

# TRAI TARIFF ORDERS – EFFECT ON BROADCASTING SECTOR

*Ameet B. Naik\**

*“Broadcasting is really too important to be left to the broadcasters.”<sup>1</sup>*

**ABSTRACT** *Tony Benn, the veteran British Labour politician, as the then Minister of Technology in 1968, made the statement in the context of journalism. However, in the current Indian current scenario, the quote measures true with respect to the entire broadcasting sector, with Telecom Regulatory Authority of India (TRAI) scampering to regulate the third largest broadcasting market in the world.<sup>2</sup> The article deals with the impact of the TRAI Tariff Orders passed from time to time to regulate the broadcasting sector. The author acknowledges TRAI’s competence to fixing tariff, as has been judicially held,<sup>3</sup> but questions the extent to which the said power can be exercised, while taking into consideration the apparent conflict of the general statute establishing TRAI with the special enactment of Copyright Act, 1957, and also the apparent inconsistencies in delegated legislation of TRAI. The article is divided into three parts: first, the TRAI Act, 1997 and its Scheme, second, TRAI Tariff Orders, and third, the impact of the Tariff Order on the Broadcasting Sector and its conflict with the Copyright Act, 1957.*

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\* Ameet B. Naik is the Founder and Managing Partner of Naik Naik & Co., a leading full-service law firm based at Mumbai, India. He is an IP specialist and a litigator par excellence and has several landmark judgments to his credit. He is also a visiting faculty at the ILS Law College, Pune, and other leading law schools in India.

<sup>1</sup> John Herbert, *Journalism in the Digital Age: Theory and Practice for Broadcast, Print and Online Media*, (CRC Press, 1999).

<sup>2</sup> Girish Kumar R., Relfi Paul, *Rights of Broadcasting Organizations: Do We Need Legal Reform?*, (2009) 2 INDIAN JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 87.

<sup>3</sup> *Star India (P) Ltd. v. Telecom Regulatory Authority of India*, 2007 SCC OnLine Del 951.

## I. TRAI VIS-À-VIS BROADCASTING

### A. The Telecom Regulatory Authority Act, 1997 (TRAI Act)

The TRAI Act was enacted in 1997. At the time of the enactment of the TRAI Act, Broadcasting Bill was pending in the Parliament. Definitively, pre-supposing the Bill to become a legislation, the TRAI Act specifically excluded Broadcasting Services from the ambit of ‘Telecommunications Service’ in the definition in S. 2(k). S. 2(k) reads as:

*“‘telecommunication service’ means service of any description (including electronic mail, voice mail, data services, audio tex services, 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 electromagnetic means but shall not include broadcasting services.”*

However, as the Broadcasting Bill failed to achieve the Parliamentary consensus for becoming an Act, it lapsed and died a natural death.

In 2000, when amendments to the TRAI Act were being contemplated, ironically to the original legislative intent and premise, a proviso was inserted to S. 2(k) vesting power in the Central Government to notify services to be a part of ‘Telecommunication Service’. The Proviso expressly stated inclusion of ‘broadcasting services’ at the discretion of Central Government. The Proviso aimed at negating the effect of exclusion of broadcasting services from the ambit of ‘Telecommunication Service’ provided that the Central Government notify such exclusion.

*“The following proviso was added to definition of ‘telecommunication service’ under Section 2(k) of the TRAI Act. [Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.]”*

The Central Government, employing the power so vested, released Notification S.O. 44(E) and Order S.O. 45(E), dated January 9, 2004. By this, the scope of ‘Telecommunication Service’ was expanded, bringing broadcasting services within its ambit. This specific exclusion and subsequent inclusion has also been noted by the Delhi High Court.<sup>4</sup>

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<sup>4</sup> Star India (P) Ltd. v. Telecom Regulatory Authority of India, 2007 SCC OnLine Del 951.

Thus, the ambit of TRAI's regulation was widened. Alongside the ambit of regulation, even its scope as stated in the perambulatory paragraph was increased from mere 'regulation of telecommunication services and matter connected therewith or incidental thereto' to provide to 'adjudication of dispute', 'disposal of appeal', 'protection of the interests of service providers and consumers' and to 'promote and ensure orderly growth of the telecom sector'.

Resultantly, in the current day, TRAI exercises a broad jurisdiction, which is not only to fix tariff but also to lay down the terms and conditions for providing services.<sup>5</sup> This is shadowed by the judicial opinion that TRAI cannot make recommendations overlooking the basic constitutional postulates and established principles and thereby deny people from participating in the distribution of national wealth.<sup>6</sup>

## B. Extent of TRAI Regulation

While the extent of TRAI's broadcasting regime is limited by the Copyright Act,<sup>7</sup> TRAI's functions can be classified as recommendatory<sup>8</sup> or regulatory.<sup>9</sup> However, the recommendations have to be given due weightage by the Central Government, for TRAI is deemed to be an expert body.<sup>10</sup>

The Regulations of TRAI are issued in one of these forms: Regulations for Interconnection, Quality of Service or Infrastructure Sharing, and Tariff Orders.

- Interconnection Regulations broadly cover agreements between service providers i.e. Broadcasters, MSO/DTH operator and Local Cable Operator.
- Quality of Service Regulations broadly cover aspects relating to:
  - Connection, disconnection, transfer and shifting of cable and satellite services;
  - Handling and redressing consumer complaints;

<sup>5</sup> Hotel & Restaurant Assn. v. Star India (P) Ltd., (2006) 13 SCC 753.

<sup>6</sup> Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

<sup>7</sup> The Federation of Indian Chambers of Commerce and Industry (FICCI) contends to the extent that the same should be recognized by TRAI to avoid inconsistencies. See Federation of Indian Chambers of Commerce and Industry, *National Intellectual Property Rights and Policy – Industry Concerns and Suggestions*, available at <http://ficci.in/SEdocument/20340/FICCI-Suggestions-on-Proposed-IPR-Policy-Nov-2014.pdf> (last visited on March 20, 2018).

<sup>8</sup> TRAI Act, S. 11(1)(a).

<sup>9</sup> TRAI Act, Ss. 11(1)(b), (c) and (d).

<sup>10</sup> Union of India v. Assn. of Unified Telecom Service Providers of India, (2011) 10 SCC 543.

- Consumer billing procedure;
- STB related issues and handling complaints; and
- Technical parameters to be adhered by the service providers.
- Tariff orders prescribe the wholesale tariff, retail tariff and revenue share amongst the service providers.

## II. TRAI TARIFF ORDERS

While attempting to assess the impact of TRAI's Tariff Orders, it is essential to first understand the basic features of the Tariff Orders. Till date there have been 7 Tariff Orders with multiple amendments.

### A. First Tariff Order, 2004

The First Tariff Order (*The Telecommunication (Broadcasting and Cable) Services Tariff Order 2004*) was a two-point regulation merely fixing charges payable, which were to be as per rate as prevalent on December 26, 2003 and defining the territorial scope of application of regulation to extend “*throughout the territory of India as also those originating in India or outside India and terminating in India*”. Thus, while it was short and sweet, it had created a string of complications by being silent on how to calculate the prevalent rate.

Further issues arose on the interpretation of ‘charges’ post the first amendment, as a result of the press release subsequent to it.<sup>11</sup> The main issue was that the press release contradicted the tariff fixed by the First Tariff Order, because it provided for the tariff in certain instances to be “*not more than those applicable on December 26 2003*”,<sup>12</sup> which implies that the tariff could be less than that prevalent on December 26, 2003. This was taken to court for interpretation in *IndusInd Media and Communications Ltd. v. Telecom Regulatory Authority of India*,<sup>13</sup> though dismissed, supplying supremacy to the Tariff Order, it was held that the press release did not vitiate the original intent and did not create any conflict. Soon after this judgment, TRAI clarified that charges to be “*exclusive of taxes*”.

Impact: First Tariff Order was the first time that the Broadcasting Sector, which was till then an unorganised sector, was subjected to price regulation.

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<sup>11</sup> Press Release No. 13 of 2004 dated February 19, 2004 issued by TRAI.

<sup>12</sup> Press Release No. 13 of 2004 dated February 19, 2004 issued by TRAI.

<sup>13</sup> 2004 SCC OnLine TDSAT 23 : 2004 TDSAT 6.

## B. Second Tariff Order, 2004

The Second Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004*), repealed the First Tariff Order. It was more or less a carry forward of the First Tariff Order, though with few additions like provisos for new pay channels or FTA converted to pay channel and choice to MSO for reducing ceiling charges. This Tariff Order is also relevant for having setup a reporting mechanism, though limited but providing for reporting requirement in case of new pay channel or FTA converted to pay channel and the manner of reporting. Further, clarity was provided regarding application throughout the territory of India, which by implication included even those services originating outside India but terminating in India. At first, the additions seemed laudable for the clarity provided, but the provision to reduce ceiling charges by reducing the number of channels shown became a bone of contention as this alternative had practical impediments, such as absence of addressability. Resultantly, *vide* First Amendment to the Second Tariff Order, Broadcaster was included to be given a choice of reducing ceiling charge by the same means.

Towards the end of 2004, a need to account for inflating was felt. Thus, the Second Tariff Order was amended for the second time to provide for tariff to be “*prevalent as on December 26 2003 plus 7%*”. This was soon amended in 2005 by the Third Amendment to provide for rate “*prevalent as on 26.12.2003 as enhanced by 7% permitted w.e.f. 1.1.2005 plus 4% on such enhanced charges w.e.f. 1.1.2006 shall be the ceiling with respect to both free-to-air and pay channels*”. The increased inflation was challenged in *Grahak Hitvardhini Sarvajanic Sanstha v. Telecom Regulatory Authority of India*,<sup>14</sup> before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). While there was an interim order staying the Tariff Order, it was lifted conclusively.

As the regulatory jurisprudence progressed, TRAI, *vide* the Fourth Amendment, made a distinction between Ordinary Cable Subscriber and Commercial Cable Subscriber, i.e. cable operator, and provided a specific provision for ceiling charges payable by Commercial Cable Subscriber. *Vide* the Fifth Amendment, certain amount of autonomy was provided to the Broadcasters/MSO to decide the payment flow, dependant on the terms of the agreement.<sup>15</sup> Soon, *vide* the Seventh Amendment, Clause 3-A was deleted and there was a further distinction between Ordinary Cable Subscriber, Commercial Cable Subscriber and hotels with rating of three star and above

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<sup>14</sup> 2006 SCC OnLine TDSAT 435.

<sup>15</sup> TRAI Act, S. 3-A.

or heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) or any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms, with the latter category being excluded from Commercial Cable Subscriber.

However, the burning question remained that in the absence of the mention of rates of similar channels as on December 26, 2003, what was the yardstick for fixing rate of new pay channels or FTA which had converted to pay channels post First Tariff Order and how the tariff was to be fixed for these channels. Even the explanatory memorandums had failed to clarify the same. This has caused nuisance because of the surge capacity of such channels and the vertical integration of the various stakeholders of the Broadcasting sector. As a result, Clause 3-B was inserted *vide* the Sixth Amendment which provided for factors decisively affecting the rate of ceiling charge, based on factors like genre and language, range of price to the individual channel and channel in bouquet of similar genre. This also came under judicial review in *Neo Sports Broadcasting v. Telecom Regulatory Authority of India*,<sup>16</sup> which contended difference between a cricket-centric channel and general sports channels for the purpose of bundling and calculating stand-alone rate. TDSAT had dismissed the plea, by applying the broader classification of genre and sports channel.

In 2007, TRAI, *vide* the Eighth Amendment, replaced the Tariff Order as amended on December 26, 2003 with December 1, 2007. This Amendment is one of the most significant amendments because of the major changes and clarifications brought about in terms of the manner of offering of channels by the Broadcasters,<sup>17</sup> reporting requirement and exhaustive list of information to be reported like names, genre and language of all FTA or Pay channels offered by the Broadcaster, list of all bouquets offered, revenue share arrangement, target audience, status of pay channels throughout the country as in whether paid throughout the country, advertisement revenue and lastly any other information relevant to free to air channels, pay channels, *a la carte* rates and bouquet. This Amendment also enforced the power of authority to intervene<sup>18</sup> and provided for issue of receipt and bill,<sup>19</sup> maintenance of records by Broadcaster, MSO and cable operator<sup>20</sup> and non-applicability to

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<sup>16</sup> *Neo Sports Broadcasting (P) Ltd. v. Telecom Regulatory Authority of India*, (2007) 3 Comp LJ 524.

<sup>17</sup> TRAI Act, S. 3-C.

<sup>18</sup> TRAI Act, S. 4A.

<sup>19</sup> TRAI Act, S. 4B.

<sup>20</sup> TRAI Act, S. 4C.

addressable system.<sup>21</sup> It also bifurcated the manner of reporting into two parts – Part I and Part II. Part I was for charges payable by a subscriber to Cable operator or MSO transmitting and re-transmitting both FTA and Pay channels, and Part II was for charges payable by a subscriber to Cable operator or MSO transmitting and re-transmitting both FTA and Pay channels in Non-CAS Areas.

*Vide* the Ninth Amendment in 2009, TRAI supplied clarification as to the manner of reporting in case of charges payable by a subscriber to Cable operator or MSO transmitting and re-transmitting both FTA and Pay channels. The Tenth Amendment in 2014 introduced a further category of Authorised Agency or intermediary in the chain of supply. It also amended the manner of determining the rate of bouquet of channels specified. The Eleventh Amendment also provided for ceiling charge escalation and increased inflation accounting from 4% to 15%. The Twelfth Amendment provides the flow of payment between ordinary cable subscribers to cable operators or MSO, cable Operators to MSO or Broadcasters and MSO to Broadcasters, for FTA and Pay as well as in bouquet. Owing to the uproar against the exorbitant rate of 15% inflation, it was brought down to 11%, *vide* the Fourteenth Amendment. The Fifteenth Amendment changed the ceiling to the rate prevalent as on March 31, 2014.

**Impact:** This Tariff Order has been the most amended one, a total of 15 times. While there have been stifling issues in terms of fixation of ceiling charges of new pay channels and FTA converted to pay channel, and the vagueness of similar channels, solutions have been provided for most and clarity has been ensured. Also, the changes in dates for prevalent rates go on to show how TRAI has attempted to keep the ceiling charge updated as per the growing economy while also accounting for the inflation.

### C. Third Tariff Order, 2006

The Third Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order 2006*) repealed the Second Tariff Order as to the applicability of the CAS areas and the charges payable by MSOs to Broadcasters and Cable Operators to MSOs in the CAS areas was concerned. Charges payable by MSOs to Broadcasters and Cable operators to MSOs in non-CAS areas was still determined by the Second Tariff Order.

Third Tariff Order was essentially to regulate carriage for both, digital and analogue ways of transmitting signals in the CAS areas. It divided the

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<sup>21</sup> TRAI Act, S. 4B.

tariff into tariff ceiling for 'basic service tier' in CAS Areas, tariff for supply of set top boxes in CAS Areas and ceiling on maximum retail prices for pay channels in CAS Areas.

Tariff ceiling for 'basic service tier' in CAS Areas was fixed at Rs.77, with the obligation on the Cable Operator to offer at least 30 FTA channels in the bouquet. Tariff for supply of set top boxes in CAS Areas accounted for standard and alternative tariff packages, recognising the entry barrier of additional expenditure of STB, thus factoring in installation of set top box, activation charges, smart card/viewing card and repair maintenance or any other charges (for five years). It further put a ceiling in respect of maximum retail prices of Rs. 5 per pay channel per month payable by a subscriber to MSO/CO. Ceiling on maximum retail prices for pay channels in CAS Areas was applicable on both existing pay as well as new pay channels.

The First Amendment in the Third Tariff Order was contemporary to the Seventh Amendment in the Second Tariff Order providing for exclusion of a list of hotels from Commercial Cable Subscriber. The Tariff Order was challenged due to the petty rate of Rs.5 per pay channel per month being fixed as ceiling in respect of MRP. In *Set Discovery (P) Ltd. v. Telecom Regulatory Authority of India*,<sup>22</sup> it was held that such a low rate was resulting in destroying the business model by rendering it unviable. As a result, TRAI increased the rate from Rs. 5 to Rs. 50.35.

#### D. Fourth Tariff Order, 2006

The Fourth Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order 2006*), as the name suggests, was the first Tariff Order focussing exclusively on addressable system. It also made the definition of 'addressable systems' more inclusive and exhaustive as compared to the Third Tariff Order, to provide regulation for Direct to Home (DTH), Internet Protocol TV (IPTV), Head-end In The Sky (HITS) and digital addressable cable services. This was more or less attributed to the various rounds of litigation<sup>1</sup> with DTH players pleading for a level playing field to fix tariff, essentially for CAS and DTH to be treated at par. It ended with Court holding that DTH operators be provided channels at 50% of the rate in non-CAS areas until tariff regulation.

It also diversified tariff into three heads – Wholesale Tariff, Retail Tariff and those offering of Customer Premises Equipment. It also had a string of

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<sup>22</sup> Appeal No. 10 (C) of 2006, decided on 27-2-2007 (TDSAT).

reporting requirements to be complied with and power of authority to intervene being vested.

The First Amendment to the Fourth Tariff Order provided for revenue share between MSO and LCO in case of no mutual agreement, for bouquet as well as stand-alone channels. The Second Amendment fixed that tariff of *a la carte* pay channel cannot exceed two times the *a la carte* rate of the channel and three times the ascribed value of the pay channel. The Third Amendment, in consonance with the Tenth Amendment to the Second Tariff Order, recognised ‘authorised agent or intermediary’.

There was also a shift in the regulatory mechanism of TRAI when it shifted to mandating agreements for tariff fixing between the various stakeholders. For instance: *vide* the Fourth Amendment it was mandatory for the Commercial subscriber to enter into an agreement for charging customer or any person for broadcasting within premises, *vide* the Fifth amendment TRAI mandated a tripartite agreement between distributors of TV and commercial subscriber and the same had to be filed with the Authority within 30 days of the Amendment. This created a lot of conflict, boiling down to the contention that an agreement is not limited to tariff, but once it is mandated by TRAI, whether TRAI is going beyond its boundaries to regulate broadcasting sector. *Vide* the Sixth Amendment, Reference Interconnect Offer (RIO) was provided. It is essentially an offer document setting out matters relating to the price, and terms and conditions, under which a carrier will permit the interconnection of another carrier to its network.

### E. Fifth Tariff Order, 2013

The Fifth Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Fifth) (Digital Addressable Cable TV Systems) Tariff Order 2013*), regulated the tariff for supply and installation of Set Top Box (STB). It was applicable alongside the Fourth Tariff Order. Its application was limited to MSOs. This was an attempt to make the transition from analogue affordable and eliminate the ‘entry barrier’ of technology and cost as contemplated. TRAI, however, did not limit itself to just the tariff here. It also stipulated a condition that the STB should conform to the Indian Standard as stipulated by the Bureau of Indian Standard.

### F. Sixth Tariff Order, 2013

The Sixth Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Sixth) (The Direct to Home Services) Tariff Order 2013*) regulated tariff for supply and installation of customer premises equipment, which

was essentially equipment which enabled reception of broadcasting service through addressable system, including STB and dish antenna. However, television receiver set, computer or any such equipment was excluded. This was applicable to the DTH operators.

### G. Seventh Tariff Order, 2015

The Seventh Tariff Order (*The Telecommunication (Broadcasting and Cable) Services (Seventh) (The Direct to Home Services) Tariff Order 2015*) focused on DTH services. It consolidated the tariff for supply and installation of the Customer Premises Equipment, providing even for repair and maintenance of the customer premises equipment as well as refund on surrender of connections. It was more exhaustive in comparison to its predecessor.

### H. Eighth Tariff Order, Regulation Draft

Of the four Draft Regulations and Tariff Order, the relevant one is *Consultation on the Draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016*.

The key points of the Draft Tariff Order are as follows:

- Rs. 130 as monthly rental for 100 standard definition channels on set top box from April 2017.
- Subject to the availability of capacity on network, each distributor shall offer additional capacity to a subscriber in the slabs of 25 SD channels, beyond initial 100 channels capacity at cost not exceeding Rs. 20 (excl. taxes/such slab/STB/month).
- General Cap on Maximum Retail Prices for pay channels, based on genre.
- Price forbearance. A bouquet of channels should not be priced less than 85% of sum of *ala carte* pricing.
- Broadcasters will provide minimum 20% distribution fee to distributors for collection and remittance of pay channel revenue.
- No bundling or bouquet of FTA, only Pay channels.

Star India Pvt Ltd and Vijay TV have challenged this Draft Tariff Order in the Madras High Court. They contended that the recent Tariff Order is in conflict with the exclusive rights of Broadcasters under the Copyright Act, 1957. The important questions that will be dealt with by the Madras High Court in the aforesaid litigation are whether TRAI has the authority and

power to regulate the prices of channels and whether such fixation of prices is in violation of the rights of the Broadcasters under the Copyright Act, 1957. The Madras High Court had initially directed TRAI to maintain status quo on the Tariff Order and had thereby restrained TRAI from notifying the recent Tariff Order. However, subsequently in January 2017, the Supreme Court had allowed TRAI to go ahead with the consultation process of the Draft Tariff Order, but said that TRAI cannot notify these without referring them to the apex court.<sup>23</sup> The Supreme Court further *vide* its Order dated March 3, 2017 allowed TRAI to notify the recent Tariff Order and gave liberty to Star India to challenge the same before the Madras High Court and further directed the Madras High Court to continue the hearing of the case filed by Star India and dispose of the case within two months.<sup>24</sup> TRAI has accordingly notified the recent Tariff Order with certain modifications and published a Notification being F. No. 1-2/2017-B&CS dated March 3, 2017 thereby notifying the Eight Tariff Order as The Telecommunication (Broadcasting And Cable) Services (Eighth) (Addressable Systems) Tariff (Amendment) Order, 2017 (“Tariff Order”).

### III. IMPACT OF THE TARIFF ORDER ON BROADCASTING SECTOR AND ITS CONFLICT WITH COPYRIGHT ACT, 1957

The Tariff Order which prescribes for fixation of price of the channels seems to be the most important bone of contention for the Broadcasters since cheaper *a la carte* options would restrict the subscribers from subscribing to bouquets and would also lead to subscription of lesser number of channels. The Tariff Order also seeks to leave a huge impact on the Broadcasters in terms of fixation of tariff by the Broadcasters thereby limiting the right of the Broadcaster to commercially exploit their special right (i.e., the Broadcast Reproduction Right) governed under Chapter VIII of the Copyright Act, 1957.

In this background, it is critical to analyse the conflict between the Tariff Order and the provisions of the Copyright Act, 1957.

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<sup>23</sup> Apurva Vishwanath, Harveen Ahluwalia, *SC Asks TRAI not to Notify Order, Madras HC Case to Continue, Livemint* (January 17, 2017), available at [http://www.livemint.com/Consumer/wtD3ig5zV3I8nDZsil76mO/SC-allows-Trai-to-finalize-draft-tariff-order-for-broadcast.html?utm\\_source=scroll&utm\\_medium=referral&utm\\_campaign=scroll](http://www.livemint.com/Consumer/wtD3ig5zV3I8nDZsil76mO/SC-allows-Trai-to-finalize-draft-tariff-order-for-broadcast.html?utm_source=scroll&utm_medium=referral&utm_campaign=scroll) (last visited on March 20, 2018).

<sup>24</sup> FE Bureau, *TRAI gets SC nod to Notify Tariff for TV Channels, Financial Express* (March 4, 2017), available at <http://www.financialexpress.com/india-news/trai-gets-supreme-court-nod-to-notify-tariff-order-for-tv-channels/574209/> (last visited on March 20, 2018).

### Copyright Act, 1957:

The Copyright Act, 1957 (“**Copyright Act**”) came into force on January 21, 1958. S. 37 of the Copyright Act, as it was originally enacted in 1957, recognized rights of broadcasting authorities as Broadcast Reproduction Right (“**BRR**”). BRR provided for protection of programmes broadcast by means of radio-diffusion by the Government or other broadcasting authority. The emergence of BRR did not dilute the copyright protection mandated by the Copyright Act in favour of the works recognized under the Copyright Act. In fact, S. 38 of the Copyright Act, as originally enacted, specifically clarified that the exploitation of any broadcast was subject to the prior permission of the owner of the work embodied in any programme. Similarly, S. 39 of the Copyright Act, as originally enacted, clarified that the BRR would not affect the separate copyright subsisting in any literary, musical or dramatic work broadcast by the broadcasting authority or in any record embodying such work. S. 30 of the Copyright Act dealt with the licenses by owners of copyright.

The Copyright Act was further extensively amended in 2012 *vide* the Copyright (Amendment) Act, 2012 (“**the 2012 Amendment**”) which came into force on June 21, 2012. A significant amendment to the Copyright Act was the complete overhaul of Chapter VII of the Copyright Act which pertains to Copyright Societies. A new provision namely S. 33A was also inserted in Chapter VII which allows for recourse by way of an Appeal against the Tariff Scheme formulated by a Copyright Society. The 2012 Amendment also amended S. 39A of the Copyright Act which stipulates the application of certain provisions of the Copyright Act, with necessary adaptations and modifications, to the BRR.

S. 39A of the 2012 Amendment makes provisions of Ss. 18, 19, 30, 30A, 33, 33A, 34, 35, 36, 53, 55, 58, 63, 64, 65, 65A, 65B and 66 applicable to BRR. On a reading of S. 39A with some of the relevant sections of the Copyright Act it can be seen that it encompasses the following provisions in the context of BRR:

- The owner of BRR has the exclusive right to assign BRR in the manner set out in S. 18;
- The mode of assignment is as set out in S. 19;
- S. 30 grants right to owner of BRR right to grant any interest in the BRR by license;
- A society of Broadcasters can be registered in pursuance of S. 33 of the Copyright Act which can issue/grant licences with respect of BRR;

- Under S. 33A, the BRR society has to publish tariff scheme, if any. An aggrieved person has right to approach Copyright Board with respect to any grievances regarding tariff scheme so published;
- Broadcasting organization/society is vested with powers of administration of the BRR of the owners/its members as per S. 34 and the control of such society remains with BRR owners as set out in S. 35;
- The broadcasting organization/society is required to submit to the Registrar of Copyrights the returns as mentioned in S. 36;
- Under S. 55, the civil remedies as available for infringement of copyright are also available for infringement of BRR;
- Under S. 63, the offences of infringement are made applicable to infringement of BRR.

Thus, a broadcasting organization is entitled to grant license of its special right being the BRR. The 2012 Amendment expanded the ambit of regulation of licensing of BRR by broadcasting organizations. The 2012 Amendment contemplated the formation of a society of broadcasting organizations for licensing of BRR in addition to voluntary licensing by broadcasting organizations individually under S. 30 which was already applicable to BRR. Such societies are permitted to publish their tariff in such manner as may be prescribed. Any person aggrieved by the tariff scheme can appeal to the Copyright Board and the Board may after holding such enquiry, as it considers necessary, make appropriate orders to remove any unreasonable element, anomaly or inconsistency therein. The Copyright Board is even empowered to fix an interim tariff, pending the appeal before it. As per the Finance Act, 2017, the Copyright Board has been taken over by the Intellectual Property Appellate Board (IPAB).<sup>25</sup>

#### IV. CONCLUSION

It can therefore be argued by the Broadcasters that the scheme of the Copyright Act in context of BRR, sets out a complete mechanism for grant, assignment, licensing, regulating and monitoring BRR and the same cannot be governed by TRAI. It is also a well settled law that between a special law and a general law, it is the special law which shall prevail. The general law

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<sup>25</sup> *Finance Bill Gets Presidential Assent, Takes Effect From Today, Livemint* (April 1, 2017), available at <http://www.livemint.com/Politics/WGvl6ZVIkioggKsaSCvt21/Finance-Bill-gets-presidential-assent-takes-effect-from-tod.html> (last visited on March 20, 2018).

cannot defeat the special law on a subject.<sup>26</sup> Furthermore, the Tariff Order is in the form of a delegated legislation and the Supreme Court has previously held that a delegated piece of legislation is invalid “*if it is inconsistent with the substantive provisions of another statute if it seeks to amend or affect the operation of another statute.*”<sup>27</sup>

Therefore, if the Madras High Court comes to a finding that the Tariff Order or any part thereof is directly in conflict with provisions of the Copyright Act, then such part of the Tariff Order may be read down by the Court. However, the same remains to be seen as and when the matter is decided by the Madras High Court.

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<sup>26</sup> Jain Ink Mfg. Co. v. LIC, (1980) 4 SCC 435.

<sup>27</sup> *Halsbury's Laws*, (4<sup>th</sup> edn., Vol. 44) ¶¶ 965, 1001; State of U.P. v. Hindustan Aluminium Corpn., (1979) 3 SCC 229 : AIR 1979 SC 1459.