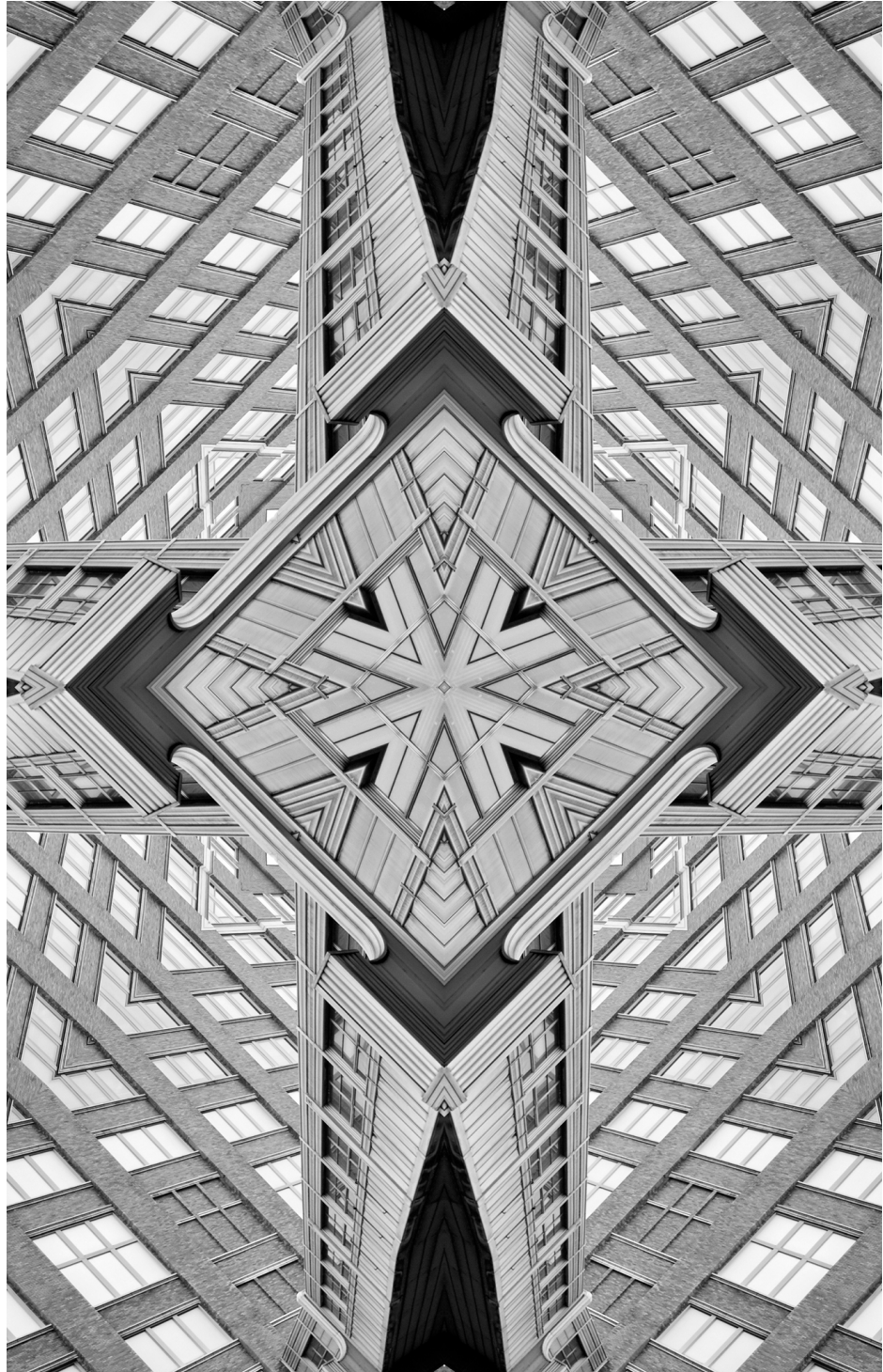


Issue

Brief

ISSUE NO. 571
AUGUST 2022



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Balancing IP and Competition Concerns in India's Audio-Visual Content Sector

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Abstract

India has become the largest and fastest-growing producer of audio-visual (AV) content in the world, with the highest number of hours of content every day. This brief discusses issues of intellectual property (IP) and competition in the AV content sector. Under India's Copyright Act 1957, the owner of AV content is accorded exclusive copyright over their work, which includes the right to monetise. Effective copyright protection incentivises creativity, and is also necessary to guarantee the investors appropriate returns. However, such exclusivity can also disrupt healthy competition in the market. This analysis highlights the intersection of these two concerns, and argues that the AV content market is competitive due to both the presence of effective competitors and current provisions in the copyright law that deals with market failure.

The Indian entertainment and media sector has shown remarkable growth in recent years. The Covid-19 pandemic has only compounded the growth, as restrictions in movement forced people to stay indoors, thereby increasing the demand for entertainment. A 2021 report by PwC India suggests that the value of the audio-visual (AV) sector is expected to reach INR 412,656 by 2025 at 10.75 percent CAGR.¹ Another report, this time by India Brand Equity Foundation (IBEF) suggests that the demand for original content could exceed 3,000 hours a year by 2023.² In 2018, the Government of India (GOI) identified audio-visual content^a as a champion service sector—i.e., the sector was given focused attention by the Government to help it achieve its full potential and earmarked funds were accorded to support sectoral initiatives.

Traditionally, AV content was restricted to motion pictures, television programmes, and sound recordings, but with the advent of technology and the internet, this scope has broadened.³ AV content is published on different media platforms and generates revenue⁴ by using appealing AV content to attract and maintain a mass viewership and gain a competitive advantage over other platforms.⁵ AV content is thus one of the main drivers of content consumption and has a huge potential to attract viewers.⁶

This brief describes the market for AV content in India; offers insights into the copyright aspect in AV content; and highlights the possible competition issues and concerns in the AV content market in India.

a Audio-Visual Services encompasses a wide range of services including motion picture, videotape, television and radio programme production and distribution services; post-production services; sound recording services; motion picture and video projection services; radio and television broadcasting services; talent agency services (including the services of artists); coaching services and other services such as, the content of multimedia products.” See Arpita Mukharjee, “India’s trade potential in audio-visual Services and the GATS”, ICRIER Working Paper No. 81, <http://www.icrier.org/pdf/avpaper.pdf>. This brief considers as ‘AV content’, any electronic media possessing both a sound and a visual components.

The Market for AV Content

Audio-Visual content can be broadly categorised based on the intended model of distribution: TV products, film works, and products intended for web distribution.⁷ Historically, media have been divided into verticals such as the internet, television, or cinema, where every segment was engaged separately in different production chains.⁸ With the integration and convergence of the AV content market, hybrid products—a single product that can be used in different types of distribution markets—are now being developed.⁹ Such hybrid products are created for greater dissemination over both non-broadcasting networks and broadcasting platforms.¹⁰ On account of growing digitisation, the media and content chain can be broken down into five sections as shown in Figure 1.^{11,12}

Figure 1:
Media Landscape¹³

<i>Creation of content</i>	<ul style="list-style-type: none"> • TV and film production houses • Entity which owns the license to the content • e.g., Disney, Balaji, Applause Entertainment
<i>Aggregator</i>	<ul style="list-style-type: none"> • Compilation of content from multiple producers • Entity which aggregates different pieces of content and often repurposes it • e.g., Sony, Hungama
<i>Platform/channel to distribute content</i>	<ul style="list-style-type: none"> • Networks, affiliates • Entity which operates a content-based service and builds its brand – a brand which the end consumer recognises • e.g., YouTube, Netflix, Zee5, Radio Mirchi
<i>Media used to transmit content</i>	<ul style="list-style-type: none"> • Entity which builds and operates the network to distribute the content or service • Cable, telco, satellite • e.g., Jio, Airtel, TataSky
<i>Devices and screens used by consumers to consume content</i>	<ul style="list-style-type: none"> • The device/ operating system / firmware on which the service or content is consumed • e.g., Apple OS, Android, Kai, Samsung

The Market for AV Content

Alternatively, the market for AV content also forms a part of the larger market for attention resale or attention brokerage or attention intermediation.^b Since consumers have limited time and attention, there is intense competition among market players to develop business models that will offer the most unique content and advertisements.

“With the integration and convergence of the AV content market, hybrid products are now being developed.”

^b 'Attention intermediaries' are platforms that link the attention seekers with their target, i.e. advertisers with sellers. Such platforms engage in attention brokerage, i.e. attracting attention by offering something to the public (entertainment, news, free services) and reselling that attention to advertisers.

Copyright grants the producers of AV content exclusive economic and moral rights. Several exclusive rights are extended to reward or safeguard the authors such as “the right to communicate their work to the public”, “the right to translate”, and “the right to reproduce their work”. However, if the exclusive right hampers social development, a compulsory license may be granted to allow the use of the work without the permission of the creator.

Cinematograph film and associated rights

The Copyright Act, 1957 (Copyright Act) defines a cinematograph film as “any work of visual recording^c and includes a sound recording accompanying such visual recording”.^{14,15} The Copyright Act confers upon the creator the exclusive right to “make a copy of the film and to store the film in any electronic medium or any means; to sell any copy or to give any copy on commercial rental, and to communicate the film to the public.”¹⁶ To accommodate the evolution of new technologies and at the same time expand the economic right of the creator, the Copyright Amendment Act, 2012 incorporated the right to “store the work in any medium by electronic or other means.”¹⁷

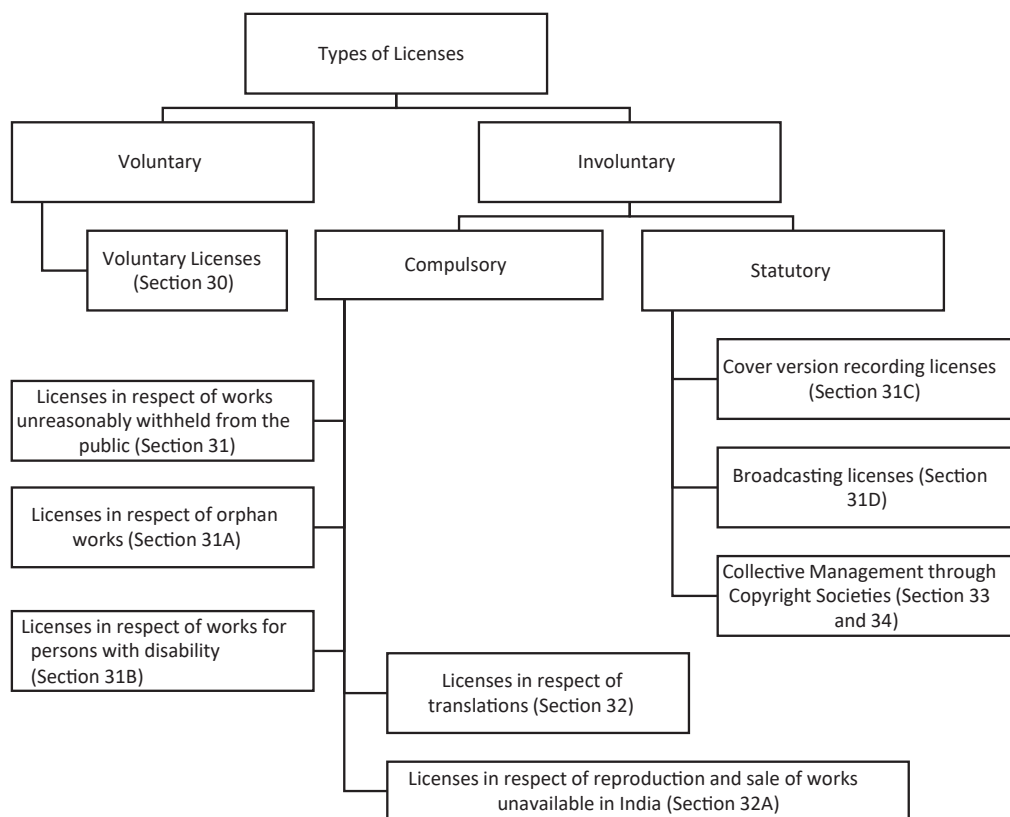
‘Communication to the public’ is defined in Section 2(ff) as “making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it.” The Copyright Act envisages different classes and types of communication such as the exhibition of the cinematograph film in theatres, on terrestrial television, and by a cable programme, among others, and these rights can be assigned to different persons without it being considered as an infringement of copyright.¹⁸ Thus, the creator monetises various exploitation rights granted by the Copyright Act through arrangements with distributors.¹⁹ The AV content is licensed to different players for dissemination to the consumers. Copyright law thus forms the core of the AV content market regardless of the distribution technology.

c Visual recording is defined as “recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method”. See: The Copyright Act, 1957 Section 2 (xxa).

Licensing of AV Content

The Copyright Act allows the copyright owners the right to assign or license the copyright to a third party. While assignment transfers the owner’s titles to another person,²⁰ licensing permits the licensee to make use of the copyright under a given set of terms and conditions mutually agreed upon by the licensor and the licensee. Copyright for different ways of communication can exist in a different person at the same time.²¹ For instance, the rights for communication via different modes such as television broadcasting, satellite broadcasting and theatrical releases could be licensed to different persons by the copyright holder at the same time. Figure 2 illustrates the three types of licenses—voluntary, involuntary, and statutory—as defined by the Copyright Act.

Figure 2:
Types of Licenses under the Copyright Act²²



1. Voluntary licenses

According to Section 30 of the Copyright Act, the owner of a copyright can charge a fee for the use of their work by issuing licenses.²³

2. Compulsory licenses

A compulsory license is one where the owner is required to grant the necessary authorisation to another party to use the copyright at a rate as determined by the administrative or judicial authorities.²⁴ The provisions of a compulsory license aim to balance the interest of the copyright owner on one hand and on the other, the interest of the public who want access to the works.²⁵ Compulsory licensing also entails low cost as the licensee does not have to negotiate with the licensor²⁶ and also help resolve market failure on account of the lack of access to copyrighted material.

3. Statutory Licenses

A statutory license is a form of compulsory license where the protected works can be freely used after a fee has been paid.²⁷ Statutory licenses are not based on an inspection of the behaviour of the copyright owner but rather provide for wholesale expropriation of owner autonomy if the work qualifies as one of the classes of works that can be so licensed.²⁸

It is important to note here that compulsory and statutory licenses diminish the incentive given to the producer by the copyright law.²⁹ The incentives provided seek to prevent the underproduction of copyrighted works, and diminishing the incentives has the potential to reduce the capital investment and intellect in creative works. Therefore, any intervention for compulsory or statutory licensing must be carefully crafted.

The Competition Act, 2002 (Competition Act) prohibits anti-competitive agreements³⁰ and the abuse of dominant position,³¹ and regulates combinations.³² This section will analyse the possible competition law concerns in the AV content market and the Competition Commission of India's (CCI) jurisdiction concerning the copyrighted product; how licensing agreements are treated under competition law; how copyright affects market definition; and how market power is assessed in such markets.

Copyrighted Subject Matter and CCI Jurisdiction

Licensing agreements for AV content are essentially vertical arrangements between the licensor—operating in the upstream market—and the licensee—operating in a downstream market—about Intellectual Property Rights (IPR). Such agreements fall under the ambit of Section 3(4) of the Competition Act.³³ In case the licensor has significant market power, such agreements can also be assessed as abuse of dominance^d under Section 4 of the Competition Act. If two or more enterprises at the same level of market are colluding with each other with respect to the copyrighted subject matter, then it is covered by Section 3(3) of the Competition Act. Though the subject matter of such agreements may be copyrighted material, the CCI will have jurisdiction over such cases.

For instance, in *M/s HT Media Limited vs M/s Super Cassettes Industries Ltd*,³⁴ it was noted that since the CCI and Copyright Board govern different aspects of law, the CCI will continue to have jurisdiction where IPR is being used for anti-competitive purposes as the Copyright Board could not serve as an effective instrument for the promotion of healthy competition. Further, in *FICCI vs United Producers/Distributors Forum*,³⁵ the CCI noted that the non-obstante clause in Section 3(5)³⁶ of the Competition Act was not absolute and held that IPR would not override the provisions of the Competition Act. The CCI further noted that this clause only protects the right holder only when the owner of the IPR is trying to protect their rights from infringement, allowing them to impose reasonable conditions. Despite this clause, the CCI has jurisdiction over IPR-related anti-competitive activities.

^d A “dominant position” is defined as “a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.” See: The Competition Act, 2002 Section 4, Explanation.

It may appear contradictory since IPR legislation confers on the holder the right of a ‘monopoly’ for a limited time while the competition law prevents abuse of power by the monopolies. However, the two fields use concepts with similar terminology but with different meanings, contexts, and implications.³⁷ IPR deals with a ‘legal monopoly’ which is based on the right to exclude whereas competition law deals with ‘economic monopolies’ which is based on the economic concept of market power.^{38,39} The IPR holder will only be able to become an economic monopoly if there are no substitutes for the product. Thus, the term ‘monopoly’ as used in competition law is vastly different from the one used in IPRs.⁴⁰

Licensing Agreements Under the Competition Act

As mentioned earlier, licensing agreements can be assessed as anti-competitive vertical agreements under Section 3(4) or as abuse of dominance under Section 4 of the Competition Act. For instance, in *M/s HT Media Limited vs M/s Super Cassettes Industries Limited*,⁴¹ it was alleged that the Super Cassettes (T-Series) had violated provisions of Section 4 of the Competition Act by forcing radio stations to enter into a one-sided agreement which had anti-competitive terms. The CCI held that T-Series was dominant in the “market for licensing of Bollywood music to private FM radio stations for broadcast in India” and that the clause in the agreement that placed commitment charges on private FM radio stations was unfair.

Meanwhile, in *K Sera Digital Cinemas Limited vs Pen India Ltd.*,⁴² the informant had alleged that the producers of the movie ‘Kahaani 2’ had entered into an anti-competitive arrangement to control the supply of the movie. The CCI noted that as the producers of the film, they have the right to decide their business strategy for releasing the films and to take measures to protect the film from being leaked. The CCI thus concluded that the actions taken by the producers to protect their work from being exploited illegally were backed by Section 3(5)(i)(a) of the Competition Act.

Under the Competition Act, the CCI analyses the licensing agreements separately, to determine whether each case is anti-competitive or not. If the licensor, by way of an agreement, imposes a reasonable restriction for protecting any of the rights recognised under Section 3(5) of the Act, the provisions under Sec 3(1) to 3(4) of the Act will not be applicable.⁴³ However, the issue is yet to be settled by the Supreme Court.

While there is an exception for reasonable exercise of IPR under Section 3, such an exception has not been made in relation to Section 4 of the Competition Act.⁴⁴ However, the Competition Law Review Committee report has recommended that a specific defence for IPR should also be provided in relation to Section 4.⁴⁵ The Draft Competition (Amendment) Bill, 2020 attempted to incorporate the defence in the Competition Act.⁴⁶ Incorporating this exception in Section 4 and improving certainty of the scope of IPR exceptions is integral to improving the interplay of the copyright and competition law. This would help bolster intellectual property-based markets such as the AV market which have huge potential to contribute to GDP and expand the reach of the country's soft power.

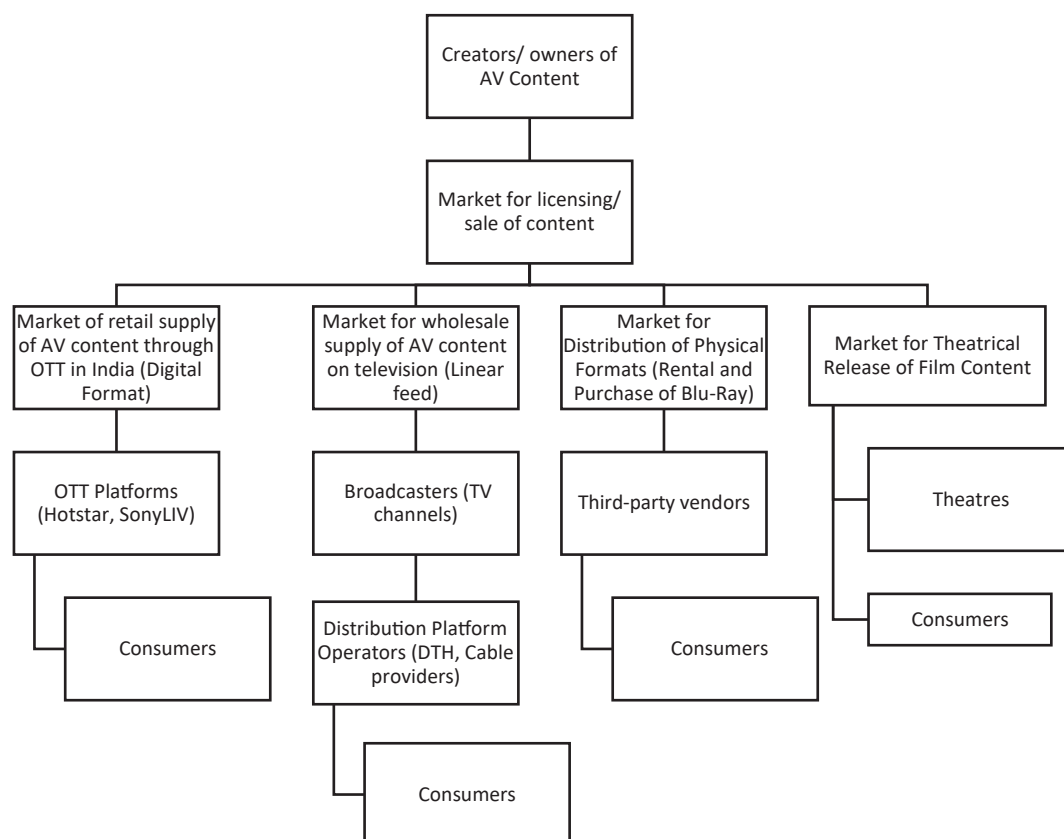
The Role of Copyright in Delineating Relevant Markets

Under the Competition Act, it is necessary to delineate the relevant market—both product and geographic markets—by assessing the substitutability in terms of characteristics, price, and intended use. Delineation of “relevant market” is essential to competition law enforcement as this determines the scope within which competition cases are adjudicated.⁴⁷ Even for cases involving copyright, the CCI will have to delineate the appropriate product and geographic market to determine the dominance.

As mentioned briefly earlier, copyright in AV content is a bundle of rights which are monetised by the producer through arrangements with distributors.⁴⁸ The owner licenses the rights for communication to the public through a specific distribution channel.^e Depending on the mode of transmission and way of storing and the right being licensed, the AV licensing market may be sub-segmented based on the mode of distribution, i.e. television, digital, or physical format.⁴⁹ Figure 3 demonstrates the various possible markets for licensing AV Content.

e As per the CCI, distribution channels refer to the “different platforms and media via which the film can be exploited which include media platforms like the theatrical distribution of a film through movie theatres, television, home video and also the new age media platforms, like internet, digital, mobile etc.” See: Film & Television Producers Guild of India v. Multiplex Association of India, Mumbai, Case No. 37/2011 (CCI).

**Figure 3:
Possible Markets for Licensing**



It is important to note that the AV content market can also be classified into three categories, i.e. film content, sports content, and non-film and non-sport content.⁵⁰ Each of these can be divided based on the language of the content.^f However, the exact delineation would depend upon the cases.

^f In *Surinder Singh Barmi v. The Board of Control for Cricket in India*, Case No. 61/2010 (CCI) (29 November 2017), the CCI observed that TV content can be distinguished on the basis of language. Similarly, in *Walt Disney Company and TWDC Holdco 613 Corp*, the CCI assessed the overlap separately for English films, Bollywood films, and regional films. In *Eros International Plc, STX Filmworks, Inc. and Marco Alliance Limited*, the CCI did consider the possibility of segmentation on the basis of the language of the film i.e., English, Hindi, and regional films.

While the market for AV content may be considered part of a larger market for attention, as witnessed in *Harshita Chawla v. WhatsApp Inc.*, the CCI is unlikely to accept such a broad market. The CCI refused to accept the argument that WhatsApp operated in a much broader market under ‘market for user attention’, stating that different apps would fall in different markets since the apps were not functionally substitutable.⁵¹ Given how different players in the attention economy have different characteristics, the users may not find the products to be an alternative to the other. Therefore, such players would not be a part of the same relevant market.

Assessment of Dominance

While assessing the level of dominance in the market, the CCI considers two factors: Qualitative assessment of the prevalent market dynamics and the relative position of strength enjoyed by the market participants.⁵² While assessing dominance, the actual competitors in the marketplace are those which can limit the enterprise’s behaviour and can prevent the latter from behaving independently of the market.⁵³

Though copyright provides exclusive rights, the chances of the right holder obtaining monopoly returns depend on whether there are good substitutes in the market.⁵⁴ If the product has high substitutability, the possibility of gaining monopoly returns is low, and vice versa. In India, the upstream market for licensing AV content in India is competitive as this market contains established licensors, both local and international studios, possessing a number of libraries of AV content.⁵⁵ Furthermore, the entry barriers for content producers have lowered due to convergence.⁵⁶ The AV content market is also hit-driven and the market shares of the production houses vary each year.

Due to the presence of substitutes for any AV content, it is unlikely that players will be able to obtain a monopoly return or will have significant market power. Therefore, it is unlikely that any player would gain a monopoly over the content markets. In such a competitive landscape, any intervention by the CCI is unlikely, unless there is serious evidence of anti-competitive activity. However, any intervention by the CCI will only harm the existing competition in the market.

Copyright Societies and Competition in AV Markets

The Copyright Act has some in-built checks to prevent misuse of copyright against the public interest. Such measures include the provisions of involuntary licenses including compulsory and statutory licenses as previously discussed. Copyright societies, established under the Copyright Act, can also play an important role in dealing with market failures and proper implementation of the provisions can create a level playing field and prevent the concentration of power in the hands of a few.

Copyright Societies

A copyright society is a collective administration society that works on the concept of collective administration of copyrights, i.e. the management and protection of a particular type of copyright works from different owners.⁵⁷ The copyright society has the power to grant licenses with respect to copyright or any other right given by the Copyright Act. The role of the copyright society is to act as a single clearance window and to facilitate the process of distribution of copyright.⁵⁸ The Copyright Act gives the copyright society wide powers, including the power to issue licenses under Section 30, to collect fees in pursuance of such licenses, and to distribute such fee amongst authors.⁵⁹

AV Content and Copyright Societies

Section 33(3) of the Copyright Act provides that only one copyright society would be registered to do business with respect to the same class of works and the Society for Copyright Regulations of Indian Producers of Films and Television (SCRIPT) has been established for collective administration of cinematograph films.⁶⁰ Further, Section 33(1) of the Copyright Act prohibits any person from issuing licences except through a copyright society. The section also prohibits any person to commence or continue issuing or granting licenses with respect to literary, dramatic, musical, and artistic works that have been incorporated in cinematograph films or sound recordings.

Section 33, therefore, envisages that issuing or granting of licences can only be undertaken by a copyright society.⁶¹ Further, as per the Copyright Act, every copyright society is required to publish its tariff scheme⁶² which can drastically reduce the possibility of abuse or anti-competitive behaviour by

Copyright Societies and Competition in AV Markets

individual licensors since the licensing is governed by a common entity. In case the copyright societies themselves engage in anti-competitive conduct, such behaviour can be assessed under the Competition Act.

Despite the regulations, however, there are private organisations that grant and issue licenses by relying on Section 18 read with Section 30 of the Copyright Act. Due to certain loopholes in the Copyright Act, private enterprises can act as agents and grant and issue licenses. Therefore, there is a need to reassess the framework for licensing under the Copyright Act to promote competition and fairness in the AV content market.

The presence of effective competitors ensures that no player in the AV content market gains monopolistic or oligopolistic strength. However, this may change based on the delineation of a very narrow relevant market. The CCI has assessed licensing agreements in several cases and decided on each one as per the framework of the Competition Act.

Further, the exclusive economic rights under the Copyright Act are not absolute and are limited by provisions meant to prevent monopolisation of the market. Such measures, if properly implemented, can provide a level playing field. AV content allows for the dissemination of free speech, and thus, any form of regulations on this market must be carefully implemented.

The Rajya Sabha report, “Review of the Intellectual Property Rights Regime in India”, recommends changes in the Copyright Act on copyright societies and statutory licenses. There is a need for an in-depth reassessment of the provisions of the Act. The provisions on copyright societies should be revisited to rectify the loopholes as the proper execution of these provisions may further promote competition and fairness in the downstream market of AV Content licensing. The law also needs to keep up with changing technologies. [ORF](#)

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