Chapter III

Rights of Broadcasting Organisations in Developing Countries: India as a case study

Modern society depends heavily on the production, dissemination and absorption of enormous quantities of data. This has been made possible with the advent of the radio, television, computers and Internet. Radio, which was the earliest of these inventions, ensured that information reached the farthest corners of the world in near real-time. Gradually, over time, telecommunications, multimedia and broadcasting informatics assumed vast importance in today’s modern society.

Broadcasting exerts enormous influence on society. Broadcasting industry, forms the backbone of expanding access and dissemination of various works in today’s society. In fact, in the Indian context this gains more currency since India is the world’s third-largest broadcasting market. Therefore, to ensure that such a strong medium of information dissemination is not misused, a strong and unbiased regulatory framework is essential. This gives rise to the question – is exclusivity of broadcasting rights justified? Opponents of this stand say exclusive broadcasting rights endows the producers/creators with rights permitting them to solely exploit the product and that is anti-competitive (Tarun Jain: 2008). They also aver that this acts against market forces. Whereas the supporters of ‘exclusivity’ claim that it promotes arts and culture by giving broadcasters their due.
In light of this controversy, this work endeavours to look at the shortcomings in copyright law which treats broadcasting rights at par with original dramatic/literary works. It is well known that copyright law aims at encouraging productivity and creativity. But no such productivity or creativity entails in the process of broadcasting (Andy Oram: 2006). So then, why should broadcasting organisations be given exclusive rights to re-transmit broadcasts? It not only defies the logic behind the jurisprudence governing copyrights but also acts as a barrier to the free flow of information in society. This work analyses the broadcast reproduction rights conferred on broadcasting organisations in accordance with Section 37, which was modified by the Amendment of 1994 to the Act of 1957, which adds an extra barrier to the re-use of broadcast material (Andy Oram: 2006).

Broadcasting, also known as mass media, constitutes a significant portion of the world of “mass communication”. Communication through media plays a major role in providing information and offering interpretations of it. As a result, it can be a powerful means of exerting social control, creating social cohesion and serving particular interests (Gibbons: 1998). Access to information, freedom of expression, pluralism and cultural diversity are fundamental objectives for media. Naturally, these values receive wide acceptance by broadcasting organisations too (Sterling and Kittross: 2002).

Broadcasting, traditionally conceptualised as a “public good”, involves the transmission of information to the widest possible
population of people as possible. Because the effort and cost expended to bring broadcasting to one person is the same as if it were provided to many (this is the concept of non-exclusivity). Also, whether it is disseminated to one person or a million, the content does not diminish in any way (this is the concept of non-rivalry). As a result, broadcasting also differs from other mass communication media, both in its mode of delivery and the different message it delivers. Many countries provide for a three-tiered system of broadcasting: public service, community and commercial.

3.1 Broadcasting and Developing Countries

Broadcasting plays a vital and primary role in providing information to the masses. As a result, it exerts social control and creates social unity. Access to information, freedom of expression, pluralism and cultural diversity are fundamental values that have great relevance for the media system. This is especially true for developing countries. Broadcasting involves the transmission of information to as many people as possible. Broadcasting is typically defined as a ‘public good’, since the effort and cost expended to bring broadcasting to one person is the same as if it were provided to thousands and millions (Eltzroth and Kenny: 2003).

Despite its manifold potential benefits, as a sector of the economy that can help expand development and alleviate poverty globally, broadcasting has not received its due (Eltzroth and Kenny: 2003). This vital industry possesses the qualities to enhance growth in other spheres of the creative community. Besides, it can add value to
other developmental activities, serving as a thrust for imparting information in sectors such as health, education, finance, training, and commercial markets. Broadcasting can act as a potent tool for transfer of information as well as to provide a prop to good governance and transparency. In fact, over the past decade, broadcasting — both radio or television — has developed into an economic sector with significant strength, acting as a hub for information and new communications technologies.

But this is not to say that all is hunky-dory with the broadcasting industry. In fact, in various countries across the world, the broadcasting industry faces serious challenges. In these countries, there have been relatively few developments in broadcasting vis-à-vis critical issues on content, advertising, relationship with content creators, cross-border transmissions, treatment of infrastructure and new infrastructure elements, rules relating to competition, independence of regulators, licensing, independence of the press and news gathering, rules on defamation, and intellectual property rights (Schartz and Satola: 2002). This is despite the fact that other spheres of the economy have grown by leaps and bounds in these countries.

The challenges faced by the broadcasting industry are many in this digital environment (Eltzroth and Kenny: 2003). National terrestrial broadcasters are experiencing strong challenge from satellite transmissions that offer non-indigenous content, besides having to contend with viewers being weaned away. This hurts local advertising revenue, the foundation on which the industry segment is
able to stand on its feet. Moreover, broadcast signals are retransmitted sans proper authorisation and authors’ rights violated quite easily. That’s not all. The Internet, which is gaining greater currency worldwide and is seen to be outside national regulations and provides vastly interesting content, further undercuts traditional local broadcasting. Such opaque regulations encourage investment in the sector through the Foreign Direct Investment (FDI) route.

In the current era of the Internet, free sharing of information gives rise to its own set of good and bad outcomes. While it is good for proper dissemination of knowledge, if the law does not remain vigilant, certain types of content could create issues for any country, developed or developing. Developing countries have the additional burden of balancing the tradeoffs between providing increased protection to broadcasting organisations and ensuring that broadcasting in public interest continues to be a central mechanism for the distribution of information and knowledge to the public.

In this context, it is important to fully understand the possible impact of the proposed treaty for the protection of broadcasting organisations in developing countries. This calls for understanding the discussion in the context of a growing global debate among the broadcasting and other media industries, governments and civil society over the past couple of decades. It can be said that ‘reduced to its fundamentals, the debate on broadcasting and new media is concerned with the principles which should be chosen to govern the distribution of information and the sharing of experience among
members of society.‘ Besides, the growing pace of technological changes witnessed in the last 20 to 30 years due to the introduction of digital formats, satellite technology and recent trends in media ownership have proved to be the main driving factor behind the debate on the future of broadcasting. This is true notwithstanding the gaps that exist in this sphere between developed and developing countries (Cornish W and L Leweyn: 2007).

It goes without saying that digital technology has revolutionised the global broadcasting sector and helped evolve a path to establish a totally interactive environment. For instance, the invention of digital media broadcasting (DMB) technology by South Korea (now known as mobile TV) has been perceived as a revolution in the field of mobile phone technology. This has made it possible for a user to access television programmes on his mobile phone without any outside user interference. However, for traditional broadcasting organisations, this poses a serious challenge, particularly in terms of competing with new media firms that specialise in the new technology and are run under business models that receive revenues directly from users. This has seen traditional broadcasting organisations in most developed countries building digital infrastructure so as to offer digital services, such as on-demand programs and interactivity, to remain competitive in the new digital environment and avoid being driven out of business by competitors in the field (Harpham Bruce: 2009).

During the course of the past few years, as convergence of
various types of industries, such as telecommunications, computers and broadcasting, which earlier functioned separately, took place, the risk of monopoly reared its head. Such a monopoly could result in overall power being concentrated in the hands of a few conglomerates, which could control the entire entertainment industry in the world (Mussa M and Rosen S: 1978). That would hardly be a desirable outcome.

Finally, in developing nations it is the use of Internet, which provides a conclusive link between various other pillars of broadcasting. Internet offers both free and on-demand services. And these have proved to be of great significance to broadcasting organisations as they help expand their scope of commercial services. To date, the Internet is based on the principle of network neutrality, that is, Internet users should be in control of the content they view and the applications they use on the Internet.

Currently, there is a debate raging on whether network operators or government agencies should be permitted to exert greater regulation or control. Due to the power that cable conglomerates are capable of exerting, it might make sense to charge fees from certain websites while keeping others free-of-charge. This would create a two-tiered system where one layer of Internet would be for those who can afford to pay and the other for those who cannot. This ‘online discrimination’ would also allow the Internet provider to regulate consumer choices by making available websites in search engines that pay the most to the provider, instead of what
would best serve the consumer. Companies like Google, eBay, Amazon, Microsoft, Yahoo and Flipkart are already opposing this and the possible result to follow would be a situation of greater control over the content transmitted, to gain an advantage over their competitors (Vaver David: 2002). This competitive scenario will result in the birth of an unfriendly situation, especially in developing nations as it would hinder access to knowledge and information for users in these less-affluent nations.

3.2 Copyright Law in India: Brief history

In the course of the past 150 years, copyright law, as we know it today, developed in India. The first instance of copyright law in India took place in 1847 through an enactment during the rule of East India Company. Passed by the Governor-General of India, the Act affirmed the applicability of English copyright law to India (Kala Thairani: 1996). The 1847 enactment laid down that the term of copyright was for the lifetime of the author plus seven years post-mortem and could not exceed 42 years on the whole. The act of infringement included unauthorised printing of a copyright work for “sale, hire or export”, or “for selling, publishing or exposing to sale or hire”. The suit for infringement under this Act could be instituted in the “highest local court exercising original civil jurisdiction”. The Act also provided that under a contract of service, copyright in “any encyclopaedia, review, magazine, periodical work or work published in a series of books or parts” shall vest in the “proprietor, projector, publisher or conductor”. It was deemed that the copies of the
infringed work were the property of the proprietor of the copyrighted work for all purposes. Also, the copyright in a work was not automatic unlike today. It was also mandatory that the work be registered with the Home Office for it to receive all protection enshrined in the Act. The Act specifically reserves the existence of copyright in the author, and his right to sue in case of its infringement to the extent available in any other law except the Act of 1847 (Kala Thairani: 1996).

When copyright law was introduced in India, it had already been developing in the US for over a century and the provisions of the 1847 enactment were reflected in the later enactments (Rajkumar S Adukia: 2015). The Copyright Act 1911, while repealing earlier statutes on the subject, was also made applicable to all British colonies, including India. The Indian Copyright Act was enacted in 1914. It saw some of the provisions of Copyright Act 1911 being modified and added to it. The Indian Copyright Act 1912 remained in force in the country until it was replaced by the Copyright Act 1957.

**3.3 Copyright Law in independent India**

In India, the Copyright Act, 1957, the rules made thereunder and the International Copyright Order 1999 govern copyright and neighbouring rights in India. Over the years, this Act has been amended five times – in 1983, 1984, 1992, 1999 and in 2012.

By virtue of Section 78 of the Act, the Central Government is empowered to make rules through notifications in the Official Gazette, for carrying out the objectives set out in this Act. According
to the provisions of the Act, a copyright office was established under the control of a Registrar of Copyrights, who was to act under the superintendence and direction of the Central Government (Sec. 9, Copyright Act 1957). The principal function of this office was to maintain a register of copyrights containing the names or titles of works, the names and addresses of authors (Sec. 44, Copyright Act 1957), etc. The Registrar enjoyed certain powers, such as entertaining and disposing of applications for compulsory licenses and to inquire into complaints of importation of infringing copies. A Copyright Board (Sec. 11, Copyright Act 1957) was set up under the Act and the proceedings before it are deemed to be judicial in nature.

Now, the scope and definition of copyright was set out thus: it included the exclusive right to communicate works through radio transmission; cinematographic films were given a separate copyright; the term of copyright protection was extended from 23 to 50 years, which was again extended to 60 years in 1992; and the term of copyright for all categories of works was also specified (Sec. 22, Copyright Act 1957). Provisions relating to assignment of ownership and licensing of copyrights, including compulsory licensing in certain circumstances, rights of broadcasting organisations, international copyrights, definition of infringement of copyrights, exceptions to the exclusive rights conferred upon authors or acts that do not constitute infringement, special rights of authors, civil and criminal remedies against infringement and remedies against groundless threats or legal proceedings were also introduced.
3.4 Amendment in 2012

India’s Copyright Act, 1957 has been significantly amended in May 2012, both houses of the Parliament placed their seal on the Copyright Amendment Bill. While extending the rights of performers and broadcasting organisations, the Amendment laid great force on eliminating unequal treatment meted out to lyricists and music composers of copyrighted works incorporated in cinematographic films. Such treatment was the result of the contractual practice prevalent in the Indian entertainment industry. According to industry practice, lyricists and music composers assigned all rights in the work to the producer of the film for a one-time lump sum payment. Thus, lyricists and music composers enjoyed no further right to any royalty accruing from their works even if the work was utilised in mediums other than the cinematographic film.

This anomaly was later set right by adding a proviso to Section 17, which provided that clauses (b) and (c) of the Section will have no impact on the right of the author of the work incorporated in the cinematographic film. This move now gave rights to the lyricists and music composers. This amendment ensured that users of copyrighted material receive access to protected materials and their fair use rights are duly protected and enforced. To meet this requirement, the Amendment Act broadened the scope of statutory and compulsory licensing provisions and empowered the broadcasting organisations to broadcast any prior published literary, musical work and sound
recording by giving a notice to the copyright owner and paying royalty at the rates prescribed by the Copyright Board.

The amendments also recognised the need to ensure access to reading material for differently-abled people through the introduction of Section 52(1). This Section is broadly worded, permitting conversion of any work in any accessible format by any person or organisation till such reproduction is aimed at benefiting persons with disability and the converting organisation or person is working on a non-profit basis.

The Copyright Amendment Act has also tried to the Copyright Act in conformity with technological advances and concomitant international developments and so Section 65A and 65 B are added to promote digital rights management. These provisions aim to protect the rights of the copyright owners in the digital domain. Further, Section 52(b) and 52(c) Have been included in order to ensure that the digital advances are useful for the users, do not unreasonably restrict access and to protect Internet Service Providers (ISPs). These provisions protect ISPs from copyright infringement liability in case of transient and incidental storage of the work for the purpose of providing access (AbhaiPandey: 2012).

3.5 Broadcasting Reproduction Rights in India

The original Copyright Act of 1957 did not envisage any protection being extended to broadcasting signals. This came about later in 1983 through the Amendment, which inserted the definition of ‘broadcast’. Section 2 defines ‘broadcast’ which means
communication to the public: (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, including a re-broadcast.

The rights of a broadcasting organisation vis-à-vis broadcasts are dealt with under Section 37. Following an amendment in 1994, the Act was substituted with a new Section providing for “Broadcasting Reproduction Rights”. The amended Section deals with a methodology under which the broadcaster is given the right to reproduce a broadcast made already. The Broadcasting Reproduction Rights thus, include:

(a) reproducing the broadcast;

(b) causing the broadcast to be heard or seen by the public on payment of a fee;

(c) making any sound recording or visual recording of the broadcast;

(d) making any reproduction, sound recording or visual recording where the initial recording was unauthorised;

(e) selling, hiring or offering for sale or hire to the public any such sound or visual recording.

Following the operation of Section 37, the performance of any act as under (a) to (e) shall require a licence of the broadcasting organisation or else the act shall be treated as violation of copyright. However, exceptions to the same have been provided in Section 39 of
the Indian Copyright Act. These exceptions can be broadly categorised as the broadcast being;

(a) for private use,
(b) for purposes of bona fide training or research,
(c) for reporting of current events (it is to be noted here that only excerpts of such broadcasts are allowed to be used under this exception), and
(d) general exceptions as provided under Section 52 of the Act.

Further, Section 39A extends the general provisions under the Act to broadcasting rights. Thus, one shall note that in many aspects Broadcast Reproduction Rights are treated at par with copyright (P.S Narayanan: 2002). However, the enunciation of broadcast rights have not been so widely spread in India as has been abroad. Nevertheless there are some judicial decisions which have brought forth the rightful position of law in this regard.

In India, the Copyright Act 1957 originally used the term ‘radio-diffusion’, which was defined by Section 2 as ‘radio diffusion includes communication to the public by any means of wireless diffusion whether in the form of sounds or visual images or both’. The Copyright (Amendment) Act 1983 substituted the definition of ‘broadcast’ for the definition of ‘radio-diffusion’. ‘Broadcast’ is defined to mean 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’ (Copyright Act: 1957). The term ‘communication to the public’ as used in the definition of ‘broadcast’ has further been defined. According to Section 2, ‘communication to the public’ means making any work 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 copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

It has further been clarified by way of an explanation that communication through satellite or cable or any other manner means simultaneous communication to more than one household or place of residence, including residential rooms of any hotel or hostels. The definition thus addresses the issue of satellite broadcasting and cable television. It is not worth that any communication to the public by wire has been included to mean broadcast. This means that transmission of sounds or visual images by cable television service is also covered by the definition of broadcast. Unlike the UK Copyright, Designs and Patents Act, there is no separate definition for cable programmes or cable programme services in the Copyright Act, 1957. However, the Cable Television Networks (Regulation) Act 1995 defines ‘cable service’ to mean the transmission by cable of programmes, including re-transmission by cable of any broadcast television signals. ‘Cable Television Network’ is defined as system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers. Further,
'programme' is defined by the Act to mean any television broadcast and includes (i) exhibition of films, features, dramas, advertisement and serials through video cassette recorder or video cassette players; and (ii) any audio or visual or audio-visual live performance or presentation (Cable Television Regulation Act 1995).

3.5.1 Broadcast Reproduction Right under Section 37

(1) Every broadcasting organisation shall have a special right which will be known as “broadcast reproduction right” in respect of its broadcasts.

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the owner of the right does any of the following acts of broadcast or any substantial part thereof, shall, subject to the provisions of Section 39 be deemed to have infringed the broadcast reproduction right. These acts include:

(a) re-broadcasts the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of a fee; 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 made without license or, where it was licensed for any purpose not envisaged by such license; or

(e) sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d).

In this regard, the rights of broadcasting organisations include:

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

Under 38 of the Copyright Act, a person is deemed to have infringed the performer's right if he does, without the consent of the performer, any of the following acts in respect of the performance or any substantial part thereof:
(i) make a sound recording or visual recording of the performance; or

(ii) reproduce a sound recording or visual recording of the performance, which sound recording or visual recording was:

(a) made without the performer’s consent; or

(b) made for purposes different from those for which the performer gave his consent; or

(c) made for purposes different from those referred to in s 39; from a sound recording or visual recording which was made in accordance with s 39; or

(iii) broadcasts the performance, except where the broadcast is made from a sound recording or visual recording other than one made in accordance with S 39, or is a re-broadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer’s right; or

(iv) Communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast.

Section 39 deals with acts not infringing Broadcast Reproduction Rights. Thus no Broadcast Reproduction Rights or performer’s rights shall be deemed to be infringed through:
(a) the making of any sound recording or visual recording for private use of the person making such recording, or solely for purposes of bonafide teaching or research; or

(b) the use, consistent with fair dealing of excerpts of a performance or of a broadcast in the reporting of current events or for bonafide review, teaching or research; or

(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52.

3.5.1 Applicability of other provisions

The Copyright (Amendment) Act, 2012 substituted Section 39 A with the following Sections: 18, 19, 30, 30-A, 33, 33-A, 34, 35, 36, 53, 55, 58, 63, 64, 65, 65-A, 65-8 and 66.

These sections deal with assignment (Sections 18-19), license (Sections 30-30A), copyright/performing rights societies (Sections 33-36), importation of infringing copies (Section 53), civil remedies for infringement (Section 55), rights of owners against persons possessing infringement copies (Section 58), offence of infringement (Section 63), power of police to seize infringing copies, etc. (Sections 64, 65 and 66), protection of technological measures (Section 654.) and protection of rights management information (Section 65B).
3.5.2 Strengthening of border measures

Section 53 incorporates detailed border measures to strengthen the enforcement of rights. The Section provides for control by the Customs Department on import of infringing copies, disposal of the infringing copies and presumption of authorship under civil remedies. According to the provisions of the Section, the owner of copyright of any work/ or any performance embodied in such work, or the author’s/creator’s duly authorised agent, may give a notice in writing to the Commissioner of Customs, or to any other officer authorised in this behalf by the Central Board of Excise and Customs (CBSE), requesting the Commissioner to treat infringing copies of the work as prohibited goods, for a period not exceeding one year. The notice could also say that the infringing copies of the work are expected to arrive in India at a time and a place specified in the notice.

After perusal of the evidence provided by the petitioner, the Commissioner may pass an order treating the infringing goods as prohibited goods. Ultimately, if any such goods are detained, the customs officer shall inform the importer as well as the person who gave notice of the detention of such goods, within 48 hours of the detention of the goods. However, if the person who gave notice does not produce any order from a court as to the temporary or permanent disposal of such goods within 14 days from the date of their detention, the Customs Officer shall release the goods, which shall no
longer be treated as prohibited goods. Section 53 is applicable to broadcasting organisations too.

3.5.3 Technological protection measures

Article 11 of WCT and Article 18 of WPPT require member countries to provide legal protection as well as legal remedies to authors and performers in connection with the exercise of their rights. This is aimed at preventing digital piracy. Hence, Section 55A has been inserted through the Amendment of 2012 to recognise Technological Protection Measures (TPMs) and can protect copyright content in digital environment. TPMs are types of technologies used to control access to copyright content and prevent users from copying such protected content. These may include access control technological protection measures and copy control technological protection measures.

Then there are circumvention devices, which are technologies used to remove, disable or circumvent technological protection measures. Under Section 54, any person who circumvents an effective technological measure put in place to protect any of the rights conferred under the Act, with the intent of infringing upon such rights, shall be punishable with a fine and imprisonment which may extend to two years.

Exceptions to TPMs are provided in Sub-Section 2, which contains fair use provisions. These shall not prevent anyone doing anything for a purpose not expressly prohibited by the Act. Any person facilitating circumvention of a technological measure by
another person for such a purpose shall maintain a complete record of such other person, including his name, address and all relevant details necessary to identify him and the purpose for which he was facilitated.

Other exceptions include (a) undertaking any act necessary to conduct encryption research or any lawful investigation, (b) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner or operator, (c) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user, and (d) taking measures necessary in the interest of national security.

### 3.5.4 Rights management information

Article 12 of WCT and Article 19 of the WPPT provide for protection of Rights Management Information. It means information which identifies the work, its author, the owner of any right in the work, information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appears to the public in connection with the communication of a work. Section 2 defines rights management information as the:

(a) title or other information identifying the work or performance;
(b) name of the author or performer;
(c) name and address of the owner of rights;
(d) terms and conditions regarding the use of the rights; and

(e) any number or code that represents the information referred to sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.

Section 65B, as inserted by the Amendment of 2012, prevents the removal of the rights management information without proper authority as well as distributing any work, fixed performance or phonogram. According to Section 65B(i) any person, who knowingly (i) removes or alters any rights management information without authority, or (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance while being aware that electronic rights management information has been removed or altered without proper authority, shall be punishable with a fine and imprisonment of up to two years.

Within any work, if the rights management information has been tampered with, the owner of the copyright in such work may also avail of civil remedies against the person(s) who indulged in such acts. Performers and broadcasting organisations both fall under the ambit of the provisions regarding technological protection measures and rights management information.

3.5.5Statutory license for broadcasting

The Copyright (Amendment) Act, 2012 also inserted Section 31 D in the Act. Relevant clauses which reads as follows:
Statutory licence for broadcasting of literary and musical works and sound recording.

(1) Any broadcasting organisation desirous of communicating to the public by way of broadcast or by way of performance of a literary or musical work and sound recording, which has already been published, may do so subject to the provisions of this section.

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

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

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

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.
(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall:

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

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

Section 31 D seeks to facilitate access to the works for the growing broadcasting industry. In the period prior to the 2012 Amendment the broadcasting organisations had to depend on voluntary licensing to gain the access to copyright works.

The new section provides for statutory license and enables broadcasting organisations to broadcast literary and musical works and sound recordings if they desire to do so. However, for this purpose, the broadcasting organisation needs to give prior notice to the copyright holder and pay in advance the required royalty as fixed by the Copyright Board.

The Section seeks to make the broadcasting organisation adhere to the moral rights, by providing that the names of the authors and principal performers shall be announced during the broadcast.
According to the provisions of the Section, the broadcasting organisation will need to maintain records of the broadcast, books of account and render to the owner such records and books of account.

3.6 Satellite broadcasting and cable television

Two major developments in the field of broadcasting took place during the second half of the last century. These were the advent of satellite broadcasting and cable television.

3.6.1 Satellite Broadcasting

In the pre-satellite days, broadcasting was a pretty simple activity. In those days, broadcasting consisted of transmission of electromagnetic signals by wireless means which were received by suitable apparatus that converted into sound and visual images, which were audible to, and perceivable by, human ears and eyes. The advent of satellite broadcasting changed this simple landscape. Satellites which were placed in geo-stationary orbit received these electromagnetic signals, which were then transmitted back to earth. Initially, these retransmitted signals were receivable only by ground stations. But as time passed, technology evolved that permitted individual members of the public to receive these signals. Interestingly, the transmitted electromagnetic signals from the satellites could even be received by countries other than the one from which it was sent up to the satellite, in fact, up to a third of the earth’s surface. Technically, the area covered by such reception of electromagnetic signals is termed the satellite’s ‘footprint’ (European Commission: 2001).
There are chiefly two types of satellite broadcasting: point-to-point transmission satellite and direct broadcasting by satellite.

Point-to-point satellites, also known as fixed service satellites (FSS), are used for intercontinental communication services, between one emitting point and one or more receiving points. Signals from such satellites cover roughly a third of the earth’s surface. Thus, with three such satellites placed over the Atlantic, India and Pacific Oceans, signals from any country in the world can be transmitted to almost all countries in the world, subject to availability of powerful earth stations.

The point-to-point satellite transmissions are generally intended for reception by selected cable stations operations, hotels and other places of multiple occupancy, which have contracts with the company transmitting via the satellite. These transmissions are not for direct reception by the public.

Compared to point-to-point satellites, Direct Broadcasting Satellites (DBS) transmit signals on much lower frequencies. Also, their signals carry more power. Therefore, signals transmitted from these satellites can be received by the general public in their homes through appropriate receiving sets. The signals transmitted by the satellites are generally intended for reception in only one of a limited group of countries. Due to their great transmitted power, direct broadcasting satellites are sometimes called ‘aerials out in space’ (Robert P. Haviland: 1968).
Besides these two chief types of satellite, there is one more category, ie, the direct-to-home (DTH) transmission satellites. The DTH transmission satellites are medium powered satellites, the transmission of which can be received over a very wide area, such as the whole of Asia or Europe. Signals from these satellites can be received with a slightly larger dish than is used for receiving signals from Direct Broadcasting Satellites.

3.6.2 Cable Television

In the case of cable television, the signals are transmitted by cable to individual television sets. The aspect that sets aside cable television from other forms of television transmission is that it is not the original broadcasting organisation, but a third party which transmits the signals from a simple aerial to more than one television set located at different places, such as hotel rooms and houses in a town. The purpose of this form of service is to provide subscribers with better reception than that possible from their individual aerials, especially in areas where reception quality is poor, such as valleys, or towns where high rises block reception, or were individual aerials are not allowed on environmental or other grounds. The transmission by the third party is made to a known set of the public, usually subscribers to the service.

The cable television system gave birth to five variants of transmission (Stephen M Stewart: 1983). These are:

(i) simultaneous diffusion of programs by wire to improve reception;
(ii) recording of programmes and relaying these at different times through cable;

(iii) diffusion of modified programmes usually by the insertion of advertising material;

(iv) programmes originated by the cable company;

(v) programmes imported from other regions of the same country or from other countries.

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

In the landmark judgment in Secretary, Ministry of Information & Broadcasting, Govt of India v. Cricket Association of Bengal, the apex court of India considerably widened the scope of right to freedom of speech and expression when it held that the government has no monopoly on electronic media and under Article 19 (1) (a) an ordinary citizen has the right to telecast and broadcast programmes to viewers through the electronic media. However, the court added that the government can impose restrictions on such a right only on the grounds specified in clause (2) of Article 19 and not on any other ground. Clause (2) of Article 19 does not mention state monopoly on electronic media.

Broadcasting freedom

In Secretary, Ministry of Information and Broadcasting, v. Cricket Association of Bengal with Cricket Association of Bengal and another v. Union of India the court examined in detail the concept of
broadcasting freedom. It then said that broadcasting freedom is implicit in the freedom of speech and expression. The European Court of Human Rights also has taken a similar view that like press, broadcasting is covered by Article 10 of the Convention guaranteeing the right to Freedom of Expression. Broadly speaking, broadcasting freedom can be said to consists of four facets, (a) freedom of the broadcaster, (b) freedom of the listeners/viewers to a variety of views and plurality of opinion (c) right of the citizens and groups of citizens to have access to the broadcasting media, and (d) the right to establish private radio/TV stations (JaswinderJani: 2014).

3.8 Public Service Broadcasting In India

In 1927, broadcasting was started in India by the Indian Broadcasting Company (IBC). Growth of the broadcasting industry gathered pace from 1936 when All India Radio (AIR) came into being. The next big milestone was the setting up of Doordarshan (DD), the national television service, in September 1959. DD and AIR were led by the government and therefore, attracted a lot of criticism that they towed to the line of the government of the day. To put an end to this criticism and to move on globally accepted modes of media independence, the Indian Parliament passed an Act in 1990 setting up the PrasarBharati, comprising both the DD and the AIR. However, it took seven years for the actual institution to come into existence. And thus, after being enacted on September 15, 1997, the PrasarBharati, an autonomous corporation of the Ministry of Information and

Over the years, it has been observed that public service broadcasting has helped play a major role in ushering in social change. This is true across the world. It has helped communities find answers to their problems. However, public broadcasting is dominated by the commercial broadcasting due to its high viewership and its typical programme content.

The importance of public service broadcasting can hardly be emphasized enough. Unlike private commercial broadcasting, public service broadcasting is concerned with the broader set of consumers and carries a much wider mandate. It is expected to meet the media needs of all citizens of the country, from the person in the city to the farmer sitting in the remotest hamlet of the country, who has very few media options at his behest. India is a country with myriad customs, religions and languages. In such a setting of ethnic, religious, and linguistic diversity, reaching out to all with relevant content is an uphill task indeed.

The public service broadcaster would need to be concerned with developing tastes, promoting understanding, spreading literacy and development, creating informed debate and empowering the disadvantaged. Only a committed public service broadcaster can achieve all these goals.

Public service broadcasting maintains its preeminent position in India, being the most powerful medium for informing, educating,
and empowering the people of the country. An ideal public broadcasting service should be able to reach the required information to the people. And such information should be reliable, instructive, and informative. For such an ideal public broadcasting service, there should be only one master -- the public. In India, where illiteracy rate is high, this medium has great potential to inform, educate and entertain people.

The networks of India’s public service broadcasters All India Radio and Doordarshan continue to provide great coverage of the population. It boasts of one of the largest terrestrial networks in the world. And as broadcasting worldover has moved to the digital space, Doordarshan and All India Radio too have not lagged behind. This has helped these two national institutions provide better services and programmes to an ever burgeoning audience.

3.8.1 PrasarBharti

Article 19(1) (a) of the Indian Constitution states that, “All citizens shall have the rights to freedom of speech and expression.” The channel through which the right to freedom of speech and expression can be sustained and promoted is broadcasting. A large portion of India’s population continues to be hobbled by high levels of illiteracy and poverty. For this segment of citizens, gaining access to information is an uphill task. Here, the national broadcasters have been playing their role with much aplomb.

On another national front, these two broadcasters DD and AIR are expected to play a critical role in the building of democracy in the
country, developing the economy, refining the social value system and spreading cultural values. Thus, the main functions of PrasarBharati are:

1) Upholding the unity and integrity of the country and values enshrined in the constitution,

2) Promoting national integration,

3) Safeguarding citizen’s right to be informed of matters of public interest and presenting a fair and balanced flow of information,

4) Paying special attention to the fields of education and spread of literacy, agriculture, rural development, environment, health and family welfare, science and technology,

5) Creating awareness about women’s issues,

6) Providing adequate broadcast coverage to diverse cultures, sports and youth affairs,

7) Promoting social justice, safeguarding the rights of the working class, minorities of tribal communities, and

8) Expanding broadcasting facilities and promoting research and development in broadcast technology.

PrasarBharati has its eyes overseas too. Though its footprint in limited internationally, still it aims to efficiently provide media
content of the highest quality through authentic and relevant programmes that endeavour to inform, educate and entertain.

Pure commercial broadcasting in any country can never hope to meet the ideals sought by public service broadcasting, ie, provide information, culture, education and entertainment of society at large. This is true especially of those living in remote areas of the country. The two have differing goals, value systems and audiences.

3.9 The Sports Broadcasting Signals Act, 2007 (Ordinance)

India is a cricket-crazy country therefore, if any international cricket match is being played anywhere in the world where India is participating and the match is being broadcast/telecast only by commercial broadcasters could gain ire against the government. Naturally, the government had to do something about it. Thus was born the Sports Broadcasting Signals (Mandatory Sharing with PrasarBharati) Act, 2007. The Act aimed at provide free-to-air programmes to the millions of listeners and viewers access to sports events of national interest through compulsory sharing of sports broadcasting signals with PrasarBharati. The Act received assent from the President of India on the 19 March, 2007 and it was brought into operation on 2005, retrospectively, as was provided in the Act. The Act is applicable throughout India.

According to Chapter 2, Section 3 of the Act, every owner or holder of content rights and provider of services (these being television or radio broadcasters) should share with PrasarBharati broadcasting content of nationally important sports events, if these
are broadcast live in India on any cable, DTH network or on radio. Content that is thus shared should be allowed to be re-transmitted by PrasarBharati’s terrestrial and DTH networks. Besides, sharing of such content should be done without advertisements (ESPN Software India Pvt. Ltd. V PrasarBharati& Another, 2013). Here, the court has considered the constitutionality of Rule 5 of the Sports Broadcast Signals (Mandatory Sharing with PrasarBharati) Rules, 2007 in relation to the present provisions of Section 3 of the Act. The Court said the broadcasters are under obligation to share live broadcasting signals of such sports events with the PrasarBharati without inclusion of advertisements, either put in place by the broadcast service provider or by the content rights holder, i.e., the event organiser, in accordance with the requirements of Section 3 of the Act.

Similarly, there are certain conditions on which such sharing should be done, including sharing of advertisement revenue between PrasarBharati and the owner or holder of content rights. Such sharing of revenue should be done in the ratio of 75:25 for television coverage and 50:50 for radio broadcast.

The Central Government is vested with the rights to penalise any of the parties acting in contravention to the Act. The provisions regarding this are specified in Section 4 of Chapter 2 of the Act. Thus, besides imposing the penalties, the Central Government can also suspend the license and withdraw permission/registrations granted in case of breach of terms or conditions of Section 3 of the Act. Penalties can go right up to Rs 1 crore. However, in consonance with
the principles of natural justice, before penalizing any of the parties involved, they should be afforded a reasonable opportunity to clarify their stand.

3.10 Broadcasting Services Regulation Bill 2007

Following the Supreme Court judgment in the *Ministry of Information & Broadcasting v Cricket Association of Bengal in 1995*, where it held that airwaves were public property, to be utilised for promoting diversity of opinions and securing citizen’s freedom of speech - there can be no monopoly on airwaves, governmental or private, the Ministry has proposed one more Bill.

However, the Broadcast Bill of 1997 and the Communications Convergence Bill of 2001 lapsed on the dissolution of the LokSabhas of the time. The Bill is still pending with Parliament, envisages the Broadcasting Regulatory Authority of India (BRAI) and a Public Service Broadcasting Council. It has three major goals: (a) Competition which will prevent monopolies in broadcast media (Section 12); (b) Public service requirements imposed on all broadcasters (Section 13); and (c) Putting in place a pre-censorship mechanism through a Content Code (Section 4).

While stakeholders were comfortable with the first two objectives, they opposed the third. In the earlier Bills too, similar provisions had played spoilsport. The power to frame and notify the Content Code is delegated to the government. It has also been vested with some draconian emergency powers (Sections 5 & 6).
One big issue of concern is the scope of the Bill - while the Convergence Bill covered Internet and mobile broadcasting, there is some ambiguity in the definitions in this Bill (Section 2 (d), (e) & (f)). For instance, it requires all broadcasters to obtain prior license. So, would one need to take a license before posting a video on You Tube? For now it would seem so, though it does sound far-fetched.