

supplied by amending the existing laws or by enacting new laws wherever required, so as to provide legal coverage to all the Rights of the Child in the Convention.

Enactment of Uniform Children Code:

There is an urgent need to enact the Uniform Children Code for India, which should cover the entire gamut of legislation

in India relating to children in one compass. Such Code should contain not only the substantive rights of children contemplated in the United Nations Convention, but also provide an integrated set-up of exclusive Children Courts to adjudicate upon these rights and an integrated administrative set-up from the Centre to the village level to look after the actual implementation of the child's rights.

BROADCASTING AND COPYRIGHT LAW

By

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Introduction

Copyright is a legal mechanism that reconciles the partly shared, partly contradicting interests of authors who give expressions to ideas; publishers and other entrepreneurs who disseminate those expressed ideas and members of the public who use these ideas. Copyright Law, which came into existence as a result of the impact of the printing press had on the society, was forced to adapt the new technologies in order to survive as an effective system. In this process of adaptation, Copyright Law recognized certain new productions as copyrightable works and also recognized certain new rights on authors by expanding the meaning of the copyright². Right to make cinematograph film and sound recording as copyrightable works are examples of this process. With the advent of new technologies like public address systems and broadcasting technology, the works of the authors were made available to the public even without performing the work in the presence of the public.

Copyright Law adapted these technologies into its fold by conferring a new right called 'right to communicate the work to the public,'³ on the authors/owners of the copyrightable works. This right is an extension to the right to perform the work in public. The technologies like loudspeakers, radio, television and cable have scattered the audience into rooms and thereby, destroyed the commonness or unity of the public. The digital technology has even destroyed the unity of time and action by enabling the public to access the copyrightable work of the authors/owners from their home or from the places of their choice and at their convenient time. Thus, there is a major shift from traditional public to the new public in the concept of communication to the public⁴.

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2. Section 14 of the Copyright Act, 1957 lists out the rights included in the copyright, which is a bundle of rights.

3. Section 14(a)(iii) recognizes the right of communication of authors of literary, dramatic and musical works, clause (c)(ii) recognizes the right of authors of artistic works, clause (d)(iii) of the authors of sound recording. Section 2(dd) of Act defines broadcast as communication to the public (i) by means of wireless diffusion, whether in anyone or more of forms of signs, sounds or visual images or (ii) by wire and includes a rebroadcast.

4. Referred from the Internet and Author's Rights by Gendreau, Sweet and Maxwell, 1999

The Copyright Law adapted this technology also by amending the definition of the phrase 'Communication to the public', thereby enabling the authors of the work to communicate their works through Internet⁵. Thus, Copyright Act, 1957 covers a broadcast and defines it as communication of copyrightable work to the public either by wireless diffusion or otherwise. As observed in *Gaware Plastics Polyester Ltd. v. M/s. Telelink*⁶, the plaintiff is a copyright holder of a film, which was transmitted by the defendant, a cable operator, to its subscribers. The Court held that the cable transmission is a communication to the public and the defendant infringed the copyright of the plaintiff.

The next phrase of adaptation of broadcasting technology is the recognition of certain rights on broadcasters for their productions under Copyright Law.

Rights of Broadcasters

With the introduction of public broadcasting, a new technological development came on the scene in the 1920's. Author's right to authorize the use of copyright protected works in the wireless broadcasting was recognized in the Rome version of the Berne Convention (1928)⁷. Having invested

considerable money in the productions of broadcasting, broadcasting organizations sought some sort of protection on the lines of their rights of producers of phonograms. The voices of the broadcasters, seeking protection for their broadcasts began to be heard in 1930's at international level. Performers, sound recording producers and broadcasters, whose interests are separate from traditional authors and whose activities are in so many ways so closely interlinked, demanded uniform international solutions, which represent a compromise of their interests involved. Their efforts resulted in the culmination of Rome Convention (1961), an international convention for the protection of performers, producers of phonograms, and Broadcasting organisations⁸. The first radio service was inaugurated in India by the Indian Broadcasting Company with the opening of Bombay Station on July 23, 1927. Except for the first two years and eight months, when the broadcasting was operated as a commercial venture, broadcasting has been under Government control in India till recently when it has taken a new Chapter VIII, called 'Rights of Broadcasting Authorities' was incorporated in 1957 Act. Though, original Section 37 conferred a special right called 'Broadcast Reproduction Right' on the Government or any authority for its broadcasts, the right really applied to the Government of India, which is the sole broadcasting authority in the country till recently. With the Supreme Court's historic judgment in *Ministry of Information and Broadcasting v. Cricket Association of Bengal*,⁹ delivered in February 1995 came handy for the private organizations to reinforce their demand for a share in the broadcasting arena. The apex Court in that case held, "Broadcasting is a means of communication and therefore a medium of speech and

5. Section 2(ff) of the Act : Commission 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.

Explanation : For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public. This incorporated in the Act, which read : 'communication to the public' means communication to the public in whatever manner, including communication through satellite.

6. AIR 1989 Bom. 31

7. Article 11(1) of the Berne Convention provides for the rights of the authors of copyrightable works to authorize broadcasting of their works.

8. India is not a party to the Rome Convention. Copyright Act, 1957 conferred a special right 'Broadcast Reproduction Right' on the Government or any authority, which broadcasts the programmes.

9. 1995 (2) SCC 161

expression. Hence, in a democratic polity, neither any private individual, institution or organization nor the Government can claim exclusive right over it. Our Constitution also forbids monopoly either in print or electronic media¹⁰. On the other hand, TRIPS Agreement entered into by WIPO members in 1994 imposed an obligation on member countries to extend protection for broadcasts of broadcasting organizations¹¹. TRIPS set 1st January 2000 as deadline to implement this obligation, well before that deadline, Indian Copyright Act, 1957 was amended in 1994 to comply with TRIPS. The (Amendment) Act, 1994 substituted the Chapter VIII with new chapter titled 'Rights of Broadcasters and Performers'¹². The amendment was brought into force on 10th May 1995.

Broadcaster's Reproduction Right

Section 37 of the Act provides that every broadcasting organisation shall have a special right to be known as 'Broadcasting Reproduction Right' in respect of its broadcasts. Broadcasting Reproduction Right (BRR) is defined negatively by explaining when the right is deemed to be infringed. A BRR is deemed to be infringed by a person, who, during the continuation of the right in relation to any broadcast, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof- (a) Rebroadcasts the

broadcast¹³; or (b) causes the broadcast to be heard or seen by the public on payment of any charges; or (c) makes any sound record or visual recording of the broadcast; or (d) makes any reproduction of sound recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence 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)¹⁴. The term of BRR is 25 years from the beginning of the calendar year next following exceptions to the infringement of BRR : (a) making of any sound recording or visual recording of broadcast for private use of the person making such recording, or solely for the purposes of *bona fide* teaching or research; or (b) the use, consistent with fair dealing, of excerpts of a broadcast in the reporting of current events or for *bona fide* review, teaching or research or (c) such other acts, with necessary adaptations and modifications, which do not constitute, infringement of copyright under Section 52. Clause (c) is very difficult to interpret and apply. Section 52 deals with the exceptions to infringement in respect of all works in various situations. According to this there is no infringement if the prohibited acts are done for the following purposes (1) Private use, use by society for *bona fide* teaching or research¹⁵; (2) fair dealing of excerpts in the reporting of current events *bona fide* review, teaching or research¹⁶; (3) reproduction for use in judicial proceedings¹⁷; (4) reproduction for the use of Members of a Legislature¹⁸; (5) the use in the certified copy in accordance

10. *Ibid* at p.213 by Justice P.B. Suvant and Justice Mohan. Justice Jeevan Reddy in his separate and concurrent judgment held that 'a monopoly over broadcasting, whether by Government, or by anybody else, is inconsistent with free speech right of the citizens.

11. Article 14(3) of the TRIPS Agreement provides that broadcasting organisations shall have the right to prohibit the unauthorized fixation, reproduction of fixation and reproducing by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

12. By the same amendment for the first time in the Indian Copyright history, performer's right was recognized in view of the TRIPS obligation.

13. Rebroadcasting means either simultaneous transmission of a broadcast of a programme being received from another source or a new, deferred broadcast of a formerly recorded programme transmitted or received earlier, WIPO reading material on Intellectual Property (P.45)

14. Section 37(3) of the Act

15. Section 52(1)(a)

16. Section 52(1)(b)

17. Section 52(1)(c)

18. Section 52(1)(d)

with any law¹⁹; (6) use of sound recording or visual recording of the broadcast in the course of activities of an educational institution if the audience are limited to students and parents and guardians of the students and persons directly connected with the activities of the institutions²⁰. The aforesaid acts can be done only with the help of a sound recording of the performance. Accordingly, the making of such recording for the purpose cannot be infringement²¹.

Provisions regarding assignment of copyright, licensing, and infringement by importation of copies, civil remedies, criminal remedies and processes of recovery of possession and disposal of infringing copies are made applicable *mutatis mutandis* to BRR by Section 39A²². Proviso to this section qualifies the broadcaster's right to licence of certain broadcaster's right to licence of certain broadcasts. They are broadcasts, made in respect of any work or performance as the case may be or both of them. In licensing of such broadcasts, the consent of the owners of work or/and performer is necessary provided that copyright or performer's right subsists in such work or performance at the time of licensing. The licensing of a broadcast of a literary work or artistic works falls under this case whereas broadcast of a sports event does not as its neither a work nor a performance.

Section 38 of the newly substituted Chapter VIII in 1994, for the first time, in

the history of Indian Copyright Law confers a special right called 'Performer's Right' on performers in relation to each of his performance. One of the facets of this Performer's Right is the right to communicate his performance to the public by broadcast or authorize such broadcast. Broadcasting organisations during the continuance of Performer's Right *i.e.*, for 50 years shall not broadcast the performance without the consent of the performer. However, it can make solely for the purpose of a *bona fide* teaching or research or for media reporting purposes²³.

Copyright (Amendment) Act, 1994, while conferring special rights on performers and broadcasters also inserted two new provisions (Sections 40A and 42A) in Chapter IX of the Act dealing with International Copyright. Under Section 40A, the Central Government, may, by an order published in the Official Gazette, direct to apply the provisions of Chapter VIII to broadcasters and performers of a foreign country (other than the member of TRIPS) has made or undertaken to make provisions for extending similar protection by it, to the Indian broadcasters and performers. Under Section 42A, the Central Government, may, by its order withdraw this protection to broadcasters of a foreign country if it appears that particular country does not give protection to Indian broadcasters.

*Ephemeral Recordings*²⁴.

Where a protected work is broadcast, it is not always possible or feasible to do this directly, that is, to broadcast the performance or presentation of the work as this actually occurs. Where the work broadcast is already fixed in the form of a sound recording or cinematograph film, no problem will occur so long as the broadcaster has received the

19. Section 52(1)(e)

20. Section 52(1)(i)

21. Copyright and Industrial Designs by P. Narayanan, Second Edition, 1995, (P.126)

22. Section 39A of the Act reads, Section 18, 19, 30, 53, 58, 63, 65 and 66 shall, with necessary adaptation and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work. Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no licence to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

23. Section 38(3)(c) read with Section 39(a) and (e)

24. Ephemeral means 'transitory' or 'passing' and is used in contrast to 'durable' or 'permanent'

authorization to transmit the broadcast from the copyright owner and the copy is lawfully made. However, where the work is performed or presented in the broadcasting studio, difficulties of timing may readily arise. It is often easier broadcaster to make a recording of the performance or presentation at a mutually convenient time and then to broadcast it at a later time or date. In such cases, however, arises as to whether permission for making of this recording is also received from the copyright owner. This issue was debated in Brussels Conference of Berne Convention. One school of thought represented by both France and UK, took the view that the acts of broadcasting and recordings were clearly differentiated, and that authorization to carry out the former did not imply the permission to make a reproduction for the purposes of the broadcast. On the other hand, there was an opposing view that the grant of permission to make a broadcast carried with it the concomitant right to do whatever else was necessary to enable the broadcast to be made. Finally a provision is made in Berne Convention to allow the broadcasters to make ephemeral recordings, for archival preservation²⁵. Copyright Act incorporated this permitted act as exception to infringement under Section 52(1)(3)²⁶, in the year 1994.

Broadcasting and Public Interest

On the other hand, copyright is acknowledged to be a motor for stimulating creative activity, thereby promoting learning and progress for the benefit of the public; on the other, limitations and exceptions to copyright answer to the public interest in the widest possible availability of copyright material. A successful Copyright Law must

find a balance between these two goals of public policy. Notion of public interest has influenced the Copyright Laws of a few major jurisdictions, namely, France, Germany, the United Kingdom and United States of America²⁷. Public interest in relation to the broadcasting can be viewed from two aspects; first, the interest of the general public in obtaining access, as cheaply as possible, to information of all kinds, disseminated through broadcasts; second, the role of a broadcast as facilitator in making available the information and copyrightable works to the public in the public interest. The first aspect covers the interest of the general public in obtaining access to the broadcasts of sports and other cultural events of national and international importance. This aspect of public interest has been enunciated by the Supreme Court in *Secretary, Information and Broadcasting v. Cricket Association of Bengal*²⁸, as concomitant right of a citizen to free speech and expression enshrined under Article 19(1)(a) of the Constitution. The Court held, "The Right to Freedom of Speech and Expression also includes the right to educate, to inform and to entertain and also, right to be educated, informed and entertained. The former is the right of the telecaster and the later that of the viewers²⁹."

These two conflicting interests, broadcasters and that of the public, emanating from the same right of free speech and expression need to be reconciled. France in its legislation concerning freedom of communication recognizes the interest of the public by imposing a limitation on exclusive right to broadcast. It provides that major events (*evenements majeours*) may not be exclusively broadcast in such a way that an important section of the public could be deprived of the possibility of following them live or recorded on a free television service.

25. Article 11(b) (3)

26. Recording by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast, and the retention of such recording for archival purposes on the ground of its exceptional documentary character.

27. See *Gillian Davies*, Copyright and Public Interest, Sweet and Maxwell, London, 2002

28. *Supra* 8

29. *Ibid* at P.226

The expression 'major event' refers not only sporting events but to other important and newsworthy events such as national festivals *etc.*³⁰. In India, absence of such provision resulted in a conflict between the private broadcaster and the public broadcaster and the public broadcaster (Doordarshan) in Ten Sports case³¹. In this case, 'Ten Sports' a foreign broadcaster purchased telecasting rights of friendly series of cricket matches played between India and Pakistan in 2004 from Pakistan Cricket Board, the event organizer. Doordarshan offered Ten Sports some amount as royalty for telecasting matches through its channel. Ten sports refused to grant licence for offered amount and claimed higher fees. Minister of Information and Broadcasting approached the Court seeking direction to telecast the cricket matches on the 'public interest' doctrine. The Court issued interim order permitting the Doordarshan to telecast pending disposal of case on condition of deposit of Rupees 10 crores in the Court.

Anti-siphoning laws of U.K. and Australia prevent the exclusive broadcasting of major sports event on broadcasting. These laws restrict pay-television licensees from acquiring the right to telecast certain listed events of national or cultural importance unless a national or commercial free-to-air broadcaster also has the right to telecast the event. Such, anti-siphoning provisions were also sought to be introduced in India. Attempts were made in India for recognition of this public interest in Section 23 read with Section 32(2)(r) of the Broadcasting Bill seeks to prohibit broadcasters, including pay-television and free-to-air broadcaster from carrying a live broadcast of certain listed sporting and other events of national and international interest held in India without the consent of the India Broadcasting Authority unless AIR and Doordarshan have also been given same broadcasting rights. Similarly, limitation was

proposed in Section 31(2) of Convergence Bill, 2001. In order, to maintain level playing field, the proposed Convergence Commission was vested with the power of determining the terms and conditions for access to the network by a public broadcaster under Section 31(3) of the said Bill. However, these provisions have not been given the force of law, yet.

Broadcaster's role as facilitator to advance the public interest is recognized in the Copyright Law in two ways; one is by making exceptions to infringements, the other is by a provision for grant of compulsory licences. Section 52(1)(c) of the Act permits a broadcaster, a fair dealing with a literary, dramatic, and musical or artistic work for the purpose of reporting current events. Section 39(b) of the Act permits the broadcaster to use, consistent with fair dealing, of excerpts of broadcast of another broadcaster in reporting the current events. Section 31 of the Act provides for grant of compulsory licence in favour of broadcasting organisations to communicate to the public any Indian work withheld from public. In *Pune Video Theatres Association v. Cinemaster*³², Copyright Board had an occasion to interpret this provision. Petitioner in this case is an association of video parlours licensed under the Maharashtra Cinema Regulation Act operating in Pune. The respondent is the owner of Video Rights (Video Copy Right) of films. Petitioner approached the Copyright Board for the grant of compulsory licence, as the respondent's fixed fee was not reasonable. The Board rejected the petition saying that the respondent not withholding any work from the public. The Board expressed its inability to fix the fee in the absence of any provision in the Act. In *Music Broadcast Pvt. v. Phonographic Performance Ltd.*³³, the complaint a FM Broadcaster sought licence from the respondent, a collective society comprising of recording manufactures.

30. Supra 26, p.169

31. A landmark SC judgment, has to be updated
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32. 2002 (24) PTC 242

33. 2003 (26) PTC 70

The complainant prayed the Board for compulsory licence of the complete repertoire of the defendant on the ground that the licence fee fixed by the latter is not reasonable. The Board accepting the claim fixed the licence fee of Rs.1,200/- per needle per hour for prime time broadcast. The Copyright Board has made the following observation in its order.

“The purpose of Section 31 is to see that such works, which are an expression of the cultural life of the community are not confined to the almirahs and vaults but are made available to the people so that they are able to enjoy the works.... The Constitution itself considers monopolies and dominant undertakings as vices..... Section 31 of the Copyright Act vested it the copyright societies. If it were not so some parts of the Copyright Act would become unconstitutional”³⁴.

In *Entertainment Network (India) Limited v. Super Cassette Industries Ltd.*³⁵, the Copyright Board followed its earlier decision and directed the grant of compulsory licence on a fee as fixed in that case (known as First Licence case).

The Board held

“A plain reading of Section 31 makes it clear that a person gets a right to move the Copyright Board where in the case of a sound recording the terms are not such which the complainant considers reasonable. Reasonability is to be judged solely by the complainant. If the complainant subjectively comes to the conclusion that the terms are not reasonable, he acquires the right to move the Copyright Board”³⁶.

On these decisions of the Board, radio channels preferred an appeal to the Bombay High Court challenging the royalty fixed by the Copyright Board. Whereas, Copyright owners moved the Delhi High Court seeking

the Court to set aside the order of the Copyright Board³⁷.

Conclusion

Throughout its near 300-year history, the Law of Copyright has been facing challenges from the developments that have been taking place in technology from time to time. Institution of copyright withstood all the challenges posed by the developments in technology by adapting those technological developments into its fold. Broadcasting technology is not an exception in this process. Broadcasters have partly shared interests with general public in accessing the works of the copyright owner. They have partly contradicting interests, with general public. A balance has been struck among these various interests by Copyright Law by protecting the interests of broadcasting organisations along with some limitations on their rights. In the compulsory licence scheme, particularly under Section 30(1)(b), the Copyright Board's role is only examining the reasonableness of fee demanded by the owner of the copyright and fixing the fee. Such fixations by Board are not immune from appeals. Hence, it is suggested a new provision of statutory licence on the lines of Section 52(1)(j) of the Act may be introduced only for the sound recording works in favour of Radio Broadcasters.

For advancing the interest of the general public in obtaining the access to the broadcast of important national events, through public broadcaster, there is an urgent need to enact suitable legislation containing public interest limitations. Alternatively, the Copyright Act may suitably be amended to empower the Copyright Board with the power of granting a compulsory licence in favour of the Public Broadcaster, for the broadcasting any event of national importance, as notified by the Central Government in this behalf, from time to time, on such terms and conditions as the Board may deem fit.

34. Ibid at P.111

35. 2004 (28) PTC 131

36. Ibid at P.148

37. Business Standard dated 26.1.2004