

Economic Impact of Copyright for Cable Operators in Europe

How revising the rights clearance system can contribute to economic development and to the emergence of innovative digital and pan-European services in the light of the i2010 initiative



Executive Summary

- The role of the cable operator shifts from being a basic infrastructure provider towards being an integrated supplier of TV, Internet and telephony (Triple Play). At the same time, new competition is arising from telecommunication operators as a result of IP based content offerings.
- The current European copyright framework reflects a high degree of inefficiency and partially impedes the EU from achieving their overarching goals including the further development of the internal market, competition and fast digitization.
- Cable operators are subject to high transaction efforts and opportunity costs as a result of uncertainties caused by copyright regulations pertaining to the clearance of cable distribution rights.
- The introduction of all-rights-included packages and central licensing opportunities will substantially increase the efficiency of copyright regulation.
- This would expose collecting societies to competition, thus resulting in copyright prices better reflecting fair market value and increasing productive efficiency of collecting societies.

Quantitative effects of new copyright framework for cable operators (Indexed)

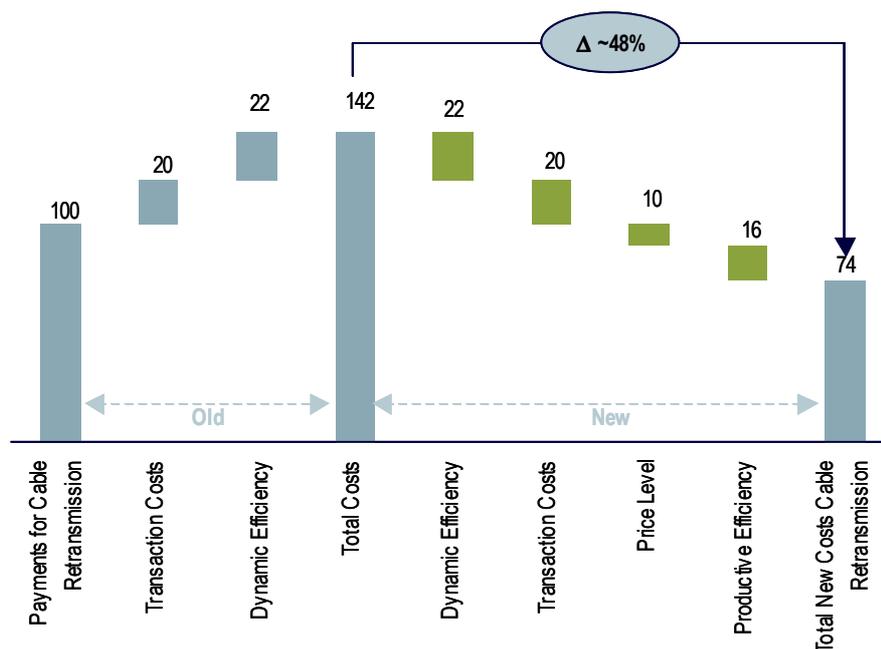


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Executive Summary

Background of the report

Copyright clearance related issues are becoming increasingly important in Europe. This is primarily due to market and technical convergence between media and telecom, the emergence of new technologies (e.g. IPTV), and the creation of international cable operators.

Although copyright fees paid by cable operators only account for a small fraction of total copyright payments, current copyright regimes are increasingly becoming impediment to the provision of state of the art and pan-European broadcasting and cable services. This is due, in part, to the regimes having numerous relationships, especially pertaining to the transmission of international broadcasters, the fragmentation of rights depending on different features and platforms (e.g. digital vs. analogue, on-demand) and regulations that tend to favour satellite and DSL. Examples illustrating the problems include:

- In the absence of a central copyright clearance approach, European broadcasters and the emerging international cable operators must negotiate with numerous copyright collecting societies in order to create an attractive cross-border offering.
- Cable operators planning to introduce interactive TV elements by means of their own IPTV platform must negotiate yet another suite of copyright issues. Especially complex is the copyright situation for time shift services that are positioned between linear broadcasting and on-demand.
- Some copyright collecting societies try to impose an arbitrary and uncontrolled increase in copyright fees on cable operators.
- Collecting societies are unwilling to take account of the market value of the rights they represent; they maintain that those rights have an autonomous value (i.e., not a value which is derived from the value of the channel in which those rights are used).
- In certain countries, rights holders even try to hinder the introduction of innovative content products by not granting necessary rights, for example in the area of video on-demand, or by postponing respective agreements.

The following examples illustrate various market inefficiencies that arise from current copyright regulation for cable operators:

- *High transaction costs* resulting from the necessary negotiation of copyrights for various content formats (e.g. analogue, digital, pay, on-demand) with numerous parties.
- *Growing cost pressure* from ever increasing copyright payments resulting in decreased competitiveness of cable versus Digital Terrestrial TV (DTT) or TV over DSL and the potential reduction of investment into the roll out of new services.
- *Double payments* due to the attempt of cable operators to cover all necessary rights within a highly intransparent setting.
- *Reduced ability to invest in new services* due to the insecurity of cable operators especially with respect to content access needed for innovative services as well as cross-border channel offerings.
- *Delays in the cross-border roll out of new services* thus delaying the i2010 initiative as well as “TV without frontiers” both striving to create a seamless European information society.

In addition to the general copyright management problems facing cable operators, the business models have also started to change. Traditionally, broadcasters financed their programmes by selling advertising time in their channels which are then distributed free to air via satellite, terrestrial transmitters or cable networks. With the advent of digital TV, broad-

casters increasingly offer special interest channels which cannot be fully financed by selling advertising time due to the limited number of viewers. Instead, they finance their channels by selling them to content distributors running a distribution platform who in turn offer these channels usually within larger packages on a subscription basis to consumers.

For the distribution of their channels, broadcasters conclude deals with operators of all kinds of electronic communications networks: cable, satellite and DTT operators but also DSL, UMTS and Wimax operators.

As the business models of cable, satellite, DTT and DSL operators are increasingly resembling each other, the question arises, if the current cable specific retransmission regime is still up to date or has to be substituted by a more technologically neutral approach.

The EU commission fully recognizes the essential function of intellectual property rights and has begun a range of initiatives to review and modernize the management of copyright and related rights in the internal market:

- 2002: Review report on the application of the SatCab Directive
- 2003: Communication on copyright management
- 2005: Study on the cross-border management of copyrights for online music
- 2006: Statement of objections to CISAC and its members.

However, the work thus far has focused on the harmonization of online music rights, by adopting a recommendation for the collective cross-border management of copyright and related issues to legitimate online music services. These effects should now be extended to other services.

Focus of the report

To support the European Commission in its effort to harmonize various national copyright approaches and promote the objectives of the i2010 programme, ECCA issued the following management level report that:

- Provides an overview of the current technological and service related trends especially with respect to the development of cross-platform and pan-European service offerings.
- Develops a model to evaluate the economic implications of the current copyright regimes for cable operators based on cable-specific high-quality and independent economic data.
- Discusses approaches for a revised copyright regime (e.g. central licensing, one-stop-shopping).
- Presents how revising the rights clearance system increases the efficiency and effectiveness of the copyright regimes and contributes to the economic development and emergence of innovative digital and pan-European services in light of the i2010 initiative.

The report focuses on the interaction of core players within the “copyright value chain” from a cable operator’s perspective. It may also be applied to other wire line based infrastructure players such as DSL.

Key findings

Rationale of copyright regulation

Copyright regulations certainly play an important role in ensuring that the television market operates appropriately. Huge expenses result from the creation of content. Further distribution and adequate remuneration of content is realized within a system including copyright collecting societies, broadcasters and cable operators. Collecting societies thereby represent a variety of rights holders, including composers, authors and artists. Broadcasters negotiate with collecting societies and content creators for the right to communicate copyright

protected works and performances to the public. Cable distribution rights are either secured by the cable operators themselves or by broadcasters that are then able to offer all-rights-included packages to the cable operators.

Copyright collecting societies significantly contribute to market efficiency by e.g. lowering transaction costs, clarifying ownership rights and eliminating disadvantages especially experienced by smaller rights holders. By enabling trades that would not have been undertaken in their absence, they help to promote investments and innovation. However, due to their monopoly position and their traditional demarcation of rights management into national territories enforced via complex and interlinking reciprocal cross licensing agreements, their actual market conduct often results in high fees for users such as cable operators, inefficient management, and the creation of information inefficiencies that result in overpayment. Although regulatory measures have been put in place in order to manage these inefficiencies, they enjoy only limited success so far.

Recent market developments

The European TV and electronic communications market is on the brink of a radical transformation. Major technological changes such as the increased digitization of TV and the emergence of integrated IP platforms contribute heavily to the emergence of new business models. The role of the cable operator shifts from being a basic infrastructure provider towards being an integrated supplier of TV, Internet and telephony (Triple Play). The internationalization of cable operators will increase in an attempt to reach a critical mass of subscribers. New competitors, such as DSL providers are emerging and offering comparable product bundles. Differentiation among the competition is expected to ensue in terms of content offerings. To stay competitive, cable operators will invest heavily in the creation of new platforms, especially IPTV over cable. Within the next five years, a total investment of 20 bn € is to be expected solely within western European cable markets.¹

The existing copyright regime was created in a time when only a few, mainly nationally active, broadcasters existed; those broadcasters normally communicated their own channels to the public via terrestrial transmitters or satellite transponders. With the cable infrastructure playing a more and more important role in the last ten years, broadcasters developed a high interest in the cable distribution of their channels in addition to terrestrial and satellite distribution². Now, in the new digital environment there is a tendency by which broadcasters offer their channels for distribution to channel aggregators, who then transmit those channels to their subscribers via electronic communications infrastructures with which they are vertically integrated, or via third party electronic communications infrastructures. Therefore, the existing copyright regime does not reflect the current demands of the market including an ever increasing number of international channels as well as content modes (analogue, digital, Free TV, Pay TV subscriptions, on-demand). Consequently, there has been a rapid increase in the number of negotiations necessary to conclude rights clearance deals, resulting in a further increase in market intransparency.

Copyright regime in select countries

Despite the general set up of the copyright value chain, national implementations indicate significant differences:

- *In Belgium*, no general framework contract exists. Cable operators close a variety of single contracts with collecting societies and broadcasters. Usually, these agreements cover any third party rights for the analogue, digital and simulcast distribution of content. Additionally, cable operators negotiate separately with all public broadcasters for neighbouring rights. The largest collecting society is SABAM, representing approximately 80% of all rights.

¹ Based on Solon calculation and Euromedia numbers.

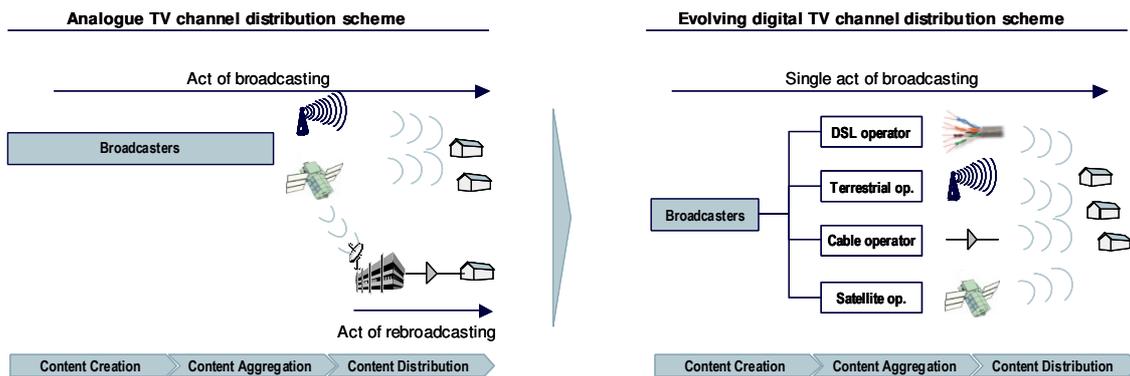
² In Germany e.g. approximately 50% of the TV consumers are reached via cable. Therefore, the cable distribution is an important aspect for broadcasters when selling advertising time on their channels. In the Netherlands and Belgium cable even has a market share of more than 90%.

Legal excerpt: Changes in TV channel distribution and the implications for copyright clearance

The present rights clearance system which applies to cable operators is based on the fact that broadcasters communicate their own channels to the public via terrestrial transmitters or via analogue satellite transponders. Cable operators pick up those signals and re-broadcast the channels on their cable systems. Both acts, the act of broadcasting and the act of re-broadcasting, are considered to be relevant acts under copyright law and, consequently, copyrights have to be cleared twice in regard to the distribution of each channel.

The present rights clearance regime no longer reflects the current situation. Free TV broadcasters need a large audience for financing their channels by selling advertising time. They are in the business of reaching the widest possible audience in order to maximize their advertising revenues. In order to achieve this objective, they need to distribute their channels on all available electronic communications networks: Terrestrial transmitters, satellite, cable systems, DSL, etc. Thus, from the perspective of the broadcasters, there is only one single act of communication to the public, albeit via different electronic communications networks. Therefore, there is no reason for artificially splitting the reception of TV channels into a broadcasting and a retransmission part.

Comparison of current and evolving TV channel distribution scheme



Source: Solon

In the digital environment a growing number of broadcasters tends not to broadcast their channels anymore, but to offer their channels for distribution to the different channel aggregators. This does not only apply to Pay TV channels, but increasingly also to Free TV channels. The channel aggregators then distribute those channels to their subscribers via different electronic communications infrastructures. Consequently, only a single communication to the public remains, for which the broadcaster uses electronic communications services (i.e., distribution services) of different electronic communications networks according to its sole discretion.

Content aggregators assemble a programme service (channel) with works produced by themselves and works purchased from third parties (external producers). This activity in itself is protected under copyright law (Rome Convention, 1961), and additionally, content aggregators own the copyright in their own works. Providers of individual channels often grant permission to channel packagers to include their channel in a package (from the same content aggregator or another).

Channel aggregators or packagers (e.g. cable, DTT, satellite or TV over DSL operators) conclude agreements with content aggregators for the communication of the content aggregator's channel(s) in a package containing different channels, on a subscription basis to a public of end users.

The notion of "communication to the public" is not to be understood in a strict legal sense. It describes for the purposes of this study the technical act or procedure of broadcasting and how this broadcast is delivered to the consumers from an economical point of view. As mentioned before, in the analogue world, the broadcasters normally communicated their own channels to the public via terrestrial transmitters or satellite transponders. Under the notion of 'communication to the public' the broadcaster remains the one who is responsible for the programming of its channel and is the only one to decide which content is made available to the consumers. The broadcaster decides which electronic communications networks are used for the distribution of his content. The only difference to the past is that the broadcasters can choose between many more electronic communications networks for having their content distributed.

Implications for regulation

The transformation of the content value chain which has already started and is likely to continue, creates a new environment for the traditional broadcasting industry. It is however not only the market players that have to adapt. Regulators will have to migrate into this new era of broadcasting as well, because existing regulatory approaches are often based on distribution technologies that can be strictly divided into telecommunication and broadcasting network technologies. Nowadays almost any electronic communications network can offer the same types of services, which calls for subjecting all of them to the same rules. This also applies to the regulation of services.

The problem of the current regulatory schemes is, that they are technology specific, which is no longer suitable in a converging environment in which different technologies can be used to offer the same types of services. It might help, if those who formulate the rules of the game would remember what made them decide to regulate certain electronic communications networks and content services in certain ways that differed from the ways in which they regulated other electronic communications networks and content services.

- *In Germany*, different types of rights are represented by a total of nine collecting societies. For the negotiation of cable retransmission rights, cable operators negotiate with various parties: GEMA, representing mainly public channels, VG media, acting on behalf of the private broadcasters, and international channels.
- *In Hungary*, cable operators pay copyright fees for the distribution of content to the biggest collecting society ARTISJUS, which also acts on behalf of other societies. A framework contract, closed between cable associations and ARTISJUS, regulates the terms and conditions. Private broadcasters from other countries have also granted ARTISJUS the rights to license their channels to cable operators.
- *In the Netherlands*, cable operators negotiate the distribution of fully cleared products with almost all broadcasters separately, music rights being the possible exception. Some foreign channels need still to be cleared by the cable operators. The legal situation is relatively uncertain since negotiations regarding new framework agreements are still pending.

Analysis and quantification of inefficiencies within the existing copyright system

To be able to calculate inefficiencies of the systems as are and to show basic economics, a model has been developed that takes major underlying drivers and characteristics of copyright frameworks into account. Such a simplified model of reality helps to understand the most important inefficiencies of the current copyright systems and can be used to evaluate and compare different policy options.

Based on hypotheses describing the current situation of copyright regimes in Europe, six central propositions have been developed to overcome the identified problems and inefficiencies. They are used to develop an alternative copyright framework. Changing business models, in particular those of broadcasters increasingly acting as content producers, and distribution platforms acting as channel aggregators and distributors, demand re-engineering of the copyright framework. The approach should be implemented technologically neutral, i.e. imposing the same copyright burden on all channel aggregators. The highest level of efficiency is supposed to be reached when negotiations happen among parties who can assess the value of the copyrights at best – namely among broadcasters, who decide how their content is distributed, and collecting societies and not among cable operators or satellite providers, who mainly act as a provider of technical services, and collecting societies. The costs may then be forwarded to the transmission platforms, e.g. cable, as integral part of all-rights-included packages.

- *Proposition 1*: There is only a single act of communication to the public, i.e., copyright fees have to be cleared only once.
- *Proposition 2*: Collecting societies should be subject to competition. Both, rights holders and users should have a choice.
- *Proposition 3*: Negotiations regarding copyright should happen among directly affected parties wherever possible.
- *Proposition 4*: Broadcasters should be able to centrally license all rights required for further usage.
- *Proposition 5*: A copyright system should be designed according to different exploitation models rather than according to the technologies used.
- *Proposition 6*: A central European authority may be needed for cross-border clearance of rights and for monitoring market participants.

We have analyzed the copyright system according to four criteria:

- *Effectiveness*, meaning the system's contribution to the achievement of the collective EU goals as set out in the EC Treaty, the Lisbon goals and the i2010 programme.

- *Efficiency of allocation*, meaning the system's ability to efficiently collect and distribute fees.
- *Efficiency of production*, meaning the system's contribution to foster market participants to act economically.
- *Efficiency of dynamics*, meaning the system's contribution to encourage investments and innovation.

Our analysis concluded that the existing copyright framework holds significant potential for improvement along all of the identified criteria. The transaction effort is demonstrably too high, since the number of contractual relations can be reduced significantly (allocative efficiency). The quasi monopolistic positions held by collecting societies throughout Europe, have resulted in fee levels partially not reflecting fair market value (allocative efficiency) while eliminating the need for collecting societies to focus on lean cost structures (productive efficiency). High intransparencies exist regarding the comprehension of rights packages and possible new pending claims. Lastly, the introduction of new products and technology is partially delayed (dynamic inefficiency), which comprises the highest share of opportunity costs facing cable operators and consumers.

If we include negotiation effort and the opportunity cost of product introduction delays, the actual cost of copyright totals approximately 150% of the actual copyright fees (incl. remuneration of artist and management costs).

Evaluation of policy options

To overcome the above identified inefficiencies and overcome the system's ineffectiveness, we have developed three policy options:

- *All-Rights-Included* packages enable cable operators to clear all rights necessary for the content distribution directly and only with the broadcasters. Since the terms on which basis a broadcaster's channel is distributed via cable need to be negotiated with the broadcaster anyway, no significant additional effort is required by the parties involved. As a result, the number of relationships between cable operators and collecting societies decreases strongly. In addition to significantly lower transaction costs, this option also leads to higher planning reliability for cable operators. Our analysis finds that adopting this policy option would on average yield savings in the range of 30% of total copyright cost.³
- *Central Licensing* enables rights holders, broadcasters and cable operators to negotiate agreements regarding the usage of any copyrights with one single collecting society of their choice. As a result, competition among collecting societies is created. Uncertainty is eliminated; and especially copyright management costs will be reduced. As a consequence, the productive efficiency of the collecting societies is expected to increase. In a stand alone case this policy option would yield average savings of approximately 30% of the total copyright cost.⁴
- *The combination of All-Rights-Included and Central Licensing* joins together the advantages of both options. All-rights-included packages are acquired from broadcasters that have previously licensed all rights centrally, thus explicitly increasing transparency. Contractual relations between cable operators and collecting societies are eliminated to a large extent. By combining the positive effects of both stand-alone solutions the joint approach could result in approximate savings of 50% compared to the total average costs of copyright.⁵

It is important to highlight that fees for cable retransmission only represent a small fraction of total income of collecting societies, typically around 5%. It is expected to decline, as the importance of pure cable retransmission is expected to decline accordingly. However, in a

³ A detailed description of this policy option can be found in section 6.3.

⁴ A detailed description of this policy option can be found in section 6.4.

⁵ A detailed description of this policy option can be found in section 6.5.

redesigned copyright environment, collecting societies would be able to effectively collect fees for the use of new content services and products that will be available not only via cable but also DSL, satellite and DTT. As a result, the total remuneration of copyright holders is rather expected to increase. Finally, both copyright holders and rights users, i.e., the channel aggregators, will gain from the efficiency gains realized by copyright collecting societies.

Policy recommendations

Based on the conducted analyses, we propose that the copyright framework should be redesigned according to changing market conditions and EU goals. The best alternative consists of implementing a combination of *All-Rights-Included* packages and *Central Licensing*.

Major advantages include:

- Breaking up of national monopolies of collecting societies, which is expected to result in appropriate fees for cable distribution due to competitive market pricing and the need for cost efficiency.
- Elimination of redundant effort for negotiation and closing agreements.
- Higher planning reliability and risk reduction (with respect to possible pending claims for rights which turn out not to have been cleared) for cable operators will accelerate the introduction of innovative products and thereby support EU goals such as digitization.
- Simplifying cross-border distribution for broadcasters, as is the case with satellite. Cable users will have increased access to international TV content.
- Freeing up collecting societies to pursue new revenue opportunities in the converging environment from other media and from the broader range of new technologies.

The impacts for the value chain operators will be as follows:

Content creator	++	Fees are distributed more fairly supported by competition among collecting societies, especially content use outside own home territory is expected to be paid better Increase in remuneration from new services and other transmission platforms such as satellite, DTT and DSL
Broadcaster	++	Direct clearing of cable distribution rights with third party rights holders. However, since they already negotiate with content creators or their rights management organizations, no significant additional effort is required Negotiations with different collecting societies are no longer necessary. Especially time-intensive negotiations with international societies are eliminated Value added to channels by rights held by third parties can be taken into account Lower level of fees from collecting societies since these are exposed to competition which is expected to lead to competitive pricing
Cable operator	++	No more negotiations with collecting societies. Clearing of all rights directly with content aggregators, i.e. broadcasters Risk reduction (less chance that not all relevant rights were cleared) Clearance of channels includes all rights and is based on the fair market value of the full product
Consumers	+	Faster access to new technology and products and especially international content Lower content prices

<p>Collecting societies</p>	<p>o</p>	<p>Access to new markets and potential for better differentiation within changing market environment</p> <p>Participate in the growing market of new products and services</p> <p>Increased incentive of streamline operations and implement new clearing technologies</p> <p>For smaller collecting societies: Chance to position as expert in local content and partner for less powerful local content creators</p> <p>Subject to control and monitoring by a central authority. Additional disclosure of fees and a consistent European-wide accounting framework may be required</p>
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The framework in general would be adjusted to the emerging TV distribution chain and base remuneration of copyrights on communication to the public independently by which means it was realized.

About the report

The report was issued by ECCA. The report was written by Solon Management Consulting, Munich in January and February of 2006. It is based on interviews with the members of the ECCA core regulatory group as well as other copyright and industry experts and on an extensive copyrights market model. In addition to the interviews, an extensive review of external sources was conducted reflecting both market development as well as copyright related issues.

1 Introduction

1.1 Purpose of the report

The intention of this report is to sensitize political decision makers for the inefficiencies of copyright regimes and to encourage the rethinking of copyright regulations for cable operators in Europe. The report is intended to explain the basic rationale and design of copyright frameworks and regulation as it applies to cable operators today. The changing market environment for cable as well as all other TV distribution platforms is explained and its impact on copyright specific issues is deducted. The overall analysis is supported by various country case studies demonstrating the difficulties arising in select European countries.

In addition, this paper is intended to illustrate the economic impacts of current copyright regimes and to develop an alternative framework. Based on an analysis of such impacts and alternative framework, policy options are developed, the implementation of which can concretely help to improve the market efficiency of copyrights within the EU.

1.2 Structure of the report

The report begins with a general description of copyright management in Europe and its significance regarding the distribution of TV programmes via cable networks. A general, simplified market framework is developed, demonstrating the basic underlying processes among market participants. A framework for evaluating the efficiency and effectiveness of the systems is developed accordingly, which will later be referred to when comparing different options/regulations. Since collecting societies play a pivotal role in copyright management, their specific advantages and disadvantages are highlighted in this section of the paper.

To support the analyses of inefficiencies, the changing European TV and electronic communications landscape is discussed. The changing role of the cable operators and the respective competitive landscape is given special attention. Based on this analysis, an opinion is developed regarding the changing market conditions affecting copyright regulations. Initial insights into the efficiency of current copyright frameworks addressing the new requirements of proper copyright management are also explained.

The market section is followed by case studies providing concrete examples of copyright regulation in select European countries. Major particularities are highlighted and – according to the developed framework – efficiencies and effectiveness of the respective countries' system are evaluated. In addition, an indicative evaluation of the performance of various countries' system is performed.

Following the qualitative evaluation of copyright frameworks from various countries, hypotheses and propositions are developed to provide a simplified model of European copyright regime and address its major insufficiencies through the creation of a redesigned framework. The latter is used as a starting point to quantify the economic effects – in terms of cost figures. The methodology of calculation is explained as this will be used later for quantifying the effects of different policy options.

In the next chapter, four policy options are developed and evaluated – both qualitatively and quantitatively – according to their impacts on market participants and their contribution to overall EU goals. The efficiency effects of the individual options are shown in detail. Thereafter, the effects of policy options are compared to one each other thus resulting in a policy recommendation.

2 General structure of copyright management for cable operators

This chapter reviews the general structure of the copyright management system as it applies to cable operators. At the outset a generic “value chain” of an ideal copyright framework is developed. It explains in detail the cable related copyright management system as set out in the SatCab Directive (93/83/EEC). Based on the description of the generic copyright value chain, a general market framework is introduced that is used to structure and understand the effects of market interventions and regulation. Core aspects of the framework are utilized to measure the effectiveness and efficiency of the current copyright management systems. Since collecting societies play a pivotal role in the management of copyrights, this framework is used for an initial, general evaluation of their efficiency.

2.1 Rationale of copyright regulation and the role of cable operators

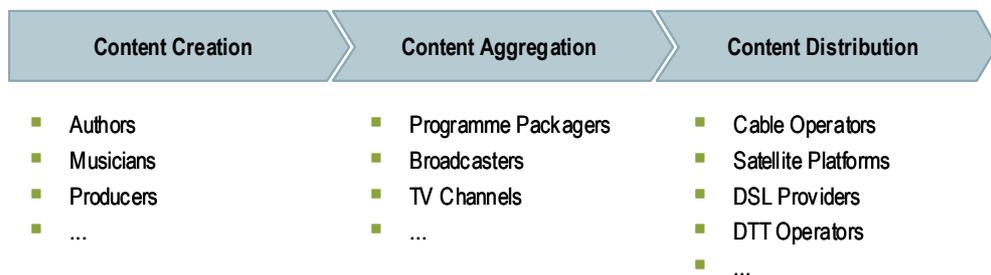
Why copyright regulation?

Content creators or the holders of neighbouring rights create economic benefits by managing respectively the sale of this content or these rights. They are holders of intellectual property rights (IPR), which grant their holders the rights to the commercial value of certain works.

The basic way of arranging appropriate contracts is to individually manage these rights, meaning that creators directly trade with intermediary users or with end users. Intermediary users hereby refer to users who use the content as inputs for the production of new services or derived works.

Taking a closer look at a generic value chain – from copyright creation to final consumption – yields that created content is used by lots of different parties over many different (technical) channels. Content is often not geographically bound, so that the trading and monitoring of rights on an individual basis would create huge efforts for each copyright holder, and in many cases is not even feasible since the necessary processing of information would exceed the actors’ individual capacity. Especially smaller rights holders, owning single rights would have no possibility to control the usage of their works.

Content value chain



Source: Solon

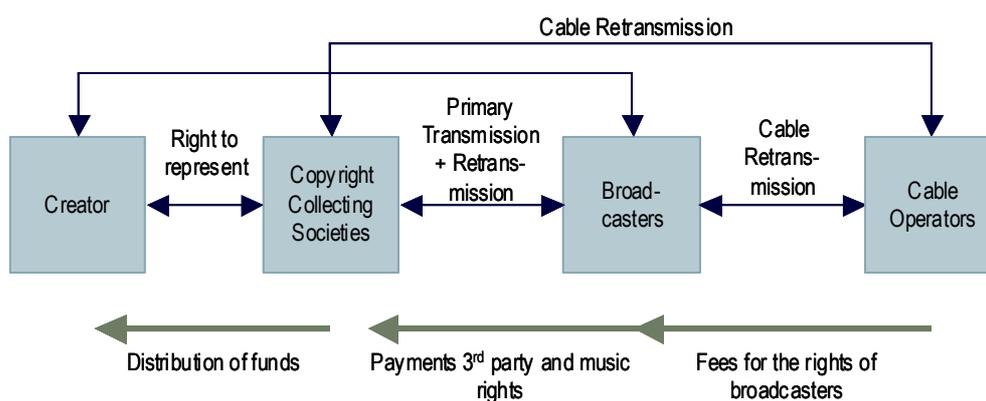
To effectively collect revenues from the usage of rights, rights holders in general would, at the very minimum, need to undertake the following activities: They would need to identify potential users, negotiate agreements on fees, collect the fees and possibly distribute them to other rights holders. Lastly, they would have to monitor the correct usage of the rights. On the other hand, the users of the rights would have to first screen who to purchase the rights from and then, following negotiations, would have to pay fees. Considering the extensive number of potentially affected parties and efforts required to close the appropriate contracts, the efficiency of individual rights trading is limited. It would only make sense if both parties

involved in the transaction would profit from the arrangement. Since transaction costs may be high due to the aforementioned reasons, a significant amount of trades may never take place. Aggregating units, namely collecting societies, could make the trading of these rights far more efficient for all participating parties since economies of scale could be realized as a result of the increased number of trades.

Which copyright and related rights regulations apply to cable operators?

The current copyright regime consists of four parties and five major relationships. The descriptions below follow the copyright regime as set out in the SatCab Directive. The actual realization of the generic value chain based on the local copyright laws is analyzed in more detail within the country case studies.

Generic copyright regime



Source: Solon

Basis of each copyright regime is the **creator**. He may authorize a selected rights management organization (e.g., a collecting society) to represent his rights, or he may transfer his rights to a rights management organization, or he may choose to manage his own rights (except in the case of cable retransmission, in which case he may exercise his rights only through a collecting society). The same goes for holders of neighbouring rights (such as performers and producers of commercial phonograms). Usually rights holders, if they want (or are required by law) to exercise their rights through a rights management organization, they are forced to join a rights collecting society within their home territory. For international utilization and remuneration of the rights, the collecting societies have set up reciprocal compensation schemes.

To properly represent the copyrights they hold, **copyright collecting societies** must fulfil several tasks. They identify potential users, negotiate license fees, structure, collect and distribute the license fee, and monitor the usage of licenses. A single copyright society usually only represents a specific right, e.g. music, literature or another artistic work. The number of copyright societies within one country varies strongly. In Europe, the number of copyright societies within a single territorial market ranges between 5 and 20. Within most countries, competition among copyright organizations is limited, since usually only one society exists per type of right.

In order to distribute certain content to the end user, in this case the subscriber of cable TV, permission must be granted for the communication to the public of copyright protected works, performances and commercial phonograms.

Broadcasters must negotiate with the individual rights holders or with collecting societies in any case to get all rights cleared for the programming they broadcast, be it via satellite or terrestrial TV, for reason that broadcasting constitutes an act of communication to the public. This negotiation has to be realized before broadcasting the programme stream. Generally at least seven aspects have to be negotiated by them: (i) Whether the rights will be transferred to them or that they will rather be granted a licence to use the work, perform-

ances and/or commercial phonograms for a certain period of time or at a certain number of occasions; (ii) The period of time for which the rights are acquired; (iii) How many times communication to the public will be allowed; (iv) The territories for which the rights are acquired; (v) The exploitation model (Free TV vs. Pay TV vs. on-demand); (vi) the possible exclusivity of the right and (vii) the payment scheme. If the programme is broadcast by them via satellite or terrestrial TV, no further rights need to be secured.

This is however different in the case of **cable distribution**. When broadcast channels are distributed via cable, the rules are such, that “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”,⁶ is deemed to be a new communication to the public.

In order to safeguard cable operators from having to acquire rights from numerous individual rights holders, the SatCab Directive anticipates 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” (Article 9 of the SatCab Directive).

However, in order to allow for one-stop-shopping, one exception is made (Article 10 of the SatCab Directive): Broadcasters may handle those retransmission rights for the cable distribution themselves.⁷

As a result, the rights for the cable distribution of television channels are acquired via one of the following two ways:

- The broadcaster only clears the rights for its own acts of communication to the public and grants a licence for communication to the public by cable operators only in respect of his own rights. In this case, the cable operator must clear the third party rights included in the TV channel(s) with the collecting societies.
- The broadcaster, knowing the audience he wants to reach as well as the transmission media he uses, also acquires all necessary rights in order to be able to contract with cable operators, for the communication to the public of his channels. In this case, the broadcaster offers a “one-stop-shopping” solution to the cable operators.⁸

As illustrated within the case studies section of the report, the current copyright management regimes resulting from this structure are comprised of a complex set of relationships due to the involvement of numerous copyright societies and broadcasters.

The complexity of the copyright management regime becomes even more extreme in the case of cross-border transmission. Rights are cleared within the country where protected works, performances and phonograms are communicated to the public. In order to distribute an international (e.g. a pan-European) channel via cable systems in several countries, the respective rights must be cleared by either the cable operators or the broadcaster concerned, in every single country thus further increasing the number of necessary negotiations.

2.2 General market framework

Before analyzing current copyright regulations, a general market framework is introduced that helps to structure and understand the effects of market interventions and regulation.

A copyright system as herein referred to has two objectives. On one hand, the system should ensure effectiveness as reflected in the achievement of EU goals (such as competi-

⁶ Art. 11bis (1)(ii) of the Berne Convention.

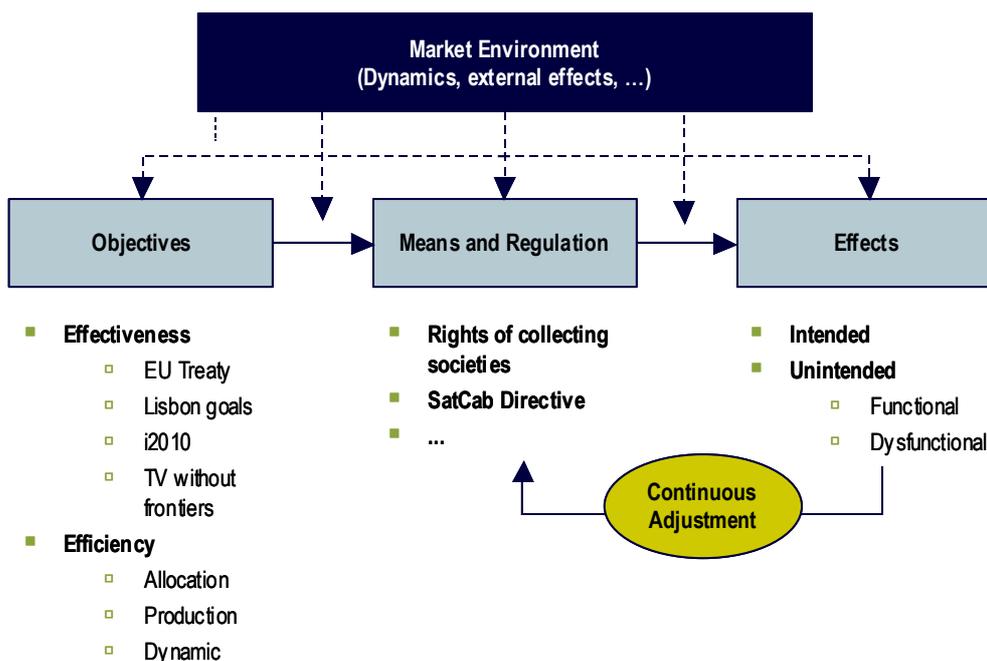
⁷ In the European Commission's 2002 evaluation report of the SatCab Directive it is stipulated that, “[...] a broadcasting organization may acquire all cable retransmission rights and thus be the sole party dealing with the cable operator”. See COM (2002) 430 final.

⁸ In Germany this is legally or practically impaired since GEMA refuses to grant to broadcasters any cable retransmission rights for third party networks. Compare Case Study on Germany.

tion within the market) and Lisbon goals⁹. The other overall objective is to ensure that a market works efficiently in terms of allocation, production and dynamics.

To attain these goals, regulatory instruments can be introduced. For example, in this case collecting societies are equipped with certain rights to claim fees of aggregators or users of content whose purpose is to deliver a fair amount of collections to artists or other holders of copyrights. Such regulations will have certain effects. At best they will fulfill their sole purpose and no unintended effects will occur. However, unforeseeable, unintended and dysfunctional effects caused by e.g. market dynamics may result which demand adjustments to current regulations.

Acting scheme for market regulation



Source: Solon

Since effectiveness and efficiency play a major role in further qualitative and quantitative analyses of copyright regulations, they are described here in more detail.¹⁰

A system shall be defined as **effective**, when it contributes to achieving overarching goals. The goals of the EU as defined in the EU treaty, and restated and further detailed by the Lisbon Strategy, can be summarized as follows:

- Generate an internal market where competition is free and undistorted,
- Ensure sustainable economic progress, especially growth and innovation,
- Eliminate barriers that divide Europe, especially remove obstacles to freedom of movement of goods and services,
- Ensure social progress and encourage the constant improvement of living conditions,
- Support cultural diversity.

The general goals are complemented by more specific policy targets. Currently, an entire range of public policy and regulatory initiatives have been set up to support the evolving

⁹ Europe shall "become the most dynamic and competitive knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment", Compare presidency conclusions, Lisbon European Council, 23 and 24 March 2000, p.2.

¹⁰ The following is partly based on the PWC paper "Music collecting societies – Evolution or regulation", June 2005, in which an approach towards the underlying economics of copyright collecting societies is developed.

digital markets and especially the transformation of the TV market. The i2010 agenda proposes a strategic framework for the promotion of an open and competitive digital economy. It suggests an integrated and consistent approach to information society and audiovisual media policies in the EU.¹¹ The first objective of the i2010 programme is especially relevant for the development of the TV markets:¹²

“The creation of a single European information space offering affordable and secure high bandwidth communications, rich and diverse content and digital services.”

An effective copyright system should support both the general targets of the EU as well as the more industry specific goals of developing a single information space. The current systems have therefore been measured against these targets.

A system or market shall be defined as **efficient** when welfare for producers and consumers is maximized. Three distinctive types of efficiency are commonly used to explain overall market efficiency:

- **Efficiency of allocation** is achieved when the price for a product equals the marginal costs of supplying it. Applying this criterion to collecting societies may lead to the fixed costs of the societies being depicted as the marginal costs of granting a single right, which should be close to or even equal to zero. The marginal cost condition may therefore not hold since fixed costs also need to be covered. Nevertheless, cost-based pricing may still be worth looking at when both variable and fixed costs are taken into consideration.
- **Efficiency of production** is maximized when, for a given output level, the needed input is minimized. If collecting societies are able to grant individual copyrights to aggregators or distributors at lower overall costs than the original content holders, then they are productively more efficient than an “individual agreement solution”.
- **Efficiency of dynamics** means that firms have incentives to invest (e.g. in new technology) or to innovate (i.e. to generate new products). Greater reliability and other quality improvements as well as the creation of new products and services, are critically linked to investment and innovation. It is affected by the distribution of profits for creators/rights holders and the benefits for consumers.

In theory, a fully competitive market without distortions will deliver efficiencies of allocation, production and dynamics without need for specific regulation. Competition among suppliers drives prices down to cost since firms that fail to do so find themselves unable to compete. Incentives for investments and innovation are given since by launching new and attractive products they are able to demand price premiums for at least a certain amount of time.

2.3 The contribution of collecting societies to market efficiency

As indicated, collecting societies can help to improve the performance of a copyright system. In regard to effectiveness, the impact of a copyright system will be evaluated according to the contribution it makes to overarching EU goals. This will transpire in a later chapter on a case by case basis. However, in terms of collecting societies’ contribution to market efficiency, some general statements can be made.

Collecting societies are instrumental in realizing efficiency compared to an individual agreement solution since

- they help to lower transaction costs by realizing economies of scale in rights management (*Efficiency of production*),
- they help to clarify the ownership of rights (*Efficiency of allocation*),

¹¹ EU Commission, 2005, COM(2005) 229.

¹² EU Commission, 2005, COM(2005) 229.

- they eliminate the delayed negotiations problem that results from certain rights holders waiting for other negotiations to be completed so that better conditions may be agreed upon (hold-up problem) (*Efficiency of dynamics*),
- the disadvantage of smaller rights holders compared to large users is eliminated (*Efficiency of allocation, efficiency of production*),
- by enabling trades of copyrights that otherwise would not have been undertaken, they can help to promote investments and innovation (*Efficiency of dynamics*).

Advantages and disadvantages of collecting societies (general)

Type of Efficiency	Advantages	Disadvantages
Allocation	<ul style="list-style-type: none"> ▪ Clarification of ownership of rights ▪ Fair representation of smaller rights holders 	<ul style="list-style-type: none"> ▪ Bundling leading to inefficient distribution of rights ▪ Price fixing without taking market value of rights into account
Production	<ul style="list-style-type: none"> ▪ Lower transaction costs 	<ul style="list-style-type: none"> ▪ No incentive to reduce operating and management costs ▪ Still high number of transactions
Dynamic	<ul style="list-style-type: none"> ▪ Promotion of investments and innovation due to realized trades that would not have happened without collecting society 	<ul style="list-style-type: none"> ▪ Delay of investments and innovation due to abuse of monopoly power

Source: Solon

Despite the advantages outlined above, the collecting societies may also cause market distortions since they have virtual monopoly positions in many EU countries. All of the above mentioned efficiency criteria could also be distorted by collecting societies.

Collecting societies do negotiate agreements for a wide variety of rights holders. They may realize structures and levels of fees that do not reflect the fair value of the rights traded. This *allocation inefficiency* may be caused by the following factors:

- Market power / Degree of monopoly of the collecting societies, also depending on the power of other market participants.
- Incoherent pricing policy that does not take fair market value of copyrights into account.
- Bundling of rights packages leads to overpayment, as certain buyers are forced to acquire rights they do not actually need.
- Intransparent distribution of copyright fees, e.g. international rights holders receive less than actual share of distributed content.¹³
- No clarity as to which rights are included in packages and which rights holders are represented by the respective collecting society (this is dependant on the disclosure policy of the collecting society).

¹³ See Tilman Lueder (2005): Speech at 13th Annual Conference on International Intellectual Property Law & Policy.

Productive inefficiency may also occur due to

- Few or no incentives for collecting societies to focus on level of management costs/ operating costs resulting in either high license fees, low distributed revenues or both.
- The existence of more than one collecting society at the same time, each having a monopoly in their represented rights. Possible synergy effects are not realized.
- Still high number of negotiations due to multitude of collecting societies throughout Europe¹⁴.

Dynamic inefficiency may also be an issue since long lasting negotiations and low planning reliability for users, regarding the structure and fees of future agreements, may lead to a delay in introducing new products and services.

All over, the advantages of collecting societies vs. purely individual negotiations still more than compensate potential and existing disadvantages. The changing market environment, especially the growing importance of new services and cross boarder offerings, does however call for adjustments of the current system.

Based on the general understanding of copyright management regimes, the following chapters will provide a closer look at general TV market trends and the current implementation of copyright management regimes in select country case studies. Furthermore, this chapter includes an analysis regarding the reach and realization of effectiveness and efficiency targets.

¹⁴ See Tilman Lueder (2005): Speech at 13th Annual Conference on International Intellectual Property Law & Policy.

3 European landscape of TV and electronic communication markets

The television market is on the brink of a radical transformation. The basis for this transformation is the result of two major technological changes: The increased digitization of TV and the emergence of integrated IP platforms.

The increased digitization of TV has multiplied the number of channels available to the consumer. Since 2000 the number of TV channels available in Europe has doubled to more than 1600.¹⁵ Integrated IP-platforms that are installed not only by telcos but also by cable operators support a whole new range of services such as Video-on-Demand (VOD), IPTV and Voice over IP (VoIP).

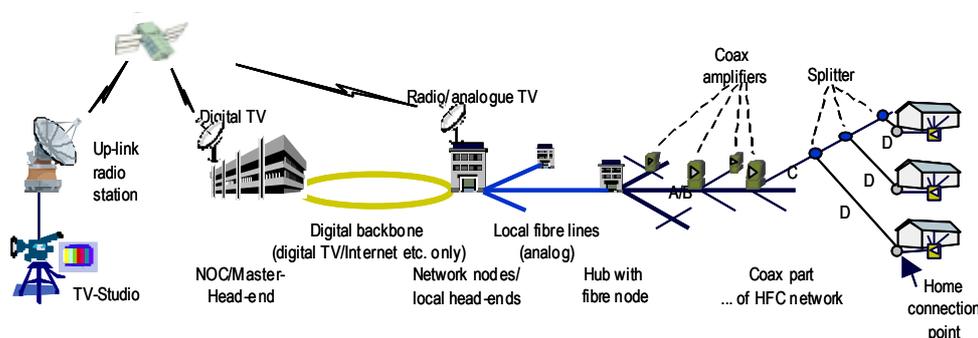
The technological changes strongly influence the traditional structure and the dynamics of the cable industry. In addition to terrestrial TV and satellite, cable operators increasingly compete with DSL operators for access to the digital home. In order to stay competitive and to offer attractive services, cable operators have shifted their business model from being mere signal transporters to taking a much more active approach towards content aggregation and marketing.

In order to analyze the requirements of the emerging digital market in regard to a modernized copyright regime, the following chapter explores the ongoing changes in the TV market and the restraints resulting from the current copyright management approach. The first section provides an overview of the development of cable operators from pure TV operators towards Triple Play players. The competitive position versus terrestrial TV, satellite and DSL will be discussed within the second section.

3.1 Cable operators on their way to Triple Play

The classic cable network works as follows: TV content is generated in TV studios and disseminated by TV broadcasters that send the signal to satellite via radio station. The satellite signal is fed into the cable networks at the Master and/or local head-ends. At this point, cable operators typically start their operations. The TV signal is then transported – usually simultaneously and without further changes - via local fibre and coax distribution networks. Finally, the signals are distributed within a single building or building complex all the way to the TV socket within an individual residential unit.

Network architecture of a cable network (Example: Germany)



Source: Solon

Cable operators: Generic business models

Cable operators play two roles. First, they act as carriers or transporters that operate networks as physical transmission facilities which are used for the mere conduit of third party content. Most cable operators are still focusing on this role by offering TV access including a

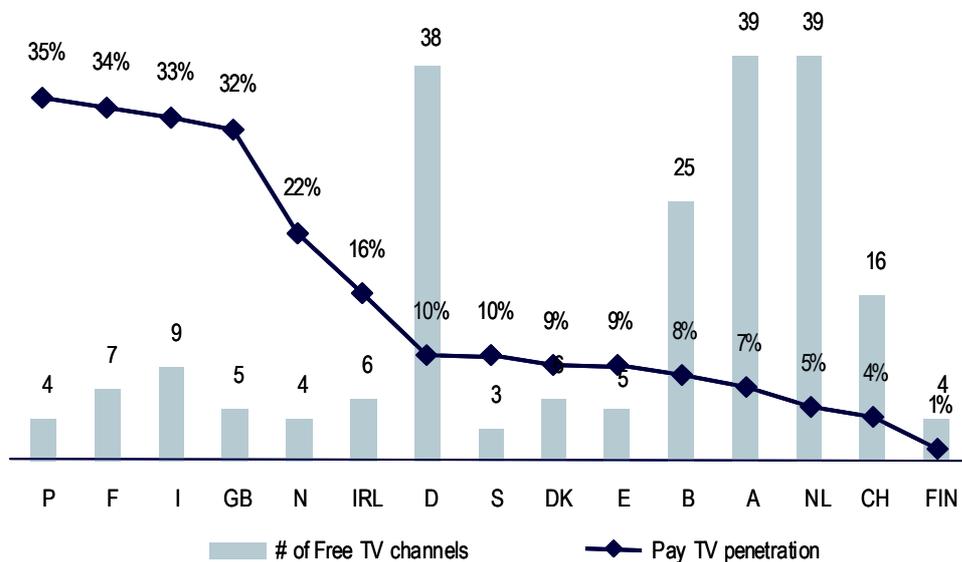
¹⁵ Booz Allen Hamilton (2006): The Future Role of Cable in Shaping the Digital Home in Europe, p. 3

certain number of “Free TV channels”. The choice of the Free TV channels offered is usually administered, at least to a certain degree, by must carry rules that leave the operators with only a very limited influence on the selection of channels.

The second role of cable operators is that of a channel aggregator. Here, the cable operator actively determines the selection of channels offered via its network by setting up its own (Pay) TV bouquet.

The relative importance of these business models and subsequently the acceptance and penetration of Pay TV is highly dependent on the number of (analogue) Free TV channels available within the access package. The broad Free TV offering within the German, Dutch and Belgian markets leaves only limited space for a significant Pay TV penetration. In comparison, countries such as France are characterized by a very limited Free TV offering and a subsequently high Pay TV acceptance. However, with decreasing marketing spending, the business models are very likely to change in the countries with a current strong Free TV presence. For example, SES Astra has recently announced to introduce an encrypted free and Pay TV platform in Germany ending the free availability of satellite TV services soon.

Free TV offering and Pay TV penetration via cable



Source: Solon

Cable operators invest heavily in the future

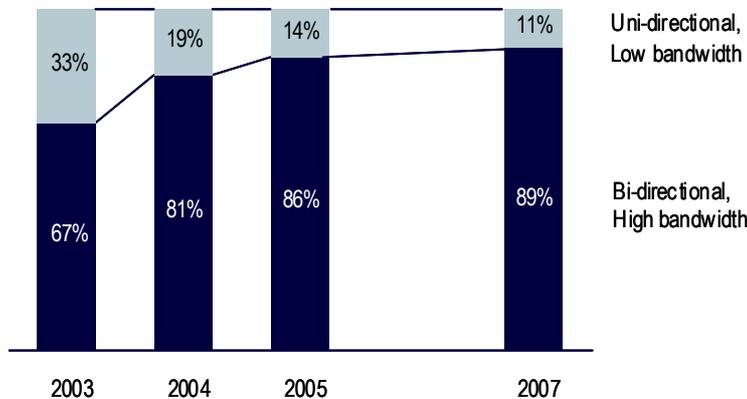
Starting in the 1990s, things have begun to change for cable operators. Telecommunication markets were exposed to deregulation and for the first time, cable operators had the opportunity to enter new market segments and find revenue sources. Since the mid 90s cable operators have invested heavily in upgrading their traditional uni-directional networks to networks with higher bandwidth and backchannel functionality, forming the prerequisite for the offering of Internet and telephony applications as well as a much broader TV offering. With the exception of Germany, where network upgrade activities have strongly been delayed due to the ongoing sales process from Deutsche Telekom, most European cable operators have managed to upgrade the majority of their networks. This first round of upgrades resulted in a total investment volume of approximately 12-15 bn € solely by western European cable operators during the last decade.¹⁶

Even though the general upgrade to bi-directional, high bandwidth networks is nearly completed in many markets, the investment level will be maintained if not increased over the next five years as cable operators begin to build their IP platforms and invest into a broad range of new services and content. For example Telenet, the fully upgraded Belgian cable

¹⁶ Assumption: 400-500 € investment per upgraded cable subscriber. Upgrade penetration of 17% for Germany, 86% for all other Western European cable markets.

operator, forecasts annual investment levels of more than 20% of revenues in 2006 slowly declining to 15% from 2010 onwards.¹⁷ If this range is applied to the total western European cable market, this would result in additional investments of approximately 4 bn € p.a. and a total investment of 20 bn € over the next five years.

Network upgrade level of European cable operators

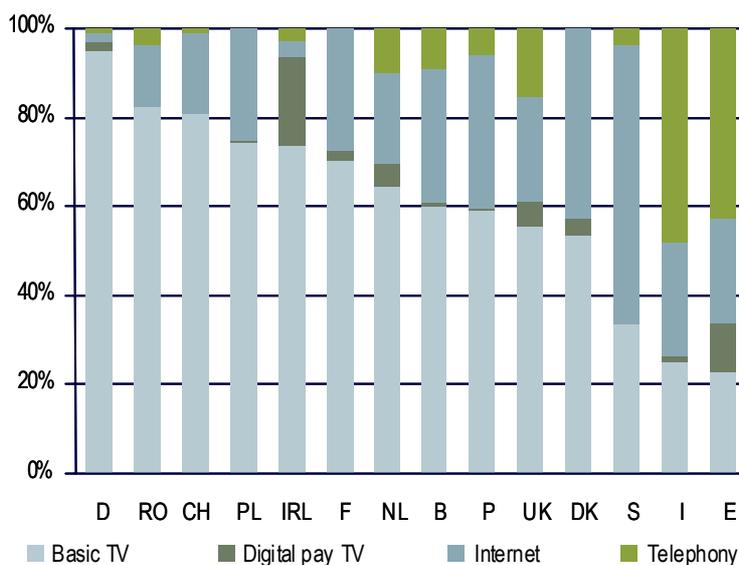


Source: Euromedia (2005): Euromedia Broadband Cable 2006, Degree of network upgrade, in % of homes passed (HP), excluding Germany, Solon

These investments will however only be realized, if cable operators have the chance to offer new, innovative services without major delays. As cable operators increasingly turn towards the offering of digitized content services and content based innovations, which form the core of cable's long term business strategies, the access to the right content at the right time will be a critical success factor.

Upgraded, bi-directional networks offer CATV operators the possibility to diversify into new business segments. With a few exceptions (especially UK) most operators started offering Internet services only and expanded to telephony just recently with the advent of stable VoIP platforms. Although European cable operators expect to diversify their revenue base, basic TV access is to remain the core competence and the top revenue generator for most cable operators.

Revenue share of different services (% of total cable revenues)



Source: Euromedia (2005): Euromedia Broadband Cable 2006, Solon

¹⁷ Lehman Brothers (2005): Telenet.

The development of cable operators will however not stop here. The increased competition from feature rich DSL platforms, the so-called “war of platforms” pushes cable operators to increasingly invest into new products. According to the Solon Cable Survey 2005, cable operators’ core issue for the next years is focusing on content-based products and products offering enhanced access capabilities such as Internet and telephony. Additionally, the offering of “Quadruple Play” meaning the offering of mobile services will be an issue on cable operators’ agenda as well.

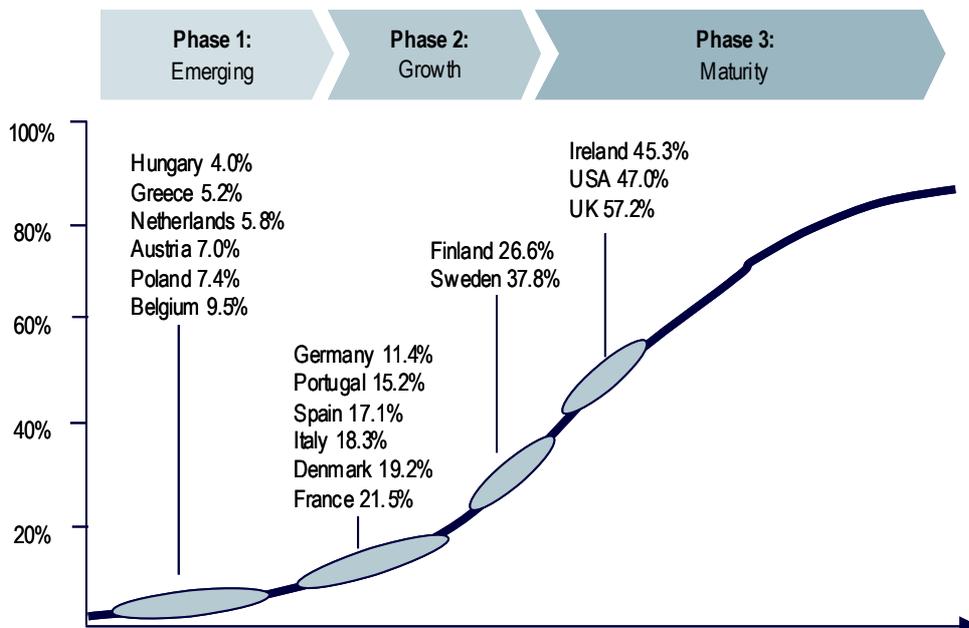
With respect to content based products, two general developments can be discerned:

- The increased digitization of cable homes resulting in a significant increase in the number of channels offered as well as the introduction of HDTV.
- The migration towards fully integrated IP platforms supporting a broad range of more and more interactive content features.

Digitization finally takes off

For a long time the digitization of TV has mainly been driven by satellite Pay TV platforms. As of today, high digital TV penetrations are only reached in markets that are dominated by a strong satellite based Pay TV platform such as BSkyB in UK.

Digital TV penetration 2004 (% of total TV households, incl. Sat.)



Source: Booz Allen Hamilton (2006): The Future Role of Cable in Shaping the Digital Home in Europe

Cable operators have long been struggling with increasing digital TV penetration, since analogue capacity offered capacity for a sufficiently high number of attractive TV channels. For the last two years however, this trend has changed. According to the European Cable Survey 2005 the penetration of digital cable TV homes has been increased by 70%, from 13% to 22%. The “best practice” cable operator has even managed to increase digital penetration from 28% to 47%. The advent of new generation of TV sets such as video projectors, LCD and Plasma significantly increases the demand for higher quality TV. Aggressive initiatives such as the distribution of free Set Top Boxes by UPV Netherlands will further leapfrog the digital TV penetration within the next few years.

With the breakthrough of digital cable TV the traditional cable offering will change significantly:

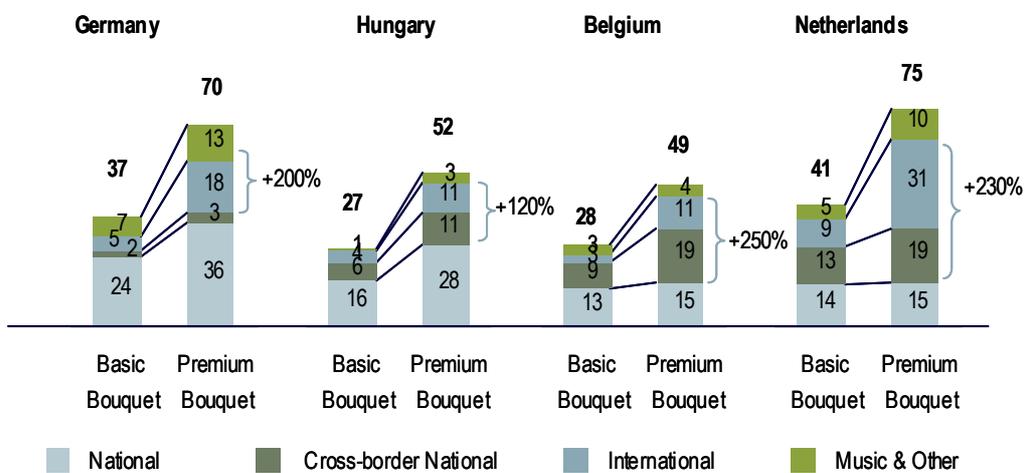
- Even the most basic digital TV access packages usually contain more channels than the analogue basic access. At no extra cost a Dutch digital TV access subscriber usually receives an additional 12-15 channels on top of the already large

(30-34 channels) analogue access product. Some of the German cable operators use the expanded capacity to add more than 40-80 additional Free TV channels within their digital access product.

- In addition to the access packages, a broad variety of Pay TV options will be available bundling a large variety of special interest channels and new international channels.
- HDTV will finally conquer the markets. The football world championship 2006 will serve as a booster for the long awaited TV revolution.

However, the most important impact of the channel expansion is the steep increase in the distribution number of international and cross-border channels. Therefore, the fast digitization is a major stepping stone towards a much higher cultural diversity within the EU TV distribution market place.

Cable channel bouquets by origin (Average number of channels¹⁸)



Source: Solon

On the way to a new IP world

The bi-directional upgrade of the cable networks and the installation of increasingly powerful IP platforms have paved the way towards Triple Play. Most cable operators began to offer cable Internet in the late the 1990s. With the exception of a few frontrunners, telephony via cable was introduced beginning in 2003. The next step in the deployment of the increasingly complex IP platforms will be the development of an encompassing IP TV offering.

With their attractive offerings cable operators have been instrumental in developing the European broadband market. In those countries where cable operators have started offering broadband service early on, the overall penetration is significantly higher than within the DSL dominated markets.

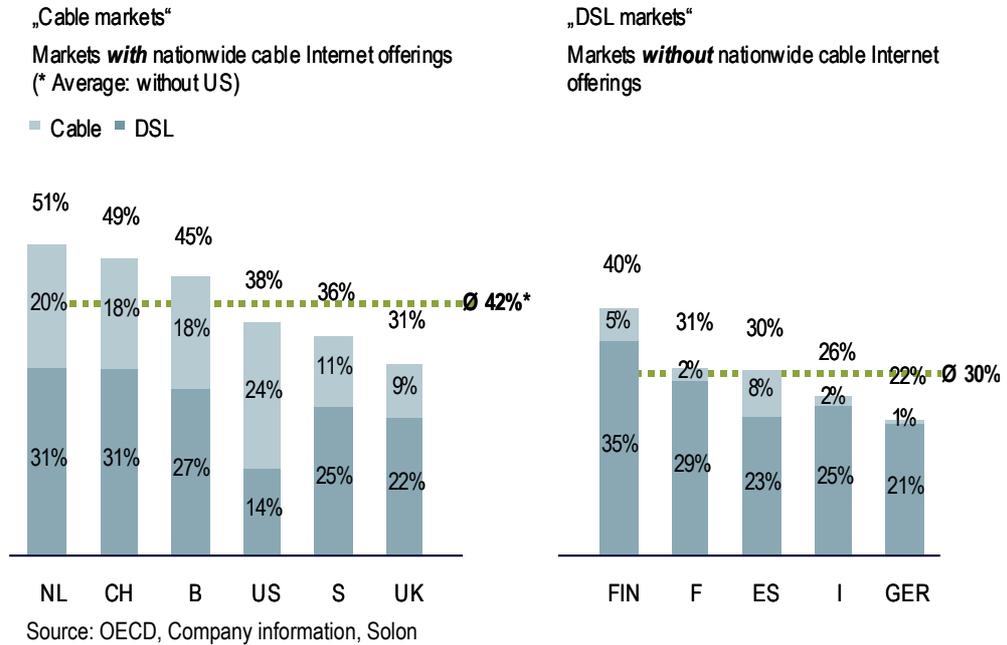
The success story of cable Internet is now being repeated for cable telephony. With the advent of cable telephony the fixed line market is finally seeing sustainable, infrastructure based competition. Up to date cable telephony is usually realized as Voice over IP. The marginal investment for setting up VoIP based cable telephony is rather low and allows for very competitive pricing compared to the incumbent's fixed network. The results are remarkable as illustrated by the examples below:

- Telenet (B) has been able to capture a market share of 20% of the Flanders telephony market within only 2 years

¹⁸ D: KDG, KBW, iesy, ish; HU: UPC, T-Kabel, FiberNet; B: Telenet; NL: UPC, Casema, Multikabel; "Basic bouquet" channels included within the basic access package, "Premium bouquet": Digital access package plus (cheapest) Pay TV package.

- 80% of the German cable Internet customers that have access to telephony also take this service. In some upgrade areas, the proportion has reversed, with more cable customers subscribing to telephony services than to broadband access

Broadband penetration 2005 (%)

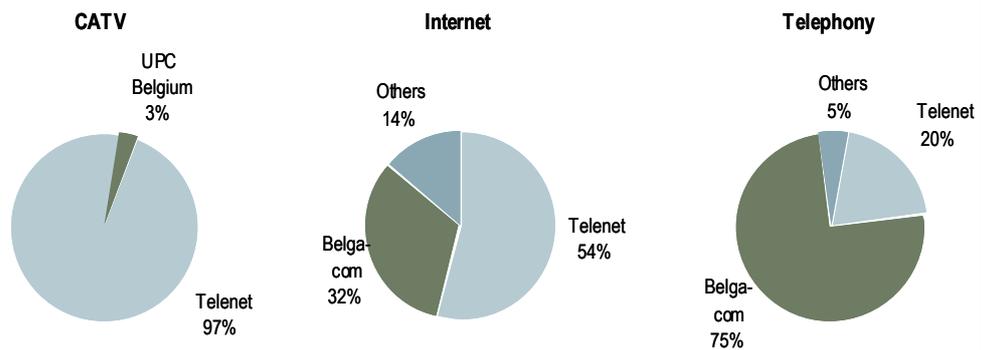


Case study triple play in Belgium: Telenet

Telenet is the leading cable operator in Belgium, operating in the Flanders region, and heavily putting pressure on the incumbent telecoms operator, Belgacom with its broadband and telephony services.

Originally, Telenet was founded to offer telecom products on city cable networks in Flanders. In August 2002, Telenet acquired parts of the cable network and since then, it is able to offer both cable and telephony products to 70% of all households. To the remaining 30%, only telephony products can be offered.

Market Shares in Flanders, Belgium (in bn €)



Source: Lehman Brothers (2005): Telenet, Solon

Telenet's TV product portfolio consists of

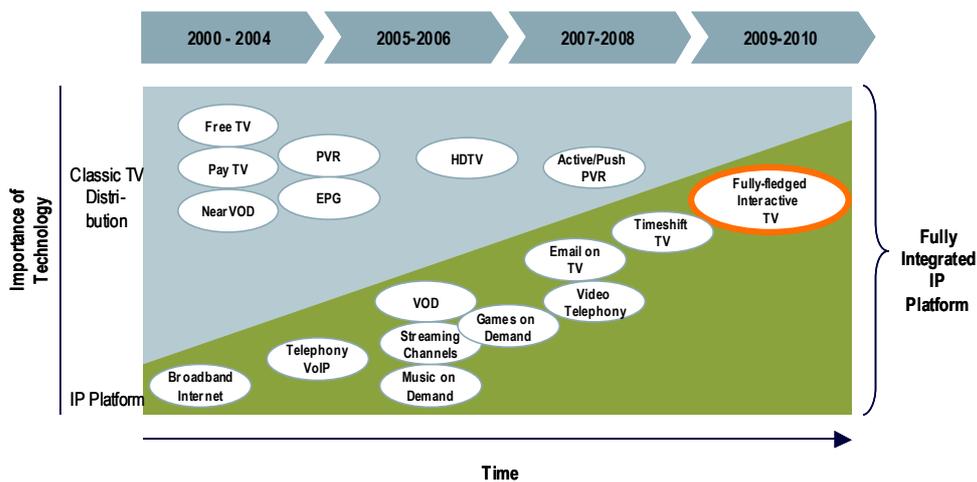
- Analogue CATV with 27 Free TV channels
- Interactive digital TV (iDTV) with 40 TV and 22 radio channels, a Video-on-Demand offer with more than 175 movies, Timeshift TV and a variety of other options like games, e-shopping or email and sms services. The launch was in September 2005. Within the first few days following the launch, 15,000 customers were already won.

- PCTV: A web based IPTV offering with Video-on-Demand, Live-TV, Timeshift TV, and Music on Demand

In addition, broadband Internet with different tariffs is offered. The telephony offering (launch end of 2004) consists of a fixed line flat-rate and options, e.g. for international telephony. Telenet is on its way to becoming the broadband Internet market leader in Flanders and has already gathered a 20% share of the telephony market; telephony and Internet services account for 50% of total revenues of Telenet.

However, the full potential of the IP platform is just starting to be realized by cable operators with the offering of IP based TV services. Using the IP platform enables cable operators to offer a whole new range of interactive TV services. In the upcoming years, the importance of IP based TV (IPTV) technologies is expected to gain ground compared to classic TV distribution platforms, not only for DSL operators but also for cable operators. By the end of 2010, fully integrated, IP based network platforms are expected to establish themselves as the market standard. However, IPTV also exposes cable operators to a new competitive environment and shifted dynamics, which will be explained in detail in the next section.

Shift from uni-directional, linear distribution to interactive on-demand content



Source: Solon

The emergence of PVRs (Personal Video Recorder) and EPGs (Electronic Programme Guide) already indicate that first milestones have been met regarding the trend towards TV with comprehensive interactive features. However, IPTV goes far beyond just having a PVR in the living-room: It seamlessly merges “lean back” consumption and interactive possibilities on one single platform, thus offering a fascinating new style of TV consumption. Attractive product features include:

- Transmission of manifold digital channels, e.g. small niche channels
- Full Video-on-Demand (VOD) including large video libraries
- Extensive TV programming from the Internet to the TV screen
- Virtual channels, which allow for rewind and forward within a television programme (“Timeshift TV”)
- Interactive television (betting / voting, additional info, etc.)
- Provision of additional information to actual TV programme in the form of video, audio and text

In order to better leverage their investments in content and IPTV platforms as well as to increase their marketable base, selected cable operators have also started to offer their IP products outside their actual footprint by reselling DSL lines or using unbundled local loop to set up own networks.

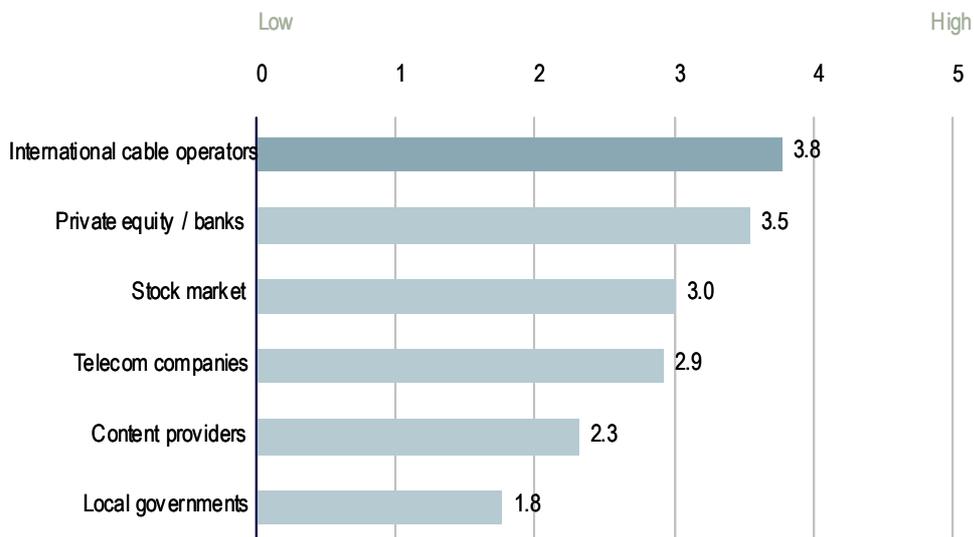
Consolidation of the cable markets

The expansion of the cable offering towards Triple Play increasingly demands a higher critical mass of subscribers. As a result, strong trends towards the consolidation of smaller cable operators into larger networks can be observed among nearly all European countries. Some recent deals confirming this trend:

- With the acquisition of ish and TeleColumbus the German operator iesy has moved from 5% to covering 31% of the German cable subscribers. The three companies are bundled in the Unity Media holding,
- With the merger of ntl and Telewest the British cable market is now dominated by a single large cable operator,
- The acquisition of Auna’s cable networks by its competitor ONO.

The consolidation of the cable market will however not end on a national level. Within the Solon European Cable Survey 2004 most cable executives expressed their conviction, that in the long term, international cable networks will take over their national networks.

In the long-term, the cable industry will be shaped by international cable networks



How do you rate the probability of the following groups seeking long term ownership in cable networks? (Low: 1; High: 5)

Source: Solon European Cable Survey 2004

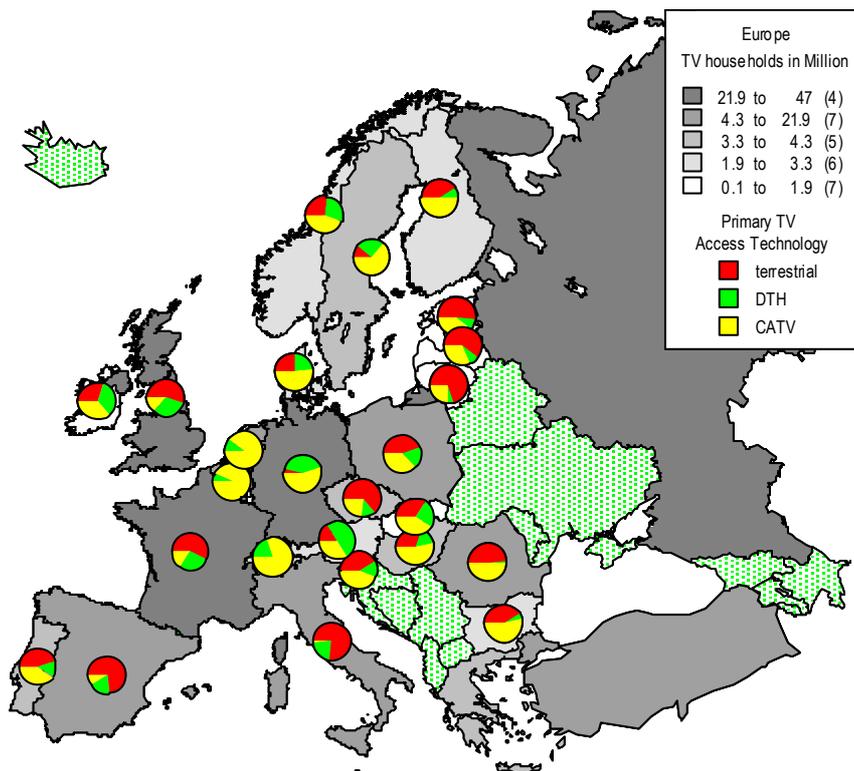
One key example illustrating this trend is US-based Liberty Global. Through its UPC broadband division, the company operates 13 cable operators throughout Europe. Under the uniform brand name “chello”, high speed Internet access is promoted. Through the “chellomedia” division, Liberty Global develops digital solutions for interactive TV, VOD and Pay TV content for the European market. UPC has announced it will launch digital TV in the Netherlands, Austria and Hungary and export this model to other countries as well.

With the emergence of European-wide networks, the issue of cross-border acquisition of content and thereby copyrights will become an important issue to the cable networks. The current copyright system with vast national copyright collecting societies will pose a major hurdle in the efficient acquisition of content rights for these international networks and consequently impede the development of European wide content offers.

3.2 Competitive landscape

The development of cable operators into Triple Play providers has begun to change the competitive environment within the European TV markets. In the classic, uni-directional TV segment, satellite operators and terrestrial TV, especially DTT are still the main competitors. While overall, terrestrial TV is still the number one TV access infrastructure in Europe, cable is the leading TV access technology in many European countries. In Belgium, the Netherlands and Switzerland, the percentage of homes passed, meaning their theoretical ability to get connected to a cable network is far above 90%. However, other countries like Germany, Denmark and Sweden also have high proportions of homes passed. Additionally, DSL providers have started to offer linear, streaming TV since Internet accesses have become fast enough to be used for TV functionality as well.

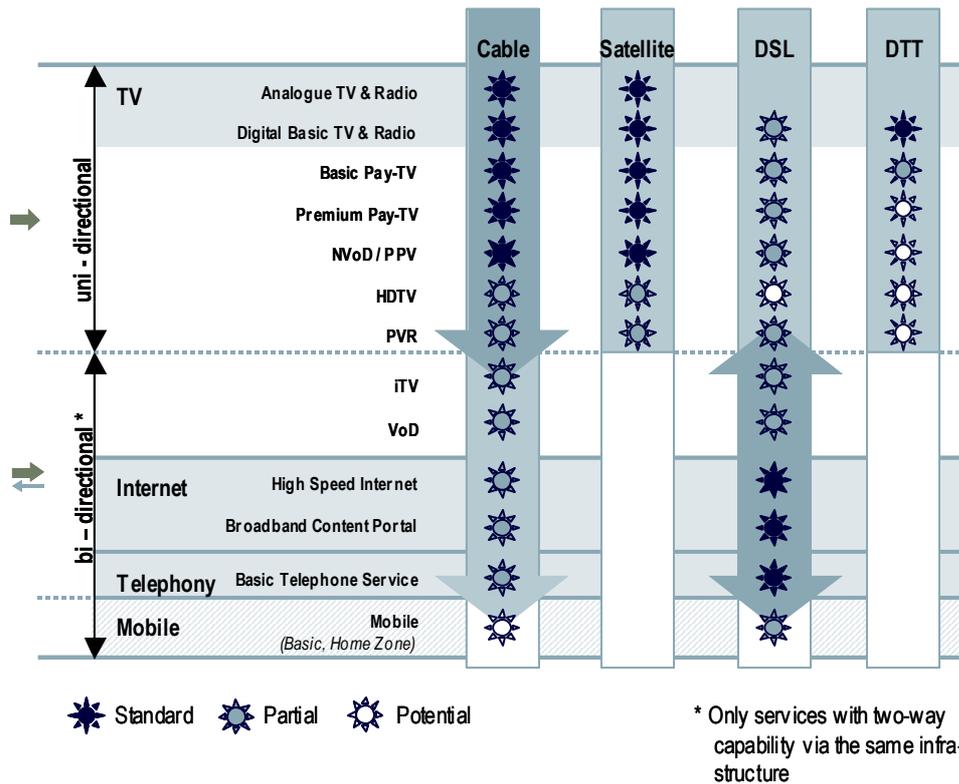
TV access technologies in Europe



Source: SES Astra, Solon

A new situation has developed in the area of bi-directional services. Here, cable operators compete against DSL providers on their natural home turf, namely interactive services such as broadband Internet and telephony. By using IP platforms to deliver IPTV services, DSL operators have also started to enter the home market of cable operators. For both competitors, cable and DSL operators, the integrated offering of Internet, telephony and TV services, also called "Triple Play", has become a strong mean of differentiation.

Infrastructure platforms are breaking ground in new product territories



Source: Solon

According to the Solon European Cable Survey 2005 noticeable shifts in market shares are expected as a result of changed market conditions. Especially in countries with rather high cable market share, cable operators expect to lose market shares. TV over DSL, satellite and DTT are expected to gain importance all-over. Of little surprise is the fact that, analogue terrestrial TV is expected to lose heavily in terms of importance since it will be replaced by DTT.

Expected market share shifts 2004 - 2009

Cable market share:	Low < 40%	Medium 40% - 70%	High > 70%
TV over DSL	2.3%	1.8%	4.3%
Digital terrestrial TV (DTT)	5.6%	2.7%	2.6%
Analogue terrestrial TV	-15.3%	-3.4%	-2.4%
Satellite	3.4%	0.0%	0.8%
Cable	4.0%	-1.1%	-5.3%

Development of TV market shares in countries with small, medium and high cable market shares

Source: Solon European Cable Survey 2005

Within this increasingly competitive environment, cable can only maintain its position and continue investing if a level playing field and fair competition is achieved. The varying copyright situations do play a significant role here.

Terrestrial

Within many European countries terrestrial TV still holds a major if not the largest share of the TV access market. From a user's perspective, the main advantage that terrestrial TV offers is an inexpensive¹⁹, however very limited, channel line up. The migration towards digital terrestrial TV revitalizes the terrestrial medium by enabling a significantly larger channel offering. Still, the overall capacity of terrestrial TV will remain limited and only allow a very narrow offering of high bandwidth services such as HDTV. DTT achieves a limited mobility and thereby complements the stationary cable and satellite offers.

However, DTT has the potential to play a new role if combined with DSL offerings. Using a hybrid set top box DSL access and DTT can be combined: DTT is used for realizing the linear transmission of the core set of TV channels, while DSL is being used for on-demand and high bandwidth services. Telecom operators are about to discover this potential. The Dutch incumbent KPN has acquired stakes in the DTT operator Digitenne in order to offer the full Triple Play and has already captured 2% of the TV market. Belgacom plans to invest into DTT.

So far, terrestrial TV access is perceived as primary transmission and is therefore not burdened by retransmission fees. This assumption, however true for analogue terrestrial TV does not generally hold for DTT as DTT platforms increasingly act as channel aggregators also offering international channels:

- The Dutch DTT platform Digitenne for example offers 26 digital channels at a monthly subscription price of 8.95 €. A third of these channels consist of international channels such as BBC, Discovery Channel, CNN or Eurosport.
- Even the German Free TV DTT bouquets include the two international channels BBC world and TerraNova, a European nature channel.
- The Swedish DTT platform Boxer offers 31 digital channels for 159 SEK/month (~17 EUR) of which six are international (e.g. CNN, Eurosport and Discovery Channel).

The level playing field between cable and DTT can therefore not be held and adjustments should be made.

Satellite

The most distinct feature of satellite TV is its broad offering of Free TV channels as well as an excellent offering of channel packages offered on a subscription basis by third parties and Pay TV services. Due to its cross-border nature, the channel offerings from the different regional markets create an encompassing and highly attractive bouquet. The increased market focus on Triple Play forces satellite operators to evaluate ways to complement their offering towards Internet and telephony and especially towards more interactive content packages.

As opposed to cable, satellite transmission is perceived as primary transmission and therefore not burdened by retransmission fees. The country of origin principle allows for the one-stop acquisition of all relevant copyrights without the need to secure additional national licenses within the receiving countries.

While satellite Pay TV has always been encrypted, basic encryption is on the brink of being introduced for satellite Free TV, too. The most recent example is the move towards a basic encryption for the large German private TV broadcasters, which is being discussed intensely.

¹⁹ Actually, transmission via DTT is more expensive than e.g. cable. In order to introduce DTT, many countries have granted subsidies for its implementation.

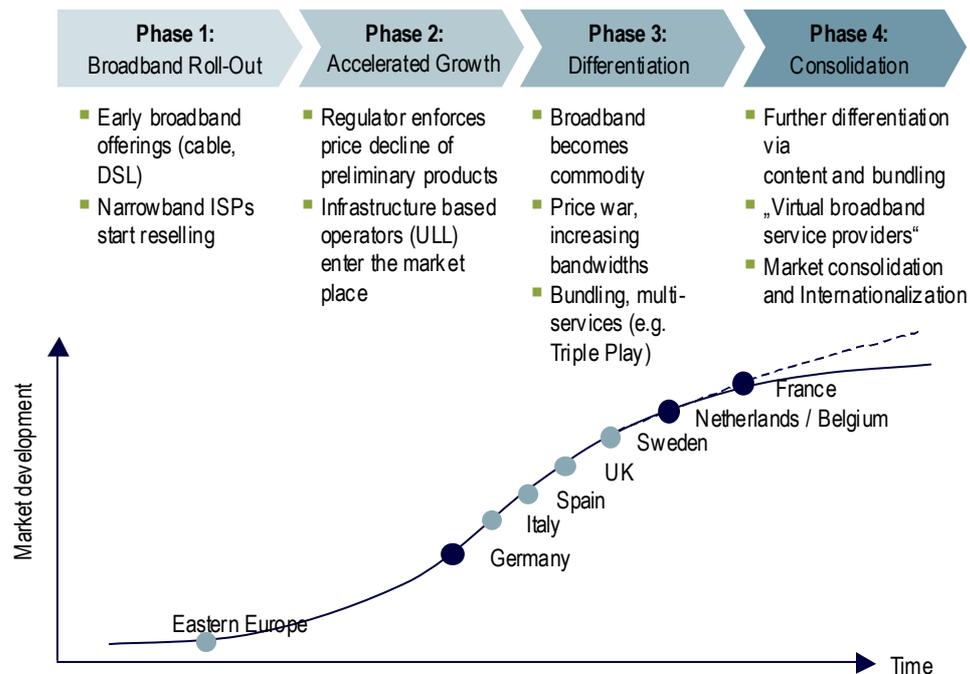
With the increased encryption of satellite TV which was already discussed within the SatCab review²⁰ and the development of a new generation of satellites equipped with “spot beams” which can direct satellite signals to individual metropolitan areas, the cross-border effects of satellite offerings as targeted by the “TV without Frontiers” directive is becoming increasingly more diluted. In the future, the satellite audience will be managed more actively and with a national rather than an international approach. As a result, national satellite platforms are developing that rather act as aggregators and distributors to the public while the broadcasters retreat to being creators of content that is bundled and distributed. Satellite operators are therefore closing in on cable operators in regard to their market approach and thus should be treated on an equal level.

DSL

Broadband Internet has been the main growth driver for telecommunication operators over the past five years. The European broadband market still faces a phase of rapid growth. Already one out of every four Western European households will utilize high-speed Internet access by 2010. As previously discussed, broadband penetration has been heavily influenced by the intensity of competition between telephone and cable network platforms. Countries, where cable networks underwent early upgrades to include two-way capability, typically have a significantly higher broadband penetration than primarily DSL-dominated markets. As a result of the intense competition, broadband Internet prices throughout Europe have fallen dramatically over the past three years.

Basically, broadband markets are experiencing a typical development: Markets are moving from the nation-wide roll out phase into a phase of steeper growth. Growing competition results in a rapid price decline and the blurring of differences between suppliers in the eyes of the customer. Hence, providers are forced to distinguish from each other, which is considerably challenging when dealing with a highly-standardized product such as Internet connections. Many Western European markets have already entered this phase of differentiation.

European broadband markets are currently experiencing a phase of differentiation



Source: Solon

Incumbents and DSL operators have put forth great effort to escape the commoditization of their core products. Various differentiation strategies are being tested. A first approach

²⁰ COM (2002) 430 final.

tested mainly by DSL operators in beginning and middle of 2004 was the offering of cheap VoIP services. Since mid 2004 the offering of TV over DSL or IPTV has moved to the top of the DSL agenda.

Although convergent IP-products have long been discussed, TV over DSL seems to have taken some of the markets, especially France and Italy, by surprise. In order to lure customers to their TV platform DSL operators have started to invest heavily into attractive premium content:

- Several incumbents have acquired online soccer rights (Deutsche Telekom, Belgacom).
- Deutsche Telekom has struck on-demand deals with all large Hollywood studios.
- Iliad (Free) and France Telecom (Maligne) have integrated the most attractive Pay TV offers (Canal+, TPS) into their platforms.

With their Triple Play offers, DSL operators are increasingly competing with cable operators. The advantage of TV over DSL lies in its inherent interactivity: On-demand services, streaming channels, additional information packages and the ultimate seamless integration of the Internet and telephony into Triple Play packages are advantages that most cable operators do not yet offer.

The current phase of differentiation will be followed by a phase of consolidation. The offering of attractive, partially exclusive content offerings demands a minimum critical mass. Large DSL service providers such as France Telecom or AOL have created a network of international subsidiaries. Some of them, e.g. Telecom Italia, have already started to roll out their on-demand platforms to other markets within the EU.

Internationalization of selected DSL service providers

	FT / Wanadoo	AOL	Telecom Italia	T-Online
Total subs (m)	6,823	6,000	5,943	4,636
Austria				
France	Core market			
Germany				Core market
Italy			Core market	
Netherlands				
Poland				
Spain				
Switzerland				
UK				

In regard to copyright clearing, DSL operators are treated similarly within many EU countries (e.g. Hungary, Germany). Deutsche Telekom has just signed an agreement with GEMA that ensures the payment of retransmission fees for the channels that will be included within the IPTV package (market introduction: Summer 2006). Thus, the missing technological neutrality is also an issue for DSL operators. Additional cost of content provision may hamper the fast and successful introduction of new content services via this infrastructure. As cable operators, DSL providers have problems in acquiring all content necessary for innovative services such as Timeshift TV.

3.3 Impact of market development on copyright regulation

All trends discussed, be it the increased digitization, the emergence of IPTV or the emergence of international networks of cable operators have significant impacts on the copyright situation of cable operators.

Core market trends with relevance for copyright management system

Trend	Changes with relevance for copyright management system
Digitization	<ul style="list-style-type: none"> • Multiplication in number of channels • Increasing share of international content and content sources • Analogue and digital simulcast
IPTV	<ul style="list-style-type: none"> • Simulcast extends towards IP platform • Additional acquisition of on-demand rights • Blurring of content modes: e.g. Timeshift TV between broadcasting and on-demand
Internationalization of cable operators	<ul style="list-style-type: none"> • Further increase in number of copyright negotiations needed
New TV value chain	<ul style="list-style-type: none"> • Aggregation and distribution realized by all TV infrastructures including satellite, DTT and DSL • Level playing field missing

As a result, the effectiveness and efficiency of the current copyright regimes are reduced.

- The number of rights to be secured increases in line with the rapid growth of especially international channels to be broadcast within a certain footprint. As a result, the costs for acquiring the relevant copyrights will increase in the future (decrease in allocation efficiency).
- Moreover, channel aggregators and distributors have no way of knowing which third party rights will be used by the content service providers (the broadcasters), with whom they enter into distribution agreements, and who administers the rights which need to be cleared. The broadcasters do know this and therefore they are in a much better position to clear the rights (decrease in allocation efficiency).
- The strong internationalization of content and content sources increases the complexity even further, as the transparency with respect to the copyright relevant contents within these channels decreases. The insecurity regarding the rights to be acquired has the potential to result in overpayment (decrease in allocation efficiency).
- Cable operators will have to secure rights for an increasing variety of different content types (analogue vs. digital, on-demand, interactive content etc.), thereby increasing the complexity of copyright management even further (decrease in allocation efficiency).
- Simulcasting a specific programme via different platforms (analogue, digital, IP) may be perceived as separate acts of communication to the public, even though the law is technology neutral and does not know any such differentiation. A recent example was the negotiation of analogue-digital simulcast in Germany. In this case, the large private broadcasters held back the rights for digital transmission for about two years by means of long negotiations (reduced dynamic efficiency). As a result the digitisation of the cable infrastructure had been delayed as simulcast is a highly important step into digitisation. Secondly, also the introduction of Triple Play services suffers from the delay, as their offering requires more digital capacity which itself requires an analogue melt-off. Such analogue melt-off will only be accepted by the end-customer if it does not affect the number of TV channels.
- For some of the new products the actual copyright situation will be hard to determine, since these products develop along the border between linear and on-demand services. The most prominent product is net-based Timeshift TV, where the TV programme is stored on a central server for a certain period of time (up to one week) and can be downloaded for later consumption. The resulting insecurity

with respect to the copyright situation already delays the actual introduction of these products (reduced dynamic efficiency) and may result in claims.

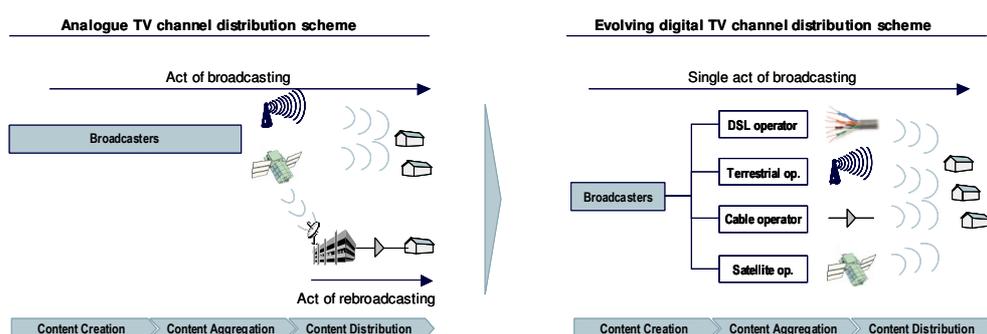
The situation for cable operators is further aggravated by the fact that the SatCab Directive puts satellite platforms in a more favourable position than cable, while it does not explicitly regulate other delivery platforms, such as ADSL and DTT.

The present rights clearance system which applies to cable operators is based on the fact that broadcasters communicate their own channels to the public via terrestrial transmitters or via analogue satellite transponders. Cable operators pick up those signals and re-broadcast the channels on their cable systems. Both acts, the act of broadcasting and the act of re-broadcasting, are considered to be relevant acts under copyright law and, consequently, copyrights have to be cleared twice in regard to the distribution of each channel.

The present rights clearance regime no longer reflects the current situation. Free TV broadcasters need a large audience for financing their channels by selling advertising time. They are in the business of reaching the widest possible audience in order to maximize their advertising revenues. In order to achieve this objective, they need to distribute their channels via all available electronic communications networks: Terrestrial transmitters, satellite, cable systems, DSL, etc. Thus, from the perspective of the broadcasters, there is only one single act of communication to the public albeit via different electronic communications networks. Therefore, there is no reason for artificially splitting the reception of TV channels into a broadcasting and a retransmission part.

As discussed in the chapters above, in the digital environment a growing number of broadcasters tends not to broadcast their channels anymore, but to offer their channels for distribution to the different channel aggregators.²¹ This does not only apply to Pay TV channels, but increasingly also to Free TV channels. The channel aggregators then distribute those channels to their subscribers via different electronic communications infrastructures. Examples are channel aggregators who offer channel subscription packages to subscribers via DTT (e.g., KPN and Digitenne in the Netherlands), via satellite (e.g. Canal Digitaal Netherlands or TPS (France)), and via DSL by MaligneTV (France), Free (France), Sky (UK), T-Online (Germany), Fastweb (Italy) etc. Consequently, only a single communication to the public remains, for which the broadcaster uses electronic communications services (i.e., distribution services) of different electronic communications networks according to its sole discretion.

Analogue and evolving digital TV channel distribution chain



Source: Solon

Nevertheless, more favourable rules apply to channel packagers who communicate their subscription packages over other platforms than cable (especially to those who communicate their channel packages to the public via satellite). As opposed to cable, the transmission of channel packages on a subscription basis via satellite is often perceived as only one communication to the public, for which the broadcasters clear all the rights. The country of

²¹ For a detailed discussion of the changes in the broadcasting value chain see also: van Loon, A.: The end of the broadcasting area; in: Communications Law, Vol. 9, No. 5, 2004.

origin principle allows for the one-stop acquisition of all relevant copyrights without the need to secure additional national licenses within the receiving countries. Consequently, at comparative packages the cable offering is burdened by additional costs (double rights clearance: Once by the broadcaster; once by the cable operator). The level playing field between cable and other distribution platforms can therefore not be held and adjustments should be made.

The copyright management systems in most European countries do not yet have an answer to these questions. The current systems were developed in a time where cable retransmission was relevant for a comparatively small selection of analogue channels only. The strong increase especially in the number of international channels and diversification of content modes will in the long run not be managed efficiently by the current regimes.

However, digitization and IPTV cable also open the door for a new approach regarding individual content management by means of effective DRM systems. Set top boxes with integrated basic encryption support a better screening of the content actually consumed by the customer. IP platforms are based on one-to-one relationships and are therefore also generally apt to monitor the content usage of individual customers.

A future proof copyright management regime should be able to significantly simplify the process of securing all necessary content rights and take advantage of the new possibilities arising from digital rights management systems.

The following main adjustments could help to adjust the European copyright regime to the future market demands:

- Technologically neutral regulation: Today's satellite, DSL and DTT providers are acting as aggregators, that bundle content provided by broadcasters rather than just transmitting it. Their function therefore increasingly resembles the one of the cable operators, which means cable operators should be subject to the same set of rules as their competitors (i.e., satellite, DTT and DSL).
- The introduction of all-rights-cleared packages from broadcasters as a standard approach: Cable operators should be able to demand fully cleared packages from the broadcasters – and collecting societies should be bound to the respective requests of cable operators. Fully cleared packages would not only reduce the load of negotiations for cable operators but would also limit the intransparency extending to certain rights already acquired.²²
- Rights holders should not have the right to determine which technologies can be used for the communication of content services to the public.
- For reasons of network efficiency, the network operators will need to have the right to decide which technology they will use to communicate channels and other content services to the public. The role of rights holders should be limited to permitting or to prohibiting the communication of their 'products' to the public.

²² In general, in cases where there are many owners of parts that are used to develop a product, but the product can only be sold as a full product (a car, for example, in which there are thousands of parts protected by patent rights), the individual parts only get a certain value because of the added value of the full product. In the same way, individual sets of rights (for example musical rights) have no value for channel packagers such as cable operators. The value of the individual set of rights is to be derived from the added value of the full product of which they form part.

4 Copyright regulation in selected European countries

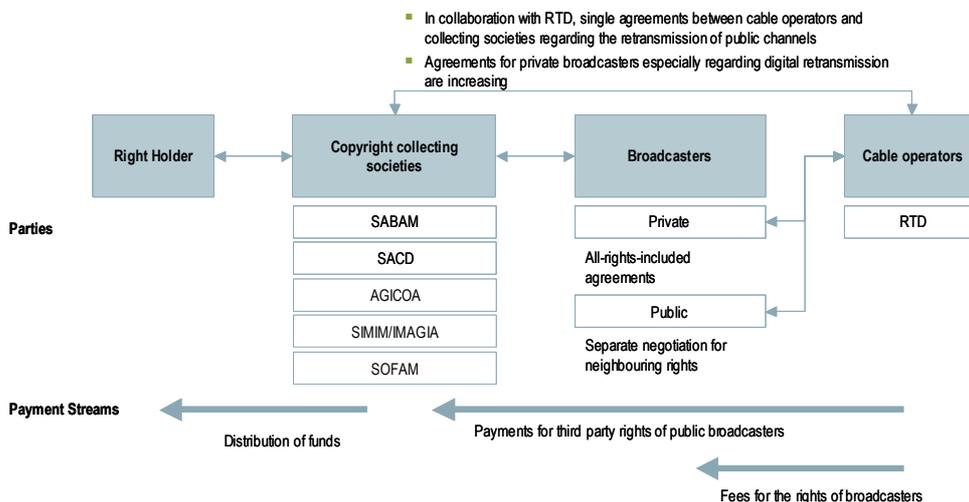
A final evaluation of the efficiency of copyright regimes and collecting societies must be conducted on a case by case basis. In the next chapters, the copyright regimes of four countries will be briefly introduced and qualitatively evaluated according to the developed efficiency criteria. Since this paper focuses on the distribution situation, copyright regimes will be reviewed under this premise. The efficiency situation for rights holders and aggregators will only be commented on if direct relationships to distributors are in place or may occur. The following descriptions only point out major influencing factors and changes that have occurred. Detailed country case studies can be found in the appendix.

4.1 Belgium

In contrast to other European countries, no general framework contract exists in Belgium. Cable operators close a variety of single contracts with both collecting societies and broadcasters. The RTD (the Belgian cable industry trade association) closes – in cooperation with cable operators – agreements with all of the aforementioned collecting societies regarding the general retransmission of public broadcasters (both national and international). These agreements cover any third party rights for analogue, digital and simulcast transmission. Additionally, cable operators negotiate separately with all public broadcasters for their neighbouring rights.

Negotiations with private broadcasters have until now also been realized bilaterally on a case by case basis. Typical contracts include all necessary rights for cable distribution. No further contact to a collecting society is necessary. However, things have slightly begun to change. Nowadays, contracts with collecting societies regarding single private broadcasters also must be agreed upon. Collecting societies are attempting to demand fees for the digital cable distribution for private broadcasters as well.

Copyright value chain of Belgium



Source: Interviews, Solon

Inefficiencies of Belgian system

- **Allocation inefficiency**
 - Lacking transparency may cause double payments. It is not always clear which rights are covered by which collecting society. The absolute amount of fees may actually be too high. Additionally, the amount of negotiations could be reduced

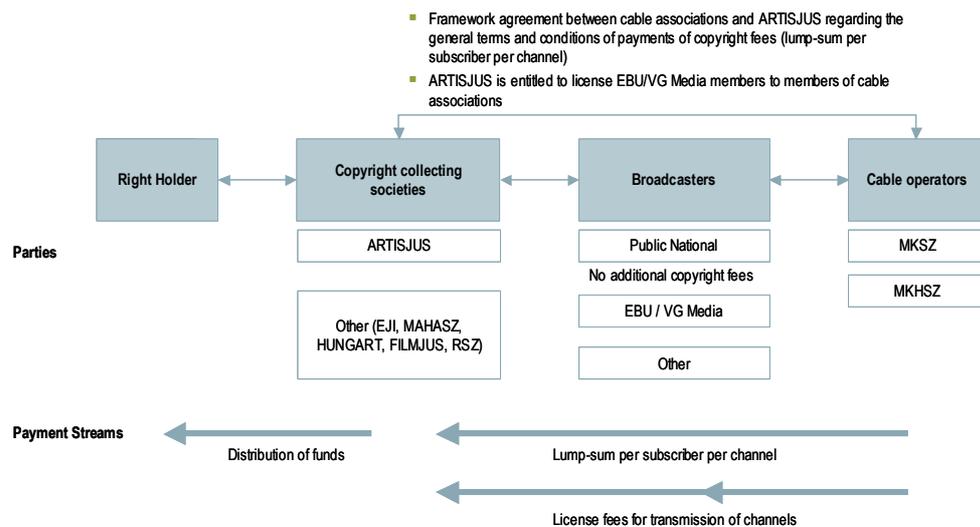
- **Productive inefficiency**
 - SABAM has a quasi monopoly position as it represents 80% of all relevant rights. At 18%²³, its cost basis is comparatively high and indicates the existence of inefficiencies (due to a lack of incentives).
- **Dynamic inefficiency**
 - High uncertainty regarding new claims of collecting societies for new services like IPTV and on-demand limits planning reliability of distributors.

4.2 Hungary

The general terms of copyright payments for cable operators are settled in a framework agreement between cable associations MKSZ/MKHSZ and ARTISJUS, the most important of the collecting societies, which is also acting as an agent for the other, smaller societies. This agreement concerns reporting tasks, frequency and rules of payment.

As a member of one of the cable associations, operators can elect to settle copyright fees according to this framework agreement. Payments are agreed upon as a monthly lump-sum per subscriber per channel. No negotiations regarding copyright happen between broadcasters and cable operators. The vast majority of fees is paid to ARTISJUS, which acts on behalf of other collecting societies based on law and redistributes the fees accordingly. Fee levels are defined in yearly addendums to the aforementioned agreement.

Copyright value chain of Hungary



Source: Interviews, Solon

Certain variations regarding the treatment of copyright payments of different types of broadcasters are existing. Public broadcasters and some local broadcasters are subject to must-carry rules. No additional copyright fees have to be paid for their distribution by cable operators.

French, German, Austrian and Italian channels are organized within the EBU/VG Media associations. The treatment of these is carried out according to another framework agreement, closed between these two associations and the MKSZ/MKHSZ. ARTISJUS is entitled to license the member channels of these societies to members of the cable associations. Retransmission fees are usually paid according to the abovementioned agreement. As a consequence of this agreement, operators do not need to negotiate directly with the member channels of EBU/VG Media and both pay the license fee and the fee for distribution to ARTISJUS.

²³ Cap Gemini (2005).

The third group is formed by any other channels. Cable operators close individual contracts with them regarding carriage; copyright fees are also paid as a lump-sum per subscriber per channel to ARTISJUS. Pricing in line with the framework agreement.

Inefficiencies of Hungarian system

- **Allocation inefficiency**
 - Level of fees (lump-sum per subscriber) according to the framework agreement neither takes the total number of subscribers of the cable operator into account nor does it reflect the differences among channels, meaning their valuation according to viewers and reach.
 - Cable operators have to negotiate the carriage of programmes with the broadcasters and the copyright fees with collecting societies leading to higher transaction costs.
- **Productive inefficiency**
 - ARTISJUS, the leading collecting society in Hungary currently has a very high level of management fees, accounting for approximately 17% of revenue.
- **Dynamic inefficiency**
 - The future treatment of new services is not regulated clearly by now.

4.3 Germany

In Germany, cable operators need the permission of broadcasters and collecting societies for transmission of programmes. They must be granted cable retransmission rights in contrast to satellite and DTT²⁴ who not require this. The collecting societies regard DSL as cable infrastructure and therefore negotiate retransmission payments. Collecting societies thereby act on behalf of the respective rights holders. Different kinds of rights are represented by a total of nine collecting societies. However, not all rights are represented by collecting societies since broadcasters can choose, whether they want to be represented by a collecting society or not – a right which is especially used by foreign channels.

Case Study: Implementation of SatCab

Article 8(1) of the SatCab Directive provides that retransmission by cable shall take place on the basis of individual or collective contractual agreements between copyright owners, holders of neighbouring rights and cable operators. Article 9 of the SatCab Directive sets the principle of the mandatory interposition of a collecting society when it comes to the settlement of cable retransmission rights. This is intended to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders. However, Article 10 of the same directive guarantees an alternative to this principle if rights are exercised by a broadcasting organization with respect to its own broadcasts. It is immaterial whether rights concerned are its own or have been transferred to it by other copyright owners.²⁵

According to the German Copyright Act however, the cable operator must pay remuneration for rights holders who granted their broadcasting rights to broadcasting companies, provided that the rights holder did not already receive an adequate remuneration from the broadcasting company. Such claims for remuneration are payable to a collecting society. That makes it much more difficult for the cable operator to negotiate freely and settle definitely with the broadcaster, since broadcasters refuse to indemnify the cable operator if a collecting society claims an additional remuneration since the claim is a statutory one. The cost relating to the acquisition of the rights is uncertain and not market driven.

²⁴ The broad introduction of DTT planned by national public broadcasters ARD and ZDF is criticized by German cable associations DKV and ANGA. Public broadcasters spend around 380 m€ for terrestrial broadcasting of their channels. As this is financed by TV license fees, they claim that DTT was granted a competitive advantage compared to other distribution platforms. See e.g. press release DKV and ANGA, 10.02.2006.

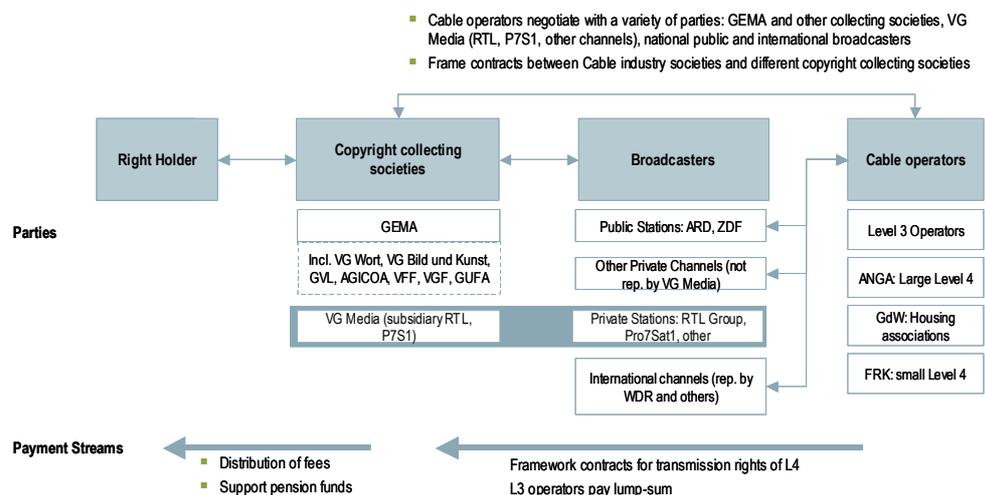
²⁵ See COM(2002)430 final.

The EC Commission has already stated that German legislation considerably weakened the full effect of Art. 10 of the Directive:

“However, the full effect of Article 10, i.e. the existence of an alternative to the principle, set out in Article 9, of negotiations between collecting societies and cable operators, is considerably weakened in German legislation. The introduction of the right to an equitable remuneration of authors which can be paid by cable operators only through a collecting society does not allow a sole contract to be concluded between the broadcaster and the cable operator and can make negotiations on cable retransmission more difficult in Germany than in the other Member States.”²⁶

Based on these legal regulations cable operators are required to negotiate with the following collecting societies: GEMA, VG Wort, VG Bild und Kunst, GVL, AGICOA, VFF, VGF, GUFA, VG Media. The national public broadcasters represented in the past the foreign public broadcasters, the national private broadcasters (if their own broadcasting right is not administered by VG Media) and foreign private broadcasters. Larger cable operators (Level 3) directly negotiate with the collecting societies. The interests of Level 4 cable operators are tended to by the ANGA (the German cable industry trade organization, mostly larger operators), FRK (Cable Association, mostly smaller operators) and GdW (Association of Housing Associations).

Copyright value chain of Germany



Source: Interviews, Solon

Inefficiencies of German system

Allocation inefficiency

- Due to a lack of transparency it is not clear which rights are in fact acquired when contracts with collecting societies are closed. Therefore, cable operators prefer to enter into agreements with all collecting societies, thereby accepting that the rights may have already been cleared by a broadcaster.
- VG Media belongs to private national broadcasters. Cable retransmission fees may be used to re-finance feed in fees.
- In the past, smaller collecting societies or single stations have frequently left the negotiation rounds or already closed agreements (e.g. Danish TV station broke from GEMA frame contract, claiming not to get a high

²⁶ Report from the European Commission on the application of Council Directive 93/93/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission COM(2002)430 final.

enough share of fees). This further increases the uncertainty as cable operators cannot always rely on closed agreements.

- Although VG Wort, VG Bild-Kunst and GVL receive a compensation from the level 3 cable operators, these collecting societies claim an additional compensation according to Section 20b Subs. 2 of the German Copyright Act due to the fact that VG Media left the Munich Round.
- It is unclear, which rights in detail are administered by which copyright collection society, which may well cause double payments.

Case Study: VG Media and the rights for digital cable retransmission

VG Media, the representative of the large private broadcasters P7S1 and RTL in Germany, has claimed for a long time not to represent the rights for digital cable retransmission which resulted in cable operators' inability to digitally broadcast nearly any German private channel. Negotiations had to be undertaken separately with the respective channels, due to the diverging interests of the participating parties. The introduction of simulcasting for most of the popular channels has been effectively postponed by more than 2 years.

Abroad however, e.g. in the Netherlands, VG Media has been able to offer both analogue and digital rights.

Aside from delaying the broader acceptance of digital basic TV access, the development of an attractive digital Pay TV market has also suffered significantly from the delay in general digitization. Additionally, cable operators were limited in their possibilities to offer Triple Play products since this would require additional cable capacity which can only be fully exploited when channels are digitally distributed since this demands significantly less capacity.

- **Productive inefficiency**
 - Quasi monopoly situation of GEMA and VG Media creates no incentive to work at lean cost base.
- **Dynamic inefficiency**
 - Notwithstanding the frame contract between ANGA and VG Media about the compensation of feed in of analogue as well as digital signals, VG Media stated that they have not been granted digital rights from the broadcasters thus far. The case of this argument has resulted in delaying digital simulcast of private TV station by nearly two years.
 - Treatment of new services like on-demand and online services are currently unclear. Future financial exposure is also unclear which hampers the implementation of new business models.

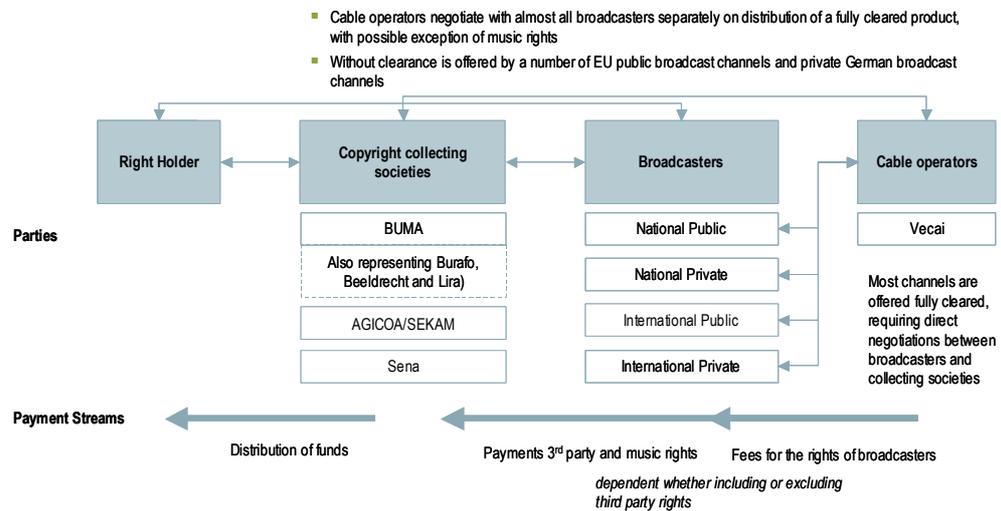
4.4 Netherlands

In the Netherlands, cable operators negotiate with almost all broadcasters separately on the distribution of fully cleared products with the possible exception of musical rights. Only a select number of public channels from EU countries and private broadcast channels from Germany are offered without clearance. Formerly, copyright fees due have been regulated by the so-called Model Agreement which was cancelled by the cable operators in March 2005. Since then, cable operators negotiated separately with broadcasters and collecting societies regarding different types of rights. So far, no new agreement could be reached with the collecting societies. Besides that, other agreements exist with Sena, the copyright collecting society regarding the communication to the public of commercial phonograms.

A so-called 'Framework Agreement' additionally addresses the third party rights in channels without a primary interest of being broadcasted in the Netherlands. It has been closed between the copyright collective (consisting of AGICOA/SEKAM and the local CISAC organisations) and the cable operators.

For broadcasters negotiating rights themselves, cable operators did not need to negotiate for further distribution agreements, with the possible exception of musical rights (for reason that music composers tend to transfer all their rights to the local collecting society, BUMA). The latter is due to the fact that the collecting societies for music rights have created territorial monopolies, often supported by legislation. For situations in which cable operators only need to clear the music rights, negotiations are ongoing between VECAL (the cable industry trade association) and BUMA.

Copyright value chain of the Netherlands



Source: Interviews, Solon;
 Note: Broadcasters are also rights holders as far as they produce programmes on their own.

Case Study: The distribution of BBC in the Netherlands

Currently, broadcasters offer their channels fully cleared for cable distribution in the Netherlands, with the possible exception of clearances for musical rights (music composers tend to transfer all their rights to the local collecting society; consequently, the collecting society holds the rights). The latter is due to the territorial exclusivity negotiated between the collecting societies for music rights. In a number of cases, notably where it concerns cable distribution of public broadcasts channels from other European countries and in the case of the private commercial broadcast channels from Germany, the broadcasters offer their channels without clearance for the rights that third parties may have in the programmes on those channels. In those cases, respective third party rights need to be cleared separately by the cable operators. On the basis of the SatCab Directive, the third parties who have rights in the channels concerned can only negotiate collectively with the cable operators. The individual collecting societies have interpreted the SatCab Directive in such a way, that they can force cable operators to negotiate with a collective of different rights management organisations acting together.

The cable operators in the Netherlands have negotiated a distribution agreement with BBC Worldwide for the distribution of a number of BBC channels. BBC Worldwide has offered to deliver those channels to the cable operators on a fully cleared basis. This requires direct negotiations between BBC Worldwide and the collecting societies. The collecting societies, however, refused to talk to BBC Worldwide and claimed the right to only talk to cable operators with the justification that they only want to deal with the organizations that actually communicate the copyright protected works to the public.

The reaction of cable operators was to confirm this claim yet at the same time appoint BBC Worldwide as their agent for the negotiations. This was also refused by the jointly operating collecting societies. The issue as to whether collecting societies are allowed to refuse is an issue that is still pending. As is the issue of whether or not the collecting societies have the right to concert their practices in operating jointly.

The activities of BUMA, the musical rights organisation which has a monopoly in the Netherlands, are monitored by an official body. The monitoring authority indicated that it cannot monitor the activities which BUMA jointly undertakes with other rights management organisations that do not fall under the authority's competence.

Inefficiencies of Dutch system

- **Allocation inefficiency**
 - The copyright situation in the case of channel distribution is characterized by a low level of transparency
 - Performing artists and creators of television programmes and films often transfer their rights twice or more (despite of the fact that this is impossible from a legal point of view).
 - The distribution of channels from other countries demands additional clearance of third party rights. This leads to double transaction costs. Cases of double payment cannot be accepted.
 - The distribution of international channels demands additional clearance of music rights only. Apart from the necessity of double negotiations, cases of double payment cannot be accepted.
 - The rights management organizations acting together, are clearly in a dominant position and have recently shown that they are willing to take advantage of this position by increasing their fees by 7%.
- **Productive inefficiency**
 - The final distribution and usage of the fees collected from cable operators is unclear. How are they divided among the various national and international rights holders?
 - The repartition of fees collected by the collecting societies representing the interests of producers of television programmes and films is not done on the basis of underlying contracts, but on the basis of who is mentioned in the credits at the end of the programme or film.
- **Dynamic inefficiency**
 - The legal situation is not well-defined and current fee models may be subject to change in the future.
 - Due to increased attention to possible infringement of copyrights due to new activities and services, new collecting societies are established from time to time. Future financial exposure is unclear.

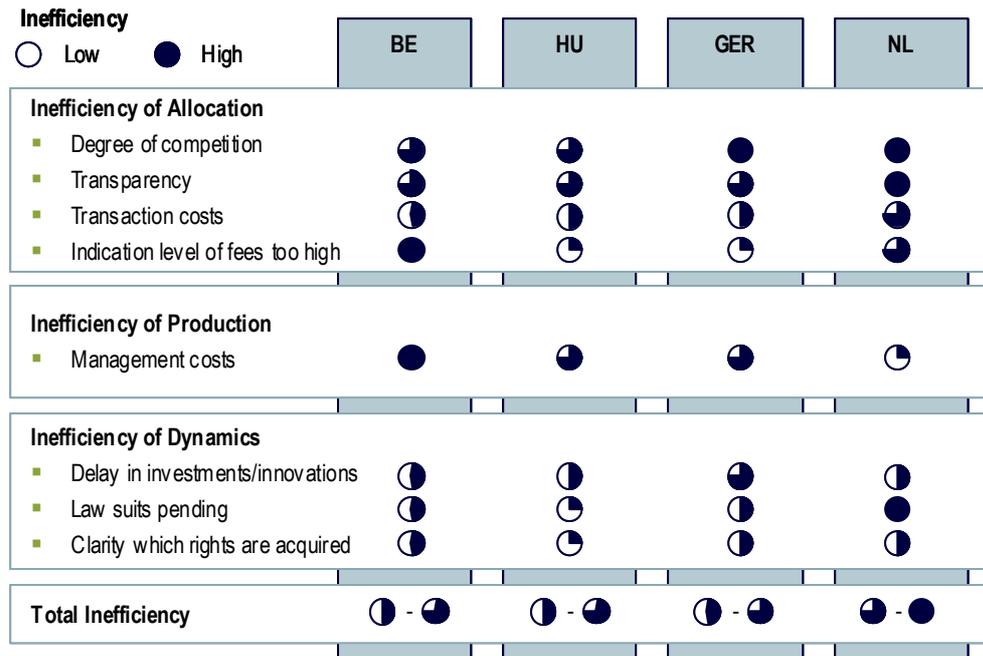
4.5 Comparative evaluation of copyright situation

Having analyzed the situation in selected European countries, several similarities with respect to inefficiencies are identifiable:

- **Allocation inefficiency**
 - Competition among collecting societies is almost non-existent, neither on a national or on international basis; on the contrary, they tend to act jointly and engage in concerted parties.
 - Transparency regarding the comprehensiveness of rights, the calculation of the level of fees due and the rights of the collecting societies is rather low.
 - High efforts for clearing rights and negotiating are needed.
 - Creators and performers may transfer their rights twice or more to different organizations.
- **Productive inefficiency**
 - Distribution and usage of collected fees is often unclear.

- Quasi monopoly situations of collecting societies creates no incentive to work on a lean cost base.
- **Dynamic inefficiency**
 - Establishing of new collecting societies from time to time due to increased attention to the infringement of copyrights – possible new claims pending hinder the introduction of new products and services.
 - Treatment of new services by collecting societies unclear.

Indicative comparison of inefficiencies of copyright regimes



Source: Solon

Not only is the efficiency of the actual copyright systems limited, the overall effectiveness as defined by achieving the overall goals of the EU as set out in the EU treaty and the Lisbon goals is also limited:

- Differences in the general regulation of satellite and DTT vs. cable and DSL result in a higher cost level of the latter infrastructures. Taking into account that the cable based infrastructures require much higher investments, this distortion results in a relatively better playing field for satellite and DTT.
- The high degree of intransparency and insecurity resulting from highly complex copyright regimes slows down the introduction of innovations especially for interactive products. As a result, the full economic growth potential is not realized.
- Burdened by the additional cost of rights clearance, some international channels are not distributed to the same extent they would be without this additional fee (see e.g. the ARTE case in the Appendix on the Netherlands). The additional fee therefore acts as a hurdle for the free movement of programmes throughout Europe.
- As a result, cultural diversity is not achieved to the degree it could be.

The goals of the i2010 programme are especially violated: Rather than having a single European information space, innovative programming is available only on a local level. Even then the full potential of these products is not yet realized. Rich and diverse content service will only become available on a European-wide level if the copyright system is adjusted.

The various inefficiencies and especially the violation of core EU goals such as fair market conditions, innovation, the development of a single information market and missing support of increasing cultural diversity by means of cross-border transmission of TV channels indicates a clear need to act for the EU. As statements of Lueder and Ungerer show,²⁷ the Commission is already aware of the various problems and ready to act on behalf of an improved market place.

²⁷ Ungerer, H. (2004): Competition law and rights management – Recent Developments; Lueder, T (2005): Legislative and Policy Developments in the European Union.

5 Analysis and quantification of copyright induced market efficiency

5.1 Hypotheses and propositions towards a redesigned copyright framework

The primary goal of this paper is the quantification of inefficiencies resulting from the existing different copyright regimes and the development of a possible alternative regime. For this purpose, a model approach is developed that takes the special characteristics of the various national systems into account and shows basic underlying economics. However, as it is implied by the nature of a model, it can only show a simplified image of reality. Indeed, due to the limited amount of data available and the comparatively high intransparency of the copyright situation in the European Union – as indicated earlier – the inputs of such a model may be subject to high uncertainty and will partly be based on estimates. Nevertheless, the model will help to explain major economic effects of current copyright regimes and will allow for the development and comparative evaluation of an alternative to show possible ways to improve the efficiency of such systems.

As already discussed, a system's performance can be analyzed according to four criteria: Effectiveness, efficiency of allocation, efficiency of production and efficiency of dynamics.

For the following analyses, a simplified generic system or copyright regime shall be used, consisting of and depending on the following parameters:

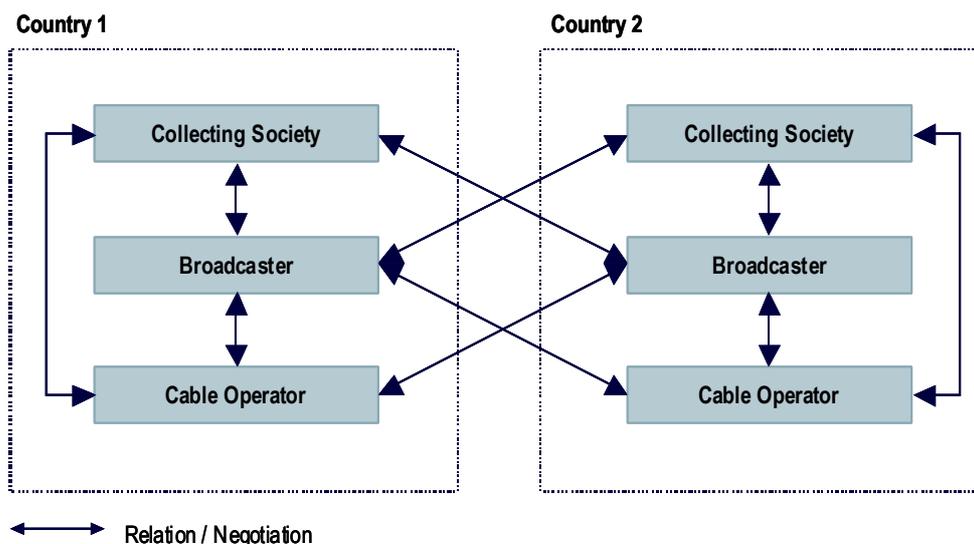
- Actors: Distributors, broadcasters, collecting societies, possible other rights holders
- Products: e.g. basic TV access, TV channel, etc.
- Rights: Legal framework

and shall further on be referred to as the 'Market', whose efficiency is evaluated according to the three criteria. Starting point of the analysis are three hypotheses, based upon the introduced country case studies.

- **Hypothesis 1:** The interests of rights holders, collecting societies and distributors of content diverge:
 - Rights holders want to maximize their collected fees,
 - Collecting societies have an interest in maximizing their utility based on power, secure jobs, status which can be reached by either driving management cost up or via the maximization of collections,
 - Distributors want to minimize fees due.
- **Hypothesis 2:** High informational asymmetries exist between the different players. The monopolistic situation of collecting societies influences pricing policy. Due to a lack of transparency neither rights holders nor users have appropriate means of monitoring rights usages.
- **Hypothesis 3:** Increasing digitization of content distribution drives the demand for the distribution of international channels. Also broadcasters increasingly want to offer their channels on an international basis. Especially the number of on-demand and digital rights to be negotiated increases.

A simplified sketch of the current European copyright system supports the developed hypotheses:

Simplified sketch of current European copyright regulation



Source: Solon

Typically, broadcasters must negotiate the terms under which cable operators will distribute their channels. Additionally negotiations between broadcasters, collecting societies and cable operators must be undertaken respectively. In the case of international/pan-European distribution, broadcasters must clear the rights with collecting societies in target countries as well. Obviously, collecting societies have a monopolistic position towards both broadcasters and distributors of content. Moreover, negotiation relations coexist such that e.g. distributors must talk both to collecting societies and broadcasters to have all rights cleared for distribution.

Additionally, broadcasters increasingly act as content creators while the different TV platforms act as channel aggregators and realize the transmission to the public.

Assuming these hypotheses hold true, the following propositions have been developed to address the aforementioned problems:

- **Proposition 1:** There is only a single act of communication to the public, i.e. copyright fees have only to be cleared once.²⁸
- **Proposition 2:** Collecting societies should be somehow subject to competition, such that prices for copy- and related rights reach a fair market value as well as to increase productive efficiency.^{29 30}
- **Proposition 3:** Negotiations should happen among participating parties where possible, so that informational asymmetries are minimized, meaning that direct negotiations should happen among direct market participants (i.e. rights holders and users).³¹

²⁸ The exact structure and amount of payments would then be subject to further negotiations among broadcasters, aggregators and distributors.

²⁹ In February 2006, the European Commission has sent a "Statement of Objections" to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA members, where implicitly a lack of competition in copyright systems is criticized. MEMO/06/63, 2006: "[...] The Commission considers that certain aspects of the agreements [bilateral agreements regarding the copyright exploitation of Internet, satellite transmission and cable retransmission] might infringe the EC Treaty's prohibition of restrictive business practices [...]. These aspects are membership and territorial restrictions and the network effects of the agreements that "guarantee to collecting societies an absolutely exclusive position on their domestic market [...] potential new entrants are prevented from entering the market".

³⁰ Competition among collecting societies is a widespread claim when it comes to the discussion of new copyright regulation: See e.g. Ungerer, H. (2004): Competition law and rights management – Recent Developments; Lueder, T (2005): Legislative and Policy Developments in the European Union.

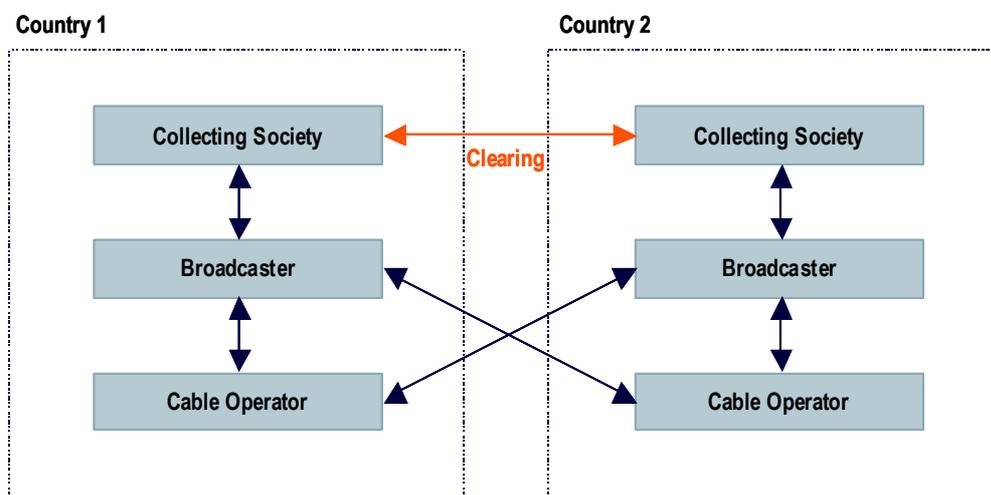
³¹ See EC (2005) Study on a community initiative on the cross-border collective management of copyright.

- **Proposition 4:** Broadcasters should be able to centrally license all rights needed for international respectively pan-European distribution. The central authorities granting these international licenses may also be already existing collecting societies.³²
- **Proposition 5:** Any copyright regime should be designed technologically neutral; putting the same burden on all market participants with comparable functions.
- **Proposition 6:** A central European authority may be needed for the international clearance of rights and for monitoring collecting societies if perfect competition cannot be achieved.

Following the propositions, a newly designed system offers certain advantages: Broadcasters are offered the possibility of one-stop-shopping. All rights needed for distribution can be negotiated with a collecting society of their choice. The direct effect of this is a more adequate pricing of copyrights and related rights due to the following reasons:

1. Broadcasters know best which rights are touched by their programme. Copyrights are no longer negotiated between parties (i.e. cable operators and collecting societies) that possess only limited knowledge regarding the extent as to which copyrights are really touched. Hence, efficiency of allocation increases. Moreover, broadcasters have to negotiate with the major part of the collecting societies anyhow for being granted the broadcasting rights.
2. Since broadcasters can independently choose which collecting society to negotiate with, collecting societies are de facto competing against each other on a European level. Hence, to ensure competitiveness, collecting societies are fostered to work more efficiently (efficiency of production). Prices will stabilize at the level of the real value of the respectively traded right (efficiency of allocation).

Simplified sketch of possible new European copyright regulation



Source: Solon

Distributors such as cable operators will only need to negotiate directly with broadcasters about the distribution of their programmes, meaning a broadcaster represents a one-stop-shop for cable operators as well. The direct effects of this are avoidance of double negotiation, more transparency, less double transfer of rights and enforced planning reliability for further investments due to the following reasons:

³² See EC, Study on a community initiative on the cross-border collective management of copyright (2005): Central licensing has been developed as a policy option by the European Commission in 2005 regarding the rights for online music, whereby shortcomings of reciprocal rights clearing agreements could be diminished.

1. Thus far, cable operators needed to negotiate with broadcasters in any case for the terms under which their channels would be distributed. Additional negotiation for cable retransmission rights with collecting societies is eliminated (efficiency of allocation).
2. Due to the acquisition of fully cleared programme packages, cable operators are given full planning reliability. The introduction of new products (like IPTV) is not prevented by the insecurity of not knowing if rights have already been cleared or if possible further claims are pending. Investment decisions are thereby disburdened (Efficiency of dynamics, Effectiveness).

As the functions of different transmission platforms are becoming increasingly similar, a new technologically neutral approach has to be established. Copyright fees should be cleared only once, as communication to the public happens only once as well. Negotiations of all-rights-included packages should be realized by broadcasters, who know best which rights are included in their programmes.

Compared to traditional copyright frameworks, collecting societies would be subject to clear the granted rights on an international basis among each other. Besides reciprocal clearing, demanding relatively high administrative effort, a central European clearing authority could take liability for that. Such an authority could also be equipped with monitoring and controlling rights, so that collecting societies could be benchmarked against each other – with relatively low additional effort.

5.2 Quantification of market inefficiencies

In the following section, possible concrete measures are developed and explained along the three types of efficiency forming the framework for the analysis. In some cases, the argumentation is developed as a comparison of the copyright framework as is and the possible alternative, based on the propositions developed above. By doing so, opportunity costs can also be taken into account. In general, calculations are based on the four depicted country case studies and respective data.

Efficiency of allocation

(i) Transaction Costs

The negotiation efforts of the two alternative models are comparable to the relations necessary for the negotiations required for all rights. This analysis shall be based on the assumption that each relation is worth the same respectively and demands equal effort in terms of cost or personnel. In each country only one cable operator and one collecting society shall exist, which is sufficient to show relative differences.

The formula for the traditional framework shall be defined as follows:

$$p \times \left[\frac{m(m-1)}{2} \times 4 \times i + 3m \right]$$

whereby p shall be the factor for the number of different content types (analogue, digital, on-demand) to be negotiated separately. m is the number of countries involved. i is the factor of internationality, meaning how many of the broadcasters are de facto active cross-border. The term

$$\frac{m(m-1)}{2}$$

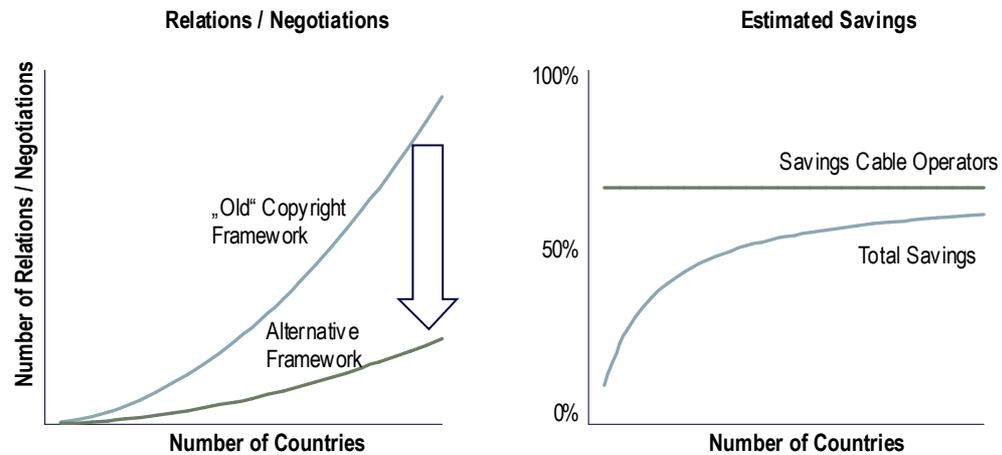
is the sum formula for the number of reciprocal relations among m objects, in the case here, countries. It is multiplied by 4 since four contractual relations are needed for the necessary clearance of all rights (2x copyright collecting society - broadcaster, 2x broadcaster - cable operator). Additionally, three relations have to be cleared within each of the depicted countries (copyright collecting society - broadcaster, copyright collecting society - cable operator, cable operator - broadcaster).

The introduced new simplified copyright framework can be characterized by the following formula since only two reciprocal relations are needed among countries and only two relations within each country. The factor for different products is eliminated due to the possibility of all-rights-included packages:

$$\frac{m(m-1)}{2} \times 2 \times i + 2m$$

The improvement that can be achieved by switching from the old to the suggested alternative is represented by the difference of the two formulas. With increasing m the relative advantage in total needed relations is increasing and it converges towards 75%³³. The following graph indicates the number of necessary relations, depending on the number of involved countries.

Comparison of necessary contractual agreements



Source: Solon

For cable operators, their relations to collecting societies are completely eliminated in the alternative model thus negotiation effort is reduced by 75% independent of the number of countries involved. Potential clearing effort is not taken into account – neither in the old nor the alternative model. It is assumed that the effort is more or less the same as collecting societies already have to clear international rights among them. By e.g. introducing a central clearing authority, clearing effort is expected to rather decrease, which would mean further improvement of the situation as is.

(ii) Price Level

The second driver of allocation efficiency is the price level collecting societies are currently demanding for cable distribution rights. As already indicated, collecting societies have monopoly positions in nearly all of the depicted countries. In classic economic theory, monopolies can demand higher prices from customers than they would be able to do in perfect competition. In the case of collecting societies, this means that the fees for copyrights are not priced according to their real market value.

Significant differences among cable retransmission fees exist throughout Europe, ranging from 2-12% of basic cable revenue.³⁴ Due to the lack of a standardized accounting system and the high intransparency of collective rights management in certain countries figures might not be directly comparable to each other. For example issues, whether VAT is in-

³³ The following values have been assumed for the calculation: $p=2; i=40%$

³⁴ Solon research.

cluded or not ³⁵, which deductions from the cable revenues have been agreed (e.g. corporate taxes, amortizations etc.) or which part of cable revenue is taken into account hampers comparability of figures.

Since the value of copyrights should not differ significantly throughout Europe, the different figures and their intransparency can only be explained by the use of monopolistic behaviour. The determination of the fair level of the prices for these rights can only be achieved with perfect market conditions. A first estimate of the opportunity costs of pricing shall therefore be the overpricing compared to the average level in the depicted countries. This price decrease will however be overcompensated by fees from additional products and transmission media.

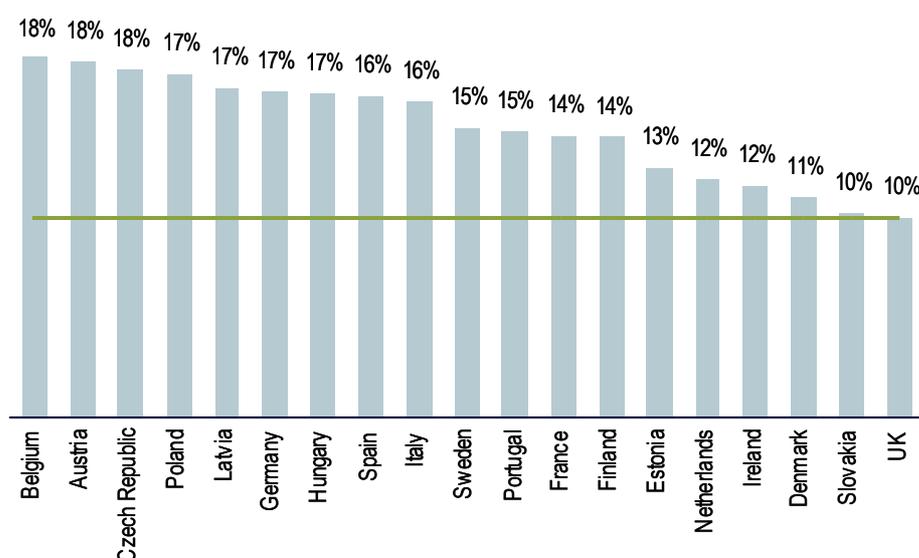
However, we expect that even further price reduction can be achieved by exposing collecting societies to competition. Another price distortion may occur due to the inability of collecting societies to price cable transmission rights fairly. The latter will also improve when transmission rights are agreed upon directly with the broadcasters, since they possess the knowledge regarding the rights involved. Although the remuneration obtained for transmission by cable operators might decrease in some markets, total copyright payments would increase if besides cable and DSL also Sat and DTT platforms would be integrated into the same copyright system.

Efficiency of production

Collecting societies are not profit oriented per se since they are officially required to redistribute their collected fees. However, the organization itself can follow other sub-goals that do not directly conflict with this goal, which might be e.g. power, status or secure jobs. As indicated in **Hypothesis 1**, this can happen via the maximization of collected fees or by driving up management costs. The former has been discussed in relation to the efficiency of allocation. The level of management costs shall be the subject of this paragraph.

A comparison of the cost level of music collecting societies, which traditionally account for a major share of collected fees, and cable distribution, indicates significant differences throughout Europe.

Comparison of operating costs of collecting societies (% of total income)



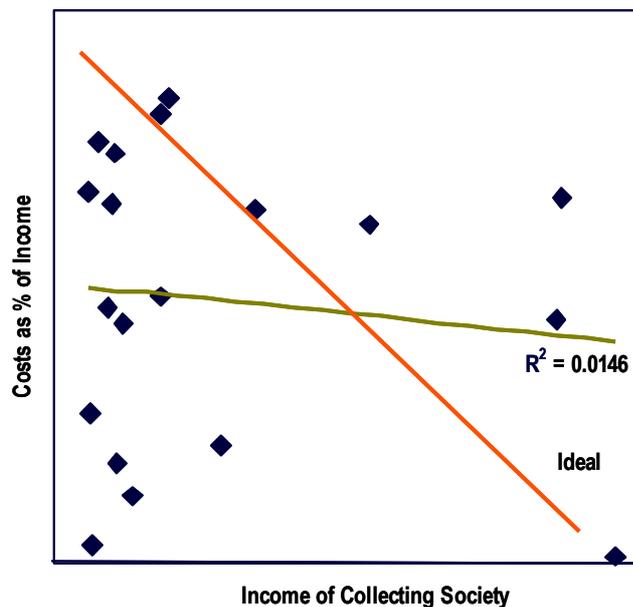
Source: CapGemini (2005) : Music in Europe - Sound or Silence?, Solon

³⁵ The single fact of net or gross revenues will lead to a difference of two percentage points if VAT of 15% is applicable. This effect significantly increases with any agreed deductions. Therefore, a copyright fee of 8% in one country might easily equal a copyright fee of 4% in another country.

Inefficiencies in production are clearly indicated by the difference of the cost level compared to the benchmark – which is around 10%.

Another argument backing the assumption of wide-spread inflated cost levels throughout Europe is based on the business model of collecting societies. Collecting and distributing fees is mainly a fixed costs business as basically overhead and administrative systems are needed. Usually, in a fixed cost driven business, unit costs of producing or supplying goods decrease with the total amount of produced goods as the block of fixed costs is distributed among all units produced. For collecting societies, goods produced equal the rights they grant. Hence, relative costs should decrease compared to an increasing amount of fees collected. However, no such correlation is identifiable. Since costs must be covered by the fees due, inefficiencies on the cost side will lead to higher fees. Or vice versa: A reduction in costs could help to lower fees.

Correlation between income and costs of collecting societies



Source: CapGemini (2005) : Music in Europe - Sound or Silence? Solon

Due to their monopolistic position, collecting societies currently have no incentive to work on cost reduction. Enforcing competition would create the need for cost reduction and thereby help to reach fair allocation of funds.

Efficiency of dynamics

The following analysis is based on the hypothesis that collecting societies are maximizing their utility in terms of power, status, etc. and thereby tend to exploit their monopolistic position. This may lead to a delay in negotiations and consequently an extended period of time before a solution respectively an agreement can be found. On the other hand, the situation regarding cable distribution rights is subject to high uncertainty. Operators do not always know exactly which rights they have already cleared or if the introduction of a new product, e.g. on-demand or IPTV would demand the acquisition of additional rights. Collecting societies, in turn do not tend to fully disclose the information on which rights they in fact represent and what is already included in rights packages.

Hence, the proposition is made, that the current copyright framework causes a certain amount of delays in the introduction of new products. This in turn causes opportunity costs in terms of missed revenues and profit for cable operators and later access to new technologies for the final customer. As discussed in the market section of this paper, the pace of new product introduction is currently increasing and therefore the impact of dynamic inefficiencies will become more prominent.

Case Study: Simulcast as Pay TV driver

As explained in section 4.3, the private TV stations and VG Media have effectively delayed the start of simulcast in Germany by two years.

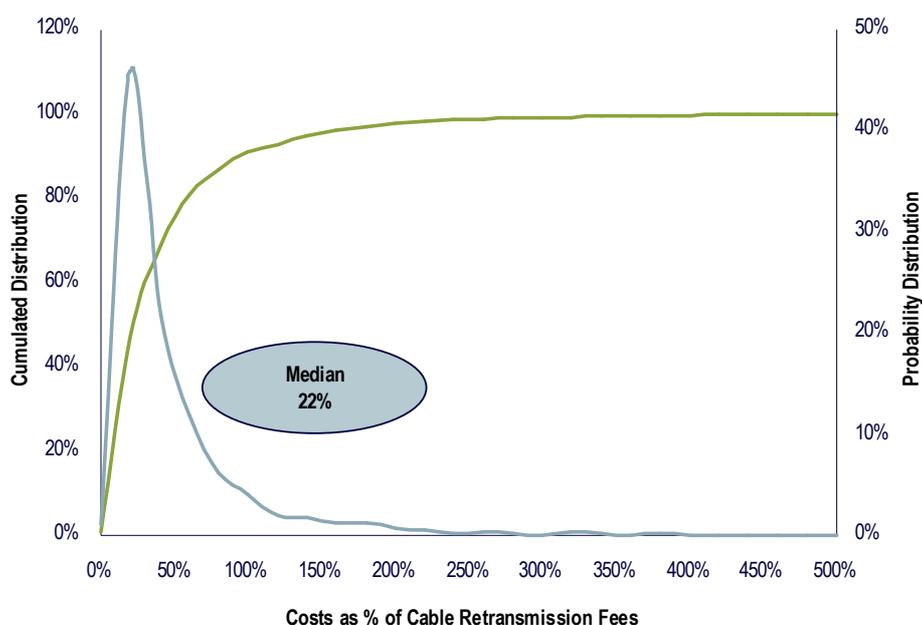
The example of the Swiss Cablecom shows that the introduction of digital simulcast has positive effects not only on the general digital TV take up but also on Pay TV penetration: After the introduction of simulcast the net take up per month doubled to tripled).³⁶

If this growth was applied to the German market, it would relate to a digital Pay TV penetration of 10% rather than 3% 1.5 years after the introduction of the KDG digital Pay TV package. Assuming an EBITDA margin of 20%, this relates to opportunity costs in the range of 5.6 m € for KDG alone (~15% of payments for cable retransmission).

To get a quantitative indication for the level of inefficiency, a simulation has been undertaken to determine the level of missed EBITDA³⁷, which is used as quantitative indicator of opportunity costs. The following variables shall be input to the simulation, all of them modelled according to normal distribution:

- Number of new products that are introduced per year. We have assumed a mean $\mu=2.0$ and a standard deviation of $\sigma=0.5$ products/year
- Additional revenue per user generated by these products with a μ of 4.0 EUR and a σ of 2 EUR
- Delay in market introduction with a μ of 12 months and a σ of 5 months
- Customer penetration the product would have reached per year with a μ of 5% and a σ of 2%
- The EBITDA margin of the new product with a μ of 30% and a σ of 10%

The properties have been designed according to interviews with market participants and Solon industry know-how. The outcome is calculated as percentage of cable distribution fees already paid. The simulation yielded the probability distribution indicated below.

Simulation of inefficiency of dynamics

Source: Solon

³⁶ Cablecom management interview.

³⁷ Earnings before interest, tax, depreciation and amortization.

The median of the resulting distribution is around 22%, meaning that on average, additional costs of uncertainty account for an additional 22% on top of already paid fees for cable distribution. The blue curve shows the probability of a certain cost level to be reached.

In conclusion, significant inefficiencies can be identified among all three types of efficiency. However, the situation has been analyzed on a generic level, such that the de facto amount of inefficiency is highly dependent on the situation in the respective country. Nevertheless the quantification yields that current copyright regimes show significant potential for efficiency improvement. In combination with the already discussed ineffectiveness of the system with respect to core goals of the EC Treaty and Lisbon Strategy, the need to act becomes obvious.

6 Policy options

The following section discusses concrete policy options, based on the hypotheses and propositions used for the discussion of market efficiency. Above discussed approaches for quantification will be used to evaluate the impacts of possible changes in copyright regimes.

The evaluation of the policy options needs to be done according to the defined objectives of effectiveness and efficiency. These objectives help to specifically measure the effect of the respective policy option.

- Effectiveness, meaning the contribution of the policy option to overall EU goals
- Efficiency of allocation – the contribution of a system to low transaction costs and fair market prices.
- Efficiency of production – the ability of a system to handle copyrights at a low level of costs
- Efficiency of dynamics – how does the system support the introduction of new products and encourage investments

In order to create an efficient new system for the European management of cable distribution rights, the following policy options are considered and evaluated with respect to their impact on market participants:

- **Do Nothing**,
- Allow cable operators to acquire **All-Rights-Included** packages directly from content providers, e.g. broadcasters,
- Enable **Central Licensing**, meaning that either broadcasters or cable operators have the opportunity to get all rights cleared from one single authority,
- A **Combined Approach** including All-Rights-Included and Central Licensing.

The evaluation and quantification of each of the policy options will be conducted on a general, average basis. The extent of effect may differ significantly from country to country, depending on the respective situation and the extent of existing inefficiency.

Any of the options chosen should be platform and technology neutral in order to provide a level playing field for all TV distribution infrastructures. As a result all distribution platforms should be exposed to equivalent copyright payments.

6.1 Overview policy options

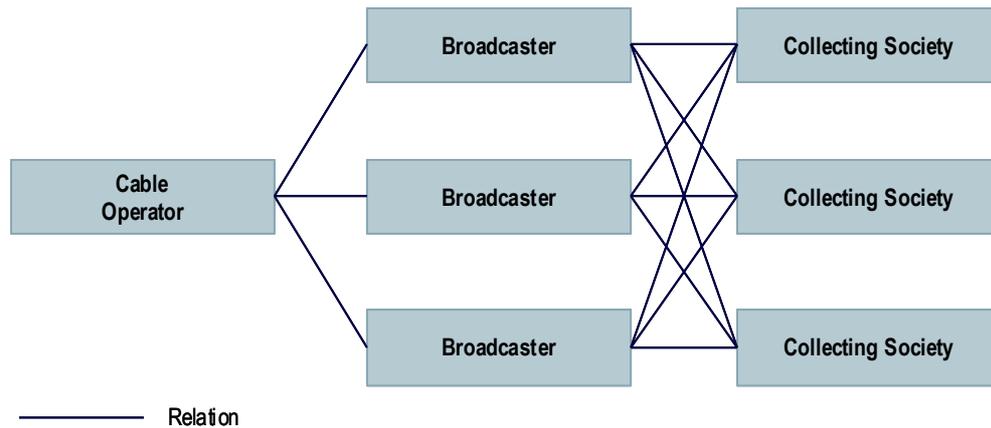
Do Nothing

Do Nothing means that no changes are applied to the current system.

All-Rights-Included

Within the *All-Rights-Included* option, the broadcasters clear all rights needed for communicating to the public – independently of the technological platform to be used for distribution in the end – and can thereby offer fully cleared packages. Neither cable operators nor the other TV distribution platforms need to negotiate with collecting societies anymore.

Sketch of policy option *All-Rights-Included*

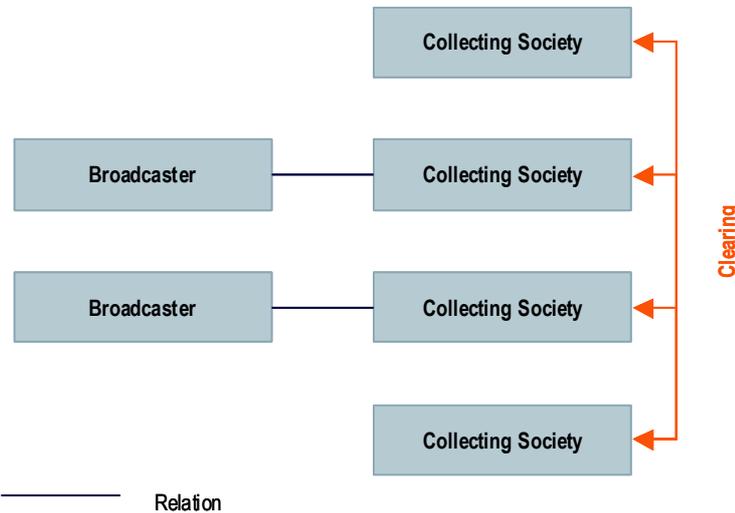


Source: Solon

Central Licensing

Central Licensing in this context means the clearing of all necessary rights for the usage of content by one single authority. A market participant, be it a broadcaster or a cable operator should have the opportunity to clear all relevant rights for their purpose of use at an organization or authority of their choice on a European level. The same principle should hold for copyright holders. The organizations granting the rights – namely collecting societies – should be subject to competition, such that prices should converge towards a fair level over time – dependent on the actual reach of the distribution platform and not their technological characteristics. For the effective implementation of freedom of choice of collecting societies for all market participants, a clearing mechanism needs to be implemented, such that fees are finally distributed correctly.

Sketch of policy option *Central Licensing*



Source: Solon

To overcome problems and high expected efforts for reciprocal clearing, we propose the introduction of a central European clearing and monitoring authority. An all-encompassing monitoring of the collecting societies may help to make the system more transparent.³⁸

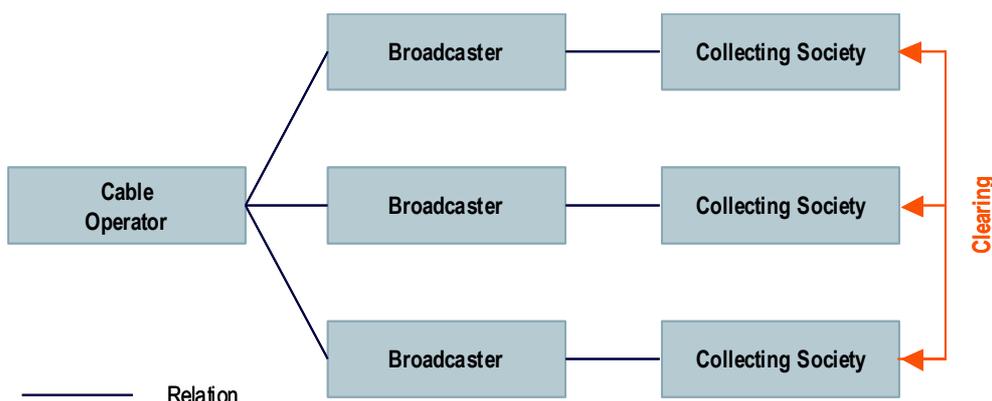
³⁸ In Europe, currently a high number of reciprocal agreements among collecting societies exists. However, this report is intended to provide an economic analysis of current and alternative copyright regimes. The analysis of existing reciprocal agreements is therefore beyond the scope and shall not be subject to further investiga-

The option of *Central Licensing* is currently promoted within the online music environment.³⁹ At the end of January 2006, a first agreement has been closed between EMI and GEMA/MCPS-PRS.

Combined Approach

The *All-Rights-Included* option has already granted distributors the opportunity to acquire fully cleared content packages, which in turn means that broadcasters would have to clear all necessary rights with collecting societies. To further increase the efficiency, *Central Licensing* should be implemented in addition to create a competitive environment and therefore fair market prices.

Sketch of policy option Combined Approach



Source: Solon

6.2 Do Nothing

General evaluation

Should the option of *Do Nothing* be chosen, we expect market inefficiencies as outlined above to increase further. A large proportion of total inefficiency is caused by uncertainty and delay (efficiency of dynamics). As discussed before, the importance of new products and services, as well as the pace of their market introduction is expected to increase significantly. Hence, the impact of uncertainty regarding the clearance of respective rights would be expected to increase accordingly. As a result, achieving EU goals, such as digitization would be delayed since market participants will invest more carefully and perhaps to a lesser extent than with full planning reliability. Negotiation efforts will increase further due to the increase in the number of channels and content types.

Impact on selected market participants

Single market participants are especially affected as follows:⁴⁰

Content creator	-	Delay in receiving fees for the use of their rights, which is caused by the delayed introduction of new products. Continued inequality between local and foreign content creators. Lower remuneration due to high management costs.
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tion at this point. Nevertheless, it is important to notice, that an applied policy option as suggested here may also require to take these agreements into account.

³⁹ See European Commission (2005): Commission Staff Working Document - Study on a Community Initiative on the Cross-Border Collective Management of Copyright.

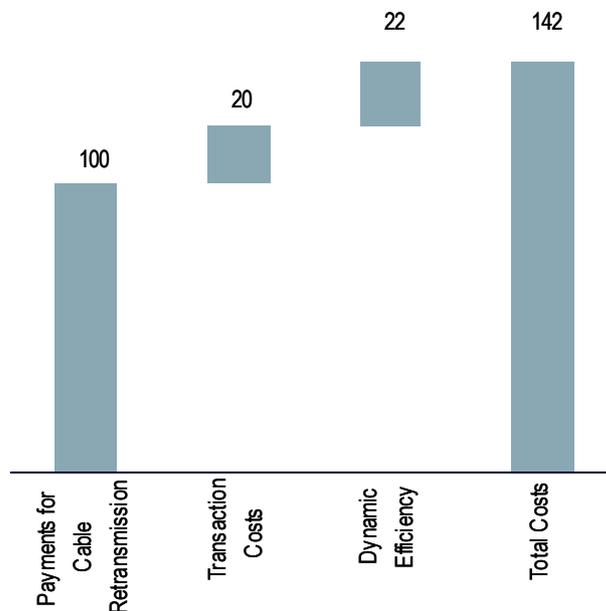
⁴⁰ The second column of the table gives an indicative evaluation of the impact on the respective market participant.

Broadcaster	-	Prevented from becoming truly international channels. The examples of BBC and ARTE in the Netherlands show that behaviour of collecting societies has potential to hinder certain channels from being broadcasted
Cable operator	-	Increasing effort of negotiation as well as of clearing all needed rights for the distribution of content, especially when it comes to the introduction of new products. Investment decisions may be postponed due to unclear legal situation, which causes significant losses in revenues and profit.
Consumers	-	Later access to new technology and content. Higher content prices due to inefficient management costs.
Collecting societies	o	Remain in monopolistic positions and profit from intransparencies and uncertainty of other market participants. Nevertheless, as the business model for broadcasters and cable operators is changing, revenues for cable retransmission are expected to decline accordingly. Collecting societies would not be able to participate from new services. New business models such as contracts EMI-GEMA will only slowly develop.

Efficiency gains compared to current market situation

Do nothing clearly will not improve efficiency for any of the market participants. Nevertheless, the actual cost structure of cable retransmission and related costs is an important point of reference for the following policy options. In addition to the fees due (including management costs and actual copyright payments), two other cost blocks occur on the side of cable operators:⁴¹ transaction costs and opportunity costs due to delay and uncertainty. The total amount of 142% of basic fees poses a high burden on cable operators.

Do Nothing: Quantification of costs of rights management for cable operators (Indexed)



Source: Solon

⁴¹ For the way of calculation see chapter 4.

Consistency with EU policies and strategies

The clearly-defined goals of the EU include: Fair competition within the internal market, the international spread of television (TV without frontiers) and fast digitization (i2010). All of these goals will, to certain extent, be negatively affected by the current copyright regime. Broadcasters – especially smaller ones – are impeded from spreading their programmes internationally; cable operators must put forth significant additional efforts for the clearance of rights and face a highly uncertain legal situation due to the extreme intransparency of the system.

6.3 All-Rights-Included**General evaluation**

Since broadcasters have to negotiate with collecting societies to secure distribution agreements anyway, the additional clearing of all necessary rights for cable (re)distribution would not cause significantly more effort. Hence, we propose that cable operators should have the opportunity and right to acquire all these rights from the broadcasters directly who clear it with collecting societies.⁴²

This would result in the following:

- Cable operators know exactly which rights they have acquired, which in turn leads to higher planning reliability for investments.
- Fees for cable distribution will only be demanded for content that is actually distributed so that a fair price level ensues.
- Significant reduction of transaction effort since no more agreements would need to be reached among cable operators and collecting societies.
- Content creators can better profit from the use of their rights in new services.

Impact on selected market participants

The opportunity for distributors to clear all-rights-included packages with broadcasters would significantly alter the current situation for certain market participants:⁴³

Content creator	+	Better leverage of content rights due to easier cross-boarder broadcasting
Broadcaster	o	Have to additionally clear cable distribution rights. However, since they already negotiate with rights holder for the distribution of their products on other platforms, this should not result in significant additional effort for them. Additionally, they know exactly with whom to negotiate Value added to channels by rights held by third parties can be taken into account
Cable operator	+	No longer have to undertake negotiations with collecting societies. The already existing negotiations with broadcasters with respect to the broadcasters' own rights can also be used to clear the third party rights for cable distribution. Risk reduction (less chance that not all relevant rights were cleared) Clearance of channels includes all rights and is based on the fair market value of the full product

⁴² In fact, Article 10 of the Council Directive already takes the role of broadcasters as both holders of exclusive rights to their own programmes and acquirers of rights for the initial broadcasting into account. "In this context they have been given latitude to negotiate the acquisition of rights for the retransmission of programmes, without right holders being mandatorily represented by a collecting society." Hence, "a broadcasting organization may acquire all cable retransmission rights and thus be the sole party dealing with the cable operator. [...] Collecting societies cannot demand a related payment from cable operators." See Report from the European Commission on the Application of the Council Directive (COM(2002) 430 final).

⁴³ The second column of the table gives an indicative evaluation of the impact on the respective market participant.

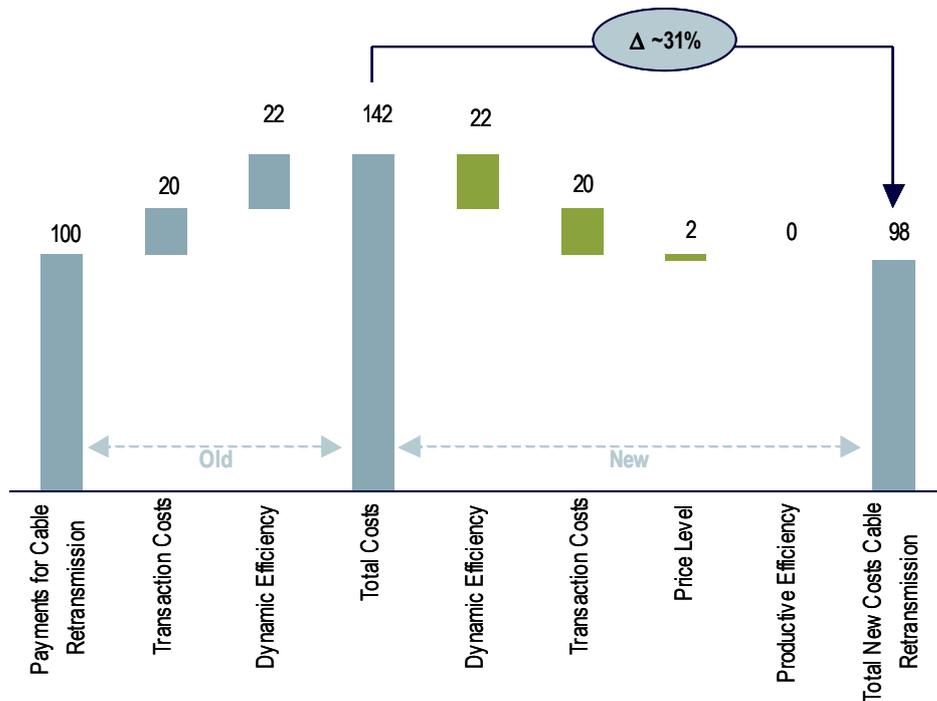
Consumers	+	Earlier access to new products and technology and lower prices
Collecting societies	+	Potential for higher effectiveness and therefore better cost-margin ratio for content creators. No longer negotiate with cable operators. They may be affected by losing monopolistic rent. However, negotiations with broadcasters will happen regarding to the communication to the public. Hence, they can participate in growing market of new services (e.g. IPTV).

Efficiency gains compared to current market situation

Establishing the opportunity for all-rights-included packages clearly increases efficiency. Broadcasters have exact knowledge of the rights included in their programmes as well as the reach of the respective channels. Fees will be calculated on the real value and reach of the distributed programme. Intransparencies and possible double payments are eliminated by clearing rights directly. Additionally, collecting societies do not have the possibility to prevent investments by not granting respective rights or claiming additional fees. The situation would be clearly calculable for distributors.

The effects for cable operators are represented in the following graph:

All-Rights-Included: Efficiency gains for cable operators (Indexed)



Source: Solon

Since cable operators are more or less given reliability regarding the rights they have acquired, we expect opportunity costs due to dynamic inefficiencies to be eliminated. Also transaction costs for negotiations with collecting societies are no longer an issue. Additionally, a certain improvement in fee levels is realistic as broadcasters are able to price the respective rights on a fairer basis or according to the real value of their channels. By implementing this policy option, a total gain in efficiency (if only measured in costs) of 30% seems realistic.

Consistency with EU policies and strategies

International distribution of TV channels is encouraged and simplified. Investments in new technology and new ways of content distribution are encouraged.

6.4 Central Licensing

General evaluation

Broadcasters today must clear programme rights in all countries they want to be distributed in and oftentimes with more than one collecting society. Direct effects of this are a high effort of negotiation and often insecurity regarding which rights have been already cleared and what can be offered to third parties. The *Central Licensing* approach as described above attempts to eliminate these problems. With a *Central Licensing* approach, each cable operator could clear the necessary rights with one single collecting society offering the most convincing package.

This would result in the following:

- Full security for cable operators regarding which rights they have acquired and elimination of uncertainty regarding possible new claims.
- Break up of national monopolies of collecting societies since market participants are given freedom of choice regarding which collecting society they would like to negotiate with.
- Need for productive efficiency of collecting societies increases, as lower cost basis would allow collecting societies to improve competitive position. As a result, inefficient collecting societies would disappear from the market.

On the other hand, collecting societies could start distinguishing themselves offering different elements and additional services to their customers, be it rights holders or users.⁴⁴ Small national collecting societies could establish themselves as national specialists with especially good access to local content. Bigger collecting societies could offer large content providers with special key account services (e.g. GEMA-EMI)

Impact on selected market participants

The option of *Central Licensing* gives users of copyright protected works the opportunity to centrally acquire all rights required for their respective application. The following effects are expected:⁴⁵

Content creator	+	Fees are distributed on a fairer basis. This is backed by competition among collecting societies and a central monitoring authority which controls market participants and interferes if dysfunctional developments should occur. Especially content use outside own home territory is expected to be paid better
Broadcaster	+	Opportunity to clear rights at a collecting society of their choice. Direct effects should be lower levels of fees due to competition. ⁴⁶
Cable operator	+	Reduction of negotiation effort and transaction costs. Improvement in the level of fees due
Consumers	+	Faster access to new products and international channels/content. Lower prices

⁴⁴ See EU COM (2005) working Document, p. 35. Examples are highly transparent management systems, monitoring of rights usage, higher speed of fee distribution or additional information services.

⁴⁵ The second column of the table gives an indicative evaluation of the impact on the respective market participant.

⁴⁶ Especially for smaller broadcasters which are mainly focusing on one country, it may often be not optimal to clear rights with at international collecting societies but leave the established relations unchanged. However, only due to having the opportunity to switch and due to the significantly enhanced service based competition on an international level also smaller broadcasters are expected to be able to profit from the changed copyright framework.

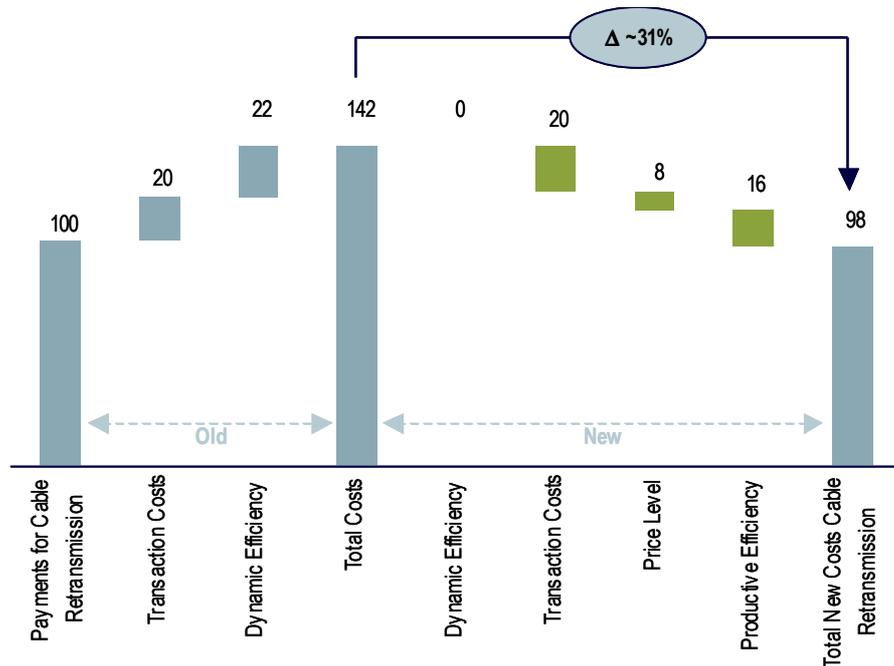
<p>Collecting societies</p>	<p>Access to new markets and potential for better differentiation within changing market environment</p> <p>Increased incentive to streamline operations and implement new clearing technologies</p> <p>For smaller collecting societies: Chance to position as expert in local content and partner for less powerful local content creators</p> <p>Subject to control and monitoring by a central authority. Possible disclosure of e.g. fee levels required to ensure transparency</p>
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Efficiency gains compared to current market situation

Efficiency gains are especially expected on the allocation side since the transaction effort is expected to decrease significantly. Broadcasters would only need to negotiate with one instead of a wide variety of collecting societies. The amount of fees due for all related copyrights regarding the distribution of TV content is expected to level off at a fair point. Since broadcasters would have the freedom to choose which collecting society would clear their rights, the latter are forced to act in a competitive environment.

The *Central Licensing* option heavily exposes collecting societies to competition which has two main effects. At first, fees are expected to decrease. On the other hand, as competition emerges over fees due, collecting societies operating at lower cost bases will have significant advantages. As already indicated in chapter 4, there is a significant potential for cost reduction, which should be passed in part on to cable operators. An average efficiency gain of around 30% can be expected if this option was implemented.

Central Licensing: Efficiency gains for cable operators (Indexed)



Source: Solon

Consistency with EU policies and strategies

The de facto break-up of the national monopolies of European collecting societies leads to cross-border competition amongst them. The general EU goal of the creation of a European internal market is thus supported.

Cross-border distribution of content is encouraged as broadcasters and other channel aggregators find it far easier to clear rights for the international distribution of their respective content.

6.5 Combination of All-Rights-Included and Central Licensing

General evaluation

The simultaneous introduction of *Central Licensing* and *All-Rights-Included* packages certainly offers additional advantages. Efficiency gains for the market will be even greater, if cable operators can acquire all-rights-included packages which are in turn compiled by broadcasters under market conditions. The break-up of the collecting society monopoly will lead to significant improvements in prices, which will then also affect fees for cable operators. Productive efficiency gains on the part of collecting societies will only affect cable operators if both options are combined. Content creators will be able to profit accordingly from the introduction of new services and products as fees for the communication of the public of these rights will be part of the all-rights-included agreements.

Impact on selected market participants

Market participants will face the combined impacts of the other policy options.⁴⁷

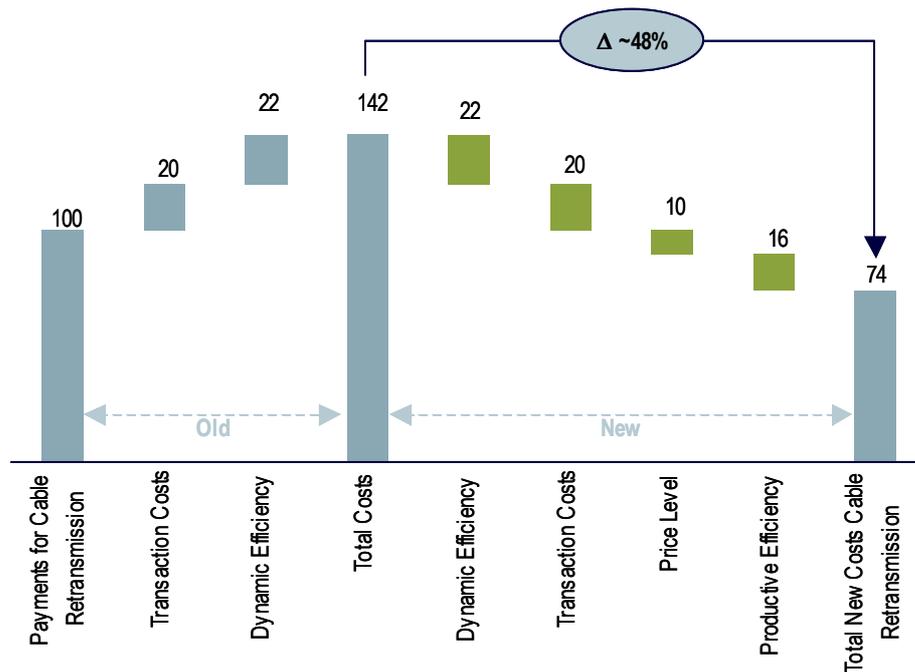
Content creator	++	Fees are distributed more fairly supported by competition among collecting societies, especially content use outside own home territory is expected to be paid better Increase in remuneration from new services and other transmission platforms such as satellite, DTT and DSL
Broadcaster	++	Direct clearing of cable distribution rights with third party rights holders. However, since they already negotiate with content creators or their rights management organizations, no significant additional effort is required Negotiations with different collecting societies are no longer necessary. Especially time-intensive negotiations with international societies are eliminated Value added to channels by rights held by third parties can be taken into account Lower level of fees from collecting societies since these are exposed to competition which is expected to lead to competitive pricing
Cable operator	++	No more negotiations with collecting societies. Clearing of all rights directly with content aggregators, i.e. broadcasters Risk reduction (less chance that not all relevant rights were cleared) Clearance of channels includes all rights and is based on the fair market value of the full product
Consumers	+	Faster access to new technology and products and especially international content Lower content prices
Collecting societies	o	Access to new markets and potential for better differentiation within changing market environment Participate in the growing market of new products and services Increased incentive of streamline operations and implement new clearing technologies For smaller collecting societies: Chance to position as expert in local content and partner for less powerful local content creators Subject to control and monitoring by a central authority. Additional disclosure of fees and a consistent European-wide accounting framework may be required

⁴⁷ The second column of the table gives an indicative evaluation of the impact on the respective market participant.

Efficiency gains compared to current market situation

The introduction of the proposed copyright framework will have the following economic effects: Due to increased competition among collecting societies and all-rights-included packages granted by broadcasters, the simulated opportunity costs of the dynamic inefficiency are eliminated completely. Another effect of increased competition is the achievement of a fair price level, accounting for an improvement of another 10 points. The improvement of productive efficiency on the side of collecting societies is then put through directly to broadcasters (and therefore indirectly to cable operators) accounting for another 16 points, so that the final cost base for cable operators is reduced to 74%. Based on current total costs, this results in an improvement of 48% compared to the actual costs of cable distribution rights.

Combined Approach: Efficiency gains of the new copyright framework (Indexed)



Source: Solon

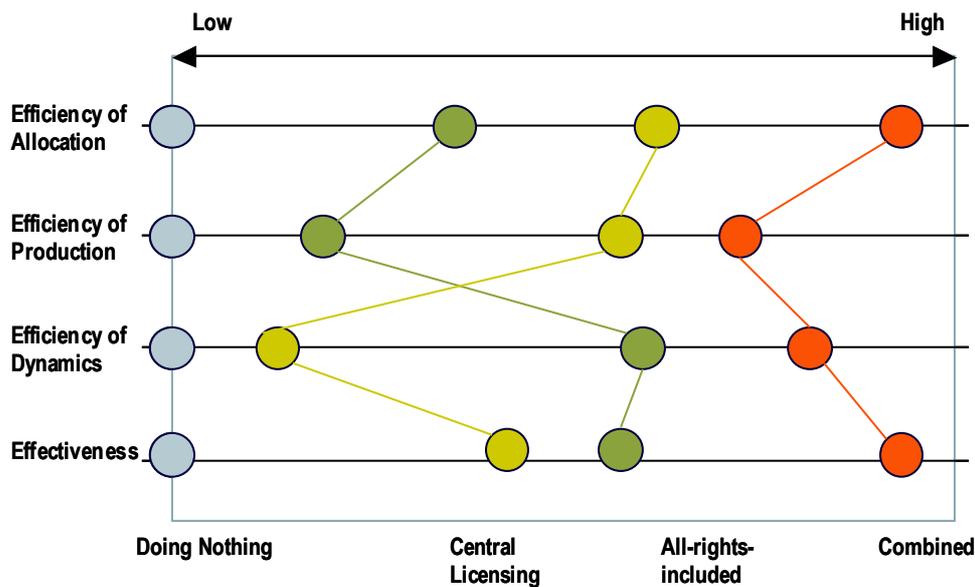
Consistency with EU policies and strategies

Combining all-rights-included packages and central licensing would be a major step towards achieving the EU’s overarching goals. Initially, competition is ensured in today’s much regulated and hardly transparent market. The cross-border activities of both broadcasters and cable operators are not hindered by overly bureaucratic copyright solutions and are backed by significantly enhanced planning reliability. In turn, the pace at which new products and new technologies are introduced is expected to increase.

6.6 Comparative evaluation of copyright frameworks

To summarize the evaluation of a new copyright framework based on the policy options discussed above, the following graph compares the effects of the four policy options including the option of doing nothing, to the current situation.

Comparison of all policy options



Source: Solon

Both, the Central Licensing and All-Rights-Included options as qualitatively more efficient and effective than the Doing Nothing option.

The *Central Licensing* option, offers clear advantages in improving efficiency of allocation and production since it generates a competitive environment among collecting societies. Prices levels are therefore expected to decrease and the organizations are forced to partially focus attention on cost efficiency. In addition, a central licensing approach reduces transaction effort since the number of necessary negotiations respectively the number of parties to find agreements with are reduced.

The *All-Rights-Included* option's biggest advantage lies in granting cable operators planning reliability. Acquiring fully cleared content packages allows for the faster introduction of new products and services, thereby significantly reducing a high portion of current opportunity costs.

The optimal outcome is achieved by selecting a hybrid of the two options and forming a *Combined Approach*, since their strength together is far superior to that of either individual option on its own. Collecting societies compete with each other resulting in more market oriented prices and cost levels. On the other hand, cable operators negotiate directly with broadcasters, leading to fairer pricing, to the extent it is possible with collecting societies even in a competitive environment.

7 Recommendations

Core issues

Having analyzed the copyright systems of select European countries and developed a general model to show basic interrelations and efficiency effects, we propose the implementation of a policy with the following characteristics:

- All-rights-included packages should be available to cable operators. Cable operators should be able to clear all rights directly with the broadcasters. Redundant contractual relations with collecting societies are thereby eliminated.
- Maximum efficiency gains from the all-rights-included option can be exploited by simultaneously establishing a central licensing opportunity. Current copyright regulations often force both broadcasters and distributors, such as cable operators, to negotiate with a variety of parties at the same time. Cross-border operations complicate the situation even further since copyrights for cable distribution usually have to be cleared in the country of their final use. Through central licensing, competition among collecting societies ensues on a European basis, meaning that internationally active market participants are able to choose one single society within Europe to clear the needed rights.

The implementation of these two proposed policy options will cause significant improvements in market efficiency. The most important ones are summarized below:

- National monopolies of collecting societies are broken up. Competition is enabled amongst them on a European basis, which will cause three direct effects:
 - Collecting societies will improve their cost level. Analysis has yielded that ample room for cost reduction exists. At best, cost reduction will be utilized to improve competitive position, meaning another deflation in the level of fees due.
 - Fee levels are expected to decrease to some degree and will level off at an equilibrium price.
 - A fairer remuneration especially of international content creators will be achieved.
- Transaction costs are reduced. Redundant contractual relations will be eliminated
- By giving cable operators the opportunity to purchase all-rights-included packages, a fairer level of fees for cable distribution can be achieved since individual negotiations reflect the fair value of these rights.
- Due to enhanced planning reliability, investments in innovative new products and services are encouraged.
- Cross-border distribution of channels and thus cultural diversity is improved.

Other Changes

The implementation of the aforementioned policy options requires that other issues are also taken into account:

- Remuneration of copyrights shall be based on the fair value of the respective channel. The increasing importance of CRM systems and encryption technology will enable monitoring of real and actual usage of a certain channel.
- It should be acknowledged that there is only one communication to the public regardless of the means of transmission used, be it analogue or digital.

- Cable operators should have a right to distribute all channels that are available within their service area on a Free TV base via alternative distribution platforms, such as satellite and DTT.
- Collecting societies must ensure that all relevant copyrights can be covered by them: Analogue, digital and on-demand in order to enable one stop shopping.
- Possible misuse by collecting societies, broadcasters and distribution platforms (such as but not limited to cable operators) should be subject to monitoring by the proposed central authority.
- The same authority should promote transparency by continuously benchmarking collecting societies regarding fee level, management costs, etc. and by publishing results to provide smaller market participants fair conditions.
- A catalogue with defined criteria for the collection of fees should be established to allow for ex-ante control of the adequacy of copyright fees.

Benchmarking and criteria catalogue

The implementation of the aforementioned benchmarking and monitoring functionality requires to take into account:

- A benchmarking of fee levels not only on a nominal level, but also taking into account the specific market environment, such as market reach of the channels, infrastructure landscape, etc.
- That it is not intended to act as a “pricing” authority, which is setting appropriate pricing for copyrights but rather contributes to transparency of pricing politics in different countries.
- That benchmarking happens on a regular basis, e.g. every 18 months.

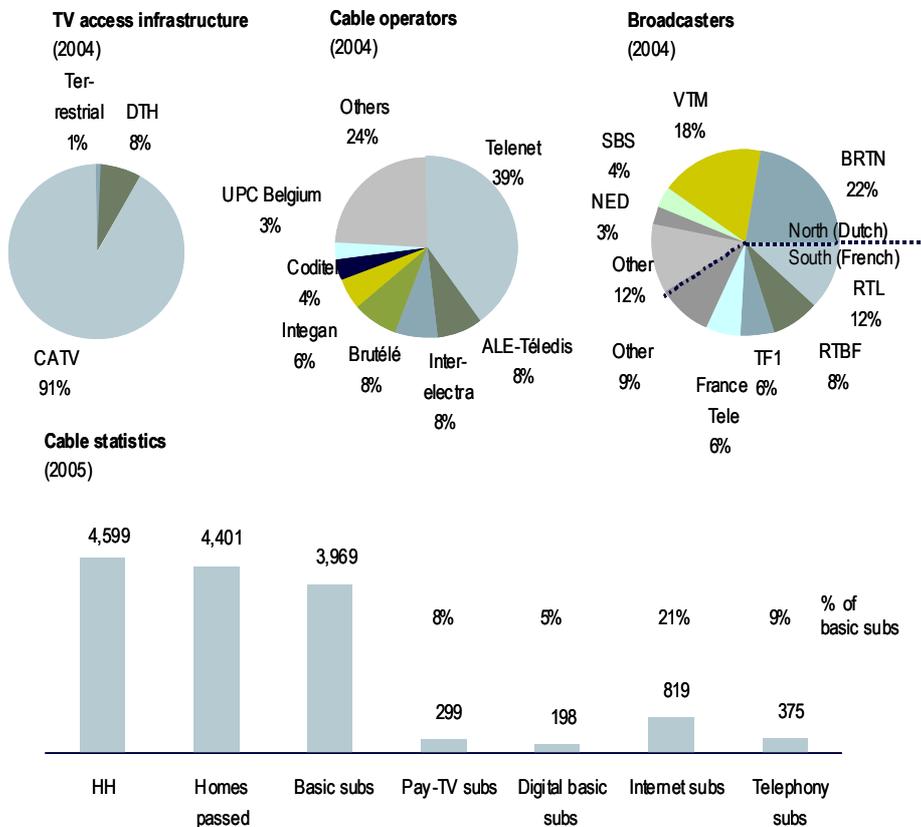
Additionally, the authority should develop a catalogue of criteria that should be taken into account when compiling a price structure. This catalogue should nevertheless be not dictating, but recommending an appropriate pricing policy such that competition will further be ensured.

The proposed authority does not necessarily need to be a completely new organization. It is by all means conceivable that already existing organizations as the Commission take responsibility for that.

Appendix

Case Study Belgium

Market overview



Source: SES Astra, Euromedia, Informa, Solon

The Belgian market is one of the most extensive cable networks in the world, having a 91% share of the primary TV access infrastructure.

The key cable player is Telenet with a market share of 40%, which has driven consolidation in the industry by acquiring/merging smaller municipal operators since 2003. The remaining players are primarily smaller municipality-owned companies, the other private cable companies Conditel and UPC Belgium account for only 7% of combined market share.

Based on its original telecommunications focus, Telenet launched additional services such as telephony and internet already in 1997. Operational agreements with municipalities dating before the consolidation era also allowed Telenet the provision of telephony and Internet services within the subscriber base of competing municipal cable companies. This led to an overall penetration of 9% for telephony and 21% for Internet services in 2005 within the basic cable market, which are amongst the highest in Europe. Telenet is continuing to push new services, and started offering iDTV (digital interactive-TV) towards the end of 2005.

On the broadcasting side, based on the dual language situation, a broad range of players are active: The public broadcaster RTB, with RTBF addressing the French language regions and VRT addressing the Dutch speaking regions. RTL is the leading commercial broadcaster in the French speaking Belgium besides the French TF1. VMM and SBS address the Dutch speaking region.

Digital Terrestrial TV (DTT) was launched in 2003, and is expected to cover about 90% of the country by 2006. The analogue switch-off is planned for 2010. Based on the existing high share of cable subscribers the effect of DTT on the TV reception landscape will be limited.

Collecting societies

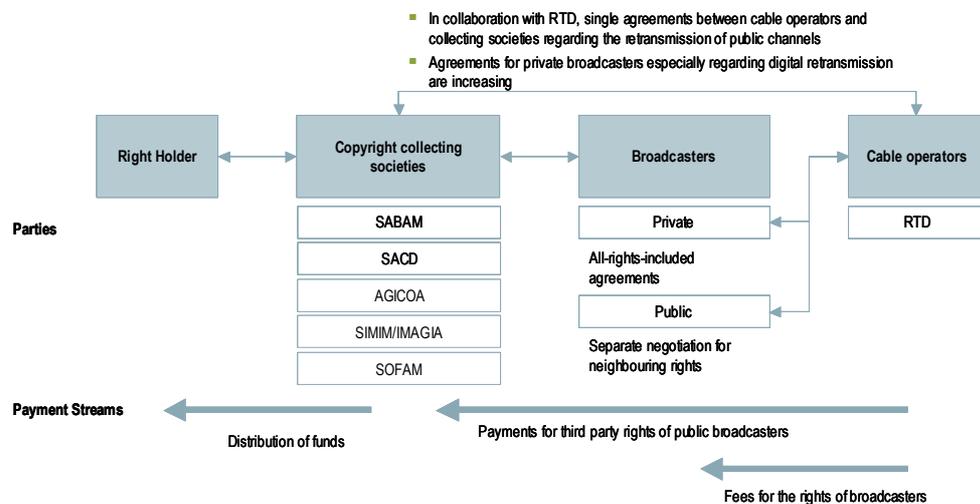
In Belgium, five collecting societies exist, representing different rights owners. Cable operators have closed agreements with each of them.

- **SABAM** (Music owners and producers of films, representing approx. 80% of all relevant copyrights in Belgium)
- **SACD** (Originally French collecting society, representing audiovisual producers)
- **AGICOA** (Audiovisual producers, especially from the US and national producers different from those represented by SACD)
- **SIMIM/IMAGIA** (SIMIM represents phonograph rights of music producers, IMAGIA the music rights in audiovisual content)
- **SOFAM** (Visual artists like photographers or architects)

Collecting agreements and structure of payments

In Belgium, unlike other European countries, no general framework contract exists. Cable operators close a variety of single contracts with both collecting societies and broadcasters. The RTD (the Belgian cable industry trade association) closes – in cooperation with cable operators – agreements with all of the aforementioned collecting societies regarding the distribution of the channels of public broadcasters (both national and international). These agreements cover any third party rights for analogue, digital and simulcast transmission. Additionally, cable operators negotiate separately with all public broadcasters for their neighbouring rights.

Copyright value chain of Belgium



Source: Interviews, Solon

Negotiations with private broadcasters have until now been negotiated bilaterally on a case by case basis. Typical contracts include all necessary rights for cable distribution. No further contact to a collecting society is necessary. However, things have slightly begun to change. Nowadays, contracts with collecting societies regarding single private broadcasters have also been agreed upon. In addition, collecting societies are trying to demand fees for the digital cable distribution of the channels of private broadcasters.

The structure of contracts, normally 3-5 years, does not generally differentiate between public and private broadcasters. Typically, a lump-sum per subscriber per channel is agreed upon. For public channels, it is transferred to the respective collecting societies, for private channels directly to broadcasters. Despite the similarity of the fee structure, the amount of fees differ significantly.

Satellite and DTT operations are currently not subject to copyright payments for retransmission. A satellite platform will soon enter the market but information regarding the handling of retransmission copyright is not available up to now. DSL Operators seem to be obliged to payments similar to cable operators.

Recent developments

Copyright societies are increasingly trying to demand new kinds of fees from cable operators. Although private broadcasters used to offer fully cleared packages to distributors, collecting societies claim that the rights for digital cable distribution have to be paid on-top as they are not thus far included in the agreements. This issue is still pending.

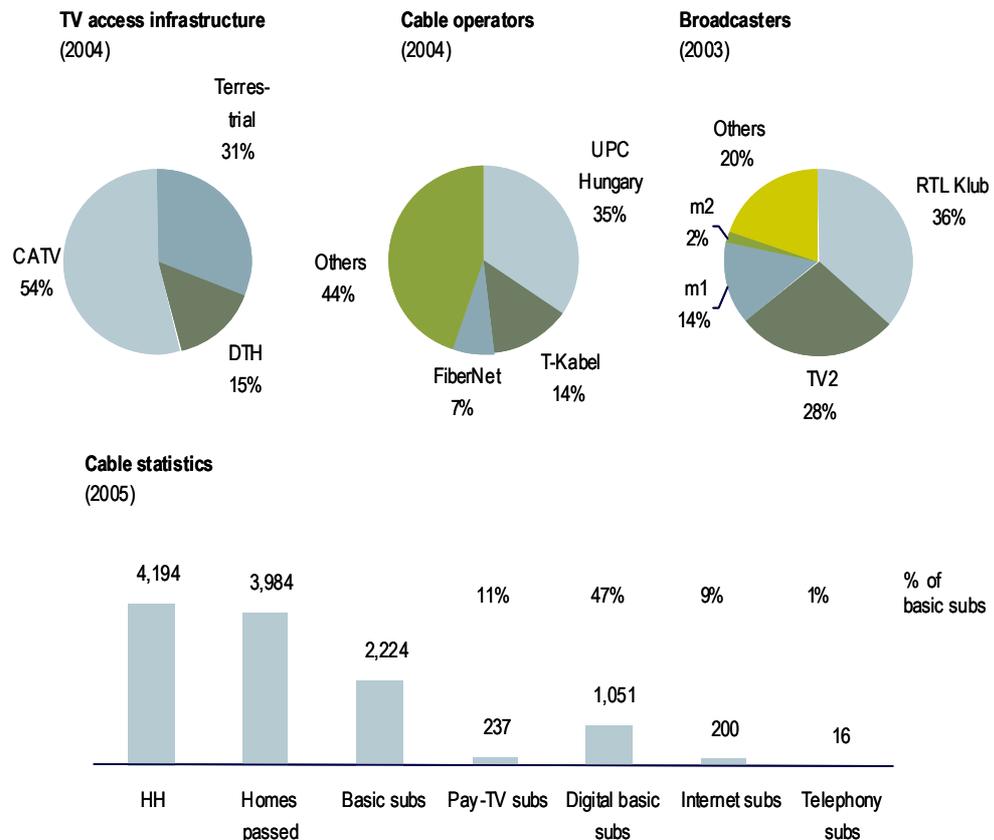
Another issue pending is the awarding of rights for new services like IPTV or on-demand features. It is likely that collecting societies will claim additional fees for that as well. Private broadcasters have explicitly included these rights in their all-rights-cleared packages.

Inefficiencies of current system

- The intransparency of the copyright collecting society may cause double payments, since it is not clear which rights are covered by which society. As societies partly represent the same kind of rights the absolute amount of the remuneration fees may be too high.
- Broadcasters are negotiating with copyright collecting societies and cable operators as well. Additionally cable operators are negotiating with copyright collecting societies for different rights. Negotiation effort for all parties may be reduced if the “copyright value chain” was slightly rearranged.
- High uncertainty regarding new claims by collecting societies for new services like IPTV and on-demand hinders planning reliability of distributors in Belgium. The introduction of new services is always subject to the high uncertainty of possibly related copyright costs.
- Even though collecting societies do not act collectively, SABAM has a quasi monopoly position since it represents 80% of all relevant rights. Room to negotiate for distributors is therefore limited.

Case Study Hungary

Market overview



Source: SES Astra, Euromedia, Informa, Solon

Hungary is one of the largest cable markets in Central and Eastern Europe. 54% of all households are served by cable, terrestrial access still plays an important role with a share of 31% of TV access infrastructure.

The largest cable player is UPC Hungary with a market share of 35%, followed by T-Kabel and FiberNet with 14% and 7% respectively. Rapid consolidation has characterized the market over the last years, having led to the relatively high degree of concentration.

The cable market is currently at the brink of transformation, with most of the operators preparing to launch digital cable TV. Additional services like pay-per-view and video on demand are expected to be introduced soon thereafter.

Broadband cable Internet has grown strongly over recent years and all leading cable operators continue upgrading their networks. Hungary is the first market in Central and Eastern Europe where a full Triple Play service is offered to customers.

Besides the cable industry, Hungary has a digital DTH platform operated by UPC. Digital terrestrial TV had been introduced in October 2004 with the launch of a trial service by Antenna Hungária. Initially it offered the public channels M1, M2 and Duna TV. Commercial TV stations RTL Klub and TV2 have expressed little if any interest in supporting a DTT platform.

Collecting societies

In Hungary, six collecting societies exist, representing different rights holders. However, cable operators only negotiate with the biggest one: ARTISJUS.

- **ARTISJUS:** Hungarian Bureau for the Protection of Authors' Rights
- **EJI:** Association of the Arts Unions Bureau for the Protection of Performers' Rights
- **MAHASZ:** Hungarian Music Industry Association

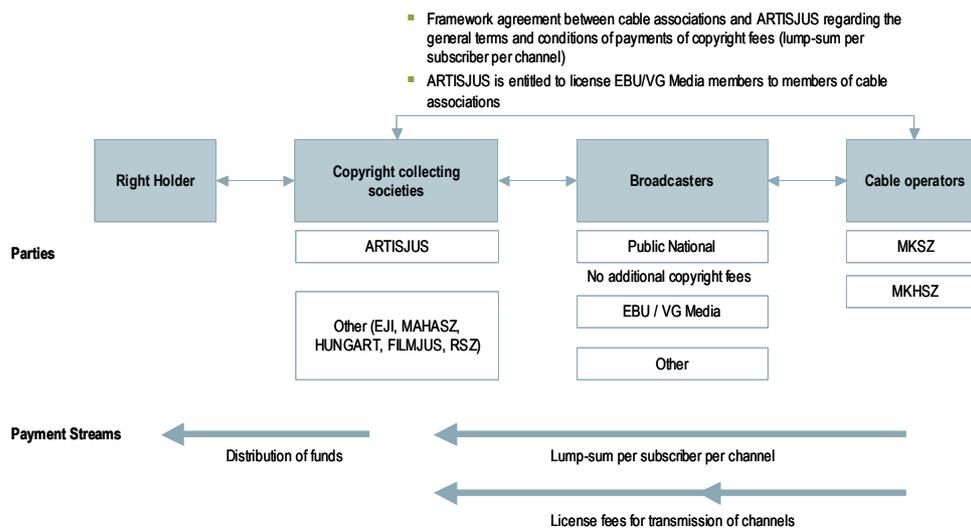
- **HUNGART:** Collecting Society of Hungarian Creative Artists' Association
- **FILMJUS:** Hungarian Society for the Protection of Audiovisual Authors' and Producers' Rights
- **RSZ:** Hungarian Alliance of Repographic Rights

Collecting agreements and structure of payments

The general terms of copyright payments for cable operators are settled in a framework agreement between cable associations MKSZ/MKHSZ and ARTISJUS, the most important of the collecting societies, which is also acting as an agent for the other, smaller societies. This agreement concerns reporting tasks, frequency and rules of payment.

As a member of one of the cable associations, operators can elect to settle copyright fees according to this framework agreement. Payments are agreed upon as a monthly lump-sum per subscriber per channel. Cable operators are not obliged to close their agreements according to the framework agreement, however cable associations have managed to negotiate better conditions than it might have been possible on an individual basis. No negotiations regarding copyright happen between broadcasters and cable operators. The vast majority of fees is paid to ARTISJUS, which acts on behalf of other collecting societies based on law and redistributes the fees accordingly. Fee levels are defined in yearly addendums to the aforementioned agreement.

Copyright value chain of Hungary



Source: Interviews, Solon

Certain differences regarding the treatment of copyright payments of different types of broadcasters are existing. Public broadcasters and some local broadcasters are subject to must-carry rules. No additional copyright fees have to be paid for their distribution by cable operators, instead they are paid from the broadcasting fund by the national radio and television board (financed by license fees of private broadcasters, the state and to a small fraction also by consumers).

French, German, Austrian and Italian channels are organized within the EBU/VG Media associations. The treatment of these is carried out according to another framework agreement, closed between these two associations and the MKSZ/MKHSZ. ARTISJUS is entitled to license the member channels of these societies to members of the cable associations. Retransmission fees are usually paid according to the abovementioned agreement. As a consequence of this agreement, operators do not need to negotiate directly with the member channels of EBU/VG Media and both pay the license fee and the fee for distribution to ARTISJUS.

The third group is formed by any other channels. Cable operators close individual contracts with them regarding carriage; copyright fees are also paid as a lump-sum per subscriber per channel to ARTISJUS. Pricing is accordingly to the framework agreement.

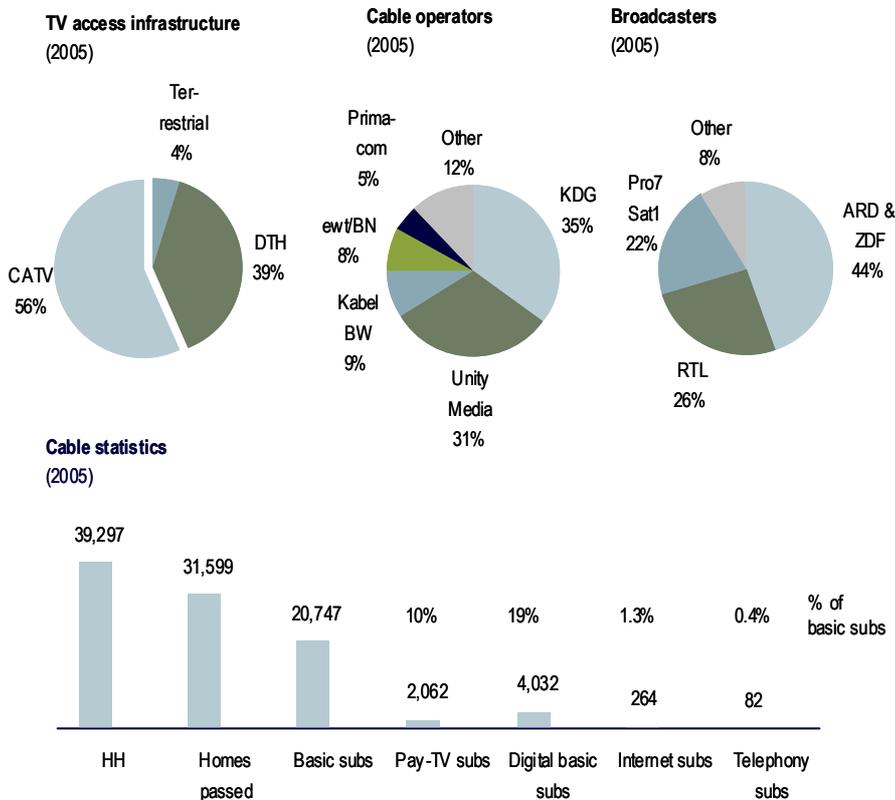
Copyright law also treats encrypted and non-encrypted channels differently. For the encrypted transmission of channels, copyright fees have to be paid once, be it by the broadcaster or by the cable operator who are jointly and severally liable for the payment. For non-encrypted channels, copyright fees have to be paid both by broadcasters (license fees) and cable operators (fees for further transmission). Copyright fees for unencrypted transmission are approximately twice as high as for encrypted transmission.

Inefficiencies of current system

- Level of fees (lump-sum per subscriber) according to the framework agreement neither takes the total number of subscribers of the cable operator into account nor does it reflect the differences among channels, meaning their valuation according to viewers and reach.
- Cable operators have to negotiate the carriage of programmes with the broadcasters and the copyright fees with collecting societies leading to higher transaction costs.
- The system is rather intransparent regarding the activities of ARTISJUS. There is no easily accessible data available that shows the amount of revenues collected to cover costs and expenditures of ARTISJUS' management.
- ARTISJUS has a very high level of operating costs, accounting for around 17% of total income.
- The future treatment of new services is not regulated clearly by now.

Case Study Germany

Market overview



Source: SES Astra, Euromedia, Informa, Solon

Although cable TV access in Germany only shows a market share of 56%, closely followed by satellite with 39%, Germany is still the biggest European cable market with approx. 21 m subscribers.

Unlike their European peers, German cable operators mostly rely on basic CATV services; the subscriber base of German cable operators is thus far underleveraged with Internet and telephony penetration reaching only 1.3% and 0.4% respectively. The low uptake of additional services can in part be explained by the unique historic situation in Germany, which separated the cable industry into Level 3 operators (city and local HFC networks up to the Home connection point) and Level 4 operators (in-house wirings). Although consolidation has led to more Level 3/4 integration in the past, complex sets of contractual agreements between Level 3 and Level 4 operators and housing associations are still a major obstacle hindering the increased uptake of additional services.

The broadcasting situation is characterized by 3 major broadcasters: The public broadcasters, ARD and ZDF, offering more than 15 national and regional channels with a market share of 44% and the leading private broadcasters RTL (5 channels) with a 26% market share and ProSiebenSat1 (4 channels) with a 22% market share.

DTT was launched in 2002 in the Berlin region and was further rolled out on a regional basis. The complete analogue switch-off is planned by 2010. Regions which already completed the analogue switch off did not experience major effects in TV access shares.

Collecting societies

In Germany, nine collecting societies exist, representing different rights owners. However, for the purpose of investigating copyright (re)transmission rights, the rights owners can be clustered into two important groups:

- The Munich Round (GEMA-Group, VG Wort, VG Bild und Kunst, GVL, AGICOA, VFF, VGF, GUFA, national public channels (representing foreign public broadcasters) and some smaller private (foreign) channels)
- VG Media, representing the two largest private national channels P7S1 and RTL Group as well as a range of smaller national private TV channels (Owner of VG Media are P7S1 and the RTL Group with 50% respectively)

Besides these groups, there are some private broadcasters who chose not to be represented by VG Media nor are they members of the Munich Round.

Collecting agreements and structure of payments

In Germany, cable operators need the permission of the broadcaster and the collecting society for the transmission of programmes. They must be granted cable retransmission rights in contrast to satellite and DTT - both not requiring this. The collecting societies regard DSL as cable infrastructure and therefore negotiate retransmission payments. Collecting societies thereby act on behalf of the respective right holders. Different kinds of rights are represented by a total of nine collecting societies as mentioned above. However, not all rights are represented by collecting societies since broadcasters have the freedom of choice, whether they want to be represented by a collecting society or not – a right which is especially utilized by foreign channels.

These legal regulations require cable operators to negotiate with all the collecting societies and the broadcasters or VG Media. Larger cable operators (Level 3) directly negotiate with the collecting societies. The interest of Level 4 cable operators are represented by the ANGA (the German cable industry trade organization, mostly larger operators), FRK (Cable Association, mostly smaller operators) and GdW (Association of Housing Associations).

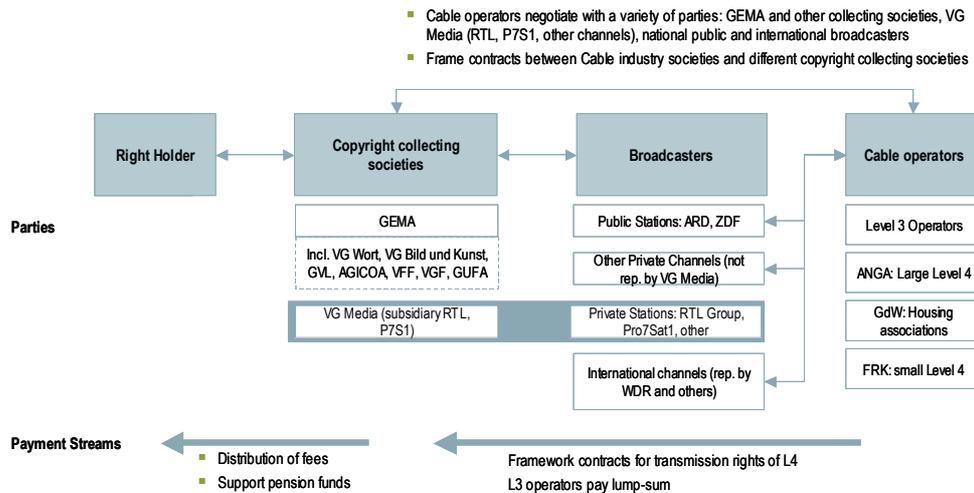
In the past, Level 3 operators have collectively negotiated an agreement with the so-called Munich Round. The outcome of the agreement was that a lump-sum has to be paid, which is then distributed by GEMA – according to a certain breakdown – among the aforementioned parties. For the cable retransmission to Level 4 operators without own head-end is included in the lump-sum. It must be noted that the Munich Round has been built on a voluntarily basis. In the past the VG Media was also a member of the Munich Round but decided to negotiate independently.

ANGA, FRK and GdW have closed framework agreements with VG Media that arrange a certain percentage of basic access revenue as remuneration. The contract also includes some clarifications compared to former agreements:

- (1) Only cable operators with an own feed-in, be it integrated Level 4 networks or Level 3 networks are obliged to pay retransmission fees. This avoids double payment by Level 4 networks that are connected and fed in from Level 3 operators networks
- (2) Revenues of the retransmission of Pay TV and Teleshopping are excluded from obligation to pay remuneration
- (3) Future digital feed in of private broadcasters is included in the fee
- (4) Re-analogization of digital received signals is also included in fee

However, these rules do not apply in general. Only cable operators having closed a respective single agreement can refer to them. Later, this framework agreement could also be applied to a contract between ANGA and GEMA, which was signed in July 2004. The agreement has also been the base for further agreements between collecting societies and the two other relevant associations. However, the amounts of fees as percentage of revenues differ. Typically, an agreement lasts for three to four years.

Copyright value chain of Germany



Source: Interviews, Solon

Recent developments

Despite its comparatively clear structure, the German system is lacking transparency in terms of which rights are included in the acquired package. This has recently led to the emergence of a new collecting society called “VG Werbung” claiming to represent the producers of commercials and claiming that they have the same authorizations as GEMA. However, they are in fact not representing any German artists but so far only Turkish ones.

Additionally, collecting societies have repeatedly tried to increase fees. The current legal situation is subject to high uncertainty and therefore hindering the planning reliability of cable operators.

VG Media has currently released a new tariff. However cable operators have not yet accepted, such that for 2006 an interim agreement is in place, with payments being comparably structured as before. The new tariff may demand further negotiation among cable operators and the collecting society. GEMA has indicated that the proposed fees are assessed too high, compared to the absolute share of fees VG Media has received in the past.

At the end of 2003, ARGE Kabel (consisting of VG Wort, VG Bild-Kunst and GVL) claimed that cable operators owed certain copyright fees – summing up to ~4.4 Mio. € - related to authors and artists represented by them. However, cable operators believe that they do not owe these fees since the affiliated collecting societies VG Wort, GVL and VG Bild & Kunst have already received retransmission fees agreed upon in framework contracts. The reason for the ARGE Kabel claim is the following: The broadcasters which are members of the Munich Round agreed to pay to VG Wort, VG Bild-Kunst and GVL a certain amount of the fees which the broadcasters receive from the cable operators in order to compensate the cable distribution adequately since the ARGE Kabel apparently had the opinion that the broadcaster did not compensate the broadcasting rights in an adequate manner. It must be noted, however, that the share the ARGE Kabel shall receive from the broadcaster are in addition to the payments the collecting societies receive from the level 3 cable operators. When VG Media left the Munich Circle the ARGE Kabel was not able to participate at the payments which cable operators made on behalf of the VG Media. As a result ARGE Kabel initiated an arbitral trial against Kabel Deutschland demanding additional payments.

Inefficiencies of current system

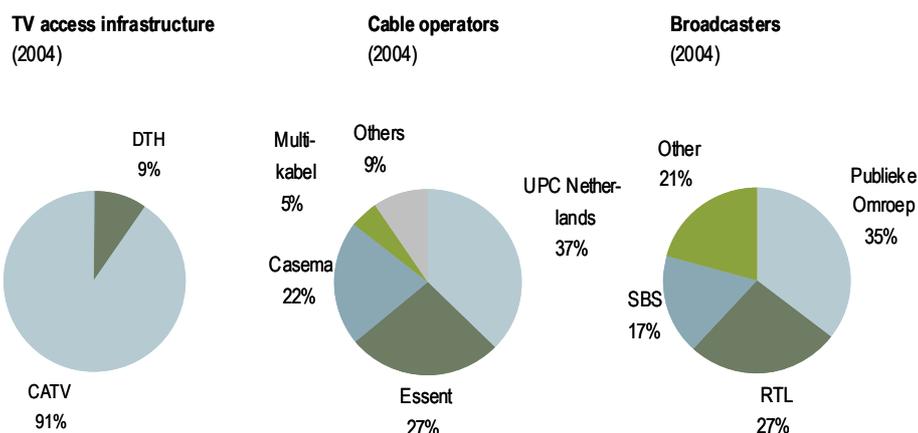
- The large private Free TV broadcasters claim to already have acquired cable distribution rights from some of the collecting societies. Due to a lack of transparency it is unclear which rights have in fact been acquired when contracts with collecting

societies are closed. Therefore, cable operators prefer to enter into agreements with all collecting societies, thereby accepting that the rights may have already been cleared by a broadcaster.

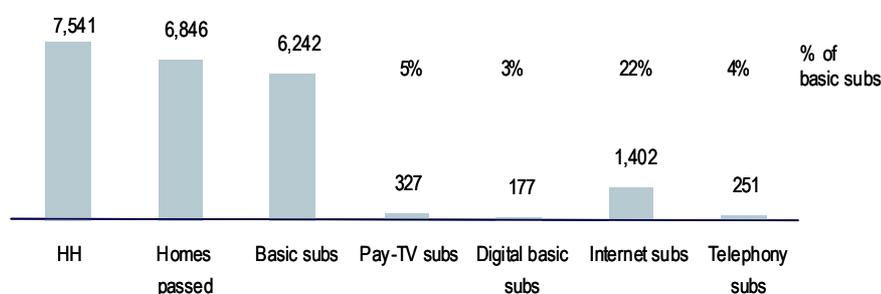
- VG Media belongs to the private national broadcasters. Cable retransmission fees may be used to re-finance feed in fees. An indication for this is the current tariff of VG Media for radio and TV that states in section 1(b) that fees reduce to 1% if operators can prove not to claim feed in fees from broadcasters.
- In the past, smaller collecting societies or single stations have frequently left the negotiation rounds or already closed agreements (e.g. Danish TV station broke from GEMA frame contract, claiming not to get a high enough share of fees). This increases the uncertainty further as cable operators cannot always rely on closed agreements.
- Notwithstanding the frame contract between ANGA and VG Media about the compensation of feed in of analogue as well as digital signals, VG Media stated that they have not been granted digital rights from the broadcasters thus far.
- It is unclear which rights in detail are administered by which copyright collection society, which may well cause double payments. Societies have promised to disclose this information but this has not happened up until now.
- In theory, broadcasters could serve as a one-stop-shop from the cable operators' point of view today already. However, GEMA refuses to grant the broadcasters the retransmission rights for musical rights.
- Treatment of new services like on-demand and online services are currently unclear. Future financial exposure is unclear as well.
- Cable operators acquire distribution and marketing rights from broadcasters in order to market channel packages as Pay TV offers, so that they may be exposed to further claims by collecting societies or other holders of copyrights and related rights.

Case Study Netherlands

Market overview



Cable statistics (2005)



Source: SES Astra, Euromedia, Informa, Solon

Cable is the leading primary TV access infrastructure in the Netherlands, accounting for a 91% market share, followed by satellite reception with about 9% share. Terrestrial reception only plays a minor role.

The four leading cable companies are UPC, Essent, Casema and Multikabel, accounting for about 91% of total subscribers. Digitalization has been slow thus far, due to long disputes between cable companies and the regulator about how to pass on digital TV upgrade costs to customers, and lacking standards. Following an agreement on October 2005, digitalization shows a stronger uptake in the future. In contrast to Digital TV, broadband Internet access through cable shows a high penetration of 22% of cable subscribers, telephony has reached 4% penetration thus far.

The major broadcaster in the Netherlands is Publieke Omroep, which oversees the three national public channels (Nederland 1) achieving a combined market share of 35%. The commercial broadcasters RTL (operates the RTL4, RTL5 and RTL7 channels) and SBS (SBS6, Net5, Veronica) account for a 27% and 17% market share respectively.

Collecting societies

In the Netherlands, a variety of collecting societies exist, representing different types of copyright holders. Cable operators have closed agreements with BUMA and SENA, both enjoying statutory monopoly positions for the distribution on cable networks. The following collecting societies exist:

- **SENA:** By order of the Ministry of Justice and to the exclusion of anyone else, SENA has been charged with implementing the Neighbouring Rights Act. SENA is the legal representative designated by the Minister of Justice, exclusively entrusted with the collection and distribution of remuneration related to phonograms or reproductions published for commercial purposes.

- **BUMA** (composers, songwriters and music producers transfer their authors' rights for existing and future works to BUMA for particular forms of use (e.g., for broadcasting and distribution purposes, but not for on demand services or Internet streaming); BUMA may exercise the rights that were transferred to the organization as a rights holder in its own right and internationally via reciprocal agreements with similar collecting societies in other countries worldwide.
- **SEKAM** (national film and TV producer rights)
- **AGICOA** (international film and TV producer rights)
- **Others** (Burafo, Stichting Beeldrecht, Lira)

Collecting agreements and structure of payments

From the perspective of a cable operator, different agreements exist, regulating the distribution of channels.

One of the most important agreements used to be the “Agreement concerning the license for the simultaneous, unchanged and unabridged distribution of television programmes by cable” (originally concluded in 1984 and extended in 1996 with very few changes) – hereafter referred to as the “Model Agreement”, which was closed between the CISAC organizations BUMA, Burafo, Beeldrecht and Lira together with AGICOA, SEKAM, the national public broadcaster in the Netherlands, public broadcasting organizations from other European countries (Belgium, Germany, UK, France, Italy, Spain) and the private commercial broadcasters RTL Television and TF1. The joint organizations acted as a copyright collective of which BUMA was the authorized collecting agent. The Model Agreement formed the framework for individual agreements between cable operators, broadcasters and the collecting societies. Fees were negotiated as a fixed fee per subscriber per channel per period.

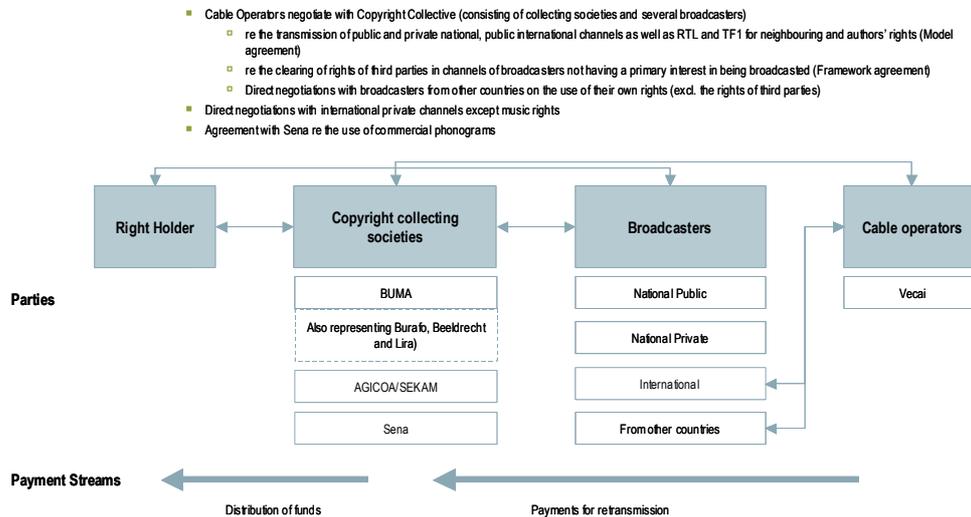
The Model Agreement did not only address copyright payments for distribution rights but also formed the basis of carriage for participating broadcasters. Fees collected under the Model Agreement were not only transferred to collecting societies but also to broadcasters. Each calendar quarter, cable operators transferred a lump sum to BUMA (with BUMA acting as an agent on behalf of all the other parties involved in the Model Agreement). 44.5% of the total amount of collected fees was transferred by BUMA to the national public broadcasting organization, NOS (later: Publieke Omroep). 33.5% was transferred by BUMA to AGICOA/SEKAM and 22% was collected for BUMA and the other CISAC organizations. The national public broadcaster acted as an authorized collecting agent for the broadcasting organizations who were parties to the Model Agreement. Its role was to transfer the fees due, to the foreign broadcasters who were parties to the Model Agreement. The distribution of the national public channels was not subject to payment as this was deemed to be already included in public funding. In the meantime, it has however become apparent, that the national public broadcaster received a management fee of approximately € 2.7 million in return for its fee collection services for the foreign broadcasting organizations.

The Model Agreement covered authors' rights plus the neighbouring rights of broadcasting organizations. It did not cover the neighbouring rights administered by Sena, i.e., the rights of phonogram producers and the rights of performing artists whose performances are incorporated in commercial phonograms. With Sena, a separate agreement was negotiated in 1996, which was updated and renewed in 2005.

For broadcasters not having a direct interest in the distribution of their channels in the Netherlands and offering their channels without clearance for the rights that third parties may have to the programmes aired on those channels, the cable operators negotiated a rights clearance agreement with the joint collecting societies (the above CISAC organizations along with AGICOA and SEKAM). This is the so-called “Framework Agreement”. This Framework Agreement is also administered by BUMA acting as an agent for the other collecting societies which are parties to the agreement.

For broadcasters negotiating rights themselves, cable operators did not need to negotiate for further distribution agreements, with the possible exception of music rights. The latter is due to the fact that the collecting societies for music rights have created territorial monopolies, often supported by legislation. For situations in which cable operators only need to clear the music rights, negotiations are ongoing between VECAI and BUMA.

Copyright value chain until March 2005



Source: Interviews, Solon
 (Note: Broadcasters are also rights holders as far as they produce programmes on their own)

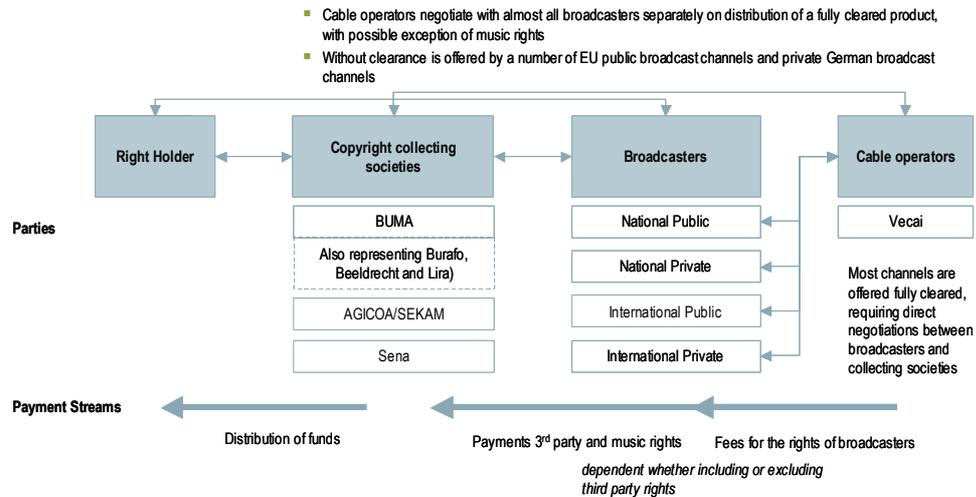
In 2004, VECAI and the vast majority of its members cancelled the Model Agreement with 12 months notice. The cancellation became effective on March 1, 2005. Until today, no new agreement could be reached due to the differing views of the participating parties as to (i) who should negotiate with whom; (ii) which rights need to be cleared by the cable operators and which rights by the broadcasters; and (iii) the level of fees. Therefore, the President of the Amsterdam District Court decided that the fees due for the distribution of works by third parties included in the programme services of broadcasters were to be calculated on the basis of the remuneration clause of the old Model Agreement, while awaiting the outcome of further negotiations set for October 1, 2005. Since then, the fees for the rights of broadcasting organizations have been directly negotiated with the broadcasters themselves.

As October 1, 2005 approached, no new agreement had been reached. The joint collecting societies threatened to take the cable operators to court again, unless they would accept an immediate 7% increase in fees due. Under those conditions, the joint collecting societies were willing to continue negotiations in order to find a solution by 1 September 1, 2006, which would then become effective on January 1, 2007. Cable operators were in no position to refuse this proposition since the distribution of channels is their core business and they could not run the risk of possible 'prohibition of distribution' orders.

The above Model Agreement is no longer effective which means that theoretically, channels formerly covered by the Model Agreement could also now be treated according to the Framework Agreement as far as third party rights are concerned. The joint collecting societies, however, have thus far refused to accept this.

Moreover, the collecting societies continue to demand a fixed price per channel, independent of the market value of the channel. As the following example illustrates, that pricing policy may lead to some channels not being distributed.

Copyright value chain of the situation as is



Source: Interviews, Solon
 (Note: Broadcasters are also rights holders as far as they produce programmes on their own)

All of the above agreements are formulated in a technologically neutral manner. The terms negotiated included the right to communicate protected works and phonograms to a known group of subscribers, whereby the cable operators would determine the means by which technical standard(s) the actual communication with this group would take place.

Case Study: The ARTE case

The Franco-German cultural broadcaster Arte offers its channel free of charge to cable operators in the Netherlands as far as its own rights are concerned. Consequently, the channel can be distributed by the cable operators if they themselves undertake to clear the third party rights in Arte's programmes. In principle, this can be done under the existing Framework Agreement. The issue is, however, that the rates for third party rights' clearance under the Framework Agreement do not vary according to the market value or actual number of viewers of the channel in which third parties have rights. Therefore, the fees that would have to be paid by cable operators for the rights of third parties in Arte's programmes are far too high compared to the number of subscribers that have a potential interest in the channel. As a result, operators tend to avoid the inclusion of Arte in their channel line-ups for economic reasons.

BUMA has taken the position that in cases where copyright protected works are communicated to the public by different technical standards, separate permissions are required for each technical standard used (regardless of the fact whether the use of a particular standard leads to new forms of exploitation (i.e., new forms of communication to the public) and/or new revenue streams for cable operators). So far, BUMA has not yet claimed additional payments. The future position of BUMA (and other collecting societies) is however highly uncertain and may possibly lead to separate negotiations and payments.

Collecting societies claim that they also have the rights for clearance of on-demand and Internet rights, except AGICOA, which only has a mandate for cable distribution. It is doubtful whether the collecting societies have those rights, especially since American studios claim to own those rights.

Cable operators, unlike DTT operators and Satellite platform operators, are subject to "must carry rules" that force them to carry 15 TV and 25 radio stations selected by the media legislator and the local programme councils, which were established on the basis of the Media Act. Despite this obligation imposed by statute, cable operators still have to clear the relevant distribution rights for those channels.

Issues re players for cable distribution

Channels	Issues Broadcasters	Issues Collecting Societies	Issues Cable Operators
Public National	<ul style="list-style-type: none"> No payments from cable operators Already paid for by public funding 	<ul style="list-style-type: none"> Broadcasters and collecting societies demand clearance by cable operators 	<ul style="list-style-type: none"> Broadcasters and collecting societies demand clearance by cable operators
International or pan-European	<ul style="list-style-type: none"> Direct negotiation with cable operators Offer fully cleared channels (with possible exception of music rights) 		<ul style="list-style-type: none"> Direct negotiation with broadcasters
Private National	<ul style="list-style-type: none"> Direct negotiation with CATV operators Offer fully cleared channels 	<ul style="list-style-type: none"> 3rd party rights negotiated with broadcasters 	<ul style="list-style-type: none"> Direct negotiation with broadcasters
Channels from other countries (except national public and German private channels)	<ul style="list-style-type: none"> Direct negotiation with CATV operators Offer fully cleared channels (except music rights) 	<ul style="list-style-type: none"> Collecting societies do not allow the clearance of 3rd party rights by broadcasters 	<ul style="list-style-type: none"> Possibly payment of fees for music rights
National public channels from other countries (except BBC) and German private channels	<ul style="list-style-type: none"> Direct negotiations with cable operators 3rd party rights negotiated with copyright collective 	<ul style="list-style-type: none"> Clearance of 3rd party rights 	<ul style="list-style-type: none"> Clearance of 3rd party rights by cable operators

Recent developments

The increase of fees in the above mentioned agreements are based on the general price index. However, collecting societies have recently forced cable operators to accept an additional 7% fee increase by the end 2006 without any explicit justification. Motivation for this action may have been the increase in subscription fees for cable subscribers.

Inefficiencies of current system

- The copyright situation in the case of channel distribution is characterized by a low level of transparency. Collecting societies claim to be responsible for all different kind of rights, including digital, on-demand and online rights. In fact, the legal situation is not well-defined and current fee models may be subject to change in the future.
- The distribution of channels from other countries demands additional clearance of third party rights. This leads to double transaction costs (due to double negotiations with rights holders); cases of double payment cannot be accepted.
- The distribution of international channels demands additional clearance of music rights only. Apart from the necessity of double negotiations, cases of double payment cannot be excepted.
- Clearing distribution rights between cable operators and collecting societies may lead to fees which are too high. Broadcasters, for instance the BBC, know exactly which rights of third parties they are going to use in their channels, the share these third party rights represent in their channels, and how much these third party rights contribute to the market value of their channels. Hence, broadcasters' direct acqui-

sition of distribution rights or complete packages may lead to fairer payment streams.

- A risk of underutilization occurs when different rights holders possess exclusive rights to permit or prohibit certain forms of use. This, in combination with the lack of transparency characterizing the rights sector and the refusal to recognize that individual rights only reach their full value in combination with the rights of others (e.g., music rights have no independent value in a film; the film can only be sold to an audience as a full product - i.e., when all rights can be cleared), contributes to the problem. The above Arte case (there are also similar cases concerning the distribution of five channels of France Télévisions in the Netherlands and the BBC's digital channels) illustrates this risk.
- BUMA is in a dominant position due to the fact that it has a statutory monopoly (the Copyright Act requires a license for collective management organizations; in practice, only BUMA has been granted such a license) and has recently shown that it is also willing to take advantage of it by increasing transmission fees by 7%.
- The collecting societies have a policy of wanting to impose levies on every revenue generating act, even though the act does not constitute a (new) communication to the public.
- BUMA, being in a monopoly situation, is subject to scrutiny by a supervisory board monitoring the activities of different collecting societies in the Netherlands. However, BUMA activities pursued jointly with other collecting societies which are not subject to the board's supervision will also not be scrutinized by the board. Therefore, by acting jointly with other collecting societies, BUMA can effectively prevent the statutory supervision to which it is subjected by the legislator.
- The final distribution and usage of the fees collected from cable operators is unclear. How are they divided among different national and international rights holders?
- Due to the increased attention paid to possible copyright infringements resulting from new activities and services, new collecting societies, which can be very persistent in their claims, are established from time to time. However, the possible financial exposure of broadcasters and cable operators is completely unclear, especially due to the lack of transparency regarding who actually holds the rights.

Abbreviations

CATV	Cable TV
DSL	Digital Subscriber Line
DTH	Direct to Home
DTT	Digital Terrestrial TV
EBITDA	Earnings before Interest, Tax, Depreciation and Amortization
ECCA	European Cable Communications Association
EPG	Electronic Program Guide
HDTV	High Definition Television
HFC	Hybrid Fiber Coax
HP	Homes Passed
iDTV; iTV	Interactive (Digital) Television
IPTV	IP Television
ISP	Internet Service Provider
NOC	Network Operations Center
NVoD	Near Video on Demand
PCTV	PC based TV
PVR	Personal Video Recorder
ULL	Unbundled Local Loop
UMTS	Universal Mobile Telecommunications System
VoD	Video on Demand
VoIP	Voice over IP
Wimax	Worldwide Interoperability for Microwave Access

Solon Management Consulting

Solon is the leading consultancy for the European cable TV industry. Services range from the development and implementation of corporate strategies to M&A transaction support. Clients include cable operators, telecommunication and media companies, as well as banks and private equity funds.

Solon Management Consulting
GmbH & Co. KG
Kardinal-Faulhaber-Strasse 6
80333 Munich
Germany

Phone: +49 89 210388- 0
Fax: +49 89 210388- 44

<http://www.solon.de>

