

**The broadcasters' neighbouring right: impossible to understand?**

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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-two 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 Organ-

izations. 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.

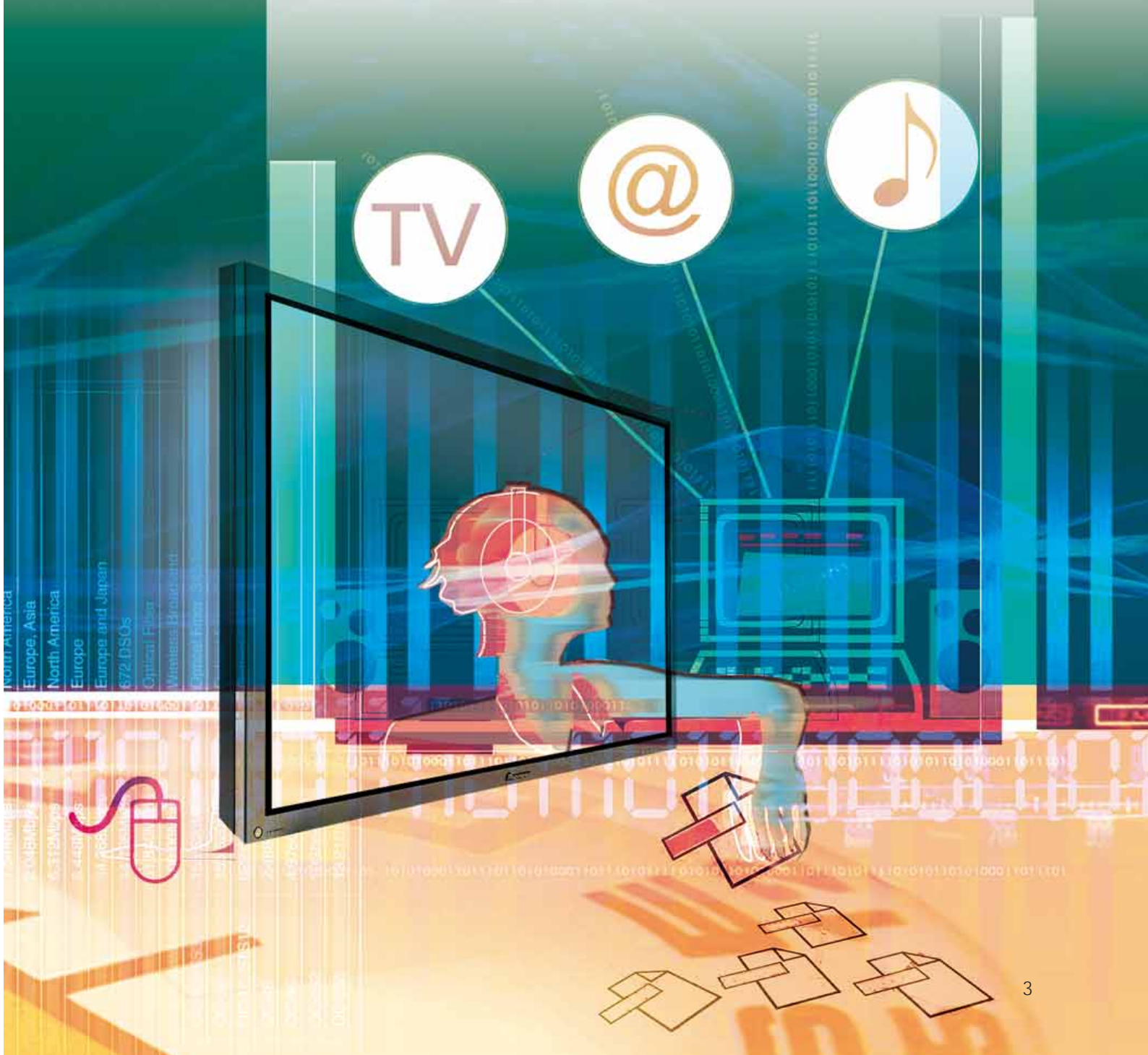
The – urgent – need for such a new Treaty becomes immediately apparent when the above-quoted Article 13 is read against the backdrop of technical developments and the explosion of the electronic media environment since 1961. Cable, satellite, the Internet, broadband, mobile telephony, digital recorders, 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

# roadcasters'

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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 focused 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 forthcoming FIFA World Cup, to be held in Germany in 2006.



There will be 64 matches. On the majority of competition days, there will be three or even four matches, with some matches played in parallel. It is obvious that the rights-holding broadcasters will not and cannot broadcast all those matches live. Some matches will be broadcast on a deferred basis, and in the case of others only more or less extensive highlights will be shown. Furthermore, the rights-holding broadcasters are scattered all around the globe, in 24 different time-zones. Many matches will be played at a time when the local broadcaster in Asia or in the Americas, for instance, can count on only a rather restricted audience. They will 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 may be expected. To complete the picture, the rights-holding broadcasters are jointly committed to paying a rights

fee of approximately \$2 billion. Each of them will then have to spend substantial additional amounts before the programmes can go on air and the audiences can enjoy them. In the end, most broadcasters will have 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 will not only have to cover the totality of their expenses through such revenue but are even expected to produce a profit for their shareholders.

What all this ultimately boils down to is the assumption/expectation that in every country all those interested in the World Cup will actually watch the matches, in whatever form, on the rights-holding broadcasters' channel or channels. Those who watch the matches on other channels or platforms will cause a corresponding reduction in the legitimate broadcasters' ratings, with a corresponding

direct negative impact on the advertising/sponsorship revenue. It is therefore vital for the rights-holding broadcasters to protect their huge investment and that they have 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 are 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 is furthermore the risk of ambush marketing, i.e. the risk that the official sponsors of the World Cup or of the rights-holding broadcaster are replaced by others, and sometimes by their direct competitors. This applies also to the case of giant-screen exhibition, where the immediate surroundings of the screen itself, though also the public venue as such, provide 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.

Eight 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.

