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Article

The Making Available Right and Online Communication: Doctrinal Analysis and Commercial Implications under the WIPO Copyright Treaty

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Abstract: When the distribution of creative content shifted from physical formats to decentralized digital networks, it completely upended traditional copyright frameworks, forcing international lawmakers to build new legal baselines for interactive data transmission. This paper looks closely at the "making available" right created by Article 8 of the WIPO Copyright Treaty (WCT), exploring both its underlying theoretical foundations and its everyday commercial application. The methodology relies heavily on a rigorous doctrinal analysis of the statutes themselves, paired with a comprehensive comparative look at international case law. Specifically, the analytical focus centers on the Court of Justice of the European Union (CJEU) doctrine alongside corresponding United States copyright applications. To see how these rules play out, the study tests them against modern digital realities and emerging technological paradigms. The WCT's umbrella solution initially gave member countries significant legislative flexibility. Yet, enforcing the making available right in practice leans almost entirely on how domestic courts choose to interpret evolving concepts, such as the "new public" and individually chosen temporal criteria. Ultimately, strictly enforcing this right along traditional territorial lines creates massive structural headaches for global digital platforms operating across borders. Building a sustainable digital economy means stakeholders urgently need to rethink this outdated framework. Policymakers must balance strong intellectual property enforcement with actual jurisdictional predictability, making sure that fragmented territorial licensing does not end up suffocating technological growth and cross-border cultural exchange.

Keywords: copyright law; digital economy; intellectual property; wipo treaty; jurisdiction

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1. Introduction

International copyright law was originally built for a physical world [1, 2]. For most of the twentieth century, distributing creative works meant pressing vinyl, printing books, or pushing content through linear broadcasts. Authors protected their economic interests mainly through two avenues: the reproduction right, which covered tangible copies, and the right of communication to the public, which handled radio and television broadcasts.

International copyright law, anchored largely by the Berne Convention for the Protection of Literary and Artistic Works, was originally built for a physical world. For most of the twentieth century, distributing creative works meant pressing vinyl, printing books, or pushing content through linear broadcasts. Authors protected their economic interests mainly through two avenues: the reproduction right, which covered tangible copies, and the right of communication to the public, which handled radio and television broadcasts [3].

This study tackles the persistent legal uncertainty surrounding the making available right and its application to modern digital business models. In 1996, the WIPO Copyright Treaty introduced provisions to capture interactive digital transmissions. Yet, in commercial practice, the exact boundaries of what constitutes making available remain heavily debated [4].

To address this friction, this paper pairs doctrinal legal analysis with a close examination of commercial impacts, aiming to connect abstract statutory interpretation to the realities of digital business. Chapter 2 maps the historical and normative background that made a standalone digital transmission right necessary. Chapter 3 dissects the doctrine itself, analyzing how recent courts interpret complex statutory requirements such as public and on-demand access. Chapter 4 then tests these theories against modern online scenarios, specifically hyperlinking mechanics and cloud computing [1]. Finally, Chapter 5 evaluates the commercial implications, focusing on jurisdictional challenges, the complexities of digital licensing, and the economic viability of technology enterprises.

Ultimately, this research aims to clarify the legal parameters of the making available right under the WIPO Copyright Treaty. The goal is to translate these abstract boundaries into practical compliance frameworks for internet service providers and digital content platforms. The practical value of this work is closely tied to international digital commerce. When online businesses expand across different regions, dealing with the fragmented implementation of these provisions becomes a significant operational challenge. By pinpointing where copyright doctrine intersects with digital transmission mechanics, this paper offers an analytical framework designed to assist policymakers and corporate counsel in balancing intellectual property enforcement with technological innovation [5].

2. Historical and Normative Background

2.1. Limitations of the Berne Convention in the Internet Era

Before the internet became a commercial reality, international intellectual property frameworks leaned heavily on the Berne Convention. The issue was that the Berne Convention managed the spread of protected works through strict, technology-specific silos. Article 11bis of the Berne Convention did establish a broadcasting right, but its scope was narrow: it only applied to wireless transmissions meant for simultaneous public reception. This setup assumed a traditional push model of media distribution. Broadcasters had total control over the timing and content of their signals, and audiences acted simply as passive listeners tuning in at a scheduled hour. Then digital networks arrived, bringing a completely different pull model of media consumption. Suddenly, end-users could request specific data from a host server whenever they wanted. Because these internet transmissions moved through telecommunication servers instead of radio waves, and because the user actually initiated the transmission rather than the sender broadcasting it, these actions fell right through the cracks of the Berne framework's definition of broadcasting. Early efforts to regulate internet transmissions by aggressively interpreting the reproduction right quickly hit a wall. Digital transmissions naturally create temporary copies in a computer's Random Access Memory (RAM) or cache [6].

Trying to regulate these micro-reproductions essentially outlawed the ordinary technical functioning of the internet. Legal scholars generally agreed that leaning on RAM copies to enforce intellectual property protections was an artificial stretch—one that completely missed the actual economic value of digital transmission.

2.2. The Rise of P2P Networks and Legal Disruption

Decentralized peer-to-peer (P2P) file-sharing networks, such as Napster, Kazaa, and Grokster, significantly transformed the traditional media landscape by enabling ordinary internet users to act as global distributors. Unlike older server-client models, where a single entity hosted the files, P2P architectures allowed users to designate specific folders on their personal hard drives as shared. This made the files within those folders instantly accessible to millions of other users on the network [5].

Tracking and prosecuting millions of individuals for downloading files, which technically constituted direct reproduction infringement, posed an overwhelming administrative and financial challenge for rights holders. The legal ambiguity was evident. Simply leaving a copyrighted MP3 in a shared folder, without actively transmitting it, did not clearly meet the definition of reproduction by the uploader [7]. Nor did it involve the physical distribution of tangible goods. Rights holders recognized the need for a distinct legal framework—one that would impose liability for the preliminary act of making a work available to the digital public. This liability would apply as soon as a file was exposed to the network, regardless of whether it was actually downloaded.

2.3. The WCT and the Umbrella Solution

To address this significant gap and maintain the relevance of international intellectual property frameworks, the World Intellectual Property Organization (WIPO) organized the 1996 Diplomatic Conference. The negotiations revealed fundamental differences between legal systems regarding the classification of internet transmissions. Delegates from the United States, adhering to their existing statutes, strongly advocated for extending the traditional distribution right to encompass digital transmissions. European delegates, grounded in the *droit auteur* tradition, proposed expanding the right of communication to the public, emphasizing that digital transmissions should be considered services rather than goods [3].

The legislative compromise that ultimately resolved the impasse was conceptualized by a Hungarian legal scholar and became known as the Umbrella Solution. Incorporated into Article 8 of the newly drafted WCT, this approach required all contracting parties to grant rights holders the exclusive authority to permit the interactive availability of their works [8]. The innovative aspect of the treaty language lay in its deliberate ambiguity regarding how domestic legislatures categorized this right within their legal frameworks. Member states retained the sovereign discretion to implement it in various ways. For instance, it could be treated as a specialized component of the communication right (as the European Union did with Article 3 of the InfoSoc Directive), as an extension of the distribution right (as seen in early U.S. interpretations under the Digital Millennium Copyright Act), or as an entirely new digital transmission right. The primary requirement was ensuring robust economic protection against unauthorized digital sharing.

3. Doctrinal Scope of the Making Available Right

3.1. Textual Interpretation: Communication and Distribution

Article 8 of the WCT explicitly grants authors 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. Structurally, this provision forces a hard legal line between intangible communication and tangible distribution.

Under the WCT framework, distribution strictly means circulating physical, fixed copies—think printed books, DVDs, or vinyl records. These tangible items fall under the doctrine of exhaustion (known in US law as the first sale doctrine). Once a physical copy is legally sold, the copyright owner simply loses the right to control the resale of that specific object [7]. The making available right, on the other hand, deals exclusively with intangible digital services. Because of this fundamental difference, digitally transmitting a work does not trigger exhaustion. The Court of Justice of the European Union (CJEU) cemented this boundary in the landmark *Tom Kabinet* ruling, deciding that supplying e-books via download is a communication to the public, not a distribution. Copyright owners effectively retain continuous legal control over any later digital transfers or subsequent uses of the file.

3.2. Defining the Audience: The New Public Criterion

Applying Article 8 raises an important question: how can the public be legally defined within a global digital network? For the right to apply, a transmission must target an indeterminate number of individuals beyond a user's immediate private or family circle.

The CJEU addressed this issue through its influential New Public doctrine. Prominently outlined in a landmark case, this judicial test requires that any subsequent digital communication reach an audience the copyright owner had not originally considered when granting the initial authorization. The legal framework operates as follows: if a rights holder permits a film to be openly streamed on a public site without access restrictions, all internet users constitute the initial audience. Posting a basic hyperlink to such openly available content does not reach a new audience. However, if a third party intercepts a proprietary stream intended exclusively for paying subscribers and redirects it to an open server for unauthorized viewers, this action clearly targets a new audience. Such secondary transmissions disrupt the original chain of authorization, resulting in a distinct violation of the making available right.

3.3. On Demand Criterion Individually Chosen Time and Place

What distinguishes the making available right from broader communication rights is interactivity [9]. The statute defines this with precise language: access from a place and at a time individually selected by the user. This specific phrasing confines the right exclusively to non-linear, interactive digital services. A traditional live stream—such as a web broadcast of a sports event or a continuous internet radio feed—falls entirely outside this subset. Live streaming does not allow users to choose the broadcast time; instead, they must tune in linearly alongside others. Video-on-Demand (VOD) services like Netflix, audio platforms like Spotify, or online academic databases exemplify this on-demand requirement. The *actus reus* (guilty act) is completed the moment a copyrighted work is uploaded to an open server and made technically accessible. Simply providing that interactive access point constitutes making available, even if no consumer ever clicks the link.

4. Practical Application in Contemporary Digital Scenarios

4.1. Hyperlinking and Framing Technologies

Assessing hyperlinking under the making available right remains a complex doctrinal issue in modern legal frameworks. From a technical perspective, a hyperlink does not reproduce a work but functions as a set of digital directions guiding a browser to locate a file on a separate server. However, judicial interpretations often extend beyond this technical reality to safeguard economic rights, distinguishing between various types of links based on their context and intent. For instance, providing a standard clickable link to a work already accessible on the open web with the rights holder's explicit consent does not constitute a new act of making available, as it fails the "new public" test [10, 11]. Conversely, linking to bypass paywalls, circumvent technical protection measures, or evade geographic restrictions constitutes clear infringement. Judicial decisions, such as those in the *GS Media* case, have further complicated this area by introducing a presumption based on profit motives.

The Court determined that if a commercial entity provides deep links to unauthorized content for financial gain, it is presumed to be aware of the illicit nature of the content. Unless this presumption is successfully rebutted, the entity may be held directly liable for making the work available. Similarly, framing or inline linking—where media remains hosted on the original server but is seamlessly integrated into another website's interface—can also result in direct liability if used to bypass access controls or distribute the work to unauthorized audiences.

4.2. Streaming Platforms and Cloud Storage Architecture

User-Generated Content (UGC) platforms occupy a complex intersection of primary copyright liability and intermediary safe harbors. Initially, if a user uploaded a

copyrighted video to a public UGC site, the user bore responsibility for violating the making available right, while the platform claimed immunity as a passive host. This legal framework has evolved significantly. When a platform actively engages in actions such as automatically indexing files, adjusting video quality, running targeted advertisements, and algorithmically promoting infringing content to specific users, it forfeits its status as a passive technical intermediary. Legislative changes, such as those introduced by Article 17 of the EU Copyright in the Digital Single Market Directive, now classify these active UGC platforms as directly engaging in acts of communication to the public. Consequently, they are required to secure proactive licenses or demonstrate that they have made their best efforts to block specific unauthorized works.

Cloud storage services present a distinct challenge by straddling the boundary between private and public digital spaces [12, 13]. Storing a legally acquired audio file in a private, encrypted cloud locker, such as a personal Dropbox or Microsoft OneDrive, solely for backup or device synchronization, lacks the public element necessary for copyright infringement. Such activities generally fall within the scope of private copying exceptions. However, if the same user utilizes the cloud provider's software to generate a public URL for the file and shares that link on an open internet forum, the situation changes dramatically. The previously private file becomes accessible to an indeterminate audience at a time and place of their choosing, thereby crossing the doctrinal threshold into unauthorized making available.

4.3. Social Media and Embedded Content

Modern social media thrives entirely on frictionless sharing and seamlessly embedding visual content. When individuals embed a copyrighted photo or video clip into their personal feed, they are technically accessing the Application Programming Interface (API) of the host server rather than copying the file to their local device. Current legal consensus suggests that if the copyright owner voluntarily uploads the image to a public platform without imposing access restrictions, sharing it within the same platform's closed ecosystem—using native retweet or share functions—is legally permissible. This protection stems from the platform's Terms of Service (ToS) agreed upon during registration, which typically grants the platform a broad, sub-licensable implied license to enable internal network sharing.

Extracting the underlying media file, copying the raw image URL, and re-uploading or embedding it on a separate, competing digital platform nullifies that contractual implied license. Such external extraction constitutes an unauthorized violation of the making available right, potentially exposing both the user and the receiving platform to liability.

5. Cross-Border Commercial Implications and Jurisdictional Challenges

5.1. Resolving Jurisdictional Conflicts

Under the traditional doctrine of *lex loci protectionis* (the law of the country where protection is claimed), rights are granted and enforced on a nation-by-nation basis. This can be likened to attempting to impose boundaries on a medium inherently designed to transcend them. When a digital file is made available, determining the precise location of the infringement becomes crucial for identifying the appropriate legal authority. For instance, a server hosting unauthorized material may be located in a region with limited copyright enforcement, while the content is accessed by consumers in a highly regulated and economically significant market. Identifying the legal origin of such transmissions presents significant challenges for legal authorities.

To address these complexities, courts in Europe and the United States have moved beyond the outdated Server Test, which focused solely on the physical location of the hardware. Instead, they now adopt the Targeting Approach [14]. Jurisdiction is no longer limited to the origin of the data but considers objective commercial indicators to determine the intended audience of a foreign website. Factors such as the primary language of the interface, accepted currencies for transactions, localized advertisements, and the

geographic distribution of internet traffic are analyzed. If a foreign website is demonstrably targeting consumers in a specific domestic market, the legal framework of that market is applied. This enables rights holders to pursue legal remedies locally and obtain injunctions against operators based abroad.

5.2. Digital Licensing Models and Territorial Compliance

The strict territorial limits of the making available right significantly influence the structure of modern digital business models, particularly in relation to global content licensing. Since each nation enforces the Article 8 right within its own defined area, a multinational streaming platform cannot simply offer a unified global catalog. Instead, they must independently secure making available licenses for every specific region they operate in.

This legal fragmentation is a primary factor behind the widespread use of geo-blocking technologies. E-commerce platforms, digital broadcasters, and VOD services employ IP address tracking, VPN detection algorithms, and digital filters to restrict access based on users' physical locations. These measures act as virtual checkpoints, ensuring that users only access content licensed for their specific area. While stringent geo-blocking ensures legal compliance, it imposes substantial administrative and technological costs. The economic value of the making available right is divided into separate regional markets, requiring technology platforms to engage in redundant, localized negotiations with numerous national management entities and distributors.

5.3. Balancing Copyright Enforcement with Business Innovation

For companies operating internationally—especially tech startups without substantial legal budgets—interpreting the making available right too strictly creates significant operational challenges. When regulatory frameworks impose overly broad interpretations of intermediary liability, they risk hindering technological innovation at its inception [15]. If foundational internet entities, such as cloud computing infrastructure providers, broadband ISPs, or algorithmic search engines, are held strictly liable for every byte of infringing data passing through their systems, the fundamental economics of maintaining internet operations could become unsustainable.

Addressing this issue requires a balanced approach. Technology platforms must implement robust, legally compliant notice-and-takedown protocols while deploying advanced automated content recognition (ACR) tools, such as digital fingerprinting [2]. These measures demonstrate proactive compliance and help maintain statutory safe harbor protections. Simultaneously, international copyright legislation should avoid imposing general, blanket monitoring obligations on ISPs. Ultimately, ensuring that the enforcement of the making available right does not compromise the openness and efficiency of global digital trade remains one of the most complex policy challenges in the current internet era.

6. Conclusion

The incorporation of the making available right into international copyright law through Article 8 of the WCT modernized a doctrine that had struggled to keep pace with digital uses, addressing a gap left by the primarily analog orientation of the Berne Convention. In practice, however, the operation of this right depends substantially on judicial interpretation. Courts have consistently emphasized whether unauthorized, on-demand access was provided to a new public. They have also made clear that the technical act of offering a work, even where no user ultimately downloads or transfers the data, may be sufficient to constitute actionable infringement. In addition, the continued distinction between intangible communication and physical distribution has generally prevented digital transmissions from falling within the doctrine of exhaustion.

From a commercial perspective, this legal framework shapes the architecture of the contemporary internet economy. Because the making available right remains territorial, multinational platforms are subject to a complex network of geographically fragmented licenses. To reduce infringement exposure across multiple jurisdictions, digital companies

routinely employ costly geo-blocking measures and sophisticated algorithmic filtering systems. Although these mechanisms support legal compliance, they also create substantial barriers to entry for smaller technology firms, thereby favoring established corporations with the resources to absorb high compliance costs. Accordingly, the right functions as an important safeguard for creators while also generating significant structural difficulties for digital trade across jurisdictions.

Looking ahead, the established judicial logic surrounding the making available right is likely to face significant pressure. Emerging decentralized architectures, including Web3 protocols and distributed ledger networks, together with the large-scale ingestion of copyrighted material for the training of generative AI systems, are already blurring the boundaries of what constitutes the public and who should legally be regarded as the communicator. Future harmonization efforts should therefore prioritize the development of modern licensing mechanisms capable of operating effectively across multiple jurisdictions. Legislators face an urgent task: adapting the current framework so that strong intellectual property protection can coexist with next-generation internet infrastructure. Such reform should avoid unnecessary fragmentation of the global digital market while continuing to ensure fair remuneration for authors in an increasingly automated environment.

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