Say Nay to the Neighbouring Right!

Kluwer Copyright Blog
April 14, 2016

Bernt Hugenholtz (Institute for Information Law (IViR))

Please refer to this post as: Bernt Hugenholtz, 'Say Nay to the Neighbouring Right!', Kluwer Copyright Blog, April 14 2016, http://copyrightblog.kluweriplaw.com/2016/04/14/say-nay-to-the-neighbouring-right/

The European Commission keeps sending us surprises. After December's Communication on Modernizing Copyright, which contained a mixed bag of copyright goodies, we had expected just about anything but the announcement that followed on March 23rd. The European Commission has launched a public open consultation on 'the possible extension' of neighbouring rights to publishers. As we all know, neighbouring (or related) rights at EU level are currently confined to four categories: performing artists, phonogram producers, broadcasters and film producers. Apparently, someone has convinced the Commission that extending this regime to publishers might be a good idea.

In my opinion, it is not. Whereas the case for neighbouring rights for performers has always been strong, since performing artists are excluded from the domain of authors' rights even though performing a work of authorship is usually a creative act, the same has never been true for the other three categories of neighbouring right holders. The main argument here is that such rights 'incentivize' and reward investment in producing phonograms (i.e. sound recordings), broadcasts or films, but the economics of this rationale remain largely unproven. And now that digital technologies have reduced the costs of sound recording, broadcasting and video production by several orders of magnitude, the arguments for 'Leistungsschutz' are even less convincing. In fact, the best argument one can make for giving these industries their own IP rights is, here too, the absence of copyright protection. But this argument is very weak in light of actual contractual practices in these sectors.

The same can be said for the publishing sector, where digitization has vastly reduced the costs of formerly high-investment publishing activities such as type-setting and printing, and copyrights are commonly transferred (either assigned or exclusively licensed) by the authors. So why would we even consider extending this regime to the publishing sector? The answer lies elsewhere. As is well-known, news publishers plagued by news aggregators such as Google News, are lobbying everywhere in Europe, and increasingly in Brussels, for some form of protection against unauthorized aggregation. These efforts have resulted, several years ago, in the introduction of an ancillary aggregation right in Germany, and a right to remuneration in Spain. In practice, both new rights have spectacularly failed. The German right has so far not resulted in a single paid license, whereas Google has withdrawn its Google News service from Spain.

Would a general neighbouring right for publishers, analogous to the existing right of phonogram producers, help the news publishing industry in its battle against Google? I suspect it will not. The neighbouring rights that presently exist at EU level do not provide for a right to prohibit aggregation, so any 'extension' as envisaged by the EC's consultation would not do much for the news industry. Most likely, extending neighbouring rights to the publishing sector would just lead to another, unnecessary layer of rights, in a digital market place already overgrown by rights.

The Commission's consultation will run until June 15th. On April 23rd, CIPIL (University of Cambridge) and IViR (University of Amsterdam) jointly organize a conference in Amsterdam on the pro's and cons of protecting news publishers. The conference is part of a CIPIL project jointly undertaken with Cardiff University. Speakers at the Amsterdam conference comprise both critics and proponents of special news protection, including Ian Hargreaves, Lionel Bently, Marietje Schaake (MEP),Raquel Xalabarder, Mireille van Eechoud, Richard Danbury, Jan Hegemann, Michael Grünberger, Bernt Hugenholtz, as well as representatives of the publishing industry and consumers. Everyone else agreeing or disagreeing with this blog, is kindly invited to attend. Registration for the conference is free.