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Neighbouring Rights are Obsolete

P. Bernt Hugenholtz

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Abstract Neighbouring rights based on technological investment that do not provide for a threshold test and corresponding rule of scope, such as the phonographic right, the broadcaster’s right and Europe’s film producer’s right, are outdated and inherently unbalanced. The new press publisher’s right introduced by the EU DSM Directive is similarly unbalanced.

Keywords Neighbouring right · Phonographic right · Press publisher’s right · *Pelham* case · Minimum threshold

On 17 May 2019, the DSM Directive was officially published.¹ The new copyright directive brings us many new and controversial elements, including a neighbouring right for press publishers.² This opinion is not to reopen the debate on the new right, but to place it in the broader context of a conceptual problem that is inherent to the notion of neighbouring rights.

As is clear from the history of the Rome Convention, the neighbouring rights of phonogram producers were grounded in the large investments that were commonly involved in the production of sound recordings at the time the convention was

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92, 17 May 2019 [DSM Directive].

² DSM Directive, Art. 15.

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adopted (1961): investment in recording studios, technicians, mastering, record manufacturing and distribution. In those days, this “technological investment” rationale provided sufficient justification for granting legal protection against the evils of record piracy, which was on the rise.

A similar rationale motivated the neighbouring right for broadcasters, who were suffering from piracy as well, albeit to a lesser degree.³ But *Realpolitik* also played a role here. Many broadcasters initially opposed the Rome Convention for fear of the additional payments that neighbouring rights for performers and phonogram producers would entail. As a *quid pro quo*, broadcasters were given their own rights in Rome.

Why film producers in Europe also ended up having neighbouring rights is a mystery. They were not included in the Rome Convention, but out of the blue they appeared in the European Rental Right Directive of 1993 – apparently without lobbying on the part of the film producers themselves.⁴ Most likely they owe this right to the *Gründlichkeit* of the officials and scholars involved in drafting the directive. “*Laufbilder*” (non-original films) already enjoyed neighbouring rights protection in Germany in the years preceding the Directive.⁵ Much like the phonographic right, this is a right based on the idea that investment in recording technology merits protection of the recorded content.

The neighbouring rights of performing artists, by contrast, have a different rationale – one quite similar to the *raison d’être* of author’s rights. Indeed, scholars in the past have convincingly argued that performing artists are creators that deserve protection under copyright law.⁶ The exclusion of performing artists from the copyright domain has a mainly historical reason. By the time sound recording technology was so advanced that performances could be recorded and recordings exploited commercially, the cards in Berne were already stacked against the performers. I will not touch upon performer’s rights any further in this opinion.

1 The End of “Technological Investment”

It is questionable whether the “technological investment” argument that informed the neighbouring rights of phonogram producers and broadcasters still holds up in 2019. In recent decades the record industry has undergone a revolution as a result of digitisation. Many of the most successful music genres, such as hip-hop and electronic dance music, no longer require large and expensive recording studios. Increasingly, artists produce their recordings themselves and deliver these to the labels, ready or almost ready for commercial release. Physical sound carriers (CDs)

³ Guide to the Rome Convention and the Phonogram Convention, WIPO 1981, p. 12.

⁴ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, 27 November 1992.

⁵ German Copyright Act, Art. 95.

⁶ See e.g. J.H. Spoor, *RM Themis* 1973, pp. 324–351; H. Cohen Jehoram, “The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations”, 144 *RIDA* 80 (April 1990).

are no longer in demand, although the good-old vinyl LP is experiencing a minor revival. The main media of distribution of recorded music are online streaming platforms, such as Spotify. Consequently, the costs of recording, producing and distributing phonograms are only a fraction of what they used to be in the mid-20th century. In fact, the entire value chain and business model of the recording industry have radically changed in recent years. Contemporary labels have shifted their activities from producing phonograms to managing and promoting artists and their performances. Where labels do invest in is in “A&R” (discovering artists and repertoire) and in promotion and marketing. But neighbouring rights were never meant to protect these costs.

The same applies *mutatis mutandis* to broadcasters. Whereas in the 1960s operating a radio or television station cost a small fortune, in 2019 any person equipped with a broadband internet connection, a smartphone and a YouTube account can become a broadcaster – with a potential worldwide audience. In the meantime, the technical costs of operating professional radio stations have plummeted as a result of digitisation. For example, the Netherlands’ most popular radio station *Sky Radio* (non-stop music without DJs) is essentially a playlist that is automatically broadcast from a computer. In the professional television sector, too, technical production costs have sharply decreased, while in many countries broadcasting transmission costs have fallen to almost zero as a result of the termination of terrestrial television. TV signals in these countries are distributed mainly or solely over broadband cable networks. Of course, operating a television station remains an expensive enterprise – not for reason of the technical expenses involved, but because the costs of acquiring broadcasting rights (e.g. in sports content) have risen sharply in recent years. However, neighbouring rights were never meant to protect investment in copyright-protected content.

My interim conclusion is that the concept of neighbouring rights based on technological investment, such as the phonographic right, the broadcaster’s right and Europe’s film producer’s right, is outdated. Absent an alternative economic justification, these rights should be abolished or, at the very least, thoroughly reduced.

2 Minimum Threshold

A substantive problem that directly stems from the idea that investment in recording or broadcasting technology merits legal protection of the recorded or transmitted content, is that neighbouring rights do not provide for a minimum threshold requirement. According to the letter of the law, every first recording of sounds automatically leads to a phonographic right, even if no significant investment or effort whatsoever is involved.⁷ (For example, a recording of street noise on a smart phone.) Apparently, the Rome neighbouring rights were premised on the idea that

⁷ Rome Convention, Art. 3(b) defines a “phonogram” as “any exclusively aural fixation of sounds of a performance or of other sounds”; according to Art. 3(c) a “producer of phonograms” is “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds”.

the technical costs of recording or broadcasting posed a *de facto* investment threshold.

By contrast, other rights of intellectual property do provide for a *de jure* threshold, such as the originality test in copyright or the standard of substantial investment in the EU database right. In neighbouring rights, the absence of a threshold test results in overprotection in cases where acts of recording or broadcasting require little or no technological investment. It also leads to legal uncertainty in determining the extent of protection. If every sound recording, broadcast or film is immediately protected, what is the scope of the neighbouring right?

In copyright law, the requirement of originality determines not only the object of protection, but also its scope. According to the Court of Justice of the European Union (CJEU), a work is (partly) reproduced “if the elements thus reproduced are the expression of the intellectual creation of their author”.⁸ As regards the *sui generis* database right, the requirement of substantial investment fulfils a similar dual function.⁹ But what about neighbouring rights?

The scope of the phonographic right is central to the *Pelham* (“Kraftwerk”) case that was recently decided by the CJEU.¹⁰ The first question referred to the Court by the German Federal Supreme Court (Bundesgerichtshof) directly addresses this problem: does the phonographic right extend to every fragment – even the smallest sample – of a phonogram? According to Advocate General Szpunar:

A phonogram is not an intellectual creation consisting of a composition of elements such as words, sounds, colours etc. A phonogram is a fixation of sounds which is protected, not by virtue of the arrangement of those sounds, but rather on account of the fixation itself. [...]. A phonogram is not made up of small particles that are not protectable: it is protected as an indivisible whole. Moreover, in the case of a phonogram, there is no requirement for originality, because a phonogram, unlike a work, is protected, not by virtue of its creativeness, but rather on account of the financial and organisational investment.¹¹

This rather circular reasoning leads the AG to reject the argument that the phonographic right comes with a threshold requirement (which he mischaracterises as a *de minimis* rule). Therefore, the phonographic right must extend to every fragment of the recording. Based on a literal reading of Art. 2(c) of the Information Society Directive,¹² which defines the right of reproduction, the CJEU similarly concludes that the phonographic right in principle extends to every fragment of the phonogram. However, there is no reproduction in case the fragment is modified in such a way “that that sample is unrecognisable to the ear in that new work”. So, the

⁸ CJEU C-5/08, *Infopaq International*.

⁹ CJEU C-203/02, *The British Horseracing Board*.

¹⁰ CJEU C-476/17, *Pelham and Others*.

¹¹ Opinion AG Szpunar, C-476/17, *Pelham and Others*, para. 30.

¹² Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, 22 June 2001.

phonographic right does not cover modifications, which is not really a surprise since neighbouring rights do not extend to adaptations as a matter of course. In contrast to its extensive reading of the reproduction right, the Court also holds that a phonogram containing a fragment of another phonogram is not a “copy” of that phonogram for the purpose of the distribution right. The Court, however, remains silent on the threshold issue.

3 Other Reasons for Granting Neighbouring Rights

While the primary reason for granting neighbouring rights was that record producers and broadcasters needed these rights in order to combat piracy and engage in licensing, an additional policy argument was that having rights of their own would discourage these intermediaries from contractually wresting the rights from the authors and artists. The introduction of neighbouring rights would thus lead to “purification” of copyright. However, this hope has not materialised in practice. With few exceptions, recording contracts provide for the transfer of the performers’ rights to the producers. Broadcasters, too, often insist on assignments of rights from television and film producers, or – in the case of self-produced audiovisual works – from the authors and actors of the film.

Moreover, record producers and broadcasters may additionally rely on a variety of legal instruments that warrant legal standing in infringement procedures or the right to engage in (sub)licensing, including statutory rules that give standing to licensees, statutory transfers of copyright to film producers, rules on employer’s copyright, etc. All this leaves little room for the argument that these intermediaries require neighbouring rights for enforcement or licensing purposes.

4 Content Aggregation

More recent neighbouring rights seem to have their main justification not so much in the argument of technological investment, but of investment in *content aggregation*: compiling large amounts of works or items of information into a single corpus, and making this available and retrievable. This is clearly the case for the database right that was established by the European Database Directive in 1996, and which is triggered by the act of aggregating data, works or other subject matter into a database. The brand-new neighbouring right for press publishers similarly seems to rely on an aggregation rationale. Article 2(4) of the DSM Directive defines a “press publication” as “a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter [...]”. This rationale is, however, not reflected in a clear threshold requirement. Article 15(1) of the DSM Directive, which requires the Member States to equip press publishers with rights of reproduction and making available “for the online use of their press publications by information society service providers”, does not provide for a test of substantial investment or similar threshold test. Apparently, the EU legislator

assumed that *any* periodical that meets the definition of press publication is *ipso facto* the result of sufficient economic investment to merit protection.

As is the case for the first-generation neighbouring rights, the absence of a threshold test will lead to overprotection and create uncertainty regarding the scope of the press publisher's right. Earlier versions of the proposed right varied between applying a copyright infringement test (only takings that reflect intellectual creation) to a database right standard (takings of substantial parts). In the end, it was agreed that the new right "shall not apply in respect of the use of individual words or very short extracts of a press publication". This comes perilously close to the overly extensive phonographic right that AG Szpunar and the CJEU seem to embrace.

All this makes the new press publisher's right an inherently unbalanced right in the bad-old tradition of no-threshold neighbouring rights. This concept, I argue, is passé. Whether neighbouring rights deserve a place in the landscape of intellectual property law at all, can be debated. But if we grant them, we need to ensure that they come with a clear threshold criterion and corresponding rules of scope. The new right does not meet this basic test of rational IP law making.

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