

New Services and Protection of Broadcasters in Copyright Law

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The Legal Protection of Broadcasters

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Foreword

“New game – new chances!” Or, as the Latin scholar would say: “*Hodie mihi, cras tibi.*” Does this phrase also apply to broadcasters who are hoping that the debate recently launched at the Council of Europe concerning the protection of their interests will finally give them the level of protection for their programmes that they have long been craving?

This proverb can at least be used to illustrate the current situation of broadcasters and of the national representatives who make up a Council of Europe group of experts on their rights and, therefore, to convey an initial impression of the difficulties that lie ahead.

The proverb denotes the sense of optimism that is, or should be, felt when “the cards are reshuffled”. As well as this tendency to look forward and emphasise the opportunities of a new beginning, it also often contains a retrospective element and a degree of consolation for past losses. Finally, inherent in the Latin tradition is also a certain humility – anyone who tends, when he wins, to lose sight of his opponent and his interests, is reminded that it is rare for any achievement to be definitive, but rather that new challenges always lie ahead and everything may be different next time round.

This emphasising of the process, length and variability of developments is, of course, familiar to people with an interest in copyright law; just the fact that the roots of the legislation date back several centuries makes these elements clear for all to see. Specific regulations on the legal protection of broadcasting organisations have existed for 50 years now. However, the scope and effectiveness of these regulations have been debated for a long time. After WIPO members spent many years negotiating, without success, an international instrument designed to improve the protection of broadcasters, the Council of Europe has now taken up the matter.

A European Audiovisual Observatory publication had already investigated one aspect of the debate in autumn 2004. In IRIS *plus* “The Legal Protection of Broadcast Signals”, Lucie Guibault and Roy Melzer described in detail current provisions for the international protection of broadcast signals. Due to the lack of a successful conclusion to the WIPO negotiations, this snapshot from 2004 has remained largely unchanged. Therefore, a description of the legal protection of broadcast signals can, as before, be found in this IRIS *plus*, which can be downloaded free of charge from http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2004.pdf.

The aforementioned publication did not examine the protection of broadcasters in relation to the content of their programmes. In the meantime, the fact that broadcasters are extending their traditional broadcasting services to include more comprehensive audiovisual media services is increasing the need for this information gap to be filled. Consequently, the lead article considers whether the protection of broadcasting rights is adequately regulated for broadcasters in the current context, which is characterised by the advantages and disadvantages of digital technology. What does it all mean for authors and holders

of copyright-related rights? What conflicting interests must be taken into account? What different scenarios are there and what legal developments? Under the committed guidance of Alexander Scheuer, Anne Yliniva-Hoffmann and Peter Matzneller have sounded out the current situation and investigated the protection of broadcasting organisations, particularly with regard to content that lies outside that of traditional television services. They have also looked into the current political debate concerning a possible Council of Europe instrument regulating copyright-related rights of broadcasters. The lead article explains which issues have been discussed in the Council of Europe since the start of this year, and why.

The lead article is again supplemented with additional information on the international legal framework, significant legislative activities and relevant court decisions. These can be found in the Related Reporting section. We have not included the very extensive range of important decisions of the Court of Justice of the European Union, since these, although still relevant, are mostly rather old and therefore easy to research. The IRIS Merlin database may be helpful in this respect (<http://merlin.obs.coe.int>). However, the Related Reporting section looks in greater detail at themes covered in the lead article, such as the protection of broadcast signals using digital rights management systems or the supposed right to access to broadcast signals, which have recently been discussed by national authorities.

It appeared essential that we should add an overview of the international and European instruments relating to the protection of broadcasting organisations. For, despite some obvious gaps in the regulations, these instruments govern the protection of signals and broadcast content, the potential expansion of which has already been wrestled with for so long. You can see from the overview that starts the ZOOM section which agreements and EU directives are relevant and which European states are bound by these legislative instruments. The following table shows, at a glance, which international and European regulatory instruments protect which copyright-related rights held by which rightsholders in relation to the distribution of audiovisual media content via various distribution methods. The term of protection and any exceptions are also listed. Supplementing the information on current protection for broadcasting organisations, the second table describes measures available to them for the enforcement of the related legislation. These tables are both as complex as the subject matter itself and are therefore explained by means of a legend. Once again, we are grateful to our partner institution, the Institute of European Media Law, for compiling both tables.

Hodie mihi, cras tibi! ... and the next report on this subject is bound to come!

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The Legal Protection of Broadcasters

Challenges Posed by New Services

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I. Introduction

Digitisation and convergence, especially the enormous increase in capacity and performance in the case of Internet access, computers and storage media, have simplified and speeded up the distribution and consumption of programme content. In addition to the growth in the number of legal services, piracy has benefited from the greater efficiency of the new technologies. Digital signals can be copied in high quality and distributed, and programmes delivered via the Internet are particularly vulnerable. The programme-carrying signals are often the direct objective and “quarry” of the pirates, and broadcasters are trying to protect their signals by technical means. Digital identification systems, such as watermarks and fingerprints, are suitable for marking and recognising stolen signals and are being employed. There are also technical protection measures to prevent unauthorised access to and/or the (further) use of the audiovisual content. The problem of protecting the broadcast signal has been raised once again, and perhaps even more clearly than in the past, as a result of the considerable stepping up of the broadcasters’ own Internet activities, that is to say the live broadcasting of programmes using this particular distribution channel (web- and simulcasting) and making available to the user for individual access at any time and place audiovisual content that has already been broadcast or is scheduled to be broadcast in the near future. This also applies, incidentally, to services available from broadcasters for mobile reception devices. All this once again raises the question of whether the protection granted broadcasters is sufficient. Is the existing legal framework capable of meeting the challenges brought about by technological progress and the introduction of new business models?

The protection of broadcasters is governed by an entire range of legal provisions at both international and Council of Europe level, as well as by EU law. These measures will not be outlined individually here as they were the subject of an earlier article in the IRIS *plus* series that has lost none of its topicality.¹ It is worth briefly mentioning the considerable degree of heterogeneity that characterises these provisions. This applies for example to the definition of broadcasting as the subject of legal protection. In some cases, it does not cover the distribution of broadcast signals via wire-bound technologies or sometimes only refers to television and often – at least explicitly – does not include distribution using new transmission channels, such as the Internet or the mobile telephone networks. Especially in the latter context, it must be assumed that the legal instruments mainly leave out of account those transmissions preceded by an individual user

1) Guibault, L./Melzer, R., “The Legal Protection of Broadcast Signals”, IRIS *plus* 2004-10 (all IRIS *plus* issues mentioned are available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/index.html).

request. Both programmes broadcast originally on the Internet in linear form (webcasting) and non-linear programmes (on-demand services) are consequently not protected. This inconsistency concerning the level of protection intended also exists in other areas, for example with regard to the actions for which broadcasters are granted exclusive exploitation rights after an item has been broadcast. Differences also exist in the way in which any public or third party interests that may stand in the way of comprehensive protection are mentioned.² The extent and content of provisos and derogations accordingly differ, for example on the question of reporting daily news events, on use for science and research purposes, on private use and so on.

In many cases, the inconsistency in the amount of protection afforded in this context continues at the national level. It is also due to the fact that, although international legal instruments normally lay down a minimum degree of protection, states can go further either individually or collectively (for example in connection with the harmonisation of provisions through EU law).³ This may seem surprising bearing in mind the increased global dimension of audiovisual content distribution resulting from the digitisation and convergence process (especially in the form of the Internet). This may explain the need for reform perceived by many observers.

This article primarily discusses the protection afforded the broadcaster's *programme-carrying signal* as the object of the copyright-related protection that it has been granted. It also includes a discussion of the idea that some broadcasters can enjoy copyright protection with regard to programme *content* on the basis of either primary or derived law. Furthermore, it takes account of the fact that the extent of the broadcasters' legal protection is also determined by the nature of the authorisation rights⁴ granted to copyright holders and by the extent to which reference is made to the latter.⁵ The protection of the broadcast signal is based on the (technical and organisational) efforts made by the broadcaster for transmission purposes. Broadcasters should not have to tolerate third parties benefiting from their investments without being able to defend themselves. Here, the parallel to the protection under competition law provided at the domestic level becomes clear (protection against the unlawful exploitation of another's work – "business parasitism"; prohibited competitive edge brought about by a breach of the law). It will accordingly also be necessary to discuss some issues connected with this.

In the following, the challenges and problems caused by current developments will be discussed in depth (section II). An overview will then be provided of the present state of the debate on whether and, if so, to what extent broadcasters need new or additional legal protection (section III). A brief summary of the conclusions drawn is provided in section IV.

2) See the overview of the individual measures in the ZOOM part of this IRIS *plus*.

3) For reasons of space, it is not possible here to provide a more comprehensive review of the protection of broadcasters provided by national provisions, whether it be the protection of copyright or copyright-related rights or both. These questions are discussed in the context of national legislation with the help of the legal classification of current technical and business models described in the following section.

4) This means the exclusive (exploitation) rights to which the rightsholder is entitled with respect to permitting or prohibiting the use of its works, i.e. granting or refusing usage rights. If national law permits the use without requiring permission in certain defined cases or following an examination and a consideration of the mutual interests involved in an individual case, then the authorisation right is (usually) replaced by the right to appropriate remuneration. As far as retransmission by cable is concerned, where the transmission right is affected as a sub-right of the right of public performance, collecting societies exercise the power to grant usage rights, but this does not apply to a broadcaster's own programmes.

5) The question of what protection broadcasters or producers can claim with regard to the programme format, for example the organisation of a quiz show like "Who wants to be a millionaire?", is not discussed in this article. See for example A. Blocman, IRIS 2008-5: 8/12 (all references to the European Audiovisual Observatory's IRIS legal newsletter can be searched in the IRIS Merlin database: <http://merlin.obs.coe.int>).

II. New offers of audiovisual programme content and the protection of broadcasters

In this age of digitisation and convergence, the broadcast signal can be captured in various ways: apart from the permission-free use of programme content by “viewing” or “listening”, there is also the possibility of (direct) access to the signal, which can be obtained for example by breaching a conditional access system or through the unauthorised onward transmission of the signal. In addition, the signal can be (indirectly) used for offering already broadcast content for downloading or distribution via so-called streaming. It is first necessary to store the signal before it is retransmitted. The possibility for the user to access programmes that have already been broadcast is increasingly becoming the focus of attention.

The following selection of types of use made possible by new business models is based on the circumstances in which the user seeks access to the broadcast signal or its content. Portals and navigators are examples of arrangements that make it easier for the user to choose from various programmes or locate a specific programme (see II.1. below). In the case of virtual video recorders and “intelligent recording software”, the primary aim is to satisfy the user’s interest in storing programme content already selected (II.2.). So-called peer-to-peer technologies turn the (mere) receiver into a device for offering content to additional users at the same time (II.3.). Programs or devices that make it possible to circumvent measures that provide protection against the unauthorised use of conditional access services enable content that is not (legally) available in this way to be accessed (II.4.). While the applications mentioned normally target private use, the very popular big-screen showings of major sports events constitute a special form of the public use of television programmes. Although they are permission-free for the viewers themselves, this raises a number of questions for the organisers of such events (II.5.). Here, as in the case of ad-skipping technology or the ability to supplement the television signal with Internet content accessible on the screen (II.6.), the interest of third parties in offering services that exploit the attractiveness of the content carried by the broadcast signal in pursuit of their own aims, including commercial objectives, becomes particularly clearly evident.

It emerges that, depending on the situation, various intellectual property rights and authorisation rights of broadcasters may be affected. However, unlawful interference with rights granted does not always occur. Given the services and technologies now available, it is hard to avoid the impression that they have often been conceived with certain “gaps” in the broadcasters’ protection in mind. For example, they take advantage of any technical criteria limiting the application of the (related) rights or – adopting the user perspective – are tailored to existing exceptions from the protection of the signal and limitations to that protection. Here, the question of the lawfulness of a private copy and the amount of scope allowed for its use becomes relevant again and again.

1. Portals and navigators

A number of interesting services enable the user to access audiovisual content (that is being or has been transmitted by the broadcaster) by “sorting” the items available. Such portals may supply professionally produced content only (II.1.1.) or they may also be based on content made available by users themselves. However this “user-generated content” (UGC) may contain legally protected material owned by third parties (II.1.3.). Combinations of the two types of content may be found at one and the same portal. Electronic programme guides, as an advanced form of navigator, have a function comparable to that of a portal in the sense described above (II.1.2.). Some portals give potential users the impression that they provide a largely fixed range of items while others serve as a starting-point from which users can actually call up content by means of varying degrees of interaction (own search and/or selection). The following examples show that this difference may have a role to play for the legal assessment.

1.1. Portals

Portals are understood to be services that enable users to access programme content by taking one or more selection steps. They are organised either in the form of real-time onward transmission or make programmes available on a time-shifted basis.

Live or library access to television programmes

In a case brought by the Warner Bros. and Universal film studios against the online TV service Zattoo, the *Landgericht Hamburg* (Hamburg Regional Court) ruled on 8 April 2009⁶ that the defendant was in breach of German copyright law.

With its portal *Zattoo.de*, Zattoo offers a service through which programmes are provided at the same time as they are broadcast on public free-to-air television. In order to do this, it captures and encrypts the broadcasters' signals. To this end, the signals are not stored permanently but only temporarily. The data are then forwarded to Zattoo's registered customers, who can view the programmes they want using the free software available. The transmissions are subject to territorial limitations in accordance with the agreements reached with the broadcasters concerned. The service is funded by advertising. In the case in issue, several feature films in which the plaintiff film studios held the exclusive exploitation rights had been retransmitted via the Zattoo service. The public service broadcasters ARD and ZDF had broadcast the films in question with the relevant licence from the plaintiffs and at the same time permitted, subject to their agreement with the collecting societies concerned, the simultaneous and unaltered retransmission via Zattoo. The plaintiffs considered that their right in the public transmission had been breached and applied for an injunction.

The Regional Court allowed the claim for injunctive relief against Zattoo under section 97(1) in conjunction with sections 2(1)(6), 2(2) and 15(2) of the *Urheberrechtsgesetz* (Copyright Act),⁷ stating that, according to the national treatment principle enshrined in section 121(4) of the Copyright Act in conjunction with Article 2 and 5 of the Revised Berne Convention, the protection of the United States based plaintiffs had to be assessed under German law. In the court's opinion, contrary to the assumption of the contracting broadcasters and Zattoo, the latter's service could not be classified as cable retransmission within the meaning of sections 20b and 87 of the Copyright Act, so that the broadcasters had no effective contractual agreement to transfer the rights. Although the wording of the Act allowed the term "cable system" to be interpreted to mean that it included the network infrastructure used by Zattoo (the Internet), the historical context and the intention of the legislature militated against such an interpretation. The court pointed out that when the rule was introduced in 1998 in transposition of Directive 93/83/EEC⁸ it related to the retransmission of programmes via the existing coaxial cable network. The technologies and business models for the transmission of such programmes via the Internet did not yet exist. Nor did the preparatory documents for the Act allow the conclusion to be drawn that the legislature intended the term "cable system" to be understood without reference to a specific technology and therefore subject to change. The same applied, the court went on, to the preparatory documents for the enactment of the directive and for Article 11^{bis}(1)(2) of the Revised Berne Convention, which explicitly made the exercise of the broadcasters' rights subject to the relevant domestic legislation. It was also necessary to note that, according to the systematic built into the law, a narrow interpretation had to be given to section 20b of the Copyright Act, in which the statutory requirement for rights to be managed collectively by collecting societies constituted considerable interference with freedom of contract. Consequently, section 20b of the Copyright Act could not be applied to the service provided by Zattoo.⁹ The right concerned was the right of public performance under section 15(2) of the Copyright Act, which comprised the right of transmission (section 20) and the right to make publicly accessible (section 19a). However, Zattoo had no licence to exploit those rights and the permission of the film studios themselves was required to retransmit the films on the Internet.

6) Judgment of 8 April 2009 (Case 308 O 660/08), available at: <http://rechtsprechung.hamburg.de/jportal/portal/page/bshaprod.psml?doc.id=KORE220512009&st=ent&showdoccase=1¶mfromHL=true#focuspoint>

7) The German Copyright Act is available at: <http://www.gesetze-im-internet.de/urhg/BJNR012730965.html>

8) See on this, especially in the context of the cable retransmission right, for example B. Hugenholtz, "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", in *Convergence, Copyrights and Transfrontier Television*, published by the European Audiovisual Observatory, IRIS *plus* 2009-8, pp. 12 ff.

9) This contrasts with the view expressed in proceedings between Deutsche Telekom AG and the collecting society VG Media by the Arbitration Board set up under the Copyright Management Act and located at the German Patent and Trademark Office. Cf. A. Yliniva-Hoffmann, IRIS 2010-5/15.

In this context, it is also worth mentioning the judgment of the Paris *Tribunal de Grande Instance* (Regional Court) of 18 June 2010. The proceedings concerned an action brought by the French private broadcasters M6 and W9 against the company SBDS Active, which provides the Internet service *tv-replay.fr*.¹⁰ The main objective of the service is the collection and user-friendly compilation of references to individual programmes in the freely available media libraries of France's best-known television channels (catch-up TV). The broadcasters considered the unauthorised public transmission of their programmes to be a breach of their copyrights. In the court's opinion, however, the service only provides the user with assistance in finding the desired programmes, whereas they are actually accessed via the original provider. The court therefore came to the conclusion that a mere compilation of references did not constitute the public transmission of the content and therefore rejected the plaintiffs' claim of a breach of Article L 122-2 of the French Intellectual Property Code.¹¹

Indexing services

Similar to the portal described above, there are other services that make audiovisual content easily accessible to users. However, they do this without remaining on the surface of the web (in the figurative sense) but locate items hidden in the depths of the Internet. As a rule, they supply references to content for which they evidently lack the right of exploitation in the form concerned.

The indexing service TV Links was the subject of a legal dispute in the United Kingdom. It provided links to other websites from which television programmes, films and similar items could be called up. The court acquitted the company of the charge of copyright violation and therefore of a breach of its duties as an Internet service provider. In the court's opinion, merely providing links to audiovisual content "directly" available on the Internet did not constitute a public performance.¹²

Also in the United Kingdom, the High Court recently delivered a judgment on the Usenet indexing website Newzbin.¹³ This registration based service addresses its users as "members" and – depending on the status acquired – calls on them "only" to collect sources of, inter alia, audiovisual content on the Usenet or to add information on existing content and feed the file produced (so-called "reports") into a database. According to the operators of the website, about 250 such "editors" are involved in this work. Depending on the nature of the membership rights, the sources can be searched with varying ease. The court held that this service breached the ban on communicating copyrighted works to the public without the rightsholder's permission within the meaning of section 20(2)b of the Copyright, Designs and Patents Act 1988 (CDPA). The service, it said, was not limited to merely making simple references available to television programmes, films, etc., but it offered its users an active facility that extended far beyond that. As a result of the detailed configuration of the premium membership area together with the additional options available (more precise searches, automatic downloads) the operators of Newzbin had also conveyed the impression to their paying members that they were authorised to grant permission to copy the film. Making available the "reports" and technical user support and the fact that the service provider was aware that its conduct was in breach of copyright was also to be seen as involvement

10) Tribunal de Grande Instance de Paris, judgment of 18 June 2010, *M6 Web, Metropole Télévision et autres c. SBDS*. The complete text of the judgment is available at: http://legalis.net/spip.php?page=jurisprudence-decision&id_article=2941

11) The court also held that there had been no breach of the *sui generis* database protection right resulting from the transposition of the Database Directive 96/9/EC. Although the television channel had set up a database, it could not prove that considerable investments had had to be made for this, as required by Article L 341-1 of the Intellectual Property Code. The unfair competition claim was also dismissed – M6 and W9 had claimed that their refinancing by carrying advertising was being made more difficult, whereas *tv-replay.fr* was making money itself from the advertising on its website. However, the reason for dismissing this claim was that M6 and W9 had advanced the same arguments as those already employed to support the allegation of a breach of copyright.

12) Cf. D. Goldberg, IRIS 2010-4/26.

13) Cf. D. Goldberg, IRIS 2010-6/32. The judgment is available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2010/608.html&query=newzbin&method=Boolean>.

in the breach of copyright by its users resulting from their unlawful copying of copyrighted works within the meaning of section 16 of the CDPA.¹⁴

Another case involves focusing on the technical aspects of the transmission of stored audiovisual content to the user: in the case of streaming and so-called “progressive downloads” of audio and video items, the content called up individually by the user is transmitted in packages. Unlike “persistent downloads”, the content begins to play before all of it has been transmitted. Another difference from a download is that the content transmitted is not permanently recorded on the user’s device because the data stream is normally only stored temporarily in the user’s cache.¹⁵ In the case of streaming services, which are currently the subject of much discussion, the broadcast signal and, often, the logos of the television broadcasters are used without authorisation, and the platform providers generate income from the programme concerned using their own marketing concept (for example, “in-stream advertising”). They also benefit from the high carrying capacity and the relatively low costs of setting up and maintaining the service. The portal kino.to,¹⁶ for example, offers free downloads of films, series and documentaries in German via streaming. It also redirects the user to websites where (normally illegally) copied films – allegedly in close co-operation with kino.to – have been uploaded. The user can view the films offered at any time by means of Internet access on his/her own PC. Here the question arises as to whether those who make use of such offerings are also in breach of copyright if they produce an unauthorised copy. Depending on the software employed to play the audiovisual content (video player), such a copy may be illegal when the entire content rather than only parts of it are saved temporarily on the recipient’s PC and the memory is not (automatically) deleted at comparably short intervals, for example when the computer is shut down. German legal commentators generally agree that the private copying exception pursuant to section 53(1) of the Copyright Act does not apply here because a copy, which was obviously unlawfully produced or made publicly available, is being used for making a further copy or copies.¹⁷

1.2. Electronic programme guides

Electronic programme guides (EPGs) are available to help viewers select the programmes they want to watch. While the teletext service, which is incorporated by the broadcaster into the broadcast signal, is text-based and often only contains brief items of information, EPGs, which are often provided by third parties (manufacturers of reception devices such as set-top boxes or operators of technical platforms such as cable networks), offer users more detailed information in the form of overviews of programme schedules, text and (moving) images and, like a portal, “guide” them to the programmes themselves. They are closer to the broadcast signal in the way they are organised and their use is more akin to the traditional situation involving a (simple) television set. That is why they will be discussed here in section II.1. and separately from hybrid TV (see II.6.2.).¹⁸

Problematic in this connection is the use by the EPG providers of accompanying materials (text and, especially, images) owned by the television channels. These providers usually take the content concerned directly from the information pages (“press lounges”) made available by the broadcasters themselves. It is a matter of debate whether the accompanying materials in the EPGs may be used “copyright-free” or whether the EPG providers have to acquire the necessary licences.

14) For a comparable situation in Germany, see the judgment of the Hamburg Regional Court of 28 January 2009 (Case 5 U 255/07), in which the court establishes that a Usenet service is liable for breaches of copyright by its members if it is not only aware of the abuse of its service but clearly solicits this and makes software available that considerably facilitates the improper use of the Usenet. The judgment is available at: http://openjur.de/u/30652-5_u_255-07.html

15) Cf. J. Ensthaler/S. Weidert, *Handbuch Urheberrecht und Internet*, 2nd. Edit. 2010, 3 B 49, with further references. This has to be distinguished from so-called live streaming, for example of a broadcaster’s programme, where the relevant data stream is transmitted by the provider at a fixed time (such as simulcasting in the form of the parallel transmission of a television programme via the Internet).

16) Further information is available at: <http://rsw.beck.de/rsw/shop/default.asp?sessionId=681E4C40E7624985BAFDB1E615369699&docid=298438&highlight=kino.to>

17) F. Radmann, F. “Kino.ko – Filmgucken kann Sünde sein”, *Zeitschrift für Urheber- und Medienrecht* 2010, pp. 387 ff.

18) For further information on EPGs, see also *Searching for Audiovisual Content*, published by the European Audiovisual Observatory, IRIS Special 2008-2.

The *Oberlandesgericht Dresden* (Dresden Court of Appeal – OLG) decided on 15 December 2009 in appeal proceedings between the collecting society *Verwertungsgesellschaft Media* (VG Media) and the online programme magazine *tv.tv.de* that television broadcasters may demand a licence fee for the EPG use of their programming information. With this decision, the OLG confirmed the lower court's judgment and rendered it final.¹⁹ VG Media had demanded that *tv.tv.de* should not use for its EPG any of the text or images owned by the broadcasters represented by the collecting society as the copyrights and related rights existing in the works had been granted to those broadcasters. The OLG allowed VG Media's application against *tv.tv.de* to order it to cease copying the text and images and making them publicly available on the Internet, basing its decision on section 97(1) of the Copyright Act in conjunction with section 2(1)(1) and 2(1)(5) and sections 72(1), 19a and 16. The defendant company, it said, could not rely on section 50 of the Copyright Act, which permitted the use of copyrighted works in the case of reporting on daily news events because the text and images used for the programme guide lacked the necessary connection to any event that had taken place (the programme had yet to be broadcast).

Another interesting judgment in this context was delivered by the *Bundesgerichtshof* (Federal Supreme Court – BGH) on 19 November 2009. First of all, that court established that the unauthorised inclusion of 593 film stills in an online archive and making them available to view and download did not constitute cinematographic exploitation within the meaning of section 91 of the old version of the Copyright Act (now section 89(4)).²⁰ This was not altered by the fact that the Internet offering was advertised as an "online film scene archive". The mere fact that the photographs originated from a film did not mean their use could be regarded as cinematographic exploitation within the meaning of section 91 of the Copyright Act, so the online database provider had not breached the filmmaker's right to cinematographic exploitation (of stills produced when making a cinematographic work). At the same time, however, the BGH sent the case back to the Court of Appeal, instructing it to examine once again to what extent the plaintiff was entitled to damages for a breach of the right in the photographs pursuant to section 72 of the Copyright Act. For procedural reasons, with which the BGH did not agree, the Court of Appeal had dismissed this claim despite acknowledging that it subsisted in principle.

1.3. Portals predominantly designed for UGC

Platforms like YouTube, Google Video, Dailymotion, Clipfish, MyVideo and many others offer users the possibility of making their own video content and/or content produced by them publicly available and exchanging it among themselves. However, these platforms often contain items that are, at least partially, protected by third party copyright and their use has not been permitted by the relevant rightsholder. In many cases, the items consist of recordings from broadcasters' programmes that – illegally – find their way onto the video platforms. The platforms co-operate in different ways with the rightsholders. Firstly, television broadcasters have their own so-called "channels" on these websites; secondly, the portals employ technical measures to mark content in order to meet their obligations to protect the copyright and related rights of third parties.²¹

Mediaset v. YouTube

The *Tribunale Ordinario di Roma* (Rome District Court)²² decided on 16 December 2009 in proceedings between the media company Mediaset and the video platform YouTube, which belongs to Google, that YouTube had to delete all content complained about by Mediaset in this context.

19) Leipzig Regional Court of 22 May 2009 (Case 05 O 2742/08), available at: <http://openjur.de/u/31830.html>; Dresden Court of Appeal of 15 December 2009 (Case 14 U 818/09), available at: <http://openjur.de/u/32285.html>; cf. S Schweda, IRIS 2010-2/12.

20) BGH, judgment of 19 November 2009 (Case I ZR 128/07), available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d9b548f83e71a11d7287655e9a513e12&nr=52132&pos=0&anz=1>

21) Other instances of intermediary liability, especially (preventive) filtering obligations, are discussed in detail by C. Angelopoulos, "Filtering the Internet for Copyrighted Content in Europe", IRIS *plus* 2009-4, pp. 3 ff., and F. Cabrera, "User-Generated Content Services and Copyright", IRIS *plus* 2008-5, pp. 4 ff.

22) Order of 16 December 2009 issued by the *Tribunale Ordinario di Roma* (Case 54218/08), available at: <http://www.tgcom.mediaset.it/res/doc/sentenzatribunale.pdf>

Mediaset had accused the portal of making available illegally uploaded video and audio files from broadcasts in which it held the rights, in particular episodes of the television programme "Grande Fratello" (Big Brother). Mediaset demanded that the platform cease these activities and pay damages of EUR 500 million for breach of copyright. In a decision on a part of the action, the court allowed Mediaset's application and ordered that the content in issue be taken down, stating that YouTube was not to be regarded as a hosting provider but a publisher and was consequently fully responsible for the published content. YouTube's objection that its function was limited to making web space available was, the court went on, untenable in view of its obvious and repeated conduct in breach of copyright.

From the point of view of authors' rights, the agreement announced at the end of July 2010 between the Italian collecting society *Società Italiana degli Autori ed Editori* (SIAE) and YouTube is interesting in this connection.²³ The agreement, which is valid until 31 December 2012, provides for the payment of compensation for rightsholders if their copyrighted works are used in any form on the video platform. However, it is not expected to have any influence on the above-mentioned proceedings as Mediaset is not represented by SIAE.

Viacom v. YouTube

On 23 June 2010, a court in New York²⁴ dismissed the action filed against YouTube by the media company Viacom, to which, inter alia, the music channel MTV and the Paramount films studios belong. The subject of the legal dispute was videos – including MTV videos – that users had uploaded onto the platform without the rightsholders' permission. Viacom saw in this a breach of its reproduction, distribution and performance rights and accused YouTube of doing nothing to prevent these rights' violations and demanded damages.

The court dismissed this claim with reference to the provisions of the Digital Millennium Copyright Act (DMCA).²⁵ According to the limitation on liability contained in that Act, the operator cannot be held liable for breaches of the law committed by third parties if it is not, and did not have to be, aware of those breaches. In addition, it must work with the rightsholders and take down any potentially infringing material without delay,²⁶ and YouTube had met those obligations. Viacom announced its intention to appeal against the decision.

2. Personal Video Recorders (PVRs) and Intelligent Recording Technologies (IRTs)

The term PVR refers to a service provider's offer to record specific programmes and make them available later for downloading. IRTs enable users to make copies of broadcast content both from analogue radio and streamed Internet radio broadcasts.

2.1. Personal virtual and online video recorders

In order to be able to avail themselves of a PVR service, users have to register with the relevant provider. In accordance with the procedure laid down by the provider, they determine what programmes from what channels are to be recorded for them. The provider receives the

23) See SIAE press release of 28 July 2010, available at: http://www.siae.it/edicola.asp?click_level=0500.0100.0200&view=4&open_menu=yes&id_news=9444

24) United States District Court, Southern District of New York (07 Civ. 2103 (LLS)), available at: http://www.eff.org/files/filenode/viacom_v_youtube/06-23-10_Summary_Judgment.pdf

25) <http://www.copyright.gov/legislation/pl105-304.pdf>

26) The "safe harbour" provision: Title II, section 202, section 512(c), (m) and (n). The liability of video platforms – and, in particular, the obligations to carry out checks they can reasonably be expected to conduct in the context of publication – is also the subject of proceedings before the Hamburg Regional Court (Case 310 O 197/10), in which the copyright society Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) is demanding that YouTube block music titles that are being illegally used (for videos). The judgment was expected to be delivered on 27 August 2010.

broadcasters' signals and records the programmes chosen by the user. The recording is then stored on the provider's hard drives in an online archive reserved exclusively for the registered user ("online video recorder"). The user can access this archive at any time, download the recordings and/or store them on his/her own PC.

ProSiebenSat1 and others v. Shift.TV

In the cases of ProSiebenSat1 v. Shift.TV,²⁷ RTL v. save.tv²⁸ and RTL v. Shift.TV²⁹ (all decisions dating from 22 April 2009), the BGH considered PVRs and examined, inter alia, whether the services concerned were in violation of broadcasting rights. The plaintiff television stations regarded the PVR service as violating their broadcasting rights under section 87(1) of the Copyright Act and sought injunctive relief, information and damages from the PVR providers.

The BGH initially examined whether storing the programmes in the user's online archive interfered with the broadcasters' exclusive reproduction rights (sections 87(1)(2) and 16 of the Copyright Act) and ruled that this was not the case. In principle, it said, recording programmes on the user's online video recorder interfered with the plaintiff's reproduction rights as the PVR had to be considered an "image and sound carrier" within the meaning of section 16 of the Copyright Act. However, the question arose as to whether the provider or the user was the producer of the copy. The lower court had regarded the provider as the producer as it offered an overall service package that, on the basis of standard assessment criteria, was not limited to making storage space available. Consequently, and also because the service was free of charge, the copy was not a private copy within the meaning of section 53(1) of the Copyright Act. The BGH did not share this assumption, stating that anyone who made the copy had to be assessed on the basis of purely technical and mechanical criteria and, therefore, according to who physically makes it by technical means. If the producer of the copy acted on the instructions of a third party who had it made for his/her own private use, then under section 53(1), 2nd sentence, of the Copyright Act the responsibility for this act had to belong to the individual commissioning the copy. The key criterion here, in the court's view, is whether the producer in the case in issue merely acted "as a necessary tool"³⁰ – exercising the function of a duplicating device – or whether it "brings about a copyright-relevant use to an extent that can no longer be reconciled with the private use exception".³¹ In the first case, the court went on, responsibility for making the copy had to be assumed to belong to the individual commissioning it, in the second to the actual producer.³² In the second case, the consequence was that neither the exception for private use pursuant to section 53(1), 1st sentence, of the Copyright Act applied nor the limitation laid down in section 53(1), 2nd sentence, as the copy was not free of charge. As the facts had not been sufficiently clarified by the lower courts, the BGH decided that it should be assumed in the defendant's favour that the recording of the programmes chosen by the customer had been made "fully automatically without any (human) outside influence" – in other words that it had been produced by the customer. The BGH also discussed whether the retransmission to the PVR of the programmes received via a (satellite) aerial breaches the right to retransmit a broadcast (sections 87(1)(1) and 20 of the Copyright Act). A retransmission within the meaning of the relevant provisions was, it said, to be understood to mean a simultaneous retransmission. If it was assumed (as the BGH did) that the recording process – and in consequence

27) Available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b2ddd48d74f4aa0eea54f8d38aaf2ab0&nr=48391&pos=1&anz=2>

28) Available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7f170b3f18d677efe88700097d51e60b&nr=48390&pos=1&anz=2>

29) Available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=db97285140686c9068a05b3a52637261&nr=48686&pos=1&anz=2>; See J. Maus, IRIS 2009-7/9.

30) BGH, judgment of 25 February 1999 (I ZR 118/96), available at: <http://lexetius.com/1999,808>.

31) BGH, judgment of 10 December 1998 (I ZR 100/96), available at: http://www.online-recht.de/vorent.html?BGH981210+auswahl=1&st_num=1&case=-i&pattern=OLG+D%FCsseldorf&mark=

32) It is worth comparing this judgment with a decision of the Munich Court of Appeal of 20 March 2003 (Case 29 U 5494/02) concerning a case of copying "in the real world". The case involved a so-called "coin-operated CD copier", that is to say a machine that enabled a customer to make a copy on his/her own blank CD of a recording he/she had provided. The offer of this service was worded in such a way that even assistance from the shop staff should be ruled out. The court assumed in that case that the "producer" of the copy was the customer and not the service provider.

the use of the PVR – had been carried out by the customer, then the decisive issue was whether the signal received by the defendant had been sent on simultaneously to the PVR. This question had to be answered in the affirmative. That process could also be a “transmission” within the meaning of section 20 of the Copyright Act as it involved “uses involving a work being made publicly available by means of wireless signals” and in a way in which the “transmission of the work (concerned) can be described as a communication to the public”.³³ The service offered by the defendant was not limited to retransmitting the signals received to the customers’ PVRs but also involved making available the very reception facilities with which the customers were able to view the programmes received. As the facts had been insufficiently clarified by the lower courts, the BGH was unable to judge in this particular case whether the transmission of the programme was in the form of a retransmission to an “audience”.

The BGH ruled that making the stored programmes available for interactive retrieval did not breach the exclusive right to communication to the public (sections 87(1)(2) and 19a of the Copyright Act). If storing the programmes on the PVR was assumed to have been carried out by the defendant, then the latter had communicated the programmes to the public within the meaning of section 19a of the Copyright Act by enabling the customer to retrieve them at any time and at any place. However, the “public communication” element, which required that the broadcast be made available to a majority of members of the public (section 15(3) of the Copyright Act) was lacking. In the case concerned, the individual recordings were only available to the (individual) customer. The crucial factor was that at the time the offer to record future broadcasts and make them available for retrieval was made to the general public “the work concerned ... [could] not be accessed” by the defendant to enable it to be retrieved by the public. The BGH also considered whether the possibility existing at any time for programmes with content unsuitable for children and young people to be called up had any effect on aspects of competition law and the protection of minors in the media.³⁴ After due consideration, it affirmed that there had been a breach of sections 5(1) and 3(1) of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on Youth Protection in the Media – JMStV)³⁵ and, consequently, ruled that the plaintiff was entitled to injunctive relief under sections 3 and 4(11) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG).³⁶ The plaintiff and the defendant were in competition with one another as a result of the action in issue despite the fact that their companies belonged to different branches of the industry. The defendant had breached section 5(1) and 3(1) of the JMStV because it was easy to circumvent the age verification system it had employed to protect children and young people from unsuitable content. One purpose of section 5 of the JMStV, the court said, was “to regulate market behaviour in the interests of the market players”. As there was a danger of repetition, the claim for injunctive relief was justified.

Summarising its conclusions, the BGH established that the availability of Internet based PVRs “may breach the broadcasters’ copyright-related rights under the Copyright Act and is as a rule unlawful”.³⁷ As the BGH was of the opinion that the lower court had not sufficiently clarified all aspects, it remanded the case for reconsideration and a decision.

Twentieth Century Fox and others v. Cablevision

In the United States, the Supreme Court³⁸ on 29 June 2009 confirmed an appeal court’s judgment³⁹ in favour of Cablevision against several film producers who had filed an action for breach of copyright. In proceedings before the District Court, American media companies (including

33) BGH, judgment of 8 July 1993 (I ZR 124/91).

34) Only in the RTL v. Shift.TV case.

35) Available at: http://www.alm.de/fileadmin/Download/Gesetze/JMStV_aktuell_deutsch.pdf

36) Available at: http://www.gesetze-im-internet.de/uwg_2004/

37) Cf. J. Maus, IRIS 2009-7: 7/9.

38) No. 08-448, available at: <http://www.supremecourt.gov/orders/courtorders/062909zor.pdf>; vgl. Maus, J., MMR 9/2009, p. XII, available at: <http://rsw.beck.de/rsw/shop/default.asp?sessionid=8C56CF571A1C4483944E334D13808330&docid=288104&highlight=Cablevision>

39) United States Court of Appeals for the Second Circuit, New York, 4 August 2008 (Docket Nos. 07-1480-cv(L) and 07-1511-cv(CON)), available at: http://www.wired.com/images_blogs/threatlevel/2009/06/cablevision.pdf

Twentieth Century Fox and Universal City Studios Productions) successfully brought an action against the cable television operator Cablevision, which offered registered customers a PVR service. The plaintiffs considered that the service had breached their copyrights as Cablevision was copying their programmes and communicating them to the public without authorisation. The PVR service was, they claimed, comparable to video-on-demand services and accordingly required a licence. The Court of Appeal rejected this argument, stating that, although the programmes were recorded at a central facility, the actual copying was done by the users themselves – with no influence on the part of Cablevision, which only made the system available. Furthermore, the court went on, the fact that every registered user could only retrieve the recording made for him/her ruled out the assumption of a public performance, so that the PVR service did not differ substantially from a traditional VCR and the private copy for home use made on it.

M6 and others v. Wizzgo

The Paris *Tribunal de Grande Instance* (Regional Court) came to a different conclusion⁴⁰ in two decisions dated 6 August and 25 November 2008. In the proceedings concerned, several French television channels (M6, W9, NT1 and TF1) brought an action against Wizzgo, a PVR provider, because they believed the service had breached their copyrights.

In both cases, the court ruled (without giving any reasons) that a programme recorded by means of a PVR was not to be described as a private copy of the user and that this constituted a copy unlawfully made by Wizzgo (followed by its communication to the public). It ordered the provider to pay damages and prohibited it from continuing to offer the PVR service.

2.2. Intelligent recording software

“Intelligent recording software” explicitly relies on the exception made for private copies in German law (section 53 of the Copyright Act). With the help of such programs, copies of broadcast content are made by employing the software to record music items automatically and depositing the file on the user’s PC. The software cuts out all advertising and news items.

Rightsholders claim in this connection that this automatic generation of copies of copyrighted content runs counter to the original idea of a private copy, which would lose the subordinate role it has had up to now, so that the standard fee for a private copy should be increased. Some people also demand a ban on such programs as control over the procedure does not lie with the private individual but a third party, namely the program provider and the operator of the necessary server.

No response in terms of actual legislation has so far been given to the question raised by the German Federal Ministry of Justice in 2009 after the completion of the reform of copyright legislation⁴¹ concerning the extent to which a statutory ban on “intelligent recording software” would be conceivable.

3. Peer-to-peer technologies

Peer-to-Peer (P2P) technology is severely criticised by many people as it enables a group of users that it has helped to set up to exchange files for which the necessary rights in the content exchanged have often not been cleared.

40) Cf. A. Courtinat, IRIS 2008-9: 9/13. The decisions of 6 August 2008 and 25 November 2008 are available respectively at: <http://www.foruminternet.org/specialistes/veille-juridique/jurisprudence/IMG/pdf/tgi-par20080806.pdf> and <http://www.juriscom.net/documents/tgiparis20081125-Wizzgo.pdf>; cf. A. Courtinat, IRIS 2009-1: 11/17.

41) Cf. N. Lamprecht-Weissenborn, IRIS 2007-10: 9/15.

3.1. Joost

However, the online service provided by Joost.com is an example of the lawful application of these technologies. The free Joost software automatically forwards the relevant data, especially among users connected to the P2P network. Only when part of the content is temporarily unavailable on the users' computers connected to the P2P network is it supplied from a central memory location. The service comprises both video on demand and linear channels comparable to traditional television broadcasts. Users can also participate in blogs, online chats and news services. For the content distributed by Joost, the provider negotiates licence agreements with the rightsholders, for instance in the United States with Viacom and Warner. In Germany, Joost had concluded agreements with 13 content providers at its launch in 2009. According to Joost itself, it is possible to carry out the central monitoring of the content exchange procedure and thus establish whether it meets the conditions of the licences acquired by Joost.⁴² Geographic markets are separated from one another using geolocation technology. Joost is financed by advertising.

3.2. CyberSky

On the other hand, in the following case P2P technology appears in the unfavourable (because unlawful) light alluded to above: the pay-TV operator Premiere (now Sky Deutschland) sought an injunction against the operator of CyberSky TV software under section 97(1) in conjunction with section 87(1) of the Copyright Act.⁴³ In the plaintiff's opinion, the distribution of software that enables users to set up a P2P network and quickly exchange large quantities of data within that network interferes with the exclusive right under section 87(1) of the Copyright Act to retransmit their broadcast signals and make them publicly accessible. Moreover, the networks set up permitted the exchange of entire television programmes with only a minimal time delay. The software was advertised as having this feature, and particular emphasis was placed on the fact that pay-TV programmes could also be exchanged in this way if one of the P2P users received a programme as part of a subscription and fed it into the network. In the opinion of the BGH, breaches of copyright by subscribers are to be feared as a result of bringing the software into circulation and specifically advertising it for an unlawful use, so the defendant was accordingly liable for the impending breaches of the law. The court regarded the fact that the plaintiff had not employed any copy protection mechanism as insignificant, stating that the rights violation claimed did not involve the unauthorised storage or copying of Premiere's programmes but their unauthorised retransmission to non-subscribers, which violated the plaintiff's exclusive transmission right enshrined in section 87(1)(1) of the Copyright Act.⁴⁴ For these reasons, the BGH granted the plaintiff's application for an injunction concerning the distribution and advertising of the software.

4. Technical measures for protection against unauthorised use and the making of private copies

4.1. Digital rights management (DRM)/Technical protection measures (TPM)

Both providers and distributors of media content – for example, offline in the case of DVDs and online in connection with pay-TV services – can employ various technical measures to protect items from unauthorised access (for example, encrypting and access authorisation systems) and/or unauthorised reproduction (copy protection) or make it easier to investigate rights violations (watermarks). In this context, broadcasters' current plans concerning "new" technical measures

42) Cf. <http://www.joost.com/about/joost/>

43) BGH, judgment of 15 January 2009 (Az. I ZR 57/07), available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f76fc892eefcdc29a6d8736952874ce8&nr=48631&pos=0&anz=1>

44) In the view of the BGH, this also provided grounds for denying a claim under the *Gesetz über den Schutz von zugangskontrollierten Diensten und von Zugangskontrolldiensten* (Act on the legal protection of services based on, or consisting of, conditional access), which transposed Directive 98/84/EC.

to protect their signals are interesting. For example, through use of the CI Plus technology⁴⁵ broadcasters can decide how the user can proceed with the signal received: for instance, in accordance with the so-called “usage rules information”, which is also transmitted, it is determined whether the user is in principle to be given authorisation to record programmes and whether they may also be shared with others. The problem consequently arises that technical protection measures may result in users not being able to exercise the right which is in principle granted to them to make copies for private use (without the provider’s consent).⁴⁶ It is therefore not hard to understand why digital rights management (DRM) has for a long time led to the offer of programs or devices that (also) enable access restrictions to be circumvented.

In 2003, the Frankfurt Court of Appeal gave its opinion on the ban on the production, import and distribution of circumvention devices designed or adapted to permit the unauthorised use of a conditional access service. The court made it clear in its decision that this ban also covers devices originally not put on the market for the purpose of circumventing conditional access and went on to say that determining the purpose of a device not only followed from the manufacturer’s instructions but also from a consideration of all the circumstances involved. In the court’s opinion, such factors as the technical knowledge of potential users, existing practices or advice from third parties could even override the different purpose stated by the manufacturer.⁴⁷

4.2. (Link with) Private copies

In 2006, France’s *Cour de Cassation*, the country’s highest appellate court, had to rule on the extent to which a copy protection mechanism (in this case DRM) is compatible with the private copy exception.⁴⁸ The action had been brought by a citizen who had been prevented from making a copy on a VHS cassette by the copy protection installed on his legally acquired DVD and regarded this as a breach of his “right to a private copy”. The court ruled that there was no *right* to a private copy but only an *exception* to the copyright protection. With reference to the three-step test, it said making a copy of a DVD on a VHS cassette adversely affected the normal use of the work, so that the installation of the technical protection mechanism was lawful.⁴⁹ Protection mechanisms, including DRM, are protected by the French regulations implementing the Copyright and Related Rights Act of 2006, which makes it a punishable criminal offence to possess or use devices that enable a technical protection mechanism installed in a work to be rendered inoperative or one or more information elements that identify the rightsholder to be destroyed.⁵⁰

A decision delivered in 2007 by the Aix-en-Provence Court of Appeal also related to the private copy exception. In that decision, the court ordered a student to pay damages and a fine for a breach of Articles L 335-2 and L 335-3 of the French Intellectual Property Code⁵¹ of 1992. The accused had collected 507 different film titles by downloading them from the Internet and copying borrowed CD-ROMs, lent some to friends and distributed some on P2P networks. He had also watched some of the films with friends. In the Court of Appeal’s opinion, his conduct had resulted in a breach of the ban on copying, making publicly available, performing and distributing copyrighted works without the rightsholder’s permission. The court dismissed the defendant’s claim in respect of the private performance and private copy exceptions pursuant to section L 122-5(1) and (2) of the Intellectual Property Act on the ground that showing various films in a group of friends was not covered by the term “inner family circle”, which had to be subjected to a narrow interpretation. Also, lending the copied CD-ROMs to friends did not constitute “private use” as it resulted in the defendant losing

45) See <http://www.ci-plus.com/index.php>. This also enables a check to be made to see whether any advertising skipping technology installed in the user’s devices can be effectively employed (see also II.6.1. below).

46) Critics also complain that it is possible to extensively monitor what the end user does with the programmes.

Cf. <http://www.verbraucherzentrale-rlp.de/UNI126995704408240/link591451A.html>

47) Cf. I. Beckendorf, IRIS 2003-8: 14/28.

48) Cf. A. Blocman, IRIS 2006-4: 12/20.

49) For a further discussion of rights management systems and their relationship with private copies, see F. Cabrera, “Digital Rights Management Systems (DRMs): Recent Developments in Europe”, IRIS plus 2007-1, pp. 3 ff.

50) Cf. A. Blocman, IRIS 2007-2: 12/20.

51) *Loi n° 92-597 du 1^{er} juillet 1992 relative au code de la propriété intellectuelle (partie législative)*, available at: <http://www.legifrance.gouv.fr>

control over the further use and distribution of the works by his friends. With regard to the private copy of the downloaded films, the court ruled that the defendant could not rely on the private copy exception if the work to be copied had not been legally acquired.⁵²

Many European legislatures have provided for rightsholders to be compensated for losses of revenue that may be caused by the exploitation of the exception granted under domestic law to make a “private copy”. Private broadcasters (represented by VG Media) recently brought a state liability action against the Federal Republic of Germany on the ground that it had not properly transposed Directive 2001/29/EC.⁵³ The aim of the action was to secure a share of the receipts of copying fees levied on blank media (section 54(1) of the Copyright Act) as compensation for private recordings (section 53 of the Copyright Act). In contrast to holders of other copyright-related rights, broadcasters are excluded from the levy (section 87(4) of the Copyright Act), and the plaintiff considered this incompatible with Article 5(2)(b) of the Directive, stating that Article 2(e) of the Directive provided that it was always the broadcaster that held the reproduction right. It went on to state that Article 5(2)(b) provided that the rightsholders should “receive fair compensation” in connection with the private copy exception. These rules had not been properly transposed into German law, which was why the plaintiff was claiming damages with reference to state liability under Community law.

The *Kammergericht Berlin* (Berlin Court of Appeal) agreed with the lower court and dismissed the claim,⁵⁴ stating that it presupposed that section 87(4) of the Copyright Act had to be incompatible with mandatory Community provisions. Moreover, that violation had to constitute an obvious and significant breach of Community law. It could not be definitively concluded from the wording of Article 5(2)(b) of the Directive that the “fair compensation” had to be made through a share of the levy on devices – or, indeed, through a “reward, indemnification or payment”. The member states were given considerable scope with regard to enacting relevant provisions, and this view was supported both by Recitals 35 and 38 and the genesis of the Directive, according to which the “fair compensation” was to be understood as a generic term and given a flexible interpretation. This flexibility also allowed the rightsholders concerned to be treated differently. As was clear from the preparatory documents, the domestic legislature had decided not to allow the broadcasters a share of the levy on devices as they received payment for the production of sound carriers and films and the permission to make private copies did not affect the “core area” of their copyright entitlement under section 87(1) of the Copyright Act.⁵⁵ This core area was the right of retransmission and of public performance. In contrast, the manufacture and sale of copies formed the core of the activity of the sound carrier and film producers, and that area was directly affected by the right to make private copies. The defendant had not exceeded the broad legislative scope granted it by the Directive, so that no obvious and significant breach of Community law had taken place and the claim made by VG Media was ill founded. No leave to appeal against this judgment on points of law was granted.

5. Public viewing exhibitions

Public viewing exhibitions involve live television images being broadcast at locations accessible to the public – usually in connection with popular major sports events such as the recent football World Cup.⁵⁶ The broadcasts are shown in public venues or at open-air locations as part of (large-scale) specially organised events, as well as at schools, sports clubs and local council premises.

52) See A. Blocman, IRIS 2007-10: 12/19. The full text of the decision is available at: <http://www.juriscom.net/documents/caaixenprovence20070905.pdf>

53) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22 June 2001, p. 10.

54) Judgment of 14 April 2009 (Case 9 U 3/08), http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/1ckl/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=116&numberofresults=187&fromdoctodoc=yes&doc.id=KORE406372009%3Ajuris-r01&doc.part=L&doc.price=0.0&doc.hl=1#focuspoint

55) Bundestag, Doc. 16/1828 of 15 June 2006, pp. 16 ff.

56) F. Reinholz, “Lizenzgebühren für Public Viewing?”, K&R 2010, p. 364.

It is first of all difficult to draw a firm distinction between a private celebration (such as a World Cup party) and public viewing exhibitions of television broadcasts in their various manifestations – organised event or not, commercial or non-commercial – and the different issues involved, such as the licences required (for example from GEMA, the Fédération Internationale de Football Association – FIFA or the Union of European Football Associations – UEFA⁵⁷). In the case of a party held by an exclusively private group of people, with guests who know one another, no licences are necessary – with the exception of any television licence fees payable. Such a party differs from the public performance in that it is not directed at the general public.

FIFA requires all exhibitors to apply to it for a licence but only demands licence fees in the case of commercial events. The public exhibition is commercial when the exhibitor carries it out for commercial purposes, which is assumed to be the case when an admission charge is made, sponsorship is involved or other business benefits are obtained.⁵⁸ Expressly excluded are “pubs, clubs and bars” (paragraph 1 of the relevant FIFA regulations). FIFA stipulates what broadcast coverage is to be selected (paragraph 2; with any pay-TV costs payable by the exhibitor). The broadcast coverage must be simultaneous and shown in its entirety (paragraphs 4 and 7) and no sponsors that are not FIFA marketing affiliates may be involved. An exception may be made for local sponsors if they are not competitors of FIFA marketing affiliates (paragraph 5). Public viewing exhibitions are considered non-commercial⁵⁹ when no admission charges are made (paragraph 10) and no sponsors are involved (paragraph 5). Non-commercial organisers are not obliged to pay any licence fees but are subject to the same (strict) conditions concerning the choice of match broadcast coverage (paragraph 2) and the form of the coverage (paragraph 7).

In Germany, GEMA⁶⁰ manages – irrespective of any obligation to obtain a licence from FIFA – the rights concerning any music played during a public viewing exhibition as well as the rights of journalists and sports reporters of which the management has been assigned to it by the collecting society VG Wort. It draws a distinction between public exhibition that does not have the character of an event – in pubs, retail stores or similar locations –, which is subject to a lower rate, and public exhibition that does have the character of an event, is advertised separately from the normal business operation, involves additional services and is often accessible against payment of an admission charge. The relevant rate is payable on a case-by-case basis.

From the copyright point of view, it needs to be pointed out that the FIFA regulations do not have the force of law and that any claims are always determined by reference to domestic law. In Germany, section 87(1)(3) of the Copyright Act gives broadcasters the exclusive right to allow the public to view or listen to their programmes against payment of an admission charge. However, this right is transferable under section 87(2) of the Copyright Act, so FIFA can in principle exploit the television rights after they have been acquired. In this case too, however, it follows from the wording of the provision that a public viewing exhibition may only be prohibited if it is accessible “against payment of an admission charge”, which is to be understood as the direct payment for admission to an event,⁶¹ and any indirect payment, for example charges added to prices of food and drink. It is the predominant view, however, that this does not include the involvement of a sponsor,⁶² so the obligation to obtain a licence under the FIFA regulations goes beyond what can be demanded under the German Copyright Act. A public viewing exhibition organised without making an admission charge cannot be effectively prohibited under section 87(1)(3) of the Copyright Act.

57) On public performances as far as UEFA is concerned, see <http://de.uefa.com/newsfiles/533215.pdf>. The discussion here is limited to the rules established by FIFA and GEMA.

58) Commercial public viewing exhibitions: http://www.fifa.com/mm/document/tournament/loc/01/12/91/88/fwc2010_regulations_for_commercial_public_viewing_exhibitions_100330.pdf

59) Non-commercial public viewing exhibitions: http://www.fifa.com/mm/document/tournament/loc/01/12/91/96/fwc2010_regulations_for_non-commercial_public_viewing_exhibitions_100330.pdf

60) Public viewing exhibition rates for the 2010 World Cup: [http://www.gema.de/presse/pressemitteilungen/pressemitteilung/?tx_ttnews\[tt_news\]=912&tx_ttnews\[backPid\]=76&cHash=5bf44441fc](http://www.gema.de/presse/pressemitteilungen/pressemitteilung/?tx_ttnews[tt_news]=912&tx_ttnews[backPid]=76&cHash=5bf44441fc)

61) F. Reinholz,, *op. cit.*, p. 366.

62) *Ibid.*, with further references.

6. Ad-skipping and Hybrid TV

Broadcasters' rights may also be affected due to unfair competition. There are parallels here to the core copyrights and related rights granted broadcasters (to protect their investments), to which we shall now turn our attention.

6.1. Skipping commercial messages

In the context of "traditional" television, the BGH had to pass judgment on a case in 2004 involving a complaint by a private, advertising funded television station, which had sued the manufacturer of a device programmed to switch automatically at the beginning of a commercial break to another television channel not interrupted by advertising.⁶³ The plaintiff considered this practice a breach of section 1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act). In particular, it claimed, it constituted an impediment to its business and a "general disruption of the market". The court ruled that the plaintiff had not been actually impeded in any way as the defendant neither exerted direct influence on its transmissions nor the commercials they contained. The device merely offered viewers the possibility of cutting out the advertising. The court also denied that there had been a general disruption of the market because, although the distribution of the device made its economic activity more difficult, the plaintiff was not yet threatened to an extent that jeopardised its livelihood.

6.2. Hybrid TV

So-called Hybrid TV is a technology that is mainly available from manufacturers of reception devices (television sets, set-top boxes) and permits both the reception of programmes broadcast by radio waves and of content available via broadband Internet using the Internet Protocol (IP).

In particular, Hybrid TV makes it possible to create an "Internet framework" for displaying television signals on-screen. This can be used to display different types of content that will normally have been specially adapted for this purpose. The non-broadcast content that the user can access is always controlled by the company that makes the application available through the use of the end devices it markets. This control is mainly possible by pursuing a so-called "walled-garden" policy, in which case it is rendered impossible to switch to the open Internet. There are, however, end devices that impose virtually no restrictions on this, i.e. involve no or very little control.

The incorporation of access to IP-based content/applications not controlled by the manufacturer is, among other things, the subject of a standard accepted on 1 July 2010 by the European Telecommunications Standards Institute (ETSI) in version 1.1.1 of the HbbTV⁶⁴ specification.⁶⁵ In the broadcasters' opinion, its importance mainly lies in the fact that they can program applications that permit the retrieval of content via media libraries and/or are suitable for the supplementary display of (audiovisual) commercial communication. The question of what information the user can retrieve – when this program is employed – can accordingly be decided by different bodies.

Hybrid TV also raises both competition and copyright related issues with regard to broadcasters' rights. In Germany, television stations regard as a breach of the Unfair Competition Act the conduct of an Internet provider that in response to an enquiry from a user places its content next to the actual television picture or even superimposes it on it. They claim that the Internet provider unfairly exploits its competitors' prior outlays (investment in infrastructure, setting and developing the signal range) and is thus in breach of section 1 of the Unfair Competition Act. This view can be countered by reference to a BGH judgment in 2004 establishing that unfair competition can always be ruled out when the user himself/herself brings about the situation complained of

63) BGH, judgment of 24 June 2004 (Case I ZR 26/02), available at: <http://juris.bundesgerichtshof.de/cgi-bin/recht-sprechung/document.py?Gericht=bgh&Art=en&sid=95f0c7769655158b8ee1219b652f0b18&nr=30179&pos=0&anz=1>. Cf. P. Strothmann, IRIS 2004-7: 7/11.

64) www.hbbtv.org

65) ETSI TS 102 796, http://www.etsi.org/deliver/etsi_ts/102700_102799/102796/01.01.01_60/ts_102796v010101p.pdf

by taking an autonomous decision.⁶⁶ This is the case here: it is entirely up to the user to decide to what extent he/she makes use of the services of an Internet provider in addition to receiving the actual television signal.

Broadcasters' rights enshrined in section 87 of the German Copyright Act may also be affected by the new technologies. Here, too, in the rightsholders' opinion the Internet provider is easily able to turn the television broadcasters' prior investments to its own advantage. However, as superimposing Internet-based content on the television signal does not result in its being changed or copied, retransmitted or made publicly accessible or the subject of a public performance, the protection afforded by section 87 does not apply. Broadcasters are therefore clearly endeavouring to bring about a widening of the scope of the relevant provision that would result in also giving protection to a "further exploitation" involving a new technical development.⁶⁷

7. Interim conclusions: new services and legal challenges

The discussion of current economic and technical developments and their legal classification in the previous parts of this section has shown that the assessment is not always entirely clear.

It is obvious that the unlawfulness or, indeed, lawfulness of new business models based on the audiovisual content distributed by broadcasters first of all depends on their actual technical features – including in the case of functionally comparable services. Secondly, the decisive factor is the scope of the provisions protecting the broadcast signal (and the exceptions to these provisions!) in an individual case and, in particular, what rights are actually affected. Even within one legal system, but even more when a comparative analysis is made of different systems, it is in the details that differences emerge. For example, although European Union directives have harmonised national provisions in respect of individual issues – including bringing about a minimum level of protection – the nature and/or interpretation of rights in individual states and/or the limits imposed on them may differ from one another, which may be the reason why the impression is gained that the protection is (has become) "porous".

III. The Current Legal Discussion at the International Level

At the international level, the existing level of protection for broadcasters is felt to be problematic. In 1996, the Performances and Phonograms Treaty, a WIPO treaty in favour of other holders of copyright-related rights, was adopted. Its clear purpose was to take account of the challenges expected as a result of digitisation. Broadcasters were not included at that time, which explains why great efforts continue to be made to push through amendments to existing agreements and treaties and/or create new instruments.

The Council of Europe Committee of Ministers recently decided that at least the Council of Europe should strive to bring about internationally binding rules on the protection of broadcast signals in order to be able to safeguard audiovisual content against piracy, and it instructed the Steering Committee on the Media and New Communication Services to carry out the necessary work.⁶⁸ This initiative was taken after an international treaty on neighbouring rights for broadcasters (the so-called WIPO Broadcasting Treaty) had been discussed under the auspices of WIPO for a long time but had come to a standstill without any appreciable results in 2007 when the negotiations were

66) BGH, judgment of 24 June 2004 (Case I ZR 26/02) – Advertising filter, see fn. 53.

67) Cf. V. Kitz, "Hybride Empfangsgeräte – Prüfstein für eine moderne Medienordnung", in Kleist/Rossmann/Scheuer (eds.), *Festschrift aus Anlass des 20-jährigen Bestehens des Instituts für Europäisches Medienrecht e. V. (EMR)*, Vol. 40 of the EMR Series, Baden-Baden 2010 (soon to be published).

68) Cf. <http://www.urheberrecht.org/news/3239/> and <http://www.unwatched.org/node/796>

broken off because of insurmountable differences of opinion on fundamental issues.⁶⁹ The aim of the consultation carried out, in which the European Community and its member states (as well as the then applicant countries Bulgaria and Romania) were involved and issued statements,⁷⁰ was to bring about the revised, modernised and balanced protection of broadcasters in view of the complex developments in the area of the communication and information technologies.

The Council of Europe's Steering Committee initially decided to set up a group of experts, which then took stock of the rules of protection applying under international and European law. With reference to a Committee of Ministers recommendation adopted in 2002,⁷¹ the group reached the conclusion in 2008 that there was a need for a stronger initiative. In the course of 2009, the Steering Committee took important preliminary decisions concerning this initiative, among other things the setting up of an ad hoc advisory group, which was to begin discussions on a Council of Europe convention for the protection of broadcasting organisations' neighbouring rights. At a consultation meeting held at the end of January 2010, the group identified several aspects that would have to be taken into account in the creation of a binding instrument.⁷²

Summarising the state of the discussion at the level of WIPO and in the context of the new Council of Europe initiative, the key aspects include the following:

- *Clear definitions:* There is general agreement on the need to clarify what activities of broadcasters should enjoy rights protection and how signals should be treated before they are broadcast. The term "broadcasting" should be defined in a technology-neutral way and a signal-based approach should be adopted.
- *Clarification of the time aspect with regard to the object of protection:* According to one opinion, the strictly signal-based approach logically means that a treaty based on it would not cover any uses to which the signal is put after it has been broadcast as these uses no longer relate to the signal but to the broadcast and recorded content. In our opinion, however, the effectiveness of the protection of the signal also requires the inclusion of actions undertaken after the recording has been made – and the inclusion of the relevant copyright-related rights. "Signal-based protection" should be understood to mean that the compilation of the content and its transmission result in its protection.
- *Clarification of the area of application as far as content is concerned:* According to the discussions, linear services are to be covered irrespective of the methods and platforms via which they are distributed. However, in the WIPO negotiations no agreement was reached on whether a future treaty should also refer to webcasting. Broadcasters called for exclusive rights for programmes transmitted over the Internet, but critics saw in this a threat to freedom of expression and information on the Internet. The European Community was moving towards having simulcasting at any rate fall within the scope of the protection provided.⁷³ There is disagreement in particular on whether on-demand services should be covered. One view is that they are already protected under other provisions, for example by the copyright protection of databases or the protection of conditional access services. This view is countered by reference to the fact that the distribution of the signal provided by the broadcasters serves the purpose in both cases of transmitting content to the user, so that no distinction should be drawn with regard to the object of protection.

69) Non-paper on the WIPO Treaty on the Protection of Broadcasting Organisations, available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf

70) The statement of 20 July 2006 is available at: http://ec.europa.eu/internal_market/copyright/docs/wipo/wipo-broadcasting2006_en.pdf

71) Recommendation of the Committee of Ministers to member states on measures to enhance the protection of the neighbouring rights of broadcasting organisations, Rec(2002)7, 11 September 2002, available at: http://www.ebu.ch/CMSimages/en/leg_ref_coe_r2002_7_nr_110902_tcm6-4398.pdf

72) The report of the meeting on 22 March 2010 is available at: http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/MC-S-NR_2010_Misc1rev%20EN%20Meeting%20Report.pdf

73) Cf. the proposal of the European Community and its member states of 24 June 2003, available at: http://ec.europa.eu/internal_market/copyright/docs/wipo/wipo-broadcasting_en.pdf

- *Object of protection:* The elements on which the 1961 Rome Convention and other international treaties are based should be included here, in particular investments carried out, programme planning and organisation, preparation for public reception, liability for rights acquired and the publisher's responsibility.
- *Scope of protection:* A binding instrument should grant broadcasters exclusive rights, comparable to the creators' authorisation rights, with regard to the retransmission, public performance (against an admission charge), recording, reproduction of recordings, making publicly accessible, further transmission and distribution of their protected broadcasts. Here, too, the individual rights should be defined in a technology-neutral way.
- *Pre-broadcast signals:* The need to protect such signals (for example raw data or content that is transferred but not broadcast) is in principle recognised. If this content were not protected, third parties could easily appropriate it and claim rights in it in some form or other.
- *Obligation to protect technical rights management measures:* No agreement on this was reached in the WIPO negotiations. Supporters argued that this was a fundamental aspect that clearly showed the need for a new instrument. Broadcasters had no obligation to introduce technical measures to manage their rights but if they did so those measures also had to be protected. Others held the view that this would make it harder for the general public to access information already in the public domain. Moreover, they pointed out, it was to be feared that the mere fact that this protection was enshrined in law would result in the more extensive use of technical measures.
- *Duration of protection:* With regard to the duration of the protection afforded, no agreement could be reached either in the WIPO negotiations or in the ad hoc group's initial deliberations. Those holding the view that the signal should only be protected until the time of the recording logically regarded the introduction of a specified duration as superfluous because only simultaneous transfers would be covered in any case. The proposals of the supporters of the principle of protection beyond the time of the recording varied between 20 and 50 years.
- *Exceptions to and limitations on rights:* In the WIPO negotiations, no agreement was reached on the arrangements concerning exceptions and limitations. The consultation at the Council of Europe came out against drawing up an exhaustive list and in favour of employing the three-step test approach. In the WIPO negotiations, the European Union unequivocally supported drawing up an exhaustive list of possible exceptions and limitations.⁷⁴

IV. Conclusions and future outlook

The controversies surrounding personal video recorders and portals illustrate with respect to all new services how different national ways of addressing issues can be. On the one hand, PVR services (offered by providers that are independent of television broadcasters) are generally regarded as unlawful in Europe (Wizzgo in France and *Shift.TV* and *save.tv* in Germany), whereas in the United States the same service (offered by a cable TV operator, Cablevision) was considered lawful. On the other hand, in the case of the legal disputes concerning the various types of portal it is clear that a big distinction has to be drawn between cases where the user is simply guided to the broadcasters' (original) services (*tv-replay.fr*) and those where the "service" is much more extensive, especially because it enables unlawfully produced copies of programmes to be made more or less directly accessible (Newzbin). The reason for a portal being able to avoid a verdict of illegality, with the result that the broadcasters cannot take any action against it, is sometimes to be found in the exceptions for such services contained in provisions outside copyright law that limit their liability under certain circumstances. A great deal depends in an individual case on how much and, in particular, how promptly the providers co-operate with the rightsholders (see on the

74) The European Union's position on this can mainly be seen in the wording of the InfoSoc Directive 2001/29/EC.

one hand the U.S. case *Viacom v. YouTube* and on the other hand the Italian case of *Mediaset v. YouTube*). Finally, it has become clear that the effectiveness of the protection also depends on the systematic arrangements for (and interpretation of!) exceptions in favour of third parties – in this area, the greater harmonisation of the legal approaches seems just as difficult as it is necessary. An example that might be mentioned here is the view still held today by a German court of appeal that – with reference to a view expressed by the legislature and irrespective of the enormous increase in the capacity of broadband Internet access for private individuals and of the storage media they possess – the core of the protection of broadcasters is not protection against (private) copying.

The discussion concerning the legal protection of broadcasters and the need to adapt it to current challenges shows that extremely complex questions are involved. They are also complex given the need to formulate any changes to neighbouring rights in a way that ensures that the protection granted to creators and other rightsholders is not adversely affected. The reform debate will be continued this year, both at the Council of Europe at a first (regular) meeting of the Steering Committee's ad hoc advisory group⁷⁵ scheduled for September and by WIPO, whose Standing Committee on Copyright and Related Rights intends to consider among other things a study produced on this subject at its meeting this November.⁷⁶

To be continued! (At any rate in the IRIS eNewsletter – <http://merlin.obs.coe.int/newsletter.php>)

75) Cf. http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/default_en.asp

76) Cf. also on the partial results of this study currently available: http://www.wipo.int/pressroom/en/articles/2010/article_0021.html