Chapter VI

Conclusion

In today’s world, being able to access information is most crucial, as this helps promote the spread of knowledge, democracy, abridgement of the digital divide and the making of more creative and technology-based products. Since developing countries need to access the latest developmental work being done in the developed world, this is all the more true for developing world. Developing countries should be able to access information in the public domain, which comes at zero cost or very little cost. In this context, broadcasting organisations call for an “update” of their rights, which though worded as a call for the protection of their signals, may go on to extend exclusive rights, in essence aimed at protecting their investments.

Information can be distributed/disseminated via various means, such as wireless media that includes radio, television and satellite or through wireless communications like cable networks or though simulating and webcasting using the Internet. According to extant law, broadcasting organizations are given legal protection only in the case of transmissions made through wireless means. Typically, broadcasters do not create the works that they transmit. Instead their role is only to distribute the information contained in the newly-created works. As a result, broadcasters do not get
copyright protection over the works they transmit since they do not create these. They only get rights over the use of these signals. The copyrights are given to the original creators of the works. So, we observe that there is a clear line that delineates content and content-carrying signal. Copyrights are given respectively to the creator of the content and the broadcaster that transmits these signals. This separation of the two is very vital, since it puts in place a new layer of intellectual property-like rights on top of the IPR enjoyed by the copyright holders.

The aim of granting protection to broadcasting organisations vis-à-vis the signals they broadcast is to save them from signal piracy. That is, no third party should be allowed to use these signals transmitted by the broadcasting organisation. This also saves them from suffering financial losses in cases where they receive payment for the transmitted works. Besides, in view of the investments they have made in setting up the infrastructure to transmit these signals, these broadcasters are afforded certain other additional rights too.

Several international treaties provide for protection of broadcasting organisations. Which include the 1961 Rome Convention on the Protection of Performers, Producers and Broadcasting Organizations, Berne Convention of 1971, Brussels Satellite Convention of 1974 and the TRIPS Agreement. Accordingly, Article 6 of the Rome Convention, 1961, provides for national treatment to broadcasting organizations subject to certain conditions. And Article 7 endows performers the right to prevent broadcasting or
communication to the public, fixation, or reproduction of fixation and describes the relation between the broadcasters and performers. It permits national law to regulate the protection given hereby. However, the domestic law cannot deprive the performers of the ability to control their relations with a right to authorise or prohibit rebroadcasting, fixation and reproduction and communication of television broadcasts in public places accessed by paying a fee.

The Berne Convention of 1971 provides authors of literary and creators of artistic works, exclusive right of authorising the broadcast or communication to the public of their work by wire and wireless, rebroadcast (of the original broadcast) by an organisation different from the first one and public communication of the said works through loudspeakers, etc. It permits compulsory licensing. The members can legislate to allow the broadcasters to undertake ephemeral recordings. It also allows for the preservation of the matter for documentary purposes.

The Brussels Convention (Satellite Convention) of 1974 protects the rights of member broadcasters by preventing the distribution of programme-carrying signals by any other distributor for whom the signals are not intended. The national law will decide on the duration of such preventive period. However, in cases where the signals are to be received directly by the public, the restriction does not apply. Such a stand allows for fair use of the signals for the purpose of information, education or scientific research in developing countries. This provision does not set any limit on the
rights of authors, performers, etc. Instead it allows members to prevent abuse of monopoly.

Compared to the Rome Convention, the WTO’s TRIPS Agreement provides less protection to broadcasting organisations. It establishes that broadcasters have the right to prohibit – but not to authorise – the fixation, reproduction of fixation, and rebroadcasting by wireless means of broadcasts and live performances. In cases where broadcasters are not accorded such rights by members, the copyright-owners can be given such rights, subject to the provisions of the Berne Convention.

According to the proposals forming part of the new broadcasting treaty and which is now under consideration in WIPO, traditional broadcasts, including wireless means of transmissions, cablecasts, wired transmissions, transmissions, and webcasting transmissions over the Internet, will be provided protection. These exclusive rights that are proposed are normally reserved for creators of works and not for signals, as these would create a new layer of rights over those in vogue for copyrights, whereby the separation between signal protection and content could be obliterated.

It is a fact that liberalisation has taken place in the broadcasting sector; but, it is also a fact that in most countries in the world, private monopolies as well as public oligopolies continue to exist. And now thanks to the development of new technologies, transnational conglomerates that control entire communication chains are continuously expanding their scope of operations. As a
result, poorer citizens are constrained from expressing their preferences in commercial markets for broadcasting. Thus, it is only those consumers who have ample financial resources who can avail such pricey services offered by these broadcasters, to the detriment of other poorer sections of consumers who are left unable to access these services. The protection given to broadcasting organisations under the national and international legal system provides, traditional broadcasting organisations with availing certain kinds of protection against signal theft.

A transnational media order is coming into being. It is remapping media spaces, bringing new media practices, flows and products across the world. India, a comparatively strong soft power with rich cultural legacy, has an increasing number of media companies having even overseas presence. Transnational TV channels have multiplied and grown in diversity over the past 10 years to include some of the most innovative and influential channels. For instance, Indian television market witnessed exponential growth, attracted by the large and increasingly affluent urban middle classes and even attracted multinational broadcasting conglomerates into India. The success of news channels in India is attributed to market driven strategies, which include the skilful localization of content, and aggressive business practices. This also includes litigations invoking provisions in Indian copyright related to neighbouring rights. We have seen that the multinational broadcasting companies and the Indian companies have made good use of international practices/ provisions in neighboring rights.
Broadcasting organisations in India enjoy certain rights; and these are consistent with the international treaties and conventions that provide for the exclusive rights-based approach. Thus, Rome Convention 1961 and TRIPs Agreement 1994 are the bedrock on which the Indian law relating to this segment has been developed. India has a strong Copyright regime. Copyright Act was passed in 1957 by the Parliament in the exercise of its legislative powers conferred by Entry 49 of the Seventh Schedule to the Constitution of India. Copyright is applicable to original literary, dramatic, musical and artistic works; cinematograph films; and sound recording. “Copyright” means, the exclusive right to do or authorise the doing of any of the acts in respect of a work or any substantial part thereof. Following membership in WTO, amendment was initiated in 1995 strengthening the IPR further, especially with respect to broadcasting reproduction rights. Accordingly, every broadcasting organization shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts. The word “broadcast” means communication to the public by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images or by wire and includes a re-broadcast, as defined by Section 2(dd) of the Act. The expression “communication to the public” is defined by Section 2(ff) to mean 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. Article 19 (1)
(a) of Indian constitution has guaranteed freedom of speech and expression as fundamental rights of individuals. Broadcasting is the most important mass communication channel through which the right to freedom of speech and expression, which is to receive and impart information and dissemination of ideas freely can be sustained. We had a strong Public Service Broadcasting (PSB), which meets community needs that exist beyond traditional geographic and institutional boundaries. PrasarBharati through All India Radio (AIR) and Doordarshan (DD) networks provide maximum coverage of the population and are one of the largest terrestrial networks in the world. The competition is getting stiffer with the existence of private channels and with the move into digital age. Public broadcasting is in the forefront of using new technology to provide better service and programmes to an even wider and more diverse community, despite being criticized for its lack of visual appeal and low standards of programming quality. With the advent of cable network reaching villages and towns in the country, the expectation of the quality of programs that inform and educate has also risen. Another important move from the part of government is the ‘Mandatory Signal Sharing ordinance 2007” It provide free-to-air programmes to the millions of 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.
For the public, broadcasting is no doubt an instrument for the transmission of information and access to knowledge. And regardless of the consumers’ ability to pay, the general public should have the right to access broadcast material. The requirement of ensuring access to knowledge is fundamental in the case of developing countries, in view of the cultural diversity in their societies. In such countries, community broadcasting, rather than commercial broadcasting has to be the driving principle. There is also the condition that any new right created anywhere in the world should be balanced with restrictions and exceptions so that access to essential information and communication services for all consumer, especially in developing nations, can be guaranteed. Traditional broadcasting organisations currently enjoy certain protection against signal theft and have been granted IP-type rights with the aim of fostering investment in broadcasting under international conventions and treaties.

In order to safeguard developing countries from witnessing the rise of new monopolies and the resultant social exclusion, they require strong public service broadcasting and equitable rules for the sector. While setting up broadcasting infrastructure may require sizable investments, it is also a fact that large corporations in the media segment, both traditional and modern, are pretty profitable. As a result, there is little need for any exclusive intellectual property-type rights as sops for this industry. The advent of new technology in broadcasting services has seen broadcasters extend its reach to foreign markets, resulting in heightened competition. Of
course, the domestic players, who then cry for protection from such onslaught, do not take this lightly. Any understanding in the arena of broadcasters’ rights should ensure access to knowledge and its dissemination in the digital world. These rights should impinge on those of the public and other stakeholders.

India, the third-largest television market in the world, has much at stake vis-à-vis the viewers’ right to information and broadcast material. It therefore, flows that the primary objective of media regulation in a democracy like India is to protect citizens’ fundamental rights to information and freedom of expression. As the Supreme Court noted in its landmark judgment of 1995 pertaining to broadcast media, “Airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights.” Thus, it is evident that the only rightful role for the state is to act as trustees for the public.

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Judiciary has also made frequent interferences for protection of public rights. In the landmark judgment, for instance, in Ministry of Information & Broadcasting v. Cricket Association of Bengal, the apex court 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. Following the Supreme Court judgment in the Ministry of I&B v Cricket Association of Bengal, 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. The Broadcasting Regulation Bill of 1997 which 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). It is understand that there are many pressures from Multi-National broadcasting Companies to withdraw the Bill.

The existing legislations are enough to contain multi-national companies from widening their monopoly/dominance in Indian broadcasting industry. MNCs also failed to use judiciary as a platform to make forays into the public domain. Different judgements reveal that the judiciary upheld the public right to information by giving a broad interpretation to Article 19 (2) contained in Part III of the Constitution.

The Supreme Court in *Ministry of Information and Broadcasting v. Cricket Association of Bengal* while granting the right to the organisers of the event to monetise the event by granting broadcasting rights to private broadcasters, gave a note of caution. The Court said that the degree to which this right is available depends on the underlying character of activity. Thus, if the activity 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 Article 19(2) of the Constitution. The scope of the rights of broadcasting information affects freedom of speech and expression too.

Therefore, the scope of broadcasting rights must be arrived at by evaluating its impact on freedom of expression. Although the balance between freedom of expression and exclusive intellectual property rights is maintained by in-built exceptions, such as 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 the way for constitutionalisation of intellectual property law.

De-regulation followed the liberalisation of the new market for broadcasting. Besides giving rise to a new competitive landscape, the market model of broadcasting eyes providing more options. In an open market, naturally individuals can fully express their preferences. As a result, commercial broadcasting versus public broadcasting can better hold their fort. Here, viewers are the consumers. This belief is underscored by the manner in which new private companies runs their operations -- based on the subscription fee model. This is unlike the traditional broadcasting model.

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 (electronic access controls), 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.

It is clear that as a result of rising segmentation of viewers, controlling programming (for instance, exclusive rights to transmit a sports event) via methods such as digital gateways is vital for cornering the lion’s share of limited number of viewers. Despite an increase in the number of channels available to choose from, consumers (viewers in this case) will only watch those that are of interest to them. While it gives rise to greater number of viewing options for the viewer, it also results in greater costs, since the subscribers have to pay subscription fees and buy hardware to view the programmes being aired. Worse, there is the fear and stigma of social exclusion for those who cannot afford to pay. To obviate such a situation, free-to-air broadcasting is the only way to keep the less affluent populations in the loop of knowledge of access.