

Research on the Information Network Dissemination Right of Broadcasting Organizations

YUCHEN CHU^{1,a,*}

¹*Nanjing Tech University, Jiangpu sub district, Pukou District, Nanjing City, Jiangsu Province.
211816, China*

a. 1023509721@qq.com

**corresponding author*

Abstract: Article 47 of China's 2020 Copyright Law expands the scope of broadcasting organization rights to a certain extent, and grants broadcasting organizations the information network transmission right. With continuous innovation of communication methods, the rights of broadcasting organizations have suffered unprecedented violations in cyberspace. To deal with the problem, it is necessary to give broadcasting organizations the information network transmission right. The broadcasting organization right include the information network transmission right. By analyzing the source and nature of broadcasting organization's information network transmission right, it proves the legitimacy of its right expansion. The application space of the newly added information network dissemination right needs to be strictly delimited, and the exercise of This right must not damage the prior right.

Keywords: Copyright Law, Information Network Transmission Right, Public Domain

1. Introduction

After the third revision, Article 47 of the new Copyright Law grants broadcasting organizations the information network transmission right, expands the protection scope of broadcasting organization rights, and includes the network environment into its protection scope.

The academic disputes over the content of the rights to expand the rights of broadcasting organizations are essentially disputes over the object of the rights of broadcasting organizations. Regarding the object of the broadcasting organization right, the disagreements and debates in the academic circles have never ceased. At present, the "signal theory" occupies a dominant position both domestically and internationally. SCCR and some scholars believe that the broadcasting organization right will be extended to the network environment based on the "signal theory", which is also feasible and effective [1]. However, after the revision of China's Copyright Law, Article 47 stipulates that the radio and television broadcast by broadcasting organizations are the objects of broadcasting organization rights rather than "signals containing programs", and that additional information network transmission right is obviously biased towards "program theory". This revision has aroused more and more disputes among domestic scholars over the subject of broadcasting organization rights. China's broadcasting industry is more inclined to "program theory". In the information network, according to "signal theory", broadcasting organizations will lose control over the radio and television they broadcast. Many scholars are opposed to the demand for the expansion of rights in the world.

Some scholars also worry that granting broadcasting organizations the information network transmission right will damage other legitimate rights and interests, especially the public domain.

2. Theoretical Divergence on the Object of Broadcasting Organization Right

“Signal theory” and “program theory” are the two most important theories, on which the debate has never stopped in China’s academic circles. China’s original Copyright Law determined the object of broadcasting organization rights according to the “program theory”, that is, radio and television programs. The Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) discussed the formulation of the Convention on the Protection of the Right of Broadcasting Organizations, and finally chose to use the “signal theory” to determine the subject of the rights of broadcasting organizations [2]. After that, the “signal theory” began to be the mainstream in the world, which has greatly influenced the Chinese academic circles. As a result, the “signal theory” has also become the mainstream theory in the Chinese academic circles. The “program theory” believes that the object of broadcasting organization rights is the radio and television programs broadcast by radio stations and television stations. The “program theory” holds that the object of broadcasting organization rights is “signals carrying radio and television”. It can be seen from the Copyright Law that the objects of the broadcasting organization rights are the radio and television broadcast by radio stations and television stations, which are not designated as programs. Therefore, it is not unreasonable to interpret them as carrying radio and television signals [3].

2.1. Limitations of “Broadcast Signal Theory”

“Broadcasting signal theory” violates the essential feature of intellectual property, that is, the immateriality of the object [4]. The immateriality of the object is the foundation of the intellectual property system. As a new type of civil right, intellectual property is an intangible property right. Although the right of broadcasting organization is a neighboring right, it also belongs to the protection scope of intellectual property. “Broadcasting signal theory” believes that the object of broadcasting organization rights is “physical signals carrying programs”, and physical signals are material. If signals are regarded as objects of legal protection, then the act of protecting signals is more like the protection of property rights rather than intellectual property. Intellectual property should protect the work itself instead of the carrier of the work. It can be seen that if the “broadcast signal theory” is followed, it will lead to confusion in the source of law.

“Signal theory” believes that the object of broadcasting organization rights is broadcast signals, which are fleeting and cannot be stored. In contrast, the right to information network communication enables the public to obtain works at a selected time and place through wired or wireless means. Therefore, the works must be stored in a certain location on the network in advance, which contradicts the traditional “signal theory”. Some scholars have proposed new or improved theories, such as the “revised signal theory”. The core of the “revised signal theory” is to give broadcasting organizations the right to follow-up control over broadcast signals, among which the right to network transmission of signal recordings is related to information network dissemination. However, with the diversification of broadcasting methods, network broadcasting has emerged, whose transmission medium is no longer a signal in the traditional sense. Nevertheless, since it is hard to make a signal into a recording, this new theory fails to well protect TV and programs broadcast directly on the Internet.

2.2. The Rationality of “Radio Program Saying”

The object of the broadcasting organization right must first conform to the characteristics of the object of general civil rights. Academic circles have different views on the nature of the object of rights, such as “interest theory” and “action theory” [5]. The broadcasting organization right is a property right, through which broadcasting organizations generally obtain benefits and create social benefits. In order to determine the object of broadcasting organization rights, it is more appropriate to choose the “interest theory”; and the behavior that infringes the interests of broadcasting organizations is an infringement of the content of their radio and television programs rather than an infringement of signals.

The creative work done by broadcasting organizations is the basis for their acquisition of the right of broadcasting organizations, which is a neighboring right. Radio programming is the part of the broadcasting organization that invests the intellectual work, not the process of broadcasting. Some scholars have ignored the work done by broadcasting organizations before the broadcast signal is sent out, who believe that broadcasting organizations only play the role of disseminating works and do not contribute to the program itself. They hold that the broadcasting organization rights should not be granted. In fact, broadcasting organizations need to perform creative work, including the selection of programs, the editing and arrangement; and the value of labor is contained in radio programs.

The application of the “program theory” can better protect the rights of broadcasting organizations in information cyberspace. If they insist on the “signal theory”, broadcasting organizations can only have control over the moment of broadcasting and the recording of radio programs. Broadcasting organizations cannot stop or even prevent others from spreading radio programs using new technologies such as network rebroadcasting and digital recording. Broadcasting organizations themselves cannot be protected by using the above-mentioned technologies to transmit programs, which greatly harms the interests of broadcasting organizations. If the “program theory” is applied, the method and carrier of broadcasting programs are no longer important, because neither of them will affect the substantive content of the program. As long as broadcasting organizations have control over the programs, they can protect their rights in various fields.

3. Contents of Broadcasting Organization’s Information Network Transmission Right

Because the realization of rights requires the contribution of the obligor, rights should be restricted [6]. China’s Copyright Law stipulates the right of broadcasting organizations’ information network dissemination in Article 47, paragraph 1, item 3, that is, radio stations and television stations have the right to prohibit the broadcasting of radio and television broadcasts without their permission through information networks. Only with the permission of the broadcasting organization can others disseminate the radio and television broadcast by the broadcasting organization to the public through the information network, which not only protects the broadcasting organization’s right to broadcast radio and television programs, but also protects the broadcasting organization’s property rights, because the broadcasting organization can also allow others to broadcast to obtain benefits. This also shows that the information network dissemination right is a kind of copyright property right. As mentioned above, rights are not boundless, especially when new rights are given to broadcasting organizations. Even if it is reasonable and appropriate to grant them the information network transmission right, the restrictions on this right still need to be enhanced.

3.1. Rights Arising from the System of Neighboring Rights

Due to the multiplicity of broadcasting organizations as subjects of rights, there are two sources of broadcasting organizations’ right to disseminate information on the Internet. One is that broadcasting

organizations, as authors, enjoy copyright, which naturally also includes the right of information network dissemination. This article is going to discuss the other situation. Broadcasting organizations are only holders of neighboring rights and obtain the right of information network dissemination through the neighboring rights system. At this time, the right of information network dissemination is included in the rights of broadcasting organizations. The right of broadcasting organizations is a kind of adjacent right, which belongs to the category of intellectual property rights. Although the adjacent right is closely related to the copyright, it is not attached to the copyright, which is an independent right instead. Neighboring rights and copyrights actually share the same internal logic, whose origins lie in the generation and dissemination of intellectual achievements [7]. The copyright includes the right of information network dissemination, which has been clearly stipulated by law. The copyright and the adjacent right belong to the same intellectual property rights and share the same internal logic, which are independent of each other. Therefore, the adjacent right also has the conditions to derive the right of information network dissemination, which has been reflected in China's Copyright Law. The producers and performers of audio and video recordings have obtained the right to disseminate information on the network through the neighboring rights system, both of which are the owners of neighboring rights. Broadcasting organizations not only contribute to the dissemination of works, but also provide more creative labor in the process of producing and processing programs, like the contribution made by audio and video producers and performers to the works.

3.2. Both Prohibition and Permission

The information network dissemination right of broadcasting organizations is not only the right of prohibition, but also the right of permission, whose exercise shall not conflict with the copyright or other related rights. Paragraph 3 of Article 14 of the TRIPS Agreement is about the rights of broadcasting organizations and uses the expression "the right to prohibit", which is the same with China's Copyright Law [8]. In this regard, it is acknowledged at home and abroad that the information network transmission right of broadcasting organizations should include the right to prohibit. As for the reason of adopting the expression "the right to prohibit", this article considers it to be a restriction on the broadcasting organizations' right to disseminate information on the network. When the right of information network dissemination is infringed, broadcasting organizations can exercise their right to prohibit the continuation of the infringement. This is a passive way of safeguarding rights to prevent the right of information network dissemination from being incompatible with the rights of the copyright owner or other adjacent rights holders. Although broadcasting organizations have paid intellectual labor in the process of disseminating works and producing programs, copyright and other neighboring rights holders usually have to make more creative contributions.

The Copyright Law does not clearly stipulate the licensing rights of broadcasting organizations. However, the expression "without its permission" indicates that under certain circumstances, broadcasting organizations can license. To disseminate radio and television broadcasts by radio stations and television stations to the public through the information network first requires the permission of the relevant copyright owners or the owners of the neighboring rights. A broadcasting organization is restricted by the license rights of the relevant copyright owners or neighboring rights holders, which cannot license without these prior conditions. However, as long as the prior conditions are met, broadcasting organizations can license. In addition, the right of prohibition and the right of permission are two inseparable aspects of exclusive rights. Only with "permission" will it not be "prohibited".

3.3. The Legitimacy of Increasing the Right of Information Network Dissemination

The convenience and diversity of network communication methods have increased the number of online infringements. Meanwhile, broadcasting organizations have also suffered greatly in this process. The significant reduction in the cost of infringement has led to more infringement cases, which has made broadcasting organizations almost lose control of their own programs in the network field. The right of information network dissemination is actually the application of the right to provide programs for the public in the network environment. The WIPO Expert Committee once explained that when the actor performs the act of providing the work to the public, it belongs to the category of the right to provide the public [9]. One of the functions of broadcasting organizations is to provide works for the public. Now that they can provide works for the public in the Internet environment, they should be given the right of information network dissemination.

Article 47 of China's "Copyright Law" expresses the method of network communication as "communication through information network", which is the best choice at present despite the fact that it seems large and vague. On the surface, the expression of a wide range of modes of communication adds lots of rights for broadcasting organizations. In fact, however, this is in response to the diversity of infringement modes and new modes of communication that might emerge in the future with further technological development.

Some experts and scholars insist on the "signal theory" and deny the legitimacy of adding information network dissemination rights for broadcasting organizations. While the rationality of the "program theory" has been analyzed and explained above, the problems that may erode the public domain during the application of rights will be analyzed in the following.

4. Application of Broadcasting Organizations' Right of Information Network Communication

The information network dissemination right of broadcasting organizations is a part of broadcasting organizations' right, whose application must first follow the basic rules of the application of broadcasting organizations' right. The necessity of the information network dissemination right has always been an issue discussed by Chinese academic circles, which depends on the application of rights. If a right can be superseded by other rights in application, it does not need to exist on its own. How the broadcasting organizations' right to disseminate information on the Internet is applicable and what are the unique applicable spaces will determine whether the existence of the information network dissemination right is necessary or not. Information network dissemination and broadcasting are two dissemination methods with many similarities.

4.1. General Laws that Apply

The application of the information network dissemination right needs to conform to the basic rules of broadcasting organizations' right application. As a part of broadcasting organizations' rights, the rebroadcast right can best represent the applicable law of broadcasting organizations' rights. Therefore, this article will take the rebroadcast right as an example, and then explore the broadcasting organizations' information network as its parallel right. Rebroadcasting rights protect the immediate interests of broadcasting organizations, which can ensure that a particular broadcasting organization at a particular time is the designated provider of the program content it broadcasts [10]. The information network dissemination right of broadcasting organizations should follow the same basic rules in the application of the right of rebroadcasting. In addition, the information network dissemination right also exists to protect some specific rights and interests of broadcasting organizations, which does not overlap with other rights.

4.2. Special Applicable Space

There are many similarities between information network communication and broadcasting, both of which are public communication means and have enormous publicity and broadcasted programs [11]. In terms of the nature, they both enjoy exclusive rights. Of course, there are differences between the two. We can analyze the characteristics of information network communication rights by comparing the two, and then find out its special scope of application. From the perspective of the technical means and methods of communication, broadcasting is the act of unilaterally disseminating broadcast signals to the public in a wired or wireless manner. The essential difference is that broadcasting is the active dissemination of works by the media, while the audience must passively accept the works at the time or place arranged by the media, which is a one-way transmission. In contrast, as for information network communication, while the media provides works, the audience can choose the time and place by themselves and actively accept works through the media, which is a two-way transmission. Therefore, information network communication is also called interactive communication. Nevertheless, in terms of Internet radio, users can only listen to or watch the programs broadcast by the website at a certain time according to the scheduled program schedule as they do with traditional radio, and cannot obtain the works at the time selected by themselves. It can be seen that Internet radio is not affected by it.

The applicable space of broadcasting organizations' information network dissemination right needs to be further divided. After the first broadcast of radio and television, broadcasting organizations can enjoy the right of information network dissemination for 50 years. But if a broadcasting organization broadcasts the same program content again, is it considered a new broadcast of radio and television? This article believes that the "first broadcast" in the law refers to the first broadcast of the program content. Therefore, there is no possibility of repeatedly playing the same or similar programs to extend the protection period. The information network dissemination right of broadcasting organizations protects the interactive dissemination in the network environment within a certain period of time after the broadcasting organization's program content is broadcast for the first time.

Even if the applicable space of the broadcasting organizations' information network dissemination right has been compressed, there will still be problems in the application of the law, which will be analyzed in more detail in the next part of this article.

5. Problems and Suggestions in the Application of Broadcasting Organizations' Information Network Dissemination Right

The latest Chinese Copyright Law explicitly add the right of information network dissemination of broadcasting organizations. Although the revisers have considered the issue of the restriction of rights in the process of revising the law, there will still be issues that are not considered comprehensively or even not considered in legal practice, which may lead to many problems. In this regard, this article will analyze the problems that may arise in the application of law, and make corresponding suggestions.

5.1. Possible Problems

There may be problems that erode the public sphere. If the copyright protection period of A's film and television work has expired, and Broadcasting Company B will make it into a radio program, and the content of the program has not been broadcast by other broadcasting organizations before, then Company B is equivalent to obtaining the information network communication right of the film and television work according to law. This obviously violates the common domain. Originally, the public

could enjoy the film and television works of A for free. Because of the one broadcast by Company B, the protection period of the works of A will be increased, the rights of the works will fall into the hands of Company B, and the rights belonging to the public will be deprived, which runs counter to the legislative purpose of the Copyright Law.

There may be problems that make China receive unequal treatment internationally. Countries around the world hold different views on whether to grant broadcasting organizations the right of information network dissemination; and there is no clear regulation in international treaties. When referring to the object of broadcasting rights, the UK Copyright Act stipulates that “the definition of broadcasting excludes Internet transmission”, which excludes the possibility of broadcasting organizations being granted the right of information network transmission in the UK. If China joins the international treaty A in the future, and country B, which also accedes to the treaty, does not stipulate the broadcasting organizations’ right of information network dissemination in its laws, then China needs to protect the information network dissemination right of broadcasting organizations in country B, while country B does not need to protect the information network dissemination rights of Chinese broadcasting organizations, which is very unfair.

5.2. Analysis of the Problems and Suggestions

The problem of encroaching on the public sphere mentioned above is due to the imperfection of the law. In order to broadcast a work, a broadcasting organization must obtain permission of its copyright owner or other neighboring right holders if the right to disseminate information on the Internet has not expired. Broadcasting organizations do not enjoy the information network dissemination right of such broadcast programs when the protection period expires. When the information network dissemination right of the copyright owner or other adjacent rights holders expires, broadcasting organizations exclusively enjoy the right of information network dissemination, which will infringe on the public interest. And the scope of rights of broadcasting organizations should be limited according to the fact that broadcasting organizations exclusively enjoy the right of information network dissemination.

Whether or not to grant broadcasting organizations the information network dissemination right will inevitably lead to international disputes because industrial development in different countries is not the same. Some countries and regions have given broadcasting organizations the right of information network dissemination in relevant legislation. For example, the EU Copyright Directive on Information Society stipulates that member states shall grant broadcasting organizations the information network dissemination right of their broadcasts by means of authorization or prohibition [12]. It can be seen that there is also a certain international demand for granting broadcasting organizations the information network dissemination right. The problem of unequal treatment of different countries that accede to the same international treaty can only arise when the principle of unconditional most-favored-nation treatment is applied, which conflicts with the principle of reciprocity and can be dealt with by combining the two principles. The principle of reciprocity, as a tit-for-tat cooperation strategy, is the most effective solution when cooperation falls into a prisoner’s dilemma, that is, one party does what the other party has already done [13]. This paper suggests that the conditional most-favored-nation treatment principle should be selected in combination with the non-conflicting parts of the two principles.

6. Conclusion

The development of network technology has led to continuous innovation of communication methods, which poses challenges to the protection of the right of broadcasting organizations. In order to cope with the predicament, broadcasting organizations should be granted the information network

dissemination right. As the object of broadcasting organization rights, broadcasting programs are more reasonable and applicable than signals. The illustration on the source and nature of broadcasting organizations' information network dissemination right demonstrates the legitimacy of increasing rights; and its application is also restricted in order to prevent abuse of rights. During the application of broadcasting organizations' information network dissemination right in practice, in addition to possibly eroding the public domain and causing unequal treatment among countries, there may be more problems waiting to be resolved. However, as long as the interests are realized without deviating from the Copyright Law, we can always find a corresponding solution.

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