to allegations of defamation. The Sunday paper is often rife with reports of articles, books and films, which have depicted in an allegedly defamatory manner, various public personalities (alive, or long dead). Against any such publication, injunctions are sought, and for films, these follow the strategy of last minute interim injunctions.

The onus of proof for defamation is high; the plaintiff must prove that the statement or picturisation alleged to be defamatory, injured the plaintiff's reputation. The defence to a claim of defamation lies in proving that the statement(s) / depiction(s) in question were true, or amounted to a fair comment. If a plaintiff can prove defamation, he/she is entitled to a permanent injunction, restraining the further publishing (a film is published when promotional material/ the film itself, is released), of the defamatory content. The plaintiff is also entitled to be compensated for loss or damages suffered.

Increasingly however, Indian courts are becoming alive to the fact that defamation proceedings are being filed with too broad a brush stroke, resulting in muzzling artistic expression or free speech, and sometimes, without any basis, to extract a monetary settlement – often just days before a book or film's release. Taking a dim view of such antics, (a film is published when promotional material/ the film itself, is released), *Lodha Developers Ltd. v Krishnaraj Rao [2019]*, put particular emphasis on the right to free expression and fair comments and refused to gag either the videos or the articles objected to by the plaintiffs.

Last minute injunctions:

So, when can/ should an injunction be granted? Indian law mandates that the plaintiff must be able to establish a prima facie case and prove that irreparable harm would be caused to it if the injunction were to be refused (and the offending material circulated). The plaintiff must also demonstrate the balance of convenience lies in its favour, i.e. that the plaintiff would be irretrievably injured should an injunction be refused, whereas the defendant would not be so prejudiced should it be granted.

Further, the plaintiff must also establish urgency for the grant of an ad interim injunction. Urgency is clear when a film is heading to the theatres in a few days, but that in itself is not sufficient – the plaintiff should have also been diligent in approaching the court. An application filed just days before the release may well be urgent, but it often the plaintiff had actual knowledge, or should have had knowledge of the offending parts of the film, much earlier, since promotional material and trailers are released months or weeks in advance.

We see and hear of claimants plaintively urging that the release of the offending film would make the alleged infringement irreversible whereas a delay in release would not materially affect the producers. However, Indian courts today are increasingly cognizant of the shotgun plaintiff's conduct, waiting till the last minute in the hope of an ad interim injunction which sets at naught the best laid plans of producers and distributers. For instance, in relation to the film *Mission Mangal [2019]*, the Bombay High Court refused an injunction, ruling that if a plaintiff deliberately delays seeking a stay until the film makers have invested huge sums of money, entered into several agreements and business tie-ups, the balance of convenience would tilt in favor of the filmmakers and a stay would ordinarily be refused. Similarly, in *Dashrath B Rathod v. Fox Star Studios India [2017]*, the Bombay High Court observed that last-minute injunctions would not be granted absent exceptional circumstances. In this case, the plaintiff prayed for an injunction against release of the movie *Phillauri* alleging infringement of the copyright in the film *Mangal Phera*. Even though the trailer came out on February 6, 2017 with the release date stated to be March 24, 2017, a last minute stay on the release was sought on March 21, 2017. Refusing the stay, the Court deprecated the practice of delaying the filing of a claim until the very last minute, and instead ordered the plaintiff to pay costs of INR 5 lakhs to the defendant, noting that the attempt of the plaintiff was, *"… clearly, to pressure the Defendants into making a statement of some kind or, worse yet, to pressure the Court into passing some hurried pro tem order for want of time with little or no assessment on merits, a wholly unfair advantage. A plaintiff who waits till the last minute must face the consequences of a failed gambit of this kind… I must have regard to the conduct of these Plaintiffs: the manner in which they deliberately delayed coming to court, letting valuable third party rights intervene in the interregnum, wasted judicial time… Not to award costs in these circumstances would be to encourage frivolity in litigation.".*

Increasingly, the last minute injunction is becoming more difficult to obtain – validly so.

Refusing last minute stays except in genuine cases, imposing heavy costs for such extortionate litigation and remaining cognizant of the realities of the business of movie making will ensure evolution of sound and commercial-minded legal principles that would ultimately discourage last minute litigation. Until then, it would appear that every now and then, a blockbuster release may be preceded by a blockbuster court hearing.

Online Gaming:

of blue Ocean and Grey regulations

The legal status of online gaming for real money stakes (**Online Gaming**) has been the subject matter of substantial ambiguity due to varying state legislation and contrary judicial precedents. In addition to the existential question of the permissibility of such gambling per se, this uncertainty may have caused a range of ripple effects including matters of taxation[1], contract law[2], exchange control[3], money laundering legislation[4], and information technology law[5].

Legal Framework

Betting and Gambling"[6] (and the taxation thereof)[7] have been included within List II (the State List) of the Seventh Schedule to Constitution of India in order to empower the States to make laws either to prohibit or to regulate them, each according to their socio-economic requirements[8].

The Public Gambling Act, 1867 (**Gambling Act**) was enacted in British India with the purpose of punishing public gambling and the keeping of common gaming-houses in certain provinces. While certain states have adopted its provisions in their entirety[9], others including Assam[10], Kerala[11], Maharashtra[12], Nagaland[13], Odisha[14], Sikkim[15], Tamil Nadu[16], Telangana[17] and West Bengal[18] have enacted state specific legislation to govern the subject.

Game of skill vis-à-vis chance

The definition of gambling under the Gambling Act does not apply to games of "mere skill"[19]. While several states adopt the same position on game of skill, some going so far as to enumerate express exclusions thereof, including West Bengal, Nagaland, Sikkim, others do not recognise such a distinction. The state legislations in Odisha and Assam do not expressly distinguish games of skill from games of chance, and the Telangana Gaming Act, 1974 (**Telangana Act**) defines wagering or betting as being inclusive of any act of risking money or otherwise in the unknown result of an event including on a game of skill[20]. It also includes 'cyber space' within the meaning of common gambling houses making online betting illegal even in the context of games of skill[21].

Case Laws and Gaming of Skill

The Supreme Court in *State of Bombay v. RMD Chamarbaugwala*[22], evolved the skill test to determine if a game amounted to gambling by assessing whether success was dependent, to a substantial degree, on exercise of skill. The decisions in *Lakshmanan*[23] and *Satyanarayana*[24] substantiated this decision and held that while a game of skill was one where success depended principally upon superior knowledge, training, attention, experience and adroitness of player, the element of chance may not be entirely eliminated.

In *Varun Gumber*[25], the High Court of Punjab and Haryana afforded the much-needed comfort by extending the skill test to online fantasy sports and upholding them as games of skill. The judgment does not delve into legality when such games are played for stakes. In contrast, the High Court of Madras held that the presence of money or valuables as stakes made games of skill to fall afoul of the law.[26] A single judge bench of the Gujarat High Court in *Dominion Games Pvt. Ltd*[27] adopted a similar position.

---

01. CSGT Rules, 2018 (promulgated under the Central Goods and Services Tax Act, 2017), Rule 31A; Income Tax Act, 1961, § 115BB.
02. Indian Contract Act, 1872, § 23.
03. Rule 3 read with Schedule 1, Foreign Exchange Management (Current Account Transactions) Rules, 2000
04. Prevention of Money Laundering Act, 2002 and the Prevention of Money Laundering (Maintenance of Records) Rules, 2002.
05. Rule 3(2)(b) of the Information Technology (Intermediaries Guidelines) Rules, 2011 requires intermediaries to ensure that rules, regulations, terms and conditions or user agreement shall inform users not to host, display, upload, publish, transmit information, inter alia, relating to or encouraging gambling.
06. Constitution of India, Schedule 7, List II, Entry 34.
07. Constitution of India, Schedule 7, List II, Entry 62.
08. Law Commission of India, Report No. 276 titled 'Legal Framework: Gambling and Sports Betting Including in Cricket in India' (Page 29)
09. Arunachal Pradesh, Punjab, Madhya Pradesh, Chhattisgarh and Uttarakhand
10. Assam Game and Betting Act, 1970.
11. Kerala Gaming Act, 1960.
12. Bombay Prevention of Gambling Act, 1887.
13. Nagaland Prohibition of Gambling and Promotion and Regulation of Online Gaming Act, 2016.
14. Odisha Prevention of Gambling Act, 1955.
15. Sikkim Online Gaming (Regulation) Act, 2008.
16. Tamil Nadu Gaming Act, 1930.
17. Telangana Gaming Act, 1974.
18. West Bengal Gambling and Prize Competitions Act, 1957
19. Public Gambling Act, 1867, § 12.
20. The Telangana Gaming Act, 1974 defines gaming as playing a game for winnings or prizes in money for money or any other stakes including wagering or betting and defines wagering or betting to include any act of risking money or otherwise on the unknown result of an event including a game of skill.
21. Telangana Gaming (Amendment) Act, 2017
22. State of Bombay v. RMD Chamarbaugwala, AIR 1957 SC 699.
23. Dr. K. R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226 (SC).
24. State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 285.
25. Varun Gumber v. Union Territory of Chandigarh & Ors., (2017) CrLJ 3827.
26. Director General of Police v. Mahalakshmi Cultural Association, 2012 (2) CTC 484 (Madras HC).
27. Dominance Games Pvt. Ltd. & Ors. v. State of Gujarat, Special Civil Application No. 6903/2017.

This has resulted in legal ambiguity about whether a variant of a game, which has otherwise been classified as a game of skill, will be proscribed under Gambling Legislation in specific states. This ambiguity was dealt with by the Bombay High Court in *Gurdeep Singh Sachar*[28]. In this case, the court clarified that only where a game or contest is determined merely by chance or accident, and money placed on stakes with consciousness of risks involved and in the hope of gain, would such a game amount to 'gambling' or 'betting'.

Petitions filed before the division bench of the Bombay High Court and the Supreme Court against the judgment in *Gurdeep Singh Sachar* were dismissed in December last year. According to public reports, the Supreme Court, orally observed that there cannot be any doubt as to whether fantasy sport are games of skill as the person who enters the contests needs to apply his mind and judgment on choosing one player over the other. The court further observed that that if Rummy was deemed to be a game of skill, so would fantasy sports[29].

In certain instances, games which are considered to be based on skill may be held as games of chance when played online. For instance, while Poker has been held to be a game of skill in the case of *Indian Poker Association v. State of Karnataka*[30], a contrary finding has been reached in *Dominance Games* in relation to the online version of the game. A similar finding may be seen in the case of video-based poker in the United States which was deemed to be a game of chance[31] where Poker has been held to be a game of skill[32].

The situation of gaming vis-à-vis gambling in Kerala is more complex. The Kerala Gaming Act, 1960 (**Kerala Act**) exempts games of skill from its purview[33], does not require proof of stakes for penalization[34] and allows the Government to exempt games from the application of the Kerala Act through a notification in the gazette[35]. The fact that the Government of Kerala, vide gazette notification dated September 30, 1976 exempted Rummy on the condition that there would be no side-betting was not referred to and the Kerala High Court held that while Rummy was a game of skill, it amounted to gambling when played for stakes under the Kerala Act[36].

Pursuant to a review petition against this verdict, the Kerala High Court held that while playing rummy was excluded from provisions of the Kerala Act, the question of whether it would amount to a violation when played for stakes would be determined on a case-by-case basis. The court held that the manner in which games of skill are played for stakes, including through online means, the stakes involved in the game would determine if it fell afoul of the Kerala Act[37].

Implications of Uncertainty

Applicability of GST

The judgment in Gurdeep Singh Sachar also examined the applicability of the Goods and Services Tax (**GST**) to betting and gambling. Under Rule 31A of the CGST Rules, for lotteries, gambling and horse racing, the value is presumed to be 100% (One Hundred Percent) of the face value of the bet. The term 'supply' is defined under Section 7 of the CGST Act to expressly exclude actionable claims, other than lottery, betting or gambling and treats them neither as a supply of goods nor a supply of services.

Consequently, actionable claims in relation to matters other than gambling would not qualify as supply, and resultantly, deposits relating thereto would not be taxable. The court therefore held, in the context of games of skill which did not amount to gambling, that where the CGST Act itself excluded deposits pooled in the escrow account from being taxed, the CGST Rules cannot be said to override and gain precedence. The court therefore held that amounts pooled in the escrow account were not taxable.

28. Gurdeep Singh Sachar v. Union of India, (2019) 75 GST 258 (Bombay)
29. Gambling Compliance: India's highest court confirms 'Game of Skill' status for Fantasy Sports, available at https://gamblingcompliance.com/premium-content/insights_analysis/india%E2%80%99s-highest-court-confirms-%E2%80%98game-skill%E2%80%99-status-fantasy-sports
30. Indian Poker Association v. State of Karnataka, WP Nos 39167 to 39169 of 2013.
31. Collins Music Co. v. North Carolina Alcoholic Beverage Control Commission, 451 S.E.2d 306, 308.
32. United States v DiCristina, 886 F.Supp.2d 164(E.D.N.Y. 2012).
33. Kerala Gaming Act, 1960, § 14.
34. Kerala Gaming Act, 1960, § 11.
35. Kerala Gaming Act, 1960, § 14A.
36. Ramachandran K. v. The Circle Inspector of Police, Perinthalmanna, 2019 (1) KHC 627
37. Play Games 24X7 Private Limited & Ors. v. Ramachandran K. & Ors., 2019 (4) KLT 542
38. Swami Ramdev & Ors. v. Facebook Inc. & Ors., 263 (2019) DLT 689

Online gaming platforms and intermediaries

While the judgment in Gurdeep Singh Sachar and the dismissal of an appeal against the same in the division bench of the Bombay High Court and the Supreme Court has provided and extended much-needed clarity with respect to games of skill played for stakes, the verdicts in Ramachandran and Play Games judgments of the Kerala High Court delivered subsequent to the Gurdeep Singh Sachar verdict retain the ambiguity. This ambiguity, particularly in view of the findings on global takedown issued by the Delhi High Court[38], may form a cause for concern. A definitive finding on the fact that games of skill when played online for stakes continue to constitute games of skill would benefit the gaming industry.

Celebrities and Personality rights:

What's in a Name?

Modern ideas of marketing dictate that while a rose by any other name would still smell as good, it may not sell as much. The perceived commercial value of associating with a well-regarded personality has led to enormous sums being offered to celebrities to endorse products. The monetisation of a celebrity's personality has naturally necessitated the protection of its commercial value. Traditionally, such protection was sought under common law remedies such as the tort of passing off, defamation and/or causing injurious falsehood. However, these remedies carry onerous requirements such as proof of intent and harm caused. Thus, they have not adequately served the purpose.

It is in this context that the recognition of personality rights as a distinct legal right assumes significance. Personality rights are closely associated with the right to privacy. While the right to privacy focuses primarily on the right to be left alone, personality rights are concerned with the right to control one's publicity. These rights focus on identifying and assigning ownership of the commercial interest associated with the name, image or personality of a given celebrity. In essence, personality rights ensure the protection of a "celebrity's pecuniary interest in case of commercial exploitation of his identity"[1].

Jurisprudence in relation to personality rights is arguably most evolved in the United States, where such rights are referred to as publicity rights. A number of US states have not only statutorily recognised the right to publicity, but have also gone beyond to consider it to be in the nature of a property right, thus allowing it to be inherited and exercised posthumously. For instance, as far back as in 1982, the Supreme Court of Georgia allowed a case brought by the estate of Martin Luther King, Jr. against a defendant selling his plastic busts without due authorisation[2]. On the other hand, in the European Union, while treatment varies across different member-states, it is broadly based on the theory of personality viz. as being personal to the celebrity. In the UK, protection continues to be sought indirectly by reliance on the tort of passing off and/ or provisions relating to copyright, trademark and data protection.

In India, personality rights are not recognised statutorily. There has, however, been judicial recognition, most notably in the recent Supreme Court judgement on the right to privacy. One of the judgements in this case has explicitly recognised the right to publicity, stating, ***"Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent."***[3] Pertinently, the judgement links the right to publicity, not only to economic justifications but also to protection of individual autonomy and personal dignity. Earlier, the Delhi High Court had adopted a similar approach and had expressly recognised the right to publicity as vesting in individuals only[4]. Both these approaches view personality rights as individual-specific rights, as opposed to proprietary rights that can be assigned and inherited.

However, implementing it becomes a problem when it comes to posthumous enforcement. This has been evident for instance in the legal tussle over the release of 'Thalaivi', a biopic on Jayalalithaa. Jayalalithaa's niece approached the Madras High Court to prevent the release of the movie on the ground that it infringed Jayalalithaa's personality rights. However, the Madras High Court declined to do so, stating that it was difficult to accept the plaintiff's contention that she had inherited her aunt's personality rights. The court further stated that the question of whether personality rights are capable of being inherited at all would require trial and final disposal of the matter, and could not be decided at an interim stage[5]. It remains to be seen if the court will set a precedent in recognising posthumous personality rights in India.

A number of concerns arise in the enforcement of personality rights of living persons as well. Relief sought for the infringement of personality rights is usually in the nature of an injunction to prevent the continued unauthorised use of a celebrity's image and damages to compensate the celebrity for the loss of remuneration as well as potential damage to reputation. However, places a high burden on celebrities to prove the existence of the personality right, the intent to cause damage and the damage caused. The enforcement of such rights can therefore entail a long legal battle. Further, courts have traditionally been overly conservative in their estimation of damages, with courts in India previously having

---

01. Right of Publicity: Is it Encompassed in the Right of Privacy?, Subhashini Narasimhan and Thriyambak J. Kannan, (2005) 5 SCC (J) 5; Privacy, William L. Prosser, California Law Review, Vol.48 at p. 383.
02. Martin Luther King, Jr. Center For Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697.
03. Justice Sanjay Kishan Kaul's Judgment in Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
04. ICC Development (International) Ltd v. Arvee Enterprises, 2003 (26) PTC 245 (Del).
05. OA No. 1102 of 2019 in CS No. 1102 of 2019.

awarded damages in the range of INR 1,00,000[6] to INR 5,00,000[7]. In comparison to the many crores routinely commanded by celebrities for endorsements, these are paltry sums, insufficient to recompense them for the damage caused. This mismatch between market rate and the damages awarded by courts is reflected in the damages for breach of sports image rights awarded by European courts as well[8].

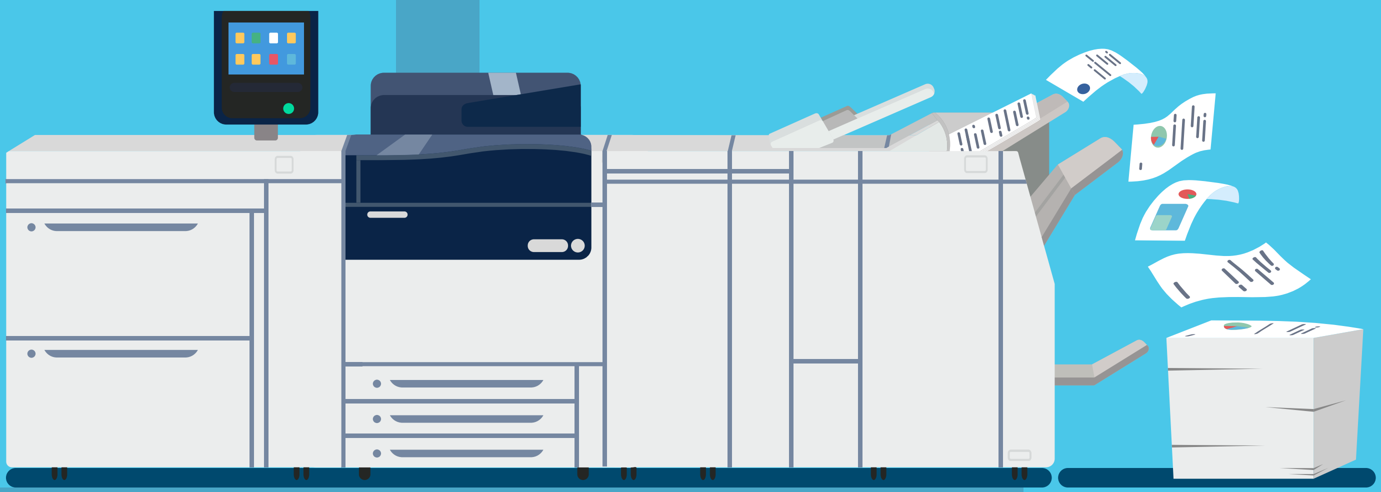
Another concern that has arisen in relation to personality rights pertains to the assignment of these rights. Particularly, in football contracts, it has become increasingly common for a percentage of an athlete or a coach's image rights to be assigned to a football club. While this offers both commercial and tax benefits, it has presented challenges during negotiations when an athlete/ coach moves from one club to another[9]. The determination and maintenance of the value of such rights also becomes critical, particularly if the assignment of the rights is part of the commercial discussions and decisions regarding remuneration. In such cases, morality clauses may be included in contracts to ensure that the athlete/ coach does not conduct himself in a manner detrimental to his image or its commercial value[10]. While such contractual safeguards are helpful to an extent, they are no substitute for a clear legal framework on the scope and ownership of personality rights.

As such, there is a need for statutory protection, regulation and enforcement of personality rights in India. A useful model may be the statutory recognition of image rights by Guernsey. The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 provides for registrable image rights and sets out the manner of their exercise, license, ownership and assignment. It incorporates provisions for posthumous exercise and further details the consequences of infringement or violation of these rights.

Moreover, it is essential to address the unique challenges and complexities presented by the pervasiveness of social media. In a world defined increasingly by an unforgiving, un-forgetting internet that disseminates information at lightning speed, an injunction may be too little too late. The legal framework must provide for effective remedies against violations by providing for special courts, expedited procedure and compensation based on actual market rate.

06. DM Entertainment v Baby Gift House (CS(OS) 893/2002, Delhi High Court) – damages awarded for the unauthorized use of Mr. Daler Mehndi's persona.
07. Tata Sons Limited v Aniket Singh (CS (OS) 681/2012, Delhi High Court) – damages awarded for the misuse of Mr. Cyrus Mistry's name.
08. Ian Blackshaw, Understanding Sports Image Rights, available at https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html.
09. Simon Stone, Jose Mourinho: Image rights negotiations hold up Manchester United deal available at https://www.bbc.com/sport/football/36382637.
10. Ian Blackshaw, Understanding Sports Image Rights, available at https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html.

What's in a Name?



Print media in India

Standing the Test of Time?

NEWS

Introduction

In an increasingly digital, mobile and social media environment, where the newspaper industry has been dwindling worldwide it is heartening to see that in India, this year marked the 198th anniversary of Asia's oldest newspaper, *Mumbai Samachaar*. The Indian print media industry, up until now, seems resilient and has shown growth in circulation and readership, albeit slow. The print segment grew 0.7% in 2018 to reach INR 305.5 billion[1]. The slow growth of the print media may be attributable to the fact that the Indian newspapers continue to be heavily dependent on advertising revenues and face increasing competition from other mass media sectors. In 2018, of the total revenues earned by the print segment, the advertising revenues and circulation revenues contributed 71% and 29%, respectively[1].

This note analyses the challenges and opportunities that the Indian newspaper segment is faced with in the face of digitization of news and the controversies surrounding the recent regulatory changes that may potentially impact the industry.

Challenges

Rising cost, shrinking revenues:

The Indian print media segment imports more than half of its newsprint consumption[1], and therefore the operating margins of the segment are dipping low with the depreciation in the value of the Indian Rupee and relatively stagnant circulation numbers. A muted growth in the advertisement revenues in the recent years has also not offered the necessary off-set against the soaring operating costs[2]. Further, the Finance Bill 2020 has reduced the 10% basic custom duty imposed by the Finance Bill 2019 to 5% on newsprint and lightweight coated paper. The change was brought in after several representations were made to reduce the additional burden on the print media as it was already going through a difficult phase.

Competition for attention:

Over the past few years digital media has emerged as an important platform of communication. With eyeballs shifting from print and television to online media, the second screen phenomenon is on the rise. While it took 15 years from 1995 to 2010 before 100 million Indians (8% of the population) had internet access, growth has greatly accelerated since, surpassing an estimated 500 million users by June 2018, more than 30% of the population, driven primarily by tremendous growth in mobile internet access[3]. The digital platforms have provided the advertisers a cheaper alternative to newspapers and, arguably, a better reach.

01. A Billion Screens of Opportunity, 2019, FICCI-EY.
02. Rise in newsprint cost to lower profitability of print media companies by 400 bps this fiscal, (CRISIL), September 12, 2018.
03. India Digital News Report, 2019, Reuters Institute.

While *Mumbai Samachaar* may have celebrated its 198th anniversary, some newspaper publications like DNA (**Daily News & Analysis**) newspaper, have moved to a purely digital platform and some have shut shop altogether, for instance, Deccan Chronicles Holdings Limited discontinued the print edition of its business daily, Financial Chronicle.

Opportunities

'Fake News' and era of disinformation:

With the ever-growing internet penetration, the news ecosystem which is being established is one where the users themselves are becoming diffusers, commentators and creators of news[4], thereby giving rise to 'fake news'. In this context, it is important to recall the oft-quoted words of C.P. Scott, *"comment is free but facts are sacred"*[5]. Thus while the internet may have challenged the status quo of the newspapers, it has also provided it with an opportunity to establish its foothold as a credible and fact-driven source of news.

A recently published editorial in one of the most respected Indian newspapers suggests that in order to distinguish itself from the social media platforms where even misinformation is propagated as 'breaking news', engaged journalism should become the norm for newspaper publishers so that its readers are informed of the editorial processes that guide a newspaper and how it is different from the opinions that populate the social media space[6].

Policy changes

Foreign Direct Investment (FDI):

In a recent amendment, the Department of Promotion of Industry and Internal Trade (**DPIIT**) vide Press Note No. 4 has permitted 26% FDI under Government route for uploading/ streaming of news and current affairs through digital media. The intent of this policy change is not very clear – whether the policy is to encourage domestic media players to raise additional capital from overseas by separating their digital media businesses from print/ broadcasting business or, it is to restrict the foreign investment in the news and current affairs genre over the digital platform in line with the print media. Clarifications and views from the Ministry of Information and Broadcasting are awaited.

Working Journalists Acts:

In the print media industry, the employment rights of journalists are presently governed by the Working Journalists and Other Newspaper Employees (Conditions of Service) And Miscellaneous Provisions Act, 1955 (the **1955 Act**) and the Working Journalists (Fixation of Rates of Wages) Act, 1958 (the **1955 Act**). The 1955 Act and the 1958 Act (together, the **Working Journalist Acts**) are proposed to be repealed by the Code on Occupational Safety, Health and Working Conditions Bill, 2019, which proposes to replace approximately 44 labour legislations including the Factories Act, 1948, the Contract Labour Act, 1970 and so on. This move, which may provide greater flexibility to newspaper publishers in their resource management, is being strongly opposed by the Delhi Union of Journalists as being 'hastily planned and extremely arbitrary'[7].

The wage boards constituted under the 1955 Act and the protections afforded to journalists under the Working Journalists Acts have been controversial for quite some time. Section 3(2) and Section 16 (2) of the 1955 Act, provide better protection for journalists than even that offered under the Industrial Disputes Act, 1947 to workers in other sectors. By virtue of Section 16(2)[8], the rights or privileges of journalists granted under the 1955 Act are protected even in instances where journalists are engaged under bilateral contracts with better remuneration than that fixed by the wage boards. From the publisher's perspective, the Working Journalists Acts have outlived their relevance, as the object and purpose of the said laws – to ameliorate the conditions of service – has been achieved since journalists are being paid 'fair' wages[9]. Greater competition from television, the internet and from foreign publications ensures that good working conditions are provided to retain talent. From the journalists' perspective, the need for a law which provides journalists greater protection than a worker in any other private service is required as a measure for protecting free speech and insulating them from political pressure on media owners.

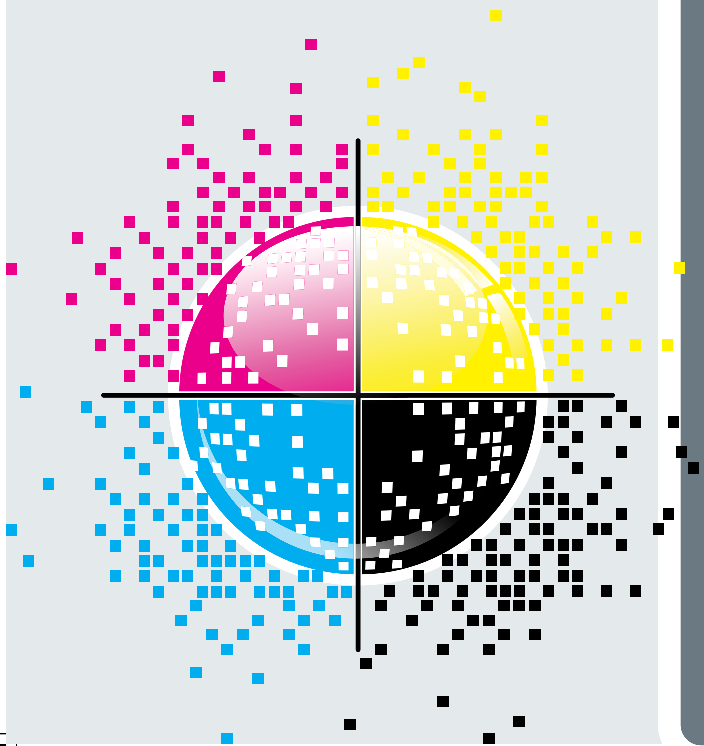
---

04. 'The Changing Business of Journalism and its Implications for Democracy', Reuters Institute for the Study of Journalism.
05. 'A Hundred Years', C.P. Scott.
06. 'The elements of engaged journalism', The Hindu, December 9, 2019.
07. 'Scribes' body opposes New Labour Codes; calls it 'anti-employee'', The Hindu Business Line, July 1, 2019.
08. Section 16(2) of the 1955 Act states 'nothing contained under this Act shall be construed to preclude any newspaper employee from entering into an agreement with an employer for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under this Act.'
09. 'Wage Board Wars', Himal Southasian, April 3, 2015.

What's next?

Paid subscription for premium content: Many newspapers have established an online presence, making their entire content available to the masses at the click of a button, without having to pay even the minimal cover charges at which the newspapers are priced. At present only a few Indian newspaper publishers leverage their premium content and charge subscription fees for such content. If the print media is to be sustained primarily by subscription revenues, the business model will need to be altered by making access to content chargeable. If journalism has to survive, the public has to pay[10].

10. 'The Big Digital Paywall Question', Livemint, October 27, 2016.



Closing remarks

The need for robust measures to stimulate sustainable growth of the newspaper industry does not just flow from the sentiment of preserving a 'relic of the past' but also the need to promote credible journalism. While each form of news media may be unique in its offering, it is the print media, especially the established newspaper publications, national as well as regional, that outrank all other sources of news by being a validated, analytical, high-impact and wide-reach source of news.

Whilst the Indian print media landscape may not have changed as dramatically or radically as other countries on account of the socio-economic setting of the Indian democracy – linguistic plurality of print media, lower cover prices, door-step delivery of newspapers, the technology boom and greater internet penetration has made it vulnerable to increased competition. Whether the industry stands the test of time by embracing technology needs to be seen.

Tax challenges
in respect of

Digital Media & Characterisation of Income in the Industry

Existing tax regimes of developing countries were originally designed to tax business activities being conducted physically on their soil. Digitalisation of businesses, while increasing their reach, has also brought to light loopholes in tax laws as these businesses do not leave physical footprints while tapping newer markets in most countries. This has enabled such businesses to shift their profits from countries of their revenue source to countries where tax is 'nil' or low. This also raises concerns of tax erosion in the source countries. This discord between existing tax laws and the idea of a fair tax allocation amongst jurisdictions has triggered a need to tax digital transactions in the source country by changing international tax laws. This article discusses, in brief, certain tax issues arising due to the digital age of businesses.

Base Erosion and Profit Shifting

The Organisation for Economic Co-operation and Development (**OECD**) had released various action plans to tackle the aggressive tax avoidance strategies resulting in erosion of tax bases of countries and artificial shifting of profits to low tax jurisdictions (**BEPS**). As part of BEPS Project, the OECD released 15 Action Plans targeting various tax avoidance strategies. One such measure was the Action Plan 1, which sought to tackle tax challenges posed by the digital economy by suggesting introduction of: (a) nexus rule based on significant economic presence (**SEP**); (b) withholding tax on digital transactions; and (c) equalisation levy (**EL**).

OECD Approach under Inclusive Framework

The Inclusive Framework on BEPS, commissioned by the G20 Finance Ministers, submitted a report titled *Tax Challenges Arising from Digitalisation*. The Inclusive Framework had received several proposals for reaching long term solutions to the tax challenges. These proposals are divided under two pillars; the first pillar dealing with the allocation of taxing rights which involves review of the nexus and profit allocation rules (**Pillar One**), and the second pillar (**Pillar Two**) dealing with introduction of rules to counter BEPS (**Proposals**). The main principle underlying Pillar One is that the user/ market jurisdiction must be able to tax profits that are reasonably attributed to the user/ market jurisdiction. The Proposals suggest covering large consumer facing digitised businesses such as the OTT platforms like Netflix, YouTube et al. As the proposal is in formulation stage, it still needs to come up with the meaning of concepts such as 'consumer facing businesses', limitation based on size etc. It is suggested to have a new nexus rule such that the taxation of business profits arising from digital transactions will not be conditional on 'physical presence' but will be ascertained through the 'sustained and significant involvement in the economy of a market jurisdiction'. This nexus would be determined based on the revenue threshold, which in turn will be based on the size of the market itself. This new rule is proposed to be a standalone rule separate from and in addition to the existing permanent establishment (**PE**) rules. The Proposals also elucidate a three tier mechanism for allocation of profits to the relevant market jurisdiction, which is based on excluding certain routine profits and allocating certain portion of 'deemed residual profit' of the multinational enterprise (**MNE**) group to the concerned market jurisdiction.

The Indian approach to nexus

India has been one of the leading voices of the developing nations in OECD. For the new nexus rules, India has raised objection to the Proposal that is based on the premise that exclusion of routine profits from allocation is contrary to the allocation under the conventional PE rule, where all profits allocable to the PE are taxed in India. Various nations have joined in India's objection to this issue.

Indian Scenario

The Indian authority's attempts to tax digital business models have not succeeded in most cases as the courts did not accept existence of PE under the extant principles and rules. Characterisation of payments to search engines for advertisements is an example, where the authorities sought to tax this as royalty or fees for technical services (**FTS**). However, Indian courts on various occasions have been quick to grant relief to tech giants, ruling in all cases that the payment could not be characterised either as royalty or FTS within the definition of these terms under the tax treaties. They consistently characterised these payments as business income of these MNEs and could not hold them taxable in India in the absence of physical presence and PE. This issue of characterisation of payments assumes relevance even with respect to OTT platforms such as online streaming portals, as payments towards advertisements, and subscriptions in the absence of a physical presence, would not be taxable in India under the conventional PE rule, unless they qualify as royalty or FTS under the applicable tax treaty.

Taking the cue from Action Plan 1, India has introduced SEP under its source rules, whereby a non-resident in India would be said to have a SEP in India, if (a) transactions relating to goods, services, property including provision to download data or software in India by a non-resident exceeds the prescribed amount; or (b) the non-resident engages in a systematic and continuous soliciting of business activities or interactions with the prescribed number of users through digital means. However, these rules have not been enforced as the thresholds aren't prescribed yet.

In addition to the SEP, India has introduced EL inspired by Action Plan 1. EL, though not an income tax, operates in a manner similar to withholding tax, and is levied at the rate of 6% on consideration paid or payable to a non-resident for certain 'specified services'. It is done by either a resident Indian who has a business or is a professional or by a non-resident having a PE in India. The EL is intended to be applicable only on business-to-business transactions. Currently, 'Specified services' include online advertisements, provision for a digital advertisement space or any other facility or service for the purpose of online advertisement. The government has power to notify any other services on which EL may be levied.

Conclusion

The international tax regime and network of tax treaties work on the principle of international comity, and pacta sunt servanda under the Vienna Convention on Law of Treaties, 1969 (**VCLT**). It requires the parties to the treaty to fulfil their obligations in good faith. To meet the spirit of the above two principles, it is vital that any change in the international tax regime is implemented through bilateral or multilateral agreements.

In this context, while India has introduced the concept of SEP in its domestic law, its tax treaty network has remained unchanged. Thus, it is critical that SEP or the above proposals are included in the form of a multilateral instrument or in tax treaties post bilateral negotiations, to be in line with the VCLT. Any unilateral measure to implement these measures would remain futile without amendment to tax treaties. As the world moves to recognise the right to tax income in a country where market exits, it is clear that the OTT platforms and other digital media companies will need to examine these developments carefully and be prepared to pay taxes even where they do not have PE.

They will be well advised to keep track of these developments and ensure that business activities are aligned with the ever changing laws. It is also critical to note that a legitimate tax planning can be undertaken but employing aggressive tax avoidance strategies could have adverse implications under the domestic General Anti Avoidance Rules, and the Multilateral Instrument to implement BEPS measures (**MLI**), if the main purpose (or one of the main purpose under MLI) is to obtain tax benefit.


TAX
TAX
TAX

Effectiveness of

John Doe orders in the Media Industry

John Doe orders, also known as Ashok Kumar orders or Rolling Anton-Pillar orders, are ex-parte interim injunctions issued against defendants who either are unknown or unidentified at the time of obtaining or issuing the order. John Doe orders have helped copyright owners, especially in the media industry, to overcome difficulties faced in infringement cases against unknown persons belonging to an identifiable class. These persons may be a group or an individual, a real person or a legal person, a company, a registered society, service providers, websites, newspapers, among others, which infringe the right of another through certain actions. These orders are granted under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908, and are based on the same principles involved in grant of an interim injunction. These are passed as ex-parte as generally in these cases, time is of essence as movies have a brief lifespan and sidestepping any postponement caused by the anonymity of the infringer may cause irreparable damage to the copyright owner. The order is anticipatory in nature as the copyright owner can simply serve the order on those defendants who are found to be infringing and the defendants then must comply with the order, as failure to do so would constitute contempt.

In India, the trend of John Doe orders was started in 2002 by the Delhi High Court in the case of ***Taj Television v. Rajan Mandal***[1] against unknown cable operators. Initially, a suit for John Doe orders were filed by broadcasters, such as ESPN[2] and Star[3], having exclusive licence to broadcast sports. Thereafter during every major sporting event the broadcaster holding rights to telecast the event rushed to the High Court to obtain John Doe orders to protect the copyright of the event to be shown on their channels. Production houses like UTV[4], Viacom18 Motion Pictures[5] and Red Chillies Entertainment[6], too, joined the trend and filed suits against unidentified cable operators and unlicensed distributors, who were broadcasting movies without obtaining proper licenses. With technological advancement, the trend to pray for grant of John Doe orders against cable operators has now shifted to file sharing websites and internet service providers (**ISP**)[7].

The contention against John Doe orders are with respect to the manner in which such orders are granted as movie producers are successful in getting these orders against an entire website on the 'possibility' of piracy. Such was the case in ***Star India v. Sujit Jha***[8], where the Delhi High Court had passed a pre-emptive order to block 73 websites in their entirety. The argument is that it is extremely easy for a website to circumvent the order by merely changing a character in the URL, thereby nullifying it. Thus, unless the access to the entire website of the defendants, whether identified or not, is blocked, there is no alternative and efficient remedy that remains with the plaintiff. However, in some cases, these infringing websites may also host a sizeable portion of legitimate content, which also suffers when such orders are passed. Conflated with this issue is the **"safe harbor"** protection that most websites that act as intermediaries have. If they are notified of infringing content, websites that adhere to the safe harbor guideline do take down content. However the take down process itself takes time which in the case of a new theatrical release or a live sporting event, is **"of the essence"**. It is natural therefore for the courts to take a view on the balance of convenience and the imminent threat of piracy especially if the impugned websites have in the past been notified of infringing content being uploaded on their sites.

In previous instances, the Indian courts had ordered the removal of only specific content from YouTube without ordering the entire video-sharing website to be shut down. Therefore, there needs to be minimal standard of evidence on which such John Doe orders are granted. Such standards in terms of John Doe orders were passed in the case of ***Bloomsbury Publishing Group v. News Group Newspapers***[9], where it was held that: *"First, the claimant needs to demonstrate that he has a good arguable case against the defendant. The stronger the order, no doubt the stronger that case should be. Second, the order has to be in terms which clearly state what the defendant must and must not do. Third, it must be possible to identify the defendant against whom the order is sought. Fourth, it will only be effective against a person who, when made aware of the terms of the order, will understand that it applies to him."*

01. CS (OS) No. 1072/2002.
02. ESPN Software India Pvt. Ltd. v. Tudu Enterprise , CS (OS) No. 384/2011.
03. Satellite Singapore PTE Ltd. v. Star Cable Network, CS (OS) No. 211/2010.
04. UTV Software Communications Limited v. Home Cable Networks, CS (OS) No. 821/2011.
05. Viacom 18 Motion Pictures v. Jyoti Cable Network & Ors, CS (OS) No. 785/2012.
06. Red Chillies Entertainments Private Limited v. Hathway Cable & Datacom Limited, Suit (L) No. 993 of 2014.
07. Reliance Big Entertainment v. Multivision Network, CS (OS) No. 3207/2011
08. CS (OS) No. 3702/2014.
09. 2003 EWHC 1205 (Ch).

In India, another problem is that various High Courts approached John Doe orders differently. For instance, in 2016, hundreds of websites were blocked under the order of the Madras High Court to curb unauthorized hosting of the film A Flying Jatt. However, on the other hand, Bombay High Court has been granting John Doe orders in a limited manner[10], by ordering the block of specific URLs and links hosting the infringing material rather than blocking the entire website. Justice Gautam Patel of Bombay High Court stated that John Doe orders was far too broad and admitted of little or no scrutiny. Moreover, they had the potential of shutting down entire websites and blocking all content, including legitimate content. In another case before Delhi High Court,[11] the measures suggested by the Court were quite dynamic. The Court directed Ministry of Electronics and Information Technology and Department of Telecommunications to explore the possibility of framing a policy under which a warning could be issued, as a pop-up or email, to the viewers of the infringing content cautioning the viewers to cease viewing/ downloading the infringing material. In the event, the viewers continue to view, access or download the infringing content, a fine could be levied on them. This measure, in the opinion of the Court, would go long way in curbing the pirated content and promoting the initiative of 'Digital India'. Having said that, it is difficult to determine the boundary limits of John Doe orders since it is a concept that has evolved from judicial pro-activeness. Each case for grant of John Doe order needs to be examined independently. There is always a fear of the John Doe order being improperly implemented, which may result in legitimately harming the rights of third parties. Courts have now started taking a conservative approach in granting such orders, holding that indefinite injunctions should be granted cautiously as breach of injunction may cause serious consequences for the violator[12].

The Bombay High Court[13] has recently taken a view that such blanket John Doe orders cannot be passed unless the plaintiff can show actual incidents of breach or acts which are likely to result in such cases of intellectual property violation. In another case[14], the Bombay High Court laid emphasis on the importance of identifying individual links by the plaintiffs, rather than providing the links to entire websites.

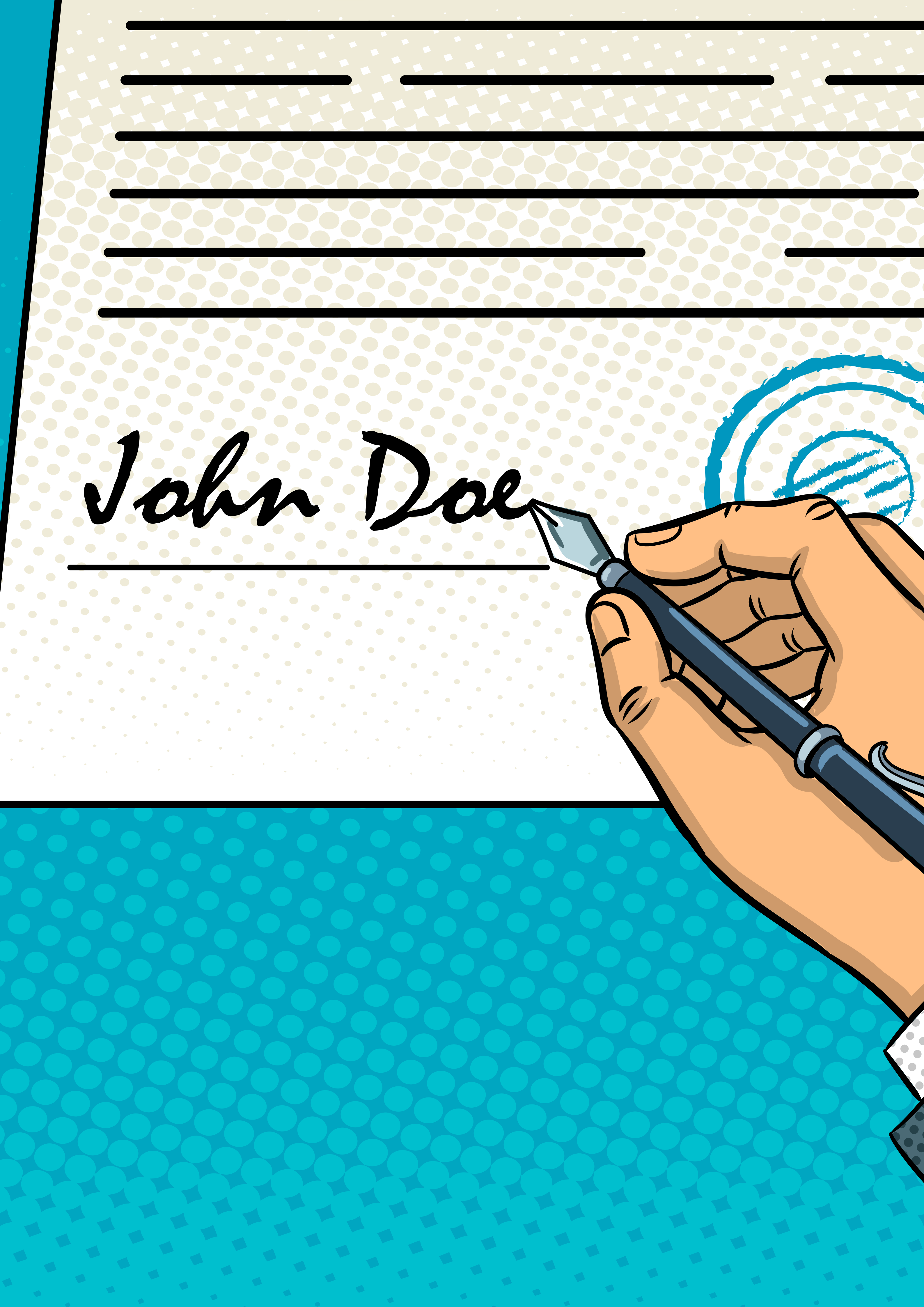
As far as the media industry is concerned, when it comes to piracy the loss, which can be caused when a pirate copy of a new film is released online even before its theatrical release, is not easy to quantify. Once a copyright is infringed, the loss cannot be recovered, and hence, John Doe orders have gained popularity as a legal shield in the media industry. However, there is a need for checks and balances as it could easily over-step the boundary and serve as a vague injunction if not specified. In the case of ***Sony Network India Pvt Ltd. v. Home Cable Networks***[15], the Delhi High Court went to the extent of using John Doe orders to reduce litigations by enabling the plaintiff to enter into licensing agreements with the unknown defendants being identified by the local commissioner appointed under the case.

Another aspect that needs to be settled by the Indian courts is the right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution while granting John Doe orders. While this right certainly cannot extend to the protection of online piracy, the argument revolves around the need for orders blocking websites in their entirety and the principles of free and fair internet. There needs to be a balance between freedom and statutory rights.

Even though the path taken by the judiciary in India is in the right direction, there is a need to balance the scope of injunctions to ensure that the purpose of these John Doe orders are not defeated or abused. John Doe orders are more of preventive in nature which gives a chance to owners of copyright to protect the economic value of their work. There is no denying that John Doe orders have helped in the protection of intellectual property rights, it now remains to be seen whether such orders have actually helped in curbing piracy.

---

10. Balaji Motion Pictures Ltd. v. Bharat Sanchar Nigam Ltd., Notice of Motion (L) No. 1940 of 2016.
11. UTV Software Communications Ltd. v. 1337x.to and Ors, CS(Comm) 724/2017
12. IPRS v. Mr. Badal Dhar Chowdhry, CS (OS) No. 1014/2004.
13. Abis Rizvi Films v. Hathway Cable and Datacom Ltd., Notice of Motion (L) No. 2407 of 2014 in Suit (L) No. 1016 of 2014.
14. Yash Raj Films Pvt. Ltd. v. Bharat Sanchar Nigam Ltd & 49 Ors, Notice of Motion (L) No. 1933 of 2016 in Suit (L) No. 692 of 2016.
15. CS (COMM) No. 239/2017.


John Doe

Online Games

GST'S New Playground

Online fantasy sports have caught the attention of revenue officials for potential leakage of GST revenue on two counts. One: Whether the inherent nature of fantasy sport was a game of skill or in the nature of gambling. Two: How to ascertain the value of the supplies and consequently the amount of GST payable.

Such concerns stem from the differential tax treatment for games of skill vis-a-vis games of chance under the GST legislation. Online games are exigible to GST at an effective rate of 18%, whereas gambling is exigible to GST at 28%. Interestingly, even after two years of implementation of GST legislations, gambling has not been defined nor any clarification in this regard has been issued. Additionally, w.e.f. January 23, 2018, the valuation of supply has itself become a cause for concern since the rules were amended wherein actionable claims in the nature of lottery, betting and gambling would be 100% of the face value of the bet or the amount paid into the totalizator.

While the revenue official were still in the process of initiating investigations against major players, the High Court of Bombay (**High Court**) found itself adjudicating on a criminal writ petition filed by Gurdeep Singh Sachar alleging that Dream 11 was hosting illegal operations of gambling/betting/wagering in the pretext of Fantasy Sports and for evasion of GST[1].

Fantasy Sports

The High Court reviewed the game-structure and manner of playing on Dream11 platform and observed that participant selected virtual teams on the basis of prior knowledge, awareness of player's performance and conditions of playing arena. A participant's victory or rank was not dependent upon winning or losing of any team in the real world but on a pre-calculated score programmed for virtual teams on the basis of performance of the players in the real sport event. It was, therefore, concluded that such games were predominantly based on skill and the supply of fantasy sports by Dream 11 was an online gaming service exigible to GST at an effective rate of 18%. The instant judgement has brought clarity on the applicability of GST and the role of the service provider in relation to the online gaming industry dealing with fantasy sports.

In order to determine whether the pooled amount's value is a consideration for the supply of fantasy sport, the High Court observed that such amount must be used to award participants for their wins in the virtual game. Hence, they were in the nature of 'actionable claims'. An 'actionable claim' other than lottery, betting and gambling was neither a 'supply of goods' nor a 'supply or services'.

Accordingly, it held that the pooled amount was a consideration for an activity not exigible to GST and that GST was payable on the platform fee/service alone, i.e. consideration which was collected for the supply of online gaming service and not the pooled amount.

Interestingly, while the High Court judgement clarifies that fantasy sports should be treated as games of skill, confusion shrouds other web-hosted games as the legislation does not include a specific definition of games of skill. The Supreme Court of India, in its earlier ruling[2], held that while all games involve an element of chance, a game of skill is one where the element of skill predominates. Further, certain states have enacted legislations governing gambling activities which provide clear distinction. For example, the Nagaland Act lays down a list of 'games of skill' which include Bridge, Rummy, Poker, Virtual Sports & Fantasy Games, Quizzes and Binary Options. Moreover, games such as poker have been treated contrarily in different states. For example, Gujarat High Court has held that poker is a game of chance whereas Nagaland and West Bengal do not treat it as gambling.

Although the above test of skill is a settled position of law, some of the high courts in India are struggling with contentions to exclude certain games from the purview of skill. This is on account of games being played for stakes[3]. Accordingly, a web-hosted game may face diverse treatment in different states. In light of the same, it becomes essential to review the mechanism, methodology and conclude whether the games hosted by online gaming websites are considered as skill in a state from where the services are provided. Once the nature of game is determined, the online gaming platforms would have to discharge GST at the applicable rates.

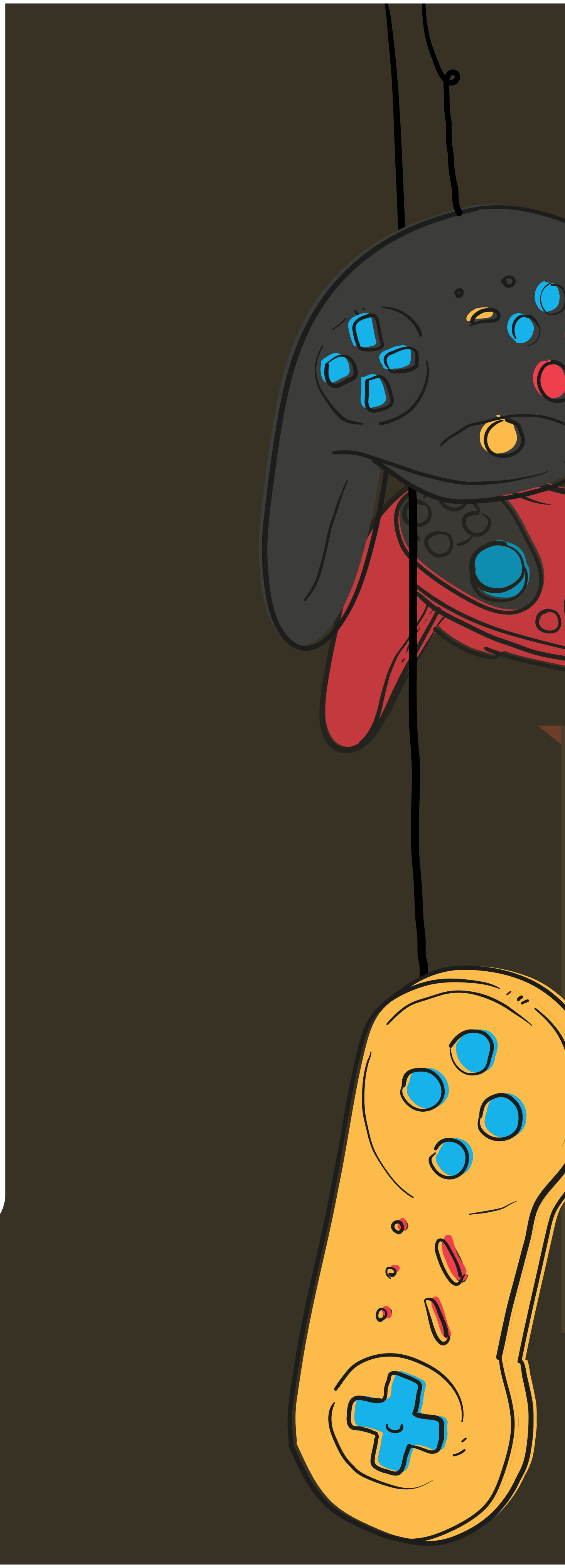
---

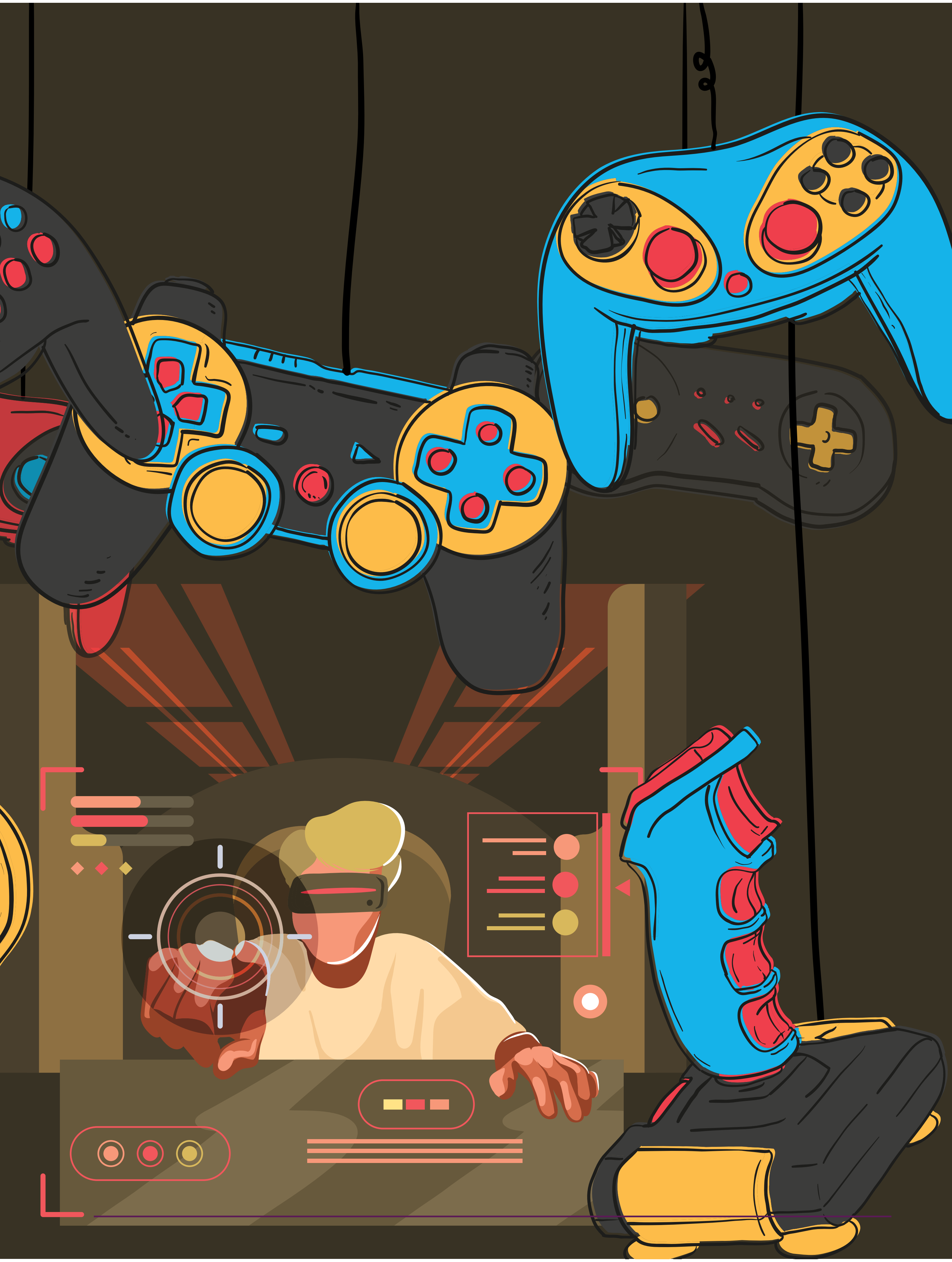
01. Gurdeep Singh Sachar v. Union of India, 2019 (6) TMI 1008.
02. State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825; Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.
03. Director General of Police v. Mahalakshmi Cultural Association, 2012 (2) CTC 484 (Madras High Court) challenged vide Special leave petition. The petition was later allowed to be withdrawn with express direction of non-survival of High Court decision. Dominance Games Pvt. Ltd. & Ors. v. State of Gujarat, Special Civil Application No. 6903/2017.

For the evaluation of GST in relation to games of chance, it can be inferred that the tax would be payable on both the fee collected by online platform and the pooled money. When it comes to game of skill, a position may be taken relying on Dream11's case that GST was payable only on the platform fee / service, i.e. consideration collected for the supply of online gaming service and not the pooled amount. However, the said position has emanated from a criminal public interest litigation having a secondary question in relation to valuation under GST which was relevant only where the fantasy sport was in nature of gambling. Moreover, the High Court has assumed that the pooled amounts were in nature of actionable claim. Therefore, the fate of how GST should be calculated in relation to game of skill still remains open to interpretation.

Conclusion

Going by the current trend, it is advisable that the companies hosting online facility of gaming/gambling determine whether such online facility is a game of skill or a game of chance depending on the state from where the facility is being provided and the tests laid down by various judicial forums. Additionally, the operational mechanism and methodology of the online facility remain important aspects warranting detailed review for determining the applicable rate and the value of supply.





Penalising

Expression

2020 marks the beginning of a new decade, for India the past decade has been a rather interesting one. There has been an evident change in the political scenario of the country, one of India's native languages, Aka-Bo was declared officially extinct, we launched our second mission to the moon, and we also saw a bounty being placed for the head of one of Bollywood's top actresses.

Amongst all that defined the decade, one cannot deny the role public intolerance has played in re-defining what India stands for. At the outset, India is a secular democracy, Article 25 of the Constitution of India lays the foundation for how religion is to be exercised within the country. It states, that every person has the right to freely profess, practice and propagate religion provided that such exercise does not disturb public order, morality and health. Justice Ramaswamy in ***S.R Bommai v. Union of India*[1]** stated religion under the Constitution of India to constitute that which binds a man to the moral and basic principles regulating his life. While, Article 19 of the Constitution gives all citizens the right to freedom of speech and expression, subject to reasonable restrictions for preserving inter-alia "public order", "decency" or "morality".

In the recent years, there has been a considerable rise in litigation that has seen religion and freedom of speech and expression cross roads with each other. Section 295(A) of the Indian Penal Code, 1860 penalises deliberate and malicious acts intended to outrage religious feelings of any class of citizens of India. Acts that are penalised under the Section include words spoken or written, signs or visible representations, insults or attempts to insult the religion or the religious beliefs of a class. Anyone who is convicted under the Section may be penalised with imprisonment of up to 3 years, or fine, or both. It has now become of utmost importance to understand the purport of section 295A and more importantly, how is the right guaranteed under Article 19 balanced with penal provisions such as Section 295(A).

Legislative history of Section 295A

Section 295A was enacted in 1927 after the publication of a book called 'Rangila Rasul' which concerned the marriages and sex life of Prophet Muhammad. This was considered to be an insult to the Mohemmadan religion, but as there was no law at the time penalising insult to religion, the Lahore High Court ruled that prosecution was not sustainable. A demand by the Muslim community lead to the British government enacting a law which deals with malicious insult to one's religion. The Select Committee prior to the Section's enactment stated that the purpose of the section was to punish persons who indulge in wanton vilification or attacks upon the religion of any particular group or class or upon the founders and prophets of a religion. It is pertinent to note, that the Select Committee further stated that:

"an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made".

The constitutionality of the Section was challenged in Ramji Lal Mody on the grounds that it infringed the freedom of speech and expression. The Supreme Court of India while rejecting the challenge held that ***"Section 295(A) does not penalise any and every act of insult to or attempt to insult the religion...Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section...It only punishes the aggravated form of insult to religion perpetrated with deliberate and malicious intention"*[2].**

Therefore, at the time of enactment of Section 295(A), the legislative intent was never to curb freedom of speech, but allow a balance whereby no one deliberately or intentionally disrespects another's religion. As also opined by the Supreme Court, the Section does not penalise any and every act of insult, and it was never intended to be an arm-twisting mechanism to curb freedom of speech. However, India has seen a large number of criminal cases being filed against public personalities for hurting the religious sentiments of a community. Such alleged assertion, is often clubbed with vigilantes' vandalising public and private property along with causing public unrest,

01. (1994) 3 SCC 1.
02. Soli J. Sorabjee, "Insult to Religion", The Indian Express. Published on June 25, 2006 at 00:21 hrs. Accessed on January 7, 2020. Available on: http://archive.indianexpress.com/news/insult-to-religion-/7214/2

as can be seen from the rioting which occurred prior to the release of "Padmaavat" a movie on a poem[3], which is a fictional account on the life of Rani Padmavati, a Rajput queen and wife of Maharawal Ratan Singh[4].

Interplay with freedom of speech and expression

Film-makers use films as a medium of exercising their right of freedom of speech and expression, this constitutionally protected right is often undermined by certain factors of the society who not only question the decision of the certifying authority, who is entrusted with the duty of ensuring that a film does not upset public order or morality, but also commit crimes in pursuit of imposing their sense of morality and coercing the public into abiding by their ideologies through violence.

Renowned film maker Sanjay Leela Bhansali saw several complaints under Section 295(A) filed against him by certain vigilantes prior to the release of his film 'Padmaavat' on the ground that it shows the Rajputs in a bad light and demeans their culture and religion[5]. Additionally, these vigilantes also vandalised the movie set and physically attacked Mr. Bhansali and his crew. Similarly, a complaint under Section 295(A) against Mahendra Singh Dhoni was filed on the basis of a magazine cover wherein he is depicted as lord Vishnu, stating malicious insult to the religious beliefs of Hindus[6]. In both cases, the courts found no merit to the complaints and dismissed the cases accordingly. However, this does not take away from the fear that these vigilantes intend to instil within film-makers attempting to address a historical subject or even a fictional account, as seen in the film 'PK', which saw a public interest litigation filed in the Delhi High Court seeking a restraint on the public exhibition of the film on the ground that it hurts the religious sentiments of all communities but mainly Hindus[7].

The abovementioned instances are a few in many, Section 295(A) has become a tool in the hands of overly-sensitive and motive driven members of the public, who are unhappy with the decision of the Central Board of Film Certification (**CBFC**) resorting to arm-twisting mechanisms to achieve their aim and cause delay and losses to producers and directors alike. For instance, the film 'Bhajrangi Bhaijaan' subsequent to certification and public exhibition saw a public interest litigation being filed against Salman Khan as he was wearing shoes in the song 'selfie le le' on the same platform as Lord Hanuman, a Hindu god, and was further hitting 'gulal' (artificial colour, often used in Hindu religious ceremonies) with his feet. The case was dismissed by the Bombay High Court[8], but it still raises important questions regarding the misuse of a penal provision and the undermining of decisions of a statutorily empowered machinery of the State.

It is a settled principle that *"the effect of the allegedly offending words/visuals is to be judged from the standards of a reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view"*[9]. Therefore, a film-maker's artistic expression needn't satisfy the moral threshold of each and every person, especially since each person has the choice to not go for a movie which they believe may offend their sensibilities.

The CBFC is constituted under Section 3 of the Cinematograph Act, 1952 (**Cinematography Act**), and Section 4 requires any person desirous of exhibiting a film to apply to the CBFC for certification. Section 5B of the Cinematography Act provides that a film shall not be certified for public exhibition, if in the opinion of the authority competent to grant the certificate, the film or any part thereof is against (a) the interests of the security of the State (b) friendly relations with foreign States (c) public order, and (d) is likely to incite the commission of any offence.

The government under the Cinematograph Act has issued guidelines for film certification with the objective to ensure (a) the medium of film remains responsible and sensitive to the values and standards of the society (b) artistic expression and creative freedom are not unduly curbed (c) certification is responsible to social changes (d) the medium of film provides clean and healthy entertainment, and (e) the film is of aesthetic value. The Cinematography Act and the guidelines issued thereunder provide a comprehensive

---

03. "Padmavat" by Malik Muhammad Jayasi (1540).
04. Shehab Khan, "Padmaavat: Riots break out in India as protesters take to streets to oppose release of controversial Bollywood film", The Independent, UK. Published on January 27, 2018 at 00:25 Hrs. Accessed on January 7, 2020. Available on: https://www.independent.co.uk/news/world/asia/padmaavat-india-riots-bollywood-film-movie-protests-streets-rajasthan-bihar-a8179191.html
05. Sanjay Leela Bhansali & Ors v. State of Rajasthan 2018(1) RLW 513 (Raj.).
06. Mahendra Singh Dhoni v. Yerraguntla Shyamsundar and Anr ((2017) 7 SCC 760).
07. Ajay Gautam v. Union of India AIR 2015 Del 92.
08. Raj Kaluram Rathod v. Salman Salim Khan & Ors, Public Interest Litigation (L) No. 124 of 2015.
09. Supra Note 5.

mechanism against which every film is tested objectively before it's certification and subsequent public exhibition. However, as mentioned above, even after passing the scrutiny of certification, some films are subjected to illegal moral policing by members of the public and self-certifying vigilantes, leading to malicious cases being filed against film-makers and rioting around cinema halls. This problematic thread of acts often leads to State governments succumbing to pressure and banning the exhibition of films in their states even prior to its release. However, when challenged, the courts have held such prohibition to be unsustainable[10].

In a secular democracy as ours with strong constitutional values, there is no place for intolerance to take over our statutorily established mechanism. It is pertinent for state machineries to protect its citizens from wrongful loss and illegal vigilantism leading to submission of their freedom of expression.

Way Forward

The government should consider amending Section 245(A) in order to accord protection to film-makers against frivolous and baseless litigations. The provision has become a toy in the hands of miscreants who use it to impose their idea of morality on the society as a whole. Freedom of speech and expression is one of the three pillars of our constitution and form part of the golden trinity, the State is under an obligation to ensure protection of the same albeit the reasonable restrictions as mentioned in Article 19 of the Constitution of India.

10. Viacom 18 Media Private Limited v. Union of India & Ors (2018) 1 SCC 761.

To Bet or

Not to Bet

"As the society changes, the law cannot remain immutable"

– Justice D P Madon

They say cricket is not a game, it is a religion. In 2019, the India – Pakistan ICC World Cup match saw a viewership of 229 million within India itself[1]. The importance of cricket as a unifying force cannot be debated and needn't be proved; what is rather interesting is the ancillary impact a simple match of cricket can have on an economy, such as India.

Economic exploitation of cricket is widespread globally: it includes broadcasting rights, sponsorship and merchandising, to name a few. However, another prevalent and illegal exploitation in the form of betting takes precedence over all of the above, for the simple reason that due to the nature of the transaction, the said consideration paid, is officially taken out of India's financial system and put into a parallel industry, which remains untaxed and unregulated.

In essence, betting is the act of putting at stake a wagering amount (a valuable or liquid cash) on the prediction of occurrence or non-occurrence of an event. According to the Federation of Indian Chambers of Commerce and Industry (**FICCI**), India's estimated illegal betting market is worth over INR 3,00,000 crore[2], a number that is even more astounding given India's defence budget for 2019-2020 is INR 4,31,000 crore[3]. In 2015 alone, the Indian cricket team played 21 One Day International matches that raked in a total betting figure of INR 27,300 crore.

There are two kinds of money trail involved in betting: (1) black money exchanging hands; and (2) white money being turned into black money, due to the illegality of betting. While it is not certain when the former was taken out of the system, and whether its impact is subsisting or dealt with, the latter raises concerns about the economic stability of present-day India.

One may think that the bets are placed simply on the outcome of a match. The truth is far more complex, however, with bets placed on runs scored in an over, number of wickets taken by a bowler, number of sixes or fours hit by a team or a player, number of dot balls in an over, run outs and, lastly, stumped wickets. This web of possible bets makes it an enticing activity for people to engage in and possibly win large sums from. Bets change in a matter of seconds, they depend on several variables such as weather, unforeseen play, or even the toss.

Indians are not permitted to engage in online betting, hence, hawala (alternative remittance) channels are used to obtain passwords and carry out transactions on betting websites abroad. Irrespective of betting being illegal, betting is very deep rooted in Indian society – it has invariably become one of those acts that almost everyone indulges in but no one speaks of it[4].

In 2013, India saw the unravelling of this parallel universe of betting, when the case of spot-fixing was brought to the forefront during the Indian Premier League. Following the 2013 fiasco was the 2015 IPL Season, where a total of 13 arrests were made for those involved in betting. However, it must be kept in perspective: these arrests possibly don't even amount to 0.01% of people who were betting in 2015.

In 2018, the Law Commission of India published its report on "Legal Framework: Gambling and Sports Betting Including Cricket in India" (**Report**)[5] where it dealt with the history, purpose and present-day impact of betting. Tracking the habit of betting back to ancient Indian texts such as the Mahabharata, Ramayana, and Rig Vedas, the Law Commission recognised the possibility that had betting been regulated at the time of Mahabharata, Yudhishtir wouldn't have been able to use his brothers and wife as stakes in a game of dice.

---

01. Maryam Farooqui, "ICC World Cup 2019: India-Pakistan match garners viewership of 229 million", Money Control, June 28, 2019. Available on https://www.moneycontrol.com/news/trends/sports-trends/icc-world-cup-2019-india-pakistan-match-garners-viewership-of-229-million-4149861.html
02. Law Commission of India, Report No. 276 – Legal Framework: Gambling and Sports Betting Including in Cricket in India, Government of India, July 2018.
03. Harsh V Pant, "We need not whine about India's small defence budget", Live Mint, July 10, 2019. Available on https://www.livemint.com/opinion/columns/opinion-india-s-non-debate-on-defence-1562750138136.html
04. Soumalya Santikari, "Betting In Cricket: Stakes Skyrocket In India's Dark Playgrounds This World Cup – Part I", MoneyControl. Available on: https://www.moneycontrol.com/news/cricket/betting-in-cricket-stakes-skyrocket-in-indias-dark-playgrounds-this-world-cup-part-i-4096011.html
05. Id 1

Preceding the Report, two committees were set up by the Supreme Court of India: the Mudgal Committee, stated that ***"legalising sports betting would reduce the element of black money and influence of the underworld besides helping them in detection and focusing their investigation"***; while the Lodha Committee recommended the legalisation of betting albeit with strong safeguards.

Betting and gambling are enumerated in List II of the Seventh Schedule in the Constitution of India, which makes it a state subject to be legislated upon[8]. While Goa, Daman & Diu, Sikkim, and Nagaland are the only states where gambling activity can be said to persist albeit in a very limited way, Maharashtra and Delhi have the most stringent provisions regulating the activity.

The Question of Morality

Historically, India's stand against the legalisation of betting finds its root in morality. It is understood that with gambling, other perils such as loss of wealth, toxic vices and trouble to family are inevitable. Hence, the government generally prohibits activities that it considers may cause societal harm. The result is the banning of betting.

However, public morality is not a static concept, it's an ever-changing aspect of society. Therefore, a relook at what is understood to be moral is warranted given the pervasive nature of illegal betting[6]. J.S. Mill discussed the extent to which State should be allowed to restrict liberty of individuals and highlighted the conflict between liberty of individuals to carry out a trade of their choosing and be involved in desired activities that may affect the society at large. He stated ***"A person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of another are his own affairs. The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over other"***[7]. This leads us to understand democracy and governmental rule to be for the welfare of its citizens and the country as whole, something which the current legislations are not able to cater to.

Those in favour of the legalisation of betting or gambling, for that matter, are of the opinion that primacy should be given to individual autonomy and state intervention should be at the minimum. Those against it believe that immorality is a justifiable ground for restricting individual liberty, in order to maintain societal decorum. However, there is a need to disassociate morality from the act of betting. In order to regulate certain practices, it is necessary to acknowledge them as a prevalent act, instead of a moral or immoral act.

Legalising Betting: Mechanisms and Impact

It is pertinent for the state governments to take cognisance of the effect legalising betting may have on the economy, apart from increasing revenue. It will invariably increase employment, allow transparency in the market and strike at the pervasive control the underworld has on the unregulated betting industry. Furthermore, regulating the industry would allow authorised agencies to identify and prevent instances of gambling by minors and gamblers who are identified as "problem-gamblers".

In the Report, the Law Commission suggests a three-pronged mechanism to regulate gambling, namely: (1) reform the existing gambling (lottery, horse racing) market; (2) regulate illegal gambling; and (3) introduce stringent and over-arching regulations.

Since betting in India primarily is done over telephones, wireless, broadcasting and other similar forms of communication, the Indian Parliament may choose to legislate on the same under Entry 31 of List I of the Seventh Schedule. Further, Parliament may also choose to enact a model law, which can then be adopted by the respective State Legislature.

Regulating betting and gambling can be a long process and will require amendments to be made to a series of state and central legislations, such as an amendment to the Foreign Exchange Management Act, 1999 and the Rules, as well as to the FDI Policy, to allow FDI into the sector and to prevent money laundering. Similarly, the Indian Contract Act, 1872, which does not recognise

---

06. Regulating Sports Betting in India: FICCI available at:http://blog.ficci.com/sports-betting-india-faq/3708/2/.
07. J.S. Mill, On Liberty and Utilitarianism (Bantom Classic, New York, 2008).
08. Constitution of India, List II, Seventh Schedule.

any contract where the consideration is unlawful, affects morality or is against public policy, and is in the nature of a wagering contract, will have to be amended to bring it into line with the change in law, as they may be detrimental to the interests of players and participants of gambling. The Indian Penal Code, 1869, The Income Tax Act, 1961, the Information Technology Act, 2000 and Rules thereunder, The Central Goods and Services Tax Act, 2017 will also see amendments to bring forth the legalisation[9].

Some pivotal aspects with regard to the infrastructure will also need to be established – for instance, gambling and betting should only be offered by Indian licensed operators who have obtained valid licenses from the game licensing authority, there should be a limitation on the number of transactions a person can engage in along with a time period stipulation. The nature of stakes should be restricted to liquid consideration, linked to a PAN or Aadhaar card, and the betting amount should also be prescribed by law. Additionally, the Report suggests that all those who get subsidies or do not fall within the purview of the Income Tax Act or the GST Act should be debarred from participating in online and/ or offline gambling platforms. The Report also recommended detailed safeguards for the employees of casinos, minors, internal control requirements for casinos, maintenance of accounts, audits, and the establishment of a council to look into and prevent 'problem gambling' and 'gambling by minors'[9].

The advantages of a regulated gambling and betting industry is multi-fold. It will generate considerable revenue, employment, tourism, protect vulnerable sections of society and prevent any inconvenience caused by law enforcement authorities. It is pivotal, if not absolutely necessary, for State Governments to reassess their stance on betting and analyse whether morality lies in banning the activity or regulating it.

---

09. Id 1

about FICCI

Established in 1927, FICCI is the largest and oldest apex business organisation in India. Its history is closely interwoven with India's struggle for independence, its industrialization, and its emergence as one of the most rapidly growing global economies.

A non-government, not-for-profit organisation, FICCI is the voice of India's business and industry. From influencing policy to encouraging debate, engaging with policy makers and civil society, FICCI articulates the views and concerns of industry. It serves its members from the Indian private and public corporatesectors and multinational companies, drawing its strength from diverse regional chambers of commerce and industry across states, reaching out to over 2,50,000 companies.

FICCI provides a platform for networking and consensus building within and across sectors and is the first port of call for Indian industry, policy makers and the international business community.

LEENA JAISANI
ASST. SECRETARY GENERAL
Media & Entertainment Division, FICCI
E: leena.jaisani@ficci.com
Tel: +91 11 2348 7323 / 2331 6527
www.ficciframes.com

FICCI

about Cyril Amarchand Mangaldas

2020

'INDIA LAW FIRM OF THE YEAR'

ALB India
Law Awards

2019

'BEST OVERALL LAW FIRM'

India Business Law
Journal (IBLJ)

2018

'NATIONAL LAW FIRM OF THE YEAR'

Chamber
Asia-Pacific

Over
100
years of legacy

Over
750
lawyers

Over
130
partners

Office in *6 major cities* to serve clients across India

MUMBAI | DELHI | BENGALURU | HYDERABAD
CHENNAI | AHMEDABAD

Our *Values*

CHARACTER | COMPETENCE | COMMITMENT

Our Media & Entertainment Law Practice

We operate at the intersection of technology, telecommunication and broadcast, applying new media, data privacy and security expertise to the Media & Entertainment sector. We represent studios, sports associations, television and film production houses, independents, new media companies, music companies and television networks in all aspects of the Media & Entertainment industry.

cyril amarchand mangaldas
advocates & solicitors
character • competence • commitment

cyril amarchand mangaldas
advocates & solicitors

CYRIL AMARCHAND MANGALDAS
Advocates & Solicitors
Peninsula Chambers, Peninsula Corporate Park,
G.K. Marg, Lower Parel,
Mumbai - 400 013. India.
Tel: 91-22-2496 4455
www.cyrilshroff.com

OTHER OFFICES
New Delhi | Bengaluru | Ahmedabad | Chennai | Hyderdabad

FICCI

THE FEDERATION OF INDIAN CHAMBERS OF COMMERCE AND INDUSTRY FEDERATION HOUSE
Tansen Marg, New Delhi - 110001, India
Tel: 91-11-2348 7323 / 2331 6527
www.ficciframes.com