PART III

SATELLITE COMMUNICATION AND COPYRIGHT LAW

BY

Dr. Adolf DIETZ * **

INTRODUCTORY REMARKS

It is no surprise that the stormy evolution of satellite communication techniques will also create a number of important copyright problems. Before, however, dealing with these problems in more detail, we should define more precisely what kind of satellite communication we mean in this context. Of course, communication and, in particular, international telecommunication covers a very broad field including, apart from broadcasts, also telephone communication, transfer of data, methods of teleprinting and telecopying and other means of information transfer via satellite services. To a certain degree all these acts of telecommunication by satellite can be relevant under copyright law if the information transmitted consists of works or other elements protected under copyright law, for example, in case of satellite delivery of documents or of copies of articles from scientific reviews to customers or receivers in other countries. This larger field of satellite communication, however, is not discussed further in this paper which, on the contrary, deals exclusively with satellite transmission intended — directly or indirectly — to the general public, hence, in a very broad sense of the word, with broadcasting by satellite. Nevertheless the term of « broadcasting » is used here only in a preliminary way, because we

* Head of Department, Max-Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich.

* * This contribution represents a shorter and compressed version of my following articles : « Urheberrecht und Satellitensendungen », *UFITA Band 108* (1988), pp. 73 et sec. ; « The Shortcomings and Possible Evolution of National Copyright Legislation in View of International Satellite Programme Transmission », in : de B. Bate (Ed.), *Television by Satellite — Legal Aspects*, Oxford 1987, pp. 112 et sec. ; « Problèmes liés à l'expansion du câble et du satellite », Contribution to *Colloque sur le droit d'auteur* (December 11-12, 1987), Université Libre de Bruxelles (Collection of papers forthcoming). The latter article in French has been distributed in advance together with the present contribution as a document for discussion. The author refers to the references given in this document and in the other articles.

cannot be sure that we really have always to do with broadcasting in the legal sense of the word, at least from the point of view of copyright law.

When these copyright problems which arise in connection with satellite programme transmission are discussed, a distinction is traditionally made between, on the one hand, point-to-point satellites and distribution satellites (the latter also called « fixed service satellites » or FSS) and on the other hand, direct broadcasting satellites (DBS) ; the first exist already since a certain time under names such as ECS 1 or 2, the latter will probably be available soon. If the attempt in 1987 to launch the first European DBS, namely the German satellite TV-SAT, was not successful at all because of irreparable technical problems, new attempts will be made perhaps still in this year or in the next future. In addition to that, a new type of a « hybrid » satellite or a so called « medium-power satellite » has also been announced for the next months. It is characterized by the fact that even if it will, like FSS, be primarily used to serve cable systems, it will be capable to be received also by individual households with dish aerials of a diameter of essentially the same size as needed for DBS. On the other hand, we know already that for a number of reasons, be it urbanistic or economic-technical ones, even if DBS should be available in the near future, an important part of individual households will not receive the programmes transmitted by DBS with their own individual dish aerials but still through cable systems to which they are already connected. This demonstrates that the clear distinction between FSS and DBS which characterized the initial phase of discussions of satellite communication and copyright law is blurred more and more. If, however, we continue to separately analyze and evaluate the different forms of satellites for reasons of methodological clearness, we should always keep in mind the relativity of this distinction and, from the beginning, try to avoid legal solutions too far apart from each other.

FIXED SERVICE SATELLITES (FSS)

FSS in its traditional low power form is a type of satellite the programmes of which are not capable and not intended to be directly received by the general public. Therefore an intermediary actor is used namely, in the original form of point-to-point satellites, a terrestrial or ground station and, in the more modern form of FSS, a cable system. As practical experience shows, in Europe with its patchwork of countries, as a rule the whole transmission procedure often has a cross border character. Of course, the satellite programme organizer and user of the satellite, on the one hand, and the cable systems, on the other hand, can be established in one and the same country. In this case the situation is simpler, at least from the point of view of international private law, because if we concentrate on this

« national » feeding of cable systems the law applicable will only be the law of this specific country. Nevertheless even in this case a question of legal responsibility arises concerning the act of use of copyrighted works transmitted by the satellite to the cable system and further on to the general public : who shall be held responsible for it, the satellite programme organizer or the operator of the cable system ? This question must be answered under the law of this specific country. If, however, the two actors of the play are established in different countries, in addition to the question of legal responsibility, we have to answer the question of the applicable law.

In view of the actual and future situation in Europe where programmes transmitted by satellites almost always are receivable in more than one country, we will concentrate our deliberations now on this very important case namely where programmes transmitted via FSS are retransmitted by cable systems in a country other than the country where the programme organizer is established. (We presuppose that the relevant retransmission is made simultaneously and is complete and unalterated).

First of all, apart from the question of the applicable law, we will deal with the copyright law aspects of this question. From the beginning, there were two opposing opinions as regards the interpretation of this transmission via FSS. On the one hand, broadcasting was interpreted in the classic, narrower sense as relating solely to the emission of signals which can be received directly by the public ; in this case transmission to and from the satellite would not mean broadcasting at all, which, on the contrary, would begin only with the act of cable transmission. On the other hand, the concept of broadcasting was interpreted in a broader sense, namely that the emission towards a satellite, in particular a FSS, of programme-carrying signals intended for the later reception by the general public only after the intervention of a terrestrial station or a cable system already constitutes an act of broadcasting (the so called « right of injection » or « droit d'injection »).

However, an intermediate position seems to gain ground now. It requires that while the responsibility for broadcasting has already begun at the moment of the emission of a programme-carrying signal towards a FSS, nevertheless their exists but *one single act of broadcasting,* the end result of which is the broadcast made by the distributor in the receiving country. Therefore, there would be not a double but only a joint liability of the originating organization in the emission country and of the ground station or the cable system in the receiving country. As a consequence of this intermediate position and as a first result, the owners of copyright can only ask to be paid once whoever of the two possible responsible actors should pay.

But this economic and apparently reasonable result does not answer all aspects of the question and in particular not the question of the applicable

law. In view of the fact that, especially in Europe with its patchwork pattern of countries and frontiers, almost every case of satellite transmission leads to cross border situations, an, at first sight, very elegant solution — which, by the way, reappears in the context of direct broadcasting satellites — would consist in the application of the law of the country where the programme organizer is established. The elegance of this solution lies in the fact that, in all cases of reception of the programme concerned in different countries, we would be directed back to the law of one and the same country. This would finally mean uniform control of the satellite-to-cable broadcast so to say at its source. But elegance and simplicity of solutions do not, of themselves, imply the necessary element of justice. The opposite opinion, therefore, is based on the idea that the most important part of this « single act of broadcasting » nevertheless is realized in that country or those countries where communication to the general public actually takes place. (It should be noted, by the way, that under copyright law, it is not actual reception as such, but the possibility of reception which determines the concept of « communication to the public »).

If, in this case, we would not apply the copyright law of that country where the cable system is established but only the law of the country of the programme organizer, cable systems could too easily conclude that they were not responsible at all for the cable transmission. At first sight, however, an argument in this direction could be drawn from the fact that — in the field of collective administration of « petits droits » (broadcasting rights concerning works of music) — these rights are often negotiated directly between satellite programme organizers and the various collecting societies of the countries within the footprint of the satellite. But, we should call this system of direct negotiations a « semi-centralized » solution, because it is centralized only in the sense that the programme organizer accepts his *de facto* responsibility for paying the necessary copyright royalties for the acts of use of the « cable right » in all countries concerned. This does not mean however that the law of the country where the programme organizer is established is uniformly applied ; on the contrary, the different collecting societies operating in their respective countries always negotiate their own « cable right » which can only mean a right of use under the copyright law of their respective country.

From the point of view of international private law therefore the result is a cumulative application of all national copyright laws within the footprint of the FSS ; therefore, the programme organizer *de facto* has to pay for as many cable rights as there are countries and cable systems within the footprint, if ever the operators of cable systems themselves are not prepared to pay for the cable right used by them in each case. Consequently, cable operators are free from liability under the copyright law of their own country only if copyright royalties are effectively payed by the programme organizer. (By the way, if the satellite programme organizer

would not be prepared to pay on behalf of the cable operators, the latter would simply not take over the relevant programmes ; but this is another question concerning the bilateral relations between cable operators and satellite programme organizers).

The cumulative application of the copyright laws of different countries within the footprint, of course, can lead to certain difficulties, in particular when differences exist between the copyright laws of the footprint countries concerned. In view of the fact, however, that cable retransmission in case of legal difficulties can be stopped independently for each cable system, the whole process of satellite transmission as such remains untouched.

At this point an important difference between FSS and DBS appears, because in the case of DBS cumulative application of the copyright laws of different countries, as proposed later in this paper, admittedly can lead to more serious practical difficulties without the availability of individual solutions at the level of the cable system. Nevertheless, we should be aware that, on the one hand, the latest generation of « medium-power satellites » with their hybrid nature already make disappear the differences between FSS and DBS and, on the other hand, that certain economic-technical prognoses tell us that an important part of the public will receive programmes transmitted by DBS also through cable systems. In that respect DBS have to be qualified equally as FSS and, consequently, the cumulative application of the copyright laws of the different footprint countries concerning the cable right, with its admittedly less important danger to interfere with the whole system, cannot be avoided either.

Before we enter the field of DBS more concretely a last remark should be made concerning the so called Brussels Satellite Convention of 1974 (« Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite »). This convention is no copyright convention in the strict sense of the word but is conceived as a means of protection of « originating organizations » against unauthorized further distributions of their programmes « by any distributor for whom the signal emitted to or passing through the satellite is not intended » (Art. 2). In addition to that, the convention does expressly not apply to DBS (Art. 3). Of course, one could defend the idea that copyright owners could « instrumentalize » that Brussels convention by obliging the protected programme organizers (« originating organizations ») to use it also in their interests against infringers of copyright, namely against cable systems operators not willing to pay the necessary copyright fees for the use of the « cable right ». We will, however, not go into further details of this convention and its possible application because of its still reduced importance, in view of the small number of its member countries.

DIRECT BROADCASTING SATELLITES (DBS)

As already mentioned, direct broadcasting satellites, in their pure form, will probably never exist in Europe, even if one of the planned launchings of DBS should be successful in the near future. Urbanistic and other reasons will lead to the result that, if dish aerials of individual households will dominate in rural areas, in urban areas, at least where cable systems are already highly developed, individual households will receive DBS programmes equally through existing cable. In that respect DBS have to be treated in the same way as FSS and our foregoing deliberations apply also here. This means, in particular, that cable systems taking over programmes of DBS have to pay for this in the same way as they already pay for the retransmission of programmes of terrestrial stations and/or of FSS. The only difference between FSS and DBS in this case could arise in countries such as Austria where a system of compulsory licences for the cable retransmission of « true » broadcasts is provided by the law. In this situation FSS would have to be distinguished from DBS, because cable (re)transmission allowed under the compulsory licence presupposes a full and *complete* preceeding act of broadcasting which does not exist with FSS but does exist with programme transmitted by terrestrial stations as well as by DBS. But it is doubtful whether this distinction can be maintained in view of the tendency of the technical differences between DBS and FSS to disappear in favour of « hybrid » satellites of all kinds.

Without doubt, DBS is broadcasting in the copyright sense of the word from the beginning. The question, highly debated recently, however, concerns the applicable law. Of course, this question does not appear in cases where the so called « footprint » of the satellite essentially does not cover more than one country. For geographically big countries like Australia, the USA, China or India or for geographically relatively isolated countries like Japan, it is not excluded — apart from only marginal spill-over — that the « footprint » of the satellite is actually restricted to the territory of the relevant country. Then, of course, the question of the applicable law does simply not arise. In this case, and only in this case, the idea that the satellite is nothing more than an « aerial in space » is true without restriction.

The situation in Europe, unfortunately, is not so easy. We all expect that in the same way as this is already reality with FSS the programmes of DBS in the future will be receivable simultaneously in a number of European countries, sometimes even in more than a dozen. Here the recent debate in favour and against the so called « Bogsch theory » or better the « footprint theory » starts. Those who won't accept this recently formulated theory in case of DBS allege that the concept of the « aerial in space » is applicable

also here. This means that, as with traditional terrestrial broadcasting which in many cases equally spilled over to foreign countries, the law of the country of the originating organization — and only and exclusively this law — is to be applied. The inventors of the « footprint theory », on the contrary, defend the idea that the special meaning of « broadcasting » within copyright law is nothing other than « communication to the public » and that this communication takes place to the public of all countries within the footprint of the satellite. Therefore, strictly speaking, we are not confronted with a situation of choice of law but — finally in the same way as with FSS and cable systems in different countries — with a situation where simply cumulative application of the copyright laws of several countries takes place. This is similar to the situation where a publisher wants to publish, i.e. to distribute and sell a work, in more than one country and therefore traditionally and undisputedly has always to acquire the necessary rights for all countries concerned. Here we must not forget that, in contrast to frequent contractual wording, from a strictly legal point of view there exists nothing like a « world copyright » but only smaller or bigger « bundless » of national copyrights, all of which can be of different content and can have a different legal fate. In the same way broadcasters already for a long time had to do with « bundless » of broadcasting rights, for example, if they wanted to sell their programmes to other countries.

If it is said that the concept behind the footprint theory has never been applied in the past where radio broadcasts in the form of « world services » were especially intended to foreign countries, it must be stated that the technical but also the legal and economic situation was different, indeed. Radio broadcasts, under international law, were traditionally only regulated in view of the allocation of frequencies, whereas television satellites, under international law, have been allocated, in addition to frequencies, exactly determined « footprints » which initially should follow the configuration of the country concerned as exactly as possible (WARC Conference 1971).

In addition to that, with traditional radio programmes in the framework of « world service », the main parts relevant under copyright law — apart from news and political features — are musical works ; here the interest of the public is not weakened but even stimulated when broadcast takes place once or more often. In the field of audiovisual and film works, on the contrary, the interest of the public decreases very quickly after the very first showing. Therefore, it is not without relevance whether one and the same copyright work has already been broadcast before to the same general public or part of it. This is especially true also in view of the growing importance of commercial television financed by advertisements were « ratings » and « potential ratings » are so decisive. If then, in case of DBS, only and exclusively the law of the country of the originating organization is to be applied, how can it be guaranteed that one and the same film work

will not be broadcast almost at the same time to the same section of the public within a footprint country but stemming from another programme organizer established in a third country, different from the country of the original broadcaster.

It is frankly admitted here that the application of the Bogsch theory or footprint theory can lead to more practical difficulties in the field of acquisition of rights and also in the field of application of law, because the users (the broadcasters) have to acquire cumulatively the necessary rights for all the countries within the footprints and have to respect the copyright situation in all these countries.

Concerning acquisition we are told, however, that this « bundle » of broadcasting rights is unnecessary because, even in the framework of the application of the « emission theory » (i.e. exclusive application of law of the emission country), based on the only exclusive right then available one would obtain the same royalty justified under market conditions, also in view of the bigger public. A bundle of exclusive rights could not change these market conditions. But there are several arguments against this. First there is no legal guarantee that in all cases an exclusive broadcasting right will be available at all in the emission country. This is true also in view of Art. 11*bis*, Par. 2 of the Berne Convention which generally is interpreted in the sense of allowing compulsory licences for broadcasting. Of course this article allows compulsory licences only in so far as the conditions of their exercise « shall apply only in the countries where they have been prescribed ». It remains doubtful, however, whether a royalty fixed under this compulsory licence would necessarily have to consider the bigger public in all countries within the footprint of the satellite ; on the contrary, it appears that this argument paradoxically would obtain an economic result which has been denied juridically before. If only and exclusively the law of the emission country applies, this would also — without any potential infringement of Article 11*bis* — be true for the conditions of a compulsory or legal licence.

Second, I simply don't believe that the broadcasters would always be satisfied to acquire only the right for the relevant emission country if they would be more and more confronted with the danger of competing and damaging satellite broadcastings stemming from other countries. The concept to *contractually* bind the licensor of the copyright in the works concerned not to license other satellite operators for the same footprint does not work in every case, in particular, where the licensor simply is not the owner of the necessary rights for all countries. In addition to that we must not forget that at least the anti-trust provisions of the Rome-Treaty would not very easily allow tie-in clauses of this kind.

The real problem therefore lies not in the field of acquisition of rights where the interests of the broadcasters may best be served by acquiring

simply — under market conditions — the copyrights for all the footprint countries. It lies within the field of application of the different copyright laws of the different countries because of their different content and extent of protection.

A very important example is the question of the term of protection for film works. A number of countries, and especially also Luxemburg, provide for only 50 years of protection after publication (first showing) of the film whereas other countries like Germany and France apply the regular period of protection of 50 (in Germany : 70) years *post mortem auctoris,* which leads to very long periods of protection in the field of film works. In this case it is only the footprint theory which can help avoid that the old famous films of the twenties and the thirties, still protected in certain footprint countries but not in others, can be broadcast « into » the first countries without paying a penny to copyright owners, but, in addition to that, destroying their exploitation market.

The same is true for other questions, for example the moral right aspect. This question is coming up dramatically not only in the United States, but recently also in Europe. Already from the daily press we know that in the United States there is a wave of protest against unauthorized colorisation of the old black and white films ; the problem, however, is that there seems to be no adequate instrument of protection against it. On the other hand in a number of European countries (especially in Germany and in France) moral right protection could probably be used to hinder colorisation against the will of the film director concerned. Broadcasters therefore could not transmit colorized films without authorization. But this is only true, if the national law of these countries can be applied. On the basis of the theory of the emission country if emission takes place from a country which does not grant moral right protection in this situation, the film directors within the footprint countries which do grant this protection would, nevertheless, be left without any protection. Shall we accept this if we consider the fact that it will be the same screen in the same households where the same film is shown today on one channel and the other day on another channel. In one case copyright protection would work in the other case it would not work. This leads, I think, to a dilution of fundamental principles of copyright protection and also to a destruction of public conscience of its necessity. Once more, only the application of the footprint theory can help here and lead to adequate and just results.

In addition to that, we must also be aware that apparently difficult legal situations, once they are clearly recognized, often are very quickly surmounted by practical solutions elaborated by the interested circles, especially in the field of collective administration of copyright. The most important thing is that the authors and other copyright owners, on the basis of their relevant national copyright law, can act as players at all and are not

simply neglected within the whole process of using protected works in all countries concerned.

EUROPEAN PERSPECTIVES

Europe, also from the point of view of copyright industries, is certainly still one of the most interesting regions of the world. If in the future a harmonized or even unified European copyright protection system should be established, an important part of the difficulties stemming from the differences of national copyright protection could be mitigated or overcome. This solution should be envisaged also for general reasons of European integration. What cannot be accepted, however, is a simple neglect of national copyrights to the detriment of copyright owners, as long as this European solution is not available. The sole reason that the footprint theory would create additional practical problems is not enough to refuse it. If avoidance of practical problems should be the only rational behind modern copyright solutions, it would be better to abolish copyright protection at all. This, however, cannot be the outcome of long decades of fight for better protection of authors and other copyright owner with its very impressive results as represented by modern copyright acts, such as, for example, in France, Germany, Spain or the Scandinavian countries.

In addition to that, from the aspect of international private law, what we should avoid is a sort of « country shopping » where organizers of satellite programmes get established in countries with the lowest copyright protection possible. It is only the footprint theory which would help us in such a situation.