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INTERNATIONAL SPORTS LAW PERSPECTIVE

ONLINE PIRACY OF LIVE SPORTS TELECASTS IN INDIA

SEEMANTANI SHARMA*

“The law should protect investments in sport.”¹

I. INTRODUCTION

Online consumption of sports content is on the rise in India due to increasing smartphone penetration and falling data tariff.² The last three seasons of the Indian Premier League (IPL) has witnessed a 62% growth rate of IPL’s digital viewership. While a substantial number of these viewers watched the IPL on legitimate online services such as Star India’s Hotstar mobile streaming app and Time Internet’s platform Crickbuzz, many also resorted to unauthorized online streaming of live matches.³ For instance, at the recently concluded IPL season, it was discovered that more than 1, 700 unique URLs were telecasting IPL illegally via 211 unique servers, 122 pirate streams, 51 hosting sites, and 23

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1. D. Murali, “*The Law Should Protect Investments in Sport*”, HINDU BUS. LINE, Sept. 18, 2008, <http://www.thehindubusinessline.com/todays-paper/ldquoThe-law-should-protect-investments-in-sportrdquo/article20012903.ece>.

2. *Sports in India*, ERNST & YOUNG (July 2017), [http://www.ey.com/Publication/vwLUAssets/ey-sports-newsreel/\\$File/ey-sports-newsreel.pdf](http://www.ey.com/Publication/vwLUAssets/ey-sports-newsreel/$File/ey-sports-newsreel.pdf); see *The Business of Sports: Playing to Win as the Game Unfurls*, KPMG (Sept. 2016), <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf>.

3. *Id.*

infrastructure providers.⁴ Further, the advent of live streaming apps have also led to rampant piracy of sports broadcasts worldwide, including India.⁵

While there are no recent statistics quantifying the losses to the Indian broadcasting industry due to sports broadcast piracy, the overall losses because of broadcast and movie piracy is estimated to touch up to \$3.1 billion U.S. Dollars by 2022, making India the largest victim of broadcast piracy in the world.⁶ Even during 2010-2011, India had the highest rates of broadcast piracy in the Asia-Pacific region, with total accumulated losses of \$1.4 billion U.S. Dollars.⁷ Further, back in 2007, it was estimated that signal piracy was growing 12% annually.⁸ Despite these alarming statistics, India's attitude towards broadcast piracy has been lackadaisical. For instance, India has recurrently opposed the inclusion of online signals in the proposed treaty for the protection of broadcasting organizations rights (Broadcasters Treaty) despite the fact that a majority of the broadcast piracy – especially sports broadcast piracy – takes place online.⁹ Similarly, even though the Indian courts recognize the broadcast

4. *IPL 2017: The Piracy Conundrum*, INDIAN TELEVISION, Apr. 20, 2017, <http://www.indiantelevision.com/television/tv-channels/sports/ipl-2017-the-piracy-conundrum-170420>.

5. See Shubham Agarwal, *Facebook Live is Now Being Used to Stream Pirated Movies and Sports Events*, TECH. PERSONALISED (Nov. 5, 2016), <http://techpp.com/2016/11/05/facebook-live-movie-streaming/> (example of online piracy of live cricket match); Cecilia Kang & Will Hobson, *Streaming Apps Threaten a TV Bastion: Live Sports*, DAILY HERALD, Sept. 5, 2015, <http://www.dailyherald.com/article/20150509/business/150508868/>. See generally Bryan Altman, *NFL Broadcast Copyrights Threatened By Periscope, Meerkat*, CBS N.Y., Apr. 2, 2015, <http://newyork.cbslocal.com/2015/04/02/periscope-meerkat-threaten-multi-billion-dollar-sports-broadcast-copyrights/>; Mark Bridge, *Facebook Accused of Failing to Tackle Piracy as 400,000 Watch Boxing Free*, SUNDAY TIMES, May 4, 2017, <https://www.thetimes.co.uk/article/facebook-accused-of-failing-to-tackle-piracy-as-400-000-watch-boxing-free-qbwxxvqvq9>.

6. See Jim O' Neill, *Online TV & Movie Piracy Losses to Soar to \$ 52 Billion*, OOOYALA: VIDEOMIND (Oct. 30, 2017), <http://www.ooyala.com/resources/vidiomind-blog/online-tv-movie-piracy-losses-soar-52-billion>; see also *Friend MTS Tackles India's Digital Piracy Problem*, FRIEND MTS (Nov. 21, 2016), <https://www.friendmts.com/friend-mts-tackles-indias-piracy-problem/> (stating that India had the highest rate of broadcast piracy in the world).

7. WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 668, Twenty-Third Session, SCCR/23/10, (July 20, 2012), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_10.pdf.

8. *Govt to Sign Global Pact Against TV Signal Theft*, FIN. EXPRESS (June 16, 2007, 5:30 AM), <http://www.financialexpress.com/archive/govt-to-sign-global-pact-against-tv-signal-theft/201917/>. See Prasad Bhosekar, *Gang Involved in Satellite Signal Theft Busted; 4 Arrested*, ZEE NEWS, June 30, 2014, http://zeenews.india.com/news/nation/gang-involved-in-satellite-signal-theft-bUSted-4-arrested_943837.html (stating that illegal transmissions had resulted in an estimated loss of Rs 6000 crores to TV broadcasters and the film industry).

9. See WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 51, Thirtieth Session, SCCR/30/6, (Sept. 14, 2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_6.pdf (Delegation of India expressing that no post-fixation rights should be provided under the Treaty and that the scope of protection should cover only signal protection); see also WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 33, Twenty-Ninth Session, SCCR/29/5, (June 11, 2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_29/sccr_29_5.pdf (Delegation of India supporting the

reproduction right of broadcasters, as of now, no Indian court has date decided upon the copyrightability of live sports telecasts. In this vein, this article argues that with growing popularity of digital viewership of sports events, the Indian copyright law and judicial precedents offer limited protection to sports webcasters and organizers against online piracy of their webcasts. This lacuna creates an uneven playing field between sports broadcasters and webcasters, which has an overall negative impact on the local sports industry.

Part II of the article gives a background of sports broadcast piracy in India, and Part III undertakes a comparative analysis of the protection extended to live sports telecasts under the copyright legislation of India, U.S., U.K., E.U., and China. A comparative analysis with the U.S., U.K., and E.U. has been undertaken due to their Anglo-Saxon nature, which the Indian legal system is based on. A comparative analysis with China has been undertaken due to its similar demography, and the similarity of issues faced by the Indian and Chinese broadcasters.¹⁰ Part IV of the article analyzes why India should protect live sports telecasts. Part V makes some recommendations for mitigating live sports telecast piracy, and Part VI concludes the article.

II. SPORTS BROADCAST PIRACY IN INDIA

The increasing online consumption of sports in India, coupled with the availability of affordable pirate technologies and online streaming devices such as Meerkat and Periscope, has led to an ever growing menace of sports broadcast piracy.¹¹ For instance, during the 2017 IPL season, illegal streams were viewed by spectators on tablets and mobile phones despite the fact that Star India was the exclusive broadcaster of the event, which ultimately

position that no post-fixation rights should be allowed under the Treaty as the scope of protection covered only signal protection).

10. India has the second largest number of internet subscribers, next only to China. *See Sports in India*, *supra* note 2.

11. For increase in online consumption of sports in India, see *id.* *See also The Business of Sports: Playing to Win as the Game Unfurls*, *supra* note 2. While there are no statistics available for India, it is estimated that in the UK, at least one in five millennials watch illegal streams of live sports events. *See Paul MacInnes, More Than Half of Young People Watch Illegal Streams of Live Sports, Study Finds*, *GUARDIAN*, Apr. 26, 2017, <https://www.theguardian.com/sport/2017/apr/25/illegal-streams-live-sports-sports-industry-group>. For the growing popularity of Meerkat and Periscope, see Altman, *supra* note 5; Kang & Hobson, *supra* note 5. *See also* Don Kaplan & Christian Red, *Live Streams of Mayweather-Pacquiao Fight Latest Battle in the Fight Against Online Piracy*, *N.Y. DAILY NEWS*, May 4, 2015, <http://www.nydailynews.com/sports/online-piracy-cuts-hbo-profit-mayweather-pacquiao-article-1.2210041>. *See generally* Samuel Gibbs, Julia Powles & Sam Thielman, *What Do Periscope and Meerkat Mean for Broadcasting Copyright?*, *GUARDIAN*, May 11, 2015, <https://www.theguardian.com/technology/2015/may/11/periscope-meerkat-broadcast-copyright-premier-league>; Seb Joseph, *Live Streaming – The Ticking Time Bomb for Sports Broadcasters*, *DRUM*, Apr. 11, 2016, <http://www.thedrum.com/news/2016/04/11/live-streaming-ticking-time-bomb-sports-broadcasters>.

culminated into a legal battle.¹² Similarly, during the 2014 FIFA World Cup, illegal broadcasts were made available via file sharing websites such as Luckyshare, Bitshare, Terafile, Freakshare, and Letitbit.¹³

While there are no recent statistics quantifying the losses to the Indian broadcasting industry due to broadcast piracy – especially sports broadcast piracy – the available studies indicate a grim picture. For example, the last study conducted by the Cable & Satellite Broadcasting Association of Asia (CASBAA) quantified the overall losses due to broadcast piracy at \$1.4 billion U.S. Dollars for the 2010-2011 year.¹⁴ Similarly, it is projected that losses due to broadcast and movie piracy will touch up to \$3.1 billion U.S. Dollars by 2022, making India the largest victim of piracy in the world.¹⁵ The problem is particularly grave for cricket, the sport affected the most because of unauthorized live streaming.¹⁶ It is estimated that at least 941 viewers watched unauthorized live streams of nine major cricket matches held in 2005.¹⁷ It is because of these alarming statistics that at the 24th Standing Committee on Copyright and Related Rights (SCCR), the Indian delegation conceded that, with its network of more than 800 television channels, it was deeply concerned about broadcast piracy.¹⁸ Despite this, India has yet to endorse a futuristic Broadcasters Treaty, which is extremely important for curtailing sports broadcast piracy.¹⁹

12. See *IPL 2017: The Piracy Conundrum*, *supra* note 4.

13. See FP Staff, *Anti-Piracy for FIFA: Delhi HC Orders Blocks 219 Websites Post Sony Complaint*, FIRST POST, July 8, 2014, <http://www.firstpost.com/sports/anti-piracy-for-fifa-delhi-hc-orders-blocks-219-websites-post-sony-complaint-1606671.html>; Tarun Mazumdar, *The Pirate Bay Blocked for FIFA World Cup Piracy*, INT'L BUS. TIMES, July 8, 2014, <http://www.ibtimes.com.au/pirate-bay-blocked-fifa-world-cup-piracy-1346294>.

14. WIPO, *supra* note 7.

15. See O' Neill, *supra* note 6; see also *Friend MTS Tackles India's Digital Piracy Problem*, *supra* note 6.

16. ENVISIONAL LTD. & NETRESULT LTD, BACKGROUND REPORT ON DIGITAL PIRACY OF SPORTS EVENTS 28 (2008).

17. *Id.*

18. WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 183, Twenty-Fourth Session, SCCR/24/12, (July 27, 2012), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_24/sccr_24_12.pdf.

19. For India's position on the Broadcasters Treaty, see Seemantani Sharma, *India and the Proposed Treaty for the Protection of Broadcasting Organizations*, 52 ECON. & POL. WKLY. 65 (2017). For the importance of the Broadcasters Treaty for curtailing sports broadcast piracy, see *Broadcasting & Media Rights in Sport*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-sport/en/broadcasting.html> (last visited July 30, 2018). See also Seemantani Sharma, *India Needs to Urgently Endorse a Strong Broadcasters Treaty*, WIRE, Dec. 11, 2016, <https://thewire.in/86022/india-broadcasters-treaty/> [hereinafter *India Needs Strong Broadcasters Treaty*]; Seemantani Sharma, *Will India Lead the Way for International Broadcasting Rights?*, WIRE, May 25, 2017, <https://thewire.in/139600/india-broadcasting-treaty-intellectual-property/>; Seemantani Sharma, *Why the Standing Committee on Copyright and Related Rights Matters for India*, WIRE, Nov. 14,

There are three primary ways in which online sports broadcast piracy can take place: (1) live streams made available via peer-to-peer television services or streamed directly from a web server; (2) recorded versions of events uploaded to file-sharing networks such as bittorrent or eDonkey; and (3) highlights placed on user-generated-content (UGC) sites such as YouTube or Webcast On.²⁰ From the perspective of this article, only online piracy of live sports telecasts shall be discussed as the real value of sports events lies in their live nature. In India, the most common form of live sports broadcast piracy is via live streaming from web servers, and by uploading the recorded versions of sports events to illegal file-sharing networks such as Luckyshare, Bitshare, Terafile, Freakshare, and Letitbit.²¹

III. COPYRIGHT PROTECTION FOR LIVE SPORTS TELECASTS

A. Protection Under Indian Copyright Law

No Indian court has *per se* decided the issue of copyrightability of live sports telecasts even though the Delhi Court has indicated that both copyright and neighboring rights protection, in the form of broadcast reproduction right, can separately co-exist in sports telecasts.²² In *ESPN Star Sports v. Global Broadcast News Ltd.*, the Delhi High Court held that both copyright and broadcast reproduction right under Section 37 of the Indian Copyright Act (the Act) were independent of each other.²³ In this case, ESPN, the exclusive broadcaster for various cricket matches from December 26, 2007 until March 8, 2008, sought an injunction against several broadcasters to prevent them from broadcasting the footage of the matches on grounds that it violated its broadcast reproduction right under Section 37 of the Act.²⁴ The Court, while recognizing the broadcast reproduction right of broadcasters, held:

2017, <https://thewire.in/196768/why-the-standing-committee-on-copyright-and-related-rights-matters-for-india/>.

20. *Update on Digital Piracy of Sporting Events 2011, Submitted in Call for Evidence to Independent Review of Intellectual Property and Growth*, at 11-12, NETRESULT, http://www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy_report_2011.pdf (last visited July 30, 2018).

21. The 2017 IPL season was pirated by both online streaming and via illegal file sharing networks. See *IPL 2017: The Piracy Conundrum*, *supra* note 4. However, unauthorized streaming via peer-to-peer networks was the most common form of online piracy of the nine cricket matches monitored by anti-piracy company NetResult; see also ENVISIONAL LTD. & NETRESULT LTD, *supra* note 16 (stating that 280 out of 941 cases of unauthorized streaming was via peer-to-peer networks).

22. *ESPN Star Sports v. Global Broadcast News Ltd. & Ors.*, RFA (OS) No. 25/2008 INDLHC 2683 ¶ 17.

23. *Id.*

24. *Id.* ¶ 3.

It is thus evident that there could be both copyright and broadcasting reproduction right which could separately co-exist. As an example, the copyright of cinematography film being broadcast on a satellite channel vests with the producer of the film whereas the broadcast reproduction right for the same vests with the broadcaster channel itself. The recording of such movie and unauthorized re-telecast by cable operators could thus result in violation of two separate rights. The first being the copyright which vests with the producer and second the broadcast reproduction right which vests with the broadcaster channel. These rights may vest with two different persons or even with the single person which is evident from the Act.²⁵

Since the live telecast of a sport event is nothing but an audio-visual recording, it can be protected as a cinematographic film²⁶ under Section 13(b) of the Act provided it meets other strictures of the copyright law.²⁷ A broadcaster, with its large team of technicians and announcers, can make decisions regarding instant videotape and replays of the live sporting event. Further, just like the producer of a film, cameramen, director(s) and producers of a live sporting event, a broadcaster can also choose the subject of the telecast, the angles, lightning effects, and sound requirements for shooting the film; therefore, resembling a cinematographic film.

Recently, Indian courts have started awarding an indigenous version of John Doe Orders called the “Ashok Kumar Orders” to curb online piracy of live telecasts of sports events.²⁸ The genesis of these orders in India can be traced to the decision of the Delhi High Court in *Taj Television & Anr. v. Rajan Mandal & Ors.*, where the Delhi High Court awarded a John Doe order for the

25. *Id.* ¶ 17.

26. Section 2(f) of the Act defines cinematographic films to include “any work of visual recording . . . and includes a sound recording accompanying such visual recording and ‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films.” See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 2(f).

27. Under Section 13(b), copyright subsists in cinematographic films provided it is not substantially infringed from any other work. See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 13(b).

28. A John Doe order is an order restraining anonymous infringers and owes its origin to King Edward III of England. See Binny Kalra & Achuthan Sreekumar, *Hunting Down India’s Nameless Infringers*, 237 MANAGING INTELL. PROP. 36 (2014). See generally Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 J. INTELL. PROP. RTS. 351 (2013); T. Prashant Reddy, *A Critical Analysis of the Delhi High Court’s Approach to Ex Parte Orders in Copyright and Trade Mark Cases*, 3 MANUPATRA INTELL. PROP. REV. 171 (2011); Rodney D. Ryder & Ashwin Madhavan, *The IP Lessons of India’s Cricket Sensation*, 227 MANAGING INTELL. PROP. 34 (2013).

first time²⁹ by appointing a local commissioner to search the premises of cable operators that were illegally broadcasting the 2002 FIFA World Cup, and to seize all equipment used for such purposes.³⁰ In this case, Ten Sports was the exclusive broadcaster for the 2002 FIFA World Cup.³¹ The Court recognized the menace of cable piracy and held that it was not powerless to award John Doe Orders against unnamed defendants for protecting the broadcast reproduction right of a broadcasting organization under Section 37 of the Act.³²

A similar order was recently awarded in *Sony Pictures Networks India Ltd. & Anr v. Home Cable Network Pvt. Ltd. & Ors.*, where the Delhi High Court awarded an ex parte ad interim injunction restricting the unauthorized telecast of the 2017 IPL season for which Sony held the exclusive broadcast rights.³³ The Court also appointed two local commissioners for undertaking various steps to prevent the unauthorized broadcast of the matches by any means, including the internet.³⁴ Some of these steps ordered by the Court for the local commissioners were:

- (i) to ascertain whether the 2017 season of IPL [was] being unauthorisedly exhibited, communicated or made available for viewing by the public . . . at the premises . . . visited by . . . Local Commissioners; (ii) to serve a copy of the order of injunction passed by [the] Court on the person(s) in-charge of the establishment . . . ; (iii) to search and make an inventory of all equipment which is being used for the unauthorized broadcast . . . found at such premises . . . ; (iv) to seize/take into custody all equipment which is being used for the unauthorized broadcast . . . , and thereafter seal the same in suitable packing materials/containers . . . [and] (vi) to take photographs and video recordings of the unauthorized broadcast³⁵

In *Dep't of Elecs. & Info. Tech. v. Star India Pvt. Ltd.*, the Delhi High Court awarded an ex parte injunction against seventeen defendants, and restrained them from unauthorized online streaming of the India-Australia Test

29. For the history of John Doe orders, see Gupta, *supra* note 28.

30. *Taj Television & Anr. v. Rajan Mandal & Ors.*, [2003] F.S.R. 22 ¶¶ 17-19 (India).

31. *Id.* ¶ 3.

32. *Id.* ¶ 17.

33. *Sony Pictures Networks India Ltd. & Anr v. Home Cable Network Pvt. Ltd. & Ors.*, CS(COMM) 239/2017 ¶ 7 (India). See Prateek Suriseti, *Delhi HC's John Doe Order #IPL 2017 # Sony*, SPICY IP (Apr. 22, 2017), <https://spicyip.com/2017/04/delhi-hcs-john-doe-order-ipl-2017-sony.html>

34. *Sony Pictures Networks India Ltd. & Anr*, CS(COMM) 239/2017 ¶ 7.

35. *Id.*

match series (the exclusive broadcast rights were held by Star India).³⁶ The Court initially passed an order blocking seventy-three URLs instead of the entirety of each website that engaged in illegally streaming the matches.³⁷ But, it revised its order in July 2016 by allowing the blocking of entire websites rather than just URLs on grounds that it was relatively easy to create new infringing links within the same website.³⁸ Founding Managing and Partner of Saikrishna & Associates, Saikrishna Rajagopal, stated that Justice Pradeep Nandrajog and Justice A.K. Pathak “observed that ‘in relation to websites which have hardly any lawful business and which are in entirety or to a large extent indulging in piracy, merely blocking a URL where the infringing content is located not an effective solution.’”³⁹

Similarly, in *Multi Screen Media Pvt. Ltd. v. Sunit Singh & Ors.*, the Delhi High Court again awarded a John Doe injunction, which prohibited more than 250 websites that were illegally broadcasting the live and recorded footage of the 2014 FIFA World Cup (the exclusive broadcast rights were held by Sony Pictures, previously known as Multi Screen Media Pvt. Ltd.).⁴⁰ The plaintiff alleged that the illegal streaming violated its broadcast reproduction right under Section 37 of the Act, causing irreparable financial loss.⁴¹ The Court agreed with the plaintiff’s contentions even though the case was subsequently withdrawn because the event had ended.⁴²

Further, in *Star India Pvt. Ltd. & Anr. v. Haneeth Ujwal & Ors.*, Star India alleged that the defendants violated its broadcast reproduction right, under Section 37 of the Act, by illegally broadcasting the footage of the 2014 India-England Series for which it held the exclusive broadcast rights.⁴³ The Delhi High Court agreed with the plaintiff’s allegations and awarded an injunction restraining 107 websites for illegally rebroadcasting Star’s channels

36. Dep’t of Elecs. & Info. Tech. v. Star India Pvt. Ltd., R.P. No. 131/2016 in FAO (OS) No. 57/2015 ¶ 17 (India).

37. *Id.* ¶¶ 1-2.

38. *Id.* ¶¶ 14-17. See R Parthasarathy, *India: No Clear Position on Blocking Injunctions*, MANAGING INTELL. PROP. (Aug. 24, 2016), <http://www.managingip.com/Article/3581224/India-No-clear-position-on-blocking-injunctions.html>; see also *Delhi HC Orders Blocking of 73 ‘Rogue Websites’ for Piracy*, LIVE MINT, Aug. 2, 2016, <http://www.livemint.com/Consumer/Xg7pTahUSsnGa3jXUPQsSL/Delhi-HC-orders-blocking-of-73-rogue-websites-for-piracy.html>.

39. Saikrishna Rajagopal, *Delhi High Court Division Bench Upholds Website Blocking for Pirate Websites*, BUS. WIRE INDIA, Aug. 1, 2016, <https://businesswireindia.com/news/news-details/delhi-high-court-division-bench-upholds-website-blocking-pirate-websites/49586>.

40. *Multi Screen Media Pvt. Ltd. v. Sunit Singh & Ors.*, CS(OS) 1860/2014 ¶ 9 (India).

41. *Id.* ¶ 7.

42. *Id.*

43. *Star India Pvt. Ltd. & Anr. v. Haneeth Ujwal & Ors.*, CS(OS) 2243/2014 ¶ 8 (India).

carrying the footage of the India-England Series.⁴⁴ In the same year, Star was again successful in seeking an injunction prohibiting at least seventy rogue websites from illegally rebroadcasting Star's channels carrying the footage of the 2014 India-Sri Lanka Match Series.⁴⁵

From the above case law, it is clear that Indian broadcasters are adequately protected against live sports telecast piracy irrespective of whether copyright subsists in the live sports telecasts. No Indian court to date has had the opportunity to decide the copyrightability of live sports telecasts. But per the decision of the Delhi High Court in *ESPN Star Sports*, it is clear that at least the Delhi High Court is receptive to the idea of granting copyright protection to live sports telecasts.⁴⁶ Of course, the live telecast would have to be sufficiently creative and original.⁴⁷

B. Protection Under U.S. Copyright Law

Until 1976, American copyright law did not recognize copyright protection in live sports telecasts.⁴⁸ But in 1976, the United States Congress adopted a revamped copyright statute that recognized copyright protection in live sport telecast in the form of audiovisual works.⁴⁹ This is because just like any other film, the camera operator of a live sporting event could choose the subject of the film and the angles by which to videotape.⁵⁰ It is for this reason that judicial precedent supports the copyrightability of live sports telecasts from the time

44. *Id.* ¶ 13.

45. *See* Star India Pvt. Ltd. & Anr. v. Roy Ma & Ors., CS(OS) 3319/2014 ¶ 17 (India) (Star India alleged that the defendants violated its broadcast reproduction right under Section 37 by illegally broadcasting the footage of the 2014 India-Sri Lanka Match Series, for which it held the exclusive broadcast rights).

46. *ESPN Star Sports*, RFA (OS) No. 25/2008 INDLHC 2683 ¶ 17.

47. As per Section 13(3)(a) of the Indian Copyright Act no copyright shall subsist in any cinematographic film a substantial part of which infringes the copyright in another film. *See* Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 13(3)(a).

48. J. Gordon Hylton, *The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere*, 21 J. LEGAL ASPECTS SPORTS 43, 46 (2011). *See* Phila. Eagles Football Club, Inc. v. City of Phila., 823 A.2d 108, 121 (Pa. 2003):

[U]nder the Copyright Act of 1909, the predecessor to the current Act, there was uncertainty as to whether live broadcasts were copyrightable. However, this is no longer the case because the Act expressly provides that "a work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission."

49. *See* Hylton, *supra* note 48, at 51; *see also* Subject Matter and Scope of Copyright: In General, 17 U.S.C. § 102(a)(6) (2018).

50. *See* Sandra J. Garcia, *Order in the Court: An Evaluation of Copyrights on Videotaped Coverage of Trial Proceedings*, 4 UCLA ENT. L. REV. 143, 171 (1997) (in drawing an analogy with Zapruder's footage of President Kennedy's assassination, the author states that the courtroom camera operator could choose the subject of the film and the angles by which to videotape).

they are fixed in a tangible medium of expression such as recording onto a videotape, film, or other media format.⁵¹ As per standard industry practice, the live telecasts of games are usually recorded onto a videotape, film, or other media format.

Baltimore Orioles v. Major League Baseball Players Ass'n is the seminal case dealing with copyright protection for live sports telecasts.⁵² The primary issue in this case was whether Major League Baseball clubs owned exclusive rights to the televised performances that were made during the game.⁵³ The United States Court of Appeals for the Seventh Circuit held that the telecast of a baseball game was a copyrightable subject matter, all rights related to which were presumed to be held by the baseball clubs.⁵⁴ It recognized the creativity inherent in live sports telecasts and held: “The many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts.”⁵⁵ The copyrightability of live sports telecasts was also reiterated by the United States Court of Appeals for the Eighth Circuit in *Nat'l Football League v. McBee & Bruno Inc.*, where the court held that football telecasts were copyrightable under Section 102 of the Copyright Act.⁵⁶

In the United States, copyright ownership in the live sports telecasts usually vests with the sports league unlike in other countries where the copyright

51. 17 U.S.C. § 102(a)(6) (2018) (stating that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed . . .”). The Report of the Committee of Judiciary indicates that one of the reasons Congress intended to add the definition of fixation in the newly amended copyright law was to clarify the status of live broadcasts. See H.R. REP. NO. 94-1476, at 52 (1976) (“[T]he bill seeks to resolve, through the definition of ‘fixation’ in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixated form but that are simultaneously being recorded.”); see also KATHLEEN ANN RUANE & BRIAN T. YEH, CONG. RESEARCH SERV., R43096, SELECTED LAWS GOVERNING THE BROADCAST OF PROFESSIONAL SPORTING EVENTS 7 (2013), available at https://www.everycrsreport.com/files/20130812_R43096_78ba728fa4ee24b293b54f3faced7b659120ce24.pdf (stating that for a live sports telecast to be eligible for copyright protection, it has to be fixed simultaneously with its live transmission); David E. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L. J. 369, 390 (1988).

52. *Balt. Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

53. *Id.* at 668.

54. *Id.* at 674.

55. *Id.* at 668 (citing H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665).

56. *Nat'l Football League v. McBee & Bruno Inc.*, 792 F.2d 726, 729 (8th Cir. 1986). See Sonali Chitre, *Technology and Copyright Law - Illuminating the NFL's 'Blackout' Rule in Game Broadcasting*, 33 HASTINGS COMM. & ENT. L. J. 97, 102 (2010) (analyzing the decision of the United States Court of Appeals for the Eighth Circuit in *Nat'l Football League v. McBee & Bruno Inc.*).

ownership in the telecast vests with the broadcaster itself.⁵⁷ For example, since the early 1980's, the National Football League (NFL) has secured copyright ownership over the main coverage of every NFL game.⁵⁸ Similarly, copyright ownership in the Major League Baseball game vests with Major League Baseball (MLB).⁵⁹

57. See *Pittsburgh Athletic Co. v. KQV Broadcasting*, 24 F. Supp. 490, 492 (W.D. Pa. 1938) (holding that the individual ball clubs had the right to control the broadcast of the games.); see also Bari Solomon, *Friend or Foe? The Impact of Technology on Professional Sports*, 20 *COMMLAW CONSPICUOUS* 253, 277 (2011) (stating that "copyright law only protects the television broadcasts made available by the professional sports leagues through telecast agreements with television stations."); Lynne S. Sutphen, *Sports Bars' Interception of the National Football League's Satellite Signals: Controversy or Compromise?*, 2 *SETON HALL J. SPORT L.* 203, 205 (1992) (stating that telecasts of sports events are generally created through contracts whereby broadcasters agree to pay leagues and team owners a fee for the right to show games to a specific audience located in a defined geographic area).

58. Eric E. Johnson, *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 (4) *N.D. L. REV.* 760, 765 (2010), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016448 (stating that through its business arrangements, the NFL has secured copyright ownership over the main coverage of every game). In *Detroit Lions v. Dep't of Treasury*, the Michigan Court of Appeals held that since 1978, the National Football League (NFL) held copyright ownership in the live telecast of a NFL game. *Detroit Lions v. Dep't of Treasury*, 403 N.W.2d 812, 817, (1986). This was also reiterated by the Supreme Court of Pennsylvania in *Phila. Eagles Football Club, Inc. v. City of Phila.* where it held that the NFL was the copyright owner in the live telecast of its game. *Phila. Eagles Football Club, Inc. v. City of Phila.*, 823 A.2d 108, 122 (Pa. 2003). Further, the NFL registers the videotape recordings of the games with the U.S. Copyright Office. *Nat'l Football League v. Prime 24 Joint Venture*, 211 F.2d 10, 11 (2d Cir. 2000) (stating that "simultaneously with the broadcast, the NFL makes videotape recordings of the games, which it then registers with the Copyright Office."). As a matter of fact, the NFL has the following copyright notice, "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited." See, e.g., *Dallas Cowboys vs. New England Patriots* (CBS Television Broadcast Oct. 14, 2007). This is the typical warning given during every National Football League game. However, it has been criticized due to its overarching language. See Eric Gebert, *The Long Arm of the National Football League: Is The NFL's Copyright Policy Violating the Rights of Its Fans and Franchises?*, *BOSTON COLL. INTELL. PROP. & TECH. F.* (2017), available at <http://bciprf.org/wp-content/uploads/2017/02/Blog-The-Long-Arm-of-the-National-Football-League-Gebert.pdf>; see also Nate Anderson, *Any Use of This Article Without the NFL's Express Written Consent is Prohibited*, *ARS TECHNICA* (Feb. 16, 2010), <https://arstechnica.com/tech-policy/2010/02/challenging-copy-right-at-the-nfl/>.

59. See Jeff Friedman, *The Impact of Major League Baseball's Local Television Contracts*, 10 *SPORTS L. J.* 1, 2 (2003) (stating that even before MLB games were televised, MLB clubs asserted their rights to the play-by-play broadcasts of their games). The MLB copyright notice states, "This copyrighted telecast is presented by the authority of the Office of the Commissioner of Baseball. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated, without express written consent." See, e.g., *Arizona Diamondbacks vs. Colorado Rockies* (TBS Television Broadcast Oct. 14, 2007). This is a typical warning given by Major League Baseball during all its games though it has been criticized due to its overarching language. See, e.g., Tyler McCormick Love, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 *J. INTELL. PROP. L.* 369, 382 (2008); Cory Tadlock, *Copyright Misuse, Fair Use, and Abuse: How Sports and Media Companies are Overreaching Their Copyright Protection*, 7 *J. MARSHALL REV. INTELL. PROP. L.* 621, 628 (2008) (stating that NFL's and MLB's blanket copyright notices were legally inaccurate); see also Kirk Biglione, *Warning: Those Copyright Warnings May Not be Entirely Accurate*, *MEDIA LOPER*, (Aug. 2, 2007), <http://medialoper.com/warning-those-copyright-warnings-may-not-be-entirely-accurate/>; Mike

C. Protection Under UK Copyright Law

The seminal English case on copyright protection for live sports telecasts is *Union of European Football Association (UEFA) v. Briscomb*.⁶⁰ In this case, UEFA, the governing body for football in Europe, along with its licensed broadcasters, “British Sky Broadcasting Group PLC” (BskB) and “British Sky Broadcasting Limited” (Sky Plc), sued three people for infringing on its copyright in the UEFA Champions League, the broadcast rights for which vested with channels such as BskB and Sky Plc.⁶¹ The defendant’s streaming service streamed UEFA Champions League matches that were originally broadcasted on Sky and other channels without UEFA’s authorization, in violation of Section 20 of Copyright, Designs and Patent Act (CDPA).⁶² Justice Lindsay of the High Court of Chancery held that the plaintiffs owned the copyright in the live broadcasts of the UEFA Champions League and in the ancillary works.⁶³ Therefore, it issued a preliminary injunction prohibiting the defendants from streaming UEFA Champions League without authorization.⁶⁴ Further, since there is no explicit requirement under the CDPA for films to be original, it becomes easier for recordings of sports events to qualify for copyright protection.⁶⁵ However, audiovisual recordings, which are not sufficiently creative such as those associated with minor sports events, will not be copyrightable.⁶⁶ Similarly, just like in the U.S., even in the U.K., copyright ownership in the live sports telecast vests with the sports league.⁶⁷

Masnick, *MLB Refuses to Give Permission to Guy to Describe Game to a Friend*, TECHDIRT (Sept. 4, 2009), <https://www.techdirt.com/articles/20090904/0304256103.shtml>. However, according to another commentator, there was some uncertainty about who owned the copyright in the live telecast of a baseball game. See Shipley, *supra* note 51.

60. *Union of European Football Association (UEFA) v. Briscomb* [2006] EWHC (Ch) 1268, 2006 WL 1635072.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; see also Antwayne Robertson, *Internet Piracy of Sports Broadcasts: Finding the Solution in the United Kingdom and the United States*, 25 MARQ. SPORTS L. REV. 469, 479 (2015).

65. Under Section 5 (B)(1) of the UK Copyright Act 1988, “films are defined as a recording on any medium from which a moving image may” be produced by any means. Copyright, Designs and Patents Act, (1988) § 5 (B)(1), 5 CURRENT LAW 48 (Eng.). See *Study on Sports Organisers’ Rights in the European Union*, ASSER INST. (Feb. 2014), https://www.ivir.nl/publicaties/download/study_sports_organisers.pdf.

66. Thomas Margoni, *The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection*, 47 INT’L REV. OF INTELL. PROP. & COMPETITION L. 386, 389 (2016).

67. *Id.* (stating that if sports organisers, clubs, or federations act as producers of the audiovisual coverage of the games then copyright in the audiovisual work will vest with them).

D. Protection Under EU Copyright Directive

The issue of copyright protection for live sports telecast was considered for the first time by the Court of Justice for the European Union (CJEU) in the joined cases of *Football Ass'n Premier League v. QC Leisure* and *Karen Murphy v. Media Protection Services Limited*.⁶⁸ In the joined cases, the CJEU held that copyright protection vested in sports telecasts, which could be asserted either by the broadcaster or by the authors of the works concerned.⁶⁹ This was reiterated by the CJEU in *C More Entertainment AB v. Sandberg*, where it held that EU member states can extend copyright protection to protect live digital sports broadcasts.⁷⁰ However, considering that copyright and related rights are not harmonized at the EU level, the Swedish Supreme Court adopted a different approach by holding that there was no copyright protection for live telecasts of hockey games.⁷¹ The Swedish Supreme Court adopted the originality requirements as outlined by the CJEU in *Infopaq International v. Danske Dagblades Forening*, and held that live broadcasts of the hockey games did not meet the requirements of copyright protection because they were not the result of “intellectual creation.”⁷² According to the Court, this was primarily because the work of commentators, cameramen, and picture producers was mainly driven by the events of the game.⁷³ Further, even though the broadcaster may make some choices in the creation of the broadcast, such as adding commentary or graphic design elements, it was not an intellectual creation.⁷⁴

E. Protection Under Chinese Copyright Law

The status of live sports telecasts is uncertain under the Chinese copyright law primarily because it is not explicitly recognized as a copyrightable subject matter under Article 3 of the Copyright Law of People's Republic of China.⁷⁵

68. Joined Cases 403/08 & 429/08, *Football Ass'n Premier League v. QC Leisure, Murphy v. Media Protection Services Ltd*, 2011 E.C.R. I-09083, 1 C.M.R.L. 29 ¶ 104 (2012).

69. *Id.* ¶ 148 (holding that two categories of persons can assert intellectual property rights relating to television broadcasts; first, the authors of the works concerned, and, secondly, the broadcasters).

70. Case C-279/13, *C More Entertainment AB v. Sandberg*, 2015 EUR-Lex CELEX LEXIS 199, ¶ 33 (Mar. 26, 2015).

71. See Advokatfirman Lindahl, *No Copyright Protection for Sports Broadcasts*, LEXOLOGY (Oct. 3, 2016), <https://www.lexology.com/library/detail.aspx?g=bb9fc252-28d7-45c3-8225-506dab93b42c>; see also Case C-5/08 *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569.

72. Lindahl, *supra* note 71.

73. *Id.*

74. *Id.*

75. See Seagull Haiyan Song, *How Should China Respond to Online Piracy of Live Sports Telecasts? A Comparative Study of Chinese Copyright Legislation to U.S. and European Legislation*, 9 U. DENV. SPORTS

Because of this, there is a conflict between Chinese scholars as to whether live telecasts are subject matter of copyright protection or of neighboring rights protection.⁷⁶ According to some scholars and officials from the National Copyright Administration of China (NCAC), live sports telecasts are not original nor creative enough to qualify as “video recordings” under Article 3 of the Copyright Law.⁷⁷ However, recently a lower level Beijing court has held that live telecasts of a sports competition are sufficiently creative to be copyrightable subject matter even though the court did not decide under which category of works the live telecasts fall.⁷⁸

According to the other view, broadcasters can only claim neighboring rights protection in the form of “video recordings” or as “broadcasting rights” under Article 41 of the Chinese Copyright Law.⁷⁹ Chinese scholars have expressed that extending only neighboring rights protection instead of copyright protection has many limitations.⁸⁰ First, live sports telecasts do not fit the definition of “video recordings,” which as the name speaks for itself, should first be recorded in a tangible medium.⁸¹ Even though a live sports telecast may be transmitted real time, it may or may not be recorded. Therefore, it would not fit into the definition of a video recording. Secondly, neighboring rights protection does not protect broadcasters against unauthorized online streaming of their telecasts.⁸² This is because Article 44 of the Chinese copyright law grants the producers of video recordings only the right to authorize others to reproduce, distribute, rent, and communicate the video recordings to the public on an information network.⁸³ This is a serious shortcoming as it does not protect broadcasters against live online streaming of their telecasts, which is the most

& ENT. L. J. 3, 10 (2010); Mathew Alderson, *Sports Broadcast Copyright in China: The Stranglehold of Originality*, HARRIS | BRICKEN: CHINA LAW BLOG (June 25, 2017), <https://www.chinalawblog.com/2017/06/sports-broadcast-copyright-in-china.html>. For the Copyright Law of the People’s Republic of China, see *Copyright Law of People’s Republic of China*, THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (last visited July 30, 2018).

76. Song, *supra* note 75.

77. Sun Xiaochen, *Is it Illegal to Pirate Sports Broadcasts? Law Will Decide*, CHINA DAILY (June 26, 2017), http://www.chinadaily.com.cn/m/chinalic/2017-06/26/content_29906411.htm.

78. *Beijing Court Grants Copyright Protection to Live Sports Broadcast* (July 2, 2015), CHINA IPR, <https://chinaipr.com/2015/07/02/beijing-court-grants-copyright-protection-to-live-sports-broadcast/>.

79. Song, *supra* note 75. See Wei Liu & Jiarui Liu, *Copyright Protection of Sports Programs in China*, 64 J. COPYRIGHT SOC’Y U.S.A. 235, 249 (2017).

80. Liu & Liu, *supra* note 79.

81. *Id.*

82. See Song, *supra* note 75, at 11; see also *id.*

83. 中华人民共和国著作权法 [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 1990, effective Oct. 27, 2001) 15 STANDING COMM. NAT’L PEOPLE’S CONG. (China) Art. 42. See *id.*

rampant form of sports broadcast piracy.⁸⁴ The real value of sports lies in their live nature, and, in reality, an immediate legal action (within hours) is almost always necessary after the online broadcast piracy is discovered.⁸⁵

It is for all these reasons that some Chinese scholars have expressed that copyright protection, rather than neighboring rights protection, was more suitable for curbing online broadcast piracy.⁸⁶ They have proposed that creative sports telecasts should be protected as “cinematographic works” under Article 3 of the Chinese Copyright Law.⁸⁷ Only time will tell how far this proposal will be accepted. Currently, the Chinese Copyright Law is in the process of amendment. There is some speculation that the revised copyright law may extend copyright protection to sports telecasts as a separate category of works under Article 3.

From the above discussion, it is clear that major international jurisdictions such as U.S., U.K., and E.U. favor granting copyright protection to live sports telecasts provided they meet the creativity threshold. Even though as of now China does not recognize copyright protection in live sports telecasts, it is a matter of time before it does. Therefore, India should recognize live sports telecasts as copyrightable subject matter in order to be consistent with international practices.

IV. WHY INDIA SHOULD PROTECT LIVE SPORTS TELECASTS

Even though the Indian courts grant broadcasters the broadcast reproduction right, it may not be sufficient to tackle live online piracy. Before delving into how India could protect live online sports piracy, a fundamental question that needs to be answered is why should India protect sports telecasts at all? The answer to this lies in theories of neighboring rights, which mandates that the skill, effort, and creativity expended by broadcasters in the packaging, assembling, and scheduling of programs should be duly awarded.⁸⁸ Creating raw footage of a live sporting event involves sufficient creative talents in the form of camera angles, lightning, sound requirements, commentary, and so on.⁸⁹

84. Liu & Liu, *supra* note 79, at 250.

85. *Id.*

86. Song, *supra* note 75, at 16 (proposing that live sports telecasts should be protected as “cinematographic works” rather than “video recordings”).

87. *Id.*

88. For neighboring rights of broadcasting organizations, see Herman Cohen Jehoram, *The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, 15 COLUM.-VLA J.L. & ARTS 75, 81 (1990). For neighboring rights in general, see George H. C. Bodenhausen, *Protection of Neighboring Rights*, 19 L. & CONTEMP. PROBS. 156, 171 (1954).

89. See Nat'l Ass'n of Broadcasters v. Copy. Royalty Tribunal, 675 F.2d 367, 378 (D.C. Cir. 1982) (holding that anyone who has ever watched ABC's Monday Night Football, for example, knows that the

The technical skills required for producing a successful live sport telecast are strikingly similar to those required for making a cinematographic film.⁹⁰ Therefore, just like other categories of work, in the absence of copyright protection, broadcasters will have no incentive to invest technical skills and human resources in producing the live footage of sports events. This is especially so given the exorbitant prices of sports broadcast rights.⁹¹ It is estimated that Star India successfully bid for the broadcast rights of the IPL, from 2018 until 2022, at a sweeping price of INR 16, 347.5 crore.⁹² As a matter

commentary of the announcers and such efforts as instant replay in slow motion add immensely to the quality of a sports telecast); Paul E. Kritzer, Thesis, *Copyright Protection for Sports Broadcasts and the Public's Right of Access*, 15 PAT. TRADEMARK & COPY. J. RES. & ED. 385, 401 (1971) (stating that producing a live broadcast of a sports event demanded special creative talents such as establishing camera angles, sites, lighting effects, sound requirements, directing the efforts of a large team of technicians and announcers, instant video tape "replays" and so forth.); Thomas Margoni, *The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection*, 47 INT'L REV. OF INTEL. PROP. AND COMPETITION L. 386, 388 (2015) (stating that in the audiovisual recording of a sport event, the director can certainly influence the framing and the angle of the view of the cameras); Amy R. Mellow, Note, . . . *And the Ruling on the Field is Fair: A Fair Use Analysis of Uploading NFL Videos Onto YouTube and Why the NFL Should License its Material to the Website*, 17 S. CAL. INTERDISC. L. J. 173, 186 (2007) (stating that "a football telecast [was] no longer a simple recording of a live occurrence, but a creative method of displaying athletic performances."). The Indian copyright law, just like the U.S. copyright law, has utilitarian underpinnings. This utilitarian approach of the Indian copyright law was recently reiterated by the Delhi High Court, where it stated that copyright law was intended to motivate the creative activity of authors and inventors in order to benefit the public. The Chancellor, Masters & Scholars of the Univ. of Oxford & Ors. v. Rameshwari Photocopy Services & Anr., (2016) CS(OS) 2439/2012 ¶ 80 (India). The utilitarian underpinnings of copyright law take the form of the incentive theory of copyright. See Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 305-06 (2013). Further, people may also create due to spiritual and inspirational reasons. See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1953 (2016); David M. Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COLUM. L. REV. 848, 856 (1948) (arguing that an absolute property right may be found in the skillful selection of camera angles and in expert arrangement of lighting effects which result in the finished television picture); Comment, *Copyrights and TV—A New Use for the Multiple Performance Theory*, 18 U. CHI. L. REV. 757, 760 (1951) (arguing that telecasts, which entail much effort, artistic skill, and equipment are "original unpublished, intellectual productions" that deserve copyright protection); Note, *The Property Right in a Sports Telecast*, 35 VA. L. REV. 246, 258 (1949) (stating that there is abundant artistic skill and intellectual effort involved in producing and televising a sport event).

90. See Solinger, *supra* note 89; see also Liu & Liu, *supra* note 79, at 248 (stating that although filming a sports program for broadcasting it accurately may not have as much room for creativity as filming a feature movie, the fact does not prohibit copyright protection for sports programs).

91. Star India holds the broadcast rights to the IPL from 2018 until 2022 at an exorbitant price of INR 16,347.5 crore. See Sayan Ghosh, *IPL Media Rights Auction Highlights: STAR India Sweeps All Rights with World-Record Bid for Rs 16,347.5 Crore*, HINDUSTAN TIMES, Sept. 4, 2017, <https://www.hindustantimes.com/cricket/live-indian-premier-league-media-auction-big-names-lucrative-rights/story-RA1LOPqaQcWBUQ0j1Vt9WN.html>. For more on costs incurred by Indian broadcasters in acquiring sports broadcast rights, see *The Business of Sports: Playing to Win as the Game Unfurls*, *supra* note 2, and *Sports in India*, *supra* note 2.

92. Ghosh, *supra* note 91.

of fact, the number of online players who bid for the IPL media rights outnumbered traditional broadcasters.⁹³ This is not surprising considering that India has the second largest number of internet subscribers, next only to China.⁹⁴ Because of this trend, Indian broadcasters are capitalizing on the trend and offering content, including sports content via digital platforms. Even though there are no recent statistics, it is reasonable to assume that while a substantial proportion of audiences legitimately access digital content, there may be a sizeable proportion that resorts to unauthorized live streaming of sports events. It is to prevent these latter categories from “free-riding”⁹⁵ on the efforts of sports leagues and the official broadcaster.

In the U.S., the incentive theory of copyright, which has deeply rooted utilitarian underpinnings, has been refuted by scholars on grounds that there is not a positive co-relation between copyright and creativity.⁹⁶ Having said this, one cannot ignore a small, but growing body of literature that supports heightened copyright protection for boosting local creativity in developing countries.⁹⁷ For instance, in a pioneering World Bank study on “Intellectual Property and Development,”⁹⁸ economist Keith Maskus found that increased copyright protection was likely to be beneficial for Lebanon’s local creative industries such as software applications, publishing, and film production, and

93. Bindu D Menon, *Online Players Outnumber TV Broadcasters for IPL Media Rights*, HINDU BUS. LINE, Sept. 3, 2017, <http://www.thehindubusinessline.com/news/sports/online-players-outnumber-tv-broadcasters-for-ipl-media-rights/article9842253.ece>.

94. *Sports in India*, *supra* note 2.

95. For a detailed analysis of the “free-riding” problem, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989).

96. See Raymond Shih Ray Ku, Jiayang Sun, & Yiyang Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis into Copyright’s Bounty?* 62 VAND. L. REV. 1669 (2009); see also Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). See Dan Hunter, *Why Cash and Copyright are Bad News for Creativity*, CONVERSATION, Jan. 4, 2015, <https://theconversation.com/why-cash-and-copyright-are-bad-news-for-creativity-34696>. For the utilitarian underpinnings of copyright law, see DiCola, *supra* note 89.

97. For a glimpse into these studies, see Keith Maskus, *Strengthening Intellectual Property Rights in Lebanon*, in CATCHING UP WITH THE COMPETITION: TRADE OPPORTUNITIES AND CHALLENGES FOR ARAB COUNTRIES 251-84 (Bernard Hoekman & Jamel Zarrouk eds., 2000) (arguing that copyright protection was beneficial to local creative industries in Lebanon). See also Mark F. Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY L. J. 79, 81 (2008) (elucidating the role of a robust copyright regime for boosting Africa’s commercial music industry); Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT’L & COMP. L. 37, 39 (2002) (“[A]cademics and policy analysts tend to condemn higher levels of IP protection as the unfair requirement of trade pressure, without going further to consider the possible benefits to local industry and commerce.”).

98. INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 271 (Carsten Fink & Keith E. Maskus eds., 2005).

advertising.⁹⁹ This study can be relevant to India because India and Lebanon are more or less on similar levels of economic development.¹⁰⁰

Of course one may argue that because broadcasters are related rights owners and not copyright owners, these studies have limited applicability to broadcasters' rights.¹⁰¹ However, this ignores the fact that broadcasting (which includes radio and television) is one of the core copyright industries where its total economic contribution to copyright industries in certain developing countries, such as Jamaica, has been as high as 12.3% of the total copyright industry.¹⁰² Therefore, Indian courts should consider granting sufficiently original and creative live sports telecasts copyright protection in the form of cinematographic works rather than just neighboring rights protection in the form of broadcast reproduction rights.¹⁰³ This would greatly enable the broadcasters to curtail live online piracy as they would get an exclusive right of sixty-years over the live telecast from the date of its first broadcast.¹⁰⁴ Of course, I am in no way suggesting that broadcasters should have a monopoly over their live telecasts, which according to Werner Rumphorst is public property.¹⁰⁵ The rationale for proposing a copyright protection is to secure the investment incurred by broadcasters in producing the live telecast, provided it is sufficiently creative and original. This means that, just like other creative works, only those

99. *Id.* at 289.

100. As per the World Bank, Lebanon was an upper middle-income country while India ranks in the lower middle-income group. *See Lebanon*, THE WORLD BANK, <https://data.worldbank.org/country/lebanon> (last visited July 30, 2018); *India*, THE WORLD BANK, <https://data.worldbank.org/country/india> (last visited July 30, 2018).

101. Related rights are similar to copyright except the scope is limited. *See* WIPO, *Guide on Surveying the Economic Contribution of the Copyright Industries*, WORLD INTELL. PROP. ORG. 26 (2015), http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf.

102. According to WIPO, core copyright industries are those which are wholly engaged in the creation, production and manufacture, performance, broadcasting, communication and exhibition, or distribution and sale of works and other protected subject matter. *See id.* at 51. WIPO classifies copyright industries into four industry groups: (i) Core copyright industries; (ii) Interdependent copyright industries; (iii) Partial copyright industries; and (iv) Non-dedicated support industries. *See id.* at 45. Television and radio broadcasting contributed U.S. \$57.3 million or 12.3 % of the total copyright sector to Jamaica's economy. *WIPO Commissioned Study on the Contribution of the Copyright-Based Industries to the Economy of Jamaica*, JAM. INTELL. PROP. OFF. (Aug. 6, 2013), <http://www.jipo.gov.jm/node/116>.

103. To date, only the Delhi High Court has recognized that copyright and neighboring rights can co-exist in live sports telecast.

104. *See* Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 26 (stating that copyright subsists in a cinematographic film until sixty years from the beginning of the calendar year next following the year in which the film is published).

105. Werner Rumphorst, *Sports Broadcasting Rights and EC Competition Law*, EUR. BROADCASTING UNION 12 (July 25, 2001), https://www.ebu.ch/CMSimages/fr/leg_p_sports_rights_wr_tcm7-4406.pdf (questioning “[w]hy should the public be forced to pay more and more for viewing sports events which are part of their own cultural environment?”).

telecasts should be protected if they contain sequential videotaping, especially composed background music, logos, and commentary. This is imperative for protecting live sports events that have a very short shelf life, ranging from fraction of seconds to a few minutes, while the cost of piracy in India remains as low as Rs. 2000.¹⁰⁶ Further, even though broadcasters can adopt anti-piracy techniques, such techniques are expensive and potentially out of reach of India's public broadcaster, Doordarshan.¹⁰⁷ Revenue generated by traditional broadcasters is directly proportionate to their ability to invest in the development and procurement of quality content, a harbinger of every informed society. Therefore, a better utilization of funds would be on producing and procuring quality programming, rather than spending scarce resources on anti-piracy techniques.

India has yet to realize the potential of sports as a full-fledged commercial industry even though it is estimated that the Indian sports industry has a potential to touch 4 billion U.S. dollars in coming years.¹⁰⁸ For the sports industry to grow and flourish, it is important that the rights of the different stakeholders, such as the sports leagues and broadcasters, are adequately protected. In the U.S. broadcast market, cricket has been severely affected because of rampant online piracy due to broadcasters no longer being keen on bidding for broadcast rights.¹⁰⁹ To avoid such a situation from occurring in

106. Werner Rumphorst, *Protection of Broadcasting Organisations Under the Rome Convention*, 27 COPY. BULL. 3 (1993) (stating that sports broadcasting rights have certain aspects which make them unique as each sport event is characterized by its particular "live" value which will (almost) completely diminish as soon as the event is over). For the cost of piracy, see *India Needs Strong Broadcasters Treaty*, *supra* note 19.

107. Prasar Bharati, India's public service broadcaster has recently faced budget cuts. See Harveen Ahluwalia, *Govt Cuts Grants for Prasar Bharati*, LIVE MINT, Apr. 13, 2016, <http://www.livemint.com/Politics/l63iik8Nq1qnEAsdbupUJI/Govt-cuts-grants-for-Prasar-Bharati.html>. As a matter of fact, even in developed countries such as the U.S. and Denmark, public broadcasters may face budget cuts; Brian Naylor, *Trump Budget Cuts Funding for Arts, Humanities Endowments and Corporation for Public Broadcasting*, NAT'L PUBLIC RADIO, Mar. 16, 2017, <https://www.npr.org/2017/03/16/520401246/trumps-budget-plan-cuts-funding-for-arts-humanities-and-public-media>; *Public Service Broadcasting Under Threat*, MYNEWSDESK (Jan. 10, 2018), http://www.mynewsdesk.com/se/utbildningsradio/pressreleases/public-service-broadcasting-under-threat-2367768?utm_source=rss&utm_medium=rss&utm_campaign=Alert&utm_content=pressrelease (stating that Denmark's public service broadcaster, Danish Broadcasting Corporation, was under threat due to budget cuts by at least 25%).

108. Sooraj Aurora, *India's Growing Sports Industry*, DIPLOMAT (July 27, 2016), <https://thediplomat.com/2016/07/indias-growing-sports-industry/>. See *The Next Big Industry in India - Sports*, SPORTS & MGMT. RES. INST., <http://www.smri.in/sportsbusiness/> (last visited July 30, 2018) (sport is likely to be the next biggest industry in India in the coming years); see also *The Indian Sports Industry in 2016: Challenges and Opportunities*, NIELSEN SPORTS, <http://nielsen-sports.com/indian-sports-industry-2016-challenges-and-opportunities/> (last visited July 30, 2018).

109. ENVISIONAL LTD. & NETRESULT LTD, *supra* note 16, at 5.

India, a cricket frenzy nation, it is extremely important that the broadcast rights of sports broadcasters are adequately protected.¹¹⁰

V. PROPOSALS FOR PROTECTING PIRACY OF LIVE SPORTS TELECASTS IN INDIA

A. Define Broadcasting Organizations Under the Indian Copyright Act, 1957

Section 37 of the Act grants neighboring rights protection to broadcasting organizations in the form of the broadcast reproduction right.¹¹¹ However, because the Act does not define the term “broadcasting organization,” it is difficult to say whether pure webcasting organizations (or internet broadcasters), such as Netflix, Facebook Live, Periscope and other similar services that solely broadcast content online, will be able to exercise the broadcast reproduction right. Recently, with respect to Section 31(D) of the Act, the Department of Industrial Policy & Promotion (DIPP) clarified that pure internet broadcasters (webcasters) are included within the definition of broadcasting organization.¹¹² Most likely this interpretation cannot be replicated to Section 37 of the Act because DIPP’s rationale for covering pure webcasters within the ambit of broadcasting organization was based upon an interpretation of the phrase “communication to the public.”¹¹³ Per its notification, “any broadcasting organization desirous of communicating to public” may not be restrictively interpreted to include only radio and television broadcasting.¹¹⁴ This was based upon a combined reading of the definition of “broadcast” and “communication to public.”¹¹⁵ However, Section 37 of the Act merely states that every broadcasting organization will have a special right known as the broadcast reproduction right with respect to its broadcasts.¹¹⁶ Therefore, unlike Section 31(D), it has no relation whatsoever to the definition of “communication to public.” In this situation, pure webcasters and sports

110. Markandey Katju, Former Indian Supreme Court Judge derisively but accurately describes cricket as the opium of Indian masses. See Markandey Katju, *Cricket: The Opium of the Masses in India*, SADDHAQA (Oct. 11, 2015), <https://www.saddahaq.com/cricket-the-opium-of-the-masses-in-india>.

111. See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 37.

112. Memorandum from Surabhi Sharama to Registrar of Copyrights (Sept. 5, 2016), available at http://dipp.nic.in/sites/default/files/OM_CopyrightAct_05September2016.pdf. See Seema Jhingan, Karan Gandhi, & Mohd. Kamran, *Indian Copyright Act Now Covers Online Streaming*, MONDAQ (Oct. 13, 2016), <http://www.mondaq.com/india/x/534950/Copyright/Indian+Copyright+Act+Now+Covers+Online+Streaming>.

113. Memorandum from Surabhi Sharama to Registrar of Copyrights, *supra* note 112.

114. *Id.*

115. *Id.*

116. Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012).

organizers have simply no recourse available to tackle online piracy unless the Indian courts are flexible enough to include webcasters within the ambit of broadcasting organization.¹¹⁷ In coming times, it is not far-fetched to say that organizers of major Indian sports events, such as IPL, will exclusively transmit the raw footage of the games online rather than on traditional platforms. In such a scenario, relying solely on broadcasters neighboring rights protection will prove to be inadequate unless the courts adopt an expansive interpretation of the term “broadcasting organizations.” Alternatively, as explained below, I propose that the Act should be amended to define webcasting organizations within the ambit of the term “broadcasting organization” or a separate webcast reproduction right on the lines of the broadcast reproduction right should be granted to webcasters.

B. Option 1: Define Broadcasting Organization

One possible way to tackle this situation is to add the definition of “broadcasting organization” under the Act to make it more technologically relevant.¹¹⁸ This definition can be on the lines of the definition of broadcasting organization under the proposed treaty for the protection of rights of broadcasting organizations (Broadcasters Treaty), except webcasters should be included.¹¹⁹ Therefore, the proposed definition can be, “Broadcasting organization means a legal entity that takes the initiative and has the editorial responsibility for broadcasting including the assembling and the scheduling of the programme carrying signal. An entity that exclusively delivers its

117. Similar proposal has been made in the context of Chinese Copyright law, see Liu & Liu, *supra* note 79, at 251 (stating that if a sports program is first transmitted on the internet rather through broadcast signals, its online organizer may not be able to exercise any exclusive rights unless Chinese courts are exceedingly flexible in interpreting who constitute “radio and television stations.”).

118. There are certain countries, such as Canada, that define the term broadcaster. Section 2 of Canada’s Copyright Act defines broadcaster as a “body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission (radiodiffuseur).” Copyright Act, R.S.C. 1985, c C-42, § 2. Even the Australian Copyright Act outlines services that are not considered as broadcasting services. See Copyright Act 1968 (Cth) s 10 (Austl.).

119. Clause I(d) of the Revised Consolidated Text defines broadcasting organization as:

the legal entity that takes the initiative and has the editorial responsibility for broadcasting [or *cablecasting*], including assembling and scheduling the programmes carried on the signal. *Entities that deliver their programme-carrying signal exclusively by means of a computer network do not fall under the definition of a “broadcasting organization” [or a “cablecasting organization”].*

The bracketed and italicized text implies that it is subject to negotiations. See WIPO, *Standing Committee on Copyright and Related Rights: Revised Consolidated Text on Definitions, Objection of Protection, Rights to be Granted, and other Issues*, at I(d), Thirty-Fourth Session, SCCR/34/4, (May 5, 2017).

programme carrying signal by means of a computer network shall also be a broadcasting organization.”

From a purely regulatory perspective, some webcasters may oppose this definition as they may not want to be regulated in the same way as broadcasters.¹²⁰ A potential strategy to tackle this is to clarify somewhere in the Act or in the broadcast regulation, that the two are independent of each other. Alternatively, pure webcasters can be granted a right similar to the broadcast reproduction right.

C. Option 2: Grant Webcast Reproduction Right to Webcasters

A right based on the same lines as the broadcast reproduction right can be granted to webcasters. A new chapter titled *Rights of Webcasting Organizations* can be added after Chapter VIII titled the *Rights of Broadcasting Organization and of Performers*. This chapter could include the following clauses protecting webcasting organizations against online piracy.

Section 40 - Webcast reproduction right:

- 1) Every webcasting organization shall have a special right to be known as “webcast reproduction right” in respect of its webcasts.¹²¹
- 2) The webcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the webcast is made.
- 3) During the continuance of a webcast reproduction right in relation to any webcast, any person who, without the licence of the owner of the right does any of the following acts of the webcast or any substantial part thereof, –
 - a) re-broadcasts the webcast;
 - b) causes the webcast to be heard or seen by the public on payment of any charges;
 - c) makes any sound recording or visual recording of the webcast;
 - d) makes any reproduction of such sound recording or visual recording where such initial recording was done

120. For the broadcast regulatory framework in India, see *Regulatory Framework for Broadcasting in India*, CABLE QUEST, http://cablequest.org/pdfs/trai/trai_regulatory_framework.pdf (last visited July 30, 2018). See also Siddharth Narrain, *A Broad Overview of Broadcasting Legislation in India*, ALT. L. F., http://indiatgether.org/uploads/document/document_upload/2139/blawbackgroundunder.pdf (last visited July 30, 2018).

121. My usage of the term webcast implies broadcast of an event on the internet.

without licence or, where it was licensed, for any purpose not envisaged by such licence; or

e) sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provisions of section 41, be deemed to have infringed the webcast reproduction right.¹²²

Section 41 - Acts not infringing webcast reproduction right: No webcast reproduction right shall be deemed to be infringed by:

- a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or
- b) the use, consistent with fair dealing, of excerpts of a performance or of a webcast in the reporting of current events or for bona fide review, teaching or research; or
- c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.

One of the advantages of adding a separate section on webcast reproduction right is that it distinguishes broadcasting organizations from pure webcasting organizations, which may not want to be included within the ambit of broadcasting organizations for purely regulatory reasons. Having said this, legislative amendments of this nature are often complex and even unnecessary when the issue can be tackled by sound judicial reasoning. Therefore, in this situation the best approach would be for the judiciary to recognize sports webcasts as cinematographic works.

D. Extend Copyright Protection to Creative Sports Webcasts

No Indian court to date has had the opportunity to decide the copyrightability of live sports telecasts because, until recently, exclusive webcasting of sports events was rare in India.¹²³ As a matter of fact, no Indian court has decided the copyrightability of live sports telecasts primarily because, in the event of live sports telecast piracy, broadcasters are well-protected under Section 37 of the Act. However, the Delhi High Court's decision in the *ESPN*

122. The proposed section has been modeled on Section 37 of the Indian Copyright Act. See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 37.

123. Internet companies such as Facebook, Amazon, Twitter, and Yahoo unsuccessfully bid for the 2018-22 global digital rights of the IPL. Had they been successful, their activity would have fallen under the purview of webcasting as they are not traditional television broadcasters. See Ghosh, *supra* note 91.

Star Sports makes it clear that live sports telecasts could be protected as cinematographic films, independent of the broadcast reproduction right.¹²⁴ The same rationale would be applicable to live sports webcasts because a webcast is nothing but an audio-visual recording that is transmitted (broadcasted)¹²⁵ online. Of course, this audio-visual recording could be made by a conventional camcorder or a digital camera installed in mobile phones, tablets and other devices.¹²⁶ What is important is that the footage should not be a mere mechanical recording of the sport event as it occurs. It should have an element of creativity in the form of unique, composed background music, logos, graphics, and commentary.¹²⁷ As far as the issue of ownership of the webcast is concerned, it could vest either with the sports organizer or the webcaster (producer) depending upon the contractual arrangements between the organizer and the webcaster.¹²⁸

It is not far-fetched to say that with higher internet penetration rate and falling data tariffs, webcasting of sports events will become more popular than traditional broadcasting in coming years.¹²⁹ It is, therefore, important that webcasts of both broadcasters and webcasters are sufficiently protected. While broadcasters can take refuge of the broadcast reproduction right in the case of live webcast piracy, the current lacuna in law leaves pure webcasters remediless in a similar situation. To create a level playing field between webcasters and broadcasters, it is important that webcasts, irrespective of whether they are transmitted by a webcaster or a broadcaster, are sufficiently protected. Safeguarding the rights of webcasters by amending the Act could be complex and time-consuming. The first option requires a broader level policy analysis while the second option entails amendments to several provisions of the Act. In

124. *ESPN Star Sports*, RFA (OS) No. 25/2008 INDLHC 2683 ¶ 17.

125. The word broadcast is not ideal as the usual connotation of the word implies mass dissemination of content via radio and television.

126. For the different techniques for recording sports, see Jennifer O'Rourke, *Sports Shooting: Football, Baseball, Basketball and More*, VIDEOMAKER (Oct. 26, 2012), <https://www.videomaker.com/video-news/2012/10/sports-shooting-football-baseball-basketball-and-more>. See also Mark Bosko, *Video Kickoff: Your Guide to Shooting Sports*, VIDEOMAKER (Nov. 1, 1994), <https://www.videomaker.com/article/f2/1123-video-kickoff-your-guide-to-shooting-sports>.

127. *Briscomb*, [2006] EWHC (Ch) 1268 at 4 (Justice Lindsay recognized original elements of a live sports broadcast such as the use of video sequences, onscreen graphics, a program content roll, short film clips called break bumpers, the UEFA starball logo and specially composed accompanying music, the UCL music, and referred to the original elements as ancillary works).

128. Under Section 17(b) of the Indian Copyright Act, the first copyright owner of a cinematographic film is the person in whose instance the cinematographic film is made. See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 17(b).

129. In 2002, India's internet penetration rate was 1.5%, while as of 2016, India's internet penetration rate is 34.8%. See *India Internet Users*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users/india/> (last visited July 30, 2018).

this situation, the best recourse would be for courts to consider live sports webcasts, which are sufficiently creative and original as cinematographic films. This is also in sync with international practices that recognize live sports telecasts as copyrightable subject matter. Needless to say, webcasts transmitted by webcasters that do not meet the creativity threshold will have no copyright protection. However, because creativity is not a *sine qua non* of granting a broadcasting reproduction right, the courts can always protect such webcasts under Section 37 of the Act, which is of course contingent upon an expansive interpretation of the term “broadcasting organization.”

E. Endorsing the Making Available Right and Online Transmissions in the Broadcasters Treaty

At a time when broadcasters operate in a borderless world, relying solely on domestic law is inappropriate.¹³⁰ The Standing Committee of Copyright and Related Rights (SCCR) has been working on an international treaty to update the rights of broadcasting organizations as envisaged under the International Convention for the Rights of Performers, Phonogram Producers, and Broadcasting Organizations (Rome Convention) since 1997.¹³¹ The Broadcasters Treaty owes its genesis to the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (the Manila Symposium) convened jointly by the World Intellectual Property Organization (WIPO) and the Government of Philippines in Manila, Philippines in April, 1997.¹³² The Manila Symposium had culminated into a consensus that the existing international regime was inadequate to combat online signal piracy. Since then, broadcasters have been battling out the Broadcasters Treaty at least bi-annually at the WIPO headquarters in Geneva.¹³³ Within the precincts of WIPO, no other intellectual property (IP) treaty has witnessed such protracted negotiations as the Broadcasters Treaty.

Since the Broadcasters Treaty negotiations commenced, India has vehemently opposed the inclusion of post-fixation rights, simulcasting, and any form of online transmissions within the scope of the Broadcasters Treaty, on

130. For the shortcomings of the domestic law, see *India Needs Strong Broadcasters Treaty*, *supra* note 19.

131. *Protection of Broadcasting Organizations – Background Brief*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/pressroom/en/briefs/broadcasting.html> (last visited July 30, 2018).

132. *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property*, WORLD INTELL. PROP. ORG. (April 1997), ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_757efs.pdf.

133. *Protection of Broadcasting Organizations – Background Brief*, *supra* note 131.

grounds that it was against the mandate of the 2007 WIPO General Assembly.¹³⁴ As I have previously argued, India's opposition to the inclusion of online transmissions in the Broadcasters Treaty based on an interpretation of the Mandate is erroneous.¹³⁵ This is because traditional Indian broadcasters relay their streams over the internet, which are often subject to piracy. It is not uncommon for Indian broadcasters to make a catch-up service of a live sports event available to viewers at a later date on their OTT channel.¹³⁶ For example, Star TV made IPL streams available on its Hotstar mobile streaming app, which allows spectators to watch the match at a time and place convenient for them (known as the making available right).¹³⁷ The Act grants the making available right to broadcasters, which is a form of post-fixation right.¹³⁸ Further, Section 37 of Act also protects online transmissions of traditional broadcasting

134. The Mandate of the 2007 WIPO General Assembly clarified that the scope of the Treaty was restricted to traditional broadcasting and cablecasting organizations, which was meant to exclude entities transmitting content solely via computer networks or internet. For the mandate, see WIPO General Assembly, *Report on the Special Sessions of the Standing Committee on Copyright and Related Rights Regarding the Proposed Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations*, 2(i), Thirty-Fourth (Eighteenth Ordinary) Session, WO/GA/34/8, (July 23, 2007), http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_34/wo_ga_34_8.pdf. See WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 51, Thirtieth Session, SCCR/30/8, (Sept. 14, 2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_6.pdf (Delegation of India expressing that “no post-fixation rights should be [provided] under the Treaty and [that] the scope of protection should cover only signal protection”); see also WIPO, *Standing Committee on Copyright and Related Rights*, at ¶ 33, Twenty-Ninth Session, SCR 29/5, (June 11, 2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_29/sccr_29_5.pdf (Delegation of India “support[ing] the position that no post-fixation rights should be allowed under the . . . Treaty, as the scope of protection covered only signal protection.”).

135. Seemantani Sharma, *India and the Proposed Treaty for the Protection of Broadcasting Organisations*, 52 *ECON. & POL. WKLY.* 65, 66 (2017).

136. *Sports in India*, *supra* note 2, at 4.

137. *Id.* at 5 (stating that the first screen for the IPL still remains TV, but OTT platforms allow consumers to watch anytime anywhere and catch up on matches during travel time).

138. Section 2(ff) of the Indian Copyright (Amendment) Act defines the term communication to the public as:

making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Indian Copyright (Amendment) Act, No. 27 of 2012, INDIA CODE (2012), § 2(ff). While Section 2(dd) defines 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 includes a re-broadcast.” Therefore, based on a combined reading of Section 2(ff), Section 2(dd), and Section 37 of the Act, it is clear that broadcasting organizations are also granted the available right. Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 2(dd); see *id.* § 37.

organizations.¹³⁹ Therefore, it is preposterous for the Indian delegation to oppose the making available right of broadcasters (which is a limited form of post-fixation right) and online transmissions when its domestic law recognizes these rights in order to cater to the contemporary needs of its domestic broadcasting industry. Of course, one may argue that India's outlier position on the Broadcasters Treaty has no effect on curtailing live sports broadcast piracy in India. However, as Professor Pamela Samuelson says, "legal rules in foreign jurisdictions can sometimes limit the force of IP rights in the domestic country."¹⁴⁰ This is particularly true for piracy of online sports telecasts, which is a global menace. Often, pirate servers are located in different jurisdictions from the country of origin of the telecast.¹⁴¹ In case of unauthorized usage of live telecasts, the broadcaster or the sport organizer will invariably have to file a lawsuit in the foreign jurisdiction where the remote server is located. The success of the lawsuit will depend on whether the copyright law of the pirate jurisdiction protects broadcasting organizations against online piracy. Live cricket telecasts of Indian broadcasters are often pirated via remove servers located in different parts of the Indian sub-continent. For the adequate protection of online signals of Indian broadcasters in these pirate jurisdictions, international harmonization of broadcasters' rights, in sync with the technological developments of the time, is extremely crucial.

India plays a prominent role in the international copyright norm setting process.¹⁴² If India continues to oppose protection of broadcasters' online signals, it is likely to adversely influence the position of other developing countries as well. As a matter of fact, in the past SCCR meetings, the delegation of the Islamic Republic of Iran has aligned itself with India's position on

139. Section 37(1) of the Indian Copyright Act grants the broadcast reproduction right to broadcasting organizations with respect to its broadcasts while Section 2(dd) defines broadcast as communication to the public by any means of wireless diffusion or by wire. The expression wireless diffusion includes online transmissions. See Indian Copyright Act, No. 14 of 1957, INDIA CODE (2012), § 37(1).

140. Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHIC. L. REV. 223, 225 (2004) (exemplifying that country B's decision not to protect an innovation, or to protect it less strongly than A, has spillover effects for country A).

141. Very often, pirate servers are located in countries such as Canada, the Netherlands, China, Korea, Sweden, the U.S., and the U.K. See Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 261 (2008).

142. India's role in international copyright norm setting has been nothing short of robust. India played a leading role on behalf of a group of developing countries demanding the lowering of copyright standards at the Stockholm Revision Conference of the Berne Convention. See PRASHANT REDDY T. & SUMATHI CHANDRASHEKARAN, CREATE, COPY, DISRUPT 115 (2017). Further, India was the first country to ratify the Marrakesh Treaty for the visually blind. See *India is First to Ratify "Marrakesh Treaty" Easing Access to Books for Persons Who Are Visually Impaired*, WORLD INTELL. PROP. ORG. (June 30, 2014), http://www.wipo.int/pressroom/en/articles/2014/article_0008.html.

post-fixation rights and online signals.¹⁴³ If many developing countries (wrongfully) oppose a right as important as broadcasters' online signals, there will be no effective harmonization of broadcasters' rights keeping in mind the technological realities. Therefore, at a time when multilateralism in international IP law making is at a threat, a futuristic Broadcasters Treaty should be urgently endorsed by India especially because its domestic law protects broadcasters' online signals anyway.¹⁴⁴ This will go a long way in protecting the interests of its domestic sports broadcasting industry.

Moreover, the international copyright community has no valid reason to justify a different treatment for broadcasters considering that performers and phonogram producers already have the making available right under the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty for the Audiovisual Performances (BTAP).¹⁴⁵ If other neighboring rights holders, such as performers and phonogram producers, have the making available right, why should broadcasters be left out? This would lead to an anomaly, which would be impossible to explain to future generations dealing with international copyright law. Therefore, to maintain a parity between all the categories of the neighboring rights holders, i.e. performers, phonogram producers, and broadcasting organizations, it is important that the Broadcasters Treaty grants the making available right to broadcasters.

143. For Iran's views on online signals, see WIPO, *Standing Committee on Copyright and Related Rights*, ¶ 44, Thirty-Third Session, SCCR/33/7, (Feb 1, 2017) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_7_prov.pdf (expressing its preference for a possible treaty to be restricted to existing technologies and refrain from establishing some regulation concerning future and unpredictable technologies); see also WIPO, *Standing Committee on Copyright and Related Rights*, ¶ 30, Thirty-Second Session, SCCR/32/5, (May 9, 2016) (aligning itself with India's position, it expressed that since webcasting was not part of the WIPO General Assembly Mandate, it was not in a position to support the inclusion of webcasting under the framework of the Treaty.); WIPO, *Standing Committee on Copyright and Related Rights*, ¶ 22, Twenty-Third Session, SCCR/23/10, (July 20, 2012) (stating that protection under the Broadcasters Treaty should not extend to webcasting organizations.); WIPO, *Standing Committee on Copyright and Related Rights*, ¶ 55, Twenty-Second Session, SCCR/22/18, (Dec. 9, 2011) (again reiterating that protection should not extend to webcasting organizations).

144. Francis Gurry, Director General, WIPO, Opening Remarks at the Thirty-Fifth Standing Committee of Copyright and Related Rights (Nov. 13, 2017). See *Francis Gurry on the Challenges for Multilateralism in the Field of Intellectual Property*, WIPO MAG., Oct. 2016, http://www.wipo.int/wipo_magazine/en/2016/05/article_0001.html.

145. Performers have been granted the available right under Article 10 of the WPPT and the BTAP, while phonogram producers have been granted this right under Article 14 of the WPPT. See WIPO Performances and Phonograms Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 203 (entered into force on May 20, 2002); see also Beijing Treaty on Audiovisual Performances art. 10, June 24, 2012, 51 I.L.M. 1214.

VI. CONCLUSION

The recent spate of court cases by broadcasters asserting their broadcast reproduction right in relation to online piracy of live sports telecasts indicates that broadcast piracy is a big menace in India. With higher internet penetration rates and falling data tariffs, online streaming of live sports events is likely to become popular in coming times and especially for sports such as cricket. To avoid a similar situation to the U.S., where rampant online piracy led to a decline in the broadcast market for cricket, it is extremely important that online transmissions of both traditional broadcasters as well as webcasters are adequately protected. Granting copyright protection to live sports telecasts will go a long way in combating sports broadcast piracy. This will also be consistent with international practices such as those in the U.S., E.U., and U.K. where a sports telecast is protected through judicial precedent. Further, it will also help in boosting the local sports industry, which has a potential to touch 4 billion U.S. dollars in coming years.