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# The (New?) Right of Making Available to the Public

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## The (New?) Right of Making Available to the Public

--Jane C. Ginsburg\*

Abstract

### *Introduction*

The Berne Convention 1971 Paris Act covered the right of communication to the public incompletely and imperfectly through a tangle of occasionally redundant or self-contradictory provisions on “public performance,” “communication to the public,” “public communication,” “broadcasting,” and other forms of transmission. Worse, the scope of rights depended on the nature of the work, with musical and dramatic works receiving the broadest protection, and images the least; literary works, especially those adapted into cinematographic works, lying somewhere in between. The 1996 WIPO Copyright Treaty rationalized and synthesized protection by establishing full coverage of the communication right for all protected works of authorship. The WCT also introduced a new designation, the “right of making available to the public.” This right corresponds to much communication of works over the Internet, whose users “access these works from a place and at a time individually chosen by them” (WCT art. 8).

As the drafters of the WCT (and its companion “Internet treaty” the WIPO Performers’ and Phonograms Treaty, arts. 10 and 14) sought to modernize the Berne Convention to address new exploitations by means of new technologies,<sup>1</sup> one might infer that the “right of making available” is something new and different, not previously within the Berne Convention minimum rights protected. If so, then Berne Convention members who have not yet ratified the WCT are not obliged to enforce foreign Berne Union authors’ rights of making available (unless that country’s own authors enjoy such a right, in which case the principle of national treatment would require extending the same protection to Unionist authors).<sup>2</sup> The WCT has entered into force,<sup>3</sup> but many Berne Member States have yet to ratify the treaty.<sup>4</sup> As a result, the determination whether the “right of making available” is a

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<sup>1</sup> See, e.g., WCT Preamble, Recital 3 ; Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, 675-77 (WIPO 1996); Jorg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996*, 24 (2002) [hereafter Reinbothe & von Lewinski] ; Mihaly Ficsor, *The Law of Copyright and the Internet*, para. 1.45-47] (2002) [hereafter Ficsor].

<sup>2</sup> Berne Conv., art 5(1).

<sup>3</sup> The WCT entered into force effective March 6, 2002, see <http://www.wipo.int/treaties/notifications/wct/0032.html> ; the WPPT entered into force effective May 20, 2002 , see, <http://www.wipo.int/treaties/notifications/wppt/0032.html> .

<sup>4</sup> Currently (as of 6 May 2004), the Berne convention has 155 member states, see <http://www.wipo.int/treaties/en/documents/word/e-berne.doc>, while, as of 24 March 2004, the WCT had 42, see <http://www.wipo.int/treaties/en/documents/word/s-wct.doc>; and, as of 24 February 2004, the WPPT had 43, see <http://www.wipo.int/treaties/en/documents/word/s-wppt.doc>.

substantive enlargement of Berne Convention rights, rather than a reaffirmation of the scope of the rights already mandated by Berne, carries practical consequences. Another practical consequence of the characterization of the “making available” right concerns its amenability to compulsory licensing. To the extent the right was comprehended within the Berne Convention art. 11bis broadcasting and retransmissions rights, Member States may subject it to compulsory licensing. Were the right either outside the Berne Convention altogether, or included only within the “communication to the public” rights set out in other articles of the Berne Convention, then Member States must treat the making available right as an exclusive right.

Whether the “right of making available” is a reaffirmation or an enlargement, its actual scope remains to be ascertained. This Essay will explore the meaning of “making available” in the WCT and “communication to the public” in the Berne Convention by applying these concepts to several of the principal forms of communication over the Internet. How, for example, should one analyze communications to and from websites, or peer-to-peer exchanges, or email, under the Berne Convention? What, if anything, do the WIPO Treaties add to the analysis?

*Predicate Question of Private International Law: Who is “the public” to which works are communicated or made available?*

In considering the scope of the communication and making available rights under the Berne Convention and WIPO Treaties, it is necessary to recognize that neither the Berne Convention nor the WIPO Treaties define the “public” in “communication to the public” or in “making available to the public,” though it may be implicit that any group comprising the “non public” (for example, the traditional “family circle”) should be economically insignificant.<sup>5</sup>

In the absence of a treaty definition of “the public,” Member State legislation or caselaw must fill the gap. But neither the Berne Convention nor the WIPO Treaties clearly designate which national law supplies the definition. One might assume that the relevant “public” is the public in the country to which the work is being communicated or made available. But this may place simultaneously into play a great number of countries’ laws. In the analogous situation of satellite communications, many commentators advocated, and the European Union adopted, a different characterization, localizing the act of communication to the public of satellite signals at the point of emission, rather than at the multiple points of receipt.<sup>6</sup> Unless one takes the position that the EU has acted inconsistently with an implicit Berne Convention designation of the applicable national law -- that of the

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<sup>5</sup> Sam Ricketson, *The Berne Convention: 1996-1986* (1987) para. 8.71 [hereafter Ricketson], Reinbothe & von Lewinski pp. 107, 111.

<sup>6</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, art. 1(2)(b), Official Journal L 248, 06/10/1993 P. 0015 – 0021.

country(ies) of receipt of the communication,<sup>7</sup> it would follow that the Berne Convention leaves open to a variety of national private international law solutions the question of which country's law defines the "public" to which the works are being made available, as well as any scope in excess of the conventional minima for the right of communication to the public.

As for the WCT, the argument favoring localization in the country(ies) of receipt may be stronger, as the text of art. 8 (and of WPPT arts. 10 and 14) ties the act of making available to the place and time chosen by the end-user. It might follow that the "public" is located wherever the end user accesses the work. On the other hand, facilitating the implementation of authors,' performers' and record producers' rights in networked commerce furnished much of the impetus for the WIPO Treaties, yet separate application of the laws of all the countries of receipt would seem to encumber exploitations over the Internet. As a result, one might contend that interpreting the WIPO Treaties to require applying so many different laws would be inconsistent with that underlying goal.

But if neither the Berne Convention nor the WIPO Treaties mandate application of the laws of each country of receipt, neither do they oblige Member States to apply the law of the country of emission. (Moreover, in the context of Internet communications, it is not always clear which *is* the country of emission.) It would therefore appear that if the WIPO Treaties do not themselves designate which national law will supply the definition of "public," then 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.

*Testing the scope of the rights of communication to the public and "making available"*

Consider the following scenarios:

1. Roger Jolly runs a website, Pirates-R-Us.com, from which he offers a variety of digital-format copyrighted works, including photographs, musical recordings, videogames, and text. Users accessing the site may download the desired files directly from the Pirates-R-Us.com site.
2. Jean Lafitte operates a website, music4free.com, that aggregates links to other websites from which users can download unauthorized copies of recorded music. Some links are identified by the name of the music file; clicking on these links takes the user directly to another website and automatically downloads the named file from that website to the user's hard drive. Other links are identified by the names of the other websites; clicking on these sends the user to the website, from which she may elect to download a variety of files.

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<sup>7</sup> Dr. Arpad Bogsch, the former Director General of WIPO, had contended that art. 11bis required application of the laws of all the countries within the receiving "footprint" of direct broadcast satellites, but this view has not been generally accepted, see Ricketson para. 8.81-83 ; Ficsor at 4.42-4.48.

3. Secret-sharer.com distributes a software program, TotalShare, enabling end users to designate digital files of all kinds (text, image, sound, audiovisual) on their hard drives for other users of TotalShare to copy into their hard drives. Tracy Trader has accordingly designated files corresponding to the text and recorded reading of the 19<sup>th</sup> Harry Potter book, *Harry Potter and the Never-Ending Royalty Statement*, and a collection of great outtakes from all 14 Harry Potter films to date, as well as a poster depicting in the part of Dumbledore, Russell Crowe -- the fourth actor in a role that has definitively capped the cinematographic careers of more elderly predecessors.<sup>8</sup>

4. Sir Joseph Porter KCB, having acquired the various Harry Potter-related files from Tracy's hard drive, forwards them to a listserv consisting of his sisters and his cousins (whom he numbers by the dozens) and his aunts, as well as all practitioners of Admiralty law, and the occasional Tar.

5. Oscar, an admiralty lawyer on Sir Joseph's listserv, emails Lucinda the files he received from Sir Joseph. Lucinda keeps her digital copies, but also sends the files on to Sybilla, who in turn sends them to Clancy, and so on.

This Essay addresses the extent to which the Internet-inspired WIPO Treaties' "making available" right in fact reaches the conduct at issue in each of these scenarios. It will also consider how the same conduct would have fared under the communication to the public rights in the Berne Convention, in order to discern what the WIPO Treaties add to the prior scope of protection.

1. *The Pirates-R-Us website*

a. *"making available" under the WIPO Treaties*

The facts of this hypothetical fit squarely within the "making available" right, which, indeed, appears to have been conceived to cover exactly this kind of communication.<sup>9</sup> The right applies equally to all kinds of Berne Convention-protected works, as well as to sound recordings, through the WPPT. Roger has posted all of these kinds of works on his unrestricted website so that any member of the public can access, download to a temporary or permanent storage medium, view or listen to the contents from

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<sup>8</sup> This scenario reflects the facts of several recent litigations in a variety of countries ; see e.g., *In re Aimster Copyright Litigation*, 334 F.3d 643 (7<sup>th</sup> Cir. 2003)(preliminary injunction awarded against operator of file sharing network) ; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029 (C.D. Cal. 2003), *appeal pending* (maintenance of file sharing network held not to give rise to contributory or vicarious liability); *Buma-Stemra v. Kazaa*, (Court of Appeal Amsterdam, 28 March 2002), [2002] AMI 134 (declining to award preliminary injunction against distribution of file sharing software); *Jasrac v. MMO Japan* (Tokyo District Court, Jan. 29, 2003), <http://www.jasrac.or.jp/ejhp/release/2003/0129.html> (English-language summary) (awarding preliminary injunction against distribution of FileRogue file-sharing program).

<sup>9</sup> Reinbothe & von Lewinski p. 108; Ficsor, para. 4.112-4.1115; 4.129-4.140.

any place (with Internet access) and at any time “individually chosen by them.” Assuming the countries of emission and/or receipt have ratified the WIPO Treaties, Roger would therefore require the authorization of the copyright owners of the works his site makes available.

*b. “Communication to the public” under the Berne Convention*

By contrast, the analysis of Roger’s potential violation of Berne Convention norms is considerably more complex. Because the Berne Convention does not confer a uniform communication right across all protected subject matter, and does not cover sound recordings at all, it is necessary to divide the analysis by type of communication, and by type of work. The broadest right, with respect to subject matter, does not cover all kinds of Internet-relevant communications; the broadest right, with respect to covered communications, does not extend to all types of works.

As Roger is offering the gamut of copyrighted works, we will start with the right most inclusive of subject matter, 11bis, which covers all “literary and artistic works” (but not sound recordings), and concerns broadcasting and “any other means of wireless diffusion of signs, sounds, or images.” 11bis also reaches retransmissions, including by wire, effected by someone other than the original broadcaster. It does not extend to communications that originate by wire. Although wireless access to the Internet is already available, and may become increasingly widespread, most users access Roger’s site by wire. The rightholders might contend that when members of the public access Roger’s site, a “retransmission” will have occurred, because the placement of the works on Roger’s site required an initial transmission. Even assuming, however, that posting the works to the website constitutes a transmission (a term the Berne Convention does not define), the posting will not have been a “broadcast” of the works, as required by art. 11bis(1)(ii). As a result, much of Roger’s current activity will not come within the scope of art. 11bis.

Other provisions of the Berne Convention do apply to transmissions originated by wire, but they address specific types of works: literary works adapted into cinematographic works (art. 14(1)(ii)), and cinematographic works (art. 14bis(1)). If the videogames are considered “cinematographic works” (a matter for determination by national law), then Roger’s site may violate the rights of the videogame producers, as well as of the authors of any underlying literary works from which the games were adapted.

Authors of dramatic, dramatico-musical or musical works, and of literary works enjoy the exclusive right of authorising the “public performance [or recitation] by any means or process” and “any communication to the public” of a performance or recitation of those works (arts. 11, 11ter). A public performance or recitation by any means or process presumably means something different from any communication of the performance or recitation to the public, or it would not have been necessary to articulate these rights separately. If “public performance” or “recitation”

imply a live performance or recitation before the public, then Roger's website does not implicate those rights. By contrast, if "any communication to the public of a performance [or recitation]" includes performances and recitations that are not rendered live before a public, then the communication to the public of a sound recording of a performance of a musical composition or of a reading of a literary work (whether the recording is made live or in a studio) would invade the composer's or author's right.

But is Roger's website communicating recorded performances of musical compositions to the public? As with the "making available" right, the "public" in "communication to the public" is implicated, because anyone with Internet service can access the website. Whether there is a "communication," however, may be less clear. The French text of art. 11 provides for "public *transmission* by all means" (not "any communication"); this may in fact be limited to wired transmissions, as art. 11bis concerns wireless broadcasting, and has the effect of excluding broadcasting from the scope of art. 11.<sup>10</sup> To the extent that Roger's site is accessed by wire, the art. 11 right may apply.

To the extent that any of the communication rights may apply, there remains the question whether the "public" to which the work is communicated must receive the work at the same time. While it is implicit in the broadcasting and retransmissions rights that the members of the receiving public may be separated in space, the Berne Convention does not specify whether they may also be separated in time. Put another way, the question is: At whose impetus, the sender's or the recipient's, must the transmission occur? Both articles 11 and 11bis address traditional "push" technologies: broadcast or wired transmissions from an originating (or retransmitting) entity to a passively receiving public. The transmitting entity selected the content and the timing of the communication; the public's choice was limited to selecting among pre-programmed communications, it did not extend to making up the programming to be received. While "*broadcasting*" may imply widely sending a communication simultaneously to many potential recipients, the more open-ended language in art. 11bis covering "any other means of wireless diffusion of signs, sounds or images," as well as the broader concept of "communication to the public" in article 11, need not exclude "pull technologies" like Roger's website. Although those technologies may not have been contemplated in 1948, when the "any communication to the public right" was first introduced into article 11,<sup>11</sup> and the "any other means" language first appeared in article 11bis,<sup>12</sup> nothing in the text of these articles prohibits their application to on-demand transmissions.<sup>13</sup> On the other hand, given the historical context, it may be

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<sup>10</sup> See WIPO Guide, para 11.5; Ricketson para. 8.70.

<sup>11</sup> See Ricketson para. 8.70.

<sup>12</sup> See Ricketson, para. 8.77.

<sup>13</sup> The Records of the 1948 Brussels revision reveal a particular preoccupation with the "théatrophone," a dial-up service that allowed subscribers to hear transmissions of performances over a telephone line. The Report acknowledged that the number of listeners at any given time was likely to be small, and offered this as one reason for the technology's non coverage by the article 11bis(1)(ii) broadcasting right. The Report also urged that rights over this technology not be subject to the art. 11bis(2) authorization to Member States to

bold to assert that these articles *oblige* Member States to classify on-demand transmissions as communications to the public.

Finally, even assuming article 11 and 11bis apply to “pull” technologies, neither reaches the wired communication (other than via third party retransmission) of the text of the literary works, and of the photographic images that Roger offers from his site. As to these works, as well as with respect to sound recordings, the Berne communication rights present significant gaps that the WIPO Treaties appear successfully to fill, at least in the archetypal case represented by the Pirates-R-Us.com website.

## 2. *Music4free.com*

### a. “making available” under the WIPO Treaties

Jean Lafitte’s site does not directly send digital files of the recorded music to users who access the music4free.com site. Rather, Jean Lafitte aggregates links to other sites. In some cases, if a user clicks on a link, she will be sent to another site, and a process of automatic downloading from that site will commence. In other instances, she will be sent to another site, and will be able to browse that site, with the possibility of ultimately selecting a file to download. From the user’s point of view, the experience of clicking on the first kind of link to acquire the file is the same, whether or not she knows that the file is coming from Jean Lafitte’s site or from some other site; either way, she contacts the music4free.com site and receives the file without the apparent further intervention of another website operator. In the second case, the user knows she is being taken to another site, from which she may download files of recorded music. In either case, the linked-to websites are making works available to the public in the same way that Roger Jolly’s site does. But, in either case, is Jean Lafitte’s site, by rerouting to the other sites, also “making [the files] available” to the members of the public who contact his site?

Art. 8 WCT (and 10 and 14 WPPT) gives authors the exclusive right of “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.” The “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,” e.g., website, that the user contacts in order to gain access to the work.<sup>14</sup> Applying that interpretation, in the second case, the connection between accessing Jean Lafitte’s site and the communication of the work may be too attenuated, because the user knows that the site from which she is receiving the work is no longer music4free.com. The other site becomes the

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impose compulsory licenses. *Documents de la conférence réunie à Bruxelles*, p. 256 (Bureau internationale pour la protection des oeuvres littéraires et artistiques 1951).

<sup>14</sup> Nothing in the Records of the Diplomatic Conference, *supra* note 1, indicates that the language “from a place and at a time individually chosen by them” received special attention, apart from general endorsement of its adaptability to digital communications.

place from which the user chooses to access the work. In the first case, by contrast, the place from which the user appears to be accessing the music is the music4free.com site, which is the only site she chose. Accordingly, though the source of the communication is ultimately another site, the user's selection should control.

Jean Lafitte might point to the Agreed Statement to WCT art. 8 (and to WPPT arts. 10 and 14): "It is understood that the mere provision of physical facilities for enabling or making a communication does not itself amount to communication within the meaning of this treaty . . ." He would contend that supplying links to other sites merely provides the means for others to make available, and does not constitute making available in its own right. But the Agreed Statement does not exempt all enabling; instead it excludes only enabling achieved solely through the provision of "physical facilities." "Physical facilities" most likely refers to the hardware infrastructure supplied by the telecommunications companies and Internet service providers who lobbied for the Agreed Statement,<sup>15</sup> rather than to the digital rerouting code contained in Lafitte's website.

Indeed, the Agreed Statement may prompt a negative inference favorable to the composers, performers and producers. If merely providing "physical facilities for *enabling* or making a communication" (emphasis supplied) does not itself constitute a communication, then other forms of enabling communications might be deemed communications in their own right.

*b. "Communication to the public" under the Berne Convention*

Because the only works at issue are recorded musical compositions (sound recordings being excluded), art. 11bis would cover wireless communications, and art. 11(1)(ii) would cover the wired communications, at least if one interprets the Berne Convention to cover "pull technologies." In this case, the WIPO treaties expand coverage by including sound recordings. Do the WIPO treaties also enlarge rights vis à vis the Berne Convention, other than expressly covering transmissions initiated by recipients? There will be a further difference in coverage between the Berne Convention and the WIPO Treaties to the extent that enabling a third party to communicate a work is itself a communication of that work to the public within the meaning of the WIPO Treaties, but not of the Berne Convention. The Berne Convention lacks the textual support the WIPO Treaties lend to the argument for inclusion of at least some facilitators. As a result, the characterization of facilitators as "communicators" will be a matter of national law application of Berne Convention norms.

3. *Tracy Trader/Secret-Sharer.com*

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<sup>15</sup> See Ficsor at para. C8.24 (on lobbying); Reinbothe & von Lewinski p. 112 (on infrastructure).

a. *“making available” under the WIPO Treaties*

By opening her hard drive to all TotalShare-equipped users who seek to acquire the music and other files that Tracy “shares,” Tracy is making these files available to the public, within the meaning of the WIPO Treaties. The WIPO Treaties make clear that an act of communication to the public through “making available” occurs when the work is “accessed” by members of the public. Accordingly, it should not matter whether the access occurs from websites or hard drives; whether the files reside on a website or on an open hard drive, they are equally available for accessing. TotalShare users would be considered “the public” because any member of the public may acquire and use the file-sharing software; its dissemination is neither limited nor private. This leaves open the question whether users of a file-sharing program whose circulation was restricted to family members or friends would also be considered “the public.”

A distinct, and difficult, question concerns Secret-Sharer.com. This company makes its own software available to the public, but by doing so, does it also make the files on Tracy’s (and other users’) computer available to the public? Secret-Sharer.com makes it possible for Tracy and others to engage in the act of making available, but its facilitation is far more indirect than Jean Lafitte’s. Where, at least with respect to the automatically downloaded files, Jean Lafitte’s site identified *specific* works to be made available, the TotalShare program allows end users to acquire *any and all* files that participants designate as available for file-sharing. Copyright and neighboring rights owners might urge the negative inference from the Agreed Statement, as Secret-sharer.com is providing digital, not physical, facilities for enabling communications to the public. But here the argument may prove too much, particularly as it is uncoupled from the contention made with respect to music4free.com, that the user had chosen that website as the source for the particular works made available. In Secret-sharer.com’s case, the user chooses the site to acquire the *means* to access works, but not to acquire the *works* themselves. For that, the user turns to other users’ hard drives. It would therefore appear that it is up to Member States to determine the circumstances under which those who supply the means of making available are also deemed participants in those acts.

b. *“Communication to the public” under the Berne Convention*

Even assuming the Berne Convention applies to “pull technologies,” the subject matter limitations of the disparate Berne communication rights result in much more spotty coverage than the WIPO Treaties afford. While the wired communication of *Harry Potter and the Never-Ending Royalty Statement* in digital book form would not be covered, Berne Convention articles 11ter(1)(ii) and 14(1)(ii) would protect the literary work to the extent of its incorporation in the recorded readings and of its adaptation into the film clips that Tracy also “trades.” The poster would be covered only with respect to those users who access Tracy’s hard drive through a wireless Internet connection (art. 11bis(1)(i), applicable to all the works that Tracy trades), but

the film clips would be protected against both wireless and wired access (art. 14bis(1)).

#### 4. *Sir Joseph Porter KCB*

Because Sir Joseph Porter has sent the Harry Potter files to a list serve, the communication may be of the traditional “push” variety, covered by the general communication to the public right, rather than by the specific making available right. The “making available” right might imply that members of the public have selected the works they “pull” from the person or entity who makes them available.<sup>16</sup> On the other hand, Sir Joseph’s correspondents decide whether or not to open the files that Sir Joseph unilaterally sent them, so that the ultimate act of “access” is at a time and from a place (understood as meaning the user’s location, rather than the original location of the file) chosen by the user.<sup>17</sup>

Even if the sending to the list serve were not deemed a “making available,” it would be a “communication” (whether the communication is “to the public” remains to be determined) within the scope of the WIPO Treaties, because, unlike the Berne Convention, the WIPO Treaties extend the general communication to the public right to all categories of protected works. (The analysis of Berne Convention coverage of the works Sir Joseph sends to the listserv would be the same as that regarding Tracy Trader’s file sharing.)

As for whether Sir Joseph’s communication or making available is “to the public” under either the WIPO Treaties or the Berne Convention, it is possible that the treaties assume a traditional “family circle” limitation on the concept of “the public,” even though they do not define the latter term. An aggressively generous interpretation of “family circle” might include the sisters and the cousins whom Sir Joseph numbers by the dozens, not to mention the aunts. But, even in the absence of a treaty definition of “public,” Sir Joseph has probably gone too far, for he has included the entire Admiralty bar, as well as the occasional Tar. At this point, he has exceeded even an enlarged family circle (fraternal feelings among admiralty lawyers notwithstanding), and has encompassed a substantial number of unrelated persons. The larger the group of selected recipients, the more likely the communication is to diminish the effectiveness of the author’s protection called for by the Preamble of the WCT,<sup>18</sup> and to impinge on the author’s exercise of her “exclusive” rights.<sup>19</sup>

#### 5. *Oscar and Lucinda . . .and Sybilla . . .and Clancy . . .and . . .*

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<sup>16</sup> See Reinbothe & von Lewinski p. 109.

<sup>17</sup> For that reason, Reinbothe & von Lewinski conclude, at p. 110, that “there is no difference between the situations involving ‘push technology’ . . . and . . . comparable situations involving the ‘pull technology’ . . .”

<sup>18</sup> See Reinbothe & von Lewinski p. 111.

<sup>19</sup> See Ricketson para.8.71.

While many individuals may ultimately receive the Harry Potter files, each communication is personal, point-to-point and *seriatim*. Despite the absence of a treaty definition of “public,” it is unlikely that any Member State would find support in either the Berne Convention or the WIPO Treaties for extension of the making available or communication rights to these individualized transmissions.

### *Conclusion*

Some of the WIPO Treaties’ provisions may fairly be deemed to reaffirm the scope of rights already present in the Berne Convention, while others clearly add new protections to the range of minimum rights. The WIPO Treaties have significantly expanded the subject matter coverage of the Berne Convention’s communication to the public right, filling in the kinds of blank spots that this Essay’s analysis has exposed. The WIPO Treaties have also eliminated the disparate treatment of wired and wireless transmissions. The core concept of “making available,” however, can fairly be called neither a reaffirmation nor a novelty, for it resolves an ambiguity as to whether the old communication to the public rights accommodated or excluded “pull technologies.” This Essay has concluded that if Berne did not mandate the inclusion of recipient-initiated transmissions, neither did it preclude them. The right may have been incipient, but there was sufficient uncertainty to leave room for Member State interpretation. As a result, it is appropriate to mark the “making available” right as a clarification. The text of article 8 of the WCT lends further support to this view of the communication to the public right because it encompasses the “making available” right within the general exclusive right of communication to the public.<sup>20</sup>

If the making available right clarifies a prior ambiguity, then those Berne Member States who are not WCT/WPPT members, and had previously limited the application of the Berne communication rights to “push” technologies, need not now implement a making available right. On the other hand, when any of these countries join the WIPO Copyright Treaties, they will be obliged to implement the “making available” right as a full exclusive right. Those non-WCT/WPPT Berne members who had interpreted the communication rights to extend to “pull” technologies should continue to do so (within the subject matter limitations of articles 11, 11bis, 11ter, 14 and 14bis). If any of these countries had previously treated wireless on-demand communications as coming within the local equivalent of the broadcasting and wireless diffusion rights, then those countries would be entitled (but not obliged) under article 11bis(2) to subject those transmissions to compulsory licensing. Moreover, upon joining the WIPO Treaties, those countries would

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<sup>20</sup> See WCT art. 8 : “. . . 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 . . .” (emphasis supplied); Reinbothe & Von Lewinski at 103 (“the making available right was considered to be an aspect of the communication right.”)

be permitted to continue to maintain the compulsory license regime.<sup>21</sup> The regime would only apply to wireless on demand transmissions; wired on demand transmissions would not have come under article 11bis(1)(ii), and the Berne Convention therefore would not have permitted compulsory licensing with respect to those transmissions.

As for the scope of the “making available” right, this Essay has endeavored to show that not all forms of communication of works over the Internet come within its reach. Moreover, some of the excluded (or at best ambiguously covered) communications may be economically significant. This suggests that, despite the aim of the WIPO Treaties’ enactors to assure “effective and uniform” “protection of the rights of authors,”<sup>22</sup> technology may continue to outstrip the ingenuity of the drafters of multilateral instruments.

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<sup>21</sup> See Agreed Statement to WCT article 8: “It is further understood that nothing in Article 8 precludes a Contracting Party from applying article 11bis(2).

<sup>22</sup> WCT Preamble, recital 1.