

The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age

Submitted by

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Signed

Cheryl Jo Lin Foong

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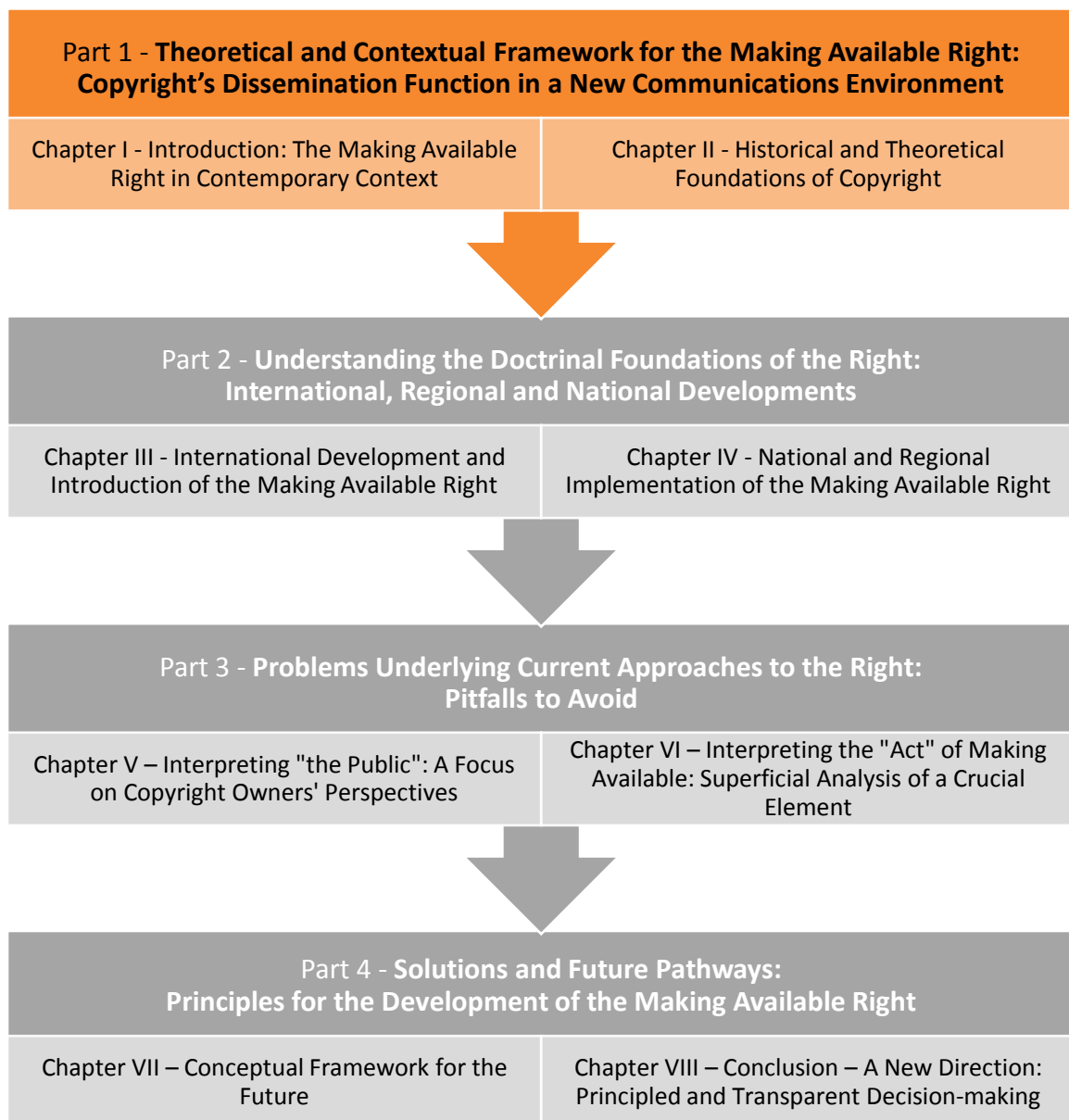
ABSTRACT

This thesis seeks to analyse the scope of the making available right as introduced by the WIPO Internet Treaties, and provide insights that can guide the interpretation of the right going forward. It does so by critically analysing the key elements of the making available right — an “act” of making available that is to “the public”. The thesis evaluates current judicial approaches to the right in Australia, the US and EU, and attempts to uncover the underlying theories and justifications driving these disparate decisions. Review of current and historical approaches to “acts” of communication, performance or making available reveal superficial analysis of the “act”, and show that courts have taken expansive approaches to “the public” in key cases. An express justification in these instances tends to be the advancement of copyright’s authorship incentivising function. Unfortunately, these decisions do not adequately address copyright’s dissemination function, i.e. to encourage public access to knowledge. This thesis fills a void in copyright scholarship by expanding on copyright’s dissemination function and advancing our understanding of this important objective. It aims to produce a framework for the interpretation and development of the making available right that furthers copyright’s dissemination function, as well as its authorship function, in the internet era.

- PART 1 -

Theoretical and Contextual Framework for the Making Available Right: Copyright's Dissemination Function in a New Communications Environment

This first part provides the legal and theoretical foundations needed to develop our understanding of the making available right, and constructs the basic framework for analysis throughout this thesis. It highlights the unique nature of the making available right in copyright law, and explores both the historical roots of the right and its contemporary context.



CHAPTER I. INTRODUCTION: THE MAKING AVAILABLE RIGHT IN CONTEMPORARY CONTEXT

Purpose

This chapter aims to introduce the subject matter of this thesis and highlight the increasing importance of the making available right. To do so, it will:

1. Explain the objectives of this thesis and its significance;
2. Set out the research proposal and structure of the thesis; and
3. Discuss the research methodology and delineate matters that are beyond the scope of this thesis.

Sections

- A. Introduction
- B. Subject Matter and Context
- C. Significance and Objectives
- D. Methodology
- E. Matters Beyond the Scope of this Thesis
- F. Structure of the Thesis

Section A. Introduction

This thesis analyses the scope of the making available right, and seeks to develop a constructive framework for the interpretation of the right. The making available right posits that copyright owners have the exclusive right to make their copyright material available online to members of the public. The basic elements of the right are (1) an “act” of making available, that is (2) to “the public”. The first element requires an analysis of *how* accessibility is brought about, and *who* is responsible for that act. The second element — “the public” — considers if those capable of receiving or gaining access to the copyright owner’s content are “members of the public”. Both elements have raised conceptual and practical issues for courts interpreting the right, and the default approaches have erred on the side of broader protection, to ensure the maintenance of *existing* markets for the dissemination of copyright content and to protect authorship incentives.

Such approaches evince a partial understanding of copyright’s core functions, of which there are two: (1) an authorship function, and (2) a dissemination function. Copyright’s authorship function is well-accepted and often-cited. Under this function, copyright aims to incentivise the creation of new works of authorship, by providing limited statutory exclusivity to authors in their resulting creations. A second function, which occupies an increasingly prominent role in the digital age, is copyright’s dissemination function. This function encourages the efficient dissemination of copyright content to

the public. It aims to ensure broad access to knowledge, and the advancement of our abilities to read, write, enjoy content and communicate with one another.

This thesis proposes strategies for remedying current approaches to the making available right that fail to adequately address copyright's dissemination function. It articulates a conceptual framework for the interpretation and development of the making available right that promotes *both* functions of copyright, instead of favouring copyright's authorship function by default. This framework can be implemented by courts, legislators and industry participants to bring transparency and coherence to debates on the scope of the making available right.

Section B. Subject Matter and Context

Today, the dissemination of content is instantaneous and interactive in nature. We access “books” on wafer thin devices. Hoards of data, whether on this evening's traffic or this week's weather, are available at our fingertips — presented in an individualised manner on smartphone applications. Music and movies can be streamed on demand from our laptops and tablets. We see, hear and experience these streams of information, images and sound — but do we care about where they come from or where they are stored? What role should copyright play in this new environment of on demand access?

In this context, digital technologies and the online markets developing around them are swiftly displacing the traditional reliance on the distribution of multiple copies of copyright works for income generation.¹ Consumers, as described by the Director-General of WIPO Dr Francis Gurry, have an interest in ‘the short-term gratification of immediate consumption’,² something which no longer requires the distribution of copies. Copies, while still important, are losing significance as the key

¹ See William A van Caenegem, ‘Copyright, Communication and New Technologies’ (1995) 23 *Federal Law Review* 322, 325 (predicting that interactive access to copyright works would be increasingly common, and that income from reproduction would be partly usurped).

² At an address delivered at the Blue Sky Conference in 2011, Dr Gurry stated the central question of copyright policy as follows:

How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them navigate the economic system? It is a question that implies a series of balances: between availability, on the other hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.

Francis Gurry, ‘The Future of Copyright’ (at the Blue Sky Conference: Future Directions in Copyright Law, Sydney, 25 February 2011) <http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html>. See also Francis Gurry, ‘Foreword: The Future of Copyright’ in Brian Fitzgerald and John Gilchrist (eds), *Copyright Perspectives: Past, Present and Prospect* (Springer, 2015) vi.

driver of copyright markets. In these online markets, value lies primarily in *access* to the work, i.e. experiencing a transient representation of the work without necessarily acquiring a tangible copy.³ These markets give effect to copyright's dissemination function,⁴ ensuring that members of the public are able to access, consume and learn from copyright content. Securing incentives to create on the part of copyright owners is but one of copyright's core functions. The other end of the "social contract"⁵ requires that the resulting works are disseminated to the public. Without efficient dissemination of copyright content to the public, the benefits flowing from the copyright system will not be fully realised.

In this online environment, the right to make copyright content available to the public is poised to surpass the reproduction right in importance and prominence. The "making available" right is an exclusive right of authors, performers and phonogram producers to make their works and other protected material available to the public through electronic interactive networks such as the internet. The right is contained in the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT")⁶ and WIPO Performances and Phonograms Treaty ("WPPT")⁷ (collectively known as the "Internet Treaties"),⁸ concluded in Geneva on 20 December 1996.⁹ The Internet Treaties entered into force in 2002, and have since been acceded to or ratified by 96 contracting parties.¹⁰

³ See Jane C Ginsburg, 'From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law' in Hugh Hansen (ed), *US Intellectual Property Law and Policy* (Edward Elgar, 2000) 39; Guido Westkamp, 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36(5) *George Washington International Law Review* 1057.

⁴ See L Ray Patterson and Stanley F Jr Birch, 'A Unified Theory of Copyright' (2009) 46 *Houston Law Review* 215, 392, describing dissemination as one of several functions of copyright.

⁵ See *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458 471.

⁶ *WIPO Copyright Treaty*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) ('WCT,') (Australia entry into force 26 July 2007; US entry into force 6 March 2002; EU entry into force 14 March 2010).

⁷ *WIPO Performances and Phonograms Treaty*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) ('WPPT,') (Australia entry into force 26 July 2007; US entry into force 20 May 2002; EU entry into force 14 March 2010).

⁸ See Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press, 2002) 414–15.

⁹ WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8; WPPT, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) arts 10 and 14. Ibid arts 10 and 14.

¹⁰ See WIPO, *WIPO-Administered Treaties: Contracting Parties - WIPO Copyright Treaty* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16>; WIPO, *WIPO-Administered Treaties: Contracting Parties - WIPO Performances and Phonograms Treaty* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20>.

The right to make available to the public is recognized as a stand-alone right in article 10 and 14 of the WPPT,¹¹ and expressed in article 8 of the WCT as a “sub-right” to the communication right. Article 8 provides that:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.¹²

As part of the WIPO “Digital Agenda”, the drafters of the WCT and WPPT sought to modernize the Berne Convention,¹³ which covered the right to communicate to the public incompletely and imperfectly.¹⁴ The basic proposition was that transmissions of works on the internet and in similar networks should be the object of a copyright owner’s exclusive right (subject to appropriate exceptions).¹⁵ One of the main objectives of a broad “making available” right was to cover on-demand transmissions of copyright works through interactive systems, i.e. not just “push” technologies but “pull” technologies.¹⁶ Therefore, it would be irrelevant whether copies of a work were made available or whether the work was simply “made perceptible” to users.¹⁷ As explained by WIPO, the concept

¹¹ Article 10 of the WPPT extends the right of making available to the public to performers, for the recordings of their performances, and states:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 confers the same right on producers of sound recordings of performances.

¹² An agreed statement concerning article 8 is that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. ...’: WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8 n 7.

¹³ *Berne Convention for the Protection of Literary and Artistic Works*, signed 9 September 1886, (entered into force 5 December 1887) (*‘Berne Convention,’*), as amended on 28 September 1979, WIPO Lex No TRT/BERNE/001 (entered into force 19 November 1984).

¹⁴ Jane C Ginsburg, ‘The (New?) Right of Making Available to the Public’ in David Vaver and Lionel Bently (eds), *Property in the New Millenium: Essays in Honour of William R. Cornish* (Cambridge University Press, 2004) 234–47. It had become apparent that new binding international copyright norms were necessary, as the technology-centric communication rights in the Berne Convention for the Protection of Literary and Artistic Works was not adequate to respond to problems raised by digital technology. See also International Bureau of WIPO, ‘The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)’ <http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf>; Mihály Ficsor, ‘Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument: The Rorschach Test of Digital Transmissions’ in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment* (Kluwer, 1996) 111–21.

¹⁵ International Bureau of WIPO, above n 14, 5.

¹⁶ WIPO, ‘Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference (on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/4 (30 August 1996)’ 44 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2481> (‘Basic Proposal for Draft Treaty No. 1’).

¹⁷ WIPO, Summary Minutes, Main Committee I (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/102 (‘Summary

of making available extends to acts which make the work accessible by the public, even if ‘members of the public still have to cause the system to make it actually available to them’.¹⁸

The making available right is gaining prominence around the world.¹⁹ Governments, for example, are investing resources on studies and consultations regarding the right. These include a study conducted by the US Copyright Office to assess the making available right as given effect under US law, and investigate the feasibility and necessity of amendments to strengthen and clarify this area.²⁰ The European Commission has also funded a study on the relationship between the making available right and the reproduction right in cross-border digital transmissions.²¹ While scholars speculated on the correct interpretation of the making available right shortly after it was adopted,²² new challenges are emerging and raising further questions about the scope and proper interpretation of the making available right.

Minutes’) 40 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2472> (Chairman Jukka Liedes’s opening remarks on article 10 of the WCT).

¹⁸ WIPO, ‘Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (CT-8.6)’ (2003) 208 <http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf>. See also Ficsor, *The Law of Copyright and the Internet*, above n 8, 131:

In an interactive digital network, the role of a ‘receiver’ may be much more active; the ‘transmitter’ may only make the work or object of neighbouring rights *accessible* for *retrieval* by the members of the public who may eventually *cause* the system to *transmit* the work or object of neighbouring rights to them.

¹⁹ See Peter K Yu, ‘The Copy in Copyright’ in Jessica C Lai and Antoinette Maget Dominicé (eds), *Intellectual Property and Access to Im/material Goods* (Edward Elgar Publishing, 2016) 65, 84.

²⁰ See US Copyright Office, ‘The Making Available Right in the United States: A Report of the Register of Copyrights’ (February 2016) <http://copyright.gov/docs/making_available/>. The US Copyright Office finds that across the various jurisdictions and models of implementation, there is still a great deal of uncertainty and inconsistency as courts struggle to apply the right to new and emerging technologies (at 73). Note that the Internet Policy Task Force of the US Department of Commerce also discussed the making available right in its Green Paper: Internet Policy Task Force, US Department of Commerce, ‘Copyright Policy, Creativity, and Innovation in the Digital Economy’ (July 2013) 14–15 <<http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>>.

²¹ Sari Depreeuw and Jean-Benoît Hubin (De Wolf & Partners), ‘Study on the Making Available Right and Its Relationship with the Reproduction Right in Cross-Border Digital Transmissions’ (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf>.

²² See, eg, Ginsburg, ‘The (New?) Right of Making Available to the Public’, above n 14; Kim Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2’ (1999) 21(8) *European Intellectual Property Review* 398; Kim Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Right to Communicate Works to the Public: Part 1’ (1999) 21(7) *European Intellectual Property Review* 342; Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27(2) *Sydney Law Review* 237. See also more recent scholarship on the US distribution right and whether it extends to merely making copies available, as opposed to an actual distribution: Peter S Menell, ‘In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age’ (2012) 59 *Journal of the Copyright Society of the USA* 201.

Section C. Significance and Objectives

Despite the increasing prominence of the making available right, much of copyright law's focus tends to remain on the exclusive reproduction right.²³ Prominent IP scholars such as Jessica Litman and Pamela Samuelson have highlighted the problems caused by an overbroad application of the reproduction right in the digital age.²⁴ Due to this preoccupation with the reproduction right, most observers are blind to the potential afforded by the making available right in the midst of efforts to address emerging technologies.²⁵ Cases involving the provision of “cloud”-based²⁶ Remote Storage Digital Video Recorder (RS-DVR) services and primary liability for linking highlight the law's persistent focus on copies and our lack of engagement with the making available right.²⁷ In these instances, courts tend to use findings on the reproduction right to allocate liability for making copyright content available to the public.²⁸ In other words, who conducts the act of copying (or on whose facilities the reproduction occurs) determines liability.

Where courts refrain from focussing on copying, on the other hand, their interpretation of the making available right may hinge on analogies with out-dated technologies.²⁹ Furthermore, although the making available right has two basic elements—(1) an *act of making available* that is (2) *to the public*—a disproportionate emphasis tends to be placed on the requirement that the communication

²³ See André Lucas in *The WIPO Worldwide Symposium on the Future of Copyright and Neighbouring Rights* (Le Louvre, Paris, 1–3 June 1994, WIPO publication No 731 (E), 1994) 279. Prior to the adoption of the Internet Treaties, Lucas had succinctly summed up the difficulty posed by the online environment, stating:

[C]opyright and more especially the Anglo-American form of copyright, has evolved around the right of reproduction. How is one therefore to cater to this new reality? ... The truth of the matter, it seems to me, is that the procedures for the distribution of the work no longer appear to be essential.

See also Melville B Nimmer, ‘The Nature of Rights Protected by Copyright’ (1962) 10 UCLA Law Review 60, 62 (‘As the very name “copyright” suggests, the right to copy represents the most fundamental, as well as historically the first, right in the domain of literary property’).

²⁴ Jessica Litman, ‘Fetishizing Copies’ in Ruth Okediji (ed), *Copyright in An Age of Limitations and Exceptions* (Cambridge University Press, 2015); Pamela Samuelson, ‘Preliminary Thoughts on Copyright Reform’ (2007) 3 *Utah Law Review* 551, 563–65. See also Pamela Samuelson, ‘The Copyright Principles Project: Directions for Reform’ (2010) 25 *Berkeley Technology Law Journal* 1175, 1212 (the communication right is discussed briefly at 1214). See also Jessica Litman, ‘Copyright Legislation and Technological Change’ (1989) 68 *Oregon Law Review* 275, 353 (arguing that the law's claim over private reproductions and uses of copyright content ‘breeds disrespect for copyright among potential infringers and clouds the marketplace with confusion’).

²⁵ Cf William F Patry, *How to Fix Copyright* (Oxford University Press, 2011) 12, arguing that ‘we must focus on the rules for access as well as on the social, interactive way people now relate to each other and to copyrighted works’ (emphasis added).

²⁶ “Cloud” computing has been described, from the perspective of the user, as ‘storing and accessing data and programs over the Internet instead of your computer's hard drive’: Eric Griffith, *What Is Cloud Computing?* (13 March 2013) PCMag <<http://www.pcmag.com/article2/0,2817,2372163,00.asp>>.

²⁷ See the discussion of statutory implementation and judicial interpretation of the right in Chapter IV.

²⁸ See *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147.

²⁹ See *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) (applying the public performance right, which gives effect to the making available right in the United States).

be made to “the public”, with insufficient regard to the “act” of making available.³⁰ Despite the existence of protracted judicial analysis, the meaning of “the public” remains elusive. The concept of “the public”, developed prior to the proliferation of internet technologies, struggles to keep pace. Pressure on “the public” as a limit upon the making available right is intensified by our lack of understanding regarding the “act” of making available.

In promulgating the right to make available to the public, one of the objectives of the WIPO Internet Treaties was to address the interactive communication channels afforded by the internet and, in the process, facilitate public access to content.³¹ Yet, this important right remains under-theorized, and its scope uncertain.³² Current approaches to the right do not align with the core objectives of copyright, particularly the dissemination function embedded in modern copyright law’s foundational document — the Statute of Anne.³³ The protection of copies was a means to an end, not an end in itself — i.e. copyright protects copying as it has been the primary means of connecting authors with readers and each copy (in theory) represents a revenue stream for the copyright owner.³⁴

The internet may be the ‘ultimate ... phase in copyright’s long trajectory, perfecting the law’s early aim of connecting authors to their audiences’.³⁵ It is unlikely that this aim can be achieved if we continue with current ad hoc approaches to *the* key right in this environment. The lack of engagement with the making available right at a conceptual level means that there is little opportunity to develop coherent principles to guide interpretations of the right in the face of new technologies. Therefore, this thesis aims to fill this void by constructing coherent principles that will support the development of the making available right in tandem with the advancement of innovative communications technologies.

³⁰ See, eg, *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013). *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) (‘*Svensson*’).

³¹ See *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) Preamble (recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules raised by technological developments, and the profound impact such technologies have on the creation and use of content, and access to information).

³² The theoretical deficiencies of current approaches are discussed in Chapter V and Chapter VI.

³³ The full title of the act was ‘An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned’: see *Statute of Anne 1710* (London). It should be noted that there is some disagreement in existing scholarship over the function (or functions) of copyright and whether dissemination is a function.

³⁴ See, eg, Lyman Ray Patterson, *The Nature of Copyright: A Law of Users’ Rights* (University of Georgia Press, 1991) 177ff. Patterson argues that modern copyright law continues the long tradition as a form of trade-regulation, with authors as the beneficiary, but laments the fact that ‘the statute is so complex, judicial precedents so confusing, and an understanding of copyright history so rare that courts in recent years have tended to treat copyright as more proprietary than regulatory’.

³⁵ Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford Law and Politics, Revised edition, 2003) 277.

The making available right is a fundamental component of copyright in the dynamic internet environment. This thesis lays out important steps towards realising the potential of the right. It will critically analyse each element of the right, and consider whether internet technologies present an opportunity for copyright to fulfil its dissemination function more effectively than ever before.

In short, this research aims to provide a basis for clearer and more principled approaches to the making available right. The thesis contributes to the existing knowledge by:

- I. Demonstrating that the making available right is not given effect in a clear and consistent manner in a number of important copyright jurisdictions;
- II. Articulating the reasons why the making available right is under-theorized, and investigating how this perpetuates the current incoherence and lack of clarity;
- III. Providing a conceptual framework for understanding the role of the making available right in the modern information economy; and
- IV. Proposing policies and principles for the interpretation and further development of the making available right that brings copyright closer to its objective of facilitating the dissemination of knowledge, as well as encouraging the creation of cultural works.

Section D. Methodology

The research undertaken is doctrinal in nature, involving an investigation of existing knowledge from primary legal sources such as legislation, case law and international treaties. Analysis of these primary sources is further supported by secondary sources such as books, journal articles and reports. These sources are utilised to provide a clear and comprehensive discussion of the scope of the making available right, and provide insight on the current and emerging challenges relating to the right. Historical records regarding the negotiation and enactment of international treaties and national legislation have been consulted to provide context and explain the background of the WIPO Internet Treaties. In addition, this research moves beyond legal scholarship to consider broader theoretical discussions in the social sciences, covering topics such as causal theories of action and critical theories of technology. These theories are used to develop a better understanding of existing legal doctrines. The objective of this framework is to promote greater coherence and transparency in the development of the making available right that is in sync with technological change.

Section E. Matters Beyond the Scope of this Thesis

This thesis focusses on the making available right and its interpretation in Australia, the US and the EU. Other aspects of copyright law may be relevant to the broader aims articulated in this thesis, but are not the focus of enquiry. Where some of these matters are raised, they will be considered to the extent that they advance our understanding of the making available right. The limits of this thesis are

necessary to keep the research within reasonable bounds. A number of limits are explained in more detail below. Furthermore, it should be noted that the thesis considers the law as current to 1 December 2017.

1 The Reproduction Right

This thesis acknowledges and builds on existing criticisms of an overbroad interpretation of the reproduction right, but aims to find a sensible alternative to this misplaced focus on the reproduction right. It may to a limited extent consider the overlaps between the making available right and the reproduction right. However, a comprehensive analysis of the distinction between the exclusive rights of copyright owners will not be undertaken within the confines of this thesis.

2 Exceptions to Copyright Infringement

The limits of copyright protection and the public policy objectives of such limits tend to be borne disproportionately by exceptions to copyright infringement. Rights, on the other hand, set the baseline for the protection of rightsholders, and seem to leave less room for debate.³⁶ Moving away from such narrow conceptions of the role of rights and exceptions, this thesis focusses on the limits of the making available right.³⁷

3 Secondary Infringement

This research will focus on primary infringement of the making available right.³⁸ We should understand the primary basis of liability, before considering how a third party could be secondarily liable for facilitating or encouraging such acts.³⁹ Furthermore, secondary infringement is beyond the scope of international treaties and is left to each jurisdiction (e.g. authorisation liability under Australian law and vicarious or contributory infringement under US law).

³⁶ See Ansgar Ohly, 'Economic Rights' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009) 213.

³⁷ See Susy Frankel, 'The International Copyright Problem and Durable Solutions' (2015) 18(1) *Vanderbilt Journal of Entertainment & Technology Law* 101, 133–34, arguing that exceptions should not determine or operate in conflict with exclusive rights, rather 'exceptions and rights should function together and create a working system around copyright to reflect the object and purpose of copyright'.

³⁸ It should be noted that the term "direct" infringer is used in the US to denote primary infringement. In Australia, on the other hand, authorisation liability is categorised as a form of direct liability (in contrast to indirect infringement involving dealings with infringing copies: see, eg, *Copyright Act 1968* (Cth), s 38). For the sake of consistency, this thesis will use the terms primary and secondary liability to denote the distinction between "direct infringement" and contributory or vicarious infringement in the US, and primary infringement and authorisation liability in Australia.

³⁹ A primary act of infringement has to be established before one can proceed to consider secondary infringement: see *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (2012) 248 CLR 42; *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984).

4 *Jurisdictions Beyond the US, Australia and the EU*

This research will canvass non-jurisdiction-specific legal instruments such as international treaties and agreements. Beyond these international instruments, the thesis discusses the laws of select jurisdictions that are likely to have an ongoing influence on the global information economy.⁴⁰ These include, at the regional level, the Directives of the European Commission and decisions of the Court of Justice of the European Union (CJEU) and, at the national level, the legislation and case law of Australia and the United States (US).

Section F. Structure of the Thesis

The thesis consists of four parts, which are divided into eight chapters, as shown in Figure 1.1 below. This first chapter has provided an introduction to the topic. Chapter II of Part 1 provides a more detailed discussion of the contemporary internet context, and builds the foundation for this thesis. It explains the historical foundations of copyright, with an emphasis on the development of performance rights (i.e. non-copy-related rights). This first part of the thesis will also canvass the theoretical perspectives that have been put forward in support of copyright, and introduces copyright's dissemination function (a perspective that will be revisited and refined throughout the thesis, particularly in Parts 3 and 4).

Part 2 is relatively descriptive in nature, in contrast to the remaining parts of the thesis. Chapter III explains the context surrounding the introduction of the making available right and the rationales for doing so, highlighting discussions from the preparatory works to the Internet Treaties. It also considers academic commentary on the making available right at its inception. Chapter IV investigates how countries and regions have implemented the making available right in their local laws via legislation and judicial interpretation. Preliminary analysis and critical questions will be posed here, before they are afforded more detailed discussion in subsequent chapters.

Parts 3 and 4 provide in-depth critical analysis and set out key insights. Part 3 consists of Chapters V and VI. Chapter V elaborates on aspects of the second element — “the public” — which are problematic and identifies the need for a conceptual shift in our approach to this element. Chapter VI critiques current approaches to the “act” of making available, and considers analytical tools that could assist our interpretation of the “act”. Together, these chapters provide the basis for the proposals set out in Part 4. In light of the deficiencies of existing analytical tools and judicial approaches, Part 4 addresses the need for overarching principles to guide the use of existing tools and approaches.

⁴⁰ See Frankel, ‘The International Copyright Problem and Durable Solutions’, above n 37, 137 (noting the potential influence of the EU and US as major economies).

Chapter VII of Part 4 explains the policies and principles that should guide the development of the making available right. It calls for a more transparent and coherent approach to the right, and constructs a framework for analysis that may be utilised by judges and legislators. This framework can also guide the conduct of stakeholders in the copyright and communications technology industries. Finally, Chapter VIII concludes the thesis. Reflecting on the findings and proposals, it emphasises the importance of the new analytical direction set out in this thesis.

Figure 1.1. Thesis structure



CHAPTER II. HISTORICAL AND THEORETICAL FOUNDATIONS OF COPYRIGHT

Purpose

This chapter aims to lay the foundation for critical analysis in this thesis by introducing the relevant copyright history, theory and context. To do so, it will:

1. Discuss the development of non-copy-related rights (e.g. public performance rights) in the context of copyright's Anglo-Saxon history, and contrast this with communications in the internet era;
2. Review the theoretical justifications for copyright and potential deficiencies in existing theory; and
3. Explain copyright's dissemination function, and emphasise the importance of this function to the sustainability of copyright in the internet age.

Sections

- A. Historical Development
- B. A New Communications Environment: The Internet
- C. Theoretical Foundations
- D. The Dissemination Function of Copyright

An attempt to understand the role of the making available right in today's interconnected digital environment would be incomplete without an appreciation of copyright's history — stemming from the protection of book printing up to the internet era we have today. This chapter alone cannot do justice to the rich history of copyright; it will focus on copyright's evolving coverage of different mediums of communication, particularly through the introduction of performance or transmission rights. The discussion outlines copyright's expansion, from the protection of specific acts of reproduction and performance, to a right that covers the mere offering of public access online.

Once this background and context is established, the chapter moves onto consider theories that have been utilised to justify copyright protection. Taking a critical perspective, it questions whether these theories remain relevant in today's internet environment. This chapter seeks to identify the limitations of existing theories, and considers how we may provide clearer justification and guidance for the development of copyright into the future. With this objective in mind, this chapter will explore the dissemination function of copyright, and the potential role of the making available right in progressing this function.

Section A. Historical Development

The law of copyright has not developed in isolation, but is a product of its surrounding philosophies and social movements.⁴¹ Looking back at the history of copyright provides us with a deeper understanding of the evolving role of copyright in society. Broadly, approaches to the regulation of information historically fell into two classes: obligation-based and entitlement-based.⁴² Obligation-based societies are characterised by social quiescence — i.e. each class in the social hierarchy respected the obligations bestowed upon it and accepted their unchanging status and fixed function within society.⁴³ Entitlement-based societies, on the other hand, repudiate a fixed social order in favour of the individual freedom to accrue material benefits in a contested environment.⁴⁴

As an idea of entitlement, recognition of authorship (and ownership of literary property) emerged first in ancient Greece, and later spread through the Roman world.⁴⁵ This notion of authorship, however, stagnated in Europe's feudal society, which lasted for nearly a millennium from the fifth century.⁴⁶ Only as feudalism broke down in the fifteenth century, and a shift towards entitlement-based societies occur, did a political movement towards endorsement of property ownership rights (including in information) begin.⁴⁷ As a general observation, it can therefore be said that 'strong copyright systems are characteristic of relatively free societies'⁴⁸ whereby power over dissemination of creative content is decentralised.⁴⁹ This sentiment is reflected in the Statute of Anne, which had a prominent role in moving England away from government censorship and control over the flow of information.

1 *The Statute of Anne and the Right to Publish and Print Books*

Recognition of authors and concepts on how to manage, control and share knowledge and culture existed in various societies before the eighteenth century,⁵⁰ but it was the Statute of Anne of 1710 that

⁴¹ Benedict Atkinson and Brian Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer International Publishing, 2014) 6.

⁴² *Ibid* 7.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* 10–11.

⁴⁶ *Ibid* 11.

⁴⁷ *Ibid* 12–13, 15.

⁴⁸ Barbara Ringer, 'Two Hundred Years of American Copyright Law' in *Two Hundred Years of English and American Patent, Trademark, and Copyright Law* (American Bar Center, 1977) 117, 118; quoted in Goldstein, above n 35, 272.

⁴⁹ Paul Edward Geller, 'Copyright History and the Future: What's Culture Got to Do with It?' (2000) 47 *Journal of the Copyright Society of the USA* 209, 219 (observing that copyright laws tended to decentralize power over the dissemination of creative content, as mercantilist regimes were replaced by laissez-faire approaches to the market place and individuals became increasingly free to think, work and trade in civil societies).

⁵⁰ See, eg, Atkinson and Fitzgerald, above n 41, 10–11 (describing Greek and Roman recognition of authors); Geller, above n 49, 210–215 (discussing for example the state sponsored visual arts and drama of the Classical Greeks and book trade in imperial China).

established the foundations of modern copyright law. The Statute of Anne supported the dissemination of knowledge — its long title described it as an act for ‘the Encouragement of Learning’.⁵¹ Prior to the enactment of the Statute of Anne, copyright existed as a monopoly over the printing of books, granted by the monarch to members of the Stationers’ Company, a London guild of bookbinders, printers and booksellers.⁵² The right to copy in this instance belonged to the stationer, not the author. Although the author would furnish their manuscripts and be paid a lump sum, ‘upon entry the author dropped away’.⁵³ The Stationer’s Company was able to acquire such trade advantages in part because of their role in effecting royal censorship.⁵⁴

The Restoration of the English monarchy in 1660 marked a shift from an obligation-based society to an entitlement-based one, and allowed for the accrual of property. A *Printing Act* restricting printing and reinstalling licensing was passed by Parliament in 1662,⁵⁵ but the Act was allowed to expire through non-renewal in 1695 in light of the impending demise of censorship.⁵⁶ The stationers thus ‘came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security’.⁵⁷ Stationers saw the tactical advantage of aligning self-interest with that of authors, having lost the role of royal censor.⁵⁸

The Statute of Anne arose from these efforts, and for the first time authors’ rights in their writings were recognised.⁵⁹ The Statute gave authors the right to control the printing, publishing and selling of books and “other writings” for 14 years, renewable by living authors for a further 14 years. This

⁵¹ *Statute of Anne 1710* (London). Cf Diane Leenheer Zimmerman, ‘The Statute of Anne and Its Progeny: Variations without a Theme’ (2010) 47 *Houston Law Review* 965 (arguing that these lofty aspirations were more rhetorical than substantive, benefitting only a small portion of the literate citizenry); Lyman Ray Patterson, ‘The Statute of Anne: Copyright Misconstrued’ (1965) 3 *Harvard Journal on Legislation* 223, 236 (arguing that ‘while the statute clearly benefitted the author, it was primarily an antimonopoly trade regulation statute’).

⁵² It should be acknowledged that prior to the *Statute of Anne*, the House of Lords recognised authors’ common law rights to prevent publication of their unpublished works: *The Stationers v The Patentees about the printing of Rolle’s Abridgment* (1666) Cart. 89. This common law right would terminate following publication.

⁵³ Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967) 5.

⁵⁴ *Ibid* 3. As Kaplan notes, soon after Caxton founded his press in England, the Crown took interest in ‘this dangerous art and to assert prerogative rights regarding it.’ The direct censorship through royal letters patent for the exclusive printing of particular books was found to be ‘a slippery and inefficient business’, therefore the crown enlisted the printers and booksellers to take on this role.

⁵⁵ *Ibid* 6.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* 6–7, citing *Donaldson v Beckett* (1774) 17 Cobbett’s Parl. Hist. 953 (1813) 995.

⁵⁸ Kaplan, above n 53, 8.

⁵⁹ It has been observed that in practical terms, ‘[t]he right of assignment ... meant both that authors could be deprived of their “natural law” rights by contract, and that booksellers’ monopoly would be enhanced by that same contract’: L Ray Patterson, ‘Copyright and “the Exclusive Right” of Authors’ (1993) 1(1) *Journal of Intellectual Property Law* 1, 13.

recognition of authors' rights to property in books and writings 'laid the foundation for the modern edifice of copyright regulation'.⁶⁰

2 From Printing to Public Performance Rights: Extension to Non-Copy Related Rights

These early iterations of copyright protection emerged in the late fifteenth century, in the years following the invention of the printing press by Johannes Gutenberg in Germany around 1440 and the establishment of the first printing press in England by William Caxton in 1476.⁶¹ This printing technology is said to have 'provided the first realistic opportunity for authors to recognize the potential economic benefit from their work',⁶² and made possible an 'awakened sense of injury' from being deprived of printing profits.⁶³ Since then copyright protection has been progressively extended to other kinds of works through a combination of legislation and interpretations developed through case law. Copyright subject matter in England was legislatively expanded to include engravings,⁶⁴ patterns on linens, cottons, calicoes and muslins,⁶⁵ three-dimensional models and casts of human or animal figures,⁶⁶ plays,⁶⁷ the spoken words of private lectures,⁶⁸ and paintings, drawings and photographs.⁶⁹

The UK *Dramatic Literary Property Act 1833*,⁷⁰ in particular, extended protection to cover public performance rights, quite autonomously from the reproduction right or the "copyright".⁷¹ Nevertheless, its developmental trajectory exhibited similarities with that of the protection afforded to literary works. The 16th and 17th century theatre industry in England was closely supervised by the Crown, which would license play performances by theatre companies and intervene in disputes

⁶⁰ Atkinson and Fitzgerald, above n 41, 23.

⁶¹ See Kaplan, above n 53, 2.

⁶² Russ VerSteeg, 'The Roman Law Roots of Copyright' (2000) 59 *Maryland Law Review* 522, 525.

⁶³ Brander Matthews, 'The Evolution of Copyright' (1890) 5(4) *Political Science Quarterly* 583, 586. Matthews explains:

Indeed, it was only after the invention of printing that an author had an awakened sense of the injury done him in depriving him of the profit of vending his own writings; because it was only after Gutenberg had set up as a printer, that the possibility of definite profit from the sale of his works became visible to the author.

⁶⁴ *Engravers' Copyright Act 1735* (London) 8 Geo. II, c.13.

⁶⁵ *Calico Printers' Act 1787* (London) 27 Geo.III, c.38.

⁶⁶ *Models and Busts Act 1798* (London) 38 Geo.III, c.71 (also known as the *Sculpture Copyright Act 1798*).

⁶⁷ *Dramatic Literary Property Act 1833* (London) 3 & 4 Will.IV, c.15.

⁶⁸ *Publication of Lectures Act 1835* (London) 5 & 6 Will.IV, c.65. Note that this was the first time protection was extended to works in an oral form: John S Gilchrist, *The Government and Copyright: The Government as Proprietor, Preserver and User of Copyright Material Under the Copyright Act 1968* (Sydney University Press, 2015) 16.

⁶⁹ *Fine Arts Copyright Act 1862* (London) 25 & 26 Vict., c.68.

⁷⁰ (London) 3 & 4 Will.IV, c.15.

⁷¹ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) 707.

amongst companies on issues ranging from repertory to compensation.⁷² In 1832, the Select Committee on Dramatic Literature called for the expansion of copyright in dramatic literature to give writers control of public performances of their plays and to terminate the patent theatres' monopoly.⁷³ Although Parliament did not dissolve the patent theatres' monopoly, the resulting Act nevertheless enabled authors or their assignees to prohibit unlicensed productions of their plays.⁷⁴

Australian colonies of the 19th century adopted definitions and concepts from the UK's *Copyright Act* of 1842,⁷⁵ each passing copyright legislation which required the registration of books, dramatic or musical or works of fine art with the relevant colony registry.⁷⁶ These statutes granted a performing right in relation to registered dramatic or musical pieces.⁷⁷ The copyright law of Australia was united after Federation with the enactment of the 1905 *Copyright Act*⁷⁸ which included a performing right in musical and dramatic works and a lecturing right.⁷⁹ Similar developments were occurring in the US and Europe. In the US, dramatic performance rights were added to the copyright law in 1856.⁸⁰ Shortly after the enactment of the 1833 UK Act, American writers began to lobby for a similar law.⁸¹ In Europe, the French copyright regime crystallized after freedom of the press took hold at the start of the French Revolution, and the Law of 1791 recognized authors' rights to control the public staging of their works was enacted after intense lobbying by the playwrights' trade association.⁸² The lobbying efforts in the US were successful, and the 1856 *Dramatic Copyright Act* gave the author or proprietor of a dramatic work, or his heirs or assigns, 'the sole right ... to act, perform, or represent'

⁷² Jessica Litman, 'The Invention of Common Law Play Right' (2010) 25 *Berkeley Technology Law Journal* 1381, 1395.

⁷³ *Ibid* 1399. Note that the Statute of Anne made no observable difference to the plight of dramatists, because the statute required one to publish and register a play as a book, and once published the performance rights were universally understood to be in the public domain (see *ibid* 1396, 1398).

⁷⁴ *Ibid* 1399–1400. It should be noted that this did not immediately benefit dramatists with regards to existing plays, because courts held that theatres and publishers owned the new performance right as part of its prior purchase of copyright (*ibid*, citing *Cumberland v Planché*, (1834) 110 Eng. Rep. 1329). This was remedied by the 1842 Copyright Act which provided that assignment of copyright would not convey the right to represent the work: Isabella Alexander, 'Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words': The Birth of the Performing Right in Britain' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers, 2010) 321, 333.

⁷⁵ *Copyright Law Amendment Act 1842* (London) 5 & 6 Vict., c.45.

⁷⁶ Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney University Press, 2007) 14. Note that Tasmania was the one exception.

⁷⁷ *Ibid*.

⁷⁸ *Copyright Act 1905* (Cth).

⁷⁹ Atkinson, above n 76, 21.

⁸⁰ *Dramatic Copyright Act* (Act of Aug. 18, 1856, 11 Stat. 138).

⁸¹ Litman, 'The Invention of Common Law Play Right', above n 72, 1402–3.

⁸² Geller, above n 49, 226. It should be noted that an extension of protection to 'any ... production of the mind or genius belonging to the fine arts', including literary copyright was granted two years *after*, in 1793. See also Matthews, above n 63, 593.

the work.⁸³ This addition recognized the nature of dramatic works which relied on performance, as opposed to the sale of copies, to provide remuneration to their creators.⁸⁴ Therefore, beginning with the subject matter of dramatic literature, public performance rights were protected at an early stage in various jurisdictions (although the conditions of protection could vary considerably).⁸⁵

3 *Rise of the Broadcast Industries*

Nine years after the *Dramatic Literary Property Act 1833*, the 1842 UK Copyright Act provided that the protections applicable to dramatic literary property also applied to musical compositions.⁸⁶ In contrast to the intense lobbying of those in the books and theatre trades, the initial extension of the public performance right to musical compositions in the UK has been described as a “legislative throwaway”.⁸⁷ Despite the grant of performance rights, composers and music publishers doubted the benefit of charging money for performances. It was perceived that collection of fees would interfere with composer’s profits, as such performances would make music popular and stimulate sales of sheet music.⁸⁸ Publishers and composers also distanced themselves from one Harry Wall — described as the world’s first “copyright troll” — who was in the business of collecting fees for unauthorised performances of songs by deceased composers whose assigns had given Wall power of attorney.⁸⁹ These early attitudes of music composers and publishers, in contrast to those of dramatic authors,

⁸³ *Dramatic Copyright Act* (Act of Aug. 18, 1856, 11 Stat. 138) 139, cited in Litman, ‘The Invention of Common Law Play Right’, above n 72, 1403.

⁸⁴ See E Fulton Brylawski and Abe Goldman (eds), ‘H.R. Rep. No. 60-2222 (1909); S. Rep. No. 60-1108 (1909)’ in *Legislative History of the 1909 Copyright Act* (1976) S4:

This section is intended to give adequate protection to the proprietor of a dramatic work. ... He does not usually publish his work in the ordinary acceptance of the term, and hence in such cases never receives any royalty on copies sold. His compensation comes solely from public representation of the work.

⁸⁵ Ricketson and Ginsburg, above n 71, 707. This variation set up the need of unanimity and the eventual adoption of art 11 of Berne which required national treatment in regards to the right of public representation of dramatic and dramatico-musical works and the right of public performance of musical works in the 1884 Conference of Berne. The recognition of national treatment for a general right of public performance in art 11 finally came with the Brussels revision in 1948, which was adopted not without reluctance by countries wary of the development of well-organized national collecting societies acting on behalf of composers and writers (at 710).

⁸⁶ *Copyright Law Amendment Act 1842* (London) 5 & 6 Vict., c.45 s 20.

⁸⁷ Atkinson, above n 76, 115, observing that:

Literary property took the first place in the thinking of legislators and lawyers. Dramatic and musical property attracted the same rights, but embodied on sheets of paper they were seen as subsidiary products, secondary, by a long distance, to books. The performing right can thus be seen as a kind of legislative throwaway, an expedient that recognised that the economic value of plays, and to a lesser extent musical compositions, lay in public performance for the benefit of a paying audience.

⁸⁸ Alexander, above n 74, 339–340.

⁸⁹ *Ibid.*

could be attributed to the strength of the market for sheet music in comparison with the weak market for printed dramatic works.⁹⁰

This hesitation on the part of music composers and publishers would dissipate as the wireless gained immense popularity in the 1920s. The war had stimulated both radio's technological growth and, following 4 years of catastrophe, society's need for entertainment.⁹¹ In other words, this legislative throwaway had "grand consequences" — '[g]ramophone, and then radio, changed everything, and when the conceptual mists cleared, surprised onlookers saw that the holders of the performing right occupied central places at the copyright banquet'.⁹² The emergence of the public performance right as a central element of copyright protection signified copyright departure from reliance on reproductive and distributive rights in copies only.⁹³

4 *Incorporeal Rights and an Enduring "Copy-Fetish"*

The preceding account of copyright's history is by no means exhaustive. It highlights copyright's evolution from exclusive rights in book printing to exclusive rights in ephemeral acts of performance (which do not require the creation and dissemination of copies). Before concluding this discussion, some reflections on the broader legal and philosophical history are warranted, as they provide further insights on the development of intangible rights in information.

Looking further back into our Anglo-Saxon legal heritage brings us to Roman law, said to be 'the greatest gift that the ancient Romans have left to posterity'.⁹⁴ Although the Romans did not establish copyright concepts *per se*, many of the constituent elements of intangible personal property (and therefore the basis of copyright) were pioneered by the Romans.⁹⁵ The term *res* for "thing" initially referred to physical things, i.e. *res corporales*, but over time the Romans recognized *res incorporales* or intangibles as well.⁹⁶ This recognition of intangible property and treatment of 'rights as things in themselves' has been described as truly significant in historical jurisprudence and a 'laudable feat of abstraction and rationalism'.⁹⁷

Observations from philosophers on the nature of property rights further illustrate the perceived differences between possession of a "thing" and enjoyment of a thing. Saint Thomas Aquinas, Italian

⁹⁰ Ibid 340.

⁹¹ Atkinson and Fitzgerald, above n 41, 71.

⁹² Atkinson, above n 76, 112ff.

⁹³ Ibid 115.

⁹⁴ VerSteeg, above n 62, 524.

⁹⁵ Ibid 531.

⁹⁶ Ibid. These first intangibles took to form of "praedial servitudes" (similar to modern easements) over land, but eventually extended to personal servitudes such as a third party's right to use the services of another's slave.

⁹⁷ Ibid, citing JAC Thomas, *Textbook of Roman Law* (North-Holland Publishing Company, 1976) 126.

philosopher and theologian from the 13th century, distinguished the use of a thing (i.e. its application to some activity) from the end (i.e. the enjoyment of a thing).⁹⁸ Aquinas derived his theory of law (including property relations) from the nature of human beings as rational beings.⁹⁹ Enjoyment was said to be the result of attaining the end.¹⁰⁰ In his theory of property, Aquinas stated that human beings, unlike animals, consciously understood their appetites for pleasure, and that desire follows this knowledge or human reason.¹⁰¹ As a result, human beings come to desire property as an end rather than for enjoyment only; they try to overcome the finitude of material possession ‘by thinking or imagining and delighting about the good of [such] objects *in infinitum*’.¹⁰² Another perspective worth noting is that of 18th century German philosopher Immanuel Kant, who viewed books as a mere tool for conveying the author’s thoughts.¹⁰³ Rather than treating books as goods, he viewed them as actions¹⁰⁴ (i.e. ‘the author is speaking to his [or her] reader’).¹⁰⁵

These broad observations on the nature of property rights bring to mind characteristics of different copyright exclusive rights. The communication of content, a form of immediate access or consumption, is akin to the “enjoyment of a thing”. The production and transfer of a copy, on the other hand, provides one with possession of a “thing”, and greater control over one’s future consumption and enjoyment of the “thing”.¹⁰⁶ The “thing” is arguably secondary to acts of enjoyment (or immediate access to copyright content), yet we continue to focus on the secondary notion of possession of the “thing” (or copies). These conceptual differences between access and transfer of copies indicate that there is a significant distinction between the reproduction right and making available right in copyright. Yet our understanding of the making available right has not advanced substantially since its introduction. Despite the Romans’ early feats of ‘abstraction and rationalism’¹⁰⁷ regarding the intangible enjoyment of property, our understanding of copyright, to a certain degree, remains confined by concepts of physical possession. As Professor Joseph Liu argues, conventional notions of physical property ownership have an unrecognized but important role in copyright,

⁹⁸ Anthony Parel, ‘Aquinas’ Theory of Property’ in Anthony Parel and Thomas Flanagan (eds), *Theories of Property: Aristotle to the Present* (Wilfrid Laurier University Press, 1979) 93.

⁹⁹ Kenneth Einar Himma, *Natural Law* Internet Encyclopedia of Philosophy <<http://www.iep.utm.edu/natlaw/>>.

¹⁰⁰ Parel, above n 98, 93.

¹⁰¹ Ibid 94–95.

¹⁰² Ibid 94.

¹⁰³ Friedemann Kawohl, ‘Commentary on Kant’s Essay On the Injustice of Reprinting Books (1785)’ in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_d_1785>.

¹⁰⁴ Ibid.

¹⁰⁵ Immanuel Kant, ‘On the Unlawfulness of Reprinting’ (1785) 5 *Berlinische Monatsschrift* 403, 406.

¹⁰⁶ See Ficsor, *The Law of Copyright and the Internet*, above n 8, 498 [C8.08] (explaining that ‘copy-related rights’ typically enable ‘deferred’ use since the perception of the expression embodied in the work occurs at a different time). This is discussed further in Chapter III – Section D. Academic Commentary on the Making Available Right.

¹⁰⁷ See Thomas, above n 97, 126.

intuitively shaping the scope of copyright's bundle of rights.¹⁰⁸ While recognising the broader economic framework and the role of transaction costs,¹⁰⁹ Liu argues that copy owners (i.e. owners of the physical copy) enjoy relatively broad residual "rights", which include the ability to read, lend and transfer their physical copy, and that these "rights" are defined primarily by the law of personal property.¹¹⁰

As modes of dissemination increasingly gravitate to the ephemeral provision of access to content, copyright law continues to exhibit a disproportionate interest in protecting the act of copying. Jessica Litman has labelled this phenomenon "copy-fetish", i.e. 'the idea that every appearance of any part of a work anywhere should be deemed a "copy" of it, and that every single copy needs a license or excuse, whether or not anyone will ever see the copy, whether or not the copy has any independent economic significance, whether or not the so-called copy is incidental to some other use that is completely lawful'.¹¹¹ In the era of the printing press, the making and subsequent sale of copies was the primary way in which copyrighted works were exploited.¹¹² Therefore copyright law's initial focus on copies made sense because they were easy to identify and served as a rough proxy for use.¹¹³ As Litman explains:

When the old copyright laws fixed on reproduction as the compensable (or actionable) unit, it wasn't because there was something fundamentally invasive of an author's rights about making a copy of something. Rather, it was because, at the time, copies were easy to find and easy to count, so they were a useful benchmark for deciding when a copyright owner's rights had been unlawfully invaded. Unauthorized reproductions could be prohibited without curtailing the public's opportunities to purchase, read, view, hear or use copyrighted works.¹¹⁴

¹⁰⁸ Joseph C Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership' (2001) 42 *William and Mary Law Review* 1245, 1248: '[T]he bundle of rights, and the corresponding limits on that bundle, are determined in part by certain conventions and understandings that we commonly hold about the ownership of physical property.'

¹⁰⁹ Ibid 1314–18.

¹¹⁰ Ibid 1278, 1286–294, 1302. Liu's broader argument in the article is that these incidents of copy ownership should be replicated in the digital environment by ensuring owners of a digital copy have an unlimited ability to access, read or use that copy, assuming there are no contractual or technological limitations to the contrary. Note that Liu's arguments take into account the promotion of noneconomic values: ibid 1337, 1325ff.

¹¹¹ Litman, 'Fetishizing Copies', above n 24.

¹¹² Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership', above n 108, 1285. Miller and Feigenbaum dispute the centrality of reproduction to the advent of copyright protection, arguing that 'publishing, printing and vending' implied distribution, and that the first mention of the word "copy" in the 1909 US Copyright Act was merely to ensure that the right extended to distribution of new subject matter: Ernest Miller and Joan Feigenbaum, 'Taking the Copy Out of Copyright' in *SpringerLink* (Springer, Berlin, Heidelberg, 2001) 233 <https://link.springer.com/chapter/10.1007/3-540-47870-1_15>.

¹¹³ Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership', above n 108, 1361.

¹¹⁴ Jessica Litman, 'Revising Copyright Law for the Information Age' (1996) 75 *Oregon Law Review* 19, 37.

However, copies ‘are less useful measures today’; they are difficult to find and count, and opportunities for exploitation are more often unconnected with the number of reproductions.¹¹⁵ Therefore, Litman argues that there is a need to restructure the system in ways that ‘make money for creators a higher priority than control of copies’¹¹⁶ while recognising the importance of facilitating the enjoyment of works by the public.¹¹⁷ She asserts that ‘[t]he fact that the whole world has been linked up over digital networks hasn’t changed the essence of reading, and interactive engagement with works of authorship is as crucial an aspect of reading (and listening, and viewing) today as it was 40 years ago.’¹¹⁸ In light of this, Litman asks a highly pertinent question:

[I]f we stop defining copyright in terms of reproduction, we will have to rethink it completely. ... What manner of exclusive right could we devise to replace reproduction as the essential compensable unit?¹¹⁹

The making available right in the WIPO Internet Treaties of 1996 may have started out as a gap-filling exercise in relation to the Berne Convention,¹²⁰ but it is advancing well beyond this role. Its potential as a fundamental pillar sustaining copyright’s ongoing viability in the internet environment should not be underestimated.¹²¹

¹¹⁵ Ibid. See also Aaron Perzanowski and Jason Schultz, ‘Legislating Digital Exhaustion’ (2014) 29 *Berkeley Technology Law Journal* 1535, describing a “post-copy world” (citations omitted):

Although copies have existed since the origins of copyright law, we are shifting quickly into a post-copy world, one where digital works exist as data flows and rarely reside in a material object for more than a transitory period of time, where copies blink into and out of existence on a nearly constant basis. In such a world, expecting consumers, rightsholders, or regulators to keep tabs on individual copies is as useful as demanding that fish track the movements of particular drops of water.

And see Yu, ‘The Copy in Copyright’, above n 19, 91:

If the concept of “copy” is indeed increasingly irrelevant to copyright law – for example, when the copyrighted work is being streamed online to consumers fragment by fragment – does it still make sense to call the right “copyright”?

¹¹⁶ Litman, ‘Fetishizing Copies’, above n 24. See also Yu, ‘The Copy in Copyright’, above n 19, observing that the concept of the “copy” in copyright ‘has slowly evolved away from being the *raison d’être* of copyright to become one of the many legal tools within the copyright system’.

¹¹⁷ Litman, ‘Fetishizing Copies’, above n 24. Litman warns that ‘[a]ffirming the core importance of readers, listeners and viewers in the copyright ecosystem is an essential step toward restoring the public’s respect for the copyright law’.

¹¹⁸ Ibid.

¹¹⁹ Litman, ‘Revising Copyright Law for the Information Age’, above n 114, 40. See also Committee on Intellectual Property Rights and the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academy Press, 2000) 230 (suggesting that ‘the notion of copy may not be an appropriate foundation for copyright law in the digital age’).

¹²⁰ See the discussion in Chapter III – Section A. The Berne Convention and TRIPS Agreement.

¹²¹ See Miller and Feigenbaum, above n 112 (arguing that we should abandon copy-centrism in copyright law, and that ‘public distribution of instantiations of a work’ should be the key right granted to a copyright holder).

Section B. A New Communications Environment: The Internet

The decentralized nature of internet communications stands in stark contrast to the broadcast industries and print industries of the past. The prominence of the new giants in the internet era — Google, Amazon, Apple, for example — is undeniable each time we seek to gain access to content online. Most of us are familiar with the innovations that have emerged in the internet era, and how these technologies have changed the way we communicate and transmit cultural and informational content. Nevertheless, it is useful to at this point to outline the current and emerging context, which sets the scene for the theoretical discussion that follows. We should have an appreciation for the development of this communication medium, before embarking on efforts to refine the role of copyright in this environment. Therefore, the following discussion outlines the internet's history and explains the infrastructure and protocols that enable the seamless exchange of information online.

1 *The Internet: A Decentralised Network of Computers*

The internet may be described as a 'network of networks'¹²² — a giant network interconnecting innumerable smaller groups of linked computer networks.¹²³ From its inception, the internet was said 'to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable.'¹²⁴ Its decentralised nature has been emphasised by a US court in *ACLU v Reno*¹²⁵ as follows:

No single entity — academic, corporate, governmental, or non-profit — administers the Internet. ... There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.¹²⁶

A second important characteristic highlighted by the Court is its non-discriminatory nature, forming important base architecture for a multitude of different communication functions. This is facilitated

¹²² *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 296 (Emmett J).

¹²³ *ACLU v Reno* 929 F. Supp. 824 (ED Pa. 1996) 830.

¹²⁴ *Ibid* 831. The internet began as an outgrowth of ARPANET, a military program designed for communications on defence-related research, hence the need for operational channels should the system be damaged by war. ARPANET provided an example for the development of civilian networks which resembles the internet that we know today.

¹²⁵ *Ibid* 830–49. The US District Court considered the characteristics of the internet in detail, outlining the technical dimensions and early history of the internet (findings which were accepted by the US Supreme Court on appeal in *Reno v ACLU* 521 U.S. 844). The case concerned the *Communications Decency Act* of 1996, and whether the banning of obscene speech under the Act was constitutional.

¹²⁶ *Ibid* 832.

by “packet switching”, described as ‘communications protocols that allow individual messages to be subdivided into smaller “packets” that are then sent independently to the destination, and automatically reassembled by the receiving computer.’¹²⁷ First discussed in the 1960s, the use of packets as opposed to circuits was a major step along the path towards computer networking.¹²⁸ Reliable end-to-end protocols were necessary to maintain effective communication within packet systems, hence the development of protocols such as TCP (Transmission Control Protocol) which provided all the transport and forwarding services of the Internet.¹²⁹ As explained by experts closely involved in the internet’s development and evolution,¹³⁰ ‘[a] key concept of the Internet is that it was not designed for just one application, but as a general infrastructure on which new applications could be conceived, as illustrated later by the emergence of the World Wide Web’.¹³¹ It was general purpose protocols such as TCP which made this possible.¹³²

2 *The World Wide Web and Linking: Language and Communication on the Internet*

The internet may be described as a network of computer networks, but in order for different computers to communicate over these networks, a common language is required.¹³³ One of the most common ways in which people communicate over the Internet is by using the World Wide Web.¹³⁴ Although the terms “the Internet” and “the Web” tend to be used interchangeably, the World Wide Web is more

¹²⁷ Ibid. See also *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 297 (explaining that ‘[d]ata sent by means of the Internet Protocol is broken up into small packets, consisting of less than half a megabyte’).

¹²⁸ Barry M Leiner et al, ‘Brief History of the Internet’ (2009) 39(5) *Computer Communications Review* 22, 23, citing L Kleinrock, ‘Information Flow in Large Communication Nets’ (RLE Quarterly Progress Report, Massachusetts Institute of Technology, July 1961); L Kleinrock, *Communication Nets: Stochastic Message Flow and Delay* (McGraw-Hill, 1964).

¹²⁹ See Leiner et al, above n 128, 24–25.

¹³⁰ Ibid 22. Note that the paper was first published online in December 2003 by the Internet Society: Barry M Leiner et al, *Brief History of the Internet* (1995) Internet Society <<http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>>.

¹³¹ Leiner et al, above n 128, 25.

¹³² Ibid 25–26. For a formal definition of the internet, one may look to the US Federal Networking Council (FNC) resolution which states:

“Internet” refers to the global information system that –

- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons;
- (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and
- (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.

FNC Resolution: Definition of ‘Internet’ (10/24/95) NCO/NITRD Archives The Networking and Information Technology Research and Development (NITRD) Program <https://www.nitrd.gov/fnc/Internet_res.aspx>, quoted in Leiner et al, above n 128, 30. This definition concisely captures the preceding discussion, including the decentralized and non-discriminatory nature of communications on the internet.

¹³³ It is described in W3C’s Specification as ‘a kind of publishing mother tongue that all computers may potentially understand’: W3C, *HTML 4.01 Specification (W3C Recommendation 24 December 1999)*: 2. *Introduction to HTML 4* W3C 2.2 <<https://www.w3.org/TR/html401/intro/intro.html>>.

¹³⁴ *ACLU v Reno* 929 F. Supp. 824 (ED Pa. 1996) 836.

accurately described as a service that sits on top of the internet's infrastructure. As explained by the District Court in *ACLU v Reno*:¹³⁵

The Web utilizes a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text, images, sound, animation and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world.¹³⁶

In addition, the High Court of Australia in *Dow Jones v Gutnick*¹³⁷ emphasised users' control over content accessed on the WWW:

The World Wide Web is distinguished from previous modes of communication (and from other Internet services like e-mail) by "pull" technology: the user's browser software sends "get" messages to the server which "pulls" the required information from it. ... The World Wide Web is a passive library of material available to the public (by subscription or not). It is not "pushed" into any particular jurisdiction by the website owner who controls the server. Information from the website is acquired by choice of the user and by dint of that user's technology. Once material is uploaded on a webserver, it can be downloaded via the Internet throughout the world.¹³⁸

The rapid growth of the internet has been attributed to the free and open access to the specifications of its protocols.¹³⁹ A number of communities and organisations have supported the growth and evolution of the internet since its inception, which today include the Internet Society (formed in 1991 as community support for the internet) and the World Wide Web Consortium or W3C (responsible for evolving the various Web protocols and standards).¹⁴⁰ W3C's HTML 4 Specification state that:

¹³⁵ 929 F. Supp. 824 (ED Pa. 1996).

¹³⁶ *Ibid* 836.

¹³⁷ (2002) 210 CLR 575.(2002) 210 CLR 575.

¹³⁸ *Ibid* 578. The Court continues to note that this access is subject to the erection of 'an electronic barrier which would operate to block normal access'.

¹³⁹ Leiner et al, above n 128, 28. The authors also state: 'As the current rapid expansion of the Internet is fueled by the realization of its capability to promote information sharing, we should understand that the network's first role in information sharing was sharing the information about it's own design and operation...'

¹⁴⁰ *Ibid* 29. Tim Berners-Lee, creator of the WWW and Director of W3C, describes W3C as 'a place for those companies for whom the Web is essential to meet and agree on the common underpinnings that will allow everyone to go forward. ... [T]he Consortium starts an Activity to help reach a consensus on computer protocols

The *World Wide Web (Web)* is a network of information resources. The Web relies on three mechanisms to make these resources readily available to the widest possible audience:

1. A uniform naming scheme for locating resources on the Web (e.g., URIs).
2. Protocols, for access to named resources over the Web (e.g., HTTP).
3. Hypertext, for easy navigation among resources (e.g., HTML).¹⁴¹

The ability to link to other Web documents is a fundamental characteristic of the Web. Every resource available on the Web, whether a HTML document, image, video clip, or program, is said to have an address that may be encoded by a Universal Resource Identifier or URI.¹⁴² Examples of URIs given in the specification include `<http://www.w3.org/TR>` for a HTML document and `<http://www.acme.com/icons/logo.gif>` for an image. In HTML, URIs may be used to link to another document or resource, or to include an image or object in a page (among other things).¹⁴³ Tim Berners-Lee, inventor of the WWW, once said that ‘the Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks.’¹⁴⁴ In *ACLU v Reno*,¹⁴⁵ the US District Court recognised the fundamental importance of linking to the Web. The Court stated that ‘links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique.’¹⁴⁶

3 The “Cloud” and the Rise of Mobile Applications: A New Frontier

In light of the exponential development of data processing technologies (including higher data transfer speeds and data compression which necessitate smaller bandwidth),¹⁴⁷ a notable “buzzword” that has

for that area. Protocols are the rules that allow computers to talk together about a given topic. When the industry agrees on protocols, then a new application can spread across the world, and new programs can all work together as they all speak the same language. This is key to the development of the Web.’: Tim Berners-Lee, *Realising the Full Potential of the Web* (1998) W3C <https://www.w3.org/1998/02/Potential.html>.

¹⁴¹ W3C, above n 133. Note that the current recommended specification is HTML 5 <https://www.w3.org/TR/html5/>. See <https://www.w3.org/TR/html/> for the latest html version.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Berners-Lee, above n 140.

¹⁴⁵ 929 F. Supp. 824 (ED Pa. 1996); aff’d *Reno v ACLU* 521 U.S. 844 (1997).

¹⁴⁶ Ibid 836–37. The Court continues to state: ‘The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.’

¹⁴⁷ The development and popularity of cloud services can be seen as a culmination of various factors, an important one being the wide availability of high-speed internet connections: Adam Clark Estes, *What Is “the Cloud” – and Where Is It?* (29 January 2015) Gizmodo <http://gizmodo.com/what-is-the-cloud-and-where-is-it-1682276210>. As Google’s Executive Chairman, Eric Schmidt stated: ‘[M]oving to the cloud is not a questionable proposition – it’s inevitable’: Eric Schmidt, *Rebirth of IT* (8 October 2013) Google Cloud Official Blog <https://cloud.googleblog.com/2013/10/rebirth-of-it.html>. See also Thor Olavsrud, *Microsoft Says Its*

made its mark in the internet environment is “cloud computing”. The term has been used from as early as 1996,¹⁴⁸ yet a precise definition of “cloud computing” has proven to be elusive.¹⁴⁹ Nevertheless, it is possible to set out certain parameters upon which there is broad agreement.¹⁵⁰ The National Institute of Standards and Technology, an agency of the US Department of Commerce, explains that:

Cloud computing is a model that enables ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. ... The essential characteristics include on-demand self-service by users, broad network access through standard mechanisms that promote use on platforms such as mobile phones and tablets, and resource pooling (i.e. dynamic assignment and reassignment of physical and virtual resources according to consumer demand).¹⁵¹

A study conducted by the World Economic Forum in 2011 found that the flexibility and efficiency gains were ‘just scratching the surface of cloud’s potential’, and that cloud computing had ‘the potential to benefit organizations, whole industries, and even entire economies’.¹⁵² One commentator has noted that cloud computing ‘is arguably responsible, at least in part, for the speed at which new social platforms are being developed and brought to market’.¹⁵³ Therefore cloud computing promises to bring about major efficiency gains and innovation in terms of software and services delivered over the internet. As described by Google and Facebook, ‘[a]t its core, the Web consists of a set of technologies that act as a global file retrieval system, allowing users connected to the internet to

Future in the Cloud Is Bright (9 October 2013) CIO
<http://www.cio.com/article/741168/Microsoft_Says_Its_Future_in_the_Cloud_Is_Bright>.

¹⁴⁸ Antonio Regalado, *Who Coined “Cloud Computing”?* (31 October 2011) MIT Technology Review
<<http://www.technologyreview.com/news/425970/who-coined-cloud-computing/>>.

¹⁴⁹ Christopher S Yoo, ‘Cloud Computing: Architectural and Policy Implications’ (2011) 38 *Review of Industrial Organization* 405, 406.

¹⁵⁰ Ibid.

¹⁵¹ Peter Mell and Timothy Grance, ‘A NIST Definition of Cloud Computing’ (National Institute of Standards and Technology, Special Publication 800-145, September 2011)
<<http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>>. See also Urs Gasser, ‘Cloud Innovation and the Law: Issues, Approaches, and Interplay’ (Research Publication No. 2014-7, Berkman Center for Internet & Society, 17 March 2014) 3 <<https://cyber.harvard.edu/node/92450>> (‘For purposes of this paper, cloud computing is a broad label for technologies that enable the transition of computing resources – including information processing, collection, storage, and analysis – away from localized systems [i.e., on an end user’s desktop or laptop computer] to shared, remote systems [i.e., on servers located at a data center away from the end user accessible through a network].’).

¹⁵² World Economic Forum and Accenture, *Exploring the Future of Cloud Computing: Riding the Next Wave of Technology-Driven Transformation* (2010) <<http://www.accenture.com/us-en/Pages/insight-cloud-computing-technology-driven-transformation.aspx>>.

¹⁵³ Gasser, above n 151, 2.

retrieve content stored on remote servers anywhere in the world'.¹⁵⁴ Therefore, it may be argued that the “cloud” is just another term to describe services enabled by the internet, albeit delivered in a more efficient and personalised manner.

With the improvement in mobile data transfer speeds and proliferation of mobile devices, people are increasingly turning to mobile applications (or apps) as a means of accessing content on the internet (or in the “cloud”).¹⁵⁵ Mobile apps may be described as another interface or layer that sits on top of the internet. There are different types of mobile apps in existence, therefore it is not accurate to say that mobile apps are entirely separate from the WWW. Mobile apps called “native apps” are coded with a specific programming language (Objective-C for Apple’s iOS and Java for Android), and are built specifically to work well with the mobile platform and can take advantage of the phones features (e.g. camera and geolocation).¹⁵⁶ These have been described as segregated from the WWW due to the use of native code (not HTML code) and different URL schemes which do not facilitate linking between apps.¹⁵⁷ On the other end of the spectrum are “Web applications” — Web pages delivered over HTTP which provide an “application-like” experience within a Web browser.¹⁵⁸

It should be noted that criticisms have been levelled at the closed nature of apps and the control that platform owners such as Apple and Android have over their design, which may be contrasted with the openness of the Web.¹⁵⁹ Jonathan Zittrain described similar challenges in an article written in 2006, where he described rise of “information appliances” that would ‘run only those programs

¹⁵⁴ Google Inc. and Facebook, Inc., ‘Brief of Amici Curiae, Google Inc. and Facebook, Inc. in Support of Neither Party’ *Flava Works v Gunter* No. 11, 7, citing *In re DoubleClick Inc Privacy Litigation* 154 F. Supp. 2d 497 (S.D.N.Y. 2001) 501.

¹⁵⁵ See Sarah Perez, *ComScore: In U.S. Mobile Market, Samsung, Android Top The Charts; Apps Overtake Web Browsing* (2 July 2012) TechCrunch <<http://social.techcrunch.com/2012/07/02/comscore-in-u-s-mobile-market-samsung-android-top-the-charts-apps-overtake-web-browsing/>>; Ewan Spence, *The Mobile Browser Is Dead, Long Live The App* (2 April 2014) Forbes <<http://www.forbes.com/sites/ewanspence/2014/04/02/the-mobile-browser-is-dead-long-live-the-app/>>.

¹⁵⁶ Fred Cavazza, *Mobile Web App vs. Native App? It's Complicated* (27 September 2011) Forbes <<http://www.forbes.com/sites/fredcavazza/2011/09/27/mobile-web-app-vs-native-app-its-complicated/>>.

¹⁵⁷ Liron Shapira, *Is Apple to Blame for the Mobile App Deep Linking Delay?* (7 March 2014) VentureBeat <<http://venturebeat.com/2014/07/03/is-apple-to-blame-for-the-mobile-deep-linking-delay/>>.

¹⁵⁸ *Mobile Web Application Best Practices (W3C Recommendation 14 December 2010)* W3C [1.3.2] <<https://www.w3.org/TR/2010/REC-mwabp-20101214/#webapp-defined>>. It should be acknowledged that W3C has intentions to improve Web apps and ‘close the gap’ with native apps, i.e. by identifying the strengths and weaknesses of the Web platforms in comparison to native apps, and to reduce critical weaknesses while taking greater advantage of Web apps’ strong points: Dominique Hazaël-Massieux, ‘Closing the Gap with Native Apps’ <<https://www.w3.org/blog/2013/03/closing-the-gap-with-native-ap/>>. Also note that in between mobile Web applications and native apps are the hybrid apps, which expose content from existing websites in app format. Hybrid apps allows one to package Web content and publish it in an app store, and have been described as ‘essentially Web site wrappers’ built upon the Web’s existing HTML specifications: Rachel Appel, *Modern Apps - Mobile Web Sites vs. Native Apps vs. Hybrid Apps* (November 2014) Microsoft Magazine <<https://msdn.microsoft.com/en-us/magazine/dn818502.aspx>>.

¹⁵⁹ Spence, above n 155; Chris Anderson and Michael Wolff, *The Web Is Dead. Long Live the Internet* (17 August 2010) WIRED <http://www.wired.com/2010/08/ff_webrip/>.

designated by the entity that built or sold it'.¹⁶⁰ His view was that these information appliances could negatively affect the open architecture of the internet, by giving rise to closed endpoints (i.e. consumers' entry points to the internet).¹⁶¹ The challenge to the maintenance of a 'vibrant global Internet', as described by Zittrain, is the creation of:

[T]wo separate Internets with distinct audiences: a return to the quiet backwater for the original experimentalist Internet that would restart the generative cycle among researcher and hackers distinct from consumers who live with a new, controlled Internet experience.¹⁶²

Apps are still relatively new considering the long history of the internet. Therefore, how mobile apps will influence the architecture of the internet, and whether it will clash with the early philosophies that have driven the development of the Web, remain to be seen.

4 The Future of the Internet and the Evolving Role of Copyright

In the infamous 'Declaration of the Independence of Cyberspace', John Perry Barlow purported to reject the rule of governments and their laws on behalf of the inhabitants of cyberspace.¹⁶³ Notwithstanding Barlow's convictions, it is clear today that the internet is not beyond legal regulation and governance under territorial jurisdictions. We should nevertheless question whether all existing rules, and the theories underlying those rules, continue to have the same meaning and relevance to an information society. It is important taking stock of the fundamental changes brought about by internet technologies, before reflecting on the conventional theories of copyright and considering newer theories put forward in response to the current context.

In contrast to the historical roots of copyright, it is clear that our ability to disseminate knowledge and cultural creations has advanced well beyond the use of printed copies. That is not to say that copyright is losing relevance; far from it. Copyright will be all the more important, *if* understood as a part of the dynamic communications environment. Experts involved in the early development of the internet

¹⁶⁰ Jonathan Zittrain, 'The Generative Internet' (2006) 119 *Harvard Law Review* 1974, 2014.

¹⁶¹ See *ibid* 2022–23, where Zittrain discusses the short-lived iTunes streaming feature.

¹⁶² *Ibid* 2040.

¹⁶³ John Perry Barlow, *A Declaration of the Independence of Cyberspace* (8 February 1996) <<https://www.eff.org/cyberspace-independence>>. The Declaration states:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

.....

Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

made some observations on the future of the internet which may be relevant to the development of copyright.¹⁶⁴ In an editorial note on the ‘Brief History of the Internet’ written in 2003, they noted the differences and overlaps between the internet and pre-digital media channels, stating that ‘[t]he Internet, although a network in name and geography, is a creature of the computer, not the traditional network of the telephone or television industry’.¹⁶⁵ This was likely to be so even if the internet would continue to change and support new applications such as ‘Internet television’.¹⁶⁶ The early pioneers of the internet explained that the ‘[t]he most pressing question for the future of the Internet is not how the technology will change, but how the process of change and evolution itself will be managed’.¹⁶⁷ Although these experts were addressing the internet’s technical architecture, the insight is nevertheless relevant to copyright’s role in this dynamic interconnected medium. Copyright law has to respond and evolve with the communications landscape. It is not about predicting or pre-empting a particular outcome or legal position, but guiding the process of change.¹⁶⁸

Section C. Theoretical Foundations

A rather pessimistic but generally accepted view is that the ‘periodic expansion of the subject matter, scope, or duration of rights under copyright *represents outcomes of specific legal and political contests* in which the interests of those seeking to broaden copyright generally have prevailed’.¹⁶⁹ The furtherance of private interests has been a characteristic inherent in copyright litigation and legislative lobbying since copyright’s formative centuries.¹⁷⁰ Nevertheless, Brian Fitzgerald reminds us that theory, while constrained by the ‘power of tradition of the interpretive community’, is a strategic tool of the IP pragmatist, particularly in the volatile digital environment.¹⁷¹ Likewise, Jessica Litman observes that the rhetoric used in copyright litigation and copyright lobbying in novel situations often relies heavily on fundamental principles.¹⁷² Therefore, it is useful to analyse changes in copyright law

¹⁶⁴ Leiner et al, above n 128.

¹⁶⁵ Ibid 31.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ As Shubha Ghosh argues, stability as a virtue within intellectual property law ‘is not about fixed addresses or relationships between owner and object. Instead, stability is found in *the process* through which these addresses and relationships change’: Shubha Ghosh, ‘Managing the Intellectual Property Sprawl’ (2012) 49(4) *The San Diego Law Review* 979, 1024 (emphasis added).

¹⁶⁹ Michael W Carroll, ‘The Struggle for Music Copyright’ (2005) 57 *Florida Law Review* 907, 910 (emphasis added).

¹⁷⁰ Zimmerman, above n 51; Isabella Alexander, ‘All Change for the Digital Economy: Copyright and Business Models in the Early Eighteenth Century’ (2010) 25 *Berkeley Technology Law Journal* 1351.

¹⁷¹ Brian Fitzgerald, ‘Theoretical Underpinning of Intellectual Property: I Am a Pragmatist but Theory Is My Rhetoric’ (2003) 16 *Canadian Journal of Law and Jurisprudence* 179.

¹⁷² Jessica Litman, *Digital Copyright* (Prometheus Books, 2001) 77. This occurs despite their existence “in an evidentiary vacuum”, as copyright theories are not clearly supported by historical evidence and remain unverified: Atkinson, above n 76, 1–3. Cf impressive industry statistics: e.g. Stephen E Siwek (Economists

through the lens of legal theory. In considering legal theory, we should take a critical view and ask whether these theories provide a sound foundation for the continued development of copyright into the future.

Prefaced by this objective of critical review, we may consider four theories that have been raised in the context of copyright law:

- utilitarian/economic theory;
- labour desert/natural rights theory;
- personality theory; and
- social-planning theory.¹⁷³

The first three may be described as conventional theories of property that have been applied to intellectual property discourse. Social-planning theory, on the other hand, has emerged more recently as a response to copyright's regulation of public discourse in a networked information society.

1 Utilitarian/Economic Theory

Often put forth by industries reliant on robust copyright protection, the utilitarian or economic theory of copyright provides that copyright is a necessary economic incentive for investment in the creation and distribution of original copyright works.¹⁷⁴ Copyright law is thus explained as 'a means for promoting efficient allocation of resources.'¹⁷⁵ Without proper protection of a marketable right, it is envisaged that an under-production of copyright works will occur.¹⁷⁶ Under this theory, copyright law's role is to maximize the benefits from creating additional works, minus the losses from limiting access and the costs of administering copyright protection.¹⁷⁷ In other words, it recognises that over-protection can be counterproductive as this raises the cost of expression.

The US Constitutional basis for copyright, which provides that Congress may legislate '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,'¹⁷⁸ is said to be explicitly utilitarian in

Incorporated), 'Copyright Industries in the U.S. Economy: The 2003-2007 Report' (Prepared for the International Intellectual Property Alliance (IIPA), 2009) <<http://www.iipa.com/pdf/IIPASiwerekReport2003-07.pdf>>.

¹⁷³ See William W Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001).

¹⁷⁴ See William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325.

¹⁷⁵ Ibid 325–33, 344–53.

¹⁷⁶ See Julie E Cohen et al, *Copyright in A Global Information Economy* (Aspen Publishers, 2nd ed, 2006) 6–8.

¹⁷⁷ Landes and Posner, above n 174.

¹⁷⁸ *United States Constitution* art. I, § 8, cl. 8.

nature — it aims to induce ‘the production and dissemination of works of the intellect’ to benefit society at large.¹⁷⁹ The US copyright clause is potentially broad enough to encompass various theories. For instance, an author-focus (in accordance with Locke’s labour desert theory) may be found in the express recognition of authors in the constitutional clause.¹⁸⁰ In addition, the aim of rewarding authors and inventors has also been emphasized by various US courts.¹⁸¹ Nevertheless, the utilitarian theory remains the primary justification in the US. In *Feist Publications v Rural Telephone Services*,¹⁸² the Supreme Court clarified that the vesting of rights in authors is a means to an end — ‘the primary objective of copyright is not to reward the labors of authors, but to promote the Progress of Science and useful Arts.... To this end copyright assures authors the right to their original expressions.’¹⁸³

Likewise, the High Court of Australia has taken a utilitarian approach to copyright, explaining that the 1710 Statute of Anne represented the ‘longstanding theoretical underpinnings of copyright’ as a ‘social contract’.¹⁸⁴ The Court stated that the ‘[c]opyright legislation strikes a balance of competing interests and competing policy considerations’ and ‘is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.’¹⁸⁵ Unlike the US Constitution, the Australian constitutional clause on copyright does not express a particular objective. Section 51 (xviii) provides that ‘[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... copyrights, patents of inventions and designs, and trade marks.’¹⁸⁶ Despite the lack of a constitutional objective subscribed to s 51(xviii), Kirby J of the High Court has cautioned that:

No absolute or unlimited rule may be stated. The protection of IP rights must be afforded in a constitutional setting which upholds other values of public good in a representative

¹⁷⁹ Fisher, above n 173.

¹⁸⁰ Jane C Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’ (2002) 52 *DePaul Law Review* 1063, 1064.

¹⁸¹ Fisher, above n 173, citing for example Justice Reed’s statement that the ‘[s]acrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered’ in *Mazer v Stein* 347 U.S. 201 (1954) 219.

¹⁸² 499 U.S. 340 (1991).

¹⁸³ *Ibid* 349–350.

¹⁸⁴ *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458 471 (French CJ, Crennan and Kiefel JJ):

In both its title and opening recitals, the Statute of Anne of 1709 echoed explicitly the emphasis on the practical or utilitarian importance that certain seventeenth century philosophers attached to knowledge and its encouragement in the scheme of human progress. [citations omitted]

¹⁸⁵ *Ibid* (French CJ, Crennan and Kiefel JJ).

¹⁸⁶ *Commonwealth of Australia Constitution Act 1900* s 51 (xviii). The head of power has been interpreted widely by the Australian High Court to include subject matter not expressly mentioned in s 51(xviii): *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479.

democracy. In the US, the relevant head of constitutional power has been viewed as containing in-built limitations many of which are derived from the competing constitutional objective of public access to information. In Australia, the constitutional setting is different but the existence of competing constitutional objectives, express and implied, is undoubted.¹⁸⁷

This understanding of copyright's contextual limits in Australia indicates that copyright should exist only to the extent that it benefits the public, by encouraging the creation and dissemination of knowledge. In sum, the utilitarian theory appears to play the most prominent role in shaping judicial perspectives on copyright law in the US and Australia.

Despite its prominence, key criticisms may be levelled at this utilitarian or economic theory of copyright. Commentators have observed that it now seems to have 'a touch of monomania about it'—we have seemingly replaced the divine right of kings with the 'divine right of markets'.¹⁸⁸ Former Chief Justice Spigelman of the New South Wales Supreme Court has said that conclusions in law and economics literature 'appear to be an ineluctable inference from the assumptions made about human behaviour, rather than a result of analysis'.¹⁸⁹ It is assumed that the use of economic incentives to maximize cultural production will lead to 'the greatest good for the greatest number of people'.¹⁹⁰

A related criticism of utilitarian theory is that it does not account for 'our fundamental, non-monetizable interests in expressive diversity and informed citizenship'.¹⁹¹ It is said that copyright owners are given broad, exclusive rights over all valued uses of copyright works, and users are required to pay the owner's price 'except in anomalous cases of insurmountable market failure'.¹⁹² In essence, the argument is that the utilitarian theory tends to define social welfare too narrowly. This creates a skewed copyright law that benefits highly organised content owning industries while disadvantaging amateur and social or non-commercial producers of expressive content.¹⁹³

2 Labour Desert/Natural Rights Theory

A theory also often cited by rightsholders is John Locke's labour desert theory of property rights. Locke asserted that a person who expends labour upon resources which are unowned or 'held in

¹⁸⁷ *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 531 n 266 (citations omitted).

¹⁸⁸ JJ Spigelman, 'Economic Rationalism and the Law' (2001) 24 *University of New South Wales Law Journal* 200, 213. See also at 201: 'There is a tendency amongst proponents of market ideology to treat "the market" as some sort of force of nature, as if it were no more than an Oriental bazaar or a Mediterranean rialto.'

¹⁸⁹ *Ibid* 206.

¹⁹⁰ Madhavi Sunder, 'IP3' (2006) 59 *Stanford Law Review* 257, 322.

¹⁹¹ Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, 289.

¹⁹² *Ibid* 290.

¹⁹³ Lydia Pallas Loren, 'The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection' (2008) 69 *Louisiana Law Review* 1.

common' has a natural property right to the fruits of his/her efforts.¹⁹⁴ Imported into intellectual property law, the protection of the products of a person's creativity is seen as morally right or natural.¹⁹⁵ However, this natural property right is not without limitation. According to Locke's theory, property rights can only be legitimately acquired if, after the acquisition, 'there is enough and as good left in common for others.'¹⁹⁶ In addition, it should be noted that Locke's theory was subject to a "non-waste" condition, which 'prohibits the accumulation of so much property that some is destroyed without being used'.¹⁹⁷

It is worth noting that Locke has been credited as being directly responsible for the expiry of the Licensing Act that granted exclusive printing rights to the Company of Stationers.¹⁹⁸ While Locke's 1694 Memorandum against the Stationers' Monopoly may be construed as a clear view against censorship and their publishing monopoly, his near silence on authorial rights is notable from an IP perspective.¹⁹⁹ It has been observed that neither 'the memorandum nor, apparently, any other now published writing of Locke makes any express connection between rights (or their absence) in expressive works and Locke's property theory'.²⁰⁰ On the other hand, the Memorandum does not hint at opposition to the application of his labour theory of property to expressive works.²⁰¹ What is clear is that Locke was consciously opposed to the idea of perpetual exclusive rights in expressive works and the idea of a government granted monopoly that was 'injurious to learning'²⁰² — a view that accords with the conditions of 'enough and as good left in common' and 'no-waste' placed upon his general theory of property. However, this vague proviso tends to be overshadowed by the general assertion that ownership rights can be justified as morally right or natural.²⁰³

¹⁹⁴ John Locke, *Two Treatises of Government* (Ansham Churchill, 1689).

¹⁹⁵ Wendy J Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1992) 102 *Yale Law Journal* 1533, 1544–45.

¹⁹⁶ John Locke, 'Two Treatises of Government, Second Treatise, Sec. 27' in Peter Laslett (ed), *Locke's Two Treatises of Government* (Cambridge University Press, 1960).

¹⁹⁷ Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 298; citing Locke, above n 194, § 37.

¹⁹⁸ Peter Laslett, 'Introduction' in Peter Laslett (ed), *John Locke, Two Treatises of Government - A Critical Edition with an Introduction and Apartus Criticus* (Cambridge University Press, 1960); Justin Hughes, 'Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)' (2009) 27 *Cardozo Arts & Entertainment Law Journal* 555, 556. See also Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1995) 32.

¹⁹⁹ Hughes, 'Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)', above n 198, 556–57.

²⁰⁰ *Ibid* 557.

²⁰¹ *Ibid* 557–58.

²⁰² *Ibid* 558, 560–61.

²⁰³ See also Ghosh, 'Managing the Intellectual Property Sprawl', above n 168, 1006:

A focus on labor as the source of property rights, and hence social and economic value, distorts our understanding of markets. ... To reduce the value that markets produce to labor is to ignore the role of technologies, finance, taste, pure chance, and a host of other factors. ... Locke offers a powerful myth for property rights that is helpful for shaping modern democracy, but is not insightful at all for what drives market transactions.

3 *Personality Theory*

A third theory that is raised in support of copyright protection is personality theory. Under this theory, creations of the mind are recognised as a method for individuals to become fully self-realised, and therefore they should be protected to promote “human flourishing”.²⁰⁴ In contrast to utilitarian theory, personality theorists posit that a just state must recognise intellectual property, regardless of efficiency considerations.²⁰⁵ George Hegel is often cited by personality theorists who argue for the heightened protection of intellectual property.²⁰⁶ However, Hegel’s theory only requires that citizens have some *minimal* property rights and be able to freely contract with private property in order for a free society to function.²⁰⁷ Hegel justifies the concept of property, not on a natural relationship between subject and object, but ‘on purely functional grounds — the role it plays in the modern state’.²⁰⁸ Hegel did not consider individual ‘free will’ as tantamount, but theorised that freedom is increasingly realised as the individual engages with society and their will is expressed through higher social orders.²⁰⁹ In common law jurisdictions the personality theory tends to be utilised to support certain aspects of protection such as moral rights,²¹⁰ although the theory forms the foundation of the French dualist system of both economic and moral rights.²¹¹

4 *Social-Planning Theory*

Finally, we come to a body of scholarship which posits that copyright law can and should be shaped to stimulate production and dissemination of works for the cultural enrichment of the public.²¹² This

²⁰⁴ See Fisher, above n 173; Margaret Jane Radin, ‘Property and Personhood’ (1981) 34 *Stanford Law Review* 957, 972. It should be noted that personality theory forms the basis of the French copyright law (*droit d’auteur*) and has had a significant impact on the development of the Berne Convention’: Jane C Ginsburg, ‘French Copyright Law: A Comparative Overview Part I’ (1988) 36 *Journal of the Copyright Society of the U.S.A.* 269, 269, discussing the perception amongst some participants in the Berne adherence process that “Berne level” copyright protection is synonymous with “French” copyright protection. See also Peter Burger, ‘The Berne Convention: Its History and Its Key Role in the Future’ (1988) 3 *Journal of Law and Technology* 1; Jean-Luc Piotraut, ‘An Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared’ (2006) 24 *Cardozo Arts & Entertainment Law Journal* 549, 557, highlighting article 2(6) of the Berne Convention which identifies authors as the beneficiaries of copyright protection.

²⁰⁵ Jeanne L Schroeder, ‘Unnatural Rights: Hegel and Intellectual Property’ (2005) 60 *University of Miami Law Review* 453, 453. See Hegel, ‘Remarks on Intellectual Property, Berlin (1821)’ in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (<http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_d_1821>).

²⁰⁶ Schroeder, above n 205, 453.

²⁰⁷ Hughes, ‘The Philosophy of Intellectual Property’, above n 197.

²⁰⁸ Schroeder, above n 205.

²⁰⁹ Hughes, ‘The Philosophy of Intellectual Property’, above n 197, 331–39, 332.

²¹⁰ See, eg, Martin A Roeder, ‘The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators’ (1940) 53(4) *Harvard Law Review* 554, 557.

²¹¹ Rudolf Monta, ‘The Concept of Copyright versus the Droit D’Auteur’ (1958) 32 *Southern California Law Review* 177, 177.

²¹² Fisher, above n 173.

school of thought, rooted in free-speech democratic ideals,²¹³ has yet to have a commonly accepted label. The term “social-planning theory” has been put forth by Professor William Fisher to represent a collection of views sharing this theme.²¹⁴ Public interest considerations in copyright law are not new, but have been raised in the midst of dominant labour desert and utilitarian theories throughout the history of copyright law.²¹⁵ This focus on public discourse is arguably also reflected in the first modern copyright act, the British *Statute of Anne 1710*, the long title of which provided that it was ‘[a]n Act for the Encouragement of Learning’.²¹⁶ Nevertheless, these themes are gaining prominence in the digital age, when copyright ‘reaches across the spectrum of ways in which we engage in our culture.’²¹⁷

Social-planning theory’s teleological orientation may be similar to that of utilitarian theory, but its vision of a desirable society takes into account the diversity of the “information society”.²¹⁸ Under this theory, copyright’s primary goal is not limited to allocative efficiency, but encompasses support for a democratic culture.²¹⁹ In short, ‘the public is the intended ultimate beneficiary.’²²⁰ However, a theory which calls for laws which promote human flourishing, in the abstract, may tell ‘us very little about the conditions of human flourishing in the networked information society’.²²¹

5 Commonalities and Differences between Existing Theories

The theories canvassed above encapsulate a view about the role of copyright in building a better society. However, each has a different emphasis, focussing either on the personhood interests of

²¹³ See Netanel, above n 191; Jack M Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’ (2004) 79 *New York University Law Review* 1; Rosemary J Coombe, ‘Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue’ (1990) 69 *Texas Law Review* 1853; Niva Elkin-Koren, ‘Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace’ (1996) 14 *Cardozo Arts & Entertainment Law Journal* 215.

²¹⁴ See Fisher, above n 173.

²¹⁵ See Atkinson, above n 76. Atkinson finds that as early as 1831, historian and poet Thomas Macaulay spoke in parliament of copyright as a necessary evil not a moral necessity. He said that the legislature need only to look at the public interest, not the heavens or natural law, to determine how copyright should be constituted. He placed the public interest in the optimum dissemination of information at the forefront of copyright policy (at 35). Likewise, in the mid-1900s, English economist and Nobel Prize winner Arnold Plant, in arguing for a circumscribed term of copyright, declared copyright regulation to be “socially inefficient”(at 8).

²¹⁶ *Statute of Anne 1710* (London).

²¹⁷ Lawrence Lessig, ‘Getting Our Values around Copyright Right’ (2010) 45(2) *EDUCAUSE Review* 26, 28. See also Elkin-Koren, above n 213.

²¹⁸ Fisher, above n 173. An “information society” is a society in which information is the core economic, cultural and social resource – almost everything citizens engaged in is intimately connected with information creation, retrieval, processing or management: Brian Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law, and Policy* (Thomson Reuters, 2011) 13. For more on the information society, see Frank Webster, *Theories of the Information Society* (Routledge, 2007).

²¹⁹ Netanel, above n 191.

²²⁰ Pierre N Leval, ‘Nimmer Lecture: Fair Use Rescued’ (1996) 44 *UCLA Law Review* 1449, 1450.

²²¹ Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012) 6.

authors, on the investment of labour, or on the economics of a free market. In considering their commonalities, both Locke's labour desert theory and Hegel's personality theory seem to centre on the creator. It can also be observed that Locke viewed property rights as justified because respecting them tends to further economic growth,²²² and in that regard, his view shares similarities with utilitarian theory. Likewise, one can also find commonalities shared by labour desert theory and Hegelian personality theory. Locke's view, it has been suggested, was that 'applying one's labor to a natural object ... endow[s] it with certain features pertaining to one's own form of existence'.²²³

Parallels may also be found between the emerging social-planning theory and the more conventional personhood theory of IP rights. As Professor Madhavi Sunder argues, technological changes have shifted 'human rights thinking away from first-generation rights (which focus on civil and political rights) toward third-generation rights (which focus upon culture, development and distributive justice)'.²²⁴ In other words, the personhood or "human flourishing" that is to be protected and encouraged is not solely that of an individual, but that of a person situated in society.²²⁵ In that regard, social-planning theory finds alignment with the personality rights theory propounded by Hegel. Social planning theory seeks to highlight the importance of culture and social development in a way that suits contemporary conceptions of a functioning modern state.

Despite sharing a number of thematic similarities, these theories can nevertheless be used to perpetuate disagreements on the scope and extent of copyright protection.²²⁶ Perhaps a more constructive approach begins with a recognition that no single over-arching theory holds the answer to the current and future challenges for copyright.²²⁷ As copyright has grown to affect our lives in more ways than previously imaginable, copyright law and policy needs to accommodate a range of values that are relevant to intellectual production and dissemination (whether it be economic efficiency, free speech or cultural exchange). Each theory carries a different focus and has its

²²² See Hughes, 'The Philosophy of Intellectual Property', above n 197, 299 ('[Locke] suggests that granting people property rights in goods procured through their labor 'increas[s] the common stock of mankind,' a utilitarian argument grounded in increasing mankind's collective wealth.'), citing Locke, above n 194, § 37. See also Marcus Verhaegh, *The A Priori of Ownership: Kant on Property* (9 September 2004) Mises Institute <<https://mises.org/library/priori-ownership-kant-property>>.

²²³ Rapaczynski, 'Locke's Conception of Property and the Principle of Sufficient Reason' (1981) 42(2) *Journal of the History of Ideas* 305, 307.

²²⁴ Sunder, above n 190, 273.

²²⁵ See Julie E Cohen, 'The Place of the User in Copyright Law' (2007) 74 *Fordham Law Review* 347 (discussing the place of the "situated" user).

²²⁶ See Ghosh, 'Managing the Intellectual Property Sprawl', above n 168, 1015 ('Foundational principles, because they are at such a high level, can be used to justify any position').

²²⁷ Cf Sunder, above n 190, 260, arguing for an overarching cultural theory of IP. Sunder nevertheless states that '[a] cultural approach to intellectual property is pluralist, emphasizing multiple values beyond just efficiency' (at 324).

limitations, therefore we should be wary of asserting their general applicability to all novel copyright challenges or disputes.

Section D. The Dissemination Function of Copyright

The overbroad application of conventional theories is not the only criticism that can be raised — a key omission under existing theories is consideration of *how* the dissemination of copyright content will occur using evolving communications technologies. At a fundamental level, copyright may be said to have two functions:

1. Incentivising authorship; and
2. Disseminating the resulting works to the public.²²⁸

Existing theories, particularly the utilitarian theory, tend to be used by proponents of stronger protection to prioritise authorship incentives. Uncritical reliance upon the utilitarian theory tends to lead to an assumption that wide and effective distribution of creative outputs will occur so long as the exclusive rights of authors or producers are secured under statute.²²⁹ This approach encapsulates a belief that ‘simple, clear and broad entitlements, unfettered by any regulation, will lead to the optimal deployment and development of communication technologies’.²³⁰ Although social-planning theory emphasises the need for greater communication of and access to cultural works for our modern society to flourish, there is little discussion of how this dissemination occurs.

²²⁸ *Twentieth Century Music Corporation v Aiken* 422 U.S. 151 (1975) 156 (‘The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good’); *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458 471 (‘Copyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public’). See also Patterson and Birch, who have described copyright as having one purpose (to promote learning). This purpose is fulfilled by several functions, i.e. ‘to encourage the creation, dissemination, and use of learning materials’: Patterson and Birch, above n 4, 392.

²²⁹ See Shubha Ghosh, ‘Decoding and Recoding Natural Monopoly, Deregulation, and Intellectual Property’ (2008) 4 *University of Illinois Law Review* 1125, 1131 (‘An emphasis on cost structure alone [under the incentives story of intellectual property] ignores the broader market and institutional arrangements which intellectual property helps to shape’); Sunder, above n 190, 284 (‘Utilitarianism’s central failure, of course, is its neglect of distribution’).

²³⁰ Phrased in communications policy terms, this may be described as the “stewardship model”: see Timothy Wu, ‘Copyright’s Communications Policy’ (2004) 103 *Michigan Law Review* 278, 337.

1 Copyright's Communications Policy

Recognising these omissions, Tim Wu explicitly considers the role of copyright in mediating disputes between intermediaries or “disseminators” of copyright content.²³¹ Wu suggests that ‘the main challenges for twenty first century copyright are not challenges of authorship policy, but rather new and harder problems of copyright’s *communications* policy’, i.e. the regulation of competition among rival disseminators of copyright content.²³² It is termed “communications policy” due to its regulation of the same parties as communications law, and the similar issues that arise.²³³ The rivalry occurs when a new disseminator — or in competition policy terms, a new market entrant — seeks to compete with or displace an incumbent disseminator.²³⁴

Wu posits that there are three basic positions that can be taken by law and policy makers in response to disputes between competing disseminators: open, stewarded and judicially-balanced.²³⁵ The open position is one which most likely favours new entry. The approach is ‘highly optimistic about the market and the process of creative destruction’ (a phrase first coined by economist Joseph

²³¹ Wu, ‘Copyright’s Communications Policy’, above n 230. Wu explains that copyright’s history as a struggle to adapt to new technologies is not new, but has yet to be consolidated (at 284–85). It should be recognised that Wu is not the first to consider copyright’s impact on competition between disseminators: see Wu at 285, citing Randal C Picker, ‘Copyright as Entry Policy: The Case of Digital Distribution’ (2002) 47 *Antitrust Bulletin* 423 (considering these issues in the context of online distribution of music and video). Other scholars have also considered copyright’s impact on market entry more generally: Shubha Ghosh, ‘Market Entry and the Proper Scope of Copyright’ (2005) 12(3) *International Journal of the Economics of Business* 347; Christopher S Yoo, ‘Copyright and Product Differentiation’ (2004) 79(1) *NYU Law Review* 212.

²³² Wu, ‘Copyright’s Communications Policy’, above n 230, 279 (emphasis in original). Wu notes that, depending on what one accepts as “copyright”, copyright’s management of rival disseminators actually predates copyright’s authorship regime, as it had roots as a publisher’s right ‘with no concern for the author’ (at 288, citing Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968) 8).

²³³ Wu, ‘Copyright’s Communications Policy’, above n 230, 286.

²³⁴ Wu describes this communication’s regime explicitly in competition policy terms and explains that ‘the term “communications policy” is taken simply to mean a special case of competition, or antitrust policy as between disseminators.’: *ibid.*

²³⁵ *Ibid* 363.

Schumpeter),²³⁶ and gives new online distribution systems an exemption from liability,²³⁷ in the hope that it will not destroy authorial incentives in the long term. The hope comes in two forms: (1) that ‘the demands of the market will necessarily recreate authorial incentives from somewhere, even if it is hard to specify where right now’²³⁸ or (2) that the exemption from liability will force matters into the political process and activate copyright’s classic communications regime.²³⁹ At the other end of the spectrum is the stewardship position, which views copyright as a market precondition.²⁴⁰ This position would argue that ‘the incumbent industry can and should be trusted to introduce online dissemination in an efficient and timely manner’.²⁴¹

A middle ground is described as the judicially-balanced position, which ‘puts the judiciary in charge of overseeing market entry based on its assessment of harms’.²⁴² It does not, as a default position, consider incumbent control as desirable, but on the other hand, is sensitive to potential negative effects on creative incentives.²⁴³ The effect of this position is ‘to call for the greatest judicial involvement and oversight of the three views’, as it places the judiciary in the position to assess ‘whether a pirate industry is likely to become a legitimate market player’.²⁴⁴ In concluding, Wu’s key point is that courts should be aware that their decisions ‘are de facto setting a substantial and growing part of the

²³⁶ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013) 83–84. Schumpeter’s concept of innovation as “creative destruction” posits that ‘[e]very piece of business strategy acquires its true significance only against the background of that process and within the situation created by it’, and cannot be understood outside of ‘its role in the perennial gale of creative destruction’. The competition which counts is ‘competition which commands a decisive cost or quality advantage which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives’. See also William J Abernathy and Kim B Clark, ‘Innovation: Mapping the Winds of Creative Destruction’ (1985) 14(1) *Research Policy* 3, 4, 6 & 14. Abernathy and Clark, building on the work of Schumpeter, have explained that ‘innovation is not a unified phenomenon: some innovations disrupt, destroy and make obsolete established competence; others refine and improve’. The former is characteristic of Schumpeter’s “creative destruction”, but firms may transition between modes of innovation when ‘the focus of innovation shifts from meeting emerging needs with new concepts, to refining, improving and strengthening the dominant design and its appeal in the market’. See also Gurry, ‘The Future of Copyright’, above n 2, where Dr Gurry explained that ‘[t]he enticing promise of universal access to cultural works has come with a process of creative destruction that has shaken the foundations of the business models of our pre-digital creative industries’.

²³⁷ It should be noted that Wu refers to contributory liability (secondary infringement in the US), but the same could be said about primary infringement, i.e. the open position could be achieved through a finding of non-infringement.

²³⁸ An example cited is *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 380 F.3d 1154 (9th Cir. 2004) 1167, where Thomas J states:

The introduction of new technologies is always disruptive of old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.

Wu, ‘Copyright’s Communications Policy’, above n 230, 363–64.

²³⁹ Wu, ‘Copyright’s Communications Policy’, above n 230, 363.

²⁴⁰ *Ibid* 364.

²⁴¹ *Ibid*.

²⁴² *Ibid*.

²⁴³ *Ibid*.

²⁴⁴ *Ibid*.

nation's copyright policy' and the only question that remains is 'how painful and costly' the transition from incumbent to challenger technology will be.²⁴⁵

Wu does not conclusively state which approach is best for copyright's communications policy.²⁴⁶ Nevertheless, he notes that 'while not conclusive, much recent economic thinking and even mainstream communications policy casts doubt on a model that grants the incumbent control over future inventions'.²⁴⁷ Further elaboration on the negative impact of a stewarded position is found in Wu's later work, where he explains that in periods of great change or uncertainty, it may be best that the law facilitate decentralized decisions.²⁴⁸ This is because centralized investment decisions are likely to 'block the best or most innovative ideas from coming to market'.²⁴⁹

Wu labels several decisions from 1900 to 1976 in the US as giving effect to copyright's "classic" communications policy, which involved disputes between the nascent recording industry and sheet music publishers, and disputes between cable television providers and the broadcasting industry.²⁵⁰ In these instances, the solution has taken the form of compulsory licences, implemented to ensure that the entrant or new disseminator has access to an essential input — copyright content.²⁵¹ Wu explains that a "new" communications policy has emerged since the passage of the 1976 Copyright Act, largely in response to the new challenge to incumbent disseminators which thereafter have taken the form of 'passive, enabling technologists paired with infringing users'.²⁵² He cites the *Sony* case (where the US Supreme Court found that VCR manufacturers may not be liable for contributory or vicarious copyright liability where their copying equipment was "capable of substantial noninfringing uses")²⁵³ as establishing the precedent 'for setting technological rivalry problems with judicially-balanced immunity rules'.²⁵⁴ He describes the judicially-determined limitations on liability as 'the foundation and centrepiece of copyright's new communications policy'.²⁵⁵

²⁴⁵ Ibid 366.

²⁴⁶ Ibid. Wu states: '[N]one of these options is particularly tidy. ...What the right answer is to the online distribution problem is hard to say.'

²⁴⁷ Ibid 338.

²⁴⁸ Tim Wu, 'Intellectual Property, Innovation, and Decentralized Decisions' (2006) 92(1) *Virginia Law Review* 123, 130. Wu's key argument is captured in this paragraph:

[W]e should assess intellectual property assignments their effects on industry structure. In this model, the of intellectual property is to subsidize selected industries sets are vulnerable to misappropriation. The chief costs use of intellectual property rights to block or delay the try of threats to intellectual property owners, and (2) the centralization of decisionmaking within the industry. The intuition that other costs and benefits described in the literature are irrelevant, but rather that they are less significant to national economic performance than the long-term effects on industry structure.

²⁴⁹ Ibid 126.

²⁵⁰ Wu, 'Copyright's Communications Policy', above n 230, 297ff & 311ff.

²⁵¹ Ibid 324.

²⁵² Ibid 343.

²⁵³ *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984).

²⁵⁴ Wu, 'Copyright's Communications Policy', above n 230, 350.

²⁵⁵ Ibid.

2 “Technology Neutrality” as Judicial Balancing

Copyright’s communications policy and the judicially-balanced approach put forward by Wu has not gained much prominence in today’s debates; instead we find a different phrase being touted as an objective of copyright law in the internet era — “technology neutrality”. It has been asserted that a strategy for adaptability in the law is to formulate laws to be as “technology neutral” as possible.²⁵⁶ Since even the most visionary computer scientist cannot predict how technology will evolve, the argument is that we should endeavour to enact laws that are ‘predictable, minimalist, consistent and simple’, which are more flexible and adaptable than complex and ambitious laws.²⁵⁷ As Pamela Samuelson explains, one of the challenges of regulating the global information society is the ‘development of legal norms capable of adaptation to a rapidly changing technological and business environment’.²⁵⁸ The benefit of a legal provision that is drafted in technology neutral terms and not formulated by reference to a specific technology is that, firstly, it is less likely to become outmoded as technology evolves, and secondly, the law is less likely to benefit specific classes of competitors in a market.²⁵⁹

In practice however, minimalism and simplicity can be difficult to reconcile with the objective of having predictable laws. A provision that is drafted broadly can be interpreted in various ways, particularly where the policy objective of implementing that provision is unclear.²⁶⁰ Deliberate use of broad legislative terminology to encourage judicial contribution to its interpretation is in effect parliamentary delegation of law-making function.²⁶¹ Therefore, “technology neutrality” is more accurately described as a *drafting* solution that shifts responsibility at the first instance to the courts. It should not be mistaken as a solution or guiding principle for courts tasked with interpreting copyright rules as applied to novel technologies.²⁶²

²⁵⁶ Pamela Samuelson, ‘Five Challenges for Regulating the Global Information Society’ in Christopher Marsden (ed), *Regulating the Global Information Society* (Routledge, 2000) 317, 321.

²⁵⁷ Ibid, citing William J Clinton and Albert Gore Jr, ‘A Framework for Global Electronic Commerce’ (1 July 1997) <<http://clinton4.nara.gov/WH/New/Commerce/read.html>>.

²⁵⁸ Samuelson, ‘Five Challenges for Regulating the Global Information Society’, above n 256, 321.

²⁵⁹ See *ibid*.

²⁶⁰ See Brad A Greenberg, ‘Rethinking Technology Neutrality’ (2016) 100 *Minnesota Law Review* 1495, explaining the deficiencies of relying solely on the drafting of technology neutral laws.

²⁶¹ Susan Corbett, ‘Out of Time? Copyright Law and the Australasian Judiciary in the Digital Age’ in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014) 161, 168. See also Greenberg, above n 260, 1514.

²⁶² Expressed as a guiding principle, “technology neutrality” is not about the formulation of laws, but its interpretation and application in novel contexts. See Gurry, ‘Foreword: The Future of Copyright’, above n 2, vi:

The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or moribund technologies. Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from the cultural exchanges made possible by those technologies to return to creators and

Understood in this way, technology neutrality is a means, not an end. The drafting of technology neutral laws initiates the judicially-balanced approach described by Wu. Building on Wu's scholarship, Peter DiCola and Matthew Sag provide further insight on the roles of various institutions in copyright disputes.²⁶³ They explain that the '[c]ontroversies between copyright owners and new technologists are not simply resolved by making one-time decisions about the allocation or design of property rights. ... The baseline allocation of property rights is often just the beginning of a negotiating process.'²⁶⁴ Put another way, property rights solutions 'are not like wind-up toys'; achieving the desired allocation of rights requires 'government participation at the start to set up the system and on a continuing basis to maintain the system'.²⁶⁵ They note that court decisions are an important source of information for legislative setting of priorities and draft statutes.²⁶⁶ Therefore, the legislature may deal with the lack of information at a particular point in time by leaving issues for courts to resolve (presumably by drafting legislative terms in ambiguous language).²⁶⁷ In sum, technology neutral laws may be desirable to ensure that copyright rules may adapt more quickly in the face of technological changes through judicial interpretation. A technology neutral copyright rule is a starting point; it cannot, in and of itself, bring about predictability, consistency or certainty to this area of practice.²⁶⁸

performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.

However, the term "technology neutrality", in and of itself, does not tell us how we can achieve this interpretive objective. See also Carys J Craig, 'Technological Neutrality: Recalibrating Copyright in the Information Age' (2016) 17 *Theoretical Inquiries in Law* 601, 609, explaining that 'technology neutrality has many shades of meaning' and acknowledging that 'actual technological neutrality is not ... an attainable state for copyright law; it is more akin to a normative quest'.

²⁶³ Peter DiCola and Matthew Sag, 'An Information-Gathering Approach to Copyright Policy' (2012) 34 *Cardozo Law Review* 173. The authors provide a detailed account of the process of copyright policy-making through "private" dispute settlement in their scholarship. They focus, in particular, on the role of various US government institutions (including Congress and the courts) in gathering information about the impact of new technologies, and intervening during the course of a dispute.

²⁶⁴ Ibid 241.

²⁶⁵ Ibid 186.

²⁶⁶ Ibid 192. Congress' principal methods of gathering information are private conferences and congressional hearings, but a main drawback of this is that 'the information Congress receives through these tools is limited by the set of parties invited to participate' (at 189).

²⁶⁷ Ibid.

²⁶⁸ It should be noted the concept of technology neutrality has been debated in the context of Canadian jurisprudence in recent years following Supreme Court decisions endorsing the principle: see e.g. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326, and further discussion in Carys J Craig, 'Technology Neutrality: (Pre)Serving the Purposes of Copyright Law' in Michael Geist (ed), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright* (University of Ottawa Press, 2013) 271. In the EU, the Court of Justice of the European Union has explained in its interpretation of the transient copying exception in article 5(1) of the InfoSoc Directive that the exception 'must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other': *Football Association Premier League v QC Leisure*;

3 *Evolution and Instability as a Necessity*

The drafting of copyright statutes in broad and flexible terms that are capable of encompassing new technologies may perpetuate uncertainty, but Wu argues that such uncertainty is not necessarily a bad thing, nor is it avoidable.²⁶⁹ This may be contrasted with the conventional view that investment in efforts to gain favourable legislative action or judicial outcomes is wasteful or undesirable.²⁷⁰ Wu argues that uncertainty ‘can also advance a communications policy that favours new entry’.²⁷¹ This statutory ambiguity forces rival disseminators to come to the government or litigate, and in the process, present information that could lead to a better and earlier settlement of the legal framework.²⁷² Therefore, a level of uncertainty is inherent in so-called flexible, “technology neutral” rules, and the process of resolving disputes may mitigate the chilling effects on innovation.

This optimistic account of statutory uncertainty, however, does not address some matters that could skew the outcome in favour of incumbents. Even in the case of risk-neutral parties, economic literature suggests that parties tend towards over-compliance in the face of uncertainty.²⁷³ In the copyright context, examples of over-compliance include conservative product design decisions of technology firms,²⁷⁴ and the lost opportunity where certain technologies are not pursued due to a risk averse approach.²⁷⁵ Where technologies or technology-reliant industries are stifled, information vacuums are created, and there is little opportunity to observe what the technology is capable of and no real information on the effect on revenues, business prospects and technological opportunities.²⁷⁶ According to DiCola and Sag, these observations highlight the need for an information-focussed institutional perspective to supplement a pure property rights approach that attempts to provide a

Karen Murphy v Media Protection Services Ltd (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [164].

²⁶⁹ Wu, ‘Copyright’s Communications Policy’, above n 230, 335–36. See also Ghosh, ‘Managing the Intellectual Property Sprawl’, above n 168, 1023 (‘[I]ntellectual property itself is about change. Promoting progress, to echo the U.S. Constitution, may have many meanings, but one implication is that of disruption’).

²⁷⁰ See Wu, ‘Copyright’s Communications Policy’, above n 230, 297.

²⁷¹ *Ibid* 336.

²⁷² *Ibid*.

²⁷³ John E Calfee and Richard Craswell, ‘Some Effects of Uncertainty on Compliance with Legal Standards’ (1984) 70 *Virginia Law Review* 965. See also Feldman and Lifshitz on how uncertainty could lead to benefits and avoid “distorting effect of the law” on our conduct (perhaps inhibiting novel solutions to legal barriers): Yuval Feldman and Shahar Lifshitz, ‘Behind the Veil of Legal Uncertainty Advances in the Behavioral Analysis of Law: Markets, Institutions, and Contracts’ (2011) 74 *Law and Contemporary Problems* 133.

²⁷⁴ DiCola and Sag, above n 263, 214–215.

²⁷⁵ *Ibid* 238. See also Michael A Carrier, ‘Copyright and Innovation: The Untold Story’ (2012) 2012 *Wisconsin Law Review* 891, detailing the potential lost innovation in the music industry in light of the Napster decision.

²⁷⁶ DiCola and Sag, above n 263, 240. See also Wu, ‘Copyright’s Communications Policy’, above n 230, 349 observing that ‘court suppression of a new technology is, for all intents and purposes, congressionally irreversible. A new technologists almost by definition has little chance of convincing Congress to reverse a copyright holding’.

definitive solution.²⁷⁷ Importantly, in the face of uncertainty or ambiguity in the statute, there should not be a presumption that it is interpreted in favour of a particular party; it ought to be interpreted in a manner ‘that best serves the *public* interest in the creation and dissemination’ content.²⁷⁸ The resolution of copyright disputes through allocation of exclusive rights and exceptions is an imperfect solution. Therefore, efforts should not be invested in an idealised solution or one-off legislative fix, but in supporting and guiding the *incremental process* of fostering copyright’s dual dissemination and authorship functions.

4 More Robust Consideration of Copyright’s Dissemination Function

Wu does not dispute the importance of what he terms “author-centric” theories of copyright, but asserts that existing theories of authorship ‘provide only a partial description of the law’.²⁷⁹ He expressly characterises copyright’s authorship and communications policies as bearing independent functions,²⁸⁰ and argues that however ‘pure and true’ copyright’s authorship policy is, its communications policy inevitably arises by necessity.²⁸¹ While Wu notes the attractiveness of an ‘author-driven communications policy’, he considers the aspiration that ‘authors would one day become masters of their own destiny’ an unlikely reality due to the generally weak bargaining power of authors and the lack of regulation in copyright contracting.²⁸² This unequal bargaining power is

²⁷⁷ DiCola and Sag, above n 263, 244. In contrast, Professor Paul Goldstein asserts the necessity of prompt legislative action to secure the rights of owners, and the interest of copyright owners to litigate early, because uncertainty and inaction can lead to a *de facto* standard of legality. Once this *de facto* standard is established and uncompensated use ensues, another information vacuum is created — members of the public no longer use price signals to indicate their preference for particular creative outputs: Goldstein, above n 35, 256–57. However, this argument alleviates market-based perspectives over and above the broader implications of copyright overreach, such as the stagnation of technological development and the associated effects on copyright’s communication function. It may be argued that the opposite outcome is no more desirable, i.e. prompt legislative action which sets a *standard of illegality* before the technology has been developed further, means that there is not opportunity to assess its value as a means of communication and the positive role it could play in copyright markets.

²⁷⁸ ‘Brief for Intellectual Property and Copyright Law Professors as Amicus Curiae Supporting Defendant’ *WNET, Thirteen v Aereo, Inc.* 712 F.3d 676 (2nd Cir. 2013), 10 (emphasis in original). The law professors continue:

[T]he court’s role in construing the statute is not to produce maximum authorial reward, but maximum public benefit. Where that means (as it often does) that it is the copyright owners who must persuade Congress to address the matter and adjust the balance so that it tips more in their favor, they are entitled and well-equipped to do that, as they have done so often in the past.

²⁷⁹ Wu, ‘Copyright’s Communications Policy’, above n 230, 281–283. These are the utilitarian or economic theory and Lockean labour desert or natural rights theories.

²⁸⁰ See *ibid* 279, 325. For Wu’s views on copyright’s authorship policy, see Tim Wu, ‘On Copyright’s Authorship Policy’ (2008) 1 *University of Chicago Legal Forum* 335 (arguing that a neutral authorship policy supports various modes of authorship).

²⁸¹ Wu, ‘Copyright’s Communications Policy’, above n 230, 325.

²⁸² *Ibid* 339, where Wu states:

The problem remains what it always has been. ... [Authors] rarely control copyrights. Most copyrights are contractually assigned to disseminators ... or otherwise effectively controlled by the disseminator. It is a function of the relative bargaining power of authors and disseminators. Unless this difference in

attributed to the comparative advantage held by industries that specialise in disseminating packaged information.²⁸³ If this view is accepted, one may conclude that copyright's authorship regime features prominently in the rhetoric of disputes, when the disputes in fact centre on copyright's communications regime.

At other points of his article, Wu nevertheless seems to recognise an interdependence between the two functions of authorship and dissemination. He notes that the *Sony* ruling under the "new" communications policy requires courts to 'make some assessment of whether, on balance, the likely harm created by the subject technology – *most obviously, through damage to creation incentives* – usually makes market entry desirable'.²⁸⁴ A clearer statement may be found towards the end of his article, where Wu states that:

The communications policy perspective, in other words, sees online distribution as a weighing of two costs, both difficult to assess. On one side are the costs of the foreclosure, which are the forgone benefits of the new technology and of disrupting the market power of existing content industries. *On the other side are the lost incentives for new authors and value (if any) of the reliance interests in the property rights guaranteed the copyright law.* Weighing these two costs leads to a spectrum of plausible policy positions on the question of online content distribution, each of which reflects different views of national communications policy.²⁸⁵

In critiquing current approaches that afford inadequate attention to copyright's dissemination function, it may be useful to conceptually separate the two functions. Moving past this point, however, we need to consider how these functions relate to one another in order to advance our analysis of copyright law. Wu recognises a connection between the two functions, but tends to position them as competing considerations to be balanced by courts.²⁸⁶ If understood in these terms, the encouragement of innovation and implementation of disruptive dissemination models may be perceived as a trade-off with authorship incentives. The calibration of copyright policy then becomes a zero-sum game; a step forward for copyright's communications policy represents a step back for its authorship policy.

power or the laws controlling copyright contracting changes, true authorial control of copyright will likely remain an attractive vision but not a discernable reality.

²⁸³ Ibid 340. Wu explains that '[c]hanges in technology have not changed that basic dynamic, even though today's intermediaries have changed'.

²⁸⁴ Ibid 345 (emphasis added).

²⁸⁵ Ibid 363 (emphasis added).

²⁸⁶ See also Wu, 'Intellectual Property, Innovation, and Decentralized Decisions', above n 248, 126, where he states that the concern of centralized decision-making resulting in the blocking of innovation 'must be weighed against the desirable incentives and subsidies created by an intellectual property grant'.

This may be true if we view these policies in static terms, but we should consider how these policies could align if we take a dynamic approach to these interests.

If we take a stewardship approach and vest control in incumbent disseminators, we may guarantee the remuneration of creators in the short run. However, in the process we could be limiting the potential for disruptive innovations to bring about the “creative destruction” of dissemination markets. This stabilises the market of an incumbent disseminator, and its power within the market. If this trend continues over a period of time, an incumbent disseminator is more likely to accrue substantial market power or become a bottleneck disseminator, and be in a position to exploit authors and content producers. A stewardship approach favouring such stability is unlikely to encourage “revenue stream diversity” for content creators.²⁸⁷ Where such diversity is absent, Eric Priest observes that monetization opportunities for smaller and independent creators of content are drastically reduced, and creators are disproportionately exposed to the idiosyncrasies of peculiar markets and exploitation by intermediaries.²⁸⁸ Therefore, there is a potential for disruption of existing dissemination models to benefit creators. This potential could be made more apparent if we consider the *dynamic* role of disseminators more explicitly in copyright law and policy. If we simply consider static incentives and merely envisage increasing or decreasing points of consumption, we fail to take into account the potential benefits that flow from technological innovation.²⁸⁹ Importantly, such innovation may uproot complacent incumbents from their position of power. Under this threat of “creative destruction”, incumbents are conditioned by changes in market conditions and cannot simply seek to maintain the status quo. In sum, rather than viewing authorship and dissemination as trade-offs, we may find alignment between them and consider how dissemination rivalries could benefit copyright’s authorship policy if assessed over a longer period of time.

Wu notes the relevance of temporal considerations at certain points in his article.²⁹⁰ On the “new” communications policy that emphasises the role of the judiciary, Wu considers judges to be in ‘continuing supervision of the online distribution industry, waiting for *the moment* that the pirate

²⁸⁷ Eric Priest, ‘Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China’s High Piracy Environment?’ (2014) 27(2) *Harvard Journal of Law and Technology* 467, 514–15. Priest cites Paul Goldstein’s formulation of the best method for encouraging revenue stream diversity, which ‘is to extend rights into every corner where consumers derive value from literary and artistic works’ (Goldstein, above n 35, 277), but in doing so, points out that this should not be taken to mean that copyright rights should be absolute or that every use should be monetizable.

²⁸⁸ Priest, above n 287, 515–16.

²⁸⁹ This is likely to occur because the incentives for authorship are observable in static terms (i.e. the scope of rights and degree of control afforded to rightsholders), while the changes in dissemination interests require observation over time.

²⁹⁰ In Wu’s description of the “open position” of copyright’s communications policy, he discusses its reliance on faith that an exemption from liability, ‘however traumatic in the *short term* for both disseminators and creators, will not destroy authorial incentives in the *long term*’: Wu, ‘Copyright’s Communications Policy’, above n 230, 363 (emphasis added). In addition, he refers to ‘the *static* benefits of copyright as a form of property’ in his discussion of author-centric theories (at 283, emphasis added).

becomes legitimate'.²⁹¹ Here the overall task of courts is to filter out 'clearly illegitimate' technology that 'could not survive but for the advantage of piracy'.²⁹² Wu's reference to pirate technology should be understood in the context of the legal rules discussed, i.e. contributory liability for copyright infringement, which considers use of the disseminator's technology by third parties for infringing purposes. In the context of the making available right however, courts are assessing the primary liability of disseminators themselves through their provision of an access service to consumers. Here we should be cautious about describing the analysis as one identifying "legitimate" (as opposed to "pirate") technology, but appreciate that it requires a nuanced assessment of the scope of the making available right. In terms of the making available right, it may be more productive to take the temporal dynamics of copyright's communications policy into account via an explicit evaluation of the technological innovation being introduced by a new disseminator.²⁹³ The so-called legitimacy of a rival disseminator's competitive conduct could perhaps depend on the value of the disruptive technology being introduced. The question, albeit not a simple one, is whether the rival disseminator is introducing a technological innovation that will enhance copyright's dissemination function going forwards.

Wu has taken the important step of articulating matters that a decision-maker should be aware of in advancing copyright's dissemination function, focusing in particular on the rivalries among disseminators of copyright content. However, to be of utility to courts interpreting the making available right, we need to expand on this scholarship and consider other matters that should inform this challenging task. Firstly, we may consider whether a link between the interests of content creators and new disseminators can be substantiated in clearer terms. For instance, we can ask if creators stand to benefit from the rivalries and power struggles amongst disseminators, notwithstanding their low bargaining power. Secondly, efforts to advance copyright's dissemination function could benefit from more in-depth consideration of the changing interests of disseminators. In light of technological advancements, the interests of disseminators may shift — a disseminator may initially be interested in introducing disruptive innovations that enhances access to content by members of the public; at a

²⁹¹ Ibid 365 (emphasis added). See also Wu's statement that courts are to assess 'likely harm created by the subject technology' (at 348, emphasis added).

²⁹² Ibid 350. He also refers to the 'mere evasion of the copyright statute' (at 348). Note that Wu recognises the limits of judicial competence, and the difficulties in the context of contributory liability whereby mainstream communications technologies 'were born as pirates' (at 349).

²⁹³ It should be recognised that Anthony Reese has investigated the temporal dynamics of the 'capable of substantial noninfringing uses' test established in *Universal City Studios v Sony Corporation of America* 480 F. Supp. 429 (C.D. Cal. 1979). He finds that the legal character of "dual-use devices" (i.e. infringing and non-infringing use) can change, particularly under the fourth fair use element which focusses on the ability of the owner to exploit work in markets. This is because markets tend to expand, or more markets develop, over time: R Anthony Reese, 'The Temporal Dynamics of "Capable of Substantial Noninfringing Uses"' (2006) 13(1) *Michigan Telecommunications and Technology Law Review* 197, 203–204. While this analysis is made in the context of *Sony's* application of fair use and secondary liability principles, temporal dynamics may also be considered when interpreting the scope of exclusive rights.

different technological context, that same disseminator may prefer maintaining the status quo and preserving control over content.²⁹⁴ Therefore, the dynamics of copyright's dissemination function and its role in mediating the relationships between other actors within the copyright system should be considered.²⁹⁵

Section E. Chapter II – Conclusion

We need a principled framework to guide copyright into the future. This is necessarily a forward-thinking approach to copyright; one that furthers our understanding of copyright law's role in an evolving environment. Various theories have been put forward to justify the role of copyright in society, and they provide useful insights despite technological innovations that distort or upend the existing relationships between copyright owners, disseminators and the public. Nevertheless, our understanding and application of those theories may need refinement as we strive to develop a copyright system that remains relevant in today's environment.

One aspect that should be considered in more depth is the role of disseminators in furthering copyright's key functions of encouraging authorship and facilitating the dissemination of content. The need to respond to technological changes has been a driving factor in copyright law's development since its inception. However, we should question whether copyright law merely responds to technological change. Dissemination rivalries arise due to technological innovation and changes that initiate the "creative destruction" of copyright markets. Instead of viewing technological change as a problem that requires copyright law's response, we could consider if copyright has an active role in guiding technological innovation in a positive sense. The scope of the making available right, in particular, is likely to be a significant factor driving the development of communications technologies — technologies which enable the efficient dissemination of copyright content from authors to consumers.

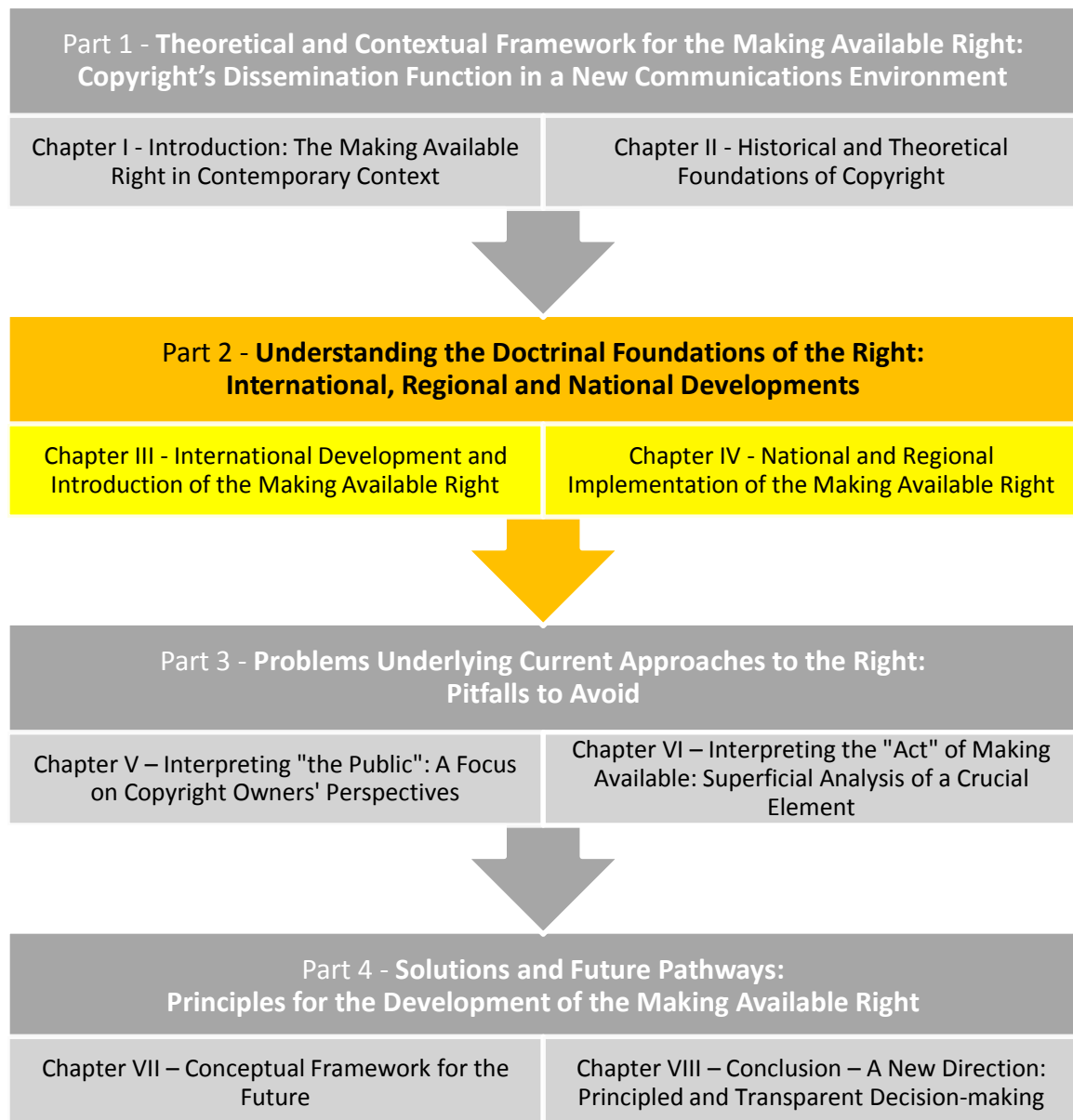
²⁹⁴ This shifting of interests, from disruptive newcomer to incumbent maximising control, is broadly captured in Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Vintage, Reprint edition, 2011). This consideration is particularly relevant to the element of "the public" in the making available right, which is considered in detail in Chapter V.

²⁹⁵ This analysis may also be enriched by a consideration of consumer interests in access to copyright content, which has been recognised by scholars such as Joseph Liu: Joseph P Liu, 'Copyright Law's Theory of the Consumer' (2003) 44(2) *Boston College Law Review* 397. Liu highlights copyright law's 'dominant image of the author' and observes that 'far less attention has been paid to consumers of copyrighted works' (at 398). Consumer interests are allied to copyright's dissemination function, as copyright consumers are the beneficiaries of more efficient and effective dissemination of content. This thesis will consider consumer autonomy interests in Chapter 7.

- PART 2 -

Understanding the Doctrinal Foundations of the Right: International, Regional and National Developments

Part 2 considers the development of the making available right in Australia, the US and the EU, and asks whether implementation of the right is meeting early expectations and objectives. It begins with an account of the reasons for introducing the making available right, based on the preparatory works of the Internet Treaties and academic commentary. It then canvasses the approaches taken by legislators and courts in the relevant jurisdictions under the “umbrella solution”, identifying common themes and disparities in their approaches.



CHAPTER III. INTERNATIONAL DEVELOPMENT AND INTRODUCTION OF THE MAKING AVAILABLE RIGHT

Purpose

This chapter aims to explain the basic elements of the making available right and the rationale for its introduction via the WIPO Internet Treaties. To do so, it will:

1. Outline the making available right as set out in the WIPO Internet Treaties;
2. Identify the objectives of introducing the making available right as expressed in the preparatory works to the Internet Treaties and in academic commentary; and
3. Highlight the lack of authoritative guidance on the making available right, and underscore the importance of national and regional decisions on the right.

Headings

- A. The Berne Convention and TRIPS Agreement
- B. The WIPO Internet Treaties: WCT and WPPT
- C. Interpreting the Internet Treaties
- D. Academic Commentary on the Making Available Right
- E. Who Interprets Treaties?

The introduction of the making available right via the WIPO Internet Treaties was a response to the internet, which greatly expanded the way content could be disseminated to the public. A specific concern was that existing rights did not adequately protect on-demand content delivery. The result of extensive preparations and deliberations coordinated by WIPO was a broadly-worded right of communication to the public, which encompassed “acts” of making available. However, neither the notion of “make available” nor “the public” were defined by the treaties. The right as drafted represented a compromise — a technology neutral right which afforded member states great flexibility as to how they wished to implement the right.

It is useful to understand the background to the treaties, before we proceed to consider the complications that have arisen in the digital age. This chapter canvasses the broad aspirations accompanying the introduction of the right, as expressed in the meetings and preparatory works to the WIPO Internet Treaties. It also outlines the academic speculation and disagreement about the scope of the right following its introduction. This discussion shows that there has been little clarity surrounding the scope of the making available right since its inception. The chapter progresses from this reflection on the history of the right to consider significant questions for its future: how do we find meaning in the WIPO Internet Treaties, and who is responsible for interpreting the making available right?

Section A. The Berne Convention and TRIPS Agreement

1 *Public Performance and Communication to the Public under Berne*

The first major multilateral treaty on international copyright law was the Berne Convention for the Protection of Literary and Artistic Works 1886.²⁹⁶ The goal of the Berne Convention was not primarily to harmonize national laws and substantive rules, but to prohibit discrimination against foreign authors.²⁹⁷ Nevertheless, it contains broadly worded substantive minima setting out the baseline protection that must be afforded to foreign authors in order to supplement its non-discrimination principle.²⁹⁸ As a fundamental instrument, its structure has become a template for subsequent copyright and neighbouring rights conventions, which build on or refer to the Berne Convention.²⁹⁹

Under the Berne Convention, the rights covering dissemination of works in non-material form can be divided into direct means (i.e. public performance or recitation to an audience) and indirect means by transmission (e.g. broadcasting, and dissemination by wire, including cable and the internet).³⁰⁰ The public performance right is contained in articles 11 and 14, and the right of communication to the public by transmission are in articles 11*bis*, 11*ter*, 14 and 14*bis* (the latter two articles dealing with cinematograph adaptations).

Under article 11, authors of dramatic, dramatico-musical and musical works have the exclusive right of authorizing:

- (i) the public performance of their works, including such public performance by any means or process; and
- (ii) any communication to the public of the performance of their works.

Under article 11*bis*, authors of literary and artistic works have the exclusive right to authorise:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

²⁹⁶ *Berne Convention*, signed 9 September 1886, (entered into force 5 December 1887). Note that prior to the Berne Convention, international protection was largely sought through a proliferation of bilateral treaties: see Jane C Ginsburg and Edouard Treppoz, *International Copyright Law: U.S. and E.U. Perspectives* (Edward Elgar Publishing, 2015) 11–18.

²⁹⁷ Ginsburg and Treppoz, above n 296, 21.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid* 1 ('Like the planets that orbit the sun, and the moons that revolve around a planet, the various copyright and neighboring rights treaties are interrelated and interdependent, and primordially influenced by the Berne Convention'). Note that such similarities in structure and expression are not shared by the WTO TRIPS Agreement (*ibid* at 21).

³⁰⁰ Ricketson and Ginsburg, above n 71, 703–4.

- (ii) 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; and
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

Article 11*ter* provides that authors of literary works shall enjoy the exclusive right to authorise:

- (i) the public recitation of their works, including such public recitation by any means or process; and
- (ii) any communication to the public of the recitation of their works.

Article 14(1)(ii) provides that authors of literary or artistic works enjoy the exclusive right of authorising ‘the public performance and communication to the public by wire’ of the cinematograph adaptation of these works. Article 14*bis*(1) extends these rights to the owner of copyright in the cinematograph work, providing that ‘[t]he owner of copyright in a cinematograph work enjoys the same rights as the owner of an original work, including the rights referred to in the preceding Article’.

The Berne Convention applies to “literary and artistic works”, defined broadly by an inclusive list encompassing dramatic or dramatico-musical works, musical compositions and cinematograph works.³⁰¹ It does not, however, cover sound recordings and the rights of performers and phonogram producers. A separate treaty, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations³⁰² was eventually established in 1961 to extend protection to performers in performances and producers of phonograms in phonograms, and protect the rights of broadcast organizations in their broadcasts. The rights are often classed as “related rights” or “neighbouring rights”, in contrast to the “authors’ rights” that were protected by the Berne Convention.³⁰³

2 *Ambiguities and Gaps under Berne*

The Berne Convention left open a variety of gaps in coverage in terms of subject matter and exclusive rights.³⁰⁴ For example, the right of communication to the public *by wire* (cable) does not extend to literary and artistic works in any form; it only extends to:

- (1) the performances of dramatic, dramatico-musical and musical works (under art 11(1)(ii);

³⁰¹ *Berne Convention*, signed 9 September 1886, (entered into force 5 December 1887) art 2.

³⁰² *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, signed 26 October 1961 (entered into force 18 May 1964).

³⁰³ See, eg, Ginsburg and Treppoz, above n 296, 22.

³⁰⁴ See Ricketson and Ginsburg, above n 71, 138–140.

- (2) the recitation of literary works (under art 11*ter*(2)(ii);
- (3) works adapted for or reproduced in cinematograph works (under art 14(1)(ii); and
- (4) cinematograph works themselves (under art 14*bis*(1)).³⁰⁵

Therefore, subject matter such as computer programs, dramatic works, musical works in printed and/or sheet music form, graphic works and photographic works are excluded from the right of communication to the public by wire.³⁰⁶ While article 11*bis* covers the broadcast and wireless diffusion of literary and artistic works, the right of communication to the public by wire only applies to *broadcasts of the work*, when the communication is made by an organization other than the original one.

Where subject matter are covered, questions remain as to the scope of the communication right. The Berne Convention left open one ambiguity, i.e. at whose impetus the transmission must occur. While it is clear that “push” communications such as cable transmissions and broadcasts (i.e. communications of preselected programming to a passive public) are subject to the Berne Convention, the issue of on-demand (or “pull”) transmissions is an open question under Berne.³⁰⁷ Ricketson and Ginsburg note that the concept of “communication” does not exclude pull technologies and is arguably sufficiently open-ended to be neutral regarding the initiator of the communication.³⁰⁸

Even if on-demand communications were covered, questions remain as to whether the “public” to which the work is communicated must receive the work at the same time, or whether they may be separated in time.³⁰⁹ This is not specified in the Berne Convention. For example, the public nature of a transmission of a film via cable television (a communication clearly covered by the Berne Convention) may be contrasted with an on-demand digital communication via a website.³¹⁰ It may be argued that what makes the cable transmission public is ‘the invitation to *any member of the public* to turn on the television and view the programme’ (or any member of the public to pay and become a subscriber, if the cable transmission is restricted to paying subscribers).³¹¹ Similarly, any member of the public may access a website and respond to its offer to receive a communication.³¹² However, this broad reading is not obvious on a plain reading of the communication right in the Berne Convention.³¹³

³⁰⁵ Ficsor, *The Law of Copyright and the Internet*, above n 8, 495.

³⁰⁶ Ibid.

³⁰⁷ Ricketson and Ginsburg, above n 71, 741–42.

³⁰⁸ Ibid 742.

³⁰⁹ Ibid.

³¹⁰ Ibid 743.

³¹¹ Ibid.

³¹² Ibid.

³¹³ This would require one to interpret the relevant act of communication to be the mere invitation to have the work transmitted to the public, and not the actual transmission of the work.

The Rome Convention is similarly silent on the issue of on-demand transmissions. These ambiguities operate as gaps in the Berne and Rome Conventions' scopes of application. As Ricketson and Ginsburg explain, '[w]hile it may be reasonable to construe the rights under the Berne Convention of communication to the public, with the possible exception of broadcasting, as extending to on-demand digital transmissions, it may also be overly bold to contend that the Berne Convention not only permits this construction, but mandates it.'³¹⁴

Technological developments in the 1970s and 1980s (including reprography, compact cassette systems facilitating 'home taping', cable television and the increasing importance of computer programs and electronic databases) brought these gaps and ambiguities to light.³¹⁵ Rather than establish new international norms to address these developments, the international community followed a strategy of "guided development" led by WIPO. Based on the interpretation of existing international norms and with the introduction of some new standards, various WIPO bodies provided recommendations, guiding principles and model provisions.³¹⁶ Although non-binding in nature, this period of "guided development" had an important impact on national legislation and on the development of copyright internationally.³¹⁷ These activities were also important for setting the scene for the preparation of a "possible protocol" to the Berne Convention.³¹⁸

3 *The TRIPS Agreement*

A discussion of international copyright standards would be incomplete without mention of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),³¹⁹ concluded in 1994 and administered by the World Trade Organisation (WTO). TRIPS had the effect of placing IP protection within the broader framework on international trade.³²⁰ Unlike the WIPO-administered treaties, the focus of TRIPS was not the protection of IP *per se*, but IP as a means of regulating trade.³²¹ Most of the provisions of the Berne Convention, with the exception of the moral rights provisions, were incorporated into TRIPS by reference.³²² In other words, nations joining the WTO would have to agree to comply with most of the Berne Convention requirements. A significant

³¹⁴ Ricketson and Ginsburg, above n 71, 743. In other words, the scope of 'communication to the public' in relation to on-demand online communications under Berne may be a matter of interpretation by member states.

³¹⁵ See Ficsor, *The Law of Copyright and the Internet*, above n 8, 4.

³¹⁶ *Ibid* 5.

³¹⁷ *Ibid*.

³¹⁸ Ricketson and Ginsburg, above n 71, 143.

³¹⁹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994.

³²⁰ See Ginsburg and Treppoz, above n 296, 23.

³²¹ *Ibid*.

³²² TRIPS provides that '[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto': *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994 art 9.

contribution of TRIPS to the international framework for copyright protection was the WTO Dispute Resolution mechanism, which includes the appointment of a panel to make rulings or recommendations.³²³ TRIPS gave the Berne Convention a much-needed set of “teeth”, as it provided an avenue for members to more effectively force other members to comply with treaty obligations, including the substantive minima of IP protection.³²⁴ If a country does not comply with a panel decision, the complaining member state may seek permission from the Dispute Settlement Body for permission to retaliate and impose “trade sanctions”, i.e. suspend concessions or other obligations towards the non-complying country for a period of time.³²⁵

In terms of substantive minima, TRIPS provided for the protection of new subject matter not contained in the Berne Convention, such as computer programs and data compilations.³²⁶ TRIPS did not, however, directly address the scope of the rights of public performance or communication to the public in relation to Berne Convention works.³²⁷ As Mihály Ficsor observes, the internet started its ‘truly spectacular expansion’ around the time of the *de facto* finalization of the TRIPS Agreement in December 1992.³²⁸ Therefore the gaps and ambiguities left by Berne in relation to digital transmissions remained unresolved.

Section B. The WIPO Internet Treaties: WCT and WPPT

1 A New Protocol and Diplomatic Conference

The expanding global information network and the emerging issues for the international, regional and national norms on copyright and related rights led to an acceleration of the preparatory work for a

³²³ See, eg, *United States - Section 110(5) of the US Copyright Act* WTO Doc WT/DS160/R (15 June 2000) (Report of the Panel).

³²⁴ Under article 33 of the Berne Convention and article 30 of the Rome Convention, the International Court of Justice (ICJ) has jurisdiction in disputes between member states. However, due to the ineffectual jurisdictional powers of the ICJ, this avenue for dispute resolution under the Berne or Rome Convention was never utilised. In contrast, as of 2015, the WTO Dispute Resolution mechanism had been seized 34 times in relation to TRIPS and 10 times for copyright issues: Ginsburg and Treppoz, above n 296, 23. On the jurisdiction of the ICJ, see further Aloysius P Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) 18(5) *European Journal of International Law* 815.

³²⁵ The Dispute Resolution mechanism provides for clearly defined rules and timetables for decisions of a WTO dispute resolution panel and for appeals based on points of law to the WTO Appellate Body, both of which are set up by the Dispute Settlement Body (i.e. the General Council in another guise): see *Understanding the WTO - A Unique Contribution* WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.

³²⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994 art 10.

³²⁷ Ricketson and Ginsburg, above n 71, 744. Note that TRIPS also confers on performers of works fixed on phonograms the ‘possibility of preventing’ the unauthorized ‘broadcasting by wireless means and the communication to the public of their live performance’: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994 art 14(1).

³²⁸ Ficsor, *The Law of Copyright and the Internet*, above n 8, 25.

new protocol to clarify the Berne Convention.³²⁹ Since 1886, the Berne Convention had been revised approximately every twenty years, with the last revision taking place in 1971 in Paris.³³⁰ Due largely to what was perceived to be an increasing difficulty in achieving unanimity of votes required for a revision,³³¹ WIPO did not call further revision conferences in relation to Berne.³³² Instead, WIPO envisaged the next step as a “protocol” to clarify the existing provisions of the Berne Convention.³³³

According to Reinbothe and von Lewinski, this new protocol (eventually adopted as the WCT) ‘has always been conceived as a special agreement within the meaning of Article 20 Berne Convention, which does not require unanimity of the Berne Union members.’³³⁴ Article 20 provides that ‘[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.’³³⁵

In 1989, the Assembly and the Conference of the Representative of the Berne Union convoked a Committee of Experts on a Possible Protocol to the Berne Convention.³³⁶ As most countries indicated a preference for progressing the protection of phonograms in a separate treaty, in 1992 the Assembly decided to convoke a second Committee of Experts to address the protection of phonogram producers and performing artists.³³⁷ From 1991, the Committee of Experts on a Possible Protocol to the Berne Convention held seven sessions; from 1993, the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms held six sessions.³³⁸ During

³²⁹ See *ibid.*

³³⁰ Jorg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press, 2nd ed, 2015) 3.

³³¹ See Article 27(3) of the Berne Convention, which provides that ‘any revision of this Act, including the Appendix, shall require the unanimity of the votes cast.’

³³² Reinbothe and von Lewinski, above n 330, 3.

³³³ *Ibid* 7. As explained by Ricketson and Ginsburg, ‘[t]he principal advantage of such an instrument is that it can provide for limited changes to the Convention that may then be accepted by all or part of the existing membership without disturbing the status and operation of the current Act’: Ricketson and Ginsburg, above n 71, 144.

³³⁴ Reinbothe and von Lewinski, above n 330, 7. Ficsor notes that the legal nature of the so-called “protocol” was not precisely or conclusively determined in the terms of reference issued in 1989, but was later established by increasing agreement on the ‘special-agreement’ approach: Ficsor, *The Law of Copyright and the Internet*, above n 8, 18–19. See also Ricketson and Ginsburg, above n 71, 145. Ginsburg observes that it is not entirely clear whether the making available right may be considered a substantive enlargement of Berne Convention rights or a mere affirmation of the existing scope of rights, and prefers to describe it as clarification: Ginsburg, ‘The (New?) Right of Making Available to the Public’, above n 14.

³³⁵ *Berne Convention*, signed 9 September 1886, (entered into force 5 December 1887) art 20. See also *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 1(1), which provides that ‘[t]his treaty is a special agreement within the meaning of Article 20 of the Berne Convention...’.

³³⁶ Reinbothe and von Lewinski, above n 330, 7, citing *WIPO Program for the 1990-91 Biennium*, WIPO doc AB/XX/2, Annex A, item PRG 02(2).

³³⁷ Reinbothe and von Lewinski, above n 330, 7.

³³⁸ *Ibid* 7–8. The authors explain that the second Committee of Experts was established to address the protection of producers of phonograms (and also performing artists) because most countries strongly objected the inclusion

the September 1995 session of the Committee of Experts, the US proposed to convene a Diplomatic Conference on the conclusion of a copyright and neighbouring rights treaty, and the Committee of Experts later proposed that it be held in December 1996.³³⁹ In the lead up to the Diplomatic Conference, draft texts were prepared by the Chairman of the Committees, Jukka Liedes, with the assistance of the International Bureau of WIPO.³⁴⁰ These were the three basic proposals, each relating to three proposed treaties: the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works, the Treaty for the Protection of the Rights of Performers and Producers of Phonograms, and the Treaty on Intellectual Property in Respect of Databases.³⁴¹ Basic Proposal I and Basic Proposal II (drafts of the WCT and WPPT respectively) contained parallel provisions on a right of communication to the public, which included the making available of material online.³⁴²

The WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions was held in Geneva from the 2nd to 20th of December 1996.³⁴³ In back-to-back sessions, over 130 countries adopted by consensus two treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together termed the “Internet Treaties”).³⁴⁴

2 *The Digital Agenda*

The issues posed by digital technologies and the internet were addressed in national and regional studies at WIPO “brainstorming” meetings and placed on the agenda of the Berne Protocol and New Instrument Committees, forming the so-called “Digital Agenda”.³⁴⁵ Ricketson and Ginsburg note that WIPO ‘appears to have played an important catalysing role’ in developing the Digital Agenda; it sponsored “worldwide” and “global” symposia at Harvard in 1993, Paris in 1994, and in 1995, two symposia in Mexico City and Naples respectively, the centrepiece of which was the proposal of the new right of communication to the public which extended to the making available of works online.³⁴⁶

of protection of phonograms into a Possible Berne Protocol and preferred to improve the international protection of phonograms within the framework of a separate treaty.

³³⁹ Ibid 11.

³⁴⁰ Ibid, citing ‘Report on the Session of February 1996’ (1996) 3 *Industrial Property and Copyright* 118, 118.

³⁴¹ Reinbothe and von Lewinski, above n 330, 11. It should be noted that agreement was not reached regarding the Basic Proposal for the database treaty, and the Diplomatic Conference instead adopted a Recommendation Concerning Databases: WIPO, *Protection of Non-Original Databases* </copyright/en/activities/databases.html>.

³⁴² Reinbothe and von Lewinski, above n 330, 12.

³⁴³ See *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (CRNR/DC, 2-20 December 1996, Geneva, Switzerland)* WIPO <http://www.wipo.int/meetings/en/details.jsp?meeting_id=3010>.

³⁴⁴ Ficsor, *The Law of Copyright and the Internet*, above n 8, 414–15.

³⁴⁵ Ibid 25.

³⁴⁶ Ricketson and Ginsburg, above n 71, 148. This was coupled with proposals for technological protection measures and the protection of rights management information.

As part of the WIPO Digital Agenda, the WCT and WPPT were designed to modernize the Berne Convention and remedy its incomplete coverage of the right to communicate to the public.³⁴⁷ The basic proposition was that transmissions of works on the internet and in similar networks should be the object of a copyright owner's exclusive right (subject to appropriate exceptions).³⁴⁸ One of the main objectives of a broad making available right was to cover on-demand transmissions of copyright works through interactive systems.³⁴⁹ Furthermore, it would be irrelevant whether copies of a work were made available or whether the work was simply "made perceptible" to users.³⁵⁰ As explained by WIPO, the concept of making available:

...extends not only to the acts that are carried out by the "communicators" themselves (that is, to the acts *as a result of which* a work or object of related right is, in fact, made available to the public and the members of the public do not have to do more than, for example, switch on equipment necessary for its reception), but also to the acts which only consist of making the work accessible to the public, and *in the case of which the members of the public still have to cause the system to make it actually available to them*.³⁵¹

This explanation of the relevant "act" focusses on the *effect* of the act. In other words, one may be liable for making copyright content available to the public, even if some causal intervention by members of the public is needed before access can be achieved.

3 The Umbrella Solution

Due to a lack of consensus concerning the legal characterisation of online interactive transmissions and the rights to be applied to such transmissions,³⁵² the 1996 Diplomatic Conference settled on an "umbrella solution" for the national implementation of this broad right. Under the "umbrella solution", the act of digital transmission would be described in a neutral way, free from specific legal characterization, and the actual choice of the right or rights to be applied would be left to national

³⁴⁷ Ginsburg, 'The (New?) Right of Making Available to the Public', above n 14, 234–47.

³⁴⁸ International Bureau of WIPO, above n 14, 5.

³⁴⁹ WIPO, 'Basic Proposal for Draft Treaty No. 1', above n 16, 44.

³⁵⁰ WIPO, Summary Minutes, Main Committee I (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/102 ('Summary Minutes'), above n 17, 40 (Chairman Jukka Liedes's opening remarks on article 10 of the WCT).

³⁵¹ WIPO, 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (CT-8.6)', above n 18, 208 (emphasis added). See also Ficsor, *The Law of Copyright and the Internet*, above n 8, 131:

In an interactive digital network, the role of a 'receiver' may be much more active; the 'transmitter' may only make the work or object of neighbouring rights *accessible* for *retrieval* by the members of the public who may eventually *cause* the system to *transmit* the work or object of neighbouring rights to them.

³⁵² The right of distribution (a copy-related right) and the right of communication to the public (a non-copy-related right) were the two basic alternative rights put forward in debates about how interactive transmission via digital delivery should be given effect: see Ficsor, *The Law of Copyright and the Internet*, above n 8, 234.

legislation.³⁵³ In other words, a member state could introduce an explicit making available right, or provide effective coverage of the right through a combination of pre-existing rights (however these rights may take shape).³⁵⁴

The extensive deliberations and negotiations culminated in the right of making available to the public, recognized as a stand-alone right in article 10 and 14 of the WPPT,³⁵⁵ and expressed in article 8 of the WCT as a “sub-right” to the communication to the public right. Article 8 has been described as the ‘[t]he centrepiece of the WCT, so far as the advent of the networked environment is concerned’.³⁵⁶ Article 8, in referring to literary and artistic works generally, eliminated the gaps in subject matter protection for the communication right that was left by the Berne Convention.³⁵⁷ It provides that:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

An agreed statement concerning article 8 provides that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention’.³⁵⁸ As explained by Ficsor, this states the obvious, i.e. carrying out an act other than that directly provided for in the Convention would not result in primary copyright

³⁵³ Ibid 204–6.

³⁵⁴ It should be noted that the “umbrella solution” accords with established international norms of treaty implementation which do not prescribe a means for implementation. Unless a treaty prescribes a particular mode of implementation, ‘states are free to use whatever methods their constitutions afford’ provided they comply with the provisions of customary law as stated in the Vienna Convention on the Law of Treaties: Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 126, citing *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 (every treaty which is in force must be performed by the parties in good faith) and art 27 (a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty).

³⁵⁵ Article 10 of the WPPT extends the right of making available to the public to performers, for the recordings of their performances, and states:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 confers the same right on producers of sound recordings of performances.

³⁵⁶ Ricketson and Ginsburg, above n 71, 152.

³⁵⁷ Ficsor, *The Law of Copyright and the Internet*, above n 8, 495. See also Ricketson and Ginsburg, above n 71, 718, 739–43.

³⁵⁸ WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8 n 7.

liability (although as a separate matter, it may be subject to secondary forms of liability).³⁵⁹ Nevertheless, its inclusion can be explained by the intensive lobbying campaign of non-governmental organizations representing internet service providers and telecommunication companies seeking to limit their liability for infringements committed by their users.³⁶⁰

Section C. Interpreting the Internet Treaties

Extensive negotiations leading up to the introduction of the Internet Treaties provide additional context that could inform our interpretation of the making available right. These records provide us with insight on the objects and purposes of the treaties. However, before we consider the historical records, it is necessary to determine the extent to which this background can be taken into account in interpreting the treaty provisions. This calls for an investigation of the applicable principles of treaty interpretation, and an understanding of what constitutes the “object and purpose” of a treaty.³⁶¹ Importantly, this consideration of treaty interpretation principles reveals the role that national and regional courts have in developing international consensus on the interpretation of the making available right in the absence of authoritative pronouncements.

1 Principles of Treaty Interpretation

International treaty interpretation gives rise to a number of challenges, but a sensible starting point is ‘the holy grail’ of treaty interpretation³⁶² — the Vienna Convention on the Law of Treaties of 1968.³⁶³ It is accepted as a codification or reflection of the customary rules of interpretation and is relevant even if a treaty does not explicitly refer to the Vienna Convention as a source of interpretive principles.³⁶⁴ Article 31(1), titled ‘General rule of interpretation’ provides that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning’ given to the terms of the treaty ‘in

³⁵⁹ Ficsor, *The Law of Copyright and the Internet*, above n 8, 509. Note that similar provisions purporting to exempt certain technology providers from liability may be found in national legislation: see, eg, *Copyright Act 1968* (Cth) ss 39B and 112E.

³⁶⁰ Ficsor, *The Law of Copyright and the Internet*, above n 8, 509. According to Ficsor, this was an unsuccessful campaign, since the agreed statement did not address contributory or vicarious liability.

³⁶¹ It should be noted that this discussion of the rules of treaty interpretation under the Vienna Convention is not meant to be exhaustive, but outlines the methods of interpretation that may be adopted when hypothesising about the meaning of the articles of the Internet Treaties.

³⁶² Michael Waibel, ‘Demystifying the Art of Interpretation’ (2011) 22(2) *European Journal of International Law* 571, 572.

³⁶³ *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

³⁶⁴ See Ginsburg and Treppoz, above n 296, 89. In relation to the interpretation of the Berne Convention, Ginsburg and Treppoz note that although ‘the Berne Convention predates the Vienna Convention, the incorporation of this treaty into the TRIPS Agreement in effect brings the Vienna Convention to bear because article 3.2 of the World Trade Organization Dispute Settlement Understanding makes the TRIPS subject to “customary rules of interpretation of public international law”’.

their context and in light of its object and purpose'. The general rule in article 31 is said to have four elements: (1) good faith, (2) ordinary meaning, (3) context, and (4) object and purpose, with considerable flexibility as to how treaty interpreters may mix the four elements.³⁶⁵

The context of a treaty, according to article 31(3), includes 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'. Examples of this are the agreed statements in the WCT concerning articles 1(4) and 3, which relate to the interpretation of the Berne Convention.³⁶⁶ Article 32 of the Vienna Convention provides that:

Recourse may be had to supplementary means of communication, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.³⁶⁷

³⁶⁵ Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press, 2016), citing United Nations, 'Yearbook of the International Law Commission 1966: Volume 2' 219 [8] <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf>; J Pauwelyn and M Elsig, 'The Politics of Treaty Interpretation' in JL Dunoff and M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2013) 450. It should be acknowledged that although the rules of interpretation found in articles 31–33 appear to settle old disputes on treaty interpretation, an alternative view is that the Vienna Convention's broad interpretive principles leave open such a substantial leeway that it simply reduces the existing disagreements to writing: Waibel, above n 362, 573. See also Frank Berman, 'Community Law and International Law: How Far Does Either Belong to the Other?' in BS Markesinis (ed), *The Clifford Chance Lectures: Bridging the Channel* (Oxford University Press, 1996) 250, explaining that the Vienna Convention 'swept away ... all the supposed special tenets of interpretation that had enveloped the subject like cobwebs'. Nevertheless, it is worth considering how the interpretative tools expressed in the Vienna Convention might assist us in understanding the Internet Treaties.

³⁶⁶ Ginsburg and Treppoz, above n 296, 95–96; Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004) 106; WIPO Standing Committee on Copyright and Related Rights, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (Prepared by Professor Sam Ricketson)' (SCCR/9/7, 2003) 6 (referring to the agreed statements in the WCT as context for the purposes of interpretation under article 31(2)(a) of the Vienna Convention). See, eg, agreed statements concerning Article 1(4), which provide:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 1(4).

³⁶⁷ *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 32.

Therefore, the starting point for treaty interpretation is the ordinary meaning of the text in context and ‘in light of its object and purpose’; the preparatory works (or *travaux préparatoires* — the official records of negotiations) are of secondary relevance, in the event of ambiguity.³⁶⁸

Furthermore, article 31(3) states that, together with the context, any ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ and ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (i.e. “subsequent state practice”) shall be taken into account. This subsequent state practice could include the interpretations that are adopted by national and regional courts, provided they are capable of establishing the agreement of the parties.³⁶⁹

The “object and purpose” of a treaty

As a starting point, we may consider if the stated objects and purposes of the Internet Treaties assist a decision-maker faced with the task of interpreting the making available right. Article 31(1) of the Vienna Convention provides for a treaty’s “object and purpose” in the singular, but in reality a treaty often encapsulates multiple objectives and purposes. For example, the preamble of the WCT lists the following five objectives:

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation, [and]

³⁶⁸ Susy Frankel, ‘The WTO’s Application of “The Customary Rules of Interpretation of Public International Law” to Intellectual Property’ (2006) 46 *Virginia Journal of International Law* 365, 387.

³⁶⁹ See Frankel, ‘The International Copyright Problem and Durable Solutions’, above n 37, 129. This point is discussed further in Section E of this Chapter.

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention...³⁷⁰

As explained by Sir Hersch Lauterpacht, former member of the UN International Law Commission and judge of the International Court of Justice, the difficulty of ascertaining the ‘intention of the parties’ arises because ‘the treaty — far from giving expression to any common intention of the parties — actually registers the absence of any common intention (either in general or in relation to the subject-matter of the dispute) or contains provisions which are mutually inconsistent and which the creative work of interpretation must reduce to some coherent meaning.’³⁷¹ In other words, the treaty is a compromise that is reduced to writing; it represents a delegation of broader interpretational power to a future decision-maker.³⁷² The umbrella solution of the Internet Treaties is a reflection of this, as each jurisdiction is left to establish the precise form of protection.

Therefore in looking for the “object and purpose” of a treaty, Lauterpacht argues that a court is ‘imputing rather than discovering a common intention underlying the treaty as a whole’.³⁷³ Despite its generality, Frankel and Gervais explain that the “good faith” requirement has a role in preventing absurd or unreasonable results.³⁷⁴ Therefore, the consideration of objects and purposes should be supported by the requirement in article 31(1) of the Vienna Convention that a treaty be interpreted in good faith.

The relevance of preparatory works

In addition to looking to the stated objectives of the Internet Treaties, we may consider if the preparatory works (relevant in the event of ambiguity under article 32 of the Vienna Convention) provide assistance. The preparatory work and the “context” of a treaty are said to be distinct.³⁷⁵

³⁷⁰ WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) Preamble.

³⁷¹ H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 *British Year Book of International Law* 48, 52. Lauterpacht goes on to note that this is akin to contract interpretation whereby ‘the decision must be given by reference to the implied intention of the parties’ as the precise subject matter of the dispute was not contemplated when concluding the agreement.

³⁷² Ibid 77:

[T]he absence of an effective common intention may be due to the circumstance that, being unable to reach an agreed solution, the parties are content to use an ambiguous or non-committal expression and to leave the divergence of views to be solved in the future by agreement or in some other way.

³⁷³ Ibid 81. Lauterpacht rejects the characterization of this exercise as a fiction once the treaty language is agreed upon by a competent legal tribunal (at 79). Cf Julius Stone, ‘Fictional Elements in Treaty Interpretation - A Study in the International Judicial Process’ (1954) 1(3) *Sydney Law Review* 344, 347, criticizing this as a fiction which conceals the true nature of the activity.

³⁷⁴ Susy Frankel and Daniel Gervais, ‘Plain Packaging and the Interpretation of the TRIPS Agreement’ (2013) 46(5) *Vanderbilt Journal of Transnational Law* 1149, 1167.

³⁷⁵ Gardiner, above n 354, 25.

However, where the circumstances surrounding the preparation and conclusion is mentioned in the preparatory work, the preparatory work would illustrate the ‘context’ which forms a primary consideration (i.e. one of the four elements of article 31).³⁷⁶ The context of the treaty has been regarded as an important consideration in treaty interpretation even before the existence of the Vienna Convention, because ‘an appraisal of the *de facto* and *de jure* situation existing at the time of conclusion of the treaty enables the interpreter to identify the common intent of the parties’ which ‘is always influenced by the historical context in which it has emerged’.³⁷⁷ Therefore, it would appear that the “object and purpose” and “context” of the treaty are related considerations. The context of the Internet Treaties have been canvassed above, mainly with regards to concerns about gaps or ambiguities under the Berne Convention. We may look to the preparatory works to investigate whether they provide further insight on the context.

2 Preparatory Works of the Internet Treaties

It is clear that the process of treaty interpretation is far from a simple exercise. Matters to bear in mind include the supplementary nature of preparatory works, and the multiplicity of objectives. Equipped with these reservations, we may nevertheless consider whether the preparatory works to the Internet Treaties provide some degree of guidance to the interpretation of its provisions.

The meaning of the term “preparatory works” is somewhat uncertain, having been described as ‘an omnibus expression which is used rather loosely’.³⁷⁸ Broadly, it can be said to include material that ‘is objectively assessable and was available to all negotiators at one point in time and reflects their common understanding’.³⁷⁹ The preparatory work of the WCCT and WPPT may be said to include the Records of the Diplomatic Conferences (and the relevant summary minutes),³⁸⁰ and the Basic Proposals (I and II in 1996) for the Draft Treaties,³⁸¹ including the respective Explanatory Notes

³⁷⁶ Ibid. Gardiner states that ‘[t]he circumstances surrounding the preparation and conclusion of a treaty may be mentioned in the preparatory work, but are nevertheless distinct from it’.

³⁷⁷ Luigi Sbolci, ‘Supplementary Means of Interpretation’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 145, 157. See also Lauterpacht, above n 371, 83, asserting that there is ‘no merit in an attitude or doctrine which, in view of the difficulties attendant upon the discovery of the authors or of the fact of intention, discards it altogether and concentrates exclusively upon what is considered the plain text of the rule’. It should be noted that Lauterpacht’s views were expressed in 1949 and therefore predate the Vienna Convention of 1969.

³⁷⁸ Baron Arnold Duncan McNair McNair, *The Law of Treaties* (Oxford University Press, 2nd ed, 1961) 411, quoted in Gardiner, above n 354, 112.

³⁷⁹ Reinbothe and von Lewinski, above n 330, 47, citing Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) art 32, paras 10-13.

³⁸⁰ ‘Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Vol 2’ (WIPO, 1999) <ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v2.pdf>; ‘Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Vol 1’ (WIPO, 1999) <ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v1.pdf>.

³⁸¹ WIPO, ‘Basic Proposal for Draft Treaty No. 1’, above n 16; WIPO, ‘Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights of Performers and Producers of Phonograms to Be

which were the basis of negotiations at the Diplomatic Conferences (unless they were rejected by the negotiating parties).³⁸² Where the provisions of the WCT and WPPT are similar or identical, Reinbothe and von Lewinski assert that the preparatory treaty of each treaty may be taken into account.³⁸³

Addressing “near to interactive” content delivery

As the Basic Proposal for Draft Treaty No. 2 regarding the rights of Performers and Producers of Phonograms explains, the ‘expressions “may access” and “from a place and at a time individually chosen” cover directly all situations that are interactive’.³⁸⁴ Although the relationship between article 8 of the WCT and services somewhat similar to subscription-based services was raised by several delegates in the 1996 WIPO Diplomatic Conference, this was not clarified.³⁸⁵ The Basic Proposal for Draft Treaty No. 2 (the WPPT) was more explicit, stating:

There are, however, systems and services based on particular technical arrangements and programming structures which make it possible to access the fixed performances provided by the service *without such access being fully interactive*. Such services are offered on a subscription basis. From the point of view of the members of the public these services are “near to interactive”. In many cases the only difference between interactive and “near to interactive” is in the time required for access. For both members of the public and rightholders, *the shorter the delay, the closer the effect of such practices is to those of services that enable immediate access*. ...

The proposed right of making available of fixed performances in Article 11 is intended to cover both directly interactive ways of making available and *services with similar effects*, as described above.³⁸⁶

Considered by the Diplomatic Conference (on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/5’ <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2483> (‘Basic Proposal for Draft Treaty No. 2’).

³⁸² Reinbothe and von Lewinski, above n 330, 48.

³⁸³ Ibid 49. See also Ficsor, *The Law of Copyright and the Internet*, above n 8, 55. In applying articles 31 and 32 regarding sources of interpretation (such as the ‘context’, possible ‘subsequent practice’ and ‘the preparatory work of the treaty and the circumstances of its conclusion’), Ficsor argues that the context and preparatory work of the Berne Convention should also be taken into account in the interpretation of the WCT, because the text of the substantive provisions of the Berne Convention was not simply reproduced in the WCT, but the countries and international organisations party to the WCT are obliged to comply with the provisions of the Berne Convention.

³⁸⁴ WIPO, ‘Basic Proposal for Draft Treaty No. 2’, above n 381, 54–56.

³⁸⁵ See WIPO, Summary Minutes, Main Committee I (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/102 (‘Summary Minutes’), above n 17, 43.

³⁸⁶ WIPO, ‘Basic Proposal for Draft Treaty No. 2’, above n 381, 54–56 [11.06], [11.08] (emphasis added).

Therefore, it would appear that an act of making available was intended to cover conduct that provides a variety of interactive access services, including “near to interactive” content delivery.

An “initial act” of making available

Our analysis of the scope of the making available right, however, should not end at its broad effect of providing access. It is still necessary to identify the relevant *act* of making available, because the copyright law grants owners exclusive rights over specified “acts”, not over “uses” of their works.³⁸⁷ The question is this: at what point does one exercise the exclusive right of the copyright owner to “make available” to the public?

As the notes to the proposed article 8 presented at the Diplomatic Conference explain, it was envisaged that:

What counts is the *initial act* of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user. ... [T]he relevant acts of communication include cases where members of the public may have access to the works from different places and at different times. The *element of individual choice* implies the interactive nature of the access.³⁸⁸

In other words, the making of a copy or a subsequent dealing with any copy made, although facilitating the making available of the copyright owner’s content, does not necessarily trigger an exercise of the right to “make available”. What matters is the initial act of making *the work* available, even if the process of delivery requires an “element of individual choice” by users.³⁸⁹

The Vienna Convention does not provide us with clear rules of interpretation, particularly where the “ordinary meaning” of the text is inherently ambiguous and the “object and purpose” of the treaty is

³⁸⁷ Cf Rebecca Giblin and Jane C Ginsburg, *Asking the Right Questions in Copyright Cases: Lessons from Aereo and Its International Brethren* (2015) ATRIP 2014 Edited Collection <<https://ssrn.com/abstract=2539142>>. Giblin and Ginsburg argue that:

Given the significant (and increasing) potential for arbitrary outcomes to the “who does?” analysis, we consider that a better approach would centre inquiry on whether, after full reflection on the contributions of each party, the use should be permitted – instead of allowing ancillary considerations to determine liability.

³⁸⁸ Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E) 204 (emphasis added), cited in Ficsor, *The Law of Copyright and the Internet*, above n 8, 243.

³⁸⁹ See Christie and Dias, above n 22, 249 (noting that other types of communication encompassed by article 8 could occur subsequent to an act of making available).

not easily discernible. In such an instance, the preparatory work outlined above is arguably of limited weight. Nonetheless, these discussions give us an indication of the aims of introducing a technology neutral making available right. They show that at the international level, the act of “making available” was considered sufficiently broad as to encompass implementation of technologies which had the *effect* of making copyright works available to the public, even if the interactions of users were necessary to bring about that effect. The preparatory works also show that the drafters had not clearly conceptualised *the act* that would bring about this outcome of accessibility, which is reflected in the umbrella solution.³⁹⁰ Nevertheless, the records indicate an appreciation that the act should be limited to an *initial act* of making available, and should not extend to subsequent technical measures that merely facilitate such access.³⁹¹ In other words, the making available right should not cover all connections which the work passes through or is stored.

In sum, the preparatory works do provide some context to the treaty language and insight on the objectives of drafting the right in such a broad manner, even if the technology or acts involved were not clearly conceptualised.

Section D. Academic Commentary on the Making Available Right

As the Internet Treaties entered into force in 2002,³⁹² scholars speculated about possible interpretations of the making available right.³⁹³ New challenges are emerging and raising further questions about the scope of the making available right. Nevertheless, this scholarship is an indication of concerns that existed since the introduction of the right, and of how the right was perceived as a unique response to the internet.

The uncertainties and arguments that can be distilled from early scholarship related to matters such as:

³⁹⁰ See, eg, WIPO, ‘Basic Proposal for Draft Treaty No. 1’, above n 16, 54–56; WIPO, Summary Minutes, Main Committee I (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 2–20 December 1996), WIPO Doc CRNR/DC/102 (‘Summary Minutes’), above n 17, 43.

³⁹¹ See Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E), above n 388, 204.

³⁹² The treaties required ratification or accession by 30 States in order for the treaties to enter into force: *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 20; *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) art 29.

³⁹³ See eg Ginsburg, ‘The (New?) Right of Making Available to the Public’, above n 14; Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2’, above n 22; Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Right to Communicate Works to the Public: Part 1’, above n 22; Christie and Dias, above n 22. See also more recent scholarship on the US distribution right and whether it extends to merely making copies available, as opposed to an actual distribution: Menell, above n 22.

1. whether the act covered “indirect” acts of communication;
2. how to distinguishing secondary infringement (a matter beyond the scope of international agreements and subject to national laws);
3. challenges for private international law, particularly the locus of the act; and
4. the scope of “the public”.

1 The “Act” of Making Available and Varying Scopes of Interpretation

The flexibility of the Internet Treaties is given effect by the “umbrella solution”. **Mihály Ficsor**, former Assistant Director General of WIPO,³⁹⁴ explains the “umbrella solution” in his seminal treatise on the WIPO Internet Treaties entitled *The Law of Copyright and The Internet: The 1996 Treaties, their Interpretation and Implementation*.³⁹⁵ Ficsor discusses two categories of rights in terms of their coverage of ‘acts through which works are made available to the public’.³⁹⁶ The first is copy-related rights (such as public distribution or right of rental) that cover ‘acts by means of which copies are made available to the public, typically for “deferred” use’ since the perception of the signs, images and sounds in which the work is expressed (i.e. the actual “use”) by members of the public occur at a later time.³⁹⁷ Non-copy-related rights (such as the right of public performance and right of communication to the public by wire), ‘on the other hand, cover acts through which works and objects of related rights are made available for direct use (perceiving, studying, watching, listening to) by members of the public.’³⁹⁸ Ficsor explains that the introduction of the making available right under the “umbrella solution” marked the first time that a right crossed the traditional borders between “copy-related rights” and “non-copy-related rights”³⁹⁹ Ficsor elaborates on this point, noting that the actual extent of use is not determined at the moment of making available by the person/entity that carries out the act of making available, but is determined by the member of the public’s “virtual negotiation” with the system.⁴⁰⁰ For example, a content delivery system may allow a member of the

³⁹⁴ Ficsor is recognized as having played a decisive role in the preparation, negotiation, completion and adoption of the WCT and the WPPT: Ficsor, *The Law of Copyright and the Internet*, above n 8, vii (Foreword by Dr. Kamil Idris, then Director General of WIPO).

³⁹⁵ Ibid 496–500. In this treatise, Ficsor lays out a detailed account of the extensive meetings, preparatory works and “Diplomatic Conferences” leading up to the adoption of the WCT and WPPT (at Parts I and II of the text).

³⁹⁶ Ibid 498 [C8.08]. Ficsor notes that there is a third category – transformation rights such as the right of translation and right of adaptation (which are not relevant in the present context).

³⁹⁷ Ibid 498–99 [C8.08].

³⁹⁸ Ibid.

³⁹⁹ Ibid. This is said to be in accordance with the “principle of relative freedom of legal characterization” (at 499). The principle as applicable to acts covered by international copyright obligations is perhaps best explained using examples. As Ficsor notes, in some countries the right of public performance may cover public performance, broadcasting and communication to the public, whereas in other countries the right of communication to the public is a general right covering all three categories of performance, broadcasting and communication. International copyright obligations were adhered to under this principle, so long as the minimum level of protection for such acts concerned were duly respected (at 497–98)

⁴⁰⁰ Ibid.

public to pay for immediate access, or for an additional fee, they may be allowed to download the material on a more permanent basis.⁴⁰¹ Ficsor characterises the “umbrella solution” as a compromise, stating:

It should be emphasized that the “umbrella solution” was linked to a specific historical situation, it took into account a given status of communication and distribution technologies, and its main objective was to eliminate the obstacles that the differing positions concerning the applicability of this or that existing right created to reaching agreement on this important issue on the ‘digital agenda’ of the preparatory work and the Diplomatic Conference.⁴⁰²

This characterisation reflects general observations on treaty interpretation, whereby the terms may ‘leave the divergence of views to be solved in the future’.⁴⁰³

From an Australian perspective, **Christie and Dias** writing in 2005 set out their interpretations of the making available right as enacted in Australia in order to comply with the WCT.⁴⁰⁴ Although focussing on the Australian context, their observations on national obligations under the WCT are relevant here. They note that the vague nature of article 8 leaves the detail of interpretation to member states and as a result, there is ‘in urgent need for clarification’ (which their article aimed to provide).⁴⁰⁵ Christie and Dias attempt to classify the right, and conclude that the making available right is a subset of the broader right of communication, particularly because the broader right embraces other acts of communication such as broadcasting.⁴⁰⁶ The authors also speculate on when a communication by “making available” would occur. In terms of “when”, Christie and Dias identify several possibilities on a continuum: (1) when it first becomes accessible by an individual member of the public (i.e. it is received by the internet server) on one end; and (2) when the member of the public receives the signal on the other.⁴⁰⁷ A final possibility identified is that the act is not confined to any particular point on the continuum, but can occur at each and every point.⁴⁰⁸ In line with the preparatory work’s reference to the initial act of making available, Christie and Dias conclude that ‘the act of communication, *in*

⁴⁰¹ Ibid 499 [C8.08].

⁴⁰² Ibid 501. Ficsor goes on to observe that:

With progressive technological developments, [the role of the umbrella solution] may change and what may only remain applicable from it may be the principle of relative freedom of legal characterization of acts covered by copyright; it seems, nevertheless, that so far it has been applied the way it was foreseen in December 1996.

⁴⁰³ Lauterpacht, above n 371, 77.

⁴⁰⁴ Christie and Dias, above n 22.

⁴⁰⁵ Ibid 239.

⁴⁰⁶ Ibid 245.

⁴⁰⁷ Ibid 248.

⁴⁰⁸ Ibid.

the form of making available, is complete by merely making a work available for on-demand transmission'.⁴⁰⁹

In addition to the question of “when” the act occurs, there has been speculation about the distinction between secondary liability for providing the facilities for carrying out the act and the exercise of the act itself. **Ficsor** in his treatise briefly discusses the agreed statement to article 8 concerning the mere provision of physical facilities,⁴¹⁰ observing that liability issues are very complex and reliant on the national statutory or case law of each country.⁴¹¹ Therefore, international treaties on IP (including the WCT and WPPT) understandably and rightly do not cover such issues of secondary liability.⁴¹² Nevertheless, a number of academics interpret the “act” in a way that potentially encroaches upon acts that are more appropriately governed by secondary liability principles. For instance, **Reinbothe and von Lewinski**, in an updated treatise published in 2015⁴¹³ point out that the Internet Treaties do not determine who is considered to perform the act as a “doer” and what conditions (e.g. subjective knowledge criteria) are to be taken into account.⁴¹⁴ In considering the relevance of knowledge, the authors raise factors usually considered under secondary liability principles.

Ricketson and Ginsburg, in their treatise on International Copyright and Neighbouring Rights, hypothesize that the making available right *could* encompass an indirect supply of literary and artistic works, using the aggregation of links which allow users to download unauthorized copies of recorded music.⁴¹⁵ This is based on a reading of the term “place” in ‘from a place and at a time individually chosen by’ members of the public in the relevant provisions of the Internet Treaties to ‘refer to the networked “place”’, such as the website initially chosen or contacted by the user.⁴¹⁶ The authors distinguish a link which automatically downloads the file from the source website ‘without the apparent further intervention of another website operator’, from a link which takes the user to another

⁴⁰⁹ Ibid (emphasis in original). However, the authors note that other types of communication encompassed by article 8 of the WCT, such as an actual transmission of content, would occur at a point in time subsequent to that of a making available (at 249). The authors state that ‘the issue does not need to be decided in this discussion’.

⁴¹⁰ The agreed statement concerning article 8 provides:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).

⁴¹¹ Ficsor, *The Law of Copyright and the Internet*, above n 8, 509.

⁴¹² Ibid.

⁴¹³ Reinbothe and von Lewinski, above n 330.

⁴¹⁴ Ibid 134, 142.

⁴¹⁵ Ricketson and Ginsburg, above n 71, 747.

⁴¹⁶ Ibid 748. The authors acknowledge that “[t]he “place” contemplated most likely refers to the place where the member of the public is located (for example, at home, or at an Internet café). But the text might also be read to refer to the networked “place”, for example, website, that the user contacts in order to gain access to the work’.

site from which she may download the relevant files.⁴¹⁷ Focussing on the user’s perspective, they assert that where an automatic download occurs, ‘the place from which the user *appears* to be accessing the music is the site the user initially contacted, which is the only site *she chose*’.⁴¹⁸ Ricketson and Ginsburg conclude that even though another website is the source of the communication, ‘the user’s selection would control’ and ‘[i]f so, then the WCT “making available” right will reach certain acts of indirect infringement’.⁴¹⁹

The treatise reiterates **Jane Ginsburg**’s position as expressed in a book chapter published prior, titled ‘The (New?) Right of Making Available to the Public’.⁴²⁰ In this book chapter, she tests the scope of the making available right by comparing it with the right to communicate to the public under Berne, using a range of different scenarios. For instance, where one offers digital downloads of copyrighted works from a website, this is said to fit ‘squarely within the “making available” right, which, indeed, appears to have been conceived to cover exactly this kind of communication.’⁴²¹ Moving beyond this scenario, Ginsburg considers a website that does not host the downloadable content, but simply aggregates links to other websites that do so. She finds that this *may* constitute an “act” of making available because ‘the Agreed Statement does not exempt all enabling; it excludes enabling achieved solely through the provision of “physical facilities”’.⁴²² Therefore digital rerouting code or links, being non-physical facilities, might still constitute an “act” of making available.⁴²³ Ginsburg takes this speculation a step further, and argues that the express omission of non-physical facilities in the Agreed Statement may prompt a negative inference that non-physical forms of enabling communications are *deemed* to fall within article 8.⁴²⁴

Reinbothe and von Lewinski take a similarly expansive view on the “act” of making available (albeit stated in less equivocal terms).⁴²⁵ The authors argue that a work is made available to the public ‘even if the work has already legally been made available on a website and is subsequently made available on another website, including by a link.’⁴²⁶ In other words, ‘any new act of making available a work via the internet, for example through a separate upload or link on a second website to the one where the work was originally made available, or through a search engine, represents a new act of making

⁴¹⁷ Ibid 747.

⁴¹⁸ Ibid 748 (emphasis added).

⁴¹⁹ Ibid.

⁴²⁰ Ginsburg, ‘The (New?) Right of Making Available to the Public’, above n 14.

⁴²¹ Ibid 238.

⁴²² Ibid 242–43.

⁴²³ Ibid 242–243.

⁴²⁴ Ibid 243.

⁴²⁵ Reinbothe and von Lewinski, above n 330.

⁴²⁶ Ibid 141. The authors note the decision to the contrary in *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

available to the public’.⁴²⁷ In addition, they state that the act of making available occurs each time the computer or server is connected to the internet, as this is a new offering to the public.⁴²⁸

2 *The Scope of “the Public”*

The uncertainties surrounding the element of “the public” has also been subject to criticism (although a number of academics posit that there is a minimum standard must be adhered to in order to comply with the Internet Treaties). **Ricketson and Ginsburg** recognise that the meaning of the “public” is an ‘important threshold issue’,⁴²⁹ and that the Berne Convention offers no specific guidance on the matter.⁴³⁰ The authors nevertheless offer a ‘general principle that can be derived from a study of the structure of the Convention’.⁴³¹ They explain that the rights of public performance and communication to the public refer to performances or communications to ‘a substantial number of unrelated persons’.⁴³² Their view is that ‘[t]he larger and more disparate the audience, the greater the impact on the author’s ability to exploit the work in relation to her “public”, that is, those who are willing to pay for the benefit of hearing or seeing the work performed’.⁴³³ Those who form the ‘normal circle of family and its social acquaintances’, on the other hand, are the ‘non-public’ because they are ‘economically insignificant’.⁴³⁴ While the precise demarcation of what is ‘public’ remains a matter of national determination due to the lack of Conventional guidelines, Ricketson and Ginsburg argue that it is ‘subject to the implied qualification that this line should not be set in such a way as to prejudice the author’s right to exploit his work by means of public performance or communication to the public’.⁴³⁵ **Reinbothe and von Lewinski** echo Ricketson and Ginsburg’s views, stating that the WCT ‘prohibits an overly narrow definition of “public” under national law because it must be given “effective” protection’.⁴³⁶ They assert that, given the aim of article 8 is ‘to cover important acts of

⁴²⁷ Reinbothe and von Lewinski, above n 330, 133 (citations omitted).

⁴²⁸ Ibid 136–37. Reinbothe and von Lewinski seem to classify the terms ‘from a place and at a time individually chosen by them’ as limitations upon the making available right. In their view, the element of individual choice ‘excludes from the making available right any exploitation by way of offering, at specified times, predetermined programmes for reception by the general public, such as broadcasting of radio or TV programmes by traditional means, or through digital networks such as “webcasting”...’ (at 139). However, it is unclear why this distinction or exclusion from an act of “making available” is significant, since such “push” transmissions would be considered “communications” more broadly under article 8 of the WCT. This point is perhaps more relevant for phonograms because the right to make available to the public under the WPPT is a stand-alone right.

⁴²⁹ Ricketson and Ginsburg, above n 71, 704.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Ibid.

⁴³⁵ Ibid 705.

⁴³⁶ Reinbothe and von Lewinski, above n 330, 141.

exploitation by the author's exclusive right' to communicate to the public, 'the interpretation of "public" should not be such as to prejudice this exploitation right of the author'.⁴³⁷

A harsher critic of the uncertainties surrounding "the public" is **Kimberlee Weatherall**, who in a two-part article explores the changes brought about by the Internet Treaties and the Australian *Copyright Amendment (Digital Agenda) Bill 1999* (Cth) implementing such changes.⁴³⁸ She considers that the immediate issue raised by article 8 of the WCT and the surrounding international debate is whether 'point-to-point, interactive communications can be characterised as communications "to the public"',⁴³⁹ and critiques the difficulties in distinguishing public and private communications⁴⁴⁰ (using the Australian High Court case of *Telstra v APRA*⁴⁴¹ as an example).⁴⁴² Weatherall's main concerns are encapsulated in this statement:

The right to communicate works to the public is inextricably tied up with an important public interest which copyright law is intended to promote: the enjoyment and wide dissemination of copyright works. When limits are placed on the ability of members of the public to communicate works to others without making tangible, permanent copies one inevitably limits the extent to which existing creations can be used, talked about, benefited from and built on.⁴⁴³

While Weatherall's criticisms and concerns are largely targeted at the element of "the public", her concerns are also attributable to the broad "act" of making available which includes communications that 'look less and less like the classic "communication to the public" of which broadcasts are the epitome'.⁴⁴⁴ Nevertheless, Weatherall seems to assume that the act of making available will be interpreted broadly, and considers "the public" to be 'the only limit on a copyright owner's rights' in this context.⁴⁴⁵

⁴³⁷ Ibid 133.

⁴³⁸ Weatherall, 'An End to Private Communications in Copyright? The Expansion of Right to Communicate Works to the Public: Part 1', above n 22; Weatherall, 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2', above n 22. This article has an Australian focus, but is relevant because the meaning of "the public" not resolved in the Internet Treaties but is left to domestic law: see Weatherall, 'An End to Private Communications in Copyright? The Expansion of Right to Communicate Works to the Public: Part 1', above n 22, 349.

⁴³⁹ Weatherall, 'An End to Private Communications in Copyright? The Expansion of Right to Communicate Works to the Public: Part 1', above n 22, 348.

⁴⁴⁰ Ibid 349.

⁴⁴¹ (1997) 191 CLR 140. This case is discussed further in Chapter IV – Section C. Interpretations of "the Public".

⁴⁴² Weatherall, 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2', above n 22.

⁴⁴³ Ibid 407.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid 408.

3 Questions for Private International Law

The potential breadth of the act and uncertainty surrounding “the public” also brings up new challenges for private international law, for instance, the locus of the infringing act, which in turn has an impact on the application of choice of law rules. As the relevant “public” is the public in the country to which the work is being made available, **Jane Ginsburg** asserts that ‘this may place simultaneously into play a great number of countries’ laws’.⁴⁴⁶ Furthermore, as the WIPO Treaties do not designate which national law’s definition of “public” would apply, ‘each Member State remains free to choose between the law of the country of emission or of receipt, or indeed, to designate some other means of determining which country’s(ies’) law(s) govern’.⁴⁴⁷

In terms of where a “making available” takes place, **Christie and Dias** find that nothing in the wording of article 8 provides any indication of how the locus of the act should be determined.⁴⁴⁸ They identify three possibilities: (1) the location of the uploading computer; (2) the location where the internet server is situated; and (3) the location of the downloading computer.⁴⁴⁹ The authors consider the first possibility to be flawed, because this does not coincide with the time of making available. The second possibility, on the other hand, ‘looks a very likely candidate, because it clearly connects the time of the making available with the place of making available’.⁴⁵⁰ However, this is again deemed inappropriate because the relevant act of making available is one which *enables* members of the public to access the work ‘from a place...chosen by them’.⁴⁵¹ Therefore, the true location is said to be the location of the downloading computer, as ‘[t]his possibility connects the *place*, *time* and *concept* of making available’.⁴⁵² In other words, where a work is made available on the internet, the reality is that there may be multiple downloads, and the relevant locations are that of ‘each and every individual capable of accessing the Internet server’.⁴⁵³ Christie and Dias note that this may at first blush ‘appear ridiculous’, but ‘[t]he very nature of the act of making a work available online, involving as it does an omnipresence of the work, compels this result’.⁴⁵⁴ However, it is unclear how this conclusion is

⁴⁴⁶ Ginsburg, ‘The (New?) Right of Making Available to the Public’, above n 14, 236.

⁴⁴⁷ Ibid 237. That is, ‘[i]n the absence of a treaty definition of “the public”, Member State legislation or caselaw must fill the gap’ (at 236).

⁴⁴⁸ Christie and Dias, above n 22, 249. It should be noted that this discussion is also relevant to the scope of the right itself i.e. at what point infringement occurs.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid 250.

⁴⁵¹ Ibid.

⁴⁵² Ibid 2503.

⁴⁵³ Ibid 250.

⁴⁵⁴ Ibid. It should be noted that the authors also consider the extraterritoriality of the Australian communication right (at 256).

compatible with their initial observation that the act of making available is exercised by the mere provision of accessibility, and that an actual download is not required to complete the act.⁴⁵⁵

4 The Academic Commentary in Summary

In conclusion, the right to make available to the public received varying treatment in academic circles (some providing extensive historical background, and others focussing more on the impact upon national law). Ficsor, an authoritative commentator in light of his key role in bringing the Internet Treaties into fruition, confirms the breadth and flexibility of the umbrella solution, but also highlights matters beyond the scope of the treaties such as secondary liability. Nevertheless, there remain numerous points of contention on the scope of the “act”. Ricketson and Ginsburg note uncertainties around what they term ‘indirect infringement’,⁴⁵⁶ while Reinbothe and von Lewinski go as far as to argue that an act of linking to an authorised source would constitute an act of making available’.⁴⁵⁷ Therefore, the application of the making available right to different forms of online communications has been a matter of speculation since its inception.

Nevertheless, some matters appear to garner general acceptance. It is clear that the act of making available merely requires that the work is made accessible; an actual transmission is not necessary. Another point of consensus is that the question of who is “the public” is a matter of national determination (subject to arguments that it should not be interpreted so as to prejudice the rights of the author to exploit her works).⁴⁵⁸ Taking an Australian perspective, Weatherall critiques the interpretation taken by national courts and the resulting uncertainties, and highlights the impacts these decisions may have on the public interest in access to content.⁴⁵⁹

Section E. Who Interprets Treaties?

Academic views may inform the interpretations of the courts at the national and regional level, and potentially influence the development of global consensus on the proper scope of the making available right. However, as the Internet Treaties are international agreements among sovereign nations, an important question remains: who has authority to determine the proper interpretation of the making available right? As a general and established principle, ‘the right of giving an authoritative

⁴⁵⁵ See *ibid* 248, where the authors assert that ‘the act of communication, in the form of making available, is complete by merely making a work available for on-demand transmission’.

⁴⁵⁶ Ricketson and Ginsburg, above n 71, 748.

⁴⁵⁷ Reinbothe and von Lewinski, above n 330, 133, 141.

⁴⁵⁸ See *ibid* 133; Ricketson and Ginsburg, above n 71, 705.

⁴⁵⁹ Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2’, above n 22.

interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.⁴⁶⁰ This means an authentic, binding interpretation requires the agreement of all parties to the treaty in question.⁴⁶¹ Such agreement may be contrasted with the interpretation by individual parties to the treaties and their national courts, which is not binding on other parties, and judicial interpretation by international or arbitration courts, which are usually binding only *inter partes*.⁴⁶²

In practical terms however, those who most frequently interpret treaties are the parties to the treaties themselves, or more specifically, the state's legislatures and courts.⁴⁶³ Where authoritative interpretation at the international level are absent, the interpretative rules developed by national or regional courts may have an important role in forming accepted customs of interpretation.⁴⁶⁴ In this regard, article 31(3)(b) of the Vienna Convention provides that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account, together with the context. This is highly relevant to the making available right, because to date the International Court of Justice has not been called upon to interpret the right.⁴⁶⁵ Therefore national or regional courts may have interpretational power over the text of a treaty, depending on how influential their decisions may be on the global stage. In this context, the question is whether certain influential decisions that are widely followed may be regarded as establishing 'the agreement of the parties regarding its interpretation'. This necessitates a survey of various key

⁴⁶⁰ Gardiner, above n 354, 109, citing *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* (Permanent Court of International Justice Advisory Opinion, Series B, No 8, 6 December 1923) 37.

⁴⁶¹ See Reinbothe and von Lewinski, above n 330, 45.

⁴⁶² See *ibid.* However, it should be noted that such interpretations could constitute international customs of interpretation. See for example *Statute of the International Court of Justice*, signed 26 June 1945, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) (entered into force 24 October 1945) art 38(1)(b), which states: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... international custom, as evidence of a general practice accepted as law...'

⁴⁶³ Gardiner, above n 354, 110. See also Frankel, 'The International Copyright Problem and Durable Solutions', above n 37, 130, explaining that 'it is often the job of a national court to fill any gaps'.

⁴⁶⁴ See Frankel, 'The International Copyright Problem and Durable Solutions', above n 37. Frankel argues that international interpretation and national interpretation by legislators and courts are linked, and that consistent interpretation methods are an important aspect of 'creating durable rules to address the problems that international copyright law faces' (at 116). She explains that international and national copyright law 'overlap because national practices will inform, but not determine, both the negotiated text and its interpretation' (at 129).

⁴⁶⁵ It should be acknowledged that customary international law is also applicable to the ICJ: see *Statute of the International Court of Justice*, signed 26 June 1945, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) (entered into force 24 October 1945) art 38(1)(b). Article 9 of TRIPS incorporates the articles of the Berne Convention by reference, but TRIPS does not expressly refer to the WCT or WPPT (concluded a year after TRIPS entered into force). A WTO Panel has nevertheless held that the WCT provides contextual guidance to avoid conflicts within the overall framework for multilateral copyright protection: *United States - Section 110(5) of the US Copyright Act* WTO Doc WT/DS160/R (15 June 2000) (Report of the Panel) [6.70]. However, this is arguably contrary to the Vienna Convention, as the WCT does not form the context of the TRIPS agreement under article 31(2) of the Vienna Convention, and it does not constitute "subsequent agreement" or "subsequent practice" under article 31(3)(a) or (b) of the Vienna Convention: see Frankel, 'The WTO's Application of "The Customary Rules of Interpretation of Public International Law" to Intellectual Property', above n 368, 33.

jurisdictions as to how the making available right has been implemented and interpreted, in order to find commonalities and differences in their approaches.⁴⁶⁶ While existing decisions on the right may not currently constitute state practice, they may nevertheless be indicative of the legal trends that could establish agreement in future.

Section F. Chapter III – Conclusion

One of the broad objectives of the WIPO Internet Treaties was to remedy the perceived gaps and deficiencies of the existing treaties (particularly the Berne Convention). The treaties were a response to the internet, which loomed large with its seemingly limitless potential. As result, the making available right was drafted in broad, ambiguous and technology-neutral terms.

In light of the context of its introduction and the academic commentary, certain characteristics of the making available right can be outlined. It is clear that the right may be exercised via the mere provision of access to copyright content, and it is not necessary to prove that an actual transmission has occurred. Article 8 of the WCT raised the lower thresholds of the communication right by providing that copyright owners need not prove an actual transmission of copyright content in asserting primary infringement of the right. However, the Internet Treaties provide no guidelines as to which types of one-to-one communications would be “to the public”. Therefore, the outer limits of the making available right remains unclear, giving rise to disputes testing the scope of the right.

The rulings emerging from these disputes could lead to subsequent state practice that establishes agreement, depending on the extent to which these rules influence global consensus. The development of clear and consistent principles for understanding the right across various jurisdictions accords with the stated of objectives of the WCT, which includes ensuring that the protection of rights is as ‘uniform as possible’.⁴⁶⁷ Formal rules of treaty interpretation aside, we should recognise the practical importance of coherent and principled interpretation of the making available right across borders. The reality is that global markets for content enabled by the internet are growing and evolving exponentially, and the making available right is likely to play a key role in these ongoing developments.

⁴⁶⁶ In light of the verbatim implementation of the making available right in the EU, Jane Ginsburg notes that ‘EU judicial and administrative interpretations and the interpretations of member state courts are therefore probative of the application of the making available right to RS-DVR services, but cannot yet be said to constitute controlling “state practice” within the meaning of art. 31(3)(b) of the Vienna Convention on the Law of Treaties’: Jane C Ginsburg, ‘Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available; Request for Additional Comments Docket No. 2014–2’ 11 <http://copyright.gov/docs/making_available/comments/docket2014_2/reply/>.

⁴⁶⁷ WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) Preamble.

CHAPTER IV. NATIONAL AND REGIONAL IMPLEMENTATION OF THE MAKING AVAILABLE RIGHT

Purpose

This chapter aims to provide an account of current national and regional approaches to the making available right. To do so, it will:

1. Discuss the statutory provisions implementing the making available right in Australia, the US and the EU under the “umbrella solution”;
2. Consider the judicial interpretation of the right in these jurisdictions, particularly in cases involving linking and cloud computing;
3. Provide preliminary analysis on the conceptual difficulties that have been exacerbated by online technologies, laying the groundwork for deeper analysis in the latter parts of this thesis.

Headings

A. Statutory Implementation

1. Australia
2. United States
3. European Union

B. Interpretations of the “Act” of Making Available

1. Mere Accessibility of Content
2. Individualized Communications from the Cloud
3. Uncertain Limits of the “Act” in Linking Cases

C. Interpretations of “the Public”

1. Exclusion of the Private and Domestic Sphere
2. Expansion from “in Public” to “to the Public”
3. A Focus on Economic Interests in Various Conceptualisations of “the Public”

This chapter sets out the implementation and interpretation of the making available right in Australia, the US and EU.⁴⁶⁸ Importantly, this discussion of national and regional laws provides a basis for the

⁴⁶⁸ In Australia, the treaties were acceded to and came into force 2007, while the United States ratified in 1999 and the treaties came into force in 2002. EU ratification was in 2009, with entry into force following in 2010. See WIPO, *Contracting Parties - WIPO Copyright Treaty* <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16>; WIPO, *Contracting Parties - WIPO Performances and Phonograms Treaty* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20>.

critiques and recommendations that will be developed in subsequent chapters. In addition, the discussion may be relevant to our interpretation of the Internet Treaties, as national or regional interpretations could constitute controlling state practice if it establishes agreement of the parties.⁴⁶⁹ The chapter begins with an examination of the statutory provisions that have been enacted or the existing provisions purporting to satisfy the umbrella solution. The drafting choices and different approaches taken by each jurisdiction will be covered. The remainder of the chapter will discuss the judicial interpretation of these provisions in cases involving internet technologies such as linking and cloud services. Some points of consensus across the jurisdictions will be discussed, before the chapter moves on to consider contentious approaches to the right that have yet to be resolved.

The discussion is divided into two parts corresponding with the two key elements of the right — i.e. (1) an “act” of making available (whether via a “communication” or “performance”, depending on the drafting solution)⁴⁷⁰ that is (2) to “the public”.⁴⁷¹ While some basic thresholds of the making available right (e.g. mere accessibility) are generally accepted, other aspects such as the one-to-one nature of on-demand communications tend to be problematic under national copyright laws. This discussion highlights the uncertain nature of the “act” of making available, and the lack of clear principles to determine whether a communication is made “to the public”.

Section A. Statutory Implementation

Under the “umbrella solution”, it is not necessary that the rights introduced at the national or regional level be drafted in the same form as article 8 of the WCT, or articles 10 and 14 of the WPPT.⁴⁷² The relevant copyright law simply has to give effect to the right by adequately covering its basic elements. Jurisdictions have taken different approaches to implementing the right in accordance with the “umbrella solution”. The EU adopted language closest in form to that of the WCT, while Australia introduced an explicit making available right in terms slightly different from the WCT. The US, on

⁴⁶⁹ *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3).

⁴⁷⁰ It should be acknowledged that the Internet Treaties do not specifically refer to an “act”, although it is made clear in Australia that exercise of an act is required: see *Copyright Act 1968* (Cth) ss 13, 31 and 36.

⁴⁷¹ See *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8, which provides:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

See also *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) arts 10 and 14 (setting out the making available right in relation to fixed performances and phonograms).

⁴⁷² Contracting parties to the treaties are free to implement in whichever form they wish so long as the right is protected in substance: Ficsor, *The Law of Copyright and the Internet*, above n 8, 204–6.

the other hand, took full advantage of the umbrella solution and chose to rely on a combination of existing rights to give effect to the making available right. Regardless of the form of the act of making available, the second element of “the public” is common to exclusive rights at the national or regional level that give effect to the making available right. As “the public” remains undefined in the Internet Treaties, respective national and regional courts are left to determine its meaning.

1 Australia

To enable Australia’s accession to the WCT and WPPT, a technology-neutral right to communicate to the public was introduced via the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). As amended, “communicate” is defined to mean:

... make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)...⁴⁷³

Section 22(6) of the *Copyright Act 1968* (Cth) further provides that:

... a communication ... is taken to have been made by the person responsible for determining the content of the communication.

The Explanatory Memorandum to the Digital Agenda bill observed that the development of new communication technologies had exposed gaps in the protection afforded by the Copyright Act, and that the limited technology-specific transmission rights were no longer adequate.⁴⁷⁴ It explained that the amendments ‘would improve the protection of copyright material on the Internet and the new communication networks, including pay TV, and thus facilitate the growth of the information economy’.⁴⁷⁵ Therefore, the new right of communication to the public would provide copyright owners with ‘more effective protection in relation to the new and expanding means of commercial exploitation of copyright material, particularly online delivery.’⁴⁷⁶ The ‘new technology-neutral right to communicate literary, dramatic and musical works to the public’ was described as ‘the keystone to the reforms provided’ by the Digital Agenda bill.⁴⁷⁷

⁴⁷³ *Copyright Act 1968* (Cth) s 10(1).

⁴⁷⁴ Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth) 4. These were the wireless broadcasting right and the limited cable diffusion right.

⁴⁷⁵ Ibid 8.

⁴⁷⁶ Ibid 13–14. See at [55]:

The new right ... provide[s] protection to copyright material made available through on-demand, interactive transmissions. An example of the exercise of this right would be the uploading of copyright material onto a server which was connected to the Internet.

⁴⁷⁷ Ibid 33 (Item 35).

2 United States

The US implemented some aspects of the WCT via the *Digital Millennium Copyright Act* of 1998,⁴⁷⁸ but did not take specific legislative action to implement the making available right. The US concluded that explicit references to “making available” and “communication to the public” were not necessary, as the relevant acts were given effect by the scope of existing exclusive rights.⁴⁷⁹ These were the rights to reproduce copies, distribute copies to the public, perform the work publicly and display the work publicly.⁴⁸⁰ The elements of these existing rights, however, align imperfectly with the making available right. For example, the distribution right refers to the distribution of copies,⁴⁸¹ which may be contrasted with the Internet Treaties’ coverage of accessible “works” or “performances” without requiring the transmission of a copy. While the US Supreme Court has held that “distribution” under the US Copyright Act includes electronic transmission,⁴⁸² there has been conflicting pronouncements by US courts as to whether “distribution” covers the mere making of an offer to distribute a copy, as opposed to requiring an actual distribution of a copy.⁴⁸³ Therefore, the distribution right may not provide adequate coverage of mere accessibility.

Implementation of US obligations under the Internet Treaties is also reliant upon the rights of public display and public performance. Section 101, the definitional section of the US Copyright Act, provides that:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

...

⁴⁷⁸ These were the provisions regarding anti-circumvention of technological protection measures (TPM) and protection of electronic rights management information (ERMI), and the “safe harbour” provisions for online service providers.

⁴⁷⁹ Internet Policy Task Force, US Department of Commerce, above n 20, (citing Digital Millennium Copyright Act of 1998, HR Res 105-551, Pt. 1, 105th Congress (1998) 9, which stated that ‘[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law’). For a more recent expression of this view, see US Copyright Office, above n 20, 4 and 74 (finding that the current exclusive rights in the statute ‘collectively meet and adequately provide the substance of the making available right’, despite some inconsistencies in lower court decisions).

⁴⁸⁰ *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 106.

⁴⁸¹ The exclusive right to “distribute” as stated in § 106(3) is the right ‘to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending’. The term “distribute” is not separately defined in the legislation, however “copies” or “phonorecords” are defined in § 101 as ‘material objects...in which a work is fixed by any method now known or later developed, and from which the [work/sounds] can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device’.

⁴⁸² *NY Times Co, Inc v Tasini* 533 U.S. 483 (2001) 498.

⁴⁸³ See the discussion of *Hotaling v Church of Jesus Christ of Latter-Day Saints* 118 F.3d 199 (4th Cir. 1997), and *Capitol Records v Thomas* 579 F.Supp.2d 1210 (D.Minn. 2008) later in this Chapter.

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

In contrast to the reproduction or distribution rights, the performance and display rights as drafted provide more effective coverage of the making available right. The definitions of “perform” or “display” use broad terms such as “render” or “show”, and may be effected by means of “any device or process”. Furthermore, the performance right relates to *the work*, not a copy of the work. It should be noted that there is still some degree of misalignment between the display right and the making available right, as the US display right refers to the showing of a copy. Nevertheless, it still affords more flexibility than the reproduction right or distribution right, as it does not appear to require the making or transfer of a copy.

According to the House Report to the 1976 Act, ‘the concepts of public performance and public display cover not only the initial rendering or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public’.⁴⁸⁴ Therefore, ‘any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set’ if this was done “publicly” as defined in § 101.⁴⁸⁵ The section provides that the performance or display of a work “publicly” means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁴⁸⁶

In terms of the former “public place” clause, the House Report to the US Copyright Act of 1976 explains that the definition of “publicly” in § 101 makes clear that ‘performances in “semipublic” places such as clubs, lodges, factories, summer camps, and schools are “public performances” subject to copyright control.’⁴⁸⁷ With regards to the latter “transmit” clause, the House Report states that a performance is “public” ‘even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time

⁴⁸⁴ H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 63.

⁴⁸⁵ Ibid.

⁴⁸⁶ *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101.

⁴⁸⁷ H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 64.

of the transmission’⁴⁸⁸ The House Report goes on to explain that ‘[t]he same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service’.⁴⁸⁹

In stark contrast to the comments supporting the Australian Digital Agenda Bill of 2000,⁴⁹⁰ these pronouncements in the House Report to the 1976 US Act reflect the technology of the moment — broadcast — and do not address the issue of non-contemporaneous access by users via the internet which was not yet in mass use in the 70s.⁴⁹¹ The comments seem to support a broad interpretation of the “the public”. Nevertheless, questions remain as to whether an actual performance or display must occur. In regards to “the public”, the House Report refers to “potential recipients” (reflected in the statute via the terms ‘members of the public *capable* of receiving the performance or display’),⁴⁹² but the assumption seems to be that a broadcast is indeed occurring or has occurred. While *potential recipients* may constitute “the public” under the statute, the provisions do not clearly address whether permitting potential receipt of content alone (without proof of actual receipt) satisfies the “act”. In short, despite a broad definition of “the public”, numerous ambiguities remain regarding the “act” of making available as implemented in the US.

3 *European Union*

The making available right has been harmonized throughout the European Union (EU) under the Information Society Directive of 2001 (“InfoSoc Directive”), introduced to enable EU’s ratification of the Internet Treaties.⁴⁹³ Article 3(1) is drafted in terms mirroring article 8 of the WCT, requiring member states to protect the right of communication to the public ‘including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them’.⁴⁹⁴ The InfoSoc Directive has been described as ‘the most important measure ever to be adopted by Europe in the copyright field’, bringing ‘European copyright rules into the digital age’.⁴⁹⁵ The preamble of the Directive explains that:

⁴⁸⁸ H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 64–65.

⁴⁸⁹ Ibid.

⁴⁹⁰ See Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), above n 474.

⁴⁹¹ Cf H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 64, stating that ‘[t]he definition of “transmit”—to communicate a performance or display “by any device or process whereby images or sound are received beyond the place from which they are sent”—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them’ (emphasis added).

⁴⁹² *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101 (emphasis added).

⁴⁹³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10 art 3.

⁴⁹⁴ Ibid art 3(1).

⁴⁹⁵ European Commission, ‘Commission Welcomes Adoption of the Directive on Copyright in the Information Society by the Council’ in *European Commission Press Release Database* (Brussels, 9 April 2001)

The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.⁴⁹⁶

The preamble also states that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive’,⁴⁹⁷ which reflects the agreed statement to article 8 of the WCT.

Further context may be found in the European Commission’s Communication on Copyright and Related Rights in the Information Society, where it was observed that ‘the market in on-demand services is considered to be one of the main areas of growth, with further technological developments to come’.⁴⁹⁸ The EC asserted that the right covering on demand transmissions had ‘to be harmonized as a matter of priority’ because ‘the exploitation of works and other protected material in the context of on-demand services will, to a large extent, depend on EU-wide markets and a clear and coherent level of protection of these activities across Member States’.⁴⁹⁹

Article 267 of the Treaty on the Functioning of the European Union (TFEU) provides that the Court of Justice of the European Union (CJEU) has jurisdiction to issue preliminary rulings on the interpretation on EU treaties upon request by courts or tribunals of member states. Therefore, the CJEU holds the authority to interpret the making available right in the EU. In light of the EU’s verbatim implementation of the right, it is arguable that the approaches of the CJEU and EU member

<http://europa.eu/rapid/press-release_IP-01-528_en.htm> (quoting Internal Market Commissioner Frits Bolkestein). See also Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10, above n 493, preamble 15, which states ‘[t]his Directive also serves to implement a number of the new international obligations’ as set out in the Internet Treaties.

⁴⁹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10, above n 493, Preamble 25.

⁴⁹⁷ Ibid Preamble 26.

⁴⁹⁸ European Commission, ‘Communication on Copyright and Related Rights in the Information Society’ in *European Commission Press Release Database* (Brussels, 20 November 1996) <http://europa.eu/rapid/press-release_IP-96-1042_en.htm>.

⁴⁹⁹ Ibid.

state courts *could* be probative of the appropriate interpretation of the making available right internationally (as state practice establishing the agreement of the parties to the treaties).⁵⁰⁰

The following table sets out the provisions that have been discussed above.

Figure 4.1. Table of Legislative Provisions

Jurisdiction	Legislative instrument	Sections / Provisions
Australia	<i>Copyright Act 1968</i> (Cth)	<p>s 31 – Nature of copyright in original works</p> <p>(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:</p> <p>(a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:</p> <ul style="list-style-type: none"> (i) to reproduce the work in a material form; (ii) to publish the work; (iii) to perform the work in public; (iv) to communicate the work to the public; (vi) to make an adaptation of the work; (vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (iv), inclusive; and <p>(b) in the case of an artistic work, to do all or any of the following acts:</p> <ul style="list-style-type: none"> (i) to reproduce the work in a material form; (ii) to publish the work;

⁵⁰⁰ Ginsburg, ‘Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available; Request for Additional Comments Docket No. 2014–2’, above n 466, 11. However, Ginsburg is of the view that it ‘cannot yet be said to constitute controlling “state practice” within the meaning of art. 31(3)(b) of the Vienna Convention on the Law of Treaties’. This conclusion is sensible considering the lack of consistency across the EU decisions (as will be discussed further below).

		<p>(iii) to communicate the work to the public; ...</p> <p>[In relation to subject matter other than works (i.e. sounds recordings, cinematograph films, and television broadcasts and sound broadcasts), see ss 85-87]</p> <p>s 10(1) – Interpretation</p> <p>(1) In this Act, unless the contrary intention appears:</p> <p>...</p> <p>“Communicate” means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)....</p>
US	<p>17 U.S.C. 90</p> <p>Stat. 2541</p> <p>(Copyright Act of 1976)</p>	<p>§ 106 - Exclusive rights in copyrighted works</p> <p>Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:</p> <ul style="list-style-type: none"> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

		<p>(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.</p> <p>§ 101 - Definitions</p> <p>Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:</p> <p>...</p> <p>“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.</p> <p>...</p> <p>“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.</p> <p>...</p> <p>To perform or display a work “publicly” means—</p> <p>(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or</p> <p>(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.</p> <p>...</p>
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		<p>To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.</p> <p>...</p> <p>To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.</p>
EU	InfoSoc Directive 2001/29/EC	<p>Article 3 - Right of communication to the public of works and right of making available to the public other subject-matter:</p> <p>1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.</p> <p>2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:</p> <ul style="list-style-type: none"> (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. <p>3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.</p>

Section B. Interpretations of the “Act” of Making Available

To exercise the making available right, firstly, one has to carry out an “act” of making available that enables access to the relevant copyright content ‘from a place and at a time individually chosen by’ recipients.⁵⁰¹ This characteristic is plain on the face of the right as expressed in the Internet Treaties — i.e. mere accessibility of the work may satisfy the act; it is not necessary to prove an actual transmission of the work has occurred. Most jurisdictions have adequately given effect to this aspect (subject to some contention in the US). However, other characteristics of the “act” have been more challenging, giving rise to difficulties in identifying *who* has carried out the “act” of making available. While it is generally accepted that the “act” could be exercised by enabling individualized or one-on-one communications, the purported breadth of the “act” has been challenged in cases involving cloud technologies. In these cases, the recipient exercises some level of choice as to what they receive, and questions arise as to whether this is an “act” of making available by the cloud service provider, or just the facilitation of a communication that has been initiated and executed by the user of the system.

Furthermore, the application of the right to linking — an act that is of fundamental importance to the operation of the Internet⁵⁰² — has not been consistent. US and Australian courts have held that linking to copyright content is not an “act” of making available that gives rise to primary infringement, regardless of whether the initial post that was linked to is authorised. Following this negative finding on the “act”, it is not necessary to consider if “the public” is satisfied. The CJEU, on other hand, has construed the act of making available broadly to encompass linking (and chosen to limit the scope of the right with conditions upon “the public”).

1 *Mere Accessibility of Content*

In Australia and the EU, the position on accessibility is clear based on an explicit making available right.⁵⁰³ The position in the US, on the other hand, is less certain due to the lack of legislative intervention on the matter. Existing rights such as public performance and distribution, drafted in the pre-internet era, cover mere access to content imperfectly. While the US Supreme Court has interpreted the performance right in a manner which seems to cover on-demand access, the ruling

⁵⁰¹ See *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8; *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) arts 10 and 14.

⁵⁰² See the discussion of linking earlier in this thesis in Chapter II – Section B. A New Communications Environment: The Internet.

⁵⁰³ See *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285; *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006).

does not clearly explain the basis for its interpretation of the statute.⁵⁰⁴ Furthermore, decisions on the distribution right show a lack of consensus as to whether actual transmissions of copies are required, or if merely offering to provide such copies amounts to an exercise of the right.⁵⁰⁵

Australia: Mere accessibility sufficient in the peer-to-peer filesharing context

In the peer-to-peer filesharing context, Australian courts have confirmed that the “act” of making available merely requires that content be made accessible. These findings have been made in cases focussing on secondary liability, which nevertheless require that primary infringement by users be proven. Copyright liability for peer-to-peer filesharing was first addressed in 2005 by the Federal Court in *Universal Music v Sharman*.⁵⁰⁶ The defendant’s Kazaa software as designed permitted users to share MP3 files of music via their “shared folder”. Users were also able to search for files from other users’ folders, and download those files to their shared folders.⁵⁰⁷ Although the statement of claim alleged the software provider’s primary infringement of the communication right by making available online or electronically transmitting the MP3 files⁵⁰⁸ (in addition to the authorisation of users’ conduct), the primary infringement claim was rejected outright by Wilcox J of the Federal Court. His Honour held that this was not ‘seriously arguable’, as ‘[r]ealistically speaking, the applicants’ copyright infringement claim depends entirely on the question’ of whether authorisation of infringement had occurred.⁵⁰⁹ The discussion therefore centred on the application of authorisation principles,⁵¹⁰ and proceeded on the footing that primary infringement of the making available right by users of the Kazaa software had been satisfied. Here it is arguable that the software provider was not seen as a plausible primary infringer of the making available right because the source of the files in this instance were other users (not the service provider).

More explicit consideration of the making available right in a peer-to-peer filesharing context may be found in the 2011 Full Federal Court decision of *Roadshow Films Pty Ltd v iiNet Ltd*.⁵¹¹ Here the applicants sought to prohibit the peer-to-peer sharing of their cinematograph films using the BitTorrent system, and alleged that the ISP was secondarily liable for authorising the file-sharing

⁵⁰⁴ See *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014).

⁵⁰⁵ See *Hotaling v Church of Jesus Christ of Latter-Day Saints* 118 F.3d 199 (4th Cir. 1997); *Capitol Records v Thomas* 579 F.Supp.2d 1210 (D.Minn. 2008).

⁵⁰⁶ (2005) 222 FCR 465.

⁵⁰⁷ See *ibid* 480. Note that the Court does not make a clear finding as to whether the Kazaa system was a true “peer-to-peer” technology involving direct transfer of files among individual computer users, or whether it had the features of a centrally indexed system.

⁵⁰⁸ *Ibid* 474.

⁵⁰⁹ *Ibid* 475.

⁵¹⁰ Authorization liability in Australia stems from legislative provisions stating that copyright is infringed by a person who does or *authorises* the doing of one of the exclusive rights held by the copyright owner: *Copyright Act 1968* (Cth) ss 36(1) and 101(1). See also *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

⁵¹¹ (2011) 194 FCR 285.

activities of internet users utilising its internet services.⁵¹² As a preliminary step, the plaintiffs had to prove primary infringement by users.⁵¹³ The discussion in this case illustrates the effectiveness of the Digital Agenda reforms in the context of peer-to-peer filesharing. The Court held that the plaintiff's films were made available to the public online via the peer-to-peer file-sharing software BitTorrent each time the computer (which was running the peer-to-peer program and stored the shared file) was connected to the internet, as it was at these points that the works were made accessible to other BitTorrent users.⁵¹⁴ This gave rise to multiple, separate "acts" of making available each time a modem was connected to the internet as a result of the 'intervention by a user'.⁵¹⁵

Merely bringing about a state of accessibility by virtue of a working internet connection was the operative act. It did not matter whether or not a transmission of the work occurred, or how long the work had been accessible for; what mattered was that a work had become accessible due to that particular act or "intervention". In response to arguments that there would be no infringement of a substantial part of the works due to the transfer of fragments of the cinematograph films (via a multitude of data "packets"),⁵¹⁶ Emmett J held that:

The width of the statutory definition of communicate in s 10(1) of the *Copyright Act*, and the extrinsic material relating to the Digital Agenda Act, make it plain that the introduction of the right of communication *to the public* was intended to provide a technologically neutral right to cover technological developments such as the internet.⁵¹⁷

Therefore, in light of the broadened definition of "communicate" to include a "making available", it was not necessary for the plaintiff to prove that the work (or a substantial part of the work) had been transmitted. The mere availability or accessibility of smaller data packets containing the work was sufficient to constitute primary infringement of the making available right in this case.

⁵¹² It should be noted that the issue of secondary liability under authorisation principles was appealed to High Court. The High Court held that iiNet had not authorised the infringements through the provision of an internet service: *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (2012) 248 CLR 42.

⁵¹³ Moreover, iiNet sought to rely on the "safe harbour" provisions. Therefore, it was necessary to determine whether numerous acts of infringement were being committed by users, as s 116AH(1) of the *Copyright Act 1968* (Cth) provides that a carriage service provider must adopt and reasonably implement a termination policy for "repeat infringers": see *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 313 (Emmett J).

⁵¹⁴ *Ibid* 321 [152] (Emmett J):

Connection to the internet is an essential element in making available online, in that communication cannot occur if there is no connection to the internet. ... *Every time that a modem is connected to the internet, and makes a Film available, there is a new making of the film available online.* [emphasis added]

See also 363–64 [328] (Jagot J) and 436 [666] (Nicholas J).

⁵¹⁵ *Ibid* [152]–[153] (Emmett J).

⁵¹⁶ See *Copyright Act 1968* (Cth) s 14(1)(a), which provides that acts done in relation to substantial part of the copyright work or other subject-matter is deemed to be done in relation to the whole.

⁵¹⁷ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 323 (emphasis in original).

EU: Broad interpretation encompasses mere accessibility

Likewise, the CJEU has unequivocally confirmed that the “act” of making available covers merely making copyright content accessibly by members of the public. In the case of *Svensson* involving the primary liability of an aggregator of links to news articles, the CJEU held that the “act” ‘must be construed broadly..., in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to [the InfoSoc Directive], a high level of protection for copyright holders.’⁵¹⁸ The Court explained that ‘it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity’.⁵¹⁹ Therefore, it was not necessary to prove that the links were actually accessed; the mere fact that the content was accessible was sufficient.

The Court in *Svensson* refers to the decision of *SGAE v Rafael Hoteles* (‘*SGAE*’)⁵²⁰ in support of this interpretation.⁵²¹ In *SGAE*, the “act” of making available was interpreted broadly in the context of pre-internet technology. The CJEU held that the provision of television sets to customers in hotel rooms was a distribution of broadcast signals through those TV sets, constituting “acts” of communication to the public.⁵²² The Court in *SGAE* explained that whether access had actually occurred (i.e. by switching on the television) was not a decisive factor.⁵²³ Therefore the hotel proprietors, in supplying these television sets in their hotel rooms, were exercising the making available right held by broadcasters.

US: Uncertainty under pre-existing rights

In the US, whether existing rights cover the mere accessibility of copyright works is subject to debate. Questions arise under both the public performance right and the distribution right. Looking first to the performance right, it is arguable that the US Supreme Court, through its broad reading of the right, has implicitly accepted that the mere accessibility of content without an actual transmission is a

⁵¹⁸ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) 17, citing *Football Association Premier League v QC Leisure; Karen Murphy v Media Protection Services Ltd* (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [193].

⁵¹⁹ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [19].

⁵²⁰ (Court of Justice of the European Communities, Case C-306/05, 7 December 2006).

⁵²¹ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [19].

⁵²² *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [23].

⁵²³ *Ibid* [43]:

It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of Rafael and Ireland, that customers who have not switched on the television have not actually had access to the works.

“performance”. In the case of *ABC v Aereo* (“*Aereo*”),⁵²⁴ the Aereo system implemented by the defendant allowed subscribers of the service to select and stream free-to-air television broadcasts from their internet-enabled mobile devices.⁵²⁵ The US Supreme Court in *Aereo* appears to equate the mere offering of the service with an infringement of the public performance right.⁵²⁶ At the outset of the majority opinion, Justice Breyer states:

We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.⁵²⁷

This statement assumes that the mere “selling” of the service that “allows” the public to view the programs would trigger an infringement of the public performance right, without actual transmissions.⁵²⁸ While it is possible to criticize the *Aereo* decision as outcome-focused, it was perhaps sensible in light of US obligations under the Internet Treaties. It may be that the Supreme Court in *Aereo* proceeded on the assumption that transmissions of the recorded programs had occurred or could easily be proven (an approach that is found in cases considering the distribution right, discussed below). The Court does not clarify whether transmissions need not be proven, or whether it had merely read a rebuttable presumption in favour of the plaintiff into the performance right. If it is the latter, i.e. an evidentiary presumption that transmissions have occurred unless the defendant has proven otherwise, then the US public performance right is still more restrictive than the making available right. While it may be argued that the *Aereo* decision narrows the gap between US law and international norms as the Court did not require proof of transmissions, it still leaves questions on the scope of the performance right unanswered.⁵²⁹

The issue of mere accessibility under the US distribution right is also unclear. Although cases involving physical copies have held that the mere availability of these copies (without proof of an actual transfer of ownership of the copy) constitute a “distribution”, a number of courts considering the online availability of electronic copies have taken a more limited approach. Therefore, whether the distribution right adequately gives effect to the making available right is still unsettled under US law. In the context of tangible copies, *Hotelling v Church of Jesus Christ of Latter-Day Saints*

⁵²⁴ 134 S. Ct. 2498 (2014).

⁵²⁵ The details of the intricate Aereo system will be explained more fully below when discussing the “individualized” nature of the communications.

⁵²⁶ Jane C Ginsburg, ‘Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms - Part I (Making Available Right)’ (2014) 241 *Revue Internationale du Droit d’Auteur (RIDA)*.

⁵²⁷ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2503.

⁵²⁸ Ginsburg, ‘Letter from the US’, above n 526.

⁵²⁹ Ibid.

(“*Hotaling*”)⁵³⁰ interprets “distribution” broadly to cover mere accessibility. The Fourth Circuit Court of Appeals held that a church library holding an unauthorized copy of the plaintiff’s work in the form of a microfiche in its collection infringed the distribution right, as the copy was made available to members of the public. This was so despite the absence of proof or records to indicate that any member of the public actually borrowed the microfiche. The Court stated that ‘[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public’.⁵³¹ Were the Court to absolve the library of liability, the ‘copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.’⁵³²

The decision in *Hotaling* has received varying treatment in subsequent cases. The Tenth Circuit in *Diversey v Schmidly*⁵³³ agreed with *Hotaling* in a case involving similar facts. In addition, several decisions appear to find that the *Hotaling* interpretation of “distribution” extended to online transmissions.⁵³⁴ However, it is unclear whether there is, at most, an evidentiary presumption in favour of the plaintiff, or whether an actual distribution is not required. At least one court has limited *Hotaling* to instances where proof of actual infringement is impossible to produce because the infringer has not kept records of use by the public.⁵³⁵ The interpretation of *Hotaling* as a mere evidentiary presumption in favour of the plaintiff would be more sensible on a plain reading of the distribution right, as the operative “act” is distributing the work, not permitting potential distribution of the work.

A decision that is in direct opposition to *Hotaling* in the digital context is *Capitol Records v Thomas*.⁵³⁶ At trial, the jury was instructed that ‘[t]he act of making copyrighted sound recordings available ... violates the copyright owners’ exclusive right of distribution, regardless of whether actual distribution has been shown.’⁵³⁷ However, the District Court held that the jury instruction had been in error, rejecting the *Hotaling* approach.⁵³⁸ In *Thomas*, the plaintiffs argued that US courts

⁵³⁰ 118 F.3d 199 (4th Cir. 1997).

⁵³¹ *Ibid* 203.

⁵³² *Ibid*.

⁵³³ *Diversey v Schmidly* 438 F.3d 1196, 1204 (10th Cir. 2013) 1204.

⁵³⁴ See, eg, *A&M Records, Inc v Napster, Inc* 239 F.3d 1004, 1014 (9th Cir. 2001) 1014 (‘Napster users who upload file names to the search index for others to copy violate plaintiff’s distribution rights.’); *Getaped.com, Inc v Cangemi* 188 F. Supp. 2d 398 (S.D.N.Y. 2002) (‘When a webpage goes live on the Internet, it is distributed and “published”...’).

⁵³⁵ *Arista Records, Inc v MP3Board, Inc* No. 00Civ. 4660(SHS), 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y. Aug. 28, 2002) 14 (‘[A] copyright holder may not be required to prove particular instances of use by the public when the proof is impossible to produce because the infringer has not kept records of public use’).

⁵³⁶ 579 F.Supp.2d 1210 (D.Minn. 2008).

⁵³⁷ *Ibid* 1213. Based on this instruction, Jammie Thomas was found to have infringed the distribution right.

⁵³⁸ *Ibid* 1223. This finding was based on precedent set by its own Eighth Circuit Court of Appeals in *National Car Rental System, Inc v Computer Associates International, Inc* 991 F. 2d 426 (8th Cir. 1993), which held that

should interpret the distribution right in a manner consistent with the WCT, in light of US ratification of the treaty.⁵³⁹ This argument was based on the ‘Charming-Betsy Doctrine’ from the 1804 Supreme Court decision of *Murray v Schooner Charming Betsy*,⁵⁴⁰ which held that ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’.⁵⁴¹ The District Court acknowledged that the Charming-Betsy doctrine directs the court to adopt a reasonable construction consistent with US international obligations.⁵⁴² It nevertheless concluded that, following its review of the Copyright Act, its legislative history, binding precedent and extensive case law, the plaintiffs’ interpretation of the distribution right ‘is simply not reasonable’.⁵⁴³ It explained, firstly, that the WIPO Internet Treaties were not self-executing and lacked binding authority, and secondly, Charming-Betsy doctrine was a helpful tool for statutory construction and not substantive law.⁵⁴⁴ In short, ‘concern for U.S compliance with the WIPO treaties and the FTAs cannot override the clear congressional intent in § 106(3).’⁵⁴⁵

The US Copyright Office in its report on the making available right presents a contrary position, despite submissions asserting that the distribution right as drafted in s 106(3) is unsuitable to cover the mere accessibility of works online.⁵⁴⁶ The report largely relies on Professor Menell’s research on the history of the distribution right, which highlights the historical legislative decision to substitute “distribute” for the act of “publication”.⁵⁴⁷ Menell’s interpretation on the history is considered by the Copyright Office to be ‘compelling evidence’ on the matter of mere accessibility under the distribution right.⁵⁴⁸ Under the 1909 Act, “publication” had been consistently interpreted as encompassing the offering of copyright works to the public, with no need to prove actual distribution, therefore Menell’s argument was that this broad interpretation should be carried over to the replacement term “distribute”.⁵⁴⁹ In other words, the history is said to support the proposition that to

distribution required an actual dissemination of copies. The Court considered that ‘*National Car Rental*, not *Hotaling*, is consistent with the logical statutory interpretation of § 106(3), the body of Copyright Act case law, and the legislative history of the Copyright Act’. Note Carson’s argument that the view in *National Car Rental* was simply *obiter*, as there was no attempt to offer or distribute in that case: David O Carson, ‘Making the Making Available Right Available’ (2010) 33 *Columbia Journal of Law & the Arts* 135, 154.

⁵³⁹ *Capitol Records v Thomas* 579 F.Supp.2d 1210 (D.Minn. 2008) 1226.

⁵⁴⁰ 6 U.S. 64 (1804).

⁵⁴¹ Ibid 118. The Charming-Betsy doctrine was affirmed more recently by the US Supreme Court in *F Hoffmann-La Roche Ltd v Empagran SA* 542 U.S. 155 (2004) (‘[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law — law that [we must assume] Congress ordinarily seeks to follow.’).

⁵⁴² *Capitol Records v Thomas* 579 F.Supp.2d 1210 (D.Minn. 2008) 1226.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ US Copyright Office, above n 20, 19.

⁵⁴⁷ See Menell, above n 22.

⁵⁴⁸ US Copyright Office, above n 20, 30, citing Menell, above n 22.

⁵⁴⁹ US Copyright Office, above n 20, 30ff.

“distribute” a work covers merely offering to distribute copies, rather than actually distributing copies of the work. Despite more recent inconclusive judicial findings on the matter,⁵⁵⁰ the US Copyright Office indicates a preference for Menell’s interpretation based on the legislative history of the right.⁵⁵¹

In summary, notwithstanding efforts to construe the US distribution right so as to encompass the mere making available of electronic copies online, it is questionable whether US courts will be able to clearly and consistently interpret the distribution right to cover mere accessibility based on the existing statutory language.⁵⁵² Unlike the Australian application of the right to peer-to-peer filesharing in *Roadshow Films v iiNet*,⁵⁵³ the US legislative provisions present a more challenging path for rightsholders to navigate. Depending on the technology used, a plaintiff may face difficulties, firstly, because the right refers to the distribution of *copies*, and secondly, because it is unclear whether proof of actual transmissions of such copies is necessary.

2 *Individualized Communications from the Cloud*

In contrast to the issue of mere accessibility, individualized or one-to-one communications has given rise to challenges in all three jurisdictions under consideration. To illustrate the difficulties raised by individualised communications, two types of services may be outlined here: (1) a content-neutral “cloud” storage service, and (2) a “cloud”-based time-shifting/streaming service for television broadcasts. It is clear that, at a general level, both systems allow members of the public to gain access to content. A more difficult question, however, is *who* has made this content available — the user of the system or the system proprietor?

The provider of a content-neutral “cloud” storage service simply makes remote storage on its server available to users. The subscriber or user selects any file that they wish to upload and access at their convenience on any internet-enabled device. The file may be uploaded directly from the device they are using, or it may be that it is uploaded to the cloud via another storage location on the web. The service does not discriminate on the type of content that can be uploaded by the user; the user may

⁵⁵⁰ See, eg, *BMG Rights Management (US) v Cox Communications, Inc* No. 1:14-cv1611, 2015 WL 7756130 (E.D. Va. Dec. 1, 2015) *27, cited in US Copyright Office, above n 20, 23.

⁵⁵¹ See Melville B Nimmer and David Nimmer, Matthew Bender, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (at 21 July 2017), § 8.11 (section co-authored by David Nimmer and Peter S Menell), cited in US Copyright Office, above n 20, 34–36.

⁵⁵² See Robert A Gorman, Jane C Ginsburg and R Anthony Reese, *Copyright: Cases and Materials* (Foundation Press, 8th ed, 2011) 713:

The great majority of courts that have considered the question, however, have stopped short of fully endorsing the “making available” right. Instead, many such courts have expressed interest in the possible viability of the “making available” right, without expressly reading the right into the statute or otherwise resolving the issue.

See also Carson, above n 538; Joe Weissman, ‘Distribution, I Presume: A Role for Presumptions in Establishing the “Making Available” Right’ (2010) 27 *Cardozo Arts & Entertainment Law Journal* 737.

⁵⁵³ (2011) 194 FCR 285.

upload and access anything they wish from their remote storage. In other words, the service is content-agnostic. This may be contrasted with a “cloud”-based time-shifting or streaming service for television broadcasts, which is specifically designed to allow users to watch free-to-air television broadcast programs from their internet-enabled device. Broadcasted content are captured by such systems via antennas, before the content is recorded and stored. A user is provided a menu of programs that will be aired, and if a program is selected for viewing or time-shifting, the automated service will capture and record that program. The content can be streamed to the user on their command. It is services satisfying this latter description that have attracted allegations of copyright infringement.

Such cloud storage services present challenges for our interpretation of the making available right, as they grant users a choice as to *what* content is made available, *when* that content is made available and *how* it is made available. On the one hand, it may be argued that the proprietor of this system is merely facilitating the communication carried out by the user of the system, in which case it is merely a “private” communication from the individual to themselves. On the other hand, it may be argued that the proprietor of the system is actually making content available to the various users of the system.

Australia: A focus on copies in *OptusTV*

As discussed, the Australian Full Federal Court has established in the peer-to-peer file sharing context that merely making content accessible may constitute an “act” of making available.⁵⁵⁴ The case of *NRL v Singtel Optus* (“*Optus TV*”)⁵⁵⁵ further tested the scope of the right, providing the Full Federal Court with an opportunity to consider how the making available right should apply to the activities of cloud service providers.⁵⁵⁶ The Court however chose to forego this analysis and only considered the right to make copies of broadcasts.⁵⁵⁷

⁵⁵⁴ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285.

⁵⁵⁵ (2012) 201 FCR 147.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ The relevant rights in relation to television broadcasts are set out in s 87 of the *Copyright Act 1968* (Cth), which states:

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

- (a) in the case of a television broadcast in so far as it consists of visual images--to make a cinematograph film of the broadcast, or a copy of such a film;
- (b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds--to make a sound recording of the broadcast, or a copy of such a sound recording; and
- (c) in the case of a television broadcast or of a sound broadcast--to re-broadcast it or communicate it to the public otherwise than by broadcasting it.

In *Optus TV*, allegations of copyright infringement were brought by the National Rugby League (NRL) and Australian Football League (AFL), parties whose lucrative licensing deals for the live online streaming of their sports events were disrupted by the availability of the Optus TV Now service. The service allowed its users to time-shift programs, and with certain devices, view programs “almost live”.⁵⁵⁸ Optus established a single TV antennae and a number of digital format receivers for each free to air channel in every capital city where TV Now was being offered. Upon the request of a subscriber who clicked “record” on their electronic program guide, Optus would capture and digitally convert the signal received at the scheduled time into four specifications designed for playback on different types of subscriber devices.⁵⁵⁹ When a subscriber clicked the “play” button for the recorded program, Optus’s server would look up the recording ID associated with the subscriber’s ID in their database, and send the compatible version of the recording to a subscriber’s device.⁵⁶⁰ The plaintiffs in this case alleged infringement of both the right to make copies of the broadcasts, and the communication right.

On the right to make copies, Rares J of the Federal Court of Australia at first instance held that the user of the service was the maker of the copies when they clicked the “record” button on the system, as they were solely responsible for the creation of those copies.⁵⁶¹ It followed that the exercise of the right to make copies of broadcasts by users were exempt from copyright liability under section 111 of the Australian Copyright Act, which provides that a person who ‘makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made’ does not infringe copyright.⁵⁶²

Turning to the communication right (which encompasses a “making available” to the public), Rares J considered s 22(6) of the *Copyright Act 1968* (Cth), which provides that ‘a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication’.⁵⁶³ Rares J was of the view that s 22(6) and the expression “the person responsible” for determining the content of the communication was an ‘artificial construct’ to determine liability for copyright infringement where more than one party is effecting that communication.⁵⁶⁴ His Honour held that, in accordance with the operation of the TV Now service, the user who selected the program

⁵⁵⁸ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 312 [26]. “Almost live” streaming with a 2-minute delay was only available to subscribers using Apple devices.

⁵⁵⁹ *Ibid* [27]-[30].

⁵⁶⁰ *Ibid* [35].

⁵⁶¹ *Ibid* [63].

⁵⁶² *Copyright Act 1968* (Cth) s 111.

⁵⁶³ *Ibid* s 22(6).

⁵⁶⁴ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 329 [92].

to be recorded was the person determining the content to be played back to him or her.⁵⁶⁵ A user who was communicating the content to himself or herself was therefore not communicating “to the public”.⁵⁶⁶

In support of the negative findings on both rights, Rares J cites the volition test from the US Second Circuit Court of Appeals case of *Cartoon Network v CSC Holdings* (“*Cablevision*”).⁵⁶⁷ On the right to copy, His Honour found that ‘the only person who could cause the Optus datacentre to bring into existence or create the films in the four formats was the user who clicked the instruction “record” on his or her compatible device. ... The [US] Court of Appeals did not consider that a service provider should be made liable for directly infringing a rightholder’s copyright simply by offering a service that makes copies automatically upon a user’s command’.⁵⁶⁸ In regards to the making available right, Rares J again cites *Cablevision*, explaining that ‘the potential audience of any copy communicated by a service like TV Now was limited to the individual user, [and this] denied its capacity to be a transmission to the public.’⁵⁶⁹

In accordance with Rares J’s findings on the making available right (which were not considered on appeal), merely offering a service cannot lead to liability for the making available right because the individual transmissions were carried out by users. The scope of the “act” of making available would be limited to access to particular works as selected and initiated by users. This precludes a finding that the “act” of making available is carried out by designing and operating a system that permits access to a range of copyright content captured and recorded by the system on-demand.

Rares J’s decision may be contrasted with *Telstra v APRA*,⁵⁷⁰ a decision of the High Court of Australia in 1997 involving telephone transmissions. Telstra provided a music-on-hold service to its customers without obtaining a licence from the Australasian Performing Right Association (APRA). The music was either played via the telephone from a pre-recorded compact disc or tape recording, or sourced from radio stations.⁵⁷¹ Where the caller used a mobile telephone, the works were considered to be “broadcast” under s 31(1)(a)(iv).⁵⁷² “Broadcast” was defined at the time in s 10(1) as meaning ‘transmit by wireless telegraphy to the public’.⁵⁷³ The trial judge, Gummow J, considered

⁵⁶⁵ Ibid 328 [90].

⁵⁶⁶ Ibid 330 [100].

⁵⁶⁷ 536 F.3d 121 (2d Cir. 2008).

⁵⁶⁸ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 [66].

⁵⁶⁹ Ibid [104].

⁵⁷⁰ (1997) 191 CLR 140.

⁵⁷¹ Ibid 148.

⁵⁷² See *ibid*. Where a caller used a conventional telephone, the plaintiffs alleged that Telstra had caused the transmission of their works to subscribers of a “diffusion service” (a right that has since been superseded by the communication right as introduced by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth)).

⁵⁷³ Ibid 153 (Dawson and Gaudron JJ). For the current definition of “broadcast” under Australian law, see *Copyright Act 1968* (Cth) s 10(1).

each transmission separately as each mobile phone call would travel on a different frequency and/or from a different base station.⁵⁷⁴ There separate transmissions were therefore seen as private communications between two parties.⁵⁷⁵ On appeal, both the Full Federal Court and the High Court disagreed with Gummow J.⁵⁷⁶ The appeal courts were willing to look behind each separate transmission, and consider the system as a whole. Dawson and Gaudron JJ of the High Court found that the transmissions were “to the public”, in the process accepting that the facility had to be ‘available to those members of the public who choose to avail themselves of it’, even if only a small portion of persons may receive the transmission.⁵⁷⁷ It is arguable that in *Telstra v APRA*, the courts on appeal were willing to find that Telstra, the proprietor of the system, was carrying out the relevant “act” of broadcasting because the recipients of the music (the listeners who were being subject to the music-on-hold) had no control over or choice as to what they were receiving.⁵⁷⁸ In contrast, where communication of particular work is initiated by the user (i.e. the user exercises some level of choice), courts could be less inclined to find that the proprietor of the system is carrying out the “act” of making available. An example of this is Rares J’s first instance decision in *Optus TV*.

In the *Optus TV* appeal, the Full Federal Court unanimously reversed Rares J’s decision without addressing Rares J’s interpretation of the “act” of making available.⁵⁷⁹ The right to make copies was said to be sufficient to resolve the appeal.⁵⁸⁰ The Court held that Optus’s role (i.e. capturing the broadcast and then embodying it in a hard disk) was ‘so pervasive that, even though entirely automated, it cannot be disregarded’ in identifying who does the copying.⁵⁸¹ The Court expressly rejected the volitional conduct standard from *Cablevision* in relation to the right to make copies, stating that ‘its adoption in this country would, in our view, require a gloss to be put on the word “make”’.⁵⁸² It was not apparent to the Court ‘why a person who designs and operates a wholly automated copying system ought of course not be treated as a “maker” of an infringing copy where the system itself is designed so as to respond to a third party command to make the copy’.⁵⁸³ As a

⁵⁷⁴ *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1993) 118 ALR 671 693–94.

⁵⁷⁵ *Ibid* 697.

⁵⁷⁶ See *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1995) 131 ALR 141; *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140.

⁵⁷⁷ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 156.

⁵⁷⁸ This may be contrasted with liability under the diffusion right (applicable to transmissions via conventional fixed-line telephones), which only required a finding that Telstra was operating a ‘service of distributing broadcast or other matter’ under the definition of a diffusion service in s 26. Furthermore, the Court held that the matter ‘need not be provided by the operator of the diffusion service’ (at 150). Therefore, in this case the availability of the system as whole was sufficient to constitute a “diffusion service” and it was ‘irrelevant that Telstra [had] not itself provided or selected the music’ (at 150).

⁵⁷⁹ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147.

⁵⁸⁰ *Ibid* 152 [7].

⁵⁸¹ *Ibid* 165 [67].

⁵⁸² *Ibid* 164 [63].

⁵⁸³ *Ibid* 165 [64].

result, the Court’s preferred view was that both Optus and the subscriber, acting together, were the makers of the copies, and therefore they were jointly and severally responsible for the act.⁵⁸⁴ This finding, in turn, disqualified Optus from taking advantage of the time-shifting exception in s 111. As a commercial provider of the TV Now service, Optus was not making the copies ‘solely for private and domestic use’.⁵⁸⁵

A deficiency in the Australian approach to cloud services in *Optus TV* is that both the trial judge and the Full Federal Court took the making of *copies* as a starting point for their analysis. Although Rares J showed a willingness to engage with the making available right, His Honour’s consideration of the making available right was restricted to acts that occurred post-copying — i.e. after a copy of the program selected by the subscriber had been made on the system. Rares J did not consider the initial act of making the system (and its capability of capturing and streaming broadcast programs) available, but considered whether the copies that were already made on the system were being made accessible to users or electronically transmitted when the user clicked the “play” button.⁵⁸⁶ Opting to use the making of copies as a starting point for the making available right is arguably another example of courts’ “copy fetish”,⁵⁸⁷ which is neither necessary nor appropriate in an environment that prizes digital access to content.

The TV Now service offered to the public a way to access free-to-air broadcast television online at a time and place of their choosing. Copies of copyright material were not available to users, but *the ability* to capture the broadcast signals and to make recorded copies of the programs perceivable via the service was available to subscribers. In other words, the Court could have considered whether it was possible to conceptualise the “act” of making available as having occurred *before* the making of copies. To find that a user, by choosing what to record and copy through the system, is solely responsible for the “act” of making available does not take into account the potentially broad nature of the “act”, which entails an “element of individual choice” exercised by users and does not require

⁵⁸⁴ Ibid 167 [77]–[78]. In expressing this preference, the Court noted that it was not strictly necessary to determine whether Optus alone or Optus and the subscriber jointly were the makers of the copies.

⁵⁸⁵ Ibid 168–69 [82]–[87].

⁵⁸⁶ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 327 [86]. See also 329–30 [94]–[95]. Although Rares J’s approach to the making available right was not explicitly addressed by the Full Federal Court on appeal, it may nevertheless have influenced the Full Federal Court’s decision on the right to make copies. The Full Federal Court could have been inclined to find the defendant liable for an exercise of the right to copy, in order to avoid negating the owners’ right to make their works available to the public. Regardless of whether the Court was taking the making available right into consideration, the decision based on the right to make copies effectively protects the plaintiffs’ interests in ‘an exclusive licence to communicate to the public, by means of the internet and mobile telephony enabled devices’ that was granted to Telstra: see *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 150.

⁵⁸⁷ See Litman, ‘Fetishizing Copies’, above n 24 (discussed in Chapter II).

the making of copies.⁵⁸⁸ However, these points should not be taken in isolation to justify a finding that Optus has executed the “act” of making available, as one should also consider whether Optus’s provision of the service constitutes *an initial act* of making content available, as opposed to the mere provision of facilities.⁵⁸⁹ These seemingly conflicting considerations do not provide a clear answer to the question of whether a service such as Optus TV makes copyright content available to the public, but they do highlight matters that *could* have been taken into account.

US: Volition vs “functional similarity” in *Aereo*

Under the US Copyright Act, it is clear that streaming content online is a public performance.⁵⁹⁰ Again, difficulties of interpretation arise where the stream comes from the “cloud”, and users exercise some choice and control over what is stored and streamed to them. Key US cases in this context are the US Supreme Court *Aereo*⁵⁹¹ case of 2014 and *Cartoon Network v CSC Holdings* (“*Cablevision*”),⁵⁹² a decision of the Second Circuit Court of Appeals from 2008. Although *Aereo* is the authoritative decision on the matter, it is useful to consider the *Cablevision* decision, as it provides context to the issues and principles considered in *Aereo*. *Cablevision* also highlights some contentious issues that the US Supreme Court did not address.

In *Cablevision*,⁵⁹³ subscribers of the Cablevision cable service could request that a program be recorded using the remote storage digital video recorder (RS-DVR) service, and if so, a copy of that program was created for the customer on a portion of Cablevision’s remote hard drive assigned solely to that customer. As a cable company, Cablevision held licences to make the initial transmission of the copyright owners’ content to subscribers through its cable service, but it did not hold licences for the reproduction or subsequent transmission of that same content via the RS-DVR service. The parties agreed to drop any claims of fair use and secondary infringement under contributory liability

⁵⁸⁸ See Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E), above n 388, 204, cited in Ficsor, *The Law of Copyright and the Internet*, above n 8, 243.

⁵⁸⁹ Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E), above n 388, 204, cited in Ficsor, *The Law of Copyright and the Internet*, above n 8, 243. The records state that “[w]hat counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals”.

⁵⁹⁰ *WPIX, Inc v ivi, Inc* 691 F.3d 275 (2d Cir. 2012) 287; *United States v Am Soc’y of Composers, Authors, Publishers (ASCAP)* 627 F.3d 64 (2d Cir. 2010) 74.

⁵⁹¹ 134 S. Ct. 2498 (2014).

⁵⁹² 536 F.3d 121 (2d Cir. 2008). As mentioned, the reasoning in *Cablevision* was endorsed by Rares J of the Australian Federal Court in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300, but rejected by the Full Federal Court on Appeal in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147.

⁵⁹³ *Ibid.*

principles, and focused their dispute on direct liability for infringement of the reproduction right and public performance right.⁵⁹⁴

The US Court of Appeals for the Second Circuit held that the copies produced on the RS-DVR service were volitionally “made” by the RS-DVR customer, and that Cablevision’s contribution to this reproduction by providing the system did not warrant the imposition of direct liability.⁵⁹⁵ This finding was made in accordance with precedent established in *Religious Technology Center v Netcom Online Communication Services* (“Netcom”)⁵⁹⁶ that “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”⁵⁹⁷

In terms of the public performance right, the Second Circuit did not conclude as to whether the subscriber or Cablevision volitionally “performed” the work.⁵⁹⁸ The Court disposed of the question by finding that the alleged performances were not made “to the public”, holding that “capable of receiving the performance” under the transmit clause referred not to the performance of the underlying work being transmitted, but to the particular *transmission* at issue.⁵⁹⁹ Therefore, each private transmission was not capable of being received by the public. It held that these individualised transmissions should not be aggregated as this ‘obviates any possibility of a purely private transmission’, and would make Cablevision’s liability ‘depend, in part, on the actions of legal strangers’.⁶⁰⁰ Furthermore, ‘unique individual transmissions would be considered private performances, except where the transmissions were being generated from a “master copy”’.⁶⁰¹

⁵⁹⁴ Ibid 124.

⁵⁹⁵ Ibid 131–35.

⁵⁹⁶ *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995).

⁵⁹⁷ Ibid 1370. The Court found that, with regard to material posted by users, an ISP or bulletin board provider was not directly liable for the automatic reproduction of a copyright work on its facilities.

⁵⁹⁸ *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) 134.

⁵⁹⁹ Ibid 135. In other words, it was necessary to examine ‘who precisely is “capable of receiving” a particular transmission of a performance,’ i.e. the potential audience of the individual transmission. The transmit clause provides:

[T]o transmit or otherwise communicate a performance or display of the work to a [public place] or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101.

⁶⁰⁰ *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) 136.

⁶⁰¹ The Court carved out an exception to this “no-aggregation” rule where private transmissions were being generated from the same copy of the work because ‘the use of a unique copy may limit the potential audience of a transmission’ and noted that ‘in general, any factor that limits the potential audience of a transmission is relevant’ (at 138). This interpretation was made in light of the finding in *Columbia Pictures Industries, Inc. v Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984) that the performance of tapes in private booths by a video rental store was “public”, because the *same* copy of the work was repeatedly performed. This “master copy” rule has been labelled a principle of “individualized copy immunity” by Nimmer and Nimmer, who criticize it as a

The defendant in *ABC v Aereo*⁶⁰² sought to capitalise on the *Cablevision* ruling by building what has been criticised as a “copyright-avoiding” business model.⁶⁰³ Unlike the time-shifting feature at issue in *Cablevision*, the Aereo system had functionalities similar not only to a RS-DVR, but also to a streaming service as it captured and relayed free-to-air broadcasts. A subscriber was able watch a TV show with a second or two delay on their computer or internet-enabled device (the “watch” function) or record it for later watching (the “record” function). The Aereo system featured thousands of dime-sized antenna, installed next to each other and able to receive broadcast television channels. When a subscriber chose to watch or record a program, Aereo’s server would assign one of the antennas and a transcoder (to convert the signal into different file formats) to the subscriber. The system would then tune in to the program that the user wished to watch or record, transcode the data, send it to an Aereo server and save it on a hard drive in a directory reserved for that particular Aereo user. Aereo’s position was that the broadcasts were received from subscribers’ own “individual” dime-sized antenna and stored in their “personal” directory on Aereo’s central system.⁶⁰⁴ This position was taken in reliance on the *Cablevision* precedent, which excluded unique individual transmissions *not* made from a “master copy” from being performances to “the public”.⁶⁰⁵

On appeal, the infringement claim in *Aereo* was limited to the public performance right, i.e. through the availability of the “watch” function. The “record” function and the reproduction right were not under consideration.⁶⁰⁶ The Second Circuit in *Aereo* found the *Cablevision* precedent and its “master copy” rule to be decisive and ruled for the defendants.⁶⁰⁷ However, the Supreme Court overturned the holding on appeal, finding Aereo liable for performing the TV programs to the public.⁶⁰⁸ In coming to this decision, the Supreme Court relied heavily on Aereo’s functional similarity with cable or CATV (community antenna television) providers. On the first element, i.e. whether Aereo “performs”, the Court considered whether Aereo carried out a viewer function or performer function. The Court emphasised that Congress’ primary purpose in amending the Copyright Act in 1976 was to overturn the Supreme Court’s holdings in *Fortnightly Corp v United Artists Television, Inc*

means for vindicating a principle of “massive parallel copy immunity”: Nimmer and Nimmer, above n 551, § 8.14 [C][3].

⁶⁰² 134 S. Ct. 2498 (2014).

⁶⁰³ See Rebecca Giblin and Jane C Ginsburg, ‘On Aereo and “Avoision”’ (2014) 32(4) *Copyright Reporter* 14; Rebecca Giblin and Jane C Ginsburg, ‘We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the “Transmit” Clause’ (2014) *Columbia Public Law & Legal Theory Working Papers*, Paper 9207.

⁶⁰⁴ See *WNET, Thirteen v Aereo, Inc*, 712 F.3d 676 (2nd Cir. 2013) 683.

⁶⁰⁵ *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) 138.

⁶⁰⁶ This was arguably due to concerns that it would be exempt from infringement under fair use in accordance with *Sony*: see ‘Brief of 36 Intellectual Property and Copyright Law Professors as Amici Curiae in Support of Respondents’ Submission in *ABC v Aereo* 134 S. Ct. 2498 (2014), 10.

⁶⁰⁷ *WNET, Thirteen v Aereo, Inc*, 712 F.3d 676 (2nd Cir. 2013) 691.

⁶⁰⁸ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014).

(“*Fortnightly*”)⁶⁰⁹ and *Teleprompter Corp v Columbia Broadcasting Sys, Inc* (“*Teleprompter*”)⁶¹⁰ that a CATV provider was more like a viewer than a broadcaster. The Court in *Aereo* noted that the transmit clause ‘makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals’.⁶¹¹ As *Aereo*’s activities were “substantially similar” to those of the CATV companies, a finding that *Aereo* was not simply an equipment provider but a “performer” was in accordance with Congressional intent.⁶¹²

The Court noted one difference between *Aereo* and the CATV systems of old. The CATV systems transmitted programs continuously to subscribers’ TV sets, and therefore ‘lurked behind the screen, ready to emerge when the subscriber turned the knob’.⁶¹³ The *Aereo* system on the other hand ‘remains inert until a subscriber indicates that she wants to watch a program’, upon which the automatic response of *Aereo* was to activate an antenna and transmit the requested program.⁶¹⁴ The majority nevertheless concluded that ‘[g]iven *Aereo*’s overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between *Aereo* and traditional cable companies does not make a critical difference here.’⁶¹⁵

Some comments made in the context of whether the performances were made “publicly” seem to overlap with the Court’s consideration of whether the relevant “act” had occurred. The Court stated that the transmit clause ‘suggests that an entity may transmit a performance through multiple, discrete transmissions. That is because one can “transmit” or “communicate” something through a *set* of actions’.⁶¹⁶ It found that the ‘behind-the-scenes way in which *Aereo* delivers television programming to its viewers’ screens...does not significantly alter the viewing experience of *Aereo*’s subscribers’.⁶¹⁷ Therefore, the Court was of the view that the technology used ‘does not render *Aereo*’s *commercial objective* any different from that of cable companies’.⁶¹⁸ However, it did not explain why a defendant’s “commercial objective” was relevant to the analysis.

These findings were made in the context of questioning whether the performance was made “publicly”, and not whether a performance had occurred at all. However, the Supreme Court does not

⁶⁰⁹ *Fortnightly Corp v United Artists Television, Inc*, 392 US 390 (1968).

⁶¹⁰ *Teleprompter Corp v Columbia Broadcasting Sys, Inc*, 415 U.S. 394 (1974).

⁶¹¹ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2506.

⁶¹² *Ibid*. The Court also states at 2506-507: ‘*Aereo*’s equipment may serve a “viewer function”; it may enhance the viewer’s ability to receive a broadcaster’s programs. It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.’

⁶¹³ *Ibid* 2507.

⁶¹⁴ *Ibid*.

⁶¹⁵ *Ibid*.

⁶¹⁶ *Ibid* 2509.

⁶¹⁷ *Ibid* 2508.

⁶¹⁸ *Ibid* (emphasis added).

address a discrepancy between the definition of “publicly” under the transmit clause and the definition of “perform”. The transmit clause permits the consideration of potential audiences. In *Aereo* however, the transmissions did not occur at the defendant service provider’s initiation; such transmissions only occurred at the user’s request. The Court nevertheless asserts that “[t]he Transmit Clause must permit this interpretation [of “perform” to include multiple, discrete transmissions], for it provides that one may transmit a performance to the public “whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.””⁶¹⁹ In other words, the Court chose to ignore the plain meaning of “perform”, and interpret it broadly to match the definition of “publicly” in the statute.

The Supreme Court in *Aereo* briefly refers to the Second Circuit decision of *US v ASCAP*⁶²⁰ for the finding that a download is not a “performance”, as a performance requires the work to be ‘contemporaneously perceptible’.⁶²¹ Another point made in this decision is notable. In *US v ASCAP*, the Court explained that “[t]he definition of “publicly” simply defines the circumstances under which a performance will be considered public; it does not define the meaning of “performance”’.⁶²² This latter point, however, is not considered by the Supreme Court in *Aereo*. Although these comments regarding the definition of “publicly” were made in a different context (distinguishing downloads from performances), they reflect the plain language of the provisions.⁶²³ In contrast, the US Supreme Court largely bases its findings regarding both elements of “performance” and “to the public” on *Aereo*’s functional similarities to cable systems, without close consideration of the definition of “perform”. It held that irrespective of the number of discrete communications and the technological differences in how the signals were routed to the subscriber, *Aereo* was performing them to the public.⁶²⁴

In the dissenting judgement in *Aereo*, Justice Scalia applied the volition standard to the public performance right and emphasised the importance of distinguishing primary liability from secondary

⁶¹⁹ Ibid 2509.

⁶²⁰ 627 F.3d 64 (2d Cir. 2010), cited in *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2508.

⁶²¹ *United States v Am Soc’y of Composers, Authors, Publishers (ASCAP)* 627 F.3d 64 (2d Cir. 2010) 72–73.

⁶²² *United States v ASCAP* 627 F.3d 64 (2d Cir. 2010) 73. The Court further describes this argument as “unavailing” and a misreading of the definition of “publicly”.

⁶²³ See further Jonah M Knobler, ‘Performance Anxiety: The Internet and Copyright’s Vanishing Performance/Distribution Distinction’ (2007) 25 *Cardozo Arts & Entertainment Law Journal* 531, arguing that this finding is supported by a close textual analysis of the transmit clause, which refers to a transmission of a performance of the work, not just a transmission of the work; Jesse A Bland, ‘Biting the Hand That Feeds: Why the Attempt to Impose Additional Performance Fees on iTunes Is a Search for Dollars Without Sense’ (2010) 58 *Journal of the Copyright Society of the USA* 901.

⁶²⁴ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2509.

liability.⁶²⁵ The aim, Justice Scalia noted, was not to excuse the defendant from accountability, ‘but to channel the claims against them into the correct analytical track.’⁶²⁶ Without expressing a clear conclusion, Scalia J observes that *if* Aereo was not contributorily liable for the public performance and reproduction rights, and primary liability for the reproduction right was not found, then ‘what we have before us must be considered a “loophole” in the law.’⁶²⁷ He continued that ‘[i]t is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes.’⁶²⁸ These observations, tentative as they may be, assume that a negative finding on primary and secondary liability for the reproduction right would tend to follow from a finding of non-infringement under the public performance right. However, this is not necessarily the case. Primary and secondary liability for each exclusive right, and the acts which allegedly fall within those rights, should be assessed independently.

The Supreme Court majority made no mention of volition in *Aereo* (despite its application in the *Aereo* dissent). Therefore, one might question the continued relevance of volition, and whether the doctrine has been implicitly overturned.⁶²⁹ Nevertheless, the US Copyright Office, in its report on the making available right, finds that ‘[a]t a minimum ... *Aereo* establishes that the performance right does not require “volition” at the level of individually selecting the works to be transmitted’.⁶³⁰ Therefore, the status of volition as a requirement under US law remains uncertain.⁶³¹

EU: Relevance of “different technical means” in *TVCatchup*

The CJEU has consistently held that a broad approach must be taken to the interpretation of the “act” of making available under the InfoSoc Directive.⁶³² The breadth of the “act” has meant that the second

⁶²⁵ Ibid 2512. Scalia J argues that ‘[t]he distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act,’ and that the ‘volitional-conduct requirement supplies that rule’ (at 2514).

⁶²⁶ Ibid.

⁶²⁷ Ibid 2517.

⁶²⁸ Ibid.

⁶²⁹ Volition aside, it is clear that the Supreme Court has rejected the “master copy” rule from *Cablevision: Nimmer and Nimmer*, above n 551, § 8.14 [C][3].

⁶³⁰ US Copyright Office, above n 20, 46–47, citing Ginsburg, ‘Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available; Request for Additional Comments Docket No. 2014–2’, above n 466, 10.

⁶³¹ The US Copyright Office has noted that ‘courts have disagreed over whether, or to what extent, a streaming service must exercise “volitional conduct” to infringe the public performance right’: US Copyright Office, above n 20, 41, citing *Fox Broadcasting Co v Dish Network LLC* 2015 WL 1137593 (C.D. Cal. Jan. 20, 2015) (finding that volition was necessary), and *Fox Television Stations, Inc v FilmOn X LLC* 2015 WL 7761052 (D.D.C. Dec. 2, 2015) (holding that volition was not necessary in light of *Aereo*).

⁶³² See, eg, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [36]; *Football Association Premier League v QC Leisure; Karen Murphy v Media Protection Services Ltd* (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [186]; *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7

element — “the public” — has borne most of the burden in efforts to find the limits of the right. Problems arising from an overbroad interpretation of the “act” of making available manifest more clearly in cases involving linking. Nevertheless, it is useful to consider the EU approach in *ITV v TVCatchup* (“*TVCatchup*”),⁶³³ a case involving a cloud streaming service similar to *Aereo* and *OptusTV*. TVCatchup ensured that users could only access content they were entitled to watch by virtue of their television licence through a location authentication system. Commercial TV broadcasters claimed that the provision of this service was an infringement of their communication right. The High Court of Justice in England referred the matter to the CJEU, asking whether article 3(1) of the InfoSoc Directive must be interpreted to include a terrestrial television broadcast by means of an internet stream made available to the subscriber (among other things).

Like the system in *Cablevision*, TVCatchup would divide the data into separate streams corresponding to each subscriber.⁶³⁴ However, the fact that the service sent individualized or “one-to-one” streams of data to each subscriber did not have an impact on the CJEU’s finding on the making available right. The Court explained that “the public” refers to ‘an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons’.⁶³⁵ In assessing this criterion, the Court asserted that ‘the cumulative effect of making the works available to potential recipients should be taken into account.’⁶³⁶ Furthermore, it was irrelevant whether the potential recipient accesses the communicated work through a one-to-one connection, as this ‘technique does not prevent a large number of persons having access to the same work at the same time’.⁶³⁷ Therefore, the decision unequivocally confirmed that “individualized” transmissions are not exempt from the scope of the making available right.

The Court reiterated the need for ‘a high level of protection of authors’, an objective cited in several decisions,⁶³⁸ which purportedly justified a broad interpretation of ‘communication to the public’.⁶³⁹ The Court found that the EU legislature intended that ‘each transmission or retransmission of a work which uses *a specific technical means* must, as a rule be individually authorised by the author of the work in question’.⁶⁴⁰ As the retransmission of a terrestrial TV broadcast over the internet used ‘a

December 2006) [17]; *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [20].

⁶³³ (Court of Justice of the European Communities, Case C-607/11, 7 March 2013).

⁶³⁴ It should be noted that unlike the *Aereo* service, TVCatchup did not assign a separate antenna to each user.

⁶³⁵ *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [32].

⁶³⁶ *Ibid* [33].

⁶³⁷ *Ibid* [34].

⁶³⁸ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [36]; *Football Association Premier League v QC Leisure*; *Karen Murphy v Media Protection Services Ltd* (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [186].

⁶³⁹ *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [20].

⁶⁴⁰ *Ibid* [24].

specific technical means different from the original communication’, the retransmission had to be considered an exercise of the communication right.⁶⁴¹ The Court stated that ‘each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and *each is intended for a public*’.⁶⁴² The Court’s analysis blurs the distinction between the two elements, as each “different technical means” of transmission is assumed to lead to a “new public”.⁶⁴³

In summary, the outcome of *TVCatchup* largely hinges on the Court’s finding that the defendant utilised *specific technical means* that was different from the initial technical means used to transmit the content by the rightsholder (i.e. internet stream as opposed to broadcast). The CJEU arrived at this conclusion without considering how the transmissions were occurring through a system, and whether the “act” of communication occurred due to the availability of the system as a whole, or whether it was carried out by the users who select the programs to view and record. Perhaps it assumed that the service providers were carrying out the “act” through the design and management of this automated system, but this finding is not made explicit.

Furthermore, a broad approach to the “act” of making available in the EU has not been limited to internet communications. Both article 8 of the WCT and the article 3(1) of the InfoSoc Directive exempt the mere provision of “physical facilities” for access from infringement, but this exemption was interpreted narrowly in 2006 decision of the CJEU in *SGAE v Rafael Hoteles* (“SGAE”).⁶⁴⁴ Responding to the argument that the provision of televisions by the hotel was simply ‘a technical means to ensure or improve reception of the original broadcast in the catchment area’ and therefore not an act of communication, the Court held that ‘[o]n the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers.’⁶⁴⁵ The Court stated that ‘[i]n the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.’⁶⁴⁶ This is akin to a crude “but for” test, as the Court is concerned with the outcome — that members of the public gain access to the content — regardless of how access is brought about.

⁶⁴¹ Ibid [26].

⁶⁴² Ibid [39] (emphasis added).

⁶⁴³ It concludes that in these circumstances, it is not necessary to examine the “new public” requirement: *ibid*. The “new public” requirement will be discussed further in the next section of this Chapter.

⁶⁴⁴ (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [45].

⁶⁴⁵ Ibid [42]. Note that this mention of “knowledge” gives rise to a further, problematic ruling in *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016), a case involving linking discussed below.

⁶⁴⁶ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [42].

In *SGAE*, the Court distinguishes the pure sale or hire of television sets from actual installation of such facilities in one's premises. By installing the television sets, the hotel was said to do more than provide the physical facilities — 'the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal.'⁶⁴⁷ The case exemplifies the breadth of CJEU's approach to the "act", even in the pre-digital context whereby individualised "access" is provided at the convenience of hotel patrons in their rooms (who may or may not choose to turn on their television sets). In light of *SGAE*, it is not surprising that the TVCatchup system, which made access to content possible through the capture of broadcast signals and storage of copies, was held to be an exercise of the making available right.

Concluding remarks on cloud services: Uncertainty and ambiguity in each jurisdiction

Systems that provide members of the public with individualised systems of storage and access to content have presented difficulties for courts in each jurisdiction. Unfortunately the responses have been less than satisfactory, and deficiencies may be found in the US, the EU and Australia. Australian courts, particularly the Full Federal Court in *OptusTV* could have refined our understanding of the "act", rather than relying solely on the right to make copies. Likewise, the US Supreme Court in *Aereo* fails to engage with the relevant "act" by broadly analogizing *Aereo* with cable systems. In the EU, we see the development of ad hoc conditions to limit "the public", with little analysis of the "act" except to assert that it must be interpreted broadly. In these instances, the CJEU undertakes a rather superficial analysis of the technology used, and does not clearly explain how the standards applied are relevant to the two key elements: the "act" of making available and "the public".

Volition is ignored by the US Supreme Court, and plays no role in CJEU jurisprudence. It is not difficult to see why these courts have not utilised volition in their reasoning. Volition, as explained in prior US cases, has not exhibited clear or consistent characteristics.⁶⁴⁸ Nevertheless, the current approaches, devoid of volition or close analysis regarding who has executed the relevant "act", are not sustainable into the future. The decisions do not distinguish the execution of an act from the facilitation of that act via the provision of technology. Technologies that increasingly challenge our concepts of "acts" and volitional conduct through the use of design and automation will be developed. We need to engage with these technologies and associated issues now, instead of allowing the void between copyright law and communications technologies to widen.

⁶⁴⁷ Ibid [46].

⁶⁴⁸ It should be noted that the concept of volition is considered in more detail in Chapter VI of this thesis.

3 *Uncertain Limits of the “Act” in Linking Cases*

In addition to the difficulties in cases involving cloud services, linking presents a new set of challenges for courts interpreting the making available right. Linking, or the ability to link or connect to a Web resources, is ‘one of the primary forces driving the success of the Web’.⁶⁴⁹ As we will see, there is some alignment between the US and Australian cases, with courts in both jurisdictions finding that linking to content does not satisfy the relevant “act”. The EU, on the other hand, have adhered to a broad interpretation of the “act”, but subjected it to several ad hoc limitations.

Australia: Availability of links distinguished from availability of copies

Universal Music v Cooper,⁶⁵⁰ decided in 2006, was the first Australian case to consider copyright liability for linking. The plaintiff record companies brought copyright infringement claims against the proprietor of a website (www.mp3s4free.net) which permitted users to post links on the website. Clicking the links would activate an automatic direct download of the sound recording to the user’s computer, from the remote computer of a third party on which the recording was stored.⁶⁵¹

Tamberlin J of the Federal Court held that the provision of links to music files stored elsewhere on the internet did not constitute a “making available” of the sound recordings to the public. Cooper did not “communicate” the sound recordings to the public because the files did not pass through its website.⁶⁵² The Cooper website was said to merely ‘facilitate the easier location and selection of digital music files and specification to the remote website, from which the user can then download the files by clicking on the hyperlink on the Cooper website’.⁶⁵³ His Honour held that although ‘the request that triggers the downloading is made from the Cooper website, it is the remote website which makes the music file available and not the Cooper website’.⁶⁵⁴

It is clear from this holding that the Tamberlin J was willing to look “behind-the-scenes” and consider the technicalities of how content was routed to members of the public seeking access. In addition, His Honour appeared to be influenced by the pre-existing “public” nature of the links. Tamberlin J observed that the initial act of making available had already been carried out, and therefore the stored

⁶⁴⁹ W3C, *HTML 4.01 Specification (W3C Recommendation 24 December 1999)*: 12. *Links in HTML Documents* W3C <<https://www.w3.org/TR/html401/struct/links.html>>.

⁶⁵⁰ *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1.

⁶⁵¹ *Ibid* [60].

⁶⁵² *Ibid* [65]. His Honour explained that:

When a visitor to the Cooper website clicked on a link on the website to an MP3 file hosted on another server, this caused the user’s browser to send a “GET” request to that server, resulting in the MP3 file being transmitted directly across the internet from the host server to the user’s computer. ... [T]he downloaded subject matter is not transmitted or made available from the Cooper website and nor does the downloading take place through the Cooper website.

⁶⁵³ *Ibid*.

⁶⁵⁴ *Ibid*.

files could be accessed via an alternative route by directly accessing the remote websites.⁶⁵⁵ It is unclear whether the pre-existing public nature of the initial communication was determinative in this instance. In light of *Cooper*, it is nevertheless clear that merely linking to content without permission would not in and of itself be a primary infringement of the making available right.⁶⁵⁶

Tamberlin J's finding that the act of linking was not an act of making available accords with the proposition that the operative act is the *initial act* of making available, as discussed in the preparatory works to the WCT and WPPT.⁶⁵⁷ However, in arriving at this conclusion, Tamberlin J takes into account the existence of *copies* on the server, and whether or not these copies pass through the Cooper website.⁶⁵⁸ These points were made to highlight the fact that the initial making available was conducted from the remote website by a third party (and not by the defendant Cooper). Nevertheless, the emphasis on the location of copies could be misconstrued to mean that the making available of copyright material requires, as a preliminary step, the making available of copies. This would not be in accordance with the making available right under the Internet Treaties, the exercise of which is not reliant on copies. Although this consideration might not have altered the outcome in *Cooper*, it may have set the *de facto* starting point for analysis of the "act" of making available in subsequent cases as the making of copies. The reasoning of the trial judge in *OptusTV*,⁶⁵⁹ discussed previously, is an example of this. Rares J's analysis assumes that each "act" of making available stemmed from the availability of each copy, and does not consider the availability of a range of content through the system more broadly.

US: The "server test"

Subject to one known exception,⁶⁶⁰ US courts have applied the "server test" to allegations of primary copyright infringement for linking. This server test is similar in substance to the reasoning in

⁶⁵⁵ Ibid 16 [64]. His Honour stated:

[T]he evidence indicates that no music sound recordings are actually stored on the Cooper website. *The music sound recordings have initially been made available to the public by being placed on the remote websites.* The evidence given by Mr Beckett was to the effect that the digital music files to which links were provided on the Cooper website were also available to users through the internet generally. [emphasis added]

⁶⁵⁶ It should be acknowledged that on appeal, the Full Federal Court affirmed the finding that Cooper had authorized infringement of the reproduction right by visitors of its website: *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

⁶⁵⁷ See Mihály Ficsor, *Svensson: Honest Attempt at Establishing Due Balance Concerning the Use of Hyperlinks – Spoiled by the Erroneous "New Public" Theory* (5 May 2014) <http://www.copyrightseesaw.net/archive/?sw_10_item=68>. It should be noted that the preparatory works to the Internet Treaties have been discussed in Chapter III.

⁶⁵⁸ *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1, 16 [64]-[65].

⁶⁵⁹ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300.

⁶⁶⁰ *Live Nation Motor Sports, Inc v Davis* 2006 U.S. Dist. LEXIS 89552 (N.D. Tex., Dec. 11, 2006); 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007), discussed further below.

Cooper.⁶⁶¹ In the case of *Perfect 10, Inc. v Amazon.com, Inc.*⁶⁶² decided in 2007, the Ninth Circuit held that inline linking⁶⁶³ to the plaintiff's images through the Google search engine was not a direct infringement of the plaintiff's display right. The plaintiff Perfect 10 operated a subscription website on the internet, providing access to copyrighted images of nude models in a "members' area" of the website for a monthly fee.⁶⁶⁴ Google Image Search results would contain an inline link to the images associated with the relevant search query, and Perfect 10 claimed that the results included images owned by Perfect 10.⁶⁶⁵ The images allegedly displayed by Google were automatically indexed from third party websites, where Perfect 10's images had been posted without authorisation.⁶⁶⁶

The application of the "server test" is encapsulated in this passage:

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser.⁶⁶⁷

In contrast to the Australian approach in *Cooper*, the emphasis on copies is arguably justified here as "display" is defined as 'show a copy of it' in the US Copyright Act.⁶⁶⁸ The Ninth circuit considered that Google merely 'facilitates the user's access to infringing images',⁶⁶⁹ a matter that raised the potential of secondary liability, and not primary (or direct) infringement of the display right.⁶⁷⁰ In response to arguments that an inline link should be treated differently under the server test, the Court stated that while inline linking 'may cause some computer users to believe they are viewing a single Google webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion'.⁶⁷¹

⁶⁶¹ (2005) 150 FCR 1.

⁶⁶² 508 F.3d 1146 (9th Cir. Cal. 2007).

⁶⁶³ An inline-link is content that is embedded within a webpage. The content appears to be part of the webpage, but may be sourced from a different server. See further Tim Berners-Lee, *Design Issues: Links and Law* (April 1997) W3C <<https://www.w3.org/DesignIssues/LinkLaw.html>>.

⁶⁶⁴ *Perfect 10, Inc v Amazon.com, Inc* 508 F.3d 1146 (9th Cir. Cal. 2007) 1157.

⁶⁶⁵ Ibid 1155.

⁶⁶⁶ Ibid 1157.

⁶⁶⁷ Ibid 1161 (emphasis added).

⁶⁶⁸ *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101.

⁶⁶⁹ *Perfect 10, Inc v Amazon.com, Inc* 508 F.3d 1146 (9th Cir. Cal. 2007) 1161.

⁶⁷⁰ Ibid. Note that the Court remanded on the issue of whether Google was liable for secondary infringement.

⁶⁷¹ Ibid.

Although the “server test” was established in the context of the display right in *Perfect 10 v Amazon*,⁶⁷² it has nevertheless been applied to other rights. As a result, liability for inline linking to copyright works under the US Copyright Act is generally dealt with under principles of secondary liability.⁶⁷³ Unlike the display right, the public performance right does not refer to the showing of a copy. To “perform” is defined with reference to *the work*, using terms such as “recite”, “render” and “play”.⁶⁷⁴ Under this definition, there is arguably more leeway to find that an in-line link constitutes a performance, notwithstanding the server test. In this regard, we may consider two contrasting decisions: *Flava Works v Gunter*⁶⁷⁵ which adheres to the server test, and *Live Nation Motor Sports v Davis*⁶⁷⁶ which takes a much broader approach the notion of “perform”.⁶⁷⁷

In *Live Nation Motor Sports, Inc. v Davis*,⁶⁷⁸ the District Court for the Northern District of Texas granted both a preliminary injunction and summary judgment in favour of the plaintiff for its copyright claims. The plaintiff SFX was a promoter and producer of motorcycle racing events or “Supercross” events, which it would broadcast live via radio, television and the internet as an audio webcast.⁶⁷⁹ SFX claimed that Davis streamed the live webcast of the races on his website in “real time”, causing it ‘irreparable harm by limiting its right to sell sponsorships or advertisement on its own website as the “exclusive source” of the webcasts’.⁶⁸⁰ It should be noted that the findings of fact do not clearly identify the defendant’s conduct as inline linking, even though this was likely to be the

⁶⁷² 508 F.3d 1146 (9th Cir. Cal. 2007).

⁶⁷³ *Flava Works, Inc v Gunter and Salsaindy, LLC* 689 F.3d 754 (7th Cir. 2012); *Leveyfilm, Inc v Fox Sports Interactive Media, LLC* 2014 U.S. Dist. LEXIS 92809; Copy. L. Rep. (CCH) P30,631 (both involving the right of public performance). Note also cases that have dealt with ordinary linking under principles of secondary liability such as *Arista Records, Inc v MP3Board, Inc* No. 00Civ. 4660(SHS), 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y. Aug. 28, 2002); *Ticketmaster Corp v Tickets.com* 2003 U.S. Dist. LEXIS 6483, Copy. L. Rep. (CCH) P28,607 (C.D. Cal. Mar. 6, 2003).

⁶⁷⁴ *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101. To “display” means ‘to *show a copy* of it, either directly or by means of a film, slide, television image, or any other device or process . . .’, while to “perform” a work means ‘to recite, render, play, dance, or act *it*, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.’

⁶⁷⁵ 689 F.3d 754 (7th Cir. 2012).

⁶⁷⁶ 2006 U.S. Dist. LEXIS 89552 (N.D. Tex., Dec. 11, 2006) (preliminary injunction); 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007) (summary judgment).

⁶⁷⁷ It should be noted that the Court considers both the display right and performance right, but applies them in the same manner.

⁶⁷⁸ 2006 U.S. Dist. LEXIS 89552 (N.D. Tex., Dec. 11, 2006) (preliminary injunction); 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007) (summary judgment).

⁶⁷⁹ *Live Nation Motor Sports, Inc v Davis* 2006 U.S. Dist. LEXIS 89552 (N.D. Tex., Dec. 11, 2006) 3.

⁶⁸⁰ *Ibid*.

case.⁶⁸¹ The plaintiff alleged infringement of its exclusive rights to perform and display the copyrighted work publicly.⁶⁸²

The Texas District Court held that the preliminary injunction was warranted,⁶⁸³ and appears to assume that links require authorization (without distinguishing inline linking from other forms of linking). The Court stated: ‘Even if the court enjoins Davis from providing live webcasts of SFX’s racing events, he may continue to provide a website for racing enthusiasts and *authorized links* to other racing events’.⁶⁸⁴ SFX’s subsequent motion for partial summary judgment was again successful.⁶⁸⁵ The Court adopted the reasoning of the Second Circuit in *National Football League v PrimeTime 24 Joint Venture*,⁶⁸⁶ stating ‘the most logical interpretation of the Copyright Act is to hold that a public performance or display includes *each step* in the process by which a protected work wends its way to its audience.’⁶⁸⁷ However, this quote is arguably taken out of context, as *NFL v Prime Time 24* involved satellite signals and the jurisdictional issues raised by these signals, not primary liability for inline linking under the public performance or display rights.⁶⁸⁸ Adopting the reasoning in *NFL v Prime Time 24*, the Texas District Court determined that ‘the unauthorized “link” to the live webcasts ... qualifies as a copied display or performance of SFX’s copyrightable material’.⁶⁸⁹

In contrast, the Seventh Circuit Court of Appeals in *Flava Works v Gunter*⁶⁹⁰ adhered to the server test in its application of the public performance right to inline linking. Here the defendants were trading as myVidster, which provided an online “social bookmarking” service.⁶⁹¹ Once a bookmark was placed, myVidster would automatically request the video’s “embed code” from the server that was hosting the video, and use this to create a webpage that collected all the videos (displayed as

⁶⁸¹ The Court states that ‘Davis’s response to SFX’s allegations are unclear, because he denies streaming, copying or rebroadcasting SFC’s shows; however, Davis asserts that he has an “affirmative defense” to SFC’s complaint because he provides “the same audio webcast link freely distributed by ClearChannel executives and thousands of individuals upon thousands of websites worldwide.”’: *ibid* 9. The Court does not address this further and continues to characterise Davis’s activities as “streaming”, without explaining whether it is a form of linking (although inline linking is appears to be the likely conclusion, based on Davis’s response to the allegations).

⁶⁸² *Ibid* 6.

⁶⁸³ *Ibid* 8.

⁶⁸⁴ *Ibid* 16 (emphasis added).

⁶⁸⁵ *Live Nation Motor Sports, Inc v Davis* 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007) 4.

⁶⁸⁶ 211 F.3d 10 (2d Cir. 2000).

⁶⁸⁷ *Live Nation Motor Sports, Inc v Davis* 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007) 12 (emphasis added).

⁶⁸⁸ The defendant satellite carrier captured or uplinked copyright material and retransmitted football broadcast to its satellite subscribers in Canada (outside of the US and contrary to the §119 licence). The defendant argued that any public performance or display occurred only during the downlink from the satellite in Canada, where the US Copyright Act would not apply. This argument was not accepted.

⁶⁸⁹ *Live Nation Motor Sports, Inc v Davis* 2007 U.S. Dist. LEXIS 2196 (N.D. Tex., Jan. 9, 2007) 12.

⁶⁹⁰ 689 F.3d 754 (7th Cir. 2012). The defendants in this case appealed to the Seventh Circuit, seeking to vacate a preliminary injunction against them.

⁶⁹¹ *Ibid* 756.

“thumbnails”, i.e. miniature pictures of the video’s opening shot).⁶⁹² The video as viewed on myVidster would be framed by ads, the selling of which financed myVidster’s operation.⁶⁹³ The plaintiff Flava Works was the producer and distributor of pornographic videos, hosting the videos behind a “pay wall” for users to view and download for personal, non-commercial use only.⁶⁹⁴ It alleged infringement of its copyright by myVidster, as myVidster was linking or framing videos that were uploaded and hosted by third parties without authorisation.⁶⁹⁵

In considering whether the public performance right was infringed, Judge Posner of the Seventh Circuit identified a tension in the definition of a “performance” and what it means to perform “publicly”. The decision sets out two possible interpretations of a performance in this context: (1) “performance by uploading” whereby ‘uploading plus bookmarking a video is a public performance because it enables a visitor to the website to receive (watch) the performance at will’; and (2) “performance by receiving” whereby ‘performance occurs only when the work (Flava’s video) is transmitted to the viewer’s computer’.⁶⁹⁶ The Court noted that with “performance by viewing”, it is the viewer who determines when a performance begins, but ‘it is odd to think that every transmission of an uploaded video is a public performance’.⁶⁹⁷ On the other hand, the Court states that “performance by uploading” which posits that performance occurs when ‘the public becomes capable of viewing it — is better at giving meaning to “public” in public performance but worse at giving meaning to “performance.”’⁶⁹⁸ In other words, the definition of the second “public” element under the US legislation accounts for the mere provision of access to content in accordance with the Internet Treaties, but the definition of the “act” of performance may be limited to actual transmissions of content. The Court finds that ‘[l]egislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome.’⁶⁹⁹

The Seventh Circuit ultimately held that myVidster was not performing (thereby favouring “performance by uploading”), as myVidster played no role in the uploading of content.⁷⁰⁰ It stated that myVidster was simply ‘giving web surfers addresses where they can find entertainment.’⁷⁰¹ In

⁶⁹² Ibid. Note that all content on myVidster was publicly accessible, therefore any internet user, upon clicking a thumbnail, would be activating code connecting the internet user’s computer to the server and allow that user to play the video through myVidster.com.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid 755–756.

⁶⁹⁵ It should be acknowledged that the plaintiff also alleged infringement of the reproduction and distribution right, but these claims failed because the act of linking did not create or transmit copies: *ibid* 757–60.

⁶⁹⁶ Ibid 760.

⁶⁹⁷ Ibid 761.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid. The Court’s observation was that “performance by uploading” ‘is hopeless for Flava. For there is no evidence that myVidster is contributing to the decision of someone to upload a Flava video to the Internet’.

⁷⁰¹ Ibid. Judge Posner elaborates on this with an analogy, stating that ‘[b]y listing plays and giving the name and address of the theatres where they are being performed, the *New Yorker* is not performing them. It is not

addition, the Court noted that ‘[t]o call the provision of contact information transmission or communication and thus make myVidster a direct infringer would blur the distinction between direct and contributory infringement and by doing so make the provider of such information an infringer even if he didn't know that the work to which he was directing a visitor to his website was copyrighted.’⁷⁰² In other words, where there is no knowledge of the content being communicated, primary liability for the public performance right should not arise.⁷⁰³ Interestingly, the decision hinges on the existence of knowledge despite being an assessment of primary liability, which is a strict liability tort.

In addition, the Seventh Circuit’s characterisation of myVidster as the “linker” (i.e. by ‘giving web surfers addresses where they can find entertainment’)⁷⁰⁴ is questionable. Here myVidster was one step removed from the access that was granted to members of the public. It merely provided an automated platform that permitted members of the public to post links, and in turn, access links (and the corresponding embedded media) posted by others. This was characterised by Google and Facebook in their amicus brief to the Court as “tertiary” infringement, which is not a form of infringement recognised under copyright law.⁷⁰⁵ The Court makes note of this in relation to the distribution and reproduction right,⁷⁰⁶ but does not address this “tertiary” role clearly in the context of the alleged public performance. In this sense, *Flava Works v Gunter* may be distinguished from *Live Nation Motor Sports v Davis*, as the defendant in *Flava Works* did not select and post the links, and did not have knowledge of the content that would be performed if a member of the public opted to play the embedded media.

Nevertheless, these cases show that even when courts are wary of the differences between primary and secondary liability, the act that is allegedly executed by the defendant is not clearly identified in their analysis of primary infringement. In addition, the Seventh Circuit’s comments in *Flava Works v Gunter* regarding the statutory definitions are on point. The definition of “the public” is sufficiently flexible as to encompass potential recipients, but the definition of “perform” seems to require an actual transmission to occur. Therefore, there is a need to reconcile these inconsistent definitions, instead of ignoring the plain meaning of “perform” in the statute. This is arguably a straightforward issue, which could be addressed by amending the definition of “perform” such that it corresponds

“transmitting or communicating” them.’ However, this analogy arguably disregards the embedded nature of the videos, and glosses over the differences between a stage performance and a video stream.

⁷⁰² Ibid (emphasis added).

⁷⁰³ It should be noted that this finding is in direct contrast with the CJEU decision of *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016). See the discussion that follows regarding the EU context.

⁷⁰⁴ *Flava Works, Inc v Gunter and Salsaindy, LLC* 689 F.3d 754 (7th Cir. 2012) 761 (although the Court goes on to note that in doing so myVidster is merely ‘facilitating public performance’).

⁷⁰⁵ Google Inc. and Facebook, Inc., above n 154, 18.

⁷⁰⁶ *Flava Works, Inc v Gunter and Salsaindy, LLC* 689 F.3d 754 (7th Cir. 2012) 760.

with the flexibility contained in the definition of “publicly” and encompasses the mere provision of access to content. It should be recognised that although an express reference to mere accessibility in the legislation may eliminate uncertainties regarding the lower threshold of the right in the US, this would not address the lack of clarity surrounding the outer limits. In other words, a superficial inconsistency in the legislative implementation of the making available right under US law can be remedied by amendment, but at a conceptual level, interpretation of the right in a principled manner may not be achieved as simply. To achieve such conceptual clarity, we need to undertake a more in-depth examination of the right that is informed by the basic functions of copyright.

EU: Ad hoc limitations on “the public” in light of an overly broad interpretation of the “act”

In contrast to a potentially under-inclusive interpretation of relevant “act” in the US and Australia, the EU approach sits at another extreme — a broad interpretation of the “act” which seems to lack boundaries. In recent years, the CJEU has considered a proliferation of referrals from member states on the issue of linking. In stark contrast to the US and Australian cases, the CJEU has held that the “act” of making available must be interpreted broadly to include linking.⁷⁰⁷ The CJEU nevertheless attempts to counterbalance the breadth of “act” using the second element. Rather than imposing limits directly upon the “act” of making available, the Court does so through limitations on “the public”. Unfortunately, these ambiguous and seemingly ad hoc limitations (most infamous being the “new public” standard) do not promote clearer and more consistent interpretations of the right. Where the defendant is linking to publicly available content initially made available with the rightsholder’s authorisation, the outcome in these EU cases is the same: linking does not lead to primary liability for the making available right. However, if the content was initially posted without the authority of the rightsholder and the defendant links to the unauthorised post, then the defendant may be directly liable *if* the defendant had knowledge of its infringing nature (and if the defendant links ‘for profit’ then a presumption of such knowledge arises).⁷⁰⁸

⁷⁰⁷ This may be contrasted with national courts in the EU that treat linking as a mere reference which facilitates access already provided by others: Emanuela Arezzo, ‘Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?’ (2014) 45(5) *IIC - International Review of Intellectual Property and Competition Law* 524, 539–540, citing *Paperboy* Case I ZR 259/00, 17 July 2003, 35 IIC 1097 (2004) (Unreported, German Federal Supreme Court (Bundesgerichtshof)) [42], and *Napster.no* (*Tono et al v Frank Allan Bruvik d/b/a Napster*) (2006) IIC 120 (Supreme Court of Norway, 27 January 2005). See also Mira Burri, ‘Permission to Link: Making Available via Hyperlinks in the European Union after Svensson’ (2014) 5(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 244.

⁷⁰⁸ See *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016), discussed further below.

The seminal case in a series of European disputes on linking is that of *Nils Svensson v Retriever Sverige AB* ('*Svensson*').⁷⁰⁹ A number of journalists brought an action against the Retriever, a personalized information aggregator that would search the internet and create a list of links for the customer. The plaintiff journalists, whose articles had been published on major Swedish news sites that were openly accessible to the public, alleged that the Retriever was infringing their right to communicate to the public by making available.⁷¹⁰

The CJEU applied two cumulative criteria: (1) an "act of communication" of a work; and (2) the communication of that work to a "public".⁷¹¹ In terms of the first criterion, an "act of communication", the CJEU reiterated that 'this must be construed broadly' in order to ensure 'a high level of protection for copyright holders'.⁷¹² It held that here, 'the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works' and was therefore an "act of communication".⁷¹³ The issue is dealt with simply, as if the finding was self-explanatory, or at least one justified by the need for 'high level of protection for copyright holders'.

However, the defendant's actions did not satisfy the second criterion — "the public". This was so even though the Court found that the provision of clickable links was aimed at all potential users of a website and that such users would constitute an indeterminate and fairly large number.⁷¹⁴ In this instance, the link merely takes one to the online location of the copyright work, which is openly accessible to the public. It held that where the communication uses the same technical means, it must be directed to a "new public". A new public is 'a public that was not taken into account by the copyright holders when they authorized the initial communication to the public'.⁷¹⁵ In *Svensson*, the links were not directed to a new public, because the press articles were already freely available to the public on the original website.⁷¹⁶

In addition, the *Svensson* court speculated about matters that would be relevant to the "new public" standard. Where access restrictions have been put in place on the initial communication (e.g. a

⁷⁰⁹ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

⁷¹⁰ It should be recognised that it is not clear as to whether the case involved ordinary links or inline links. The decision notes some unresolved allegations of framing and that visitors were unaware that they were being redirected to the plaintiff's websites: *ibid* [8].

⁷¹¹ *Ibid* [16].

⁷¹² *Ibid* [17].

⁷¹³ *Ibid* [18].

⁷¹⁴ *Ibid* [21]-[22], citing *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [37]-[38]; *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [32].

⁷¹⁵ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [24].

⁷¹⁶ This may be contrasted the technology used in *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013), whereby the streaming of content online was considered "different technical means" in comparison to terrestrial broadcasts.

password protected access portal or website), it considered that circumvention of that restriction would constitute an intervention without which a “new public” would not have been able to gain access.⁷¹⁷ In addition, the Court surmised that a “new public” would arise where the initial, publicly available site later becomes restricted.⁷¹⁸ The Court appears to suggest that a link can subsequently become infringing, as soon as an access restriction is added to content on the original website. If this is the case, a person who posts a link could be liable for infringement of the making available right due to changes made by the website proprietor — a matter that is beyond that person’s control.

Under *Svensson*, it is clear that the public, beyond the section of the public who had gained restricted access, would constitute a “new public”,⁷¹⁹ but it remains unclear as to how these restrictions could take shape. The CJEU in *Svensson* seems to assume that this division of “new publics” would occur through technical restrictions upon access (e.g. password protected paywalls). The thorny question of whether overcoming *practical* obstructions to public accessibility could satisfy the “new public” criterion was referred to the CJEU in *GS Media v Sanoma and Playboy* (“*Sanoma*”).⁷²⁰ The defendant GS Media was the proprietor of a Dutch online magazine *GeenStijl.nl*,⁷²¹ and had posted links on its website that led to leaked photographs due to be published in *Playboy* at a later time.⁷²² The photos were stored on Filefactory, a cloud-based storage system, after being uploaded by an unknown third

⁷¹⁷ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [31]. The Court held:

[W]here a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public.

The issue of paywall circumvention arose in *C More Entertainment AB v Linus Sandberg* (Court of Justice of the European Communities, Case C-279/13, 26 March 2015). However, the question on circumvention was retracted and the issue was not adjudicated by the CJEU.

⁷¹⁸ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [31]. The Court stated:

This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorisation.

⁷¹⁹ Following *Svensson*, the CJEU has had the opportunity to consider whether inline linking to a YouTube video is an “act” of making available in *BestWater International GmbH v M Mebes & S Potsch* (Court of Justice of the European Communities, Case C-348/13, 21 October 2014). An inline link involves the embedding of the YouTube player code in another website, thereby allowing the video to be played from the site. The video is immediately perceptible on the site, but the data stream for the video flows from YouTube’s servers and can be removed from YouTube by the user who initially posted it on YouTube: see YouTube, *Embed Videos & Playlists - YouTube Help* <<https://support.google.com/youtube/answer/171780?hl=en>>. The CJEU in *Bestwater* held that the embedded or inline nature of the link did not materially change the application of the principles derived from *Svensson*.

⁷²⁰ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

⁷²¹ *Ibid* [7].

⁷²² *Ibid* [6], [10], [14]-[15].

party.⁷²³ The photos on Filefactory were not indexed by search engines such as Google,⁷²⁴ and could not be found by the general public without knowledge of the specific hyperlink or web address.

The Danish Supreme Court sought clarification from the CJEU on whether facilitating access to a work that was discoverable, but not easily so, through the use of hyperlinks amounted to a communication to the public.⁷²⁵ The Danish court also asked whether the lack of prior permission for the initial “making available” online was a relevant distinguishing factor, and whether defendant’s awareness of the lack of prior permission for the initial “making available” online and knowledge of the generally “private” nature of the link was relevant.⁷²⁶ Despite ruling for the plaintiff, the CJEU imposed unprecedented qualifications upon the making available right. In doing so, the Court expressly acknowledged the importance of safeguarding ‘freedom of expression and of information’ and stated ‘that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information’.⁷²⁷

The CJEU explained that in assessing whether the right has been exercised, one has to have regard to ‘several complementary criteria, which are not autonomous and are interdependent’.⁷²⁸ The Court considered the emphasis of previous decisions on criteria such as:

...the indispensable role played by the user and the *deliberate nature* of its intervention. The user makes an act of communication when it intervenes, in *full knowledge of the consequences* of its action, to give access to a protected work to its customers, and does so, in particular, where, *in the absence of their intervention*, its customers would not, in principle, be able to enjoy the broadcast work.⁷²⁹

⁷²³ Filefactory later removed the files following a take-down notice from Sanoma, but GS Media then published an update on Geenstijl.nl, providing a hyperlink to another file-storage website Imageshack.us where the same photos were accessible. ImageShack later also removed the photos upon receipt of a take-down notice from Sanoma: *ibid* [12].

⁷²⁴ *Ibid* [18].

⁷²⁵ *GS Media v Sanoma Media Netherlands & Playboy* (Supreme Court of the Netherlands, Case No. 14/01158, 3 April 2015) (questions 1.b and 2.a).

⁷²⁶ *Ibid* (questions 1.c and 2.b).

⁷²⁷ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016) [45]. Note that the importance of linking was not acknowledged explicitly by the CJEU in *Svensson*.

⁷²⁸ *Ibid* [34]. The Court goes on to explain that ‘[s]ince those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another’. These criteria include the ‘public’ (referring to an indeterminate number of potential viewers), a ‘profit-making nature’ and communication ‘using specific [different] technical means, ... or failing that, to a “new public”’: see [36]-[38].

⁷²⁹ *Ibid* [35] (emphasis added), citing *Società Consortile Fonografici (SCF) v Marco Del Corso* (Court of Justice of the European Communities, Case C-135/10, 15 March 2012) [82], and *Phonographic Performance (Ireland) Ltd v Ireland and another* (Court of Justice of the European Communities, Case C-162/10, 15 March 2012) [31].

This passage encapsulates several criteria in a single statement, and raises further questions of interpretation. Firstly, the so-called “deliberate nature” of the intervention brings to mind concepts of volition or intention. Secondly, the formulation of an “intervention” appears to bear some semblance with a “but for” causation test (i.e. in absence of the defendant’s “intervention”, its customers would not have access to the work).⁷³⁰ Finally, an element of “knowledge” of the consequences of the action (i.e. public access to infringing content) is introduced as a relevant criteria. It is this final “knowledge” requirement that extends primary liability to the defendants in this *Sanoma* case. The *Sanoma* Court distinguishes *Svensson*⁷³¹ and *Bestwater*,⁷³² and limits the principles in those cases to instances where the works on the source website were posted with the consent of the rightsholder.⁷³³

The Court begins with a negative statement regarding knowledge, stating that “as a general rule” a person linking to content freely available on another website without pursuing a profit does not ‘intervene in full knowledge of the consequences of [their] conduct’ (i.e. any illegal nature of the initial posting).⁷³⁴ In addition, it notes that the content of a website may be changed after the creation of the link, without the person who created that link being aware of this.⁷³⁵ However, the Court proceeds to assert that once knowledge of illegality can be proven, via notification by the rightsholders for instance, then ‘it is necessary to consider that the provision of that link constitutes a “communication to the public” within the meaning of Article 3(1)’ of the InfoSoc Directive.⁷³⁶ The CJEU does not explain further why such a finding is “necessary”. The Court goes a step further, and lays down a rebuttable presumption of knowledge where ‘the posting of the hyperlinks is carried out for profit’.⁷³⁷ Where links are provided for ‘the pursuit of financial gain’,⁷³⁸ it is said that ‘it can be expected that the person who posted such a link carries out the necessary checks to ensure that the

⁷³⁰ On the deliberate nature of the act or “intervention”, the Court explains that an example of this is where the link ‘allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers’ (at [50]).

⁷³¹ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

⁷³² (Court of Justice of the European Communities, Case C-348/13, 21 October 2014).

⁷³³ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016) [41]. The CJEU asserts that ‘the reasoning of those decisions [were] intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightsholder’. The Court further states that the decisions ‘confirm the importance of such consent under [Article 3(1) of the InfoSoc Directive, as it] specifically provides that every act of communication of a work to the public is to be authorized by the copyright holder’ (at [43]).

⁷³⁴ *Ibid* [47]-[48].

⁷³⁵ *Ibid* [46].

⁷³⁶ *Ibid* [49].

⁷³⁷ *Ibid* [51].

⁷³⁸ *Ibid* [55].

work concerned is not illegally published on the website to which those hyperlinks lead'.⁷³⁹ As a result, these factors brought the activities of the defendant GS Media within the scope of the right.⁷⁴⁰

In essence, the decision provides that:

1. if the defendant did not know that the content was posted online without authority then they are not a primary infringer; but if the defendant did know or ought reasonably to have known then they are a primary infringer; and
2. where the defendant is linking for profit, a presumption arises that they should have checked the legality of the initial communication, and therefore ought reasonably to have known of the illegality.

It is not immediately apparent how this additional knowledge criterion (encompassing a notion of fault) fits within the “new public”.⁷⁴¹ It appears to be introduced to address the broadening of the “new public” to encompass linking to publicly available content. First, the *Sanoma* Court highlights the importance of consent to the identification of the relevant “public”.⁷⁴² That is, a public may constitute the “same public” where consent has been given in relation to access by *that* public. However, an intervention that provides access to a public that has not been contemplated by the rightsholder in the initial communication constitutes a “new public”. Therefore, unlike the facts in *Svensson* which involved linking to material posted with the rightsholders’ consent (with the understanding that all internet users would have access to that content), linking to material posted initially by a third party without the rightsholders’ consent would constitute a “new public”. This represents a significant enlargement of the “new public” criteria applied in *Svensson*, as the *Sanoma* Court itself rightly observes.⁷⁴³ The Court then imposes a limitation on this broad “new public” criteria by subjecting it to a fault condition, emphasizing the need for the defendant’s intervention to carry with it ‘full knowledge of the consequences of his [or her] conduct’.⁷⁴⁴ However, the Court in *Sanoma* then tips the ruling in favour of rightsholders, lowering their burden of proof by establishing a presumption of knowledge in the event that the defendant is linking for profit.

⁷³⁹ Ibid [51].

⁷⁴⁰ See *ibid* [54].

⁷⁴¹ It should be noted that the existing framework and “new public” requirement is outlined earlier in the decision, but the Court does not explain the relevance of its ruling to these existing requirements: *ibid* [22].

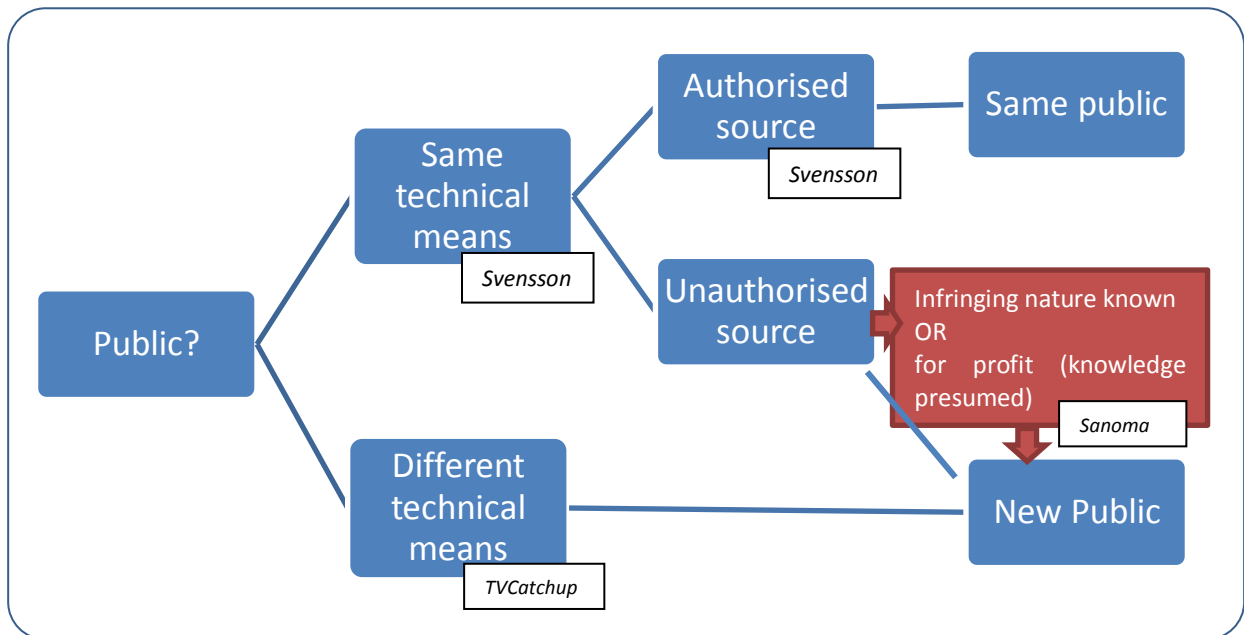
⁷⁴² *Ibid* [22], [39]-[41].

⁷⁴³ See *ibid* [45]-[46] (hinting at the impact such a ruling might have upon freedom of expression and freedom of information on the internet).

⁷⁴⁴ *Ibid* [48].

The European “new public” requirement, including the different characteristics that could lead to satisfaction of a “new public”, is summarized in Figure 4.2 below.⁷⁴⁵

Figure 4.2. EU “new public” requirement



Two 2017 decisions of the CJEU, *Stichting Brein v Wullems* (“*Filmspeler*”)⁷⁴⁶ and *Stichting Brein v Ziggo BV and XS4ALL Internet BV* (“*Pirate Bay*”)⁷⁴⁷ applied the standards set out in *Svensson* and *Sanoma*. Both cases were brought by Stichting Brein, a Danish foundation that represented and aimed to protect the interests of rightsholders. The defendant in *Filmspeler* sold a multimedia device that operated as an interface between online streaming websites and the television screens of its users. Installed on the “*Filmspeler*” device was open source software that linked to streaming websites operated by third parties (some of which contained unauthorized content, while others provided access to authorized content).⁷⁴⁸ The software could have been installed on the device by users themselves, and the same content could be accessed online by the public without the use of the *Filmspeler* device.⁷⁴⁹ The CJEU nevertheless found that the defendant’s provision of the *Filmspeler* device was an intervention with full knowledge of the consequences of his action, giving his

⁷⁴⁵ It should be acknowledged that under the CJEU’s analysis, this “new public” criteria would be relevant to the second element — “the public”. It is nevertheless set out in the context of the “act” of making available because these considerations, particularly the “technical means” utilized, are more relevant to the “act” (see the concluding remarks on linking at the end of this Section).

⁷⁴⁶ (Court of Justice of the European Union, Case C-527/15, 26 April 2017) (“*Filmspeler*”).

⁷⁴⁷ (Court of Justice of the European Union, Case C-610/15, 14 June 2017) (“*Pirate Bay*”).

⁷⁴⁸ *Filmspeler* (Court of Justice of the European Union, Case C-527/15, 26 April 2017) [16].

⁷⁴⁹ See *ibid* [22].

customers access to protected works.⁷⁵⁰ The CJEU took note of the fact that the device was advertised as enabling easy television access to unauthorized online content, and this knowledge of the infringing nature of the linked content satisfied the criteria established in *Sanoma*.⁷⁵¹ Furthermore, the Court found that the device was being supplied in order to make a profit.⁷⁵²

The Court also considered recital 27 of the InfoSoc Directive (mirroring the agreed statement to WCT article 8) which excludes ‘the mere provision of physical facilities for enabling or making a communication’ from an “act” of communication. It concluded that the present case went beyond that exclusion, in light of the defendant’s knowledge of the consequences.⁷⁵³ The Court explained that the defendant enabled ‘a direct link to be established’ between the unauthorized content and users of the device, without which access would be more difficult.⁷⁵⁴ In other words, making it easier for users to access content satisfied the “act”, even if the provision of the device and software was not indispensable for gaining access to the same content.⁷⁵⁵

In the latter *Pirate Bay* case, Stichting Brein sought an injunction ordering Internet Service Providers (ISPs) to block the domain names and IP addresses of “The Pirate Bay”, a peer-to-peer file sharing platform that indexed BitTorrent files. The issue to be determined was whether The Pirate Bay made copyright content available to the public, notwithstanding the fact that content was placed on the platform by users.⁷⁵⁶ The CJEU held that the operators of The Pirate Bay, ‘by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network’.⁷⁵⁷ The Court held that the operators of The Pirate Bay were not merely providing physical facilities for enabling a communication, as they categorised the works into different genres, actively filtered content and deleted obsolete or faulty torrent files.⁷⁵⁸ Therefore, the Court concluded that ‘the making available and management of an online sharing platform such as that at issue in the main proceedings, must be considered to be an act of communication’ under the InfoSoc Directive.⁷⁵⁹ On the “for profit” knowledge presumption set out

⁷⁵⁰ Ibid [31], [38].

⁷⁵¹ Ibid [18], [50].

⁷⁵² Ibid [51].

⁷⁵³ Ibid [30], [41].

⁷⁵⁴ Ibid [41].

⁷⁵⁵ The Court also reasoned by analogy, finding that the defendant’s actions were similar to the provision of television sets in hotel, which distributes the signal to customers and has been held to be a communication to the public: *ibid* [40], citing *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [46].

⁷⁵⁶ See *Pirate Bay* (Court of Justice of the European Union, Case C-610/15, 14 June 2017) [36].

⁷⁵⁷ *Ibid*. [36]

⁷⁵⁸ *Ibid* [38].

⁷⁵⁹ *Ibid* [39].

in *Sanoma*, the CJEU concluded that the defendant's purpose was to make protected works accessible to users, and encourage users to make copies of those works.⁷⁶⁰ The Pirate Bay could not be unaware that content was accessible online without the permission of rightsholders, and their purpose in offering the platform was to obtain a profit.⁷⁶¹

In sum, *Filmspeler* and *Pirate Bay* illustrate the breadth afforded by *Svensson* and *Sanoma*, particularly the consideration of fault. The Court took intention and knowledge into account in determining whether a party should be primarily liable for the making available right.⁷⁶² The "act" was taken as executed by the provider of an online service or device, even if the content made its way through the service or device via an algorithm pursuant to users' selection and initiation.⁷⁶³ In both cases, the CJEU explained that under article 3(1) of the InfoSoc Directive (setting out the making available right), 'authors thus have a right which is *preventive* in nature and allows them to intervene between *possible* users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication'.⁷⁶⁴ Furthermore, the exclusion of mere physical facilities was read narrowly, and making unauthorized content more easily accessible (via indexing or linking) satisfied the "act" of making available.⁷⁶⁵

Concluding remarks on linking: technical "server test" vs ambiguous ad hoc standards

In conclusion, there are a number of problems in each jurisdiction (some more obvious than others). One might question whether the US "server test" and equivalent ruling in Australia is in line with the

⁷⁶⁰ Ibid [45].

⁷⁶¹ Ibid [45]-[46].

⁷⁶² See Tatiana Eleni Synodinou, 'Decoding the Kodi Box: To Link or Not to Link?' (2017) 39(12) *European Intellectual Property Review* 733, 735 ('Indeed, for the CJEU, the question is no longer simply whether objectively an act of communication to the public has occurred: the assertion of the existence of the act itself is connected to subjective elements, such as the intention and the direct or constructive knowledge of the potential infringer').

⁷⁶³ See Eleonora Rosati, 'The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms' (2017) 39(12) *European Intellectual Property Review* 737, 744. Rosati finds, in light of *Pirate Bay*, that:

[A]n "intervention" for the purpose of determining what amounts to an act of communication merely requires the making of acts of indexing, categorisation, deletion or filtering of content. It appears that it is also irrelevant whether such activities are carried out manually or automatically, e.g. algorithmically: it is sufficient that a system is put in place to perform such activities.

⁷⁶⁴ *Filmspeler* (Court of Justice of the European Union, Case C-527/15, 26 April 2017) [25] (emphasis added); *Pirate Bay* (Court of Justice of the European Union, Case C-610/15, 14 June 2017) [2] (emphasis added), citing *Reha Training v GEMA* (Court of Justice of the European Communities, Case C 117/15, 31 May 2016) [30].

⁷⁶⁵ The *Filmspeler* decision has been said to weaken the required causal chain to catch a wider group of potential primary infringers: John Groom, Iona Silverman and Birgit Clark, 'Still Lost in the Labyrinth? CJEU Rules in *Filmspeler* That Pre-Loading a Set-Top Box with Links to a Pirate Site Is a Communication to the Public' (2017) 39(9) *European Intellectual Property Review* 591, 594; cf the Advocate General's opinion on the *Pirate Bay* case that allowing this instance to fall under national secondary liability rules would lead to 'divergent solutions' that would undermine the objective of harmonizing the scope of rights within the single market: 'Opinion of Advocate General Szpunar - Stichting Brein v Ziggo BV, XS4ALL Internet BV (Case C-610/15)' (16 March 2016) [3].

expansive language of article 8 of the WCT or articles 10 and 14 of the WPPT, which merely require that the *work* is made accessible, regardless of where the copy is located. However, in lowering this threshold and dispensing with the need for copies, we need to ensure that there are principled limits upon the “act” of making available. Otherwise, we may inadvertently be subjecting a host of online activities to copyright infringement claims.

The CJEU, in contrast, has taken a broad approach to the “act” of making available, with little analysis of the “act” other than to assert that it should be interpreted broadly so as to ensure ‘a high-level of protection for copyright owners’.⁷⁶⁶ The CJEU has focussed disproportionately on “the public”, considering whether there is a new audience or “new public”. The European “new public” approach may give rise to exhaustion of the right to make available to the public,⁷⁶⁷ which could explain the lengths taken in subsequent cases to limit the “new public” criterion. Unfortunately, these efforts have led to ad hoc factors and convoluted approaches to the right as a whole. While the *Sanoma* case rightly considers the importance of linking to the functioning of the Web, the decision does not add clarity, but further blurs the distinction between primary infringement and secondary infringement.

An aim of introducing article 8 of the WCT and articles 10 and 14 of the WPPT was to clarify the operation of the communication right in the online environment. Yet, decisions interpreting the “making available” aspect of the right raise a host of unanswered questions. These cases illustrate the unanticipated complications that can arise when interpreting the right in a dynamic internet environment, and highlight the inadequacies of superficial approaches to the right. They show that more in-depth analysis and engagement with the “act” of making available is needed.

Section C. Interpretations of “the Public”

The second element, “the public”, gives rise to further interpretational challenges. It should be noted at the outset that the difficulties of interpretation raised by “the public” are related to broadened approaches to the “act”. Prior to the introduction of broadcast or radio technologies that permitted the transmission of content across distances, our conception of non-copy related rights was limited to ephemeral performances to a live audience (the typical example being a band playing a song in a restaurant). In this context, it is possible to locate “private” and “public” on a sliding scale, with each characteristic at opposite ends of a spectrum. “The public”, on the one end, tends to be conceptualised as a large or indeterminate group of people. The expansion of the relevant “act” from performances in a physical space to transmissions such as broadcast has meant that a recipient’s “private” space as

⁷⁶⁶ See, eg, *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [17] (said to be in accordance with the recitals and preamble of the InfoSoc Directive).

⁷⁶⁷ See Ficsor, *Svensson: Honest Attempt*, above n 657.

a counterpoint to “the public” disintegrates. This is made more apparent with an “act” of making available, as potential access by any *member of the public* satisfies the element. The private nature of the context of receipt becomes largely irrelevant.

Without the private context acting as a conceptual limit to “the public”, protection of the copyright owner’s perceived licensing markets or their commercial interests tend to take centre stage as key reference points. However, these approaches rely on circular standards that do not provide a clear objective measure, as they focus the enquiry upon the interests of the copyright owner and disregard the public interest in access to creative and informational content. Such approaches may be found in the decisions of Australian courts, the CJEU and, to some extent, US courts.

1 Exclusion of the Private and Domestic Sphere

Starting with the US, we find that the public/private dichotomy is reflected in the relevant legislation. A “public place” under § 101 of the US Copyright Act includes ‘any place where a substantial number of persons *outside of a normal circle of a family and its social acquaintances* is gathered’.⁷⁶⁸ In other words, the legislative definition explicitly carved the private context out from “the public”. The House Report to the 1976 Copyright Act goes on to explain that:

The term “a family” in this context would include an individual living alone, so that a gathering confined to the individual’s social acquaintances would normally be regarded as private. Routine meetings of business and governmental personnel would be excluded because they do not represent the gathering of a “substantial number of persons”.⁷⁶⁹

According to the House Report, the principal purpose of the definition in § 101 was to make clear that performances in “semipublic” places such as clubs, lodges, factories, summer camps and schools would be covered.⁷⁷⁰ Therefore, US lawmakers appreciated the importance of the public/private distinction, but also understood that there was no bright line dividing public and private spheres.

In Australia, the legislation does not define “the public”, nevertheless similar statements on “the public” may be found in judicial decisions. In *Australasian Performing Right Association v Commonwealth Bank of Australia*,⁷⁷¹ Gummow J of the Federal Court considered the natural and ordinary meaning of the term and, referring to *The Oxford English Dictionary* definition of “in public”, noted that ‘in general and in most senses “public” is “the opposite of private”’.⁷⁷² In

⁷⁶⁸ *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101 (emphasis added).

⁷⁶⁹ H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 64.

⁷⁷⁰ *Ibid.*

⁷⁷¹ (1992) 111 ALR 671.

⁷⁷² *Ibid* 674. See similar sentiments by Kirby J in *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 197.

recognising that there is ‘an antithesis between performance which are public and those which are “domestic” or “private” in character, Gummow J found that ‘the nature of the audience is important’.⁷⁷³ Gummow J asked: ‘In coming together to form the audience for the performance were the persons concerned bound together by a domestic or private tie or by an aspect of their public life?’⁷⁷⁴

Similar sentiments on “the public” may be found in decisions of the CJEU. In *Reha Training v GEMA*,⁷⁷⁵ the Court summarised the relevant principles regarding “the public”, explaining that the ‘term “public” refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons’.⁷⁷⁶ Furthermore, ‘it means making a work perceptible in any appropriate manner to “persons in general”, that is, not restricted to specific individuals belonging to a private group’.⁷⁷⁷ The Court noted that ‘the concept of “public” encompasses a “certain *de minimis* threshold”, which excludes from the concept groups of persons which are too small, or insignificant’.⁷⁷⁸

2 Expansion from “in Public” to “to the Public”

Technological advances enabling the transmission of content over vast distances have presented new challenges for determining the scope of “the public”. On the one hand, it is arguable that the question should not be exceedingly different; early decisions indicated that the spatial element of a performance in public was not determinative and that “semi-public” places could be covered by performance rights.⁷⁷⁹ The main consideration was the characteristics of *the audience*, not their location. On the other hand, it is arguable that the locale or context invariably has an impact on how the audience is characterised by the courts (even if it is not determinative) and as a basic threshold, it may be asserted that a performance occurring in a clearly private or domestic setting is not *in public*.

⁷⁷³ *Australasian Performing Right Association v Commonwealth Bank of Australia* (1992) 111 ALR 671 74.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ (Court of Justice of the European Communities, Case C 117/15, 31 May 2016).

⁷⁷⁶ *Ibid* [41], citing *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [37]-[38].

⁷⁷⁷ *Reha Training v GEMA* (Court of Justice of the European Communities, Case C 117/15, 31 May 2016) [42], citing *Società Consortile Fonografici (SCF) v Marco Del Corso* (Court of Justice of the European Communities, Case C-135/10, 15 March 2012) [85].

⁷⁷⁸ *Reha Training v GEMA* (Court of Justice of the European Communities, Case C 117/15, 31 May 2016) [43], citing *Società Consortile Fonografici (SCF) v Marco Del Corso* (Court of Justice of the European Communities, Case C-135/10, 15 March 2012) [86].

⁷⁷⁹ See, eg, *Rank Film Production Ltd v Dodds* [1983] 2 NSWLR 553 560.

“To the public”,⁷⁸⁰ on the other hand, is not subject to such a limitation because the nature of the place where the communication is received is indeed irrelevant.⁷⁸¹

US: Expansion via the “transmit” clause

In the US, a broad approach to the “public” under the “transmit” clause is apparent. As set out in the legislation, the “transmit” clause encompasses performances ‘to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times’.⁷⁸² Under this clause, it is said that the relevant public includes ‘potential recipients of the transmission’, even if they ‘are not gathered in a single place’ and ‘represent a limited segment of the public’.⁷⁸³ The reasoning of the US District Court for the Northern District of California in *On Command Video Corporation v Columbia Pictures Industries*⁷⁸⁴ illustrates this broadened approach to “the public”. Here the plaintiff On Command had designed ‘an innovative video viewing system’ and sought a declaratory judgment of non-infringement, and in response the movie studios counterclaimed for copyright infringement.⁷⁸⁵ The system in question was ‘for the electronic delivery of movie video tapes’, which consisted of ‘a computer program, a sophisticated electronic switch, and a bank of video cassette players’ which were all located in the hotel’s equipment room.⁷⁸⁶ Selection and playback of a particular video would be controlled remotely by the guest in her hotel room, and once a video was selected, it would no longer be available for viewing by other guests.⁷⁸⁷

With regards to the “public place” clause, the rightsholders argued that the relevant place was the entire hotel, because On Command’s system components were located throughout the hotel. This argument was rejected by the Court.⁷⁸⁸ It held that under the definition of a performance, a video is performed ‘only when it is visible and audible’, and therefore ‘a performance of a work does not occur every place a wire carrying the performance passes through; a performance occurs where it is

⁷⁸⁰ This element of “to the public” was introduced in the US in the 1976 Act, and in Australia in a 1986 amendment to the 1968 Act: see *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 106 (the ‘transmit clause’), and *Statute Law (Miscellaneous Provisions) Act (No 2) 1986* (Cth) s 10(1) (addition of ‘to the public’ to the definition of ‘broadcast’). For more discussion on the Australian amendment, see *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 154 (Dawson and Gaudron JJ).

⁷⁸¹ For a discussion of when and where a “making available” occurs, see Christie and Dias, above n 22.

⁷⁸² *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (1976) § 101. See the discussion of US statutory implementation of the making available right in Section A of this Chapter.

⁷⁸³ See H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 65 (citing ‘the occupants of hotel rooms or the subscribers of a cable television service’ as examples).

⁷⁸⁴ 777 F. Supp. 787 (N.D. Cal. 1991).

⁷⁸⁵ Ibid 788.

⁷⁸⁶ Ibid.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid 789.

received.⁷⁸⁹ As the hotel guest rooms were ‘indisputably not public places for copyright purposes’, the claim under the ‘public place’ failed.⁷⁹⁰

Application of the “transmit” clause, however, led the Court to a different conclusion. Even though the hotel guests were not watching the videos in a “public place”, they were nonetheless considered “members of the public”.⁷⁹¹ According to the Californian District Court, Congress drafted the transmit clause to include reception ‘in the same place or in separate places and at the same time or at different times’ precisely to cover performances available by transmission to ‘a limited segment of the public’ (via what was described as a type of ‘single-viewer system’).⁷⁹² The Court identified the commercial relationship between the transmitter of the performance and the audience in support of its holding, stating:

[T]he relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a *commercial*, “public” one regardless of where the viewing takes place. *The non-public nature of the place of the performance has no bearing* on whether or not those who enjoy the performance constitute “the public” under the transmit clause.⁷⁹³

The Court asserted the relevance of the commercial relationship without citing any authority for it. In addition, the Court considered the actions of hotel guests in initiating the transmissions and choosing the videos to be irrelevant.⁷⁹⁴ On Command was responsible for the transmissions, and it was sufficient that the system operated by On Command communicated the motion picture images and sounds by a device or process (i.e. the equipment and wiring network) from the hotel’s central console.⁷⁹⁵

The decision illustrates how the notion of “in public” is limited by the context of receipt, unlike a transmission “to the public”. When considering whether the performance was “to the public” under the transmit clause, the Court highlighted the proprietor’s commercial relationship with the recipient and was willing to look beyond the technical act of performing to consider the availability of the system as a whole (as opposed to individual transmissions initiated by hotel guests). These factors led to a finding that public performances were carried out by the proprietor of the system.

⁷⁸⁹ Ibid.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid 790.

⁷⁹² Ibid, citing H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) 29.

⁷⁹³ *On Command Video Corporation v Columbia Pictures Industries* 777 F. Supp. 787 (N.D. Cal. 1991) 790 (emphasis added).

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid 789–790.

Australia: “To the public” and “in private” not mutually exclusive

In the Australian context, Kirby J of the High Court (writing in 1997) recognised the challenges in distinguishing “public” performances from “private and domestic” ones.⁷⁹⁶ His Honour stated that ‘the source of difficulty was the adaptation of the public performance right to the new potential for copyright infringement arising from broadcast technology’.⁷⁹⁷ Australian courts have attempted to resolve this tension between “public” and “private” by using the commercial character of the defendant’s conduct as an indicator of “publicness”. In contrast to their US counterparts, Australian courts have been more explicit about the relevance of this characteristic, incorporating it into a legal test.

In *Rank Film Production Ltd v Dodds*,⁷⁹⁸ Rath J of the NSW Supreme Court Equity Division held that the transmission of films by a motel proprietor to its customers in their motel rooms via a video cassette recorder (VCR) was an infringement of the copyright owner’s right to perform the films in public. The VCR was connected to the TV sets in various rooms by wire, and the defendant advertised “free in-house movies (some rooms)” as part of the services it offered to prospective guests.⁷⁹⁹ In considering whether these transmissions were exhibited “in public”, Rath J relied on the concept of the “copyright owner’s public”⁸⁰⁰ established in *Jennings v Stephens*.⁸⁰¹ The relevant question was ‘whether that audience may fairly be regarded as part of the monopoly of the owner of the copyright’.⁸⁰² In applying the test, His Honour placed emphasis on the commercial interests of the owner, finding that ‘all the judgments accept that the object of the statute was to confer on the author the financial benefit of a class of performances of his work’.⁸⁰³ Rath J held that ‘there would appear to be an interference with the plaintiffs’ proprietary rights, because the statement of agreed facts shows that *there is a market* for the display of films in hotel rooms.’⁸⁰⁴ In addition, His Honour considered that the viewers saw the films as guests of the motel — members of a section of the public, and the performances were arranged as part of a commercial transaction to which members of the public had been invited. In other words, ‘the provision of such movies should be regarded as part of

⁷⁹⁶ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 197.

⁷⁹⁷ *Ibid* (Kirby J), citing *Chappell & Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350 360.

⁷⁹⁸ [1983] 2 NSWLR 553.

⁷⁹⁹ *Ibid* 555.

⁸⁰⁰ *Ibid* 560.

⁸⁰¹ [1936] 1 All ER 409. Green LJ held that the question is ‘whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him’ (at 418).

⁸⁰² *Rank Film Production Ltd v Dodds* [1983] 2 NSWLR 553 560.

⁸⁰³ *Ibid* 557.

⁸⁰⁴ *Ibid* 558 (emphasis added). Furthermore, since 1975, the copyright owners in a large number of films had already purportedly granted licences to persons in Australia for the exhibition of such films in hotel and motel rooms for guest viewing (at 555).

the consideration for the guests' payment'.⁸⁰⁵ Rath J noted that it was useful to distinguish performances "in private", by considering that 'the purpose of the Act is to preserve the copyright owner's right of property in his work against infringement and prevent unauthorized third parties from using his work *to his financial disadvantage*'.⁸⁰⁶

The decision shows that once commerciality becomes a key factor in the analysis, the private context of receipt becomes largely irrelevant. This was made explicit when Rath J cautioned that it would be wrong to convert the statutory test from "in public" to whether the performance was not "in private" as the answers to the two questions would 'not necessarily lead to the same conclusions'.⁸⁰⁷ His Honour ventured that the public performance right 'may cover situations that might be thought to be performances in private'.⁸⁰⁸ However, it was 'not the restricted size of the audience, or the privacy of the surroundings, that is decisive on the issue; the critical matter [was] the presentation of the movie by the occupier of the motel to his guest in that [commercial] capacity'.⁸⁰⁹

The distinction between "in public" and "to the public" under the "copyright owner's public" is captured in observations of the High Court in *Telstra v APRA*.⁸¹⁰ Dawson and Gaudron JJ explained that:

If anything, the use of the words "to the public" conveys a broader concept than the use of the words "in public" since it makes clear that the place where the relevant communication occurs is irrelevant. That is to say, there can be a communication to individual members of the public in a private or domestic setting which is nevertheless a communication to the public.⁸¹¹

This statement confirms the exclusion of the recipient's "private" context as a relevant factor.

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid 559 (emphasis added). At 560, His Honour quotes the following passage from *Performing Right Society Ltd v Rangers FC Supporters' Club, Greenock* [1975] RPC 626 634:

In a situation where a person organises a private party in his own home, or in what might reasonable be deemed an extension of his own home, then it seems reasonable to assume that the unauthorised publication or use of the copyright work is *not rebounding to the financial disadvantage of the owner of the copyright*, since the selected audience is *not enjoying the work under conditions in which they would normally pay* for the privilege in one form or another. A performance of the work in such circumstances would ordinarily be regarded as being in private. [emphasis added]

⁸⁰⁷ *Rank Film Production Ltd v Dodds* [1983] 2 NSWLR 553 560.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid 559.

⁸¹⁰ (1997) 191 CLR 140.

⁸¹¹ Ibid 155 (Dawson and Gaudron JJ).

EU: Assessing cumulative effects and potential audiences

A broadened conception of “the public” with reference to *potential* audiences, as opposed to actual audiences, is also evident in CJEU decisions. In *Reha Training v GEMA*,⁸¹² for example, the Court explained that determining the size of an audience required one to take into account ‘the cumulative effects of making works available to potential audiences’.⁸¹³ In this assessment, how many persons have access to the same work in succession is also relevant.⁸¹⁴ Under this approach, the Court held that patients who could watch television programs on television sets installed in two waiting rooms and a training room of a rehabilitation centre constituted “the public”.

3 A Focus on Economic Interests in Various Conceptualisations of “the Public”

As raised in the preceding discussion, the commercial aspect of the defendant’s activities tends to play a more prominent role when courts assess whether transmissions are *to* the public. Expanding further on this discussion, we may consider the focus on commerciality in the Australian and EU legal tests, and also in US case law as a factor for consideration.

Australia: The “copyright owner’s public”

The emphasis on commerciality is apparent in the 1997 High Court decision of *Telstra v APRA*,⁸¹⁵ which applied the “copyright owner’s public” to the defendant’s provision of a music-on-hold service to telephone subscribers. In response to the defendant’s contention that these one-to-one telephone transmissions were private communications, the Court asked: ‘Is the audience one which the owner of the copyright could fairly consider a part of his [or her] public?’⁸¹⁶ The High Court considered that the concept of the “copyright owner’s public” encompassed circumstances where the copyright owner can *expect to receive a fee*, regardless of whether the transmission is made to only one person or a private audience.⁸¹⁷ In coming to the conclusion that Telstra was transmitting the music to the public, factors taken to be relevant included: (1) the availability of the facility to members of the public generally (even if not all member choose to avail themselves of it) and (2) the commercial setting of

⁸¹² (Court of Justice of the European Communities, Case C 117/15, 31 May 2016).

⁸¹³ Ibid [44], citing *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [39].

⁸¹⁴ *Reha Training v GEMA* (Court of Justice of the European Communities, Case C 117/15, 31 May 2016) [44], citing *Phonographic Performance (Ireland) Ltd v Ireland and another* (Court of Justice of the European Communities, Case C-162/10, 15 March 2012) [35].

⁸¹⁵ (1997) 191 CLR 140. It may be noted that this case has been discussed previously in this Chapter in the context of the “act” and individualized communications from the cloud. Transmissions of the music via mobile telephones were considered under a superseded definition of “broadcast” in s 10(1) of the *Copyright Act 1968* (Cth), i.e. ‘transmit by wireless telegraphy to the public’.

⁸¹⁶ Ibid 155–56.

⁸¹⁷ Ibid 156–157 (Dawson and Gaudron JJ).

the unauthorized performance, which will ordinarily be seen to represent a financial disadvantage of the copyright owner.⁸¹⁸

Dawson and Gaudron JJ explained that ‘[l]ying behind the concept of the copyright owner’s public is recognition of the fact that where a work is performed in a commercial setting, the occasion is unlikely to be private or domestic and the audience is more appropriately to be seen as a section of the public.’⁸¹⁹ In other words, commerciality is said to be a characteristic of “public-ness”. Their Honours further explained that ‘the relationship of the audience to the owner of the copyright is significant’ to the development of the notion of the copyright owner’s public.⁸²⁰ The key consideration was said to be the defendant’s willingness ‘to bear the cost’, as it represented the ‘commercial deprivation suffered by the copyright owner’.⁸²¹ This was purportedly necessary in light of the technological advances and marketing techniques that had developed.⁸²²

This approach was applied to the making available right in *Roadshow Films v iiNet*.⁸²³ On the question of whether the “acts” of making available conducted by “non-commercial” peer-to-peer file-sharers were “to the public”, Emmett J explained that:

The relevant relationship is the potential commercial relationship between the owner of copyright and an infringer, not between infringers engaged in file sharing. There is a potential commercial relationship between the Copyright Owners and infringing iiNet users in the present case, given the range of legitimate avenues available for the transmission of Films through sources such as iTunes. The illegitimate transmission of Films over the internet reduces such commercial opportunities and *deprives the Copyright Owners of revenues to which they would be entitled as the owners of copyright*.⁸²⁴

In summary, Australian courts have been willing to interpret “the public” with reference to rightsholders’ interests. A commercial benefit accrued by the defendant appears to be the overriding factor swaying courts to find that a communication was “to the public”.

⁸¹⁸ Ibid (Dawson and Gaudron JJ).

⁸¹⁹ Ibid 157.

⁸²⁰ Ibid 155.

⁸²¹ Ibid 157.

⁸²² Ibid. The Court explains:

In this case it is not so much the preparedness of the audience of music-on-hold to pay to hear the works were it not for their unauthorised performance that is significant. *That simple analysis belongs to an age where communications were less technologically advanced* and business and marketing techniques were less developed. [emphasis added]

⁸²³ (2011) 194 FCR 285.

⁸²⁴ Ibid 323–24 (emphasis added).

EU: The “new public” standard

In the EU, a problematic concept that has developed in relation to the second element is the “new public”. The “new public” criterion has been raised previously in the context of the “act”, as the “technical means” used is more appropriately considered in one’s analysis of the “act”. Nevertheless, we may consider the “new public” criterion in more detail here, in particular the relevance of the defendant’s profit-making objectives and the potential for exhaustion of the right under the “new public”.

Relevance of the defendant’s “for profit” activities to the “new public” standard

The “new public” concept was established in the case of *SGAE v Rafael Hoteles SA* (“*SGAE*”),⁸²⁵ a case referred to the CJEU by a Spanish court in 2006. Similar to the “copyright owner’s public”, the notion of a “new public” is approached from the rightsholder’s perspective and considers their interest in protecting their licensing markets. The CJEU explained the concept of a “new public” in *SGAE* as follows:

[A] communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.⁸²⁶

Taking this approach, the CJEU in *SGAE* held that the distribution of broadcast signals through television sets to customers in hotel rooms constituted a communication to the public. The Court explained that ‘when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the program.’⁸²⁷ Therefore, the clientele of a hotel, regardless of whether they were accessing the broadcast from a “private” room, formed a “new public” that was not initially taken into account by the copyright owner.⁸²⁸ The Court explained that the *cumulative effects* of making works available to potential television viewers could be very significant, even if the occupants of private hotel rooms, taken in isolation, were of limited *economic interest* for the hotelier.⁸²⁹

⁸²⁵ (Court of Justice of the European Communities, Case C-306/05, 7 December 2006).

⁸²⁶ Ibid [40].

⁸²⁷ Ibid [41].

⁸²⁸ Ibid [42].

⁸²⁹ Ibid [39].

This “new public” approach was applied in the joined cases of *Football Association Premier League v QC Leisure* and *Karen Murphy v Media Protection Services Ltd* (“FAPL”).⁸³⁰ The cases involved the use of decoding devices that were manufactured with permission, but used outside of the designated geographic area in breach of the usage conditions. In the UK, some bars and restaurants had been using these foreign decoding devices to access Premier League matches at a price lower than that offered by the exclusive broadcaster in the UK, thereby undermining the value of the exclusive territorial licences.⁸³¹

On the question of whether a communication to the public covers ‘transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house’,⁸³² the Court relied heavily on the “new public” standard established in *SGAE*. The CJEU found that:

When those authors authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for *an additional public* which is permitted by the owner of the television set to hear or see the work, *an intentional intervention* of that kind must be regarded as an act by which the work in question is communicated to a new public.⁸³³

In short, the customers of the establishment constituted an additional public not considered by the authors when they authorised the initial broadcast of their works.⁸³⁴

In *FAPL* and *SGAE*, the CJEU made cursory comments about the “for profit” nature of the defendant’s activities to support their conclusions on the existence of a “new public”. The Court in *SGAE* clarified that ‘the pursuit of profit is not a necessary condition’ of a communication to the public.⁸³⁵ It nevertheless found that the circumstances at hand were of a profit-making nature, as it had ‘an influence on the hotel’s standing and, therefore, on the price of rooms’.⁸³⁶ Likewise, the Court in *FAPL* observed that it was ‘not irrelevant that a “communication” within the meaning of Article 3(1) of the [InfoSoc Directive] is of a profit making nature’.⁸³⁷ It held that the proprietor of the bar or restaurant receives and plays the broadcasted transmission ‘in order to benefit therefrom’ as it ‘has an effect upon the number of people going to that establishment and, ultimately, *on its financial*

⁸³⁰ (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011).

⁸³¹ *Ibid* [42]-[43].

⁸³² *Ibid* [183].

⁸³³ *Ibid* [198] (citations omitted) (emphasis added).

⁸³⁴ *Ibid* [199].

⁸³⁵ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [44].

⁸³⁶ *Ibid*.

⁸³⁷ *Football Association Premier League v QC Leisure; Karen Murphy v Media Protection Services Ltd* (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [204].

results’.⁸³⁸ Therefore, the communication to the public in question was ‘of a profit-making nature’ and article 3(1) of the InfoSoc Directive had to be interpreted as covering the defendant’s conduct.⁸³⁹

In the subsequent decision of *Società Consortile Fonografici (SCF) v Marco Del Corso* (“*Del Corso*”),⁸⁴⁰ the CJEU interpreted this “for profit” characteristic as a substantive requirement of the right to communicate to the public (including by making available), and found that a communication unrelated to the defendant’s income was not to “the public”. Following unsuccessful negotiations with the Association of Italian Dentists, SCF (the collecting society for phonogram producers) brought an action against Del Corso for playing background music in his dental practice, alleging infringement of the right to communicate to the public.⁸⁴¹ The Court noted that the ‘profit-making nature’ of practice was ‘not irrelevant’,⁸⁴² but took the statements in *SGAE* and *FAPL* a step further, finding that ‘the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely “caught” by chance.’⁸⁴³ A dentist ‘cannot reasonably either expect a rise in the number of patients because of that broadcast alone or increase the price of the treatment he provides’, therefore the communication of the music does not have an impact on the dentist’s income.⁸⁴⁴ Furthermore, it was said that dental patients attend a dental practice ‘with the sole objective of receiving treatment’, of which the background phonograms played no part.⁸⁴⁵ Patients had ‘access to certain phonograms by chance and without any active choice on their part’.⁸⁴⁶ The decision effectively exempts the defendant from liability by characterizing the conduct⁸⁴⁷ as being *not* of a profit-making nature.⁸⁴⁸ In addition, the Court found that dental patients formed ‘a very consistent group of persons and thus constitute a determinate circle of potential recipients’,⁸⁴⁹ and considered them ‘insignificant’ and ‘in general, very limited’.⁸⁵⁰

The *Del Corso* decision may be contrasted with *Phonographic Performance (Ireland) Ltd v Ireland*,⁸⁵¹ which concerned the liability of hotel operator for the provision of television sets and

⁸³⁸ Ibid [205] (emphasis added).

⁸³⁹ Ibid [207].

⁸⁴⁰ (Court of Justice of the European Communities, Case C-135/10, 15 March 2012).

⁸⁴¹ Ibid [29]-[30].

⁸⁴² Ibid [88].

⁸⁴³ Ibid [91].

⁸⁴⁴ Ibid [97].

⁸⁴⁵ Ibid [98].

⁸⁴⁶ Ibid [98].

⁸⁴⁷ It should be noted that the Court refers to the acts of the dentist as “broadcasting”.

⁸⁴⁸ *Società Consortile Fonografici (SCF) v Marco Del Corso* (Court of Justice of the European Communities, Case C-135/10, 15 March 2012) [99].

⁸⁴⁹ Ibid [95].

⁸⁵⁰ Ibid [96]. It may be argued that the not “for profit” characterization of the communication (i.e. lack of connection between dental treatment communication of the works) supported the finding that the audience was insignificant. However, the Court does not clearly explain the relevance of commercial interests to “the public”.

⁸⁵¹ (Court of Justice of the European Communities, Case C-162/10, 15 March 2012).

radios in guest bedrooms and the provision of phonograms in physical or digital form to be played on in the rooms using apparatus supplied by the hotel. Again, the “act” was satisfied due to its “indispensable” role (i.e. in a “but for” sense), as customers would not have access to the content without the hotel operator’s “intervention”.⁸⁵² On the “profit-making nature” of the broadcast reception, the CJEU held that the hotel guests ‘may be described as “targeted” and “receptive”’.⁸⁵³ Applying the approach in *SGAE* and *FAPL*, the Court observed that this ‘constitutes an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms’.⁸⁵⁴ This analysis appears to support an affirmative finding on the “new public”, as such an audience ‘is distinct from and additional to the one targeted by the original act of communication’.⁸⁵⁵ The Court went on to note that ‘the hotel operator derives economic benefits from the transmission which are independent of those obtained by the broadcaster or the producer of phonograms’.⁸⁵⁶ In other words, a targeted audience constitutes a “new public” as it represents additional economic benefits for the defendant.⁸⁵⁷ It is worth noting that the “for profit” factor occupies a clearer position under *Sanoma*⁸⁵⁸ (discussed previously in relation to the “act”), which establishes a rebuttable presumption of knowledge regarding the illegality of the source content.⁸⁵⁹ However, the *Sanoma* “for profit” knowledge presumption is limited to cases where the initial communication is not authorised.

Access restrictions and potential “exhaustion” under the “new public” approach

Use of the “new public” as a limit the making available right leads to further complications. Although some have lauded the outcome in *Svensson* as one that accommodates ‘the essential functions of the internet as a network of networks’,⁸⁶⁰ cogent arguments against the EU’s “new public” approach have been put forward by prominent copyright scholars. Mihály Ficsor describes the “new public” requirement as ‘in conflict with the Berne Convention (and equally with the TRIPS Agreement and

⁸⁵² Ibid [62], [67].

⁸⁵³ Ibid [44].

⁸⁵⁴ Ibid, citing *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (Court of Justice of the European Communities, Case C-306/05, 7 December 2006) [44]; *Football Association Premier League v QC Leisure*; *Karen Murphy v Media Protection Services Ltd* (Court of Justice of the European Communities, Joined Cases C-403/08 and C-429/08, 4 October 2011) [205].

⁸⁵⁵ *Phonographic Performance (Ireland) Ltd v Ireland and another* (Court of Justice of the European Communities, Case C-162/10, 15 March 2012) [51].

⁸⁵⁶ Ibid.

⁸⁵⁷ These principles have been applied in *Reha Training v GEMA* (Court of Justice of the European Communities, Case C 117/15, 31 May 2016). On the “for profit” consideration, see [49]-[50] and [63]-[64].

⁸⁵⁸ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016) [51], [55].

⁸⁵⁹ Under *Sanoma*, commerciality is relevant to characterising the “act” and ascribing responsibility for the “act”. See application in *Filmspelers* (Court of Justice of the European Union, Case C-527/15, 26 April 2017) [51] (sale of multimedia device linking to unauthorised streaming websites); *Pirate Bay* (Court of Justice of the European Union, Case C-610/15, 14 June 2017) [46] (advertising revenue gained from online file-sharing platform).

⁸⁶⁰ See, eg, Burri, above n 707, 251.

the WCT)’, as ‘it is an error to speak about *communication to a new public* when the right is about a *new act of communication to the public*’.⁸⁶¹ The Association Littéraire et Artistique Internationale (ALAI or International Literary and Artistic Association) has also made similar arguments about the “new public” criterion’s lack of relevance to international conventions and the InfoSoc Directive.⁸⁶²

Ficsor argues that the “new public” theory erroneously applies a principle of exhaustion to the making available right, which is explicitly precluded by the InfoSoc Directive.⁸⁶³ By requiring that the scope of the right be dependent on the owner applying restrictions on access, the “new public” criterion begins to resemble a formality as a condition of protection, which is explicitly prohibited under article 5(2) of the Berne Convention.⁸⁶⁴ This criticism is echoed by Jane Ginsburg, who explains that ‘[t]he scope of rights (including any limitations or exceptions) also comes within the “enjoyment” of Berne and national rights’, and member states may not deny coverage of particular rights to authors who fail to meet certain obligations.⁸⁶⁵

Furthermore, the CJEU in *Svensson* in effect finds that such exhaustion (although not labelled as such in the decision) could be avoided by *subsequently* imposing restrictions on access or removing the content from the source website.⁸⁶⁶ As ALAI explains, such ‘[p]ost-making-available restrictions or removals apparently restore the full right of communication to the public as to the restricted or removed content because any access by hyperlinking would in these circumstances satisfy the “new public” requirement.’⁸⁶⁷ In other words, the exhaustion as made possible under the “new public” principle in *Svensson* could be reversible, and liability for linking could arise subsequent to the execution of the act. Therefore, exhaustion under the “new public” criteria is not only concerning from rightsholders’ perspective, but also for potential linkers, as this would require linkers to constantly monitor linked content to avoid primary infringement for the “act”.⁸⁶⁸

⁸⁶¹ Ficsor, *Svensson: Honest Attempt*, above n 657 (emphasis in original).

⁸⁶² Association Littéraire et Artistique Internationale (ALAI), ‘Opinion Proposed to the Executive Committee and Adopted at Its Meeting, 17 September 2014 on the Criterion “New Public”, Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public’ (2014) 9–10 <<http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>>.

⁸⁶³ Ficsor, *Svensson: Honest Attempt*, above n 657, 6, citing Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10, above n 493, art 3(3).

⁸⁶⁴ Ficsor, *Svensson: Honest Attempt*, above n 657, 35. Article 5(2) provides that ‘[t]he enjoyment and the exercise of these rights shall not be subject to any formality’: *Berne Convention*, signed 9 September 1886, (entered into force 5 December 1887) art 5(2).

⁸⁶⁵ Jane C Ginsburg, “With Untired Spirits and Formal Constancy”: Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching’ (2014) 28 *Berkeley Technology Law Journal* 1583, 1590.

⁸⁶⁶ See *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) [31].

⁸⁶⁷ Association Littéraire et Artistique Internationale (ALAI), above n 862, 22.

⁸⁶⁸ *Arezzo*, above n 707, 545.

US: Commercial relationships under the “transmit” clause

In comparison to the Australian or EU position, the emphasis on copyright owners’ licensing markets is not as prominent in US jurisprudence on the performance right — it is not applied as a core standard or test. Nevertheless, the profit-related characteristics of the defendant’s activity, as a factor for consideration, can take a prominent role in interpretations of “the public” under the transmit clause.

Relevance of “similar commercial objectives”

In *ABC v Aereo*,⁸⁶⁹ the technical infrastructure of Aereo’s time-shifting/streaming service consisted of multiple user directories and thousands of dime-sized antennas. The respondent Aereo designed the system this way, in part, to portray a system of private communications.⁸⁷⁰ In considering whether these transmissions were made “publicly”, the US Supreme Court found that the ‘behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens...does not significantly alter the viewing experience of Aereo’s subscribers’.⁸⁷¹ The Court explained that the technology used ‘does not render Aereo’s *commercial objective* any different from that of cable companies’.⁸⁷² The Court’s findings on both the act of performance and the public were heavily dependent on legislative changes implemented four decades ago to bring cable TV providers within the ambit of the public performance right.⁸⁷³ The Court did not explain why “commercial objectives” were relevant to the interpretation of a “performance”, but merely went on to say that the behind-the-scenes technology did not ‘significantly alter the viewing experience of Aereo’s subscribers’.⁸⁷⁴

The consideration of a commercial characteristic or relationship is not unprecedented in interpretations of the performance right. Another example is the case of *On Command Video Corporation v Columbia Pictures Industries* (“*On Command*”),⁸⁷⁵ discussed previously to illustrate the expansion of “the public” under the transmit clause. *On Command* concerned the transmission of videos from the hotel’s central collection to the guest room television set upon remote selection by a

⁸⁶⁹ 134 S. Ct. 2498 (2014).

⁸⁷⁰ See Giblin and Ginsburg, ‘We Need to Talk About Aereo’, above n 603.

⁸⁷¹ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2508.

⁸⁷² *Ibid* (emphasis added).

⁸⁷³ *Ibid* 2506, 2511. The Court emphasized that Congress’ primary purpose in amending the Copyright Act in 1976 was to overturn the Supreme Court’s holdings in *Fortnightly* and *Teleprompter* which held that a CATV provider was more like a viewer than a broadcaster, and therefore its actions fell outside the scope of the Copyright Act (at 2505–507): see *Fortnightly Corp v United Artists Television, Inc*, 392 US 390 (1968); *Teleprompter Corp v Columbia Broadcasting Sys, Inc*, 415 U.S. 394 (1974); H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 86–87. The analogy with cable was criticised by Scalia J in dissent as a “guilt-by-resemblance” test, with the majority implementing an ‘ad hoc rule for cable-system lookalikes’ without providing any criteria as to when it applies (at 2515–16). Scalia J concluded that Aereo did not “perform”, ‘for the sole and simple reason that it does not make the choice of content’ (at 2514), and did not consider the element of “the public”.

⁸⁷⁴ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2508.

⁸⁷⁵ 777 F. Supp. 787 (N.D. Cal. 1991).

customer.⁸⁷⁶ The US District Court for the Northern District of California highlighted the commercial relationship between the transmitter of the performance and the audience to justify its finding that the transmission was “public”.⁸⁷⁷ Similar to the Supreme Court in *Aereo*, the relevance of commerciality is assumed, and the District Court does not cite authority on this point.

A consistent approach to commerciality is not obvious in the US context. The Court in *On Command* considered the commercial relationship between *the transmitter* and the audience (in contrast to the rightsholder’s relationship with its audience, as in Australia and the EU). In *Aereo*, the formulation was again slightly different — the Court referred to similar “commercial objectives” between the competing disseminators of content (i.e. *Aereo* and cable services). Nevertheless, the commercial relationship with users or similar commercial objective with other intermediaries is used to support a conclusion that “the public” element is satisfied, due to a perceived negative impact on the rightsholder’s licensing market. In other words, we may find varying statements regarding the relevance of commerciality, but at a higher level of abstraction it is apparent that the common end objective in these arguments is the protection of copyright owners’ licensing markets.

An “owner” or “possessor” of a work is not “the public”

In addition to its consideration of commercial objectives, the Supreme Court in *Aereo* made cryptic references to the relevance of a “possessory relationship” between the user and the underlying work. In what appears to be an attempt to shield cloud lockers like Dropbox from their decision (a concern raised during the hearing),⁸⁷⁸ the Court asserted that subscribers who ‘receive performances in their capacities as owners or possessors of the underlying works’ would not be performing to the public, due to their ‘relationship to the underlying work’.⁸⁷⁹ The Court uses a valet parking scenario to illustrate this point:

When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars “to the public.” We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a *pre-existing relationship* to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to “the public,” whereas an entity like *Aereo* that transmits to

⁸⁷⁶ Ibid 788.

⁸⁷⁷ Ibid 790, stating that ‘the relationship between the transmitter of the performance, *On Command*, and the audience, hotel guests, is a commercial, “public” one regardless of where the viewing takes place’.

⁸⁷⁸ See *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 2013 U.S. Trans. 13461; 2014 U.S. Trans. LEXIS 58.

⁸⁷⁹ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2510.

large numbers of paying subscribers who lack any prior relationship to the works does so perform.⁸⁸⁰

The analogy with physical possession is inapt, as copyright is a form of intangible personal property, with “property” referring not to a particular object but to the relationship between a person and a copyright work.⁸⁸¹ Use of terms such as “owns” or “possesses” to refer to a digital information product does not clarify what rights attach to the intellectual property. The reality, as Giblin and Ginsburg observe, is that ‘[w]hat makes the possession “mine”, may result from a license agreement, or from a fair or tolerated use, such as “format-shifting” a hardcopy CD to a digital file.’⁸⁸² The rights that one has to files placed in Dropbox or music lockers depend on the scope of rights and express or implied licence attached to the works.⁸⁸³

The Supreme Court does not clearly address why this possessory relationship with the work overrides the proprietary right attached to the work.⁸⁸⁴ The cryptic statement is a gloss over the proper scope of the public performance right, and provides little guidance on the right in the context of individualised, on-demand dissemination of content. The connection of this factor to the basic principles of copyright law or the public performance right as drafted is not made clear, and it appears to serve no purpose other than to quell concerns that the Court’s ruling would have negative effects on new technologies, particularly remote cloud services.⁸⁸⁵

Concluding remarks on commerciality as a general theme

The cases discussed illustrate the emerging difficulties when interpreting “the public” as an element of the making available right, particularly in the face of novel technologies allowing one-to-one or individualized communications. While commerciality is less prominent under US jurisprudence, it is

⁸⁸⁰ Ibid (emphasis added). See also 2502.

⁸⁸¹ Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (Lawbook, 2004) 12.

⁸⁸² Rebecca Giblin and Jane C Ginsburg, ‘We (Still) Need to Talk About Aereo: New Controversies and Unresolved Questions After the Supreme Court’s Decision’ (2015) 38(2) *Columbia Journal of Law & the Arts* 109, 155.

⁸⁸³ It should be noted that although the concept of “digital first sale” has not fared well in the courts (see, eg, *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013)), the Supreme Court seems to be introducing an analogous concept here, i.e. the rights of users to make use of copies of works that they have purchased, provided they may be considered the “owners” or “possessors” of such works. Nevertheless, there is nothing to suggest that the first sale doctrine was contemplated by the Court when it made this point.

⁸⁸⁴ See Ginsburg, ‘Letter from the US’, above n 526.

⁸⁸⁵ See *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2510:

We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect. ... We have said that [the public] does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content.

nevertheless clear that broader interpretations of “the public” have emerged following the introduction of the transmit clause, which covers transmissions *to* the public (and not just performances *in* a public place).⁸⁸⁶ In Australia, the private context has become irrelevant, as the focus turned to the commercial interests of the defendant under the “copyright owner’s public”. Similarly, an additional profit-making section of the receiving public has been considered by the CJEU to be a “new public”.⁸⁸⁷ Unfortunately both Australian and European concepts are circular and of limited utility as objective criteria. The scope of the “the public” is measured primarily from the perspective of the copyright owner, who would notionally be seeking as wide a licensable market as possible.⁸⁸⁸

Section D. Chapter IV - Conclusion

Upon reviewing cases involving similar underlying technologies, it is difficult to find consistency across the jurisdictions discussed. These approaches are outlined in the table that follows this conclusion (Figure 4.3). Indeed, different legislative provisions may be used to give effect to the making available right under the umbrella solution.⁸⁸⁹ Nevertheless, the variation in form does not justify how differently the fundamental elements are conceptualised in each jurisdiction. Inconsistencies in interpretation are the perceivable symptoms of a more concerning chronic deficiency, which is the lack of principles or theories to drive the interpretation of this right in a sensible direction. Courts are either relying on broad assertions that provide close to no assistance,⁸⁹⁰ drawing analogies with outdated technologies,⁸⁹¹ or ignoring the making available right to focus on the reproduction right.⁸⁹²

It is accepted that the mere provision of access to content may constitute an “act” of making available (whether or not an actual transmission occurs). However, effective coverage of this aspect under US legislation remains a challenge, as it requires courts to interpret “performance” or “distribution” in a

⁸⁸⁶ See *On Command Video Corporation v Columbia Industries* 777 F. Supp. 787 (N.D. Cal. 1991).

⁸⁸⁷ The “new public” is a requirement where the defendant utilises the same “technical means” of communication as the rightsholder.

⁸⁸⁸ See also Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2’, above n 22, 402.

⁸⁸⁹ It may be argued that this is a positive trait, as ‘[d]ifferent national approaches to novel issues function as helpful experiments in designing a new international standard’: Graeme B Dinwoodie, ‘A New Copyright Order: Why National Courts Should Create Global Norms’ (2000) 149 *University of Pennsylvania Law Review* 469, 514. Dinwoodie also recognises that ‘at some point the different experiments should ideally converge toward common understandings’ (at 515).

⁸⁹⁰ See, eg, *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014) (holding that the act was to be interpreted broadly).

⁸⁹¹ See, eg, *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) (analogy with cable).

⁸⁹² See, eg, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 (explicitly focusing on the right to copy); *Perfect 10, Inc v Amazon.com, Inc* 508 F.3d 1146 (9th Cir. Cal. 2007) (implicitly relying on the location of copies).

manner that exceeds a plain reading of the statute. In light of this, the introduction of an explicit making available right would clarify that the relevant “act” encompasses mere accessibility via one-to-one communications.

Broadening the language of the provisions, however, brings with it another set of complications. As the rulings of the CJEU have shown, an explicit making available right does not necessarily lead to the clearest rules or principles regarding the limits of the act. In the EU, the analytical burden is disproportionately borne by the second element — “the public” (or “new public” depending on the “technical means” used by the plaintiff and defendant). As a result, there is little analysis of the “act” of making available as a limitation upon the right. Instead of considering the “technical means” used under “the public”, we should ask whether use of those “technical means” constitutes an “act” of making available. This proposal reflects the Advocate General’s opinion on *Sanoma*, i.e. whether an ‘intervention’ is indispensable to the availability of a work should be ‘approached only in examining the existence of an act of communication’ and not used in order to find that ‘there had not been a communication to a new public.’⁸⁹³ This might encourage more meaningful engagement with the “act” of making available.⁸⁹⁴ It is not a solution to the uncertain limits of the right, but paves the way for the development of more transparent approaches to the “act”.

The second element, “the public”, remains a problematic concept. CJEU jurisprudence in particular presents difficulties due to the ambiguous nature of the “new public” standard. Nevertheless, findings on profits or licensing markets that underlie the “new public” standard are not as unusual as they seem; similar factors are captured in the longstanding Australian concept of the “copyright owner’s public”. While the US does not emphasise licensing markets as prominently, the commercial interests of the owner are nevertheless used to support affirmative findings on “the public”. In light of vague

⁸⁹³ ‘Opinion of Advocate General Wathelet - *GS Media BV v Sanoma Media Netherlands BV* (Case C-160/15)’ (7 April 2016) [58]-[59]. Advocate General Wathelet goes on to say that ‘I consider that hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an “act of communication” within the meaning of Article 3(1) of Directive 2001/29...’ (at [60]).

⁸⁹⁴ Subsequent CJEU decisions and a number of scholars have conceptualised the various “new public” factors as part of a multi-factorial test: see, eg, *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016) [34]; Alexander Tsoutsanis, ‘Why Copyright and Linking Can Tango’ (2014) 9(6) *Journal of Intellectual Property Law & Practice* 495 (Tsoutsanis identifies five factors: “making available”, “to the public”, “new public”, “intervention” and “profit”, which are to be considered in conjunction with four policy objectives: harmonization, high-level protection, technology-neutral and authorisation). However, it is difficult to see how viewing these matters as factors, without an in-depth understanding of why they are relevant to the two key elements, assists our analysis. An approach that would lead to more clarity is to focus on the elements from the plain language of the article 3 of the InfoSoc Directive and clarifying the relevance (or irrelevance) of “new public”, “intervention”, “specific technical means” and “profit” towards the interpretation of these two core elements.

and circular approaches to “the public”, it is all the more important to seek clarity on the “act” of making available.

Who is carrying out the “act” of making available can be difficult to determine where the facts involve an automated system which requires the interaction and choice of users in order to complete the dissemination of content to those users. The fine line between execution of an act and facilitation of the act is not easy to draw. The next two chapters expand on the rules and associated problems identified here, looking deeper into the history and concepts that underpin this jurisprudence. The objective is to find principles that can assist our interpretation of the “act” of making available and “the public”.

Figure 4.3. Table summary of national/regional approaches to the making available right

Context	Australia	United States	European Union
<p>“The Public”</p> <p>General – including pre-digital technologies (broadcast and other transmissions)</p>	<p>Performance “in public” distinguished from those that are “domestic” or “private” in character. (<i>APRA v Commonwealth Bank</i>)</p> <p>“The public” is conceptualized as the “copyright owner’s public”, which focuses on the need to preserve economic incentives via licensing markets. (<i>Telstra v APRA</i>)</p>	<p>The “public place” clause excludes places where ‘a normal circle of a family and its social acquaintances is gathered’, but may cover “semipublic” places. A technical approach to “in public” is applied, with cases questioning whether the same copy is repeatedly performed. (<i>On Command</i>)</p> <p>“To the public” is interpreted more broadly, with reference made to the commercial relationship between the transmitter and audience (e.g. hotel guests). The general availability of a service as a whole is taken into account. (<i>Aereo</i>)</p>	<p>“The public” refers to an indeterminate number of potential recipients; it implies a fairly large number of persons or “persons in general”, i.e. persons not restricted to specific individuals belonging to a private group’. “The public” encompasses a “certain <i>de minimis</i> threshold”. (<i>Reha v GEMA</i>)</p> <p>Where a work is retransmitted, consider whether retransmission in a place accessible to the public is a “new public” not considered by the copyright owner when initially transmitted. (<i>SGAE, FAPL, Svensson</i>)</p> <p>However, whether the “new public” must be satisfied depends on whether same technical means are used, and whether the defendant has/should have knowledge of the infringing nature of the source (e.g. the initial post in linking cases). If different technical means are utilized, then it is not necessary to consider the “new public” requirement (it is assumed that a “new public” is reached by this different technical means). (<i>Sanoma, TVCatchup</i>)</p>

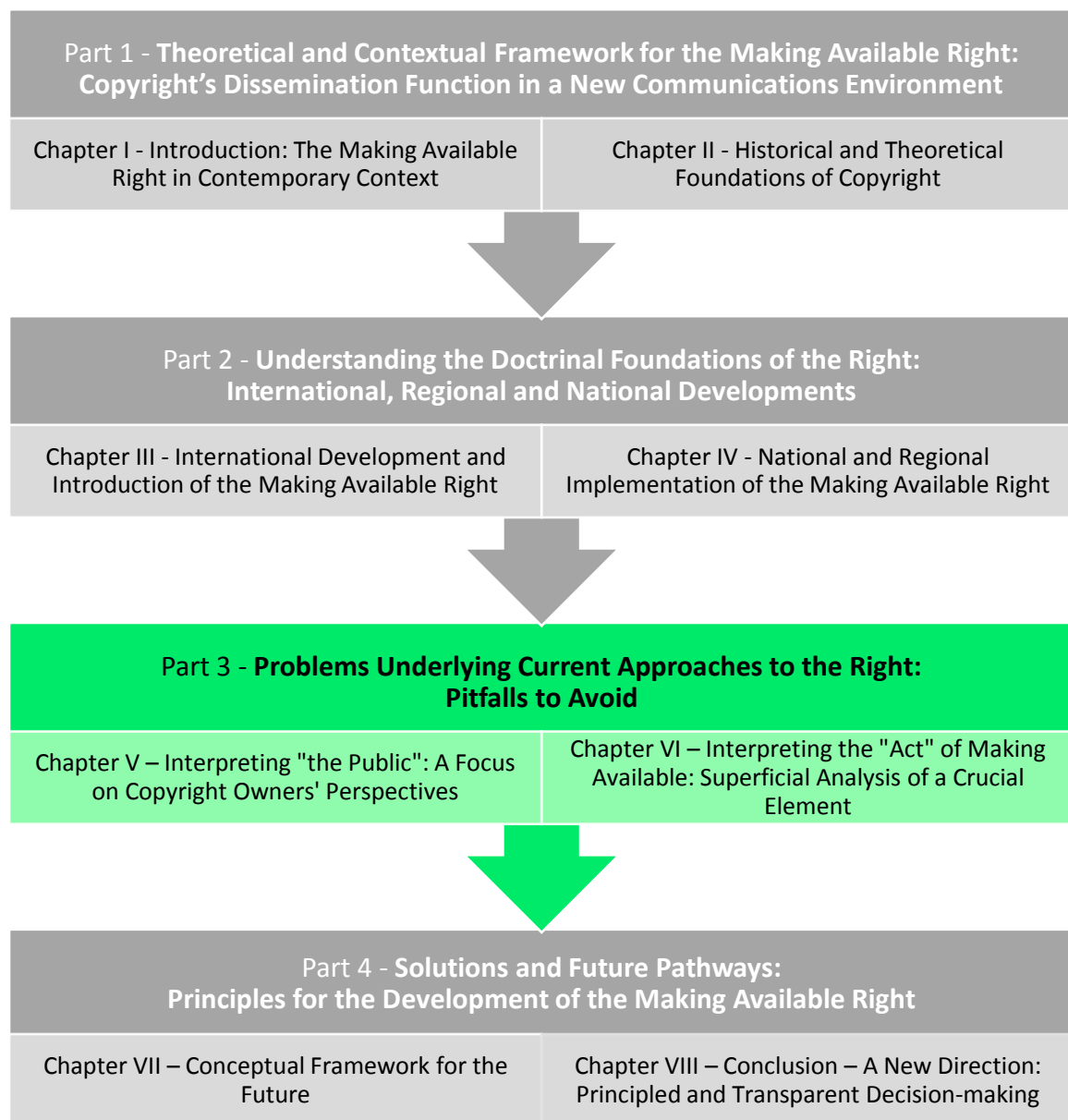
(Figure 4.3. continued)

	Context	Australia	United States	European Union
The “Act” of Making Available	Linking	Linking is not an “act” of making available but merely a reference to content made available by others. (<i>Cooper</i>)	The “server test” is applied. Linking (including embedding/in-line linking) to a third party’s content is not a “display” or “performance” of the work. (<i>Perfect10 v Amazon</i>)	Linking is an “act” of making available. Liability is dependent on the “new public” analysis. (<i>Svensson</i>)
	Cloud/Time-shifting	Reliance on the right to copy broadcast programs. The commercial nature of the service means that the defendant is precluded from relying on the statutory time-shifting exception. (<i>OptusTV</i> on appeal) Where the “act” of making available is assessed, the court focusses on each possible transmission of a work, without considering the overall system and availability of a collection of works. (<i>OptusTV</i> trial decision)	Emphasis on the similarity of the defendant’s technology with cable services and the legislative background. A user’s “possessory” relationship with the work may be relevant, although it is unclear how this accords with the intangible nature of copyright. The volition approach is ignored. (<i>Aereo</i>)	Each separate “technical means” for communicating a work to the public must be authorised. Where “different technical means” is used by the defendant (in contrast to initial technical means of communication) then it is not necessary to satisfy the “new public” standard (or the work is assumed to reach a “new public”). (<i>TVCatchup</i>)

- PART 3 -

Problems Underlying Current Approaches to the Right: Pitfalls to Avoid

Part 3 elucidates the conceptual shifts that are needed before we can move forward and develop the making available right in a principled and transparent manner. It critically analyses current approaches to the right and highlights deficiencies that may be found in the judicial reasoning of Australian, US and EU courts. In doing so, it uncovers the problems that flow from expansive approaches to “the public” and superficial analysis of the “act” of making available.



CHAPTER V. INTERPRETING “THE PUBLIC”: A FOCUS ON COPYRIGHT OWNERS’ PERSPECTIVES

Purpose

This chapter aims to reveal the drawbacks of an overly broad approach to “the public”, an approach that allows courts to disregard the dissemination function of copyright. To do so, it will:

1. Show how conceptions of “the public” that focus on securing the copyright owner’s licensable market emerged in early cases interpreting the public performance right;
2. Highlight the unlimited nature of these market-centric conceptions of “the public” that focus on short term market profits and eschew copyright’s dissemination function; and
3. Explain the impact that market-centric interpretations of “the public” may have on technological innovation and the long term sustainability of copyright.

Headings

- A. Historical Perspectives on “the Public”
- B. The Relevance of Copyright Markets
- C. Impacts of Copyright Law on Technological Innovation

Interpretational challenges in regards to both elements of the making available right have been raised in the preceding chapter.⁸⁹⁵ This chapter considers the conceptual difficulties relating to “the public” in more depth, and as a starting point, will investigate the rationale for requiring that performances in the analogue context be “in public”.⁸⁹⁶ This entails an examination of the history of public performance rights, and the debate leading up to the introduction of such rights. “The public” was seen as an important limitation on the scope of performance rights when they were introduced. However, as markets for the licensing of public performance rights developed and grew, courts came

⁸⁹⁵ As discussed, the making available right has two basic elements: (1) an “act” of making available, that is (2) to the public. See *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

See also *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) arts 10 and 14 (setting out the making available right in relation to fixed performances and phonograms).

⁸⁹⁶ The second element, “the public”, has been discussed first in this thesis. This is because courts have afforded more attention to “the public”, and it is useful to take these matters into consideration in our analysis of the “act” of making available.

to conceptualise “the public” as copyright owners’ licensing markets. In other words, if the copyright owner could receive a fee from the audience gaining exposure to the content, then this audience would constitute “the public”. Unfortunately, judicial conceptions of “the public” have yet to mature beyond such formulations from the pre-internet era.⁸⁹⁷

As means of commercializing copyright content are increasingly “individualized”, recipients are able to dictate the terms of enjoyment of the works in the comfort of their home or any location they wish.⁸⁹⁸ In this environment, it is increasingly difficult to maintain distinction between what is conventionally understood as “public” and “private”. Existing circular approaches to “the public” do not account for the ever-expanding and vague interpretations of the “act” of making available. The tendency to view the “public” as a proxy for any activity that ought to be monetized by copyright owners could permit the expansion of the right to encompass every form of communication. Such conceptions of “the public” focus solely on the perspectives and interests of copyright owners, and do not take copyright’s dissemination function into account. A question that can be asked at this point is whether current approaches to “the public” are feasible or suitable for the making available right of today, and of the future. If we agree that current approaches are unsustainable, then we should start thinking beyond the public/private distinction and seek principles to guide our interpretation of “the public” in an interconnected communications environment.

⁸⁹⁷ Unlike the right of reproduction, the relevant “act” of a non-copy-related right (whether a performance or transmission) has to have a “public” quality. As explained by Nimmer and Nimmer, ‘[i]t would, of course, be unthinkable for an infringement to arise every time someone, for his own amusement or that of his friends, were to read a book aloud or sing a song.’: Nimmer and Nimmer, above n 551, § 8.14, citing *Twentieth Century Music Corporation v Aiken* 422 U.S. 151 (1975) 155 (‘No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower’). This view is expanded upon below in the context of historical discussions. However, a further conceptual question may be asked: is a “public” characteristic required here because these exploitation means provide *an immediate transfer of value* from the copyright owner to the user? This may be contrasted with copies of copyright works, which permit deferred uses of the works: see Ficsor, *The Law of Copyright and the Internet*, above n 8, 498–99 [C8.08]. The regulation of deferred uses of works is not an easy task; “public” performances or transmissions, on the other hand, seem to present a more realistic avenue for regulation. Whether an immediate transfer of value (as opposed to deferred use by consumers) is a material distinction between copy-related rights and non-copy-related rights remains an open question. Regardless, the introduction of the making available right aligns with the technological capabilities that have developed, and in the process, disassembles these boundaries between access to copies of content and enjoyment of such content.

⁸⁹⁸ As Ficsor has explained, the actual extent of use is not determined at the moment of making available by the person/entity that carries out the act of making available, but is determined by the member of the public’s “virtual negotiation” with the system: Ficsor, *The Law of Copyright and the Internet*, above n 8, 498–99 [C8.08]. Ficsor’s comments have been discussed previously in Chapter III – Section D. Academic Commentary on the Making Available Right.

Section A. Historical Perspectives on “the Public”

While challenges to the public/private distinction are heightened in the digital age, it should be recognised that the distinction has never been clear cut even in the context of physical spaces. Cases early in the 20th century involving novel contexts show that difficulties of interpretation involving “the public” are not just a product of the internet.

From this early stage, courts began to emphasise the need to protect copyright owners’ revenue that could be obtained from the licensing of performances. If a proprietor was willing to pay for the performance of music to enhance the attractiveness of a venue, then that place was considered a public place under the performance right. In addition to “the public”, US courts considering the public performance right for musical compositions had to consider whether performances were “for profit” under the 1909 Copyright Act (before it was superseded by the 1976 act). Although this “for profit” element was introduced as a limitation upon the scope of the public performance right, US courts linked the notion of “for profit” to the protection of owners’ licensing markets. In short, problematic interpretations of “the public” have arisen since the early days, when courts have had to consider performances occurring *in public*. Even the “for profit” element, an express limitation upon public performance rights, was eroded as courts prioritised copyright owners’ interests.

1 *Early UK Conceptions: Emphasis on Licensing “Markets”*

The “copyright owner’s public” in *Jennings v Stephens*

The case of *Jennings v Stephens*,⁸⁹⁹ brought before the UK Court of Appeal in 1936, involved the public performance right in the *Copyright Act 1911* (UK). This decision established the concept of the copyright owner’s public, which was subsequently adopted by Australian courts.⁹⁰⁰ A play was performed by and for members of the Duston Women’s Institute, and as a result, the copyright owner of the play brought an action for infringement of her exclusive right to perform the work in public. The Institute was a branch of the National Federation of Women’s Institutes which represented unions of all Women’s Institutes in England of Wales, of which there were over 5,000.⁹⁰¹ The Institute would hold monthly meetings of a social or educational nature, particularly to encourage music, drama and dancing.⁹⁰² At the time of the performance, the Duston Women’s Institute had 109 members, and every female inhabitant of the village of Duston was expressly or tacitly invited to be a member.⁹⁰³

⁸⁹⁹ [1936] 1 All ER 409.

⁹⁰⁰ See *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 156.

⁹⁰¹ *Jennings v Stephens* [1936] 1 All ER 409 410.

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

The performers received no payment and no charge was made for admission.⁹⁰⁴ The Institute was unanimously held liable for copyright infringement in this case.

Lord Wright noted that the 1911 Act did not define the words “in public”.⁹⁰⁵ In His Honour’s view, the concept involved both questions of law and fact, as the true meaning of the words “in public” must be ascertained as a matter of law, and it must be determined whether the facts of the case fall within that meaning.⁹⁰⁶ Lord Wright cautioned that “the public” ‘is a term of uncertain import; it must be limited in every case by the context in which it is used’.⁹⁰⁷ His Honour was inclined to consider the character of the audience or their interest in the copyright work as the key consideration, stating:

In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or *who would be interested in any particular matter*, professional, political, social, artistic, or local. In the case of a dramatic work *the public may be regarded as including persons to whom the drama appeals*, but that again must be limited by local and other conditions.⁹⁰⁸

Lord Wright continued that “the public” meant ‘a portion of the public’, and this portion ‘may sometimes be very small indeed’.⁹⁰⁹ Lord Wright noted that the Duston Institute was one of many similar branches around the country, and that it ‘is useful to remember as a warning to the court that if the performance in question is held not to be a performance in public, the rights of owners of dramatic copyright in music or copyright in lectures all over the country will be seriously prejudiced; their plays will be liable to lose novelty, and the public demand for performance will be affected; the public appetite will be exhausted.’⁹¹⁰

Romer LJ in the same case also focussed on the character of the audience, and emphasised the interests of the audience in the content being performed. Romer LJ explained that in relation to “the public”, the audience ‘are present in their capacity as members of the music-loving section of the public.’⁹¹¹ Furthermore, Romer LJ was of the view that the nature of the place was not relevant, as ‘[a] private entertainment may be given in a public room. A public entertainment may be given in a private house.’⁹¹² In sentiments echoing those of Lord Wright, Romer LJ explained that the overall number

⁹⁰⁴ Ibid 411.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ibid 412.

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid (emphasis added). See also at 414: ‘The true criterion seems to be the character of the audience.’

⁹⁰⁹ Ibid.

⁹¹⁰ Ibid 415.

⁹¹¹ Ibid 416.

⁹¹² Ibid. His Honour continues: ‘The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience.’

of institutes in the country was a material consideration as to whether the meeting was part of a member's "public life":

The annual subscription to the Institute is no doubt a very small one, and there are at present only 109 members. But the question that we have to decide is one of principle and one of great importance to lecturers, authors, and composers. For there are about 5,000 similar institutes in England and Wales with a total membership of something like 300,000. If performances given before these institutes are private performances, the result to the owner of the copyright in the works performed would be serious.⁹¹³

The judgement of Greene LJ in *Jennings v Stephens* is perhaps the most relevant opinion, as it is His Honour's conception of the "copyright owner's public" that has been adopted in subsequent Australian cases. His Honour explained the concept as follows:

The question may therefore be usefully approached by inquiring whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him. In other words, the expression "in public" must be considered in relation to the owner of the copyright. *If the audience considered in relation to the owner of the copyright may properly be described as the owner's "public" or part of his "public," [sic] then in performing the work before that audience he would, in my opinion, be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright.*⁹¹⁴

Greene LJ considered the interests of the persons on the receiving end of the performance to be relevant. An example given was that of a lecturer who 'makes his living by composing and delivering lectures to an audience wherever he can find one', and in this example, 'persons who desire to obtain entertainment and education by means of lectures form the lecturer's "public"'.⁹¹⁵ Here, 'the plaintiff makes a living by writing plays and authorising their performance to audiences *desirous* of seeing the plays performed.'⁹¹⁶ In essence, "the public" was 'to be examined primarily in light of the relationship of the audience to the owner of the copyright, and not in the relationship of the audience to the performers'.⁹¹⁷ However, Greene LJ noted that the relationship between the performer and their audience would not be determinative in all cases, as children performing in their parents' drawing

⁹¹³ Ibid 418.

⁹¹⁴ Ibid 418–19 (emphasis added).

⁹¹⁵ Ibid 419.

⁹¹⁶ Ibid 420 (emphasis added).

⁹¹⁷ Ibid.

room or performances by members of a house party to their hosts and fellow guests, for example, would not be considered performing in public.⁹¹⁸

Therefore, an interpretation of “the public” under *Jennings v Stephens* does not depend on the nature of the specific context, but on whether similar situations may be replicated widely in society. If a similar context would arise around the country, then the work might also be performed in these contexts without remuneration to the copyright owner. In essence, “the public” was a proxy for the copyright owner’s licensable market. Importantly, this conception of “the public” omits any consideration of the role of the performer (or in broader terms, the “disseminator” of the content) from the analysis on the scope of the right. Furthermore, a consideration raised by several of the judges is the interests of the audience, i.e. whether they have a desire to enjoy the works of authorship. The interests of the receiving public, however, are only used to signify the profits that could be made from potential licensees.

Elaboration on the “copyright owner’s public” in subsequent cases

Two joined appeals decided by the UK Court of Appeal in 1943 provide further insight on the reasoning behind the concept of the “copyright owner’s public”. These appeals involved copyright allegations by the Performing Right Society against Ernest Turner Electrical Instruments Ltd and Gillette Industries Ltd, both of which had installed wireless receiving sets in their respective factories, along with a number of loudspeakers to diffuse the received broadcasts throughout the factories. The program played in the premises was a BBC program called “Music While You Work”. In addition, the first appellant had performed gramophone records to its workers. The appeals were again unanimously decided in the copyright owners’ favour.

In this decision, Lord Greene MR elaborated on the “copyright owner’s public” as expressed in *Jennings v Stephens*.⁹¹⁹ Lord Greene again emphasized the importance of the relationship between the audience and the copyright owner. However, rather than focus on the interest or demand of the receiving public as in *Jennings v Stephens*,⁹²⁰ the interest emphasised here was that of *the copyright owner*:

When the legislature under the Copyright Act conferred upon the owner of copyright a monopoly, it no doubt intended that that monopoly should be a real and not an illusory right of property, and it is, therefore, in my opinion, important to consider whether a particular performance, the character of which is in question, is of a kind calculated to whittle down

⁹¹⁸ Ibid.

⁹¹⁹ [1936] 1 All ER 409.

⁹²⁰ Ibid.

that monopoly to any substantial extent. ... The monopoly is, of course, confined to performances in public, but *in considering whether a performance is in public its effect upon the value to the owner of the copyright of his statutory monopoly is, I venture to think, a consideration to which at any rate great importance should be given.* I say that by way of further explanation of the observations which I ventured to make in *Jennings v Stephens*.⁹²¹

Lord Greene considered ‘the circumstance that there are thousands of factories in the country, employing, no doubt, hundreds of thousands, indeed, millions, of workpeople’ and observed that if these performances can be given without infringement, ‘they can be given in every case’.⁹²² According to Lord Greene, this was an important consideration as it affected the value of the copyright owner’s statutory monopoly. His Honour explained:

When you consider such a state of affairs throughout the country as a whole, if it be right to say that in all those cases the performance would not be in public, *the effect would be to destroy to a large extent the value of the statutory monopoly by depriving the owner of the copyright of the exclusive right to sell his goods to the public.* I think it is legitimate to take those matters into consideration, not, as I say, for the purpose of turning a rightful act into a wrongful act in these two cases, but for the purpose of seeing what is this audience, what is the nature of this audience that is having the benefit of this music.⁹²³

Luxmore LJ and Goddard LJ echoed similar sentiments regarding the value of the public performance right to the copyright owner.⁹²⁴ Goddard LJ, in agreeing with the guidelines proposed by Lord Greene, provided additional insight on what His Honour perceived to be performances “in private”. His Honour noted that ‘[i]f it be objected that guests in a private house would be a part of that public, the answer, I think, is that in selling a piece of music or a gramophone record the owner of the copyright contemplates that it will be played and consents to its being played by the purchaser and neither expects nor desires that it should be enjoyed in solitude, but that it may be heard by members of the purchaser’s household and his guests.’⁹²⁵ In considering the consent and expectations of the copyright

⁹²¹ *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd; Performing Right Society Ltd v Gillette Industries Ltd* [1943] 1 All ER 413 416 (emphasis added).

⁹²² Ibid 417.

⁹²³ Ibid (emphasis added).

⁹²⁴ See ibid 418 (Lord Luxmoore LJ): ‘[I]f the performance in *Jennings v Stephens* were not a performance in public and might be repeated indefinitely all over the country, the performing right would not be of much value’; and at 418 (Goddard LJ):

The principal object of the Act is to safeguard the property of authors or their transferees in their copyright, and if employers of labour were entitled to cause compositions to be performed before their employees merely by buying a piece of music or a record, or paying the ordinary licence for a broadcasting set, an author would very soon have his public seriously diminished, and the protection of the Act would be to a great extent illusory.

⁹²⁵ Ibid.

owner, Goddard LJ's view aligns with the perspective that the notion of an implied licence granted by the copyright owner can inform the scope of "the public".

2 *Australia: Adoption of the "Copyright Owner's Public"*

This conceptualisation of "the public" as "the copyright owner's public" was adopted in Australia⁹²⁶ in the New South Wales (NSW) Supreme Court decision of *Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd*.⁹²⁷ Here the appellant club was alleged to have infringed the performing right held by the respondent in a musical work. The club was described as a sporting and social club, and every Saturday night, the club would promote dances for club members and their guests.⁹²⁸ At these dances, the club acquired and paid for the services of a dance band and a master of ceremonies. The band would play music in accordance with directions from the master of ceremonies, who was unrestrained as to how the events were run and which songs would be played.⁹²⁹ The NSW Supreme Court in this case unanimously found the club liable for infringing the public performance right.⁹³⁰ Ferguson LJ provided an extensive overview of the various cases that had considered the concept of "the public",⁹³¹ and adopted Greene LJ's formulation of the copyright owner's public in *Jennings v Stephens*.⁹³²

Ferguson LJ, in finding for the respondents, prioritised the interests of the copyright owner and considered the number of similar establishments that would be excused from liability if the Court held otherwise. Ferguson LJ stated:

After all, the aim of the Copyright Act is to protect authors and composers from infringement of their copyrights. It gives to the owner the sole right to perform the work in public. If the performance in this case were held not to be a performance in public it would make that protection a mockery. It would mean that every club in the country would be entitled to promote concerts for its members and their guests and, with impunity, to present dramatic and musical productions for their entertainment without obtaining the consent of the owners of the copyright therein. To give the Act such an interpretation would deprive copyright owners of the very protection which, in my view, it was intended to confer.⁹³³

⁹²⁶ See *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 156.

⁹²⁷ *Australian Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd* (1964) 5 FLR 415.

⁹²⁸ *Ibid* 416.

⁹²⁹ *Ibid*.

⁹³⁰ Herron CJ concurred with the decision of Ferguson J, whilst Asprey J wrote a separate judgment.

⁹³¹ *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd; Performing Right Society Ltd v Gillette Industries Ltd* [1943] 1 All ER 413 418–22.

⁹³² *Australian Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd* (1964) 5 FLR 415 422.

⁹³³ *Ibid*.

Asprey J of the NSW Supreme Court noted the recent development of a licensing market for such performances, stating that it would ‘not be improper to pay regard to the large number of clubs of this type which in recent years ... have sprung up throughout the State’.⁹³⁴

3 US: Erosion of a “For Profit” Limit on the Public Performance Right for Musical Works

The protection of public performances of musical compositions in the US between 1909 and 1976 is of interest here, because the legislation encompassed a “for profit” element that was more obviously tied to a consideration of market conditions. The historical rationales for imposing this “for profit” limitation included the *interest of the public* in performing from sheet music that they had purchased. In other words, one reason for imposing the “for profit” element as a limitation on the scope of copyright owners’ right was to prevent the right from encroaching upon public access.⁹³⁵ Therefore, the norms and expectations regarding spaces and freedoms for the public enjoyment of works were taken into account when this element was introduced. However, decisions interpreting this “for profit” element broadly⁹³⁶ eventually eroded the requirement, and it was discarded altogether when the 1976 Act was enacted. Rather than being interpreted as a limitation to protect the public, the element seemed to embody an objective of maintaining owners’ *profit* channels. In conceptualising the “for profit” element in this manner, courts began to prioritise copyright owners’ licensing markets over and above the public’s interest in access.

Introduction of the “for profit” requirement in the 1909 Act

In the US, the existing performance right applicable to dramatic works was expanded to cover musical works in 1897,⁹³⁷ and at that point the right applied to public performances regardless of whether they were for profit. When the performance right was extended to other specified works in 1909, Congress introduced a “for profit” requirement for musical and certain other works. The Act provided that the copyright owner of a musical composition had the exclusive right ‘[t]o perform the copyrighted work publicly for profit’,⁹³⁸ and the copyright owner of a ‘lecture, sermon, address, or similar production’ had to exclusive right ‘[t]o deliver or authorize the delivery of the work for profit’.⁹³⁹ This “for profit”

⁹³⁴ Ibid 429. However, Asprey J asserted that the conclusion on liability was made ‘quite apart from this consideration’.

⁹³⁵ It should be noted that the interest was not purely in “public access” *per se*, but also included maintaining the value of the market for sheet music.

⁹³⁶ See *Herbert v Shanley* 242 U.S. 591 (1917).

⁹³⁷ Borge Varmer, ‘Study No. 16: Limitations on Performing Rights’ (October 1958) 81 <<http://copyright.gov/history/studies/study16.pdf>> (citing 29 STAT. 481 [1897]).

⁹³⁸ *Copyright Act of Mar 4, 1909*, 35 Stat. 1075 (1909) §1(e).

⁹³⁹ Ibid §1(c).

limitation did not apply to dramatic works, due to a belief that *any* public performance of a dramatic work would have a negative impact on the owner's ability to make a profit from it.⁹⁴⁰

Despite already existing under the previous 1897 Act, the proposal for a public performance right without a "for profit" limitation in the initial draft bill for the 1909 Act was criticised by those concerned that the right would unduly restrict the enjoyment of music and interfere with a legitimate public interest.⁹⁴¹ The suggestion of a "for profit" restriction originated from Mr Arthur Steuart, chairman of the American Bar Association's Copyright Committee.⁹⁴² Testifying before Congress, Steuart noted that there had been 'a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music'.⁹⁴³ He went on to explain that:

There is no reason in the world why a child or a regimental band passing down the street singing or performing a copyrighted piece of music should be penalized for the act when it is a mere matter of entertainment and a mere matter of the use of music which has been bought or learned. The thing to be protected is the business of the music publishers and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed. So that the introduction of the words "for profit" in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free use and the free enjoyment of music.⁹⁴⁴

In sum, there was a concern that the scope of exclusive rights over performances might encroach upon the ability of the public to enjoy the works. Furthermore, as Loren observes, the debates leading up to the 1909 Act carried a general sense that one who had purchased a copy of a musical work (in sheet music, for example) had an "implied right" to publicly perform it.⁹⁴⁵

⁹⁴⁰ Lydia Pallas Loren, 'The Evolving Role of for Profit Use in Copyright Law: Lessons from the 1909 Act' (2009) 26 *Santa Clara Computer & High Technology Law Journal* 255, 266. See also Makeen F Makeen, 'The Reception in Public Dilemma Under US Copyright Law' (2011) 58 *Journal of the Copyright Society of the USA* 355, 356–57.

⁹⁴¹ See Loren, above n 940, 262.

⁹⁴² Ibid. See further E Fulton Brylawski and Abe Goldman (eds), 'Hearings Before the House and Senate Committees on Patents on S. 59-6330 and H.R. 59-19853 (1906)' in *Legislative History of the 1909 Copyright Act* (1976) 161.

⁹⁴³ Brylawski and Goldman, above n 942, 162.

⁹⁴⁴ Ibid.

⁹⁴⁵ Loren, above n 940, 264. An example cited by Loren is the case of *John Church Co v Hilliard Hotel Co* 221 F. 229 (2d Cir. 1915) 230, where the Second Circuit held that '[w]hen the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them'.

Herbert v Shanley (1917) and the expansion of “for profit”

*Herbert v Shanley; John Church Company v Hilliard Hotel Company*⁹⁴⁶ was a consolidation of two appeals before the US Supreme Court. The question for the Court was ‘whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit’.⁹⁴⁷ The Second Circuit in *John Church Company v Hilliard Hotel Company*⁹⁴⁸ had decided in the defendant’s favour, in part, because it was concerned that the public’s free enjoyment of music would be affected if “for profit” was read broadly to include merely making a business more attractive.⁹⁴⁹

The Supreme Court, in contrast, focussed upon the protection of the copyright owners’ property rights. Justice Holmes, writing for the Court, found that ‘[i]f the rights under the copyright are infringed only by a performance where money is taken at the door they are very *imperfectly protected*’.⁹⁵⁰ His Honour emphasised the need for a broad interpretation in order to prevent the defendants’ ability to ‘compete with and even destroy the success of the monopoly the law intends the plaintiff to have’.⁹⁵¹ Justice Holmes explained that:

The defendants’ performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important.⁹⁵²

This total “package” paid for was the dining environment, which ‘to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal’.⁹⁵³ In conclusion, Justice Holmes held that ‘[w]hether [music] pays or not the purpose of employing it is profit and that is enough’.⁹⁵⁴ Under this view, the potential revenue gains that could be derived from the public became the priority, while the public interest in having access to and enjoying music faded into the background.

According to Tim Wu, the opinion appears to rely on ‘simple economics, but underlying it is a substantive view of the rights of the copyright holder’ which ‘saw copyright as a commercial property to an extent never reached before’.⁹⁵⁵ Tim Wu highlights the drastic effect of Justice Holmes’

⁹⁴⁶ 242 U.S. 591 (1917).

⁹⁴⁷ Ibid 593.

⁹⁴⁸ 221 F. 229 (2d Cir. 1915).

⁹⁴⁹ Loren, above n 940, 272.

⁹⁵⁰ *Herbert v Shanley* 242 U.S. 591 (1917) 594 (emphasis added).

⁹⁵¹ Ibid.

⁹⁵² Ibid 594–95. Note that eleemosynary means ‘relating to or dependent on charity’: ‘*Eleemosynary*’ Oxford Dictionaries <<https://en.oxforddictionaries.com/definition/eleemosynary>>.

⁹⁵³ *Herbert v Shanley* 242 U.S. 591 (1917) 595.

⁹⁵⁴ Ibid.

⁹⁵⁵ Wu, ‘Copyright’s Communications Policy’, above n 230, 305.

decision, which reframes subsequent perspectives on the exclusive rights granted under copyright. Wu explains that:

His view, now mainstream, presumed that the copyright owner should have the power to demand a license for every revenue stream dependent on the copyrighted work — even revenue from adaptations to other media, or revenue arising from improved restaurant atmospherics. This, this *Herbert* principle, has had a powerful impact on copyright’s theory and evolution.⁹⁵⁶

As Lydia Loren argues, the Court should have acknowledged that ‘perhaps Congress meant to “imperfectly protect” the public performance right as a means of balancing the public’s interest in the enjoyment of music’.⁹⁵⁷ In light of the broad interpretation adopted by the Supreme Court in *Herbert v Shanley*,⁹⁵⁸ it may be said that ‘[t]he “for profit” requirement became a non-test’.⁹⁵⁹ A case which illustrates this point is *Associated Music Publishers Inc v Debs Memorial Radio Fund Inc*.⁹⁶⁰ Here the defendant was a non-profit corporation which ran a radio station, with one-third of its air-time dedicated to paying advertisers. The advertising revenue was used to support the other two-thirds of its programming. The plaintiff alleged that infringing performances occurred when the broadcasts was supported by advertising. Even though the overall purpose of the station was charitable, the Second Circuit held that the relevant programme was “for profit” because it ‘resulted in profit to the advertisers and to an increment to its own treasury, whereby it might repay its indebtedness ... and avoid an annual deficit’.⁹⁶¹ As Melville Nimmer observes, this would mean that ‘virtually no performance which is paid for directly or indirectly can ever be regarded as not for profit’.⁹⁶² Furthermore, it is arguable that the profits to the advertisers should not be relevant, as it is not the advertisers who are alleged to be performing.

Eventually, the “for profit” requirement was removed by the 1976 Copyright Act. The House Report for the final bill for the 1976 Act emphasised authorship incentives in explaining its rationale for doing so:

⁹⁵⁶ Ibid 305–6. Loren also highlights the importance of Justice Holmes’ final paragraph to the development of copyright law, having been cited by over seventy federal court decision and influencing copyright decisions overseas, and also accepted favourably in the scholarly literature that followed: Loren, above n 940, 274.

⁹⁵⁷ Loren, above n 940, 274.

⁹⁵⁸ 242 U.S. 591 (1917).

⁹⁵⁹ Loren, above n 940, 280.

⁹⁶⁰ 141 f.2d 852 (2d Cir. 1944). It should be noted that this case is said to occupy ‘the outer limits’ of the *Herbert v Shanley* ruling: Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (Matthew Bender, 1974) vol 1, 404.

⁹⁶¹ *Associated Music Publishers Inc v Debs Memorial Radio Fund Inc* 141 f.2d 852 (2d Cir. 1944) 855.

⁹⁶² Nimmer, above n 960, § 107.32.

The line between commercial and “non-profit” organizations is increasingly difficult to draw. Many “non-profit” organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that *performances and displays are continuing to supplant markets for printed copies* and that in the future a “not for profit” exemption could not only hurt authors but could dry up their incentive to write.⁹⁶³

In sum, the “for profit” limitation, already eroded by the Supreme Court in *Herbert v Shanley*,⁹⁶⁴ was finally put to rest in favour of protecting authors and incumbent copyright industries (here, the print industry for music) from “market harm”.

4 Continuation of a Market-Protectionist Heritage

A trend may be discerned from the historical development of public performance rights: as new means of exploiting subject matter became available, rightsholders would raise concerns about their inability to reap the rewards of their labour and seek remedies before the courts or petition that legislators should remedy the situation. The owners’ positions could be framed in terms of “harm” to property rights due to negative impacts on existing licensing markets. These considerations featured prominently in the reasoning of the courts, and legislative terms such as “for profit” or “public” took on meanings that seemed to be inevitably tied to market harm. These approaches have been accepted as established law, and applied to communications *to* the public.

As discussed in Chapter IV, the notion of the “copyright owner’s public” applied in Australia⁹⁶⁵ is circular, i.e. it provides no meaningful definition except to say that a communication or transmission to *that* public is within the owner’s exclusive right.⁹⁶⁶ Australian courts have attempted to refine the concept by emphasizing that it has to be *fairly* considered a part of the copyright owner’s public.⁹⁶⁷ Nevertheless, applications of this concept tend to emphasise the commercial nature (if any) of the

⁹⁶³ H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 62–63 (emphasis added).

⁹⁶⁴ 242 U.S. 591 (1917).

⁹⁶⁵ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140. See application of “the copyright owner’s public” to the communication right in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 367–368; *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 330–331.

⁹⁶⁶ Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2’, above n 22, 402.

⁹⁶⁷ *Ibid*, citing, eg, *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd; Performing Right Society Ltd v Gillette Industries Ltd* [1943] 1 All ER 413.

defendants operations.⁹⁶⁸ It is unclear how this “commercial use” consideration fits into the assessment as a limiting principle; commercial use is not an express requirement for the exercise of a copyright owner’s exclusive rights (or for the communication right) in Australia.⁹⁶⁹

The public/private distinction under EU jurisprudence carries an additional layer of complexity. One must compare the defendant’s communication with the initial communication, and determine whether the defendant is using the same or different technical means, before asking whether the communication is “to the public”.⁹⁷⁰ The result is unprincipled and convoluted decision-making by the courts based on seemingly arbitrary factors, without a clear explanation of why the defendant’s *particular acts* should be considered an exercise of the copyright owner’s exclusive rights. By applying the “new public” standard, the CJEU is not engaging with the relevant “act”, or considering how separate acts may fall within the exclusive making available right. The use of “the public” and concepts such as the “new public” to delineate various “markets” for exploitation by the copyright owner is an opaque approach that is prone to manipulation. The concept could give rise to an infinite number of “publics”, without requiring any attempt at identifying the relevant act. Likewise, the notion of “private” communications would be erased if every person is conceived as members of the “copyright owner’s public”.⁹⁷¹ Along similar lines, US courts have at times utilised the “for profit” nature of the defendant’s activities to justify a finding of infringement, with emphasis on its relevance to “the public”, in particular.⁹⁷² In these instances, the relevance of commerciality tends to be asserted, but not explained.

These concepts do little to advance our understanding of “the public” as an element of the making available right. Ultimately, the assessment of the courts morph into a consideration of where the owner’s copyright markets should extend. Regardless of the terminology used to express these limitations — whether “public” or “for profit” — courts have construed them primarily with copyright

⁹⁶⁸ It should be acknowledged that the CJEU in *TVCatchup* does recognise that ‘a profit-making nature does not determine conclusively whether a retransmission, such as that at issue in the main proceedings, is to be categorised as a “communication” within the meaning of Article 3(1) of Directive 2001/29’: *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [43].

⁹⁶⁹ Cf Australian Government, Copyright Convergence Group, ‘Highways to Change: Copyright in the New Communications Environment’ (August 1994) 19 and 29 (‘[The CCG] recommends that a provision be inserted into the Act which deems transmissions of copyright material which are made for a commercial purpose to be transmissions to the public.’).

⁹⁷⁰ See Figure 4.2 in Chapter IV of this thesis.

⁹⁷¹ It should also be noted that profits or markets are relevant not only to the “new public” standard, but give rise to a fault-type presumption when linking to infringing content: see *GS Media BV v Sanoma Media Netherlands BV*, *Playboy Enterprises International Inc*, *Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

⁹⁷² See, eg, *On Command Video Corporation v Columbia Pictures Industries* 777 F. Supp. 787 (N.D. Cal. 1991) 790, and *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2508.

owner's interests in mind. If any activity is "profitable" (i.e. licensing fees can be recouped)⁹⁷³ then this activity is automatically seen as detracting from the copyright owner's interest, regardless of the public benefits of such an activity. In doing so, it overemphasises authorship incentives, and does not take into account copyright's dissemination function and the importance of public access to copyright content. This approach to "the public", coupled with a broad interpretation of the "act" of making available, means that there is no effective limitation on the scope of the making available right.

Section B. The Relevance of Copyright Markets

Having traversed the historical origins of current conceptions of "the public", this Section elaborates on their inadequacies, and considers if they have any grounding in sound copyright policy. This Section asks the question: if we are to consider copyright "markets" in a principled manner when analysing "the public", what matters should be taken into account? The discussion here shows that existing concepts tend to limit our understanding of markets and obscure considerations that are relevant to the advancement of copyright's dissemination function. It also shows that the notion of "markets" needs to be understood in a broader context.

Therefore, this Section considers how our analysis of "the public" could be advanced if we stop limiting our conception of markets to those controlled by incumbent disseminators or copyright owners. In contrast to the superficial consideration of copyright owners' markets, this discussion provides a more dynamic and comprehensive account of copyright markets. It calls for analysis that takes changing markets and the emergence of new markets into account, as envisaged by Schumpeter's theory of "creative destruction".

1 Implied Licences and "Markets"

One conception of copyright markets considers that any uses that fall beyond an implied licence is part of the copyright owner's licensable "public". As Ginsburg explains, if 'the author made the work freely available on the website, then it follows that the author consents to third-party links to that website'.⁹⁷⁴ Taking this interpretation, the condition would apply differently if the content was made available on the source website without the permission of the owner, because in this instance, 'there

⁹⁷³ It should be recognised that extensive discussion of the link between transaction costs and copyright have been undertaken by other scholars: see, eg, Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82(8) *Columbia Law Review* 1600; David M Diesen and Shubha Ghosh, 'The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction' (2005) 47 *Arizona Law Review* 61.

⁹⁷⁴ Jane C Ginsburg, *Hyperlinking and Infringement: The CJEU Decides (Sort Of)* (17 March 2014) The Media Institute <<http://www.mediainstitute.org/IPI/2014/031714.php>>.

will have been no license, implied or otherwise'.⁹⁷⁵ Ginsburg nonetheless recognises that this implied licence gloss on the “new public” criterion is problematic, and questions whether this would cover ‘increasing access for those members of the public who may otherwise have had difficulty finding the source websites’⁹⁷⁶ (a scenario that subsequently arose in *Sanoma*⁹⁷⁷ and *Filmspeler*).⁹⁷⁸ In addition, Ginsburg notes that it creates a kind of “exhaustion” doctrine for the right of communication to the public.⁹⁷⁹

Furthermore, viewing the copyright owner’s “new public” as the lack of an implied licence reinforces a permission culture,⁹⁸⁰ which assumes that all acts causally connected to the public accessibility of the work (however tenuous) falls within the exclusive rights of the copyright owner.⁹⁸¹ Under this view, unless the owner decides (notionally, implicitly or otherwise) that they have already granted permission, then further authorisation by the owner is required. Again, the interest of the copyright owner and their protection from “market harm” is paramount under this view.⁹⁸²

In summary, this “implied licence” rhetoric excludes important considerations, which could lead to an interpretation of “the public” that lacks boundaries. We should recognise that “the public” is a limitation on the copyright owner’s exclusive making available right, and that such limitations allow room for technological innovations that facilitate communications and access to content.

2 *The Customs and Reasonable Expectations of Users*

In the alternative, the limits of the scope of “the public” may be conceptualised using norms of usage that are practiced in relation to copyright works. In other words, the copyright owners’ exclusive right to communicate to “the public” should be tempered by the public’s reasonable expectation of what freedoms should adhere to their possession of a copyright work. The US Supreme Court’s *Aereo* may have been alluding to this, when it found that subscribers who ‘receive performances in their

⁹⁷⁵ Ibid. Note that this interpretation of the “new public” requirement does not appear to have been taken up by the CJEU in the subsequent decision of *BestWater International GmbH v M Mebes & S Potsch* (Court of Justice of the European Communities, Case C-348/13, 21 October 2014), as the allegedly unauthorised nature of the initial YouTube post did not change the Court’s analysis.

⁹⁷⁶ Ginsburg, above n 974.

⁹⁷⁷ (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

⁹⁷⁸ *Filmspeler* (Court of Justice of the European Union, Case C-527/15, 26 April 2017).

⁹⁷⁹ Ginsburg, above n 974.

⁹⁸⁰ See Lawrence Lessig, *Free Culture* (Penguin Group, 2003) 192–93.

⁹⁸¹ See, eg, the assertion in *Hal David v Showtime/The Movie Channel, Inc* 697 F. Supp. 752 (S.D.N.Y. 1988) 759 that ‘Congress intended the definitions of “public” and performance’ to encompass each step in the process by which a protected work wends its way to its audience’.

⁹⁸² See, eg, Ginsburg, above n 974. Ginsburg explains the *Sanoma* decision as follows:

Subjecting the second communication to the copyright holder’s authorization would create an unseemly situation of “double dipping.” But if the copyright owner hasn’t been remunerated because the initial communication was infringing, then the second communication cannot result in “double dipping.”

capacities as owners or possessors of the underlying works’ would not be performing to the public due to their ‘relationship to the underlying work’.⁹⁸³ However, this approach to “the public” is problematic because it conflates physical possession with a right to exercise the exclusive rights that attach to the intangible property.⁹⁸⁴

Arguments along similar lines have been raised in the context of linking. Charles Oppenheim, for example, has stated:

The copyright owner made a deliberate choice to place his Web site online, with full knowledge (presumably) of how the system operates. Linking of Web sites to one another is extremely common and is, arguably, both the *raison d'être* of the WWW and the reason for its success. It is custom and practice, and so if a copyright owner puts up a Web site, he MUST expect others to link into his site. Services such as Web search rights could not operate without this ability.⁹⁸⁵

It is possible to view the implied licence approach and the “reasonable expectations of the public” approach as two sides of the same coin. Under the former, we consider that the copyright owner has been put on notice regarding the uses that can and will be made of their copyright work, and by proceeding to place their work online, they are consenting to such activities. Under the latter approach, our focus may be on the expectations of the public, but the perspective (or notional authorisation) of the owner is nevertheless implicitly taken into account.

These views are not unlike one of the rationales for introducing the “for profit” limitation on the US public performance right for musical works in 1909. As Loren explains, ‘at the time of the debates leading to the 1909 Act there was a sense of an “implied right” to publicly perform a musical work when one purchased a copy of the work, for example in sheet music form’.⁹⁸⁶ This was furthered bolstered by the practice of expressly stating on the copy of sheet music that the purchaser had a

⁹⁸³ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2510.

⁹⁸⁴ See the analysis of *Aereo* in Chapter IV – Section C. Interpretations of “the Public”.

⁹⁸⁵ Charles Oppenheim, ‘Cause for Concern? Copyright Battles: The Shetlands’ (1997) 10(2) *Learned Publishing* 161, 163, quoted in Mark Sableman, ‘Link Law Revisited: Internet Linking Law at Five Years’ (2001) 16(3) *Berkeley Technology Law Journal* 1273, 1330. Note that a similar approach is found in the German Federal Court of Justice decision, *Abbildung von Kunstwerken als Thumbnails in Suchmaschine* [Display of Works of Art as Thumbnails in Search Engine], GRUR, 628 (2010) [Ger]. As explained in Florian Potzlberger, ‘Google and the Thumbnail Dilemma—“Fair Use” in German Copyright Law?’ (2013) 9(1) *I/S: A Journal of Law and Policy for the Information Society* 139, 148, the German court held that:

[T]he uploading of images on the Internet, without taking any technical restrictions to block the image search function, would—from an objective viewer’s perspective—constitute implied consent in the use of these works. ... [R]ight holders had to face the commonly accepted use, regardless of the appellant’s understanding of what was common. Any implied consent could have been withdrawn only by actually taking the addressed technological steps; a mere objection to the future use of her work towards Google would not have been sufficient. (emphasis added, citations omitted)

⁹⁸⁶ Loren, above n 940, 264.

permission to publicly perform the musical work.⁹⁸⁷ Ricketson and Ginsburg note similar sentiments reflected in historical versions of article 11 of the Berne Convention, which sets out the public performance right afforded to authors of dramatic and dramatico-musical works.⁹⁸⁸ They explain that the right, as adopted into the Act of 1886 (then article 9) explicitly required that authors wishing to prevent unauthorised public performances of their music would have to state such a reservation on the actual copies of the musical work.⁹⁸⁹ This requirement was said to reflect ‘the assumption in some national laws that the public should be free to perform musical works, unless this was clearly forbidden in advance’.⁹⁹⁰

3 *Owners vs Users: The Weaknesses of Existing Rhetoric*

The preceding discussion shows that the “implied licence” rhetoric and references to customs and norms of usage to conceptualise limitations on exclusive rights are not new. It may be argued that they reflect the competing interest of the public in access and the interest of copyright owners in protecting their markets. This balance of competing interests that copyright law seeks to maintain is important. However, simply stating these interests in different terms does not necessarily advance our legal analysis, particularly if we are trying to support the evolving role of copyright in the digital age with clear principles.

Digital and internet technologies are developed and adopted notoriously quickly, and along with these changes comes a shift in our understanding of how information and content can be used and manipulated. These understandings could form the norms of usage applicable to copyright content. A perspective put forward by Paul Goldstein is that a goal of copyright law in the 21st century is to restrain and transform norms for private as well as public behaviour,⁹⁹¹ but should this always be the case? Copyright rules may have a role to play in guiding norms around enjoyment of artistic and creative works, but this does not mean that copyright should seek to distort norms for the benefit of incumbent disseminators in the market.

The perspectives canvassed above omit an important consideration — the role of copyright (or more specifically, the making available right) in mediating the rivalries and disputes between

⁹⁸⁷ Ibid, citing Bernard Korman, ‘Performance Rights in Music Under Sections 110 and 118 of The 1976 Copyright Act’ (1977) 22 *New York Law School Law Review* 521, 523–24.

⁹⁸⁸ Ricketson and Ginsburg, above n 71, 708.

⁹⁸⁹ Ibid.

⁹⁹⁰ Ibid, citing *Copyright (Musical Compositions) Act 1882* (UK) s 1; *Copyright Act 1870* (Germany) art 50[2].

⁹⁹¹ Goldstein, above n 35, 275. Goldstein states:

One goal for copyright in the twenty-first century is to establish its principles of restraint and permission as a norm that is as effective as the norms of real property. ... The great task will be to identify and to implement those measures that can effectively transform copyright into a norm of private as well as public behaviour.

disseminators.⁹⁹² Furthermore, these approaches do not take into account the transitions that occur in the process of “creative destruction” as a result of innovation and new technologies. The markets that emerge or survive rivalries initiated by new technologies can in turn affect norms, customs and expectations regarding how users interact with copyright works. These matters need to be considered more explicitly if we are to develop a copyright framework that is fit for the digital environment. While the interests of new rival disseminators may not align perfectly with that of the public, it may be the closest proxy for the interest of the public in access to copyright works.

4 A Missing Perspective: Copyright’s Dissemination Function and the “Creative Destruction” of Copyright Dissemination Markets

Moving away from the view that authorship incentives alone should drive the scope of “the public” entails discarding the assumptions built into that view. One of those assumptions is that every conceivable “market” will provide an incentive to create which outweighs the harms of expanded exclusive rights. In addition, we should not treat copyright dissemination markets as static concepts, but appreciate the constant evolution of these markets as communication technologies develop. A static view of copyright dissemination markets could serve to hinder the development of new technology, and the new markets reliant upon such technology.

Relevant to these points is Tim Wu’s argument, examined in Chapter II, that copyright policy should take into account the rivalries between disseminators of copyright content, which give effect to copyright’s communications policy.⁹⁹³ The ‘perennial gale of creative destruction’⁹⁹⁴ brought about by the development of new communication technologies disrupt the “markets” of incumbent disseminators, and at first blush appear to harm the incentives of authors to create. However, our view of copyright markets may benefit from a longer term view that takes into account the positive effect of creative destruction on public access to creative content. This positive effect does not necessarily require that copyright markets are destroyed, but merely that these markets be conditioned by competitive pressures or *threats* of destruction.⁹⁹⁵ In other words, markets pressures amongst disseminators would discipline them so as not to be complacent.

If we do not explicitly consider incumbent disseminators and the markets within which they operate, then they will continue to hide behind the purported interests of copyright owners and the authorship incentivising objective of copyright, distorting our view of how copyright’s functions may be

⁹⁹² See Wu, ‘Copyright’s Communications Policy’, above n 230.

⁹⁹³ Ibid.

⁹⁹⁴ See Schumpeter, above n 236.

⁹⁹⁵ See Ghosh, ‘Decoding and Recoding Natural Monopoly, Deregulation, and Intellectual Property’, above n 229, 1166 ([P]otential competition could discipline a dominant firm in its pricing and distribution decisions’).

advanced. Uncritical adherence to this objective may impede new means of dissemination and the emergence of new markets, without considering the long run benefits that authors could reap from the development of diverse dissemination markets. We may appear to be protecting creators' licensable "markets" for copyright works by adopting expansive interpretations of exclusive rights, but in reality we are protecting the incumbent disseminator from the "creative destruction" of copyright dissemination markets and development of new means of dissemination.⁹⁹⁶

These new means of dissemination provide copyright owners with alternate markets through which to reach members of the public that are seeking access to copyright works. Rather than impeding the development of new technologies to bolster incumbent dissemination markets, the law should take a nuanced approach that appreciates the changes that have to occur as part of the process of "creative destruction".⁹⁹⁷ A problem in current copyright analysis of "the public" is that markets for copyright content are assumed to be stable.⁹⁹⁸ If not perceived as stable, the assumption is that they should only be allowed to expand. Any reduction or demise of these markets is perceived solely as harm to copyright owners' interests and incentives to create, without due consideration of how this is inherent in any process of creative destruction. Therefore, pre-existing markets should not be seen as deserving of optimal protection by default; our analysis should also take into account incentives to invest in new communication technologies and facilitate new markets for the dissemination of copyright content.

Section C. Impacts of Copyright Law on Technological Innovation

If we accept that copyright's dissemination function is underappreciated and should be positively nurtured, then how can courts and legislators direct their attention to this function? In particular, we may ask how this function may be given effect through the purportedly "technology neutral" right to make available to the public. This thesis has previously discussed the objective of "technology neutral drafting", which is said to "futureproof" these legislative provisions from the need of constant legislative updates.⁹⁹⁹ A more pessimistic view of technology neutral drafting is that this is a delegation of lawmaking functions to the courts, because the broad and ambiguous terminology can be interpreted in diverse ways.¹⁰⁰⁰ Therefore, "technology neutrality" should not be seen as an end in

⁹⁹⁶ See Wu, 'Copyright's Communications Policy', above n 230, 280: '[T]he author-centrism of copyright theory has left little basis to evaluate or criticize copyright's decisions that create communications policy.'

⁹⁹⁷ See the discussion in Chapter II – Section D. The Dissemination Function of Copyright.

⁹⁹⁸ Stability is assumed to be a virtue in this context. This is not surprising, as '[a]n efficient, wealth-maximizing system of property is reinforced by stable property relationships, and in turn efficient arrangements can support stability': Ghosh, 'Managing the Intellectual Property Sprawl', above n 168, 1023.

⁹⁹⁹ See Samuelson, 'Five Challenges for Regulating the Global Information Society', above n 256, 321 (discussed in Chapter II of this thesis).

¹⁰⁰⁰ Corbett, above n 261, 168.

itself, but merely as a drafting approach that defers explication of the law to a decision-maker in the future.

A law drafted in technology neutral terms should not be confused as a law that is technology neutral in *effect*. It is arguably fallacious to call for copyright laws that are technologically neutral in effect. Technological changes may impact on the viability and profitability of copyright dissemination markets, and the transaction costs incurred when commercialising content via these markets. New means of communication are likely to change the policy considerations relevant to the scope of copyright law. A purportedly technologically neutral exclusive right which dictates that copyright must expand to apply to all “like” contexts would not be a *neutral* result at all, as such a mandate could impede technological innovation by insisting that new means of communication emulate existing technological capabilities. In other words, a purportedly technology neutral law could provide preferential treatment to incumbent disseminators.

The scope of the making available right in copyright could have an impact on how technology is designed to deliver content. Technology and the ease of access to content may in turn change consumer behaviour or expectations towards content-delivery, and perspectives as to what should be “legal”.

1 Critical Theories of Technology

A much broader question that we may ask, before considering the relationship between technological change and copyright law, is what impact technology has on society, and vice versa. One may look to “technological determinism” a philosophy of technology which posits that social progress is driven by technological innovation.¹⁰⁰¹ On the other end of the spectrum is “social determinism”, which is a belief that ‘technological innovations in society are driven by social progress’.¹⁰⁰²

A strict view of technological determinism provides that technology ‘has its own autonomous logic of development ... once introduced, bends the recipient social system to its imperatives.’¹⁰⁰³ This position is subject to criticism, because to speak of technology as deterministic is too stringent and it is ‘hard to imagine a theory of history meeting this definition that would be plausible’.¹⁰⁰⁴ Adherence to technological determinism isolates technological change from its social and economic context, and

¹⁰⁰¹ Benjamin Branda, ‘Up in the Airways: Technological Determinism, the Public Performance Right, and Aereo’ (2015) 15(2) *Wake Forest Journal of Business and Intellectual Property Law* 287, 290.

¹⁰⁰² *Ibid.*

¹⁰⁰³ Andrew Feenberg, *Transforming Technology : A Critical Theory Revisited* (Oxford University Press, 2002) 138.

¹⁰⁰⁴ Bruce Bimber, ‘Three Faces of Technological Determinism’ in Merritt Roe Smith and Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (The MIT Press, 1994) 79, 99 (see also 89).

in addition, attributes a sense of neutrality to technology.¹⁰⁰⁵ David Morrow disputes the purported value-neutrality of technology, and argues:

[T]he effects of any technology depend on the way that technology is used, which is determined by its (potential) users, rather than by the technology itself. ... [W]hen people do bad things with some piece of technology, it is because of some moral failure on the users' part.¹⁰⁰⁶

Put simply, technology is designed to be utilised by people in society to bring about certain results. Therefore, Morrow argues that 'technologies mediate people's behaviour by changing the attractiveness of various options.'¹⁰⁰⁷ The use of technology to 'do bad things' can lead to a pessimistic view of 'technological determinism'. It has been observed that since the Enlightenment, technology was seen as the vehicle to realize the dream of Progress, by providing seemingly neutral systems of production and control.¹⁰⁰⁸ However, Leo Marx argues that 'as the history of the twentieth century has confirmed, high technical skills may serve to mask, or to displace attention from, the choice of ends',¹⁰⁰⁹ and this has set up 'the way for an increasingly pessimistic sense of the technological determinism of history'.¹⁰¹⁰

Likewise, Andrew Feenberg is critical of technological determinism and argues that technology embodies political decisions but obscures their consequences by purporting to be neutral in design.¹⁰¹¹ Feenberg rejects two widely held beliefs that are said to support our faith in progress: 'that technical necessity dictates the path of development, and that the pursuit of efficiency provides a basis for identifying that path.'¹⁰¹² He argues that:

¹⁰⁰⁵ See Feenberg, above n 1003, 5.

¹⁰⁰⁶ David R Morrow, 'When Technologies Makes Good People Do Bad Things: Another Argument Against the Value-Neutrality of Technologies' (2013) 20(2) *Science and Engineering Ethics* 329, 331.

¹⁰⁰⁷ Ibid 333.

¹⁰⁰⁸ Leo Marx, 'The Idea of "Technology" and Postmodern Pessimism' in Merritt Roe Smith and Leo Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (The MIT Press, 1994) 237.

¹⁰⁰⁹ Ibid 253–254.

¹⁰¹⁰ Ibid 237.

¹⁰¹¹ Andrew Feenberg, 'Subversive Rationalization: Technology, Power, and Democracy' (1992) 35 *Inquiry* 301. See also Feenberg, above n 1003, 3, where he argues for the democratic transformation of technology:

What human beings are and will become is decided in the shape of our tools no less than in the action of statesmen and political movements. The design of technology is thus an ontological decision fraught with political consequences. The exclusion of the vast majority from participation in this decision is profoundly undemocratic.

¹⁰¹² Feenberg, above n 1011, 318. At 313–14, Feenberg explains how technology adapts to social change using the example of steamboat boilers and safety standards. Safer designs cost more and were protested by shipowners, despite thousands of casualties within a year. It took an extended political struggle before uniform codes issued by the American Society of Mechanical Engineers to change the definition of 'a boiler' to encompass these safer designs. Feenberg calls this the "technical code" of the object which mediates the process of change, because the code responds to society's perspectives at the level of technical design. Eventually,

Technologies are selected by these interests from among many possible configurations. Guiding the selection process are social codes established by the cultural and political struggles that define the horizon under which the technology will fall. Once introduced, technology offers a material validation of the cultural horizon to which it has been preformed. I call this the “bias” of technology: apparently neutral, functional rationality is enlisted in support of a hegemony. The more technology society employs, the more significant is this support.¹⁰¹³

In contrast, a social constructivist view of technology ‘rejects the usual assumption that technologies succeed on purely functional grounds’ and challenges our tendency to exclude technology and scientific theories from sociological examination.¹⁰¹⁴ Based on the constructivist argument that technologies are ‘underdetermined by scientific and technical criteria’, Feenberg argues that ‘first, there is generally a surplus of workable solutions to any given problem, and social actors make the final choice among a batch of technically viable options; and second, the problem-definition often changes in the course of solution.’¹⁰¹⁵

A more moderate view of technology, and a more sensible one which takes into account some of the criticisms canvassed above, is “soft” technological determinism. A soft technology determinist, ‘[i]nstead of treating “technology” *per se* as the locus of historical agency, ... [locates] it in a far more various and complex social, economic, political, and cultural matrix.’¹⁰¹⁶ That is, if we accept that technology’s ‘power to effect change may be derived from certain specific social-economic and cultural situations’, then technological determinism ‘refers to the human tendency to create the kind of society that invests technologies with enough power to drive history’.¹⁰¹⁷ It should be noted that “soft technological determinism” is arguably not determinism at all, because ‘these accounts attribute causal agency in the history of technology to human social practice and beliefs, rather than to technology or prior technological laws.’¹⁰¹⁸ It is perhaps more suitably considered a form of social

conformity with these baseline standards is no longer considered an expensive add-on but regarded ‘as an intrinsic production cost’.

¹⁰¹³ Ibid. Feenberg further states:

As Foucault argues in his theory of “power knowledge”, modern forms of oppression are not so much based on false ideologies as on effective techniques ‘encoded’ by the dominant hegemony to reproduce the system. So long as that act of choice remains hidden, the deterministic image of a technically justified social order is projected.

See further Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, 1980).

¹⁰¹⁴ Feenberg, above n 1011, 305.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Leo Marx and Merritt Roe Smith, ‘Introduction’ in Merritt Roe Smith and Leo Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (The MIT Press, 1994) ix, xiii.

¹⁰¹⁷ Ibid xiv. See also Bimber, above n 962, 87, explaining that ‘[t]echnology is the medium through which physical laws, some of which we learn through science, shape the course of human events’.

¹⁰¹⁸ Bimber, above n 1004, 88.

constructivism, or at least a view occupying a middle ground between technological determinism and social constructivism.

Another theory that seems to complement “soft technological determinism” is “technological momentum”, proposed by Thomas P Hughes as a more nuanced approach which takes into account the temporal dimension of technological change in society.¹⁰¹⁹ Hughes’s theory of “technological momentum” is that ‘younger developing technological systems tend to be more open to sociocultural influences while older, more mature systems prove to be more independent of outside influences and therefore more deterministic in nature’.¹⁰²⁰ He notes that ‘shaping it is easiest before the system has acquired political, economic, and value components’.¹⁰²¹ In other words:

A technological system can be both a cause and an effect; it can shape or be shaped by society. As they grow larger and more complex, systems tend to be more shaping of society and less shaped by it.¹⁰²²

Thus, it seems that the applicable theory of technology gravitates on a sliding scale between social determinism and technological determinism at different times, depending on the extent to which a technology has entrenched itself within society.

A point that can be distilled from these critical theories of technology is that systems of communication should not be seen to be immune from the political, economic and social context. Furthermore, these technological contexts shape the applicable legal rules and regulations, which in turn affect choices about technological design and capabilities. Therefore, these technologies do not just develop in isolation, but the law mediates the attractiveness of various technological options.

2 Copyright and the Inhibition of Technological Innovation

Following on from this broad discussion on technology and society, we may consider what role copyright law has in this context. Benjamin Branda, who argues for a technological deterministic view in the adjudication of copyright cases, makes an interesting point about the role of judges:

Even though judges cannot rule on the aesthetic value of a work, they are entitled to determine the value new technology has, or will have, in a society because there is no corresponding

¹⁰¹⁹ Thomas P Hughes, ‘Technological Momentum’ in Merritt Roe Smith and Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (The MIT Press, 1994) 101, 112. Hughes describes “technological momentum” as ‘located somewhere between the poles of technological determinism and social constructivism’.

¹⁰²⁰ Ibid 101.

¹⁰²¹ Ibid 112.

¹⁰²² Ibid.

doctrine of jurisprudence that requires judges to evaluate technological advancements in a neutral light.¹⁰²³

In other words, regardless of whether these rulings take into account the appropriate role of that technology has in shaping society, these decisions are to an extent *predicting* the value of the technology, and in the same process, *determining* its prospective value by placing legal limits upon its use.

Perspectives on technological design and the scope of law and regulation are not new in legal scholarship. An earlier iteration of these arguments focussing on software code is Lawrence Lessig's proposition in 1999 that "Code is Law", highlighting the use of computer code and the design of software to regulate behaviour in cyberspace, as opposed to relying on laws to regulate behaviour.¹⁰²⁴ Building on Lessig's idea and focusing instead on the responses of code-writers to law, Tim Wu argues that laws and other regulations, by preventing groups from carrying out activities that they would otherwise wish to do, leads to avoidance mechanisms that are implemented through code.¹⁰²⁵ Wu's argument is that 'code can influence the effect of law by *redesigning* behaviour for legal advantage.'¹⁰²⁶ He explains further that code design is a mechanism for *avoidance* as opposed to legal *change* because '[n]othing the code designer does rewrites laws. Instead, code design defines behaviour to avoid legal sanctions.' Wu's arguments reflect an understanding that the law as expressed is usually directed towards the regulation of human behaviour, not the forms in which technology takes. However, it should be recognised that the law may change the course of technological development due to its impact upon the design choices of innovators.

Certainly, the relationship between law and technology is a complex one. Nevertheless, a number of scholars have raised examples of how copyright law could lead to the inhibition of technological innovation. Joseph Liu for example explains that reliance solely on transaction costs to justify expansive rights affects incentives to innovate and encourages the maintenance of inefficiencies.¹⁰²⁷

¹⁰²³ Branda, above n 1001, 289–290. Branda argues that judges may 'allow their philosophical understandings of the role technology plays, or should play, in society to slip into their opinions' when considering the legality of a new technology (at 290). He cites Justice Breyer's concurring decision in *Grokster* to be the prime example of technological determinism (which is said to be forward-looking). This is contrasted with Judge Chin's dissent in the Second Circuit's *Aereo* decision, said to take a social determinist perspective which aligns with the view that 'the applicability of society's carefully crafted laws should not be contingent on which technology sector projects venture capitalists choose to invest in' (at 309). Branda's argument is that because copyright relies heavily on technology for the creation and dissemination of works, 'authors and innovators alike should not be held hostage to a statute that remains stagnant while the technological reality around them is changing so rapidly', and therefore, judges should adhere to technological determinism (at 309–310).

¹⁰²⁴ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999).

¹⁰²⁵ Tim Wu, 'When Code Isn't Law' (2003) 89(4) *Virginia Law Review* 103.

¹⁰²⁶ *Ibid* 129.

¹⁰²⁷ Joseph P Liu, 'Enabling Copyright Consumers' (2007) 22 *Berkeley Technology Law Journal* 1099, 1110–12. Liu's discussion is directed towards exemption from liability under fair use, but the rationales may also be

Liu observes that when companies innovate and make certain uses of copyright works more efficient, they potentially encroach on existing markets:

When companies step in to facilitate such uses, however, both sides of this equation change. The defendant companies above make it far more efficient for consumers to engage in the uses in question. Given the reduced cost of the activity to the consumer, this might have the effect of increasing the extent to which consumers engage in such uses. A more widespread practice might pose a greater threat to the direct market for the copyrighted work.¹⁰²⁸

Under Wu's communications policy, these "defendant companies" are essentially new rival disseminators that initiate the "creative destruction" of existing dissemination markets. Liu argues that 'once a company steps in to eliminate the inefficiency, the entitlement is automatically re-allocated to the copyright owner.'¹⁰²⁹ This leads to "perverse incentives" for incumbent disseminators to maintain inefficiencies in their dealings, as the law punishes attempts to make a process more efficient for consumers.¹⁰³⁰ In other words, copyright law may be used to delay the introduction of more efficient dissemination technologies and inhibit the process of "creative destruction".

Similar sentiments have been raised by Jessica Litman, who argues that backward-looking rules or analogies in copyright could distort the development of technology, and in turn impact competition in markets reliant on these technologies. An example of how old rules might impact on technological design and efficiency is explained by Litman as follows:

Relying on old rules encourages us to solve the problem that the World Wide Web is not like a newsstand by disabling some of its un-newsstand-like qualities. We could enact rules requiring the proprietors of web pages to set them up to behave much more like newsstands; we could demand that they insert code in each of their documents that would prevent downloading or would degrade any downloaded copies; we could require modem manufacturers to install chips that disabled the transfer of digital data unless some credit card were charged first. But would we really want that?¹⁰³¹

Litman explains that a newsstand was 'an effective way of marketing literary works in part because it is difficult as a practical matter to make and distribute additional copies'. In today's environment,

applied to our interpretation of the making available right. Cf Professor Paul Goldstein's argument that '[t]he question of transaction costs lies at the heart of any determination of whether copyright should be extended to cover the new use of a creative work': Goldstein, above n 35, 258.

¹⁰²⁸ Liu, 'Enabling Copyright Consumers', above n 1027, 1110.

¹⁰²⁹ Ibid 1111.

¹⁰³⁰ Ibid 1112.

¹⁰³¹ Litman, 'Revising Copyright Law for the Information Age', above n 114, 26.

what might an “effective way” of marketing copyright works look like? Again, this raises questions regarding the efficiency of communications technologies and copyright markets.

Arguments regarding the technological efficiency of existing and alternative markets for the delivery of copyright content have been raised in copyright litigation, but have not carried much weight. *Sony BMG v Tenenbaum*,¹⁰³² a decision of a US District Court, is one example in the context of copyright exceptions. This was a typical file-sharing case where a “non-commercial” user shared music files on a peer-to-peer network. The defendant Tenenbaum was a college sophomore who used the network to download and share 30 songs, the copyright of which was held by the plaintiffs.¹⁰³³ The defendant tried to rely on precedent suggesting that ‘the fair use determination may be affected by the availability – or absence – of authorized ways to obtain the work in question.’¹⁰³⁴ In other words, ‘it is sensible that a particular unauthorized use should be considered “more fair” when there is no ready market or means to pay for the use, while such an unauthorized use should be considered “less fair” when there is a ready market or means to pay for the use.’¹⁰³⁵ District Judge Gertner recognised that ‘the emergence of easy-to-use, paid outlets for digital music -- such as the iTunes Music Store -- lagged well behind the advent of file sharing.’¹⁰³⁶ However, she found that the role of these benefits in this particular fair use analysis was ‘less clear’, and in any case, by the time Tenenbaum’s file sharing was detected, ‘a commercial market for digital music had fully materialized’.¹⁰³⁷ Therefore, the Court was not willing to find that the defendant’s infringements were excused under fair use just because the copyright owner could have used more efficient technological means to disseminate its content. Although the fair use exception is broadly worded and flexible, the doctrine does not readily permit a court to take technological inefficiencies maintained by copyright owners into account.

In light of *Tenenbaum*, there appears to be little scope for efficiency concerns to be taken into account directly when interpreting the scope of copyright protection. Once the property entitlement is set, there is no opportunity to fine tune the way in which it is exploited by the owner/licensee. Having considered whether technological changes can influence legal interpretation, we may turn to consider how the scope of the law affects innovation in communications technologies.

¹⁰³² *Sony BMG Music Entertainment et al v Joel Tenenbaum* 672 F. Supp. 2d 217 (D. Mass., Dec. 7, 2009).

¹⁰³³ *Ibid* 218. Note there was evidence that he had shared thousands of songs, but the trial focused on 30 songs: see *Sony BMG Music Entertainment et al v Joel Tenenbaum* 721 F. Supp. 2d 85 (D. Mass., Jul. 9, 2010) 87.

¹⁰³⁴ *Sony BMG Music Entertainment et al v Joel Tenenbaum* 672 F. Supp. 2d 217 (D. Mass., Dec. 7, 2009) 235.

¹⁰³⁵ *Ibid*, citing *American Geophysical Union v Texaco Inc* 60 F.3d 913, 931 (2d Cir. 1994) 931.

¹⁰³⁶ *Sony BMG Music Entertainment et al v Joel Tenenbaum* 672 F. Supp. 2d 217 (D. Mass., Dec. 7, 2009) 235. District Judge Gertner went on to note at 236:

The considerable advantages of digital media are not difficult to discern. File-sharing software, by contrast to CDs, made individual songs directly available as digital mp3 files. Music listeners could get exactly the songs they wanted, in exactly the format they wanted -- an alternative that the plaintiffs did not offer consumers for several years.

¹⁰³⁷ *Ibid* 236.

3 *Innovating Around Copyright*

Several academics have begun to recognise that there is a countervailing pressure against the so-called “perverse incentives”¹⁰³⁸ of the copyright owner or incumbent disseminator to maintain inefficiencies. This pressure may be described as the incentives of new or competing disseminators to avoid legal liability or licensing fees by designing communication technologies that sit just beyond the scope of the law.¹⁰³⁹ Expanding on Tim Wu’s arguments about code design as a mechanism for avoiding the law,¹⁰⁴⁰ Dan Burk points out that “inventing around copyright” might lead to innovations that benefit the public.¹⁰⁴¹ Drawing upon scholarship in patent law, Burk argues that these innovations could prevent a ‘potential monopoly stagnation of placing a broad swath of innovation into the hands of a single’ owner, therefore ‘potentially fostering competition, which is in and of itself valuable’.¹⁰⁴²

Burk makes arguments similar to those presented by Joseph Liu on the elimination of inefficiencies,¹⁰⁴³ i.e. the rightsholder (or incumbent disseminator) tends to invest in existing technology and stands to benefit from extension of their rights to new technologies.¹⁰⁴⁴ Without the advantage and control of exclusivity, they have no incentive to develop means of communication that fall outside those exclusive rights and challenge their competitive advantage.¹⁰⁴⁵ Nevertheless, Burk recognises that there are complexities to this view, as “inventing around” is unlikely to occur unless the parties’ estimations of cost and value of developing an alternative communication means and negotiating licensing royalties are very different (again, drawing from lessons in patent law).¹⁰⁴⁶

In addition, this analogy with patent “inventing around” is not a perfect fit, due to several key differences between the patents regime and the copyright regime. In the case of inventing around

¹⁰³⁸ See Liu, ‘Enabling Copyright Consumers’, above n 1027, 1112.

¹⁰³⁹ These discussions may be contrasted with a more negative view of attempts to avoid legal liability through technological design: Giblin and Ginsburg, ‘On Aereo and “Avoision”’, above n 603. See also Frankel, ‘The International Copyright Problem and Durable Solutions’, above n 37, 109 (‘While the encouragement of creators and innovators to work around others is part of what intellectual property incentives anticipate, legal workarounds do not always produce innovation. Business models being devised around the gaps may involve avoidance as the primary driver of innovation, rather than innovation as a positive in its own right.’).

¹⁰⁴⁰ Wu, ‘When Code Isn’t Law’, above n 1025.

¹⁰⁴¹ Dan L Burk, ‘Inventing Around Copyright’ (2014) 109 *Northwestern University Law Review* 64, 71. It should be acknowledged that both Wu and Burk build upon Leo Katz’s concept of “avoision”, coined in the context of tax evasion and insider trading to denote acts and omissions that fall between legitimate avoidance of legal limits and illegitimate evasion of the law: Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud and Kindred Puzzles of The Law* 17–30 (1996). As explained by Wu, ‘When Code Isn’t Law’, above n 983, 115, “avoision” ‘can be defined as efforts to exploit the differences between a law’s goals and its self-defined limits’.

¹⁰⁴² Burk, ‘Inventing Around Copyright’, above n 1041, 72.

¹⁰⁴³ Liu, ‘Enabling Copyright Consumers’, above n 1027, 1110–1112.

¹⁰⁴⁴ Burk, ‘Inventing Around Copyright’, above n 1041, 74.

¹⁰⁴⁵ Cf Joseph Fishman, ‘Creating Around Copyright’ (2015) 128(5) *Harvard Law Review* 1333 (arguing that these copyright restrictions induce creativity), and see Burk’s response to Fishman: Dan L Burk, ‘The “Creating Around” Paradox’ (2015) 128 *Harvard Law Review Forum* 118.

¹⁰⁴⁶ Burk, ‘Inventing Around Copyright’, above n 1041, 73.

specific patent claims, one is skirting or creating a substitute for a particular patent or *particular subject of exclusivity*.¹⁰⁴⁷ In the context of copyright however, one is avoiding liability for disseminating a class of copyright content, because one is skirting pre-existing *methods of delivering* copyright content.¹⁰⁴⁸

A second, more fundamental question to consider is this: should copyright law specifically target technological functionality and innovation around such functionalities, an objective that has traditionally fallen within the realm of patents? As Dennis Karjala explains:

With only a few exceptions, copyright has always eschewed protection of *functional* works, while functional works of technology are the very stuff of patent subject matter. Moreover, patent law has tried to steer clear of works that are merely useful in the sense of informing human beings or portraying an appearance but not functional in the sense of actually doing work in the physical world. As a result, traditional patent and copyright subject matter divided rather cleanly between the nonfunctional, reserved to copyright, and the functional, reserved to patent.¹⁰⁴⁹

Mark McKenna and Christopher Sprigman have considered ‘how IP’s boundary rules shape innovation’ and in the process endorsed the distinction between patent objectives and copyright’s conventional authorship incentivising objectives as explained by Karjala.¹⁰⁵⁰ McKenna and Sprigman make some interesting observations about our choices regarding the boundaries of IP regimes and the significant consequences of those choices for competition and innovation.¹⁰⁵¹ They argue that:

Until we appreciate all of the forms of utility, and until we have a calculus for understanding their relative value, we can’t think coherently about which types of competition we want to promote or the costs of promoting that type of competition. Nor can we even think about how best to satisfy consumers’ actual demand, or how different IP regimes can actually help shape that demand. ... Importantly, how we construct each of the IP systems, and even more how we conceive of the interaction among those systems, necessarily embeds a choice about the type of competition, and therefore the type of innovation, we want to produce.¹⁰⁵²

Admittedly, McKenna and Sprigman’s arguments are not directed towards copyright’s less prominent dissemination function, as their commentary focusses on the limits of copyright subject matter

¹⁰⁴⁷ Ibid 74.

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ Dennis S Karjala, ‘The Relative Roles of Patent and Copyright in the Protection of Computer Programs’ (1998) 17 *Marshall Journal of Computer and Information Law* 41, 41–42.

¹⁰⁵⁰ Mark P McKenna and Christopher Jon Sprigman, ‘What’s In, and What’s Out: How IP’s Boundary Rules Shape Innovation’ (2017) 30(2) *Harvard Journal of Law and Technology* 491.

¹⁰⁵¹ Ibid.

¹⁰⁵² Ibid 66.

(particularly the exclusion of systems and “useful” articles from copyright protection).¹⁰⁵³ Nevertheless, based on the points raised, one *could* argue that aspirations driven by copyright’s dissemination function take copyright law beyond the traditional role it has adopted over the years, i.e. *as a response to* technological development.¹⁰⁵⁴

With respect, these arguments would only be valid under a partial understanding of copyright’s objectives. Innovation in the development of communication technologies is imperative to copyright’s dissemination function, which operates in tandem with copyright’s conventional authorship function.¹⁰⁵⁵ As this thesis has emphasized, these copyright rules do not only have an impact on the perceived immediate “markets” of copyright owners; an overbroad interpretation of copyright protection is likely to favour an incumbent disseminator. This accords with L Ray Patterson’s argument that copyright law has operated as form of trade regulation, and that we should be wary of its evolution from control over material (books) to control of the service that enables communication.¹⁰⁵⁶ An important way in which the promotion of copyright’s dissemination function supports its authorship function is through the generation of diverse revenue streams. As Eric Priest explains:

[C]opyright enables creators to monetize diverse revenue streams — a crucial but often overlooked function of copyright. Reduced revenue stream diversity harms the creative ecosystem by diminishing monetization opportunities for smaller and independent producers, distorting market signals sent to producers, and disproportionately exposing producers to the idiosyncrasies of peculiar markets and exploitation by intermediaries.¹⁰⁵⁷

Unfortunately, there has been a lack of appreciation for copyright’s dissemination function. In advancing this function, we should understand that copyright may have a proactive role in driving innovation. Copyright’s rules are not just responses to technological change; every response in

¹⁰⁵³ Ibid 37.

¹⁰⁵⁴ Dan L Burk, ‘Copyright and the Architecture of Digital Delivery’ (2014) 19(10) *First Monday* 3. Burk argues that:

Classically, copyright was not intended to be directed toward technological discovery or progress. The core subject matter of copyright historically has been, and today remains, largely directed to aesthetic and artistic creations. ... If anything, copyright was classically intended *as a response to* technological discovery or progress. ... Consequently, the suite of exclusive rights encompassed by copyright is structured toward providing the control and opportunity for remuneration that eroding material affordances no longer supply. [emphasis added]

¹⁰⁵⁵ Cf a more pessimistic view of the impact of dissemination via online channels on “professional authorship”: Jane C Ginsburg, ‘The Role of the Author in Copyright’ in Ruth Okediji (ed), *Copyright in an Age of Exceptions and Limitations* (Cambridge University Press, 2015) 60.

¹⁰⁵⁶ L Ray Patterson, ‘Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights’ (2001) 62(2) *Ohio State Law Journal* 703; L Ray Patterson, ‘Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition’ (1991) 17 *University of Dayton Law Review* 385.

¹⁰⁵⁷ Priest, above n 287, 471–472.

copyright law drives and changes the direction of technological innovation going forward. Importantly, copyright's dissemination function should not be understood in static terms, as it plays a key role in the complex interaction between copyright law and technological development. The consideration of technological innovation is not out of place in copyright law.¹⁰⁵⁸ A prominent example of how the development of new technology has been taken into account in copyright law is the Sony *Betamax* case of US Supreme Court.¹⁰⁵⁹ However, without an understanding of copyright's dissemination function, it is not entirely clear how the *Betamax* ruling fits in with our overall understanding of copyright policy. What is clear in hindsight is that this decision of non-liability gave rise to a video tape industry for delivery of content through purchases and rentals, and this became a source of income for rightsholders.¹⁰⁶⁰ Contemporary technologies could fulfil similar roles. For instance, the design and use of peer-to-peer filesharing technology may be aimed at evading secondary liability principles by requiring as little control as possible over the system,¹⁰⁶¹ yet film and television streaming provider Netflix has been investigating the viability of such technology to deliver its services.¹⁰⁶² It may be another example of how technology which emerged as a threat to copyright markets can take on a new role within copyright markets.

The Sony *Betamax* case was decided on the fair use exception and secondary liability principles. Perhaps courts are able to find more flexibility in the language of the fair use exception to take into account encroachments upon technological innovation. However, these considerations should not be relegated to the exceptions to copyright, but should play a part in defining the scope of exclusive rights. Exclusive rights lie at the heart of copyright law and are equally as important, if not more important, to the furtherance of copyright's dissemination function. If we do not have clear principles to guide our interpretation of a key exclusive right in the digital age, it is difficult to see how consistency and clarity can be achieved in the copyright system as a whole.

¹⁰⁵⁸ Cf Jane C Ginsburg, 'Copyright 1992-2012: The Most Significant Development?' (2013) 23 *Fordham Intellectual Property, Media & Entertainment Law Journal* 465, 489–490. Ginsburg's criticises the shift in fair use analysis from transformative works (i.e. in an expressive sense) to transformative "purpose" which permit, for example, a commercial database with complete copies of copyright works which exploits the work for its informational (not its expressive) value.

¹⁰⁵⁹ *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984).

¹⁰⁶⁰ See Joshua M Greenberg, *From Betamax to Blockbuster: Video Stores and the Invention of Movies on Video* (MIT Press, 2010) 2, noting that 'within just thirteen years the motion picture industry was making more money from video than the theatrical exhibition'. See also Derek Khanna, *A Look Back At How The Content Industry Almost Killed Blockbuster And Netflix (And The VCR)* (27 December 2013) TechCrunch <<http://social.techcrunch.com/2013/12/27/how-the-content-industry-almost-killed-blockbuster-and-netflix/>>.

¹⁰⁶¹ See, eg, *A&M Records, Inc v Napster, Inc* 239 F.3d 1004, 1014 (9th Cir. 2001).

¹⁰⁶² It has been described as 'a hybrid hub-and-spoke and peer-to-peer solution': Jon Brodtkin, *Netflix Researching "Large-Scale Peer-to-Peer Technology" for Streaming* (26 April 2014) Ars Technica <<http://arstechnica.com/information-technology/2014/04/netflix-researching-large-scale-peer-to-peer-technology-for-streaming/>>. It should be noted that another reason for adopting this technology is to avoid data transfer fees imposed by ISPs: Romain Dillet, *Netflix's Ongoing Quest To Save Bandwidth* (15 December 2015) TechCrunch <<http://social.techcrunch.com/2015/12/15/netflixs-ongoing-quest-to-save-bandwidth/>>.

Section D. Chapter V – Conclusion

The older foundational cases on the public performance right have shown that, since the early development non-copy-related rights, the element of “the public” has been conceptualised as a licensable market of the copyright owner. This approach continues to play a prominent role in the copyright laws of Australia and the EU, and to some extent the US. An unintended consequence that flows from this approach is the inhibition of technological innovation. As technology increasingly enables markets for access to copyright content in an individualized and on-demand manner, coupling this conception of “the public” with a broad interpretation of the “act” of making available could lead to unbounded interpretations of the right as a whole. In the process, copyright law may be undermining its authorship function by increasing the competitive advantage and bargaining power of incumbent disseminators, and restricting the space needed for developing new means of access to copyright content.

The scope of the making available right is important, because prospective new disseminators are more likely to innovate beyond the bounds of the right. This innovation could lead to new ways of dissemination that are not controlled by the incumbent disseminator, therefore leading to revenue stream diversity for the delivery of copyright content. Activities that fall beyond the scope of the right pose as a constant threat of creative destruction, forcing the incumbent disseminator to innovate and compete (instead of resting on its laurels and relying on inefficient access models in existing dissemination markets). Copyright protection should not be used to insulate incumbent disseminators from the threat of creative destruction. Therefore, when defining the scope of rights, we should be wary of casting the net too widely purely for the sake of protecting authorship incentives. Stated in a positive sense, the ability to disseminate content without being subject to rightsholders’ control presents third parties with an incentive to innovate. In order to further copyright’s dissemination function in the long run, we need to appreciate the limits of the making available right, while recognising the need for the law to adapt to cover means of communication that mature to form viable copyright markets.

A potential argument against copyright taking technological efficiency and communication means into account is that this takes copyright beyond its conventional role. However, continuing with the current approach would have us focusing solely on copyright’s authorship function, and disregarding copyright’s dissemination function to the detriment of the copyright system as a whole. Copyright law has always had an impact on the state of technological innovation — the difference today is that its impact is more perceptible in light of the internet and the advancements afforded by digital technologies. Ignoring copyright’s dissemination function just because it has not occupied a prominent position in existing law and scholarship is not a satisfactory response to the growing tensions faced by copyright. Now is the time to begin looking for a more holistic and realistic framework for understanding the role of copyright in today’s society and the future of our information

society. We can begin to do so by acknowledging and understanding copyright's dissemination function and investigating the role of the making available right in furthering this key function.

It is important to recognise that the concerns expressed here on the negative impacts on technological innovation become more acute in light of a broad interpretation of the *act* of "making available". This will be the case if the act is interpreted so broadly as to cease becoming a substantive limit on the right to communicate to the public. Therefore, the proposals that follow are necessarily incomplete without an in-depth analysis of the "act" of making available. Nevertheless, it is possible to tentatively outline several responses to the problems raised by current approaches to "the public":

1. Continue with the current formulation or approach;
2. Remove "the public" and replace it with a different requirement; or
3. Develop clearer principles that guide our interpretation of "the public".

The third option is a process that can be undertaken by national and regional courts without substantive change to the language. Leading courts could influence the interpretation of the making available right and "the public" by creating accepted custom. Depending on how influential national or regional decisions are, this may occur in accordance with article 31(3)(b) of the Vienna Convention, by establishing subsequent practice that 'establishes the agreement of the parties regarding its interpretation'. However, as the decisions currently stand it is difficult to see any form or method of interpretation of the public to be particularly influential. If any commonality can be found, it is in the emphasis on licensable markets. As this chapter has discussed, this brings about negative impacts that may not be immediately obvious. Therefore, there is a risk that if this approach is perpetuated, it may become the norm or standard for interpretation.

Having exposed the problems and the assumptions underlying the element, it is clear that "the public" as currently conceptualised does not operate as a meaningful limitation upon the making available right. The principles underlying its interpretation are flawed as they do not acknowledge the role of "the public" in furthering copyright's dissemination function. Therefore, continuing with the current formulation of "the public" and focusing solely on authorship incentives and existing licensing markets is the least viable option. We are ignoring and potentially hindering copyright's dissemination function, without any awareness as to the impacts of this approach.

Does this mean that the term "public" is not suitable as a limitation upon the communication right, particularly by making available *to* members of the public? Perhaps so. But until we explore possible alternatives and the principles that should inform these alternatives, we have but a vague idea of how the dissemination function of copyright could be positively nurtured. The distinction between public and private may be increasingly blurred as disseminators implement novel ways of making content available, yet the term "public" has not lost all utility in the meantime. The existing rules simply fail to take the dissemination function of copyright into account and need to be supplemented. Therefore, rather than eliminating "the public" altogether and looking for another broad, ambiguous term (under

option 2), we may be better off incorporating new principles into our assessment of what is to “the public” (option 3). The development of new principles requires that courts interpreting the concept of “the public” be open to a dynamic view of dissemination markets, instead of focussing solely on authorship incentives and immediate licensing markets.

The resulting analysis should not default to an expansive approach to “the public” in order to protect the “copyright owner’s market”. It should be one that utilises “the public” as a principled limit upon the making available right that is tied to copyright’s basic functions. An obvious benefit of shaping the scope of the right in a more principled manner is the encouragement of public access to copyright content. However, we should also recognise the benefits that accrue from encouraging the development of new communication technologies that form the foundations of viable dissemination markets. The creative destruction initiated by new technologies are necessary for the development of efficient dissemination markets, which in turn benefit of authors and producers of content in the long run.

Courts need to engage in this discussion with an understanding that the existing approaches are built upon an incomplete view of copyright’s functions. Through an iterative interpretation process informed by new principles, it is possible to come up with a formulation or element that better encompasses both copyright’s authorship function and dissemination function. Once courts, lawmakers and scholars realise the error of assuming that the core objective of “the public” is to protect the existing licensing markets of content creators, we can move forwards and find approaches to “the public” that better suit the information age.

CHAPTER VI. INTERPRETING THE “ACT”: SUPERFICIAL ANALYSIS OF A CRUCIAL ELEMENT

Purpose

This chapter aims to highlight the insufficient judicial scrutiny of the “act” of making available, and as a result, the lack of clear principles to guide the interpretation and development of the right. To do so, it will:

1. Underscore the importance of the “act” of making available as a key element of the making available right, and its impact on the overall scope of the right;
2. Identify and explain the concepts that have been used to preclude more in-depth analysis of the “act”; and
3. Explain the elusive nature of “volition” and breadth of fault-based considerations, and how they could be used to subvert copyright’s strict liability standard for primary infringement and inhibit copyright’s dissemination function.

Headings

- A. The “Act” as a Determinative Starting Point
- B. Current Understandings of the “Act”
- C. Physical Parameters of the “Act”
- D. A Mental Component: Volition as a Limit upon the “Act”
- E. Copyright’s Liability Standard Through a Communications Policy Lens

Identifying the “act” is an important first step that should not be taken for granted. However, existing judicial approaches at times conflate the “act” and “the public”, the two key elements of the making available right.¹⁰⁶³ Clear analysis of the scope of the “act” tends to be avoided in favour of notions such as multiple “publics” or exhaustion. In addition, some US courts have used the notion of volition to capture elements of fault in their analysis. As this chapter will explain, these constructs do not

¹⁰⁶³ As discussed, *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8 provides:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

See also *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002) arts 10 and 14 (setting out the making available right in relation to fixed performances and phonograms).

foster engagement with the underlying policy issues and fail to promote the construction of clear principles for the interpretation of the “act”.

This chapter focusses on a question that has a significant impact on the overall scope of the making available right: *how* should we determine what constitutes an “act” of making available? The question is also inherently tied to *who* should be responsible for executing the allegedly infringing act. The “act” of making available, in contrast to a performance in public, is not explicitly confined by time or space. It remains undefined and “technology neutral”, in contrast to other acts of communication such as broadcasts that use a specific technology to reach a wide audience.¹⁰⁶⁴ In light of the expansive interpretations afforded to the making available right, it is all the more important that we build sensible principles to guide its development in a coherent and transparent manner.

Section A. The “Act” as a Determinative Starting Point

As discussed above, two key elements have been distilled from the making available right.¹⁰⁶⁵ A question that may be asked is whether analysing the “act” separately may be artificial, as we are attempting to identify an “act” that leads *to* public accessibility. Therefore, it could be argued that a key characteristic of the “act” is its “public-ness”, or its causal connection with such public access. If adhering to this view, “the public” characterises the “act” and is inseparable from it.

On the other hand, an approach that conflates the “act” and the public” means that the act is afforded little to no independent meaning. While we should consider how conceptions of “the public” could impact on our characterization of the relevant “act”, the “act” as a threshold question should not be discarded in favour of relying solely on “the public” as a limitation. We should be cautious of attempts to conflate the two elements. In looking closely at the certain doctrines that have developed over the years, it is apparent that judicial analysis of the “act” has been obscured by various superficial concepts and terminology.

The “act” of making available is a fundamentally important element, because our conceptualisation of the “act” sets the baseline for measuring the scope of “the public”. For instance, if the “act” is

¹⁰⁶⁴ See Westkamp, above n 3, 1084. Westkamp states that “traditional non-physical rights” carry ‘a predefined connotation of the public reached’ and present ‘a reliable context of the economic gravity of use’. See also the definition of “broadcast” in *Copyright Act 1968* (Cth) s 10(1) as ‘a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*’. The *Broadcasting Services Act 1992* (Cth) s 6 in turn defines a “broadcasting service” to mean ‘a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means...’.

¹⁰⁶⁵ As mentioned in Chapter V, the latter element, “the public”, has been discussed first because courts have afforded more attention to “the public”, and it is useful to take these matters into consideration in our analysis of the “act” of making available.

conceptualised as each individual transmission, then the “act” is likely to be private. However, if it is seen as executed using a system managed by the proprietor, then it is most likely to be considered a making available “to the public”.¹⁰⁶⁶ In other words, our conceptualisation of the “act” determines the *quantum of measurement* for “the public”. The more broadly we conceptualise the “act”, the easier it is to find that “the public” has been satisfied. By conflating the two elements, we are reading the “act” out of existence as a threshold element of the making available right. In light of this, it is crucial to have clear principles or rules to guide our interpretation of the “act”.

Section B. Current Understandings of the “Act”

On a plain reading of the relevant articles of the Internet Treaties, coupled with the background to the treaties and early commentary,¹⁰⁶⁷ the following propositions regarding the “act” of making available may be accepted:

1. An actual transmission is not required (i.e. mere accessibility of the work is sufficient);
2. It is not necessary for copies to be made available (although copies may facilitate the availability of the work); and
3. The mere provision of physical facilities is not an “act” of making available.¹⁰⁶⁸

In terms of mere accessibility, the “act” may cover “near to interactive” content delivery services, which permits a degree of individual choice to be exercised by recipients.¹⁰⁶⁹ These factors, stated negatively, raise the lower threshold of what may constitute a communication and clarifies some uncertainties left open by the Berne Convention.¹⁰⁷⁰ However, these fairly vague parameters as to what *could* constitute an act of making available offers us little guidance regarding which acts lie beyond the boundaries of the right, and are excluded from the copyright owner’s control.

A number of national and regional judicial decisions illustrate the difficulties that can arise when interpreting the “act” of making available (or performance/display in the US) in the context of new

¹⁰⁶⁶ For a similar argument in the context of performances “in public”, see Nimmer, above n 960, § 107.42: ‘If [a performance] is caused by a private individual for his own benefit in a private home it clearly is not a public performance. Not so, however, if it is caused by a hotel for the benefit of its guest.’ See also John Kheit, ‘Public Performance Copyrights: A Guide to Public Place Analysis’ (1999) 26 *Rutgers Computer & Technology Law Journal* 1, 8–9, finding that conclusions on the public place clause depend on whether the court is considering the entire establishment (e.g. a hotel as a whole) or focusing on a finite area (a hotel room).

¹⁰⁶⁷ See the discussion in Chapter III.

¹⁰⁶⁸ WCT, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002) art 8 n 7. These three points are discussed in Chapter III

¹⁰⁶⁹ See Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E), above n 388, 204, cited in Ficsor, *The Law of Copyright and the Internet*, above n 8, 243.

¹⁰⁷⁰ See Ricketson and Ginsburg, above n 71, 741–43.

communication technologies. The same technology can give rise to vastly different approaches in each of the jurisdictions (even if the outcomes may be the same). An example is the conflicting approaches to linking. On one view, a link is a mere reference to works that have already been made available (in Australia and the US).¹⁰⁷¹ On another view, linking is an “act” of making available, under a broad interpretation of the “act” (in the EU).¹⁰⁷² These linking cases illustrate the lack of consistency to the relevant “act”.

In addition, courts have struggled to distinguish the execution of the “act” from the mere facilitation of the “act”, particularly in cases involving cloud technologies. This matter is not expressly dealt with by the WCT, as the agreed statement to article 8 merely refers to “physical facilities”. It is unclear when the proprietor of an automated online service crosses the threshold into an “act” of making available, as opposed to merely facilitating such “acts” by its users. If there are already “acts” of making available carried out by users of the system, to what extent does the proprietor also carry out an independent “act” of making available? In this context, the relevance of “volition” remains uncertain. It was not explicitly addressed by the US Supreme Court majority in *Aereo*, despite the dissent explicitly drawing attention to the need for volition to be satisfied.¹⁰⁷³ Similar concepts arise in CJEU decisions that ascribe primary liability to a defendant using fault, when the Court has found that a “deliberate intervention” gives rise to primary liability if one *knowingly* links to infringing content¹⁰⁷⁴ or facilitates access to unauthorised content via a device or platform.¹⁰⁷⁵ The role of these concepts should be clarified. Do they have a place within rules for primary infringement of copyright, which are said to fall under a strict standard of liability?

These are some of the challenging issues that have emerged. While certain rulings may be limited to the facts or technology before them, the reasoning of the courts provide an indication of the factors that have been a driving force in contemporary disputes. There is a conceptual disconnect between these factors and copyright’s core functions because the decisions are not clearly explained by policy rationales or principles. Consequently, the continued relevance of these factors in the various jurisdictions is difficult to predict as new communication technologies emerge.

In sum, we do not have principles that assist us in identifying the outer limits of the “act”. Before we embark on efforts to develop these principles, we should closely analyse the various factors taken into

¹⁰⁷¹ See *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1; *Perfect 10, Inc v Amazon.com, Inc* 508 F.3d 1146 (9th Cir. Cal. 2007).

¹⁰⁷² See, eg, *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

¹⁰⁷³ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2512–14 (Scalia J).

¹⁰⁷⁴ See *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

¹⁰⁷⁵ See *Filmspelers* (Court of Justice of the European Union, Case C-527/15, 26 April 2017); *Pirate Bay* (Court of Justice of the European Union, Case C-610/15, 14 June 2017).

account in assessing the “act”. Some of these factors appear to be physical parameters, relating to the size of the public that may be reached, and whether the copyright owner has “exhausted” their exploitation channels. Volition, on the other hand, seems to incorporate mental considerations such as fault. Examining these issues and reflecting on them may assist us in finding clearer overarching principles to guide our interpretation of the “act”. Importantly, these principles should be developed with copyright’s fundamental functions in mind – i.e. its dissemination function and authorship function.

Section C. Physical Parameters of the “Act”

In considerations of the “act”, the terminology or concepts used by courts tend to add complexity to “the public”, or divide the “act” into different categories (without clear justifications for doing so). Current concepts that obscure clearer analysis of the limits of the “act”¹⁰⁷⁶ may be contrasted with a number of older US cases assessing liability for the alleged performance of music using radio receiving sets. These decisions considered the notion of a “performance” in detail, instead of focussing solely or disproportionately on “the public”. Moreover, these cases used policy considerations to justify the limits of the relevant act. This analysis and comparison could assist in efforts to develop a more principled understanding of the “act” of making available going forward.

1 Multiple “Publics” vs Online “Exhaustion”

The CJEU’s “new public” doctrine has raised the question of whether the copyright owner’s making available right is limited to exploitation in relation to a single public (in which case the right is “exhausted” as soon as copyright content is made available to the public online), or whether it encompasses a notion of multiple “publics”. It should be recognised that the idea of “new audiences” or a “new public” is not an entirely novel consideration in the context of performance rights (or non-copy related rights). The 1936 UK case of *Jennings v Stephens*,¹⁰⁷⁷ for example, considers *portions* of the public to be included in the “copyright owner’s public”, even if the notion of multiple publics was not express on the face of “the public” element.¹⁰⁷⁸ Unfortunately, the notion of multiple “publics”, in and of itself, does not assist us in differentiating these various “publics” (as

¹⁰⁷⁶ See the discussion of these cases in Chapter IV

¹⁰⁷⁷ [1936] 1 All ER 409.

¹⁰⁷⁸ Ibid 412. The Court states:

“The public” is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only ... such members of the community ... who would be interested in any particular matter, professional, political, social, artistic, or local. ... Thus it is clear that by “public” is meant, in the words of Bowen LJ, “a portion of the public.” The particular portion of the public which is meant may sometimes be very small indeed.

evident from the CJEU jurisprudence on linking). According to the CJEU, different technological means that are used to provide the “same public” access to content must be separately authorised.¹⁰⁷⁹ Again, the CJEU does not provide much guidance as to what constitutes different technical means.

In opposition to the notion of multiple “publics” is the idea that the making available right may be exhausted.¹⁰⁸⁰ This would occur if the copyright owner’s making available right was limited to a single “public” (or more specifically, a single online public). It should be noted that this purported exhaustion of the making available right is distinct from the first sale doctrine or exhaustion of the distribution right, which controls the distribution of “copies”. The first sale doctrine exhausts the distribution right in relation to a *particular* physical copy of the work; it does not exhaust the distribution right for other copies of the work that have yet to satisfy the “first sale” requirement. Therefore, legal arguments relating to the first sale doctrine in the analogue era are not strictly applicable.

With this reservation in mind, we may nevertheless look to the broader justifications for the first sale doctrine, and consider if they provide some guidance. Some scholars have characterised exhaustion as a limitation upon the copyright owner’s market. L Ray Patterson, for instance, argues that the first sale doctrine satisfies the “primary-market principle”, which ‘precludes the copyright owner from controlling the secondary market for copies after he or she has sold them’.¹⁰⁸¹ According to Patterson, this represents a recognition that the publication right is limited by the right to vend and ‘cannot qualify the title of a lawfully purchased copy of the work’.¹⁰⁸² This discussion of markets is not unlike the issues raised in the previous chapter, where we find that expansive interpretations of “the public” arise when it is conceptualised as copyright owners’ licensing markets. Patterson’s arguments, however, are targeted at limiting the scope of this market. A difficulty with this argument, particularly in the online environment, is the development of objective criteria for categorising a market as “primary”, as opposed to “secondary”. With the distribution of physical products embodying copyright works, it is perhaps easier to draw a line around the perceived primary market. In terms of limiting the relevant “act” of making available, however, there may be various stages in the chain of communication where one could set the limit.

¹⁰⁷⁹ See *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013). This case is discussed in Chapter IV.

¹⁰⁸⁰ It should be noted that article 3(3) of the EU InfoSoc Directive expressly provides that:

The rights referred to in paragraphs 1 and 2 [right of communication, including by making available] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

¹⁰⁸¹ Patterson, ‘Copyright and “the Exclusive Right” of Authors’, above n 59, 30.

¹⁰⁸² *Ibid.* The “primary market principle” is said to grow out of the “limited-grant principle”, which provides that ‘copyright is the statutory grant of a monopoly limited in scope as well as time’, and is described as a means of achieving important public purposes (at 28, citing *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984) 429).

How then may the idea of multiple publics be incorporated into our analysis of the two core elements of the making available right? One way of aggregating multiple recipients (whether based on the technology, or the character of the audience), is to interpret the “act” of making available in a way that covers access to copyright content by such recipients. For instance, in the EU *TVCatchup* case, the Court could have considered whether the “act” of making available was occurring via the provision of the system (leaving aside for the moment whether it *should* be characterised as the relevant “act”).¹⁰⁸³ Therefore, identifying the “act” should be the first step of a court’s analysis. If courts are clear about the nature of the “act”, then it should not be necessary to aggregate multiple “publics”.

In short, the “new public” conception or idea of multiple publics is unpersuasive as a substantive requirement. It would be more productive to invest effort into our enquiry of whether an “act” of making available has occurred, before proceeding to the question of whether it reaches members of “the public”. In relying on concepts such as “new public” and ignoring the “act”, we are effectively using “the public” to differentiate between acts that lead to public access. This melding of the two elements tends to obscure the analysis that should be undertaken in relation to the “act”.

2 Lessons from the Pre-Digital “Multiple Performance Doctrine”

Current approaches that emphasise “the public” may be contrasted with historical US cases on the reception of music using radio receiving sets and whether these were “performances”. In excluding reception from the relevant “act” of performance, the US Supreme Court explained the rationales for their interpretation of the “act” and the policy perspectives relied upon.¹⁰⁸⁴ We may take for granted today that playing a radio receiving set in a public place is a public performance, and that its legal effect should be no different from playing a copy of a sound recording. However, this was not always the case. Before the resolution of this issue in the US, defendants argued that the reception of a broadcast could not be a performance, as receiving and performing were mutually exclusive functions. Although this argument may be characterised as a historical artefact, the differentiation between a “primary transmission” and a “secondary transmission” of radio broadcasts under the so-called “multiple performance doctrine” is worth revisiting here. It should be noted that the doctrine was labelled as such by commentators critiquing court decisions, and not utilised by the courts themselves. The doctrine is particularly interesting because disputes about the meaning of “performance” are not unlike the struggles we face today in interpreting the “act” of making available. Importantly, the

¹⁰⁸³ Cf *Filmspeler* (Court of Justice of the European Union, Case C-527/15, 26 April 2017); *Pirate Bay* (Court of Justice of the European Union, Case C-610/15, 14 June 2017) (where the provision of automated systems or devices for access to content satisfied the ‘act’ of making available). These cases are discussed in Chapter IV.

¹⁰⁸⁴ See *Twentieth Century Music Corporation v Aiken* 422 U.S. 151 (1975), discussed below.

protection of public access to copyright content occupied a prominent position in the debate on whether radio receptions amounted to performances.

The case said to give rise to the “multiple performance doctrine” was *Buck v Jewell-LaSalle Realty Co.*,¹⁰⁸⁵ a decision of the US Supreme Court in 1931. At the time, the “for profit” requirement was still in place. The defendant was a hotel owner who maintained a master radio receiving set that was wired to public and private rooms via loudspeakers or head phones. The defendant argued that since the initial transmission of the musical composition by the broadcasting station was a public performance for profit, ‘control of the initial radio rendition exhausts the monopolies conferred...and that a monopoly of the reception, for commercial purposes, of this same rendition is not warranted by the Act’.¹⁰⁸⁶ This analogy with the first sale doctrine was rejected by the Court, as ‘a monopoly is expressly granted of all performances for profit’.¹⁰⁸⁷

The defendant also argued that ‘there can be but one actual performance each time a copyrighted selection is rendered’.¹⁰⁸⁸ Again, this argument was unequivocally rejected, as ‘nothing in the Act circumscribes the meaning to be attributed to the term “performance,” or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit’.¹⁰⁸⁹ The Supreme Court in this instance perceives its duty to protect the interests of rightsholders as paramount, explaining that ‘the novelty of the means does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer’.¹⁰⁹⁰

Scholars critical of this decision labelled this the “multiple performance doctrine” as any subsequent uses of the transmission as received could fall within the copyright owner’s exclusive right to perform publicly.¹⁰⁹¹ The initial radio transmission has been described as a “primary transmission” and the subsequent receipt of that transmission considered a “secondary transmission”¹⁰⁹² (although the courts have not made that distinction but simply considered each to be an act of “performance”). The phrase “multiple performance” is presented as a criticism of these “acts” being characterised as

¹⁰⁸⁵ 283 U.S. 191 (1931).

¹⁰⁸⁶ *Ibid* 197.

¹⁰⁸⁷ *Ibid*.

¹⁰⁸⁸ *Ibid* 197–98. That is, once a broadcaster is held to be the performer, ‘one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it’ (at 198).

¹⁰⁸⁹ *Ibid* 198.

¹⁰⁹⁰ *Ibid*.

¹⁰⁹¹ David M Lilenfeld, ‘Why Congress Should Eliminate the Multiple Performance Doctrine’ (1997) 58 *Ohio State Law Journal* 695, 701–702.

¹⁰⁹² *Ibid* 702.

performances. Having “multiple” performances is said to be inequitable, as it allows the owner to double-dip or obtain multiple licensing fees.¹⁰⁹³

In addition, critics of the “multiple performance doctrine” have emphasized the defendant’s lack of choice or control over what is received and performed,¹⁰⁹⁴ an argument that was also raised by the defendant in *Buck v Jewell-LaSalle Realty*.¹⁰⁹⁵ However, the Supreme Court was of the opinion that ‘knowledge of the particular selection to be played or received is immaterial’, analogizing the situation with one who hires an orchestra for public performance for profit and not selecting the particular program to be played.¹⁰⁹⁶ Therefore, when the defendant ‘tunes in on a broadcast station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another’.¹⁰⁹⁷ In this case, the initial broadcast by broadcasting station operator, Duncan, was *not authorised* by the copyright owner. This point, however, receives little attention in this case and its relevance is only recognised in a footnote:

If the copyrighted composition had been broadcast by Duncan with plaintiffs’ consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. ... But Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.¹⁰⁹⁸

Over four decades later in 1975, the Supreme Court in *Twentieth Century Music v Aiken* (“*Aiken*”)¹⁰⁹⁹ found that *Buck v Jewell-LaSalle*¹¹⁰⁰ was limited to its specific facts and distinguishable as the initial broadcast in *Buck v Jewell-LaSalle* was unauthorised.¹¹⁰¹ The defendant in *Aiken* was a

¹⁰⁹³ See Louis G Caldwell, ‘The Copyright Problems of Broadcasters’ (1932) 2 *Journal of Radio Law* 287, 295, advocating for a “single performance” principle.

¹⁰⁹⁴ See, eg, *ibid.* Caldwell states:

We urge that the man who has no control over what music is played and who cannot possibly protect himself against infringement no matter what precautions he takes and no matter how many license fees he pays, should not be held liable under sound copyright legislation.

¹⁰⁹⁵ The argument was that ‘the operator of a radio receiving set cannot render at will a performance of any composition but must accept whatever program is transmitted during the broadcast period’: *Buck v Jewell-LaSalle Realty Co* 283 U.S. 191 (1931) 198.

¹⁰⁹⁶ *Ibid.*

¹⁰⁹⁷ *Ibid* 199 (emphasis added). It should be noted that this is not unlike the CJEU ruling in *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

¹⁰⁹⁸ *Buck v Jewell-LaSalle Realty Co* 283 U.S. 191 (1931) 199 n 5.

¹⁰⁹⁹ 422 U.S. 151 (1975).

¹¹⁰⁰ 283 U.S. 191 (1931).

¹¹⁰¹ See also the conflicting cases preceding *Buck v Jewell-LaSalle Realty* 283 U.S. 191 (1931), including *Buck v Debaum* 40 F.2d 734 (S.D. Cal. 1929) 735 (playing a radio in a cafe was not a performance, as an operator of a receiving set is no different from opening a window to permit ‘strains of music of a passing band to come within the inclosure in which he was located’); cf *M Whitmark & Sons v Bamberger & Co* 298 F. 628 (S.D. Oh. 1924); *Jerome H Remick & Co v American Automobile Accessories* 5 F.2d 411 (6th Cir. 1925). In the latter decision, the Sixth Circuit explained at 414 n 20 that:

restaurant owner who played background radio music to his patrons via a single radio connection to four separate loud speakers. Before the case reached the Supreme Court, the Third Circuit phrased the question as follows: ‘has [the] defendant “performed” the plaintiffs’ copyrighted musical compositions within the meaning of the Copyright Act, 17 U.S.C. § 1, when these compositions were made available to the defendant’s patrons at his restaurant by the instrumentality of a radio and loud speakers?’¹¹⁰² The Third Circuit held that the defendant had merely extended the range of audibility of a broadcast program, and this could not be said to constitute a “performance” under the US *Copyright Act*.¹¹⁰³

This decision was affirmed by the US Supreme Court. The Court stated that ‘[t]he Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several “rights” that are made “exclusive” to the holder of the copyright. If a person ... puts the work to a use not enumerated in § 1, he does not infringe.’¹¹⁰⁴ Importantly, the Supreme Court emphasised in its reasons that the ‘limited scope of the copyright holder’s statutory monopoly’ reflected a balance of competing interests, and that ‘[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music and other arts.’¹¹⁰⁵ This next statement of the decision, reminding us that copyright’s authorship function is not the sole or primary function of copyright, has since been cited in various decisions:

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.¹¹⁰⁶

A performance ... is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance ... be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance.

¹¹⁰² *Twentieth Century Music Corporation and Mary M Bourne v George Aiken* 500 F. 2d 127 (3d Cir. 1974) 128.

¹¹⁰³ *Ibid* 137. The Court recognised that there were conflicting tests to be found in the Supreme Court decisions of *Buck v Jewell-LaSalle Realty Co.* 283 U.S. 191 (1931) (which favoured the plaintiff) and *Fortnightly Corp. v United Artists Television, Inc.* 392 U.S. 390 (1968) (which favoured to defendant). In *Fortnightly*, the question of whether a performance had occurred depended ‘upon a determination of the function that is played by CATV in the overall process of telecasting and reception’. The CATV framework in *Fortnightly* was said to fall ‘on the viewer’s side of the line’, as it ‘no more than enhances the viewer’s capacity to receive the broadcaster’s signals’: 392 U.S. 390 (1968) 399. Applying this *Fortnightly* “functional” test, the Third Circuit in *Aiken* held that the extension of the range of audibility of a broadcast program was not a performance.

¹¹⁰⁴ *Twentieth Century Music Corporation v Aiken* 422 U.S. 151 (1975) 154–155, quoting *Fortnightly Corp v United Artists Television, Inc.*, 392 US 390 (1968) 393–5.

¹¹⁰⁵ 422 U.S. 151 (1975) 156 (emphasis added).

¹¹⁰⁶ *Ibid*.

Attempting to distinguish a viewer function from a performer function is all the more difficult today.¹¹⁰⁷ Nevertheless, we may consider whether the policy arguments of the Court in *Aiken* are still relevant. Firstly, the Court held that it was inequitable to base primary liability for an exercise of the performance right on whether the initial performance was authorised, as the only way to avoid liability would be to keep the radio off.¹¹⁰⁸ This position may be compared to the *Sanoma* CJEU case,¹¹⁰⁹ which attempts to address this inequity by introducing an additional fault threshold for primary liability. Secondly, the Court found that multiple licences for ‘what is basically a single public rendition of a copyrighted work’ would ‘go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1 (e).’¹¹¹⁰ The policy argument advanced here takes into account the size of licensable markets,¹¹¹¹ a notion used to justify expansive interpretation of “the public” (as discussed in Chapter V of this thesis). However, the analysis of authorship incentives here, through the Court’s consideration of licensing markets, is not assumed to be paramount. The Court demonstrates a willingness to engage with copyright’s dissemination function and the public interest in access, and in contrast to approaches today, cabins the scope of the right by finding that the relevant act was not exercised.¹¹¹²

¹¹⁰⁷ Cf *ibid* 157, where the Court expressed the view that the facts in *Aiken* could be distinguished from an orchestra or singer who performs in a public place, because ‘it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously “performing,” and thus also guilty of infringement’.

¹¹⁰⁸ *Ibid* 162.

¹¹⁰⁹ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

¹¹¹⁰ *Twentieth Century Music Corporation and Mary M Bourne v George Aiken* 500 F. 2d 127 (3d Cir. 1974) 162–3. See also 163 n 14, where court explains further:

The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster’s audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster’s advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments.

¹¹¹¹ See Lilenfeld, above n 1091, 272. Lilenfeld notes that this justification takes into account a system whereby licensing fees are accrued at the source, as the broadcasts is able to seek higher fees based on the expected total number of listeners or viewers of the broadcast, rather than collecting smaller payments from downstream users.

¹¹¹² Cf Nimmer, above n 960, § 107.44, arguing that ‘the public’ should be the relevant limitation:

Policy questions aside, the Court’s reasoning appears faultless but for the major obstacle of how to treat the precedent of the *Jewell-LaSalle case*, and the multiple performance doctrine which it fostered. If this doctrine were still to be regarded as viable law, then the Court’s analogy to the broadcaster’s performance (upon which its conclusion is predicated) is in error. It is true that the broadcaster is held to have accomplished the primary performance, but a television viewer by activating his set has himself brought about a secondary or multiple performance. The viewer is immune from the reach of the Copyright Act not because he has not caused a performance, but rather because that performance (within the confines of his own home) is not a “public” performance.

Ultimately, the “multiple performance” doctrine was said to be reinstated by legislative amendments.¹¹¹³ However, the reasoning and the approach in *Aiken* highlights the importance of considering both copyright functions, rather than assuming a broad approach to further authorship incentives only. Leaving it to the legislature to introduce limited, technology-centric exceptions to circumscribe the scope of such rights leads to a cumbersome and technical copyright regime.¹¹¹⁴

In addition, we should be wary of superficial labels that conceal the underlying policy considerations. Exhaustion in the online context, for example, might mean that there is only *one* public audience for each copyright work in a jurisdiction. This bright line rule is untenable; the issue invokes questions of policy and requires a more nuanced approach. We should not be seeking to reduce sources of copyright content to a single source, but at the same time, the exclusive rights of the owner should not cover all possible uses of copyright works, as the Supreme Court reminded us in *Aiken*.¹¹¹⁵ The real questions that need to be addressed are not whether the right should be “exhausted” or whether the owner’s market should be limited to a “primary market” — it is how to find principled limits for the “act” and “the public”.

It is the “act” that leads to new audiences or segments of the public, therefore an important first step is to consider what the relevant “act” entails. By hinging the scope of the exclusive right on “the public”, we are left with a vacuum devoid of principles to guide our interpretation of the “act”. There is little understanding about the limits of the “act”. This creates unnecessary complexity around “the public” through the addition of ad hoc conditions (as evident in EU). For the sake of clarity and consistency (and in light of the vague nature of “the public”), we need to invest more efforts into identifying the boundaries of the “act”.

¹¹¹³ This reading is based on the legislative intent expressed in the House Report that ‘a cable television system is performing when it retransmits the broadcast to its subscribers’: H.R. Rep. No. 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 63. However, Nimmer argues that an alternate interpretation eschewing the multiple performance doctrine is still open to courts, as the effect of the House Report’s justification ‘is to alter the statutory text rather than merely to interpret it’: Nimmer, above n 960, § 8.18 [B]. The broadened performance right was made subject to section 110(5)(A), which provides an exception for performances or displays using ‘a single receiving apparatus of a kind commonly used in private homes’, provided no direct charge is made and no retransmission is made. This exception was termed the “Aiken exception” and purportedly designed to exempt conduct that fit the facts in *Aiken*, despite having been drafted ten years before the *Aiken* decision: Lilenfeld, above n 1091, 722.

¹¹¹⁴ See Pamela Samuelson’s criticism of efforts to simplify exclusive rights that have effectively led to their expansion: Samuelson, ‘Preliminary Thoughts on Copyright Reform’, above n 24, 565. Samuelson argues that ‘[t]his manner of articulating exclusive rights implies that if the 1976 Act does not specifically provide an exception for a particular activity that falls within one or more of the broadened exclusive rights, then the activity, no matter how economically trivial, will be deemed illegal unless it can somehow be shoe-horned into the fair use rubric or some other specific exception’.

¹¹¹⁵ *Twentieth Century Music Corporation v Aiken* 422 U.S. 151 (1975) 154–155, quoting *Fortnightly Corp v United Artists Television, Inc.*, 392 US 390 (1968) 393–5 (‘The Copyright Act does not give a copyright holder control over all uses of his copyrighted work’).

Section D. A Mental Component: Volition as a Limit upon the “Act”

In a number of instances, US courts have used the notion of volition to limit the scope of the relevant “act”. On the basis of the existing piecemeal jurisprudence, volition appears to be an imprecise concept that is easily manipulated, leading to ad hoc judicial decisions.¹¹¹⁶ However, rather than dismissing volition as a gloss,¹¹¹⁷ it may be useful to investigate why some US courts saw the need for this volition requirement. Discussions of volition in copyright law provide us with a superficial understanding of the term, therefore this analysis of volition will be supplemented by broader philosophical studies and principles from other areas of law such as torts and criminal law.

1 Various Shades of “Volition” in Copyright

In the copyright context, volition has been described as ‘a simple but profoundly important rule’, i.e. ‘[a] defendant may be held directly [or primarily] liable only if it has engaged in volitional conduct that violates the Act’.¹¹¹⁸ However, the development of volition under US copyright law has not been straightforward. To understand this deceptively simple rule, it is necessary to study the cases that established the concept of volition, and consider subsequent cases purporting to apply it in different contexts. Conclusions on volition tend to depend on how it is interpreted, either broadly or narrowly, and on the level of the defendant’s involvement in the “process” (without a clear discussion of the relevant “act”). Therefore courts may arrive at vastly different conclusions, despite purporting to rely on the same concept. In cases interpreting volition narrowly, the courts find that the defendant has to personally carry out the act, and the lack of volition means that the defendant is not primarily liable. Where volition is interpreted broadly, however, the defendant’s involvement (whether through some level of control or filtering of content, or the selection of a type of content) might lead a court to conclude that the requisite volition is satisfied, and the defendant has carried out the “act”. In short, these varied approaches show that volition, as understood by the courts, is far from a simple concept.

The bulletin board cases: *Netcom* vs *Frena*

The US District Court decision of the Northern District of California, in ***Religious Technology Center v Netcom*** (“*Netcom*”),¹¹¹⁹ established volition as a requirement in considering primary liability for the reproduction right, distribution right and display right.¹¹²⁰ The plaintiff, in addition to suing the

¹¹¹⁶ See Eleanor M Lackman and Scott J Sholder, ‘The Role of Volition in Evaluating Direct Copyright Infringement Claims Against Technology Providers’ (2013) 22(3) *Bright Ideas* 3.

¹¹¹⁷ See *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 164–5 [63].

¹¹¹⁸ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2512.

¹¹¹⁹ 907 F. Supp. 1361 (N.D. Cal. 1995).

¹¹²⁰ Ibid 1365–1366. The plaintiffs held the copyright of published and unpublished works written by Ron Hubbard, the late founder of the Church of Scientology, and sought to remove discussion and criticism of

person who had initially posted content online without their permission,¹¹²¹ sought remedies against the operator of the bulletin board service (BBS) on which the content was posted and the ISP Netcom that connected the BBS to the Internet.¹¹²²

The Court dealt with the alleged infringement of the reproduction right separately before discussing the distribution and display rights. The fact that copies were made automatically as part of a process initiated by a third party was material to the Court's decision.¹¹²³ Both the BBS and the Netcom's connecting system could 'operate without any human intervention'.¹¹²⁴ It thus found that 'the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean Netcom has *caused* the copying.'¹¹²⁵ The Court then likened 'Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of data sent through it' with 'the owner of a copying machine who lets the public make copies with it', noting that this was more appropriately considered under contributory infringement principles (a form of secondary liability).¹¹²⁶

The Court explained the volition requirement as follows:

Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.'¹¹²⁷

The Court does not explain this concept of volition or causation further, but in the context, two relevant factors may be distilled. Firstly, there were third parties who were more closely related in a causal sense to the making of copies. They were the persons posting on the BBS, who more clearly carried out the act of copying. Secondly, it was an automated system that uniformly created copies of the data. In other words, neither Netcom nor the BBS operator scrutinised the content passing through their automated systems. The defendants did not have knowledge of the specific works.

In addition to these contextual matters, the Court makes policy observations on the creation of potential 'unreasonable liability' to justify the need for a volition requirement in this instance.¹¹²⁸ The

Scientology on online bulletin boards, alleging that portions of their works were posted on these bulletin boards without their permission.

¹¹²¹ Erlich, the initial poster, was a former Scientology minister.

¹¹²² *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1366.

¹¹²³ Ibid 1368.

¹¹²⁴ Ibid.

¹¹²⁵ Ibid 1368–1369 (emphasis added).

¹¹²⁶ Ibid 1369.

¹¹²⁷ Ibid 1370.

¹¹²⁸ Ibid 1369 ('Plaintiffs' theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability').

Court explained that the initial poster's messages would be carried to different servers 'regardless of whether that server acts without any human intervention beyond the initial setting up of the system', and this would result in liability imposed on parties who merely operated a system essential for Usenet messages to be widely distributed.¹¹²⁹ Therefore, volition was a way of limiting the scope of primary liability, as there was no need here to 'make all of these parties infringers'.¹¹³⁰ In other words, the design and implementation of a system was still one step removed from the execution of the relevant act by the system.

Importantly, the Court recognises that volition ought to apply differently, depending on the right alleged to be infringed. This recognition is made in its rejection of the plaintiffs' reliance on *Playboy Enterprises v Frena* ("Frena"),¹¹³¹ a decision of the District Court for the Middle District of Florida, which held that a BBS operator was directly liable for the distribution and display rights. The Court in *Frena* did not expressly refer to volition, but held that it was sufficient that the defendant 'supplied a product containing unauthorized copies of a copyrighted work' to directly infringe the distribution right – '[i]t does not matter that Defendant Frena claims he did not make the copies itself'.¹¹³² The *Netcom* court considered the facts at hand to be distinguishable from *Frena*, because *Netcom* did not maintain an archive of files for its users and could not be said to be 'supplying a product' (using the terminology of the Court in *Frena*).¹¹³³ It highlighted the fact that the Court in *Frena* only considered the right to distribute copies to the public, therefore direct liability was not dependant on whether the defendant made copies.¹¹³⁴

Despite noting the differences between the acts of distribution and reproduction in its discussion of *Frena*, the *Netcom* court deals with the public distribution and display rights in largely the same manner as the making of copies. The Court finds that the plaintiff's allegations suffer from the same problem of causation in the context of distribution.¹¹³⁵ The Court asserts that '[o]nly the subscriber should be liable for causing the distribution of plaintiffs' work', as the actions of the BBS provider are automatic and indiscriminate.¹¹³⁶ In this context, the Court again refers to the creation of

¹¹²⁹ Ibid 1369–1370.

¹¹³⁰ Ibid 1370.

¹¹³¹ 839 F. Supp. 1552 (M.D. Fla. 1993).

¹¹³² Ibid 1556.

¹¹³³ *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1372. See *Playboy Enterprises, Inc v Frena* 839 F. Supp. 1552 (M.D. Fla. 1993) ('[T]here is no dispute that [the BBS operator] supplied a product containing unauthorized copies of a copyrighted work'), cited in *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1370.

¹¹³⁴ *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1370.

¹¹³⁵ Ibid 1372.

¹¹³⁶ Ibid.

‘unreasonable liability’.¹¹³⁷ The Court’s finding that the ISP Netcom was not ‘supplying a product’ appears conclusory.¹¹³⁸ However, the Court does highlight Netcom’s lower level of involvement in the distribution of copies in contrast to the defendant in *Frena*.¹¹³⁹ This is supported by a footnote in *Netcom*, which cites criticism of *Frena* and speculates that the outcome in *Frena* was influenced by the defendants’ knowledge of ongoing infringements.¹¹⁴⁰ This criticism is not unwarranted, as the Court in *Frena* deals with direct infringement in a rather cursory manner, without scrutinizing the alleged act of distribution in great detail.¹¹⁴¹

In short, we find two conflicting US district court decisions in the span of three years, *Frena* in the Eleventh Circuit’s jurisdiction taking a broad approach to primary infringement, and *Netcom* under the Ninth Circuit raising the volition requirement as a limitation. Over the next two decades, courts gravitate toward either of these positions, and the volition standard tracks a fractured path through US caselaw.¹¹⁴²

¹¹³⁷ Ibid. The Court also considered Netcom’s position in the “chain of distribution”:

There is no logical reason to draw a line around Netcom and Klemesrud and say that they are uniquely responsible for distributing Erlich's messages. Netcom is not even the first link in the chain of distribution--Erlich had no direct relationship with Netcom but dealt solely with Klemesrud's BBS, which used Netcom to gain its Internet access. Every Usenet server has a role in the distribution, so plaintiffs' argument would create unreasonable liability.

¹¹³⁸ See *ibid*.

¹¹³⁹ The Court found that Netcom did not create or control the content of the information available to subscribers, but just provided access to the internet. It held that it was inappropriate to hold a service liable if it acts more like a conduit, that is, ‘one that does not itself keep an archive of files for more than a short duration’: *ibid*.

¹¹⁴⁰ Ibid 1371 n 16, citing Lance Rose, *NetLaw: Your Rights in the Online World* (Osborne McGraw-Hill, 1995) 91–92.

¹¹⁴¹ The Court deals with the “act” in a single paragraph at 1556, stating:

Public distribution of a copyrighted work is a right reserved to the copyright owner, and usurpation of that right constitutes infringement. PEI's right under 17 U.S.C. § 106 (3) to distribute copies to the public has been implicated by Defendant Frena. Section 106(3) grants the copyright owner "the exclusive right to sell, give away, rent or lend any material embodiment of his work." There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself.

The Court refers to Jay Dratler, Jr., *Intellectual Property Law: Commercial, Creative, and Industrial Property* (Law Journal Press, 1991)§ 6.01[3], at 6-15 (1991). Dratler states that ‘the distribution right may be decisive, if, for example, a distributor *supplies products* containing unauthorized copies of a copyrighted work but has not made the copies itself’ (emphasis added).

¹¹⁴² Cases relying on volition to find the defendant(s) not directly liable include: *Marobie-FL, Inc v National Association of Fire Equipment Distributors and Northwest Nexus, Inc* 983 F. Supp. 1167 (ND Ill, 1997); *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004); *Fox Broadcasting Co v Dish Network, LLC* 723 F.3d 1067 (9th Cir. 2013); *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008). On the other hand, a range of US district courts have held, notwithstanding the volition requirement, that direct infringement had occurred: *Playboy Enterprises, Inc v Chuckleberry Publishing, Inc* 939 F. Supp. 1032 (S.D.N.Y. 1996); *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997); *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997); *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009). Most of these decisions are discussed further below.

The importance of *Netcom* and the volition requirement was explained in *Perfect 10 v Cybernet Ventures*.¹¹⁴³ The Court observed that:

Computer technology, and in particular the Internet, has created a challenge to copyright's strict liability scheme. Because of the architecture of the web and the workings of computer technology, almost any business that utilizes computer hardware to create access to the Internet or to store content may find its hardware creating or displaying infringing material as a result of decisions by third-parties (the system's users) without the business doing any truly volitional actions.¹¹⁴⁴

Captured in this paragraph was a concern that the automated passage of data necessarily entailed the making or showing of copies, and strict copyright liability without requiring volition would impede the development of computer technology and internet architecture.¹¹⁴⁵ In the context of the making available right, however, the making of copies is not a necessary component of “act”. Therefore, it is necessary to identify the relevant “act” before asking whether that particular act was accompanied by the necessary volition.¹¹⁴⁶

Beyond *Netcom*: continued uncertainty surrounding volition

Subsequent cases have expanded upon *Netcom*'s volition requirement. Unfortunately, these decisions tend to avoid pinpointing the relevant act (instead focusing on the act of copying, even if the distribution or display right could be applied), and perpetuate the lack of clarity surrounding volition. One such case is *CoStar v Loopnet*,¹¹⁴⁷ a Fourth Circuit Court of Appeals decision from 2004. The defendant Loopnet ran a website that allowed subscribers to post commercial real estate listings, which included photographs of the relevant properties.¹¹⁴⁸ Loopnet employees would review each

¹¹⁴³ 213 F. Supp. 2d 1146 (C.D. Ca. 2002). In this case, the defendant provided an online age-verification service, which also had search and link functions. It maintained a directory of links to websites utilizing its service, organized by category. The District Court found that there were no serious questions on the merits concerning a negative finding on Cybernet's liability for direct infringement, although there was a strong likelihood of success on the contributory infringement claim (at 1164). Following the *Netcom* ruling and noting inconsistent applications in cases that follow (*Sega Enterprises Ltd v Maphia* 857 F. Supp. 679 (N.D. Cal. 1994) and *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997)), the Court held that at the very least ‘defendants must actively engage in one of the activities recognized in the Copyright Act’ (at 1168). As ‘Cybernet does not use its hardware to either store the infringing images or move them from one location to another for display’, it was unlikely that direct infringement could be found (at 1168-69).

¹¹⁴⁴ Ibid 1167, cited in *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 558 (Circuit Judge Gregory in dissent).

¹¹⁴⁵ See *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 558. Circuit Judge Gregory stated in dissent that ‘the *Netcom* rule was fashioned to protect computer systems that *automatically* transfer data with no realistic manner by which the operator can monitor content’ (emphasis in original).

¹¹⁴⁶ In other words, the application of volition depends on the nature of the “act”.

¹¹⁴⁷ 373 F.3d 544 (4th Cir. 2004).

¹¹⁴⁸ Ibid 547.

photograph briefly to determine if the photograph actually depicted commercial real estate and to find obvious evidence that the subscriber was not a rightholder (such as a copyright notice) before permitting it to be seen by website visitors.¹¹⁴⁹ CoStar claimed that Loopnet was directly liable for the posting of CoStar's photos by subscribers.

The Fourth Circuit explained that a direct infringer has 'been characterized as one who "trespasses into [the copyright owner's] exclusive domain" established by § 106, subject to the limitations of §§ 107 through 118.'¹¹⁵⁰ Although wilful violation of the copyright owner's rights is not required, the Copyright Act 'nonetheless requires *conduct* by a person who causes in some meaningful way an infringement'.¹¹⁵¹ It goes on to note the impacts on technology providers should mere constructive knowledge of third party infringements amount to strict liability.¹¹⁵² The Court explicitly contrasts a volitional act to indirect (or secondary) forms of liability which require additional elements such as knowledge or supervision, explaining that direct infringement applies to 'the party who *actually engages* in the infringing conduct'.¹¹⁵³ Therefore, to establish direct liability for copyright infringement:

[S]omething more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.¹¹⁵⁴

The Court found that an ISP who owns the electronic facility simply 'responds automatically to users' input'.¹¹⁵⁵ It reasoned that even when copies are made on the system, these are made as a component part of a transmission system – it is 'a temporary, automatic response to the user's request, and the entire system functions solely to transmit the user's data to the Internet'.¹¹⁵⁶ Furthermore, the ISP is 'totally indifferent to the material's content', and in that way functions similar to a traditional

¹¹⁴⁹ Ibid.

¹¹⁵⁰ Ibid 549, citing *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984) 433.

¹¹⁵¹ *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 549 (emphasis in original).

¹¹⁵² Ibid. The Fourth Circuit Court of Appeals states '[w]ere this not so, the Supreme Court could not have held, as it did in *Sony*, that a manufacturer of copy machines, possessing constructive knowledge that purchasers of its machine may be using them to engage in copyright infringement, is not strictly liable for infringement.', citing *Sony Corporation of America v Universal City Studios, Inc*, 464 U.S. 417 (1984) 439–42. It should be noted that the plaintiff also unsuccessfully argued that the volition requirement in *Netcom* was driven by the need to shield facilitators of internet communications, and that this was no longer necessary in light of the "safe harbour" protections introduced by the *Digital Millennium Copyright Act* in 1998 (at 547, 549).

¹¹⁵³ *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 549–50 (emphasis in original).

¹¹⁵⁴ Ibid 550.

¹¹⁵⁵ Ibid. The Court considered the defendant ISP in this case to be analogous to a copy machine operator who allows customers to make copies.

¹¹⁵⁶ Ibid 551.

telephone company.¹¹⁵⁷ The cursory review process undertaken by the defendant would tend to lessen the likelihood of infringements occurring, and therefore did not supply the necessary volition.¹¹⁵⁸ The Court noted that this ‘gatekeeping function’ did not entail searching or selecting of photographs for duplication.¹¹⁵⁹ In other words, it was not prepared to extend liability on the basis of acts designed purely to prevent infringement by others.¹¹⁶⁰

The Court raises important policy considerations and considers the impact of its decision on technological developments. However, it makes a key omission. The Court in *CoStar v Loopnet* does not precisely identify the relevant exclusive right that volition ought to attach to. The Court refers to liability as “a copier”¹¹⁶¹ and asserts that LoopNet is not an “actual duplicator”,¹¹⁶² therefore it may be inferred that the Court was only considering the reproduction right. However, the Court does not consider the right of public display, even though it would be relevant on the facts. Thus the decision fails to distinguish the relevant “acts” under each exclusive right.

A comparison of the majority decision with that of the dissenting judge reveals a fundamental disagreement about the meaning of volition. The dissenting judge in *CoStar v Loopnet* takes a much broader view of the conduct or characteristics that would satisfy volition, a view influenced by the commercial nature of the defendant’s enterprise.¹¹⁶³ Judge Gregory characterized the LoopNet employee’s choice, whether or not to reject or accept the photograph based on certain criteria as the relevant volitional act.¹¹⁶⁴ In addition, Judge Gregory found that LoopNet cannot be characterised as a “conduit”, as it ‘has a *deeply vested interest* in its content’ and screening occurs ‘to further its *commercial aims*, ensuring that the photos which appear comply with the website’s purpose, namely advertising commercial real estate’.¹¹⁶⁵ Furthermore, the dissenting judge asserted that this finding was supported by LoopNet’s role as ‘the pivotal volitional actor, “but for” whose action, the images

¹¹⁵⁷ Ibid.

¹¹⁵⁸ Ibid 556.

¹¹⁵⁹ Ibid.

¹¹⁶⁰ Ibid 556–57. The Court appears to chastise the plaintiff CoStar for the lack of a copyright notice on its photographs, particularly in light of the defendant Loopnet’s efforts to filter infringing photos following complaints by CoStar, a process that ‘CoStar and other copyright holders benefit significantly from’. The Court stated at 557: ‘CoStar can hardly request LoopNet to prevent its users from infringing upon particular unmarked photographs and then subsequently seek to hold LoopNet liable as a direct infringer when Loop-Net complies with CoStar’s request.’

¹¹⁶¹ Ibid 546.

¹¹⁶² Ibid.

¹¹⁶³ It should be noted that the dissenting judge refers to volition as “the *Netcom* defense”: ibid 557.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Ibid 559 n 1 (emphasis added).

would never appear on the website.’¹¹⁶⁶ In this statement, the volition of the defendant is not linked to any particular “act”, the defendant is simply characterised as “a volitional actor”.¹¹⁶⁷

Narrow interpretations of volition in relation to passive automated conduits

In the cloud context, there have been attempts to extend volition to the conscious inducement of infringing activity, some of which have been unsuccessful. In *Disney Enterprises v HotFile*,¹¹⁶⁸ the defendant’s HotFile system was a cloud storage site that encouraged the uploading of popular copyright infringing files, by making payments to users who uploaded these files.¹¹⁶⁹ The District Court of the Southern District of Florida however rejected the plaintiff’s arguments that inducement of third party infringement could constitute direct infringement.¹¹⁷⁰ Distinguishing a number of cases that found volition to be satisfied, the Court observed that in these other cases ‘rather than having users upload the copyrighted material, the defendant took a volitional act, i.e., uploading the copyrighted work itself or using software to search for material to upload.’¹¹⁷¹ The Court also questioned decisions which held that the defendant company’s knowledge of massive infringement or a policy of encouraging infringement gave rise to volitional conduct,¹¹⁷² noting the *Netcom* Court’s express finding that knowledge coupled with inducement or supervision and financial interests gave rise to secondary liability, not primary liability.¹¹⁷³

Similar outcomes may be found in two subsequent cloud cases: *Fox Broadcasting v Dish Network*,¹¹⁷⁴ a decision of the Ninth Circuit, and *Smith v Barnesandnoble.com, LLC*,¹¹⁷⁵ a decision for summary judgement by the US District Court of the Southern District of New York. In *Fox Broadcasting v*

¹¹⁶⁶ Ibid 560, citing *Webster’s Third New International Dictionary of the English Language (Unabridged)* (1981) 2562. Judge Gregory states:

Indeed, “volition” is defined as ‘the act of willing or choosing[;] the act of deciding (as on a course of action or an end to be striven for)[;] the exercise of the will ...[or] the termination of an act or exercise of choosing or willing[;] a state of decision or choice.’

¹¹⁶⁷ The judge concludes ‘that the *Netcom* volitional defense should focus on passivity and the automated nature of the act – not the fact that a user’s initial volition somehow exterminates liability for later volitional acts’: *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 561.

¹¹⁶⁸ 798 F. Supp. 2d 1303 (S.D. Florida 2011).

¹¹⁶⁹ See *ibid* 1306–307.

¹¹⁷⁰ Ibid 1308 (‘[T]he plaintiffs argue that, Netcom notwithstanding, they have alleged a direct--copyright-infringement claim by alleging that Hotfile created a business plan that induced infringement’).

¹¹⁷¹ Ibid, distinguishing *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997) 549; *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997) 510; *NY Times Co, Inc v Tasini* 533 U.S. 483 (2001) 489 (note that the Supreme Court in this case did not explicitly discuss volition, as the case hinged on their interpretation of the defendant publishers’ competing rights as owners of collective works).

¹¹⁷² *Disney Enterprises v Hotfile Corp* 798 F. Supp. 2d 1303 (S.D. Florida 2011) 1309, citing *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009); *Capitol Records, Inc v Mp3Tunes, LLC* No. 07-cv-9931, 2009 U.S. Dist. LEXIS 96521, 2009 WL 3364036 (S.D.N.Y. Oct. 16, 2009).

¹¹⁷³ *Disney Enterprises v Hotfile Corp* 798 F. Supp. 2d 1303 (S.D. Florida 2011) 1309.

¹¹⁷⁴ 723 F.3d 1067 (9th Cir. 2013).

¹¹⁷⁵ *Smith v BarnesandNoble.com LLC*, 143 F. Supp. 3d 115 (S.D.N.Y. 2015).

Dish Network, the copies were stored locally on the customer’s device, but Dish’s program controlled how long the copies would be available, and Dish could modify the start and end time in which primetime programmes were recorded.¹¹⁷⁶ This control over the copying was insufficient to attribute volition to Dish, as it was the user, and not Dish, that had taken ‘the initial step of enabling’ PrimeTime Anytime,¹¹⁷⁷ and the user was ‘the most significant and important cause’ of the copy.¹¹⁷⁸ In the 2015 decision of *Smith v Barnesandnoble.com*,¹¹⁷⁹ the initial transfer of a copy of an e-book was authorised, but the subsequent storage and automated transmission from the cloud to the customer’s device was not (as authorisation had been revoked).¹¹⁸⁰ Despite uncertainty about the relevance of the volition test following *Aereo*,¹¹⁸¹ Judge Carter relied on the volitional conduct approach in *Cablevision*¹¹⁸² and held that the volitional element was missing here. The judge held that the Court could not ‘impose liability as a direct infringer on a different party for copies that are made automatically upon [the] customer’s command’.¹¹⁸³ Although the defendant ‘designed, housed, and maintained a system—the Digital Locker system—through which it distributed licensed content to customers’, this was not a case where the defendant’s contribution to the creation of a copy was ‘so great that it warrants holding that party liable for the infringement, even though another party actually made a copy’.¹¹⁸⁴ Here Judge Carter seems to be saying that the defendant was not at fault for the inadvertent making of a copy. Other than the plaintiff’s book, there was no evidence that defendant hosted unlicensed copyright materials in its digital lockers, therefore this case could be distinguished from other cases where the ‘defendants actively encouraged and benefitted from the infringing copying activity and in fact set up their services around such activity’.¹¹⁸⁵ In coming to this conclusion, Judge Carter takes into account the potentially ‘far-reaching consequences [an alternate finding may have] for the many users of cloud-based storage systems like Dropbox or Apple’s

¹¹⁷⁶ It should be noted that the case involved a number of complex issues and findings involving fair use and breach of contract, and contained a brief discussion of primary infringement.

¹¹⁷⁷ *Fox Broadcasting Co v Dish Network, LLC* 723 F.3d 1067 (9th Cir. 2013) 1074.

¹¹⁷⁸ *Ibid*, quoting Page Keeton and William L Prosser, *Prosser and Keeton on the Law of Torts* (West Group, 1984) § 42, as cited in *Fox Broadcasting Co v Dish Network, LLC* 905 F.Supp.2d 1088 (C.D. Cal. 2012) 1102. Continuing with the causal terminology, the Court states that ‘[i]nfringement of the reproduction right requires “copying by the defendant”, which comprises a requirement that the defendant cause the copying’: See also *Fox Broadcasting Co v Dish Network, LLC* 723 F.3d 1067 (9th Cir. 2013) 1074, emphasizing causality in its assertion that ‘[i]nfringement of the reproduction right requires “copying by the defendant”, which comprises a requirement that the defendant cause the copying’ (citations omitted).

¹¹⁷⁹ 143 F. Supp. 3d 115 (S.D.N.Y. 2015).

¹¹⁸⁰ The Barnes & Noble e-reader system automatically transferred files between an e-reader and the cloud, depending on whether there was sufficient storage on the customer’s device. The rightsholder alleged that the defendant Barnes & Noble had directly and contributorily infringed its reproduction and distribution rights.

¹¹⁸¹ 134 S. Ct. 2498 (2014).

¹¹⁸² 536 F.3d 121 (2d Cir. 2008).

¹¹⁸³ *Smith v BarnesandNoble.com LLC*, 143 F. Supp. 3d 115 (S.D.N.Y. 2015).

¹¹⁸⁴ *Ibid* 122.

¹¹⁸⁵ *Ibid* 123, citing a range of cases including *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 148; *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 555–56.

iCloud—particularly as it is not always clear to the user what is stored locally and what is stored in the cloud’.¹¹⁸⁶ Each of these cases have limited volition to the execution of specific infringing acts, and declined to take into account supervision or control over the conduct of third parties more broadly.

Broad interpretations of volition encompassing overall conduct

In contrast to the preceding cases, a number of US courts concluded that the defendant was primarily liable for copyright infringement as it exercised a degree of control over the activities of third parties using the system. The factors taken into account in these broad approaches to volition are not unlike the considerations relevant to secondary liability. Notably, the technology or services in most of these cases appear to target infringing conduct by its users, or are tailored for the delivery of specific types of content.

Prime examples are three successive cases from 1996 involving Playboy Enterprises, which sued website proprietors and BBS operators for Playboy content present on online services. In the first two cases, there was evidence that the defendants were the source of the content being distributed, either by supplying the content themselves¹¹⁸⁷ or by actively moving files uploaded by others into an accessible folder.¹¹⁸⁸ In the third case, *Playboy Enterprises v Webbworld*,¹¹⁸⁹ the District Court for the Northern District of Texas provided a more detailed discussion of the precise role of the defendant, particularly as the content was sourced using an automated process. The defendant Webbworld utilised software to seek out adult-oriented images from Internet forums or “newsgroups”. Using a software called “ScanNews”, Webbworld would take the news feed, discard the text accompanying the news feed and retain the sexually-oriented images.¹¹⁹⁰ Once these images were loaded to Webbworld’s servers, they would be available to users who had paid a subscription fee.¹¹⁹¹ The Court

¹¹⁸⁶ *Smith v BarnesandNoble.com LLC*, 143 F. Supp. 3d 115 (S.D.N.Y. 2015) 125.

¹¹⁸⁷ The first *Chuckleberry* case is not precisely on point as it concerned the interpretation of “distribution” in an injunction granted for trade mark infringement. In considering whether the injunction which prohibited “distribution” of trade mark infringing images was violated, the Court held that the defendant not only provided access, but supplied the content for the services and actively invited use of their internet site: *Playboy Enterprises, Inc v Chuckleberry Publishing, Inc* 939 F. Supp. 1032 (S.D.N.Y. 1996).

¹¹⁸⁸ The *Hardenburgh* case related to the BBS operator’s liability for material uploaded by subscribers (i.e. the operator was not the initial source). However, there were two factors that were key to an affirmative finding on direct liability for both distribution and display rights. Firstly, the defendant actively encouraged the uploading of files to the system and, secondly, the defendant exercised control over the dissemination of those files. Control was found as the defendant had a screening procedure, which involved its employees moving uploaded files into a folder that made files generally available to subscribers. Although not stated explicitly, it may be that the Court considered the movement of files to be the relevant “act” of distribution that was volitionally carried out by the defendant’s employees: *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997).

¹¹⁸⁹ 991 F. Supp. 543 (N.D. Tex. 1997).

¹¹⁹⁰ *Ibid* 549.

¹¹⁹¹ *Ibid* 550. Note that the Playboy images were all obtained from the newsgroups, as none of the defendants themselves posted any of the images at issue onto the newsgroups: *ibid* 549.

held that all three rights of reproduction, distribution and display were infringed directly by the defendant.¹¹⁹² The defendants' argument that it was a mere conduit between their subscribers and adult-oriented newsgroups was rejected.¹¹⁹³ The Court held that 'Webbworld did not sell access; it sold adult images'.¹¹⁹⁴ Unlike the defendant in *Netcom*, Webbworld 'functioned primarily as a store, a commercial destination within the Internet'.¹¹⁹⁵

Therefore, by using software to select and source images of a particular characteristic, Webbworld had control over what was being made accessible on its website, and it could not 'now evade liability by claiming helplessness in the face of its "automatic" operation'.¹¹⁹⁶ Therefore, although the process of sourcing the images was automated and the choice as to each work did not involve human selection, the defendant was still liable for direct infringement.

In *Arista Records v Usenet.com*,¹¹⁹⁷ volition was again applied broadly where the defendants' service clearly targeted file-sharing practices. The Usenet network allowed users to post messages (or "articles") in newsgroups organized according to specific subject matter, with certain news groups dedicated to sharing of music.¹¹⁹⁸ The finding of facts emphasized that the defendants' services 'were used overwhelmingly for copyright infringement',¹¹⁹⁹ and that the record was 'replete with instances of Defendants and their employees specifically engendering copyright infringement and targeting infringement-minded users to become subscribers'.¹²⁰⁰ In addition to alleging secondary infringement of the reproduction right,¹²⁰¹ the plaintiffs sought a motion for summary judgement for direct infringement of their distribution right. The Court acknowledged that 'volitional conduct is an important element of direct liability',¹²⁰² but found volition to be satisfied as the defendants here

¹¹⁹² *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997) 551.

¹¹⁹³ *Ibid* 552.

¹¹⁹⁴ *Ibid*.

¹¹⁹⁵ *Ibid*. The Court continued:

Just as a merchant might re-package and sell merchandise from a wholesaler, so did Webbworld re-package (by deleting text and creating thumbnails) and sell images it obtained from the various newsgroups. In contrast to the defendants in [*Netcom*], Webbworld took "affirmative steps to cause the copies to be made." [*Netcom*], 907 F. Supp. at 1381. Such steps included using the ScanNews software to troll the Usenet for Webbworld's product.

¹¹⁹⁶ *Ibid* 553.

¹¹⁹⁷ 633 F. Supp. 2d 124 (S.D.N.Y. 2009).

¹¹⁹⁸ See *ibid* 131–132. Usenet was similar to peer-to-peer filesharing from the perspective of users, but differed from a technical standpoint as the files would be saved to central news servers (see 130).

¹¹⁹⁹ *Ibid* 131.

¹²⁰⁰ *Ibid* 132. This included the explicit acknowledgement of infringing uses through the defendants' service, and the use of infringing music as examples in tutorials on how to download content using the service (see *ibid* 133). In addition, this encouragement of infringement was a 'way for Usenet to get back in the game' in light of Napster's and Kazaa's copyright challenges (at 133, quoting Plaintiffs' Statement of Undisputed Facts 11). Note that the case was also tarnished by spoliation of evidence and discovery misconduct on the part of the defendants (at 134–42).

¹²⁰¹ It should be noted that there was a lengthy discussion of secondary liability in this case.

¹²⁰² *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 147, quoting *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) 131.

(1) were aware that digital music files were the most popular files on the service;¹²⁰³ (2) took active measures to create servers dedicated to such files;¹²⁰⁴ and (3) took active measures to increase the retention times of newsgroups containing such files.¹²⁰⁵ These actions transformed the defendant from a passive conduit into a party who ‘actively engaged in the process so as to satisfy the “volitional conduct” requirement for direct infringement’.¹²⁰⁶ However, the Court did not clearly specify how the overall conduct of the defendant in “the process” constituted an “act” of distribution. It is arguable that conduct supporting the functionalities utilised by users were one step removed from an exercise of the act by the defendant.

In addition, the Fourth Circuit in *Quantum Systems v Sprint*¹²⁰⁷ considered volition inapplicable to the facts, effectively applying an approach akin to “broad volition” in *Webbworld* and *Arista Records*. Here the defendant inadvertently failed to remove copies of the plaintiff’s software from a number of computers following the termination of the licence, and this software was automatically loaded into the computers’ random-access memory when the computers were turned on or rebooted by employees.¹²⁰⁸ The Court held that the volitional requirement as stated in *CoStar v Loopnet* only applied where the defendant was a mere conduit for third party activity.¹²⁰⁹ Here, the copying was instigated by Sprint’s own employees and the ‘original loading of the software onto its computers was volitional’ (unlike an ISP with no control over content uploaded to the internet).¹²¹⁰ In effect, the Court is attributing volitional conduct to the defendant by acts that precede the allegedly infringing act.¹²¹¹ If this approach is to be accepted, then the “act” of infringing reproduction extends to a range

¹²⁰³ *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 148.

¹²⁰⁴ *Ibid.*

¹²⁰⁵ *Ibid.* Other active measures included both automated filtering and human review to remove access to certain content and block certain users. Therefore, the Court found that the defendant had control over what was accepted and stored on their servers and what was rejected, and routinely exercised such control (at 148-49). Note that in contrast to the defendant in *Hardenburgh*, Usenet was rejecting some files already available, and not moving the files into a share folder. Nevertheless, the Court does not appear to consider this a material difference.

¹²⁰⁶ *Ibid* 149.

¹²⁰⁷ 338 Fed. Appx. 329 (4th Cir. 2009).

¹²⁰⁸ *Ibid* 331.

¹²⁰⁹ *Ibid* 336.

¹²¹⁰ *Ibid* (emphasis added).

¹²¹¹ Cf *Field v Google, Inc* 412 F.Supp. 2d 1106 (D. Nev. 2006). The plaintiff alleged that Google was creating and distributing copies of his works when Google users clicked on a cached link of his webpage. It should be recognised that the plaintiff did not allege that the initial caching of copies of the website was infringing. The District Court of Nevada held that when a user clicked on a cached link, ‘it is the user, not Google, who creates and downloads a copy of the cached Web page’ (at 1115). Google was characterised by the Court as a ‘passive’ participant, responding automatically to user requests, and this ‘automated, non-volitional conduct’ by Google was not direct infringement (at 1115). See also *Parker v Google, Inc* 422 F. Supp. 2d 492 (E.D. Pa. 2006) where the District Court of the Eastern District of Pennsylvania, considered Google’s direct liability for caching websites. The automated archiving postings and excerpting websites in response to users’ search queries without human intervention was held to lack the ‘necessary volitional element to constitute direct copyright infringement’ (at 497).

of activity beginning from the loading of the computer programs (which was not an infringing at the time, as it occurred prior to the termination of the licence) to the reboot of its computers.¹²¹² In support of its findings, the Court resorted to a notion of fault, explaining that the defendant was ‘less than diligent’ in ensuring that the copies of the software would not be loaded into RAM, therefore the automatic nature of these subsequent copying did not absolve the defendant from primary liability.¹²¹³

More recently in 2013, a district court in *Capitol Records v ReDigi*¹²¹⁴ effectively found that the design of a system could supply the volitional element for acts of distribution or reproduction. Similar to the preceding cases, ReDigi targeted a particular type of content (here “used” digital music files). In contrast to the previous cases however, the system was not clearly targeting infringing activity or designed to support copyright infringement. The culpability or fault of the defendant was less palpable, as liability of the defendant depended on the application of the first sale doctrine in the online environment, a matter yet to be conclusively settled by the courts. Here ReDigi marketed itself as an online marketplace for digital “used” music, allowing users to buy and sell digital music files purchase from iTunes.¹²¹⁵ The sales of so-called “used” music on ReDigi was facilitated by the Media Manager software, which would analyse a user’s computer and collate a list of digital music that were purchased from iTunes and therefore deemed eligible for sale.¹²¹⁶

The Court began its analysis with whether copyright had been infringed, before considering who should be responsible for such infringement. Having found that reproduction and distribution of the plaintiff’s content had occurred¹²¹⁷ and rejected the application of fair use and the first sale doctrine,¹²¹⁸ the Court moved on to consider ReDigi’s liability. Applying the principles from *Cablevision*¹²¹⁹ and *CoStar v Loopnet*,¹²²⁰ the Court found that ReDigi’s acts went beyond mere ownership of a machine used by others to make illegal copies; it had carried out ‘actual infringing

¹²¹² The Court continues to state that ‘[e]ach copy of the Quantum software was within Sprint's control and the actions of Sprint's employees (in rebooting the computers) are attributable to Sprint’: *Quantum Systems Integrators, Inc v Sprint Nextel Corp* 338 Fed. Appx. 329 (4th Cir. 2009) 336.

¹²¹³ *Ibid.*

¹²¹⁴ 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

¹²¹⁵ *Ibid* 645.

¹²¹⁶ *Ibid.* It should be noted that music files downloaded from a CD or other file-sharing websites were ineligible for sale via ReDigi. The Media Manager would also carry out checks to ensure that the user had not retained music that had been sold or uploaded for sale in the computer or attached devices.

¹²¹⁷ *Ibid* 651.

¹²¹⁸ It held that fair use was inapplicable as ‘ReDigi facilitates and profits from the sale of copyrighted commercial recordings, transferred in their entirety, with a likely detrimental impact on the primary market’ (at 654). In addition, the first sale doctrine would only apply to a *particular* copy of a phonorecord, and therefore could not apply to a new phonorecord on Redigi’s server (at 655).

¹²¹⁹ 536 F.3d 121 (2d Cir. 2008).

¹²²⁰ 373 F.3d 544 (4th Cir. 2004).

conduct with a nexus sufficiently close and causal to the illegal copying'.¹²²¹ Reasons for this included the following:

1. ReDigi's service was built to sell only copyrighted work (therefore the automated nature of the process did not absolve ReDigi of direct liability);¹²²²
2. The software was programmed to choose copyrighted content, and this act satisfied the volitional conduct requirement, rendering the act indistinguishable from human review of content which gave rise to liability under a broad approach to volition in previous cases;¹²²³
3. ReDigi provided the infrastructure for its users' infringing sales and affirmatively brokered sales by connecting users who were seeking unavailable songs with potential sellers.¹²²⁴

Given ReDigi's fundamental and deliberate role, the Court concluded that ReDigi's conduct 'transformed it from a passive provider of a space in which infringing activities happened to occur to an active participant in the process of copyright infringement'.¹²²⁵ Again, this decision does not identify the precise nature of the infringing act in its reasoning. The conduct of the defendant may be "deliberate" and "fundamental" to the overall process, but it is questionable whether the conduct is deliberate towards the relevant "act" of distribution or reproduction.

Volition in summary: varying interpretations by courts

In summary, whether volition is satisfied depends on a range of factors, and it is not always made clear why certain characterisations of the defendant's conduct are given more weight in some instances. Broadly, the defendant tends to be found primarily liable for infringement, where the court emphasizes the following characteristics of the defendant's overall conduct:

1. Active filtering of content;¹²²⁶
2. Control over the content, or the type of content based on the source;¹²²⁷
3. Design of the system to facilitate access to particular types of content;¹²²⁸ and

¹²²¹ *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) 657–58.

¹²²² *Ibid* 657.

¹²²³ *Ibid*, citing *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 148, and *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997) 512–13.

¹²²⁴ See *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) 657.

¹²²⁵ *Ibid*, quoting *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 148 (quotation marks and square brackets omitted).

¹²²⁶ See *Playboy Enterprises, Inc v Russ Hardenburgh, Inc* 982 F. Supp. 503 (N.D. Ohio 1997) (active filtering present); cf *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) (cursory check not sufficient).

¹²²⁷ See *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997) 553. Note that this is relevant even if choice is implemented via automated software such as Webbworld's ScanNews.

¹²²⁸ See *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

4. Prior blameworthy conduct attributable to the defendant (even if such conduct, in and of itself, is not an infringing “act”).¹²²⁹

In these cases, the defendant’s conduct tends to be characterised as reprehensible, as it targets or encourages the infringing activity of users. Even though the affirmative findings on volition do not explicitly hinge on fault, factors such as choice and design of the system may be seen to evince such infringing objectives. Knowledge of infringements might also be utilised to support a finding that the defendant has some level of “control” over its users’ activities. However, it is unclear how this factor relates to the actual exercise of an infringing “act” under primary infringement. Liability appears to hinge on a perceived causal connection between the defendant’s involvement and the alleged infringement that results,¹²³⁰ without clearly identifying the relevant act executed by the defendant. Furthermore, it is notable that in a number of cases, secondary liability of some of the defendants was found to be satisfied on the basis of similar factors. In *Webbworld*, the Court found two of the defendants vicariously liable,¹²³¹ and in *Arista*, both contributory liability and vicarious liability were held to be satisfied. Likewise, the Court in *ReDigi* found the defendant contributorily and vicariously liable.¹²³² Therefore, the expansive approaches to primary infringement were perhaps unnecessary as they would lead to the same outcome in each case.

In contrast, volition is unlikely to be satisfied where the defendant’s conduct or system is characterised in the following terms:

1. The system is characterised as automated;¹²³³ and
2. The defendant is described as a passive conduit.¹²³⁴

The result is that the defendant’s conduct is then dealt with under secondary liability principles (for facilitating or contributing to third parties’ primary acts of infringement). In addition, courts have taken the temporary or incidental nature of the copies into account when assessing liability for the reproduction right.¹²³⁵ The cases discussed are summarised in the table below.

¹²²⁹ See *Quantum Systems Integrators, Inc v Sprint Nextel Corp* 338 Fed. Appx. 329 (4th Cir. 2009).

¹²³⁰ In *ReDigi*, for instance, the Court emphasized the “fundamental” role of the defendant, which is similar to a “but for” causal test: *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) 657.

¹²³¹ *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997) 554.

¹²³² *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) 658–660.

¹²³³ See *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹²³⁴ Other ways of describing this characteristic include the indiscriminate passage of data through the system, indifference to the content or a lack of human intervention: see, eg, *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004).

¹²³⁵ *Religious Technology Center v Netcom On-Line Communication Services, Inc*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1369.

Figure 6.1. Summary table of volition cases

Case	Technology	Exclusive Right	Volition	Primary Liability
<i>Netcom</i> (N.D. Cal. 1995)	BBS provider and ISP	Reproduction, Distribution and Display	Narrow	✗
<i>Frena</i> (M.D. Fla. 1993)	BBS operator	Distribution and Display	Broad (not explicit)	✓
<i>CoStar v Loopnet</i> (4 th Cir. 2004)	Real Estate advertising platform	Unclear – most likely reproduction right	Narrow	✗
<i>Disney v Hotfile</i> (S.D. Fla. 2011)	Cloud storage	Unclear	Narrow	✗
<i>Fox Broadcasting v Dish</i> (9 th Cir. 2013)	Cloud time shifting	Reproduction right (recording feature only)	Narrow	✗
<i>Smith v Barnesandnoble.com</i> (S.D.N.Y. 2015)	Cloud e-book storage	Reproduction and distribution	Narrow	✗
<i>Playboy v Chuckleberry</i> (S.D.N.Y. 1996)	Trade mark infringing images	Non-copyright context: interpretation of “distribution”	Broad	✓
<i>Playboy v Hardenburgh</i> (N.D. Ohio 1997)	BBS operator	Distribution and display	Broad	✓
<i>Playboy v Webbworld</i> (N.D. Tex. 1997)	Image subscription service, automated collection of images	Reproduction, distribution and display	Broad	✓
<i>Arista v Usenet</i> (S.D.N.Y. 2009)	BBS specifically for file sharing of music	Distribution right	Broad	✓
<i>Quantum v Sprint</i> (4 th Cir. 2009)	Failure to remove copies of software after licence termination	Reproduction	Broad	✓
<i>Capital Records v ReDigi</i> (S.D.N.Y. 2013)	Platform and software for sale of “used” music files online	Reproduction and distribution right	Broad	✓

Scholarly disagreement on the relevance of volition

It is not always possible to draw a dividing line between the various characteristics that are highlighted in each case. A system may be designed to have a mixture of the attributes identified above. For example, a system may be automated to carry out certain functions, but the design may be such that the system proprietor maintains some level of “control” upon the activities of its users. The relevance of control and choice exercised by the defendant has been highlighted in recent scholarship regarding volition in copyright. Robert Denicola, for instance, argues that volition ‘should be understood to require a connection between the system owner and the copyrighted work that is sufficient to permit the owner to control infringements without the necessity of monitoring the behaviour of third parties’.¹²³⁶ In other words, where the only means to avoid infringement is to monitor and police the conduct of others, then the conduct is more appropriately dealt with under secondary liability principles.¹²³⁷ It may be argued that control and choice are interrelated characteristics, and a connection between the two would arise where the automated nature of the system limits the choices afforded to its users. However, Denicola does not specifically discuss the level of choice necessary in such instances.¹²³⁸

Automated systems, or more specifically the design of such system to control the source material entering the system, is considered by Bruce Boyden.¹²³⁹ He argues that what makes cable companies (and by analogy, services such as Aereo) directly responsible ‘over even the automated responses of its system are the design choices it made in selecting not only the particular type of content, but also a particular *source* for that content, and in putting it on a system where the expected use for that content is viewing by subscribers’.¹²⁴⁰ Boyden seems to argue that, by controlling the type of content that passes through the system, one is dictating the purpose of the system, and if this is aimed at providing entertainment then the design of such a system should be considered a primary infringement of the copyright owner’s exclusive right.¹²⁴¹ Making primary infringement contingent on this purposive notion of control could be a challenging standard to apply, as it is unclear how one could

¹²³⁶ Robert C Denicola, ‘Volition and Copyright Infringement’ (2016) 37 *Cardozo Law Review* 1259, 1295.

¹²³⁷ *Ibid.*

¹²³⁸ It should be acknowledged that Denicola does refer to cases such as *Capitol Records v ReDigi* 934 F. Supp. 2d 640 (S.D.N.Y. 2013) and *Arista Records v Usenet* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) where automated selection occurred through the use of software, but does not explicitly address automated choices: *ibid* 1282 n 165. Choice enters Denicola’s argument as a connecting factor to the infringing conduct, i.e. where a third party has introduced the work into the provider’s (and therefore chosen that work). In such a case, the defendant can only monitor their activities on the system to prevent infringement (at 1279).

¹²³⁹ Bruce E Boyden, ‘Aereo and the Problem of Machine Volition’ (2015) 2 *Michigan State Law Review* 485.

¹²⁴⁰ *Ibid* 505–506.

¹²⁴¹ Boyden contrasts this with services that do not place restrictions on the type, source or format of content such as Dropbox, and as a result, ‘the content on their servers is not one that could reliably be used by Dropbox for the purpose of entertaining or informing its users’: *ibid* 506.

easily distinguish an entertainment-related purpose from a non-entertainment purpose.¹²⁴² The emphasis on control of the source could be consistent with the making available right as envisioned by the drafters of the WCT, with the relevant act being the initial act of making available, not the provision of server space or connections.¹²⁴³ However, what qualifies as an entertainment-related purpose is not easily determined, and the relevance of such a purpose to the making available right is unclear.

Nimmer and Nimmer present a more sceptical view of volition in copyright law.¹²⁴⁴ They critique *Cablevision*'s characterisation of volition as an "element" of direct liability and describe this as "revolutionary", since cases prior to *Netcom* have not raised the need for volition.¹²⁴⁵ Their preference would be to limit volition as 'a specialized defense operative only in the context of those claims brought against automated systems that are nominally user-controlled'.¹²⁴⁶ Moreover, Nimmer and Nimmer seem to take a broad approach to volition and incorporate fault into their assessment, arguing that 'it is hard to imagine *more* egregious facts than those presented by [*Cablevision*]'.¹²⁴⁷ They assert that *Aereo* calls into question previous cases exempting suppliers of equipment and services based on the absence of volition, and that the decision effectively holds 'the mastermind who set up the entire enterprise responsible as a joint tortfeasor with the individuals who might each constitute the efficient cause of individual counts of copyright infringement'.¹²⁴⁸ In other words, the authors acknowledge that there are third party primary actors, but see a need to broaden legal liability beyond these primary acts. Nimmer and Nimmer do not clearly explain the policy reason for broadening the scope of primary liability, but hint at the consideration of authorship incentives and commercial purposes in their argument that *Aereo* focusses correctly 'on the company that spent millions investing in infrastructure and equipment designed to allow exploitation of copyrighted material by members of the public'.¹²⁴⁹ Ultimately, the authors indicate a preference for abandoning volition altogether. They criticise the deflection of responsibility onto individuals in cases involving complex systems, and

¹²⁴² Cf Boyden's argument that even web hosts that provide services for entertainment or information 'do not meet the control test because they are not channeling content of a particular type from a particular source onto a system with limited and predictable functionality': *ibid* 507.

¹²⁴³ See Records of the Diplomatic Conference, International Bureau of WIPO, Geneva, 1999, WIPO Publication No 348 (E), above n 388, 204.

¹²⁴⁴ See Nimmer and Nimmer, above n 551, § 13.08[C][3][b]. In addition to the specific points outlined here, Nimmer and Nimmer consider volition to 'exert little practical significance' as the avoidance of liability by online service providers such as *Netcom* are given effect by the safe harbour provisions in the Digital Millennium Copyright Act. Therefore, their view is that same result would be achieved today without volition in previous cases such as *Netcom* and *CoStar v Loopnet*. Similarly, the authors find the outcome in *Cablevision* to be correct based the Supreme Court's comments on "the public" in *Aereo*, not on the basis of volition.

¹²⁴⁵ *Ibid* § 14.08[C][1]. The authors prefer to characterize volition as a defence, as this 'latter methodology comports with practice from time immemorial'.

¹²⁴⁶ See also *ibid* § 13.08[C][2].

¹²⁴⁷ *Ibid* § 13.08[C][1].

¹²⁴⁸ *Ibid* § 13.08[C][3][a].

¹²⁴⁹ *Ibid* § 13.08[C][3][c].

contend that we should rely on the element of the “public” and consider if the recipients have ‘a prior relationship with the content in question’, as outlined in *Aereo*.¹²⁵⁰

It is apparent that scholars disagree on the meaning of volition and its relevance to primary copyright infringement. While some speculate about its parameters using factors such as choice or purpose, others such as Nimmer and Nimmer dismiss it altogether. These different views are not surprising; volition can take on vastly different meanings or connotations in each case. Courts are purporting to apply the same element, but there is no common understanding of what volition represents, or why it is necessary. Where volition is held to exist on the facts, the reasoning of the courts imply that the defendant’s fault or wrongful conduct is relevant. Where there is no volition, there is no mention of fault—the defendant is simply a passive facilitator of third party activity. In other words, volition has the makings of a shield when it excludes a defendant who has set up an automated system from primary liability, but where some degree of fault accompanies the allegedly infringing “act”, volition may be used as a sword to attribute primary liability to the defendant. In other words, volition may be used to reach back into the past to find relevant, “causal” conduct, or be used to deny responsibility for third party infringing conduct. The former may be described as broad volition,¹²⁵¹ where one looks to fault elements and volitional “acts” that precede the infringing “act”. The latter approach, sitting at the other end of the volitional conduct spectrum, is narrow volition, where one focusses solely on the allegedly infringing “act”. Can volition take on these dual roles? Or is there some innate inconsistency in subsuming both approaches under a single concept?

In short, there is a great deal of uncertainty surrounding the meaning of volition, evident from the varied judicial approaches to the term. The US Supreme Court in *Aereo* had an opportunity to consider volition in more depth, but did not address it in the decision.¹²⁵² In light of this, the need to prove volitional conduct when alleging primary infringement under US law is subject to dispute. One possible reading is that the Supreme Court in *Aereo* has implicitly rejected the volition standard. However, it is also arguable that the Court has issued reasoning that is consistent with a broad approach to volition. As the US Copyright Office stated, ‘[a]t a minimum, ... *Aereo* establishes that the performance right does not require “volition” at the level of individually selecting the works to be transmitted’.¹²⁵³ Similarly, the Australian Full Federal Court in *OptusTV* tentatively applies broad

¹²⁵⁰ Ibid.

¹²⁵¹ It is arguable that broad volition is simply a rejection of the need for volition over each individual act, and is an approach that substitutes volition with a form of system-based liability.

¹²⁵² See the discussion of this case in Chapter IV.

¹²⁵³ US Copyright Office, above n 20, 46–7, citing Ginsburg, ‘Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available; Request for Additional Comments Docket No. 2014–2’, above n 466, 10. See also Nimmer and Nimmer, above n 551, § 13.08[C][3][a], recognizing two possible explanations on the Supreme Court’s approach to volition: (1) that volition does not need to be proven; or (2) the facts provide sufficient volition to establish liability in this case (citing the “copy shop” analogy as support for the latter interpretation). It should be noted that the Australian Full Federal Court in *OptusTV* tentatively applies broad

volition, despite rejecting the need for volition in Australia.¹²⁵⁴ The Court explains that ‘the system performs the very function for which it was created by Optus’, and ‘[e]ven if one were to require volitional conduct proximate to the copying, Optus’s creating and keeping in constant readiness the TV Now system would satisfy that requirement’.¹²⁵⁵ Quoting the US Fourth Circuit in *CoStar v Loopnet*,¹²⁵⁶ the Full Federal Court asserted that Optus’s conduct had ‘a nexus sufficiently close and causal to the illegal copying’ to impose primary copyright liability.¹²⁵⁷

A broad approach to volition appears to rely on an element of “wrongdoing” or fault on the part of the defendant. By ignoring the need to identify an infringing act as soon as fault is present, courts are expanding the scope of primary infringement for the making available right. This approach that subsumes primary infringement under a finding of fault ordinarily required under secondary liability principles. We should be cautious of a back-door introduction of fault into primary infringement under US or Australian law, without appreciating the pitfalls of such an approach. This may be contrasted with the European approach, which expressly requires fault or knowledge for the primary infringement of the making available right when linking to unauthorised content.¹²⁵⁸ Even though the relevance of fault is made express in CJEU rulings, the justifications for doing so are not clearly articulated. Therefore, the concept of volition needs to be unpacked further and its relevance to the standard of liability applicable to primary acts of copyright infringement considered in more depth.

2 Causation Principles and Causal Theories: Supporting a Distinction between Volition and Fault

In copyright law, courts have referred to causation and volition interchangeably, but should they be considered as equivalents? Before analysing volition in copyright further, it may be useful to consider the concept of causation more broadly. Discussions in other areas of law may assist us in identifying the differences between these concepts. Under broader causation principles in law, it is apparent that volition or voluntary human acts are not synonymous with causation. Voluntary human acts are treated as causal starts, a view that is rooted in libertarian metaphysics. Moving beyond the law to consider broader theoretical discussions on volition provides insight on the role of volition in initiating acts. These discussions indicate that volitions are “mental acts” that sit between intentions

volition to the act of copying, despite rejecting the need for volition in Australia: *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 164–65. The Court states that ‘[e]ven if one were to require volitional conduct proximate to the copying, Optus’s creating and keeping in constant readiness the TV Now system would satisfy that requirement’ (at 165).

¹²⁵⁴ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 164–65.

¹²⁵⁵ *Ibid* 165 [67].

¹²⁵⁶ *CoStar Group, Inc v LoopNet, Inc*, 373 F.3d 544 (4th Cir. 2004) 550.

¹²⁵⁷ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 165 [67].

¹²⁵⁸ See *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016) [46]–[51].

and human acts. One may have a number of intentions, but it is volition that connects the relevant intention with the ultimate act. In this sense, volition as a causal act may be contrasted with intention, which constitute a mental state.

For the purpose of analysing the making available right in copyright, a key point can be drawn out from these discussions: there is a fundamental distinction between volition and fault-based considerations such as knowledge or intention. Therefore, these discussions caution against an approach that ignores these distinctions without clear justifications for doing so.

The indeterminacy of “causation”

The debate on “volition” in *Cablevision*¹²⁵⁹ and *Aereo*¹²⁶⁰ has ignited discussion that a causation requirement should be made explicit, by substituting volition with a “proximate causation” analysis taken from tort law.¹²⁶¹ This is not surprising, as the *Netcom* decision and cases that follow refer to the defendant’s acts in “causing” the distribution or reproduction.¹²⁶² Deviating for a moment from a copyright-focussed notion of volition and the interchangeable reference to volition and “causation” in *Netcom*, we may consider what “causation” means in different contexts, such as tort law and criminal law. Although the policy objectives of tort and criminal law may be different, analysis and critique of causation in these areas of law may provide further insight on the nature of volition. In these contexts, causal principles tend to be explicitly considered by courts, and the resulting principles and theories of causation critiqued by scholars. By exploring causation and volitional acts in a broader context, we may perhaps gain a better understanding of the uncertainties that plague volition in copyright.¹²⁶³

¹²⁵⁹ *Cartoon Network, LP v CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

¹²⁶⁰ 134 S. Ct. 2498 (2014).

¹²⁶¹ Terry Hart criticizes the volition test due to the courts’ undue focus on the word “volition” and lack of attention to the causation element, and calls for use of the term “proximate causation”: Terry Hart, *Symposium: Series Finale for Aereo, but Will There Be a Spin-Off?* (26 June 2014) SCOTUSblog <<http://www.scotusblog.com/2014/06/symposium-series-finale-for-aereo-but-will-there-be-a-spin-off/>>; Terry Hart, *Making Copies! Retiring the Volitional Conduct Test in Favor of Proximate Causation* (7 April 2014) CopyHype <<http://www.copyhype.com/2014/04/making-copies-retiring-the-volitional-conduct-test-in-favor-of-proximate-causation/>>.

¹²⁶² *Religious Technology Center v Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) 1370. Cf the plain meaning of “volition”, which *prima facie* does not have a clear causation element. According to the Oxford English Dictionary volition is ‘[t]he faculty or power of using one’s will’: ‘*Volition*’ Oxford English Dictionaries <<https://en.oxforddictionaries.com/definition/volition>>.

¹²⁶³ It should be noted that causation is not an explicit requirement on the face of copyright law, although there have been some attempts to integrate causation principles into other areas of copyright such as intermediary liability: see, eg, Kylie Pappalardo, ‘Duty and Control in Intermediary Copyright Liability: An Australian Perspective’ (2014) 4(1) *IP Theory* 9. See also Shyamkrishna Balganesh, ‘Causing Copyright’ (2017) 117(1) *Columbia Law Review* 1 (in the context of authorship).

At a very basic level, an element of causality is said to be embedded in action verbs that are used in tort and criminal law.¹²⁶⁴ Although the word “cause” is not used in liability rules, “causatives” are utilised (i.e. verbs that require some causal relation).¹²⁶⁵ For example, a killing would require one to cause death. Causation is arguably an implicit requirement of all “acts”, including to “make” available, even if the right is not stated in causal terms.¹²⁶⁶ This would be in line with a dictionary definition of “make”, which includes ‘cause (something) to exist or come about; bring about’.¹²⁶⁷ In the US context, this consideration of causative verbs is supported by Scalia J’s argument in *Aereo* that the volition requirement ‘is firmly grounded in the Act’s text, which defines “perform” in active, affirmative terms’.¹²⁶⁸

Michael Moore explains that, depending on the specificity of the action verb used, certain “means-restrictions” may be built into the verb.¹²⁶⁹ Examples include “kick” (which requires a particular foot movement), and “kiss” (which requires a particular lip movement).¹²⁷⁰ As Moore notes, this draws some criticism, as it is possible to start up a machine that will ‘thrusts my boot into your midriff’ and still cause someone to be kicked.¹²⁷¹ In addition, Moore finds that ‘there are no means-restrictions built into the meaning of causally complex verbs of action that make them more restrictive in their application than the corresponding causal idioms’.¹²⁷² For example ‘[t]he verb, “kill”, does not have the implicit means-restrictions suggested by its idiomatic usage as does (perhaps) “remove”, “fell”, and “kick”’.¹²⁷³ Therefore, it is necessary to carry out a causal analysis, as the fact that ‘X caused Y to die’ does not necessarily mean that ‘X killed Y’.¹²⁷⁴

¹²⁶⁴ Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2010) 9.

¹²⁶⁵ *Ibid* 5.

¹²⁶⁶ See also Nimmer’s discussion on the “multiple performance doctrine” which integrates causal terminology: The key to determining whether a multiple performance is a public performance seems properly to turn on the determination of *who is causing* such performance. If it is *caused* by a private individual for his own benefit in a private home it clearly is not a public performance. Not so, however, if it is *caused* by a hotel for the benefit of its guests. [emphasis added] Nimmer, above n 960, § 107.42.

¹²⁶⁷ ‘Make’ Oxford English Dictionaries <<https://en.oxforddictionaries.com/definition/make>>. It should be recognised that the Australian Full Federal Court considers the definition of “make” at length in the context of the right to make copies: *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 161.

¹²⁶⁸ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2512 (in dissent); Nimmer and Nimmer, above n 551, § 13.08[C][2] (‘Active’ and ‘affirmative’ verbs do not denote ‘volitional’ conduct-indeed, the verbs ‘tripped’ or ‘slipped’ share the same grammatical form with the language of Title 17, but connote the opposite of volitional activity’).

¹²⁶⁹ Moore, above n 1264, 10.

¹²⁷⁰ *Ibid*.

¹²⁷¹ *Ibid* 9–10, citing Judith Thomson, *Acts and Other Events* (Cornell University Press, 1997) 220–2; Jonathan Bennett, *Events and Their Names* (Bobbs-Merrill, 1988) 222–4.

¹²⁷² Moore, above n 1264, 11.

¹²⁷³ *Ibid*.

¹²⁷⁴ *Ibid* 11–12, citing Jerry Fodor, *The Language of Thought* (MIT, 1975) 130–1 n 23.

The causal question, in and of itself, is not necessarily concerned with how this outcome is achieved. Differentiating various ways of achieving an outcome is arguably not a question for causation *per se*, but for the objectives specific to that area of law. The policy reasons may dictate whether it is necessary for the law to differentiate between various acts that bring about similar outcomes. Therefore, causal principles may assist us in connecting particular acts with an outcome (e.g. public accessibility of copyright content under the making available right), but the policy question of whether the law should govern particular methods of achieving such outcomes still requires resolution.

While causal principles have been utilised to achieve normative goals and take policy considerations into account, it is not always easy to distinguish these principles from a positivist account of causation. In tort law for example, proximate causation¹²⁷⁵ is a policy-based test that may be contrasted with “cause-in-fact”, which is concerned with real causal relations in the world.¹²⁷⁶ Nevertheless, in difficult cases, it is said that ‘matters of policy and estimates of factual likelihood become hopelessly interwoven with each other’.¹²⁷⁷ Wex Malone, for example, argued that causal emphasis was simply guided by context-specific, practical interests.¹²⁷⁸ Therefore, to be “the cause” of some harm is ‘just another way of saying one was responsible for the harm’,¹²⁷⁹ leading to some level of circularity in causal analyses. In addition, ordinary speech is said to contribute the illusions regarding singular causal relations.¹²⁸⁰ For instance, when we say C caused E, we may simply be referring to ‘the regular following of events of type C by events of type E’.¹²⁸¹ Whether something is a “cause” tends to be a result of our own expectations as to what is “natural” or “usual” in the world.¹²⁸² Trying to identify

¹²⁷⁵ The term was first coined by Sir Francis Bacon: see Francis Bacon, ‘Maxims of the Law’ in *The Elements of the Common Law of England* (Assigns of I Moore, 1630) 1. See also Joseph Beale, ‘The Proximate Consequences of an Act’ (1920) 33 *Harvard Law Review* 633.

¹²⁷⁶ Moore, above n 1264, 102.

¹²⁷⁷ Wex S Malone, ‘Ruminations on Cause-in-Fact’ (1956) 9(1) *Stanford Law Review* 60, 72. See also *Travel Compensation Fund v Robert Tambree t/as R Tambree & Associates* (2005) 224 CLR 627 [45]–[46] (Gummow and Hayne JJ):

It is now clear that there are cases in which the answer to a question of causation will differ according to the purpose for which the question is asked. ... [I]t is doubtful whether there is any “common sense” notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to a question of causation will require examination of the purpose of a particular cause of action, or the nature and scope of the defendant’s obligation in the particular circumstances.

¹²⁷⁸ Moore, above n 1264, 91, citing Malone, above n 1277.

¹²⁷⁹ Moore, above n 1264, 91.

¹²⁸⁰ *Ibid* 263.

¹²⁸¹ *Ibid*. Moore observes that ‘probability theorists regard causal laws as irreducibly probabilistic rather than exceptionless universal generalizations’, citing Patrick Suppes, *A Probabilistic Theory of Causality* (North Holland, 1970).

¹²⁸² This is reflected in the Australian High Court’s interpretation of cause-in-fact as ‘ultimately a matter of commonsense’: *Fitzgerald v Penn* (1954) 91 CLR 268 277 (Dixon CJ, Fullagar and Kitto JJ). See also Albert Levitt, ‘Cause, Legal Cause and Proximate Cause’ (1922) 21(1) *Michigan Law Review* 34, 46–47: ‘When we say that B is the natural consequence of the act of A, we mean that in the experience of society it has been observed that B usually follows A in coming into or vanishing from the world of fact.’

“causation” in novel situations is therefore more challenging. As Albert Levitt explains, this ‘feeling of prophesy could only arise after acts had been followed by consequences so often that the two have become inseparably connected’.¹²⁸³

In addition to the scepticism on “causation” and its pliability, it should be noted that voluntary human actions appear to have a special place in causation principles. The law recognises three kinds of intervening causes, or “chain-breakers”: voluntary human actions, abnormal natural events and pre-emptive causes.¹²⁸⁴ Therefore, voluntary human acts seem to have an important role in determining where *the* relevant “cause” starts and ends in law, even if there are infinite causal factors to choose from.¹²⁸⁵ These principles may be explained by human intuitions that are rooted in ‘libertarian metaphysics’.¹²⁸⁶ As Hart and Honoré contend, ‘voluntary human actions are our basic, central paradigms of causation’ and therefore we trace causal chains to such actions.¹²⁸⁷ In other words, voluntary human actions are seen as *uncaused events*, but fresh causal starts relegating all prior events to a non-causal status.¹²⁸⁸ Along these lines, Hart and Honoré assert that ‘whatever the metaphysics of the matter may be [a deliberate] human action is never regarded as itself caused or as an effect’.¹²⁸⁹

¹²⁸³ Levitt, above n 1282, 47. Levitt continues at 47–48 to emphasize the need for sufficient frequency of a given act to occur such that the consequences can be anticipated.

¹²⁸⁴ Moore, above n 1264, 241. Moore explains that as an intervening cause, “voluntary” human action has an extended meaning which includes principally:

1. Voluntariness of action in the law’s usual sense (e.g. not a reflex action, or involuntary bodily movement);
2. Accompanied by an intention to bring about the harm or, sometimes, foresight or even negligence;
3. Which intention is formed in the absence of coercive pressure making the choice difficult;
4. By one sufficiently possessed of his or her faculties as to be a generally responsible agent.

See also HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 74–77 (recognising the free, informed and voluntary act of a third party as an intervening cause).

¹²⁸⁵ It should be noted that there may be instances where deliberate third party interventions are not causal starts. For example, where the defendant comes ‘under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk, ...[t]o deny recovery in these situations ... would be to deprive the duty of any content’: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506.

¹²⁸⁶ Moore, above n 1264, 268.

¹²⁸⁷ Hart and Honoré, above n 1284, 41–44, cited in Moore, above n 1264, 258. Moore explains further that:

It is because of their paradigmatic status that we refuse *to* trace causal relations *through* such actions. Where another voluntary human action subsequently intervenes, we lose our ability to analogize the more complex causings to the paradigmatic and simpler doings. We cannot analogize our indirect manipulations to simpler cases of direct action because another, more paradigmatic cause has intervened. ‘The intervenor did it’ precludes us from analogically extending ‘the original actor did it’ to ‘the original actor caused it’. [citations omitted]

A problem with this ‘paradigm-case argument’ of causation, which Moore asserts is ‘the main problem with all of ordinary-language philosophy’, is that ‘it allows the nature of the thing, causation, to be fixed by the conventions of present usage’. It is said to cut off scientific theorizing on grounds not already recognized as causation. Therefore, Moore argues that ‘we should put aside the paradigm case approach to describing our common sense conception of cause’ (at 259).

¹²⁸⁸ Moore, above n 1264, 268.

¹²⁸⁹ See HLA Hart and Tony Honoré, *Causation in the Law* (Clarendon Press, 1959) 80. See also Hart and Honoré, above n 1284, 42–3, 51–9, 186–204, 363–88 (taking a seemingly softer position to human actions).

Thus in tort and criminal law, volition (or voluntary human conduct) is considered within a subset of rules regarding causality. Volition is not the equivalent of causation, contrary to the interchangeable use of the terms in copyright cases. Importantly, this discussion shows that the meaning of “causation” is unsettled; rather than blindly importing “causation” principles from tort law or criminal law, we can learn from the challenges that have arisen in these areas of law. We may be facing the same challenges in our efforts to identify an “act” or “acts” of making available to the public, and this discussion highlights certain difficulties that are not immediately apparent.

This discussion also shows that causation alone does not resolve all questions on legal liability. Causation or volition, in the abstract, cannot tell us whether the act of making available is “means-restricted”. Causation may assist us in recognising the connection between an act and an outcome that the law seeks to regulate, but it does not necessarily answer the question of how that “act” should be defined or limited. Another point worth highlighting from this causal analysis is that common understandings of how copyright works are “made available” may have an impact on our conclusions as to whether an “act” of making available has occurred. If we do not consciously address this tendency, we may find ourselves imposing a means-restriction upon the making available right based on analogies with existing technologies and incumbent services.

Volition vs intent in causal theories of action

It is also possible to argue, using causal theories of action, that there is an innate distinction between volitional conduct giving rise to strict liability, and the intent or fault that guides conduct in a broader sense.¹²⁹⁰ Philosophical discussions of human agency and “volition” fall within action theory (or the philosophy of action). Broadly, these theories attempt to make a fundamental distinction between ‘what we do and what happens to us, between actions and mere happenings’.¹²⁹¹ We may investigate volition from its executive dimensions.¹²⁹² Zhu explains that ‘intentions alone are not sufficient in

See further Moore, above n 1264, 268; Sanford H Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’ (1985) 73 *California Law Review* 323, 330.

¹²⁹⁰ It should be acknowledged that the role of volition in theories of action is not settled. As Goldman explains, the doctrine of volitions has tracked a difficult journey through philosophy, subject to the ‘fashion and taste’ of the ‘philosophical household’: Alvin I Goldman, ‘The Volitional Theory Revisited’ in M Brand and Douglas Walton (eds), *Action Theory: Proceedings of the Winnipeg Conference on Human Action, Held at Winnipeg, Manitoba, Canada, 9–11 May 1975* (Springer Science & Business Media, 2012) 67, 67. This is not necessarily a negative thing, as this disagreement gives rise to arguments that may help us to gain a deeper understanding of volition in copyright law.

¹²⁹¹ Carlos J Moya, *The Philosophy of Action: An Introduction* (Polity Press, 1990) 9. To illustrate the point, Moya explains that if a person is drinking a glass of water, we may characterise the act as ‘drinking water’, or say that this was simply movements caused by muscle contractions, and so on. Taking a “reductionist attitude”, actions seem to dissolve into a sequence of happenings, with nothing initiated by agents as the chain of causes is traced further and further into the past.

¹²⁹² It should be noted that volition has been said to be a species of desire or intention: Goldman, above n 1290, 68. However, the characterisation of volition as intention has been criticised, as intentions are merely mental

initiating all kinds of intentional action and controlling their execution — they must be supplemented by volitions’.¹²⁹³ In other words, ‘intentions alone are insufficient to *cause* intentional actions’, because they are mere mental states, not events.¹²⁹⁴ For instance, if a person is subject to conflicting desires or intentions, their volition mediates these mental states to bring about the intended bodily movement.¹²⁹⁵ This is visually represented in Figure 6.2 below.

Figure 6.2. Volition as a mediator between acts and intentions



In addition, volition is arguably distinguishable from other mental states based on its temporal proximity with an act. Audi, reflecting on Moore’s explanation of volition as “bare intentions”, notes that ‘while *long-range, future-directed intentions*, the kind most important in planning, must meet the relevant belief condition, *bare intentions*, the kind plausibly identified with volition, need not’.¹²⁹⁶ Similarly, Robert Kane asserts that intentions ‘are *states* of mind that persist through time and guide actions’.¹²⁹⁷ Volition as an “action initiator”, on the other hand, may be described as ‘momentary mental acts’.¹²⁹⁸

states, not events that happen: Robert Audi, ‘Volition, Intention and Responsibility’ (1994) 142 *University of Pennsylvania Law Review* 1675, 1682. Intentions do not happen as events, but to intend ‘is to be in a kind of state, even if momentarily; it is not to be doing or undergoing something’. Therefore, according to Audi, calling volition an intention does not make volition more familiar, but ‘makes both volition and intention seem less so’.

¹²⁹³ Jing Zhu, ‘Understanding Volition’ (2004) 17(2) *Philosophical Psychology* 247, 184–5.

¹²⁹⁴ Ibid 185. See also Moya, above n 1291, 20:

[V]olitions, besides being thoughts, are executive, actional in character, they are executive actions with respect to intentions and desires. The content of intentions and desires are descriptions of actions: I have the intention of raising my arm. Volitions execute intentions by bringing about the result of the intended actions, namely the arm’s rising in the above example.

¹²⁹⁵ Zhu, above n 1293, 187–8 (an example given is the picking up a phone, when one has an intention to concentrate on pressing work, even if the phone call could be an important pre-arranged one). Similarly, Audi states that volition may be described as a kind of connection between intention and execution of that intention to act. It plays a ‘refereeing role that cannot be played by beliefs and desires’, but instead it resolves conflicting beliefs and desires to trigger the action that is pursued: Audi, above n 1292, 1686–7, citing Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford University Press, 2010) 140.

¹²⁹⁶ Audi, above n 1292, 1681 (emphasis in original).

¹²⁹⁷ Robert Kane, *The Significance of Free Will* (Oxford University Press, 1998) 24 (emphasis in original).

¹²⁹⁸ Zhu, above n 1293, 252.

One may ask if volitions are really purely “mental actions”, because ‘to will the occurrence of a change is to enter upon the act of bringing it about’.¹²⁹⁹ That is, we may question if volition really has a separate existence apart from an “act”. Perhaps, at the very least, we can accept that volition, straddles the rather blurry line between thoughts or states of mind and actions. The importance of volitions for the identification of actions is put forward by Moya, who argues that ‘[w]ithout [volitions], there could not be actions at all, since they transmit agency to other actions by causing their results. Without them, nothing could qualify as the result of an action, and there would be only happenings and no actions’.¹³⁰⁰ In other words, the world would simply be a chain of never-ending happenings connected to each other, with no initiations of those happenings by agents. The identifiable differences between volitions and intentions are summarised in Figure 6.3 below.

Figure 6.3. Comparison table of volitions and intentions

	Volitions	Intentions
Temporal character	Mental events or activities	States of mind / long-range, future directed
Outcome	Instigate execution of acts	Does not necessarily result in acts
Relation with act	May be part of the act	Separate from the act

On the basis of these theoretical debates, it is still unclear whether volition is part of an act or a separate “mental action” that triggers the act. The discussion nevertheless highlights the inherent difference between volitions that immediately precede an act, and the intentions that broadly direct a course of action aimed towards achieving longer-range outcome (potentially through the execution of several volitional acts). This supports the view that volition may be used to identify acts and the agents who are responsible for executing such acts.

Section E. Copyright’s Liability Standard Through a Communications Policy Lens

Insights from causation and causal theories of action help us to understand the meaning of volition. In the copyright context, however, the meaning of volition is not the most pertinent matter. More to the point is the way in which volition may be used to further copyright’s policy objectives. The notion of volition is not limited in its application to the making available right. Nevertheless, it seems to have gained prominence in cases involving the making available right and cloud technologies. This

¹²⁹⁹ Moya, above n 1291, 21, quoting Hugh J McCann, ‘Volition and Basic Action’ (1974) 83 *Philosophical Review* 451, 469.

¹³⁰⁰ Moya, above n 1291, 20.

may perhaps be attributed to the way the right is drafted. The relevant “act” of making available is stated in broad, technologically neutral terms, making it harder to distinguish singular acts from a series of acts.

Volition prompts us to consider the nature of exclusive rights, and how volition may be used to distinguish different standards of liability applicable to infringements. Ultimately, the objective of this discussion is to consider the impact that these varying approaches to the “act” of making available may have on copyright policy and the furtherance of copyright’s core functions.

1 *Strict Liability and Volition*

According to Scalia J in *Aereo*, the volition requirement aims to channel claims ‘into the correct analytical track’ of either primary or secondary liability, and not to excuse the defendants from liability.¹³⁰¹ A primary infringer is one who has carried out the specified acts which are within the exclusive rights of the copyright owner. In Australia, this is set out in the *Copyright Act 1968* (Cth), which provides that copyright ‘is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, *does in Australia ... any act* comprised in the copyright’.¹³⁰² As explained by Scalia J in *Aereo*, a primary (or direct) infringer under US copyright law is one who ‘personally engages in infringing conduct’.¹³⁰³

Each analytical track carries with it different standards of liability, and these standards have an impact on the likely outcome in each case. Primary infringement of a copyright owner’s exclusive rights has conventionally been categorised as a strict liability tort.¹³⁰⁴ It is strict in the sense that no intention to infringe copyright is required.¹³⁰⁵ For example, innocent infringers, i.e. those who infringe copyright without knowledge that they are infringing and without intent to do so, are liable for infringement.¹³⁰⁶

¹³⁰¹ *American Broadcasting Companies, Inc., et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2514. However, the lines between primary and secondary liability are ‘not clearly drawn’, as recognised by the US Supreme Court in *Sony: Sony Corp of America v Universal City Studios, Inc*, 464 U.S. 417 (1984) 435, quoting with approval *Universal City Studios v Sony Corporation of America* 480 F. Supp. 429 (C.D. Cal. 1979) 457–8. See also *Disney Enters v Hotfile Corp* 2013 U.S. Dist. LEXIS 172339, 2013 WL 6336286 (S.D. Fla. Aug. 28, 2013) 10 (‘Courts have struggled with defining the liability of Internet-based companies that provide the technological mechanism to foster, or at least enable, others to infringe.’).

¹³⁰² *Copyright Act 1968* (Cth) ss 36(1) and 101(1) (emphasis added). Note that secondary liability for facilitating acts of infringement by third parties is dealt with under authorisation principles, captured in the terms ‘authorizes the doing in Australia’ in ss 36(1) and 101(1) (which have been omitted from the quote). This authorisation liability standard is further elaborated upon in ss 36(1A) and 101(1A).

¹³⁰³ *American Broadcasting Companies, Inc., et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2512.

¹³⁰⁴ William F Patry, *Copyright Law and Practice* (Greenwood Press, 1994) 1142.

¹³⁰⁵ See, eg, *Buck v Jewell-LaSalle Realty Co* 283 U.S. 191 (1931) 198 (‘Intention to infringe is not essential under the Act.’); Nimmer and Nimmer, above n 551, § 13.08[A] (‘[T]he general proposition is that innocent intent is no defense to copyright infringement’).

¹³⁰⁶ See, eg, *Fitzgerald Publishing Co v Baylor Publishing Co* 807 F.2d 1110 (2d Cir. 1986) 1113, and *Haas v Leo Feist Inc* 234 F. 105, 107 (S.D.N.Y. 1916) 107, cited in Dane S Ciolino and Erin Ann Donelon, ‘Questioning

So what do we mean by “strict” liability, and how does it differ from other standards of legal liability?¹³⁰⁷ Kenneth Abraham supplies a concise explanation of strict liability in law, i.e. ‘strict liability is the imposition of liability even when reasonable care has been exercised’.¹³⁰⁸ Different types of strict liability rules exist. Depending on the character of the legal right being asserted, it could be conduct-based strict liability or harm-based strict liability.¹³⁰⁹ The former attaches liability to a defendant who engages in a form of proscribed conduct (regardless of whether harm occurred), while the latter attaches liability to a defendant only if their proscribed conduct causes a harmful consequence.¹³¹⁰ Copyright is arguably a conduct-based strict liability regime, as it is not necessary to prove harm when asserting liability. A possible alternate view is that any exercise of the copyright owner’s rights inherently harms the exclusive value of their property right. It should be noted that harm-based strict liability is not equivalent to “absolute” liability, as it is still necessary for one to make a choice between actions which are more or less likely to cause the harms that the law aims to prevent.¹³¹¹ It is nevertheless arguable that conduct-based strict liability such as copyright comes close to imposing absolute liability.

Strict liability may be contrasted with negligence (or fault-based liability), which ‘is the failure to exercise reasonable care’.¹³¹² Taking an instrumentalist stance, the difference between strict liability and fault liability may be explained in terms of what they control. Negligence or fault-based rules have been said to control only care levels (and not activity levels), while strict liability rules control

Strict Liability in Copyright’ (2002) 54 *Rutgers Law Review* 351, 352. Innocence is irrelevant to liability, even if it has an impact on the appropriate order: see, eg, *Copyright Act 1968* (Cth) s 115(3), which provides that if ‘the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright’ then an account of profits, but not damages, may be awarded.

¹³⁰⁷ Much of the following discussion arises from tort law scholarship. It should be noted that tort law encompasses various policies (such as deterrence, loss spreading and encouraging individual responsibility) and it may not be possible to ascribe a single policy to tort as such: see Prue Vines, ‘Introduction’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co., 10th ed, 2011) 10–18.

¹³⁰⁸ Kenneth S Abraham, ‘Strict Liability in Negligence’ (2012) 61 *DePaul Law Review* 271, 274.

¹³⁰⁹ Patrick Russell Goold, ‘Is Copyright Infringement a Strict Liability Tort?’ (2015) 30(1) *Berkeley Technology Law Journal* 305, 312.

¹³¹⁰ *Ibid* 313.

¹³¹¹ Keith N Hylton, ‘Property Rules, Liability Rules, and Immunity: An Application to Cyberspace’ (2007) 87(1) *Boston University Law Review* 1, 6. As Hylton explains:

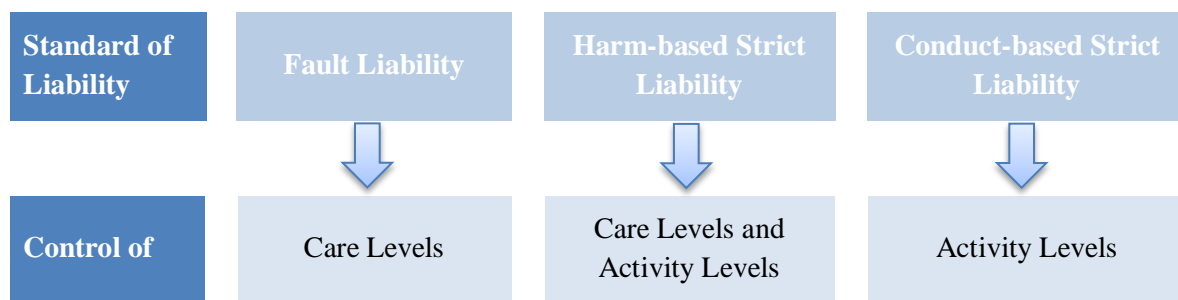
[T]here are few, if any, examples of absolute liability in the law. Most cases of strict liability involve a point at which the injurer made a choice to impose harms on the victim; for example, by choosing to locate his smoke-belching factory next door to the victim’s house. And it is this choice to impose harm that the law aims to control through strict liability.

¹³¹² Abraham, above n 1308, 274. Note that there are different conceptions of “reasonable care”. Under an instrumentalist or utilitarian view, negligence is ‘the taking of socially or economically excessive risk’ (at 274, citing Richard A Posner, ‘A Theory of Negligence’ [1972] 1 *Journal of Legal Studies* 29, 33). Under a corrective justice view, negligence reflects ‘moral responsibility for wrongfully causing loss’ (at 274, citing Jules L Coleman, *Risks and Wrongs* [Cambridge University Press, 1992] 330–32).

both care and activity levels.¹³¹³ Care levels refers to the standard of care adopted when engaging in the activity; while activity levels mean the frequency or extent of carrying out that activity.¹³¹⁴ This may not be the most accurate description if we take the different types of strict liability into account. Conduct-based strict liability is arguably focussed on controlling activity levels, regardless of any harm that eventuates.

These generalisations are imprecise, and the extent to which conduct or care levels are controlled would depend on how the relevant rules are drafted. Nevertheless, the differences are summarised in the table below.

Figure 6.4. Standards of liability and the control of care/activity levels



The following, however, is likely to be true for both conduct-based and harm-based strict liability: a party subject to strict liability would have greater incentives to look for or create substitute activities that are cost-effective.¹³¹⁵ Therefore, whether an “act” or conduct should be subject to strict liability or fault liability may depend on whether the objective is to minimise the likelihood of the activity from occurring, or on the contrary, if one wishes to permit the activity but require that it be carried out with a level of care or control.¹³¹⁶ In the former instance one would apply a strict liability standard, and in the latter a fault liability standard.

¹³¹³ Hylton, above n 1311, 10, citing Steven Shavell, ‘Strict Liability Versus Negligence’ (1980) 9 *Journal of Legal Studies* 1, 2–6; Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970); Posner, above n 1312. See also Abraham, above n 1308, 278–80.

¹³¹⁴ Hylton, above n 29, 10. This is perhaps not universally true, as the extent to which conduct or care is controlled would depend on how the relevant rules are drafted. Furthermore, it would be necessary to differentiate conduct-base strict liability from harm-based strict liability, as conduct-based strict liability arguably seeks only to control the activity levels, regardless of any harm that eventuates. The distinction between harm- and conduct-based strict liability is not always made clear in these discussions.

¹³¹⁵ Abraham, above n 1308, 280.

¹³¹⁶ It should be recognised that interest in different standards of liability has tended to fluctuate with a society’s development and industrial evolution. On the evolution of early common law torts which showed little concern for moral responsibility or “fault”, see Donal Nolan, ‘Strict Liability’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co., 10th ed, 2011) 380–81. According to Nolan, ‘[t]o all appearances, primitive law imposed liability for causation rather than fault’. Fault-based liability came to represent ‘an individualistic society set on private enterprise and self-help’. However, as industry grew in its

According to HLA Hart, strict liability in tort is ‘sometimes defended on the ground that it is in the interest of “society” that those accidentally injured should be compensated; and it is claimed that the easiest way of doing this is to place the burden on those whose activities, however carefully controlled, result in such accidents’.¹³¹⁷ These defendants are targeted due to their deep pockets and opportunities to insure, and liability is not necessarily grounded in morality or justice.¹³¹⁸ From an enforcement perspective, a benefit of strict liability is that it reduces information costs. This is because proving negligence (or subjective knowledge) is costly and time consuming, in contrast to merely showing that the defendant carried out a particular activity subject to a strict liability standard.¹³¹⁹ Without the need to determine whether the defendant complied with custom or was negligent in some way means that trials may be shorter or would not occur at all.¹³²⁰

Turning to a rights-based or corrective justice view of strict liability, another justification is that strict liability may satisfy norms of responsibility. Under this view, ‘those who benefit from engaging in an activity should rightly bear the costs associated with the activity’.¹³²¹ This justification would be most relevant to vicarious liability for the activities of employees (i.e. enterprise liability). A criticism of this benefit theory is that, in itself, it ‘cannot differentiate among the different enterprises that derive benefits from activities that result in harm’.¹³²² In other words, it is a broad-brushed justification that could lead to over-inclusiveness.¹³²³

2 *Volition as a Superficial Limiting Standard*

How might these justifications for strict liability be relevant to primary infringement of copyright? For one, justifications for harm-based strict liability would not be directly applicable to copyright’s conduct-based strict liability standard. More importantly, we should keep the policy objectives of copyright protection in the forefront when considering these rationales. Copyright is a regime which allocates copyright interests, and the expansive allocation of exclusive rights to copyright owners could stymie public access and technological innovation by intermediaries. Any perceived “harm”

ability to distribute the cost of tort losses, the interest in strict liability was revised in the interest of societal compensation.

¹³¹⁷ HLA Hart, *The Concept of Law* (Clarendon Press, 1965) 162.

¹³¹⁸ *Ibid.*

¹³¹⁹ Abraham, above n 1308, 276–77. This would presumably be more relevant to conduct-based strict liability rules.

¹³²⁰ *Ibid* 277.

¹³²¹ *Ibid* 281, citing Francis H Bohlen, ‘The Basis of Affirmative Obligations in the Law of Tort’ (1905) 53 *American Law Register* 209, 273, 337; Gregory C Keating, ‘The Theory of Enterprise Liability and Common Law Strict Liability’ (2001) 54 *Vanderbilt Law Review* 1285, 1289.

¹³²² Abraham, above n 1308, 281.

¹³²³ It should be noted that the Australian High Court has held that the tort of strict liability for dangerous activity or dangerous substances, under *Rylands v Fletcher* (1868) LR 3 HL 330, has been absorbed by negligence principles under Australian common law: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 556–57.

that is suffered by the copyright owner is possible only if the law has allocated rights of *that* scope to the copyright owner.¹³²⁴ Therefore, we need to consider how the allocation and enforcement of exclusive rights impacts on the overall objectives of copyright law — not just a class of stakeholders within the copyright system. Copyright aims to further dual functions: encouraging authorship (its authorship function) and facilitating the wide dissemination of knowledge and culture (its dissemination function). Therefore, we should consider how copyright's strict liability standard for primary infringement aligns with copyright's core objectives.

Due to its widespread acceptance, we may tend to take copyright's strict liability standard for granted today. However, US courts hearing copyright cases previously expressed concern about the standard in certain instances.¹³²⁵ Some courts lamented the harsh result of imposing liability on innocent infringers, which did not seem to accord with the general doctrine of torts.¹³²⁶ Nevertheless, the case of *De Acosta v Brown*¹³²⁷ established the rule of strict liability in 1944, with subsequent cases emphasizing its deterrence function.¹³²⁸ However, this deterrence justification may be challenged on the basis that 'the difference in deterrent impact between "liability for all conduct" and "liability for unreasonable conduct" is likely to be minimal'.¹³²⁹ Looking to the manufacturing context, we find other criticisms of strict liability's adverse impact on the free enterprise economy, and its discouragement of the development of new products with unknown risks.¹³³⁰

Ordinarily, making liability conditional on fault of the defendant should limit the scope of liability. In other words, proving the mere execution of the relevant "act" is not sufficient, as the plaintiff needs to prove an additional element of moral blameworthiness. In interpretations of the making available right,¹³³¹ however, fault seems to broaden the scope of liability, because the perceived presence of fault obscures the need to prove that a relevant "act" has been executed. If some market harm is suffered by the plaintiff and "causation" is broadly attributed to the defendant due to its fault in bringing about this outcome, courts seem to see no need to clearly conceptualise the "act" that falls

¹³²⁴ Stated in different terms, these "harms" are impediments to the enjoyment of the exclusivity afforded under copyright law.

¹³²⁵ Kent Jr Sinclair, 'Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context' (1970) 58 *California Law Review* 940, 945–46.

¹³²⁶ *Ibid* 946, quoting *Barry v Hughes* 103 F.2d 427 (2d Cir. 1939) 427. Judge Hand argued in *Barry v Hughes* that '[l]aying aside a possible action for unjust enrichment, or for injunction after discovery, we should hesitate a long while before holding the use of material, apparently in the public demesne, subjected the user to [liability for] damages, unless something put him actually on notice' (at 427).

¹³²⁷ 146 F.2d 408 (2d Cir. 1944).

¹³²⁸ Sinclair, above n 1325, 949.

¹³²⁹ *Ibid*, citing Marc A Franklin, 'Replacing the Negligence Lottery: Compensation and Selective Reimbursement' (1967) 53(4) *Virginia Law Review* 774, 781 n 24.

¹³³⁰ Sinclair, above n 1325, 949, citing Francis E Lucey, 'Liability without Fault and the Natural Law' (1957) 24 *Tennessee Law Review* 952, 649; 'Note' (1951) 26 *NYU Law Review* 352, 358, 361.

¹³³¹ It should be noted that this observation is also applicable to national rights implementing article 8 of the WCT under the umbrella solution, such as the public performance or distribution rights.

within the exclusive rights of the copyright owner. In short, courts lose sight of the need to prove the physical parameters of the act as soon as fault or broad volition may be found.

This form of strict liability without a clear “act” lowers the burden of proof in the plaintiff’s favour, and this *could* have a strong deterrent effect not only on infringing conduct, but also on conduct that tests the boundaries of exclusive rights. In this sense we can draw from the criticisms of strict liability in the manufacturing context, and consider its impact on copyright disseminators and the development of new means of dissemination. Importantly, how might a strict standard of liability inhibit dissemination rivalries, or the “creative destruction” of dissemination markets? We should be cautious of a broad fault-based approach to primary infringement that is justified on the basis of only one of copyright’s functions — i.e. the maintenance of authorship incentives.

If volition for the “act” can be ascribed to the design of the system, there should be clear justifications or principles to guide such findings. Courts should adopt a principled approach and explain why certain technological systems or designs of such systems satisfy the “act” of making available, while others may be subject to fault-based secondary liability principles. A principled approach may be contrasted with a reliance on technical rules that can be manipulated or easily avoided, such as the “master copy rule” applied in *Cablevision*.¹³³² In contrast to *Cablevision*, the Supreme Court in *Aereo*¹³³³ takes a broader approach to the “act”. However, the Supreme Court does not articulate clear principles that justify its affirmative finding of primary infringement under a strict liability standard.¹³³⁴

Where unclear fault factors are used to broaden the scope of strict liability rules, its deterrent effect could be spread across a wide range of activities. It could discourage the development of new technologies for dissemination and copyright markets dependant on such technologies. In communications policy terms,¹³³⁵ applying this standard of liability to the activities of a new disseminator places the incumbent disseminator in a stronger legal position, as the incumbent is able to protect its existing dissemination market from “creative destruction” in a more cost effective manner. Is this the objective that courts are seeking to achieve through their decisions? If so, it is not made explicit. The decisions exhibit a lack of transparency in this regard. A superficial analysis of the “act” of making available does not allow us to consider the objectives of copyright law, and

¹³³² “[U]nique individual transmissions would be considered private performances, except where the transmissions were being generated from a “master copy””: *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) 138.

¹³³³ *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014).

¹³³⁴ See the discussion of these cases in Chapter IV.

¹³³⁵ See Wu, ‘Copyright’s Communications Policy’, above n 230.

explore how these objectives may be achieved through a principled interpretation of the making available right.

Section F. Chapter VI – Conclusion

This chapter has highlighted the need for more substantial analysis of the “act” of making available. Clearer approaches to the “act” are important, due to its impact on the scope of the making available right as a whole. As a first step, one needs to identify the act of the defendant that gives rise to strict, primary liability for the right. In this process, volition may be regarded as a *tool* for refining our analysis of the “act”. If the making available to the public of copyright content is carried out through a process that involves various parties, the volition requirement calls for the identification of individual acts and closer analysis of each party’s contribution to the entire process. Clear identification of the “act” has been omitted in a number of difficult copyright cases, where courts have aggregated a series of acts in combination with factors such as knowledge and control to conclude that the defendant had carried out the relevant “act”. In sum, volition as a requirement could ensure that courts identify the specific act or acts of the defendant said to trespass upon the plaintiff’s exclusive rights. That said, we should understand the limits of volition as an analytical tool. Recognising volition as a condition precedent or inherent part of *all* human acts is not the same as clarifying the “act” of making available in copyright. In other words, volition alone does not answer the normative question of whether liability *should* attach to the defendant’s conduct. Nevertheless, volition hints at broader policy questions that need to be addressed.

On the face of the Internet Treaties, there are no clear limitations upon the “act” of making available. The “act” could encompass a range of conduct from the design of a “cloud” system to the selection of categories of content to be made accessible. Nevertheless, we know that volition for an “act” should be distinguished from intention to bring about an outcome, or conduct merely having some causal connection to public accessibility in a broad sense. Even if a line between volition and intent may be difficult to draw in practice, support for distinguishing the two may be found in causal theories of action. Yet, in cases such as *Aereo* and *OptusTV*, courts have taken a broad approach to volition and conflated the “act” with the overall process through which consumers gain access to content. In doing so, courts have taken elements of fault into account, despite purporting to apply a strict liability standard for primary infringement. In *Sanoma*, the CJEU has explicitly introduced fault into its assessment of primary infringement for the making available right, a step that has been subject to criticism and debate.¹³³⁶ The incorporation of fault, whether justified or not, has at least ignited

¹³³⁶ See, eg, Tito Rendas, ‘How Playboy Photos Compromised EU Copyright Law: The GS Media Judgment’ (2017) 20(11) *Journal of Internet Law* 11; Martin Senftleben, ‘Copyright Reform, GS Media and Innovation

discussion. In contrast, the implicit consideration of fault through the design of systems (via broad volition) has not attracted the same level of scrutiny.

Judicial interpretation of the making available right may be broadening the net of primary liability, and regulating the design of technological systems on the basis of fault-based factors such as intention and purpose. A problem with these decisions is the lack of transparency. Without an understanding of the basis for these decisions, it is difficult to appreciate their impact on copyright's dissemination function. Under the guise of furthering copyright's authorship function, courts are inadvertently shaping a communications policy that favours incumbent disseminators and inhibiting copyright's dissemination function. Volition alone cannot alleviate these problems and, if taken beyond its modest capacity as an analytical tool, can be abused. A broad notion of volition may be used by courts to extend liability to those that facilitate or provide services, and they may do so without providing clear justifications. Moving forwards, decisions on the scope of copyright liability must take the impact on copyright's dissemination function into account. Interpretations of the "act" of making available should not hinge precariously on terms such as volition, but should be built on clear principles grounded in sound copyright policy.

Climate in the EU – Euphonious Chord or Dissonant Cacophony?' (2016) 5 *Tijdschrift voor Auteurs-, Media- en Informatierecht* 130. See also criticism of the subsequent *Filmspeler* decision: Synodinou, above n 740, 736 ('instead of building a solid conceptual core for this right, the CJEU has opted for a decentralised and subjective approach, by fragmenting the right into a chaotic series of pieces'); Groom, Silverman and Clark, above n 743, 593 (finding that the communication right 'remains a complex labyrinth to navigate' as the 'judgments have taken an overlapping, inconsistent and sometimes contradictory approach' and noting that 'the search for an over-arching doctrine remains elusive').

- PART 4 -

Solutions and Future Pathways: Principles for the Development of the Making Available Right

The final part of this thesis articulates a coherent framework for understanding and developing the making available right in a transparent manner. It provides judges with principles to progress the development of the right in a changing technological landscape, and allows us to comprehend past rulings in a clearer light. The framework also provides a constructive perspective that could inform legislative reforms regarding the right, and guide the development of sensible content access models in a dynamic communications environment.



CHAPTER VII. CONCEPTUAL FRAMEWORK FOR THE FUTURE

Purpose

This chapter aims to build a conceptual framework to guide the development of the making available right in a principled and coherent manner. To do so, it will:

1. Reflect on copyright's fundamental aims, and consider the role of the making available right in promoting these objectives;
2. Articulate a conceptual framework for understanding existing decisions on the making available right in more transparent terms; and
3. Explain the practical utility of the principles set out in the conceptual framework, and illustrate how they may be used to guide the decisions of courts, legislators and industry participants.

Headings

- A. Copyright's Fundamental Functions
- B. Distilling Four Interrelated Principles
- C. Using the Principles as Policy Levers
- D. Other Avenues Forward: Statutory and Negotiated Solutions

The making available right has the potential to be interpreted broadly and to restrict a range of conduct. It is clear that the right *may* be infringed by providing access to copyright content, regardless of whether copies are transferred to the recipient.¹³³⁷ In this context, courts have struggled to determine whether the provision of secondary access points constitute primary infringement of the right, or whether this merely facilitates access by consumers.¹³³⁸ These secondary points of access arise where content may be accessed in some manner, but members of the public are provided with an alternative means of gaining access to the same content.¹³³⁹

Courts, in their analysis of “the public” and the “act” of making available, have tended to rely on concepts that focus disproportionately on copyright's authorship function. Such approaches were largely developed in the context of synchronous public performance rights. The internet has brought about significant changes in how we communicate with one another, yet courts have transplanted these concepts into the dynamic internet environment without critically questioning their relevance.

¹³³⁷ See the discussion in Chapter III – Section B. The WIPO Internet Treaties: WCT and WPPT.

¹³³⁸ See the cases on cloud time-shifting/streaming, discussed in Chapter IV – Section B. Interpretations of the “Act” of Making Available.

¹³³⁹ This is evident in the cases involving linking, discussed in Chapter IV – Section B. Interpretations of the “Act” of Making Available.

The concepts guiding current judicial analyses of “the public”, discussed in Chapter V, are prime examples of this author-centricity. Approaches such as the “copyright owner’s public” or “new public” focus on the perspective of the copyright owner, or the owner’s implied permission or authorisation.¹³⁴⁰ Copyright’s authorship function has also guided interpretations of the “act”, as canvassed in Chapter VI. In some cases, courts have incorporated the notion of fault expressly or implicitly (using a broad conception of volition) into the relevant “act”, with fault evidenced by the defendant’s intentional design of the system to have certain functions.¹³⁴¹ While emphasis on authorship incentives is not as prominent in approaches to the “act”, conceptions of the “act” in these cases nevertheless favour the incumbent in copyright dissemination markets.

In short, judicial interpretation of the elements of the making available right tend to be driven by a perceived need to promote authorship incentives. This objective occupies a primary position above all others, when authorship should be but one of the relevant considerations. The decisions do not promote trust and understanding of the copyright system, and fail to pave the way for the development of innovative communications technologies and new business models. This chapter considers how we can recalibrate current skewed approaches to the making available right. A conceptual void exists between interpretations of the right and the core functions of copyright — i.e. to incentivise authorship *and* encourage dissemination of the resulting works. In order to fill this void, this chapter presents a theoretical framework for understanding the making available right. The framework consists of a number of interrelated principles, which may be used to guide the development of the right in a more transparent manner. It provides a clearer structure for judicial reasoning, and helps us understand the broader import of existing rulings. The framework also provides useful insights for lawmakers contemplating legislative action, and plots a constructive path forward for industry participants seeking a sensible approach to the making available right.

¹³⁴⁰ See, eg, *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140; *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

¹³⁴¹ See, eg, *Arista Records LLC v USENET.com, Inc* 633 F. Supp. 2d 124 (S.D.N.Y. 2009) 149 (where the defendant’s awareness of infringement and active measures to encourage such infringement transformed it into a party who ‘actively engaged in the process [of distribution] so as to satisfy the ‘volitional conduct’ requirement for direct infringement’). See also *Playboy Enterprises, Inc v Webbworld, Inc* 991 F. Supp. 543 (N.D. Tex. 1997); *Capitol Records, LLC v ReDigi Inc*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

Section A. Copyright's Fundamental Functions

In articulating a way forward, a sensible starting point is to consider the core functions of copyright, which have been identified in Chapter II. At a most basic level, copyright may be said to carry two fundamental functions:

1. Incentivising authorship; and
2. Disseminating the resulting works to the public.

Much has already been said about copyright's role in incentivising authorship and creation.¹³⁴² However, its dissemination function is relatively underappreciated and under-theorised. Difficulties of interpretation involving the making available right have highlighted this deficiency. If the making available right is to be interpreted clearly and fit conceptually with copyright's role in an interconnected information society, then a deeper understanding of copyright's dissemination function is needed.

1 Communications Policy and Copyright's Dissemination Function

Focusing our analysis on copyright's dissemination function prompts us to consider the practical impacts of exclusive rights granted under copyright law.¹³⁴³ In particular, we may consider the impacts of copyright law on the conduct of intermediaries or disseminators that give effect to copyright's dissemination function, and the consequences for those who benefit from the efficient dissemination of content — i.e. members of the public who access, enjoy and use such content. Copyright's communications policy, as put forward by Tim Wu and covered in Chapter II, is a useful starting point for understanding copyright's dissemination function as it elucidates the important role of content disseminators and the rivalries amongst these disseminators. It encourages closer analysis of the conduct of disseminators as conditioned by copyright and competition, and shows that broader interpretations of copyright owners' rights are in the strategic interest of incumbent disseminators.

Through the lens of copyright's communications policy, it is apparent that broad exclusive rights, if exercised in relation to a wide range of copyright content, may give rise to the power to inhibit rival disseminators of copyright content from entering the market and reaching consumers. These rival

¹³⁴² See, eg, Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', above n 178; Ginsburg, 'The Role of the Author in Copyright', above n 1046 (note that at 68, Ginsburg recognises that '[a]s a practical matter, the future of copyright for professional authors is likely to depend on the development of consumer-friendly payment and protection mechanisms'). See also scholarship that focuses on authorship, but nevertheless accounts for the role of disseminators and publishers: Wu, 'On Copyright's Authorship Policy', above n 275; Wendy J Gordon, 'The Core of Copyright: Authors, Not Publishers' (2014) 52(2) *Houston Law Review* 613.

¹³⁴³ Wu refers to this as 'the economics of distribution': Wu, 'Copyright's Communications Policy', above n 230, 283.

disseminators initiate the “creative destruction” of copyright dissemination markets and have an incentive to implement new disruptive technologies, in contrast to incumbent disseminators that control exclusive rights and seek to maintain the status quo.¹³⁴⁴ The use of a broad making available right to inhibit new entry into the market means that incumbent disseminators are not conditioned by competition to innovate and initiate the adoption of novel communications technology.¹³⁴⁵

Explicitly turning our minds to copyright’s communications policy enables us to identify impediments to dissemination that may arise in the journey of copyright content to their ultimate recipient — members of the public. The creation and expansion of exclusive property rights, said to incentivise authorship, in and of themselves do not facilitate or encourage copyright’s dissemination function. In other words, the development of efficient copyright dissemination markets is not the inevitable consequence of broader exclusive rights. The value that these rights purportedly bring to society may be lost along the way, depending on the scope of these property rights and how they are exercised.¹³⁴⁶ Courts are creating communications policy, which in turn has an impact upon technological innovation and consumer autonomy (two underlying policy objectives that have yet to take a prominent place in these copyright discussions).

2 Consumer Autonomy and Communications Policy

In addition to the role of disseminators, we should expand our inquiry to consider the interests of other key stakeholders in the copyright system. Our understanding of copyright’s dissemination function may be advanced if we consider the beneficiaries of a balanced communications policy — i.e. consumers of copyright content. Implementation of a balanced communications policy ensures that consumers seeking access to copyright content may do so using the latest technologies. Wu’s conception of copyright’s communications policy may be described as a mechanism for furthering the interests of members of the public; it is a means to an end. It encourages disseminators to implement new disruptive technologies which benefit consumers.¹³⁴⁷ This may be contrasted with

¹³⁴⁴ See the discussion in Chapter II – Section D. The Dissemination Function of Copyright.

¹³⁴⁵ See the discussion on “innovating around” copyright in Chapter V – Section C. Impacts of Copyright Law on Technological Innovation.

¹³⁴⁶ See Ghosh, ‘Managing the Intellectual Property Sprawl’, above n 168, 995. Ghosh explains that:

The source of value, both economic and social, comes from the use to which new works and products are put. The new, new thing may wow us, but ultimately if the newness does not translate into concrete benefits, whether realized as gains in productivity, contributions to knowledge, or stimulation of entertainment and pleasure, then it is hard to say whether the new, new thing is really valuable. [citations omitted]

¹³⁴⁷ At various points in Wu’s article on copyright’s communications policy, Wu refers to consumers but does not elaborate on their interests. For instance, he seems to consider consumer interests as a part of incentive theories: Wu, ‘Copyright’s Communications Policy’, above n 230, 284. Further into the article, he considers consumers as the principal victims of the legal reform process, due to their disorganized and disparate nature (at 293). Wu also considers their role in threatening to destabilise incumbent disseminators (at 356), and asserts

copyright markets whereby incumbent disseminators rely on technology that lags behind current possibilities, and seek to preserve their interests in those existing markets.¹³⁴⁸

Recognition of consumer interests is increasingly important as exploitation models change in the digital age. Advancements in bandwidth and “cloud” storage capacities mean that consumers no longer require access to a *copy* of a work to enjoy that work — they may simply gain on-demand access to an ephemeral stream of data. Access-only models enable consumers to perceive and interact with a potentially limitless library of content, without requiring their investment in corresponding storage space. This should benefit consumers.¹³⁴⁹ However, these transient forms of on-demand delivery could be implemented with significant restrictions on the ability of consumers to engage with copyright content. Unlike the receipt of a copy, every minute aspect of use is within the control of the disseminator.¹³⁵⁰ The consumer no longer holds rights as the chattel owner to deal with their particular copy as they wish. Therefore, these technological developments and access-only models also have the potential to inhibit the freedoms of copyright consumers to engage with content.

This is not to say that copyright law ought to preserve the freedoms that attach to the possession of copies, as such a technology-centric conception of consumer freedoms may hinder future innovations.¹³⁵¹ Ultimately, the law should aim to permit interactions with copyright content that promotes learning and meaningful engagement with one’s intellectual and cultural environment, instead of seeking to mirror traditional forms of interaction.¹³⁵² Contemporary debates about consumer interests in copyright nevertheless tend to focus on dealings with copies. For example, in

that consumer welfare will be enhanced in the short term under an open position to copyright’s communications policy (at 363).

¹³⁴⁸ See Breyer J’s concurring opinion in *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 380 F.3d 1154 (9th Cir. 2004) 949–966. Breyer J characterises the *Sony* rule on contributory infringement as ‘strongly technology protecting’, and that the rule ‘recognizes that copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently’ (at 957). On ‘whether a positive copyright impact would outweigh any technology-related loss’, Breyer J’s view is that ‘the law disfavors equating the two different kinds of gain and loss, rather, it leans in favour of protecting technology’ (at 960).

¹³⁴⁹ See Patry, above n 25, 42–3 (noting that the trend towards accessing works stored in the cloud ‘represents significant changes to consumer habits, and opens up the possibility for a true global distribution of culture’).

¹³⁵⁰ The potential loss of consumer autonomy through increased control by disseminators providing online access has been highlighted by several scholars: Liu, ‘Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership’, above n 108, 409; Julie E Cohen, ‘The Place of the User in Copyright Law’ (2005) 74 *Fordham Law Review* 347, 349; Jessica Litman, ‘Lawful Personal Use’ (2006) 85 *Texas Law Review* 1871, 1913; Patterson, ‘Copyright Overextended’, above n 1056, 393.

¹³⁵¹ See Litman, ‘Lawful Personal Use’, above n 1350, 1911. As Litman argues, ‘[j]ust as technology spurs evolution in the creation and marketing of works of authorship, it causes parallel evolution in the modes of interaction with those works’. Cf Ann Bartow, ‘Electrifying Copyright Norms and Making Cyberspace More Like a Book’ (2003) 48 *Villanova Law Review* 13 (advocating for library-specific exceptions and limitations to reflect real-space norms of usage by patrons).

¹³⁵² Litman, ‘Lawful Personal Use’, above n 1350, 1911. Although reading aloud, play-acting etc are lawful by tradition, Litman explains that it does not ‘make any copyright sense to limit readers, listeners, and lookers to the reading and listening behaviours that were customary in 1790’.

considering ‘trends in consumer use of copyright material’,¹³⁵³ the report of the Australian Law Reform Commission (ALRC) on Copyright and the Digital Economy focussed on “private use” exceptions for format-shifting and time-shifting.¹³⁵⁴ The Australian Competition and Consumer Commission (ACCC) in its submission to the ALRC observed that a recent trend affecting the copyright industries was ‘consumer empowerment over consumption’ whereby consumers can ‘organise use of copyright material around their own preferences in terms of time, location and method and consumption’.¹³⁵⁵ This point could just have easily been directed at the making available right, and not just private use exceptions permitting consumer copying. Similarly, a report on copyright and consumer rights commissioned by the European Parliament limits its discussion to exceptions for private copying and technological protection measures.¹³⁵⁶ However, in light of the move away from copies in models of exploitation and the increasingly difficult public/private distinction in the context of the making available right, it is apparent that these reform efforts are not considering the most significant hurdles that will be faced by copyright consumers. Concerns regarding consumer autonomy are not being directed toward new dissemination models, and do not address the negative consequences for consumers that could materialise through on-demand models. Bridging this divide is an important step in efforts to recalibrate and reform copyright law, and to interpret and develop the making available right in manner sensitive to its impact on consumer access models.¹³⁵⁷

A number of scholars have articulated such consumer interests, at times using different terminology. Joseph Liu, for example, uses the terms “copyright consumers”, and argues that copyright consumers

¹³⁵³ See Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013) 45 <<http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>>.

¹³⁵⁴ Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122 (2014) [3.23]-[3.36] <<https://www.alrc.gov.au/publications/copyright-report-122>>. Cf the Australian Government’s response to the Productivity Commissions report on Intellectual Property, supporting ‘the ability for Australian consumers to affordably access copyright content in a timely manner, noting that this is a key factor in preventing copyright infringement’: ‘Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements’ (August 2017) 4 <<https://www.industry.gov.au/innovation/Intellectual-Property/Pages/default.aspx>>.

¹³⁵⁵ Australian Competition and Consumer Commission, ‘ACCC Submission to the ALRC Copyright and the Digital Economy Issues Paper’ 21 <<https://www.accc.gov.au/system/files/ACCC%20submission%20to%20ALRC%20issues%20paper%20November%202012.pdf>>, cited in Australian Law Reform Commission, above n 1354, 62.

¹³⁵⁶ Severine Dusollier, ‘The Relations between Copyright Law and Consumers’ Rights from a European Perspective’ (European Parliament, 2010).

¹³⁵⁷ Scholars such as William Patry and Peter Yu have emphasised the importance of understanding consumer interests in the internet era: William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) (‘Successful Internet business models are based on satisfying consumer preferences, honed and targeted through information provided by consumers [and offering] more choices’); Peter K Yu, ‘Digital Copyright and Confuzzling Rhetoric’ (2011) 13 *Vanderbilt Journal of Entertainment & Technology* 881, 937 (‘[W]hether the [entertainment] industry can ... avoid a radical transformation of the business and legal environment will depend on whether it responds adequately to consumer demand—and more importantly, their continued frustrations.’).

are not just passive consumers, but “active consumers” that have autonomy interests in copyright.¹³⁵⁸ This autonomy interest of copyright consumers lies in the ‘freedom in choosing when, how, and under what circumstances to consume a copyrighted work’.¹³⁵⁹ Julie Cohen articulates the interests of the “situated user” in culture, emphasising the importance of “play” and unexpected encounters with copyright content.¹³⁶⁰ Cohen explains that ‘[c]onsumption, communication, self-development, and creative play merge and blur into one another, and the play of culture is the result’.¹³⁶¹ This thesis will use the term “consumer”, although scholars have oscillated between “user” and “consumer”.¹³⁶² Conceptually, consumers fit more readily within an analysis of markets under copyright’s communications policy.¹³⁶³

Consumer autonomy is arguably an integral part of the making available right as stated in the Internet Treaties — the right explicitly refers to “choice” on the part of potential recipients.¹³⁶⁴ Under a conventional interpretation of the communication right, this reference to consumer choice only serves to raise the thresholds of the communication right. The consumer’s exercise of *some level of choice*

¹³⁵⁸ Liu, ‘Copyright Law’s Theory of the Consumer’, above n 295, 406.

¹³⁵⁹ Ibid. See also more limited arguments presented by Alan Durham on consumer modification of individual copies: Alan L Durham, ‘Consumer Modification of Copyrighted Works’ (2006) 81 *Indiana Law Journal* 851.

¹³⁶⁰ See Cohen, ‘The Place of the User in Copyright Law’, above n 1350, 349. See also Jennifer E Rothman, ‘Liberating Copyright: Thinking Beyond Free Speech’ (2010) 95 *Cornell Law Review* 463, considering the individual liberty interests of users within a US constitutional context.

¹³⁶¹ Cohen, ‘The Place of the User in Copyright Law’, above n 1350, 373. Similar sentiments are put forward by Liu in describing consumer interests, stating that ‘repeated access and some degree of freedom in interacting with copyrighted work can lead to a richer and more complex appreciation of the work’: Liu, ‘Copyright Law’s Theory of the Consumer’, above n 295, 407. Liu asserts that an active consumer is not relevant just because they may eventually morph into an author. He argues that the focus should not be on whether authorship results in a conventional sense, but on protecting ‘the ability of consumers to derive meaning from copyrighted works’ (at 415–16, 422). This perspective is supported by Jessica Litman’s assertion that users’ interests in reading, viewing, listening to and experiencing copyright works are just as important as authors’ interests: Litman, ‘Lawful Personal Use’, above n 1350, 1882. See also, Ghosh, ‘Managing the Intellectual Property Sprawl’, above n 168, 1009, discussing the autonomy of users:

Autonomy is necessary only when society arises, and autonomy’s contours make sense only against a background of social relationships and roles. ... [T]o focus on the autonomy of ownership is a normative choice ... , but one could just as readily begin with the autonomy of users and make that the foreground in understanding the scope of intellectual property rights. [citations omitted]

¹³⁶² Cohen for example notes that the term “consumer” has been criticized due to its passive connotations, and instead settles on “user” to ‘connote both more active involvement in the process of culture and a residual aura of addiction that may be entirely appropriate to the age of the iPod, the XBox, and the blogosphere’: Cohen, ‘The Place of the User in Copyright Law’, above n 1350, 347. In contrast, Liu and Elkin-Koren have used the term “consumer”: Liu, ‘Copyright Law’s Theory of the Consumer’, above n 295; Liu, ‘Enabling Copyright Consumers’, above n 1027; Niva Elkin-Koren, ‘Making Room for Consumers under the DMCA’ (2007) 22 *Berkeley Technology Law Journal* 1119.

¹³⁶³ It is also arguable that the “consumer” perspective has a political advantage as it may increase the legitimacy of these interest: see Elkin-Koren, above n 1362, 1154 (comments made in the context of criticising the anti-circumvention provisions for Technological Protection Measures).

¹³⁶⁴ Article 8 of the WIPO Copyright Treaty provides that ‘authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time *individually chosen* by them’ (emphasis added).

does not negate an exercise of the copyright owner's exclusive right to communicate to the public by "making available". On this reading, the consumer seeking to gain access to content is only relevant to the disseminator's control, and the consumer's role is indistinguishable from a cog within the system for providing access. Perhaps more can be said about consumers' autonomy interests than is apparent on this reading of the making available right. Article 8 of the WCT refers to individual choice in the way works are accessed and the autonomy that a consumer may exercise via an on-demand model. We should question whether a right drafted with an expectation that consumers will exercise some choice in the execution of that right is compatible with interpretations that ignore the autonomy interests of consumers seeking to exercise that choice.

As highlighted by scholars such as Litman and Liu, consumer interests have conventionally been protected by the outer boundaries of copyright, i.e. the areas falling beyond the scope of protection.¹³⁶⁵ However, as the exercise of the making available right threatens to encroach upon consumers' autonomy over when and how they engage with copyright content, it has become necessary to explicitly turn our minds to the interests of copyright consumers.¹³⁶⁶ Attempts by copyright owners and disseminators to inhibit the access choices of copyright consumers should not be supported by an over-broad interpretation of the making available right, particularly if such efforts are driven by a perceived need to protect existing markets built upon soon-to-be superseded technology. Viewed via a consumer policy lens, conduct conventionally framed as an attempt to enforce a right may be revealed as an effort to hinder the autonomy interests of consumers in accessing content via innovative and more efficient communication technologies.

In response, it may be tempting to craft bright line rules outlining consumer freedoms. However, autonomy interests expressed in terms of existing technology, or based on the capabilities afforded by existing technologies, are likely to become outdated and redundant. Worse still, they may inhibit technological advancement in this space.¹³⁶⁷ A more robust approach — one which should develop in tandem with technological change — is to utilise insights from communications policy to identify and safeguard consumer autonomy interests. The ability to enhance choices surrounding access to content hinges on technological innovation, and the ability of consumers to utilise such technology is in turn contingent upon the willingness of disseminators to implement these technologies to satisfy

¹³⁶⁵ Jessica Litman, 'Readers' Copyright' (2011) 58 *Journal of the Copyright Society of the USA* 325, 334; Litman, 'Lawful Personal Use', above n 1350, 1882; Liu, 'Copyright Law's Theory of the Consumer', above n 295, 420–21.

¹³⁶⁶ See Ghosh, 'Managing the Intellectual Property Sprawl', above n 168, 1017. Ghosh explains that:
As the Internet expands, the zone of private space free from intrusion by intellectual property law contracts. Users have to worry about access to information, ability to share knowledge, and ownership over content. The need to focus on the interests of users becomes more salient.

¹³⁶⁷ Miller and Feigenbaum, above n 112 (arguing that the implementation of "trusted-systems" enabling private sharing of content 'vitiates the nature of digital documents', and that attempts 'to ensure that digital documents behave like physical ones' could 'eliminate the incentive to innovate').

consumer interests. Therefore, the interest of a rival disseminator may be taken as a proxy for consumers' autonomy interests in access, albeit an imperfect one. Rather than trying to specify these minimum freedoms, the law should provide rival disseminators with opportunities to fill niches or gaps in consumer needs that remain unmet, despite the existence of technological capabilities to do so.¹³⁶⁸

It may not be necessary for copyright law to articulate these basic freedoms. However, our interpretation of the law should consider the extent to which consumers may choose alternative disseminators to meet their needs, particularly when incumbent disseminators fail or are unwilling to do so. Such an approach requires recognition that the alignment of interests between consumers and disseminators may change, depending on how established a disseminator is in the market. Consumers may have a "right to read", but what it means to "read" is likely to change as technological innovations enhance our ability to engage and interact with content. Therefore, rather than striving to understand consumer autonomy interests or dissemination rivalries in isolation, we should consider the connection between these two factors in more depth in order to advance our analysis of the making available right.

3 Integrating Policy Objectives in Accordance with Dworkin's "Fit" Principle

The proposal to take communications policy and consumers' autonomy interests into account in our interpretation of the making available right may be supported by an understanding of Dworkin's principle of "fit" in judicial interpretation.¹³⁶⁹ Dworkin asserts that law as integrity 'requires a judge to test his [or her] interpretation of any part of the great network of political structures and decisions of his [or her] community by asking whether it could form part of a coherent theory justifying the network as a whole'.¹³⁷⁰ The "seamless web"¹³⁷¹ of law consists of legal principles that are constructed by a "Judge Hercules", an ideal judge in a common law jurisdiction endowed with 'superhuman skill, learning, patience and acumen'.¹³⁷² Dworkin explains that this Judge Hercules must discover

¹³⁶⁸ As Litman argues, copyright did not need to express these interests — '[i]nstead of setting out the scope of individual audience interests in explicit terms, the basic architecture of the system respected the rights of readers, listeners, and viewers by limiting the reach of copyright rights': Jessica Litman, 'The Copyright Revision Act of 2026' (2009) 13(2) *Marquette Intellectual Property Law Review* 249, 255.

¹³⁶⁹ Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 228–39.

¹³⁷⁰ *Ibid* 245. An explicit endorsement of this notion of "fit" may be found in the Australian High Court decision of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. As McHugh J states at 593:

A judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not "fit" into the general body of the established law cannot be the subject of judge-made law.

¹³⁷¹ See Ronald Dworkin, 'Hard Cases' (1974) 88 *Harvard Law Review* 1057, 1093. See also Ronald Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527 (characterising the task of judges as akin to the writing of a chain novel).

¹³⁷² Dworkin, 'Hard Cases', above n 1371, 1083. See also Dworkin, above n 1369, 239.

principles that not only fit the particular precedent of the dispute at hand, but also fit the other judicial decisions and statutes within the general jurisdiction.¹³⁷³ Dworkin acknowledges that an actual judge is not Herculean, but argues that judges nevertheless can seek to imitate Hercules in a limited way.¹³⁷⁴ Although judges may disagree on how disparate rules may fit the body of law, it is important that they make ‘plain to their public, through their opinions, the path that later judges guided by integrity will follow’.¹³⁷⁵

Furthermore, Dworkin explains that the separation of law into departments is based on tradition,¹³⁷⁶ and it is possible for these categories to grow arbitrary, ‘particularly when the central rules of the departments were developed in different periods’.¹³⁷⁷ Therefore, ‘the adjudicative principle of integrity asks judges to make the law coherent as a whole, so far as they can, and this might be better done by ignoring academic boundaries and reforming some departments of law radically to make them more consistent in principle with others’.¹³⁷⁸ In other words, the separation of these areas of law into conceptual and doctrinal silos ought to be justified in the process of interpretation.¹³⁷⁹

The “fit” principle may have been enunciated by Dworkin with the common law in mind, but it should be recognised that statutory interpretation is also an act of judicial law-making (albeit in a weaker sense, within the limitations of the statute).¹³⁸⁰ This is particularly true for the making available right, which as drafted provides wide scope for judicial discretion. The language of the right may permit a broad interpretation. However, the limits of the right, even if not apparent on the face of the text, may be drawn from the surrounding legal landscape. This legal landscape includes other areas of law, such as competition law and consumer law. To be clear, this is not an argument that the conduct of copyright owners and disseminators should be assessed solely under competition law or consumer law.¹³⁸¹ Dworkin does not posit that any particular area of law should dominate under the notion of “fit”. The argument is that the principles from these other areas of law should inform the development

¹³⁷³ Dworkin, ‘Hard Cases’, above n 1371, 1094.

¹³⁷⁴ Dworkin, above n 1369, 245.

¹³⁷⁵ Ibid 248.

¹³⁷⁶ Ibid 251.

¹³⁷⁷ Ibid 253.

¹³⁷⁸ Ibid 251.

¹³⁷⁹ Judge Hercules would be seeking ‘an explanation of the practice of dividing law into departments that shows that practice in its best light’: ibid 252.

¹³⁸⁰ Brian Fitzgerald, ‘The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer’s Liberty or Copyright Menace/Circumvention Device?’ (2005) 10 *Media and Arts Law Review* 85, citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 143–3 (Brennan J). It may be noted that Dworkin’s subsequent work argues for “unity of interpretation”, i.e. interpretation as a general normative practice that extends to all human activities except science: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011). See further Lawrence B Solum, ‘The Unity of Interpretation’ (2010) 90(2) *Boston University Law Review* 551, 558.

¹³⁸¹ It should be acknowledged that the application of competition laws to copyright disputes have been considered by other scholars: see, eg, John T Cross and Peter K Yu, ‘Competition Law and Copyright Misuse’ in Ysolde Gendreau (ed), *Un Cocktail de Droit D’auteurs* (Les Éditions Thémis, 2007) 55.

copyright law.¹³⁸² As these areas exist in tandem to further important policies, copyright law should not be taken as impenetrable to seemingly foreign policy objectives.

Section B. Distilling Four Interrelated Principles

In drawing these policy objectives together, we should recognise that consumer autonomy interests and communications policy are interrelated concepts. A balanced communications policy promotes consumer autonomy in access to content; consumer demands in turn drive the direction of dissemination rivalries. A factor that links the two together is innovation in dissemination technologies.¹³⁸³ It is through technological innovation that rival disseminators strive to bring about the “creative destruction” of existing markets.¹³⁸⁴ A question that flows from this is how courts can utilise these linkages and connections, and ensure that each decision regarding the scope of the making available right fits within a coherent framework. Choosing to rely on a single policy objective, without discussing why this objective should trump all others, does not bring clarity to a ruling. Therefore, we should consider how judicial analysis and reasoning may be guided within a framework, with the relationships between each consideration made clear.¹³⁸⁵

As a starting point, we may distil principles from the policy objectives identified above, and consider the connections between these principles. The principles stem from the three considerations identified above — communications policy, consumer autonomy and technological innovation — and may be articulated within a conceptual framework that provides due consideration to copyright’s fundamental dissemination function. This conceptual framework provides us with a basis for understanding the increasingly prominent role of the making available right in the modern information economy. The framework is made up of principles for the interpretation and further development of the making

¹³⁸² Wu appears to support this proposition, noting the US government’s endorsement of open, competitive innovation as a model for its national communications policy, and arguing that ‘[c]opyright, as it grows in importance, should not be exempt from such principles’: Wu, ‘Copyright’s Communications Policy’, above n 230, 281.

¹³⁸³ See Francis Gurry’s observation that innovation ‘lies at the heart of the mission of intellectual property’: Francis Gurry, ‘2017 Address of the Director General’ (at the WIPO Assemblies, Geneva, 2 October 2017) <http://www.wipo.int/about-wipo/en/dgo/speeches/a_57_dg_speech.html>.

¹³⁸⁴ Wu considers public conflict among rival disseminators ‘as nearly inevitable’ and ‘a permanent problem for copyright’s regulation of packaged information’, in part, because ‘more efficient technologies of dissemination will be invented’: Wu, ‘Copyright’s Communications Policy’, above n 230, 292.

¹³⁸⁵ Susy Frankel explains that ‘[b]etter interpretation is not only important for resolving disputes, but it is also relevant for framing laws and thus tackling the international copyright problem at a national level’: Frankel, ‘The International Copyright Problem and Durable Solutions’, above n 37, 137. See also Susy Frankel, ‘The Path to Purpose-Driven Treaty Interpretation: A Hermeneutic of International Intellectual Property’, Hauser Global Fellows Forum October 2013 (Draft), 7 <http://www.law.nyu.edu/sites/default/files/upload_documents/SusyFrankel.pdf>, where Frankel argues that ‘interpretation should and can take account of multiple purposes, many of which are dynamic’, and that ‘interpretation should be fundamentally based on policy goals’.

available right that brings copyright closer to its objective of facilitating the dissemination of knowledge, as well as encouraging the creation of cultural works.

This thesis will adopt the term “Interpretive Matrix” for this conceptual framework. The four interrelated principles within this framework are:

The Interpretive Matrix	
Principle 1 – Communications Policy	Interpretation of the making available right must take into account its impact on new rival disseminators and, more specifically, whether the interpretation has the effect of excluding or limiting the pressures of “creative destruction” that would otherwise condition the competitive conduct of an incumbent disseminator.
Principle 2 – Technological Innovation	Interpretation of the making available right must factor in the extent to which exclusivity is used to inhibit the implementation of technological innovations that enhance communications by rival disseminators.
Principle 3 – Consumer Autonomy	As a corollary to Principles 1 and 2, any inhibition of technological innovation or rivalrous conduct amongst disseminators should be considered from a consumer autonomy perspective, by taking into account any impact the scope of the making available right may have upon the autonomy interests of consumers engaging with copyright content.
Principle 4 – Authorship Incentives	We should refine our understanding of authorship and the interpretive concepts that focus on authorship incentives, and recognise that the protection of authorship operates in conjunction with the important considerations captured in Principles 1, 2 and 3. Authorship interests, if situated within a sustainable environment for innovative technologies and business models, are more likely to foster respect for the law and encourage new opportunities for the exploitation of copyright content.

Although each principle of the Interpretive Matrix appears to be taken from a different perspective (that of consumer, disseminator/innovator and creator), we should not see each interest as a trade off against the other but ask about their flow on impact upon the other objectives. In other words, the

analysis is not just a linear balance of interests, but a constantly evolving ecology with multiple linkages.

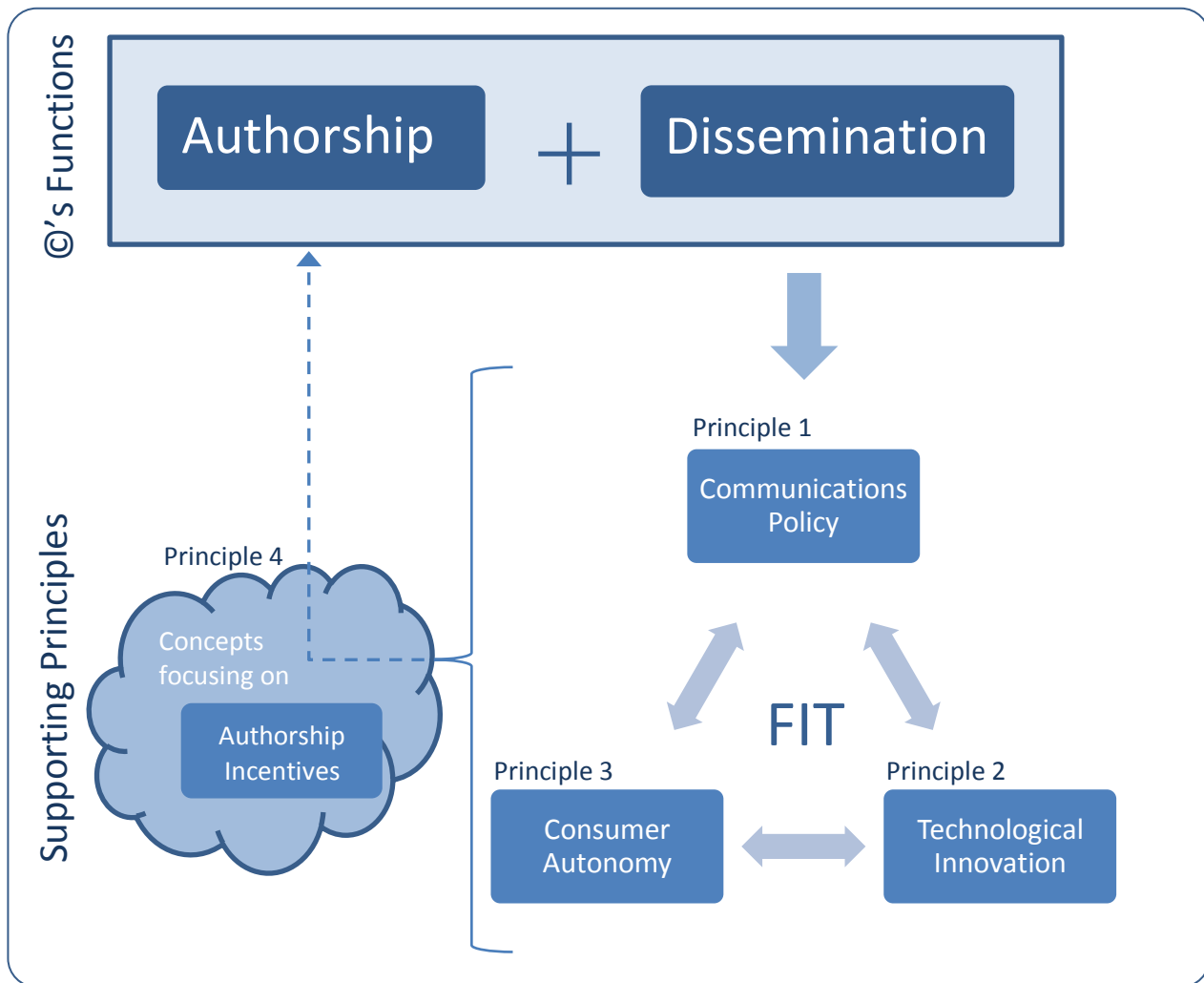
This conceptual framework takes us a step in the right direction by recognising the relationships and connections between content creators, disseminators, and consumers. It encourages decision-makers to cast a critical eye upon the transfer of value between authors and the reading public, and asks whether this transfer can be made more efficient with the use of innovative communication technologies. Express recognition of technological innovation in our analysis reflects an understanding that copyright law does not merely respond to technological changes, but positively guides the advancement of communication technologies.

These principles may at times be implicit in judicial reasoning, as judges have yet to expressly engage with them in a comprehensive manner. Moreover, there are no explicit rules to this effect in legislative provisions implementing the making available right. Therefore, their status has yet to be clarified — judges may vaguely refer to one factor or another that supports these principles, without clearly conceptualising these principles in their reasoning. Moving forward, judges should explicitly address the principles within this framework and use them to craft more sensible and transparent rulings on the making available right.

The relationships between these principles and their relevance to copyright's two core functions are expressed diagrammatically in Figure 7.1 that follows. It should be recognised that this conceptual framework does not elevate any principle above the rest as a primary objective, but calls for an appreciation of the interconnected nature of these principles.¹³⁸⁶ These principles are more likely to resonate with a decision-maker who accepts that copyright does not require exclusivity over all *uses* of copyright content that are seen to be of value. It is an approach that entails a more nuanced understanding of authorship incentives (in accordance with Principle 4), and an appreciation that copyright's authorship function operates in conjunction with technological innovation, communications policy and consumer interests.

¹³⁸⁶ As Susy Frankel argues, '[i]f there is an interest to be protected, the mode of protection is not determined by whether it is more or less important than another interests Rather, an effective analysis should consider how any interest and corresponding related interests could all be appropriately accommodated': Frankel, 'The International Copyright Problem and Durable Solutions', above n 37, 113.

Figure 7.1. The Interpretive Matrix: Functions and Principles



Section C. Using the Principles as Policy Levers

With these principles in mind, we may revisit judicial approaches to the making available right and situate them within this conceptual framework. We may use the Interpretive Matrix to review the implicit policy perspectives driving these rulings. The select examples that follow show how transparency could be brought to these existing rulings using the four principles in the framework. The Interpretive Matrix itself may not explicitly refer to the elements of the making available right, but it can be used to better implement the recommendations regarding each element.¹³⁸⁷ It supports the proposition that the “act” of making available should not be assessed using ad hoc standards. Furthermore, perspectives informing interpretations of “the public” should be broadened beyond the

¹³⁸⁷ See the conclusions of Chapter V and Chapter VI respectively.

interest of the copyright owner, and ought to include consideration of copyright's dissemination function as articulated by the principles of the Interpretive Matrix.

It should be noted that these principles are largely targeted at the judiciary, providing courts with the tools to interpret of the right in a coherent and transparent manner. A potential argument is that judges, in contrast to legislatures, are not as well-equipped to recognise and analyse the broader effects stemming from over-inclusive exclusive rights. This is particularly relevant to Principle 1, which requires a decision maker to consider the activities of rival disseminators in accordance with copyright's communications policy. However, regardless of whether courts acknowledge copyright's communications policy, their decisions are crafting this policy in a way that has an impact on the conduct of disseminators and the autonomy of consumers. The question is not *if* courts should be concerned with communications policy. In the context of the making available right, courts inevitably drive communications policy — the question is *how* this may be done in a more transparent and principled manner.

1 EU: Digital “Exhaustion” of the Communication Right?

Firstly, we may consider how a number of key EU rulings may be situated within this framework. The “new public” test applied in *Svensson*¹³⁸⁸ is not satisfied where a consumer constitutes the “same public” of a copyright owner, as the consumer has already gained “lawful” access to the same content authorised for communication to them by the copyright owner.¹³⁸⁹ In accordance with Principle 3, it may be argued that the consumer should have the freedom to utilise other connection points on the internet (i.e. a link) to access the same content. The “new public” doctrine has been criticised as effecting exhaustion of the making available right. Without arguing for exhaustion of the making available right specifically,¹³⁹⁰ it is possible to consider the rationales for exhaustion or the first sale doctrine applicable to the transfer of physical copies. Exhaustion is said to be justified based on the chattel owner's personal property right in the item embodying the work.¹³⁹¹ However, copyright is an intangible right separate from the tangible property, so why does the chattel owner's right trump the intangible right at this precise point? A clearer justification is the protection of consumers' ability to

¹³⁸⁸ *Svensson* (Court of Justice of the European Communities, Case C-466/12, 13 February 2014).

¹³⁸⁹ See *ibid* [24], referring to a “new public” as ‘a public that was not taken into account by the copyright holders when they authorised the initial communication to the public’.

¹³⁹⁰ Exhaustion of the communication right is explicitly excluded under the InfoSoc Directive, but the WCT and WPPT are silent on this issue: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10, above n 493, art 3(3); cf *WCT*, signed 20 December 1996, S Treaty Doc No 105-17 (1997); 36 ILM 65 (1997) (entered into force 6 March 2002); *WPPT*, signed 20 December 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) (entered into force 20 May 2002).

¹³⁹¹ Ariel Katz, Aaron Perzanowski and Guy A Rub, ‘The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes’ (2016) 102 *Virginia Law Review* 8, 111.

retain control over content that they have lawfully gained access to.¹³⁹² In other words, copyright provides the rightsholder with a limited monopoly to exploit the work, but this right does not extend to all uses of the content by consumers. Therefore, rather than attempting to craft an “exhaustion” doctrine for the making available right, we should aim to apply principle 3 on consumer autonomy in our interpretation of the right. In this process, we would consider how consumer autonomy interests fits with the other principles in the framework.

Consumer autonomy interests are not made express in *Svensson*, and are not consistently applied in the EU. The rule applied in *TVCatchup*, for example, bypasses any consumer-oriented “exhaustion” ruling under the “new public” test. The *TVCatchup* decision dictates that each different “technical means” of communication needs to be separately authorised by the copyright owner.¹³⁹³ A broad interpretation of “different technical means” represents a stewardship approach to communications policy. A stewardship approach would favour incumbents as these various “means” of communication must be authorised by the incumbent. It is an overlay upon the “new public” test, effectively providing that use of a different “technical means” will always reach a “new public” that was not contemplated by the rightsholder in authorising the initial communication.¹³⁹⁴

In *Svensson*, the CJEU held that an “act” of communication ‘must be construed broadly’ to ensure ‘a high level of protection of copyright holders’ (prioritising authorship incentives). Yet, the Court utilises the “new public” test in this instance to limit the scope of the right and avoid the inhibition of linking on the internet. Perhaps this reflects a recognition of the fundamental importance of linking to the operation of the internet, a concern that would be of relevance to Principle 1 on communications policy and Principle 2 on technological innovation. However, the Court in *Svensson* does not expressly refer to these policy objectives in its decision. The importance of linking to the flow of information is made express in *Sanoma*,¹³⁹⁵ where the CJEU expressly acknowledges the importance of safeguarding ‘freedom of expression and of information’ and states ‘that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information’.¹³⁹⁶ Nevertheless, the *Sanoma* Court introduces a “fault” requirement to extend primary liability for linking (in the process

¹³⁹² See Liu, ‘Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership’, above n 108, 1275 (considering the right to read or access a copy that is in one’s possession). See also *Kirtsaeng v John Wiley & Sons* 133 S. Ct. 1351 (2013) 1363, where the Supreme Court explained that the justification for the first sale doctrine was based on ‘the common law’s refusal to permit restraints on the alienation of chattels’, but also recognized that ‘competition, including freedom to resell, can work to the advantage of the consumer’.

¹³⁹³ *ITV et al v TVCatchup* (Court of Justice of the European Communities, Case C-607/11, 7 March 2013) [24].

¹³⁹⁴ See *ibid* [39]:

[E]ach [transmission] is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public ...

¹³⁹⁵ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekker* (Court of Justice of the European Communities, Case C-160/15, 8 September 2016).

¹³⁹⁶ *Ibid* [45].

overstepping the boundaries of primary liability into secondary liability), arguably with authorship incentives in mind. The reasons for this decision could have been made clearer if framed in terms of the Interpretive Matrix. Using the 4 principles, a court would explain the interrelated nature of communications policy, technological innovation, consumer autonomy and authorship incentives in the context of the dispute.

2 US: “Volition” vs Receiving Performances as “Possessors” of the Works

In the US, the contrasting approaches of the Supreme Court majority and the dissent in *Aereo*¹³⁹⁷ illustrate the operation of these principles. Scalia J’s dissenting judgment uses the volitional conduct of the user to determine liability, an approach that seems to focus on consumers’ autonomy interests. The consumers’ actions alone dictate the limits of the making available right, overshadowing the conduct of disseminators. While Scalia J’s judgement appears to adhere to Principle 3 on consumer autonomy, it is not in accordance with the framework as a whole because the other principles are not considered. Using the Interpretive Matrix, one may ask whether this narrow approach to volition allows a rival disseminator to hide behind consumers’ interests, without introducing a technological innovation that furthers consumer autonomy (in accordance with Principle 2). If the defendant is facilitating the creative destruction of stagnant dissemination markets (under Principle 1), we may ask if it is doing so by implementing an innovation that ultimately benefits consumers and creators in the long run. As discussed in Chapter VI, volition may be used in its limited capacity as an analytical tool. However, to hinge important policy considerations on this malleable term is to invite inconsistency. Unless we understand how volition gives effect to these interrelated principles, focussing on volition is likely to lead to more seemingly ad hoc rulings. Whether or not courts use the term volition in their decisions is unimportant; the important thing is that courts are clear about their reasons for applying volition, or whatever term they choose.

Turning to the majority judgment in *Aereo*, we may consider the outcome of the decision, which seems to favour authorship incentives. However, the reasoning does not consider Principle 4 on authorship incentives as linked to the other principles in the Interpretive Matrix. The Court makes some attempt to engage with consumer interests by noting that a prior possessory relationship with the work may give rise to a right to deal with the content (e.g. using cloud storage).¹³⁹⁸ However, this hint at a consideration of consumer autonomy interests (with reference to a valet parking analogy)¹³⁹⁹ is vague and does not clearly contextualise the interest. A more explicit account of consumer

¹³⁹⁷ 134 S. Ct. 2498 (2014).

¹³⁹⁸ Ibid 2502, 2510.

¹³⁹⁹ Ibid 2510.

autonomy interests may be found in the Supreme Court's *Teleprompter*¹⁴⁰⁰ decision. The Court emphatically stated that '[t]he privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so.'¹⁴⁰¹ Although the finding in *Teleprompter* that a cable service provider does not "perform" in public may have been overturned by legislative intervention,¹⁴⁰² the Court's resounding support of consumer autonomy interests with reference to the available technology is an example of explicit consideration of Principles 2 and 3.

Whether or not one agrees with the outcomes of these decisions, it is apparent that the judges are making some attempt to incorporate consumer autonomy interests in their reasons. Rather than using terms such as "possession" or "volition" in an ad hoc manner to consider consumer autonomy interests, we may consider how these cases fit within the broader framework. The *Aereo* majority may have cast their minds upon principle 3 on consumer autonomy (based on their comments on a prior possessory relationship with the work),¹⁴⁰³ but much of the decision is driven by authorship incentives. What is lacking from this decision is an appreciation of how Principle 1 (communications policy) and Principle 2 (technological innovation) fit with consumer autonomy and authorship incentives. Without connecting these principles within a coherent conceptual framework, the Court's reasoning appears to lack transparency.

3 *Australia: Partial Analysis Due to a Focus on Copies*

In the Australian context, the *OptusTV* trial decision is notable, as Rares J's reasoning clearly identifies the intersection between consumer autonomy (Principle 3) and technological innovation (Principle 2). Rares J considers primary infringement of both the making available right and right to copy, and in doing so, takes note of the various policies that are implicated in these disputes. His Honour observes that 'copyright legislation has had to balance the legitimate interests of the makers of original works and of ordinary citizens who use technological advances to copy those works for their own use in their private or domestic lives'.¹⁴⁰⁴ In this context, Rares J explains that there is a

¹⁴⁰⁰ *Teleprompter Corp v Columbia Broadcasting Sys, Inc*, 415 U.S. 394 (1974).

¹⁴⁰¹ *Ibid* 408.

¹⁴⁰² This legislative change in turn was a key reason for the *Aereo* majority's approach, citing clear legislative intention that cable-like entities "perform": *American Broadcasting Companies, Inc, et al, v Aereo, Inc*, 134 S. Ct. 2498 (2014) 2505–506.

¹⁴⁰³ *Ibid* 2510. The Court stated:

[A]n entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public," whereas an entity like *Aereo* that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

¹⁴⁰⁴ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 320, citing *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; 2 All ER 484.

‘somewhat symbiotic love-hate relationship between the entertainment industry, the electronics and communications industries and the consuming public’.¹⁴⁰⁵

Express recognition of consumer autonomy as enabled by technological innovation features throughout the decision. Rares J observes that technological advancements have led to ‘an evolving array of recording equipment capable of making a film’,¹⁴⁰⁶ and our daily lives have been ‘transformed over the last 20 years with advances in technology’.¹⁴⁰⁷ With regard to the reproduction right and the time-shifting exception, Rares J emphasizes the consumer-focussed rationale for the introduction of the exception in s 111, explaining that ‘[t]he public want to utilise the latest that technology has to offer to see and hear the entertainment as often as they desire, *using whatever medium is most convenient*.’¹⁴⁰⁸ In agreeing with the reasoning of the US Second Circuit in *Cablevision*,¹⁴⁰⁹ Rares J considers the consumer to be the maker of copies, as she initiates the process.¹⁴¹⁰ His Honour comes to the same conclusion on the “act” of making available on the basis of volition, i.e. by instructing Optus to record, consumers were responsible for determining the content of the communication.¹⁴¹¹

The intersection of consumer autonomy and technological innovation is again palpable in Rares J’s discussion of whether the alleged communications were to “the public”. Applying the notion of the “copyright owner’s public”, Rares J observes that ‘[a] user could have watched the broadcast as they were made and, had he or she done so, would have been part of the viewing public’¹⁴¹² Furthermore, Rares J states that if a user did not use the Optus TV Now service, the user ‘would need to have or acquire his or her own recording technology or other equipment ... in what is now a conventional and accepted means of copying such a program’.¹⁴¹³

It may be argued that the decision could have provided more in-depth consideration of the other principles within the Interpretive Matrix. Authorship incentives (relevant to Principle 4) are considered briefly when Rares J considers the potential commercial detriment to rightsholders. His Honour finds that the service lacked the detriment that a rightsholder might accrue, for example, in the Telstra’s music on hold case, since they could have made the recording anyway using their own

¹⁴⁰⁵ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 321.

¹⁴⁰⁶ *Ibid* 320.

¹⁴⁰⁷ *Ibid* 321.

¹⁴⁰⁸ *Ibid* 319–321 (emphasis added), citing Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).

¹⁴⁰⁹ *Cartoon Network, LP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008).

¹⁴¹⁰ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 322–23.

¹⁴¹¹ *Ibid* 326. This was said to satisfy s 22(6), which provides that ‘a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication’.

¹⁴¹² *Ibid* 331.

¹⁴¹³ *Ibid*.

device.¹⁴¹⁴ Furthermore, express consideration of communications policy (Principle 1) is lacking, as Rares J does not analyse the impact of the decision on competitive rivalries between Optus and other disseminators such as Telstra.

The Full Federal Court, rather than address Rares J's findings on the making available right and His Honour's cogent reasons that utilised some of the principles within the Interpretive Matrix, ignores the analysis on the making available right. Nevertheless, it is arguable that the Full Federal Court's reasoning, *if* applied to the making available right, would not have been any different. Some of the Court's remarks on the right to copy are telling of its likely analysis of the making available right. On the right to copy, the Court states that 'Optus could be said to be the maker in that the service it offered to, and did, supply a subscriber was to make and to *make available* to that person a recording of the football match he or she selected'.¹⁴¹⁵ Likewise, in concluding, the Court states that Optus 'captures, copies, stores and *makes available* for reward, a programme for later viewing by another'.¹⁴¹⁶

The Court seems to be aware of the principles in the Interpretive Matrix, as it makes observations relevant to consumer autonomy (Principle 3), technological innovation (Principle 2) and communications policy (Principle 1). It takes note of the objectives in the Explanatory Memorandum to the legislation introducing the time-shifting exception, which emphasised technologies 'giving consumers new and more convenient ways to use copyright material, particularly for personal entertainment'.¹⁴¹⁷ In terms of technological innovation and communications policy, the Court recognises the impact of the OptusTV service on innovation and competition. It quotes Optus's internal documents describing the business case for approval of the project as enabling Optus to become 'an innovative and *disruptive* TV & Video product'.¹⁴¹⁸ Taken in the context of the decision as a whole however, the Court appears to be emphasising the disruptive nature of the Optus TV service in a negative sense. Ultimately, any innovation introduced by the system does not influence the Court's conclusion on the right to copy. The Full Federal Court notes that the service is "highly automated",¹⁴¹⁹ but nevertheless finds that 'a person who designs and operates a wholly automated system' ought to be treated as the "maker" of an infringing copy 'where the system itself is configured designedly so as to respond to a third party command to make that copy'.¹⁴²⁰

¹⁴¹⁴ Ibid 332, citing *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140.

¹⁴¹⁵ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 152 (emphasis added).

¹⁴¹⁶ Ibid 166.

¹⁴¹⁷ Ibid 154, quoting Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), above n 1408, 6–7.

¹⁴¹⁸ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 156 (emphasis in original).

¹⁴¹⁹ Ibid 159.

¹⁴²⁰ Ibid 165.

4 Building Resilient Principles and Avoiding Outcome-Focussed Decisions

The objective of this framework is not to discount the importance of copyright's authorship incentivising function. However, in relying exclusively on authorship incentives or focussing on authorship in a disproportionate manner, other interrelated and important objectives of copyright are afforded insufficient attention, or worse, neglected altogether. As a result, the decisions are based on a partial understanding of copyright policy. We need to understand that copyright has a role in advancing a number of interrelated policies. As a starting point, the Interpretive Matrix does not require that we pick one policy over another, but asks that we identify these policies more clearly and appreciate the links between them.

This task is not easy, but it is necessary if we wish to secure the sustainability of copyright into the future. The framework does not dictate a particular outcome, but highlights the incoherence and opaque nature of existing outcome-focussed decisions. Courts should aim to craft more principled and transparent decisions, as such decisions are more likely to be of assistance to future courts encountering novel technologies. These decisions are the necessary building blocks of the seamless web of copyright law that will hold up to the rigours of rapid technological advancements.

Section D. Other Avenues Forward: Statutory and Negotiated Solutions

Finally, we may ask if there are other ways to support the principled interpretation and development of the making available right. Although the judiciary seems to be the primary driver of the scope of the making available right, the Interpretive Matrix may nevertheless inform legislative refinement of the right and support negotiated solutions in practice.

1 Statutory Adjustment as a Supplement to Judicial Balancing

Prima facie, legislatures are unlikely contenders for addressing the problems identified in this thesis. Legislatures are capable of establishing broadly-worded rights in technology-neutral terms, but the legislative process is not designed to respond quickly to changes or anticipate the range of communications technologies that may arise in the future. Therefore, refinement of the meaning of the making available right is unlikely to come from legislative amendments, particularly in an environment filled with uncertainty. Attempts to define the right with reference to existing technologies may unnecessarily "fix" communications policy, restricting the ability of courts to adjust and recalibrate communications policy through their interpretation of the right. In this regard, legislators need to be cautious of any attempts to state rules in narrow terms or based on specific technological means of communication. In other words, the 4 principles may serve as a cautionary framework that justifies a decision to refrain from legislative action. Legislatures should resist calls to broaden the scope of the making available right in accordance with the demands of copyright

owners or incumbent disseminators, unless due regard is paid to consumers' autonomy interest in access, technological innovation and the impacts on copyright's communications policy.

This does not mean that legislators do not have a role to play. The legislative branch should be open to opportunities for providing clarification. Statutory reform may highlight the need to factor in consumer autonomy and communications policy, without codifying technology-specific rules. For example, a legislative provision could state that in assessing the scope of the making available right, a list of non-exhaustive factors reflecting the 4 principles in the Interpretive Matrix are to be considered. Legislators could also consider instituting a "innovation safe harbour" that limits the risk for new rival disseminators seeking to bring about the creative destruction of a stagnant copyright market, by restricting the availability of injunctions and damages and only allowing a partial account of profits to the rightsholder. However, this latter option carries certain risks. It is uncertain how this safe harbour can be drafted clearly and in a way that withstands technological changes. Moreover, it could lead to the implementation of what Tim Wu describes as copyright's "classic communications regime",¹⁴²¹ which is a compromise that provides the new rival disseminator with access to the "essential input" of copyright content while ensuring rightsholders receive compensation.¹⁴²² This may present itself as a neat solution to a holdout problem, but it ignores the practical impact that remedies may have on the scope of rights. As Andrew Gilden argues, remedies are an integral part of a right, even though a "rights essentialism" approach tries to conceptually and temporally separate rights from remedies.¹⁴²³ An example of this is where courts have "split the baby" by ruling in favour of the rights holder at an earlier stage on the merits of the case, but later ruling in favour of the defendant on remedies.¹⁴²⁴ In other words, an "innovation safe harbour" could encourage courts to eschew injunctions under the guise of supporting technological innovation, but this may inadvertently expand substantive copyright protections, effectively "reaching back" and shaping a court's determination.¹⁴²⁵ While the interpretation of this "innovation safe harbour" could alleviate the risks of disruptive market entry, courts should be cautious of arguments for expanded interpretations of the right to ensure that rightsholders are remunerated.

In sum, legislative change is unlikely to be a significant part of the solution. However, it could supplement efforts to instil clarity in the law, utilising principles have been tried and tested over time.

¹⁴²¹ Wu, 'Copyright's Communications Policy', above n 230, 334–35.

¹⁴²² Ibid 335.

¹⁴²³ Andrew Gilden, 'Copyright Essentialism and the Performativity of Remedies' (2012) 54 *William & Mary Law Review* 1123, citing James Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law' (2006) 116 *Yale Law Journal* 882, 945; Wendy J Gordon, 'Render Copyright unto Caesar: On Taking Incentives Seriously Colloquium: Intellectual Property' (2004) 71 *University of Chicago Law Review* 75, 91.

¹⁴²⁴ Gilden, above n 1423, 1133.

¹⁴²⁵ Ibid 1144. Cf Mark A Lemley and Philip J Weiser, 'Should Property or Liability Rules Govern Information' (2006) 85 *Texas Law Review* 783 (appearing to support a liability rule in order to address holdout problems).

Legislative clarification is more likely to come from a codification of the general principles and approaches established by the courts.

2 *Voluntary Consortium*

The principles in the Interpretive Matrix could also support the achievement of negotiated outcomes.¹⁴²⁶ Formal legal change is important to bring about transparency and clarity to copyright law, but in the event that change is slow to come, key stakeholders may use these principles to structure sensible arrangements. If various stakeholders aim to advance the technological architecture of the internet while satisfying dissemination markets, then negotiated solutions could give rise to new business models that benefit both consumers and authors. Implementation of the Interpretive Matrix by industry participants could lead to the development new norms of exploitation and consumption.

Organising authority

A number of organisations or governmental agencies may have sufficient influence to bring interested parties together. In light of the different interests within the Interpretive Matrix, the collaboration of various types of organisations may be necessary. We could look to organisations or agencies that focus on copyright and IP. In addition, it would also be useful to include competition or consumer rights agencies in this process. These entities could be further divided by jurisdiction — they may operate at the global level, or operate at a regional or national level.

As large intermediaries and content producers that are active in the online environment tend to operate on a global level, international organisations are likely to carry the most influence. An organisation that could bring the major stakeholders together on a global scale is WIPO. It would be a recognised authority on the making available right, as it administers the Internet Treaties. Furthermore, the Director General of WIPO, Dr Francis Gurry, has expressed interest in developing global multi-stakeholder dialogue, and fostering more effective business models.¹⁴²⁷ In addition to this peak IP

¹⁴²⁶ In this context, it is worth considering Lawrence Lessig's argument that law is but one of four modalities of regulation in the online environment: Lessig, above n 1024. In addition to law, Lessig explains that online activity is regulated by code (or the architecture of cyberspace), the market and norms. It is not difficult to find some parallels between the Interpretive Matrix and Lessig's modalities. Communications policy in particular focusses on the conduct of rival disseminators (within the dissemination market), and the impact of their conduct on technology (communications "architecture") and the autonomy of copyright consumers (norms of copyright usage).

¹⁴²⁷ Gurry has called for the establishment of 'a seamless global digital marketplace': Francis Gurry, '2013 Address by the Director General' (at the WIPO Assemblies, Geneva, 23 October 2013) </about-wipo/en/dgo/speeches/a_51_dg_speech.html>. Elaborating on this proposal, Gurry considered the possibility of 'some legislative tweaks' but explained that it was 'mainly about better business models, which is for the private sector to do. It is about improving the culture and understanding, it is about infrastructure, and data

organisation, other global organisations may be able to contribute insights on technological innovation, competition policy and consumer interests. The United Nations Educational, Scientific and Cultural Organization (UNESCO), for example, has a broad mandate to coordinate international cooperation in education, science, culture and communication.¹⁴²⁸ Some relevant themes driven by UNESCO's activities include 'fostering creativity'¹⁴²⁹ and 'building knowledge societies',¹⁴³⁰ matters tied to copyright and technological innovation. WIPO and UNESCO are 2 of 16 specialised agencies of the United Nations that carry out various functions,¹⁴³¹ and it would be sensible if these two agencies considered how they could achieve some common objectives.

An international organisation that could supply the necessary input on competition is the Organisation for Economic Co-operation and Development (OECD). The OECD has a Competition Committee, and through its competition working parties, has published best practice roundtables on pro-competitive policy reform.¹⁴³² The OECD has previously reported on the diffusion and uptake of new technologies by business, focusing on productivity without squarely addressing communications technologies.¹⁴³³ The OECD nevertheless holds an interest in the "Internet Economy"¹⁴³⁴ — the themes in the OECD Seoul Declaration for the Future of the Internet Economy of 2008 included high-speed infrastructure, digital content and green ICTs, and consumer empowerment and protection.¹⁴³⁵ In addition, the OECD has a Committee on Consumer Policy, under the rubric of Directorate of Science, Technology and Innovation.¹⁴³⁶ The Committee's recommendations on Consumer Protection in E-commerce already include points on 'digital content products'.¹⁴³⁷ Furthermore, the OECD

standards': Catherine Saez, *WIPO Director Gurry Speaks On Naming New Cabinet, Future Of WIPO* (8 May 2014) Intellectual Property Watch <<https://www.ip-watch.org/2014/05/08/wipo-director-gurry-speaks-on-naming-new-cabinet-future-of-wipo/>>. Moreover, in his 2017 address to the WIPO Assemblies, Gurry praised the success of public-private partnerships that are bringing forth innovations in the digital sectors and creative industries: Gurry, '2017 Address of the Director General', above n 1383.

¹⁴²⁸ *Introducing UNESCO* UNESCO <<http://en.unesco.org/about-us/introducing-unesco>>.

¹⁴²⁹ *Protecting Our Heritage and Fostering Creativity* (13 May 2013) UNESCO <<http://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity>>.

¹⁴³⁰ *Building Knowledge Societies* (18 June 2013) UNESCO <<http://en.unesco.org/themes/building-knowledge-societies>>.

¹⁴³¹ *Funds, Programmes, Specialized Agencies and Others* United Nations <<http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/>>.

¹⁴³² See OECD, *Best Practice Roundtables on Competition Policy* <<http://www.oecd.org/daf/competition/roundtables.htm>>.

¹⁴³³ See OECD, *New Technology Still Underused by Businesses* (10 May 2017) <<http://www.oecd.org/innovation/new-technology-still-underused-by-businesses.htm>>.

¹⁴³⁴ See OECD, *The Internet Economy on the Rise: Progress since the Seoul Declaration* <<http://www.oecd.org/internet/internet-economy-on-the-rise.htm>>.

¹⁴³⁵ OECD, 'Seoul Declaration for the Future of the Internet Economy' <<http://www.oecd.org/sti/40839436.pdf>>.

¹⁴³⁶ *Directorate for Science, Technology and Innovation* OECD <<http://www.oecd.org/sti/>>.

¹⁴³⁷ OECD, *Consumer Protection in E-Commerce: OECD Recommendation* (OECD Publishing, 2016) <<http://dx.doi.org/10.1787/9789264255258-en>>. See also OECD, *Consumers in the Digital Economy* <<http://www.oecd.org/sti/consumer/consumersinthedigitaleconomy.htm>>.

Ministerial Meeting on the Digital Economy: Innovation, Growth and Social Prosperity held in June 2016¹⁴³⁸ considered the development of ICT related patents.¹⁴³⁹ All of these activities relate to the interests driven by a balanced communications policy under the Interpretive Matrix. To further these objectives, the OECD could extend its efforts to include technological innovation in the dissemination of copyright content, and consider the rivalries between disseminators and autonomy interests of consumers.

As a starting point, these entities could foster an open environment for negotiation amongst the relevant copyright stakeholders. In addition to facilitating negotiations, these entities could ensure accountability in the process of achieving negotiated outcomes. This may require a commitment to reporting on the changes in access to content as a result of these negotiated solutions, and the impact that these solutions have on copyright owners and consumers. Through these efforts, socially-conscious consumers would be able to see the impacts that these businesses have on broader norms of communication and consumption.¹⁴⁴⁰ In the interest of information sharing, we may also consider the role of the International Consumer Protection and Enforcement Network (ICPEN), composed of consumer protection authorities from over 60 countries, which aims to share ‘information about cross-border commercial activities that may affect consumer welfare’ (among other things).¹⁴⁴¹ The ICPEN could foster debate from a consumer perspective, and discuss the issues and concerns shared by copyright consumers around the world.

In addition, national and regional agencies or organisations may have a role in achieving these objectives. Perhaps a less ambitious geographic scale could be more conducive to negotiations; practices may be tested and eventually scaled up to various jurisdictions. Again, we may consider the various copyright- or IP-focussed entities. These include the US Copyright Office, or in the EU, the Directorate-General for Communications Networks, Content and Technology (DG Connect).¹⁴⁴² In Australia, the Department of Communication and the Arts would be the relevant government

¹⁴³⁸ 2016 Ministerial Meeting - *The Digital Economy: Innovation, Growth and Social Prosperity* (Cancún, Mexico, 21-23 June, 2016) <<http://www.oecd.org/internet/ministerial/>>.

¹⁴³⁹ See OECD, *Digital Economy Data Highlights* (2016) 7 <http://www.oecd.org/sti/ieconomy/Cancun_ChartBooklet.pdf>.

¹⁴⁴⁰ Frankel observes that consumers are empowered by social media, which increasingly allow them to express ‘views regarding copyright and who should benefit from it’: Frankel, ‘The International Copyright Problem and Durable Solutions’, above n 37, 111.

¹⁴⁴¹ In the European context, see also the European Consumer Organisation (BEUC, which stands for “Bureau Européen des Unions de Consommateurs” in French). BEUC represents 42 European consumer organisations from 31 countries, and also considers ‘Digital Rights’ to be one of their priorities: see The European Consumer Organisation (BEUC), *Digital Rights* BEUC <<http://www.beuc.eu/digital-rights>>.

¹⁴⁴² DG Connect is ‘the Commission department responsible to develop a digital single market to generate smart, sustainable and inclusive growth in Europe’: *Communications Networks, Content and Technology* (25 June 2015) European Commission <https://ec.europa.eu/info/departments/communications-networks-content-and-technology_en>.

agency.¹⁴⁴³ Once again, consumer or competition authorities could provide their expertise and support the achievement of negotiated solutions in line with the Interpretive Matrix. In Australia, the relevant agency would be the Australian Competition and Consumer Commission (ACCC), and in the US, we could look to the Federal Trade Commission (FTC)¹⁴⁴⁴ and Federal Communications Commission (FCC).¹⁴⁴⁵ In the EU, the relevant agency would be the Directorate-General for Competition of the European Commission, as advised by the Chief Competition Economist, as it is the entity responsible for competition policy initiatives in the EU.¹⁴⁴⁶ Furthermore, there are various consumer-focussed initiatives in the EU that seek to advance digital media dissemination. Broadly, the objectives of the EC Digital Single Market strategy includes ‘supporting media and digital culture’, and ‘creating a digital society’.¹⁴⁴⁷ More specifically, the Consumer Agenda released by the EC in 2012 explicitly refers to copyright and the encouragement of innovative business models.¹⁴⁴⁸ The EC’s stated consumer strategy in this space includes adapting consumer law to the digital age (objective 7) and promoting sustainable growth and supporting consumer interests in key sectors (objective 8).¹⁴⁴⁹

Copyright stakeholders

The private entities that may be brought together with the view of achieving negotiated solutions are varied. These entities could be actual or potential “rivals”, each seeking to compete more effectively and gain a stronger position in copyright dissemination markets. They could collectively initiate the “creative destruction” of dissemination markets *if* in the process of reaching a negotiated solution, these entities resolve to promote the advancement of technology. While inhibiting creative destruction may be beneficial for their private profit margins in the short run, some level of accountability in this process will ensure that such conduct is made clear to the public, bringing with it some degree of consumer scrutiny.

¹⁴⁴³ Department of Communications and the Arts, *Copyright* (3 December 2015) <<https://www.communications.gov.au/what-we-do/copyright>>.

¹⁴⁴⁴ See *Bureau of Consumer Protection* Federal Trade Commission <<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection>>; *Bureau of Competition* Federal Trade Commission <<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition>>.

¹⁴⁴⁵ The FCC is an independent federal agency overseen by Congress and responsible for communications law and regulations: *About the FCC* Federal Communications Commission <<https://www.fcc.gov/about/overview>>.

¹⁴⁴⁶ See *Directorate General for Competition* European Commission <http://ec.europa.eu/dgs/competition/index_en.htm>; *The Chief Competition Economist* European Commission <http://ec.europa.eu/dgs/competition/economist/role_en.html>.

¹⁴⁴⁷ *Digital Single Market* European Commission <<https://ec.europa.eu/digital-single-market/en>>.

¹⁴⁴⁸ European Commission, ‘A European Consumer Agenda - Boosting Confidence and Growth’ (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(2012) 225 final, 22 May 2012) <http://ec.europa.eu/consumers/archive/strategy/docs/consumer_agenda_2012_en.pdf>.

¹⁴⁴⁹ European Commission, ‘EU Consumer Policy Strategy 2007-2013’ (Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee COM(2007) 99 final, 13 March 2007) <http://ec.europa.eu/consumers/archive/overview/cons_policy/doc/EN_99.pdf>.

Key players likely to have an interest in sustainable negotiated solutions going forward include Google,¹⁴⁵⁰ Apple,¹⁴⁵¹ Amazon¹⁴⁵² and streaming platforms such as Spotify and Netflix.¹⁴⁵³ We may consider if more open negotiations with existing rightsholders or content producers such as movie studios, broadcasters, record companies and publishers can be facilitated. With the input and scrutiny of consumer organisations and competition authorities, there is a greater likelihood that the negotiated outcomes do not merely benefit these parties' profit margins but actually answer the needs of consumers.

The public accountability of negotiated outcomes amongst these private entities is important because the effects flowing from these agreements are not unlike the effects of regulation. The impact may be felt widely by members of the public. Instead of focussing their efforts on controlling specific technology or using exclusive rights over content to limit the uptake of technology, these parties should consider how dissemination can be made more efficient and lead to new exploitation opportunities. In this context, we can utilise the Interpretive Matrix and hold these parties accountable to the 4 principles. In other words, the 4 principles would operate as criteria against which negotiated outcomes will be assessed. For instance, if acting as a disseminator of copyright content, we may consider the way in which a party is carrying out this role. Are they introducing technological innovations that meet consumer demands? To the contrary, are they attempting to impede the use of technology to maintain control? Drawing from the Interpretive Matrix, these are some of the questions that may be asked in the process of seeking negotiated solutions. It is important that these stakeholders invest time and effort into seeking genuine sustainable outcomes. In adhering to the 4 principles, these entities would be encouraged to develop business practices that can evolve and continue to be relevant into the future.¹⁴⁵⁴

¹⁴⁵⁰ Google's streaming services include Google Play and YouTube Red: see *Google Play* <<https://play.google.com/store>>; *YouTube Red* YouTube <<https://www.youtube.com/red>>.

¹⁴⁵¹ See *iTunes* Apple <<http://www.apple.com/itunes/>>; *Apple Music - Membership* Apple (Australia) <<https://www.apple.com/au/apple-music/membership/>>.iTunes service

¹⁴⁵² See *Amazon Prime Video* <<https://www.primevideo.com/>>; *Amazon Prime Music* <<https://www.amazon.com/gp/dmusic/promotions/PrimeMusic>>; *Amazon Music Unlimited* <<https://www.amazon.com/gp/dmusic/promotions/AmazonMusicUnlimited>>.

¹⁴⁵³ Most of these entities may have started out as technology companies or intermediaries, supplying the underlying infrastructure or platform for the delivery of copyright content. However, that distinction is increasingly being blurred as these companies begin creating original content. See Davey Alba, *Netflix Is Killing It-Big Time-After Pouring Cash Into Original Shows* (20 January 2017) WIRED Business <<https://www.wired.com/2017/01/netflix-investing-original-shows-finally-pays-off/>>.

¹⁴⁵⁴ Peter Yu has argued that multi-stakeholder dialogues can lead to the development of 'much-needed codes of best practices, soft law recommendations or international instruments': Peter K Yu, 'A Seamless Global Digital Marketplace of Entertainment Content' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar Publishing, 2017) 265.

Section E. Chapter VII – Conclusion

A consideration of the fundamental functions of copyright, i.e. authorship and dissemination, reveals a number of interrelated policy objectives. These policies are captured in an Interpretive Matrix consisting of four interrelated principles. These principles highlight the consumer autonomy gains that flow from technological innovation, and also uncover the opportunities for abuse by disseminators if they are afforded extensive control over consumers' access to content. Technological innovation underpins these considerations, as the "creative destruction" that is initiated by technological change is integral to achieving a communications policy that enhances consumer autonomy interests and fosters efficient dissemination markets. The Interpretive Matrix also seeks to cultivate an evolving copyright ecology that promotes new exploitation opportunities and supports authorship incentives.

In seeking to use this Interpretive Matrix effectively, we need to recognise that the scope of the making available right has an impact on various policy objectives. Incentivising authorship is but one of the two fundamental functions of copyright that we should strive to nurture. Clear limits may not be apparent on face of the making available right, but this does not mean that the right lacks outer boundaries. These limits will not reveal themselves without effort; we need to actively find these limits using the 4 principles by applying them to our interpretation of the right in novel contexts. This framework allows us to understand the nuances underlying existing case law on the making available right and their role within a coherent framework. It drives courts to explicitly address these principles and craft more transparent decisions and clearer approaches going forward. The four principles may also be utilised by legislators seeking to codify a principled structure for judicial decision-making, and used as criteria in crafting sensible negotiated solutions. Furthermore, the achievement of such negotiated solutions is more likely if the process is supported by the relevant copyright, competition and consumer authorities.

The Interpretive Matrix is a roadmap towards a sensible copyright future; it requires the judiciary to take an active role, encourages legislatures to be aware of opportunities to provide guidance, and seeks to spur dialogue between various stakeholders and authorities. In sum, it takes us beyond the existing reactive approach to copyright law, and calls upon various decision-makers and copyright stakeholders to proactively drive copyright to achieve both fundamental functions within a coherent and transparent framework.

CHAPTER VIII. CONCLUSION – A NEW DIRECTION: PRINCIPLED AND TRANSPARENT DECISION-MAKING

Purpose

This chapter aims to conclude this thesis. To do so, it will:

1. Underscore the contribution of this thesis to the existing knowledge;
2. Highlight the key findings of this thesis; and
3. Emphasise the theoretical and practical legal strategies that should be put into practice to further the core functions and aims of copyright.

Headings

1. The Problem
2. The Solution

Section A. The Problem

We stand in an era of significant technological change. The limits upon our ability to communicate with each other have dissolved as technological advancements increasingly allow us to control the dissemination of content in 1s and 0s. The making available right is likely to be more important than ever in an environment where consumers seek and value on-demand access to content.

Despite the growing importance of the right, interpretations of the making available right show little clarity or consistency. Courts tend to avoid close analysis of the relevant “act”, or obscure important policy considerations using concepts such as volition. In terms of “the public”, courts have applied expansive approaches that prioritise the commercial interests of rightsholders. These rulings exhibit a lack of transparency and form the impetus for this thesis, as the decisions neither engender trust nor garner respect for the copyright system. Therefore, this thesis canvasses these varied and oftentimes conflicting decisions, and asks if clarity and transparency can be brought to the debate. This thesis highlights the expansion of copyright in this area, going through the historical roots of copyright and the subsequent development of non-copy related rights, and questions whether today’s interpretations of the making available right are consistent with copyright’s core functions and aims. It seeks to distil themes from the thicket of rulings and technical arguments.

The considerations underlying these themes may be developed further, and used to construct clear principles to guide our interpretation of the right. This thesis challenges the existing approaches to the making available right (and its national equivalents as instituted under the umbrella solution). Judicial decisions on the right tend to take a limited perspective and focus on the authorship

incentivising function of copyright. Complacency with current approaches means that we continue to take copyright's dissemination function for granted, and assume that it will be promoted in tandem with broader protections for rightsholders. Under these approaches, the role of disseminators and the power of their rivalries to promote consumer autonomy interests and technological innovation are not adequately considered.

Section B. The Solution

This thesis has revealed the perils of maintaining this trajectory. It seeks to reorient our approach to the making available right by presenting a coherent framework of interrelated principles within an Interpretive Matrix. The principles within the Interpretive Matrix function as a roadmap for judges, lawmakers and industry participants seeking to utilise the making available right to its full potential, bringing copyright in line with the capabilities afforded by the internet. They ensure that we explicitly consider important interests that have been relegated to the periphery of analysis. The Interpretive Matrix highlights the need to actively encourage the dissemination of copyright content as enabled by innovative communications technologies, and protect the autonomy interests of copyright consumers. In accordance with the Interpretive Matrix, decisions on the scope of the making available right should bring copyright closer to its objective of facilitating the dissemination of knowledge, as well as encouraging the creation of cultural works.

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