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## THE LEGAL PROTECTION OF EUROPEAN BROADCASTERS – CHALLENGES POSED BY NEW SERVICES

*Peter Matzneller\**

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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. This impacts on all electronic media, but particularly on broadcast services, under the European definition. 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.<sup>1</sup> It is worth briefly mentioning the considerable degree of heterogeneity that characterises these provisions. This applies for example to the definition of broadcasting - in the European rather and U.S. sense - 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 (as in the U.S.) 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

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<sup>1</sup> See Lucie Guibault & Roy Melzer, *The Legal Protection of Broadcast Signals, 2004-10 IRIS PLUS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY* (2004), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus10\\_2004.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2004.pdf.en).

mainly leave out of account those transmissions preceded by an individual user 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.<sup>2</sup> 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).<sup>3</sup> 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 European 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 broadcaster's legal protection is also determined by the nature of the authorisation rights<sup>4</sup> granted to copyright holders and by the extent to which reference is made to the latter.<sup>5</sup> 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.

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<sup>2</sup> See the overview of the individual measures in the ZOOM part of this IRIS *plus*.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> See A. Blocman, *Conseil d'Etat Cancels the Conventions of Two Terrestrially Broadcast Digital TV Channels*, 2008-5 IRIS PLUS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, 7-8 (2008).

## **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.

### *A. 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. 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.

#### a. 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 2009<sup>6</sup> 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),<sup>7</sup> 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/EEC<sup>8</sup> it related to the retransmission of

<sup>6</sup> Landgericht Hamburg [LG] [Hamburg Regional Court] Apr. 8, 2009 (Ger.), *available at* <http://www.landesrecht.hamburg.de/jportal/portal/page/bshaprod.psml;jsessionid=D0EE59E4F4B727BF37EAB3766448FAB8.jpj4?showdoccase=1&doc.id=KORE220512009&st=ent>.

<sup>7</sup> Urheberrechtsgesetz vom 9. September 1965 [Urheberrechtsgesetz] [German Copyright Law], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBl. I] at 1273, last amended by Art. 2 Abs. 53 (Article 2, ¶ 53), Dec. 22, 2011, BGBl. I at 3044 (Ger.).

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 11bis(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 system 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.<sup>9</sup> 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.

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.<sup>10</sup> 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.<sup>11</sup>

#### b. 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

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<sup>8</sup> See *id*; Übergangsregelung bei Umsetzung der Richtlinie 93/98/EWG [Transitional provision in implementation of Directive 93/98/EEC] (1998) (especially in context of the cable retransmission right, see P. Bernt Hugenholtz, *SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive*, 2009-8 IRIS PLUS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, (2009), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus8\\_2009.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_2009.pdf.en).

<sup>9</sup> German Patent and Trade Mark Office, Arbitration Board, Case Sch-Urh 07/08 (settlement proposal), Feb. 22, 2010.

<sup>10</sup> Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 18, 2010 (Fr.), available at [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2941](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2941).

<sup>11</sup> 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.

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.<sup>12</sup>

Also in the United Kingdom, the High Court recently delivered a judgment on the Usenet indexing website Newzbin.<sup>13</sup> 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 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.<sup>14</sup>

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.<sup>15</sup> In

<sup>12</sup> See *Regina v. Rock & Overton*, Crown Court at Gloucester, Feb. 9, 2010 (Eng.), available at [http://www.obs.coe.int/oca\\_publ/legal/reginavsrockoverton.pdf](http://www.obs.coe.int/oca_publ/legal/reginavsrockoverton.pdf); see also David Goldberg, *TV Links Acquitted of Copyright Theft Charges*, 2010-4:1/26 IRIS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY (2010), available at <http://merlin.obs.coe.int/iris/2010/4/article26.en.html>.

<sup>13</sup> See *Twentieth Century Fox Film Corporation & Anor v. Newzbin Ltd* [2010] EWHC (Ch) 608 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Ch/2010/608.html>.

<sup>14</sup> Cf. Landgericht Hamburg [LG] [Hamburg Regional Court] Jan. 28, 2009 (Ger.), available at [http://openjur.de/u/30652-5\\_u\\_255-07.html](http://openjur.de/u/30652-5_u_255-07.html) (Comparable situation in Germany, 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 and considerably facilitates the improper use of the Usenet).

<sup>15</sup> See JURGEN ENSTHALER, *HANBUCH URHEBERRECHT UND INTERNET (COPYRIGHT AND INTERNET GUIDE)* 3 B 49 (2d. ed. 2010). 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).

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,<sup>16</sup> 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.<sup>17</sup>

## 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.).<sup>18</sup>

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.

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 tvtv.de that television broadcasters may demand a licence fee for the EPG use of their programming information. With this decision, the OLG

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

<sup>17</sup> Friedrich Radmann, *Kino.ko – Filmgucken kann Sünde sein*, 54 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [Journal of Copyright and Media Law] 387 (2010).

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



confirmed the lower court's judgment and rendered it final.<sup>19</sup> VG Media had demanded that tvtv.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 tvtv.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 sections 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)).<sup>20</sup> 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.

### 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. First, television broadcasters have their own so-called “channels” on these websites; second, the portals employ technical measures to mark content in order to meet their obligations to protect the copyright and related rights of third parties.<sup>21</sup>

<sup>19</sup> Compare VG Media v. tvtv.de, Landgericht Leipzig [LG Leipzig] [Leipzig Regional Court] May 22, 2009 (Ger.), available at <http://openjur.de/u/31830.html>, and VG Media v. tvtv.de, Oberlandesgericht Dresden [OLG Dresden] [Dresden Appeals Court] Dec. 15, 2009 (Ger.), available at <http://openjur.de/u/32285.html> with VDZ v. VG Media, Landgericht Köln [LG Köln] [Cologne Regional Court] Dec. 23, 2009 (Ger.), available at <http://openjur.de/u/140813.html>.

<sup>20</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 19, 2009 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d9b548f83e71a11d7287655e9a513e12&nr=52132&pos=0&anz=1>.

<sup>21</sup> For other instances of intermediary liability, especially (preventive) filtering obligations, see Christina Angelopoulos, *Filtering the Internet for Copyrighted Content in Europe*, 2009-4 IRIS PLUS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY 3 (2009), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus4\\_2009.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2009.pdf.en); see also Francisco Javier

a. Mediaset v. YouTube

The Tribunale Ordinario di Roma (Rome District Court)<sup>22</sup> 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.

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.<sup>23</sup> The agreement provided 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.

b. Viacom v. YouTube

On 23 June 2010, a court in New York<sup>24</sup> 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).<sup>25</sup> 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,<sup>26</sup> and YouTube had met those obligations. Viacom announced its intention to appeal against the decision.

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Cabrera Blázquez, *User-Generated Content Services and Copyright*, 2008-5 IRIS PLUS, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY 5 (2008), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus5\\_2008.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus5_2008.pdf.en).

<sup>22</sup> Tribunale Ordinario di Roma, 16 dicembre 2009 (It.) available at <http://www.tgcom.mediaset.it/res/doc/sentenzatribunale.pdf>.

<sup>23</sup> See Press Release, Società Italiana degli Autori ed Editori, SIAE and YouTube Sign a License Agreement (July 28, 2010), available at [http://www.siae.it/edicola.asp?click\\_level=0500.0100.0200&view=4&open\\_menu=yes&id\\_news=9444](http://www.siae.it/edicola.asp?click_level=0500.0100.0200&view=4&open_menu=yes&id_news=9444).

<sup>24</sup> Viacom Int’l. Inc. v. YouTube, Inc., 718 F.Supp. 2d (S.D.N.Y. 2010).

<sup>25</sup> Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (2006).

<sup>26</sup> 17 U.S.C. §§ 512(c), (m), (n) (2006). See also Landgericht Hamburg [LG Hamburg] [Hamburg Regional Court], April 20, 2012 (Ger.), available at <http://gmnrccio.wordpress.com/2012/04/29/hamburg-district-court-gema-v-youtube-english-translation>.

## B. *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.

### 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 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.

#### a. ProSiebenSat1 and Others v. Shift.TV

In the cases of *ProSiebenSat1 v. Shift.TV*,<sup>27</sup> *RTL v. save.tv*<sup>28</sup> and *RTL v. Shift.TV*<sup>29</sup> (all decisions dating from 22 April 2009), the Bundesgerichtshof (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), second 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

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<sup>27</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2009 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b2ddd48d74f4aa0eea54f8d38aaf2ab0&nr=48391&pos=1&anz=2>.

<sup>28</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2009 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7f170b3f18d677efe88700097d51e60b&nr=48390&pos=1&anz=2>.

<sup>29</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2009 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=db97285140686c9068a05b3a52637261&nr=48686&pos=1&anz=2>.

view, is whether the producer in the case in issue merely acted “as a necessary tool”<sup>30</sup> – 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.”<sup>31</sup> 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.<sup>32</sup> In the second case, the consequence was that neither the exception for private use pursuant to section 53(1), first sentence, of the Copyright Act nor the limitation laid down in section 53(1), second sentence applied, 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 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.”<sup>33</sup> 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

<sup>30</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 25, 1999 (Ger.), *available at* <http://lexetius.com/1999,808>.

<sup>31</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 1998 (Ger.), *available at* [http://www.online-recht.de/vorent.html?BGH981210+auswahl=1&st\\_num=1&case=-i&pattern=OLG+D%FCsseldorf&mark=](http://www.online-recht.de/vorent.html?BGH981210+auswahl=1&st_num=1&case=-i&pattern=OLG+D%FCsseldorf&mark=)

<sup>32</sup> It is worth comparing this judgment with a decision of the Munich Court of Appeal concerning a case of copying “in the real world”. *See* Oberlandesgericht [OLG] [Munich High Regional Court], 29 U 5494/02, Mar. 20, 2003, *Zeitschrift für Urheber – und Medienrecht* 911, 2004 (Ger.). 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.

<sup>33</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] July 8, 1993 (Ger.) *available at* <http://dejure.org/dienste/vernetzung/rechtsprechung?Text=I%20ZR%20124/91>.

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.<sup>34</sup> 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)<sup>35</sup> 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).<sup>36</sup> 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”.<sup>37</sup> 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.

#### b. Twentieth Century Fox and others v. Cablevision

In the United States, the Supreme Court<sup>38</sup> on 29 June 2009 confirmed an appeal court’s judgment<sup>39</sup> 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 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 Appeals 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

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<sup>34</sup> See *supra* note 29.

<sup>35</sup> Jugendmedienschutz-Staatsvertrag [JMStV] [Inter-State Agreement on Youth Protection in the Media] April 1, 2010 (Ger.), available at: [http://www.kjm-online.de/files/pdf1/\\_JMStV\\_Stand\\_13\\_RStV\\_mit\\_Titel\\_english.pdf](http://www.kjm-online.de/files/pdf1/_JMStV_Stand_13_RStV_mit_Titel_english.pdf).

<sup>36</sup> Gesetz gegen den unlauteren Wettbewerb [UWG] [The Act Against Unfair Competition], March 3, 2010, BGBl. I at 254 (Ger.) available at [http://www.gesetze-im-internet.de/englisch\\_uwg/the\\_act\\_against\\_unfair\\_competition.pdf](http://www.gesetze-im-internet.de/englisch_uwg/the_act_against_unfair_competition.pdf).

<sup>37</sup> See *supra* note 29.

<sup>38</sup> *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S.Ct. 2890 (2009).

<sup>39</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

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.

c. M6 and Others v. Wizzgo

The Paris Tribunal de Grande Instance (TGI, a regional court) came to a different conclusion<sup>40</sup> 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. 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 legislation<sup>41</sup> concerning the extent to which a statutory ban on “intelligent recording software” would be conceivable.

C. *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.

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

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<sup>40</sup> Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Aug. 6, 2008 (Fr.), *available at* <http://www.foruminternet.org/specialistes/veille-juridique/jurisprudence/IMG/pdf/tgi-par20080806.pdf>; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 25, 2008 (Fr.), *available at* <http://www.juriscom.net/documents/tgiparis20081125-Wizzgo.pdf>.

<sup>41</sup> Cf. Nicola Lamprecht-Weissenborn, “*Second Basket*” of Copyright Reform Approved, 2007-10: 9/15 IRIS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY (2007), *available at* <http://merlin.obs.coe.int/iris/2007/10/article15.en.html>.

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 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.<sup>42</sup> Geographic markets are separated from one another using geolocation technology. Joost is financed by advertising.

## 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.<sup>43</sup> 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.<sup>44</sup> For these reasons, the BGH granted the plaintiff's application for an injunction concerning the distribution and advertising of the software.

### D. *Technical Measures for Protection Against Unauthorised Use and the Making of Private Copies*

#### 1. Digital Rights Management (DRM)/Technical Protection Measures (TPM)

<sup>42</sup> *About Joost.com*, JOOST.COM, <http://www.joost.com/about/joost/> (last visited Apr. 15, 2012). By the publishing date of this article, Joost was no longer in service.

<sup>43</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 15, 2009 (Ger.) available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f76fc892eefcdc29a6d8736952874ce8&nr=48631&pos=0&anz=1>.

<sup>44</sup> *Id.* 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.

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 to protect their signals are interesting. For example, through use of the CI Plus technology<sup>45</sup> 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).<sup>46</sup> 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.<sup>47</sup>

## 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.<sup>48</sup> 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.<sup>49</sup> Protection mechanisms, including

<sup>45</sup> COMMERCIAL INTERFACE PLUS (Apr. 15, 2012), <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).

<sup>46</sup> Press Release, Consumer Rhineland-Palatinate, IAAF World Cup in HDTV: Consumer Sees HD + and CI + is Highly Critical (Aug. 3, 2009) available at <http://www.verbraucherzentrale-rlp.de/UNI133462682228733/link591451A.html> (Critics also complain that it is possible to extensively monitor what the end user does with the programmes).

<sup>47</sup> Oberlandesgericht Frankfurt [OLG Frankfurt] [Frankfurt Appeals Court], Case no. 6 U 7/03, June 5, 2003 (Ger); see also Ingo Beckendorf, *Illicit Decoding of Conditional Access Services*, 2003-8:14/28 IRIS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY (2003), available at <http://merlin.obs.coe.int/iris/2003/8/article28.en.html>.

<sup>48</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 28, 2006, Bull. civ. I, No. (Fr.), available at <http://www.foruminternet.org/telechargement/documents/cass20060228.pdf>.

<sup>49</sup> For a further discussion of rights management systems and their relationship with private copies, see Francisco Javier Cabrera Blázquez, *Digital Rights Management Systems (DRMs): Recent Developments in Europe*, 17.1 MEDIA L. & POL’Y 2 (2007).



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.<sup>50</sup>

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 Code<sup>51</sup> 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 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.<sup>52</sup>

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.<sup>53</sup> 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.

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<sup>50</sup> Décret 2006-1763 du 23 décembre 2006 relatif à la répression pénale de certaines atteintes portées au droit d'auteur et aux droits voisins [Decree No. 2006-1763 of December 23, 2006 on the Criminal Punishment of Certain Infringements of Copyright and Related Rights], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Dec. 30, 2006, p. 20161.

<sup>51</sup> Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law No. 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 1, 1992, (amended by Loi 97-283 du 27 mars 1997 [Law No. 97-283 of March 27, 1997]).

<sup>52</sup> Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, 5th Chamber, Sept. 5, 2007 (Fr.), *available at* <http://www.juriscom.net/documents/caaixenprovence20070905.pdf>.

<sup>53</sup> See 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, 2001 O.J. (L 167) 10.

The Kammergericht Berlin (Berlin Court of Appeal) agreed with the lower court and dismissed the claim,<sup>54</sup> 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.<sup>55</sup> 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.

#### E. *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.<sup>56</sup> 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.

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 (UEFA)<sup>57</sup>). In the case of a party held by an exclusively private group of people, with guests who know one another, no

<sup>54</sup> Kammergericht Berlin [KG][Berlin Court of Appeal] Apr. 14, 2009 (Ger.), *available at* [http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/1ckl/bs/10/page/sammlung.psm?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](http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/1ckl/bs/10/page/sammlung.psm?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).

<sup>55</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 16/1828, (Ger.), *available at* <http://dipbt.bundestag.de/dip21/btd/16/018/1601828.pdf>, at 16.

<sup>56</sup> Fabian Reinholz, *Lizenzgebühren für Public Viewing?*, 6 KOMMUNIKATION & RECHT 364 (2010)(Ger.).

<sup>57</sup> On public performances as far as UEFA is concerned, *see* Union of European Football Associations, UEFA Public Viewing Terms and Conditions for matches of the UEFA European Football Championship 2008, *available at* [http://www1.uefa.com/MultimediaFiles/Download/Competitions/Finals08/68/63/77/686377\\_DOWNLOAD.pdf](http://www1.uefa.com/MultimediaFiles/Download/Competitions/Finals08/68/63/77/686377_DOWNLOAD.pdf). The discussion here is limited to the rules established by FIFA and GEMA.

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.<sup>58</sup> 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-commercial<sup>59</sup> 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, GEMA<sup>60</sup> 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,<sup>61</sup> 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,<sup>62</sup> so the

<sup>58</sup> See International Federation of Association Football (FIFA), FIFA Regulations for Public Viewing Exhibitions, *available at* [http://pt.fifa.com/mm/document/tournament/loc/01/12/91/88/fwc2010\\_regulations\\_for\\_commercial\\_public\\_viewing\\_exhibitions\\_100330.pdf](http://pt.fifa.com/mm/document/tournament/loc/01/12/91/88/fwc2010_regulations_for_commercial_public_viewing_exhibitions_100330.pdf).

<sup>59</sup> See International Federation of Association Football (FIFA), Non-Commercial Public Viewing Events of the 2010 FIFA World Cup South Africa, *available at* [http://www.fifa.com/mm/document/tournament/loc/01/12/91/96/fwc2010\\_regulations\\_for\\_non-commercial\\_public\\_viewing\\_exhibitions\\_100330.pdf](http://www.fifa.com/mm/document/tournament/loc/01/12/91/96/fwc2010_regulations_for_non-commercial_public_viewing_exhibitions_100330.pdf)

<sup>60</sup> Public viewing exhibition rates for the 2010 World Cup: <https://www.gema.de/presse/pressemitteilungen/presse-details/article/gema-bietet-sondertarif-zur-fussball-wm.html>

<sup>61</sup> Reinholz, *supra* note 56, at 366.

<sup>62</sup> *Id.* at 366.

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.

#### F. *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.

##### 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.<sup>63</sup> 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.

##### 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 HbbTV<sup>64</sup> specification.<sup>65</sup> In the broadcasters' opinion, its importance mainly lies in the fact that they can

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<sup>63</sup> Bundesgerichtshof [BGH] {Federal Court of Justice} June 24, 2004 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=95f0c7769655158b8ee1219b652f0b18&nr=30179&pos=0&anz=1>.

<sup>64</sup> HBBTV (July 16, 2012), <http://www.hbbtv.org>.

<sup>65</sup> European Telecommunications Standards Institute, *Hybrid Broadcast Broadband TV*, ETSI TS 102 796 (June 2010).

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 by taking an autonomous decision.<sup>66</sup> 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.<sup>67</sup>

#### G. *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 of their actual technical features – including in the case of functionally comparable services. Second, 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".

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<sup>66</sup> See BGH, *supra* note 63.

<sup>67</sup> Cf. Kitz, *Hybride Empfangsgeräte – Prüfstein für Europäische Medienordnung* in: Festschrift aus Anlass des 20-jährigen Bestehens des Instituts für Europäisches Medienrecht, Kleist/Rossnagel/Scheuer (EMR), vol. 40, Baden-Baden 2010.

### 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. During the 22nd session of the Standing Committee on Copyright and Related Rights (SCCR) held in June 2011, the commitment on WIPO level towards the development of a new Treaty on the Protection of Broadcasting Organizations has been substantiated by the establishment of some detailed elements for a Draft Treaty on the Protection of Broadcasting Organizations.<sup>68</sup> These were grounded on an informal consultation meeting of the WIPO Members with observers on the protection of broadcasting organizations as well as technical experts (14-15 April 2011). The participants of the meeting agreed that the Chair should outline a non-paper on this issue for the 22nd session, considering the impact of technological – particularly digital – development as well as following a technology-neutral and signal-based approach. The Elements for a Draft Treaty on the Protection of Broadcasting Organizations delineate the objectives and define the scope and object of protection of the Treaty to come under negotiation. Such commitment has been further affirmed by the conclusions of the SCCR to its 23rd session held in November and December 2011,<sup>69</sup> during which the delegations of South Africa and Mexico presented a draft version of such Treaty and a work plan was drawn up.<sup>70</sup> In this plan the WIPO Members were called upon to comment the proposal of the named delegations, which should then revise the proposal at hand. The outcome of this should subsequently build the base of the next session. According to the work plan the scheduling of a Diplomatic Conference on the topic in due time shall be aimed at. Informal consultations on the protection of broadcasting organizations held during the 23rd session resulted in further statements of intent.<sup>71</sup> During the 24th session from 16-25 July 2012, the SCCR reaffirmed its commitment to work, on a signal-based approach, towards developing an international treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense. In this regard, the Committee adopted a text titled "Working document for a treaty on the protection of broadcasting organizations," which will constitute the basis of further text-based discussions.<sup>72</sup>

<sup>68</sup> WIPO, *Elements for a Draft Treaty on the Protection of Broadcasting Organizations*, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (May 30, 2011), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_11.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_11.pdf).

<sup>69</sup> WIPO, *Conclusions of the Twenty-Third Session of the Standing Committee on Copyright and Related Rights*, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Dec. 2, 2011), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_23/sccr\\_23\\_ref\\_conclusions.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf).

<sup>70</sup> WIPO, *Draft Treaty on the Protection of Broadcasting Organizations: Proposal Presented by the Delegations of South Africa and Mexico*, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Nov. 28, 2011), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_23/sccr\\_23\\_6.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_6.pdf).

<sup>71</sup> WIPO, *Report on the Informal Consultations on the Protection of Broadcasting Organizations: Prepared by the Chair of the Informal Consultations on the Protection of Broadcasting Organizations*, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Jan. 27, 2012), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_23/sccr\\_23\\_9.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_9.pdf).

<sup>72</sup> WIPO, *Conclusions of the Twenty-fourth Session of the Standing Committee on Copyright and Related Rights*, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Jul. 25, 2012), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_24/sccr\\_24\\_ref\\_conclusions.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_24/sccr_24_ref_conclusions.pdf). WIPO, *Draft Agenda for the Twenty-fifth*

The Council of Europe Committee of Ministers 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.<sup>73</sup> 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 broken off because of insurmountable differences of opinion on fundamental issues.<sup>74</sup> 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,<sup>75</sup> 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. On December 13, 2011, the Council of the European Union confirmed that the European Commission will be entitled to participate in these negotiations on behalf of the European Union as regards matters falling within the Union's competence and in respect of which the Union has adopted rules. The member states shall participate on their own behalf in the negotiations only in so far as matters that arise in the course of the negotiations fall within their competence.<sup>76</sup>

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,<sup>77</sup> 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. 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.<sup>78</sup>

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*Session: Prepared by the Secretariat, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Sep. 7, 2012),*  
[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_25/sccr\\_25\\_1\\_prov.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_1_prov.doc).

<sup>73</sup> *Steering Committee on the Media and New Communications Services* (Nov. 29, 2011-Dec. 2, 2011), *available at*  
[http://www.coe.int/t/dghl/standardsetting/media/cdmc/CDMC\(2011\)028\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/cdmc/CDMC(2011)028_en.pdf).

<sup>74</sup> *Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organisations* (Apr. 20, 2007), *available at*  
[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_s2/sccr\\_s2\\_paper1.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf)

<sup>75</sup> *See Submission to the WIPO on the Treaty for the Protection of Broadcasting Organisations, THE EUROPEAN COMMUNITY AND ITS MEMBER STATES AND THE ACCEDING STATES BULGARIA AND ROMANIA* (July 20, 2006),  
[http://ec.europa.eu/internal\\_market/copyright/docs/wipo/wipo-broadcasting2006\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/wipo/wipo-broadcasting2006_en.pdf).

<sup>76</sup> *Decision of the Council and of the Representatives of Governments on the Member States Meeting Within the Council on the Participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the Protection of the Rights of Broadcasting Organisations*, (Dec. 13, 2011),  
<http://register.consilium.europa.eu/pdf/en/11/st18/st18061.en11.pdf>; Press Release, Council of the European Union, 3139th Council Meeting, Environment (Dec. 19, 2011),  
[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/envir/127063.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/127063.pdf); Memorandum from the General Secretariat of the Council of the European Union to the Permanent Representatives of the Committee/Council (Dec. 8, 2011), *available at* <http://register.consilium.europa.eu/pdf/en/11/st18/st18062-ad01.en11.pdf>.

<sup>77</sup> *Recommendation Rec (2002)7 of the Committee of Ministers to Member States on Measures to Enhance the Protection of the Neighbouring Rights of Broadcasting Organisation, COUNCIL OF EUR., COMM. OF MINISTERS* (Sept. 11, 2002),  
[http://www.ebu.ch/CMSimages/en/leg\\_ref\\_coe\\_r2002\\_7\\_nr\\_110902\\_tcm6-4398.pdf](http://www.ebu.ch/CMSimages/en/leg_ref_coe_r2002_7_nr_110902_tcm6-4398.pdf).

However, the Steering Committee, on its meeting from March 27-30, 2012, agreed that the question of neighboring rights of broadcasting organizations will be put on hold awaiting developments within the European Union.<sup>79</sup> This is remarkable insofar as the Council of the European Union, as mentioned above, already confirmed in December 2011 the competences of the European Commission to participate in the respective negotiations.

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.<sup>80</sup> 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.
- *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.

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<sup>78</sup> *Consultation Meeting on the Protection of Rights of Broadcasting Organisations* (Jan. 28-29, 2010), available at [http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/MC-S-NR\\_2010\\_Misc1rev%20EN%20Meeting%20Report.pdf](http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/MC-S-NR_2010_Misc1rev%20EN%20Meeting%20Report.pdf).

<sup>79</sup> *Steering Committee on the Media and Information Society*, (Mar. 27-30, 2012), available at [http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI\\_2012\\_002Rev\\_Abridged\\_report\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI_2012_002Rev_Abridged_report_en.pdf).

<sup>80</sup> *Cf. WIPO, Proposal of the European Community and its Member States, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS* (June 24, 2003), [http://ec.europa.eu/internal\\_market/copyright/docs/wipo/wipo-broadcasting\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/wipo/wipo-broadcasting_en.pdf).



- *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.<sup>81</sup>

#### 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'

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<sup>81</sup> See *supra* note 53.

(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 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, both at the Council of Europe at a first (regular) meeting of the Steering Committee’s ad hoc advisory group<sup>82</sup> and by WIPO, whose SCCR – after having presented a study produced on this subject at its 21st session in November 2010<sup>83</sup> – proceeded to formulate a Draft Treaty on the Protection of Audiovisual Performances after having reached an agreement on the transfer of rights from the performed to the producer.<sup>84</sup>

## V. AMERICAN PERSPECTIVES\*\*\*

### A. Portals and Navigators

Section 512(c) of the Copyright Act attempts to balance the rights of copyright-owning broadcasters with the interests of the digital-consuming public. Commonly referred to as the “Safe Harbor” provision, this part of the Copyright Act is aimed at protecting online service providers (OSP’s) of digital content from liability of copyright infringement. In order to be free from liability, the OSP must not have knowledge that the material it posts is infringing, must not receive a financial

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<sup>82</sup> Cf. WIPO, Study on the Socioeconomic Dimension of the Unauthorized Use of Signals – Part III: Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organizations, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Aug. 4, 2010), [http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/MC-S-NR/default_en.asp)

<sup>83</sup> WIPO, Study on the Socioeconomic Dimension of the Unauthorized Use of Signals – Part III: Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organization, STANDING COMM. ON COPYRIGHT AND RELATED RIGHTS (Aug. 10, 2010), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_21/sccr\\_21\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_21/sccr_21_2.pdf).

<sup>84</sup> E.g., Press Release, World Intellectual Property Organization, Agreement on Transfer of Rights Paves Way to Treaty on Performers’ Rights (June 24, 2011), *available at* [http://www.wipo.int/pressroom/en/articles/2011/article\\_0018.html](http://www.wipo.int/pressroom/en/articles/2011/article_0018.html).

benefit directly attributable to the infringing activity, and must remove the content expeditiously if given warning by the copyright owner of infringing activity.<sup>85</sup>

While measures such as the safe harbor provision have been taken to protect OSP's, legislation has also been introduced that increases punishment for those who illegally transmit copyrighted material for financial gain.<sup>86</sup> In March 2011, the Intellectual Property Enforcement Coordinator (IPEC) suggested that criminal enforcement of copyright laws were not adequate because there were questions as to whether streaming copyrighted content constituted distribution of a copyrighted work or performance of those works. If the streaming constituted distribution it was considered a felony, while performance was merely classified as a misdemeanor.<sup>87</sup> On May 12, 2011, a bill was introduced in the Senate aimed at increasing penalties for criminal copyright infringement. Enacted on June 20, 2011, the bill expanded felony infringement to include public performance of a work.<sup>88</sup> Supporters of this bill argue that the law needs to be changed in order to keep up with advancements of technology. Since illegal streaming over the Internet has become more popular and indicates an infringement of the public performance right, supporters argue that the punishment for streaming should be classified as a penalty.<sup>89</sup> Opponents of the bill have argued that the law is too broad and is likely to be misapplied. Some worry that bloggers who post infringing YouTube videos on their sites may be targeted by the bill if they run the infringing material alongside advertising, which could be evidence of "private financial gain."<sup>90</sup>

### 1. Viacom v. YouTube

In April 2012, the Second Circuit reversed the district court's grant of summary judgment to YouTube in Viacom's suit against the user generated content web site.<sup>91</sup> The decision opened up the door for future litigation against YouTube by ruling that "a reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website."<sup>92</sup> Although the court reversed the grant of summary judgment, it reaffirmed that the safe harbor provisions of the DMCA protected YouTube so long as they removed infringing content expeditiously upon request.

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<sup>85</sup> 17 U.S.C. § 512(c)(1)(2006).

<sup>86</sup> S. 978, 112th Cong. § 1(a)(2011).

<sup>87</sup> U.S. Intellectual Property Enforcement Coordinator, *Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations*, March 2011, at 10, [http://www.whitehouse.gov/sites/default/files/ip\\_white\\_paper.pdf](http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf).

<sup>88</sup> See *supra* note 2; see also Brian T. Yeh, *Illegal Internet Streaming of Copyrighted Content: Legislation in the 112th Congress*, CONGRESSIONAL RESEARCH SERVICE, 7 (Aug. 29, 2011), [http://ipmall.info/hosted\\_resources/crs/R41975\\_110829.pdf](http://ipmall.info/hosted_resources/crs/R41975_110829.pdf).

<sup>89</sup> Yeh, at 9 (citing Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcommittee on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary, 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights)).

<sup>90</sup> Yeh, at 10 (citing Nathan Pollard, *Senate Panel Mulls Online Streaming Bill, Takes No Vote Amid Lingering Concerns*, June 15, 2011, BNA'S ELECTRONIC COMMERCE & LAW REPORT (quoting Senator Klobuchar)).

<sup>91</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 10-3270-cv (2d. Cir. April 5, 2012), available at [http://www.ca2.uscourts.gov/decisions/isysquery/c5792ca8-db37-4107-b0f7-67548a6a5a5f/1/doc/10-3270\\_10-3342\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/c5792ca8-db37-4107-b0f7-67548a6a5a5f/1/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/c5792ca8-db37-4107-b0f7-67548a6a5a5f/1/doc/10-3270_10-3342_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/c5792ca8-db37-4107-b0f7-67548a6a5a5f/1/hilite/).

<sup>92</sup> *Id.* at 2.

Some have analyzed that this decision will potentially cost Google/YouTube millions of dollars in future litigation.<sup>93</sup>

## 2. Aereo

In March 2012, a group of broadcasters sued Aereo, an unlicensed service that provides streaming television content to subscribers over the Internet onto personal mobile devices and tablets.<sup>94</sup> The broadcasters sought a preliminary injunction against Aereo and alleged that the Internet company infringed the broadcasters' public performance right and reproduction right and alleged that the new service constituted unfair competition. In July, 2012, Aereo received an early victory, as a federal district court judge denied the broadcasters' request for a preliminary injunction. The judge ruled that "although [the plaintiffs] have demonstrated that they face irreparable harm, they have not demonstrated that the balance of hardships decidedly tips in their favor."<sup>95</sup> On April 1, 2013, the Second Circuit Court of Appeals essentially affirmed the district court's decision, leaving the case to proceed to trial.

### B. Peer-to-Peer Technologies

The CyberSky TV decision mirrors the decision the United States Supreme Court handed down in *MGM v. Grokster* in regards to advertising infringing features.<sup>96</sup> In the 2005 case, the Supreme Court applied the rule of inducement of infringement to Grokster's activities. The court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties."<sup>97</sup> "The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations."<sup>98</sup>

Traditionally the inducement rule has been used to hold liable an indirect infringer. The District Court for the Southern District of California in *Perfect 10 v. Megaupload*, recently found that "creat[ing] distinct websites, presumably in an effort to streamline users' access to different types of media . . . [Megaupload] encourages and, in some cases pays its users to upload" copyrighted media.<sup>99</sup> The court found this action along with the knowledge of infringing activity taking place on its websites to be volitional conduct and denied Megauploads motion to dismiss.<sup>100</sup> The District

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<sup>93</sup> Sam Gustin, *Federal Court Revives Landmark \$1 Billion Viacom vs. YouTube Case*, TIME BUSINESS, April 6, 2012, <http://business.time.com/2012/04/06/federal-court-revives-landmark-1-billion-viacom-vs-youtube-case/?iid=biz-main-lede>.

<sup>94</sup> See Complaint for Injunctive Relief and Damages (Mar. 1, 2012), [http://www.nab.org/documents/newsRoom/pdfs/030112\\_Aereo\\_complaint.pdf](http://www.nab.org/documents/newsRoom/pdfs/030112_Aereo_complaint.pdf).

<sup>95</sup> American Broadcasting Companies, Inc. v. Aereo, Inc., (S.D.N.Y. 2012); see also Christina Warren, *Aereo Gets Early Win in Lawsuit Against Broadcasters*, MASHABLE ENTERTAINMENT, July 11, 2012, <http://mashable.com/2012/07/11/aereo-injunction-denied/>.

<sup>96</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913(2005).

<sup>97</sup> *Id.*, at 936-37.

<sup>98</sup> *Id.* at 937.

<sup>99</sup> *Perfect 10, Inc. v. Megaupload Ltd.*, 2011 U.S. Dist. LEXIS 81931 11-12 (S.D. Cal. 2011).

<sup>100</sup> *Id.* at 12-13.

Court for the Central District of California has issued permanent injunctions against websites such as torrentbox.com and isohunt.com after finding they induced infringement.<sup>101</sup> The court enjoined the sites from hosting or providing access to any copyrighted works and assisting users in reproduction of copyrighted works.<sup>102</sup>

### *C. Technical Measures for Protection Against Unauthorized Use and the Making of Private Copies*

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), part of which is embodied in section 1201 of the Copyright Act.<sup>103</sup> The DMCA concerns circumvention technological protections designed to restrict access to and preserve the right to copyrighted works.<sup>104</sup> The Act prohibits individual acts of circumvention that control access to a work<sup>105</sup>, manufacturing or offering devices that circumvent and provide access to a work<sup>106</sup> or designed for the purpose of circumventing a protection that protects an exclusive right of a copyright owner.<sup>107</sup>

In 2005, Sony BMG was using copy protected CDs to install digital rights management (DRM) technology onto personal computers (PC).<sup>108</sup> CDs purchased from Sony were installing a root kit on to the consumers' PCs that enacted a restrictive DRM including possible incompatibility with common devices used for playing the CDs.<sup>109</sup> This resulted in a public relations fiasco for Sony BMG. The means used to employ the software was criticized and eventually classified as "spyware" by Computer Associates, which provided tools for its removal.<sup>110</sup> This incident highlights the fragile balancing a company must take to protect their intellectual property without alienating the consumer.

### *D. Public Viewing Exhibitions – Section 110 of the Copyright Act*

Section 110 of the Copyright Act lists the types of performances and displays that are exempt from copyright infringement.<sup>111</sup> For example, food and drink establishments smaller than 3,750 gross square feet are among the exemptions under U.S. Copyright law, which explains why so many restaurants and bars are permitted to show sporting events. Food and drink establishments larger

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<sup>101</sup> See *Columbia Pictures Indus. v. Fung*, 2010 U.S. Dist. LEXIS 91169 (C.D. Cal. 2010).

<sup>102</sup> See *id.*, at 20-30.

<sup>103</sup> See 17 U.S.C. 1201 (2012).

<sup>104</sup> See §1201(a)(1)(A).

<sup>105</sup> §1201(a)(1).

<sup>106</sup> §1201(a)(2).

<sup>107</sup> §1201(b).

<sup>108</sup> See Molly Wood, *DRM this, Sony!*, CNET.COM, Nov. 10, 2005, [http://www.cnet.com/4520-6033\\_1-6376177-1.html](http://www.cnet.com/4520-6033_1-6376177-1.html).

<sup>109</sup> *Id.*

<sup>110</sup> See Suzi Turner, *CA Targets Sony DRM as Spyware*, ZDNET.COM, Nov. 8, 2005, <http://www.zdnet.com/blog/spyware/ca-targets-sony-drm-as-spyware/698>.

<sup>111</sup> See generally 17 U.S.C. § 110 (2006).

than 3,750 gross square feet are also exempt, although subject to restrictions regarding the size and number of televisions broadcasting the sporting event.<sup>112</sup>

When it comes to the Super Bowl, America's most-watched sporting event, the National Football League ("NFL") has sought to strictly enforce its copyright in recent years. In particular, the NFL has targeted churches that violated federal copyright law when hosting gatherings for the Super Bowl. For example, in 2007, the NFL warned Fall Creek Baptist Church in Indianapolis about hosting a Super Bowl party that it planned on showing on its projector to about 400 people.<sup>113</sup> Under the Copyright Act, venues other than food and drink establishments smaller than 2,000 gross square feet are exempt. Such venues that are larger than 2,000 gross square feet are also exempt so long as they comply with the same restrictions imposed upon food and drink establishments.<sup>114</sup> The NFL targeted churches in large part because a significant number of churches had projection screens exceeding the 55-inch maximum size restriction under the Copyright Act.<sup>115</sup>

On February 4, 2008, a bill was introduced in the United States Senate that sought to amend the Copyright Act to provide an exemption for non-profit organizations.<sup>116</sup> Although the bill was never enacted into law, it caused enough publicity for the NFL to reverse its hard stance in seeking to enforce its copyright against churches.<sup>117</sup> While the NFL has relaxed its stance against churches, these establishments still must comply with certain requirements in order to host Super Bowl parties without facing potential liability. First, churches may not charge admission for any of its guests. Second, churches must show the game on equipment that they use in the regular course of ministry at their venue. Finally, although not explicitly required, churches should refrain from advertising the event as a "Super Bowl" party since the NFL has trademarked the term.<sup>118</sup>

The NFL's aggressive efforts in enforcing its copyright have caused some to criticize the league for abusing and overstating its copyright protection under the current law.<sup>119</sup> Since the Copyright Act allows rights holders to define what constitutes infringement of their work, critics argue that it adds an incentive for a powerful organization such as the NFL to issue warnings about infringement that a court may deem to be fair use. Further, such organizations make it more

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<sup>112</sup> 17 U.S.C. § 110 (5)(B)(ii) (2006).

<sup>113</sup> Robert Marus, *Church Super Bowl Parties OK as Long as NFL Rules Followed, Experts Say*, ASSOCIATED BAPTIST PRESS, Jan. 29, 2010, <http://www.abpnews.com/content/view/4787/53/>.

<sup>114</sup> 17 U.S.C. § 110 (5)(B)(i) (2006).

<sup>115</sup> *Id.* See also Susan Fontaine Goodwin, *Avoid Penalties of Super Bowl Copyright Infringement*, COPYRIGHT COMMUNITY, Jan. 25, 2012, <http://www.copyrightcommunity.com/avoid-being-tackled-by-super-bowl-copyright-infringement>.

<sup>116</sup> S. 2591 110th Cong. § 1 (2008).

<sup>117</sup> Jacqueline L. Salmon, *NFL Reverses Call on Church Parties*, THE WASHINGTON POST, Feb. 21, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/20/AR2008022002772.html>.

<sup>118</sup> Goodwin, *supra* note 31.

<sup>119</sup> See Tyler McCormick Love, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. INTELL. PROP. L. 369 (2008).

confusing for the general public to realize what constitutes infringement.<sup>120</sup> As a result, innovation is stifled, as businesses are prevented from profiting from fair use of copyrighted material.<sup>121</sup>

#### *E. Recent Developments*

In 2011, the United State Senate introduced the Protect IP Act (PIPA), an anti-piracy bill.<sup>122</sup> Later in 2011, Representative Lamar Smith of Texas introduced PIPA's counterpart in the House, the Stop Online Piracy Act (SOPA).<sup>123</sup> SOPA's stated purpose was "[t]o promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes."<sup>124</sup> Both bills would permit the United States Justice Department and copyright-holders broader power in seeking injunctions against copyright-infringing websites. While PIPA was aimed directly at foreign web sites, SOPA targeted both foreign and domestic sites.<sup>125</sup> Critics of the proposed legislation fear that aggressive copyright-holders will further overstep their boundaries if the law was enacted. Further, critics worry that social media web sites could be shut down if the sites linked to infringing material.<sup>126</sup> With the bill facing much scrutiny, Representative Smith withdrew his proposed legislation in early 2012, stating, "I have heard the critics and I take seriously their concerns regarding proposed legislation to address the problem of online piracy. It is clear that we need to revisit the problem of foreign thieves that steal and sell American inventions and products."<sup>127</sup> Both bills thus are now defunct, with the beginning of a new session of Congress.

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<sup>120</sup> *Id.* at 389-90.

<sup>121</sup> *Id.* at 396.

<sup>122</sup> S. 968, 112th Cong. (2011).

<sup>123</sup> H.R. 3261, 112th Cong. (1st Sess. 2011).

<sup>124</sup> *Id.*

<sup>125</sup> Luke Johnson, *What is SOPA? Anti-Piracy Bill Explained*, THE HUFFINGTON POST (Jan. 19, 2012, 3:27 PM), [http://www.huffingtonpost.com/2012/01/19/what-is-sopa\\_n\\_1216725.html](http://www.huffingtonpost.com/2012/01/19/what-is-sopa_n_1216725.html).

<sup>126</sup> *Id.*

<sup>127</sup> Todd Wasserman, *SOPA is Dead: Smith Pulls Bill*, MASHABLE US & WORLD, Jan. 20, 2012, <http://mashable.com/2012/01/20/sopa-is-dead-smith-pulls-bill/>.