

DOCTRINE AND OPINIONS

THE BROADCASTERS' NEIGHBOURING RIGHT: IMPOSSIBLE TO UNDERSTAND?

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

Werner Rumphorst**

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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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.

* * *

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.

* * *

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.



DOCTRINE AND OPINIONS

REFLECTIONS ON THE DRAFT WIPO BROADCASTING TREATY
AND ITS IMPACT ON FREEDOM OF EXPRESSION

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I. The draft WIPO Broadcasting Treaty (WBT)

For several years, WIPO has undertaken efforts to negotiate and conclude a treaty granting rights to broadcasters. Going beyond the minimum protection to be granted to broadcasting organizations under Article 14(3) TRIPS¹, the draft WIPO Broadcasting Treaty (WBT)² is parallel to, and complements the legal protection granted by the WPPT to performers and phonogram producers, i.e. to the other two beneficiaries of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations.

Like those provisions of the Rome Convention and TRIPS that concern phonogram producers and broadcasting organizations, the draft WBT is a legal instrument protecting investment rather than creative activities. The underlying rationale is that in the absence of legal protection, signals of broadcasts would be subject to unhindered appropriation by free-riders. While in the short run, unauthorized use of broadcasting signals would increase access by users, in the long run, broadcasting would become a less profitable enterprise. Consequently, the lack of legal protection for broadcasting organizations might ultimately result in less access to materials broadcast. This view seems to be shared by the wide range of States that actively support some sort of legal protection for broadcasting organizations.

In 1961, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which is jointly administered by the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), had already recognized, in its Article 13, the legitimate need for protection of broadcasting organizations. Article 14(3) TRIPS reinforced this minimum protection for broadcasting organizations. Therefore, the draft WBT does not add, at the international level, another layer of IP protection to the already many-tiered IP-system. Moreover, it should be noted that in many respects the protection to be granted by the WBT is already provided for by many national laws, at least in the European Union, where broadcasting organizations enjoy an exclusive fixation right, reproduction right, distribution right, a limited public communication right, and a right of making the broadcast available to the public (Articles 6(1), 8(1) and 9(1) of the EU Rental and Lending Directive (92/100/EC),³ and Articles 2(e), 3(2)(d) of the EU Copyright in the Information Society (2001/29/EC).⁴ This level of protection as it presently exists within the EU is considered adequate by a substantial number of countries, albeit developed ones. -

¹ Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh, 1994.

² WIPO Doc. SCCR/12/2 Rev. 2 of May 2, 2005), together with the “Working Paper on Alternative and non-Mandatory Solutions on the Protection in Relation to Webcasting, hereafter “Working Paper on Webcasting”, WIPO Doc. SCCR/12/5 Prov.

³ Council Directive [92/100/EEC](#) of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

⁴ European Parliament and Council Directive [2001/29/EC](#) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

However, the draft WBT, with its full set of exclusive rights regarding retransmission (by any means, including by wire), communication to the public, fixation, reproduction, distribution, transmission following fixation, and making available to the public (Articles 6 - 12), clearly goes beyond what had been accepted until that time as the minimum standard of protection for broadcasters at the international level. In addition, even in those cases in which the rights listed in the WBT had been granted before, the draft WBT will eliminate certain limitations (Article 14). Moreover, members of the future WBT shall provide legal protection of signals prior to broadcasting (Article 13), and, under the draft WBT, beneficiaries shall not be limited to over-the-air broadcasters, but shall also include cablecasters and possibly webcasters (Article 4). Finally, the draft WBT provides for legal anti-circumvention protection and for legal protection of rights management information (Articles 16 and 17).

This gives rise to the question whether and to what extent would a new treaty, as presently drafted, with its suggested alternatives, be in conflict with freedom of expression and freedom of access to information?

II. WBT and freedom of expression and access to information

Freedom of expression, as guaranteed by the Universal Declaration of Human Rights,⁵ the International Covenant on Civil and Political Rights⁶ and the European Convention on Human Rights (ECHR),⁷ is a fundamental freedom that protects individuals against State censorship, but in doing so, forms the basis for a free and democratic society. Also it is not limited to the freedom to have and express personal opinions and ideas; as a condition necessary for forming such personal opinions, it also encompasses the right to seek,

⁵ Universal Declaration of Human Rights Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁶ International Covenant on Civil and Political Rights, Article 19: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

⁷ European Convention on Human Rights, Article 10: “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

receive and impart information and ideas through any media and regardless of frontiers. It is not possible in the present Article to explore the extent to which the fundamental right of freedom of expression is merely a defensive right directed against State acts that actively *prevent* the freedom of expression or access to information, or whether it likewise gives a positive right obliging States to enact legislation that *enables* freedom of expression and access to information. Moreover, it should be pointed out that what is commonly referred to as “right of access to information” does not mean free access. Furthermore, it primarily aims at barring States from controlling or even prohibiting the seeking, receiving and imparting of information and ideas by individuals. Even if States may be duty bound to create an environment in which information sources can exist, the right of access to information probably does go as far as imposing a duty on States to actively create, or improve existing access possibilities.

Obviously, a conflict exists between this fundamental principle of freedom of expression on the one hand, and the exclusive protection of broadcasting organizations, on the other. Since both freedoms are protected on an equal level, they somehow have to be accommodated, as expressly stated in Article 19 (3)(a) of the International Covenant and Article 10(2) of the ECHR. Without entering into the details of the proper standards to be applied when accommodating the two conflicting rights, it should be mentioned at the outset, that in doing so, and notwithstanding the far-reaching importance of the freedom of expression and of access to information, the mere granting of exclusive rights protection to broadcasting organizations does not constitute an infringement of freedom of expression and of access to information per se. True, any exclusive right touches upon the freedom of expression and with it the freedom of access to information. However, an infringement of the right of freedom of information in all likelihood requires that conflicting rights are unduly restricting the freedom of expression and access to information. In striking this balance, the fact that exclusive rights are granted in order to further access, rather than to restrict access, will have to be considered, as well as the previously noted fact that freedom of access to information does not necessarily mean that States have to provide cost-free access.

In view of the legitimate need for some sort of protection to be granted to broadcasting organizations (even in addition to the protection such organizations receive with regard to some parts of the contents of their broadcasts), the decisive issue is therefore whether the scope of protection proposed by the draft WBT is appropriate in view of the likewise legitimate interests of freedom of expression and access to information. This question is not to be taken too lightly since the proposed WBT will substantially increase the existing minimum protection granted under both the Rome Convention and TRIPS. Of course, the question of which provisions of the draft WBT jeopardize the “safety valves”, which usually guarantee the necessary and appropriate balance between rightholders’ proprietary intellectual property rights on the one hand, and users’ access interests on the other, will have to be examined in much more detail than can be done in the present Article. But it seems worthwhile to draw attention to some of the features of the draft new WBT that must not be overlooked in finalizing the text of this new Treaty.

III. Major problem areas

As it appears, the provisions of the draft WBT give rise to at least four major areas of potential conflict with regard to freedom of expression and access to information. These areas are: the necessary distinction between the “broadcast” as the object of the protection conferred by the WBT, and the “contents” broadcast (1); the extended scope of protection of the broadcasters’ rights (2); the necessary synchronization of the exceptions to the exclusive broadcasters’ rights with the exceptions to the exclusive rights in the contents broadcast (3); and, finally, the (non)-adjustment of the anti-circumvention protection between the broadcasters’ rights and the rights in the content broadcast (4).

1. “Broadcast” and “contents” broadcast

Firstly, as regards defining the object of protection of broadcaster’s rights, it is important to distinguish between, the *broadcast*, on the one hand, and the material that is broadcast, i.e. the *contents* of the broadcast, on the other hand. Only the former is the object of broadcasters’ rights. This is notwithstanding the fact that broadcasters may well enjoy rights of their own with regard to the contents broadcast. There are two ways in which such rights in the contents broadcast can vest with the broadcasters: (1) many countries grant broadcasting organizations protection as producers of the films they have produced and broadcast. (2) in practice, broadcasting organizations have often been transferred or assigned authors rights in films that have been produced by broadcasting organizations. However, none of these latter rights are the subject of protection to be granted under the WBT.

It follows that the definition of the object of protection of the WBT has to be drafted in such a way that legal protection granted to broadcasters only covers the broadcast as such, but not the content that has been broadcast. In other words, it must be made sure that once a work already in the public domain is broadcast, only re-use of that particular broadcast is covered by the exclusive right granted to the broadcaster, but not the use of the work broadcast per se. It must remain possible to use the same work from another source. For example, this aim can be achieved by defining the object of protection as the broadcasting signals (as is now foreseen in the new paragraph (0) of Article 3 draft WBT).

Second, the distinction between the “broadcast” as object of protection of the draft WBT on the one hand, and the “contents” broadcast on the other hand, is of vital importance in properly limiting the negative effects that the granting of exclusive rights to broadcasters’ as done by the WBT might have with regard to the freedom of access to, and use of, the contents broadcast. A user can only use parts of a broadcast, if both the rights with regard to the content broadcast and the rights in the broadcast itself allow him to do so. In other words, even if copyright law does allow a particular use with regard to a particular work in question (first layer), the user may nevertheless not engage in such an act if doing so infringes the right in the broadcast itself (second layer). Therefore, great care has to be exercised in aligning the legal policies underlying both layers of exclusive rights. This can be done either

by limiting the scope of the rights that will be granted to broadcasting organizations by the draft WBT, or by providing for adequate limitations and exceptions (see below III.3), and for an adequate legal anti-circumvention protection (see below III.4).

2. Scope of exclusive broadcasting rights

a) Re-use of public domain material

In order to avoid a manifest conflict with the right to freedom of access and information, the exclusive protection granted to broadcasters should not extend to the re-use of a work broadcast in the public domain, at least not as long as re-use is made only of that particular work but not of the actual broadcasting signals. In this way, exclusive protection granted to broadcasters would parallel, for example, the exclusive protection granted to phonogram producers, who record public domain material. There as well, re-use of the protected phonogram itself is subject to copyright, whereas an independent use of the public domain material recorded on the phonogram is not. A similar parallel is to be found in photographs of public domain material. There also, the public domain material photographed can be used independently of the copyright in the photograph itself.

b) “Exclusive” rights rather than rights “to authorize or prohibit”

Contrary to the Rome Convention, the WBT proposes to grant broadcasters true exclusive rights rather than mere “rights to authorize or prohibit”. However, this difference in wording between a mere “right to authorize or prohibit” and an “exclusive right” has mainly historical reasons. At the time of the conclusion of the Rome Convention, the UK only granted protection to performing artists by way of criminal law. Moreover, in practice, it hardly makes a difference for purposes of access to information and freedom of speech on what legal basis a broadcaster can enjoin others from performing certain acts with regard to his protected broadcast. Hence, the adoption of exclusive rights for broadcasters does not have major negative effects on freedom of speech and access to information.

c) “Old” rights and new rights granted by the WBT

Regarding the rights provided for in the draft WBT, it is necessary to distinguish between rights that are already provided for by the Rome Convention and TRIPS and those that are not. It appears that the former group of “old” rights, which has already a long-standing tradition in international copyright law, requires considerably less scrutiny regarding the impact that these “old” rights might have on the freedom of expression and access to information than the group of rights to be newly granted.

Those “old” rights include the wireless rebroadcasting (retransmission) right, to be understood as the right of simultaneous retransmission (see the Explanatory Comments to Article 6 of the draft WBT), the fixation right, the reproduction right and the right to public communication of protected broadcasts (which, under the Rome Convention, is further limited to communications made in places accessible to the public against payment of an entrance fee). Of course, in several instances the WBT goes beyond the scope of those „old“ rights as they have been formulated in the Rome Convention and TRIPS, but this aspect will not be addressed here. Likewise, if the number of beneficiaries is increased (see below IV.1), the field of application of those rights becomes broader, but this does not pose a major problem as such with regard to issues of freedom of expression. The same is true if broadcasting is extended to cover transmission by satellite (Article 2 (a) draft WBT) and is no longer limited to wireless broadcasting, but also encompasses cablecasting (Article 3 (2) draft WBT) and, possibly, webcasts by any webcasting organizations or simulcasts by broadcasting organizations, as discussed in the Working Paper.

The new rights provided for by the draft WBT which are not granted neither by the Rome Convention nor by the TRIPS-Agreement, are: the protection of broadcasters prior to broadcasting, the distribution right, the right of making available, and the right of transmission following fixation. These rights give rise to the following remarks:

- *Protection prior to broadcasting* - Although the protection granted to broadcasting organizations for their broadcasts prior to the act of broadcasting (i.e. the protection of “pre-broadcast signals” that are not intended for direct reception but are merely used to transport programme material from a studio to the place of the transmitter, as explained by the Explanatory Comments of the draft WBT) is a new feature in international law, such protection appears as a logical completion of the legal protection of broadcasting organizations, and should not pose a major problem to freedom of expression.
- *Distribution right* - Although at the international level, the exclusive right to distribute fixations of their broadcasts is a novelty, it should be noted that such a right has already been granted to broadcasting organizations by Article 9(1) of the EU Rental and Lending Directive (92/100/EC). In addition, the distribution right has in the meantime been adopted both in the WCT⁸ and the WPPT⁹ (Article 6 WCT; Articles 8 and 12 WPPT). Therefore, it appears logical to also grant a distribution right to broadcasting organizations within the future WBT.
- *Right of making available* - The same applies, mutatis mutandis, to the right of making available (see. Articles 8 WCT, 10 and 14 WPPT, as well as Article 3(2)(d) of the EU Directive on Copyright in the Information Society (2001/29/EC)).
- *Right of transmission following fixation* - In contrast, the right of transmission following fixation is probably the right provided for by the draft WBT, which merits the closest scrutiny from the viewpoint of its possible interference with principles of freedom of expression and access to information. On the one hand, as defined by the draft WBT, the rebroadcasting (retransmission) right covers only acts of *simultaneous*

⁸ WIPO Copyright Treaty, Geneva, 1996.

retransmission, i.e. acts where the original signals of the broadcast are being rebroadcast or retransmitted. It therefore seems logical to grant broadcasting organizations an additional right to also prohibit any retransmission using a fixation of the signals broadcast instead of the signals themselves. Without such protection, the legal protection against unauthorized retransmission could all too easily be circumvented. On the other hand, in view of the broad notion of “transmission”, there is a danger that this new right of transmission following fixation can be used to block acts that would otherwise be legal with regard to individual works that are broadcast (either because the work broadcast is in the public domain, or because the particular act of using an otherwise protected work is permitted under an exception to copyright. In view of this, the right of transmission following fixation should only apply to the broadcast as a whole and not to the broadcast of an individual work. Otherwise, acts currently permitted, such as private copies for purposes of time and/or place shifting might no longer be permitted. To avoid this, four options seem to be available. One option consists of deleting the right to transmission following fixation altogether. Another option would be to limit the right to retransmission of broadcasts as a whole. A third option is to craft a mandatory exception to the right of transmission following fixation to the effect that this right does not apply in cases where the use of a work broadcast is permitted from the viewpoint of the legal protection granted to the work broadcast. Finally, a fourth (minimum) option consists of adopting, at the Diplomatic Conference, an Agreed Statement clarifying the scope of the transmission right and which acts, with regard to the contents broadcast, remain unaffected by this right.

3. Synchronization of exceptions

Moreover, in order to safeguard the right to freedom of expression and access to information, it is essential that the rights granted to broadcasting organizations under the future WBT be consistent with fundamental copyright policies regarding the content broadcast. In other words, whenever copyright law permits the free use of a work for a particular purpose or under particular circumstances (such as, but not limited to, the freedom of expression or private copying for time and/or for place shifting), this use should also be permitted if the work in question has been broadcast and if the signals that have broadcast the work are being used. This issue is of particular importance in view of a proper balance between the broadcasters’ proprietary interests on the one hand, and the interests of free expression and access to information on the other. It can be argued that with regard to freedom of expression and access to information, this point is of far greater importance than any other of the issues regarding the number of beneficiaries or the scope of the exclusive rights to be granted by the future WBT.

Therefore, from the point of view of freedom of expression and access to information, it is recommended to apply the limitations and exceptions that exist with regard to the rights

⁹ WIPO Performances and Phonograms Treaty, Geneva, 1996.

in the contents broadcast, to the exclusive rights in the broadcast itself, in cases in which the work or related subject matter has been broadcast and as far as the use of a particular work or related subject matter that has been broadcast is concerned. Of course, there is probably no need to extend all existing copyright limitations to the broadcast taken as a whole.

With regard to exceptions, the three-step test is another point that merits examination. Nowadays, this test is uniformly applied to all rights granted in the major international conventions in the field of copyright (Articles 9(2) BC, 13 TRIPS, 10 WCT and 16 WPPT). Therefore, it seems logical to incorporate it into the future WBT as well. However, it should be kept in mind that legal protection of broadcasts constitutes a second layer found “on top” of the first layer of copyright protection in the material broadcast. It follows that if the three-step test is applied in order to test whether a certain limitation or exception in national law: 1) constitutes a special case; 2) conflicts with normal exploitation of the protected broadcast; and 3) unreasonably prejudices the legitimate interests of the broadcasting organization, this analysis, in focussing on the economic situation of the broadcasting organization alone, might result in narrower exceptions than the exceptions permitted with regard to individual works broadcast. Once again, this, will conflict with the principle of freedom of expression and access to information. Also, it should be kept in mind that the understanding of the three-step test is not uniform. While right holders and some countries with strong export-oriented copyright industries tend to view the three-step test as a means to limit the possibilities of exceptions in national law, users and countries with import-oriented copyright industries rather tend to interpret the three-step test as an enabling clause that guarantees sufficient flexibility in internal law to carve out limitations and exceptions from the mandatory exclusive rights.

In view of this, it seems advisable to adopt, at the Diplomatic Conference, an Agreed Statement to the effect that the interpretation and application of the three-step test with regard to the legal protection granted to broadcasting organizations by the WBT shall not negatively affect the outcome of any permitted limitations and exceptions with regard to copyrighted contents that has been broadcast.

4. Adjusting anti-circumvention protection

As a matter of principle, there seems to be no general objection to protecting broadcasts against the circumvention of effective technological protection measures that restrict acts, in respect of the broadcasts, which are not authorized by the broadcasting organizations concerned or permitted by law (Article 16 draft WBT). A provision to this effect would simply mirror Articles 11 WCT and 18 WPPT.

However, in view of freedom of expression and access to information, synchronization of legal anti-circumvention protection with the exceptions and limitations to the exclusive rights of broadcasters is called for. This can be achieved by copying the wording of the WCT and the WPPT, i.e. by limiting legal anti-circumvention to “acts which

are not authorized by the authors concerned or permitted by law". Again, the reference to acts authorized and acts permitted by law must refer to both acts with regard to the broadcast and to the works that are broadcast. If this approach is followed, future WBT-Members are under no obligation to grant legal anti-circumvention protection against acts of circumvention that a user undertakes with regard to public domain material, or to make legitimate use of limitations and exceptions permitted with regard to a particular work that has been broadcast. Of course, past experience regarding the implementation of the corresponding provisions of the WCT and the WPPT has demonstrated that this wording does not prevent Member States from extending anti-circumvention protection to acts that are otherwise permitted by law (for a far-reaching example to this effect see, e.g., Article 6(4) of the EU Copyright in the Information Society, which declares all circumvention illegal if copyrighted works have been made available to the public online under a contract). Therefore, an additional safeguard is needed to prevent Member States from overcoming, by way of extending the legal anti-circumvention, (at least) those limitations and exceptions to the exclusive broadcasters' rights, which are based on a rationale of freedom of expression and access to information.

Moreover, what has been stated with regard to the synchronization of the limitations and exceptions of the rights of broadcasters on the one hand, and the limitations and exceptions of the rights in the contents broadcast on the other, applies in principle, *mutatis mutandis*, also to the legal anti-circumvention protection vis-à-vis the contents broadcast. In other words, it is necessary to ensure that the legal anti-circumvention protection for the broadcast as such can not be used in order to block access to, and use of, material included in the broadcast, in cases where the use of this material is not subject to the broadcasters' authorization.

Finally, another issue of discussion is whether legal anti-circumvention protection should only cover *acts* of circumvention, or whether it should also cover the production, advertising, marketing, use, and perhaps even the mere possession of *devices* that enable the circumvention of legitimate technical protection measures. This debate has already taken place with regard to the formulation and implementation of the legal anti-circumvention protection contained in the WCT and the WPPT. Without retracing this debate, it can be concluded that from the point of view of freedom of expression and access to information, legal anti-circumvention protection should be limited to acts; however, if it is extended to devices, it should be limited to devices whose sole intended or main purpose is to circumvent legitimate and effective technical protection measures.

IV. Additional remarks

Two other issues of the draft WBT should be pointed out: namely, the effect of the possible extension of the beneficiaries of protection and the term of protection under the draft WBT.

1. Possible new beneficiaries

So far, the protection provided to broadcasting organizations by both the Rome Convention and TRIPS (the Brussels Satellite Convention is of minor importance, due to the limited number of adherents) only covers over-the-air broadcasts. Assuming that the extension of protection to new modes of transmitting protected content cannot be refused per se, the following remarks seem to be called for:

- *Transmission by satellite* - In order to create a technology-neutral legal rule, the distinction between wireless terrestrial and wireless satellite transmission of signals (Article 2(a) draft WBT) should be abandoned, and, hence, protection should be granted to broadcasters irrespective of the means they use in transmitting their broadcasting signals.
- *Cablecasters* - Likewise, the extension of protection to cablecasters (Article 2 (c) draft WBT) seems quite logical. Again, it hardly can make a difference by what means a broadcaster transmits the broadcasting signals (i.e. by way of terrestrial broadcasting, by satellite, or by cable).
- *Simulcasting* - It might seem appropriate to extend the legal protection of broadcasting organizations to simulcast signals in view of the fact that broadcasting organizations often emit their signals over the air, by cable and over the Internet.
- *Webcasters* - In principle, this argument also supports an extension of the legal protection to webcasters. However, it can be argued that webcasting does not require the same amount of investment as does broadcasting, and hence is less in need of additional legal protection. But if protection is extended to webcasters, then it will have to be assured that there is no overlap between webcasting and the exclusive right of making protected subject matter available.
- *Simultaneous retransmission* - Arguably, no exclusive right is needed for the activity of mere simultaneous retransmission of another broadcaster's signals. First, it can be argued that the protection of the initial broadcast also extends to the signals that are simultaneously retransmitted. Second, simultaneous retransmission usually requires much less investment than the initial act of broadcasting. In view of this, many States do not grant legal protection to the act or simultaneous retransmission as such (see, e.g. Article 6(3) of the EU Rental and Lending Directive, 92/100/EEC).

2. Term of protection

In proposing a 50-year minimum term of protection for all beneficiaries covered by the WBT (Article 16 draft WBT), the draft Treaty goes well beyond the present minimum of 20 years under both the Rome Convention and TRIPS. This raises the issue of whether this proposed term of protection is too long, from the perspective of freedom of expression and access to information. On the one hand, it might be argued that the underlying rationale for the legal protection of broadcasting organizations is investment rather than creative activity and that, consequently, the term of protection should be modelled after the 15-year term of the EU Database Directive,¹⁰ rather than after the 50-year term granted to performers. On the other hand, the same argument could be made with regard to phonogram producers, who are currently protected for 50 years (Article 17(2) WPPT). In addition, the EU already protects broadcasting organizations for a 50-year period (Article 3(4) of the Term of Protection Directive¹¹). Moreover, in countries that protect phonogram producers not by a neighbouring right but by copyright, protection might even be longer. It follows that unless one considers the 50-year term to be an undue and unjustified encroachment upon the freedom of expression and access to information, the 50 year-term of protection proposed for broadcasting organizations does not pose a major problem.

V. Summary

The main points of this Article shall only briefly be summarized in the form of recommendations to the parties negotiating the WBT:

- 1) the WBT will have to clearly distinguish between the “broadcast” and the “contents” of a broadcast. Only the former is the object of protection under the WBT.
- 2) The object of protection must be rather narrowly defined, in order to cover only the broadcast as such, and to ensure that the protection does not indirectly extend to the elements broadcast.
- 3) (Probably the most important recommendation) the limitations and exceptions with regard to the exclusive rights granted under the WBT must be synchronized with the limitations and exceptions to the exclusive rights in the contents broadcast in order to avoid the possibility of broadcasters’ exclusive rights being used to prohibit acts with regard to the contents broadcast that are permitted by exceptions and limitations to the

¹⁰ Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases.

¹¹ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

exclusive rights in that particular contents broadcast.

- 4) Recommendation 3 (above) also applies, *mutatis mutandis*, to the legal anti-circumvention protection.

SELECTED WORKS

LUCIE GUIBAULT, P. BERNT HUGENHOLTZ (Eds.). [*The Future of the Public Domain \(Identifying the Commons in Information law\)*](#), Kluwer Law International BV, The Netherlands, 2006, 377 pp.

The fact that items that once had little or no economic value, such as factual data, personal data, genetic information and pure ideas, nowadays have become a tradable commodity has caused a debate on the state and future of the public domain. Whereas this discussion has already led to the production of a rich body of scholarly literature concerning the expansion of intellectual property rights, other aspects have so far received less attention.

Published in the context of a workshop on the “Commodification of Information: the Future of the Public Domain”, held in Amsterdam in 2004, this book aims to provide an “information law”- oriented approach towards the question of preserving the public domain.

The future of the public domain is addressed by thirteen contributors from academia worldwide, each author approaching the topic from a different angle. In addition the authors reflect upon the notion and role of the public domain in the context of information law and policy.

The book not only provides an overview of the way and the extent to which the public domain is affected by various legal and paralegal influences, it also examines the economics of the public domain. In addition the book focuses on the public domain from a human rights perspective and analyses the impact of technological protection measures and intellectual property law. Furthermore the book deals with the commodification of private data, government information and traditional knowledge. Finally, the last two chapters examine the capacity of the Creative Commons project and the Open Source Software movement to preserve the public domain.

Intended for legal scholars, academic and research institutions, corporate counsel, lawyers, government policymakers and regulators this book will no doubt be of great value to anyone who is interested or involved in the regulation of the knowledge economy.

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