SCOPE OF RIGHTS OF BROADCASTING ORGANISATIONS UNDER COPYRIGHT ACT, 1957

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ABSTRACT

Rights of broadcasting organisations envisaged by the Indian Copyright Act, 1957 as amended in 1994 are a set of exclusive rights given to broadcasters. These rights are essentially neighbouring rights, which do not protect the copyright in the work but the broadcast itself. This essay examines the story of broadcasting rights until and after the introduction of the latest 2012 amendment in the Copyrights Act, 1957, the oldest existing intellectual property rights legislation in India. It criticizes the exclusive rights based approach of the Indian law and suggests that a ‘signal’ based approach is best suitable for a developing country like India. The essay also examines the case laws concerning rights of broadcasting organizations and suggests that the approach of Indian courts is more in consonance with the ‘signal’ based approach. The authors also attempt to clarify the position of Indian laws with respect to the growing influence of the Internet and webcasting over broadcasting organizations.

Keywords: Broadcasting rights, neighbouring rights, ‘signal’ based approach.

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1. INTRODUCTION

“Broadcasting is really too important to be left to the broadcasters,” said Tony Henn. Broadcasting began, essentially in the hands of very, very few players. Then the network came along and rules were formulated to protect that concentrated group. All around us, we see monopolizing of broadcasts by a few. This essay examines the story of broadcasting rights until and after the introduction of the latest 2012 amendment in the Copyrights Act, 1957, the oldest existing intellectual property rights legislation in India.

In today’s “knowledge society,” a country’s social and economic development depends heavily on the production, dissemination and absorption of information and knowledge. Most of the information reaches the public through radio and television. Broadcasting ensures that information reaches even the remotest parts of the country. This has been possible due to the progress in the field of digital technology resulting in a technological convergence between the three foundations of communication-telecommunications, multimedia and broadcasting informatics.

India is the third largest broadcasting market in the world, and it constitutes a great chunk of the mass-media industry of the world. Thus, broadcasting industry forms the crux of cheap and quick data transmission to all segments of the society and holds enormous potential for increasing access and wide dissemination of works. It is a powerful means to exert influence in the society. This is where we need a regulatory framework rigorous enough to match the skyrocketing pace of technological development in the domain.

The exclusivity of the broadcasting rights has long been under debate. Conferring exclusive broadcasting rights gives the developer sole rights to exploit his product but this has been perceived as being anti-competitive as the licensing and ownership of these rights act as legal barriers to competition. Yet another contention is that they act as an un-

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1 Viviana Munoz Tellez and Andrew Chege Waitara, “A Development analysis of the proposed WIPO Treaty on the protection of broadcasting and cablecasting organizations”, p.13
natural interference with the market forces. One issue that this essay attempts to address is the lacuna in the copyright law that treats broadcasting rights at par with the original dramatic/literary work. The motive behind copyright law is to encourage productivity and creativity. However, little or no creativity is added at the level of broadcasting. If so, why should broadcasting organizations be offered the exclusive rights to re-transmit broadcasts? Not only is this against the jurisprudence behind copyrights but also it hinders the free flow of information that is essential for public discourse. This essay criticizes broadcast reproduction rights conferred to the broadcasting organization as per S.37 modified by the 1994 amendment to the 1957 Act, which adds an extra barrier to re-use.

2. RIGHTS OF BROADCASTING ORGANISATIONS IN INDIAN LAW

The rights of broadcasting organisations in India are primarily governed by the Indian Copyright Act, 1957. The amendments made in 1994 introduced the rights of broadcasting organisations in copyright law that was further amended in 2012 to extend the scope of the rights granted to broadcasting organisations.

Every broadcasting organization has a special right called “broadcast reproduction right” in its broadcasts. The rights subsist for twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. For example, twenty-five years will start from 01.01.2013. During this period the broadcasting organization’s exclusive rights are said to be infringed if any person, without license:

a) Rebroadcasts 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

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5 Id.
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 of such rental, any such recording or visual recording referred to clause (e) or clause (d).

However, Section 39 provides for fair use of the broadcast like reporting of news, bona fide research and also includes all the other fair use cases referred to in Section 52.

Further amendments were made in 2012 which granted statutory license to broadcasting organisations desiring to broadcast already published literary, musical works or sound recordings. They can now do so provided they fulfill certain conditions like paying royalties to right owners as per the rates fixed by Copyright Board, mentioning names of performers or artists in the broadcast among others.

2.1 Statutory License Introduced by 2012 Amendments

Section 31D introduced by the Copyright (Amendment) Act, 2012 grants a statutory license to broadcasting organisations desirous of broadcasting already ‘published’ literary or musical works and sound recordings. The broadcasting organisation shall give prior notice to the right holders and pay royalty at the rates fixed by the Copyright Board. The names of authors and performers shall be announced during the broadcast. The broadcasting organisation shall maintain all records of the broadcast, books of account and render them to the owner. Before the introduction of Section 31D, access to copyright works by broadcasters was dependent on voluntary licensing. As a result, the copyright owners and societies were imposing unreasonable terms and conditions. The sole purpose of this section seems to be to allow the broadcasting organisations to synchronize musical works with their visual broadcasts. For example, TV serials can now use film songs in synchronization with their visuals.

Visual works have been excluded from this section. So it is unclear how licensing will work for broadcasting of film clips or visuals. Also, this amendment does not clarify whether a broadcast of a literary or musical

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work is itself a published work. Going by definition a broadcast can be considered a ‘published work’ as it is communicated to the public by means other than by issuing copies. But this stands in contradiction to the exclusive reproduction rights given to broadcasting organisations giving rise to ambiguity.

Super Cassettes Industries Ltd. has challenged the constitutional validity of Section 31D of the Copyright Amendment Act, 2012 along with Section 31(1)(b). It argued that the provision discriminates between copyright owners and broadcasters because the owners are deprived of their right to license the work whereas the broadcasters are allowed to carry their business. It also singles out literary and musical works and sound recordings are leaving owners of other copyrighted works like cinematographic works and dramatic works to exploit their works commercially. There is also no provision for the copyright owners to be heard before the broadcaster avails of the statutory license, thereby violating principles of natural justice. This, Super Cassettes claimed, is capable of violating Article 14 of the Constitution. They also contended that Article 19(1)(g) has been violated since there is no incentive for third parties to enter into voluntary licensing contracts with copyright owners. The petition is presently pending before the Delhi High Court.

2.2. Comparison with US Copyright Regime

A comparative study of Indian copyright regime with other existing regimes enables us to better estimate the efficiency of the former. It is not surprising that different systems offer varying degrees of protection to broadcasters’ rights since it is dependent on its being covered within the meaning of ‘broadcast’ as defined under the applicable law. For instance, the Australian law states that the protection shall be granted only if the medium is covered under the statute regardless of its falling under the scientific or technological definition of a broadcast. Therefore, communication of a work by one private individual to another through mobile phone was not considered to be falling within the legal definition of the term “broadcast” and hence, the Australian Federal Court granted no protection.

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7 W.P.(C) No. 2316 of 2013, Delhi High Court.
8 *Australian Performing Rights Association v. Telstro Corporation Ltd.* (1994) RPC 299 (FC).
Just like all other intellectual property rights, broadcaster’s rights are also argued as being anti-competitive and hindering the natural and commercial development of new entrepreneurs. Despite the exclusive-rights approach being called as prejudicial to the commercial interests of the entire industry on an international level, it has been accepted as long as it is not inconsistent with public interest.

Unlike India, the US Constitution provides for intellectual property protection in what is commonly known was the “copyright clause.” Article 1(8) clause 8 guarantees exclusive rights to authors and inventors. However, this creates an illusion of there being a stricter copyright regime that is completely deceiving. On the contrary, in US, protection is granted only to situations of re-transmission or the copyright owner fixes copying of a live broadcast in an unauthorized manner while it simultaneously. Instances where live performances are recorded but not transmitted are not protected, since it is the simultaneous occurrence of recording and transmission of live broadcast, which is protected. Under the US Copyright Act of 1970, broadcasting by itself is merely a publication, and it is only by virtue of the distribution of copies to television stations for broadcasting which is considered an act of publication.

The US copyright setup offers minimal protection to broadcasters. This is aggravated by the fact that United States is not party to Rome Convention or TRIPS Agreement and is in clear opposition to the proposed WIPO treaty. Thus, we can conclude that although first glance leaves an impression that US has a rigid setup relative to India but reality suggests a different picture. Indian copyright law guarantees numerous positive rights to broadcasters, which the US system completely lacks.

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3.1 Nature of Broadcasting Rights

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 right.

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 holder. This terminology in itself showed that the two rights, though akin to each other, operated in exclusive and separate ambits.13

3.2 Whose right is it?

Generally an author of the original work has the right to communicate the work to the public.14 This right to communication also includes the right to communicate through a broadcast.15 Therefore, the broadcasting organization can acquire a license from the author and convert the work into a signal and broadcast it. If this is the case, clearly broadcasting organizations cannot have a right over the broadcast, it being a right of the author.

3.3 What is a ‘broadcast’ and a ‘broadcasting organization’?

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14 The Indian Copyright Act, 1957, s. 14.
As seen in Section 2.2, whether a particular broadcast is protected under the copyright law is contingent on its being covered by the definition of the term ‘broadcast.’ This is on the account of the fact that the medium of transmission must be covered under the definition.\textsuperscript{16} Thus, a particular medium of transmission may technologically be defended as a broadcast but it may not warrant protection unless it satisfies the statutory definition.

The Indian Copyright Act, 1957 does not recognize a broadcast as an independent creative work but grants ‘broadcast reproduction’ rights to broadcasting organizations. Section 2(dd) defines broadcast as follows:

“Broadcast’ 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 word ‘broadcast’ can be used in two contexts, i) as a verb describing the transmission i.e. ‘broadcasting’, ii) as a term denoting either the signal or the act of transmitting the broadcast signals. But the right to transmit the work thereby communicating it to the public is the author’s right and not the broadcaster’s right. Assuming this the ‘broadcast’ would only cover the signal and not the entire transmission.\textsuperscript{17} International conventions including the Rome Convention define the word ‘broadcasting’ and not the word ‘broadcast’ in terms of transmission of the work through wireless means. Thus in the international context the word ‘broadcast’ is used as a noun denoting the signal, which is to be protected, and the word ‘broadcasting’ is used to denote the act of transmission. Whereas, in the Indian context, it is used as a verb to demonstrate the mode of transmission of the signal. It is the right of the author to ‘have the work broadcasted (noun)” and it is the right of the broadcasting organizations to ‘broadcast’ (verb) the work.

The definition does not clarify whether the ‘diffusion’ to be considered is by analogue signals (TV and radio) alone or also by digital signals (Internet).\textsuperscript{18} However, the definition of ‘communication to the public’ conveys that satellite or cable ‘or any other means of simultaneous

\textsuperscript{16} Supra, note 4
\textsuperscript{17} Supra, note 8
communication’ where information reaches more than one household is deemed to be communication to the public. Considering this definition, Internet can be said to be a means used for broadcasting.

However, it is highly uncertain whether the new technological concepts involving digital transmission can be accommodated in the existing regime of neighbouring rights by an interpretative innovation. The Copyright Act also does not define a ‘broadcasting organization’. In today’s day and age virtually anyone with Internet availability is a broadcaster where one an upload, download, reproduce and record audio-visual content.

Since broadcast has been defined broadly, anyone communicating to the public through wireless means or by a wire can be said to be a broadcaster. Thus, the definition of broadcast lacks clarity. Instead of defining ‘broadcasting’ the legislators have defined broadcast to cover transmission of a program, which gives protection beyond what is actually entailed. Without conceptual clarity, there will be overlap between ‘broadcasting rights’ of the author and ‘broadcast reproduction rights’ of the broadcasting organizations.

3.4 What is broadcast reproduction or re-broadcast?

The Indian Copyright Act, 1957 grants exclusive right to broadcasters to reproduce the broadcast for the period for which they hold the right. The law also restricts any sound or visual recording of the broadcast. It is, however, not specified as to rebroadcast or retransmission through what medium is illegal; only through the medium in which the original signal was broadcast or through any other means. For example, if the original broadcast was of a live performance of a singer shown live on TV. If I take an audio recording of his performance and put it on the Internet, will I be infringing the broadcaster’s reproduction rights? If indeed this is illegal, then it would have a serious negative impact on the flow of information on the Internet. It will further give greater rights to broadcasting organisations to censor information under the pretext of protecting copyright in the work.

The Copyright Act does not separately define a re-broadcast but says that a broadcast includes a re-broadcast. It is unclear whether the Copyright Act prevents ‘reproduction’ of the broadcast or ‘re-broadcast’ itself or both.

19 supra, note 3, p. 87-101
The difference between reproduction and re-broadcast has been specified in the Rome Convention itself.\textsuperscript{20}

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 Act. Some High Court judgments have established that recording the broadcasts and re-transmitting the same broadcasts at a later point in time infringes the broadcast reproduction right subject to the fair use provisions.\textsuperscript{21}

\section*{4. \textbf{CONSTITUTIONAL PERSPECTIVE OF BROADCASTING RIGHTS AND JUDICIAL DICTUM}}

In the landmark judgment in Secretary, \textit{Ministry of Information and Broadcasting v. Cricket Association of Bengal}\textsuperscript{22}, the Supreme Court has unequivocally established that the freedom of speech and expression includes the right to acquire and disseminate information. The right to communicate includes the right to communicate through any means available including electronic media.

This landmark judgment involved the right of cricket match organizers to license the telecasting rights to a foreign broadcast agency. Affirming their fundamental right to do so, the Court ruled that not only the organizers have a fundamental right to disseminate the information as per their

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\textsuperscript{20} \textit{Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations} (adopted 26 October 1961, w.e.f. 18 May 1964) 496 UNTS 43.
\textsuperscript{21} \textit{New Delhi Television Limited v. Icc Development (International) and another}, 2013 (53) PTC 71 (Del).
\textsuperscript{22} \textit{Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal} (1995) 2 SCC 161.
\end{flushleft}
choice, but the people at large also have the fundamental right to acquire and receive information by means of electronic media including broadcast.

It is observed that the judgment laid down a dual right of freedom of speech and expression. Firstly, it is the right of the event organizers or the owners of copyright of the content to distribute the content and to choose the medium for the same. Secondly, it is also the fundamental right of the people to access that content by any means including electronic means. The role of broadcasting organizations is that of an intermediary who provides access to the underlying content through its broadcasts. The protection afforded to the rights of the broadcasting organizations will eventually determine the balance between the exclusivity in ownership of information and the accessibility of information.

4.1. ‘Exclusive Rights’ Based Approach versus ‘Signal’ Based Approach

The exclusive rights approach was first adopted in the Rome Convention of 1961 which granted exclusive rights to broadcasting organisations to reproduce or retransmit their broadcasts. Later, with the establishment of WTO, developing countries like India had to sign the TRIPS Agreement, which also maintained an exclusive rights approach and also provided for the enforcement of the rights and dispute, redress mechanisms in greater detail. The main proponents of the TRIPS were the developed countries like the US that were primary producers of information where information processing industry functions on a large scale. Such countries wanted to cover more types of information under intellectual property rights by granting new kinds of rights to not only the creators of original works but also to other legal entities involved in information processing industry like the broadcasting organisations. Whereas developing countries like India, which were major importers of information, were concerned more with easy access to information and were mainly concerned with public broadcasting because private broadcasting and communication revolution was still in its infancy in India. Being a signatory to the TRIPS, Indian laws governing rights of broadcasting organisations had to be modeled strictly on the lines of TRIPS Agreement and later in consonance with the WIPO. Thus, the exclusive rights based approach is evident in the Indian Copyright Act, 1957.

However, the major concern with this approach is that it is unclear as to what exactly is protected by the rights given to broadcasting organisations.
Giving exclusive rights to broadcasters over their broadcasts implies that they can control the access to the content contained in the broadcast. However, this is inherently against the object of granting rights to broadcasting organisations. Broadcasting organisations, not being creators of any new work but mere transmitters of copyright works, should not have any control over the information they transmit, but merely on the ‘signal’ that they generate to transmit their broadcasts. This basically aims at giving protection to broadcasters against signal theft and piracy which occurs rampantly. Simultaneous online broadcasts of live cricket matches are a common practice, most of which is based on signal piracy. It is for such kind of practices that protection should be granted to broadcasters. But an exclusive rights approach tends to create a monopoly over information itself rather than its mode of transmission.

Exclusivity of rights is most important for broadcasting organizations. Especially in sports broadcasting exclusivity is necessary to guarantee the value of the sports program. Broadcasting rights for sporting events are usually granted for a given territory on an exclusive basis. The tremendous flow of advertising income and the large number of viewers that sports events attract form the value consideration for this exclusivity. However, it is important to ask whether this exclusive rights based approach will constrain the rights of owners of information in favour of the broadcasting organizations. As seen before, it is the right of the author of the original work to communicate it to the public by way of a broadcast. Provided which, it is difficult to actually determine the extent of rights given to broadcasting organizations. Broadcasting organizations then cannot have the exclusive right to communicate the work to the public, since it is the right of the author. Will this exclusive rights approach give rise to ownership over content? For example, a film producer grants exclusive rights to a TV channel to broadcast his film. It implies that none other than the broadcasting organization can re-broadcast the film without a license. Ultimately it tends to stem the free flow of information as well as compromises the right of the right of the author to communicate the work to the public.

23 Supra, note 3
24 Id.
26 Supra, note 9.
27 Supra, note 10.
4.2. Effect of Convergence

Convergence, which, in broadcasting, is the combining of all types of media in digital form, has been one of the most discussed and debated developments in the media over the past decade or more.\(^{28}\) 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.\(^{29}\) In an era of technological convergence, information is not limited only to a particular medium. Information once meant only for TV can now be easily made adaptable to different platforms like Internet, mobile TV etc. These different platforms can now carry essentially similar kinds of services.

Therefore, the exclusivity of broadcast rights in today’s digital age is of unprecedented value. Media conglomerates want exclusive rights to exploit the content through all the commercially profitable platforms. Due to convergence there exists a risk of monopoly because it paves the way for overall power in the hands of a few media conglomerates that could control the entire entertainment industry.\(^{30}\) The ongoing dispute between Star India and some telecom service providers in the Supreme Court is a classic example of the effect of convergence. Star India has 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.\(^{31}\) Therefore, Star is restraining mobile service providers from disseminating live scores of matches through SMS on a fixed service charge. Such integration all the rights in a particular


\(^{31}\) Nira, Pahwa, ‘STAR Gets Interim Injunction From Supreme Court of India In Cricket’s Hot News Case (2014) \url{www.medianama.co} Error! Hyperlink reference not valid.

\url{http://www.medianama.com/2013/10/223-star-cricket-interim} Error! Hyperlink reference not valid.\url{court/} (Last accessed May 14, 2014)
media entity essentially create monopoly, which is against the philosophy of the Constitution.\textsuperscript{32}

This trend is essentially against the philosophy of broadcasting rights granted to broadcasting organizations. The law intended to create a monopoly of organizations only with respect to the mode of transmission of the content, not with respect to the whole process of transmission of information. This mode or medium of transmission is at the core of the definition of ‘broadcast’ as noted before. There are different modes by which content can be broadcasted. And it is the right of the author to have his work broadcasted by any mode he chooses. These different means of broadcasting must be treated differently. The Bombay High Court has recognized this point in \textit{Video Masters v. Nishi Productions}\textsuperscript{33}. In this case the plaintiff claimed that he had bought the sole and exclusive video rights of a copyrighted film from the defendant and that the defendant gave away the cable TV rights to another person. The court made a clear distinction between the satellite rights and cable TV rights and held that both rights can exist with different persons at the same time, and that would not amount to infringement of the plaintiff’s rights. The feasibility of this approach, however, has not been judicially tested as yet with respect to convergence technologies in recent times.

\textbf{4.3. Impact of exclusive rights approach on Fundamental Rights}

The most-important aspect to be looked at is whether the exclusive rights approach affects the fundamental right to be informed and how have the courts approached this problem. It is interesting to note that the judiciary has always given more weightage to fundamental concepts like freedom of expression and equal access to information than taking a mere technical approach in cases concerning broadcasting organisations. This is evident from the policy the courts have adopted with regard to the broadcasting of sporting events especially cricket which has a huge following in India. The decision of the Delhi High Court in \textit{Taj Television v. Rajan Mandal}\textsuperscript{34} came as a boon for broadcasters where the court was relying on a signal-based approached granted injunction against signal piracy of live cricket matches.

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\textsuperscript{32} \textit{Supra}, note 17.
\textsuperscript{33} \textit{id.}
\textsuperscript{34} \textit{Taj Television v. Rajan Mandal} (2003) F.S.R. 22.
Due to increasing disputes regarding sports broadcasting, the Ministry of Information and Broadcasting issued a policy guideline in 2005 making it mandatory for private broadcasters to share the live telecast feed of events of national importance including cricket matches to the public broadcaster Doordarshan owned by the government. Ten Sports challenged this policy saying that it infringed upon their exclusive broadcasting rights. The court in its order stated that Doordarshan should telecast ‘uninterrupted live feed’ received from Ten Sports. Doordarshan was not allowed to show its own advertisements or its own programmes during lunch breaks. In the dispute between Nimbus Sports and Doordarshan, Nimbus Sports was forced to share its live feed of matches with Doordarshan. However, there was to be a seven minutes delay in the feed. Considering the popularity of cricket in India, the Parliament passed the Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

It mandated all private broadcasters to share their live television and radio feed, minus advertisements, to Doordarshan and All India Radio in events of national importance as judged by the Ministry of Information and Broadcasting.

It is evident that the judiciary has tried to balance the people’s right to inform others and to be informed with the broadcasters’ exclusive rights. The judiciary views broadcasting in the larger perspective of community or public interest rather than a mere commercial activity. In cases involving sports broadcasts where exclusivity is of utmost importance the courts have granted the exclusive rights to the broadcasters only for the protection of the signal of the program that they desire to broadcast. Nowhere the courts have given exclusive rights over the content, and the information that the broadcast brings into the public domain. Thus, largely the courts have adopted a signal-based approach for providing remedy against signal piracy.

4.4. A Way Ahead: Suggested reforms for India

Following legal reforms will help in updating the law and bring clarity:

a) Clarifying the definitions of terms like ‘broadcast,’ ‘reproduction,’ ‘retransmission’ and ‘re-broadcast’ with reference to various international conventions, especially the Rome Convention.

35 Supra, note 3.
Basing these definitions on sound technical understanding will help in differentiating between them and outlining the scope of each term. The Copyrights, Designs and Patents Act, 1988 of UK specifically recognizes broadcast as an independent ‘work’ unlike Indian law.\(^{36}\) This confers a broadcast right on the broadcasting organisations. Such clarity in Indian law will limit the confusion regarding the actual ownership of the right, i.e. whether it is the right of the author or the broadcaster.

b) Clearly specifying that the transmission over the Internet falls outside the scope of the provisions of the Copyright Act. For example, the Copyrights, Designs and Patents Act, 1988 of UK specifically exclude internet transmission from the purview of the Act unless it is used for simultaneous transmission of a live event or the content is being simultaneously broadcast on other means.\(^{37}\) Therefore, the Act includes internet transmission only to tackle signal piracy of live events like sports or other programs which are being simultaneously broadcast through television or other means.

c) To restrict the monopoly created because of convergence effect, law to restrict ownership patterns must be enacted. The Broadcasting Services Regulation Bill 2007 aimed to prevent monopolies through “restrictions on accumulation of interests.”\(^{38}\)

d) Restriction on ownership has been a feature of most modern and mature democracies like USA, UK, Australia, Germany and France.\(^{39}\) But the Broadcasting Services Bill was put off on several occasions due to numerous reason. Legislation on similar lines is necessary.

### 5. Is there a Need for a Treaty on Broadcasters’ Rights?—
Brief Analysis of the Proposed WIPO Treaty

In this section, we analyze the proposed WIPO treaty for the protection of broadcasters’ rights and whether these rights are likely on the aggregate to bring more benefits than costs for developing countries like India. Given

\(^{36}\) Copyrights, Designs and Patents Act, 1988, s. 1.

\(^{37}\) Copyrights, Designs and Patents Act, 1988, s. 6 (1A).

\(^{38}\) Broadcasting Services’ Regulation Bill, 2007, s. 12.

\(^{39}\) Supra, note 3
that broadcasters already have protection against signal theft and intellectual property-type rights under the Rome Convention, TRIPS and the Satellite Convention, some opine that from a developing country’s perspective, these additional rights are neither necessary nor desirable.

Capitalization in the hands of a few players should not be encouraged in a time where the broadcasting landscape is being revolutionized by new media and technology. In this era of free access to knowledge, a battle to control access is clearly undesirable. It is in the public interest that monopoly be kept away from public service broadcasting and the like lest these services become unaffordable and inaccessible to citizens of developing countries. Broadcasting organizations do not produce, but merely arrange and transmit work. As part of mass media, broadcasting implies first and foremost the transmission of information to as many people as possible and furtherance of educational, cultural and social policy objectives. Access to information, freedom of expression, pluralism and cultural diversity are fundamental to the media system. The authors believe that the pre-existing rights need not be layered with an additional set of rights that confer close to absolute hold over broadcasts, which are not even the right-holder’s (broadcaster) creation. However, having said that, the authors also believe that the proposed WIPO Treaty (“the treaty”) is not intended to provide any more rights than is warranted by the signal-based approach. Also, it does not touch upon the area of webcasting, meaning the flow of information on Internet will continue unaffected by the Treaty.

The three important elements of broadcasting—broadcasting infrastructure, licensing of copyrighted works and creation of copyrighted works are already protected under the existing legal system. Even the related rights,

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40 Supra, note 15.
43 Id.
44 Id.
45 Id.
those of the broadcasters are protected under existing international conventions. With changing technologies and growing battle between free-flow of information and expansion of commercialization to newer platforms, there clearly is a need for a more contemporary regime.

The proposed treaty strikes a balance between broadcasters’ rights and public interest. For instance, it upholds the general principle that the treaty shall not limit access to knowledge and information, promotion of public interest. It further talks of protection of cultural diversity and expression which is favourable to India given its diverse cultural heritage. Even anti-competitive practices cannot find shelter under the treaty which does not allow any practices having adverse effect on the competition the market or unreasonable restraints on trade, transfer and dissemination of technology.

Further, in the scope of application, it is clarified that the protection is only for signals and not the matter/work carried by such signals. This is clearly against the exclusive rights based approach. It has been suggested that public performance cannot be granted protection as it falls under the content and not the signal itself, since it is an element of copyrights and distinct from broadcasters rights which are related rights.

In 2007 WIPO General Assembly, a mandate was set forth adopting the signal based approach which is hoped to be furthered by the proposed treaty, if at all it comes in force. To conclude, the treaty which is still open

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48 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961


50 Id., Article 3, ‘The Protection and Promotion of Cultural Diversity’

51 Id., Article 4, ‘Defense of Competition’.

52 Id., Alternative ‘A’ to Article 6, ‘Scope of Application’


54 See Statement of CIS India on the WIPO Broadcast Treaty at the 22nd SCCR, cited in Comments on the Proposed WIPO Treaty on the Protection of Broadcasting Organizations By The Centre For Internet And Society, Bangalore, India, available at http://cis-india.org/a2k/blog/cis-comments-to-hrd-on-wipo-treaty.pdf,
to suggestions and deliberations is neither undesirable nor unnecessary, but is a mere re-statement of the signal based approach.

6. CONCLUSION

The rights given to broadcasting organisations in India are actually in mere consonance with international treaties and conventions which provide for exclusive rights based approach. Indian law, right from amendments in 1999 to 2012, in this regard has been particularly modeled on the principles laid down by the Rome Convention 1961\textsuperscript{55} and TRIPs Agreement 1994.\textsuperscript{56}

Developing countries like India and activists supporting access to knowledge have been pushing harder for a signal-based protection of broadcasting organisations. The criticism of a signal-based approach is that the rights of the broadcasters would extinguish the moment the broadcast is made and the signal thereafter ceases to exist. However, the authors here want to put forth that it is essential, especially in developing countries like India, to take a liberal approach towards access to information and that signal based approach is the right one and activists supporting access to knowledge have been pushing harder for a signal-based protection of broadcasting organisations. The criticism of a signal-based approach is that the rights of the broadcasters would extinguish the moment the broadcast is made and the signal thereafter ceases to exist. However, the authors here want to put forth that it is essential, especially in developing countries like India, to take a liberal approach towards access to information and that signal based approach is the right one. In an age where information; be it literary, audio or visual is available so cheaply over the Internet that it would be unreasonable to grant exclusive rights to broadcasters after they have made their first broadcast.

The Supreme Court in Secretary,\textit{ Ministry of Information and Broadcasting v. Cricket Association of Bengal}\textsuperscript{57} while granting fundamental right to the event organizers to monetize the event by granting broadcasting rights to private broadcasters also gave a note of caution. The Court said that the degree to

\textsuperscript{55} Supra, note 15.  
\textsuperscript{56} Supra, note 32.  
\textsuperscript{57} Supra, note 17.
which this right is available depends on the underlying character of activity. Thus, if the activity is such which restricts the access to information and goes against the well cherished principle of freedom of information given by the Constitution, the activity must be tested only on the grounds of reasonable restrictions under Art. 19(2) of the Constitution. The scope of the rights of broadcasting information affects the freedom of speech and expression to a large extent. Therefore, it is imperative that the scope of broadcasting rights must be determined by assessing its impact on freedom of expression. Although, it is argued that the balance between freedom of expression and exclusive intellectual property rights is maintained by inbuilt exceptions like compulsory licensing and fair use doctrine, basic human rights like freedom of expression ought to be invoked to determine the scope of intellectual property rights and its exceptions and pave way for constitutionalization of intellectual property law.