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Conclusion

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CONCLUSION

Monroe E. Price

We have tried in this volume to capture some of the complexities of applying comparative models in the media law reform context. What arises from our study is an interesting duality. On the one hand, country-specific statutes must be understood in terms of explicit and implicit global and regional linkages — such as the EU and the World Trade Organization — which serve as modifiers to individual state action. Regulation no longer stands in national isolation; like technology, it becomes increasingly interlocked with much of what occurs elsewhere in the world. On the other hand, so much about every statutory modification is unique to its own culture, reflecting the particular and traditional roles of the nation in which it arises, that comparisons are difficult to make. Language itself — the very words that are the currency of media discourse — reflects this duality. Terms that look the same have radically different meanings depending, in part, on the locus of each society in the media transformation so characteristic of late twentieth century life. For these reasons, the volume focuses both on traditions and history within India but, at the same time, tries to place the Indian debate in a global context.

In bringing together the segments of this book, one thing, and perhaps only one thing, is clear: there is no other place in the world with India’s special history and special cultural needs. There are very few places that have had the sudden and generally unregulated liberalization in cable and satellite that is characteristic of India since 1990. There are very few places that are as conscious of the need for sensitivity with respect to programming that can be divisive to the point of violence. And, still, there are very few places that have so sophisticated a reservoir of talent in the rapidly burgeoning information technology sector. Few places have had to work out in so complex a fashion the complementary role of the center and the regions in terms of broadcasting and cultural policy. The move to private broadcasting rarely has so neatly coincided with the shift of the central broadcaster, moving in the language of the discipline from a state entity to a public service provider under the auspices of an independent authority. There are, indeed, few places that are becoming so fully integrated into the world political
and economic discourse. These are all characteristics of India but, together, of nowhere else. As a result, India is incomparable, a severe problem in a book about comparability.

The essays in this volume show, too, that the process of drafting broadcasting legislative reform is — worldwide — one of the most important legal phenomena of our time. Societies everywhere are — or have been — intensely reexamining the role of the state and the power of law in a time of media globalization. In the last decade, broadcasting laws have changed for two major reasons. In some countries, as in the former Soviet Union, change has been a result of major internal political transformations that redefine the role of the state. In other countries, primarily in the West, change is mandated because shifts in technology have implications for the economic assumptions of the existing regulatory regimes. In many places — and India is certainly one of them — the revision of broadcasting laws brings together concern about new technology at the very same time as the process of defining the nation itself continues to evolve. This process of reinventing broadcast regulation is not an easy one. Europe, after a decade, is still amplifying and clarifying its “Television Without Frontiers” Directive. Russia, years after the dissolution of the Soviet Union, has not been able to reconcile itself to new legislation. The US is, with difficulty, digesting the massive and complex Telecommunications Act of 1996. Taiwan, Australia, Canada, Korea, the UK, and many others are, have been, or are planning extensive changes to their broadcast regime. The search for the proper tools of regulation is a worldwide phenomenon.

In this context, comparative media law can help on the theoretical and practical level. Comparative law is an aid in comprehending the underlying dialectics, the themes that are beneath the surface, the kinds of economic and social plays that characterize media law reform in a wide variety of settings. Comparative law allows us to see change in the large, great divisions of approaches, including those that are typical of democratic societies and those that are not. Comparative law is practical as well; it deals with the mechanics of the language of licensing or of establishing regulatory authorities and tests the language of program content control.

For all decision makers in every state engaged in media reform, a key question is which guiding rule is chosen, which rule of emphasis among competing goals. The adoption of such a principle becomes an internal signal that indicates how various potentially
conflicting goals can be simultaneously achieved or sorted out. A guiding rule indicates whether economic development is the prevailing theme, or cultural preservation, or acculturation and absorption within a world economy. Of course, in most contexts, the signals sent out incorporate several of these objectives.

The documents surrounding the Broadcasting Bill — as we have tried to show — indicated something of the guiding rule for the future course of the law. The Ministry’s Issues and Perspectives note made the very valuable point that, in designing the Broadcasting Bill, “we ha[d] to look for a suitable model [for legislation] among the democratic countries,” fairly much rejecting “the other option of licensing and regulating each and every individual dish antenna” because such an approach is “neither desirable nor feasible.”

By opting for the “democratic countries” as a model a guiding rule is implicitly selected. For what is characteristically distinctive about these “democratic countries,” in fact, is how they articulate the strategy of achieving goals, how they navigate among competing goals, and how they balance interests important to the society. By choosing to look at the “democratic countries,” the drafters seemed to be selecting more than form, more than the words of the draft. Imbedded in the regulatory choices of the Western models is a recognition that consumer choice must be given great weight and that diversity and plurality of voices, including non-governmental voices and voices from abroad, should be recognized as making a significant contribution to an emerging national identity and vision. Each of these societies must choose how to balance the various goals, though in each of them there seems to be deep-seated reservations about excessive state control and undue state intervention in economic planning.

The Ministry note was even more precise as to which of the models from abroad were most relevant and helpful in the formation of the Indian Broadcasting Bill. Among the options, as was indicated earlier in this volume, the US and German models were found less relevant, the former, perhaps, because of over-reliance on the private sector and the latter because of over-reliance, historically, on the state. The drafters turned, especially, to the model of the UK which has “much more elaborate and detailed rules and

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regulations on . . . broadcasting, which have been tried and tested for the last 6 to 7 years."² Thus, the note concludes that "[t]he basic framework of our proposed broadcasting bill is, therefore, based on the UK law."³ The Minister similarly recognized in many of his public statements that India is and must be part of the global marketplace of imagery and that the regulatory regime must take this into account.

The objectives of the UK, however listed, cannot be fully understood without fathoming the way in which national identity concerns are harmonized with the encouragement of consumer choice and open entry. Broadcasting, long one of the instruments of establishing national identity, under a BBC monopoly is now one of the most liberal of institutions in terms of entry and one where restrictions on ownership are being progressively diminished. The UK is not only a good model for specific provisions, it is a good model for the balance among provisions as well.

Just as important, the UK regulatory framework cannot be understood without the perspective of Europe and its institutions (i.e., the Commission, the Parliament and the Courts). Broadcasting regulation in any of the member states must be interpreted against the struggle for European identity, European information space, and a European regulatory framework. This part of the UK model is important for India because there are surprising similarities and lessons. First, in Europe as well as here there is the tension between unity and diversity. The European Commission is seeking a regulatory pattern that fosters European unity; as well, one of the historic purposes of broadcasting policy in India has been to contribute to national unity. Certainly, aspects of the current bill are designed to do that. At the same time, in Europe, as here, broadcasting policy is increasingly about recognizing diversity, especially cultural diversity, and preserving and strengthening languages through the recognition of regional voices.

European regulation — as is true of the proposed Broadcasting Bill — also involves the difficult relationship between broadcasting as commodity and broadcasting as an essential element of formation of culture. There is no question — in Europe and elsewhere — that broadcasting is classified as a service governed by the rules of trade within the Union. Television programming is

² Id.
³ Id.
subject to the Treaty of Rome and prohibitions on impediments to trade among the member states. On the other hand, the cultural face of television programming is present in the EU’s toleration of country-based content standards, licensing of terrestrial broadcasters, and other techniques related to the growing importance of this form of visual imagery.

The European experience is also vital — as a means of developing a European Information Space — because of the shift from “negative regulation” to “positive incentives,” from a focus on restrictions and quotas to affirmative efforts to create a European voice including the assemblage of existing national voices. The European case is interesting because it tolerates — perhaps requires — the unimpeded, unregulated locus of Luxembourg while simultaneously embracing the far more articulated regulation within each state. Satellite, especially satellite to home, can find a zone that encourages experimentation and freedom from regulation at the same time that terrestrial broadcasting merely evolves from its previous regulatory forms.

Of course, it is interesting, too, in terms of the comparison between Europe and India to consider the tension between unity and diversity. The Broadcasting Bill could be seen as a restructuring of broadcasting policy, shifting from an emphasis on unity to a recognition of diversity, while Europe is shifting from the diversity of national systems to an effort to create a unifying European space. The public broadcast map in India has been divided into both the national network and the regional, which permitted the Indian Government to have a hold on the nation while enabling the state governments to broadcast regional cultural, political, and social events in the major regional language. This hardly captures the complexity of either the Indian or European context on this question of unity and diversity. Another comparative note is that in Europe broadcasting has not been perceived so much as a developmental tool as it has been in India, while in both contexts broadcasting has been an educational tool, an instrument of state culture.

I. GLOBALISM AND CULTURAL INVASION

We turn, finally, to a few specific goals and objectives and try to provide some comparative perspectives on issues that were central to the Broadcasting Bill. One of the most difficult parts of the Bill involved what might be called “foreignness,” the need for techniques, according to the Ministry note, that would “thwart the in-
vasion from foreign satellite broadcasters,”4 or, to quote another comment, that would reduce “[t]he adverse impact of these TV programmes on the Indian values and culture...”5 Of course, the elimination of foreign programming, or even foreign values, is not a goal or objective of the Bill. The relevant objective or goal is “preserving national identity,” to put it positively.

A review of the global debate and global developments casts light on the refiguring of the terms of discourse concerning what is often called “cultural invasion.” Increasingly, each private producer of programming, and public service programmer as well, wants to be a participant in the global or regional distribution system as well as the domestic one. The line between “foreign,” transnational, and domestic is eroding, and certainly it is eroding as an indicator of programming strategy. Furthermore, the World Trade Organization impetus — which is clearly a direction though not yet a universal tendency — is to redefine lines so that decisions about the right to participate in a market do not turn on the country of origin of the potential programmer or provider. For historic and security reasons, this is not true of terrestrial broadcasting, but it is increasingly, though not always, the case with the new satellite technology.

Examining recent changes in communications policy in Europe, in the UK and elsewhere, it is clear that increasingly there are more positive and dynamic aspects of globalism. The aim is for a future in which there can be a global discourse with regional efforts specifically seeking to be represented. The BBC is an example of an entity which has moved from a defined and historic domestic function to an ambitious and potentially commercially supportable global function. The Turkish Government has encouraged its public and private broadcasters to become active in Central Asia and to provide programming to the Turkish worker diaspora in Europe. MBC, the satellite service originating in the Middle East, has a similar cultural, political, and commercial set of goals. The recent Green Paper published in Ireland stated in paragraph 15.2 that “[i]n the new international broadcasting environment it is probable that public service broadcasting . . . must, in order to survive, no

4 Id.
longer rely purely on a national strategy.\textsuperscript{6} The Green Paper in paragraph 15.7 then asked this tantalizing question: "[I]s there a need in the current environment to consider whether there should be a framework to cater for the establishment and transmission of broadcasting services from Ireland on a purely commercial basis . . . ?"\textsuperscript{7}

Increasingly, the question may be how does one harness the energy of the new multi-channel, transnational universe to pursue global — as well as domestic — cultural and political goals. For India, as for the UK, great opportunities exist in this redefinition of the global set of images. Reliance on the line between "foreign" and domestic entrants becomes less and less likely the greater the country becomes an exporter of information. The private sector in television programming in India is still at its early stages, but it has grown with great rapidity. That sector, and those involved in building distribution, will be seeking alliances, including additional markets outside of India. The accomplishments of the Indian economy in the computer hardware and software field will have their counterparts in the entertainment and cultural areas of programming. In this way, the categories of "foreign" and "domestic" will give way to new ones governed more by trade than by borders.

This is a time when Hollywood studios are owned by Japanese and other foreign corporations and the major American exporter of programming could be characterized as Australian. Europe’s television is unique because of the multiplicity of sources available to an increasing number of individuals: it is the fact that German, British, and French television are available that makes it European. The search for an audience forces a Europeanization of NBC and CNN, not the other way around. The same may be true for India. The ironies and contradictions between a policy of encouraging exports and becoming part of a world of borderless economic alliances, but regulating imports, becomes too apparent and, in a time of increasing reciprocity, too limiting.

Another aspect of the debate is that it is becoming increasingly clear that ownership restrictions have less impact on content than might have been predicted or hoped and merely are often mechanisms designed to protect local competitors without major


\textsuperscript{7} Id.
cultural consequences. In a competitive multi-channel environment, no individual channel wants to be hamstrung in its efforts to secure the largest or most profitable audience. In the necessarily open environment that now exists, the task of thinking about information space and its substantive content is a far more complex one than ever before. For this reason too, legislation which focuses on limiting foreign ownership can be self-deceptive if it is a tool for influencing content.

This volume stands for the proposition that what is important in evaluating comparative approaches to broadcast regulation is the balance among competing priorities. The UK, indeed all of the countries with a verbal allegiance to the "free market," take into account national interest and cultural considerations in fashioning their domestic regulatory pattern. But the question is not whether all countries are sensitive to their national identity needs. It is, rather, the balance, the combination of restrictions and immunities that makes up the package of regulations. Article 10 of the Council of Europe’s Convention on Transfrontier Television flexibly provides that the majority of transmission time — not including sports, news, game shows and the like — should be of "European works." Canada carefully determines which satellite services are eligible for carriage on direct broadcast satellites directed at its population so as to provide encouragement for domestic counterparts. Of course, there are these tools for addressing national identity. But the tools exist in a context of competition, increasingly free entry and a maximization of consumer choice.

Besides, especially in Europe, while it is important that national economic and cultural interests be protected, the method of doing so seems to be changing in ways that reflect the increasingly regional and transregional distribution of signals. The studies in this book indicate how in Europe there is both a greater zeal for a European Information Space and a relaxation of quota requirements. The search is for mechanisms that will affirmatively be effective in terms of serving the regional culture as opposed to mechanical and seemingly unproductive efforts.

In all the European member states, the role of the public service broadcaster has been redefined in terms of protecting pluralism. As the Ministry note stated: public service broadcasting must

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be a "catalyst for social change and national development. In order to achieve this objective and with a view to meet the information, education and entertainment need of the general masses, it is necessary that a country must have a strong public service broadcasting." This truth, so clearly articulated here, suggests how important public service broadcasting becomes in the new multi-channel universe. That is the experience in Europe, and it should be the experience in India as well.

II. CROSS-MEDIA RESTRICTIONS AND PLURALISM

The Indian Broadcasting Bill was designed to increase pluralism and diversity, and ownership restrictions of broadcast service licenses were a major tool for accomplishing that objective. Throughout the world, however, economists and others question why standard antitrust approaches are not used to regulate concentration in the media field. It is often said that special rules are adopted to regulate competition in the media field either because of (a) the scarcity of frequencies or (b) the critical role of speech and culture in the society. But both these arguments are being refuged in the current architecture of broadcast regulation. Neither is abandoned. New modes, however, are being established to meet these concerns.

One basis for departing from special rules is that the scarcity argument is becoming less and less powerful. In the US, particularly, there is almost a sense of scorn for those who contend for special regulation of broadcasting on the basis of scarcity of channels. The departure of "scarcity" as an argument means, however, that legislative attempts should be measured by whether they increase diversity. Cross-media ownership rules which make pluralism and diversity harder to achieve are counterproductive and should not be imposed.

As a result, what might be called "mechanical" or automatic cross-media or ownership restrictions — of the kind included in the Broadcasting Bill — are being eliminated in the UK, throughout Europe and elsewhere in favor of newer tests for effective determination of dominance. These include "share of audience" tests or tests in which cross-ownership depends on the mix and impact of the combination rather than the categorical limitation on one area of the media to another. In Germany, for example, no media com-

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9 Issues and Perspectives, supra note 1, at 2-3.
pany can gain more than a 30% share of annual viewership. A lower measure is used for information-related programs. In Italy, for instance, no owner of a national television channel can also control a newspaper that has more than 16% of the national daily circulation. In the UK, numerical limits on the holding of television licenses have been abolished as have rules limiting the common control of terrestrial, satellite and cable television broadcasters. Instead, there are measures of dominance — as, for example, 15% of the national audience — and increased attention from the general competition regulators.

Second (again reflecting the UK and Australia approach), for those categories of media that are considered “less influential” than others, the basis for special restrictions on ownership are also reduced. The reflection of this principle in the Broadcasting Bill might be constructed as follows: terrestrial broadcasting should remain regulated as to ownership because it reflects scarce frequencies and it plays a highly critical role in terms of culture and society. DTH functions in an environment that is far less vital to the formation of the political sense of nationhood. This is a function of cost of subscriber access, levels of penetration, and the nature of programming carried on the DTH platform. The point is that many of the newer broadcasting legislative initiatives recognize that diversity and pluralism can be defeated rather than furthered by cross-media prohibitions that are unnecessarily restrictive. The introduction of new capital-intensive technology can be thwarted by limiting or prohibiting the incentives for potential entrants. Many countries have cross-media ownership restrictions; these, however, seemed somewhat accentuated in the categorical and multi-layered restrictions characteristic of the Broadcasting Bill.

The studies in this volume also show how useful it is to examine the substantive limitations and procedural practices under the ICCPR and the European Convention. Parallels between decisions of the High Court in India and similar decisions elsewhere should also be especially noted. For example, there has been a great deal of attention, in various contexts, to the discretion of the DTH satellite operator in selecting many or all of the broadcast services that are delivered to the home. The more the restrictions on carriage (for example, the extent to which existing national broadcasters are required to be carried), the less the onus on cross-media restrictions.
In this regard, the European experience with media concentration rules and cultural protection measures are of particular relevance to India’s proposed legislation. In constructing the freedom of expression guarantees in article 19 of the Indian Constitution, the Indian Supreme Court has at least twice taken into account article 10 of the European Convention and the jurisprudence of the European Court of Human Rights. Moreover, the case law of the EU’s competition rules implicates the exercise of rights guaranteed under article 10, which the ECJ has recognized as one of the fundamental rights protected in the EU’s legal order.

This is not to say that European law negates all attempts to regulate media ownership or impose measures of cultural protectionism. It is, however, recognition of the fact that European courts and lawmakers have acknowledged the complexity of these issues and the duty imposed on states to justify their policies in these areas — similar to the burden imposed on the state by the Indian Supreme Court in article 19 cases. In particular, in the European experience these requirements have been subject to particular scrutiny when they have entailed the denial of national treatment to foreign media entities.

Here again, India’s goals and dilemmas are shared by those of many other countries; how India realizes them will be important not only internally, and not only as a model for other countries of the region, but also as an integrated part of an international whole. Because of the growing international flow of information, each state’s restrictions become a matter of interest and relevance for other states. A fundamental question is whether the proper line to draw is foreign/domestic ownership, or, rather, a line that is related to the pluralistic mix of services or content carried on the satellite. Related questions are whether regulation should turn on whether an Indian satellite is used, and whether uplinks should be allowed only from India. Ostensibly, reasonable content restrictions might render additional constraints more harmful than beneficial.

III. RETROACTIVITY

While the Broadcasting Bill sought to bring a new order to the new technological environment, it recognized, in some instances, the need to respect existing investments. Transitions are honored for existing cable systems while the licensing process takes shape. And there are provisional opportunities for non-licensed satellite
broadcasting services to be carried so that present programming strategies can be maintained.

There was, however, some concern expressed about the Broadcasting Bill’s possible retroactivity effect, where proposed restrictions undermine substantial investments made in Indian communications ventures under the preexisting legal regime. With respect to bilateral and multilateral relations between India and other nations, this retroactive restriction poses serious legal questions. In general, a dramatic retroactive limitation on ownership and investment that is inconsistent with the currently existing worldwide pattern and practice of encouraging foreign investment in the communications and media spheres would merit great scrutiny.

The question of retroactivity of foreign investment restrictions is quite independent of the question of whether such restrictions (and similar restrictions on ownership) are themselves justifiable and consistent with world trends. Indeed, the foreign investment restriction issues of the Broadcasting Bill are being examined worldwide. There are currently many patterns of prospective restrictions on foreign investment, sometimes differentiating investment from ownership, sometimes differing between carriers and programmers, sometimes differing based on technology. In this volume, there has not been sufficient opportunity to explore fully these questions on the relationship of regulation to investment or the impact of multilateral and bilateral agreements.

IV. UPLINKING AND LICENSING

Our comparative study suggests the interrelatedness of provisions of the Broadcasting Bill — or any media legislation. For example, the content-related aspects of the Broadcasting Bill reflected important public, religious, and historical needs. But, in light of these provisions, the question might have been asked whether the combination of techniques used to achieve these goals is productive, especially the domestic uplinking requirement. Uplinking requirements can be a transmission counterpart to licensing satellite dishes and receivers. If all programming suppliers conform to the content requirements, then an external uplinking prohibition is not necessary. If the requirement for uplinking is to favor a domestic economic supplier, then other bilateral trade arrangements are at risk. It is worth examining whether the particular nature of the statute’s cumulative aspects of content standards,
licensing requirements, and foreign ownership requirements provide a coherent, effective way for India to realize its objectives.

None of the democratic societies cited by the various Ministry notes have an exclusive uplinking requirement. It is true that any analysis in India or about India must be responsive to the particular complexities of the Indian broadcasting landscape, including the mosaic of Indian culture, linguistic needs, and the system of national and regional broadcasting and its relationship to the political system. The Indian Government is appropriately concerned about strengthening and encouraging Indian culture and requiring the carriage of Indian channels. But it should be some cause of concern if the predominant practice, especially in societies that India respects, is at odds with the provisions of the Broadcasting Bill.

V. OBJECTIVES OF MODERN BROADCASTING LEGISLATION

The objectives of broadcasting legislation sometimes get lost in the technicalities of drafting and the competition among interest groups. We must remember, however, why the process is so riveting: these statutes are not only about competing economic interests, but are about communications and culture, sovereignty and development. These are issues that — in their relationship to technologies of speech — have never seemed so immediate, so pressing, and so difficult to define and adjust. At the moment, in fact, the very capacity of law to effect massive changes in communications technology seems, sometimes, to be in doubt.

One need go no further than the Ministry note that was issued in relation to the Bill for an understanding of this society's goals. The note echoes concerns that are articulated in many countries, and they are presented, slightly restated, here:

(a) Preserving national identity and giving direction and shape to the national vision;
(b) Encouraging local and regional aspirations and needs;
(c) Assuring plurality of news and views;
(d) Recognizing and fulfilling the need for private broadcasting;
(e) Sustaining and developing voices and production talent that can compete effectively in a global marketplace of programming;
(f) Avoiding monopolies in broadcast ownership and sources of information; and
(g) Making efficient uses of the airwaves in the public interest.

In addition, there are objectives not so frequently articulated here as in the West, but nonetheless recognized as necessary consequences of broadcasting reforms:

(a) Expanding the economy;
(b) Enhancing the information infrastructure through job creation and new business development; and
(c) Increasing consumer choice.

More significant than listing objectives is determining the comparative emphasis among them. Explicitly or not, when provisions from foreign models are imported and collected for a new synthesis, as in the Broadcasting Bill, there is a danger that the relationship between those provisions and others that surround them will be abandoned. Various formulae for emphasis and prioritization can be conceived and have been in various national contexts. For example, a guiding rule might be to design a statute which tailors the task of maintaining identity and plurality so as to encourage, simultaneously, the maximum positive impact on the economy. A somewhat different formula would be to maximize consumer choice while protecting and guarding community needs. Some societies — and they are often referred to as “the closed societies” — claim to maximize national identity while, in fact, maximizing political control.

VI. THE INTERNATIONAL CONTEXT AND THE BROADCASTING BILL

In this volume, we have sought to address how significant goals reflected in the Broadcasting Bill relate to similar goals in other broadcasting reform initiatives, particularly in Europe. We have tried to discuss, in greater particularity, certain of those objectives, including preserving and strengthening national identity and encouraging a plurality of voices. We have indicated that in the democratic societies that have served as models for India, these goals are melded with concerns about the growth of the economy and the dignity of consumer choice. This volume is, however, only a beginning in this process. In India, the debate shifts from a discussion on a broadcasting bill to a discussion of a broadcasting law, as well as to the substantial changes in the structure of Doordarshan as a result of Prasar Bharati. So, in every country, the debate shifts as well: sometimes as a result of technology, sometimes as a
result of changing attitudes toward competition or the appropriate infrastructure for the media.

In the family of changes in media laws around the world, the Indian Broadcasting Bill has been among the most ambitious. It is ambitious in terms of the geographical and population scope of its impact. It is ambitious in its effort to unite so many areas of regulation of the electronic media. And it is ambitious in terms of its effort to legitimate the growth of broadcasting while at the same time being attentive to the special needs of Indian culture. Drawing on many other models, the Bill represents an attempt to address new technologies, harmonize these new technologies with older ones, control the effect of new communications technologies on national identity, culture, and religion, restrict foreign and domestic ownership patterns with respect to communications interests, and maintain India's important thrust in encouraging investment and expanding trade relations.