35 years with section 35

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Section 35 of the Danish Copyright Act epitomises the smooth licensing of retransmission rights, etc., and the provision is key to the scheme that ensures the population access to TV channels from all over Europe and financing of Danish content production.[2] Visionary from the start, the provision has worked for several decades now, but when section 35 was launched some 35 years ago in 1985, originally as section 22a, it met both opposition and controversy.

The provision was later amended in 1989, 1995 and 1997, and extended in 2014.

This article tells the story of section 35.

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[1] Lassen Ricard is a firm is attorneys and the secretariat of UBOD (for further details, see paragraph 1.4), and, due to the TV stations' cooperation with Copydan, the author has been dealing with the licensing of rights under section 35 for many years.

[2] A single agreement enables an antenna association to show more than 100 TV channels, as all rights are managed together, see https://www.copydan-verdenstv.dk/antenneforening (accessed on 28 December 2020). TV channels include ARD, ZDF, RTL, Sat1 and ProSieben from Germany, NRK and TV2 from Norway, SVT and TV4 from Sweden, the German/French ARTE, France2 from France, Rai from Italy, RTVE from Spain and YLE from Finland. The scheme covers TV channels not only from Europe, but from all over the world as well as radio channels.
According to the report 'Danish Content Production of the Future' from December 2017, the rights revenue in 2016 for third-party exploitation of TV (retransmission fees including digital services) amounted to DKK 1.1 billion, and to this amount should be added the TV distributors' payment of around DKK 3.5 billion annually for distributing the TV channels from the commercially funded TV stations; for further details about the different types of TV channels, see paragraph 1.4 below.

1 1985: Launch of section 22 a

The proposed section 22 a was introduced on 13 December 1984 in a bill to amend the Danish Copyright Act[3], which, in addition to section 22 a included several other amendments.

The purpose of section 22 a was, for one thing, to simplify rights clearance in respect of cable TV and make it feasible for cable system owners – a business consideration – and for another, to ensure that right holders are remunerated for the exploitation – in other words, a cultural consideration. The section was also intended to give Danes access to neighbouring-country channels, that is, a window on our neighbouring countries – a freedom of information consideration. This was the first time that a general licensing scheme was introduced for cable transmission of radio and television programmes.

The government at the time consisted of four political parties: the Conservative People's Party (C/KF), the Liberal Party (V), the Centre Democrats (D) and the Christian People's Party (Q); also known as the "Firkløver Government" (four-party coalition government), with Poul Schlüter as Prime Minister. Mimi Stilling Jakobsen (D) was Minister for Cultural Affairs[4], under whose remit the bill belonged and whose head of division, Willy Weincke, was the key copyright expert[5] behind the bill.

1.1 Introduction

The Minister for Cultural Affairs introduced the bill with section 22. The explanatory memorandum to the bill included the following comments on technological developments and judicial decisions in other European countries as the background for the provision:

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[3] L 113, Bill to amend the Copyright Act. The Official Report of Danish Parliamentary Proceedings (*Folketingstidende*), 1984-85, 2nd session, Schedule A, columns 1979ff.

[4] This was the Ministry of Culture's name when it was first set up in 1961 under Julius Bomholt, the legendary Social Democratic minister. In 1987-88 it was renamed the Ministry of Culture and Communications, and in 1988 the Ministry of Culture.

[5] Willy Weincke operated internationally, which was also evident when the licensing scheme was implemented, a process in which he actively participated. He also sat as a judge on the Compulsory Licensing Tribunal (*tvangslicensnævnet*); see paragraph 1.4 for further details. In the Ministry, Willy Weincke was assisted by Johannes Nørup-Nielsen, who later became head of division in the Ministry of Culture and continued Weincke's work in the field.

"In recent years, large parts of the population have gained access to foreign TV by setting up large or small cable systems. In a number of European countries that have seen similar developments, the question of rights clearance in relation to such retransmission of programmes has caused considerable difficulties and lengthy litigation. This has been the case, for example, in Austria, Switzerland, Belgium and the Netherlands. The litigation has led to landmark Supreme Court decisions recognising that authors' consent is required for the simultaneous retransmission of their radio or television works broadcast by cable, and that in the absence of agreement on remuneration or other terms, authors will be able to prohibit the retransmission of programmes that incorporate their works. The decisions were made on the basis of national copyright legislation designed to comply with international obligations (the 1971 Berne Convention for the Protection of Literary and Artistic Works), which also apply to Denmark."[6]

The explanatory memorandum stated that for the Ministry to provide a basis for a significant increase in the retransmission of foreign television in Denmark:

"[…] finds […] it necessary that rights clearance in the cable area be simplified through an amendment to the Copyright Act."[7]

Simplification would be achieved by:

"[…] implementation of a general licensing scheme entitling right holders to remuneration. On the other hand, right holders should no longer have the possibility of prohibiting simultaneous retransmission of radio and television programmes by means of cable systems – as is the case under existing law. Furthermore, the many individual right holders should only be able to assert their claims through one single, joint organisation approved by the Minister for Cultural Affairs and which is to cover all types of rights. If the parties cannot agree on the remuneration, the matter must be settled by the Tribunal referred to in section 54 of the Act, whose administrative decision is final. With regard to the special protection afforded to broadcasting organisations under section 48 of the Copyright Act, separate rules are proposed for section 54 – the Tribunal's jurisdiction."[8]

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[6] Bill to amend the Copyright Act, Explanatory memorandum to the bill, the Official Report of Danish Parliamentary Proceedings, 1984-85, 2nd session, Schedule A, columns 1988-89.

[7] Ibid., column 1989.

[8] Ibid. Section 54 concerned the Compulsory Licensing Tribunal, and a subsection (2) was proposed (and passed), according to which – as regards the signal right of broadcasting organisations – the Tribunal could make decisions on consent and conditions for cable retransmission, but that claims for remuneration could only be made through the joint organisation of section 22 a(3); for details of the Tribunal's tariff setting, see paragraph 1.4.

On the necessity of the compulsory licence, which was proposed in the interests of both right holders and users and in accordance with the international Berne Convention, the explanatory memorandum stated that:

"The proposed licensing scheme represents a significant interference with the exclusive rights principle that generally governs the exercise of copyright in countries having acceded to the Berne Convention. However, as discussed below, article 11 bis (2) of the Berne Convention assumes this principle may have to be derogated from in the case of simultaneous retransmission of broadcasts. In the Ministry of Culture's opinion, it would hardly be possible to appropriately regulate the cable transmission of radio and television broadcasts in Denmark if it were maintained that, prior to distribution, the individual cable distributor was required to obtain the consent of all holders of rights in the programmes being retransmitted.

For the cable systems, it is essential to be able to distribute a given broadcasting organisation's programme in its entirety. A cable system must be certain to hold all the necessary rights, and the communal aerial systems in Denmark, which are invariably non-commercial and generally very small, would often be unable to cope with situations in which a right holder or a group of right holders would have an injunction granted against the cable transmission of a single programme item, for example, a feature film broadcast on television.

In the Ministry's view, a scheme based on exclusive rights and thus on agreements could certainly be implemented as far as musical works are concerned, since KODA (Danish non-profit collective rights management organisation for music creators and publishers) has authority to authorise public performances of a repertoire of musical works covering virtually the whole world. However, for the other works, there are no organisations in Denmark of an international character similar to KODA.

In several European countries, attempts have been made to resolve the rights issues surrounding cable transmission by means of agreements, and some licence schemes have indeed been put in place, for example in Belgium. However, the Ministry of Culture is of the opinion that the resulting contractual solutions are unlikely to be practicable in Denmark.

In addition to the comments about the organisational situation regarding rights, the Ministry emphasises in this connection that cable development in Denmark has led to the establishment of a large number of non-commercial, private cable systems, which would presumably have considerable difficulties in handling rights negotiations with an indefinite number of right holder organisations and individual right holders at home and abroad. Against this background, the Ministry finds that there is significant public interest in implementing the proposed licensing scheme.

According to article 11 bis (2) of the Berne Convention, authors must be secured an 'equitable remuneration' under a licensing scheme, and the scheme must not infringe authors' moral rights; see section 3 of the Copyright Act. The bill meets both these conditions."[9]

In brief, it appeared that the simplified rights clearance was secured in section 22 a by the removal of the requirement for consent, while the payment of remuneration was maintained:

"Simultaneous and unaltered redistribution of radio and TV programmes via cable systems will no longer require the authors' consent. Redistribution may be carried out freely, but in accordance with Denmark's minimum obligations under article 11 bis (2), authors will be entitled to remuneration; see section 22 a(2) of the bill."

However, the payment of remuneration was to be capable of being made to a single recipient:

"In order to reduce the practical difficulties of settling remuneration, section 22 a(3) provides that the remuneration must be capable of being settled with *a single* organisation approved by the Minister for Cultural Affairs, such as the COPY-DAN organisation, which is to cover *all* types of rights."[10]

It was also stated that, as an alternative to compulsory licensing, an exception for national programmes had been considered, but the conclusion was that Danish authors should be covered by the provision:

"Some Berne Convention countries have implemented provisions exempting simultaneous cable retransmission of national programmes from the authors' rights. The background was, on the one hand, public-law provisions, which oblige the national broadcaster to ensure, if necessary by setting up cable systems, that national programmes are available to the country's entire population and, on the other hand, a certain general presumption that the authors' cable retransmission rights must be considered to be covered by the broadcasting agreements concluded with the national broadcasting organisations.
The Ministry of Culture has considered whether similar provisions should be implemented in the Danish Act. However, the Ministry has come to the conclusion that a provision of the nature mentioned would not be expedient. Under the Berne Convention, nothing prevents implementation of an exemption clause for national programme retransmission in relation to Danish authors. However, in the Ministry's view, applying such a provision vis-à-vis right

[9] Bill to amend the Copyright Act, Explanatory memorandum to the bill, the Official Report of Danish Parliamentary Proceedings, 1984-85, 2nd session, Schedule A, columns 1989-90.

[10] Ibid., column 1999.

holders from other Berne Convention countries would be difficult to reconcile with Denmark's obligations under article 11 bis of the Berne Convention. An exemption for national programmes could therefore seriously strain the cooperation between a single Danish joint collecting institution for all types of rights and foreign countries, which corporation the Ministry of Culture considers an absolutely essential prerequisite for achieving in practice the simplification of the rights clearance desired by the Ministry. The bill therefore proposes no exemption for Danish programmes.[11]

It further appeared that the Ministry had considered the possibility of a so-called opt-out, but had found it impracticable:

"The right of redistribution or retransmission under section 22 a applies to all types of works. The Ministry of Culture is aware that there may be reasons why certain types of works, such as cinematographic and scenic works, in the interests of their commercial exploitation, should not be capable of retransmission via cable systems without the right holders' consent, or why right holders should at least retain the option of prohibiting cable retransmission in specific cases, for example, of a film broadcast on television.
However, the Ministry sees no real possibility for the individual cable systems to accommodate, technically and administratively, any requests from the right holders concerned to omit individual programme units, for example, a film, from the overall programme schedule. Accordingly, the provision of section 22 a contains no exemption clauses of the nature mentioned."[12]

1.2 Readings and debate

The readings and debate by the Folketing (the Danish Parliament) and its Cultural Affairs Committee reflect well the different elements and considerations weighed in section 22 a, as well as the situation with thousands of small antenna associations, the new possibilities for receiving TV from satellites and the emerging judicial decisions in other European countries on the right holders' necessary consent to cable retransmission. [13]

1.2.1 Connection with the hybrid network – technological developments

[11] Ibid., column 2002.

[12] Ibid., columns 2002-3.

[13] There were 6,500 antenna associations (see, for example, the statement by Hans Hækkerup (S), reproduced in paragraph 1.2.3), and the small, private, non-commercial ones had largely started retransmitting the TV channels in their aerial systems, which was illegal, since consent had not been obtained from the right holders, but obtaining such consent was an impossible task in practice given the many right holders. The few major cable operators (telecommunications companies), who were parties to the later compulsory licensing case (see paragraph 1.4) and publicly owned, could hardly participate in such illegalities, so facilitation of lawful exploitation was necessary.

The new copyright regulation in section 22 a was closely linked to the establishment of a hybrid network in Denmark. This was not apparent from the explanatory memorandum to the bill, but the provision was proposed because there was a strong awareness of the need for regulation once the hybrid network had been established, and between the first and second readings of the copyright bill, the Folketing decided to establish the hybrid network.[14]

There was a general sense that the rapid pace of technological development would lead to the need for copyright regulation in a new and difficult area.

During the first reading on 16 January 1985, Helge Sander (V – the Liberal Party) stated that

"The background to the proposed amendment of the Copyright Act is, of course, that since the Act was passed in 1961, technologies, particularly in the field of communications, have developed exponentially."[15]

Ingerlise Koefoed (SF – the Socialist People's Party) was slightly more dramatic:

"You could say that the more technology develops, the more difficult it becomes to protect authors' rights and the more complex legislation will become. ...
I also think it is only fair that cable TV legislation is brought in now, before the satellites are finally above us."[16]

Hans Hækkerup (S – the Social Democratic Party) said that, although the Social Democratic Party had reservations, they were in favour of the bill, partly because of the hybrid network:

"So we can accept the proposal, but only because of the special circumstances relating to cable TV, such as the number of antenna associations, the lack of organisation on the user side and the need for regulation once the hybrid network has been established."[17]

The Minister for Cultural Affairs, Mimi Stilling Jakobsen, summed up the first reading with these words:

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[14] Motion no. B 2, Motion for a parliamentary resolution on the establishment of a hybrid network, was tabled on 3 October 1984 and passed on 26 February 1985. The hybrid network was intended to develop a nationwide broadband network.

[15] First reading – meeting 41, the Official Report of Danish Parliamentary Proceedings 1984–85, 2nd session, Schedule F, column 4293.

[16] Ibid., columns 4294–95.

[17] Ibid., column 4291.

"It is true what several spokesmen have said, that the bill we have on the table today does not solve all copyright problems and, in particular, will not do so in the future; we must also expect ongoing revisions of this legislation in the years to come. But the bill we are reading today should be seen as an attempt to legislate on the basis of the existing situation, what we reasonably feel can be legislated about, and the bill has, of course, also been introduced because some copyright issues urgently need to be resolved before we start the massive retransmission of the increased range of cable TV programmes on offer.[18]

Bernhard Baunsgaard's (RV – the Danish Social Liberal Party) statements during the second reading on 15 May 1985 also show the connection to the hybrid network:

"When the Folketing has passed this on the hybrid network, or is about to pass it, it is clear that a decision about licence fees must be made [...]"[19]

Others were more critical of such a connection, and of how the issue was handled. Steen Tinning (VS – the Left-wing Socialists) thus states:

Sometimes I think of our country's Prime Minister. Shortly after he took office, he told a very touching story about how we should gradually try to handle matters in the Chamber. No more negotiations in corridors and dark hallways; now we were simply to talk down here. Unfortunately, the Copyright Bill is an example of how this never happened. This bill's primary concern is the hybrid network settlement, which is again linked with TV 2. All of this is talked about in the corridors, and at some point it reaches the committee, and the committee tries to make some amendments to the copyright legislation, which of course is also justified by other considerations, but primarily by a desire to pass cable TV legislation that makes the hybrid network settlement practical or operational, or whatever one should call it. I think it is sad that the country's media policy should be shaped in such a way that everything happens so relatively randomly."[20]

At the second reading, it was also agreed to amend the wording of section 22 a(2), second sentence, so that instead of "households", it refers to "connections".

1.2.2 Copyright or not

Generally, the bill highlighted the ideological differences on copyright between the political parties. Helge Dohrmann (FP – the Progress Party) already stated during the first reading that:

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[18] Ibid., column 4299.

[19] Second reading – meeting 98, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, column 10109.

[20] Ibid., column 10110.

"[...] on 12 January 1983, the Progress Party tabled a motion for a resolution to phase out the current copyright schemes. We find the view held by a majority in the Folketing to these matters bureaucratic and archaic.
The explanatory memorandum to the bill we tabled states that, if an asphalt worker, for example, helps to build a motorway section, no one would dream of paying him a fixed amount every time a car passed the given road section. That is sucking up to what we call cultural personalities. Writers and others must make sure they receive fair pay for the work they do and then, of course, it must be free to use. I think anything else is completely outdated, also in view of the world's increasing commercialisation.
In a relatively short time, we will be able to view satellite programmes from all over the world, and the idea is then to expand the bureaucratic systems with a lot of people sitting around, not only in Denmark, but also elsewhere, checking and keeping long lists of who are to receive a few bucks because they are either the father or mother of the works concerned.
As I said, we believe this is entirely outdated and we will of course oppose any expansion of this scheme."[21]

At the committee stage - white paper of 10 May 1985 issued by the Cultural Affairs Committee - the Progress Party's committee member delivers the following broadside at copyright, but nevertheless supports the bill since it is, nonetheless, more acceptable than the existing state of the law:

"The copyright rules are from an era when technical and social conditions were completely different from the current and future ones.
Patching up the totally outdated copyright legislation is therefore in any case a fruitless exercise. It is the system itself that is completely wrong, as demonstrated time and again by the minority, for example, by tabling motions for parliamentary resolutions on phasing out copyright in the 1982-83 parliamentary year [...]
First of all, the government's present bill addresses some of the weaknesses of the Copyright Act, weaknesses that entail a significant risk of destroying the exploitation opportunities offered by modern technology, to the detriment of the population's possibility of deriving maximum benefit from television, radio and other media.
Here we should have gone straight to the point, strongly and consistently, for example, by giving the communal aerial systems complete and full access to provide all available radio and television programmes.
Instead, the government bill is straying further into a bureaucratic and hopeless maze.

[21] First reading - meeting 41, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, columns 4298-4299.

Having strongly emphasised this, I should add that the miserable rules of the existing Act are even worse, and that the Minister for Culture's draft bill therefore represents, on balance, more steps forward than backward, compared with the current state of the law.
With this absolutely minimal positive support, the minority will vote in favour of adoption of the Minister for Culture's bill [...]"[22]

The Socialist People's Party members viewed copyright in an entirely different way:

"The purpose of the legislation must first and foremost be to ensure that authors and performing artists are fairly remunerated for the use of their work. This purpose must be pursued, not least because artists, whether creative or performing, often belong to the lowest-paid sections of the population and whose opportunities to practise their art are considerably reduced if they lack the financial security to be able to immerse themselves in and deepen their effort."[23]

Others took into account the existence of copyright and were more concerned with how it would interface with technological developments. For example, Annelise Gotfredsen (KF – the Conservative People's Party) said:

"The many opportunities we are facing in radio and television have necessitated regulating the rights of authors and broadcasters in relation to cable retransmission, a task we must start on right away. Litigation abroad has led to landmark decisions recognising that the authors' consent is required for simultaneous retransmission by cable and that the author can prohibit retransmission of his or her programme. These matters must be regulated if a radio and television scheme is to be a reality, and this bill does just that, while also seeking as far as possible to continue Nordic unity of the law in this area. [...]
The present bill legalises cable retransmission and entitles right holders to claim remuneration while at the same time simplifying matters for cable distributors, allowing them to negotiate with a single Danish organisation. It would be a huge undertaking if individual negotiations had to continue. We have to work with new methods and new legislation now. The best basis must be created for users to benefit, at the smallest cost, from the many opportunities we will see in future, and the greatest security must be provided for the right holders and creators of the large range of content that will be on air."[24]

Others again were more concerned about the compulsory element; see right below:

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[22] Committee stage. White paper. The Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule B, column 1381.

[23] Ibid., column 1379.

[24] First reading - meeting 41, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, columns 4291-4292.

1.2.3 Compulsory licensing

The majority was concerned that the proposed section 22 a provided for compulsory licensing since, according to the bill, right holders could not accept or refuse exploitation of their rights, but only receive remuneration.

However, there was also concern that users' freedom to make contractual arrangements was being removed. Thus, during the first reading, Hans Hækkerup (S) stated:

"In the Social Democratic Party we accept the proposed solution, but would like to stress that we are not enthusiastic about the removal of the freedom to make contractual arrangements. Thereby the government is precisely removing the incentive for the users, the 6,500 antenna associations, to organise themselves."[25]

Helge Sander (V) fully agreed:

"Put simply, it is proposed that right holders give up their exclusive right and have it replaced by a claim for remuneration - also called compulsory licensing. This means, for example, that a television broadcast can be retransmitted via a cable system without authorisation, as long as this is done without alterations and simultaneously with the broadcast. We think such a change raises many questions of fundamental and practical importance, but we hope this can be discussed in greater depth at the committee stage; I will only raise a few of them here.
[...] How is it ensured that a person who may want to receive West German TV is not forced into accepting some package deal with three to four other programmes? How much would the introduction of a compulsory licensing scheme cost an individual household on an annual basis?"[26]

Ingerlise Koefoed (SF) was also concerned, but realised the need for a compulsory scheme:

"... it is a little urgent to at least get some fundamental provisions made, and there is probably nothing we can do about this becoming a compulsory licensing scheme, because anything else would be practically impossible to implement. However, we would much rather have preferred an ordinary extended collective licence in this area."[27]

On this issue, the Minister for Cultural Affairs, Mimi Stilling Jakobsen, summed up the first reading as follows:

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[25] Ibid., column 4291.

[26] Ibid., column 4294.

[27] Ibid., column 4295.

"There are no great cries of joy on either side over this proposal. Those who are now to pay a fee will feel it is unfair, and those who are to receive the money may feel it's too little – nobody is probably fond of the term compulsory licensing. But we feel we are more or less at the middle ground that we were aiming for, but there is of course a possibility to discuss this at the committee stage."[28]

During the second reading on 15 May 1985, great ingenuity was used to avoid the adoption of "compulsory licensing". Poul Qvist Jørgensen (S) proposed:

"The very term compulsory licensing evokes [...] more unpleasant associations than the term can really bear. I wonder if another term could be found?"[29]

Annelise Gotfredsen (KF) went along with the unspeakable:

"Admittedly, I agree with the Social Democratic spokesman that 'compulsory licensing' may not be the very best term, and I would be happy to discuss finding a better and more agreeable wording, but we agree with the content of the concept and intend to vote for it."[30]

Bente Nielsen (V) saw no alternative:

"I would like to emphasise that, on behalf of the Liberal Party, I already expressed some reservations and concerns at the first reading about the compulsory licensing scheme as proposed in section 22 a. These concerns in fact still apply. We have had a very thorough and extensive committee stage and looked at similar schemes in other European countries. In fact, it turned out that the countries having given contractual arrangements a try have experienced major problems with them.
In the light of the information we received in the committee, we find it difficult to find any other way than the one proposed by the Minister for Culture."[31]

Bernhard Baunsgaard (RV) also ventured:

"[...] I actually think the term 'compulsory licensing' perfectly covers what is happening here. Paying this licence fee when you are dependent on the hybrid network is compulsory. Let us make that clear."[32]

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[28] Ibid., column 4300.

[29] Second reading – meeting 98, the Official Report of Danish Parliamentary Proceedings 1984–85, 2nd session, Schedule F, column 10105.

[30] Ibid., column 10106.

[31] Ibid., columns 10106–7.

[32] Ibid., column 10109.

Ingerlise Koefoed (SF) found it necessary to try and imagine eating the more palatable extended collective licence before the compulsory bun:

"In continuation of Mrs Bente Nielsen's statement up here, I would like to start by expressing my regret that it was not possible to get the committee to jointly write in the white paper that in principle, it opposes compulsory licences, because it wants first of all extended collective licences. This was not possible, but I think it should have said so; it should be something we could all have agreed on. It was the wish of the organisations – which, incidentally, supported the bill – that the committee should make this fundamental remark.
There is a lot of talk up here about compulsory licensing, and it is probably fair to say that section 22 a of the bill does not have to end in compulsory licensing, because, as you will remember, it initially allows the joint negotiating organisation to make agreements on cable TV. However, we probably know that such agreements will soon collapse and then we would have compulsory licensing. In order not to completely distort the entire debate, I do think we should note that."[33]

Steen Tinning (VS), on the other hand, did not even want to taste compulsory licensing for reasons of principle, and this turned out to be the deciding factor at the third reading on 21 May:

"[...] we have chosen to vote against because the whole issue of compulsory licensing is so crucial for us.
We are aware that the issue of compulsory licensing may not initially be said to directly deteriorate the position of Danish copyright holders very much. It is not like you are suddenly stripped of a lot of rights that you have exercised extensively in the past. The possibility of prohibiting retransmission by cable, which did exist, has in fact not yet been used for anything at all.
But what is important for us is that, by introducing compulsory licensing as a principle, we fear – and we believe rightly – that this very principle will spread to other areas of media policy as well, and we think that is very unfortunate."[34]

1.2.4 Copydan as a joint organisation

There were also discussions about the fact that the claim for remuneration under the bill would have to be made by a single, joint organisation approved by the Ministry of Cultural Affairs. Bernhard Baunsgaard (RV) noted the monopoly:

[33] Ibid., column 10107.

[34] Third reading – meeting 99, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, column 10166.

"[...] the proposed new provisions on rights issues in connection with retransmission by cable TV is based on centralisation, as the bill states that all future remuneration claims must be negotiated with one single approved joint organisation. This means cable TV owners are faced with a monopoly."[35]

Ingerlise Koefoed (SF) first expressed herself in a way that could be interpreted to mean that she thought there were already too many organisations:

"It appears from the bill – as I read it – that a new organisation is envisaged to be set up to run the scheme. I would like to ask: how many copyright organisations or organisations entitled to negotiate should we really have? We have COPY-DAN, and we have KODA for music."[36]

However, at the committee stage the Socialist People's Party later proposed that the remuneration claim under section 22 a(3) could be asserted by "organisations or groups thereof".[37]

The Minister's reply to the question put by the Cultural Affairs Committee clarified that "all organisations except Koda will be willing to form part of a joint management body provided that the management is carried out in accordance with the basic principles laid down in the rules governing COPY-DAN" and that "the joint organisation referred to in section 22 a(3) can be established relatively quickly after section 22 a has been passed".[38]

This seemed crucial, as, at the end of the second reading, the Minister for Cultural Affairs (Mimi Stilling Jakobsen) made it clear that:

"The government rejects the amendments proposed [...] by SF, aimed at enabling more organisations and right holders to act in relation to the users. The proposers perhaps imagine that in effect this would mean that composers negotiate through KODA and that the other right holders join together in a single, joint organisation. I do not think that will happen if the proposed amendment is implemented. The broadcasters, too, will probably demand to be able to negotiate separately, and so will the film producers. We will have an arrangement that will be very difficult for users to administer, but, more pertinently, we will have one

[35] First reading – meeting 41, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, column 4296.

[36] Ibid., column 4295.

[37] Committee stage. White paper. The Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule B, columns 1382-83.

[38] Ibid., columns 1389-90.

that means users cannot be sure of having obtained full rights coverage. The proposal must therefore be rejected."[39]

1.3 Adoption

With the above-mentioned amendment to subsection (2) ("connections" instead of "households")[40], the proposed section 22 a was adopted at third reading on 21 May 1985. All voted in favour, except VS, which was against, and SF, which abstained. The Act came into force on 1 July 1985.

The adopted section 22 a read as follows:

"Works broadcast on radio or television may be retransmitted via cable systems and retransmitted to the public by means of radio systems, provided that this is done without alteration and simultaneously with the broadcast.
(2) The author is entitled to remuneration. However, this does not apply where radio and television broadcasts are received by means of own communal aerial and retransmitted via cable systems comprising no more than 25 connections in a building or in a group of adjacent buildings.
(3) The claim for remuneration can only be asserted by a joint organisation approved by the Minister for Cultural Affairs and comprising authors, performing artists and other right holders, including broadcasting organisations and photographers, whose works, performances, creations and images are used in radio or television broadcasts in Denmark.
(4) The joint organisation's remuneration claims become time-barred after three years from expiry of the year in which the exploitation took place. The limitation period is interrupted by written demand from the joint organisation. The author's claim against the joint organisation becomes time-barred after three years from expiry of the year in which the exploitation took place. The limitation period is interrupted by written demand from the right holder."[41]

1.4 Implementation: Copydan and cooperation with TV stations via UBOD

According to section 22 a(3), the remuneration claim under the compulsory licence was to be asserted by a joint organisation comprising, inter alia, broadcasting organisations, i.e. the TV stations. The compulsory licence was thus also to extend to the TV stations' rights.

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[39] Second reading - meeting 98, the Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule F, columns 10115-16.

[40] See paragraph 1.2.1.

[41] Bill as passed by the Folketing, Official Report of Danish Parliamentary Proceedings 1984-85, 2nd session, Schedule C, columns 428-29. Act no. 274 of 6 June 1985 amending the Copyright Act.

The compulsory licence meant that the cable systems could legally retransmit TV programmes without the right holders' consent; see section 22 a(1). The cable systems had to pay remuneration for the retransmission, but this was not a condition for starting the retransmission. If no agreement could be reached on the amount of remuneration, each party could refer the matter to the Compulsory Licensing Tribunal. No agreement between the cable systems and the right holders was therefore necessary, but the cable systems could legally start retransmission immediately after adoption of the Act.

The initial plan was for the TV stations to join the Copydan producers' group[42], but the TV stations did not accept this, referring to their right to the signal (neighbouring right) under the Copyright Act.[43] The Danish legislature could not stipulate that the right to the signal protection should be subject to compulsory licensing, thus depriving the TV stations of their prohibition right, as the right to the signal was supported by international law through the 1960 European Agreement on the Protection of Television Broadcasts, to which Denmark had acceded. Only the TV stations' acquired rights could be covered by the requirement for a joint organisation under section 22 a(3).

During a meeting at the Ministry of Culture, the TV stations presented this argument, while at the same time expressing their understanding of the need for a flexible clearance model. The TV stations therefore offered to join forces in a cooperation comprising all the relevant TV stations and offered to enter into an agreement with Copydan to jointly conclude agreements with the cable operators. The Ministry thought this sounded reasonable, but Copydan found such a deal unacceptable.

To ensure that the TV stations' right to the signal did not prevent the telecommunications companies (cable operators) from starting the retransmission requested by the Ministry, the TV stations informed Copydan that they themselves would have to conclude an agreement with the telecommunications companies to give them the necessary consent to retransmission. Copydan did not want the TV stations to conclude such an agreement with the telecommunications companies, and Copydan therefore agreed that the TV stations should not be part of Copydan.

The result was therefore that the TV stations – initially the then relevant major foreign public service TV stations: Swedish SVT, Norwegian NRK, German ARD and ZDF, together with DR (the Danish Broadcasting Corporation) – joined together in UBOD (Union of Broadcasting

[42] At the time, the organisation was called Copy-Dan Kabel TV; this was later changed to Copydan Verdens TV. The producers' group was headed by attorney Johan Schlüter.

[43] The right to the signal in section 48 of the Copyright Act in force at the time (the 1961 Act), which was amended to section 69 by the 1995 Act.

Organizations, Denmark[44]), whose secretariat was located at Lassen Ricard law firm and with attorney Steen Lassen as the driving force.

Another result was that the Ministry of Culture made the approval of Copydan as a joint organisation entitled to collect remuneration under section 22 a conditional on Copydan having a cooperation agreement with UBOD, according to which Copydan and UBOD coordinated the management of all rights relating to the cable retransmission of radio and TV programmes vis-à-vis the cable systems, including a common tariff whereby Copydan collected the remuneration on all right holders' behalf.

Against this background, Copydan and UBOD concluded a cooperation agreement, according to which they were to take a concerted approach to the cable systems, including with regard to agreements; the tariff was to be fixed by the Compulsory Licensing Tribunal; and the splitting of the remuneration among the right holder groups was to be decided by an arbitration tribunal consisting of three Supreme Court judges appointed by the President of the Supreme Court.

Therefore, the question of calculating the remuneration, etc., under the scheme established by section 22 a was brought before the Compulsory Licensing Tribunal, which was required by law to make a final administrative decision.[45] The parties to the case were Copydan and UBOD of the one part and the telecommunications companies, i.e. the cable operators, of the other.[46] By order of 27 June 1986, the Tribunal fixed the tariff[47] ("equitable remuneration"[48]), taking into account, inter alia, the statement in the legislative material that, when the remuneration is fixed, regard must be had to the fact that "the retransmission of foreign programmes has a certain secondary character compared with the retransmission of Danish programmes, for which cable subscribers cover the full costs of the production and distribution of the programmes by paying a licence fee to DR", and that the total remuneration payable by each cable subscriber "should not exceed a certain small percentage of what is paid in licence fees to DR for the existence of the Danish programmes".

The Tribunal then set the tariff – a degressive tariff – i.e. the more channels being retransmitted, the lower the remuneration to be paid per channel. The tariff entailed a lower remuneration than that which, according to their claim in the proceedings, the

[44] See www.ubod.dk UBOD was established in 1985.

[45] See section 54 of the Copyright Act in force at the time.

[46] The parties to the proceedings before the Compulsory Licensing Tribunal were Copy-Dan Kabel-TV and UBOD of the one part and the Directorate-General for Post and Telegraph Services together with telecommunications companies Kjøbenhavns Telefon Aktieselskab, Fyns kommunale Telefonselskab and Jydske Telefon-Aktieselskab of the other.

[47] The Tribunal consisted of two Supreme Court judges and Willy Weincke, head of division, of the Ministry of Culture.

[48] See article 11 bis (2) of the Berne Convention; and paragraph 1.1 above.

telecommunications companies had been prepared to pay, and a different tariff structure from that in respect of which Copydan and UBOD had entered a claim.[49] This skilfully formulated tariff set by the Tribunal, which included the remuneration from the coming into force of section 22 a on 1 July 1985, was sustainable and, with annual indexation and surcharges for new exploitations, has been applied ever since, to this very day.

An arbitration award of 8 February 1989 decided the splitting of remuneration between the various right holder groups, i.e. UBOD, the producers' group, Koda, the Danish Actors' Association, writers/dramatists, photographers, journalists, directors, set designers, etc.[50], a distribution key which, like the tariff, has been applied ever since.

International TV channels being retransmitted in Denmark and having cleared all rights to the retransmission, except for music, were not a part of UBOD, so Koda alone concluded an agreement with the cable operators for these TV channels, which had concluded agreements independently with the cable operators. These channels were therefore called Koda channels, now music TV channels. Subsequently, the so-called middle group channels were also added. Clearance of additional rights beyond music was missing for these channels, which Copydan handled, and for which the TV station also concluded a separate agreement with the cable operator. In other words, these music TV and middle group channels are not subject to the same 'one-stop shop' clearance as the Copydan/UBOD channels.[51]

2 1989: Addition to section 22 a

In 1989, a new subsection (4) was inserted in section 22 a, stating that the claim for remuneration is the responsibility of the owner of the system and that the Ministry of Culture can lay down more detailed rules on the collection of remuneration.[52] Subsection (4) at the time became subsection (5). The new subsection (4) read:

"The claim for remuneration is the responsibility of the owner of the system. If the remuneration payable by the owner is fixed as an amount per connection, the user of the individual connection is obliged to pay a corresponding amount to the owner. The Minister for Culture can lay down more detailed rules on the collection of the remuneration."

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[49] The Tribunal could do so, as it is not a court which is bound by the parties' claims, but an administrative body.

[50] During the arbitration, the other right holder groups argued that the TV stations' right to the signal was a pure prohibition right, which did not entitle the TV stations to a distinct right to remuneration. However, the arbitration tribunal held that the right to the signal conferred a distinct right to remuneration in addition to the right to remuneration for the acquired rights.

[51] See the lineup of all the channels today, both Copydan/UBOD channels, middle group channels and music TV channels here: https://www.copydan-verdenstv.dk/media/2544/kanaloversigt-a-z-2021.pdf (accessed on 28 December 2020).

[52] Bill no. L 132, tabled on 8 December 1988 and passed by the Folketing at the third reading on 23 May 1989. Act no. 378 of 7 June 1989, amending the Copyright Act, which came into force on 10 June 1989.

The explanatory memorandum read:

"The licence scheme implemented in 1985 for cable transmission, etc., of radio and television programmes has given rise to practical difficulties on a number of points. These include the question of who is obliged to pay the total remuneration for the retransmission of radio and television programmes by radio or cable. The legislative material clearly show that, according to section 22 a(2), the total claim for copyright remuneration falls on the owner responsible for a system, who has a de facto and de jure right to control and manage the system. In the light of the question raised, the Ministry considers it appropriate to propose that the legislative text of section 22 a should clarify that the claim for remuneration is the responsibility of the system owner.

[…]

Copy-Dan has expressed a wish that section 22 a be supplemented by a provision, according to which the owner of the system must be obliged to inform Copy-Dan of various factors of importance for collection of the remuneration, such as the number of connections and the extent of the programme retransmission. Although the Ministry is of the opinion that at present there is insufficient evidence of a need for such a provision, it is considered appropriate to provide – also on this point – a legal basis for administratively laying down at a later stage detailed rules on the obligation to provide information."[53]

3 1995: section 22 a becomes section 35 and is amended

In 1995, section 22 a was slightly amended and moved to section 35 in the context of a major copyright reform[54]. The amended wording was due to the SatCab Directive[55], which also required further amendments, but initially only a new subsection (5) was added, according to which the provision of subsection (1) on the simultaneous and unaltered retransmission of broadcasts via cable systems, etc., does not apply to broadcasts made by communication satellites unless they are simultaneously broadcast directly to the public, nor does it apply to broadcasts transmitted in encoded form.

The SatCab Directive required Member States to introduce a quasi extended collective licensing scheme, but the explanatory memorandum stated that in the Ministry of Culture's opinion, the existing compulsory licensing scheme should be maintained until the end of

[53] The Official Report of Danish Parliamentary Proceedings 1988-89, 2nd session, Schedule A, columns 3220 and 3222.

[54] L 119, Copyright Bill, tabled on 18 January 1995 and passed at the third reading on 2 June 1995; Act no. 395 of 14 June 1995.

[55] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and copyright-related rights in connection with satellite broadcasting and cable retransmission.

1997, as permitted by the Directive, in order to "use the intervening period to look further into the way in which the future scheme should be organised"[56].

The new section 35 – which therefore had the same wording as the previous section 22 a, only with the addition of communication satellites in subsection (5) and transfer of the last sentence of subsection (4) and the existing subsection (5) to another place in the Act[57] – read as follows:

"Works broadcast on radio or television may be distributed via cable systems and retransmitted to the public by means of radio systems, provided this is done without alteration and simultaneously with the broadcast.
(2) The author is entitled to remuneration. However, this does not apply where radio and television broadcasts are received by means of own communal antenna and retransmitted via cable systems comprising not more than 25 connections in a building or in a group of adjacent buildings.
(3) The claim for remuneration can only be asserted by a joint organisation approved by the Minister for Culture and comprising authors, performing artists and other right holders, including broadcasting organisations and photographers, whose works, performances, creations and images are used in radio and television broadcasts in Denmark.
(4) The claim for remuneration is the responsibility of the system owner. If the remuneration payable by the owner is fixed as an amount per connection, the user of the individual connection is obliged to pay a corresponding amount to the owner.
(5) The provision in subsection (1) does not apply to broadcasts on radio and television transmitted via communication satellites, unless they are simultaneously broadcast directly to the public, nor does it apply to broadcasts transmitted in encoded form."

4 1997: Section 35 changes from a compulsory to an extended collective licensing scheme

In 1997, in connection with implementation of the SatCab Directive, a major amendment was made to section 35, which came into force on 1 January 1998.[58]

4.1. Extended collective licence

[56] The Official Report of Danish Parliamentary Proceedings, 1994-95, Schedule A, page 1369 (explanatory notes to section 35).
[57] The Ministry of Culture's authority to lay down detailed rules on the collection of remuneration in the last sentence of subsection (4) was transferred to the generally worded provision in section 47(2), just as the limitation rule in section 22(5) was transferred to the generally worded limitation rule in section 49.
[58] Act no. 1207 of 27 December 1996. Bill no. L 77 was tabled on 20 November 1996 by the Minister for Culture (Jytte Hilden).

According to the explanatory memorandum[59]:

"The compulsory licensing scheme in section 35 of the current Act on cable retransmission etc. of radio or television broadcasts is proposed to be converted into an extended collective licensing scheme [...]. The amendment is necessary as a result of article 8(2) of the Satellite and Cable Directive. According to article 8(2), compulsory licensing schemes in the cable sector must have been abolished by 1 January 1998 and replaced by a system of exclusive rights based on collective rights management (article 9). The Ministry of Culture considers the compulsory licensing scheme for cable retransmission that has been in force since 1985 to have worked satisfactorily for both right holders and users. It is therefore proposed to continue the main features of the scheme in the new agreement-based scheme. This implies in particular that the organisations handling the right holders' interests vis-à-vis the cable systems will continue to be subject to public control. Furthermore, in the event of disagreement between users and right holders, the possibility of an administratively binding tribunal decision should be maintained in cases where cable transmission is unreasonably refused or offered on unreasonable terms."

Extended collective licensing was known from other areas:

"The bill means compulsory licensing [...] changes to extended collective licensing, corresponding to what applies under section 50 of the Copyright Act in a number of other user areas, for example, to radio and television stations' broadcasts (section 30), educational recordings, photocopying, etc. (sections 13-14 and section 17(3))."[60]

When the bill was introduced, Jytte Hilden, Minister for Culture (Social Democratic Party), stated as follows:

"The change means that in future, agreements on cable retransmission of radio and television broadcasts must be concluded between right holders and users."[61]

There was strong support for the bill. At the first reading, Jytte Wittrock (S) stated:

"[...] amendment [...] applies to what has to date been known as the compulsory licensing scheme, which has guaranteed right holders a remuneration for radio and TV programmes transmitted via cable networks. It has worked perfectly for the 11 years it has existed.
The scheme can therefore be continued on the basis of a new structure, more specifically the extended collective licence. [...] This is fully in line with the basic position of the Social

[59] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1926.

[60] Ibid., page 1932.

[61] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1965, written introduction (20 November 1996).

Democratic Party, namely that right holders and users negotiate agreements themselves; we therefore agree with the intention of the bill."[62]

Lars Løkke Rasmussen (V) also concurred:

"[...] naturally we pledge our support for the implementation of the two EC directives[63] mentioned. We have a number of technical issues which we will revert to at the committee stage, but we are of course happy to help bring the Act into line with the obligations we have assumed through our EU membership."[64]

And Brian Mikkelsen (KF):

"[...] there is not much to look closer at. It reflects European Union legislation, and, what is more, in a way that we in the Conservative People's Party can support.
Since the experience with compulsory licensing in the field of rights has not been particularly unfavourable, the draft bill proposes to continue a number of the provisions that apply already now. …
We Conservatives would like to stress [...] that the competitive situation must of course be kept in mind at all times, so we do not end up in a situation where competition law considerations and the principle of non-discrimination are disregarded."[65]

Aage Frandsen (SF) was slightly annoyed that it had to come from the EU:

"On the [...] issue of replacing the existing compulsory licensing scheme with an extended collective licence, we think that is right. We just wonder why the EU has to decide that we should do it. We might as well go through the schemes and identify what we ourselves find is right, and then implement it. But just because the EU says so, we do not think that should stop us from endorsing it, and I would say we believe the idea, as presented, is right."[66]

Even Kim Behnke (FP) concurred, perhaps a little reluctantly:

"We support the conversion of the compulsory licensing schemes that the Progress Party has been opposing into extended collective licences instead. In this connection, at the committee stage, we would like to investigate what changes this will bring to the absurd paradox

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[62] The Official Report of Danish Parliamentary Proceedings 1996-97, Discussions page 2153.

[63] The second directive that was implemented together with the SatCab Directive, was the Rental and Lending Directive.

[64] First reading - meeting 31. The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule F, page 2154.

[65] Ibid., page 2155.

[66] Ibid.

that people who pay TV licence fees to DR and TV 2 if they are connected to cable TV will be paying for it once more via the Copy-Dan levy."[67]

Eigil Møller (DF) was also in favour:

"Overall, there are positive improvements in this area. The Danish People's Party therefore supports the bill."[68]

What extended collective licensing more precisely meant in relation to the new section 35 was described in the explanatory memorandum as follows:

"The proposal involves incorporating the proposed new extended collective licensing scheme of section 35 of the Act [...] into section 50 of the Act, which contains the general provisions common to the extended collective licensing provisions of the Act. This implies that organisations which in future will be concluding agreements on retransmission via cable systems must cover a substantial number of Danish holders of rights in a particular kind of works. The extended collective licence essentially entitles cable systems to exploit non-represented authors' works, including foreign authors, in the same way and on the same terms as laid down in the agreement concluded with the organisation. This applies irrespective of whether the contracting Danish organisation works on the basis of powers of attorney issued by foreign authors. The contracting organisations are subject to approval by the Minister for Culture." [69]

4.2. Relationship with national right holders

Questions were raised along the way about the legality of the requirement regarding the organisations' national right holders:

"The notes to [...] [section 35] in the bill [the notes are included in the quote right above] [...] state that organisations [...] must cover a substantial number of Danish holders of rights in a particular kind of works. Does the Minister not consider this statement to be contrary to the EU's non-discrimination provisions?"[70]

The Minister (Jytte Hilden) replied, inter alia:

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[67] First reading - meeting 31. The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule F, page 2156.

[68] Ibid., page 2156.

[69] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1937 (notes to no. 12). On payments to DR and TV 2, see paragraph 4.2 below.

[70] Question no. 11, Cultural Affairs Committee, L 77 - Appendix 25.

"Under section 50(2) of the current Copyright Act, the extended collective licence only entitles the user to use the works of the non-represented authors in the same way and on the same terms as laid down in the agreement concluded with the organisation. It follows from this provision that foreign authors who are not represented by the contracting organisation are not to be placed in a less favourable legal position than authors who are represented by the organisation.
Furthermore, Articles 8(1) and 9(2) of the Satellite and Cable Directive require Member States to implement a system of exclusive rights in this area based on collective rights management. Rights clearance on the basis of an extended collective licensing scheme must therefore be considered to be in conformity with the Directive.
A broadly similar scheme has been in place in the other Nordic countries for several years. Against this background, I do not consider the provision of the bill [...] [section 35] on the organisational conditions for the new scheme to be contrary to the prohibition of discrimination under EU law."

An exemption for clearance of rights to national programmes was proposed by the user side (Danish Cable Television Association, "FDA"), but as in 1985, when the issue was considered, the Ministry of Culture concluded that Danish authors should be covered by the provision, so that no changes were to be made on this point:

"Like the current compulsory licensing scheme, the proposed subsection (1) - in accordance with Article 11 bis of the Berne Convention - covers any broadcast on radio or television, whether Danish or foreign. During the consultation process, the FDA, Tele Danmark, Local Government Denmark and the Federation of Non-Profit Housing Associations in Denmark proposed that Danish broadcasts be exempted from the new extended collective licensing scheme. The Ministry of Culture cannot agree to the proposal made. In the Ministry's view, the convention-related, media policy and practical reasons that in 1985 caused the implemented compulsory licensing scheme to comprise all broadcasts on radio and television, whether Danish or foreign, advocate equally strongly that this should also apply to the proposed new extended collective licensing scheme."[71]

The FDA raised the question again as a question to the Minister. The FDA proposed that

"a provision be introduced in the Copyright Act exempting cable distribution of programmes covered by the must-carry obligation from further clearances once such distribution takes place on Danish aerial systems. The exemption is a natural consequence of the fact that the rights in such programmes have already been fully cleared by the responsible broadcasters as far as all Danish listeners and viewers are concerned."

[71] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1933.

The Minister replied:

"This question was carefully considered when the compulsory licensing scheme was introduced by a broad majority in the Folketing in 1985. In the notes to section 22 a of the then Copyright Act, which corresponds to section 35 of the current Copyright Act, the Ministry of Culture declined to propose an exemption for national programmes on the following grounds [...] [hereinafter a reproduction of the notes quoted above in paragraph 1.1]"[72]

4.3. Scope of application

Section 35 again included encoded broadcasts, which in 1995 had been exempted in subsection (5):

"Since the cable retransmission scheme implemented by Chapter 3 of the Directive at its core is an agreement-based system, the considerations which caused encoded programmes to be exempted from the current compulsory licensing scheme do not seem to apply in the same way in the context of extended collective licensing. It is therefore proposed that retransmission of encoded broadcasts on the basis of an extended collective licence be subjected to the same rules as apply to rights clearance of initial broadcasting under Chapter 1 of the Directive. Encoded broadcasts will thus be covered by the extended collective licensing scheme in all cases where decoding equipment has been made available to the public by the broadcasting organisation or with its consent, wherever this may have been done.
The scope of application of the extended collective licence will then generally be the concept of "broadcast on radio or television", as this concept is defined in the notes to section 2 of the Copyright Act."[73]

Programmes initially transmitted by cable were still exempted:

"In one respect, the scope of application of the new extended collective licence is narrower than the concept of 'broadcast on radio and television' in section 2 of the Copyright Act. This concerns so-called 'programmes initially transmitted by cable', i.e. retransmission of primary broadcasts by cable. In the Ministry's view, there is no need to regulate the rights concerning simultaneous retransmission of programmes between different cable systems. The word 'wireless' clarifies that the extended collective licence for retransmission does not apply when the original broadcast was made via a cable system."[74]

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[72] Question no. 3, Cultural Affairs Committee, L 77 – Appendix 11.

[73] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1932.

[74] Ibid., pages 1932-33.

But it was made clear that the type of signal actually used for the retransmission was irrelevant:

"Furthermore, it is of no importance how the signal used for retransmission is received. In most cases, the signal is received wirelessly, but the extended collective licence will also cover retransmission of radio and television broadcasts on the basis of closed long-distance transmission, for example by long-distance cable or radio chain, provided that the broadcasts in question are simultaneously transmitted wirelessly to the public in this country or elsewhere."[75]

Another change was the removal of TV stations from the licensing provision of the Act:

"The proposed subsection (1), second sentence, according to which the extended collective licensing scheme is not to apply to rights held by broadcasting organisations, is a consequence of Article 10 of the Satellite and Cable Directive. Under Article 10, it is not possible to require broadcasting organisations to have their rights exercised through a right holder organisation. This implies that, unless otherwise agreed, each cable distributor must conclude individual agreements with broadcasting organisations on the right to retransmit their broadcasts via cable systems, etc."[76]

TV station rights, which were exempted from the extended collective licence, included both the right to the signal and acquired rights.[77] However, the exemption had no practical implications, as the cooperation established in 1985 between Copydan and UBOD continued, thus fulfilling the political wish for a flexible clearance option for cable operators.

In addition, the lower limit of the scope of application for the licensing scheme was changed from 25 connections to 2 connections:

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[75] Ibid. This specification is important, as Norway did not have a similar specification in its explanatory memorandum, which led the Norwegian Supreme Court in 2016 to rule in a case between Norwaco and Get that the exploitation in question was not covered by the corresponding Norwegian extended collective licensing provision in this area, but that a primary broadcast (which had not been cleared at the time and for which no clearance possibility existed under the extended collective licence) was involved.
See now also Article 2(2)(a) of the SatCabII Directive, according to which retransmission exists "regardless of how the party carrying out the retransmission obtains the programme-carrying signals from the broadcasting organisation for the purpose of retransmission".

[76] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1933.

[77] See Article 10 of the SatCab Directive, according to which the compulsory licensing of cable retransmission rights through collective management organisations (extended collective licensing) does not apply to broadcasting organisations "irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights". See also the quote from the 2014 explanatory memorandum on exemption from extended collective licensing of TV stations' rights, reproduced in paragraph 5.2.

"During the consultation process, the proposal [to change the limit for exemption from payment from 25 to 2 connections] received support from the Federation of Non-Profit Housing Associations, Copy-Dan, the FDA, Stofa, Tele Danmark and Local Government Denmark. It is argued, inter alia, that the current limit of 25 connections leads to distortion of competition in favour of reception of radio and television broadcasts by means of satellite dishes. [...]
The main objective of the current 25 connections limit has been to avoid unnecessary, lengthy litigation between right holders and users by clarifying in law when rights must be cleared in connection with cable retransmission. As this objective may equally well be achieved by a lower limit than 25 connections, the Ministry of Culture finds that the request for a lower limit should be granted. Against this background, Article 35(2) proposes that works included in a wireless radio or television broadcast received by means of the recipient's own antenna may be retransmitted via cable systems comprising no more than 2 connections. The proposal will bring the Danish lower limit for rights clearance in connection with cable retransmission broadly in line with what currently applies in the UK and the Netherlands."[78]

The cable system owner's responsibility for the payment of the remuneration and the end-user's settlement with the owner was also maintained, but it was pointed out that no remuneration is payable for the newer options to choose different packages or encoded channels if they have not been chosen by the end-user concerned:

"The proposed subsection (3), first sentence, according to which the owner of a cable system is responsible for concluding the agreements required under subsection (1) in connection with the retransmission of radio and television broadcasts via the cable system, corresponds to section 35(4) of the current Act. The same applies to the proposed subsection (3), second sentence, according to which the user of the individual cable connection is obliged to settle with the owner of the cable system in cases where the remuneration payable by the owner under an agreement concluded or an order made by the Copyright Licence Tribunal is fixed as an amount per connection. [...]
On the basis of points of view expressed by the FDA in its consultation response, the Ministry of Culture considers it appropriate to clarify that the proposed section 35(3) does not cover situations where, by so-called 'package selection' or use of decoders in the system, the individual connections to a cable system have opted out of given radio or television programmes otherwise available via the cable system."[79]

4.4 Adoption

[78] The Official Report of Danish Parliamentary Proceedings 1996-97, Schedule A, page 1933.

[79] Ibid., page 1934.

The bill was adopted at the third reading on 20 December 1996 and all parties voted in favour, except the Red-Green Alliance (EL) which voted against, but not because of section 35.

Section 35, now with an extended collective licence instead of a compulsory licence, then read as follows:

"Works which are broadcast wireless on radio or television may be retransmitted simultaneously and without alteration via cable systems and may in the same manner be retransmitted to the public by means of radio systems, provided the requirements regarding extended collective licence according to section 50 have been met. The provision of the first sentence shall not apply to rights held by broadcasters.
(2) Notwithstanding the provision of subsection (1), works forming part of a wireless radio or television broadcast received by means of the receivers' own antennae, may be retransmitted via cable systems consisting of no more than two connections.
(3) The owner of a system as mentioned in subsection (1) is responsible for an agreement being made regarding retransmission of radio and television broadcasts via the systems. If remuneration to be paid by the owner according to an agreement made in accordance with subsection (1) or an order from the Copyright Licence Tribunal under section 48(1), is fixed as an amount per connection, the user of the individual connection is under an obligation to pay the owner a corresponding amount."[80]

In the new decade, i.e. millennium, after its adoption, wireless retransmission became widespread, and Copydan, Koda[81] and UBOD entered into agreements with TV distributors on retransmission by satellite, DTT and mobile networks. In addition, agreements on new forms of cable retransmission such as IPTV were concluded under the section 35 scheme. This was possible because, in line with the Danish tradition of technology-neutral interpretation of copyright, the concepts of "cable retransmission" and "radio retransmission" of section 35 could also cover new forms of cable (wire) and wireless retransmission, even though, inter alia, IPTV did not exist when the statutory provision was adopted in 1996.[82]

5 2014: Section 35 is extended to on-demand exploitation, etc.

[80] The Ministry of Culture's Official translation.

[81] Copydan and Koda are each approved by the Ministry of Culture for extended collective licensing under section 35; see extended collective licence approvals at https://kum.dk/kulturomraader/aftalelicensgodkendelser (accessed 26 March 2021).

[82] The situation was different in Germany, where a judgment held that IPTV was not covered by a corresponding German collective management provision introduced following the SatCab Directive, because IPTV was a new technology compared to the form of cable retransmission existing at the time the provision was adopted.

In 2014, section 35 was extended to include third-party on-demand exploitation and other forms of reproduction of the content of radio and television broadcasts. New provisions in subsections (4)-(7) were thus added to section 35 in this regard, which came into force on 29 October 2014.[83] The bill to extend section 35 was passed at the third reading on 27 May 2014, with all voting in favour.

5.1 Updating the scheme generates legislative support

Already at the first reading on 18 February 2014, there was strong support for updating the scheme. [84] Eyvind Vesselbo (V) said:

"We consider it [...] appropriate to update section 35 of the Copyright Act to adapt it to technological developments, thereby making distribution of radio, television and TV programmes via on-demand services easier and more transparent. On-demand services and streaming are here to stay and it is therefore crucial that the legislation is adapted to the new digital reality and does not continue to only address so-called flow TV."

And Troels Ravn (S):

"In relation to retransmission of broadcasts, I would say that this part of the Act is intended to adapt the extended collective licence for retransmission of broadcasts to technological developments, with a particular focus on including the third-party exploitation option, primarily on-demand services, within the framework of the extended collective licence. [...] The Social Democrats consider this extremely sensible and we support the proposal."

Even Alex Ahrendtsen (DF), who grumbled a little, was in favour of the section 35 proposal:

"It is perhaps not so surprising that both the Liberal Party and the Social Democratic Party support this bill, given that they are wearing EU socks in this matter as well, as expected. We are not so optimistic and positive in the Danish People's Party...
But the bill is also about section 35, that is, on-demand television or on-demand services, and about conferring more powers on the Copyright Licence Tribunal. [...] that part we support."

Özlem Sara Cekic (SF) was in favour, too:

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[83] Act no. 741 of 25 June 2014, amending the Copyright Act (Certain permitted uses of orphan works and amendment of the extended collective licensing provision relating to cable retransmission). Introduced on 29 January 2014 by the Minister for Culture (Marianne Jelved).

[84] Session 2013-14. See https://www.ft.dk/samling/20131/lovforslag/L123/BEH1-53/forhandling.htm

"[...] we support the bill to amend the Copyright Act. We think it is positive ... that section 35 is extended to take account of technological developments."

And Jørgen Arbo-Bæhr (EL) as well:

"Broadly speaking, I think this is actually a pretty good copyright bill. The bill concerns changing the extended collective licence when broadcasts are retransmitted via cable systems, etc., and on-demand exploitation when third parties are involved, which seems like a good and flexible solution."

And Lars Barfoed (KF):

"[...] it is simply a question of updating the legislation to the technological developments that are taking place, and to the Danes' television habits, where we see on-demand television being used more and more. I think it makes perfect sense for us to do this, and we can therefore [...] support the bill."

The Minister for Culture, Marianne Jelved, concluded by repeating that the purpose was to update the provision:

"[...] it is proposed to modernise section 35 of the Copyright Act to take account of the way in which television and radio programmes are used today. The current section 35 was last revised in 1996, when the electronic world was entirely different from what it is today. For example, it was uncommon to access protected content on demand or to show television broadcasts in shops. The proposed amendment to section 35 updates the provision to the digital world and, more specifically, does so by making it easier for users and right holders to conclude agreements on new ways to use television and radio programmes."

The explanatory memorandum initially stated as follows on the extended collective licensing provision of section 35:

"The reason for this is that broadcasts contain a large number of works and other protected creations which are impossible to clear individually. The extended collective licence construction allows all rights involved to be cleared collectively through a right holder organisation that represents a substantial proportion of the authors of the works used. In practice, the extended collective licensing scheme is administered by Copydan Verdens TV, which is responsible for collecting the remuneration for the retransmission."[85]

[85] The Official Report of Danish Parliamentary Proceedings 2013-14, Schedule A, page 6, column 2 (section 4.1.1 of the bill on "Applicable law").

The proposal was prompted by recent years' technological developments:

"[...] section 35 was most recently revised in connection with Act no. 1207 of 27 December 1996. The pace of technological developments is rapid, with new technologies offering new ways of making content available. Broadcasting organisations and TV distributors alike want to use these new ways and see them as an essential element of their business. One example is the emergence of various forms of on-demand services for e.g. flat screens, mobile phones and tablets, where the general public can access content at an individually chosen place and time.
Television use today has changed significantly since the time when section 35 was implemented. For example, as a supplement to repeat broadcasting, TV distributors are increasingly making broadcasts available on demand. The provision should therefore be modernised to take account of the way in which television is consumed today, with broadcasts not exclusively being watched at the same time as they are transmitted, but often time-shifted or on other platforms.[86]

The Ministry of Culture found that

"[...] there is a growing need to establish a flexible way for third parties to clear the rights to these kinds of services."[87]

The possibility of licensing by way of extended collective licensing under the general extended collective licensing provision was already available, but the Ministry of Culture was aware of the significance of the legislative support implicit in a specific extended collective licensing provision:

"These areas are already covered by the general extended collective licence of section 50(2). It is proposed that technological developments in this area should not result in these forms of use of broadcasts being comprised by the general extended collective licence, which is in the nature of a catch-all provision. The specific extended collective licences reflect areas in which it is considered socially important that collective agreements can be concluded with the effect of extended collective licensing. This calls for a kind of codification by which the extended collective licence is included in a specific extended collective licence rule. This will generate greater openness and transparency for users as well as right holders in an area of social importance such as television. The Ministry of Culture believes this will help improve the reliability of TV provision to Danes."[88]

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[86] Ibid., column 1 (Section 3 of the bill on "amendment of section 35 of the Copyright Act").

[87] Ibid.

[88] The Official Report of Danish Parliamentary Proceedings 2013-14, Schedule A, page 7, column 1 (Section 4.1.3 of the bill: "The Ministry of Culture's considerations and proposals").

5.2 New provisions

The new subsection (4) secured new ways of using the linear, also called flow TV, broadcasts from TV stations. According to the explanatory memorandum:

"Subsection (4) refers to forms of exploitation that are ancillary to the original broadcast, but which the Ministry of Culture nonetheless considers may be of considerable economic importance. For example:
- making radio and TV broadcasts considered to fall outside the scope of section 35(1) of the Copyright Act available simultaneously and unaltered regardless of technology on, e.g. the internet,
- on-demand use of radio and TV broadcasts by TV and other content distributors (including catch-up),
- services/involvement of TV and other content distributors in connection with the recording of TV content, and
- public performance of radio and TV broadcasts in shops, restaurants and other places accessible to the public, etc."[89]

Programmes broadcast by cable, which had previously been exempted, were thus also covered by section 35.

The reproduction of works and making them available must be linked temporally to the broadcast, but this is interpreted dynamically. According to the explanatory memorandum:

"The term 'temporally linked' means that the act of making programmes available on demand takes place within a specific, delimited period of time (e.g., catch-up). The proposed condition is designed to have built-in flexibility so that it can be adapted to the circumstances, including technological and market developments. Ultimately, it will be up to the contracting parties to define the specific delimited period of time."[90]

The new subsection (5), which concerns the use of broadcasts made available on demand, provides:

"[...] a possibility for a third party – e.g. a TV distributor – to make content from a broadcasting organisation available on demand when the work is simultaneously made available on demand by the broadcaster."[91]

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[89] Ibid.

[90] Ibid., column 2 (Comments in the bill on the individual provisions).

[91] Ibid., page 7, column 1 (Section 4.1.3 of the bill: "The Ministry of Culture's considerations and proposals").

The corresponding requirement for "simultaneous and unaltered" retransmission in relation to on demand is as follows:

"The proposed section 35(5) means a third party would be able to fully or partially mirror a broadcasting organisation's on-demand services. Broadcasts must be made available within the same period of time as the broadcasting organisation makes them available. Thus, there must be simultaneity between the broadcaster's making the broadcast available and the third party's making the broadcast available. The proposed provision covers the situation in which the third party's service must normally mirror the entire on-demand offering. However, it will be up to the individual broadcasting organisation to decide whether the third-party service is to mirror the entire on-demand offering or only some of it."[92]

The new subsection (6) concerns an opt-out option, which is not known from subsection (1) of section 35, i.e:

"As with the general extended collective licence in section 50(2) of the Copyright Act, subsections (4) and (5) must allow the individual author to have an injunction granted vis-à-vis any of the contracting parties against exploitation of the work, see the proposed section 35(6), because the author does not want to be covered by the agreement."[93]

Under the new subsection (7), the Copyright Licence Tribunal will be given jurisdiction:

"[...] to decide whether an organisation authorised under section 50(4) to enter into agreements with the effect of extended collective licensing covered under the proposed subsections (4) and (5), is setting unfair terms for entering into such agreements. The Tribunal may lay down the terms, including the amount of the remuneration."[94]

In addition, according to subsection (7), the TV stations' rights are exempted from the extended collective licence:

"As is the case for cable retransmission and other retransmission according to section 35(1), broadcasting organisations' rights will not be covered by the extended collective licence of subsections (4) and (5). This is stated in the proposed section 35(6). Broadcasting organisations will thus continue to have an unrestricted exclusive right in these areas and, as previously, a broadcasting organisation must give its express consent for use in relation to the signal right and any acquired rights covered by subsections (4) and (5)."[95]

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[92] The Official Report of Danish Parliamentary Proceedings 2013-14, Schedule A, page 17, column 1 (Comments in the bill on the individual provisions).

[93] Ibid., column 2.

[94] Ibid.

[95] Ibid.

The new provisions of section 35(4)-(7) read as follows:

"(4) Works broadcast by radio or television may in ways other than as provided in subsection (1) be reproduced by others provided that the requirements regarding an extended collective licence under section 50 below are met. Acts of reproduction and of making works available in such a way that the public acquires access to them at an individually chosen place and time, cf. section 2(4) (i), shall take place in connection with the broadcasting in terms of time.
(5) Works made available by a broadcasting organisation in such a way that the public acquires access to them at an individually chosen place and time, cf. section 2(4) (i), may be made available by others in such a way that the public acquires access to them at an individually chosen place and time, cf. section 2(4) (i), when they are made available in the same way and within the same period as they are made available by the broadcasting organisation and provided that the requirements regarding an extended collective licence under section 50 below are met. Acts of reproduction necessary to make them available may be carried out.
(6) The provisions of subsections (4) and (5) shall not apply if the author has obtained an injunction prohibiting the exploitation of the work by any of the parties to the licence agreement. The provisions shall not apply to rights held by broadcasting organisations.
(7) If questions arise as to whether an organisation approved under section 50(4) hereof to conclude licence agreements covered by subsections (4) and (5) is imposing unfair conditions in connection with a licence, either of the parties may submit the question to the Danish Copyright Licence Tribunal (Ophavsretslicensnævnet), cf. section 47. The Tribunal may determine the conditions, including the amount of the remuneration."[96]

In the years following the adoption of the new provisions, Copydan, Koda and UBOD entered into agreements under the scheme with TV distributors for a range of digital services, such as catch-up, on-demand, N-PVR (except TV), offline and TV station streaming (DR TV) services. This was a continuation of the licensing that had started some years earlier under the general extended collective licence, but after the adoption, licensing of digital services really took off. Other third-party exploitation under the scheme such as TV in public venues also developed.

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There is broad agreement that the scheme under section 35 is a success. It has ensured legality, flexible clearance of all rights involved and remuneration to right holders. The new scheme has also meant that conflicts over exploitation of rights have been avoided. Such

[96] The Ministry of Culture's Official translation.

conflicts have been seen in other countries like Finland, causing the exploitation of rights to be interrupted and payments to right holders to be cancelled. Denmark is therefore also the most advanced country in Scandinavia – well, probably in the whole of Europe – in terms of digital exploitation. This is not least due to the extensive political support for the scheme and support from the Ministry of Culture.

A further extension of section 35 is underway in 2021, in that a bill on extended use of on-demand content and the further exploitation of streaming services not provided by TV stations, as well as the implementation of the SatCabII Directive[97], which should have been accomplished by 7 June 2021, was submitted for public consultation on 18 December 2020, as adjusted on 14 January 2021, by the Ministry of Culture. The bill was introduced on 26 March 2021[98].

This means section 35 will continue to be significant for many years, providing an important basis for cooperation on flexible rights clearance as well as for the financing of Danish content production – in a broader perspective, the TV industry's cooperation on access to TV content, i.e. freedom of information, which is key in a democracy.

26 March 2021

[97] EU Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions and retransmissions of TV and radio programmes by broadcasting organisations.

[98] Bill no. L 205, see: https://www.ft.dk/ripdf/samling/20201/lovforslag/l205/20201_l205_som_fremsat.pdf