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## “Free-to-Air = Free-to-Use?” – Retransmission of broadcast signals without rights clearance

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## ...a seemingly simple question:

Does the transmission of free-to-air broadcasts mean that such unencrypted signals can be freely re-used?

- Yes
- No
- Well, ....

Although the answer may seem obvious, the legal framework is not as clear when it comes to ensuring that the “correct” answer is actually the one that can be ticked. And that is what I will be talking about...

# But why is it a problem at all?

- **Existing EU legislative framework in IP law directed against „unauthorized re-use“ of protected matters**
  - piece-by-piece although by now very advanced, but still piecemeal
  - three decades on and deep into digital context (“information society“ 2001; “Digital Single Market“ 2019), but actually started with a very different setting and – interestingly – already then other rightsholders than authors concerned including broadcasting organizations
  - differences between copyright and related rights
- **But: differing degree of harmonization**
  - for some areas high degree of harmonization (e.g. authors’ exclusive right of communication to the public, **cttp**)
  - for others little to no coordination on EU level (e.g. some related rights)
  - = continued relevance of national law

# And why is it *really* a factual problem?

- **Assumption that re-using a protected work or other matter automatically necessitates authorization**
  - but: not only a matter of precision of legal framework
  - and: numerous appearances of (re-)use of broadcasting programmes
  - technological dimension of dissemination
    - for certain content: “free-to-air“ means freely available, but...
    - ...should this mean “free-to-use“ as in the question above?
- **More specifically: can a satellite signal of a broadcast be re-used just because it is out there „for free“?!**
  - satellite dissemination has a cross-border dimension inherent: the satellite footprint
  - this is why we have an EU dimension concerning the single market and why this aspect was the basis for EU action

# The relevant legislative framework

- **EU was not first to address these questions**
- **Background in international IP law**
  - Berne Convention for the Protection of Literary and Artistic Works of 1886 (as last amended on September 28, 1979)
  - International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 1961
- **Berne and Rome Conventions not part of EU acquis, but partially inspiration for Directives**
- **In addition: national legal framework**
  - relevant to identify whether gaps that are not covered by harmonised EU legislation are filled and because national law is the transposition of EU Directives
  - can be a complex potpourri because of mixing one and the other in the same bowl (obviously)

# What's the legal protection of broadcasting organizations in EU law?

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## ■ Here: focus on EU law

- once again: no full harmonization of related rights, including those of broadcasting organizations
- What is in question?
  - broadcast programme as such, not individual items of it which themselves are copyright-protected (and to which the broadcasting organization has either the original copyright or the right to include the protected matter in its broadcast)
- several Directives but none broadcaster-specific nor exhaustive
  - Rental and Lending Rights 1992 (codified Dir. 2006/115/EC)
  - CabSat 1993 (Dir. 93/83/EEC)
  - InfoSoc 2001 (Dir. 2001/29/EC)
  - CabSat 2.0 or Online CabSat 2019 (Dir. (EU) 2019/789)
  - DSM Copyright Directive 2019 (Dir. (EU) 2019/790)
  - and more addressing broadcasters



# Overview of rights of broadcasting organizations in the EU Directives

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## ■ Related rights of broadcasters

### ■ Fixation right

- Art. 7 (2) Rental and Lending Rights Dir.: Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

### ■ Rebroadcasting / (specific) cttp right

- Art. 8 (3) Rental and Lending Rights Dir.: Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

### ■ Distribution right, (general) cttp right, reproduction right, right of making available to the public

- Art. 9 Rental and Lending Rights Dir., Art. 2/3 InfoSoc Dir., also potentially relevant Art. 17 DSM Copyright Dir.
- but: when it comes to broadcasting organizations typically concerning fixations of their broadcasts

### ■ Satellite dissemination as cttp right

- Art. 4 (1) CabSat Dir.: For the purposes of communication to the public by satellite, the rights of ... broadcasting organizations shall be protected in accordance with ... Directive 92/100/EEC (...including cttp by satellite)

### ■ Cable retransmission? See below



# Focussing on the CabSat Directive

- **Looking for „(re)transmission“ of broadcasting programmes this is the first place to go**
  - Title of CabSat Directive: ...on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
- **CabSat differentiates between the two**
  - Sat-rights and Cab-retransmission procedures
  - initially created to back up Television without Frontiers-Directive
- **Specifically: retransmission**
  - creation of right left to Member States
  - introduction of procedures to facilitate rights clearing and ensure equitable remuneration



# The „cable retransmission“ question

## ■ Article 8 - Cable retransmission right

- (1) Member States shall ensure that when programmes **from other Member States** are retransmitted by cable in their territory the **applicable copyright and related rights are observed** and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.

## ■ Article 9 - Exercise of the cable retransmission right

- (1) ... may be exercised only through a collecting society.
- but: broadcasting organizations exempted from mandatory collective licensing arrangements (Art. 10)

## ■ Actual rights concerning cable retransmission

- depending on national law for broadcasting organizations
- but: encouragement in EU framework to create additional rights

# So, then what is cable retransmission?

- **Concerning the question of definition the CabSat Directive is enlightening**
- **Article 1(3)**
  - For the purposes of this Directive, ‘cable retransmission’ means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.
- **Article 1(3) after CabSat 2.0**
  - ..., regardless of how the operator of a cable retransmission service obtains the programme-carrying signals from the broadcasting organisation for the purpose of retransmission.
- **More directly formulated:**  
**“WHO that retransmits broadcasting programmes HOW“**  
**is included in this definition?**

# A little illustration of the issue before answering the question...

A broadcaster in one Member State disseminates  
a broadcasting programme  
via satellite  
(which is therefore receivable in other Member States)  
from which the signal is picked up in another Member State by means of a parabolic antenna/satellite dish  
by a ...

... hotel

(rather than a large-scale cable network operator)

which then forwards the signal by means of a cable network within its premises to the individual hotel rooms  
(rather than the cable network operator to the individual households connected)

for the benefit of the hotel room guests that can view the signal on TV sets installed in the hotel rooms  
(rather than the subscribers of the cable network operator in their homes on their TV sets)

- **And why is this (and the comparison) so relevant** (besides the economic dimension of whether or not a remuneration is paid)?

→ „hotel-case law“ of the CJEU and pending case

- **CJEU has taken a decisive role in shaping the copyright and related rights framework**
- **Specifically concerning hotel-related and other cttp-constellations**
- **Numerous cases in the last two decades and several of them on very comparable issues**
  - Concerning author's rights
    - from hotels to spas and other establishments giving access to broadcast content to their guests/clients/patients (famously different: the dentist)
  - Concerning related rights
    - from hotels to hotels (sic) pre- and after InfoSoc Directive

# A snapshot of key CJEU findings

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- **CJEU confirmed a cttp in the hotel-situation of above**
  - for cable networks within hotels (author's right C-306/05)
  - already for setting up of TV sets in rooms (C-136/09)
  - for playing works from phonograms or other fixations (C-162/10)
  
- **Arguments**
  - technically 'obvious'
  - added value to hotel service with the offer of programmes
  - 'new public' approach
  
- **Specific preliminary question**
  - in most recent Hetteger Hotel Edelweiss case (C-117/15)
  - is it a Rental and Lending Rights Directive-matter because price for hotel room should be regarded as "entrance fee"?
  - would have been application of a harmonised right, but rejected because not a specific payment for the TV availability



# So the pending question has already been answered by the CJEU?

## ■ Existing case law confirms

- no harmonisation in EU law of the cable retransmission right for broadcasting organizations (in contrast to authors)
- but: clearly a cttp by hotels if they offer by cable or other means viewing and listening of broadcasting programmes to their guests in the hotel rooms

## ■ But: pending case C-716/20 is a new setting

- factually same as existing case law
- but: preliminary questions concern for the first time the interpretation of “cable retransmission“ definition of CabSat Directive in connection with hotels because referring court from Portugal needs answer to be able to properly apply the rights as provided by national law
- opportunity to add an important missing puzzle for cttp understanding: clarifying that the hotel activity is not only a cttp but also specifically a cable retransmission which is relevant concerning broadcasting organizations

# What should the answer about the WHO and HOW of cable retransmission be?

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- **Concerning WHO can conduct a cable retransmission**
  - no specification concerning type or category of provider of cable in any of the applicable “retransmission” references in legislative framework
  - everyone that retransmits by cable broadcasting programmes by others
- **Concerning HOW cable retransmission takes place**
  - no specification concerning type of cable (network)
  - every type of cable, but specifically targeting cable technology
- **Taken together**
  - other conditions of definition need to be fulfilled. Reminder:
    - For the purposes of this Directive, ‘cable retransmission’ means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.
  - in which case any entity, including a hotel, that re-uses the signal by disseminating via cable, is to be regarded a ‘cable retransmitter’



- **Related rights of broadcasting organizations are between EU harmonization and national approaches**
  - this might mean for a specific rights issue that existence of protection depends on inclusion in national law
  - but: this has to mean that EU law notions have to be interpreted consistently across the different uses in relevant legislative framework
  - answers to preliminary reference questions by the CJEU concern EU law but enable EU law compatible application of national law
  - concretely for our setting
    - cttp by hotels is ‘technically’ existing as cable retransmission, specific protection of broadcasting organizations (currently) follows national law



## ■ Outcome of case with this result relevant

- *otherwise* exactly the same factual situation would be evaluated differently based only on the different source of protection (national or EU law depending on broadcasting organizations' or authors' rights)
- *otherwise* system of facilitated rights clearance for “retransmitters“ would be endangered which also affects protection of holders of copyright of individual programme items of broadcasting programmes
- *otherwise* the seemingly simple question of the beginning cannot be answered appropriately for this specific setting
- *because* such clarifications concerning the substantive law are only the first (but important) step to avoid “free-riding“ (applying “free-to-use“ although the use clearly has an economic dimension justifying a remuneration expectation) – the next big challenge is enforcing the rights
  - More on this now in the next presentation
  - More on case C-716/20 soon
  - More on the issue – if you are interested – in a paper on „Retransmission of broadcast signals by cable in hotels“



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