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THE EVOLUTION AND SCOPE OF NEIGHBOURING RIGHTS: A COMPARATIVE STUDY OF INTERNATIONAL AND INDIAN LEGAL FRAMEWORK

Authored By- Sheheen Marakkar, Karun Roy & Gowri Parvathy R

INTRODUCTION

Neighbouring rights, also known as rights neighbouring to copyright, were created for three categories of people who are not technically authors: performing artists, producers of phonograms, and those involved in radio and television broadcasting.

The history of copyright historical development reflects the development of technology. Copyright developed as the means by which 'works', i.e., materials deserving copyright protection, reach the public. At the beginning it was the invention of the printing press which gave copyright its progress. The protection of printed material against unauthorised reproduction was the main concern of copyright and the right to prevent such reproduction, that is the reproduction right, was the basic and the main right, it was followed by the translation right in literary works1. Until the second half of the 19th century the printing press was the sole technology involved in taking literary works of all kinds to their public. In the case of dramatic and musical works the main route of the work to its public was live performance and in the case of artistic works, was exhibition. In the second half of the 19th century technology created photography, sound recording and silent films and in the 20th century, films with sound tracks, radio and television. These creations entirely transformed the whole scene of the copyright.

[1] STEWART, STEVEN, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS, Butterworth (London) Second ed. p. 185

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The Berne Convention as at its inception did not therefore extend to these entrepreneurial efforts which is the neighbouring rights. Efforts in this context means performances, phonogram and broadcast. If you look into these neighbouring rights, it is all products of teamwork while the copyright system was meant to incentivise individual creativity. But over time, it gained recognition both internationally and in national legislation. there has been a breakdown of this assumption even within the internal discipline of copyright, leading to these efforts, and rights connected therewith, gaining acceptance and recognition both internationally and in the Indian legislation.

INTERNATIONAL POSITION PRIOR TO ROME CONVENTION

Prior to Rome convention into some national legislations included neighbouring rights. Italian law, one of the first to recognise these new rights in 1941, called them, diritti conessi (connected rights), German law verwandle schutzrechte, (related rights) French law droit voisins (neighbouring rights). In English Law the term "neigbouring rights" is now most commonly used. The Indian law does not use term "neigbouring rights".

In International law the first move towards neighbouring rights was made in 1928 by the Rome Revision Conference of Berne Convention when Conference, although refusing to grant a copyright to performers, as had been suggested, expressed a voeu at the end of the Conference that members of the Berne Convention should "consider the possibility of measures intended to safeguard the rights of performers". It was envisaged that a Convention or later two Conventions (one for Performers and Producers of Phonograms and one for Broadcasting Organisation) should be "annexed to the revised Berne Convention".

The first copyright owners were 'printers', in modern terminology publishers, of books who combined artistic skills and judgement with technical skills and made the initial investment. They were individuals in the 17th and 18th centuries but in the 19th century many became companies. Thus, the copyright resided in the company. When broadcasting was invented 'copyright' legislations had no difficulty in granting a copyright to the broadcasting organisations which were responsible for creating and disseminating the programmes.

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Copyright is given for work while Neighbouring rights on the other hand, does not constitute works because they presuppose a pre-existing work. It means that it develops from a work which is already there. Performers are usually only protected if they perform works. Phonograms are nearly always recordings of work (birdsong or sound effect being the unimportant and rare exceptions). Broadcasts consist largely of performances of works (the broadcasting of sporting or public events being some of the notable exceptions). In copyright, works are being protected but in neighbouring rights the beneficiaries are protected.

The scope of copyrights is, also by definition, wider than the scope of neighbouring rights, which encompasses only three categories of rights: the reproduction rights, the public performance rights and the broadcasting rights. The term of neighbouring rights is, again by definition, almost invariably shorter than that of other copyright, as 50 years from the death of the author is always longer than 20 or 30 or even 50 years.

OWNERSHIP, SCOPE AND TERM OF NEIGHBOURING RIGHTS

As to ownership, invariably it is a company or corporation in the case of phonogram producers and broadcasting organisations. It is usually an individual or a group of individuals (orchestra, chorus, pop group) in the case of performers although some orchestras have formed companies for business purposes.

In the case of author's rights, the scope of the right is a large bundle of rights which comprises apart from the basic reproduction right, inter alia the translation right, the performance right, the broadcasting right and the film rights. The scope of these new rights, whether they are classed as copyright or neighbouring rights, is confined to the reproduction right, the performance right and the broadcasting right. Throughout the history of copyright, the duration of the right has always been 'at the heart of the policy argument"2. The statutory term represents the compromise between the interests of the rightsowner and the public interest in the widest

[2] CORNISH, W.R, INTELLECTUAL PROPERTY RIGHTS, (1981) Sweet & Maxwell (London) p. 340.

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possible access to all works. For published works, most countries have now accepted the '50 years after the death of the author' term of the Berne Convention for works not published in the author's lifetime the period is usually 50 years from the end of the year in which the work was first 'published'. It is the latter type of term, i.e., a number of years from publications, that has become the rule for neighbouring rights. In the case of phonograms and broadcasts where the original right owner is not a physical person this is the only logical solution. The minimum term under the Rome Convention is 20 years3.' Under national laws the term varies from 25 years in the Nordic countries and Germany4,' 50 years in the U.K. and India to 75 years in the United States5."

In the case of performers, the starting point of the term is in most national laws the time when the performance took place or when the performance was fixed. As performers, unlike producers of phonograms or broadcasting organisations, are physical persons with a natural lifespan, such a term, if it is as short as 20 years, leads to abnormal situations. When the performer who has made a recording in his twenties or thirties reaches his forties or fifties his new and protected recording may have to compete in market with his own earlier recording which are already in the public domain. Thus, the rights in the new materials are always of shorter duration by definition and sometimes much shorter.

PROTECTION OF PERFORMERS

Performers have the right to prevent fixation (recording), broadcasting and communication to the public of their live performances without their consent, and the right to prevent reproduction of fixations of their performances under certain circumstances. The rights in respect of broadcasting and communication to the public may be in the form of equitable remuneration rather than a right to prevent. Due to the personal nature of their creations, some national laws also grant performers moral rights, which may be exercised to prevent unauthorized use of their name and image, or modifications of their performances that present them in an unfavourable light. When the Beijing Treaty enters into force, these rights will extend to performers in relation to their audio-visual performances.

[3] Rome Convention, Article 14
[4] Denmark: Copyright 1960, Articles 45 and 47; Germany. Copyright Act 1965, Article 82.
[5] Copyright Law 1976, Section 302-305.

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The classical definition in international law is actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works"6. The definition is wide in that it includes performances of works in the public domain, but narrow in that it excludes all those who don't perform works, e.g., variety artists, acrobats, sports persons or extras on stage or in films.

It is rather paradoxical that although of all neighbouring rights owners - performers are closest to derivative authors such a translator of literary works or adaptors of musical scores who receive full authors rights are in many jurisdictions and in international law the weakest.
There seems to be two reasons for the weakness of the performers position in law. The first is historical and social. Actors or 'strolling players' were regarded as vagrants by the law during the formative period of copyright. Adam Smith, (Scottish economist and philosopher) in his work gave players, buffoons, musicians, opera-singers, opera - dancers as classical examples of unproductive labour 7. Modern times have removed this social stigma and from the bottom of the social scale star performers have gone to the top and some have become the idols of modern society.

The second reason is historical and technological. Adam Smith goes on to say: "The work of all of them perishes in the instant of its production". This was perfectly correct in his days. This reason was, however, removed with the invention of records - films, radio and television, from the time when performances could be fixed and the fixations both reproduced in large numbers and performed to large audiences, thus involving the two basic rights in the copyright bundle, the reproduction right and the performance right, the second reason too had been removed.

Minimum protection for performers8 by the Convention includes the possibility of preventing the broadcasting and the communication to the public, the fixation of their unfixed performance, the reproduction of a fixation of their performance. The reproduction of a fixation of the performance, without the consent of the performer must satisfy the following conditions.

[6] Article 3(a), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
[7] SMITH, ADAM, THE WEALTH OF NATIONS Book II, Chill, quoted by Edward Thompson, 'Twenty Years of the Rome Convention'(1981) Copyright 274.
[8] Article 7, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).

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(i) If the original fixation itself was made without their consent.

(ii) If the reproduction is made for purposes different from those for which the performers gave their consent.

(iii) If the original fixation was made in accordance with the exception, and the reproduction is made for purposes different from those referred to in those provisions.

Article 14 of Agreement on Trade-Related Aspects of Intellectual Property Rights deals with the rights of performers. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall prevent the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance. The term of the protection available under TRIPS to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place.

The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights of two kinds of beneficiaries, namely, performers (actors, singers, musicians, etc.) and producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds).

The Treaty grants performers economic rights in their performances fixed in phonograms (not in audio-visual fixations, such as motion pictures): (i) the right of reproduction9 (ii) the right of distribution10 (iii) the right of rental11 and (iv) the right of making available12.

The Treaty grants performers of unfixed (live) performances, the right of broadcasting (except in the case of rebroadcasting), the right of communication to the public (except where the performance is a broadcast performance) and the right of fixation. The Treaty also grants performers moral rights, that is, the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the

[9] Article 7, WIPO Performances and Phonograms Treaty (WPPT) (1996)
[10] Article 8, WIPO Performances and Phonograms Treaty (WPPT) (1996)
[11] Article 9, WIPO Performances and Phonograms Treaty (WPPT) (1996)
[12] Article 10, WIPO Performances and Phonograms Treaty (WPPT) (1996)

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performer's reputation.

PROTECTION OF PRODUCERS OF PHONOGRAMS

In the early days, a phonogram was no little more than a recording of sounds, a kind of facsimile reproduction of a performance of musical or literary works, or both, involving only technical skills. But gradually advancing technology made record production an act form which probably demands as much creativity as any other derivative work. Phonograms were first included in the list of 'work' in the United Kingdom in 1909; other common law countries such as India and Australia followed.

Rome Convention specifies “phonogram” to be exclusively aural fixation of sounds of a performance or of other sounds.13 Also, “producer of phonograms” means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds14. The term of protection to be granted under the Convention shall last at least until the end of a period of twenty years computed from the end of the year in which the fixation was made for phonograms incorporated therein. Producers of phonograms enjoy the three basic rights in the 'bundle of rights' granted to right owners: the reproduction right, the public performance right, and the broadcasting right.

The Phonograms or Geneva Convention provides for the obligation of each Contracting State to protect a producer of phonograms who is a national of another Contracting State against the making of duplicates without that producer's consent; against the importation of such duplicates, where the making or importation is for the purpose of distribution to the public; and against the distribution of such duplicates to the public. Protection may be provided under copyright law, sui generis (related rights) law, unfair competition law or penal law. Protection must last for at least 20 years from the date of first fixation or the first publication of the

[13] Article 3 *(b)*, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
[14] Article 3 *(c)*, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).

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phonogram15. WIPO is responsible, jointly with the ILO and UNESCO, for the administration of this Convention. The Convention does not provide for the institution of a Union, governing body or budget.

Article 14 of Agreement on Trade-Related Aspects of Intellectual Property Rights deals with Producers of Phonograms. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Rental rights of phonogram are provided under TRIPS. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place.

PROTECTION OF BROADCASTING ORGANIZATION

In order to understand the relative dearth of private international law relating to broadcasting organisations, one must look at the nature of broadcasting organisations and the history of their international relations. Among the beneficiaries of the Rome Convention, performers are private individuals and phonogram producers are private or public companies whereas broadcasting organisations are either departments of state (usually in authoritarian countries), public law corporations with a charter (mainly in Western Europe), or commercial organisations (mainly in North and South America) which need a licence from the government in order to be able to operate. Thus, their dependence on the government or their proximity to the government and also their influence on the government is far greater than that of either authors or publishers among the copyright owners or of the other two neighbouring right owners. They perform a public service and their task is cultural and artistic as well as being a leading agency of news and current affairs. It is, thus, not surprising that the international problems being encountered by broadcasting organisations with regard to their rights tended to be dealt with either at the diplomatic level or by public international law, whereas copyright is,

[15] Article 4, Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971)

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in its essence, the exercise of a private right. Thus, in the early days of broadcasting (sound broadcasting) in the 1930s and 1940s the interest of broadcasting organisations in solutions based on copyright was not of very great importance to them. The Rome Act, of the Berne Convention 1928 had established the broadcasting right of copyright owners 'jure conventionis' and broadcasting organisations regarded themselves primarily as users of copyright material. At the Brussels Revision Conference of the Berne Convention in 1948 the broadcasters played the role of the largest user achieving a compulsory licence and other user benefits. Immediately, thereafter, and in the 1950s, broadcasters represented by the EBU (European Broadcasting Union16) actively participated in the preparatory work for the Rome Convention. This period did, however, also see the advent of television which made broadcasting organisations the largest single user of copyright of all kinds (news, literature, drama, music etc.)

RIGHTS OF BROADCASTING ORGANISATIONS

Generally speaking, broadcasting organisations have following rights:

(i) An absolute right to 'authorise or prohibit the rebroadcasting of their broadcasts'17. This can be said to be the basic broadcasting right, the equivalent to the reproduction right of copyright owners. Rebroadcasting in the strict sense18 means the simultaneous relay of the programme. Deferred broadcasting must by definition imply the fixing of the broadcast first so that, if done without the consent of the original broadcasting organisation, the infringement already takes place at the time of fixation and before the fixation is rebroadcast.

(ii) Broadcasting organisations have an absolute right to authorise or prohibit the fixation of

[16] The OIR (Organisation International Radio) was founded in 1946. In 1950 the EBU was founded by 23 European Broadcasting Organisations. The OIR moved to Prague and changed its name to OIRT (International Radio and Television Organisation) Covering Eastern Europe.
[17] Article 13 (1) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
[18] Article 3 (g) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).

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their broadcast19. The right is the equivalent of a recording right but usually takes the form of a reproduction right as a copy of the first fixation is made and sent to the other broadcasting organisations under a contract between the two broadcasting organisations (either against payment or by way of programme exchange agreement).

(iii) Broadcasting organisations have an absolute right to 'authorise or prohibit the communication to the public of their television broadcast'20. This right is the equivalent of a public performance right and may be subject to a compulsory licence. The right is, however, restricted to the public performance of television broadcasts as opposed to sound broadcasts and exercisable only if the communication to the public is made in places accessible to the public against the payment of entrance fee, public places which install television sets, e.g., hotels.

The Brussels or Satellites Convention provides for the obligation of each Contracting State to take adequate measures to prevent the unauthorized distribution on or from its territory of any programme-carrying signal transmitted by satellite. A distribution is considered unauthorized if it has not been authorized by the organization that decided on the programme's content. The obligation exists in respect of organizations that are nationals of a Contracting State.

The provisions of this Convention are not applicable, however, where the distribution of signals is made from a direct broadcasting satellite21. The Convention permits certain limitations on protection. The distribution of programme-carrying signals by non-authorized persons is permitted if the signals carry short excerpts containing reports of current events or, as quotations, short excerpts of the programme carried by the emitted signals or, in the case of developing countries, if the programme carried by the emitted signals is distributed solely for the purposes of teaching, including adult teaching or scientific research. The Convention does not establish a term of protection, leaving the matter to domestic legislation. The Convention does not provide for the institution of a Union, governing body or budget.

[19] Article 13 (b) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
[20] Article 13 (d) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
[21] Article 3, Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974).

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INDIAN PERSPECTIVE

PERFORMER'S RIGHTS IN INDIA

India has not ratified the Rome Convention yet and is a member to the WIPO Performance and Phonograms Treaty,1996. India's regime of protection for performer's rights has closely mirrored the treaties in vogue. Prior to the 2012 amendment, Indian copyright law guaranteed the minimum rights provided for by the Rome convention, by way of the 1994 amendment that introduced performer's rights to Indian law for the first time22. Post the 2012 amendment, this protection broadly conforms to the provisions of the WPPT in so far as performer's rights are concerned.

Starting with definitions, the Copyright Act, 1957, defines a performer to include "an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance."23Performance is defined, in turn, as "any visual or acoustic presentation made live by one or more performers."24 These definitions did not create much controversy till the 2012 amendment inserted a proviso after the definition of "performer" that reads: Provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of the practice of the industry, is not acknowledged anywhere including in the credits of the film shall not be treated as a performer except for the purpose of clause (b) of section 38B Prior to this proviso, studio singers and actors in cinematograph films were not considered "performers" because their presentation was not made live but confined to a studio. However, this proviso makes it appear as though actors in a cinematograph film are performers in general, except where their performance is casual or incidental in nature. This has led to considerable industry unrest recently because singers in films have started demanding a share of the royalties flowing from the different uses made of the sound recordings /songs in the film. No conclusive view can be expressed on this issue till it is adjudicated by courts. The only judicial observation - it cannot be termed more than just an observation because the case was decided on a separate footing - supports the case of singers. In Neha Bhasin v. Anand Raj Anand25, the Single Judge of the Delhi High Court has observed

[22] As explained by the Delhi High Court recently in *Akuate Internet Services v. Star India Pvt. Ltd.*, MIPR 2013 (3) 1, it was in the wake of 'livelihood threatening technological changes' that the law intervened in 1994 to recognise performer's rights and broadcast reproduction rights.
[23] Sec. 2(qq) The Copyright Act, 1957.
[24] Sec. 2(q) The Copyright Act, 1957.
[25] 2006 (32) PTC 779 (Del).

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that every performance has to be live in the first instance whether it is beforean audience or in a studio. Therefore, if any such performance was recorded and thereafter exploited without the permission of the performer, the performer's right would be infringed.

Turning to the duration of the rights, the 2012 amendment has brought us in conformity with the WPPT by doubling the term of protection from twenty-five to fifty years, starting from the beginning of the calendar year following the year in which the performance is made. Prior to this Amendment, the coverage of the rights was also narrow, akin to that in the Rome convention, and did not extend to the distribution of copies of the performance, either by way of sale or commercial rental26. The moral rights of integrity and attribution have been introduced, in line with the WPPT, vide Section 38B.

Section 38(4) as it stood before the amendment also provided that a performer's rights ceased to exist the moment the performance was incorporated as part of a cinematograph film with the performer's consent. This provision has now been repealed, and the 2012 amendment makes it clear, vide Sec. 38A(2), that the performer's consent only bars him from objecting to the enjoyment by the producer of the film of the performer's right in the same film. The proviso to Sec. 38A(2) adds that the performer shall, in any event, be entitled to royalties in case of making of the performances for commercial use, a right akin to the equitable remuneration right introduced by the WPPT. Finally, Section 39(c), a provision that has been in force since 1994, makes it clear that performer's rights (and broadcast reproduction rights) shall not be infringed by any act of the kind that would qualify as a fair dealing exception to the exclusivity of copyright, provided for in Section 52.

PROTECTION OF PHONOGRAM IN INDIA

Phonograms were never considered a neighbouring right in India, and the Indian Copyright Act, 1957, right from its enactment, included both sound recordings and cinematograph films within the category of works entitled to copyright protection.

[26] The 2012 amendment has expressly conferred this right on the performer, *vide* Section 38A(a)(ii) and (iv).

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BROADCAST REPRODUCTION RIGHTS

Distinct from performer's rights, broadcast reproduction rights existed even prior to 1994. 1994, however, marked a watershed in the recognition of such rights because the statutory language was modified to suit the needs of private broadcasting organisations that had entered the television and radio broadcasting sector post liberalisation. Prior to the '94 amendment, the law was worded largely to accommodate the interests of the Government and Doordarshan, the only broadcasting authority till the early to mid-90s. It is interesting though to briefly trace the evolution of the broadcast reproduction right from 1957 to the present.

In 1957, the Act did not define "broadcast", using instead the expression "radio diffusion", defined in Sec. 2(v) as including "communication to the public by any means of wireless diffusion whether in the form of sounds or visual images or both." This definition was restrictive because it did not cover communication by means of wire. However, one could possibly contend that even such communication would make use of some form of wireless diffusion. In 1983, the Act was amended to remove "radio-diffusion" and define "broadcast", thus fully substituting the former term with the latter. Section 2(dd) was inserted, defining "broadcast" as 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 including re-broadcasts too within its scope. The next major amendment came in '94, when the term "broadcasting authority" was replaced with "broadcasting organisation", and the special broadcast reproduction rights were extended to every such organisation. This amendment also enhanced the scope of the right by including within it the right to reproduce recordings of the broadcast, and the right to sell or hire such recordings or their reproductions to the public or to offer to do so. The 2012 amendment makes only a nominal change, substituting the term "hire" with "commercial rental." Because this expression is defined in Section 2(fa) to exclude the rental of a lawfully acquired copy for non-profit purposes by a non-profit library or a non-profit educational institution, the object of the substitution is to facilitate greater public access to broadcasts. The duration of the right remains at twenty-five years.

Section 37 provided for the substantive right, and classified "broadcast reproduction right" as a special right arising on occasions where a programme was broadcast by radio-diffusion by the Government or any other broadcasting authority. The duration of this right was twenty-five years from the beginning of the calendar year following the year of first broadcast of such

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programme, and the right extended to restraining (i) rebroadcasts of the programme, (ii) communication of the same to the public, and (iii) recordings of the broadcast. It is thus seen that the Indian enactment stole a march on the Rome Convention by a full four years in guaranteeing broadcast reproduction rights.

Any unauthorised interference with, or alteration of, the broadcast will violate the broadcast reproduction right.

CONCLUSION

It can, thus, be said by way of conclusion that neighbouring right are now firmly recognised and they are certainly going to stay. Some countries have in fact treated neighbouring rights at par with copyright.

Neighbouring rights is that India today has a very robust regime, on paper, for protecting the rights of performers and broadcasters. The major concern is that of enforcement, which in turn is heavily dependent on awareness. The 2012 amendment considerably enhanced the scope of performer's rights but it does not seem to have made any significant on-the-ground impact. Similarly, the rampant cable piracy all around makes us rethink whether broadcast reproduction rights are, after all, that instrumental in rewarding the entrepreneurial efforts taken by broadcasters. We will have to give some more time to study the working of these provisions to arrive at a definitive conclusion on their efficacy, and in the interim, hope that they improve the lot of performers and broadcasters for the better.