

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the German Copyright Act	IIC 2011, 201
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Current Misguided Developments in the Interpretation of the Term "Initial Transmission" as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the German Copyright Act

Mathias Schwarz* and Gerd Hansen**

A significant source of income for creators and other rights holders consists of proceeds from the right to retransmit a work protected by copyright by cable (the so-called right of cable retransmission, Sec. 20b German Copyright Act). In order to bring copyright law into line with the current state of technological development,¹ and thus continue to improve the position of creators and other rights holders, the current discussion revolves, above all, around the frequently demanded, "technologically neutral interpretation" of the right of retransmission (by cable).² A central question, in particular, is whether the retransmission of linear programmes, for example, using IP TV, is also to be deemed a retransmission by cable.³ This should be the case at least when the particular platform operator interposed has its own financial relationship with the end customer and transmits the programme contents

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" 202 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

simultaneously and unaltered, for its own account.⁴ In cases of technically newer and financially comparable retransmission of linear programmes not capable of being characterised as an (initial) broadcast in the narrower sense, from a legal policy point of view, a desirable equal loading of all technological dissemination routes already speaks for the presumption of an act of retransmission comparable to a cable feed and thus for guaranteeing a remuneration to creators and those entitled to protection of intellectual property, including copyright.⁵

Introduction

The discussion about a technologically neutral interpretation of Sec. 20b German Copyright Act shall not be continued in this article at great length, but it appears to be one of the reasons why a very questionable court decision from the Netherlands dealing with the preliminary issue of when does an initial transmission exist from a copyright law point of view, has largely been ignored. Little attention has been afforded the decision despite the complicating fact that the existence of an initial transmission is a prerequisite for applying the cable retransmission right at all. It is the decision of the Netherlands Supreme Court of 19 June 2009 in the case of *Buma v. Chellomedia*,⁶ which ought to cause collecting societies, in particular, throughout Europe quite a headache.

Before discussing this decision in more detail below, some principles in the legal interpretation of an initial transmission should be briefly revisited. It is, for instance, acknowledged that it makes no difference for assuming a broadcast whether signals sent by a broadcasting organization are actually received by potential viewers. Further, an encoded broadcast of programme-carrying signals (pay TV, for instance) must also be characterised as an initial transmission under copyright law as long as decoding devices to make the signal visible again are provided.⁷ This should equally be the case in a situation in which a pay TV broadcaster takes up transmission of an encoded signal and only one initial subscriber has yet concluded a subscription agreement, or even no subscriber at all, if and to the extent that the broadcaster is willing to conclude (further) subscriber agreements. Otherwise, the broadcasting organization would be without protection under the neighbouring right in view of an unauthorised use of its signal.

According to the *Chellomedia* decision, this traditional understanding, however, shall no longer be true in cases in which the broadcasting process is composed of two stages, if during the first leg of such transmission encoded programme signals are being transmitted by satellite to cable head ends and

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the German Copyright Act (IIC 2011, 201) ▲ ▼

from thereon are fed into cable networks. Further, according to this decision the first phase of the transport of the signal is not seen as an initial transmission (for further details see below). This is astonishing, in particular, if one imagines a typical satellite distribution system that distributes a programme signal by satellite to, for instance, 500 cable head ends, where the signal then is decoded and retransmitted simultaneously and unaltered to the end consumer. It only seems natural that in such a system, the entire signal transport forms a uniform broadcasting process destined for the public. Already, at first glance, it appears very artificial not to recognise the first phase of the encoded signal transmission as forming part of the broadcast.

The interests of the various parties involved by a typical distribution system as described in the previous paragraph have convincingly been taken into consideration by legislation since the early 1990s. Satellite broadcasting organizations enjoy copyright protection provided by the neighbouring right of Sec. 87, para. 1, German Copyright Act, they can decide about the feeding of the signals emitted by them into cable networks⁸ and they can fight against the unauthorised decoding and feeding of their programme-carrying signals that have been broadcast. For their part, creators and producers can go after the satellite broadcasting organization responsible for unauthorised initial transmissions of their works based on the broadcasting right codified in Sec. 20 German Copyright Act. The interest of the cable retransmission enterprises to be able to acquire the necessary rights in the contents that they want to disseminate to their customers as simply and complete as possible is taken into account by the collective assertion of the cable retransmission right by collecting societies.⁹ This working system would in essence be completely reversed if the core statement of the *Chellomedia* decision would be generally applied to similar cases.

I. The Chellomedia Case

In this case, the Dutch collecting society *Buma* claimed remuneration from the cable enterprise *Chellomedia* for the dissemination of programme contents via cable head ends and Direct to Home (DTH) platforms. The content that was being (re)transmitted was broadcast in encoded form via satellite for the express purpose of such (re)transmission by cable. The collecting society, however, lost its case before the Netherlands Supreme Court, which confirmed the decision rendered by the lower court. In this decision it was crucial to determine whether the satellite-supported transmission of encoded programme signals, which is intended to ultimately reach the general public,

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" 204 ▲ ▼ as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the German Copyright Act (IIC 2011, 201)

constitutes an initial transmission under copyright law, even if the reception of the signals is only possible by means of professional receiving devices at the cable network operators' cable head end stations so that the signals transmitted by the satellite cannot as such be received by the general public. The Court did not discuss how cases in which a broadcasting organization does not transmit programme-carrying signals by satellite, but rather by cable directly to the cable head ends where they are then fed into the cable networks, shall be dealt with under copyright law. If one comes to the conclusion that in both situations *no* initial broadcast relevant under copyright law existed, consequently, in accordance with the Directive on Satellite Broadcasting and Cable Retransmission,¹⁰ the collectively administered right of retransmission by cable would not apply: If there is no initial broadcast there is no retransmission by cable; and if there is no retransmission by cable no right of retransmission can be asserted by the collecting societies.

The Netherlands Supreme Court, in its decision of 19 June 2009, made reference to the European Court of Justice (ECJ) *Lagardère*¹¹ decision rendered in 2005 and denied the existence of an initial broadcast on the following grounds: Since the ECJ has decided in paras. 31 and 35 of its *Lagardère* judgement "that a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public, given that the latter must be made up of an indeterminate number of potential listeners" and that the signals "must be intended for the public and not the programmes that they carry", it must be presumed that the Dutch term "*openbaarmaking*", in accordance with Sec. 12 of the Dutch Copyright Act, does not include the

up-linking and down-linking of encoded programme signals not received by the public as these are received exclusively by cable head ends and/or DTH platforms, which decode these encoded programme signals using professional decoding equipment, not obtainable by the final consumer, in order to transmit these signals, encoded again, to viewers who have concluded an agreement with the cable network provider.¹² The Netherlands Supreme Court came to the conclusion that the form of signal transmission effected by *Chellomedia*, does not represent communication to the public (“*openbaarmaking*”) of the works protected by copyright law and therefore the rights in these works would not be represented by Buma.

The decision rendered by the Netherlands Supreme Court does not withstand a critical examination. Pursuant to the view expressed in this article, a signal

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 205 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

transport which is encoded during the first stage of transmission but which is intended for the general public does in fact represent an initial broadcast relevant under copyright law. According to the meaning and the purpose of the Satellite Broadcasting and Cable Retransmission Directive, therefore, the right of retransmission by cable should apply in such an instance.

II. Critical Appreciation

The central reasoning of the Netherlands Supreme Court will be examined first below (see below under II.A. and II.B.), followed by a more detailed discussion whether, under a teleological interpretation of the relevant legal regulations, a case exists in such circumstances for assuming an initial broadcast or rather only a transmission by cable. In the latter case, there would clearly be a gap regarding the protection of the initial transmission. Moreover, the loss of fees from the right of retransmission by cable which could arise from the *Chellomedia* decision would result in an unacceptable gap in protection also from an economic viewpoint. Also, an easy way to circumvent the law disadvantageous to creators and those entitled to the protection of copyright and neighbouring rights (more under II.C.) would exist. Finally (under II.D.), the result found herein is tested and cross-checked against similar broadcast situations.

A. Signal Reception by the Public

The Netherlands Supreme Court based its decision that the transmission of encoded programme signals via satellite does not represent an (initial) broadcast within the meaning of copyright law, if it is only possible to receive such signals by the use of professional reception devices (cable head-end facilities) by cable network operators, primarily on the absence of a public who can freely receive such signals. In order to be able to accurately answer the question as to whether, in this situation, a first transmission relevant under copyright law exists, the particular national copyright law must be interpreted in the light of European and international legal provisions.¹³ Particularly relevant in this respect is the right of communication to the public, laid down in Art. 3 of the so-called “Information Society Directive”¹⁴ and in Art. 11b, para. 1 of the Berne Convention,¹⁵ more particularly set out in Art. 1, para. 2a) of the Satellite Broadcasting and Cable Retransmission Directive.

The Netherlands Supreme Court in its *Chellomedia* decision has explained accurately, (item 2.5), that the European legal term “public” must be interpreted

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 206 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

in the light of the recent ECJ jurisdiction.¹⁶ For this purpose, the decisions *SGAE/Rafael*,¹⁷ *Lagardère*¹⁸ and *Mediakabel*¹⁹ must be taken into consideration, according to which reception of the signal by the public, i.e., by an indeterminate number of potential viewers or listeners, is necessary to constitute the characteristic of a “public”. In the *Lagardère*²⁰ decision, the ECJ set out in detail that because of a lack of an indeterminate number of possible recipients, “a limited circle of persons who can receive the signals from the satellite only if they use professional

equipment cannot be regarded as part of the public“.

However, before one prematurely concludes, as the Netherlands Supreme Court does, that therefore also in the case at hand there is no public and thus no initial broadcast can be assumed, one should consider that in the *Lagardère* judgement, regarding Art. 1, para. 2a) of the Satellite and Cable Retransmission Directive, the interpretation of the term “public” may have been correct as such, but that the Netherlands Supreme Court in its case may still have looked at the wrong group of people and that it neglected the fact that it ought to suffice if the programme-carrying signals are *intended* for public reception by the final consumer. It is important to realize that, from an economic as well as from a natural point of view, the initial broadcaster definitely wants to reach the public; the broadcaster is only protecting the dissemination of its signal by using technical means. As stated at the beginning of this article, it is undisputed in similar cases of initial broadcasts that encoded pay TV, in particular, must be categorized as a broadcast, and, thus, also as a potential initial broadcast, if the pay TV broadcaster takes up broadcasting even before the first subscriber has concluded an agreement. There is no reason to assume that the situations examined in the *Chellomedia* case should be assessed differently.²¹ (For the purpose of a comparative

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 207 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the ▼
German Copyright Act (IIC 2011, 201)

view with other similar broadcasting processes, see also the explanations below under II.D.).

It is true that these findings of the Netherlands Supreme Court are indeed in line with more than a few voices in the legal literature on the German broadcasting right codified in Sec. 20 German Copyright Act.²² And the doubts expressed in the German discussion, namely by Dreier,²³ criticizing the ECJ for not discussing in the *Lagardère* decision the possibility that the totality of cable stations as such can also represent a relevant public, are not convincing either. Dreier does not take into account that the totality of cable head stations could represent a group of recipients consisting of ultimate consumers, which would justify the assumption of a public constituted by them, only if one were to look at the individual persons employed at the cable operators involved in (re)transmitting the signals. The idea that those employed with the cable operators actually may view the initial broadcasts at least from time to time before (re)transmitting them, however, appears unrealistic. These different opinions in our view can remain without reconciliation since – as explained below under item II.B. – it does not matter whether the totality of the cable head stations form a “public”, but whether the programme-carrying signals are *destined* for public reception.

In addition, in the *Lagardère* case, the ECJ decided on particular facts which permit a generalisation of its findings only to a very limited extent. In the *Lagardère* case, there was, for instance, only one single entity involved in the entire transmission process: *Lagardère* was a broadcasting organization which produced broadcast programmes in its Paris studios, transmitted them to a satellite whose signals were received by receiving stations on French soil and retransmitted after frequency modulation. Since this method of dissemination did not cover all of the French territory, the satellite transmitted these signals also to a *single* broadcaster in *Felsberg* in Saarland. The latter was technically set up in such a way that it disseminated the signals on long wave towards certain French areas which were not otherwise covered. The actual broadcast was effected by *Compagnie européenne de radiodiffusion et de*

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 208 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the ▼
German Copyright Act (IIC 2011, 201)

télévision Europe 1 (CERT), which was a subsidiary of *Lagardère*. There is a crucial difference here, compared with the *Chellomedia* situation, in which two different enterprises are involved: the broadcasting enterprise on the one hand and the cable operator on the other hand. Anybody who, as in the *Lagardère* case, is technically only transmitting signals to itself within a group of companies hardly communicates to the public. Under these circumstances, the ECJ may well have correctly decided this very special case in front of it.

The situation examined in the *Chellomedia* case is a fundamentally different one because the signal transport by satellite was effected to numerous cable head ends belonging to third parties or outside cable operators. Moreover,

the other very specific circumstances on which the ECJ expressly based its *Lagardère* decision²⁴ do not apply in the *Chellomedia* situation either. The ECJ, for instance, justified that it did not assume a communication to the public because unlike what is required by the Satellite Broadcasting and Cable Retransmission Directive, there was no “closed communications system of which the satellite forms the central, essential and irreplaceable element”.²⁵ According to the ECJ, such a closed communications system²⁶ would only exist if in the event of malfunction of the satellite, the transmission of signals was technically impossible and, as a result, the public received no broadcast. However, this was precisely not the case in the *Lagardère* situation, because in the latter case a parallel terrestrial transmission path to the *Felsberg* broadcaster was planned as a back-up in the event of a satellite disruption.²⁷ Thus, the satellite was not an irreplaceable element of the communications system. All these special circumstances of the *Lagardère* case strongly support the view that the corresponding ECJ decision cannot be applied one-to-one to the case examined here.

B. The Signals Are Intended for Public Reception

Article 1, para. 2a) of the Satellite Broadcasting and Cable Retransmission Directive provides that a “communication to the public by satellite” requires “the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth”. In contrast to the ECJ opinion, it is therefore crucial that the programme-carrying signals must be *intended* for public reception. In the case of transmission by satellite of encoded signals to cable operators with the intention to let them decode the signal for the

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 209 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

purpose of simultaneous and unaltered retransmission, as well as in the case of direct transmissions to cable enterprises for them to feed the signals into the various cable systems, this requirement for assuming a communication to the public, contrary to the ECJ's opinion, is met.²⁸ In both cases it is exactly the intention that the programme-carrying signals can be received by the public. This is exactly what they are meant for. This view is also shared by a decision of the Austrian Supreme Court dated 13 November 2001,²⁹ according to which it is sufficient that the public reception of the programmes transmitted is the ultimate purpose of the initial transmission.³⁰ A broadcast programme within the meaning of Secs. 17 and 59 a of the Austrian Copyright Act “already exists when a work, with the help of Hertzian waves, is made perceivable to everybody who is within reach of these waves and uses an appropriate receiving device”.³¹

C. Assumption of an Initial Broadcast from a Teleological Point of View

When considering the meaning and purpose of the legal provisions in Art. 3 of the Information Society Directive, and taking economic considerations into account, one cannot close one's eyes to the fact that an initial broadcast must exist in the situation in question and thus, there is also a case for a later retransmission by cable.

Broadcasting rights are intended to provide to the rights holders the possibility to control exploitation and share in the proceeds of works protected by copyright through the granting of an exclusive right, and this, independent of whether a particular work is actually received by one or several end users.³² Rather, the decisive element is the mere communication to the public in intangible form, the facilitation of reception as such. In the case of a satellite broadcast, the whole transmission process of feeding programme signals into a continuous chain of transmission leading to the satellite (uplink) and back to earth (downlink) is of necessity protected as an act of copyright exploitation.³³ Categorizing the signal transport which undoubtedly

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term “Initial Transmission” 210 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

is eventually intended for the public as a legal zero, solely because of its technical encoding during the first section

of its transmission, and thus excluding its status as an act of broadcasting,³⁴ also from an economic point of view, would lead to the unacceptable result that broadcasters transmitting their signals in an encoded manner would be unprotected with respect to copyright if somebody picks up the signal unauthorised and decodes it and/or retransmits it. The broadcaster's right to protection of its neighbouring right granted by Sec. 87, para. 1, German Copyright Act would then be worthless. Neither could this result be possibly brought into line with Art. 13a) of the International Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961, because according to the latter, broadcasting organizations must be granted the right to permit or forbid retransmission of their broadcasts. For this reason, the technical process of signal transport aimed at a simultaneous, unaltered retransmission must therefore be included in the protection provided by the broadcasting right.

Even if one does not take the perspective of those broadcasting organizations, but rather that of the creators and film producers (the latter protected under Sec. 94, para. 1, German Copyright Act) as a basis, one has to come to the same conclusion. Under *Chellomedia* they would also largely be denied the legal tools to act against an illicit primary satellite transmission of encoded signals of their works if the transport of encoded signals to cable operators would not constitute an act of broadcasting although ultimately intended for reception by the public.

One only has to imagine what would happen if rights holders ceased to license content to broadcasting organizations transmitting encoded satellite signals, or (as for series productions) did not wish to extend such licenses (e.g., because they expected higher license proceeds from another broadcaster, or from using other channels of distribution), but the broadcasters nevertheless continued to transmit the encoded programme contents to cable head ends. In such a scenario, the owners of the broadcasting rights would not be able to prevent the integration of content into the programme plan of, and subsequent transmission by, the satellite "broadcaster" organizations to cable operators under copyright law.³⁵ The owners of rights to film contents would, thus, lose control over the exploitation of their works by these satellite broadcasting organizations, notwithstanding the fact that these

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" 211 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

broadcasters will set the uninterrupted chain of communication to the public of the particular content in motion. This just cannot be right.

Due to the mistakenly denied initial broadcast by the satellite broadcasters, the creators and film producers would then, in order to protect their works, have to bring action against the cable operators or other distribution platforms for an alleged act of first cable broadcast and would have to enforce their remuneration claims against the various cable operators. This would inevitably cause high transaction costs. This instance clearly shows why the existing system of a collective administration of the right of retransmission by cable is also superior under economic considerations.³⁶ When the Satellite Broadcasting and Satellite Retransmission Directive was passed, the assertion of the right of retransmission by cable was deliberately harmonised by means of an obligatory representation of the relevant rights by collecting societies,³⁷ because it could no longer be expected of the individual cable operators to have to individually acquire the numerous copyrights and neighbouring rights relating to the contents of the programmes being retransmitted.³⁸ Thus, the aim of the Satellite Broadcasting and Cable Retransmission Directive was to facilitate the acquisition of rights to promote cross-border dissemination of programmes.³⁹ It is quite obvious that this aim would be reduced to absurdity as a possible consequence of the *Chellomedia* decision. Neither the acquisition of rights, nor the enforcement of rights, would be facilitated. Instead, they would be complicated unnecessarily.

A further consideration on which the Directive was based was the wish to prevent the danger of complete rights acquisition by cable network operators being torpedoed by objections from outsiders holding rights to individual parts of programmes.⁴⁰ Regardless of whether this aim is achieved (in the way German legislation does) by a general collecting society obligation (from which only broadcasting organizations are excluded, Sec. 20b, para. 1, cl. 2, German Copyright Act), or by declaring collective agreements generally binding, both approaches, in the final analysis, solve the problem regarding outsiders similarly: The outsider can no longer individually exercise its rights against the cable network operator, but is limited to a mere remuneration claim.⁴¹ This way, outsiders can be successfully prevented

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" 212 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

from stopping retransmission of a whole programme by asserting their authorisation right regarding individual parts of the programme in question.⁴² If the Netherlands Supreme Court's legal view in the *Chellomedia* decision were to set a precedent, both problems of an individual acquisition of all copyrights and neighbouring rights remaining necessary, as well as the outsider problem would remain unsolved. For these reasons, both the satellite-supported transmission of encoded programme signals to cable head ends and the cable-supported transmission of signals to be fed directly into cable networks should be characterised as an initial broadcast within the meaning of copyright law; as a consequence hereof the preconditions for applying the right of retransmission by cable could be regarded as given.

D. Comparative Examination Regarding Similar Broadcasting Arrangements

The conclusion that the assumption of an initial broadcast must be correct is further supported by the fact that the situation examined herein is confirmed also by a final comparison with similar situations involving an initial broadcast by satellite. An initial broadcast indisputably exists, for instance, in those cases in which programme-carrying signals, for public reception, are fed into an uninterrupted chain of communication to the satellite under the control of one responsible broadcasting organization, and are received in parallel by an indeterminate number of individuals and cable head ends.⁴³ An encoded signal does not change this either, if the means for decoding the broadcast have been made available to the public by the broadcasting organization or with its consent, or, at least, the willingness exists to do so.⁴⁴ Further, an initial broadcast also exists if the encoded signal is presently only received by cable head ends because all pay TV subscribers directly receiving the signal have cancelled their subscriptions because these subscribers could take up a new subscription at any time. In this respect, the possibility for reception suffices. The same analysis applies to cases in which a signal transport for HD TV recordings or 3D broadcasts to cable head ends is commenced and a reception by private individuals would technically be possible, but the reception initially only takes place via cable head ends and downstream cable networks because of the considerable costs involved with individual reception.

An initial broadcast can also be assumed in those cases where an encoded programme signal is sent directly to end consumers and, in parallel, with technically different specifications, to cable head ends. The same applies in the instance where an encoded signal transport takes place domestically by satellite to private households and to cable head stations, while abroad the

Schwarz, Hansen: Current Misguided Developments in the Interpretation of the Term "Initial Transmission" 213 ▲
as a Prerequisite for the Right of Retransmission by Cable – An Analysis Proceeding from Section 20b of the
German Copyright Act (IIC 2011, 201) ▼

encoded signals are being transmitted exclusively to cable head stations because no private reception occurs. Based on an overall view of the signal transport taking place domestically as well as abroad, no one would deny that, under such circumstances, the signal transport abroad qualifies as initial broadcast. Therefore, the situation examined herein, in which the encoded programme signal intended for the public is transmitted solely to the cable head stations, must be viewed identically. There is no reason why this case should be dealt with differently.

In addition, in cases where, for example, an initial broadcast is transmitted terrestrially and in parallel by encoded satellite transmission, it cannot make any difference in an evaluation whether the cable operator, for retransmission purposes, is using a signal especially encoded for and supplied to it by the broadcaster or the other signal it has received. The exploitation process always remains a retransmission as long as the cable or platform operator has its own financial end customer relationship, i.e., transmits the programme signals onwards to the viewer for its own account.⁴⁵

III. Conclusion

The fact that cable operators use a range of linear programmes which they retransmit for their own account and, thus, make a profit from retransmission justifies making them the addressees of remuneration claims under

copyright law.⁴⁶ This cannot be different only because the signal made available to them by satellite is encoded and is then decoded at the cable head end. Cases implying transmission for simultaneous and unaltered direct feeding into cable networks should not be treated differently. In both instances, the programme-carrying signals are intended, at least indirectly, for public reception. This is why an initial broadcast has to be assumed. In order to achieve final legal certainty, it appears desirable, however, for European legislation to take up and clarify the issue discussed in this article in the course of the revision of the Satellite Broadcasting and Cable Retransmission Directive, which has become necessary in any event to address the requirement of a technologically neutral wording of the directive.

* Professor; Dr. jur; Attorney, Munich.

** Dr. jur; Attorney, Munich.

¹ The microwave systems also referred to in the law, for instance, are rather uncommon in Germany for transmission purposes. See von Ungern-Sternberg, in: Schricker/Loewenheim (ed.), "Urheberrecht" ["Copyright Law"], para. 20b, marginal note 9 (4th ed., Munich 2010); Weber, 2009 Zentrale für Urheber- und Medienrecht (ZUM) 460, 462, points out that, if need be, they play a role in certain areas where linking up to the cable network is impossible for topographic reasons.

² On this, see the opinion by the Bundesrat (Senate of the German Federal Parliament) on the draft of a Second Law Regulating Copyright in the Information Society, BR-Dr. 257/06, at 2; Weber, 2009 ZUM 460, 462; Fischer, "Discussion Report on the Working Session of the Institut für Urheber- und Medienrecht [Institute for Copyright and Media Law] Dated 27 March 2009", 2009 ZUM 465, 466 *et seq.*; and the Hamburg District Court's decision, 2009 ZUM 582, in the *Zattoo* case, where a technologically neutral interpretation of Sec. 20b German Copyright Act was rejected.

³ An opinion held for instance by the German production economy: see p. 4 of the Producers' Alliance opinion on the so-called 3rd basket of the Copyright Law Reform dated 5 June 2009, downloadable online from: http://www.produzentenallianz.de/fileadmin/data/dokumente/Stellungnahme_3._Korb.pdf.

⁴ See also Weber, 2009 ZUM 460, 461 *et seq.*

⁵ See for instance the opinion (at 4) of the Producers' Alliance on the so-called 3rd basket of Copyright Law Reform of 05 June 2009, *loc. cit.*, footnote 3.

⁶ The decision dated 19 June 2009 (LJN: BH7602, Netherlands Supreme Court, 07/12553) can be downloaded from: <http://zoeken.rechtspraak.nl/ResultPage.aspx>. See this issue of IIC at 228.

⁷ See von Ungern-Sternberg, *supra* note 1, at Sec. 20, marginal note 12.

⁸ This means that broadcasting organizations do not necessarily need to have all rights of retransmission by cable for all programmes transmitted by them as such rights are represented by the various collecting societies. However, in accordance with Sec. 87, para. 5, German Copyright Act, they are, in terms of civil law, subject to an obligation to contract with cable enterprises unless a material reason exists to justify refusal to conclude an agreement.

⁹ Only broadcasting organizations are excluded from the collecting society obligation. See also *supra* note 8.

¹⁰ Directive 93/83/27/EEC of the Council of 27 September 1993, co-ordinating particular industrial property and copyright protection regulations relating to satellite broadcasting and retransmission by cable (hereinafter: Satellite Broadcasting and Cable Retransmission Directive).

¹¹ ECJ, 2006 GRUR 50, 52 *et seq.* – *Lagardère*.

- 12 Translation by the author, see item 2.7 of the judgement downloadable at <http://zoeken.rechtspraak.nl/ResultPage.aspx> providing the following data: LJN: BH7602, Netherlands Supreme Court, 07/12553.
- 13 See Dustmann, in: Fromm/Nordemann (eds.), "Urheberrecht" ["Copyright Law"], Sec. 20, marginal note 7 (10th ed., Stuttgart 2008).
- 14 Directive 2001/29/EC of the European Parliament and the Council dated 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- 15 Berne Convention for the Protection of Literary and Artistic Works in the Paris Version dated 24 July 1971.
- 16 ECJ 2007 GRUR Int. 225, 226 – *SGAE/Rafael*.
- 17 ECJ 2007 GRUR Int. 225, 227 – *SGAE/Rafael*.
- 18 ECJ 2006 GRUR 50, 52 *et seq.* – *Lagardère*.
- 19 ECJ 2005 ZUM 549, 552 – *Mediakabel*.
- 20 ECJ 2006 GRUR 50, 52, item 31 – *Lagardère*.
- 21 The fact that conversion of the programme-carrying signal is required for a feed into the cable network is not an obstacle if the work transmitted is retransmitted at the same time and unaltered. Article 1, para. 2c) of the Satellite Broadcasting and Cable Retransmission Directive is also not an obstacle to the view expressed here. On the contrary: if a communication to the public by satellite is answered there in the affirmative on condition that the means of decoding encoded broadcast signals are made accessible to the public by the broadcasting company itself *or with its agreement* (that is to say, through the cable head stations), Art. 1, para. 2c) of the Satellite Broadcasting and Cable Retransmission Directive is proof that, in the view of European legislation, a two-stage signal transport via satellite to cable head stations and then to the public suffices for the assumption of an initial broadcast if the decoding of the signals, intended to be ultimately received by the viewers, in the final analysis is effected by the cable operators stations with the agreement of the initial broadcaster.
- 22 See von Ungern-Sternberg, *supra* note 1, at Sec. 20, marginal note 8 [with further references], Sec. 20a, marginal note 16 ("According to this, 'public' can only refer to an indeterminate group of people; a restricted group of people who can only receive the satellite signals using a professional device is not part of the public in the sense of the Directive"); Dreier, in: Dreier/Schulze (eds.), "Urheberrecht" ["Copyright Law"], Sec. 20, marginal note 9; Mand, "Das Recht der Kabelweiterleitung. Kabelweiterleitung von Rundfunkprogrammen im Lichte des Sec. 20b UrhG" ["The Right of Retransmission by Cable. Retransmission of Broadcast Programmes by Cable in the Light of Sec. 20b German Copyright Act"], 15 (Frankfurt am Main 2004) ("Therefore, only those signal transmissions at the end of which members of the public, i.e., the end consumers, can perceive the signals without further action by third parties are included under broadcast law."); Ehrhardt, in: Wandtke/Bullinger (eds.) "Urheberrecht" ["Copyright Law"], Sec. 20, marginal note 9 (3rd ed, Munich 2009).
- 23 See Dreier, *supra* note 22, at Sec. 20, marginal note 9. For a different view, see von Ungern-Sternberg, *supra* note 1, at Sec. 20, marginal note 8.
- 24 See ECJ, 2005 GRUR Int. 819, 822, paras. 39 to 41 – *Lagardère*.
- 25 ECJ, 2005 GRUR Int. 819, 822, para. 39 – *Lagardère*, based on Art. 1, para. 2a) of Directive 93/83/EEC of the Council of 27 September 1993 co-ordinating particular industrial property and copyright protection law regulations relating to satellite broadcasting and retransmission by cable.
- 26 ECJ, 2005 GRUR Int. 819, 822, para. 39 – *Lagardère*.

- 27 ECJ, 2005 GRUR Int. 819, 822, paras. 14 and 40 *et seq.* – *Lagardère*.
- 28 ECJ, 2006 GRUR 50, 52 – *Lagardère*, para. 35: “A comparison of the wording of the various language versions of that provision, in particular the English (“programme-carrying signals intended for reception by the public”), the German (“die programmtragenden Signale, die für den öffentlichen Empfang bestimmt sind”), the Spanish (“las señales portadoras de programa, destinadas a la recepción por el público”) or the Dutch version (“programmadrage signalen voor ontvangst door het publiek”), shows that it is the signals which must be intended for the public and not the programmes that they carry.”
- 29 2002 GRUR Int. 938, 939 – *Kabelnetz Breitenfurt*.
- 30 In agreement with this for instance Wallentin & Reis (eds.), (forthcoming).
- 31 2002 GRUR Int. 938, 939 – *Kabelnetz Breitenfurt*.
- 32 See Dreier, *supra* note 22, at Sec. 20, marginal note 1; von Ungern-Sternberg, *supra* note 1, at Sec. 20, marginal note 10.
- 33 See von Ungern-Sternberg, *supra* note 1, at Sec. 20a, marginal note 14 (on European satellite broadcasting); as to Sec. 20 German Copyright Act von Ungern-Sternberg (*loc.cit.*, Sec. 20, marginal note 22) by contrast wants to unconvincingly exclude the emission to the satellite (uplink) from the satellite broadcaster's act of exploitation.
- 34 To alternatively see the whole process from the broadcasting organizations to the cable network operator and then onwards to the end receiver as one single act of broadcasting for which the broadcaster and the cable operator to a certain extent “jointly” bear responsibility cannot be convincing from a dogmatic point of view. “Broadcaster” can only refer to the party under whose control and responsibility the *emission* of the programme-carrying signals takes place. The act of initially transmitting the signals here, however, takes place under the sole control of the (original) broadcasting organization.
- 35 At most, they could appeal because of the aiding and abetting infringement of copyright by the cable enterprises, which seems artificial.
- 36 On the need for a collective assertion of rights from the viewpoint of transaction costs economics in detail, see *Hansen/Schmidt-Bischoffshausen* 2007 GRUR Int. 461 *et seq.*
- 37 The rights of broadcasting organizations are not included in the collecting society obligation.
- 38 See Dreier, *supra* note 22, at Sec. 20b, marginal note 2; von Ungern-Sternberg, *supra* note 1, at Sec. 20b, marginal note 2.
- 39 See also, “Grounds for Consideration 3 of the Satellite Broadcasting and Cable Retransmission Directive”.
- 40 On this see, “Grounds for Consideration 28 of the Satellite Broadcasting and Cable Retransmission Directive”; Dreier, *supra* note 22, at Sec. 20b, marginal note 2; von Ungern-Sternberg, *supra* note 1, at Sec. 20b, marginal note 2.
- 41 Dreier, 1991 GRUR Int. 13, 18.
- 42 See Dreier, *supra* note 22, at Sec. 20b, marginal note 2; von Ungern-Sternberg, *supra* note 1, at Sec. 20b, marginal note 2.
- 43 See Art. 1, para. 2a) of the Satellite Broadcasting and Cable Retransmission Directive.

- 44 See *also* Art. 1, para. 2c) of the Satellite Broadcasting and Cable Retransmission Directive; von Ungern-Sternberg, *supra* note 1, at Sec. 20a, marginal note 17.
- 45 Weber, 2009 ZUM 460, 462 likewise.
- 46 Kreile quoted according to Fischer, "Diskussionsbericht zur Arbeitssitzung des Instituts für Urheber- und Medienrecht am 27.3.2009" ["Discussion Report on the Working Session of the Institute for Copyright and Media Law on 27 March 2009"], 2009 ZUM 465, 467.