PREFACE

The global architecture of the IPR regime has been getting increasingly complex and including in its ambit a diversity of multilateral agreements, international organisations, regional conventions, instruments and bilateral agreements. Of these, the agreements that affect the greatest number of countries are the TRIPs agreement and some of the multilateral treaties administrated by the World Intellectual Property Organization (WIPO). Human thought transcends boundaries, finding creative solutions to applied technical and scientific problems, in communicating the existence and quality of products and persuading consumers to buy them, and in expressing images and thoughts. These intellectual efforts create new technologies, describe new ways of conducting affairs, develop new products and services, and expand the cultural richness of society. These result in the development of intellectual assets, or pieces of information that are called intellectual property to the extent they bear recognised ownership. The economic returns to creating them depend on their costs of creation, their desirability to potential users, the structure of the markets in which they are sold, and the legal rights established to permit property owners to control their use. The legal devices that provide such control are called Intellectual Property Rights (IPR). It is an exclusive right granted by the State for the exploitation of intellectual creations. Besides science and technology, much of the world’s intellectual property (IP) is embodied in music, movies, videos, books, articles, illustrations and other creative content. Besides the on-going revolution and developments in digital devices and services, there is content being created, moved and consumed in increasingly complex ways. There exists technical convergence between telecommunication, broadcasting,
informatics and interactive multimedia and this is showing enormous potential of growth besides dissemination and entertainment.

Even though broadcasting does not draw substantive attention when it comes to multilateral trade treaty negotiations, it has started playing a critical role when it acts as a widespread tool of information transfer as a method of improving transparency and other elements of governance. Mediums of broadcast like the radio or the television – form a significant sector offering potential access point to new information and communication technologies. In recent times, media has moved into the lives of people through internet and television, especially in the areas of sports, business news, and entertainment, including soap operas. This buoyant commercialisation has resulted in intense litigations too.

Literature on the Copyright and Neighbouring Rights connecting ‘Broadcasting’ is scarce. It is not possible to separate copyright and Neighbouring Rights so as to provide a separate legal regime for protection of Neighbouring Rights in India. Developments in the global copyright regime have created so much trade interest that WIPO and WTO stand together on the issues of protection, and compel members to bring their municipal laws into conformity with international commitments that facilitate trade. This shows that Neighbouring Rights have acquired a status, from which no relegation is possible now. The need to devise a stringent domestic legal regime to strengthen these intermediary rights is strongly felt. Neighbouring Rights differ from copyright because they belong to owners who are regarded as intermediaries in the production, recording and dissemination of works. The link with copyright is due to the fact that the three categories of related rights owners are auxiliaries in the intellectual
creation process since they lend their assistance to authors in the communication of the latter’s works to the public.

Neighbouring Rights have taken a new dimension with easy accessibility of technology to the world at large. The Government of India is obliged to honour fundamental principles and international treaties like UCC, WPPT and WCT. First, the Government has committed itself to respect and implement the provisions of the agreements it has ratified, which include the Universal Declaration. Second, these international instruments create a body of customary international law. Even if India has not ratified a particular treaty, the world community will judge India by these civil and political standards. Third, the rights and responsibilities embodied in these agreements are similar to those in the Indian Constitution, particularly with regard to freedom of speech and expression. Admittedly, working with these instruments is challenging. It is hard to determine what tens or hundreds of different framers intended the provisions to mean. And it is difficult to get guidance from the practices at the time the Constitution and the Charter were drafted, because technology has changed significantly since then. The Constituent Assembly finalised the Indian Constitution on November 26, 1949; it came into force on January 26, 1950. Radio broadcasting was quite limited in India in the late 1940s; at the time of India's independence from England, the Government owned and operated 11 stations. Television did not come to India until 1959, more than a year after the Russians launched Sputnik in October 1957. This study attempts to understand broadcasting rights vis-à-vis IPR with special relevance to India.

The IPR connecting this aspect is the Copyright and Neighbouring Rights which are a major part of IPR designed to reward and promotes the production of intellectual works in relation to the development of information technology.
Neighbouring Rights are rights that may be granted to persons or legal entities different from those that are generally considered traditional beneficiaries of copyright. In countries that provide a distinct classification between copyright and related rights, the scope and level of protection granted to the beneficiaries of related rights is generally lower than that of copyright. This is in recognition that the beneficiaries of related rights are not original creators of works but merely intermediaries in their production, recording or diffusion; hence the term ‘related’ or ‘neighbouring’ rights.

Broadcasting has been traditionally conceptualised as a ‘Public good’. The effort and cost required to provide it to one person is the same as if it were provided to many. Understanding the long history of machinations by broadcasters in public relations and various regulatory agencies is crucial for those concerned with the future of public broadcasting. Public-funded State broadcasting services with a monopoly of broadcasting in a country, no longer exists in developing countries. Liberalisation Policies and Foreign Direct Investments (FDI) in the new market for broadcasting, followed by deregulation and creation of a new competitive environment, facilitate the growth of the market model in broadcasting. In an open market, it is considered that individuals can fully express their preferences and hence commercial broadcasting would be able to meet them better. Viewers become consumers. This belief is exemplified by the emergence of Multinational Broadcasting Companies.

While broadcasting organisations are protected all over the world, countries have different legal traditions on how to provide protection. Eighty-three countries have signed the Rome Convention of 1961. At a global level, in Article 14 of the TRIPS Agreement, broadcasters are given the right to prohibit the following acts when undertaken without their authorisation: the
fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organisations, they shall provide the owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention of 1971. Many other conventions provide leeway to the broadcasters to ensure control and many other disputes arise on copyright infringements. With convergence, complexities are increasing, as the broadcasting industry remains highly profitable and IP issues in Internet remain very illusive. This is especially true in the context of freedom of expression and the uncertainty that prevails in permission or remuneration which are critical for creative communication.

Currently, the Broadcasting Organisations enjoy legal protection only over those transmissions made through wireless means. They enjoy a certain level of protection against signal theft and intellectual property-type rights under the international copyright regime, namely the Rome Convention of 1961, the TRIPS Agreement, WIPO Performers and Phonograms Treaty (WPPT-1996) and Satellite Convention (protection of content-carrying signals is presently provided by the Brussels Satellite Convention of 1974). Also, WIPO has been addressing the topic of updating the protection of the rights of broadcasting organisations since 1998 to address the problem of signal theft, particularly in the digital environment. These discussions are still ongoing. The draft treaty’s exclusive rights-based approach is further complicating the present understanding and the future of broadcasting in developing countries like India.
Broadcasting organizations normally do not produce any works; they just arrange transmission. Under these precincts is it justified to grant rights to broadcasting organisations, similar to those granted to the creators, through new international copyright norms? Further, will it constrain the rights of the copyright holders in favour of the broadcasting organisations? If so, will it eventually create an ownership over the ‘contents’ broadcasted in favour of the broadcasting organisations? How far can such a new layer of IPR affect citizens’ fundamental right to be informed? One of the main challenges that developing countries face is their ability to effectively participate in the international policy discourse in trade, investment, and IP issues. With their low capacity and information gap, will their domestic legal framework coalesce with international law? Another important question that arises pertains to the role Public Service Broadcasting (PSB) can play in the future, especially in developing countries, where PSB can be instrumental in promoting access to education and culture, developing knowledge, and fostering interactions among citizens.

The objectives include:

(i) To analyse the historical developments of international copyright and broadcasting right regime from Berne to WIPO.

(ii) To study the existing national and international copyright and broadcasting rights regime and how far they address the problem of the asymmetries of information access.

(iii) To examine the economic growth and development of the broadcasting industry in India and the role of Multinational Corporations (MNCs) in the Indian broadcasting arena.
(iv) To suggest policy measures to policy makers in ensuring fairness in broadcasting services in regard to strengthening the right to information, media pluralism and cultural diversity.

The study attempts to answer the following questions:

(i) How far the existing international copyright and Neighbouring Rights regime vis-à-vis broadcasting rights helped the multinational broadcasting companies to widen their dominance?

(ii) Does the existing copyright and Neighbouring Rights regimes properly address the interests of the broadcasting organisations and the public?

(iv) Does the present copyright and broadcasting rights affect the interests of different stakeholders in the broadcasting network?

(iii) How far the Indian Copyright Act succeeds in maintaining a harmonious balance between the interests of society and the rights of broadcasting organisations?

Owing to the peculiar nature of the topic, the work would be interdisciplinary in nature relying on the principles of Law, Economics and International Relations. Since the study necessitates an analysis of international law, judicial decisions and governmental policies it will be mainly descriptive and analytical in its treatment. Both primary materials and secondary methods will be used to collect data. The major sources of data include the documents of WIPO, WTO, Government of India (Ministry of I&B), Doordarsan, TRAI, BCCI, FICCI, CII, court judgments, etc.

The first chapter introducing the concept of intellectual property and the rights. It presents the structure of Copyright and related rights across the world and the emergence and scope of the broadcasting industry. The second chapter titled ‘Copyright and Neighbouring Rights: International Legal Framework’,
explains the global IPR regimes from Berne to WIPO. International standards of protection in the field of related rights are a recent development, having only come into being in the 20th century. Over time, an increased number of international agreements in the field of copyright and related rights have been adopted, which are explained in this chapter. The third Chapter titled ‘Rights of Broadcasting Organisations in Developing Countries: India as a case study’ presents the overview of Indian Copyright Law Provisions dealing with broadcasting rights and the importance of Originality in Copyright Provisions dealing with Infringement. In this chapter, an attempt has been made to highlight and identify protection regime for the Neighbouring Rights under the Copyright Act, 1957. It also explains the concept of Neighboring Rights, its Indian context and the protection regimes.

In the fourth chapter, discussion is focused on Broadcasting industry in India - Economics, Law and Technology. It also address broadcasting regulations, and its commercialization and corporatisation with special reference to Cricket. The fifth chapter titled ‘Judiciary and Broadcasting Rights: Towards Corporatisation’, deals with how judiciary has addressed issues related to the rights of broadcasting organisations and maintained a balance between the people’s right to be informed and the broadcasters’ rights. The judiciary views broadcasting in the larger perspective of community or public interest than as a mere commercial activity. The sixth is the Concluding chapter, which says that Public Broadcasting Systems too are getting marginalised due to stiff resistance from private broadcasting companies thanks to the latter’s higher quality content, transformation from analog to digital, application of sophisticated technology, variety of content in programmes, live-updating of news with more visuals and comparatively better objectivity, among others. Government Control is falling and there is a lack of regulation in the content
of the programmes and information which can further skew the public issues. There is also evidence of cultural invasion and increase in consumerism. The gameplan of the new business model envisages offering specialised programming to a smaller and more segmented group of consumers, who are armed with the requisite purchasing power to pay for the exclusive service(s). For this gameplan to succeed, the essentials consist of the use of digital gateways, a combination of hardware (set-top box) and software (encryption). These provide the key of access into the hands of the consumers. Moreover, the operators of these electronic access controls can exercise significant influence over market conditions, competition, and individual access to content.