DOCTRINE AND OPINIONS

THE BROADCASTERS' NEIGHBOURING RIGHT: IMPOSSIBLE TO UNDERSTAND?

Spontaneous reaction to some key findings by P. Akester [*]

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As a result of a remarkably thorough academic exercise Patrícia Akester arrives at the following conclusion:

> "The [WIPO BROADCASTERS'] treaty would give broadcasters and cablecasters (and possibly webcasters) broad rights which in parallel with *technological measures*, could prevent or restrict the flow of information with respect to *materials which may not be protected by copyright*, such as news of the day, or which are in the *public domain*, because their term of protection has expired, or in relation to *materials created by third parties who do not wish to prevent dissemination of the latter*."

From a broadcast lawyer's point of view, this conclusion provokes a number of spontaneous reactions:

1. Technological measures

In fact, there exists only one technical measure to restrict the unauthorized use of a broadcast: *encoding*. Broadcast signals are encoded for two distinct reasons: either to limit reception to those members of the public who have agreed to pay for the programme service (pay-TV) or to ensure, at the request of rightowners in the programme material, that reception of the signal is not possible outside the licensed territory. How could it possibly be argued that encoding of broadcast signals interferes with the general public's freedom of information and, accordingly, should not be permitted or, even if permitted in principle, could be freely circumvented?

2. Materials which are not protected by copyright

When broadcasters broadcast such material, they contribute positively to the free flow of information, rather than preventing or restricting it. Anyone else remains free to make the

[*] "The draft WIPO Broadcasting Treaty and its impact on freedom of expression" by P. Akester - UNESCO e-Copyright Bulletin, April - June 2006.

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Original: English
August 2006

same, or any other, use of the same material, provided only that such use is not made by way of a free ride on the broadcaster's efforts and investment in broadcasting the said material in the first place.

3. Public domain

Exactly the same reasoning applies here as in the case of materials which are not protected to begin with. Just one example: a broadcasting organization obtains authorization to go into the Louvre for the purpose of broadcasting Leonardo's Mona Lisa, followed by an interview with the director of the museum. How could it possibly be argued/justified that the *broadcast signal* should be free for anyone to exploit, when in reality the sole possible obstacle to free use of the Mona Lisa is the fact that physical access to the picture is restricted, and may be permitted only subject to certain conditions (prohibitions)? By the same "logic", it would then also have to be concluded, for instance, that musicians should not be granted neighbouring rights protection with respect to a performance of a Beethoven symphony or a Schubert quartet, or that phonogram producers should not enjoy neighbouring rights protection with regard to a CD which incorporates such musical performances which are based on public domain musical works.

4. Materials created by third parties who do not wish to prevent dissemination of the latter

Such third parties may only act or choose not to prohibit with respect to their own rights. They may tolerate, or even positively encourage (e.g. under a Creative Commons licence), any other use of their creations by anyone else, including broadcasts by other broadcasters. But they cannot thereby invalidate other rights (in particular, neighbouring rights) which may exist independently in relation with their creation, whether it be the rights of co-authors, performers, phonogram producers, producers of first fixations of films or, last but not least, broadcasting organizations.

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> Readers who are familiar with the concept and nature of the broadcasters' neighbouring right will require no further explanation. However, since not everyone will necessarily claim to fall within that category, the following restatement of the nature of the broadcasters' neighbouring right may be appreciated, together with the natural conclusion that the convening of a Diplomatic Conference to adopt the Broadcasters' Treaty is now overdue.

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Since 1961 the broadcasters' neighbouring right has been recognized on the international level. Article 13 of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* grants broadcasting organizations the right to authorize or prohibit:

- the rebroadcasting of their broadcasts
- the fixation of their broadcasts
- the reproduction of certain fixations of their broadcasts

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

Eighty-three countries currently adhere to the Rome Convention and are hence obliged to grant broadcasters from their own country, as well as from all the other countries which belong to the Convention, *at least* the minimum level of protection laid down in Article 13. In reality, many countries grant a higher level of protection. This applies too, and in particular, to the European Union, which obliges its Member States to grant broadcasters a degree of protection which - though not yet responding to today's needs - is noticeably higher than that prescribed by Article 13. Thanks to the principle of *national treatment* (Article 6 of the Convention), broadcasters from all the other countries automatically enjoy the same standard of protection which a given country grants to its own broadcasters.

Among the countries which do *not* belong to the Rome Convention are, notably, the United States and China.

Both those countries, however, are now actively contributing to the work within the World Intellectual Property Organization (WIPO) aimed at establishing a new Treaty for the Protection of Broadcasting Organizations. Once it has been adopted and has entered into force, this Treaty will gradually make the Rome Convention obsolete, since only the new Treaty will apply between countries which belong to both the Rome Convention and the new WIPO Treaty.

The - urgent - need for such a new Treaty becomes immediately apparent when the above-quoted Article 13 is read against the backdrop of technical developments and the explosion of the electronic media environment since 1961. Cable, satellite, the Internet, broadband, mobile telephony, digital recorders, and no end in sight...

In concrete terms, what does this mean as regards the scope and extent of the broadcasters' neighbouring right? What protection do broadcasters really need, and how can it be ensured that their protection does not impinge on the rights of authors and owners of other neighbouring rights (phonogram producers and performing artists) or affect the general public's legitimate access to cultural products, whether they are still protected or have already come within the public domain (such as a Beethoven symphony, a Shakespeare drama or a Botticelli painting)?

The answer to all these questions can ultimately be found in the very notion of the broadcasters' *neighbouring right*. If properly understood, and thought through to the end, this term implicitly settles the three questions just raised:

- the necessary scope and extent of the right
- the impact on the other right-owners
- the impact on the legitimate interests of the general public.

The "neighbouring right"

The broadcasters' neighbouring right is there to protect the broadcasters' entrepreneurial efforts and investments in the form in which they materialize as an end product from their activity, viz. the broadcasts. "Broadcasts" are the electronic signals which carry radio or

television programmes and which are transmitted over the air by or on behalf of broadcasters for reception by the public. Only those *signals* are protected under the neighbouring right, and not the programme content which is carried by the signals. Consequently, when a broadcasting organization *authorizes* a given use of its signal (e.g. cable distribution), that authorization does not extend to the programming content. The user (cable distributor) will need to obtain, in addition, authorization from all the right-owners (authors, performing artists, phonogram producers) whose contributions make up the programmes. When, instead, a broadcasting organization *prohibits* a given use of its signal, then *de facto*, automatically, that prohibition also extends to the content of the programmes carried by that signal, but only in that particular context and in that particular combination. The right-owners are perfectly free, as regards their own rights in the programming content, to authorize the requested use, as long as the user takes it not from the broadcasting signal but, instead, direct from the physical carrier in which it is embedded and which the broadcaster itself used as a basis for its programming (in particular, a film or a CD).

The broadcasters' neighbouring right in the broadcast signal is thus exactly the same as the phonogram producers' neighbouring right in phonograms (CDs). For such producers it is their entrepreneurial efforts and investment in the form in which they materialize as an end product from their activity, viz. the CDs, which justify the protection by a specific neighbouring right.

For the phonogram producers, too, it is only the physical carrier, the CD, which is protected, and not also the content (the music, as performed by performing artists). As in the case of the broadcasters' neighbouring right, protection exists even when the content is no longer protected (compositions by Bach, Mozart or Verdi) or when it is not subject to any copyright or neighbouring rights protection (a simple interview, or a recording of birds warbling).

When it comes to the concrete protection of the neighbouring right, the market reality, as well as the concrete risks of piracy, needs to be taken into account.

As regards the *market reality*, unlike the case of CDs (which are on sale in many countries, in large quantities, for a certain period of time) broadcasts are normally aimed at the audience in one single country (the broadcaster's own country), they take place once, and potential pirates' interests are normally focussed on a parallel or close-in-time exploitation through competitive audiovisual media outlets. The other important element is that broadcasts are normally financed, exclusively or at least predominantly, through advertising and sponsorship revenue calculated on the basis of the actual audience of the programme or, in the case of pay-TV, through subscriptions by the subscribers to the pay-TV services. In other words, potential audiences which are lost to competing offers by pirates lead to a corresponding drop in the broadcasters' revenue.

Risks of piracy

As regards the concrete risks of piracy, it may be helpful to take by way of example the recent FIFA World Cup, held in Germany in June/July 2006.

There were 64 matches. On the majority of competition days, there were three or even four matches, with some matches played in parallel. It is obvious that the rights-holding broadcasters would not and could not broadcast all those matches live. Some matches were broadcast on a deferred basis, and in the case of others only more or less extensive highlights were shown. Furthermore, the rights-holding broadcasters are scattered all around the globe,

in 24 different time-zones. Many matches were played at a time when the local broadcaster in Asia or in the Americas, for instance, could count on only a rather restricted audience. They would therefore either be delayed for prime time or shown live (to a relatively small audience) and then presented again in a highlights package at a time when the maximum potential audience might be expected. To complete the picture, the rights-holding broadcasters were jointly committed to paying a rights fee of approximately 2 billion US dollars. Each of them then had to spend substantial additional amounts before the programmes could go on air and the audiences could enjoy them. In the end, most broadcasters had to cover the totality of their expenses related to the FIFA World Cup at least partially through commercial revenue, and the majority of the rights-holding broadcasters did not only have to cover the totality of their expenses through such revenue but were even expected to produce a profit for their shareholders.

What all this ultimately boiled down to was the assumption/expectation that in each country all those interested in the World Cup would actually watch the matches, in whatever form, on the rights-holding broadcaster's channel or channels. Those who watched the matches on other channels or platforms would cause a corresponding reduction in the legitimate broadcasters' ratings, with a corresponding direct negative impact on the advertising/sponsorship revenue. It was therefore vital for the rights-holding broadcasters to protect their huge investment and that for that purpose they actually had all the necessary legal means to enforce their rights effectively against pirates, whether it be through injunctions or damages or both.

Seen from a potential pirate's point of view, the opportunities opened up by the World Cup were unique:

- very high audience interest, in the complete matches and in highlights
- scheduling problems for the rights-holding broadcasters (due to time-zone constraints and the number of matches played consecutively per day, and sometimes even in parallel), which open up possibilities for prior offers to the public
- availability of the signal not only off-air (when it is broadcast) but also when it is being sent from the venue in Germany to the broadcaster ("pre-broadcast signal") or when the broadcast signal is simultaneously relayed on a cable system or over the Internet, broadband or a mobile telephone system (the last three variants being referred to as "simulcasts")
- especially thanks to the rapid development of digital technology, numerous potential outlets for offering the pirated signal to the public: in addition to the one and only form of piracy which is envisaged and covered by the Rome Convention, viz. simultaneous retransmission over the air by another broadcaster, and which has become fairly rare today, there are now the following possibilities in particular:
  - deferred retransmission over the air, wholly or in part (highlights)
  - cable retransmission, simultaneous or deferred, wholly or in part
  - retransmission over the Internet, broadband or mobile telephony systems, simultaneous or deferred, wholly or in part
  - on-demand delivery over Internet, mobile telephone, etc., wholly or - more likely in practice - in part
  - exhibition on giant screens installed in public places

- Digital technology permits rapid editing, so that highlights or summaries or just packages of the goals can be offered almost instantaneously.

In all those cases of potential piracy, which would directly result in a loss of audience for the legitimate right-holder, and thus automatically in a corresponding loss of revenue there was furthermore the risk of ambush marketing, i.e. the risk that the official sponsors of the World Cup or of the rights-holding broadcaster were replaced by others, and sometimes by their direct competitors. This applied also to the case of giant-screen exhibition, where the immediate surroundings of the screen itself, though also the public venue as such, provided plenty of space and opportunities for third-party sponsorship posters or similar installations.

Scope of protection needed

Anyone who is really serious about granting broadcasters a meaningful legal basis for protecting their investment in today's audiovisual environment will quite naturally arrive at the following conclusions:

1. ***It is not only the (traditional) over-the-air broadcast signal which needs to be protected, but also***

   - ***the pre-broadcast signal***

   - ***the signal in the form in which it is simultaneously relayed over another broadcast network, a cable distribution system, the Internet, broadband, mobile telephony or similar present or imminent systems.***

   No pirate should be able to get away with the excuse that he did not steal the broadcast signal as such but that he took the signal from, for instance, the Internet, where it was simulcast in parallel with the broadcast, or that he intercepted the signal on its way from the venue to the broadcaster's transmission network ("pre-broadcast" signal).

2. ***The scope of rights granted must ensure that any acts of parallel or alternative exploitation of the broadcast signal by third parties on other platforms are subject to the broadcaster's prior authorization and that, by the same token, any and all acts of piracy can be prohibited.***

Third parties' interests

What objection could possibly be raised against such all-encompassing protection of broadcasters, other than a claim that it interferes with the rights of owners of rights in the content which is incorporated in the broadcast signal, or that there is "over-protection" to the detriment of the legitimate interests of the general public?

That first possible objection has already been clearly answered at the beginning of this paper: only the signal as such is protected, which means the broadcaster can neither authorize the use of the content incorporated in the signal nor prohibit such use as long as it is not the broadcast signal itself which is used to enable such use of the programme content.

As regards the legitimate interests of the general public, it could certainly be debated what precisely those "legitimate interests" are. However, there would appear to be no need for that in the present context, since the same exceptions and limitations - among them, in particular, the right of *private use* - which apply to copyright and neighbouring rights would automatically apply as well to the broadcasters' neighbouring right. There is, nevertheless, one particular aspect which may require an explanation. It is sometimes claimed that by broadcasting a work which has already fallen into the public domain broadcasters would automatically become the *de facto* right-owners in such works, thanks to the exclusive right in the broadcast signal which incorporated the public domain work. Three concrete examples will illustrate that this is not the case:

- In a radio broadcast, a poem or short story by a 19th-century author is read out. Members of the public remain free to make the same or any other use of the work, based on a printed copy which may be in their possession, which they borrow or which they will have to buy (and indeed *pay for*, even though the work itself is no longer protected).

- In a radio broadcast, a Beethoven symphony is presented to the audience. Anyone is free to perform the same symphony in public, as well as to broadcast a performance of it. If the symphony is performed by an orchestra, then although the music is in the public domain the performers (musicians) do indeed enjoy a neighbouring right in the performance, and that right is *not* covered by the broadcaster's neighbouring right. If the broadcast is based on an old phonogram (e.g. from the 1940s) which itself is no longer protected under a neighbouring right, then the public is free to acquire a copy of the phonogram on the open market and make any private or public use thereof.

- On television, a film from the 1930s is broadcast. Again, whereas recording of the broadcast for *private use* and other purposes covered by the usual limitations and exceptions is permitted, anyone wanting to use the film for any other purposes is free to acquire a copy on the market. If it is not available, or is too costly, that is clearly not a result of the broadcaster's neighbouring right. If anyone is the *de facto* "right-owner", it is the owner of the rare or even unique copy of the film, but not the broadcaster.

Nine years after the WIPO Manila Conference, where the process towards a new Treaty for the Protection of Broadcasting Organizations was launched, and after seven years of intensive/exhausting meetings and deliberations by governmental experts, under the auspices of WIPO, it is legitimate to wonder why the Treaty has still not seen the light of day. If the delay is essentially due to the difficulty of fully comprehending and appreciating the - admittedly - complex nature of the broadcasters' neighbouring right, the foregoing explanations may help contribute to a better understanding, thereby speeding up the procedure towards the - overdue - convening of a Diplomatic Conference to adopt the Treaty.