



ECONOMIC RIGHTS OF BROADCASTING ORGANISATION UNDER COPYRIGHT

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Dr. Charu Dureja, Assistant Professor Law, Rayat College of Law, Ropar, Punjab

Abstract: *Earlier the economic rights were not granted to the broadcasting organisation under the Copyright Act. The reason being that in most of the cases of that time, sound and television broadcasts were 'live' transmitted and because of their ephemeral nature, they could not fit into the then existing categories of copyright subject matter, which required that the subject of copyright should be reduced to writing or be in tangible form. The Broadcasting organisations are the via-media through which the public gets to see the content made by a production house. Unlike copyright, the broadcaster's rights are not based upon a creative contribution to the work. They are rather based on the protection of the broadcaster's investment, and are obtained simply by broadcasting the work to the public. The paper deals with the questions such as what are the economic rights of broadcasting organisation, why they have been acknowledged and granted so late under the Indian legislation.*

Key words: *Economic, broadcasting, Copyright, live, transmitted, ephemeral, via-media, protection*

INTRODUCTION

Broadcasting in India actually began about 13 years before the All India Radio (herein after AIR) came into existence. In June 1923 the Radio Club of Bombay made the first ever broadcast in the country. This was followed by the setting up of the Calcutta Radio Club five months later. The Indian Broadcasting Company came into being on July 23, 1927, only to face liquidation in less than three years. In 1936, the first Indian Public sector audio broadcaster namely, All India Radio was established¹. In 1976 began the audio-visual State run broadcaster, Doordarshan². The Indian Broadcasting Industry took a large leap with the advent of new technologies like, satellite broadcasting, cable television, frequency modulator radio etc. Now, there are many broadcasting organisations plying in the industry like, Colors, Star, Zee, FM Radio etc. They buy the content from the production house and by applying necessary editing and additions like advertisements; they broadcast the content to



the public. Earlier, the broadcasting was under the control of the Government because there were only All India Radio and Doordarshan which were state run broadcasters but with the privatisation and de-regulation of broadcasting in India many new broadcasting organisations came into existence and the quality of the television and radio too has enhanced with the advancement of the technology.

BACKGROUND TO ACKNOWLEDGEMENT OF RIGHTS OF BROADCASTING ORGANISATION UNDER COPYRIGHT LAW

The concept of broadcasting organisation's rights is comparatively new in comparison to copyright protection for literary, artistic, dramatic, musical and artistic works. The pre-1957 Copyright law did not provide protection to broadcast. These rights were recognised in India for the first time in the year 1994³. The reason being that in most of the cases of that time, sound and television broadcasts were 'live' transmitted and because of their ephemeral nature, they could not fit into the then existing categories of copyright subject matter, which required that the subject of copyright should be reduced to writing or be in tangible form⁴. At international level also, protection to broadcast was given at a later stage. The broadcasting organisations were either department of state, or public corporations or commercial organisations. They required licence in order to operate. Their proximity and influence on government was far too great than that of the author, publisher or performer of a copyright work. They performed public service and their task was cultural, artistic as well as being of a leading agency of news and current affairs. Therefore, their problem could be solved at two levels only i.e. either at diplomatic level or at international level, whereas copyright is in its essence the exercise of private right. In early days of broadcasting i.e. 1930's and 1940's the interest of broadcasting organisations solutions based on copyright were of prime importance to them. They were also rapidly becoming one of the largest users of copyright works⁵.

In 1950s, the broadcasters represented by European Broadcasting Union actively participated in the preparatory work for the Rome Convention, 1961. This period did, however, also see the advent of television which made broadcasting organisations the largest single user of copyrights of all kinds (news, literature, drama, music etc). The broadcasting organisations felt several anxieties about their rights in broadcast in 1950s and



1960s. As a consequence of this, several agreements were entered into to protect their rights. These agreements included European Agreement on the Protection of Television Broadcasts, 1960; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, 1961; European Agreement for the Repression of Broadcasts Effected by Stations Outside any National Territory, 1965; and Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite, 1974. In the second half of the century, two new developments took place in the field of broadcasting and communications i.e. satellite broadcasting and cable television⁶. The Rights of the Broadcasting Organisations have been provided in Chapter VIII of the Copyright Act, 1957.

MEANING OF BROADCAST AND BROADCASTING ORGANISATION

The term 'broadcast' is defined under section 2(dd) of the Copyright Act, 1957 as: communication to the public –by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or by wire, and includes a re-broadcast⁷. The term communication to public⁸ means that the work must be seen, heard or enjoyed by the people at large. It need not be a live performance i.e. it can be transmitted through satellite or cable and can either be seen simultaneously at various places together or even at a chosen time by the individual. It implies that electronic transmission is included in the definition. The term 'satellite transmission' has not been defined under the Copyright Act, but includes the distribution of multimedia content or broadcast signals over or through a satellite network. The broadcasts signals usually originate from a station such as a TV or radio station and then are sent via a satellite uplink (uploaded) to a geo-stationary artificial satellite or redistribution or retransmission to other predetermined geographic locations through an open or a secure channel. Downlinks are then received by base stations such as small home satellite dishes or by base stations owned by the local cable network for redistribution to their customers⁹. Thus, the satellite broadcasting uses the satellite technology to deliver the content i.e. video, audio, data, music etc.

The word communication by cable has been used in the explanation of Section 2(ff) of the Copyright Act, but no definition has been provided under the Act. In the cable transmission, the signals are transmitted by cable to the individual television sets. The essence of cable



television is that not the original broadcasting organisation but a local party who transmits signals from a simple aerial to more than one television set located in different places such as rooms in hotels and houses in a city¹⁰. Thus, from the conjoint reading of both Section 2(dd) and Section 2(ff) of Copyright Act, 1957, it can be said that broadcast means when a work has been transmitted by wireless means or through cable to people to see, hear or enjoy, which can be seen, heard etc. simultaneously by a number or people at different places or at different times and places chosen by them. It is pertinent to mention here, that though the title of Chapter VIII of the Copyright Act is 'Rights of Broadcasting Organisation and Performers', the term 'Broadcasting Organisation' has not been defined under the Copyright Act. According to Article 2(c) of the WIPO draft basic proposal for the Protection of Broadcasters by the Chair of Standing Committee on Copyright and Related Rights,

'The Broadcasting Organisations are those organisations which are engaged in the activity of broadcasting'¹¹.

However, the definition of Broadcasting Organisation has been provided under the Finance Act, 1994 as:

Any agency or organization engaged in providing service in relating to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or any person who acts on its behalf in any manner, engaged in the activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multisystem operator or any other person on behalf of the said agency or organisation'¹².

Thus, the Broadcasting organisations are the via-media through which the public gets to see the content made by a production house. The broadcasting organisations have been provided with the economic rights under the Copyright Act. Within the ambit of copyright,



broadcasting organizations are given some special economic rights for the protection of their investment. Unlike copyright, the broadcaster's rights are not based upon a creative contribution to the work. They are rather based on the protection of the broadcaster's investment, and are obtained simply by broadcasting the work to the public. Although, the broadcast itself is treated at par with an original work, capable of copyright protection, the copyright in the work or the content underlying the broadcast is unaffected by the broadcast reproduction right¹³.

The Delhi High Court has stated that as per Clause 11 of the ***Statement of Objects and Reasons of the Copyright Act***, the broadcasting reproduction rights were akin to the rights of a copyright holder¹⁴

Clause (11): Certain rights akin to copyright are conferred on Broadcasting authorities in respect of programmes broadcast by them.

Thus, the Legislature itself by terming broadcast rights as those akin to copyright clearly brought out the distinction between the nature of two rights in Indian Copyright Act, 1957. This was a clear manifestation of the legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. Further, it is to be seen that the Amendment Act of 1994 while amending the Act not only extended such rights to all Broadcasting Organizations, but also clearly crystallized the nature of such rights. Hence, in our view, the contention of the respondent that the broadcast reproduction right as a special right, does not stand de hors copyright and that the two rights are not mutually exclusive, cannot be sustained as it is clearly seen from the legislative intent that the two rights though akin are nevertheless separate and distinct.

Section 37 of the Copyright Act provides the Broadcast reproduction right as:

- (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 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 licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof-
- (a) re-broadcast 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 licence or, where it was licensed, for any purpose not envisaged by such licence; or
 - (e) sells or gives 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)¹⁵.

Basically, Section 37 of the Copyright Act is negatively worded. It does not tell specifically as to what are the rights of a broadcasting organisation, but provides what the other person cannot do in relation to a work of a broadcasting organisation. Thus the rights of broadcasting organisation are: to re-broadcast the broadcast i.e. once a broadcasting organisation has broadcasted the work, it is only he, who has the right to re-broadcast it and none else. The broadcasting organisation can take payment for the broadcasted work from the public for providing the content. The broadcasting organisation can make sound recording or visual recording of the broadcast.

Reproduction of a broadcast involves making copies of the work or copies of the fixation of the broadcast. Whereas, re-broadcast is strictly limited to simultaneous broadcasting of a signal belonging to some other broadcasting organization. To put it plainly, re-broadcasts are limited to the phenomenon of signal piracy like that of an unauthorized transmission of live cricket match and is possible only for the time period during which the signal subsists. Reproduction, on the other hand, involves capturing the signal or the broadcast in some tangible form, recording or storing it in some form and transmitting it at some other point of time after the initial broadcast has been made. The position of Indian law is unclear because there is no express distinction recognized by the Act. Although the Act bars visual or sound recording of the



broadcast, later transmission is not a requirement to constitute a violation of reproduction right under the Act¹⁶.

In *New Delhi Television Limited v. Icc Development (International) and another*,¹⁷ the respondents instituted a suit seeking permanent injunction to restrain the appellant from infringing their copyright in the broadcast of the cricket matches organized by ICC as also the reproduction rights therein. As per the plaint, International Cricket Council (ICC) organizes cricket events and the first respondent, ICC Development (International) Ltd. owns and controls the commercial rights in the said cricket events. A lot of money is spent in organizing the tournaments and persons sponsoring the tournaments have a right to claim exclusive association with the tournament. Those who advertise their products during the performance of the tournament, on the field when the match is played and on the air when the match is broadcasted have an unequivocal right to protect their commercial interest and none can predate thereon. It is pleaded that ESPN (Mauritius) Ltd. has acquired the broadcasting and the reproduction rights from respondent No.1 for all cricket members organized by ICC till the year 2015 as per an exclusive licence agreement dated July 11, 2007. Thus, the latter, acts as host broadcaster and provides broadcast services in the form of making live transmission, recording, editing and in the process produces a broadcast feed, which includes a host of alterations to the live feed such as virtual graphics, bowling analysis, players statistics etc. The latter has the exclusive broadcasting rights for ICC events which include, but are not limited to, making live transmissions, deferred transmissions and/or delayed transmissions on designated channels and designated websites by means of any delivery system and any permitted payment mechanism together with commentary in any language. ICC Development (International) Ltd. claims to own the copyright in the footage i.e. recording. ESPN (Mauritius) Ltd. claims the right as a licensee to the exclusivity to record edit and use footage for the purpose of making and transmitting highlights/clippings in television shows relating to cricket organized by ICC.

The Court observed that, the organizers of the tournament spend millions of dollars to pay money to the participating teams. It pays special prize money for the team which comes first, second, etc. Then, special prize money is paid for the Man of the Match, at each match, for the best catch etc. by the sponsors of the tournament or the match. A special prize for the Man of the Series, the best batsman of the series, the best bowler of the series is paid.



And these are by the sponsors of the tournament. These sponsors pay money to ICC, apart from paying money for the special prizes. This is done to cash upon the goodwill generated by the cricket tournament. Then, people pay money for their product to be advertised on the field or off the field, within the precincts of the cricket stadium. They pay huge sums of money because they know millions of viewers, while seeing the broadcast or the footages re-played, would simultaneously be seeing their advertisements. Advertisers pay during commercial breaks when the match is on. To put it pithily, money flows from different channels to the organizers of the cricket tournament and from this reservoir the organizers of the cricket tournament spend money; which flows out, for the tournament to be held.

Thus, when the tournament is on, any association by a third party, with respect to the footages of the tournament would ex-facie be competing and simultaneously exploiting the copyright of the copyright owner i.e. the broadcaster with the right of reproduction, in that, the potential customers of those who have invested would be predated upon. Such activities i.e. special events would clearly infringe the rights of the broadcaster which would include the reproduction rights when footages are used and along therewith commercial advertisements are put on the air and in particular where the commercial advertisements are specially targeted for the programmes in question. In the world of media reporting, the dissemination of news pertaining to the event of a wicket falling or a century being scored, would encompass not only the audio mode of dissemination but even the visual mode of dissemination and thus such kind of events, i.e. momentary events which remain news for momentary durations are entitled to be diffused so as to reach the audience by TV channels with limited footage, restricted to the fall of the wicket or the scoring of the milestone run. Logic and reason demands this. The interest of the consumer i.e. the viewer also demands this.

In relation to a match or an inning, with respect to specially designed sports news programmes i.e. where TV channels have specially designed the news programmes and have earned advertisement revenue to advertise products of third parties, it would constitute an act of infringement if footages are used of the sports event and simultaneously, sitting within the special programme, advertisements are put on the air. The reason is that the broadcasters themselves, having a right to do so, earn revenue by putting on the air specifically designed shows in which the footage is used. It would be a case of unfair



competition if during the special sports news programme of TV channels, other than broadcasters or those who have acquired rights from them, they use the footages, for the reason the same viewers may be predated upon. Further, on issues pertaining to injunctions, even third party rights being adversely affected have to be kept in mind. Those who have obtained time slots to have their product put on the air by way of advertisement during immediately before, the currency of the match and immediately thereafter, would be losing on the viewership and thus would be adversely affected, in the context of the revenue paid by them to either the organizers of the tournament or the broadcasters. Thus, the TV channels would have two options, only one of which can be opted for in relation to special sports news programmes. Firstly, to opt to put on the air, an advertisement specifically targeted during special programmes, and not to use the footages. Secondly, to opt to put on the air the footages, but not put on the air any advertisements. The choice would be theirs. It was held that recording the broadcast and transmitting it later would amount to infringement of broadcast reproduction rights.

In *Aasia Industrial Technologies v. Ambience Space Sellers Ltd.*¹⁸, the 2nd plaintiffs were owners of copyrights in various programmes which were produced in India. The 2nd plaintiff had given an exclusive licence to the 3rd plaintiff to broadcast those programs on a T.V channel. This broadcast was made from Hongkong to the "Asian Footprint" of "Asiaset I". This included free to air program. This means that the viewers were not charged for watching the program. As this was free to air program the expenses were met through advertisements. The 1st plaintiffs were the sole agent, who procured it for the 3rd plaintiff's advertisements in India. The 3rd plaintiffs after receiving the program from the 2nd plaintiffs and the advertisement from the 1st plaintiffs combined the two and broadcasted the programme on the Zee TV Channel. The advertisers choose programs, in which to advertise, according to their popularity and time of showing. Also, it need not be stated that an advertiser will expect that his advertisement is shown during programme. The defendants were two companies which own, control and operate Cable Television Networks in several cities. Thus instead of individual viewers having their own separate dish antennas, the cable operators have common dish antennas and other equipment for deploying the signals by means of wire to viewers for a charge.



With the sophisticated equipment which is now available Cable Television Networks are in a position to blank out/ switch off the signals sent by various broadcasters and interpose their own program or material. The plaintiffs alleged that the defendants were blanking out the plaintiff's advertisements and substituted their (i.e. defendants) advertisements during the period that the plaintiffs were broadcasting their advertisements.

The Bombay High Court observed: 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 right 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 '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 rebroadcast 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 plaintiff's programmes nor cause it to be heard or seen by the public on payment of charges without licence from the plaintiffs. It was submitted that since the plaintiffs programme was 'Free to Air', the defendants did not need a licence. However, it is required to be noted that the programme is 'Free to Air, the defendants did not need a licence. However, it is required to be noted that the programme 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 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 plaintiff's 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.

In *ESPN Star Sports v. Global Broadcast News Ltd*¹⁹, The entire dispute hinged on the plaintiff's allegation about its exclusive broadcast reproduction rights. The Plaintiff, ESPN Star Sports which was engaged in the production and the telecasting of sports channels, sought permanent injunction against the defendants (various broadcasters running several news channels including 'CNN-IBN', 'NDTV 24x7' etc. to restrain them from utilizing the footage of the plaintiff, in the matches played, and to be played during the India-Australia test matches, 20x20 series and the tri-series, one day internationals involving Sri Lanka, India and Australia, without obtaining its prior permission and in violation of the plaintiff's terms and conditions and from utilising the footage from the television for any television programme, except for regularly scheduled news bulletin, in excess of 30 seconds per bulletin and a total of two minutes per day and from carrying any advertisements before, during and after such footage. The plaintiff averred that it had obtained the sole and exclusive rights/licence from various sports bodies including but not limited to Cricket Australia to televise sporting events including the India versus Australia cricket test matches, one day international (ODI) matches and the solitary T20 cricket match to be played in Australia from December 26, 2007 to March 8, 2008. Therefore, no other person or entity could broadcast those cricket matches in India without licence from the plaintiff or its sole and exclusive distributor ESPN Software India Private Limited. The plaintiff claimed that the defendants were unauthorized to telecast the signals of matches, which was inconsistent with their primary obligation of being news based channels, and they had allegedly used, without authority substantial portions of the plaintiff's footage of its Star Cricket channel, which had telecast the test matches exclusively, from December 26, 2007 to January 28, 2008. It was also alleged that the defendants used the footage for creating programmes



which they commercially exploited. In short, the entire case was based on the plaintiff's allegation about its exclusive broadcast reproduction rights.

As per the plaintiff, broadcast reproduction rights are special class of rights, recognized under Chapter VIII of the Copyright Act. As Section 37(3) provides, in clauses (a) to (e) acts deemed to be infringement of broadcast reproduction rights, the unauthorised telecast of footage belonging to the plaintiff, by the defendants, amounted to re-broadcast under Section 37(3)(a) and also reproduction of the event under Section 37(3)(d). The only exception recognised under Chapter VIII of the Act was the use, consistent with fair dealing, excerpts of any programme, in the broadcast of current event or bonafide review for teaching and research, embodied in Section 39(b). It was submitted that the use of footage for hours at an end aggregating to between 10 to 16 hours in a span of 3-4 days, as indulged by the defendants, can never be considered as fair dealing and was in any event not bonafide. The court observed that whenever a court has to see whether a particular conduct is 'fair dealing' or not, the context, the length of the original work borrowed, and the purpose, can never be ignored. The plaintiff cannot be granted the ad-interim injunction sought for. The mandate of Section 61(1) applies in case of claims for infringement of broadcast reproduction rights; the non-impleadment of the owner of copyright is fatal to the maintainability of the suit.

Convergence, in broadcasting means, combining of all types of media, in digital form, is the most debated developments in the media over the past decade or more.²⁰ We live in a digital age in which it is possible to have a much higher capacity of traditional and new services to be transported over the same networks and to use integrated consumer devices for purposes such as news, telephony, television or computing.²¹ In this digital age the content is not confined to one particular media. The content has become adaptable and can be accessed through different media due to convergence. The dispute between Star India and some telecom service providers in the Supreme Court is a classic example of the effect of convergence. Star India had acquired exclusive rights from the BCCI to exploit the information related to cricket matches through broadcasts and also all other methods like Internet and Mobile Rights.²² Therefore, Star had obtained interim injunction against the mobile service providers from disseminating live scores of matches through SMS on a fixed service charge.



The Copyright Act, 1957 recognises broadcasting organisation's work as a derivative work and not as an independent work as provided under the United Kingdom Copyright, Design and Patent Act, 1988. In India these rights subsist for twenty five year next following the year in which the broadcast is made where as in the United Kingdom the term is for fifty years.

CONCLUSION AND SUGGESTIONS

After comparing the laws of India, UK and it can be concluded that the persons or organisations who help in communicating the creation of an author to public at large are called neighbours to the author and have been provided with certain rights under the law, which are called neighbouring rights. The neighbouring rights are the derivative works but are no less than the copyright. It was not until 1994 that the Indian Copyright law give recognition to the rights of broadcasting organisation and that too only the economic rights were recognised and not the moral rights. Moral rights have not been attributed to the broadcasting organisation because these rights are generally granted to the individuals and not to an artificial being, which a broadcasting organisation is. Although, the Copyright Act provides the rights of broadcasting organisation but the legislature has forgotten to define the broadcasting organisation in the Act. According to me, legislation and that too a special legislation should start by defining and explaining the meaning of all the important terms, when a special chapter has been assigned to that particular term, implying there by that it is of special importance. The neighbouring rights of the broadcasting organisation include the reproduction right, which shall subsist for twenty five years. The organisation has been provided with the right of re-broadcasting the broadcast. It is worth mentioning here that there are gaps in the legislation which must be fulfilled by the Indian Judiciary through judicial pronouncements, however, even the international rules regarding the broadcasting organisations are fragmented as can be seen from studying the various treaties and conventions such as TRIPS, WPPT, WCT etc.

Because of no proper international rules and guidelines regarding broadcasting organisation the World Intellectual Property Organisation is in a process to draft a separate treaty for protecting the rights of broadcasting organisations. This treaty may enhance the of protection level of broadcasts internationally with regard to subject-matter as well as rights including rights in broadcasting signals, on which the laws are as of now silent. The



Copyright Amendment Act, 2012 has considerably widened the scope of neighbouring rights in India however no changes or amendments have been brought about with reference to the rights of broadcasting organisation.

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