Rights and Duties of Broadcasting Organizations: Analysis of WIPO Treaty on the Protection of Broadcasting Organizations

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Transmission of data through a signal based approach has been made possible by the broadcasting organizations, but it has come at certain costs. The problem posed by incidences of signal theft induced the member states of World Intellectual Property Organization to create a new international tool in the form of a treaty to tackle this problem. The paper seeks to analyse this in the light of present legal regime where protection is granted to the broadcasting organizations, and whether granting further protection in the form of exclusive rights will serve the interest of developing nations or not. The representatives of developing nations have made it clear that if the treaty is not based on elementary and absolutely necessary rights, it should be abandoned. A study of the treaty makes it clear that the primary purpose of treaty is not to tackle signal theft, which makes its primary agenda ancillary in nature.

Keywords: Transmission, signal theft, exclusive rights, WIPO, broadcasting organizations

The developments witnessed in the last few decades have shown that the production, dissemination and absorption of information and knowledge has become central to a country’s wholesome growth. Developing countries can acquire knowledge overseas as well as generate their own indigenously. In such a process, the mass media can play a fundamental role in both promoting, or limiting access to knowledge and its dissemination. Broadcasting through radio and television today remains one of the most important mechanisms for communicating knowledge to the public at large in developing countries. Nonetheless, the development of digital technologies, leading to a technological convergence between the three pillars in the chain of communication namely, telecommunications, broadcasting and informatics, and interactive developments (multimedia), holds enormous potential for increasing access and wide dissemination of works specifically to developing countries.\(^1\) Therefore, delivering information and entertainment to all segments of society happens to be quicker and cheaper, thus, fostering learning in an increasingly interactive environment.

A need currently felt amongst developing countries is to create an appropriate national and international regulatory framework to promote the production of works, and its transmission for the benefit of all segments of society.\(^2\) Part of this process involves revising the existing frameworks for the protection and regulation of broadcasting organizations. One of the main challenges that developing countries face with a potential treaty on the protection of broadcasting organizations is effectively participating in and influencing the discussions to ensure that the outcome responds to their needs, takes into account their unique conditions and provides enough short as well as long-term benefits that outweigh the costs of implementation. Moreover, developing countries being the primary constituents of the treaty, it is necessary that the services remain affordable to them, consistent with the widely recognized values and objectives of freedom of expression and all ancillary benefits it confers to a citizen, subject to the condition that it not only reduces unnecessary costs for consumers, but also does not interfere with the rights of other protected authors so as to create an unhealthy environment where there is restricted access to knowledge and less scope for innovation.\(^3\)

A balance sought by the way of this treaty is one that apparently not only tends to protect the commercial exploitation of broadcasters, but also seeks to appease the plight of developing countries by giving heed to their demands. To satisfy these purposes, the draft treaty has been formulated in the

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form of a set of thirty-four articles and a preamble that seeks to attain the problems existing in the field of digital media. This paper attempts to evaluate the provisions of the draft treaty and its possible overall impact, by examining that whether the implementation of the provisions will be able to strike a balance between the rights of broadcasting organizations and the interests of the general public at large.

**Developing Countries and the Concept of Broadcasting**

Free sharing of information paves way for proper dissemination of knowledge and unless the law takes note of the same, the fact remains a nightmare for any country irrespective of whether it is a developing or developed one. Nevertheless, developing countries have the extra burden of balancing the tradeoffs between providing increased protection to broadcasting organizations and ensuring that broadcasting in public interest continues to be a central mechanism for distributing information and knowledge to the public.

In order to fully comprehend the possible impact of the proposed treaty for the protection of broadcasting organizations on developing countries, it is important to consider the discussion in the context of a wider and growing global debate among the broadcasting and other media industries, governments and civil society over the past 20 years. 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, it cannot be denied that the growing pace of technological change witnessed in last two or three decades due of the introduction of digital formats, satellite technology and recent trends in media ownership, has proved to be the main driving force behind the debate on the future of broadcasting despite the existing gaps between developed and developing countries.

Communication through the media (or mass media), i.e. broadcasting, plays a fundamental role in providing information and can be a powerful means of exerting social control and creating social cohesion. Access to information, freedom of expression, pluralism and cultural diversity are fundamental values and objectives that have particular relevance for the media system, specifically in the context of developing countries. Broadcasting, as a segment of the media, implies the transmission of information to as many people as possible. Broadcasting has been traditionally conceptualized as a ‘public good’, in the sense that the effort and cost required to provide it to one person is the same as if it is provided to many.

There is no doubt that digital technology has revolutionized the broadcasting sector and revealed a path to establish a totally interactive environment, like a two-way communication between the sender and the receiver. For instance, the invention of digital media broadcasting (DMB) technology by South Korea (famously referred to as mobile TV) has been perceived as a revolution in the field mobile phone technology. This has made it possible for a user to access television programmes on his mobile phone without any outside user interference. Nevertheless, for traditional broadcasting organizations, this poses a great challenge, particularly in terms of competing with new media firms that specialize in the new technology and run under business models that provide for revenues directly from the users. In most developed countries, traditional broadcasting organizations are building digital infrastructure in order to provide digital services such as on-demand programming and interactivity to gain a competitive edge in the new digital environment and avoid being driven out of the market by other competitors. Moreover, due to convergence of different types of industries like telecommunication, computers and broadcasting, that functioned separately, in an orthodox manner, there exists a risk of monopoly because this convergence paves way for overall power in the hands of some conglomerates which could control the whole entertainment industry in the open market.

The final link amongst all the other connections in the concept of broadcasting, pertinent to developing nations, is the Internet usage. Services offered by the Internet in the form of either free services or the on-demand services has proved to be of real significance to broadcasting organizations for it helps them to expand their purview 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. The debate focuses on whether network operators or a government agency should be
allowed to exert greater control or regulation. In view of the power that could be exerted by cable conglomerates, it might make sense to charge fees from certain websites and excuse others as a matter of regulation. The effect would be to create a two-tiered system on the Internet where one layer would be for those who can afford to pay and the other for those who cannot. Furthermore, this on-line discrimination would 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 and Yahoo are already opposing this and a pertinent result to follow would be a situation of greater control over the content transmitted, to gain an advantage over their competitors. This competitive scenario will yield an unfriendly situation specifically for developing nations because it would hinder access to knowledge and information for users in these nations.

Legal Framework for the Protection of Broadcasters

Broadcasting organizations currently have been granted certain rights in addition to the rights under copyright law, which act as an additional layer of protection. The fact that broadcasting organizations and cable-casting organizations do not generally produce works, but merely arrange and transmit them, raises questions about whether it is justified to grant new rights through new international copyright and related right norms. New developments like computer programs, databases and multimedia productions in the IT sector too are the subjects of copyright protection.

Related rights or neighbouring rights are rights that may be granted to persons or legal entities different from the traditional beneficiaries of copyright i.e., authors. 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 or authors’ rights. The idea being that the beneficiaries of related rights are not original creators of works but merely intermediaries in their production, recording or diffusion.

Copyright law purports to safeguard the production of knowledge in a literary form which it does by protecting the rights of the owners from unauthorized copying and thus encouraging intellectual creation. Moreover, copyright law also takes into the account the interests of society by granting protection for a limited time with certain exceptions so that the public can benefit from the protected work. On the other hand, the purpose of related rights is to protect the interests of certain persons or legal entities that are ancillary to making the work available to public.

Generally, apart from the protection to publishers and producers of cinematographic works, works by producers of phonograms, performers and broadcasting organizations are also protected by related rights. However, due to distinct legal traditions existing across the world, the beneficiaries of copyright and related rights, their classification and level of protection differ among different national copyright systems. The creation of a new category in terms of beneficiaries of related rights in the 20th century is due to manifold reasons. Technological development coupled by a situation of increased domestic and international pressure has provided enough scope for these producers to in turn direct their demands to the government. However, in the said process of procuring benefits in the form of rights, many of the rights covered under related rights are already protected under copyright law. For instance, under the United States copyright law, sound recording producers and performers are recognized as joint authors of sound recordings. Similarly, in the United Kingdom and Ireland, producers of sound recordings and broadcasters benefit from copyright protection and are recognized as authors. Besides, in most of the European continental countries and Latin American countries, producers’, performers’ and broadcasters’ rights are protected by related or neighbouring rights.

Protection to Broadcasting Organizations under International Conventions

Copyright law is applicable within the geographical limits of that country’s territory only. However, the adoption of an increased number of international agreements over both copyrights and related rights has gained a lot of importance. Besides, efforts have been made by several countries by way of agreements to extend the scope of protection with the sole purpose of establishing minimum standards for protection under their own laws.

The first international convention that directly dealt with broadcasting organizations was the Rome
Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961. It established international minimum standards of protection for performers in respect of their performances, for producers in respect to phonograms and broadcasting organizations in respect to their broadcasts. Nevertheless, it made clear the intent of the Convention by making neighbouring rights subordinate to copyright. Soon enough, most of the countries started providing protection to all the three categories of beneficiaries, irrespective of the legal tradition existing in the country or of its being a party to the convention (for example India). Countries like India and the United States made their broadcasting industries flourish by extending the protection under their copyright law.

By making a clear distinction between the literary and artistic works on the one hand, and related rights on the other, the Convention sought to ensure the minimum ‘related rights’ to be granted to the three new categories of beneficiaries. Moreover, realization of the difference in the nature of the right is reason for which the term of protection granted is twenty years, computed from the end of the year in which the fixation was made for phonograms or the performance or broadcast took place (Article 14 of Rome Convention). Nevertheless, as per Article 15 of the Convention, it is kept to the discretion of the contracting nations to decide upon the limitations and exceptions to the protection to be granted to the broadcasting organizations as well as other two categories.

The International Convention Relating to the Distribution of Programmed-Carrying Signals Transmitted by Satellite (Satellites Convention), as per its preamble, was designed to address signal theft by establishing an international system to prevent distributors from distributing program carrying signals transmitted by satellite which were not intended for those distributors. The fact that the Satellite Convention deals only with signals that carry a ‘program’ makes it specifically in the interest of broadcasting organizations, unlike Rome Convention that also dealt with stage performers and producers of phonograms. The former obliges the state parties to the Convention to ‘take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through a satellite is not intended’ [Article 2(1)].

The other international agreement in respect of related rights is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Just like Rome Convention, it too distinguished related rights of the broadcasters from that of the author’s, but with some additional features. Firstly, the Agreement contained detailed provisions on enforcement mechanism and secondly, it made the obligations contained in the Agreement subject to the procedures of the WTO dispute settlement mechanism, thus strengthening the implementation procedure. The Agreement also created a new ‘right of rental’, limited to authors of computer programs and cinematographic works, under certain conditions as stipulated in Article 11.

Idea Underlying Providing Protection to Broadcasting Organizations

The concerns expressed by the broadcasting organizations and certain European Member States to receive increased protection against signal piracy, in the light of recent technological advances and a need to balance the interest of the broadcasting organizations in comparison to both performers and producers of phonograms, ultimately led to the conception of a new international instrument for the protection of broadcasting organizations in WIPO. Moreover, updated protection of the broadcasters’ neighbouring right was felt to be the only remedy against the grave concerns raised by the dilemma of signal theft.

The Preamble of the WIPO treaty recognizes the need to maintain the necessary balance between the different levels of copyright owners and related right holders, and public interest, but the first part of it raises doubts as to its true character. It appears that the core objective of the treaty would be to build on the existing rights, create new rights for broadcasting organizations, and to harmonize such protection among WIPO members. This objective can prove to be an apple of discord for the developing countries which, while agreeing to the proposals were given to understand that the purpose of the treaty was to protect broadcasting organizations against signal theft and nothing else. Therefore, if the intended objective of the treaty is the protection against signal theft, the Preamble should have included an explicit reference to the broadcast signal as the object of protection, rather than highlighting the desire to maintain and develop the rights of broadcasting organizations.
The Subject Matter of Protection

One of the most common doubts pertaining to the object behind protection is the very subject matter of protection. Does the protection also extend to the contents of the signal which it transmits? This question can be answered only by discussing the definitions of the necessary terms involved in the discussion. ‘Broadcasting’ as per Article 3(f) of the Rome Convention is the signal that constitutes the transmission via wireless means of images and/or sounds, when such signals are intended for the reception of the public at large. A ‘signal’ on the other hand, as per the Brussels Satellites Convention is defined as ‘an electronically-generated carrier capable of transmitting programs’ [Article 1(i)]. A comparison of the two definitions leaves no doubt that the object of the protection would be the signal, and not the content it transmits. The rationale behind this being that broadcasting organizations do not create or own such content, but only use and disseminate it to the public.19 This distinction, as stressed upon by the developing countries, between content and signal is crucial in maintaining a proper balance between the rights of copyright holders as creators of works, and broadcasters as users and transmitters of such works.

However, broadcasting organizations have been granted certain rights under international copyright and related right treaties, namely, the Rome Convention, and in a more restricted and non-mandatory form, in the TRIPS Agreement, that go beyond mere signal protection. Some of the rights, particularly those related to reproduction and fixation, that do not subsist in signals as such, however, create lingering doubts.

Rights and Duties of Broadcasting Organizations as Proposed in the Treaty

The grant of exclusive rights in the Revised Draft Basic Proposal (of the WIPO treaty)4 to broadcasting organizations seems contradictory to the aim and scope of treaty, which primarily was to tackle the dilemma of signal theft. Exclusive rights are generally reserved for original creators of works and not for signals. Therefore, in all probability a new layer of intellectual property-type rights over existing copyright and related rights can come into existence by extending protection beyond signal protection.

Presently, the draft proposal seeks to provide broadcasting organizations with several rights like right of fixation, reproduction, distribution, etc., which lie completely out of the domain of neighbouring rights. These rights are exclusive in nature and would allow broadcasting and cable-casting organizations to exert greater control over the underlying content of the signals they transmit, regardless of whether the content is subject to copyright or related right protection or is in the public domain. There are numerous provisions to support this view:

- The right of retransmission or rebroadcasting is provided under the Rome Convention and in the TRIPS Agreement as a right to prohibit, only in respect to wireless means of transmission, but the Revised Draft Basic Proposal broadens it. The revised draft makes the right of retransmission, defining the same as an exclusive right for broadcasting and cable-casting organizations, to authorize or prohibit retransmission ‘by any means’ which would include re-transmissions via computer networks too. The impact of such a right being granted is potentially negative in nature for it would restrict the flow of information on the Internet and will create an imbalance in the copyright law by granting a seemingly unfair advantage to broadcasting organizations over new competitors who may choose to communicate to the public only through the Internet.

- Similarly, the right of communication to the public as contained in the Rome Convention grants an exclusive right of communication to the viewers of television broadcasts if this is done in places accessible to the public on payment of an entrance fee [Article 13(d)]. The conditions under which the right may be exercised are left to national law and countries may declare that they will not implement the right. Similarly, the TRIPS Agreement provides broadcasting organizations with the right to prohibit communication to the public of television broadcasts undertaken without their authori-zation. But, the right of communication to the public as contained in Alternative ‘L’ of the Revised Draft Basic Proposal merely reproduces the language of the Rome Convention. The only addition is that it has been provided unconditionally. Alternative ‘M’ gives countries option to limit the application of the right with respect to certain communications, or to declare that they will not apply the right.
The Rome Convention in its Article 13 provides traditional broadcasting organizations with the exclusive right to authorize or prohibit the fixation of their broadcasts, which is extended by the TRIPS Agreement by granting broadcasting organizations an optional right to prohibit the fixation of television broadcasts undertaken without their authorization. The Revised Draft Basic Proposal would provide the exclusive right of authorizing the fixation of broadcasts and cablecasts, without the requirement of embodiment in any material form, as is the general requirement. This expression of the right of fixation, implies that a right of fixation would extend protection beyond the scope of application of the treaty that is intended to be limited to signal protection only. Moreover, the right potentially creates an imbalance between the rights of copyright owners and related right holders by extending protection to the content embodied in the signal.

The Revised Draft Basic Proposal vests broadcasting and cable-casting organizations with an unqualified right to the direct or indirect reproduction of fixations of their broadcasts/cablecasts ‘in any matter or form’. This would mean that the reproductions in digital form through storage in an electronic memory will also fall within the scope of protection of the right of reproduction. Besides, the draft proposal extends the purview of the right of reproduction further by granting broadcasting organizations another right to prohibit the reproduction of fixations of their broadcasts and the right of authorizing copies even if they are made under a recognized limitation or exception to the broadcasters’ exclusive right. It is provided further that such organizations shall have recourse to effective legal remedy for the breach of their right of reproduction.

Apart from the above mentioned rights (or rather protection), an exclusive right of ‘making available’ their broadcasts to the public via wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them, has been introduced in Alternative ‘R’ of the Revised Draft Basic Proposal. Undoubtedly, this new right allows broadcasting or a cable-casting organization to control the content of their signal, which takes the scope of the treaty beyond its original objective, i.e. tackling the dilemma of signal theft. The effect of such an act would result in concentration of power of distribution in the hands of broadcasters to such an extent that even an undistributed broadcast would become protected by a mere act of fixing it on a server. Nevertheless, consideration of the importance of balancing economic incentive to broadcasting and cable-casting organizations with the private rights of other copyright and related rights holders, has also introduced some limitations. Given the kind of protection these broadcasting organizations have been provided with, checks as such in the form of maintaining limitations and exceptions by the way of national laws will not serve the purpose of proper safeguard.

Conclusion

Undoubtedly, broadcasting remains a tool for the transmission of information and access to knowledge amongst the public. Ensuring public access to the broadcasts forms a part of their right to access regardless of their ability to pay. Moreover, the requirement of ensuring access to knowledge is fundamental in case of developing countries, given the kind of cultural diversity they have in their societies. Surprisingly, the impugned treaty pays no heed to the concerns of these developing nations. Community broadcasting, rather than commercial broadcasting has to be the driving principle and there is a requirement that any new right created in the international arena must be balanced with adequate limitations and exceptions so that access to essential information and communication services for all members of the population, specifically in such developing nations, can be guaranteed.

Despite efforts towards liberalization in the broadcasting sector, in most of the countries around the globe, both public oligopolies as well as private monopolies continue to exist. Moreover, with the development of new technologies, transnational conglomerates, which operate on a commercial basis and possess the ability to control the entire chain of communication, have formed and continue to expand their horizons. This means poorer citizens will be unable to express their preferences in a commercial market for broadcasting. In other words, such kinds of services offered by the broadcasters offer more choice to consumers who can afford to pay while excluding
access to rest of the population. As a response to this dilemma, the concept of public service broadcasting can be fruitful. The treaty however does not provide for any plan of action in this regard.

Given the kind of protection being availed by the broadcasting organizations in the national as well as the international regime, there is no doubt that traditional broadcasting organizations currently enjoy certain protection against signal theft and granting of such right will have the effect of merely creating a new layer on top of copyright and other related right holders, which may also negatively impact the production of creative works; a scenario totally inconsistent with the original objective of the copyright law. Moreover, in addition to constraining the exercise of rights by copyright owners and related right holders, the rights and other protection envisaged in the Revised Draft Basic Proposal would restrict access to knowledge and the flow of information to public, particularly in developing countries, ultimately retarding technological innovation and hampering competition. The need of the hour, therefore, is to recognize the implications of the impugned treaty vis-à-vis the interest of developing countries. On the other hand, developing countries must reject the inclusion of any exclusive rights or otherwise insist that such rights do not extend beyond those already incorporated in different Conventions that are still in operation, so as to ascertain that the scope of application of the new instrument remains confined to signal protection only.

References

3 Numerous examples are there to support this view. For instance Indian Copyright Act, 1957 does not permit even an act of selling or hiring to the public or offer for sale, such sale or hire, any sound recording or visual recording of broadcast which has been made without licence of the owner of the right, as per Section 37 (e).
10 Harpham Bruce, Net neutrality in the United States and the future of information policy, Faculty of Information, 1 (2) (2009) 1-16.
12 Fortune Film International v Dev Anand (1979) AIR Bom 17.
13 The protection here refers to protection by the way of exclusive rights, i.e. the right that is enjoyed by a copyright holder that excludes the acquisition or enjoyment of the same right in relation to the same work by anyone else, on the basis that only the copyright holder may perform a certain act and may authorize or prohibit the performance of that act by others.
19 Article 6 (1) of the Revised Draft Basic Proposal explicitly establishes that the scope of protection extends only to signals, and not to works and other protected subject matter carried by the signals.