CABLE RETRANSMISSION OF BROADCASTS

A study on the effectiveness of the management and clearance of cable retransmission rights

14 November 2007

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Introduction and general outline

This paper examines the feasibility and justifiability of a mandatory copyright clearance scheme, proposed by cable operators, whereby cable operators can limit their acquisition of the rights necessary for redistributing the broadcast channels they wish to offer to the public, to individual arrangements directly and only with the respective broadcasters, thereby avoiding a contractual relationship with any other right-holders in (parts of) the content of those channels.

In the 2006 "Solon" study, commissioned by the main cable operators in Europe, it was claimed that cable operators face complex negotiations with numerous copyright collecting societies and would sometimes be hindered in obtaining the necessary rights for their services. In the cable operators' view, these complications would lead to high transaction costs and uncertainty in their business, and thereby reduce investment in new services. To overcome these difficulties, the Solon study recommends the combination of the following policy options:

1) "All-Rights-Included" packages: Cable operators should be enabled to clear all rights necessary for their distribution activities directly and only with the relevant broadcasters;

2) "Central Licensing": Broadcasters and cable operators should be allowed to negotiate agreements on the use of any rights with one single collecting society of their choice.

According to the Solon study's estimates, the combination of these two options could result in approximate savings of 50% compared to their total average costs of copyright clearance.[1]

Concerning the first above-mentioned policy option[2], cable operators propose that, in order to lower their average rights clearance costs, it should be possible to acquire all rights for cable retransmission of broadcast channels direct from the broadcasters alone. This would be tantamount to obliging broadcasters to acquire the necessary retransmission rights from all other right-holders on behalf of the cable operators.[3] Broadcasters, or at least those represented by the European Broadcasting Union, are firmly opposed to this idea. In their view, such a mandatory clearance model would shift both the legal and the financial responsibility for the acquisition of the cable retransmission rights from the cable operators to the broadcasters, while the cable operators alone would benefit therefrom.

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[1] Details of the 2006 Solon Study are available at http://www.cableeurope.eu/uploads/documents/pub27_en-2006_05_09_solon_study_final.pdf (summary: pages 10/11).

[2] The second option of "central licensing" is currently subject to intensive debate, including the open question of whether this option is likely to result in reducing or increasing transaction costs, and is not examined further here.

[3] This suggestion is not entirely new: A reference thereto can be found in a July 2002 report by the EC Commission on the implementation of the 1993 Satellite and Cable Directive in the EU Member States, available at http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm#reports.

The following study is therefore intended to demonstrate in detail that the proposed copyright clearance scheme for the cable redistribution of broadcast channels is, apart from creating conflicts with the present international and European legal framework, largely based on unrealistic assumptions and likely to result in less efficient rights management and higher costs than those resulting from multilateral arrangements.

The study includes a *general part* and *national reports* from a selection of European countries. The general part sets out the most relevant legislative provisions of international and European law and court decisions, and includes an analysis of the current arrangements on the national level. It also offers some thoughts on the desirability of applying the present legislative framework to new media platforms and/or new technology for broadcast retransmissions, and conducts a final evaluation of the (proposed) retransmission rights clearance obligation for broadcasters. The national reports from Belgium, the Nordic countries (except Finland), Germany, the Netherlands and Switzerland provide detailed information not only on the actual implementation of European and international rules on cable retransmission on the national level but also on court cases, as well as practical and economic aspects of local arrangements. These country reports have been prepared from contributions from certain EBU Members and/or their legal representatives, while the general part was mainly provided by the EBU Legal and Public Affairs Department.

Geneva, 14 November 2007

Executive Summary

➢ **Licensing agreements for the cable retransmission of broadcast channels involving multiple collecting societies and other right-holder groups have been a well-established practice in Europe for several decades and occasion the lowest negotiation and administration costs of all possible business models.**

➢ **Global (i.e. multilateral) licensing agreements, i.e. single contracts involving all categories of right-holders on the one hand and cable operators (or national associations thereof) on the other, are favoured by broadcasters. Even in countries where cable operators refused to conclude global licensing agreements, multiple right-holder groups have successfully licensed their repertoire to those operators.**

➢ **The proposal by cable operators that broadcasters should be obliged to acquire and manage all cable retransmission rights on behalf of the cable operator is unacceptable for broadcasters and would create higher transaction and administration costs. The question as to which (whose) retransmission rights the broadcaster would wish to acquire should remain the broadcaster's own free decision. Consequently, *such a proposal should be unequivocally rejected*.**

The rights clearance model proposed by cable operators in the Solon study, whereby the broadcaster should be obliged to clear all rights for the television channels that the cable operator wishes to offer to its paying subscribers, is apparently based on a desire to transfer the cable operators' legal and financial responsibility to the broadcasters. However, this would obviously contravene well-established licensing patterns which have successfully facilitated the cable retransmission of television programmes for many years. Moreover, for the reasons set out below, making broadcasters a mere rights clearance entity on behalf of cable operators and burdening them with the cost of the cable distribution activity is neither legally justified nor feasible in practice:

- Under copyright law, the *raison d'être* of the exclusive cable retransmission right is the ***intended economic benefit*** of this activity by the cable operator. This follows on from Article 11bis(1)(ii) of the Berne Convention, from case-law of the European Court of Justice and from national copyright laws and European recommendations. Consequently, given that cable operators use television programmes (and the relevant rights) for their own business purposes, they are legally and financially responsible for acquiring the cable retransmission rights from all right-holders concerned.

- The act of cable retransmission, for which consumers must pay a subscription fee, is operated and managed only by the cable distributor. Given that the latter is selling the retransmitted programmes to consumers ***for commercial purposes***, the copyright liability for such retransmissions should not be placed on the shoulders of any right-holders in the value chain.

- For the simultaneous, complete and unchanged cable retransmission of (foreign) broadcasts, the 1993 Satellite and Cable Directive introduced a simplified rights clearance system, facilitating the ***collective licensing*** of retransmission rights of certain right-holders. This system, which helps copyright users to obtain the retransmission rights which they need, was adopted ***specifically upon request from cable operators***.

- Under the 1993 Satellite and Cable Directive, broadcasters are intentionally provided with the necessary ***flexibility*** to negotiate their rights as they deem appropriate. In the model proposed by the Solon study, the economic risk of the negotiations for all the retransmission rights would be a burden entirely for the broadcaster alone.

- The proposed model would therefore involve more negotiations, because it would require additional discussions between the broadcasters and the other right-holders, thereby creating ***higher transaction and administrative costs***.

- Unlike the case of multiple-party licensing agreements, where right-holders sit around the same table with cable operators, in the proposed model broadcasters cannot sufficiently anticipate whether (and, if so, in which countries and under which commercial circumstances) their channels will be retransmitted in the future. The broadcasters would thus have ***no solid basis for negotiations*** with the other right-holders.

- Today, retransmission rights are remunerated by cable operators according to actual usage/consumption, e.g. on the basis of the actual subscription model and the retransmitted channels. In the proposed model, collecting societies would have to ask for payment from broadcasters *without knowing in advance the scope of actual retransmissions*, i.e. which channels would be retransmitted and on which commercial basis (subscription model, fees, etc.). This would also lead to an ***unjustified and unnecessary increase in negotiation costs***.

- These difficulties can be further illustrated by broadcast retransmissions via the ***new media platforms***, as the business models of the new media operators were not known in advance to broadcasters and other right-holders.

- New media platform operators do not expressly enjoy the benefit of a mandatory collective licensing scheme for clearing the retransmission rights which they need. Consequently, the legal framework for simultaneous, complete and unchanged retransmission of broadcasts creates an obvious ***incentive for a similar system of rights clearance*** for broadcast retransmissions by such other media operators.

Contributors to the national reports

The national reports of this paper were contributed by the following authors:

For Belgium:

Ms Carine Doutrelepont, Doutrelepont & Associés, Brussels, Belgium
Mr Koen Lemmers, Doutrelepont & Associés, Brussels, Belgium

For the Nordic countries:

Mr Steen Lassen, Lassen Ricard, Copenhagen, Denmark
Ms Terese Foged, Lassen Ricard, Copenhagen, Denmark

For Germany:

Mr Peter Weber, ZDF, Mainz, Germany
Mr Michael Krause, WDR/ARD, Cologne, Germany

For the Netherlands,

Mr Rick van den Dolder, NPB/NOS, Hilversum, the Netherlands

For Switzerland:

Mr Hermann Stern, Zurich, Switzerland

PART I

GENERAL PART

A. INTERNATIONAL PROVISIONS

1) Article 11bis of the Berne Convention

Cable retransmission is governed by Article 11bis (1) of the Berne Convention and Article 8 of the WIPO Copyright Treaty (see below). The latter recalls the right of communication to the public, including the right of making available.

Article 11bis(1) of the Berne Convention states:

> *"Authors of literary and artistic works shall enjoy the exclusive right of authorizing:*
>
> *(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
>
> *(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;" (...)*

An author's right to authorize broadcasting is dealt with in Article 11bis(1)(i) of the Berne Convention, whereas Article 11bis(1)(ii) of the Convention gives authors the right to authorize the (cable and other) retransmission of broadcasts. The text of Article 11bis(1) of the Convention is a compromise made as a result of disagreement between those who wished to extend authors' protection to this new type of representation and those who wanted to avoid any extension of their rights. The Convention defines the exclusive right on communication to the public in very broad terms, and includes the retransmission of a broadcast when it is carried out by an entity other than the originating one.

a) Rejection of "new audience" as decisive criterion

The cable retransmission right is independent from the broadcasting right. If the initial broadcast is retransmitted by an entity other than the initial broadcaster, Article 11bis(1)(ii) of the Convention implies that this should be considered a new act of communication to the public, and as such should require authorization by the author. The criterion of "an organization other than the original one" is decisive.

As explained in the Guide to the Berne Convention (Masouyé, 1978), which without being legally binding may assist in the interpretation of this Convention, when the author authorizes the broadcast of his work, he considers only direct users, i.e. the owners of the reception equipment who receive the broadcast programme direct.

One of the characteristics of retransmission by cable is that the service is intended for an open (i.e. not determinable in advance) circle of the public (normally the cable subscribers). However, this does not always need to be a "new" public compared to those receiving the original broadcast service. Even if the same public receives through its cable subscription a channel which it already receives through hertzian (terrestrial) means, the cable retransmission of the same channel is still regarded as a new act of communication to the public. The history of Article 11bis(1)(ii) of the Convention reveals that there was a discussion among the member countries as to whether it should be a necessary condition that the broadcast retransmitter reaches a "new audience". This idea was ultimately, following a proposal from Belgium, rejected, and preference was given instead to the (sole) triggering criterion *of whether there is an "autre organisme" ("another organization") using the broadcast programme for its own business*. At the same time, it was clarified that a mere technical intermediary (such as the local telecom operator or relay transmitters) was considered irrelevant.[4]

This wording of the provision does not exclude the possibility that in cases where the broadcast retransmission actually reaches a new audience, compared to the original broadcast, that factor is taken into account as an *additional* determining factor. However, it is important to realize that for the legal question of whether the retransmission constitutes a relevant act under copyright, the audience factor is not a *sine qua non* prerequisite for the applicability of Article 11bis(1)(ii) of the Convention. On the other hand, it follows on from the provision's history that decisive is the question whether the retransmitting organization uses the broadcast for its own business purposes. This means that in order to determine whether a retransmission under Article 11bis(1)(ii) BC takes place, the focus must be on the *economical advantages* gained (or intended) by the retransmitting act of the "other organization".

b) Difference between cable-originated transmission and cable retransmission

It is worth explaining that cable operators can engage not only in the redistribution of 'traditional' terrestrial, over-the-air broadcasts of established broadcasters but also in so-called "cable-originated" transmissions of the cable operator's own programme-carrying signals intended for direct reception by the general public. The latter would consist of the act of broadcasting *by means of wire diffusion*, and in that case the cable operator would have to acquire the necessary rights to broadcast such programming in exactly the same way as a broadcaster. Such cable-originated programming is often simply part of the same package for the consumers, i.e. offered together with the channels of other broadcasters.

On the other hand, the act of cable *retransmission* implies that such communication concerns *another party's* broadcast, i.e. an existing programme intended for reception by the public. However, the wording of Art. 11bis(1)(ii) of the Convention does not require an "earlier" communication (in time). Rejecting the notion of "new audience" as the decisive criterion also makes it irrelevant whether there was any audience before. Moreover, even if no broadcast take place *before* the retransmission, the fact remains that the cable operator has no editorial responsibility for the broadcast programmes which it retransmits. In reality, today and even more tomorrow, there will be various *parallel* broadcasts (simulcasts) and there is no reason why Article 11bis(1)(ii) of the Convention should not apply to the retransmission of *any* such broadcast as long as this is done by an "*autre organisme*". It may be that such retransmission could involve, purely technically speaking, a signal which is *different from the original (e.g.*

[4] See, for instance, Walter, GRUR Int. 1974, 119 f.

free-to-air) signal. However, the purpose of Article 11bis(1)(ii) of the Convention is to protect the authors against a new type of use which is intended to generate new revenue for the "other organization". The fact that cable operators offer the broadcast to consumers for their own commercial purposes makes it evident that such intentions are present. It may also be added that the object of legal protection for broadcasters (as neighbouring rights owners) is the *broadcast* as an intangible good, which goes beyond the notion of the transmission signal as a quasi-physical object.

c) Exercise may be subject to conditions

Article 11bis(2) of the Convention allows the member countries of the Berne Union to determine the conditions under which the right is exercised. The countries may simply reduce the scope for applying the right or make such application subject to particular requirements. However, the general interpretation (see, for instance, the above-mentioned WIPO guide) is that a member country can replace this exclusive right by an obligatory licensing system provided that the country lays down in parallel a right to equitable remuneration, to be established by an amicable agreement or, failing that, by a competent authority. For example, in European Union countries the simultaneous, unchanged and unabridged retransmission of foreign broadcasts by cable is subject to a mandatory collective licensing scheme for certain right-owners in accordance with the 1993 Satellite and Cable Directive (Council Directive 1993/83/EEC of 27 September 1993; see below).

d) Article 8 of the WIPO Copyright Treaty

Article 8 of the 1996 WIPO Copyright Treaty (WCT) aimed at taking into account the new modes of communication, i.e. the so-called "digital agenda", and confirmed a very broad exclusive right of communication to the public. Recalling Article 11bis(1) of the Berne Convention, it states that the communication right may be authorized for wire or wireless means.[5] The regime of Article 11bis of the Berne Convention is therefore fully maintained by Article 8 of the Copyright Treaty.

For the sake of completeness, there is also a so-called Agreed Statement concerning Article 8 of the Copyright Treaty which states that *"it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis (2) [of the Berne Convention]."* This statement was invoked by a hotel undertaking in an - unsuccessful - attempt to avoid the need for authorization by the authors (see below).

2) Future treaty for the protection of the broadcaster's neighbouring right?

The agenda for the regular meetings of the Standing Committee for Copyright and related Rights (SCCR) of WIPO includes preparatory work on a possible Treaty for the broadcaster's neighbouring right. Although a WIPO Diplomatic Conference (originally scheduled for November/December 2007) is not going to take place this year, it is worth mentioning that a

[5] Article 8 of the WIPO Copyright Treaty reads as follows: *"Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."* [Emphasis added].

draft text already exists ("Revised Draft for the WIPO Treaty on the Protection of Broadcasting Organizations").

One (if not *the*) core exclusive right of that draft text for a future Treaty is the *retransmission right*, which is foreseen for both simultaneous and deferred retransmissions, as well as for retransmissions "by any means".[6] This proposal reflects the fact that the Rome Convention of 1961 covers only "rebroadcasting" (as exclusive right for broadcasters), which is defined in that Convention as simultaneous retransmissions via wireless means only, whereas many countries in the world already provide for a broader retransmission right, as documented in the WIPO comparative law study of 1998 on the broadcaster's neighbouring right.[7] In its own proposal for a draft WIPO Treaty, the European Community also provides for this unlimited (except in time) exclusive right.

B. EUROPEAN LAWS AND PRACTICES

It should be recalled that although the European Union as such is not a party to the Berne Convention it has to comply with the Convention in accordance with Article 9 of the GATT-TRIPS Agreement, to which the European Union is a party.

1) Case-law

European case-law in the field of cable distribution has been marked by two major decisions which pave the way for interpreting the international regulation of the cable retransmission. This has resolved two kinds of questions regarding the right of communication to the public by means of cable.

a) The Coditel case law (Case 62/79 Judgment of 18 March 1980, and Case 262/81, Judgment of 6 October 1982 - Coditel/Ciné Vog Films)

The willingness of the European court to look at the special features of the copyright field within the context of several other aspects was illustrated by the Coditel cases. A French film producer had granted a seven-year exclusive copyright licence in his film to a Belgian distributor for the Belgian territory. The film was screened in cinemas on the Belgian territory and was then shown on a German television channel. This broadcast was picked up in Belgium by a cable network company, Coditel, and distributed to its subscribers. The Belgian distributor considered that the retransmission on the Belgian cable network would jeopardize his commercial exploitation of the film and sued Coditel.

On the copyright aspect, the Court of Appeal considered that the Coditel undertakings had made a communication to the public of the film because they had picked up the broadcast of the film by a German broadcaster. The Court stated that the Coditel companies should have required the authorization of the Belgian distributor to retransmit the film on their networks The effect of this reasoning by the Court of Appeal is that the authorization given by the copyright owner to German television did not include permission to relay the film over cable distribution networks outside Germany, or at least to those existing in Belgium.

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[6] The current version of the Revised Draft Basic Proposal (SCCR/15/2) describes the right as follows: *"Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks."*

[7] See http://www.wipo.int/documents/en/meetings/1998/sccr_98/doc/sccr1_3.doc, page 13.

b) The Hotel Rafael case (Case C-306/05, Judgment of the European Court of Justice, 7 December 2006 - Rafael/SGAE)

The first question in this case related to the interpretation of the 1993 Satellite and Cable Directive. After a Spanish hotel installed television sets in guests' rooms, SGAE (the Spanish Authors' Collecting Society) claimed that the hotel was infringing copyright because it was making an act of communication to the public by wire. The issue was whether reception by the hotel of the television signal, terrestrial or satellite, followed by the distribution thereof by cable to every room, was to be regarded as an act of communication to the public. The doubts about such a classification arose given that the public comprised not of a number of people at the same time but a sequence of people who were present successively (in the case of a hotel bedroom).

A similar case occurred in 2000 (the EGEDA case, C-293/98 [2000] ECR I-629), also in Spain, where the European Court was asked the same question. At the time, the Court ruled that it was not a matter governed by the Satellite and Cable Directive and should be resolved in accordance with national law, although the Advocate General La Pergola held the view that such use of a television set constituted an act of communication to the public.

The Court confirmed the EGEDA decision by stating that the Satellite and Cable Directive was not applicable. It held that the applicable text was the EC Copyright Directive 2001/29 on copyright and neighbouring rights in the Information Society. While noting that communication to the public was not defined by that Directive, the Court referred to Recital 23 in its Preamble, which states that communication to the public must be interpreted broadly. In this context the Court had already held that the term "public" refers to an indeterminate number of potential television viewers (Case C-89/04 Mediakabel [2005] ECR I-4891; Case C-192/04 Lagardère Active Broadcast [2005] ECR I-7199).

The Court stated that for the concept of "public" it was necessary to take into account not only the customers in their rooms but also customers in any other area of the hotel who could make use of a television set installed anywhere on the premises. The Court considered that the public of a hotel constitutes a new public,[8] and that it is irrelevant whether or not the hotel's guests have switched on the television set; what counts is whether they have access to it. Moreover, the Court considered that the private nature of a hotel room does not preclude the possibility of describing communication by means of the television sets as communication to the public (thereby reversing the decision of the Spanish Supreme Court in this case).

The Court concluded that this distribution activity by the hotel constituted an act of communication under Article 11bis(1)(ii) of the Berne Convention "by an organization other than the original one".[9] Moreover, it stressed that the hotel's provision of access to the broadcasts "must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a

[8] The European Court of Justice's references to a "new public" in the decision grounds Nos. 40-42 may be confusing, since for the application of Article 11bis(1)(ii) of the Berne Convention this criterion is not decisive, see above. However, most probably the intention of those references was to regard the fact that a new audience was reached by redistribution as an *additional* element for the application of that provision.
[9] See, in particular, the decision grounds Nos. 40, 44 and 46.

necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings." This finding confirms the abovementioned "raison d`être" of a separate retransmitting right, notably the *intended economical benefit* of the retransmitting activity.

The Court also rejected the hotel's claim that it merely provided technical (or physical) facilities to view the original broadcasts and should therefore be exempted in accordance with the Agreed Statement to Article 8 of the WIPO Copyright Treaty.

As a final conclusion the Court stated that *"while the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC [...], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that Directive."*

2) 1993 Satellite and Cable Directive

With the objective of promoting the availability of broadcasting services from EU countries throughout the rest of the European Union, the Satellite and Cable Directive introduced, *inter alia*, a simplified rights clearance system for simultaneous, complete and unchanged cable retransmission of foreign broadcasts on a country-by-country basis. By ensuring greater legal certainty, on a contractual basis, for such retransmission methods, the Directive aimed at "eliminating the obstacles to cross-border broadcasting created by differences between the legislations of the contracting States". However, the Recitals to the Directive leave no doubt that cable retransmission is an act subject to copyright, and in several countries subject also to neighbouring rights.[10] At the same time, by making the licensing of cable retransmission rights of certain right-owners *mandatory* through a collecting society, the Directive recognized such a regime as being a necessary facility to help copyright users to receive, through a single licence from such a collecting society, the rights which they need for all the works they use for such retransmission. Moreover, it needs to be realized that this system was also adopted at the pressing request of the cable operators, and not at the request of right-holders.[11]

In the Commission's report of 26 July 2002 on the implementation (and future) of the Directive[12] it is stated that Articles 8, 9 and 10 lay down "the principle of a contractual relationship between holders of copyright and related rights and cable operators (Article 8), with the former being able to exercise their exclusive right only through a collecting society and such collective management also benefiting non-members in the same category (Article 9)". According to the Commission, this mandatory collective management of rights "fulfilled a need for a balance between the exercise of the exclusive right and an assurance for the cable operator that all copyright and related rights had been acquired for the programmes being retransmitted, due in particular to the extension of collective management to non-

[10] See Recital 27: *"Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted;"*

[11] See Recital 10: *"Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights [covered by such an agreement;]"*

[12] Available at http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm#reports.

members, which guaranteed the cable operator complete representation of the collectively managed material".

Article 10 of the Directive deals with the exercise of the cable retransmission right by broadcasting organizations: *"Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights."* This provision excludes the broadcasters from the mandatory licensing scheme of Article 9. One of the main reasons for that exclusion is that the individual broadcasters are far fewer in number and much easier for the cable operator to identify than are the multitude of other right-owners in the broadcast programmes the cable operator may wish to include in its offer. Collective licensing of broadcasters was therefore not regarded as necessary or appropriate. Thus, through Article 10 of the Satellite and Cable Directive broadcasters are intentionally granted the power to negotiate their own (acquired and neighbouring) rights with the local cable operators *independently* from the other right-holders.

According to the Commission's report, Article 10 is said to "take into account the particular situation of broadcasting organisations. (...) In this context, they have been given latitude to negotiate the acquisition of rights for the retransmission of programmes, without right-holders being mandatorily represented by a collecting society. (...) As regards the alternative introduced by Article 10, this introduces a degree of flexibility which should meet the various needs of the parties affected by cable retransmission. At all events, it is for the broadcasting organisation to decide whether or not to become involved in the transfer of cable retransmission rights which do not belong to it as such and whose acquisition for a particular retransmission is directly incumbent upon the cable operator."

On the specific nature of contractual relations in the context of cable retransmission, the report concludes that "an extended system of mandatory collective management ensures legal certainty as regards the settlement of fees for all right-holders and remains an essential principle in the context of retransmission by cable". The Commission's report further observed that "an examination of national legislation shows that the provisions of the Directive concerning payment in respect of cable retransmission rights have been correctly transposed in all Member States". It was noted that mechanisms designed to facilitate negotiations have already been put in place in some Member States. The Commission encouraged initiatives designed to improve negotiating conditions, but deliberately refrained from setting such conditions, as "this would jeopardise the principle of contractual freedom".

The report also refers to the idea of introducing, in the context of cable retransmission, an obligation for the broadcasting organization to negotiate with the collecting societies of a single Member State (in accordance with the law applicable in that country), an "all rights acquired" contract which would determine the remuneration for initial transmission. The Commission acknowledged that "some broadcasting organizations manage the acquisition of all cable retransmission rights on behalf of the cable operator, who remains legally responsible for the acquisition of such rights." However, the Commission did not explain that this model of rights clearance is preferred only by pan-European or transnational channels which are specifically created with the intention to be received European-wide; in such cases the transnational broadcaster's preference for clearing the retransmission rights itself is obvious because it corresponds to such broadcaster's own business aims to be available on a pan-European basis. This explains why such "all-rights-clearance" approach does not

normally take place with respect to national "generalist" channels whose focus is on the national audience. Moreover, the Commission stated that this idea "cannot be given tangible form by a mechanism which relies on a broadcasting organisation, as the legal responsibility and financial commitment associated with the retransmission rights and initially incumbent upon the cable operator might be too much of a burden for some broadcasting organisations. It would amount to setting up a one-stop-shop system with the risk that it would be an empty shell in view of *the specific difficulties involved in its implementation which would be faced by some broadcasting organisations when it came to determining the remuneration*." [Emphasis added]

Nevertheless, the Commission concluded that "the one-stop-shop for the transfer of cable retransmission rights represents a major project and is in keeping with the dynamic impetus of the internal market. It therefore needs to be the subject of in-depth consideration, particularly in a more horizontal context linked to developments induced by the emergence of the information society in which the established principles for the transfer of rights will have to undergo change". (Concerning the various possibilities for, and implications of, different one-stop-shop models, see below under section D.2).

3) Council of Europe

a) 1960 European Agreement for the protection of television broadcasts (EAT)

The EAT (1960) entered into force on 1 July 1961. As it was later amended by several Protocols, which made it compulsory for countries wishing to adhere also to adhere to the Rome Convention, it lost much of its attractiveness. Thus, it is currently binding on only a limited number of countries (Denmark, France, Germany, Norway, Sweden and the United Kingdom).

On the other hand, the minimum rights granted under Article 1(1)(b) of the Agreement exceed the rights granted under the Rome Convention, and notably in that it includes the exclusive right for the *diffusion of television broadcasts by wire*. The adhering States are allowed to make the exercise of this right subject to certain, non-essential restrictions.[13]

b) 2002 Recommendation on broadcasters' rights (Rec(2002)7)

In 2002, the Council of Europe issued a Recommendation[14] which encourages all Member States to confer broadcasters under their jurisdiction with, *inter alia*, the exclusive right *"to authorise or prohibit the retransmission of their broadcasts by wire or wireless means, whether simultaneous or based on fixations".*

[13] See also WIPO study (*op. cit*. in footnote 4), page 8.
[14] Recommendation Rec(2002)7 of the Committee of Ministers to Member States on measures to enhance the protection of the neighbouring rights of broadcasting organisations, which is available at the EBU website: http://www.ebu.ch/CMSimages/en/leg_ref_coe_r2002_7_nr_110902_tcm6-4398.pdf.

4) Current arrangements on the national level

The following is a summarized overview of the national regulations and present contractual arrangements in the countries covered by the attached national reports.[15]

- National regulation with regard to cable retransmission

The national cable reports reflect the various trends set out above. As the countries considered are, except for Switzerland and Norway, members of the European Union it appears that they have implemented the European and international instruments in an homogeneous way.

The legislation of the various countries, whose reports are attached hereto, consider that under Article 11 of the Berne Convention and/or the European Directives, cable retransmission is an act of communication to the public. No legislation makes any distinction between the retransmission of national and foreign programmes. Furthermore, the countries examined, including even Norway, have implemented homogeneously the model of the rights management proposed by the Satellite and Cable Directive.

Belgium, Dutch and German legislation mentions that the cable retransmission right has to be exercised through collecting societies, with the exception of broadcasters, who can exercise on an individual basis their own retransmission rights. The Nordic countries' legislation requires that the rights be exercised only through extended collective agreements, with the same exception as regards broadcasters, who are allowed to conclude licence agreements with cable operators on an individual basis.

The only exception is Switzerland, where broadcasters are obliged by law to have their cable retransmission rights vis-à-vis the cable operators managed by the collective societies (the only body allowed to deal with the cable operators).

- Court cases at the national level

In the exercise of cable retransmission rights, some litigation has occurred concerning, in particular, two issues, one relating to the small cable network, the SMATV networks, and the other regarding the interaction between must-carry rules and cable retransmission right.

Regarding the SMATV issue, in most countries the retransmission through these very small networks is usually regarded as exempted of any authorization or as an act of communication which is not relevant as far as copyright is concerned. In Germany, for example, the practice of a collecting society has determined that in case of fewer than 75 households the retransmission of programmes is exempted from any authorization and remuneration to the rights-holders. In Belgium the law and the courts consider that there is such a close relationship between inhabitants of dwellings that the communication has a private character.

[15] These countries are Belgium, Germany, the Netherlands, Switzerland and the "Nordic countries" (i.e. Denmark, Sweden, Norway and Iceland; Finland could not be included as final arrangements were still outstanding at the time of writing).

However, the Netherlands constitutes an exception in this respect as the Supreme Court considered that "any other body" must be understood as a body other than the organizer which is responsible for the broadcast, including the very small cable network. The only situation where there could be such an exemption is, in the Court's view, retransmission within the family circle.

Regarding the must-carry rules, all the countries referred to have either in their legislation or in their case-law explicitly acknowledged that must-carry rules and copyright rules were two distinct categories and that the must-carry rules therefore do not exempt the cable operators from paying copyright remuneration to the broadcasters for the cable retransmission of their programmes. Cable operators continue to challenge remuneration for must carry, if any, and remuneration for copyright, but the public authorities and the judicial bodies are maintaining their analysis.

It is nevertheless worth noting that in some countries, such as Sweden, the public service broadcaster voluntarily decided to pay the copyright remuneration to the national collecting society on behalf of the cable operators for the must-carry channels.

- Administration of cable retransmission rights

In the countries referred to, no legislation has considered entrusting broadcasters with the task of gathering all rights and acting as a one-stop-shop for cable rights. The system applicable is twofold: the cable operators should negotiate on a collective basis with the collecting societies and on an individual basis with the broadcasters. In practice, broadcasters negotiate in those countries within a global framework. In all the countries examined, there is either a global contract (most cases) or a situation where this global contract has been cancelled or not renewed. Where these global agreements have been cancelled or not renewed, this is the result of a unilateral decision by cable operators, as in the Netherlands or Belgium.

In no countries do national broadcasters play the role of a one-stop-shop as demanded by the cable operators. The sole exception to this rule are some transnational channels (as explained above under B.I.2).

In the Nordic countries the scheme adopted is the extended collective agreement where a cable operator may use all the programmes of channels with which it has an agreement even if the authors are not represented by the collecting society, which has to provide legal representation for a substantial number of authors. The unrepresented authors may then ask for their relevant remuneration, provided that they forward their claims within (usually) three years of the exploitation of his work, as in Sweden.

An important issue in the administration of cable retransmission rights is the situation where the negotiations between right-holders and cable operators have failed. In some countries, such as Germany, the law lays down an obligation to negotiate, sometimes called a "compulsory licence". This imposes on the parties an obligation to negotiate (reasonable) terms for cable retransmission. However, this obligation does not apply when objective grounds would justify a party's refusal to accept the terms.

When negotiations fail, most legislations have a procedure for making it possible to unblock the process. It differs from country to country. In some countries, such as Germany, it is an arbitration system carried out by the Federal Patent Office, whose proposals are binding on

the parties unless they decide to appeal to Court. In Belgium, it is a mediation system whose proposals are not binding. In the Netherlands there is also a mediation system provided under the law, but it seems never to have been used yet. In Denmark and Norway arbitration is by a copyright tribunal (a commission in Norway). These tribunals have the power to grant the necessary permission and to lay down the conditions for cable retransmission.

In Switzerland, where the broadcasters also have to be represented by a collecting society, the tariffs proposed by the collecting societies must be approved by the Federal Commission.

C. NEW PLATFORMS/NEW TECHNOLOGY FOR RETRANSMISSIONS

1) General context

Today's range of new digital platforms opens up several possibilities for simultaneous retransmission of (terrestrial or direct-to-home satellite) broadcasts across frontiers, and not least for all EU citizens who do not have access to traditional cable services. Thus cable operators and certain digital satellite providers are not the only parties engaged in broadcast retransmission. There are also now operators of DSL or IPTV, mobile telephony operators and other digital platforms (such as DTT) which use exactly the same business model.[16]

Evidently, insofar as any such new forms of delivery involve the retransmission of another party's broadcast, such retransmissions will take place only if the necessary rights can be cleared. The assimilation of (wireless) microwave retransmission systems to cable systems in Article 1(3) of the Satellite and Cable Directive is itself already evidence of the initial intention that the simplified rights clearance system for cable redistribution established by that Directive should apply in a broader context. Since the reasoning behind this simplified system is determined not by its technical character but by the *commercial nature* of the retransmission activity made available by the third-party operator (i.e. only to paying subscribers for its services), it would be justified to have the same system extended - in a revision of the Directive or by other appropriate means - to simultaneous, complete and unchanged retransmission of broadcasts by any third-party operators which exploit broadcasts in analogous circumstances "on their own account", whatever technical means they may use.

Audiences would thereby obtain a broader choice of transmission platforms on which they can receive their favourite programme services, which is in line with the growing demand for time- and place-shifting use of broadcasts. After all, for consumers, all these new technical retransmission systems serve to facilitate reception, and they can be applied cumulatively. Indeed, in many cases consumers could already receive the same broadcast signal either by individual off-air reception of the terrestrial transmission (in the country itself, as well as in border areas of neighbouring countries) or with the aid of a satellite dish. Politically, this context of broadcast reception by satellite justified the facilitation of rights clearance for cable retransmission, and the same should thus apply where any new distribution platforms perform the same function as cable. In practice this is already applied in part, as broadband (i.e. DSL or IPTV) operators themselves ask to be included in existing global arrangements for cable redistribution and to be subject to the same or similar conditions. Similarly, in some countries the cable operators themselves want a legal clarification that complete, unchanged and unabridged retransmissions by other operators are a copyright relevant act (e.g. Germany).

[16] Of course, in the near future there will also be radio or television channels specifically designed for distribution via the World Wide Web (e.g. "Web-TV"), but if this is done by the broadcasters direct it would not involve any retransmission activity by another organization.

Consequently, with a view to safeguarding a level playing-field, the system of simplified clearance of cable distribution rights should be extended to comparable cases of *retransmission of broadcasts by commercial third-party operators over wired, mobile and other wireless "new media" platforms*, such as broadband, mobile telephony and digital terrestrial or satellite ("bouquets") platforms, provided that such retransmission takes place simultaneously, completely and without any modification and, in particular, provided that the individual subscribers to the retransmission service are clearly identifiable and that they are charged by the third-party operator for access to the respective programme service.

2) National developments

At the national level the situation may differ from one country to another. In some countries, like Belgium, Switzerland and the Nordic countries, the legislation is worded in a technologically-neutral way. The legislative approach to retransmissions is often very broad and encompasses a wide range of technology, wire or wireless, such as IPTV and mobile. In some other countries, e.g. Germany and the Netherlands, the law provides a definition of the term "cable retransmission" (Germany) or "broadcasting network" (in the Netherlands) which seems to cover only a small range of technology and limits them to wire platforms.

However, most of these countries have entered into agreements with DSL, IPTV or mobile platforms and adopt in practice, even if the legislation is not clear, a reasoning by analogy with the characteristics of a cable network. In some cases, e.g. in Germany, it is clear that the law does not for the time being deal with wireless technology other than free-to-air broadcasting.

D. EVALUATION OF A (SUGGESTED) RETRANSMISSION RIGHTS CLEARANCE OBLIGATION FOR BROADCASTERS

1) Legal aspects

The legal situation as described in the previous sections is unambiguous in the sense that the retransmission by cable operators (or other third parties) is a separate act under copyright and subject to an exclusive right for authors (the exercise of which may be subject to conditions insofar as permitted under the Berne Convention). The latest decision by the European Court of Justice concerning hotel distribution also confirms that the redistribution of broadcasts with the objective of obtaining revenue from the public cannot invoke the exemption for the mere provision of "technical facilities" under Article 8 of the WIPO Copyright Treaty. Moreover, it appears that there is an increasing recognition, on a European and even a worldwide level, that *any form* of broadcast retransmission should also be subject to an exclusive right for broadcasters as part of their own neighbouring right. This legal framework makes the cable operator liable for clearing the cable retransmission rights from all right-holders concerned, while creating a clear incentive for similar treatment of other broadcast retransmission operators.

The one-stop-shop clearance model proposed by the cable operators seems to be based on transferring the cable operators' legal responsibility to the broadcasters: while the act of retransmission is operated by the cable distributor, for which consumers are asked to pay a cable subscription fee, the cable distributors wish the broadcasters to bear the cost of that activity. However, this would put broadcasters in the role of a mere rights clearance entity for activities performed by the cable operators. Given that the latter is selling the broadcast programmes for commercial purposes to consumers, there is no justification whatsoever for placing the copyright liability for such retransmissions entirely on the shoulders of one of the right-owners in the value chain. Also, Article 10 of the Satellite and Cable Directive intentionally provided broadcasters with the necessary flexibility to negotiate their rights in the way the broadcaster would deem as most appropriate.

From a historical perspective, such a model as proposed would seem to be turning the developments upside down. Given the systematic denial by cable operators of the mere existence of basic copyright rules, for several decades right-holders were forced to engage in litigation, e.g. for more than 15 years in Belgium, as well as in Germany, Denmark and Switzerland, before cable operators agreed to enter into negotiations with right-holders' representatives. The cost for right-holders for simply having the existence of their rights recognized was considerable.

Insofar as cable operators would complain about the *cost of negotiations* with "multiple collecting societies and right-holder groups", this would also be contradictory. In countries where a single global contract involving all categories of right-holders was in place (providing, therefore, a true "one-stop-shop"), cable operators have unilaterally withdrawn from such global contracts and engaged in separate negotiations; the most recent case is in the Netherlands, where after more than 20 years of smooth implementation in practice whereby cable operators acquired the rights from all categories of right-holders jointly, the cable operators started separate negotiations with authors' groups and film producers on the one hand and with individual broadcasters on the other, in an attempt to create confusion on the possible separation of the various rights categories. This change in the bargaining position, made without approval by any of the right-holders' groups, contradicts the affirmed desire of cable operators for simplification of negotiations.

Furthermore, the proposed model would not make negotiations between the parties concerned better or "smoother" than before. In such a model the broadcaster would have to deal with all the other right-holders' groups before it could finally conclude the contract with the cable operator. This means that the proposed model would only *add more negotiation phases* to the process than in the case of "global agreements" where all parties sit around the same table. These additional negotiations are even more complicated given that at all those stages of the negotiations by the broadcaster the final position of the cable operator concerned remains unknown. The broadcaster would have to negotiate first, perhaps even on a preliminary basis only, with the other right-owners, without the possibility for the broadcaster or the other right-owners to know the outcome of the negotiations between that broadcaster and the cable operator. In their negotiations with the other right-owners, broadcasters cannot sufficiently anticipate whether, and if so, in which countries and under which circumstances (subscription models and fees) their channels will be retransmitted in the future, and broadcasters would thus not have a solid basis for their negotiations with the other right-owners. The broadcaster would also have no possibility to renegotiate with the other right-owner groups after it had made arrangements with the cable operator.

This difficulty can also be illustrated by broadcast retransmissions via the *new media platforms*, as in this area the business models of the new media operators were previously unknown to both broadcasters and other right-owners.

Consequently, the negotiation process in the proposed model would lead to ping-pong negotiations on two (or more) different tables. It is therefore predictable that the proposed model would effectively result in protracting the entire negotiation process instead of improving it, and would thereby increase unnecessarily the total sum of administrative costs (see also below).

It should also be stressed that *other operators engaged in broadcast retransmissions* (in particular, broadcast delivery via DSL or IPTV (and in some cases via digital satellite) *do not expressly benefit from any similar or more favourable rights clearance regime*. Among broadcasters and other right-owners, and to some extent also among new retransmission operators themselves, there is a broad consensus that the same simplified rights clearance regime should apply by analogy to similar forms of simultaneous, unabridged and unchanged retransmissions. However, so far this is not expressly set out in any legislative text (at least on a European level). In fact, these new platform operators could have the most reasons for complaining that they are not yet given the benefit of a mandatory collective licensing scheme, as for the moment they are, from a strictly legal point of view, in a more difficult negotiating position than cable operators to acquire the necessary retransmission rights.

Finally, it is worth noting that in Germany, the new draft for an amendment of the copyright law provides for the possibility that, on the request of a collecting society, a broadcaster or cable operator, all right-holders involved in one and the same programme service are obliged to negotiate together.

2) Economic and practical aspects

Given the various possibilities for (partly) separate and (partly) joint negotiations of cable retransmission rights between all the parties concerned (cable operators, broadcasters and other right-owner groups, including film producers), it would be possible to distinguish, for the sake of comparison, some basic negotiation models with varying degrees of "collectivism" and to assess the economic implications thereof.

a) Fully individual negotiations

In this model each cable operator would need to negotiate on an individual basis with each broadcaster and each other category of right-owner (films, music, graphic arts, etc.) separately. It is not difficult to imagine that of all possible negotiation models this one would give rise to by far the highest transaction/negotiation costs, which is the situation that the 1993 Satellite and Cable Directive wished to avoid as far as possible.

b) Negotiations with individual broadcasters, but with (most) right-holders jointly

Applying this model would include the fact that individual negotiations are taking place between cable operators and each broadcaster for its channel(s), but at the same time between the cable operators and the other right-owner groups on a joint basis (e.g. film producers negotiate separately via their collecting society AGICOA, but in the negotiations the latter is often joined by a CISAC collecting society representing other right-holders). This model,

which is currently being explored in some countries, might be feasible in cases where the cable operator is interested only in retransmitting a limited number of broadcast channels, but the transaction/negotiation costs would obviously rise exponentially with the number of channels (from different broadcasters) which the cable operator wishes to offer (by, for example, the bundling of channels for various "packages" according to theme, language and/or region, in order to attract more subscribers). This means that in the future such a model may no longer be adequate. Moreover, this scheme still represents a model of multilateral agreements with multiple right-holder groups as originally envisaged by the 1993 Satellite and Cable Directive.

c) Rights clearance obligation for broadcasters on behalf of the cable operator

As set out above, apart from making the negotiation process more complicated, this model would create *additional* transaction/negotiation costs compared to the previous model because it requires additional negotiations to take place between the broadcasters and the other right-owner groups. After all, currently the local collecting societies undertake the right clearance for all the channels retransmitted, whereas the rights clearance in the model proposed by cable operators would have to be carried out entirely by each broadcaster separately, which would inevitably increase substantially the total right clearance costs. Not only would this deprive the collecting societies of the possibility to be involved in direct negotiations with the cable operator, but the economic risk of all the negotiations would be entirely upon the shoulders of the broadcaster. Moreover, in the current system the rights are remunerated by the cable operator according to the actual use/consumption (i.e. on the basis of the cable operator's actual subscription model and the retransmitted channels), whereas in the proposed model the collecting societies would have to ask for remuneration from the broadcaster without knowing in advance the scope of actual retransmissions, i.e. which channels would actually be retransmitted and on which commercial basis (subscription model, fees etc.), which is most likely to lead to an (unjustified) increase in negotiation costs.

d) "Global" licensing agreements

In this model all parties involved in the same programme service are gathered around the same negotiating table. This has already been the practice for many years in several countries. Variations on this model allow for even closer links among the same parties, such as by joint negotiation of most or nearly all foreign broadcasters (e.g. all public or all commercial channels together) vis-à-vis the cable operators, just as joint negotiating via a national "association" can take place on the part of the cable operators of the same country. Such variations are currently applied in nearly all of the Central and Eastern European countries and to some extent in Switzerland.

This approach, which evidently gives rise to the fewest transaction/negotiation costs of all models discussed above, is favoured by right-holders. Moreover, it seems to imply that a collective licensing obligation *also on the part of foreign broadcasters* could be a possible regulatory measure to facilitate such cable retransmission agreements even further.

PART II

NATIONAL REPORTS

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BELGIUM

I. LEGAL ASPECTS

A. National regulation with regard to cable retransmission

1. Implementation of European and international treaties

The 27 September 1993 EC Directive on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission (the "Cable and Satellite Directive") has established a minimum set of rules applicable to cable retransmission which has to be implemented by Member States.

In Belgium, these rules have been implemented in the Law of 30 June 1994 related to Copyright and Related Rights (hereafter "The Belgian Copyright Law"). This legislation is national, as copyright is a matter falling within the competence of the Ministry of the Economy.

- **Definition of cable retransmission**

Article 52 of the Belgian Copyright Law defines cable retransmission as "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission by wire or over the air including by satellite or of television/radio programmes intended for reception by the public".

This definition is built on the model of the Cable and Satellite Directive. Under the definition, the criterion for defining cable retransmission appears to be, both in the EC Directive and in the Belgian Law, the fact that the retransmission of an initial transmission is made by a third party (cable or microwave system). Such a criterion, distinguishing primary broadcasting and secondary retransmission, is also the one initially laid down in Article 11bis of the Berne Convention (cable retransmission by "an organization other than the original one").

In this definition of cable retransmission, two entities are active: the cable operator and the broadcaster.

- **The Belgian model for the management of cable rights**

The Belgian model for the management of cable retransmission rights comes from the one set up by the 1993 Cable and Satellite Directive.

Article 51 of the Belgian Copyright Law states that copyright and related rightholders have the exclusive right to authorize the cable retransmission of their works.

Article 53 mentions that exclusive right may be exercised only by collecting societies, with the exception for broadcasters, in respect of their own transmission rights which may be exercised individually (irrespective of whether these rights are their own or have been transferred to them by other rightholders).

The Belgian/EC model for the management of cable rights is thus a fragmented one. It is a very simple dual model, whereby the cable operator faces only two kinds of entities for rights acquisition: the broadcasters and the collecting societies.

The *ratio legis* of this model imposed by the EC Directive, which makes the collective management of rights compulsory for all rightholders (except for broadcasters), is to ensure better legal security by enabling global coverage of the cable rights.

The European Commission chose to entrust the collecting societies with this task of providing better security, putting them in the centre of the system. In practice, this collective system imposed by the EC Directive, has brought real improvements to the management of cable rights, compared to the previous system whereby cable operators were obliged to negotiate with each individual rightholder and were never sure to have identified them all.

All the current national copyright laws of EU Member States, which have to implement the Cable and Satellite Directive, are built on this model.

In this Belgian/EC model, the legislator has in no way considered entrusting broadcasters with the task of gathering all rights and acting as a one-stop-shop for cable rights. Any other model, such as the one proposed by the Solon Report, whereby a cable operator may only enter into an agreement with a broadcaster who should have acquired all rights, will be contrary to EC legal rules and to most of the national rules of Member States.

Belgium applies the Berne Convention and does not accept cable operators' claim regarding the service area and, consequently, does not exonerate cable operators from asking the rightholders' authorization or from paying copyright fees for the cable retransmission of national television channels.

- **SMATV and cable rights**

The Belgian Copyright Law treats in the same way the retransmission by cable and the retransmission by microwaves, as Article 52 defines the cable retransmission as being the retransmission "by cable or by microwave system (…)".

The Law does not distinguish between large cable systems and small cable systems (SMATV).

Article 52 defines the cable retransmission as a retransmission "intended for reception by the public".

Under Article 11bis of the Berne Convention, the authorization of rightholders is needed for the communication of the broadcast programmes when the latter are communicated to the public.

Thus, no authorization is needed when the communication is made in the family circle. Article 22.3 of the Belgian Copyright Law states that the communication made "in the family circle is private and not subject to copyright payment". The concept of "family circle" refers to a limited and defined group of persons who have a close relationship, such as family or friends. Over this close circle, the solution has been discussed.

- **National channels and cable rights (the "service area" question)**

Article 11bis of the Berne Convention states that Member States' legislations "shall not in any circumstances be prejudicial to (…) the right of the author to obtain equitable remuneration".

However, the Berne Convention does not establish any distinction between the different channels, whether national or foreign. Thus, historically, in Belgium as in some other EC countries, cable operators have tried not to pay a fee for the cable retransmission of national channels, claiming that the rights for such a retransmission have already been paid within the primary retransmission agreement which the broadcaster concluded with the rightholders. They claim that the unabridged and unaltered cable retransmission takes place in the same geographical "service area" and with the same audience as that of the primary transmission for which the rights have already been paid.

Such a claim is contrary to Article 11bis of the Berne Convention, which provides that any retransmission to the public by an organization other than the initial one constitutes a new act of communication and, as such, shall be subject to the authorization of the rightholders and subject to remuneration.

The only sector in which the rules are not harmonized between the operators is the audiovisual sector, but this has nothing to do with copyright. In Belgium, audiovisual legislation is not a national matter but falls within the competence of the Communities. In the French-speaking Community Decree of 27 February 2003 some rules apply only to coaxial cable operators. This is, for example, the case for must-carry rules, which apply to networks defined as "coaxial networks" (Definition, Article 1.36, which means that it should not apply to DSL cable networks which are not "coaxial" networks. Another example of such a different regime may be found in the must-carry system applying to Hertzian (free-to-air) terrestrial digital operators (Article 84 of the Decree), which is less extensive than the one applying to cable networks.

Nonetheless, such audiovisual rules have nothing to do with the copyright legislation governing cable retransmission, the latter already being technologically neutral vis-à-vis new technology.

2. Court cases on cable retransmission

The Brussels Court of First Instance has, in several recent decisions, confirmed the legal pertinence of the fragmented model of managing cable rights.

These decisions also confirmed that a new communication to the public is completed by cable operators and that the task of obtaining the preliminary written authorization from the rightholders relies on the cable operators.

- On 3 September 1981 the Belgian Court of Cassation (which is the highest judiciary court) decided (Pas. 1982, I, 8) that cable retransmission constitutes a communication to the public. Consequently, cable operators are obliged to obtain the authorization of rightholders.

- The "must-carry" decisions of the Brussels Court of First Instance (Decisions of 4 July 1997 - RTBF, BRT v. RTD - and of 27 January 2005 - RTBF v. 13 cable operators) established that the must-carry obligations do not exempt cable operators from obtaining authorization from rightholders and from paying the latter a fee for the exploitation of the television programmes on cable.

Moreover, in the 2005 decision the Court decided that a direct "injection" of a television programme on cable constitutes a communication to the public only and exclusively by the cable distributor (there is no communication to the public by the broadcaster) and that such an injection by cable operators is subject to the authorization of rightholders.

- In another decision, dated 28 February 2003 (TF1 and crts v. RTD and crts), the Brussels Court of First Instance examined the question of the copyright and neighbouring rights payment by the Belgian cable operators for the distribution on their cable networks of the television channels of several national broadcasters in the EU (TF1, France 2, France 3, ARD, ZDF, etc.). The Court recalled that the broadcasters have the exclusive right to authorize or refuse the cable distribution of their works, and that for the grant of their own and acquired rights they may fix a remuneration to be paid by cable operators.

- **SMATV case-law**

Some court decisions tried to determine when a communication is directed to the public or intended for the family circle. From this point of view, the location where it takes place is not relevant: a private household may be a public place if it is opened up to the general public for a special event. The fact that payment is requested is not relevant (Cassation, 26 February 1960, Pas., 1960, I, 745). A public communication takes place when it is intended for general public (and not to a closed group of persons) (Cass. 26 May 1972, Pas., p. 885).

Some operators of SMATV (small master antennas) have claimed that such a retransmission to a small number of subscribers within a building or a specific block of buildings or in the rooms of a hotel does not constitute a "communication to the public".

Belgian case-law has considered that flat owners in multiple dwellings who equip the building(s) to receive television channels via a collective antenna have between them such a close relationship that the communication has a private character, and is thus not subject to any authorization from rightholders or to any payment (Brussels Appeal Court, Coditel, 30 March 1979).

The Brussels Appeal Court decided that the public character of the communication is linked to the fact that the retransmission is directed to the general public (i.e. an indefinite number of persons without any link between them and in which anyone could participate), which is the case with the retransmission by a cable network. In contrast, a collective antenna can be used only by a limited number of defined persons, linked by joint ownership in a building or a small group of buildings.

In Belgium, the cable retransmission in hotel rooms is considered a public communication, and the criterion of the family circle excludes a private communication. In France, the Court of Cassation also came to the same conclusion (Cass. Fr., 6 April 1994, CNN c. Novotel).

- **Must-carry rules**

- Cable operators ask not to pay for must-carry channels

In the Belgian French-speaking Community, must-carry status is granted by the 27 February 2003 Decree to some national television channels under some conditions (Article 48 *et seq.*).

Must-carry status is also granted to television channels from other EU countries which fulfil some criteria (Article 82).

Article 82§3 of the Decree states that cable operators must distribute, in a simultaneous and unchanged way, the television channels from other Member States with which the French-speaking community has signed a convention whereby the television channels have a financial obligation to contribute to cultural promotion in the Community and in the EU. So far, no television channel has signed such a convention.

Article 82§1 of the Decree states that cable operators must distribute international television channels in whose capital the public television channel RTBF has a share. On this basis, TV5 was granted must-carry status for years, but it has to be stressed that, recently, the Belgian Council of State cancelled the must-carry status of TV5. In its decision of 17 May 2006 (UPC Belgium, Coditel, Brutele and Wolu TV, no. 158.928) the Council of State considered that:

> "TV5 is a company, which proceeds of a collaboration with the RTBF, governed by the law of France. In a world where the international co-operation takes more and more importance, it cannot reasonably be considered that any undertaking in which an institution of the French Community takes a limited participation, would thus automatically fall under the competence of the Belgian French-speaking Community. In the case of TV5, the link with the Belgian French-speaking Community is too loose and the fact that it has been granted a must carry status does not imply that this status has been given on a well-founded basis."

Historically, in Belgium as well as in other EC countries cable operators have always tried not to pay a fee for the cable retransmission of must-carry channels, claiming that the must-carry obligation is not compatible with the obligation of asking the broadcaster for the retransmission authorization requested by the copyright law and paying a corresponding fee to the broadcaster.

However, in Belgium, case-law has come to the opposite conclusion.

In a decision dated 4 July 1997 (RTBF, BRT v. RTD), the Brussels Court of First Instance decided that the obligation imposed on the cable operators to distribute a certain number of television programmes ("must-carry rules") did not exempt them from obtaining authorization from the rightholders and from paying them a fee for the exploitation of their programmes on cable. The Court distinguishes the must-carry obligation - which falls within the scope of administrative law - and the obligation to obtain the authorization of the broadcasters in exchange for adequate remuneration - which falls in the scope of private law. The Court added that, in this matter, there is no need to distinguish between national and foreign broadcasters.

In a decision dated 27 January 2005 (RTBF v. 13 cable operators) the Brussels Court of First Instance confirmed its previous decision in a case in which the RTBF was opposed to cable operators on similar questions.

The Court stated once more that the obligation to distribute certain programmes ("must-carry rules") does not exempt cable operators from asking for the authorization of the broadcasters and from paying the corresponding rights' fees. The Court recalled that a cable retransmission constitutes a new communication to the public and that such communication is subject to the authorization of the rightholders.

- Moreover, cable operators request that a must-carry retransmission should be subject to financial compensation by the broadcaster

Cable operators asked for compensation for the costs in connection with the transport of the signal of the must-carry television channels on cable networks. However, no payment obligation has been fixed by the Belgian Community legislators.

Indeed, from a private law perspective, cable operators do not deliver a service to the broadcasters, since they distribute in their own interest (on their account) which is a distinctive act of communication. They take the initiative for the transmission; they choose their public (the subscribers) and act as the exploiters of the programmes rather than as mere technical service providers. In other words, pretending that cable operators are only transport operators boils down to refusing their capacity of rights users. However, the Coditel judgments made it clear that under Belgian law, in line with article 11bis of the Berne Convention, the cable operators are rights users.

The RTBF/Cable operator decisions confirm that the must carry obligation does not exempt the cable operators from the obligation to pay the rightholders for the exploitation of the protected works by the cable networks.

In the Flemish Decree on radio and television (of 4 March 2004), no obligatory payment has been fixed for the must-carry transmission, although such obligation is not excluded. However, Article 128 states explicitly that the transmission of regional channels is free within the region of each of these channels.

3. Treatment of new technology

Cable operators claim that the existing legal rules are not technologically neutral as, among television channels distributors, only the cable networks face strict, extensive rules.

Such a statement is not correct. In Belgium, the rules applying to the management of cable rights do not distinguish between operators.

Indeed, Article 52 of the Belgian Copyright Law defines a cable retransmission as being "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public".

Even if article 52 of the Belgian Copyright Law does apply explicitly only to cable transmission, two observations can be made:

- not only coaxial cable operators but every cable operator is concerned (DSL, …);
- in any event, the international rules – and more precisely article 11bis of the Berne Convention - have to be applied to all other retransmission operators not

mentioned in Article 52 (e.g. mobile television). This disposition obliges retransmitting third parties to negotiate with the right holders.

From this perspective, Belgian law is technologically neutral as far as the obligation to negotiate with the rightholders is concerned, although a difference could be noted between the collective negotiations and the individual negotiations (the obligation for collective negotiations only refers to the technology mentioned in Article 52).

In Belgium, the legislator did not introduce any exceptions to the dual fragmented model for the acquisition of cable rights, which asks that the cable rights be acquired by the operator from the broadcaster and the collecting societies.

B. Administration of cable retransmission rights

- **Relevant regulation on collecting societies, including the scope of administration of retransmission rights via collecting societies**

In Belgium, the collective management of cable rights is a legal obligation.

Article 53§1 of the Belgian Copyright Law states that "copyright and related rights may only be exercised via a collecting society", which is the model contained in the 1993 Cable and Satellite Directive.

On the basis of the Directive, Article 53§2 adds that when a rightholder has not entrusted any collecting society with the management of its rights, those rights shall be managed by the collecting society active for rights of the same category.

Only the broadcasters' own and acquired rights may be exercised on an individual basis by broadcasters (Article 53§3).

As mentioned above, such a cable retransmission model is a dual one: it is only one organization - the cable operator - that has the task of acquiring cable rights, on the one hand with the broadcaster for its own and acquired rights and, on the other, with the collecting societies for the rights not owned by the broadcaster.

The Belgian Copyright Law also contains some provisions on the competence of collecting societies. For example, Article 65 states that the collecting societies have the competence to conclude global agreements, and Article 73 gives collecting societies the power to introduce actions before a court to protect the rights which they manage.

In Belgium, the most important collecting societies are:

SABAM (music rights)
SACD-SCAM (literary, audiovisual and multimedia rights)
SINIM-IMAGIA (rights of music producers)
PROCIBEL (private copying rights)
SOFAM (visual arts rights)
BELFITEL (film producers' rights)
URADEX (performers' rights)
SAJ (rights of journalists).

- **Description of the arbitration system and relevant arbitration decisions**

The arbitration technique is an alternative dispute resolution technique which makes it possible to find more adequate solutions to some disputes than would be found by a court. The decisions of arbitrators are binding on the parties. When many parties are involved, as in the cable retransmission, this system has proved particularly quick and efficient.

The Belgian Copyright Law does not provide for an arbitration system in the case of a dispute between cable operators and rightholders regarding cable rights, but only for a mediation system.

Article 54 of the Law contains the possibility of mediation if it appears impossible to conclude a cable distribution agreement, stating that "the parties may call upon three mediators". In the wording of the Law, such mediation is not compulsory for the parties, which have no obligation to use this alternative dispute resolution technique, as also recalled by the Brussels Court of First Instance of 27 January 2005, which mentions on the basis of Article 54 that "the parties may use mediation".

Moreover, if the parties decide to conduct mediation, the mediator's final decision is not binding on the parties, which are entitled to ignore it.

In the mediation system, the courts remain competent if mediation has failed.

During the long dispute in Belgium between cable operators and rightholders, mediation was organized at the end of the 1990s after the global contract had ended, but it failed.

This dispute lasted for about ten years. To remedy such a situation and to propose a resolution procedure which is more efficient than the optional mediation system, a member of the Belgian Senate, Mr Philippe Monfils, proposed introducing into the Copyright Law a compulsory arbitration system for cable retransmission disputes (Senate documentation No. 2-533/1, session of 24 October 2002). The project consisted of establishing a commission, to be composed of an equal number of members appointed by each party.

However, the Monfils proposition received a negative opinion from the Belgian Council of State (Senate Doc, No. 2-533/2), which decided that the compulsory arbitration system established by the proposal was in contradiction with Article 11 of the 1993 Cable and Satellite Directive, which only establishes a non-compulsory mediation system. Consequently, the proposition was given up.

II. PRACTICAL AND ECONOMIC ASPECTS

A. National cable market

In 1980 the total number of cable subscribers in Belgium was 2,308,254.

On 30 September 2005 this number reached about 4,000,000 for the whole territory of Belgium, which could be split into about 2,500,000 for the Flemish-speaking part of Belgium (Flanders) and about 1,500,000 for the French-speaking part (Wallonia and Brussels).

The subscribers are divided among 19 companies (cf. Annex 1).

About 60 television channels (national and foreign channels) are distributed on cable networks (see Annex 2).

- National cable companies and other platform operators, business models (e.g. with regard to triple play), annual turnover, etc.

Currently, in Belgium, the television retransmission market is split between the main operators:
- cable operators
- BELGACOM
- the platform Be TV originally dedicated to satellite dishes
- TV Vlaanderen (satellite platform)
- mobile operators as BELGACOM Mobile

Be TV is only active in pay-TV programmes. Cable operators and BELGACOM compete on the triple play market (television, telephony, the Internet).

Digital terrestrial television has just started in Belgium on an experimental basis.

- **Cable operators**

All cable companies in Belgium offer optional digital services, in addition to their basic analogue television services. Most of them also offer voice telephony service and ADSL Internet connections.

- **French-speaking area (Wallonia)**

Two groups of cable companies are operating:

Three purely public companies (100% held by public local authorities): Ale-Teledis, Inatel and Brutele. Recently, Ale-Teledis and Brutele joined to create a common entity, Voo, to develop triple-play services in Wallonia.

Seven cable companies are "mixed companies", held by public local authorities and the private electricity company Electrabel/Suez, the latter being in charge of running the cable companies. Recently, these seven companies, as well as Inatel, decided to sell their cable activities. Ale-Teledis and Telenet announced that they were interested in buying them.

- **Brussels area**

Four cable companies are operating in Brussels:

- two private companies: Coditel, controlled by the cable operator Altice-Cinven, active in France, and UPC, mainly controlled by the US cable operator Liberty Global;

- two companies run by local authorities: Brutele and Wolu-TV.

- Flanders

Two groups are operating:

- Telenet**,** representing more than 1,600,000 subscribers and already offering the triple play. It is now owned by a US company, Liberty Global.

- four purely public companies (owned by local authorities), Interelectra, Integan, PBE and WVEM, representing about 800,000 subscribers. Internet connections for the Interkabel area are also sold by Telenet.

- **BELGACOM**

One and a half years ago, Belgacom, the longstanding public telephone operator, also entered television activities. It proposes a digital DSL bouquet, with about 150 television channels, which now reaches about 100,000 subscribers. It also offers a mobile 3G TV platform, currently offering about 20 television channels.

- **Be TV**

Be TV is a satellite platform, only active in digital subscription and pay-per-view TV. It currently has fewer than 100,000 subscribers. It is facing difficulties in developing because, two years ago, it lost the contract it has long had with the Belgian Football Federation.

The main shareholders of Be TV are the cable operators of Wallonia.

- **Digital terrestrial television**

Digital terrestrial television has just started, with the public television channel RTBF using some digital frequencies that have been attributed to it under the contract signed with the Government. It may be received with a small antenna and a decoder.

The Flemish public broadcaster VRT is broadcasting for more than 4 years via BVB-T. More investments are planned. In the management contract between the VRT and the Flemish Government is has been stipulated that all VRT radio and television channels have to be universally available in Flanders and Brussels for free via DVB-T. Multiplex capacity has been created.

So far, no call for proposals has been launched by the Belgian authorities to attribute digital terrestrial frequencies. If such a launch does occur, Belgacom has announced it would be interested.

In Flanders, as has been stressed, the VRT is making growing efforts to develop its digital capacity via ether.

B. Cable retransmission agreements

In Belgium, cable activities developed very early on, and the country acted as a laboratory for cable retransmission agreements.

- **Description of global agreements**

In 1978, on the initiative of the EBU on behalf of the broadcasters, negotiations started to resolve the question of cable retransmission rights in Belgium. The colleting society AGICOA represented the film industry, CISAC represented the musical and literary rights and AID (the International Alliance for Distribution by cable) represented the cable operators.

To facilitate the acquisition of cable retransmission rights and to replace the contracts signed by cable operators with each broadcaster and with each collecting society, a global contract was signed in 1983, gathering cable operators, broadcasters and collecting societies.

This contract was signed by:

- the broadcasters BRT (the name has changed in VRT), RTBF, TF1, A2, FR3, NOS, ARD, ZDF, RTL and the BBC
- SABAM on behalf of the authors for musical and literary rights
- RTD (Union professionnelle de Radio Télé-Distribution).

The contract authorizes the simultaneous, unaltered and unabridged retransmission of 18 channels among those of the above-mentioned broadcasters, in exchange for a global sum to be shared among all rightholders.

The global amount to be paid by cable operators for all rights included was fixed at 15% of the average of the annual subscription fee they charged to their subscribers. On this basis, in 1992 the average annual cable subscription fee paid by subscribers amounted to 2,917 BEF (72.31 Euros) and the corresponding copyright/related rights remuneration to 439 BEF (10.83 Euros per year per subscriber). This was based on a distribution of 16 (in Brussels 17) programs, to choose by the customer out of 21 authorized TV channels. In 1995, this remuneration was 539 BEF (13.36 Euros per year per subscriber). If the cable operator wanted to retransmit more, the subscriber had to pay a fixed supplementary amount per extra TV channel.

The amount of copyright/related rights was split among the right holders.

The global contract concerning the authorisation for 18 programmes, signed in 1983, remained in force for six years until 31 December 1988. It was used as a model in many European countries (Scandinavia, for example). From 1990 onwards, also RAI and RTL+ signed the contract, whereas ITV abstained. In 1992, ITV and Arte signed too.

It came to an end in 1996 because right-holders and cable operators could not come to a new agreement regarding the copyright and related rights remuneration based on a new situation created by the arrival on the market of a large number of new broadcast programmes.

Instead of negotiating a new global contract, RTD decided, for the future, to negotiate separately with the different collecting societies and also separately with broadcasters for the programmes they intended to retransmit on their networks.

- **Description of individual contracts (apart from global contracts)**

Today, cable retransmission rights are negotiated on the basis of individual contracts.

Cable operators negotiate separately with the different collecting societies and with each of the broadcasters for the programmes they intended to retransmit on their networks. Cable operators play on the existing competition among the individual broadcasters and between the broadcasting organizations and the other rightholders, trying to pay a fee which is as low as possible. The cable operators wished to conclude agreements with right-holder groups individually, regardless of the increase in transaction costs following on from the additional negotiations.

The content of these individual contracts is confidential, but it is known that the average price paid by cable operators for the rights of a foreign broadcast channel is comparable to the rights' fee under the previous agreement.

As the remuneration is negotiated by cable operators taking into account the importance of the audience of each programme, it is clear that there may be an important difference in the amounts paid to each television channel, both national and foreign.

ANNEX 1

Belgian cable operators and the number of cable subscribers on 30 September 2005

AIESH	15,454
ALE-TELEDIS	312,658
BRUTELE	288,832
CODITEL BRABANT	136,163
IDEA	134,795
IGEHO	96,336
INATEL	136,497
INTEGAN	218,126
INTERELECTRA	308,844
INTEREST	24,041
INTERMOSANE	53,206
PBE	52,145
SEDITEL	108,386
SIMOGEL	23,344
TELELUX	91,912
TELENET	1,790,796
WOLU TV	20,275
WVEM	191,932
TOTAL	**4,003,742**

ANNEX 2
Distribution and penetration of TV channels of cable basic offer on 30 September 2005

Programmes	Sociétés	Nombre d'abonnés desservis				
		1	2	3	4	S
TVI	19	2,467,878	1,163,014	358,430	14,420	4,003,742
KETNET/CANVAS	19	2,467,878	1,163,014	358,430	14,420	4,003,742
LA UNE	19	2,467,878	1,163,014	358,430	14,420	4,003,742
LA DEUX	19	2,467,878	1,163,014	358,430	14,420	4,003,742
Club RTL	15	13,341	1,163,014	358,430	\4,420	1,549,205
ARTE	19	814,857	1,163.014	358,430	14,420	2,350,721
NEDI	15	2,467,878	508,315	358,430	0	3,334,623
NED2	17	2,467,878	970,295	358,430	14,420	3,811,023
NED3	Il	2,467,878	6,944	358,430	0	2,833,252
TF1	15	142,916	1,163,014	358,430	14,420	1,678,780
FR2	19	2,467,878	1,163,014	358,430	14,420	4,003,742
FR3	19	867,580	1,163,014	358,430	14,420	2,403,444
RTL+	2	1,366	61,461	0	14,420	77,247
ARD	19	2,467,878	1,163,014	358,430	14,420	4,003,742
ZWF	17	2,467,878	1,051,224	358,430	14,420	3,891,952
WDR3	9	1,187,418	57,994	0	14,420	1,259,832
SWF	3	0	109,596	0	14,420	124,016
ITV	2	360,742	0	0	0	360,742
BBC1	18	2,467,878	1,153,393	358,430	0	3,979,701
BBC2	13	2,466,512	545,032	358,430	0	3,369,974
RAI UNO	18	1,279,780	1,163,014	358,430	14,420	2,815,644
VTM	13	2,467,878	57,512	358,430	0	2,883,820
TV5	16	47,453	1,163,014	358,430	14,420	1,583,317
TV REG.LOC.	19	2,462,528	1,163,014	358,430	14,420	3,998,392
SAT1	2	0	17,684	0	14,420	32,104
MTV	18	2,467,878	1,095,720	358,430	14,420	3,936,448
Euronews	16	351,288	1,163,014	358,430	14,420	1,887,152
CNN	17	807,495	1,079,292	229,629	0	2,116,416
RTPi	8	346,675	485,903	229,629	0	1,062,207
TVE Int.	18	727,909	1,147,560	358,430	14,420	2,248,319
TRT lnt.	Il	1,282,814	658,086	358,430	0	2,299,330
RTL-Tvi	19	2,467,878	1,163,014	358,430	14,420	4,003,742
CNBC/NGC	10	2,459,150	663,909	106,661	0	3,229,720
VT4	9	2,461,899	0	358,430	0	2,820,329
Cartoon Network	4	1,688,103	0	235,462	0	1,923,565
MCM	13	30,469	1,153,393	358,430	0	1,542,292
Kanaaltwee	10	2,467,878	0	358,430	0	2,826,308
BBC WORLD	9	609,584	242,355	229,629	14,420	1,095,988
TMF	6	2,412,359	0	0	0	2,412,359
RTM	6	0	429,677	358,430	0	788,107
ERT	5	7,362	285,605	358,430	0	651,397
TV Polonia	1	266,666	0	0	0	266,666
HSE	3	0	555,523	0	0	555,523
Event TV	17	2,412,359	1,063,838	358,430	0	2,235,759
Kanaal Z/Canal Z	17	2,466,512	936,962	358,430	14,420	3,776,324
Kindernet	1	0	0	0	14,420	14,420
FR5	4	5,979	243,632	106,66\	0	356,272
Vitaya	7	2,461,899	0	102,693	0	2,564,592
Kanal 3	2	0	322,279	0	14,420	336,699
DSF	1	0	9,621	0	14,420	24,041
PR07	1	0	2,677	0	14,420	17,097
JimTV	7	2,419,721	0	0	0	2,419,721
AB3	15	5,979	1,163,014	358,430	0	1,527,423
AB4	12	11,975	1,130,049	338,155	0	1,480,179
PlugTV	7	11,975	629,624	358,430	0	1,000,029
Vijftv	4	2,093,548	0	102,693	0	2,196,241

1. Communauté flamande (sans Bruxelles) / Wallonia (without Brussels) / 3. Brussels / 4. German Community / 5. Total for Belgium

THE NORDIC COUNTRIES (DENMARK, NORWAY, SWEDEN AND ICELAND)

Introduction

UBO (the Union of Broadcasting Organizations) is an umbrella organization which encompasses organizations in all the Nordic countries: in Denmark, including Greenland and the Faeroe Islands, UBOD, in Norway UBON, in Sweden UBOS, and in Iceland UBOI.

The UBO organizations are associations of broadcasting organizations with respect to the retransmission of their broadcast signals, first and foremost by wire, i.e. normally in cable networks, but also wireless, via satellite etc.

Co-operation with national collecting societies

Each of the UBO organizations cooperates closely with the national collecting societies: Copydan and KODA in Denmark, Norwaco in Norway, Copyswede, FRF and IFPI in Sweden and IHM in Iceland. Through this cooperation the UBO organizations and the national collecting societies are able to offer cable networks a single global agreement, thereby clearing all necessary rights for the retransmission of a large number of radio and television channels in accordance with Articles 8 and 9 of the Cable and Satellite Directive.

I. LEGAL ASPECTS

A. National regulation with regard to cable retransmission

1. Implementation of European and international treaties

National legislation in the Nordic countries is very similar with regard to copyright, including cable retransmission.

- **Denmark**

The Danish Copyright Act, Section 35, - on the right to retransmission provided that the conditions for extended collective license are fulfilled - provides that[1]:

> "(1) Works which are broadcast wireless on radio or television may be retransmitted simultaneously and without alteration via cable systems and may in the same manner be retransmitted to the public by means of radio systems, provided the requirements regarding extended collective license according to section 50 have been met. The provision of the first sentence shall not apply to rights held by broadcasters.
>
> (2) Notwithstanding the provision of subsection (1), works forming part of a wireless radio or television broadcast received by means of the receivers' own antennae, may be retransmitted via cable systems consisting of more than two connections.

[1] Translation by the Danish Ministry of Culture. The Danish Consolidated Act on Copyright 2006 can be found in English at www.kum.dk/sw832.asp.

(3) The owner of a system as mentioned in subsection (1) is responsible for an agreement being made regarding radio and television broadcasts via the systems. If remuneration paid by the owner according to an agreement made in accordance with subsection (1) or an order from the Copyright License Tribunal under section 48(1), is fixed as an amount per connection, the user of the individual connection is under an obligation to pay the owner a corresponding amount."

- **Norway**

The Norwegian Copyright Act, section 34, - on the right to retransmission provided that the conditions for extended collective license are fulfilled - provides that[2]:

"Works that are lawfully included in a broadcast may, by simultaneous and unaltered retransmission, be communicated to the public when the person effecting the retransmission fulfils the conditions for an extended collective licence pursuant to section 36, first paragraph, or retransmits with the permission of a commission pursuant to the provisions of section 36, second paragraph.

The exclusive right of the author as regards retransmission may only be exercised through an organization approved in terms of section 38 a.

Retransmission of works originally broadcast by wire is not covered by this section."

- **Sweden**

The Swedish Copyright Act, Article 42 f, - on the right to retransmission provided the conditions for extended collective license are fulfilled - provides that[3],

"Anyone is entitled to transmit to the public (retransmit), simultaneously and in an unaltered form, by wireless means or by wire, works which form part of a wireless sound radio or television broadcast, provided that an extended collective license applies pursuant to Article 42 a.

The provisions of the first Paragraph do not apply to works where the retransmission right belongs to the sound radio or television organization that carries out the original transmission."

2. Court cases on cable retransmission

In Denmark the national television channels DR1, DR2 and TV2 are must carry. There are similar provisions on must-carry channels in the other Nordic countries.

In Denmark, Norway and Iceland cable networks pay for the retransmission of national must-carry channels.

[2] Translation from www.lovdata.no

[3] Translation by Government offices of Sweden.

In Sweden the public service broadcaster SVT – until February 2009 - pays on behalf of the cable operators the copyright remuneration to the national collecting society Copyswede regarding retransmission by wire.

For some time certain cable networks in Denmark have been raising objections to their payment for must-carry channels. However, the Copyright Licence Tribunal and the courts have several times maintained that the cable networks have to pay.

The Copyright Licence Tribunal's decision No. 16 of 27 June 1987 did not specifically deal with the question of payment for national channels, but the Tribunal defined the tariff, where there is no distinction between national must-carry channels and other channels.

In the Copyright Licence Tribunal's decision No 19 of 6 July 1987 the defendants (the cable networks) claimed (see the decision, page 13, first paragraph) that to the extent that they only retransmitted DR's programmes they were to be exempt from payment. The Tribunal's decision regarding this question is (see the decision, page 14, last paragraph) that they also have to pay in such a case. In other words, the Tribunal maintains that it is legal to collect remuneration, even if cable networks only retransmit must-carry channels.

In a judgment by the Western division of the High Court, fourth section, No. B 605/1989 of 17 May 1991 it appears from the Court's grounds that the Court first refers to the Tribunal's award No. 19, where "the Tribunal found no basis for exempting Danish channels when the amount of remuneration should be calculated".[4] The Court then stated:

> "The licence to Danmarks Radio does not comprise the collection of compulsory licence for Danish programmes, and there is no hindrance for Danmarks Radio as producer and rights holder to receive as well license as part of the compulsory licence from the same television viewers.
>
> Hereupon, and as it is neither found to be contrary to a principle of equality before the law that no compulsory licence should be collected with a minor group of cable television viewers, who cannot receive foreign programmes, the claimant should be entitled to collect compulsory licence for the defendant as effected. As a consequence of the above a judgment is to be delivered in support of the claimant's claim".[5]

In the Copyright Licence Tribunal's decision No. 70 of 16 December 1997 the cable networks in the case had accepted payment for must carry channels, and they only claimed that as a consequence of the already paid licence and the must-carry obligation the remuneration had to be smaller for must-carry channels. The Tribunal rejected this, (see the grounds, page 29, last paragraph) and stated that the national television channels shall be treated on equal terms with the foreign ones:

> "In support of the claim that the basic tariff should comprise six television channels instead of three against a simultaneous increase of the basic tariff from 55.45 DKK to 60.00 DKK the defendants have stated that the remuneration for cable retransmission of national television channels should be essentially smaller than the remuneration for cable retransmission of foreign television channels. However, as well the preparatory works to the amending act of 1985 as the preparatory works to the amending act of 1996 have expressly dissociated from the proposal that national television channels should be kept outside the regulation of cable retransmission

4 Translation by UBO

5 Translation by UBO.

> entitled to copyright and thus be free, and the Tribunal finds that these preparatory works should be understood in the way that it has also been a condition that national television channels should be comprised on equal terms with the foreign ones by the stipulation of the remuneration scheme. This has also expressly or conditionally been made the basis as well in the Compulsory Licence Tribunal's [now the Copyright License Tribunal's] decision of 27 June 1986 and 6 July 1987 as in the Western division of the High Court's judgment of 17 May 1991. To this comes that the defendants' proposal would imply an essential reduction of the total remuneration, which the Tribunal finds unreasonable."[6]

More recently, a judgment from the Eastern division of the High Court, 23rd section, in the case No. B-648-04 of 20 January 2005 stated that cable networks shall pay the copyright remuneration for retransmission of must-carry channels. The Court declared in its grounds (page 13) that:

> "As stated it follows from the Copyright Act that cable retransmission of as well Danish as foreign television broadcasts are subject to copyright, and that the provisions in the Radio and Television Act does not aim at any limitation in the rights holders' right to remuneration according to the Copyright Act to the extent unchanged and simultaneous cable retransmission is effected with authority in the Copyright Act, S.35(2) or subject to permission from the Copyright Licence Tribunal.
>
> The cable remuneration scheme in the Copyright Act is not contrary to article 11bis in the Berne Convention, which is no hindrance to copyrights being protected to a greater extent than stipulated in the provision. Likewise there is no reason to maintain that the stipulation is contrary to the EU directives claimed by the defendant."[7]

In Norway some cable networks have also opposed payment for national must-carry channels, but the Copyright Licence Tribunal has decided that they should also pay for the retransmission of such channels. Thus, in decisions dated 22 December 2004 and 29 September 2005 the Tribunal confirmed this. In a default judgment on 24 November 2006 the district Court of Nord-Trom also confirmed this.

3. Treatment of new technology

It follows from the quotations from the copyright acts in I.A.1. above that the extended collective licence is technology neutral and therefore applies to all forms of retransmission, including cable, IPTV, DVB-T, satellite and mobile television retransmission.

UBO's co-operation with the national collecting societies is also technology neutral and covers retransmission both by wire and wireless (satellite etc.).

The national collecting societies and UBO have entered into several contracts with cable networks about IP-based retransmission (IPTV, also called DSL). Retransmission to mobile telephones (e.g. 3G) is just beginning, and in 2007 UBOD and Copydan have entered into two agreements with mobile telephone operators (3G), while agreements with other operators are pending.

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[6] Translation by UBO.

[7] Translation by UBO.

As regards DVB-T, retransmission is relevant only for foreign channels, as distribution of national channels via DVB-T is a primary broadcast. The national collecting societies and UBO are prepared for such licensing and have taken initiatives to that effect, for example in Denmark, UBOD and Copydan are in the process of negotiating a DVB-T retransmission agreement.

B. Administration of cable retransmission rights

- **Denmark**

The Danish Copyright Act, Section 50, with common provisions on the extended collective licence states:

> "(1) Extended collective licence according to sections 13, 14, and section 16 b, section 17(4), section 23(2) and sections 30, 30 a and 35 may be invoked by users who have made an agreement on the exploitation of works in question with an organization comprising a substantial number of authors of a certain type of works of the same nature although the authors of those works are not represented by the organization.
>
> (2) The extended collective licence gives the user right only to exploit the works of the unrepresented authors in the manner and on the terms that follow from the agreement made with the organization and from the provisions mentioned in subsection (1).
>
> (3) Rightholder organizations who make agreements of the nature mentioned in subsection (1), shall be approved by the Minister for Culture. Only one organization can be approved for each type of works. The Minister may decide that an approved organization in certain fields shall be a joint organization comprising several organizations which meet the conditions of subsection (1)."

The Danish Copyright Act section 48(1) on the Copyright License Tribunal provides that:

> "If an organization approved in accordance with section 50(3) or a broadcaster unreasonably refuses to consent to retransmission via cable systems or wireless of works and broadcasts that are broadcast by wireless simultaneously and without alteration or if such retransmission is offered on unreasonable terms, the Copyright Licence Tribunal may upon request grant the necessary permission and lay down the conditions in this respect. The provision of section 50(1), second sentence, shall apply correspondingly. The Copyright Licence Tribunal's decisions as described in the first sentence are not binding on radio and television companies."

The Minister for Culture in Denmark has approved the two collecting societies Copydan and KODA.

Copyright Licence Tribunal Case regarding the Tariff - Denmark

In the Copyright Licence Tribunal's decision No. 16 of 27 June 1987 the Tribunal defined the tariff, which can be seen below in II.B.1., for distribution in basic packages (the "general Copydan tariff"). The tariff has been used since, only indexed every year.

- **Norway**

The Norwegian Copyright Act, sections 36 and 38a, with common provisions on a extended collective licence provides that:

> "§ 36. When there is an agreement with an organization referred to in section 38 a which allows such use of a work as specified in sections 13b, 14, 16a, 17b, 30, 32 and 34, a user who is covered by an agreement shall, in respect of rightholders who are not covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies.
>
> As regards the retransmission of works pursuant to section 34, where negotiations on an agreement as referred to in the first and second sentences of the first paragraph, or negotiations with a broadcasting organization concerning an agreement, are refused or no agreement has been entered into within six months after the commencement of negotiations, each of the parties may demand that permission and conditions for retransmission be determined in a binding manner by a commission pursuant to section 35, second paragraph. The provisions of the first paragraph shall apply correspondingly in such cases."
>
> "§38a. Agreements intended to have an effect as specified in section 36, first paragraph, shall be entered into by an organization which in the field represents a substantial part of the authors of the works used in Norway, and which is approved by the Ministry. For use in certain specified fields, the King may decide that the organization which is approved shall be a joint organization for the right holders concerned.
>
> The King may issue further provisions regarding the supervision of the organizations and funds which receive remuneration for further distribution."

The Norwegian Ministry of Culture has approved the collecting society Norwaco.

Furthermore, Norwaco has been approved as the organization for collection and distribution under the Norwegian Copyright Act, section 45 b, regarding remuneration for cable retransmission of sound fixations of the performances of performing artists.

The Copyright License Tribunal in Denmark and Norway

In Denmark and Norway there is a Copyright Licence Tribunal (in Norway called a commission in English; see above I.A.1) which has the authority to lay down the conditions for retransmission if a collecting society or a broadcaster offers this on unreasonable terms.

- **Sweden**

The Swedish Copyright Act, Article 42 a, with common provisions on an extended collective licence provides that:

> "An extended collective licence as referred to Articles 42 b–42 f applies to the exploitation of works in a specific manner, when an agreement has been concluded concerning such exploitation of works with an organization representing a substantial number of Swedish authors in the field concerned. The extended collective licence confers to the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organization. ...
>
> When a work is being exploited pursuant to Articles 42 b–42 d, or 42 f, the following applies. The conditions concerning the exploitation of the work that follow from the agreement apply. In respect of the remuneration deriving from the agreement and in respect of other benefits of the organization that are essentially paid out of the remuneration, the author shall be treated in the same way as those authors who are represented by the organization. Without prejudice to what has been said now, the author has, however, always a right to remuneration for the exploitation,

> provided he forwards his claims within three years from the year in which the works was exploited. Claims for remuneration may be directed towards the organization.
>
> As against the user exploiting a work pursuant to Article 42 f claims for remuneration may be forwarded only by the contracting organizations. All such claims shall be forwarded at the same time."

In Sweden the collecting society is Copyswede (co-operating with IFPI and FRF).

- **Iceland**

In Iceland the collecting society is IHM.

It follows from these provisions in the Copyright Acts of the Nordic countries that a cable network via the extended collective licence, i.e. consent from the collecting societies, and consent from the broadcasting organization - via UBO for the UBO members' channels - can obtain permission for the cable retransmission of broadcast signals.

The law does not distinguish between foreign channels and national must-carry television channels, just as the law does not distinguish between large cable systems and small cable systems (SMATV).

II. PRACTICAL AND ECONOMIC ASPECTS

A. National cable market

- **Denmark**

Denmark has a population of 5.5 million. There are about 2.5 million television households, and the cable market covers about 1.6 million households. The biggest cable operator, Yousee (formerly known as TDC), has about one million connected households. The second largest cable operator is Telia Stofa, which supplies cable networks with about 600,000 households with channels or services them. However, Denmark has many small cable networks, and there are about 6,000 cable networks in Denmark.

- **Norway**

Norway has a population of 4.6 million. The cable market covers about 950,000 cable households. Canal Digital retransmits channels to about 386,000 households, and Get to about 340,000 households. The remaining 224,000 or so cable households are supplied by smaller cable networks.

- **Sweden**

Sweden has a population of 9 million. There are about 2.5 million cable households and the largest cable operator – by far - Comhem retransmits channels to about 1.75 million of these. The second and third largest cable operators are Tele2Vision, which has about 300,000 connections, and Canal Digital, with about 220,000 connections.

- **Iceland**

Iceland has a population of 300,000. The cable operator Skjárinn has about 8,700 connections and 365 Media about 9,000 connections.

B. Cable retransmission agreements

In 2007, the tariffs for the UBO channels are the following:

- **Denmark**

Distribution in basic packages (also called the "general Copydan tariff"), per year:

The first three channels (including radio channels under the Copydan tariff), basic rate in total	DKK 68.64 / EUR[8] 9.22
The 4th, 5th and 6th channel, each	DKK 15.19 / EUR 2.04
The 7th, 8th, 9th, 10th, 11th and 12th channel, each	DKK 7.59 / EUR 1.02
The 13th channel, each further channel, each	DKK 4.65 / EUR 0.62

(Average price per channel based on the average of 14 channels retransmitted by each cable network: DKK 12.08 / EUR 1.62)

Radio channels outside the general Copydan tariff, per year per household:

One or two channels in total	DKK 3.20 / EUR 0.43
3 or 4 radio channels in total	DKK 6.11 / EUR 0.82
5-12 radio channels in total	DKK 11.66 / EUR 1.57
More than 12 radio channels in total per each further channel	DKK 1.41 / EUR 0.19

Distribution in standard add-on packages, per year:

Each television channel	DKK 33.25 / EUR 4.47
Each radio channel	DKK 5.04 / EUR 0.68

UBOD, i.e. the broadcasters, receives 36% of the remuneration, but only 25% for radio channels outside the general Copydan tariff.

[8] Tariffs converted into EURO according to the exchange rate of 29 June 2007.

- **Norway**

Large cable networks – distribution in both basic and add-on packages[9]:

Total number of connections to UBON channels	Price/connection /month	Price/connection /year
1,200,000	NOK 1.456 / EUR 0.183	NOK 17.472 / EUR 2.192
1,250,000	NOK 1.444 / EUR 0.181	NOK 17.328 / EUR 2.174
1,300,000	NOK 1.431 / EUR 0.179	NOK 17.172 / EUR 2.154
1,350,000	NOK 1.419 / EUR 0.178	NOK 17.028 / EUR 2.136
1,400,000	NOK 1.407 / EUR 0.176	NOK 16.884 / EUR 2.118
1,450,000	NOK 1.394 / EUR 0.175	NOK 16.728 / EUR 2.098
1,500,000	NOK 1.382 / EUR 0.173	NOK 16.584 / EUR 2.080
1,550,000	NOK 1.369 / EUR 0.172	NOK 16.428 / EUR 2.061
1,600,000	NOK 1.357 / EUR 0.170	NOK 16.284 / EUR 2.043
1,650,000	NOK 1.344 / EUR 0.169	NOK 16.128 / EUR 2.023
1,700,000	NOK 1.332 / EUR 0.167	NOK 15.984 / EUR 2.005
1,750,000	NOK 1.320 / EUR 0.166	NOK 15.840 / EUR 1.987
1,800,000	NOK 1.307 / EUR 0.164	NOK 15.684 / EUR 1.967
1,850,000	NOK 1.295 / EUR 0.162	NOK 15.540 / EUR 1.949
1,900,000	NOK 1.282 / EUR 0.161	NOK 15.384 / EUR 1.930
1,950,000	NOK 1.270 / EUR 0.159	NOK 15.240 / EUR 1.912
2,000,000	NOK 1.258 / EUR 0.158	NOK 15.096 / EUR 1.894
2,050,000	NOK 1.245 / EUR 0.156	NOK 14.940 / EUR 1.874
2,100,000	NOK 1.233 / EUR 0.155	NOK 14.796 / EUR 1.856
2,150,000	NOK 1.220 / EUR 0.153	NOK 14.640 / EUR 1.836
2,200,000	NOK 1.208 / EUR 0.152	NOK 14.496 / EUR 1.818

Small cable networks - remuneration per year per channel in basic packages:

For each of the first two channels	NOK 20.15 / EUR 2.53
For each of the next two channels	NOK 16.80 / EUR 2.11
For each of the next two channels	NOK 13.95 / EUR 1.75
For each of the next two channels	NOK 11.20 / EUR 1.40
For the 9th channel and each further channel	NOK 7.85 / EUR 0.98

Remuneration for retransmission in add-on packages:

	Per month	Annually
For each television channel	NOK 2.30 / EUR 0.29	NOK 27.60 / EUR 3.46

[9] Tariffs converted into EURO according to the exchange rate of 29 June 2007

- **Sweden**

Main agreement – analogue distribution[10]

Television:

	Per month	Annually
The first two channels in total	SEK 6.20 / EUR 0.67	SEK 74.40 / EUR 8.04
Each additional channel	SEK 1.60 / EUR 0.17	SEK 19.20 / EUR 2.07

Radio:

Each channel per year	SEK 1.50 / EUR 0.16

Supplementary agreement - add-on packages - digital distribution:

Television:

Per Nordic channel per month	SEK 3.90 / EUR 0.42
Per other channel per month	SEK 2.20 / EUR 0.24

- **Iceland**

Remuneration per year[11]:

For the first three channels in total	ISK 1,449 / EUR17.20
For each of the next three channels	ISK 322 / EUR 3.82
For each of the next six channels	ISK 201 / EUR 2.39
For each of the next channels	ISK 94 / EUR 1.12

Conclusion

It follows on from the above that the present clearance scheme in the Nordic countries is very rational; it functions in an optimal way. Thus, collecting societies for 15-20 categories of different rights together with broadcasting organizations conclude so-called global licence agreements with cable networks in accordance with Article 8 of the Satellite/Cable Directive. Approximately 10,000 cable networks in the Nordic countries are served by the present clearance scheme.

The present scheme has been working for more than 20 years with the notification of the competition authorities responsible.

[10] Tariffs converted into EURO according to the exchange rate of 29 June 2007.

[11] Tariffs converted into EURO according to the exchange rate of 29 June 2007.

GERMANY

I. LEGAL ASPECTS

A. National regulation with regard to cable retransmission

1. Implementation of European and international treaties

The legal framework of cable retransmission under German copyright law is primarily based upon the following provisions:

- Article 20 UrhG (right of broadcasting):

The right of broadcasting is the right to make the work accessible to the public by wireless broadcasting, such as radio or television transmission, satellite transmission, cable transmission or by similar technical devices.

- Article 20b UrhG (cable retransmission):

(1) The right to retransmit a transmitted work in the framework of simultaneous, unaltered and unabridged retransmission of a programme by a cable or microwave system (cable retransmission) may be exercised by a collecting society only. This shall not apply to rights that a broadcasting organization exercises in respect of its transmissions.

(2) If the author has granted the right of cable retransmission to a broadcasting organization or to the producer of an audio recording or a film, the cable operator shall nevertheless pay reasonable remuneration for the cable retransmission. The claim to remuneration may not be waived. It may only be assigned in advance to a collecting society and shall only be exercisable by a collecting society. This provision shall not run counter to collective agreements or works agreements of broadcasters if the author is thereby granted reasonable remuneration for each cable retransmission.

The cable retransmission right authorizes the cable operators responsible to supply simultaneously integral programmes broadcast by terrestrial, cable or satellite via the cable network in unaltered form to the households connected. Based on Article 20b sec. 1 UrhG the different cable operators in Germany need the permission of collecting societies as well as of broadcasters for the retransmission of programmes.

In respect of the broadcasters 20b UrhG does not distinguish between national and foreign television-channels. Consequently, the provision clarifies that also the retransmission of national channels is a copyright-relevant act, which has to be remunerated (BT-Drucks 13/1496, p. 9/13) It hereby goes beyond the scope of application of the Cable and Satellite Directive, which applies only to cross-border retransmission.

Article 20b sec. 2 UrhG sets up separate remuneration right for the author vis-à-vis cable operators, which may not be waived and which in advance can be assigned only to a collecting society. Cable operators have to pay reasonable remuneration to the author, even if the author has granted retransmission rights to a broadcaster or the producer of an audio recording or a film.

In order to ensure the possibility of one single contract under which the cable operator can acquire the necessary rights and fulfil legal payment obligations the so-called global cable agreement remains of vital importance. The most recent amendment to the German Copyright Act provides a clause stating that on the request of a broadcaster or the cable operator all rightowners (including the collecting societies) involved in a programme have to negotiate together.

In practice, broadcasters have entered into agreements with unions setting up remuneration rules for their employees and freelancers in compliance with Article 20b sec. 2 sentence 4 UrhG. Such agreements preclude claims for remuneration by the collecting societies in respect of the employee's rights. Those agreements, concluded both with unions and collecting societies, ensure that public service broadcasters own all cable retransmission rights with regard to own and commissioned productions. Authors of and performers in those productions receive in return equitable remuneration out of the broadcaster's remuneration share.

- Article 87 sec. V UrhG

Broadcasters and cable operators shall be mutually required to conclude a contract on reasonable terms regarding cable retransmission within the meaning of the first sentence of Article 20b sec. 1 UrhG unless there is an objective reason justifying refusal to conclude the agreement; the requirement imposed on a broadcasting organization shall also apply to broadcasting rights granted or transferred to it in respect of its own transmission.

Article 87 sec. V UrhG aims at promoting a widespread cable retransmission. As Article 20b UrhG does not apply to neighbouring rights Article 87 sec. 5 UrhG imposes a mutual obligation to broadcasters and to the cable operators to negotiate reasonable terms on cable transmission in respect of the transmission rights of the broadcasting services, which include the derived rights granted or transferred to the broadcasting service in respect of its own transmission. The provisions limit the contractual freedom of the parties. According to the opinion of the German legislator, this does not contradict the principle of contractual freedom for rights acquisition as provided in Article 9 of the Cable and Satellite Directive. The reason for this is that Article 12 of the directive demands efficient legislation to guarantee that the involved contractual parties for cable retransmission do not refuse or hinder without justified reasons negotiations on cable retransmissions.

Article 87 sec. 5 UrhG is widely called an "obligation to contract" or rather a "compulsory licence". Both terms go too far, as the provision merely stipulates an "obligation to negotiate" by introducing a right to refuse to conclude the agreement in case of "objective grounds". The "objective grounds" may concern legal (e.g. media law provisions of the Federal States) as well as material aspects. For example, providing an analogue signal of the programme may be regarded as "objective grounds" for refusing to conclude an agreement on cable retransmission of a digital signal of the same programme if the cable operator intends to use the digital signal for packaging encryption or other interference in broadcasters' neighbouring rights. These limitations match the requirements of the Cable and Satellite Directive of 1993, which allows limitations of the right in respect to transmission technologies or languages (Recital 16).

In case of failure to conclude an agreement under Article 87 sec. 5 UrhG the arbitration rules of the Copyright Administration Act apply. In compliance with Article 14c sec. 2 UrhG the arbitration board at the German Federal Patent Office is empowered to make proposals for interlocutory agreements, which are binding until a decision is taken on the merits of the case.

Hence, in case parties do not agree to this proposal they can appeal under § 16 sec 4 UrhWG to court. The court decides on the obligation of the parties to conclude a contract, as well as on the content. Most importantly, this decision by the Court of First Instance (*Oberlandesgericht*) - or, if parties appeal against the decision to the court, the decision of the Federal Court of Justice is binding for the parties.

- Article 13 b sec. 3 UrhWG (Copyright Administration Act)

If a rightholder has not assigned administration of the cable retransmission right within the meaning of Article 20b sec. 1 sentence 1 Copyright Act in advance to a collecting society, the collecting society which ordinarily exercises such rights is deemed to be empowered to administer its rights. If different collecting societies are to be considered, those societies are deemed to be empowered to administer its rights jointly. Sentences 1 and 2 do not apply to rights held by a broadcasting organization with respect to the retransmission of its programme.

Article 13 sec. 3 implements the so-called "outsider-rule" of the Cable and Satellite Directive. It applies to rightholders who have not assigned the administration of their cable retransmission rights to collecting societies. The provision stipulates a legal fiction, empowering collecting societies to administer retransmission rights notwithstanding the fact that the rightholder has not assigned them.

2. Court cases on cable retransmission

One central issue in Article 20 and Article 20b UrhG is to draw a line between the transmission and the mere reception of a programme in respect of cable retransmission. Problems particularly arise where common antennas (so-called small systems) are connected to single households in apartment buildings or to single rooms in hotels.

Another example is cable retransmission in areas actually covered by the terrestrial or cable signal of the broadcasting service, in which the reception of the signal is, for example, due to bad landscape conditions - blocked or hampered (so called *Abschattungsgebiete* - areas affected by shadowing affects). From the view of the *Versorgungsbereichstheorie* developed in German copyright literature (re-)transmissions in such areas shall not be deemed as a copyright-relevant transmission. However, in 2000 the German Federal Court of Justice stated (GRUR 2000, 699, 700f. - Kabelweitersendung) that this theory does not comply with German copyright law, as Artcile 20 and Article 20b UrhG do not refer to the ranks of the receivers of the signal. Nevertheless, it is acknowledged that in the described facts a more flexible interpretation of the (re-)transmission right is necessary: if retransmission connects only a very small number of households to the broadcasting signal the transmission right shall not be applicable or, rather, shall be deemed to be granted through an implicit contract.

Admittedly, the question remains as to what quantity of households connected should regarded as a "small number" in this context. A proposal submitted by the GEMA, the German collecting society for musical works, in the late 1990s provided for a number of 75 households, but was never confirmed by the legislator or court decisions. However, the current agreements between the collecting societies GEMA, VG Media (a collecting society founded by private broadcasters) and the cable operators are still referring to this number.

3. Treatment of new technology

Article 20b UrhG provides a legal definition of the term "cable retransmission", which - by its exact wording - covers only a small range of technology, namely transmission by cable and by microwave systems. However, the term cable comprises a multitude of different types of technology, and in particular transmission via DSL. Thus, German broadcasters, such as RTL, ProSiebenSat1, ARD and ZDF have already entered into contracts on retransmission of their programmes via the "T-Home" IPTV-platform (based on VDSL technology) of the Deutsche Telekom, thus regarding DSL as a particular form of cable retransmission. Moreover, the collecting societies regard DSL as cable retransmission and negotiate payments.

On the other hand, the provision currently does not apply to wireless retransmission technology other than microwave systems. Thus, in Germany the treatment of new wireless retransmission technology e.g. mobile platforms or satellite retransmission platforms within the meaning of Article 20b UrhG, is not expressly regulated by law.

Wireless technology like those taking the wording of Article 20b UrhG as a basis are only covered by the general transmission right of Article 20 UrhG, which would mean that the rights-clearing system for cable retransmission could not be applied. As this would render the administration of retransmission under German Copyright law difficult in respect of new technology, "microwave systems" is widely construed as a general term for wireless technology. However, this is difficult from a technical point of view, since the term "microwave systems" cannot be equated with "wireless transmission". Thus, there are still strong demands for clarification of the wording of Article 20b UrhG towards a more technologically independent approach.

In addition, Article 20b UrhG nowadays has to cope with new transmission platforms, which combine different business models. The issue of "encrypted digital satellite retransmission" may serve as an example for the current dimension of cable retransmission in the legal context. In Germany the satellite operator SES ASTRA, or rather its subsidiary APS (Astra Platform Services), and private broadcasters considered a system of generally encrypted digital retransmission of programmes via satellite (the so-called *Grundverschlüsselung*) based on the platform Entavio (ex "Dolphin") initiated by APS. These suggestions aimed at establishing a new type of "pay-TV", since customers of the programmes transmitted must at least pay a monthly fee for decrypted reception even of free-TV programmes, in favour of APS as well as the broadcasters involved.

This envisaged system apparently not only blurs the borders between pay-TV and free-TV but challenges the scope of Article 20b UrhG. At first, since encrypted transmission via satellite can hardly be defined as transmission via a "microwave system" Article 20b UrhG does not apply from a technical point of view. More importantly, the intended system goes far beyond mere "retransmission of programmes" within the original meaning of Article 20b UrhG, since it would in fact allow the introduction of numerous different business models aimed at collecting charges from the end-users, thereby being completely flexible in respect of the payment system and the prevailing programme to which it applies. Introducing a general fee for reception of programmes would, for instance, raise the question of whether broadcasters need to acquire pay-TV rights.

However, the anti-trust authority in Germany has raised doubts as to whether the envisaged platform is in compliance with the respective legislation. Owing to these statements, the

commercial free-TV broadcasters have withdrawn, for the time being, their plans to encrypt the satellite transmission.

Furthermore, Article 20b UrhG is only applicable to the simultaneous, unaltered and unabridged retransmission of a programme. Therefore retransmission of single parts of such programmes or at times other than the original signal is not subject to Article 20b UrhG. Thus, new additional services provided by the cable operators, such as time-shifted viewing or near-on-demand based services, are not covered by Article 20b UrhG.

B. Administration of cable retransmission rights

As already partly outlined above, collecting societies play an important role in the administration of retransmission rights under German copyright law. The collecting societies grant cable network operators and operators of small antenna systems the rights of cable retransmission in compliance with Sections 20 and 20b of the German Copyright Act, except for the rights of broadcasters, as Article 20b sec. 1 UrhG does not apply to those.

In short, the collecting societies in Germany are involved in the following aspects of cable retransmission:

- exercising the rights under Article 20b sec. 1 UrhG
- exercising the rights of the authors under Article 20b sec. 2 UrhG
- exercising the rights of "outsiders" under Article 13 sec. 3 UrhWG

Article 11 sec 1 UrhWG obliges collecting societies, with respect to the rights administered by it, to agree with any person on a licence, provided that equitable remuneration is paid. GEMA, the collecting society for musical works, and the other seven collecting societies (e.g. VG Wort, VG Bild-Kunst, GVL) as well as the - private and public - broadcasting companies are currently negotiating new general agreements with the associations of cable network operators KDG, ISH and IESY. In the past, the rightowners concluded a general agreement also with ANGA, the Association of Private Cable Network Operators and similar organizations.

One remaining issue in the context of the obligation to contract in Article 11 UrhWG is the application of Article 11 sec. 2 UrhWG in practice. The provision reads as follows:

> "Should no agreement be reached with respect to the amount of remuneration to be paid for the grant of a licence or for an approval, the licence or approval should be deemed to have been granted if the remuneration demanded by the collecting society has been paid without prejudice, or if such remuneration is deposited in favour of the collecting society."

This provision raises the question of how to proceed if cable operators refuse to pay any remuneration at all. In such a case the broadcaster would have to prohibit the cable retransmission of its programmes. The broadcaster would be forced to file for injunctive relief. Consequently, the programme concerned would not be transmitted to millions of households. The legal issue behind this situation is the fact that German procedural law does not recognize any type of interlocutory injunction for recovery and it could take years to obtain any decision on the payment. Thus, in the end only the collecting societies would be in a position to exercise their right to prohibit the retransmission of programmes.

The latest development on the part of the German law is the involvement of collecting societies in the negotiating process under Article 87 sec. 5 UrhG. The German legislator recently decided on an amendment to the provision (Article 87 sec. 5 sentence 2) which would set up a claim for joint negotiations between broadcasters and cable operators, including the participation of collecting societies. The aim of this amendment is to promote trilateral agreements between all rightholders involved in order to render the costs for cable retransmission more transparent and calculable.

II. PRACTICAL AND ECONOMIC ASPECTS

A. National cable market

Germany has a population of approximately 82 million. Currently, there are 33.904 million television households in Germany. 51.8% of these households (approximatively 18 million) receive television services via cable and 15.2% via digital cable.

The three major players in the German cable market are the company successors to the former DTAG (Deutsche Telekom):

- Kabel Deutschland GmbH (KDG); approximately 9,581,000 customers
- Unity Media (a co-operation of the companies ish and iesy); approximately 5,095,000 customers
- Kabel Baden-Württemberg (Kabel BW); approximately 2,300,000 customers

Since all of them have taken over certain regions of the former DTAG network they are also called *Regionalgesellschaften*. Their networks cover a total range of about 17 million. households either directly (6.5 million) or via the delivery of their signals to smaller cable operators on the so-called net level 4 (10.5 million). The distinction between different levels of the network is a specific feature of the German cable market (see page 40 ff. of the Solon Study). The cable operator on level three runs a reception unit and delivers the signals either to individual homes connected directly or to a level four operator who takes over the signals at a certain point at the border of a property and provides the signals within a smaller network to several buildings, for instance.

Almost all level four operators are organized in three umbrella organizations such as ANGA, FRK and GdW, the last of these representing house building companies. The complete turnover of the German cable operators is estimated at 2,300 million Euros. The share of the *Regionalgesellschaften* is 1,829.3 million Euros.

On their analogue networks cable operators normally offer, at most, 33 TV channels. Most of these services are also simulcast when the networks are digitized. Furthermore, in digital cable they can offer several packages of, for instance, foreign language channels, special interest programmes or pay TV-services. Only very few cable operators offer content themselves.

B. Cable retransmission agreements

The contractual relations between broadcasters and cable operators in Germany are widely influenced by the market strength of the cable operators. With regard to their dominant position the above-mentioned major level three operators are still today in a position to claim carriage

fees from each broadcaster for all the programmes distributed. As a result, all broadcasters have concluded so-called distribution agreements with the *Regionalgesellschaften* especially determining the payments but also the technical parameters of the retransmission.

The smaller cable operators represented by the above-mentioned umbrella organizations are not asking broadcasters to pay any carriage fee for the distribution of their services. Nonetheless, distribution agreements are concluded with them too in order to have clear appointments on the technical standards of retransmission.

In parallel to those distribution agreements separate contracts are concluded with regard to the licence under copyright. Those agreements are concluded as global contracts, which means that on the rightholder's side all the relevant collecting societies (GEMA, VG Wort, VG BildKunst, GVL, AGIOCA, VFF, VGF and GÜFA) are parties to the contract, as well as the broadcasters concerned. The internal split between rightholders mentions the fact that 15% of the total revenue coming from the global agreement was dedicated to the retransmission of radio services.

The last global contract with DTAG expired at the end of 2002. It included all the national broadcasters (public services and commercial) as well as several EBU broadcasters. The licence granted under this agreement covered only the cable retransmission of terrestrial television and radio programme services. When an extension of this agreement was negotiated in late 2002, all relevant commercial broadcasters in the RTL Group and Pro 7/Sat 1 jointly founded a special collecting society called VG Media to administer broadcasters' neighbouring rights.

All the other broadcasters which were party to the old DTAG global contract - German public services broadcasters, the EBU broadcasters, some commercial radio stations but also some private television stations of minor importance - together with the above-mentioned collecting society (jointly called the "Münchner Gruppe") concluded a new global contract for the period 2003-2006. The global agreement between this group and the *Regionalgesellschaften* successors to DTAG covers the cable retransmission of both satellite and terrestrial programmes. It was concluded as a settlement. The rights covered by this agreement include not only all the collecting societies' rights with regard to the broadcaster members of the Münchner Gruppe (e.g. EBU Members) but also the collecting societies' rights with regard to the services of the broadcaster members of VG Media. Regarding broadcasters' neighbouring rights, solely those of the broadcaster parties to this contract are included and solely for those television and radio services individually listed in an annexe to the contract (especially EBU broadcasters).

In parallel to this agreement VG Media also concluded bilateral contracts with the above-mentioned level three cable operators. The tariff which VG Media published in 2003 guaranteed cable operators that they would be held harmless against claims by broadcasters possibly outside a global contract.

Both agreements mentioned before expired by the end of 2006. Despite several negotiations no follow up contract was achieved. The collective of right-holders now intends to publish a tariff and to offer to the cable operators to conclude a new agreement on this basis. If this should be rejected, then the German copyright administration law provides for the possibility to appeal to an arbitration board.

Besides the above-mentioned agreements, rightholders in the Münchner Gruppe have also concluded global contracts with ANGA, FRK and GdW, the umbrella organizations of the level

four operators. These contracts cover all networks connecting more than 75 households. Since those operators do not claim any carriage fees, they pay a lower licence fee.

Several operators started to offer DSL in summer 2006. Again, the members of the Münchener Gruppe granted an interim licence for a limited period during show-cases of several providers, such as Deutsche Telekom.

From a copyright perspective rightholders are prepared to treat this kind of retransmission similarly to a cable retransmission, and the same contractual principles apply. So there is, on the one hand, a global contract providing the licences under copyright and, in parallel, a distribution agreement between broadcasters and operators with regard to the details of the retransmission. Broadcasters do not pay any carriage fees for the retransmission of their services

Cable operators are lobbying strongly for a clarification of copyright law, aiming at a clear statement that not only retransmission via cable is a copyright relevant act but so too are all other forms of complete, unchanged and unabridged retransmissions insofar as they are economically comparable (a technologically neutral approach).

THE NETHERLANDS

I. LEGAL ASPECTS

A. National regulation with regard to cable retransmission

1. Implementation of European and international treaties

- Article 11bis 1 sub. 2 BC has been implemented in Article 12 sub 6 of the Copyright Act: CA (*Auteurswet*) as follows: As a separate communication (to the public) is not considered the simultaneous broadcasting of a work contained in a radio or television programme by the same organism that originally broadcasts that programme.

(For small antenna systems, see I.A.2 below.)

- In 1996 the Cable and Satellite Directive was implemented in the CA and the Neighbouring Rights Act: NRA (*Wet op de naburige rechten*) in the 26a - 26c resp. Article 14a, - 14d.

Article 26a par. 1 CA: The right to authorize the simultaneous, unchanged and unabridged transmission of a work embodied in a radio or television programme by a broadcasting network as meant in Article 1 sub q of the Media Act: MA (*Mediawet*) can only be exercised by corporate bodies which, pursuant to their statutes, set out to represent the interest of rightowners by exercising their above-mentioned accrued rights.

Article 26a par. 4 CA: This article is not applicable to rights as meant in paragraph 1 which accrue to a broadcasting organization with respect to its own broadcasts.

Article 1 sub q MA defines a broadcasting network as follows: electronic communication network as meant in Article 1.1 sub e of the Telecommunication Act: TA (*Telecommunicatiewet*) which is being used, mainly using cables, for disseminating programmes.

Article 1.1 sub e TA defines an electronic communications network as follows: transmission systems, including switching or routing apparatus and other means, that make it possible to transmit signals via cables, radio waves, optic or other electromagnetic means, including satellite networks, fixed or mobile terrestrial networks, electricity networks, as far as these are used for the transmission of signals and networks for radio and television broadcasts and cable television networks, regardless of the nature of the transmitted information.

- Treatment of (national) channels

All channels (both national and foreign) can authorize/prohibit cable retransmission on the basis of their (own or licensed) copyright on their programmes or their neighbouring right as broadcaster (Article 8.1.a NRA) and are therefore entitled to demand remuneration for their own/licensed rights. The national channels, however, always run the risk of political interference.

2. Court cases on cable retransmission

- Supreme Court 30-10-1981 (NJ 1982, p. 435) & Supreme Court 25-5-1984 (NJ 1984, p. 697): the relay by a central antenna system in Amstelveen of a programme constitutes a separate/additional communication to the public. Under Article 11 bis 1 BC it does not matter that the audience could have received the programme also with its own antenna. The broadcaster and the signal transmitter constitute one organization, and the central antenna system is a separate organization, which needs separate authorization.

- Supreme Court 24-12-1993 (NJ 1994, p. 641) small cable systems: another body must be understood as a body other than the organization which is responsible for the broadcast. It is not the task of the court to create criteria, such as the limited number of connections, the character, purpose or the way the antenna system is organized, under which these systems should be exempted from the authorization of rightowners. Only if these systems are used for carrying programmes into circles of families, friends, or other circles with close personal connections are exempt from authorization.

- Court of first instance Amsterdam, 7-4-2005 (AMI 2005, p. 201) - Buma c.s. v. Kabelexploitanten): in this case between the cable operators of Vecai against the societies BUMA/AGICO/SEKAM/CISAC, the court held that the collecting societies could not be compelled against their wish to negotiate their cable retransmission rights only with the broadcasters.

- The must-carry rules apply to operators of broadcasting networks. The (genuine) must-carry rules are laid down in Article 82i of the Media Act.

Broadcasting networks must carry:

- the domestic national channels: three television and five radio channels operated by NOS/NPB;
- the regional television and radio channel which is offered in the province where the cable operator delivers his services;
- the local television and radio channel which is offered in the community where the cable operator delivers his services;
- two television and two radio channels of the VRT;
- the additional local television and radio channels aimed at specific groups (in age or minorities) which might be offered in the community where the cable operator delivers his services, up to a limit of two television and five radio channels;

Besides these (genuine) must-carry rules, there are the (pseudo) must-carry rules laid down in Article 82k MA: if the (real) must-carry television channels are under 15 in number and there are fewer than 25 radio channels, the broadcasting network has to fill the remaining channels up to those numbers in accordance with the advice of the Programme Council established by the City Council where the broadcasting network delivers its services.

3. Treatment of new technology

Because of the limitation of "broadcasting network" in Article 1 sub q MA by the addition "mainly using cables" it is doubtful whether the Cable and Satellite Directive has been

implemented in a technically neutral way and it is more likely that it mainly refers to cable systems. In practice, however, NOS/NPB and the collective rights organizations consider exploitation of programme services by other third parties (telecom operators or mobile telephone companies) by nature as identical to cable distribution. Those parties are therefore offered similar contracts at similar prices.

B. Administration of cable retransmission rights

On the basis of the above quoted Article 26a par. 1 CA cable retransmission rights can only be exercised by corporate bodies which, pursuant to their statutes, represent the interests of rightowners with respect to these rights.

In the Netherlands the most important collecting societies in relation to cable retransmission rights are:

- BUMA (musical rights and rights of other Cisac organizations)
- SENA (phonogram producers and artists, with respect to phonograms)
- SEKAM (national producers of films and television productions)
- AGICOA (foreign film producers)
- NORMA (artists and actors).

Government supervision (by the Supervisory Board) is limited to those societies which are entrusted with mandates laid down by law. With respect to cable retransmission this concerns only BUMA and SENA.

There is no arbitration system, and nor are there any decisions. The mediation paragraph of the Cable and Satellite Directive has been implemented in Article 26c CA, but does not seem ever to have been used.

II. PRACTICAL AND ECONOMIC ASPECTS

All statistical data under this Section date from December 2006.

A. National cable market

Of a total of 7,091,000 television households, 6,230,000 (90%) are dependent for the reception of television programmes on cable retransmission (2005 figures).

- **National cable companies**

There are 662 cable operators, split among 24 entities. The major cable operators are:

	Analogue households	Annual turnover	Internet connections	VOIP/ Telephone
UPC	2.2 million	?	544,000	336,000 + 61,300 Mobile connections
Essent/Kabelcom	1.7 million	432.5 million	531,000	20,000

Casema	1.3 million	416 million together with Multikabel	?	200,000 together with Multikabel
Multikabel	315,000		?	

UPC is owned by Liberty Global, which operates worldwide. In 2006 the investment company Cinven Limited-Warburg Pincus LLC acquired the ownership first of Multikabel, thereafter of Casema, and recently of Essent/Kabelcom. According to financial newspaper reports, the acquisition of Casema/Multikabel involved 2.1 billion Euros, and the acquisition of Essent/Kabelcom 2.6 billion Euros. Other newspapers reported the figure of 5.2 billion Euros for the complete transaction. The average price paid per connection is supposed to be approximately 1,575 Euros.

These main cable operators with a (cable) market share of 80% all offer triple play and are in fierce competition with the telephone operators KPN and Versatel/Tele 2. KPN is said to have lost 600,000 telephone subscribers to cable, whereas telephone subscribers are three times more profitable than subscribers to television programmes.

There are approximately one million digital cable households.

- **Other platform operators**

- Canaal Digitaal: offers both technical satellite transmission services to broadcasters and a satellite bouquet on a subscription basis to the public. Since NOS pays for the transmission services, the public can receive the national public broadcasting channels free of charge by acquiring a set-top-box and a smart card (for copyright reasons) against (technical) cost price. Free-to-air foreign broadcasts are, of course, receivable without charge. For private national broadcasters a subscription fee has to be paid, as well as for some non-free-to-air foreign channels. Canaal Digitaal has a reach of approximately 650,000 households.

- Digitenne/KPN offers both technical digital terrestrial television transmission services to broadcasters and programmes through third-party operators (such as Scarlet) on a subscription basis to the public. DTTV has replaced the analogue television transmission of NOS. NOS has its own multiplex and pays for the transmission services. The public can receive the national public channels free of charge on acquiring the necessary technical equipment, but has to acquire a subscription for any other channels through the third-party operators. DTTV reaches 245,000 households. Tele2 reaches 100,000 IPTV households.

B. Cable retransmission agreements

- Global Agreement

The global cable contract was cancelled by VECAI (branch organization of the major cable operators) on behalf of the majority of the cable systems (6,063,639 households as of 1 April 2005). It is still in force for cable systems with 144,403 households, except for the BBC.

This contract covered/covers the programmes of NOS, VRT, RTBF, ARD (WDR, SW3 N3), ZDF, BBC (1+2), TF1, FRANCE 2+3, RTL Television Germany, RAI (Undo) and RTVE (i). The collecting societies who were/are party to this contract: BUMA (also on behalf of the

CISAC organizations) SEKAM and AGICOA. Under this contract the cable operator paid/pays a fee per subscriber per quarter of the year based on the amount of the non-national programmes carried. The fee was/is calculated per four non-national programmes carried.

A similar contract was concluded by the same parties with KPN (telecom) for the distribution by IPTV. The fee is 0.11 per programme per month. This contract was cancelled by NOS as of 1 January 2007 for strategic reasons. KPN has only a few hundred subscribers.

Since private broadcasting was made possible by the MA only via satellite to cable and it therefore needed the cable to reach its audience, private national broadcasters have been obliged by the cable operators to clear all rights on their behalf and hold them harmless for any claims of third-party rightowners and even had to pay a carriage fee. It is unknown whether the latter is still the case today.

VECAI has insisted on concluding individual contracts with all broadcasters. In the negotiations VECAI initially demanded that broadcasters clear all rights. In the end, most broadcasters concluded individual contracts with respect to their own and licensed rights. After an injunction procedure initiated by the collecting societies, an agreement was also made for the rights covered by BUMA, SEKAM and AGICOA. It expired on 1 July 2007.

- Contracts on retransmission via new technology

As a consequence of these cable developments, it has become common practice within NOS to conclude agreements for distribution via IPTV or mobile telephony only for its own and transferred rights and to refer the operators to the collecting societies for the clearance of the remaining third-party rights. The collecting societies agree that in the current situation a global solution is no longer feasible since the broadcaster and the collecting societies have to follow their own strategy.

In this way NOS has concluded the following contracts:

> Versatel/Tele2 and KPN: VOD-service *Uitzending Gemist* via IPTV (= "catch up TV": high-quality programmes are made available for a maximum of ten days after broadcasting).
>
> Orange Mobile: pilot for the simultaneous streaming of regular and thematic channels via UMTS. Talks with Vodafone on comparable pilot are pending.

SWITZERLAND

I. LEGAL ASPECTS

A. National regulation with regard to cable retransmission

1. Implementation of international treaties

Under Swiss law the duty of collective management applies broadly to all rebroadcast programmes, regardless of whether they are rebroadcast by means of wire or wireless. It does not matter whether the programme is rebroadcast via cable, telephone, the Internet or satellite, analogue or digital or otherwise. Furthermore, it is irrelevant whether the programme is broadcast inside or outside the so-called "intended reception area". Finally, it makes no legal difference whether a national or foreign programme or a so-called must-carry programme is rebroadcast.

The revised Exploitation Act followed the Federal Court and confirmed that the cable right was comprehensive and exclusive. However, unlike the EU Cable and Satellite Directive neither the author nor the broadcaster is able to enforce the cable rights directly against the cable distributor. This means that the collecting societies must acquire the respective rights from their members and their foreign affiliated companies and, as far as the rights of the broadcasting stations are concerned, they must be acquired from IRF.

2. Court cases on cable retransmission

The first relevant case dealing with redistribution of a foreign radio or television programme in Switzerland goes back to 1981 (Federal Court decision 107 II 57). In that case the Swiss Supreme Court confirmed that the cable distributor Rediffusion and the Swiss PTT needed an authorization from the Austrian broadcaster ORF when redistributing an Austrian television programme in Switzerland. This holding was confirmed by the same Court in favour of Suisa, the Swiss collecting society regarding non-theatrical musical rights, after it had been denied by the lower courts.

After these decisions the Act with respect to exploitation of copyright (the "Exploitation Act") had to be adapted since it was impossible for the cable distributors to acquire each single exclusive right relating to the program individually.

B. Administration of cable retransmission rights

The revised Exploitation Act stipulated that in Switzerland cable rights have to be collectively managed by collecting societies under a federal concession. Consequently, Suisa became licensed with respect to non-theatrical musical rights, Suissimage with respect to film rights and Pro Litteris with respect to works of literature. In 1996 Swissperform received a licence for the exploitation of performing rights, which have been protected in Switzerland since the above-mentioned decisions of the Supreme Court.

The television stations syndicated as IRF in 1982 and concluded individual contracts with the collecting societies Suissimage and Pro Litteris, as well as later on with Swissperform, based on which IRF received a share of the royalties collected.

II. PRACTICAL AND ECONOMIC ASPECTS

A. National cable market

Switzerland has a widespread cable network covering the whole territory. More than 90% of the population receive television signals via cable networks. According to the latest statistics there are 2.8 million cable households in Switzerland which are being offered a basic package of approximately 40 television programmes for a monthly payment averaging 13 Euros. Around 350 programmes are offered as digital packages for additional compensation calculated per package and/or programme. Cablecom is the largest cable company in Switzerland and has more than 50% of the cable networks.

B. Cable retransmission agreements

Compensation of cable rights is dealt with in the tariff agreement between the collecting societies (the "Tariff"). The Tariff must be approved by the Federal Commission regarding the exploitation of copyright and neighboring rights (*Eidgenössische Schiedskommission für die Verwertung von Urheberrechten und Leistungsschutzrechten*, ESchK). The Tariff is based on a percentage of the amount which the cable distributors charge to their connected households. The collecting societies charge 12% as total compensation for the copyright and neighbouring rights which they hold. This percentage is drawn from the gross income collected by the cable companies.

The broadcasters participate in the earnings of Suissimage, Pro Litteris and Swissperform. From the total amount of approximately 29 million Euros which these societies collect per year the broadcasters receive a share of approximately 16 million Euros per year through IRF. They do not receive anything from Suisa, as the broadcasters do not acquire or own any theatrical musical rights which are administered by Suisa.

The broadcasters are responsible for the distribution of the royalties which IRF collects on their behalf. In accordance with the distribution rules of IRF which the broadcasters agreed upon a share of 25% is paid out in favour of Swiss television programmes and 75% in favour of foreign television programmes received and redistributed via cable in Switzerland.
