

## DTT PRIMARY TRANSMISSION AND RETRANSMISSION – COPYRIGHT CHALLENGES

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DTT is an abbreviation of Digital Terrestrial TV. In Norway, the DTT transmission network is known as "bakkenettet", in Sweden as "marknettet" and in Denmark simply as "DTT-sendenettet" (the DTT network).

The main topic of this article is DTT, but I shall also examine other platforms, as the copyright issues are the same in relation to distribution on all platforms, such as satellite, to mobile phones, and cable, including IPTV and web TV.

Primary transmission is also called primary broadcast or simply broadcast and means the distribution of radio and TV programmes that is made by the broadcaster itself. Retransmission, which is new transmission/new public performance by another organisation than the broadcaster, is also called rebroadcasting, and the neutral term distribution covers both primary transmission and retransmission.

#### 1. UBO

Lassen Ricard act as attorneys and secretariat for the organisations UBOD (Union of Broadcasting Organisations in Denmark), UBON (Norway), UBOS (Sweden), UBOI (Iceland) and UBOF (Finland), jointly called UBO. New UBO organisations may join; at the moment efforts are being made to establish a UBOE (Estonia).

As indicated by the name, UBO is a union of broadcasters. Among the members are: DR, TV 2|Denmark, SVT, TV4 (Sweden), NRK, TV2 (Norway), YLE, MTV OY, RUV, SVF, KNR, ARD, ZDF, VG Media (the channels RTL, Sat.1, Pro7 and others), France Télévision, RAI, TVE, and broadcasters from Poland, Turkey, Russia, Bosnia and Arab countries etc. More than one hundred broadcasters, with more than 180 TV channels, are today members of UBO, and their radio channels are also included.

The public service broadcasters are the core of the UBO cooperation, and they were the founders more than 25 years ago.<sup>2</sup> All the UBO broadcasters have one thing in common, viz. that their target is their

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<sup>1</sup> My motivation for writing this article is that in my capacity as attorney with Lassen Ricard I deal every day with all the questions related to the distribution of TV channels and TV content in every possible way, including in particular the new platforms, media and issues involving digital distribution.

<sup>2</sup> In 1985 a compulsory licence scheme for retransmission was introduced in s. 22a of the Danish Copyright Act, which came into force on 1 July 1985, and this gave rise to the formation of UBOD. In the 1995 Copyright Act the wording of s. 22a was moved to s. 35. As a result of the Sat/Cab Directive, the compulsory licence scheme was changed in the 1996b Copyright Act with effect from 1 January 1998 into the agreement-based scheme known today.

own home country, and so they have not cleared the distribution rights to their radio and TV channels abroad, or in Denmark, Norway, Sweden, Iceland and Finland, respectively. The opposite is the case of the so-called international TV channels (in Denmark called the KODA channels<sup>3</sup>), where the broadcaster has acquired the distribution rights abroad, perhaps even worldwide.

In UBO we cooperate in matters concerning retransmission, compensation for private copying and "ancillary on demand", which will be described in detail below.

## 2. The UBO cooperation areas

### 2.1. Retransmission

Retransmission of member channels is UBO's main area of interest.

Retransmission is covered by the broadcaster's exclusive right. Thus the broadcaster has a signal right, see s. 69 of the Danish Copyright Act, and consequential copyrights from employees and others, and accordingly the broadcaster must give its consent to any retransmission. Moreover, all other rights holders involved in radio and TV programmes have copyrights in case of retransmission, and they must also give their consent.

There are very many, and many different, rights involved in radio and TV programmes, and as a result it is not practically possible to clear retransmission rights on an exclusive-rights basis, i.e. by obtaining the consent of each individual rights holder. For cable retransmission, the Sat/Cab Directive<sup>4</sup> lays down mandatory collective administration of all these other copyrights, i.e. all copyrights apart from the rights held by the broadcaster, and in the Nordic countries the same arrangement is also found in the extended collective licence provisions in the retransmission area.

Extended collective licence means that if a collecting society has entered into an agreement with a user (e.g. a cable network or an operator), then the agreement covers not only the rights of the collecting society's own members, but also rights of a similar nature held by non-members. Thus the user is able to exploit these rights on the same terms. In this way an extended collective licence ensures that all necessary copyrights are cleared. The extended collective licence scheme is a brilliant tool for the clearing of rights, as the user only has to enter into an agreement with one single organisation for each type of right. The scheme is also valuable for the rights holders, as extended collective licence guarantees that agreements are in fact concluded in relation to a given exploitation, and that payment is actually made to the rights holders.

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<sup>3</sup> The term "KODA channels" refers to the Danish organisation KODA. The broadcasters have cleared all retransmission rights for these channels apart from musical rights, which are represented by KODA.

<sup>4</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting of radio and TV programmes and cable retransmission.

All types of copyright to radio and TV programmes are represented by the various Nordic collecting societies. In Denmark UBOD cooperates with the collecting societies Copydan Cable TV and KODA, who have been approved by the Ministry of Culture to enter into retransmission agreements with extended collective licence effect under s. 35 of the Copyright Act, and this means that UBOD, Copydan Cable TV and KODA together can offer a retransmission operator a joint agreement with all necessary copyrights. In Norway UBON has a similar cooperation with Norwaco under s. 34 of the Norwegian åndsverkslov; in Sweden UBOS cooperates with Copyswede, IFPI and FRF<sup>5</sup> under s. 42 f of the Swedish upphovsrättslagen; in Iceland UBOI cooperates with IHM under s. 23 a of the Icelandic copyright act; and in Finland UBOF cooperates with Kopiosto under s. 25 h of the Finnish copyright act. The extended collective licence provisions in the retransmission area are very similar in all the Nordic countries.

In other words: The UBO radio and TV channels are offered to the user with all retransmission copyrights in one single package, as all rights have been cleared in one agreement, and the terms, including payment for the exploitation, are the same for all UBO channels. For many years the extended collective licence scheme for retransmission and the cooperation between UBOD, Copydan Cable TV and KODA have constituted a highly efficient arrangement, also according to the Danish Ministry of Culture.<sup>6</sup>

Retransmission may take place on all platforms: by cable, including IPTV and web-TV, and wirelessly by mobile TV, satellite and DTT.

To illustrate the development in the multi-media world, Copydan Cable TV has been considering for a long time to change its name, as the word "Cable" is no longer in keeping with the times. The name was originally chosen because the retransmission scheme initially started with cable, whereas wireless retransmission is a much more recent phenomenon. This can also be seen in the Sat/ Cab Directive and the Commission report on its application, see clause 11 below.

## 2.2 Compensation for private copying

The cooperation between the UBO organisations and the collecting societies in the Nordic countries also covers compensation for private copying, i.e. the scheme under which rights holders receive compensation for the copying that takes place for private use in accordance with the exemptions in the copyright acts. Such compensation is made by way of tariffs imposed on blank media and hardware or via government subsidies. The issue of private copying lies outside the scope of this article.

## 2.3 "Ancillary on demand"

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<sup>5</sup> IFPI (international Federation of the Phonographic Industry) represents the record producers (see [www.ifpi.se](http://www.ifpi.se)), and FRF represents the film producers (see [www.frf.se](http://www.frf.se)).

<sup>6</sup> See e.g. the explanatory notes to the 2003 Copyright Act (L17), where it is stated in item 7 that "The Copyright Act's cable scheme must be described as efficient". See also letter of 2 June 2005 from the Minister for Culture to Poul Nødgaard, in which the cable scheme is described as "rather efficient", and the explanatory notes to the 2008 Copyright Act (L58), where it is stated as a general comment that "Extended collective licence has proved to be an efficient and easy method for clearing rights ...". (my translation)

The cooperation in Denmark between UBOD, Copydan Cable TV and KODA was recently expanded to also include TV content exploited on demand by a third party. In this connection on demand is ancillary to retransmission, which is the primary exploitation.

Clearing of on-demand exploitation with extended collective licence effect has become an option in Denmark as a result of a new provision in s. 50 (2) of the Copyright Act that entered into force on 1 July 2008.<sup>7</sup> The provision introduces a general extended collective licence, and it is now possible to give extended collective licence effect to (an) agreement(s) in a specified area if the organisation (the collecting society) that applies for approval of extended collective licence is representative, and the Ministry of Culture accepts that the organisation enters into such (an) agreement(s).

So far this scheme is only an option in Denmark (the Danish Copyright Act), but the other Nordic countries are considering the possibility of introducing a similar provision in their copyright acts. To date, Copydan Cable TV, KODA and NCB have applied for approval by the Ministry of Culture of an agreement with the cable operators etc. on Start Over and an on-demand DR channel (DR TV Arkiv – DR TV Archive). The agreement was entered into in collaboration with UBOD, as are retransmission agreements, and thus all necessary copyrights to the services are offered collectively to the cable operators.

Start Over means that a cable operator is able to offer their customers that they may start a given TV programme (all programmes except sports programmes) from the beginning – start them over – as long as the programme has not ended.<sup>8</sup> Thus, if you are a cable customer and returns from work or have just put your children to bed two minutes before the end of a programme that you would like to see, you will still be able to see it from the beginning. Moreover you will be able to pause the programme, which is convenient if, for instance, you would like a break to make a cup of coffee. In this way the TV programme is not distributed simultaneously with the primary transmission, but staggered for a limited on-demand period. Consequently the Start Over service cannot be covered by the extended collective licence for retransmission, as this would require that the retransmission took place "simultaneously" (see s. 35 of the Copyright Act) with the primary transmission, but as previously mentioned the service can be covered by the new general extended collective licence.

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<sup>7</sup> Ss. 50 (1) and (2) of the Danish Copyright Act now read as follows:

"Extended collective licence according to sections 13, 14 and section 16 b, section 17 (4), sections 24 a, 30, 30 a and 35 may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.

(2) Further the extended collective licence may be invoked by users who, within a specifically defined area, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the area in question. However, this does not apply if the author has issued a prohibition against the use of the work to any of the contracting parties."

<sup>8</sup> The two major cable operators in Denmark, YouSee and Stofa, now offer the service to their customers; for YouSee, see: [http://yousee.dk/publish.php?dogtag=ktv\\_priv\\_tv\\_eksi\\_sf](http://yousee.dk/publish.php?dogtag=ktv_priv_tv_eksi_sf); and for Stofa, see: <http://www.stofa.dk/showpage.php?mid=336>. Telia TV has also introduced the service: <http://ww3.telia.dk/tv/startforfra/Default.aspx>

The on-demand DR channel shows material (70- 125 hours of TV programmes) that is replaced on an on-going basis, as it has been broadcast during the previous month and can also be viewed at DR's web-site (www.dr.dk). But when it is offered by the cable operators to customers with an interactive digital receiver, creating a "DR universe", the programmes can be viewed in broadcast quality and on TV sets (instead of on a pc), which enhances the user experience.

On-demand services such as Start Over and the DR on-demand channel are excellent examples of the way in which extended collective licence can be used in today's multi-media world. The Ministry of Culture gave its approval in July 2009.

### 3. The scope of the cable retransmission scheme in Denmark

The extended collective licence for cable retransmission in Denmark today covers more than 7,000 cable networks, with a total of more than 1.6 million connected households. There are a total of more than 21 million connections to UBOD/Copydan TV channels in Danish cable networks, and a connected household thus receives an average of 13.3 UBOD/Copydan TV channels, which is quite a large number. To this should be added the distribution of UBOD radio channels.

Unfortunately there is not the same tradition for having access to neighbouring countries' channels in Norway and Sweden as is the case in Denmark, and consequently there are fewer connections to UBO TV channels in the two countries.

### 4. The legal challenges in relation to DTT and other platforms - facts

As there are many copyrights involved in connection with radio and TV programmes, the legal challenge in relation to DTT is, as with all distribution of radio and TV, whether the rights in question have been cleared. And that may be a question of whether the transmission is primary transmission or retransmission.

The situation is that in connection with national UBO channels, e.g. distribution of the DR1 channel in Denmark, DR has cleared all rights in relation to its own primary transmission, but not all rights to retransmission.<sup>9</sup>

In relation to neighbouring countries' UBO channels, e.g. distribution of DR1 in Norway, the situation is that DR has not cleared all rights to the distribution of DR1 outside the home country (Denmark), neither to primary transmission by DR itself or to retransmission by another organisation.

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<sup>9</sup> Cf. the Minister for Culture's reply of 11 May 2005 to question no. S 1158, where it is stated that:

"It is a contractual issue who should be responsible for payment to the rights holders. Many satellite TV stations [international TV channels] have also cleared the cable rights in their contracts with the rights holders, so that the cable network does not have to pay separately for this to Copy-Dan. But in DR and TV 2 this is not standard practice. DR and TV 2 only clear the broadcasting rights - not the right of the cable networks to retransmit the programmes."

Consequently, if e.g. an owner of a cable network<sup>10</sup> wishes to retransmit the UBO channels (the national ones and the neighbouring countries'), they have to enter into an agreement with Copydan Cable TV, KODA and UBOD, and in the other Nordic countries with their corresponding national organisations, thus acquiring all rights collectively. The channels are known as free or inexpensive channels (low pay).

The international TV channels (as mentioned above, they are known in Denmark as the KODA TV channels) will often have cleared the rights to both primary transmission and retransmission, the latter not including music rights, however, and the party that wishes to retransmit the channels must acquire these music rights as well as the rights held by the broadcaster behind the TV channel.<sup>11</sup>

For the TV channels that are known in Denmark as middle-group channels (e.g. Disney Channel, Kanal 5 and TV 2 Zulu), the broadcaster has acquired some, but not all the other retransmission rights.<sup>12</sup> In order to acquire the remaining rights, agreements must be entered into with both Copydan Cable TV and KODA.

Anyone who wishes to retransmit international and middle-group channels, which are more expensive than the UBO channels (and therefore "high pay"), must not only enter into an agreement with the broadcaster, but also a separate agreement with Copydan Cable TV (on behalf of KODA), and in the other Nordic countries with the corresponding national organisations. And consequently the party that wishes to retransmit the channels must also pay two separate tariffs.

##### 5. The legal challenges in relation to DTT and other platforms - jurisprudence

Not much can be found in Danish legislation to help solve the question of whether something is primary transmission or retransmission. First of all there must, of course, be distribution, i.e. an act protected by copyright, but in practice that is hardly ever a problem. The relevant question is whether a given distribution is primary transmission or retransmission. And nothing is stated in this regard in Danish legislation. The extended collective licence provisions in the Nordic countries only lay down the way in which rights are cleared when retransmission takes place<sup>13</sup>, and the provisions do not even cover the entire retransmission area; see for further detail clause 10 below.

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<sup>10</sup> There is a slight difference in the extended collective licence provisions in the Nordic countries. S. 35 (3) of the Danish act stipulates that it is the owner of the network who must enter into the retransmission agreement, whereas s. 34 of the Norwegian act and s. 42 f of the Swedish one stipulate that it is the party in charge of the retransmission that must enter into the agreement. In practice there is, however, hardly any difference in the way the systems operate.

<sup>11</sup> In Denmark, the international TV channels are also known as the KODA TV channels, and the tariff payable to KODA (it is invoiced by Copydan Cable TV on behalf of KODA) depends on the music content of the TV channel (e.g. MTV has a high music content, BBC World a medium music content, and Eurosport News a low music content), see channels and prices at <http://www.copydan.dk/DK/Kabeltv/Kunder/Antenne-%20og%20boligforeninger/Priser.aspx>.

<sup>12</sup> See channels and prices at <http://www.copydan.dk/DK/Kabeltv/Kunder/Antenne-%20og%20boligforeninger/Priser.aspx>.

<sup>13</sup> See article by Peter Schönning "Det ophavsretlige viderespredningsbegreb" (The copyright concept of retransmission), printed in the Danish weekly law reports U.2008.B.347, where he states that "S. 35 of the Copyright Act ... is an extended collective licence provision that only lays down the way in which rights are cleared when cable retransmission takes place." (my translation)

Correspondingly, the Sat/ Cab Directive does not specify conclusively the situations in which retransmission takes place.<sup>14</sup>

On the other hand, the international copyright convention, the Berne Convention<sup>15</sup>, includes a definition of retransmission. It appears from Art. 11 bis (i) (ii) that

"Authors ... shall enjoy the exclusive right of authorizing ... any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one"

It appears that two factors are decisive for determining whether there is retransmission: 1) There must be a primary transmission, and 2) the "other" distribution must be carried out by "an organisation other than the original one", i.e. by another organisation.

The Berne Convention does not distinguish between different platforms, and the same assessment has to be made in relation to a DTT network and e.g. a cable network, which also appears from a reply from the Danish Minister for Culture in 2005.<sup>16</sup>

With regard to the second condition it is not decisive whether retransmission is made to a new audience, be it in terms of geography or method of receiving the signal etc. When the condition was worded (in 1948) such distinction was discussed, and rejected, and consequently the only decisive factor is whether the distribution is made by another organisation.

But when are we dealing with another organisation? That can be difficult to decide. It is particularly difficult in cases where, on the surface, it is another organisation, but this organisation is owned by the original broadcaster and/or carries out distribution on behalf of that broadcaster, which is the case in respect of DTT in Denmark:

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In relation to Denmark, the decisive factor for determining whether there is "radio or television broadcasting" that requires a licence is the interpretation of s. 2 (4) no. 1, 1st sentence, of the Danish Copyright Act ("Public performance ... also includes ... transmission by wire or wireless transmission of works to the general public, including radio and television broadcasts ..."). S. 35 is found in chapter 2 of the act that is concerned with "Copyright limitations and administration of rights by way of extended collective licence".

<sup>14</sup> See the European Court of Justice's judgment of 3 February 2000 in case C- 293/98 (Egeda v. Hoasa), where it appears from para. 29 that "...the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an act of communication to the public or reception by the public is not governed by the Directive, and must consequently be decided in accordance with national law."

<sup>15</sup> The Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, most recently amended in Paris on 24 July 1971.

<sup>16</sup> In his reply of 10 May 2005 to question S 1144 the Minister states, among other things, that "The same assessment must be made in relation to a DTT network and a cable network in connection with the distribution of radio and TV broadcasts. On this background the DTT network and the cable network are in principle given equal status." (my translation)

## 6. DTT in Denmark

In Denmark, DTT consists of six so-called multiplexes, with the abbreviation "mux".

The public service programmes are distributed in mux1 and mux2. In mux 1 this includes the TV channels DR1, DR2 and TV 2 (the main channel with regional windows) until 2012, and, until 1 November 2009, DR Update, and from 1 November 2009 also local/regional TV (all in the MPEG-2 standard). In mux2 the distribution (in the MPEG-4 standard) as of 1 November 2009 will include DR Update and three new DR TV channels - DR Ramasjang (a children's channel), DR K (a history/culture channel) and DR HD - plus Folketings-tv (TV from the Danish parliament).

Mux1 is owned by I/S Digi-TV, which company is owned jointly by DR and TV 2|Danmark. Mux1 is operated by Broadcast Service Danmark A/S, which company services, maintains and develops the technical equipment (at the request of DR and TV 2|Danmark), and it is also owned by DR og TV 2|Danmark. Mux2 is owned by DR and operated by Broadcast Service Danmark A/S. I/S Digi-TV owns the broadcasting licence for mux1, and will also get the licence for mux2, as I/S Digi-TV broadcasts the channels on behalf of DR, TV 2|Danmark and the other broadcasters etc. in mux1 and mux2.

The distribution of the channels in mux1 is one of the situations that might at first glance seem complicated, but there is no question that it must be deemed to be primary transmission of the DR channels and TV 2, as I/S Digi-TV, being the owner of mux1 (and being, in its turn, owned by DR and TV 2|Danmark), carries out the transmission on behalf of DR and TV 2|Danmark.<sup>17</sup>

This is supported by the fact that as mentioned above, retransmission presupposes that primary transmission takes place. Previously (i.e. before 1 April 2006, where DTT was launched in Denmark), there was only analogue terrestrial transmission of DR1, DR2 and TV 2, and this was primary transmission. Now, until the analogue transmission stops on 31 October 2009, the channels are transmitted in both the analogue and digital terrestrial way, both kinds of transmission being primary transmission. When the analogue transmission stops, there will be only one primary transmission of DR1, DR2 and TV 2 in the terrestrial network, and that will be digital.

Thus, until the analogue terrestrial signal is turned off all over the country on 31 October 2009, there are two primary transmissions of some of the channels (DR1, DR2 and TV 2) in the terrestrial television network, but there is nothing to prevent a broadcaster from making several primary broadcasts - on the same platform or on different platforms - i.e. parallel primary transmissions, the so-called simulcasts. Obviously there may also be several retransmissions; retransmission is, for example, carried out by more than 7,000 cable networks in Denmark, see clause 3 above.

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<sup>17</sup> Peter Schønning agrees with my understanding; in his article on the copyright concept of retransmission ("Det ophavsretlige viderebredningsbegreb"), printed in the Danish weekly law reports U.2008.B.347, he states that "In relation to DR and TV 2 it is an integral premise in the whole DTT set-up that the distribution is primary broadcast, the first broadcast. Usually it will also follow from the contractual facts that DTT is primary broadcast." (my translation)



With regard to mux3-6, Boxer TV A/S won the commercial gatekeeper tender in March 2008 for a period of 12 years, officially running from 1 November 2009.

Among other channels, Boxer will be distributing the UBO neighbouring countries' channels<sup>18</sup>, and this distribution is retransmission, Boxer being another organisation. This is a fortunate situation, as there is a system – the extended collective licence scheme – for retransmission that makes it easy to clear the necessary rights. Had Boxer's distribution been primary transmission, there would have been no easy way in which Boxer could have cleared the rights.

The general idea is that in case of primary transmission the rights have been cleared, whereas the rights must be cleared once again in case of retransmission, i.e. authorisation must be obtained from the rights holders, and remuneration must be paid. But, as mentioned earlier (clause 4), the general rule with regard to the UBO channels is that they only obtain the distribution rights for their respective home countries, so the rights will not have been cleared, neither in case of primary transmission, nor retransmission. In relation to UBO neighbouring countries' channels it will thus also be an advantage – for e.g. Boxer TV – to consider DTT as retransmission, as a clearing scheme will then be available.

To sum it all up, distribution of some TV channels via Danish DTT is primary transmission, whereas distribution of other TV channels is retransmission. This situation is new compared to distribution in the analogue terrestrial network, as we have been used to such distribution being only primary transmission, just as many interested parties are used to the cable platform being in practice only retransmission. So the challenge in relation to DTT is chiefly to explain the clearing situation to all the interested parties.

Boxer will also be distributing other national channels (as mentioned, the national public service channels will be distributed in mux1 and mux2 and are thus not part of the channels offered by Boxer), such as TV2 Zulu, TV2 Film, TV2 Charlie and others, and this distribution may be primary transmission or retransmission, depending on the actual and legal situation. Finally, Boxer will be also be distributing international channels (KODA channels) such as Animal Planet and Discovery Channel, and as mentioned these channels have cleared all distribution rights except music rights.

## 7. Clearing of rights - conclusion

Against the background of the above description my conclusion is as follows:

The decisive factor in respect of the clearing of rights, be it for primary transmission or retransmission, is whether the broadcaster has acquired the distribution rights in its underlying contracts with rights

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<sup>18</sup> It is a requirement in the tender documents that the gatekeeper must distribute at least one neighbouring- country channel.

holders.<sup>19</sup> On the other hand, the issue of acquisition of rights has no impact on the question of whether something is primary transmission or retransmission.

If no rights have been acquired, it may be an advantage that the formal criteria for retransmission – primary transmission and "another organisation" – have been fulfilled, as in that case a clearing system is available, provided that also the general conditions of "simultaneously and without alteration" are fulfilled.

#### 8. The extended collective licence scheme also covers wireless retransmission, e.g. DTT

As mentioned (clause 2.1) wireless retransmission may today take place by satellite, to mobile phones and via DTT. There may, of course, be other types of wireless technology in the future.

The provisions on extended collective licence in the various Nordic copyright acts cover both retransmission by wire and wireless retransmission.

However, certain interested parties have advanced the view that extended collective licence cannot cover wireless retransmission or certain types of wireless retransmission (and, I believe, even that certain wireless platforms cannot in general be categorised as retransmission), but I am of the opinion that the provisions quoted below are sufficiently precise to eliminate any doubt.

S. 35 (1) of the Danish Copyright Act establishes that

"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, ..."

The concept "radio system" alludes to wireless distribution, which is spelled out in the explanatory notes to the 2003 Copyright Act (L17) regarding s. 48, from which it appears that

"... the rights holders have the same rights in relation to wireless retransmission as in relation to cable retransmission ...

Wireless retransmission (or retransmission by means of radio systems) shall especially mean simultaneous and unaltered retransmission of radio and TV programmes via satellite (satellite programme packages). In this regard the term "cable networks in the sky" is used." (my translation)

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<sup>19</sup> Peter Schønning draws the same conclusion in his article on the copyright concept of retransmission ("Det ophavsretlige videre-spredningsbegreb"), printed in the Danish weekly law reports U.2008.B.347, where he states that "The overall conclusion in relation to the question of defining the copyright concept of retransmission is that what is decisive is not so much the conventions and acts, but rather the contracts." (my translation)

Finally it appears from s. 48 of the Copyright act that wireless distribution is included:

"If an organisation ... or a broadcaster unreasonably refuses to consent to retransmission via cable systems or wireless of works and broadcasts that are broadcast wireless simultaneously and without alteration ..., the Copyright License Tribunal may at request grant the necessary permission ..." (my emphasis)

The Norwegian copyright act lays down in s. 34 that:

"Works that are lawfully included in a broadcast may, by simultaneous and unaltered retransmission, be communicated to the public. ... Retransmission of works originally broadcast by wire is not covered by this section." (my emphasis).

As you will note, there is mention of "retransmission" only, and that is not limited to retransmission by cable. This means that also wireless retransmission is covered.

S. 42 of the Swedish copyright act lays down that:

"Anyone is entitled to transmit to the public (retransmit), simultaneously and in an unaltered form, by wireless means or by wire, works which form part of a wireless sound radio or television broadcast ..." (my emphasis)

As can be seen, "wireless" is specifically mentioned in the provision and is therefore covered.

Thus the Nordic extended collective licence provisions are not limited to a specific type of retransmission (cable), and similarly, with regard to cable, it is not a condition in the extended collective licence provisions or the Sat/Cab Directive that a certain cable type must be used, which means that all types of cable are covered, including coaxial cables, broadband and fibre cables.

9. It is not a requirement that technically the retransmitted signal is (the wireless) signal from the primary transmission

It appears from the Nordic extended collective licence provisions that the primary transmission must be wireless in order for the extended collective licence provisions to be applicable. Thus the Danish s. 35 opens with "Works which are broadcast wireless ..."; the Norwegian s. 34 lays down that "Retransmission of works originally broadcast by wire is not covered by this section"; and the Swedish s. 42 f mentions "... a wireless sound radio or television broadcast ...".

It is, however, not a requirement that the signal that is being retransmitted (by cable/ wire or wirelessly) technically is the same signal that is used for the primary transmission. But the signal content must be the same, cf. "without alteration/unaltered" in s. 35 of the Danish act, s. 34 of the Norwegian act and s.

42 f of the Swedish act. An example could be that Boxer TV A/S in Denmark wished to distribute the Swedish channel SVT1 and get the signal direct from SVT in Sweden, instead of using the Swedish SVT1 DTT signal. Would this mean that it would not be retransmission as defined under the extended collective licence provision in s. 35? No; it would still be retransmission as defined under the extended collective licence provision in s. 35. There are no requirements anywhere that technically it must be the primary signal that is distributed, and in the explanatory notes to the Danish 1996b Copyright Act it is specified in relation to s. 35 that:

"By use of the word "wireless" it is made clear that the extended collective licence for retransmission does not apply when the original broadcast took place via a cable network.

Otherwise it is not important in which way the signal that is used for the retransmission is received. In most cases the signal is received wirelessly, but retransmission of radio and television broadcasts that takes place via a closed long-distance installation, e.g. long-distance cable or radio link, will also be covered by the extended collective licence, provided that the broadcast in question is simultaneously broadcast wirelessly to the public in this country or elsewhere." (my translation)

The Sat/ Cab Directive has no such requirement either.

In the same way, the Berne Convention has no requirement that in case of retransmission the signal that is used must be from the primary transmission.

#### 10. The extended collective licence scheme and the Sat/ Cab Directive

The Sat/ Cab Directive is part of the background for the Nordic extended collective licence provisions on retransmission. However, the Directive only covers cable retransmission of foreign transmissions, see Art. 1 and Art. 9:

"Art. 1(1)(3): "For the purpose of this Directive, 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public." (my emphasis)

"Art. 9(1): "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society." (my emphasis)

In contrast the Nordic extended collective licence provisions cover both retransmission by cable/ wire and wireless (see clause 8 above) and also cover retransmission of domestic transmissions.<sup>20</sup> The extended collective licence provisions are thus more far-reaching and broader than the Directive, which only harmonises the clearing of cable retransmission.

Art. 10 of the Directive lays down that the copyrights of the broadcasters cannot be covered by the mandatory collective scheme:

"Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, 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."

This is fully in line with the fact that the broadcasting rights are not represented by the Nordic collecting societies (but by UBO).

I note, by the way, that it appears from Art. 1 that primary transmission may be by wire or wireless ("by wire or over the air", see the above quotation), whereas the Nordic extended collective licence provisions are specifically limited to retransmission of primary transmissions that are wireless, see clause 9 above. Primary transmission by wire could, for example, take place from a broadcaster's website, e.g. web radio channels, and if that is the only primary transmission, i.e. there is no simultaneous wireless simulcast, then, according to their wording, the Nordic extended collective licence provisions do not apply when such transmissions are retransmitted. It therefore seems that in this area the Directive has not been correctly implemented in the Nordic countries.<sup>21</sup>

This situation also confirms what is stated in clause 5 above, viz. that the extended collective licence scheme cannot be used to determine whether something is retransmission, but only how to clear the rights when something is retransmission.

#### 11. The EU Commission's 2002 report on the application of the Sat/ Cab Directive

The EU Commission's 2002 report on the application of the Sat/ Cab Directive confirms that retransmission can be wireless, including by DTT and satellite. It thus appears that:

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<sup>20</sup> With regard to the inclusion of domestic transmissions, see e.g. the Danish 1985 explanatory notes regarding s. 35.

<sup>21</sup> In practice there seems to be no great need that the Nordic extended collective licence provisions should cover retransmission of primary transmissions by wire. In Denmark, such need could now also be met through the general extended collective licence in s. 50 (2) of the Copyright Act. There is, however, a difference between extended collective licence under s. 35 (retransmission) and under s. 50 (2) (general extended collective licence) in that there is no individual prohibition right in s. 35, whereas there is in s. 50 (2), as an author can issue a prohibition against the use of their work, see s. 50 (2).

"At the technological level, the conditions currently required for digital retransmission by microwave channel [DTT] have similarities with the cable retransmission. However, it must be recognised that this method of retransmission is still in its infancy, and the Commission regards it as necessary to consider the more general conditions for developing this form of transmission before envisaging any extension of the current system of administering copyright and related rights for cable broadcasting." (my emphasis)

"In the case of retransmission by satellite, in which a satellite distributor (who is neither a broadcasting organisation nor the satellite operator providing transport) includes in a single package a number of channels which have already had an initial broadcasting, rents transmission bands from a satellite operator and makes that package available to television viewers against payment of a subscription." (my emphasis)

It also appears from the report that in 2002 the Commission did not find that the mandatory collective scheme should be extended to other retransmission categories (or platforms) than cable:

"The Commission does not therefore consider it appropriate, at this stage, to extend the mandatory collective-management regime to other categories of retransmission."

However, the scheme under the Directive may, perhaps, be extended at a later stage – as mentioned, the report is from 2002 and thus already seven years old – and as also mentioned (clause 10) the scope of the Directive does not prevent the Nordic countries from implementing extended collective licence provisions that reach beyond what is harmonised by the Directive (licensing of cable retransmission).<sup>22</sup>

#### 12. Status on the retransmission of UBO neighbouring countries' channels via DTT

In Denmark, UBOD, Copydan Cable TV and KODA have an agreement with Boxer TV A/S on the distribution of neighbouring countries' channels. In the same way, UBOD, Copydan Cable TV and KODA have agreements with the DTT operator in the Faroe Islands, Televarpid, and with a DTT operator in Greenland, Nuuk TV.

In Norway, UBON and Norwaco have been discussing the distribution of UBON neighbouring countries' channels for a long time with the DTT operator RiksTV, but so far without any result; originally RiksTV expressed uncertainty of the legal situation in connection with the clearing of rights, and later they referred to a lack of capacity.

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<sup>22</sup> It appears from recital 18 in the InfoSoc Directive (2001/29/EC) that "this Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences". Accordingly extended collective licence is not mentioned in Art. 5 of the Directive on exceptions and limitations. Thus, it is established that extended collective licence only covers the management of copyrights, and that it does not constitute a limitation of or exception to copyright that is laid down in the Directive.

In Sweden, UBOS, Copyswede, IFPI and FRF are trying to have the UBOS neighbouring countries' channels distributed, and the Swedish ministry responsible for the copyright area can expect an approach in this regard. The parties have been given to understand that at present there is not sufficient capacity for further channels in the Swedish DTT network.

In Iceland, UBOI and IHM have an agreement with a DTT operator on the distribution of UBOI neighbouring countries' channels.

### 13. Summary

My conclusions can be summed up as follows:

- The legal challenge is the clearing of rights.
- DTT may be primary transmission or retransmission – the same assessment must be made as when dealing with other platforms.
- The kind of distribution must be decided channel by channel – some TV channels may be primary transmission, whereas others in the same platform may be retransmission.
- It is retransmission if there is a primary transmission and "another organisation".
- It is not a requirement that technically the retransmitted signal is (the wireless) signal from the primary transmission.
- Extended collective licence is an easy way to clear rights in connection with retransmission (and now also in connection with on-demand in Denmark) – and the collaboration between the various Nordic collecting societies and UBO makes clearing of UBO channels even simpler.
- Extended collective licence covers wireless (including DTT) retransmission, but the Sat/ Cab Directive does not.
- According to the Sat/ Cab Directive, the extended collective licence scheme should also cover retransmission of primary transmissions by wire, which it does not today.

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