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Credibility of Media Regulatories and Controversial Initiatives to Reform

Thomas Jefferson has rightly said that the information is currency of democracy. The quality of information decides the quality of democracy. The state cannot interfere with the ethical aspects of the profession of media as the freedom of speech & expression is a constitutionally guaranteed right. However, the state regulation of professional ethics through Press Councils is a significant mechanism that is in vogue in different jurisdictions. But the most appropriate way is self regulation. Whether these two regulatories' are working well? The state, profession and media industry besides civil society started serious initiatives to reform or restructure the regulatories. Significant changes are either contemplated or initiated in India, UK and South Africa, which need to be analysed.

The First Press Commission in Independent India observed perversities in profession, yellow sensationalism, malicious and irresponsible attacks, objectionable writings, indecency, vulgarity, and recommended constitution of a Press Council for protecting the professional standards and independence of the Press besides providing a forum for hearing complaints against and by the press.

The new Chief Justice of India P. Sathasivam called freedom of the press the 'Ark of the Covenant of democracy because public criticism is essential to the working of its institutions'. He questioned the media excesses. Referring to recognition by all major legal systems that expression of facts, ideas and opinions could not be 'absolutely free', the CJI said the words could cause damage by 'prejudicing trial or by inciting communal hatred' and pointed to the trend of 'sensational' headlines, without cross-checking facts, and blamed the media's 'negative coverage' for helping to create a mood of 'despair and helplessness'.

The CJI suggested a machinery to deal with irresponsible behavior of the press. However he cautioned that while an 'external regulatory authority' to correct the media might seem a dominant urge, 'this was not the answer'. This could lead to a 'perilous departure' from the principle of free press. The CJI prescribed 'self regulation' by the journalist profession with the Press Council handling cases of violation of ethics as well as

defending a free press[1].

Former Press Council Chairman Justice G N Ray in his foreword to Annual Report 2010-11 wrote: "I am sorry to note that there has been paradigm shift in the functioning of media as a whole with no exception to print media in our country for quite some time past, propelled by various reasons including globalization, corporatisation of media houses and above all ever increasing propensity to adopt a mindset for deriving higher and higher profits like ordinary commercial venture, thereby sacrificing the primary goal of a media house to remain deeply attached with a mission of being a vibrant partner of democracy"[2].

The ethical values of the media in a complex globalized commercial world is equally complex to understand and difficult to follow unless there is a strong deterrence or inviting incentive. Being unenforceable component of behavioural science, media persons cannot be deterred. In the same way it is difficult to expect incentives from management or state or society for abiding by the ethical values. Still, ethics continue to be highly relevant in every field that touches upon public in general including media, which is vehicle of thought and builder of opinion.

A. Hackgate and PCC in UK

Worldwide, in a democratic society, state has created a forum to suggest and enforce media ethics through press councils. The Press Complaints Council faced a challenge when it was confronted with the charge of inaction in the phone hacking affair engineered by the new management of the News of the World. Journalist Nick Davies called it a failure of PCC in investigating the vast majority of complaints on technical grounds[3]. The House of Commons Culture Media and Sports Committee which investigated the hacking scam chose to call PCC 'toothless'[4]. The Members of British Parliament called it 'well-meaning but a joke', and as much use as 'a chocolate tea pot'. When phones of relatives of murdered schoolgirl Milly Dowler and victims of the 7/7 London bombings were hacked, it crossed the line of 'ethics' and entered the category of criminality.

1 The Hindu, July 24, 2013, http://www.thehindu.com/news/national/cji-criticises-media-excesses-but-bats-for- selfregulation/article4946645.ece (Last visited on 24th July 2013.

2 Annual Report of the Press Council 2010-2011, available at http://presscouncil.nic.in/HOME.HTM (last visited on June 10, 2013).

3 In his book Flat Earth News, 2008.

4 During February 2010.

Immediate impact of the 'hackgate' was boycott by advertisers that 'contributed' to the closure 168 year old News of the World. Its impact was far more serious than this and the News Corporation's deal to take over of the British Telecommunications Company BSkyB. Investigations resulted in convictions of several journalists for illegally acquiring the confidential information. It is not just ethical values of journalists but those of Private Detective agencies who assisted in criminal acquisition of private details of crime victims. Ethical investment Advisory Group EIAG of the Church of England commented "the behavior of the News of the World has been utterly reprehensible and unethical". The EIAG refused to believe the promise of News Corporation that it would return to ethical practices. The Church of England Pensions Board also decided to sell away its shareholdings valued at around 1.9 million pounds.

The threat of criticism not only affected the financial stability of News Corporation, but seriously impacted the financial foundation of PCC as the Express Group (the Northern and Shell group publishers) withdrew its subscription to the PCC. Such a withdrawal also means that PCC would lose its formal jurisdiction over this media group. Because of this step the Daily and Sunday Express, Scottish Daily and Sunday Express, Daily and Sunday Star, OK!, New Magazine and Star Magazine are no longer bound by the PCC's code of practice, and the public no longer have recourse to making complaints through the PCC.

All this media ethical fiasco led to proposals for replacing the PCC with a new independent regulator. Lord Hunt announced in December 2011 that he would introduce a voluntary paid-for 'kitemarking' system for blogs to indicate that blogger has agreed to strive for accuracy and it would regulate the bloggers who cover current affairs. Lord Hunt wanted more and real powers for PCC to investigate allegations such as phone hacking, illegal computer hacking, general intrusions by press like paparazzi, besides power to impose fines and award compensation to victims of misreporting by press. It was also proposed that PCC would sign binding contracts with newspapers to adhere to PCC rulings for five years at a time. They proposed a rationale mix of law and contract to regulate the media on its ethical conduct and raise the level of responsibility to that of liability to compensate the victims.

Contemplated new regulation also included a proposal to give binding effect to the code of conduct for which the code need to be

reviewed with a focus more on what is deemed best journalistic practice, hoping that this would generate a scope for evolving good journalists and good journalism.

Scourging bad practice is as much required as prescribing good practices in journalism. The experience in London should help creating loyal friends for good journalism, with public interest as its heart and foundation stone.

With social media expanding the horizons of expression by leaps and bounds, the PCC also wanted to proportionately expand the jurisdiction. *The Guardian* newspaper reported in May 2011 that social media messages are proposed to be brought under the remit of the PCC after it ruled in February 2011 that information posted on Twitter should be considered public and publishable by newspapers.

i. Failure of Press Complaints Council & Lord Justice Leveson Report

Post hackgate events in UK include significant Leveson inquiry into the culture, practice and ethics of the press, which published report in November 2012. While Lord Justice Leveson recommended an Independent Self Regulatory Body, the Government is moving towards a strong state controlled Press Regulatory. The Leveson report wanted an **independent regulatory body** established by legislation for the press which should provide for periodical assessment of the regulatory. This self regulatory body, to be established by the Press, has gained substantial support from publishers such as News UK, the Daily Mail publisher, Associated Newspapers and Telegraph Media Group – joined by The Independent outlets, Guardian News and Media and the Financial Times. This is expected to replace the Press Complaints Commission.

The legislation was expected to enshrine, for the first time, a **legal duty on the government** to protect the freedom of the press. It also suggested creation of an **arbitration system** through which people who claim to have been the victims of the press can seek redress without having to go to the courts.

The inquiry says that the newspapers that refuse to join the new body could face direct regulation by media watchdog Ofcom. The composition of the body is expected to be **independent** of current journalists, the government and commercial concerns, and not include any

serving editors, government members or MPs. The report wanted the press to be transparent as far as the 'sources' of its stories are concerned, if the information is in the public domain.

A major revelation of inquiry is that the nexus between politicians and the press had damaged the perception of public affairs. The report said: 'Politicians of all parties had developed "too close a relationship with the press in a way which has not been in the public interest".

Referring to hackgate, the report revealed: When chasing stories, journalists have caused "real hardship and, on occasion, wreaked havoc with the lives of innocent people". This happened to both famous people and members of the public. Press behaviour, at times, "can only be described as outrageous". At the News of the World, quite apart from phone hacking, there was a failure of systems of management and compliance. There was a general lack of respect for individual privacy and dignity at the paper.[5]

ii. Self Regulatory & State Regulation

As suggested by Lord Justice Leveson the newspaper and magazine industry on July 8, 2013 took the first step to set up the Independent Press Standards Organization.

The IPSO was described to be a complete break with the past to deliver the key Leveson suggestions. It consists of independent members at every level and industry will not have any veto power on appointments. It will have power to impose 1 million pounds for serious systemic wrong-doing, and direct upfront corrections and adjudications –whether editors like it or not. It is armed with investigative powers to call editors to account. It also tried to provide an inexpensive alternative to the libel courts in the form of a speedy arbitration service.

Response to this proposal was quick and serious. Professor Brian Cathcart, said: This is no more than a cynical rebranding exercise… they are determined to hold on to the power to bully the public without facing any consequences. By their actions they are telling the public that they are not answerable to judges, and not subject to the democratic will of Parliament. They are telling us that they are outlaws.

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5 *Press 'needs to act' after Leveson*, November 29, 2012, http://www.bbc.co.uk/news/uk-20543133 (last visited on June 10, 2013)

iii. State Regulatory

Simultaneously the State is initiating the royal charter approval process, with the setting-up of the Privy Council sub-committee. The announcement of the establishment of IPSO comes just days after Lord Prescott quit the Privy Council in protest against the delays in implementing the government's royal charter for a press regulator, which was agreed by the three main parties and Hacked Off in March.

B. Asking for Media Council in India

In India also the Government of India has introduced the Leveson Committee Report in a Consultative Committee of MPs to discuss its implications for India. This move was criticized as a temptation among sections of the political class to push for external regulation. The new Chief Justice of India P. Sathasivam favoured self regulation with the support of Press Council of India. After Justice Markandey Katju assumed as Chairman of Press Council, the demand for consolidating and expanding the Press Council kicked up a debate in media and civil society. Present Press Council Act need to be fine-tuned, restructured and reformed to make it a comprehensive institution to achieve media accountability besides performing the prescribed functions. There is also a strong necessity review the law as to whether the chairmanship of Press Council should be entrusted to eminent professional journalist, instead of former judge of Supreme Court[6].

i. Idea of Press Council

To symbolize responsibility and accountability of the Press, 16th November, the day on which the Press Council of India came into existence in 1966, was declared as National Press Day. The Press is free as per Article 19(1)(a) of the Constitution, but its responsibility cannot be guaranteed by Constitution. Accountability of Press depends upon various dynamics and responsive character of the members of profession and that of the organizations like Press Council of India and Journalists associations. If press is supposed to be the watchdog of the society, the Press Council of India is expected to be the watchdog of the Press. It is a forum where people can send the complaints against irresponsible functioning of media

6 These points are discussed by this editor in an article published at http://thehoot.org/web/What-the-Press-Council-could-have-been/6449-1-1-7-true.html (Last accessed on July 24, 2013)

and press persons also can complain about the threats to their functional independence. Whether it is happening or not is what to be examined.

As the Government's control over Press would amount to deprivation of freedom of press, peer group of professionals are ideal to deal with professional aspects of journalism. The idea of Press Council started catching up when it was set up as the Court of Honour for the Press in Sweden in 1916. This concept spread later in Scandinavian countries and then in Europe, Canada, Asia, Australia and New Zealand. Either Press Council or Media bodies are put in place in around 50 nations.

ii. Challenges before Press Council

Press Council of India today has two challenges before it. The first challenge is securing independence of the Press while the second is making Press accountable. The latter challenge has been met to the extent that the Press Council is hearing the complaints against media organisations and trying to correct the news professionals. First Press Commission recommended the constitution of a statutory authority to maintain professional ethics in journalism. It started functioning on this day 46 years ago, under Press Council Act, 1965, as an autonomous, quasi-judicial body with 22 members headed by former Justice of Supreme Court of India. It worked up to December 1975 at which point Mrs. Indira Gandhi's government abolished it saying that it was not serving its purpose. It was revived after revised law Press Council of India Act 1978 was passed by Janata Government. The functions of the Council were changed in this new law. Three of functions listed in the 1966 law were left out as they were considered to be burdensome for the Council. Thus, a) promoting the establishment of common services for the supply and dissemination of news to newspapers, b) providing facilities for proper education and training of persons in the profession and c) promoting technical or other research are things that the Council does not have to do anymore. However, two new functions were added, namely: undertaking studies of foreign newspapers and their impact and undertaking studies as may be entrusted to the Council by Central Government.

Establishment of common services to supply news to newspapers is a really burdensome activity and Parliament in its wisdom has rightly removed this activity from the mandate of the Press Council. However, it was not proper to stop the Press Council from having a strong research wing. The new Act wanted Press Council to undertake studies of foreign

newspapers and in light of such a provision, stopping the Press Council from having a strong research wing is a major contradiction. Press Council should have been encouraged to be a strong academic and research institution so as to be able to undertake studies and research projects which would help the profession to improve its standards. Bar Council of India is expected to work on improving standards and Medical Council of India was entrusted with responsibility of imparting continuous medical education. Where is a similar provision for media education?

iii. Demand for more powers

Successive Press Council of India Chairmen have repeatedly asked for reforms to give PCI more powers as well as teeth to enforce its directions and orders in almost a manner similar to a court of law imposing punishments and penalties. It is a surprise that former Supreme Court judges wanted 'district court' powers for their 'national' level body, against which an appeal can lie to High Court. Instead, they should have asked for more funds and more functions. However their demand has a justification in the fact that even the smallest of directions against giant Press barons are not complied with. Though it is a court for some purposes, it has no power of contempt to secure enforcement of its orders, which is a reasonable demand. At the very least, Press Council should be in a position to deny certain governmental facilities to media organisations if they defy the orders of Press Council. The very concept of appointing a former Judge of Supreme Court as the chairman of Press Council of India appears to be not conducive to the nature, character and functioning of the Council in relation to dynamics of Press.

iv. Did it serve the purpose?

If it is true that Press Council of India was abolished because it did not serve the purposes for which it was set up, such a 'truth' should have been established by Mrs. Indira Gandhi's government before killing it. When it was believed that it would serve the purpose, the Janata Government should have explained why they thought so. When both the legislations wanted former Judge of Supreme Court to be the Chairman, they should have explained the reasons and justification for that. They did not because there is no justification. There is absolutely no connection or relation between journalistic functioning and adjudication. The PCI has been reduced to a body for hearing complaints and passing orders of

censure or admonition in addition to offering some advice, good words and morals etc. Without intending any disrespect for former judges of Supreme Court in general and the dynamic and great judges who led Press Council of India very effectively in particular, the author thinks that a senior professional journalist with experience would work out to be a better choice as the Chairman for the purposes of giving a professional leadership to the Council, motivating journalists and achieving professional excellence and accountability.

Very little was done to achieve the statutorily prescribed functions such as, to a) foster a due sense of both the rights and responsibilities of citizenship, b) provide facilities for the proper education and training of persons in the profession of journalism, c) promote a proper functional relationship among all classes of persons engaged in the production or publication of newspapers and d) study developments which may tend towards monopoly or concentration of ownership of newspapers, including a study of the ownership or financial structure of newspapers, and if necessary, to suggest remedies therefore. A person without specialized expertise of professional aspects of journalism may not be comfortable in leading the Council to achieve these stipulated statutory functions.

v. Operational deficit

Justice Goda Raghuram of Andhra Pradesh High Court, in his address on the occasion of National Press Day (2011), reviewed the working of Press Councils and their structures generally and said: "Operational deficit with many Press Councils is that they tend to consider themselves as complaints councils and insist on mediating and not on adjudicating against the Media, if they can avoid. On a holistic perspective, the role of Council is not just to satisfy a few individuals or groups who have been hurt by the media; not just to avoid lawsuits; and not just to discourage the State or limiting the freedom of the Media to make money. **A Press Council is meant to improve the news Media**." (emphasis is added). Justice Raghuram suggested that "a vibrant council on the other hand should not avoid seeking publicity, taking positions, establishing case law and taking initiatives even when no complaint is lodged. It should also assume functions like reporting on the state and evolution of the media and periodic audit of the Media in terms of its essential functions. A Press Council should take interest in the training of journalists to improve professionalism and take up research on how the media actually functions,

what influence it exercises and what citizen need from them….The Press Council should also encourage evolution of other Media Accountability systems like documents, people and processes." He suggested a handbook of ethics to be put in the public domain, collection of opinion through questionnaires, website offering journalists information and advice on promoting accountability and teaching the public how to evaluate the Media, etc. Justice Raghuram also detailed several measures for achieving accountability. For instance, corporatization of Media Houses has had a serious impact on the profession which has today transformed into news business. This tendency needs to be researched properly so that we are able to come up with effective alternatives to shape the ownership policy[7].

vi. Regulating media

Legally speaking, the controversy is between regulation of media vis-à-vis self regulation. Regulating anything in our democratic set up is a doubtful legal phenomenon while self regulation, something which has to emanate from within is equally doubtful. When market and demand command most actions of the media, self regulation is reduced to an invisible level. With their resources and influences, the media barons fight every action under law till the last appeal to Supreme Court. The Chairman of Press Council of India, Justice Markandey Katju's critical comments on performance of contemporary media evoked a lot of criticism. Justice Katju sought amendment to the Press Council Act in order to make it a Media council which has the authority to question unethical practices in every type of media.

This is an old and oft repeated demand. However, one can say that 'press' in its wider scope and connotation includes the news media in the form of 24 hour non-stop news channels. When PCI was constituted, the radio was under control of Government of India. Similarly when state-organized TV – Doordarshan emerged, it was an annex of Information and Broadcasting department, used and abused by the ruling party. Hence the ruling governments never thought of including radio and tv media into the fold of PCI. With globalization and expansion of private electronic media by leaps and bounds, both radio and tv, the need for giving people a forum to question unethical and irresponsible broadcasting and telecasting has also emerged. Without waiting for amendment, the PCI should have been pro-

7 Article by Justice Raghuram in this journal gives more detailed insight into the ethics of media.

active and should have questioned the misdeeds, some of them as listed out by the new PCI Chairman, and admonished them. Every Chairman of PCI, including Justice Katju, should have used their jurisdictional power to examine *suo motu* certain unethical and irresponsible telecasts and questioned them as per the prescribed norms and procedures under PCI. However for clarity and certainty, there is a need for declaring by law that 'press' includes 'electronic media' also.

Second demand of Chairman Justice Markandey Katju was to give teeth to the Press Council so that it can penalize the erring media. The character of PCI as envisaged by law is to regulate the profession of journalism and not to penalize. The PCI can admonish, demand publication of apology or denial. It can also disentitle the media to receive benefits and advertisements from the state. At the same time, the PCI's jurisdiction gets ousted whenever the victim of irresponsible media attack prefers to sue for defamation or files a criminal complaint in any legal forum for damages or punishment. When a victim of media resorts to legal action, the PCI does not have power to look into the matter from professional standards regulatory point of view. If the Press Council of India also is given the power to impose penalties and direct the media to pay damages to the victim, it will become yet another court with opportunities for review and appeals. That will lead to unnecessary duplication of the system. Besides hearing complaints against the media, the PCI has powers to hear complaints by journalists against any powerful section or government body affecting the freedom of press. However, there is a need to increase the number of remedies without converting Press Council into another court. One single Press Council seated at National Capital Delhi will not be able to bring justice to either an affected journalist or person affected by a journalist. The PCI should be expanded and a bench should be set up in each State to hear the complaints and to initiate *suo motu* actions against wrong deeds of media and threats against media.

C. Reshaping South African Regulatory

Pakes Dikgetsi, of COPE[8], complained against the Northern Cape Times newspaper alleging that the latter published untruthful and inaccurate report alleging an extra-marital affair between Northern Cape Chairman Fred Wyngaardt and DFA journalist Sarah Evans – and that this

8 COPE = Congress of the People, a political party in South Africa.

has led to the newspaper taking a soft stand towards COPE; and pictures that accompanied the story did not substantiate the misleading and insulting allegation of the so called 'affair'. The Editor contended that newspaper took due care not to unduly slant or scandalize the subjects, but merely posed a question in the public domain about both the nature of their relationship as well as the likely impact that relationship might have upon what is ultimately published by the journalist and by extension the DFA; and also stated that assumptions made in the article were in the public interest.

An ethical point for media is that a rumour must be checked, investigated and the information obtained needs to be carefully assessed to determine what weight to give to it before publishing it. In this case, the Press Council noticed that *the story did not refer to any source, nor did it provide any shred of evidence.* It was explained that if this kind of journalism is tolerated, it will open the door for any irresponsible journalist to report an unsubstantiated "rumour" and thereby unnecessarily placing doubt in the public's mind with regard to someone's integrity, reputation and dignity – without any kind of justification. This can only lead to causing serious, unnecessary harm, as has happened in this case. Press Council of South Africa observed that the failure to provide substantial information to link the Wyngaardt and Evans romantically was in breach of the following articles of the Press Code:

> *Art. 1.1: "The press shall be obliged to report news truthfully, accurately and fairly";*
>
> *Art. 1.2: "News shall be presented…in a balanced manner…";*
>
> *Art. 1.4: "…Where it has not been practical to verify the accuracy of a report, this shall be mentioned in such report"; and*
>
> *Art. 5: "The press shall exercise exceptional care and consideration in matters involving dignity and reputation, bearing in mind that any right to privacy may be overridden only by a legitimate public interest".*

Needless to say most of the media organizations just do the opposite of what the above norms suggest. The South African Press Council directed the NC Times to **apologise profusely** to Wyngaardt and Evans for unfairly planting the seed of an "affair" in the public's mind without any journalistic substance to do this, and for cropping the pictures

such that it created the impression that there might have been such a basis; use the exact same **front page layout** as the one that COPE complained about (also on the front page); use the **headline** on the front page: WE APOLOGISE TO THEM; **publish** the text below, starting on page 1 and leading on to page 2; and **again use the word "apology" or "apologise"** in the headline on page 2.[9]

i. The 2013 changes

The Press Council of South Africa came up with the changes - effective from January 1, 2013[10]. It announced following, along with a reviewed code of conduct and constitution.

1. Complaints must be considered and mediated or adjudicated on within the shortest possible time.
2. A complaint must be made not later than 20 working days from publication.
3. The PCSA will appoint its public advocate who will throughout the entire process advise and assist the complainant.
4. Complaints must be made to the public advocate - not the ombudsman, as is currently the case - either in person, by telephone, or in writing, including cable, telegram, telex, SMS, e-mail, and fax messages.
5. Will not accept complaint, which is anonymous, fraudulent, frivolous, malicious or vexatious, or prima facie falls outside the ambit of the press code, or which is directed at a newspaper outside the jurisdiction of the ombudsman.
6. Public Advocate may file a complaint
7. If, within 30 working days after the date of publication there has been no complaint, but the public advocate believes a *prima facie* contravention of the press code has been committed and it is in the public interest, he may file a complaint with the ombudsman for adjudication.

9 This complaint was decided on Nov 23, 2012, http://www.presscouncil.org.za/Ruling/View/cope-vs-northern- cape-times-2373 (last visited on June 11, 2013).

10 See a detailed articles on proposed changes: http://www.presscouncil.org.za/News/View/sweeping-reforms-on-press-regulation-coming-69 (Last accessed on July 24, 2013).

8. PA should notify the complaint, seek response in seven days, if not settled in 15 days refer to ombudsman.
9. Hearing by Ombudsman
10. May decide matter based on papers
11. May convene an informal hearing of both parties
12. If hearing is required, draw an adjudication panel, which will decide by majority.
13. Appeal lies to chair of appeals. One press member and three public members from panel of adjudicators to hear appeal.
14. Open hearing. Generally no advocate. Should hand down finding within 21 days.

Sanctions suggested include cautioning or reprimanding the publication, a direction that a correction, retraction, or explanation and, where appropriate, an apology and/or the findings be published in such manner as they may determine; an order that a complainant's reply to a published article, comment, or letter be published by the publication; or making any supplementary or ancillary orders or issuing directives that are considered necessary for carrying into effect the orders or directives made and, more particularly, issue directives as to the publication of the findings of the ombudsman, the adjudication panel, or the appeals panel[11].

ii. Monetary fines

The Press Council recommended monetary fines as per a formula determined by it, besides suspension or expulsion from the jurisdiction of ombudsman for failure to appear for adjudication hearings.[12]

D. Conclusion

The Press Council has no role to play in shaping journalistic education and institutional organization unlike the other professional councils such as Bar Council and Medical Council. Bar Council is not an academy but it still has a significant role in standardizing legal education.

11 For details see: www.presscouncil.org.za (last visited July 24, 2013)

12 *Revamped press complaints system announced*, October 2, 2012 http://www.news24.com/SouthAfrica/News/Revamped-press-complaints-system-announced-20121003 (last visited on June 11, 2013)

While these two bodies are professional bodies which came into being due to coming together of professional members, Press Council is a multi-member, representative body imposed from top rather than emerging from the bottom. Considering changes in Media regulatory structures in different jurisdictions, the reconstitution of Indian Press Council has to be debated upon seriously.

Press Council is an essential concept, but it has to be comprehensively structured and provided with enough resources and infrastructure. Proper demarcation of increased functions is also needed. Through media, free flow of unpolluted or unbiased information should be facilitated for a better democracy. Media, which was expected to be watch dog of all the three estates in democracy, is in dire need of a watchdog. The million dollar question is: Whether Press Council or Independent Press Standards Organization will fulfill the need?

Professor Madabhushi Sridhar
Editor-in-Chief

Editors Note

This year's volume of the NMLR will continue to look at a diverse arrangement of issues involving an intersection of media and the law. This volume reflects several trends, patterns, and issues that have risen to prominence in recent times, including, media reporting in emergency situations, reporting of sub-judice matters, free speech & censorship, and digital rights management. Furthermore, we have the honour of publishing a piece by Hon. Justice Raghuram. A brief overview of published pieces:

Justice Raghuram, in his article, titled "*Media as an Instrument of Public Accountability*" delves into the role of media in an India that has seen its public institutions and officials hit by serious allegations of corruption. The article provides deep insight into the various functions-forum of discussion, power monitor amid others- that modern day media has to play in its role as a watchdog. The article also briefly looks at some of the issues plaguing the profession of journalism in our country.

Danish Sheikh, in his article "*The Limits Of Speech: Extending Free Speech Beyond The Censorship Paradigm*" argues for a broader understanding of the right to free speech under Article 19(2) where it is seen as a positive obligation on the state rather than just a negative right. Proceeding on the basis of this premise, the article looks at two distinct strands of these arguments: one in the realm of disability jurisprudence, and the other in the realm of debates around media infrastructure, especially in the context of contemporary spectrum allocation issues.

In "*Software Programmes, the Internet and Copyright law: An Analysis of American Law*," the authors Himabindu Killi and Sruthi Namburi examine the American law on the problematic area of defining the scope of a copyright granted to a software program. The authors examine the development of case-law on the matter, traversing the journey from *Apple Computer, Inc. v. Franklin Computer Corp.* to *Whelan Associates Inc. v. Jaslow Dental Laboratory, Inc* and finally ending at the landmark case of *Computer Associates International Inc. v. Atlai, Inc*, which remains the seminal case in regard to computer programs. The authors, thus, suggest that countries having small body of copyright law, like India, would be best served by following the *Altai* case, which continues to be good law on the issue of what is protectable in a computer program.

Sahil Arora and Aanchal Basur, in their article "*Media Reporting in 'Emergency Situations': An Appraisal of the Self-Regulation Undertaken in the Aftermath of the 26/11 Mumbai Terror Attacks*," have looked at a topic that

has created a lot of debate—the media reporting of the 26/11 terror attacks in Mumbai. The media was criticised heavily from all quarters for its insensitive and callous reporting of the tragic event which not only endangered the safety of security personnel and hostages but also created dangers to communal harmony in society. The media, in light of such criticism, pledged to undertake a range of self-regulatory actions. The authors, after examining the self-regulatory mechanism that had been adopted, comment on the inadequacy of the mechanism before coming up with a regulatory model that they feel would be able to strike a balance between the need for public harmony and the right of the media to report freely.

The next article "*Defending the Fourth Estate- Reporting of Sub-Judice Matters in Light of Sahara v. Sebi*" by Abhishek K. Singh looks at the contentious issue of reporting of *sub-judice* matters, in light of the Supreme Court's judgement in *Sahara India v. SEBI*. The Supreme Court in this case held that if the High Court or the Supreme Court is of the view that any reporting might result in possible Contempt of Court, it may issue postponement orders. The author, in the article, has systematically dismantled that the reporting of *sub-judice* matters hampers the course of justice, arguing instead that such reporting results in furthering the ends of justice. The judgement has also been criticised for wrongly relying on a previous case which has no relevance in the present scenario.

The last article that we have is "*The Technology of Rights: The Implications of Digital Rights Management for Fair Use, Privacy and Freedom of Expression*" by Astha Pandey. The author, in light of the growing importance of electronic media in contemporary society, has discussed the recently passed *Indian Copyright (Amendment) Act, 2012* with regard to the impact it may have on media law, with a specific focus on the issue of Digital Rights Management. The potential conflict between DRM and the fair use doctrine as well as the implications of DRM technology on privacy and right to freedom of speech and expression have been examined in the article as part of the larger analysis of the social implications of DRM technology.

The Board of Editors genuinely hope that the Journal's readers will find this issue both interesting and useful in their media law related research.

Board of Editors

MEDIA AS AN INSTRUMENT OF PUBLIC ACCOUNTABILITY

Justice G. Raghuram *

Abstract

India is currently standing at an interesting and challenging bend of history. There is a deep deficit of faith and credibility in the formal institutions of governance while general human conduct and institutional functioning in the recent past have largely been unedifying. In such a scenario, reform of our public institutions and State actors' return to professional behaviour, hinges to a very large extent on citizens holding institutions and incumbents accountable. Making our public institutions effective and accountable; regulating malfunctioning public services; and disciplining delinquent public actors requires an adequately informed people. This can be achieved only by knowledge which is based on continuous and detailed information. This is where the media comes in. Since the dawn of cognitive human existence, we are driven by the need for accurate and reliable information that helps us sustain existence in a challenging natural and societal habitat. Today, a professionally competent and neutral media, sensitised to the awesome, onerous and continuous responsibility of informing democratic society of its obligations and rights; of its essential sovereignty; and of the unvarnished anatomy of their public institutions, is a non-derogable and vital tool. A competent and responsible Media is perhaps the only remnant factor that validates the optimism of a sustainable future.

I. Journalism as an institution

Journalism is the medium and the system that society generates to supply news. Therefore, the character and integrity of the news and the institutions of journalism are of critical concern. Journalism influences the quality of our lives, moulds our thoughts and indexes our culture. It provides a unique component to our culture – independent, reliable, accurate and comprehensive information that we as citizens require, to be free.

Journalism that is ordered to be or which provides something other than the above characteristics subverts democratic

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culture. History verifies this reality. From the Roman empire through Nazi Germany, the former Soviet Union, the Middle-eastern monarchies, dictatorships – old and new and fundamentalist States, reinforce the fact that distorted journalistic values, whether they be distortion on account of external control or internal pathology, subvert cultures, enfeeble the population, promote inequality, and sooner or later, contribute to the fall and decline of society.

Corporate controlled Media and its associated pathology started in the United States in a more purely commercial form. News outlets owned by large corporations were employed to firstly, promote their conglomerate parent's products; secondly, to engage in subtle lobbying to gain an upper hand over their corporate rivals. This pathology becomes malignant when a media house or group owes loyalty to a broad political formulation due to its corporate affliations. When this happens, political discourse in the society, which is the life-blood of a democracy, becomes garbled, slanted and wholly distorted.

There was widespread public condemnation of the essentially insensitive and even down-right dangerous handling of the terrorist attacks in Mumbai in November, 2008, by some sections of the Media. E·ven, responsible sections of the media lament the tendency to sensationalise news and the growing obsession with irrelevance and Television Rating Points[1], at the expense of honest reporting of events and issues that matter to most of the people. The country has been witness to shocking exposes of the growing phenomenon of paid news, an element which ridicules any pretence of objective and honest reporting. Nevertheless, the explicit desire to sensationalise and the equally strong desire to present news in ways that suit corporate bosses have come to define the way most mass media in the country operate today– Media accountability is sometimes confused with self-regulation. It does include self-regulation but it is a far wider concept. Self-regulation implies that Media imposes rules upon themselves. Most often Media owners initiate in-house discipline for fear that the 'Government will legislate restrictions to their freedom of enterprise, taking public

1 Hereinafter TRP.

hostility towards Media as a pretext. Sometimes journalists initiate rules to ensure good service and to protect their profession..

II. Accountability to State or People?

We are often posed with a mind boggling question with regard to accountability towards an entity. *Who are we accountable to?* Clearly and obviously, the accountability is to the public. Media accountability involves the Press, the profession and the public. Somewhere in the middle of the 20th century, the Press Council evolved involving these three groups in order to mediate complaints by users against the Media. In western European, African and Asian nations, the Press Council has come into its own. There are several structural, organisational and compositional varieties in the architecture and operation of Press Councils, in different countries and societies.

Operational deficit with many Press Councils is that they tend to consider themselves as complaint Councils and insist on mediating and not on adjudicating against the Media, if they can avoid it. In a holistic perspective, the role of the Council is not just to satisfy a few individuals or groups who have been heard by the Media; not just to avoid law suits; and not just to discourage the State or limiting the freedom of the Media to make money. A Press Council is meant to improve the news. Many Press Councils keep a low profile but a vibrant Council on the other hand should not avoid seeking publicity, taking positions, establishing case law and taking initiatives even when no complaint is lodged. It should also assume functions like reporting on the state and evolution of the Media and periodic audit of the Media in terms of its essential functions. A Press Council should take interest in the training of journalists to improve professionalism and take up research on how the Media actually functions, what influence it exercises and what citizens need from them.

At this juncture, it is necessary to briefly refer to the complex and multi-dimensional linkages among the Media, good governance, democracy; and sustainable and peaceful development. The Media shapes public opinion but it is in turn influenced and often manipulated by different interest groups in the society. The Media can promote democracy by educating voters, protecting human rights, promoting tolerance and accommodation amongst social groups and ensuring

that governments are transparent and accountable. The Media can play anti-democratic roles as well. They can inject or promote fear, division and violence and thus instead of promoting democracy, can contribute to democratic decay.

A fearless and effective watchdog is critical in fledgling democracies where institutions are weak, homo-centric and persuaded by political pressure. When legislators, judiciaries and other oversight bodies are powerless against the mighty or are themselves corruptible, the Media is often the only check against the abuse of power. To efficiently deliver upon this role, the Media must play a heroic role, exposing the deficiencies, the excesses or the delinquencies of legislators, bureaucrats or magistrates, despite the risks. A watchdog Press is the guardian of public interest, warning citizens against those who are doing them harm.

> *Were it left to me to decide whether we should have a Government without newspapers or newspapers without Government, I should not hesitate to prefer the latter.*[2]

Amartya Sen, the Nobel Laureate, ascribed to the Press cleansing powers and outlined the need for transparency and guarantees such as a free Press and flow of information. He also argued that information and critical public discussion are an inescapable important requirement of good public policy and the Media have a clear instrumental role in preventing corruption, financial irresponsibility and under-hand dealings.

Though ownership of Media is a very serious problem, there are many good practices of the Media promoting democracy and good governance by pursuing neutral, professional and integrity based investigative reporting. The Media serves as a watchdog and investigative reporting on corruption, human rights violations and other forms of wrongdoing helps build a culture of accountability in Government and strengthen democracies. Serious investigative reporting must however not be confused with flippancy, disproportionate sensationalism or disguised blackmail, nor is it a one-time affair. The investigation must be clear, penetrating, continuous, and be persuaded to the logical conclusion of ferreting

2 Thomas Jefferson, 16 Jan. 1787 Papers 11:48—49.

out the facts of the wrongdoing. Investigative journalism to be effective and credible requires skill apart from the ethical values and these are obtained only by special training on reporting techniques; on reading financial statements; constructing data-bases; and researching on the internet or by cultivating human intelligence, i.e., by personal contacts with the concerned.

III. A forum for discussion

Another vital role that the Media performs is as an information tool and a forum for discussion. In democratic societies where elections are the key to democratic exercises and societies where caste, language, religion or other such narrow constraints diminish the bases of democracy, the Media plays an important role in highlighting the positive and negative characteristics of political parties and candidates; including past performance, personality, record of service and the track of integrity. In societies where corruption is a serious factor, the Media must highlight the difference in wealth and assets of the candidate pre and post public office. Views, ideologies, theories of governance, a critical analyses of election manifestos; whether particular or specific promises that are made in the manifestos are sustainable given the economic and differential developmental reality, are areas where the Media serves as a vital tool for information dissemination and could provide a forum for discussion and enlightenment of citizens. This, in turn, deepens democracy and vitalises governance.

Media also serves as a tool for fostering peace and building consensus in the socio-political diaspora. The role of the Media is significant in moderating passion mediating between warring sections and providing a voice of sanity. On this count, the Indian Media has faced serious criticisms. Some analysts point out that Media has generally not played a neutral role in conflict situations. In many cases they have fanned flames of discord by taking sides, muddling the facts, peddling half-truths or reinforcing prejudices. Too often, sections of the Media have been criticized for sensationalising violence without explaining the roots of conflict. Many non-governmental organisations across the world are now endeavouring to train journalists in "peace journalism" which is intended to promote reconciliation through careful reportage that lends voice to all sides of a conflict and resists explanations for violence. Different levels of Media can play a constructive and hierarchical role in mediating conflict and brokering peace. These differ in context on whether the Media entity is a national, regional, State or local provider.

This primary purpose of journalism is however being undermined and challenged today in ways not seen earlier in human history, at least in liberal societies. Technology is shaping a new economic organisation of information companies which is subsuming journalism inside it. Today the threat is no longer or even primarily from government censorship. The new danger is in independent journalism being dissolved in the solvent of commercial communication and synergistic self-promotion. The Indian Constitution's implied guarantee of a free Press as an independent institution is threatened for the first time in our history even without government meddling.

The central purpose of journalism is to tell the truth, the whole truth and nothing but the truth – so that people will have the information they need to be sovereign.

> *With its vast and direct influence on public opinion, journalism cannot be guided only by economic forces, profit and special interest. It must instead be felt as a mission in a certain sense sacred, carried out in the knowledge that the powerful means of communication have been entrusted to you for the good of all.*[3]

Walter Lippmann, one of the world's most famous journalists, observed that democracy was fundamentally flawed. People, he said, mostly know the world only indirectly, through the pictures they make up in their heads. And they receive these mental pictures largely through the media. The problem Lippmann argued, is that the pictures people have in their heads are hopelessly distorted and incomplete, marred by the irredeemable weaknesses of the press. Just as bad, the public's ability to comprehend the truth even if it happened to come across it was undermined by human bias, stereotype, inattentiveness, and ignorance.

Another major pathology of much of journalism today is corporatisation transiting through conglomeration and indexed by globalisation. News chains and corporate media houses that own outlets across different communities are throwing up newer challenges for the ethics of journalism. News decisions by conglomerated media houses are based on a set of simplified cultural cues. This is the reason why titillation, disaster, violence, crime, and tragedy occupy the centre-stage in the content

3 Pope John Paul II, Vatican's Holy Year Day for Journalists, June 2000.

of the media. The chief criticism against this regress is mediocrity and homogeneity of the news content. As in many areas of the world, Indian' journalism is increasingly purchased by the entertainment business, e-commerce and industrial and business establishments, and of late by political interests. After all, Indian politics returns the highest economic profits and with none or marginal economic or intellectual investment and beyond the fear of audit.

That journalism's first obligation is to the truth is agreed. There is however utter confusion on what truth means. When a committee of certain journalists and the PEW Research Centre for the People and the Press in 1999 conducted a survey and interviewed a large number of journalists in the West, all the interviewed members of the profession answered that truth means : getting the facts right. All members of the media, the electronic included, volunteered that truth is a primary mission.

Since news is the material that people use to learn and think about the world beyond themselves, the most important quality is that it should be usable and reliable. Truthfulness creates the sense of security that grows from awareness and is the essence of news.

The earliest colonial journalism was a heady mix of essay and fact; opinion and reality. Journalists trafficked in facts mixed with rumour. As it disentangled itself from political control in the 19th century, journalism in the West sought its first mass audience by relying on sensational crime, scandal, thrill seeking and celebrity worship - the age of yellow journalism had dawned; but even here the Lords of the Yellow Press sought to assure their readers that they could believe what they read even if the pledge was usually dishonoured. Truth being subjective .and relative and journalism by nature being reactive and practical rather than philosophical and interpretive, journalism's perception of truth may be different from truth as perceived by philosophers, by the legal community or by epistemologists. Journalist Jack Fuller in his book, News Values: Ideas for an information age' explains that there are two tests of truth according to philosophers. One is correspondence and the other is coherence. For journalism, these roughly translate into getting the facts straight and making sense of the facts. Coherence must be ultimate test of journalistic truth, Fuller decides. They want the whole picture, not just part of it – they are tired of polarised discussion.

While context and coherence are the bedrock of the journalists'

version of truth, accuracy is as important. It is the foundation upon which everything else is built. If the foundation is faulty, everything is flawed. One of the risks of the new proliferation of news outlets, talk-shows and interpretative reporting is that it has left verification behind. A debate, for instance between political opponents at election time, arguing with false figures, on flawed data or purely on prejudice fails to inform. It only inflames and does not take a society anywhere.

To put it very briefly, it is realistic to understand journalistic truth as a process; a continuing journey towards understanding, which begins with naked facts of an event or a transaction and builds over time with corresponding, developing, integrating and coherent facts that give the reader/viewer a vision of the complex mosaic of truth. Truth thus in journalism is a calendar of facts getting fuller over time.

The media needs to concentrate on synthesis and verification, sift out the rumour, innuendo, the insignificant, and the spin and concentrate on what is truth and important about a story. Verification and synthesis thus become the backbone of the new gatekeeper role of a journalist, i.e., the role of being a news-maker. Walter Lippmann wrote in 1922: The function of truth is to bring to light the hidden facts, to set them into relation with each other, and make a picture of reality upon which men can act. Since social transaction reality has a spatial element, the search for truth becomes a conversation continuing over time.

IV. Who do journalists work for?

The next element is to realise who journalists work for, or rather should be working for. We understand that in today's corporatized media, news organisations answer to many constituencies apart from primarily the corporate self-interest - to community institutions, local interest groups, parent companies, shareholders, advertisers and many more and other interests. All must be considered and served by a successful news organisation. Journalists inside such organisations and the organisations themselves as well must, however, have one allegiance above any other. Journalism's first loyalty is to citizens. This is the implied covenant with the people.

People who gather news are not like employees of other companies. They have a social obligation that can and should actually override their employer's immediate interests at times, and yet this obligation is a source

of their employers' success. Only in the latter part of 19th century did newspaper publishers begin to substitute editorial independence for political ideology. There are numerous shades of principles that inform the content of journalism's first loyalty to citizens.

Suffice it to note that rather than selling customers content, news people are building a relationship with their audience, based on their values, on their judgment, authority, courage, professionalism, and commitment to community. Providing this creates a bond with the public, which the news organisations then rent to the advertisers. The business relationship of journalism is different from traditional consumer marketing, and in some ways more complex. It is a triangle. The audience is not the customer buying goods and services. The advertiser is. Yet the customer/advertiser has to be subordinate in that triangle to the third figure, the citizen.

In the corporatized media context, the public must understand their stake in the value of this freedom and demand that their democratic interests must be recognised not only by journalists but by the corporate leadership to whom the journalists now answer. If this does not occur, journalism independent of the corporate self-interest will disappear.

Another element of journalism is independence from those they cover. This element applies even when journalism operates in the realm of opinion, criticism and commentary. The practitioners of journalism must therefore be independent and to a large extent neutral to class or economic status; race, ethnicity, region and gender; as well as to the richness of conflict that exists in complex and large societies. This is so, since the identification of workable solutions that will achieve equilibrium in complex societies is the function of social debate and discourse and the compromises that societies make must emerge out of the crucible of such discussion and discourse. As the monitor of power, however, journalism must strive to put before the public all shades of opinions that abound in civil society.

A Independent monitors of power

Journalists must serve as independent monitors of power. In the words of James Madison, one of the founders of American democracy, Journalism is a bulwark of liberty, just as truth is the ultimate defence of the Press. *In New York Times Co. v United States*[4], Justice Hugo Black, emphasised

4 403 US 697 (1971)

the watchdog role of the press when he wrote: The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

Being an independent monitor of power means simply and properly; watching over the powerful few in society on behalf of the many, to guard against tyranny. Professional investigative reporting must be distinguished however with muckraking.

There are broadly three types of investigative reporting. Original investigative reporting which involves reporters themselves uncovering and documenting activities previously unknown to the public. This kind of investigative reporting often results in official public investigations about the subject or activity being exposed. This is a case of the press pushing public institutions on behalf of the public. The uncovering and investigations into the recent CWG and Spectrum scams are illustrations of the beneficial role of this watchdog role of the media.

The second type is interpretive investigative reporting. In this, reporting develops as the result of careful thought and analysis of an idea as well as dogged pursuit of facts to bring together information in a new, more complete context which provides deeper public understanding. This is possible only by a synthesis between facts and interpretation. Government programmes like SEZ allocations, industrial licensing, contracts and huge land grants can be effectively monitored for regularity only by exposing the connectivities between executive discretion and executive rain-making. This is an area that is not much pursued in India.

Reporting on investigations is the third investigative category where reporting develops from the discovery or leak of information from an official investigation already under way or in preparation by others, usually government agencies. Reporting on investigations requires enormous due diligence.

Each type and methodology of reporting carries distinct skills, levels of commitment, professionalism, integrity, scepticism and risk. Too often reporters are not mindful of the distinctions and their own distinct role and the ethics involved.

B. Journalism as a public forum

Media must provide a forum for public criticism and comment. It

must alert the people to public issues in a way that encourages judgment. The natural curiosity factor means that by reporting details of events, disclosing wrongdoing, or outlining a developing trend, journalism sets people wondering. As the public begins to react to these disclosures, the society becomes filled with the public voice - on radio and TV, call-in programmes, talk- shows, personal opinions and response pages and shows. Those in power hear these voices and make it their business to understand the nature of the public opinion developing around the subject.

The public forum function of the media counteracts the exclusive access that modern governments provide to powerful interest groups, business and industrial houses who operate through exclusive networking, lobbyists or specialised opinion makers and political propaganda. The media should decipher the spin and lies of commercialised argument in the society. This forum component must be available for all parts of the community, not .just the affluent or the demographically attractive sections. Since society is built on compromise, the public forum must include the broad areas of agreement, where most of the public resides, and where the solutions to the society's problems are found.

C. The news must be comprehensive and proportional

Journalism is the modern cartography of society. It creates a map for citizens to navigate. Sensation and titillation makes for good TRP ratings but is a poor guide for enriching social awareness or the democratic content. An hourly dose of scandal and tid-bits does not enrich the people, improve their lives or index the sovereignty of the individual, which is critical to democracy. The nightly newscasts we observe have shifted to less reported news of the work of civic institutions to more of entertainment.

ABC news correspondent Robert Krulwich observed in 2000: We have reached the point where entertainment divisions are doing the news and news divisions are doing the entertainment. In the spring of 2000 ABC hired movie actor Leonardo DiCaprio to interview President Bill Clinton about the environment but quickly abandoned the project amid staff protests. Manifest chaos had started dominating the news divisions.

Kovach and Rosenstiel observe that news journalism has lost its way in large part for the reason that it has lost meaning in people's lives, not only its traditional audience but the next generati.on as well. Journalists have lost the confidence of the people by failing to make the news comprehensive and proportional. Closer home we have evidence of this

insecurity in the media. Otherwise why would channels proclaim that they are the first to bring to you, the Japanese earthquake and the tsunami? Self-acclaim in news is the earliest symptom of content poverty and degeneration.

C. Responsibility to individual conscience

Every journalist - from the newsroom to the boardroom - must have a personal sense of ethics and responsibility - a moral compass. Each has a responsibility to voice their personal conscience out loud and allow others around them to do so as well. In the end, journalism is an act of character. Since there are no laws of journalism, no regulations, no licensing, and no formal self- policing, and since journalism by its nature can be exploitative, a heavy burden rests on the ethics and judgment of the individual journalist and the individual organisation where he or she works. This is a difficult challenge to any profession. But for journalism, there is the added tension between the public service role of the journalist - the aspect of the work that justifies its intrusiveness - and the business function that finances the work. Those who inhabit news organisations must recognise a personal obligation to differ with or challenge editors, owners, advertisers, and even citizens and the established authority, if ·fairness and accuracy require that they do so.

It is clear from the preceding discussion that a journalist has to be trained like any professional and the training, as the trends and norms of the profession show, must be rigorous and include the fundamental ethics, the nature of the personal character required and the difficulties of practicing this craft with integrity and commitment. An untrained journalist is a greater menace to society that an irresponsible government. And we have ample evidence of both before us today.

A free press is rooted in independence. Only a press free of government censor could tell the truth. In the modern context, that freedom must be expanded to mean independence from other institutions and interests as well - political parties, advertisers, business and industrial houses and cultural, racial and religious insularities as well. A conglomeration of news business threatens the survival of the Press as an independent institution of journalism .

In the corporatized context, the challenge of our age is: whether the public can rely on this new subordinated media to monitor the powerful

interests in society? Can we rely on a few large companies to sponsor that monitoring, even when it is not in their corporate interests? The essential question is: can journalism sustain in the 21st century, the purpose that was forged in it the three-and-a-half centuries that came before? This is in my humble view the great and momentous challenge and the dialectic dilemma that is facing the profession today.

I am one humble consumer of the product of journalism. I have no expertise, no familiarity with the skills and intellectual components that inform the operations of your craft. I have however deep concerns and it is these inadequately reasoned concerns that I have placed before this constellation of talent and expertise in the field of journalism. Each of you is more and eminently qualified to deliberate on the problems of the profession, if you recognise that there is a problem. Please consider in your wisdom if the time has come to reflect on and identify the core and elemental values of journalism, examine and audit whether the profession today is on track or has deviated from the elemental path and what needs to be done.

Aidan White, the General Secretary- International Federation of Journalists, presented a crisp but scintillating paper on the theme Media Accountability: Setting Standards for Journalism and Democracy to the Bali Democracy Forum Workshop on December 09, 2009. Some of his observations are noteworthy. The Bali workshop was about exploring and developing one of the key ethics of journalism - Accountability. The other three key ethics were identified as truth-telling; independence; and responsibility to the people Media serves. White observed :

> *But making ourselves accountable, owning up to our mistakes and revealing our frailties to the outside world is not something journalists ever find easy. There is nothing that journalists like better than exposing the hypocrisy of politicians, the corruption that is rife in the world of business and the frailties of celebrity. But while journalists relish dishing out punishment to society's sinners and big-shots, they are notoriously thin skinned when it comes to admitting their own mistakes. The failure of media to be open and accountable is rightly identified as a symptom of arrogance and complacency.*
>
> *Media accountability to be effective must be about the defence of press freedom not defence of the press yet many of the existing self-regulating press councils in the world have their roots in campaigns to avoid*

> *governmental legislation against the press. That has often created the impression that these press councils are self serving.*
>
> *Media accountability in whatever form it comes must balance the rights of the individual and the community and the rights of the press to free expression. It must be framed in the notion that both the freedom and the regulation are indispensable if we want news media to provide citizens with the service they need to be informed participants in democratic life.*
>
> *Accountability should also be based upon the principle of self-rule. That is why many press councils and media commissions are set up by the media themselves. But to be credible and to build public confidence they must operate with a high degree of independence from media and provide a set of rules under which people featured in the news media can complain if something is inaccurate, intrusive or unfair. They must also be open to participation from the communities that media serve.*
>
> *Commercial media are increasingly incapable of meeting democracy's needs. But what are the alternatives? One of them is the growing success of the non-profit media, particularly public broadcasting. In the United States, for instance, as the giants of the private media have been laid low National Public Radio, whose funding comes from foundation grants, corporate grants and sponsorships, and licensing fees, has seen its listenership double in the past ten years. Foundations and other non-governmental subsidies are increasingly playing a role.*[5]

However they are employed, and by whom, journalists hold several keys to the fate of their craft. Journalists tend to see their work as a vocation, but their faith in that calling has been badly shaken in recent years. Morale is low. It is hard to do good work when your work is under threat, when the social and professional conditions are scarred by neglect, corruption and interference. The resulting impact on quality of journalism is palpable.

5 Adian White, General Secretary, International Federation of Journalists, Media Accountability: Setting Standards for Journalism and Democracy.

THE LIMITS OF SPEECH: EXTENDING FREE SPEECH BEYOND THE CENSORSHIP PARADIGM

Danish Sheikh[*]

Abstract

There is a set paradigm for understanding free expression law in the country today: it exists in an oppositional space to that of censorship. We understand free speech in terms of the reasonable restrictions under Article 19(2) of the Constitution: guided more by what cannot be spoken as opposed to expanding on what can be. The judicial role in evaluating these has often been to ensure that the restrictions don't override the right.

In only looking at free speech as a negative right, in merely evaluating it in terms of where the State cannot encroach, we miss looking at the important domain – of where it should step in. Free speech must be understood as a positive obligation upon the state. This paper will explore two very different strands of extending these arguments: one in the realm of disability jurisprudence, and the other in the realm of debates around media infrastructure. In the former, I attempt to tease out arguments for access to free speech for persons with disabilities from existing case law, and in the latter, I scope out the post-independence newsprint debates to explore ramifications on free speech with present day spectrum allocation issues.

The Limits of Speech?

Extending free speech doctrine beyond the Censorship paradigm

I. Introduction

Article 19(1)(a) of the Indian Constitution guarantees to every citizen the freedom of speech and expression.[1] As with all the other rights under Article 19 of the Constitution, this freedom is not absolute. Article 19(2) of the Constitution allows the continuance of existing laws and enactment of future laws so long as any restriction on the exercise the right is reasonable and 'in the interests of the sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence.[2]

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1 Article 19(1)(a) of the Constitution of India, 1950. [Hereinafter referred to as the Constitution].

2 Article 19(2) of the Constitution.

There is a set paradigm for understanding free expression law in the country today: it exists in an oppositional space to that of censorship. We understand free speech in terms of the reasonable restrictions under Article 19(2) of the Constitution: guided more by what cannot be spoken as opposed to expanding on what can be. The judicial role in evaluating these has often been to ensure that the restrictions don't override the right. This extends from the prevalent international regime concerning the entire panoply of civil and political rights on the one side, and social and economic rights on the other. With the divide between these 2 sets of rights that conventions succeeding the Universal Declaration of Human Rights introduced, what was also institutionalized was the idea that civil and political rights were as such "negative" rights, while social and economic rights were "positive" in their content. In effect, the presumption that stood was that while States needed to expand resources to uphold social and economic rights, no such correlative obligation required observance in respect of civil and political rights.[3]

In only looking at free speech as a negative right, in merely evaluating it in terms of where the State cannot encroach, we miss looking at the important domain – of where it *should* step in. Free speech must be understood as a positive obligation upon the state. This paper will explore two very different strands of extending these arguments: one in the realm of disability jurisprudence, and the other in the realm of debates around media infrastructure.

When it comes to disability rights, the Convention on Persons with Disabilities marks cognizance of the negative-positive rights dichotomy, and attempts to create hybrid rights, notably with the right to freedom of expression. For recognition of this right, provision has to be made for alternative and augmentive modes of communication, as without such provision the right would be meaningless.[4]

As for questions of media infrastructure, we find that much of the discourse around spectrum today is premised on the corruption aspect of the 2G scam. A large portion of the discussions following the recent 2G judgment[5] were premised on the implications of the cancellation of 122

3 Amita Dhanda, *Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities*, Year 5 No. 8 Sao Paulo June 2008.

4 *Infra* no. 15.

5 *Centre for Public Interest Litigation and others v. Union of India*, Judgment dated February 2, 2012,

licenses across the country. What was left relatively unspoken was the manner of spectrum allocation that the Supreme Court was suggesting: that of spectrum auctions. Missing in this analysis was an understanding of the relevant public interest concern for advocating the same, a concern that I argue should be premised on free speech. What, then, is the method of spectrum allocation that will best allow for propagation of more speech? And what lessons can we take from prior jurisprudence relating to media infrastructure, particularly with the post-independence newsprint debates?

II. Disability and Free Speech

Autonomy is a prime component of the freedom of thought and expression, the prerequisite for which is the ability to communicate. Communication is a crucial way for people to relate to each other, an indispensable outlet for emotional feelings, and a vital aspect of the growth of one's character and ideas.[6] Granting – and realizing – the liberty of speech constitutes recognition of people, both speakers and listeners, as autonomous and rational, and further constitutes public recognition that people have dignity and are equal.[7]

When we come to persons with disabilities though, we find that communication stands impeded, that information flows stand hampered, that dissent even, stands silenced. The mandate under Article 19(1)(a) of the Constitution requires much more than non-interference from the State: when it comes to persons with disabilities, there is a very strong positive obligation on the part of the state that is required to realize the right to freedom of expression.

The jurisprudence of Article 19(1)(a) of the Constitution as it stands today in India has little to address directly to persons with disabilities. This section of the paper will instead attempt to make analogical extensions from existing case law to examine the ways in which the right to free speech plays out when it comes to persons with disabilities.

A. Speech As Information And Communication

Freedom of speech and expression has been held to include

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available at http://supremecourtofindia.nic.in/outtoday/39041.pdf (last visited on March 3, 2013).

6 Kent Greenawalt, FIGHTING WORDS : INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH, Princeton University Press, 1st ed. 1995.

7 *Id.*

freedom of propagation of ideas[8] and opinions.[9] True democracy, the courts have held, cannot exist unless all citizens have a right to participate in the affairs of the country.[10] This right is meaningless unless the citizens are well informed on all sides of issues, in respect of which they are called upon the express their views. In the judgment of *S P Gupta v. Union of India*[11], the Supreme Court deduced the right to information from the guarantee of free speech and expression contained in Article 19 1(a) of the Constitution. Its reasoning is clearly influenced by the doctrine developed by the US courts that certain unarticulated rights are immanent and implicit in the enumerated guarantees.[12]Furthermore, freedom of the press, and consequently dissemination of information to people was held to be integral to the effective exercise of the freedom of speech and expression.[13]

Extending this argument, it can clearly be argued that citizens with disabilities should be provided information by methods and through a medium which they can access. Without such information citizens with disabilities cannot have the informed understanding of issues which is required for the effective exercise of the freedom of speech and expression.[14]

Further, the non-recognition of sign language, Braille script and other modes of communication is a restriction on the freedom of speech and expression.[15] As this restriction results in a total loss of freedom, it cannot be considered reasonable, even other than the fact that it can't really be justified under any of the grounds for restriction. A hearing impairment coupled with an inaccessible phone system, for example, results in virtual exclusion from telephony and all of the roles telephone communication can play in everyday life.[16]

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8 *Romesh Thappar v. State of Madras*, A.I.R. 1950 S.C. 124; *Sakal Papers (P) Ltd. and Ors. etc. v. Union of India,* A.I.R. 1962 S.C. 305.

9 *S. Rangarajan v. P. Jagjivan Ram and Ors*, 1989 (2) S.C.C. 574., at ¶ 8.

10 *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, at ¶ 80.

11 AIR (1982) SC 149.

12 THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK : INTERNATIONAL AND COMPARATIVE LAW, STANDARDS AND PROCEDURES, August 1993, available at www.article19.org/pdfs/publications/1993-handbook.pdf (last visited May 12, 2013).

13 *Bennett Coleman v. Union of* India, AIR (1973) SC 106.

14 NATIONAL HUMAN RIGHTS COMMISSION DISABILITY MANUAL 2005, available at http://nhrc.nic.in/Publications/Disability/chapter10.html, (last visited on April 1, 2011).

15 *Id.*

16 Paul T. Jaeger, Cynthia Ann Bowman, UNDERSTANDING DISABILITY : INCLUSION, ACCESS,

Access to information and communication would not necessarily be based on mechanical faculties – there is also the realm of learning disabilities which must be taken into account. Further, with the United Kingdom case of *Hewett v. Motorola Ltd.*[17], the Employment Appeal Tribunal confirmed that difficulties in understanding were not limited to difficulties in understanding information or knowledge but included difficulties in understanding social interactions. Based on this acknowledgment, impediments faced by persons with Autism or Asperger's Syndrome, or related disabilities would also come under the ambit of protection under this right. [18]

It is important to recognize that a budgetary restraint argument simply cannot be maintained by the State in this regard. The State and its agencies often tend to counter allegations of non-realization, with economic incapacity. The Supreme Court has set aside such a trend in *Municipal Council, Ratlam v. Shri Vardhichand*[19] : "The Human Rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Otherwise a profligate statutory body or pachyderm governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget."

One level of interventions are required in the form of funding and support of all the necessary aids and equipment that will enable persons living with disability to access the full range of information and communications products and services that are available to the rest of the population. Comparative provisions may be found with respect to Title IV of the Americans with Disabilities Act which amended the prior Communications Act of 1934. This amendment requires that all telecommunications companies in the U.S. take steps to ensure functionally equivalent services for consumers with disabilities, notably those who are deaf or hard of hearing and those with speech impairments.[20] The Telecommunications Act of 1996 further establishes accessibility requirements for telecommunications equipment and services, applying to the design, manufacture, and delivery of telecommunications services.

DIVERSITY AND CIVIL RIGHTS, Praeger, 1st ed. 2005.

17 2004 IRLR 545 EAT.

18 See James Graham, AUTISM, DISCRIMINATION AND THE LAW : A QUICK GUIDE FOR PARENTS EDUCATORS AND EMPLOYERS, Jessica Kingsley Publishers, 1st ed. 2008.

19 (1980) 4 SCC 162).

20 See Spain's *Real Decree1497/2007* establishing the use of accessible technology, products and services related to information and mass communication.

Intended to provide both physical and intellectual access, this law mandates that, when possible, accessible telecommunications technology is available for federal agencies providing government information and services online.[21]

Internet Accessibility is another important area of concern. As the content of the Internet has become more popular and more complex, constantly evolving graphical, auditory, and other features have made it continually harder for persons with visual, hearing, mobility, cognitive, and learning disabilities to use the Web. Though assistive technologies and adaptive devices have been designed to help overcome the general inaccessibility of the online environment, so long as most sites are not developed to be accessible to users with disabilities, many of the services and much of the content on the Web remain beyond the reach of many persons with disabilities.[22]

Recognizing the importance of accessibility in the online environment, the World Wide Web Consortium began to develop the Web Content Accessibility Guidelines in the late 1990s. These guidelines are recommendations for all Web sites to follow to ensure accessibility for users with a range of disabilities, emphasizing design for full accessibility for all persons with disabilities in the creation of a Web site.[23] They are in effect, the touchstone by which most lobbyists, legislatures and web developers determine the accessibility of a website. [24]

Information and programs broadcast on television are inaccessible for deaf and blind persons. It is necessary that certain laws are amended with a view to ensuring that persons with auditory/ visual disabilities be able to enjoy television with the benefit of closed captioning that would enable captioning of all audio content on a program, as well as audio transcription[25] to benefit blind persons. Provisions for close captioning can

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21 HARMONIZING LAWS WITH THE UNCRPD, Ed. (Dr, Amita Dhanda, Rajive Raturi), Human Rights Law Network, 2011, available at www.hrln.org/hrln/reports/.../Harmonizing%20Laws.pdf (last visited on 12-5-2013).

22 Paul T. Jaeger, Cynthia Ann Bowman, UNDERSTANDING DISABILITY: INCLUSION, ACCESS, DIVERSITY AND CIVIL RIGHTS, Praeger, 1st ed. 2005.

23 *Id.*

24 *Understanding Web Accessibility,* available at: http://www.infosysblogs.com/web2/2008/11/understanding_web_accessibilit.html#more; see Shawn Lawton Henry, UNDERSTANDING WEB ACCESSIBILITY, available at http://uiaccess.com/understanding.html#whatis.\,(last visited June 5, 2013).

25 This technology provides auditory cues describing onscreen proceedings as an aid to blind

be found in a number of countries across the world, notably Argentina[26] and the United States.

B. Speech As Dissent

Cass Sunstein argues that at the core of modern free speech law is a prohibition on government discrimination against any point of view. He discusses how terrorists suffer from a crippled epistemology – that, in effect, conformists of all kinds in their way suffer from a crippled epistemology. While public forums may not always supply a complete corrective, things are likely to go far better if dissenting views are heard and if people reject those views only after actually hearing them. Free societies depend on a high degree of receptivity in which many perspectives are heard, and in which dissent and disagreement are not unwelcome.[27]

A legal system that is committed to free speech forbids the government from silencing dissenters. Extraordinary though this accomplishment may be, it is not nearly enough – people often silence themselves not because of the law but because they defer to the crowd – something that the binary of discredited and discreditable in the realm of persons with psychosocial disabilities lays testament to.[28] A well-functioning democracy necessarily has a culture of free speech, not simply legal protection of free speech. It encourages independence of mind, imparts a willingness to challenge prevailing opinion through both words and deeds. Equally important: it encourages a certain set of attitudes in listeners, one that gives a respectful hearing to those who do not embrace the conventional wisdom. In a culture of free speech, the attitude of listeners is no less important than that of speakers.[29]

Courts in India have time and again recognized the importance of this aspect of the right to freedom of speech and expression. In *Anant Janardhan Karandikar v. State*[30], the court proclaimed that the right to dissent is the very essence of democracy. Conformity to accepted norms and belief has always been the enemy of freedom of thought. Any form of intolerance to dissent is dangerous to democracy. Peaceful protests and the voicing of a

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persons.

26 Resolution Number 679/2008, 25 August 2008.

27 Cass Sunstein, WHY SOCIETIES NEED DISSENT, Harvard University Press, 1st ed. 2003.

28 See Susan Stefan, *Discredited and Discreditable : The Search for Political Identity by People with Psychiatric Diagnoses*, 44 William and Mary Law Review 2003.

29 *Infra* n. 41.

30 1967 CriLJ 28; *Ramprakash And Ors. vs State Of Madhya Pradesh And Ors,* (1976) 78 BOMLR 1.

contrary opinion are powerful wholesome weapons in the democratic repertoire.[31]

In *Sec., Ministry of Broadcasting v. Cricket Association, Bengal*, where the Supreme Court was dealing with the regulation of air waves and frequencies, it stated that freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment, enabling people to contribute to debates on various issues. If speech can communicate ideas and viewpoints, selective silencing of certain communities has the opposite, totalitarian effect.[32] Thus, in effect not providing an adequate platform to disabled persons, to express themselves, amounts to this kind of selective silencing.

The importance of the right to reply was examined by the Supreme Court in *Manubhai Shah v. Life Insurance Corp. of India*. In this matter, Professor Manubhai Shah had published a study paper which was strongly critical of the working of the government-controlled Life Insurance Corporation (LIC). A reply to Professor Shah's article was published in Yogakshema, a magazine of the LIC. Shah's request that his article should also be published in the same magazine was refused. The Supreme Court held that LIC's refusal was "unfair because *fairness demanded that both viewpoints were placed before the readers*".[33]

The importance of dissent and diversity in a democracy has perhaps most eloquently been worded by Sanjay Kaul, J. in *MaqboolFida Husain v Raj Kumar Pandey*[34], "India is ... (a) pluralist society which acts a model of unity in the mosaic of diversities and has taught the world the lesson of tolerance by giving shelter to the persecuted and refugees of all religions and all nations. The standards of the contemporary society in India are fast changing and therefore, now in this age of modernization, we should more so embrace different thinking and different thoughts and ideas with open arms. Democracy has wider moral implications than mere majoritarianism. A crude view of democracy gives a distorted picture. A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy. The

31 *Ram Bahadur v. State of Bihar,* 1975 AIR 223.

32 *Naz Foundation v. Union of India*, Petitioners Brief, available at www.lawyerscollective.org, (last visited March 3, 2013).

33 [1992] 3 SCC 637.

34 2008 (6) AD (Delhi) 533.

right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. There should be freedom for the thought we hate. Freedom of speech has no meaning if there is no freedom after speech."[35]

History has often found individuals with disabilities having been classified as having little social value or as not part of society at all.[36] The social construction of mental illness has become a vehicle to allow for marginalization and exclusion and allows for communities to deny the social and cultural conditions that gave rise to the expression of what is referred to as a mental illness. It allows for communities to conveniently label the biological difference as "illness" and not accept the diversity of subjective life experience.[37] It is as important to see how conversations are avoided, as it is to see how they are made, and with non-recognition of this aspect of the right to freedom of expression in the case of persons with disabilities, the conversations are often closed at the very onset. It is in that context that this aspect of the right to dissent becomes important to persons with disabilities. More than that, it is the very presence of the alternate voices that come from the midst of persons with disabilities that solidify this right.

Intellectual access to information for persons with disabilities, at a more conceptual level, entails equal opportunity to understand intellectual content and pathways to that content.[38] For individuals with learning disabilities, intellectual access is a keenly important issue, as their ability to understand certain content may hinge on how it is organized and represented. Clarity in organization and representation is similarly essential for intellectual access for individuals with cognitive disabilities.[39] For instance, it does no good for a screen to be made readable if the user still cannot access the information on the screen.

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35 *Id.*

36 Paul T. Jaeger, Cynthia Ann Bowman, UNDERSTANDING DISABILITY: INCLUSION, ACCESS, DIVERSITY AND CIVIL RIGHTS, Praeger, 1st ed. 2005.

37 Anne Marie Robb, MoosaSalie, *Submission to the Committee on the Rights of Persons with Disabilities: Day of General Discussion on CRPD Article 12*, available at www2.ohchr.org/SPdocs/CRPD/.../Ubuntu_Center_SouthAfrica.doc, (last visited April 12, 2013).

38 Paul T. Jaeger, Cynthia Ann Bowman, UNDERSTANDING DISABILITY: INCLUSION, ACCESS, DIVERSITY AND CIVIL RIGHTS, Praeger, 1st ed. 2005.

39 Ibid.

Looking towards fostering social and emotional communication when it comes to disabilities like autism, the Code of Practice issued by the Secretary of State under UK's Disability Discrimination Act[40] is indicative. It states that account should be taken of a person's ability to remember, organize his or her thoughts, plan a course of action and carry it out, take in new knowledge, or understand spoken or written instructions. This includes considering whether the person learns to do things significantly more slowly than normal. Examples are listed as to what amounts to substantial adverse effect, including inability to remember names and to adapt after a reasonable period of time to changes in work routine. It is stated that it would be a reasonable adjustment for an employee to communicate in a particular way to an employee with autism – and the responsibility of the employer to seek the cooperation of other employees in communicating in that way.

III. Media Infrastructure and Free Speech

As mentioned in the introduction, the 2G judgment[41] articulates the question of spectrum assignment as an access issue, but its obvious implications on free speech require us to locate it within the line of cases dealing with media infrastructure and its relation to the promotion of public interest. Clearly, freedom of speech and expression does not operate in vacuum, and it has to be acknowledged that questions of infrastructure play a vital role in creating a healthy ecology of speech. The infrastructure may either be provided by the state or by private players, but in both cases the question of public interest in such infrastructure exceeds the question of private or state ownership.

We have for instance the 1962 case of *Sakal Newspapers v. Union of India*[42], which involved a challenge under Article 19(1)(a) of the Constitution to a Government order which sought to regulate the number of pages according to the price charged, prescribed the number of supplements to be published and regulate the size and area of advertisements in relation to other matters contained in the newspaper. The government argued that the order was valid since it only regulated the

40 § 53 of Disability Discrimination Act, 1995.

41 *Centre for Public Interest Litigation and others v. Union of India*, Judgment dated February 2, 2012, available at http://supremecourtofindia.nic.in/outtoday/39041.pdf (last visited on May 9, 2013).

42 AIR 1962 SC 305.

commercial aspects of the newspapers and not dissemination of the news and views by them

The Supreme Court struck down the order holding that the same directly affected the freedom of speech and expression because inherent in the freedom is the right to publish and circulate the publications. It said that the right of freedom of speech cannot be taken away with the object of placing restrictions on business activities of a citizen:

> *It may well be within the power of the State to place, in the interest of the general public, restrictions upon the rights of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in Clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech ....cannot, like the freedom to carry on business, be curtailed in the interest of the general public.*[43]

Again, in *Bennett Coleman and Co. Ltd. v. Union of India*[44], it was the newsprint policy of the Government that came up for scrutiny before the Court. The restrictions here were in the form of a newsprint control order that fixed the maximum number of pages which a paper could be allowed to print on the basis of their reported consumption of the commodity.

In a context of acute shortage, it seemed that the only means available to keep the newspaper industry functioning was to ration the allotment of newsprint. This made it imperative that newspapers publish no more than 10 pages. Of particular significance was the fact that newspapers would not be permitted to reduce circulation to maintain or increase the number of pages. To provide a full day's complement of news, publishers could rationalise their allocation of space between editorial and advertisement material or maintain profitability by curtailing news coverage to accommodate advertisements.

The government defended its policy before the Court saying that it was intended to allow small newspapers to grow and prevent the monopolistic combinations of big newspapers. Holding that the policy was

43 *Id* at ¶ 37.
44 AIR 1973 SC 106.

not a reasonable restriction since the newspapers were not allowed the right to circulation or the right of page growth, the Court struck it down:

> *It cannot be said that the newsprint policy is a reasonable restriction within the ambit of Article 19(2). The newsprint policy abridges the fundamental rights of the petitioners in regard to freedom of speech and expression. The newspapers are allowed their right of circulation. The newspapers are not allowed right of page growth.... Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content.*[45]

The right of access was articulated in Justice K.K. Mathews' judgment which recognized the importance of bringing all ideas into the market and that free expression would be "somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers".

In both these cases, the Supreme Court acknowledges the relationship between infrastructure and speech when it holds that for the promotion of free speech there have to be venues through which a citizen can propagate these views, and the regulation of the commercial aspects of a newspaper cannot impinge on such freedom. In other words, freedom of expression involves the right of access to media space,[46] a requirement that could be met only through the "creation of new opportunities for expression or greater opportunities to small and medium dailies to reach a position of equality with the big ones". Sukumar Muralidharan notes how the underlying principles in these cases have a certain universality that allows them to be transported to the spectrum debates.[47] The scarcity argument was invoked for newsprint in the seventies, as it is for the electromagnetic spectrum now.

From the newsprint cases, we come to the mid nineties where the Supreme Court made the famous declaration in *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*[48]: Air waves are public property. The judgment stands as a vital signpost for the emergence of a language of a right to access within the media and

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45 *Id.* at ¶82.

46 See Sukumar Muralidharan, *Broadcast Regulation and Public Right to Know*, ECONOMIC AND POLITICAL WEEKLY, March 3, 2007.

47 *Id.*

48 AIR 1995 SC 1236.

broadcast framework. One of the statements made by Justice Savant in this regard is particularly significant, where he categorically rejects the government's argument that broadcasting media can be subject to additional restrictions because of spectrum scarcity: "the virtues of electronic media cannot become its enemies", he noted, in opposing enlarging restrictions beyond those listed in Article 19 (2) of the Constitution.

Here again, it is the paradigm of access that informs free speech jurisprudence, as opposed to that of censorship of content. Where this becomes translated into a positive obligation upon the state now is with the advent of the 2G judgment: the Court states that spectrum distribution should happen in a manner that maximizes public interest. The Court then goes on to push for spectrum auctions in the public interest:

> *In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/ public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for constitutional ethos and values.*

Are spectrum auctions really the best option? Particularly when we frame the question of public interest as one that might allow for the greatest level of access, and therefore, free speech?

Spectrum auctions might raise money for the national exchequer, but they also inevitably result in companies bearing the burden of massively priced spectrum. The burden for the same is most easily shifted to the consumers. The regime also functions as a barrier to entry for those mid-level companies that might have the most innovative ideas about spectrum usage.[49] Stuart Buck argues that the auction "solution" as governments put it, masks an underlying problem – that spectrum is misconceived in the first instance as a form of property that necessarily requires individualized allocation.[50] The government has thus created a property right over spectrum, but it appears that management of the right presently is one that is anti-competitive, that creates barriers to the exercise of free speech.

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49 Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 Stan.Tech. L. Rev. 2.
50 *Id.*

IV. Conclusion

There is a certain kind of rhetoric that couches issues that are primarily based on civil and political rights and hides them under a tangle of questions about infrastructure. So, interrogations about lack of communication aids to persons with disability becomes an occasion for the government to talk about limited resources, and the spectrum scam becomes a pedestal for discussion about losses to the public exchequer. Meanwhile, free expression is splashed across headlines only when it comes to a question of its restriction *vis-à-vis* censorship.

This paper has been an attempt to tease out the free speech issues that otherwise lie buried under seemingly unconnected rhetoric, and ground them in a constitutional rights framework. The higher conceptual linkages I am advocating for here involve connecting access rights to civil and political ones, but at the most basic, this endeavour involves pushing free expression as a positive right, as an obligation that the State must act upon, as opposed to merely an arena the State must refrain from encroaching. It is essential that we pursue the answers to these questions raised in this paper if we are to truly locate the public interest and move towards the highest and most equitable level of access to communication possible.

SOFTWARE PROGRAMMES, THE INTERNET AND COPYRIGHT LAW: AN ANALYSIS OF AMERICAN LAW

Himabindu Killi[*] *& Sruthi Namburi*[**]

I. Introduction

A. Computer Program

Some new technologies fit easily into the preexisting legal framework. Immediately upon development, attorneys and courts comfortably place the technology into a familiar category. Rights are certain, transactions efficient and technological progress continues unhindered. Such is not the case with computer software, which from the very beginning has resisted neat categorization.[1]

A computer program is a set of instructions to a computer.[2] These instructions can be anything from executing a game program to converting the commands from a high language to the binary language of zeroes and ones. While most programs accept and process user- supplied data, the fundamental processes utilized by a program are called algorithms and are at the heart of the program.[3] The first step in creating the program is identifying the problem that the computer programmer is trying to solve. As the programmer learns more about the problem, she or he may begin to outline a solution. The outline can take the form of a flowchart, which will break down the solution into a series of smaller units called "subroutines" or "modules," each of which deals with elements of the larger problem.[4] A program's efficiency depends in large part on the arrangements of its modules and subroutines; although two programs could produce the same result, one might be more efficient because of different internal arrangements of modules and subroutines. The arrangement of the data is accomplished by means of data files and is affected by the details of the program's subroutines and modules.

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1 Brett N. Dorny & Michael K Friedland, Copyrighting "Look and Feel": Manufacturers Technologies v. CAMS 3 HARV L.J. TECH. 195 (1990). [Hereinafter Dorny and Friedland].

2 17 U.S.C. § 101.

3 Kiplinger, Computer Software – Its Nature and its Protection, 30 EMORY L. J. 483, 484-85 (1984).

4 Note, Defining the Scope of Copyright Protection for Computer Software, 38 STAN.L.REV. 497, 500-01 (1986).

B. Issues

Once the program is written, each of the steps identified in the design must be turned into a language that the computer can understand. This translation process in itself requires two steps. The programmer first writes in a "source code," which may be in one of several languages, such as COBOL, BASIC, FORTRAN, or EDL. Once the program is written in source code, it is translated into "object code," which is a binary code, simply a concatenation of "O"s and "1"s. In every program, it is the object code, not the source code that directs the computer to perform functions. The object code is therefore the final instruction to the computer. So, which part of the program is copyrightable? In *Apple Computer, Inc. v. Franklin Computer Corp.*[5], *Stern Electronics v. Kaufman*[6], and other cases, the Courts have held that copyright protection extends both to the program's source and object codes.

This is not the only controversy when it comes to a computer program, unfortunately. A computer program interacts with the user through the screen. The display created on the screen lets the user read, understand and respond to the actions being performed by the computer or input new commands to instruct the program to do a certain thing. Since most users do not have the capability to read binary code, it is translated into normal language and audiovisual display. This screen display consisting of the pictorial, auditory and graphical works has a separate copyright from the work in the underlying program.

Since it is an audiovisual work, it will not have a literary copyright but has instead an audiovisual copyright. So, in a computer program, assuming that there is only one program that is working, there is a minimum of two copyrights. This is the established law and two cases are forerunners in this context: *Williams Electronics Case*[7] and the *Midway Manufacturing Co Case*.[8] Additionally, the same screen display can be created by another program. So, in addition to protecting the program itself, the manufacturer also has to protect the screen display. Although most commentators and companies agree that some type of protection is required for computer screens, they fail to agree on what type of protection

5 714 F.2d 1240, 1246-47 (3d Cir. 1983).
6 669 F.2d 852, 855 (2d Cir. 1982).
7 685 F.2d at 874.
8 564 F.Supp. At 749.

is optimal. The major focus has been on protecting copyright protection because the underlying program is protected by copyright and because the screens are best characterized as artistic or literary or compilations. There have also been arguments that patents or trade dress would be better to the type of work involved in the creation of computer displays.[9]

The scheme of the paper is as follows: The researchers, in the introduction, lead with the definition of a copyright and outline the various difficulties that have arisen over the years in defining the scope of a copyright granted to a computer program. The development of case law with regard to this issue has been divided into 3 parts. In the second part, the researchers look at the early case law and talk about the challenges faced by the court in figuring out where in fact a computer program fit within the existing statutory framework. The third part discusses the cases post *Whelan* where the Court has already existing case law and statutory framework and is trying to expand the scope and define it better. The fourth part introduces cases where the doctrines are streamlined further and developed into concrete principles of law. Finally, in the last part, the researchers conclude the paper with a short analysis of the three stages of development and present a set of general theories that can be followed world over.

II. Copyright ability Of Software Programs – Beginning To The *Whelan* Judgement

A. Statutory Law

According to § 101 of the U.S. Copyright Law, A literary work includes "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phone records, film, tapes, disks, or cards, in which they are embodied." §102 lists out eight different categories of copyrightable subject matter. They are:

(1) literary works;(2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. But a computer program is neither included in the §101 works or the §102 categories. This initially caused some confusion as to

9 Dorny and Friedland, *supra*, n.1., p.195.

where they would fall. However, in 1980, the definition of 'computer program' was added to §101 as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." As the definition indicates, unlike other copyrightable works, computer programs have utility. They are written to fulfill a certain purpose and they operate a machine. This is the main problem with a computer program.

§101 also define a 'useful article' as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." To determine the copyright-ability of such articles requires a different kind of analysis than determining the copyright-ability of something like a work of fiction or a painting. Useful articles are not generally copyrightable but certain aspects of the design may be eligible for copyright protection. To determine what, if anything is protectable when the work at issue is a "useful article," the statute requires what is known as a "separability" analysis. As we have already determined, a computer program has utility. But is it part of the definition of a useful article? On looking at the sections closely, one notices that the statute uses the phrase "useful articles" in the context of the definition of pictorial, graphic or sculptural works. This means that a useful article does not include works like computer programs, or literary works, regardless of their utility. [10]

B. Case Law

This leads us to the next question: if the copyright-ability of a computer program is not to be determined by the separability analysis, then does that mean that all parts of the program are equally copyrightable? What, in the first place are the various parts of a computer program?

Various courts at various times have tried to define the scope of a computer program, the various parts of the program, the utility element, etc. in order to determine the scope of protection that can be afforded to it. The object of this chapter will be to look at all those judgments and try to recommend a test that can be applied in India given that a lot of Indians these days are moving from using computer programs to writing them.

10 LYDIA PALLAS LOREN AND JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW 334 (2010).

Apple Computer, Inc. v. Franklin Computer Corp.[11] is a case from the time when Apple was making the Apple II computers. Understandably, the Court is dealing with such cases in great detail and trying to address all the issues raised by the defendant. Thus, it becomes extremely important to look at these initial cases in greater detail than the later ones for this paper since the object is to understand the concept of computer software copyright ability. In this case, Franklin Computers manufactured the ACE 100 computer and the contention was that Franklin had copied 14 of the computer programs of Apple II. Franklin didn't dispute the fact that it copied the Apple 'operating system' programs but defended its actions saying that Apple's programs were not in fact, protectable.[12] An operating system program, as distinguished from an application program[13] is something that is used to "manage the internal functions of the computer or facilitate use of application programs." This distinction is the main thrust of the defendant's argument: Since an operating program manages the internal functions of the computer, it is a 'process', a 'system', or a 'method of operation' and hence is un-copyrightable. Processes or methods of operation are subject matter of patent law as pointed out in *Baker v. Selden*[14] and not copyright law which protects the writings describing these processes or methods. This contention is similar to what was held in an Australian Case, *Computer Edge v. Apple Computer*,[15] that "a literary work is intended to afford either information or instruction, or pleasure, in the form of literary enjoyment and at least when the program reaches electronic form, it has become a means of operating the machine and is no longer an appropriate subject matter for copyright protection." [16]

The Court dealt with this contention by pointing out that both types of programs instruct the computer to do something. So, it should not make a difference if the task is playing a game or translating a high level language into binary code. It is only the instruction that is protected and a "process is no more involved because the instructions in an operating system program may be used to activate the operation of a computer than it would be if instructions were written in ordinary English in a manual which

11 714 F.2d 1240 (3d Cir. 1983).

12 Dorny and Friedland, *supra*, n.1 at 343.

13 An application program usually performs a specific task for the computer user such a word processing, checkbook balancing or playing a game. Supra, n.1 at 342.

14 101 U.S. 99 (1879).

15 [1986] F.S.R. 537.

16 W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS 443 (2001). [Hereinafter referred to as Cornish].

described the necessary steps to activate an intricate complicated machine. There is therefore, no reason to afford any less copyright protection to the instructions in an operating system program than to the instructions in an application program." [17] Additionally, the Court pointed out that "Programs should no more be considered machine parts than videotapes should be considered parts of projectors or phono-records parts of sound reproduction equipment. . . . That the words of a program are used ultimately in the implementation of a process should in no way affect their copyright-ability."[18]

The second contention put forth by Franklin Corp is that the operating system programs are purely utilitarian works and that Apple is seeking to block the use of the art embodied in its operating systems. This is a *Baker v. Selden* argument and although a literal reading of the language of the section would support this argument, the Supreme Court in *Mazer v. Stein*[19] stated that "We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law."

Next, Franklin challenged the copyright-ability of software relying upon the idea and expression dichotomy. The contention was that a computer program was an idea. However, the court dealt with this by looking at whether it was capable of different modes of expression. In other words, if other programs can be written to perform the same function as an Apple's operating system program, then that program is an expression of an idea and hence copyrightable. The fact that there are a limited number of ways in which this rewriting can be done is not material to the issue.

Finally, the Court referred to *Williams Electronics v. Arctic International, Inc.*,[20] and concluded that the copyright-ability of computer programs was firmly established after the 1980 amendment to the Copyright Act.[21]

In the 1986 case of *Whelan Associates Inc. v. Jaslow Dental Laboratory, Inc.,* et al.,[22] the question involved was the determination of the scope of

17 Dorny and Friedland, *supra*, n.1 at 344.
18 *Id.*
19 347 US 201, 218 (1954).
20 685 F.2d at 874.
21 685 F.2d 870, 875 (1982).

protection for a computer program used in a dental laboratory. In this case, Rand Jaslow was a dentist who realized that computerizing all his records would help him in his business and hence decided to write a program on his personal computer to satisfy these needs. He was unsuccessful, though, and had to hire another company to develop this program for him. The person who created this program, Elaine Whelan, was a representative of the company hired by Rand Jaslow and she visited Rand Jaslow's lab and several others to gather information. Finally, she created "Dentalab." Whelan left the original company soon after writing this program and the interest and acquired the property in Dentalab soon after forming her new company. She then entered into an agreement with Rand Jaslow to market this program to other dental laboratories. Soon, they realized that the program would have a better market if the program was written in the BASIC language instead of EDL which only bigger capacity computers would be able to understand. Then, Rand Jaslow wrote "Dentcom" and asked Whelan to stop marketing Dentalab. Whelan Associates did not agree and a suit was filed.

Rand Jaslow raised some interesting contentions in this case and hence it is important to deal with these contentions even if they are not necessarily related to the present question. On being alleged that he had infringed Whelan Associates' copyright over the Dentalab program, he contended that although he had not been listed in the copyright registration, he had been a co-author (with Elaine Whelan) of the Dentalab program. The omission of his name from the registration form, rendered the copyright defective. In the alternative, if he was not a co-author, since Elaine had written the program while being employed by Rand Jaslow, the work would become a work-for-hire and hence, he would own the copyright. The District Court held that Elaine has sole ownership of the program and the contract between Elaine and Jaslow made it clear that the full ownership would be with her. A similar question of ownership and work-for-hire would be raised much later in the case of *Fylde Microsystems v. Key Radio Systems*[23] where the defendant claimed ownership of a program owned by the plaintiff, that he checked for bugs. It was held that the defendant was not a joint author and the contribution of the defendant did not amount to authorship. It was mere testing for errors in the software.

22 797 F.2d.1222.
23 (1998) FSR 449.

The second contention raised by the defendant was that the Dentcom system was developed independently and hence was not violative of the Whelan Associates' copyright, if the copyright was valid. Here also, the District court held for Whelan and said that although written in a different computer language from the Dentalab, and although not a direct transliteration of Dentalab, was substantially similar to Dentalab because its structure and overall organization were substantially similar. In Computer Associates International, Inc. v. Altai, Inc., a situation arose where the defendant's program was substantially similar to the plaintiff's and in order to prove that they had not copied the plaintiff's program, the defendant got programmers to write the program all over again in a room that was "uncontaminated" by the plaintiff's program. In other words, the defendant did not give any notice or information to the programmers about the plaintiff's program, created a "clean room" and still came up with a similar program as the allegedly infringed one. The Second Circuit court held that though this would be a proof of 'independent creation,' it would still not be sufficient to let the defendants free and did not base their opinion on this fact.

The Third Circuit Court focuses on this contention of substantial similarity to decide whether there is a copyright infringement. To decide substantial similarity the Court used the expert testimony method while rejecting the bifurcated standard recommended by *Arnstein v. Porter*.[24] In this case, the Court recommended that the test for substantial similarity must consist of an expert testimony test called the extrinsic test and an ordinary observer test called the intrinsic test. The Court felt that it would be hard for the same person to forget or ignore the expert testimony when analyzing the problem under the layman test. Additionally, the Court felt that there was no need to separate the two when one test could be used and expert testimony can be accepted while taking into consideration the ordinary observer's view.[25]

The defendant argued that because the District Court did not find any similarity between the literal elements of the programs, but only found it in their overall structures, the Courts' finding of substantial similarity was incorrect. Literal elements of a computer program are its' source and object

24 154 F. 2d 464.
25 *Id.*

code.[26] The question therefore arises whether mere similarity in the overall structure of programs can be the basis for a copyright infringement, or, put differently, whether a program's copyright protection covers the structure of the program or only the program's literal elements, i.e., its source and object codes.[27] According to the statute, since computer programs are literary works, similar rules must apply. For other literary works, there can be an infringement even when there is no substantial similarity between the works' literal elements. By analogy, it would thus appear that the copyrights of computer programs could be infringed even absent copying of the literal elements of the program.

However, the defendants argued that computer programs are different and hence that analogy cannot be applied because the structure of a computer program is by definition an idea and not the expression. This is *a Baker v. Selden* argument and has been reiterated many times, including *Universal Athletic Sales Co.*[28] and the Supreme Court case of *Mazer v. Stein*. On a close examination of precedents and several provisions of the Copyright Act that provided for the protection of compilations and derivative works, the Court came to the conclusion that the purpose of a utilitarian work would be the work's idea and everything else that is not necessary to perform this function would be part of the expression. The idea was to create a computer program for operating a dental laboratory and the expression of that idea was in the manner in which the computer program operates, controls and regulates the computer in receiving, assembling, calculating, retaining, correlating, and producing information either on a screen, print-out or by audio communication. The detailed structure of the Dentalab program is part of the expression and not the idea of the program. Thus, what the *Whelan* Court is most noted for doing was, "in rejecting an argument that all elements of the structure must be excluded as mere idea, [it] proferred the generalization that the purpose or function of a utilitarian work would be the work's idea and everything else that is not necessary to that purpose or function would be part of the expression of that idea" [29] (internal quotation marks removed).

26 As discussed in the Introduction, p.1.
27 797 F.2d 1234-5.
28 511 F. 2d 904, 906 (1975).
29 CORNISH, *supra* no. 16 at 447.

This decision, the Court observed was contrary to an earlier decision: *Synercom Technology, Inc. v. University Computing Co.*,[30] which dealt with the question of whether the "input formats" of a computer program – the configurations and collations of the information entered into the program – were idea or expression. The court held that the input formats were ideas, not expressions, and thus not protectable. However, they distinguished this judgment from Synercom on the basis that the subject matter of both cases was different. While *Synercom* dealt with input formats, Whelan was dealing with full programs and hence the level of structural complexity of Whelan was missing in Synercom.

A contention put forth in the *Whelan* was that the programs were not substantially similar depending upon the argument that the screen outputs had a separate copyright since they were audio-visual works under the Act and the Court's dependence upon the similarity was not evidence of the infringement. This is an interesting contention and an area of the law that has been heavily litigated. Screen-display is considered to be an audiovisual work according to *Williams Electronics v. Arctic International Inc.*,[31] and *Midway Manufacturing Co v. Arctic International, Inc.,*[32] where the audiovisual copyright in the display of a video game was distinguished from the copyright in the program that creates the audiovisual display. Although there is a causal connection between the program and the screen outputs, they are covered by a different copyright than the programs that are literary works.

III. Post-*Whelan* Judgements To *Altai*

The cases following the case of *Whelan* are diverse in their findings. They sometimes acknowledge the position the other court has laid down but determine it to be erroneous or just ignore the cases altogether.

A. Cases broadening the scope of Copyright Protection over Software

In *Broderbund Software, Inc. v. Unison World*[33], the defendants argued that the audiovisual display of the program was not protected because it was a useful article that was neither a pictorial, graphical or sculptural work. But when the Court looked at the structure, sequence, and layout of the

30 462 F.Supp 1003 (N.D. Tex. 1978).
31 685 F.2d 870 (3d Cir. 1982).
32 547 F.Supp 999 (N.D. III 1982).
33 648 F.Supp. 1127 (1986).

audiovisual displays in the infringed program, it was clear that they were dictated primarily by artistic and aesthetic considerations, and not by utilitarian or mechanical ones. This meant that they were part of the pictorial or graphic works as defined in §101. By holding there was infringement on the ground that copyright protection extends to the overall structure of a program, including its audiovisual displays, and not just the literal aspects of a computer program,[34] the Court expanded the position in *Whalen*. However, it is important to note that *Whalen* had only dealt with the evidentiary use of the copying of screen displays for the purpose of establishing copying of the underlying computer program—it did not lie down the proposition that the screen displays are to be protected by the computer program's copyright from copying. Later cases have argued that *Broderbund* was a decision based on an over expansive and erroneous reading of *Whalen*.[35]

In *M. Kramer Mfg. Co. v. Andrews*[36] the court held that where a copyright subsists in an audiovisual display that is created by a computer program, the copyright protects the underlying computer program to the extent that the program embodies the audiovisual display as well as the actual audiovisual screen display. With regard to the idea-expression dichotomy, the court held that in the realm of computers, the test is that if there is only one way to express the idea, the idea and expression merge, meaning there is no material that is subject to copyright protection.[37]

Digital Communications Associates, Inc. v. Softklone Distributing Corp.[38] followed in Whelan's footsteps in the context of copyright over screens. Digital had a copyright in its status screen that contained a number of parameter/commend terms ground under various headings. Each of these command terms was a reflection on the setting of a parameter that affects the transmission of data through a communications channel; each one also had two letters capitalized and highlighted on the screen. By typing these letters, the user could invoke the corresponding command to change the parameter. Softklone's program produced a competing communications program with a virtually identical status screen.

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34 648 F. Supp. at 1133.

35 *Digital Communications Associates, Inc. v. Softklone Distributing Corp*, 659 F. Supp. 449 (N.D. Ba. 1987).

36 783 F.2d 421 (4th Cir. 1986).

37 *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240; *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

38 659 F. Supp. 449 (N.D. Ba. 1987).

The district court observed that in order to establish ownership of a copyright, five points had to be proved: originality in the author, copyright ability, proper citizenship of the author, compliance with statutory formalities, and if the plaintiff is not the author, a transfer of rights or other subsisting relationship that enables the plaintiff to file the suit. The defense used points two and four to say that a status screen is not copyrightable and that the plaintiff failed to place a copyright notice on the status screen.

In order to decide whether the status screen was capable of being copyrighted, the court looked into the idea expression dichotomy to see if the screen was an idea or expression. The court took note where an idea has only one necessary form of expression, the idea and expression merge, so as to make the two indistinguishable.[39] The inherent problem with distinguishing the two is the defining of the underlying idea of the copyrighted work.[40] The court distinguished the case of *Synercom Technology, Inc. v. University Computing Co.,*[41] holding that that in the present case the copied material was not essential to the functioning of the program. The defendants here copied the arrangement, headings, capitalization and highlighting of the plaintiff's work and presented it as their own.

The case of *Baker v. Selden*[42] is no longer valid where it says that black forms are not capable of being copyrighted—if the arrangement of information is itself informative due to the innovation of the author, a copyright may be acquired over the blank form.[43] Thus, a finding that the concerned material is a compilation of information, such as parameter/command terms, is not sufficient to say that a copyright cannot subsist. [44]

The court held that the status screen was copyrightable, making the defendant's program an infringement. Taking into account the particular arrangement and grouping of the parameter/command terms on the screen and the highlighting and capitalizing of two specific letters of each term, the

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39 *Herbet Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971); analyzing the case of *Baker v. Selden,* 101 U.S. 99 (1879).

40 *Sid. & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

41 462 F.Supp. 1003 (N.D. Tex. 1978).

42 101 U.S. 99 (1879).

43 *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240; *Manpower, Inc. v. Temporary Help of Harrisburg, Inc.*, F. Supp. 788 (E.D. Pa. 1965).

44 *Southern Bell Telephone and Telegraph Co. v. Associated Telephone Directory Publishers,* 756 F.2d 801 (11th Cir. 1985).

Court found that the status screen constituted a copyrightable expression that evidenced "considerable stylistic creativity and authorship above and beyond the ideas embodied in the status screen."[45] Since programmers position information on a screen in various ways, use many symbols to represent such information, and employ several methods to emphasize the symbols, such as highlighting, underlining, or brackets, the court concluded that Digital's status screen was not indispensable to a computer communications package. Because these elements were protected expression, Softklone's copy violated the copyright.

The defendant's argument that the need for standardization in the computer industry should allow for more leeway for the defendant to sue the same arrangement of status screen commands, a standard in the market now, was wholly rejected by the court. This proposition had been rejected in a court six months earlier in *Broderbund Software Inc. v. Unison World, Inc.*.[46]

This case followed *Whelan*, where the court approved of cases wherein a computer program's screen displays could be the subject of copyright.[47] *Stern Electronics, Inc. v. Kaufman*,[48] held the following: "many different computer programs can produce the same 'results;' whether those results are an analysis of financial records or a sequence of images and sounds." Similarly, *Midway Manufacturing Co. v. Strohon*,[49] "it is quite possible to design a game that would infringe Midway's audiovisiual copyright but would use an entirely different computer game."

The court in *Broderbund*[50] took this a step further and held that a computer program's copyright protection also extends to audiovisual screen displays. However, this court in this case, upon review of the case law, stated the law to be that a copyright protection of a computer program does not extend to the screen displays that are generated by the program. Where the screen display is not separately copyrighted, the use of the same screen in another program does not constitute a copy or reproduction of the literary or substantive content of the computer program. The reason for this is that, using a variety of different and independent computer

45 659 F. Supp. at 460.

46 648 F. Supp. 1127 (1986). Alan S. Middleton, *A Thousand Clones: the Scope of Copyright Protection in the "Look and Feel" of Computer Programs,* 63 WASH. L. REV. 195.

47 *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F. 2d 870 (3rd Cir. 1982); *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2nd Cir. 1982) p. 855.

48 669 F.2d 852 (2nd Cir. 1982) p. 855.

49 564 F. Supp. 741 (N.D. 111. 1983) at 749.

50 *Broderbund Software, Inc. v. Unison World*, 648 F.Supp. 1127 (1986).

programs, authors can make the same screen. The court stated that any implication in *Broderbund*[51] to the contrary is to be rejected. When considering *Kramer Mf. Co.*,[52] the court observed that it was essentially saying that while a computer program is a copy of the audiovisual screen display, a screen display is not a copy of the computer program. However, the court in this case said that the anomaly is due to the unusual nature of computers, and does not need to be fixed.

Like the *Whelan* court, the court in *Softklone* correctly observed that the potential plurality of ways to display information on the screen has an important bearing on whether one of those ways deserves copyright protection. However, the court should have determined whether consumers would accept these other formats. The court observed that this status screen display had enabled the company to "receive such widespread support." It follows that a system display could become the standard in the marketplace and no other display would be marketable at equivalent prices. Although it may have been only one of several technically possible ways to represent data when first introduced, through consumer use and acceptance the Digital system may have become the only marketable method. In this way, the manner in which data was displayed on the screen may have become an un-copyrightable idea for the development of which others have a right to compete.

In the case of *Lotus Development Corp. v. Paperback Software International*,[53] the court followed *Whelan*. The plaintiff charged Paperback with infringement over its copyright subsisting in the structure of the menu command system. Approving of *Whalen*, the court considered the existence of alternative arrangements as a key factor in judging whether the program is a copyrightable expression. The Court stated that copyright protection would be perverse if only the mundane increments were protected while the more strikingly innovative advancements are left in the public domain. Hence, it found infringement where the menu structure was original, making it an expression, and not an idea.

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51 *Id.*

52 *M. Kramer Mfg. Co. v. Andrews,* 783 F.2d 421 (4th Cir. 1986).

53 740 F.Supp.37 (D. Mass. 1990).

B. Cases Narrowing the Scope of Copyright Protection over Software

In the case of *Plains Cotton Co-op v Goodpasture Computer Serv., Inc., v. Goodpasture Computer Serv., Inc.,*[54] the court gave far more importance to the market aspect to copyrights over software. The plaintiff was an agricultural cooperative that had developed computer software called the "Telcot System," which operated on a mainframe computer. Though telecommunications, it permitted cooperative members to obtain regularly updated displays of information concerning the cotton prices, availability, accounting and order processing. As for the individual defendants, they had worked on the development of this software; however, the signing of a confidential agreement was not required of the employees. They then left the company and went to work for CXS, which had initially entered into an agreement with Plains—the latter licensed the former to create a personal computer version of the system with both parties given credit as joint owners. This agreement was sought to be terminated upon the employees shifting to CXS. Upon declaring bankruptcy, CXS renegotiated an agreement, giving Plains an option to purchase all rights in the software created up until this point, which it left unexercised. The corporate defendant, Goodpasture, hired the individual defendants to create a personal computer version of the system. This was completed and in several months time, the software entered the market under the names "GEMS."

In the district court, notice was taken that the four former Plains employees had access to the system—one of them even bringing a diskette containing the programming design to Good pasture. Also, it noted that at least one Telcot subroutine could be found in the programming for GEMS. Still, the court refused to grant a preliminary injunction stating that the underlying program code for the two programs hand not been copied—the subroutine was replaced by the date of the injunction hearing.

Upholding this judgment, the Appellate Court was clear in its refusal to give a broad scope of protection for software copyrights. Noting that that ultimately a district's court decision to grant or deny a preliminary injunction lies within its discretion,[55] the court concluded that the plaintiff had failed to demonstrate that the district court's finding on the facts were

54 807 F.2d 1256, 1262 (5th Cir. 1987).

55 *Enterprise International v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464 (5th Circ. 1985); *Apple Barrel Productions v. Beard*, 730 F.2d 384 (5th Cir. 1982).

erroneous or the finding of law incorrect. The court added that the appellant had not persuaded either court that harm stemming from the alleged infringement would cause harm that is not compensable through an award for damages. A post-*Whelan* appellate decision, it was the first one officially reported that did not find or affirm an infringement based on less than a literal copying of the underlying program code.

Refusing to follow *Whelan*, the court found that even though GEMS was very similar to Telcot in functional specification, programming and documentation levels, the structure, sequence and organization of the plaintiff's program might just be an idea and not expression. Only through litigation on a case-by-case basis could this be determined. In relation to this, the court held that similarities between the two programs might be due to the demand of consumers of such cotton information software. Market factors play a significant role when it comes to determining the sequence and organization of cotton marketing software.

This conclusion was influenced by *Synercom Technology, Inc. v. University Computing Co.*[56] In this case, the court analyzed the scope of copyright protection in computer data format cards. University Computing had designed a program that required input in the same exact order as punched on the plaintiff's cards. The plaintiff argued that this was a violation because the latter program merely translated the expression of the cards into a computer program. Here, the sequence of the data input into the computer is relevant to the functioning of the *Synercom* computer program. It was only this sequence that was copied, not format cards with the same headings and shading areas, which would have entitled the petitioner to protection like in the case of *Digital Communications Associates, Inc. v. Softklone Distributing Corp.*[57] There was no stylistic creativity above and beyond the sequence of data.

Considering whether the idea of the cards was to input data in any sequence or input data in only Synercom's sequence, the court held the latter—the sequence is not protected by copyright. Comparing the facts of the case to the creation of a figure H stick shift pattern, the court held that where consumers are comfortable with a specific product attribute, the consumers might be unwilling to use competing products that use

56 462 F.Supp. 1003 (N.D. Tex. 1978).
57 659 F. Supp. 449 (N.D. Ba. 1987);

alternative forms. Hence, the court held that the idea and the expression were merged—the petitioner is not entitled to copyright protection.

IV. *Atlai* To Present

A. *Atlai*

In the case of *Computer Associates International Inc. v. Atlai, Inc.*[58], the court dealt with the question of whether and to what extent the non-literal aspects of a computer program, that is, those aspects that are not reduced to written code, can be protected by copyright.

Computer Associates (CA) has a marketed program entitled CA-SCHEDULER, a job scheduler that was designed to operate in IBM mainframe computers. This contains a sub-program called ADAPTER. Altai began to make its own job scheduling software called ZEKE when it inadvertently and unknowingly hired a person with intimate knowledge of ADAPTER. This man convinced his new employer to introduce a common system interface without informing him that this idea stemmed from his knowledge of ADAPTER—he used 30 percent of the source code of ADAPTER. The new component-program was titled OSCAR 3.4. This was found to be an infringement. The question before the court in this appeal is whether or not the new revamped OSCAR 3.5, a version without ADAPTER's source code according to Atlai, is substantially similar to ADAPTER.

CA argued that OSCAR 3.5 is substantially similar to the structure of the ADAPTER program, which includes non-literal components such as general flow charts, specific organization of inter-modular relationships, parameter lists, and macros. The appellate court approved the District Court Judge's decision not to follow *Whelan*.[59] It considered that the academic community has widely criticized the judgment's standard for distinguishing idea from expression as conceptually overbroad as well as the effect of passage of time. *Whelan* represents an outdated appreciation of computer science.

In rejecting *Whelan*, the court sought to lay down a three-step procedure for district courts to follow in order to determine whether non-literal elements of different programs are substantially similar. The court explained that the process merely draws upon familiar copyright doctrines.

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58 982 F.2d 693 (2nd Cir. 1992).

59 *Computer Associates International, Inc., v. Atlai, Inc.*, 775 F.Supp. 544, 549-55 (E.D.N.Y. 1991).

i. Step One: Abstraction

The test of abstraction was first enunciated in case of *Nichols v. Universal Pictures Co.*.[60] Originally developed in the context of literary works such as novels and plays, the test is adaptable to computer programs. The difference brought about here—from *Whalen*—is that the test recognizes implicitly that works can consist of a mixture of numerous ideas and expressions.

This test forces the court to dissect the allegedly copied program's structure and isolate each level of abstraction contained within it, beginning with the code and ending with the articulation of the program's ultimate function.

At the lowest level of abstraction, a computer program may be thought of in its entirety as asset of individual instructions organized into a hierarchy of modules, while at a higher level, the instructions in the lowest-level modules may be replaced conceptually by the functions of those modules. With each higher level, the function of the higher-level modules in terms of lower-level modules and instructions until one is left with naught but the ultimate function of the program.

ii. Step Two: Filtration

The court adopted Nimmer's suggestion of a successful filtering method for separating protectable expression from non-protectable material. This would entail the examination of structural components at each level of abstraction to determine whether their particular inclusion at that level constituted part of the idea or was dictated by considerations of efficiency, so as to be necessarily incidental to that idea; required by factors external to the program itself; ort taken from the public domain and hence is non-protectable expression. This filtration process serves the purpose of defining the scope of plaintiff's copyright. An analytic dissection of computer programs allows for the isolation of the expression that can be protected. [61] Ultimately, a core of protectable material will be left behind. Elements can be divided into three types:

1. Elements Dictated by Efficiency: this deals with the concept of merger; where the idea and expression are inseparable, copyright is no bar to

60 45 F.2d 199 (2nd Cir. 1930).

61 *Brown Bag Software v. Symantec Corp.,* 960 F.2d 1465 (9th Cir. 1992).

copying that expression.[62] The doctrine is especially applicable here as programmers compete to create more efficient programs. Thus, if the particular set of modules is necessary to effectively implement that part of the program's process, the expression has merged with the underlying idea and cannot be protected.

2. Elements Dictated By External Factors: standard techniques, that are necessary to write a program to perform particular functions in a specific computing environment, will not be protected. This arises from the case of *Hoehling v. Universal City Studios, Inc.,*[63] where it was laid down that certain stock or standard literary devices, without which a particular historical era or fictional theme cannot be used, cannot be copyrighted. This is also known as the *scenes a faire doctrine* and has analogous application to computer programs.[64] In the case of *Q-Co Industries, Inc. v. Hoffman*,[65] the court denied copyright protection to four program modules employed in a teleprompter program as they would be an inherent part of any prompting program. Thus, it is clear that when it comes to computer programs, the author's freedom of design choice is often limited by extrinsic considerations,[66] like:
   i. The mechanical specifications of the computer on which a particular program is intended to run;.
   ii. Compatibility requirements of other programs with which a program is designed to operate in conjunction;
   iii. Computer manufacturers' design standards;
   iv. Demands of the industry being serviced;
   v. Widely accepted programming practices within the computer industry.

   External market considerations were brought up in *Plains Cotton*.[67] In *Manufacturers Technologies, Inc. v. Cams, Inc.*[68]*,* the district court noted that the type of hardware that the software was designed to be used on influences the program's method of screen navigation. Hence,

62 *Baker v. Selden,* 101 U.S. 99 (1879); *Concrete Machinery Co. v. Classic Law Ornaments, Inc.,* 843 F.2d 600 (1st Cir. 1988).
63 618 F.2d 972 (2nd Cir. 1980).
64 *Data East USA, Inc. v Epyx, Inc.,* 862 F.2d 204 (9th Cir. 1988), applying *scenes a faire* to a home computer video game.
65 625 F.Supp. 608 (S.D.N.Y. 1985).
66 *Id.*
67 807 F.2d 1256, 1262 (5th Cir. 1987).
68 706 F. Supp. 984 (D. Conn, 1989).

protection was denied. Similarly, in *Data East USA, Inc. v. Epyx, Inc.,*[69] the court held that the use of the Commodore computer for a karate game intended for home consumption is subject to various constraints inherent in the use of that computer.

3. Elements Taken from the Public Domain: such material is free for the taking any person. Even if found in a copyrighted work, it cannot be appropriated by a single author.[70] Thus, for expressions that are standard or commonplace in the computer software industry must be filtered out from the allegedly infringed program before the final inquiry as to the substantial similarity is done.[71]

iii. Step Three: Comparison

The last step in determining substantial similarity is a comparison between the two factors. What remains at this point is a core of protectable expression. After taking out all functional elements and elements from the public domain, only a few lists and macros in OSCAR 3.5 were similar to ADAPTER, and their impact on the program was not large enough to declare copyright infringement. The court found that the similarity in services required by the operating system was due to the nature of the operating system, thus it was not protected by copyright. Similarly, the flow charts were found to be an element dictated by external factors following from the nature of the work, also unprotectable by copyright law. In light of this analysis, the court upheld the district courts finding that there was no copyright infringement by OSCAR 3.5. The district court ruled that OSCAR 3.5 rewrite, on the other hand, did not constitute copyright infringement

B. Following *Altai*

In the case of *Mitel, Inc. v. Iqtel, Inc.,*[72] the court found that the plaintiff's command codes for its technology to enhance the utility of telephone systems were unprotectable by copyright law on the grounds of *scenes a faire* and lack of originality. On the basis of law, the decision is correct, but technological command codes actually have nothing to do with

69 862 F.2d 204 (9th Cir. 1988).

70 *E.F. Johnson Co. v. Uniden Corp. of America*, 623 F.Supp 1485 (D. Minn. 1985); *Sheldon v Metro-Goldwyn Pictures Corp.,* 81 F.2d 49 (2nd Cir. 1936).

71 *Brown Bag Software v. Symantec Corp.,* 960 F.2d 1465 (9th Cir. 1992).

72 124 F.3d 1366 (10th Cir. 1997).

scenes a faire or merger. In fact, there was a modicum of creativity involved. Perhaps a better way of dealing with such a case, as opposed to blindly relying on *Altai*, is to say that systematic assemblages of information, such as specifications of interfaces necessary to achieve interoperability are unprotectable.[73]

C. Following *Apple v Franklin*

A case dealing with the issue discussed under *Apple v. Franklin* is the case *of Data General Corp v. Grumman Systems*.[74] The appellant Data Corp. Registered its computer programs with the Copyright office and Grumman (cleverly) copied only the object code. Grumman argued that it is entitled to copy because the appellant failed to prove that the programs in which they held a copyright were indeed the same works that were copied by the respondents. More specifically, he argues that the appellant was supposed to prove that the object code programs operated by Grumman were the same as the source code programs registered in the Copyright Office. Although innovative, the Court held that this augment was flawed. It was held that, "contrary to Grumman's understanding, the materials deposited with the Copyright Office do not define the substantive protection extended to the registered work… Since Copyright registration is not a condition of Copyright protection, it follows that the deposit that accompanies a registration cannot by itself define the copyrighted work. In this case, the source code deposits that were made with the Copyright Office were merely symbols, rather than definitions, of the protected work." It is important to keep in mind that as per 17 U.S.C.A. §408 (a), registration is not essential for copyright protection and it may be obtained at any time during the subsistence of the copyright. Thus, Data Corp had copyrights over the various versions of the computer program and not the just source code version.[75]

The Court found Grumman's conception of programs problematic for another reason: Grumman misconceives as three separate programs the registered computer program, source code version and the object code version of that program. According to the Court, the Copyright Office views the source code and the object code as two representations of the of

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73 Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 TEXAS L. REV. 1921 (2007).

74 825 F. Supp. 340 (D. Mass. 1993).

75 ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 193-194 (2002).[Hereinafter as GORMAN AND GINSBURG]

the same computer program. For registration purposes, the claim is in the computer program rather than in any particular representation of the program." [76]

V. Conclusion

Why is copyright even required for software in the first place? The cost of developing computer programs far exceeds the cost of their duplication. Dissemination of computer programs would occur only if:

1. the creator may recover all of its costs plus a fair profit on the first sale of the work, thus leaving it unconcerned about the later publication of the work; or
2. the creator may spread its costs over multiple copies of the work with some form of protection against unauthorized duplication of the work; or
3. the creator's costs are borne by another, as, for example, when the government or a foundation offers prizes or awards; or
4. the creator is indifferent to cost and donates the work to the public.[77]

Taking the first possibility into consideration, the consequence would be that the price of virtually any program would be so high that there would necessarily be a drastic reduction in the number of programs marketed.[78] In USA, possibilities three and four rarely occur outside of academic and government-sponsored research. Thus, the National Commission on New Technological Uses of Copyrighted Works in 1978 stated that some form of protection is required in order to foster the creation and distribution of computer programs in a competitive market.[79]

Initially, the *Apple* decision drew mixed reviews. Some authors[80] argued that the copyright ability of a new subject matter should depend upon whether protection would increase the quantity or quality of such works. On the other hand, certain other authors[81] argued that strong copyright protection for operating systems coupled with network effects

76 *Id.*, at 194.
77 GORMAN AND GINSBURG, *supra note* 76 at181
78 *Id.*
79 *Id.*
80 P Samuelson, CONTU Revisited: the Case Against Copyright Protection for Computer Programs in machine Readable Form, 1984 DUKE.L.J. 663 (1984).
81 D. Karjala, Copyright Protection of Operating Software, Copyright Misuse, and Antitrust, 9 CORNELL J.L. AND PUB. POL. 161 (2000).

that increase a program's value in proportion to the number of users will inexorably produce a single dominant firm.[82]

The test laid down in *Whelan* was heavily criticized as providing overbroad protection to computer programs resulting in restriction of competition,[83] due to the fact that it had conceived programs as having only on abstract idea each,[84] no matter now complicated the program was.[85] It endorsed the protection of the overall structure of a program as opposed to just protecting the highly detailed structure found near the code level. Further, it suggested that the efficient structural elements of programs were copyrightable under law.

The *Synercom* and *Plains Cotton* courts discussed the effect of allowing copyright on a particular subject on the market for that program. In *Whelan*, *Softklone*, and *Broderbund*, the court did not look into marketability of the allegedly infringing products before determining that adequate substitutes existed for the "look and feel" aspects of the allegedly infringed products. In *Softklone*, the users may have become so conditioned to Digital's screen format, or the cost of learning to use another format may have become so prohibitive, that the Digital format should have entered the public domain. The court also should have inquired whether other screen formats really were as applicable to consumer uses as the court hypothesized. Although it seems unlikely, the position of the information on the screen may have been dictated by the needs of the users, and thus all other possible displays would have been inferior and noncompetitive. [86]

The *Whelan* case has been replaced as the standard case on the proper scope of copyright protection for computer programs. It is interesting to note that the test is derived from the test that was proposed by Professor Nimmer's son David.[87]

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82 RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 130 (2005).

83 Donald S. Chisum et al., *Last Frontier Conference Report on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 15, 20 (1989).

84 David Nimmer et al., *A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases*, 20 ARIZ. ST. L.J. 625, 629–30 (1988).

85 Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1125 (1986).

86 Lee b. Burgunder and carey e., an emerging theory of computer software genericism available at (last accessed October 10, 2011).

87 Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 TEXAS L. REV. 1921 (2007).

Despite several cases being litigated in the Courts since *Altai*, it remains to this day the most important case law with regard to computer programs. The sheer number of issues dealt with by the courts is unprecedented. Although in *Softel Inc., v. Dragon Medical and Scientific Communications*,[88] the Court was worried about the fact that Altai's test would lead to too much filtering because the Court split the program into too many small pieces, it still agreed with the test of abstraction. The only departure it makes is to make sure that the level of abstraction must be lower than the one recommended in *Altai* because individual program elements that are filtered out at one level may be copyrightable *when* viewed as part of an aggregate of elements at another level of abstraction. In this sense, *Altai* still remains, to this day, good law with relation to determination of what is protectable in a computer program. Thus, the researchers recommend that other countries without a huge body of Copyright law, like India, would do well to adopt the *Altai* ratio.

88 891 F.Supp. 935 (1995).

MEDIA REPORTING IN 'EMERGENCY SITUATIONS': AN APPRAISAL OF THE SELF REGULATION UNDERTAKEN IN THE AFTERMATH OF THE 26/11 MUMBAI TERROR ATTACKS

Sahil Arora and Aanchal Basur[*]

The publicity from media coverage is the oxygen of terror activities. On the one hand terrorism relies on communication fora to sensitize its cause among the vulnerable sections of the society and feeds on publicity to achieve its desired objective of creating fear among the masses. The media on the other hand, has undergone a paradigm shift from the initial objective of dissemination of information to a more profit making agenda where the choice of news items reported depends on their potential to garner higher Target Rating Points and advertising revenue so as to maximise profits. It is argued via the paper that these institutions, in certain cases, benefit each other in the attainment of the aforementioned objectives. The authors point out that the one instance where the media's greed for TRPs was most evident was the media's reporting of the Mumbai Terror Attacks. The paper, analysing the inter-relation between the terror activity and its media coverage, makes a perusal of the Indian media's coverage of the attacks. In doing so, the authors second the opinion of the Hon'ble Supreme Court in the Ajmal Kasab case wherein it questioned the media's legitimacy to self regulate in light of its pernicious and hysterical reporting during the Mumbai Terror Attacks which not only endangered the security of the hostages and security personnel but had the potential of disrupting communal harmony. The theme of the paper focuses on the argument that the extant mechanism of regulation, undertaken in light of the much public criticism, is grossly inadequate and therein lies the need for an independent regulatory mechanism which would ensure that in 'emergency situations', a balance is maintained between the need for public harmony and the right of the media to report freely. The paper attempts to provide one such regulatory model.

I. Introduction

"Any attempt to justify the conduct of the TV channels by citing the right to freedom of speech and expression would be totally wrong and unacceptable in such a situation. The freedom of expression, like all other freedoms under Article 19, is subject to reasonable restrictions. An action

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> *tending to violate another person's right to life guaranteed under Article 21 or putting the national security in jeopardy can never be justified by taking the plea of freedom of speech and expression."* - The observation by the Supreme Court on the nature of media reporting during the Mumbai Terror Attacks.[1]

Much like western liberal democracies, the paradigm of television news in India has seen a gradual yet slow shift from half an hour newsbytes to 24 hour news channels. There has been an advent of private players in the media industry which has taken the focus of the media away from its primary role of providing leadership to the society and reporting on matters the society needs more than wants, to a more profit making agenda where the choice of news items reported depend on their potential to garner higher Target Rating Points[2] and advertising revenue so as to maximise profits. [3]

The one instance where the greed for TRPs was most evident was the media's reporting of the terror attacks that struck India's financial capital, Mumbai on the fateful night of November 26, 2008[4] which left 166 people dead and 238 people injured[5]. The idea behind the attack, much like any terror attack was to inspire fear and respect among the masses; to make one question their sense of security and shake their confidence in the government and the security agencies. The attack on Mumbai was further aimed at attacking India not just militarily but also economically as the attack on a country which is gradually being perceived as an upcoming super-power would hamper the confidence of investors and tourists alike. The choice of targets and targeted killing of foreigners was also aimed at

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1 *See Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, AIR 2012 SC 3565, hereinafter KASAB CASE.

2 Hereinafter as TRPs.

3 Oscar Wilde terms this as the 'insatiable curiosity' of the public to know anything and everything of an event, the demand of which is supplemented by the Media while being conscious of its tradesman like habits. *See generally* OSCAR WILDE, THE SOUL OF MAN UNDER SOCIALISM (1891), *available at* http://generation.feedbooks.com/userbook/11610.pdf (Here Oscar Wilde has commented on the tradesman like habit of the Media to satisfy the 'insatiable curiosity' of the public by supplementing the demand of the public to know anything and everything of an event); *see also* GIOVANNA BORRADORI, UNGRIEVABLE LIVES: GLOBAL TERROR AND THE MEDIA 471 (2011) (Here it was opined that mainstream news channels embedded in large corporation are more concerned about representing shareholder interests than embracing public interest standards that might better serve democracy).

4 Hereinafter as Mumbai Terror Attacks.

5 AJMAL CASE, *supra note* 1, schedule 1.

altering the India's relations with foreign countries and create a sense of incompetence around the Indian state in regard to its ability to ensure the safety of its citizens and visitors. There was further a fully fledged strategy to place the blame of the attack on Indian Muslims from the Deccan region of Hyderabad which had the potential of disrupting the communal harmony of the country and defect the blame from the terror modules across the border and the Pakistani establishments- who in fact were the real perpetrators.

With people shuffling through the innumerable news channels to get hold of the latest news from the attack sites, news channels understood that in order to hold on to their audience in what could be the moment of reckoning for the channel, its anchors and reporters on the ground alike, they had to be one step ahead of their counterparts. The ultimate objective of the channels became to report any new information they obtained with scant regard being placed on its veracity and repercussions of such disclosure. Terrorism it has been suggested exists purely as a form of communication[6] and need publicity in some form to obtain their desired objective[7] of creating fear among the masses and ensure a sense of understanding for their cause from the vulnerable sections of the society.[8] The Indian media with its irresponsible and unregulated reporting gave them not just air time but with their hysterical and pernicious reporting endangered the security of the hostages and security personnel engaged in the anti-terror operations alike.

The public criticism of media coverage (includes within its ambit reporting on the unfolding events, its analysis and subsequent debates) of the attacks during the attacks by the Supreme Court, parliamentarians and the intellectuals alike has added fuel to the debate over the need to regulate the Indian media. The clamour for regulation can even be heard from within the media circles with journalists agreeing that in order to compete effectively with weekly TRPs, their standards have been falling. [9] There has

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6 Alex Schmid, *Terrorism on Trial: Terrorism -- The Definitional Problem*, 36 W. RES. J. INT'L L. 375, (2004).

7 *See* RAPHAEL PERL, *Byliner: Terrorism, The Media, And The 21st Century*, (Jun 18, 1997), http://www.usembassy-israel.org.il/publish/press/security/archive/1997/June/ ds10619.htm (last visited on July 12, 2013).

8 M. Neelamalar, P. Chitra & Arun Darwin, *The Print Media Coverage of the 16/11 Mumbai terror attacks: A study of the coverage of leading Indian Newspapers and its impact on the people,* 1 J. MEDIA & COMMUNICATIONS STUDIES 95 (2009).

9 Abhilasha Ojha & Anushree Chandra, *News Channels Blame Weekly Ratings For Quality Decay,* LIVEMINT http://www.livemint.com/2011/09/07002631/News-channels-blame-weekly-

also been an attempt by the leading broadcasters to form a self regulatory mechanism with the coming up of the News Broadcasters Association[10] which has prescribed for the journalists a set of Code of Ethics to follow and in the aftermath of the Mumbai Terror Attacks has provided some guidelines for telecast of news during emergency situations. It is the analysis of the said guidelines and the enforcement mechanism set up by the NBA which forms the focal point of the present paper.

The paper is divided into four parts. In the *first* part, the author analyses the inter-relation between a terrorist activity and media coverage of the same. It would be highlighted how media coverage plays an important part in disseminating the message that is terrorism. In the *second* part, a perusal would be made of the Indian media's coverage of the Mumbai Terror Attacks which would showcase as to why at the first instance, there has arisen a need for regulation of news coverage during emergency situations. In the *third* part, the voluntary guidelines formulated by the NBA would be elucidated and an analysis would be made whether they are sufficient to deal with emergency situations like the Mumbai Terror Attacks that may arise in the future. In the *fourth* part, a refined regulatory set up is proposed which would be a step ahead of the current voluntary regulation and which the authors believe would have the necessary independence (unlike regulation by the government) and deterrence (unlike the extant voluntary guidelines of the NBA) to effectively regulate news coverage in general and emergency guidelines in specific. It would be concluded that such a setup would be that such a regulatory setup would be a '*reasonable restriction*' on the freedom of press which has been read under Article 19(1)(a) of the Constitution of India[11] in the interest of the 'security of the state' and 'public order' which is permissible under Article 19(2) of the Constitution.

II. Inter-Relation Between Terrorism and Media Coverage

The reason behind the terrorists' reliance on the media can be summed up by quoting renowned authors Pohlmann and Holey when they said that "*there is no need to cry in wilderness when anyone so inclined can plead his case on national television.*" [12]

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rat.html. [last visited July 12, 2013]

10 Hereinafter the NBA.

11 Hereinafter the Constitution.

12 POHLMANN & HOLEY, *Terrorism in the 70's: Media's Connection,* 61 Nat'l Forum 33, 34 (1981) as

The history of terrorism totally disproves the claim that violence is speechless. All serious terrorist campaigns are characterised by "*frenetic use of every available access to the mass media*". [13] The hostage situation during the Munich Olympics, the hijacking of the TWA flight 847 by Lebanese terrorists in 1985, the terror attacks of 9/11 and more recently the attacks in Madrid (2004), London (2005) and Mumbai (2008) were all mediated mega events, where terrorists wanted the attention of the public and media benefited by record increase in revenue and audience.

Scattered isolated incidents of violence by themselves are of little use to publicity seekers in producing their objectives of fear, coercion and publication of a cause or self identification. Terrorist rely on the psychological impact of acts rather than their immediate destructive consequences.[14] To achieve such impact, publicity seeking criminals need to attract attention and publicize their acts as widely as possible. The publicity of its action enables them to communicate their message to the masses. [15] Since the mass media have the ability to confer importance upon an individual or an event merely by presenting it[16], they plan a major role in the spreading and intensification of the desired psychological impact.

Violence has long been regarded as a 'newsworthy' item by the media and publicity seeking criminals have recognised this fact and put it to full use. By attacking highly visible targets in a dramatic manner, terrorists are guaranteed news coverage on a large scale in a short span of time with little effort. Some authors have even attributed the creation of the "modern" terrorist to the media which magnify and enlarge him; and project him as "having powers far beyond its true magnitude". [17] The disproportionate amount of news coverage also makes the public feel that the events are more common than they usually are. [18] Television places everyone at the scene of the crime, helpless to do anything and instils in

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cited in Michelle Ward Ghetti, *Terrorist Is a Star!: Regulating Media Coverage of Publicity Seeking Crimes,* 60 Federal Communications Law Journal at p. 481.

13 P. WILKINSON, *'Terrorism and propaganda, in Terrorism and the Media: Dilemmas for Government, Journalists and the Publi'c*, (eds. Y. Alexander and R. Latter) (1990) at p.26.

14 M. CHERIF BASSIOUNI, '*Terrorism, Law Enforcement and the Mass Media: Perspectives, Problems and Proposals',* 72 J. Crim. Law and Criminology*,* at 18-19 (1981).

15 G. MARTIN, Understanding Terrorism: Challenged, Perspectives and Issues (2009) at p. 384.

16 *See* Thomas G. Krattenmaker & L. A. Powe, Jr., *Televised Violelnce: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123,1134 (1978).

17 *See* NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE AND STANDARDS & GOALS, Report of the Task Force on Disorders and Terrorist 366 (1976).

18 *See id.* at 3.

them a feeling of fear and anxiety. The media coverage of the attacks has also been attributed to encouraging other individuals to engage in such conduct (commonly known as 'imitation factor); endangering the lives of hostages and coming in the way of effective law enforcement (commonly known as imperilization factor).[19]

In a study conducted on the impact media coverage on the terrorist activities, ninety three percent of police chiefs surveyed felt that live television coverage of terrorist acts encouraged terrorist,[20] while sixty four percent of the general public attributed increasing acts of terrorism to the television coverage of the attacks.[21]

The situation has only gotten graver with the advent of 24 hour news channels, which being run largely for commercial purposes, thrive on making profits which is attained by obtained advertising revenue which is directly related to the audience size. The larger the audience, the greater the profit of the enterprise which in turn impacts all those employed therein. The anchors and field reporters therefore have a direct interest in ensuring maximum TRPs for the coverage. The dramatic and emotional reporting of an event which in itself is prone to publicity draws millions to the television sets and adds to the profits of the media owners, advertisers, shareholders and employees. In some cases, such as that of Umar Farouk Abdulmuttalib (better known as the 'Underwear Bomber' which attempted to blow up the a flight to Detroit but failed) the media's dramatisation of the situation has been such that the ultimate objective of terrorising the target audience has been achieved even though the attack failed to be carried out.

Terror modules such as the Al Qaeda have long understood the advantages of publicity via media coverage. As eloquently put by Daniel Kimmage in a New York Times column, "*Al Qaeda made its name in blood and pixels, with deadly attacks and an avalanche of electronic news media*."[22] As the line between news and entertainment grows less and less visible, and as the

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19 M. CHERIF BASSIOUNI, '*Terrorism, Law Enforcement and the Mass Media: Perspectives, Problems and Proposals',* 72 J. Crim. Law and Criminology, at 18-19 (1981).

20 M. SOMMER, '*Project on Television Coverage of Terrorism',* reported in Editor and Publisher, Aug 27, 1977 at p. 12.

21 *See Also* HENDRICK, '*When Television is a Schook for Criminals',* TV Guide, January 29, 1977, at 4.

22 NEW YORK TIMES, D. KIMMAGE, '*Fight Terror with You Tube*', available at http://www.Nytimes.com/2008/06/26/opinion/26kimmage.html (last visited July 12, 2012); *See Also* P. ARNETT, *Transcript of Osama Bin Laden interview by Peter Arnett,* available at http://www.informationclearinghouse.info/article7204.htm (Last visited February 17, 2012).

commercial objectives of news carriers become more and more evidenced, publicity seeking terrorists can be expected to continue (and if possible expand) their efforts to feed on this audience attracting need of the media.

III. Media Coverage of the Mumbai Terror Attacks

The media coverage of the Mumbai Terror Attacks, showcased probably for the first time, the ugly side of new channels. While the attacks were not the first instance of media's attempt at sensationalisation, it surely was the first time when in doing so it endangered national security and public order.

The media agencies with their continuous coverage of the terror attacks, spared not even the goriest detail, in their bid to be attributed as the "most watched and trusted channel" during the attacks. With the dramatisation of the terror attack and creation of an atmosphere of the country being under siege, the coverage had the desired impact with people openly expressing fear for their life and lack of confidence in the government and security agencies.[23] As noted by the Supreme Court as well, it was evident that the terrorists and their collaborators were watching every step of the security agencies on their televisions and the revelation of our military strategy heightened the risk to the lives of security personnel engaged in the anti-terror operation and also endangered the lives of hostages.[24] The Court in the *Kasab Case*, perused the transcripts of the conversation between the terrorists and their collaborators and pointed out several instances where the terrorists holed up inside the attack sites were alerted as a result of our media coverage. While in one instance the terrorists were informed of the dome of the Taj Hotel catching fire and advised to leave the room adjacent to it, in another the collaborators informed the terrorists at Hotel Oberoi that the troops had strengthened their position on the roof of the building.[25] In yet another instance, the terrorists were informed of the forces taking position at a specific location beside the Taj Hotel and were accordingly advised of the best possible position for a counter attack.[26] This lead to a unique situation where on one

23 *See* BLOOMBERG, CHANDRAHAS CHOUDHURY, '*Mumbai Bombs Breed Anger and Resignation: World View*', July 20, 2011, *available at* http://www.bloomberg.com/news/2011-07-20/mumbai-bombs-breed-anger-and-resignation-world-view.html (Last Visited February 18, 2012).

24 *See* KASAB CASE, *supra note* 1, at 3590.

25 *Id.* The Transcripts and relevant conversation was Hotel Oberoi, Talk No. 4 and marked as Ext No. 979.

26 *Id.* The Transcripts and relevant conversation was Hotel Taj, Talk No. 3 and marked as Ext. No. 970.

hand, the terrorists were completely hidden from the security forces and had no means of knowing their exact position or even the kind of firearms and explosives they possessed and on the other hand the positions of the security forces, their weapons and all their operational movement were being watched by the collaborators across the borders on TV screens and being communicated to the terrorists.[27]

In another conversation intercepted by the Indian Government and presented before the Supreme Court[28] the terrorist handlers were heard instructing the terrorists holed up in Nariman House to represent themselves as members of the Deccan Mujahideen belonging to the Deccan region of Hyderabad in India. The instructions, which as later events showed, were for the purpose of their interaction with the media, also dealt with what the response of the terrorists should be to questions from the media on their reasons for the terror attack and what their demands for the release of the hostages were. The subsequent media interaction of the terrorist with India TV was on exactly the lines as they were instructed by their handlers on the other side of the border. The deception and falsehood of the terrorists being Indian Muslims and hailing from Hyderabad was considered by the Supreme Court in the *Kasab Case* as, "*one of the most ominous and distressing parts of the conspiracy*". The Court further noted that had Ajmal Kasab not been caught alive and the investigating agencies would not have been able to fully unravel the conspiracy, the terrorists would have passed as Indian Muslims which would in turn have had devastating consequences. It would have created distrust between the communities and disturbed the communal peace and harmony of the country. The media channel in telecasting the said interview[29] did so without verifying the veracity of the claims made by the terrorists and their actions were in complete disregard to the impact it may have had on the perception of the society on the source of the attacks and communal harmony of the country.

Another shocking incident which directly threatened the security of the hostages was the telecast of a telephonic interview between the anchor of a renowned news channel and a politician holed up inside the Taj Hotel. The live conversation which involved the anchor probing the politician

27 *Id.*

28 *See* KASAB CASE, *supra note* 1, at 3598 The conversation was Talk No. 7 and marked as Ext. No. 984, p. 111.

29 *Id.*

regarding the location where he and the other hostages were hiding, lead to the disclosure of their location on national television[30] which subsequently lead to a number of a hostages having been hunted down by the terrorists.

Furthermore, by showcasing the detailed plan of the terrorists and giving unnecessary coverage to their demands, media offered a platform for the terrorists to appear less heinous and more heroic as having been prepared to give their lives for the cause of not just Indian Muslims but also those in the Middle East and Philippines.[31] They were given a platform to showcase their solitude towards the Indian Muslims who have been unjustly treated by the government and may have resulted in a number of 'misdirected individuals being inspired by the message which was meant to deceive and give rise to future terrorists.[32] Unverified news items floated throughout in relation to the number of terrorists, the possible targets and number of casualties. Instead of reporting only the updates received from authorised spokesperson, there were instances of news channels approaching persons not authorised to speak on the matter for a quick 'byte' which in turn lead to revelation of more than the situation demanded.[33]

There was also unnecessary attention attributed to experts who called for retaliatory steps to be initiated against the Pakistani spy agency, the Inter- Services Intelligence and 'routine' troop movements which was seen as an attempt by the Indian state to channel increased troops across the north-western borders. This not only created a 'war-like' atmosphere in India but could also have justified an attack from Pakistan on the grounds of 'Anticipatory Self Defence'.

The aforementioned gaffes by the media took place despite the repercussions of reckless media coverage in emergency situations being

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30 *See* TIMES NOW, Footage of Arnab Goswami's Interview with a Politician Held Hostage in Hotel Taj *available at* http://www.youtube.com/watch?v=ZB5oQktNVkg&ytsession=4Tm6isyn_JY3lfR80DbYkK5KGAYOTWpcSihMvvsGroqXxcki1_ysxwWbQPBEAtk7yPummkG_EDXwuNA71cSJIzSaSr7zB_Kqaq-TPuZF1Wf2EPLhnDFt0fa68uYtwsklEo_y4yXcpD4Ad_wv2rztQ5tXJuIGHQonNBKu2trlQRMf6XqVmne1B3tAizJON9OFuNZbqTk-dSDRCm560BPXnz4IHhSXDA1DRLQO10xUBbw (Last Visited July 12, 2013).

31 *See* KASAB CASE, *supra note* 1, at 3605. The transcript of the relevant conversation which detailed their stated reasoning for the attack was Talk No. 7 and marked as Ext. No. 984.

32 Ibid; *See Also* WILLIAM R. CATTON, JR., *'Militants and the Media: Partners in Terrorism?'*, 53 Ind. L. J. 703, at p. 707 (1978).

33 *See* HINDUSTAN TIMES BLOG, *26/11: Media Wont Learn, Government Dare Note Teach*, available at http://blogs.hindustantimes.com/medium-term/?p=403 (Last Visited, November 18, 2012).

largely straightforward. Similar repercussions have been seen in previous terror attacks, most notably the 1977 Hanafi Muslim takeover of three buildings and 135 hostages in Washington DC. In the case, television cameras filmed a basked being lifted to the fifth floor where eleven people had evaded capture. Upon seeing the broadcast, the Hanafis tried to break the barricaded door to this room down. A tense nine hour ordeal ensued but the police were finally able to free the people. There was also a tense incident when the leader of the sect became enraged at the reporter who asked pointed questions and threatened to execute a hostage. During the 1977 hijacking of the Lufthansa jet also, reckless media coverage took the life of the pilot when it was shown that the pilot was passing intelligence information to the police. The media therefore cannot plead the defence of the repercussions of their reporting were unique and something which could not have been anticipated.

IV. The Aftermath: Guidelines Imposed In An Attempt To Self Regulate

Despite the resounding criticism of the way in which the Mumbai Terror Attacks were telecasted, there is a section within the media which has argued that the effect of reporting the news is not the reporter's concern nor is preventing violence or determining the legitimacy of the grievance.[34] It is also argued that the lack of coverage would have provoked these criminals to even more visible forms of violence which could not have been ignored; may have instilled in the public a false sense of security and in turn played into the hands of the terrorists which have long tried to show that democratic states are not really free.[35] The defence though has not found many takers and the only concession that has been accorded by the Government is to the effect of not calling for government regulation of content on news channels. They called on news broadcasters to themselves form guidelines aimed a responsible reporting and according impose them. Accordingly, the NBA which is "*a body of 22 leading news and current affairs broadcasters and represents their voice before the government*" has formulated a set of guidelines which would regulate news coverage during emergency situations.[36] It has also set up the News Broadcasters Standards Dispute Redressal Authority (hereinafter, "Authority") which enforces the NBA's

34 *See* CURTIS D. MACDOUGHALL, Interpreting Reporting 11 (1977).

35 *See* DAN VAN DER VAT, *Terrorism and the Media,* INDEX ON CENSORSHIP, Apr. 1982, at 26.

36 *See* Website of the NEWS BROADCASTERS ASSOCIATION, available at http://www.nbanewdelhi.com/ (Last Visited, November 18, 2012).

Code of Ethics and Broadcasting Standards as well as guidelines as laid down from time to time.[37]

In the immediate aftermath of the Mumbai Terror Attacks, the NBA formulated the '*Guidelines for telecast of News during Emergency Situations*'[38] which provides at the first instance that coverage of armed conflict, internal disturbance, communal violence, public disorder, crime and other similar situations is to be "*tested on touchstone of 'public interest'*". It further makes it obligatory on the media to disseminate information which is factual; prevents reporting which could facilitate publicity of an terror outfit or its ideology; prohibits reporting on details of hostages pending rescue operations and any details on the methods being employed by security personnel; prevents contact with victims or security personnel during the incident; and also prohibits the channels from showcasing footage which could "*re-agitate*" the minds of the viewers.

In addition to these specific guidelines dealing with 'emergency situations', the NBA has also formulated the '*Specific Guidelines Covering Reportage*'[39] which has laid down fundamental standards which news channels are to follow at all times. In addition to re-iterating some of the points as laid down in the guidelines regarding reporting during emergency situations, the guidelines also deal call on news broadcasters to, in the interest of national security, not disclose confidential information involving national security; not report of events which erodes the public confidence in the capacity of national institutions meant to protect them; and not air live interviews with perpetrators.

The aforementioned guidelines as much as they deal with content regulation seem to be all encompassing and having been formulated after due regard to the lapses that occurred during the reportage of the Mumbai Terror Attacks. What is pertinent to note though is whether there Authority which is empowered to ensure compliance with the aforementioned guidelines and sanction in case of not abidance has been given sufficient

37 *See* NEWS BROADCASTERS ASSOCIATION, News Broadcasting Standards Regulation, § 4 and 6, available at http://www.nbanewdelhi.com/pdf/final/NBA_Disputes-Redressal_Guidelines_English.pdf (Last Visited, July 12, 2013).

38 *See* NEWS BROADCASTERS ASSOCIATION, Guidelines for Telecast of News During Emergency Situations, Formulated on December 18, 2008 available at http://www.nbanewdelhi.com/pdf/final/NBA_Guidelines_Emergency_Situations_English.pdf (Last Visited July 12, 2012).

39 *See* NEWS BROADCASTERS ASSOCIATION, Specific Guidelines Covering Reportage, § 6, available at http://www.cable-quest.in/nba.pdf (Last Visited, November 18, 2012).

powers so as to demand compliance and act as appropriate deterrence for the broadcasters.

The Authority has the power to warn, admonish, censure, express disapproval, impose fine and recommend suspension/revocation of license; and can in also impose of fine of up to a maximum of Rs. 1,00,000.[40] The complainant though first needs to approach to broadcaster for appropriate redressal and in the event of failure or dissatisfaction can approach the Authority.

The process though was significantly laid down and guidelines specifically enunciated, the regulatory mechanism lacks the 'real power' to impose effective sanctions. With the ability to impose a just a meagre fine, it cannot be anticipated that the broadcasters would fear the fine and not broadcast news items which could earn the enterprise significantly higher revenue. It is also doubtful whether the Authority would ever recommend suspension/revocation of licenses when a number of broadcasters fail to report responsibly and sensationalise an issue, much like they did during the Mumbai Terror Attacks. It would also refrain from suspending or revocating the license of a member for it would amount to setting a benchmark for when a suspension/revocation of license is to be imposed, as in future events it may have to abide by the same.

V. Independent Regulation vide a Statutory Body

In addition to the inadequacies inherent in the self regulation mechanism devised by the NBA, the observation of the Supreme Court in the *Kasab case* wherein it opined that the "*coverage of the Mumbai Terror Attack by the mainstream electronic media has done much harm to the argument that any regulatory mechanism for the media must only come from within*"[41] are stinging. They have been seconded by the Chairman of the Press Council of India, Justice (Retd.) Markandey Katju who has openly called for regulation of news coverage vide either an independent regulatory authority or by the Press Council of India itself. He has aptly questioned that "*if self regulation actually works, who do we have laws against theft, murder and rape?*"[42]

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40 *See* NEWS BROADCASTERS ASSOCIATION, News Broadcasting Standards Regulation, § 7, available at http://www.nbanewdelhi.com/pdf/final/NBA_Disputes-Redressal_Guidelines_English.pdf (Last Visited, July 12, 2013).

41 *See* KASAB CASE, *supra note* 1.

42 *See* EXPRESS NEWS SERVICE, Katju Calls for Media Self Regulation, September 11, 2012, available at http://newindianexpress.com/cities/chennai/article604338.ece (Last Visited,

The author proposes the establishment of a statutory authority which is empowered to regulate news coverage, with specific emphasis on 'sensationalisation' and 'coverage during emergency situations'. The independence of the authority could be ensured by only the Parliament sanctioning funds for its operations from the Consolidated Funds of India and the members being neither majorly composed of neither Editors of news channels nor representatives of the government. The members could be appointed by a committee comprising of the Chief Justice of India, the Leader of Opposition, the Prime Minister and the Minister of Information and Broadcasting and could have representation, much like the Authority, from the media industry, government and persons having special knowledge in law, education, medicine, science, literature, public administration, consumer affairs, environment, human psychology and/or culture. The Chairperson though must in all cases be a retired Judge of the Supreme Court of India. The powers of the body could be the same as that of the Authority except for the maximum fine which could be Rs. 10 crore. There could be a further addition in the mandate of the body to the effect that its recommendations regarding suspension/revocation of license to be treated on par with that of an Expert Body and be lightly interfered with by the Ministry of Information and Broadcasting and only on grounds such as arbitrariness, *mala fide,* non application of mind or insufficient reasoning/material relied on. This would be in line with the dictum of the Supreme Court in a number of cases wherein it has held that the recommendations of the expert body, being specifically empowered to deal with a particular matter and having specific expertise regarding the same, are to be lightly interfered with.[43]

There could also be additional guidelines framed in relation to non-content related aspects of reporting in emergency situations. There could a restriction placed on the media's access to the scene of the crime. The authorities could be empowered to set up a broadcast area in the vicinity of the crime scene so that there can be an appropriate mode of press briefing and there is no hindrance in the anti-terror operation. There could also be an appointment of a designated spokesperson of the security forces and the media be made to report during the 'emergency situation' only the information released by the said spokesperson. These guidelines, in addition

February 18, 2012).

43 *See A.P. Pollution Control Board v. M.V. Nayadu*, 2000 (3) SCALE 354; *See also Suraj Arora v. Delhi Development Authority*, CWP. Nos. 2729/96 and 3482/2001, decided on September 27, 2002.

to the prevailing guidelines could go a long with ensuring content regulation during times of emergency.

It is pertinent to mention also that similar regulations have been imposed in a catena of jurisdictions which have been a centre of much publicised terror attacks. Countries such as Britain & Germany already have content regulation in the form of criminal or civil sanctions attaching subsequent punishment to media dissemination of information having a harmful effect.[44] In Australia, the Anti–Terrorism Act, introduced in 2005, reintroduced sedition as a punishable offence and expanded its potential use in Australia.[45] The regulations in the United States have also been recognised and seconded by lower federal courts which have restricted media coverage of deportation proceedings where terrorist is involved[46] and have found no right of the media to imbed a journalist with the troops.[47] They have also dealt with civil claims against media outlets alleging them of negligently causing harm to another person.[48]

The said regulations would further be a reasonable restriction under Article 19(2) of the Constitution in the interest of 'security of the state' and 'public order'. Not having prior-restrain on reporting the said specific information would surely result in direct, immediate and irreparable damage to the nation's people. The restriction on access to scene of the crime would also be justified as since the public does not enjoy a right to access the said sites, no such right could exist in the press. The penal sanctions imposed on reporters is also justified as reporters, especially those trained in terrorist tactics, should know what information, if released, would endanger lives. Such knowledge should make them and their respective employers liable for any harm caused because of their actions. Having said that, the government must in addition to the power to designate spokesperson and media booths, exercise their power to blackout and order delayed coverage in a reasonable and unbridled manner so that concerns regarding the 'security of the state' and 'public order' as under Article 19(2) of the Constitution, are balanced with the right of the people to know as read under Article 19(1)(a).

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44 *See* POHLMANN & HOLEY, *supra note* 10.
45 *Id.*
46 *See N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).
47 *Flynt v. Rumsfeld*, 355 F.3d 697, 703 (D.C. Cir. 2004).
48 *See* e.g. *Clift v. Narragansett Television L.P.*, 688 A.2d 805 (R.I. 1996).

VI. Conclusion

The publicity from media coverage is, in the words of Margaret Thatcher, the oxygen of terror activities and as seen from the Mumbai Terror Attacks, irresponsible reporting in times of 'emergency' can threaten the lives of security personnel and hostages; and adversely impact public order, communal harmony and the security of the state. There is therefore a need to impose regulations on the media coverage during 'emergency situations'. Though the news broadcasters seem to have made a genuine attempt at self regulation through the guidelines imposed by the NBA, the Authority set up under the NBA does not seem to be empowered enough to impose sanctions which could have the required deterrent effect on the broadcasters, given that often millions are riding on a 'sensational' news coverage.

It has been argued by news broadcaster that over the past two years there has been a considerable improvement in the standard of news reporting with the media restraining itself from indulging in personal matters such as Aishwarya Rai's 'Godbharai', Sonia Gandhi's treatment in the United States, death of Mohd. Azharuddin's son and 'sensationalising' political matters such as the judgement of the Allahabad High Court in the Ram Janmabhoomi dispute, the Gujjar movement in Rajasthan (after a message from the Prime Minister), the communal riots in Bharatpur and Moradabad and lastly the bomb explosion outside the Delhi High Court (though the media houses were in receipt of footage which could incite passion). Though it is submitted that the present voluntary regulation mechanism may be sufficient to deal with general issues of 'sensationalisation', but they can do little to deal with a magnitude of the Mumbai Terror Attacks where the stakes are too high and the price for non adherence too low.

The independent regulatory mechanism proposed vide the paper would, in the opinion of the author, protect the society from the harmful impact of irresponsible news coverage while ensure the independence of the media.

DEFENDING THE FOURTH ESTATE- REPORTING OF *SUB JUDICE* MATTERS IN LIGHT OF SAHARA V. SEBI

Abhishek K. Singh[*]

I. Introduction

> "*I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press*"
>
> Pandit Jawaharlal Nehru

Reporting of *sub judice* matters has always been a contentious issue in India. The Print and Electronic media is criticized on the grounds that reporting of *sub judice* matters often takes shape of 'trial by media' which results in creating public opinion against the accused. In the Aarushi Talwar case,[1] where a 16 year old girl was killed in her flat, the media branded the parents as the murderer of the child even before the trial had begun and in the NOIDA Nithari killing case one of the accused was branded by the media as '*nithari murderer*', however after trial the said accused was acquitted.[2] Recently, News Broadcaster Association, censured Times Now for running news titled '*Will Kanimozhi turn approver?*'[3], Approver in law is referred to a person who has accepted his guilt and is willing to share information with the Court in exchange for lesser punishment,[4] whereas till date neither Kanimozhi has accepted her guilt nor there was any such offer made from her side[5] hence the whole story was based on conjectures.

However to say that media has always been on the wrong side would be incorrect because there exists cases like the Jessica Lal, Priyadarshini Mattoo, Nitish Katara wherein existing institutions of the society working in favour of rich and the powerful were challenged by

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1 "Talwars killed Aarushi and lover hemraj", Rediff News, Available on http://www.rediff.com/news/report/slide-show-1-talwars-killed-aarushi-and-lover-hemraj-cbi/20120523.htm [last visited on July 11, 2013].

2 "Court acquits Nithari accused Mohinder Singh Pandher", Reuters India, Available on http://in.reuters.com/article/2009/09/11/idINIndia-42392320090911[last visited on July 11, 2013].

3 Complaint No. 8 of 2011 - In the matter of M/s. Times Global Broadcasting Company Ltd., Mumbai - Telecast of programme titled "Will Kanimozhi turn approver" on news channel Times Now on May 20, 2011, Available on http://www.nbanewdelhi.com/images/Upload/website-matter-times-now.pdf[last visited on July 11, 2013].

4 For more See § 306 and 307 of the Code of Criminal Procedure, 1973.

5 Information is correct as on November 4, 2012.

media and those guilty of the crime irrespective of their position and status in the society were brought to justice. In the backdrop of these cases, there has been a rising debate in the society of the so called phenomenon of 'trial by media' and its overall efficacy. Those who oppose media trial often argue that besides creating a public opinion against the accused, media trial influences the opinion of the judges as well.

In *Sahara India v. SEBI*[6], certain confidential information exchanged between Sahara and SEBI during the course of litigation was published by a newspaper. According to Supreme Court Rules, such information can only be published after prior approval has been taken by the Court. Sahara argued that such publication can substantially violate its right of free and fair trial hence prayed the Court to frame guidelines for publishing *sub judice* matters.

After a thorough analysis of the case laws available, the Court came to the conclusion that it can direct postponement of media reporting if it believes that such order has the substantial likelihood of interfering with the administration of justice and rights of the accused in form of free and fair trial. At a primary level, the case concerns balancing the right of the accused in form of fair trial, read into Article 21 of the Constitution vis-à-vis Article 19(1) in which freedom of press has been read. The Court sought to balance these rights by reading 'postponement orders' as reasonable restrictions under Article 19(2).

The author through this paper would like to through light on the judicial outburst on the so called 'media trial' and investigative journalism and build a case that media has right to conduct such investigations. At another level the author has tried to critique the said judgment because it has enlarged the scope of the Contempt of Court Act, 1971, by relying on a decision of the Supreme Court which has no relevance today.

For the sake of convenience and brevity this paper has been divided into six sections. The first section is the introduction which is followed by theoretical underpinnings of the Sahara case in the next section. The case itself is discussed in the third section while issuing regarding media trial and how it is justified has been discussed in the fourth section. One of the aspects of the case has been critiqued in the fifth section while issues raised

6 C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011 with I.A. Nos. 14 and 17 in C.A. No. 733 of 2012, [hereinafter SEBI Sahara Case].

and various arguments are summarised in the sixth section which is the conclusion.

2. Theoretical Underpinnings

A. Constitutional Basis for Freedom of Press

Article 19(1) (a) of the Constitution guarantees every citizen the freedom of speech and expression.[7] While this right has been given the status that available to natural rights,[8] it has been subjected to reasonable restrictions contained under Article 19(2).[9] Unlike the constitution of the United States of America, our constitution does not explicitly guarantee freedom of press however; the Supreme Court of India in a series of judgments has read freedom of press into 'freedom of speech and expression'.[10] Since the freedom of press flows from freedom of expression the press can neither be subjected to restrictions greater than those contained under Article 19(2)[11] nor can it claim any special privileges.[12]

In *Brij Bushan v. State of Delhi*,[13] where under § 7(1)(c) of the East Punjab Safety Act, 1950 newspapers were required to submit their content for scrutiny before publication, the Court struck it down on the grounds that such pre-censorship constitutes a restriction on the freedom of press hence violates Article 19(1) of the Constitution. In the *Sakal Case*, the Court had held that any act on the part of the State which results in reducing the circulation of newspaper violates the freedom of press. While the pre-censorship is rejected on the grounds that it interferes with the freedom of speech and expression guaranteed under the Constitution, post publication, print and electronic media is open to punishment for sedition[14], obscenity[15], defamation[16], Contempt of Court[17] and other offences.

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7 Article 19(1) of the Constitution.

8 *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 92; *L.I.C. of India v. Prof. Manubhai D. Shah*, (1992) 3 SCC 637.

9 Article 19(2) of the Constitution.

10 *Express Newspaper v. Union of India*, (1959) SCR 12; *Bennet Coleman v. Union of India*, AIR 1973 SC 106 ¶ 16; *Indian Express Newspaper v. Union of India* (1985) 1 SCC 641¶ 23; *Romesh Thapar v. Union of India*, (1950) SCR 594 (607).

11 *Sakal Papers v. Union of India*, (1962) 3 SCR 842, [Hereinafter Sakal Case].

12 *Sharma v. Srikrishna*, AIR 1959 SC 395.

13 AIR 1950 SC 129.

14 See § 124A of the Indian Penal Code, 1860.

15 *Id* § 292.

16 *Id* §499.

17 Contempt of Court is punished under Contempt of Court Act, 1971 and has been discussed in

In the case of *Rajagopal v. State of Tamil Nadu*,[18] the Court has recognized the need to balance the rights of individual guaranteed under Article 21 and freedom of press. It was held that the State cannot impose prior restraint on press under the belief that published material might invade the privacy of individuals and remedy to an individual affected is available only when the material in question has been published.[19]

B. Free Trial as read into Article 21 of the Constitution

Article 21 of the Constitution[20] guarantees every person the right not to be deprived of his life or personal liberty except according to the procedure established by law. The Supreme Court in the case of *Maneka Gandhi v. Union of India*[21] has held that the procedure established by law needs to be just and fair and must conform to the principles of equality and non-arbitrariness as enshrined in Article 14 of the Constitution.[22] Over the years, 'life' under Article 21 has been interpreted very liberally by the Courts and it has not been understood as a single right but rather a bouquet of rights in which Supreme Court has time and again read other rights like the right to speedy trial,[23] right against cruel and unusual punishment,[24] right to compensation,[25] and right to know.[26]

In case of *Zahira Sheikh v. State of Gujarat*[27], the court read fair trial, in which the accused is free from any prejudices and bias, as part and parcel of right to life. Elaborating on the facets of a fair trial the Court observed that, "*Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial.*"[28] Besides judicial intervention in guaranteeing fair trial under Section 327 of the Code of Criminal Procedure, 1973, a

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detail in this paper.

18 (1994) 6 SCC 632.

19 *Id* ¶22.

20 Article 21of the Constitution of India.

21 (1978) 1 SCC 248.

22 Article 14 of the Constitution of India.

23 *Hussainara Khatoon (I) v. Home Secretary, Bihar*; (1980) 1 SCC 81.

24 *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20.

25 *Rudul Shah v. State of Bihar*, (1983) 4 SCC 141; *Bhim Singh v. State of J&K*, (1985) 4 SCC 677.

26 *R.P. Ltd. v. Proprietors, Indian Express Newspapers, Bombay (P) Ltd.*, (1988) 4 SCC 592.

27 AIR 2004 SC 3114.

28 *Id.*

criminal trial must always be conducted in open to which "*general public may have access*".[29]

C. Contempt of Court Act and Freedom of Press

As discussed earlier, though not explicitly guaranteed by the Constitution, Courts have read freedom of press into Article 19(1) as part and parcel of freedom of speech and expression and like other rights under Article 19(1) it is subjected to reasonable restrictions under Article 19(2), hence restricted in relation to contempt of Court. The Courts have time and again reiterated that Contempt jurisdiction is vested with the Courts to ensure protection of the administration of justice.[30]

The present Contempt of Court Act, 1971 was passed based on the recommendations made by the Sanyal Committee and Joint Parliamentary Committee.[31]Section 2 of the Act defines Civil Contempt as wilful disobedience to Court orders while Criminal contempt as publication which lowers the authority of Court or interferes with due course of justice.[32] It is important to note that Courts can only punish for contempt when the judicial proceedings are pending.[33] Under § 3(1) the Act, immunity is granted to a person in case he had reasonable belief that proceedings are not pending in the Court of law[34] while under Section 4 if there is '*fair and accurate reporting of judicial proceeding*' then irrespective of the stage at which such proceedings are pending full immunity is granted under the Act.[35] These sections can be constructed as a way to balance the rights of press guaranteed under Article 19(1) of the Act and restrictions imposed on it by virtue of Article 19(2). Moreover, as long as such reporting is fair and accurate then even if the trial was *in camera* or in chambers of the judges the same is protected under the Act.[36]Also the Act protects fair criticism on the merits of the case, once a case has been finally decided by the court, from Contempt.[37]It is important to highlight that as per the Act there is a need that the contempt need to substantially interfere with the course of justice

29 § 327 of the Code of Criminal Procedure Code, 1973.
30 *Mohammed Yamin v. Om PrakashBansal, 1982*, Cr. L.J. 322 (Raj.)
31 The Contempt of Court Act, 1971: A Critique, Available on http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/12/12_chapter%204.pdf[last visited on July 11, 2013].
32 § 2(b) and (c) of the Act.
33 § 3(2) of the Act.
34 § 3(1) of the Act.
35 § 4 of the Act.
36 § 7 of the Act.
37 § 5 of the Act.

and until there is no substantial interference the publication is not liable for Contempt proceedings under the Act.[38]As can be seen the Contempt of Court Act has various inbuilt check mechanisms to prevent misuse of the Act and has been passed with the intention of protecting free speech made by the press in good faith and to prevent any undue limitations on its freedom and not to curtail the freedom of the press.

III. Sahara India Real Estate Corp. Ltd. V. Securities & Exchange Board of India[39]

A. Facts of the Case

Sahara had raised $4.3 billion from the Securities market using fully convertible debentures.[40] Securities Appellate Tribunal[41] directed SEBI to return this money along with interest on grounds of gross violations of Companies Act, 1956 and SEBI Regulations. Sahara appealed against this decision to the Supreme Court and on November 28, 2011 the Supreme Court sought to inquire from Sahara the manner in which they were going to make the payment. The reply filed by Sahara on January 1, 2012 regarding payment of its liability, was opposed by SEBI on the grounds that the securities listed by Sahara were insufficient. As a result, the Court asked the two parties to work out a mutually satisfactory security in form of an unencumbered asset.[42]On February 7, 2012, counsel for Sahara wrote a letter to counsel for SEBI regarding the details of security along with a Valuation Certificate, as proof of market value of the asset outlined as security. A day before the matter had to come up before the Court this letter was leaked by a television news channel. When the matter was taken up by the Court, counsels for Sahara expressed their displeasure regarding disclosure of letter and accused SEBI for breach of confidentiality. Though, SEBI denied any disclosure from its side, the Court took serious view of this matter and viewed such reporting by news channel as interference in the administration of justice. Meanwhile, Sahara filed an Interlocutory

38 § 13 of the Act.

39 C.A. No. 9813 of 2011; 9833 of 2011and 733 of 2012. [Hereinafter referred as, "Sahara & SEBI Case"].

40 Jeff Glekin, "SEBI's past haunts Sahara case", Reuters, September 14, 2012. Available on http://in.reuters.com/article/2012/09/14/breakingviews-india-sahara-idINDEE88D04F20120914[last visited on July 11, 2013].

41 Hereinafter SAT.

42 SAHARA & SEBI Case, *supra* no. 39 at¶7.

Application (IA) praying the Court to frame guidelines regarding reporting of *sub judice* matters. [43]

B. Issue

The issue for consideration before the Court was:

(a) Whether Supreme Court should lay down guidelines regulating reporting of *sub judice* matters? or;

(b) Whether the Court should refrain from framing any guidelines and rather read exception in Article 19(2) with a view to balance the rights of press which has been read into Article 19(1) (a) vis-à-vis rights of fair trial without any prejudice read into Article 21 of the Constitution of India?

C. Arguments

Sahara argued that on a conjoint reading of Order XII Rules 1 and 2 of the Supreme Court Rules, 1996; a person who is not a party to a case may inspect or get copies of records of a case only if it has obtained prior permission from the Court. In this case since news channel was a third party and it had not obtained prior permission from the Court it was clear violation of the said Rule. Moreover, it was argued that while in the instant case sufficient public interest was involved, since SAT had asked to return money of 30 million rural investors, no public interest is served by disclosing private inter party confidential information by a private news channel. Reliance was placed on the decision of the Supreme Court in case of *State of Maharashtra v. Rajendra J. Gandhi*,[44] where it was held that trial by media is the antithesis of rule of law. Hence, it asked the Court to frame guidelines regarding reporting of *sub judice* matter.

SEBI on the other hand denied that it had anything to do with the said leak and being a regulatory body there is no business reasons for it to disclose such information to media. However, SEBI agreed with Sahara that it is rather appropriate for the Supreme Court to frame guidelines regarding reporting of pending cases.

43 *Supra* no. 1 ¶ 13.

44 (1997) 8 SCC 386.

D. Judgment of the Court

Justice S.H. Kapadia, who wrote the decision of the Constitutional Court[45] while refrained from framing any guidelines on reporting of *sub judice* matters, held that Courts can under its inherent powers restrain print and electronic media from reporting *sub judice* matter, if it is satisfied that such publication may result in obstructing free trial. The Court relied on *Naresh Shridhar Mirajkar v. State of Maharashtra*,[46] wherein the Supreme Court was of the opinion that if restrain orders are passed by the Court to prevent miscarriage of justice they do not violate Article 19(1)(a) of the Constitution.[47]The Court read these postponement orders as 'reasonable restrictions' under Article 19(2) hence reasoned that they will not violate Article 19(2) of the Constitution. In the *Mirajkar case*, the Court had observed that rights under Article 19(1)(a) are not absolute and can be restricted *inter alia* on grounds of 'contempt of court' under Article 19(2). Since reporting of *sub judice* matter may in certain exceptional cases result in interfering with administration of justice there by leading to possible contempt, Courts can pass restrain orders.

With a view to balance Article 19(1)(a) *vis-à-vis* Article 21, the Court relied on the decision of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*.,[48] in which proportionality test and necessity test were propounded. Under the Necessity test postponement orders can be passed only in exceptional circumstances when there is a substantial likelihood of rights of the accused being severely impaired and other mechanisms to prevent such impairment like change of venue or postponing the trial are of no use while under proportionality test postponement order is passed when, "*salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to free expression and the right of the accused to open trial*."[49]The Court held that these two tests be kept in mind before restrain orders can be passed and also clarified that these restrain orders can only be temporary in nature.

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45 The bench strength of the present case was of five judges and constituted of Justice S. H. Kapadia, Justice D.K. Jain, JusticeSurinder Singh Nijjar, Justice Ranjana Prakash Desai and Justice Jagdish Singh Khehar.

46 AIR 1967 SC 1. [Hereinafter Mirajkar case].

47 *Id* ¶ 12.

48 [1994] 3 SCR 835.

49 SEBI & SAHARA Case, *supra* no. 39 at ¶ 22.

Since Courts are required to go through substance and context of the publication on a case to case basis before any restrain orders is passed, it was felt that it is impossible for the Court to frame any guidelines in this regard.

IV. Reporting of *sub judice* matters taking the shape of media trial

While the case primarily dealt with reporting of *sub judice* matters a strong undercurrent of the present case was the fact that media reporting of *sub judice* matters often take the form of 'trial by media'. In recent years the judiciary has come down heavily on trial by media and has voiced strong opinion against it. In the case of *M.P. Lohia v. State of West Bengal*,[50] it was alleged that a women named Chandini committed suicide because of continuous harassment suffered in the hands of her in laws and husband and while the case was *sub judice* a magazine called "Saga" did a story titled "doomed for dowry' based on the interview of the deceased father. The Court expressed its displeasure over trial by media and severely reprimanded the media on the grounds that such trial by media results in interfering with the rights of the accused and administration of justice. Similar view was also echoed by the Supreme Court in the case of *Saibal Kumar v. B. K. Sen*.[51] In *Bijoyananda v. Bala Kush*,[52]it was observed by the Court that reporting of pending cases should be as unbiased as possible without causing any harm to the reputation of the accused in question. Hence it has become necessary to address this issue.

A. Whether trial by media affects the judges subconsciously?

There is a divided opinion on the issue of, whether the judges subconsciously get influenced by trial by media. While the American judges[53] answer the question in negative and believe that a judge will only decide a case on its merits depending on the evidence presented before him, the Anglo Saxon view is that [54] a trial by media may have effect on the Judge, because judges after all are human beings, and this deleterious effect may be compounded at the time of hearing bail applications and if the party in question is rich and powerful, because corruption charges in these cases

50 AIR 2005 SC 790.
51 (1961) 3 SCR 460.
52 AIR 1953 Orissa 249.
53 *Nebraska Press Association v. Hugh Stuart*, (1976) 427 US 539.
54 *Attorney General v. BBC*, 1981 A.C 303 (HL).

cannot be ruled out.[55] The latter view, that judges do sometimes get affected by trial by media, find minority support in America as well where Justice Cardozo, Associate Judge, United States Supreme Court, had famously observed, "*The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by*." [56]

The Law Commission of India in its 200th Report had relied on the opinion of the Supreme Court in case of *P.C. Sen in re*[57] to conclude that in India the view is that judges do get subconsciously affected by trial by media and hence it should not be allowed. However, it is submitted that this view does not reflect the majority view in India. In the *PC Sen Case,* the facts germane to the issue were that the Governor of West Bengal made an order known as, "West Bengal Milk Products Control Order 1965" under which the manufacturing of milk products was regulated. The said order was challenged before the Honb'le Calcutta High Court and while the case was *sub judice*, the Chief Minister of West Bengal, P.C. Sen, made a speech on radio in which he justified the Governor's order. The Calcutta High Court reprimanded the Chief Minister and held that the speech interfered with the administration of justice by the Court and hence made him liable for Contempt of Court.[58]On appeal the Supreme Court confirmed the finding of the Calcutta High Court and observed that if a speech has the tendency to influence the jurors then it shall affect the judges also. It is submitted that majority of decisions in India does not subscribe to this view and the Law Commission has made an incorrect reliance on the said judgment.

In case of *R. Balakrishna Pillai v. State of Kerala*, [59]a politician facing corruption charges sought to shift the venue of trial on the grounds that trial by media has resulted in adverse publicity and that it might prejudice his case also. The Court while declining the request observed that, "*….Judges are not influenced in any manner either by the propaganda or adverse publicity. Cases are decided on the basis of the evidence available on record and the law applicable. ….Transferring the appeal would result in casting unjustified aspersion ….that judicial verdict is consciously or sub-consciously affected by the popular frenzy,*

55 *P.C. Sen (in Re)*, AIR 1970 SC 1821 [hereinafter as hereinafter PC Sen Case.]; *Rao Harnarain v. Gumori Ram*, AIR 1958 Punjab 273; *Bijoyananda v. Bala Kush*, AIR 1953 Orissa 249.

56 'Nature of the Judicial Process', Lecture IV, Adherence to Precedent, The Subconscious Element in the Judicial Process, YALE UNIVERSITY PRESS.

57 P.C. SEN, *supra* note 55 at 1821.

58 *P.C. Sen v. Unknown*, AIR 1966 Cal 411, ¶ 34.

59 (2000) 7 S.C.C. 129.

official wrath or adverse publicity, which is not the position qua the judicial administration in this country."[60]

In case of *State v. Mohd. Afzal*[61], a plea of excessive media coverage resulting in causing prejudice in the minds of the Trial Court was ruled out by the High Court and it was observed that, "*Judges are trained, skilled and have sufficient experience to shut their minds receiving hearsay evidence or being influenced by the media.*"[62] A similar view was also expressed by the Supreme Court in case of *Zee News v. Navjot Singh Sidhu.*[63] Hence, it can be seen that the judicial attitude in India favours that reporting of *sub judice* matter and trial by media has no effect on judges. Moreover, the Law Commission has relied on the decision of *P C Sen Case* which in the first place never dealt with trial by media and was concerned with statements made by a Chief Minister on *sub judice* matters hence the facts are distinguishable and in the opinion of the author does not apply to media trial.

It is perhaps correct to fall back on the golden words of Lord Parker in *Regina v. Duffey*[64], where he had famously observed that, "*Even if a Judge….had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A Judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case.*"

B. Recent cases where 'active' reporting of *sub judice* matter helped the Court

While there are umpteen number of cases where an 'active' reporting or what has been called as trial by media prevented the miscarriage of justice, the author would like to throw light on three very celebrated cases in which due to proactive role played by the media while justice was certainly delayed it was not denied to the victims and the perpetrators of crime were eventually brought to justice.

The first is the Jessica Lal case where an upcoming model was shot dead by Manu Sharma, son of Member of Parliament, after she refused to

60 *Id.* ¶9.
61 107 (2003) DLT 385.
62 *Id.* ¶ 138.
63 2003 (1) SCALE 113.
64 [1960] 2 Q.B.D. 188.

serve more liquor to the accused.[65] At the trial 32 prosecution witness turned hostile including Shayan Munshi, who was present at the time of commission of crime, as result of which the Trial Court acquitted all the nine accused.[66]After the trial Court acquittal verdict several media houses ran stories on how Manu Sharma used his money and fathers' influence to buy witness including ballistic experts. A sting operation by *Tehelka* aired on Star News also revealed how Venod Sharma, father of one of the accused, bribed and prevented witnesses from speaking truth in the Court.[67] The case subsequently went of appeal where the High Court convicted all the accused[68] which was subsequently confirmed by the Supreme Court in its decision of April 19, 2010.[69]It is only due to vigils organized by the media and carrying headlines like "No one killed Jessica", "Miscarriage of Justice" the perpetrators of such crime could be brought to justice.

In the second case, Priyadahrshini Matoo, a 23 year old lawyer was raped and murdered at her house and the prime accused of the case Santosh Kumar, son of an IPS officer, was acquitted by the Trial Court.[70] Post lower Court trial, a key prosecution witness Virender Prasad, domestic help of Priyadarshini, who was declared untraceable by the CBI, was traced by a news channel.[71] As a result lot of hue and cry was made by the media and due to intense publicity received by the case the CBI which had initially, in the words of the Trial Court judge, '*acted in a manner to favour the accused*" was forced to file an appeal against the judgment of the Trial Court in the High Court. Due to augmented media scrutiny and in light of the testimony of the witness who until trial court proceedings was untraceable,

65 "Manu Sharma and Vikas Yadav charged with Jessica Lal's murder", Rediff.Com, Available on http://www.rediff.com/news/1999/aug/03jess.htm.[last visited on July 11, 2013].

66 "All accused acquitted in the Jessica Lal Murder case", The Hindu, Available on http://www.hindu.com/2006/02/22/stories/2006022214170100.htm[last visited on July 11, 2013].

67 "Tehelka reveals the truth behind the Jessica Lall murder investigation cover-ups in a 60 minute Star News' expose "Case Ke Kaatil" aired at 9.00 pm, September 26th, 2006", Available on http://www.tehelka.com/story_main19.asp?filename=Ne093006JESSICA.asp [last visited on July 11, 2013].

68 State v Siddhartha Vashisht MANU/DE/9771/2006.

69 "Supreme Court confirms life term to Jessica Lal", The Hindu, Available on http://www.thehindu.com/news/national/article403180.ece[last visited on July 11, 2013].

70 "A Shocking Acquittal*",* Frontline, Available on http://www.hinduonnet.com/fline/fl1627/16270340.htm[last visited on July 11, 2013].

71 "Matoo Story revisited", Express India, Available on http://www.expressindia.com/news/fullstory.php?newsid=71408[last visited on July 11, 2013].

the accused was sentenced to death which was subsequently modified by the Supreme Court to life imprisonment.[72]

Thirdly, in the Sanjeev Nanda or the BMW hit and run case, the accused grandson of a former Navy Admiral, ran over and killed six people including three police officers and injured one person while driving his BMW in an inebriated state.[73] During trial, the lone survivor of the accident and star witness of the prosecution, somersaulted in the Court and turned hostile and said that accident was caused by a truck and not by the BMW as alleged by the Police.[74] While the case was still pending a sting operation was conducted by NDTV in which another witness Sunil Kularnai was offered large sum of money by the defence counsel R.K. Anand to change his testimony in the presence of IU Khan, the public prosecutor in the case.[75] The sting highlighted the unholy nexus between the defence and the prosecution and how the rich accused was using his money to buy witnesses. The Supreme Court while hearing appeal against the decision of the Delhi High Court, in which the two lawyers were held guilty of criminal contempt, the Court observed that the news channel had in fact served public cause by preventing miscarriage of justice.[76]

III. Trial by Media is nothing more than Private Investigation

A common thread that runs through all these cases is that in each of these the Trial Court erred in its finding and such error was not inadvertent but was deliberately caused by the defence. However, due to investigative journalism carried out by the media, miscarriage of justice was prevented. While such efforts must be lauded by the Courts it is sad to note that media is often reprimanded for the same and in *Rao Harnarain v. Gumori Ram*,[77] the Court went on to the extent of observing that the duty of

72 "Death reduced to life in Priyadarshini Matoo murder case", Asian Age, Available on http://www.asianage.com/india/death-reduced-life-priyadarshini-mattoo-murder-case-028[last visited on July 11, 2013].

73 "1999BMW case: Sanjeev Nanda to walk away a free man", The Indian Express, Available on http://www.indianexpress.com/news/1999-bmw-case-sanjeev-nanda-to-walk-away-a-free-man/983257 [last visited on July 11, 2013].

74 "Sanjeev Nanda gets five years in BMW hit and run case", IndLaw. Com, Available on http://www.indlaw.com/guest/DisplayNews.aspx?CE0E7BF4-C9E4-42AE-B993-B0C159382260[last visited on July 11, 2013].

75 "BMW case- A massive judicial failure", Available on http://www.legalserviceindia.com/articles/bmw_case.htm[last visited on July 11, 2013].

76 R.K. Anand v. Registrar Delhi High Court, Criminal Appeal No. 1393 of 2008¶ 180, hereinafter R.K. Anand Case.

77 AIR 1958 Punjab 273.

the press is not to investigate a case but rather report it and when reporting takes form of investigation it results in interfering with the administration of justice hence punishable with Contempt of Court.

It is submitted that such observations by the Courts is unwarranted and by undertaking investigative journalism the media is merely discharging the duty vested on private individuals by the Cr.P.C.[78] In each of these cases the media helped the Court and prevented the appellate Court from taking an incorrect decision. Imagine a situation where each of these cases would not have been actively reported by the media! The message to the society would have been that rich and powerful can manipulate and play the system including judiciary as per their whims and fancies.

According to a research conducted post the judgment in the Jessica Lal case, the faith of the people in the judiciary's ability to address wrong in the society and deliver justice had gone down to 2.7/10[79] and such negativity only give rise to vigilante justice in the society. Hence, it is the view of the author the media played an extremely crucial role by not only airing the sentiments of the common public, it also helped the Courts in arriving at the correct decision. The Supreme Court in the *R.K. Anand case* has also upheld the proprietary of sting operations. Hence, it can be said that these media trials instead of interfering with the administration of justice they further the cause of justice and help the Court. However, at this juncture it is important to add a caveat that such sting operations or investigative journalism is only allowed to the extent it furthers the cause of justice and at any moment if such journalism is used for nefarious reasons like saving the accused or falsely implicating an accused then Courts have all the right to step in to prevent such journalism.

It is also pertinent to note that besides helping the Court in taking correct and informed decision a trial by media often publicises the issue which has several merits of its own. The Supreme Court noted these merits and observed that, "*those who know about the incident maycome forward with information, it prevents perjury by placing witnesses under public gaze and it reduces*

78 V. KELKAR, K.N. CHANDRASEKHARAN PILLAI (rev.), "Lectures on Criminal Procedure", 4thed. 2006, Eastern Book Company, Lucknow, p. 48.

79 The poll was conducted by the Hindustan Times. Kathakali Nandi, "Investigative Role of Media: Responsibility To The Society", Global Media Journal – Indian Edition/ Summer Issue / June 2011, p.4.

crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues."[80]

5. Incorrect reliance on A.K. Gopalan v. Noordeen

In the Sahara case, the Supreme Court while allowing postponment orders obsevred that it is deriving power to issue such order to prevent possible Contempt of Court[81] and that while answering as to from when can these orders be put into effect, the Court relied on the decision of the Supreme Court in *A.K. Gopalan v. Noordeen*[82], to hold that such orders can be passed when, *"criminal proceddings in a subordiante Court are imminent or where suspect is arrested."*[83]It is submitted that the Court has made an incorrect reliance on a previous judgment of the Supreme Court which has no relevance post the passing of the Contempt of Court Act, 1971.

Contrary to the present Contempt of Court Act, the previous two Acts of 1926 and 152, never defined Contempt of Court nor specified the time from where it can be said that case has become *sub judice*. It becomes important to acertain the time from when the case is deemed to be *sub judice*because any publication prior to the case being *sub judice* is not deemed to interefer with the adminsitration of jsutice has been granted complete immunity by Contempt of Court Act.[84] As a result, prior to the present Act, Courts applied Contempt laws from the time prooceedings were '*imminent*'.[85]There was lot of confusion with resepect to the scope of the word imminent and for a long time the position of law was that trial is imminent from the time an FIR is lodged.[86]However this position was subsequently overturned by the Supreme Court in case of *A.K. Gopalan*.

In the *A K Gopalan case,* the accused was arrested based on the statements made by an A K Gopalan. These statements were published by a news paper and since they were made post filling of an FIR, the accused

80 *Kartongen Kemi Och Forvaltning AB v. State through CBI, 2004* (72) DRJ 693, ¶ 10 as cited in 1 MLR 2010 91-112 (94).

81 SEBI & SAHARA Case, *supra* no. 39 ¶ 19.

82 (1969) 2 SCC 734.[Hereinafter A. K. Gopalan Case.]

83 *Id.* ¶ 33.

84 Law Commission of India, 200th Report, p. 121.

85 For more See *Subrahmanyam in re*, AIR 1943 Lah329 (335); *Tulja Ram v. Reserve Bank*, AIR 1939 Mad 257; *State v. Radhagobinda*, AIR 195 4 Orissa 1; *State v. Editor etc. of Matrubhumi*, AIR 1955 Orissa 36; *Le Roy Frey v. R. Presad*, AIR 1958 Punjab 377; *Emperor v. Kustalchar*, AIR 1947 Lah 206.

86 *Smt. Padmavati Devi v. R.K. Karanjia*, AIR 1963 MP 61[Hereinafter as Padmavati Case].

argued before the High Court that they amount to contempt of Court because they unnecessary interfere with the administration of justice. The High Court relying on the judgment of the Supreme Court in case of *Padmavati* treated these publications as contempt. However, the Supreme Court reversed the decision of the High Court and held that trial is imminent from the time when an arrest is made, there by signalling a change in the judicial attitude. After this case, for a long time the settled position of law with respect to meaning of the word imminent was the time from which arrest is made and any publication which *substantially* interferes with the administration of justice post arrest was deemed to be Contempt of Court hence punishable under the Act.

However, the Joint Parliamentary Committee which had drafted the present Contempt of Court Act decided to discontinue the use of word 'imminent' on the grounds that the use of the word is vague and it will unnecessary interfere with the freedom of speech.[87] The reasoning stems from the fact that over a period of time, the judiciary has given varied sets of interpretations to the word 'imminent' hence there exists a possibility that subsequent judicial decisions may given such an interpretation to the word that it might result in complete blanket ban on reporting of *sub judice* matters. Hence, the Joint Parliamentary Committee decided to drop the word 'imminent' and added explanation to Section 3 of the present Act to determine with certainty the time from when judicial proceedings shall be deemed to be *sub judice*.

Under Section 3 of the Act any publication which interefers with the administration of justice is not punishable as contempt if at the time of publication no civil or criminal proceedings were pending. As per Explanantion to Section 3, a judicial proceeding is said to be pending in case of civil proceeding when a plaint is filed and in case of criminal procedings when charge sheet is filed or when summons is issued.[88]

Hence, it can be seen that through this judgment judiciary has try to negate the express words of legislature. Besides judicial rewriting of legislation, the said observation of the Court could have disastrous effects because if the view of the Court is accepted then from the moment any person is arrested comments made by the media may expose it to proceedings under the Contempt of Court Act. It is submitted that this

87 Supra no. 85 at p. 4.

88 Explanation to § 3 of the Contempt of Court, 1971.

might prejudice the trial itself because there exists a possibility that the accused might have been falsely implicated by the police and to deny a chance to the media to oppose such police excess by chaining it with Contempt of Court Act will have negative effect on the society at large.

6. Conclusion

The author through this paper has tried to study reporting of *sub judice* matters in light of the recent decision of the Supreme Court in the *SEBI Sahara* case. The case was peculiar in the sense that while some confidential information was leaked by one of the parties, the Court on the request of one of the parties took on itself the task of framing guidelines for media while reporting *sub judice* matters. While the Court refrained from framing general guidelines for the media it allowed issuing postponement orders, if the High Court or the Supreme Court is of the view that any reporting might result in possible Contempt of Court.

It is trite to say that reporting of *sub judice* matters is a statutory and constitutional right of the media which should and cannot be curtailed under any circumstances. While deliberating on the issue the Court came down heavily on investigative journalism and how trial by media creates an atmosphere of prejudice against the accused and especially when the accused is either rich or powerful. Through this paper the author made a two pronged argument against these judicial dicta. At one level it was argued that any reporting of the *sub judice* matters even when if it takes the form of investigative journalism or string operations in light of some of the recent cases instead of obstructing rather furthers the cause of justice. Moreover as mandated under Code of Criminal procedure it is the duty of the media to disclose anything which it is aware of in a pending trial. Hence even if the media sensationalizes such issues then it cannot be a ground for attacking and preventing the media from exercising its right and duty under the Cr.P.C. Secondly, on analysis of judicial decisions it was found that judges are neither influenced nor subconsciously affected by reporting of *sub judice* matters. Hence the argument that media should be restrained in reporting of *sub judice* matters because it affects the judges has been found to be purely untrue and devoid of any merit.

At another level, the author tried to critique the present judgment by arguing that the Court has made an incorrect reliance on the judgment of the Supreme Court in *A.K. Gopalan* Case which has not relevance post the passing of the present Contempt of Court, 1971. While relying on the

said judgment the Court has tried to negate the express words of the legislature and also such a decision has the tendency of causing sever harm to the public in large.

In all the cases which have been discussed in this paper, a common charge which is made against the media is that through reporting of *sub judice* matters and investigative journalism the accused is defamed and his public image is shattered. However, it is relevant to add at this juncture that it is not just a duty that is imposed on private persons, which includes media, to disclose information relating to trial under Cr.P.C., the law relating to defamation under Section 499 of the Indian Penal Code, 1860, besides providing valid defence on publication of Court proceedings, merits of case and conduct of witness protects media if any true imputation is made on any person for public good. Hence, in light of these provisions of law it is submitted that the law of defamation has granted privileges to the media in this regard and these charges seems to be vile and unscrupulous.

As far as the present case is concerned, Sahara had raised US$ 4.3 billion from rural investors without following SEBI guidelines in this regard hence sufficient public interest was involved, so even if the media published certain inter party related documents in the opinion of the author it is purely justified. Also, the primary liability with respect to maintaining confidentiality of the documents lies with the parties hence instead of fixing liability and finding the real culprit the journey of the Court to frame guidelines on reporting of *sub judice* matters in the opinion of the author was truly uncalled for and unwarranted.

In the present social set up where law has become an instrument to favour the rich and powerful at the cost of economically and socially weaker section of the society, such investigative journalism has become the need of the hour and the Courts must support media rather than discouraging them.

THE TECHNOLOGY OF RIGHTS: THE IMPLICATIONS OF DIGITAL RIGHTS MANAGEMENT FOR FAIR USE, PRIVACY AND FREEDOM OF EXPRESSION

Astha Pandey*

Abstract

The media, both print and electronic, plays an important role in the modern world in that it influences the society's outlooks, beliefs and attitudes. With the advancement in technology, electronic media has gained significant importance in terms of not just providing information and entertainment, but also in terms of creating awareness about socio-political, economic and cultural events around the world. As a result, media professionals have become increasingly aware of the crucial role played by the media in disseminating information to the public as well as serving as a platform that enables cross-border dialogue amongst people.

Both, the Rajya Sabha and the Lok Sabha, passed the Copyright Amendment Bill, 2012 (Amendment) on May 17, 2012 and May 22, 2012 respectively, bringing about significant changes to the Indian Copyright Act, 1957. The Amendments had been extensively debated upon both, inside and outside the Parliament and are forecasted to majorly impact the content industry.

The author attempts at providing an overall insight into the amendments that are likely to significantly impact the media with respect to information dissemination and content regulation. Thus, the author has analyzed the Indian Copyright (Amendment) Act, 2012 and its impact on media law from the point of view of focusing on the issue of Digital Rights Management.

With respect to the aforementioned issue, in the 2012 Amendment Act, Sections 65A and 65B have been inserted under the titles of 'Protection of Technological Measures' and 'Digital Rights Management' respectively, that deal with prevention of circumvention of technological measures. The spread of DRM technologies has not gone unchallenged. Privacy advocates have ignited an important public debate by identifying the serious threat that DRM technologies pose to fair use, privacy and free expression rights of consumers. The author will examine the potential conflicts that may arise due to the tension between DRM and the fair use doctrine as well as

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the implications of the DRM technology on privacy and right to freedom of speech and expression. Thus, the paper aims at examining the broader social implications of enabling the DRM technology.

I. Introduction

A. Digital Rights Management: A Primer

In the recent times, the world has witnessed rapid technological advancement especially with respect to the internet.[1] Prior to the these advancements in technology, individuals used to access creative works such as books, journals, articles, magazines, works of art, music etc by purchasing them or accessing them by visiting libraries.[2] The parallel analog regulatory system was thus designed in a manner as to ensure a relatively greater degree of privacy in terms of both, autonomy as well as anonymity with respect to the users of creative works since there were no mechanisms though which copyright holders could keep track of or control the users' activities in relation to creative works.

Digital networking across the globe has significantly altered the manner in which individuals access and operate creative works that are available on the internet.[3] In today's scenario, on one end of the spectrum are individuals or users who are well-acquainted with the recent developments in technology and hence keen on exploring new means of accessing creative works and on the other hand of the spectrum are copyright holders who are becomingly increasingly cautious with regard to making their works available on the digital platform and ensuring a greater degree of control over the use and enjoyment of their creations by individuals[4] and in order to ensure such control over their creations, copyright holders resort to technological tools such as Digital Rights Management ("DRM"), also known as Digital Locks or Technological

1 *Digital Rights Management Technologies and Consumer Privacy*, CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC), pp. 1-4, September 2007, www.cippic.ca (last visited on May 16, 2013).

2 *Id.*

3 *Neil Layton, Fading Ways Music and the Concept of Copy Left*, which offers innovative distribution rules under its Share sampler series, http://www.fadingwaysmusic.com/mission.html (last visited on October 29, 2012); *supra* note 1.

4 Peter Lauria, B*ronfman Rips Jobs*, NEW YORK POST, February 9, 1990, http://www.nypost.com/seven/02092007/business/bronfman_rips_jobs_business_peter_lauria.htm (last visited on May 18, 2012); *supra* note 1.

Protection Measures ("TPM"), for regulating the manner in which users engage with the content available in digital format.[5]

Simply put, DRM "*is a system, comprising technological tools and a usage policy that is designed to securely manage access to and use of digital information*."[6] Typically, a DRM system has three main components: a rights authority, a content player and encrypted content.[7] The content player, which is usually a software application installed on a particular physical device, utilizes an application-specific or device-specific identification[8] and needs a specific license or digital certificate from the rights authority in order to obtain permission to play each part of the encrypted content.[9] The number of copies of the encrypted content that distributed is not a matter of concern for the content owner because every time the user downloads digital content, the right authority confirms the users' rights in relation to that content by issuing a digital license,[10] which can either be obtained as a separate file or forms part of the content file itself.[11] In cases of unauthorized use of the content by a user, the license is revoked by the rights authority thereby ensuring efficient protection of the content owner's rights over each copy distributed digitally.[12]

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5 *Supra* note 2.

6 Kerr, Maurushat and Tacit, *Trends*; Ian R Kerr, Alana Maurushat and Christian S Tacit, *Technological Protection Measures: Part I—Trends in Technical Protection Measures and Circumvention Technologies* (2003); http://www.pch.gc.ca/progs/ac-ca/progs/pdacpb/pubs/protection/5_e.cfm (Kerr, Maurushat and Tacit, "Trends") (last visited on May 10, 2012); Alapan Arnab, Dr. Andrew Hutchison, *Digital Rights Management: A Current Review*, DATA NETWORK ARCHITECTURE LABORATORY, University of Capetown, April (2004) – Paper submitted to Infosec South Africa 2004 Conference.

7 *What is Windows Media DRM*, microsoft.com, http://web.archive.org/web/20040214160034/http://www.microsoft.com/windows/windowsmedia/WM7/DRM/what.aspx (last visited on May 18, 2012); Ben Fernandez, *Digital Content Protection and Fair Use: What's the Use*, J. ON TELECOMM. AND HIGH TECH. LAW, Vol. 3, pp. 439-440, (2005).

8 Brett Glass, *What Does DRM Really Mean*?, PC MAG., April 8, 2003, http://www.pcmag.com/article2/0,1759,1164013,00.asp (last visited on May 10, 2012); FERNANDEZ, *supra* note 7.

9 FERNANDEZ, *supra* note 7.

10 *How to Deploy Windows Media DRM*, microsoft.com, pp. 2-3, http://web.archive.org/web/20040304005145/http://www.microsoft.com/windows/windowsmedia/WM7/DRM/how.aspx (last visited on May 29, 2012); FERNANDEZ, *supra* note 7.

11 *Id.*

12 *Features of Windows Media Rights Manager*, microsoft.com, p. 7, http://web.archive.org/web/20040218032957/http://www.microsoft.com/windows/windowsmedia/wm7/drm/features.aspx (last visited on May 13, 2012).

B. Digital Rights Management: The Legal Framework

There is a substantial body of literature available with respect to the questionable aspects of DRM technologies as they have resulted in widespread controversy. Where on one hand its supporters are of the view that DRM is a necessary tool for the protection of the interests of copyright holders as far as digital networking is concerned, its opponents argue that DRM alters the foundations of copyright law by providing copyright holders unwarranted and excessive control.[13] Currently, the focus of majority of DRM systems is on multimedia, especially music and movies. Owners of such systems utilize the DRM technology as a means to combat internet piracy. Legislations dealing with intellectual property are primarily designed to protect works through copyrights, patents, trademarks etc., thereby creating the possibility of financial rewards for the right holders through the sale of their works. They confer exclusive rights to the holder to use the work for financial gain. Intellectual property laws are largely derived from the treaties made under the World Intellectual Property Organization ("WIPO") such as the Berne Convention.

The Indian Copyright (Amendment) Act, 2012 has incorporated within its ambit "*Protection of Technological Measures*" and "*Digital Rights Management Information*" via insertion of Section 65A and 65B respectively to the existing legislation of the Indian Copyright Act, 1957,[14] which prohibits circumvention of technological measures in order to protect copyright holders against infringement of their rights. In contrast to this, the Digital Millennium Copyrights Act ("DMCA"), passed in 1998 in the United States of America, draws a sharp distinction between '*circumvention*' and '*infringement*' and thus, in order to be liable under the enactment, a person need not actually infringe a copyright to violate the statute.

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13 Michael Geist, *TPMs: A Perfect Storm for Consumers*, TORONTO STAR January 31, 2005, http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1107126609169&call_pageid=970599119419 (last visited on October 16, 2012), citing competition concerns, consumer protection, innovation issues, and freedom of expression values, among other things, as threatened by TPMs.

14 Insertion of new sections 65A and 65B - Protection of Technological Measures and Digital Rights Management respectively: http://164.100.24.219/BillsTexts/RSBillTexts/PassedRajyaSabha/copy-E.pdf (last visited on May 28, 2013).

II. Digital Rights Management, Fair Use And Privacy

A. The Fair Use Doctrine

The copyright legislations of many countries regulate what is popularly known as the '*Fair Use*' doctrine.[15] This doctrine is basically an exception to the general theoretical foundation that lies beneath copyright laws i.e., protection must be afforded to copyright owners in order to prohibit others from infringing their works by either copying them or creating a derivative work. Therefore, the fair use doctrine encompasses certain cases wherein a user can copy or create a derivative work despite the copyright holder's objection to such use, for instance, including short clips from a movie in an online review of the movie is generally fair use, even though it involves copying parts of the original copyrighted work.[16] However, there are cases where there are no existing legislations on how copyright regulates the uses of a work, for instance, how often a copyrighted work is used, where the copyrighted work is used, who uses the copyrighted work, the time period that the copyright work can be used and transfer of ownership.[17] Despite the fact that some of these uses are regulated by license agreements, no such restrictions are imposed in most works. There are also related fears that the DRM media will be protected in the future via license agreements resulting in preventing fair use.[18] Thus, as is evident, the concept of fair use is too broad and not well-defined which makes its effective implementation extremely difficult.[19]

Fair use is an extremely pertinent example that manifests the discrepancy between the requirements of law and what technology can provide.[20] Copyright legislations provide as to what constitutes fair use, there is no precise algorithm of the doctrine that can be made applicable when it comes to digital networking. Though the law provides that in such cases, a case-by-case analysis should be made on the threshold of four factors: the nature of the use, the nature of the original work, the portion of the original

15 Section 65A(2) of the Indian Copyright (Amendment) Act, 2012 and Section 107 of the U.S Copyright Act, 1976. Sections 12–19 of South Africa's Copyright Act 98 of 1978.

16 Edward W. Felten, *A Skeptical View of DRM and Fair Use*, COMMUNICATIONS OF THE ACM, pp. 57-58, Vol. 6, No.4, April (2003).

17 *Supra* note 23.

18 S. Dusollier, *Fair Use by Design in the European Copyright Directive of 2001*, COMMUNICATIONS OF THE ACM, pp. 51-55, Vol.4, (2003).

19 *Supra* note 24, at 57-59.

20 *Supra* note 27, at 59.

work used and the effect of the use on the market, it does not provide for any mechanisms for either evaluating the aforementioned factors or weighing them against each other.[21]

B. User Privacy

Besides the dichotomy between the fair use doctrine and DRM technologies, there are other critical legal concerns associated with DRM systems. One such issue is that of user privacy. The DRM technology can implicate privacy due to one of its basic features which results in its ability to regulate who is authorized to access and use information digitally available.[22] The origins of the legal concept of privacy can be traced back to an article written in 1890 in the Harvard Law Review by Professors Samuel Warren and Louis Brandeis, who defined privacy as "*the right to be let alone*."[23] This traditional concept of privacy has evolved over the last century to include at least two strands: the right of individuals to control their physical space i.e., their body or home and to control their personal information. The latter right is known as "*informational privacy*" or "*informational self-determination*."[24] DRM systems enable an unprecedented degree of surveillance over the users' activities with respect to their use of creative works, be it in the form of reading, listening, browsing or viewing.[25]

Thus, collecting personal information about consumers is an integral part of the functionality of DRM.[26] Though DRMs are commonly referred to as '*Rights Management*' systems, what these databases essentially manage is personal information about users gathered through continuous surveillance and monitoring and thus, what they should actually be referred to is '*Rights Monitoring*' systems.[27]

As a result, several privacy regulators, policy-makers as well as IT experts have expressed deep concerns regarding the privacy implications of DRM technologies.[28]

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21 *Supra* note 28, at 58.

22 *Supra* note 5.

23 www.louisville.edu/library/law/brandeis/privacy.html; Ann Cavoukian, *Privacy and Digital Rights Management: An Oxymoron?*, INFORMATION AND PRIVACY COMMISSIONER, ONTARIO, www.ipc.on.ca (last visited on May 28, 2012).

24 *Id.*

25 Ian Kerr and Jane Bailey, *The Implications of Digital Rights Management for Privacy and Freedom of Expression*, INFO, COMM AND ETHICS IN SOCIETY, (2004).

26 *Id.*

27 *Id.*

28 KERR AND BAILEY, *supra* no. 34.

The Privacy Commissioner of Canada has noted:

> "*Alternatives exist that would provide copy protection and at the same time protect privacy. For instance, token and password systems could be used to authorize a download of digital content. Alternative, non-privacy invasive solutions do not appear to have been explored adequately, and this is what we must demand of DRM systems that are deployed in Canada.*"[29]

The European Union Data Protection Working Party while recently considering the issue pointed out:

> "*The Working Party is concerned about the fact that the legitimate use of technologies to protect works could be detrimental to the protection of personal data of individuals. As for the application of data protection principles to the digital management of rights, it has observed an increasing gap between the protection of individuals in the off-line and on-line worlds, especially considering the generalized tracing and profiling of individuals.*"[30]

Thus, as is evident, the context in which DRM is deployed raises several legitimate concerns relating to violation of user privacy.[31] Individuals are habituated to and expect a reasonable degree of anonymity and privacy when it comes to the use and enjoyment of creative works. However, the employment of DRM technologies, especially in unexpected places, defeats the requirements of user anonymity and privacy. For instance, consider a situation wherein a DRM monitors the frequency i.e., the number of times a digital product is used by an identifiable consumer within the first three weeks of him purchasing the product.[32] Assuming that the purchaser is an educated and aware one, he has read the terms and conditions of the product's use carefully, which indicate that the product's use might be monitored anytime for '*statistical purposes* (whatever that

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29 PRIVACY COMMISSIONER OF CANADA, *DRM Fact Sheet*; PRIVACY COMMISSIONER OF CANADA, *Digital Rights Management and Technical Protection Measures*, November (2006), http://www.privcom.gc.ca/fs-fi/02_05_d_32_e.asp (Privacy Commissioner of Canada, "(DRM Fact Sheet") (last visited on May 21, 2013).

30 Article 29 Data Protection Working Party, *Working document on data protection issues related to intellectual property rights WP104*, January 18, 2005, (last visited on May 12, 2013); http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp104_en.pdf, p. 8 (last visited on May 13, 2013).

31 Mulligan, D., Han, J., and Burstein, A., *How DRM based content delivery systems disrupt expectations of* "*personal use*". In *Proceedings of the 2003 ACM workshop on Digital Rights Management* (2003), ACM, pp. 77–89, http://doi.acm.org/10.1145/947380.947391.

32 *Supra* note 37.

means).[33] Since the consumer is eager to use the product, as and at the same time is aware that he lacks the bargaining power to modify or alter the terms and conditions, he clicks the '*I agree*' option.[34] Under what circumstances can this be said to lead to the definite conclusion regarding his consent, let alone informed consent, relating to the kind of and the purposes and duration for which information about him is collected and managed. Moreover, by what means can he safeguard the accuracy of his data profile and ensure that the data collected is not used for purposes other than for which it was originally collected?[35]

III. Access To Information And Freedom of Speech And Expression

In light of the above discussion, it becomes clear that the debate surrounding anonymity is particularly heated in the context of access to information.[36] It is undoubted that anonymity facilitates intellectual exploration and development of innovative ideas. Individual users, who argue in favour of anonymity, contend that their decision to access a particular website, material etc., is greatly influenced by whether they can do so anonymously and thus, monitoring of their activities via DRM database results in discouraging them from accessing intellectual information.[37] The opponents of anonymity i.e., copyright holders, are of the view that access to creative works based on anonymity has resulted in widespread infringement of intellectual property rights across the board.[38] Anonymous P-2-P file sharing of video games, movies and other copyrighted works are examples often-cited by copyright holders to demonstrate instances of violation of their rights.[39]

Technical experts have proposed several models of DRM technologies wherein privacy considerations can be incorporated within the DRM system itself. Such models aim at preventing unauthorized use of creative works without compromising on the privacy rights of users by collecting only basic and relevant information necessary for monitoring the

33 *Id.*
34 *Id.*
35 *Id.*
36 *Supra* note 42.
37 Julie Cohen, *DRM and Privacy*, BERKELEY TECHNOLOGY LAW JOURNAL, pp.580-581 (2003), http://btlj.boalt.org/data/articles/18-2_spring-2003_symp_cohen.pdf (last visited on October 31, 2012); *Supra* note 43.
38 *Supra* note 47.
39 *Id.*

use and enjoyment of creative works by them.[40] Given the fact that the surveillance features associated with DRM systems form an inherent part of their operation and are extremely crucial to the technological enforcement of various aspects of a given license, in the attempt to formulate any of the aforementioned models, the compelling question to be pondered upon is as to what are the limitations that ought to be placed on the surveillance operations of a DRM and on what factors are these limits to be determined?[41] This, naturally, would lead to the consideration of another basic question of what does or does not count as privacy invasion in the context of networked digital technologies.[42]

As Cohen so eloquently stated the problem more than half a dozen years ago:

> "*In truth, however, the new information age is turning out to be as much an age of information about readers as an age of information for readers. The same technologies that have made vast amounts of information accessible in digital form are enabling information providers to amass an unprecedented wealth of data about who their customers are and what they like to read. In the new age of digitally transmitted information, the simple, formerly anonymous acts of reading, listening, and viewing – scanning an advertisement or a short news item, browsing through an online novel or a collection of video clips – can be made to speak volumes, including, quite possibly, information that the reader would prefer not to share.*"[43]

Therefore, a crucial first step for lawyers and policy-makers is to disrobe the structure of particular systems which violate fair information practices.[44] However, this is only a first step. The next important task would be to urge those who design DRM softwares to formulate the architecture in a manner that confirms to ethical and legal standards. Such projects, as mentioned earlier, are in progress already.[45]

The concerns relating to privacy violations of users due to employment of DRM technologies is closely linked with the issue of

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40 *Id.*
41 *Supra* note 46.
42 *Id.*
43 J. Cohen, *DRM and Privacy*, BERKELEY TECH.L.J.*, (2003),* p.575; *Supra* note 53.
44 *Supra* note 53.
45 Kerr, I., *Look out: The Eyes Have It*, GLOBE AND MAIL*,* January 12, 2004, *Supra* note 55.

freedom of speech and expression, especially with respect to the internet. The right to freedom of speech and expression is the foundation of a democratic set-up as it is not only intrinsic to self-fulfillment associated with the ability to express oneself freely, but is also instrumental in the search for truth and informed public participation.[46] Access to information is a critical component of the right to freedom of speech and expression as it serves as a platform for informed decision-making and leads to generation of new ideas inspired by the expression of others.[47]

As Moon has written:

> "*The creation of meaning is a shared process, something that takes place between speaker and listener. A speaker does not simply convey a meaning that is passively received by an audience. Understanding is an active, creative process in which listeners take hold of, and work over the symbolic material they receive, locating and evaluating this material within their own knowledge or memory. …Freedom of expression is valuable because in communicating with others an individual gives shape to his or her ideas and aspirations, becomes capable of reflection and evaluation, and gains greater understanding of her/himself and the world. It is through communicative interaction that an individual develops and emerges as an autonomous agent in the positive sense of being able to consciously direct his or her life and to participate in the direction of his or her community*."[48]

Copyright law, by enforcing privately held rights of exclusivity in relation to the expression of ideas, seems to be inconsistent with a public commitment to free speech and expression which is the underlying principle of a democracy.[49] Despite the fact that copyright provides right holders with a distinct advantage in the marketplace by allowing them to place limitations on the use and enjoyment of their expressions, several

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46 Mill, J. S. (1947) *On Liberty*, In Castell, A. (ed.), *On Liberty*, AHM Publishing Corp, Meiklejohn, A. (1965) *Political Freedom*, Oxford University Press; *Supra* note 55.

47 Numerous international human rights instruments recognize the centrality of access to information in building and maintaining vibrant communities: *Universal Declaration of Human Rights*, G.A. Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 19; *International Covenant on Civil and Political Rights,* 23 March 1976, 999 U.N.T.S. 172, Art. 19; *Convention for Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5, Art. 10.

48 Moon, R. (2000) *The Constitutional Protection of Freedom of Expression*, University of Toronto Press, pp. 23–24; *Supra* note 55.

49 *Supra* note 55.

jurisdictions have chosen to establish and protect exclusivity rights in order to maintain a healthy and competitive marketplace of ideas.[50] On the flipside, many contend that copyright can serve as an '*engine of free expression*' thereby reconciling the legal protection afforded to such exclusivity rights with the public commitment to freedom of speech and expression.[51] An economics-based analysis suggests that copyright provides the economic incentive essential for the creation and dissemination of new ideas thereby enriching the marketplace of ideas available to all.[52] The problem with the marketplace model argument is that even if the fact that a certain degree of exclusivity is imperative to motivate creation and expression is conceded to, determination as to what degree of exclusivity should be afforded legal protection becomes an extremely difficult task.

Legislations protecting copyright, as the case should be, do not protect copyright in its entirety. Instead, they are designed with the objective of affording the degree of protection necessary to encourage creation without inordinately delving into the issues of public use and access.[53] Hence, determination of whether use of or access to particular content is legally permissible is almost akin to a Herculean task. The debate surrounding freedom of speech and expression, particularly with respect to the internet, has gained significant importance lately. The United Nations Educational, Social and Cultural Organization (UNESCO) recognizes the decisive role played by the internet in today's times.[54] It is an undoubted fact that the internet, by providing access to an unprecedented volume of resources for knowledge and information, opens up new opportunities for participation and expression, even where none exist.[55] DRM systems provide the necessary mechanism that enables controlling and monitoring access to and use of not only copyrighted works, but even those that are otherwise part of the public domain and therefore not legally subject to restrictions imposed by copyright laws.

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50 A list of copyright legislation in various countries, http://www.eblida.org/ecup/lex/.

51 *Supra* note 60.

52 This analysis of copyright's relationship to free expression was endorsed by O'Connor J. of the United States Supreme Court in *Eldred v. Ashcroft* 537 U.S. 186, p. 219, (2003).

53 *Supra* note 62.

54 Freedom of Expression on Internet, http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-expression-on-the-internet/ (last visited on May 28, 2013).

55 Adam Thierer, *Hillary Clinton's Historic Speech on Global Internet and Freedom*, THE TECHNOLOGY LIBERATION FRONT, January 21, 2010, http://techliberation.com/2010/01/21/hillary-clintons-historic-speech-on-global-internet-freedom/ (last visited on May 28, 2012).

There exists a high probability of the widespread employment of DRM systems resulting in hindering innovation and discouraging public participation by blocking digitally available content according to the private economic interests of rights holders, with little or no regard for the larger fundamental interest in facilitating a healthy marketplace of ideas through access to and use of others' expressions.[56] DRM systems, to the extent that they restrict access to and use of digital content, assist in the undermining of the right to freedom of speech and expression which is the underlying basis of public policy in democratic jurisdictions. DRM systems are not currently technologically capable of analyzing these fundamental textured distinctions.[57] It therefore becomes important for policy-makers to not give priority to private technological control over the larger interests of the public without a convincing exposition from right holders that the excessive or additional degree of control via the DRM technology is justified.[58] Furthermore, in addition to the compelling justification, if provided, policy makers must not fail to consider the negative social implications of surrendering public interests in the hands of private control in order to maintain a balance between public and private interests which is extremely important in order to protect public commitments to free speech and expression.[59]

Several courts, in highlighting the crucial role governments can play by limiting privately imposed restrictions have noted:

> "*a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information*."[60]

The manner in which freedom is conceived, therefore, becomes an issue worthy of consideration. If the term 'freedom' is conceptualized in a manner to be equated with 'control free', then it would not be sufficient for governments to simply refrain from taking action.[61] It would then become

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56 *Supra* note 63.
57 *Id.*
58 *Id.*
59 *Id.*
60 *Haig v. Canada*, 1993, 2 S.C.R. 995, 1039.
61 *Supra* note 66.

important to go a step further and look beyond freedom as something that merely is a connotation of absence of governmental control in order to highlight the repressive nature of private social control, which, according to Mill "*leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.*"[62] Therefore, such a conception of 'freedom' would not only require governments to refrain from enacting legislations that protect copyright, but also take positive measures to ensure the removal of the negative implications which result due to private imposition of unduly restricted access to and use of information available in digital formats. Critical questions regarding whether or not and how much of private exclusivity is an actual necessity have persisted since before the advent of the digital networking world.[63]

With the development of digital networks, added concerns regarding balancing of interests essential to maintaining public commitments to freedom of speech and expression have come to the forefront once again, requiring greater attention and analysis, especially in the context of publicly accountable political institutions one the one hand, and technological systems designed to serve the interests of rights holders on the other.[64] DRM technologies are here to stay which is why future systems will need to include DRM systems to satisfy both, legislative requirements as well as publishers' and consumers' demands.[65] Thus, the question we need to grapple with is as to what form will DRM technologies take in their further development in the future- as stated earlier, the current disposition of DRM systems poses a serious threat to our fundamental commitment to personal privacy and freedom of expression and is not equipped enough to provide for the balancing of public interests with private interests.

IV. Conclusion

The persistent concern regarding DRM systems is aptly expressed in the words of Andrew Carnegie who stated that:

> "*many of today's digital rights management systems are designed to help only those who pay. They pauperize. They impede the aspiring and lock away from these chief treasures of the world – renting to them instead*

62 Mill, J. S. (1947) *On Liberty*, In Castell, A. (ed.), *On Liberty*, AHM PUBLISHING CORP.
63 *Supra* note 66.
64 *Id.*
65 *Supra* note 25.

> *only brief glimpses, tracking their every move all the while. A taste for such systems drives out higher tastes*."[66]

The theorization of DRMs by various scholars leaves no doubt that there exists a clear link between copyright, privacy and freedom of expression.[67] The decision as to whether to express or suppress information, creative and intellectual works is highly dependent on the manner in which we experience them which is why the issue of surveillance techniques employed by DRM systems to monitor and control what, how often and with whom one interacts or communicates has a bearing on one's ability to express oneself freely.[68]

It is also important to note, at this juncture, the glaring differences between the underlying concept of copyright law and DRM technologies. Laws dealing with copyrights, barring a few exceptions, give the rights holder exclusive rights over their works. However, anticipation of every possible use of a copyrighted use is beyond the scope of a copyright legislation's objective and purpose.[69] As opposed to this, DRMs function in a manner wherein any action that a user intends to take has to explicitly granted or provided for.[70] This feature of DRM technologies is a prerequisite to their efficient operation but it contemplates far-reaching implications for future uses of protected works. Where copyright legislations adopt the approach of "*everything that is not forbidden is permitted*," DRM is an expression of "*everything that is not permitted is forbidden*."[71] Hence, the future interaction of DRM systems and innovation will not only be stifling but also have compelling consequences. The bottom-line is that in today's world where technological innovation is a major contributor towards development and growth of ideas and concepts, DRMs will form a very important part of our future.[72]

Therefore, the author is of the view that it is imperative that those involved in the development and formulation of DRM software's participate in discussions taking place in standard organizations and the

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66 Mathew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my I-Pod*, Edward Elga Publishing Ltd, pp. 171-172, (2007).

67 *Id.*

68 *Id.*

69 Karen Coyle, *The Technology of Rights*, www.kcoyle.net/drm_basics.pdf (last visited on October 16,2012).

70 *Id.*

71 *Id.*

72 *Id.*

research arena, not only to comply with legislative requirements but also to ensure that these technologies that will significantly impact our ability to access and use digital works do not, in any manner, hinder the foundational principles upon which our democracies our built, namely, privacy and freedom of speech and expression.

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