



The Broadcast Treaty – The Never Ending Story – Ended (a report from WIPO, Geneva)

By Harald van Hielmcrone, CEG

In EBLIDA NEWS nr 2 - January 2007 [The Broadcast Treaty – The Never Ending Story, report from WIPO by Harald v Hielmcrone, p. 2], I gave an account of the development of the work of the Standing Committee on Copyright and Related Rights (SCCR) to conclude a treaty to protect the signals of broadcasting organisations.

This is a follow up on the latest development at the SCCR Special Session from 18th-22nd June 2007.

In September 2006 the main players, Brazil and USA, seemed to have come to a principal agreement, but at the SCCR Special Session meeting in January everything seemed to have regressed and no progress, what so ever, was made. The meeting in June would therefore be decisive.

In March the Chair tried to pave the way by circulating a "non-paper", a draft of the main articles for Member States to comment upon. If there had been a will, this draft might have been a basis for a treaty. However, the will seemed to be lacking. There is no reason to blame any country in particular. The lack of will was evenly distributed and thus illustrative of the deep chasm between developed and developing countries.

EU insisted on a "rights based" treaty. This was not in conformity with the agreement of the September meeting and the decision of the General Assembly [a "rights based" treaty means a treaty where broadcasting organizations 'have the exclusive right of authorizing the retransmission of their broadcasts...&c.' The alternative would have been that the contracting parties were 'obliged to provide for adequate legal protection against unauthorized retransmission...&c.']. Brazil, on the other hand, insisted on having statements from the preamble changed into the operative articles, statements recognizing the need

- ◆ to maintain a balance between the rights of broadcasting organizations and the interests of the general public,
- ◆ to promote access to knowledge and information and national educational and scientific objectives,
- ◆ to curb anti-competitive practices, and to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development, and
- ◆ to safeguard and promote the diversity of cultural expressions.

The USA would not accept this under any circumstances. This had been clearly announced already at the meeting in September.

Finally many countries obstructed the process by adding new alternatives to the draft articles, when the objective of the Special Sessions was to seek compromises and reduce the alternatives

Just before restarting the negotiations on Brazil's demands concerning the preamble, the USA – much to the relief of everybody but the Chair – announced that this would lead to nothing and that one should stop the process.

Despite great effort and informal negotiations, the Chair had to conclude that a diplomatic conference in December 2007 or in 2008 was not possible and that the work on the treaty had to be relegated to the normal meetings of the SCCR. The most likely results of this are indefinite postponements. Eventually it will be taken off the agenda, as it happened with the proposal for a treaty on the protections of databases.

What are the long term effects?

No doubt, WIPO is the big loser. This is the third abortive treaty since 1996, and irrespective of whether these treaties may all have been rejected for good reasons, the very fact that they have been rejected leaves WIPO in a difficult and weak position. This may not be in the long term interest of developing countries.

It is likely that the USA and EU will take this message and speculate whether WIPO is a relevant forum for them or whether some "forum shopping" might be to their advantage. The issue of signal piracy – and perhaps also other issues – may be taken up in another context, e.g. in trade negotiations, where developing countries do not have a particularly strong position. It is also likely that some of the issues important to developing countries, e.g. a minimum level of exceptions and limitations to right owner's rights and copyright protection of Traditional Knowledge, will have difficulties in making progress.

Copyright Subgroup of the HLG on Digital Libraries Toby Bainton, CEG Expert Group

The Copyright Subgroup of the European Commission's High Level Group on Digital Libraries held its fifth meeting at the Deutsches Filminstitut in Frankfurt am Main on 25 and 26 June. Much of its business concerned final details for its published pieces of work, in particular the Model Licence for the digitisation of out-of-print works. A major question here was whether to try to make the Licence

workable for digitised versions that are publicly available over the internet. It was decided to leave the Model Licence in its current form, that is, restricted to 'secure' (non-public) networks only. This was on the basis of step by step progress, so that if the Licence is successful for secure networks, it might later be useful for full public on-line access. Other topics included the programme for the stakeholders' seminar for the European Digital Library, an invitation-only event to be held in Brussels on 14 September, with the purpose of advertising the Subgroup's work to a wider audience of cultural institutions and right holders. The Subgroup also heard two interesting presentations, one from a member of the European Commission's staff, on the history and philosophy of the European Digital Library project, and one from someone who works for the Volltextsuche project in Germany. This is a database run as a joint enterprise of German publishers and booksellers, allowing the public to view the full text of certain publications and to be directed to channels to buy the original book. The Subgroup also visited the archive of the Deutsches Filminstitut and saw a fascinating example of one of its thousands of 'orphan works' - a short film of the construction of a cinema in Wiesbaden in the early 20th century.

EBLIDA-FEP Meeting, Amsterdam University Library, 27 June 2007 By Andrew Cranfield, EBLIDA

At the end of June representatives of EBLIDA, Kjell Nilsson, Wilma Mossink, Harold Mueller and Andrew Cranfield met with representatives of the FEP (Federation of European Publishers) and the European publishing community - Anne Bergman, Olga Martin Sancho (FEP), Hugh Jones (UK Publishers Association), Kurt Van Damme (Flemish Publishers Association), Michel Frequin (Dutch Publishers Association) and Verena Sich (Boersenverein).

The meeting was hosted by Arnold Verhagen, Librarian at the Library of the University of Amsterdam. The first item on the agenda was a short discussion about the European Digital Library (EDL) and how the various elements of this project will fit together, not least the integration of the Michael and Michael Plus projects, which also deal with the digitization of cultural heritage in a European context.

The meeting also addressed the two reports from the Institute of Information Law (IViR) - [The Recasting of Copyright & Related Rights for the Knowledge Economy](#) (November 2006) and [Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society](#) (February 2007). Both reports are critical of the upward spiral of copyright protection over the last 15 years and the degree of actual harmonization that has been achieved. Kjell Nilsson raised the issue of contracts and how these can override copyright legislation and quoted the report's conclusion that *the legislature could consider declaring null and void any unilateral contractual clause deviating from those limitations that, as our study advises, deserve mandatory status*. This is, of course, implemented already in the da-

tabase directive where contracts are not allowed to override statutory rights and a suggestion that EBLIDA strongly supports.

Also of interest to both parties is the question of limitations as set out in Article 5 of the Info Soc directive from 2001 and the question of whether a voluntary list of exceptions (apart from article 5.1) which is at the same time closed, i.e. without the option of providing for additional limitations is both hindering harmonization, and at the same time creating a closed system in conflict with the development of an online environment. The report suggests replacing the present list with a shorter list of mandatory limitations, while at the same time adopting an *open norm leaving member states the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the Internal Market*. Not surprisingly the FEP and its representatives have no urge to change the present framework on limitations, while EBLIDA supports these suggestions. However, it is debatable whether it is possible to introduce mandatory limitations at this stage of the directive's history, but we predict that it will be essential, at some stage, in the not too distant future to review the closed scope of the limitations.

After lunch the discussion moved on to the important issue of orphan works and out-of-print works, which Toby Bainton, Chair of the CEG, has reported on in a number of issues of EBLIDA News. The discussion centred around the report on "Digital preservation, orphan works and out-of-print works. Selected implementation issues" as published by the High Level Expert group - Copyright Subgroup in April 2007 and a paper submitted before the meeting by Arnold Verhagen outlining some of the problems facing libraries in regard to the issue of mass digitization and proposing some practical solutions for these. The idea of the diligent search to ascertain whether a work is orphan or not is at face value reasonable enough, but the idea of trying to locate the right holder on an individual title level for projects of mass digitization remains an almost impossible task in terms of human resources - many in the library community agree that this would be more expensive than the actual cost of digitization itself. The discussion then moved on to thoughts about rights clearance, the roll and possible future roll of collecting societies and how one can implement a system that on the one hand facilitates the mass digitization of the collections of large academic and national (and archives and museums) libraries (a so called one-stop-shop solution) while at the same time honouring the right holders. If the system becomes too burdensome then we can more or less be sure of one thing - little will get digitized, huge collections of materials will stay in analogue form and right holders will receive no remuneration for helping to make content available in an online environment. If we are able to negotiate viable solutions for orphan works, then I am convinced that we can achieve a win-win situation for libraries and other cultural institutions and for right holders.

The next EBLIDA-FEP meeting is set for 11th September 2007, where we will continue to look at practical and possible solutions for mass digitization.