Is It Broadcast or Broadcasting?*

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Received 12 November 2010, revised 14 January 2011

An authors’ right to communicate to the public also includes the right to ‘broadcast’ the work. However, the right to broadcast can only be commercially exploited with the help of broadcasting organizations. Due to the technical contributions of broadcasting organizations to disseminate the works to the public, they are given some rights which are known as broadcast reproduction rights or neighbouring rights. The Indian Copyright Act defines the word ‘broadcast’ which may be used for the purpose of determining the scope and ambit of broadcasting organizations’ ‘broadcast reproduction right’. In effect, there arises an ambiguity in law regarding the author’s right to broadcast and the broadcasting organization’s rights. Clarity on the definition of broadcast for the purpose of determining the rights of the author as well as those of the broadcasting organizations is necessary. This paper critically analyses the definition of broadcast under Indian Copyright Act by way of examining the relevant provisions in detail.

Keywords: Broadcast, broadcasting, broadcasting organizations rights, authors’ communication right, neighbouring rights

Within the ambit of copyright, broadcasting organizations are given some special rights known as broadcasters’ economic rights for the protection of their investment. However, there are some contentious issues like whether the law of copyright gives protection to the broadcast or broadcasting of an authors’ work and what is the extent of the protection given to the broadcasting organizations i.e., whether they have a right over the broadcast itself. Generally, an author of a work has the right to communicate his work to the public. If so, the right of communication to the public includes the right to communicate through broadcast. It is therefore, understood that the author can then assign or license his broadcast rights to a broadcasting organization, which, may then convert the work into a signal and broadcast the same to public. Provided this is the case, it is clear that broadcasting organizations cannot have any right over the broadcast, since it is the right of the author. Given this background, the paper examines the legal position of broadcasting organizations under Indian Copyright Act.

Provisions Related to Broadcasting

Unlike the UK CDP Act, 1988, Indian Copyright Act, 1957 (hereinafter referred to as ‘the Act’) does not recognize broadcast as an independent work. However, broadcast reproduction right has been recognized as a neighbouring right under the Act for protecting the interest of broadcasting organizations. According to Section 2 (dd) of the Act:

Broadcast means communication to the public:

(i) by any means of wireless diffusion whether in any one or more of the forms of signs, sounds, or visual images; or

(ii) by wire, and includes a re-broadcast.

The Act in Section 2 (ff) in turn defines ‘communication to the public’. It reads:

‘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.

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;

Here, though the definition says that ‘communication to the public’ means making available of any work for the purpose of being heard or seen either directly or through any means of

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* This paper is a part of the author’s LLM dissertation work
display or diffusion, it does not include issuing copies of such work. This therefore, implies that communication to the public covers electronic communication which is similar to a public performance unlike issuing original copies of the works. It also includes display of works for public exhibition. But it may be noted that communication to public of the work that is covered in the definition of broadcast is only by any means of wireless or wire diffusion.

The Act also defines the term ‘work’ (Section 2 (y)) as follows:

‘Work’ means any of the following works, namely: (i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording.

The definition of ‘communication to the public’ has to be read along with the definition of ‘work’.

Summing up the above, it is clear that broadcast is communication to the public by wireless or wire diffusion. As per Section 14 owners of the work shall have the right of communication to the public. The authors’ right of communication to the public includes the right to broadcast his works by wire and wireless diffusion methods. Although the Act does not define ‘broadcasting’, Section 37 of the Act provides for broadcast reproduction right. Accordingly, every broadcasting organization shall have broadcast reproduction right. But again, the Act does not define broadcasting organizations. A critical consideration of the term broadcast is therefore necessary.

**Broadcast or Broadcasting?**

Generally, broadcasting organizations are those organizations which are engaged in the activity of broadcasting. In practice, the word broadcast can be used in two ways: (i) as a verb where it denotes the transmission i.e., broadcasting and (ii) as a noun where it may denote either to the ‘broadcast signal’ which carries the content, or the act of transmitting the signals. If this dictionary meaning is taken into account, broadcast may be interpreted as the act of transmission in general. However, in the copyright context, such a simple interpretation is not possible. This is due to the fact that, communication of the work i.e., transmitting the contents to the public is an author’s right and not a broadcasters’ right. Assuming this is true, the word broadcast especially in the copyright context, would cover only the signal not the entire transmission. Evidently, it is accepted that the broadcasting organizations are responsible for the transmission of the work to the public in the technical context, but this is not true especially in the case of rights as provided in the copyright context.

**Interpretation in a Global Context**

Internationally, the Rome Convention is the one which recognizes broadcasters’ protection under the umbrella of copyright. Nonetheless, the Convention does not define the term ‘broadcast’. An examination of the provisions further reveal that the Rome Convention does not impart any positive rights to the broadcasting organizations, although the broadcasters may authorize or prohibit others from doing certain acts. From this, one may safely conclude that the Rome Convention does not grant broadcasting organizations right over the signal. On the contrary, the TRIPS Agreement states that broadcasting rights may be recognized as authors’ rights or broadcasters’ rights, a decision which rests on the Member countries. Given this legal position, there arises a need to examine the stand at other international fora such as the WIPO’s Standing Committee on Copyright and Related Rights (SCCR). In order to understand this, it is necessary to analyze the definition of broadcast and broadcasting in the draft WIPO Treaty on the Protection of Broadcasting Organizations.

According to the definition, ‘broadcast’ means electronically generated signals transmitted by wireless means and carrying a specifically assembled and scheduled program for the reception by general public.

- transmission of such a set of signals by satellite is also ‘broadcast’
- such signals are also ‘broadcasts’ when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent.

Broadcasting organizations usually generate signals in order to transmit the work. Here, the work or content, where copyrightable, is already protected by copyright. In the context of the broadcasting organization, copyright gives protection to the signals which can be easily captured by unauthorized persons. Primarily, this is the reason why such signals are protected under copyright. As per the draft treaty, broadcast means electronically generated signals which can carry the assembled and scheduled program or content. In addition to that, the definition states that if the signal is transmitted through satellite, it shall still be considered as a broadcast. On common consensus, the SCCR decided to move forward with the ‘signal based approach’ for the protection of
broadcasting organizations’. Assuming a signal based approach, protection should be made available only to the signal and nothing more. However, the first Draft Non-paper (on the WIPO Treaty on the Protection of Broadcasting Organizations) defined broadcast in a manner that was not confined to just signal but went beyond that to cover transmission of signals too. In general, transmission right vested with the owner of the works, in view of which the definition of broadcasting WIPO draft treaty seemed very broad and gave protection beyond the signal. However, these definitions were later modified due to objections raised by various countries including India.

In the context of copyright thus, it may be deduced that the term ‘broadcast’ is used as a noun, and in that sense the signal of broadcasters is protected; whereas, the term ‘broadcasting’ is used to denote the act of transmission. As far as rights of owners are concerned, it is evident that they have the right to broadcast their work to the public; the usage of broadcast here is as a verb.

Interpretation in the Indian Context

When one takes into account the definition of ‘broadcast’ as defined under Section 2(dd) of the Act, it is evidently used as a verb to define the mode of transmission or dissemination of the work. This is also apparent from the use of the word ‘diffusion’ meaning dissemination or distribution. The definition in the Indian Copyright Act is closer to the definition of broadcasting as defined in Rome Convention. Therefore the Act employs the word broadcast as a verb rather than as a noun as used in other fora.

Conclusion

From the above discussion it can be concluded that transmission of the work for public reception is considered as broadcasting. Even the definition in WIPO’s draft treaty clearly indicates that the word transmission refers to ‘transmission of signal’. Assuming this as the definition of broadcasting, Section 2(dd) of Indian Act definitely lacks clarity since according to the section, broadcast means communication of the works to public by any means of wireless diffusion or wire. Instead of defining the word ‘broadcasting’, legislatures have apparently defined broadcast to cover transmission of program which gives protection beyond what is actually entailed. Therefore, the provision needs more conceptual clarity. Without this distinction, there is finite overlap between Section 14 of the Act and the provisions in it relating to the broadcasting organizations’ broadcast reproduction rights.

Acknowledgement

The author would like to thank Prof N S Gopalakrishnan for his guidance in this work and Mr Yogesh Pai, NLU Jodhpur for his valuable comments on this paper.

References

1 According to Section 1 of UK CDPA, 1988, broadcast is also a work just like literary, dramatic and musical works. Even the UK Copyright Act 1956 recognized the broadcast as work. However, the 1956 Act provide for two types of work. With respect to the Indian Copyright Act, 1957, it does not consider broadcast as a work.

2 Section 37 of the Copyright Act, 1957 provides a special right known as ‘broadcasters’ reproduction right’. However, these rights are subject to the Section 39A of the Act.

3 Section 2(dd) was inserted by the 1984 amendment.

4 Section 14 of the Copyright Act, 1957 reads: Meaning of copyright.-For the purposes of this Act, ‘copyright’ means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely: (a) in the case of a literary, dramatic or musical work, not being a computer programme, (iii) to perform the work in public, or communicate it to the public. In addition to the above mentioned sub-class, (iii) of (d) & (e) provide the right to communicate the film to the public and the right to communicate the sound recording to the public respectively.

5 According to Section 37 of the Copyright Act 1957, (1) Every broadcasting organization shall have a special right to 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 licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof, (a) re-broadcasts the broadcast; or (b) causes the broadcast to be heard or seen by the public on payment of any charges; or (c) makes any sound recording or visual recording of the broadcast; or (d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or (e) sells or 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) shall, subject to the provisions of Section 39, be deemed to have infringed the broadcast reproduction right.

6 WIPO Draft basic proposal for the protection of broadcasters along with a non mandatory proposal for the protection of webcasters was prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat in the 14th SCCR held between 1 - 5 May 2006, Article 2 (c), www.wipo.int/edocs/mdocs/copyright/en/scr_14/scr_14_2.doc (6 March 2010).
As per the first Non-paper, the definition of broadcast is as follows: ‘broadcast’ means the transmission of a set of electronically generated signals by wireless means and carrying a specifically assembled and scheduled program for the reception by the general public; transmission of such a set of signals by satellite is also ‘broadcast’; transmission of such a set of signals is also ‘broadcast’ when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent; ‘broadcast’ shall not be understood as including transmissions over computer networks. http://www.nepalcopyright.gov.np/pdf/India.pdf (13 January 2011).

The definition reads: ‘broadcasting’ means the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also ‘broadcasting’. Wireless transmission of encrypted signals is ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent. ‘Broadcasting’ shall not be understood as including transmissions over computer networks. WIPO Draft basic proposal for the protection of broadcasters along with mandatory proposal for the protection of webcasters, Article 2(a), www.wipo.int/edocs/mdocs/copyright/en/scrr_14/scrr_14_2.doc (6 March 2010).


Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, Article 3 (f), ‘broadcasting’ means the transmission by wireless means for public reception of sounds or of images and sounds.