

## INTRODUCTION

Copyright and neighbouring rights (related rights) are one of the major areas for debate in the contemporary world. The concept of 'broadcasting reproduction right', is comparatively new to the traditional copyright notion. It is a form of intellectual property designed to reward and promote the production of intellectual works in relation to the development of information and communication technology. Generally, the rights of performers and broadcasters are protected under the 'copyright law' against the unauthorized use their performances and signals. 'Neighbouring rights' are a distinct form of intellectual property right. The term is used to indicate rights of performers and producers to be compensated when their performances and recordings are performed publicly, broadcast, rented out or reproduced. The purpose of 'neighbouring rights' is to protect the interests of certain persons or legal entities that either contribute in making creative works available to the public or produce subject matter that is considered worthy of copyright-like protection, which is not original or creative enough to qualify as a work under a national copyright system.<sup>1</sup> The beneficiaries of neighbouring rights are generally producers of phonograms, performers and broadcasters.

Before proceeding further, to have a conceptual clarity, it is indispensable to distinguish between 'broadcasting rights' and 'broadcast reproduction rights.' Freedom of speech and expression enshrined in article 19(1) (a) of the Constitution embraces the right to propagate one's views through the print media or through any other communication channel including radio and television. Article 19(1)(a) thus covers right to telecast and broadcast one's views to the viewers or listeners through electronic media. This 'broadcasting right' is a fundamental right of each and every citizen.

However, the Copyright Act, 1957 uses the term 'right to broadcast' in a different context. In section 14, while dealing with the meaning of

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1 Viviana Munoz and Andrew Chege, "The Proposed WIPO Treaty on the Protection of Broadcasting Organization: Are New Rights Warranted and will Developing Countries Benefit" South Centre, September (2006).

copyright and economic rights of the owners of copyright, the Act confers to owners of works the exclusive 'right to communicate the work to the public'. Similarly, section 38A(a)(iii) confers 'right of communication to the public' as an exclusive right of the performers. Section 2(ff) of the Act defines 'communication to the public' as making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available. The explanation to this definition clause clarifies that communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public. This definition clause addresses the broadcasting rights of both the authors and the performers. Section 38A(b) further confers right to broadcast or communicate the performance to public. Thus in the scheme of copyright law, right to broadcast is an exclusive right conferred to owners of copyrighted work and performers of performances with respect to their work and performances respectively. In the notion of copyright law, the former is falling under the copyright law and the latter falling under the neighbouring rights.

On the other hand, under section 37, the Copyright Act deals with 'broadcasting reproduction rights' of broadcasting organizations. This is altogether a different right addressing exclusively the special right called "broadcast reproduction right" of broadcasting organizations. The broadcast reproduction right in relation to any broadcast comprises of right to (a) re-broadcasts the broadcast; or (b) cause the broadcast to be heard or seen by the public on payment of any charges; or (c) make any sound recording or visual recording of the broadcast; or (d) 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; or ((e) sell or give on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to in clause (c) or clause (d). It is also interesting to note that the duration of right to broadcast the work of copyright owners (lifetime plus sixty years), the performances of the performers (fifty years) and duration of broadcasting reproduction right of broadcasting organizations (twenty five years) are different.

These rights can further be distinguished from broadcasting rights of sports events<sup>2</sup> to which inter alia the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 would apply.<sup>3</sup>

The law of broadcasting in India has been governed by a disparate set of regulations and guidelines along with obsolete British era legislation like the Telegraph Act, 1885. Indian Copyright Act, 1957 has been borrowed extensively from the Copyright Act, 1956 of the United Kingdom. This Act has been amended six times since its enactment.<sup>4</sup> The Indian Copyright Act today is compliant with most international conventions and treaties in the field of copyrights. India is a member of significant international treaties concerning copyright including the Berne Convention of 1886, the Universal Copyright Convention (UCC) of 1952 and the TRIPs Agreement of 1994.<sup>5</sup>

Broadcasting constitutes a large segment of mass media. Through broadcasting the media plays a fundamental role in providing knowledge and information to the people. It is a powerful means of exerting influence in society. Broadcasting has been traditionally conceptualized as a 'public good',<sup>6</sup> which means that the effort and cost required in providing it to one person is the same as it is provided to many.

In the present international framework broadcasting organizations have legal protection only over the transmissions made through wireless means (satellite). They enjoy a certain level of protection against signal theft<sup>7</sup> under the existing international regimes, namely

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- 2 The broadcasting of sports events is the coverage of sports as a television program, on radio and other broadcasting media.
  - 3 See S. 3 of the Act which mandates mandatory sharing of certain sports broadcasting signals: No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct- to- Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re- transmit the same on its terrestrial networks and Direct- to- Home networks in such manner and on such terms and conditions as may be specified.
  - 4 Amendments were made in 1983, 1984, 1992, 1994, 1999 and 2012.
  - 5 Though India is not a member of the Rome Convention of 1961, the Copyright Act, 1957 is fully compliant with the Rome Convention.
  - 6 *The Secretary, Ministry Of Information & Broadcasting v. Cricket Association of Bengal* (1995) 2 SCC 161.
  - 7 Using signals without the authorization of broadcasters, which could cause the economic losses for broadcasting organizations.

the Rome Convention 1961,<sup>8</sup> Brussels Satellite Convention 1974,<sup>9</sup> TRIPs Agreement 1994,<sup>10</sup> WIPO Performers and Phonograms Treaty (WPPT) 1996<sup>11</sup> etc.

In India protection to broadcasting signal was not originally envisaged under the Copyright Act of 1957. However, Copyright Amendment Act, 1994 introduced the notion of "broadcasting reproduction rights" in India. In the landmark judgment of *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*<sup>12</sup> the Supreme Court has considerably widened the scope and extent of the right to freedom of speech and expression and held that the government has no monopoly on electronic media and that under article 19 (1) (a) a citizen had the right to telecast and broadcast to the viewers through electronic media. The government could 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. The Supreme Court noted that 'airwaves' were 'public property'. Their use had to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. The only legitimate role for the state in this regard was that of a trustee. The Supreme Court, confirming the order of Calcutta High Court, held that monopoly over electronic media was inconsistent with the right to freedom of speech and expression.<sup>13</sup>

There is a surge in litigations regarding broadcasting rights recently. In 2006, Doordarshan used its clout with the Ministry for Information and Broadcasting, to promulgate an ordinance,<sup>14</sup> which made it

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8 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.

9 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.

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

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

12 (1995) 2 SCC 161.

13 *Ibid.*, wherein it was suggested that suitable amendments should be made to the Indian Telegraph Act keeping in view of modern technological developments in the field of information and communication.

14 Ultimately the Government passed the 'Broadcasting Signal Ordinance, 2007' which compels other broadcasters to license their broadcast rights to DD in the case of a sporting event of national interest. It provides mandatory sharing of signals with Prasar Bharati; See the Ordinance issued by Government of India on February 1, 2007.

mandatory for private television channels to share their live feed of the official one day international (ODI) matches and the 'Twenty20' ties and some other test matches, with the national broadcaster Doordarshan (DD). On the contrary, private television channels had paid substantial amounts to secure telecast rights to all of those matches.<sup>15</sup> A dispute took place between Nimbus Sports and DD in January 2007 regarding the broadcasting right over the second ODI between India and West Indies. Nimbus filed a petition before the Delhi High Court for preventing DD from using footage of its exclusive right. But in its provisional order, the court directed Nimbus to provide feed to DD, to telecast it on DD International and its DTH service. The cricket feed to DD was however, to be at a delay of seven minutes. Considering the popularity of sports events in India, especially cricket, the judiciary and the government always manage to force private broadcasters into sharing their signal with national broadcaster DD. Another incident in this regard is quite unique: the national broadcaster DD filed a petition in the Delhi High Court against private news channels for using the unauthorized recording of the Beijing Olympics which was the exclusive right of DD. Prasar Bharati successfully obtained an order from the Delhi High Court restraining all private news channels from sharing Doordarshan's footage of the Beijing Olympics, unless they enter into a commercial agreement with Prasar Bharati and the Indian Olympics Association. DD paid around \$3 million for the exclusive broadcasting right to the Beijing Olympics Organizers, and argue footage beamed by other channels damages its commercial interests. So the national broadcaster is set to claim damages of around Rs.5 crore from over a dozen news channels for illegal usage of their signals.

Referring to the Prasar Bharathi Broadcasting Corporation of India Act, 1990 the Court said that it could not be brought into force because the Government did not choose to issue a notification for its enforcement. The court directed to the Government to set up an independent autonomous authority which would free Doordarshan and *Akashvani* from the shackles of Government control and ensure conditions in which the freedom of speech and expression could be meaningful and effectively enjoyed by one and all. However, disputes over the transmission and ownership of broadcasting signals become regularly raised before the Supreme Court and different high courts in India. So the need for a comprehensive legislation in this area has

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15 Nimbus Communications has paid \$612 million to BCCI for getting the exclusive broadcasting right of cricket from March 1, 2006 to March 31, 2010.

certainly been felt. This proliferation of litigation in sports, especially cricket may spread to education and dissemination of information in future.

In an era of globalization, the sphere of Government control is shrinking in many fields. But globalization is going hand in hand with legislation by bringing more international regimes to control national governments further and to provide MNCs with more legal security. The primary objective of media regulation in a democratic country is to protect the citizens' "fundamental right to information and freedom of expression". Broadcasting constitutes a large segment of mass media<sup>16</sup>. The media plays a fundamental role in providing knowledge and information to the people and acts as a powerful means of influence in society. Broadcasting has been traditionally conceptualized as a 'public good'<sup>17</sup> which means that the effort and cost required in providing it to one person is the same as it is in providing it to many. Because of the existence of many languages and a ceiling of 20% for FDI in Indian broadcasting industry, neighbouring rights is an area untouched by the legislators due to little competition from MNCs. But of late cricket is becoming a religion, and MNC's have started to buy copyright on broadcasting cricket because of their commercial value. Complainants refer international regimes to substantiate their claims. It has become the responsibility of the judiciary to fill this gap through various pronouncements. But international rules *vis-à-vis* neighbouring rights are itself in a fragmented conglomeration of rules borrowed from various international treaties like Rome Convention, TRIPS, WPPT, WCT etc. What makes the situation gruesome for India is the attempt of WIPO to give more tooth to neighbouring right of broadcasters.

WIPO is in the process of drafting a separate treaty for protecting the interests of the broadcasting organisations. The proposed treaty is hoped to increase the level of international protection of broadcasts, both as regards protected subject-matter and the scope of granted rights. This treaty's exclusive "rights-based" approach would create new intellectual property rights, such as rights in broadcast signals, which would be layered upon existing copyright in the underlying

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16 When one imparts ideas and information "to whom it may concern" through some mechanical or electromechanical means, usually rapidly, over considerable distance, to a large and essentially undifferentiated audience, and when there are many copies of the message (duplicates of a newspaper or individual television sets tuned in)—then we have *mass* communication. See Sterling and Kittross 6 (2002).

17 See (1995) 2 SCC 161.

program material (content).

In India, the Broadcasting Bill was introduced in 1997. The Subsequent Broadcasting Services Regulation Bill, 2006 and 2007 were also failed. The Communication Convergence Bill, 2001 introduced in the Lok Sabha could not be converted in to law. The Indian Telecom Ministry is working on a new Convergence Bill for setting up a framework to govern transmission of telecom and broadcasting services on common network. The Copyright Amendment Act, 2012 had considerably widened the scope of neighbouring rights in India though the rights of broadcasting organizations have not been restructured as in the case of performers' rights. The changes brought about by the 2012 amendments have been explained in the respective chapters.