

IJLT | THE INDIAN JOURNAL OF LAW AND TECHNOLOGY

Volume 17 | Issue 2 | 2021

[Cite as: 17 IJLT, < page no. > (2021)]

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
BANGALORE

Price: Rs. (in 2 issues)

© The Indian Journal of Law and Technology 2021

The mode of citation for this issue of The Indian Journal of Law and Technology, 2020 is as follows:

17 IJLT, <page no.> (2021)

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Published by:

Student Bar Association

National Law School of India University

Nagarbhavi, Bangalore – 560072

Website: www.ijlt.in

Email: ijltedit@gmail.com

Distributed exclusively by:

Eastern Book Company

34, Lalbagh, Lucknow - 226 001

U.P., India

Website: www.ebcwebstore.com Email: sales@ebc.co.in

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IJLT
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THE INDIAN JOURNAL OF
LAW AND TECHNOLOGY

Volume 17 | Issue 2 | 2021

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IN-HOUSE COUNSEL, THE ADOPTION OF ARTIFICIAL INTELLIGENCE, AND LEGAL ETHICS

Dr. Felicity Bell & Prof. Michael Legg***

ABSTRACT In-house counsel have become a large and influential group of lawyers in many jurisdictions. When it comes to transactional and regulatory work, they play a key role. Nevertheless, in-house counsel are also under pressure to create efficiencies in legal work, with tightening legal budgets and ever-growing volumes of regulation. Artificial intelligence (AI) applications are often suggested as a means of creating these cost savings. There is a strong business case for using AI in this context as routinised work lends itself to economies of scale. But what are the implications of using AI, for the in-house lawyer? They must ensure that professional ethical standards are being adhered to. They must also be, effectively, a change manager – encouraging their staff to use the tech options available. And finally, they must be a team player, supporting and supervising the use of tech by both lawyer and non-lawyer employees. This article describes the uses of AI by in-house counsel before examining what it demands of them in their role.

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INTRODUCTION

There are thousands of in-house or corporate counsel around the world. In many jurisdictions, they are the fastest-growing segment of the lawyer

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population.¹ It seems also that the role of the in-house counsel is broadening – in addition to giving legal advice and managing relations with external law firms, they are likely to be ‘intimately involved in compliance, corporate governance, and risk and reputation management’.² For example, just over half of company directors surveyed by the global Association of Corporate Counsel (an association of over 40,000 in-house counsel around the world) identified that ensuring compliance with regulations was one of the three main ways in which general counsel provide value to the company.³ At the same time, as in-house counsel are expected to act as stewards of the company’s ethical and compliance obligations, they are being pressured to demonstrate their and their team’s ‘value’ as never before.⁴ Unsurprisingly, then, automation of legal work using artificial intelligence (AI) is increasingly identified as a means of delivering this value.⁵

The corporate counsel role was already an object of academic study due to its peculiarities: the in-house counsel works for only one “client”, and moreover, this client is also the lawyer’s employer.⁶ In particular, studies have looked at in-house counsel’s ethics and how these are enacted.⁷ This article considers the influence of AI on this specific professional legal group. We find that certain ethical obligations are heightened for in-house counsel

¹ Eli Wald, ‘In-House Risks’ (Compliance & Ethics, ABA Antitrust Section Newsletter 2015) 15 (‘Over the last thirty years or so, as the number of in-house counsel rose and their role increased in scope and prominence.’).

² Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart 2020) 210; See also Omari Scott Simmons, ‘Chief Legal Officer 5.0’ (2020) 88 *Fordham Law Review* 1741, 1741–42 (‘modern CLOs perform an embedded internal regulatory function, which includes “monitoring, formulating company procedures and policies, and enforcement”’).

³ Veta T Richardson and Mary Blatch, ‘Leveraging Legal Leadership: The General Counsel as a Corporate Culture Influencer’ (Association of Corporate Counsel 2017) 3 <https://www.acc.com/sites/default/files/resources/vl/public/QuickReference/1468922_3.pdf> accessed 11 July 2022; See also Marc Steinberg and Stephen Yeager, *Inside Counsel – Practices, Strategies and Insights* (West Academic 2015) 181 (referring to in-house counsel’s role in implementing law compliance programs as ‘the practice of preventive law’).

⁴ Eg, ‘Tech Tactics: The Case for Rethinking the Legal Function’ (*GC Magazine*, 27 September 2021) <<https://www.legal500.com/gc-magazine/category/feature/>> accessed 11 July 2022.

⁵ Dana Remus and Frank Levy, ‘Can Robots be Lawyers: Computers, Lawyers, and the Practice of Law’ (2017) 30(3) *Georgetown Journal of Legal Ethics* 501, 540; ‘Tech Tactics’ (n 4).

⁶ *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* (1972) 2 QB 102, 129.

⁷ See, eg, Robert L. Nelson and Laura B. Nielsen, ‘Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations’ (2000) 34(2) *Law and Society Review* 457, 466–68; Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyers’ Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart 2018).

when using AI.⁸ Further, while in-house counsel are likely to be ‘consumers’ rather than producers of AI products,⁹ they also play an important role in procurement and in leading their teams’ use of AI technologies.

In referring to AI, we are talking about an umbrella term which might include expert systems (sometimes called ‘first wave’ AI) as well as machine learning,¹⁰ sometimes referred to as systems that can ‘learn’:

Machine learning programs excel at finding statistical patterns in data. This model developed is a pattern of statistical relationships that exist between different features of the data in the dataset. Typically, the more data analysed, the greater the accuracy of the model. The dynamism of machine learning comes from the ability of the program to refine itself as it encounters even more new data and its capacity to scale to huge amounts of data.¹¹

The use of AI, especially machine learning, in professional occupations is growing across the board. Looking in particular at legal services, Remus and Levy have explained:

As pressure increases to hold down expenses, the purchase of technology becomes more attractive. [One] factor promoting accelerated technology purchases is the shift of corporate legal work from law firms to the corporation’s own legal department. Such legal departments are part of standard, profit-maximizing organizations that put a higher value on efficiency than a partner-based firm.¹²

In a survey of general counsel, 91% reported that they thought AI would disrupt the legal industry.¹³ AI is useful for in-house counsel in several

⁸ This article does not seek to address the general topic of ethics of AI, which has been the subject of substantial research, but rather legal ethics and how those requirements impact on the use of AI by lawyers. The regulation of lawyers through professional and ethical codes of conduct may act as an indirect form of regulation of AI as legal ethics limits and guides lawyers as to when and how they may use AI. However, the focus is the regulation of lawyers so that AI is only regulated when used by a lawyer.

⁹ See, John Armour, Richard Parnham and Mari Sako, ‘Augmented Lawyering’ (University of Oxford and ECGI December 2020) Law Working Paper N° 558/2020, 9 <https://ecgi.global/sites/default/files/working_papers/documents/armourparnhamsakofinal.pdf> accessed 11 July 2022.

¹⁰ We refer to expert systems to denote pre-programed systems which can guide users through a sequence or series of steps and machine learning systems to refer to data-driven programs which use pattern recognition in data to produce their outputs.

¹¹ Legg and Bell (n 2) 29.

¹² Remus and Levy (n 5) 540: citing Deborah A DeMott, ‘The Discrete Roles of General Counsel’ (2005) 74 *Fordham Law Review* 955, 958–60 and Nelson and Nielsen (n 7) 466–68.

¹³ ‘Tech Tactics’ (n 4).

interrelated areas. First, it is argued that AI in legal services is well positioned to be used for repetitious legal tasks such as document review (whether of voluminous electronic documents, such as in Technology Assisted Review (TAR),¹⁴ or of single documents); and for document automation (drafting).¹⁵ Due to the ‘high fixed costs’ associated with assembling sufficient data for machine learning systems, the optimum context for their use is in relation to ‘tasks for which relevant data are readily available and in which results can be scaled such as discovery review, contract analytics, and legal research’.¹⁶ AI has various uses for transactional law, in areas that we summarise as review and drafting, management, and analysis. These areas can also be seen as interrelated, in that the results of analysis have lessons for drafting; review is relevant to management; and management enables data collection, which in turn facilitates analysis. The potential for increased efficiency was the ‘most frequently cited factor’ by general counsel in a survey that asked why they were considering implementing new technology.¹⁷ At the same time, technology use in law has been conceptualised as part of a wider and long-standing shift towards commodification, and away from a traditional, bespoke manner of offering legal services.¹⁸

Second, AI may underpin regulation technology (‘RegTech’) that has been developed to streamline and automate compliance with increasingly extensive regulation.¹⁹ The growth of regulatory requirements and costs of complying with them has been rapid and in-house lawyers have a central (and possibly burdensome) role in achieving this compliance:²⁰

¹⁴ Legg and Bell (n 2) 109–112.

¹⁵ Remus and Levy (n 5).

¹⁶ Armour, Parnham and Sako (n 9) 4.

¹⁷ ‘In-House Technology in Europe: Measuring the Appetite for Tech’, (*GC Magazine*), <<https://www.legal500.com/gc-magazine/feature/the-state-of-play/>> accessed 11 July 2022 (reporting that 84% said this).

¹⁸ See, eg, Emily Carroll and Steven Vaughan, ‘Matter mills and London-lite offices: Exploring forms of the onshoring of legal services in an age of globalisation’ (2019) 22(1–2) *Legal Ethics* 3.

¹⁹ Australian Government Productivity Commission, ‘Regulatory Technology, Information Paper’ (2020) 5–6 <<https://www.pc.gov.au/research/completed/regulatory-technology/regulatory-technology.pdf>> accessed 11 July 2022.

²⁰ ‘Lawtech Adoption Research’ (The Law Society February 2019) 19; SH Kim, ‘The Ethics of In-House Practice’ in L Levin and L Mather (eds), *Lawyers in Practice – Ethical Decision Making in Context* (University of Chicago Press 2012) 198; Steinberg and Yeager (n 3) 181–211; Benjamin W Heineman Jr, *The Inside Counsel Revolution* (American Bar Association 2016) 21.

The global RegTech Market size is expected to grow USD 7.6 billion in 2021 to USD 19.5 billion by 2026, at a Compound Annual Growth Rate (CAGR) of 20.8% during the forecast period.²¹

The article is structured as follows: Part I looks at the “AI use case” for in-house counsel. Part II then considers the role of in-house counsel and how that role intersects with automation or AI use, in particular, the interplay of ethical tensions which may arise. Specifically, we argue that there are three main areas where AI might impact or change the in-house counsel role— around professional ethical obligations; as a change manager; and as a supervisor, especially of multidisciplinary teams. Part III concludes.

I. THE AI USE CASE FOR IN-HOUSE COUNSEL

The growth of the in-house counsel sector is directly linked to corporations and governments seeking to reduce the amount of legal costs incurred through reliance on external lawyers.²² It is a classic example of the ‘make-or-buy decision’. Traditionally, the decision involved the act of choosing between manufacturing a product in-house (internal production) or purchasing it from an external supplier (out-sourcing) based on which was the most cost-effective, taking into account the need for oversight of external suppliers and co-ordination of the external supplier with the firm’s processes and goals.²³ Applied to legal services, the ‘make or buy decision’ means choosing between having legal work completed by in-house counsel and purchasing it from an external supplier, usually a law firm.²⁴ The decision by corporations to ‘make’ more of their own legal services has been referred to as insourcing. Insourcing means that the in-house legal function undertakes legal work internally where previously it would have used an external law firm. Central to the insourcing decision is who can provide legal services better – in-house counsel or external counsel. Both compete for the corporation’s work.²⁵ The in-house legal function will continue while it is more efficient, or less

²¹ ‘Global RegTech Market - Forecast to 2026’ (Research and Markets February 2022) <<https://www.marketsandmarkets.com/Market-Reports/regtech-market-63447434.html>> accessed 7 July 2022.

²² ‘The Future of Law and Innovation in the Profession’ (The Law Society of New South Wales 2017) 17, 53 (a key driver of corporations insourcing legal work was the corporate imperative to contain costs in a flat commercial market).

²³ See generally Ronald H Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Milton Regan and Palmer Heenan, ‘Supply Chains and Porous Boundaries: The Disaggregation of Legal Services’ (2010) 78 *Fordham Law Review* 2137, 2142–48.

²⁴ Steven L Schwarcz, ‘To Make or Buy: In-House Lawyering and Value Creation’ (2008) 33(2) *Journal of Corporation Law* 497.

²⁵ Michael Legg and Felicity Bell, ‘Insourcing – Implications for In-house Counsel and Private Practice Lawyers’ (2018) 45 *Law Society Journal* 70.

costly, than the alternative. AI provides a key source of efficiency. Further, the growth of in-house since the 1990s, both in size and prestige, means that these lawyers also play a key role in controlling the work that is sent out to external law firms.²⁶ As Wilkins noted, this was part of the general rise of corporate counsel, who held themselves out as those ‘who should be entrusted with the role of being both a ‘partner’ to the business in achieving its objectives and the ‘guardian’ of the company’s long-term reputation and values’.²⁷

Currently, in-house counsel are typically viewed as central to the establishment of an ethical corporate culture – one which is supportive of legal and regulatory compliance, where neither legal professional obligations nor corporate performance are compromised.²⁸ There is a trend toward seeing compliance as value-creating, as it is vital not only for staff and customers but also for the organisation’s wider public image. The role of the corporate counsel as an ethical compass is therefore treated with increasing importance. In this formulation, in-house legal departments are not just cost centres, but also a key part of maintaining professional ethical standards and risk and reputation management. Having said this, the role of corporate counsel has been routinely studied for its actual and potential ethical weak spots, which may include the dominance of a particular (unethical) corporate culture, the challenges of having only a single ‘client’ (the organisation), and whether the in-house counsel has the power to challenge internal corporate hierarchies.²⁹ Although they work for a single employer-client, as legal practitioners, in-house counsel must comply with the law and with the ‘law of lawyering’ – the professional ethical rules and associated general law and statutes. In this article, as examples, we draw on the conduct rules (and draft or model rules) of various common law jurisdictions.

AI has wide application for transactional law, and thus for corporate counsel. Generally, its usefulness for transactional law is the ability to scale

²⁶ Tanina Rostain, ‘General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions’ (2008) 21(2) *Georgetown Journal of Legal Ethics* 465; David B Wilkins, ‘Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship’ (2010) 78(5) *Fordham Law Review* 2067, 2081–82; Schwarcz (n 24); Raymond H Brescia et al, ‘Embracing Disruption: How Technological Change in the Delivery of Legal Services can Improve Access to Justice’ (2014) 78(2) *Albany Law Review* 553–622.

²⁷ Wilkins (n 26) 2084.

²⁸ Richardson and Blatch (n 3) 1–2.

²⁹ Nelson and Nielsen (n 7); Robert Eli Rosen, “‘We’re All Consultants Now:’ How Change in Client Organizational Strategy Influences Change in the Organization of Corporate Legal Services’ (2002) 44 *Arizona Law Review* 671; Wilkins (n 26); Omari Scott Simmons and James D Dinnage, ‘Innkeepers: A Unifying Theory of the In-House Counsel Role’ (2011) 41(1) *Seton Hall Law Review* 77; Schwarcz (n 24).

and generate significant time savings for in-house counsel and their teams. Review and management functions are among those most heavily promoted to in-house counsel. Recall the headlines generated by JP Morgan Chase's 2016 announcement that it was using machine learning to automatically obtain information from legal documents— such as 'Are Robots Taking Over the World's Finance Jobs?' and 'JP Morgan Does in Seconds What Took Lawyers 360,000 Hours'.³⁰ Data points might include key information such as dates, party names, and value such as monetary sums payable. Automatically extracting this type of information therefore allows organisation of masses of data easily. For instance, all those contracts which will expire by a certain date or concern a certain party could be quickly identified. GC magazine reported that 'the most commonly cited use of technology was for contract management, from 55% of [in-house] respondents'³¹ to a technology survey.

Review functions can also be used for individual documents. For instance, Lawgeex's contract review software claims to 'review and redline legal documents'.³² "Redlining" refers to editing the contract terms in a process of negotiation. Lawgeex explains:

Unlike other solutions that only flag unacceptable or missing clauses, Lawgeex understands the contractual context ... Our technology makes redlines to the contract and negotiates with the counterparty – just like an experienced attorney, but with enhanced speed and accuracy.³³

The automation of contract review has the potential to save considerable time: Lawgeex claims to reduce time spent on review by 80%.³⁴ Review may also be of multiple documents, such as in due diligence. Conducting due diligence refers to reviewing the affairs of a business or business entity prior to entering into a contractual arrangement, for instance, acquiring the business.³⁵ Usually this would include reviewing the contracts to which the business is a party. For example, a review of contracts with third parties may be needed to ascertain if the contract can be assigned or novated to the

³⁰ N Alam and G Kendall, 'Are Robots Taking Over the World's Finance Jobs?' *The Guardian* (11 July 2017); 'JP Morgan Does in Seconds What Took Lawyers 360,000 Hours', *Bloomberg* (27 February 2017). Note that Legg and Bell suggest this time saving may have been overstated: (n 2) 178.

³¹ 'In-House Technology in Europe' (n 17).

³² 'Contract Review Automation' (*Lawgeex*) <<https://www.lawgeex.com/cra/>> accessed 11 July 2022.

³³ *ibid.*

³⁴ 'Conquer your Contracts', (*Lawgeex*) <<https://www.lawgeex.com/>> accessed 11 July 2022.

³⁵ See Legg and Bell (n 2) 171.

new purchaser³⁶ or if a change of control due to the purchase creates a right or termination for the third party. The existence and content of assignment/novation and termination clauses may be central to the value sought from the acquisition. While it is acknowledged that automating this type of review can also generate huge time savings, Remus and Levy have argued that AI is less successful at due diligence review due to the potential for unknown or unexpected findings.³⁷

Similar methods to those used for review and management can also be used for analysis. Williams argues that drafting can be informed by machine learning analysis of many thousands of existing contracts. Williams refers to ‘predictive contracting’ which would mean taking empirical data about contractual clauses and using these statistics to inform drafting.³⁸

The automation of legal, particularly contractual, drafting is long-standing, though it may or may not be ‘AI’. Susskind said, in 2006:

I cannot help but feel that document assembly technology is and will remain ... a fundamental technology. If one looks at the heart of legal work, it’s about the production of documents and document assembly is an enabling tool that automates and streamlines that process.³⁹

Betts and Jaep argue that legal document assembly has increased in sophistication, although systems continue to operate in essentially the same way.⁴⁰ It may involve some degree of automation of a law firm or company’s existing precedents or it may be a subscription-based service, giving access to a range of document types. Accordingly, ‘[t]his type of automation works most effectively when contracts are largely standardised⁴¹ – and for high volume.

Meanwhile, as noted, Reg Tech has emerged in response to growth in regulation and therefore in compliance costs:

It has been estimated that governance, risk and compliance costs account for 15 to 20 per cent of the total ‘run the bank’ cost base

³⁶ Contracts for the supply of goods or services commonly have a clause forbidding assignment or novation without the consent of the counter-party.

³⁷ Remus and Levy (n 5) 517 (what they term the ‘unstructured’ component of legal work).

³⁸ Spencer Williams, ‘Predictive Contracting’ (2019) 2 Columbia Business Law Review 621.

³⁹ Richard Susskind, ‘The Next Ten Years’ (Society for Computers and Law 2006 Annual Lecture, 6 March 2006).

⁴⁰ Kathryn D Betts and Kyle R Jaep, ‘The Dawn of Fully Automated Contract Drafting: Machine Learning Breathes New Life into a Decades-Old Promise’ (2015) 15 Duke Law & Technology Review 216, 219.

⁴¹ Legg and Bell (n 2) 180.

of most major banks. Unsurprisingly Reg Tech applications that can reduce cost but better achieve compliance have attracted considerable interest.⁴²

Areas of regulation such as anti-money laundering ('AML'), bribery, privacy and sector-specific regulatory requirements create high value risks through state enforcement actions (including criminal prosecutions), private litigation such as class actions and reputational harm that can impact the share price. Effective approaches to compliance that avoid, or at least minimise, the above risks are crucial components of corporate operations, because of the financial and non-financial costs associated with contraventions. Equally, corporations want to minimise compliance costs. For example, the Commonwealth Bank of Australia and ING used AI to interpret about 1.5 million paragraphs of regulation on the European Union's Markets in Financial Instruments Directive. Undertaking the task manually would have taken the banks about 1800 hours (or one year's work for one full-time employee) to complete. By employing AI, the banks were able to complete the task in two and a half minutes.⁴³

It can be seen that AI has many uses for in-house counsel. However, the use of automated legal tools may give rise to its own ethical risks. In-house counsel are sometimes referred to as gatekeepers, who act to evaluate corporate actions or proposed actions, and are able to deny or stop these if they pose a legal ethical risk. A survey by Lawyers on Demand found that 45% of in-house lawyers had been asked to advise on matters of dubious ethicality, while 39% had been asked to advise on matters which were legally questionable.⁴⁴ Especially salient duties for corporate counsel include their duties of independence and to the administration of justice, which mean that they can (and should) perform the role of scrutinising the organisation's operations to ensure it is compliant. In addition, Foster and Lawson have suggested that ethical issues have been generally overlooked when it comes to AI for transactional law.⁴⁵

⁴² Matthias Memminger, Mike Baxter and Edmund Lin, *Banking Regtechs to the Rescue?* (Bain & Co 2016).

⁴³ Australian Government Productivity Commission (n 19) 14.

⁴⁴ Steven Vaughan and Richard Moorhead, 'Which way is the Wind Blowing? Understanding the Moral Compass of In-house Legal Practice' (*Lawyers on Demand*) <<https://www.lodlaw.com/au/our-thinking/reports/which-way-is-the-wind-blowing/>> accessed 11 July 2022.

⁴⁵ William E Foster and Andrew L Lawson, 'When to Praise the Machine: The Promise and Perils of Automated Transactional Drafting' (2018) 69(3) *South Carolina Law Review* 597, 598.

Lawyers have a duty to perform competently, and in their clients' best interests.⁴⁶ If AI can improve a lawyer's work and increase efficiency, then, arguably, the lawyer may have a duty to use AI tools. This is perhaps most clearly apparent in large scale document review where, as noted above, there is evidence indicating that machine learning can perform with fewer mistakes than humans.⁴⁷

The duty of independence is typically characterised as acting, and rendering candid judgement, free from external pressures.⁴⁸ The Australian Uniform Solicitors Rules refer to solicitors 'avoiding any compromise to their integrity and professional independence'.⁴⁹ Other professional rules characterise this obligation as one of acting with integrity or with honour.⁵⁰ In relation to in-house counsel, this duty has been discussed in relation to the lawyer being independent of his or her client-employer. When it comes to AI, the lawyer's reliance on the outputs of AI systems may also challenge independence if the lawyer is not exercising his or her own independent judgement but is rather deferring to the answers of an AI system. This is especially so if the way that the system works is so complex that it is effectively 'inscrutable' or unable to be ascertained or understood by humans interpreting its outputs.⁵¹ This is apparent in relation to something such as a prediction of a case outcome where the lawyer cannot necessarily either explain the way that the prediction has been generated or vouch for its accuracy, but must disclose the prediction to the client-employer.

A core duty for lawyers is the duty to the administration of justice which, in a narrow sense, focuses on not misleading the court or abusing its processes. However, the obligation is wider than an obligation to the Court and its processes – although it is the court which enforces the duty, it is really an

⁴⁶ Eg, Solicitors Regulation Authority (England and Wales) Principles, Principle 7; Legal Profession (Professional Conduct) Rules 2015 (Singapore) rr 5 and 6; American Bar Association, Model Rules of Professional Conduct, r 1.1; the Hong Kong Solicitors' Guide to Professional Conduct, r 6.01; Bar Council of India draft Code of Ethics (2011) pt III.

⁴⁷ Maura R Grossman and Gordon Cormack, 'Technology-Assisted Review in e-Discovery can be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17 *Richmond Journal of Law & Technology* 1.

⁴⁸ Legg and Bell (n 2) 302; American Bar Association, Model Rules of Professional Conduct, r 2.1; Bar Council of India, Part VI, Ch II Standards of Professional Conduct and Etiquette, Preamble and Section II Duty to the Client; also Bar Council of India draft Code of Ethics (2011) pt III, [25].

⁴⁹ Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015, r 4.1.4.

⁵⁰ Eg, Code of Professional Conduct for British Columbia, ch 2 Standards of the Legal Profession, 2.2; Law Society of Ontario, Complete Rules of Professional Conduct 2000, 2.1-1; Legal Profession (Professional Conduct) Rules 2015 (Singapore), r 4(c).

⁵¹ Brian Sheppard, 'Warming Up to Inscrutability: How Technology Could Challenge Our Concept of Law' (2018) 68 (Supp 1) *University of Toronto Law Journal* 36, 50.

obligation to support the rule of law, which benefits the wider community and is part of upholding public respect for the legal profession and the institutions of justice. Accordingly, it is a duty that extends beyond the advocate or lawyer dealing directly with the court and applies to all lawyers, including in-house counsel, who must comply with the law. Examples of failure to uphold the law and comply with the duty to the administration of justice can be seen in the misconduct that was able to occur in the likes of Enron, Worldcom and Purdue Pharma (manufacturers of OxyContin).⁵²

In the sections that follow, we look at some of the points of tension for in-house counsel in upholding these duties. These includes issues around the duty of competence and the level of knowledge required in order to use AI competently, as well as to supervise others in its use; what is required for the exercise of independent judgment; and finally, a wider question about the extent to which the use of AI may impinge on legal professionalism or even give rise to rule of law issues.

We also consider in greater detail how in-house counsel must oversee or maintain RegTech and other AI systems. In addition to professional ethical complexities, there are also practical hindrances to the adoption of AI tools by in-house teams. Armour and Sako identify two key impediments.⁵³ Firstly, the investment that is needed for AI technologies. They observe that as in-house legal teams are typically not revenue generators, it may not seem worthwhile to invest in legal technologies for their use.⁵⁴ A recent survey of Australian in-house counsel appeared to support this, finding that in-house counsel's role is becoming increasingly complex as they assume broader roles, yet 'lack the time, budget and understanding to adopt legal technology tools that could help them'.⁵⁵ Secondly, most machine learning systems need voluminous data to operate effectively. Within the organisation, this data may be either hard to access and organise, or too small in volume to be used effectively. Armour and Sako explain that often internal data "will be spread across a multitude of legacy systems".⁵⁶ They note, further:

⁵² Steve Mark, 'Walking the Ethical Tightrope – Balancing the Responsibilities of In-House Counsel to Key Stakeholders' (Legalwise Seminars Pty Ltd, Sydney, 12 November 2009); Legg and Bell (n 2) 303-305.

⁵³ John Armour and Mari Sako, 'AI-enabled Business Models in Legal Services: From Traditional Law Firms to Next-Generation Law Companies?' (2020) 7 *Journal of Professions and Organization* 27, 36.

⁵⁴ *ibid.*

⁵⁵ Christopher Niesche, 'Australian In-House Lawyers Busier than Ever But Stumped by Legal Tech Solutions', *Law.com* (1 September 2021).

⁵⁶ Armour and Sako (n 53) 37.

Many organizations are of course engaging in “digital transformation” to facilitate better access to internal data. Even where this is done, only very large corporations may have sufficient data to enable effective training of AI models and generate sufficient volume of activity to justify the fixed costs of labelling training data.⁵⁷

However, regulators have made datasets available in the RegTech space to assist in the creation of tools for aiding compliance.⁵⁸

Nevertheless, the use case for AI in-house is not straightforward or clear cut, heightening the role of the in-house counsel in both procurement and adoption.

II. THE ROLES OF IN-HOUSE COUNSEL

In this part, we consider the ways in which in-house counsel mediate the use of technology, including automation technology, and how their role is, accordingly, affected or changed by the use of AI.

The role of lawyers vis-à-vis technology has been conceptualised in different ways. Armour and Sako have examined lawyers’ relations with legal tech via different types of legal business structures.⁵⁹ They have also drawn attention to the different ways in which lawyers’ work may be impacted: AI may substitute or replace, or it may augment what lawyers do.⁶⁰ Arguably, AI may also give rise to wholly new types of tasks, and, indeed, roles, for lawyers.⁶¹

Many legal AI products are marketed to lawyers as augmenting tools – whether they are characterised as time-saving, guarding against mistakes, or enhancing what lawyers do.⁶² As the discussion in Part I indicates, saving time and increasing efficiency through the automation of tasks which either do not require complex analysis or are not strictly legal, such as contract management, is one of the most widely made claims for legal AI products. There are also suggestions that AI tools can reduce human error. This has been shown most persuasively in relation to Technology Assisted Review,

⁵⁷ Armour and Sako (n 53) 37; citing A Andal-Ancion, PA Cartwright and GS Yip, ‘The Digital Transformation of Traditional Business’ (2003) 44(4) MIT Sloan Management Review 34; and GC Kane, et al, ‘Strategy, Not Technology, Drives Digital Transformation’ (MIT Sloan Management Review and Deloitte University Press 2015).

⁵⁸ See ASIC, ‘ASIC and Regtech’ <<https://asic.gov.au/for-business/innovation-hub/asic-and-regtech/>> accessed 11 July 2022.

⁵⁹ Armour and Sako (n 53).

⁶⁰ Armour and Sako (n 53) 29.

⁶¹ Armour and Sako (n 53) 29.

⁶² Legg and Bell (n 2) 181.

but extends also to other areas.⁶³ Moreover, these types of tools remain as augmenting because, for instance, while a program may be able to identify clauses that are not standard when compared with the database that it has been trained on, it likely cannot explain what is problematic about the clause or what it should be replaced with.

In terms of automated systems more generally, authors have referred to the idea of keeping a ‘human in the loop’.⁶⁴ Effectively, this means that a human can alter system outputs. Here, we refer to a ‘lawyer in the loop’. However, this role is broader than just giving the tick to ‘outputs’. The duties of independence and competence arguably require a more involved approach to interrogating the results of AI systems, such as those used for contract review or prediction. The in-house counsel’s role is to oversee and maintain legal AI systems; to check their functioning; to scrutinise their outputs; and to ensure that any changes to law or regulation are correspondingly reflected in the system. To perform such a complex role adequately, in-house counsel will need access to training or expertise. For example, the State Bar of California has suggested, in relation to competence in undertaking Technology Assisted Review, that lawyers can acquire the skills and knowledge they need, or they may consult with experts.⁶⁵ We now turn to look at three key elements of the in-house counsel role in the sections below.

First, and perhaps most importantly, in-house counsel often already play a key role in upholding and disseminating professional ethical obligations within their department and organisation. We describe this role in section A, below, as being an ‘ethical compass’. This role ought to be, if anything, heightened with the uptake of automation technologies. A professional magazine for general counsel reported that ‘84% of in-house respondents reported that they use some form of specialised legal technology within their legal department, with 82% revealing that their department’s use of technology had increased in the past five years’.⁶⁶ In-house counsel must, therefore, be an ethical compass for their team and indeed, their organisation, including when AI or automated systems are used.

Second, and as per section B below, in-house counsel are likely to either play a role in, or be entirely responsible for, technology procurement, and

⁶³ Betts and Jaep (n 40) 226; Foster and Lawson (n 45); Grossman and McCormack (n 47) (on TAR).

⁶⁴ Mireille Hildebrandt, ‘Smart Technologies’ (2020) 9(4) *Internet Policy Review* <<https://policyreview.info/concepts/smart-technologies>> accessed 11 July 2022.

⁶⁵ The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion 2015-193.

⁶⁶ ‘In-House Technology in Europe’ (n 17).

then in ensuring that staff use the technology and use it effectively and ethically. In other words, they must adopt a managerial role when it comes to technology uptake and use case, which includes educating teams on the benefits, both economic and ethical. We refer to this as acting as a change manager. In the context of digital courts, it has been noted that as well as technology, ‘change, communication, training and lots of detailed management issues’ are involved in technological change⁶⁷ – human use of technology is central. Moreover, in legal practice, there is a further overlay of complexity, given tensions about the meaning of professionalism and the association of technology with efficiency and routinisation, sometimes characterised as antithetical to the professional project.

However, technology may also be characterised as ethically benign or even beneficial – for instance, in the context of Reg Tech. Yet, the former Chair of the US Securities and Exchange Commission, discussing ‘deficient corporate cultures’,⁶⁸ has noted that RegTech cannot by itself alter cultural, internal ethical approaches⁶⁹ – for this, people are needed. Having said this, there is an identified debate as to whether compliance is naturally an in-house legal function. Moorhead noted that it ‘mixes behavioural, managerial, and legal tasks’.⁷⁰ Langevoort suggests that compliance and legal go together in smaller and in medium sized organisations, but says:

for larger organizations there is a robust debate among compliance professionals as to whether the [chief legal officer] should be walled off from too much influence over the corporate compliance and ethics function. Many firms now have chief ethics and compliance officers with separate staffs, who may utilize in-house counsel for advice (and perhaps have specialized lawyers of their own), but who report directly to the CEO...⁷¹

⁶⁷ Lord Justice Colin Birss, ‘Keynote Address to the Online Dispute Resolution Forum’ (3 May 2022) <<https://www.judiciary.uk/announcements/speech-by-lord-justice-colin-birss-online-dispute-resolution-forum/>> accessed 11 July 2022.

⁶⁸ Mary Jo White, ‘A Few Things Directors should Know about the SEC’ (Stanford University Rock Center for Corporate Governance – Twentieth Annual Stanford Directors College, Stanford, California, 23 June 2014).

⁶⁹ Nizan Geslevich Packin, ‘Regtech, Compliance and Technology Judgment Rule’ (2018) 93 Chicago-Kent Law Review 193, 212; see also Donald Langevoort, ‘Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis’ (2011) Georgetown Law Faculty Working Papers No. 154, <https://scholarship.law.georgetown.edu/fwps_papers/154> accessed 11 July 2022.

⁷⁰ Richard Moorhouse, ‘Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers’ (2014) 67(1) Current Legal Problems 447, 459.

⁷¹ Langevoort (n 69)6.

Pacella reports that in 2020, in 48% of companies, the general counsel was also the chief compliance officer,⁷² and that this duality is not confined to smaller companies.⁷³

Finally, as explained in section C, in-house counsel must likely supervise and support members of multidisciplinary teams, including those who are not lawyers or not practising lawyers – whether they are compliance specialists, paralegals or technologists – in their use of legal technology. Rostain has said that ‘compliance regimes often require the deployment of multidisciplinary expertise...this regulatory approach calls for the participation of different types of knowledge professionals’.⁷⁴ As we describe below, then, in-house counsel may need to supervise different types of professionals, the use of technology, and different types of professionals, using technology. Rostain uses AML compliance as an example, saying ‘Federal anti-money laundering provisions... frame their mandates in terms of internal controls that require a mix of legal, computer and software expertise’.⁷⁵ In particular, if compliance is ideally diffused throughout the company, this broadens out the role of the general counsel.

A. As Ethical Compass

In terms of in-house counsel being an ‘ethical compass’ as regards the use of automation technology, we adopt an expansive and idealised approach to the in-house role, and conceive of them as a gatekeeper rather than a ‘hired gun’. A gatekeeper guards against misbehaviour by blocking improper corporate actions. The counsel’s responsibilities are ‘to identify, manage and communicate corporate legal risks to the relevant persons’.⁷⁶ As explained above, the role of the in-house counsel as an ethics compass is an important source of oversight which also gives value to the company.⁷⁷ As legal professionals,

⁷² Jennifer M Pacella, ‘The Regulation of Lawyers in Compliance’ (2020) 95(2) *Washington Law Review* 995, 947; citing Jamie Saine, ‘Should General Counsels also be Chief Compliance Officers?’ (*Convercent*, 13 July 2015) <<https://www.convercent.com/blog/should-general-counsels-also-be-chief-complianceofficers>> accessed 11 July 2022.

⁷³ Pacella (n 72) 949.

⁷⁴ Rostain (n 26) 468.

⁷⁵ Rostain (n 26) 468–69.

⁷⁶ Legg and Bell (n 2) 211. For a range of roles that in-house counsel may perform see Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (Cambridge University Press, 3rd ed 2018) ch 9. The authors put forward a range of roles from the ‘ethically apathetic’ (at 289) to ‘responsible lawyer’ (at 305) and recognising that ‘in-house lawyers very often have the breadth of information and forensic skill needed to be the ethical watchdogs of the corporation’ (at 309).

⁷⁷ Ben Pender II, ‘Invigorating the Role of the in-House Legal Advisor as Steward in Ethical Culture and Governance at Client-Business Organizations: From 21st Century Failures to True Calling’ (2009) 12 *Duquesne Business Law Journal* 91, 96 (‘business organizations

in-house counsel owe duties of competence,⁷⁸ independence⁷⁹ and fidelity to the administration of justice.⁸⁰ They can undertake the role of looking at the company's operations and whether it is complying with laws and regulations. A number of authors have also considered lawyers' ethical obligations in relation to AI tools.⁸¹ Shea Boyd described the ethical duties of lawyers in regard to technology as including the following steps:

First, the lawyer must assess his own general technical competence and ability to evaluate technologies, including their benefits and risks. If he or she cannot competently evaluate the technology, he or she may consult an expert. Second, the lawyer must assess the specific technology he or she wishes to utilize to determine if it provides a reasonable expectation of privacy, and what, if any additional safeguards must reasonably be employed. Third, the lawyer must continue to monitor the selected technology provider and stay up to date with the relevant foreseeable risks and reasonable precautions. Finally, in the application of that technology, the lawyer must have the requisite expertise to supervise its use or employ technical experts as necessary.⁸²

These obligations are arguably heightened for in-house lawyers. The first and third points, attributable to the duty of competence, mean that in-house lawyers must have good general understanding of technology that they may recommend, acquire and use, including any drawbacks or issues that may need to be overcome, or risks that must be mitigated against. As Rogers and Bell have explained, this is challenging for several reasons related to opacity and the level of knowledge needed for understanding:

[need to] invigorate the role of the in-house legal advisor from “mere legal technician” to simultaneous legal gatekeeper and ethical steward’).

⁷⁸ See above (n 46).

⁷⁹ See above (n 48–50).

⁸⁰ Solicitors Regulation Authority (England & Wales), Principles, principle 1; Legal Profession (Professional Conduct) Rules 2015 (Singapore) rule 9(1)(a); Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 3.

⁸¹ Katherine Medianik, ‘Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era’ (2018) 39 *Cardozo Law Review* 1497; Chen Meng Lam, ‘Impact of Artificial Intelligence on the Professional Responsibilities of Lawyers’, 37 *Singapore Law Review* 43 (2019-2020); Legg and Bell (n 2) ch 11; Justine Rogers and Felicity Bell, ‘The Ethical AI Lawyer: What is Required of Lawyers when they Use Automated Systems’ (2019) 1(1) *Law, Technology and Humans* 80; Mark L Shope, ‘Lawyer and Judicial Competency in the Era of Artificial Intelligence: Ethical Requirements for Documenting Datasets and Machine Learning Models’ (2021) 34 *Georgetown Journal of Legal Ethics* 191; Jamie J Baker, ‘Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society’ (2018) 69 *South Carolina Law Review* 557, 557–63.

⁸² Shea Boyd, ‘The Attorney’s Ethical Obligations with Regard to the Technologies Employed in the Practice of Law’ (2016) 29 *Georgetown Journal of Legal Ethics* 849, 849–50.

To identify the possibility of ethical risk or whether a system is indeed competent, lawyers require awareness of the shortcomings or limitations of the tools they are using. This presents a significant challenge, as such knowledge is not likely to be readily available (i.e., the product developers are unlikely to readily explain a product's flaws). Likewise, if the software's functioning is opaque, lawyers may have no way of finding out if it is reliable. Even if openly accessible, lawyers may lack the technical knowledge to make sense of the explanation; in the case of complex applications (e.g., where a prediction is being generated), it may be difficult for lawyers to evaluate outputs themselves.⁸³

The lawyer must be sceptical, rather than assuming infallibility of the technology. Moreover, the lawyer may need to do more – such as testing that technology works as intended or desired, or works accurately enough to be relied upon. For example, in-house counsel may need to check the functioning of contract review software to ensure that it is picking up appropriate clauses and is not missing anything; or is suggesting valid changes. If lawyers rely on the workings of software without appropriate checks, they may not be properly adhering to their duty to exercise their independent judgement,⁸⁴ or their duty of competence.

Another, more nebulous area where ethical decision-making may be complex for in-house counsel is in the use of drafting software, whether this is to generate first drafts or engage in more complex processes of refinement as per the Lawgeex example above. Here, the question is whether the use of automated drafting can entrench particular clauses thereby cementing their use, even if it is not appropriate. Foster and Lawson point out that:

although automation can reduce technical errors and rapidly incorporate evolving laws and techniques, reliance on software creates risks of undue deference to computer-generated outputs and of temptation to undertake representations that strain an attorney's sphere of proficiency.⁸⁵

Of course, this could happen in any event, as Gulati and Scott demonstrated in *The 3½ Minute Transaction*,⁸⁶ but it may be that automation exaggerates the effect (though automation in this area is longstanding⁸⁷). As Rogers and Bell explain:

⁸³ Rogers and Bell, 'Ethical AI Lawyer' (n 81) 86–87.

⁸⁴ See Legg and Bell (n 2) 303.

⁸⁵ Foster and Lawson (n 45) 598.

⁸⁶ Mitu Gulati and Robert E Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* (University of Chicago Press 2013).

⁸⁷ Foster and Lawson (n 45) 598.

pre-programmed systems automate a series of steps, but if the script does not include reference to relevant ethical factors it can hinder a person's capacity to 'see' them. Moreover, the very fact of codification into a technological system may give such 'scripts' the appearance of precision and completeness, a potential threat to professional competence... any ethical parameters included in an automated system may have been defined by those designing the system rather than the lawyers whose role the system seeks to emulate.⁸⁸

In the in-house context, it may be that the data or precedent used to support drafting software has biases or problems which will become unthinkingly replicated if the process is automated – such as overly onerous or unfair contractual clauses. If machine learning is used to conduct due diligence, there is a possibility that critical issues will be missed if the system has not been specifically trained to find them.⁸⁹ This demonstrates the importance of continuing oversight by in-house counsel of the technology being used.

B. As Change Manager

Tech projects are notoriously prone to failure.⁹⁰ Lawyers, meanwhile, are typically portrayed as conservative and resistant to change,⁹¹ though this picture has been contested in some recent literature.⁹² Taken together though, one might expect that implementing legal technology carries particular challenges.⁹³ Procuring the technology is one thing, but ensuring personnel actually use it is another. This was recently reported by some respondents to a *GC Magazine* survey: '[O]ne respondent, general counsel at a Canadian energy company, noted, "Finding technology is not a problem. Making sure that technology is being used properly by everyone in the team is the issue".⁹⁴ The professionals within a workplace will be central to the way that new technologies are received and whether they are adopted or not. As the survey respondent went on to explain: 'You can't execute a tech transformation in a large team without having some form of discipline and training. You either

⁸⁸ Rogers and Bell, 'Ethical AI Lawyer' (n 81) 87.

⁸⁹ Remus and Levy (n 5) 517.

⁹⁰ See the summary in Mary Pratt, 'Why IT Projects Still Fail', (*CIO*, 3 March 2021) <<https://www.cio.com/article/230427/why-it-projects-still-fail.html>> accessed 11 July 2022.

⁹¹ Justine Rogers and Felicity Bell, 'Transforming the Legal Profession: An Interview Study of Change Managers in Law' [2022] *Legal Studies* 1; Helena Heizmann, Emmanuel A Mastio, Sumati Ahuja, 'Stuck in Defensive Professionalism: Undermining Organizational Change in an Intellectual Property Law Firm' (2020) 7(2) *Journal of Professions and Organization* 117.

⁹² Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹³ *ibid.*

⁹⁴ 'Tech Tactics' (n 4).

all do it together or it doesn't work'.⁹⁵ However, managing change processes is far from straightforward, and if the organisation does not host dedicated change managers, or even if it does, the in-house counsel is likely to shoulder this burden when it comes to legal tech. This might involve utilising various change strategies, a complex managerial role, especially since employees are likely to already have established methods for carrying out their work. Lawyers, in particular, generally have high levels of autonomy and decision latitude in the ways that they conduct their work,⁹⁶ which may make them resistant to adopting new ways of working.

Change might also be particularly resisted if the technology, as many legal technologies are, is geared toward efficiencies and is therefore perceived as threatening, by the change recipients, or as a slight upon their work. Studies of technological change and professional work have highlighted possible outcomes: replacement of the professional by technology; augmentation of professional work; or generation of new types of work.⁹⁷ However, the focus on replacement is unsurprisingly at the forefront for many actually occupying these roles.⁹⁸ This may be more likely (at present) for staff who are not lawyers – Brescia has written that '[i]n some respects, as law firms adopted new technologies and their lawyers became more adept at their use, this reduction in non-lawyer staff was likely inevitable, but the pandemic accelerated firms' self-review and the actions taken in light of them'.⁹⁹ Yet in-house counsel are likely to also manage these staff, as we discuss below.

In their study of change in a mid-size IP law firm in Australia, Heizmann, Mastio and Ahuja found that change recipients were apprehensive about streamlining work processes, which they interpreted as eroding professional values.¹⁰⁰ Similar findings were reported by Rogers and Bell in their study of legal change managers.¹⁰¹ Change may also be resisted if the in-house teams hold genuine concerns about the quality of technology or what it can do, as they must accept responsibility for work outputs. As a key duty of lawyers is that of competence, they must be satisfied that the technology produces work to an acceptable standard. Yet concerns may also be more identity-based and particularized. In Heizmann, Mastio and Ahuja's study, lawyers were concerned not just with the erosion of work product standards,

⁹⁵ *ibid.*

⁹⁶ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹⁷ Armour, Parnham and Sako (n 9).

⁹⁸ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹⁹ Raymond Brescia, 'Lessons from the Present: Three Crises and their Potential Impact on the Legal Profession' (2021) 49 *Hofstra Law Review* 607, 618.

¹⁰⁰ Heizmann, Mastio and Ahuja (n 91) 125–26.

¹⁰¹ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

but also that new (automated) ways of working would impact client service and reputation.¹⁰²

C. As Supervisor

Finally, in-house counsel must, in all likelihood, supervise the use of legal technology, not just by other lawyers, but by associated legal professionals, compliance personnel and technologists.

Supervision in legal practice is usually conceived of in terms of the senior lawyer supervising the work undertaken by more junior lawyers and other assistants, such as paralegals. The US Model Code requires lawyers with supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.¹⁰³ Further where ‘a nonlawyer [is] employed or retained by or associated with a lawyer’ the person’s conduct ‘is compatible with the professional obligations of the lawyer’.¹⁰⁴ The rule has been interpreted as extending to in-house counsel.¹⁰⁵ In England & Wales, the Solicitors Regulation Authority Code of Conduct for Solicitors provides:

Where you supervise or manage others providing legal services:

- (a) you remain accountable for the work carried out through them; and
- (b) you effectively supervise work being done for clients.¹⁰⁶

Similarly, the Australian Solicitors’ Conduct Rules 2015 provide that ‘[a] solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter’.¹⁰⁷ Reasonable supervision is not defined and will vary according to the employee’s experience, qualifications, role and with the type and complexity of the work delegated.¹⁰⁸

The above rules make clear that in the provision of legal services, supervision extends to both subordinate lawyers and non-lawyers. The duty to supervise may be triggered where a subordinate utilises AI as part of their

¹⁰² Heizmann, Mastio and Ahuja (n 91) 126–27.

¹⁰³ American Bar Association, Model Rules of Professional Conduct, r 5.1. See also rule 5.2 which addresses the responsibilities of a subordinate lawyer.

¹⁰⁴ American Bar Association, Model Rules of Professional Conduct, r 5.3.

¹⁰⁵ John Villa, *Corporate Counsel Guidelines* (Westlaw 2020) § 3:30 – Ethical responsibility for the actions of other lawyers and non-lawyers in corporate counsel’s office.

¹⁰⁶ Solicitors Regulation Authority (England and Wales), Code of Conduct for Solicitors [3.5].

¹⁰⁷ Australian Solicitors’ Conduct Rules 2015, r 37.

¹⁰⁸ *Legal Services Commr v Michael Vincent Baker* [2005] LPT 002, [42]; Gino E Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 6th ed 2017) [20.205].

legal work.¹⁰⁹ Supervision of lawyers generally includes ensuring that the lawyer understands the scope of their role, including the tasks they are responsible for and limits of their authority, can seek advice on matters (both legal and ethical) which they are unsure about and understand the internal operation and controls in the law firm or office of corporate counsel.¹¹⁰

In the context of AI, technology use needs to be added into the supervision definition as set out above, including ensuring the lawyer knows when and how to use AI tools, and if uncertain there is an ability to seek advice.¹¹¹ While senior in-house counsel have responsibility for supervision, they may need to call on expert assistance, from within the company or externally, to assist in training subordinates and monitoring the use of technology by subordinates.¹¹² Indeed, one of the features of technology use, especially when it extends from a pure legal role to other areas of the company, such as drafting/reviewing contracts or ensuring compliance for other functions such as sales/marketing people or purchasing/procurement people, is a multidisciplinary team approach.¹¹³ Indeed, in some areas such as compliance, the hands-on operation of systems may be by non-lawyers in other areas of the company, including a dedicated compliance function.¹¹⁴

It might also be argued that the duty to supervise includes the supervision of the technology, not just the human using the technology. Some North American authors have stated previously that legal technology must be supervised, just as a junior lawyer should be supervised in their work.¹¹⁵ But, as discussed above in relation to competence, there are key differences in the ‘inscrutable’ way that some systems operate when compared with people who can always be asked to provide an account of their reasoning

¹⁰⁹ See Shope (n 81) 193 (referring to rules 5.1 and 5.3 of the US model code as being ‘triggered when a subordinate is tasked with deciding which particular AI tool to use and further while implementing those tools.’).

¹¹⁰ Michael Legg, ‘Opening Keynote – Legal Regulation in a Changing World’ (2021 Conference of Regulatory Officers, 8 November 2021) UNSW Law Research Paper No. 21-68.

¹¹¹ The supervision requirements here mirror the competence requirements that apply to lawyers generally: see discussion above.

¹¹² Legg and Bell (n 2) 296–97; Boyd (n 82).

¹¹³ David Bundi, ‘RegTech – A Mindset for Breakthroughs’ in Michele DeStefano and Guenther Dobrauz (eds), *New Suits* (Staempfli Verlag 2019) 414, 426. See also Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press 2017) 177 (linking the need for teamwork to the complexity of contemporary legal problems and the international context in which problems arise).

¹¹⁴ Langevoort (n 69); Rostain (n 26) 468 (‘compliance responsibilities are not centralized within a corporation’s legal department, but are spread among corporate managers and employees’).

¹¹⁵ Medianik (n 81).

and actions. Consequently, supervision of AI technology may need expert assistance.

Supervision, as sketched above, takes place in a technology-enabled and teams-based environment; which means in-house counsel need to demonstrate ethical leadership, as part of being the ethical compass described above, but also utilise collaboration skills to be able to engage with other employees to be able to draw on their expertise. Modelling ethical behaviour within an organisation communicates that ethics and compliance with the law is valued – it becomes the culture of the organisation.¹¹⁶ This ethical leadership extends to the use of AI and its interaction with legal requirements. Thus, in-house counsel or the in-house legal department may need to scrutinise the use of AI in other areas of company operations. Gartner Inc, a leading research and advisory company, has identified a need ‘to prevent AI gone wild’, where the AI does not function correctly or has unintended consequences leading to legal, financial and reputational risks.¹¹⁷ For example, most jurisdictions have laws that protect consumers in relation to lending practices and the sale of financial products/services. AI may be used to aid compliance with these requirements. Equally, AI might be used to increase profits or unfairly discriminate against customers who are calculated to represent a greater risk of default, leading to ‘product steering, discriminatory pricing, unfair credit rationing, exclusionary filtering, and digital redlining’.¹¹⁸ Another example is using machine learning as part of a hiring process. While this reportedly helped Unilever to diversify its workforce, it backfired at Amazon, where the system learnt from past data that employees should be white and male.¹¹⁹ Clearly, if the use of a system is breaching law

¹¹⁶ Jennifer Robbennolt, ‘Behavioural Legal Ethics and Attorney Wellbeing in Contemporary Practice’ in Michael Legg, Prue Vines and Janet Chan, *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia 2020) 172–73. The requirement for supervision goes hand-in hand with the concept of in-house counsel as ethical compass, since supervision, especially of non-lawyers, provides an avenue by which in-house counsel can monitor compliance with legal requirements.

¹¹⁷ Jared Council, ‘Companies Bolster AI Governance Efforts’ (Wall Street Journal, 20 August 2019) <<https://www.wsj.com/articles/companies-bolster-ai-governance-efforts-11566293400>> accessed 11 July 2022.

¹¹⁸ Makada Henry-Nickie, ‘How Artificial Intelligence Affects Financial Consumers’, (*Brookings Institute*, 31 January 2019) <<https://www.brookings.edu/research/how-artificial-intelligence-affects-financial-consumers/>> accessed 11 July 2022. See also Gary Smith, ‘High-tech Redlining: AI is Quietly Upgrading Institutional Racism’, (*Fast Company*, 20 November 2018) <<https://www.fastcompany.com/90269688/high-tech-redlining-ai-is-quietly-upgrading-institutional-racism>> accessed 11 July 2022; James Eyers, ‘Banks Warned using AI in Loan Assessments could “Awaken a Zombie”’ *The Australian Financial Review* (15 June 2021).

¹¹⁹ Bernard Marr, ‘The Amazing Ways How Unilever Uses Artificial Intelligence to Recruit & Train Thousands of Employees’ *Forbes* (14 December 2018); Jeffrey Dastin, ‘Amazon

or regulation, in-house counsel have an obligation to ensure the system is either fixed or not used. If the situation is less clear cut than this, in-house counsel may wish to refer to general ethical guidance about the use of AI, of which there is now a proliferation.¹²⁰ In-house counsel must be the voice for legality and compliance, such as ensuring that historical biases in the data used to train AI models are detected and removed.¹²¹

In-house counsel, when supervising lawyers, non-lawyers, and the technology, need to be sceptical and willing to test whether the technology does indeed assure compliance with what the law requires.¹²² Ideally, this would mean involving in-house counsel when the AI tool is being purchased or designed and then trained and tested. Further, once a system is operational, the in-house counsel should be part of the process when a compliance problem is detected, so as to ensure that steps are taken to correct the problem rather than risk that noncompliance may be overlooked or concealed.¹²³ Equally, while in-house counsel have a supervisory role to perform, they also need to involve technologists and the employees from the relevant functions. An AI tool that is used to identify potential AML or bribery contraventions but is inaccurate, will need technologists to be involved in its reprogramming. Similarly, the employees familiar with how the company's business functions and where its operations may be subject to AML or bribery contraventions need to be included.

As demonstrated by the professional conduct rules, in-house counsel have always had a supervisory responsibility in relation to lawyers and non-lawyers in relation to the provision of legal services. The adoption of AI expands that responsibility and necessitates a multi-disciplinary team approach to allow in-house counsel to draw on the necessary expertise to discharge the supervisory responsibility.

Scraps Secret AI Recruiting tool that Showed Bias against Women' *Reuters* (San Francisco, 11 October 2018).

¹²⁰ See, eg, A Jobin, M Ienca and E Vayena, 'The Global Landscape of AI Ethics Guidelines' (2019) 1 *Nature Machine Intelligence* 389.

¹²¹ Sian Townson, 'AI can Make Bank Loans More Fair' *Harvard Business Review* (6 November 2020).

¹²² Richard Gruner, 'General Counsel in an Era of Compliance Programs' (1997) 46 *Emory Law Journal* 1113, 1159 ('Because of their familiarity with governing legal standards and past offenses within their companies, general counsel will often be able to make valuable contributions in specifying the criteria and targeting strategies applied in compliance monitoring systems').

¹²³ Legg and Bell (n 2) 212.

III. CONCLUSION

Henderson argued that the ‘mechanisation’ of legal advice through software is one way that in-house lawyers can expand their capacity, as it increases their ‘ability to evaluate cost and value’.¹²⁴ However, there are unanswered questions about the extent to which the automation of legal work, including compliance, may detract from or assist attempts to, promote an ethical corporate culture.

The role of in-house counsel was already an organisationally and ethically complex one, as work has shifted in-house and away from external lawyers. The addition of AI, and a backdrop of continuous quest for value, further complicate their role. The AI use case for in-house counsel is compelling – transactional and regulatory law are key sites for the development of AI tools. As both areas have grown in complexity,¹²⁵ there is both a more pressing need for degrees of automation simply to make the volume of work feasible, and more and more data to use in the development of AI products. At the same time, in-house counsel must be aware of AI’s pitfalls – particularly, how data and design issues can not only compromise performance, but give rise to unethical or even illegal outcomes. The fear is that, at scale, this can give rise to rule of law concerns, as AI use continues to proliferate.

Here, we have shown how AI tools can both help in-house counsel to work efficiently and reduce mistakes, but also how AI systems need monitoring and oversight. Accordingly, we suggest that the in-house counsel role is more multi-faceted than ever before, requiring skills in management and the ability to supervise both other staff and technology in a competent manner. While the in-house counsel role may already have encompassed the provision of ethical oversight, the use of AI generates new issues for all lawyers around the meaning of legal professional ethics in areas such as independence, competence and supervision.

¹²⁴ William D Henderson, ‘From Big Law to Lean Law’ (2014) 38 *International Review of Law and Economics* 5, 7.

¹²⁵ Eg, M Jennejohn, ‘The Architecture of Contract Innovation’ (2018) 59(1) *Boston College Law Review* 71, 74; ‘Lawtech Adoption Research’ (n 20).

AUTHORITARIANISM AS A SERVICE: INDIA’S MOVES TO WEAPONIZE PRIVATE SECTOR CONTENT MODERATION WITH THE 2021 INFORMATION TECHNOLOGY RULES

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ABSTRACT *A central regulatory challenge related to the spread of Internet access is that the power of mass communication has both been democratized and decentralized into the hands of anyone with a connected device, but also consolidated in a handful of massive tech companies, providing opportunities for unprecedented surveillance and control over the public discourse. This paper argues that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 pose a severe threat to freedom of expression in India, by providing an avenue for the government to coopt these enormous powers under revised safe harbor provisions that essentially turn private sector content moderation powers into a cudgel to target government critics outside of traditional mechanisms of constitutional scrutiny. While India is not the first country to adopt a “jawboning” strategy against platforms to suit domestic political purposes, this posture goes far beyond what any comparable democratic country has attempted. Ultimately, the paper argues in favor of India’s potential to assume global leadership in fostering robust public accountability in platform governance, but that this requires the country to put human rights and democracy at the center of its reform agenda.*

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I. INTRODUCTION

Among the thorniest challenges which governments around the world are grappling with are concerns about how to regulate a digital information ecosystem which has evolved beyond what even the most perceptive and forward-thinking constitutional theorists from previous generations could have ever imagined. The change is not merely that information moves exponentially faster, but that the power to speak to a mass audience has been decentralized, from the purview of a small number of elite and powerful channels into the hands of anyone with a connected device. In contrast to the traditional adage that “freedom of the press is guaranteed only to those who own one”,¹ today a simple, free-to-access account on a major platform grants ordinary people with the potential to address an audience in the millions, and to direct their ideas, or their grievances, to the highest echelons of power.²

The flip-side to this incredible expansion in expressive opportunity, is that access to the means of mass communication is consolidated in the hands of a small number of international tech companies.³ These companies, while global in their scope and influence, have traditionally maintained a notoriously myopic attitude to how they manage online speech, dominated by American First Amendment values and American media narratives.⁴ Despite the companies’ massive footprint across the developing world, stakeholders in places like Myanmar or the Philippines have struggled to get Facebook, in particular, to pay attention to its often catastrophic impacts on the political discourse.⁵

In the absence of careful attention by the major platforms to these impacts, the migration of more and more of our lives into the online space has given

¹ AJ Liebling, ‘Do you Belong in Journalism?’ *The New Yorker* (14 May 1960) 105.

² See *eg*, Katie Rogers, ‘Barack Obama Surprises Internet with Ask Me Anything Session on Reddit’ *The Guardian* (29 August 2012) <<https://www.theguardian.com/technology/us-news-blog/2012/aug/29/barack-obama-ask-me-anything-reddit>> accessed 14 July 2022.

³ Christopher S Yoo, ‘When Antitrust Met Facebook’ (2012) 19 *Geo Mason L Rev* 1147, 1148-58

⁴ Chinmayi Arun, ‘Facebook’s Faces’ 135 *Harvard Law Review Forum*; Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’, (2018) 131 *Harv L Rev* 1598, 1618–21; Michael Karanickolas, ‘Squaring the Circle Between Freedom of Expression and Platform Law’, (2020) 20 *Pitt J Tech L & Pol’y* 175, 183-4.

⁵ Eric Johnson, ‘Memo from a ‘Facebook Nation’ to Mark Zuckerberg: You Moved Fast and Broke our Country’ (*Vox*, 11 December 2018) <<https://www.vox.com/2018/11/26/18111859/maria-ressa-rappler-facebook-mark-zuckerberg-philippines-kara-swisher-recode-decode-podcast>>. See also <<https://progressivevoicemyanmar.org/wp-content/uploads/2018/04/Burmese-NGOs-to-Facebook-April-2018.pdf>> accessed 14 July 2022.

rise to unprecedented opportunities for surveillance, manipulation, and ultimately control.⁶ A century ago, the vast majority of expression was informal and transient. Even the most despotic king could never hope to control what their subjects actually said about them in the marketplace. Today, nearly every meaningful interaction includes at least some online component, which means that governments which exercise authority over the infrastructure and services for online communication can potentially control virtually the entirety of the national discourse, from what we say about our elected representatives, to how we order our evening meals.⁷ Much has been written about the danger posed by massive tech companies, and the harmful impacts of their data-centric business models.⁸ However, without discounting these concerns about the surveillance economy, the threat posed by governments wielding these same tools to control their populations is objectively more dangerous than any commercial actor, due to the State's vastly greater coercive power. A new hybrid model of despotism has emerged, where leaders coopt private sector communication networks, and sometimes even commandeer the social media companies themselves, in order to maintain their grip on power.⁹

This paper considers India's latest moves to regulate the digital space in the context of this broader trend towards blurring the line between private sector enforcement and State restrictions on speech to assess the likely impact of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* [the 2021 Rules] on freedom of expression in India. While certain aspects of the 2021 Rules address real deficits in accountability related to the consolidation of private sector power, the changes as a whole are structured in a manner which will coopt the platforms' power in support of tightening the government's grip on India's political discourse, to

⁶ Michael Karanicolas, *Travel Guide to the Digital World - Surveillance and International Standards* (Global Partners Digital 2014, 1, 7-9).

⁷ David Moser, *Press Freedom in China under Xi Jinping* (Tina Burrett & Jeff Kingston (eds), Routledge 2019) 68.

⁸ See Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2019).

⁹ For a particularly extreme example of the hand-in-glove relationship between online platforms and State repression, see: Xin Xu, 'Permission Denied: Sina Weibo Behind China's Great Firewall' (2016) 13 *Michigan Journal of Public Affairs* 47. However, while most governments are not as heavy handed as China, the cooption of private sector tools as a mechanism for violating the right to freedom of expression is not an isolated phenomenon, including among democracies. See, eg, Michael Karanicolas, 'Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"', (2019) 17 *Canadian Journal of Law and Technology* 201, 215-22; 'Israel/Palestine: Facebook Censors Discussion of Rights Issues' (*Human Rights Watch*, 8 Oct 2021) <<https://www.hrw.org/news/2021/10/08/israel/palestine-facebook-censors-discussion-rights-issues>> accessed 14 July 2022.

the detriment of freedom of expression and democracy. Ultimately, the paper argues in favor of India's potential to assume global leadership in fostering robust public accountability in this space, but that this requires the country to put human rights and democracy at the center of its reform agenda, including getting its own house in order to prevent further democratic backsliding.

II. REGULATING INDIA'S DIGITAL SPACE

The rise of privately-owned internet infrastructure companies as a core player in the global expressive ecosystem has profound implications for traditional understandings of speech regulation.¹⁰ Social media companies, in particular, have an enormous ability to both empower their users, and to silence them. Powerful network effects drive consolidation of the online discourse into the hands of a relatively small number of massive platforms, which retain significant discretion regarding which kinds of speech they will amplify, and who they will or will not do business with.¹¹ A decision by these major companies to “deplatform” a user, or even to change the way their speech is algorithmically amplified, bears enormous consequences for that person's ability to meaningfully express themselves.¹²

The consolidation of such power in private sector hands, combined with the platforms' comparative lack of transparency or public accountability, is the root of some understandable concern.¹³ Where governments exercise similar powers over the public discourse, there are typically a range of checks and balances, and clear international standards for legitimate restrictions and controls impacting public expression.¹⁴ The exercise of this scale of private sector power over the global political discourse creates novel challenges from the perspective of human rights and democracy, resulting in significant scholarly debate over the precise meaning of concepts like freedom of expression and transparency in the context of the new “platform law”.¹⁵

¹⁰ Jack M Balkin, 'Free Speech is a Triangle' (2018) 118 Colum L Rev 2011.

¹¹ Spencer W Waller, 'Antitrust and Social Networking' (2012) 90 NCL Rev 1771.

¹² Daphne Keller, 'Amplification and its Discontents: Why Regulating the Reach of Online Content is Hard' (2021) 1 Journal of Free Speech Law 229, 230-3.

¹³ Evelyn Douek, 'The Rise of Content Cartels' (*Knight First Amendment Institute at Columbia University*, 11 February 2020) <<https://knightcolumbia.org/content/the-rise-of-content-cartels>> accessed 14 July 2022. See also Michael Karanicolas, 'A FOIA for Facebook: Meaningful Transparency for Online Platforms' (2021) 66 St. Louis University Law Journal 49 (2021).

¹⁴ See, eg, UN Human Rights Comm, 'General Comment 34, at art 19, Freedoms of Opinion and Expression' UN Doc CCPR/C/GC/34 (2011) <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> accessed 14 July 2022.

¹⁵ Michael Karanicolas, 'Squaring the Circle Between Freedom of Expression and Platform Law' (2020) 20 Pitt J Tech L & Pol'y 175.

However, the ambiguity around who, exactly, is responsible for governing online speech leaves an opening for governments, some of whom have been keen to weaponize the platforms' unprecedented powers as an avenue for controlling the online discourse, and of circumventing constitutional limitations on state censorship.¹⁶ A key example of this has been the rise of specialized referral agencies as a mechanism for governments to combat platform-hosted content which is viewed as being problematic, though not necessarily illegal.¹⁷ These agencies, which are typically connected to law enforcement, monitor social media and file takedown requests against content on the grounds that it purportedly violates the private terms of service of the platform.¹⁸ The fact that the decision to remove the content is being made by the platform, rather than the government, can place the decision outside of traditional judicial scrutiny, despite the fact that the governments are initiating the complaint, and that there is often a blatantly coercive subtext underlying these requests.¹⁹ For example, in April 2021 the Israeli Supreme Court denied a petition against Israel's Cyber Unit due to the inability of the complainants to establish conclusive factual grounds for their argument, including whether the actions taken by the platforms were solely the result of the unit's referral.²⁰

The nuances of this dynamic between governments, their citizens, and private sector platforms mean that regulations impacting online intermediaries need to be considered exceptionally carefully vis-à-vis their impact on the freedom of expression of their users.²¹

India's first major move towards regulating online intermediaries came with the 2000 *Information Technology Act*, which applied new rules to any entity which "receives, stores or transmits" messages, or otherwise delivers services in respect of these messages.²² However, a major deficiency of this

¹⁶ Daphne Keller, 'Who Do You Sue? State and Platform Hybrid Power Over Online Speech' (*Aegis Series Paper* No. 1902, 29 January 2019) <<https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech>> accessed 14 July 2022, 2.

¹⁷ Michael Karanicolas, 'Squaring the Circle Between Freedom of Expression and Platform Law' (2020) 20 *Pitt J Tech L & Pol'y* 175, 185-6.

¹⁸ *ibid.*

¹⁹ Michael Karanicolas, 'Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"' (2019) 17 *Canadian Journal of Law and Technology* 201, 215-22.

²⁰ *Adalah Legal Center for Arab Minority Rights in Israel v. State Attorney's Office – Cyber Department* HCJ 7846/19.

²¹ Jack M Balkin, 'How to Regulate (and Not Regulate) Social Media', (2019) SSRN <<https://ssrn.com/abstract=3484114>> accessed 14 July 2022.

²² *Information Technology Act 2000*, s 2(w).

early framework was its lack of proper intermediary liability protections,²³ which left the platforms potentially open to direct, strict liability regarding some types of harmful content posted by their users.²⁴ The problem with such a structure is that the enormous scale at which online platforms operate renders meaningful editorial control, of the type that a newspaper or broadcaster exercises, to be functionally impossible.²⁵ Any platform which features user-generated content on a massive scale needs some avenue for meaningful safe harbor against the negative behaviours of these users in order to operate, which is why intermediary liability protections are generally understood as foundational to the modern digital information economy, and to a robust democratic discourse.²⁶ This rationale, which underlay the original passage of Section 230 of Communications Decency Act in the United States,²⁷ also explains why serious reform proposals by critics of that statute typically aim at modest adjustments to the ambit of protection offered, as opposed to a wholesale revocation of safe harbour.²⁸

In 2008, the *Information Technology Act* was amended to provide for broader safe harbour protections for intermediaries over material for which they were a mere conduit, provided they exercised appropriate “due diligence” against problematic content.²⁹ However, these reforms were followed by the promulgation of a set of Rules which granted the government enhanced ability to control the flow of online information, through expanded powers to order intermediaries to block and decrypt user content.³⁰ In 2011, these powers were further supplemented by the *Information Technology (Intermediaries guidelines) Rules*, which mandated the removal of several vaguely defined categories of problematic content within just 36 hours of receiving a complaint.³¹ These rules were criticized for incentiviz-

²³ In particular, s 79 of the law provided conditional immunity only for offences under the Information Technology Act, as opposed to blanket immunity for speech related offences by the platforms’ users. See also *Aneeta Hada v Godfather Travels and Tour (P) Ltd* (2012) 5 SCC 661 [64].

²⁴ *Avnish Bajaj v State* 2008 SCC OnLine Del 688.

²⁵ See, eg, *persistent challenges applying fair use doctrine to alleged cases of copyright infringement: Leron Solomon, ‘Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube’* (2015) 44 Hofstra L Rev 237.

²⁶ Chinmayi Arun, ‘Gatekeeper Liability and Article 19(1)(a) of the Constitution of India’, (2014)7 NUJS L Rev 73.

²⁷ 47 USC § 230 (1996).

²⁸ See, eg, Danielle Keats Citron & Benjamin Wittes, ‘The Internet will not Break: Denying Bad Samaritans Section 230 Immunity’ (2017) 86 Fordham L Rev 401.

²⁹ Information Technology Act 2000, ss 79(1), 79(2)(c).

³⁰ Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009; Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009.

³¹ Information Technology (Intermediaries Guidelines) Rules, 2011, rr 3(2)(b), 3(4).

ing aggressive moderation by intermediaries, including of material which would normally be protected speech under India's Constitution.³² By creating a baseline level of moderation enforcement, with penalties for failing to takedown enough material, but no concomitant incentive against moderating too aggressively, the natural result of this structure is that intermediaries will remove anything which is subject to a colorable complaint, regardless of whether or not the content at issue is actually illegal.³³ It is worth noting that short time frames for response are particularly problematic in this context, since they preclude a meaningful standard of review in light of the volume of content that intermediaries carry.

These problems were addressed in the landmark judgment of *Shreya Singhal v. Union of India*, in which the Court recognized the practical limits of intermediaries' ability to examine the totality of user-generated content that they host, reading down the "actual knowledge" requirements for removing content to be limited to cases where a government or court order had been delivered, and emphasizing that the latter instances must be justified within the confines of Article 19(2) of the Constitution.³⁴ However, s. 69A of the Information Technology Act, which grants the government power to block any websites, was ultimately upheld, with the Court finding sufficient safeguards around the exercise of this power.

Following this judgment, civil society voices called for a framework to formalize protection for intermediary liability, in recognition of the values which the Court spelled out in *Shreya Singhal*.³⁵ Such protections would be in line with the robust intermediary liability protections which exist in most healthy democracies.³⁶ However, in the years following this deci-

³² Ujwala Uppaluri, 'Constitutional Analysis of the Information Technology (Intermediaries' Guidelines) Rules, 2011', (*Centre for Internet and Society*, 16 July 2012) <<https://cis-india.org/internet-governance/constitutional-analysis-of-intermediaries-guidelines-rules>> accessed 14 July.

³³ Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 Harv J L & Tech 171.

³⁴ *Shreya Singhal v Union of India* (2013) 12 SCC 73 [116].

³⁵ Jyoti Panday, 'The Supreme Court Judgment in *Shreya Singhal* and What it does for Intermediary Liability in India?' (*Centre for Internet and Society*, 11 April 2015) <<https://cis-india.org/internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability>> accessed 25 December 2020.

³⁶ See, eg, Communications Decency Act, 47 USC § 230 (1996); Tambiama Madiaga, 'Reform on the EU Liability Regime for Online Intermediaries: Background on the Forthcoming Digital Services Act' (*European Parliamentary Research Service*, May 2020). <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf)> accessed 14 July; *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, European Commission (December 15, 2020), <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>> accessed 14

sion, governments have continued to test the boundaries of constitutional permissibility in their blocking orders.³⁷ Civil society, for their part, have struggled to obtain reliable information regarding the exercise of content blocking orders.³⁸ Subsequent judicial decisions have also narrowed the protections that *Shreya Singhal* purported to apply to intermediaries.³⁹ Notably, the Supreme Court in both *Sabu George*⁴⁰ and *In Re: Prajwala*⁴¹ expressed support for automated and proactive filtering measures to remove prescribed categories of sexual content, despite concerns about collateral damage from these automated measures on legitimate speech and, in particular, regarding their potential discriminatory impacts on marginalized groups.⁴²

While proactive filtering has become increasingly normalized, particularly to combat child sexual abuse material (CSAM), these uses are still overwhelmingly dependent on human reviewers to manually identify illegal images for the filters to seek out.⁴³ Moreover, there are still highly publicized examples of these algorithms getting it wrong.⁴⁴ This is despite the fact that CSAM is vastly easier to algorithmically identify than, say, hate speech or defamation, since the latter relies on judgments than are far more subtle

July; Vivek Krishnamurthy & Jessica Fjeld, *CDA 230 Goes North American? Examining the Impacts of the USMCA's Intermediary Liability Provisions in Canada and the United States*, (SSRN, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645462 (2020)> accessed 14 July 2022.

³⁷ Vrinda Bhandari & Anja Kovacs, 'What's Sex Got to Do with it', (SSRN, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3769942> accessed 14 July 2022.

³⁸ See Jyoti Panday, 'DeitY says 143 URLs have been Blocked in 2015; Procedure for Blocking Content Remains Opaque and in Urgent Need of Transparency Measures', (*Centre for Internet & Society*, 29 April 2015) <<https://cis-india.org/internet-governance/blog/deity-says-143-urls-blocked-in-2015>> accessed 14 July 2022.

³⁹ See *MySpace Inc v Super Cassettes Industries Ltd* 2016 SCC OnLine Del 6382 [65]; *The Registrar (Judicial), Madurai bench of Madras High Court v Secy to Govt, Union Ministry of Communications, Govt of India* 2017 SCC OnLine Mad 25298.

⁴⁰ *Sabu Matthew George v Union of India* (2015) 11 SCC 545.

⁴¹ *Videos of Sexual Violence and Recommendations, In re* (2018) 15 SCC 551.

⁴² Rishab Bailey and Vrinda Bhandari, 'Rethinking Legal-Institutional Approaches to Sexist Hate Speech in India', (2021) IT For Change <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792184> accessed 14 July 2022, 4-5.

⁴³ While automated systems have become increasingly sophisticated at recognizing copies of a proscribed image, they still require a reference point to carry out this task, generally a database of proscribed images which has been assembled by a human. See eg, Nikola Todorovic & Abhi Chaudhuri, 'Using AI to Help Organizations Detect and Report Child Sexual Abuse Material Online', (*The Keyword*, 3 September 2018) <<https://www.blog.google/around-the-globe/google-europe/using-ai-help-organizations-detect-and-report-child-sexual-abuse-material-online>> accessed 14 July 2022; Facebook Security, 'Want to know how Facebook uses PhotoDNA? Read a Recent Blog Post by the Head of our Safety Team', (*Facebook*, 10 August 2011) <<https://www.facebook.com/security/posts/want-to-know-how-facebook-uses-photodna-read-a-recent-blog-post-by-the-head-of-0/234737053237453/>> accessed 14 July 2022.

⁴⁴ Zoe Kleinman, 'Fury over Facebook 'Napalm Girl' Censorship' (*BBC News*, 9 September 2016) <<https://www.bbc.com/news/technology-37318031>> accessed 14 July 2022.

and contextual. International human rights standards generally hold that automated content filtering is analogous to prior censorship, and is generally an unjustifiable interference with freedom of expression when imposed via a government mandate.⁴⁵

Although it is important not to overstate the specific impact of the *Sabu George* and *In Re: Prajwala* decisions, they have taken place against the backdrop of a broader and widely noted deterioration of India's freedom of expression climate, particularly with regards to online speech.⁴⁶ This includes the country's ongoing status as the global leader in Internet shut-downs,⁴⁷ which are generally recognized as a grave violation of human rights, and which are prima facie unjustifiable under international human rights law.⁴⁸ There is also ample evidence that the *Information Technology Act's* takedown rules are being applied to facilitate massively overbroad blocking orders, including against multi-purpose services such as Indian Kanoon, Reddit, and Telegram.⁴⁹

However, even more troubling than these formal moves to clamp down on online speech are indications of informal engagement with online platforms, particularly Facebook, with the aim of influencing the social network's moderation policy towards certain Indian content.⁵⁰ In parallel with these moves, the present government of India has demonstrated their own

⁴⁵ 'Joint Declaration on Freedom of Expression and the Internet', (OSCE, 1 June 2011) <www.osce.org/fom/99558?download=true> accessed 14 July 2022, 68.

⁴⁶ Soutik Biswas, 'Why Journalists in India are Under Attack' (*BBC News*, 4 February 2021) <<https://www.bbc.com/news/world-asia-india-55906345>> accessed 14 July 2022; 'Freedom in the World 2021: India, Freedom House' (*Freedom House*, 2021) <<https://freedomhouse.org/country/india/freedom-world/2021>> accessed 14 July 2022; 'World Report 2021: India' (*Human Rights Watch*, 2021) <<https://www.hrw.org/world-report/2021/country-chapters/india>> accessed 14 July 2022.

⁴⁷ 'Shattered Dreams and Lost Opportunities: A Year in the Fight to #KeepItOn' (*Access Now*, March 2021) <https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf> accessed 14 July 2022.

⁴⁸ UNGA Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, United Nations General Assembly (*Human Rights Council*, 23 April 2020) <<https://undocs.org/A/HRC/44/49>> accessed 14 July 2022.

⁴⁹ Torsha Sakar & Gurshabad Grover, 'How India is using its Information Technology Act to Arbitrarily Take Down Online Content', (*Scroll*, 22 June 2022) <<https://scroll.in/article/953146/how-india-is-using-its-information-technology-act-to-arbitrarily-take-down-online-content>> accessed 14 July 2022.

⁵⁰ Newley Purnell and Jeff Horwitz, 'Facebook's Hate-Speech Rules Collide with Indian Politics', *Wall Street Journal* (August 14, 2020), <<https://www.wsj.com/articles/facebook-hate-speech-india-politics-muslim-hindu-modi-zuckerberg-11597423346>>; Newley Purnell and Jeff Horwitz, 'Facebook Services are Used to Spread Religious Hatred in India, Internal Documents Show', *Wall Street Journal* (October 23, 2021), <<https://www.wsj.com/articles/facebook-services-are-used-to-spread-religious-hatred-in-india-internal-documents-show-11635016354>>; Kari Paul, Facebook Blocked Hashtag Calling for Narendra

willingness to weaponize the platforms' terms of service as a cudgel against their opponents, through the constitution of "cyber warriors" tasked with flagging content for removal, including a particular focus on government critics.⁵¹ In addition to concerns around the extra-constitutional nature of these enforcement actions, which strip users of the normal procedural protections that are meant to apply to cases where governments suppress speech,⁵² this behaviour is also part of a growing trend of political actors employing online "troll armies" to harass opposition, and try and drown out, or otherwise bully them offline.⁵³ Across much of the world, a similar toolkit has been associated with anti-democratic movements and a general backsliding across emerging democracies.⁵⁴

III. THE 2021 RULES

In the context of a closing civic space online, the promulgation of the 2021 Rules raises a number of concerns, insofar as they present the clearest signal yet that the present government of India seeks to tighten its control over the online political discourse. The 2021 Rules, which supplant the 2011 Rules, were announced in a press release which declared that they would "empower ordinary users of social media, embodying a mechanism for redressal and timely resolution of their grievance" with a framework that is "progressive, liberal and contemporaneous".⁵⁵ The government in particular justified the changes by pointing to proliferating threats online, such as abusive language,

Modi to Resign over Pandemic, *The Guardian* (April 28, 2021), <<https://www.theguardian.com/technology/2021/apr/28/facebook-blocked-resignmodi-hashtag-india-coronavirus>>.

⁵¹ Rina Chandran, "Sinister form of Censorship: India's 'Cyber Volunteer' Programme Pits Citizens against Each Other", (*Scroll*, 2 December 2021), <<https://scroll.in/article/1011856/sinister-form-of-censorship-indias-cyber-volunteer-programme-pits-citizens-against-each-other>> accessed 14 July 2022; Rishab Bailey, Vrinda Bhandari and Faiza Rahman, 'Examining the Online Anonymity Debate: How far Should the Law go in Mandating User Identification?', (Data Governance Network, 2021) <<https://datagovernance.org/report/examining-the-online-anonymity-debate-how-far-should-the-law-go-in-mandating-user-identification>> accessed 14 July 2022.

⁵² See, eg, UN Human Rights Comm, *Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (2011), at arts 19, General Comment 34 <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> accessed 15 July 2022.

⁵³ See, eg, Jonathan Corpus Ong & Jason Vincent A. Cabañes, 'Architects of Networked Disinformation: Behind the Scenes of Troll Accounts and Fake News Production in the Philippines', (2018) UMass Amherst Communication Department Faculty Publication Series; Artur Pericles Lima Monteiro, 'Brazilians are Desperately Fighting against Bolsonaro's Digital Tactics' (*Rest of World*, 2 December 2021) <<https://restofworld.org/2021/brazil-bolsonaro-social-media/>> accessed 15 July 2022.

⁵⁴ *ibid.*

⁵⁵ 'Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021', (*Press Information Bureau*, 2021) <<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>> accessed 15 July 2022.

defamatory and obscene content, “blatant disrespect to religious sentiments”, revenge porn, misinformation, and the “misuse of social media for settling corporate rivalries in blatantly unethical manner”.⁵⁶

However, the new Rules have raised a number of concerns among human rights groups who have been particularly alarmed by measures aimed at undermining the privacy of online communications.⁵⁷ Though some within the tech sector have defended these provisions on nationalistic grounds, claiming that they would ensure that the rules around privacy are drawn by Indian courts rather than American ones, there is little prospect that the resulting framework will provide for more privacy protections than the status quo.⁵⁸

Rule 4(4) also seeks to further entrench the use of automated filtering tools by significant social media intermediaries, including for any content which has previously been subject to a removal order.⁵⁹ As noted earlier in this paper, the use of filtering technologies to target heavily contextual categories of content, such as hate speech, raises particular concerns due to persistent challenges in accuracy and reliability. Questions have also been raised regarding whether the 2021 Rules are ultra vires their parent legislation, insofar as they may constitute a regulatory framework which exceeds the

⁵⁶ *ibid.* It is worth noting that, while some of these are real and legitimate concerns, regulating of speech to prevent “disrespect” of religions is generally not considered justified under international human rights law. *See, eg*, UN Human Rights Comm, ‘Freedoms of Opinion and Expression’, UN Doc. CCPR/C/GC/34 (2011), General Comment 34, at art 51 <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> accessed 15 July 2022.

⁵⁷ Although this paper focuses exclusively on concerns related to online content and platform governance, this focus is not intended to gloss over other problems with the 2021 Rules. In particular, Rule 4(2), which requires “Significant Social Media Intermediaries” to maintain a means of identifying the “first originator” of information they host, poses a severe threat to online privacy, as well as to freedom of expression. The lack of a timeframe connected to this requirement is particularly concerning, as the volume of information storage that this would necessitate runs counter to fundamental principles of data minimization, as spelled out by Justice B.N. Srikrishna and the Committee of Experts in their White Paper on Data Protection in India. For a full discussion of concerns with the 2021 Rules, *see eg*, Torsha Sarkar, Gurshabad Grover, Raghav Ahojja, Pallavi Bedi and Divyank Katira, ‘On the Legality and Constitutionality of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021’, (*Medianama*, 22 June 2021), <<https://www.medianama.com/2021/06/223-legality-constitutionality-of-it-rules/>> accessed 15 July 2022.

⁵⁸ ‘WhatsApp-India case: ‘They have Clear Double Standards’, TV Mohandas Pai Says’, *The Economic Times* (26 May 2021) <<https://economictimes.indiatimes.com/tech/technology/whatsapp-india-case-they-have-clear-double-standards-tv-mohandas-pai-says/article-show/82969539.cms?from=mdr>> accessed 15 July 2022.

⁵⁹ This approach is problematic since, for a number of categories of prohibited content, such as intellectual property violations, their legality can depend on the surrounding context.

scope of the original Information Technology Act.⁶⁰ However, from the perspective of online content and platform governance, the most relevant aspect of the new Rules concerns the amended requirements for intermediaries to establish “due diligence”, and therefore qualify for safe harbor protections against liability for their users’ speech.

Of particular note is s. 3(1)(b), which appears to mandate that intermediaries revise their terms of service to prohibit certain categories of speech. Some of these align with traditional categories of legally prescribed content, such as defamation, CSAM, and content which violates intellectual property rights. However, there are also a number of categories of prohibited content which are perfectly legal under Indian law, and whose prohibition would never pass muster under international human rights standards or, for that matter, under the laws of virtually any state with meaningful constitutional protections for freedom of expression.⁶¹ For example, s. 3(1)(b)(ii) mandates that intermediaries prohibit content which is “insulting or harassing on the basis of gender” or which is “racially or ethnically objectionable”. Both of these categories of content go vastly beyond the acceptable contours of hate speech law according to international human rights standards, which typically require both that the statement was intended to generate hatred and that the statement was likely to generate actual harm.⁶² A number of other categories in the code are hopelessly vague, including information that “belongs to another person” (s. 3(1)(b)(i)), “is harmful to [a] child” (s. 3(1)(b)(iii)), or which “knowingly and intentionally communicates information which is patently false or misleading in nature but may reasonably be perceived as a fact” (s. 3(1)(b)(vi)). It is worth noting that, according to international human rights standards, the presence of overly vague restrictions on speech is itself a violation of the right to freedom of expression, regardless of whether this discretion is actually exercised abusively.⁶³

State pressure against intermediaries to improve their site-specific rules against particular types of speech is a relatively common, albeit problematic,

⁶⁰ See eg, *Agricultural Market Committee v Shalimar Chemical Works Ltd* (1997) 5 SCC 516; *State of Karnataka v H. Ganesh Kamath* (1983) 2 SCC 402.

⁶¹ In the Indian context specifically, it is relevant to note that the Lok Sabha Committee on Subordinate Legislation, in their 31st Report on Rules under the IT Act, recommended in 2013 that ambiguities in the Act’s definitions needed to be addressed: <http://164.100.47.193/lss-committee/Subordinate%20Legislation/15_Subordinate%20Legislation_31.pdf> accessed 15 July 2022.

⁶² See eg, *Jersild v Denmark*, No 15890/89, [1994] ECHR 33, 19 EHRR 1; *Erbakan v Turkey*, App No 59405/00 (ECHR, 6 July 2006); *Prosecutor v Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence (December 3, 2003).

⁶³ UN Human Rights Comm (n 52) at arts 24, 27

feature of global content moderation debates.⁶⁴ But while governments frequently approach the line of demanding that platforms undertake specific, extra-legal enforcement actions, India's move to essentially require that site-specific terms of service meet a particular government-imposed standard in targeting various forms of legal content goes significantly beyond the measures taken in any other constitutional democracy. While, in theory, platforms are free to set terms of service that do not align with these provisions, the importance of intermediary liability protections to their operations means that this is not a realistically available option. The government's power to push for moderation structures that suit partisan objectives is even further bolstered by a new mandate in the 2021 Rules which requires platforms to maintain staff that are resident in India, and could therefore be subject to personal consequences, in addition to any commercial pressures the government might bring to bear on the company.⁶⁵

A system which allows the government to set the rules, to trigger enforcement actions, and to exercise pressure over how complaints are resolved is, for all practical purposes, indistinguishable from a direct government restriction on speech. Any purported firewall in the 2021 Rules between government enforced restrictions on speech and the platforms' own "independent" enforcement efforts is no more than a fig leaf to shield a massive expansion in government control over the contours of acceptable speech from meaningful judicial or constitutional scrutiny. Though the success or failure of this gambit remains to be seen,⁶⁶ such an overt attempt to weaponize the incredible power that platforms wield over online expression is deeply troubling for the precedent that it sets in India, and among other emerging democracies. For all the legitimate concerns around the consolidation of private sector power in governing the online discourse, an expansion of unaccountable government power into this space is far more dangerous, since it threatens to permanently close off the political discourse from any expression which the ruling party may find inconvenient.

⁶⁴ Michael Karanickolas, 'Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"' (2019) 17 Canadian Journal of Law and Technology 201.

⁶⁵ See, in particular, the requirements for maintaining employees resident in India, Vittoria Elliott, 'New Laws Requiring Social Media Platforms to Hire Local Staff Could Endanger Employees' (*Rest of World*, May 2021) <<https://restofworld.org/2021/social-media-laws-twitter-facebook/>> accessed 15 July 2022.

⁶⁶ *Agij Promotion of Nineteenonea Media (P) Ltd v Union of India* 2021 SCC OnLine Bom 2938.

IV. FINDING ACCOUNTABILITY

None of this is to suggest that government regulation of social media platforms is inherently problematic, or that there is no role for governments in ensuring robust accountability and due process in how platforms manage content. Major social media platforms do a poor job of serving their users, particularly across emerging democracies. Defenders of the 2021 Rules are not wrong to point to the inherent tension between the companies' American character and the global services they provide, or about the double standards in how different rules and requests are treated.⁶⁷ Despite having made some strides towards better representation in recent years, content moderation resources at most platforms remain overwhelmingly focused on serving the United States and Western Europe.⁶⁸ Moreover, the development and application of the platforms' moderation standards remains opaque and generally unaccountable, with a significant need for better and more clearly demonstrated procedural rigor.⁶⁹

Interestingly, the 2021 Rules also include a number of proposals which aim to address this aspect of the problem, by supporting better transparency and public responsiveness in platform decision-making. For example, section 4(d) requires the publication of monthly reports regarding complaints received and removals that have been executed, as well as information about automated moderation tools that are being deployed. Given the pervasive challenge in obtaining accurate information about content moderation, particularly in terms of how platforms' policies and implementation differ depending on the language or region of the world, this is a welcome development.⁷⁰

⁶⁷ 'Ravi Shankar Prasad, IT Minister Exclusive Interview, Social Media Giants Vs Govt with Marya Shakil' (CNN-News 18, 2021) <<https://youtu.be/akmIuukWEEg>> accessed 15 July 2022.

⁶⁸ Craig Silverman, Ryan Mac & Pranav Dixit, "'I Have Blood on My Hands': A Whistleblower Says Facebook Ignored Global Political Manipulation", (*Buzzfeed*, 14 September 2020) <<https://www.buzzfeednews.com/article/craigsilverman/facebook-ignore-political-manipulation-whistleblower-memo>> accessed 15 July 2022; Marwa Fatafta, 'Facebook is Bad at Moderating in English. In Arabic, it's a Disaster', (*Rest of World*, 18 November 2021) <<https://restofworld.org/2021/facebook-is-bad-at-moderating-in-english-in-arabic-its-a-disaster/>> accessed 15 July 2022.

⁶⁹ Jonathan Zittrain, 'Three Eras of Digital Governance', (*Völkerrechtsblog*, 27 November 2019) <<https://voelkerrechtsblog.org/three-eras-of-digital-governance/>> accessed 15 July 2022.

⁷⁰ See eg, Carlos Cortés and Luisa Fernanda Isaza, 'The New Normal? Disinformation and Content Control on Social Media during COVID-19', (*Centro de Estudios en Libertad de Expresión y Acceso a la Información*, April 2021) <https://www.palermo.edu/Archivos_content/2021/cele/papers/Disinformation-and-Content-Control.pdf> accessed 15 July 2022.

However, even among the aspects of the Rules which approach these challenges more constructively, there are reasons for concern. Probably the most ambitious and novel aspect of the Rules, from an accountability perspective, is the constitution of a sort of co-regulatory structure for processing complaints related to platforms' moderation decisions. This begins with a requirement for user notification related to adverse moderation actions, and for platforms to designate a human point of contact for receiving complaints related to moderation actions.⁷¹ The latter requirement, in particular, is badly needed, as anyone who has struggled through the labyrinthine processes of attempting to get an account restored can tell you.⁷² But even here, there are aspects of the framework which lend themselves to political abuse. For example, a key responsibility of the grievance officer under section 3(2)(b) is to facilitate the removal of pornographic or impersonating content upon receipt of a complaint from the subject of the image. While efforts to combat non-consensual pornography are absolutely a legitimate State interest,⁷³ the extension of this provision to any "artificially morphed images" opens the door to censoring a huge amount of legitimate political satire.⁷⁴ This concern is compounded by the fact that the material is required to be removed within 24 hours, which will effectively prevent any meaningful analysis regarding whether the material may be legitimate speech, such as political satire.

Above these grievance officers, the Rules introduce an ambitious vision for one or more "self-regulatory bodies of publishers", comprising a set of independent experts who perform a range of tasks including hearing appeals against content decisions by the platforms.⁷⁵ Such "social media councils" have been a mainstay of expert discussions around how to improve online content governance in recent years, with a number of high profile supporters, particularly David Kaye, the former United Nations Special Rapporteur on Freedom of Expression.⁷⁶ However, this aspect of the Rules applies not just

⁷¹ The 2021 Rules, ss 3(2)(a), 4(8).

⁷² See eg, Shannon Bond, 'Your Facebook Account Was Hacked. Getting Help May Take Weeks — Or \$299', (NPR, 2 August 2021) <<https://www.npr.org/2021/08/02/1023801277/your-facebook-account-was-hacked-getting-help-may-take-weeks-or-299>> accessed 15 July 2022.

⁷³ Danielle Keats Citron & Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345.

⁷⁴ See eg, Lee Moran, 'Donald Trump's Small Desk is Now Part of a Hilarious 'Photoshop Battle'', *The Hill* (November 28, 2020), <https://www.huffpost.com/entry/donald-trump-tiny-desk-photoshop-battle_n_5fc1f423c5b66bb88c670e5f> accessed 15 July 2022.

⁷⁵ The 2021 Rules, s 12.

⁷⁶ *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/38/35 (UNHRC, 2018), <<https://undocs.org/A/HRC/38/35>> accessed 15 July 2022. See also, 'The Social Media Councils: Consultation Paper', (Article 19, 2019) <<https://www.article19.org/wp-content/>

to social media platforms, but to all publishers of news, current affairs and online curated content, comprising a significant subset of all online content.⁷⁷ This breadth in scope creates an overlap with existing self-regulatory organizations, such as the Press Council of India and the Advertising Standards Council of India.

While recognition of a role for self-regulatory structures in the social media realm could potentially be a positive development, any actual impact of these bodies on the development of content governance in India is undermined by the fact that the Rules grant an Inter-Departmental Committee organized by the Ministry of Information and Broadcasting with the power to oversee and overrule their decisions.⁷⁸ This Inter-Departmental Committee would exercise enormous power over online speech, retaining an ability to reclassify, edit, delete, or otherwise modify content from online news and curated content publishers.⁷⁹ In this context, it is difficult to see the purpose of the self-regulatory body at all, especially given that they are wholly dependent on the Inter-Departmental Committee to translate their recommendations into actionable orders.⁸⁰ Once again, the inclusion of these nominally independent agencies seems to serve little function other than potentially providing a layer of insulation to shroud the government's assertion of vast new coercive powers over the online political discourse.

V. CONCLUSION

The lack of adequate representation for Global South interests and perspectives is one of the most significant structural problems in modern content governance.⁸¹ Although the biggest platforms have pivoted away from “marinating in the First Amendment”,⁸² and towards a more nuanced understanding of freedom of expression as an international human right,⁸³ the centre of

uploads/2019/06/A19-SMC-Consultation-paper-2019-v05.pdf> accessed 27 December 2021.

⁷⁷ The 2021 Rules, s 8.

⁷⁸ The 2021 Rules, ss 13-14.

⁷⁹ The 2021 Rules, ss 14-16.

⁸⁰ The 2021 Rules, s 14(5).

⁸¹ Jenny Domino, ‘Why Facebook’s Oversight Board is Not Diverse Enough’, (*Just Security*, 21 May 2020) <<https://www.justsecurity.org/70301/why-facebooks-oversight-board-is-not-diverse-enough/>> accessed 15 July 2022.

⁸² David Kaye, Panelist, ‘Glasnost! Nine Ways Facebook can Make itself a Better Forum for Free Speech and Democracy’ (*Bonaverro Institute of Human Rights*, 28 February 2019), <<https://livestream.com/oxuni/facebook-freespeech-democracy/videos/188101461>> accessed 15 July 2022.

⁸³ See, eg, ‘The References to Relevant Human Rights Principles in Guiding Decision-making at the Facebook Oversight Board: Oversight Board Bylaws’, (*Facebook*, January 2020)

gravity for these conversations remains heavily focused on the United States and other western democracies.⁸⁴ Governments, particularly from emerging democracies, have an important role to play through informal pressure and, where appropriate, through regulation, in pushing platforms to pay more attention to the needs of their international user base. As the largest market for Facebook and YouTube, and one of the largest markets for Twitter, India is well positioned to play a leading role in fostering a pivot by these platforms towards allocating their resources and attention in a manner that corresponds to their global footprint.⁸⁵

Unfortunately, rather than supporting better and more responsive policymaking at online platforms, the 2021 Rules pose a significant challenge to freedom of expression in India, by pushing the platforms into a position where their moderation processes are subject to being further weaponized for political ends. Worse still, by bundling some nominally positive provisions, such as transparency requirements and recognition of a co-regulatory structure, alongside more nakedly repressive changes, the 2021 Rules pettifog the legitimate content governance problems that exist, and discredit real and meaningful efforts at improving accountability. Nationalistic anger at having India's online discourse controlled by foreign entities is fully understandable. But solutions to this challenge which comes at the cost of the very characteristics that made these platforms popular and useful in the first place, namely their free and open character, will ultimately be counterproductive to freedom of expression and democracy in India.

It is also worth noting that, for all the well-documented complaints about content moderation, there can be benefits underlying the platforms' exercise of editorial control over the discourse they host, including where it has been used to push back against harmful government narratives. Their relatively aggressive crackdown on COVID-19 misinformation, including State-driven misinformation, is one example which has been inarguably in the public interest.⁸⁶ Likewise, the platforms' pushback against attempts by former U.S.

<<https://about.fb.com/wp-content/uploads/2020/01/Bylaws6.pdf>> accessed 15 July 2022.

⁸⁴ Chinmayi Arun, 'Facebook's Faces' 135 *Harvard Law Review Forum*.

⁸⁵ 'Leading Countries Based on Facebook Audience Size as of October 2021 (in Millions)', (*Statista*, 2021) <<https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/>> accessed 15 July 2022. 'India Becomes YouTube's Largest and Fastest Growing Market', *The Hindu* (9 April 2019) <<https://www.thehindu.com/business/india-becomes-youtubes-largest-and-fastest-growing-market/article26785428.ece>> accessed 15 July 2022; 'Leading Countries Based on Number of Twitter Users as of October 2021 (in millions)', (*Statista*, 2021) <<https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/>> accessed 15 July 2022.

⁸⁶ See, eg, Kurt Wagner, 'Facebook, Twitter, YouTube Remove Posts From Bolsonaro', *Bloomberg* (30 March 2020) <<https://www.bloomberg.com/news/articles/2020-03-31/>>

President Donald Trump to stir up unrest related to his loss in the 2020 election was clearly to the good of that country's democracy, especially in light of the shocking escalation that followed.⁸⁷ While there are legitimate concerns about accountability deficits underlying these decisions, particularly in the context of the Global South, legislative responses which aim to bring the platforms under government control are, in the long run, a greater threat to democracy and freedom of expression.

Instead, India should target its policies towards empowering users and fostering real platform transparency and accountability. This is an opportunity for Indian leadership, as the country has traditionally been a global leader in recognition of core democratic values, such as the right to information.⁸⁸ Yet, here too, recent years have seen an erosion of this cornerstone of Indian democracy.⁸⁹ There is a clear nexus between the deteriorating health of India's own democratic and constitutional order, and the closing window of opportunity to play a leading role in pushing for a global content governance structure which respects the needs and interests of India's massive online community.

As noted in the introduction, India's government is by no means unique in seeking to weaponize the power of social media platforms to entrench government interests. However, among the broader tide of democratic backsliding, one major asset which India has, and which is missing among many contemporaries across the Global South, is the strength and independence of its judiciary. Although there are some troubling signs that the government

facebook-twitter-pull-misleading-posts-from-brazil-s-bolsonaro [<https://perma.cc/YG6E-6WMT>] accessed 15 July 2022]; See Kim Lyons, 'Twitter Removes Tweets by Brazil, Venezuela Presidents for Violating COVID-19 Content Rules', (*The Verge*, 30 March 2020) <<https://www.theverge.com/2020/3/30/21199845/twitter-tweets-brazil-venezuela-presidents-covid-19-coronavirus-jair-bolsonaro-maduro> [<https://perma.cc/S46G-PWLS>]> accessed 15 July 2022; See Rebecca Shabad, 'Twitter Removes Tweet Highlighted by Trump Falsely Claiming COVID-19 'Cure'', (*NBC News*, 28 July 2020) <<https://www.nbcnews.com/politics/donald-trump/twitter-removes-tweet-highlighted-trump-falsely-claiming-covid-cure-n1235075> [<https://perma.cc/U2PP-PBLU>]> accessed 15 July 2022

⁸⁷ Megan Graham & Salvador Rodriguez, 'Twitter and Facebook Race to Label a Slew of Posts Making False Election Claims before all Votes Counted', (*CNBC*, 4 November 2020) <<https://www.cnn.com/2020/11/04/twitter-and-facebook-label-trump-posts-claiming-election-stolen.html>> accessed 15 July 2022.

⁸⁸ *S.P. Gupta v Union of India* 1981 Supp SCC 87.

⁸⁹ Yashovardhan Azad and M Sridhar Acharyulu, 'RTI: A bill that may kill a right', (*Hindustan Times* (22 July 2019) <<https://www.hindustantimes.com/analysis/rTI-a-bill-that-may-kill-a-right/story-EkYRO9yihPgoOexQJaCGJ.html>> accessed 15 July 2022; Anjali Bhardwaj and Amrita Johri, 'To defend Modi govt's RTI Act Changes, BJP Released a 'Factsheet'. It doesn't have Much Facts', (*The Print*, 24 July 2019) <<https://theprint.in/opinion/to-defend-modi-govts-rTI-act-changes-bjp-released-a-factsheet-it-doesnt-have-much-facts/267161/>> accessed 15 July 2022.

is trying to push the envelope in circumventing judicial oversight over their actions, a constitutional challenge is nonetheless the most promising avenue for curtailing the worst aspects of the 2021 Rules.⁹⁰ Given the Court's prior role in recognizing the importance of intermediaries in the exercise of a robust right to freedom of expression, and the current raft of legal challenges being advanced against the 2021 Rules,⁹¹ there is hope that that institution will remain as a bulwark in support of India's constitutional values, and against the common tide of platform-enabled authoritarianism sweeping the world.⁹²

⁹⁰ 'I&B Sought Media Compliance with IT Rules Even after HC Issued Stay, Digital Rights Body Says', (*The Wire*, 26 January 2022) <<https://thewire.in/government/ib-sought-media-compliance-with-it-rules-even-after-hc-issued-stay-digital-rights-body-says>> accessed 15 July 2022.

⁹¹ 'Bombay High Court stays the Operation of Rule 9(1) and Rule 9(3) of IT Rules, 2021' (*Internet Freedom Foundation*, 2021) <<https://internetfreedom.in/bombay-high-court-stays-the-operation-of-rule-9-1-and-rule-9-3-of-it-rules-2021/>> accessed 15 July 2022.

⁹² 'NH Web Desk, 'Joint Plea by 13 Media Houses Challenges Constitutional Validity of IT Rules, 2021 in Madras High Court' *National Herald* (23 June 2021), <<https://www.nationalheraldindia.com/india/joint-plea-by-13-media-houses-in-madras-hc-challenges-constitutional-validity-of-it-rules-2021>> accessed 15 July 2022.

INDIA'S TAKE ON LEGAL REMEDY OF PASSING- OFF: A CELEBRITY'S PERSPECTIVE

Niharika Salar & Sonal Sinha***

ABSTRACT *The development of mass media led to the development of intrigue and curiosity around celebrities and their persona, and the profits hidden therein. Harping upon this intrigue, stakeholders realised the brand power behind celebrity personalities. However, problems arose when there was an increase in the unauthorised exploitation of celebrity personalities. While on the legal front, several remedies are resorted to, William Prosser narrowed down these into four, i.e., intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light and misappropriating one's personality for commercial gain. Hinged on the brand value of a celebrity's personality, the right to publicity emphasises the right of a celebrity to claim control over the commercial value of their identity. Remedy against the unauthorised commercial exploitation of a celebrity's identity is commonly found in the tort of passing off. The article assesses the contours of the remedy of passing off as availed by celebrities and implemented by the Indian Courts. The article also draws a comparison with the approaches employed by American and English law in their understanding of celebrity personality, contrasting the same with the Indian approach.*

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I. INTRODUCTION

Brand value sells, and with the increasing stakeholders and investments involved, concerned parties are prepared to go to lengthy extents to protect or exploit the same. The fundamental issue in this article's context, therefore, is to appreciate and assess how celebrities capitalize on the non-tangible assets that they possess and the legal remedies at their disposal in cases of unauthorized exploitation of this asset.¹

Throughout the world, legal systems have largely taken the help of varying approaches; including the recognition of rights in personalities themselves,² creating rights in images,³ unfair competition,⁴ and tortious liability, among many others.⁵ Some jurisdictions have also evolved a jurisprudence that presents a cocktail of the above as an underlying principal solution.⁶ The Indian approach is partially one of them. This which has not been spoken about at length in popular literature, probably because it is still in its initial stages.

While there is a farrago of rights associated with personality, it was William Prosser who tried to compartmentalise these into four, namely— intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light, and misappropriating one's personality for commercial gain.⁷ The right to publicity is an aspect of personality rights that recognises the commercial value of the celebrity's persona. The concept was introduced by Melville B Nimmer,

¹ Stuart B. Walzer & Jan C. Gabrielson, 'Celebrity Goodwill' [1986] *Journal of the American Academy of Matrimonial Lawyers* 35, 44.

² See Mark Bartholomew, 'A Right is Born: Celebrity, Property, and Postmodern Lawmaking' (2011) 44 *Connecticut Law Review* 301.

³ Jan-Jaap Kuipers, 'Towards a European Approach in the Cross-Border Infringement of Personality Rights' (2011) 12 *German Law Journal* 1681, 1706.

⁴ Restatement (Third) of Unfair Competition (1995) has stated that misappropriation of publicity rights is a form of unfair competition.

⁵ See annx 1.

⁶ Ingrid Pusey & Marc Morgan, 'Celebrity Personality Rights in Jamaica: A Path for Development' (2012) 61 *Social and Economic Studies* 99, 125.

⁷ William Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

who advocated for the celebrity's "right to control the commercial value of their identity."⁸ Arising from Locke's labour theory, the right to publicity for celebrities is a form of incentive for their hard work in creating their persona and image. Hence, using a celebrity's image for promotion of one's goods and services without authorisation forms a part of unfair trade practice and can be actionable under the tort of passing off.

This article will attempt to look at the usage of the remedy of passing off by Indian celebrities in lieu of them protecting their intellectual property rights. Part I of this article will present a descriptive analysis of the development of the remedy of passing off, as extended to celebrities, in India. This part will analyse how American and English law and precedents look at personality rights and their approach to the remedy of passing off. This analysis will prove to be useful in Part II, where the authors will attempt to show that High Courts have taken different approaches with respect to the interpretation of the criteria of passing off—being (A) goodwill and reputation, (B) misrepresentation, and (C) damage to goodwill and reputation. The article will slightly stretch its ambit by discussing English and American developments for the purpose of comparison. The authors will try to show conflicting approaches by Indian courts as and when the essentials of passing off are dealt with in Part II; thereby concluding that the state of the remedy in India can be considered to be in a state of confusion.

II. DEVELOPMENT OF PASSING OFF LAWS IN INDIA

A. The Rising Cult of Indian Celebrity, Communication Standards, and Demand for Protection

The perception of the "social value of a personality"⁹ evolved considerably with the development of mass media, especially television.¹⁰ With various forms of mass media in India itself like Doordarshan¹¹ and All India Radio¹² (apart from India's very own thriving film industry, Bollywood¹³), there was

⁸ Melville B. Nimmer, 'The Right of Publicity' (1954) 19 *Law and Contemporary Problems* 203.

⁹ See Samantha Barbas, 'The Social Origins of the Personality Torts' (2015) 2 *Rutgers University Law Review* 393.

¹⁰ Robert Strunsky, 'The Cult of Personality' (1956) 25 *The American Scholar* 265, 272.

¹¹ Doordarshan is an autonomous public service broadcaster founded by the Government of India in 1959, owned by the Broadcasting Ministry of India.

¹² See Arvind Singhal & Everett M. Rogers, *India's Communication Revolution: From Bullock Carts to Cyber Marts* (Sage Publications 2001).

¹³ Kaushik Bhaumik, 'A Brief History of Cinema from Bombay to "Bollywood"' (2004) 2 *History Compass* 1, 4; Stanley Rothman, 'The Media, Identity and Personality' (1997) 14 *International Journal on World Peace* 49, 80.

an increasing influence on the construction of a known face by the general public. This is when Indian celebrities started gaining recognition and popularity. A cult status accrued upon the Indian celebrities, as the general public started being intrigued by their lifestyles.¹⁴

Weilernotes the fact that celebrities needed public exposure to earn a livelihood, despite the risks of invasion that came alongside it.¹⁵ Such a conflict also had a huge impact on the development of tort law, as the development of law recognized the social interest involved in the protection of individual interest.¹⁶ The rise of endorsement businesses, wherein celebrities were used as endorsers in advertisements, was a testament to the fact that one's name and personality had property-like characteristics.¹⁷ Products sold more if they had the value of a relevant face attached to them,¹⁸ as alluring potential buyers with a personality attached to it had become a significant element of the "contemporary act of selling".¹⁹ Additionally, globalisation has brought many international brands to India, due to which there has been an increased demand for cultural and functional knowledge about the Indian value system.²⁰ With such developments, protection sought by celebrities with respect to their intellectual property increased and legal remedies have been expected to develop accordingly.

B. Indian Developments in Comparison with USA and England

In its early 19th century formulation, the law was meant to protect the name or trademark of a product/business alone.²¹ But as competition grew, the

¹⁴ See annex 2.

¹⁵ Fred M. Weiler, 'The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity' (1994) 13 *Cardozo Arts and Entertainment Law Journal* 223, 274.

¹⁶ Roscoe Pound, *Interests of Personality* (1915) 28 *Harvard Law Review* 343, 365.

¹⁷ Weiler (n 15).

¹⁸ Arpita Khare, 'Impact of Indian Cultural Values and Lifestyles on Meaning of Branded Products: Study on University Students in India' (2011) 23 *Journal of International Consumer Marketing* 365, 379.

¹⁹ Naeha Prakash, 'Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill' (2013) 35 *Hastings Communications and Entertainment Law Journal* 247, 276; See also St Michael Hylton & Peter Goldson, 'The New Tort of Appropriation of Personality: Protecting Bob Marley's Face' (1996) 55 *The Cambridge Law Journal* 56, 64.

²⁰ Khare (n 18); For example, an international brand like Loreal uses a local well-known face like Aishwarya Rai to enter the Indian market. See 'Katrina named the Indian face of L'Oréal Paris after Aishwarya, Sonam and Freida' (*India Today*, 21 January 2014) <<https://www.indiatoday.in/lifestyle/story/katrina-kaif-loreal-paris-aishwarya-rai-sonam-kaipoor-and-freida-pinto-177717-2014-01-21>> accessed 2 March 2020.

²¹ T. Vidya Kumari, 'Celebrity Rights as a Form of Merchandise – Protection under the Intellectual Property Regime' (2004) 9 *Journal of Intellectual Property Rights* 120, 135.

desire to earn quick and easy money resulted in the exploitation of the goodwill of other traders. Subsequently, in cases where the look of the business premises was passed off, or there was a misrepresentation as to goods,²² no action was maintainable in common law. Consequently, the present shape of the remedy makes it flexible enough²³ to encompass a wide spectrum of trade-related activities and descriptive material,²⁴ while still being an action for deceit.²⁵

i. American Developments

The heavily cited academic opinion by Warren & Brandeis²⁶ (which proposed the need for a tort law that would allow the “victims of press gossip to sue and recover damages for dignitary and emotional injuries”) played a significant role in shaping the current US regime on privacy. Appropriation was considered insufficient to protect commercial interests,²⁷ due to which a standalone right of publicity was developed to focus on the economic aspects of persona.²⁸

²² Anu Tiwari, ‘Passing off and the Law on ‘Trade Dress’ Protection: Reflections on *Colgate v Anchor*’ (2005) 10 *Journal of Intellectual Property Rights* 480, 490.

²³ Manzoor Elahi, ‘Passing Off and Infringement of Trademarks –India’ [2014] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410451> accessed 2 March 2020; See Arpan Banerjee, ‘Goodwill in Passing Off Actions: in Search of Balance’ (2018) 59 *The Law Review of the Franklin Pierce Center for Intellectual Property* 1, 24.

²⁴ Passing off action is recognised both in respect of registered goods as well as non-registered goods: Section 27 of the Indian Trademarks Act, 1999: No action for infringement of unregistered trade mark. — (1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark. (2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof.

²⁵ Supreme Court of India in *Durga Dutt Sharma v Navaratna Pharmaceutical Laboratories* AIR 1965 SC 980, while explaining the difference between trademark infringement and passing off; See *Ellora Industries v Banarsi Das Goela* 1979 SCC OnLine Del 198: 1981 PTC 46 per Anand Behari Rohatgi, J.: “The gist of the conception of passing off is that the goods are in effect telling a story of falsehood about themselves, are saying something about themselves which is calculated to mislead (sic)”.

²⁶ Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy* (1890) 4 *Harvard Law Review* 193, 220.

²⁷ See Graeme B. Dinwoodie and Megan Richardson ‘Publicity Right, Personality Right, or Just Confusion?’ in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar Publications 2017) 425–445; See Rosina Zapparoni, ‘Propertising Identity: Understanding the United States Right of Publicity and Its Implications - Some Lessons for Australia’ (2005) 28 *Melbourne University Law Review* 690.

²⁸ ‘US-Style “Personality” Right in the UK – En Route from Strasbourg?’ in 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: The New Digital Legal World? Queen’s University of Belfast US-style 1–11; See Julius Pinckaers, From Privacy Toward a New Intellectual Property Right in Persona: The Right of Publicity

At present, celebrities in the USA have two options to protect their personality and its likeness from unauthorized commercial exploitation. The first pathway is through the federal statute dealing with trademarks in the US i.e., the Lanham Act; the other is through the publicity laws of individual states.²⁹

The primary purpose of protection under Lanham Act concerns the safeguarding of consumers from misrepresentation or deception. Hence, in order to bring a claim of right of publicity under the Lanham Act, it is important to show the misperception of the consumers that a celebrity has either endorsed the Defendant's product or is associated with it in some other way.³⁰

With respect to the state laws, the right of publicity arises from the doctrine of privacy, which stands for the right 'to be let alone'. The first case to extend privacy to encompass a separate right of publicity for celebrities was *Haelan Laboratories, Inc. v. Topps Chewing Gum Inc.*, dealing with baseball players and their rights to license their images to be used on baseball cards. The Court, while coining the term 'right of publicity', held that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture".³¹ While this claim of the right of publicity varies from state to state, the elements stay the same; the standard common law right of publicity claim that requires the Plaintiff to prove, (1) use of Plaintiff's identity by Defendant, (2) the use by Defendant leads to some commercial advantage to him, (3) lack of authorisation from Plaintiff, (4) use resulting injury.

The difference between remedies under the Lanham Act and the right to publicity under state laws is that the primary purpose of the former is to prevent consumer confusion, whereas the latter is concerned with protecting the rights of an individual against unjust infringement and misappropriation of their persona and ensuring the right to remuneration arising from it.

(United States) and Portrait Law (Netherlands) Balanced with Freedom of Speech and Free Trade Principles (Kluwer Law International 1996) 15.

²⁹ Jonathon Schlegelmilch, 'Publicity rights in the U.K. and the U.S.A: It is Time for the United Kingdom to Follow America's Lead' (2016) 1 *Gonzaga Law Review* 101, 119.

³⁰ *ibid.*

³¹ Souvanik Mullick & Swati Narnaulia, 'Protecting Celebrity Rights Through Intellectual Property Conceptions' [2008] *NUJS Law Review* 615.

In India, one of the first cases which recognized the right of publicity³² was *ICC Development (International) Ltd v Arvee Enterprises*.³³ The following two factors were considered essential to invoke the right:

- (i) validity: the plaintiff owns an enforceable right in the identity or persona of a human being; and
- (ii) identifiability: the Celebrity must be identifiable from a defendant's unauthorized use³⁴ (so much so that if identifiable, the Court does not require proof of falsity or confusion).³⁵

Furthermore, the practical application of the First Amendment to the right of publicity has been getting considerable attention.³⁶ Indian courts, on the other hand, are just starting to gear up for interference with the right to freedom of speech.³⁷ Additionally, the Supreme Court of India³⁸ found publicity to be an element of privacy that is protected as a fundamental right; thereby granting a constitutional status to the same. But since the case actually did not revolve around the issue of celebrity rights, it stands the risk of getting ignored by the lower courts by being deemed *obiter*.

³² *ICC Development (International) Ltd v Arvee Enterprises* 2003 SCC OnLine Del 2: (2003) 26 PTC 245, ('*ICC Development*').

³³ See *ibid* [14] "The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc."

³⁴ *Titan Industries Ltd v Ramkumar Jewellers* 2012 SCC OnLine Del 2382: (2012) 50 PTC 486 ('*Titan Industries*').

³⁵ The identifiability test was further upheld in *Shivaji Rao Gaikwad v Varsha Productions* 2015 SCC OnLine Mad 158: (2015) 2 CTC 113 ('*Shivaji*'); and *D.M. Entertainment (P) Ltd v Baby Gift House CS (OS) No. 893 of 2002, decided on 2-11-2010 (Del)*. ('*D.M. Entertainment*'), ("to avail the right against the infringement of right to publicity, the plaintiff must be "identifiable" from defendant's unauthorized use"); See *ibid* "If the plaintiff is very well known and widely recognized celebrity a simple comparison of the defendant's use and the plaintiff's identifying features may itself be sufficient to create a strong inference of identifiability. This is termed as unaided identification(sic)".

³⁶ Stephen Barnett, 'The Right of Publicity versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy' (1995) 18 *Hastings Communications and Entertainment Law Journal* 593; See Roberta Kwall, 'The Right of Publicity vs the First Amendment: A Property and Liability Rule Analysis' 70 *Indian Law Journal* 47.

³⁷ Justice Bhat gives out a word of caution in *D. M. Entertainment* (n 35), stating "In a free and democratic society, where every individual's right to free speech is assured, the over emphasis on a famous person's publicity rights can tend to chill the exercise of such an invaluable democratic right. Thus, for instance, caricature, lampooning, parodies and the like, which may tend to highlight some aspects of the individual's personality traits, may not constitute infringement of such individual's right to publicity."

³⁸ *K.S. Puttaswamy v Union of India* (2014) 6 SCC 433 ('*Justice K.S. Puttaswamy*'); Publicity rights in the form of the right to privacy were first recognized explicitly by the Indian Supreme Court in *R. Rajagopal v State of T.N.* (1994) 6 SCC 632.

ii. English developments

The English approach caters to the protection of the commercial value of the celebrity identity. English Courts have stretched the ends of passing off remedy in order to incorporate new developments.³⁹ *Routh v. Webster*⁴⁰ set the stage for English Law by referencing “an appropriation of personality by an unauthorized use of another’s name”.⁴¹ English Courts eventually narrowed it down to the classical *Trinity* test.⁴² The Supreme Court of India framed a similar definition of the tort in *Wander Ltd v Antox India (P) Ltd*⁴³ as follows:

1. a reputation (or goodwill) acquired by the plaintiff in his goods, name, mark, etc.,
2. a misrepresentation by the defendant leading to confusion, causing
3. damage to the plaintiff

This article will discuss two major English decisions (*Irvine and another v. Talksport Limited*⁴⁴ and *Fenty & Ors v. Arcadia Group Brands Ltd*⁴⁵) that have helped celebrities invoke the passing off remedy in order to protect their intellectual property.

III. ESSENTIAL INGREDIENTS OF PASSING OFF AND INDIAN COURTS’ REACTION

The Court, in *Anil Kapoor Film Co (P) Ltd v Make My Day Entertainment*⁴⁶ opined in favour of a tiered structure to passing off essentials.⁴⁷ The structure

³⁹ Hylton & Goldson (n 19); See Clive D. Thorne, ‘The Promotion and Protection of Celebrities under English Law’ (2006) 2 *Convergence* 45,57.

⁴⁰ *Routh v Webster* 10 Beav 561 (1847).

⁴¹ Julie King, ‘The Protection of Personality Rights for Athletes and Entertainers Under English Intellectual Property Law: Practical Difficulties in Relying on an Action of Passing Off’ (2000) 1 *Sports Lawyers Journal* 351, 374.

⁴² In *Reckitt & Colman Products Ltd v Borden Inc* (1990) 1 WLR 491; (1990) RPC 341 (HL) 405, their Lordships used the term “classical trinity” for goodwill, misrepresentation and damage as the three essentials to show passing off in a case; See *Conorzio Del Prosciutto Fi Parma v Marks & Spencer Plc* [1991] RPC 351 (CA) [368]– [369].

⁴³ *Wander Ltd v Antox India (P) Ltd* 1990 Supp SCC 727; (1991) RPC 351 (CA) 368–69.

⁴⁴ *Irvine v Talksport Ltd* 2002 EWHC 367 (Ch) (*Irvine*).

⁴⁵ *Fenty v Arcadia Group Brands Ltd* 2015 EWCA Civ 3 (*Fenty*).

⁴⁶ *Anil Kapoor Film Co (P) Ltd v Make My Day Entertainment* 2017 SCC OnLine Bom 8119(*Anil Kapoor*).

⁴⁷ See *ibid* [18] “There is a tiered structure to passing off actions, and a plaintiff and the court he approaches, must proceed down that well-worn path: first, reputation; then, misrepresentation; and then all the rest. (sic.)”

has been the usual path followed in major decisions.⁴⁸ A plaintiff, in an action for passing off, has to establish three basic ingredients, reiterated in numerous cases. This three-tiered structure comprises of,

- (1) goodwill and reputation of the plaintiff in the mark, amongst the public
- (2) representation by the defendant that article is that of the plaintiff
- (3) actual damage or real likelihood of damage to the plaintiff by the defendant.⁴⁹

The court in *Anil Kapoor* summed up the essence of passing off, i.e., deception caused to persons, other than the plaintiff himself and calculated actions of the defendant intended to deceive. For this, reputation has been held to be of utmost importance.⁵⁰ It must be shown that the name, description or get-up used by the defendant led to an association in the mind of the public to that of the plaintiff. The above elements of passing off in conjunction to celebrity personality have been discussed in the following paragraphs.

A. Goodwill and Reputation

A passing off suit is aimed towards protecting goodwill. While it is easier to describe goodwill, defining goodwill is not an easy task. As per the oft-cited definition given by Lord Macnaghten, “It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom”.⁵¹ The following paragraphs explore the approach taken by various Indian High Courts in defining goodwill requirements for passing off.

In a general Indian case scenario, proving goodwill is considered to be a “fairly straightforward task” wherein the plaintiff has to show “sufficient evidence of consumer purchasing the goods or services that the plaintiff seeks to protect.”⁵² English courts have also drawn a relationship between the number of customers and the goodwill of the product or service.⁵³ Goodwill

⁴⁸ But see *Star India (P) Ltd v Leo Burnett (India) (P) Ltd* 2002 SCC OnLine Bom 942 : (2003)105 (2) BOM LR 28 (*Star India*), where the Court discussed a third ingredient, namely reputation after building upon damage and misrepresentation respectively and serially.

⁴⁹ *ibid.*

⁵⁰ See *Anil Kapoor* (n 46).

⁵¹ *IRC v Muller & Co's Margarine Ltd*, 1901 AC 217.

⁵² Arpan Banerjee, ‘Spill-Over Reputation in Passing Off Actions: Indian and English law Compared’ (2014) 14 Oxford University Commonwealth Law Journal 21, 45.

⁵³ See *Fenty* (n 45).

can be proved only if there are customers to consume it;⁵⁴ this is very much applicable to celebrities as well, since they invite public attention due to the kind of work in which they are involved.

i. Hard-line approach v Soft line approach

English courts have held that concerned parties cannot gain reputation in other jurisdictions until and unless the party proves the presence of valid customers in the concerned jurisdiction.⁵⁵ This has been termed as the hard-line approach to goodwill; and as Banerjee⁵⁶ puts it, it “is essentially the result of a historical judicial *faux pas*- the ill-conceived transplantation of a narrow tax law concept to the field of intellectual property law.”

On the other hand, the Indian approach has been what scholars refer to as a soft-line approach.⁵⁷ Judges are sympathetic to reputation; this may spill into other jurisdictions owing to growing digital mass media,⁵⁸ websites having visits from internet protocol addresses in India,⁵⁹ e-commerce⁶⁰ and the presence of goods in duty-free shops at airports.⁶¹ This approach was further cemented by appreciating “trans-border reputation.”⁶²

Indian courts have focused on determining reputation rather than goodwill. It was expressly held in *Kamal Trading Co v Gillette UK Ltd*⁶³ that a product’s availability in the country does not have any influence on its reputation and goodwill. A wide reputation could also be attributed to the product by means of advertisements and newspapers, or through social media

⁵⁴ *Athlete’s Foot Mktg Associated Inc v Cobra Sports Ltd* 1980 RPC 343 (Ch).

⁵⁵ See *Amway Corp’n v Eurway International Ltd* 1973 FSR 213 (Ch) 222; *Alain Bernardin Et Compagnie v Pavilion Properties Ltd* [1967] RPC 581 (Ch).

⁵⁶ Banerjee (n 52).

⁵⁷ See *Star India* (n 48).

⁵⁸ See *Calvin Klein Inc v International Apparel Syndicate* 1994 SCC OnLine Cal 304 : (1996) 16 PTC 293; *William Grant & Sons Ltd v McDowell & Co Ltd* 1995 SCC OnLine Del 398 : [1994] FSR 690 (Delhi High Court) [716]-[717]; *Kamal Trading Co v Gillette UK Ltd* 1987 SCC OnLine Bom 754 : (1988) 8 PTC 1.

⁵⁹ *Easygroup IP Licensing Ltd v EasyJet Aviation Services (P) Ltd* 2013 SCC OnLine Del 3181 : (2013) 55 PTC 485.

⁶⁰ See *H&M Hennes & Mauritz AB v HM Megabrand (P) Ltd* 2018 SCC OnLine Del 9369.

⁶¹ *Cadbury UK Ltd v Lotte India Corp’n Ltd* 2014 SCC OnLine Del 367 : (2014) 57 PTC 422 (Delhi High Court); See *SC Cambatta & Co (P) Ltd v CEPT* AIR 1961 SC 1010 : (1961) 2 SCR 805 (Supreme Court of India).

⁶² See *N.R. Dongre v Whirlpool Corp’n* (1996) 5 SCC 714 : (1996) 16 PTC 293 (Calcutta High Court) (usage of a mark was restrained because the said product was sold to US diplomats despite not having sales in India; See Ishaan Saha, ‘Supreme Court of India Supplants the Doctrine of Transborder Reputation with the Territoriality Principle in Passing Off Actions’ (2018) 13 Journal Of Intellectual Property Law and Practice 442, 444.)

⁶³ *Kamal Trading Co v Gillette UK Ltd* 1987 SCC OnLine Bom 754 : (1988) 8 PTC 1 (Bombay High Court).

in today's time. In *Apple Computer Inc v Apple Leasing & Industries*,⁶⁴ the court stated that "it is not necessary in the context of the present-day circumstances to insist that a particular plaintiff must carry on business in a jurisdiction before improper use of its name or mark can be restrained by the court".

Soft-line approach in today's age of information and globalisation has been preferred by Banerjee.⁶⁵ In *Cadbury UK Ltd v Lotte India Corpn Ltd*,⁶⁶ the High Court of Delhi had held that reputation can be acquired in the modern day via advertisements or displays over the internet or social media. One of the major reasons for the refusal of the hard-line approach as observed in the UK is the requirement of protecting Indian consumers from being misused by local sellers purporting to be franchises of foreign traders. However, the potential drawback of this Soft-line approach has been highlighted by Banerjee as when local traders using a valuable mark in a bona fide manner would be disadvantaged in cases wherein their marks are similar to that of foreign traders.

ii. Goodwill v/s Reputation

Earning goodwill in India requires actual business to be transacted using the mark, either by making the products available or by providing services. Reputation, on the other hand, is the knowledge and awareness that a particular brand/mark commands, although the goods/service in connection with which the mark is used may not be available in a particular territory/market.⁶⁷ It will not be wrong to conclude that in cases involving celebrities, Indian judges have focused more on determination of reputation,⁶⁸ the onus of which is usually on the plaintiff.⁶⁹

In *Star India (P) Ltd v Leo Burnett (India) (P) Ltd*,⁷⁰ the conflict was between a serial and a ten-second commercial with characters similar to those in the serial. The plaintiffs' claim to reputation was based on the film and characters. But the Court noted that the "reputation does not extend to

⁶⁴ *Apple Computer Inc v Apple Leasing & Industries* (1992) 1 Arb LR 93 (Delhi High Court) [119].

⁶⁵ Banerjee (n 52).

⁶⁶ *Cadbury UK Ltd v Lotte India Corpn Ltd* (n 61).

⁶⁷ See Arpan Banerjee, 'Goodwill in Passing Off Actions: in Search of Balance' (2018) 59 *The Law Review of the Franklin Pierce Center for Intellectual Property* 1, 24; Sanjeev Chaswal, 'Indian Courts Judicial Approach to Principle of Territoriality and Trans-Border Reputation – A Comparative Study', (Mewar University 2019).

⁶⁸ Banerjee (n 23).

⁶⁹ See *Star India* (n 48).

⁷⁰ *ibid.*

or separately exist in any particular person or dialogue in or part of a serial so that any member of the public would associate any particular incident or script or word or sentence or scene in the film with the plaintiffs alone”.⁷¹ In another case,⁷² the judge noted that while mala fide intention is not necessary, intentional misrepresentation may prove that the reputation of the plaintiff is such that it is worthwhile for the defendant to cash upon it. It seems Indian courts have tilted towards the determination of reputation as a bi-product of misrepresentation and taking the help of the latter to prove the former.

On the contrary, in *Anil Kapoor*,⁷³ Justice Patel noted that it would not do any good for the plaintiff to allege misrepresentation and, on that basis, to try and establish reputation. He appears dissatisfied with the parties conveniently using the terms ‘reputation’ and ‘goodwill’ interchangeably;⁷⁴ yet chooses to avoid discussion regarding the differentiation. After expressing concern, he nevertheless allows the plaintiff to include goodwill within reputation.⁷⁵ He then goes on to focus on reputation and decides that no reputation can vest in a work in progress.⁷⁶

In *Shivaji Rao Gaikwad v Varsha Productions*,⁷⁷ popular Indian actor Rajinikanth sued the release of a film titled “Main Hoon Rajinikanth”, translating to ‘I am Rajinikanth’ in English. The Court concluded that if the audience is reminded of only one particular face after reading the title of the film, goodwill and reputation vested in the personality. Clearly, the judgment largely hinged on the awareness or familiarity with the celebrity’s image amongst consumers.⁷⁸

iii. Extending the arms of goodwill

Justice Patel of the Bombay High Court, well known for his meticulous and stringent opinions, had an opportunity to hear an application for an

⁷¹ See *Star India* (n 48) [12].

⁷² *Arun Jaitley v Network Solutions (P) Ltd* 2011 SCC OnLine Del 2660 (*‘Arun Jaitley’*).

⁷³ *Anil Kapoor* (n 46).

⁷⁴ See *ibid* (n 46) [10] “At this stage, this is the only material the Plaintiff shows of reputation and goodwill, even assuming the two can be conflated and treated as synonymous, which I very seriously doubt”.

⁷⁵ See *ibid* (n 46) [21] “A Plaintiff must show reputation (and I will again allow Mr Kadam the latitude of including in this the concept of goodwill), misrepresentation and damage”.

⁷⁶ See *ibid* (n 46) [13].

⁷⁷ *Shivaji* (n 35).

⁷⁸ See *Zee Entertainment Enterprises Ltd v Gajendra Singh* 2007 SCC OnLine Bom 920 (*‘Zee Entertainment’*) [157] “There can be really no doubt about the enormous reputation developed by the Plaintiff over the last fourteen years in its television game show. I am in fact at a loss to understand how the first Defendant could ever have denied the same.”

injunction for passing off.⁷⁹ The application was for the protection of the title of a mainstream Bollywood film titled ‘*Veere Di Wedding*’ which translates to “My Best Friend’s Wedding” against the title of the defendant’s film, ‘*Veere Ki Wedding*.’ Justice Patel was of the opinion that reputation cannot be considered an unfinished product. This was due to the fact that there could be no reputation in a creation which is in anticipation, viz., the plaintiff’s film. More importantly, Justice Patel took a strong view about not underestimating the average movie goer’s common sense of confusing two different films. He acknowledges that the time of 1950s-60s is not applicable here, given the advancement of various kinds of posters, movie promotion, internet, and proliferation of online material. This was not taken into account by the Madras High Court in *Shivaji*.⁸⁰

Despite taking note of evolving changes, Justice Patel failed to appreciate the importance of the build-up in reputation that movies have had through online promotions, months their releases. The Court also noted that the advertisements shown to prove reputation are essentially third-party comments. Reputation can be considered to be established here when somebody else, other than the owner of the product, talks about and discusses the work. The potential discourse of reputation is set out when the concerned audience engages in conversations and daily chit-chats regarding a particular work. The court failed to take this into account.

*Irvine*⁸¹ is a notable English case wherein the defendant was sued for using a doctored image of the plaintiff, resulting in a confusing endorsement. The court appreciated the handsome compensation that a famous person receives by endorsing a product, thereby attaching the “lustre” of a famous personality to their goods and services; this which enhances their attractiveness. Therefore, there was goodwill in the reputation of the famous personality which allowed the endorsee i.e., the celebrity to derive a benefit. It was due to this goodwill that the judge was convinced that passing off needs to be applied to false endorsement cases.

The Delhi High Court had an interesting set of facts to deal with in 2010. In the case of *D. M. Entertainment (P) Ltd v Baby Gift House*,⁸² small caricature dolls resembling the popular Indian pop star Daler Mehndi⁸³ were found to be sold. The Court was of the opinion that Mr. Mehndi had become an extremely famous artist and “brought an association in the mind of the

⁷⁹ *Anil Kapoor* (n 46).

⁸⁰ *Shivaji* (n 35).

⁸¹ *Irvine* (n 44).

⁸² *D.M. Entertainment (P) Ltd v Baby Gift House* (n 35).

⁸³ See annex 3.

public and trade alike” with his entertainment services. The Court also took note of the protection of personality as the inherent purpose of trademark law; and despite extending the wings of passing off remedy to celebrities, the opinion still chooses to remain in the grey overlapping area between passing off used for traders and passing off used for protection of personality.

Indian law has also considered goodwill in characters. Judges recognize personality rights only when the character has independently acquired public recognition. Intending to use such fame for merchandising products is essential.⁸⁴ If the popularity has not been used earlier, and if someone else tries to use similar methods for the promotion of their own goods or services, the case would not hold good.⁸⁵ Mere potential for merchandising the character is not sufficient by itself. This principle was reiterated in *Star India*.⁸⁶ However, the Court did note the possibility of the growth of a character beyond the film.⁸⁷

Inconsistency and confusion on how goodwill is to be determined in personality protection is apparent in the preceding paragraphs. While the usual trend has been that of the soft-line approach (where establishing reputation via advertisements and even social media campaigns has been enough), *Anil Kapoor* highlights a shift in the trend and a tilt towards a stricter regime.

B. Misrepresentation

Misrepresentation and possible deception to the customer is the crux of a passing off action. As per *Wander Ltd v. Antox India (P) Ltd*,⁸⁸ passing off consists of causing misrepresentation to the consumers, with the intention of damaging the goodwill of another's trade. There are various elements of the consideration examined by courts in order to determine misrepresentation. These elements and the Indian approach to them are discussed in the following paragraphs.

⁸⁴ Suman Naresh, 'Passing-Off, Goodwill and False Advertising: New Wine in Old Bottles' (1986) 45 *The Cambridge Law Journal* 97, 125.

⁸⁵ See Manoranjan Ayilyath, 'Character Merchandising and Personality Merchandising: The Need for Protection: An Analysis in the Light of UK and Indian laws' [2012] *Entertainment Law Review* 1.

⁸⁶ *Star India (P) Ltd v Leo Burnett (India) (P) Ltd* (n 48) (The case revolved around the defendant's commercial which was telecast with a similar title and similar characters from the plaintiff's TV series).

⁸⁷ See *ibid* [12] "It is necessary for character merchandising that the characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears. Only then can such character be moved into the area of character merchandising".

⁸⁸ *Wander Ltd v Antox India (P) Ltd* 1990 Supp SCC 727 : [1991] RPC 351 (CA) [368]– [369].

In India, what is generally held necessary in passing off is not just any misrepresentation, but one which damages the claimant's goodwill.⁸⁹ This has been reiterated by the Delhi High Court which held that causing damage by inciting confusion concerning the source of the goods may not be as necessary as proving that damage was caused to the goodwill of the trademark.⁹⁰ The expansion of misrepresentation to include misappropriation transgresses the well-established passing off jurisprudence and brings personal rights into the realm of commercial rights, which the court in *ICC*⁹¹ sought to keep separate.

i. Likelihood of Confusion & common field of activity

Even while applying the concept of trademark law to domain names, the Court in *Satyam*⁹² was of the opinion that it was sufficient for the plaintiff to establish the "likelihood of confusion in the minds of customers or likely customers." The test in passing off cases is whether there is a likelihood of confusion or deception arising in the minds of unwary customers, irrespective of dissimilarities in the trade name.⁹³

In what looked like more of a personality rights case, the Madras High Court in *Shivaji*⁹⁴ found that infringement of the right of publicity required no confusion, especially when the celebrity was identifiable. The Court did not require much convincing that the poster would confuse the audience with Rajnikanth, as the court heavily relied on his immense popularity. In *Anil Kapoor*,⁹⁵ the Bombay High Court was of the opinion that deception or likelihood of deception is important for a passing off action.⁹⁶ The Court in

⁸⁹ Tabrez Ahmad and Satya Ranjan Swain, 'Celebrity Rights: Protection under IP Laws' (2011) 16 Journal of Intellectual Property Rights 7, 16.

⁹⁰ *D.M. Entertainment* (n 35).

⁹¹ *ICC Development* (n 32) "An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event." Justice Surinder Aggarwal while holding that right of publicity did not vest in ICC cricketing events. In concluding so, he also pointed out that the copyright law, trademark law, dilution law and unfair competition law provide full protection against all forms of appropriation of property to legal entities due to which non-living entities are not entitled to publicity rights protection.

⁹² *Satyam Infoway Ltd v Sifynet Solutions (P) Ltd*, (2004) 6 SCC 145. ('*Satyam*').

⁹³ *Colgate Palmolive Co v Anchor Health & Beauty Care (P) Ltd* 2003 SCC OnLine Del 1005 : (2003) 27 PTC 478 (Del).

⁹⁴ *Shivaji* (n 35).

⁹⁵ *Anil Kapoor* (n 46).

⁹⁶ See Latha Nair, 'Tracking the Protection of Well-Known Marks in India: A Befuddled Path to Nirvana?' (2011) 101 The Trademark Reporter, International Trademark Association; *ICC Development* (n 32).

*Star India*⁹⁷ was of the opinion that because various episodes of series and a ten-second commercial were different fields of work, the likelihood of confusion was not possible. On the other hand, confusion amongst customers regarding the source of the product was not found to be essential if there was damage to goodwill in a passing off suit.⁹⁸

Likelihood of confusion amongst potential customers was followed in the *ICC judgement*⁹⁹ as well, where Justice Aggarwal opined that inclusion of a pictorial representation of a ticket with an imaginative seat and gate number saying “Cricket World Cup 2003” is not enough to show any likelihood of confusion. In *Zee Entertainment Enterprises Ltd v. Ganjendra Singh and Ors*¹⁰⁰ the question was whether the defendants were passing off their similar game show as that of the plaintiff's. Establishing the likelihood of deception, the Court held that the “Defendant's game-show is considered as nothing but the plaintiff's game-show telecast earlier, but only in a new avatar.”¹⁰¹

In English jurisprudence, the need for a common field of activity was part of the historical baggage in the development of the tort, as the underlying intention was to protect the trader community.¹⁰² But today, proof of a common field of activity is not required in the extended action of passing off.¹⁰³ India has adopted a diluted approach. When the fields of activity of the plaintiff and the defendant in a passing off suit are different, establishing misrepresentation and the likelihood of confusion becomes even more difficult,¹⁰⁴ due to which Courts have considered the common field of activity as a “highly relevant consideration”.¹⁰⁵ However, the court also stated that it cannot be laid down as a rule of law, that in the absence of a common field of activity, there is no possibility of confusion or misrepresentation. Hence, while the absence of common field of activity is not fatal, yet it isn't relevant also, in determining confusion in passing off in personality rights.¹⁰⁶

⁹⁷ *Star India* (n 48).

⁹⁸ *D.M. Entertainment* (n 35).

⁹⁹ *ICC Development* (n 32).

¹⁰⁰ *Zee Entertainment* (n 78).

¹⁰¹ See *Zee Entertainment* (n 78) [163].

¹⁰² P. Narayanan, *Law of Trade Marks and Passing off* (2004) 685.

¹⁰³ *Irvine* (n 44).

¹⁰⁴ *Star India* (n 48).

¹⁰⁵ *ibid*; See *Yahoo! Inc v Akash Arora* 1999 SCC OnLine Del 133 : 1999 Arb LR 620.

¹⁰⁶ *Aktiebolaget Volvo of Sweden v Volvo Sheets Ltd of Gujarat (India)* 1997 SCC OnLine Bom 578 : 1998 IPLR 63.

ii. Relevant customers

English Courts considered the remedy of passing off when t-shirts bearing a close-up shot of singer Rihanna's face were being sold by the defendants.¹⁰⁷ Rihanna's case was that putting up a picture on the said goods created an association between the goods and her likeness which was unauthorized and played a heavy role in the purchaser's motivation to buy the t-shirt due to which there was misrepresentation taking place. The Court sympathized with the facts of this particular case and heavily relied on previous instances¹⁰⁸ wherein the relevant audience believed that this apparent association was authorized by Rihanna.

The Court held that the establishment of likelihood of confusion amongst a substantial number of consumers (not necessarily all of them) had to be shown. "It was therefore plainly relevant to consider potential customers who were both fans of Rihanna and prepared to shop in a Topshop store."¹⁰⁹

In *Anil Kapoor*,¹¹⁰ while deciding misrepresentation amongst moviegoers, the Bombay High Court was cautious to not "assume that the public is so gullible, so infantile and quite so easily deceived that it does not know what it wants to see, hear or read."¹¹¹ Similarly, in *Zee*,¹¹² it was contended that the two shows in question cannot be similar because they aired on different channels. The Court answered in the negative, stating that misrepresentation cannot occur in the minds of regular viewers of the show.¹¹³

In terms of determining relevant consumers, courts in both the UK and India have followed a similar approach. In *Irvine*,¹¹⁴ the court had referred to "a not insignificant section of market" which must have been misled by the defendant. In *Fenty*,¹¹⁵ the court laid down that in passing off, a false

¹⁰⁷ *Fenty* (n 45).

¹⁰⁸ A shopping competition and a visit by Rihanna to Topshop.

¹⁰⁹ See *Fenty* (n 45) [61].

¹¹⁰ *Anil Kapoor* (n 46).

¹¹¹ See *Anil Kapoor* (n 46) [15].

¹¹² *Zee Entertainment* (n 78).

¹¹³ See *Zee Entertainment* (n 78) [160]. "Misrepresentation does not occur in the minds of viewers who may happen to see but one episode or casually while, if I may use the expression, "channel surfing". Passing off cannot be judged qua such viewers. Regular viewers of such game-shows would normally be expected to note the day and time when the same are telecast. If I am right, such a viewer, while accessing the show at a particular time, would of necessity be aware of the particular television channel to be accessed. There will thus be no confusion in the minds of the viewers as to on which channel a particular programme is to be telecast. In other words, it is not as if the viewer would access the programme on the third Defendant's channel thinking that it is the Plaintiff's television channel".

¹¹⁴ See *Irvine* (n 44).

¹¹⁵ *Fenty v Arcadia Group Brands Ltd* 2015 EWCA Civ 3.

belief must be engendered in the minds of a “potential customer”. The court took into account the previous efforts made by the defendant, Topshop, to emphasize a connection between themselves and Rihanna, such as a shopping competition to win a chance to meet her, publicity materials related to her, etc. These actions led to an assumption in the minds of the customers that there is some connection between t-shirts sold by them and the celebrity.

In *Star India*,¹¹⁶ the High Court of Bombay had referred to “reasonable people” who mistake an association between plaintiff and defendant, or a might possibly be confused. It was held that the public must be well aware of merchandising by the plaintiff in the field of defendant for a misrepresentation to happen.

iii. Dilution of uniqueness

However, Justice Bhat in *D.M. Entertainment*¹¹⁷ was more cautious regarding the protection of the purpose of trademark law, i.e., to indicate the source of the work with clarity without diluting its exclusivity. He was of the opinion that “in a passing off action, one has to see as to whether the defendant is selling goods/service so marked to be designed or calculated to lead purchasers to believe that they are plaintiff’s goods”.¹¹⁸ But the Court explored the possibility of damage to a trademark’s power to indicate the source by noting that although a similar trademark may not cause confusion, it may still “cause damage to the well-known trademark by reducing or diluting the trademarks power to indicate the source”¹¹⁹ as it takes “advantage of goodwill.” Similar sentiments are not necessarily shared by other judges, who speak of confusion as a complete element in itself.¹²⁰

It is clear that in Indian scenario, courts have considered field of activity as significant, though not essential. Inconsistency lies in the approach towards determining the relevant section of people for misrepresentation. While in certain judgments, a relevant section has been discerned in terms of regular viewers as given in *Zee*, the approach in others such as “reasonable people” in *Star India* or “public” *Anil Kapoor* is uncertain and open to various interpretations.

¹¹⁶ See *Star India* (n 48).

¹¹⁷ *D.M. Entertainment* (n 35).

¹¹⁸ See *D.M. Entertainment* (n 35) [16].

¹¹⁹ *ibid.*

¹²⁰ But see *Latha Nair* (n 96) (the author remarks: “This is perhaps the first and only case in India enjoining a defendant from using the plaintiff’s well-known mark on the sole ground of free-riding, without analysis of likelihood of confusion or deception” with respect to *Daimler Benz Aktiengesellschaft v Eagle Flask Industries Ltd* 1993 SCC OnLine Del 604 : AIR 1994 Del 239.

C. Injury to Goodwill and Reputation

The last requirement of a passing off action is injury to goodwill caused due to the unauthorized use of the celebrity's image. Acts such as false endorsement and merchandising lead to a false association with the celebrity in the minds of the consumer. This false association leads to injury to the celebrity's persona. The section explores the concept of injury as accepted by varied judgments of the High Courts.

i. False Endorsement

Davis¹²¹ suggests that in the UK, it is the nature of the damage rather than the nature of misrepresentation which is determinative of whether there has been passing off. In *Fenty*,¹²² the Court was of the opinion that the loss of control over reputation would result in damage of reputation. In *Irvine*,¹²³ the Court, referring to dilution principles, argued that the remedy is not restricted to action against unlicensed inferior goods but extends to usage of goodwill to reduce its exclusivity.¹²⁴ The Court also stressed upon the need to show that the defendant's actions gave rise to a false message,¹²⁵ which would be understood by a non-significant section of his market that his goods have some connection with the plaintiff.¹²⁶

Reduction in exclusivity was followed in *D. M. Entertainment*¹²⁷ where the Court noted that the use of Mr. Mehndi's persona for the purpose of capitalizing upon his name by using its conjunction with the commercial product resulted in a clear dilution of the uniqueness of such personality.¹²⁸

In Indian context, what the court has focused upon in *D.M. Entertainment*¹²⁹ is whether the use of another's mark or a similar one leads the purchaser to believe that there is some association between the Plaintiff and the use by Defendant, leading to the dilution of the uniqueness of the

¹²¹ Jennifer Davis, 'Why the United Kingdom Should have a Law Against Misappropriation' (2010) 69 Cambridge Law Journal 561, 581.

¹²² *Fenty* (n 115).

¹²³ *Irvine* (n 44).

¹²⁴ See *ibid* [34].

¹²⁵ See 'Is the UK Heading Towards Protection of Image Rights?' [2014] Athens Institute for Education and Research 1101.

¹²⁶ A major criticism of the decision in *Irvine* is that it effectively instructs that where a plaintiff cannot prove direct loss or damage to his goodwill, the damages for the defendant's wrongdoing will be calculated as if the defendant had acted properly in seeking a license prior to using the plaintiff's image. This result may not necessarily be a true reflection of the damage to the claimant's goodwill.

¹²⁷ *D.M. Entertainment* (n 35).

¹²⁸ See *ibid* [15].

¹²⁹ *ibid*.

personality. Focus is not so much on the business and commercial loss of the Plaintiff but on the confusion among consumers as to the source of goods and damage or dilution to the power of the mark to indicate the source. In case of famous celebrities, it was held in *Shivaji*,¹³⁰ “A celebrity must be identifiable from the defendant’s unauthorized use. Infringement of the right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable.” An injunction would be granted in the favour of the Plaintiff if the said celebrity could be easily identified by the use of their name by the defendant.

ii. Extended version of damage

“Real likelihood of damage or probability of damage”¹³¹ appears to be essential for Indian judges while considering damage in a passing off claim. The Court in *Star India*¹³² was of the opinion:

*Establishing passing off by goods in which the claimant does not trade, calls for special evidence to establish that the defendants’ action would induce the belief, if any, that his goods are those of the claimant, at least that his business is an extension of or somehow connected with that of the claimant or that his goods have been somehow approved or authorized by the claimant.*¹³³

In *Anil Kapoor*,¹³⁴ the Court attempted to include deception in the extended version of damages by stating that the concerned “attempt must deceive, a calculated deception by the defendant to pass off his product or service as that of the plaintiff (or vice versa).”¹³⁵ On the other hand, when the tort was used in *D.M. Entertainment*,¹³⁶ the Court did not award more than nominal damages, which suggests that if this doctrine is adopted, celebrities may find it difficult to obtain a great amount of damages.¹³⁷

A general practice in India since the past few years has been to invoke all possible remedies since Courts have recognised them on paper, though

¹³⁰ See *Shivaji* (n 35).

¹³¹ *Star India* (n 48).

¹³² *ibid.*

¹³³ See *Star India* (n 48) [13].

¹³⁴ *Anil Kapoor* (n 46).

¹³⁵ See *ibid* [13].

¹³⁶ *D.M. Entertainment* (n 35).

¹³⁷ See Bhargavi Vadeyar, ‘The Commercial Appropriation of Personality in India’ (2015) 9 National University of Advanced Legal Studies Law Journal 1.

in passing.¹³⁸ An example of the same is the case of *Shivaji*,¹³⁹ wherein the plaintiff prayed for an injunction under passing off as well as infringement of personality rights. The Madras High Court was of the opinion that injury to reputation took place as the defendant's forthcoming feature film had the plaintiff's name (Rajnikanth) in the title and showed the protagonist (also named Rajnikanth) in a few immoral scenes. However, this can be in contradiction with the holding in *Anil Kapoor*,¹⁴⁰ where Justice Patel has taken the average movie goer's common sense of differentiation between similar-looking films into consideration. Application of this logic would yield a different result in *Shivaji*¹⁴¹ as an ardent fan of Rajnikanth would easily be able to not confuse the actor with a similarly-named protagonist in a completely different film. However, the Court ruled in favour of the plaintiff and an injunction was granted against the release of the film.¹⁴²

In *Sholay Media & Entertainment (P) Ltd v Parag Sanghavi*,¹⁴³ the defendant's film was under question for being similar to that of the plaintiff's cult classic titled 'Sholay'.¹⁴⁴ The Court was of the opinion that passing off their film or other productions using the plaintiff's trademark (trademark being SHOLAY) was against the law. Though this goes against the holding in *D. M. Entertainment*¹⁴⁵ where the Court was concerned about protecting the inherent purpose of trademark law, there is an indication of source and the underlying general understanding that passing off remedy is a tool for unregistered marks.¹⁴⁶

¹³⁸ See *ICC Development* (n 32); See *Sonu Nigam v Amrik Singh* 372/2013 (Bombay High Court) ("no third person should be commercially profited by using images of the celebrities without their consent, exploiting the personality right of the celebrities and observed that the heavy fine so imposed would act as a deterrent to people who intend to engage in such acts").

¹³⁹ *Shivaji* (n 35).

¹⁴⁰ *Anil Kapoor* (n 46).

¹⁴¹ *Shivaji* (n 35).

¹⁴² The film was then never released in South India to avoid further disputes and was released only in North India (with a changed title).

¹⁴³ *Sholay Media & Entertainment (P) Ltd v Parag Sanghavi* 2015 SCC OnLine Del 11644 : (2015) 223 DLT 152.

¹⁴⁴ Released in 1975, *Sholay* is considered to be a classic and one of the best Indian films. It broke records for continuous showings in many theatres across India, and according to some accounts, *Sholay* remains the highest-grossing Indian film of all time, adjusted for inflation.

¹⁴⁵ *D.M. Entertainment* (n 35).

¹⁴⁶ Even though the defendant's feature film was an adaptation of plaintiff's film, the fact that the former was produced without proper authorization rendered it an act of passing off as the plaintiffs were the owners of the names of the characters and the dialogues.

iii. Merchandising and Endorsement

Courts in India and the U.K. have drawn a subtle distinction between the terms endorsement and merchandising. The difference between the two terms and the extent of their use in passing off cases was highlighted by Justice Laddie in *Irvine*.¹⁴⁷ In endorsement deals, the celebrity attaches their name to the product, with the intent of informing the public of their approval of the said product, encouraging them into buying the product. Merchandising cases are different in the essence that their aim is to exploit the fame of images of the celebrity. Character merchandising, which was explained by Lord Justice Kitchin in *Fenty*,¹⁴⁸ pertained to activities focused on the use and exploitation of the likeness or name of a celebrity.

It was highlighted in *Irvine*¹⁴⁹ that as opposed to endorsement cases, perception in the mind of the public that the celebrity has endorsed the merchandised product is not necessary. Endorsement is not a necessary feature of merchandised products. Strong evidence will have to be led by the claimant to show significant goodwill and consequent public perception of endorsement, causing or likely to cause him damage to his goodwill and business. Following the judgment laid down in *Irvine*,¹⁵⁰ it is highlighted that public perception and belief as to whether the celebrity has endorsed the merchandise or not plays an immense role in character merchandising in the UK.

As per the jurisprudence set by the Indian precedents as well, public recognition forms an important requirement for passing off in character merchandising cases. It was held in *Star India*,¹⁵¹ that it is essential for the character being merchandised to have gained some public recognition that has achieved a form of independent life and recognition of itself, outside and discernible from the original production or the arena in which it appears. In *D.M. Entertainment*,¹⁵² while emphasizing on the requirement of identifiability, the court had added that as a secondary consideration, i.e., it was also essential to show that the unauthorized use by the defendant was adequate and substantial to identify that the defendant appropriated the personality and the attributes of celebrity.

There are discrepancies in the way that each court has approached the third requirement of passing off. While it is important to show that there is a

¹⁴⁷ *Irvine* (n 44).

¹⁴⁸ See *Fenty* (n 45).

¹⁴⁹ See *Irvine* (n 44).

¹⁵⁰ *ibid.*

¹⁵¹ See *Star India* (n 48).

¹⁵² See *DM Entertainment* (n 35).

false idea of association created by the defendant, the threshold of the same has varied. In *Shivaji* the court required the celebrity to be recognizable, while in *Anil Kapoor*, the court raised the bar such that even if the celebrity is recognizable, it is required to prove that the public formed a mistaken association in their minds between the celebrity and the defendant.

IV. CONCLUSION

There are evident discrepancies in the way with which High Courts have chosen to apply the concept of passing off in personality. Indian Courts have also kept themselves open to other remedies as judges have been inspired by the idea of creating a right in privacy,¹⁵³ publicity,¹⁵⁴ and personality¹⁵⁵ itself.¹⁵⁶ The same has not been discussed in detail here as that would be beyond the scope of this paper. Whilst some protection may be offered to celebrity identity through these regimes, they are allbi-products of some other subject-matter; hence, courts are struggling to afford meaningful protection to the personality rights of celebrities. High Courts have dealt with a good number of cases on passing off claims by celebrities. However, the cases are usually unable to reach the Supreme Court to get a more concrete ruling; this tends to point towards a general notion amongst parties and lawyers that infringement of publicity is important only till sufficient damages and injunctions are claimed, but not enough of a priority to appeal to the Apex Court.

In Indian context, there is a cocktail of remedies, often used in a concoction, and the lines differentiating them are blurred. Passing off, which emanates from the right of publicity, is just one of the remedies. While passing off has been resorted to in the majority of cases, there are other remedies available as well. Apart from publicity, celebrities have also resorted to right to personality and right to privacy, forming a part of Article 21 of Constitution of India. One of the earliest instances of recognition of the right to one's personality and privacy by the Indian judiciary was seen in *Phoolan Devi v Shekhar Kapoor*¹⁵⁷ wherein the right to privacy and protection against tarnishing of the images of celebrities were held to be important. The right to personality provides that there is an inherent right within every

¹⁵³ See *R. Rajagopal v State of T.N.* (n 38); See *K.S. Puttaswamy* (n 38); See *Phoolan Devi v Shekhar Kapoor* 1994 SCC OnLine Del 722.

¹⁵⁴ See *ICC Development* (n 32); See *Shivaji* (n 35); See *K.S. Puttaswamy* (n 38).

¹⁵⁵ See *Rajat Sharma v Ashok Venkatramani* CS (COMM) 15/2019.

¹⁵⁶ See annex 1.

¹⁵⁷ 1994 SCC OnLine Del 722 : (1995) 57 DLT 154)

person that allows them to control the commercial use of their identity. This cannot be exploited by others for commercial gains without authorisation.

One of the major obstacles which Indian courts are struggling to overcome is of demarcating the legal areas of passing off, infringement,¹⁵⁸ and personality rights.¹⁵⁹ Indian Courts seem to be comfortably sitting in the grey area; they refrain from differentiating the purpose and essentials of the above-stated remedies.¹⁶⁰ Parties are therefore found to be approaching courts with strategies involving every possible remedy thereby leading to a vicious cycle where Indian courts seem to be wandering in the overlapping uncertainty.

While it is interesting to see that more contested and novel terrain like internet domains have been addressed, it appears that Indian courts do not want to confine themselves to one remedy and out rightly reject the other. A firm stance on which remedy is to be resorted to in cases of violation of personality rights remains undetermined. Due to the availability of a variety of tools, the situation in India at this point in time can be said to be a bit confusing and baffling due to several overlapping remedies. A meaningful implementation of the legislative purpose of these provisions is only possible if pragmatic and consistent standards are set by the judiciary in dealing with passing off actions involving famous celebrities.

V. ANNEXURE 1

LEGAL REMEDY	RIGHT TO PRIVACY	RIGHT TO PERSONALITY	RIGHT TO PUBLICITY
LEGAL ELEMENTS	As per Samuel Warren and Louis Brandeis, all persons have the basic personal freedom and right	Personality forms part of an individual's identity via which they recognize their place in society.	To sue for the right of publicity, the party has to show immense reputation and that the action of defendants

¹⁵⁸ See *Raja Pocket Books v Radha Pocket Books* 1996 SCC OnLine Del 851 (Defendant's comic series character "NAGESH" was found to infringe copyright in the plaintiff's popular comic series character titled "NAGRAJ" over similarity in artistic manner).

¹⁵⁹ *Shivaji* (n 35).

¹⁶⁰ See *Tata Sons Ltd v Aniket Singh* 2015 SCC OnLine Del 13728.

	<p>of privacy, known as the ‘Right to be let alone.’¹⁶¹ A subset of right of personality, right of privacy recognises the right of persons to prevent unreasonable intrusion.</p> <p>Privacy rights consist of following elements, 1. right to prevent intrusion upon the person’s seclusion or solitude or into his private affairs, 2. right against public disclosure of embarrassing private facts about the person, 3. right against publicity which places the plaintiff in a false light in the public eye, 4. right against appropriation, for the defendant’s advantage, of the person’s name or likeness. India follows a three-pronged test required for the encroachment of any Article 21 right – legality-i.e., through an existing law; necessity, in terms</p>	<p>An individual invests efforts and conscious care via their actions and contributions to society to set expectations about themselves in the eyes of others. This personhood approach is derived from theories of Kant and Hegel, who viewed private property as embodiment of the personality. Out of this personality emanates the right to prohibit undue interference into the person’s private sphere and to prohibit unjust or unauthorised manipulation of the individual’s personality. Right of personality and right of publicity overlap in India. Right of publicity can, in a jurisprudential sense, be located within the individual’s right and autonomy to permit or prohibit the commercial exploitation of his likeness or some attributes of his personality.</p>	<p>caused damage to such reputation. Infringement of the right of publicity does not require any proof of falsity, confusion, or deception, especially when the celebrity is identifiable.¹⁶² There is a subtle overlap between personality and publicity, i.e., the theory and justification for personality rights gives a leeway to publicity rights, which is an extension of personality.</p> <p>Further, at times it is also claimed that publicity and privacy claims overlap. However, the difference is privacy plaintiffs are concerned with unwanted intrusions into their personal lives,</p>
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¹⁶¹ Louis D. Brandeis and Samuel D. Warren (n 26).

¹⁶² Even though the Trade Marks Act does not make any specific provision for publicity rights, its definition of ‘marks’ includes names within its ambit. Hence, a number of celebrities have resorted to using the pre-emptive step of trade marking their names to stall any misuse.

	of a legitimate state objective and proportionality, that ensures a rational nexus between the object of the invasion and the means adopted to achieve that object. ¹⁶³		while publicity plaintiffs complain of uncompensated exploitation of their identities, making privacy remedies inadequate. ¹⁶⁴
POSITION IN INDIA	The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 ¹⁶⁵ and as a part of the freedoms guaranteed by Part III of the Constitution. Although the right to publicity comes under the extended view of Article 21, this right is not absolute; reasonable restrictions can be placed thereon in public interest under Article 19(5). Further, freedom of speech and expression also includes freedom of press and the right to acquire and disseminate information, under Article 19(1) (a). Celebrities have voiced their resistance against this on grounds that	Few Indian High Courts have identified such rights as vesting in public figures by virtue of them having acquired a status and a personality that adds commercial value to their individual persona. But generally, personality rights tend not to be recognized as distinct legal rights but are instead recognized through the rights to privacy and publicity. Given the hype around celebrities, influence they hold and curiosity surrounding them, the media at times violates the personality rights of celebrities. The media either associates them with some product or activity that runs	High Courts have attempted to recognise the right of publicity. The same has evolved from the right of privacy and can only exist in an individual or an individual's personality like his name, personality trait, signature, voice, etc. Courts have laid down that in order to claim infringement of right to publicity, the plaintiff as a celebrity must be identifiable from the unauthorised use of the defendant.

¹⁶³ *K.S. Puttaswamy* (n 38).

¹⁶⁴ Melville B. Nimmer (n 8).

¹⁶⁵ Art 21 of the Constitution of India, 1950 provides that, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

	under the garb of this freedom, media has violated their privacy.	contrary to or turns out to be harmful for the personality of the celebrity. In such cases, action of defamation can be sought and the celebrity could claim that their image has been tarnished.	
RELATIONSHIP WITH PASSING OFF REMEDY IN INDIA	<p>People generally tend to personalize celebrities and become curious about every personal aspect of their lives. The public has a huge appetite for gossip and scandal and that leads to hyping up of even the smallest of incidents that surround celebrities. Celebrities in turn try to control their personal information since the disclosure of the same might put them in a situation of embarrassment or humiliation resulting in a feeling of insecurity. Passing off cannot be termed to be a direct product of the right to privacy but can be through the right to personality</p>	<p>The 'wrongful appropriation of personality' could amount to passing off as the celebrity could be said to have a proprietary right in the exclusive marketing for gain in his personality. Indian law recognizes personality rights only when the character or the person has independently acquired public recognition¹⁶⁶</p>	<p>Right to publicity is a right to exploit the economic value of the name and fame of an individual. To claim this right, it is necessary to establish that fame is a form of merchandise. Hence, if someone uses the fame of a celebrity to promote his goods it would be termed as an unfair trade practice, misappropriation of intellectual property, or an act of passing off.</p>

¹⁶⁶ See text on [14].

THE GROWING NECESSITY OF INTERIM MEASURES TO PRESERVE COMPETITION IN RAPIDLY CHANGING DIGITAL MARKETS

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ABSTRACT *On March 9, 2021, the CCI granted interim relief to Fab Hotels and Treebo by overturning their de-listing from certain platforms and directing their re-listing, to safeguard their presence in the relevant market during the pendency of competition law proceedings.¹ In the background of rapidly changing digital markets, the protection afforded by interim orders assumes immense significance. It is important that the CCI activates its power of granting interim orders, conferred under Section 33 of the Competition Act, 2002, and uses this tool effectively to prevent irreparable injury to competition, pending outcomes of the investigations directed by it. This article analyses why the CCI has granted interim reliefs sparingly since the very inception of the law and examines the need for using this power pro-actively in fast-paced, digital markets, where it may be impossible for the competition regulator to restore an industry to its competitive status quo ante.*

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¹ *In re: Federation of Hotel & Restaurant Associations of India and Another v. MakeMyTrip India (P) Ltd 2021 SCC OnLine CCI 12 (“The FabHotels and Treebo case”). See pp 12-14 for a detailed analysis along with the latest developments of this case.*

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PART I

I. INTRODUCTION

“(The) long run is a misleading guide to current affairs. In the long run, we are all dead”

—John Maynard Keynes²

In the years to come, the greatest challenge faced by competition law authorities will be to stop large digital companies from rapidly taking over the market and driving out competition beyond the point of no return. Traditionally, the philosophy shared by antitrust regulators has been that avoiding false positives (good conduct judged to be bad) is more beneficial to the economy than avoiding false negatives (anti-competitive conduct judged to be good) - the former being more difficult to correct, latter being capable of correction by market forces.³ Consequentially, the granting of interim orders to restrain possible anti-competitive conduct pending investigation has been a tool used sparingly by competition authorities and comes with its set of caveats. With the emergence of digital markets and continuously evolving technologies, under-enforcement of the law may now become costlier, and the damage to the market, irreparable.⁴ The only solution for law enforcers will be to move swiftly. However, in a world of legal rules where every firm has a right to defend itself, there are limits on how fast the law

² JM Keynes, *A Tract on Monetary Reform* (Macmillan and Co 1924) 89 See also Beranek, William and David R Kamerschen. ‘Examining Two of Keynes’s Most Popular Statements—Wasteful Public Spending can be Acceptable, and, in the Long Run We are all Dead—Yields Some Surprising Implications’ (2016) 61(2) *The American Economist* 263–67.

³ Tilottama Raychaudhuri, ‘Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence’ (2020) *CCI Journal on Competition Law and Policy* 1, 15. See also Committee for the Study of the Digital Platforms, Market Structure and Antitrust Subcommittee Report, (George J Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business 15 May 2019) p. 8 <<https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf>> accessed 7 March 2022.

⁴ Tilottama Raychaudhuri (n 3).

can move to stop market distortion. Recent developments in Europe and India show that in absence of timely action, there is clear danger of markets tipping beyond the point of recovery. Hence, using the tool of interim measures is vital, as it can make a crucial difference in the regulation of rapidly evolving digital markets.⁵

In principle, the power to grant interim relief is an effective enforcement tool at the disposal of the court, to prevent a party from suffering irreparable damage during the pendency of the proceedings.⁶ Without such a remedy, a party could effectively lose its right even before the court renders its final decision, and the entire case could get reduced to a mere mechanical exercise. Under Section 33 of the Competition Act, 2002 (“Competition Act”) the Competition Commission of India (“CCI”) has the power to issue interim orders during the pendency of an inquiry into a matter.⁷ However, despite the explicit conferral of this power upon the CCI, there are very few instances of the power to grant interim relief being exercised in the history of Indian competition jurisprudence.⁸ There have been several cases wherein the parties have invoked Section 33 of the Competition Act, praying for an interim order. In most cases, the CCI has not acquiesced to the party’s request and this tool has remained largely unused. On March 9, 2021, in the case of *In Re: Federation of Hotel & Restaurant Association of India and Another v. Make MyTrip India Private Limited and Others* (the “*Fab Hotels and Treebo Case*”),⁹ the CCI issued an order under Section 33 of the Competition Act, pending investigation of the matter by the Director-General. The case pertained to the delisting of FabHotels and Treebo from the online portals of MakeMyTrip and Go-Ibibo (collectively referred to by the CCI as “MMT-Go”).¹⁰ In this matter, the CCI granted interim relief to FabHotels and

⁵ Commissioner Vestager, ‘Digital Power at the Service of Humanity’, Conference on Competition and Digitisation, Copenhagen, November 29, 2019.

⁶ See, John Leubsdorf, ‘The Standard for Preliminary Injunctions’ (Jan 1978) *Harvard Law Review*, 525-566.

⁷ The Competition Act 2002, s 33. “Where during an inquiry, the Commission is satisfied that an act in contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary”. See also Alec J Burnside and Adam Kidane, ‘Interim Measures: An Overview of EU and National Case Law’ (2018) *Concurrences: Antitrust Publications & Events, e-Competitions Antitrust Case Laws e-Bulletin 1*.

⁸ Pranjal Prateek and Radhika Seth, ‘The CCI’s Power to Issue Interim Relief: Lost in the Interim’ (*Bar and Bench*, 1 November 2020) available at <<https://www.barandbench.com/columns/ccis-power-interim-relief-lost-in-the-interim>> accessed on 7 March 2022.

⁹ *The Fab Hotels and Treebo case* (n 1).

¹⁰ It is interesting to note that the CCI has recognised MMT-Go as a dominant platform in para. 107 of this decision. However, in its earlier decision in the matter of Sonam Sharma

Treebo, by directing MMT-Go to relist these entities on their platforms.¹¹ This case brought into focus the importance of granting interim reliefs to safeguard competition in digital markets in India.¹² With the dynamic development of the digital sector in the country, the consequence of delays in judicial decision-making can be severe.¹³ Therefore, to maintain the competitive fabric of the market, the power to grant interim relief becomes a vital tool in protecting entities that become victims to potential anti-competitive behaviour by a market player.¹⁴

In light of the above, this article examines the significance of Section 33 of the Competition Act and the need for the CCI to exercise its power to grant interim relief in an efficacious manner, especially in fast-growing digital markets. Part I of this article contains the introduction. Part II traces the evolution of the law relating to the grant of interim reliefs, under the MRTP Act, 1969 and the Competition Act. Part III elucidates the landmark decision of the Supreme Court in *CCI v. SAIL*¹⁵ and the three-prong test for the granting of interim orders, laid down in this case. Part IV traces the aftermath of the *CCI v. SAIL*¹⁶ decision and analyses the recent order of the CCI in the *Fab Hotels and Treebo* case. Part V examines the nuances of digital markets and elaborates on the concerns relating to the need for using interim measures in digital markets. In Part VI, the authors examine the latest developments on this issue in the European Union. Finally, in Part VII, the authors consolidate the analysis made in the preceding parts, identify reasons for the infrequent grant of interim orders by the CCI and provide recommendations for improving the mechanism relating to the grant of interim reliefs in Indian competition law.

v. Apple, 2013 SCC OnLine CCI 25: 2013 Comp LR 346 (CCI), the CCI observed that the Indian competition law does not recognise the concept of ‘Collective Dominance’ of entities.

¹¹ The Fab Hotels and Treebo case (n 1).

¹² *ibid.*

¹³ See Prateek and Seth (n 8).

¹⁴ *ibid.*

¹⁵ *Competition Commission of India v. Steel Authority of India Limited and Another* (2010) 10 SCC 744. (“*CCI v. SAIL*”)

¹⁶ *ibid.*

PART II

II. INTERIM INJUNCTIONS UNDER THE MRTP ACT, 1969 & COMPETITION ACT, 2002

A. The MRTP Act, 1969

The Monopolies and Restrictive Trade Practices Act, 1969 (“MRTP Act”) was the first legislation enacted by the Government of India to prevent concentration of economic power in the Indian market. The primary purposes of the MRTP Act were (i) keeping a check on the concentration of economic power, (ii) controlling the growth of monopolies in the Indian market economy, and (iii) the preventing of various trade practices which could be detrimental to public interest.¹⁷ The MRTP Act came into force on June 1, 1970, and subsequently underwent a plethora of amendments and modifications before it was finally repealed by the introduction of the Competition Act in 2002.¹⁸

The MRTP Act, as originally enacted, did not contain a provision for the granting of interim relief. In June 1977, a High-Powered Expert Committee on Companies and MRTP Acts headed by Justice Rajindar Sachar was constituted, popularly known as the ‘Sachar Committee.’¹⁹ The Sachar Committee submitted its report in August 1978.²⁰ The Sachar Committee in Chapter XXII of its Report, recommended the inclusion of ‘*certain provisions, with a view to checking...unfair trade practices, so as to ensure adequate protection of the interests of the unwary consumers.*’²¹ In this regard, in Paragraph 22.14 of the Sachar Committee Report, a recommendation was made to vest the MRTP Commission with the ‘*power to grant injunctions*’. The Report stated that by the time the proceedings before the MRTP Commission were concluded, a party to a dispute could suffer irreparable harm unless given immediate relief. The Report also recommended that the

¹⁷ The Monopolies and Restrictive Trade Practices Act 1969, Statement of Objects and Reasons, <https://www.mca.gov.in/Ministry/actsbills/pdf/The_Monopolies_and_Restrictive_Trade_Practices_Act_1969.pdf> 1-2, accessed 7 March 2022. For a detailed discussion on the evolution of the law, See, Pradeep S Mehta, ‘Competition Law Regime in India: Evolution, Experience and Challenges’ *Horizons, Concurrences*, 149.

¹⁸ See Mehta (n 17).

¹⁹ See HK Paranjape, ‘The MRTP Amendment Bill: A Trojan Horse’ (1984) 19(17) *Economic and Political Weekly*.

²⁰ The contents of the report can be accessed from the website of the Ministry of Corporate Affairs, <<https://www.mca.gov.in/bin/dms/getdocument?mds=9FnTF0a4evi6AJeJYg-7wqw%253D%253D&type=open>> accessed 7 March 2022.

²¹ Report of the High-Powered Expert Committee on Companies and MRTP Acts, August 1978, para 22.14, 277

MRTP Commission should be authorised to grant temporary as well as permanent injunctions. For this purpose, it suggested that Section 12 of the MRTP Act be suitably amended to vest the power to grant injunctions with the MRTP Commission.²²

Subsequently, by virtue of the MRTP (Amendment) Act, 1984, Section 12A was inserted into the MRTP Act, which gave the MRTP Commission the power to grant temporary injunctions during the pendency of an inquiry. By vesting such a power with the MRTP Commission, it was ensured that parties to proceedings were unable to indulge in anti-competitive practices during the pendency of the proceedings or the inquiry procedure.²³ The relevant provisions of the Code of Civil Procedure, 1908 were to apply to the MRTP Commission at the time of granting a temporary injunction under Section 12A.²⁴

There are limited cases on the adoption of interim measures by the MRTP Commission. The issue of granting interim relief came up in 1991 in the case of *Milton Plastics v. Union of India*.²⁵ Here, an interim order passed by the MRTP Commission was set aside by the Bombay High Court on grounds of procedural irregularity. Shortly thereafter, a more significant order was passed by the Bombay High Court in the case of *MP Ramachandran v. Union of India and Others*,²⁶ where the court emphasised the need to view procedural technicalities less stringently and pass interim orders with “greater vigour and vitality, when the injunction is intended to project and protect the public interest.”²⁷ This case pertained to the Ujala Blue advertisement dispute, wherein, after a detailed analysis of the power to grant interim orders under the MRTP Act, the Court upheld an interim order. The Court stated that injunctive reliefs granted by the MRTP Commission have to be viewed from the larger perspective of public benefit and consumer interest. However, apart from a few cases, the grant of interim reliefs did not assume much significance during the years of the MRTP Commission.

B. The Competition Act, 2002

The Competition Act received the assent of the President of India on January 13, 2003, and came into force on March 31, 2003, repealing the earlier law.²⁸

²² *ibid*, 280-281.

²³ HK Paranjape (n 19).

²⁴ The Monopolies and Restrictive Trade Practices Act 1969, s 12A (2).

²⁵ 1991 SCC OnLine Bom 443; (1992) 94 Bom LR 9.

²⁶ *MP Ramachandran v. Union of India*, 1992 SCC OnLine Bom 82; (1992) 94 Bom LR 105.

²⁷ *ibid* at para 14.

²⁸ The Competition Act 2002 (12 of 2003).

The provision vesting the power to issue interim orders has been laid down in Section 33 of the Competition Act. As originally enacted, Section 33(1) empowered the CCI to grant a temporary injunction restraining any party who has acted, and continues to act, or is about to act, in contravention of Sections 3(1), 4(1) or 6, from carrying on such act until the inquiry procedure pending before the CCI has been concluded, or further orders have been passed, without any notice to the opposite party. In addition to this, in terms of Section 33(2), the CCI was also empowered to issue an order of temporary injunction to restrain any party from importing any goods that are likely to result in the contravention of Sections 3(1), 4(1) or 6, from importing such goods until the conclusion of the inquiry procedure, or the passing of further orders in this regard, without any notice to the opposite party. Similar to the language of Section 12A of the MRTP Act, Section 33(3) stated that the relevant provisions of the Code of Civil Procedure, 1908 were to apply to the CCI at the time of granting a temporary injunction.

Subsequently, on December 12, 2006, the Standing Committee on Finance (2006-2007) submitted its forty-fourth report and introduced the Competition (Amendment) Bill, 2006.²⁹ By virtue of the draft bill, it was proposed that Sections 33(2) and 33(3) be omitted and that the language of Section 33(1) be altered.³⁰ This was recommended largely due to the shift from a ‘complainant’ approach to a broader ‘informant’ approach, which was also ushered in by the proposals of the Standing Committee.³¹ Therefore, by virtue of the Competition Law (Amendment) Act, 2007, Section 33 now reads—*“if the CCI is satisfied, during an inquiry, that an act in contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 has been and continues to be, or is about to be committed, it can pass an order temporarily restraining such act until the conclusion of the inquiry procedure or further orders being passed in this regard, without any notice to the opposite party.”*³²

In addition to Section 33, the Competition Commission of India (General) Regulations, 2009 (“2009 General Regulations”) also deals with the power

²⁹ The contents of the report can be accessed from the website of the Ministry of Corporate Affairs, <https://www.prsindia.org/sites/default/files/bill_files/bill73_2007050873_Competition_Bill__2006_standing_committee.pdf> accessed 7 March 2022.

³⁰ Ministry of Company Affairs, Standing Committee on Finance (2006-2007), Forty-Fourth Report, December 2006, 107.

³¹ *ibid* pp 103. The shift in terminology from ‘complainant’ to ‘informant’ was made in view of the broader change in the role of the CCI as an inquisitorial body, in place of its earlier role as an adversarial adjudicatory body to ultimately give CCI a ‘*better regulatory role*’. For a detailed understanding of this change and for discussions relating to it, see Ministry of Company Affairs, Standing Committee on Finance (2006-2007), Forty-Fourth Report, December 2006, 24-26.

³² The Competition Act 2002, s 33.

of the CCI to grant interim orders. According to Regulation 31, the party against whom an interim order under Section 33 has been made, shall be heard as soon as possible, and the final order in the concerned matter shall also be passed by the CCI within 90 days of the interim order, as far as possible.³³

It is pertinent to note that it may not be feasible for CCI to restore the competitive conditions in favour of the aggrieved party after the conclusion of the investigation process. Therefore, the power to grant interim relief during the pendency of the inquiry procedure is crucial to ‘*promote and sustain competition in markets*’ - one of the objectives of the Competition Act - as enshrined in its Preamble.³⁴

PART III

III. THE THREE-PRONG TEST FOR INTERIM ORDERS IN CCI v. SAIL

A. CCI v. SAIL³⁵

The most significant development in the jurisprudence of granting interim relief under Section 33 of the Competition Act, is the case of *Competition Commission of India v. Steel Authority of India Limited and Another*. This landmark judgment of the Supreme Court of India was delivered on September 9, 2010.³⁶

In this case, the informant i.e., Jindal Steel & Powers Limited alleged that the Steel Authority of India Limited (“SAIL”) abused its dominant position in the market and deprived other participants of fair competition by *inter alia*, entering into an *exclusive supply agreement* with the Indian Railways for the supply of rails. Therefore, it was alleged that SAIL has engaged in anti-competitive behaviour by violating Sections 3(4) and 4(1) of the Competition Act. The CCI, satisfied that a *prima facie* case existed against SAIL, directed the Director-General to investigate the matter in terms of Section 26(1) of the Competition Act. This order was appealed by SAIL before the Competition Appellate Tribunal (the “COMPAT”) which stayed

³³ The Competition Commission of India (General) Regulations 2009, reg 31.

³⁴ The primary objectives of the Competition Act, as mentioned in its preamble are (i) prevention of practices having an adverse effect on competition, (ii) *promoting and sustaining competition in markets*, (iii) protecting the interests of consumers, and (iv) ensuring freedom of trade carried on by other participants in markets, in India.

³⁵ CCI v. SAIL (n 15).

³⁶ *ibid*.

the proceedings and investigation undertaken by the Director-General.³⁷ The order of the COMPAT was appealed before the Supreme Court. Among other issues, the question relating to the stage and manner of exercise of the power to pass temporary orders, vested in the CCI under Section 33 of the Competition Act, was raised.

To evaluate whether a particular case warrants the grant of interim relief, the Supreme Court, in this case, propounded a *three-prong test* that needs to be satisfied before passing an interim order:³⁸

- (i) that the CCI is satisfied that there exists a *prima facie* case in the matter such that the activities which contravene Sections 3(1), 4(1) or 6 of the Competition Act, have been, are being, or shall continue to be, committed. Such *prima facie* view must be of a *higher degree* than that required under Section 26(1) of the Competition Act³⁹ (the *prima facie* stage);
- (ii) that it is necessary to pass an interim order,⁴⁰ that is to say that there exist definite reasons having nexus to the necessity for passing such an order⁴¹ (the *necessity* stage); and
- (iii) that it is apparent that there is every likelihood that the party seeking interim relief shall suffer irreparable and irremediable damage, or that there shall be an appreciable adverse effect on competition, if interim relief is not granted by the CCI (the *likelihood* stage).⁴²

Moreover, the Supreme Court also specified certain procedural formalities and safeguard measures to be followed by the CCI, in respect of its power of granting interim reliefs under Section 33 of the Competition Act, read with Regulation 31 of the 2009 General Regulations. The Supreme Court stated that:

- i. The power under Section 33 can be exercised by the CCI only *after* it has formed a *prima facie* opinion with respect to the information provided by the informant, and has directed for an investigation to be undertaken in terms of Section 26(1).⁴³ In terms of Regulation 18(2) of the 2009 General Regulations, the inquiry stage is deemed to

³⁷ *Steel Authority of India Limited and Another v. Jindal Steel & Power Limited*, 2010 SCC Online Comp AT 5.

³⁸ *CCI v. SAIL* (n 15) 31(4).

³⁹ *ibid* 31(4)(a).

⁴⁰ *ibid* 31(4)(b).

⁴¹ *ibid* 75.

⁴² *ibid* 31(4)(c), p 73.

⁴³ *ibid* 21.

commence when a direction is given to the Director-General to undertake an investigation according to Section 26(1) of the Competition Act. Therefore, the jurisdiction of the CCI to exercise its power under Section 33 and pass an *ex parte* order can only be invoked by a party on or after the commencement of the inquiry stage.⁴⁴

2. In the event of any prejudice to public interest, or violation of the provisions of the Competition Act, owing to any conduct of any person/enterprise or an association of persons/enterprises, the CCI shall be within its jurisdiction to pass *ex parte ad interim injunction orders* under Section 33. Additionally, the parties shall be afforded a chance to be heard, soon after the passing of the interim order. This shall be sufficient to comply with natural justice principles.⁴⁵ When the applicant is able to satisfy the CCI that an order granting a temporary injunction is called for in the interest of free market and trade, the CCI in its discretion may pass such an order *ex parte*, or otherwise.⁴⁶
3. As *ex parte* restraint orders can have far-reaching consequences, such orders should be passed in exceptional circumstances.⁴⁷ The power under Section 33 must be exercised by the CCI sparingly and under compelling circumstances.⁴⁸
4. While granting an *ex parte* interim order, the CCI must record its due satisfaction as well as its reasoned opinion on not to issue a notice to the other side.⁴⁹
5. A final order on the concerned matter should follow an interim order as expeditiously as possible, within a maximum of 60 days.⁵⁰

PART IV

IV. THE AFTERMATH OF CCI v. SAIL

A. Application of the Three-Prong Test by the CCI

Notwithstanding the judgement of the Supreme Court in *CCI v. SAIL* laying down detailed guidelines on interim measures, the CCI has seldom made

⁴⁴ *ibid* 70-71.

⁴⁵ *ibid* 53.

⁴⁶ *ibid* 75.

⁴⁷ *ibid* 72.

⁴⁸ *ibid* 72.

⁴⁹ *ibid* 75.

⁵⁰ *ibid* 82.

use of its power to grant interim relief.⁵¹ A few cases where the granting of interim reliefs has been considered by the CCI, are discussed below:

In 2015, in the case of *Fast Track Call cabs (P) Ltd v. CCI and ANI Technologies (P) Ltd*, the CCI rejected an application by an informant seeking interim relief against Ola Cabs.⁵² The CCI reiterated the three-prong test laid down in *CCI v. SAIL*⁵³ and observed that the fulfilment of the first prong i.e., the establishment of a *prima facie* case, by itself does not entitle the informants to interim relief under Section 33 of the Competition Act. The informant is required to fulfil the second and third prongs as well, and demonstrate that the balance of convenience tilts in his favour; and that in the absence of interim relief, irreparable loss shall be caused to him. Or, it must be proved that there shall be an appreciable adverse effect on competition (“AAEC”) in the market.⁵⁴ As these two prongs could not be satisfied, the CCI refused to grant interim relief to the informants. On appeal, the Competition Appellate Tribunal upheld the decision of the CCI.⁵⁵

In contrast, in *Nuziveedu Seeds Ltd v. Mahyco Monsanto Biotech (India) Ltd*,⁵⁶ a seven-member panel of the CCI, by a majority of 6:1 decided in favour of passing an order under Section 33 of the Competition Act. The CCI first examined whether there existed a *prima facie* contravention of Sections 3(4) and 4 of the Competition Act in the instant case, and ruled that the higher standard required for passing an interim relief to the applicant had been met. Subsequently, it proceeded to analyse whether, in the absence of interim relief, irreparable and irretrievable harm shall be caused to the Informants. The CCI answered this in the positive, as it involved the interests of not just the Informants, but also dependant farmers as well as the entire ecosystem of BT cotton cultivation in the specified areas. The CCI reasoned that they shall suffer irreparable harm if an interim order is not passed. Thereafter, the CCI elucidated the tests given by the Apex Court in *CCI v. SAIL*⁵⁷ and stated that although powers vested in it under Sec. 33 of

⁵¹ Abir Roy, ‘Competition Commission of India Exercises its Interim Powers: Sets its Enforcement Priority of Ensuring Timely Intervention in Dynamic Markets’ (*Sarvada Legal*) <<https://competitionlawsarvada.legal/2021/03/13/competition-commission-of-india-exercises-its-interim-powers-sets-its-enforcement-priority-of-ensuring-timely-intervention-in-dynamic-markets/>> accessed 7 March 2022.

⁵² *In Re: Fast Track Call Cab Private Limited v. ANI Technologies Private Limited* 2015 SCC OnLine CCI 140.

⁵³ *CCI v. SAIL* (n 15).

⁵⁴ *CCI v. SAIL* (n 15) 12.

⁵⁵ *Fast Track Call Cabs Private Limited v. CCI and ANI Technologies Private Limited* 2016 SCC OnLine Comp AT 89, 15-16.

⁵⁶ *Nuziveedu Seeds Limited v. Mahyco Monsanto Biotech (India) Ltd* 2016 SCC OnLine CCI 48, 25.

⁵⁷ *CCI v. SAIL* (n 15).

the Competition Act are to be used sparingly by it, however, upon consideration of the foregoing aspects, it is necessary and appropriate for the CCI to intervene in the matter and safeguard the interests of the parties. It also weighed the balance of convenience and held that it tilted towards granting the interim relief sought. Given the circumstances of the case, the CCI found it appropriate to provide a provisional remedy to the informants in light of the clauses which were invoked by the opposite parties who were dominant players in the relevant market.⁵⁸ The CCI found the instant clauses to be *prima facie* anti-competitive and held that if an interim relief is not granted to the informants, they shall suffer irreparable harm.⁵⁹

Again, in the case of *G Krishnamurthy v. Karnataka Film Chamber of Commerce (KFCC)*,⁶⁰ the CCI employed its power to issue an interim order to prevent the opposite parties from hindering, obstructing or causing an adverse effect on the release of ‘*Dheera*,’ a dubbed movie of the informant intended to be broadcasted in the State of Karnataka.⁶¹ The CCI observed that the informant was successful in making out a favourable case for issuing the interim order prayed for.⁶²

The case of *INSA v. ONGC*⁶³ is another matter wherein the applicant made a prayer for interim relief. The CCI, after setting out the test for granting interim relief as laid down in *CCI v. SAIL*⁶⁴, analysed whether the factual circumstance justified the exercise of its power to grant temporary relief to the applicant.⁶⁵ It held that while all the conditions provided in the judgment of the Supreme Court in *CCI v. SAIL*⁶⁶ were fulfilled in the instant case, the undertaking of the opposite party to not invoke, until further orders of the CCI, Clause 14.2 of the Special Contract Conditions (which gave the opposite party the prerogative to terminate the arrangement between the parties in a unilateral manner), sufficiently addressed the concern of the applicant.⁶⁷ Hence, it did not issue an order under Sec. 33.⁶⁸

⁵⁸ *ibid* 22-23.

⁵⁹ *ibid*.

⁶⁰ *G Krishnamurthy v. Karnataka Film Chamber of Commerce* 2018 SCC OnLine CCI 77.

⁶¹ *ibid*.

⁶² *IBID* 19.

⁶³ *Indian National Shipowners' Association. v. Oil and Natural Gas Corporation Limited* 2018 SCC OnLine CCI 48. (“*INSA v. ONGC*”)

⁶⁴ *CCI v. SAIL* (n 15).

⁶⁵ *INSA v. ONGC* (n 63).

⁶⁶ *CCI v. SAIL* (n 15).

⁶⁷ *INSA v. ONGC* (n 63).

⁶⁸ Saba, ‘CCI Reiterates Principles for Granting Interim Order under Section 33 of the Competition Act’ (*SCC Online*, July 4, 2018) <<https://www.sconline.com/blog/post/2018/07/04/cci-reiterates-principles-for-granting-interim-order-under-section-33-of-the-competition-act/>> accessed 7 March 2022.

B. Interim Orders in the Digital Market: The Fab Hotels and Treebo Case of 2021

In the *Fab Hotels and Treebo Case*, the CCI passed a detailed order on the grant of interim measures; the first of its kind pertaining to digital markets.⁶⁹ The CCI also, for the first time, invoked Section 33 in the form of a ‘*mandatory injunction*.’ This involved ordering the opposite party to perform an overt act, instead of a ‘*prohibitory order*,’ i.e., restraining the opposite party from undertaking a certain activity.⁷⁰ This case marks a milestone in the jurisprudence of the grant of interim reliefs by the CCI and is discussed briefly, below.

1. Brief Facts

In 2018, MMT-Go delisted FabHotels and Treebo from its online portal owing to an exclusive agreement with OYO. The Federation of Hotel and Restaurant Associations of India (“FHRAI”) in the capacity of an informant, intimated the CCI that MMT-Go was involved in predatory pricing, was charging exorbitant commissions and was engaging in activities that denied market access to other players.⁷¹ It also stated that the vertical integration of MMT-Go and OYO resulted in, *inter alia*, price and non-price abuses, causing AAEC in the relevant market to the detriment of FabHotels and Treebo. The CCI, on being *prima facie* satisfied that there is a case for investigation against MMT-Go under Section 4 of the Competition Act, and that there is a case for investigation against MMT-Go as well as OYO under Section 3(4), ordered a detailed investigation in terms of Section 26(1).⁷²

2. The decision of the CCI

On the aspect of ‘*Determination of Relevant Market*’, the CCI stated that both the entities MMT-Go and OYO operate in different relevant markets. However, the two entities are vertically related to each other. It stated that OYO operated in the ‘*market for franchising services for budget hotels in India*,’ and was a *prima facie* significant player in that market, though not a dominant one. It further stated that MMT-Go operated in the ‘*market for*

⁶⁹ The *Fab Hotels and Treebo case* (n 1).

⁷⁰ Mohini Parghi, ‘CCI on Interim Measures in Digital Markets’ (IndiaCorpLaw, 3 April 2021) <<https://indiacorplaw.in/2021/04/cci-on-interim-measures-in-digital-markets.html>> accessed 7 March 2022.

⁷¹ The *Fab Hotels and Treebo case* (n 1) 3.

⁷² On being satisfied of a *prima facie* case, the CCI passes an order under s 26(1) of the Competition Act 2002 directing the Director-General to initiate an investigation into the matter before it.

online intermediation services for booking hotels in India,' and was a *prima facie* dominant player in that market. On perusal of the preliminary facts and records placed before it, the CCI *prima facie* found that the Agreement, in terms of which MMT-Go '*agreed to not list the closest competitors of OYO on its platform*', was in contravention to the provisions of the Competition Act. Consequently, FabHotels and Treebo prayed before the CCI for the grant of a temporary injunction in the form of an interim relief directing MMT-Go to relist them on its online platform. The CCI recapitulated the three-prong test laid down by the Supreme Court in *CCI v. SAIL*,⁷³ and, on being satisfied that each of the tests was suitably established and fulfilled, granted interim relief to the applicants.

3. *Subsequent Developments*

Pursuant to the decision of the CCI on March 9, 2021, OYO approached the High Court of Gujarat by way of a writ petition, challenging the interim order passed by the CCI. It argued that it was not afforded a due opportunity to present its case in the matter before the CCI. The Single Bench of the Gujarat High Court stayed the order passed by the CCI until the final disposal of the petition before it.⁷⁴ Subsequently, the matter went in appeal before a Division Bench of the Gujarat High Court in the case of *Casa2 Stays (P) Ltd v. Oravel Stays (P) Ltd (OYO)*.⁷⁵ On June 14, 2021, the Division Bench disposed of the writ petition and also set aside the order of the CCI, passed by it on March 9, 2021, This was done on the ground of '*lack of opportunity of hearing*' before the CCI being afforded to Oravel Stays Private Limited, the original petitioner before the CCI. It further directed the CCI to provide a due opportunity of hearing to OYO, in accordance with law, and to thereafter decide the case on merits.⁷⁶

Although there is a stay on the order of the CCI granting interim relief to FabHotels and Treebo at present, the law on the matter of interim injunctions has remained unchanged. Subsequent cases have also followed the test laid down in *CCI v. SAIL*.⁷⁷ For instance, in *TT Friendly Super League Assn v. Suburban Table Tennis Assn*,⁷⁸ the CCI enumerated the judicial dicta laid

⁷³ *CCI v. SAIL* (n 15).

⁷⁴ *Oravel Stays Private Limited (OYO) v. Competition Commission of India*, MANU/GJ/0470/2021.

⁷⁵ *Casa2 Stays Private Limited v. Oravel Stays Private Limited (OYO) & Ors.*, SPECIAL CIVIL APPLICATION NUMBER 5085 OF 2021.

⁷⁶ *Casa2 Stays Private Limited v. Oravel Stays Private Limited (OYO) & Ors.* (N 75) PARA 5 PP 5.

⁷⁷ *CCI v. SAIL* (n 15).

⁷⁸ *TT Friendly Super League Assn v. Suburban Table Tennis Assn* 2021 SCC OnLine CCI 67.

down in *CCI v. SAIL*.⁷⁹ The CCI, on being satisfied that the opposite party was involved in anti-competitive behaviour in a manner that frustrated the cause of promoting table tennis as a sport, and that the continuance of such behaviour could potentially hinder the purpose of the Competition Act, ruled in favour of passing an interim order against the opposite party, restraining them from restricting or dissuading players, coaches or clubs from joining or participating in the tournaments organised by the several association or federations that are purportedly not *per se* recognised by it.⁸⁰

Again, in the case of *Nishant P Bhutada v. Tata Motors Ltd*,⁸¹ the CCI elucidated the three-prong test laid down by the Supreme Court in *CCI v. SAIL*⁸² and held that the informants had failed to meet any of the parameters laid down by the Apex Court and accordingly refused to pass an order of interim injunction granting the several prayers sought by the Informant. Similarly, in the case of *Asianet Digital Network (P) Ltd v. Star India (P) Ltd*,⁸³ the CCI ruled against the issuance of an order granting a temporary injunction to the Informants on the ground that the Informants have '*not been able to project any higher level of prima facie case warranting a positive direction as sought...at the interim stage.*'⁸⁴ The CCI also stated that it was not satisfied that the Informants would suffer irreparable harm in the absence of an interim order. It set out the test laid down by the Apex Court in *CCI v. SAIL*⁸⁵ and concluded that it was not inclined to interfere in the instant matter by issuing any interim directions.⁸⁶

The CCI also passed interim orders in the cases of *CREDAI-NCR v. DTCP*,⁸⁷ on August 1, 2018, and in *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India*,⁸⁸ on June 3, 2021. In both these cases, the CCI looked into the test laid down in *CCI v. SAIL*⁸⁹ and having been satisfied with each parameter, proceeded towards the issuance of an interim order.

⁷⁹ *CCI v. SAIL* (n 15).

⁸⁰ *TT Friendly Super League Assn v. Suburban Table Tennis Assn* (n 78) PARA 35 PP 12.

⁸¹ *Nishant P Bhutada v. Tata Motors Ltd* 2021 SCC OnLine CCI 66.

⁸² *CCI v. SAIL* (n 15).

⁸³ *Asianet Digital Network (P) Ltd v. Star India (P) Ltd* 2022 SCC OnLine CCI 5.

⁸⁴ *Asianet Digital Network (P) Ltd v. Star India (P) Ltd* (n 83) para 22, p 8.

⁸⁵ *CCI v. SAIL* (n 15).

⁸⁶ *Asianet Digital Network (P) Ltd. v. Star India (P) Ltd* (n 83) para 22 p 8.

⁸⁷ *Confederation of Real Estate Developers Assn of India v. Govt. of Haryana* 2018 SCC OnLine CCI 66.

⁸⁸ *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India* 2021 SCC OnLine CCI 30.

⁸⁹ *CCI v. SAIL* (n 15).

PART V

V. THE NEED FOR PROACTIVE USE OF INTERIM MEASURES IN DIGITAL MARKETS

A. The Fast-Growing Digital Sector

The judgment of the Supreme Court in *CCI v. SAIL*⁹⁰ was delivered in 2010 and, as elucidated above, the CCI has, till date, followed the parameters laid down in this case. However, the market in India has undergone rapid digitisation in recent years, necessitating a re-look at the law relating to interim measures in digital markets. The pandemic has accelerated the process of digitisation, with more and more consumers shifting towards online platforms, globally. This has resulted in enhanced market power of tech companies.⁹¹ Today, competition laws all over the world are grappling with ways to deal with regulation of competition in the digital economy. The term “digital economy,” however, is not a new concept. It was first used by Don Tapscott decades back in 1995, in his New York Times bestseller titled “*The Digital Economy: Promise and Peril in the Age of Networked Intelligence*”.⁹² The competition law challenges associated with the digital economy are manifold. At the outset, the term is difficult to define with precision, as it includes within its fold various markets such as platform markets, social networking sites, payment sites and search engines, to name a few.

Digital markets differ from traditional markets in various ways, and competition laws, in their current form, are not equipped to deal with these new markets. For example, transaction platforms thrive on network effects and big data. They can use price leveraging tactics on both sides of the markets that they operate on, unlike firms which operate on one side of the market and have a unidirectional price structure. Platform markets have the advantage of reaching out to a wider number of people in a much shorter time frame, which makes it easier for them to gain market power. However, it is important to note that such market power may or may not amount to dominance, as it may be easier for a firm to capture more customers by aggressive competitive practices in the nascent stages of building its network, till the market settles in favour of a particular enterprise. Thus, market leadership is

⁹⁰ *ibid.*

⁹¹ See Rajesh Mehta and Govind Gupta, ‘Big Tech in the Era of Techopoly’ (*Financial Express*, 26 January, 2021) <<https://www.financialexpress.com/industry/technology/big-tech-in-the-era-of-techopoly/2176986/>> accessed 7 March 2022.

⁹² Don Tapscott, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence* (1st edn, McGraw-Hill Education 1995).

unstable in the early stages of building a network and the same should not be construed as dominance, following the traditional tests for market power.⁹³

Assessment of anti-competitive behaviour in digital markets is a challenge for competition authorities, and a time-consuming exercise. Take, for example, the first conundrum which is with respect to the definition of relevant market. Early cases like the Ola and Uber disputes (which continued for years pending final investigation) illustrate this difficulty.⁹⁴ Since 2015, the CCI has been faced with complaints against these app cab-aggregators whose business model was new to our country and changed the landscape of traditional modes of commuting. Ola and Uber are classic examples of platform markets – the companies do not own the vehicles, but simply use the Internet and an application to connect drivers to the customers. A number of allegations were made against these companies, including those of predatory pricing and other forms of anti-competitive behaviour. However, the CCI rejected the complaints in almost all these cases, due to its inability to reach a finding of dominance in the relevant market and closed its investigations. The COMPAT, while ordering investigation into the matter,⁹⁵ highlighted the need to examine platform markets by stating that

*“Aggregator based radio taxi service is a relatively new paradigm of public transport in Indian cities which has revolutionized the manner in which we commute and work... Therefore, it cannot be said definitively that there is an abuse inherent in the business practices adopted by operator such as respondents but the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it. Whichever is true, the investigations would show”.*⁹⁶

Unfortunately, due to the reluctance of the CCI to pass interim orders, this state of affairs continued in the app cab market for many years. This changed via the Supreme Court order of 2019,⁹⁷ wherein the Apex Court made clear that competition law ought to look beyond traditional market definitions in order to assess dominance in platform markets. In digital markets, delays like this can result in irrevocable changes to the competitive fabric of the market.

⁹³ Tilottama Raychaudhuri, ‘Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence’ (2020) CCI Journal on Competition Law and Policy, 1-27.

⁹⁴ *Meru Travel Solutions (P) Ltd v. ANI Technologies (P) Ltd* 2018 SCC OnLine CCI 46

⁹⁵ *Meru Travel Solutions Pvt. Ltd. v. Competition Commission of India & Uber India Systems Pvt. Ltd.*, Appeal No. 31 of 2016 (COMPAT)

⁹⁶ *ibid* para 18.

⁹⁷ *Uber India Systems (P) Ltd v. CCI* (2019) 8 SCC 697.

The CCI, in the case of *FabHotels & Treebo*, identified that there is a growing trend in the Indian consumer market towards shifting to online modes for shopping and booking requirements.⁹⁸ The CCI also highlighted the tremendous change in distribution mechanism in markets across the globe with the emergence of online distribution channels which are developing at an extraordinary pace.⁹⁹ Therefore, it became increasingly critical for digital service providers such as FabHotels and Treebo to obtain visibility in the relevant market and stay relevant in order to survive.¹⁰⁰

In this case, the CCI elaborated on the quick accumulation of market power by digital platforms. The CCI observed that “*Recent reports and studies (national as well as international) strengthen this conviction by showing how a few large platforms can control online distribution because of a variety of factors, including strong network effects in the digital environment, and their ability to access and accumulate large amounts of data.*”¹⁰¹ Importantly, the CCI clarified that Section 33 of the Competition Act now needed to be applied keeping in mind newer markets, stating that:

*“It would not be in the interest of justice to let the market suffer because of the alleged delay, if any, on the part of any party... the provisions of Section 33 of the Act have to be read and understood in the context of the markets which are dynamic in nature, more so in the context of digital markets.”*¹⁰²

In the wake of the *FabHotels & Treebo*, the grant of interim measures has received renewed focus in Indian competition law.¹⁰³

PART VI

VI. INTERIM MEASURES IN THE EUROPEAN UNION

A. The Evolution of the Law relating to Interim Measures in Europe

The tests prescribed for the grant of interim measures in European competition law are somewhat similar to those in Indian law. Recent years have

⁹⁸ The *Fab Hotels and Treebo* case (n 1) 99.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ The *Fab Hotels and Treebo* case (n 1) para 112.

¹⁰² The *Fab Hotels and Treebo* case (n 1) para 96.

¹⁰³ Sean Doherty and Aditi Sara Verghese, ‘Competition Policy in a Globalized, Digitalized Economy, Platform for Shaping the Future of Trade and Global Economic Interdependence’ (2019) World Economic Forum 1, 4, 14, 16.

witnessed a rapid increase in the use of interim measures in European competition law, particularly in digital and technology-driven markets. In this section, the authors trace the evolution of the law relating to interim measures in the European Union and then demonstrate how application of the European standards of granting interim measures could be considered in India.

In the history of the European Union, a legal provision for undertaking protective measures to safeguard competition between different market players was introduced and incorporated for the first time, in the Treaty establishing the European Coal and Steel Community, 1951 (“ECSC Treaty”).¹⁰⁴ Article 66(5) of the ECSC Treaty provides for the power of the ‘High Authority’ to ‘*take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties...*’.¹⁰⁵ However, Regulation 17/62,¹⁰⁶ which was the first regulation that was made (detailing the implementation and administration of competition law provisions), did not contain any specific mention regarding the power to award interim measures for safeguarding competition.

Nonetheless, in the case of *Camera Care Ltd v. Commission of the European Communities*,¹⁰⁷ (“*Camera Care*”) the decision of the European Commission to take interim measures was upheld by the Court of Justice of the European Union.¹⁰⁸ In course of time, a few other cases regarding directions by the European Commission, for adopting interim orders, also came to the fore. It is interesting to note that the situation in Europe was similar to India, in so far as the number/frequency of cases regarding the grant of interim measures was concerned. The European Commission remained hesitant in granting such measures in cases where Articles 101 or 102 of

¹⁰⁴ Treaty of Paris setting up the European Coal and Steel Community (ECSC Treaty), April 18, 1951. A Summary of the ECSC is available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022/>> accessed 7 March 2022.

¹⁰⁵ Treaty of Paris setting up the European Coal and Steel Community 1951, art 66(5).

¹⁰⁶ Regulation 17 (First Regulation implementing Arts 85 & 86 of the Treaty establishing the European Economic Community), Official Journal of the European Communities 204/62, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31962R0017&from=EN/>> accessed 7 March 2022.

¹⁰⁷ Order of the Court of 17 January 1980. *Camera Care Ltd v. Commission of the European Communities*. Competition - Interim measures. Case 792/79 R, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CO0792>>.

¹⁰⁸ Order of the Court of 17 January 1980. *Camera Care Ltd v. Commission of the European Communities* (1980), Case 792/79 R, <<https://curia.europa.eu/juris/showPdf.jsf?sessionid=9ea7d2dc30d6ea81985f5f1542dd8206e07c24b9e331.e34KaxiLc3qM-b40Rch0SaxyLbN50?text=&docid=90631&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=122075>> accessed 7 March 2022.

the Treaty on the Functioning of the European Union (“TFEU”) were contravened. In 2001, the European Commission imposed interim measures in the *IMS Health* case.¹⁰⁹ However, this decision was appealed by IMS to the Court of First Instance (now the General Court) which suspended the interim measures, pending final investigation.¹¹⁰

The limited grant of interim measures by the European Commission may be attributed primarily to the following reasons:

- (i) *Firstly*, the European Commission recommended that third parties approach courts within their domestic jurisdiction, or the National Competition Authorities (NCAs), praying for grant of interim reliefs in competition matters, instead of issuing such measures directly.¹¹¹
- (ii) *Secondly*, the authority to grant interim orders or direct the adoption of interim measures, was not explicitly accorded to the European Commission, and thus lacked a clear legislative foundation. Therefore, the European Commission used the tool of interim measures sparingly.¹¹²

To address these lacunae, the provisions relating to interim measures were codified under Article 8(1) of Regulations 1/2003.¹¹³ By virtue of Article 8(1), the European Commission was conferred with the power to grant interim orders in antitrust matters.¹¹⁴ Article 8 of Regulation 1/2003 provided for ‘Interim Measures’ and laid down a two-prong test for a party seeking interim relief. As per the terms of Article 8(1), the applicant has to prove a case of urgency by establishing two factors:

- (i) serious and irreparable damage to competition; and

¹⁰⁹ Case COMP D3/38.044 (2001) – NDC Health/IMS HEALTH: Interim measures <https://ec.europa.eu/competition/antitrust/cases/dec_docs/38044/38044_15_5.pdf> accessed 7 March 2022.

¹¹⁰ See Hogan Lovells, Commission seeks interim measures for the first time in 18 years at <<https://www.lexology.com/library/detail.aspx?g=370cad49-c608-47c6-93e2-322e9938bdc5>> accessed 7 March 2022.

¹¹¹ Giulio Preti, ‘European Commission Slaps Interim Measures Against Broadcom: The Perfect Test-Case?’ 2020 King’s Student Law Review, Commercial & Financial Law Blog, available at <<https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/04/06/european-commission-slaps-interim-measures-against-broadcom-the-perfect-test-case-giulio-preti>> accessed 7 March 2022.

¹¹² *ibid.*

¹¹³ Council Regulation (EC) No 1/2003 of December 16, 2002 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>> accessed 7 March 2022.

¹¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty, art 8(1).

- (ii) the existence of a *prima facie* case of infringement of the provisions of the European antitrust laws.¹¹⁵

It is noteworthy that the conditions contemplated by the European Regulation are similar to the requirements under Section 33 of the Competition Act in India. On a perusal of the text of these two tests, it is evident that the *first prong* of the test given in Article 8(1) of Regulation 1/2003 i.e., the checking of whether there exists any “*serious and irreparable damage to competition*,” corresponds, in part, to the *third prong* of the test propounded by the Supreme Court of India in *CCI v. SAIL*¹¹⁶ i.e., “*the likelihood that the applicant shall suffer irreparable and irretrievable damage, and that there shall be appreciable adverse effect on competition if interim relief is not granted.*” Similarly, the *second prong* of Article 8(1) of Regulation 1/2003 i.e., testing whether there is “*a prima facie case of infringement*” corresponds, in text and in principle, to the *first prong* of *CCI v. SAIL*¹¹⁷ i.e., “*prima facie case of contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 of the Competition Act*”. In effect, the European law is less stringent as it does not contemplate a separate “necessity” stage.

In addition to these two stages of checking, Article 8 also clarifies the time period within which the interim measure, if and as granted by the European Commission, shall remain valid. In terms of Article 8(2), a decision to grant interim measures shall only remain in operation for a limited period of time, as specified, based on the facts and circumstances of the case, and shall also be subject to renewal to the extent “necessary and appropriate.” However, even after the explicit introduction of provisions relating to the grant of interim measures in 2003 making the law less stringent, such measures were used sparingly by the European Commission. It is quite astonishing that the power of using interim measures was not considered by the Commission, even in multi-year investigations like the *Google Shopping Case*.¹¹⁸

B. The *Broadcom Case* – Reawakening the Use of Interim Measures in Newer Markets

The provision enshrined in Article 8(1) of Regulation 1/2003 has recently been invoked by the European Commission in the landmark *Broadcom Case*.¹¹⁹

¹¹⁵ *ibid.*

¹¹⁶ *CCI v. SAIL* (n 15).

¹¹⁷ *ibid.*

¹¹⁸ Case AT. 39740, Google Search (Shopping) Commission Decision of 27 June 2017.

¹¹⁹ European Commission Press Release, ‘Antitrust: Commission Imposes Interim Measures on Broadcom in TV and Modem Chipset Markets’ (16 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109> accessed 7 March 2022.

Almost two decades after the *IMS Health* case, the European Commission issued interim measures against Broadcom for alleged abusive conduct in the market for the supply of chipsets for TV set-top boxes and modems. On October 16, 2019, the EC directed Broadcom, the world's largest developer of chips for video and broadband services, to cease the application of certain portions of the distribution agreements entered into by it which contained "*exclusivity-inducing provisions*" with immediate effect.¹²⁰ The EC also directed Broadcom to refrain, in the future, from entering into such agreements, or agreements with an equivalent *object* or *effect*. The EC also directed it to refrain from adopting such measures or practices which were in the nature of punishment or retaliation and possess an equivalent object or effect.¹²¹ Broadcom was ordered to "*cease to apply the exclusivity and leveraging provisions contained in its six agreements with manufacturers of TV set-top boxes and modems*" and also to "*refrain from including the same provisions in any future agreements with these manufacturers, and also refrain from implementing other practices that would have an equivalent effect.*"¹²² This decision of the EC was based on its finding that Broadcom held a dominant position in the relevant market, and had abused such dominant position. This resulted in the violation of Article 102 of the TFEU, which expressly prohibits the abuse of dominant position by any person or entity, insofar as it impacts the trade between the Member States.

In the aftermath of the Broadcom decision, interim measures have resurfaced to occupy an important position in European competition law. A recent report of the Digital Competition Expert Panel of the United Kingdom recommended changes in the antitrust laws to encourage the implementation of interim measures by competition authorities and also serve the dual purpose of timely intervention and the granting of the opportunity to be heard and defend.¹²³ The report recommended 'greater and quicker use of interim measures' in order to safeguard the market players from significant harm.¹²⁴ As per this report, the antitrust enforcement mechanism can at times, be slow and cumbersome, making it more and more difficult to curtail the abuse of dominance by entities in the fast-moving digital sector and bring them to books.¹²⁵

¹²⁰ Case AT. 40608 – Broadcom, 2019, EC, 127, decision on interim measures dated October 16, 2019, <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40608/40608_2791_11.pdf> accessed 7 March 2022.

¹²¹ *ibid* 128.

¹²² *ibid*.

¹²³ Jason Furnam, *Unlocking Digital Competition* (2019) Report of the Digital Competition Expert Panel 1, 104.

¹²⁴ *ibid* 14.

¹²⁵ *ibid* 6.

Therefore, interim measures are perceived as an effective instrument to address these concerns relating to the digital market sector.¹²⁶

In addition to the above, the Member States of the European Union have also become cognizant of the need of using interim measures in a proactive manner. Amendments to the antitrust law in Germany provide for more relaxed pre-requisites for passing interim orders. Competition authorities in France have also been using interim measures in appropriate cases.¹²⁷ Further, the competition law of the United Kingdom has also undergone modification. The threshold for employing interim measures by the Competition and Markets Authority, was relaxed in the United Kingdom from ‘serious irreparable damage’ to ‘significant damage’. In this manner, the EU, its Member States and the United Kingdom are enhancing their legal framework to encourage active utilization of the power to order the adoption of interim measures.¹²⁸

PART VII

VII. RECOMMENDATIONS TOWARDS MORE PROACTIVE USE OF INTERIM MEASURES IN INDIAN COMPETITION LAW

In light of the foregoing analysis, it is evident that competition law in India needs to be suitably modified in order to facilitate the use of interim reliefs more proactively, especially in light of competition concerns relating to digital markets. It is important not only to decide when to intervene but also how to intervene, so that competition can be enhanced without curbing efficiency, in such markets. Hence, use of interim measures should conform to a set of guidelines, so as to avoid the danger of excessive implementation of such measures, which could again be counter-productive.

In this regard, a few suggestions are put forward by the authors:

Firstly, there is a need to relax the strict prerequisites for invoking the provision for grant of interim relief. The law, as it exists, is sufficiently worded to authorize the CCI to grant interim reliefs to applicants in genuine need of the same. However, the implementation of the provision (Section 33) granting power to the CCI to issue interim orders, is guided by the test provided by the Supreme Court of India, in *CCI v. SAIL*.¹²⁹ In the opinion of the authors,

¹²⁶ Concurrences (n 7).

¹²⁷ Prateek and Seth (n 8).

¹²⁸ *ibid.*

¹²⁹ *CCI v. SAIL* (n 15).

the three-prong test given in *CCI v. SAIL* needs to be reconsidered, as it imposes a harsh burden on the applicant seeking interim relief. According to the authors, in a situation whether an applicant is able to satisfy the CCI of the first prong (*prima facie* contravention) and of the third prong (the *likelihood* stage), it seems to be, but a direct inference that there arises a ‘necessity’ to grant interim relief to the applicant and protect the competition in the relevant market. Therefore, the *second prong* of the test (necessity) given in *CCI v. SAIL* is no longer relevant today. In light of this, the authors suggest that it is time for the CCI to align its approach to that of the European Commission, and consider the grant or rejection of the remedy of interim orders, by considering the two-prong test of the European Commission (“*serious and irreparable damage to competition*” and “*prima facie case of infringement*”) and dispensing with the three-prong test by doing away with the “necessity” stage. It is important to note that the decision of *CCI v. SAIL* was delivered at a point in time much before the growth of digital markets. The rise of the digital sector has brought with itself a real and severe threat of large companies driving smaller competitors out of the market in a much shorter span of time. Thus, an overly stringent test for passing an interim order may hamper competition, instead of safeguarding it.

Secondly, the *CCI v. SAIL* case has also raised the threshold of *prima facie* infringement to a degree higher than what is provided under Section 26(1) of the Competition Act.¹³⁰ The authors suggest reducing the burden of proving “*prima facie case of infringement*”, to the extent of its requirement as per the statute, under Section 26(1). The Competition Law Review Committee (“CLRC”) in its July 2019 report (“CLRC Report”), had also considered this matter. In its recommendation, it supported the existing language of Section 33, without modification.¹³¹ After reiterating the 3-prong test as propounded by the Supreme Court in *CCI v. SAIL*,¹³² the CLRC considered whether there was a requirement to amend Section 33 to alter the threshold of ‘*satisfaction*’ for granting interim relief, as opposed to keeping the existing ‘*prima facie*’ standard.¹³³ The CLRC noted that there exist various other factors, such as weighing the balance of convenience and preventing irreparable injury which the CCI is required to consider before passing any order of temporary restraint. Accordingly, the CLRC recommended that the language of Section 33 should be retained as it is, and not be amended.¹³⁴

¹³⁰ *ibid* 31(4)(a).

¹³¹ Report of the Competition Law Review Committee, July 26, 2019, para 5.3-5.4, pp 88 (“CLRC Report”).

¹³² *CCI v. SAIL* (n 15).

¹³³ CLRC Report (n 131).

¹³⁴ CLRC Report (n 131) para 5.5, pp 88.

It is the opinion of the authors that in the wake of rapidly evolving newer markets, it is preferable to apply the *prima facie* test to its limited extent, as required under Section 26(1), instead of imposing a higher degree of ‘satisfaction’ of *prima facie* contravention of the provisions of the Competition Act, as prescribed in *CCI v. SAIL*.¹³⁵

Thirdly, it is not only just the grant of an interim order, but also the time frame during which the order should stay in place and continue to operate, that needs to be specified. This is extremely important, as interim orders that do not come with specific timelines could lead to the very same danger of causing irreparable injury to the market. The CLRC Report had recommended that at the time of granting an interim order, the time period for which it shall remain in operation, also be mentioned by the CCI. However, this recommendation has not been followed. For instance, in the *FabHotels and Treebo Case*, the CCI has not specified the duration up to which the applicants shall remain re-listed on the platforms of MMT-Go.¹³⁶ Hence, it is the opinion of the authors that a set of guidelines be put in place, governing the grant of interim orders. These guidelines should specify the procedure to be followed while granting interim orders, including the thresholds mentioned above, so that there is more clarity in this aspect.

Fourthly, even with a set of guidelines in place, it cannot be ignored that digital markets are far more complex in nature than traditional markets. Hence, it may not be possible to treat such markets on the same plane as the latter. A telling order in this regard is the *Uber* matter where the CCI expressed its hesitation in interfering with evolving markets. To quote:

“At this stage, it is difficult to determine with certainty the long-term impact of this pricing strategy as the market is yet to mature...the Commission is hesitant to interfere in a market, which is yet to fully evolve. Any interference at this stage will not only disturb the market

¹³⁵ *CCI v. Steel Authority of India Ltd* (2010) 10 SCC 744.

¹³⁶ S 33 uses the phrase ‘temporarily restrain’, hinting that an interim order can only be in the nature of a prohibitory injunction, as opposed to a mandatory injunction which directs the parties to perform an overt act to comply with the order. Therefore, it can be argued that the time period to be specified in the order is for setting out the duration of the restraint. In the *FabHotels and Treebo Case*, the CCI has stated that its direction to re-list the Applicants is not in the nature of a mandatory injunction as it is to ‘prohibit’ conduct that may have an adverse effect on the market. In any case, the decision of the CCI does not contain a time-period up to which the order shall remain in operation. See, Mohini Parghi, ‘CCI on Interim Measures in Digital Markets’ (IndiaCorpLaw, 3 April 2021) <<https://indiacorplaw.in/2021/04/cci-on-interim-measures-in-digital-markets.html>> accessed 7 March 2022.

dynamics, but also pose a risk of prescribing sub-optimal solution to a nascent market situation."¹³⁷

In view of the difficulty and complexity of analyzing digital markets, it is the suggestion of the authors, that the CCI equips itself with a panel of experts to deal with cases pertaining to digital markets. This specialized panel can take into account all relevant factors and guidelines, and assist the CCI in deciding whether interim relief should be granted in particular cases. Competition agencies across the world have been appointing such specialized panels to deal with digital markets. For instance, in the United Kingdom, an expert Digital Markets Unit has been constituted to work toward a pro-competitive regime for digital markets.¹³⁸ In the United States, the Federal Trade Commission has formed a Technology Enforcement Division to monitor competition in technology markets.¹³⁹ In Australia, the Australia Consumer and Competition Commission has set up a Digital Platforms Branch to examine cases pertaining to digital platform markets.¹⁴⁰

Fifthly, the legal framework should be modified to facilitate the CCI in making appropriate decisions regarding the use of interim measures. Competition law in India, in its current form, is not equipped to tackle the challenges that ensue with the emergence of digital markets. However, to facilitate any change in the law on this matter, a detailed discussion amongst competition law authorities, academicians and legal practitioners is the need of the hour. Jurisdictions across the world have been appointing working groups to study digital markets.¹⁴¹ As a step in this direction, the authors suggest the constitution of a specialized Working Group on Digital Markets, in line with other Working Groups constituted by the CCI. In 2020, the CCI conducted a Market Study on E-Commerce. However, the report analyzed

¹³⁷ *Fast Track Call Cab (P) Ltd & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies (P) Ltd* 2017 SCC OnLine CCI 36, paras 122-123.

¹³⁸ See, 'Digital Markets Unit' (UK Government) <<https://www.gov.uk/government/collections/digital-markets-unit>> accessed 7 March 2022.

¹³⁹ See, Patricia Galvan and Krisha Cerilli, What's in a Name? Ask the Technology Enforcement Division (Federal Trade Commission, 16 October 2019) <<https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division>> accessed 7 March 2022.

¹⁴⁰ See, Digital Platforms (Australian Competition and Consumer Commission) <<https://www.accc.gov.au/focus-areas/digital-platforms#:~:text=The%20ACCC%20has%20set%20up,and%20competition%20law%20enforcement%20cases>> accessed 7 March 2022.

¹⁴¹ See, World Reports on Digital Markets <<https://www.chicagobooth.edu/research/stigler/events/antitrust-competition-conference/world-reports-on-digital-markets>> accessed 7 March 2022.

broad trends and views that had emerged in stakeholder consultations.¹⁴² The CLRC Report also discussed the ‘new age developments in digital markets’ and stated that there was a need for the creation of a conducive environment for businesses to thrive in such newer markets. However, this Report also did not focus in detail on digital markets or discuss the matter relating to the grant of interim reliefs in such markets.¹⁴³ Therefore, a more detailed discussion on this subject needs to be undertaken by the members of a Working Group specifically established for and dedicated to this purpose.

In conclusion, it may be said that the *Fab Hotels & Treebo Case*¹⁴⁴ has ushered in an increased awareness of the significance of CCI’s power to grant interim reliefs, especially for the purpose of maintaining competition in digital markets. Damage to competition in such markets, sans quick intervention, may be irrevocable. Hence there is an urgent need for reforms with respect to the grant of interim injunctions in such newer markets. Such reforms could be in the form of changing the approach towards implementation of the law as discussed, and eventually, in the long term, by changes to the legal framework itself. This shall go a long way in ensuring that interim measures serve as a powerful safeguard against irreparable injury to competition.

¹⁴² See, Market Study on e-Commerce in India (Competition Commission of India) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 7 March 2022.

¹⁴³ See, CLRC Report (n 131) pp 63, 68, 70-72, 101, 128, 140-159.

¹⁴⁴ The *Fab Hotels and Treebo case* (n 1).

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