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MEDIA & ENTERTAINMENT IN INDIA

CAN WE CREATE A BETTER MEDIA ECOSYSTEM IN INDIA?

WHITE PAPER

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ASSOCHAM

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INDIA'S MEDIA AND ENTERTAINMENT SECTOR

CAN WE CREATE A BETTER MEDIA ECOSYSTEM IN INDIA?

BACKGROUND

Despite the commonly held belief that India's media and entertainment (M&E) sector is highly prolific, the fact remains that the total M&E sector in India constitutes only around 1% of the world's M&E revenues.[1] Though in the last ten years India has undergone a process of liberalization making the Indian M&E sector attractive for corporate investments, much remains to be done to take full advantage of India's vast potential in this space. An increase in professionalism, a change in marketing strategies, changes in the regulatory framework, improved enforcement and dispute resolution can give it the much needed impetus to turn a serious profit and attract investment.

According to the Department of Industrial Policy and Promotion (DIPP)'s Fact Sheet on Foreign Direct Investment (FDI) from 2000-09,[2] the total FDI inflow into the information and broadcasting sector (including print media) has been INR 72,688.44 million (USD 1,614.11 million), forming a mere 1.64% of the total FDI inflow into India. It is quite

As an illustration, we can examine the relative position of the Indian film and television industries in the global landscape. The world's total expenditure on filmed entertainment amounts to USD 80 billion (as of 2009), of which Hollywood receives 90-95%. By contrast, Bollywood, the Indian film industry, makes up for around 2% of the world's filmed entertainment spend (about USD1.8 billion).[3] While Hollywood matured into a professional industry many decades ago, Bollywood continues to be plagued by various endemic issues such as shadow finance, financial mismanagement; a shortage of creative and management talent (in part due to the severe lack of training and education institutions); a shortage in the number of screens; a small home entertainment market; piracy; and high taxation rates. These shortcomings seriously affect a genuine investor's ability to find a predictable, sustainable and, most importantly, profitable film business model in Bollywood, in comparison with Hollywood. The success of the Hollywood studios has led to deals such as Reliance ADAG's USD 825 million investment into Dreamworks SKG. On the television front, the market in India is presently nearing USD 5.5 billion and has grown at an average rate of 17.4% since 2004.[4] While the progress of this relatively young industry has been laudable, there is much untapped potential that remains. This is apparent in the fact that the penetration of television amongst the

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[1] *2009 PWC Global Entertainment and Media Outlook Report*

[2] http://www.dipp.nic.in/fdi_statistics/india_FDI_September2009.pdf, last viewed on December 10, 2009

[3] *2009 PWC Global Entertainment and Media Outlook Report*

[4] *2009 PWC Indian Entertainment and Media Outlook Report*

Indian populace remains at 40%.[5] With a fast growing economy, the total penetration is likely to increase and newer technologies are likely to penetrate at the higher end of the markets to a considerable degree.

This poses the following inevitable questions:

- **Why is the Indian M&E sector performing below its potential?**
- **Does it make more sense for an investor to invest abroad?**
- **Should we not rather improve our own media ecosystem to build a globally competitive M&E sector that allows both local and foreign investors to thrive?**
- **What measures should policymakers, Indian industry players and facilitators take to build such an eco-system?**

To address these questions, industry players, policymakers and facilitators need to come together and take synchronized, proactive measures. They need to resolve the systemic issues causing the underperformance of India's M&E sector and spur growth to help unlock the latent potential of this sector. Specifically, a further increase in professionalism, a radical shift in marketing strategies, surgical changes in the regulatory framework, improvements in enforcement and rapid dispute resolution can give it the much needed impetus to stabilize the risk-return equation for the M&E investments.

This paper primarily focuses on these issues faced by the M&E sector and certain recommendations have been put forth in order to make India a more lucrative destination for foreign investments in this sector.

I. CREATE A MEDIA POLICY FOR INDIA

Various segments of the M&E sector, such as film, music, radio, television and print media, used to be independent, non-overlapping industries. The current statutory framework that comprises of numerous policies, guidelines and regulations was developed to independently govern these industries. Furthermore, the development of technology has been rapid in the last two decades and both the manners of transmission and the business models followed by companies in the sector have undergone a significant change. The audience has become substantially more tech-savvy and media companies have become far more competitive. The convergence of information technology and telecom with the media industry has created an amalgamated sector, in which every new technology changes the business equations and positions.

A comprehensive policy addressing the emergent issues is the need of the hour to adjust the regulatory directions to the new ground realities and future developments.

[5] *Ibid*

Such a single national media policy that outlines the vision and strategy for India and the new M&E landscape should be created based on inter-ministerial consultations and the participation of stakeholders including broadcasters, investors, aggregators, distributors and experts in the M&E sector.

The planned and steady implementation of the National Telecom Policy, 1999 (NTP) is an outstanding example of how the Indian telecom sector was prepared for a complete transformation leading to phenomenal growth in this sector. The NTP provides temporal benchmarks by which targets are to be achieved in terms of various initiatives intended to be undertaken. Some of these initiatives include building physical infrastructure, increasing technology penetration and certain others with reference to industries which (in 1999) included fixed line telephony, mobile telephony, cable service, IP telephony and many other services. It is apparent that the policy was both farsighted and clear in its objectives. With the rapid growth of the telecom sector, many of these targets have been achieved. The Biotech Policy has also evolved and adopted a very similar approach in terms of phase-wise implementation.

The all-in-one media policy should lay down a distinct roadmap covering the various segments of the M&E sector. These would include government initiatives in improving physical infrastructure, creating and streamlining regulations that can govern new media, the liberalization of foreign investments, ensuring affordable access in rural areas, incentives and the development of special media zones on the lines of special economic zones. With reference to the last point, Dubai has successfully developed a media city which may be used as a model for a special media zone.

The policy should adopt a phase-wise approach by setting and achieving chronologically predetermined targets for policy reforms and implementation, thereby strengthening, and where necessary, changing the existing statutory framework. The framework of the NTP mentioned above may be a good starting point in this endeavour.

II. FOCUS ON BUILDING CREATIVE AND BUSINESS INFRASTRUCTURE

Lack of Creative Infrastructure

In the M&E sector, both individual and collective creativity drives content and this content, in turn, drives the business. Although India produces a large quantity of content, this content is often unoriginal and does not match international standards. The unavailability of original quality content in films, for example, is one of the main reasons for the box office failure rate of Indian films being as high as 95%.[6] This is also limiting India's outsourcing potential in the areas of gaming, animation, runaway productions

[6] www.dnaindia.com/.../report_biggies-flop-bollywood-bleeds_1315210 - DNA India, November 23, 2009

and other non-mainstream areas.

The major factors contributing to the poor quality of content are the lack of best-practice processes and unavailability of high quality training and education institutions in this sector. This has resulted in having a workforce that is under-trained and under-performing in comparison with global standards in terms of content-creation and content management processes.

The Indian filmed entertainment sector has over 5 million people working directly and indirectly in the sector.[7] Most of the direct workforce comprises self-taught craftsmen having no formal education or training in their fields of work. Often, only a coincidence brings best of them together on a project and ensures it success. It is no wonder that there is a high failure rate in this space. Therefore, the focus must be on raising world-class creative talent by building world-class inter-disciplinary creative and performing arts' training and educational institutions. Such centers of excellence will be one of the keys to unlocking the potential of the Indian M&E sector in the coming years.

FutureReady Business Infrastructure

An equally important area of focus for industry players, policy makers, and facilitators alike is the need to provide strategic direction towards building world-class business infrastructure in the Indian M&E sector. Globally, the M&E sector is going through a huge structural change due to its transition into digital media. Digital media is expected to revolutionize the way in which we create, manage, market, distribute, and consume M&E products and services. The current business infrastructure of the Indian M&E sector is lagging even in its existing needs much less being prepared for the new future.

However, an underdeveloped business infrastructure can actually be a positive circumstance provided we can "leapfrog" straight to digital technologies as we have already done in the telecom sector. India needs improved content creation, distribution, and delivery mechanisms and innovative business models to match the peculiar realities of the Indian market (such as our poor physical infrastructure) in order to make our M&E business infrastructure "*FutureReady*".

III. LEGAL, TAX AND REGULATORY MEASURES

a. LLP- the new vehicle for investment in the Indian Film Industry

FDI in LLPs ought to be permitted

[7] http://www.indiandth.com/2008/11/govt-plans-to-hike-fdi-limit-to-74-for-dth-singh.html

India has recently enacted The Limited Liability Partnership Act, 2008 ("**LLP Act**"). LLP Act treats the limited liability partnership ("**LLP**") as a *body corporate* and has many common features akin to a company. An LLP being a distinct legal entity from its partners offers not only structural flexibility but also the benefit of limited liability to its partners i.e. neither the partners in an LLP have joint and several liability nor are they liable for the acts of the LLP's employees or agents. It is a new business model which combines professional expertise and entrepreneurial initiative, and gives impetus to organize and operate in an innovative, flexible and efficient manner, without imposing detailed legal and procedural requirements.

As discussed below, an LLP could become an effective investment structure in the M & E sector, especially in the film industry. While the LLP Act allows LLPs to have a foreign partner, the Indian exchange controls have not yet been amended to allow foreign investments in LLPs as the law is presently silent on the matter. But, owing to a number of similarities between the features of an LLP and a private limited company and on the express provisions enabling a non-resident to be a partner in an Indian LLP, it would be advisable that foreign investment into an LLP should be governed as per the present FDI regime regulating investments into the shares of an Indian private limited company. Therefore, FDI in LLPs should be permitted and the corresponding amendments should be made in the various media Acts, rules and regulations. For instance, the eligible applicant under the Uplinking and Downlinking guidelines for TV channels can only be an Indian company incorporated under the Companies Act, 1956. This should be amended to include an LLP as an applicant too.

LLP – an effective structure for investment in the media industry

As the costs of making and marketing a film on a global basis have risen to the stratosphere, it is common to see two or more entities contributing towards film making or co-producing a film to share the costs, risks and rewards. One entity may fund the film and the other may take control of the production.

Often, the parties create a separate de-risked entity, a special purpose vehicle, which actually produces the film and collects and distributes the revenue. The vehicle may be in the form of a partnership or a company. In some cases, parties do not create a separate entity but instead enter into a contractual arrangement for profit sharing etc. However, the tax authorities in India sometimes deem such group of entities entering into such arrangements as an "association of persons" and tax the income of the entities accordingly.

In contrast to the abovementioned structures, the newly introduced LLP appears to be the most efficient structure in light of the advantages discussed hereinafter.

Company v. LLP

Tax

When a company distributes profits by way of dividends, there are two levels of taxation in the case of dividend distribution of a company i.e. corporate taxation in the hands of the company at the rate of 33.99% and a dividend distribution tax at the rate of approx. 17%. The calculation of profits distributed has been illustrated below:

Particulars	Amount (INR)
Taxable Income	100
Less: Corporate tax (@ 33.99%)	33.99
= Profits after tax (PAT)	66.01
Less: Transfer to reserve (@ 10% of PAT)	6.60
= Profits available for distribution	59.41
Less: Dividend Distribution Tax (@ 16.995%)	8.63
= Dividends distributed to shareholder	**50.78**

An LLP is treated as a separate taxable entity and is liable to be taxed at the partnership level (as opposed to being taxed in the hands of the partners) at the rate of 30.9%. To the extent of distributing profits, there would be no further tax in the hands of the partners.

Agreeably, this makes an LLP more tax efficient than a company as taxes such as dividend distribution tax and Minimum Alternate Tax (which is applicable at the rate of approx. 10% of the book profits of a company, and has been increased to 15% with effect from April 1, 2010 as per the Finance Act, 2009) are not applicable to an LLP.

Compliances

Under the Companies Act, 1956, there are certain mandatory reporting requirements, which can tend to be onerous on the stakeholders of a company. However, under the current LLP Act, there is no requirement of maintaining statutory registers, such as the details of board minutes and the register of charges. As opposed to a memorandum and articles of association that prescribe various procedures laid down in the Companies Act, 1956, an LLP is governed by an LLP agreement (at the option of the partners) or by the LLP Act.

Partnership v. LLP

An LLP, being a separate legal entity distinct from its partners, offers not only structural flexibility and tax efficiency but also the benefit of limited liability to its partners. In an LLP, the partners neither have joint and several liability nor are they liable for the acts of the LLP's employees or agents. On the other hand, in a general partnership, a partner is jointly and severally liable for all acts of the firm while he is a partner.

Association of Persons v. LLP

An association of persons (AOP) is formed when two or more persons voluntarily come together for a certain purpose, with the common object of producing income, profits or gains. It, essentially, involves a combination in joint enterprise along with an arrangement for common management. The AOP is regarded as a separate taxable person. If the shares of the members of the AOP are determinate, the respective shares in the profits of the AOP would be taxed at the maximum marginal rate (currently at the rate of 30.9%). However, if a non-resident company is a member of an AOP resident in India, the profit share of the non-resident company would be taxed at the rate of 42.23% while the remaining shares of the other resident members would be taxed at the rate of 30.9%. Likewise, if the shares of the members of the AOP are indeterminate[8], the profits of the AOP shall be taxed at the maximum marginal rate (currently at the rate of 30.9%). However, if a non-resident company is a member of such indeterminate AOP resident in India, the entire profit of the AOP would be taxable at the rate of 42.23%.

b. Foreign Venture Capital Investors (FVCIs) should be allowed to invest in the M&E sector

Although the Reserve Bank of India (RBI) has started clearing FVCI applications in recent times, it has prescribed additional conditions that the investments by FVCI entities be restricted to select sectors being infrastructure, biotechnology, information technology, nanotechnology, research in new chemical entities in the pharmaceuticals sector, dairy and poultry industry, among others. The RBI, while granting FVCI approvals, has enumerated these permitted sectors for FVCI investment in the approval letters issued by it. The regulations of the RBI (in terms of legislation or delegated legislation) in this regard make no restrictions on the ability of FVCI entities to invest in certain sectors. Therefore, it is apparent that the sectoral restrictions specified in the approval letters are not based on the present position of law in this space. The RBI does not seem to consider that the intent behind venture capitalism is to focus on entities which are in the growth phase. Such entities may be operating in sectors that are currently unrecognized – including parts of the M&E sector, amongst others. Many of the entities in the M&E sector are still in a growth phase, require capital, and have high employment as well as revenue generation capabilities. Bearing this in mind, it should be appreciated that the requirement to expand the scope of investment opportunities, especially for FVCIs, which tend to target companies with high growth potential is essential. Therefore, the government should clarify and remove such sectoral restriction, which has been made applicable to FVCI entities.

[8] The shares of the members of an AOP are deemed to be indeterminate if the same is not clearly defined either at the time of formation of the AOP or at any time thereafter.

c. Streamlining FDI Regimes for the M&E Sector

In the following table, we summarize the various regulations governing foreign investments in the M&E sector.

Medium	FDI Permitted	Other Government Clearances required for operations
FM Radio	20%, subject to Foreign Investment Promotion Board (FIPB) approval	1. MIB; 2. Wireless Operating License from the Wireless Planning & Coordination (WPC) Wing, Ministry of Communications.
Cable Network	49%, subject to FIPB approval	Registration with the Head Post Master of the area within whose territorial jurisdiction the office of the cable operator is situated. Multi-system operators who provide cable television network services require MIB permission.
Direct-to-Home	49%, subject to FIPB approval, and where the FDI limit cannot exceed 20%	1. License from MIB in consultation with Ministry of Home Affairs (MHA) and Department of Space; 2. Standing Advisory Committee for Frequency Allocation (SACFA) Clearance from WPC Wing; 3. Wireless Operational License from WPC Wing.
Setting up hardware facilities such as up-linking, HUB etc.	49%, subject to FIPB approval	License from MIB.
Uplinking a News & Current Affairs TV Channel	26%, subject to FIPB approval	License from MIB in consultation with MHA.
Uplinking a Non-News & Current	100% investment subject	License from MIB in consultation

Affairs TV Channel	to FIPB approval	with MHA.
Downlinking a News & Current Affairs TV Channel	100% investment subject to FIPB approval	License from MIB in consultation with MHA.
Downlinking a Non-News & Current Affairs TV Channel	100% investment subject to FIPB approval	License from MIB in consultation with MHA.
Internet Protocol TV (IPTV)	74%; Automatic upto 49% and FIPB approval required beyond 49% in respect of telecom licensees. 49%, subject to FIPB approval in respect of cable television network operators.	No separate specific license is granted for provision of IPTV services. The following service providers are permitted to provide the IPTV services subject to their respective clearances: 1. Telecom operators allowed to provide 'Triple Play' service (UASL); 2. ISP Licensee with networth of more than INR 100 crores; 3. Any other telecom service provider authorized by DoT; 4. Cable TV operators registered under Cable Television Network (Regulation) Act, 1995.
Head-end-in-the-Sky (HITS)	74%; Automatic upto 49% and FIPB approval required beyond 49%	License from MIB.

Presently, the rules regarding FDI vary from segment to segment in the M&E sector. This creates confusion and discourages foreign investors from investing in India's M&E sector. There is a strong case for the review of the FDI policy to bring consistency in the policy and to provide a level playing field for competing technologies. This issue has gained importance on account of increasing convergence in broadcasting and telecommunications technologies and the impact of this convergence on competition in the market.

d. Increase the Investment Limits in the Television Industry

Recent Foreign Investment in the M&E Sector:

In spite of the recent global economic crisis, there has been much to cheer about in the Indian M&E sector in terms of foreign investment into the industry.

The *PWC Indian Entertainment and Media Outlook, 2009* states that the penetration of television in India is around 40% whereas in the US it is around 99% and in China it is around 90%. It must be noted that this is a capital intensive sector with a long gestation period and it requires substantial investments to be made. Such investments are required for the dual purpose of making modern technology available to the domestic industry and bringing in international best practices. In terms of ensuring the entry of new technology, it is important to provide an acceptable degree of control to any foreign entity that wishes to provide the technology and do business in India.

Unfortunately, under the current regime, the limits on foreign ownership in the broadcasting sector are restricted to minority ownership. The Telecom Regulatory Authority of India (TRAI) has issued its recommendations on revising these limits. A comparison between the two is shown below:

Sector	Existing Limit	Proposed
Cable Networks	49%	74%
Direct-to-Home	49%,	74%
Uplinking a News & Current Affairs TV Channel	26%	49%
FM Radio	20%,	49%

While the government seems to be dithering on these recommendations, it is suggested that the poor penetration in the market can be improved by increasing the FDI caps in the aforementioned segments of the M&E sector to 74%. Also, the present break-up of the FDI limits seems to be based on restrictions as per the medium of delivery. A rather more effective foundation for the break-up would be based on the objective of protecting content. For this reason, restrictions on delivery based segments should be raised so as to permit the penetration of upcoming technology and permit competition across delivery mechanisms as they develop.

e. Streamlining the approval processes

As can be seen from the table appearing in (d) above, for most foreign investment proposals in the M&E sector, separate approvals from MIB as well as FIPB are required to be obtained. Further, irrespective of the foreign investment, licenses and approvals are required to be obtained for various activities including Uplinking, Downlinking, DTH and others. These licenses, while necessary in terms of avoiding spectrum conflicts and

other issues, are nonetheless cumbersome and could use some streamlining in order to reduce the timeline in starting a business.

The approval process suffers from, *inter alia*, the following difficulties:

1. The task of obtaining the required approvals becomes even more onerous as very often, the regulations are neither well drafted nor self explanatory, which leads to the need for several rounds of clarifications between the government and the applicant.

2. Overlaps in the various notifications, circulars, guidelines, codes and other regulations dealing with any one segment are a common feature and more often than not, lead to confusion and inconsistencies while adhering to the relevant laws. Further, the scope for interpretation leaves a lot to the discretion of the authorities, only serving to increase the uncertainty.

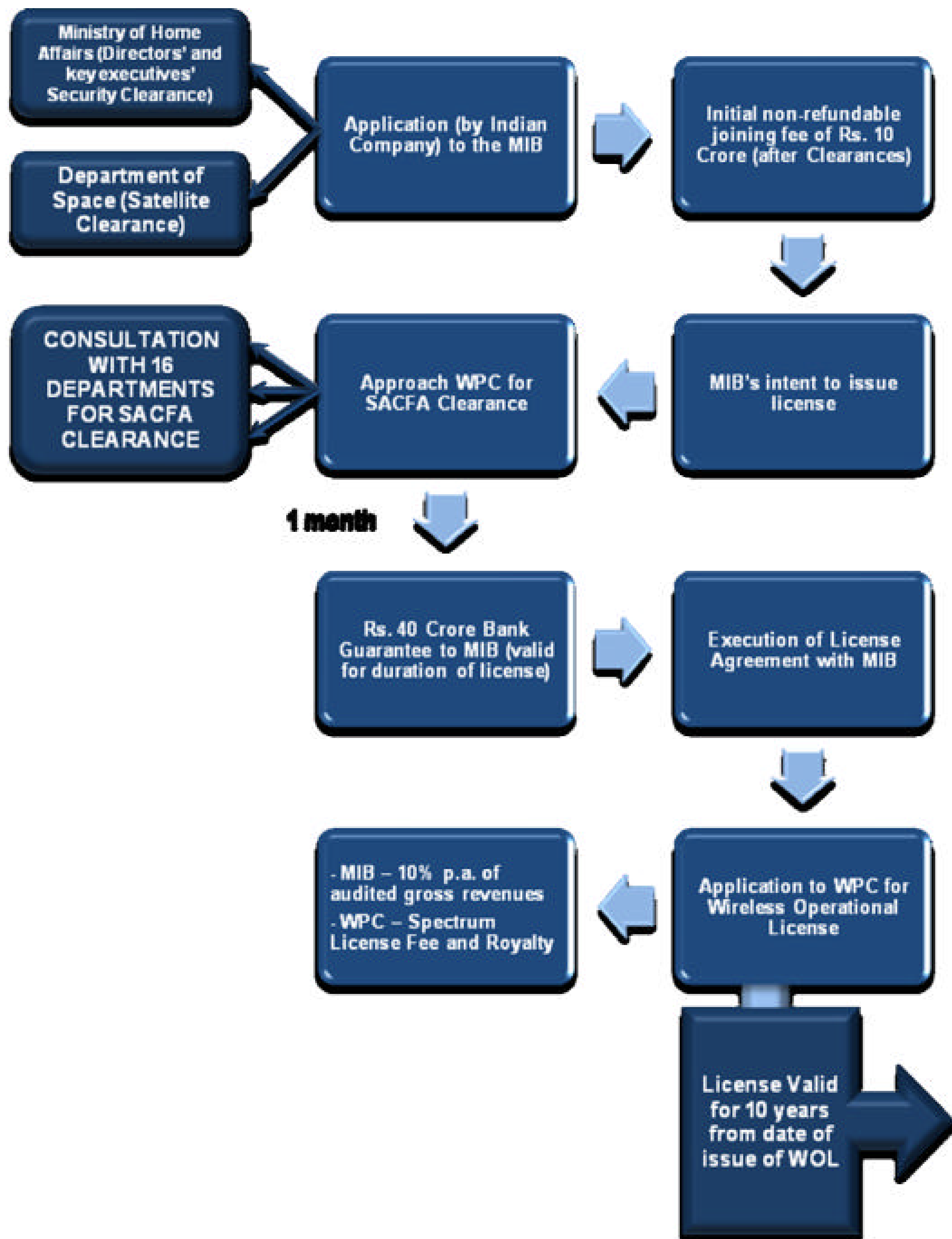
3. When both FIPB and MIB approvals are required to be obtained for foreign investment in certain segments of the M&E sector, the investor has to apply to and follow up with two separate government agencies. With reference to the investment, the investor needs to approach the FIPB and obtain consent in order to set up the entity and make the investment. The FIPB has its own consultation processes to follow before it grants the approvals. The investor also needs to approach the MIB for consents with respect to certain clearances, which may involve considerable interdepartmental approvals.

4. In most cases where MIB approvals are required, the MIB in turn is required to internally receive clearances from other relevant ministries. Typically, these are discussed in what is known as inter-ministerial meetings. Such inter-ministerial meetings are not set up frequently (sometimes even with the gap of 3–4 months), which delays the entire approval process. For instance, in applying for a DTH license, the company in question is required to submit information to the MIB regarding its directors and key executives, which the MIB will then send to the MHA in order to receive security clearances for the concerned individuals. Alongside this, an application must be made to the Department of Space under the Ministry of Science and Technology for satellite clearance. An application must also be made to the WPC for SACFA clearance. This process involves the WPC coordinating with 16 different departments in order to give the applicant company a Wireless Operational License. As is clear from the above description, the process is rather complicated. The entire DTH application process is described in a flowchart later in the paper.

5. Neither the pending applications for licenses nor the licenses themselves (e.g. DTH license, licenses for Uplinking or Downlinking television channels) can be transferred to another entity wishing to continue the pending application or to

acquire the license to continue the business. Such other entity must go through the entire approval process afresh. The MIB has already placed the question regarding transferability of permissions and approvals before TRAI and the matter is under consideration.

The entire approval process takes anywhere between 6 months to more than 1 year. On the following page, we have a flowchart that shows the approval process for entering into the DTH space:



It is exceedingly apparent that processes such as the DTH application process mentioned above are cumbersome and come with extremely uncertain timelines. As many foreign investors come from jurisdictions where they are accustomed to far more efficient government agencies, speeding up these approvals and processes is essential from the point of view of closing transactions with foreign partners. Often the investor is dissuaded by the timelines for getting the various approvals.

Therefore, we make the following recommendations:

1. *Streamlining regulations*: A thorough review should be done of all regulations and they must be streamlined to clarify the entire approval process. The all-inclusive approach at the policy level will iron out these inconsistencies and confusion by streamlining and simplifying the legal and regulatory regime within this industry. Providing this level of simplicity and clarity will be beneficial to both foreign and domestic players. Additionally, the media policy should also set out the exact scope and functions of the MIB in order to achieve an effective statutory framework. Such a transformation will help create a one-stop shop reference guide for foreign players looking to invest in India and will, in turn, encourage these foreign players to invest in India by providing them with a greater level of clarity.

2. *Single window clearance:* A single window system should be implemented whereby applicants need approach only one authority for obtaining all required approvals and clearances. The single authority, in turn, should have an efficient process in place for liaising and consulting with other authorities in order to receive any consents or clearances necessary from them.

3. *Expedite inter-ministerial approval process*: The inter-ministerial approval process should be expedited by having more frequent meetings and better administrative systems in place to ensure swift clearances during the meetings;

4. *Transferability of permissions:* The MIB should consider permitting the transfer of pending applications and licenses to eligible entities so as to permit smooth transitions in events such as mergers and acquisitions or corporate restructuring;

5. *Regular interaction with the government authorities*: The DIPP should be applauded for successfully implementing the 'Chat Sessions' on its website wherein DIPP officials provide nearly instant responses to queries posed. A similar service may be initiated at the MIB whereby applicants can be provided such interactive and prompt guidance by MIB officials. To this extent, as a positive step towards the effective implementation of the machinery, it is greatly appreciated that the MIB now meets on the 5th of every month to take up any issues stakeholders may have in connection with their license/ approval processes. While such a system is already put in place, it may still be more effective to take further measures and create a regular interaction mechanism similar to that of the DIPP Chat Sessions. This will

enable the authorities and stakeholders to drastically reduce the time it takes to obtain clearances/ approvals, thereby ensuring there is little delay in kick-starting an applicant's business operations in India.

f. Royalty issues and the Copyright Board and copyright owners

The success of the radio industry and, to an extent, the television industry is dependent on the availability of an appropriate royalty structure for licensing music content. Copyright societies established under the Copyright Act, 1957, viz. Phonographic Performance Ltd. (PPL) and the Indian Performing Right Society Limited (IPRS) control the licensing of a majority of the available music content in India. The royalty rates currently being charged by the copyright societies and other copyright owners are exorbitant and are eating away the margins of radio and television companies. For establishing sustainable and profitable businesses, the rationalization of royalty rates is the need of the hour. While the Ministry of Human Resource Development has been asked to intervene to diffuse the situation, it still appears to be in turmoil.

The government has been considering rolling out the FM 'Phase III' Policy which will add more than 780 radio channels in about another 275 cities and towns across the country. However, the radio industry has refused to bid for the Phase III rollout till such time that the Copyright Board fixes the royalties payable to these copyright societies. Given the nature of these refusals, MIB has seen fit to examine the financials of the radio operators in order to better understand the impact of the high royalties on their finances.

In case of a dispute between the owner of a copyrighted work and a potential licensor in relation to the amount of royalties payable, the statutory power to fix royalties vests only with the Copyright Board and the Board sits only a few times a year. At present the Board does not have the power to grant interim royalties. Therefore, parties sometimes approach civil courts for fixing royalties, leading to a multiplicity of proceedings. By way of the Copyright Amendment Bill, 2009, Section 33A has been included in the Copyright Act, 1956. Under the provisions of this section. broadcasters will now be required to pay the royalties fixed by the Board pending resolution of any dispute. In view of the proposed provision and the issues faced by the industry, it is necessary to rationalize the rates of royalty and also to confer upon the Board the power to grant interim relief. Furthermore, measures ought to be taken to ensure regular and more frequent meetings of the Board in order to deal with the existing and anticipated workload.

g. Countering Piracy

The problem of piracy has increased with rapid advances in technology. New technological solutions have emerged, making it easy for the pirates to carry on their illegal activities.[9] The film and music industries in India are inextricably linked with each other and piracy in one has an adverse effect on the other. The revenue streams flow

[9] http://www.indianmi.org/whatispiracy.htm, as visited on December 10, 2009

from common sources to common recipients. At the same time, these two sectors are also grappling with forms of piracy peculiar to each segment.

Music piracy refers to counterfeiting storage devices, illegal downloads and the illegal import/sale of music. Film piracy includes piracy of film DVDs/VCDs, illegal transmission of films by cable operators and peer-to-peer transfers over the internet. Given that in urban India, it is cheaper to purchase a DVD of a movie than pay for a theatre ticket for the same, it is imperative to control piracy in order to ensure growth in the revenues of the film and music industries. According to news reports, the Indian Music Industry reported a loss of about 50% of its revenues to piracy and it is finding it difficult to "keep its head above water".[10] According to the *US India Business Council - Ernst & Young 2008* report on 'The Effects of Counterfeiting and Piracy on India's Entertainment Industry,' the Indian film industry lost USD 959 million and 571,896 jobs due to piracy. It is quite apparent that piracy has a serious impact on revenues for both industries. The problem has become so deep-rooted that pirated CDs/VCDs/DVDs are now sold publicly on footpaths at prices as low as INR 30 (as compared with INR 150-300 for a multiplex theatre ticket).

Existing Legal Framework to Curb Piracy:

India has set out a strong legal framework to attack piracy in the M&E industry. The laws governing intellectual property rights (IPRs) are compliant with the world standards set out in the TRIPS (Trade Related Aspects of Intellectual Property Rights) and provide for criminal action in addition to civil remedies in piracy related matters. For instance, the police have the power of search and seizure to the benefit of the IP owners in cases of copyright and trademark infringement. Even the judiciary has proactively taken steps to curb piracy, by imposing punitive damages on offenders in order to deter such acts. Certain measures including *Anton Piller* orders (which permit searches without a warrant) are available and are increasingly being utilized. The Supreme Court of India has also directed all subordinate courts in India to decide IP disputes within four months to ensure speedy delivery of justice in matters related to counterfeiting.[11]

Further, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 (IPR Rules) empowers the Central Government to prohibit the import of goods that infringe IPRs. There has been a notification in force since January 18, 1964, prohibiting import of goods infringing trademarks and design. The new IPR Rules expand upon the subject of the 1964 notification and prohibit the import of goods infringing patents, copyrights and geographical indications as well. For the smooth implementation of the evolving IPR regime, the IPR Rules also stipulate the establishment of an IPR Cell at each Customs House which shall be vested with the responsibility of verifying the applications, providing web-enabled registration formalities and corresponding with the risk management division and other Customs bodies.

[10] "*Piracy accounts for 50% of Music Industry's losses*", http://www.dnaindia.com/report.asp?newsid=1194524 as visited on December 10, 2009

[11] *Bajaj Auto Limited v. TVS Motor Company Limited*, Civil Appeal No. 6309 of 2009 arising out of S.L.P.(C) No. 13933 of 2009

The Maharashtra government has recently notified an ordinance to curb audio-video piracy, prescribing preventive detention and equating IPR pirates with drug offenders under the Maharashtra Prevention of Dangerous Activities (MPDA) Act, 1981.[12] The MPDA allows the police to place offenders or potential offenders in detention for as long as 3 months without bail, and up to a maximum of 12 months. However, the constitutionality of these 'preventive detention' provisions has constantly been challenged in the courts. To beef up its campaign against pirates, the state government is also setting up an anti-piracy cell to enforce the new provisions of the MPDA Act.[13] The social service branch of Mumbai police deals with copyright violation and particularly with piracy of physical storage media.[14] In addition, the States of Tamil Nadu, Karnataka and Andhra Pradesh also equate pirates and counterfeiters, *inter-alia*, with bootleggers and drug offenders and punish them with imprisonment up to a maximum of 12 months under the respective applicable State laws, which are colloquially referred to as the 'Goonda Acts'.

It is notable to mention the efforts made by the Tamil Nadu police in combating piracy and identifying and investigating piracy related cases. In 2008, Chennai Police Commissioner Mr. R. Sekar stated on record that about 180 cases relating to piracy have been registered in the State with many persons being detained under the Goonda Act and a total of INR 130 million worth of piracy has been pre-empted and prevented in the State.[15] The Goonda Act has helped the Tamil Nadu police to curb piracy and a similar initiative by the legislature at the central level may be able to achieve the same results on a national basis.

Better Enforcement mechanism needed:

While Indian laws certainly provide for adequate protection, the challenge really lies with its enforcement. The enforcement machinery needs to deal with fly-by-night operators who make the raids more difficult. Also, some police cells are not well equipped to handle counterfeiting cases as they are not adequately educated on the laws governing IP. At times, while dealing with criminal actions, the judiciary is wary to take action, especially when the IPR is not registered or there is lack of evidence establishing a *prima facie* case in favour of the purported owner of the IPR. Also, though the IPR Rules provide a framework to combat piracy, practically, there are a number of issues that one faces in implementing the processes under the IPR Rules. For instance, under the Trade Marks Act, 1999 and under common law, even unregistered trademarks are protected. Further, copyright does not require registration in order to qualify for protection in India. The right holders often face difficulties in convincing the authorities about their

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[12] "*Film industry hails Maharashtra anti-piracy ordinance*" http://headlinesindia.mapsofindia.com/entertainment-news/film-industry/film-industry-hails-maharashtra-antipiracy-ordinance-17056.html , as visited on December 10, 2009

[13] *Latha Jishnu: The dangerous business of film piracy"*, http://www.business-standard.com/india/news/latha-jishnudangerous-businessfilm-piracy/364538/, as visited on December 10, 2009

[14] http://www.mumbaipolice.org/special/org_fun5.htm , as visited on December 10, 2009

[15] *Piracy accounts for 50% of Music Industry's losses "*, http://www.dnaindia.com/report.asp?newsid=1194524 as visited on December 10, 2009

ownership of unregistered IPRs. Therefore, there is a need for guidelines to be issued in respect of recognizing and enforcing unregistered IPRs in order to facilitate the better implementation of the IPR Rules. Setting up of separate IP benches will also achieve speedy disposal of the cases.

Creating awareness about IPRs within the enforcement machinery and training the relevant individuals to deal with counterfeiting matters should be of utmost priority in terms of preventing piracy. The industry players also need to be aware of their rights and should take action immediately to ensure speedy justice. Some of the ways by which the industry can protect itself is by hiring private investigators and keeping evidence of usage and ownership ready in the event the IPR is not registered.

Different agencies in the industry have taken various initiatives including spreading awareness about IPRs, anti-piracy drives and campaigns and conducting raids on counterfeiters. For instance, the Indian Music Industry has instituted anti-piracy cells which have helped local police in raiding manufacturing units and shops in all parts of the country. Industry initiatives have proved to be very helpful in other industries as well, like the anti-piracy raids facilitated by NASSCOM and the Business Software Alliance (BSA) which have had beneficial effects in curbing software piracy. Therefore, emulating such industry initiatives in the context of films and music will be beneficial in preventing piracy.

In a nut shell, the recommendations are as follows:

- The government, media and industry bodies should make more concerted efforts towards curbing piracy.
- Awareness about IPRs and their enforcement should be improved.
- To strengthen the enforcement mechanism, the education of Police and Customs officials on IPRs should be a priority.
- Separate IP courts or benches should be set up to deal specifically with IPR matters in order to ensure that they are dealt with speedily and that the court/bench is well versed with the governing regime.
- The role of anti-piracy cells should be strengthened, especially the cyber-crime cells, which currently deal with limited matters only.

h. Create an effective mediation and arbitration center

Foreign investors as well as those entering into collaboration and licensing arrangements with Indian partners are often worried about the protection of their intellectual property and investments and are skeptical about piracy issues. The law enforcement mechanism in India makes it very inefficient to enforce inter-party arrangements and contracts on a short timeline which is essential to the M&E industry given their tight schedules. In view thereof, in addition to taking measures to curb piracy,

the M&E sector should consider setting up of a mediation and arbitration center, specifically for the purpose of addressing disputes related to the M&E sector.

As an existing example, the Construction Industry Development Council (CIDC) has set up a special international arbitration center for the resolution of disputes in respect of construction works in India. Creating an effective mechanism akin to CIDC's arbitration center will help cater to the needs of the M&E sector. Specific rules may be drawn up and the arbitration/mediation proceedings can be conducted based on these rules. To ensure a speedy and more efficient disposal of cases, the center could consist of a panel of mediators/arbitrators specialized in the M&E sector and who have the relevant technical knowledge to deal with issues concerning this sector.

IV. CONCLUSION

It is quite apparent from our examination of various commercial, legal, tax and regulatory aspects of the M&E industry that while the industry is growing at a fast pace, it needs many measures to be taken in order to achieve its true potential. We have observed that while the government and the stakeholders have taken many positive steps over the last few years, a lot remains to be done and many multi-faceted changes are necessary in order for the industry to function in a streamlined, efficient and contemporary manner.

The start of this movement must be a consolidated media policy, as discussed earlier. This policy should focus on the growth of conventional, contemporary and convergent media, in a phase-wise manner so that maximum penetration is achieved and industry growth as well as profitability is maximized.

We have identified a need for a world-class creative and business infrastructure. India's M&E sector needs high-end training and educational institutions in order to improve and increase its workforce. Further, the M&E sector must use the telecom sector as an example and leapfrog our physical infrastructure in M&E instead of perpetuating technologies that may very well be obsolete in the near future.

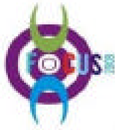
FDI limits in the television sector should be increased and the illogical restrictions on delivery mechanisms should be lifted. Further, FVCI investments should be permitted into the M&E space as the industry is a high growth sector that is ideal for venture capital. Investments must be permitted in more suitable vehicles such as LLPs in order to improve the tax efficiency of foreign investments and easing the extraction of income for foreign investors.

The approval processes involved in various aspects of M&E activities need to be streamlined and made more efficient. Providing a single window clearance system and a

dedicated staff would improve these processes and, in turn, encourage foreign investment into the sector.

The present royalty regime, imposed by the copyright societies needs to be brought in check and the powers of the Copyright Board to adjudicate disputes need to be rationalized. Steps need to be taken to educate police and customs officials in preventing piracy and in bringing culprits to justice. Further, the industry as a whole needs to come together and create a more efficient forum for dispute resolution as has been done by the construction industry.

It is apparent that change is necessary and that it must be done soon. The changes required have been clearly identified above. Furthermore, we have also identified the courses of action that need to be continued and the external examples that must be emulated. It is now up to the various stakeholders to take this forward and GRO!



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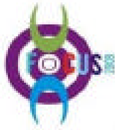

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