TRAI'S QUANTITATIVE ADVERTISEMENT REGULATION: ENSURING A QUALITY VIEWING EXPERIENCE OR REGULATORY OVERREACH?

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On March 22, 2013, the Telecom Regulatory Authority of India released the Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013, which mandates that broadcasters restrict advertisements on television channels to a maximum of twelve minutes per clock hour. While the Ministry of Information and Broadcasting and the News Broadcasters Association vehemently oppose this measure as a draconian step that will adversely impact revenues and violate broadcasters' freedoms of speech and business, the TRAI argues that the duration of advertisements is inversely proportional to the quality of the viewing experience, and that the measure is necessary to protect consumer interest. This paper analyses the debate surrounding the Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013, as a measure for advertising regulation. It examines the TRAI's role as regulator and evaluates the legal and economic arguments for and against the measure.

I. INTRODUCTION

Television is the most prominent media segment in India and serves as a vehicle for the delivery of news, information and entertainment.[1] It accounts for approximately forty-two per cent of the total media industry pie,[2] and yet, remains substantially unregulated[3] since its inception in 1959.[4]

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1 Telecom Regulatory Authority of India, *Consultation Paper on Monopoly/ Market dominance in Cable TV services*, June 3, 2013, available at http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/C_Paper_Cable_monopoly__3rd%20JuneFINAL.pdf (Last visited on September 26, 2013).

2 *Id*.

3 Till the mid nineties, the Indian Telegraph Act, 1885 and The Wireless Telegraphy Act, 1933, wre the only statutory sources of regulation in the broadcasting industry.

4 Vanita Kohli-Khandekar, The Indian Media Business 100 (2003).

Secretary, Ministry of Information & Broadcasting, Govt. of India v. *Cricket Assn. of Bengal*[5] ('CAB case'), in which the Supreme Court held that airwaves are public property and cannot be monopolised by the Government, marked a watershed in the history of broadcasting regulation in India. Subsequently, the Cable Television Networks Rules, 1994 ('Rules'), and the Cable Television Networks (Regulation) Act, 1995, were enacted.

Until 1991, Indian viewers received controlled, development-oriented and sometimes propaganda-induced content.[6] After the P.V. Narasimha Rao government's liberalisation efforts in the 1990s, not only did television change in terms of content broadcasted, it also underwent a radical structural transformation from a wholly government-owned industry to a multi-channel, diversely owned media market.[7] In response to these transformations, the Telecom Regulatory Authority of India ('TRAI') was established in 1997 under statute.[8] The roles of the TRAI as a regulator and that of the Central Government as a policy maker are clearly demarcated[9] in order to deliver a stable regulatory environment which is less susceptible to political capture.[10] The TRAI's diverse regulatory portfolio includes broadcasting and cable services. Among the issues that it has taken note of in this area is the concern with excessive advertisements on television channels. Television advertising is "any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, right and obligations, in return for payment".[11] Television viewers are presented by broadcasters as well as well as Multiple System Operators ('MSOs') and Local Cable Operators ('LCOs') with content feeds interspersed with advertisements.[12] For broadcasters, the importance of advertising, which constitutes a primary source of revenue, cannot be underemphasised. Free-to-air ('FTA') channels[13] are completely dependent on advertisements for their

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5 Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161: AIR 1995 SC 1236.

6 Usha M. Rodrigues, *Globalisation of Indian Television* in Indian Media In A Globalised World 1 (2010).

7 *Id*.

8 TRAI, *History*, October 31, 2013, available at http://www.trai.gov.in/Content/History.aspx (Last visited on October 31, 2013).

9 Rory Macmillan, *Reflections on Regulation and Dispute Resolution in the Indian Telecommunication Sector*, 47 JILI 33 (2008).

10 *Id*., 34.

11 Audiovisual Media Services Directive, 2010, Art. 1(1)(*i*).

12 TRAI, *Consultation Paper on "Issues Related to Advertisements in TV channels"*, March 16, 2012, available at http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/cp-aproved-Authority.pdf (Last visited on October 31, 2013).

13 *Id*., 4 (FTA Channel: A channel for which no fees is to be paid to the broadcaster for its re-transmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly).

revenue, while pay channel[14] broadcasters derive seventy-one per cent of their revenue from carrying advertisements.[15]

Naturally, broadcasters attempt to lengthen commercial breaks by packing in more advertisements to maximise revenue. The TRAI argues that this significantly reduces the quality of the viewing experience.[16] In March, 2012, the TRAI released a consultation paper concerning quantitative regulation of advertisements on television.[17] While several existing statutory provisions regulate quality and content of advertisements,[18] the sole provision for quantitative regulation is Rule 7 of the Advertising Code of the Rules. Then, in May, 2012, the TRAI released the Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012 ('principal regulations'). Regulation 3 provided that broadcasters cannot carry more than twelve minutes of advertisements in a clock hour.[19] Several broadcasters protested the measure, bringing a challenge to the regulation at the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT'). The TRAI responded with revisions to the principal regulations and released the draft Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012 in August, 2012, to solicit comments of stakeholders.[20] In March, 2013, the TRAI notified the Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013 ('amended regulations').[21] While the amended regulations have been diluted to

[14] *Id.*, 4 (Pay channel : A channel for which fees is to be paid to the broadcaster for its retransmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly).

[15] *Id.*, 2.

[16] *Id.*

[17] *Id.*

[18] *See* The Indian Penal Code, 1860, §292(2)(*d*) and 294-A; The Young Persons (Harmful Publications) Act, 1956, §3, 4, 6 and 7; The Emblems and Names (Prevention of Improper Use) Act, 1950, §3; The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, §2(a); The Indecent Representation of Women (Prohibition) Act, 1986, §3; The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, §22; The Transplantation of Human Organs Act, 1994, §19(f); The Drugs and Cosmetics Act, 1940, §29; The Prize Competition Act, 1955, §4, 11; The Prize Chits and Money Circulation Schemes (Banning) Act, 1978, §5, 7, 8, 11, The Motor Vehicles Act, 1998, §116(4); The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, §5; The Consumer Protection Act, 1986, §14(1)(*f*) and The Representation of People Act, 1951, §126 and 127-A; *see also* MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 191-197 (2013).

[19] Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012, Reg. 3 (Duration of advertisements in TV channels).

[20] Press Release, PRESS INFORMATION BUREAU, August 27, 2012, at http://pib.nic.in/newsite/PrintRelease.aspx?relid=86850 (Last visited on October 31, 2013).

[21] Press Release, PRESS INFORMATION BUREAU, March 22, 2013, available at http://pib.nic.in/newsite/erelease.aspx?relid=94234 (Last visited on October 31, 2013).

accommodate broadcasters' demands, the focal mandate, that broadcasters cannot carry advertisements exceeding twelve minutes per clock hour, remains.[22]

Following the TRAI's notification of the principal regulations, the National Broadcasters Association ('NBA'), expressed "deep shock and concern" and termed the regulations as "sweeping and intrusive".[23] The Ministry of Information and Broadcasting ('MIB') also opposed the amended regulation. The two bodies' opposition rested on three grounds, addressed in turn in this paper. *First*, that the TRAI did not have the power to notify these regulations.[24] *Second*, that the amended regulations violated the fundamental rights to freedom of speech and expression and to freedom of trade and occupation under Articles 19(1)(a) and 19(1)(g) of the Constitution of India ('the Constitution').[25] *Third*, that a restriction on advertisements would cause significant financial detriment to the broadcasting industry and would affect the industry's primary source of revenue.[26]

II. THE TDSAT TUSSLE

The introduction of the amended regulations saw multiple claims and counter claims being filed. A suit initiated by the TRAI against broadcasters who did not comply with these regulations kick-started the process. A tussle between the TDSAT and the TRAI then ensued, culminating with a Supreme Court directive in *BSNL* v. *Telecom Regulatory Authority of India*[27] stating that the jurisdiction to hear appeals against regulations issued by the TRAI does not rest with the TDSAT. Accordingly, the TDSAT dismissed the claims and declared that the broadcasters may approach the appropriate high courts.[28]

The Supreme Court's reasoning was based on the nature of regulations, and on the breadth of the TDSAT's powers in the amended Telecom

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22 Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013, Reg. 3, Explanation ("The clock hour means a period of sixty minutes commencing from 00.00 of an hour and ending at 00.60 of that hour. (example: 14.00 to 15.00 hours)").

23 Press Release, News Broadcasters Association, March 23, 2013, available at http://www.nbanewdelhi.com/images/uploadfile/45_PRESS_RELEASE_23-3-13.pdf (Last visited on October 31, 2013).

24 The Hindu, *Never-ending commercial breaks*, April 5, 2013, available at http://www.thehindu.com/opinion/lead/neverending-commercial-breaks/article4581532.ece (Last visited on October 31, 2013).

25 *Id.*; Press Release, *supra* note 23.

26 *Id.*

27 BSNL v. Telecom Regulatory Authority of India, Civil Appeal No. 5253 of 2010, December 6, 2013, available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=41056 (Last visited on July 2, 2015).

28 The Economic Times, *Supreme Court judgment forces TDSAT to dismiss petitions on ad cap*, December 15, 2013, available at http://articles.economictimes.indiatimes.com/2013-12-15/news/45216477_1_trai-order-tdsat-chairman-justice-aftab-alam (Last visited on January 11, 2013).

Regulatory Authority of India Act, 1997 ('TRAI Act' or 'the Act') when compared to the initial enactment. It was held that the adjudicatory power vested in the TDSAT under §14(b) of the TRAI Act did not provide the TDSAT the power to challenge regulations framed by the TRAI under §36.[29] By virtue of §14(b), the TDSAT is vested with the power to hear appeals against any "direction, decision or order" set out by the TRAI. Since regulations stand on a different footing to directions, decisions and orders, the adjudicatory functions of the TDSAT as envisaged under the TRAI Act clearly exclude from its scope the power to hear appeals against regulations issued by the TRAI.[30]

In light of the Supreme Court directive, the NBA along with other broadcasters approached the Delhi High Court, seeking relief against the coercive action taken by the TRAI. The Delhi High Court, through its interim order on December 17, 2013, ruled that the TRAI should not take steps towards enforcing the amended regulations till the court pronounces the final judgment in March, 2014.[31] The matter remains *sub judice*, and the TRAI has been directed not to penalise any channel in the interim.[32] Consequently, the broadcasting industry now finds itself at an impasse.

III. THE TRAI'S COMPETENCE

The TRAI Act empowers the TRAI to lay down minimum thresholds for the quality of services to be provided to consumers.[33] The duration of advertisements, their placement either with or in between programmes and the frequency of their occurrence are closely linked to the quality of consumers' viewing experience. As a result, the manner in which advertising is treated determines the quality of service that service providers are able to deliver.

Presently, content feeds on television are interspersed with advertisements, often repeated several times. Consumers have launched complaints about the lack of continuity in programming as a result of the frequency and volume of advertising. They argue that they pay a subscription fee for channels

[29] BSNL v. Telecom Regulatory Authority of India, Civil Appeal No. 5253 of 2010, December 6, 2013, available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=41056 (Last visited on July 2, 2015).

[30] India Television, *The SC court judgment & TDSAT's powers,* December 19, 2013, available at http://www.indiantelevision.com/headlines/y2k13/dec/dec39.php (Last visited on January 10, 2013).

[31] Urvi Malvania, *NBA to appeal in High Court regarding TRAI's 12 minute ad cap*, Business Standard (Mumbai), December 16, 2013.

[32] Indian Television, *Ad cap case adjourned to 24 July; broadcasters hope govt. will reverse earlier order*, March 24, 2015, available at http://www.indiantelevision.com/regulators/high-court/adcap-case-adjourned-to-24-july-broadcasters-hope-govt-will-reverse-earlier-order-150324 (Last visited on April 10, 2015).

[33] Telecom Regulatory Authority Act of India (Amendment), 2000, §11(1)(b)(v).

in expectation of content feeds and not advertisements.[34] Coupled with the fact that the consumers have no option of skipping advertisements, this adversely affects the quality of service. To remedy this, the TRAI issued the principal regulation in 2012, capping the maximum duration of advertisements in one clock hour at twelve minutes. The foremost area of contention is whether the TRAI is competent to pass such a regulation.

§2(1)(k) of the TRAI Act defines "telecommunication services". In 2000, the Parliament amended the Act, introducing a proviso granting the Central Government the authority to notify services other than those provided in §2(1)(k) to be "telecommunication services".[35] This amendment was unsuccessfully challenged in the Delhi High Court on the ground that it vested the Central Government with powers *ultra vires* the main provision in §2(1)(k).[36] Specifically, the argument was that a proviso could not vest the power to notify "broadcasting services" to be "telecommunication services" as they are specifically excluded in the definition. The Delhi High Court opined that the definition and proviso to it should be read harmoniously. In addition, the Court ruled that the Central Government was empowered to legislate on issues relating to broadcasting under Entry 31 of List I of Schedule VII to the Constitution, which expressly includes broadcasting as a means of communication.

In 2004, the Central Government, using §2(1)(k)'s proviso issued a notification bringing broadcasting and cable services within the purview of "telecommunication services" and so under the jurisdiction of the TRAI.[37] It appeared that cable operators were now "service providers" under §2(1)(j) of the TRAI Act. The TDSAT has confirmed this position, reasoning that all intermediaries in the provision of a broadcast to a consumer would amount to service providers.[38]

§11(d) of the TRAI Act empowers the TRAI to perform any administrative or financial function necessary to carry out provisions of the Act entrusted to it by the Central Government. In 2004, the Central Government passed an order empowering the TRAI to make recommendations on the

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34 TRAI, *Recommendations on Issues Relating to Broadcasting and Distribution of TV Channels*, October 1, 2004, available at http://www.trai.gov.in/WriteReadData/Recommendation/Documents/01octcable[1].pdf (Last visited on October 31, 2013).

35 Telecom Regulatory Authority Act of India (Amendment), 2000, §2(1)(k), proviso ("Provided that the Central Government may notify other service to be telecommunication service including broadcasting services").

36 Star India Pvt. Ltd v. Telecom Regulatory Authority of India, 146 (2008) DLT 455, ¶34.

37 Ministry of Communications and Information Technology, Department of Telecommunications, Notification S.O 44(E), January 9, 2004. *See also*, TRAI, *supra* note 1.

38 *Sea* TV Network Ltd v. Star India Limited, Petition No. 41(C) of 2005, M.A.N. 152 of 2005 decided on 24-8-2005.

parameters for regulating maximum time for advertisements.[39] The principal regulations rely on this foundation.

The TRAI is empowered under §36 of the TRAI Act to notify regulations which are consistent both with the TRAI Act, as well as rules made by the Central Government to effectively carry out the purposes of the Act.[40] Broadcasters argue that the Standard of Quality of Service Regulations are *ultra vires* §36.[41] The language of §36 clearly reflects that the power is an open-ended one, through its use of the words "without prejudice to the generality of the foregoing power". Thus, there is nothing in the language of §36 to exclude the TRAI's power to place a cap on the duration of advertisements through regulations.

The necessity of the regulation is also questioned by broadcasters. §7(11) of the Advertisement Code contained in the Rules, already caps the duration of advertisements at twelve minutes per hour of programming.[42] The Cable Television Network (Regulation) Act which was subsequently enacted in 1995 reinforces these Rules.[43] The principal regulations do not alter the position established by the 1994 Rules. They only clarify that "hour" under §7(11) of the Rules means "clock hour" and propose to enforce this rule. Admittedly, an enforcement mechanism exists within the Cable Television Network (Regulation) Act, 1995 itself under §2(a).[44] Further, State and District Level Monitoring Committees were established in 2005 as a second tier of enforcement.[45]

Additionally, the NBA also argued that it was the MIB, and not the TRAI, that was the nodal agency for enforcement of these Rules.[46] Despite complaints from viewers, the MIB continues to abstain from taking penal

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39 Ministry of Communications and Information Technology, Department of Telecommunications, Order S.O. 45(E), January 9, 2004.

40 TDSAT, Telecom Broadcasting and Cable Laws- A Compendium (2006).

41 National Broadcasters Assn. v. Telecom Regulatory Authority of India, MA No. 183 of 2013; TRAI, *Discovery Communications India's (DCIN) Preliminary Response to Telecom Regulatory Authority of India's Consultation Paper dated 16.03. 2013 on issues related to Advertisements in TV Channels*, March 16, 2013, available at http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/DiscoveryCommunications070412.pdf (Last visited on October 31, 2013).

42 The Cable Television Networks Rules, 1994, Rule 7(11).

43 The Cable Television Networks (Regulation) Act, 1995, §6.

44 The Cable Television Networks (Regulation) Act, 1995, §19.

45 Ministry of Information and Broadcasting, Government of India, *Monitoring Committee for Private Television Channels at the State and District Levels*, Order No 2301/7/2003-BC-III, September 6, 2005, available at http://www.prd.kerala.gov.in/comitte_tvchannel.pdf (Last visited October 31, 2013); *See also*, Press Information Bureau, Government of India, *I&B Ministry issues guidelines for State & District level monitoring committees for TV Channels*, February 20, 2010, available at http://pib.nic.in/newsite/erelease.aspx?relid=35496 (Last visited on September 21, 2013).

46 News Broadcasters Association, *Representation on Behalf of News Broadcasters Association to TRAI on Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012 issued by TRAI vide Press Release dated 27th August 2012*,

action against service providers in blatant violation of the twelve minutes rule.[47] The TRAI imposed the regulations in response to the "brazen breach" of existing norms under the Rules.[48] A study conducted by the Centre for Media Studies revealed that across six major news channels, over the last four years, around thirty-five per cent of prime time television (from 1900-2300 hours) consisted of advertisements.[49] The permitted limit is twenty per cent.[50] This absence of proper regulation, coupled with the TRAI's statutory duty to protect consumer interests[51] made the notification bringing broadcasting and cable services within the TRAI's purview both necessary and lawful.[52]

IV. CONSTITUTIONALITY OF THE TRAI REGULATION

The second strand of the NBA's argument concerns the constitutionality of the regulation. It alleged that in the garb of advertisement regulation, the TRAI is engaging in content control.[53] It also argued that the regulation was "an anathema" to Articles 19(1)(a) and 19(1)(g) rights of the broadcasters.[54] An evaluation of these arguments follows.

A. THE ARGUMENT FROM FREEDOM OF SPEECH AND EXPRESSION

1. Do commercial advertisements fall within the ambit of Article 19 (1)(a)?

The scope of the 'right to advertise' under Article 19(1)(a) was first considered in *Hamdard Dawakhana* v. *Union of India* ('Hamdard Dawakhana'),[55] where the issue was whether commercial advertisements were

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September 11, 2012, available at http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/201304120523295562576NBA-New.pdf (Last visited on October 31, 2013).

47 The Hindu, *supra* note 24.

48 The Hindu Business Line, *TRAI asks TV Channels to restrict Ad Duration*, March 22, 2013, available at http://www.thehindubusinessline.com/industry-and-economy/trai-asks-tv-channels-to-restrict-ad-duration/article4538568.ece (Last visited on September 16, 2013).

49 TRAI, *Consultation Paper on "Issues Related to Advertisements in TV Channels"*, Consultation Paper No. 7/2012, March 16, 2012, ¶1.10, available at http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/cp-aproved-Authority.pdf (Last visited on October 31, 2013).

50 *Id.*

51 Telecom Regulatory Authority of India Act, 1997 ('TRAI Act'), Preamble; TRAI Act, 1997, §11(1)(b)(v).

52 Notification No. 39 dated 09.01.2004 TDSAT, Telecom Broadcasting and Cable Laws- A Compendium (2006).

53 Press Release, *supra* note 23.

54 Press Release, *supra* note 23, ¶4.

55 Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.

protected under it. The Supreme Court held that a standard rule could not be applied to all kinds of advertisements. Instead, the nature of the advertisement would need examination. Where an element of trade or commerce exists, Article 19(1)(a) would not apply,[56] and interferences with the freedom of speech resulting from their regulation would be permissible.[57] Advertisements such as those whose object is to propagate social or political or economic ideas, promote literature or human thought, on the other hand, would be protected.[58]

Unlike Hamdard Dawakhana, *Tata Press Ltd.* v. *Mahanagar Telephone Nigam Ltd.*, ('Tata Press')[59] which presently holds the field, held that commercial speech could not be denied the protection of Article 19(1)(a) merely because businessmen or enterprises engage in it. Recognising the national significance of advertisements, the Court accurately[60] stated that advertising was "[a] cornerstone of our economic system".[61] As a primary source of revenue, it is critical to a free media, making content widely available. The Court emphasised the scale of this dependence, noting that the availability of advertising revenues could have drastic effects on both the quality and quantity of news.[62]

In spite of Tata Press,[63] the broadcasters' argument fails on two grounds. *First*, the mere fact that commercial speech is protected by Article 19(1)(a) does not permit broadcasters to subject viewers to indiscriminate advertising.[64] The legal position that Tata Press succeeded in establishing was that the commercial character of advertisements is *per se* not a ground to justify

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56 *Id.*, ¶17.

57 *Id.*, ¶711.

58 *Id.*, ¶687.

59 Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139, ¶19 : AIR 1995 SC 2438.

60 Divan, *supra* note 18, 189; *see also*, Confederation of Indian Industry, *India Entertainment and Media Outlook 2012*, 2012, available at http://www.pwc.in/assets/pdfs/india-entertainment-and-media-outlook/india-e-and-m-outlook-2012.pdf (Last visited on August 30, 2014); Ernst & Young, *Spotlight on India's entertainment economy- Seizing new growth opportunities*, 2011, available at http://www.ey.com/Publication/vwLUAssets/Entertainment_economy_of_India/$File/Indias-Entertainment-Economy_Oct_%202011_.pdf (Last visited on August 30, 2014); Magna Global, *Magna Global Advertising Forecast 2013*, available at http://news.magnaglobal.com/magna-global/press-releases/advertising-growth-2013.print (Last visited on August 30, 2014); Afaqs, *Indian ad market to grow by 7.8 per cent in 2013: Magna Global*, June 14, 2013, available at http://www.afaqs.com/news/story/37785_Indian-ad-market-to-grow-by-7.8-per-cent-in-2013:-Magna-Global (Last visited on August 30, 2014); Magna Global, *Magna Global Advertising Forecasts: 2014*, December 9, 2013, available at http://news.magnaglobal.com/ipgmediabrands/press-releases/magna-global-advertising-forecast-2014-ipg-mediabrands.htm (Last visited on August 30, 2014).

61 Tata Press Limited v. Mahanagar Telephone Nigam Limited, AIR 1995 SC 2438, ¶19.

62 *Id.*

63 *Id.*

64 Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641: (1985) 2 SCR 287; Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139: AIR 1995 SC 2438; *see also*, United States in Bigelow v. Virginia, 44 L Ed 2d 600: 421 US 809 (1975), Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 48 L Ed 2d 346: 425 US 748 (1976), Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 37 L

their restriction. It does not apply to the TRAI regulation because the commercial character of advertisements as a ground for restriction is not in issue. Instead, the basis of the regulation in question pertains to the welfare of consumers in having an optimal viewing experience. Restrictions on commercial speech which further consumer interest are clearly not excluded.[65]

Second, commercial speech may be subjected to a higher degree of regulation than non-commercial speech.[66] The United States Supreme Court adopts this position. In *Central Hudson Gas & Electricity Corp.* v. *Public Service Commission*,[67] it held that though commercial speech is a constitutionally protected form of expression, its inherent nature made it prone to more limitations than other forms of speech. This distinction between commercial and non-commercial speech evolved to protect consumers from "deception or coercion" and thus ensure "flow of truthful and legitimate" information.[68] In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*,[69] as well, while recognising the importance of allowing the free flow of commercial information, the U.S. Supreme Court added a "common sense" note that commercial and non-commercial speeches received different degrees of protection.[70]

A similar approach was adopted by the Delhi High Court in *Mahesh Bhatt* v. *Union of India*,[71] where a public interest test was proposed – the determining factor ought to be the object and purpose of the advertisement.

Ed 2d 669 : 413 US 376 (1973) and Bates v. State Bar of Arizona, 53 L Ed 2d 810 : 433 US 350 (1977).

65 Procureur du Roi v. Marc J.V.C. Debauve and others, 1980 ECR 833; Action for Children's Television v. FCC (here the restriction was not placed on advertisements, but on indecent shows on television. The court laid down that commercial speech may be restricted to serve "compelling public interest"); Oliver Castendyk, Egbert Dommering & Alexander Scheuer, European Media Law 650 (2008).

66 P. Ishwara Bhat, Fundamental Rights- Study of Their Inter-relationship 358 (2004).

67 Central Hudson Gas & Electricity Corp. v. Public Service Commission, 65 L Ed 2d 341 : 447 US 557, 561 (1980) (The court proceeded to lay down a four pronged test in order to assess the validity of restrictions on commercial speech. Under the first prong, commercial speech could be restricted if it did not provide the public with accurate information about a lawful activity. The second prong required that the State assert a substantial interest in imposing such a restriction. According to the third prong, the restriction should have a nexus with achieving this substantial interest. Lastly, the fourth prong mandated that the "least restrictive means" be employed by the State in achieving its interest.); *see also* Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 345-46 (1986) (where the Court held that the "least restrictive means test" does not require the restriction to be absolutely the least severe restriction which will achieve the said purpose, but merely requires a "reasonable fit" between the ends and the means to achieve the same. This was upheld in City of Cincinnati v. Discovery Network, Inc., 123 L Ed 2d 99 : 507 US 410, 417 (1993)).

68 *Id*.

69 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 48 L Ed 2d 346 : 425 US 748 (1976).

70 Bhat, *supra* note 66.

71 Mahesh Bhatt v. Union of India, (2008) 147 DLT 561 (DB).

Advertising with the object restricted to mere promotion of sales of goods and services, without any social purpose, does not receive the same protection as social or political speeches. The Court also stated that the decision in Tata Press was made in light of such a public interest requirement, since it concerned the publication of a telephone directory providing the public access to useful information. The Court opined that the decision in Hamdard Dawakhana was not overruled by Tata Press, and in fact the underlying principle of both cases is the promotion of public interest. Therefore, it held that commercial speech is entitled to limited protection under Article 19(1)(a) when it is in public interest.[72]

For the purposes of the TRAI Act, as well as under general principles of consumer protection, the television viewer is a 'consumer'. Thus, a right to quality television may be inferred, which is detrimentally affected due to excessive advertisements. From this standpoint, the need for quantitative regulation may be justified by drawing an analogy to the qualitative regulation for misleading advertisements.[73] The purpose of both forms of regulation is similar, *i.e.*, to provide the consumer with a quality viewing experience.

In the CAB case, an important issue was whether the right to telecast and broadcast was a component of Article 19(1)(a). The Court found that it was. Its rationale is worth noting: a telecaster did not exercise his right to self-expression during a broadcast, as he was not a participant in the game. His right to freedom of speech and expression was based on the interaction between his right to educate, inform and entertain the viewers and the viewers' right to be informed, educated and entertained.[74] Protection was accorded under Article 19(1)(a) to the point where these two rights met.[75] In a scenario with no limitation on duration of advertisements, this balance which is made possible by respecting the viewers' rights would be disturbed. While broadcasters are in a position to raise their concerns and demands through organisations like the NBA and the Indian Broadcasting Foundation ('IBF'), the innumerable television viewers who wish to be subjected to fewer advertisements can only make their voice heard through the TRAI. Indeed, the TRAI has explicitly mentioned in its consultation paper that it has acted on several complaints and requests by consumers and consumer organisations to reduce the duration and overplaying of advertisements, and overlaying of advertisements on the screen.[76]

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72 The Supreme Court however issued a stay order in this case. The stay order is still in force.

73 Consumer Protection Act, 1986, §2(2), 14(1)(hc).

74 Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161, ¶75 : AIR 1995 SC 1236 ("However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers."); *see also*, ¶194 ("From the standpoint of Article 19(1)(*a*), what is paramount is the right of the listeners and viewers and not the right of the broadcaster — whether the broadcaster is the State, public corporation or a private individual or bod").

75 Bhat, *supra* note 66, 355.

76 Telecom Regulatory Authority of India, *Consultation Paper on "Issues Related to Advertisements in TV channels"*, March 16, 2012, available at http://www.trai.gov.in/

2. Scope of Article 19(1)(g) with reference to media.

Unlike Article 19(1)(a), the Article 19(1)(g) freedom to carry on business can be restricted in the interests of the general public. In *Express Newspaper (P) Ltd.* v. *Union of India* ('Express Newspaper Ltd.),[77] the Supreme Court observed that the State cannot restrict this latter freedom "by directly and immediately curtailing" the freedom of speech, since there is no hierarchy of the freedoms under Article 19.[78] Therefore, it was held that the impugned law directly violated the newspaper's freedom of speech by placing a restraint on its right to publish any number of pages it wishes.[79]

In *Sakal Papers (P) Ltd.* v. *Union of India* ('Sakal Papers'),[80] the petitioners questioned the constitutionality of laws which regulated the number of pages according to the price charged, prescribed the number of supplements that could be published, and provided for regulation of the sizes and area of advertising matter in relation to the other matters contained in a newspaper, and even prohibited the publication and sale of newspapers. The Supreme Court ruling for the petitioners was based on its holding that newspapers had the freedom under Article 19(1)(a) to disseminate news and views.

In *Bennett Coleman & Co.* v. *Union of India* ('Bennett Coleman'),[81] the Import Policy for Newsprint for 1972-73 ('the Policy') was the central issue. It included a bar on starting new papers or editions by a common ownership unit, a maximum limitation of ten pages per newspaper, and a bar on interchangeability within a common ownership unit. Striking down the Policy as violative of Article 19 (1)(a), the Court held that Article 19(1)(a) included the right to choose a volume of circulation as well as the volume of news and views that the newspaper would carry.[82] Applying the 'direct effect test', the Court rejected the union government's plea that the purpose of the Policy was to regulate the consumption of newsprint rather than newspapers. It held that the impugned policy was directly controlling the growth and circulation of newspapers, depriving their area of advertisement and exposing them to financial loss.

Precedent like Express Newspaper Ltd., Sakal Papers and Bennett Coleman do not fully apply to the TRAI's attempt to regulate advertising for four reasons. *First*, there is an indispensable difference between print and broadcasting media. While all three of the abovementioned cases pertain to

WriteReaddata/ConsultationPaper/Document/cp-aproved-Authority.pdf (Last visited on January 17, 2014).

77 Express Newspaper (P) Ltd. v. Union of India, AIR 1958 SC 578.

78 *Id*.

79 Divan, *supra* note 18, 36.

80 Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.

81 Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106.

82 V.N. Shukla, Constitution of India 127 (M.P. Singh, 4th ed., 2008).

print media in general and newspapers in particular, our case pertains to broadcasting. Broadcasting media have always been subject to a higher degree of regulation, in comparison to print media.[83] This is because of, first, the scarcity of airwaves and their fundamental nature as public property.[84] Broadcasters do not own airwaves, but instead hold state-issued licenses to use them. There is nothing that would presumptively prevent the government from freely deciding the terms on which it will issue those licenses, in order to ensure the best allocation of a public good.[85] Print media is plentiful and therefore subject to lesser restrictions.[86] The second strand is that electronic media such as television has both audio and video appeal and thus has a greater influence on the viewers.[87] Further, being ubiquitous and readily accessible, they constitute a powerful medium of communication.[88] In the CAB case, the Supreme Court reiterated the difference between print and broadcasting media[89] and said that even though the broadcasting medium enjoys the protection of Article 19(1)(a), it cannot be equated to other modes of communication. While print media in the form of newspapers and magazines may be allowed to function in a free market mechanism, the same cannot be allowed for broadcasting media.[90] Thus, broadcasting media may be subjected to a higher degree of control and restriction in comparison to print media.

Second, Express Newspaper is inapplicable here because the amended regulations, do not prioritise the fundamental right to trade and business over the right to freedom of speech and expression. Express Newspaper Ltd. would only be applicable if the TRAI purported to characterise carrying of advertisements in broadcasting media as a commercial activity to the exclusion of freedom of speech and expression of the broadcasters. It has not done so. The purpose of the regulation is to regulate the quantum of advertisements in the interests of the consumers who suffer due to indiscriminate advertising. This does not amount to preferring the freedom of trade over freedom of speech. This aspect has been dealt in further detail in the proceeding section on 'Freedom of Trade and Occupation'.

Third, Sakal Newspapers is inapplicable here due to the non-application of one crucial assumption the Court adopted while arriving at its conclusion. The Court assumed that every newspaper develops a business plan

83 J.M. Balkin, *Media Filters, the V-Chip, and the foundations of broadcast regulations*, 45 (1131) Duke Law Journal 1132 (1996).

84 *Id.*; *See also* Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161: AIR 1995 SC 1236, ¶47 (echoing this proposition in its ratio).

85 Red Lion Broadcasting Co. v. FCC, 23 L Ed 2d 371 : 395 US 367 (1969).

86 National Broadcasting Co. v. United States, 87 L Ed 1344 : 319 US 190, 226-27 (1943); Adam Thierer, *Why Regulate Broadcasting? Towards A Consistent First Amendment Standard For The Information Age*, 15 Commlaw Conspectus 436 (2007).

87 Red Lion Broadcasting Co. v. FCC, 395 US 367, ¶47 (1969).

88 Balkin, *supra* note 83.

89 Divan, *supra* note 18, 241.

90 Divan, *supra* note 18, 241.

for carrying out its activities for a period of time. This plan is influenced by factors such as place of publication, target readership base, labour conditions, price of raw material and the availability of advertisements.[91] Accordingly, it decides the content and price of the newspaper. This plan which the newspapers would have made before the commencement of the financial year, would be "rudely shaken if not completely upset" by the impugned Act and Order as they would not have taken the reduction in pages or increase in price into account.[92] However, this assumption does not apply to the amended regulation because the restriction of advertisements to twelve minutes per hour is not a new rule. It was a part of the already existing Advertisement Code in Rule 7(11)[93] of the Rules. This rule mandated that no programme can carry more than twelve minutes of advertisements per hour, of which up to ten minutes may be commercial advertisements and up to two minutes may be self-promotional programmes. Since this rule has been in force for the past two decades, it is rational to expect that broadcasters would have taken the rule into account and incorporated it into their business model. The impugned regulation is merely a measure to enforce these pre-existing standards.

Further, the quantitative ceiling of twelve minutes is reasonable and conforms to international standards. With the prominent exception of the United States of America, quantitative regulation of advertisements is widely prevalent in a number of jurisdictions.[94] The Audiovisual Media Services Directive ('AVMSD'), which governs coordination of national legislation and policy on all audiovisual media across the European Union, caps the duration of advertising and teleshopping spots at twenty per cent per clock hour.[95] This is followed by most member countries, including the United Kingdom ('UK'),[96] Belgium, Germany, Ireland,[97]

[91] Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.

[92] *Id*., ¶25.

[93] The Cable Television Networks Rules, 1994, Rule 7(11) ("No programme shall carry advertisements exceeding 12 minutes per hour, which may include up to 10 minutes per hour of commercial advertisements, and up to 2 minutes per hour of a channel's self-promotional programmes").

[94] Simon P. Anderson, *Regulation of television advertising*, available at http://www.virginia.edu/economics/RePEc/vir/virpap/papers/virpap363.pdf (Last visited on January 18, 2014).

[95] Audio Visual Media Services Directive, 2010, Art. 23(1).

[96] Code on the Scheduling of Television Advertising, 2010, Art. 4 (In addition to the clock hour cap, the UK imposes a 7 minute average hourly requirement across the broadcasting day, subject to a cap of 12 minutes in any given hour. According to the Communications Act, 2003 while the Ofcom can make stricter norms for the regulation of the duration of advertisements in the U.K., it cannot dilute the ad cap of twelve minutes outlined in the AVMSD).

[97] Press Release, European Union, June 24, 2010, available at http://europa.eu/rapid/press-release_IP-10-803_en.htm?locale=en (Last visited on April 10, 2015); *see also* Simon P. Anderson, *Regulation of television advertising*, available at http://www.virginia.edu/economics/RePEc/vir/virpap/papers/virpap363.pdf (Last visited on January 18, 2014); Torben Stuhmeier & Tobias Wenzel, *Regulating Advertising in the Presence of Public Service Broadcasting*, January 2012, available at http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/041_Stuehmeier_Wenzel.pdf (Last visited on August 28, 2014).

and Croatia.[98] In Australia, as in the UK, the Code of Practice employs both clock hour and average of hours as bases.[99] Broadcasting of an average of thirteen minutes of non-program matter is permitted between 6 P.M. and midnight, and fifteen minutes at other times.[100] However, the clock hour prescription mandates a cap of fifteen minutes between 6 P.M. and midnight, which cannot exceed an average of fourteen minutes in any four hours.[101]

Fourth, the Supreme Court in Bennett Coleman struck down the Control Order[102] because it would restrict circulation and prevent the setting up of new newspapers. The Court formulated the 'direct effect' test, which requires it to examine the directness of the effect that the law will have on the freedom of speech, instead of the directness of the subject matter of the law to Article 19(1)(a) in order to determine whether the right has been infringed. Here, the object behind the notification of the regulation, *i.e.*, to protect the interests of consumers, has a decisive link with the reason for the notification, the need to reduce indiscriminate advertising. The direct effect of the regulation is to ensure channels abide by the existing mandate in Rule 7(11) of the Rules. If at all there is any impact on the freedom of speech and expression under Article 19(1)(a), it is indirect, incidental and remote. Another aspect of the test is that laws seeking to "regulate the press as a business" and having an "indirect, incidental or remote impact" on the freedom of speech would not be incompatible with Article 19(1)(a).[103] Broadcasters have argued that because the freedoms of speech and trade are interrelated, an adverse impact on the latter will automatically affect the former. The regulation fully meets this test.

Broadcasters also argued that since commercial speech is protected speech, viewers have a right to see advertisements. A similar fact situation arose in *Telecom Watchdog* v. *Union of India*,[104] in which the TRAI regulations limiting the number of Short Message Services ('SMSs') that could be sent by a person per day with a view to curbing Unrestricted Unsolicited Commercial Communications ('UCC') by telemarketers was challenged. The Delhi High Court's reliance on *Suresh* v. *State of T.N.*[105] and *D.C. Saxena* v. *Chief Justice of India*[106] ('D.C. Saxena') are instructive. In the former, the Supreme Court held that "where the freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced

98 Electronic Media Act, 2009, Art. 32. (In addition to the 12 minute per clock hour requirement, the law emphasises the importance of maintaining "integrity" of programming content).

99 Code of Practice, Arts. 5.6 and 5.7.

100 Anderson, *supra* note 97.

101 *Id.*

102 Newsprint Order, 1962.

103 Divan, *supra* note 18, 33.

104 Telecom Watchdog v. Union of India, WP(C) No. 8529 of 2011 & CMA No. 19296 of 2011, July 13, 2012, available at http://lobis.nic.in/dhc/AKS/judgement/13-07-2012/AKS13072012CW85292011.pdf (Last visited on July 2, 2015).

105 Suresh v. State of T.N., (1997) 1 SCC 319: AIR 1997 SC 1889.

106 D.C. Saxena v. Chief Justice of India, (1996) 5 SCC 216 : AIR 1996 SC 2481.

against societal interest".[107] In D.C. Saxena, the Court went further and held that the right to freedom of speech and expression was never absolute and that:

> "Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression."[108]

In light of this, Telecom Watchdog concluded that the imposition of a limit of 200 SMSs per day was justified[109] and that recipients of UCC calls and SMSes were unwilling and thus their rights were infringed.[110] The regulation was upheld.

Advertisements are broadcasted in between content feeds to earn revenue and profit. These advertisements are shown irrespective of whether the viewer is willing or unwilling. The amended regulation imposes a reasonable limit on the number of advertisements, and achieves the balancing that D.C. Saxena envisions, in a manner similar to the regulation in Telecom Watchdog.

B. ARGUMENTS FROM THE FREEDOM OF TRADE AND OCCUPATION

The regulation does not violate Article 19(1)(g) for three reasons. *First*, the amended regulation satisfies the test of reasonableness. The test has two components: the restriction should be "in the interest of the general public" and must be reasonable.[111] In *Brahmo Samaj Education Society* v. *State of W.B.*,[112] the Supreme Court held that the expression "in the interest of the general public" is of wide import and includes public order, public health, public security, morals, economic welfare of the community and the objects mentioned in the Directive Principles of State Policy of the Constitution. The TRAI regulation clearly meets this standard.

As there are no fixed yardsticks in assessing reasonableness of a measure in the public interest under Article 19(6), we test the TRAI regulation against commonly prescribed standards, such as the nature of the right alleged

[107] Suresh v. State of Tamil Nadu, (1997) 1 SCC 319: AIR 1997 SC 1889.

[108] D.C. Saxena v. Chief Justice of India, (1996) 5 SCC 216: AIR 1996 SC 2481.

[109] Telecom Watchdog v. Union of India, WP(C) No. 8529 of 2011 & CMA No. 19296 of 2011, decided on 13-7-2012, available at http://lobis.nic.in/dhc/AKS/judgement/13-07-2012/AKS13072012CW85292011.pdf (Last visited on July 2, 2015).

[110] *Id.*; *See also* Noise Pollution *(V)*, *In re*, (2005) 5 SCC 733: AIR 2005 SC 3136.

[111] Shukla, *supra* note 82, 162.

[112] Brahmo Samaj Education Society v. State of W.B., (2004) 6 SCC 224 : AIR 2004 SCW 3189.

to have been infringed, the public interest sought to be secured by the regulation, the nexus between the regulation and its object, and the proportionality of the imposition.[113] Since the object sought to be achieved by the regulation is protection of consumers' interests, and the regulation merely imposes an unambiguous, moderate restriction of twelve minutes per hour, a value amounting to twenty per cent of viewing time, it is a reasonable standard. The object of the TRAI's efforts is to defend the consumer interest by improving the quality of services broadcasters provide. The need for this is acutely felt, and is a matter of record through consumer complaints to the TRAI.[114] There is a direct nexus between the advertisement cap and an improved viewing experience. Significantly, the TRAI has been responsive to fair stakeholder criticism of the principal regulation. It removed provisions such as the fifteen minute limit between the end of one advertisement break and the start of the next, the prohibition of part-screen or drop-down advertisements and the requirement that the audio level of advertisements should not be higher than the audio level of the programme broadcasted, *inter alia*. The regulation achieves a balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by Article 19(6), and is therefore a reasonable one.[115]

Second, the mere fact that regulation of a given trade, business or industry might cause a loss or reduce income to those engaged in it cannot render the effort unreasonable.[116] In *Laxmi Khandsari* v. *State of U.P.*[117] the Supreme Court emphasised that "trade and industry pass through periods of prosperity and adversity on account of economic, social or political factors". The main argument of the broadcasters against the TRAI regulation has been that it will cause far-reaching revenue losses and financially cripple the industry. That is clearly not enough to defeat the measure for incompatibility with Article 19(6).

Third, while there are no rigid criteria that will apply in all cases to assess reasonableness, it is significant that the TRAI regulation does not fall foul of any of the grounds that the Supreme Court has identified so far. There is no lack of clarity regarding the circumstances in which power may be exercised

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113 *See* Hatisingh Mfg. Ltd. v. Union of India, AIR 1960 SC 923; Peerless General Finance and Investment Ltd. v. RBI, (1992) 2 SCC 343: AIR 1992 SC 1033; RBI v. Peerless General Finance and Investment Co. Ltd., (1996) 85 Comp Cas 808 (Cal); LAXMI KHANDSARI V. STATE OF UP, (1981) 2 SCC 600 : AIR 1981 SC 873; VG Row v. State of Madras, AIR 1951 Mad 147; M.R.F. Ltd v. Kerala Govt., (1998) 8 SCC 227; Manohar Lal v. State of Punjab, AIR 1961 SC 418.

114 JAGDISH SWARUP, CONSTITUTION OF INDIA 655 (2006).

115 Abdulsattar Yusufbhai v. State of Gujarat, AIR 2001 Guj 179; *see* also, SHUKLA, *supra* note 82, 170.

116 Minerva Talkies v. State of Karnataka, 1988 Supp SCC 176 : AIR 1988 SC 526, ¶14; Shree Meenakshi Mills v. Union of India, (1974) 1 SCC 468: AIR 1974 SC 366; *see also*, Laxmi Khandsari v. State of UP, (1981) 2 SCC 600: AIR 1981 SC 873; Deepak Theatre v. State of Punjab, 1992 Supp (1) SCC 684: AIR 1992 SC 1519.

117 Laxmi Khandsari v. State of U.P., AIR 1981 SC 873.

by the executive,[118] the regulation is neither vague[119] nor too wide,[120] it is not in the nature of an imposition[121] and most importantly, it strikes a proper balance between freedom and social control.[122] The amended regulation is therefore, a reasonable restriction under Article 19(6).

V. ECONOMIC ASPECTS OF THE REGULATION

The current system in India consists primarily of MSOs and LCOs, along with DTH/satellite operators and Internet Protocol Television ('IPTV') service providers.[123] Initially, the industry was run by LCOs.[124] However, with the entry of the big players, the predominant business model has changed. Small operators consolidated to form MSOs, predominantly due to the better quality of services offered by MSOs, which provided sixty-five channels (including a range of local channels),[125] as opposed to the thirty channels provided by LCOs.[126]

The most common, and most traditional, revenue model in place in the cable television industry in India relies on advertising.[127] In fact, commercial television's reliance on advertisements has reached such a degree that one commentator remarked that India was the first nation to introduce the "five-ball over" since the advertisements often run into the sixth ball.[128] The growth in advertising revenue is thus considered an important propellant for the television industry.[129]

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118 State of Rajasthan v. Nath Mal, AIR 1954 SC 307.

119 Harakchand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453.

120 R.M. Seshadri v. District Magistrate, Tanjore, AIR 1954 SC 747.

121 *Id.*

122 Chintaman Rao v. The State of Madhya Pradesh, AIR 1951 SC 118.

123 *Id.* (The sector comprises of 6000 MSOs, 60,000 LCOs, 7 DTH/satellite TV operators and a number of IPTV service providers).

124 India Telecom Online, *Cable TV in India*, December 22, 2010, available at http://www.indiatelecomonline.com/cable-tv-industry-in-india/ (Last visited October 11, 2013).

125 *Id.*

126 Indiacabletv, *How cable TV began and spread in India*, available at http://www.indiancabletv.net/cabletvhistory.htm (Last visited on October 11, 2013).

127 Associated Chamber for Commerce and Industry in India, *Background paper on Digitizing Indian Broadcasting*, May 4, 2012, page 8 available at http://www.assocham.org/arb/general/CMS-Final-Background-paper.pdf (Last visited October 12, 2013); FICCI-KMPG Indian Media and Entertainment Industry Report 2011, *Hitting the High Notes*, available at http://www.kpmg.com/IN/en/IssuesAndInsights/ThoughtLeadership/FICCI-KPMG-Report-2011.pdf (Last visited November 2, 2013).

128 Mark Tully, *Business of Broadcasting*, 33 India International Centre Quarterly 257 (2007).

129 PWC, *India Entertainment and Media Outlook 2011*, available at http://www.pwc.in/en_IN/in/assets/pdfs/publications-2011/India_Entertainment_and_Media_Outlook_2011.pdf (Last visited November 2, 2013).

Another source of revenue for broadcasters is subscriptions.[130] Television subscription is the amount collected from pay Television ('TV') households in India. This is generally collected by LCOs and is subsequently distributed among broadcasters, LCOs and MSOs.[131] Though the cable television industry as a whole relies more on subscription revenue, the cable TV broadcasters depend primarily on advertising revenues.[132] This dependence on advertisements for their revenue forms the main driver of broadcasters' objections to the TRAI regulations.

Since the introduction of the principal regulation, the NBA and IBF have challenged the regulations on four economic grounds, in addition to legal ones. *First*, due to its current revenue model, advertising is the primary source of revenue for the broadcasting industry. A reduction in the duration of advertisements to twelve minutes an hour could lead to losses exceeding five hundred crores.[133] *Second*, the advertisement cap should only be imposed after the digitisation process[134] is complete.[135] The analogue system which forms a major share of the cable and satellite TV network has, however, given rise to a number of problems. To address these, the TRAI introduced its Implementation of Digital Addressable Cable Systems in India Recommendations of 2010, which advocated the implementation of digitisation in the country.[136]

The Government subsequently took a policy initiative to switch over to the digital mode for cable systems. This was to take place in phases, the

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[130] TRAI, *Implementation of Digital Addressable Cable Systems in India*, August 5, 2010, ¶1.11, available at http://www.trai.gov.in/WriteReadData/Recommendation/Documents/finalreom5agust.pdf (Last visited on October 16, 2013).

[131] Associated Chambers of Commerce and Industry of India, *Media and Entertainment in India Digital Road Ahead*, September 2011, available at http://www.deloitte.com/assets/dcom-india/local%20assets/documents/me%20-%20whitepaper%20for%20assocham.pdf (Last accessed October 17, 2013).

[132] *Id.*

[133] Press Release, News Broadcasters Association, August 20, 2013, available at http://www.nbanewdelhi.com/images/uploadfile/48_PRESS%20RELEASE%2020-8-13(1).pdf (Last visited on January 18, 2014).

[134] National Broadcasting Commission, *Transition from Analogue to Digital Broadcasting in Nigeria*, available at http://www.nbc.gov.ng/broadcast.php?menu=1&submenu=6 (Last visited October 14, 2013). (Supporting the proposition that digitisation, heralded to be the move that would revolutionise the broadcasting industry, is a process which converts broadcast and communication systems from analogue to digital format).

[135] Press Release, News Broadcasters Association, March 23, 2013, available at http://www.nbanewdelhi.com/images/uploadfile/45_PRESS_RELEASE_23-3-13.pdf (Last visited on January 18, 2013); *see also*, Press Release, News Broadcasters Association, August 20, 2013, available at http://www.nbanewdelhi.com/images/uploadfile/48_PRESS%20RELEASE%2020-8-13(1).pdf (Last visited on January 18, 2014); Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012.

[136] TRAI, Implementation of Digital Addresable Cable TV Systems in India, August 5, 2010, available at http://www.trai.gov.in/WriteReadData/Recommendation/Documents/finalreom5agust.pdf (Last visited on October 15, 2013).

first in Delhi, Mumbai, Kolkata and Chennai by June 30, 2012.[137] The rest of the country would go digital by December, 2015.[138] *Third*, implementation of the regulation will lead to an increase in the subscription rates of pay channels.[139] *Fourth*, a common benchmark of twelve minutes per hour without consideration for kind of channel and time of day is designed to kill the industry.[140] Since the first three of these arguments will involve an empirical study of economic realities in the broadcasting sector, they are not within the scope of this article. Instead, we focus on whether the fourth argument, *i.e.*, a uniform cap of twelve minutes per hour, without accounting for the broadcasting genre and the time of day, is valid.

A. FEASIBILITY OF AN AVERAGE CAP

The question of whether it is feasible to enforce a common cap of twelve minutes per hour on average, rather than strictly per clock hour, is an important one. The Explanation to Regulation 3 defines clock hour as "a period of sixty minutes commencing from 00.00 of an hour and ending at 00.60 of that hour". The quantitative regulation of advertisements in the regulations is based on this clock hour prescription. During the consultation process with the TRAI, broadcasters opined that the duration of advertisements should not be regulated on the basis of clock hour "as the viewership pattern differs throughout the day".[141] Instead, they argue for total advertisement time over a period of twenty-four hours being averaged out in an hour.[142] The TRAI correctly views this as not viable. If the regulation is based on an average, broadcasters will likely attempt to confine as many advertisements as possible to segments such as the prime time segment (1900-2300) with large a viewership. This will defeat the very purpose of the regulation – it will result in diminishing content and increase in advertisements in certain slots.

B. UNIVERSAL APPLICABILITY OF THE REGULATION?

There are three main kinds of channels in Indian television: general entertainment channels ('GECs'), music channels and news channels. These differ in both content and advertising patterns. While the content broadcasted

137 Associated Chamber for Commerce and Industry in India, Background paper on Digitizing Indian Broadcasting, May 4, 2012, available at http://www.assocham.org/arb/general/CMS-Final-Background-paper.pdf (Last visited October 14, 2013).

138 *Id.*

139 Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013, Explanatory memorandum, available at http://www.ibfindia.com/sites/default/files/QoS-on-Ad-Minutage.pdf (Last visited on January 18, 2014).

140 *Id.*

141 Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012, Reg. 3, Duration of advertisements in TV channels, Explanatory memorandum.

142 *Id.*

by GECs is static, structured and orderly, the content of news channels is dynamic and often *ad hoc*. Absent the regulation, if important news is being broadcast by a news channel, it may choose not to carry any advertisements for that clock hour. In order to fulfil its commitments to advertisers, the news broadcaster may choose to air the advertisements in the next clock hour. Music broadcasters operate in a model that resembles that of news broadcasters. Most music channels are not part of larger networks, with the notable exceptions of MTV and VH1, which belong to the Viacom18 network.[143] Music channels such as 9XM and B4U, which do not belong to umbrella networks, have argued before the TDSAT that the regulation violates Article 14, treating unequals as equals by placing free to air, pay, news, sports, music and GEC channels on the same footing.[144]

Another argument against the imposition of a standard ad cap on channels across the board is based in predictions that it will benefit only large networks in the GEC segment, while adversely affecting news channels, niche channels and small players who cannot afford to roll out more channels in diverse genres.[145] Unsurprisingly, then, three of the four large networks, have pledged their support to the TRAI regulation, while the news channels, music channels and smaller players oppose it.[146]

Given the peculiarities of each genre, one solution could be for the TRAI to classify GECs, music channels and news channels in three different groups with separate advertisement cap regulations arrived at after consultation with stakeholders and a consideration of the economic and market realities of revenue realisation (including the effects of digitisation) in that segment. Among these would be digitisation; one would need to consider how far the gains of digitisation have benefited each of these genres in the broadcasting sector. We would also suggest that while arriving at a model of quantitative advertisement regulation for news broadcasters, the bar on carry forward of advertising minutes could be relaxed in certain situations. Exceptions should be made strictly, on an objective consideration of whether that particular news is of national importance for national news channels, and regional importance

[143] Exchange4media.com, *Select music channels set to defy TRAI ad cap*, September 19, 2013, available at http://www.exchange4media.com/52793_select-music-channels-set-to-defy-trai-ad-cap.html (Last visited on January 18, 2014).

[144] IndianTelevision.com, *What the music channels said on the ad cap issue*, December 18, 2013, available at http://www.indiantelevision.com/mam/media-and-advertising/regulations/what-the-music-channels-said-on-the-ad-cap-issue (Last visited on January 18, 2014).

[145] Times of India, *Trai's 12-minute/hour cap for TV ads will benefit bigger channels*, September 18, 2013, available at http://articles.timesofindia.indiatimes.com/2013-09-18/india/42181686_1_ad-cap-news-broadcasters-association-broadcast-regulator-trai (last visited on January 18, 2014).

[146] IndianTelevision.com, *The puzzling case of TRAI's ad cap*, December 19, 2013, available at http://www.indiantelevision.com/mam/media-and-advertising/regulations/the-puzzling-case-of-trais-ad-cap (Last visited on January 18, 2014) (These are Zee Entertainment, Star India and Viacom18. Only Sony Entertainment does not support the cap).

for regional news channels, and essential to the public interest.[147] The logic employed in relation to live broadcasts of sporting events in unamended Regulation 3(3) is also instructive – advertisements are to be carried only during breaks in sporting action.[148] Due to the distinct nature of sporting events, it was decided by the TRAI that commercial breaks should only be permitted to interrupt sporting events during the natural breaks in the sporting action. Even though this provision does not find a place in the amended regulation, it will be useful to apply while identifying situations in which the advertisement cap may be relaxed in the news broadcasting sector.

Neither the principal regulations nor the amended regulations account for tele-shopping channels, which broadcast advertisements targeted at home shoppers and are often characterised by an absence of programming content. While the principal regulations make a distinction between sports channels, live broadcasting channels and part screen advertisements, it does not make a mention of tele-shopping channels. The amended regulations also do not address the issue. A 2012 TRAI Consultation Paper titled "Issues Related to Advertisements in TV Channels" shows that a comparative study of advertising regulations globally preceded the regulations.[149] The United Kingdom, Austria, Germany, Ireland, and Russia limit the time allotted for both advertisements and teleshopping spots.[150] Despite the TRAI's review of these laws, only provisions with respect to advertisements appear in its regulations. This could imply that the TRAI intended to exclude teleshopping from the purview of the twelve minute rule. The TRAI was also presented with the suggestion to regulate the duration of teleshopping advertisements by the Cable Operators Federation of India in its comments on the draft regulations introduced.[151] While the current regulatory regime does not quantitatively restrict teleshopping, qualitative restrictions, such as compliance with the Drugs and Magic Remedies Act (Objectionable Advertisements) Act, 1954, the Advertising Code contained in the Cable Television Networks Act, 1995 and Advertising Standards Council of India's ('ASCI') self-regulatory code would apply.[152]

[147] *See generally* The Economic Times, *Two broadcasters sought exemption from 12-minute advertisement cap: I&B Ministry*, December 5, 2014, available at http://economictimes.indiatimes.com/industry/media/entertainment/media/two-broadcasters-sought-exemption-from-12-minute-advertisement-cap-ib-ministry/articleshow/45385046.cms (Last visited on April 10, 2015).

[148] Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012, Reg. 3(3).

[149] TRAI, *Consultation Paper on "Issues Related to Advertisements in TV channels"*, March 16, 2012, available at http://trai.gov.in/WriteReadData/ConsultationPaper/Document/CABLEBROADBAND070412.pdf (Last visited on August 28, 2014).

[150] *Id.*

[151] Cable Operators Federation of India, Comments on the TRAI Draft on Standards of Quality of Service (Duration of Advertisements in TV Channel) Regulations No 15 of 2012 dated 27 August 2012, September 23, 2012, available at http://www.trai.gov.in/writereaddata/consultationpaper/document/201304121143221698645cofi-new.pdf (Last visited on August 28, 2014).

[152] Ministry of Information and Broadcasting, *Advisory to all TV Channels not to telecast the advertisements as found violative by ASCI*, August 21, 2014, available at http://mib.nic.in/

VI. CONCLUSION

The Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013, is good law, as is. In this sector at least, the TRAI is constructively responding to the need for clear and stringent regulation. The regulation this article considers is geared plainly toward securing the consumers rights. The TRAI should be commended for attempting to regulate the cable sector, which has been disorganised and largely unregulated since its inception in 1959. Nevertheless, the suggestions for a genre-dependent advertisement cap and for permitting carry forwards in certain cases would be significant improvements to the regulation. The question of the regulation's constitutionality remains *sub judice*. In the meantime, this debate raises questions policymakers must consider. Even though advertisement caps improve viewing experience, it may lead to lower quality of broadcasting since broadcasters will be compelled to exhibit more content per clock hour, and may see reductions in revenue from reduced advertisements. Therefore, a harsh cap on advertisements could prove counter-productive, and the TRAI will need to balance limiting advertisements with ensuring the maintenance of quality and diversity in television content.

ShowDocs.aspx (Last visited on August 28, 2014).