

Copyright and Related Rights Law

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LECTURE – 37

Broadcast Reproduction Right

Welcome back to this course on copyright and related rights law. We were discussing broadcasters' rights, and in the first session, we had seen the definition of broadcasting in UK law and under the Indian Copyright Act. We had understood that broadcasting is a type of subject matter of copyright or a work under the UK Copyright Act, and it is not a work under the Indian Copyright Act, but the justification for protection of broadcasting, whether as a work or as a related right is something which we can connect, with the kind of responsibility, and initiative that copyright is looking to encourage with respect to film producers, and sound recording producers, and how they are granted a copyright protection. In this particular session, we are going to look at what the various broadcasting rights are that have been granted under the Indian Copyright Act. But before we understand the broadcasting rights individually, let us first understand how broadcasting falls within the sphere of the copyright of authors. Let us understand that broadcasting is not considered a work in itself in India.

Thus, in providing copyright for communicating the work to the public under section 14, we understood that broadcasting is a part of communication to the public. Thus, when section 14 reads as follows: "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 in the case of a literary, dramatic or musical work not being a computer program, communicate it to the public. What do we understand then? That if there is a work that is being broadcast, then such a work and its broadcasting would have to be authorized by the copyright holder of the work. And this fits quite well into how we understood broadcasting as a means of carrying the work.

It is not the expression itself. Rather, it is the carrying of the expression, and this is the foundational basis for us to understand where broadcasting as a right falls. Therefore, if we are considering the importance of rights within the realm of the Copyright Act, We

must give primary importance to work. If there is a copyrighted work, such as a literary work, then since the content is being carried in the broadcasting, the utilization of the literary work must be authorized. How then must we understand the rights of the broadcaster? Are we saying that some kind of rights remains? Aren't all the rights with the copyright holder of the work, or do we attribute certain rights to broadcasters by way of separating the broadcast from the content? Isn't that how we considered the protection of sound recordings as copyrightable subject matter as well? Hadn't we separated the content on which the sound recording is made? The underlying works that have copyright in them and sound recordings that have copyright in themselves.

Similarly, can we make a distinction between the content that is being broadcast and the broadcast itself? Let us look at a provision within the Copyright Act that tells us about this severability. It says, this is section 39A, subclause 2: the broadcast reproduction right shall not affect the separate copyright in any work in respect of which the broadcast is made. What we understand is that the copyright in the work being carried by the broadcast, that copyright under section 14, is unaffected. But on the fact that the broadcast is authorized at this point, certain rights emerge with respect to the broadcast itself. And these rights are such that they don't affect the separate copyright in the work itself.

You would recall that in session 28, we discussed this in connection with sound recordings and cinematograph films. In section 13 clause 4, we have seen that the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which, or a substantial part of which, the film or, as the case may be, the sound recording is made. Underlying works such as literary works and musical works that are part of a sound recording have a separate copyright, and a separate copyright exists in the sound recording. Similarly, the broadcast reproduction right is separate from the rights that the copyright holder has in his work. We have also seen this severability with respect to performance.

In session 34, we discussed section 39A, clause 2. But in respect of performances, it was said that performers' rights shall not affect separate copyright in any work in respect of which the performance is made. This application of severability is very important because unless we are capable of making the separation, the understanding of rights and how that applies in terms of the work is unclear. Either in terms of the broadcast or in terms of the performance does not become very clear. With this in mind, please remember that we have separated the content from the broadcast.

With that in mind, let us now look at Section 37. Section 37 states that there is a special right vested in broadcasting organizations, known as the broadcast reproduction right. It states that every broadcasting organization shall have a special right known as the

broadcast reproduction right in respect of its broadcasts. There are certain types of acts that are provided under Section 37. These are all acts of reproduction.

How is this a relevant consideration? We understood in the previous session, that the broadcast is effectively a signal that is being transmitted from one location to another. We had also seen how the UK Copyright Act specifically provides protection to encrypted transmissions, provided that there is a decoding device that has been provided in the user's place, or with respect to the recipient. It is not solely because what is being played is the content. The content itself is under the copyright of the author. But had it not been for the broadcaster, this content would not have been made available to the recipient; therefore, the broadcasting process is very important.

Therefore, if not for the broadcasting process, this content would not have been available to the recipient and must be considered along with the copyright of the content under the Copyright Act. Before we understand this application, let us first understand what reproduction means. Reproduction is basically understood as the action, or process of copying something to grab the content from the signal, to rebroadcast such a signal without authorization, to record the broadcast which is made, which is being played on a device and then to use that recording. These are all considerations that would fall within reproduction. This important understanding that a broadcast carries content means that it would not be possible to neglect the importance of the work or the performance being presented by the broadcast.

Clarity is provided by Section 39A. 39A clause 1, the first proviso to this clause reads: provided that where copyright or performer's rights subsist in respect of any work or performance that has been broadcast. No license to reproduce such broadcasts shall be given without the consent of the owner of the rights or the performer, as the case may be, or both of them. Let us understand that this proviso starts by saying that where copyright or a performer's right subsists. When we understood communication to the public and its interpretation under section 2, we understood that it referred to the communication of a work or performance.

It's important to restrict such a definition to a work, or performance when we are referring to performer's right to communicate the performance to the public, and, the author's right to communicate the work to the public. But there are situations where such communication may not have any copyright or performer rights. In such a situation, we can say broadcasting is not based on any licensing needed from any author or performer. Rather, a broadcaster essentially has broadcast reproduction rights that he uses solely and that are not encumbered in any way. But what the proviso tells us very clearly is that where copyright or performers' rights are subsisting, then no license to reproduce such broadcasts shall be given without the consent of the owner of the rights or performer.

In other words, what we are going to be discussing in terms of reproduction, whether the content that is being broadcast is an author's right or a performer's right, Then, reproductions of such broadcasts will also require authorization from the right holder of the work or the performance, or both. Supplementing this is the second proviso to the same provision, which provides further that the broadcast reproduction right, shall not subsist in any broadcast if that broadcast infringes the copyright in any one. Which means what? Because copyright in a work is the right to communicate the work to the public, if the content itself is infringed, Then, in other words, if the content is not something that is authorized by the right holder, or if the content is an adaptation. If it is a derivative of the original work, then we can clearly say that the content is infringing and therefore the broadcast reproduction right is not something that arises at all. Let us now consider section 37, clause 3, which says, during the continuance of a broadcast reproduction right in relation to a broadcast, any person who, without the license of the owner of the right does any of the following acts of the broadcast or any substantial part thereof: Rebroadcast the broadcast.

This is the first kind of broadcast reproduction right that we are considering, which is to rebroadcast the broadcast. Once the broadcasting is made, to then rebroadcast that broadcast is the exclusive right of the broadcasting organization. No rebroadcast can happen without the permission of the broadcasting organization. In other words, such a rebroadcast must be licensed. The second kind of broadcast reproduction right is when causing the broadcast to be heard or seen by the public for payment of any charges.

We must understand that broadcasting organizations generate revenue from such broadcasts. And the economic perspective that arises here is significant because, just like copyright in any work, it is intended to enable the copyright holder to firstly recoup his investment and secondly to be rewarded for creative efforts. In terms of the producer of a cinematograph film, we have understood that this is a consideration of recouping the investment along with the profits that such a work would generate. Similarly, the broadcasting organization is also looking to recoup its investment and therefore to make broadcasting available to be seen by a person without any license on payment of charges. Then such charges, you would realize, are charges that are legitimately connected to the broadcaster and not to an unlicensed person.

The next kind of broadcast reproduction right is to make any sound recording or visual recording of the broadcasts. Where such sound recording or visual recording is made, we must understand that this is not just a sound recording of what has been broadcasted, but rather we must understand, that this is not just a sound recording of the signal by itself; the content also is something that gets recorded, and therefore this would not only be a violation of the broadcaster's right, but also a violation of copyright and a violation of the performer's rights. The dealing with such a recording is something that the next two reproduction rights concern themselves with. This provision, as you can see, states that it

makes any reproduction of such sound recordings a visual recording where such initial recording was done without a license or where it was licensed for any purpose not envisaged by such license. You would realize that when a recording is licensed, it is not just the signal but also the content.

Any license would authorize the use of the content in terms of all the authors, all the right holders, and all the performers who have a stake in that particular signal. And therefore, any license which is given will be given for a specific purpose. In the specification of these stakeholders, where any usage occurs beyond such purposes, then that is a violation of the broadcast reproduction right. If the initial recording was unlicensed, then there is no question. Any reproduction of such a recording is definitely a violation of the broadcast reproduction rights.

Finally, it also discusses a commercial rental right with respect to that recording. It says: Sells or gives on commercial rental or offers for sale or for such rental any such sound recording or visual recording referred to in clause c or clause d. To engage in the renting of such sound recordings and not to create any reproductions. Reproductions would be covered under clause d, and the renting of that copy of the recording would be covered under clause e. With that, I hope we have understood the scope of broadcast reproduction rights and how broadcast reproduction rights are a kind of related right in India.

How broadcasting is a work under the UK Copyright Act. The justification, though, for an intellectual property consideration is the same. In the next session, we will take a look at what resale royalty rights are. Thank you for joining me.

See you all in the next session. Thank you.