

Direct Injection

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Online (re)transmission of TV programmes

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- Legal framework
- Definition « cable retransmission »
- Technical schemes
 - Traditional scheme
 - Direct injection
- National case law
 - The Netherlands
 - Norway
 - Belgium => CJEU
- EU copyright reform (Wölken report)
- Open questions

CURRENT LEGAL FRAMEWORK

- 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”)
- Implementation in national copyright law

COPYRIGHT REFORM

- Commission Proposal for a Regulation of the European Parliament and of the Council 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 - COM(2016)594
- EP Committee on Legal Affairs – draft report (report Wölken - 2016/0284(COD))
- EP Committee on the Internal Market and Consumer Protection – opinion (COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))

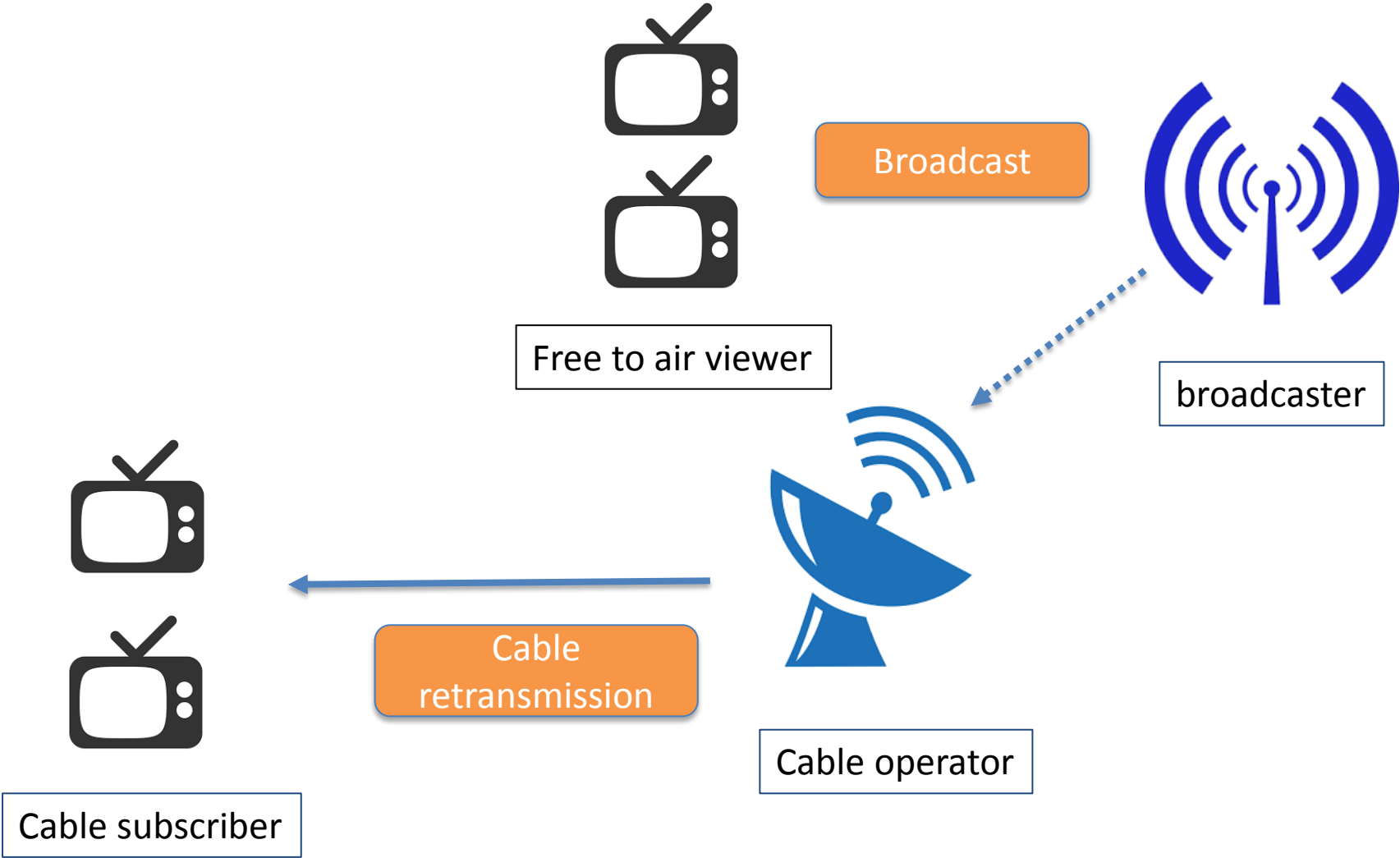
- Species of right of « communication to the public »
=> exclusive right
 - Art. 3 InfoSoc Dir, art. 8 Rental Dir
- Special regime
 - Individual or collective contractual agreements
 - Between copyright owners, holders of related rights and cable operators
 - Mandatory collective management
 - Exception for broadcasting organisation in respect of its own transmission
 - Mediation
 - Prevention of abuse of negotiating positions

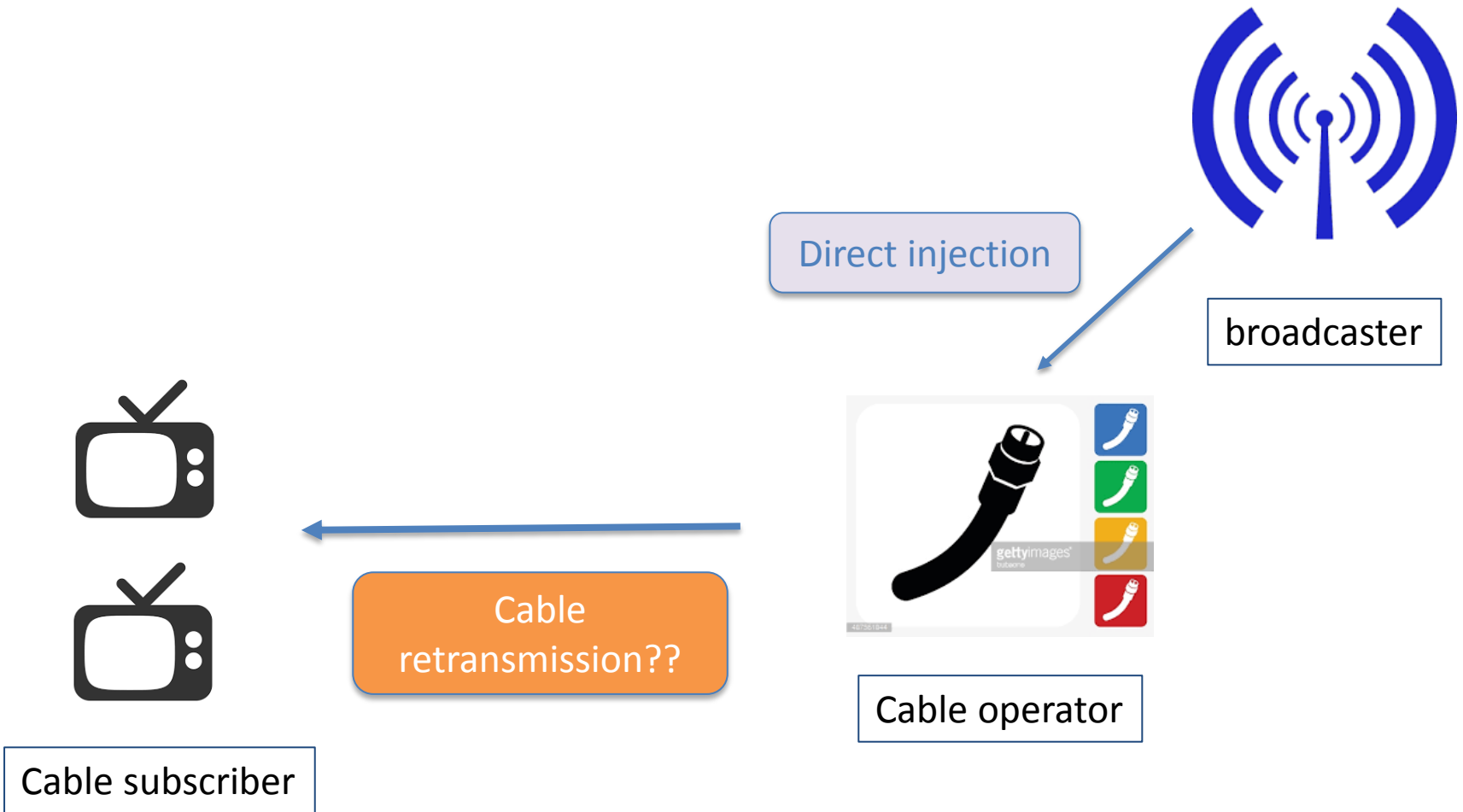
‘Cable retransmission’ (art. 1(3) SatCab Dir):

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.

Traditional scheme

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- « Direct injection »
 - ✓ – 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**
 - >> 'Transmission' is not intended for reception by the public but the TV/radio programmes are
- Consequences
 - If direct injection is a cable retransmission
 - Two communications to the public
 1. Broadcast by broadcaster
 2. Retransmission by cable by cable operator <= mandatory collective management
 - If direct injection is not a cable retransmission
 - One communication to the public by cable => no mandatory collective management of rights
 - By broadcaster and/or cable operator?

- **Supreme Court 28 March 2014** (ECLI:NL:GHSGR:2012BW1078)
 - Circumstances
 - Norma: CMO neighbouring rights performers
 - NLKabel: sector organisation of cable operators
 - ‘Retransmission by cable’ requires:
 - Primary communication to the public
 - Secondary retransmission by cable
 - Direct injection: no public
 - Transmission by broadcaster to cable operator
 - One-on-one transmission (Media Gateway)
 - Not accessible to the general public (viewers)
 - Even if direct injection for profit and possibly big number of cable operators

- Supreme court 10 March 2016 (HR-2016-00562-A)
- Circumstances
 - Norwaco: CMO
 - Get AS: cable operator
- Direct inject of encrypted signal over fibre optic cable is not initial transmission to be transmitted
 - Art. 11bis(2) BC: retransmission of broadcast of works
 - SatCab Directive (EEA)
 - Simultaneous primary transmissions
 - Strict interpretation of mandatory collective management
 - Copyright clearance by broadcaster SBS (ARI), if not Get AS
 - Reference to NORMA (NL)

- Various outcomes
 - 1990s: CA Brussels direct injection => retransmission by cable
 - 2005: 1st instance tribunal Brussels direct injection => communication to the public
 - 2010s:
 - SBS – CJEU
 - Telenet – Supreme Court 30 September 2016 C.14.0045.N-C.14.0217.N

- No ruling under SatCab Dir
- Ruling under InfoSoc Dir: SBS c. SABAM (C-325/14)
 - Circumstances
 - SABAM is CMO
 - SBS is ‘broadcasting’ organisation – only direct injection to cable operator with no public access to signals – no ‘broadcast’ (wireless communication to the public) – transmission to cable subscriber by cable operator
 - ‘Broadcaster’ does not perform communication to the public through direct injection
 - Communication: yes
 - ‘Public’: no (only transmission to cable operators, not viewers)

– Nuance

- ‘Public’ are cable subscribers => served by broadcaster or cable operator?
 - Cable operator: autonomous service performed with the aim of making a profit
 - Subscription fee paid to operator, not to broadcaster, for access to the communication and to programmes (not for technical service)
 - Unless: cable operator offers merely technical service for broadcaster without independence v. broadcaster

⇒ National court!

CA Brussels has not yet ruled in SBS

Supreme Court has integrated ruling in Telenet => CA Brussels

Amendment 13

(ba) "direct injection" means a two-step process involving firstly the transmission by broadcasting organisations of their programme-carrying signals for reception by the public to distributors point to point via a private line, whether by wire or over the air, including by satellite, without those signals being accessible or communicated to the public during such a transmission and secondly the transmission by those distributors of those signals to their respective subscribers, to enable them to view or listen the programs on networks, including cable networks, microwave systems, digital terrestrial, closed-circuit IP-based and mobile networks and similar networks.

Amendment 21

Direct Injection Liability

A broadcasting organisation which transmits its programme-carrying signals through direct injection to distributors shall be jointly liable with such distributors for acts of communication to the public and making available to the public, as defined in Article 3 of Directive 2001/29/EC, which they carry out together.

- ‘Cable retransmission’: relation between (i) primary transmission and (ii) cable communication
 - Two acts of communication to the public required?
 - Parallel primary transmissions (broadcast + cable communication following direct injection)
 - Question asked (but not answered) by CA Amsterdam 18 October 2016 (Ziggo)
ECLI:NL:GHAMS:2016:4183
 - Focus on technical criterion or editorial dependence?
 - Cable transmission of the broadcasting signal?
 - Cable transmission of the programmes (as composed by the broadcaster)
- If direct injection = primary communication to the public by cable (not cable retransmission)
 - No mandatory collective management
 - Right clearance with producer/broadcaster/CMOs?
 - Notion of ‘broadcaster’ (without ‘broadcast’)?
 - Remuneration for authors/performers
 - Right to appropriate remuneration for ‘cable retransmission’ => excluding direct injection?
 - Quid in case of joint liability broadcaster-cable operator?

Many thanks!

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