

## **PROTECTION OF THE RIGHTS OF THE BROADCASTING ORGANISATIONS - CRITIQUE OF THE INTERNATIONAL DEVELOPMENTS**

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### **ABSTRACT**

Today in developing countries, particularly in remote areas broadcasting through Radio and Television has become one of the most important mechanisms for communicating knowledge to the public at large. Aim of this article is to study the scope of protection granted to the broadcasting organisations and the new development in the field of IPR laws in relation to the broadcasting organisations in International regime and its impact on the Copyright holder, public interests, and developing countries. It focuses specially on the WIPO's new Proposed Draft Treaty in relation to Broadcasting Organisation. Further it deals with certain question like- Is there sufficient protection granted to the broadcasting organisations under International norms? Is there any need to grant additional new rights to them? Is it proper to grant new exclusive rights to broadcasting organisations through WIPO's Proposed Draft Treaty? Will it restraint the rights of the copyright holder by granting similar rights in favour of the broadcasting organisations. It focuses on how the changing regime in International Law relating to the Broadcasting organisation will affect the developing countries etc.

**Keywords:** WIPO, broadcasting organisation, copyright, Intellectual property rights, related rights, International Law etc.

## **INTRODUCTION**

In the context of today's "knowledge society" and knowledge based economy, the production, dissemination, and knowledge absorption of information and knowledge has become central to a country's social and economic development. Developing countries can acquire knowledge overseas as well as create their own at home. In such a process, the mass media, in particular broadcasting can play a fundamental role in both promoting or limiting access to knowledge & its dissemination<sup>1</sup>.

Today in developing countries, particularly in remote areas broadcasting through Radio and Television has become one of the most important mechanisms for communicating knowledge to the public at large. The development in digital technologies holds immense potential for increasing access to knowledge and wide dissemination of works to the public and delivering information and entertainment quicker and cheaper to the all segment of society.

As the protections given to the broadcasting organisations vary from country to country there is need for some International framework to provide protection to the broadcasting organizations when such broadcast is done across the national country. For these reasons protection to the rights of the broadcasting organisation has been granted through International norms e.g. Rome Convention, Brussels Convention, TRIPS Agreement, and WPPT etc. Further, WIPO have been discussing on granting some new rights to the broadcasting organisations through the Proposed Draft Treaty which would provide some exclusive rights to the broadcasting organisation in respect of their broadcasts.

## **COPYRIGHT AND RELATED RIGHTS**

Copyright is a form of intellectual property protection which is intended to reward and promote the production to the literary, dramatic, artistic musical and cinematograph film. Some have argued that copyright law is "the invisible thread between authors, producers and the public".

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<sup>1</sup> A Development Analysis Of The Proposed WIPO Treaty On The Protection Of Broadcasting And Cablecasting Organizations, By Viviana Munoz Tellez And Andrew Chege Waitara, South Centre, January 2007 at p. 1

Related rights, also termed as ‘neighbouring rights’ are rights that may be granted to persons or legal entities different from those that are generally considered the beneficiaries of copyright (i.e. authors). The level and scope of protection granted to the related rights is generally lower than that of copyright holder’s right. The rights of broadcasting organisations are called related rights or neighbouring rights because they are not original creators of works but merely intermediaries in transmission of the work to the reception by the public.

The general justification for copyright protection providing “exclusive rights” is that by providing incentives for creators, intellectual creation is encouraged and ultimately, the public will benefit from the free use of the works after the limited period of protection. On the other hand, the purpose of related rights is to protect the interest of certain persons or entity that contribute in making work available to the public or who produce subject matter that is considered worthy of copyright like protection, but that is not qualify as a “work” under the national Copyright Laws, because it is neither original nor creative one.

The beneficiaries of related rights generally form three categories, viz. Producers of phonograms, performers and broadcasting organisation. In general, producers of phonograms are granted related rights in respect of their phonograms, performers in respect of their performances. Broadcasting organizations in some legislation are granted related rights in respect to their broadcasts. The protection granted to the beneficiaries of related rights differs among national copyright systems, because different countries have developed their national copyright systems independently based on two separate legal traditions, common law or civil law.

### **THE EVOLVING ROLE AND CONCEPT OF THE BROADCASTING**

Broadcasting constitutes a large segment of “mass communication”. Communication through the media plays an important role in providing information and suggesting a proper meaning for it. Access to information, freedom of expression, pluralism and cultural diversity are fundamental values and objectives that have particular relevance for the media system and receive wide recognition as such, including by broadcasting organisations.<sup>2</sup>

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<sup>2</sup> *Supra* note 1, at p.4

Reasons for evolving and developing the concept of broadcasting are as follows:-

- ❖ The transmission of information at a time to many people as much as possible.
- ❖ The cost and efforts required to provide information to many person is the same as if it would have been incurred for providing the same to one person.
- ❖ Broadcasting is the faster means of communicating work to the public than any other means.

## **INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF BROADCASTING ORGANIZATION**

The protection granted to the broadcasting organisation in their national laws differ from country to country. Because of this different national law treatment in granting protection to the broadcasting organisation create more problems when the transmission of broadcast takes place other than national country. To overcome these problems there should be some legal framework at international level. This need was realised by the International organizations and they come up with some International norms for granting protection to the broadcasting organisation against its unauthorised use. One thing which is important to note here is that in the present International framework Broadcasting Organisations have a legal protection only over the transmissions made through wireless means (satellite). They enjoy a certain level of protection against the unauthorised use of their broadcast under the existing international regimes, namely the Rome Convention 1961, Brussels Satellite Convention 1974, TRIPS Agreement 1994, WIPO Performers and Phonograms Treaty (WPPT) 1996 And WIPO Copyright Treaty (WCT) 1996.

Since 1998, WIPO has been discussing the topic of updating the protection of the rights of Broadcasting Organisations to prevent the problem of signal theft i.e. unauthorised use of the signal broadcasted through the Proposed Draft Treaty for The Protection of the Rights of Broadcasting Organizations and Cablecasting Organizations.

### **1. Rome Convention 1961:**

Rome convention established for the first time international minimum standards of protection for performers in respect of their performances, for producers in respect to phonograms and broadcasting organisations in respect to their broadcasts. At present, only

83 countries are Members of the Rome Convention. It is to be noted that United States and India are not party to the Convention. Rome convention provides protection to the broadcasting organizations as follow:

Broadcasting organizations enjoy the right to authorise or prohibit (limited to wireless means of transmission) certain acts namely:

- Rebroadcasting of their broadcasts
- Fixation of their broadcasts
- Reproduction of such fixation
- Communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention allows exceptions in national laws to the above – mentioned rights as regards private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases.

## **2. Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted By Satellite (1974):**

The development of satellite communication in the 1960s raised concerns regarding the need to combat theft or “piracy” of signals, particularly television transmissions by satellite. The Brussels Convention was designed to address such concerns by establishing an “international system to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors”.<sup>3</sup>

Convention protects broadcaster’s rights by allowing Members to prevent dissemination of programme-carrying signals by any distributors for whom the signals are not intended. In other words, the Convention provides for the obligation of each contracting State to take adequate measures to prevent the unauthorised distribution on or from its territory of any programme-carrying signal transmitted by satellite. The distribution is unauthorised if it has not been authorised by the broadcasting organizations. **The protection granted by the Convention is**

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<sup>3</sup> Brussels Convention (preamble)



**limited only to the signals that carry programmes and does not extends to the ‘content’ that those signals may carry.**

The provisions of this Convention are not applicable, however, where the distribution of signals is made from direct broadcasting satellite.

### **3. TRIPS AGREEMENT, 1994:**

TRIPS Agreement grants rights to the broadcasting organisations to prohibit the following acts when undertaken without their authorisation:

- ❖ Fixation of the broadcasts
- ❖ Reproduction of fixations, and
- ❖ The rebroadcasting by wireless means of broadcasts,
- ❖ Communication to the public of television broadcasts of the same.

### **4. WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) 1996:**

The treaty deals with intellectual property rights of performers and producers of phonograms. WCT and WPPT are commonly known as the ‘Internet treaties’ because first time they expand the rights of copyright and certain related rights in the digital environment and also create a new obligation for Member state to prevent the circumvention of TPMs and DRM scheme. This treaty grants to the producers of phonograms the rights of reproduction, right of distribution, right of rental, right of making available to the public. Right of making available is the right to authorise making available to the public the phonograms, by wire or wireless means, in such a way that members of the public may access the phonograms from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet. Thus, WPPT first time expand protection to the related rights over the Internet. It also provides right of equitable remuneration for wireless broadcasting or for any communication to the public of phonograms<sup>4</sup>.

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<sup>4</sup> Art. 15 of WIPO Performances and Phonograms Treaty (WPPT) 1996.

## **5. THE PROPOSED WIPO TREATY ON THE PROTECTION OF BROADCASTING ORGANIZATIONS AND CABLECASTING ORGANISATION:**

### *Introduction*

Since 1998, Member states of WIPO have been discussing the possibility of creating New International Treaty (WIPO Proposed Draft Treaty) for the protection of the broadcasting organizations. The objective of the proposed treaty is to grant new international protection to the broadcasting organizations against the theft of their signals transmitted across national borders. Because even though the protection is granted to the broadcasting organization through various International Treaties and Convention broadcasters consider it insufficient in the light of the new technological advancement and the new digital environment. SCCR has drafted Draft Proposal in its 17<sup>th</sup> session. The text is known as the “Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations.”

The main purpose of this article is to focus on this Revised Draft Treaty and its impact on several other persons and countries i.e. copyright holders of the ‘content’ broadcasted, general public and developing countries which have the access to information and knowledge through internet.

The main purpose of this Treaty is to prevent the theft of the signal transmitted by the broadcasting organisation across their national border. As per the Report prepared by Screen Digest, London namely Study on the Socioeconomic Dimension of The Unauthorised Use of Signals- Part II in some countries national legislation has been based on previously drafted global copyright policies/ regulations such as the Rome Convention. As a result, several technologies that are currently used for distributing programming and broadcast signals (legally or illegally) may not be covered within these previously established legislations, and new national level policies have, in many cases been instituted to address these issues. Similarly, a form of signal usage may be considered as fair use in one country, while being categorized as piracy/ copyright infringement in another.

**5.1 Reasons for unauthorised use or piracy of the signals:** Access barriers are barriers to the unhindered consumption of content, the presence of which often results in the personal consumption needs of viewers being unmet<sup>5</sup>.

As per the survey conducted by WIPO / SCCR to discover the reasons behind such unauthorised use of signals or piracy are as follows:

- Cost of access to broadcast services is one of the important reasons for piracy or unauthorised access to broadcast signals on individual level.
- Availability of distribution technologies and competition between multiple operators offering similar services has a positive impact on consumer level prices, helping to keep cost of services low and offering them at multiple price points.
- Non-availability or delayed availability of content in certain markets.
- Less stringent national laws for the protection of broadcasting signals.
- Content regulation. Strict censorship national laws resulting in the non- availability of broadcast content/ TV shows has been quoted as one of the important reasons for such piracy of content.

## **5.2 DEVELOPMENT ANALYSIS OF THE PROPOSED TREATY:**

There is broad agreement that the objective of the treaty would be to tackle with the unauthorised use of signal/ signal theft and that the object of the protection through this treaty should be limited to the signals only and should not extend to the content transmitted through the signals, which may be subject matter of the copyright or related rights protection. The Revised Draft Basic Proposal provides with number of exclusive rights and additional protection with regard to TPM and DRM scheme to the broadcasting organizations and cablecasting organizations.

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<sup>5</sup> Study on the Socioeconomic Dimension of the Unauthorized Use of Signals – Part II Unauthorized Access To Broadcast Content – Cause And Effects by Screen Digest, London at p. 9



This article is going to discuss the main issues in regard to the Proposed Treaty which provides some exclusive rights like copyright holder in favour of the broadcasting organizations and cablecasting organizations and also it extends its protection over the Internet.

### **5.3 Beneficiaries of the Proposed Treaty:**

The beneficiaries of the proposed treaty will be only broadcasting organizations and cablecasting organisations only. Interests of the other stakeholders are going to affect by this Treaty. These stakeholders include the authors and performers, copyright holder, cable and satellite operators, audiences/users/ consumers, states/ governments, and society.

### **5.4 Exclusive Rights of the Broadcasting Organisation and its Impact:**

The main objective of the Proposed Treaty is to prevent the theft of signal transmitted by broadcasting organizations. But if we see into the text of the Treaty then it can find that Treaty has granted the exclusive rights to the broadcasting organisation and cablecasting organisation to control the access and use of information transmitted over their signals by the public without the permission of broadcasting organisations or cablecasting organisations.

In terms of the impact of such exclusive rights over their signals is that such rights may allow broadcasters to control access and use of not only of their signals but also on the ‘content’ transmitted through such signals. Such ‘contents’ may be of two kinds:

- Contents protected by the copyright; or
- Contents not protected by copyright (those are in public domain).

If exclusive rights are granted to broadcasting organizations in case of a ‘content’ protected by the copyright then it may result in constraining the rights of copyright holder in favour of broadcasting organisations. Then question arises here is that will it be justified to grant such protection to the broadcasting organizations? One more thing important to be noted here is that already there are existing International norms which granted protection to the broadcasting organisations against the theft of their signal transmitted through broadcasts<sup>6</sup>. Thus, if such

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<sup>6</sup> Brussels Convention Relating to The Distribution of Programme- Carrying Signals Transmitted By Satellite, 1974

existing protection considered being insufficient then additional protection should be granted over the existing rights to protect their signals against unauthorised use.

Next issue is in respect of the contents not protected by copyright. In case of content those are not protected by the copyright but are already in public domain and if such control to access and use of those content is exercised by the broadcasting organisations then in such circumstances there shall be restriction on the public interests and violation of the rights of public to access to information and freedom of expression.

### **5.5 Protection Extended To the Internet:**

The Internet has rapidly become a worldwide network offering an open environment where the public can access and share information. Anyone can “publish” on the Internet, as the cost of establishing a website is very low compared to the infrastructure required for setting up a broadcasting station, cable or satellite systems of communication. Therefore, webcasting as the transmission of sound and images over the internet to a computer desktop is a simple task for anyone who can obtain a connection to Internet<sup>7</sup>.

One of the most controversial issues in the ongoing discussions in SCCR sessions is whether to extend the scope of application of the Proposed Draft Treaty to the Internet or not. The Revised Draft Basic Proposal provides exclusive rights to the broadcasting organisations would also extend to the Internet. This would grant rights to broadcasting and cablecasting organisations over their retransmissions through the Internet that no other beneficiaries would have in respect of their work. The right of retransmission or rebroadcasting provided under the Rome Convention and in the TRIPS Agreement is right to authorise or prohibit only in respect to wireless means of transmission and not the Computer network. But **the Proposed Draft Treaty grants the exclusive right to authorise or prohibit retransmission “by any means” which includes retransmissions through computer networks.**

Developing countries already face many problems to access barriers to access to knowledge. In many developing countries and low-income states Internet plays a very important role as the source of access to knowledge and information either on free of cost or on less payment as compared to broadcasting through wireless or wire connections. It is the cheaper and easiest

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<sup>7</sup> *Supra* note 1 at p. 21

way to gain information which also contributes to the development of the nation. But if such a right extend to cover transmissions through computer networks, any individual would be stopped from viewing content transmitted through the Internet even when it is not protected by copyright and would not be able to store and redistribute the content. The Internet is very different from those of broadcasting and cablecasting because of its openness, free access and de-regulated environment which allows for online collaboration and participation. If such rights are granted over the Internet then it will create plenty of problems for the public at large and it will restraint the right of the people to be informed as well as freedom of expression, and access to information at low cost and it will discourage the growth of the creative work which defeats the objectives of the granting IP rights protection.

### **5.6 Technological Protection Measures Obligation and Developing Countries:**

The Proposed Treaty creates obligations for Members to provide technological protection measures (TPM) and DRM as technical mandates against decryption and other measures, including banning devices that may help circumvent technical mandates. Similar obligations were also included in the WCT and WPPT Treaties. If examined appropriately then we can comprehend that such technological protection measures are not necessary to protect signals, but it extend its protection to the content which would be dangerous for access to information and knowledge by the public and may create unfavourable effects for the scientific research, competition and technological innovation, restricting private and non-commercial use of non-copyrighted works. The main question which is arises here is that will it be affordable to the Developing countries or low income states to grant such legal protection to the TPM and DRM technology. As we know that broadcasting organisations are mostly developed in the developed countries and not in developing countries. By granting such protection it will benefit to the high income countries. Therefore, before accepting such obligations developing countries will have to think twice because it will bring more costs than benefit for the developing countries.

### **CONCLUSION**

The demand made by the broadcasting organisations for the protection against the unauthorised use of their signals is legitimate one as they make investment in the transmission of the work

to the reception by the public. But while granting such protection one thing should be kept in mind that there must be harmonisation between the rights of the copyright owners and other related rights holders as well as public interests. Instead of granting protection to the broadcasting organisations over the 'content' carrying-signals protection should be limited to the signals. In relation to the rights extended to the internet it should be kept apart from the concept of the broadcasting. Thus, even developing countries should include some exception and limitations in their national laws in respect of their obligations by which they can protect public interests and also some strict laws for protecting the broadcasting organisations from signal theft.

## **SUGGESTIONS**

In relation to the Revised Draft Basic Proposal for the WIPO Treaty it is suggested that:

- Developing countries should consider maintaining that the scope of application of the Proposed Draft Treaty should be limited to the signal protection and not to extend over the 'content.'
- The inclusion of Webcasting in the Proposed Treaty is defeating the main objective of Treaty to concentrate only on signal theft. Extension of scope to the Internet would hamper access to knowledge and flow of information to the public, particularly in developing countries, therefore developing countries should take stand that not to extend such scope of Treaty to the Internet.
- For maintaining the balance between rights of the broadcasters and also public interests developing countries should include some limitations and exceptions in their national laws as such not to hamper the access to knowledge and information which is necessary for the development of the country.
- Instead of granting some additional, exclusive rights to the broadcasting organisations, some additional protection should be given to the existing rights those are already granted to them through various International norms.