

# TV Signal Delivery to Cable Operators and DTH Platform Operators

## Primary Copyright Use, Retransmission, or Another Form of Communication to Public?

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**Abstract:** The paper discusses new business models of transmission of television programs in the context of definitions of broadcasting and retransmission. Typically the whole process of supplying content to the end user has two stages: a media service provider supplies a signal assigned to a given TV channel to the cable operators and satellite DTH platform operators (dedicated transmission), and cable operators and satellite DTH platform operators transmit this signal to end users. In each stage the signals are encoded and are not available for the general public without the intervention of cable/platform operators. The services relating to the sup-

ply and transmission of the content are operated by different business entities: each earns money separately and each uses the content protected by copyright. We should determine how to define the actions of the entity supplying the signal with the TV program directly to the cable/digital platform operator and the actions of the entity providing the end user with the signal. The author criticizes the approach presented in the Chellomedia and Norma rulings, arguing that they lead to a significant level of legal uncertainty, and poses the basic questions concerning the notion of "public" in copyright.

**Keywords:** Satellite DTH platform, cable operators, retransmission, communication to public, collecting society, broadcasting, media service provider, mandatory management by collecting society, audiovisual media service, equitable remuneration

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## A. Introduction

1 New models of cooperation between broadcasters, cable operators, and operators of digital platforms all require that digital TV must be transmitted to the end user. This creates serious problems in the domain of the collective management of copyrights. Various entities take part in the transmission process, usually acting on their own behalf, and what they do should be somehow placed within the known modes of use of copyright works. It is necessary to establish which entity is responsible for which part of the transmission process and whether it has obtained all relevant authorizations from the right holders. The adopted classification of such acts will

also determine whether there will be compulsory licensing by a collecting society. A good illustration of this problem can be found in two recent court rulings: BUMA and STEMRA v. Chellomedia Programming and Norma – Irda v. NL Kabel Vecai.<sup>1</sup> Both cases shared a common problem: on the one hand, how to define the actions of the entity supplying the signal with the TV program directly to the cable operator or an operator of a digital TV platform; and on the other hand, how to define the actions of the entity providing the end user with the signal. It has been discussed inter alia whether providing the operator with the signal with the TV program could be understood as broadcasting, retransmission, or maybe another form of communication to the pub-

lic. Should the last view be correct, compulsory licensing by collecting societies would not be applicable. The spotlight has also been cast on the concept of the “public,” deemed to be a necessary component of broadcasting.

- 2 Based on these two rulings, one may furthermore notice that the same use of work may be looked at differently by copyright law and by public law governing broadcasting activities. It seems indispensable to bring the copyright regulations into compliance with the technological neutrality rule of audiovisual services, which is uniformly accepted as the basis for development of the information society. The incompatibility of the definition of a broadcaster in public law regulations with the definition of broadcasting in copyright regulations could impede the process of transferring the technological neutrality rule to copyright law.
- 3 The present paper tries to situate the process of transferring digital signals from the supplier to the cable operator/operator of a digital platform and transmitting the signal to the end user in the context of the definitions of “broadcasting” and “retransmission.” It will also try to discuss the legal and economic consequences of leaving the above-described model of transmitting TV signals outside the scope of compulsory licensing by collecting societies.
- 4 Before we turn to the copyright context of new models of transmission of broadcasts, it would be useful to start with drawing a picture of the various forms of distribution of television channel signals that we come across in practice.

## B. New models of transmission of television programs

### I. Initial comments

- 5 In the new business models for transmitting television programs, we typically deal with specific activities carried out by different business entities. Each conducts business on its own account, while the services relating to supply of the content (the content component) and the transmission of the content (distribution component) to the user are separate. Transmission takes place via an electronic communications network, which is the access facility (for instance, satellite networks and fixed telephone networks, both circuit- and packet-switched, as defined in Art. 2a) of the Directive EC 2002/21).<sup>2</sup>
- 6 The whole process of supplying content to the end user has many stages and includes services relating to creation of the content and putting together of television programs; transmission of a signal car-

rying the programs, i.e., transmission of audiovisual content using electromagnetic energy; operation of an access facility; and finally sale of access to the programs to end users. Consequently, technical and organizational operations, performed to supply television programs to the end user, are performed consecutively by:

- a) the media service provider as defined in Art. 1d) of Directive 89/552/EEC (the “AVMS Directive”)<sup>3</sup> as worded according to Directive EC/2007/65;<sup>4</sup>
- b) cable network operators or satellite DTH platform operators (so-called access facility operators) who are the first users of channel distribution services;
- c) and the entities acting as subcontractors of those listed above, i.e., transmission network operators and others (for example, entities retransmitting the signal and/or supplying telecommunications equipment and telecommunications networks).

## II. Media service provider

- 7 The process described above involves the entity that has actual control over the choice of individual programs as defined in Art. 1b) of the AVMS Directive, and the manner in which they are placed in the chronological layout of the distributed television channel. This entity bears editorial responsibility for the content and is thus the broadcaster from the point of view of public law, i.e., the provider of a media service in the form of television broadcasting (linear audiovisual media service) as defined in Art. 1f) of the AVMS Directive.
- 8 The supply by the media service provider of the television program constitutes the provision of a media audiovisual service as defined in Art. 1a) of the AVMS Directive. The fact that there is no payment to the media service provider directly from the end user cannot change this classification. The term “payment” does not have to be understood in such a way that the consumer always pays for the service directly. For example, in its ruling of 30 April 1974 in the case 155/73 Sacchi,<sup>5</sup> the ECJ found that broadcasting of a television channel maintained solely from the revenue from advertisements shown on that channel constituted a “service.” One should also consider that a large number of television channels are maintained using a portion of the revenue from a subscription fee that the user pays to the access facility operator.
- 9 The media service provider can be a producer (in-house production), co-producer, or entity entitled to make use of the programs under license or sub-license agreements concluded with copyright hold-

ers, with regard to programs making up the content of the channel as defined in Art. 1b) of the AVMS Directive (for example, feature films, documentaries, or transmission of sporting events).<sup>6</sup>

### III. Supply of television signals to users for further transmission

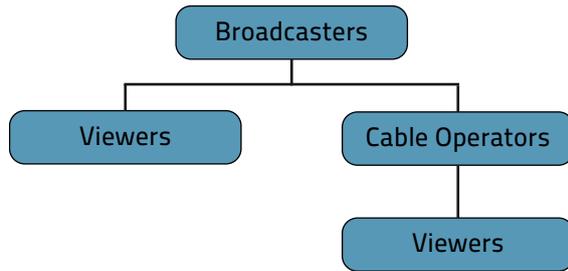
- 10 In the above-described process of transmission of television channels (process of distribution of audiovisual content), a distinction should be made between:
- a) supplying of a signal assigned to a given television channel to the first users, i.e., cable operators and satellite DTH platform operators;
  - b) transmission of a television signal by cable operators and satellite DTH platform operators to end users.
- 11 A media service provider (broadcaster) makes the signal available for a given television channel directly to commercial users (satellite DTH platform operators and cable network operators), who provide the service of distribution of the received signal within the access facility they operate. In each stage the signals are encoded and are not available for general reception by the end user without the intervention of cable operators. The term “cable television network” as defined in Art. 1. 8) of Directive EC 2002/77<sup>7</sup> refers to any mainly wire-based infrastructure established primarily for the delivery or distribution of radio or television broadcasts to the public. Television signals carrying the programs are therefore transmitted via the above-described wire-based cable television infrastructure or satellite-earth DTH platforms, which are a configuration of two or more earth stations interworking by means of a satellite. A media service provider can supply a television program to a cable operator and/or satellite DTH platform operator by way of
- a) wireless transmission made into an encoded signal via an earth telecommunications infrastructure and satellite,
  - b) a wire-based and direct transmission of a signal over a live feed between the entities referred to above,
  - c) supply of carriers (for example, CD, DVD) with recorded audiovisual content for communication.
- 12 This paper discusses only the first two models as the third should not give rise to any controversies in copyright law. In the first of these models, the actions taken during the process of making available the television programs to end users are taken consecutively by the media service provider and cable operator or satellite DTH platform operator. By itself or by making use of the services of transmission infrastructure operators, the media service provider sends the signal via an uplink. The signal is enhanced and encoded to the appropriate standard. As a result, it is not possible to access the data (of a given television channel) without the appropriate devices and technical solutions needed to decode it. The described process of transmission (making available) of the signal is performed by the media service provider solely for a cable operator or satellite DTH platform operator (dedicated transmission). This is because the signal is directed individually, using a satellite downlink, solely to that cable operator or satellite DTH platform operator’s head-end, which has the relevant contractual arrangements with the audiovisual media service provider.
- 13 In the second model, the media service provider transmits the audiovisual content to the cable operator directly via a wire-based connection (over the Internet). This can be done at the same time for a number of cable operators and satellite DTH platform operators. It should be emphasized that the supplied television program does not have to be made available to the public via any other distribution platform, for example via wireless broadcasting of a signal.
- 14 In both cases, the cable and satellite DTH platform operators receive a signal from the media service provider that carries a linear television program for the purpose solely of distributing it to a specified group of users. The operators are required to comply with the following rules:
- a) Provide access to television signals carrying the programs solely to those users who fulfill the payment conditions specified between the media service provider and an access facility operator.
  - b) Secure access to the television signal from third parties who have not been granted access in the manner agreed upon (CAS: conditional access system).
  - c) Refrain from tampering with the integrity of the television programs and any other content of a different nature (any modifications and shortening are not allowed).
  - d) Prevent the television program from being copied and further distributed by unauthorized parties.
  - e) Refrain from using the supplied television program as a carrier for framing.
- 15 To summarize, in the business of cable and satellite DTH platform operators, we are dealing with a mul-

tiptex of received channels and additional services (for example, an Electronic Programme Guide: EPG) in one byte stream and its retransmission in a multicast system sent simultaneously to a precisely specified group of end users. This transmission system – in contrast to a point-to-point unicast system and a typical broadcast system – is characterized by a selective supply of television signals solely to those users who fulfill the specified conditions laid down in the broadcaster's agreement with the access facility operator. Cable and satellite DTH platform operators have the option of varying the number and type of television channels that are to be supplied to a given subscriber.

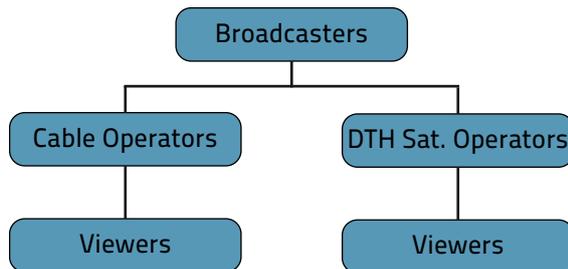
#### IV. Model for cooperation between media service providers and access facility operators

- 16 Different payment models are used in the agreements between cable or satellite DTH platform operators with media service providers:
  - a) payment by the media service provider to the access facility operator for transmission of the signal (then however the media service provider collects subscription fees from end users);
  - b) payment by that operator to the media service provider for the right to use the program.
- 17 In both of these cases, the model used for settlement of payments is *per subscriber, per period*.<sup>8</sup>
- 18 These methods of settlement of payments can each exist separately or both at the same time. Usually, media service providers do not enter into exclusive agreements for distribution of a given television channel.<sup>9</sup> It should also be underlined that in the case in question, neither of the categories of the entities described above – as a rule – can be given the right to provide users with authorization for individual access to television channels (*pay-per-view or on demand*).
- 19 A television program is distributed using a conditional access system so that the television channels and other additional services can only be received by persons entitled to do so for the relevant fee. In a given case, the term “conditional access system,” defined in Art. 2b) of Directive 98/84/EC<sup>10</sup> and Art. 2f) of Directive 2002/21/EC, should be understood to mean specific instruments and technical devices – i.e., a combination of technical elements implemented by the access facility operator and located with the user (smartcard, digital decoder) – which form a uniformly functioning system enabling control over access to the audiovisual media service. An audiovisual media service provided in this way constitutes a protected service as defined in Art. 2a) of Directive 98/84/EC, i.e., a service provided against remuneration (paid directly to the access facility operator) and on the basis of conditional access. The signal is therefore encoded to ensure that the user pays the relevant fee. The access facility operator allows users to purchase/rent devices (conditional access device adapted as required) such as terminals or smartcards and authorizes them through transmission of the so-called decoding keys (intelligent access card technology). This system is no different from the typical system of access to the traditional cable television network.
- 20 From an economic point of view, the models described above are characterized by the fact that each entity participating in the transmission process earns money separately and that its business involves the use of content protected by copyright. A media service provider (supplier of content) makes money on advertisements and fees from the operator; the operator – the supplier of the service directly to the subscriber – makes money on the subscription fees. The supplier of the content also makes money on advertising since those submitting the advertisements decide to buy specific advertising slots because of the qualities of the TV channel that it puts together.
- 21 Are the models described above entirely different from the existing ones? The broadcasting market has changed recently because of new digital technologies and through development of new distribution services. Broadcasters seek viewers interested in specific programs; they do not broadcast them via Hertzian waves directly to the public but use intermediaries. As a result, the television signals carrying the programs are not available for general reception by the viewers without the intervention of cable operators. Traditionally, cable operators caught the broadcasted programs from the terrestrial network or from satellite; now broadcasting organizations transmit their programs directly to cable operators (direct feed), who then sell them to their own subscribers. This mechanism justifies the following question: Are there are two separate economic activities involved (as there used to be), which would give the right holders the right to remuneration both from broadcasting companies and from the telecom operator, or only one activity (primary copyright use) and thus only one source of remuneration?
- 22 The difference may be illustrated by the following diagram:

## 1. Traditional model



## 2. New model



### C. The model for transmission of programs in the *Buma and Stemra v. Chellomedia Programming* and *Norma v. NLKabel* cases

23 Chellomedia produced various television programs, a large portion of which was copyrighted material, and then uplinked the signals carrying the program in coded form to a distribution satellite from which the signals were then down-linked to cable head-end facilities and DTH (Direct to Home) platforms. These signals could only be received using specialized decoding devices by operators who entered into the appropriate agreement with the broadcaster. The signals could not be directly received by the viewers. The viewers received the signals from the operator and decoded it using the device supplied by the operator. The business model used in the *Norma v. NLKabel* case (which concerned the neighboring rights, but this does not change much here) was similar. The signals carrying programs were sent directly to cable head-end facilities and DTH platforms and were not accessible to the public. Under copyright law, the question is how the described model for distribution of programs should be classified, i.e., what form of exploitation should be attributed to it. Theoretically, the options are the following:

1. The process of uplinking an encoded signal to a distribution satellite and down-linking it to the operator of head-end facilities or a DTH plat-

form operator is broadcasting, while the process of sending the signal to the end user is retransmission.

2. The process of uplinking an encoded signal to a distribution satellite and down-linking it to the operator of head-end facilities or DTH platform operator is a neutral process from the point of view of copyright law, while the process of sending a signal to an end user is communication to the public other than broadcasting and retransmission, though nevertheless subject to copyright.<sup>11</sup>

3. The process of uplinking an encoded signal to a satellite and then down-linking it to the operator of head-end facilities or DTH platform operator and the process of sending the signal to the end user is a single process in which various entities take part, qualified in its entirety as broadcasting.<sup>12</sup>

24 In the rulings cited above in the *Chellomedia* and *Norma* cases, the conclusion of the courts was that the process of uplinking a signal in coded form to a distribution satellite for reception only by cable or DTH platform operators could not be regarded as the initial broadcasting because the signal was intended for a closed group of users, i.e., operators, and not for general reception by the public. As a result, the second part of the process of distribution of the signal could not be considered retransmission and was described as communication of a work to the public. The courts thus adopted the classification described in point 2 above.

- 25 What are the implications of this reasoning? They are quite serious as far as guaranteeing copyright holders due remuneration and operators a proper level of legal confidence with respect to acquiring the rights needed to conduct business. The operators have no agreements with right holders on the basis of which they would receive the right to communicate the works to the public. A radio or television organization as a media service provider (referred to further for the sake of convenience as a broadcaster) that sends a so-called dedicated signal acquires on the basis of an agreement with the right holders the rights to broadcast and not a vast right to communicate works to the public in any imaginable way. Thus, a broadcaster is not entitled to sublicense the right that it has not received. As explained below, the right to broadcast is a right that falls within the scope of communication to the public but constitutes only a part of that right (i.e., the general right of communication to the public encompasses different separate rights, and broadcasting is only one of them). The broadcaster usually pays a single fee for the broadcast, calculated with regard to such factors as time and the envisaged viewing figures, the geographical scope, and the number of likely repeats.

The broadcaster gains its main revenue from advertising agencies buying advertising spots based on the channel put together beforehand. In this business model, the broadcaster obtains remuneration from the cable operators or the DTH platform operators, too. As hinted above, the cable and DTH platform operators are not subcontractors of the broadcaster with regard to the transmission to the end user; instead, they enter into agreements with the end users independently and in their own name. If we accept the legal classification adopted by the courts in the *Chellomedia* and *Norma* cases, the right holder who grants permission to broadcast does not receive any remuneration from the broadcaster from the fees collected by the operators. It is difficult to assume that the copyright holder's agreement with the broadcaster provides for remuneration in this respect because the broadcaster does not know in advance how many subscribers there will be for a given service and what the value of the subscription will be. As far as the business of the operators is concerned, the fact that it is regarded as communication to the public "other than re-transmission" means that the permission and remuneration for exploitation of this kind do not have to be obtained and paid via a collecting society, as would be mandatory in the case of retransmission. Moreover, the cable or DTH platform operators will want to pay the right holder only on the basis of their own revenue from the subscription charged to the end user. Although we are dealing with two separate types of business activity, in which each of the participants independently makes commercial use of a copyright work, the copyright holder would receive only "one" remuneration, i.e., remuneration reflecting the use of the work on only one field of exploitation. It is therefore clear that the classification referred to above considerably limits the copyright holder's right to obtain equitable remuneration. The principle of equitable remuneration is stressed in numerous EU documents, including 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.<sup>13</sup>

- 26 It has long been emphasized in the copyright law doctrine that equitable remuneration to the right holder should be ensured when a third party gains revenues from economic exploitation of his work, i.e., where a business activity depends, at least in part, on the exploitation of the work.<sup>14</sup>
- 27 There is no doubt that the classification applied by the courts in the *Cellomedia* and *Norma* cases also has certain negative consequences for the cable and DTH platform operators, as in practice they are forced to obtain permission individually from all relevant right holders. This applies not only to the part of the program with regard to which the broadcasting organization is not the producer, but also often

to the rest of the program. The broadcaster as a producer usually acquires the rights to broadcast and rights of re-transmission and not the right to communicate the work to the public in every possible form. It should be noted at this point that in most national regulations, extended collective management is permitted in the field of radio and television broadcasting, thus ensuring a high level of certainty for users.<sup>15</sup> Cable operators are not able to negotiate licenses with all concerned right holders prior to supplying the signal to the public.

- 28 Adoption of the classification listed in point 3 above would mean that the entire transmission process from the broadcaster to the end user should be treated as one field of exploitation, following the concept adopted in the satellite and cable Directive with respect to satellite transmission. According to its Art. 1 (2), communication to the public by satellite means the act of introducing, under the control and responsibility of the broadcasting organization, the program-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth. However, the difference between the process regulated in Art. 1(2) of the cable Directive and the process that is the subject of this article is essential. In the first case, the process of uploading and downloading signals carrying programs remains under the broadcaster's control and responsibility, and the chain of communication may not be interrupted. Retransmission of satellite signals by an independent entity should count as an interruption. In the model of transmission considered in this article, two separate, independent subjects are responsible for the process of communication to the public.
- 29 Treating this process as a whole means the exclusion of mandatory management of a collecting society, which could be detrimental to the legal certainty for operators and could lead to an increase in the management costs. The classification named in point 3 above is neither in line with the concept of the specification of rights built on the criterion of participation of a different entity in the process of exploitation of a work nor on the criterion of separate economic significance of the use, which has been universally accepted in doctrine and, importantly, also introduced into EU directives. Of course, the criteria for specification of a separate right (separate field of exploitation) are not laid down by law; nevertheless, certain principles are universally accepted. We only have to mention the right to retransmission, where the criterion for acknowledging this separate right has been the participation in the entire process of an entity other than the broadcaster.<sup>16</sup> The retransmission does not comprise initial broadcasting in cable networks. Another criterion is the separate economic significance of a specific type of use of a work. In the Directive 2001/29/EC on the Information Society,<sup>17</sup> it is precisely this criterion

that determined the exclusion from the exclusive author's right of temporary reproductions that are transient or incidental, an integral and essential part of a technological process, and whose sole purpose is to enable:

- a) transmission in a network between third parties by an intermediary, or
- b) lawful use of a work or other subject matter to be made, and which have no independent economic significance (Art. 5. 1).

30 In the transmission model discussed here, we are undoubtedly dealing with two procedures carried out by two independent business entities, and each of these procedures has separate economic significance. It seems that this prerequisite should preclude the possibility of the described transmission model being perceived as one broadcasting process or as one process of communication to the public. Moreover, the broadcasting organization does not have any influence on factors such as the scope in which the channel is distributed to subscribers, combining of the channel with other channels in one package, or the subscription price. If only for these reasons, it is difficult to conclude that this is one field of exploitation of works and one right. Since we concur with the viewpoint that the process of retransmission of a signal to the operator and from the operator to the end user are two procedures that are separate, not only technically but above all economically, an attempt should be made to establish how they should be fitted into the existing bundle of separate rights vested with the owner of copyright.

## D. The broadcasting right

- 31 Can we classify the process of supplying the signals carrying the program by a media service provider to a cable or platform operator as broadcasting?
- 32 The Berne Convention does not give a definition of broadcasting. Art. 11bis of the Convention refers to broadcasting of works via radio or television or their communication to the public by means of wireless diffusion of signs, sounds, or images.<sup>18</sup> In line with the universal understanding of this term, in the Convention "broadcasting" is limited to wireless transmission and therefore applies to ground and satellite broadcasting. The requirement that there should be an unrestricted group of viewers to receive the signal has not been mentioned as relevant with respect to the notion of broadcasting.
- 33 No provision in the Convention or in the EU directives assumes that each act of exploitation of a work should give access to the work to the general public. Quite the opposite is true: there is a basic assumption at the core of the philosophy of copyright law

according to which each instance of economic use of a work within the scope of the author's exclusive right is subject to the author's permission, provided there is no private or permissible public use.<sup>19</sup> For this reason, reproduction of a work for the internal purposes of an employer without the permission of the author is an infringement of the author's exclusive rights, and broadcasting of a work within an intranet radio hub or a so-called closed circuit television – i.e., in a way that limits the number of users and precludes the general public from access – is an act of exploitation of the work that can be classified as broadcasting. The term "broadcasting" in copyright law is therefore not inherently linked to reception by an unlimited number of users, and broadcasting will take place even if the group of users is determined in advance. Therefore, the fact that in the business model under consideration in this paper the signal is received by a limited number of entities (operators) is not in itself a fundamental obstacle to arguing that the process of transmission of the signal from a broadcasting station to operators constitutes broadcasting. Moreover, only classification in this way is coherent with provisions concerning broadcasting activity in public law (media and communication law).<sup>20</sup>

- 34 If the broadcasting organization makes a channel available for transmitting by another entity but is responsible for its content, this element is sufficient for that entity to be considered a broadcaster from the point of view of public law. Moreover, in many countries this organization has to obtain a concession for this type of activity if it is not a public radio or public television facility. Only the conclusion that transmission of a signal to an operator is broadcasting makes it possible to reconcile the notion of a broadcaster used in public broadcasting activity regulations and in copyright law with the notion of a media service provider (supplier of content) under the AVMS Directive. It seems that by all accounts it is desirable that a broadcaster as defined in copyright law should be the same entity as a broadcaster defined in regulatory legislation. After all, no one can deny that broadcasters use protected works in their business activities regardless of whether they are sending the signal to an unlimited number of viewers or to a specified number of operators. This assertion determines that in the first stage of transmission of a signal, the broadcasting organization does not conduct activity that is neutral from the point of view of copyright law.
- 35 Another question arises: Is the fact that the operators receiving the signal are not end users, in the sense that they are not viewers, relevant with respect to classification of a given activity as broadcasting? It seems that this should not be decisive because the operator somehow uses the purchased content from scratch, combining the obtained programs into specific packages and performing so-

called multiplexing. In the study drawn up for the European Commission (“Study on the application of measures concerning the promotion of the distribution and production of European Works in audiovisual media services i.e. including television programmes and non-linear services”),<sup>21</sup> it is emphasized that in EU countries there are two types of transmission characterized by separate added value. The first is a straightforward supply of a signal to the viewer, while the second applies when the entity supplying the signal is the seller of a combination of channels or packages at the same time. The added value is created by the putting together of the channels, the channel’s trademark (brand) and image, and by the pricing of packages and services for a client in the form of invoicing and information helpdesks.

- 36 A frequent argument used to deny that the transmission of the signal to a cable or DTH platform operator by a content provider constitutes broadcasting is the definition of “the public” used by the ECJ in the *Lagardère*<sup>22</sup> and *Mediakabel*<sup>23</sup> cases. Are the rulings in the *Lagardère* and *Mediakabel* cases materially relevant for evaluation of the notion of broadcasting in copyright law?
- 37 In the *Lagardère* case, the ECJ interpreted the Directive 93/83 on satellite and cable retransmission for the purpose of determining the obligation to pay equitable remuneration for broadcasting of phonograms for public reception via a satellite and ground stations in France and Germany. According to Directive 93/83, satellite broadcasting takes place only in the member state in which the channel signal is sent, under the control of the broadcasting station and at its risk, to a closed communication chain to a satellite and back to earth (the country of origin rule) The Directive assumes that the distinction in copyright regulations between transmission by direct and communication satellites is no longer viable when the signal from the communication satellite can be received directly by the public. Therefore, satellite transmission in which the signal can be received directly is subject only to the law of the country in which it is linked up. The Directive equates the legal status of satellite transmission via a communication satellite to the status of satellite transmission via a direct satellite, provided that the signal can be received directly by the public.
- 38 For this purpose, the definition of a satellite has been provided in Art. 1.1 of the Directive. This definition affects the definition of satellite transmission covered by the Directive. It assumes that if signals are sent in frequency bands reserved under telecommunications law for private individual communication, the signal must be received individually on conditions comparable to the conditions existing when the signal is transmitted for public reception.
- 39 For this reason, it is only when the signal can be received directly by the public that the Directive is applicable, with the result that only the law of the country from which the signal is sent directly to the satellite can be applied to that transmission. If direct reception from a communication satellite is not possible, there are no grounds for excluding the law of other countries that may come into play, because in that case intervention of a ground station becomes highly relevant.<sup>24</sup>
- 40 The ECJ concluded at the same time that a limited group of people who can receive the signal from the satellite using professional equipment cannot constitute the public, taking into account that the public has to be made up of an unspecified number of potential viewers.<sup>25</sup> The assertion that the lack of direct reception by the general public means the requirement set forth in Art. 1.1 of the Directive is not fulfilled (individual reception in line with the guidelines laid down in the Directive must be comparable to those that apply in the case of broadcasting on frequencies for reception by the public) is entirely correct. It seems, however, that there are no grounds for building the generally applicable concept of “the public” on the basis of this decision. It should be emphasized that the mere term “satellite” is used in the directive in a very technical meaning (a satellite operating on frequency bands which are reserved under telecommunications law for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication – Art. 1.1 of the directive). If a communication satellite is used for retransmission of encoded signals, which can only be decoded using equipment available to professionals and are not directed towards the general public, the satellite in question is not a “satellite” as defined in Art. 1.1, and therefore the Directive is not applicable to retransmission of that kind. It is emphasized in the doctrine that in the definition of satellite retransmission to which the Directive applies, stress is placed on the intended use of the signal and not the program.<sup>26</sup> For this reason, the encoded signals sent by the satellite and exclusively intended for reception by a ground station for retransmission, from which they are then transmitted to the end user (i.e., to the general public), cannot be regarded as communication to the public. However, the term “the public” is not defined in the Directive, and its interpretation has been left to the national courts.<sup>27</sup>
- 41 In the *Lagardère* case, ECJ concluded that there was, based on the facts of the case, no “public retransmission by satellite” as provided for in Art. 1.2a of Directive 93/83, since this provision requires the signals bearing the program to be intended for public reception. The court compared versions of that provision in different languages and stated that it was the signals that had to be intended for reception by the public and not the programs carried by those

signals. In light of the objective of the Directive – i.e., securing the legal certainty both for broadcasters and copyright holders when signals bearing the channel are retransmitted to a satellite and back to earth – this view is not unfounded.<sup>28</sup>

- 42 The ruling in the *Legardère* case correctly concluded that there were no grounds for the applicability of the Directive because the facts under consideration clearly showed separate territorial use and two separate procedures, instead of one procedure of transmission to one ground station. It is also reasonable to doubt whether that ruling can be treated as creating a general notion of the public in copyright law within the EU countries, and therefore in divergence from the objectives of the Directive.
- 43 In the *Mediakabel* case, the ECJ reviewed the issue of classification of a given media service from the point of view of public law. *Mediakabel BV* filed a complaint against the decision issued by the Commissariaat voor de Media (the media regulatory authority, the “Authority”), in which the Authority stated that the “Filmtime” service offered by *Mediakabel* was a television service subject to the permit procedure in Holland. In *Mediakabel*’s view this was an incorrect assessment because the service provided should have been treated as an interactive service. As such it belonged to the category of information society services and did not require permission. *Mediakabel* offered its subscribers a service called “MrZap,” provided by broadcaster networks managed by third parties. In exchange for the monthly subscription, this service made possible (using a decoder and chipcard) the reception of the television channels as extra channels to the channels broadcast by the network provider. In addition to this service, *Mediakabel* offered subscribers to the MrZap service per-view access to additional films within the “Filmtime” service. Subscribers to the MrZap service were entitled to order a film from a list of 60 films offered by *Mediakabel*. Upon payment of the relevant fee, they received an individual access code allowing them to watch the film on their television sets at specified times. The issue considered was therefore whether this service should be classified as a service on demand or a television broadcast service under Art. 1a of Directive 89/552/EEC of 3 October 1989 on coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.<sup>29</sup> The ECJ’s conclusion was that the scope of application of the term “television service” was laid down in an autonomous and exhaustive way in Art. 1a of Directive 89/552. This term comprises any service that is the original broadcast by wire or wireless means of television channels intended for general reception, including satellite transmission, in coded or uncoded form.
- 44 The ECJ also stressed at the same time that services of this type, such as subscription television received by a limited number of users, are not excluded from the scope of the term “television service.” The important factor was that it was at the same time reception of the same images by an undefined number of potential viewers. Therefore, a television service provided for a fee, even if available to a limited number of users but relating solely to channels selected by the broadcaster and transmitted at the time determined by the broadcaster, is not a service provided upon individual request.
- 45 It is worth stressing that the ECJ did not pronounce the view that Directive 89/552 created an autonomous definition of a television service. This definition was drafted for the purposes of public law and does not necessarily have to be transferred directly to other directives or to the field of copyright law.
- 46 C. Caron also believes that in the *Chellomedia* and *Norma* cases the courts might have been influenced too much by the ECJ’s ruling in the *Legardère* case. He points out that the rulings are not consistent with Art. 1. 2b of the satellite and cable Directive adopting the country of origin rule, and indicating the law of the country in which the signal is sent to the satellite as the governing law. The country of origin theory was thought up to protect the author because the author is entitled to protection “at the foot of the antenna.” The *Chellomedia* and *Norma* rulings take away that entitlement, concluding that the process of transmission to a satellite and to earth is neutral from the point of view of copyright law and referring it to the law of the country in which the public communication takes place. This author also notices the improper distinction between the signal and the program, which leads to a divergence between telecommunications law and copyright law. The author’s view is that an “equal sign” should be put between the signal and the program channel.<sup>30</sup>

## E. Retransmission in Directive 93/83 on cable and satellite retransmission

- 47 Under Art. 1. 3 of the Directive 93/83, the term “simultaneous cable retransmission” means the simultaneous, unaltered, and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another member state, by wire or over the air or by satellite, of television or radio programs intended for reception by the public.
- 48 In the *Chellomedia* and *Norma* cases, the courts concluded from the definition given above that they were not dealing with retransmission because the transmission of a signal to an operator did not con-

stitute initial broadcasting. Signals sent to a satellite cannot be received by the general public. As emphasized above, the courts cited at the same time the ECJ ruling in the Lagardère case. On the basis of the ruling in the Lagardère case, it was argued that professionals receiving the signal using specialized equipment could not be “the public” because this term meant an unlimited group of potential viewers. This classification is transferred to satellite transmission of encoded signals intended solely for operators.

- 49 The notion “retransmission,” however, needs to be interpreted in terms of the objective to be achieved by implementing the Directive. The main objective of the Directive laid down in the preamble is to secure free retransmission of channels within the EU by ensuring legal certainty with regard to how transmission will be treated in different EU countries. The Directive is not applicable to transmissions of a national range. The objective of the Directive – to secure the legal conditions for creating a European audiovisual area – is implemented among other things by making negotiations easier, ensuring that the negotiations are held in good faith, imposing collective exercising of rights, and therefore securing to the greatest degree possible the interests of cable operators by strengthening the level of legal certainty with regard to the acquired rights. However, as emphasized in the preamble to the Directive (comment 21), it is necessary to ensure protection for authors, performers, producers of phonograms, and broadcasting organizations. As stated in comment 2), the harmonization of legislation entails the harmonization of the provisions to ensure a high level of protection. The interpretation of the term “retransmission” to cover only transmission of a signal that was initially intended for reception by the general public leads to significant limitation of the level of protection of right holders. As observed in comment 19 of the preamble to the Directive, in the past international coproduction agreements have often not expressly and specifically addressed communication to the public by satellite within the meaning of the Directive, especially as a particular form of exploitation being the subject of a separate right. The same should be said of the form of exploitation existing in the new business model described for transmission of signals to users. This model was without doubt not taken into account in coproduction agreements, in agreements between authors and producers of audiovisual works, or often in agreements between a producer and the broadcaster. The interpretation adopted by the courts leads therefore to a significant increase in the level of legal uncertainty on the part of users and the need for examination, with respect to individual works, of the extent to which rights were in fact acquired. The question therefore arises whether the exclusion from regulation of retransmission of transmission of a signal as described above (i.e., as a new business model explained in the

first part of this article) is in line with the objectives of the Directive.

## F. The right of communication to the public under the Berne Convention in Directive 2001/29/EC and in the WIPO Copyright Treaty of 20 December 1996

- 50 Because in the Chellomedia and Norma cases the courts concluded that the cable or satellite DTH platform operators make the use of the right of communication to the public, it is necessary to define that right.<sup>31</sup>
- 51 S. Ricketson and J.C. Ginsburg have observed that the Berne Convention does not create uniform regulation regarding communication to the public, and that the regulation it provides is broken down into various provisions, leaving certain loopholes.<sup>32</sup> The Convention regulates rights that are separate with respect to the various forms of communication, particularly with respect to performance in the presence of the public and over a distance. Art. 11bis is the broadest regulation, but it does not cover all forms of broadcasting: it does not apply to the initial wire-based communication. The right of initial wire-based communication applies in the Convention only to cinematographic, literary, and artistic works if adapted to a cinematographic work, and literary, musical, and dramatic/musical works but only if they are performed.
- 52 S. Ricketson and J.C. Ginsburg also emphasize that one of the major questions which arise in connection with Art. 11bis (1) (i) concerns the criterion that the broadcast has to be received by the public directly (without intermediary services). During the 1948 Brussels Revision Conference, direct reception was obvious in light of universal practice at that time, as could be seen by the definition of broadcasting in the Radio Regulations of the International Telecommunications Union (ITU) adopted at the 1947 Atlanta conference. Delegates at the Brussels Revision Conference did not therefore see the need to introduce a different definition of broadcasting.<sup>33</sup>
- 53 Art. 3 of the Directive on the information society requires that member states provide authors with the exclusive right to authorize or prohibit any communication of their works to the public, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The right of communication to the public in Art. 8 of the WIPO Copyright Treaty<sup>34</sup> is worded in a similar way, clearly stating that this right does not prejudice the provisions

of Art. 11(1)(ii), 11bis (1)(i) and (ii), 11ter (1)(ii), 14(1)(ii) and 14bis (1) of the Berne Convention.

- 54 Both definitions show unequivocally that the right of communication to the public has a broader scope than just the right of communication in such a way that anyone can gain access to the work at a time and place of their choice. There is therefore a broad understanding of this right, applying it to all kinds of communication of works by wire or wireless means. According to comment 23 of the preamble to the Directive, this right should be understood in a broad sense to cover 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. However, there is no definition in the Directive of the term “the public,” which means that the question of how many people make up “the public” remains open. Up until now this aspect of copyright law has not been harmonized, and therefore the task of defining the term “public” has been left to national laws.<sup>35</sup>
- 55 T. Dreier underlines that because the WIPO Copyright Treaty is a special agreement as defined in Art. 20 of the Berne Convention, the notion of communication of a work to the public has to be interpreted in the context of that Convention. Like the Directive on the information society, Art. 8 of the Treaty does not define the term “the public” – this has to be done at the national level. The phrase “communication to the public” in Art. 8 of the Treaty is assumed to be technologically neutral and to correspond to the requirements of the digital community. In the context of the first section of Art. 8 of the Treaty, the expression “communication to the public” refers to the situation in which a work is made available in such a way that the public can receive it at a different time and in various places. It is assumed that Art. 8 is supplementary to the Berne Convention to the extent to which the Convention does not regulate all areas of communication to the public.<sup>36</sup>
- 56 Following the rulings in the Chellomedia and Norma cases, if we assume that cable and satellite DTH platform operators do not use the works by broadcasting or by retransmitting, they have to obtain a license from the right holders to use the work for communication to the public in a manner other than broadcasting or retransmitting. In practice this can give rise to huge problems due to the terminology used in agreements entered into in the past between a producer and the broadcaster. In those agreements, the parties usually used the terms “broadcasting” or “retransmission” and not the term “communication to the public.” The same certainly applies to agreements entered into by a producer of an audiovisual work with co-authors. The producer of an audiovisual work created before the WIPO Treaty and Directive 2001/29/EC came into effect did not acquire

the right to communication of the work to the public from the co-authors, but the right to broadcast and in certain cases to retransmit. Particular difficulties arise when agreements should be taken into account that have been concluded under different legal regimes. As the right to broadcast and to retransmit are only a fragment of the right to communicate to the public in the broad sense, the acquisition of the right to broadcast or retransmit cannot include communication to the public in other forms.<sup>37</sup>

## G. Conclusion

- 57 The approach presented in the Chellomedia and Norma rulings leads to a significant level of legal uncertainty, and it seems to cause serious problems with determining the right holder who has the right to communicate the work to the public in the way described in the model presented in this paper. It should be remembered that the burden of proof as to whether the user has acquired the right to a specific form of exploitation lies with the user. This is why it was in the interests of the cable operators to introduce the compulsory management of a collecting society in the exercising of the right to retransmission.
- 58 On the basis of those rulings, the question needs to be asked whether the term “broadcasting” and the term “the public” have in fact been harmonized by the EU legislation. A procedure classified as broadcasting from the technical point of view will not necessarily be classified as broadcasting from the point of view of copyright law.<sup>38</sup> The same applies to the correlation between public law and copyright law – if we accept the reasoning as presented in the Chellomedia and Norma rulings, an entity that is treated as the broadcaster from the point of view of public law (the entity responsible for content) is not a broadcaster as defined in copyright law. There are, furthermore, serious concerns as to whether the ECJ rulings described above in the Lagerdère and Mediakabel cases can lead the foundation for creating a harmonized notion of “the public” in copyright law. It should be remembered that until now it has been a basic principle of copyright law that there is a major contrast between public and private use, and that each exploitation which does not meet the criteria for private use should be treated as public use regardless of whether the work is communicated to a limited or an unlimited group of users. It also seems that the notion of communication to the public introduced into the Directive on the information society does not diverge from this distinction. It should be underlined that there is no criterion of an unlimited group of viewers in Art. 3 (1).<sup>39</sup>
- 59 P. Weber is therefore right to suggest that the satellite and cable Directive be amended, in particular with regard to the maintaining of the criterion for

initial transmission in the definition of cable retransmission.<sup>40</sup> P. Weber observes that in order to distinguish between initial transmission and retransmission, the important factors are the provisions of an agreement between the satellite DTH platform operator and the broadcaster on the one hand, and the business model of the relations of the operator with the end user on the other. In cases in which a satellite DTH platform operator makes available a channel to viewers at the operator's own economic risk, and there is a legal relationship between the operator and the viewers, it should be assumed that another transmission takes place; therefore, from the point of view of copyright law, this constitutes retransmission<sup>41</sup> because the determining factor has to be the separate economic significance of use. After all, this was also the criterion at the core of Art. 11bis (1) (ii) of the Berne Convention, in which retransmission of a broadcast is based upon the intervention of a third party. It should also be noted that the satellite and cable Directive applies solely to cross-border retransmission and does not deal with broadcasting and retransmission of a domestic nature. Moreover, the Directive does not regulate initial cable broadcasting because in many countries this system was not being used. The conclusion is therefore that there is no reason why the national legislature shouldn't treat as retransmission the activity of a cable or satellite DTH platform operator that consists of combining the channels of a number of broadcasters into one encoded stream (package) and sending a signal to users for a fee. This is supported by the identical economic nature of exploitation of works in the form of direct cable retransmission as in the case of retransmission as defined in the Directive.

60 Another argument supporting the view presented above is the principle of technological neutrality, which is deemed to be a starting point for the regulation of information society services. The principal objective of the Directive was to facilitate the clearing of rights with respect to cable and satellite retransmission and to overcome barriers in national legislation in relation to those forms of retransmission. The objective of the Directive was not fully achieved due to the contractual systems for obtaining rights and the applied encoding systems, which still allow division of the European markets. As B. Hugenholtz emphasizes, the objective of the Directive was not achieved, not due to national differences in the national copyright law systems but because of a combination of encoding technology and territorial licensing.<sup>42</sup> The Directive does not prohibit territorial licensing, and film producers rarely license exploitation for the entire territory of Europe. To ensure territorial division, they also require encoding from broadcasters. Broadcasters are also not interested in obtaining licenses covering all of Europe because broadcasting in Europe is territorial. The parties can therefore agree that the signals will

be encoded in order to avoid reception by the general public in countries for which broadcasting is not designated. As B. Hugenholtz argues, territorial division can be achieved in principle through restriction of access to decoders.<sup>43</sup> There is therefore no doubt that cable and satellite DTH platform operators are not able to negotiate licenses with all of the right holders before transmitting the signal to users, especially as they receive channel data from the content providers not much in advance. Therefore, the assumption that acquisition of rights to communicate to the public (as discussed here) should be negotiated without societies, as concluded by the courts in the *Chellomedia* and *Norma* cases, is pure fiction from the outset. The real danger of this approach is that individual right holders could, in these cases, block retransmission of certain works and cause blackout. Therefore, a core provision in the cable and satellite Directive states that the right of cable retransmission may not be exercised by right holders individually but only by a collecting society. Legal certainty was the main reason for this regulation. It should be made clear that the Directive leaves the national legislatures the freedom to make decisions with regard not to cross-border but national retransmission.<sup>44</sup> The right of retransmission is certainly a fragmentary right that constitutes an element of the right of communication to the public, a right harmonized for the first time in the Directive on the information society.<sup>45</sup> However, harmonization does not go so far as to specify definitions of separate rights included in the broad scope of the right of communication to the public. The right of communication to the public has been defined meanwhile in specifics at the national level.<sup>46</sup> A system of terrestrial television is beginning to be replaced by direct transmission of a signal to a network, above all in those countries in which cable networks are well developed. This requires a fresh look at this process, first and foremost from the point of view of the separate economic significance of the activities of both the broadcaster and the operator. It is the economic significance and entry into the whole process of transmission by another entity acting on its own account that should determine how this entire process should be split (also from the point of view of legal classification) into two separate rights, even if they fall within the scope of the general right of communication to the public.

\* The author would like to thank her younger colleague Paweł Gruszecki for his help in describing the characteristics of the new models of transmission of TV programs.

1 *BUMA and STEMRA v. Chellomedia Programming*, Supreme Court of the Netherlands (*Hoge Raad*), 19 June 2009, available at: [www.rechtspraak.nl](http://www.rechtspraak.nl); *Norma v. NL Kabel*, District Court of The Hague, 28 January 2009, case HA ZA 06-2844, available at: [www.boek9.nl](http://www.boek9.nl), B9 7522.

- 2 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).
- 3 Council directive 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 (89/552/EEC) (OJ L 298, 17.10.1989, p. 23) amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC 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 202, 30.07.1997, p. 60).
- 4 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance). (OJ L 332, 18.12.2007, p. 27).
- 5 Case 155/73 *Sacchi* [1974] ECR 409.
- 6 We use the term licensing and sublicensing agreements due to the inconsistent distinction in copyright law between agreements that transfer copyright and licensing agreements, especially exclusive licensing agreements; see P. B. Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Report to the European Commission, DG Internal Market, November 2006.
- 7 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Text with EEA relevance) (OJ L 249, 17.09.2002, p. 21).
- 8 Case Comp/M.4338 *Cinven-Warburg Pincus/Casema-Multikabel* EUR-Lex No. 32006M4338.
- 9 *Ibid.*
- 10 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ L 320, 28.11.1998, p. 54).
- 11 See Tribunal de Bruxelles, 27.01.2005, *Auteurs & Media*, 2005, p. 138 et seq.
- 12 With respect to this arrangement, of course, the question arises as to who is responsible for this broadcasting process. It could be said that the broadcaster is responsible for content, as it is the broadcaster who decides the form of retransmission and enters into licensing agreements with operators. See F. de Visscher, B. Michaux, *Précis du droit d'auteur et des droits voisins*, Bruxelles 2000, p. 127. It is also possible to argue that in this case both entities are jointly and severally liable.
- 13 OJ L 248, 6.10.1993, p. 15.
- 14 BGH GRUR 1955, 492, 496 *Tonband/Grundig/Reporter*, BGH GRUR 2002, 248, 252 *Spiegel-CD-ROM*, W. Nordemann, *Das neue Urhebervertragsrecht*, C.H.Beck, 2002, p. 59. See also the special report by M. R. Dittrich, A. Kerever, W. Weinecke, *Intellectual Property Rights and Cable Distribution of Television Programmes*, Strasbourg 1983.
- 15 This solution has also been adopted in Art. 21 of the Polish Act on Copyright and Related Rights of 4 February 1994 (cons. text.: Journal of Laws of the Republic of Poland of 2006, No. 90, item 631, as am., referred to further as the "Polish Copyright Act"). However it can be applied only to broadcasting and to the making available of a work to the public in such a way that anyone can access the work at a time and place of their choice. Hence, it cannot be applied to the described signal retransmission model.
- 16 This criterion is adopted in the Berne Convention (Art. 11<sup>bis</sup> (2) (ii)).
- 17 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10), referred to further as the Directive on the information society.
- 18 "Authors of literary and artistic Works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or (ii) the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images."
- 19 For example, Art. 6 (4) of the Polish Copyright Act gives the following definition of broadcasting: distribution by way of wire-based or wireless radio or television broadcasting (earth or satellite). Meanwhile, this definition does not contain any reference to the reception by the public consisting of an unlimited number of persons.
- 20 For example, under Art. 4 (1) of the Polish Act on Radio and Television Broadcasting (cons. text.: Journal of Laws of the Republic of Poland of 2004, No. 253, item 2531, as am., referred to further as the "Polish Broadcasting Act"), a broadcaster is a person who creates or puts together a channel and distributes it or transmits it to other persons for retransmission in its entirety and unchanged, while under Art. 4 (2) Polish Broadcasting Act, retransmission is: a) wireless broadcasting of a channel for simultaneous, general reception, b) placing of a channel into a cable network (collective reception system). In modern regulations in which the AVMS Directive has been implemented, the broadcaster of a media service is deemed to be an entity which is responsible for the content. See Belgian Decret du 27 fevrier 2003 sur les services de medias audiovisuels; in its Art. 1 (12), the definition of "editeur de services" is given as: "la personne physique ou morale qui assume la responsabilité éditoriale du choix du contenu du service de medias audiovisuels et qui determine la manière don't il est organisé."
- 21 Available at [http://ec.europa.eu/avpolicy/info\\_centre/library/studies/index\\_en.htm](http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm).
- 22 Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199.
- 23 Case C-89/04 *Mediakabel* [2005] ECR I-4891.
- 24 In the *Lagardère*, the ECJ notes that as a result of technological progress it has become possible to broadcast directly to the public on frequencies not designated in telecommunications law for public reception. For this reason, the authors of the Directive took into account this technological development and concluded that point-to-point satellite transmission is subject to regulation under the Directive if the public is capable of receiving signals individually and directly from the satellite.
- 25 With regard to this last statement, the ECJ cites an earlier ruling in case C -89/04 *Mediakabel*.
- 26 See B. Hugenholtz [in:] *Concise European Copyright Law*, ed. T. Dreier, B. Hugenholtz, Kluwer Law International 2006, p. 271. The placing of emphasis on the designation of the signal for public reception is justified as the authors of the Directive intended that the reception of the signal from an indirect reception satellite should have the same status as reception from a direct satellite.
- 27 B. Hugenholtz, op.cit., p. 271.
- 28 In the facts of the *Lagardère* case, the signals were returned to earth where they were received by ground stations in France, which broadcast the signal to users on modified wave frequencies. Because this frequency did not cover the whole of France, the satellite sent signals to two ground stations in Germany as well, from where they were sent to users on long wave. CERT, a firm representing *Lagardère*, made those broadcasts. The channels could be received to a limited extent in Germany but were not used commercially in Germany. *Lagardère* paid for the phonograms in France to an author's organization, SPRE. For its part, CERT paid the German organization GVL fees for

the same phonograms. The fees paid by CERT to GVL were then deducted from the fees paid to the French organization SPRE. This raised the issue whether there were grounds to make that deduction and whether it could be concluded that only the law of the country in which the signals sent to the satellite originated applied.

- 29 Cited in Fn. 3.
- 30 C. Caron, *La transmission d'oeuvres et d'interprétations, le cas échéant par l'intermédiaire d'un satellite, vers le cablodistributeur ? Deux récentes décisions hollandaises, imprégnées de droit communautaire, apportent une réponse contestable à cette question importante d'un point de vue tant théorique que pratique*, Communication – Commerce Électronique- Revue Mensuelle Lexisnexis Jurisclasseur, Octobre 2009, p.12.
- 31 The principal difference between the Chellomedia and Norma cases is that in the Chellomedia case, the issue was the classification of the stage of transmission to the satellite and from the satellite to the end operator's station, while in the Norma case, in which there was direct transmission (the signals were received directly from the broadcaster), the issue was classification of the stage of transmission from the operator to the user- subscriber.
- 32 S. Ricketson, J. C. Ginsburg, *International Copyright and Neighbouring Rights*, Oxford University Press 2006, p. 717.
- 33 S. Ricketson, J. C. Ginsburg, *op. cit.*, p. 724.
- 34 WIPO Copyright Treaty (WCT) (OJ L 89, 11.4.2000, p. 8).
- 35 S. Bechtold [in:] *Concise European Copyright Law*, p. 360-361.
- 36 M. Senftleben [in:] *Concise European Copyright Law*, p. 105. It should also be noted that the term "communication to the public" in Art. 2 (g) of the WIPO Performances and Phonograms Treaty (OJ L 89, 11.4.2000, p. 15) is not as broad as in Art. 8 of the Copyright Treaty. Under this article, "communication to the public" of a performance or a phonogram means the making available to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. This solution is a result of the special provision for the right to remuneration in the case of broadcasting in Art. 15 of the WIPO Performances and Phonograms Treaty.
- 37 The problem of divisibility of the general broad right into narrower separate rights (fields of exploitation) arose clearly with respect to the right to broadcasts as well. See M. Fischer, *Der Begriff des Sendens aus urheberrechtlicher und aus rundfunkrechtlicher Sicht*, ZUM 2009, No. 6, p. 465-470, summary from the conference held in Institut für Urheber- und Medienrecht, "Der Begriff des Sendens aus urheberrechtlicher und aus rundfunkrechtlicher Sicht."
- 38 See G. Gounalakis, *Der Begriff des Sendens aus urheberrechtlicher Sicht*, ZUM 2009, No. 6, p. 447.
- 39 It is worth pointing out that in Case C-306/05 SGAE [2006] ECR I-11519, the ECJ adopted a broad definition of "the public" based on Art. 3 of the Directive on the information society.
- 40 P. Weber, *Die Reichweite des urheberrechtlichen Sendebegriffs aus Sicht der Europäischen Rundfunkunion EBU*, ZUM 2009, No. 6, p. 461.
- 41 Also according to P. Weber, *op. cit.*, p. 464.
- 42 B. Hugenholtz, *SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive*, IRIS plus, "Convergence, Copyrights and Transfrontier Television," 2009-8, p. 7-19.
- 43 B. Hugenholtz, *op. cit.* p. 10. In practice in agreements now entered into between radio and television organizations (content providers) and cable and satellite DTH platform operators, there are major territorial restrictions, including within the EU.
- 44 B. Hugenholtz underlines that the Directive does not harmonize retransmission, which does not have a range beyond the territory *op. cit.* p.12.
- 45 See comment 23 in the preamble to the Directive, which says that 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.
- 46 B. Hugenholtz, *op. cit.* p. 17.