Thomas Wallentin / Leonhard Reis

The right to secondary exploitation of cable re-transmission under Austrian law

– The initial transmission as a prerequisite under Sec. 59a Austrian Copyright Act

The Austrian Copyright Law recognises the right to secondary exploitation of cable re-transmission (Sec. 59a Austrian Copyright Act). This autonomous right is the legal emergence of a preceding copyright-related act of use. The cable re-transmission right implies the right enjoyed by both authors and ancillary copyright holders to re-transmit broadcasts from broadcasters in an integral manner (i.e. simultaneous, unaltered, and unabridged re-transimssion) via cable[1]). On the basis of recent case law from the European Court of Justice (ECJ), it could be questionable whether the legal position in Austria and its embodiment through the precedents handed down in relation to integral cable re-transmission meet the requirements of European law. This article looks into that very question.

1. Integral cable re-transmission

a. Essential features of the regulation of integral cable re-transmission in Austria

The integral re-transmission of foreign broadcasts was – as a result of a political compromise – introduced into Austrian copyright law by the amendment of the Austrian Copyright Act 1980 (UrhGNov 1980)[2)] in the form of a statutory licence to replace the author's right of exclusion (resp approval) established under case law[3]) up to that time. This provision remained in force up to the implementation of the relevant provisions under European law, which was necessary on account of the Satellite and Cable Directive[4]) proceeding from the principle of the contractual acquisition of transmission rights in place of the statutory licence. This resulted in the course of implementing the directive through the amendment of the Austrian Copyright Act 1996 (UrhGNov 1996)[5]) turning away from the statutory licence and moving towards re-introducing the right of exclusion. However, the special provision of sec. 17, para. 3 of the Austrian Copyright Act[6]) for the Austrian Broadcasting Cooperation (ORF) created through the UrhG-Nov 1980 was retained. The statutory provision of the present sec. 59a of the Austrian Copyright Act does not distinguish (any longer) between domestic and foreign broadcasts and is also applicable with regard to the re-transmission of satellite programs[7]). According to the

MMag Dr Thomas Wallentin, attorney at law and founding partner of Kunz Schima Wallentin Rechtsanwälte OG, Vienna
Dr Leonhard Reis, former senior associate with Kunz Schima Wallentin Rechtsanwälte OG, now with Hausmaninger Kletter, Vienna

1) With regard to the individual elements of the definition of the principle of integrality, see in detail: *Lusser/Krassnigg-Kulhavy*, "§ 59aUrhG" in: *Kucsko* (ed.) "urheber.recht" 890 et seq. (Manz, Vienna 2008) . See also *Walter*, "Österreichisches Urheberrecht I" margin no. 677 (Medien und Recht, Vienna 2008)
2) Federal Law Gazette 1980/321. With regard to the 1980 amendment, cf. : UFITA 88 (1980) 196; *Handl*, "Zur Frage der Anwendung des österreichischen Verwertungsgesellschaftengesetzes und der Vorschriften über die Schiedsstelle gemäß Urheberrechtsnovelle 1980", 1981 FuR 118 et seq as well as *Hodik*, "Rechtsprechung zu den österreichischen Urheberrechtsnovellen von 1980 and 1982", 1984 UFITA.
3) Austrian Supreme Court, 25 June 1974, 4 Ob 321/74 – ÖBl 1974, 140 = SZ 47/81 = EvBl 197576 = JBl 1976/96) GRURInt 1975, 68 = UFITA 73 (1975) 357 = FuR 1974, 51 (so-called *Feldkirch ruling*) and Austrian Supreme Court 12 November 1979, 4 Ob 374/79 – RfR 1980,21 = GRURInt 1980, 308 = UFITA 87 (1980) 372 = FuR 1980, 107 (so-called *Plutonium ruling*).
4) Council Directive 93/83/EEC dated 27 September 1993 on the coordination of particular copyright and ancillary copyright provisions concerning satellite broadcasting and cable re-transmission. With regard to the directivein general, cf. esp. *Dreier*, "Satellite and Cable Directive" in: *Walter/Lewinski* (eds.), "European Copyright Law" 391 et seq. (Oxford University Press, New York 2010). See also *Auer*, "Die Umsetzung urheberrechtlicher Richtlinien am Beispiel der Satellitenrichtlinie" in; *Dittrich* (ed.), "Beiträge zum Urheberrecht V" 19 et seq. (Manz, Vienna 1997); *Dreier*, "Die Umsetzung der Richtlinie zum Satellitenrundfunk und zur Kabelweiterverbreitung", 1995 ZUM 1995 458 et seq.
5) Federal Law Gazette 1996/151.
6) Sec. 17, Para 3 of the Austrian Copyright Act contains special provisions under which the transmission of broadcasts via radio relay exchange facilities or community antenna systems and the transmission of ORF broadcasts by means of cables in the country are not deemed to constitute a new broadcast insofar as they concern integral transmissions. This special provision of integral cable re-transmission applies under law only to ORF (cf. *Lusser/Krassnigg-Kulhavy*, "§ 17 UrhG" in: *Kucsko*, "urheber.recht" 266 [Manz, Vienna 2008]), and not to private radio or television stations and is therefore problematic from the point of view of basic rights in relation to the principle of equal treatment on account of the unequal treatment (cf. *Walter*, "Österreichisches Urheberrecht I", margin no. 675f [Medien und Recht, Vienna 2008] with further references).
7) *Walter*, "Österreichisches Urheberrecht I", margin no. 677 (Medien und Recht, Vienna 2008; *Lusser/Krassnigg-Kulhavy*, "§ 59a UrhG" in: *Kucsko* (ed.) "urheber.recht" 888 (Manz, Vienna 2008).

appropriate opinion in legal doctrine, this also applies to the re-transmission of original cable programmes, as well as terrestrial programmes or those transmitted via satellites, which are fed into cable networks[8]).

The Satellite and Cable Directive governs cable re-transmission within the context of the definition of the term in Art. 1 and in Art. 8-10[9]). According to the definition of Art. 1, Par. 3 of the Satellite and Cable Directive, cable re-transmission (the technical term used in the Directive) is deemed to mean the simultaneous, unaltered, and unabridged re-transmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including the transmission by satellite, of television or radio programmes intended for reception by the public[10]).

Integral cable re-transmission is structured, as it were, in a two-stage manner in the Satellite and Cable Directive and consequently in the Austrian implementation in the form of Sec. 59a and 59b of the Austrian Copyright Act: the general right of interdiction enjoyed by the authors and the ancillary copyright holders through the individual safeguarding of rights exists only in principle. The exertion of the rights was, with the introduction of the collective safeguarding of rights, subject to restrictions to ensure the comprehensive acquisition of rights on part of the cable network operators in the case of cross-border cable broadcasting[11]). The outsider provision contained in Art. 9, para 2 of the Satellite and Cable is ensued too. Although the author can continue to decide whether he/she would like to grant cable re-transmission rights at all, the Satellite and Cable Directive ties together both the exertion of the right of interdiction as well as the assertion of remuneration rights to be exercised via collecting societies (Art. 9, para 1) or – as an alternative – through broadcasting organizations in relation to their transmissions with the inclusion of the rights assigned to them by authors and ancillary copyright holders (Art. 10). This means that, as a result, the author no longer has any possibility to exercise the right of interdiction (to which he/she is entitled per se) him/herself (and on an individual basis).

For this reason, the Austrian implementing law stipulates in Sec. 59a, para 1 of the Austrian Copyright Act that the right to broadcast a work through integral re-transmission can only be asserted by collecting societies. Para 2 leg cit regulates the principle of granting contractual cable re-transmission rights through collecting societies while it, however, implements the outsider provision. Sec. 59a, para 3 of the Austrian Copyright Act finally provides for the exception of the broadcasting companies. In addition, Sec. 38, para 1a of the Austrian Copyright Act further regulates the authors of films' participation entitlements (only) to the remuneration for integral cable re-transmission[12]).

b. Initial transmission as a prerequisite

To enable the right of cable re-transmission to be safeguarded at all as a second exploitation right, a prerequisite exists for another form of use preceding the re-transmission. Such other use has to ensue in an earlier broadcast directed at the "public" [13]). The importance of the preceding transmission was also expressly emphasised[14]) by the Austrian Supreme Court in its *Sky Channel ruling* concerning the former legal situation[15]). The manner in which the inital transmission has to be carried out was not and is not relevant in legal terms. The literature therefore lists inital transmissions via broadcasting, television broadcasting, satellite broadcasting, cable broadcasting, or similar technical means as possible (preceding) forms of use[16]).

c. The element "public" in Austrian Supreme Court decisions

In addition to the concept of the "public" concerning exploitation rights in marginal areas of copyright law, the Austrian Copyright Act uses a large number of different concepts of the "public". These must be viewed differently to the general concept of "public" relating to exploitation rights depending on the subject matter to be regulated (e.g. publication within the meaning of Sec. 8 of the Austrian Copyright Act or public accessibility in Sec. 21, para 1 of the Austrian Copyright Act)[17]).

In Austria, the Supreme Court first dealt with the concept of "public" – relating to exploitation rights – in the case of cable re-transmission in the new version of Sec. 59a of the Austrian Copyright Act[18]) in connection with the so-called *Breitenfurt Cable Network ruling* (hereinafter "*Brei-*

8) *Walter*, "Österreichisches Urheberrecht I" (Medien und Recht, Vienna 2008) margin no. 677.

9) Art. 8 – 10 of the Satellite and Cable Directive are formed by Chapter III. Cable redistribution.

10) *Dreier*, "Satellite and Cable Directive" in: *Walter/Lewinski* (eds.), "European Copyright Law" 391 et seq. [446-447] (Oxford University Press, New York 2010).

11) Art. 8, Para 1, Art. 9, Para 1 of the Satellite and Cable Directive. Also see, in particular, recitals 27 et seq.. In relation to this, see *Dreier*, "Satellite and Cable Directive" in: *Walter/Lewinski* (eds.), "European Copyright Law" 391 et seq. [446] (Oxford University Press, New York 2010).

12) Sec. 38, para 1 of the Austrian Copyright Act expressly states that the authors of the film is entitled to a share only with regard to the part of the remuneration, which is apportioned to payment for the right to use the cinematographic work. If the amount of this share is acknowledged by the film producer or is set by the courts, the authors of the film can – via the collecting society representing them – also assert the claims existing vis-à-vis the fim producer (or those authorised by the producer to use the work) directly against the cable operator as the party authorised to use the work. Cf. *Wallentin*, § 38 UrhG in: *Kucsko* (ed.), "urheber.recht" 534 (Manz, Vienna 2008).

13) Austrian Supreme Court 13 November 2001, 4 Ob 182/01w = MR 2002, 34 (*Walter*) – ÖBl-LS 2002/72 – ÖBl 2002, 149 – RfR 2002,62 (*Dittrich*) – ZfRV 2002, 75 – GRURInt 2002, 938 – *Kabelnetz Breitenfurt*.

14) Before the UrhGNov 1996 copyright law amendment.

15) Austrian Supreme Court 4. February 1986, 4 Ob 354/85 - ÖBl 1986,53 – MR 1986, H2,16 (*Korn, Walter*) – RfR 1986,35 – EvBl 1986/270 – JBl 1986,320 – RdW 1986, 177 – GRURInt 1986,44 ZUM 1986,25 – SZ 59/24.

16) *Lusser/Krassnig-Kulhavy*, "§ 59a UrhG", in: *Kucsko* (ed.), "urheber.recht" 888 (Manz, Vienna 2008)

17) *Walter*, "Österreichisches Urheberrecht I" 321-322 (Medien und Recht, Vienna 2008).

18) In relation to the former legal situation, the Austrian Supreme Court had found in the Sky-Channel ruling that the in-feed and re-transmission of Sky-Channel into the Vienna Cable TV Network did not constitute a "re-transmission of foreign broadcasts" within the meaning of Sec. 59a of the old Copyright Law on account of the absence of any "preceding" transmission perceptible for →

tenfurt ruling")[19]), expressly finding in this regard that a copyright-related act of transmission does not necessarily have to be aimed directly at the public as long as the (general) aim of the act of use is to be directed at the public in the end: If a work is rendered audible or visible with the help of Hertzian waves within the range of anyone using an appropriate receiving device, a transmission is deemed to have taken place. It is not important whether actual perception occurs, according to the Supreme Court. The mere possibility of this – like the mere possibility of use of the work in general under copyright law[20]) – is sufficient. The Supreme Court further states that the party passing on program-carrying signals on the basis of its own decision through feeding into cable systems is responsible for such act of use under copyright law insofar as it is only public reception that is the ultimate purpose of the re-transmission.

In the specific initial case, the act of use was the supply of signals received over one's own satellite reception system to contract partners via a head station and cable network for the purpose of being forwarded to the households connected to different local cable networks. Consequently, in the view of the Austrian Supreme Court, both the feed to the individual households connected as well as the entire process of the „use" of broadcasts for this purpose (Sec. 17, para 2 and Sec. 59a, para 1 of the Austrian Copyright Act) as wired or cable redistribution are reserved for the author.

From the viewpoint of the Austrian Supreme Court, the legal independence of such local networks or the question of whether the forwarding cable company has a contractual relationship with the individual households was irrelevant.

The feeding of broadcasts – received via a head station – over a cable network to different and legally independent companies that carry out re-transmission to the individual households has in itself to be viewed as making these accessible to the public within the meaning of Sec. 17, para 2 of the Austrian Copyright Act. The (numerous) legally independent companies secure the re-transmission to the individual households connected themselves have to be regarded as a public within the meaning of Sec. 17, para 2 of the Austrian Copyright Act in light of the *Breitenfurt ruling*[21]).

If the Austrian Supreme Court then considers it sufficient for re-transmission in the *Breitenfurt ruling* that the act of transmission does not necessarily have to be aimed directly at the public as long as the aim of the act of use is to be directed at the public and it is not a matter of the actual perception according to the Austrian Supreme Court[22]). This also has to apply – lege non distinguente – to the initial transmission. There may not be any difference in legal terms between the requirements for the initial transmission and those applying to the second transmission[23]). In particular, there is no legally established differentiation of the prerequisites for public in relation to the inital transmission and the re-transmissions, nor would any such differentiation be justifiable – this alone in view of the uniformity of the concept of "public" relating to exploitation rights[24]).

d. Encrypted transmission as the initial transmission

In its ruling, which has met with approval in the legal doctrine[25]), the Austrian Supreme Court left open the question of the extent to which the (satellite-assisted) transmission of encrypted program signals, the reception of which is possible via receiving devices at the cable head stations owned by the cable operators, also represents an initial transmission relevant under copyright law. In other words, does an initial transmission also exist if it cannot be received by the public (directly)? Sec. 17a of the Austrian Copyright Act, which regulates the encrypted transmission of program-carrying signals as a lex specialis to Sec. 17 of the Austrian Copyright Act[26]), stipulates that these only concern a broadcast within the meaning of copyright law if the means for decoding are made accessible to the public by the broadcasting organziation itself or with its consent. This Austrian provision therefore applies not only to satellite broadcasting but, rather, also and equally to every other type of broadcasting[27]).

→ the interested public with justifiable technical and economic outlay. The transmission of the signals from the satellite is not a "preceding" broadcast by virtue of not being intended for the public (Austrian Supreme Court 4 February 1986, 4 Ob 354/85- ÖBl 1986,53 – MR 1986, H2,16 [*Korn, Walter*] – RfR 1986,35 – EvBl 1986/270 – JBl 1986,320 – RdW 1986, 177 – GRURInt 1986,44 ZUM 1986,25 – SZ 59/24). In the *RTL-Plus case*, the Supreme Court found as follows: A broadcast transmitted by terrestrial means in another country is only "used for simultaneous, complete and unaltered re-transmission" within the meaning of Sec. 59a if the domestic cable operator receives such signals transmitted by terrestrial means and feeds them into its cable network; if, on the other hand, it is exclusively the signals forwarded via the satellite that form the object of the (wired broadcasting) re-transmission in: Austria, it is then these signals that are used for the re-transmission – and not those distributed by terrestrial means simultaneously from Luxembourg. A preceding broadcast within the meaning of Sec. 59a of the former Austrian Copyright Act does not then exist (Austrian Supreme Court 13 December 1988, 4 Ob 72/88– ÖBl 1989, 26 – MR 1989,19 [*Walter*] – wbl 1989, 65 [*Scolik*] – ZfRV 1989, 57 [*Hoyer*] – ZUM 1989, 13 – ZUM 1990, 29 – GRURInt 1989,422 [*Dreier*] – SZ 61/268).

19) Austrian Supreme Court 13 November 2001, 4 Ob 182/01w = MR 2002, 34 (*Walter*) – ÖBl-LS 2002/72 – ÖBl 2002, 149 – RfR 2002, 62 (*Dittrich*) – ZfRV 2002, 75 – GRURInt 2002, 938 – *Kabelnetz Breitenfurt.*

20) E.g. *Walter*, "Die Werknutzung in unkörperlicher Form (öffentliche Wiedergabe)", 1998 MR, 132.

21) See also *Walter*, in his comments on the *Breitenfurt ruling*, 2002 MR,34

22) Cf. also the most recent ruling by the Austrian Supreme Court (Austrian Supreme Court, 26 August 2008, 4 Ob 89/08d = MR 2009, 34 [*Walter*] = ÖBl 2009/16): concerning re-transmission via cellular networks, in which the Supreme Court regarded as unproblematic the fact that a public exists in the case of re-transmission of broadcasts via cellular networks if, with the help of a server, up to 1,500 consumers are supplied via one server, with the possibility of putting other servers into operation as required.

23) E.g. expressly for Germany: *Dreier/Schulze*, "Urheberrechtsgesetz", Sec. 20 Copyright Act margin no. 7. (3th ed. Munich 2008)

24) *Walter*, "Österreichisches Urheberrecht I" 321-322 (Medien und Recht, Vienna 2008) .

25) *Walter*, supra note 21, 34.

26) Regarding the relationship between Art. 17 of the Austrian Copyright Act and Art. 17a of the Austrian Copyright Act, cf. *Lusser/Krassnig-Kulhavy*, "§ 17a UrhG" in: *Pichler*, "Die neue Urheberrechtslage der Kabelweiterverbreitung von ausländischen Fernsehsendungen", 1998 MR 21 et seq..

27) *Lusser/Krassnig-Kulhavy*, "§ 17 UrhG" in: *Kucsko* (ed.), "urheber.recht" 285-286 (Manz, Vienna 2008).

Proceeding from the Breitenfurt ruling handed down by the Austrian Supreme Court, it therefore does not make any difference in legal terms whether the initial transmission ensues in encoded or non-coded form. What – exclusively – is decisive is, whether the aim of the act of use is for it to be directed at the public[28]).

2. The influence of decisions under European law

a. Concerning the "public"

The view taken by the Supreme Court has to be examined in the light of the case law handed down by the ECJ with regard to whether more recent rulings by the latter run counter to precedents in Austria, given that the Austrian Supreme Court, as a national court, has to interpret national law in compliance with the directives, while the case law handed down by the ECJ assumes a general effect in de facto terms by virtue of the monopoly of interpretation under Art. 234, para 1 b of the EC Treaty (now Art 267 of the Treaty on the function of the European Union)[29]). In order to be able to answer the question whether there is a case of an initial transmission relevant to copyright, Austrian national copyright law has to be interpreted in the light of the requirements under European and international law. This was also emphasised in clear terms by the Austrian Supreme Court in the *Breitenfurt ruling*[30]). Relevant here is the right of communication to the public as defined in greater detail in Art. 3 of the InfoSoc Directive[31]) and in Art. 1, para 2a of the Satellite and Cable Directive[32]). In the *SGAE/Rafael ruling*[33]), the ECJ rejected the view that it was incumbent on the Member States to regulate the definition of "public" and stated expressly that the term „public" is, as far as it is relevant under European law, to be interpreted autonomously under community law.

The relationship between the Satellite and Cable Directive and the InfoSoc Directive can only be investigated briefly here. There are, however, good reasons for the Satellite and Cable Directive, which regulates cable re-transmission in fundamental terms, to be dealt with separately within the framework of European copyright law. On the one hand, the Satellite and Cable Directive was not included in the 1988 green paper and instead forms the "separated" part with copyright reference relating to Directive 89/552/EC on television without borders[34]). The intention of the Satellite and Cable Directive was thus to open up the internal market for the reception of television programmes distributed via satellite or cable in a manner not restricted by national borders. The Directive consequently underlies problems related more to media law and less to copyright law, which is why the solution approach of the directive with regard to cable transmission cannot be generalised in a restriction of the assertion of (exclusion) rights based on the model of the mandatory safeguarding of rights through collecting societies. It is therefore questionable to what extent the directive – which, as a result, restricts the exertion of copyright in favour of the overriding media policy goal of the most widespread distribution of transmissions possible – can be considered at all for copyright-related issues[35]). However, as the autonomous Community interpretation of the concept of "public" in connection with public reproduction is of fundamental importance for the entire area of Community copyright law and extends beyond cable re-transmission in terms of the area of regulation, only the case law of the ECJ, which was not handed down exclusively in relation to the Satellite and Cable Directive, can therefore be considered for interpreting the term "public". In this respect, the emphasis is placed in the following on the ECJ rulings issued in relation to the InfoSoc Directive because it can be applied to any public reproduction of protected works, while the Satellite and Cable Directive only provides for the minimum harmonisation of particular aspects of the protection of copyrights (and related protection rights) in the case of public reproduction via satellite or the redistribution of programmes from other Member States via cable[36]).

In its more recent case law, the ECJ has dealt with the copyright-related concept of the public in the *SGAE/Rafael ruling*[37]), issued in relation to the InfoSoc Directive, the *Lagardère ruling*[38]), issued in relation to the Renting and Hiring Directive as well as the Satellite and Cable Directive, and the *Mediakabel ruling*[39]), issued in relation to the InfoSoc Directive and the Television without Borders Directive. Accordingly, the reception of a signal by the public, i.e., an indefinite number of possible viewers or listeners, is requi-

28) In this sense, also *Walter*, supra note 21,34.

29) For a similar question on the relationship between the court rulings Austrian Supreme Court 16 June 1998 – 4 Ob 146/98 (*Thermenhotel*) and 10 February 2004 (4 Ob 249/03a) on ECJ case law, see *Hoeren*, "Der urheberrechtliche Begriff der öffentlichen Wiedergabe in Österreich", in: *Hilty/Drexl/Loewenheim* (eds.), FS Loewenheim 140 et seq. (Beck, Munich 2009).

30) Cf. the headnote of the *Breitenfurt ruling* concerning Sec. 17 of the Austrian Copyright Act in: *Dittrich*, "Urheberrecht" (5th ed. Vienna 2007).

31) European Parliament and Council Directive 2001/29/EC dated 22 May 2001 on the harmonisation of particular aspects of copyright and related protection rights in the information society. In relation to the directive in general, see *v Lewinski/Walter*, "Information Society Directive" in: *Walter/v Lewinski* (eds.) "European Copyright Law" 921 et seq. (Oxford University Press, New York 2010).

32) Provided for under international law in Art. 11bis, Par. 1 of the Revised Berne Convention.

33) ECJ 7 December 2006 case no. C-306/05, GRURInt 20007, 225 – EuZW 2007,81 – MMR 2007, 164 – MR 2006, 381 – ÖBl 2007/88 (*Dittrich*) – ZUM 2007,132 – *SGAE/Rafael.*

34) Cf. *Reinbothe*, "§ 4 Der acquis communitaire des Europäischen Urheberrechts" in: *Riesenhuber* (ed.), "Systembildung im Europäischen Urheberrecht" 87-88 (De Gruyter, Berlin 2007).

35) *Reinbothe*, "§ 4 Der acquis communitaire des Europäischen Urheberrechts" in: *Riesenhuber* (ed.), "Systembildung im Europäischen Urheberrecht" 87-88 (De Gruyter, Berlin 2007).

36) See the argumentation of the ECJ in *SGAE/Rafael case*.

37) ECJ 7 December 2006 case no. C-306/05, GRURInt 20007, 225 – EuZW 2007,81 – MMR 2007, 164 – MR 2006, 381 – ÖBl 2007, 88 (*Dittrich*) – ZUM 2007,132 – *SGAE/Rafael.* see also *Mahr*, "Die öffentliche Wiedergabe von Rundfunksendungen im Hotelzimmer, Anmerkung zu EuGH 7. 12. 2006 (Dritte Kammer) in der Rechtssache C-306/05 – Luxemburg locuta, causa finita", 2006 MR 372 et seq.

38) ECJ 14 July 2005, case no. C-192/04. *Lagardère*, GRUR 2006,50 – ZUM 2005,725 – EuZW 2005,535.

39) ECJ 2 June 2005, case no. C-89/04, *Mediakabel*, MR-Int 2005, 104 – ZER 2006/208 – ZUM 2005, 549– MMR 2005, 517.

red for affirming the "public" characteristic. As found by the ECJ in the *Lagardère ruling*[40]) on the question of feeding special signals that cannot be received by the public to re-transmission organziations, "a limited group of persons only able to receive signals from the satellite via professional equipment cannot be regarded as the public".

The ECJ did not consider the question of whether the totality of all the cable head stations could, taken in themselves represent a public, as also held by the Austrian Supreme Court in the *Breitenfurt ruling*[41]). In particular, the considerations of the ECJ in relation to "public reproduction" in the InfoSoc Directive are of importance here: it follows form recital 23 of the InfoSoc Directive that the term "public reproduction" is to be understood in broad terms. This was emphasised by the ECJ in the *SGAE/Rafael case*[42]). Furthermore, the ECJ states in its grounds for the decision that such an interpretation is otherwise essential in order to achieve the main objective of the InfoSoc Directive, which entails, according to recitals 9 and 10, attaining a high level of protection for the authors so as to give them the possibility to receive reasonable remuneration for the use of their works, including the case of public reproduction[43]). The ECJ also expressed this in the grounds for the decision: In order to correspond to the facts of the case in the initial proceedings, a comprehensive approach was necessary in which, on the one hand, not only the guests staying in the hotel rooms had to be considered but, rather, also those guests not explicitly referred to in the questions for the preliminary ruling who are in other areas of the hotel and for whom a television is provided there[44]). The ECJ therefore also took the (mere) possibility of receiving the television programme in the common/recreation rooms and areas of the hotel with regard to public reproduction and not the actual reception and thus deemed – in addition to the argument of the constantly changing hotel guests – the existence of a sufficient public into account.

The very system of the Satellite and Cable Directive also concentrates in connection with the right of public reproduction on the fact that public reproduction through making the programme perceptible occurs within the meaning of the transmission of signals and does not take into account whether the transmitted signals are also actually received[45]).

In relation to the changing hotel guests, the ECJ clearly took up the legal concept of the "successive public", which exists in Austrian case law (cf also Art. 3 of the InfoSoc Directive regarding interactive reproduction), though without using this term as such. The Austrian Supreme Court had ruled the playing of films in individual video booths ("Videokabinen") as constituting public performance within the meaning of Sec. 18 of the Austrian Copyright Act[46]). From the Austrian Supreme Court's viewpoint, it is not a matter of such persons being congregated together[47]) or of the work being conveyed to them at the same time. A "public" performance also exists according to this ruling where modern technical storage and transmission systems facilitate the successive covering of such a group of persons with the help of a copy[48]). This term of a "successive public" is also of importance above and beyond Sec. 18 of the Copyright Law and is – in the sense of a uniform term of "public" in relation to exploitation rights under copyright law – relevant for every exploitation right to which the author is entitled exclusively[49]). Also in connection with the right of making works available under Sec. 18a of the Austrian Copyright Act, in particular, which is essentially based on Art. 3 of the InfoSoc Directive[50]), it is evident that the World Wide Web (or other digital networks) also constitutes a public. Austrian legislation has clearly emphasised the relevance and even necessity of a successive public under copyright law with the definition of use by the public "at times of their choice" and expressly established this in law. There can be no doubt about Sec. 18a of the Austrian Copyright Act conforming to the directive[51]). The legal concept of the successive public ("sukzessive Öffentlichkeit"), as defined by the Austrian Supreme Court, is therefore imperative in European law and is in accordance with ECJ case law.

It can therefore be assumed that the totality of the cable head stations also facilitates successive covering of those persons that ultimately form the public in their entirety and that, as a further consequence, a successive public also exists in this case. If the totality of all the cable head stations is now regarded as a public, it would not appear necessary for an indefinite number of cable head stations capable of reception to exist. Precisely because – as shown in the ECJ ruling in the *SGAE/Rafael case* – the number of hotel guests can in any case be determined (and without any considerable effort). In the light of this broad terms of the "public", which the ECJ used as a basis for the *SGAE/Rafael case*, the transmission of encrypted program signals which can be

40) ECJ 14 July 2005, case no. C-192/04. *Lagardère*, margin no. 31f.
41) Cf. criticism by *Dreier*: *Dreier/Schulze*, "Urheberrechtsgesetz", Sec. 20 (d) Copyright Act, margin no. 9 (3th ed. Munich 2008).
42) ECJ 7 December 2006, case no. C-306/05 *SGAE/Rafael* margin no. 36.
43) ECJ 7 December 2006, case no. C-306/05 *SGAE/Rafael* margin no. 36.
44) ECJ 7 December 2006, case no. C-306/05 *SGAE/Rafael* margin no. 38. In this sense, also expressly *Hoeren*, "Der urheberrechtliche Begriff der öffentlichen Wiedergabe in Österreich", in: *Hilty/Drexl/Loewenheim* (eds.), FS Loewenheim 144 et seq. (Beck, Munich 2009). Cf. also the ruling of Tribunal Supremo Madrid MR-Int 2007,113 (Mahr).
45) *Dreier*, "Satellite and Cable Directive" in: *Walter/Lewinski* (eds.), „European Copyright Law" [408-409] (Oxford University Press, New York 2010).
46) In this sense, also note 38 *Hütter* "§ 18 UrhG", in: *Kucsko* (ed.), urheber.recht 299 (Manz, Vienna 2008).
47) E.g. Austrian Supreme Court 17 June 1986, 4 Ob 309/86 – JBl 1986, 655 – ÖBl 1986, 132 (so-called *Hotel Video* ruling).
48) See from older literature: *Walter*, "Die Hotel-Videosysteme aus urheberrechtlicher Sicht", 1984 MR Archiv 6.
49) See *Dittrich*, "Zur Übermittlung von Fernsehsignalen von der Hotelantenne in Gästezimmer", 2006 RfR 25: Not every sucessive reproduction, such as private television reception, can establish a public.
50) *Gaderer* "§ 18 UrhG" in: *Kucsko* (ed.), urheber.recht 310 (Manz, Vienna 2008). Concerning Art. 3 of the InfoSoc Directive and establishment of the successive public therein, see *v Lewinski/Walter*, "Information Society Directive" in: *Walter/v Lewinski* (eds.) "European Copyright Law" 988 (Oxford University Press, New York 2010).
51) See *Walter*, "Österreichisches Urheberrecht I" margin no. 736 (Manz, Vienna 2008).

received at the cable head stations (via receiving devices) can be deemed as being directed towards a public. Such transmission is, in light of the *Breitenfurt ruling*, therefore also to be regarded as an action of use directed at the public with due regard for the relevant judicature under European law up to now. Re-transmission after such a transmission is therefore an entitlement of both the authors and the ancillary copyright holders as a secondary exploitation right of re-transmission via cable (Sec. 59a of the Austrian Copyright Act).

b. Taking account of the programme-carrying signals

It can be concluded from Art. 1, Par. 2a of the Satellite and Cable Directive that the program-carrying signals have to be intended for reception by the public. The ECJ found as follows in the *Lagardère ruling*[52]): „A comparison of the different language versions of this provision, especially the English ("*programme-carrying signals intended for reception by the public*"), the German ("*die programmtragenden Signale, die für den öffentlichen Empfang bestimmt sind*"), the Spanish ("*las señales portadoras de programa, destinadas a la recepción por el público*") and the Dutch version ("*programmadragende signalen voor ontvangst door het publiek*") shows that the signals have to be intended for reception by the public and not the programmes carried by those signals. If the concept of the "public" in the *SGAE/Rafael case* is taken as a basis, it consequently follows from this that, as the programme-carrying signals are also transmitted to the cable head stations, the requirements of Art. 1, Par. 2a of the Satellite and Cable Directive are likewise met.

c. Encoded signals

Public performance not only exists in the case of a satellite transmission under Art. 1, para 1, para 2a in conjunction with b, as well as Art. 2 of the Satellite and Cable Directive where the program-carrying signals are non-coded and can therefore be received freely. As it is very much a matter of whether signals can be received by the public, encoded signals under Art. 1, para 2c of the Satellite and Cable Directive are then also deemed as being receivable by the public if the corresponding means for decoding them are made available to the public[53]).

The view of the Austrian Supreme Court that it is only decisive whether the aim of the act of use is for the transmission to be directed towards the public is therefore also in accordance with the Satellite and Cable Directive.

3. Summary

The right of integral cable re-transmission to which authors and ancillary copyright holders are entitled has its origin under European law in the Satellite and Cable Directive. As a secondary exploitation right, the cable re-transmission right presupposes an earlier broadcast to the public. According to the fundamental ruling handed down by the Austrian Supreme Court in the *Breitenfurt case*, which was handed down in relation to the right of re-transmission, this initial transmission (for which the same must apply as for the re-transmission) does not necessarily have to be aimed directly at the public, as long as the goal of the act of use is for this to be directed towards the public. This initial transmission can therefore be carried out in encoded or non-coded form.

In the *Lagardère case*, the ECJ did not regard the signals from satellites that can only be received using professional equipment (i.e. reserved for specialists) as intended for the public. However, the ECJ left the question unanswered whether the totality of all the cable head stations (and in this respect also the entirety of cable head stations) constitute a "successive public" under copyright law, as assumed by the Austrian Supreme Court. With due regard for the broad concept of "public" in the InfoSoc Directive and the interpretation of the term "public" by the ECJ in the *SGAE/Rafael case*, in which the combination of mere receivability of signals and successive receivability was sufficient for the existence of a public under copyright law, it is to be assumed that the legal view of the Austrian Supreme Court in the *Breitenfurt ruling* continues to be in accordance with European law.

Resumée (*Wallentin/Reis*, Das Zweitverwertungsrecht der Kabelweiterleitung im österreichischen Recht):

Das Urhebern und Leistungsschutzberechtigten zustehende Recht der integralen Kabelweitersendung hat seinen europarechtlichen Ursprung in der Satelliten- und Kabel-RL. Als Zweitverwertungsrecht setzt das Kabelweitersendungsrecht eine zeitlich vorhergehende Rundfunksendung an die Öffentlichkeit voraus. Nach der Entscheidung des OGH Kabelnetz *Breitenfurt* zum Weitersendungsrecht muss sich diese Erstsendung (für die das gleiche wie für die Weitersendung zu gelten hat) nicht notwendigerweise unmittelbar an die Öffentlichkeit richten, solange es das Ziel der Nutzungshandlung ist, an die Öffentlichkeit gerichtet zu werden. Diese Erstsendung kann daher in codierter oder uncodierter Form erfolgen.

In der Rs *Lagardère* hat der EuGH die Signale von Satelliten, die ausschließlich mit professionellen (also Fachleuten vorbehaltenen) Geräten empfangen werden können, nicht als Öffentlichkeit angesehen. Offengelassen hat er jedoch, ob die Gesamtheit aller Kabelkopfstationen (und insoweit auch die Gesamtheit von Kabelkopfstationen) eine „sukkzessive" Öffentlichkeit bilden, wie dies der OGH angenommen hat. Bei Berücksichtigung des weiten Öffentlichkeitsbegriffs der Info-RL und der Interpretation des Begriffs der Öffentlichkeit durch den EuGH in der Rs *SGAE/Rafael*, in der die Kombination aus bloßer Empfangbarkeit von Signalen aund sukzessiver Empfangbarkeit für das Vorliegen urheberrechtlicher Öffentlichkeit ausgereicht haben, ist davon auszugehen, dass die Rechtsansicht des OGH in der Kabelnetz Breitenfurt-E auch weiterhin europarechtskonform ist.

52) ECJ 14 July 2005, case no. C-192/04. *Lagardère* margin no. 35.
53) *Dreier*, "Satellite and Cable Directive" in: *Walter/Lewinski* (eds.), "European Copyright Law" 416 (Oxford University Press, New York 2010).