



EUROPEAN BROADCASTING UNION

Legal Department

UNION EUROPEENNE DE RADIO-TELEVISION

Département juridique

1.11.2006
WR/ACB/fw

Broadcasting Goes Digital: Regulatory Requirements

Moscow, 4 November 2006

Dr Werner Rumphorst, Director, EBU Legal Department

Introduction

Depending on their specialty, people may think, when it comes to legislation on the legal framework for the digitization of broadcasting, of technical issues, of economic questions, of regulating infrastructure or of regulating content or, last but not least, of copyright issues.

Ideally, to set a clear framework within which future providers of broadcasting services can operate, in full knowledge of their rights and obligations, the law should deal with all of these issues.

The first question to be dealt with is, of course: what does "broadcasting" actually mean in the digital world?

Traditionally, radio and television programmes are broadcast in a stream or flow from one point of transmission to a multitude of points of reception.

The introduction of digital technology makes possible new ways of producing and delivering audiovisual material. It allows for more television and radio channels, for enhanced information services, for a wider use of sophisticated multimedia applications (such as electronic programme guides and digitext), for improved picture and sound quality and for better mobile reception. In addition, digital technology also permits the point-to-point delivery of programmes (on-demand services), including interactivity, whether it be by wire (such as broadband) or wireless (mobile telephony).

Today, therefore, the term "broadcasting" needs to be defined in a technologically neutral way, irrespective of the technology or distribution platform used. It should be understood as the transmission of traditional broadcasting services ("linear" services) or on-demand services ("non-linear" services) by whatever technical means or platform (terrestrial, satellite, cable, broadband, Internet, telecommunications networks, mobile telephony networks, etc.), in any technical format (analogue, digital or high definition), for receipt or viewing on any equipment (such as television receiver, computer screen, portable equipment or mobile telephone).

New delivery systems, such as digital terrestrial (DTT), broadband (DSL), the Internet (webcasting, simulcasting, podcasting) and, increasingly, mobile networks such as 3G/UMTS mobile phone platforms and, in the near future, mobile platforms using digital broadcast technology such as DVB-H and T-DMB, are being implemented now in many countries, with different priorities and at different speeds. According to a study by the United Kingdom company Datamonitor, by the end of 2006 Europe will have more households equipped to receive digital television than the United States. The study projects that 65 million European households will be connected via cable, ADSL, DTT or satellite, as against only 59.4 million in the United States.

Digital technology has also encouraged a rapid growth in the personal consumption of television with the development of electronic programme guides (EPGs) and personal video recorders (PVRs) which, for example, allow consumers to enjoy their favourite radio and television programmes on-demand and at times other than the broadcast time. In addition, the place of viewing is widened to allow personalized viewing of television by individuals wherever they are located, at any time, thanks to mobile phones, personal digital assistant (PDA), portable computer and portable PVRs, etc.

All this represents remarkable technological progress, but it also creates or leads to a more fragmented and individualized audience. Competition in Europe within the digital television sector is becoming increasingly fierce and is forcing operators to develop offers and content which are increasingly attractive. "Content is king!" But what type of content or services will be proposed to users? What business models will ultimately be successful? Above all, however, the question which each country and each society will have to answer for itself is: how can it be ensured that quality content which responds to the genuine needs of society will actually be on offer and - ideally - available to everyone?

In the overwhelming majority of European countries, this question finds its answer in the existence of a vibrant public service broadcasting sector. On numerous occasions, and in numerous Resolutions, Recommendations and Declarations, the Council of Europe and the European Parliament have stressed the vital importance of independent public service broadcasting. The so-called Amsterdam Protocol, which is an integral part of the EU Treaty, puts this in a nutshell by stating that public service broadcasting "is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".

The market itself will not, and cannot, deliver that type of broadcasting.

In the digital world, public service broadcasters must offer their content on all available platforms, but, in addition, they must offer new types of programme services specifically adapted to the new distribution platforms (such as podcasting) which correspond to the public's expectations.

This whole transformation from analogue to digital poses considerable challenges for the legislator/regulator. Unless a certain number of rules are adopted, there is an obvious risk of the digital television market being dominated by vertically-integrated operators who

control the entirety of the value chain from production to distribution, which would call into question such basic general interest objectives as free circulation of information, fair competition, media pluralism, cultural diversity and consumer protection.

The first major area to be regulated is technical infrastructure.

1. Infrastructure/networks regulation

Three issues are particularly relevant in this context: radio spectrum management, must-carry rules and the question of open and interoperable standards.

- Radio spectrum management

In most European countries, at least, the switch-off of the analogue terrestrial transmission networks and their replacement by all-digital terrestrial networks will take place between 2008 and 2012. As a result, spectrum capacity will become spare (the so-called digital dividend) and can then be allocated for other purposes, and in particular (but not only) for new or improved broadcasting services such as high definition television, interactive services and mobile broadcasting.

In accordance with the new RRC (Regional Radiocommunication Conference)-06 ITU frequency plan for digital terrestrial broadcasting, which was adopted in Geneva in June 2006 and includes Europe, the Russian Federation, Africa and parts of the Middle East, it is for each State to assess any digital dividend in the light of its national frequency requirements and to decide on use by the various parties concerned.

In Europe, there is currently a major debate under way as to how a more flexible approach to spectrum management can be introduced at the EU level to help the parties concerned have easier access to radio spectrum frequencies and to develop new and innovative services such as mobile broadcasting. The European Commission is particularly active in that area and wants to play a leading role, encouraging the Member States to adopt, *inter alia*, a market-based approach for the assignment of spectrum among different users, which allows, for example, specific bands (including broadcasting bands) to be traded (spectrum trading).

But it is important not to forget that radio spectrum is a public resource, and its use must take into account the general interest. Questions related to spectrum management have far-ranging consequences for the quality, cost, nature and choice of services available to the public. The use of radio spectrum must be determined by the balance of all general interests, rather than by the purely economic interests of segments of the industry or by a desire for simple administration.

In particular, the specific needs of the broadcasting sector, particularly resulting from its cultural and social dimension, must continue to be recognized. Even more specifically, sufficient spectrum (including any digital dividend) should continue to be allocated to public service broadcasters, for the evolution of traditional services and for the

development of new services required by their public service mission, such as high definition television HDTV and mobile broadcasting.

As regards DTT, at least one multiplex should be reserved for public service broadcasters. That is already the case in such countries as France, the United Kingdom, Finland and Ireland.

- Must-carry rules

Another important instrument to ensure that the end-user or consumer has access to a wide and varied range of content on all major distribution platforms are the must-carry rules.

Must-carry obligations, which are in place in most EU Member States (countries such as Belgium, France, the Netherlands, Germany, Spain, Sweden and the United Kingdom), require certain television and or radio programmes and services which are of particular importance for society, such as public service broadcasting programmes and services, to be carried over certain networks. Traditionally, these rules have been applicable only to cable networks, but some EU Member States are now considering extending (or have already extended) "must-carry" or similar rules to other digital networks.

Without such rules, certain network operators could misuse their dominant position by giving special treatment to particular programmes and services, thereby unjustifiably restricting consumers' choice. In fact, an increasing number of network operators wish to become content service providers, and this may give rise to conflicts of interest and the risk of abuse, given that the operators would naturally be inclined to give priority to their own content.

For obvious reasons, it is vital for the must-carry principle to be extended to the new digital platforms, so as to ensure that viewers who do not subscribe to services on a payment basis will nonetheless continue, in a wholly digital environment, to receive free-to-air services. Free-to-air channels, including all the channels of public service broadcasters, should be part of the basic offer of any network operator.

However, with frequencies in short supply and constraints regarding capacity for terrestrial distribution it may be wondered whether it is appropriate to extend the must-carry rules to operators such as mobile telecom operators.

- Interoperability and open standards

Open interoperable standards are another key way of allowing end-users/consumers to have access to a broad range of content and services and to permit an effective and competitive market for digital television, and particularly for digital television receivers.

Currently, the digital television market in Europe is dominated by certain operators (particularly pay-TV channels) which, because of different proprietary standards integrated or linked to digital decoders or receivers, control the distribution platform.

Unless open and interoperable standards are applied to certain key features in the decoders, such as the interface for conditional access system, the application programming interface and electronic programme guides, these operators can restrict access by broadcasters to viewers and restrict viewers' access to services.

2. Content regulation

Alongside infrastructure regulation, content regulation is another fundamental pillar of digital television regulation.

It is necessary to ensure for the future that whenever end-users/consumers have access to publicly-available audiovisual content, whether it is linear or non-linear services, they can be confident that there exists a certain minimum level of protection of public interest objectives, such as the protection of minors and human dignity, which do not change with the development of new digital technology. If this minimum protection is ensured, there should be no obstacles to the transfrontier distribution and reception of the broadcasting services.

This is precisely the European regulatory approach, in the well-known Television without Frontiers Directive of the EU and in the parallel instrument of the Council of Europe, the European Convention on Transfrontier Television, which has now also been signed by the Russian Federation. Both instruments lay down certain minimum rules aimed at ensuring that there is a level playing-field for competing broadcasters from different countries and that certain important general interest objectives are achieved, such as the protection of minors and human dignity, consumer protection as regards advertising and sponsorship, the promotion of cultural diversity by promoting the European audiovisual industry, and the right of reply.

The EU Directive is currently being revised to take account of the convergence of technology and the development of new audiovisual media services, such as on demand services. The proposed Audiovisual Media Services Directive (modernizing and extending the scope of the Television without Frontiers Directive) is platform-neutral which means that it avoids the application of different rules depending on which type of technology or network infrastructure or platform is used (analogue or digital, terrestrial, satellite, cable, Internet, mobile platforms, etc.). What rightly matters is the *content* of the service.

The Audiovisual Media Services Directive adopts a graduated approach which involves applying a set of essential requirements or minimum provisions for all audiovisual services in, for example, the areas of protection of minors and human dignity and of audiovisual commercial communications combined with more detailed rules for television. This ensures that regulation is proportionate and adapted to the characteristics of linear (traditional television broadcasting services) and non-linear services (video-on-demand services).

I should nevertheless emphasize once again that in Europe too content regulation is primarily, and to a very large extent, a matter for the *national* legislator.

3. Copyright

As soon as the word "copyright" is mentioned, most people switch off, convinced that the subject is far too complicated and that, in any event, nobody has a real solution.

Let me try to attract your attention by stating, firstly, that the matter is not as complicated as that and, secondly, that concrete solutions can be offered - and I shall offer them - which only need to be adopted by the legislator.

The fundamental question in this context is: which national law (or laws?) applies in the globalized world of the Internet? To answer this question we must remember that copyright law is always *national* law, applying to acts which take place on the national territory. When a Russian film is broadcast in ten countries (outside Russia), it is not Russian copyright law which applies but the national copyright law in each of those countries, where the individual broadcasts actually take place. *Reception* of broadcasts is irrelevant under copyright law; the author has no right to authorize or prohibit it. However, since the author can authorize or prohibit the act of broadcasting itself, he can insist that his remuneration should take into account the entire actual audience, even if some or even the majority of that audience live in a foreign country or countries. As far as satellite broadcasting is concerned, this is expressly clarified in a European Union Directive of 1993, as well as in a Council of Europe Convention of 1994. And what applies to satellite broadcasting must also apply, by the same logic, to the distribution of programmes via the Internet (streaming or simulcasting). The alternative, which would be to apply the copyright laws of all the countries where the programme can be accessed on the Internet, in other words virtually every country in the world, would mean the automatic end of the distribution of any copyright-protected material over the Internet. The same must then also apply where protected material is not *communicated* over the Internet but where it is simply *made available* for anyone with Internet access to download it for viewing/listening and/or copying.

In short, the national Copyright Act should expressly confirm the country-of-origin principle, by clarifying that

in the case of satellite broadcasting, just as in the case of distribution or making available on the Internet, the only copyright-relevant act takes place in the country where the broadcaster or other communicator introduces the protected work into the electronic distribution or release chain.

The same must, of course, apply to neighbouring rights.

It should be clarified, furthermore, that as far as phonograms are concerned

the existing regime which applies to broadcasting (equitable remuneration, but no right of prohibition) also applies to distribution via the Internet (streaming, simulcasting),

and it should also be stipulated 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 (which means 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 thereof).

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 eight or ten years ago, that

the holders of that material, once they have made reasonable efforts to identify the rightowners and clear the rights, may use the material in their own electronic programme services, subject to payment of equitable remuneration to those rightowners who may identify themselves within, for example, six months after the broadcast or other distribution or delivery.

* * *

In conclusion, the introduction of digital technology into the world of audiovisual communication requires forward-looking legislation on a whole range of issues. The familiar slogan "content is king" should also be the guiding principle for the legislator, but in the sense of ensuring that the population's legitimate interest in having access to quality programming which is of true relevance to the individual as a *citizen*, as a civilized human being who is part of a given cultural, social and economic environment, will actually be fulfilled.
