Faculty of Law,
Economics
and Finance

Law Working Paper Series
Paper number 2022-001

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An analysis of the EU CabSat-Directive in light of a pending CJEU case

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28/02/2022

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I. Introduction

It is well-known that the Court of Justice of the European Union (CJEU) has played a key role in giving the EU acquis in the area of intellectual property law the relevance it has today. Especially the series of judgments clarifying the broad notion of "communication to the public" as laid down in form of an exclusive right in the so-called InfoSoc Directive 2001/29/EC[1] with which the position of authors was significantly reinforced is an extensively debated and commented outcome.[2] Until the recent addition of the DSM Copyright-Directive (EU) 2019/790[3] to the EU acquis with its inclusion of a press publisher's right and increased obligations of platforms when they allow users to upload potentially copyrighted material, the InfoSoc Directive of 2001 has always been in the centre of attention.

In the shadow of that Directive stands the so-called CabSat Directive 93/83/EEC[4], originally created in 1993 as supplementary action in order to ensure the realization of an EU-wide single market for television broadcasting which was initiated by the Television without Frontiers-Directive (TwFD) 89/552/EEC[5]. The aim of the CabSat Directive was and remains the goal of ensuring that in the use of satellite distribution of broadcast programmes as well as retransmission by cable, rightholders' positions are safeguarded and procedures respected that allow for a smooth realization of such use of broadcast signals. This Directive has only rarely been subject of preliminary reference requests by national courts. This makes a currently pending case[6] highly relevant and gives the Court a unique opportunity to complement its case law on communication to the public for the specific aspect of retransmission of broadcasting signals: It has already in the ground-breaking decision of SGAE[7] in 2006 clarified very firmly that the forwarding of broadcast signals – television programmes, notabene – by hotel operators to the individual rooms of a hotel and thereby offering the guests the possibility of individual access to the broadcast programmes constitutes a communication to the public. For such communication an authorization by the author(s) is needed and without such authorization it violates the exclusive right as laid down in Art. 3(1) InfoSoc Directive. While this has been settled concerning authors, the pending case of C-716/20 concerns exactly the same setup – a hotel operator picking up a satellite signal and disseminating it via cable to the hotel rooms – except that this time the questions to the court are asked through the lens of the CabSat Directive and the legal position of broadcasters vis-à-vis the hotel operators as provided for by the specific national law which transposed EU law.

This contribution will therefore first explain the notion of 'cable retransmission' and in which parts of EU law it is laid down or referred to (II.). It will then give a more detailed look at the relevant provisions

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1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

2 Cf. e.g. *Rosati,* Copyright and the Court of Justice of the European Union, 2019; *Leistner,* Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives, Common Market Law Review (CMLR) 51 (2014), 559-600; *Jütte,* Reconstructing European Copyright Law for the Digital Single Market Between Old Paradigms and Digital Challenges, 2017, p. 118 et seq.

3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

4 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21.

5 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30.

6 CJEU, case C-716/20, RTL Television. For background see summary document: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=238302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=787085.

7 Details on the cases mentioned see below at IV.

of the CabSat Directive and other related secondary law which establishes the framework for questions of cable retransmission and communication to the public (III.). Further, the case law of the CJEU will be analysed in order to identify those judgments that contribute to the clarification of the open question whether a retransmission by cable of a broadcast programme by hotel operators falls under the notion of cable retransmission as presented (IV.). As the actual question has not been answered by the Court in its jurisprudence so far, the main aspects of the pending preliminary proceedings will be explained without going into the details of the national proceedings of the previous instances, before the Portuguese *Supremo Tribunal de Justiça* (Supreme Court) decided to stay the proceedings and request from the CJEU a clarification of the EU law-related aspects. The criteria as developed will show – when applied to the case at hand – that the hotel operator needs to be qualified as an operator of a cable network conducting a cable retransmission (V.). Finally, in a concluding section the relevance of the outcome of this case will be discussed (VI.).

II. The concept of 'cable retransmission' and its basis in EU and international law

1. The notion of cable and (re-)transmission

The dissemination of radio and TV programmes originally took place via (terrestrial) broadcast masts and antennas that were capable of sending – 'broadcasting' – and receiving airwaves. Subsequently, with technological development, satellite signal dissemination allowed, not as an exception, but as a rule, the cross-border dissemination of such programmes because the so-called footprint of a (geostationary) satellite with the potential of direct-to-home-signal dissemination spans across large geographical areas and in Europe for the main satellite operators with the Astra- and Eutelsat-systems easily across the territory of the EU Member States.[8] In parallel, the distribution of signals via cable-based networks bringing signals from one starting point (head-end) to individual recipients became a norm. Regularly, the originating signal for distribution via a cable network comes from a satellite dissemination, in other words it is a satellite signal that is picked up by a parabolic antenna, i.e. satellite dish, on earth and from there it is fed (in an unchanged form) into a cable infrastructure that connects this point to many others. In that way the original signal is transported onwards which is why it is referred to as a retransmission and, more specifically, where it happens via a cable infrastructure, as cable retransmission.[9]

Typically, such retransmission is organized by operators of large-scale networks which enter into end-user agreements that subscribe to a cable package which will include the receipt of radio and TV programmes of broadcasters from domestic and foreign providers. However, often it is also operators of small networks that pick up the signal and retransmit it, e.g. into a limited amount of households in an apartment block. In addition, over the past decades, across the EU Member States hotels built their own infrastructure through which they picked up "one" satellite signal through a satellite dish on either the premise of a given individual hotel or more centralized for further distribution across several hotels of the same hotel operator and would then "multiply" that one signal by retransmitting it to the radio/TV sets in all hotel rooms offering their guests the individual choice of access to the different programmes.

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8 General cf. e.g. *Weinand,* Implementing the EU Audiovisual Media Services Directive, 2018, p. 71 et seq., esp. p. 81-82; *Harrison/Woods,* European Broadcasting Law and Policy, 2007, p. 88 et seq. , esp. p. 107.

9 On this e.g. *Hugenholtz/Kirchherr,* in: Castendyk/Dommering/Scheuer, European Media Law, 2008, Directive 98/83/EEC, para. 8 et seq., para. 28-29.

2. Applicable framework in EU law

From a legal perspective under EU law, signal distribution is covered in different legislative acts. Namely cable retransmission has been addressed and defined in the CabSat Directive which – as the title 'Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission' explains – aimed at ensuring that intellectual property rights licensing could happen in a way that did not hinder (in itself) the establishment of an EU-wide – then still European Economic Community, later European Community – single market for broadcasting programmes. Both definition and the system introduced by the CabSat Directive will be dealt with in more detail below (III.), but it is important to note that these early steps of an EU intellectual property rights harmonization did not only concern copyright and the position of creators such as authors, but also took into consideration so-called rights related to copyright, also referred to as neighbouring rights, for example of performers or of broadcasting organizations. Such rights can be found in a slightly older Rental and Lending Rights Directive 92/100/EEC[10], which was later codified in Directive 2006/115/EC[11] and in which some such related rights were laid down, partly also concerning the position of broadcasters vis-à-vis cable distributors (see below III.3.).

The CabSat Directive itself was initiated in order to fill the gap left by the Television without Frontiers Directive of 1989.[12] With that ground-breaking move which still continues to be intact and based on the same principles today in the codified version of the Audiovisual Media Services Directive 2010/13/EU, last amended in 2018[13], the Council created the legal framework that allows broadcasters (initially of television programmes only) to rely on compliance with the legal regime of their "home base" (in the Directive-context referred to as the country of origin) only while being guaranteed – in principle – a dissemination across the EU Member States (as well as EEA Member States) without having to check for legal requirements in any of the other Member States in which the programme can be received.[14] However, questions concerning copyright had not been settled in the Television without

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[10] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61–66.

[11] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p. 28–35.

[12] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30 (later amended by Directive 97/36/EC and Directive 2007/65/EC before being codified in Directive 2010/13/EU); background in *Cole/Ukrow/Etteldorf,* On the Allocation of Competences between the European Union and its Member States in the Media Sector - An Analysis with particular Consideration of Measures concerning Media Pluralism, 2021, https://doi.org/10.5771/9783748924975, p. 180 et seq.; the genesis and further development is extensively discussed by *Weinand,* Implementing the EU Audiovisual Media Services Directive, 2018, p. 71 et seq.

[13] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92; on this: *Cole/Ukrow/Etteldorf,* On the Allocation of Competences between the European Union and its Member States in the Media Sector - An Analysis with particular Consideration of Measures concerning Media Pluralism, 2021, https://doi.org/10.5771/9783748924975, p. 186 et seq.; *Weinand,* The revised Audiovisual Media Services Directive 2018 – has the EU learnt the right lessons from the past?, UFITA 82 (2018) 1, p. 260–293.

[14] On the country of origin *Cole,* The Country of Origin Principle. From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union, in: Meng/Ress/Stein (ed.), Europäische Integration und Globalisierung – Festschrift zum 60-jährigen Bestehen des Europa-Instituts, 2011, p. 113, 117 et seq.

Frontieres Directive,[15] thereby limiting the actual use of this new opportunity because broadcasters had to fear committing copyright violations if their programme signal would be receivable in other than the country of origin without having cleared licences for that.[16] Therefore, in a second step – and it is consequently sometimes referred to as the "sister directive"[17] – the CabSat Directive filled this lacuna by principally expanding the country of origin-logic to a fiction according to which the signal-dissemination via satellite only takes place once in the country of first dissemination and the broadcasters can rely on the agreements reached with rightholders in that state. However, this solution is contract-based and rightholders retain the right to decide whether and under which conditions they allow satellite dissemination in the first instance.[18]

While the major advancement of the EU copyright acquis in 2001 with the introduction of the InfoSoc Directive 2001/29/EC made some changes to the Rental and Lending Rights Directive,[19] it left otherwise untouched the pre-existing Directives and namely the CabSat Directive (see Recital 20 and Art. 1(2) c)).[20] As all these pieces of secondary legislation are Directives, they require national transposition which the Member States are obliged to ensure as Art. 288(3) TFEU provides. In this contribution EU law will be in the focus, but not lastly because copyright and related rights harmonization remains partial, there is a close link with rules in national law and the Directives referred to here encourages the broadening of rights for authors and others through supplementary national law.

3. The international dimension

In addition to the layer of EU law and its national transposition in the case of Directives, the international dimension is relevant, as there is a number of relevant Conventions concluded in that area, which predate similar or equivalent protection measures introduced by the EU. Although this dimension is not in the focus of this contribution, it is relevant because the Directives of interest here

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15 Besides referring in Art. 8 to cinematographic works and the release windows schemes for exploitation of such works.

16 Cf. Recitals of original Directive 92/100/EEC:

> (2) Whereas, to that end, the Treaty provides for the establishment of a common market and an area without internal frontiers; whereas measures to achieve this include the abolition of obstacles to the free movement of services (…);
>
> (3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;
>
> (4) Whereas the Council has already adopted Directive 89/552/EEC of 3 October 1989 (…);
>
> (5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; (…)
>
> (12) Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright (…).

17 *Hugenholtz,* SatCab Revisited: The Past,Present and Future of the Satellite and Cable Directive, in: Convergence, Copyrights and Transfrontier Television, IRIS plus 2009-8, p. 7, 8.

18 Generally on the CabSat Directive *Rosén,* The Satellite And Cable Directive, in: Torremans/Stamatoudi, EU Copyright Law: A Commentary, 2021, ch. 7; *Hugenholtz/Kirchherr,* in: Castendyk/Dommering/Scheuer, European Media Law, 2008, Directive 98/83/EEC, para. 1 et seq.

19 Including moving former Art. 7 Rental and Lending Rights Directive to Art. 2 Directive 2001/29/EC on the Reproduction right in order to group it together with the equivalent right of authors.

20 Notwithstanding that Recital 23 clarifies – where it comes to the author's right – that

> (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

mention or refer to the applicable international conventions as they are binding for all or nearly all of the Member States.[21]

As an example, the Rental and Lending Rights Directive mentions that the need for harmonization of Member State laws should be done "in such a way so as not to conflict with the international conventions on which many Member States' copyright and related rights laws are based"[22]. In addition, the CJEU regularly underlines the goal of interpreting the norms of EU intellectual property law in light of the international texts and obligations.[23] Namely this concerns the Berne Convention for the Protection of Literary and Artistic Works of 1886 (as last amended on September 28, 1979)[24] and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 1961[25]. Although those two Conventions are not part of the EU acquis but international treaties which predate (however are now administered by) the World Intellectual Property Organization (WIPO), a UN subsidiary organisation which includes all EU Member States as members and in which the European Commission has observer status, they are partly inspiration for the establishment of equivalent rights in the relevant EU Directives.[26] Later Directives such as the InfoSoc Directive are direct consequences of the signature of WIPO Conventions by the EU besides the ratification by its Member States.[27]

While the older Berne Convention was the first international copyright convention and entails a set of rights for authors as well as neighbouring rights, the Rome Convention concerns only holders of related rights and includes specific, but limited – in light of the technological realities at the time of creation – rights for broadcasting organizations.[28]

III. The Relevance of the CabSat Directive and Related Secondary Law

1. Background and scope of the CabSat-Directive 93/83/EEC

As mentioned above, the CabSat Directive was adopted as a complementary step to the TwFD in the environment of a significant increase of broadcasting programmes becoming available – at least technically – across borders in the early 1990s. Besides the need for creating legal certainty for both providers of such programmes as well as operators that were keen on using those programmes in their own offers, namely by further distributing them by satellite and cable, it was intellectual property rightholders fearing that with the increased territorial coverage their fair remuneration would be at risk, which motivated the clarifications sought with the Directive.

Consequently, rules were introduced that would ensure remuneration for rightholders in cross-border settings. For satellite distribution it was clarified (see Art. 1(2) b)) that the act of communication to the

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21 See e.g. Recitals 26, 30 Directive 93/83/EEC.

22 Later upheld as Recital 7 of codified Directive 2006/115/EC.

23 See e.g. CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131; CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764.

24 https://www.wipo.int/treaties/en/ip/berne/. Referred to in Recital 19 Directive 2001/29/EC. All EU Member States are ratifying parties.

25 https://www.wipo.int/treaties/en/ip/rome/. Referred to in Recital 15 Directive 92/100/EEC; Recital 26 Directive 93/83/EEC. All EU Member States except for Malta are ratifying parties.

26 E.g. Broadcasting organization right in Art. 8 (3) Directive 92/100/EEC; partly the Directives also refer to the Conventions, e.g. Directive 92/100/EEC refers to Berne and Rome when it comes to Duration (Art. 11, 12).

27 Cf. e.g. Recital 15 Directive 2001/29/EC in relation to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

28 More on this at III. 3. a) and V. 2. b).

public takes place only once in the home country (or, more precisely in the words of the Directive, where "the program-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth") but that indeed there was a right of authors to authorize (which means without authorization it is prohibited) this type of distribution. For cable retransmission it is clarified by Art. 8(2) that the rules applicable in a given Member State for such an activity have to be observed in the case of retransmission of a programme that originates in another Member State. The Directive thereby did not create any specific rights or related rights concerning cable retransmission, but set the rule that nationally applicable rules concerning retransmission extend (and Member States have to ensure their application) to these cross-border situations.

In addition, to make such retransmission practically feasible, it has to be based on individual or contractual agreements, but the exercise of this right has to take place exclusively through collecting societies (Art. 9(1)). Background to this is the need to facilitate an expedited rights clearing and under the assumption that rights for broadcasting organizations already exist under national law or can be introduced, the Directive focuses on foreseeing procedures in connection with such rights and in order to allow cable retransmission to actually work in practice while equitable remuneration of the respective rights holders is ensured. For the same reason, Art. 10 exempts broadcasting organizations in the international setting of the CabSat Directive from the mandatory use of collecting societies when arranging for the retransmission of their broadcasts. There is only a fairly limited number of broadcasters – in contrast to the vast amount of authors involved in creating elements of a broadcasting programme – and only a limited number of operators intending to use an original broadcast signal for further distribution via a cable network, which is why broadcasters can opt for direct negotiations with those interested parties.

2. The main provisions concerning cable retransmission

While the Directive does not aim at fully harmonizing the rights which authors and holders of related rights have in the context of dissemination of broadcasting programmes, but focuses on ensuring effective procedures for the realization of these rights as demonstrated above, the Directive does oblige Member States to ensure the application of their national copyright and related rights law to the situation of retransmissions.

In that sense, Art. 8 is entitled "cable retransmission right" which may sound as if the provision actually lays down this right, while it instead only clarifies in para. 1 that "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". But this clarification is the purpose of the Directive and as Recital 27 already states, cross-border "cable retransmission … is an act subject to copyright and … rights related to copyright" making it necessary that cable operators "obtain the authorization from every holder of rights in each part of the programme retransmitted". Again, as explained above, to make this practically feasible, the rights clearance is to be achieved through contractual and regularly collective licensing schemes.

a) The definition in Art. 1(3)

The Directive specifically defines the notion of "cable retransmission" concerning both radio and television programmes, as it is the starting point for the application of the related provisions of the Directive. Art. 1(3) lays down that it "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".

The definition contains several elements and besides the technical description of the process it clarifies – in line with the purpose of the Directive – that it applies to cross-border situations, that the programmes initially had to be directed to the public and that retransmission is also aimed at being received by the public and that the signal is transported in the original form. The latter means that retransmission only concerns cases in which the original signal is re-used without it being changed, although the change of technology – here for example the use of a satellite signal which is then injected into a cable network – is not a relevant "change" nor are purely technical adaptations[29]. The public availability of the programmes includes not only e.g. free-to-air-television programmes but also pay-TV which is disseminated in a scrambled way, but is still receivable by the public when they acquire the means necessary for descrambling such as a decoder card.[30]

The retransmission can concern signals initially transported by cable ("wire" as in the definition) or "over the air" (terrestrial broadcasting or by satellite) and can take place via a cable or – irrespective of the "cable retransmission" title of the definition – by a "microwave system", so again potentially by airwaves. Practically relevant today within the framework of application of the CabSat Directive is the constellation in which a satellite-distributed signal – economically especially relevant concerning television signals – that is available across large geographical areas due to the wide footprints of satellites is picked up and then distributed further, typically by forwarding it into a cable network. This phenomenon is exactly what the cable retransmission definition addresses.

It is noteworthy that the Directive is thereby not technology-neutral in that it only concerns the type of retransmission that was happening at the time of the creation of the Directive. However, within the technologies addressed, namely satellite and cable, it is important to underline that the Directive does not differentiate as to what type of cable is meant or which type of provider of a cable (network) is addressed (see in more detail below at V.). The condition is only that the process has to be aimed at "reception by the public". Interestingly, concerning the element of a "public", or – in the context of the right of communication to the public of authors under the InfoSoc Directive[31] – a "new public", the CJEU has interpreted the condition in a broad manner[32] in order to ensure an extensive protection of rightholders. Therefore, for example hotel room guests or spa establishment users are regarded to be a part of a "public".[33]

b) The rights clearance system according to Art. 8-10

Based on this definition, Art. 8-10 lay down the above-mentioned "procedural" element of how – in the responsibility of Member States – it is ensured that retransmission can actually happen and nonetheless respects the rightholders' positions. The outset is that cable retransmission is only allowed

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[29] The condition of "simultaneous, unaltered and unabridged" means that it may neither be a time-delayed retransmission (except if the delay is minimal and purely because of technical reasons) nor a modified or shortened version of the initial programme; namely overlays or replacements, such as for example the insertion of "local" advertising windows replacing the original advertising would change the character of the programme and therefore not constitute a retransmission in this sense any longer; cf. *Rosén,* The Satellite And Cable Directive, in: Torremans/Stamatoudi, EU Copyright Law: A Commentary, 2021, 7.31; *Hugenholtz/Kirchherr,* in: Castendyk/Dommering/Scheuer, European Media Law, 2008, Directive 98/83/EEC, para. 29.

[30] Cf. on this also *Hugenholtz,* SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive, in: Convergence, Copyrights and Transfrontier Television, IRIS plus 2009-8, p. 7, 10.

[31] See in more detail below.

[32] See below at IV.2.

[33] CJEU, case C-136/09, Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai, ECLI:EU:C:2010:151, no. 43 (hotel); CJEU, case C-351/12, OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s., ECLI:EU:C:2014:110, no. 33 (spa); see in more detail at IV.2.

if the according copyright and related rights as applicable in the Member State of retransmission are respected. This requires an agreement between the "cable operators" on the one side and the "copyright owners" or "holders of related rights" on the other side, as stated in Art. 8(1), which can be reached by individual or collective contractual agreement.

As it is unrealistic to assume that a cable operator can guarantee that it clears all rights of all possible rightholders of a broadcasting programme individually – notably, after this type of clearing has already taken place by the broadcaster for the initial transmission – and in a timely manner, the Directive further establishes in Art. 9 that Member States introduce in their national law for cross-border cases the mandatory use of collecting societies. This means that individual rightholders can only grant or refuse authorization for cable retransmission through a collecting society.[34] Without this restriction of freedom of contract it would be possible that a single individual rightholder could prevent retransmissions[35] and it would be practically impossible for the cable operator to secure all agreements before the retransmission is supposed to take place because other than the original broadcaster the "retransmitter" does not have the full information about the content of the programme in advance.[36]

The provision of Art. 9 goes even further by establishing in para. 2 rules concerning "outsiders", meaning rightholders that have not transferred the management of their rights to a collecting society. In such cases there is a fiction that the collecting society which is otherwise mandated to manage rights of the same category than the ones in question for the outsider, is also in charge to do so for the rightholder that does not have a contract with it.[37]

There is a noteworthy exception to the rule of mandatory use of a collecting society for rights clearance when it comes to retransmission and this is especially relevant because it clearly shows the intention that the Directive acknowledges that the holders of related rights – in this exception broadcasting organizations – need to be specifically considered in order to ensure that their position is secured. Art. 10 declares that Art. 9 is not applicable to broadcasting organizations in respect of their own transmissions. The rights that they hold, either because these are their own rights or because they have been transferred to them by copyright owners or other holders of related rights, can be negotiated directly for further use. Broadcasting organizations are hence privileged insofar as they may enter into individual agreements with cable operators as regards both authorization of and remuneration for cable retransmissions. This can be simply explained by the fact that, other than with the hardly enumerable amount of rightholders to individual elements of a television or radio programme, the amount of media service providers is limited and it is easily possible for a cable operator to negotiate with all those broadcasters whose programmes it would like to retransmit. There

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[34] For the purpose of clarification: the actual setting up and structure of collecting societies is not addressed by the CabSat Directive or other secondary law but remains a competence of the Member States. Also, the Directive does not foresee a compulsory licensing to cable operators, it makes the decision about granting or refusing the right dependent on the decision of the collecting societies.

[35] Or, as was mentioned in a discussion paper by the *European Commission*, cause "blackouts" in retransmitted programmes if cable operators would not want to risk including content for which one right could not be cleared, cf. Broadcasting and Copyright in the Internal Market - Discussion paper on copyright questions concerning cable and satellite broadcasts, III/F/5263/90, November 1990, nos. 3.29 et seq. *Rosén,* The Satellite And Cable Directive, in: Torremans/Stamatoudi, EU Copyright Law: A Commentary, 2021, 7.68; *Hugenholtz/Kirchherr,* in: Castendyk/Dommering/Scheuer, European Media Law, 2008, Directive 98/83/EEC, para. 77-79.

[36] *Hugenholtz,* SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive, in: Convergence, Copyrights and Transfrontier Television, IRIS plus 2009-8, p. 7, 12-14

[37] And this assumed mandate does not only concern the pecuniary aspects, but also would allow for a complete refusal of granting of rights on behalf of the rightsholder, cf. CJEU, case C-169/05, Uradex SCRL v Union Professionnelle de la Radio et de la Télédistribution (RTD), Société intercommunale pour la diffusion de la télévision (BRUTÉLÉ), ECLI:EU:C:2006:365, no 22 et seq.

is no need for a mandatory facilitation of the rights clearance through a collecting society – although it is possible as an alternative – because the broadcasting organization can decide by itself whether it prefers to manage its rights by itself or not.

3. Other relevant secondary law

a) Rental and Lending Rights Directive

While the CabSat Directive in contrast to the rights of authors concerning cable retransmission actually creates a harmonized right of authors when it comes to satellite by providing in Art. 2 that the authors have an exclusive right to "authorize the communication to the public by satellite of copyright works", this is not the same for cable retransmission. As far as rights of other rightholders such as broadcasting organizations in the context of satellite communication are concerned, the CabSat Directive refers in Art. 4(1) to the earlier Directive 92/100/EEC, one of the very first intellectual property rights harmonization instruments of the EU, which was later codified in Directive 2006/115/EC. This Rental and Lending Rights Directive, as already mentioned above, includes also rights related to copyright and covers beyond authors also performers, phonogram producers[38], film producers and broadcasting organizations. For the latter, some rights are created beyond the rental and lending right, namely a fixation right, a reproduction right (later moved to Art. 2 of Directive 2001/29/EC), a rebroadcasting and communication to the public right as well as a distribution right.

The list of rights assigned to broadcasting organizations does not include an exclusive right to cable retransmission, so the question of whether such a right exists and what the conditions are, remained in the realm of Member State law even after a number of similar rights had been introduced by the Directive. However, the Directive clearly states that in this context the protection offered for broadcasting and communication to the public is only a minimum level that can be expanded to more far-reaching protection in Member State law.[39] This type of extended protection partly already existed or was created by numerous Member States. Typically, these clarified in their national laws that broadcasting organizations, in order to secure their position in achieving a fair remuneration for their offers, hold the direct right to retransmission by cable or a right completely indifferent of the technical means used for retransmission respectively.[40]

Interestingly, the actual right granted to broadcasting organisations in Art. 8(3) of Directive 2006/115/EC concerns a very specific setting and only relates to two types of acts taking place against which broadcasting organizations can object. Firstly, they have the exclusive right to authorize the "rebroadcasting … by wireless means" and, secondly, the "communication to the public if [it] is made in places accessible to the public against payment of an entrance fee" of their broadcasts. This is indeed a similar constellation to retransmission by cable of an initial satellite signal as presented above, but it is not the same.

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[38] This e.g is relevant in CJEU, case C-476/17, Pelham GmbH and Others v Ralf Hütter und Florian Schneider-Esleben; ECLI:EU:C:2019:624 or CJEU, case C-162/10, Phonographic Performance (Ireland) Limited v Ireland and Attorney General, ECLI:EU:C:2012:141 (on this see below at IV.).

[39] Cf. Recital 16 (of the codified Directive; formerly Recital 20).

[40] Examples are Belgium (referring in Art. XI.215 Code de droit économique to "the simultaneous or deferred rebroadcasting of its broadcasts, including cable retransmission"), Germany (referring in § 87 (1) Act on Copyright and Related Rights to "rebroadcast its broadcast"), Greece (referring in Art. 48 (1) Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters to "retransmission of their emissions in any way, such as electromagnetic waves, satellites, cables"), Latvia (referring in Art. 53 (1) no. 4 Copyright Law to "retransmit the broadcast by cable") or Spain (referring in Art. 126 lit. d Consolidated Text of the Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions to "the retransmission by any technical procedure of its broadcasts or transmissions").

The reason for this very narrow scope of the rights can be found in the source of inspiration for this provision, which is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention), the Art. 13 (a) and (d) of which cover exactly these two constellations.[41] At that time, there simply was no wide-spread retransmission taking place and no cable networks had been established for that purpose. In light of the obligations that many Member States of the EU anyway had by being ratifying parties to the Rome Convention, that right was later also included in the Rental and Lending Rights Directive. In that sense the word "rebroadcasting" refers to the unaltered re-use of a broadcast programme, except that it is – in contrast to retransmission – limited to a specific technology, here by wireless means only.[42] It should be noted that in several language versions of the two Directives 93/83/EEC and 2006/115/EC there is not a different word used for rebroadcasting and retransmission but both are addressed with the same term.[43]

The second constellation refers to the public screening of broadcast programmes – this time irrespective of the technology used – when this takes place against payment of an entrance fee which the organizer of the event enables for exactly the reason that the audience can then follow the broadcast programme. This type of showing to the public was more relevant in the 1960s when the Rome Convention was created as it was only subsequently that the availability of television sets (the Rome Convention in Art. 13 (d) only refers to television broadcasts) in private households became the norm. The CJEU has interpreted the condition of "entrance fee" in a narrow sense as will be shown below.[44]

b) InfoSoc Directive

As mentioned above, although the InfoSoc Directive 2001/29/EC has to be regarded to be the likely single most significant advancement of horizontal harmonization of certain aspects of intellectual property law by the EU, it did not create material changes to the question of retransmission of broadcasting programmes or the rights granted to broadcasting organizations in the context of satellite and cable distribution. It integrated some rights from the Rental and Lending Rights Directive but otherwise underlined in Art. 1 that the existing Directives, including the CabSat Directive (Art. 1(2) (c)), remain unaffected by this new Directive.

Of relevance in the context of this contribution is, however, Recital 23 which states – albeit in relation to the author's right, not a right of broadcasting organizations – that the "right of communication to the public … should be understood in a broad sense covering all communication to the public not present at the place where the communication originates", which means "any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting". In other words, for the notion of retransmission, the Recital confirms that this process is to be regarded as a part of the (much broader) right of communication to the public, which by this Directive is conferred to authors.

There is no definition of retransmission that would alter the notion of cable retransmission as laid down in the CabSat Directive and therefore a consistent understanding of this concept across the

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41 In CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131 the CJEU explicitly points this out in no. 22.

42 Already Art. 3 lit. f) makes clear that back in the time when the Rome Convention was drafted, broadcasting meant "by wireless means" only as terrestrial dissemination was the technology employed then.

43 Cf. the English, French or Portuguese language versions of Directive 93/83/EEC or the Portuguese language version of Directive 2006/115/EC.

44 Cf. CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131.

different instruments of EU law as being a sub-category of communication to the public can be achieved, irrespective of whether the retransmission right concerns authors or broadcasting organizations, in the latter case if it is provided for by national law and then triggers the according provisions of the CabSat Directive. The CJEU has confirmed, in respect of authors' rights, that the forwarding of a broadcast programme received by satellite signal through a cable network to individual hotel rooms by the operator of the hotel is a communication to the public.[45] Although it was not necessary in that case to further specify this, evidently the act leading to the communication to the public is the retransmission of the signal to the hotel rooms and the recipients are the public.[46]

IV. The relevant preceding case law of the CJEU

1. Overview of cases concerning (re-)transmission of broadcasts

The pending case that will be discussed in the next section[47] is not the first occasion that the CJEU has to deal with the Directives mentioned above in settings comparable to the one on which it will be deciding now. However, none of the cases that will be introduced in the following has covered the actual question of the pending preliminary reference.

The rules applicable to transmission of broadcast programmes, to retransmission of such broadcasts in hotels or other premises and the right of communication to the public have repeatedly been subject to judgements of the CJEU, of which nine judgments between 2000 and 2017 are noteworthy. Only two of them, the first two in time, concerned specific interpretation questions of the CabSat Directive, namely the cases of Egeda[48] and Uradex[49]. The case of Egeda as well as the most recent in the series, the judgment in Verwertungsgesellschaft Rundfunk[50] concerned settings in which hotels and retransmissions to hotel rooms were involved, as well as in the decision of major importance for the interpretation of the exclusive right of authors to decide about communication to the public as laid down in the InfoSoc Directive in the 2006 judgment of SGAE[51]. Also, Phonographic Performance

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45 CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764, see more detailed below at IV. 2.

46 See for the qualification as "new public" and the cross-reference to Art. 11bis (1) (ii) of the Berne Convention CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764,no. 40.

47 Questions submitted by the Portuguese High Court in case C-716/20.

48 CJEU, case C-293/98, Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa), ECLI:EU:C:2000:66; see *Edelman*, La CJCE et la télédiffusion dans les chambres d'hôtel, Recueil Le Dalloz 2001, p. 1094–1096; *Michinel Alvarez*, Distribución por cable en habitaciones de hotel y derecho de autor: comentario a la sentencia del TJCE de 3 de febrero de 2000 (Asunto C-293/98: Egeda c. Hoasa), Diario La ley 2000, nº 5065 p. 1–3; *Tichy,* Öffentliche Wiedergabe bei Weiterverbreitung von Fernsehsendungen in Hotelzimmern?, European Law Reporter 2000, p. 122–123.

49 CJEU, case C-169/05, Uradex SCRL v Union Professionnelle de la Radio et de la Télédistribution (RTD), Société intercommunale pour la diffusion de la télévision (BRUTÉLÉ), ECLI:EU:C:2006:365; see *Ibáñez*, La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "Uradex", Revue du droit de l'Union européenne 2006 nº 3 p. 723–726.

50 CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131; see *Lucas-Schloetter*, Affaire Edelweiss : nouvelles précisions de la CJUE sur le droit de communication au public des organismes de radiodiffusion, Dalloz IP / IT 2017 nº 6, p. 332–334; *Raitz von Frentz/Masch*, Weitersendung in Hotels und über das Internet – zur Stärkung der Position der Rechteinhaber durch die EuGH-Entscheidungen "Hotel Edelweiss" und "ITV 2", Zeitschrift für Urheber- und Medienrecht 2017, p. 406–410; *Walter*, Signalschutz — Öffentliche Wiedergabe von Rundfunksendungen in Hotelzimmern, Medien und Recht 2017, p. 137–140.

51 CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764; see *Bateman*, The Use of Televisions in Hotel Rooms, European Intellectual Property

(Ireland)[52] concerns an equivalent setting of hotel operators setting up hearing and viewing possibilities in the rooms, except that the case concerned phonograms and therefore the Rental and Lending Rights Directive, which was again the case in the later Verwertungsgesellschaft Rundfunk.

The majority of cases concern different environments and the question whether in those settings a communication to the public in the sense of the InfoSoc Directive is constituted. These are, besides the SGAE case, the order in Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon[53] and the judgments in SCF[54], ITV Broadcasting and Others[55], OSA[56], and RehaTraining[57].

Review 2007 p. 22–26; *Dittrich*, Zur Übermittlung von Fernsehsignalen von der Hotelantenne in Gästezimmer, Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht 2006, p. 112–115; *Mahr*, Die öffentliche Wiedergabe von Rundfunksendungen im Hotelzimmer, Medien und Recht 2006, p. 372–380; *Ullrich*, Die "öffentliche Wiedergabe" von Rundfunksendungen in Hotels nach dem Urteil "SGAE" des EuGH (Rs. C-306/05), Zeitschrift für Urheber- und Medienrecht 2008 p. 112–122.

[52] CJEU, case C-162/10, Phonographic Performance (Ireland) Limited v Ireland and Attorney General, ECLI:EU:C:2012:141; see *McGovern*, On the question of the interpretation of Articles 8 and 10 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights relating to copy-right in the field of intellectual property, in: Claassen/Keustermans, Landmark IP Decisions of the European Court of Justice 2008-2013, 2014, p. 170–177; *Von Ungern-Sternberg*, Urheberrechtlicher Werknutzer, Täter und Störer im Lichte des Unionsrechts - Zugleich Besprechung zu EuGH, Urt. v. 15. 3. 2012 - EUGH 15.03.2012 Aktenzeichen C-162/10 - Phonographic Performance (Ireland), und Urt. v. 15. 3. 2012 - EUGH 15.03.2012 Aktenzeichen C-135/10 - SCF, Gewerblicher Rechtsschutz und Urheberrecht 2012, p. 576–582.

[53] CJEU, case C-136/09, Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai, ECLI:EU:C:2010:151; see *Dontas/Markakis*, On the question of whether the mere installation in hotel rooms of television sets connected to the central antenna of the hotel fall within the concept of 'communication to the public'?, in: Claassen/Keustermans, Landmark IP Decisions of the European Court of Justice 2008-2013, 2014, p. 85–89; *Walter*, Fernsehen im Hotelzimmer - Bestätigung des SGAE-Urteils, Medien und Recht International 2010, p. 124–125.

[54] CJEU, case C-135/10, Società Consortile Fonografici (SCF) v Marco Del Corso, ECLI:EU:C:2012:140; see *Perani*, On the question of whether equitable remuneration is due when phonograms are broadcast by radio in the waiting room of a dental practice, in: Claassen/Keustermans, Landmark IP Decisions of the European Court of Justice 2008-2013, 2014, p. 164–169; *Sciaudone*, The dental surgery, the hotel bedroom and "communication to the public", Journal of Intellectual Property Law and Practice 2012, p. 641–644; *Walter*, Öffentliche Wiedergabe - Hintergrundmusik in Zahnarztpraxis, Medien und Recht International 2012, p. 20–23.

[55] CJEU, case C-607/11, ITV Broadcasting Ltd and Others v TVCatchUp Ltd, ECLI:EU:C:2013:147; see *Castets-Renard*, L'interprétation autonome et systémique du droit d'auteur européen par la CJUE : et maintenant ?, Droit de l'immatériel : informatique, médias, communication 2013 nº 93, p. 10–15; *Kraft*, Urheberrecht: Auslegung des Begriffs der "öffentlichen Wiedergabe", Europäische Zeitschrift für Wirtschaftsrecht 2013, p. 427–429; *Silverman/Gesinde*, ITV v TV CatchUp: the saga continues..., European Intellectual Property Review 2016, p. 580–584.

[56] CJEU, case C-351/12, OSA — Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s., ECLI:EU:C:2014:110; see *Handig*, "Öffentliche Wiedergabe" im Wandel - Der EuGH harmonisiert den urheberrechtlichen Begriff, Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht 2014, p. 206–214; *Nérisson*, Last year at Marienbad: the ECJ "OSA" decision - milestones on the way to a European law of copyright and of its management, European Intellectual Property Review 2015, p. 388–394; *Welp*, Der Öffentlichkeitsbegriff im Urheberrecht und die Praxis der internationalen Rechtewahrnehmung, Gewerblicher Rechtsschutz und Urheberrecht 2014, p. 751–754.

[57] CJEU, case C-117/15, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), see *Clark/Dickenson*, Theseus and the Labyrinth? An Overview of 'Communication to the Public' under EU Copyright Law: After Reha Training and GS Media Where are we Now and Where do we Go from Here?, European Intellectual Property Review 2017, p. 265–278; *Roder*, Öffentliche Wiedergabe bei Verfolgen eines Erwerbszwecks – Totgesagte leben länger! Zugleich Anmerkung zu EuGH, Beschl. v. 14.7.2015, C-151/15 - Douros Bar und

2. On the criteria for communication to the public and the significance of hotel rooms

Although both the Egeda and Verwertungsgesellschaft Rundfunk judgments concern a factually comparable situation which also resembles the one of the pending case, each decision was about different elements than the question of whether the activity of the hotels, namely the picking up of a broadcast signal that had been disseminated either terrestrially or by satellite and disseminating it to the individual hotel rooms without requesting a specific authorization from the broadcasting organizations or the collecting societies, constituted cable retransmission. Although the referring court in Egeda asked about the CabSat Directive, the CJEU concluded that this did not govern the matter at hand in that case, and in Verwertungsgesellschaft Rundfunk the Court interpreted the broadcasting and communication to the public right under the Rental and Lending Rights Directive.

In more detail: in Egeda the collecting society requested that the hotel operator would cease to distribute the television signals by cable to the hotel rooms and pay damages for the unauthorized retransmission that had taken place in the past. The referring Spanish court asked whether the activity of the hotel constituted an "act of communication to the public" or "reception by the public" in the sense of the CabSat Directive. The decisive point here was that the referring court sought to receive an answer whether under harmonized EU (then: EC) law a "cable retransmission right" had been created. Not only did the Commission clearly argue against such a right having been created under EU law, but it also pointed out that it is likely that national law might have created such a right as it stems from a possible obligation for Spain according to the Berne Convention.[58] However, it would not be a matter of EU law and the CJEU decided in that same direction by declaring that the CabSat Directive itself did not "introduce a specific cable retransmission right nor defines the scope of any such right"[59].

Nonetheless, already in that decision the CJEU hinted at the forthcoming legislative development[60] and with the entering into force of the InfoSoc Directive a communication to the public right was created that very clearly – and confirmed by the CJEU in the SGAE case – introduced such a right for authors that encompassed cable retransmission as a sub-category of that type of communication.[61] Additionally, as described above, explicit rights for broadcasting organizations concerning communication to the public were introduced in many national copyright and related rights laws.

SGAE, the Spanish collecting society in charge, requested compensation for the unauthorized use of television programmes which were picked up by Rafael hotels, the defendant in the national proceedings, and distributed to the TV sets installed in its hotel rooms. The CJEU in a very clear manner answered in the preliminary ruling that the copyright owners' right to communication to the public of Art. 3(1) was infringed if a hotel transmits the broadcast works to its clients.[62] It also underlined the active role that such hotels play in enabling this dissemination of the original broadcast programme to a new public: "The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the

EuGH, Urt. v. 31.5.2016, C-117/15 - Reha Training, Gewerblicher Rechtsschutz und Urheberrecht INT 2016, p. 999–1007.

58 CJEU, case C-293/98, Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa), ECLI:EU:C:2000:66, no. 13.

59 Ibid., no. 24.

60 Ibid, no. 26-28.

61 See above at III. 3. b).

62 CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764, no. 47.

broadcast work"[63]. Because the communication to the public right was introduced by harmonized EU law, the Court in this case could give a full interpretation of the right contrary to the situation in Egeda, which had to be decided based on national law.

With this decision it is clear that the notion of communication to the public covers extensively any (re-)transmission of a work to the public by wire or wireless means, including broadcasting, and that the setting of a hotel operator disseminating such a signal to the hotel rooms falls within the scope. The same applies for the right of phonogram producers and performers to receive an equitable remuneration if hotel operators make available in the guest rooms commercially published phonograms either by offering them via specific devices or because they are contained in broadcasts – television or radio programmes – that are made available in the hotel rooms. With that decision in the Phonographic Performance (Ireland) case the CJEU aligned the interpretation of the communication to the public between the InfoSoc and Rental and Lending Rights Directive and underlined that the need for a separate remuneration is justified as the offer of such entertainment in the hotel rooms had an influence on the hotel's standing and could positively impact booking numbers.[64]

Repeatedly, the CJEU confirmed this approach in communication to the public-cases. Already in Organismos Sillogikis, the Court, by means of an order because of the clarity of the answer to the questions asked by the Greek court, confirmed that SGAE meant that already the setting up of TV sets in the hotel rooms through which clients can then watch programmes if they wish to do so constitutes a communication act, irrespective of the technology used. But also in other settings than hotels, where TV installations provide an added value for the clients of the establishment, a communication to the public was confirmed, such as in OSA for a spa or RehaTraining[65] for a rehabilitation centre. In only one case did the Court conclude differently for the question whether the clients of an establishment form a new public: because the determination of that element depends on several criteria, in the case of a waiting room of a dentist where background music is played from a radio, the Court rejected the idea that this would have a profit-making nature as it would not lead to a rise of number of patients, thereby differing from the situation of the other establishments mentioned previously.[66]

In one case, finally, the CJEU had to judge about one of the harmonized rights of broadcasting organizations. The 2017 judgment in the Verwertungsgesellschaft Rundfunk case (referred to also as the Hettegger Hotel Edelweiss case) concerned – as the name illustrates – the same conflict between a collecting society and a hotel that provides the possibility to its guests to view broadcast programmes by means of a cable network through which it transmits the signal picked up from the central cable TV connection where the initial transmission was captured.[67] With that, the facts of the case not only resemble what had happened in SGAE and other cases, but also in the currently pending case before the CJEU. However, the difference is that the referring Austrian court explicitly questioned whether

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[63] Ibid, no. 42. In addition, the Court underlined in no. 37 and 43 that there is no need for a simultaneous reception by the individual members of this "public" in order for them to constitute such a "public".

[64] CJEU, case C-162/10, Phonographic Performance (Ireland) Limited v Ireland and Attorney General, ECLI:EU:C:2012:141, esp. no 44.

[65] CJEU, case C-117/15, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), no. 62.

[66] CJEU, case C-135/10, Società Consortile Fonografici (SCF) v Marco Del Corso, ECLI :EU :C :2012 :140, no. 97 et seq.

[67] In the facts of CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131, no. 10, the CJEU describes this as "Hotel … which has a cable TV connection from which various television and radio programmes, including those produced and broadcast by the beneficiaries of the Verwertungsgesellschaft Rundfunk, are simultaneously redirected, unaltered and in full, via cable, to the TV sets installed in the hotel rooms".

such a setting fulfils the conditions of Art. 8(3) of Directive 2006/115/EC, namely whether the price for a hotel room could be regarded as a separate "entrance fee".[68]

The Court repeats again that the setting clearly constitutes – irrespective of the technology used – a communication to the public[69], but rejected the suggestion by the referring court that the price for the overnight stay in a hotel room which includes a TV set could be regarded as constituting a separate entrance fee.[70] Rather, this would necessitate "a payment specifically requested in return for the communication to the public of a TV broadcast"[71] while this "bonus" to a hotel room is – depending on the category of the hotel – one of the additional services that come with the room. Consequently, such cases in which hotels distribute broadcasts via television sets installed in their rooms do not fall within the scope of the exclusive right provided for in Art. 8(3) Directive 2006/115/EC for broadcasting organizations. But the provision does not limit the possibility of Member States to foresee such a right under national law, in which case the broadcasting organizations can claim their right vis-à-vis hotel operators.

The existing case-law in a summary overview therefore confirms that hotels which offer the viewing and listening of broadcast programmes to their guests in the hotel rooms commit an act of communication to a separate public that triggers the application of such a right, whether it is harmonized as in the case of authors by an EU Directive, or granted by national law, in which case the conditions for its application have to be decided in conformity with that domestic legislation. The CJEU could not, however, define directly the meaning and extent of the cable retransmission right as this is not harmonized by EU law. The currently pending case, which will be analyzed in the next section, offers the possibility to fill this last open element by completing the picture of communication to the public in hotel settings. As the national law in question – the Portuguese intellectual property law – grants broadcasting organizations the right to authorize or prevent cable retransmission, the interpretation of what "cable retransmission" as laid down in the CabSat Directive and used as basis for the Portuguese implementation of the broadcasters' right means exactly, is decisive for the application of the national law and allows the CJEU to reply to a preliminary reference question that had not been posed to it in any of the above cases.

V. Hotels as cable network operators: the pending case C-716/20 before the CJEU

The framework presented above demonstrates that several issues concerning the question of transmission of signals carrying broadcast programmes have been harmonized in EU law, while others concerning the exact rights of broadcasting organizations have not. This situation links EU law to national copyright and related rights law, especially when the latter transposes the relevant elements of EU law in connection with establishing more specific or extended rights for rightholders under national law and in line with the encouragement under EU law to do exactly that. Therefore, when it comes to core notions of the domestic law in question, if these notions have been defined in harmonized EU law, the interpretation of EU law directly impacts the application of national copyright and related rights law. Exactly such a constellation is the basis for the currently pending case C-716/20

[68] As explained above, the other alternative of the right as granted to broadcasting organizations in Art. 8(3) would not apply in this setting as it only refers to rebroadcasting by wireless means; therefore the referring court wanted to know whether the alternative "communication to the public" (which is independent of the technology used) was applicable, the condition for that being that the retransmission happens after payment of an entrance fee.

[69] CJEU, case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, ECLI:EU:C:2017:131, no. 17-19.

[70] Ibid, no. 24-25.

[71] Ibid, no. 23.

before the CJEU that offers the opportunity for the Court to settle the matter of what constitutes a "cable retransmission" and which operators act in such a way that it is a retransmission (of a broadcast signal) by cable.

1. The pending preliminary reference and its relevance

RTL Television GmbH (RTL), the claimant in the Portuguese main proceedings, offers several German-language television programmes and distributes them not only via different technological means in Germany and the neighbouring territories but makes them available by satellite dissemination, too, and thereby with a reach well beyond the aforementioned territory. These TV channels are so-called Free-TV- or "free-to-air"-channels, i.e. they are not subject to a subscription fee and are freely receivable in an unscrambled manner also via the direct-to-home satellite signals. The main channel named like the provider "RTL" is one of the most popular commercial TV channels in Germany[72] and is also viewed extensively by German-speaking audience outside the main target area of Germany, Austria and Switzerland, namely in other EU Member States where German-speaking persons are residing or temporarily staying e.g. on holidays.

Therefore, RTL has concluded licensing agreements to authorize the reception and further dissemination of its broadcast channels by operators of national cable networks as well as with individual cable network operators such as hotels or other operators offering TV programmes to their guests such as cruise ships across the European Union. Such arrangements have also been concluded on the territory of Portugal where the national law – which shall not be subject of detailed analysis in this contribution – explicitly acknowledges a related right of broadcasting organizations to authorize the retransmission of their programmes.[73]

In the case at hand, the defendants are large businesses active in the tourism sector and operating hotel chains including in popular tourist destinations such as the Algarve coast. Without having entered into any agreement with RTL and without paying any remuneration for it, hotels operated by these chains took profit of the fact that the satellite signal was "free-to-air" and due to the so-called footprint of the satellite could be picked up also in Portugal by means of ordinary parabolic antennas. In that way they captured the satellite signal of the RTL channels and then transmitted them through their own cable infrastructure on the hotel's premises to the guest rooms allowing for the RTL channels to be viewed by the hotel guests on the TV sets installed in the hotel rooms. In contrast to the defendants and in view of RTL's popularity among viewers many hotels, especially in common travel destinations of Germans, have concluded according agreements with RTL in order to offer as an "added value" access to these TV channels to their guests. The economic dimension of this type of cross-border

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[72] See KEK (Kommission zur Ermittlung der Konzentration im Medienbereich; Commission on Concentration in the Media), https://www.kek-online.de/medienkonzentration/tv-sender/unternehmenssteckbriefe/bertelsmann, in English (KEK Report on the Development of Media Concentration 2018): https://www.kek-online.de/fileadmin/user_upload/KEK/Publikationen/Medienkonzentrationsberichte/Sechster_Konzentrationsbericht_2018/KEK_KB_2018_The_Results_at_a_Glance.pdf, p. 31; die medienanstalten (Hrsg.), 22. Jahresbericht der KEK 2019/20, p. 46-47 and p. 62 (https://www.kek-online.de/fileadmin/user_upload/KEK/Publikationen/Jahresberichte/22._Jahresbericht.pdf).

[73] Cf. Article 3 and 8 of Legislative Decree No 333/97 of 27 November 1997, Diário da República No 275/1997, series I-A of 27 November 1997 (bringing domestic law into line with Council Directive 93/83/EEC of 27 September 1993) in combination with Articles 176(9) and (10) and 187(1)(a) and (e) of Código do Direito de Autor e dos Direitos Conexos, Legislative Decree No 63/85 of 14 March 1985, Diário da República No 61/1985, series I, of 14 March 1985, as amended; cf. for more explanation about the different provisions in the national legal bases and how they relate to each other the summary document, https://curia.europa.eu/juris/showPdf.jsf?text=&docid=238302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=787085, para. 29 et seq., 56-59.

retransmission is therefore highly relevant to broadcasting organizations in general and the applicant in this case. As the hotels in question did not have an authorization, RTL brought actions before the competent Portuguese courts against the two defendants. There, the issue in dispute also concerned the question of the exact scope of the relevant provisions in the two applicable legislative texts.[74] What is decisive in the context of this contribution is that in the final instance, the Portuguese Supreme Court in trying to demarcate exactly what is covered by "cable retransmission" in order to be able to judge whether the action by the hotels would violate the according Portuguese rule because of a lack of authorization by RTL, established that the definition of this notion follows respective EU law as it is integrated in the provisions transposing the obligations stemming from the CabSat Directive.

To clarify the exact meaning of "cable retransmission", the Supreme Court stayed the proceedings and is asking for an interpretation of the CJEU concerning the CabSat Directive's definition because the answer to that question will be decisive to know whether the mirroring provision in Portuguese law extends to situations in which the retransmission by cable is conducted by hotel operators. It will depend on the outcome of the CJEU's judgment whether the unauthorized forwarding of broadcast programmes to the individual guests in the hotel rooms – which as such has already been defined to be a communication to the public by the CJEU in long-standing case law – can be regarded as an infringement of rights of broadcasting organizations under the condition that these rights are protected under the respective national law. As mentioned, for lack of harmonization in EU law concerning these specific rights in contrast to the equivalent author's rights, it depends on this requirement that broadcasting organizations can impose a right, but the question of applicability in a given situation depends on EU law.

In addition, as will be shown below in V.3., the CJEU's decision will have an impact on the functioning of the clearance of rights by cable retransmitters in practice. These have to conclude agreements with every rightsholder in a broadcasting programme in order to respect the exclusive rights of authors to communication to the public and they do so by agreement with collecting societies according to the CabSat Directive. If the outcome of the pending case would not confirm the comparability of the communication to the public whether it concerns authors or broadcasting organizations, then this system could be put in question[75]: In practice the rights clearance for the inclusion of protected works (by authors) in broadcast programmes takes place when the broadcasters acquire these rights from authors or the collecting societies representing them and after that the broadcasting organizations themselves take care about the arrangement of the further use of the broadcasting programme, e.g. for retransmission in cable networks.

2. The notion of a retransmitting operator

a) The "who" and "how" of cable retransmission

Although the Portuguese Supreme Court asks two different questions in the preliminary reference which concern different elements of the definition of cable retransmission, they can be viewed together as an attempt to clarify whether the operation of a system through which retransmission by cable (with the elements of the definition in Art. 1(3) CabSat Directive being fulfilled) has to be

[74] For details on the national procedures cf. summary document, https://curia.europa.eu/juris/showPdf.jsf?text=&docid=238302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=787085, para. 16 et seq. For a comparable case in Spain cf. *Etteldorf,* RTL wins case against NH Hotels in Spain concerning illegal TV use, IRIS 2018-10:1/10, http://merlin.obs.coe.int/article/8414.

[75] Cf. *Sporn,* EuGH: Nutzung von TV-Signalen in Hotelzimmern illegal? RTL vs Pestana Hotels, MMR-Aktuell 2022, 444766 (beck-online.de).

undertaken by a specific type of entity and whether it is limited to specific types of cable "systems" or networks.

In other words, the "who" and "how" of cable retransmission is in question, specifically whether a hotel-operated cable system with which – repeating the individual definition items of Art. 1(3) CabSat Directive – "an initial transmission" (here: the transmission via the satellite) "from another Member State" (here: from Germany into Portugal) "by wire or over the air, including that by satellite" (here: via satellites) "of television or radio programmes" (here: the RTL television channels) "intended for reception by the public" (here: the free-to-air-broadcasts aimed at the general public) is forwarded to the hotel rooms through "simultaneous, unaltered and unabridged retransmission" (here: the satellite signal not being amended in any way and simply transported onwards) "by a cable or microwave system" (here: the cabling installed from the reception satellite dish to the individual hotel rooms) "for reception by the public" (here: the frequently changing hotel room occupants) is one of the constellations addressed by the CabSat Directive's definition.

b) The person or entity conducting the retransmission

The definition of cable retransmission in the CabSat Directive itself does not refer in any way to the person or entity conducting such retransmission. It actually remains completely silent also in the other elements of definition and the substantive provisions about "who" conducts such a cable retransmission and limits itself to the description of the technical process as such.

aa) Possible interpretative guidance by the Rental and Lending Rights Directive and Berne and Rome Convention

If one includes the other relevant sources to identify possible definitions or clarifications on the character of the "who" that conducts retransmission, the outcome is the same. The Rental and Lending Rights Directive does not provide for a definition of either "retransmission" or "rebroadcasting", neither in the original nor the codified version. Interestingly, taking a look at the two relevant Conventions on international level – although, once again underlining as above the limitation that they are not part of the EU copyright and related rights acquis – the situation is slightly different. And this additional consideration of the Conventions is in line with the need to interpret legislative acts of the EU to the extent possible in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the EU.[76]

The Berne Convention contains no definition, but mentions "rebroadcast" in connection with a (later inserted) substantive provision in Art. 11bis. This provision grants rights to authors and concerning the communication to the public includes the act of communication either "by wire or by rebroadcasting" (thereby using the term broadcasting for other technical means than a cable) as long as it is "made by an organization other than the original one".[77]

The Rome Convention actually includes a definition, but only of "rebroadcasting": According to Art. 3(g) it "means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation", thereby clarifying – for the purpose of the right that signatory states have to accord to broadcasting organizations, namely to authorize or prohibit the

[76] Cf., in particular, regarding EU law generally CJEU, case C-341/95 Bettati v Safety Hi-Tech Srl., no. 20; IP Conventions-related specifically CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764, no. 35.

[77] The CJEU referred to this provision in CJEU, case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764, no. 40 (see also above at III.3.b)) to not only include hotels picking up a satellite television signal and further distributing it by cable to the TV-sets installed in the guest rooms in this provision, but that the hotels are then a "broadcasting organization other than the original".

"rebroadcasting of their broadcasts" (Art. 13(a)) – that it concerns two different entities. "Broadcasting" in turn is defined in Art. 3(f) as "the transmission by wireless means for public reception of sounds or of images and sounds". As explained previously, this distinction in the Convention between a rebroadcast that can only take place by wireless means and the substantive provision of Art. 13(d) concerning communication to the public which can be done by anyone and any means (although limited to the specific constellation of making this in places accessible to the public but for an entrance fee) is to be understood against the historical background.

At the time of drafting the Rome Convention there was no use of cable technology as dissemination networks for the transport of broadcast signals to individual recipients, but actual airwave-broadcasting was predominant, which is why the definition in lit. (f) only includes this technology. Also, the actors on the market for broadcasting differed from later decades in that broadcasting activity as well as rebroadcasting was conducted by "broadcasting organizations" as the Rome Convention suggests. This wording, however, does not mean that only entities are addressed that offer original broadcasts in their initial emission and as the core of their activity. Such a narrow understanding would leave the provision without any practical relevance as rebroadcasting typically is undertaken by other than broadcasters in a narrow sense. It would also disregard the intention of the original use of the word broadcasting organization which was only chosen as it exactly assigned the character of the activity as known then (broadcasting as the technical expression for sending out a signal via airwaves which was the only technology addressed ("wireless")) to entities conducting this activity, i.e. organizations that broadcast. Therefore, potential misunderstandings resulting from provisions in national law that, following the wording of the Rome Convention, as signatories to that Convention include the right of broadcasters vis-à-vis "broadcasting organizations" as being limited to a situation when both parties are original broadcasters can be resolved.[78]

The later EU law in this context, the Rental and Lending Rights Directive confirms this understanding for the EU Member States. Not only does it not limit the right in Art. 8(3) to rebroadcasting taking place by other "broadcasting organizations" – to the contrary, as pointed out above, it does not mention at all the entity that conducts the rebroadcasting – but a systematic interpretation of the Directive underlines the openness for other entities to be covered by the expression: Another right related to copyright granted to broadcasting organizations in the Rental and Lending Rights Directive is the fixation right in Art. 7(2). "Cable distributors" in para. 3 of the provision are expressly excluded from that right if they "merely" retransmit broadcasts which would be an unnecessary declaratory provision if they were not to be seen as potentially encompassed by the right in the previous paragraph. Some language versions of the Directive even include the word "other" to clarify it concerns broadcasts from "other broadcasting organizations" than the cable distributor.[79]

bb) Possible interpretative guidance by other broadcasting-related texts

All of the above shows that no limiting interpretation of the person or entity conducting a "cable retransmission" in the meaning of the CabSat Directive can be derived from either the Rental or Lending Rights Directive or inspirational sources on the international level. Expanding the analysis on EU level beyond the IP law framework in view of autonomous and consistent interpretation of terms across EU law it is worth taking a look at the core Directive regulating the broadcasting sector. As mentioned above, the TwFD and later the AVMSD harmonize certain rules applicable to broadcasting.

[78] In the pending case this aspect is also addressed due to the wording of the provision in question in Portuguese law.

[79] Cf. e.g. the German, Italian, Polish or Slovenian versions.

Although the AVMSD contains an extensive number of definitions in its Art. 1[80], there is no reference to a "retransmitter". The same applies to the original TwFD which only contained a very limited number of definitions. Interestingly, in contrast to this, the Convention on Transfrontier Television[81] that was elaborated in the framework of the Council of Europe in parallel to the preparation of the TwFD in the EEC, actually defines "Retransmission" in its Art. 2(b): it "signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public".

Although it cannot be used for interpretation of EU law directly, as the TwFD did not follow this approach of including such a definition, it is interesting for comparison reasons. This definition also focuses on what happens technically and not by whom and does not limit the retransmission act to specific types of entities.[82] In the description of the retransmission act it is very close to the definition of "cable retransmission" in the CabSat Directive with the difference of not being limited to retransmission by means of cable. Both in the Convention and the TwFD/AVMSD, the retransmission notion is used in a more general manner in the context of the – in principle – free flow and reception of broadcasts across borders,[83] but there is no limitation with regard to definition as to how this flow of broadcasts takes place and by whom it is realized.

cc) Possible interpretative guidance by comparing the InfoSoc and CabSat Directive

As Directive 2001/29/EC only confirms that retransmission is part of the right of communication to the public (see above III. 3. b) concerning Recital 23) of authors, the meaning of "cable retransmission" has to be answered by the definition provided in the CabSat Directive alone. Nonetheless, it is relevant that the CJEU has very clearly confirmed that the mere fact of making television programmes available to hotel room occupants constitutes an act of communication to the public conducted by the hotel operators. This suggests that the technology employed to do this is not relevant, but the perspective of the beneficiaries of the right attributed by the Directive (in the case of 2001/29/EC the authors) is decisive.

Transferring this approach to the question of whether the communication to the public by the hotel operators is at the same time a retransmission and more specifically a cable retransmission if it uses the technology of cable to further disseminate the original broadcast signal, the answer will have to be exactly the same if the rights awarded to broadcasting organizations were attributed by EU law in a parallel way. The only difference is that the CabSat Directive itself does not give an exclusive right to

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[80] Including in Art. 1(1) (f) on "broadcaster" as the provider of television broadcasts, but not of "broadcasting organization".

[81] European Convention on Transfrontier Television, 5 May 1989, ECTS No. 132, generally on this *Weinand,* Implementing the EU Audiovisual Media Services Directive, 2018, p. 123 et seq.; *Cole,* The AVMSD Jurisdiction Criteria concerning Audiovisual Media Service Providers after the 2018 Reform, 2018, https://emr-sb.de/wp-content/uploads/2018/12/EMR_MDC_AVMSDjurisdiction-after-2018-reform_12-2018-1.pdf, p. 25-26.

[82] This is confirmed by the Explanatory Report to the European Convention on Transfrontier Television (Text of the Report amended by the provisions of the Protocol (ETS No. 171), which is based on the draft Explanatory Report to the draft amended Convention, as approved at the 18th meeting of the Standing Committee (16-17 April 1998, cf. document T–TT (98) 7), https://rm.coe.int/16800cb348, which in the relevant section (no. 87-90) does not give any further indications.

[83] On this system and possible derogations *Cole,* The Country of Origin Principle. From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union, in: Meng/Ress/Stein (ed.), Europäische Integration und Globalisierung – Festschrift zum 60-jährigen Bestehen des Europa-Instituts, 2011, p. 113, 117 et seq.; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive, 2020, https://doi.org/10.5771/9783748906438, p. 110 et seq., 173 et seq.

authorize cable retransmission to broadcasters, but clarifies that where such rights exist under national law they have to be applied in a specific manner. As demonstrated above, Art. 9 mandates the exercise through a collecting society when granting cable retransmission authorization to "cable operators" while Art. 10 exempts broadcasting organizations from this obligation. Again, the reference to cable operators does not limit this to a specific type of operator but connects it to the fact that a retransmission is conducted by an operator that uses a cable-based dissemination system.

In the same way as Directive 2001/29/EC wants to protect authors it is the goal of the CabSat Directive's chapter on retransmission to ensure that rights of holders of copyright or related rights (where these exist) can be realized in a practicable way. And this only works if – in principle – negotiations by the operators that want to use those rights by retransmitting broadcast programmes via cable are limited to a centralized or limited number of contracting partners, i.e. a collecting society or the broadcasting organizations themselves because they are manageable in numbers.[84]

dd) A supplementary look at the new "Online CabSat-Directive"

Even though it is not relevant for the cable retransmission of satellite signals of broadcasts, to complete the picture a brief look at Directive (EU) 2019/789[85] shall be taken. This Directive, often referred to as the Online CabSat Directive or CabSat 2.0 Directive, aims at expanding the approach of the original CabSat Directive to online transmissions and thereby further improving the cross-border availability of television and radio programmes as well as on-demand audiovisual media services in the EU's single market. Accordingly, "retransmission" is mentioned numerous times, but the definition in Art. 2(2) explicitly refers only to types of retransmission other than those included in the original CabSat Directive. It does, however, also state that the retransmission in this sense has to happen by a "party other than the broadcasting organization which made the initial transmission" (this condition in (a) is added with a limitation to retransmission that takes place over an internet access service (b)). Again, the very open wording of the "other party" indicates that it should not be limited to specific types of "retransmitters".

Also, Directive (EU) 2019/789 actually amends the CabSat Directive and specifically the definition of cable retransmission in Art. 1(3) by adding the words "regardless of how the operator of a cable retransmission service obtains the programme-carrying signals from the broadcasting organisation for the purpose of retransmission". This is a necessary addition in order to ensure that even with changed technological ways of delivering the initial programme signal to retransmitters by direct injection, a further transmission by these can be regarded as a "separate act of communication to the public" and the CabSat Directive rules can continue to apply, as Recital 21 of Directive (EU) 2019/789 points out.[86]

However, with this change the actual definition of cable retransmission in its core part remains untouched, no limitation of the potential "retransmitters" conducting such a retransmission was included – even in light of the existing CJEU case law which encompasses hotels in the activity of

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[84] *Hugenholtz,* SatCab Revisited: The Past,Present and Future of the Satellite and Cable Directive, in: Convergence, Copyrights and Transfrontier Television, IRIS plus 2009-8, p. 7, 12, summarizes this aim as facilitating a far-reaching protection of rightsholders while avoiding the "nightmare scenario"of a large number of individual rightholders to elements of broadcast programmes suing cable operators for copyright violations.

[85] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, p. 82–91; cf. for an overview on that *Rivers,* The NetCab Directive, in: Torremans/Stamatoudi, EU Copyright Law: A Commentary, 2021, ch. 20.

[86] On the amendment cf. *Rivers,* The NetCab Directive, in: Torremans/Stamatoudi, EU Copyright Law: A Commentary, 2021, T. 20.30.

communicating to the public – and the result of the analysis concerning the original CabSat Directive continues to be applicable: there is an open approach to who conducts a cable retransmission and this can include hotels that operate cable networks on their premises.

c) The use of a "cable" in conducting the retransmission

After it has been shown that the definition of cable retransmission in the CabSat Directive is open as to the question of "who" conducts the retransmission, it is necessary to briefly repeat the elements of "how" such an act has to take place in order for it to constitute a retransmission in the meaning of the CabSat Directive.

All main elements of the definition are straightforward and can be applied to different types of further disseminating an initial transmission. It is necessary that a television or radio programme emanates from one Member State and is forwarded in another Member State where the initial transmission was received by wire or airwaves. A satellite dissemination of the RTL programme from Germany which can be picked up in Portugal clearly fulfills these conditions. The retransmission necessitates that such a signal, which originally was directed at the public, is forwarded in an unchanged manner so that members of the public can receive it. RTL as free-to-air-programme is originally directed at the general public and the picking up of a satellite signal and sending it to new recipients – the members of the public that are occupants of the hotel rooms – fulfils these elements, too.

The remaining criterion is that the retransmission has to take place "by a cable or microwave system". As there is no connection of the technology to a specific operator of the technology (see above V. 2. b)), this element purely describes the technological procedure. It may seem surprising on first glance that a definition of cable retransmission includes if this procedure takes place by waves which do not actually use a cable. However, that technology can be seen as a substitute for a cable dissemination as e.g. via a microwave dissemination a local area of recipient antennas in line of sight of a transmitter antenna can be reached by the latter. In other words, although it uses a different technology it is the equivalent of picking up a signal, e.g. the satellite signal, and then further disseminating it to a limited (although this number can be large by using relay antennas in a comparable way to cable networks) amount of recipients. Whether this happens by cable or microwave is regarded as being the same by the Directive's definition.

For the use of a cable for the transmission it is clear that this refers only to the specific technology and is not for example connected to a minimum number of recipients or the dissemination to different households or the existence of a subscriber relationship between the recipient and the cable operator. Therefore, the use of a cabling system in a hotel that connects individual hotel rooms (and the TV sets therein) with a central entry-point (which in turn receives a TV signal from a parabolic antenna that picks up the satellite signal) and also a larger scale hotel-chain-wide network fulfills the criterion of "by cable" as it is unconditional beyond merely describing the wire used for the retransmission.

3. Consequence of application of the cable retransmission notion also to hotel operators

The definition of cable retransmission in the CabSat-Directive includes the conduct of such an activity – as long as the criteria are met – by any type of operator and therefore also by entities such as hotel operators. The consequence of this is clear but depends partly on the concrete copyright and related rights framework in the Member State where the hotel is located and where the retransmission by cable to the hotel rooms takes place.

The CabSat Directive requires that in case of a cross-border cable retransmission situation that takes place on their territory, the Member States have to ensure that the applicable copyright and related rights of authors, performers and broadcasting organizations as they are granted by the respective

national law are observed. A hotel that intends to offer television programmes to its hotel guests by means of cable retransmission therefore must clear all rights that are exclusively with the rightsholders concerned by the television programme. Some of these, as has been repeatedly pointed out above, are based on harmonized EU law – such as communication to the public of authors –, others depend on whether and how they are included in national law – such as the broadcaster's right to authorize or prohibit cable operators to reuse their signal for further dissemination. Where such a right exists, the CabSat Directive further requires that Member States ensure that this is exercised by means of collecting societies, except for the case of broadcasters that can also negotiate individually and directly with operators that would like to conduct a cable retransmission.

Concretely, this framework means that hotels have to be authorized to retransmit either on the basis of a clearance of the rights with a collecting society that has been mandated to represent the rightsholders for this matter, or by receiving the authorization from broadcasting organizations directly when these have a right of their own granted by national law. In either case the clearance of rights will be based on payment of royalties or a remuneration which reflects the economic benefit that the hotels have by offering the added service of (foreign) television programmes to the hotel room occupants. The broadcasting organizations would retain the choice on whether to negotiate individually or proceed via a collecting society, while the hotels are ensured that they have a facilitated rights clearance where it concerns the huge amount of individual rights of authors to specific elements of the television programmes and equally for own rights of the broadcasting organizations of which only a limited number exist as potential contracting partners if they have not anyway decided to also rely on a collecting society. At the same time, the system guarantees that the protection of rights of authors and others, which is in the focus of EU copyright law, is upheld and an equitable remuneration is awarded for the additional use of the broadcasting programme by forwarding it to a new public.

VI. Conclusion

The pending case seems to touch very technical aspects of who conducts a cable retransmission and what the necessary conditions are so that it is actually a cable retransmission. It may even seem that it has a limited scope, not last as it concerns the interpretation of the CabSat Directive which has in the academic debate always remained rather in the shades compared to the InfoSoc Directive. However, the complexity of the case and its connectivity to the specific national IP law of Portugal should not mislead to overlooking the fundamental relevance it has. With the case there is the possibility to align the interpretation and meaning of communication to the public – and as one form of this communication the cable retransmission – for all relevant Directives and for situations in which either authors' rights are concerned or related rights of broadcasters.

As has been shown in this contribution, the situation is clear when it comes to the harmonized rights of authors: the CJEU has stated several times that the same activity that is in question in the currently pending case – the retransmission of a broadcast programme to individual hotel rooms by cable after picking up the free-to-air satellite signal by means of a parabolic dish – infringes the exclusive right to communication to the public if it happens without authorization. The situation would be equally clear if there would be a harmonized right of broadcasters in EU law to authorize or prohibit cable retransmission. The CabSat Directive, however, does not include such a right itself, but points out that rights under national law have to be respected in case of cable retransmission. Because of lack of harmonization the CJEU has so far not had the opportunity to give a judgment which would allow to conclude that in States that actually offer that right to broadcasting organizations, the exact same factual situation of retransmission by hotels is covered in the same way as it is for the protection of authors' rights to communication to the public. The relevant previous case concerning hotels and

related rights was about the interpretation of a right under the Rental and Lending Rights Directive which is very specific and limited and in result the hotel room dissemination of television programmes was not regarded as falling under the communication to the public in places which are accessible against an entrance fee as it is regulated by that Directive.

Because the current preliminary reference concerns a national framework that grants broadcasting organizations a right to authorize cable retransmission, the interpretation of the notion of cable retransmission in the CabSat Directive becomes relevant and offers the opportunity for clarification. It is obvious that the CabSat Directive is not a technology-neutral Directive, as it refers only to specific types of broadcast dissemination technologies, namely satellite and cable (and with the latter microwave systems, too). This is one of the reasons why a supplementary Directive for online transmission was considered and eventually passed in 2019. Within the two technologies, however, the CabSat Directive is neutral – neutral in the sense that it does not limit the activity of "cable retransmission" to specific types of operators, but as has been argued in this contribution, only to specific types of technology: cable.

The original motivation for the creation of a mandatory collecting society system in this context – which in turn broadcasting organizations are exempted from – may have been the increasing spread of subscription-based large-scale cable networks. These were supposed to be given the opportunity to actually clear rights in a practicable manner so they could include foreign programmes in their offering, while at the same time rightsholders would be given additional remuneration opportunities. However, there is no reason to treat the situation at hand in the pending case differently to this original intention, because there is no limiting interpretation in the legal framework that suggests such a narrowing of the addressees and both situations are factually the same. Operators of large cable networks also include hotels as their clients which pay an increased fee for being able to use the cable network signal for further dissemination to a given number of hotel rooms. There is no reason why hotel operators that install parabolic dishes and organize the cable retransmission on their premises themselves in order to avoid such higher subscription/remuneration fees should be treated differently than if it is the large-scale cable network operator that enables the retransmission. The technology to install a cable network for a hotel complex is no different to a cable network with which numerous households are connected to a signal head-end.

The pending case before the CJEU is the first and at the same time very important opportunity to ensure that the established model of rights clearance by collecting societies or on the basis of individual negotiations with broadcasting organizations can continue to function while guaranteeing that the rights of authors – or, as in this case, of holders of related rights where these exist under national law – are protected in a meaningful way against unauthorized exploitation. The judgment has the potential to underline the continued relevance of the CabSat-Directive and show how the inclusion of a specific notion in that piece of the EU acquis in IP law impacts the interpretation of the according transposing national law even where it awards rights beyond those that are harmonized. In that sense, this is an ideal case for shedding light on the so far rather shady matter. The oral hearing in the case already indicated how complex the matter is, but in order to avoid that the same question will return in another form, it is to be hoped that the CJEU takes the opportunity to create an "SGAE-like" clarification judgment also for the CabSat-Directive.