Journal of Intellectual Property Rights
Vol 26, January 2021, pp 39-47

Relevance of Neighbouring Rights in India in the Context of the 2019 European Union Directive

Rajat Banerjee[†]

School of Law and Justice, Jagannathpur, Kolkata – 700 126, West Bengal, India

Received: 12th July 2020; accepted: 15th December 2020

Neighbouring rights, which form a subset of copyrights, are those subsidiary, yet parallel, rights that are accrued to a specific class of people that comprises not the actual authors but the neighbours to the authors. The class includes performers, broadcasters, producers and organizers, etc., and in some countries, makers of databases. Of late, as per European Union (EU) Directive No. 2019/790 dated 17th April 2019, the press publishers have also been included in the class. The primary objective of this paper is to revisit neighbouring rights in India in the context of the impugned provisions of the EU Directive on the neighbouring rights of press publishers. The paper tries to know whether it is a ripe time to extend such neighbouring rights to press publishers in India. To reach a logical conclusion, the paper reviews the existing literature on neighbouring rights jurisprudence in India in reference to the Copyright Act, 1957. It also assesses the international instruments governing neighbouring rights, especially the Rome Convention. Last but not the least, it critically reviews the impugned provisions of the 2019 Directive. The paper employs analytical and descriptive methods to testify facts and theoretical frameworks governing the subject.

Keywords: Neighbouring Rights, Press Publishers, Copyright Act, 1957, Rome Convention, News Aggregators, Media Monitoring Services, Information Society Service Providers, TRIPS Agreement, The Satellite Convention, 1974, WIPO Performances and Phonograms Treaty

Neighbouring rights command an important position in the entire discourse on copyright laws. Arguably, this is not only because these rights are unique in themselves (since they generally bestow moral rights on the neighbours) but also because these rights play a critical role in determining an equitable distribution of wealth and resources[1] generated through copyrighted property. As per World Intellectual Property Organization Publication No. 909(E),[2] neighbouring rights, although do not qualify as works under the copyright systems of all countries, contain enough creativity or technical and organizational skill to justify recognition of a copyright-like property right. Debatably, the main purpose of having these special rights is to create a level-playing field for those intermediate agents of change who apply their creativity and knowledge to make an author's work available to the public through reproduction and dissemination[3] of the work. Another purpose is to incentivize a group of people, apart from the authors, to create, administer and share an improvised and amended form of the original work of the authors.

In the lexical sense, the term 'neighbour' refers to someone or something situated next to or very near to someone or something. From the perspective of intellectual property law and more so from the perspective of copyright law, neighbouring rights are referred to as those subsidiary, yet parallel, rights that are accrued to a specific class of people that comprises not the actual authors but the neighbours to the authors. This class includes performers, broadcasters, producers and organizers, etc., and in some countries makers of databases. Of late, as per European Union (EU) Directive No. 2019/790/EC[4] dated 17th April 2019 (hereinafter referred to as the Directive), the press publishers have also been included in the class. Neighbouring rights in the context of copyright laws extend certain privileges[5] to the members of the class, *viz*., performers, broadcasters, and publishers of phonograms, etc., to use the works of the respective authors.

The objective of this essay is to discern the jurisprudence on neighbouring rights in India in the perspective of the Directive (also called the Directive on Copyright and Related Rights in the Digital Single Market), especially with reference to its focus on allowing rights to press publishers. The Directive

[†]Email: rajat.banerjee@adamasuniversity.ac.in

trenches on quite a few issues such as exceptions and limitations to copyright and related rights, collective licensing, the principle of appropriate and proportionate remuneration, etc., but for this present essay, we shall restrict ourselves to the rights of press publishers. The Directive has in a way tried to bring in a paradigm shift in the jurisprudence on neighbouring rights by including press publishers. Article 15 of the Directive creates a neighbouring right for press publishers against news aggregators or media monitoring services. While assessing the effectiveness of Article 15 of the Directive, the paper tries to know whether it is a ripe time to extend such neighbouring rights to press publishers in India. The paper reviews the existing neighbouring rights jurisprudence in India in reference to the Copyright Act, 1957. It also assesses the efficacy of international instruments, especially the Rome Convention. Finally, it critically examines the impugned provisions of the 2019 Directive. In light of the ongoing debate, the essay deals with two questions (1) whether the impugned provisions on press publishers' rights as stipulated in the Directive are in harmony with other laws and policies governing neighbouring rights (2) whether it is ripe time for India to continue with a similar experiment.

The Rome Convention and Beyond

To understand the nexus between neighbouring rights and copyright, it is important to know how and when these rights came to be recognized and how they eventually transpired into reality in various jurisdictions across the world. In the global perspective, the Berne Convention, 1886 (including its revisions and amendments), was the maiden attempt to formally recognize the rights of the music composers,[6,7] although the primary focus of the Convention was on protecting the author's artistic and literary work[8] rather than on reinventing the author's work through somebody else. Arguably, the need for a holistic legal solution on neighbouring rights was only felt in parts of Europe by late 1920s when a few European musicians' unions vouched for the legal protection of music composers and music performers, including performers of live music.[6] Seemingly, many of these unions anticipated job losses and unemployment in the wake of a strong 'author regime' created through the Berne framework. And when the ideas of the unions reached the ILO, it decided to address the issue by employing its own framework and understanding of the subject. It termed the hardship faced by the music composers and music performers as 'technical unemployment.'[6] But by 1939, the ILO was somehow convinced that the solution to the problems facing music producers, composers and performers would be in an overwhelming international convention bestowing special rights to these people. Parallel to this, a new development relating to the drafting of a fresh convention took place in Italy. A Committee was formed to draft a Convention determining the rights of musical performers and producers. The Committee met in Samaden and the Samaden proposal eventually became the blueprint of the Rome Convention.[9] In the interim, the Universal Copyright Convention, 1952 was passed. It focussed on broad standards of protection[10] of copyrights but seemingly failed to address the issues circumscribing neighbours.

The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, 1961 (hereinafter referred to as the Rome Convention) tended to allow the neighbouring rights holders the ability to administer uses of their works in a mutually beneficial manner.[11] It adopted a one-thread-binds-all approach in interspersing a bundle of rights to shield the musical performances embodied within phonographic recordings that were eventually transmitted through broadcasting services.[12] Article 2 of the Convention requires a contracting state to extend protection to (a) performers who are its nationals, regarding performances done, broadcast, or first fixed, on its territory (b) producers of phonograms who are its nationals, regarding phonograms first fixed or first published on its territory (c) broadcasting organisations, regarding broadcasts transmitted from transmitters situated on its territory. As per the contemplation of Article 2, such extension of protection must be in accordance with the national treatment principle under which an obligation is created on a contracting state to extend similar protection to non-nationals as it accords to its own nationals.[13] A performer as per Article 3(a) of the Rome Convention, means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. The expression "other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works" includes almost all kinds of performers, together with live performers, who take part in a performance or an activity. But to qualify as a performer under the provisions of the Convention, it

is mandatory that the performance is made before the public. Article 3(b) defines 'phonogram' as something which generally refers to a letter or a combination of letters that represents one or more voiced sounds in a word and is mainly composed of sound recording and film soundtracks. According to Article 3(f), 'broadcasting' means the transmission[14] for public reception of sounds or of images and sound.[15] Articles 4, 5 and 6 of the Convention deliberate on points of attachment for performers, producers of phonograms and broadcasting organizations, respectively.

Articles 7 through 13 of the Convention deal with the overarching rights of the performers, producers of phonograms and broadcasting organizations. As per Article 7 of the Convention, the protection provided for performers shall include the possibility of preventing, without the consent[16] of the performers (a) the broadcasting and communication of their performance to the public (b) the fixation of their unfixed performance (c) the reproduction of a fixation of their performance. Article 8 of the Rome Convention creates an obligation on the contracting states to devise procedures to apportion rights in cases of joint performances. Article 9 enjoins that a contracting state may protect performers involved in circus performances and even undefined performances. As per Article 10 of the Rome Convention, producers of phonograms shall have the right to approve or forbid the reproduction of their phonograms.[17] Article 11 of the Convention stipulates that in order to claim protection under the provisions of the law of the Contracting state, a producer needs to fulfil certain formalities.[18] Article 12 envisages that if a phonogram is used directly or is reproduced for commercial purposes, the user shall pay a single equitable remuneration to the producers of the phonograms. Article 13 of the Rome Convention specifies that broadcasters shall have the right to prohibit (or license) the rebroadcasting of their broadcasts; the fixation (recording) of their broadcasts; the reproduction of fixations of their broadcasts; the communication of their broadcasts to the public in places where an entrance fee is charged. Article 14 of the Convention sets the duration of protection at 20 years.

Through Article 15 of the Convention, limitations are created by virtue of which a contracting state may not extend the rights under certain circumstances. Article 15(1) stipulates that a contracting state may create norms to exclude neighbouring rights in cases of private use or use of short excerpts (to report contemporary events) or use for the purpose of teaching or research, or in case of ephemeral fixation by a broadcasting organization for its own broadcasts. The list of exclusion is of course not exhaustive. Also, there are two subtleties ingrained in such limitation model. The first one is that the limitations are not suited to the changing needs of the digital environment. The limitations meant for the-then existing analogue environment cannot unequivocally be transposed into the digital environment.[10] The second subtlety is that there is too much of discretionary space left to the contracting state for creating exceptions.[19]

Summing up, the provisions of the Rome Convention howsoever holistic seem to be reaching to a state of redundancy especially in the wake of digitization of content and reduction in technological investment.[20] Also, in reference to the rights of the producers of the phonograms and broadcasters, the minimum threshold test to determine the quantum of technological investment of such producers and broadcasters is not applied. This frustrates the very purpose and scope of protection.[20] The rights approach enshrined under the provisions of the Rome Convention may provide normative support to the neighbours but in the absence of a proper interpretative framework, the extent and import of such rights are not categorically assessed. It is apt to mention here that although contracting states may invoke compulsory jurisdiction of the International Court of Justice (ICJ) through Article 30 of the Rome Convention, they have never done so possibly thinking that the ICJ is not an apt platform to seek remedies such as specific performance that are generally sought under the intellectual property laws.[19]

The next convention in the field of neighbouring rights is the 1971 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms[21] that mainly protects a producer from the making and importation of duplicates without his consent, where the making or importation is for the purpose of distribution to the public. The preamble of the Convention acknowledges the unlawful duplication of phonograms. Article 7 of the 1971 Convention provides a safeguard to both authors' rights and neighbouring rights. Article 7 also enjoins that it is left to the respective contracting states to decide the extent to which performers, whose performances are fixed in a phonogram, are entitled to benefit from protection.

The Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, 1974[22] (in short known as

the Satellite Convention) also recognized the need for protecting the interests of the producers of phonograms and broadcasting organizations. The Preamble of the Brussels Convention clearly charts the way in which distributors/broadcasters can prevent signal theft. Article 6 of the Convention provides a saving clause for the authors, performers, producers of phonograms, or broadcasting organizations so that their economic and moral interests are not harmed.

The need to ensure the efficacy of neighbouring rights in the changing digitized world was revisited with the passage of the Trade-related Aspects of Intellectual Property Rights (TRIPS).[23] Part II, Section 1 (Articles 9 to 14) of the TRIPS Agreement deals with copyright and related rights. Article 14 of TRIPS provides protection to performers, producers of phonograms (sound recordings) and broadcasting organizations. As per Article 14(1), regarding the fixation of a performer's performance on a phonogram, the performer shall have the opportunity of preventing the following unauthorized acts: (i) the fixation of his/her unfixed performance and the reproduction of such fixation (ii) the broadcasting by wireless means and the communication to the public of his/her live performance. As per 14(2), producers of phonograms shall have the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Article 14(3) enjoins that a broadcasting organization shall have the right to prohibit the following acts when undertaken without its authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Article 14(5) mandates a protection period of 50 years for performers and producers of phonograms and 20 years for broadcasters.

Another overarching instrument concerning neighbouring rights is WIPO Performances and Phonograms Treaty (WPPT), which recognized the need to introduce new international rules and standards to meet the ever-growing economic, social, and cultural challenges. Article 5[24] of Chapter II of WPPT provides for the moral rights of the performers. As per Article 5, apart from the economic rights,[25] a performer shall enjoy moral rights over his/her creation. While Chapter II (Articles 5 through 10) spells out the rights of the performers, Chapter III (Articles 11 through 14) deals with the rights of the producers of phonograms.[26] Article 17 sets the term of protection for both performers and producers of phonograms at 50 years.

The EU Directive

Looking through the lens of history, we see that the Directive owes its genesis to a socioeconomic cause, which is the reduction in revenues in the press publishing sector in Europe since the early 21st Century.[27] (The cause is reflected in a few of the Recitals of the Directive, especially in Recital 54.) Yet, the 2001/29 Directive (also known as the InfoSoc Directive) had consciously excluded press publishers from the purview of neighbouring rights. In light of the intention of the European Parliament, the European Court of Justice while interpreting the provisions of InfoSoc in *Hewlett-Packard Belgium* v *Reprobel*[28] had held that the expression 'right holders' does not include 'publishers.' As digital services rendered by news publishers got substituted by news aggregators and similar players, various national governments in Europe in the absence of any EU law governing the subject were either trying to reach a consensus[29] to address the increasing divide between the press publishers and the digital content aggregators such as Google News or had started taking initiatives to regulate news content by enacting laws against such aggregators.[27] Some of the national governments such as Germany[30] and Spain[31] had already brought in new laws to support the cause of press publishers although none of the ventures was eventually proven fruitful.[32] Following the German and the Spanish experiments, the European Commission had in early 2016 initiated consultations with relevant stakeholders, including publishers of magazines, books, journals, etc., regarding creating a level-playing field for the press publishers.[27] Such initiatives by the Commission eventually got reflected into a draft Directive that was proposed for approval in September 2016. Article 11 of the proposed Directive provided for the required protection of press publications concerning digital uses,[33] in accordance with Articles 2 and 3(2) of the InfoSoc Directive. The proposed Directive was formally accepted as a law in April 2019.

Recital 1 of the Directive clearly indicates that its primary objective is not only to facilitate fair competition in the internal market in accordance with the provisions of the Treaty on European Union but also to harmonise the EU's copyright laws. As stated above, the reason why the European Parliament

included press publishers was the financial difficulties being faced by the publishers, especially the newspaper publishers, following a steep decline in revenue.[27] Considering this, the Directive seemingly invokes a difference principle[34] in distributing socioeconomic justice to address issues facing specific classes of people that include, *inter alia*, the press publishers.

One of the conspicuous features of the Directive (in reference to press publishers' rights) is that the allusion is to the news publishing sector and not to the book or the journal publishing sector. Recital 54 of the Directive read with Recitals 55 and 56 attests that the intention of the European Parliament was to create a *sui generis* right for news publishers since they had supposedly become victims of a monopolistic competition created by online news aggregators, media monitoring services and other information society service providers. Also, the use of the expression 'news aggregators or media monitoring services' in Recital 54 seemingly entails that book, journal or even magazine publishers are excluded from the list. But a deviation from the Recitals becomes obvious in the definition of 'press publication,'[35] which, contrary to the Recitals, considers the inclusion of other works or other subject matter transgressing the confines of literary works of a journalistic nature. The definition also includes general or special interest magazines. Therefore, a gap is created between the legislative intent and wordings in the definition section of the Directive. Finally, whether the expression 'press publications' excludes book, magazine or journal publications is a question of interpretation and given the legal complexities within the EU framework, a harmonious construction of the expression may not be possible.[36] And until such construction ensues, potential conflicts within the press publishing community and between the press publishers and online news aggregators, media monitoring services and information society service providers are bound to take place.

Article 15(1) of the Directive creates neighbouring rights (subject to exceptions under Article 5 of the Directive) for press publishers against news aggregators, media monitoring services and information society service providers, in conjunction with Articles 2 and 3(2) of the InfoSoc Directive. These rights include the right to reproduce content[37] and to the right of making available to the public the relevant subject-matter.[38] The rights, however, are qualified ones and news aggregators and information society service providers may hyperlink an online content or may use very short extracts[39] of published materials without attracting the wrath of payment of remuneration to the press publishers. Also, the rights are not available against private or non-commercial uses of press publications. As per Article 15(4), such neighbouring right for the press publisher shall operate for two years, post the publication of the online content, and shall not apply to matters published before June 6, 2019. Article 15(5) read with the Article 15(2) of the Directive reinstates the entitlement of an author to not only substantive protection of his/her work that is incorporated in a press publication but also financial protection through an 'appropriate share of revenues' accrued to press publishers. Article 16 of the Directive entitles a publisher (not just a press publisher) to claim a share of compensation due to an author (in the context of an exception or limitation) for the work published under a license or a transferred right.

But is the Directive working out well? The answer is probably no. In fact, when a few years before the Directive was officially conceived (in September 2016, as the 'proposed Directive'), apprehensions were running high that such a rights experiment would fail. Several research work[40] concerning the impugned matter indicated that the German and Spanish experiments were sufficient testimony that such a neighbouring rights jurisprudence against online news aggregators and similar players was not working out well. A possible explanation to this is that the neighbouring rights initiative for press publishers were purportedly in violation of the fundamental right[41] contemplated under Article 11(2)[42] of the Charter of Fundamental Rights of the EU (CFREU). As per Article 11(2) of CFREU, the freedom and pluralism of the media shall be respected; online news aggregators and similar players do qualify as media within the meaning of Article 11(2). Another possible explanation is that such an initiative was not in conjunction with the EU copyright acquis, especially the E-Commerce Directive 2000/31 and the Database Directive 96/9.[41] The recent Directive in the perspective of neighbouring rights for press publishers may similarly create an uneven field because of high levels of market concentration on online advertising and on media, and a new media regime governed by big media players may emerge.[43] Also, the press publishers' rights against online content aggregators

are seemingly imbalanced since they do not provide sufficient room for employing a threshold test or a test of substantial investment.[44,45] Overall, the European Commission's attempt to allow press publishers in Europe to charge online aggregators and similar players for displaying snippets of their digital content has seemingly failed.

The French government was the first to adopt the Directive and to pass a law in July 2019 in tune with the provisions of Article 15 read with Article 16 of the Directive. Within months of such enactment, some press publishers in France had entered into a bitter controversy with Google regarding sharing of remuneration and a case was lodged by the publishers' syndicate. The publishers alleged that Google unilaterally decided not to display article extracts, photographs, videos, infographics, etc., unless the press publishers authorized them to use such contents free of charge.[46] In April 2020, the competition regulator, 'Autorité de la concurrence,' had passed an interim order[47] in favour of the publishers and had said that Google had abused its dominant position. It had asked Google to negotiate with press publishers the remuneration due to them for the re-use of protected contents.

A Review of the Neighbouring Rights in India

India is neither a party to the Rome Convention nor a party to the WPPT. But even then, India protects neighbouring rights through the Copyright Act, 1957. The Act treats these neighbouring rights as special rights and neighbours are entitled to protection of both moral and economic rights. However, while the performer's rights and broadcasters rights are explicitly acknowledged under the Copyright laws, there is no express provision protecting the producers of phonograms. The producers of phonograms are protected either as authors or as performers. But the author of a phonogram has the complete privilege to transfer or assign his rights to the producer through any express or implied agreement.

Performers' Rights

In India, the provisions of Copyright Act, 1957 provide for a *sui generis* protection of performers' rights. According to Section 2(qq) of the Act 'performer' includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person[48] who makes a performance. Apart from the Copyright Act, the Indian Performing Rights Society Limited[49] also lends a hand in protecting the interests of the performers; the Society grants licences to users of music and collects royalties from them, for and on behalf of the authors, the composers and the music publishers.

Sections 38, 38A and 38B of Chapter VIII of the Copyright Act, 1957 safeguard the rights of the performers. As per Section 38(1), where a performer performs, he/she shall have a special right to be known as the 'performer's right' in relation to such performance. Section 38(2) stipulates the duration of such protection for 50 years. As per Section 38A,[50] performers enjoy the right to (a) make a sound recording or a visual recording of the performance, including its reproduction, its issuance of copies to the public, its communication and its selling or giving on commercial rental (b) broadcast or communicate the performance to the public. Section 38A also contains a non-obstante clause that entitles a performer to enjoy royalties if his/her performance is commercially used. Section 38B, which deals with the moral rights of the performer, enjoins that a performer shall enjoy the right to claim to be identified as the performer of his performance and to restrain or claim damages in respect of any distortion, mutilation or modification of his/her performance.

In *Super Cassettes Industries* v *Bathla Cassette Industries*,[51] a single judge of the Delhi High Court for the first time demarcated performers' rights from copyrights and subsequently held that re-recording of a song without the explicit consent of the performer amounts to a violation of performers' rights. In *Neha Bhasin* v *Anand Raj Anand*,[52,53] a single judge of the Delhi High Court had upheld the protection of performers' rights in live performances.

Broadcasters' Rights

Section 37 of the Copyright Act stipulates that every broadcasting organisation shall enjoy a special right called the 'broadcast reproduction right.' The protection for broadcast reproduction right is available for 25 years.[54] Section 37 of the Act further enjoins that during the continuance of the broadcast reproduction right, no person can rebroadcast or make a recording or a reproduction of the original broadcast. Thus, infringement actions can be brought by invoking the provisions of Section 37 of the Act. Apart from the designated rights available to the broadcasters under the above-mentioned section, under Section 31(D) of the Act, a broadcaster may broadcast a published programme by way of performance of a literary or musical work and sound

recording after taking due permission from the author and after remitting him/her the due royalty.

In one of the earliest rulings in *The Secretary, Ministry Of Information and Broadcasting* v *Cricket Association of Bengal & Anr*.,[55] a Division Bench of the Supreme Court upheld the right of the broadcaster to broadcast a certain programme.[56] Transmissions even through the new media such as the internet are allowed. In *Akute Internet Services Private Limited* v *Star India Private Limited*,[57] (Division Bench Judgment), the court held that ball-by-ball transmission of a cricket match even without the explicit permission of the organizer doesn't constitute a breach on the part of the broadcaster.

Conclusion

Holistically speaking, neighbouring rights not only ensure state-of-the-art technological application of the artistic and literary work of authors but also help a separate genre of creators and artists to recreate the authors' work in a unique and novel way. Looked from an inclusive utilitarian standpoint, neighbouring rights do ensure cultural diversity and promote the commercial impact of cultural industries.[58] But the entire discourse on neighbouring rights is not devoid of shortcomings. One of the major loopholes in the neighbouring rights jurisprudence is that it does not entail the application of either the threshold test or the test of substantial investment in determining the rights and obligations of the neighbours *vis-à-vis* their contenders.[43] In the absence of a strong normative framework guiding the neighbouring rights jurisprudence, both inter-neighbour and intra-neighbour relationships will presumably be addressed through business models and not through legal frameworks.

Now, let us take a relook at the two main questions of this paper (1) whether the impugned provisions on press publishers' rights as stipulated in the Directive are in harmony with other laws and policies governing neighbouring rights (2) whether it is ripe time for India to continue with a similar experiment. The answer to the first question lies in law whereas the answer to the second lies in the principles of expediency. In view of the non-applicability of the threshold test or the test of substantial investment in defining the import of neighbouring rights in the context of press publishers' rights, we may infer that the provisions of the EU Directive, especially concerning the rights of the press publishers, are not in harmony with other laws and policies governing neighbouring rights. Also, since many of the news aggregators and online media monitoring services are foreign companies, in the absence of an integrated system relating to royalty, compensation and monetary relief, a press publisher's right against a news aggregator or a media monitoring service is bound to fail. On the second question, since the press publishers in India did not complain of any historic injustice being faced by them in the wake of online aggregators and similar players, it is evident that there is no addressable conflict of interest prevailing between the two classes. Therefore, it would be expedient not to create a law when such is not required. Costs would outweigh benefits[59] if a new neighbouring rights law is forced on press publishers. Also, such a step may further broaden the digital divide or may force small news publishers' yield to big players and media giants. It may lead to a long-standing tussle between press publishers and online media managers such as the ones being presently faced by France. To sum up, the impugned provisions in the Directive with reference to the rights of the press publishers are neither in harmony with India's neighbouring rights laws nor is it ripe time for India to continue with a similar experiment.

References

1 The Neighbouring Right will Ensure "A Fair and Proportionate Distribution of Revenue between Publishers and Journalists," *European Federation of Journalists*, https://europeanjournalists.org/blog/2018/08/28/the-neighbouring-right-will-ensure-a-fair-and-proportionate-distribution-of-revenue-between-publishers-and-journalists/ (accessed on 9 July 2020).

2 Understanding Copyright and Related Rights, *World Intellectual Property Organization*, (2016), 1-36, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_201.pdf (accessed on 9 July 2020).

3 Guibault L, The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with regard to General Interest Missions for the Transmission of Knowledge – Prospects for their Adaptation to the Digital Environment, PhD Thesis, *e.Copyright Bulletin*, October-December (2003), 1-45, https://www.researchgate.net/publication/277288933_The_Nature_and_Scope_of_Limitations_and_Exceptions_to_Copyright_and_Neighbouring_Rights_with_regard_to_General_Interest_Missions_for_the_Transmission_of_Knowledge_-_Prospects_for_their_Adaptation_to_t (accessed on 6 July 2020).

4 The Directive, which amended Directives 96/9/EC and 2001/29/EC, was officially published in the Official Journal of the European Union on 17 May 2019.

5 Privileges, in the given context, include rights, duties and immunities of the neighbours.

6 Fleischer R, Protecting the musicians and/or the record industry? On the history of "Neighbouring Rights" and the role of Fascist Italy, *Queen Mary Journal of Intellectual Property*, 5 (3) (2015) 327-343.

7 Article 2(1), Berne Convention, 1886.

8 In fact, Article 11 of the Convention explicitly and exclusively bestows all rights on the author to use the product of his intellectual creation.

9 Fleischer R, Protecting the musicians and/or the record industry? On the history of "Neighbouring Rights" and the role of Fascist Italy, *Queen Mary Journal of Intellectual Property*, 5 (3) (2015) 327-343. According to Fleischer, the Committee vouched for a hierarchical system of unequal rights, favouring music producers over music performers.

10 Guibault L, The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with regard to General Interest Missions for the Transmission of Knowledge – Prospects for their Adaptation to the Digital Environment, PhD Thesis, *e.Copyright Bulletin*, October-December (2003), 1-45, https://www.researchgate.net/publication/277288933_The_Nature_and_Scope_of_Limitations_and_Exceptions_to_Copyright_and_Neighbouring_Rights_with_regard_to_General_Interest_Missions_for_the_Transmission_of_Knowledge_-_Prospects_for_their_Adaptation_to_t (accessed on 6 July 2020).

11 Hayes James A, Copyright and Related Rights in Canada and Abroad: A View towards a More Globally Unified System of Neighbouring Rights, *Journal of the Copyright Society of the U.S.A.*, (2017), 411-436. The Rome Convention for the first time envisaged certain technical parameters, for e.g., time limit (which was set to 20 years, (Article 14 of the Convention)) to ensure the protection of rights of the neighbours.

12 Howard G, Neighboring Rights: What They Are & Why They Matter, *TUNECORE BLOG*, http://www.tunecore.com/blog/2012/07/neighboring-rights-what-they-are-why-they-matter.html (accessed on 8 July 2020).

13 Brauneis R, National Treatment in Copyright and Related Rights: How Much Work Does it Do? *GW Law Faculty Publications & Other Works*, (2013), 1-30, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2113&context=faculty_publications (accessed on 8 July 2020). One of the essential foundations of the Berne Convention, 1886 was national treatment (Article 6 of the Convention).

14 The transmission must be by wireless means.

15 The fetter created under Section 3(f) of the Rome Convention with the inclusion of the term 'public' is checked by the provisions of Article 3 of the Brussels Convention, which provide for the protection of satellite broadcasts not intended for direct public reception.

16 An *ejusdem generis* reading of the expression 'consent' indicates that the expression is not in derogation of the conventional law of contracts and includes both express and implied consent.

17 Under the provisions of the Copyright Act, 1976 phonograms are termed as 'phonorecords'.

18 The formalities are that the commercial copies of the published phonogram or their containers bear a notice having the symbol (P), accompanied by the year date of the first publication. The notice shall also include the name and other necessary details of the publisher or the licensee of the publisher.

19 Hertz Allen Z, Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization, *Canada-United States Law Journal*, 23 (1997) 261-325, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1863&context=cuslj (accessed on 10 July 2020).

20 Hugenholtz P B, Neighbouring Rights are Obsolete, *IIC - International Review of Intellectual Property and Competition Law*, 50 (2019) 1006–1011, https://link.springer.com/content/pdf/10.1007/s40319-019-00864-3.pdf (accessed on 7 July 2020).

21 This WIPO-administered treaty was an attempt to consolidate the provisions of the Rome Convention and also to deliberate on some procedural issues concerning the application of the Convention.

22 Article 2 of the Brussels Convention mandates each contracting state to embark on measures to prevent the distribution of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.

23 The TRIPS Agreement, which became effective on 1st January 1995, created the much-desired bridge between the World Trade Organization and the WIPO.

24 Article 5(3) of WPPT gives plenary powers to the contracting states to extend statutory or common law protection to performers and producers of phonograms.

25 Economic rights of the performers in their unfixed performances are dealt under Article 6 of WPPT.

26 As per the provisions of Chapter III, producers of phonograms shall enjoy the right of making his product available, right of distribution, right of reproduction and right of rental.

27 Rosati E, Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful? Forthcoming in *International Review of Intellectual Property and Competition Law (IIC)*, 2016, SSRN: https://ssrn.com/abstract=2798628, (accessed on 7 July 2020).

28 *Hewlett-Packard Belgium SPRL* v *Reprobel SCRL*, C-572/13, EU:C:2015:750.

29 Countries such as Belgium, France and Italy had already started negotiating with online news aggregators such as Google News to reach a consensus regarding sharing of revenues. Rosati E, Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful? Forthcoming in *International Review of Intellectual Property and Competition Law (IIC)*, 2016, SSRN: https://ssrn.com/abstract=2798628 (accessed on 7 July 2020).

30 In Germany, the new law was effected in August 2013 with the introduction of Section 87f-h in UrhG (German Act on Copyright and Related Rights). Prior to the passing of such law, institutions such as the Max Planck Institute and German Association for the Protection of Intellectual Property condemned such legislative move arguing that it would lead to overprotection of press publishers. The Press Publication Right from the German Perspective, *TaylorWessing*, https://www.taylorwessing.com/download/article-press-publication-right-from-a-german-perspective.html (accessed on 7 July 2020). In *V G Media* v *Google* (JUDGMENT OF 12. 9. 2019 — CASE C-299/17 VG MEDIA), the Court of Justice of the European Union had held that the rights of the press publishers contemplated under Sections 87f-h of UrhG were unenforceable since

Germany did not notify the European Commission before bringing in such law. Also refer: Nordemann Jan B, Stefanie Jehle, VG Media/Google: German Press Publishers' Right Declared Unenforceable by the CJEU for Formal Reasons – But it will soon be Re-born, *Kluwer Copyright Blog*, http://copyrightblog.kluweriplaw.com/2019/11/11/vg-media-google-german-press-publishers-right-declared-unenforceable-by-the-cjeu-for-formal-reasons-but-it-will-soon-be-re-born/?doing_wp_cron=1594367116.3242061138153076171875, (9 July 2020).

31 Spain had introduced a similar law in January 2015 which obligated online news aggregators to pay a hefty fee to press publishers. Hirche T, New Tariff will Kill Spanish Aggregators, *IGEL*, https://ancillarycopyright.eu/news/2017-02-09/new-tariff-will-kill-spanish-aggregators (accessed on 9 July 2020).

32 EU Copyright Reforms: Is it the End for the Much-hyped Press Publishers' Right? *Osborneclarke*, https://www.osborneclarke.com/insights/eu-copyright-reforms-is-it-the-end-for-the-much-hyped-press-publishers-right/ (accessed on 9 July 2020). Kreutzer T, Ancillary Copyright for Press Publishers IGEL, 3-31, https://openmedia.org/files/documents/acforpresspublishers_kreutzerengweb-3.pdf (accessed on 8 July 2020).

33 Talke A, The Ancillary Right for Press Publishers: The Present German and Spanish legislation and the EU Proposal, Published under *Creative Commons Attribution 4.0 International License* (2017) 1-6, http://library.ifla.org/1849/1/119%20talke%20en.pdf (accessed on 7 July 2020).

34 Difference principle according to John Rawls refers to a rule that allows institutions and processes to extend more benefits to the least advantaged people or social groups to make them materially better. Distributive Justice, *Stanford Encyclopaedia of Philosophy*, https://plato.stanford.edu/entries/justice-distributive/#DifPri (accessed on 7 July 2020).

35 Article 2(4), EU Directive, 2019/790.

36 Czarny-Drożdżejko E, The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market, *IIC - International Review of Intellectual Property and Competition Law*, 51 (2020), 624–641, https://link.springer.com/article/10.1007/s40319-020-00933-y (accessed on 9 July 2020). According to the author, in France, for example, the meaning of press publication is no way similar to what is contemplated under the provisions of the Directive.

37 Article 2, EU Directive, 2001/29.

38 Article 3(2), EU Directive, 2001/29.

39 As per Recital 58 of the Directive, use of such extracts of press publications by news aggregators will not hamper investments made by press publishers in online content production.

40 CREATe, Article 11 Research, *UK Copyright and Creative Economy Centre University of Glasgow*, https://www.create.ac.uk/policy-responses/eu-copyright-reform/article-11-research/ (accessed on 9 July 2020).

41 Peukert A, An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis (20 December 2016). Research Paper of the Faculty of Law, Goethe University Frankfurt am Main No. 22/2016, https://ssrn.com/abstract=2888040 (accessed on 9 July 2020).

42 Article 11(2) must be read in light of Article 16 of CFREU which accords freedom to carry on business in accordance with the existing norms.

43 Quintais João P, The New Copyright Directive: A tour d'horizon, *Kluwer Copyright Blog*, http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/?doing_wp_cron=1594420635.9475769996643066406250 (accessed on 6 July 2020).

44 Hugenholtz P B, Neighbouring Rights are Obsolete, IIC - *International Review of Intellectual Property and Competition Law*, 50 (2019) 1006–1011, https://link.springer.com/content/pdf/10.1007/s40319-019-00864-3.pdf (accessed on 7 July 2020).

45 The test is employed in conjunction with the proportionality test. Proportionality involves a balancing exercise between the legitimate aims of the state on one hand and the protection of the individual's rights and interests on the other.

46 Related Rights: The Autorité has Granted Requests for Urgent Interim Measures Presented by Press Publishers and the News Agency AFP (Agence France Presse), *Autorité de la concurrence*, https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press (accessed on 11 July 2020).

47 The matter is presently pending in the appeal stage.

48 The inclusion of the expression 'other person' within the definition of 'performer' is in consonance with Art. 3(a) of the Rome Convention, 1961.

49 The Society was formed in 1969 and is registered *vide* Section 33 of the Copyright Act, 1957.

50 As per Section 38(A)(2), if a performer expressly consents to the incorporation of his/her performance in a cinematograph film, he shall not object to the enjoyment by the producer of the film of the performer's right in the same film.

51 107 (2003) DLT 91.

52 132 (2006) DLT 196.

53 In the said case, the plaintiff Neha Bhasin, a singer, claimed that her voice was used for the song 'Ek Look Ek Look' in the Hindi film 'Aryan' produced by defendant no. 2 Poonam Khubani, who in the said movie depicted herself as the main singer and Neha Bhasin as the playback singer.

54 Section 37(2), Copyright Act, 1957.

55 AIR 1995 SC 1236.

56 The subject of the broadcast was cricket matches in this case. In the field of sports, rights and obligations of the broadcasters are determined by the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

57 MIPR 2013 (3) 1.

58 Fleischer R, Protecting the Musicians and/or the Record Industry? On the History of "Neighbouring Rights" and the Role of Fascist Italy, *Queen Mary Journal of Intellectual Property*, 5 (3) (2015) 327-343. The expression 'cultural industries' applies to those industries which combine the creation, production and commercialisation of content and includes multimedia, audio-visual, phonographic and cinematographic productions.

59 Posner Eric A & Matthew D Adler, Rethinking cost-benefit analysis, *Yale Law Journal*, 109 (1999) 165-248.