

Cable re/transmissions The Belgian perspective

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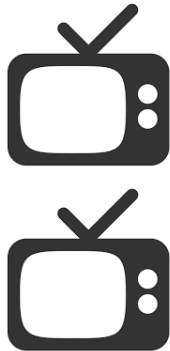
Cable transmissions – peace at last?

ABA / BVA – 29 April 2019

- **Introduction**
 - Technical evolution
 - Traditional cable transmission scheme
 - Direct injection
 - Legal controversy
- Revision of copyright rules
 - Legal framework
 - Definitions & principles
 - Cable retransmission
 - Direct injection
 - Legal consequences

Traditional scheme

DALDEWOLF

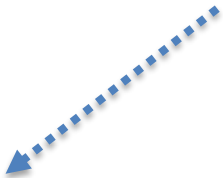


Antenna viewer

Broadcast

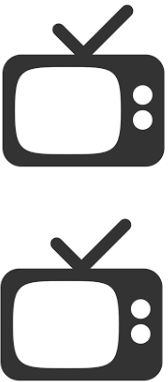


broadcaster



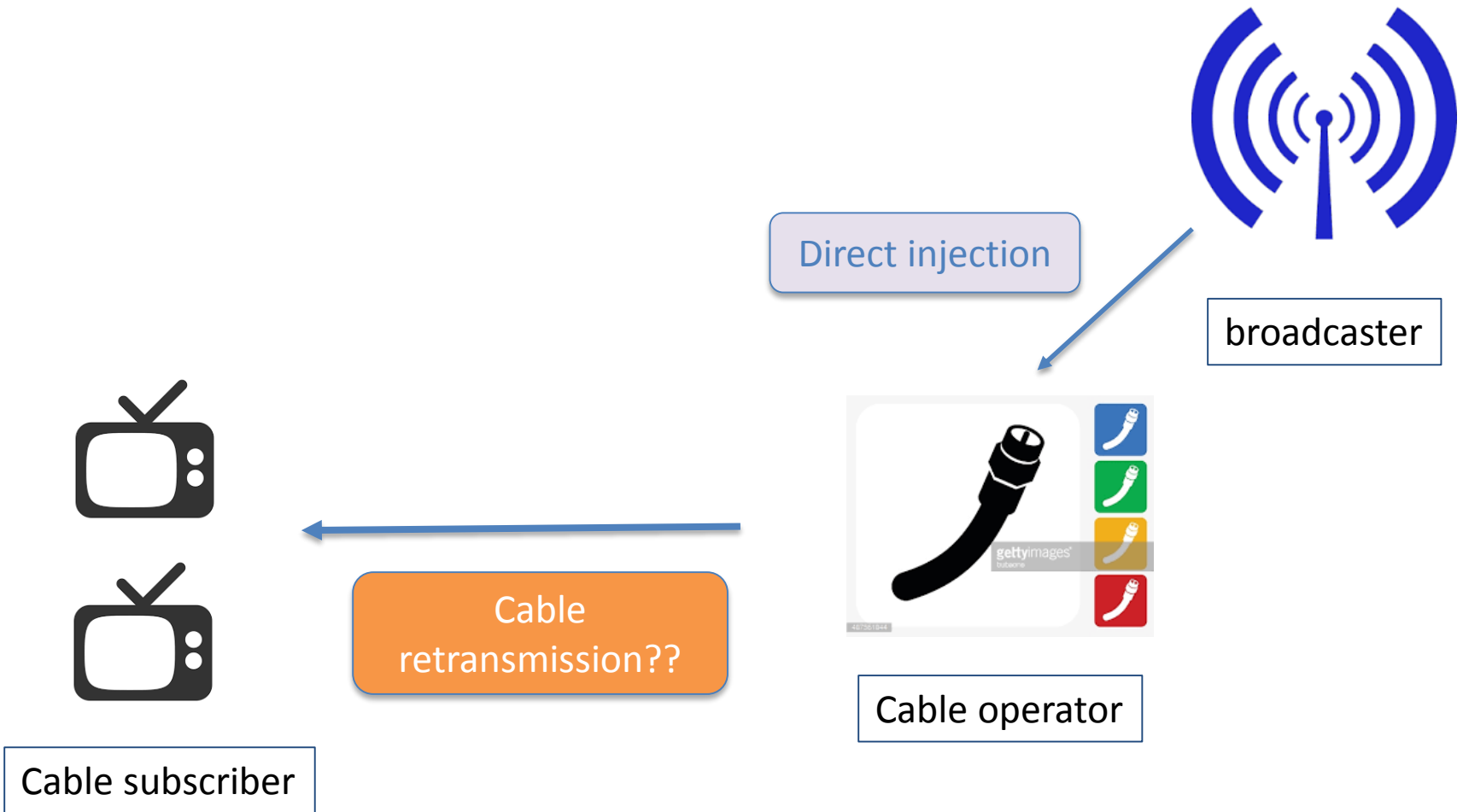
Cable operator

Cable retransmission



Cable subscriber

- Distinct acts of communication to the public (Berne Convention, SatCab Dir)
 1. Broadcast (“primary” exploitation)
 2. Cable transmission (“secondary” exploitation)
- Special regime for “cable retransmission” (SatCab Dir)
 - Mandatory collective management
Ratio: facilitating clearance of rights
 - Exception: broadcaster



- Litigation > 30 years
- Recent issues:
 - Cable retransmission - mandatory collective management
 - **By CMO of AV producer**
Transfer of rights by contract/legal presumption
No additional remuneration for authors/performers
 - **By CMO of AV authors/performers**
Membership of CMO + ratio legis (facilitating licensing)
Additional remuneration for authors/performers
 - Direct injection
 - Single protected act = generic communication to the public?
⇒ Individual management
 - Two protected acts = cable retransmission?
⇒ Collective management

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- 2 amendments of BE copyright
 - Act of 19 April 2014
 - Act of 25 November 2018
- European directive (2019)

- Berne Convention 1971
- WIPO Copyright Treaty 1996
- 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 (“SatCab Dir”)
- Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“InfoSoc Dir”)
- Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (“Rental Dir”)
- **Directive 2019/xx of xx 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**

- **Belgian Code of Economic Law**
Book XI. Title 5, chapter 4 – communication to the public by satellite, retransmission by cable and communication to the public by direct injection
 - Cable retransmission: art. XI.223 -225 CEL (amended by Act 19 April 2014)
 - Direct injection: art. XI.226-227/1 CEL (introduced by Act 25 November 2018)
 - Common provisions: art. XI.228-228/1 CEL (amended and introduced by Act 25 November 2018)

Definition; principle

CABLE RETRANSMISSION

Cable retransmission:

The simultaneous, unaltered and unabridged **retransmission** by a cable or microwave system for reception by the public of an **initial transmission**, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public

- 2 transmissions
- 2 acts of communication to the public
 - Initial communication by broadcaster
 - Second communication by cable operator
 - Cable retransmission = exclusive right
 - Independence of both exploitations
- PM: definition to be amended by
Retransmission Directive 2019?

“Communication to the public by direct injection”;
definition; principle

DIRECT INJECTION

- **Art. I.16, §1, 7° CEL**

“7° directe injectie: de techniek waarbij een omroeporganisatie haar programmadragerende signalen uitsluitend aan de distributeurs van signalen doorgeeft zonder dat die signalen tijdens en naar aanleiding van die doorgifte toegankelijk zijn voor het publiek, en waarbij die distributeurs de signalen vervolgens naar hun respectievelijke abonnees sturen, zodat deze de programma's kunnen ontvangen.”.

“7° injection directe: la technique par laquelle un organisme de radiodiffusion transmet ses signaux porteurs de programmes exclusivement aux distributeurs de signaux, sans que ces signaux soient accessibles au public au cours et à l'occasion de cette transmission, ces distributeurs envoyant ensuite lesdits signaux à leurs abonnés respectifs afin que ceux-ci puissent recevoir ces programmes.”.

- Technique
 - No definition of the protected act
 - No exhaustive list of “techniques” (cable, fiber, IPTV) – “technology-neutral”
- Broadcaster transmits (1) programme-carrying signals
 - Exclusively to distributor
 - Signals not accessible to the public
- Distributor transmits (2) to its subscribers for reception

- Two (linear) transmissions
 - Broadcaster >> distributor
 - Distributor >> public (subscribers)
 - Question: “exclusive” = ?
 - One-on-one transmission
= technical interpretation => many acts
 - Also only form of exploitation?
= only exploitation => fewer acts
- ⇒ Technical or editorial criterion?
- Relevance:
- BE exploitation >< foreign exploitation
 - BE: parallel online exploitations

- Two transmissions – one, single act of communication to the public
 - Exclusive rights (art. XI.226 CEL)
 - Authors
 - Holders of neighbouring rights
 - Responsibility (art. XI.226/1 CEL)
 - Broadcaster and distributor “together”
 - No joint liability
 - Each clears rights for its contributory transmission
 - Absent OK for one transmission => infringement => cessation?

Remuneration right, mandatory collective management, single platform, information obligation, conclusions

LEGAL CONSEQUENCES

- Before 2018 reform
 - Cable retransmission or generic communication to the public
- Since 2018 reform
 - Cable retransmission / direct injection / (generic communication to the public)
 - Uniformisation of applicable rules
Qualification still relevant but difference less impact than before 2018

- Right to remuneration
 - For author + performer
Not: producer
 - Cable retransmission (since 1 January 2015) and direct injection (from 1 July 2019)
 - If transfer of exclusive right to producer
 - Exploitation by producer
 - Remuneration for author/performer
- Features
 - Non transferrable, non waivable (= mandatory)
 - In addition to exclusive right (producer)
 - Amount to be negotiated (no legal criteria)

- Mandatory collective management
 - Cable retransmission
 - Broadcast: individual management
 - Cable retransmission: collective management
 - Exclusive rights => CMO producer
Exception: broadcaster
 - Remuneration rights => CMO author/performer
 - Direct injection
 - Transmission by broadcaster: collective management
 - Exclusive rights => CMO producer
Exception: broadcaster (acquisition from producer)
 - Remuneration rights => CMO author/performer
 - Transmission by distributor : collective management
 - Exclusive rights => CMO producer
Exception: broadcaster (transfer from broadcaster to distributor)
 - Remuneration rights => CMO author/performer

- Uniek platform / plateforme unique
 - Broadcasters, CMOs exercising exclusive rights, CMOs exercising remunerations rights
 - Purpose:
 - Facilitating collective negotiations with distributors
 - Collective agreements on conditions and modalities of exploitation
 - No criteria
 - Determining amounts
 - Debtors of remunerations
- Until then:
payment by distributors &/ broadcaster

- Obligation to exchange appropriate and sufficient information, in timely manner
 - Producers, CMOs, broadcaster, distributor (satellite, cable, other)
 - Purpose:
 - Qualification (broadcast, communication by satellite, cable retransmission, direct injection)
 - Economic basis for calculating remuneration
 - Determining remunerations (already or yet to be collected)

- Improvement
 - Legal certainty “direct injection”
 - Elimination of anomalies
 - Potential increased transparency
- However
 - Subsisting legal uncertainty “direct injection” / “cable retransmission” / generic communication
 - Technical criterion / editorial criterion?
 - Quid “broadcaster” – online “primary” transmissions
 - Importance: find coherent criterion – avoid lacunas or default application of generic communication
 - Finding agreement on remunerations

Many thanks!

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