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## ***Copyright in the World of Satellites and the Internet***

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Satellites, and especially the Internet, give rise to many questions to which the legislator must provide an answer. One particular set of questions, but certainly not the least important one, concerns copyright.

Today, I shall only address the copyright issues raised by satellites and the Internet, doing so essentially from a broadcaster's perspective.

Contrary to what many people believe, copyright is not all that difficult to understand. As is often the case, a brief look at history may help our understanding.

Copyright - and the English word "copy-right" reflects this quite explicitly - was initially the right to control illegal reproduction of books and other printed matter. As technology evolved, especially during the last century, copyright law evolved with it. Photography, cinematography, radio, television, phonograms and videograms, photocopying, sound and video recording, cable distribution; whenever new technology appeared which was capable of reproducing, distributing or communicating protected works, national Copyright Acts were adapted and international Conventions were revised or new Conventions adopted to meet these new challenges. What is it, then, that makes satellites and the Internet so different that many copyright lawyers feel insecure, if not almost powerless, in the face of these new instruments?

The simple answer is that satellites and the Internet do not recognize national boundaries and still less do they respect them. But copyright law is *national* law. It applies only to acts which take place on the national territory. Accordingly, the whole system of copyright licensing is set up country by country. Distribution (the sale) of a Dan Brown novel is entrusted in the United States, under US copyright law, to an American company; in Russia, under Russian copyright law, to a Russian company; in Spain, under Spanish copyright law, to a Spanish company; and so forth, country by country, wherever there is sufficient interest in that particular book. The same happens in television. If a Russian film attracts television stations in Sweden, Germany, Ukraine and Tunisia, there need to be four separate licence agreements, each one based on the national copyright law of the individual licensee's country, and each one limited in geographical scope to that same country. It is obvious that satellites and the Internet do not fit comfortably into this traditional country-oriented set-up. In fact, there are people who feel that the Internet is simply not controllable.

But there is yet another important factor: digital technology. Digital technology allows instantaneous recording, copying and pasting, without any loss of quality. Sound and audiovisual material can be recorded straight from the air or from the Internet to a hard disc and then within seconds can be redistributed over the Internet, by way of broadcasting, by cable or broadband distribution, by mobile telephony or by any other communications device. Apart from such *progressive downloading*, the material can also be recorded - for instance in countries where copyright enforcement still leaves much to be desired - in order to mass-produce DVDs or CDs from it which are then marketed within that country or even exported to other countries.

Is helplessly throwing up one's arms really the most sensible reaction to this? Clearly not.

As a possible answer some people suggest that in the case of satellite broadcasting and of distribution via the Internet the copyright laws should be applied of all those countries where the protected material can be received or accessed. In the case of satellite broadcasting, and especially in Europe, this may mean several dozen countries, and in the case of the Internet it would mean virtually every country in the world. To arrive at that result, it would need to be shown, of course, that in all those countries *acts* take place which are relevant under the applicable national copyright laws. That, however, is clearly not the case. Ever since the introduction of broadcasting it has been recognized, both internationally and nationally, that *reception* is not a relevant act under copyright. But assuming, for argument's sake, that reception were an act which is subject to the rightowner's authorization or prohibition: how could this possibly be applied in practice, how could it be monitored, and how, in particular, could a prohibition be enforced? And then, from the point of view of the user, i.e. the broadcaster: how could rights clearance in all those countries possibly be managed, given, furthermore, that a "no" from one single country would then automatically mean a "no" for the entire satellite broadcast? Nevertheless, in the late 1980s the defendants of this *countries-of-reception* theory (at the time referred to as the "Bogsch theory") were so insistent about it that a positive reaction was needed from the legislator to clarify once and for all that

"the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."

What I have just quoted is Article 1(2)(b) of the EU Satellite/Cable Directive of 27 September 1993. The same principle is laid down and confirmed in a Council of Europe Convention of 1994.

What is true for satellite broadcasting must apply, by the same logic, and indeed even more so, to the distribution of programmes via the Internet (streaming and simulcasting). The alternative, which would be to apply the copyright laws of all the countries where the protected material can be accessed on the Internet, in other words virtually every country in the world, would mean the automatic end of any Internet distribution of copyright-protected material.

The Internet, however, is not used only for the active *distribution* or *communication* of material, via streaming or simulcasting. Huge amounts of material are simply *made available* on servers, so that those who are interested can take the initiative to download them. This particular activity was not envisaged under traditional copyright law, so that a new exclusive right, the right of "making available", had to be introduced. On the international level, this happened in the famous WIPO Treaties of 1996. Since then, many national Copyright Acts have likewise incorporated the right of "making available".

But here again, there is only one relevant act under copyright law, taking place in one country and being subject only to that country's Copyright Act.

Ideally, what I have explained on the applicable law with regard to satellite broadcasting and distribution or making available on the Internet should be expressly stipulated, for the sake of clarity, in every national Copyright Act.

Admittedly, this in no way alleviates the fears and anxieties of those who would rather see the laws of all countries of reception applied. Their first concern appears to be remuneration. To this it must be replied that the application of one single national law does not automatically mean that only the audiences in that particular country may be taken into account when establishing the remuneration which is to be paid to the author. On the contrary, since the author has the right to authorize, but also to *prohibit*, he will naturally make sure that the whole economic reality is duly taken into account, and that means first of all the actual or estimated audiences, wherever (in whichever country or countries) they may actually be. The second concern is the risk of piracy, the risk that the protected material may be recorded in foreign countries and then reproduced, distributed and redistributed over electronic networks (including the Internet), or whatever. Apart from the fact that the applicability of the laws of all the countries where the material can be received or accessed would in no way reduce this risk, any such illegal acts of piracy would naturally be covered by other rights of the author, and these rights could - and should - then be enforced whenever such piracy occurs.

Most radio and television programmes include at least some music, if only in the form of background music. Once the question of the applicable law is settled, clearance of the *copyright* in the music (i.e. the right of the composers) causes no particular problem, since each national *petits droits* collecting society is in a position to grant the rights for the entire world repertory of protected music. However, most of the music which is incorporated in radio and television programmes comes from phonograms, from CDs, which means that the neighbouring right in the CDs must also be cleared. And here the real problems begin. To understand the whole context, it is necessary to recall that the four major phonogram producers (Universal, Warner, Sony/BMG and EMI) together represent more than 80% of the entire world market of recorded music. The phonogram producers continue to claim that in the case of *distribution* via the Internet (streaming, simulcasting) the rights must be cleared for all the countries where the streamed or simulcast programme can be accessed. Worse still, when it comes to on-demand services, where - unlike in the case of broadcasting - phonogram producers enjoy the exclusive

right of authorizing or prohibiting the making available of their phonograms, the four majors continue to be opposed to collective rights management. Instead, each of them seeks individual deals. This attitude makes it virtually impossible for broadcasters to open up their archives to the general public by way of on-demand services. The same applies to any other service which broadcasters would like to offer - and are in fact expected to offer - on an on-demand basis, such as the possibility for the public to enjoy access to the radio and television programmes which were broadcast over the preceding week. If this were to go on, many broadcasters might ultimately conclude individual agreements with the four majors, and they would then content themselves with using only the CDs which are represented by these four groups. Would that be in the public interest, or in the interests of national culture? The well-being not only of the phonogram producers but also of the composers and of the musicians and singers in all of our countries depends on the use, or non-use, of phonograms. Consequently, there need to be parallel licensing mechanisms which allow broadcasters to clear the rights in phonograms the same simple way as they clear the rights in the music itself. The legislator could easily bring about this result by stipulating that the right of making available of phonograms which are incorporated in radio or television productions can be exercised only by way of collective management.

Broadcasters are not just users of copyright and neighbouring rights. They are also owners of a neighbouring right in their own signal. This right, dating back to the beginning of the 1960s, is totally outdated today, on both the national and the international level (the Rome Convention), and it needs to be brought into line with the realities of the digital globalized world. Consequently, broadcasting organizations (i.e. legal entities which provide linear programme services for which they establish the content and the schedule) should have the right to authorize or prohibit any use of their signal by third parties, subject to the same limitations and exceptions which apply to authors.

"Any use" means, in particular, the simultaneous or deferred retransmission by any electronic means; the fixation; the production and distribution of recordings; the making available, and the communication to the public.

The "signal", which is not to be confused with the programme material carried by the signal, is the electronic signal which is used to carry the broadcasting organization's programmes from its premises to the viewer or listener, regardless of the technical means employed for that purpose (such as terrestrial transmitter, satellite, cable, optical fibre, broadband, the Internet, mobile telephony, or any combination of these).

Furthermore, since potential pirates will take the signal wherever they can find it, and therefore all potential loopholes need to be closed, the term "signal" should also include any pre-broadcast signal, i.e. a programme-carrying signal which the broadcasting organization receives via point-to-point or point-to-multipoint electronic delivery, for the purpose of incorporating its content into the own "signal".

In the digital world, digital rights management systems (DRM) play an important role. As far as copyright is concerned, it should be clarified that DRM systems are only a complementary (technical) measure and should not be used to overrule the legal framework for copyright.

Last but not least, digitization needs content to deploy its full potential. Thanks to digitization, the huge cultural and historical heritage which slumbers in broadcasters' archives could now finally be made available to the public. "Could", if only rights clearance were possible! Legislative imagination is needed here. It could be stipulated, for instance, with regard to archive material which was produced more than 8 or 10 years ago, that the holders of that material may, once they have made reasonable efforts to identify the rightowners and clear the rights, use the material for their own broadcasts (in the widest sense of the term), subject to payment of equitable remuneration to any rightowners who identify themselves within, for example, six months after the broadcast.

In conclusion, satellites and especially the Internet provide a challenge to the legislator, and not least in the field of copyright. But I hope that I have demonstrated that this challenge is by no means insurmountable. The real challenge is to get started, for satellites and the Internet are already a well-established reality.

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