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5 SNAGS FACED BY INDIA'S FAST- EVOLVING M&E INDUSTRY

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It is not easy to list down only five hurdles faced by the Media and Entertainment industry of India, but I shall give it a shot. The M&E industry is a vast sector with various laws applying to different aspects of it. We have legislations such as the Cinematograph Act, 1952, The Cable Television Network Regulation Act, 1995, The Information Technology Act, 2000 which apply for regulating content on different mediums of the exhibition such as cinema theatres, television and internet. Then we have legislations such as the Copyright Act, 1957 and Trademarks Act 1999 which deal with protection of intellectual property in the form of copyright or trademark. The Indian Penal Code, 1860 prescribes for punishment for various offences which many times are applicable to incidents which take place in the M&E industry- for instance – hurting of religious sentiments, defamation, the sale of obscene objects, doing obscene acts and songs etc.

In this article, I shall endeavour to cover the top five hurdles from a legal perspective which in my view plague the M&E industry.

Content Regulation

Free speech and expression is the bulwark of democracy and forms the basis of the functioning of the M&E industry. Article 19(1) (a) of the Constitution of India provides for the fundamental right of freedom of speech and expression. This freedom is said to be the mother of all liberties and has the preferred position in the hierarchy of all other liberties. However, no freedom is absolute. Article 19(2) provides for reasonable restrictions wherein the State can impose restrictions on the exercise of this freedom in the interests of security of the state, friendly relations with foreign states, public order, decency, morality, sovereignty and integrity of India, or in relation to contempt of court, defamation or incitement to an offence. However, these reasonable restrictions are to be exercised cautiously by the state and the burden of proof is always on the authority to justify the restrictions imposed.

All laws based on content regulation, be it the Cinematograph Act or the Cable Television Network Regulation Act, trace their origin to the Constitution. However, over a period of time, there has been a gross overstepping of powers by the authorities beyond what the Constitution intended in the reasonable restrictions.

Be it censoring of films by the CBFC (Udta Punjab, Lipstick Under My Burkha, etc), banning of films by state governments (Aarakshan, Padmaavat, etc) or the I&B Ministry trying to regulate television content despite self-regulatory bodies such as Indian Broadcasting Foundation being in place, the

outlook of each government has been to curtail creative freedom of speech and expression. Recently, the I&B Ministry has also constituted a committee for regulating digital content, which has so far been an unregulated space in India.

In my view, unbridled content regulation is the primary hurdle faced by the M&E industry. Democracy cannot survive if its people are not entitled to propagate their thoughts and opinions freely.

“The fundamental freedom under Art. 19(1)(a) can be reasonably restricted only for the purposes mentioned in Art.19(2) and the restriction must be

long battle fought by Shri. Javed Akhtar for royalty rights of authors and performers. However, noble intents are often defeated if not coupled with practicality. Such is the case with the Copyright Amendment Act of 2012. An amendment originally introduced as a welfare legislation for the benefit of authors and performers has not yet seen the light of effective implementation despite the lapse of around six years since it came into effect. Those involved in getting this Amendment Act passed are of the view that it is a perfect legislation and the only reason behind its non-implementation is the excuses

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justified on the anvil of necessity and not the quicksand of convenience and expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.”- Supreme Court in S Rangarajan v O. Jagjivan Ram [(1989) 2SCC574]

2) Flawed Copyright legislation

June 21, 2012, was a jubilant day for a certain section of the media and entertainment industry. It was on this day that the Copyright Amendment Act, 2012 came into effect after the

given by entities to not pay royalties. I beg to differ here. The 2012 Amendment is replete with ambiguities. When the Amendment was passed, it took a couple of months for most copyright lawyers to understand it and make sense of it and obviously interpret it to suit their client’s interests (Most lawyers are still struggling to make sense of some of the provisions). Instead of having a clear provision stipulating the royalty rights, the provisions go around in circles and need to be harmoniously read and interpreted. For instance, the entire fight of Mr. Akhtar was to ensure that authors are given royalties for their works once utilized post the Amendment

comes into effect (which he obviously meant for all pre-2012 works including his own works) and he did mention this in his parliamentary speech. However, the Amendment has no provision which clarifies unequivocally as to whether it has a prospective application or retroactive application. The result being, there will be years of litigation ahead to prove this point just like for most other critical amendments introduced by the Copyright Amendment Act (Great news for lawyers!). Moreover, the Copyright Amendment has created a mess with users requiring to obtain multiple licenses. Single-window licensing or an umbrella license is required for ease of entities to carry on their business. The reason I have cited this as the second biggest hurdle is that it is important for smooth functioning of any industry to have clarity in the law governing that industry. This entire chaos has resulted in India becoming a global embarrassment as regards its copyright legislation.

3) Piracy

The M&E industry's battle with piracy is known to all. As per the FICCI Frames report of 2018, film sub-sector alone, annually loses US\$2.8 billion of its total revenue to piracy. Also, the movie theatre business model is threatened by a rise in digital downloads by consumers and easy availability of inexpensive rental options. Piracy has also hindered the potential of digital media to monetise content. The report further states that high content prices, low-income level and cheaper internet infrastructure are the major factors leading to content piracy. Cam-cording in cinemas is the

major source of leakage as well as the release of the films in other geographies such as UAE one day prior to the release of the film in the Indian market. Films are made available online within hours of its release. In some cases, even prior to their release.

Producers are still required to obtain John Doe orders from courts to prevent piracy of their films. The Supreme Court in the landmark case of Shreya Singhal v/s Union of India had construed Section 79 of the Information Technology Act, 2000 (which deals with safe harbour provisions for intermediaries) in such a manner that removal of content online may only occur if an adjudicatory body issues an order compelling intermediaries to remove the content. The said decision shields intermediaries from liability unless they fail to comply with an order directing them to remove the illegal content, rather than merely a private party request. It's unfortunate that the producers are required to knock the doors of the courts to enforce their rights against this menace. While efforts are being made by the Government such as Maharashtra Cyber Digital Crime Unit (MCDCU) which was started in August 2017, for systematically eliminating websites that upload pirated content, a lot more needs to be done. Piracy is and shall remain one of the biggest hurdles faced by the M&E industry.

4) Abuse of penal laws

One of the most disturbing trends in the M&E sector has been the gross abuse by members of the public of penal laws. Last few years have seen an increase in a number of criminal cases filed under the Indian Penal Code,

1860 for hurting of religious sentiments (Section 295A), defamation (Section 499, 500), sale of obscene objects, doing obscene acts and songs etc (Section 293, 294). Few recent instances being the ones filed against Salman Khan and Shilpa Shetty over the 'Bhangi' remark, case filed against M.S. Dhoni for being portrayed as Lord Vishnu on the cover of a magazine, arrest of Comedian Kiku Sharda for mimicking Gurmeet Ram Rahim in an award show, AIB Roast case against Ranveer Singh, Arjun Kapoor, Karan Johar and others. The aforementioned penal provisions were not intended to apply to such incidents. In most cases, these complaints are filed by publicity mongers to gain media attention. While the judiciary has seldom entertained such frivolous cases, the nuisance factor caused due to the procedure to be followed is a big hurdle for the M&E industry.

5) Absence of technology agnostic laws

Laws need to evolve with technology. In my view, the absence of technology agnostic laws in India is a big hurdle for the M&E sector which will have to keep pace with the digital sector booming, the absence of data privacy laws, amongst other issues. ●