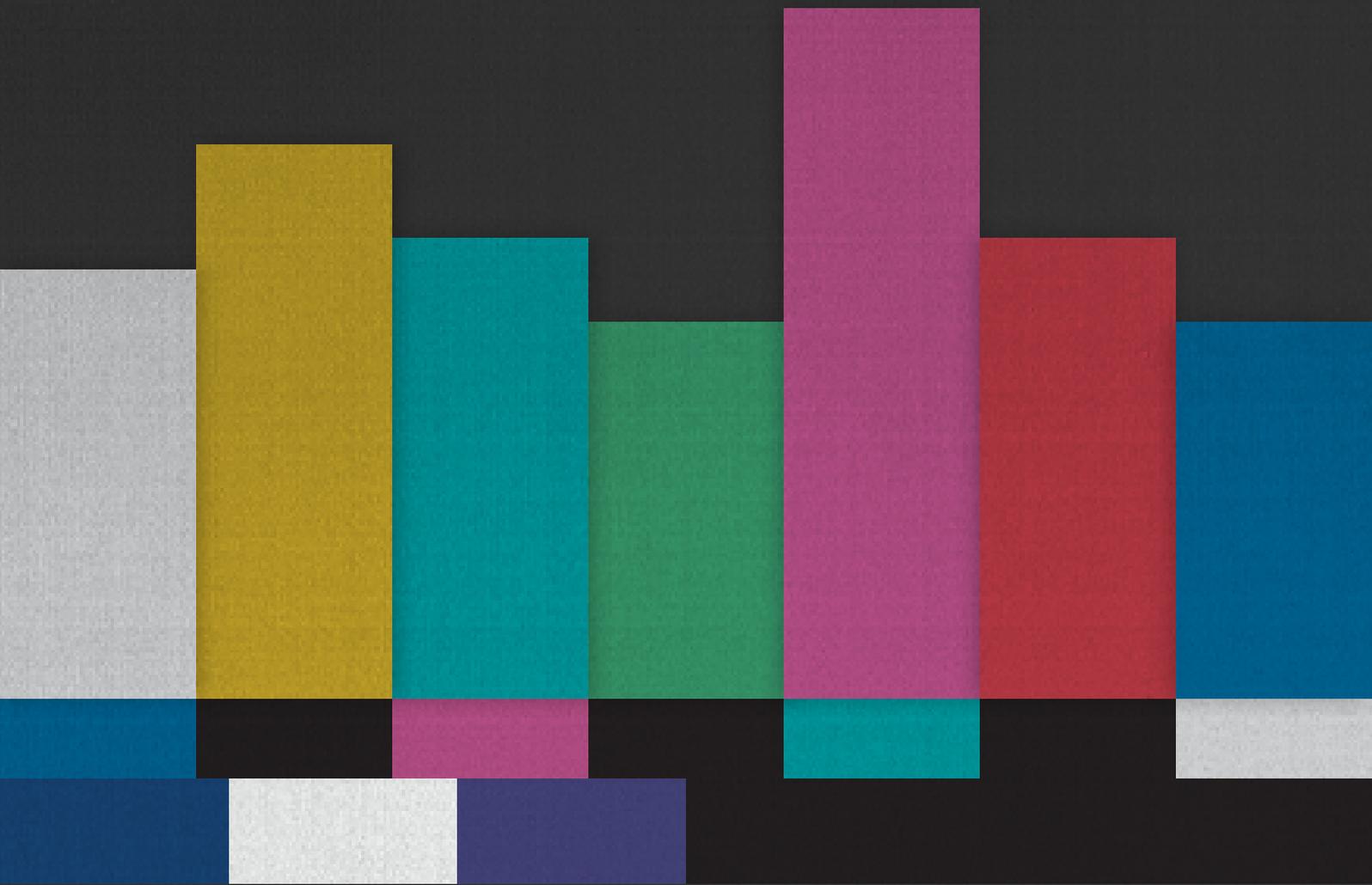




Promoting the Creative Economy: India's USD 100 Billion Imperative



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EXECUTIVE SUMMARY

Creativity is intrinsic to progress. For centuries, authors of creative works have pushed the limits of human ingenuity and innovation, and have consistently defined the boundaries of technological change. This phenomenon has been exemplified by 'convergence' in the broadcasting industry – wherein artists, writers, music composers, directors, and several other creative stakeholders, constituting broadcasting's 'upstream' ecosystem, generate content which is consumed by society through multiple means ranging from television sets to mobile phones. The 'creative economy' defined here as the set of entrepreneurs, small and large businesses that constitute the media and entertainment industry, of which broadcasting is a core pillar, has generated over a million jobs in India, created multi-billion dollar brands, helped preserve cultural diversity, enhanced India's 'soft power' projection abroad, engaged thousands of entrepreneurs, provided platforms for timely dissemination of vital information and news, and has significantly contributed to service sector growth.

India's 'emergence' on the global economic map has been driven in large part by its robust service sector. The service sector also withstood the Global Financial Crisis, a fact acknowledged in India's 2014-15 Economic Survey, indicative of the sector's resilience to the ups and downs of business cycles. However, strong protectionist headwinds now challenge the global economy; which in turn are raising competitiveness concerns domestically. The introductory sections of this report explain this trend and suggest that the creative economy can help India become more resilient to fundamental changes in the global economy, by implementing progressive policies. In fact, there exists sufficient evidence that there is no shortage in the availability of capital, talent, and markets for envisioning a creative economy. An appropriate policy framework can add up-to an additional USD 80 billion annually to the Indian economy, over and above the USD 30 billion or so expected to be added by 2019.

An essential ingredient to meet such a target is a regulatory framework for the creative economy that provides adequate economic incentives and legislative protection while balancing larger public interests of affordable access. Such a regime can unlock the true value and potential of the creative economy.

In this regard, almost half the extant value of the creative economy is generated by the broadcasting industry. While creators contribute to different aspects of television content, 'broadcasting organisations' (BOs) support the creative economy by underwriting content production. They also account for approximately half the economic size and employment generated by the creative economy. Therefore, this report focuses on broadcasting organisations in particular, as the lowest hanging fruit in terms of unlocking value, and future reports will delve deeper into other aspects of the creative industry.

After content is commissioned and created, the broadcasting sector bifurcates with different stakeholders dealing with two distinct aspects - the upstream element of broadcasting which pertains to content creation and the medium of delivery (eg. TV/radio channels) and the downstream wire/wireless network infrastructure which pertains to the carriage of content to the end consumers.

A policy framework aimed at spurring growth in the broadcasting sector must ensure that the structural segregation is reflected in the laws that regulate the different aspects. To this end, existing laws must be reoriented toward creating a conducive ecosystem for economic abundance. Illustratively, the copyright framework grants authors/owners and broadcasting organisations the right to commercial exploitation of their work and signal on reasonable terms, as well as protection against any infringement of the right by unlicensed third parties. This ensures that there is adequate capital available to compensate the creators and workers, the broadcasting organisation gains a return for their investment and channel the capital back for more content creation based on market demand. Indeed, the copyright framework induces a virtuous cycle wherein the sector can grow by responding to the market, and consumers, who comprise the market, can access both, varied and preferred content. It is therefore imperative that the content aspects of broadcasting are administered and adjudicated by the Copyright Act and the Appellate Board respectively.

In this regard, the National Intellectual Property Rights (IPR) Policy, 2016 is a positive step which has opened the discourse

on harmonisation and rationalisation of IPR and India's international obligations, as explained in later sections of this report. The National IPR policy's emphasis on commercialization raises the question of whether India's intellectual property framework adequately recognizes and protects the economic rights of rights holders. In this regard, this report points out that India's Copyright Act provides adequate rights to a range of stakeholders including the author of creative works, performers, and broadcasting organisations.

Importantly, the new IPR policy proposes that since "it is difficult to predict the reach of existing laws in a changing and dynamic knowledge field, it becomes necessary to carry out legislative changes, as may be required from time to time". In response, this report maps various laws and regulations that impact the rights of broadcasting organisations, and that are intrinsic to the 'virtuous cycle' in the creative economy. Illustratively, an amendment in 2004 to the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) categorised "broadcasting and cable services" within the ambit of telecommunication services. Since then, the TRAI has regulated the broadcasting sector, including the upstream aspect, as a telecommunication service. Among other things, this entails the imposition of economic regulations. The Report substantiates on the impact of the extant regime of imposing economic limitations on the upstream players.

Because of extant challenges, which centre on the inability of broadcasting organisations and authors of creative works to monetise their content through subscriptions, parameters such as the ease of doing business and competitiveness are also negatively impacted. This in turn has created a litigious environment, rather than supporting value creation. In India, industry has also failed to build consensus and promote innovative business models and distribution solutions to address extant regulatory challenges. For instance, online video platforms offer consumers access 'anytime, anywhere', whereas broadcast carriage providers seek regulatory arbitrage through protectionist interventions.

While technological progress makes it easier to disseminate content, the cost of generating content that is innovative, competitive and can cater to multiple consumer segments is increasing every year. A discussion in this report on the criticality of content shows that globally, broadcasting organisations that are doing well, derive revenues from *both* subscription and advertising, a substantial portion of which is ploughed back into the creative cycle. Indeed, successful companies must nurture creativity to survive, and the welfare of the consumer and the overall creative economy is closely tied to the need for a supportive domestic regulatory framework that recognizes the criticality of content. Following from this, the report outlines that the current framework for revenue realisation has instead created a vicious cycle, wherein creators have little incentive to produce content. Regulations and lack of industry consensus have created barriers to sampling of niche content, limited consumer access and fostered an ecosystem which is based on a supply led model. The broadcasting market for instance, is dominated by mass content that plays to the lowest common denominator and other content remains underdeveloped. There is little incentive for creators to invest in breakthrough or niche content unlike in foreign jurisdictions, wherein the business risks of investing in such content are justified since the content can be monetised through subscriptions.

The long term sustainability of the creative economy will depend on its ability to address diverse and plural societal demands. Today, the TV market for instance is the second largest in the world, but TV revenues are nominal compared to similarly placed global peers. The penultimate section of the report aims to outline the opportunity costs associated with the existing policy framework. If the creative economy were to contribute 3.7 percent to India's national output, like it does in the US, or 2.2 percent, as it does in the case of some of the largest emerging economies analysed in this report, its size in 2019 would range between USD 65 billion and USD 110 billion. Therefore, this section emphasises that there is a potential USD 35-80 billion opportunity cost to a business-as-usual scenario by 2019. This is on the assumption that India's creative economy has the potential to be at least as competitive as it is in other emerging economies, and that it can certainly aspire to contribute as much to the Indian GDP as the American creative economy does to the US GDP.

So, what should Indian policymakers and industry do to unlock this value creation? In the last section of this report, a comparative analysis of 46 relevant jurisdictions indicates that the India's economic regulation of the creative economy, and broadcasting organisations in particular, is an exception to the rule. Globally, the regulation of broadcasting organisations has been conducted in accordance with an overarching copyright framework; either through a separate regulator that only

administers broadcasting; or by limiting the powers of a 'converged' regulator in charge of both telecom and broadcasting with respect to issues concerning copyright. In contrast the regulatory framework for broadcasting does not succeed in facilitating the legislative intent behind the Copyright Act, instead, it introduces a telecom based regulatory framework onto an IP-centric ecosystem. It is imperative that the government conducts rationalisation exercise in accordance with global best practices, wherein there is clear differentiation between content and carriage regulations. Resolving the regulatory and industry challenges in broadcasting will go a long way towards the realisation of a USD 100 billion creative economy.

In this regard, the Indian Copyright Act, best practices in foreign jurisdictions and international law already provide a way forward – though collective management. Collective management provides ease of doing business, maximizes economic efficiency for all stakeholders in the industry, and aids the regulatory process by ensuring that a suitable body, i.e. the Intellectual Property Appellate Board, oversees the industry and checks any abuse of powers. At the same time, effort must be made to fortify the Digital Rights Management framework to ensure continuous upgradation of industry and regulatory practices. Further research is recommended for maximizing the benefits of the digital economy, in the specific fields of: (i) digital rights management; (ii) new modes of accessing entertainment such as OTT; and (iii) harmonizing India's domestic policy with its evolving positions at international fora such as before the Standing Committee on Copyright and Related Rights at the World Intellectual Property Organisation.

Introduction: services sector and the creative economy

India's 'emergence' on the global economic map has been driven by its robust services sector. Its GDP has grown from a low base, with relatively low levels of capital formation in the pre-liberalisation years, into a US\$ 2 trillion economy today, with high savings and investment rates. Availability of skilled and semi-skilled workers, an entrepreneurial spirit, increasing international linkages and gains in productivity through use of technology have helped fuel the services sector, which has outstripped agricultural and industrial sector growth combined.

However, sustained growth in services over the long term is not inevitable; particularly as exports have been sluggish and trade protectionism is on the rise globally. For example, key service industries such as Information Technology (IT) and Information Technology Enabled Services (ITES) are struggling to cope. The IT and ITES industry body NASSCOM has downgraded its expectations of revenue growth from around 11 percent to closer to 9 percent in 2016-17. Several leading IT and ITES companies have done the same for firm-level performance.¹ This downturn is also reflected in consistent negative returns posted by the National Stock Exchange's benchmark composite index for Indian IT securities (Table 1).

TABLE 1: RETURNS ON NIFTY IT INDEX (NOVEMBER 2016*) | Source: National Stock Exchange, *accessed on 20 November 2016

PERIOD	RETURNS
1 Month	-8.70%
3 Months	-12.10%
6 Months	-14.80%
12 Months	-12.60%
24 Months	-17.70%

Both large and small businesses around the world must continue to achieve efficiencies in production through specialisation – a trend that has accelerated over the past decade despite protectionist headwinds. Technology has enabled businesses to deliver services globally and overcome barriers. Concomitantly, the ability of service industries to continue to embrace specialisation and internationalisation will likely determine the extent of income convergence of India's economy with more developed nations.²

For continued economic growth, India must support inherently resilient and competitive service industries. This report makes the case that the “creative economy”, also popularly referred to as the ‘Media and Entertainment’ industry, constitutes businesses that can sustain the growth of Indian services in the 21st century. It highlights how the creative economy, consisting of artists, musicians, broadcasting organisations, distributors, new media firms and several other stakeholders, form an ecosystem that is poised to grow exponentially, if allowed to. Three prerequisites for unfettered growth – capital, labour and large markets – are already available. A supportive regulatory ecosystem must now be developed to complement these forces and bolster value formation – thereby enabling it to become a USD 100 billion industry from the current USD 20 billion (Illustration 1).



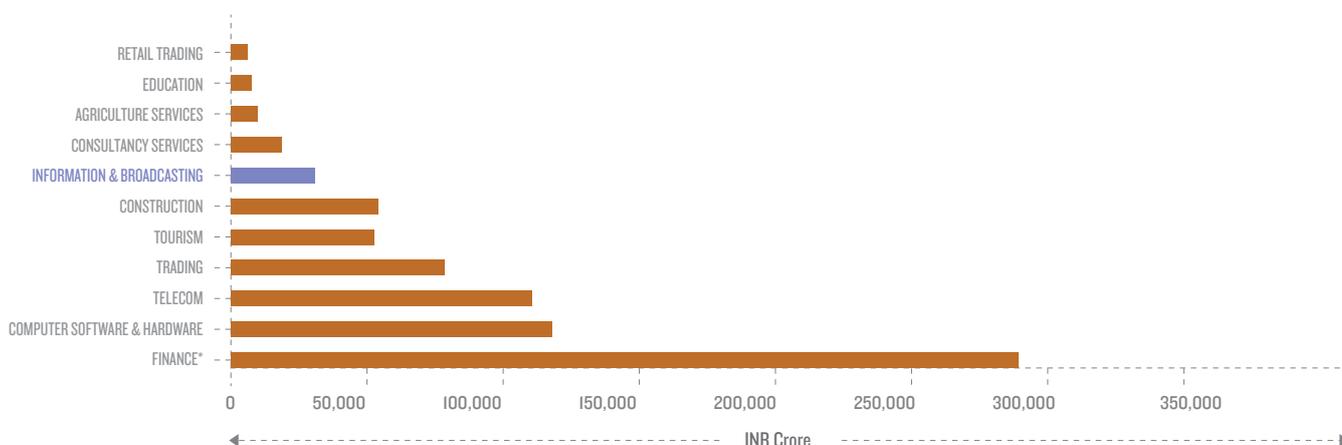
Building blocks of the creative economy

Capital

Though the Indian Government does not estimate disaggregated data³ for service industries because of the prevalence of informal and unorganised agents, foreign direct investment (FDI) data is available for creative industries such as information and broadcasting (I&B), the constituents of which overlap with the media and entertainment industry. The I&B industry has received close to USD 4.7 billion in cumulative FDI in the period between April 2000 and September 2016 (Figure 1). In addition, the telecom industry which has received around USD 17.1 billion over the same period, also complements the expansion of the creative economy, by providing the requisite physical infrastructure for wide dissemination of content.

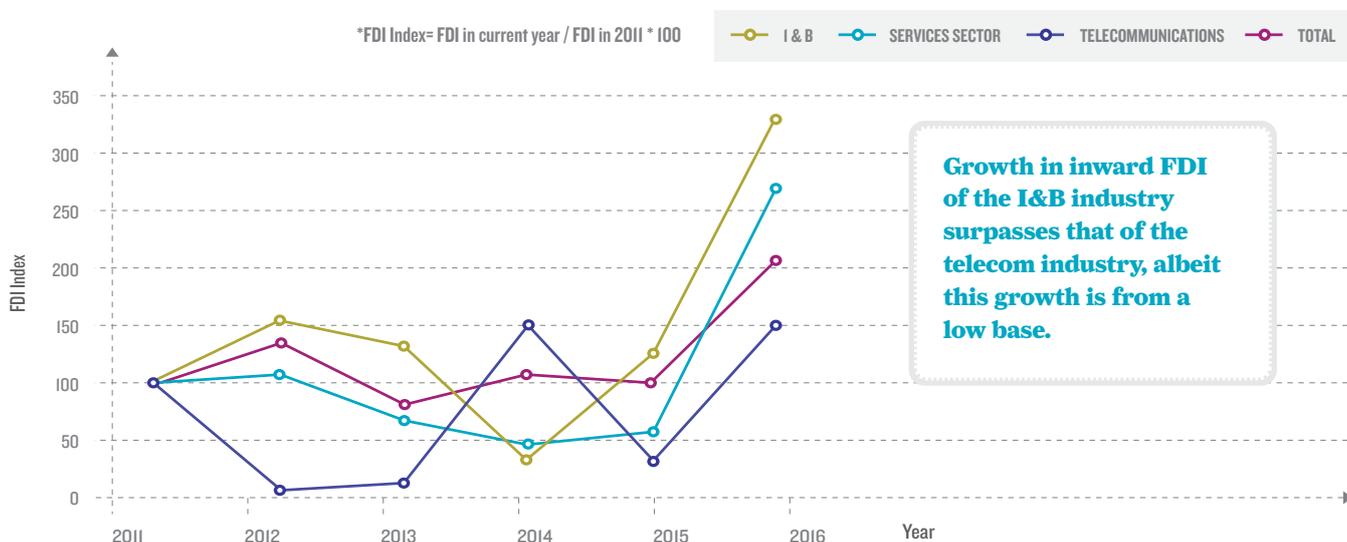
FIGURE 1: CUMULATIVE FDI RECEIVED IN KEY SERVICE INDUSTRIES BETWEEN APRIL 2000 AND SEPTEMBER 2016

Source: Department of Industrial Policy and Promotion, Government of India | * includes Financial, Banking, Insurance, Non-Financial / Business, Outsourcing R&D, Courier



While I&B industry only contributed 1.6% of FDI received by India in this period, the trend in the growth is encouraging. The FDI received by the industry has grown at a compound annual growth rate (CAGR) of 26 percent (Figure 2). The industry clocked a growth rate higher than the overall services sector (Financial, Banking, Insurance, Non-Financial / Business, Outsourcing, R&D, Courier, Tech. Testing and Analysis) and that of the total FDI received by India.

FIGURE 2: YEAR ON YEAR GROWTH IN FDI IN THE I&B SECTOR (BASE YEAR: 2011) | Source: Department of Industrial Policy and Promotion, Government of India

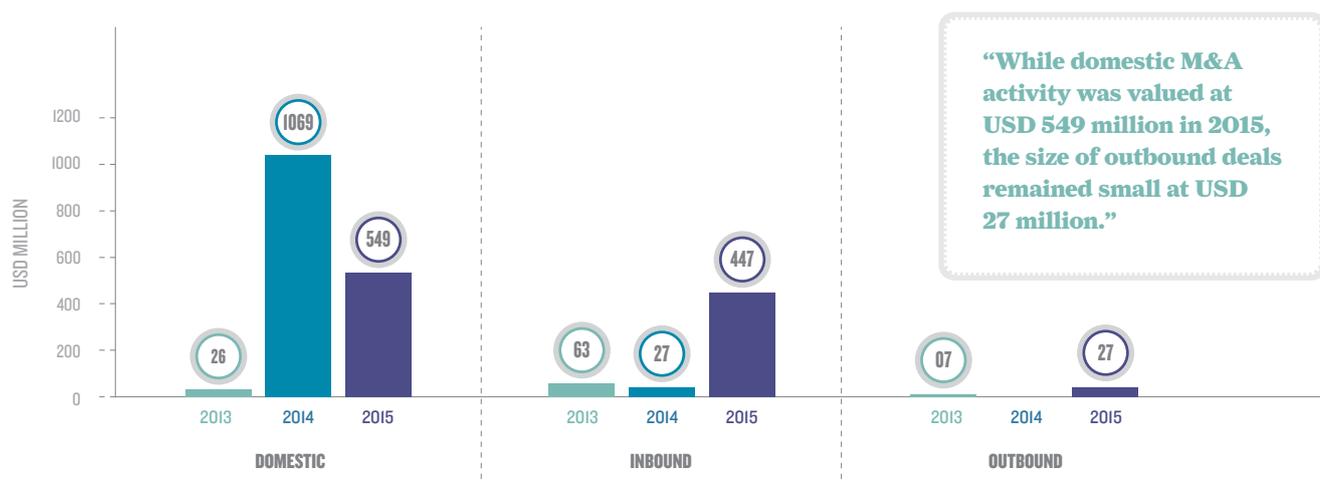


Inward FDI to the creative economy is increasingly aimed at creation of long-lasting value. Although the rapid growth in inward FDI is encouraging, it can be attributed more to a low-base effect, rather than inherent attractiveness of the industry. For a rough comparison, the US creative industry (comprising publishing, motion picture & sound recording, and advertising & related industries) attracted USD 88 billion in inward FDI between 2009-2014 as per government estimatesⁱ.

Trends such as digitisation and the growing importance of specialised content have led to a growing number of inbound mergers and acquisitions (M&A) in recent years (Figure 3). Approximately USD 447 million of inbound M&A deals took place in 2015. Domestically too there has been significant consolidation in the creative economy, which is likely to generate the value required for catalysing more outbound deals.

While domestic M&A activity was valued at around USD 549 million in 2015, the size of outbound deals remained small at around USD 27 million. By way of global comparison, according to UNCTAD, the net cross-border (M&A) purchases by domestic firms in the Arts, Entertainment and Recreation sector was USD 4,923 million in 2014. In other words, India's participation was less than one percent. Forty five percent of Indian M&A activity in 2015 was focussed on 'New Media' – exemplified by digital platforms which allow non-linear and catch-up viewing, leading to a demand for more and better content.

FIGURE 3: VALUE OF MERGERS AND ACQUISITION IN MEDIA AND ENTERTAINMENT (2013 – 2015) | Source: "PE and outbound drive M&A", EY 2016



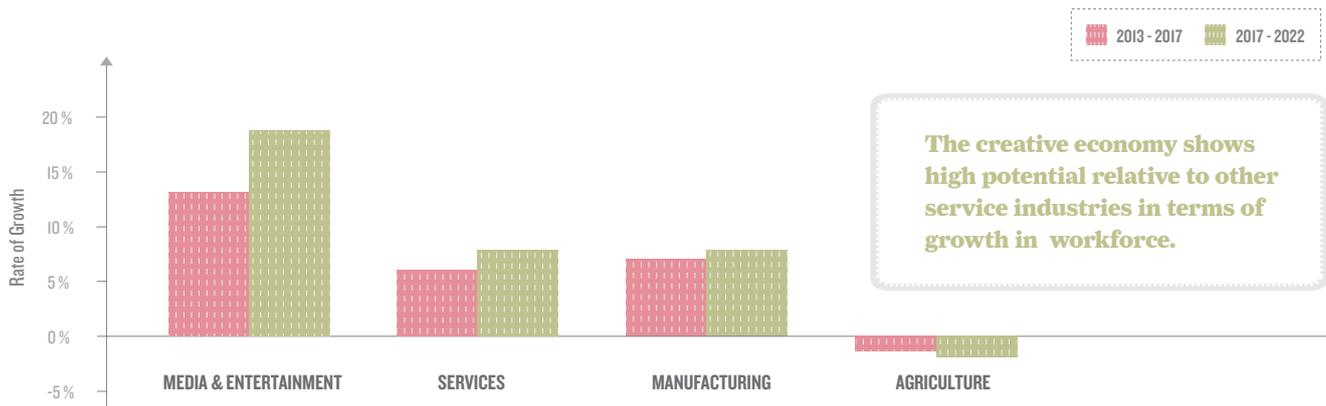
Labour

Every year 12 million people join the Indian workforce, but only 0.55 million jobs are created annually.⁴ The labour force participation rate, at 58 percent, is still not adequate to leverage the demographic dividend which India currently enjoys. In addition, even as there is continuous labour flight from the agriculture sector, the services sector currently accounts for only 29 percent of the workforce, despite contributing 58 percent to the GDP. While the future of productivity and technology remains uncertain, the creative economy has the potential to buck the trend of jobless growth in services.

The creative economy can potentially champion the efforts of the Indian Government in narrowing India's employment gap of 400 million. This is borne out by the I&B industry's consistent outperformance of the services sector in terms of job creation (Figure 4). Being a young industry with almost universal reach, it can rapidly create hundreds of thousands of jobs while still not undermining its capacity to create productive value, as discussed in subsequent sections.

ⁱ For more disaggregated data on US FDI please refer to 'Foreign Direct Investment in the United States, 2016 Report' by the Organization for International Investment.

FIGURE 4: COMPARATIVE WORKFORCE GROWTH | Source: National Skill Development Corporation, Koan Advisory Analysis



The creative economy shows high potential relative to other service industries in terms of growth in workforce.

Assumptions of continued labour growth in the creative economy are not speculative. The creative economy has created more than 650,000 jobs already and is expected to continue to create many more in the future, contingent on a supportive regulatory ecosystem. As per the National Skills Development Council (NSDC), while there is no single comprehensive database of workers in the media and entertainment industry, the total current employment in the industry is estimated to grow at a compound annual growth rate (CAGR) of around 13 percent.⁵ A large part of this growth has so far been driven by the TV or broadcasting industry, which is estimated to employ around 0.24 million workers today. The following table contains conservative projections of workforce growth based on estimated growth rates.

TABLE 2: GROWTH ESTIMATES FOR THE CREATIVE ECONOMY WORKFORCE

Source: National Skill Development Council, Koan Advisory Analysis; *conservative scenario is based on geometric mean

CATEGORY	2013	2014	2015	2016	2017	CAGR	CONSERVATIVE SCENARIO IN 2030
Television	144,600	170,600	201,300	237,600	280,400	18%	2,411,260
Film	160,800	179,300	199,900	222,900	248,600	12%	1,084,764
Digital	8,100	10,600	14,100	18,600	24,500	32%	904,955
Print	62,800	65,700	68,600	71,700	74,900	5%	141,235
Animation	22,100	24,200	26,600	29,200	32,000	10%	110,473
Gaming	17,300	18,700	22,100	23,400	25,300	10%	87,342
Advertising	15,600	17,200	18,900	20,800	23,000	10%	79,402
Radio	23,000	26,400	27,600	28,800	30,000	7%	72,295
OOH	7,600	8,200	8,800	9,400	10,100	7%	24,339
Cumulative	461,900	520,900	587,900	662,400	748,800	13%	3667631

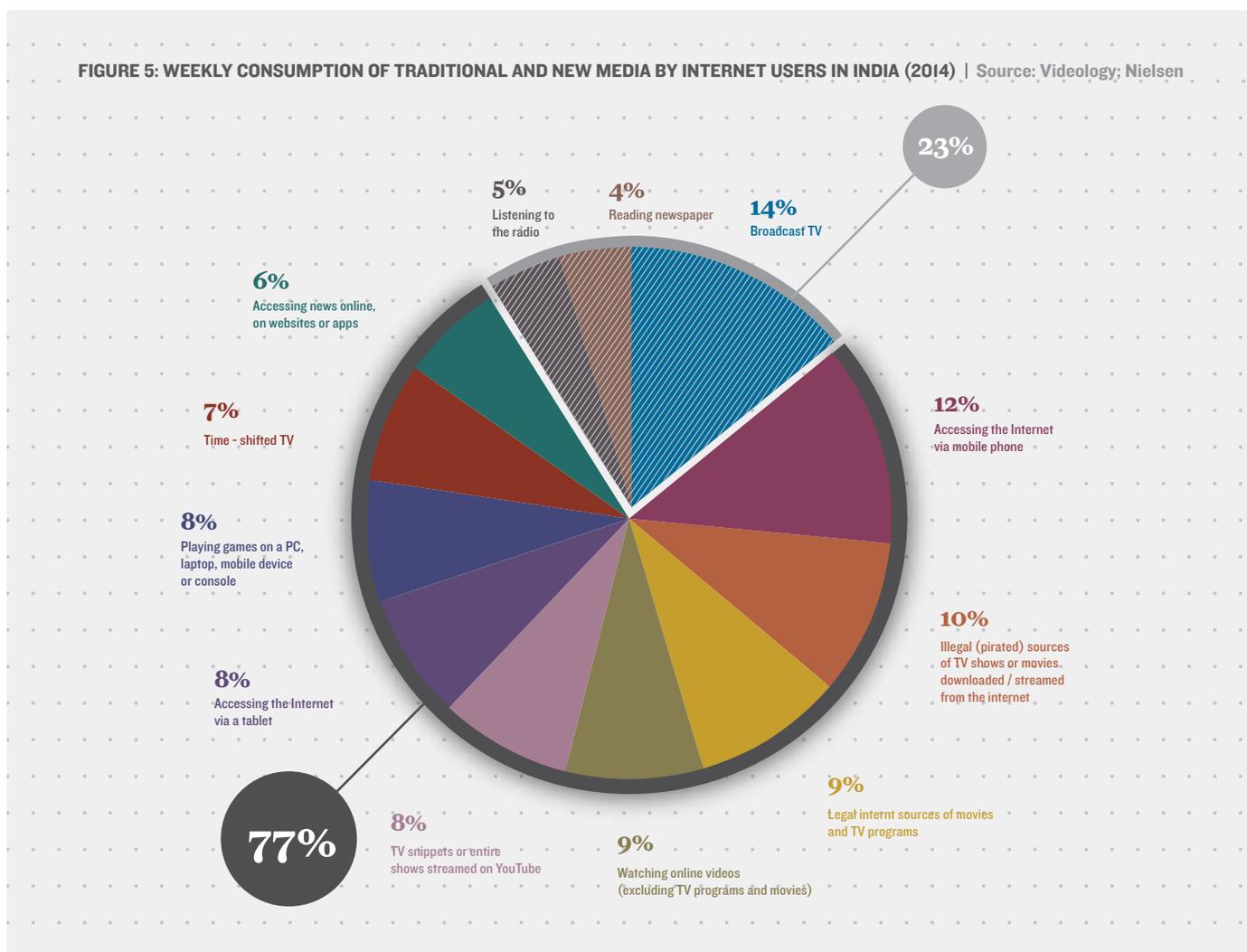
The TV industry (broadcasting) is estimated to employ over 2.4 million persons by 2030, followed by the film industry at around 1 million persons and the digital industry at around 0.9 million persons respectively.

Markets

Large domestic markets tend to help local industries become globally competitive. This effect has been seen in the case of the creative economy in both advanced and emerging economies as discussed in later sections of this report. The same can potentially hold true of India's creative economy, if it can first reach its domestic potential. The consumption of creative content in the form of movies, shows and music has been increasing steadily, bolstered by the rapid adoption of new technology. There are 1.8 televisions per household in India, (second only to China) along with 254.4 million internet subscribers, 93 percent of whom access the internet through mobile devices⁶. In addition there are 243 private FM and 401 All India Radio channels listened to by 49 million households; 1,05,443 newspapers and periodicals are read by 301 million readers; every year 1500-2000 movies get made and 3.3 billion tickets sold.

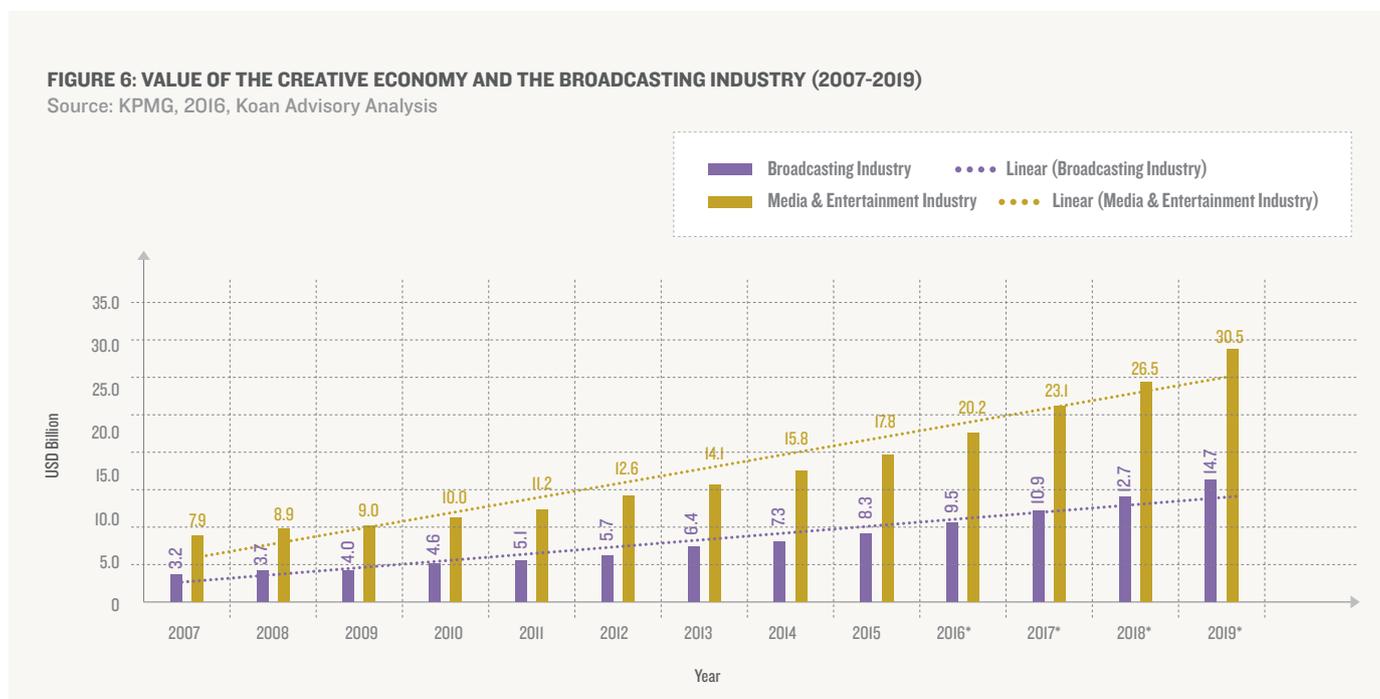
Government initiatives such as "Digital India" also aim at strengthening non-traditional 'access infrastructure' for delivering creative content. For instance, media consumption via internet-based, non-conventional means such as YouTube videos, illegal/pirated TV shows, legally accessed videos and other such means constitute 77 percent of the total weekly media consumption of the average internet-using Indian. Thus, the infrastructure to reach the masses via multiple platforms is rapidly developing, creating a market well placed to consume creative content tailored to the varied tastes and sensibilities of a diverse domestic audience (Figure 5).

However, the content engine to supply the growing consumption has not reached its full potential and is suffering from lack of capital, labor and policy initiative to fill the traditional and digital pipelines. The telecom industry's future depends on the data hungry consumer and from voice and SMS revenues potentially dying out all future bets are being put on demand for video.



Significance of the broadcasting industry

The broadcasting industry accounts for nearly half the size of the creative economy in India. The size of the creative economy is expected to reach the USD 30 billion mark by 2019 in terms of value and about half of this value will accrue from the broadcasting industry (Figure 6); making it an important contributor to the content economy in terms of job creation as well as value generation. This report focuses on the challenges in the broadcasting industry as it has commensurately large impact on other creative industries. Subsequent reports will delve into other industries.



Broadcasting supports thousands of jobs, generates millions of dollars of rupees in economic value, fortifies India's soft power and is one of most competitive and innovative industries in the country. Various technological trends are now reshaping this industry – particularly the 'convergence' of content delivery platforms and telecommunications networks, as described earlier. This convergence is accompanied by an increasing demand for better content. Leading global broadcasting organisations depend on good content to drive revenues. And they price their content as per market forces. Conversely, the Indian broadcasting industry is unable to perform up to its potential because of an inability of BOs to freely price creative content, owing to regulations discussed in subsequent sections; and the spill-over effects the entire creative economy, regardless of the mode of transmission – analog or digital.

Broadcasting organisations extensively support the Indian creative economy by underwriting content production, through procurement of cable and satellite rights as well as through in-house production. The content which BOs procure or produce is protected under the Indian Copyright Act. As holders of copyright and broadcast reproduction rights, BOs are entitled to commercial exploitation of their works and signal, including through assignment and licensing. However, this right has been diluted ever since the telecom regulator's jurisdiction was extended to cover broadcasting services in January, 2004.

The existing regulatory framework for the broadcasting industry is not in consonance with the rights of BOs, and therefore poses a serious challenge to their commercial viability. In this context, two observations may be noted at the outset. Firstly, whereas the primary purpose of IPR is to protect the right holder, this right is balanced with public interest through suitable exceptions recognized under relevant laws. Such exceptions are carved out using domestic and international law. Secondly, international experience indicates that an effectively-designed IP regulatory framework defers to specialized bodies on issues such as copyright, or relies on a coherent separation of regulatory powers between content and carriage.ⁱⁱ In the absence of both, the report examines potential solutions for better regulation of the broadcasting sector, as detailed in subsequent sections:

How content is broadcast

In India, the broadcasting sector is a complex ecosystem that comprises of a range of stakeholders including content creators, broadcasting organisations and broadcasting services, as detailed below (Illustration 2).

Content Creators: Content creators are stakeholders such as writers and performers whose work is protected under the Copyright Act, 1957 and includes broadcasting organisations that create original content.

Prasar Bharati: It is a statutory autonomous body established under the Prasar Bharati Act, 1990. It includes All India Radio and Doordarshan.

Broadcasting Organisations: Broadcasting organisations (BOs) are involved in creating and acquiring content. They have the editorial responsibility of assembling and scheduling content and provide signals either on their own or through a third-party teleport operator. BOs have copyright over their original content and broadcast reproduction right over all the content broadcasted by them. Both these rights are included in the Copyright Act, 1957. BOs are also involved in the generation and limited transmission of content to distributors.

Teleport Operators: Teleport Operators provide infrastructure to broadcasting organisations to uplink their signals to assigned satellites.

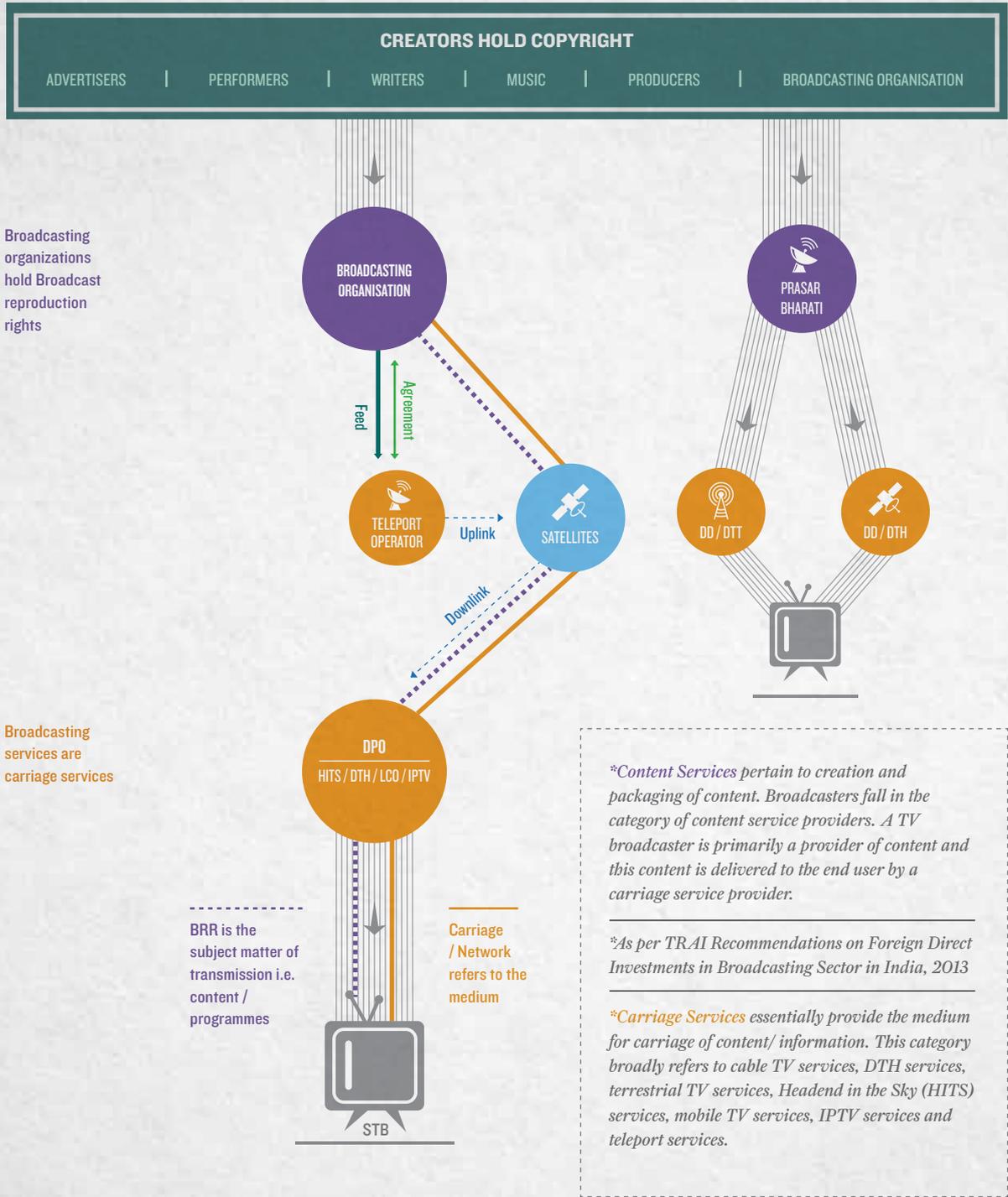
Distribution Platform Operators (DPOs): DPOs provide broadcasting services by distributing channels of Broadcasting Organisations. They downlink the signals at their head-ends using the IRDs provided by the Broadcasting Organisations. The signal is distributed to the end-consumers either through cable or DTH.

Carriage: Used to denote broadcasting services provided by DPOs which retransmit the broadcasting organisations signals. Carriage is regulated by the TRAI.

Content: Used to denote content owned or licensed by broadcasting organisations.

ii. As per the International Telecommunication Union (ITU), convergence is a process by which telecommunications, information technology and the media, sectors that originally operated largely independent of one another, are growing together.

ILLUSTRATION 2: HOW CONTENT IS BROADCAST



Thus, before a TV channel reaches the subscriber, three main stakeholders are involved in different aspects of creation and dissemination, as follows:

- ◆ Content Creators engage in creating different aspects of television content such as the script, music, lyrics and composition. Creators are usually commissioned by producers or production houses in exchange for compensation. Content may also be commissioned directly by broadcasting organisations.
- ◆ Broadcasting Organisations either commission the content directly or acquire it from the producer. Thereafter, BOs have the responsibility of assembling and scheduling content. The BO disseminates the content by uplinking the signal through teleport services. The signal is then downlinked by various distribution platform operators.
- ◆ Distribution Platform Operators collate signals from multiple BOs and retransmit the it to the end consumer. Distribution of television signals in India is done through cable (wire), 'Direct to Home' services, 'Headend in the Sky' and IPTV operators.

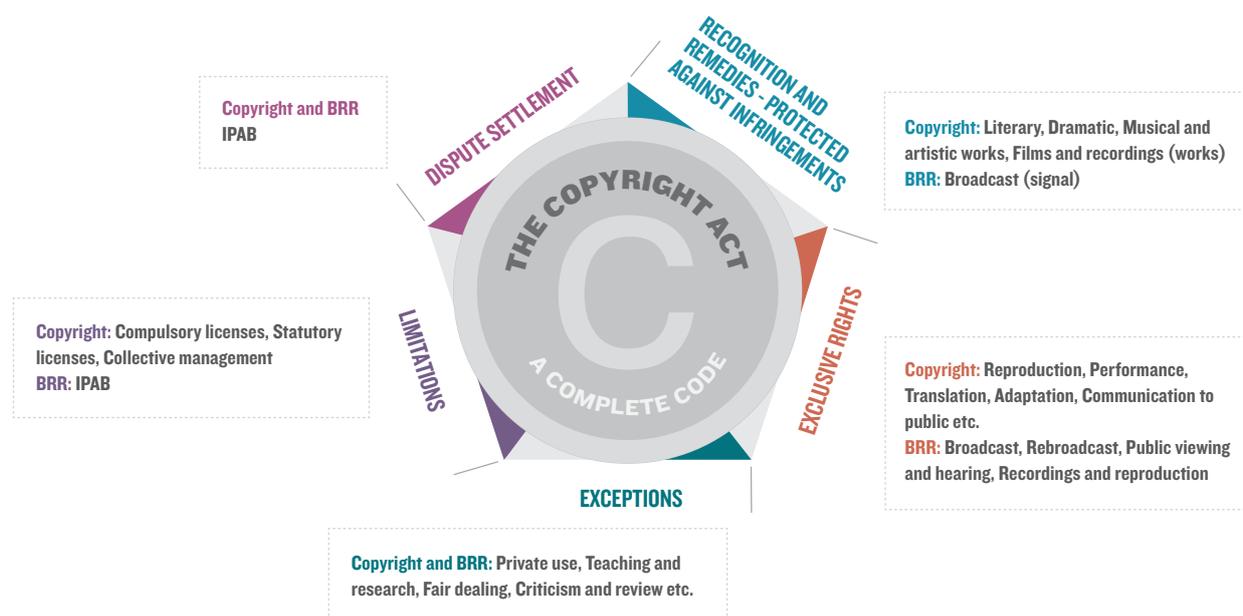
In addition, Prasar Bharti, the autonomous public broadcaster, is both a broadcasting organisation as well as the broadcasting service provider of its channels which reach the subscriber through its terrestrial network and DTH platform.

Relationship between copyright and broadcasting

The Indian Copyright Act provides an extensive and complete code giving economic incentives to creators by protecting their rights over their work – recognized as the creator’s property. Although enacted in 1957, the scope of the Act has expanded with an increasing number of industries falling under its mandate. Today, the Act not only deals with the publishing industry but also encompasses performances, software and computer programmes, photography, sports etc. Specifically, recognizing the importance of the broadcasting industry in supporting creativity and innovation, the Copyright Act was extensively amended in 1994 to include special rights for BOs namely “broadcast reproduction rights”.

The amendment extended various provisions from the copyright framework to broadcasting organisations which now have the right to commercial exploitation of their protected works and signals, including through assignment and licensing, as well as remedies in case of infringement. In 2012, the Act was amended again with the intention of extending additional copyright provisions to BOs. Importantly, this included methods for determining and publishing the tariff scheme and placed BOs under the aegis of the IPAB to settle tariff disputes.

ILLUSTRATION 3: THE COPYRIGHT ACT - A COMPLETE CODE FOR THE CREATIVE INDUSTRY



As it stands today, the Copyright Act provides a full code for the administration of broadcast content including determining the tariff scheme and adjudicating disputes.

Broadcast signals carry copyrighted content or ‘work’⁷, such as cinematograph films and sound recordings, which are protected under Section 13 of the Copyright Act, 1957. Under the Act, a copyright holder has an exclusive right to communicate the signal’s content (film, sound) to the public. Further, broadcasting organisations have a separate and special right over the signal under Section 37 of the Act. This special right - BRR, prohibits unlicensed persons from commercial exploitation of the broadcast; for example hotels providing access to private TV channels for guests in their rooms without license.⁸ Only the copyright holder and broadcasting organisation have the right to commercial exploitation of the protected work and signal, including through assignment and licensing which align with India’s international obligations.

India’s international copyright obligations

Copyright held by ‘authors’⁹ or content creators for their ‘work’ includes the exclusive right to communicate their works to the public through different means such as broadcasting signals, live performances etc.¹⁰ Under the Convention for the Protection of Literary and Artistic Works (“Berne Convention”)¹¹ the right of broadcasting is an exclusive right of authorization given to the copyright holder. However, the creator may transfer an interest in his or her copyright to another person or a third party. This limited transfer of certain rights can be done by licenses, assignment or other methods.¹² Authors who transfer such an interest to a broadcasting organisation are compensated based on mutually established terms as mandated by the copyright framework. For example, the Berne Convention specifies that in every contractual arrangement, the author’s right to equitable remuneration must be respected; and that a competent authority may fix the remuneration only in the absence of an agreement.

The evolution of copyright and related rights in India has followed the development of the international legal framework on copyright and related rights which comprises of various treaties administered by different international organisations. Consequently, retransmission of the works through various distributors of signatory countries should be done after authorization granted by content owners. In India, the broadcasting organisation always owns the signal and also holds the copyright over all original content created by them. Thus, retransmission is necessarily based on mutual agreement between broadcasting organisations and DPOs, in accordance with the Copyright Act. This is also recognized under the Programme Code of India’s Cable Television Network Rules, 1994;ⁱⁱⁱ wherein Rule 6(3) mandates that a programme protected under the Copyright Act cannot be carried on a cable network without the license of the copyright owner.

Copyright ecosystem for broadcasting organisations

INTERNATIONAL	DOMESTIC
<p>World Intellectual Property Organization (WIPO)</p> <p>WIPO is a global forum for intellectual property law and policy with 189 member states. It is a self-funding agency of the United Nations.¹³</p>	<p>Intellectual Property Appellate Board (IPAB), erstwhile Copyright Board</p> <p>Constituted in 1958, the Copyright Board was a statutory body that adjudicated disputes pertaining to the Copyright Act, 1957 such as copyright registration, assignment and licensing. Through the Finance Act, 2017, its functions have been subsumed by the IPAB.¹⁴</p>
<p>World Trade Organization (WTO)</p> <p>The WTO administers and facilitates the negotiation of trade agreements, and serves as a forum for dispute settlement. Created by the Uruguay Round negotiations (1986–94),¹⁵ it has 164 member states.</p>	

iii. While the Cable Television Network Act applies only to cable operators, the Programme Code of the Cable Television Network Rules, 1994 has been extended to broadcasters and all Distribution Platform Operators (“DPOs” such as DTH, IPTV, HITS operators) through the Downlinking Guidelines and License Conditions applicable to broadcasters and DPOs.

India's compliance with international copyright law

ADMINISTERING ORGANISATION	WIPO	WTO
Treaty	<p>Internet Treaties¹⁶</p> <p>WIPO administers the WIPO Copyright Treaty and the Performances and Phonogram Treaty - together known as the "Internet Treaties". Enacted in 1996, the treaties set down international norms to prevent unauthorized access and use of creative works on the Internet and other digital networks. India has not ratified the Internet Treaties, however it is substantially in compliance.</p>	<p>TRIPS Agreement¹⁷</p> <p>Enacted in 1995, the TRIPS Agreement is the most comprehensive multilateral agreement on intellectual property that covers copyright and related rights; trademarks; geographical indications; industrial designs; integrated circuits; and undisclosed information.</p>
Domestic Provision	<p>Performer's Rights</p> <p>Performers who appear or engage in any performance have a special right known as the "performer's right".¹⁸</p>	<p>Broadcast Reproduction Right</p> <p>"Broadcast reproduction right" is a related right akin to copyright given to broadcasting organisations over their signal.¹⁹</p>

The emphasis on commercialization and compliance with international obligations is also found in the new National IPR Policy introduced in 2016. A lauded outcome of the new policy has been the consolidation of various IPR offices under the aegis of the Department of Industrial Policy and Promotion (DIPP). Thus, in recognition of industrial developments and the impact of copyright beyond the realm of education, the erstwhile Copyright Board was shifted from the Ministry of Human Resources and Development to the DIPP. Specifically, the policy has provided much need emphasis on upgrading and rationalizing the extant IPR framework to ensure continued adherence to the highest standards of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and WIPO-administered treaties. The new policy proposes that since "it is difficult to predict the reach of existing laws in a changing and dynamic knowledge field, it becomes necessary to carry out legislative changes, as may be required from time to time. For this purpose, stakeholder consultation shall be done to keep the laws updated in consonance with national needs and priorities".

It further outlines concrete steps to achieve this purpose, including:

- ◆ Review existing IP laws, where necessary, to update and improve them or to remove anomalies and inconsistencies, if any, in consultation with stakeholders;
- ◆ Review and update IP-related rules, guidelines, procedures and practices for clarity, simplification, streamlining, transparency and time-bound processes in administration and enforcement of IP rights.

The policy also calls for identifying areas for future policy development, including:

- ◆ Interplay amongst IP laws; and between IP laws and other laws to remove ambiguities and inconsistencies, if any;
- ◆ Guidelines for authorities whose jurisdictions impact administration or enforcement of IPRs.

Existing international treaties have not defined the term "broadcasting organization" and this omission is also reflected in the Indian Copyright Act. However, the WIPO has clarified its definition in a glossary²⁰ wherein it distinguished between the functions that determine whether a broadcaster is a broadcasting organisation for determining the applicability of related rights.

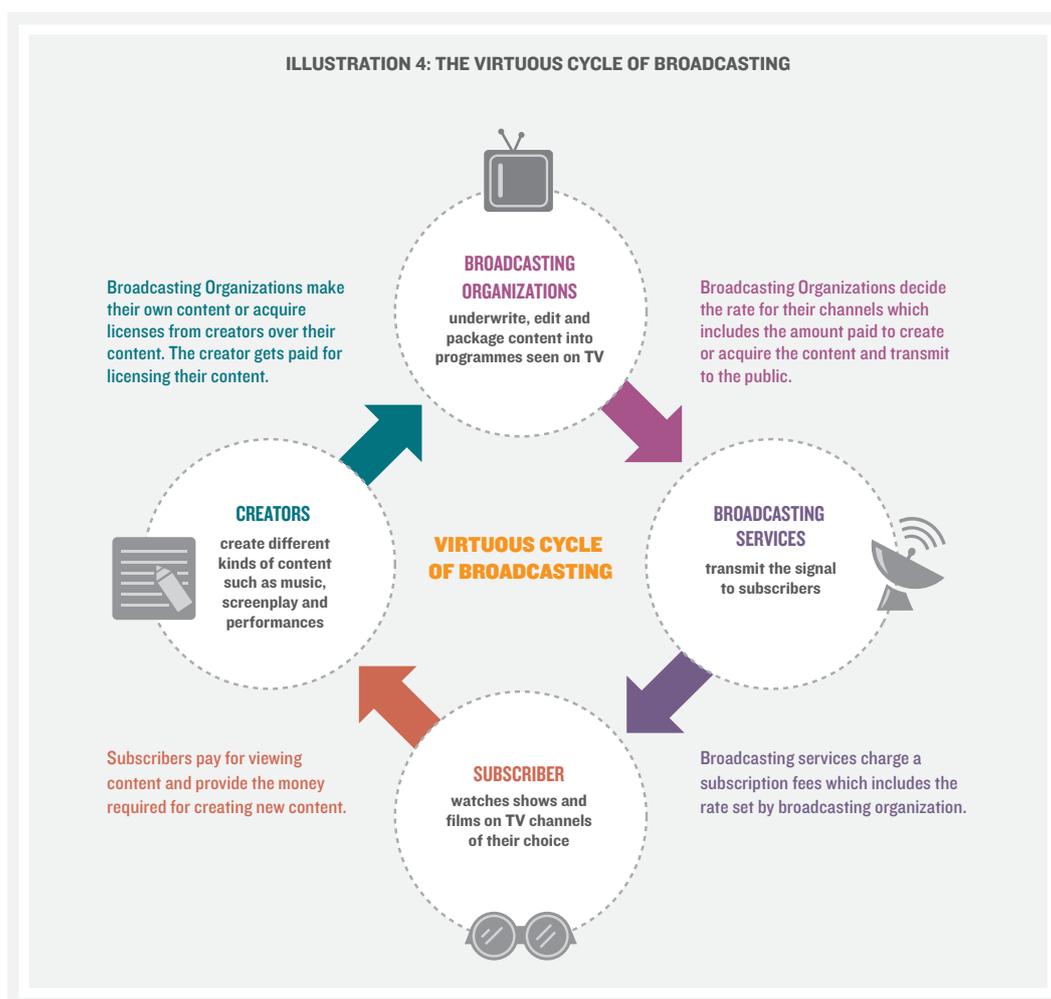
"... the meaning of the term seems self-evident; it may be derived from the concept of "broadcasting": a radio and/or television organization that broadcasts works and objects of related rights. This, implicitly, also includes the activity necessary for the preparation of a broadcast; that is, the assembling and scheduling of the program to be broadcast. On the other hand, the concept does not include those organizations which simply rebroadcast the program of a broadcasting organization thus assembled, scheduled and broadcast." - *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (WIPO Glossary), 2003*

More recently, the Standing Committee on Copyright and Related Rights (SCCR) at WIPO is working on²¹ specific criteria to define a "broadcasting organization".

“the legal entity that takes the initiative and has the editorial responsibility for assembling and scheduling the programme and for broadcasting.” - *Revised Consolidated Text on Definitions, Object of Protection, and Rights to be Granted, SCCR (WIPO), 2016*

The two definitions clarify that related rights of BOs are only applicable to those broadcasters which initiate, edit, assemble and schedule programmes such as TV shows. It also emerges that DPOs are excluded from being BOs as they merely rebroadcast the program of a BO and do not take the initiative or have the editorial responsibility for assembling, scheduling and broadcasting the programme. Instead, DPOs fall under the ambit of ‘broadcasting services’ which are separate and distinct from ‘broadcasting organizations’.

Thus, broadcasting organisations acquire copyrighted content from multiple creators, and package and edit them. For in-house productions such as original TV shows, broadcasting organisations may also hold copyright as the authors. Irrespective of the source of content and in order to protect their investment in its acquisition or creation, broadcasting organisations have broadcast reproduction rights recognized and detailed in the Copyright Act. Among other things, this includes the right to establish tariffs to ensure a return on investment. Tariffs also account for compensation of the creative economy overall (authors, directors, music composers and so on) and ensures availability of funds to underwrite further creation and innovation. The broadcast signal carrying creative content is transmitted to broadcasting services which retransmit it to the public without any alterations, for a subscription fee. This creates a virtuous cycle (Illustration 4) wherein the BO has the ability to create and acquire works by compensating the creator and the subscriber benefits from the availability of a diverse range of television content.



Broadcasting services distinguished from broadcasting organisations

Regulatory Ecosystem for Broadcasting Services

INTERNATIONAL	DOMESTIC
<p>International Telecommunication Union (ITU)</p> <p>The ITU is the specialized United Nations standard-setting body that allocates global radio spectrum and satellite orbits and develops the technical standards for telecommunications. India is a member state of the ITU and TRAI is a member entity.</p>	<p>Telecom Regulatory Authority of India (TRAI)</p> <p>The TRAI is a statutory body that specializes in administering the telecommunications sector. The Authority also regulates broadcasting services.</p>

Apart from developing standards for telecommunications, the ITU also sets standards for “broadcasting services”, defined in the ITU Constitution²². Correspondingly, TRAI was given the additional mandate of regulating broadcasting services in 2004. However, broadcasting services were subsumed under telecommunication services of the Telecom Regulatory Authority Act, 1997 (TRAI Act)²³ without including a separate definition or additional provisions for them. Therefore, “broadcasting services” are understood as “telecommunication services”²⁴ as defined under the TRAI Act. Notably, the definition of “telecommunication service” under the TRAI Act resembles the definition of “telecommunication” under the ITU Constitution. However, since broadcasting services has not been defined under the TRAI Act, the definition of broadcasting services is the same as telecommunications services, creating a deviation from the ITU definition for the former.

DEFINITION UNDER ITU CONSTITUTION	DEFINITION UNDER TRAI ACT AND ORDERS
<p>“Telecommunication: Any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.”</p>	<p>““telecommunication service” means service of any description (including electronic mail, voicemail, data services, audio tex service, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means”</p>
<p>“Broadcasting Service: A radio communication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission”</p>	<p>Broadcasting services and cable services are telecommunications services.^{iv}</p>

Notably, the ITU definition of broadcasting services excludes BOs, as they do not transmit signals directly to the public; and includes DPOs which simply retransmit signals to the public.²⁵ Conversely, in the Indian ecosystem, the economic regulations not only impose limitations on downstream broadcasting services but also on upstream broadcasting organisations (Illustration 5). Such economic limitations hinder the virtuous cycle established by copyright law, thereby deterring the sector from reaching its full potential.²⁶

iv. As per S.O. No. 44(E) issued by TRAI, vide F.No. 13-1/2004

TRAI defines broadcasting services as “the dissemination of any form of communication such as signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly,” as per Section 3 (g) of the Telecommunication (Broadcasting and Cable) Services Tariff Order, 2010

ILLUSTRATION 5: COPYRIGHT ACT VS. ECONOMIC LIMITATIONS



Challenges with the existing regulatory framework

The problems with the existing regulatory framework are two-fold. The first is related to the inability of BOs to avail of the right to monetise and offer content in accordance with market forces; as outlined subsequently. The second is related to a conflict with India's obligations under international law. The Berne Convention, to which India is a party, mandates that any exceptions to copyright law should be subject to a Three Step Test, and as shown subsequently, the extant regime does not pass this test.

Price freezing and manner of offering

When "broadcasting services" were included within the ambit of TRAI's jurisdiction, TRAI issued an interim First Tariff Order dated 15.01.2004 freezing broadcasting tariffs at the rates prevalent at the end of 2003.²⁷ On 1st October 2004, TRAI issued a second Tariff Order which reiterated the ceiling of tariff subject to periodic inflation-linked adjustments. Although the ceiling was first prescribed as an interim measure, the interim tariff for ordinary subscribers has not changed since 2003 barring inflation linked increments.²⁸ Subsequently, TRAI disallowed inflation-linked increments as well,²⁹ thus freezing the ceiling rate from any further change.

In March 2017, TRAI has modified its previous position through its latest tariff and interconnection regulations for the broadcasting sector, namely the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 and The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017.

However, a closer analysis of the economic impact of the new regulations indicates that while the regulations have removed direct ceilings on tariffs, the tariff freeze remains in effect indirectly, as the rates of channels offered individually and offered in a bundle or bouquet have been linked. Thus, a channel may only be bundled with others if priced at INR 19 or below when offered individually; and a bundle of such channels can only be offered with a maximum discount of 15 per cent vis-a-vis their individual rates. In this manner, the latest regime continues to impact the commercialization potential of IPR held by

various stakeholders and may even cause consumers to pay more for bundled channels, that are otherwise offered at heavily discounted rates. Notably, the regulations stand impugned before the Madras High Court, in the matter of Star India Pvt. Ltd. v. TRAI (W.P. 44126-44127/2016), at the time of writing.

On the other hand, the Copyright Act recognizes two exhaustive licensing mechanisms for copyright holders - voluntary and compulsory licensing. A voluntary license contemplates a contractual relationship between two consenting entities (including between the copyright holder and BO; the BO and the DPO; the DPO and subscriber). This includes royalty and other consideration payable which may be revised or terminated on mutual terms. The Act also provides a remedy in case parties cannot reach mutually agreeable terms or if the copyright holder withholds the work from public - through the IPAB which is empowered to adjudicate disputes. It is only when the copyright holder refuses to republish the work or communicate it to the public that compulsory licensing may be resorted to in public interest. Similarly, the Copyright Act and Rules grant the right to determine the tariff of signals to broadcasting organisations. The IPAB is empowered to settle disputes over the tariff decided by broadcasting organisations.

Essentially, TRAI's tariff orders have created economic limitations that do not facilitate the realisation of the purpose behind domestic and international copyright framework.

Conflict with principles of international law

Whereas the primary purpose of copyright is to protect the right of the copyright holder, this right is balanced with public interest through suitable exceptions recognized in domestic and international law. Thus, the Copyright Act provides general exceptions³⁰ such as fair dealing, private use and use for criticism or review as well as specific exceptions for broadcasting organisations.³¹ These exceptions reflect India's obligations under international IPR treaties such as the Berne Convention and TRIPS. Specifically, Article 9 of the Berne Convention outlines a "Three-Step Test" which qualifies the scope of the permissible exceptions to copyright. A similar provision is found under Article 13 of the TRIPS Agreement, entitled "Limitations and Exceptions". However, economic regulations imposed on broadcasting organisations create exceptions beyond the scope of the Copyright Act. Illustratively, the 12th Amendment to TRAI's Second Tariff Order eliminates the difference between ordinary and commercial subscribers by prescribing that the tariff payable by commercial subscribers will be the same as that of ordinary subscriber unless the commercial subscriber specifically charges their guests for the cable services (Illustration 6).

THE THREE STEP TEST

The Three Step Test was explained by the World Trade Organisation (WTO) Dispute Resolution Body¹²

The Three Step Test for Exceptions under the Berne Convention - “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

Commercial Subscriber Exception created by TRAI - ““Commercial subscriber” means a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money to be paid by such person”

1 “CERTAIN SPECIAL CASES”

STEP

EXPLANATION BY WTO

An exception or limitation in national legislation must be: clearly defined; limited in its field of application or exceptional in its scope; and **quantitatively and qualitatively narrow.**

ISSUE WITH TRAI COMMERCIAL SUBSCRIBER EXCEPTION

The scope of the ‘commercial subscriber’ exception creates a superfluous category by excluding all commercial places such as hotels that do not charge separately for providing TV services. Nearly all commercial subscribers include TV viewing charges as a part of the entirety of services provided and do not explicitly charge a separate charge for the same. Any remaining commercial subscribers that were charging separately for TV services can easily circumvent being a commercial subscriber by including any such charge within the final price of overall services provided.

2 “DO NOT CONFLICT WITH A NORMAL EXPLOITATION OF A WORK”

STEP

EXPLANATION BY WTO

‘Exploitation’ refers to the extraction of economic value by rights holders from their works. To avoid conflict with normal exploitation of works exceptions **need to be confined such that they are not in economic competition with normal non-exempted uses.**

ISSUE WITH TRAI COMMERCIAL SUBSCRIBER EXCEPTION

The Interconnection Regulation effectively prohibits broadcasters from extracting economic value from commercial subscribers as they exempt most if not all commercial subscribers.

3 “DO NOT UNREASONABLY PREJUDICE THE LEGITIMATE INTERESTS OF THE AUTHOR”

STEP

EXPLANATION BY WTO

Prejudice to the legitimate interests of right holders is unreasonable if an exception or limitation causes or has the potential to cause an **unreasonable loss of income to the copyright owner.**

ISSUE WITH TRAI COMMERCIAL SUBSCRIBER EXCEPTION

Since most, if not all, commercial subscribers are exempted, irrespective of their revenue and size, broadcasters have lost most, if not all, the income potentially earned from commercial subscriptions.



INDIAN HOTELS

Average cost of room per night: INR 3,275¹³
 Approximate number of rooms: 1,03,000¹⁴
 Occupancy Rate: 61%¹⁵

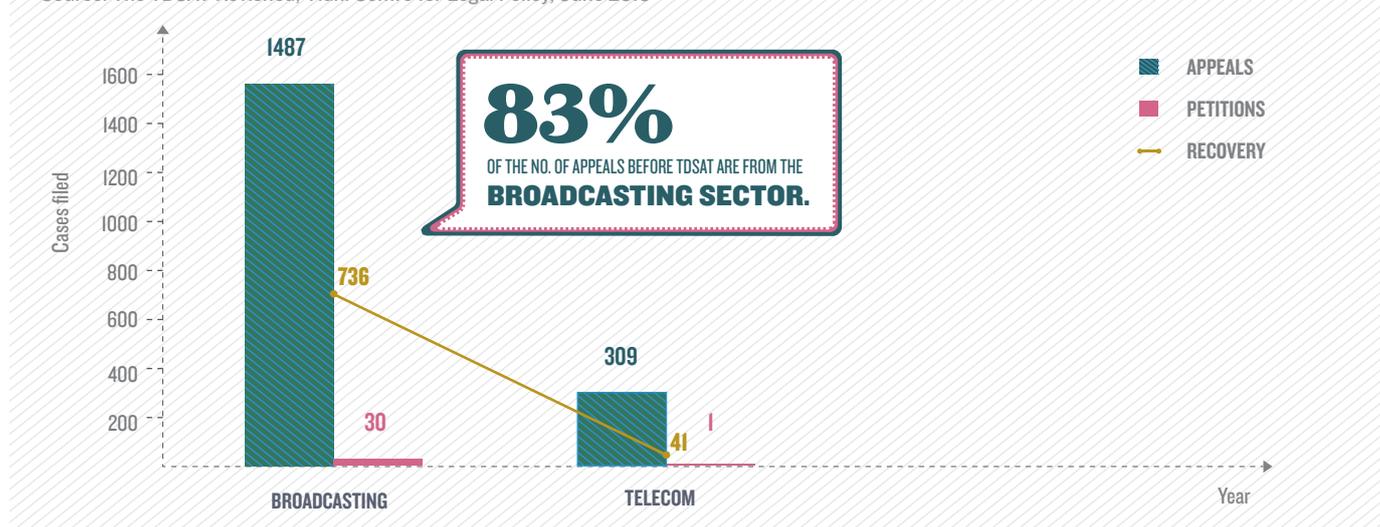
Annual revenue: INR 7,500 crores per year
 Benefit of commercial use to broadcasters: None
 Benefit of exception to public: None

Impact on the ease of doing business

Rather than promoting innovation and facilitating technological development to drive high quality programming and distribution, economic regulations have led industry to seek refuge for resolution of disputes in the judiciary. The multiplicity of proceedings before different courts of law has held back accelerated development of industry. This has created an uncertain business environment for all stakeholders thereby deterring investments and growth of the creative economy. While the World Bank has improved India's ranking in its flagship Ease of Doing Business Index, there is little cause for celebration in the creative economy underpinned by the broadcasting industry. Broadcasting remains encumbered by the quality of judicial process, a key criterion in World Bank's Index.³⁴ The Telecom Disputes Settlement and Appellate Tribunal (TDSAT) was set up as a specialized appellate tribunal to adjudicate on legal issues in the telecommunications services. While its jurisdiction was significantly expanded due to the subsuming of broadcasting regulation under the TRAI in 2004, subsequent judicial pronouncements gradually curtailed its functions. Instructively, a 2013 Supreme Court judgment³⁵ limited its jurisdiction significantly by ruling that the TDSAT merely had the power to adjudicate on directions, decisions and orders of the TRAI and did not have authority over TRAI Regulations such as the Interconnection Regulation.

FIGURE 7: NUMBER OF CASES FILED BEFORE THE TDSAT BETWEEN 17 JUNE 2013 AND 31 MARCH 2016

Source: The TDSAT Revisited, Vidhi Centre for Legal Policy, June 2016



Consequently, the 'TDSAT' lost most of its appellate jurisdiction and had to limit its function to mainly hearing cases pertaining to its original jurisdiction.³⁶ Thus, telecom matters of weighty technical and policy import were once again to be considered by civil courts such as the High Court; despite time consuming procedure and lack of specialized expertise that had led to the institution of the TDSAT in the first place.

“another decision that has seriously affected the TDSAT is the inclusion of broadcasting services as part of TRAI. The regulations and orders concerning broadcasting services needs to be relooked urgently. In 2015, a total of 707 cases were filed, of which 593 cases were from broadcasting services.”

- Justice Aftab Alam, former Chairman, TDSAT³⁷

A study on cases handled by TDSAT between the period of 17 June 2013 and 31 March 2016 indicates that the preponderance of broadcasting petitions as compared to telecom disputes has been a consistent trend over time.³⁸ Moreover, the study indicated that there is a significant proportion of recovery petitions being filed before the TDSAT from the broadcasting sector – 46 per cent of disposed petitions related to recovery of money, 95 per cent of which arose from the broadcasting sector.³⁹ Conversely, the composition of the TRAI and TDSAT remain unaltered despite the introduction of broadcasting within their mandate. Specifically, the requirement that TDSAT members should be experts in the fields of technology, telecommunication, industry, commerce or administration under the TRAI Act was not amended to reflect the new status quo.⁴⁰ Similarly, the TRAI Chairperson and members are required to have special knowledge of telecommunication, industry, finance, accountancy, law, management or consumer affairs without any mention of

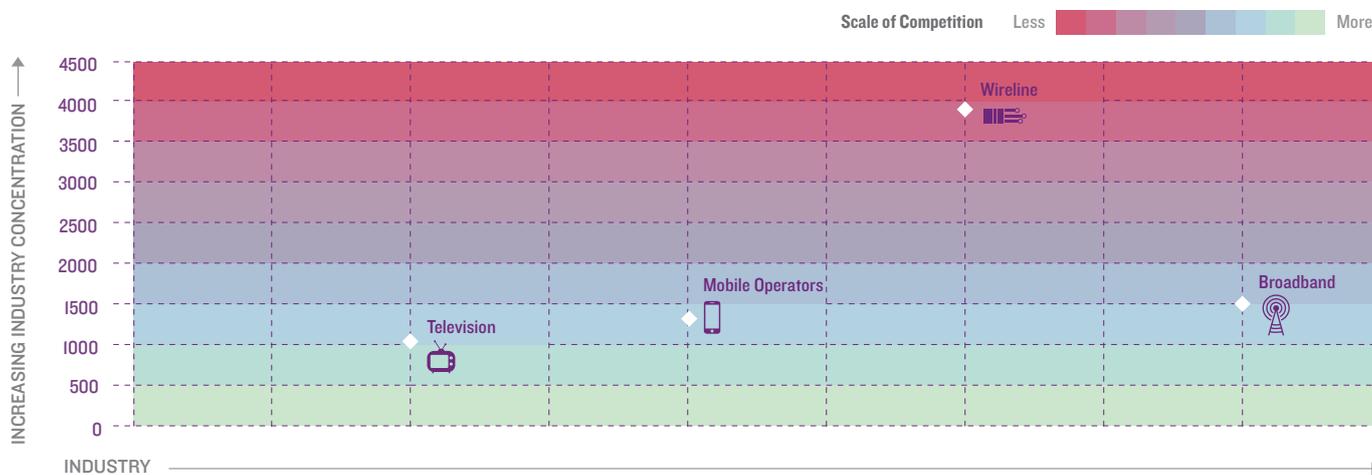
broadcasting.⁴¹ A possible explanation for this oversight may be the legislative intent of assigning broadcasting to TRAI as a temporary measure. As observed by the Delhi High Court in 2008 - “The abiding and enduring intention of the Legislature is that Broadcasting should be monitored by a distinct statute and till such time as that does not happen the TRAI Act would regulate this activity”.⁴² Indeed, the legislature had intended to carve out broadcasting as a separate regulatory realm through multiple bills both prior to and following the 2004 amendment to the TRAI Act. This includes the Broadcasting Bill in 1997 and the Broadcasting Services Regulation Bill in 2006 which proposed the institution of a separate regulatory body – the Broadcasting Regulatory Authority of India (BRAI). However, these were never enacted. Thus, while the industry may approach the TDSAT for petty recovery matters, any weighty broadcasting matter is generally brought before the High Court, thereby defeating the purpose of having a specialized Tribunal.

Two factors further exacerbate the issue: (a) TDSAT’s lack of administrative autonomy that undermines the requisite proportion of increase in staff required vis-à-vis number of cases filed; and (b) the existence of a sole bench at New Delhi which impacts the ability of petitioners in filing matters and respondents in attending hearings.⁴³

State of competition

India has a large broadcasting industry, comprising of over 881 permitted private satellite TV channels which include 281 pay channels owned by 58 BOs.⁴⁴ The Herfindahl-Hirschman Index, used to measure industry concentration (the more concentrated an industry, the less competitive the market), is much lower for the upstream broadcasting industry compared to service industries such as telecommunications (a lower score is better). Though, on the face of it, the content industry appears to be competitive (Figure 8), the natural monopoly at the last mile of delivery creates barriers to entry for content providers. Policymakers must correct the skewed regulatory framework which has enabled this.

FIGURE 8: HERFINDAHL-HIRSCHMAN INDEX: MEASURING INDUSTRY CONCENTRATION | Source: Koan Advisory Analysis



On the other hand, the DPO ecosystem in India is dominated by around 6000 MSO, 60,000 Local Cable Operator (LCOs), and a handful of Direct to Home (DTH), Internet Protocol Television (IPTV) and Headend in the Sky (HITS) providers. While on paper these numbers seem large, there are no restrictions in terms of accumulation of interest in market share. This has led to a situation wherein single entities have control over the market share in various cities, districts and states; “virtually monopolising cable TV distribution” in these markets, so much so that TRAI has issued consultations on this subject.⁴⁵

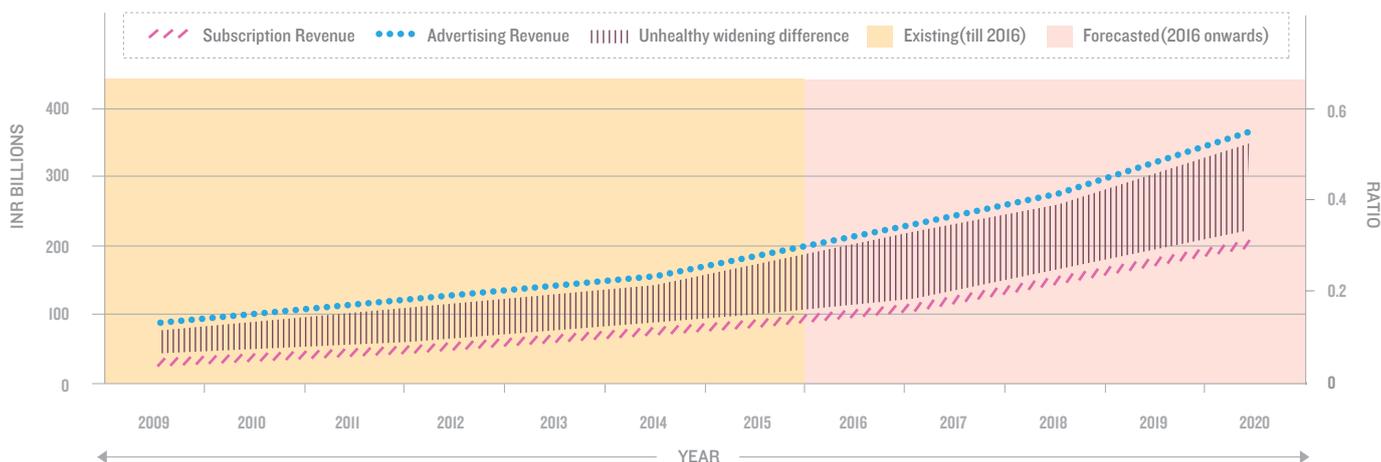
It is useful to note that owing to high chances of monopoly formation in distribution infrastructure, cable distributors have been mandated to share their networks (“unbundling of local loops”) in many international jurisdictions.

Dependence on volatile advertising revenues

Because of extant policies, BOs (and the content creators that they support) are heavily reliant on advertising revenues (Figure 9). While progress in the rollout of Digital Addressable Systems⁴⁶ is expected to buoy subscriber revenue, the lack of pricing flexibility at the wholesale level translates into less than 36 per cent of total revenues accruing from subscribers. At a global level, the reverse holds true – only about a third of revenues to BOs accrue from advertising.⁴⁶

FIGURE 9: BROADCASTING REVENUES THROUGH SUBSCRIPTION AND ADVERTISING YEAR 2009 – YEAR 2020 (PROJECTED)

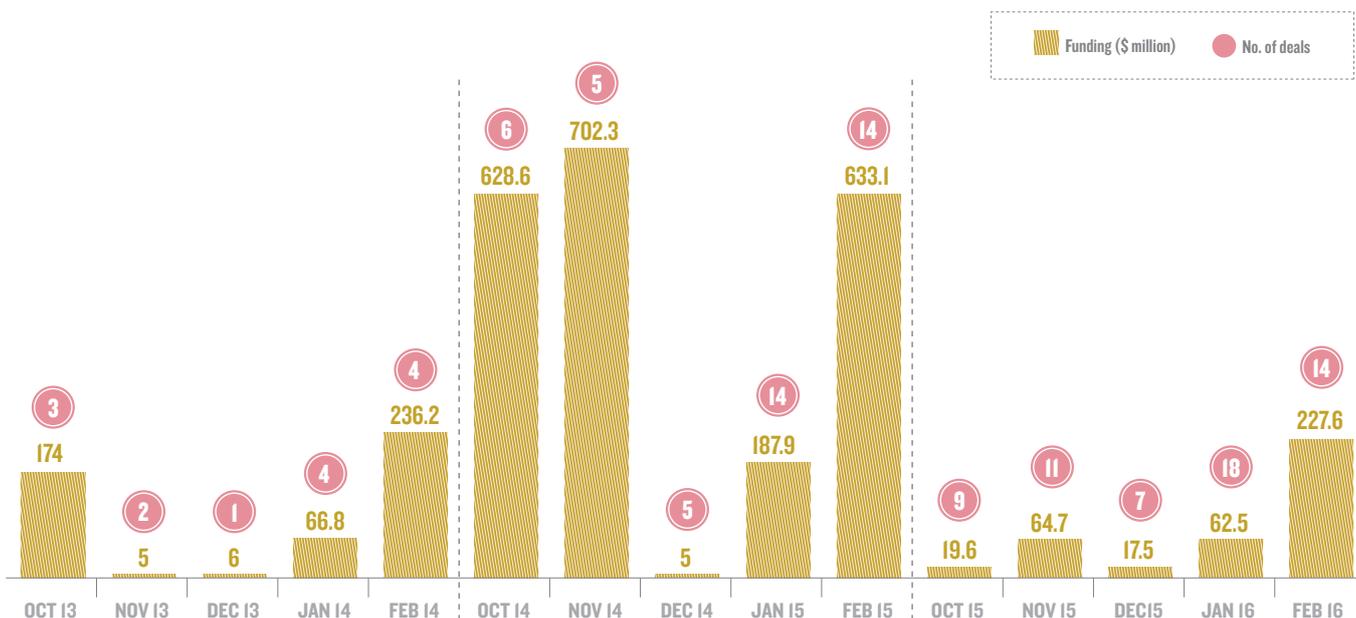
Source: FICCI-KPMG Indian E&M Industry Reports 2009-2016



Advertising revenues have been growing mainly because of digital advertising (Figure 10). Therefore, they can only be expected to keep growing if private consumption in the country continues to be robust despite global headwinds, so that industries such as e-commerce continue to propel digital advertising growth.⁴⁷ In any case, forecasted sustained growth of advertising revenue should not be used to justify restrictive subscription regulations. Illustratively, recent TV advertising numbers suggest slower digital advertising growth is already a reality because of lower than expected advertising expenditure by e-commerce firms in the first half of 2016.⁴⁸ The marketing rivalry between incumbent e-commerce firms, financed by global portfolio flows (Figure 10), is not going to subsidise private consumption in India indefinitely (particularly as interest rates in OECD countries begin to increase, reversing capital flows).

FIGURE 10: SLOWDOWN OF VENTURE CAPITAL FUNDING IN ECOMMERCE | Source: Tracxn

* Excludes logistics, food - tech and cab aggregators | * Jan 2016 numbers exclude ShopClues funding, since numbers were not disclosed



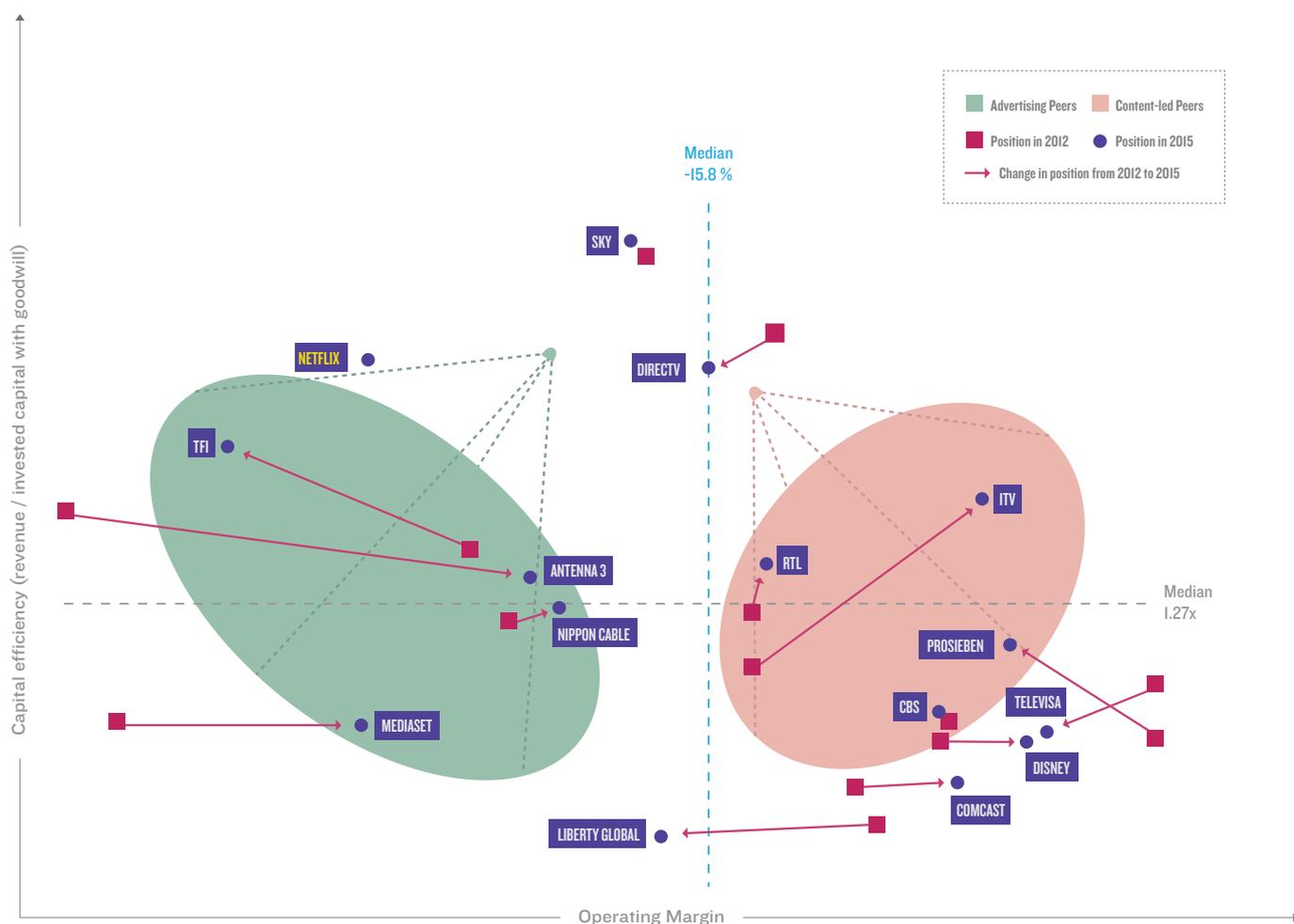
v. A description normally used for a set of hardware devices and connected software used at different stages of distribution of a TV channels through which the channels are transmitted in encrypted form.

Enabling innovative and disruptive content

Nearly 70 per cent households in the country own TVs.⁴⁹ Advertising growth is directly proportional to the reach of channels. The viewership of channels is in turn determined by competitive content. BOs underwrite production of content – commissioned sales account for a bulk of revenues earned by production houses. The criticality of content in driving household reach is also evidenced by the fact that some BOs have begun to use uniform pricing for selling their signals to cable and satellite platforms so that there is price transparency and only user choice determines further pay-outs/incentives. It is also worth noting that leading global BOs have begun to focus on developing better content themselves, for attracting viewership that can in turn justify investments in digital platforms. The recently formed BBC Studios division is an example of a leading broadcaster revisiting its approach to in-house content production.

Moreover, research has found that BOs which earn 20 percent or more of revenue from content production and licensing have outperformed their peers which rely on advertising income alone (Figure 11). As the adjoining graph shows, such firms have achieved higher levels of capital efficiency and larger operating margins.⁵⁰

FIGURE 11: CHANGE IN PROFITABILITY BETWEEN 2012 AND 2015 | Source: The Future of Broadcasting, Accenture, 2016



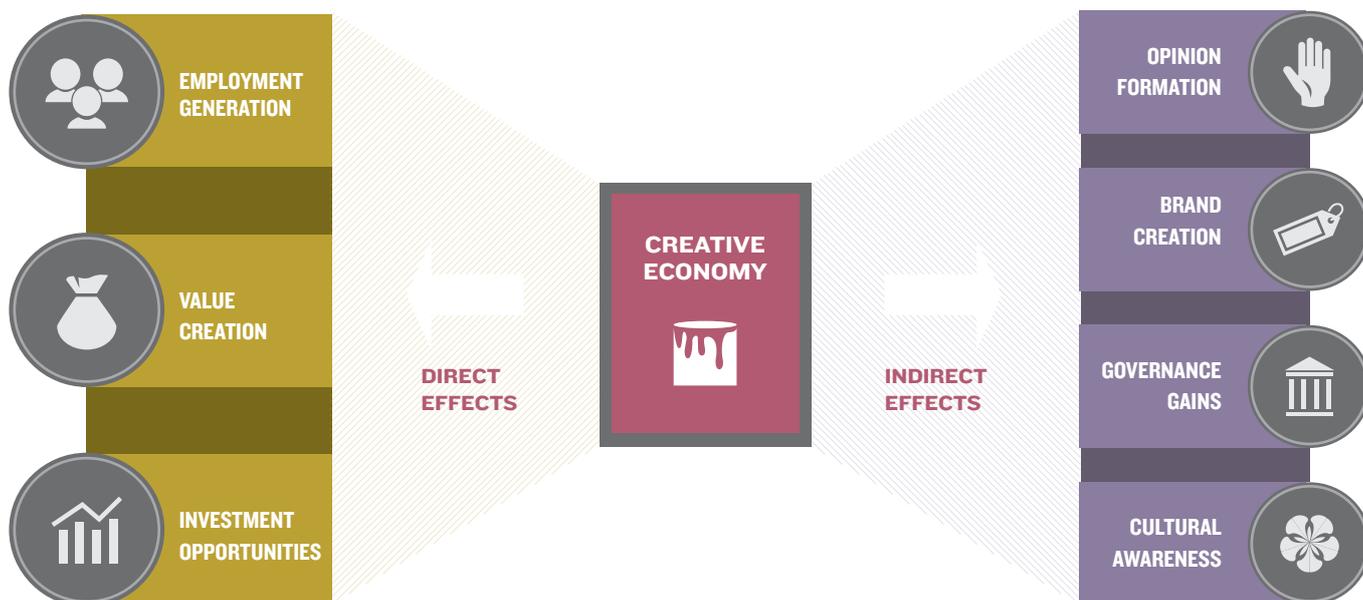
Successful broadcasting companies must nurture creativity to survive. While they drive content, they cannot generate revenues based on market demand in India. Therefore, the welfare of both the consumer and the creative economy is closely tied to the need for a supportive domestic regulatory framework that incentivises innovation and disruption in the content ecosystem.

Systemic benefits

Increasingly, successful content is becoming bimodal – viewership prefers either ‘breakout shows’ or ‘niche’ programming.⁵⁰ While ‘breakout shows’ is an industry-defined term used for cross-genre shows with unusually high ratings, ‘niche programming’ are shows with low ratings but a small and loyal viewership. Considering the rapid growth in subscriptions of mobile wireless data, shifts in patterns of consumption are already taking place; that is, consumers are moving from a “what’s on TV” to a “what do I want to watch?” approach. The global success of subscription-driven digital streaming services like Netflix is a testimony to this change. A demand for flexibility in terms of timing, volume of content, and place of consumption will determine the consumption of media in all forms. Thus creators of niche, segmented content are set to gain since they can ensure that consumer needs for specialized shows are met.

The growth of content industries not only has direct effects on employment generation, economic value and opportunities for investment, it also has spill-over effects on the rest of the economy (Illustration 7). For instance, broadcast content provides economic agents with timely information on prices, products, and trends in various markets. It also acts as a powerful medium for dissemination of vital information such as weather patterns and consumer protection messaging; and in general, reduces the level of economic uncertainty by providing a certain minimum level of information to agents for decision making. Moreover, the potential of content lies not only in its power to cater to consumption trends, but also in its capability to formulate opinions and world views- fulfilling its role as the fourth estate of the democracy. Thus, improved socio-political awareness, a prerequisite to government accountability and responsiveness is a direct result of a diverse and variegated media.

ILLUSTRATION 7: DIRECT AND INDIRECT SYSTEMIC BENEFITS OF THE CREATIVE ECONOMY | Source: Koan Advisory Analysis



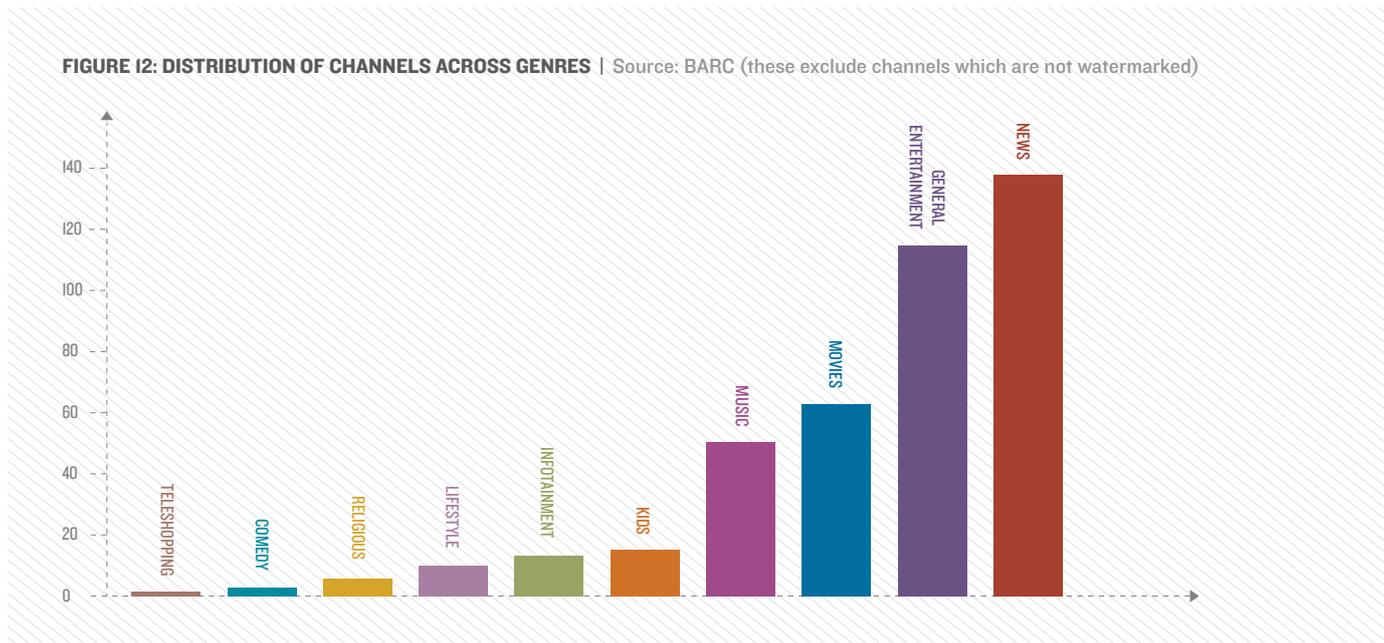
Indian audiences have always preferred to watch horizontally-differentiated content.^{vi} Whether it is the B.R. Chopra directed mythological epic *Mahabharata* which first aired on television in the 1980s; or the Bechdel-test^{vii} passing *Hum Paanch*; or the show that made India go back to books – *Kaun Banega Crorepati*, Indians have always embraced good, thought-provoking content. However, despite the profusion of channels, availability of labour and capital, and a ready viewership, variety in content remains the exception rather than rule.

vi. Horizontally differentiation refers to variety of content. The related term, vertical differentiation, alludes to quality of content, objectively decided by a population.

vii. The Bechdel-test asks whether a work of fiction features at least two women who talk to each other about something other than a man. It is widely considered an informal measure of feminist content.

Absence of major genres

Overall, major genres such as ‘Kids’ programming, ‘Lifestyle’ and several others are grossly underserved, whereas ‘News’ and ‘General Entertainment’ account for more than 60 percent of the channels in India (Figure 12).



In the rural sector, “relevant content” could comprise agriculture, education, health, and science and technology, if BOs could monetise their content better. However, entertainment programming time is four times that of relevant content time, owing to the imperative of getting maximum “eyeballs” in an advertising dependent ecosystem. The latent potential of such relevant and targeted content is evidenced by the early success of *DD Kisan* as well as the ratings of such content, which were often at par with entertainment shows on Doordarshan (DD). Even for entertainment, viewers prefer other channels in General Entertainment or Free-to-Air (FTA) than DD, which consists of dated content from paid GEC channels.

Programming for the youth is also underdeveloped in India because of the lack of a subscription driven monetisation model. As an example, 18-24 year olds in Tier 2 cities are highly passionate about sports and technology. However, sports programming is skewed towards cricket; and technology as a theme for content creation has been negligibly explored.⁵² Women remain the focal point of content supply in the TV industry; which in turn has sparked a ‘copycat’ effect with BOs relying on soap operas as a formula for garnering maximum eyeballs. And while men above the age of 15 (approx. 70% of male population) have a higher affinity for genres such as mythology, history, horror, thriller and reality TV, the entire share of content of these themes is only 12 percent.⁵³

TABLE 3: CHANNEL AVAILABILITY FOR LINGUISTIC GROUPS

Source: BARC (these exclude channels which are not watermarked)

LANGUAGE	NO. OF SPEAKERS	NO. OF CHANNELS PER MILLION SPEAKERS
Assamese	1,31,68,484	0.84
Malayalam	3,30,66,392	0.79
Tamil	6,07,93,814	0.69
Kannada	3,79,24,011	0.58
Telugu	7,40,02,856	0.54
Oriya	3,30,17,446	0.42
Bhojpuri	3,30,99,497	0.39
Punjabi	2,91,02,477	0.31
Bengali	8,33,69,769	0.28
Hindi	42,20,48,642	0.27
Marathi	7,19,36,894	0.19
Gujarati	4,60,91,617	0.15
Haryana	79,97,192	0.13
Rajasthan	1,83,55,613	0.11
Urdu	5,15,36,111	0.02

Exclusion of linguistic groups

There is clear north-south divide for channel availability. Generally, speakers of the Tamil, Telugu, Malayalam and Kannada enjoy greater channel penetration. Linguistic groups such as Urdu-speakers, or Rajasthani speakers have a below average availability of channels (Table 3 & 4). Even within highly penetrated linguistic groups, there is still much to be achieved in terms of variety. As seen in Table 4 below, there is a proliferation of genres only among Hindi, English and Telegu channels. Most genres and linguistic groups have large unmet demand or low intra-genre competition

TABLE 4: GENRE AVAILABILITY WITHIN LINGUISTIC GROUPS | Source: BARC, Koan Advisory Analysis

NUMBER OF CHANNELS 0  50

LANGUAGE / GENRE	COMEDY	GEC	INFO	KIDS	LIFESTYLE	MOVIES	MUSIC	NEWS	RELIGIOUS	TELESHOP
Telugu	1	7	0	1	2	5	3	18	3	0
Tamil	0	16	1	2	1	7	8	7	0	0
Punjabi	0	3	0	0	0	0	3	2	1	0
Oriya	0	5	0	0	0	1	1	7	0	0
Malayalam	0	9	0	1	0	4	4	7	1	0
Kannada	1	7	0	1	0	2	2	9	0	0
Hindi	0	24	0	4	0	21	20	42	1	1
English	0	7	10	6	7	13	2	16	0	0
Bhojpuri	0	6	0	0	0	3	1	3	0	0
Bengali	0	8	1	0	0	4	3	7	0	0
Assamese	0	5	1	0	0	0	1	4	0	0

The social and reformative value of television programming in a young, heterogeneous and aspirational society cannot be understated. This has been acknowledged by India’s Supreme Court in a 1995 judgement: “The right to impart and receive information is a species of the right to freedom of speech and expression guaranteed by Article 19 (1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.”

At the same time, for the creative potential of an increasingly globalised workforce to be unleashed, it is paramount that content creation be freed from economic regulations restricting pricing and access.

Creating successful content

The root cause of lack of variegated content is underdeveloped means of monetisation owing to an inability to generate subscription revenues determined by markets. It will be useful here to borrow an academic description of how industry revenues are structured: **“In the case of advertiser support, programs are supplied free of direct charge to the audience. The audience in turn is sold wholesale to advertisers who seek, by attachment of their messages to the programs, to inform or persuade consumers in regard to their products and services. The ultimate incidence of payment depends upon the extent to which advertising costs can be passed on in product prices to consumers of the advertised goods and services.”**⁵⁴

The predominance of advertising revenues for financing has led to poorer outcomes in the array of offerings in TV broadcasts. The Principle of Minimal Differentiation states that in the absence of price competition, firms will ‘go where the demand is’⁵⁵, which in the broadcasting industry is towards family-focused dramas. Even though the top-rated show

currently is a supernatural thriller, soap operas monopolise the market in terms of programme time, both at the national and regional level. Moreover, copycat shows fragment viewership, driving producers towards content that is considered ‘safe’ rather than innovative. The top 5 shows presently have a TVR^{viii} between 2-3, compared to the early 2000s when top shows commanded viewership ratings as high as 7 (Table 5).

TABLE 5: VIEWERSHIP FOR TOP 5 SHOWS(TVR) | Source: BARC (Week 43-46, 2016)

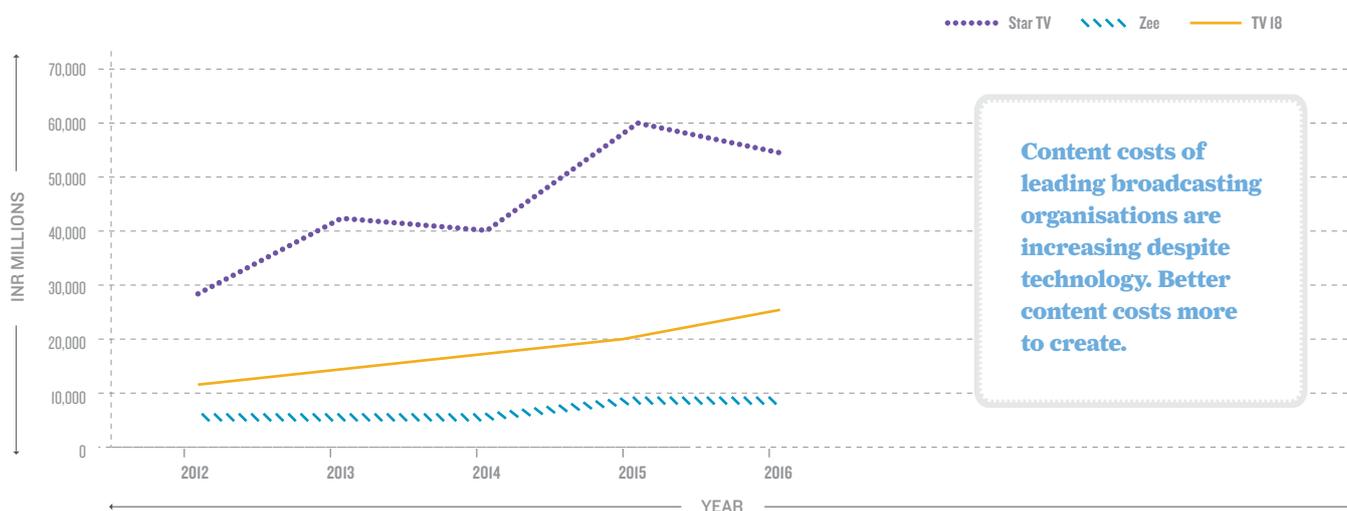
SHOW	CHANNEL	GENRE	HSM U + R ^{ix}
Naagin 2	Colors	Drama / Soap	2.9
Shakti - Astitva Ke Ehsaas Ka	Colors	Drama / Soap	2.4
Kumkum Bhagya	Zee TV	Drama / Soap	2.3
Ye Hai Mohabbatein	STAR Plus	Drama / Soap	2.1
Saathiya Saath Nibhana	STAR Plus	Drama / Soap	2.0

The cost of producing ‘breakout’ shows such as Naagin can be 2X to 3X of the usual formulaic, script-light shows. This includes the cost of shooting outdoors, which can be 1.5X to 2X more than set-based serials; 2.5X to 4X in terms of the costs incurred on location and utilities and as much as 7X the food and beverage and transport costs. Break-out shows also support a wider ecosystem of experts – art designers, make-up artists, costume designers – besides having many more VFX designers and editors, all of which contributes to a substantive production cost. Thus, while it pays to invest in production costs to develop breakout shows, there is a high-risk to doing so in the Indian market given that market revenues are throttled by policies. Niche content also adds to employment generation disproportionately, creating a positive externality in the process.

COSTS IN BREAKOUT SHOWS VS. FORMULAIC SHOWS	COST COMPONENT
1.5X - 2X	Duration of Outdoor Shooting
2.5X - 4X	Cost of Location and Utilities
7X	Cost of F&B and Transport

A report by the BBC summarizes the conundrum between the deflation of variable costs driven by digitization and the increasing trend of fixed costs in creating differentiated content: “Many argue that new technology is lowering entry costs (in particular, equipment costs) and therefore the broadcasting market will become more competitive. However, the fixed costs of transmission are likely to be large and, more importantly, for quality programming the real cost of talent and desirable content is rising quickly.”⁵⁶ A summary of increasing content costs paid out by some of India’s leading BOs is provided in Figure 13.

FIGURE 13: CONTENT COSTS OF LEADING BROADCASTERS | Source: Koan Advisory Analysis



Content costs of leading broadcasting organisations are increasing despite technology. Better content costs more to create.

viii. TVR or TV Rating is the given percentage of the base population watching a certain show, where the base is defined as a given target audience in a given TV region or area.
ix. Hindi Speaking Market, Rural + Urban

The skewed nature of the broadcasting value chain will keep choking revenues accruing to the creative economy. This challenge is apparent in the distribution of advertisement and subscription revenues among stakeholders – content creators, BOs, and distributors (Figure 14). As much as 80 percent of subscription revenue collected is appropriated by analog and digital ‘carriers’, rather than accruing to the industries responsible for content generation. Even though the share of total revenue which resides with BOs and content creators is almost equal, BOs must further pay ‘carriage fee’ to DPOs. Subsequently, distributors account for 49 percent of the net revenues, while content creators only receive 26 percent. This is contrary to global averages, wherein almost 70 percent of revenues are channelled back to the creative economy, thus spurring greater innovation and variety (Figure 15).

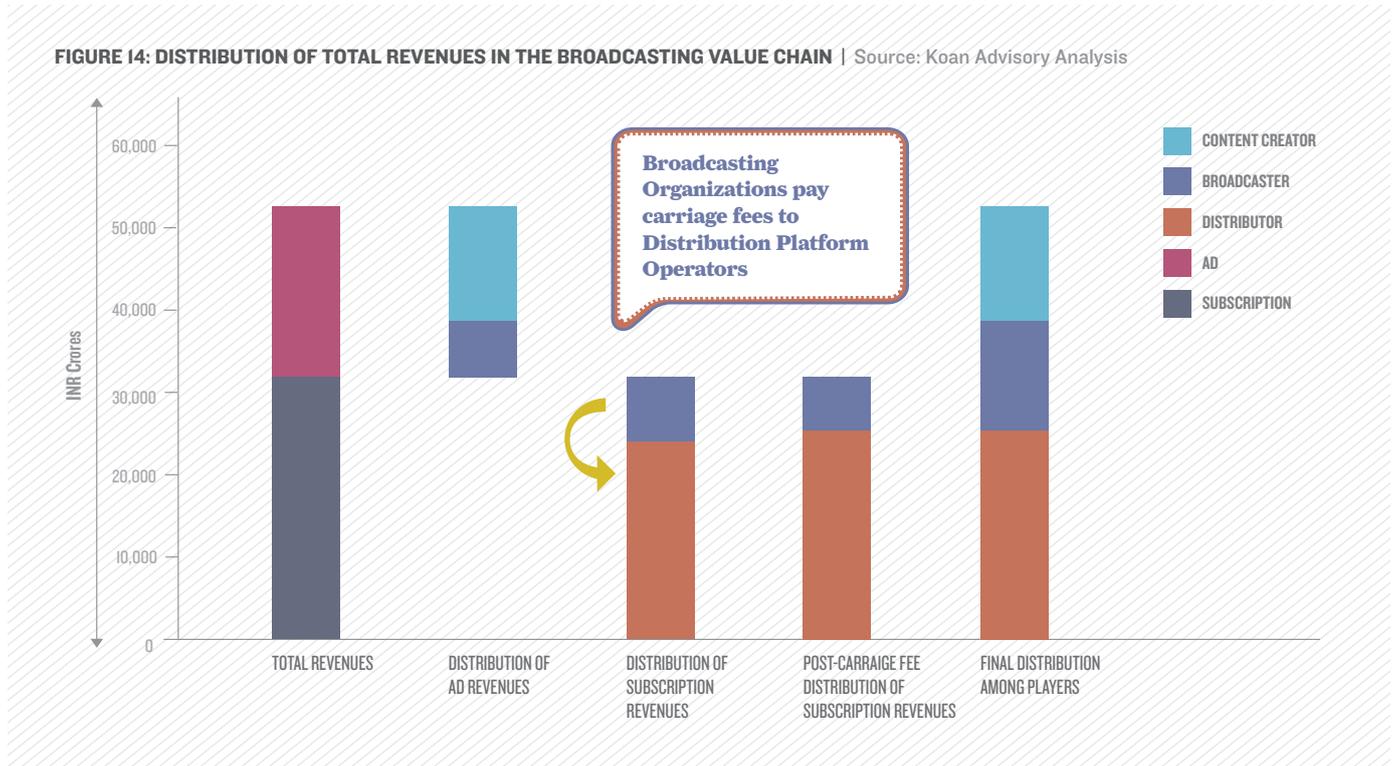
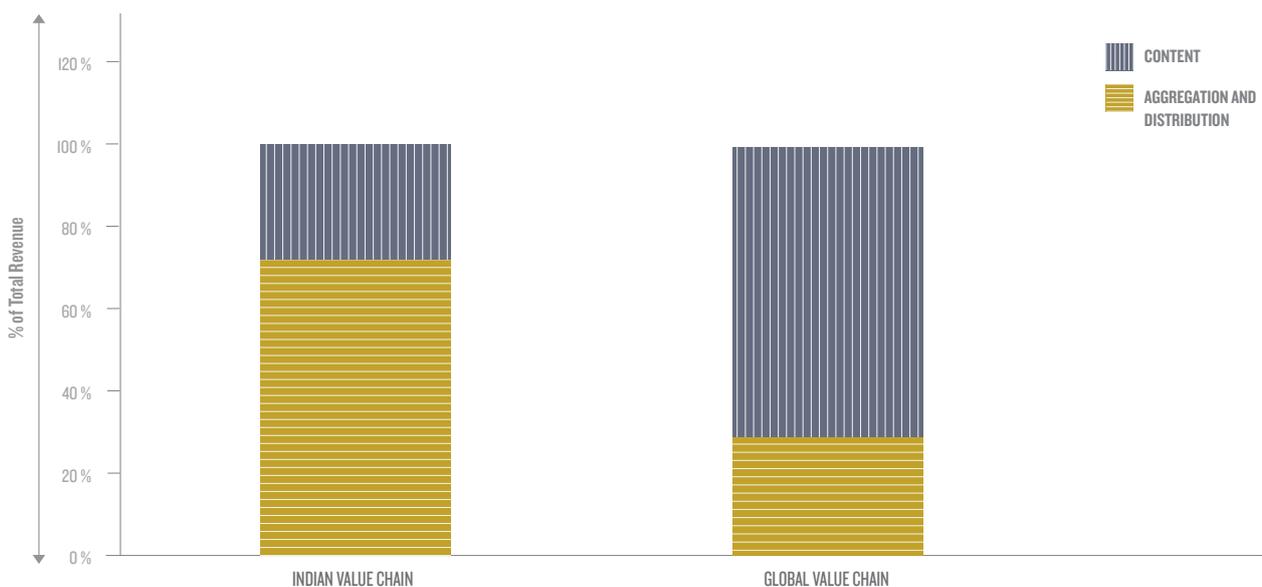
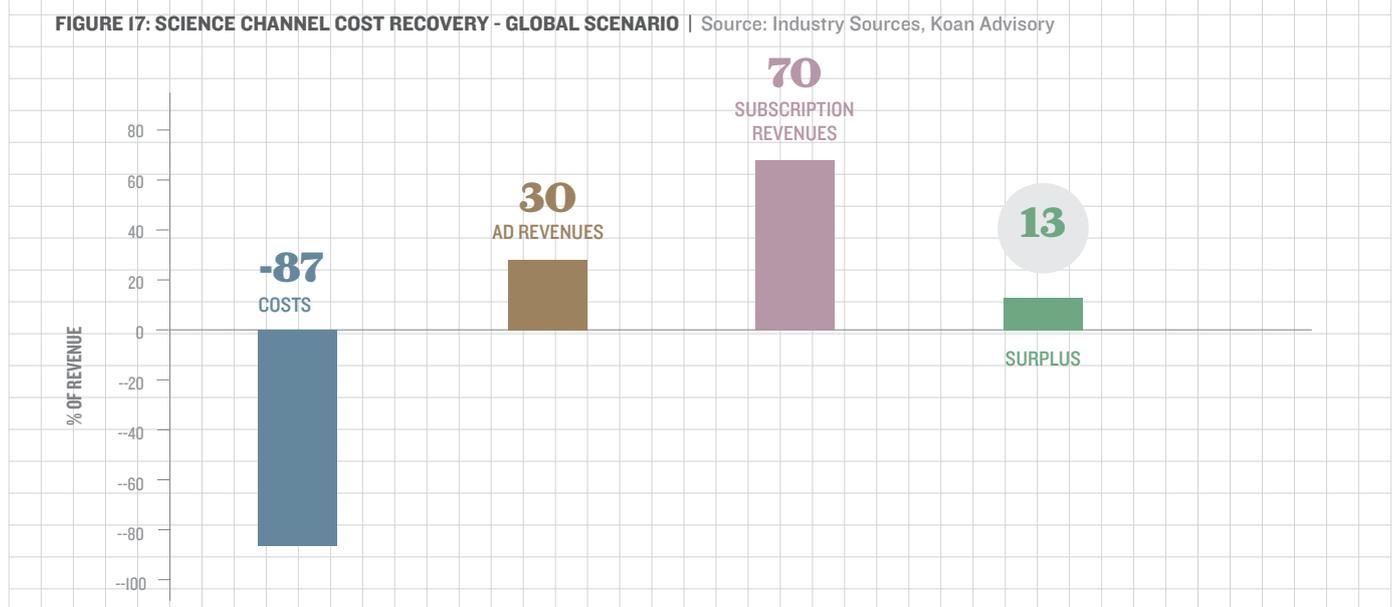
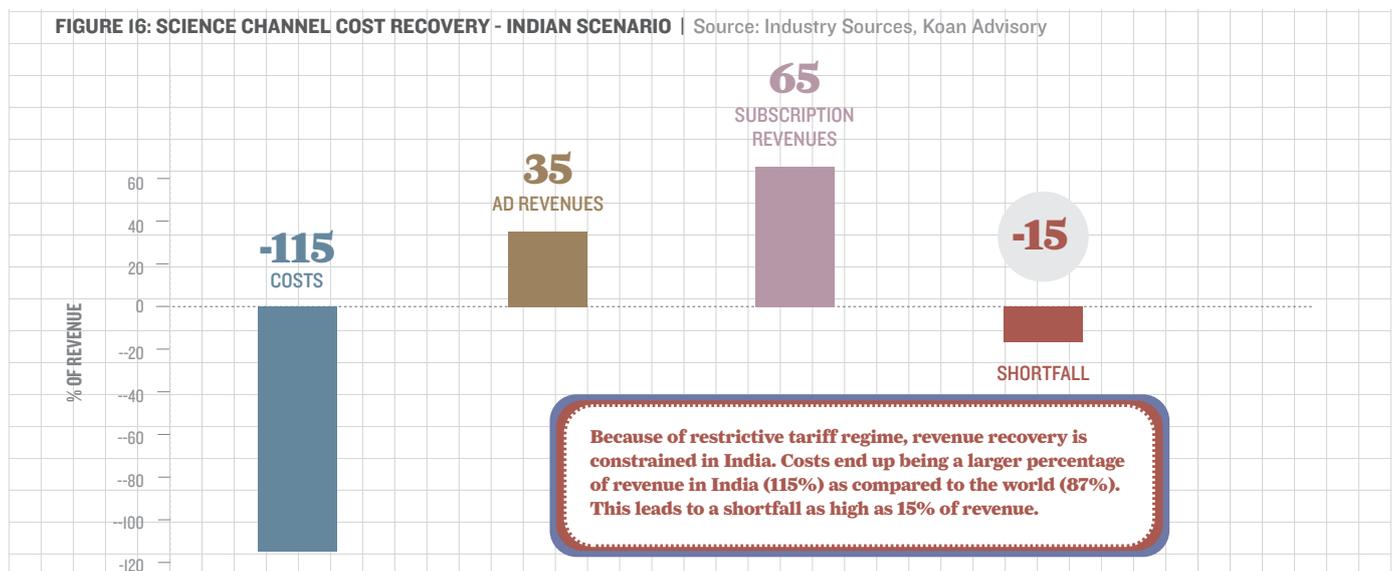


FIGURE 15: DISTRIBUTION OF TV INDUSTRY REVENUES | Source: “The Value of Content”, BCG, 2015; Koan Advisory Analysis



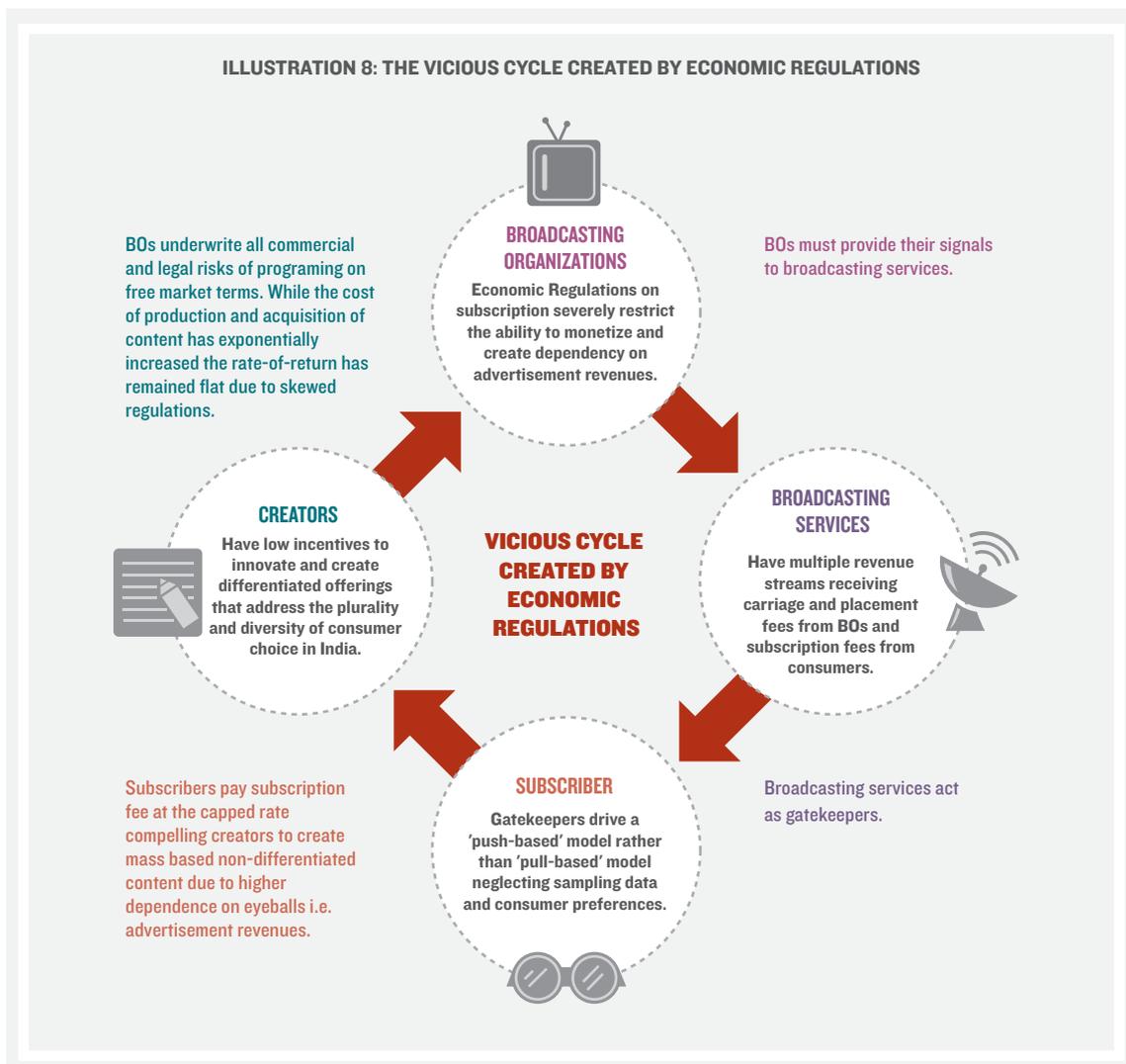
Analysis of the rents appropriated by distributors in the value chain translates to the fact that increased costs of production do not translate into higher revenues because of bottlenecks in content monetisation. As content costs increase, margins tend to recede. For instance, in the case of a leading science channel analysed here, content costs tend to be significantly higher than in the case of non-differentiated genres such as General Entertainment. Subscription revenues are not enough to recoup cost of content for niche genres. Since garnering maximum eyeballs cannot be the motive of content development in the case of niche channels, subscription revenues tend to be higher than advertising revenues in such genres.

Figures 16 and 17 show the costs of content production (not inclusive of overheads and enterprise costs of BO). Even though there is a similar split between subscription and advertising revenues in the case of the channel in India and in global markets, the channel does not recover money in India (owing to price caps) whereas it does in the larger market. Under-recovery of revenues in India because of the restrictive tariff regime results in shortfall to the extent of 15 percent, which makes production of such content patently unviable. In other, more liberalized media jurisdictions, with similar costs, content producers can earn a surplus of up to 13 percent. This stark 28 percent difference in earnings dictates what gets shown on television in India versus the rest of the world.



The current structure of revenue realisation is patently unfavourable for creative programming as is apparent from the preceding discussion; creating a vicious cycle (Illustration 8). Content should be priced based on costs associated with producing it. A less encumbered ecosystem is required to fully realize the inherent value of the creative economy.

ILLUSTRATION 8: THE VICIOUS CYCLE CREATED BY ECONOMIC REGULATIONS



Unlocking value in the creative economy

Media and Entertainment which represents the creative economy, has grown into a USD 20 billion industry as of 2016. Of this, roughly half the industry's revenues, as well as employment, come from broadcasting. The creative economy has grown at a CAGR of 11 percent since 2007 and will grow to USD 50 billion by 2025 at the current rate. Similarly, the broadcasting industry has grown at a CAGR of 13 percent and will grow to USD 27 billion by 2015. One of the reasons behind this acceleration is the fact that India is a young economy – millennials consume more content on various platforms. A billion plus mobile phone connections and a quarter of a billion smart phones have ensured that there is a screen in the hands of almost every Indian. This is besides the reach of television, which most households now own. Whereas increasing literacy has impacted the publishing industry positively, the inclusivity of moving pictures has by far been the most transformational tool in the communication era. Additionally, bypassing the personal computer and fixed line broadband revolution, India already accesses most of its internet on mobile phones, buoyed by cheap data rates due to intense competition in the telecom market.

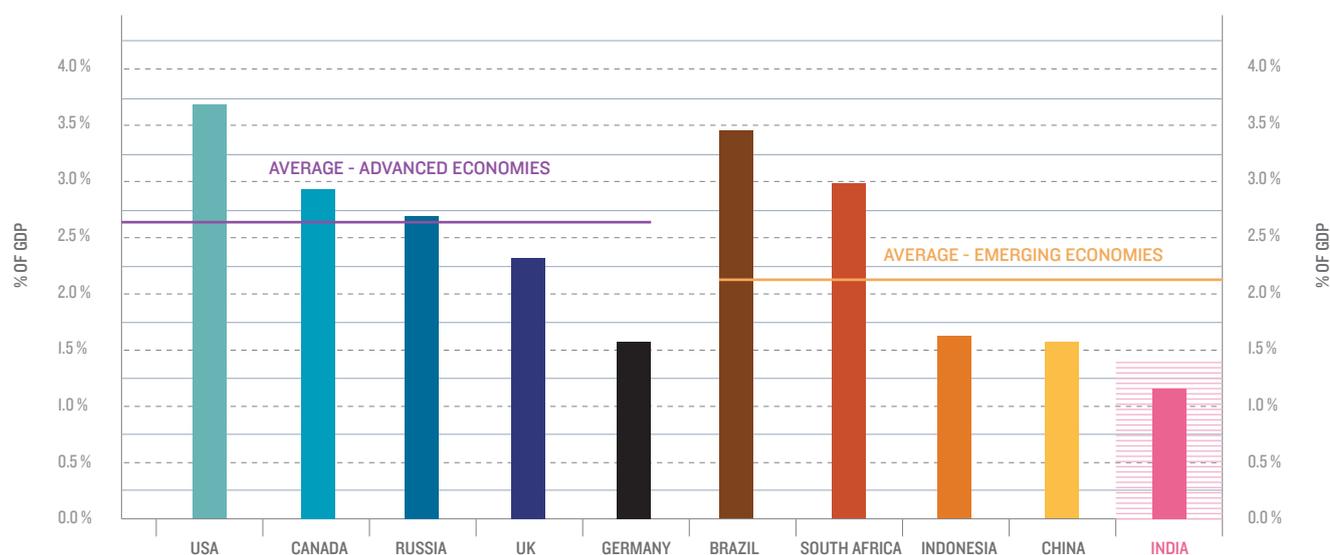
Although employment in the creative economy has also kept step with revenue growth (at 13 percent CAGR over the past four years), the workforce in this industry is estimated to surge at 19 percent over the next five years. This is driven, in part, by digital media – employment in digital content markets has grown at a CAGR of 32 percent. Given that revenue and employment growth have mirrored each other in the past, India should aspire that both industry revenues and employment expand by 19 percent year on year going forward to ensure productivity of labour does not dip. At a 19 percent CAGR, the creative economy would reach around USD 100 billion in 2025.

Despite the appearance of rapid expansion, the true potential of the creative economy, in particular of broadcasting, is throttled due to caps on revenue realisation imposed by the industry regulator. As already demonstrated, BOs operate in a competitive marketplace (as indicated by a low HHI score) and there is a dedicated free-to-air ecosystem to carry public information and ‘public purpose programming’ (supported by mandatory revenue share with the public broadcaster). Increasing competition, as it is, exerts pressure on costs. Other challenges are the growth of new media and personal entertainment production disseminated online – combined with piracy, all of which combine to create significant headwinds for revenue growth.

There is therefore, little rationale in putting mandatory caps on revenue realisation. Markets with large supply and demand should be devoid of price regulation, especially if the market does not constitute the supply of any essential goods or services, or where essential components of information dissemination and ‘public good’ broadcasting are provided for. For a USD 100 billion content economy to be realised by 2025, regulatory barriers to increased revenue realisation need to be done away with. **In fact, it can be argued that the latent growth potential of the Indian creative economy is even higher.** Currently, the creative economy revenues constitute 0.9 percent of the country’s GDP. This is considerably lower than the GDP contribution of media and entertainment in other major economies (Figure 18).

FIGURE 18: CREATIVE ECONOMY AS A PERCENT OF GDP (2017 FORECAST)

Source: PWC Entertainment and Media Outlook 2015, International Trade Administration 2016 Top Markets Report Media and Entertainment, Trading Economics. Com, Gov.UK



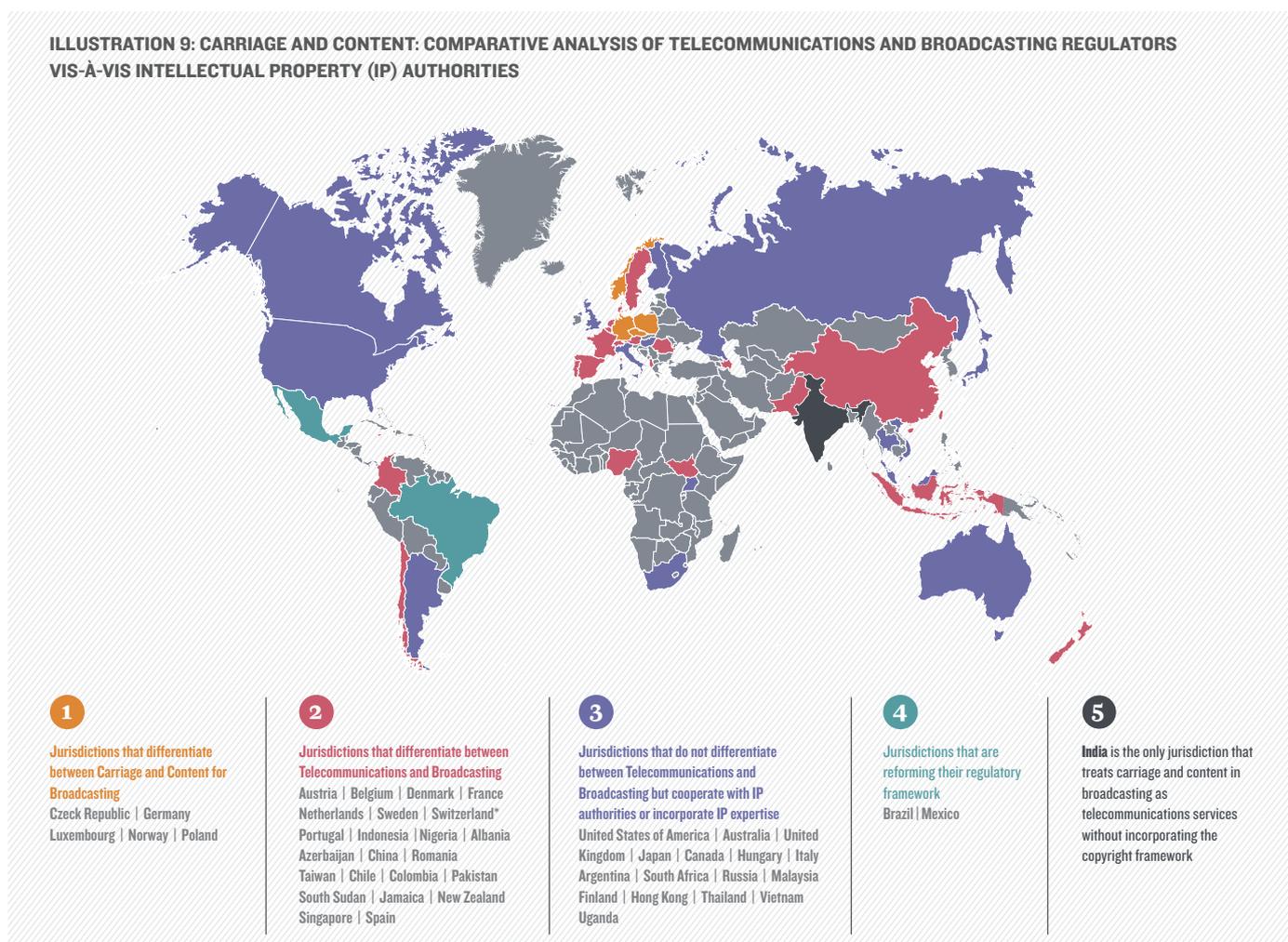
Hypothetically, if the creative economy were to contribute 3.7 percent to India’s national output like it does in the US or even 2.2 percent at the emerging economy average, then the size of the industry in 2019 would range between USD 65 billion and USD 110 billion. There is thus a potential USD 35-80 billion gap with the business-as-usual scenario of 13 percent CAGR and USD 30 billion revenue by 2019, on the assumption that India’s creative economy has the potential to be at least as competitive as in other emerging economies, and can certainly aspire to contribute as much value as does the American creative economy to its GDP.

At a global level, direct consumer spending (subscription, ticket sales, product / merchandise purchases) is growing faster than GDP, often by up to 50%. Media and entertainment spending in the ten youngest markets is growing three times more rapidly in the ten oldest markets, despite many countries with older populations such as Japan and Germany being much richer than young countries such as India and Nigeria.⁵⁷ However, in India the advertisement-subscription contribution ratio is inverse, with 70 percent contribution from advertising and only 30 percent from subscriptions, due to throttled subscription revenues. While it is nobody’s case that the Indian broadcasting ecosystem is directly comparable to more advanced economies, there should be a more equitable and sustainable balance between advertising and subscription revenues in India.

In an entertainment market where access has become ubiquitous, it is content which will determine competitive advantage. This is borne out by the shift of profitability from advertising-led to content-led broadcasting peers over the last decade in the global market. Convergence of platforms have effectively rendered them unimportant, and increasing connectivity has ensured that content which succeeds will succeed globally, and what fails globally, will fail locally as well. In other words, no market will remain for mediocre content. The internationalization of local cinema, rise of crossover stars and the ubiquity of 'viral' videos are testimony to this trend. Talented artists have sprung from the woodwork and are narrating stories from every corner of India and the world in stereophonic sound and high-definition. The commodification and marketisation of media and entertainment has however led artists and technicians to discover their worth and content can no longer be seen as separate from other creative and constructive endeavours. Monetisation of content is the only means for it to flourish and the structural impediments in India, in the form of capped tariffs, are stalling exponential growth. A USD 100 billion creative economy is a first step towards this services led growth in employment and value generation.

Revisiting economic regulation

A comparative analysis of 46 relevant jurisdictions indicates that the India's economic regulation of the content ecosystem, underpinned by broadcasting organisations, is an exception to the rule. Globally, the regulation of BO's has been conducted in accordance with an overarching copyright framework; either through a separate regulator that only administers broadcasting or by limiting the powers of a converged regulator (that is, in charge of both telecom and broadcasting) with respect to issues concerning copyright. In contrast, the Indian regulatory regime does not distinguish between either content and carriage, or telecommunications and broadcasting. Further, no explicit provision provides for harmonisation between the copyright law and other regulations (Illustration 9).



The distinct fields^x occupied by the Copyright Act and TRAI Act have been acknowledged by the judiciary:

“if such interpretation is made, it would lead to a drastic result, as the “broadcast reproduction right”, which is a special copyright, the owner of such right has to necessarily go before the TDSAT even in cases of infringement and piracy. We may also mention that the TRAI Act does not include the dispute relating to the infringement of copyright as well as piracy.”

- Madras High Court (Jak Communications Pvt. Ltd v. Sun TV Network Limited [2010-2-LW936])

Despite judicial pronouncements, the future regulatory framework for a converged broadcasting ecosystem remains uncertain in India and no concrete step has been taken to reach a parliamentary consensus. Nonetheless, the existing legal framework for broadcasting organisations comprehensively regulates the sector without a separate regulatory body. In this regard, while the copyright framework provides a complete code for regulating content, other statutes and mechanisms also shape the functioning of the creative economy. For example, extant competition law extends adequate checks and balances to foster competitive-hygiene in the public interest.

Moreover, mechanisms for the management of every type of right have already been provided under the Indian Copyright Act, in consonance with international law, namely:

Collective Management through Copyright Societies: Under the Copyright Act, broadcasting organisations may form a society to exercise its copyright functions such as determining and collecting tariffs.⁵⁸

Obligatory Joint Management through Copyright Societies: All rights holders of a class are mandated to exercise their rights only through a collective. Under Indian law, obligatory joint management through a copyright society is only required for a certain class of rights, specifically for granting or issuing licenses for works incorporated in films or sound records.⁵⁹

Individual Exercise by the organisation or through an agent: Each right holder exercises his or her rights own their own or through an agent entrusted with the task of managing their rights.⁶⁰

In fact, a key right given to broadcasting organisations under the copyright framework is the right to determine its own tariffs – through a copyright society, on their own or through an agent. Further, as indicated through detailed economic analysis, the capping of subscription revenues leads to a greater dependency on advertisements which compromises diversity of content and undermines innovation in niche genres - this militates against the fundamental right to freedom of speech and expression, the very reason private broadcasting was allowed by the Supreme Court of India⁶¹, over two decades ago:

“The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them.”

In this manner, the apex court freed broadcasting from being a government monopoly under the Telegraph Act of 1885, holding that:

“The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field

x. In fact, the two legislations in hand are derived from different fields under List I of the Seventh Schedule of the Constitution of India. Specifically, the Copyright Act is the subject matter of Entry 49 which deals with - “Patents, inventions and designs; copyright; trade-marks and merchandise marks”; whereas the TRAI Act falls under Entry 31 which deals with - “Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.”

of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still”

Since the late 90s the Indian economy has transformed due to liberalization, seeing consistent growth in GDP and per capita consumption, and continues to change with rapid technological advancement. In the new realities of the digital economy the existing regulatory framework may be inadequate. Illustratively, convergence of technologies and the introduction of triple-play services, which combines telecommunications, internet and cable services, has altered the landscape of the telecommunications industry, thereby requiring different regulatory approaches. In this regard, the Government has been lauded for fostering new modes of providing entertainment, such as through Online Video platforms, by limiting regulatory interventions.

Similarly, the existing framework where broadcasting is treated as telecommunications may have been satisfactory earlier, but with the imminent focus on content the recognition that the message needs to be treated differently than the medium becomes urgent. Otherwise, broadcasting organisations that deal with content face a prohibitive future wherein consumer demand will not be satisfied driving subscribers to seek alternate solutions, thereby hindering the industry from reaching its full potential.

Until now, the changing economic realities have been reflected in suitably altered policies and laws. For example, the opportunities of a liberalized economy were reflected in the Supreme Court’s decision to allow private broadcasting in 1995. More recently, the expansion of the copyright-based industry catalyzed the transfer of the Copyright Board from the MHRD to the DIPP. Further, through the Finance Act, 2017, the Copyright Board has been subsumed under the IPAB, which also administers aspects of trademarks and patents. As an immediate and logical next step to the IPR Policy, it is recommended that the Government of India move the content-oriented broadcasting organisation under the aegis of the IPAB. Not only will this streamline India’s regulatory framework and increase consonance with international obligations and best practices, it will also enable the realization of a USD 100 billion creative economy by 2019.

The way forward: collective management

The international IPR framework and the Indian Copyright Act provide collective management of rights as an alternate to individual administration of rights. The impracticability of managing individual rights has emerged as a concern for all rights holders. Thus, authorized organizations act in the interest and on behalf of the owners of rights to exercise copyright and related rights under a collective management regime. These organizations ensure that creators receive payment for the use of their works.

Collective administration of rights is considered in the public good as they provide the most effective means of, on the one hand, administering and protecting rights owners' interests, while facilitating easy access to copyright works by rights users and consumers.

Notably, the first collective societies predate the 1886 Berne Convention for the Protection of Literary and Artistic Works. The story of collective administration of rights in creative works begins in France in July 1777 when the renowned author Beaumarchais along with 22 other authors protested the under-remunerated use of their works by the Théâtre-Français. Although not immediately successful, the collective action eventually led to the passing of the first recognition of authors rights in France in 1791 and the establishment of the Society of Dramatic Authors and Composers (SACD) in 1829 and Society of Authors, Composers and Music Publishers (SACEM) in 1851. Interestingly, the impetus for both SACD and SACEM came from the frustration and indignation of authors caused by low remuneration.

Aspects of the Broadcast Reproduction Right, as defined under Section 37 of the Copyright Act, are found to be protected by Collectives in different jurisdictions, which license broadcast/retransmission rights and collect and disburse royalties. Notably, broadcasting organizations and producers have established the Association for the International Collective Management of Audio-visual Works^{xi} which manages cable retransmission rights in over 36 countries. AGICOA collects royalties for the right to use its repertoire contained in the simultaneous, unchanged and unabridged retransmission of TV channels, whether they are public, private, thematic or generalist. AGICOA also collects for such retransmissions in hotels. The kind of audio-visual works making up the repertoire include tele-serials or series and films. AGICOA licensing Agreements specify the type of retransmission (cable, satellite, internet, digital terrestrial broadcasting, etc.) and the type of works (independently produced audiovisual works). Further, while TV channels have traditionally been specified, with the proliferation of retransmitted TV channels, the AGICOA Alliance has started proposing blanket licensing agreements to cover the retransmission of audiovisual works on all retransmitted TV channels. The Alliance also reserves the right to ask, in exceptional and limited cases, the retransmission operators to black out the retransmission of a specific audiovisual work, for e.g. if the retransmission of a work would result in serious financial difficulties for the rightsholder who detains the rights on that work.

In fact, 42 countries out of the 46 foreign jurisdictions, studied for the purpose of this report, provide for collective management of the rights of broadcasting organisations, as follows:

xi. <http://www.agicoa.org/english/about/about.html>

ILLUSTRATION 10: FOREIGN JURISDICTION THAT PROVIDE FOR THE COLLECTIVE MANAGEMENT OF THE RIGHTS OF BROADCASTING ORGANISATIONS

INTERNATIONAL PRECEDENTS - BRR SOCIETIES

Canada

- The Canadian Broadcasters Rights Agency claims royalties for programming owned by commercial radio and television stations and networks, including private networks, independent television stations and the privately-owned affiliates of public broadcasters.
- The Canadian Retransmission Collective licenses retransmission rights to re-transmitters such as cable companies and DTH satellite systems. With the boost of a satellite or microwave, a station's signal can be extended beyond its normal reception area for delivery to subscribers in distant places. The CRC concentrates on such out of territory areas.

France

The PROCIREP, a civil society of cinema and television producers, is in charge of the defence and representation of French producers in the field of copyright and neighbouring rights. It manages the rights associated with simultaneous retransmission of certain TV programs on cable and related networks through ANGOA, in cooperation with AGICOA.

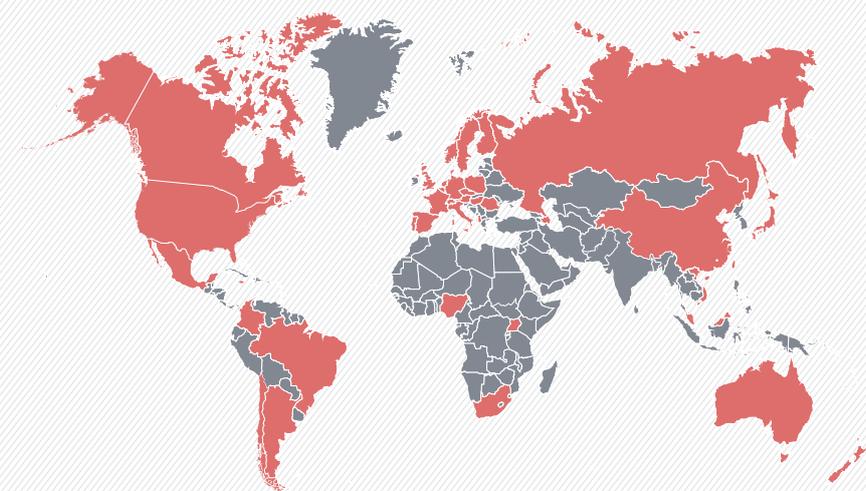
Australia / New Zealand

Screenrights in Australia/New Zealand collects royalties for uses of audiovisual works where it is difficult or impossible to license on an individual basis. Members own the right to copy, communicate or retransmit the program and include broadcasters and other collecting societies. The value of royalties derived from the retransmission of a television program is dependent on multiple factors such as its duration and frequency, the time of broadcast, the television network on which it is aired and the extent to which that network is retransmitted.

- It enables educational institutions and the government to copy broadcast material on television, radio or the internet and share it with users such as staff and students via internal networks or email. There is a 2 per cent royalty allocation for broadcast signal.

- It collects the licence fees from PayTV, IPTV and other companies retransmitting free to air channels at a negotiated royalty rate.

- It also collects royalties on behalf of its members from other collecting societies around the world such as for retransmission, copying, lending and performance.



In consonance with international best practices, the Indian Copyright Act has also made extensive provisions to foster collective management of copyright and related rights through copyright societies. Copyright societies perform three main functions under the Copyright Act – i. licensing and royalty collection; ii. distribution of royalty to members; and iii. monitoring use of and enforcing copyright. While allowing for greater freedom in determining tariffs the Copyright Act imposes certain conditions for the assertion of rights through collective management. At the same time, the individual member can choose to leave the society and fix their royalty rates either individually or through an agent.

Since the origins of collective management, the way we access, use and monetize content has changed. However, collective management remains relevant and its economic significance for monetizing intellectual property cannot be denied. The relevance of the copyright and related rights framework in a digitally networked world has been discussed since the inception of the internet and was the central focus at WIPO's Seville International Forum in 1997 and the WIPO Advisory Committee on Management of Copyright and Related Rights sessions in 1998 and 1999. The consensus reached supported the continued relevance of joint management such as through collectives and found that new technologies introduced new forms and opportunities of joint exercises.

Collective Management is an efficient way of tackling the high transaction costs associated with administering copyright. The high costs are attributed to the complexity of many copyright markets wherein a multitude of right holders provide a constellation of work to, and expect remuneration from, an even larger group of users or licensees. This holds true for the Indian broadcasting ecosystem, wherein over 50 broadcasting organizations provide a growing body of work to a multitude

of MSOs, LCOs and DTH operators. At the same time, collective management may become redundant with the maturation of digital rights management and with the internet becoming the primary mode of delivery and access, rather than the complex upstream and downstream ecosystem that exists today. When such a scenario arises, the relevance of collective management may require further consideration.

The economic justification for collective management is also based on the amount of work in the collective's repertoire. As the number increases, the overall cost of administering the licensing, collection and distribution decreases i.e. the average cost is calculated as the cost per work and therefore is indirectly proportional to the total number of work. Hence, it is also more efficient when there is a single collective for each type of work or right.^{xiii} The Indian Copyright Act maximizes efficiency by stipulating that only one copyright society may be registered for the same class of work^{xiii} with a minimum of seven right holders.^{xiv} The average cost for licensing and monitoring usage of works falls even rapidly when the licensees are identical thereby achieving economies of scales. This also reduces the cost of identifying and contacting right holders for licensees.^{xv}

Importantly, the Copyright Act ensures that collectives don't form monopolies by imposing compulsory licensing requirements. Thus, if the appropriate authority – in this case the IPAB, finds that the copyright society has fixed an inordinately high tariff or if the society refuses to license on fair terms then a mandatory licensing requirement may be imposed on the society for that work.^{xvi} This incentivizes the copyright society to license work on fair terms. Moreover, under the amended Copyright Act, the erstwhile Copyright Board – now the IPAB, is also charged with the function of dispute settlement. Not only does this ensure the availability of requisite expertise in matters of technical nature but also eases business for all relevant stakeholders.

Thus, collective management not only resolves issues of ease of doing business and maximized economic efficiency for the creative industry; it also aids the regulatory process by ensuring that a specialized body limits the powers of private stakeholders and checks abuse of dominant position. In conclusion, with the near completion of broadcasting digitization and the promise of a converged ecosystem collective management of broadcasting rights may be the way forward, once again.

xiii. Dr. Richard Watt, "An Introduction to the Economics of Collective Management of Copyright and Related Rights", WIPO

xiii. Section 33, The Copyright Act, 1957

xiv. Rule 44, The Copyright Rules

xv. Christian Handke, "The Economics of Collective Copyright Management", in Richard Watt (Ed.), Handbook of The Economics of Copyright, Author's preliminary version, SSRN, April 24, 2013, p 2

xvi. Section 31

Additionally, the objectives of the National IPR Policy facilitate further research on pressing topics, which are beyond the scope of the paper. It is recommended that the following subject matters may be considered in this light:

Introduction of Digital Rights Management in India

Digital rights management (DRM) typically includes technological prevention measures which limit the access and use of copyrighted works to the extent authorised by the copyright owner through digital locks and records of usage. DRM provisions were introduced in India in 2012, including penalties under the copyright regime for modifications to digital rights information and for the use of anti-circumvention measures. This has effectively made India compliant with the Internet Treaties, despite not having signed it. However, Indian courts have exhibited little clarity as to these provisions, often implementing them vaguely. Against the backdrop of concerns regarding harmonization of DRMs with the domestic fair use doctrine, managing the externalisation of copyright enforcement, and the need for an efficient anti-piracy strategy in the long run, it is prudent to research these concerns further to ensure effective protection of IPR in India.

Delineation of emerging models of delivery, specifically, over the internet, from the traditional broadcasting model

Emerging models of delivery, like over-the-top (OTT) services use an established telecommunication network to create a network layer that provides communication services and content. It is often believed that OTT services broadcast video content over the internet rather than through cable networks. However, the difference between OTTs and broadcasting may be much starker. Illustratively, in traditional broadcasting models, the content owner, service provider and content broadcaster, are all differentiated and operate in a vertical structure. The differentiated players involved in the traditional broadcasting model are regulated under different regimes – for instance, the cable service provider would have to obtain a license for operating its services. On the contrary, OTT services are delivered over the internet, the infrastructural requirements of which are vastly differently and cannot be subject to licensing due to the large numbers of players. Further, OTT networks span geographical and political boundaries causing jurisdictional issues, and even differentiate the content created for such platforms from the models prevalent on TV. Therefore, there is a need to consider a different regulatory framework for the industry, including the desirability of regulating OTT players at all.

Coherence between India's international position on copyright (including related rights) and the domestic framework

While India remains compliant with extant international law on copyright and related rights, certain discrepancies between India's international position vis-a-vis relevant instruments and domestic law stand out. More specifically, India's evolving position on international instruments are not necessarily reflected in the national framework and vice versa. Illustratively, India's stance at the ongoing negotiations for the Proposed Treaty for the Protection of Broadcasting Organisations at the SCCR, WIPO has evolved to support the inclusion of post-fixation rights, as opposed to its position in 2015. However, the altered stance is not reflected in India's domestic legislative framework, which continues to deny broadcasters' protection to their pre-broadcast signals and their post-fixation rights. At the same time, while India has provided for DRMs within the Copyright Act, it has not ratified the relevant international instruments i.e. the Internet Treaties. This lack of reciprocity between the domestic and international positions severely curtails effective implementation of copyright and related rights.

Acronyms

- BARC:** Broadcast Audience Research Council
- BBC:** British Broadcasting Corporation
- BO:** Broadcasting Organisation
- BRAI:** Broadcasting Regulatory Authority of India
- BRR:** Broadcast Reproduction Rights
- CAGR:** Compound Annual Growth Rate
- CRA:** Copyright Act
- DD:** Doordarshan
- DPO:** Distribution Platform Operator
- DRM:** Digital Rights Management
- DTH:** Direct-To-Home
- DTT:** Digital-Terrestrial-Television
- EU:** European Union
- FICCI:** Federation of Indian Chambers of
Commerce and Industry
- FDI:** Foreign Direct Investment
- FMCG:** Fast-moving consumer goods
- FTA:** Free-to-Air
- GDP:** Gross Domestic Product
- GEC:** General Entertainment Channel
- HHI:** Herfindahl–Hirschman Index
- HITS:** Headend in the Sky
- IT:** Information Technology
- ITES:** Information Technology Enabled Services
- ITU:** International Telecommunication Union
- IP:** Intellectual Property
- IPR:** Intellectual Property Rights
- IPTV:** Internet Protocol Television
- I&B:** Information and Broadcasting
- LCO:** Local Cable Operator
- M&A:** Mergers and Acquisitions
- M&E:** Media and Entertainment
- MSO:** Multi System Operator
- NASSCOM:** National Association of Software and
Services Companies
- OECD:** Organisation for Economic Co-operation and Development
- OOH:** Out-of-Home

R&D: Research and Development
SCCR: Standing Committee on Copyright and Related Rights
TDSAT: Telecom Disputes Settlement and Appellate Tribunal
TRAI: Telecom Regulatory Authority of India
TRIPS: Trade-Related Aspects of Intellectual Property Rights
TVR: Television Rating
USD: United States Dollar
VFX: Visual Effects
WIPO: World Intellectual Property Organization
WTO: World Trade Organisation
YoY: Year over Year

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6. <https://www.nakono.com/tekcarta/databank/tv-sets-average-number-of-tv-sets-per-tv-household/>
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