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BROADCASTING AND COPYRIGHT IN THE INTERNAL MARKET

Discussion paper prepared by the Commission of the
European Communities on copyright questions
concerning cable and satellite broadcasts

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I. Commission suggestions for Community action on satellite broadcasting and cable retransmission

1. On 3 October 1989 the Council adopted Directive 89/552/EEC, the "Television without Frontiers" Directive. In its final form the Directive departed from the Commission's original proposal, and from Parliament's opinion, in that it did not include a chapter on copyright. On 21 February 1990 the Commission in its Communication on Audiovisual Policy (COM(90) 78 final, 21 February 1990) observed:

"The legal framework established by the Directive has still to be amplified on the question of copyright. At a time when cross-frontier broadcasting has, as a result of technology, become a reality and, by legislation, a free right, this exercise must be accompanied by an effective protection of copyright in all the Member States in order that the holders of such rights may benefit fully from the European dimension of broadcasting."

Failing a Community approach, the Commission went on, the European audiovisual area would be set up solely on the basis of those legal opportunities which are left open, to the detriment of artistic creation in Europe.

2. The Commission accordingly intends to propose Community "rules of the game" for copyright which take account of the need to maintain a balance between the various interests involved and to facilitate the management of copyright and neighbouring rights on a European scale. The measures the Commission are suggesting would essentially be concerned with:

- (a) satellite broadcasting and
- (b) cable distribution of programmes.

The measures themselves and the reasoning behind them are explained in more detail below.

3. The purpose of this discussion paper is to allow a process of consultation, with all interested parties being able to make submissions putting forward their views.

II. Why is Community action necessary?

4. The Commission feels that copyright in broadcasting requires action now because of its importance to the process of European integration. The role it is playing and can play is not only an economic one but has social, cultural and political implications as well.
5. The last few years have seen accelerated growth in satellite and receiving equipment technology. At the same time satellite channels have been set up in several Member States which broadcast over multinational territories and allow individual reception of their programmes. Copyright law has not kept abreast of these developments. The technical reality of a cross border satellite footprint is not always easy to reconcile with legal concepts, which are essentially national. Copyright legislation is silent on the problem of exploitation of copyright in a European audiovisual area. It is not yet established which rights a satellite broadcaster must acquire if the satellite footprint covers several Member States. The legal uncertainty here runs directly counter to the free movement of television programmes in the Community. The absence of ground rules also threatens the interests of right owners; the use of their works may be prevented by the individual holders of exclusive rights in the different Member States; or their works may be used without any adequate remuneration.

6. Simultaneous, unaltered and unabridged retransmission of programmes by cable is similarly hampered in some respects by the legal uncertainty caused by the inability of copyright law to deal with the specific problems of retransmission across borders.

III. The measures envisaged for primary satellite broadcasting and for cable retransmission

(a) General

7. For copyright purposes a distinction has to be drawn between primary broadcasting and the simultaneous, unaltered and unabridged retransmission of programmes by cable. In a primary broadcast the broadcaster himself decides the composition of the programme, and will include only works for which he has already secured the broadcasting rights.

In cable retransmission, on the other hand, the cable operator cannot make up his programmes on the basis of a portfolio of rights which he has acquired beforehand. The cable operator can decide only whether he wants to retransmit the primary broadcast in full or not at all.

(b) Primary satellite broadcasting

8. The measures envisaged are based on three principles.

Any satellite broadcast originating in a Community Member State must be regarded as an act of broadcasting for copyright purposes, regardless of the technology used, once it constitutes communication to the public. As far as copyright law is concerned, therefore, the technical distinction between direct broadcasting satellites and other satellites must be considered obsolete.

The right to broadcast copyright works and other protected material would have to be acquired only in the country of establishment of the broadcaster. When they negotiate the grant of broadcasting rights the parties could take into account the number of viewers reached or reachable by the broadcast in the whole of the satellite footprint. The broadcasting of satellite signals by a broadcaster who is established outside the Community will continue to be exclusively governed by the national copyright laws. Those might, if necessary, select a different point of reference.

Adequate protection of copyright, and of the neighbouring rights of performers, producers of phonograms and broadcasters, must be secured by means of a minimum level of harmonization of the rules in force in the Member States. The possibility of a legal license for satellite broadcasts must be excluded. This should ensure that the interests of right owners are safeguarded no matter in which Member State the broadcaster may be established.

(c) Simultaneous, unaltered and unabridged cable retransmission

9. The Commission proposals can be summed up in four principles.

Cable retransmission of a programme from another Member State constitutes use of the work for copyright purposes. The cable operator must therefore have the authorization of the owners of all rights in any part of the programme.

Such authorization should be acquired on a contractual basis.

It should be possible for such rights to be managed collectively to the extent that this is made necessary by the specific features of cable retransmission. There should be a Community

measure to ensure that the smooth operation of collective agreements is not brought to a halt by the opposition of the owners of individual rights in sections of the programme to be retransmitted.

As cable operators would be able to acquire the retransmission rights only through management societies, the societies would have a legal monopoly. Supplementary measures would therefore be needed to ease negotiation. These would provide for a voluntary conciliation mechanism and a mechanism for avoiding abuse of the monopoly position. The latter would merely ensure that negotiations could not be held up by excessive demands or conditions which might constitute abuse; however, it would not establish the amount of remuneration due. That would be a matter entirely for the parties. The measures would facilitate negotiation between right owners and cable operators without calling in question the purely contractual nature of the acquisition of cable rights.

IV. The next step

10. The Commission hopes that this discussion paper will provide a basis for public debate in which all interested parties will have a chance to express their views. In putting these suggestions forward the Commission has sought to give a clear indication of the main features of the policy which should in its opinion be adopted by the Community. The content of the proposal for a Directive will depend on the response to the discussion paper.

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1. Introduction

- 1.1 The communication from the Commission to the Council and Parliament on audiovisual policy¹ of 21 February 1990 set out the framework for overall action in the audiovisual field. The Commission stated that the priority objective as regards combating the weaknesses of the European audiovisual sector was to overcome the current fragmentation of the market and to establish an area without borders, in which, in particular, free movement in television broadcasts is ensured.²
- 1.2 To achieve this objective will require supplementary copyright rules³ in addition to the Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.⁴ Such rules must ensure that protection is as effective as possible and that authors are justly remunerated in all Member States. At the same time, investment in promoting creativity and cross-border programme transmission is to be encouraged and the associated risks, to the extent that they derive from uncertainty as to the law, heterogeneous national rules or a degree of market fragmentation no longer acceptable in the common market, are to be minimized as far as possible.

1 COM(90) 78 final.

2 Loc. cit., p. 12.

3 89/552/EEC, OJ No L 298, 17 October 1989, p. 23.

4 COM(90) 78 final, p. 17.

- 1.3 The Commission is assuming that the changes sought in the rules on the transmission of programmes via satellite and cable must give equal consideration to the sometimes conflicting interests of the individual parties involved.⁵ Only in this way can a consensus be worked out, a consensus which is absolutely essential if a European audiovisual area is to be created.
- 1.4 For this reason, the Commission sees the discussion initiated by this paper, which is to lead to a proposal for a Directive early in 1991, not as a renewed attempt to put over ideas already rejected in the discussion of the "Television without Frontiers" Green Paper⁶ and the subsequently adopted Directive on the pursuit of broadcasting activities (the "Television without Frontiers" Directive). Rather, the concern now must be through the introduction of supporting measures to safeguard and supplement the acquisition of rights to simultaneous, unaltered and unabridged retransmission of programmes (secondary broadcasting) via cable, which in practice has since been largely organized through collective agreements. This will promote cross-border cable retransmission and underpin the European audiovisual area.
- 1.5 No rules for the retransmission of programmes by technical means other than cable are here proposed: such theoretically conceivable forms of retransmission either do not occur in practice or are of little importance at the present time.
- 1.6 The system of regulation aimed at will, above all, include the primary broadcasting of programmes via satellite (the need to cover this aspect in Community law was not acknowledged in the Green Paper). The rapidly growing number of satellites used for programme transmission, the introduction of medium-power and direct broadcast satellites and improved aerial technology, which is making good-quality individual

⁵ COM(90) 78 final, p. 3.

⁶ COM(84) 300 final, 14 June 1984.

reception increasingly attractive, means that a solution which is confined simply to cable retransmission would be incomplete.

- 1.7 Regulation for the Community will, moreover, have to be consistent with the territorially wider design currently being discussed in the Council of Europe as a supplement to the European Convention on Transfrontier Television. The objectives of the Community are different, because they aim at creating the common market. The Commission is trying to fulfil this obligation by stepping up copyright protection, promoting cross-border transmission of programmes and, hence, creating the intended audiovisual area.
- 1.8 As an initial step along this path, the discussion paper first summarizes the position in current national and international law, taking account of the legal principles affected by the cross-border transmission of programmes (section 2). This is followed by a survey of the economic interests and acquisition-of-rights practice to date (section 3): the continuing difficulties in the latter area will determine the scope of Community legislation in this field. In section 4, the Commission sets down the principles for its proposed

legislative solutions, which are again summarized in the closing section of the paper (section 5). The measures proposed in this paper do not prejudice further Community action in the field of copyright.

2. International and national copyright

2.1 Rights affected by satellite transmission

Copyright

- 2.1.1 A thorough survey of the national laws and international treaty law affected by the broadcasting and retransmission of works and performances protected by copyright was given in Part 6, C (p. 300 ff.) of the "Television without Frontiers" Green Paper⁷ to which the reader is referred. For this reason, what follows simply recapitulates the laws involved, adding a postscript where national laws have been amended subsequently.
- 2.1.2 Article 11^{bis} (1)(1) of the Revised Berne Convention on the protection of literary and artistic works (RBC) in the Brussels version, by which or by whose subsequent versions all Member States are bound, grants copyright owners the exclusive right of authorizing wireless radio-diffusion (primary transmissions). The principle applies to both terrestrial and satellite broadcasting. Under Article 11^{bis}(2), it is to be a matter for the countries of the Union to determine the conditions under which the right mentioned may be exercised, without prejudice to the moral right of the author or to his right to obtain equitable remuneration.

⁷ COM(84) 300 final, 14 June 1984.

- 2.1.3 The application of Article 11^{bis}(1) RBC to the transmission of protected works via satellites raises a series of questions, however.
- 2.1.4 Since the notion of broadcasting presupposes that programme signals can be received by the public, a distinction has hitherto been drawn, as regards satellite programme transmission, between the broadcasting of protected works by communications and direct satellite. While the latter operate at relatively high power over frequencies provided under international telecommunications law for reception by the public and their signals can be received by the public directly, the former transmit signals at much lower power over frequencies which the public, under telecommunications law, is not allowed to receive.^{7a} Although these signals were at first beamed only to the head-ends of cable networks, their individual reception has now become affordable as a result of improved aerial technology and is being allowed by national telecommunications authorities to an increasing extent.^{7b} Recently, medium-power satellites have appeared on the scene; these continue to use telecommunications frequencies but their signals can also be received directly without any difficulty in large parts of their footprint. Nevertheless, this direct reception of programme signals transmitted via communications satellites has hitherto not come within the scope of copyright law, and the distinction hitherto made in telecommunications law has continued to be applied for copyright purposes. Accordingly, only the broadcasting of programme signals via direct satellite is considered as a communication of a work to the public for the purposes of copyright, but not transmission via communications satellite; in the latter case, only the subsequent retransmission of the programme signals via cable networks is relevant for

7a See the International Telecommunications Convention and Article 1 para 37 of the Radio Regulations.

7b See Chapter 3 of the Satellite Communications Greenpaper, to be published in Autumn 1990.

copyright purposes. In contrast to what happens when signals emitted by direct satellite are fed into a network, cable retransmission seems therefore to be comparable not to wireless transmission but to a primary transmission by wire, against which authors are protected by Article 11(1)(1) of the Brussels Revision, and Articles 11^{ter}(1)(II), 14(1)(II) and 14^{bis}(2)(b) of the Paris Revision, of the Berne Convention.

- 2.1.5 The question whether a uniform approach to the satellite transmission of protected works is discernible for copyright purposes, covering both uplink and downlink and including any conversion on the satellite itself, or whether some of these operations require special authorization for copyright purposes has been answered on various occasions in various ways.
- 2.1.6 Which copyright applies to the transmission of programmes via direct satellite has not yet been clarified. Since an author, by virtue of the principle of territoriality, is in fact entitled to a bundle of territorially limited copyrights in respect of all those countries where he enjoys protection, a user of protected works must be granted a right of use for each country in which he performs a relevant act of use for copyright purposes. With conventional terrestrial broadcasting, such a relevant act of use is generally acknowledged to be carried out in the country in which the broadcast originates; the - sometimes not inconsiderable - spillover of the broadcast signals into neighbouring countries has been neglected as irrelevant for copyright purposes.
- 2.1.7 According to this approach the transmission of programmes via direct broadcasting satellite would only be subject to an authorization by the right owners in the broadcasting country and not by the right owners in the countries of reception. This can be justified on the ground that as regards copyright only the act

of transmission is relevant and the direct satellite must simply be considered an extended aerial in space, whereas in all other countries reception is simply free of copyright.

2.1.8 A more recent view, however, is that the relevant act of use for copyright purposes in the transmission of programmes via direct satellite takes place not only in the broadcasting country but at the same time in all those countries in which the programme signals are directly receivable. Consequently, any person intending to transmit programmes via a direct satellite would require authorization not only from right owners in the broadcasting country but from right owners in all the receiving countries. To protect authors it is sometimes proposed that the highest level of protection available at the time under the copyright system of the receiving countries should be applied, and sometimes that the law of the receiving countries should be applied only alternatively, where no, or only inadequate, protection exists in the broadcasting country.

2.1.9 For a long time this controversy was of theoretical interest only. Since the first direct satellites have started broadcasting - to be followed by a great many more in the foreseeable future - and since programmes transmitted via medium-power satellites can be received directly, the question of the relevant law has assumed central importance in the matter of the acquisition of rights. This is clear from those judgments which, contrary to the hitherto prevailing view, accept that copyright in the receiving country for which a terrestrial broadcast was intended has been infringed, and above all from the first-ever decision by a court regarding the copyrights affected by a direct satellite broadcast, i.e. the Vienna OLG's ruling that the accumulated copyrights of all receiving countries were affected (see 3.1.7).

2.1.10 Under the copyright laws of the Member States, authors appear to be granted the power to communicate protected works to the public not just terrestrially but via satellite as part of the broadcasting right. The copyright laws of France and Spain contain specific provisions concerning the beaming of protected works to a communications satellite (droit d'injection);^{8,9} the United Kingdom, following the 1988 copyright law amendment, also regards the diffusion of programme signals via communications satellites, which are "capable of being lawfully received by members of the public", as broadcasting activity.¹⁰ In the other Member States it is still apparently the position that only transmission of signals via direct satellite, but not the transmission of signals to a communications satellite, constitutes an act of broadcasting under copyright law. It is also unclear at national level whether in the case of diffusion by direct satellite only copyright in the broadcasting country or the copyrights in all receiving countries are affected.

Neighbouring rights

2.1.11 For historical reasons the protection of neighbouring rights, under the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, is less

8 Article 27(3) in conjunction with Article 45(3) of Law No 57-298 of 11 March 1957 on literary and artistic property, as amended by Law No 85-660 of 3 July 1985.

9 Article 20(2)(c) in conjunction with Article 36(2) of Law 22/1987 of 11 November 1987 on intellectual property.

10 Section 6(1)(a) and (2) of the Copyright, Designs and Patents Act 1988.

developed. Denmark, Germany, France, the United Kingdom, Italy and Luxembourg have acceded to the Convention, but not Belgium, Greece, the Netherlands, Spain or Portugal.

2.1.12 Performers are protected, under Article 7(1)(a) of the Rome Convention, against the broadcasting of their live performances only. If their performance, however, has been fixed with their consent on a phonogram, videogram or video-phonogram, their consent is not required for broadcasting of the fixation. If commercial phonograms are used for the broadcast either the performer, or the producer of the phonogram, or both, are at least entitled to equitable remuneration pursuant to Article 12. Apart from the fact that in this respect the Rome Convention leaves an option for the contracting States, the right to remuneration can be annulled either in part or in full by entering an appropriate reservation (Article 16(1)(a)). Thus, Denmark and Italy essentially exclude the right to remuneration with regard to transmission for non-commercial purposes only,¹¹ whereas by contrast, Luxembourg has entered a reservation with regard to the whole of Article 12.¹² Broadcasting organizations are protected, under Article 13(a) and (b) against the simultaneous use of parts of their transmissions in primary satellite broadcasts by the right to authorize rebroadcasting, and from deferred use by the right to authorize fixation of their broadcasts.

¹¹ See Copyright 1965, p. 214 (Denmark) and Copyright 1975, p. 44 (Italy).

¹² See Copyright 1976, p. 24.

- 2.1.13 At national level, however, there are many differences with regard to neighbouring rights.
- 2.1.14 Thus, first of all, neighbouring rights have not hitherto been protected by statute in Belgium, Greece and the Netherlands, although draft laws on this subject are currently being discussed in Belgium and the Netherlands. In the meantime, the courts in the Member States have granted protection to a certain extent on non-copyright grounds.
- 2.1.15 Where neighbouring rights have been protected by statute performers can prevent the broadcast of their live performances without their consent, in accordance with the international protection afforded by Article 7(1)(a) of the Rome Convention.¹³ The draft laws of Belgium and the Netherlands also confer such a right on performers.¹⁴ However, the rights which performers and/or producers of phonograms enjoy as regards direct use for the broadcasting of phonograms published for commercial purposes are regulated differently. Thus, Luxembourg and Portugal currently grant neither performers nor phonogram producers independent rights with regard to the use of phonograms for broadcasting purposes. By contrast, the United Kingdom and Ireland refuse independent rights

¹³ § 45(1)(b) of Law 158 on Copyright in literary and artistic works (Denmark); § 76(1) of the Urhebergesetz (UrhG) (Germany); Article 18(1) of Law No 85/660 (France); Section 182(1)(b) of the Copyright, Designs and Patents Act 1988 (United Kingdom); Section 5 of the Performers' Protection Act (Ireland); Article 80(1) of Law No 633 on the Protection of copyright and other rights associated with its exercise (Italy); Article 3(1)(a) of the Law on the Protection of performers, producers of phonograms and broadcasting organizations (Luxembourg); Article 178(a) of the Code on copyright and related rights (Portugal); Article 102(1) of Law 22/1987 (Spain).

¹⁴ See Article 51(1) of the draft Law on copyright, Documents du Sénat No 329-1 (1988) (Belgium), and Article 2(1)(b) of the draft Law on Neighbouring rights, Second Chamber, 1988-89, 21 244 (Netherlands).

regarding the use of phonograms for broadcasting purposes only to performers; but in both these Member States phonogram producers are entitled under copyright law to authorize the use of phonograms.¹⁵ On the other hand, in Germany,¹⁶ Denmark,¹⁷ France,¹⁸ Italy¹⁹ and Spain²⁰ both performers and producers of phonograms have a right to a share of an additional remuneration for the broadcasting of phonograms. Comparable rules are also provided for in the draft laws of Belgium and the Netherlands.²¹ However, the procedures for claiming the remuneration and the method of allocating remuneration between beneficiaries differ considerably in detail.

Lastly, broadcasting organizations are protected in all Member States which have statutory neighbouring rights or grant such organizations copyright protection, against the fixation and the rebroadcasting (see 2.2.2 for restrictions thereof) of their broadcasts.²²

¹⁵ Section 16(1)(d) and 20(b) of the Copyright, Designs and Patents Act 1988 (United Kingdom) and Section 17(1) and (4)(b) and (c) in conjunction with Section 2(3) of the Copyright Act 1963 (Ireland).

¹⁶ §§ 76(2) and 86 UrhG.

¹⁷ § 47 of Law 158 on Copyright in literary and artistic works.

¹⁸ Article 22(2) to (5) of Law No 85-660.

¹⁹ Articles 73 and 80(2) of Law No 633 on the Protection of copyright and other rights relating to its exercise.

²⁰ Articles 103 and 109(1) of Law 22/1987.

²¹ See Articles 56 and 61 of the draft Law on copyright, Documents du Sénat No 329-1 (1988) (Belgium), and Article 6 of the draft Law on Neighbouring rights, Second Chamber, 1988-89, 21 244 (Netherlands).

²² See § 48(1) of Law 158 of Copyright in literary and artistic works (Denmark); § 87(1)(1) and (2) UrhG (Germany); Article 27(1) of Law No 85-660 (France); Section 16(1)(a) and (d) in conjunction with Section 17(1) and (4) and Section 20(c) of the Copyright, Designs and Patents Act 1988 (United Kingdom); Section 19(1) and (5)(a), (b) and (d) of Copyright Act 1963 (Ireland); Article 79 of Law No 633 on the Protection of copyright and other rights relating to its exercise (Italy); Article 10(a) and (b) of the Law on the Protection of performers, producers of phonograms and broadcasting organizations (Luxembourg); Article 187(a) and (b) of the Code on Copyright and related rights (Portugal); Article 116(1)(a) and (b) of Law 22/1987 (Spain).

2.2 Rights affected by cable retransmission

Copyright

- 2.2.1 The transmission by cable of a programme broadcast either terrestrially or via direct broadcasting satellite (for the cable transmission of programme signals broadcast via telecommunications satellites, see 2.1.4) constitutes an independent act of broadcasting in accordance with Article 11 bis (2)(ii) of the Berne Convention. This qualification is valid for both a simultaneous and unchanged transmission of a programme broadcast and a deferred transmission thereof. Where the programme signals from the primary broadcast are retransmitted via cable networks in a country other than the primary broadcasting country, the national retransmission right in each individual country is affected by that retransmission. The only condition is that the signals are fed into the network by a party other than the primary broadcasting organization.
- 2.2.2 It has hitherto been argued that in order to qualify as a broadcast it should comply with an additional criterion, namely that cable retransmission must reach an additional audience vis-à-vis the primary broadcast. Retransmission within the national

service area or even within the direct reception area of commercial broadcaster would thus be admissible without the author's renewed consent and would not give rise to an entitlement to additional remuneration. The rebroadcasting right in Article 11^{bis}(1)(ii) of the Berne Convention just like the primary broadcasting right in (i) is subject to the possibilities of restriction provided for in Article 11^{bis}(2). It can therefore be made subject to exclusively collective management or even to a statutory licence.

- 2.2.3 Under the Member States' copyright laws, too, cable retransmission is subject to the author's consent.²³ Denmark has introduced a statutory licence with respect to the retransmission of domestic and foreign programmes broadcast terrestrially or via direct broadcasting satellite, but not via communications satellite.²⁴ In the United Kingdom²⁵ - and similarly in Ireland²⁶ - the law assumes that the cable retransmission of programmes which

²³ See §§ 15(2), 20 UrhG (Germany); Article 27 of Law No 57-298, as amended by Law No 85-660 (France); Section 16(1)(d), 20 in conjunction with Section 7, 178 of the Copyright, Designs and Patents Act 1988 (United Kingdom); Section 8(6)(e), 9(7)(d) and 18(4)(d) in conjunction with Section 2(3) Copyright Act 1963 (Ireland); Article 16 of Law No 633 on the Protection of Copyright and other rights relating to its exercise (Italy); Article 23(1)(2) of the Copyright Act of 29 March 1972 (Luxembourg); Article 68(2)(e) in conjunction with Article 153(3) of the Code on copyright and related rights (Portugal); Article 17 in conjunction with Article 20(2)(e) of Law 22/1987 (Spain).

²⁴ See § 22(a) and § 45(2) (compulsory licence for the rebroadcasting right of broadcasting organizations) of Law No 158 on Copyright in literary and artistic works, and § 11(a) of Law No 157 on the Right to photographic images.

²⁵ Section 73 of the Copyright, Designs and Patents Act 1988.

²⁶ Section 52(3) and (4) of the Copyright Act 1963.

network operators are obliged to retransmit under the legislation governing the media, as well as the retransmission of programmes within their intended reception area are classed as primary broadcasts, and as such do not need the special consent of right owners. This does not apply to the retransmission of satellite broadcasts.

Neighbouring rights

2.2.4 By contrast, the Rome Convention does not deal with the retransmission of primary broadcast signals in an international context. The rules of the Convention only afford protection against the rebroadcasting by wireless means (see Article 3(f) and (g) not covering a retransmission by wire. Even if a cable retransmission should be considered as "communication to the public" within the meaning of the Rome Convention, the simultaneous, unaltered cable retransmission which is the only form considered in this discussion paper would not affect any of the entitlements conferred by the Rome Convention: Article 7(1)(a) thereof does not protect performers where communication to the public uses a performance that has already been broadcast; the right to remuneration for the use of phonograms provided for in Article 12 provides that phonograms shall be used "direct" for broadcasting purposes; and, finally, broadcasting organizations are protected only against the retransmission of their broadcasts by wireless means (Article 13(a) in conjunction with Article 3(g)).

2.2.5 However, under Article 1(1)(b) of the 1960 European Convention on the Protection of Television Broadcasts, whose signatories include Belgium, Denmark, Germany, France, the United Kingdom and Spain, broadcasting organizations are also protected against the retransmission of their broadcasts by wire. The United Kingdom, however, has excluded such protection generally by entering a reservation; Belgium has excluded the protection only for Belgian broadcasting organizations and restricted the

protection of foreign broadcasting organizations to 50% of the weekly broadcasting time.

2.2.6 Of very minor importance in this respect is the 1974 Convention relating to the distribution of programme-carrying signals transmitted by satellite, to which of the Member States only Germany and Italy have so far acceded. The Convention provides protection only against unauthorized "tapping" of programme-carrying signals not intended for reception by the general public and hence essentially only against unauthorized reception of point-to-point broadcasts via satellite. Broadcasts which are transmitted via satellite direct to the public are specifically excluded from the protection of the Convention under Article 3.

2.2.7 By contrast, the Member States' legislation on copyright or neighbouring rights frequently grants, in this respect, a level of protection that exceeds the minimum provided for in international law. Thus, in particular, broadcasting organizations in many Member States, e.g. in Germany,²⁷ France,²⁸ the United Kingdom²⁹ or Spain³⁰ are protected not only against wireless retransmission of their broadcasts but as well, in principle, against any retransmission by wire. As regards neighbouring rights for performers the disparities are relatively large:

²⁷ § 87(1)(1) in conjunction with § 20 of UrhG.

²⁸ Article 27(1) of Law No 85-660 in conjunction with Article 27 of Law No 57-298 as amended by Law No 85-660.

²⁹ Sections 16(1)(d) and 20(c) of the Copyright, Designs and Patents Act 1988.

³⁰ Article 116(1)(a) of Law 22/1987.

In certain Member States, such as Germany,³¹ France³² or Spain,³³ their right also includes the right to authorize the retransmission of their performance - It is sometimes presumed that such authorization is granted when authorization is given to broadcast a performance or fix it on a videogram or audio-videogram - while in other countries, such as recently the United Kingdom,³⁴ rebroadcasting is specifically exempt. If a commercial phonogram is used for the primary broadcast, the laws of the Member States frequently also grant performers and/or producers of phonograms a right to remuneration for the retransmission of that broadcast³⁵ in addition to the minimum protection in the Rome Convention; the United Kingdom and Ireland even grant an independent right to authorize the retransmission of the broadcast.³⁶

- 2.2.8 The different degree of protection should hardly influence the cable retransmission of programmes across borders and can therefore from the point of view of the Community be disregarded for the purposes of the present objectives. For the time being, a harmonization in this field will not be proposed.

³¹ See § 76, UrhG.

³² Article 18(1) of Law No 85-660.

³³ Article 101(1) of Law 22/1987.

³⁴ See Sections 182 and 183 of the Copyright, Designs and Patents Act 1988.

³⁵ See for instance, §§ 76(2) and 86 in conjunction with § 20 UrhG (Germany) or Article 103 in conjunction with Article 20(2)(d) and (e) of Law 22/1987 (Spain).

³⁶ Sections 16(1)(d), and 20(b) of the Copyright, Designs and Patents Act 1988 (United Kingdom) and Section 17(1), (4)(b) and (c) in conjunction with Section 2(3) of the Copyright Act 1963 (Ireland).

3. Economic interests and rights acquisition in practice

3.1 Transmission of programmes via satellite

3.1.1 The transmission of programmes via satellite, is a primary broadcasting activity. The broadcaster is therefore in a position to plan the content of his programme in advance, in the same way as somebody who transmits his programme terrestrially. Like the latter, he acquires the necessary rights for this purpose, in respect of each individual component that he intends to include in his programme, from the right owners or their successors. Conditions and remuneration are negotiated separately in each case. The acquisition of some categories of rights - in particular "petits droits" - for a transmission of programmes via satellite is facilitated by the fact that such rights are no longer exercised individually but collectively by collecting societies. The legal framework in which collecting societies operate is very different in each Member State. To compensate for their de jure or de facto monopoly, these societies are sometimes obliged to grant, on appropriate terms, the rights of use subject to their management.³⁷ Sometimes the national rules provide that contracts concluded by a society representing an adequate number of right owners of a certain category may also be extended to outsiders not represented by that society.³⁸ From an economic point of view, the transmission of programmes via satellite differs from a conventional, terrestrial programme transmission in that it covers the territory of several States.

³⁷ See, for instance, § 11(1) of the German Law on the Exercise of copyright and neighbouring rights of 9 September 1965.

³⁸ See § 22(1) of the Danish Law No. 158 on Copyright in literary and artistic works.

3.1.2 To date, a distinction between communications and direct satellites is still made in contracts for the acquisition of the necessary rights for transmitting programmes via satellite.

Contracting in the case of communications satellites

3.1.3 In those Member States where, as yet, the transmission of protected works via communications satellite does not as such constitute a relevant act of use for copyright purposes (see 2.1.4 and 2.1.10), there is accordingly no need to acquire broadcasting rights. In France and Spain, which grant an independent feed-in right (droit d'injection), a person intending to transmit programmes via communications satellite must have the author's consent; the acquisition of this right is facilitated by a legal presumption to the effect that a broadcaster who has been granted the right to broadcast a work terrestrially is assumed to have equally acquired the right to broadcast via satellite. Only in the United Kingdom is no distinction made between a terrestrial broadcast, a broadcast via direct broadcasting satellite or via communications satellite. The broadcaster is obliged to acquire broadcasting rights in each of these three situations.

3.1.4 In current contracting practice, this difference is, at most, of secondary importance only. Even where the simple beaming of signals to a communications satellite is considered irrelevant for copyright purposes, a person intending to transmit a programme via satellite still acquires copyright in practice not for the transmission via satellite but for the subsequent retransmission of his programme by cable networks, which in itself constitutes a use of copyright.

According to current contractual practice the satellite broadcaster acquires the rights to cable retransmission in all those Member States where his programme is retransmitted by cable. The satellite broadcaster only acquires those rights on behalf of the cable operators, because only they are responsible for the retransmission under copyright law. However, the position of network operators in negotiations is strong enough to refuse to feed in a programme that has been transmitted via satellite if it is not "supplied" free of copyright, see 3.2.14 ff.. Mostly, such contracts include a clause to the effect that the broadcaster is entitled to "transmit the works concerned via communications satellite", but usually exclude the transmission of signals for direct reception; in practice, additional remuneration is paid for potential individual reception, if necessary, even where a programme is transmitted via communications satellite. In addition to negotiating with the owners of the cable rights in countries receiving the broadcast signals, a person intending to transmit a programme via communications satellite may well also have to negotiate in the broadcasting country with right owners over television, film and reproduction rights. Such contracts will eventually also grant the necessary right to broadcast the programme signals via communications satellite.

Contracting in the case of direct satellites

3.1.5 As regards the transmission of programmes via direct satellite, no prevailing contracting practice has yet emerged, and for two reasons. First, most such contracts have been negotiated in the last two years only; second, it is still not clear whether a transmission of protected works via direct broadcasting satellite only affects copyright in the broadcasting country or whether, at the same time, copyrights in all the receiving countries are

affected and must therefore be acquired by the broadcaster. Above all, national broadcasting organizations often argue that the direct satellite transmission of programmes must be considered a purely national broadcast, for which they have already acquired the broadcasting rights under the original broadcasting contract.

3.1.6 From the satellite broadcaster's viewpoint, moreover, a clear determination of rights necessary for a satellite broadcast has not -yet- seemed imperative, since - like the person intending to transmit a programme via communications satellite - he has so far acquired simultaneously cable rights in the individual receiving countries. Whenever he acquires such rights from the same right owners, who procured for him the direct reception broadcasting right in the country concerned, the remuneration can be calculated from the number of viewers actually reachable, whether direct or via cable. In this case a contract must not necessarily determine if a separate broadcasting right for satellite transmission has been granted, the scope of the contractual authorization being circumscribed as the right to carry out all broadcasting and retransmission activities relating to the transmission of the programme via a particular satellite, including subsequent cable retransmission.

3.1.7 This is above all the case with "petits droits," which as a rule are managed, both for the primary broadcast and for the cable retransmission, by the same collecting society. By contrast, broadcasters, when acquiring national cable rights for economically more important film productions, will probably not always negotiate with the same right owners from whom they would have to acquire the national broadcasting rights for direct reception. The problem also arises where the programme can be received direct in a receiving country and the broadcaster is not interested in acquiring cable rights himself.

A similar case was dealt with by the Vienna Court of Appeal in its judgement of 30 November 1989. A German rightholder had asked the court to confirm that he alone was entitled, on the basis of his right, to authorize a broadcast by direct broadcasting satellite from German territory. The Vienna Court of Appeal, like the court of first instance however, ruled in favour of the Austrian right-owner in the same work and dismissed the claim of the German right-owner. According to the Court, which applied Austrian law, in the case of a transmission of protected works via satellite the copyrights of all the countries "in which the broadcast can lawfully be received" are jointly relevant. As a result, the German satellite programme supplier must negotiate not only with the right owner in Germany but also with the right owner in Austria; but he may not be sure whether in the opinion of the courts in the other countries in the footprint he will have to negotiate with right owners there as well. This uncertainty will probably complicate negotiations considerably.

- 3.1.8 Even where a broadcaster actually wanted to acquire the rights in all receiving countries, however, it would still be difficult to decide in which countries the programme signals could in fact be received directly. A satellite broadcast beamed at western Europe may also be receivable in eastern Europe and parts of Scandinavia - albeit with more expensive aerials. With recent satellite technology, footprints are becoming more sharply defined, but the edges are still blurred. Reception towards the margin requires increasingly large and more powerful aerials. In the

circumstances, it is difficult for a broadcaster to determine exactly where the public can receive direct and where not. Furthermore, in countries on the edge of the footprint, it may be possible to receive a broadcast on part of the national territory only. Accordingly, there are no readily usable criteria for deciding as regards copyright what should still be disregarded as spillover and what is a significant level of reception. The discussion of an analogous problem, namely the designation of direct reception areas of terrestrial transmitters for copyright purposes, has long and for good reasons been abandoned as fruitless. Finally, it has been suggested that the countries for which the satellite broadcast was "intended" should be regarded as the receiving countries for copyright purposes. There are two points about such a proposal: first, a programme financed by advertising will probably always be directed at those viewers whom the advertiser is keen to reach, irrespective of where they reside. Secondly, a programme supplier could probably not accurately predict which of the many possible criteria - language, public targeted by the commercials, content of news - would be applied by a court hearing an infringement claim in one of the many receiving countries in order to decide in which country reception was "intended".

- 3.1.9 Clearly, a person intending to transmit programmes via satellite across borders has a considerable interest in avoiding such problems and, merely to save time and money, would wish where possible to negotiate with only one owner of territorial

rights to the components of his programme. There is another problem, too. With the conventional transmission of programmes via communications satellite, and medium-power satellite (regarded as equivalent to the former for copyright purposes), the only consequence of a failure of negotiations with one of the right owners in one of the receiving countries is that cable retransmission in that country can no longer take place. In the case of direct broadcasting satellites, however, a failure at negotiations, with even one of the right owners in one of the receiving countries, means that the entire satellite transmission is obstructed. Thus, where the copyrights of all receiving countries are relevant together, only the broadcaster has to bear the negative consequences of a territorial fragmentation of rights.

3.1.10 Right owners, on the other hand, fear that if only the copyright of the broadcasting country is to be relevant, sufficient consideration will not be given to their protection where the law of the broadcasting country does not provide, or provides only inadequate, protection for certain categories of works which are protected in the receiving countries. Where there is no protection, the transmission via direct satellite from that country would require neither the consent of right owners nor the payment of remuneration, but would lead to a use of the work reserved to right owners in all the receiving countries. Of course, given the current situation regarding rights in the Community, this could only happen in the case of owners of neighbouring rights, who to date enjoy no protection in a number of Member States. Cases where the level of protection in the broadcasting country is lower may well be more numerous, even if they do not have quite such serious consequences in practice. If the law of the broadcasting country does confer protection in principle, but makes a primary broadcast via direct satellite subject to a statutory licence,

right owners in the entire footprint are prevented from deciding how their works will be exploited and simply receive remuneration that has been fixed by the competent authority in the broadcasting country. Even if the law of the broadcasting country were to confer protection for all works, it is feared that remuneration could be determined with too much reference to the national peculiarities in the broadcasting country and too little to the number of viewers that can actually be reached and the level of remuneration to be attained in each receiving country for the corresponding use of the work. In addition to these matters of common concern to all right owners, there are, depending on the category and organization of right owners, a number of further misgivings at the idea that only the copyright of the broadcasting country might be relevant, e.g. the interest that every national collecting society has in retaining parts of its receipts for social and cultural contributions.

3.2 Retransmission of programmes via cable

Acquisition of retransmission rights for terrestrially broadcast programmes

- 3.2.1 After, in most cases, several years of no-charge, simultaneous, unaltered cable retransmission of terrestrially broadcast programmes, the parties involved - frequently following clarification by a court of the impact on copyright of so doing - have been prepared in practice, to settle the acquisition of rights by contract in most Member States.

3.2.2 One reason for this is the general consensus that has since emerged that the rights to simultaneous, unaltered cable retransmission, on account of its dependence on the primary broadcast, cannot - unlike the rights to a primary broadcast itself - be acquired by a network operator on an individual basis: the network operator cannot himself determine the content of the programmes which he relays. Instead, rights are in practice acquired collectively and for a lump sum. Collectively, because each network operator no longer deals with individual right owners but - in accordance with the CISAC (Confédération Internationale des Sociétés d'Auteurs et de Compositeurs), EBU (Union Européenne de Radiodiffusion), FIAPF (Fédération Internationale des Associations des producteurs de Films) and FIAD (Fédération Internationale des Associations des Distributeurs de Films) model contract drawn up in 1981 - with the three groups of possible right-owners: the broadcasters (who in general hold both their own rights and rights ceded to them, in house productions, commissioned productions and co-productions), organizations representing the film rights owners -AGICOA and national film collecting societies- (Association de Gestion Internationale Collective des Oeuvres Audiovisuelles) and finally collecting societies for other categories of rights. For a lump sum, since retransmission rights are not granted for individual works, but for all protected works contained in programmes subject to the contract for a specified period. The same applies as regards film works contained in terrestrial programmes.

3.2.3 Right owners are free to determine to which programmes the authorization to retransmit shall apply. Hitherto authorization has usually covered the retransmission of television and radio programmes from neighbouring countries; This cannot as such be considered to prejudice primary television broadcasting in the neighbouring country. Admittedly, the remuneration which right owners receive per viewer for primary television broadcast is in most cases many times higher than the remuneration per reachable viewer for cable retransmission. Since the actual audience

for foreign-language films, which cannot be dubbed or given subtitles in simultaneous, cross-border retransmission, is very low, however, the price secured per viewer actually reached by the cable retransmission is virtually the same as that in the case of the primary television broadcast. Because of the relatively low audience figure, it will hardly limit the market for a dubbed/subtitled primary television transmission at all. This might be different at most where programmes are retransmitted across borders within a single linguistic area. For instance, the exclusive exploitation of a film, geographically or over time, might be affected by cable transmission in a given country, or, in particular, existing agreements concerning the deferred exploitation of films might be affected. The parties involved, however, including the owners of film rights, have so far apparently not had any problems in this respect.

- 3.2.4 Appropriate contracts involving all groups of right owners simultaneously (general contracts) have so far been concluded by the parties involved in Belgium, Germany and the Netherlands. A similar agreement has been negotiated in Luxembourg by the parties involved, but has not yet been signed by all the cable operators. Remuneration is paid either on the basis of the subscription fee per subscriber (Belgium),³⁹ possibly also graduated according to the number of programmes relayed (Netherlands),⁴⁰ or, on the argument that the network is in an installation and expansion

³⁹ i.e. BFR 436, calculated as 15% of the subscription fee for a maximum of 18 programmes.

⁴⁰ i.e. HFL 3.07 per subscriber quarterly for the relay of up to five foreign programmes, HFL 4.07 for six to ten programmes and HFL 5.17 for more than ten up to a maximum of fifteen programmes. That Dutch programmes are not included in working out the remuneration, although the Dutch courts have ruled that the allocation of remuneration is also to take account of the protected works contained in them, is explained by the compromise reached over relaying within the same service area.

phase, as a lump sum (Germany).⁴¹ In France, however, the collecting societies, representatives of film rights owners and some broadcasting organizations have each concluded special contracts which provide for remuneration on the basis of the network operators' receipts.⁴² It is not certain, however, that this actually covers all the necessary rights for all networks. From the network operator's viewpoint, at any rate, the lack of a general contract has the disadvantage that retransmission can begin only after all the individual contracts have been concluded and that only then is the total amount of the remuneration established that has to be paid as compensation for the rights. In the United Kingdom and Ireland, network operators are exempted by law from obtaining authorization for feeding in most national programmes;⁴³ In Ireland, at any rate, some right owners have in the meantime begun to assert their rights with regard to the retransmission under foreign programmes and sue for remuneration of copyright law.

- 3.2.5 The contractual acquisition of rights does not exist where the law provides for a statutory licence. Finally, in Greece, Italy, Portugal and Spain there is currently no cable retransmission on a significant scale.

⁴¹ DM 63 million for the period 1989-91.

⁴² In the case of collecting societies, 3.75% of receipts from subscriptions and other donations and 4.75% of the gross receipts from advertising and other services less a lump-sum deduction for the compensation for use which the cable operator collects from subscribers on behalf of the Post Authority as the network carrier.

⁴³ See Section 73 of the Copyright, Designs and Patents Act 1988 and Section 52(3) and (4) of Ireland's Copyright Act 1963.

- 3.2.6 Whether or not the cable retransmission of programmes within the service area of the primary terrestrial broadcaster is exempted from the need to obtain copyright clearance - is a question which continues to be controversial in some Member States. In those Member States where there are, unlike the United Kingdom and Ireland, no specific rules, the problem is only considered when allocating the remuneration. Individual groups of right owners behave very differently in this respect.
- 3.2.7 This type of collective acquisition of rights - in the form of a general contract in most cases - has largely managed to solve the initial problems associated with the acquisition of rights to simultaneous, unaltered cable retransmission of terrestrially broadcast programmes. Basically, though, two problems still remain, which may jeopardize the retransmission of national programmes and the cross-border retransmission of programmes from other Member States.
- 3.2.8 The first potential threat is that, when conducting new negotiations, the parties may not be able to agree in time to modify or continue the existing contract. This may be the result of differing opinions as to the amount and composition of the remuneration or, more recently, as to the inclusion of new, satellite-broadcast programmes. Thus, in Belgium and the Netherlands it has so far only been possible to reach agreement on a one to two-year temporary extension of the original contract. Moreover, suppliers of new terrestrially broadcast programmes sometimes

encounter difficulties in being included in these general contracts, which are created by those who are already parties to them.

3.2.9 Secondly, the idea underlying general contracts at least is that the parties to them should be the owners of all rights, thus dispensing with the need for detailed proof of title. Yet network operators can never be sure that outsiders will not claim individually a right to authorize the retransmission (the "outsider problem"). Although the right owners party to a contract do undertake to indemnify network operators against claims by third parties whose rights fall within the category of rights managed or represented by them, such an arrangement gives network operators partial protection only. For one thing, the indemnity clause is limited to the amount which the outsider, had he been represented when the contract was concluded, could have claimed as his share of the total remuneration under the contract. Whether this is enough to cover the damages a network operator may have to pay, plus any legal costs, is doubtful. Indemnification protects only against damages claims, and not against injunctions preventing a retransmission or criminal sanctions. The network operator is anyway wholly unprotected against claims by those right owners whose categories of rights were not represented by any of the groups of right owners involved in the conclusion of the contract.

3.2.10 When an action is brought seeking a restraining action against a network operator, the operator is faced with the dilemma of whether to satisfy the claim and interrupt the retransmission, to the annoyance of his subscribers, or whether to run the risk of rendering himself liable to damages.

3.2.11 A series of such cases has been reported in Belgium and the Netherlands; actions were brought against network operators among other things because right owners disputed whether one group of them had been represented in the negotiation of the general contract by the other or whether, as outsiders to the contract, they had a claim on the network operator. No cases of claims on the part of outsiders have been reported so far from the other Member States.

3.2.12 In view of the outsider problem, it has been found advisable in several countries, both in and outside the Community, to regulate the acquisition of rights in legislation. Denmark⁴⁴ and Austria,⁴⁵ for instance, have both introduced a statutory licence in order to avoid anticipated negotiating difficulties in addition to the outsider problem. Switzerland is planning to do likewise, having hitherto been content to confine the collective use of cable retransmission rights to authorized collecting societies,⁴⁶ while Norway, Sweden and Finland have excluded individual claims by extending by law general agreements with respect to cable retransmissions to outsiders.⁴⁷

44 § 22a and §45(2) (Compulsory licence regarding the rebroadcasting rights of broadcasting organizations) of Law No. 158 on Copyright in literary and artistic works, and § 11a of Law No. 157 on the Right in photographic images.

45 §§ 59a and b of the Austrian Copyright Act.

46 See Article 21 of the Federal Council Bill of 19 June 1989, BBl. 1989 III 616 ff.

47 For details, see Article 20a of the Norwegian, Article 22d of the Swedish and Article 22a of the Finnish Copyright Acts.

For the same reason, the German Government recently proposed that for the collective management an obligation of retransmission rights by collecting societies should be introduced.⁴⁸ Finally, the International copyright section of the ALAI (Association Littéraire et Artistique Internationale) has come out in favour of a framework for the acquisition of rights - either in the form of an extension of general agreements or in the form of an obligatory collective management by collecting societies.⁴⁹

Acquisition of the retransmission rights to programmes broadcast via satellite

- 3.2.13 Where programmes broadcast via satellite are retransmitted over cable networks it is necessary to acquire the national cable rights irrespective of the copyright arrangements for broadcasting the programme signals via satellite: the copyright situation as regards retransmission is settled by the network operator where the network is located. There is thus no difference in law from the cable retransmission of terrestrial programmes.
- 3.2.14 Economically, however, the acquisition of rights has taken a different course. In contrast to the retransmission of terrestrial programmes, the cable rights in this case are not usually acquired by the network operator himself, but by the satellite broadcaster.
- 3.2.15 This form of rights acquisition could be described as "semi-centralized". Centralized, because the satellite broadcaster acquires the cable retransmission rights on behalf of all network

⁴⁸ See the Report on the effects of the 1985 copyright amendment, 7 July 1989, Bundestagsdrucksache 11/4929, p. 39.

⁴⁹ See the Amsterdam Resolution of 1982, Copyright 1982, p. 318.

operators in a country where his programme signals are received; but only "semi-centralized" since he must negotiate with right owners in each country separately in which his programme that was originally broadcast by satellite is to be retransmitted via cable. Only in exceptional cases is acquisition completely centralized, i.e. the satellite broadcaster negotiates with only one right owner over a certain category of rights on behalf of all network operators in all countries in which his programme is to be retransmitted via cable. Thus, in particular the national societies, which safeguard the rights of phonogram producers, have entrusted the IFPI (International Federation of the Phonographic Industry) with the central granting of cable retransmission rights. The central acquisition of cable retransmission rights to films for which the rights in respect of individual areas in the footprint have not yet been granted separately is conceivable.

- 3.2.16 Where the acquisition of cable retransmission rights by the satellite broadcaster is not required by legislation, as it is in the United Kingdom, the current contractual practice of vicarious acquisition is explained by economic reasons. The satellite broadcaster, in order to secure the financing of his programme, must make sure that his programme - and the advertising contained therein - reaches as wide an audience as possible. Network operators, on the other hand, will not be inclined to feed in extra programmes broadcast by satellite and pitched mostly at specific audiences, if they have to pay higher copyright fees than they already pay for the retransmission of terrestrial programmes (see 3.2.4). Broadcasters will want the satellite programme to reach as wide an audience as possible for financing reasons, since this alone will increase his revenue from advertising. On the other hand network operators are mostly not inclined to pay higher copyright fees than they would for retransmitting terrestrial programmes (see 3.2.4). In order to carry extra programmes broadcast by satellite and pitched mostly at specific audiences. In some Member States legislation does not allow for them to pass

on this charge to subscribers. Furthermore, from an economic viewpoint, increased subscription charges may lead to a loss of subscribers, which could exceed the number of those wanting to subscribe on account of the increased supply, particularly since the feeding of satellite programmes into networks which are already fully utilized does not increase the number of programmes supplied but at best results in their partial substitution.

3.2.17 The current practice of vicarious acquisition may relieve network operators themselves from negotiating with right owners over rights that are essential for the cable retransmission of satellite broadcast programmes. It is a risky undertaking, however, since the operator is still liable under copyright for the retransmission of programme signals broadcast via satellite. Thus, network operators have proposed that their liability should at most be alternative only. Another conceivable arrangement would be to include satellite broadcast programmes in general contracts for the retransmission of terrestrial programmes: as well as ensuring that cable rights are acquired, this would have the added advantage that the remuneration for all retransmitted programmes could be calculated on a uniform basis. So far, Denmark has facilitated the acquisition of the necessary rights for the cable retransmission of direct satellite broadcasts by introducing a statutory licence;⁵⁰

⁵⁰ § 22a of Law 158 on Copyright in literary and artistic works, § 11a of Law 157 on the Right in photographic images.

as regards the retransmission of programmes broadcast from the United Kingdom via communications or direct broadcasting satellite, the United Kingdom exempts network operators from copyright claims brought by owners of the rights to the retransmitted programmes - with the exception of claims by the broadcaster.⁵¹

3.2.18 In all other Member States, however, the network operator, as is already the case with the retransmission of terrestrial programmes, is liable to claims by individual outsiders. The risk of legal action is all the greater for him, since it is not automatically within his control whether the satellite broadcaster fulfills his obligation to acquire all rights and regularly pays the remuneration due. In particular, the authority given to AGICOA (Association de Gestion Internationale Collective des Oeuvres Audiovisuelles), which manages the cable retransmission rights to terrestrially broadcast programmes on behalf of a number of film producers, has so far not simultaneously covered the cable retransmission rights to programmes broadcast initially by satellite. These rights still belong to each individual producer or his successor and can be exercised by them separately.

3.2.19 To sum up, what is particularly striking is that there is still a distinction in copyright, based on that in telecommunications law, between communications and direct satellites, despite the fact that it is possible today to get affordable individual reception from both types of satellite. Furthermore, there is great uncertainty in practice as to the copyright rules which apply to direct satellite broadcasting. This means that the broadcasting of

⁵¹ Section 73 in conjunction with Section 6(1) and (4) of the Copyright, Designs and Patents Act 1988.

programmes is treated differently according to the technical means employed and that direct broadcasting by satellite is complicated unnecessarily.

3.2.20 The rights which a network operator must acquire if he wants to retransmit terrestrial or satellite broadcast programmes simultaneously, unaltered and unabridged via cable can, because of the dependence on the primary broadcast, appropriately be acquired only for a lump sum through collecting societies. Irrespective of whether the network operator himself acquires such rights or whether they are already acquired by the satellite broadcaster on behalf of network operators, as is most often the case in current contracting practice with regard to the retransmission of satellite broadcasts, this acquisition of rights is not complete in all respects. The occasional attempt is still made to assert rights individually. Although retransmission rights are now largely acquired collectively and for a lump sum, this may jeopardize cross-border broadcasting and, hence, prejudice the achievement of a European audiovisual area.

4. Proposed solutions

4.0 In this section, proposals are made for solving the copyright problems associated with two different events: the primary broadcast transmitted via satellite, and the retransmission via cable.

4.1 The broadcasting of programmes via satellite

Granting a broadcasting right for programmes transmitted by satellite

- 4.1.1 The traditional copyright concept of broadcasting means the communication of a work to the public. What counts is simply that the programme signals are made accessible to the public. The means used by a broadcasting organization to transmit signals and the classification in telecommunications law of the respective means of broadcasting are of no significance as regards copyright.
- 4.1.2 Of course, broadcasts can always be differentiated according to whether they are transmitted via satellites operating on frequencies which under telecommunications law allow reception by the public (direct satellites) or which are reserved for closed, point-to-point communication (low and medium-power communications satellites). But because of major changes in satellite and aerial technology, medium-power satellites can now be used like direct satellites for direct reception. Even the signals broadcast via traditional low-power communication satellites have in the meantime become directly receivable at affordable aerial prices. Direct individual reception of this kind is being aimed at by the broadcasters' on a wide scale and is generally authorized by national post and telecommunications authorities.
- 4.1.3 It would no longer seem justified, therefore, in either right owners', broadcasters' or viewers' eyes to exclude an activity which can be described as a broadcasting process from the application of copyright simply because it uses technology that was

originally reserved under telecommunications law for closed point-to-point communication.

- 4.1.4 For this reason, the broadcasting of programme signals via a communications satellite should as far as copyright and neighbouring rights are concerned be put on the same footing as broadcasting by direct satellite, provided it is comparable to the latter in terms of direct reception and the broadcasting of the programme signals can be regarded as communication to the public. A communication to the public also occurs where the signals are encrypted and decoders are provided by the broadcaster himself or with his approval by third parties to the public. Further, it is irrelevant whether the signal is received by individual or communal aerial or by a cable operator who then carries out a further exploitative act, in the form of the subsequent cable retransmission, that is as such relevant for copyright purposes.
- 4.1.5 The solution proposed here guarantees that a programme broadcast by direct or communications satellite will be treated equally with one that is broadcast by the traditional means of Hertzian waves or cable.
- 4.1.6 Such equal treatment improves the protection of right owners at the same time. Hitherto, these have been specifically granted an independent feed-in right (droit d'injection) in France and Spain only, and a genuine broadcasting right with regard to the transmission of their works via communications satellite in the United Kingdom only.⁵² The equal treatment of communications and direct satellite broadcasting proposed here does not pursue the idea of a simple feed-in right, but is intended to grant right

⁵² See 2.1.10 above.

owners the right to communicate their works to the public, including in future an independent broadcasting right as regards the transmission of works via communications satellite. It may be reserved for the Member States to determine how the right to broadcast protected works via satellite relates to the traditional broadcasting right of transmitting works by wireless means or by wire, granted by national copyright laws. The question of the interpretation of existing contracts in which a "broadcasting right" is granted in quite general terms is not prejudiced by the equal treatment of broadcasting protected works and performances via communications satellite with that via direct satellite proposed here.

- 4.1.7 As a result of equal treatment, only such contracts in which a direct broadcast to the public was previously excluded from the assignment of rights would in practice have to be clarified; it would have to be made clear that the right to broadcast via satellites operating on communications frequencies includes the right to make the licensed works available to those who receive the signals direct. The essentials remain unchanged by this, as direct reception of signals emitted in uncoded unencrypted form via communications satellite is already authorized by right owners - against additional payment where necessary - or at any rate tolerated.

The relevant act of broadcasting

- 4.1.8 With the broadcasting of programmes via satellite the intention is to communicate protected works to the public in a single act. Leaving aside the technically necessary modulation, the signals are conveyed to the public unaltered. The satellite appears as

as an extended transmitter in space and consequently simply as one of the links in the uninterrupted chain of equipment used for the broadcast.

4.1.9 It seems appropriate to see this as a single broadcasting act for copyright purposes and not to divide it up into several exploiting operations. But - and this is something which, in the Commission's view, ought to be made clear - this applies only if the chain of broadcasting equipment, from the person responsible for the content and emission of the directly receivable programme signals (the broadcaster) to the satellite from which the directly receivable programme-carrying signals are broadcast to the public, is uninterrupted.

4.1.10 Accepting the satellite transmission of programmes as a single broadcasting act does not mean, however, that activities carried out prior to that act, such as the manufacture of the tape necessary for the broadcast, would no longer be the subject of separate copyright assessment. The same applies to those activities which are carried out following the actual act of reception, such as the public showing or cable retransmission of satellite broadcast programmes.

4.1.11 For the rest, the above discussion is essentially a clarification of something on which there already seems to be, in theory and practice, a large measure of consensus.

The national copyright relevant to a satellite broadcast

Relevance

4.1.12 Where a programme is broadcast by a satellite which can be received directly in several states, as we have already seen in 2.1.6 ff., it is not at the present time clear whether for copyright purposes the broadcast should be said to take place only in the state in which the programme originates, or whether it should be said to take place simultaneously wherever the signals can be received directly. In other words it is not settled whether it is only the copyright law of the country from which the programme is broadcast which is relevant, or whether the copyright laws of all the countries of reception are relevant together.

4.1.13 For the sake of clarity in the language used it should be said at the outset that the question of the relevant or applicable law addressed here is concerned only with identifying the state or states in which cross-border broadcasting constitutes use of the work for copyright purposes, and consequently requires the consent of the right owner; it is a substantive issue to be settled in the national copyright laws of the Member States. It must be distinguished from the question of the applicable law for purposes of private international law. The problem there is which state's copyright law a national court is to apply to any case of infringement coming before it. In practice the answer to both questions will frequently be the same, since in both cases considerable weight attaches to the place with which the act of use is most closely connected. It should be emphasized, however, that it is the law which is relevant, in the substantive sense, which is discussed in this paper, and not the law which is applicable under private international law.

4.1.14 The legal uncertainty as to whether a broadcaster must acquire copyright and neighbouring rights for the components in his programme only in a single state, or in all states in which the

signals can be directly received, limits the possibilities for cross-border broadcasting. As long as there is even one Member State which accepts that the broadcasting rights of all receiving states are relevant at once, the owners of the national rights of use in other Member States are prevented from themselves authorizing a broadcast via a satellite whose footprint includes that particular Member State. And a broadcaster who has acquired the relevant right of use in a Member State which takes it that only one national law is relevant can never be certain that he is not committing an infringement of copyright in one of the states in which the broadcast is received. The question must therefore be clarified within the Community, as a matter of urgency, in order to strengthen the single audiovisual area. This is the more so not only because direct broadcasting satellites are beginning operations at the present time but also because under the arrangement proposed here no distinction is in future to be made between communications satellites and direct broadcasting satellites (see 4.1.4).

4.1.15 However, to accept that where a programme is broadcast by satellite the relevant law is not just the law of the country where the broadcast originates, but rather the laws of all the countries of reception at once, would have serious disadvantages from the point of view of the Community.

4.1.16 A person wishing to broadcast a programme by satellite would have to negotiate separately with the right owners in all the states within the footprint. Given the duration of contracts, which is often very short, it would be difficult to coordinate timing. This could result in doubt and delay, since broadcasting could begin only once the last contract had been concluded. By then the time for renewal of the contract which was concluded first might already

be close. And the number of agreements to be concluded separately would make it difficult to calculate the overall expenditure on the acquisition of the rights.

- 4.1.17 It is true that in the past a person wishing to broadcast a programme by satellite already had to negotiate separately with the right owners in each state. But as he had to acquire only the national cable rights for the retransmission of a transmission by communications satellite which was not itself considered relevant for copyright purposes, the failure of negotiations in any one country meant only that cable retransmission could not take place in that Member State.
- 4.1.18 If programme transmission by communications satellite and by direct satellite are placed on the same footing, as proposed here (see 4.1.4), the failure of negotiations in even one country would mean that the satellite broadcast could not take place at all. When contracts had to be renewed, failure to secure transfer of rights even in a single Member State might endanger the continuation of the whole programme. In view of the enormous initial investment by the broadcaster this is hard to reconcile with the need to facilitate Community-wide programme production in a single audiovisual area.
- 4.1.19 A result similar to that which would follow if only one system of law were to be held relevant could be achieved through an arrangement whereby the contractual acquisition of rights would be centralized in all respects.
- 4.1.20 There are rights which are already acquired centrally under present practice, in respect of programme transmission by communications satellite and the subsequent feeding into cable. But even if the

right owners were prepared to allow the present form of central acquisition of broadcasting rights for all states in the footprint in respect of transmission by direct broadcasting satellite too, there would still not be the legal certainty needed to provide a sound basis for cross-border broadcasting. Any centralization of the acquisition of rights on a purely contractual basis would be seriously damaged if even one national right owners' association were to break ranks. This form of acquisition is indeed conducive to the establishment of a single audiovisual area, but there is no guarantee that it will continue to operate in future. More importantly still, centralized acquisition has so far come to be the practice in respect only of a few types of right. The main rights acquired centrally are the rights to musical videograms, via the IFPI (International Federation of the Phonographic Industry) in London; even "petits droits" are not currently acquired centrally, although a changeover to central acquisition does appear possible here within the near future. It is not to be expected that the owners for example of film rights, which are fragmented within the common market, will agree to centralized acquisition without further ado. But it seems hardly right to place all the disadvantages of the present territorial nature of national markets within the common market on the shoulders of the broadcasters alone.

- 4.1.21 For these reasons the Commission favours a solution under which the copyright law of only a single Member State, rather than the laws of all states within the footprint, would be relevant to the transmission of programmes by satellite; this would be in line with the current state of discussion in the Council of Europe.

- 4.1.22 In the Commission's view, however, such a solution requires that there be an appropriate level of protection of copyright and neighbouring rights in every Member State (see 4.1.33 ff. and 4.1.50 ff.), and that contractual transfer of rights remain possible (see 4.1.39 and 4.1.40).
- 4.1.23 That only one system of national law should be relevant does not after all mean that right owners would be unable to demand fees corresponding to the real extent of use of their protected works. From the point of view of copyright it would in any event be more reasonable to assess broadcasting fees not abstractly on the basis of territories but rather by reference to the size of the public to which a protected work is made accessible, even if this public is located partly in other territories. Thus under the arrangement proposed here the broadcaster would have to acquire the right of use for the satellite broadcasting of a work in only one Member State, but the amount of the fee which a right owner could demand for the grant of that right would be calculated not by reference to the public in that Member State alone but rather by reference to the number of viewers reached or reachable in the whole of the footprint. Right owners who exercised their rights collectively would remain free to take account of the number of viewers reached or reachable in the individual Member States in the footprint, and to see to it that all the national collecting societies in the footprint received a fair share of the fees.

- 4.1.24 The arrangement proposed would still permit film right owners to give broadcasters a contractual undertaking that their entitlement to broadcast a film will be exclusive for a stated period or a stated territory or both. A film right owner who in Member State A has transferred to a broadcaster the right to broadcast a film by satellite would not thereby be prevented from transferring the satellite broadcasting rights for the same film in Member State B too. In line with existing practice he could when he first transfers the rights to a broadcaster in Member State A still undertake not to transfer the satellite rights in Member State B for a stated time; this undertaking, however, being subject to the competition rules. The situation would only become more difficult where the satellite rights in the two Member States were no longer in the same hands. In that case it would theoretically be possible for each owner of a right of use in any one Member State to agree to satellite broadcasting in that Member State, even if the signal was receivable in other Member States; with an adverse effect on the commercial interests of the holders of the rights for those other territories. But it can be expected that these difficulties will in future be overcome by better contractual coordination of film exploitation, which will also be conducive to the establishment of a single audiovisual area. Under the solution proposed here, in any event, each of the owners would be able commercially to exploit the right he has been granted for a limited territory by authorizing satellite broadcast; whereas if the broadcasting rights of all the receiving states were to be relevant the rights existing in those states would prevent him from doing so.
- 4.1.25 In effect the solution here proposed should largely satisfy the central concerns which have led to the demand that the laws both of the broadcasting country and of all countries of reception should

be relevant, despite the fact that the two approaches have different theoretical starting points. Economically, in particular, right owners would be no worse off under the arrangement proposed, provided an appropriate minimum level of protection is ensured in all Member States which allows fees to be sought on the basis of the total number of viewers reachable.

4.1.26 This rule that the copyright law of only one Member State is to be relevant might perhaps have negative implications for moral rights. In particular, it would be conceivable for example that the owners of rights in a cinematographic work would have to accept that a television version of the film which has been altered in a way permissible under the law of one Member State might as a result of a satellite broadcast be received even in those Member States in which they would be able to invoke their moral rights in order to prevent the broadcast of an altered version. Viewers in a particular Member State would be able to receive versions which had been altered in a way incompatible with the law of the State of reception. Particular instances of such anomalies might be advertising breaks, colourization, the inclusion of TV logos, or discrepancies in the application of the right to be identified as author or director.

4.1.27 But as all Member States are bound by the Berne Convention, and are consequently required under Article 6^{bis} to protect the right to claim authorship and the right to object to any modification of the work prejudicial to the author's honour or reputation, the Commission hopes that such national differences as there are in the law applicable to moral rights - a particular example being that of

the United Kingdom, which does not give a director protection against action on the part of the producer where the latter is to be regarded as the author of the work by the operation of law⁵³ - will not have too damaging an effect on the exercise of moral rights, at least in practice. If it should in future happen that a difference in the level of protection does prejudice the interests of right owners to too great an extent, a Community-wide harmonization of moral right entitlements would have to be considered, since under the solution here proposed moral rights could not be enforced separately in the individual Member States.

Place of use

- 4.1.28 Where use is made of protected works the act of use is in principle governed by the law of that state in which it takes place.
- 4.1.29 Technically speaking the transmission of directly receivable programme-bearing signals by satellite takes place in outer space, which is outside any national territory. Rather than making transmission subject to whatever law may be applicable to the satellite itself, a more rational solution is to take the preceding programme transmission to be the act relevant for copyright purposes. But the transmission of programmes by satellite comprises several separate steps which may take place in different Member States, including the decision on the content of the programme, the decision to send the signal, and the technical up-link; so that if the law of only one Member State is to be

⁵³ See section 77 and section 79(3)(b) in conjunction with section 9(2)(a) of the Copyright, Designs and Patents Act 1988.

relevant, it has to be decided which of these steps is to determine the place of use of the work for copyright purposes.

4.1.30 The definition of the relevant act of broadcasting where programmes are transmitted by satellite (see 4.1.8 ff.) suggests that the place of the act relevant for copyright purposes should be the place where the single act of broadcasting originates, namely the place where the broadcaster carries on business, in a real and substantial manner; it is the broadcaster after all who is responsible for the content of the directly receivable programme signals, who undertakes the final packaging process, and who decides that the programme-bearing signals should be transmitted, and thus decides on the form and extent of the use of protected works. In effect this point of reference corresponds to that adopted in the Television Directive.⁵⁴

4.1.31 It would not be appropriate to regard the place where the signals are up-linked as decisive from the point of view of copyright. Apart from the fact that the up-link has no independent significance in copyright terms, being merely a technical step in the relay of programme signals, there are purely practical problems which could arise. The place of the up-link can be moved to another Member State with no great difficulty; and it is conceivable that parts of a single programme could be transmitted to the satellite from a transmitter in one Member State and parts from a transmitter in another. In that case the copyright laws of more than one Member State would once again be relevant to a single programme.

⁵⁴ Article 2(1) of Directive 89/552/EEC, OJ No L 298, 17 October 1989, p. 23 ff.

4.1.32 This proposed harmonization of national copyright law relating to satellite broadcasts does not deal with the case that satellite signals are broadcast by a broadcaster who is established outside the Community. This situation will continue to be governed exclusively by national copyright law. Thus the national copyright law might select a different point of reference while the non-Community country does not grant protection equivalent to that proposed here (see 4.1.33 ff. and 4.1.50 ff.) under a treaty or convention for example.

Appropriate level of protection; acquisition of rights

4.1.33 If only the law of the Member State in which the broadcaster is established is to apply, as proposed here, it must be clear that that law does in fact confer an appropriate level of protection on right owners.

4.1.34 As far as copyright proper is concerned this should hardly cause a problem, since all the Member States are countries of the Berne Union and are thus required by Article 11^{bis}(1)(i) to grant the right to authorize broadcasting of any work within the definition in Article 2 of the Convention.

4.1.35 Where film producers for example do not themselves enjoy copyright in a Member State, they do very generally enjoy the protection at least of rights transferred to them either contractually or under a legal presumption. In a number of Member States, while they may not qualify for copyright, they do hold their own neighbouring rights. The Commission accordingly takes the view that there is no need at the present time to harmonize the rights of film producers. This would be necessary only if the differences between forms of

protection which exist were to have the effect of hindering the free movement of goods and services in the Community.

4.1.36 Article 11^{bis}(2) of the Berne Convention does allow the countries of the Union to determine the conditions under which broadcasting transmission rights may be exercised; they may even introduce a statutory licencing system, although along with his moral rights the author must at least retain a right to just remuneration. Failing agreement between the parties, this will be determined by a competent authority. The countries of the Union are accordingly entitled to reduce the right to authorize a broadcast to a simple claim to remuneration.

4.1.37 If only the law of the place of establishment the broadcaster is to apply to the broadcast of signals which can be received directly throughout the satellite footprint, as is proposed in 4.1.12 ff., any statutory licence in that country would mean that the right owners would be unable to prevent their works from being broadcast by satellite and received directly throughout the Community without their consent.

4.1.38 The Commission takes the view that this would encroach much too far on the entitlements of copyright owners, particularly as direct broadcasting by satellite represents primary broadcasting, unlike for example the retransmission of signals where already the primary broadcast has been subject to the consent of the right owners. It is doubtful, too, whether a national statutory licence with such far-reaching implications is permitted by the wording and the spirit of the Berne Convention; Article 11^{bis}(2) of the Convention states that the effects of such measures are to be confined to "the countries where they have been prescribed."

- 4.1.39 In order to prevent the excessive restriction of the entitlements of the right owners which might otherwise result from the rule that only the law of the establishment of the broadcaster should be relevant, as proposed in 4.1.12 ff., the Commission considers it necessary that satellite broadcasting rights should not be restricted by any system of statutory or compulsory licences. But Member States should be required to forego the discretion left to them by the Convention, as they are entitled to do under Article 20 of the Convention, only in respect of cross-border satellite broadcasts where the signals transmitted by satellite are directly receivable in more than one Member State as outlined in 4.1.4.
- 4.1.40 In such cases the Commission takes the view that the right owners should be free to exercise their rights on a contractual basis. Contractual transfer of rights could operate on an individual basis, or through a collective agreement, or through the extension of such an agreement to non-represented right owners. Of course those right owners who were not represented by the collecting society or authors' organization which concluded a collective contract would be entitled to refuse the extension of the contract to their rights. The Commission does not consider it necessary to propose an exception especially for film right owners, as the possibility of exercising and exploiting a right individually is maintained under the solution proposed, given the right of refusal, which may be exercised if even before a collective agreement is concluded.
- 4.1.41 Unlike copyright protection, the protection of neighbouring rights, as provided for with respect to primary broadcasting mainly in the

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, is at present subject to wide variations between Member States.

- 4.1.42 Thus there is no statutory protection of neighbouring rights in Belgium, Greece or the Netherlands, though legislative proposals are under consideration in Belgium and the Netherlands. The courts in these Member States do enforce some degree of protection on grounds other than copyright in the broad sense, but it is the case that either not all those entitled to performing rights protection under the Rome Convention are in fact protected, or the protection granted does not extend to the broadcast of their performances.
- 4.1.43 In all Member States which so far have a statutory system of protection of performing rights, performers are entitled to prevent the broadcast of their live performances, in accordance with Article 7(1)(a) of the Rome Convention. The draft legislation in Belgium and the Netherlands would also give performers this entitlement.
- 4.1.44 But in the case of broadcast of phonograms published for commercial purposes, the rights which performers and the producers of phonograms can exercise are regulated differently in these Member States.
- 4.1.45 Of the Member States which so far have a statutory system of protection of performing rights, Luxembourg and Portugal do not at present grant either performers or the producers of phonograms independent rights in respect of the use of phonograms for broadcasting.
- 4.1.46 Ireland and the United Kingdom do not grant an independent right to performers in respect of the use of phonograms for broadcasting only.

Producers of phonograms do have an independent right to prevent broadcasting in both Member States.

4.1.47 In Denmark, France, Germany, Italy and Spain, on the other hand, performers and the producers of phonograms have at least a share in an extra payment for the broadcasting of sound recordings. The draft legislation in Belgium and the Netherlands would introduce the same arrangement. However, the nature of the claim and the apportionment between the right owners differ considerably in detail. In Spain producers of phonograms also have an independent right of authorization; in the Netherlands it is being considered whether a right of authorization should be conferred both on performers and the producers of phonograms, which then would be subject to a compulsory licensing system.

4.1.48 Broadcasters do not need any special protection in respect of primary broadcasting, as they have control over their own primary broadcasts in any case. Where broadcasters are protected as such in the individual Member States, the right to authorize the retransmission of their broadcasts provides effective protection against the unauthorized appropriation of their broadcasts by third parties.

4.1.49 Under the Rome Convention performers are entitled to prevent at least the broadcasting of their live performances (Article 7(1)(a)). If their performance has been fixed on a phonogram, videogram or in a film with their consent however, no further authorization is needed from the performer in order to broadcast it. If a phonogram published for commercial purposes is used for broadcasting either the performer or the producer of the phonogram, or both together, have at least a claim to equitable

remuneration (Article 12). Thus the Convention leaves a choice to be made by the contracting states; and states are even free to exclude any claim to remuneration, in whole or in part, simply by declaring that they will not apply the provision (Article 16(1)(a)). Denmark and Italy exclude a claim for remuneration where the broadcast is for non-commercial purposes; Luxembourg has entered a reservation in respect of the whole of Article 12 of the Convention. The Rome Convention also protects broadcasters only in respect of the rebroadcasting of their broadcasts.

4.1.50 Broadcasters could exploit the present uneven level of protection in the Member States, and particularly the lack in some states of any protection of neighbouring rights, and the differing entitlements of performers and producers of phonograms where commercial sound recordings are used for broadcasting purposes, by moving their headquarters to another Member State simply because the protection of neighbouring rights there is non-existent or at a very low level. This would prejudice the interests of the owners of neighbouring rights to too great an extent; and it would distort competition between broadcasters within the Community.

4.1.51 To prevent this the Commission feels that if only one law is relevant to the transmission of programmes by satellite the protection of performers, producers of phonograms and broadcasting organizations should be harmonized and strengthened within the Community as far as the objective of the measures proposed in this paper requires it. There would not necessarily have to be harmonization of all the entitlements conferred under the Rome Convention, but only

an obligation of the Member States to grant a minimum level of protection with regard to primary satellite broadcasts. The Commission is aware that even a very limited harmonization of this kind must as far as possible take account of the balance of interests between the different parties involved which is reflected in each national legal order.

- 4.1.52 The Commission accordingly proposes that those Member States in which such protection does not yet exist should grant performers at least the right to prevent live broadcasts of their performances, in accordance with Article 7(1)(a) of the Rome Convention.
- 4.1.53 The Commission further proposes that the Member States should at least grant an entitlement to remuneration to performers and the producers of phonograms for the use of phonograms published for commercial purposes in broadcasting, in accordance with Article 12 of the Rome Convention, without the reservation in principle permitted by Article 16(1)(a). This claim would then be available either to the performing artist or to the producer of the phonogram or to both together. Member States would still have to decide to whom this claim would be given; whether if only one group had the claim the other should receive a share of the remuneration; and how to apportion that share, or any fee which under national law was to be paid jointly to performers and producers of phonograms.
- 4.1.54 To protect broadcasters against unauthorized appropriation of parts of their broadcasts by other broadcasters who transmit their own programmes by satellite, Member States should also be required to protect broadcasters against retransmission and fixation of their broadcasts, in accordance with Article 13(a) and (b) of the Rome Convention.

4.2 Cable retransmission

4.2.1 The retransmission of programmes by cable discussed in this section differs from transmission by satellite, which was discussed in section 4.1, in that it constitutes a re-broadcast rather than a primary broadcast of protected works.

4.2.2 The decisive difference is that in primary broadcasting the broadcaster decides the timing and content of the programme. Given that there will normally be sufficient time available, the broadcaster can reasonably be expected to secure the rights to all the components of a planned programme from the right owners individually, in line with what was said under 4.1. Only in respect of some particular types of right, such as "petits droits", is the acquisition of rights facilitated through collective exercise by collecting societies.

4.2.3 The position is quite different where an undertaking retransmits another undertaking's primary broadcast simultaneously and without alteration or abridgement. This retransmission is entirely dependent on the primary transmission. The cable operator can decide only whether or not he wants to retransmit the primary broadcast; he has no way of shaping or influencing the content

of the programme. This dependence on the primary broadcast also means that the cable operator does not have long advance notice of the components of the programme, and particularly of any changes. Unlike the primary broadcaster, therefore, the cable operator is not in a position to take timely steps to ensure that he has the rights necessary for simultaneous, unaltered and unabridged retransmission from each individual right owner. He has very little time to clarify any disputed points of law; and as a rule he will be unable to switch to other programmes, for technical reasons or on legal grounds such as a legal obligation to retransmit programmes in their entirety.

- 4.2.4 If the position of the retransmission of programmes in the Community is to be made safe, this distinction between the acquisition of rights for a primary broadcasting and a retransmission thereof must be borne in mind. For the sake of clarity it must be pointed out once again that what follows relates to the simultaneous, unaltered and unabridged retransmission of primary broadcasts. Thus it does not apply to cases in which the primary broadcast is changed for example by subtitling, dubbing or substitution of advertisements.

Cable retransmission of terrestrial broadcasts

- 4.2.5 As has already been pointed out in 3.2.4, since the appearance of the "Television without Frontiers" Green Paper in 1984 the two sides - on the one hand broadcasters, film right owners and owners of copyright and neighbouring rights and on the other domestic cable network operators - have in many Member States concluded contracts covering the simultaneous, unaltered cable retransmission

of domestic and foreign terrestrial television and radio programmes.

- 4.2.6 The contractual arrangements in practice adopted already mean that with the exception of a few special cases specifically provided for in the contracts the rights for cable retransmission are no longer acquired individually; the nature of simultaneous unaltered cable retransmission would hardly have permitted otherwise. The collecting societies party to these contracts grant the rights on a lump-sum basis, i.e. for a number of rights in works not individually specified, and collectively, i.e. for a number of right owners not individually specified. Thus here there is collective exercise not only of the "petits droits" which traditionally are often exercised in this way through collecting societies, but also of "grands droits" and rights in cinematographic works. The participating broadcasters likewise dispose of their rights on a lump-sum basis, without distinguishing particular rights in particular programme components; and several of them have often designated a single broadcaster to negotiate on their behalf.
- 4.2.7 The Commission expressly welcomes this development of the practice of contractual acquisition. It is already making a vigorous contribution to the establishment of a European audiovisual area. The Commission would like to ensure that such contractual agreements continue, and to facilitate their smooth operation in practice.
- 4.2.8 But this form of collective acquisition has a number of weaknesses, examples of which have been outlined in 3.2.7 ff.

4.2.9 The main difficulty is the problem of outsiders. Although all right owners will frequently be party to the collective agreements, network operators can never at present really be sure that they have in fact acquired all the rights they need for simultaneous unaltered cable retransmission of the terrestrial programmes designated in the contract. In principle they run the risk that outsiders may bring actions for the prevention of broadcasts or for damages, and they have no detailed knowledge of the existence of or extent of any such possible claims. They are also exposed to the risk of criminal proceedings. Whenever the claim is made that an item should not be retransmitted the network operator is faced with a difficult decision with serious repercussions on his subscribers, namely whether or not to comply and interrupt his simultaneous retransmission. This is particularly true of claims put forward at short notice, with which many network operators will in any case be unable to comply sufficiently rapidly, if only for technical reasons. If a network operator is forced to interrupt a retransmission, or if he infringes of a right, it appears particularly doubtful whether the indemnification given him by the right owners can in fact make up for the damage he suffers. The indemnification, after all, will be confined to the amount which the outsider would have been entitled to receive out of the lump sum agreed had he been represented. Network operators are furthermore completely unprotected against claims from those categories of right owners who were not represented at all when the collective contract was concluded.

4.2.10 A further weakness is that parties may unreasonably refuse to negotiate, or withhold agreement to simultaneous, unaltered cable retransmission, or permit it only on unreasonable conditions, thus obstructing cross-border programme retransmission.

4.2.11 The Commission takes the view that there is a need for a few supplementary but nonetheless important measures improving and safeguarding the arrangements for the acquisition of rights in order to underpin the current practice with regard to contracts, which is largely satisfactory in itself. The measures taken should interfere as little as possible with existing national rules for the collective management of copyrights.

4.2.12 The Commission therefore proposes that the legislation in the Member States should be harmonized in two respects. Firstly, cross-border cable retransmission of terrestrial programmes should no longer be at risk from individual rights invoked by outsiders not represented when the collective agreements were concluded; secondly, cross-border cable retransmission of terrestrial programmes in the Community should be further promoted by providing a minimum level of certainty that network operators can in practice acquire the rights they need.

The outsider problem

4.2.13 The outsider problem can be resolved in two ways while still leaving the acquisition of rights for simultaneous, unaltered cable distribution to be governed by contract. One possibility would be that the authorization to retransmit a protected work by cable, and thus ultimately the possibility of securing remuneration, could only be exercised by collecting societies. This would not mean that the rights in the relevant works would be assigned to the societies in their entirety, or even transferred to them by law;

a requirement that the authorization be exercised by a collecting society means only that the powers necessary to authorize or prevent simultaneous, unaltered cable retransmission of protected works included in terrestrial programmes would be granted to collecting societies, acting as trustees, by authors and performers or their successors. The second possibility would be to extend existing collective agreements concluded by users of works with recognized collecting societies or organizations of right owners to non-represented right owners.

- 4.2.14 The proposal made here that the rights necessary for simultaneous unaltered cable retransmission should largely be channelled through the collecting societies (on the precise extent see 4.2.20 ff. below) no longer has to face the objection put forward in the "Television with Frontiers" Green Paper of 1984.⁵⁵ Experience has shown that existing collecting societies have been able to manage cable distribution rights in addition to those they already protect. In addition, even "grands droits", which hitherto were managed on an individual basis, have been entrusted to collecting societies by the right owners' for purposes of cable retransmission. Lastly, the owners of film rights themselves have also recognized the need for collective, lump-sum exploitation of rights for simultaneous, unaltered cable retransmission; they have established a scheme operating through AGICOA (Association de Gestion Internationale Collective des Oeuvres Audiovisuelles)

⁵⁵ See in particular loc. cit., pp. 318 and 319.

and the national film rights management societies, and concluded the appropriate contracts. Admittedly the acquisition of rights by way of collective agreements may well have been facilitated by the present absence of neighbouring rights in some of the Member States having the most households connected to cable.

4.2.15 If the acquisition of rights is to be channelled through the collecting societies, regardless of which of the two options considered here is selected - i.e. rights to be exercised through a collecting society only or extended collective agreements - there must be proper management of the retransmission rights of authors and performers in each category. Provided it is ensured that the retransmission rights, whether in the aggregate or separately by category of work, are in fact managed by at least one representative collecting society or organization of right owners, any right owner not part of an organization can be treated as an outsider with a claim for payment on the relevant society.

4.2.16 As far as the outsider problem is concerned both solutions produce the same result: in both cases the outsider is no longer free to exercise his right of authorization individually against the actual user of the work, but is confined to a claim for remuneration against the collecting society or organization of right owners.

4.2.17 The Commission therefore takes the view that Member States should remain free to choose between the two solutions available. If the directive were to impose one of the two options it would unnecessarily force some of the Member States to give up an

established tradition of collective rights management, at least to some extent, and to replace it by another, with no roots in their own legal systems.

- 4.2.18 The other details of the system can also be left to the Member States. These would include the conditions for determining when a collecting society or organization of right owners can be said sufficiently to represent the relevant retransmission rights; procedures for the approval or recognition of collecting societies; and procedures for the extension of a collective agreement to outsiders, or for deeming an unrepresented outsider to be a member of a particular collecting society.
- 4.2.19 The Commission also considers that in cross-border dealings in rights any discrepancies between the ranges of rights managed by different collecting societies can best be handled by the societies themselves. Where the owners of rights relevant to cable retransmission have not previously been organized in a Member State, the channelling of rights' acquisition proposed here, whether rights are to be exercised through collecting society only or whether collective agreements are to be extended, should serve as an incentive to right-owners to organize better, and thus to manage their interests more effectively. In any event it can be expected that wherever cable networks and cable retransmission exist on any scale either an appropriate collecting societies will be set up or the existing collecting societies will take on cable retransmission rights too.
- 4.2.20 A further important question is whether the solution here proposed should extend to all right owners, or whether exceptions should be made for specific groups, such as the owners of cinematographic rights or broadcasters.

- 4.2.21 The Commission considers that this question must be answered by taking into account the rationale of the solution suggested. The guiding principle of that solution is to improve the level of legal certainty for the simultaneous unaltered cable retransmission of terrestrial programmes, which is to be allowed to proceed undisturbed and without having to face individual claims on the part of outsiders. Cable retransmission permitted by agreements with organizations representing right owners in return for payment of a freely negotiated fee, would be able to take place without hindrance. The solution proposed here ought therefore to cover any rights whose scope and whose owners the network operators cannot identify individually at the time they conclude the collective contracts authorizing cable retransmission.
- 4.2.22 That is the case primarily with the large number of copyright and neighbouring right owners whose protected works are included in the programmes to be retransmitted.
- 4.2.23 The Commission feels, however, that the same applies to the owners of film rights; their number is large, and at the time the collective contracts are concluded it is not yet clear which films will be retransmitted during the lifetime of the contract. The inclusion of the cable retransmission rights for cinematographic works in the solution here proposed should scarcely affect their position, if at all; firstly, film right owners by their own choice already participate in all national agreements on simultaneous unaltered cable retransmission not individually but collectively; secondly, film right owners will already have consented to the primary broadcast of their works in the Member State in which the terrestrial broadcast takes place; but above all, the

channelling of cable retransmission rights proposed here as a solution to the outsider problem regulates only the procedure for the acquisition of rights, while the determination of the content of the contracts so concluded remains entirely a matter for the parties. The Commission therefore sees no reason to leave film rights outside the solution suggested.

4.2.24 In the case of broadcasters the position is different. At the time a collective contract is concluded the number of broadcasters is clear, and every network operator knows which programme he is feeding into his network. It is true that despite the presumption to the contrary accepted by all parties to collective contracts the broadcasters may not in fact always own all the rights normally assigned to them in their own productions, their commissioned productions and their coproductions. But if it should happen that any rights are not in the broadcasters' hands they could still be enforced only by collecting societies, even if broadcasters themselves were left outside the channelling mechanism proposed here. There would thus be no danger to simultaneous unaltered cable retransmission.

4.2.25 From a Community point of view, then, it is not absolutely necessary that the solution proposed should include rights owned by broadcasters, whether originally their own or assigned to them. As far as broadcasters' rights in their own broadcasts are concerned, doubts might in any event be raised in those Member States which are party to the European Convention on the Protection of Television Broadcasts of 22 June 1960 as to whether an obligation to pass through a collecting society was compatible with that Convention. The Member States would of course remain free legitimately to take more far-reaching measures, and

might for example want to include broadcasters in a system of collective management of the rights for simultaneous unaltered cable retransmission; but in the Commission's view they should not be obliged to do so.

4.2.26 A further problem arises where a Member State, such as Denmark at the present time, has already made the cable retransmission of foreign terrestrial programmes subject to a statutory licence (on the exemption of domestic programmes see 4.2.27 below). It might be considered desirable to prohibit statutory licensing uniformly throughout all Member States, in order to strengthen the position of authors. But such a statutory licensing system for simultaneous unaltered cable retransmission of foreign terrestrial programmes does not stand in the way of the cross-border programme transmission sought. It is likewise conceivable, therefore, that existing statutory licensing systems could continue in operation, or that Member States would in principle remain free to decide whether or not to introduce statutory licensing of this kind.

4.2.27 As regards the exemption from copyright liability of simultaneous unaltered cable retransmission of domestic terrestrial programmes, or of cable relay within the service area, the Commission does not see any need for action on the part of the Community. To declare an exemption for the service area of domestic broadcasters would contribute nothing to the promotion of cross-border programme transmission. It is doubtful in any event whether an exemption for the service area is admissible under the Berne Convention, given the claim to remuneration conferred on authors by 11^{bis}(2) of the Convention, if the retransmission

right referred to in Article 11^{bis}(1)(II) is interpreted strictly. In these circumstances, dissimilar treatment of the service area by domestic broadcasters in the individual Member States can be accepted from the point of view of the Community. But it cannot be accepted that particular Member States should, within the entire area in which a programme can be received directly, exempt the cable retransmission of broadcasts by broadcasters transmitting their programmes across borders, and by satellite in particular. So broad an exemption would go far beyond the effects even of a statutory licensing system, since it would deny right owners a claim to remuneration for cable retransmission even outside the Member State in which the broadcaster is established.

Facilitation of rights acquisition

- 4.2.28 The Commission takes the approach that the national rules on collective rights management should not have to be adjusted by more than what is absolutely necessary in order to facilitate the acquisition of rights. Orderly cable retransmission presupposes two things: firstly, that the parties should in general be prepared to negotiate the acquisition of rights, and secondly that the prices or rates offered should be neither below value nor excessive. As a precaution, the Commission feels there is a need for certain minimum back-up measures. Rules differing in form but with the same purpose are to be found in the legislation of a number of Member States; it will be sufficient to mention the obligation to negotiate and the establishment of an arbitration

body in Germany⁵⁶ and Spain,⁵⁷ the obligation to draw up tariffs in Luxembourg,⁵⁸ or the consideration by the Copyright Tribunal in the United Kingdom of licensing schemes drawn up by collecting societies.⁵⁹

4.2.29 Thus if there is unwillingness to negotiate, which would be unacceptable particularly where expiring contracts have to be negotiated afresh, or if no agreement can be reached, the parties should be able to go to arbitration in good time. The arbitration body should be able to assist with negotiation, and if necessary to put forward its own non-binding recommendations for an amicable settlement. To protect everyone's interests the arbitration body should be made up of representatives of the groups concerned and of independent experts. Member States would remain free to regulate the other aspects, and particularly the details of procedure.

4.2.30 As a corollary to the proposed channelling of the right to authorize cable retransmission, by limiting its exercise to collecting societies and broadcasters only, there should also be a measure of supervision in order to ensure that negotiation or permission for simultaneous unaltered cable retransmission is not unreasonably refused and that an offer is not made on unreasonable terms. Here again the structure and operation of what is a mechanism purely for checking abuse can be left to the

56 Articles 11 ff. and 14 ff. of the Copyright Exercise Act of 9 September 1965.

57 Articles 142 and 143 of Law 22/1987.

58 Article 3 of the Regulation of 26 October 1972 Implementing Article 48 VI of the Copyright Act of 29 March 1972.

59 Sections 116 ff. of the Copyright, Designs and Patents Act 1988.

Member States. Of course the Member States would also remain free to take measures going beyond the minimum measures proposed here to safeguard the acquisition of the rights necessary for cable retransmission.

4.2.31 Under the solution proposed the parties would be obliged at least to begin negotiation on cable retransmission. Failing agreement, either party could ask the arbitration body to assist. The Commission takes the view that this, together with the authority given to the arbitration body to put forward its own recommendations for an amicable settlement reflecting usage in the relevant Member State, will produce a satisfactory solution in most cases. But if arbitration proves fruitless the supervision mechanism might ultimately have to be brought into play, to establish whether the negotiations are being blocked by excessive demands or conditions which might constitute abuse. Where collecting societies authorize cable retransmission on the basis of tariffs drawn up unilaterally, the tariffs could be considered in order to establish whether there is any abuse, but not to establish whether they are appropriate. If despite the lack of agreement no unreasonable conduct is established, cable retransmission can not take place in the particular case. The right owners cannot be obliged to authorize cable retransmission in the absence of a system of compulsory or statutory licences.

4.2.32 Nor is it the Commission's role to decide the conditions under which cable retransmission is to be authorized, or what payment may be appropriate in the particular case in terms of amount or method of calculation - a lump-sum payment or a payment per cable subscriber, differentiation according to the number of programmes retransmitted or separate payment for each programme distributed.

Cable retransmission of satellite broadcasts

4.2.33 Cross-border broadcasts are in the common market no longer confined to terrestrial transmission. There is a steadily growing number of programmes broadcast by satellite. Regardless of whether the broadcaster uses a communications satellite or a direct broadcasting satellite, these programmes can be received directly, for both practical and legal purposes (see 4.1.4), in exactly the same way as terrestrial programmes. At times one and the same programme is transmitted both terrestrially and by satellite. To the viewer the technical difference between the forms of transmission is of no importance, except perhaps as far as the different aerials needed are concerned. For the feeding of cross-border programmes into cable networks it makes no difference to the network operator or to the cable subscriber whether the signals were initially transmitted terrestrially or by satellite. In particular, the cable network operator's outsider problem is the same in both cases; as the user of the work, the network operator is responsible for the cable retransmission in copyright law, even though the cable retransmission rights for programmes broadcast by satellite are at present usually acquired by the broadcaster for the benefit of the network operators, reflecting the balance of economic interest between them. The network operator's responsibility in copyright law is not affected by the fact that the broadcasters, who are indemnified by the right owners against any claims on the part of third parties not represented, themselves indemnify in the same manner the cable network operators.

4.2.34 The differences in the ways in which rights are acquired do not in themselves require harmonization, but like the differences between the methods of transmission of programmes they do not justify that cable retransmission of programmes broadcast by satellite be treated differently by the law from the retransmission of programmes broadcast terrestrially. To try to resolve the outsider problem for the retransmission of terrestrial programmes alone, and not at the same time for the retransmission of programmes broadcast by satellite, would lead to the paradoxical situation that the feeding into a network, in one and the same place, of signals which are broadcast both terrestrially and by satellite would or would not be open to claims by outsiders depending only on whether the signals fed in were those from the satellite or those broadcast terrestrially.

4.2.35 The Commission accordingly proposes that the acquisition of rights for the cable retransmission of programmes broadcast by satellite should in order to overcome the outsider problem be channelled in the same way. Thus the rights required for the cable retransmission of programmes broadcast by satellite would in future also have to be exercised through a collecting society or by the broadcasters themselves, or, alternatively, existing collective agreements would have to be extended to non-represented right owners. Furthermore, the parties would have to be able to go to arbitration here too, and their conduct would have to be subject to supervision to ensure that it was not abusive. The acquisition of rights for the cable retransmission of satellite-broadcast programmes would therefore follow the same rules as the acquisition of rights for the cable retransmission of terrestrial programmes.

4.2.36 The Commission does not however think there is a need for more far-reaching measures, like, for example, shifting the responsibility for cable retransmission in copyright law to the broadcaster which has been introduced in the United Kingdom but not elsewhere. It is true that when rights are acquired by the broadcaster it will usually be very difficult for the network operator to check whether the broadcaster who has undertaken to acquire the cable retransmission rights has in reality done so and is making the appropriate payments. But the Commission takes the view that this can be remedied in practice, for example by the broadcaster's providing proof that he has indeed acquired the relevant rights or that he is making the payments in good time. If necessary, the network operators would simply have to acquire the rights in their own name and seek compensation from the broadcaster.

4.2.37 The solution suggested would not unduly affect the interests of right owners in the light of the special characteristics of satellite broadcasting above all the fact that a broadcast will usually be receivable over a large territory, and thus by a large number of viewers. This also applies to the rights in cinematographic works; for cable retransmission will take place only in countries for which the owner of the rights in a particular film has already authorized direct reception, when he consented to satellite broadcasting. The right owner would remain free to give this consent for each film separately in the contracts he concludes.

Even in Member States in which collective agreements for the acquisition of rights for the satellite broadcasting of protected works can be extended to non-represented right owners, these right owners would always continue to be entitled under the Commission's proposal to refuse extension, so that here too consent to the satellite broadcasting of works would be exercised individually. Thus it does not appear that cable retransmission in a Member State in which signals broadcast by satellite can be received directly could reduce the scope for exploiting a film, particularly as the relevant film rights management society would not be under an obligation to give the consent required for cable retransmission.

4.3 Protection of encrypted signals

- 4.3.1 It follows from what has been said that it may under certain circumstances be reasonable to encrypt signals, for example in the case of pay TV, or where the distribution of the signals is to be restricted to particular parts of the footprint. Restriction of this kind would not become superfluous if the only law relevant is to be that of the country in which the satellite broadcaster is established, as proposed in 4.1.12 ff.; for it is perfectly possible that for commercial reasons the payment made to the right owners for such a broadcast may have been calculated on the basis of only a section of the viewers in the footprint as a whole.

- 4.3.2 If encryption is to be effective, however, both the satellite broadcaster and the owners of rights in the individual programme components must be protected against the decoding of signals using equipment which was not put into circulation by the broadcaster himself or by third parties acting with his consent.
- 4.3.3 To date there are two Member States, France and the United Kingdom, which have enacted rules on the protection of encrypted programmes. In other Member States protection is available under more general rules, notably those on unfair competition and Telecommunications. As the problem of protection of encrypted signals surpasses by far the framework of the measures proposed in the present paper the Commission envisages to examine this problem in a separate context.

5. Summary

5.1. Proposals on satellite transmission

Granting of a right for the transmission of programmes by satellite

- 5.1.1 In view of the development of satellite and aerial technology it is no longer justifiable, either from the point of view of right owners or from that of broadcasters or viewers, that an act which amounts to broadcasting should be left outside the scope of copyright only because it uses technical facilities which were originally reserved under communications law for closed point-to-point communication.

The transmission of programmes by direct broadcasting satellite must be treated in exactly the same way for copyright purposes as transmission by communications satellite.

- 5.1.2 For purposes of copyright and neighbouring rights, therefore, the broadcasting of programme-carrying signals by communications satellite should be made equivalent to direct broadcasting by satellite, in so far as it is comparable in terms of direct receivability such a transmission consequently constitutes a communication to the public. Communication to the public also takes place where the signals are encrypted and decoders are made available to the public either by the broadcaster himself or by third parties acting with his consent. It is irrelevant whether individual or communal aerials are used for reception, and whether or not the signals are received by a cable network operator who then himself undertakes a further act of use for copyright purposes by retransmitting them on his network.

The relevant act of broadcasting

- 5.1.3 When programmes are broadcast by satellite a single act of communication of protected works and performances to the public is intended; and it seems reasonable that for copyright purposes a single act of broadcasting should be considered to take place whenever there is an uninterrupted chain of transmission from the place where decisions are taken on the content and broadcasting of the programme up to the satellite from which directly receivable programmes are broadcast to the general public. In the Commission's view this should be made clear.

The national copyright relevant to a satellite broadcast

Relevance

- 5.1.4 It has been unclear hitherto whether the satellite transmission of programmes which can be received directly in several states is subject only to the copyright law of the state in which the programme originates, or whether it is subject at one and the same time to the laws of all those states in which the signals can be received directly. This uncertainty forms an obstacle to cross-border broadcasting, and jeopardizes the establishment of a single audiovisual area.
- 5.1.5 If several jurisdictions are to be relevant at the same time, a person wishing to transmit a programme by satellite will be able to begin only when he has acquired the appropriate rights from the right owners for all countries of reception, and it is in any event very difficult to establish in which countries a direct satellite broadcast can be said to be receivable; the Commission therefore proposes that where programmes are transmitted by satellite the relevant copyright law should not be the laws of all states in the satellite footprint together but the law of one state only.

Place of use

- 5.1.6 The relevant state would be the Member State in which the person who takes the decision on the content of the programme to be transmitted by satellite, and the decision to broadcast it, carries on business, in real a real and substantial manner. This proposed harmonization of national copyright law relating to satellite broadcasts does not deal with the case that satellite signals are broadcast by a broadcaster who is established outside the Community. This situation will continue to be governed exclusively by national copyright law. Thus the national copyright law might select a different point of reference while the signals are

directly receivable inside the Community and the non-Community country does not grant a minimum level of protection equivalent to that proposed here, for example under a treaty or convention.

Appropriate level of protection; acquisition of rights

- 5.1.7 If only the law of the Member State in which the broadcaster has his place of business is to be relevant, as proposed here, it must be clear that that law does in fact confer an appropriate level of protection on right owners.
- 5.1.8 The Commission therefore considers it necessary that as far as cross-border satellite broadcasts are concerned the authors' satellite broadcasting rights should not be restricted by a system of statutory or compulsory licences, which Member States are permitted to introduce by Article 11^{bis}(2) of the Berne Convention. The right owners should rather be left free to exercise their rights on a contractual basis. Contractual acquisition of rights of this kind could operate through individual contracts, through collective contracts, or through an extension of collective agreements to non-represented right-owners. Of course those right owners who were not represented by the collecting society or authors' organization which concluded a collective contract would be entitled to refuse the extension of the contract to their rights.
- 5.1.9 As far as neighbouring rights are concerned the Commission proposes that those Member States which have not hitherto conferred such protection should at least entitle performers to prevent

live broadcasts of their performances by directly receivable satellites broadcasting across borders, in line with Article 7(1)(a) of the Rome Convention. Member States should also at least grant a claim to equitable remuneration, available either to the performer or to the producer of a phonogram, or to both together, in accordance with Article 12 of the Convention and without the reservation in principle permitted by Article 16(1)(a). The details of this claim would be left to Member States to determine. Lastly, Member States should be required to protect broadcasters against retransmission and recording of their broadcasts, in accordance with Article 13(a) and (b) of the Rome Convention, in order to ensure that parts of their broadcasts are not appropriated without authorization by other broadcasters transmitting their own programmes by satellite.

5.2 Cable retransmission of programmes

- 5.2.1 Cable retransmission differs from satellite transmission in that it constitutes not the primary transmission but rather the retransmission of a primary transmission of protected works. The decisive difference is that in primary transmission the broadcaster decides the timing and content of the programme, and has sufficient time to acquire the necessary rights. Where the primary transmission is then retransmitted simultaneously and without alteration or abridgement, timing and content are entirely dependent on the primary broadcast which is being

retransmitted. The cable operator does not have long advance notice of the components of the primary broadcast, and is not in a position to take timely steps to ensure that he has the rights required for simultaneous, unaltered and unabridged retransmission from each individual right owner.

5.2.2 For these reasons the contractual arrangements adopted in practice have already produced a situation where, with a few exceptions specifically provided for, the rights for cable retransmission are no longer acquired individually. The collecting societies party to these contracts confer these rights on a lump-sum basis, i.e. for a number of rights in works not individually specified, and collectively, i.e. for a number of right owners not individually specified.

5.2.3 Nevertheless, cable network operators can never at present be completely sure that they have in fact acquired all the rights they need for simultaneous unaltered cable retransmission of the terrestrial programmes designated in a contract. This leaves them exposed to the risk of criminal proceedings, and to claims on the part of outsiders seeking restraining injunctions or damages. Cable operators can have no detailed knowledge of the existence or extent of such claims. In addition, parties may unreasonably refuse to negotiate, or withhold agreement to simultaneous unaltered cable retransmission, or permit it only on unreasonable conditions, thus obstructing the cross-border programme retransmission desired.

Cable retransmission of terrestrial programmes

- 5.2.4 To facilitate cross-border cable retransmission, the Commission therefore proposes that national legislation should be brought more closely into line in two respects. Firstly, cross-border cable retransmission of terrestrial programmes should no longer be at risk from individual rights invoked by outsiders not represented when the collective contracts were concluded; secondly, cross-border cable retransmission of terrestrial programmes in the Community should be further promoted by providing a minimum level of certainty that the cable operators can in practice acquire the rights required.

The outsider problem

- 5.2.5 To overcome the outsider problem the Commission accordingly proposes that the right to authorize a simultaneous, unaltered and unabridged retransmission could be exercised against a network operator only by collecting societies or by the primary broadcaster, or alternatively that existing collective agreements concluded by users of works with recognized representative collecting societies or organizations of right owners could be extended to non-represented right owners. In both cases the outsider is no longer free to exercise his right individually against the actual user of the work, but is confined to a claim for remuneration against the collecting society or organization of right owners.
- 5.2.6 The choice between these two possibilities, and the other details of the system, can be left to the Member States. These would

Include the procedure for the approval or recognition of collecting societies; the procedure for the extension of a collective agreement to outsiders; and the arrangements for deeming an unrepresented outsider to be a member of a particular collecting society.

Facilitation of rights acquisition

- 5.2.7 In order as far as possible to facilitate the acquisition of the rights needed for simultaneous, unaltered and unbridged cable retransmission of terrestrial programmes, the Commission proposes a minimum package of back-up measures.
- 5.2.9 Firstly, if there is unwillingness to negotiate, which would be unacceptable particularly where expiring contracts have to be negotiated afresh, or if no agreement can be reached, the parties should be able to go to arbitration in good time. The arbitration body should be able to assist with negotiation, and if necessary to put forward its own non-binding recommendations for an amicable settlement. To protect everyone's interests the arbitration body should be made up of representatives of the groups concerned and of independent experts. Member States would remain free to regulate the other aspects, and particularly the details of procedure.
- 5.2.10 Secondly, as a corollary to the channelling of the right to authorize cable retransmission, which is here proposed should be exercised by broadcasters and collecting societies, there should also be a measure of supervision in order to ensure that negotiation or permission for simultaneous unaltered cable retransmission is not unreasonably refused and that an offer is not

made on unreasonable terms. Here again the structure and operation of what is a mechanism purely for checking abuse can be left to the Member States.

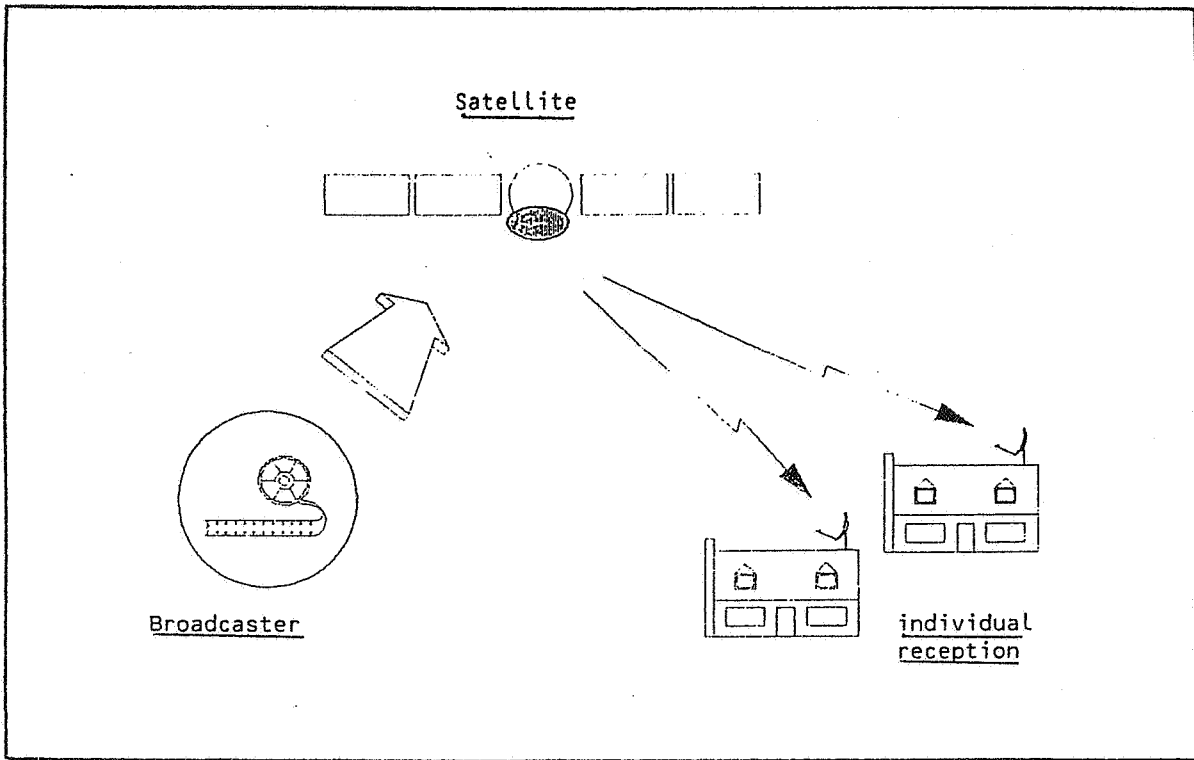
Cable retransmission of satellite broadcasts

- 5.2.11 Although cable retransmission rights for satellite broadcasts and terrestrial programmes are acquired in different ways, the outsider problem is the same in both cases. Cross-border cable retransmission of satellite broadcasts too should therefore be facilitated in the Community by providing a minimum level of certainty that cable network operators can in practice acquire the necessary rights.
- 5.2.12 The Commission accordingly proposes that the acquisition of rights for the cable retransmission of programmes broadcast by satellite should in order to overcome the outsider problem be channelled in the same way. Thus the rights required for the cable retransmission of programmes broadcast by satellite would in future also have to be exercised through a collecting society or by the broadcasters themselves, or, alternatively, existing collective contracts would have to be extended to non-represented right owners. Furthermore, the parties would have to be able to go to arbitration here too, and their conduct would have to be subject to supervision to ensure that it was reasonable. The acquisition of rights for the cable retransmission of satellite-broadcast programmes would therefore follow the same rules as the acquisition of rights for the cable retransmission of terrestrial programmes.

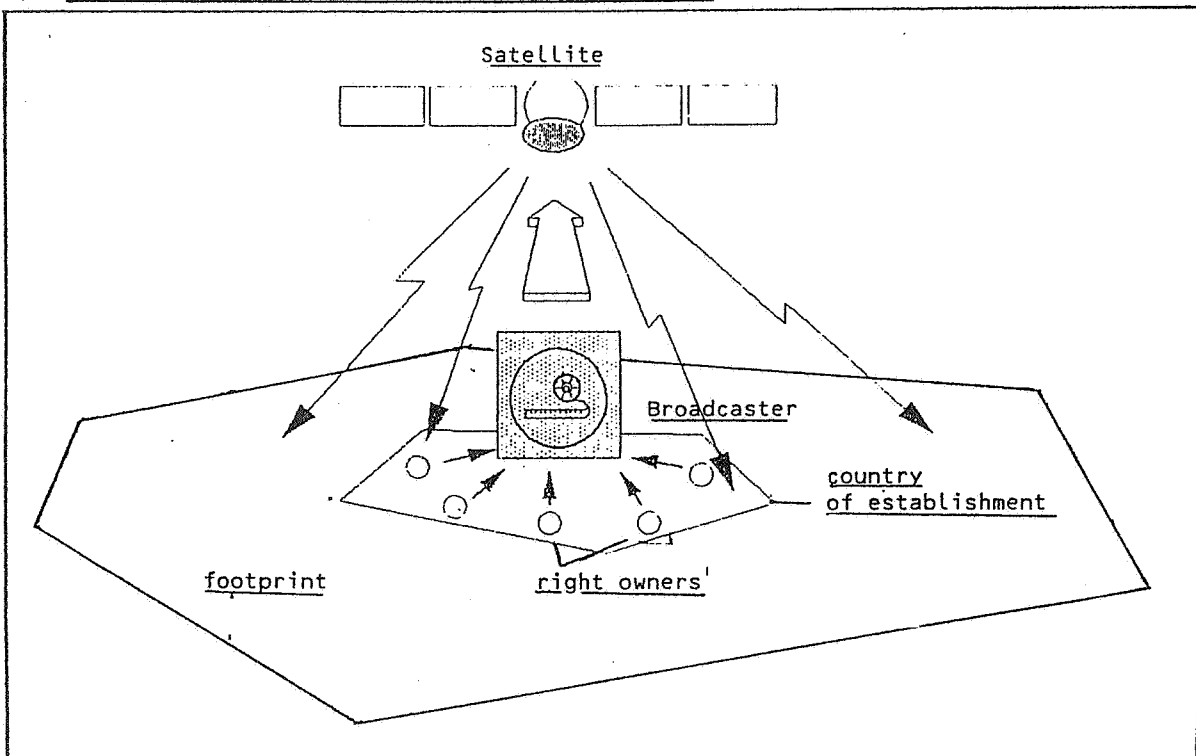
5.3 Protection of encrypted signals

- 5.3.1 The encryption of cross-border transmissions can be a reasonable step under certain circumstances, and needs effective protection to ensure that the signals are not decoded using equipment which was not put into circulation by the broadcaster himself or by third parties acting with his consent.
- 5.3.2 Such protection is provided in a number of Member States, either under specific rules or under general law, and particularly legislation against unfair competition and telecommunications law. As the problem of protection of encrypted signals surpasses by far the framework of the measures proposed in the present paper the Commission envisages to examine the problem in a separate context.

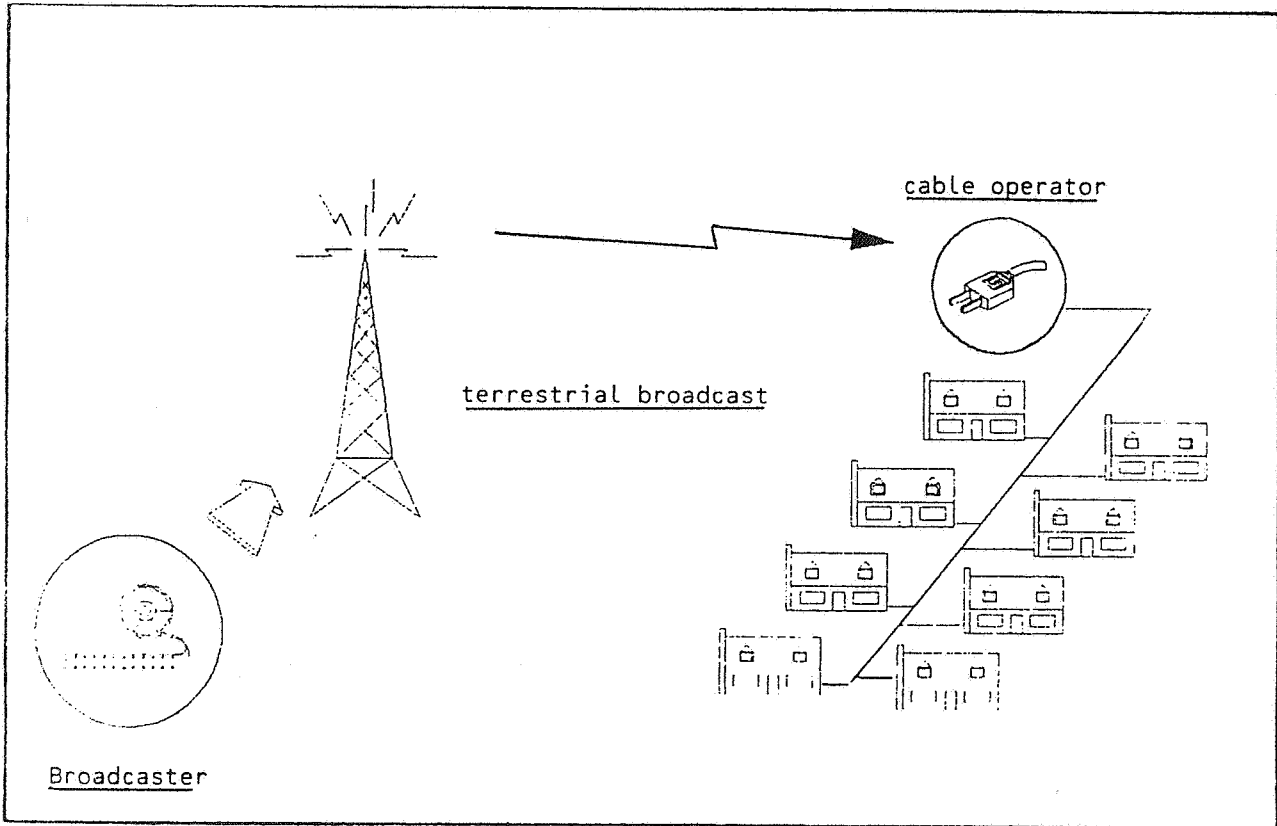
I. Broadcasting of programmes via satellite



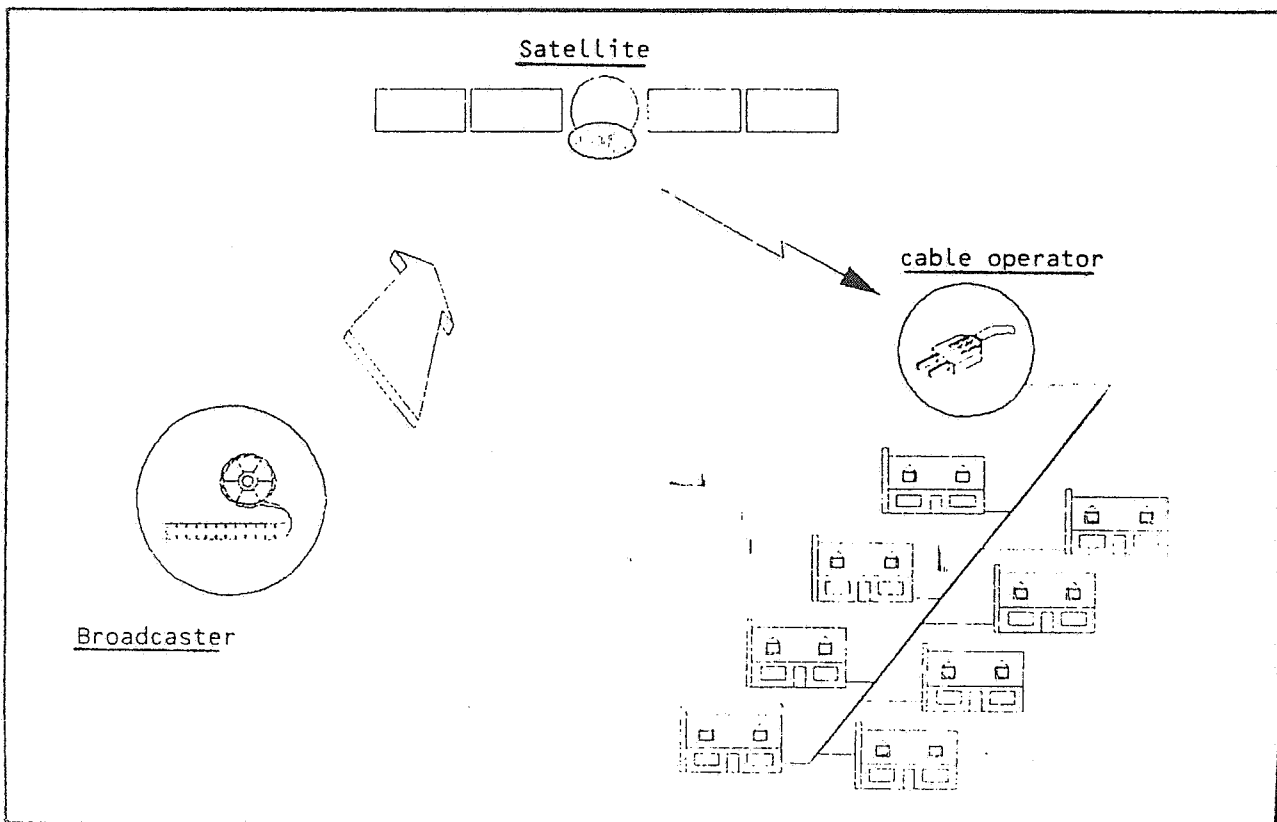
II. Acquisition of rights for a satellite broadcast



1. Retranmission by cable of
1. signals broadcast terrestrially

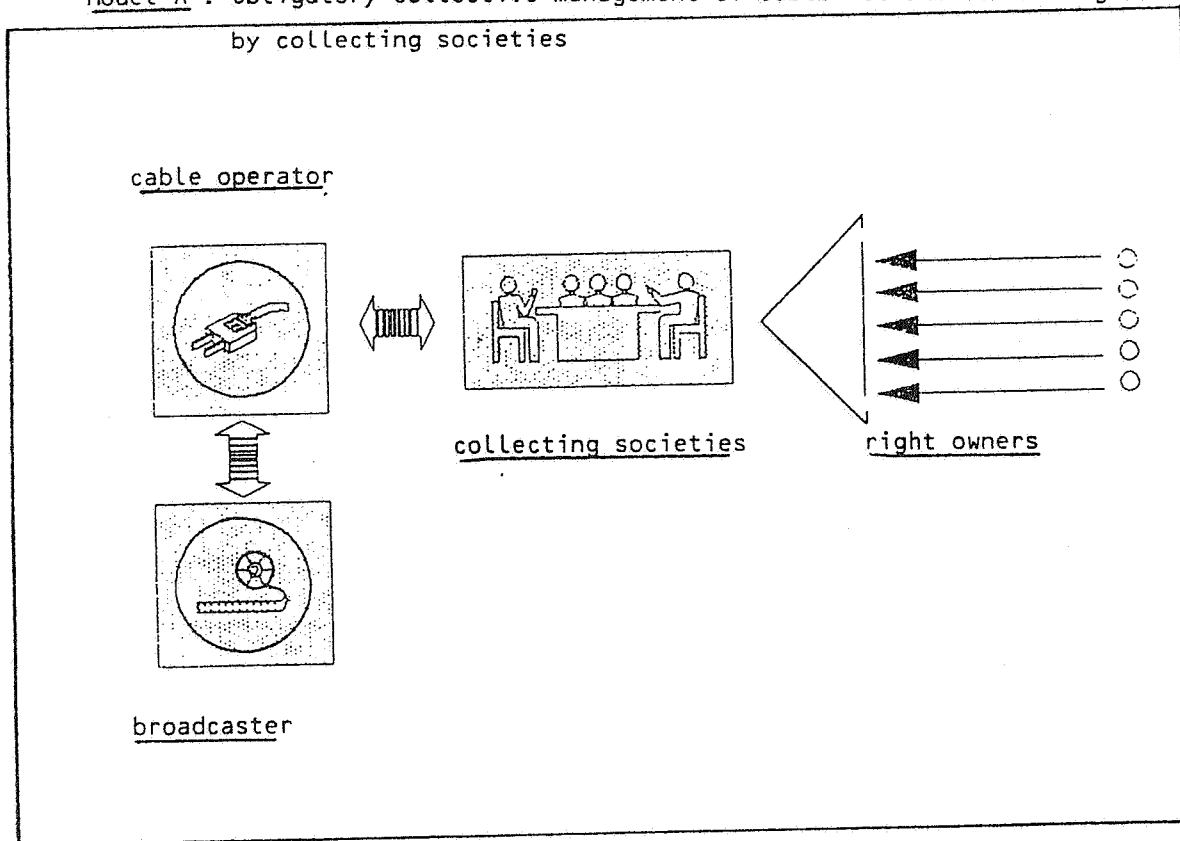


2. signals broadcast by satellite



II. Acquisition of rights for a cable retransmission

Model A : Obligatory collective management of cable retransmission rights



Model B : Extension of collective agreements to non-represented right owners

