Report on

The future of news in India

Sustaining Credibility in an Age of Digital Transformation

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V | D H | Centre for Legal Policy

This report is an independent, non-commissioned piece of work by the Vidhi Centre for Legal Policy, an independent think-tank doing legal research to help make better laws and improve governance for the public good.

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Acknowledgements

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Errors remain the authors' alone.

In this Report

This report examines the digital transformation of the Indian news environment from a regulatory perspective. In doing so, two distinct questions are considered— first, the question of "news and the Internet", which is an inquiry into how the print news industry has evolved in the Internet era; and second, the question of "news on the Internet", which is an analysis of the state of news on digital mediums, such as online websites, social media platforms and news aggregators.

These questions structure our inquiry into an evolving phenomenon: the transformation of the news industry as a result of the growth of technology.

This report is primarily concerned with print or written news. This is for two reasons— first, print news is entrenched in the physical distribution of information and is likely to be the most severely impacted segment of the news industry in the age of rapid digitisation; second, India is well on its way to introduce policy measures to address challenges associated with the print industry and the rise of digital media. For instance, the Ministry of Information and Broadcasting has recently notified the draft Registration of Press and Periodicals Bill, 2019 ('Draft RPP Bill') which attempts to reform the overarching law governing print media in India. These policy measures merit further scrutiny from the point of view of the future of both online and offline news.

Sustaining credible print journalism and orienting digital news to the public good

The news ecosystem today stands at a vital crossroads. The worsening economic health of print journalism threatens its ability to credibly inform the public and act as an institutional check upon power. The environment of digital news, on the other hand, operates in a vacuum of regulation. The emergence of a post-truth paradigm in public communications and the widespread proliferation of misinformation are barriers to realising the benefits of digital news distribution.

This report is primarily concerned with ensuring that high-quality journalism is able to transition into the era of digital communications in a manner that aligns with the public good. It breaks this inquiry into two distinct concerns: the evolution of the news industry in response to the Internet, and the evolution of the news environment on the Internet.

Part I: Identifying policy priorities for the future of news

News and the Internet

Chapter I of the report evaluates the effects of the digital transformation on the print news industry. While the economic slowdown of the industry is more pronounced in the West, it finds that India is not far behind.

News on the Internet

Chapter II takes a look at the dynamics of the ecosystem of digital news. It analyses the business models of digital news, the important players and issues with the information environment of the Internet.

Part II: Developing a policy roadmap for the future of news

Constructing a principled framework

Chapter III outlines the issues to be considered for identifying policy-based measures to regulate the press. It examines the constitutional jurisprudence on the regulation of newspapers to identify a principled basis for the development of law in this regard.

Evaluating proposals for the future of news in India

Chapter IV sets out various proposals which have been suggested across the world to address the regulation of news in light of the digital transformation. It evaluates these proposals on the basis of the constitutional parameters outlined in Chapter III.

Recommendations

Chapter V offers four recommendations to move forward regulatory action in this area and identifies future agendas for research:

- Institutionally reform the Department of Audio-Visual Promotion, Government of India ('DAVP')
- Initiate an investigation into the dominance of online advertising platforms by the Competition Commission of India ('CCI')
- Explore institutional measures to address misinformation
- Impose editorial responsibility on publishers of digital news and design duties for news aggregators

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Part I

Identifying policy priorities for the future of news

I. News and the Internet

A. State of the print media industry

Since the mid-1990s, the advent of the Internet has disrupted most sectors of the global economy. Nowhere has this effect been as stark as in the production and dissemination of information in the physical world. As the largest legacy producers of content, most newspapers across the globe have been adversely affected.[1] Even in periods of relative boom in the economy, newspapers have been shrinking in terms of readership and revenues.[2] This phase of digital disruption has coincided with the emergence of digital platforms, in the news distribution value chain. These are social media websites, standalone news aggregation websites and smartphone-based content distribution applications. These platforms either generate their own content or aggregate content created by others. They have significantly transformed behaviours and preferences of news consumers, and substantially altered the process of newsgathering and consumption.

In India for example, a survey on reading preferences conducted by Reuters demonstrates that merely 16% of individuals under the age of 35 prefer to get their primary news from print news, a number far outstripped by the 56% who identify digital platforms (search engines, social media, video streaming and news aggregator platforms) as their primary source of news.[3]

For individuals over the age of 35, these numbers are 27% for print news and 38% for online media. These figures show that the safety buffer of older, committed, legacy users of print news has been significantly weakened.[4]

In the last decade, the print news industry in developed economies such as the United States of America ('US') and the United Kingdom ('UK') have displayed some clear trends, characterised by shrinking circulations and revenues,[5] inability to attract top talent, and consequently a significant reduction in influence and importance.[6] At the same time, scholars have consistently challenged the application of this narrative in India:[7] arguing for nuance in measuring the impact on various parts of the print media ecosystem.[8] According to statistics from the Indian print industry, readership of local and national dailies has witnessed an overall rise. However, these figures do not take into account the fact that the digital transformation is only beginning in the Indian context, the loss of content quality due to the increased focus on producing viral content fast, public interest topics getting less coverage due to personalisation of news and difficulty in monetising readers who expect quality content for free without involving advertisements.[9] These assessments emanating from within the print news industry prompt an examination of the health of the print news ecosystem.

1 Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

2 Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020.

3 Rasmus Kleis Nielsen, 'The future of India's newspapers has to be digital – and it has to be now', The Scroll, 23 September, 2019 <https://scroll.in/article/937657/the-future-of-indias-newspapers-has-to-be-digital-and-it-has-to-be-now> accessed 23 April, 2020.

4 ibid.

5 Julian Smith, 'Newspapers in Decline, Digital Slowdown', The Conversation, 22 May 2015 <https://theconversation.com/newspapers-in-decline-digital-slowdown-whats-new-in-the-news-41364> accessed 23 April, 2020.

6 Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

7 Vanita Kohli-Khandekar, 'The Indian Media Business' (2015), p 27.

8 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp. 35-50.

9 Based on responses received by stakeholders (newspapers) to a questionnaire circulated by Vidhi [Newspapers Feedback].

The health of the print news ecosystem can be measured by studying variations across two parameters: (a) total circulation and total readership; and (b) advertising revenue. Here, total circulation refers to the number of newspapers sold and total readership refers to the number of readers. Advertising revenue represents the revenue provided by advertisers for the space that they occupy in the newspaper, which forms a significant portion of the total revenue of a print newspaper.[10]

Decrease in Circulation and Readership

Globally, data from the US[11] and UK[12] indicates that circulation is on a sharp downward spiral.[13] In US, the rate of decrease in circulation of print news has been stark— 10% in the period between 2017-2018[14] and 12% in the period 2018-2019.[15] In UK, the print news circulation has almost halved— from 11.5 million copies in 2008 to 5.8 million copies in 2018 (national newspapers) and from 63.4 million copies in 2008 to 31.4 million copies in 2018 (regional newspapers).[16]

Turning the lens to India, the reported overall growth of 3.4%[17] (combining circulation growth and advertising revenue growth) in the Indian print media does, prima facie offer a degree of optimism in the face of negative growth in circulation[18] and advertising revenue in the West.[19] Statistics from a number of Indian studies[20] show that readership and circulation of print news is still on the rise, albeit at a low growth rate.[21] However, researchers have cautioned that this overall growth rate is the lowest in a decade and projections from the next 2-3 years show a decrease in circulation for the first time.[22]

Further, it has been found that the current growth in revenues and circulation is not evenly distributed[23] and is being primarily led by the regional newspapers.[24] For instance, the Indian Readership Survey ('IRS')[25] shows that the growth in readership has been particularly pronounced in groups which are rural, recently literate, and are reading vernacular and Hindi

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10 Vanita Kohli-Khandekar, 'The Indian Media Business' (2015), p 29.

11 'Newspapers Fact Sheet' Pew Research Center: Journalism & Media, 9 July 2019 <https://www.journalism.org/fact-sheet/newspapers/> accessed 23 April, 2020.

12 Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020.

13 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 35-50.

14 Michael Barthel, 'Despite subscription surges for largest U.S. newspapers, circulation and revenue fall for industry overall', Factank, 1 June 2017, <https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/> accessed 23 April, 2020.

15 'Newspapers Fact Sheet' Pew Research Center: Journalism & Media, 9 July 2019 <https://www.journalism.org/fact-sheet/newspapers/> accessed 23 April, 2020.

16 Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020.

17 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 36-42.

18 Circulation is a parameter of units of newspapers sold which is sometimes used as a proxy for readership. This works as a proxy if the consumer base is such that each copy of newspaper sold is read by only one user.

19 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 35-50.

20 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 35-50; Audit Bureau of Circulation, <http://www.auditbureau.org/> accessed 23 April 2019; Nevin John, 'Indian Readership Survey 2019', Business Today, 26 April 2019 <https://www.businesstoday.in/top-story/indian-readership-survey-2019-india-today-is-the-largest-and-fastest-growing-magazine/story/340884.html> accessed 23 April, 2020 (referring to three studies: the KPMG Media Report, The Audit Bureau of Circulation Report and the Indian Readership Survey).

21 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, p 36.

22 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, p 69.

23 KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, p 37.

24 Audit Bureau of Circulation, <http://www.auditbureau.org/> accessed 23 April, 2020.

25 The Indian Readership Survey' (2019)<https://mruc.net/uploads/posts/8e428e54a95edcd6e8be593a7021a185.pdf> accessed 23 April, 2020.

regional papers.[26] Specially the IRS, in 2019, reports that circulation (for all language types) grew at 4.4%— readership growth was 10.7% for the English newspapers, 5.6% for Hindi newspapers, and 3.95% for regional newspapers such as Bengali, Kannada, Gujarati, Malayalam, Marathi etc.[27] In the present case, the figures must be viewed keeping in mind that the readership base of English newspapers is very low, around 3 crores, in comparison to 40 crore readers of Hindi and regional language newspapers.[28] What this means in effect is that the growth in English readership has limited effect on the overall readership growth numbers.

Decrease in Advertising Revenue

Adverting revenue in India, similar to the trend of circulation and readership, is growing but at a slower pace than in the previous time period (till 2017) (KPMG Media report,[29] Audit Bureau of Circulation report,[30] IRS).[31] English newspapers grew their advertising revenue by 1.7% while Hindi newspapers grew by 3.6% and regional newspapers by 4.2%.

Overall Growth Trends for Newspapers in India

English language newspapers which have traditionally enjoyed a national readership base are gaining circulation and advertising revenue much slower than their Hindi and regional peers.[32] In terms of numbers, the overall growth (in terms of both advertising revenue and circulation) of print news in the year 2018 was a decade-low of 3.4% according to the KPMG Media Report. Hindi newspapers grew at 4.3% while regional newspapers grew at 4.7%. English newspapers by contrast clocked in a dismal 1.5%.

Hindi language newspapers have been observed to be plateauing in growth (in terms of both advertising revenue and circulation) with a number of vernacular language newspapers picking up the slack.[33] The growth observed in regional language newspapers is broad based in terms of increased readership across demographics and age groups.[34] Within the spectrum of regional newspapers, however, this growth is uneven in terms of circulation; for example, in the period between 2017-2018 (last reported figures) only Gujarati, Telugu and Malayalam language newspapers had increased circulation while other language newspapers such as Bengali, Kannada and Marathi saw their circulations reduce.[35]

On this basis, it can be inferred that— (a) growth in the print media in India is slowing, although it has not reached the level of negative growth as observed in the Global North; and (b) the slowing growth is a summation of the stagnation and potential negative growth of Hindi and English language newspapers respectively, which can be contrasted with relatively higher growth rates for regional newspapers.[36] Retracing how and why this state of affairs has come about will offer useful lessons for future-facing analyses of the print media in India.

[26] 'The Indian Readership Survey' (2019)<https://mruc.net/uploads/posts/8e428e54a95edcd6e8be593a7021a185.pdf> accessed 23 April, 2020.

[27] ibid.

[28] Audit Bureau of Circulation, <http://www.auditbureau.org/> accessed 23 April, 2020.

[29] KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 36-42.

[30] Audit Bureau of Circulation, <http://www.auditbureau.org/> accessed 23 April, 2020.

[31] Nevin John, 'Indian Readership Survey 2019', Business Today, 26 April 2019 <https://www.businesstoday.in/top-story/indian-readership-survey-2019-india-today-is-the-largest-and-fastest-growing-magazine/story/340884.html> accessed 23 April, 2020.

[32] KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 36-42.

[33] Why India's Newspaper Industry Is Still Growing Fragmented market for "vernacular" editions fuels gains', eMarketer, 30 March 2017 <https://www.emarketer.com/Article/Why-Indias-Newspaper-Industry-Still-Growing/1015540> accessed 23 April, 2020.

[34] NCCS data as cited in KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, p 38.

[35] KPMG, 'Media Ecosystem: The Walls Fall Down', (2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf> accessed 23 April, 2020, pp 36-42.

[36] Som Nath Sapru, 'The on-going growth story of Indian newspapers', PrintWeek, 26 September 2016 <https://www.printweek.in/features/-growth-story-indian-newspapers-21874> accessed 23 April, 2020.

In order to identify the processes which have resulted in the current state of the print news industry, it is important to contextualise the development of this industry over the last 20 years in India. Print news was considered a fertile, booming industry in the early 2000s.[37] While most legacy media outlets had been family-owned outlets, the early 2000s saw a wave of foreign investment, as well as internal reorganisation and professionalisation of legacy outlets, which led to a flourishing print media industry.[38] However, with the advent of the Internet in general and cheap digital access to news in particular, print news media is exposed to the same set of market forces that is faced by any digital content creator on the Internet i.e. competing in an increasingly crowded field for the reader's attention online. In this transition to digital, the legacy of being a major print media organisation, as discussed later, does not bestow any added advantage and may even be bar to adopting innovative practices.

The economic outlook of the industry in 2020 appears to reflect the difficult reality of this transition from print to digital. Several big legacy outlets, such as Business Standard, The Hindu, The Indian Express (for international readers) amongst others, have put the digital editions of their newspapers behind a paywall, citing economic sustainability in a digital era as the reason that forced them to adopt this measure.[39] A constant refrain within the industry has been the threat to the growth of the industry posed by digital news.[40] There is also some degree of consensus that newspapers have failed to successfully adapt to the challenges of the digital era.[41] Even though circulation numbers may have increased for some newspapers, particularly vernacular newspapers, it is not clear if this has led to increased profitability.[42]

Newspapers today are scrambling to identify and adapt successful digitisation strategies,[43] have attacked news aggregators as 'parasites',[44] have experimented with a bouquet of subscription models and more recently, have started restricting access in order to safeguard their economic remuneration.[45] The inflection point for this transformation is difficult to precisely identify. However, an examination of some of the primary drivers of this transformation enables a contextualised understanding of the way in which the print media industry has struggled to adapt to the challenges of digitisation.

To analyse this transformation, we begin by tracing the fundamental shift caused by technology related to print media, that is, the reduction of costs associated with producing and distributing information. Following this, we examine the trends in commercial and government advertising, and outline how specific instances of market failure are observed in both markets. Finally, we briefly discuss the digitisation strategies of legacy print media outlets, in order to round out a holistic evaluation of the impact of technology on the print media.

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37 Vanita Kohli-Khandekar, 'The Indian Media Business' (2015), p 24.

38 ibid.

39 Shuchi Bansal, 'Consumers slow to adopt digital news paywalls', Livemint, 28 March, 2019 <https://www.livemint.com/opinion/columns/opinion-consumers-slow-to-adopt-digital-news-paywalls-1553722065692.html> accessed 23 April 2020.

40 Mercedes Bunz, 'Rupert Murdoch: There's no such thing as a free news story', The Guardian, 1 December 2009, < https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news> accessed 23 April 2020.

41 Opinion from stakeholder received at the Roundtable Discussion on the Digital Transformation of News Media, conducted under Chatham House Rules on 13 and 15 December 2019.

42 ibid.

43 Zeenab Aneez et al, 'Indian Newspapers Digital Transition: Dainik Jagran, Hindustan Times, and Malayala Manorama', Reuters Institute for the Study of Journalism (2016) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-04/Indian%20Newspapers%27%20Digital%20Transition.pdf> accessed 23 April 2020.

44 Mercedes Bunz, 'Rupert Murdoch: There's no such thing as a free news story', The Guardian, 1 December 2009, < https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news> accessed 23 April 2020.

45 Shuchi Bansal, 'Consumers slow to adopt digital news paywalls', Livemint, 28 March, 2019 <https://www.livemint.com/opinion/columns/opinion-consumers-slow-to-adopt-digital-news-paywalls-1553722065692.html> accessed 23 April 2020.

B. Reduction of costs and rise in competition

The legacy print media had significant fixed costs associated with the infrastructure required for printing, a significant portion of which had to be planned and paid for in advance. These costs represented a business moat for existing newspapers, protecting them against the entry of new newspapers as well as innovations that these newspapers may introduce. These costs thus represent a significant burden for legacy print newspapers when they compete with content creators who do not have to bear similar costs because of the Internet. The business moat, in the context of the Internet, risks becoming a burden for legacy newspapers when it comes to competition.

First, legacy print newspapers must internalise production costs. Newsprint, often imported, has tended to be priced expensively, and typically, advertising revenues work to subsidise the real price of newspapers for readers. An estimate states that a newspaper usually costs between Rs. 15 to Rs. 20 to produce, but it sells for Rs. 1 to Rs. 4. After deducting the trade commission, it is estimated that a publisher would receive around Re 0.6 to Rs. 1.5 per copy of a newspaper.[46] This deficit that circulation revenue cannot cover, is instead subsidised by advertising revenue received by the newspaper. The high price of newsprint means that the more the number of copies printed, the more money is lost— "unless every jump in circulation fetches an increase in advertising revenues that is more than or equal to, the rise in printing costs." (Vanita Kohli- Khandekar, 2019). Therefore, in the years when the ad spend on print was growing at a slow rate, publishers had no incentive to invest in circulation, as it would reduce their profits. Deliberate caps on circulation were standard practice for many leading newspapers and magazine companies.[47] However, this constraint does not exist on the Internet. The investment required to increase circulation on the Internet is minimal. Therefore, an increase in circulation or outreach on the Internet is not associated with rising production costs.

Secondly, the people cost of legacy newspapers is higher and is subject to more onerous regulation. The minimum standards of working conditions for journalists and newspaper employees, as well as their minimum wages, is regulated by the Working Journalists and other Newspaper Employees (Conditions of Service and Miscellaneous Provisions) Act, 1955 and the Working Journalists (Fixation of Rates of Wages) Act, 1958.[48] Crucially, these enactments rely on the definition of 'working journalists' to identify the persons to whom the provisions of such act would apply. This definition, in the 1955 Act, is linked to the concept of 'newspaper establishment', which requires any newspaper to be a 'printed, periodical work'.[49] The same regulations, thus would not apply to the production of news on the Internet.

Thirdly, an extensive regulatory framework (inherited from India's colonial past) exists to control legacy newspapers which is not applicable for news on the Internet. The Press and Registration of Books Act, 1867 ('PRB Act'), imposes detailed registration and compliance costs on newspapers. For example, the title of the newspaper must be verified by the Registrar of Newspapers and the same must be vetted by the District Magistrate for the printing of the newspaper to start. This process of vetting is mandated to be redone in case there is any change in the working conditions such as change in the printer, periodicity of publication or ownership. News on the Internet is, free of such regulatory burdens, at this point.

Fourthly, a legacy newspaper must factor in the costs of distribution. The process of distribution involves engaging 'hawkers' and 'line boys' on a commission basis which could be a figure anywhere between 18-25 percent of the cover price of the newspaper. Further, printed copies

[46] Vanita Kohli-Khandekar, 'The Indian Media Business' (2015), p 29.

[47] ibid.

[48] Working Journalists (Fixation of Rates of Wages) Act, 1958 (India).

[49] Working Journalists and other Newspaper Employees (Conditions of Service and Miscellaneous Provisions) Act, 1955 (India), s 2(b).

remain unsold due to various gaps between planning of printing and market demand. The cost of 'unsolds' (copies of newspapers which have been printed but not sold) can be as high as 1-5 percent. News on the Internet involves a negligible cost of production for each additional user and thus does not have to factor in these costs.

C. Trends in advertising

Advertising as it relates to news has two observable over-arching trends that will be examined in this section. One, advertising in the print-media is rapidly shifting to digital, mirroring the advent of digital ecosystem in other parts of the media economy. Two, in this transition period between print led advertising spend to digital led advertising spend, government spending on advertisements has emerged as a key component on the balance sheet of many newspapers. This section briefly explores these trends.

Commercial advertising

From 2014 to 2015, the Indian advertising market grew by 13%.[50] However, print-media advertising grew only at 8%, with the market for English language newspaper advertisements amounting only to half of this growth.[51] On the other hand, in the same period, digital advertising grew by 38%, and is projected to continue to grow.[52] In the last year (2019), spends on print advertising formed 29% of total advertising spend while spends on digital advertising comprised 20% of the total advertising spend.[53] If one looks at the projected growth figures (by end of 2020) of the advertising sector as a whole it stands at 11% while growth in only the digital segment of advertisement is projected at 27%.[54] These statistics tell an important story— one of the diminishing importance of print advertising market corresponding to an increased focus on digital advertising. At the same time, the Indian Government has considerably increased the amount it spends on advertising, to the extent that government advertisements are estimated to form a significant part of the total advertising revenue for newspapers.[55] However, the lack of transparency and principled decision-making in this respect is a threat to the independence of the press, which is forced to rely on government advertising for economic sustainability. This has been explored in the following paragraphs.

Government advertising

While the trend of commercial print advertising is of significant commercial importance, from a regulatory perspective, the role of government advertising in this landscape is especially concerning. Not only is government advertising a critical source of revenue for many newspapers, but there are also some crucial concerns about transparency in relation to government advertising.

Government advertising is channelled through the Department for Audio Visual Promotion ('DAVP') which comes under the ambit of the Ministry of Information and Broadcasting, Government of India. The DAVP releases all central government advertising, and is considered

[50] KPMG-FICCI Report (2016) as cited at PRASANT NAIDU, FICCI-KPMG Report 2016 – Mobile & Video Advertising Driving the Growing Indian Digital Advertising Spends, Lighthouse Insights, 8 April, 2016 <http://lighthouseinsights.in/ficci-kpmg-report-2016-mobile-video-advertising-driving-the-growing-indian-digital-advertising-spends.html/> accessed 23 April 2020.

[51] ibid.

[52] ibid.

[53] McKinsey Global Institute, 'Digital India: Technology to transform a connected nation', available at < https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20India%20Technology%20to%20transform%20a%20connected%20nation/MGI-Digital-India-Report-April-2019.ashx> Accessed 4 January, 2020

[54] Dentsu Aegis Network, 'Digital Advertising in India 2020' <https://dentsuaegisnetwork.in/uploads/digital_reports/DAN-e4m-Digital-Report-2020-Web-C3.pdf> accessed 23 April 2020.

[55] ibid.

the 'lifeline' of most small newspapers.[56] The Government has, in the past, used the DAVP to hold back or dilute its advertising spend on publications critical of the Government, as has been reported in many cases.[57] On the face of the record, English newspapers appear to be the beneficiaries of around 40% of the annual spend of the DAVP, while far smaller amounts are allocated to vernacular newspapers.[58] However, such vernacular newspapers are often particularly dependent on these sums, especially smaller ones. The sums received from the DAVP could amount to a significant, sometimes determining, proportion of the total incomes of such small newspapers.[59] Therefore, they are the most vulnerable to pressures on editorial matters by the Government. The consequence of this regime is a commercially maintained restriction on the editorial freedom of such newspapers. Historical analysis of DAVP spending also show an inconsistent spending pattern with major spikes just before general elections including before the 2009[60] and 2014[61] elections. This leads to questions being raised regarding the DAVP spending being motivated not by commercial publicity concerns but rather by political expediency.[62] The spectre of opacity around DAVP's spending does not end here.

First, a comparison of the top recipients of DAVP funding with the top newspapers by circulation (for example the Audit Bureau of Circulation) show a somewhat troubling trend. In an empirical study done in 2014, it was found that other than the Times of India, the two lists of newspapers do not correspond at all. This is problematic because overall the stated purpose of DAVP's advertising efforts are the same as any other advertiser: maximum publicity for its content. Clause 12 of the New Print Media Advertisement Policy of 2016 ('Advertising Policy'), the policy document guiding DAVP spending mentions that circulation figures mentioned by Audit Bureau of Circulation would be an essential parameter in deciding whether a newspaper would be empanelled and thus eligible to receive government advertising. This is clearly not reflected in the broad disconnect between the circulation figures of top newspapers (Audit Bureau of Circulation) and the list of top beneficiaries of DAVP spending. For example, in the years between 2008-2013, most regional newspapers who were in the top 10 list of newspapers by circulation were much lower down in the list of DAVP spending. One example which highlights the extent of this mismatch may be found in the case of Malayalam Manorama, a publication that is ranked 4 in terms of circulation by the Audit Bureau of Circulation. The same newspaper ranks 15 in terms of the advertisement spend it received from the government. Another example can be found in the data relating to the relative expense to the government to advertise (understood through the cost per column centimetre).[63] Here, the most expensive newspaper according to the DAVP spend / column centimetre metric, Punjab Kesari, was not even in the top ten of circulation charts. This disparity reveals that not just circulation, but other, possibly redistributive factors, are at play in this policy as well. If such factors govern the implementation of the policy, then the grounds and criteria for this exercise is not immediately clear. If such factors are not being considered, then this disparity is difficult to explain.

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[57] Vibodh Parthasarathi et al, 'Mapping Digital Media: India', Open Society Foundation (2012) < https://www.opensocietyfoundations.org/uploads/48c331d2-2b05-4287-b703-9c54771b28b0/mapping-digital-media-india-20130326.pdf > accessed 23 April 2020.

[58] Modi government freezes ads placed in three Indian newspaper groups', Business Today, 29 June 2019 < https://www.businesstoday.in/current/economy-politics/modi-government-freezes-ads-placed-in-three-indian-newspaper-groups/story/359927.html> accessed 23 April 2020.

[59] Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 <https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

[60] Vibodh Parthasarathi et al, 'Mapping Digital Media: India', Open Society Foundation (2012) < https://www.opensocietyfoundations.org/uploads/48c331d2-2b05-4287-b703-9c54771b28b0/mapping-digital-media-india-20130326.pdf > accessed 23 April 2020.

[61] Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 <https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

[62] ibid.

[63] ibid.

Secondly, smaller vernacular newspapers are often particularly dependent on funds disbursed by the DAVP. The sums received by the DAVP could amount to a significant, sometimes critical proportion of the total incomes of such small newspapers.[64] Scholars have pointed out this bias in favour of regional newspapers is self-serving to ensure commercial dependency for political control and not 'social objectives' and 'fairness' for small and regional publishers as mentioned in Clause 6 of the Advertising Policy.

Thirdly, the reliable data released by DAVP is frequently released with a lag of a few years and often in not easily accessible formats. The last official data release was in 2013-2014, while recently scholars have had to file RTI requests to obtain updated spending patterns up to 2018-2019. Transparency in government spending, especially when it has a demonstrable economic impact on newspapers is critical to ensure a level playing field.

Finally, in interviews with editors of a few leading English, Hindi and regional newspapers, respondents have pointed out that while the print advertising rate per unit space has been steadily hiked over the years (including a 25% hike in 2019),[65] the effect on balance sheets has been negligible for most newspapers.[66] This is because while rates have increased, the total budget has remained the same. This has the effect of further accentuating the unequal dynamics of the advertising market. This is because while rates have increased, the total budget has remained the same. This has the effect of further accentuating the unequal dynamics of the advertising market.

It is then unsurprising that 100% of our respondent newspapers sample who are empanelled with the DAVP have reported either no positive change or reduction in absolute revenues from DAVP in the last five years.[67]

D. Responses of legacy print news outlets

Legacy media organisations have, over the previous decade, undertaken a series of measures in order to adapt to the digital environment of news production, consumption and distribution.[68] These efforts have not yet been studied at an industry level. However, individual case studies of digitisation efforts of legacy media organisations offers some insights into how they have dealt with the digital transformation.

An important aspect to consider when evaluating the digitisation efforts of Indian print media is that given the still continuing growth of print media, especially for vernacular newspapers, digitisation efforts are undertaken from a position of relative strength as opposed to their counterparts in more advanced jurisdictions.[69] Digitisation efforts require the deployment of capital with a long-term strategy, and requires a degree of patience before positive outcomes of digitisation can usually be measured. Digitisation strategies have largely taken the form of operating an online version of the print publication. he transition to alternate formats of news delivery is also at an intermediate stage in the Indian context. Print-based media has been reluctant to engage with alternate formats such as streaming platforms and video content. Some digital only publications, such as The Print and The Quint have adopted aggressive strategies with video delivery of news. However, legacy media organi-

[64] ibid.

[65] Lata Jha and Saumya Tewari, 'I&B announces 25% hike in print media advertisements' Livemint, 8 January 2019 <https://www.livemint.com/Consumer/VWvF7MNqkJoytQ6wMhsmFI/IB-announces-25-hike-in-print-media-advertisements.html> accessed 23 April 2020.

[66] Opinion received from newspaper stakeholders during the Survey to Evaluate the Impact of News Aggregation on Newspapers conducted during October- December 2019 by Vidhi..

[67] ibid.

[68] Zeenab Aneez et al, 'Indian Newspapers Digital Transition: Dainik Jagran, Hindustan Times, and Malayala Manorama', Reuters Institute for the Study of Journalism (2016) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-04/Indian%20Newspapers%27%20Digital%20Transition.pdf> accessed 23 April 2020.

[69] ibid

ations do not appear to have attained the same degree of success with their transitions to alternate formats.

Legacy media organisations enter the digital news environment with considerable assets, such as their brand reputation, audience loyalty, newsroom capabilities, pre-existing capital and bright journalistic talent.[70] However, they also carry their pre-existing liabilities, such as the burden of operating a print-business, as well as entrenched newsroom practices, organisational inertia and a professional culture which is not suited to the timeframes of digital news delivery.[71]

In this context, a case study conducted by the Reuters Institute for the Study of Journalism of three established Indian legacy media organisations – Hindustan Times, Dainik Jagran and Malayalam Manorama – offers instructive insights about the ways in which digitisation can be approached by legacy media as a strategy. This section of the report briefly describes relevant insights from this study. It is pertinent to note that for all three organisations, the printed newspaper continues to be the core product of the organisation. With increasing digitisation, strategic approaches in the near future may have to revisit this premise.

There are two broad approaches to digitisation that were identified in this case study. The first, which was adopted by Malayalam Manorama and Dainik Jagran, involves investing establishing parallel digital operations which were connected with the broader organisation but remained operationally separate from the print newspaper. Digital initiatives in this approach are often driven exclusively by management and are oriented towards commercial objectives. In contrast, the second approach, adopted by Hindustan Times, relies on integrating print and digital operations. This approach relies on leveraging the existing assets of the organisation to enable adaptation to a new environment. For example, the 'boots on the ground' in the form of reporters employed by Hindustan Times can supply the leads required for the production of digital content as well, thereby representing captive productive capacity.

In an analysis of how these strategies have fared, a few common issues across organisations were observed. The perceived hierarchy between print-news and digital-news affects the internal workflow and organisational culture of these organisations. This hierarchy is sustained on the perception that the audience on the Internet is perhaps not as 'serious' as print news. Other aspects of the internal organisational culture of newsrooms, including entrenched journalistic practices which might not be sustainable for the rapid timeframes of digital news delivery, as well as the unfamiliarity of existing staff with the digital medium, have also affected the success of these digitisation strategies. While these case studies demonstrate that legacy media organisations in the Indian context are attuned to the need to undertake digitisation measures, a successful blueprint for a digital transition is yet to be identified amongst large legacy news organisations. In light of increased competition from digital-only news organisations and the upheavals caused by the digital media environment, it is perhaps crucial for such strategies to be identified in order for legacy news organisations to continue being relevant in the new media environment.

As was observed throughout this section of the report, the advent of digital communications has fostered a new digital media environment. This environment is characterised by an increase in competition, a failure to adapt to the Internet and the failure of the advertising-revenue model in sustaining print news in an era of transformation.

[70] ibid.

[71] ibid.

II. News on the Internet

The Internet has caused a paradigm shift in the processes of the production, consumption and distribution of information. This throws up fresh challenges which require the development of sophisticated solutions. Perhaps the most significant of these challenges, specifically in the context of news, is the emergence of what many have labelled the "post-truth" era— where rampant misinformation combined with a lack of access to authoritative sources has spurred some serious real-life harms in many instances. Further, the economics of the market of digital news has evolved in an interesting fashion - with a critical position in this market being occupied by platforms such as integrated advertising platforms and news aggregation platforms. The decision of various digital news outlets to adopt paywalls indicates a need to examine the economics of the market.

A common claim levelled by print media outlets is that news platforms enjoy an unfair advantage in the digital environment.[72] This perception is grounded in the notion that digital platforms such as aggregation websites, social media websites, and smartphone-based content aggregators, divert traffic from the websites of content producers/news publishers, thereby reducing page visits, and also depriving them of revenue from digital advertising.[73] However, it is also claimed that the digital platforms outlined above may also be directing a greater amount of traffic towards such websites.[74] Further, they have revolutionised information dissemination by democratising access to news, enhancing reader participation. This section of the report attempts to survey the landscape of 'news on the Internet' to assess the impact of platforms such as advertising platforms, news aggregators and social media websites on the value chain of news production and consumption. It goes on to analyse the information environment on digital mediums and identifies the processes which are possible reasons for the spread of misinformation.

A. Evolving business models of digital news in the age of digitisation

The advertisement-revenue model of legacy news organisations is well-established.[75] Over the course of the 20th century, news organisations had largely come to rely on advertisements as a source of independent funding and revenue for their print operations.[76] As opposed to public funding, advertisements created no dependence on the State for funding (in a context without government advertising), and consequently, promoted fearless journalism by such organisations. The separation of editorial and managerial branches of these organisations acted as a mechanism to introduce further safeguards and accountability in this organisational setup.[77]

If the value chain of this business model were to be crudely imagined, it would represent the following diagram:

[72] Mercedes Bunz, 'Rupert Murdoch: There's no such thing as a free news story', The Guardian, 1 December 2009, <https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news> accessed 23 April 2020

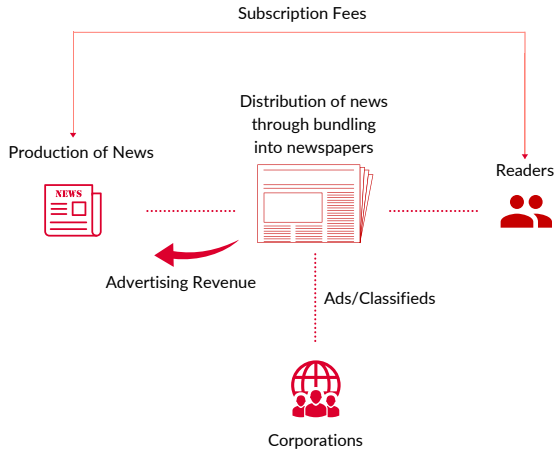
[73] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) <http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

[74] Joan Calzada and Richard Gil, 'What do news aggregators do? Evidence from Google News in Spain and Germany' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=283755> accessed 23 April 2020

[75] Frank Bosch, 'Mass Media and Historical Change: Germany in International Perspective, 1400 to the Present' (2015), p 45.

[76] Prateek Raj and Guy Rolnik, 'Fixing the business model of investigative muckraking journalism is essential for fixing the political economy', Business Model of Investigative Journalism (2018) <https://www.dropbox.com/s/f2fubaaoorqo2cp/Business%20Model%20of%20Investigative%20Journalism.pdf?dl=0> accessed 23 April 2020.

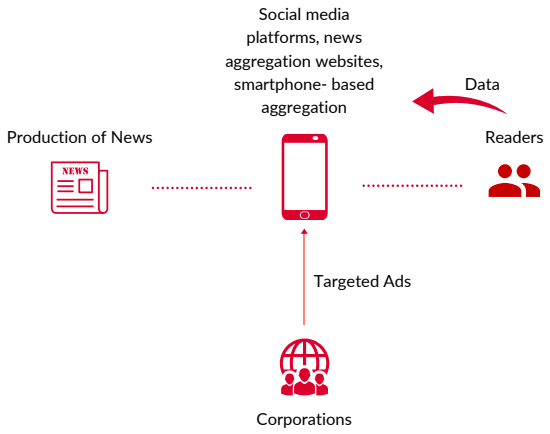
[77] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.



However, this value chain is different on digital mediums. The emergence of targeted advertising has created significant disruption to the value chain of news. Corporations arguably prefer to advertise on digital mediums because of the benefits of targeted advertisements that aggregators offer.[78] Social media and news aggregation websites can offer better targeting services and personalised dissemination of advertisements because of the aggregated data that they collect from their users as opposed to cookies of individual publishers.[79] Consequently, the advertising ecosystem now relies on personalised advertisements through news aggregators as a crucial node in reaching end-users, instead of the generalised advertisements that are found in newspapers.

Even in terms of the dissemination of news itself, the ability of such platforms to identify reader preferences allows them to distribute news in a personalised manner. The use of recommendation engines in determining the content of the feed of a user allows for this personalisation. As a consequence of this personalisation, the reader is presented with individual news articles, instead of the bundled package that was offered by newspapers. While this leads to issues of filter bubbles and echo chambers, which shall be discussed separately, it also has the effect of dislocating newspapers from this value chain altogether.

If the value chain of news distribution through digital platforms like social media and news aggregation websites had to be imagined, it would resemble the following diagram:



An examination of the value chain of news distribution in both paradigms reveals the central role occupied by digital platforms in this ecosystem. Not only are they the only access point for end-users, they are also preferred by advertisers due to their ability to target readers. Consequently, in this value chain, there is no mechanism through which the economic rewards of news gathering flow back to the publishers, and consequently, to the factors involved in journalistic practice.

It must be acknowledged that both newspapers and social media/news aggregator websites simultaneously operate in the media environment today to distribute news. Consequently, the key question in this regard, when viewed in the immediate context, becomes the split of readers between such platforms and traditional newspapers. This split seems to determine the magnitude of the economic impact of news aggregators. While systematic evidence about this has not been collected in the Indian context yet, it appears that within the current framework, the split of readers plays a significant role in determining the flow of the

[78] Matthew Hindman, 'Personalization and the future of news' in 'New Technologies and Civic Engagement' (Gil de Zuniga ed.) (2012), pp. 195, 201.

[79] Neil Thurman, 'Making the daily me: Technology, Economics and Habit in the mainstream assimilation of personalised news' (2011) 12(4) Journalism 395, p 401.

economic rewards of journalistic practice. This split would be affected by both the design aspects of an aggregator, as well as by patterns of reader behaviour.

In examining this split, however, one must be careful to not fall into the mould of academic literature which aims to 'save' newspapers by suggesting rules that have the effect of retaining economic advantages for incumbents in the industry.[80] It must be added that any assessment of the impact of social media/news aggregation must aim to identify the larger value chain of journalistic practice, as opposed to creating narrow legal rules which hamper useful and perhaps, desirable technological innovation.

B. Trends in digital advertising

The emergence of digital advertising as the primary revenue stream for creators of digital content has effectively applied the laws of the market to the production of digital content, by making any content as profitable as the number of viewers it attracts.[81] Statistical trends show the rising importance of digital advertising for Indian newspapers, evidenced by the much higher growth rate of digital advertising as outlined in the first chapter of the report. Newspapers initially adapted to the Internet by making all their content available for free, while relying on digital advertising revenue to remunerate them.[82] The emergence of news aggregators, however, is often alleged to have put this model under severe strain. In order to appreciate this claim, it is important first, to examine the market for digital advertising.

The ecosystem of digital advertising is incredibly complex and involves several actors whose role must be understood in order to understand the market for digital advertising. The ecosystem of digital advertising has typically involved a number of discrete but connected entities, all of whom perform roles such as advertisement design, providing server space, optimising revenue flows, connecting advertisers with publishers etc.

Figure 1 (below) displays the process of pay-per-click advertising, corresponding to numbers in the diagram

1. The advertiser reaches out to a 'middleman' entity on the supply side (part of a network or standalone) in the advertising world, pays the necessary fee (this usually happens through an online automated auction process) to be onboarded.
1. At the same time, the publisher reaches out to a middleman (may not necessarily be the same) entity and designates space around the published content to receive advertisements.
2. The user clicks on an advertisement that is present on the publisher website, kick-starting the process of the flow of advertising revenue.
3. For each click, the advertiser will pay the middleman entity a certain pre-decided sum.
4. From the sum received, a portion is shared by the middleman entity with the publisher. The spilt in the revenue received from the advertiser into two (or more depending on the number of middlemen and their governing terms) is referred as the revenue shared.

[80] Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

[81] Suzanne M Kirchhoff, 'Advertising industry in the digital age', Congressional Research Service (2009) <https://fas.org/sgp/crs/misc/R40908.pdf> accessed 23 April, 2020.

[82] Vibodh Parthasarathi et al, 'Mapping Digital Media: India', Open Society Foundation (2012) < https://www.opensocietyfoundations.org/uploads/48c331d2-2b05-4287-b703-9c54771b28b0/mapping-digital-media-india-20130326.pdf > accessed 23 April 2020.

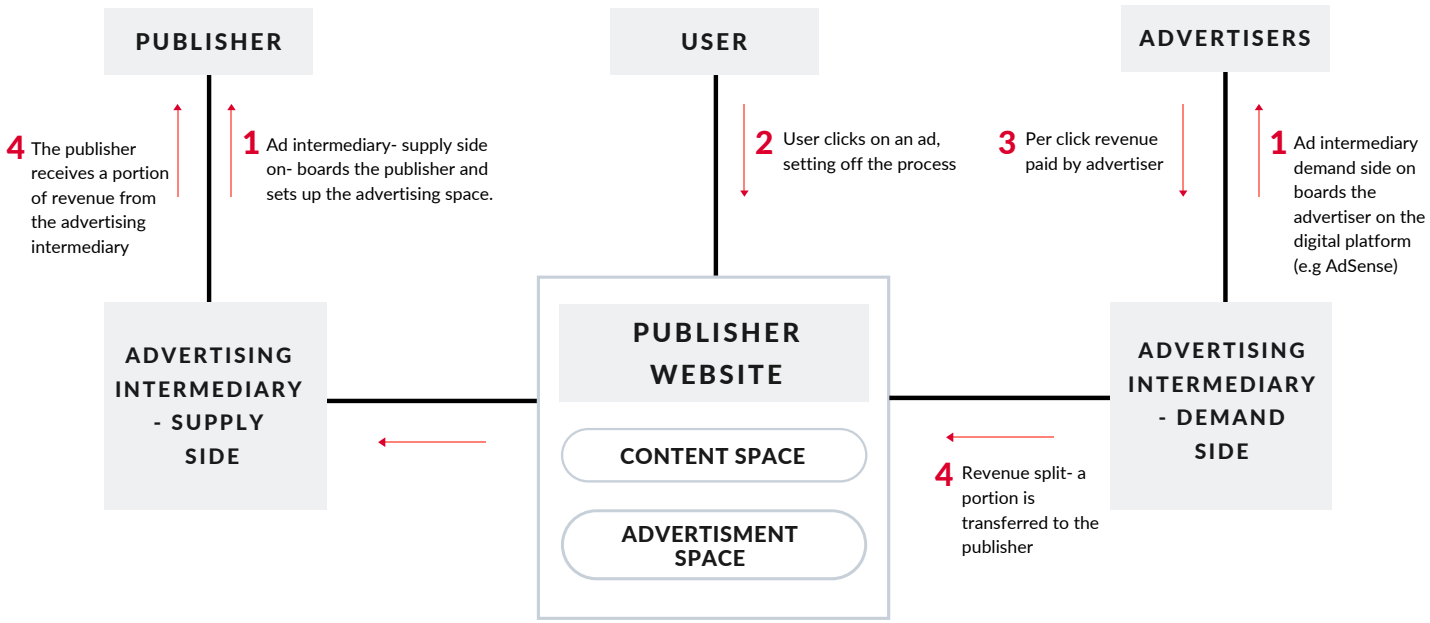


fig: a simplified version of the flowchart contained in, Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019).

However, over the previous decade, corresponding to advances in digital technology, integrated advertising platforms have emerged which consolidate many of these roles into related entities. Google and Facebook operate an increasingly concentrated duopoly in the market for digital advertisements globally.[83] Reports have indicated that Google's net digital ad revenue globally gave it a 41.2% share of the worldwide digital ad market while Facebook is second with a 26.8% share and Amazon had a 5.6% share.[84] In India there is another significant player in the digital advertisement business, Flipkart, an online shopping platform which has pivoted into becoming an advertising intermediary as well.[85] Flipkart was third in terms of market share of digital advertising, with revenues of 747 crores in the financial year 2019.[86]

While there are a wide variety of news aggregator platforms in operation in India, the market for digital advertising shows high degrees of concentration, both in India[87] and globally.[88] As attention is cornered successfully in the other services of these integrated platforms, there is an increasing motivation to design curation algorithms in news portals which complements the wider ecosystem of advertising revenue. As long as an ad-free service line is holding the attention of a user, the data continues to accrue to the platform helping it refine its understanding of user preferences. A more nuanced user profile through increased data flow increases the value of the platform to advertisers which in turn directly increases advertising revenue.

[83] Matthew Ingram, 'How Google and Facebook have taken over the digital ad industry', Fortune, 5 January 2017 < https://fortune.com/2017/01/04/google-facebook-ad-industry/> accessed 23 April 2020.

[84] Jasmine Enberg, 'Global Digital Ad Spending 2019 Digital Accounts for Half of Total Media Ad Spending Worldwide', emarketer, 28 March 2019, <https://www.emarketer.com/content/global-digital-ad-spending-2019> accessed 23 April 2020.

[85] Mihir Dalal and Anirban Sen, 'A new rivalry brews as Flipkart, Amazon cut Google ad spends', The Print, 16 July 2018 <https://www.livemint.com/Home-Page/4OMeKKWsuYTPboijCr9dtO/A-new-rivalry-brews-as-Flipkart-Amazon-cut-Google-ad-spends.html> accessed 23 April 2020.

[86] 'Google Leads Digital Ad Revenue Competition In India, Facebook Not Far Behind', Tech2, 4 September 2018 <https://www.firstpost.com/tech/news-analysis/google-leads-digital-ad-revenue-competition-in-india-facebook-not-far-behind-5107681.html> accessed 23 April 2020.

[87] ibid.

[88] ibid.

News aggregators, which are part of advertising networks are thus able to monetise the attention[89] by integrating news within the wider ecosystem, using news to drive traffic to other products such as search and finally using the data collected to improve monetisation, thus closing the feedback loop.[90]

Many publisher websites (including newspapers) use advertising networks (such as Google Ads network) to try and monetise the free space on their websites through display advertisement. Google's official documentation shows that for search related display advertisements publishers receive revenue in the proportion of 51:49 for each click and for content related display advertisements publishers receive revenue in the proportion of 68:32 for each click.[91] In 2017, there were reports that Google would enter into separate revenue sharing agreements with newspapers to the extent of offering a revenue share in excess of 70%[92] but this was denied by Google.[93] More evidence based inquiry is required in the Indian context to understand (a) the average level of revenue share as a percentage of total revenue that is received by newspapers as well as the absolute revenues received and (b) sufficiency of the revenue received in this manner from advertising intermediaries to sustain the business models of newspapers.

Newspaper associations like the News Media Alliance ('NMA') in the US have levelled arguments against news aggregators based on the logic of insufficient revenue from current contractual arrangements as well as attention lock in of users.[94] NMA has issued policy proposals to share revenue earned through news content but Google has generally rebuffed any notion of agreeing to separate and enhanced revenue sharing arrangements with newspapers, either collectively or individually, as well as questioning the accuracy of the assumptions behind the empirical research.[95] Consequently, given the crucial position occupied by dominant advertising platforms, the ecosystem of digital advertising too appears weighed against publishers. In this context, it appears that reliance on revenue from digital advertising may not be sufficient to safeguard the economic sustainability of legacy print-media organisations.

C. Impact of platforms on editorial practice

In order to identify issues which might impact the health of the news industry in the future, it is important to scrutinise the effect that technology has on editorial practices. In this context, the role of algorithms in the act of aggregation or social media curation needs to be investigated, and the full range of potential impacts that this could have needs to be identified.

Algorithms play a crucial role in the operation of news aggregators and social media platforms. For instance, the collection of news stories on an aggregator platform is done using automated protocols which 'crawl' the Internet for relevant

[89] Mihai Calin et. al, 'Attention Allocation In Information Rich Environments: The Case of News Aggregators' (2016) 62(9) Management Science, 2543 (establishing an "attention tax" from content producers which news aggregators extract in the forms of users who never click through to the original article).

[90] 'Google Benefit from News Content', News Media Alliance (2019) <http://www.newsmediaalliance.org/wp-content/uploads/2019/06/Google-Benefit-from-News-Content.pdf> accessed 23 April 2020.

[91] 'AdSense revenue share' <https://support.google.com/adsense/answer/180195?hl=en> accessed 23 April 2020.

[92] 'Google plans to share revenues with news publishers' Financial Times <https://www.ft.com/content/5609bbfe-b4cf-11e7-aa26-bb002965bce8> accessed 23 April 2020.

[93] Steven Musil, 'Google denies report of revenue sharing with news publishers', cInet, 22 October 2017 <https://www.cnet.com/news/google-reportedly-share-revenue-with-news-publishers/

[94] Mercedes Bunz, 'Rupert Murdoch: There's no such thing as a free news story', The Guardian, 1 December 2009, < https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news> accessed 23 April 2020; Lesley Chiou and Catherine Tucker, 'Content Aggregation by Platforms: The case of the news media', NBER Working Paper No. 21404 (2015) <https://www.nber.org/papers/w21404.pdf> accessed 23 April 2020.

[95] Matthew Ingram, 'NYT Promotes Questionable Study on Google', Columbia Journalism Review, 10 June 2019 <https://www.cjr.org/the_new_gatekeepers/nyt-google-media.php> accessed 23 April 2020 (describing the lack of statistical rigour in the study commissioned by New Media Alliance.)

content and proceed to rank that content based on a set of pre-identified parameters.[96] Prior to the advent of crawlers and other automated search/sort tools, the task of arranging the 'front page' of a newspaper or the 'home page' of a website was done by human editors exercising professional journalistic judgment. However, this has been supplanted in the modern news ecosystem by algorithmic judgment that rank and determine the 'top stories' that are present on any aggregator platform. The shift from professional decisions of newsworthiness to algorithmic ones helps platforms convert an unfiltered flow of content into a readable, accessible web page by using systems to corral, contain and order this flow.[97] These systems are responsive to past behaviours and the demonstrated preferences of users as well, leading to personalised recommendations being the norm amongst aggregator platforms today.

The discourse surrounding the informational practices of algorithms is encased in the language of rationality and objectivity.[98] Proponents of algorithmic judgment contrast it to biased, subjective human judgment. The discourse of objectivity legitimises the practice of news selection algorithms on the belief that they serve consumers by providing easy access to relevant, personalised news content. This leads to a presumption of 'algorithmic objectivity'— the belief that because algorithms subject all input to the same procedures rather than in-the-moment judgments, they represent a superior way of ordering information in society.[99] A preliminary problem with this view is that it ignores that these algorithms are trained on data based on human feedback - which are essentially subjective decisions constructed by their social, political and economic context. Consequently, it is mistaken of this narrative to posit the aggregation of these subjectivities as an 'objectivity' of a fundamentally different nature. Further, such a perspective undermines the nuance of journalistic practice in society. Two key ramifications of algorithmic judgment in news selection are outlined to this end: the impact on journalism as a 'gatekeeping' institution, and the personalisation of news which leads to the creation of filter bubbles and perpetuates a disinformation crisis.

Dilution of the 'gatekeeping' function of journalism

A central function of journalism has been the role of 'gatekeeping' news in society. From a broader perspective, the job of journalism has been to organise the messy world into a coherent, meaningful and legitimated array of news texts.[100] The application of professional knowledge in this exercise has been used to legitimate the position of this institution. Professionals accrue reputational authority in society, by virtue of their ability to apply learned knowledge of the discipline to dynamic factual contexts, and consequently, provide professionally valid interpretations of reality.[101] This is not to overemphasise on a formalistic professional understanding of journalism, but to identify the "institutionalised 'epistemic promise' of social benefit".[102] Journalists possess "distinct role conceptions, shared code of ethics, and a sense of which practices are appropriate or not".[103] This differentiates them as a particular group with an epistemic responsibility to generate knowledge for others in society.[104]

[96] Daniel Billsus and Michael Pazzani, 'Adaptive News Access' in 'The Adaptive Web' (P. Brusilovsky et al ed.) 550 (2007), p 561 (Discussing the functions performed by aggregator algorithms).

[97] Matt Carlson, 'Automating Judgment? Algorithmic judgment, news knowledge and journalistic professionalism', (2018) 20(5) New Media and Society 1755, p 1762 (Discussing the logic of algorithmic judgment vis-à-vis the value of journalistic professionalism).

[98] ibid.

[99] Tarleton Gillespie, 'The relevance of algorithms' in 'Media Technologies' (T. Gillespie et al ed.) 167 (2014), p 177 (Discussing the arguments made in favour of algorithmic judgment).

[100] Pamela Shoemaker et al, 'Journalists as Gatekeepers' in 'The Handbook of Journalism Studies' (Karin Wahl-Jorgensen ed.) 72 (2009), p 75 (Discussing the role of journalism in a democratic institutional setup).

[101] Bruce Lincoln, 'Authority: Construction and Corrosion' (1994), p 18 (Discussing the sources of reputational authority in society).

[102] Robert Audi, 'Epistemology' (1998), p 113 (Discussing the theory of epistemology and its manifestations in society).

[103] Thomas Hanitzsch, 'Deconstructing journalism culture: Towards a Universal Theory' (2007) 17(4) Communication Theory 367, p 381 (Building a theoretical conception of journalism by discussing institutional roles, epistemologies and ethical ideologies of journalism).

[104] Bill Kovach and Tom Rosenstiel, 'The elements of journalism' (2001), p 3 (Analysing the institutional role of journalism).

Journalistic practice, in this context, is crucial to civil society. News is distinct from other forms of knowledge, with a social function that is akin to "acquaintance with the world", as Robert Park stated in the American Journal of Sociology, news "performs the same functions for the public that perception does for the individual man; it does not so much inform as it orients the public, giving each and all notice as to what is going on".[105] Key to the formulation of this social function is the idea of news as a shared discourse comprising a 'public document'.[106] An emphasis on public service aligns journalism with this social function.[107]

The logic of journalistic practice relies on an ethically proscribed pursuit of 'objectivity', which forces journalists to ascribe value to a story based on the external qualities of newsworthiness, such as public interest, relevance to society and societal benefit in the information as opposed to motivated decisions.[108] However, algorithmic logic often lacks the semantics to measure the 'public interest' or 'societal benefit' of a news item.[109] Instead, algorithmic logic is driven by user engagement with a story, frequency of appearance and other metadata which may be used to calculate the 'newsworthiness' of a story.[110]

Despite advances in the development of algorithms, they largely continue to lack ways of incorporating checks against higher-order concepts like stereotypes and racism, and the results produced by such algorithms often correlate with divides along race, gender or other marginalised identities.[111] This is because these algorithms are trained using existing data and subjective human input which is bound to perpetuate existing biases in society. In the case of social media websites and news aggregators, studies have documented the lack of journalistic criteria in the algorithms employed by such platforms.[112] These algorithms have been shown to prioritise news content on its ability to drive user engagement, which often leads to stories with a propensity towards going viral to be featured at the cost of other content.[113]

The consequences of this are two-fold. First, the selection of news based on ideas of user engagement and virality as opposed to the professional determination of societal benefit threatens access to some news which might otherwise be considered high quality reporting. Certain types of news stories, such as investigative journalism, balanced opinions and deep-dives, are less likely to go viral as opposed to more polarising stories, entertainment and sports information and daily reporting. This is due to factors as simple as the length of the story, since longer pieces of content are usually less likely to go viral with the same sense of contagion and the subject-area of the story—investigative journalism often focuses on less attractive spheres of public functioning as opposed to more appealing subject-areas like entertainment and sports reporting.[114]

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105 Robert Park, 'News as a form of knowledge: A chapter in the sociology of knowledge', (1940) 45(5) American Journal of Sociology 669, p 677 (Discussing the role of journalism as an institution within sociological theory).

106 ibid.

107 Michael Schudson, 'Discovering the news' (1978), p 31.

108 Matt Carlson, 'Automating Judgment? Algorithmic judgment, news knowledge and journalistic professionalism', (2018) 20(5) New Media and Society 1755, p 1762 (Discussing the logic of algorithmic judgment vis-à-vis the value of journalistic professionalism).

109 Neil Thurman, 'Making 'the daily me': Technology, Economics and Habit in the mainstream assimilation of personalised news' (2011) 12(4) Journalism 395, p 401 (Discussing the way algorithms aggregate and prioritise content).

110 Elisa Shearer et al, 'The Evolving Role of News on Twitter and Facebook', Pew Research Center: Journalism & Media, 14 July 2015 <https://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/> accessed 23 April 2020.

111 Nicol Turner Lee, 'Detecting racial bias in algorithms and machine learning', (2018) 16(3) Journal of Information, Communication and Ethics in Society 252, p 258 (Analysing how racial biases end up being incorporated within algorithmic logic).

112 Concha Edo et al, 'Content Syndication in News Aggregators: Towards devaluation of professional journalistic criteria', (2019) 59 Media Education Research Journal 29 (Examining algorithms employed by several outlets and analysing them based on the criteria used).

113 Edson Tandoc Jr and Ryan Thomas, 'The ethics of web analytics: Implications of using audience metrics in news construction', (2015) 3(2) Digital Journalism 243, p 251 (Discussing the design of contemporary news aggregation algorithms).

114 Neil Thurman, 'Making 'the daily me': Technology, Economics and Habit in the mainstream assimilation of personalised news' (2011) 12(4) Journalism 395, p 401.

Consequently, the influence of editors in raising certain issues and bringing them to the fore of the public conscience is heavily undermined. Even though this might align with the preferences of individual users, when this phenomenon is observed at a social level, it raises some issues concerning the ability of journalism to structure public discourse around issues of public interest. Second, the lack of journalistic criteria means that outlets which masquerade as news outlets are able to make it to reader's feeds, even though they may lack the professional standards usually expected of news organisations. This is a crucial aspect of the disinformation crisis that exists in society.[115]

Personalisation of news and fake news

Algorithmic judgment in the modern news ecosystem also relies heavily on recommendation engines which analyse users' past behaviour, ideological affiliations and demonstrated preferences to personalise their content.[116] The logic of algorithmic judgment, therefore, shifts an emphasis on knowledge from one of shared importance to an individualised emphasis on segmented news based on the user's specific attributes and queries.[117] Algorithmically derived personalisation creates the required conditions for 'filter bubbles', which limit access to diverse topics or non-conforming opinions.[118] Traditional forms of organising news media, such as by editors, operated in an 'architecture of serendipity',[119] where access to differing opinions and perspectives enhanced citizenship by exposing people to the multiple facets of an issue. The shift from this 'architecture of serendipity' to an era of personalised feeds invokes issues of significant public interest. The consequence of this shift is an increasing polarisation along socio-political lines, a disinformation crisis and a reduction in 'balanced journalism'.

On an individual level, it reduces the possibility of exposure to diverse viewpoints. On a social level, this inhibits collective public outrage because there is no common set of facts, or shared basis of information, which has detrimental consequences for political mobilisation and action. Proposals to address 'filter bubbles' attempt to place responsibility on the platform for providing diverse viewpoints,[120] mandate algorithms to be sensitive to the creation of these bubbles[121] and demand human editorial curation of content.[122]

The lack of human curation, along with the absence of a 'public document' with reputational authority has further fuelled a disinformation crisis in society. Even highly sophisticated algorithms have been shown to be unable to assess the veracity of content, and consequently, have allowed for 'fake news' to be featured prominently in user's feeds.[123] The lack of a common set of shared facts about the world as a result of the personalisation of news has made the issue even more intractable. While human judgment is also prone to error and bias, these phenomena demonstrate that there are significant pitfalls to automation which must be addressed in the public interest. In this context,

[115] Elisa Shearer et al, 'The Evolving Role of News on Twitter and Facebook', Pew Research Center: Journalism & Media, 14 July 2015 <https://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/> accessed 23 April 2020.

[116] Neil Thurman, 'Making 'the daily me': Technology, Economics and Habit in the mainstream assimilation of personalised news' (2011) 12(4) Journalism 395, p 401 (Discussing the way algorithms aggregate and prioritise content).

[117] Matt Carlson, 'Automating Judgment? Algorithmic judgment, news knowledge and journalistic professionalism', (2018) 20(5) New Media and Society 1755, p 1762 (Discussing the logic of algorithmic judgment vis-à-vis the value of journalistic professionalism).

[118] Eli Pariser, 'The Filter Bubble' (2011), p 65.

[119] Cass Sunstein, 'The Architecture of Serendipity', The Harvard Crimson, 4 June 2008 <https://www.thecrimson.com/article/2008/6/4/the-architecture-of-serendipity-this-years/> accessed 23 April 2020.

[120] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) <http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

[121] Joshua Kroll et al, 'Accountable algorithms', (2017) 165 University of Pennsylvania Law Review 633, p 651 (Discussing the development of legal standards that can be incorporated into algorithm design).

[122] Matt Carlson, 'Automating Judgment? Algorithmic judgment, news knowledge and journalistic professionalism', (2018) 20(5) New Media and Society 1755, p 1762 (Discussing the logic of algorithmic judgment vis-à-vis the value of journalistic professionalism).

[123] Matt Carlson, 'Facebook in the news: Social media, journalism and public responsibility following the 2016 trending topics controversy', (2017) 6(1) Digital Journalism 4, p 12.

it is crucial to situate the different logics being employed in the news ecosystem, how they affect the distribution of factual information in society and discuss how this can be regulated to ensure the inherent public interest served by the institution of journalism is safeguarded.

D. Impact of aggregation on the value chain of news

News aggregators refers to a category of applications or websites which do not produce their own news content, but host the links to a collection of content produced by others.[124] These aggregators often perform the function of curating the news, therefore presenting to their readers a repository of content from a variety of sources.[125] Not only do they present a broader variety of views by virtue of covering multiple outlets, they also arrange the news in an interface that is accessible and convenient. Excerpts are regularly displayed alongside the link to the story, thereby offering the reader a synopsis of the news item. These user-friendly features are perhaps the reason behind news aggregators emerging as the dominant mode of the consumption of news in countries around the world.[126] Social media applications, which incorporate aggregation-based features into their interface, also perform the same functions and act as similar agents of transformation.

In this context, there is a need to take a bird's-eye view of the impact of such aggregators on legacy news organisations. In a number of countries which are further along the graph of technological advancement, the traditional news media industry has blamed aggregators for their 'slow death'. Rupert Murdoch, the influential media baron, perhaps issued the most vicious attack when he referred to news aggregators as 'parasites' who steal the economic benefits of news without engaging in news gathering efforts.[127] While business competition between aggregators and traditional content producers may, at first glance, appear to be typical of industries where business incumbents are challenged by technological disruption, there is a deeper issue that must be identified here.

News aggregators are not just competing media organisations. They occupy a starkly different role than traditional news-gathering entities. Most importantly, news aggregators do not produce their own content, or engage in news gathering and reporting efforts. In the situation that news aggregators are responsible for diverting away digital traffic from legacy media organisations, they would have the effect of depriving such content producers of valuable advertising money.[128] The issue here is not one of preserving the economic advantage of incumbents, but of ensuring the sustainability of the underlying good which aggregators rely on. Given the already struggling nature of the digitisation efforts of traditional media industries, this becomes a question of significant public interest: if the people who gather and produce the news are unable to economically sustain themselves in this new media environment, then what does it mean for the for the future of news production?

In response to these allegations, aggregators have consistently argued that they, in fact, direct traffic towards content producers and therefore, increase the digital traffic when compared to the traffic that such producers might get without aggregators. The basic tenet of this claim is that aggregators are complements to traditional news

[124] Kimberley Isbell, 'The rise of the News Aggregator: Legal Implications and Best Practices', Berkman Centre for Internet and Society Working Paper No 2010-10 (2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=167033>accessed 23 April 2020, p 14.

[125] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

[126] ibid.

[127] Mercedes Bunz, 'Rupert Murdoch: There's no such thing as a free news story', The Guardian, 1 December 2009, <https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news> accessed 23 April 2020.

[128] Derek Wilding et al, 'The Impact of Digital Platforms on News and Journalistic Content', Centre for Media Transition, University of Technology Sydney, NSW (2018) <https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%282%29.pdf> accessed 23 April 2020.

producers.[129] By reducing the search costs for readers, collecting and presenting this information in an accessible and convenient format, and more importantly, by personalising the distribution of news through the use of recommendation-based algorithms, aggregators claim to actually direct traffic towards content producers instead of taking it away from them.[130] This statement seems to be verified in a number of empirical studies on the subject as well, which found that aggregators and news websites tend to have a complementary relationship as opposed to a substitution relationship.[131]

However, it is key to understand that this complementary relationship does not exist in all circumstances. For example, empirical studies of the same nature as those referred to above also found that the substitution effect of aggregators increases as the length of excerpts is increases.[132] This would indicate that the manner in which information is presented to the readers on an aggregator would have a direct impact on whether that aggregator is performing a complementary function or a substitution function. Consequently, there is a need to think about the manner in which such applications are designed in order to ensure that a mutually beneficial complementary relationship between aggregators and applications can sustain.

[129] Lesley Chiou and Catherine Tucker, 'Content Aggregation by Platforms: The case of the news media', NBER Working Paper No. 21404 (2015) <https://www.nber.org/papers/w21404.pdf> accessed 23 April 2020.

[130] Susan Athey et al, 'The Impact of Aggregators on Internet News Consumption', Stanford Institute for Empirical Policy Research Working Paper No 17-034 (2017) <https://siepr.stanford.edu/sites/default/files/publications/17-034_0.pdf> accessed 23 April 2020.

[131] ibid.

[132] Lesley Chiou and Catherine Tucker, 'Content Aggregation by Platforms: The case of the news media', NBER Working Paper No. 21404 (2015) <https://www.nber.org/papers/w21404.pdf> accessed 23 April 2020.

Summary of policy objectives

This part of the report had set out to examine the challenges faced by the print news industry in adapting to the evolution of technology in order to identify policy priorities for the regulation of the news. An analysis of both "news and the Internet" and "news on the Internet" reveals the following objectives for shaping forward-looking policy:

- ***Sustaining credible print journalism***
  The emergence of increased competition, the shift of the advertising ecosystem to digital mediums and a reliance on government advertising characterise the economic health of the print news industry. While the statistics may not reflect the kind of decline witnessed in the West yet, it must also be recognised that the digital transformation in India is relatively nascent and these effects might amplify in the years to come. At the same time, large swathes of the country are yet to undergo digitisation of the same sort and continue to rely on print news in this transition. In the middle of this transition, there is significant public interest in ensuring that journalism continues being a sustainable enterprise and journalistic activity, which is crucial to democratic governance, can continue functioning freely. In this transition period, the public interest requires examining policy related to print news from the perspective of bolstering its sustainability.

- ***Orienting digital news to the public good***
  The future might lie in digital news. However, this ecosystem must be aligned with the greatest public good. The economics of the industry, on the basis of the material surveyed in this report, seems to indicate that digital news faces several challenges in trying to build a sustainable business model over the Internet. The emergence of various platforms, such as social media platforms or stand-alone aggregators, as the primary way of consuming information puts the website of the publisher in the background— leading to a failure of digital advertising to ensure its economic sustainability. The dynamic between publishers and integrated advertising platforms is another aspect of the failure of the advertiser-revenue model over the Internet. The shift to paywalls and subscriptions, as a result of this unsustainability, threatens access to information which is key to democratic accountability. Consequently, there is need to examine policies related to digital news from the perspective of safeguarding its sustainability.

  Additionally, the emergence of a crisis of misinformation on the Internet can be attributed to fundamental shifts in the process of distribution of information. When combined with the lack of editorial responsibility for publishers of news on the Internet and the design of social media platforms which are oriented towards controversy and engagement, this has serious ramifications for the information environment over the Internet. There is a need to develop policy and laws which address the entire chain of misinformation, enhance reader literacy and identify sophisticated solutions which recognise the unique nature of the Internet.

Part II

Developing a policy roadmap for the future of news

III. Constructing a principled legal framework

This report had set out to identify policy priorities for enabling the news industry to adapt to rapid digitisation. Such identification must be done in the background of the extant legal framework for the regulation of the press. In the Indian context, this poses a particular problem— the historical context of press regulation in India has led to a structure that has retained its colonial character.[133] The bouquet of Indian laws which regulate the media, both across print media and broadcasting media, display features of stringent regulatory control.[134]

The historical genesis of laws governing print media was in the colonial era. In the days before the formal organisation of the Indian National Congress, the press was emerging as the institutional nationalist opposition to colonial rule.[135] The response of the colonial state was to introduce a licensing requirement, which evolved into the regulatory framework formalised in the Press and Registration of Books Act, 1867.[136] Over the years, while some of the more stringent requirements such as the collateralisation of the printing press have been removed, the Act continues to retain its essential structure of licensing requirements and 'proprietor control'. 'Proprietor control' is a term that has been used to refer to the use of measures aimed at affecting the economic state of the newspaper through trade policy and advertisements as well as by imposing liability on the proprietor of a newspaper, thereby indirectly leveraging control over editorial freedom.[137] Consequently, when considering the identification of a legal framework for the future of news, the existing legal framework may not serve as the best repository of foundational principles to rely on.

Accordingly, this section attempts to create a legal framework for securing the future of news — a framework which is independent of the baggage of extant legal systems.

An examination of the issues faced by the press due to the evolution of technology reveals the need to look at not just the editorial or content-based restrictions on the press, but also at regulation of 'media infrastructure'—the economic policies which structure the market for an independent media.[138] The concept of media infrastructure is explained later in this chapter. It is often invoked as a theoretical framing for the regulation of concentration of ownership in media, but also includes broader questions of structuring the market conditions surrounding the media, including import controls, subsidies and financing regulations. However, given the scope of this report, the discussion on law and policy does not address questions of media ownership concentration— an aspect which merits independent and in-depth scrutiny.

In order to develop a principled basis for the regulation of media infrastructure, this chapter of the report first outlines some preliminary considerations which affect the development of law regulating the press. It proceeds to examine the extant statutory framework and identifies the potential avenues of intervention for legal regulation. Finally, it examines a series of landmark constitutional cases to identify principles for the regulation of media infrastructure that have been recognised in the jurisprudence of the Supreme Court. The next chapter of the report uses these principles as a framework to identify policy measures that address the issues outlined in this report.

[133] Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.

[134] Joseph Minattur, 'Freedom of the press in India: constitutional provisions and their application' (2012), p 8.

[135] See Bipan Chandra, 'India's struggle for independence' (1988), Chapter VIII.

[136] Bipan Chandra, 'India's struggle for independence' (1988), Chapter VIII.

[137] Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.Amway India Enterprises Pvt. Ltd. and Ors. vs. 1MG Technologies Pvt. Ltd. and Ors. (08.07.2019 - DELHC) : MANU/DE/2146/2019

[138] Smarika Kumar, 'Concentration of media ownership and the imagination of free speech', (2016) 51(17) Economic and Political Weekly, 128.

A few preliminary considerations

There are a few important caveats that should be understood when considering the development of a legal or policy framework for the press. These are the definitional problems with regulating 'news', the institutional positioning of the press vis-à-vis the state and the distinct nature of emerging challenges in the realm of news.

Definitional issues with regulating the news

Historically, the term 'news' has been an 'essentially contested' concept—the meaning of which is socially constructed and constantly evolving.[139] This makes the task of legislatively defining 'news' a Sisyphean pursuit. This is largely because the seemingly thin line between 'content' and 'news' is constantly shifting. For example, extensive reporting on celebrity culture is labelled by purists as 'entertainment' while being a staple, and sometimes the raison d'etre of many organisations ordinarily considered news organisations. The consequence of this is a threshold difficulty in imposing special responsibilities on 'news producers'— given that the point at which content may become news depends on how its consumption is informed by broader sociological realities.[140] For example, reporting on social media, citizen journalism, live-blogging and livestreams often functionally serve as 'news' while being content simpliciter at other times. This is unlike an older era when the physical nature of 'newspapers' was distinctly identifiable from other 'content'. As a consequence, structuring laws which impose special responsibilities on 'news' creators is bound to be an imperfect and static solution.

Similarly, developing a legislative definition of 'journalist' or 'news organisation' in the age of the Internet is a solution from a different time. Blogs, social media timelines and threads on discussion forums have all served as vital sources of reporting about contemporary happenings.[141] However, laws pertaining to special responsibilities of news producers cannot justly apply to all blogs or social media timelines. These definitional issues, which have always existed with regulation of the press, are tremendously amplified in the digital age. The development of laws and policies must be sensitive to this evolution. Consequently, legislation for 'news' producers must take into account the context of modern discourse and refrain from making broad classifications based on simplistic criteria.

The long tail of content on the Internet

In business terminology, the 'long tail' refers to the segment of the market that develops niche products to cater to small audiences, as opposed to trying to develop a common product for a wider audience.[142]

In the context of the production of content on the Internet, this refers to the prominence of the 'long-tail'—publishers who occupy very specific niches and would not be considered a mainstream 'press' organisation, in the consumption of information online. A series of problems, such as the crisis of misinformation and the imposition of editorial responsibility, are directly related to the activities of players in the long tail.[143] The problem that this dynamic raises is that policy, which is intended to solve problems that may arise because of the long tail, ends up having the most significant impact on mainstream organisations in the space. For example, studies of broadcasting regulation have shown that regulation aimed at addressing local content, often ends up being implemented predominantly against national-level broadcasters – given the difficulties in physically identifying and regulating local broadcasters.[144]

[139] Walter Bryce Gallie, 'Essentially contested concepts', (1955 - 1956) 56 Proceedings of the Aristotelian Society 167.

[140] Robert Park, 'News as a form of knowledge: A chapter in the sociology of knowledge', (1940) 45(5) American Journal of Sociology 669, p 677.

[141] Axel Bruns et al, 'Blogs, twitter and breaking news: The produsage of citizen journalism' in 'Producing theory in a digital world: the intersection of audiences and production in contemporary theory' (RA Lind ed.) (2012), p 15.

[142] Anita Elberse, 'Should you invest in the long tail?', (2008) 86(7) Harvard Business Review.

[143] Ziqi Zhang and Lei Luo, 'Hate speech detection: A solved problem? the challenging case of long tail on twitter', (2019) 10(5) Semantic Web 925.

[144] Roberto Taufick, 'Over the top content and content regulation', available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2708278> Accessed April 15, 2020

The development of nuanced regulation which is capable of addressing problems which emerge due to the long tail—and not just impose enhanced obligations on the most prominent or visible actors— is crucial to developing a sophisticated framework for the regulation of the press. This dynamic of online content underpins the analytical exercise in this chapter.

The institutional positioning of the press and the government

There is a unique dynamic in the context of press regulation which must be recognised before conceptualising any policy in this regard. The press, or the 'fourth estate', within the liberal democratic setup has the function of promoting governmental accountability by encouraging scrutiny and criticism of the government.[145] At the same time, the government's philosophical responsibility of enhancing the conditions for the exercise of freedom of speech justifies the regulation of the press by the government.[146] The moral assumptions that bind both institutions in this scheme makes the regulation of the press an area which must be tread with caution.

The consequence of these assumptions is that even when it comes to the regulation of the financial or business aspects of the press, there are some special constraints placed upon such regulation by courts, as is outlined later in this section. Policies which impose stringent liability, excessive penalties or provide the government with excessive powers are generally frowned upon.[147] The same sentiment persists in the development of law specifically aimed at enabling the adaptation of the press to an age of technology.

Statutory framework for the regulation of the press

The scope of this section is to analyse the different statutory frameworks which regulate the press, in order to identify the extant legal responsibilities governing both news in physical, written form and over digital mediums. This section does not address broadcasting regulation, which merits independent detailed inquiry. In addition to the specific statutory frameworks mentioned below, the ordinary laws which govern speech apply to the press.[148] Therefore, offences like sedition, incitement of violence, defamation and obscenity apply to the press. This is in addition to other general statutory frameworks such as tax regulations, corporate law, labour regulations and intellectual property laws.[149] While reform of the institutional arrangement of the regulation of the press would span all of these areas, this section focuses on some of the statutory instruments which have specifically been enacted for the purpose of press regulation.

Print news media

The scheme for the regulation of the print media in India is channelled through two institutions—the Press Registrar, who has various regulatory powers related to the registration of newspapers, and the Press Council, which is a self-regulatory institution with the function of performing journalistic oversight.

Two statutory enactments constitute this scheme: the first being the PRB Act, which governs newspapers by establishing a registration procedure for the establishment of a newspaper.[150] The Act requires the printer and publisher of a newspaper to make a declaration specifying the title, language and periodicity of the newspaper.[151] The declaration is liable to be

[145] Mark Hampton, 'The fourth estate ideal in journalism history' in 'The Routledge Companion to News and Journalism' (Stuart Allen ed.) (2009), p 47.

[146] Lee Bollinger, 'Freedom of the press and public access: Toward a theory of partial regulation of the mass media', (1976) 75(1) Michigan Law Review 1.

[147] ibid.

[148] Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.

[149] ibid.

[150] Press and Registration of Books Act, 1867 (India).

[151] Press and Registration of Books Act, 1867 (India), s 5.

cancelled if the information in the declaration is to be false or not complied with, or if the name of the paper is similar to another paper in the same language or the same state.[152] The Act establishes the institution of the Press Registrar, who has various regulatory powers over newspapers.[153]

The second statutory enactment which constitutes this scheme is the Press Council Act, 1978. The Act establishes the Press Council as a statutory self-regulatory institution with the powers of conducting inquiries against newspapers, news agencies, editors or journalists for a violation of journalistic ethics or for professional misconduct.[154] The Press Council (Procedure for Inquiry) Regulations, 1979 provide an extensive procedure for the lodging of complaints against the press.[155] For instance, these regulations require that the attention of the editor of a newspaper must be drawn to an alleged violation before a complaint is filed. They also permit a newspaper, a journalist, any institution or an individual to complain against the Central or State Government on the grounds of encroachment upon the freedom of the press.

Digital news media

There is no special editorial regime for publishers of news on digital mediums. The publication of news is treated like the publication of any other 'information' or 'content' on the Internet. However, a traditional news agency or a media house already under the jurisdiction of the Press Council may be the subject of proceedings before them, for their activities on digital mediums. Given the lack of any regulatory framework for publishers of news on digital mediums, there is no special editorial regime that is applicable to someone who is said to be publishing 'news' on the Internet. The ordinary laws related to speech mentioned at the beginning of this section as well as offences related to the publication of information in the IT Act would apply to such publishers, forming the bouquet of editorial restrictions on publishers of news online.[156]

News on digital mediums was outside the purview of funding-based regulation until 2019. In 2019, the Foreign Direct Investment Policy ('FDI Policy') was amended to include "news on digital mediums" within the policy, and to cap foreign investment in "uploading/streaming of news and current affairs through digital media" at 26%.[157] This was to bring it in accordance with the restrictions on print-based media which also has a 26% cap. These restrictions on foreign financing are claimed to be applied due to the "sensitive nature" of news publication.[158]

News Aggregators and Social Media Platforms

Most news aggregators and social media platforms would, subject to the conditions of Section 79(2) and 79(3) of the IT Act and their compliance with the IT (Intermediary Guidelines) Rules, 2011, have no editorial responsibility for the content on their platforms. This is because they would be classified as 'intermediaries' under Section 2(w) of the IT Act.[159] Content on these platforms would therefore be third-party content, protected by the safe harbour of Section 79. Section 79 of the IT Act provides that an intermediary shall not be liable for any third-party content hosted on their platform.[160]

[152] Press and Registration of Books Act, 1867 (India), s 8B.

[153] Press and Registration of Books Act, 1867 (India), s 19.

[154] Press Council Act, 1978 (India).

[155] Press Council (Procedure of Inquiry) Regulations, 1979 (India).

[156] Information Technology Act, 2000 (India).

[157] 'Domestic media welcomes FDI cap for digital news entities', Economic Times, 31 August 2019 < https://economictimes.indiatimes.com/industry/media/entertainment/media/domestic-media-welcomes-fdi-cap-for-digital-news-entities/articleshow/70918738.cms?from=mdr>accessed 23 April 2020.

[158] ibid.

[159] Information Technology Act, 2000 (India), s 2(w).

[160] Information Technology Act, 2000 (India), s 79.

While this 'safe harbour' is essential from the perspective of free expression on the Internet,[161] particularly in the context of the news, this exempts platforms from the responsibilities that are otherwise imposed on participants of the value chain of the news. Additionally, platforms are required to comply with the takedown regimes under the Intermediary Guidelines, as well as under the Copyright Act, 1957, contingent on their 'intermediary' status. However, no specific statutory rules for the aggregation of news appears to be made in other regulatory regimes.

It was reported that 'news aggregators' were intended to be included within the definition of 'uploading/streaming of news and current affairs through digital media' in the FDI Policy in 2019, though the adequacy of the definition may be a subject of challenge given the lack of any clarity in the Bill.

Principles for regulation of the press by the government

So far, this report has identified policy priorities for the future of news and examined the current legal framework governing its regulation. The next step in the process of developing a legal framework is to identify principles on the basis of which any legal or policy framework addressing any harm or challenge associated with print/digital news can be potentially developed.

The regulation of 'media infrastructure' has been identified as a governance tool through which, despite its antagonistic institutional positioning, the state exercises control over the conditions of the press.[162] For example, in the context of newspapers, control over financial resources like newsprint has been utilised by the Government to impose reforms aimed at ameliorating the economic situation of the press industry. This is an example of regulation that does not infringe on content, but on the market conditions of the press. Throughout this report, the phrase "regulation of media infrastructure" is used to signify the regulatory method where legal policy attempts to reform the market conditions of the press, as distinct from content-based or editorial responsibility.

Questions about the regulation of the business of the press by the government involve two sets of constitutionally protected interests of the press: the freedom of speech and expression under Article 19(1)(a) of the Constitution, and the freedom to carry on trade under Article 19(1)(g).

In the course of the adjudication of these questions, the Court has recognised that some business-related interests of the press form a part of their constitutionally protected freedom of speech. For other industries, however, these interests may represent questions only of trade. This flows from the Court's recognition of the critical role of a free press indemocratic processes. On account of the recognition of this role, the Court identified aspects of the business of the press as those enjoying protection under Article 19(1)(a). Consequently, governmental action to regulate the business of the press which affects these aspects, affects interests under Article 19(1)(a) as well as 19(1)(g).

The interests protected under Article 19(1)(g) are possessed by all professions and businesses – and therefore, are more generally informed by principles laying down the relationship between the state and commerce. However, particularly in respect of the press, the interests under Article 19(1)(a) represent a special set of considerations about regulating the business of the press. Therefore, an examination of the interests which have been identified within Article 19(1)(a) allows the identification of constitutional principles for regulation of the press by the government.

[161] Giancarlo Frosio et al, 'Intermediary liability and fundamental rights' in 'Oxford Handbook of Intermediary Liability Online' (Giancarlo Frosio ed.) (2019).

[162] Smarika Kumar, 'Concentration of media ownership and the imagination of free speech', (2016) 51(17) Economic and Political Weekly, 128.

At the same time, Article 19(2) outlines some restrictions on these interests. These restrictions represent the grounds on which the government may legitimately affect the interests of the press under Article 19(1)(a), as long as these restrictions are 'reasonable' in nature. The grounds listed under this head include the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The constitutional scheme therefore, outlines some principles for the development of a legal framework to regulate the press — the freedom of speech and expression under Article 19(1)(a), which promises the editorial freedom of newspapers, and the interests which have been read into Art. 19(1)(a) through constitutional cases on the regulation of media infrastructure - however, a clear statement of these interests is absent.

This part of the report addresses this analytical lacuna by identifying some of the institutional entitlements of the press within the constitutional scheme. It does this through an analysis of landmark judicial pronouncements on the right to free speech and expression when it comes to the regulation of 'media infrastructure.' This analysis reveals that despite not ultimately making the ruling on these bases, the Supreme Court identified certain metrics— such as access, circulation, and competition— within the constitutional bounds of the freedom of speech of the press. A restrictive impact along these metrics was found linked to a restriction on the freedom of the press in the cases at hand.

We examine some of the landmark constitutional judgments on newspaper regulation to identify principles which the Court identified within the scope of the constitutional freedom of speech of newspapers. The selection of these cases was made after a survey of various commentaries and secondary literature summarising the evolution of press laws in India and identifying such cases as 'landmark' cases.

However, as is inevitable with a survey of cases on a topic of such depth, there may be cases outside of this sample which may inform this position as well.

The evolution of jurisprudence on the regulation of newspapers

The first landmark case in India on the regulation of media infrastructure is the Supreme Court's ruling in ***Romesh Thapar v. State of Madras***.[163] The case concerned an order made by the Government of Madras which imposed a ban upon the entry and circulation of a journal named 'Cross Roads' in the State of Madras. The Supreme Court struck down this order because it was not justified under the permissible grounds listed in Article 19(2) of the Constitution. The Court reasoned that the "freedom of speech and expression includes the freedom of propagation of ideas - and that freedom is ensured by the freedom of circulation."[164] Therefore, the circulation of a newspaper was identified as an interest within its freedom of speech and expression under Article 19(1)(a).

Eight years later, in ***Express Newspapers v. Union of India,*** the decision of a wage board established under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 was challenged on the ground that it established a minimum wage to be paid to all working journalists which was so high that it would drive the newspapers out of business.[165] The Court reviewed the impact of paying this wage on a series of factors which would affect the freedom of speech and expression of newspapers, namely the curtailment of circulation due to decreased profits,[166] likelihood of the independence of the

[163] Romesh Thapar v State of Madras, AIR 1950 SC 124.

[164] ibid.

[165] Express Newspapers v Union of India, AIR 1958 SC 578.

[166] ibid.

the press being undermined due to increased reliance on government aid,[167] prevention of newspapers from entering the market[168] and the economic compulsion upon them to seek alternate media.[169] The Court stated that a law which has these effects would 'abridge' the freedom of speech and expression of newspapers. However, the Court ultimately reasoned that the impact of paying a wage on these factors was remote, and it was not the 'intent' or the 'proximate effect' of the Act— which was to ameliorate the working conditions of journalists. This case, however, presents four interests that are identified within the constitutional freedom of speech and expression — circulation, editorial freedom, competition and economic sustainability. Even though these interests did not prevail in this case, their identification is relevant in order to build a jurisprudence of the Court on the interests of the press.

The next relevant case is the judgment in ***Sakal Papers v. Union of India.***[170] In 1956, the Newspaper (Price and Page) Act, 1956 was enacted, which empowered the State Government to regulate the prices of newspapers in relation to their pages and to regulate the allocation of space for advertising material. Under this Act, the Central Government had made an order in 1960 fixing the maximum number of pages that could be published. This order left papers like the petitioner's with only one choice— they could either raise the price of their paper or reduce the number of pages in their paper. This order was challenged on the ground that it was designed to and would in effect curtail the freedom of the press. The Court, striking down this order, made two relevant observations. First, that the volume of circulation was an essential part of the freedom of speech and expression and therefore a law that forced newspapers to increase their price and consequently reduce circulation, or reduce the amount of information that they carried, abridged this freedom.[171] Second, in response to the suggestion that the newspapers could print the same amount of information if they printed fewer advertisements, the Court recognised the nuances of the advertisement-based business model of newspapers.[172]

It reasoned that a restriction on the advertising space available to a newspaper would reduce the amount of money that it could make. Consequently, a newspaper would either have to run at a loss or close down or raise its price, which would either affect its economic sustainability or affect its circulation. The Court identified both as constitutionally protected interests. Therefore, two metrics seem to be relevant to the Court's analytical exercise— the circulation of a newspaper and the economic sustainability of newspapers.

In ***Bennett Coleman v. Union of India***,[173] a 1962 order placing certain prohibitions on the import of newsprint ('Newsprint Order') and the 1972 Newsprint Policy ('Newsprint Policy') were challenged. The Newsprint Policy prohibited common ownership units of newspapers from establishing new papers and limited the maximum number of pages to ten. The Court upheld the Newsprint Order on the ground that newsprint was a scarce resource and a bona fide exercise of the government's power to allocate it could not be interfered with. The Newsprint Policy was struck down on the ground that it abridged the freedom of speech and expression of newspapers by imposing limits on circulation. Particularly, the Court's reasoning identified two aspects of the right to circulation— the freedom of the newspaper to circulate, but also the right of people to have newspapers circulated. The

[167] ibid.
[168] ibid.
[169] ibid.
[170] Sakal Papers v Union of India, AIR 1962 SC 305.
[171] ibid.
[172] ibid.
[173] Bennett Coleman v Union of India, AIR 1973 SC 106.

Court acknowledged that a restriction on circulation would also affect news readers and their right to freedom of speech and expression. Additionally, the impact of advertisements on the economic sustainability of newspapers was also recognised by the Court both in terms of its impact on circulation, as well as on the possible shutting down of newspapers. The decision of the majority, consequently, follows in the footsteps of Sakal Papers in terms of the foundational principles governing them— the right of circulation, both in terms of volume and access to the readers, and the economic sustainability of newspapers.

The Government's arguments in defence of the Newsprint Policy in Bennett Coleman were premised on the prevention of concentration in the press and the furtherance of competition. The majority repelled these arguments on the ground that the rights of big newspapers could not be violated in order to help small newspapers grow.[174] However, Justice Mathew's dissent took favourably to this argument and reasoned that the existing inequality in the press industry justified the government's policy, which was aimed at promoting the interests of smaller newspapers. The value of competition, combined with the reader's right to circulation, can be identified as the guiding principles in the dissenting opinion. While this was a note of dissent, the context of the media industry over the years has demonstrated an experience of growing concentration of ownership in the industry. In this context, the recognition of this value in the dissent seems prescient. Consequently, we acknowledge the underlying rationale of the dissent in the jurisprudence of the Supreme Court and include it within the parameters identified in this section.

The next case in this line of cases is the 1984 judgment in ***Indian Express Newspapers v. Union of India.***[175] The Court was responding to a challenge to an import duty which had been placed upon newsprint and was alleged to be severe enough to cripple the newspaper business, thereby affecting the freedom of speech and expression of newspapers. The Court began its reasoning by stating that like other industries, the newspaper industry was also subject to the power of the Government to impose taxes, though it may not be singled out in an excessive manner. Recognising the crucial importance of newspapers to the freedom of speech and expression, the Court adopted a special test— it examined whether the tax on newsprint demonstrated a "distinct and noticeable burdensomeness, clearly and directly attributable to the tax". The reasoning of the Court ultimately identified that this burdensomeness did exist, and that it would have an impact on circulation as well - both from the newspaper's and the reader's perspective.

The final case in this line of cases is the judgment of ***Express Publications (Madurai) v. Union of India in 2004***. In this case, a notification of the Government which stated that newspaper employees were not covered under the definition of 'excluded employee' of the Employee Provident Fund Scheme was challenged. — The consequence of this was that irrespective of their pay, all newspaper employees were entitled to the benefit of the scheme,[176] while someone earning the same amount in another industry may have been excluded by virtue of an 'income ceiling' and therefore, not be entitled the benefits of the scheme. The petitioner newspaper argued that the newspaper industry was being singled out for harsh treatment, and that this was an abridgement of their freedom of speech and expression. The Court placed reliance on the framework for adjudication set out in the 1958 Express Papers judgment,[177] ultimately finding that the 'intention' or 'proximate effect' of the notification was not an abridgment of the freedom of the press. In arriving at this conclusion, however, the Court stated with

[174] ibid.

[175] Indian Express v Union of India, 1985 1 SCC 641.

[176] Express Publications (Madurai) v Union of India, WP (Civil) 59 of 2001 (Supreme Court of India).

[177] Indian Express v Union of India, 1985 1 SCC 641.

stated with approval the paragraphs from Express Papers which were referenced above. Therefore, this judgment appears to be operating within the framework, relying on thesame metrics.

An examination of these landmark cases reveals the following five interests that associated with the constitutional freedom of speech and expression of the press— the right to volume of circulation, the reader's right to access information, the economic sustainability of newspapers, the promotion of editorial freedom and the promotion of competition. We recommend that any legal framework for the future of news be developed and assessed primarily taking into consideration these metrics. In articulating these institutional entitlements of the press, we are also able to imagine a framework for media regulation that is not tied down to the unfortunate historical context of Indian press laws. The next section of this report crystallises the rationale employed by the Supreme Court into an analytical framework that can provide the methodological basis for evaluating various proposals to regulate media infrastructure. In doing so, it attempts to identify and operationalise the "jurisprudence of the relative demands of the three organs of government and the press."[178]

[178] Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.

IV. Evaluating proposals to address the future of news

This section of the report identifies various proposals related to the objectives outlined in this report. It examines the experience of other jurisdictions which have implemented such proposals vis-à-vis the constitutional principles for India, as outlined in the previous chapter. Through this exercise, it aims to identify proposals that are aligned with the constitutional framework for the regulation of media infrastructure.

A note on method

At the outset, we must recognise that a conclusive assessment of the impact that a proposal might have on a constitutional parameter is not immediately foreseeable. There are a number of variables and complex interlocking forces that will affect how any proposal might play out.[179] Consequently, we provide the greatest latitude in our evaluation of these proposals in terms of their potential benefit on any constitutional parameter. In terms of evaluating the negative impact of a proposal on a parameter, we adopt a slightly more conservative approach, given the nature of rights and freedoms associated with the press— freedoms which impact the society at large.[180] Consequently, evidence of how a proposal has played out in other jurisdictions is assessed to examine if there is a likely and demonstrable negative impact on a constitutional parameter identified in this report.

We adopt proposals which do not have a clearly identifiable negative impact on any constitutional parameter for elaboration in the next chapter. The other proposals however continue to be worthy of consideration, though they would require a more detailed evaluation before they can be recommended as legislative measures in the Indian context.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	Editorial Freedom	Volume of Circulation	Reader's right to access	Economic Sustainability of the press	Promoting competition

Potential positive impact

Potential negative impact

Impact not apparent

Sustaining credible print journalism

The first objective identified in Part I of the report is ensuring the sustainability of print news. The case for legislative or regulatory intervention is sustained based on the value of print news to democratic processes — in large parts of the country which are yet to undergo the digital transformation, the print media continues being the dominant source of news.[181] Governments around the world have experimented with various proposals aimed at remedying the economic health of their print media industries. This section examines some of

[179] Lee Bollinger, 'Freedom of the press and public access: Toward a theory of partial regulation of the mass media', (1976) 75(1) Michigan Law Review 1.

[180] ibid.

[181] Vanita Kohli-Khandekar, 'The Indian Media Business' (2015), p 27.

the leading legal policy proposals based on how they played out in other jurisdictions.

A. Enacting a 'hot news' statute

This proposal is premised on the fact that a significant degree of news gathering is conducted by newspapers and wire services while digital publishers, news aggregators and alternative media pick up this news and report it subsequently.[182] Following from this commercial fact, the proposal to enact a 'hot news' statute has been regarded by some as a way to safeguard the economic rewards of news-gathering. The 'hot news' doctrine, which emerged in the United States, recognises a financial interest in the transmission of time-sensitive information and allows a newsgatherer to litigate against a competitor and obtain an injunction against the transmission of information, or compensation for unauthorised transmission.[183] The principle behind the doctrine is that while facts and ideas may not be copyrightable, the content producer has invested time and resources in obtaining this content and should retain some right to derive revenue from that content until its commercial value has passed.[184] For a competitor to resell the content without incurring any of the costs associated with gathering such content would unfairly injure the content producer. Protection from this injury is necessary to incentivise profit-seeking entrepreneurs to make information available to the public.[185] Without an incentive for private actors to collect 'hot news', the general public would suffer.[186]

Contemporary proposals to recognise this doctrine have suggested the codification of this doctrine.[187] The Delhi High Court also refused to recognise the doctrine, but left it open for the legislature to enact it in a statutory form. The codification of the 'hot news' doctrine is likely to shape incentives to make licensing arrangements a commonly used business practice in the industry.[188] The ability to continue being able to reproduce relevant news is crucial to continuous user engagement and market presence for digital news publishers, who will have no option but to either increase news gathering capacity or pay for being able to transmit such news.

Consequently, the possibility of protracted litigation, time-based injunctions and damages are likely to collectively have the effect of shaping a customary practice of licensing 'hot news' - a judgment supported by academic literature which suggests that codification of the doctrine is likely to impose massive social costs in the Internet era.[189] Further, the experience of legal measures which rely on litigation in the context of the news industry has been that lawsuits have been used to pressurise aggregators and digital news publishers into settlements— a result of the time and costs of litigation and the possibility of an unfavourable far-reaching precedent. Despite its economic precariousness, the print media industry has considerably greater resources than ordinary publishers on the Internet, or even most stand-alone aggregator applications. The experience of litigation in the

[182] Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020.

[183] Luiz Zambrano, 'Still an alternative way to protect traditional news: Why Barclays did not kill the Hot News Tort' (2012) 27 Berkeley Technology Law Journal 957 (Discussing the evolution and contemporary status of the hot news doctrine).

[184] John C McDonnell, 'The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation' (2010) 10(3) Northwestern Journal of Technology and Intellectual Property 255, p 258.

[185] National Basketball Association v. Motorola Inc, 105 F. 3d 841 (2d Cir. 1997) (United States).

[186] ibid.

[187] Lauren Gregory, 'Hot Off the Presses: How Traditional Newspaper Journalism can help reinvent the hot news misappropriation tort in the Internet Age', (2011) 13(3) Vanderbilt Journal of Entertainment and Technology Law 577.

[188] Daniel S Park, 'The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism', (2010) 25 Berkeley Journal of Law and Technology 369.

[189] Amy Jensen, 'When News Doesn't Want to be Free: Rethinking hot news to help counter free riding on newspaper content online', (2010) 60(3) Emory Law Journal 537.

Indian context indicates that similar pressures of time and costs will operate on smaller publishers. Consequently, the enacting of a 'hot news' statute due to the prevalence of 'licensing arrangements' and the possibility of increased litigation in the backdrop of resource asymmetry appears to be likely to have a negative impact on the reader's access to news. Further, smaller newspapers are likely to be affected detrimentally by such a statute more than larger newspapers — given that larger papers often have a greater number of journalists on the ground, access to more wire services and a greater ability to pursue litigation—factors which would combine to hurt the interests of smaller newspapers. Consequently, even though it may positively affect the economic sustainability of larger newspapers, it may have a detrimental impact on competition in the market. Therefore, when evaluating this proposal against the constitutional parameters in the previous chapter, a restrictive impact on reader's access to news must be considered.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Enacting a ' hot news statute					

B. Enabling collective negotiations with advertisers

The slowdown in advertising in print media raises concerns about the economic sustainability of the advertiser-revenue model. A proposal which has been forwarded by media consortiums in various jurisdictions is the use of a policy measure to enable newspapers to collectively negotiate with advertisers.[190] These measures have taken the form of limited competition law exemptions, such as the one proposed in the Journalism Competition and Preservation Bill, 2019 in the United States.[191]

The ability to collectively negotiate would increase the bargaining power of newspapers in this dynamic, and consequently, allow for the advertiser-revenue model to sustain newspapers. Newspapers are unable to issue credible threats to refuse commercial terms with advertisers due to a lack of bargaining power at an individualised level. If one newspaper withdraws from an advertiser in an effort to negotiate better commercial terms, they risk losing the advertiser altogether. News producers, therefore, face a coordination problem in this respect.[192]

In India, section 54 of the Competition Act, 2002 grants the Central Government the power to exempt any class of enterprises by issuing a notification if such exemption is necessary in the public interest.[193] The Draft National Competition Policy outlines the principles which a deviation from competition policy should adhere to. This includes a well-defined objective, transparent and rule bound decision-making and an inbuilt sunset clause in the exemption.[194]

[190] 'Working Party on the Information Economy: The evolution of news and the internet', Organisation for Economic Co-operation and Development: Committee for Information, Computer and Communications Policy (2010) <https://www.oecd.org/sti/ieconomy/45559596.pdf> accessed 23 April 2020.

[191] H.R. 5190, Bill for Journalism Competition and Prevention Bill Act of 2018 (115th Congress of the United States).

[192] Jonathan Rauch, 'How to save newspapers – and why', National Journal, 14 June 2008 <http://nationaljournal.com/njmagazine/st_20080614_5036.ph> accessed 23 April 2020 (Discussing the coordination problem in the newspaper publishing industry).

[193] Competition Act, 2002, (India), s 54.

[194] Draft National Competition Policy 2011, (India), cl 5.2.

However, even though questions of the concentration of media ownership are not within the scope of this paper, a competition law exemption cannot be discussed without an examination of these questions. An exemption from price fixing or merger review would have the effect of increasing concentration in the media industry, and potentially harm the interests of smaller newspapers.[195] There is considerable evidence of concentration of ownership in the Indian media industry.[196]

The harm to smaller newspapers has been a consistent criticism of such proposals across jurisdictions as well.[197] In any case, at this stage of assessment within the constitutional parameters outlined above, such a proposal appears likely to have a negative impact on competition in the industry. Consequently, we recommend that detailed, quantitative market research be conducted before such an exemption is considered, in order to evaluate the desirability of such a proposal.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	Editorial Freedom	Volume of Circulation	Reader's right to access	Economic Sustainability of the press	Promoting competition
Limited competition law exemptions					

C. Public funding of news

This proposal is grounded in the idea that news should be conceptualised of as a public good.[198] Flowing from this theoretical basis, there is a credible justification for policies to enable public funding of the media. Some Member States of the European Union have put such policies in place. For instance, in 2009, France approved a 600 million Euro emergency aid package for the newspaper industry.[199]

However, the funding of the media by the government is a thorny proposition. The possibility of funding being used as a leverage for imposing editorial pressures on newspapers has led to calls for "viewpoint neutral support measures"— including an ambitious proposal to implement newspaper vouchers to channel public money towards the media while avoiding the influence of the government. A crucial factor in any measure aimed at public funding of news is the integrity of institutional mechanisms and the operation of adequate checks and balances. A prominent view, across both academia and as reported in the experience of other jurisdictions, is that direct government funding towards newspapers provides the conditions for the restriction of editorial freedom, especially in terms of being critical of the government.[200]

[195] Walter Niebauer, 'Effects of the Newspaper Preservation Act on the suburban press', (1984) 5(4) Newspaper Research Journal 41.

[196] Smarika Kumar, 'Concentration of media ownership and the imagination of free speech', (2016) 51(17) Economic and Political Weekly, 128.

[197] 'Working Party on the Information Economy: The evolution of news and the internet', Organisation for Economic Co-operation and Development: Committee for Information, Computer and Communications Policy (2010) <https://www.oecd.org/sti/ieconomy/45559596.pdf> accessed 23 April 2020.

[198] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

[199] 'Working Party on the Information Economy: The evolution of news and the internet', Organisation for Economic Co-operation and Development: Committee for Information, Computer and Communications Policy (2010) <https://www.oecd.org/sti/ieconomy/45559596.pdf> accessed 23 April 2020.

[200] 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020.

The assessment of the institutional mechanisms related to the press portrays a more negative outlook. There has often been claimed to be a 'pathology in the operation of the law' in India in the context of press laws.[201] This phrase has been used to reflect the fact that despite seemingly rational legal rules, press laws have been implemented in a manner that leads to the imposition of editorial pressures on newspapers and the curbing of media freedoms. This is a sentiment that runs through literature on Indian press laws and continues being expressed in contemporary scholarship.[202] The particular political economy of the press in the Indian context— ranging from the state of media ownership, the attitudes of local law enforcement and the lack of institutional respect for the media in the political class lends to this 'pathology'.[203] Further, studies of media ownership have demonstrated that key political operatives are linked to influential ownership in media consortiums in India.[204] In the absence of the kind of institutional integrity necessary for such a proposal to work, direct public funding of news may not be feasible for India. Further, within the framework of constitutional parameters outlined above, direct public funding may have a restrictive impact on editorial freedom. Therefore, other forms of state support must be explored.

In India, state support to the newspaper industry is primarily channelled through advertisements— which is a form of "viewpoint neutral support measure". This support is crucial to the newspaper industry in India— being labelled the 'lifeline' of small newspapers in India.[205] However as discussed earlier, advertising by the government in India is channelled through the DAVP, a department within the Ministry of Information and Broadcasting, Government of India.[206] This Department is responsible for receiving advertisements from various ministries and entering into commercial arrangements with newspapers for publishing those advertisements. The Government of India has also demonstrated an intent to increase the amount of support channelled through advertising by announcing measures such as the "Har kaam desh ke naam" campaign, which announced an upcoming increase in the advertising expenditure of the government.[207]

However, there are various issues with the DAVP that must be addressed before this state support can effectively aid the sustainability of the print media industry— advertisement bans imposed on newspapers for critical coverage of the government,[208] lack of functional autonomy within the DAVP and institutional separation from the Ministry of I&B, lack of access to transparency releases of the DAVP which hinders accountability.[209] An institutional reform of the DAVP would allow for state support to be channelled effectively and equitably towards the newspaper industry. Institutional autonomy and effective transparency processes would enable insulation from political variables would significantly mitigate the restrictive impact that public funding may have on editorial freedom. A positive impact on economic sustainability of newspapers may have a knock-on impact on the volume of circulation and the reader's right to access information as well, depending on the operational decisions made by newspapers. Consequently, we elaborate on this policy measure in the next chapter.

201 Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.

202 Vibodh Parthasarathi et al, 'Mapping Digital Media: India', Open Society Foundation (2012) < https://www.opensocietyfoundations.org/uploads/48c331d2-2b05-4287-b703-9c54771b28b0/mapping-digital-media-india-20130326.pdf > accessed 23 April 2020.

203 Rajeev Dhavan, 'On the law of the press in India', (1984) 26(3) Journal of the Indian Law Institute 289.

204 Nalin Mehta, 'India and its television: ownership, democracy and the media business', (2015) 1(1) Emerging Economy Studies 50.

205 Vibodh Parthasarathi et al, 'Mapping Digital Media: India', Open Society Foundation (2012) < https://www.opensocietyfoundations.org/uploads/48c331d2-2b05-4287-b703-9c54771b28b0/mapping-digital-media-india-20130326.pdf > accessed 23 April 2020.

206 Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 <https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

207 'Har kaam desh ke naam': Centre launches campaign to spread the word on its public welfare works, Newslaundry, 13 February 2020 <https://www.newslaundry.com/2020/02/13/har-kaam-desh-ke-naam-centre-launches-campaign-to-spread-the-word-on-governments-public-welfare-works> accessed 23 April 2020.

208 Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 <https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

209 ibid.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	Editorial Freedom	Volume of Circulation	Reader's right to access	Economic Sustainability of the press	Promoting competition
Direct public funding					
State support channelled through an autonomous institution					

Orienting digital news to the public good

The second objective outlined in Part I of the report is orienting digital news to the public good. The case for regulatory intervention is sustained on the rising importance of digital news and the highly complex and dynamic nature of the value chain of online news. The law's role in structuring markets is at a foundational stage in the context of digital news, and consequently by establishing the appropriate 'rules of the game',[210] the law can enable the market of digital news to be oriented towards the economic health of news publishers and the development of trust in the information environment on the Internet.

A. Recognising a 'neighbouring right' for publishers of news

The European Union's Copyright Directive recognises a 'neighbouring right' of 'publishers of press publications' for the online use of their publication In effect, this automatically allows a publisher to negotiate a license with someone who uses their work online.[211] The right makes an exception for hyperlinking, very short extracts and non-commercial use. The intent behind this is to enable publishers to enforce license fees and safeguard their economic revenue.[212] However, there was major backlash to the recognition of this right from technology companies like Google and sections of civil society.[213]

In both Spain and Germany, neighbouring rights in copyright law of news content creators were recognised, which translated into a compulsory licence fee if a news aggregator used more than a snippet (usually defined as a few words) in their application.[214] However, this was not sufficient to equalise the bargaining power. After these laws were passed, Google News refused to pay the licence fee and instead chose to withdraw from these two countries.[215] Lack of distribution capacity without the presence of Google News[216] hurt the newspapers, especially the smaller ones, most of whom were forced to renegotiate worse terms with Google News. A number of newspapers also went out of business at this time. Scholars have pointed out to the experience in Spain and Germany as an example

[210] Arthur A Stein, 'Neoliberal institutionalism' in 'The Oxford Handbook of International Relations' (Duncan Snidal and Christian Reus-Smit eds.) (2008), p 201.

[211] Agnes Lucas Schoetter, 'Transfer of Value provisions in the Draft Copyright Directive', European Authors Society (2017) < https://authorsocieties.eu/content/uploads/2019/10/lucas-schloetter-analysis-copyright-directive-en.pdf> accessed 23 April 2020.

[212] ibid.

[213] Giuseppe Colangelo and Valerio Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform', (2019) 27(1) International Journal of Law and Information Technology 75.

[214] Susan Athey et al, 'The Impact of Aggregators on Internet News Consumption', Stanford Institute for Empirical Policy Research Working Paper No 17-034 (2017) <https://siepr.stanford.edu/sites/default/files/publications/17-034_0.pdf> accessed 23 April 2020.

[215] João Pedro Quintais, 'The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap)', Kluwer Copyright Blog, 17 June 2019 <http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/> accessed 23 April 2020.

[216] Már Másson Maack, 'Google's unsurprising refusal to pay for news snippets undermines new EU copyright law', <https://thenextweb.com/google/2019/09/25/googles-unsurprising-refusal-to-pay-for-news-snippets-undermines-new-eu-copyright-law/> accessed 23 April 2020.

as to why this approach can backfire.[217] While countries have till 2021 to implement the directive in their domestic law, industry experts expect its effect to consolidate the market by removing smaller publishers.[218]

The recognition of a 'neighbouring right' is likely to either require an aggregator to pay publishers to list their content or reduce the amount of information about the article that they link to. It would also reduce the circulation of information online, since there would be a cost which would accompany the reproduction of any information. Evaluating this within the constitutional parameters outlined in the previous chapter and the experience abroad, the recognition of a neighbouring right appears to be likely to have a negative impact on reader's access to information. Consequently, we recommend that the European experience with a neighbouring right be carefully studied before such a right is introduced in the Indian context.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Recognising a neighbouring right for news publishers					

B. Encouraging a shift to reader-revenue models

The previous decade has witnessed significant movement towards the adoption of reader-revenue models, such as paywalls, memberships and donations in the world of digital news.[219] Major newspapers such as New York Times and The Telegraph led this change globally, and even in the Indian context, several leading newspapers such as The Hindu and Business Standard have gone behind a paywall.

Many voices within the industry are of the opinion that the reader-revenue model represents the future of journalism online, and is the key to fostering high-quality journalism.[220] Measures which encourage this shift include the promotion of subscriptions in public offices, embassies and administrations, which was tried in Spain in 2009, and extending subsidies and tax benefits to digital news publishers.[221]

However, this model has serious implications on the access to news for readers. This is enhanced in the context of the Internet where there is a general unwillingness to pay for content, combined with the inability of a large section of the population to afford paywalls. Within the constitutional parameters outlined earlier, the impact on access would mean that we are hesitant in recommending active policy intervention in favour of reader-revenue models. While there may be strong business reasons for publishers to opt for such models, this should be the result of market forces. The positive intervention of the government in this direction is likely to be contrary to the constitutional principles of increasing access to readers.

At the same time, there are some measures which can facilitate greater access in this business environment, such as the creation of

[217] João Pedro Quintais, 'The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap)', Kluwer Copyright Blog, 17 June 2019 <http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/> accessed 23 April 2020.

[218] 'Conference: Copyright, related rights and the news in the EU: Assessing potential new laws' <https://www.ivir.nl/newsconference2016/> accessed 23 April 2020.

[219] Shuchi Bansal, 'Consumers slow to adopt digital news paywalls', Livemint, 28 March, 2019 <https://www.livemint.com/opinion/columns/opinion-consumers-slow-to-adopt-digital-news-paywalls-1553722065692.html> accessed 23 April 2020.

[220] Victor Pickard and Alex Williams, 'Salvation or folly? The promises and perils of digital paywalls', (2014) 2(2) Digital Journalism 195.

[221] 'Working Party on the Information Economy: The evolution of news and the internet', Organisation for Economic Co-operation and Development: Committee for Information, Computer and Communications Policy (2010) <https://www.oecd.org/sti/ieconomy/45559596.pdf> accessed 23 April 2020.

paywall wallets which can allow access to multiple outlets for an overall lower price. It would also reduce the dependence of news publishers on other entities for funding. These entities may have interests which impose editorial pressures on news publishers. Therefore, editorial freedom is likely to benefit as well from a shift to reader-revenue based models.

However, given the restrictive impact on access, this report recommends considering these enabling measures at the point at which market forces have naturally caused a significant shift to the reader-revenue model, which would happen when the market for digital news has matured in terms of willingness to pay – making paywalls a feasible option for most news publishers.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Encouraging a shift to reader revenue models					

C. Shaping the online advertising market

This proposal is grounded in the idea that there may be potential market failure in the market of digital advertising which requires legislative intervention. Flowing from this premise, this proposal suggests investigating the role and nature of online advertising platforms in order to examine if there indeed is market failure which requires correction.

The advertisement-revenue model on the Internet is highly dependent on advertising platforms, who have come to occupy critical positions in the value chain of online news.[222] While there used to be a series of smaller intermediaries making up this market, major ad-platforms such as Google and Facebook have over time integrated such intermediaries within their platform - emerging as powerful, integrated platforms for digital advertising. This has often been claimed to lead to an alleged duopoly in the market for digital advertising - the impact of which is unfavourable arrangements with publishers for whom such platforms may emerge as unavoidable trading partners.[223] The lack of bargaining power of individual publishers, issues with a lack of transparency in the operation of such platforms and the potential market failure in the creation of monopolies indicates that there is a need to assess the operation of the market.

Policy measures which address market failures in digital advertising are likely to have a positive impact on most of the constitutional parameters outlined earlier, with the knock-on effects of economic sustainability possibly leading to positive impacts on the volume of circulation, competition in the market and the reader's right to access information. The potential impact of regulatory action targeted at online advertising platforms, when assessed against these parameters, does not show an imminently foreseeable negative impact on any of those values. Consequently, the next chapter elaborates on proposals to study the impact of online advertising platforms in the market of digital news.

[222] European Commission, 'Press Release' (2019) <https://europa.eu/rapid/press-release_IP-19-1770_en.htm> accessed 23 April 2020.

[223] ibid.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Investigating dominance in the online advertising market					

D.Enacting special offences for misinformation

An approach that has been adopted in various jurisdictions - such as Germany, Singapore and France - is to create special offences for the spreading of 'misinformation', 'online falsehoods' or 'hate speech' on online platforms.[224] While the German law is directed at hate speech on such platforms,[225] the laws in Singapore and France target the spread of 'false statements of fact'.[226] Legislations such as these have tended to create criminal offences penalising the spread of misinformation. However, these legislations have also come under intense criticism for being restrictive of the freedom of speech and expression.[227]

Reports on the working of laws which create offences about misinformation have highlighted instances of government misuse of the law, enabling a crackdown on journalists who are critical of the government and the overbroad application of such laws due to the rudimentary definitions of 'misinformation' or 'fake news'.[228]

In India, the constitutional scheme for the restriction of the freedom of speech and expression permits reasonable restrictions on speech based on certain grounds outlined in Article 19(2) of the Constitution, such as public order and security of the State, amongst other grounds. Falsehood by itself does not justify a restriction on speech, unless it is linked to an impact on any of the grounds mentioned in Article 19(2).[229] As was outlined earlier, a series of offences related to different kinds of harmful speech - such as sedition, incitement of violence and obscene speech - are already in place in India. Consequently, the constitutionality of an offence aimed solely at 'misinformation' would be suspect - and in the case that it is linked to a threshold of harm for its applicability, its incremental effect over and above offences in the Indian Penal Code, 1860 is suspect.

When evaluated within the constitutional parameters outlined above, measures which create offences trying to prevent 'falsehood' on the Internet appear likely to have a restrictive impact on the editorial freedom of the press. This has a knock-on impact on the reader's right to access information, given that it is likely to have a chilling effect on the production of certain pieces of information. This assessment is sustained based on the experience of similar offences in other jurisdictions, as well as the inherent definitional difficulties with developing legislative standards for what amounts to "fake news". In an environment where offences about speech on the Internet are enforced in an often-arbitrary manner by the government, this report is hesitant in recommending the enactment of a new offence targeted at 'misinformation' because of the potential impact on editorial freedom and the freedom of speech generally.

[224] Daniel Funke and Daniela Flamini, 'A guide to anti-misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/> accessed 23 April 2020.

[225] Law on Improving Law Enforcement in Social Networks (Network Enforcement Law - NetzDG) (Germany).

[226] Daniel Funke and Daniela Flamini, 'A guide to anti-misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/> accessed 23 April 2020.

[227] William Echikson and Olivia Knodt, 'Germany's NetzDG: A key test for combating online hate' CEPS Policy Insight (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300636> accessed 23 April 2020.

[228] Daniel Funke and Daniela Flamini, 'A guide to anti-misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/> accessed 23 April 2020.

[229] The Constitution of India, 1950, art 19(2).

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Enacting special offences for misinformation					

E. Imposing editorial responsibility on platforms

This proposal to regulate the information environment suggests the imposition of strict editorial duties on online platforms, thereby incentivising them to stop the spread of fake news. For example, a law in China allows social media platforms to only republish and link to news articles from registered news media.[230] Other similar proposals have been mooted in Brazil,[231] and in Russia, where a proposed law aims to make social media platforms responsible for comments posted by users on their platforms.[232]

There are some issues with proposals such as these that must be addressed. First, platforms are merely 'intermediaries', and have traditionally not been held responsible for the content that is uploaded on the platforms by users.[233] The body of 'intermediary liability' law recognises this position. For example, section 79 of the IT Act provides intermediaries with an exemption from liability for third-party content subject to compliance with the provisions of the section and the guidelines promulgated under the section.[234] Second, the imposition of editorial responsibility on platforms would have the effect of turning them into adjudicators of content. The adjudication of which content is lawful or true must be conducted through accountable bodies – such as public institutions which have mechanisms for representation, oversight and deliberation.[235] Third. this may have the effect of platforms censoring legitimate speech – since platforms would be incentivised to avoid any liability which flows from that speech.[236] These platforms are not dedicated 'news' entities, but are general social media platforms where individuals exercise their freedom of speech. The imposition of responsibilities targeted at 'news' entities on social media platforms may have the effect of censoring ordinary speech on these platforms as well. When evaluated within the constitutional parameters outlined earlier, proposals such as these appear likely to have a restrictive impact on the circulation of information online. The imposition of stringent responsibility on platforms would reduce the sources that they aggregate, which would have a knock-on impact on reader's access to information as well. This report, as it explains below, suggests that instead of enacting an offence to prevent 'lying' on the Internet or imposing enhanced editorial responsibility on all publishers of information online, legal policy should focus on putting in place measures that help readers discern between real and fake information, and eventually, develop the capability to stop the spread of misinformation in the first place. This approach is labelled a "light touch strategy" for the purposes of this report.

[230] Maria Repnikova, 'China's lessons for fighting fake news', Foreign Policy, 6 September 2018 <https://foreignpolicy.com/2018/09/06/chinas-lessons-for-fighting-fake-news/> accessed 23 April 2020.

[231] Daniel Funke and Daniela Flamini, 'A guide to anti misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/#brazil> accessed 23 April 2020.

[232] ibid.

[233] Giancarlo Frosio et al, 'Intermediary liability and fundamental rights' in 'Oxford Handbook of Intermediary Liability Online' (Giancarlo Frosio ed.) (2019).

[234] Information Technology Act, 2000 (India), s 79.

[235] Giancarlo Frosio et al, 'Intermediary liability and fundamental rights' in 'Oxford Handbook of Intermediary Liability Online' (Giancarlo Frosio ed.) (2019).

[236] ibid.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Imposing stringent editorial responsibility on platforms and online publishers					

F. Imposing appropriate responsibilities on digital news entities

While social media platforms are more general entities on whom the imposition of specific responsibilities related to the news may have a restrictive impact on aspects of freedom of speech, it may be more reasonable to consider imposing appropriate responsibilities on entities which specifically identify themselves as 'news' entities. These entities are broadly of two kinds: digital news publishers, and news aggregators.

The imposition of responsibility, however, must not be knee-jerk or hastily conceptualised. There are various examples of imposing editorial responsibility on digital news entities which are draconian in nature, which are mainly through the imposition of criminal liability on news publishers online. Proposals along these lines have been implemented in countries like Egypt - which enacted a law that treats any account or blog with more than 5,000 followers on social media platforms like a 'media outlet' that, under the country's laws, can be prosecuted for publishing 'fake news'.[237] The experience of imposing stringent editorial responsibility on digital news entities, like the experience of enacting special offences, is prone to narratives of government misuse and restrictions on media freedom. For example, in December 2018, it was reported by the Committee to Protect Journalists that Egypt led the world in the number of journalists arrested under fake news charges.[238] These arrests were called a "wave of repression" and a number of anecdotal instances about activists being imprisoned for criticising the government sustain this assessment.[239]

Therefore, the imposition of responsibilities must be calibrated to the environment of news online. We identify two specific models through which the appropriate level of responsibility may be imposed. Digital news publishers, instead of being subject to criminal prosecution, should be addressed in a manner that is not as restrictive. The expansion of existing self-regulatory institutions to the field of digital news represents the first step along this path. Similarly, news aggregators – instead of being burdened with editorial responsibility – should be imposed with duties concomitant to their role as 'intermediaries'. To this end, we suggest the imposition of design duties on such aggregators – which are duties directly related to the design aspects of such platforms.[240]

The imposition of these relatively 'lenient' measures would still represent an advance over the current un-regulated state of digital news. At the same time, they may have the effect of addressing some of the prominent issues in the digital news environment. A healthy environment for digital news would directly enhance a reader's right to access information. Further, given the incremental nature of these responsibilities, a restrictive impact on the constitutional metrics outlined here is not apparent along the other metrics.

[237] Jared Malsin and Amira el Fekki, 'Egypt passes law to regulate media as President Sisi consolidates power', The Wall Street Journal, 16 July 2018 available at <https://www.wsj.com/articles/egypt-passes-law-to-regulate-media-as-president-sisi-consolidates-power-1531769232> accessed 23 April 2020.

[238] Daniel Funke, 'Egypt is jailing more journalists on false news charges than anywhere else in the world', Poynter <https://www.poynter.org/fact-checking/2018/egypt-is-jailing-more-journalists-on-false-news-charges-than-anywhere-else-in-the-world/> accessed 23 April 2020.

[239] ibid.

[240] Olivier Sylvain, 'Intermediary design duties', (2018) 50 Connecticut Law Review 203.

	Constitutional parameters for the regulation of media infrastructure				
Proposal	**Editorial Freedom**	**Volume of Circulation**	**Reader's right to access**	**Economic Sustainability of the press**	**Promoting competition**
Imposing appropriate responsibilities on digital news entities					

G. Comprehensive light-touch measures to address misinformation

The approach most commonly adopted in various jurisdictions - especially European jurisdictions[241] - to deal with issues of misinformation have involved a bouquet of legislative, co-regulatory and voluntary measures which are oriented at tackling the entire chain of misinformation - as opposed to imposing stringent measures on an amorphous class of entities. Consequently, many governments have established task forces, reporting portals, fact-checking infrastructure and have conducted media literacy campaigns as part of their efforts to combat misinformation.[242]

The problem of misinformation is not just a long-tail problem.There is a severe lack of institutional understandingof the dynamics of misinformation itself. The problem of misinformation is not just one of the existence of 'fake news' outlets, but also about the way in which social media algorithms pick up ordinary content by users. In order to effectively address the problem, one must not just look for the actor on which liability must be imposed, but have an integrated sense of the processes which enable the problem.

When combined with the institutional positioning of the media and the government, and the increasing use of digital mediums to raise questions of governmental accountability, this must impact the nature of liability that is imposed, in order to deal with the issue. Liability could either be imposed in a strict manner through statutory instruments, or legal policy could incentivise certain behaviours, through policies, guidelines and 'nudges' which enable a more comprehensive reform of the processes at hand - an approach we label as a 'light touch' approach for the purposes of this report. These measures include requiring significant platforms to provide fact-checking facilities, enabling oversight of aggregation algorithms, and requiring the voluntary registration of digital news publishers in order to generate trust in the information environment. The creation of trust in the information environment – through a combination of these measures – would concomitantly enhance a reader's right to access information. Further, since these measures represent less stringent measures than the other alternatives for regulating digital news, their impact on editorial freedom can be conceptualised as a positive impact – given that the dominant alternatives to such proposals are the imposition of criminal liability and other restrictive proposals.

In this context, knee-jerk imposition of statutory liability has been recognised across advanced jurisdictions to be likely to impose fetters on the freedom of speech, and there is a concerted effort to identify broader institutional arrangements that can help combat misinformation. Within the constitutional parameters outlined earlier, a combination of 'light-touch' measures do not appear to have an imminently negative impact on any of the identified parameters. Consequently, we elaborate on this approach in the next chapter.

[241] Daniel Funke and Daniela Flamini, 'A guide to anti misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/#brazil> accessed 23 April 2020.

[242] 'A guide to anti-misinformation actions around the world', Poynter, available at < https://www.poynter.org/ifcn/anti-misinformation-actions/>

	Constitutional parameters for the regulation of media infrastructure				
Proposal	Editorial Freedom	Volume of Circulation	Reader's right to access	Economic Sustainability of the press	Promoting competition
Adopting a 'light touch' strategy					

An overview of the various proposals studied in this chapter is provided in the table below, operationalising the framework developed in the earlier chapter:

	Editorial Freedom	Volume of Circulation	Reader's right to access	Economic Sustainability of the press	Promoting competition
I. Sustaining credible print journalism					
Enacting a 'hot news' statute					
Limited competition law exemptions					
Direct public funding					
State support channelled through an autonomous institution					
II. Orienting digital news to the public good					
Recognising 'neighbouring rights' of news publishers					
Encouraging a shift to reader-revenue model					
Investigating dominance in the online advertising market					
Enacting special offences aimed at misinformation					
Imposing editorial responsibility on platforms					
Imposing appropriate responsibilities on digital news entities					
Comprehensive light-touch measures to address misinformation					

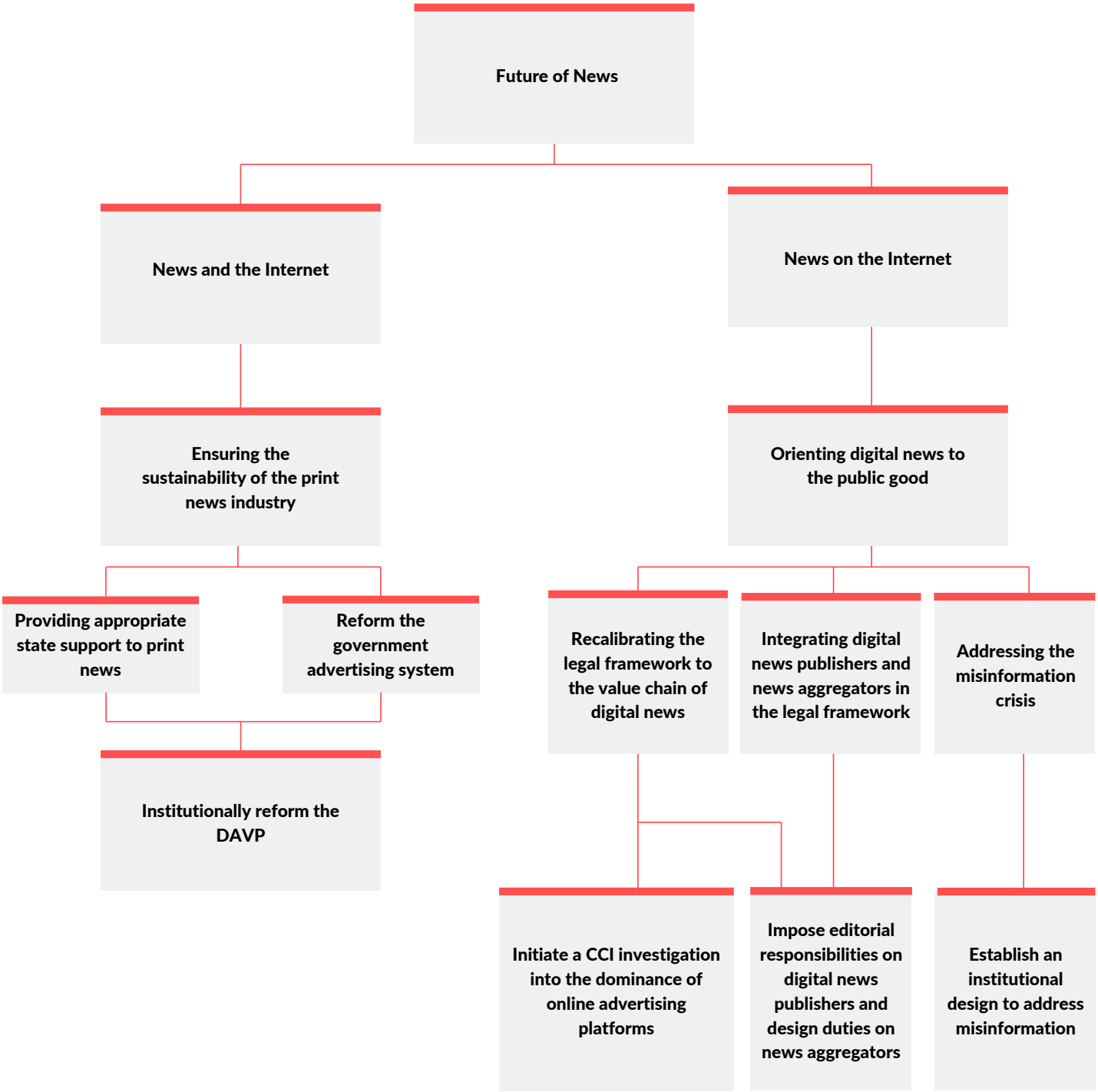
Potential positive impact

Potential negative impact

Impact not apparent

V. Recommendations

The following roadmap outlines the process of arriving at the recommendations forwarded in this chapter, and highlights how these recommendations link to the objectives outlined in Part I of the report.



A. Institutionally reform the DAVP

As demonstrated in the section on print media advertising practices, there is a widespread recognition that the advertising policies of the government (through DAVP) are not effective. The recently tabled Draft RPP Bill mentions an enabling clause in section 17 for the government to frame particular policies for the dissemination of government advertisements.[243] However, there is no mention of (a) the objectives of government advertisement dissemination policy or (b) the linking of the objectives to the marking criteria that was introduced in 2016.

First, the institutional design of DAVP, from the perspective of an efficient allocator of state resources, is flawed. We have noted from a few studies that the scope of public interest in news is underfunded and underserved through free market mechanisms.[244] This lack of funding results in newspapers which cover public interest news suffering from funding squeezes and being forced between pivoting towards other more commercially lucrative areas of reporting, or terminating operations. The funding gap thus, represents the extent of the market failure in incentivising reportage of public interest news.

A state sponsored initiative, with independent oversight has been posited as the most efficient route to close this gap.[245] Particularly, in this context, the Cairncross Report considers reporting which deepens and maintains democratic processes and investigative journalism as constituting news in the public interest. India does not have an explicit policy of state support for news organisations irrespective of the public interest component in their output. However, on a closer examination, it is clear that through the DAVP, there is an existing pipeline of state funding which is used for arbitrary state support at best and political expediency at worst.

The DAVP finds its origins in a bureaucratic position, the Office of the Chief Press Adviser set up after the outbreak of the Second World War in the colonial Indian Government. Over time, functions and positions were added to this office and it was inducted into the Ministry of Information and Broadcasting as a Department on October 1, 1955.[246] Thus, the DAVP has had a long history of bureaucratic control and as discussed in the section, News on the Internet, there are operational inefficiencies that have crept in over the years. One particular case highlights this problem: Employment News, a publication of the Ministry of Information and Broadcasting (under which DAVP currently operates), was awarded the third highest funding in the period between 2008 and 2013.[247] The circulation that this publication commanded (16 lakh) was too low to be considered within the Audit Bureau of Circulation. This should be considered in light of two facts: (a) the New Advertising Policy of 2016 considers circulation to be a critical parameter to choose recipients of DAVP funding[248] and (b) the Audit Bureau of Circulation is the only authoritative source of circulation in the Indian context.

[243] Draft Registration of Press and Periodicals Bill, 2019 ('Draft RPP Bill') (India), s 17.

[244] Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020, p 76.

[245] Frances Cairncross et al, 'The Cairncross Review: A Sustainable Future for Journalism', United Kingdom Department for Digital, Culture, Media and Sport (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 23 April, 2020, p 76; 'Protecting Journalism in the age of Digital Platforms: Report of the Media Sub-committee for the Study of Digital Platforms Media Subcommittee', Stigler Centre for the Study of the Economy and the State (2019) < http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> accessed 23 April, 2020, p 144.

[246] Directorate of Advertising and Visual Publicity, 'Manual-1: Particulars Of Organization, Functions &Duties' <http://www.davp.nic.in/r2ich2.pdf> accessed 23 April 2020.

[247] Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 <https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

[248] New Advertising Policy, 2016 (India), cl 12.

We recommend that the functions of the DAVP are best ringfenced within an independent body which is set-up to allocate this important resource of funding public interest news. An independent DAVP would be required to be empowered under a specific legislation drafted for this purpose. Independent regulators in India have suffered from similar issues which plague the state governed institutions, i.e. (i) prone to capture by both industry and political interests (ii) law making and enforcement is selective and weak (iii) establishment of arbitrary entry barriers to the regulated market. To ensure that these issues do not crop up in DAVP again, independence should be ensured by adherence to certain general principles which focus on incentives for personnel rather than particular cases of individual or collective failure. These principles are: (a) DAVP should have clarity of purpose in the statute itself (b) the DAVP should be controlled by a board which is to have a majority of non-executive members (c) regulations passed by the DAVP should be drafted with transparent public and industry consultation (d) there should be performance-based incentives for the personnel in DAVP and (e) the role of the government (through appropriate Ministry) in the oversight of DAVP should be clearly laid out.[249] Further operational details such as guaranteed tenure and salaries of key personnel and routing revenues and payments through the Consolidated Fund of India should be considered to be included in the parent legislation as well in furtherance of the above principles.

Second, there needs to be a clear alignment of the objectives of DAVP's practices. Currently, as demonstrated in an earlier section, the Advertising Policy of 2016 is internally contradictory in its aims, leaving no clear benchmark for the industry or policy analysts to judge the efficacy of the process. Without passing any value judgments as to which of the objectives of widest dissemination or creation of a level playing field for newspapers is desirable, we are of the opinion that the Draft RPP Bill was a missed opportunity to clear the contradiction in the Advertising Policy. While this is easy to state as a policy prescription, it may require considerable resources and consultative processes to execute in practice, as the role of the DAVP is to act as a conduit for various Central Ministries and thus, it is required to balance the needs of a diverse set of stakeholders.

Third, the marking criteria mentioned in Clause 18(iv) in the Advertising Policy needs to be connected to the objectives of DAVP.[250] Some of the criteria mentioned such as 'circulation' or 'number of pages' have an obvious nexus to the objective of broad dissemination. Some others like 'payment of dues to Press Council of India' may be linked to incentivising voluntary association of newspapers. 'Subscriptions to EPF' brings in an element of labour compliance but it is not clear as to how this links to the broader objectives of DAVP. 'Subscriptions to accredited wire services' can be interpreted to be incentivising collection of news from verified sources which again is not explicitly a DAVP objective. We are of the view that objectives should be clearly stated and the marking criteria should be demonstrated to be in pursuance of those objectives in the Advertising Policy itself.

Fourth, in the interests of transparency, the final marks based on which newspapers have received or been refused funding needs to be communicated publicly. This allows newspapers to plan their finances as well as make efforts to improve their chances of receiving DAVP funding. Further, official statistics from DAVP spending patterns, currently, do not lend themselves to easy analysis, furthering the dependence on RTI requests to be able to obtain any credible information.[251] In pursuance of the

[249] Subho Roy et al, 'Building State Capacity for Regulation in India', NIPFP (2018) <https://macrofinance.nipfp.org.in/PDF/RSSS_building-state-capacity.pdf> accessed 23 April 2020.

[250] New Advertising Policy, 2016 (India), cl 18(iv).

[251] Howindialives.com, 'Paper Routes', The Caravan, 1 December 2014 < https://caravanmagazine.in/reportage/paper-routes> accessed 23 April 2020.

National Data Sharing and Accessibility Policy, 2012 this data should be released in an accessible, machine readable format and within a reasonable time from the disbursement of funds.

Transparency measures can be operationalised through introducing effective safeguards as well as procedural detail through rules notified under the parent statute. This may involve the provision of the specific format in which disclosures have to be made, require disclosures to be made on a periodic basis, provide for the creation of data-sharing portals where this data can easily be organised and require greater procedural safeguards for any punitive measures undertaken against newspapers. A combination of these measures would have the effect of operationalising the requirement of transparency in the context of government advertising and address a significant issue faced by the print news industry.

B. Initiate a CCI investigation into the dominance of online advertising platforms

The experience of digital news publishers discussed in Part I of this report suggests that digital advertising intermediaries like Google and Facebook occupy a significant role in terms of their market presence. Consequently, their terms of engagement and revenue sharing with publishers merit deeper scrutiny. Based on the accounts of Indian news publishers, it can be ascertained that significant digital advertising intermediaries like Google own and control the supply chain of advertising technology, and lack transparency and fairness in revenue sharing with news publishers. These grievances are in line with experiences of publishers with the platform abroad.[252] Therefore, in order to ascertain the alleged anti-competitive impact of 'vertical service consolidation' which domestic and global studies/views hint at, more evidence based inquiry is required in the Indian context to understand the average revenue share as a percentage of total revenue that is received by digital news publishers, the business practices of digital advertising intermediaries, and a closer look at their terms of engagement with digital news publishers. Further, based on this information, the CCI can initiate an investigation to assess whether such intermediaries are engaged in anti-competitive conduct when it comes to their relationships with digital news publishers in India.[253] This information would be the result of detailed, quantitative market research and is similar to the kind of investigations that the CCI possesses the capability to conduct.

Countries like Spain, UK, and Australia have either already initiated similar studies or contemplating proposals for the near future.[254] Specifically, when it comes to anti-competitive behaviour of advertising platforms like Google, there have been a number of global instances where regulatory and judicial attention has been diverted to the platform. For instance, in 2014, in the case of *Free Range Content Inc. v Google LLC* in the United States, a class action law suit was brought by a number of publishers and web-site owners against the practices of Google relating to the AdSense program.[255] The main contention was that the participation of publishers in the Adsense program was terminated unfairly (for ostensible breach of contract terms) by Google. Next, the publishers argued that even if it was assumed that the termination was fair, the timing of the termination (at the end of the payment cycle) was alleged to done in a manner so as to deny publishers the payment that had accrued before the breach had occurred. Although this case was settled by Google for a sum of around 11 million USD in 2018, it shows that a lack of oversight has the potential to harm smaller publishers.[256]

In March 2019, the European Commission ('EC'/ 'Commission') concluded its investigation into the behaviour of Google in the digital advertising space. Specifically, the investigation focussed on the working of the Adsense for Search program. This program monetises the space around the search function that publishers (or any website owner) can set up on their website.[257] This particular market can be referred to as third-party website search digital advertising market ('TWS-DAM'). Finding that Google controlled over 85 % of the TWS-DAM, the Commission observed that broadly Google had used its' position as an unavoidable trading partner to insert restrictive clauses with counter-parties to exclude potential competitors to its digital adver

[252] Australia, USA.

[253] Competition Act, 2002 (India), for e.g. s 4 (abuse of dominant position), s 19(4) (this section provides the process of complaint against the abuse of dominant position), s 28 (division of enterprise enjoying dominant position)

[254] Comisión Nacional de los Mercados y la Competencia, 'Consultation on online advertising' (2019) <https://www.cnmc.es/en/ambitos-de-actuacion/promocion-de-la-competencia/consultas-publicas/online-advertising> accessed 23 April 2020.

[255] 'Free Range Content v Google, Ad Publisher Settlement' <http://www.adsensepublishersettlement.com/> accessed 23 April 2020.

[256] ibid.

[257] There is a similar program called 'Custom Search', with the same mechanics of advertisement revenue but with more benefits for the publisher. See 'Difference between Adsense for Search and Custom Search' <https://support.google.com/adsense/answer/92377?hl=en> accessed 23 April 2020.

-tisement eco-system.[258] The Commission found that the overall digital advertisement market was dominated by a few companies like Google and TWS-DAM was a rare viable route through which this dominance could be challenged by new entrants. This, according to Commission, was recognised by Google who acted to stem any potential loss of the overall digital advertisement market share through the TWS-DAM market in two distinct ways: (a) by inserting clauses into agreements between Google and the third party/publisher which granted Google exclusive rights to premium space on the website, (b) inserting clauses which obligated the third party/publisher to take Google's consent before changes to the advertisements by rival advertisement intermediaries were made. These efforts by Google were enough to prevent competition on merits and as such a fine of 1.49 billion EUR was imposed by the Commission.[259] Currently this order is under appeal in the European Court.

Drawing on the EC order, the Competition Commission of India in 2018 imposed a fine of 135.8 crores INR on Google for abuse of its dominant position in both the online search advertising market as well as in TWS-DAM. The part of the CCI order that is relevant to our purposes is the section where the petitioner (informant under the Competition Act, 2002) averred that the dominant position of Google in the TWS-DAM was being used to throttle competition on merits. Although the exact market share held by Google in the TWS-DAM has not been made available publicly,[260] the investigation found that the market share along with the entry barriers and network effects in the relevant market was sufficient to hold that Google was an indispensable counter-party in the digital advertising ecosystem.[261] Having established that the Google held a dominant position in the relevant market,[262] in the next part of the order the regulator found that Google's abuse of dominant position had led to harm for its competitors (other companies in the role of advertising intermediaries), as well users of services connected to these relevant markets as it reduced their choices.[263] Among other findings, the investigation reflected some of the practices uncovered by the EC were true in the Indian context as well. This was related to the restrictive covenants that the CCI found in contracts signed between Google and publisher websites.[264] These covenants ensured that Google's Adsense for Search had access to the most lucrative of advertising spaces while Google had control over the design aspects and placements of the rival advertising intermediaries on the publisher website.[265] This order has been appealed by Google and the NCLAT ('National Company Law Appellate Tribunal') has stayed the fine imposed by CCI in 2018, and stakeholders have mentioned that hearings are on-going in this matter.[266]

While these interventions were all in the context of Google, we would recommend that any regulatory intervention not limit itself to Google, but comprehensively survey the market to identify any player that might potentially be dominant. It is pertinent to mention the relevance of these regulatory interventions to this report. As discussed earlier, digital advertising is hard baked into the overall business model of Google and other significant digital advertising intermediaries. Therefore, evidence of harm is difficult to obtain or interp-

[258] European Commission, 'Press Release' (2019) <https://europa.eu/rapid/press-release_IP-19-1770_en.htm> accessed 23 April 2020.

[259] ibid.

[260] Matrimony.com Limited v Google, Case No 07 of 2012 [CCI], para 20.

[261] ibid.

[262] ibid.

[263] ibid.

[264] ibid.

[265] ibid.

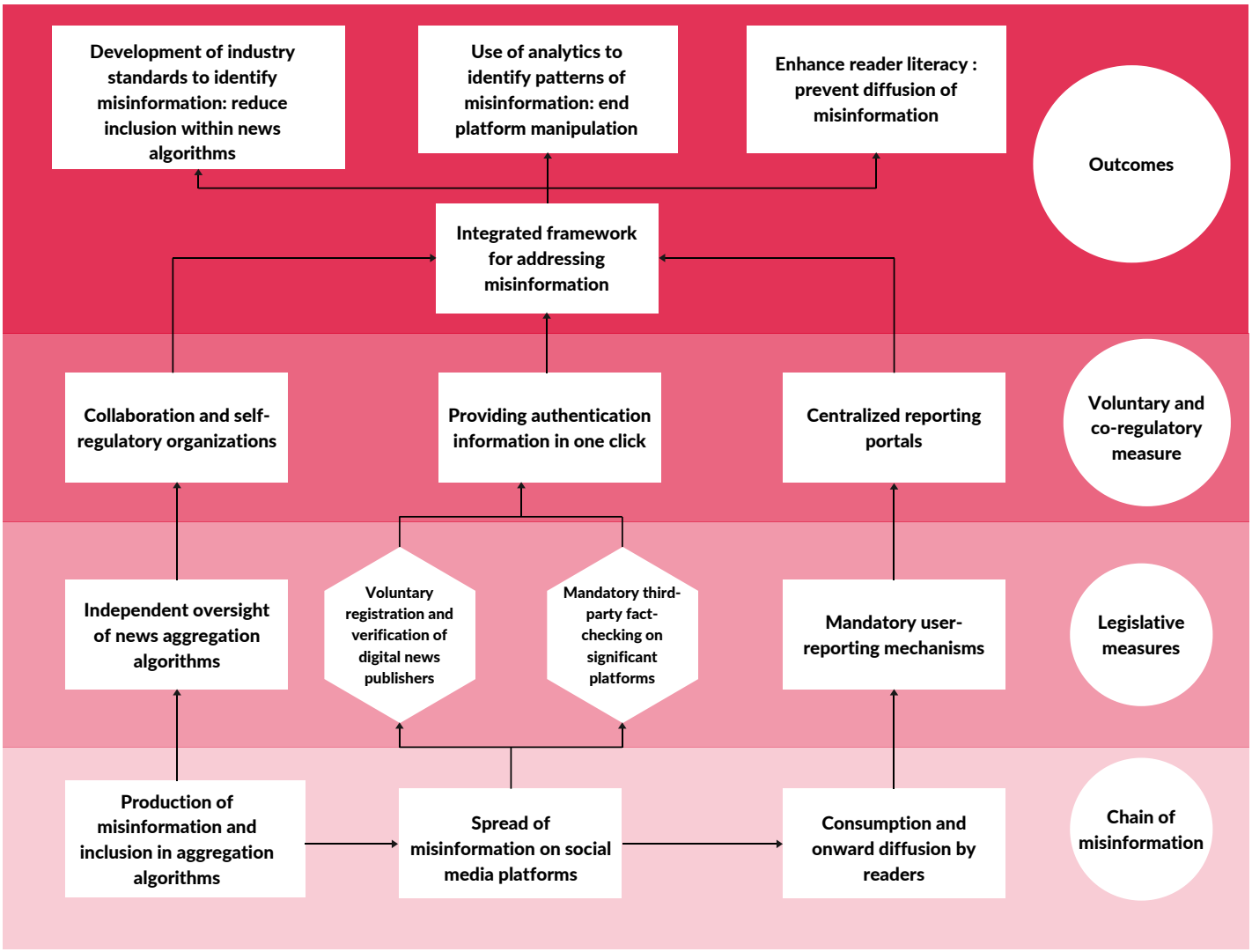
[266] 'NCLAT stays CCI penalty of Rs 136 crore on Google in search bias case', The Economic Times, 27 April 2018 <https://economictimes.indiatimes.com/tech/internet/nclat-stays-cci-penalty-of-rs-136-crore-on-google-in-search-bias-case/articleshow/63936114.cms?from=mdr> accessed 23 April 2020.

ret from only examining a single service line/vertical. At the same time, these interventions legitimise the route of examining harms by studying relevant verticals in which such platforms provides services in conjunction with entire-ecosystem effects. Observers in India have pointed that the CCI order may present a legal opening through which stakeholders in other sectors (such as newspapers) who perceive that they are being harmed by digital advertisement intermediaries can make a case for an intervention by CCI.[267] Looking beyond the realm of competition, the willingness of CCI (and EC previously) to unpack the business models of digital advertising provides a rich source of data in the public domain and sets a precedent for regulators and courts to take when investigating harm.

[267] Venkat Ananth and Shashidhar KJ, 'Google gets a rap on the knuckles. And some more', The Ken, 12 February 2018 <https://the-ken.com/story/google-cci/> accessed 23 April 2020.

C. Establish an institutional design to address misinformation on social media

The problem of misinformation and the manner in which it spreads, especially on social media platforms, has been outlined in previous sections of this report. The task of finding solutions to the problem of misinformation can be broken down into three distinct kinds of actions: reducing the diffusion of misinformation, enabling the detection of misinformation and enabling targeted interventions to remedy the crisis of misinformation.[268] While some of these actions can be legislative in nature, a comprehensive solution would require the cooperation of the platforms as well, given their critical role in the organisation of societal discourse. In order to build an integrated approach which systematically combines these kinds of actions, we recommend the following an institutional design which enables the distinct kinds of action outlined in the previous paragraph. This graphic should be read from the bottom layer upwards – by first identifying the chain of misinformation, and then examining the legislative and voluntary measures which can help arrive at the outcomes outlined in the topmost layer of the graphic:



[268] Liang Wu et al, 'Mining misinformation in social media' in 'Big Data in Complex and Social Networks' (My T. Thai et al ed.) (2016), p 135.

While misinformation is a shared global concern and a number of proposals have been mooted to solve the problem, these proposals have tended to be limited in scope. For example, a number of interventions were discussed in Brazil, with up to 20 draft bills put up for consideration to address the issue of misinformation.[269] However, each draft bill featured measures which would affect only one part of the chain of misinformation. Enhanced criminal penalties may reduce the production of misinformation however, it does not affect the 'consumption' part of the chain of misinformation. Similarly, mandating third-party fact checking or crowd-sourcing information about 'fake news' only affects their spread on social media platforms, but does not affect the production of misinformation itself. In order to overcome these issues, we present a comprehensive framework which is targeted at every node of the chain of misinformation, as well as features all three kinds of actions – preventing the diffusion of misinformation, enabling the detection of misinformation and providing targeted interventions to remedy its spread.

Chain of misinformation

The issue of misinformation requires a broader understanding than merely the epithet of 'fake news'. The evolution of the Internet has allowed for the production of content without high investment or personal cost.[270] Concomitantly, the mechanisms through which the legitimacy of content was communicated have not been replicated online – for example, there is no universal designation of what amounts to 'news', unlike the physical world, where 'news content' is usually identified and catalogued separately. On a social media platform, on the other hand, all pieces of 'content' are just content. The blurring of these lines has enabled for content which is not journalistically produced to be mistaken for news content. This problem is exacerbated since this discernment is supposed to be exercised by an algorithm. This was evident, for example, in the first week where Facebook's 'trending topics' section was left entirely to algorithmic curation and a number of 'fake' articles found their way to the top of the section.[271]

The inclusion of content which is factually incorrect within the aggregation of 'news' forms the way in which the chain of misinformation takes birth. While the inclusion of misinformation is a problem for both stand-alone news aggregators as well as social media platforms, the problem is less likely to be as pernicious on stand-alone applications which are likely to crawl a narrower, more-defined list of sources. Social media, on the other hand, features massive amounts of content being shared on the platform without any effective designation of its nature – and consequently, misinformation is more likely to be included within the aggregation algorithms of social media platforms.

The spread of misinformation takes place in a cascading manner – every reader who falls for fake news and shares it in their networks exposes an exponentially larger number of readers to that piece of information.[272] The lack of other signalling mechanisms which can provide readers with information about the legitimacy of any information makes the spread of misinformation likelier. Poor reader literacy, a problem which is especially worse in countries such as India as opposed to countries further along the graph of human development, exacerbates this problem.[273]

[269] Daniel Funke and Daniela Flamini, 'A guide to anti misinformation actions around the world', Poynter <https://www.poynter.org/ifcn/anti-misinformation-actions/#brazil> accessed 23 April 2020.

[270] Arijit Sen and Rasmus Kleis Nielsen, 'Digital journalism start-ups in India', Reuters Institute for the Study of Journalism (2016) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-04/Digital%20Journalism%20Start-ups%20in%20India_0.pdf> accessed 23 April 2020

[271] Hamza Shaban, 'Facebook to scrap trending feature after outcry over fake news', The Independent, 2 June 2018 <https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-trending-feature-shuts-down-algorithm-mark-zuckerberg-social-media-a8380681.html> accessed 23 April 2020.

[272] Michela Del Vicario, 'The spreading of misinformation online', (2016) 113 (3) Proceedings of the National Academy of Sciences 554.

[273] Chinmayi Arun, 'On whatsapp, rumours, lynchings and the Indian government' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3336127>accessed 23 April 2020.

The lack of effective reporting mechanisms means that the response to misinformation is limited to 'counter-speech'.[274] Consequently, once the chain of misinformation has been initiated, the spread and consumption of misinformation are a natural result of the design of social media platforms which aggregate content that is more likely to go viral and lack effective mechanisms to report misinformation or enhance reader literacy.

Legislative measures

The legislative approach towards social media platforms has tended to be relatively light-touch. This is owing to the scale of information on social media platforms, which makes it onerous to impose strict content-moderation practices.[275] The imposition of these practices also has implications for the freedom of speech and privacy of users.[276] Social media platforms have largely been legislatively governed by the principles of 'intermediary liability', which treats them as 'conduits' of information and ascribes no responsibility for the content of information.[277] However, the previous decade has seen a global recognition of the critical role played by such platforms in organising societal discourse and has seen the incremental imposition of greater responsibility on such platforms.[278] Since the intent of this report is to provide actionable solutions to the problems at hand, the legislative measures suggested in this section only make some inroads into the principles of intermediary liability and consequently, do not demand a radical shift away from the legal framework already in place for social media platforms. Radical shifts, in our view, are typically improbable.

Independent impact assessment of news aggregation algorithms

The increasing importance of the role of algorithms has attracted considerable attention from both academia as well as regulatory institutions.[279] The previous section outlined the problems with the different proposals aimed at algorithmic transparency, explainability or establishing a regulatory body.[280] However, it must also be emphasised that to 'do nothing' is also not an adequate regulatory prescription in the face of imminent harms arising from the deployment of these algorithms.[281] The solution of algorithmic impact assessments is a way in which the sectoral specificities of different algorithms can be accommodated while ensuring greater accountability of algorithmic systems.[282] This framework is focused on public-sector agencies, however, a similar framework for significant social media platforms would allow for increased scrutiny of these algorithms in a meaningful manner, as opposed to more basic proposals of transparency and explainability. Algorithmic impact assessment would examine the deployment of algorithms with reference to a set of pre-identified principles – such as whether the algorithm works in accordance with the intention of the operator, whether there are effective controls to identify and prevent harmful outcomes, subjecting the algorithm to different forms of error and bias testing and ensuring procedural regularity in its deployment.[283] The process of impact assessments should also be designed in a manner that ensures confidentiality of the proprietary aspects of such algorithms and prevents a race to the bottom by enabling deception of such algorithms.

[274] Daniela C Manzi, 'Managing the misinformation marketplace: The first amendment and the fight against fake news' (2019) 87 Fordham Law Review 2623.

[275] Giancarlo Frosio, 'Why keep a dog and bark yourself', (2017) 26(1) International Journal of Law and Information Technology 1.

[276] Daniela C Manzi, 'Managing the misinformation marketplace: The first amendment and the fight against fake news' (2019) 87 Fordham Law Review 2623.

[277] Giancarlo Frosio, 'Why keep a dog and bark yourself', (2017) 26(1) International Journal of Law and Information Technology 1.

[278] ibid.

[279] Tarleton Gillespie, 'The relevance of algorithms' in 'Media Technologies' (T. Gillespie et al ed.) 167 (2014), p 177.

[280] Mike Ananny, 'Seeing without knowing: Limitations of the transparency ideal and its application to algorithmic accountability', (2018) 20(3) New Media and Society 973.

[281] Joshua New and Daniel Castro, 'How policymakers can foster algorithmic accountability', Center for Data Innovation (2018) <https://euagenda.eu/upload/publications/untitled-147316-ea.pdf> accessed 23 April 2020.

[282] Dillon Reisman et al, 'Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability', AI Now Institute (2018) <https://ainowinstitute.org/aiareport2018.pdf> accessed 23 April 2020.

[283] Joshua New and Daniel Castro, 'How policymakers can foster algorithmic accountability', Center for Data Innovation (2018)< https://euagenda.eu/upload/publications/untitled-147316-ea.pdf> accessed 23 April 2020.

We see this process as analogous to environmental impact assessments required under the Environmental Protection Act, 1986 – a significant social media platform must submit to such an impact assessment report. However, additionally, given the sensitive nature of the press, this assessment must not be entirely in the hands of the government – but an independent group of experts must be constituted for the purpose of conducting such assessments. The selection and operation of this body must be insulated from the political variables which influence governments. Principles of institutional autonomy which are used to constitute critical autonomous bodies – such as requiring selection of members by a selection committee without government or industry control, insulating the conditions of service of such members from the influence of the government and industry and providing independent legitimacy to their findings without approval- should be adopted in the constitution of this body as well.

Voluntary registration procedure for publishers of digital news

A crucial aspect of the misinformation crisis is the lack of signalling mechanisms which can demonstrate the authenticity of any information. Further, any law enforcement action which attempts to stop the production of misinformation requires identification of the physical identity or location of the producer of such information.[284] We suggest that a voluntary registration procedure which enables a publisher to get a prominent mark of verification -for discerning between credible and non-credible sources. A mandatory registration procedure would be much more difficult to operationalise in the context of the Internet, which is explained in detail in the later chapter. However, a voluntary process would enable the seeds of online reader literacy to be sown.

Mandatory third-party fact-checking on significant platforms

The reliance on accredited third-party fact-checkers has emerged as a solution adopted by the industry. Many significant platforms, such as Facebook and Instagram, already display fact-checking information next to certain pieces of information.[285] The International Fact Checking Network has emerged as a global consortium which accredits fact-checkers in different countries and provides some legitimacy to their endeavours. The financial strength of significant social media platforms has also enabled the deployment of such fact-checkers.[286] However, the basis on which this practice has been rolled out remains unclear. While there are problems of scale, cost and privacy in mandating third-party fact checking for all information, a 'virality' metric would allow for such practice to be reliably implemented. There are various safeguards that would additionally be required – such as specifying the accreditation that third-party fact checkers must possess, identifying the threshold at which fact-checking can be mandated and building capacity to maintain oversight over such fact-checkers. Fact-checking, however, has emerged as one of the most effective ways to fight misinformation.[287] Consequently, given the crisis-like nature of misinformation in society today, we recommend that the institution of third-party fact-checking be developed, and its deployment be made mandatory on significant social media platforms for specified 'viral' pieces of information.

Effective user-reporting mechanisms

The final legislative measure recommended in this sub-section is the creation of effective user-reporting mechanisms. While most social media platforms already have systems in place that allows users to flag various types of content including misinformation, these systems are widely alleged to ineffective and lacking any

[284] Elyse Samuels, 'How misinformation on Whatsapp led to a mob killing in India', The Washington Post, 21 February 2020 < https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/> accessed 23 April 2020.

[285] 'Busting the viral: Fact checking on social media', Exposing the invisible <https://exposingtheinvisible.org/resources/fact-checking-social-media> accessed 23 April 2020.

[286] ibid.

[287] Daniela C Manzi, 'Managing the misinformation marketplace: The first amendment and the fight against fake news' (2019) 87 Fordham Law Review 2623.

semblance of due process.[288] In this situation, even when there are clearly misleading pieces of information masquerading as news, the 'taking down' of such information is contingent on the social media platform responding promptly to user reports. It is widely documented that these responses have been found to be lacking.[289] We recommend the imposition of principles of due process in the system of user-reporting on social media platforms.[290] This would require the social media platforms to provide reasons for their decisions, be transparent in the criteria used to govern taking down of information and providing a mechanism for review of the initial decision. The imposition of these measures would have the effect of ensuring that social media platforms are required to build the capacity to effectively address user reports, and consequently, lay the ground-work for crowdsourcing not just instances of misinformation, but also allows for readers to double up as crowdsourced moderators – thereby addressing the issues of scale on social media platforms.

Self-regulatory and co-regulatory measures

While legislative measures may be required to be light-touch in order for them to be actionable within the contemporary paradigm of legal responsibility for social media platforms, the role of platforms in the organisation of information remains the most crucial. Therefore, the legislative measures mentioned earlier would be required to be supplemented by certain action on behalf of the platforms for them to be effective. Consequently, as opposed to pitching self-regulation as a substitute to legislative measures, we recommend the following self-regulatory and co-regulatory measures as compl--ements to the legislative measures proposed earlier.

Collaboration and self-regulation organisations

The problems of misinformation have been a concern for social media platforms who have a natural incentive to curate the information environment on their platforms so as to not lose credibility and retain their user-base.[291] Further, the bigger that the problem of misinformation gets, the more the stringency of legislative measures contemplated by governments across the world. Perhaps in recognition of this inevitability, various self-regulatory initiatives have been adopted by social media platforms.[292] For instance, in the European Union, a voluntary 'Code of Practice against Disinformation' was developed and adopted by social media platforms. In India, several significant social media platforms have come together to form the 'Information Trust Alliance', an organisation to collaborate on attempts to stop misinformation as well as other kinds of abuse of social media platforms.[293] This alliance, we suggest, can be can be operationalised into becoming a forum for the collection of data, collaboration on strategies, identification of best-practices and development of industry standards For example, Facebook uses a system of 'integrity signals' in its algorithm to discern between legitimate news content and clickbait, engagement bait, misinformation and other kinds of non-news content. However, this is a privatised system developed solely by Facebook. Organisations like the Information Trust Alliance can be used to collaborate on such 'integrity signals' – thereby encouraging the formation of widely accepted standards capable of discerning news and non-news content.[294]

[288] Kate Crawford and Tarleton Gillespie, 'What is a flag for? Social media reporting tools and the vocabulary of complaint', (2016) 18(3) New Media and Society 410.

[289] ibid.

[290] Nicholas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms', (2018) 4(3) Social Media + Society.

[291] Giancarlo Frosio, 'Why keep a dog and bark yourself', (2017) 26(1) International Journal of Law and Information Technology 1.

[292] European Commission, 'Code of Practice against Disinformation' <https://ec.europa.eu/commission/news/code-practice-against-disinformation-2019-jan-29_en> accessed 23 April 2020.

[293] Megha Mandavia, 'Social media to join hands to fight fake news, hate speech', Economic Times, 19 February 2020 <https://economictimes.indiatimes.com/tech/internet/social-media-to-join-hands-to-fight-fake-news-hate-speech/articleshow/74200542.cms> accessed 23 April 2020.

[294] Campbell Brown, 'Introducing Facebook News', Facebook, 25 October 2019 <https://about.fb.com/news/2019/10/introducing-facebook-news/> accessed 23 April 2020.

Centralised reporting portals

In addition to user-reporting to social media platforms, there is a need for this information to be appropriately centralised. The centralisation of this information would allow for sophisticated data analytics to be conducted on this information, which may expose patterns which can help the identification of misinformation.[295] Further, while user-reporting mechanisms serve only to communicate this information to social media platforms, it might be important to provide an avenue for instances of misinformation to be communicated to the government as well for appropriate law-enforcement action. The Indian Government already operates the National Cybercrime Reporting Portal for instances of child pornography, obscene content and rape imagery.[296] We suggest that a separate reporting portal for instances of misinformation be operationalised as well. The control of this portal could rest with an independent agency which liaisons with law enforcement agencies. However, the provision of a portal such as this would ensure that user-reporting effectively contributes to building a repository of misinformation which can enable future corrective action.

Providing authentication information within one click.

The final measure that we suggest is that social media platforms provide authentication information- within one click/screen of the information itself. This has been conceptualised as "right-click authentication",[297] or in terms of the number of 'screens' which separate fact-check related information from a piece of content.[298] The basic principle behind this measure is that any fact-check related information must be prominently visible and easily accessible to users. In terms of application design, an inquiry into the 'ease of accessibility' would take the for of inquiring how many clicks does a user have to perform before she is presented with this information. Therefore, applying this standard, the "right-click authentication" approach appears to be an ideal which should govern the development of technology. Further, at the stage of flagging information, making 'authentication' the first option as opposed to other controls such as 'blocking the user' is more likely to enable a greater amount of third-party fact-checking.

While some platforms such as Facebook display fact-check related information next to the content wherever such information is available, not every piece of information is fact-checked – leading the absence of fact-checking information to indicate legitimacy of the information. Further, many significant platforms such as Twitter do not have prominent fact-checking information displayed in an easily accessible manner. The presence of a 'right-click authenticate' would also provide users with the status of fact-checking on a specific piece of content, and mark pieces which have not been verified appropriately.

Combined with the requirement to conduct third-party fact checking of all 'viral' content – this would enable a mechanism that enhances reader literacy without prohibiting the transmission of such information, thereby satisfying the free speech concerns that emerge related to curbing misinformation.[299]

[294] Campbell Brown, 'Introducing Facebook News', Facebook, 25 October 2019 <https://about.fb.com/news/2019/10/introducing-facebook-news/> accessed 23 April 2020.

[295] Liang Wu et al, 'Mining misinformation in social media' in 'Big Data in Complex and Social Networks' (My T. Thai et al ed.) (2016), p 135.

[296] 'National Cybercrime Reporting Portal launched for citizens to report cyber crimes online', News18, 11 January 2020 <https://www.news18.com/news/tech/national-cyber-crime-reporting-portal-launched-for-citizens-to-report-cyber-crimes-online-2454259.html> accessed 23 April 2020.

[297] Fadi Safiedenne et al, 'Corporate responsibility in combating misinformation', (2016) 7 International Journal of Advanced Computer Science and Applications 126.

[298] ibid.

[299] Giancarlo Frosio, 'Why keep a dog and bark yourself', (2017) 26(1) International Journal of Law and Information Technology 1.

D. Impose appropriate responsibilities on digital news entities

News on the Internet, as well as news aggregators, including both social media aggregators and stand-alone aggregators, are a fairly recent phenomenon. The pace at which the law governing their responsibilities has developed is much slower. As discussed earlier, there is no specific editorial responsibility for publishers of news on digital mediums and the law governing aggregators only recognises the category of 'intermediaries' and does not distinguish between intermediaries based on the functions that they perform.

Imposing stringent editorial responsibility on news publishers online has, as was discussed in the preceding section, been witnessed to have a restrictive impact on editorial freedom. Therefore, this section suggests a relatively less stringent mechanism for imposing this responsibility – as opposed to criminal liability or mandatory registration, this section suggests that existing self-regulatory institutions be expanded to cover the field of digital news.

The position occupied by news aggregators – whether social media or stand-alone – in the value chain of digital news has been outlined in the previous section. This position is crucial not just to the dissemination of news, but also to the economics of the industry and the information environment on digital mediums. Broad measures aimed at their position – such as the hyperlink tax discussed previously – have concomitant impacts on the ability of platforms to innovate and expand their services.[300] Consequently, this section identifies measures which do not make such broad rules – instead, the measures identified represent targeted interventions aimed at the specificities of the digital information environment.

Editorial responsibility for publishers

The publication of news on the Internet is treated like the publication of any other content. Therefore, while special press regulation does not apply to such news, ordinary laws like contempt of court, defamation, sedition, obscenity and other forms of constitutionally valid speech restrictions continue to apply to them. The presence of these offences, however, appears to be insufficient at addressing the deluge of misinformation on the Internet – given that the nature of misinformation is such that it may not fall squarely within any of these categories.

A website that describes itself as a 'news page' is leveraging societal trust towards the institution of journalism in order to accrue legitimacy.[301] In the physical world, there are sufficient safeguards – such as registrations under the PRB Act, the high fixed costs of starting a 'news organisation', regulation by the Press Council and the physical identifiability of the proprietor – which prevent individuals from leveraging this societal trust without following appropriate journalistic practices. On the Internet, however, these safeguards do not exist. We suggest that the social perception that is leveraged by describing or presenting oneself as 'news' should be concomitant with editorial responsibility.

In order to impose such editorial responsibility meaningfully, three analytical exercises need to be conducted: first, standards of conduct that can be enforced must be set out; second, the body which is to enforce such standards must be identified; third, a mechanism for the enforcement of standards must be developed.

[300] Giuseppe Colangelo and Valerio Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform', (2019) 27(1) International Journal of Law and Information Technology 75.

[301] Matt Carlson, 'Automating Judgment? Algorithmic judgment, news knowledge and journalistic professionalism', (2018) 20(5) New Media and Society 1755, p 1762.

Developing standards of conduct

A critical element of the rule of law is that legal standards for conduct must be set out in a clear and accessible manner.[302] These standards must be set out in a manner that allows anyone reading the law to be able to understand its meaning.

The task of developing standards of conduct for journalistic practice is an immense exercise. The Press Council of India released the 'Norms for journalistic conduct' in 2010, which specify guidelines for physical newspapers, news agencies and journalists.[303] These norms cover a wide range of topics - such as how to cover sensitive topics, practices to maintain privacy of individuals while reporting, elaboration on principles of accuracy and fairness and guidelines on a range of specific issues. The result is a hefty document that runs into 111 pages - if a piece of content were to be checked as to whether it is in compliance with these norms, it would represent a massive analytical exercise. Further, the environment of news on the Internet is markedly different - and any standard of conduct for digital news must be capable of enforcement given the specifics of the context.

To this end, we recommend that a set of baseline standards related to journalistic conduct on the Internet be set out. Importantly, we suggest that any document setting out these standards of conduct should consciously aim to be brief and accessible. The development of baseline standards - of accuracy, fairness and sensitivity - would create an accessible guide to conduct, which is necessary before any regulatory mechanism to enforce this conduct is developed.

Allocating institutional responsibility

Two statutory institutions emerge at the front-line of this discussion: the Press Council of India, which maintains journalistic oversight of physical newspapers and journalists, and the Press Registrar, who is appointed by the Central Government and has regulatory powers related to registration.

The Draft RPP Bill requires the registration of all publishers of news on digital mediums with the Press Registrar General, a body established as the successor to the Press Registrar.[304] This registration is to be done as per rules which will be prescribed under the act – consequently, the conditions attached with such registration, and the body which will enforce such conditions are unclear from the text of the bill.

We recommend that the Press Council of India, which is a much more autonomous institution be responsible for maintaining oversight of digital news. This would require a few structural amendments to the Press Council in order to develop sophisticated capabilities - stakeholders from the world of digital news would have to be included in both conversations and positions within the Press Council. For example, the criteria for the composition of members of the Press Council, under Section 5 of the Press Council Act 1978, would have to be amended to include experience in digital news as a qualification which would enable nomination to the Press Council.[305] We recommend that the allocation of this regulatory function to the Press Council be accompanied with structural measures to increase the representation of stakeholders of digital news within the Press Council as well.

[302] Tom Bingham, 'Rule of Law' (2010), p 8.

[303] Press Council of India, 'Norms for Journalistic Conduct', 2010 < http://presscouncil.nic.in/WriteReadData/Pdf/NORMSTWOZEROONEININE.pdf> accessed 23 April 2020.

[304] Draft Registration of Press and Periodicals Bill, 2019 (India), ss 18, 5 ('Draft RPP Bill')

[305] Press Council Act, 1978 (India), s 5.

Developing a mechanism to enforce standards

The final step is perhaps the trickiest in the context of digital news. The Draft RPP Bill envisages a registration requirement as the first step of this mechanism, even though the conditions associated with such registration are not set out in the bill.

If the mechanism to regulate digital news takes the form of an ex-ante prohibition on publishing news for unregistered entities, this mechanism runs the risk of being not just imperfect, but also un-implementable. This is because whether a piece of information on the Internet performs the function of news depends on the specific context of its consumption.[306] A blogger, who may not otherwise be considered a publisher of digital news, may report factual incidences on his blog which could be performing the function of news. Similarly, video streamers may have news bulletins as part of their videos. Further, misinformation is considered by many to be a problem with the long-tail of the content environment,[307] and a registration requirement would target the most prominent or mainstream news publications, but would be unable to address the actual sources of much of the misinformation. The distinct physical aspects which underlie newspapers in the physical world - such as the use of printing presses, the use of controlled raw materials in their making, the systems for their distribution and the 'style' of newspapers - all enable distinguishing between newspapers and other content - as a consequence of which, requirements such as registration can effectively be enforced. However, where these aspects do not exist and the context informs whether a piece of information is acting as news or not - a registration requirement linked to ex-ante prohibitions would have limited efficacy.

This is not to say that registration serves no utility in this context. If registration is envisaged as a voluntary measure which is linked to a mark of verification on aggregation platforms and the publishers website - then it would allow readers to be able to discern between credible and non-credible sources of information. The mark of verification would also incentivise such registration, and would directly contribute to enhancing reader literacy, as was outlined in the previous section.

On the question of enforcing a standard of conduct, we recommend that this be conceptualised as an ex-post measure instead of operationalising it through measures which impose ex-ante prohibitions. In order to do this, the Press Council would have to be granted the power to issue notice to a publisher of digital news, require them to be heard and conduct an inquiry against them. This mechanism would also allow an alleged publisher to explain whether they should be covered by the Press Council or not - thereby avoiding the error of regulating for a broad class while enabling regulation of the long-tail. Further, the powers of the Press Council represent softer forms of sanction - such as warning or admonishing publications, and at worst, censoring them[308] - as opposed to other forms of statutory sanction which tend to be more restrictive.

Further, we recommend that such powers of the Press Council be ring-fenced from the general jurisdiction of the Press Council. This is for two reasons. First, the Press Council has a wide range of powers and an extensive regulatory framework - such as the power to levy fees on newspapers[309] - which may not be appropriate for all digital news publishers. The Internet has been revolutionary by reducing the costs associated with the spread of information[310] and enabling the levy of fees on digital publishers via the Press Council would run counter to this design.

[306] Axel Bruns et al, 'Blogs, twitter and breaking news: The produsage of citizen journalism' in 'Producing theory in a digital world: the intersection of audiences and production in contemporary theory' (RA Lind ed.) (2012), p 15.

[307] ibid.

[308] Press Council Act, 1978 (India), s 14.

[309] ibid.

[310] Axel Bruns et al, 'Blogs, twitter and breaking news: The produsage of citizen journalism' in 'Producing theory in a digital world: the intersection of audiences and production in contemporary theory' (RA Lind ed.) (2012), p 15.

Second, the regulation of digital news represents, in many senses, is uncharted territory. As a consequence, we recommend that incremental measures be taken to bring it under the purview of regulation. The capabilities of the Press Council need to be evaluated and built up before general jurisdiction over the environment of digital news is granted to them. Consequently, we suggest that a ring-fenced inquiry procedure for digital news could be developed within the ambit of the Press Council of India in order to impose editorial responsibility on publishers of digital news.

Design duties for aggregators

News aggregators, including both social media platforms and stand-alone aggregators, are treated as 'intermediaries' under the law and have no liability for third-party content which is hosted on their platform. At the same time, these platforms have come to occupy an increasingly important role in the distribution of news - an activity intrinsically connected to the quality of democratic governance. Consequently, the broad statutory immunity that is provided to such platforms is not reflective of this critical position.[311]

In a 2018 article in the Connecticut Law Review, Olivier Sylvain proposed the concept of "intermediary design duties". He traces the evolution of the statutory immunity - or the safe harbour - of such intermediaries.[312] His analysis reveals that while this immunity was formulated in the nascent stages of the Internet to promote the development of intermediaries - the broad immunity is not cognisant of the "oversized influence" that is exercised by some of these intermediaries. For example, he goes through multiple examples where the services of an intermediary are designed to elicit a particular type of user content - however, in claims for liability related to the same content, the intermediary disclaims any responsibility and falls back on the statutory immunity.

At the same time, the statutory immunity is essential and a binary decision on the immunity would not represent the ideal way forward. Sylvain goes on to conceptualise of "intermediary design duties" - specific statutory duties that may be imposed on an intermediary arising from aspects of their design or functioning.

These duties arise from two aspects of intermediaries functioning: the influence over structuring of user content, and the knowledge that a service may be used in a particular way as a result of its design.[313] These aspects give rise to concomitant duties which can then be imposed on the intermediary - enabling targeted regulation while preserving the safe harbour of the intermediary for other purposes. These duties would be operationalised through amendments to the Information Technology (Intermediary Guidelines) Rules, 2011 - which may require a definition of 'news aggregation intermediaries'.

Particularly in the context of news platforms, the imposition of responsibility which is aligned to the role and influence of platforms is essential. We recommend the following two design duties, for both the 'news' segments of social media platforms and stand-alone news aggregators, which arise from their design aspects or functions.

Displaying hyperlinks with access and prominence

The first measure suggested is to require that hyperlinks of content be displayed in a manner to not obstruct access to the original content. This duty flows from the fact that the structuring of content is a decision made by the intermediary and reflects active influence in shaping the user experience. In exercising this influence, the user experience of an aggregator can effectively remove a need to go to the original source by providing the relevant

[311] Giancarlo Frosio, 'Why keep a dog and bark yourself', (2017) 26(1) International Journal of Law and Information Technology 1.

[312] Olivier Sylvain, 'Intermediary design duties', (2018) 50 Connecticut Law Review 203.

[313] ibid.

information in the form of excerpts. By imposing a requirement of displaying hyperlinks in a manner that does not obstruct discovery of the source, this requirement brings such intermediaries closer to their role as 'aggregators'.

There are two parameters on which this design can be assessed: access, or the number of clicks behind which the hyperlink lies; and prominence, that is the visibility of the hyperlink considering the overall design of the page. We recommend the development of consensus for a baseline of these parameters, which can be developed into clear, accessible legislative standards centred around the concepts of access and prominence.

Requiring the display of fact-checking information

The second design duty flows from the knowledge that an aggregator, including a social media platform or a stand-alone aggregator has that their services will be used for the distribution of news. Many applications describe themselves as 'news' apps, or as news aggregators - this labelling leverages the societal trust that is placed in the institution of the 'news and must be aligned with concomitant responsibility. Similarly, social media platforms often have dedicated sections of their website or separate pages for the 'news'. These designs indicate both subjective knowledge about the likelihood that these services will be used for distributing and consuming news, as well as objective knowledge about third-party user intent - which are both independently sufficient criteria within Sylvan's conceptualisation of intermediary design duties.

We recommend that this duty take the form of requiring the display of fact-checking information, in alignment with the suggestion made in the earlier section. While mandating that every piece of 'viral' or prominent information be fact-checked is an option for significant platforms, it might be too onerous an obligation on smaller services. Therefore, in the instance that fact-checking itself is to be mandated, this must be accompanied with a threshold for applicability. However, the display of fact-checking information, where available, can be mandated across the class of "news aggregator intermediaries".

Summary of recommendations

Sustaining credible print journalism

Institutionally reform the DAVP
Node: Ministry of Information & Broadcasting, Government of India
The Department of Audio-Visual Promotion is a crucial node in channelling state support to newspapers in the form of advertisements. This department must be provided institutional autonomy from bureaucratic control and measures for transparency and accountability should be introduced. This would enable state support to be channelled to newspapers in an equitable and transparent manner.

Orienting digital news to the public good

Initiate a CCI investigation into the dominance of online advertising platforms
Node: Competition Commission of India
The advertisement-revenue model for digital news may be displaying indications of market failure. In order to orient the market for digital news towards the public good, the role and practices of online advertising platforms must be systematically studied by a specialised authority.

Enact comprehensive light-touch measures to address misinformation
Node: Various ministries, industry associations and self-regulatory organisations
The entire chain of misinformation needs to be addressed in order to effectively tackle the crisis of misinformation. A range of legislative, co-regulatory and voluntary measures are suggested which provide an integrated framework to prevent the spread of misinformation and enhance reader literacy.

Impose appropriate responsibilities on digital news entities
Node: Ministry of Information & Broadcasting, Ministry of Electronics and Information Technology, Press Council of India
The legal vacuum for digital news needs to be filled in a manner which is sensitive to the nuances of online discourse. We recommend granting limited powers to the Press Council of India, in conjunction with a voluntary registration procedure and the development of a brief, accessible code of conduct as a mechanism for the imposition of editorial responsibility. The role of online platforms in the distribution of news should be addressed through targeted interventions based on the design aspects of such platforms.

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