

CHAPTER V

BROADCASTING RIGHTS

It is a fact that the use of satellites for the distribution of programme-carrying signals is rapidly growing both in volume and geographical coverage. This necessitated the development of certain measures in the international arena to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors.

As stated in the third chapter, in the present international framework broadcasting organisations have legal protection only over the transmissions made through wireless means (satellite). They enjoy certain level of protection against signal theft¹ under the existing international regimes, namely, the Rome Convention 1961,² Brussels Satellite Convention 1974,³ TRIPs Agreement 1994,⁴ WIPO Performances and Phonograms Treaty (WPPT) 1996⁵ etc. ;

However, article 11*bis* of the Berne Convention states that the authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made

1 Using signals without the authorization of broadcasters, which could cause the economic losses for broadcasting organizations.

2 It establishes that broadcasters have the right to prohibit but not to 'authorize' the fixation, reproduction of fixation, and the re-broadcasting by wireless means of broadcasts.

3 The Brussels Satellite Convention protects broadcasters' rights by allowing members to prevent dissemination of programme-carrying signals by any distributor for whom the signals are not intended. The duration is to be decided by national law.

4 Art. 14(3) of TRIPs Agreement provides broadcasting organizations the right to control the fixation, reproduction, wireless re-broadcasting and communication to the public of broadcasts.

5 Art. 15 of WPPT provides, equitable remuneration for wireless broadcasting or for any communication to the public of phonograms.

by an organization other than the original one;

- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

It is a matter for legislatures within the countries of the Berne Union to determine the conditions under which the rights envisaged under the Berne Convention may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of the article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

Article 3(f) of the Rome Convention defines the term 'broadcasting' as under:

'Broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds.

Article 12 of the Rome Convention reads as under:

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

In general, to broadcast is to cast or throw forth something in all directions at the same time. A radio or television broadcast is a program that is transmitted over airwaves for public reception, by anyone with a receiver tuned to the right signal channel. A broadcasting may be public, commercial, educational and so on. Public broadcasting is TV,

radio, etc. funded by an official or governments, with no paid advertisements. Commercial broadcasting, on the other hand, is TV funded by paid advertisements and contain advertisements during the TV or radio times. Educational broadcasting is the one where the broadcasting of specific subject materials are educational. Live broadcast takes place where various types of media broadcast without any significant delay.

The Rome Convention defines “broadcasting” as the transmission by wireless means for public reception of sounds or of images and sounds⁶ and “rebroadcasting” as the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.⁷ Article 13 of the Rome Convention speaks about the minimum rights for broadcasting organizations. Broadcasting organisations have been given the right to authorize or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions; and
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the state where protection of this right is claimed to determine the conditions under which it may be exercised.

Brussels Convention

Until the conclusion of the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite there was no world-wide system to prevent distributors from

6 Art. 3. f, Rome Convention, 1961.

7 Art. 3. g.

distributing programme-carrying signals transmitted by satellite which were not intended for those distributors. This lack was likely to hamper the use of satellite communications. As use of satellites for the distribution of programme-carrying signals was rapidly growing both in volume and geographical coverage. Hence, the convention provides for the obligation of each contracting state to take adequate measures to prevent the unauthorized distribution on or from its territory of any programme-carrying signal transmitted by satellite.

“Signal” is defined under the convention as an electronically-generated carrier capable of transmitting programmes (article 1 (i)); “programme” means a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution (article 1 (ii)); and “satellite” is any device in extraterrestrial space capable of transmitting signals (article 1 (iii)).⁸

The distribution is unauthorized if it has not been authorized by the organization - typically a broadcasting organization - which has decided what the programme consists of. The obligation exists in respect of organizations that are nationals of a contracting State. This convention is not applicable where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public. The convention is open to any State that is a member of the United Nations or of any of the agencies belonging to the United Nations system of organizations.

WIPO’s Standing Committee on Copyright and Related Rights, which is responsible for the broadcasting negotiations, is in the process of drafting a new treaty addressing the following issues:⁹

1. What should be protected as the rights of broadcasting organisations?
2. Feasibility of opting for a technology neutral protection
3. The issue of webcasting
4. How should broadcast signals be protected?

8 Art. 1 (iv) defines “emitted signal” or “signal emitted” as any programme-carrying signal that goes to or passes through a satellite and article 1(v) defines “derived signal” as a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations.

9 See, WIPO Background Brief: Protection of Broadcasting Organizations, available at <http://www.wipo.int/pressroom/en/briefs/pdf/brief_broadcasting.pdf>.

5. Need of introducing anti circumvention measures
6. Creation of new rights including protection from foreign piracy
7. What limitations and exceptions should there be?
8. How long should protection last?

TRIPs Agreement

Article 14.3 of TRIPs provides that broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization:

- (i) the fixation,
- (ii) the reproduction of fixations, and
- (iii) the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

If any of the contracting states do not grant such rights to broadcasting organizations, it shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971). The minimum term of protection granted under TRIPs shall last for at least 20 years from the end of the calendar year in which the broadcast took place. However, any member may, in relation to the broadcasting rights of broadcasting organisations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

The Indian Copyright Act

In India protection to broadcasting signal was not envisaged under the original Copyright Act of 1957. The 1983 amendment inserted the definition of 'broadcast'. Section 2(dd) defines 'broadcast' which means communication to the public-(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast. The rights of a broadcasting organization with reference to a broadcast are dealt under section 37. However, with an amendment in 1994 the Act was substituted with the new section providing for "broadcasting reproduction rights".

Broadcast reproduction right under section 37

- (1) Every broadcasting organisation shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.
- (2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.
- (3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-
 - (a) re-broadcasts the broadcast; or
 - (b) causes the broadcast to be heard or seen by the public on payment of any charges; or
 - (c) makes any sound recording or visual recording of the broadcast; or
 - (d) makes any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or
 - (e) sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.

Hence the rights of broadcasting organizations are:

- right to re-broadcast the broadcast;
- right to cause the broadcast to be heard or seen by the public on payment of any charges;
- right to make any sound recording or visual recording of the broadcast;
- right to make any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; and

- right to sell or hire to the public, or offer for such sale or hire, any sound recording or visual recording of the broadcast.

Fair dealing

Section 39 deals with acts not infringing broadcast reproduction right.

No broadcast reproduction right or performer's right shall be deemed to be infringed by-

- (a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bonafide teaching or research; or
- (b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bonafide review, teaching or research; or
- (c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.

Applicability of other provisions

The Copyright (Amendment) Act, 2012 substituted section 39 A with the following section:

"49-A: Certain provisions to apply in case of broadcast reproduction right and performer's rights. —(1) Sections 18, 19, 30, 30-A, 33, 33-A, 34, 35, 36, 53, 55, 58, 63, 64, 65, 65-A, 65-B and 66 shall, with necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast, and the performer's right in any performance as they apply in relation to copyright in a work:

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no licence to reproduce such broadcast, shall be given without the consent of the owner of right or performer, as the case may be, or both of them:

Provided further that the broadcast reproduction right or performer's right shall not subsist in any broadcast or performance if that broadcast or performance is an infringement of the copyright in any work.

- (2) The broadcast reproduction right or the performer's right shall

not affect the separate copyright in any work in respect of which, the broadcast or the performance, as the case may be, is made.

These sections deal with assignment (sections 18-19), license (sections 30- 30A), copyright/performing rights societies (sections 33-36), importation of infringing copies (section 53), civil remedies for infringement (section 55), rights of owners against persons possessing infringement copies (section 58), offence of infringement (section 63), power of police to seize infringing copies etc. sections 64, 65 and 66, protection of technological measures (section 65A) and protection of rights management information (section 65B).

Strengthening of border measures

The section 53 as substituted by 2012 incorporates detailed border measures to strengthen the enforcement of rights by making provision to control import of infringing copies by the customs department, disposal of infringing copies and presumption of authorship under civil remedies. It provides that the owner of copyright of any work or any performance embodied in such work, or his duly authorised agent, may give notice in writing to the commissioner of customs, or to any other officer authorised in this behalf by the Central Board of Excise and Customs requesting the commissioner for a period specified in the notice, not exceeding one year, to treat infringing copies of the work as prohibited goods, and that infringing copies of the work are expected to arrive in India at a time and a place specified in the notice. After examination of evidence so furnished, the commissioner may pass an order treating the infringing goods as prohibited goods. When any such goods are detained, the customs officer shall inform the importer as well as the person who gave notice of the detention of such goods within forty- eight hours of their detention. The customs officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention. This provision is applicable to broadcasting organization as well.

Technological protection measures

Article 11 of WCT and article 18 of WPPT obliges member countries to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are

used by authors and performers in connection with the exercise of their rights. This is to prevent digital piracy. Hence section 65A has been inserted by way of 2012 amendment to recognize technological protection measures (TPMs).

Copyright content in digital environment can be protected by a technological protection measure. Technological protection measures are different types of technologies used to control access to copyright content and prevent users from copying protected content. These may include access control technological protection measures (examples are cryptography, passwords, digital signatures, digital water marks etc.) and copy control technological protection measures (examples are serial copy management systems for audio digital taping devices, scrambling systems for DVDs to prevent third parties from unauthorized reproduction). Circumvention devices are technologies that are used to remove, disable or circumvent technological protection measures.

Under section 65A any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred under the Act with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. Exceptions to TPMs are provided in sub-section 2 enabling enjoyment of fair use provisions. The prohibition shall not prevent doing anything for a purpose not expressly prohibited by the Act. Any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated. Other exceptions include (a) doing anything necessary to conduct encryption research or conducting any lawful investigation, (b) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator, (c) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user and (d) taking measures necessary in the interest of national security.

Rights management information

Article 12 of WCT and article 19 of the WPPT provide for protection of rights management information (RMI). Rights management information means information which identifies the work, the author/

performer of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. Section 2 (xa) defines rights management information as:

- (a) the title or other information identifying the work or performance;
- (b) the name of the author or performer;
- (c) the name and address of the owner of rights;
- (d) terms and conditions regarding the use of the rights; and
- (e) any number or code that represents the information referred to sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.

Section 65B as inserted by 2012 amendment prevents the removal of the rights management information without authority and distributing any work, fixed performance or phonogram, after removal of rights management information. According to section 65B(i) any person, who knowingly (i) removes or alters any rights management information without authority, or (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. If the rights management information has been tampered within any work, the owner of copyright in such work may also avail of civil remedies against the persons indulging in such acts. The provisions regarding technological protection measures and rights management information are equally applicable for both the performers and broadcasting organization.

Statutory licence for broadcasting

The Copyright (Amendment) Act, 2012 also inserted Section 31 D in the Act which read as follows:

“31-D: Statutory licence for broadcasting of literary and musical works and sound recording.—(1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical

work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the Copyright Board shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Copyright Board may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall—

(a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and

(b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.

(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.

Section 31 D: is aiming at facilitating access to the works for the growing broadcasting industry. Prior to 2012 amendment the broadcasting organizations had to depend on voluntary licensing to get the access to copyright works. The copyright societies and copyright owners used to give the license to the broadcasting organizations on

unreasonable terms and conditions. The new section provides for statutory license and enables broadcasting organizations to broadcast literary and musical works and sound recordings if they desire to do so. The broadcasting organizations need to give prior notice to the copyright holders and pay royalty as fixed by the Copyright Board in advance. The section takes care of the moral rights as well by providing that the names of the authors and principal performers shall be announced during the broadcast. The broadcasting organization needs to maintain records of the broadcast, books of account and render to the owner such records and books of account.

Judicial Interpretations

Aasia Industrial Technologies v. Ambience Space Sellers Ltd.

As seen above, the TRIPs Agreement mandates protection for rights of broadcasting organizations under article 14(3) and this is reflected in section 37 of the Indian Copyright Act. An important decision in this respect is *Aasia Industrial Technologies v. Ambience Space Sellers Ltd.*¹⁰ This appeal was directed against an order of temporary injunction passed by a single judge. The brief facts of the case are as follows: The second plaintiffs were a company incorporated under the provisions of the Companies Act and owners of copyrights in various programmes which were produced in India. The third plaintiffs were a body corporate constituted and existing in accordance with the laws of the British Virgin Islands and carrying on business as a Satellite TV Channel in Hong Kong. The third plaintiffs were the owners of Zee TV Channel who operate the Zee TV Channel from Hong Kong through the up linking facility and satellite under the third plaintiffs arrangement with Star TV. The first plaintiffs were the exclusive licensees of the copyright in the programmes broadcast on the Zee TV Channel. The second plaintiffs have given an exclusive licence to the third plaintiffs to broadcast these programmes on a 'Zee TV Channel'. This broadcast has been made from Hong Kong to the "Asian Footprint" of Aasia set I which also include India. Zee TV is being telecast since about October, 1992 showing various types of programmes, education, social, entertainment, news-based, etc. which programmes were interspersed with commercial advertisement. The advertisement shown on Zee TV were by way of advertising slots

10 (1997) 99 Bom LR 613; 1998 (18) PTC 316.

sponsored by business houses, who wish to promote themselves, their products and services in South East Asian countries. Zee TV Channel who a "Free to Air Programme", i.e., the viewers were not charged for watching the programme. As Zee TV was a "Free to Air Programme" the expenses were naturally met through advertisements. The first plaintiffs were the sole agent, who procured for the third plaintiffs advertisements in India. The third plaintiffs after receiving the programme from the second plaintiffs and the advertisements from the first plaintiffs combined the two and broadcast the programme on the Zee TV Channel. The advertisers choose programmes in which to advertise, according to their popularity and time of showing. Zee TV Channel, a free-to-air signal, it could be seen by viewers only if they have connectivity through dish antenna. An individual viewer had to install his own dish antenna, or, as more common, dish antenna have been installed and managed by cable operators, who have their own set of subscribers, the cable operators disseminate the TV signal for a fee or charge. Thus instead of individual viewers having their own separate dish antenna, the cable operators have common dish antenna and other equipment for deploying the signals by means of wire to viewers for a charge. In cities like Mumbai the majority of viewers were subscribers to Cable Television Networks.

The principal issue in this case was whether the defendants have a right and are entitled to substitute their advertisements during the broadcast of the plaintiffs. According to the plaintiffs, the action of the defendants in substituting advertisements in intercepting the programmes broadcast by the third plaintiffs and substituting the advertisements in the programmes by their own advertisements is *per se* unlawful. The plaintiffs have based their action upon various causes of action, *viz:-*

- (a) Passing off;
- (b) Inducing a breach of contract;
- (c) Copyright and Broadcast Reproduction Rights.

On the issue of passing-off, the case of the plaintiffs was that by reason of unauthorised intervention or interruption of the Zee TV signal the programmes and original advertisements forming part of the Zee TV broadcast are cut off from the viewers and the "local advertisements" are inserted by cable operators by means of their own video films. Such interception or interruption of the original Zee TV broadcast by cutting off the programme and inserting local advertisements also results in the defendants wrongfully and illegally

passing off something which is not part of the original broadcast made by the third plaintiffs on the Zee TV Channel, as if they were so broadcasted by the third plaintiffs. The defendants thus pass off their local advertisements broadcast by them through their video cassette recording/TV network system, as if the said local advertisements are being broadcast by the third plaintiffs on the Zee TV Channel. The quality of such local advertisements is poor and in any event is not at par with the high standard of the third plaintiffs' broadcast. By reason thereof, and in any event, such local advertisements broadcast by the defendants, and passed off as broadcast by third plaintiffs, adversely affects and harms the third plaintiffs' reputation among the viewers. The third plaintiffs, by reason of the excellent quality of their broadcast, have a tremendous reputation among all the viewers of Zee TV which reputation is being injured by the defendant's wrongful acts.

The court decided thus^{10a}:

It is clearly seen that the action of the defendants in blanking out the plaintiffs advertisements during the telecast of plaintiffs programmes is calculated to deceive the public into believing that it emanated from the plaintiffs. Besides the fact that the plaintiffs might suffer damage to goodwill, there is also likelihood of the plaintiffs losing their advertisers due to wrongful action of the defendants. In our judgment, the act of insertion of local advertisements clearly amounts to passing off. It was submitted by the defendant that when the programmes of the plaintiffs are going on the plaintiffs logo appears on the screen and when the defendants advertisements appear the logo is no longer shown on the screen; therefore, the viewers immediately know that those are not the advertisements of the plaintiffs. It is not possible to accept this argument. Surely the absence or presence of a small logo on the screen will not enable viewers to know that the advertisements are not those of the plaintiffs. It was further submitted that the defendants are willing to display on the screen a notice stating that all advertisements were of the defendants and not of the plaintiffs. The advertisements slots are for shorter duration of between 10 to 15 seconds. Even if a statement as suggested is published, the very presence of these advertisements in the programme broadcast by the third plaintiffs is a misrepresentation that they are advertisements

10a *Id.* at p. 324, para 7 of PTC.

broadcast by the plaintiffs. The statement does not have the effect of converting that false representation into a true representation. In fact if such a notice is displayed, it will add to the confusion of the viewers as to who is in fact responsible for the advertisements and may even reinforce the representation to the reader that the advertisement was shown as a result of some arrangement or collaboration with the plaintiffs.

On the second issue of breach of contract the court stated that in applying the well settled principles (of contract law) to the facts of the present case, it is required to be noted at the outset that it is admitted that the defendants knew that the plaintiffs have agreements with advertisers. Such advertisers are required to pay substantial amount for broadcasting their advertisements on Zee TV. The plaintiffs are, therefore, bound to ensure that the advertisements procured for being broadcast on Zee TV as a part of a particular programme, are actually broadcast and communicated to the viewing public. With knowledge of this contract, the defendants by simple expedient of switching off the programmes at the time the advertisements are preventing the third plaintiffs from carrying out their contractual obligations. Apart from inducing the plaintiffs to commit a breach by effectively preventing them from showing their advertisers advertisements the action of the defendants would directly have the effect of the third plaintiffs losing their advertisers. This also causes injury to the lawful trade and business of the first and the third plaintiffs and their right to have broadcast in its original form reach the ultimate viewer. The defendants are thus procuring a breach of contract by the third plaintiffs. This is clearly a case of direct invasion and, therefore, amounts to an actionable interference.

On the issue of rights of broadcasting organizations' "reproduction right" under Section 37 of the Act the court observed thus^{10b}:

The argument is that since the third plaintiffs are operating from countries which are not parties to the Berne Convention, they have no right to seek protection of Section 37 since the whole Act is inapplicable so far as the third plaintiffs are concerned. The conferred under Section 37 is available to all broadcasting organisations, wherever they are situated, so long as the broadcast is available in India for viewing. Sub-section (1) of Section 37 clearly provides that every broadcasting organisation shall have a special right to be known as

^{10b} *Id.* at p. 337, para 30.

“broadcasting reproduction right” in respect of its broadcast. Under Sub-section (2) it is provided that the broadcast reproduction right shall subsist until 25 years from the beginning of the calendar year next following the year in which the broadcast is made. Sub-section (3) provides that any person who, without the licence of the owner of the right rebroadcasts the broadcast or causes the broadcast to be heard or seen by the public on payment of any charge or does any other acts mentioned in the said sub-section, shall be deemed to have infringed the broadcast reproduction right. The language of the section makes it very clear that the right is not confined only to Berne Convention countries. This is also clear from the fact that the International Copyright Order, 1991 exclude the application of Chapter VIII which deals with broadcast reproduction right. Under the broadcast reproduction right nobody can rebroadcasts the broadcast or cause the broadcast to be seen or heard by the public on payment of any charge without a licence from the owner. Therefore, the defendants cannot broadcast the third plaintiffs programmes nor cause the third plaintiffs to be heard or seen by the public on payment of charges without licence from the plaintiffs. It was submitted that since the plaintiffs programmes was “Free to Air”, the defendants did not need a licence. However, it is required to be noted that the programmes is “free to air” subject to the conditions imposed by the plaintiffs. Therefore, if the defendants want to avail of the “free to air” programmes they can only do so provided they comply with the conditions laid down by the plaintiffs. It is not open to the defendants to state that they would rebroadcast the broadcast or cause the programmes to be seen or heard by the public on payment of charges, but they would not be bound to comply with the conditions laid down by the plaintiffs. It appears that the plaintiffs are issuing a form of certificate to various cable operators. This certificate is in effect a licence. In our view the defendants can only avail of the “free to air” programmes provided they agree to and comply with the conditions laid down by the plaintiffs. This would necessarily mean that the defendants must communicate or broadcast the plaintiffs programmes in its entirety, including the advertisement portion. It will not be permissible for the defendants to substitute the plaintiff’s advertisements with their own advertisements.

Freedom of speech and expression vis-a-vis right to broadcast

In the landmark judgment in *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*¹¹ the apex court has considerably widened the scope and extension of right to freedom of speech and expression and held that the government has no monopoly on electronic media and under article 19 (1) (a) a citizen has the right to telecast and broadcast to the viewers through electronic media. The government can impose restrictions on such a right only on grounds specified in clause (2) of article 19 and not on any other ground. State monopoly on electronic media is not mentioned in clause (2) of article 19.

Broadcasting freedom

In *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal with Cricket Association of Bengal and another v. Union of India*¹² the court in detail examined the concept of broadcasting freedom. As per the court, broadcasting freedom is implicit in the freedom of speech and expression. The European Court of Human Rights also has taken the view that broadcasting like press is covered by Article 10 of the Convention guaranteeing the right to freedom of expression. But the question is what does broadcasting freedom mean? Broadly speaking, broadcasting freedom can be said to have four facets, (a) freedom of the broadcaster, (b) freedom of the listeners/viewers to a variety of view and plurality of opinion, (c) right of the citizens and groups of citizens to have access to the broadcasting media, and (d) the right to establish private radio/TV stations. The court has examined these facets in detail.

Freedom of the broadcaster

The first facet of the broadcasting freedom is the freedom from State or Government control, in particular from the censorship by the Government. As the Peacock Committee¹³ put it, pre-publication censorship has no place in a free society. Pre-publication censorship is prohibited in Germany by Article 5 of the Basic Law. This principle applies in equal measure both to public and private broadcasting.

11 See (1995) 2 SCC 161.

12 AIR1 995 SC 1236: (1995) 2 SCC 161.

13 The Peacock Committee led by Professor Alan Peacock was initiated by the Conservative government of Margaret Thatcher on March 27, 1985 to review the financing of the BBC.

However, public broadcasting is not to be equated with State broadcasting. Both are distinct. Broadcasting freedom in the case of public broadcasting means the composition of these bodies in a manner so as to genuinely guarantee their independence. In Germany, the constitutional court has ruled that freedom from State control requires the legislature to frame some basic rules to ensure that Government is unable to exercise any influence over the selection, content or scheduling of programmes. Laws providing to the contrary were held bad. Indeed, the court also enunciated certain guidelines for the composition and selection of the independent broadcasting authorities on the ground that such a course is necessary to ensure freedom from Government control. It should be noted that an unfettered freedom for licensees to select which programmes appear on their schedule to the complete disregard of the interests of public appears more like a property right than an attribute of freedom of speech. It is for this reason that the German constitutional court opined that television and radio is an instrument of freedom serving the more fundamental freedom of speech in the interest of both broadcasters and the public.¹⁴ The court opined that broadcasting freedom is to be protected insofar as its exercise promotes the goals of free speech, i.e., an informed democracy and lively discussion of a variety of views. The freedom of broadcaster cannot be understood as merely an immunity from government intervention but must be understood as a freedom to safeguard free speech right of all the people without being dominated either by the State or any commercial group. This is also the view taken by the Italian and French courts.

Listeners'/viewers' rights

Broadcasting freedom involves and includes the right of the viewers and listeners who retain their interest in free speech. It is on this basis that the European courts have taken the view that restraints on freedom of broadcasters are justifiable on the very ground on free speech. It has been held that freedom of expression includes the right to receive information and ideas as well as freedom to impart them. The free speech interests of viewers and listeners in exposure to a wide variety of material can best be safeguarded by the imposition of programme standards, limiting the freedom of radio and television companies. What is important according to this perspective is that the broadcasting institutions are free to discharge their responsibilities of providing

14 1981 57 BVerfGE 295 and 1987 73 BVerfGE 118.

the public with a balanced range of programmes and a variety of views.

Access to broadcasting

The third facet of broadcasting freedom is the freedom of individuals and groups of individuals to have access to broadcasting media to express their views. The first argument in support of this theory is that public is entitled to hear range of opinions held by different groups so that it can make sensible choices on political and social issues. In particular, these views should be exposed on television, the most important contemporary medium. It is indeed the interest of audience that justified the imposition of impartiality rules and positive programme standards upon the broadcasters. The theoretical foundation for the claim for access to broadcasting is that freedom of speech means the freedom to communicate effectively to a mass audience which means through mass media.

An important decision on this aspect is that of the United States' Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*.¹⁵ The CBS denied to Democrats and a group campaigning for peace in Vietnam any advertising time to comment upon contemporary political issues. Its refusal was upheld by the FCC, but the District of Columbia Circuit Court of Appeals ruled that an absolute ban on short pre-paid editorial advertisements infringed the First Amendment and constituted impermissible discrimination. The Supreme Court, however, allowed the plea of CBS holding that recognition of a right of access of citizens and groups would be inconsistent with the broadcasters' freedom. They observed that if such right were to be recognised, wealthy individuals and pressure groups would have greater opportunities to purchase advertising time. It rejected the "view that every potential speakers is 'the best judge' of what the listening public ought to hear" (Burger, C.J.) Some Judges expressed the opinion that the broadcaster enjoyed the same First Amendment rights as the newspapers whereas the minority represented by Brennan and Marshall JJ. was of the view that freedom of groups and individuals to effective expression justified recognition of some access rights to radio and television.

The rights to establish private broadcasting stations

The French Broadcasting Laws of 1982 and 1989 limit the right of

¹⁵ [1973] 94 US 412.

citizens to establish private broadcasting stations in the light of the necessity to respect individual rights, to safeguard pluralism of opinion and to protect public interests such as national security and public order. No private radio or television channel or station can be established without prior authorisation from the regulatory body, *Counsel superior de l'audiovisuel*. In Britain, the ITC and the Radio Authority must grant the necessary licence for establishing a private television or radio station. In none of the European countries is there an unregulated right to establish private radio/television station. It is governed by law. Even in United States, it requires a licence from FCC.

Broadcasting Services Regulation Bill

India's 'Broadcasting Services Regulation Bill, 2007' attempted to promote, facilitate and develop in an orderly manner the carriage and content of broadcasting. The bill provided for regulation of broadcasting services for offering a variety of entertainment, news, views and information in a fair, objective and competitive manner and to provide for regulation of content for public. It also aimed to codify a framework of guidelines and proposed to set up a regulatory authority called Broadcasting Regulatory Authority of India (BRAI) with a licensing and oversight function covering terrestrial as well as satellite services and cable networks.