

## Media and Entertainment Law: India

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## Introduction

India continues to retain its position as one of the largest and most influential media and entertainment hubs in the world. Content is created and made available to people in diverse forms, languages and media. On an aggregate basis, the Indian media and entertainment industry is projected to grow at the rate of 10 per cent to reach US\$36 billion by 2026.<sup>1</sup>

Several factors such as low pricing for mobile internet services,<sup>2</sup> a large internet user base<sup>3</sup> and a government-led push towards adoption of technology by the masses have enabled India to become a large market for consumption of digital content and entertainment services.

With the recent infusion of artificial intelligence (AI)-based technology in the global market, the global media and entertainment landscape is expected to undergo a shift in content creation and consumption.

Changes in government policy towards regulation of technology have tracked these recent technological advances. Over the past year, the government of India has brought significant changes in laws including:

- a. the Digital Personal Data Protection Act 2023 (Indian Data Protection Law) for regulation of collection, processing, and transfer of digital personal data;
- b. the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2021 (IT Rules 2021) to regulate streaming platforms, social media intermediaries and online gaming platforms;
- c. advisories on the use and deployment of AI;
- d. amendments to various legislation, including the Information Technology Act 2000 (IT Act), the Cinematograph Act 1952, the Cable Television Networks (Regulation) Act 1995 and the Copyright Act 1957; and
- e. notification of the Guidelines on Prevention and Regulation of Dark Patterns 2023 to regulate user interface or user experience design choices that may mislead consumers.

The Securities and Exchange Board of India (SEBI) has tightened the rules to regulate the activities of 'financial influencers' by prohibiting any person regulated by the SEBI from having any association with any person who, directly or indirectly, provides advice or recommendations related to security or securities, unless permitted by the SEBI.<sup>4</sup> The government of India is also consulting with stakeholders for the introduction of the Digital Personal Data Protection Rules,<sup>5</sup> and to replace the Information Technology Act 2000 (IT Act) with the Digital India Act (DIA). The DIA would overhaul the technology regulation framework and would focus on intermediary liability, regulation of activities on the internet through the perspective of user-harm,

regulation of AI and providing users with digital rights.<sup>6</sup> Finally, in a set of overarching reforms, the government of India notified the Bharatiya Nyaya Sanhita 2023 (BNS) to replace the Indian Penal Code.<sup>7</sup> The BNS includes acts committed by way of 'electronic communication' within the ambit of provisions governing hate speech, obscenity, public mischief, and imputations prejudicial for national integration.

## Year in review

India's media and entertainment sector is on the path of eclipsing pre-covid levels in aggregate; however, experts have noted differential growth within segments. There is a clear shift towards the digital media which is slated to become the largest segment in 2024.<sup>8</sup> The industry witnessed the largest ever consolidation with the joint venture between Reliance Industries Ltd, Viacom 18 Media Private Ltd and The Walt Disney Company.<sup>9</sup> The Indian music industry also witnessed consolidation with larger Indian and international music labels acquiring stakes in mid-sized or regional music companies as strategic alliances or for expanding their India based operations. For example, Warner Music India acquiring a majority stake in Divo TV Private Ltd, which is a leading digital media and music company in South India.<sup>10</sup>

The 2023 amendments to the IT Rules 2021 introduced a regulatory framework for real money online games and since then, with the convergence of advertising campaigns and popular sporting events in India, the online gaming industry has witnessed growth to the tune of almost 22 per cent in 2023.<sup>11</sup> Tying in with the spur in Indian users engaging in real money gaming, certain offshore gambling and betting platforms published advertisements on media including print, broadcasting, digital and outdoor advertising. As a result, the Central Consumer Protection Authority (CCPA) and the Ministry of Information and Broadcasting (MIB) issued advisories against surrogate, false and/or misleading advertisements of illegal betting and gambling platforms. Separately, despite the regulatory framework, the question around legality of games of skill versus games of chance in various Indian states remains unaddressed.

On 7 May 2024, in a bid to increase accountability among publishers and advertisers, the Supreme Court of India, in the case of *Indian Medical Association v. Union of India*,<sup>12</sup> passed an interim order mandating all advertisers and advertising agencies to upload, via online portals operated by the MIB and the Press Council of India (PCI), a self-declaration certificate (SDC) in respect of any advertisement in press, print media or on the internet, confirming compliance with all relevant laws and regulatory guidelines for advertising. However, as a result of widespread concern amongst stakeholders on the operational burden created due to this order, the MIB held several discussions to seek feedback of stakeholders. This led to the MIB issuing an advisory on 3 July 2024, making submission of SDCs an annual requirement and limiting their applicability to products and services related to 'Food and Health sectors'. Following this advisory, in a subsequent order, the Supreme Court directed the MIB to engage in further discussions to rationalise the compliance requirement and submit a report on the same. At the time of writing, this report has not been made public.

With the emergence of AI, the entertainment industry witnessed new challenges in relation to personality rights. The Ministry of Electronics and Information Technology (MEITY) issued two advisories on 'deepfakes' and use of AI/large language models (LLMs)/generative AI. Notably, four Indian film and music personalities secured favourable omnibus injunction orders against the use of their name, persona, likeness, voice and eponymous catchphrase in AI-generated content.<sup>13</sup>

Finally, the Department for Promotion of Industry and Internal Trade (DPIIT) withdrew its office memorandum issued on 5 September 2016 which extended the scope of statutory licensing of music under Section 31D of the Indian Copyright Act 1957 to internet transmissions.<sup>14</sup> The DPIIT's withdrawal of its office memorandum is in line with the Bombay High Court's decision

in *Tips Industries Limited v. Wynk Music Ltd*,<sup>15</sup> where the court ruled against Wynk Music Ltd, an over-the-top (OTT) service provider for sound recordings, and held that statutory licences under Section 31-D are applicable only in relation to radio and television broadcast.

## Legal and regulatory framework

### Print media

#### Foreign direct investment in the print sector

Under the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 notified under the Foreign Exchange Management Act 2000 (Exchange Control Laws), foreign investment in the print media sector has been capped at 26 per cent through the government of India approval route where investment is made in an entity publishing newspapers, magazines, or any other periodicals (collectively, periodicals) which (1) deal with news and current affairs content and (2) are Indian editions of foreign magazines dealing with news and current affairs content.

However, 100 per cent foreign investment is permitted through the government of India approval route for any periodicals which are in the nature of (1) scientific and technical magazines, journals or periodicals (technical periodicals) or (2) facsimile editions of foreign newspapers. The Exchange Control Laws also stipulate that foreign investment in publication of technical periodicals requires compliance with guidelines issued by the MIB for technical periodicals.<sup>16</sup>

#### Press and Registration of Periodicals Act 2023

The Press and Registration of Periodicals Act 2023 (PRP Act) and the Press and Registration of Periodicals Rules 2024 have replaced the erstwhile Press and Registration of Books Act 1867 and rules enacted thereunder. The PRP Act regulates any publication, including a newspaper, which is published and printed at regular intervals containing public news or comments on public news (i.e., periodicals).<sup>17</sup> Notably, it excludes 'books' and 'journals of scientific, technical and academic nature' from its remit. As per the PRP Act every publisher of periodicals is required to: (1) register online and provide details on title, language and ownership of the periodical; and (2) make annual filings to the Registrar General of Newspapers, established under the PRP Act. Additionally, the owner of a periodical may transfer ownership of the periodical to a third party with prior approval from the Registrar General of Newspapers by furnishing documents and payment of fees. The maximum monetary penalty for non-compliance of various provisions of the PRB Act is 500,000 rupees and six months' imprisonment in the case of continued non-compliance.

#### Press Council of India Act 1978

The Press Council of India (PCI), established under the Press Council of India Act 1978, governs the conduct and functioning of periodicals, news agencies, journalists and other print media entities. The PCI has notified the Norms of Journalistic Conduct 2022 (Norms of Journalistic Conduct), which set out:

- a. basic ethical principles for the reporting of current events, including ensuring that news is:
  - o not baseless;
  - o misleading; and
  - o backed by evidence;
- b. advertisement requirements and compliance with applicable laws on relevant disclaimers; and
- c. subject-specific guidelines for:
  - o coverage of communal disputes;

- criticism of public figures;
- music reviews;
- headlines;
- financial journalism;
- court proceedings;
- sting operations;
- election reporting;
- medical reporting; and<sup>18</sup>
- trial by media, etc.

The PCI is empowered to initiate inquiries against periodicals or news agencies for violation of standards of journalistic ethics or causing offence to public taste.<sup>19</sup> The PCI can also censure a periodical or news agency or require the relevant periodical to publish the particulars relating to the PCI's inquiries.<sup>20</sup> In 2024, the PCI issued advisories to print media advising entities in print media publishing advertisements promoting betting and gambling platforms,<sup>21</sup> norms for advertisement of ayurveda, siddha, and unani drugs,<sup>22</sup> and media guidelines for covering news on the LGBTQ+ community.<sup>23</sup>

### **Self-regulation**

In addition to statutory regulation, industry stakeholders have also formed self-regulatory bodies for industry representation. For example, the Association of Indian Magazines is an industry body of magazine publishers and represents the interests of its stakeholders on various forums.

### **Broadcast media**

The broadcasting sector is regulated by (1) the MIB and (2) the Telecom Regulatory Authority of India (TRAI). The MIB regulates broadcasters and cable service providers, content, uplinking and downlinking of television channels, and provides compliance requirements for entities with foreign investment in the broadcasting sector. The TRAI makes regulations on quality of service, revenue sharing among service providers, and inter-connect agreements by broadcasters and distributors.

The key regulations for broadcasting on television are the Cable Television Networks Act 1995 (Cable TV Act), the Policy Guidelines for Uplinking and Downlinking of Satellite Television Channels in India 2022 (Uplinking and Downlinking Guidelines 2022)<sup>24</sup> and medium-agnostic laws.

### **Foreign direct investment in the broadcasting sector**

The maximum foreign investment permitted in the terrestrial broadcasting and radio broadcasting sector is 49 per cent under the government of India approval route and requires compliance with terms and conditions specified by the MIB for the setting up of radio stations in India.

Foreign investment in entities engaged in the uplinking of news and current affairs television channels has been capped at 49 per cent through the government of India approval route. With respect to the uplinking of non-news and current affairs television channels and downlinking of television channels, foreign investment is allowed up to 100 per cent through the automatic route.

Additionally, foreign investment in the broadcasting sector requires compliance with additional conditions, which, inter alia, include:

- a. security clearance of:
  - board members and key executives;
  - shareholders holding 10 per cent or more of the paid-up capital in the entity; and
  - foreign personnel deployed for more than 60 days;

- b. a majority of the board of directors and certain key personnel being citizens of India;
- c. restrictions on transfer of subscribers' databases to persons and places outside India; and
- d. providing the necessary equipment for monitoring the broadcaster's activities to the governmental authorities.

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## Television broadcasting

The Cable TV Act provides rules pertaining to registration of cable television network operators, mandatory transmission of certain programmes, and programme and advertising content under the Cable Television Network Rules 1994 (Programme Code, Advertising Code).<sup>26</sup>

Under the Programme Code, no programme is allowed to be transmitted through cable services which:

- a. offends good taste or decency;
- b. contains criticism of friendly countries;
- c. attacks religions or promotes communal attitudes;
- d. contains anything obscene, defamatory, false or suggestive innuendos;
- e. could encourage or incite violence or contains anything against maintenance of law and order;
- f. is in contempt of court;
- g. casts aspersions against the integrity of the president of India, the judiciary or the country;
- h. encourages superstition;
- i. denigrates women or is likely to corrupt public morality;
- j. contains visuals which reflect a slandering, ironical and snobbish attitude in portrayal of certain groups;
- k. contravenes the provisions of the Cinematograph Act 1952; or
- l. is not suitable for unrestricted public exhibition.

Similarly, the Advertising Code, which governs transmission of advertisements on cable services, prohibits advertisements which:

- a. deride any race, caste, colour, creed and nationality;
- b. are against the Constitution of India;
- c. incite people to crime, breach the law, or glorify violence or obscenity;
- d. exploit the national anthem or personality of a national leader or state dignitary;
- e. depict women in a derogatory manner or encourage them to play a subordinate role in society;
- f. exploit social evils;
- g. promote the sale or consumption of intoxicants (with the exception of legitimate brand extensions);
- h. are of a religious or political nature; and
- i. are in non-compliance with the Consumer Protection Act 2019 and the Advertising Standards Code of India (ASCI Code) and guidelines.

Finally, the Advertising Code also imposes limitations on the length and placement of advertisements in programmes.

The Uplinking and Downlinking Guidelines 2022 lay down registration and permission requirements for transmission of a television channel to and from satellites, in and outside India. The Guidelines also:

- a. create a distinction between 'news channels' and 'non-news channels' and prescribe differential obligations for their registration and functioning; and
- b. provide for penalties and deterring consequences in the case where a television channel is found to have broadcast content in violation of the Programme or Advertising Code, including:
  - o by issuing an advisory to the broadcaster;
  - o by issuing a warning to the broadcaster;
  - o requiring the channel to run an apology scroll;
  - o directing the director or chief executive officer to read a statement of apology;
  - o directing the channel to be off air for specified number of hours or days; and
  - o suspension or revocation of permission of the channel.

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## **Self-regulation**

The News Broadcasters and Digital Association (NBDA), a self-regulatory organisation which represents private television news, current affairs and digital broadcasters has also prescribed an Ethics Code for its members.<sup>28</sup> The NBDA has the power to censure or express disapproval against a broadcaster or impose a fine up to 100,000 rupees, or both, or recommend the suspension or revocation of the licence of that broadcaster.

## **Radio broadcasting**

The radio broadcasting sector is regulated under the Telecommunications Act 2023 and various policies of the MIB. Under the FM Phase-III Policy,<sup>29</sup> private FM radio stations are prohibited from transmitting news and current affairs content, except unaltered news bulletins of the All India Radio. However, the following categories of programmes are considered to be non-news in nature and therefore permitted: non-local sporting events, traffic, weather, cultural events, festivals, employment opportunities, public announcements pertaining to civic amenities and natural calamities provided by local administration.

Private FM radio stations are required to comply with the Advertising Code of Prasar Bharati for all advertisements carried on the respective radio channel,<sup>30</sup> which, inter alia, prohibits the transmission of advertisements containing unlawful content, advertisements presented as news and misleading advertisements.

## **Online media**

### **Foreign investment in the digital media sector**

As per the Exchange Control Laws read with Press Note No. 4 (2019 series) (PN 4) issued by the DPIIT, foreign investment in uploading and streaming of news and current affairs through digital media is limited to 26 per cent under the government of India approval route.

Per a clarification issued by the DPIIT on 16 October 2020, the restriction under PN 4 applies to the following entities:

- a. digital media entities streaming or uploading news and current affairs;
- b. news agencies writing, gathering or distributing news and current affairs; and
- c. news aggregators, that is, entities using web application software to aggregate news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc., in one location.

The also clarified that OTT platforms which merely host the digital feed of a television news channel do not fall within the ambit of the restriction.

### **Information Technology Act 2000**

Activities on the internet are regulated by the MEITY and the MIB under the IT Act and the rules made thereunder. The IT Act is applicable to persons and activities outside India if the activity involves a person or 'computer resource' situated in India.<sup>31</sup>

The IT Rules 2021 set out the compliance and regulatory framework for intermediaries (including social media intermediaries, significant social media intermediaries and online gaming intermediaries), publishers of news and current affairs content and publishers of online curated content (i.e, OTT content platforms).

### **Compliance for intermediaries**

Under the IT Act, any platform that receives, stores or transmits electronic messages or provides services in respect of such messages on behalf of its users qualifies as an intermediary. Per Section 79 of the IT Act, intermediaries are entitled to safe harbour (i.e, exemption from liability for content made available through the intermediary) provided that: (1) the function of the intermediary is limited to providing access to the content shared by third parties; (2) the intermediary does not initiate, select the receiver of or modify the information during transmission; and (3) the intermediary undertakes due diligence prescribed by the government of India.

Under the IT Rules 2021, an intermediary is required to comply with, inter alia, a number of due diligence requirements, as follows:

- a. to prominently publish its privacy policy, rules and regulations and user agreements (collectively, 'policies') on the platform;
- b. to inform users and cause users not to host, display or publish information that:
  - o belongs to third parties;
  - o is defamatory, obscene, pornographic, libellous, racially or ethnically objectionable or otherwise is non-compliance with applicable laws;
  - o is harmful to children;
  - o infringes the intellectual property rights of a third party;
  - o violates applicable laws;
  - o impersonates another person; and
  - o threatens the unity, integrity, defence, security or sovereignty of India;
- c. to inform users at least once a year that it has a right to terminate access to the platform or remove non-compliant information upon non-compliance with the terms of the platform; and
- d. to publish details of the grievance redressal officer appointed by the intermediary along with the grievance redressal mechanism.

Further, significant social media intermediaries (i.e., social media intermediaries with more than 50 million registered users) are required to also appoint a chief compliance officer, nodal contact person and resident grievance officer who should be employees and residents of India and comply with certain additional due diligence requirements.

### **Compliance for publishers of news and current affairs and publishers of online curated content**

The IT Rules 2021 prescribe a three-tier grievance redressal mechanism for redressal of user grievances against publishers of online curated content (content publishers) and publishers of news and current affairs content (news publishers) involving: (1) self-regulation by the publisher; (2) redressal of grievances by a self-regulatory body; and (3) redressal by an inter-departmental committee constituted by the MIB. Accordingly, publishers are also required to appoint a grievance officer and become members of a self-regulatory body.

### **Code of Ethics**

Content publishers are, inter alia, required to classify all content made available on the platform into five categories:

- a. A (for adult viewers);
- b. UA 16+ (for users above the age of 16);
- c. UA 13+ (for users above the age of 13);
- d. UA 7+ (for users above the age of 7); and
- e. U (for all age groups).

This classification may be made based on parameters such as theme, content, tone, having regard to the depiction of issues such as discrimination, substance abuse, use of liquor, tobacco, etc.

News publishers are required to comply with the Norms of Journalistic Conduct issued by the PCI and the Programme Code, prescribed under the Cable TV Rules.

Note, the Bombay High Court and Madras High Court had issued interim orders restricting the operation of Part III of the IT Rules 2021 which mandate adherence to the Code of Ethics and the setting-up of the three-tier grievance redressal structure.<sup>32</sup> On 22 March 2024, the Supreme Court of India transferred all the petitions challenging the operation of Part III of the IT Rules 2021 to the Delhi High Court.<sup>33</sup> That said, these cases are at their hearing stage, and are subject to final decisions of the Delhi High Court.

### **Regulations on blocking of content**

Under the Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules 2009 (Blocking Rules), the government of India has a right to remove or block access to content that that threatens:

- a. the sovereignty and integrity of India;
- b. the security of the state;
- c. friendly relations with foreign states;
- d. public order;
- e. decency or morality or in relation to contempt of court; and
- f. defamation or incitement to an offence.

### **Regulatory regime governing online gaming intermediaries**

Under the IT Rules 2021, an online game is a game accessible on the internet via an intermediary, and is further classified as:

- a. an online real money game (i.e., where a user deposits cash with the expectation of winning a prize);
- b. a permissible online game (i.e., a permissible online real money game or a game that is not an online real money game); and
- c. a permissible online real money game (i.e., an online game verified by an online gaming self-regulatory body).

Online gaming intermediaries are only permitted to offer permissible online real money games.

Every online real money game is required to be registered with a self-regulatory body formed under the IT Rules 2021. In addition to compliance with due diligence requirements by all intermediaries, online gaming intermediaries are also required to:

- a. inform users within 24 hours of any change in its policies;
- b. ensure that their policy sets out the rules in relation to withdrawal or refund of deposits, manner of distribution of winnings, manner of calculating winnings, payments of fees and charges;
- c. implement a know-your-customer procedure;
- d. implement a verification framework;
- e. display demonstrable marks of verification of the game by a self-regulatory body; and
- f. verify a user's identity prior to accepting a deposit.

As discussed under the 'Year in review' section, the CCPA and MIB have issued advisories cautioning advertisers, publishers, intermediaries, social media platforms, celebrities, influencers and other stakeholders against publishing, engaging in surrogate advertisement, or endorsing online betting platforms.

### **Fact-checking body**

The IT Rules 2021 empower the MEITY to constitute a fact-checking body to verify all information pertaining to the government of India on social media platforms. In the event content identified as fake by the committee is reported to the intermediary and the relevant intermediary fails to take down such content, it may lose its safe harbour protection. However, at



the time of writing, the Supreme Court of India has imposed a stay on the establishment of such fact-checking body.<sup>34</sup>

### **MEITY advisories on use of AI**

On 26 December 2023, the MEITY issued advisories to all intermediaries to comply with the IT Rules 2021 in respect of content such as 'deepfakes' being uploaded on such platforms.<sup>35</sup> The MEITY reiterated the obligation of intermediaries to clearly communicate to their users about the non-permissible content in Rule 3(1)(b) of the IT Rules 2021 at the time of registration, at regular intervals and at every instance of login, or upload or sharing of content.

Similarly, on 15 March 2024,<sup>36</sup> MEITY issued another advisory to intermediaries on the use and making available of AI models/LLMs/generative AI services to users. As per this advisory, the MEITY mandated that intermediaries are required to ensure that:

- a. the use of AI models/LLMs/generative AI, software(s) or algorithm(s) by users is compliant with Rule 3(1)(b) of the IT Rules 2021 and does not violate any laws in force;
- b. the use of AI models/LLMs /generative AI, software(s) or algorithm(s) does not permit any bias, discrimination or threaten the integrity of electoral processes;
- c. under-tested/unreliable AI foundational model(s)/LLMs/generative AI, software(s) or algorithm(s) or further development on such models are to be made available to users in India with appropriate labelling of the possible fallibility or unreliability of output and consent mechanism (such as a 'pop up') to inform users about such risks;
- d. users are informed through the terms of service or user agreements about the consequences of dealing with unlawful information including disabling access/removal of such information, suspension or termination of access, usage rights of users and punishment under applicable laws for dealing with unlawful information; and
- e. if the intermediary makes available software or facilitates synthetic creation, generation or modification of content such that the generated or modified content could be used as misinformation or a 'deepfake', intermediaries are required to label or embed such content with permanent unique metadata or identifier to identify the user responsible.

### **Medium agnostic laws**

Other Indian legislation also applies to the media and entertainment sector regardless of the medium of distribution of content. For example, the Consumer Protection Act 2019 (CPA 2019), the Bhartiya Nyaya Sanhita 2023, the Indecent Representation of Women Act 1986 (Representation of Women Act), the Protection of Children from Sexual Offences Act (POCSO Act) and legislation governing advertisements or depiction of specific products and themes in any content.<sup>37</sup>

In respect of advertising content, the ASCI Code along with various guidelines are applicable to members of the Advertising Standards Council of India (ASCI). However, the ASCI Code and guidelines reflect broad industry practice. The ASCI is a self-regulatory organisation comprising stakeholders from the advertising sector such as advertisers, agencies and publishers. The ASCI Code is applicable to all members and comprises basic principles which relate to truthful and honest representation in advertisements, non-offensiveness of advertising content, prohibition against depiction of harmful products and situations, and competitive fairness in advertising. Apart from this, the ASCI Code comprises guidelines for advertisements relating to specific categories such as brand extensions, foods and beverages, endorsements by celebrities and influencers, advertising of real money games and virtual digital assets. ASCI operates the Consumer Complaints Council (CCC), a grievance redressal mechanism which handles complaints from the public, suo motu, and intra-industry disputes. Where the CCC finds a violation of the ASCI Code, the CCC has the power to issue recommendations for modifications or withdrawal of claims made in the advertisement.<sup>38</sup>

Under the CPA 2019, any unfair trade practice comprising making false or misleading representations as to the quality, standard, condition, sponsorship or usefulness of goods or services, or any misleading advertisement or endorsement is prohibited and punishable.

Under the BNS, obscenity, acts in relation to racial, religious or gender discrimination, violence, abetment of suicide, and defamation are punishable. Under the Representation of Women Act, depiction of women in an indecent or derogatory manner is punishable.<sup>39</sup> Under the POCSO Act, anybody who uses a child (anyone below the age of 18 years) in any form of media for purposes of sexual gratification by representation of sexual organs of a child, usage of a child engaged in real or simulated sexual acts or indecent or obscene representation of a child, or both, is punishable.<sup>40</sup>

## Free speech and media freedom

### Protected forms of expression

The right to freedom of speech and expression is guaranteed to all Indian citizens as a fundamental right under Article 19(1)(a) of the Constitution of India. However, freedom of speech and expression is subject to reasonable restrictions set out in Article 19(2), which are:

- a. the sovereignty and integrity of India;
- b. the security of the state;
- c. friendly relations with foreign states;
- d. public order;
- e. decency or morality or in relation to contempt of court; and
- f. defamation or incitement to an offence.

These grounds serve as the basis for judicial interpretation of all legislation and subordinate legislation notified by the government of India which aim at ensuring that the right of freedom of speech and expression is exercised within the aforesaid framework.

While 'speech' is not classified in further categories under any Indian statutes, Indian courts have analysed the concept of 'commercial speech'. Commercial speech is generally understood by Indian courts as speech which proposes a commercial transaction or is an expression of economic interest of a speaker to its audience. The Supreme Court stated in the case of *Tata Press v. MTNL*,<sup>41</sup> that advertisements and 'commercial speech' is also protected under Article 19(1)(a) of the Constitution of India.<sup>42</sup> As such, commercial speech or advertisements are also subject to the same restrictions as set out in Article 19(2) of the Constitution of India.

### Hate speech

While Indian laws do not specifically define hate speech, certain provisions of the BNS can be invoked when dealing with cases of hate speech. The BNS prescribes punishment for:

- a. deliberate and malicious acts, intended to outrage religious feelings of any class;
- b. uttering, words, etc, with deliberate intent to wound the religious feelings of any person;
- c. promoting enmity between different groups on grounds of, inter alia, religion, race, place of birth, residence, language, and doing acts prejudicial to maintenance of harmony;
- d. making any imputations, assertions, pleas, publications that are prejudicial to national integration; and
- e. publishing, making or circulating any rumour with an intent to cause mutiny, fear or alarm to the public or any section or society inducing a person to commit an offence or inciting any community to commit an offence against another community.

Further, the Supreme Court of India has recently mandated the police forces of all Indian states to suo motu register first information reports in hate speech cases attracting offences under Sections 196, 294 and 353 of the BNS, even if no complaints are forthcoming.

## **Newsgathering**

As stated above, the Norms of Journalistic Conduct govern key aspects of newsgathering and reporting. In respect of payment of sources, the Norms of Journalistic Conduct prohibit payment or material rewards to sources.

There are no special exceptions given to journalists and news agencies for trespass,<sup>43</sup> secret recording or electronic eavesdropping, or unlawfully obtained information. Furthermore, the Supreme Court of India, in *RM Malkani v. State of Maharashtra*,<sup>44</sup> stated that evidence is admissible in a court of law, even if it is obtained illegally, unless the judge in their discretion considers such evidence as inadmissible on the grounds of unfairness to the accused. The Delhi High Court in the case of *RK Anand v. Registrar*,<sup>45</sup> upheld the legitimacy of sting operations to expose corruption among public officials by journalists.

## **Freedom of access to government information**

The Right to Information Act (RTI Act) provides for the right to all Indian citizens to seek information such as records, documents, memos, emails, opinions, advice, reports, samples, models on all governmental records from any public authority. Under the RTI Act, public authority is understood to be any authority or body or institution of self-government established: (1) under the Constitution of India; (2) under a law made by the Indian Parliament; (3) under a law made by the state legislature; or (4) by a notification or order passed by the appropriate governmental authority. Bodies owned, controlled or substantially financed by the government, and any non-government organisation financed by the government fall within the purview of a 'public authority'.

However, under the RTI Act a public authority can refuse to provide information if such action:

- a. adversely affects India's sovereignty, security or other strategic interests;
- b. is prohibited by law or could lead to contempt of court;
- c. breaches legislative privilege;
- d. compromises commercial or intellectual property;
- e. exists within a fiduciary relationship;
- f. is received confidentially from a foreign government;
- g. endangers someone's life or law enforcement sources;
- h. impedes criminal investigations;
- i. involves cabinet deliberations; or
- j. relates to personal information as defined under the Indian Data Protection Law.

## **Protection of sources**

While there are no legally enumerated rights, privileges or duties to protect sources in India, the Whistleblower Protection Act 2014 (Whistleblower's Act) protects persons disclosing corruption, wilful misuse of power or discretion against any public servant. The disclosure is required to be made before a 'competent authority' and such competent authority would conduct an inquiry as per Section 5 of the Whistleblower's Act. The Act also provides for safeguards against victimisation, disclosure of identity of the whistleblower, and witness protection. The Norms of Journalistic Conduct set out an exception to the disclosure of sources in cases of 'serious allegations where matter is related to national interest and security'.<sup>46</sup>

In *Jai Parkash Aggarwal v. Vishambhar Dutt Sharma*,<sup>47</sup> it was held that while 'journalists or the information media have no absolute immunity or obligation to disclose their source of information in court . . . before the Court directs the disclosure of source it must satisfy itself that it is in the nature of justice and is not against the public interest'. In the same vein, a court in Delhi recently gave an order to the effect that journalists are not exempt from disclosing their sources to investigating agencies of the government of India.<sup>48</sup>

## Private action against publication

A wide variety of legal remedies are available to persons to initiate private actions against publication. Under the BNS, defamation is a punishable offence. The essentials for proving a claim for defamation include: (1) publication of the statement; (2) the statement must be defamatory; and (3) the statement must refer to the complainant or plaintiff. The punishment for defamation, publishing and sale of defamatory material of imprisonment up to two years, a fine or both. However, defamation can be pursued as a civil remedy under common law for a claim for damages as well. Under the BNS, exceptions to the crime of defamation are as follows:

- a. truth in public interest for public good;
- b. public conduct of public servants;
- c. conduct of persons discharging public functions;
- d. reports of proceedings of a court of law;
- e. comments on cases;
- f. literary criticism;
- g. censure by person having lawful authority;
- h. complaint to person having lawful authority;
- i. imputation made in good faith to protect their or another's interests; and
- j. caution made in good faith.

In cases for civil defamation in India, while the amount of damages depends on the individual facts of each case, we have noted defamation cases being filed for up to 10 billion rupees. In some cases, the Supreme Court has also directed an entity alleged of defamation to deposit as much as 20 million rupees in a 1 billion rupees defamation case before admitting the case on appeal.<sup>49</sup> Further, recently, the Delhi High Court awarded a sum of 20 million rupees as damages in a defamation case.<sup>50</sup>

The right to privacy has been read as a fundamental right under Article 21 of the Constitution of India in *KS Puttaswamy v. Union of India*. Further, the IT Act criminalises the violation of privacy by way of non-consensual publishing or transmission of the image of a private area of a person and lays down a punishment of three years, fine up to 300,000 rupees, or both. As stated above, under the IT Rules 2021, intermediaries are under an obligation to take-down and prohibit the access to content which is invasive of a person's privacy within 72 hours of reporting thereof to the intermediary.

Similarly, private action may also comprise a suit for disparagement under common law or under the Trade Marks Act 1999 (TMA). Entities often engage in comparative advertising that involves comparison among two or more competitor products or services. However, Indian courts have held that entities cannot state that a competitor's products or services are bad while saying that their own products or services are better,<sup>51</sup> undervalue the products or services of a competitor,<sup>52</sup> or disparage a competitor's products or services as unsafe.<sup>53</sup> The CPA 2019 and the Misleading Advertisement Guidelines, the ASCI Code and the TMA provide for guidance on how such comparative claims can be made.

## Government action against publication

Under the Blocking Rules, the government of India may, through a designated officer, direct the take down of information which is in contravention of law under the grounds outlined under Article 19(2) of the Constitution of India. Such orders are also made for the protection of children; for example, where child sexual abuse material is shared on the internet. The government of India has directed blocking of accounts on platforms such as YouTube and Twitter which were accused of sharing fake news and misinformation.<sup>54</sup> In the case where Twitter challenged such orders, the matter was decided by the Karnataka High Court in favour of the government of India.<sup>55</sup> Further, the government of India has directed blocking of applications having off-shore links which were operating in sectors requiring approvals from regulators or which were engaged in unauthorised cross-border sharing of personal data of Indians.<sup>56</sup>

## Intellectual property

### Copyright and related rights

The Copyright Act 1957 (Copyright Act) governs copyright law in India. As per the Copyright Act, copyright subsists in all published and unpublished dramatic work, artistic work, literary work, musical work, sound recordings and cinematograph films. Registration of copyright is not mandatory under Indian laws. While the Copyright Act follows the basic framework of the Berne Convention, the duration of protection of dramatic work, artistic work, literary work, musical work, granted under the Copyright Act (i.e, 60 years after the death of the author) differs from that granted under the Berne Convention (i.e, 50 years after the death of the author).

The Copyright Act provides an economic right to the author or owner of a work, to reproduce the work, to issue copies, to perform or communicate it to the public, to make any cinematograph film or sound recording or to make any adaptation or translation of the work. The Copyright Act also provides moral rights to the author such as: (1) to claim authorship of the work; (2) to protect one's reputation; and (3) to not have a work falsely attributed to oneself.

Courts in India as well as the relevant governmental authorities issued several blocking orders against websites illegally streaming or making available copyrighted content that led to a loss of revenue for rights holders. Courts have relied on dynamic injunctions, whereby additional blocking orders can be passed against new infringing websites and to catch repeat infringers. This is particularly useful in the context of illegal streaming of live events such as sporting events.

A key challenge in the field of copyright law is in relation to regulation of artificial intelligence. The Department-Related Parliamentary Standing Committee on Commerce recommended the creation of a separate category of rights for inventions or solutions related to AI, to keep up with developments in technology and innovation. In a similar vein, the copyright office recently registered an AI tool – RAGHAV Artificial Intelligence Painting App – as the co-author of a copyright-protected artistic work.

### Personality rights

While personality rights are not specifically recognised in any statute in India, courts in India have recognised personality and celebrity rights in myriad judgments. In the case of *Titan Industries v. Ramkumar Jewellers*,<sup>57</sup> the Delhi High Court held that each individual has a right to determine how the individual's identity is utilised for commercial purposes. Further, the Delhi High Court identified two prongs to test whether such rights can be enforced: (1) the plaintiff should own an enforceable right in the identity or persona of a human being (i.e., the plaintiff should be able to prove they have a proprietary interest in the

profitability of his public reputation or persona); and (2) the plaintiff should be identifiable from the unauthorised use. Courts have recognised celebrities as 'famous people' who may be known about or talked about. Personality rights are also accorded only to living individuals and are not transferred to heirs or relatives upon the death of an individual.

## Unfair business practices

Courts in India have held that the 'hot news' doctrine is not applicable in India given that there can be no monopoly afforded to 'time-sensitive information' or facts. The only circumstance in which the doctrine would find application in India would be to injunct time-sensitive news where both parties are 'direct competitors'. A controversy in this regard arose when exclusive broadcasting rights of all cricket matches were granted to Star TV and other platforms such as 'cricbuzz' started sharing ball-by-ball coverage of live cricket matches. It was held that Star TV could not claim exclusive property over the information itself, even for a short duration and it did not have a right to injunct third parties from publishing information in relation to the match, whether or not such information was disseminated for commercial reasons.

False attribution means a person falsely representing themselves as the owner or author of the work. False attribution is recognised under common law and is also recognised as a violation of moral right under the Copyright Act. Courts generally recognise: (1) a person's right to receive credit; and (2) right to prevent any distortion of the work that would be potentially harmful to the reputation and honour of the right holder. Under Section 57 of the Copyright Act, the author has the right to restrain by way of an injunction or claim damages in respect of any distortion, mutilation, modification or other acts that would be prejudicial to the honour or reputation of author.

## Competition and consumer rights

The CCPA enforces the CPA 2019 in India to provide relief to consumers from unfair trade practices and false advertisements. The CCPA issued the Guidelines for Prevention and Regulation of Dark Patterns 2023 (Dark Patterns Guidelines 2023). The Dark Patterns Guidelines 2023 is applicable to: (1) platforms systematically offering goods or services in India; (2) advertisers; and (3) sellers, and prohibits such entities from engaging in the following kinds of dark patterns such as false urgency, basket sneaking, confirm shaming, forced action, subscription trap, interface interference, etc.<sup>58</sup>

The Competition Commission of India (CCI) is the regulator set up under the Competition Act 2002 (Competition Act) to prevent anticompetitive activities, and promote price-competition, information symmetry and innovation. Under the Competition Act, agreements that may have an appreciable adverse effect on competition are considered anticompetitive. The Competition Act restricts the abuse of dominant position by an enterprise or a group, which includes imposing unfair or discriminatory conditions or pricing in purchase or sale of goods or services. Recently, the Competition (Amendment) Act 2023 introduced the following key changes: (1) requirement of CCI approval where the value of any transaction, or acquisition of control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds 20 billion rupees; and (2) expanded definition of 'control' to include material influence of the activities of an enterprise.

In terms of recent enforcement activity, the CCI approved the proposed joint venture between Reliance Industries Ltd, Viacom 18 Media Private Ltd and The Walt Disney Company.<sup>59</sup> The transaction will merge the digital streaming and television assets of Disney and Viacom 18 in India to create one of the leading TV and digital streaming platforms for entertainment and sports content in India. Furthermore, in its review of Apple's App Store commission and billing policies, it has been reported that the CCI found that Apple exploited its dominant position in the market for app stores ad has engaged in abusive conduct and

practices. As at the time of writing, the report issued by CCI on this matter was not made available publicly.<sup>60</sup> The observations in the report and the resultant enforcement action is expected to affect the revenue models of many entities in the media and entertainment sector which make their services available through the Apple App Store.

As regards enforcement of the CPA 2019, the framework of the CPA 2019 and the powers of the CCPA, these are set out under the heading 'Medium a' above.

As noted in the 'Year in Review' section above, the CCPA and the MIB issued advisories cautioning intermediaries, publishers, advertisers and endorsers against being engaged in advertisements of such platforms.

As regards 'net neutrality', the TRAI had categorically stated that there cannot be any discrimination by internet service providers on the grounds of content being accessed, protocols being used, or the user equipment deployed. However, in response to a recent consultation paper published by the TRAI on the regulation of OTT service providers,<sup>61</sup> certain telecom entities have recommended the imposition of carriage service fees on such OTT service providers.<sup>62</sup>

## Digital content

As noted above, Section 79 of the IT Act and the IT Rules 2023 provide safe harbour to intermediaries against liability for content stored, published, hosted and transmitted on such intermediaries upon compliance with certain due diligence requirements.

In the case of *X Corp (formerly Twitter) v. Union of India*, the Karnataka High Court dismissed a petition filed by X Corp against orders made by the government of India under the Blocking Rules wherein certain accounts on X were ordered to be blocked. X Corp contended that: (1) the users operating the accounts were not provided with reasons and an opportunity to be heard; and (2) the directions to suspend the entire account were disproportionate as the Blocking Rules provide for blocking of public access to 'information' and not accounts generally. However, the Karnataka High Court ruled against X Corp as (1) identification of the users was not possible before the account-blocking orders were made and the blocking orders were compliant with the Blocking Rules; and (2) the Blocking Rules allow for blocking of entire accounts. The court also took note of X Corp's earlier non-compliance with earlier orders and imposed costs of 5 million rupees. However, the imposition of costs has been stayed by a larger bench on appeal by X Corp.

As per recent news reports, the MEITY has sought from the Ministry of Home Affairs a check on status and violations regarding alleged illegal activities being conducted on the Telegram messenger application. These enforcement actions come in the wake of increased vigilance by the government of India against foreign OTT communication applications and the grant of safe harbour to intermediary platforms.<sup>63</sup>

## Contractual disputes

### Royalties for authors of underlying works

As per Section 19(10) of the Copyright Act, all authors of musical works and literary works such as lyrics (collectively underlying works) are entitled to claim the right to receive royalties and consideration for utilisation of the work in any form where such works are assigned to make a sound recording not a part of a cinematograph film. The owner of the sound recording

has the right to sell or commercially rent any copy of the sound recordings and to communicate the sound recording to the public.

However, whether a licence granted for the exploitation of a sound recording would obviate licences for the composition and lyrics has been the subject of contradictory decisions. The Intellectual Property Appellate Board (IPAB) had held that licences are required to be taken for underlying works.<sup>64</sup> The Delhi High Court took the opposite view and has held that once a licence for exploitation of a sound recording is taken, there is no requirement to obtain a separate licence for exploitation of the underlying works.<sup>65</sup> However, the case is pending to be adjudicated before a larger bench of the Delhi High Court. Recently, the Bombay High Court, in *Indian Performing Rights Society Ltd v. Rajasthan Patrika Pvt Ltd*,<sup>66</sup> gave interim relief to the Indian Performing Rights Society and ordered that FM radio broadcasters were required to make payment of royalties for underlying works as well as exploitation of sound recordings. However, as the Bombay High Court gave an interim order and the case is circumscribed to an FM radio broadcaster, this development does not have precedent value. Therefore, the legal position on this point has not been settled at this stage.

### **Right to receive royalties of the performer**

Another key area of dispute is a performer's (a person who performs such sound recordings) right to receive royalties on exploitation of the sound recordings. Performers have exclusive rights over their performances and any sound or visual recording thereof (performers' rights) and also have a right to receive royalties upon commercial use. However, the Delhi High Court has held that even performances recorded in a studio can be interpreted to be live. Following this decision, the Indian Singers' Rights Association (a copyright society for performers' rights) has obtained injunctions against commercial establishments for exploiting rights in studio recordings of the performers' performances.

As regards whether the performer's right to receive royalties is inalienable, Section 39A of the Copyright Act states that Sections 18 and 19 would apply in the case of broadcast reproduction rights and performers' rights. Broadcast has been defined as communication to the public by wire or wireless means.<sup>67</sup> A plain reading of Section 39A would render the performer's right to receive royalties inalienable. However, contrary views have been taken in the industry regarding the applicability of the provisos to Section 18 as they explicitly employ the words 'authors of the literary or musical work'. Performers are not included in the definition of 'author' as per Section 2(d) of the Copyright Act and any sound or visual recording of a performance would not constitute a literary or musical work.

### **Withdrawal of DPIIT Office Memorandum**

As noted in the 'Year in Review' section above, the withdrawal of the DPIIT office memorandum dated 6 September 2016 comes as a welcome clarification on the provisions of Section 31D of the Copyright Act.

## **Special considerations**

Recently, the Supreme Court of India in the case of *Nipun Malhotra v. Sony Pictures Films India Private Ltd*<sup>68</sup> issued guidelines to visual media to ensure dignified portrayal of persons with disabilities. The court held that the creative freedom of the filmmaker under Article 19(1)(a) cannot be protected if the overall work of the filmmaker shows a stereotypical portrayal of persons with disabilities. Such a depiction violates the right to dignity and the right against discrimination of persons with disabilities. The court distinguished between 'disabling humour', which disparages persons with disability, undermining the



dignity of individuals, from 'disability humour', which challenges traditional views on disability and is used to eliminate prejudices. The court also laid guidelines for the decision-making authorities to assess the overall message of any film on the dignity of individuals.

## Outlook and conclusions

The government of India is overhauling the technology, media and entertainment regulation landscape of India. With the enactment of the Indian Data Protection Law and leading up to the DIA, the coming year is likely to be a watershed year for regulation of the media and entertainment sector. The DIA is also proposed to overhaul the 'safe harbour' granted to intermediaries by imposing the more stringent 'notice and stay down' model instead of the 'notice and takedown' model that is currently in place in India. This could require intermediaries to ensure that infringing or non-compliant content is not just taken down but also does not resurface on the platform, by employing technology solutions. Further, the proposed enactment of the rules under the Indian Data Protection Law is expected to provide further clarity in relation to the duties and obligations of the relevant stakeholders under the Indian Data Protection Law.

As noted above, the government of India is aiming to bring a new legislation to regulate the print sector and has initiated pre-consultation on the regulatory regime for the broadcasting sector. Moreover, the government of India is also engaging in high-level discussions around the Digital Competition Bill in a bid to regulate large technology companies. New legislation governing the telecommunications sector is also expected to modernise the legal framework for telecommunications and internet service providers.

As a closing remark, it is important to keep a close eye on the increasing role of AI and its regulation under future legal frameworks, including copyright laws and information technology laws.

## Footnotes

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