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### A Brief History of Value Gaps: Pre-Internet Copyright Protection and Exploitation Models

Quintais, J.P.; Poort, J.

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Highly Dynamic Technological and  
Economic Change**

Edited by

P. Bernt Hugenholtz

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## Chapter 1

### 1.4.4.4 Cable Retransmission

Under Dusollier's right to control public circulation of works, retransmission constitutes exploitation. Ohly too assumes that retransmission resulting in profit is unfair without compensation. Under Poort's welfare analysis, right holders do already exert control over exploitation opportunities if the original transmission took place without access control and within the original reception area.

### 1.4.4.5 Text and Data Mining

For Strowel, copying for the purpose of providing information is not 'use as a copyright work', and should be outside the scope of exclusive rights. Poort and Rognstad argue that the value users derive from text and data mining can largely be priced into access contracts. There is no market failure. Dusollier argues that text and data mining does not result in the public circulation of the processed works and that the act is therefore outside of the scope of her proposed exclusive right.

In conclusion, there is considerable consensus among the proposals for reconstructing economic rights that the current scope of copyright easily leads to perverse outcomes, with aspects of over- or underprotection that cannot easily be reconciled with any underlying rationale for copyright protection. For example, text and data mining would not be treated as a copyright relevant act under any of the models under discussion. But for most borderline cases, assessment of effects appears to be conditional. Compared to antitrust (competition law), functionalist theories of copyright law may need to assess long-term dynamic effects, for example on future creation. This is difficult to draft in legislation and for courts to operationalize, as the current wave of uneven and unpredictable jurisprudence of the European Court of Justice perhaps already illustrates.

In sum, reconstructing copyright is not for the impatient or the faint-hearted; there remains much work to be done.

## Chapter 2

### A Brief History of Value Gaps: Pre-Internet Copyright Protection and Exploitation Models

João Pedro Quintais & Joost Poort\*

#### 2.1 INTRODUCTION

A premise of this book and its underlying research project is that the historical evolution of copyright has led to a growing disconnect between the legal definitions of economic rights and the business and technological realities they regulate. Whereas such legal definitions were in the nineteenth and twentieth centuries patterned on different modes of commercial exploitation of copyright works, they have in the twenty-first century lost that connection, leading to an erosion of copyright's normative content and focus. The result of this mismatch is a deficient design of the scope of economic rights, with likely negative consequences on incentives to invest 'in innovative content and information services'.<sup>1</sup>

The present chapter explores this premise from a historical perspective by examining how the increase in the scope of copyright protection tracked the progress of business models and technology. The chapter describes the

\* We are grateful to Bernt Hugenholtz for comments and suggestions on earlier drafts, and to Anne Bruna and Jasmin Hohmann for valuable research assistance. Parts of this chapter are based on and develop the research in J.P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*, Kluwer Law International (2017).

1. See the introductory chapter by P.B. Hugenholtz and M. Kretschmer in this volume.

evolution of economic rights recognized in international copyright law in the pre-internet era, against the background of related developments in the commercial exploitation of works and technological development. The focus lies on rights relating to communication technology and the corresponding exploitation models. To this end, it analyses four case studies: public performance (section 2.2), radio and TV broadcasting (section 2.3), cable retransmission (section 2.4), and commercial rental (section 2.5). In each case, the history of protection under international and EU copyright law is described, starting from the Berne Convention and its revisions, and leading on to the TRIPS Agreement, the WCT (where relevant), and the EU copyright directives prior to the InfoSoc Directive.<sup>2</sup> Alongside this, the development of relevant technology and exploitation models are described.

All case studies focus on activities and technologies relating to communication and dissemination of works, rather than reproduction.<sup>3</sup> The first reason for this focus is that reproduction rights emerged much earlier in history than communication rights. Indeed, although the birth of copyright law is often associated with the Statute of Anne adopted in England in 1710,<sup>4</sup> long before that copying restrictions were enforced by ‘Guild regulations and royal printing privileges,’ some of which stemmed from even earlier practices in the territories of Venice and Rome.<sup>5</sup> The second and more

important reason is that, despite the perpetual presence of unauthorized copying, from the sheet music pirates of the eighteenth and nineteenth century<sup>6</sup> to the internet ‘pirates’ of today, the right of reproduction (a ‘copy-right’) appears to have been less controversial than various rights relating to communication or making works available to the public.<sup>7</sup>

After examining the case studies, section 2.6 critically discusses their common patterns. The evolution of rights could be summarized in a critical fashion by observing that each time a new exploitation model or technology enabled entrepreneurs to generate money using copyright-protected works, new rights were created to reap some of these benefits. This development is consistent with the premise outlined above, as the expansion of economic rights appears to closely track the evolution of economic and technological realities. This is not to say that the development was a direct and necessary result of the copyright infringing nature of the activities of these entrepreneurs. Think for instance of a theatre company staging a play purchased in print from the authorized publisher, or an orchestra performing a symphony from legally obtained sheet music. Rather, it stems from the assertion by rights holders of an entitlement to the value created in connection with ‘their works’, and the materialization of that assertion into law. Fast-forward to the twenty-first century, and this reveals a stunning resemblance to the ‘value gap’ debate in current EU copyright law and the initiative to create new exclusive rights for publishers of press publications.<sup>8</sup> Thus, from this perspective, we can read the historical evolution of copyright as a tale of value gaps.

This chapter explores this analogy, examining whether past arguments for copyright protection and the design of legal entitlements presented a clearer connection to the technological development in modes of exploitation. This link, it is argued, has been eroded in contemporary copyright law

2. See: Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886 (last revised at Paris on 24 July 1971, and amended on 28 September 1979) [Berne Convention or BC]; Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [TRIPS]; WIPO Copyright Treaty, adopted in Geneva on 20 December 1996 [WCT]; and Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22.06.2001 [InfoSoc Directive]. This chapter focuses solely on ‘copyright’, understood as authors’ rights. It therefore excludes so-called related or neighbouring rights.
3. Legally, all cases except commercial rental are currently associated with what in EU Law falls under the umbrella of the right of communication to the public. See Art. 3 InfoSoc Directive, Art. 8 Council Directive 92/100/EEC, of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346/61) as republished and amended by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (codified version), 2006 O.J. (L 376/28) [Rental and Lending Directive], and Art. 4 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, OJ L 248/15, 6.10.1993 [SatCab Directive].
4. 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, 1710, 8 Anne, c.19 [Statute of Anne].
5. Cf. L. Bentley, ‘Introduction to Part I: The History of Copyright’; R. Deazley, ‘What’s New About the Statute of Anne? Or Six Observations in Search of an Act’; and W. Grosheide, ‘Transition from Guild Regulations to Modern Copyright Law – a View from the Low Countries’, in: *Global Copyright: Three Hundred Years since the Statute of Anne*,

from 1709 to Cyberspace, L. Bentley, U. Suthersanen & P. Torremans (eds), Edward Elgar (2010), pp. 7–13, 26–53, and 79–102. See also F. Kawohl and M. Kretschmer, ‘Abstraction and Registration: Conceptual Innovations and Supply Effects in Prussian and British Copyright (1820-50)’, *Intellectual Property Quarterly*, 2003-2, pp. 209–228; and M. Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press (1993), pp. 9–24.

6. See R. Towse, ‘Economics of Music Publishing: Copyright and the Market’, *Journal of Cultural Economics*, 2016, pp. 1–18.
7. A notable exception is the perennial controversy surrounding the application of the reproduction right to private copying activities. For a discussion of legal and economic aspects of private copying, see: J. Poort and J.P. Quintais, ‘The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies’, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)* 4(3), pp. 205–224. For a discussion of the historical background of private copying, see P.B. Hugenoltz, ‘The Story of the Tape Recorder and the History of Copyright Levies’, in: *Copyright and the Challenge of the New*, B. Sherman & L. Wiseman (eds), Kluwer Law International (2012), pp. 179–196.
8. See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, Arts 11–13.

and policy, in part due to the increasingly abstract and generic mode in which economic rights are formulated. This erosion in turn raises the crucial question of how to justify the expansion in scope of economic rights to appropriate (some of) the downstream value.

## 2.2 PUBLIC PERFORMANCE

The earliest copyright laws, such as the Statute of Anne (1710), regulated the printing, reprinting, and sale of books. Only later were other types of work added, such as sheet music and theatre plays.<sup>9</sup> In modern-day language, one can say that in the early days copyright was almost entirely *exhausted* upon sale: no restrictions existed regarding the public performance of these works, their translation, or adaptation through musical arrangements. Only reprinting a legally obtained copy was forbidden. This began to change from the end of the eighteenth century onwards, starting with France.

### 2.2.1 THE EMERGENCE OF A PUBLIC PERFORMANCE RIGHT IN FRANCE

The legal recognition of a public performance right is intertwined with the birth of collective rights management in France, which dates back prior to the *Ancien Régime*. The origins of collective management are often traced back to the *Bureau de législation dramatique*, a venture designed by playwrights to defend their interests against the actor-controlled *Comédie Française*, which held a theatre monopoly in Paris in the eighteenth century.<sup>10</sup> The *Bureau* was created at a famous dinner on 3 July 1777, by the popular playwright Beaumarchais (born Pierre Augustin-Caron) and twenty-two colleagues disgruntled with the remuneration received from theatres for the performance of their works.<sup>11</sup> Thanks to the popularity and lobbying of

Beaumarchais and his contemporaries, the *Bureau* obtained royal support and a ‘concession from the *Théâtre Français* for playwrights to be remunerated not only by the honour to be performed, but also with royalties’.<sup>12</sup> At the time, the main concern of the *Bureau* was theatrical works, as music was deemed a ‘minor art’, and music publishers viewed as ‘shopkeepers’.<sup>13</sup>

In 1789, the French Revolution brought the abolition of privileges. As a result, the interests of musical authors had to wait a couple of years to return to the political agenda.<sup>14</sup> This occurred in January 1791 in the form of a decree from the National Assembly. As Ginsburg notes, the main motivation for the decree was ‘to break the *Comédie Française*’s monopoly on the works of Corneille, Molière, and Racine’; hence, ‘the decree’s recognition of authors’ rights principally was a means to terminate that monopoly’.<sup>15</sup> Nonetheless, the decree recognized an exclusive performing right (*droit de représentation*) for dramatic and musical works lasting for five years after the author’s death.<sup>16</sup> The law stated that ‘the performance of a theatre play requires the express and written consent of its playwright’.<sup>17</sup> The penalty for unauthorized performance was ‘confiscation of the entire income of the spectacle’.<sup>18</sup> Later that year, a new decree specifically recognized ‘public performing rights including concerts, thereby giving rise to what today we consider the rights of authors and composers’.<sup>19</sup>

The 1791 laws, by releasing the theatres from governmental control or censorship, are said to have directly contributed to the rise in the number of theatres. In Paris, Kennedy reports an increase from nineteen to thirty-five

9. Kawohl and Kretschmer 2003, p. 219.

10. S. Nérison, ‘Collective Management of Copyright in France’, in: *Collective Management of Copyright and Related Rights*, D. Gervais (ed.), Kluwer Law International (2016), p. 176; See also N. Piaskowski, ‘Collective Management of Copyright in France’, in: *Collective Management of Copyright and Related Rights*, D. Gervais (ed.), Kluwer Law International (2010), p. 171, SACD, *Two centuries of experience*, <https://www.sacd.fr/en/two-centuries-of-experience> (accessed 26 September 2017) [SACD Two Centuries of experience]; and J.C. Ginsburg, ‘Tale of Two Copyrights: Literary Property in Revolutionary France and America’, *Tulane Law Review* 64, 1989–1990, pp. 991, 996–997: ‘the Crown also regulated rights of public performance of dramatic works by vesting in the *Comédie Française* the exclusive right to perform such works’. Other than the *Comédie Française*, the *Comédie-Italienne* and the *Opéra* also enjoyed privileged status until 1789. *Id.* p. 998; and S. Maslan, *Revolutionary Acts: Theatre, Democracy, and the French Revolution*, The Johns Hopkins UP (2005), p. 14.

11. See: A.C. Renouard, *Traité des Droits d’Auteurs dans la Littérature, les Sciences et les Beaux Arts*, Paris: Chez Jules Renouard et Cie (1838), pp. 212–225; F. Hardison Londré

and M. Berthold, *The History of World Theater: From the English Restoration to the Present*, A&C Black (1999), pp. 173 et seq.; and Piaskowski 2010, p. 171.

12. Nérison 2016, p. 176. The relevant articles of the *arrêt* (9 December 1780) in question are reproduced in Renouard 1838, pp. 220–221.

13. SACEM (Society of Actors, Composers and Publishers of Music), Historical Background, ‘1777’, <https://societe.sacem.fr/en/history> (accessed 26 September 2017) [SACEM Historical Background].

14. *Ibid.*, ‘4 August 1789’.

15. Ginsburg 1990, p. 1005.

16. S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, Kluwer (1987), p. 5. See also F. Rideau, *Nineteenth Century Controversies Relating to the Protection of Artistic Property in France*, OpenBook Publishers (2010), p. 242.

17. ‘Décret relative aux spectacles’ (dated 13–19 January 1791) [Loi des 13/19 janvier 1791 relative aux spectacles (complétée par un décret des 19 juillet/6 août 1791)]. Cf. A. Bertrand, *Le Droit d’Auteur et les Droits Voisins*, Masson (1991), pp. 26–27.

18. S. Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright*, Kluwer Law International (2014), p. 249.

19. SACEM Historical Background, ‘July–August 1791’. See also Bertrand 1991, pp. 26–27. For the analysis of a subsequent 1792 decree that further regulated dramatists’ public performance rights in France (including subjecting them to formalities) and the first full-fledged French copyright law (Law of 19–24 July 1793), see Ginsburg 1990, pp. 1006–1014.



within one year.<sup>20</sup> This growth is confirmed by a short reference in Charles-Augustin Renouard's *Traité des Droits d'Auteurs* (of 1838), which mentions the existence of thirty-eight theatres in Paris in 1791.<sup>21</sup> Susan Maslan's work provides additional information. She notes that 'with the end of legal privileges the construction of new theaters was unleashed': 'At least one thousand new plays were written and performed, approximately fifty new theaters opened, and there were roughly twenty-five theatrical performances every day in Paris during the revolutionary decade.'<sup>22</sup> Note, however, that Maslan links this heyday for theatres in Paris to the abolition of the existing legal privileges, not to the recognition of performing rights for playwrights.

On the basis of the 1791 decrees, Framery founded the *Société des Auteurs* with the objective of managing and enforcing the newly created performing right, as well as collecting royalties from theatres across the country. The organization obtained authorization from authors for the exercise of this right against theatres, in what is viewed as 'the origin of the collective management of copyright'.<sup>23</sup> In 1829, the *Société* merged with a competing agency to form the Society of Dramatic Authors and Composers (SACD), 'the first and oldest CMO in France'.<sup>24</sup>

One of the most colourful episodes in the history of collective management and public performance took place in 1847, more than half a decade after the recognition of some types of performance rights in France. At the concert-café *Les Ambassadeurs* on the Champs-Élysées, author (playwright, lyricist, and librettist) Ernest Bourget famously refused to pay a bill because the café did not remunerate him for the public performance of his compositions. This led to a lawsuit. The ensuing judgment awarded damages to Bourget and prohibited the café from playing his works.<sup>25</sup>

This litigation demonstrates the dynamic nature of the concept of 'public performance', which evolved from its initial application in concert halls or theatres to cover concert-cafés as well. Although it is difficult to determine the revenue generated from the 'business model' of concert-cafés in France at the time, it was clearly a popular phenomenon during the *belle époque*. It could be argued that they became even more popular than theatres for enjoying performances. The *Encyclopedia of Contemporary French Culture* notes that these establishments became popular in France in the 1860s and that 'by 1890 there were some 200 in Paris alone'. They are

historically important establishments due to the fact that they were frequented by the public to listen to music 'rather than joining in the singing of popular songs'.<sup>26</sup> This is anecdotally illustrated in the works by Édouard Manet depicting scenes in concert-cafés, while Edgar Degas even made a famous painting of the aforementioned concert-cafés – *Les Ambassadeurs*. Herbert writes: 'Many indoor cafés-concert had rather small stages, but new ones were built in the 1860s and 1870s with huge stages, rather like music halls. Outdoor cafés-concerts used covered pavilions fronting on fenced-off areas where the clients sat. Both indoor and outdoor types charged extra for the entertainment, either by elevating the prices of their drinks, or by levying an entry fee or seat charge.'<sup>27</sup> This makes clear how these establishments monetized the value generated by the performances and – in present-day language – a value gap was created, which the public performance right ought to fill.

The following years saw a proliferation of similar lawsuits, all favourable to Bourget and his colleagues. These established a line of case law supporting authors' claims to exclusive rights for the performance of their works.<sup>28</sup> In 1850, the union started to collect royalties from café owners for public performances of musical pieces.<sup>29</sup> This laid the foundation for the incorporation, on 31 January 1851, of the *Société des Auteurs Compositeurs et Éditeurs de Musique* (SACEM), with the primary aim of enforcing the performing rights of authors against concert-cafés.<sup>30</sup> SACEM is to this day one of the biggest and most important collective rights management organizations (CMOs) in Europe.

Of course, while France was taking the lead in this area, several other national copyright laws recognized public performance rights under different models.<sup>31</sup> At an international level, the first instances of recognition of such rights are found in nineteenth century bilateral treaties, which granted the right for musical, dramatic, and dramatico-musical works, subject to the

20. E. Kennedy, M.L. Netter, J.P. McGregor and M.V. Olsen, *Theatre, Opera, and Audiences in Revolutionary Paris*, Greenwood P (1996), pp. 45, 89.

21. Renouard 1838, p. 212.

22. Maslan 2005, pp. 14–15.

23. Nérisson 2016, pp. 176–177.

24. *Ibid.*, p. 177. On the transition from the collection agency *Agence Framery* to the SACD, and the role played by Beaumarchais in the same, see Piaskowski 2010, p. 171.

25. SACEM Historical Background, '1847'.

26. I. Pickup, 'Café-Concert', in A. Hughes & K. Reader (eds), *Encyclopedia of Contemporary French Culture*, Routledge (1998), p. 86.

27. R.L. Herbert, *Impressionism*. Yale University Press (1988), p. 76.

28. SACEM Historical Background, '28 April 1849', referring in particular to the decision of the Court of Justice of Paris of 28 April 1849.

29. Piaskowski 2010, p. 172, noting that at this time the union operated under the name *Agence Centrale pour la Perception des droits des Auteurs et Compositeurs de Musique*.

30. See: SACEM Historical Background, '31 January 1851'; Piaskowski 2010, p. 172; and Nérisson 2016, p. 177, noting that SACEM is an interesting CMO insofar as it represents both authors and publishers.

31. Ricketson 1987, pp. 12, 14, and 426, making reference to the UK, Netherlands, Finland, and Switzerland. For a study on the origins of performing rights in Britain, see I. Alexander, *The Birth of the Performing Right in Britain*, OpenBook Publishers (2010), pp. 321–346. For examples in the 1837 Prussian Copyright Act and 1886 Belgian Copyright Act, see Depreeuw 2014, p. 249.

principle of national treatment and other conditions.<sup>32</sup> Dissatisfaction with this bilateral approach led to the initial steps towards a first multilateral treaty. These steps included different international meetings and congresses on the topic of literary and artistic works, taking place in Brussels (1858), Antwerp (1861 and 1877), and under the auspices of the Universal Exhibition of 1878 in Paris.<sup>33</sup>

In 1878, following these congresses, the meeting of the International Literary Congress in Paris, under the presidency of Victor Hugo, led to the foundation of the International Literary Association. This was extended and renamed in 1884 as the *International Literary and Artistic Association* (ALAI). Among the resolutions passed at the founding meeting was that:<sup>34</sup>

All literary, scientific and artistic works will be treated, in all countries other than their country of origin, according to the same laws as those applicable to works of national origin. The same system will apply to the performance of dramatic and musical works.

The ALAI played a key role in the drawing up and establishment of the Berne Convention, signed on 9 September 1886.<sup>35</sup> Through the principles of national treatment and reciprocity, the Berne Convention 'allowed foreign authors to benefit from rights currently in force in countries where their works were performed'.<sup>36</sup>

## 2.2.2 PUBLIC PERFORMANCE RIGHT IN INTERNATIONAL LAW

The Berne Convention has been revised multiple times since 1886. The version currently in force suffered its last major revision in Paris in 1971 (with subsequent minor amendments in 1979). The convention establishes minimum standards. These include rights to be protected, subject to certain reservations and to exceptions or limitations. Among the minimum rights is the exclusive right in Article 11 to authorize the *public performance of dramatic, dramatico-musical, and musical works*, which is the main focus of this section.<sup>37</sup>

32. S. von Lewinski, *International Copyright Law and Policy*, Oxford University Press (2008), p. 17; See also Ricketson 1987, pp. 29, 32.

33. von Lewinski 2008, pp. 23–32.

34. Association Littéraire et Artistique Internationale – Son Histoire, Ses Travaux (1878–1889), Bibliothèque Chaconac (1889), pp. 112–113.

35. See SACD Two Centuries of experience, '1878'; von Lewinski 2008, pp. 26–32; Ricketson 1987, pp. 46–55.

36. SACD Two Centuries of experience, '1886'.

37. We focus here on the right of public performance proper, as distinguished from the other rights that relate to making the work perceptible (by sound or vision) in the presence of a public. These include the right of public recitation for authors of literary works (Art. 11ter BC) and the right of public performance of cinematographic adaptations and cinematographic works (Arts 14 and 14bis BC).

### 2.2.2.1 Evolution of Protection Between 1886 and 1971

The initial version of this public performance right was found in Article 9 of the Berne Convention (1886). It granted national treatment to citizens of other Union countries in relation to the public presentation (*représentation publique*) of dramatic or dramatico-musical works and translations thereof, whether or not they are published.<sup>38</sup> The provision also applied national treatment to the public performance of (published or unpublished) musical works.

For musical works, however, this was conditional on the author attaching a notice of reservation on the title page of the sheet music. This requirement resulted in many composers of musical works losing their performance rights due to a classic *principal-agent problem*: many publishers neglected to meet the requirement as they benefited from the sale of sheet music and not from the performance rights.<sup>39</sup> Hence, by leaving the reservation notice off, publishers hoped to increase the number of public performances of works, leading to more copies sold. Naturally, this strained their relationship with composers, who complained of 'discriminations against their interests'.<sup>40</sup>

The issue was debated at the 1896 Paris Conference. In the interest of the authors and composers, the French Government tried to remove the requirement of prior notice, only to meet opposition from the German and British delegations, who argued that 'public opinion in their countries would find it difficult to adjust to a situation where they would be prevented from performing musical works which contained no notice of reservation',<sup>41</sup> for example, 'in social clubs, by students or military music bands'.<sup>42</sup> The outcome was to maintain the status quo, but to issue a declaration stating that national laws should fix the boundaries for the next conference to 'adopt the principle that published musical works should be protected against unauthorized execution, without a need for a prior reservation in this respect by the author'.<sup>43</sup>

In the 1908 Berlin Act, the requirement for advanced reservation of rights was abolished. This Act made it impossible for national laws to curtail recognition of the rights of public performance (musical works) and presentation (dramatic and dramatico-musical works) through the application

38. See Ricketson 1987, p. 425.

39. This problem, also referred to as the 'agency problem' or 'agency dilemma', refers to a situation in which an agent (in this case the publisher) acts on behalf of a principal (the composer) while having interests that are not fully aligned with those of the principal. See, e.g., S.A. Ross, 'The Economic Theory of Agency: The Principal's Problem', *The American Economic Review*, 63(2), 1973, pp. 134–139.

40. Ricketson 1987, p. 426.

41. *Ibid.*, p. 426.

42. Depreeuw 2014, p. 249.

43. Ricketson 1987, p. 427.



of national treatment in combination with a notice of reservation requirement.<sup>44</sup>

Although the 1908 Act did not grant a general public performance right, it recognized more specific performance rights in two fields. First, Article 13(1) granted a new minimum right of public performance of musical works by means of *mechanical reproduction instruments*.<sup>45</sup> Clearly, this introduction of a mechanical performance right in international law was a response to technological and market developments. Player pianos (pianolas) playing ‘recorded’ music rolls had been developed in the last quarter of the nineteenth century to challenge the hegemony of live performances in concert halls and concert-café up to that point.<sup>46</sup> Around the same time, Thomas Edison had invented the phonograph (in 1877) and Emile Berliner the gramophone (1887). By 1898, Berliner’s company had produced over 11,000 gramophone players and more than 400,000 records.<sup>47</sup> And by 1914, six years after the Berlin Act, more than 27 million records had been printed. In 1919, record production had reached 107 million.<sup>48</sup> By that time, this technological development had already given rise to domestic court decisions in Belgium and France, which qualified the playing of recorded phonograms by means of a phonograph (a ‘graphophone’) and the public listening to a disc as a public performance (*exécution*).<sup>49</sup>

Second, Article 14 granted a public representation right for ‘cinematographic adaptations and reproductions of literary, artistic and scientific works’.<sup>50</sup> Again, this was a response to rapid technological development. The Lumière brothers held the first (private) screening of motion pictures in Paris in March 1895, and the first commercial public screening charging admission fees was in Berlin later that same year.<sup>51</sup> The advance of cinema had made it clear by then that this ‘was another means by which works could be reproduced and performed’. Thus, the recognition of such rights was seen as the ‘natural corollary of the rights of mechanical and cinematographic

44. *Ibid.*, p. 427.

45. Article 13, first paragraph, of the 1908 Berlin Act of the BC states: ‘*Les auteurs d’œuvres musicales ont le droit exclusive d’autoriser: ... l’exécution publique de Mêmes œuvres au moyen de ces instruments [instruments servant à les reproduire mécaniquement]*’. On the historical evolution of this provision in tandem with that of the mechanical reproduction right, see Depreeuw 2014, pp. 253–254.

46. Towse 2016.

47. P. Gronow and I. Saunio, *International History of the Recording Industry*, Cassell, (1999), p. 9.

48. J.R. Ogden, D.T. Ogden and K. Long. ‘Music Marketing: A History and Landscape’, *Journal of Retailing and Consumer Services* 18(2), 2011, pp. 120–125.

49. See Depreeuw 2014, pp. 252–253, and the early case law cited therein.

50. Ricketson 1987, p. 428. Art. 14 of the 1908 Berlin Act makes reference to ‘représentation publique’. *Id.*, p. 95.

51. Wikipedia, *Auguste and Louis Lumière*. Other early cinematographers, [https://en.wikipedia.org/wiki/Auguste\\_and\\_Louis\\_Lumi%C3%A8re](https://en.wikipedia.org/wiki/Auguste_and_Louis_Lumi%C3%A8re) (accessed 26 September 2017).

reproduction’; following a French proposal, they were ‘adopted with little discussion once the decision to protect the latter rights had been agreed’. This proposal aligns with a French Court decision of the same year, which considered the screening of the opera Faust in two cinemas in Paris to be a public representation.<sup>52</sup> As granted, the right covered the public projection of fixated cinematographic works, whether accompanied by sound or not (i.e., a silent film).<sup>53</sup>

The 1928 Rome Act was relatively inconsequential as regards the public performance right. There was debate on the topics of mechanical reproduction and performance rights, but the delegations could not agree on changes. Many Union countries had reservations about a general right. This was due to concerns about the practice of collective management of the public performance of musical works during the interwar period. Existing CMOs had developed monopolies (or quasi-monopolies) in the field, raising public interest concerns as to artificially high price setting for public performance licences. These concerns led some countries to propose legislation to control the activities of CMOs. Such countries felt, even in 1928, that a general public performance right would restrict their ability to regulate CMOs.<sup>54</sup>

The 1948 Brussels Act brought substantive changes in this area by introducing a general public performance right in Article 11.<sup>55</sup> From this point onwards, reservations to the right on the basis of national treatment were barred. The right was proposed in the preparatory works by the Belgian government and the International Office, on the basis of several different arguments. First, the need for unambiguous recognition of a general right on a par with the existing public performance rights (for translations, mechanical reproduction of musical works, and cinematographic adaptations). Second, the argument that such a general right would not hinder the control of CMOs via competition law. Third, the fact that Union countries would continue to be allowed minor reservations and exceptions for certain types of public performance.<sup>56</sup>

The original proposal mentioned an exclusive right for ‘the public transmission of representations and performances of their works by telephone or any other analogous means’. According to Ricketson, telephone should be read here as the ‘théâtrophone’ or ‘theatre phone’, a popular invention at the time.<sup>57</sup> Invented as early as 1881, this was ‘a telephonic distribution system available in portions of Europe that allowed the subscribers to listen to opera and theatre performances over the telephone lines’:<sup>58</sup>

52. Depreeuw 2014, pp. 254–255, and references cited therein.

53. *Ibid.*, p. 256.

54. Ricketson 1987, 428–429.

55. von Lewinski 2008, p. 76. This was also the Act that granted a general reproduction right.

56. Ricketson 1987, p. 429.

57. *Ibid.*, p. 430.

58. Wikipedia, *Théâtrophone*, <https://en.wikipedia.org/wiki/Th%C3%A9%C3%A2trophone> (accessed 26 September 2017).

music streaming *avant la lettre*. Remarkably, in 1899 a Belgian court had already qualified transmission over the telephone of a performance of Verdi's *Rigoletto* to the visitors to an electricity fair against the payment of a fee as an act covered by the domestic right of public performance.<sup>59</sup>

Coming back to the Brussels conference fifty years later, opponents to the proposal contended that a general right was unnecessary and undesirable.<sup>60</sup> The discussion led to a redrafting of the provision into a more general right (deleting the reference to the 'theatre phone') and making a clear demarcation from the rights of broadcasting (Article 11*bis*) and mechanical reproduction (Article 13), by stating that their application was 'reserved'.<sup>61</sup> The final version of Article 11(1) adopted in Brussels grants authors of dramatic, dramatico-musical, and musical works an exclusive right to authorize: '(i) the public presentation and public performance of their works, and (ii) the public distribution by any means of the presentation and performance of their works'.<sup>62</sup>

Important was the fact that delegates recognized that the general right was subject to the minor exceptions or reservations doctrine and, furthermore, each state retained the power to impose competition law controls in their territories.<sup>63</sup> In addition to the general public performance right, the Brussels Act also introduced two important changes. First, in Article 11*ter*, it granted an exclusive right for authors to authorize the public recitation of their literary works. Second, it amended Article 14 on cinematographic works, changing the formulation of the right to cover public presentation *and performance*.

59. See Depreeuw 2014, pp. 300–311, and references cited therein.

60. Ricketson 1987, p. 430. Opponents considered national treatment sufficient and were concerned a general right would lead to a reduction in protection, namely if certain restrictive conditions from national law were adopted in the text of the convention. In addition, it was feared that a general right would limit the space available for national restrictions and 'anti-monopoly controls'.

61. Article 11(1)(i), second sentence, BC. See Guide to the Copyright and Related Rights Treaties, Administered by WIPO, and Glossary of Copyright and Related Rights Terms, WIPO Publication 891(E), Geneva (2003) [WIPO Guide 2003], p. 68.

62. Article 11(1) BC of the Brussels Act (1948). See Ricketson 1987, pp. 430–431, describing the reference to 'public distribution' as 'an unfortunate translation of the original French word transmission'; the most accurate translation being 'transmission or communication'. This mistake was corrected in the Stockholm revision, which replaced the term 'distribution' with 'communication' in the official English text of the Convention.

63. *Ibid.*, pp. 421, 431. On this point it is noteworthy that the UK made a declaration – jointly with other countries – to reserve 'its freedom to promulgate legislation where necessary in the public interest to oppose or remedy the abuse of this right by copyright owners within the UK'. Cf. *ibid.*, p. 111. On the Agreed Statement on minor reservations included in the General Report of the Brussels revision conference, see WIPO Guide 2003, p. 70, citing *Documents de la Conférence réunie à Bruxelles du 5 au 26 Juin 1948* (Berne: Bureau de l'Union Internationale pour la Protection Des Œuvres Littéraires et Artistiques, 1951) [Records BC Brussels 1948].

The change brought about by the Stockholm Act in 1967 was the extension of the scope of the general right of public performance by the addition, in Article 11(1)(i), of the expression 'including such public performance by any means or process'. This *general-purpose* wording took the scope of the right beyond direct presentation by natural persons, to include performances through the use of any equipment – including the 'public rendition of recorded performances or by other technical means'<sup>64</sup> – making it future-proof with respect to new technologies and exploitation models for public performance. At the same time, from a societal perspective, it introduced the risk that certain activities would come to fall under the right without clear normative justification. The change brought within the scope of Article 11, acts previously covered by Article 13 on public performance of musical works by means of mechanical reproduction instruments. The latter article was therefore 'completely transformed'.<sup>65</sup>

The same addition was made to Article 11*ter*, regarding public recitation of works. The provision was further extended in scope to include the communication to the public of the recitation of works. A paragraph (2) was also added to grant authors of literary works the same rights in respect of translations thereof.

#### 2.2.2.2 Current Level of Protection

The current version of Article 11 of the Berne Convention contains a right of public performance<sup>66</sup> for three types of work: *dramatic*, *dramatico-musical*, and *musical* works. The scope of the public performance right covers the performance of such works by a natural person to a public that is present or 'at a place open to the public, without the need for any transmission'.<sup>67</sup> The exclusive right to authorize the public performance of cinematographic adaptations and works is laid down in Articles 14 and 14*bis*.<sup>68</sup>

The natural person in question is a human actor or performer, e.g., a musician in a concert, an opera singer, or a theatre actor in a play. As in the Stockholm Act (1967), the performance can be by 'any means or process', such as 'by means of sound recordings, tapes and other devices in which

64. Depreeuw 2014, pp. 247–248.

65. WIPO Guide 2003, p. 68.

66. In this version, and since the Stockholm Act, the English term performance corresponds to the French terms '*représentation et exécution*'. Cf. Ricketson 1987, p. 425. Note that Art. 11(1)(ii) contains a *distinct* exclusive right of communication to the public of the protected performances. Furthermore, the right of public performance is distinct from that of public recitation in Art. 11*ter*, which applies to 'performing' a literary work in the sense of reading it out loud or reciting it. *Id.*, p. 433.

67. von Lewinski 2008, p. 147.

68. WIPO Guide 2003, p. 68. Art. 14(1) also encompasses communication to the public of works 'of the works thus adapted or reproduced'. Note that pursuant to Art. 14*bis*, the owner of copyright in a cinematographic work shall enjoy a similar right to the author.

these works may be embodied'.<sup>69</sup> This extended the scope of the right beyond human performances to mechanical performances.

A key aspect of the right is that a performance is made to a 'public' that is 'present at the *location* of the (human or mechanical) performance, at the *time* it takes place'.<sup>70</sup> On the qualification of 'public', the text and preparatory works of the Convention provide little guidance beyond the exclusion of 'private' communications.<sup>71</sup> Thus, it is for national laws to precisely demarcate public from private in such a way as to not 'prejudice the author's right to exploit his work by means of public performance'.<sup>72</sup> According to the WIPO guide to this Convention, the dominant view is that an act of communication is made to the 'public' when it goes beyond the communicator's 'circle of family and its close social acquaintances'.<sup>73</sup> Furthermore, the actual presence of the public is not required. It suffices that 'the performance is made in a place open to the public' and that the public has the opportunity to attend it.<sup>74</sup>

Note that what is protected is the performance to the public as an act of *exploitation*, not the reception or enjoyment of the work (or of the performance of the work) by audience members.<sup>75</sup> Finally, the Berne public performance rights are subject to the application of 'minor reservations' by Union members. This covers *de minimis* performances that do not have a commercial character, nor are they carried out for profit-making purposes.<sup>76</sup>

## 2.3 RADIO AND TV BROADCASTING

Broadcasting is the transmission of sounds and/or images for reception by a dispersed audience using electromagnetic radiation or waves, without the

69. Ricketson 1987, p. 431. The expression therefore includes, as illustrated by von Lewinski, 'devices from which the works can be made audible or visible at a place open to the public or in its presence, such as the playing of musical works in a discotheque, bar, or at a choreographic performance in a theatre, or the showing of an audiovisual recording of a theatre play, opera, or concert to the public at an educational establishment'. Cf. von Lewinski 2008, p. 148.

70. Depreeuw 2014, p. 258 (emphasis original).

71. On the basis of the pecuniary nature of the exclusive right, Ricketson argues that the 'public' should include 'those who are willing to pay for the benefit of hearing or seeing the work performed', thereby excluding from the concept 'only performances in the immediate family circle'. Cf. Ricketson 1987, pp. 432–433.

72. Ricketson 1987, p. 433.

73. WIPO Guide 2003, p. 68.

74. *Ibid.*, p. 69. For a detailed treatment of the concept of 'public' in the BC, see Depreeuw 2014, pp. 257–259, 329–341.

75. Depreeuw 2014, pp. 258–259.

76. WIPO Guide 2003, pp. 70–73. See also Depreeuw 2014, p. 258.

assistance of 'artificial means of guidance or support', like wire or cable.<sup>77</sup> Where such artificial means are used, the transmission in question can be called a 'cable retransmission' – a topic examined below in section 2.4.

### 2.3.1 THE EARLY DAYS OF RADIO AND TV

Discussion on the technology dates as far back as the 1880s, and the first experiences with radio-communications systems, by Marconi and Tesla, from 1896 and 1897.<sup>78</sup> In the early 1890s, the German scientist Heinrich Hertz discovered electromagnetic or 'Hertzian' waves, initially used to 'communicate the telegraphs dots and dashes'; around that period, the first reports surfaced of use of radio signals by the United States (US) Navy.<sup>79</sup>

As early as 1905–1906 it is possible to identify the amateur pioneers of broadcasting in the US, who operated rudimentary radio stations, talked with each other, and listened to 'radio signals from ships at sea'.<sup>80</sup> These experimental amateur activities significantly preceded the first commercial radio transmissions in 1919–1920, distributed through radio waves from transmitters to receiving devices with antennae.<sup>81</sup> The early days of radio broadcasting in the US were characterized by the co-existence of different models, from amateur radio clubs, to radio stations of universities, churches, hotels, newspapers, the US military, and a few commercial stations. Radio was mostly local, partly due to limitations in the range of transmissions, and the content transmitted was irregular.<sup>82</sup> Between 1912 and 1922, the combination of 'massive amateur and commercial exploitation' with war production led to a boom in radio innovation in the US.<sup>83</sup> By 1924, more than a thousand broadcast stations existed and over 2 million broadcast-ready radio sets had been sold.<sup>84</sup> By the end of 1934, over 65% of households in

77. See Ricketson 1987, p. 435. When such artificial means are used, the transmission in question can be called a 'cable retransmission'.

78. See G. Austin, 'Radio: Early Battles over the Public Performance Right', in: *Copyright and the Challenge of the New*, B. Sherman & L. Wiseman (eds), Kluwer Law International (2012), pp. 117–118, noting that both men held patents on the technology in the US and UK.

79. Austin 2012; T. Wu, *The Master Switch: The Rise and Fall of Information Empires*, Alfred A Knopf (2011), p. 34.

80. Wu 2011, pp. 34 et seq., noting that, in their contemporary dictionaries, 'broadcast' was a seeding technique meaning '[c]ast or dispersed in all directions, as seed from the hand in sowing, widely diffused'.

81. See, generally, Austin 2012; Ithiel de Sola Pool, *Technologies of Freedom*, Harvard University Press (2009); Wu 2011.

82. *Ibid.*

83. Y. Benkler, 'Open Wireless vs. Licensed Spectrum: Evidence from Market Adoption', *Harvard Journal of Law & Technology*, 26(1), 2012, pp. 69–163.

84. Pool 2009; Wu 2011. On the development of the US radio industry and its regulation in this period, see Austin 2012; Benkler 2012; and Wu 2011.



the US had at least one radio receiver.<sup>85</sup> Interestingly, by 1923, 47% of radio stations with known ownership in the US were owned by radio manufacturers, who apparently saw radio stations primarily as a medium to promote the sales of receivers. 'Commercial establishments like department stores, art dealers, or jewelry and music stores' owned another 20%, the rest being educational or amateur stations.<sup>86</sup>

Across the Atlantic, the development of broadcasting suffered an interruption during the First World War (1914–1918). There is evidence that the first broadcast programmes on a fixed schedule were made in the Netherlands in late 1919, by an early Dutch radio pioneer, Mr Hanso Schotanus à Steringa Idzerda.<sup>87</sup> Between July 1922 and July 1923, the Daily Mail in the United Kingdom (UK) covered the costs of two weekly broadcasts in the Netherlands. A little later, in 1924, broadcasts were resumed by a Dutch manufacturer of transmission equipment, the 'Nederlandse Seintoestellenfabriek' who later allowed the 'Hilversumsche Draadlooze Omroep' to make use of its transmission equipment.<sup>88</sup> Thus, the early days of Dutch radio were partly sponsored by manufacturers who hoped to open this new market, just like in the US.

Meanwhile, in 1922, a UK consortium of radio manufacturers formed the BBC, which came into existence as a public 'crown' corporation in 1927, one year before the Rome Act of the Berne Convention.<sup>89</sup> In Germany, the first radio stations went on air in Berlin in 1923.<sup>90</sup> In most of Western Europe, radio broadcasting quickly turned into a state monopoly, 'defined and structured by regulation', which lasted until the 1980s.<sup>91</sup> By the 1930s, radio challenged the influence of film and had become the 'dominant form of entertainment'.<sup>92</sup>

In 1928, the first experimental demonstrations of electronic televisions (by Farnsworth and Baird) took place, as well as the introduction of the first mechanical televisions on the market (by General Electric). This period also

marks the beginning of television broadcasts in the US. In Europe, following the first experimental broadcasts in 1929, the BBC started its regular television broadcasting in 1936; one year earlier, in 1935, television broadcasts had started in Nazi Germany. However, this development was put on hold due to the Second World War,<sup>93</sup> and in many countries in Europe no television service was developed until the 1960s.<sup>94</sup> During the first decades of its existence, television broadcasting in most European countries was operated by the state, a notable exception being Luxembourg.<sup>95</sup> The major breakthrough for television in terms of household penetration came with the introduction of the colour TV. In the US, the percentage of households with a colour TV increased from 5% in 1965 to over 50% seven years later, a diffusion speed similar to that of the internet two decades later and exceeding that of the Personal Computer and the Video Cassette Recorder (VCR). A similarly rapid growth was recorded in for instance France, after a 5% penetration rate was reached eight years later.<sup>96</sup> By 2015, 96% of EU households had access to a television, making television broadcasting a multi-billion euro business in the EU alone.<sup>97</sup>

European commercial broadcasting by satellite began with ASTRA in 1989.<sup>98</sup> By 1991, approximately 2.5 million households in Western Europe had direct satellite reception, mostly in the UK and Germany.<sup>99</sup> In terms of coverage, satellite could be received by 56 million households (35% of total households) in twenty-two European countries in 1995.<sup>100</sup> By 2015, 24% of EU households were receiving satellite television. In Western European countries, the penetration of satellite is even higher, at around 29% of TV households, totalling 50 million households, 26 million of whom have free-to-air and 24 million pay satellite.<sup>101</sup>

The major technology shift produced by broadcasting, when compared with telegraph technology, was an evolution from one-to-one to one-to-many communication of messages to multiple devices. When compared to distribution of public performances 'by any means' as discussed in the previous

85. H. Leblebici, G. Salancik, A. Copay and T. King, 'Institutional Change and the Transformation of Interorganizational Fields: An Organizational History of the U.S. Radio Broadcasting Industry', *Administrative Science Quarterly*, 36(3), September 1991, pp. 333–363.

86. *Ibid.*

87. W.B.H.J. van de Donk et al., *Media Policy for the Digital Age*, WRR, Amsterdam University Press (2005), p. 29.

88. A.A.M. Enserinck (1933). *De Nederlandse radio-wetgeving geschiedkundig ontwikkeld*. N. Samson N.V., Alphen aan den Rijn, p. 69.

89. Lord Windlesham (1980). *Broadcasting in a Free Society*, Blackwell, pp. 18–23; Wu 2011.

90. Wikipedia, *History of Broadcasting*, [https://en.wikipedia.org/wiki/History\\_of\\_broadcasting#Germany](https://en.wikipedia.org/wiki/History_of_broadcasting#Germany) (accessed 26 September 2017).

91. B. O'Neill and H. Shaw, 'Radio Broadcasting in Europe: The Search for a Common Digital Future', in O'Neill, B., M. Ala-Fossi, et al., (eds), *Digital Radio in Europe: Technologies, Industries and Cultures*, Bristol, Intellect Books (2010), pp. 27–42.

92. Austin 2012; Wu 2011.

93. See Wu 2011.

94. J. Bignell and A. Fickers, 'Introduction. Comparative European Perspectives on Television History', in: *A European Television History*, J. Bignell and A. Fickers (eds), Wiley-Blackwell (2008), p. 5.

95. M.J. Rusher, in: *World Broadcasting: A Comparative View*, Alan Wells (ed.), Ablex Publishing Corporation (1996), p. 30.

96. OECD 2004, *OECD Information Technology Outlook 2004*, Paris, pp. 142–144.

97. European Commission (2016), *E-Communications and the Digital Single Market. Special Eurobarometer 438*.

98. R. Collins, *Satellite Television in Western Europe*, John Libbey (1990).

99. Rusher 1996, p. 32.

100. R. Collins, *Satellite Television in Western Europe*. John Libbey (1990).

101. Broadband TV News, *Digital TV Western Europe Forecasts report* (2016). The countries studied in this report are Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the UK.

section, there is a similar distinction: broadcasting, as a medium of mass communication, allowed all within reach of the broadcast to ‘see or hear the same program at the same time’ without requiring ‘that the public is assembled in one location’.<sup>102</sup> Radio, in its early days, became ‘the technological vehicle that allowed synchronized communication to a new audience’.<sup>103</sup>

Broadcasting also had a profound effect on copyright, mainly because protected works constituted a significant portion of the content transmitted.<sup>104</sup> The programming of radio broadcasting, for example, primarily consisted of phonograph musical recordings.<sup>105</sup> Broadcast music became part of social interactions and firms’ business practices, a tool to promote musical works and artists, the technology itself, and other types of content (e.g., newspapers, films).<sup>106</sup> Advertising grew into the standard business model for radio, proving in time ‘almost a license to print money’ and, together with sponsorship, ‘gave radio stations a sustainable financial basis’.<sup>107</sup> Even for government-run television channels in Europe, advertising became an important source of revenue in most countries, alongside licence fees levied upon the purchase or ownership of television sets.<sup>108</sup> A powerful illustration of the economic significance of broadcasting and advertising revenues through broadcasting is the fact that by 1983 advertising revenues from radio and television had outgrown box office receipts from cinemas in most Western European countries.<sup>109</sup>

The question facing copyright policymakers in the early days of broadcasting was how to balance ‘the traditional view of authors’ rights with these new modes of communication: are new formulations of rights required, or do old formulations still hold good, necessitating only a flexible interpretation to apply to these changed conditions?’<sup>110</sup> Just as in the previous case of public performance, the issue was not that radio stations had somehow acquired the recordings they played illegally. Rather, the call for the extension of existing rights or the creation of new rights stemmed from the recorded music industry’s view that airplay would hurt record sales.<sup>111</sup>

102. Depreeuw, 2014, pp. 268–269.

103. Austin 2012.

104. *Ibid.*, pp. 436–437.

105. *Ibid.*, p. 121.

106. *Ibid.*, pp. 122–123.

107. Wu 2011.

108. J. Tydeman and E.J. Kelm, *New Media in Europe. Satellites, Cable, VCR and Videotex* (1986), McGraw-Hill, pp. 54–55.

109. *Ibid.*, pp. 54–55, 79. In real terms, box office revenues had stagnated in most Western European countries between 1970 and 1982.

110. Ricketson 1987, pp. 436–437.

111. Leblebici et al. 1991, pp. 333–363.

In the US, court battles in the 1920s ‘established that radio broadcasting implicated public performance rights of copyright owners’.<sup>112</sup> Ginsburg speculates that this was due to economic reasons and fears that unlicensed and free broadcasting would undercut rights holders’ revenues.<sup>113</sup>

The move allowed US performing rights organizations representing owners of copyright in musical works (ASCAP, BMI, and SESAC) to access the operation of radio broadcasters, setting the stage for a blanket voluntary collective licensing system under which the organization provides access to its repertoire against a percentage of the radio station’s revenues. That system survives to this day. It is noteworthy that the system initially applied to commercial establishments such as hotels, restaurants, and bars. As technology evolved, the licences were extended first to radio broadcasters, and later to ‘television broadcasters, movie and television show producers and webcasters’.<sup>114</sup>

In Europe, the potential for exploitation of works through broadcasting became apparent only after the First World War, namely through the transmission of musical compositions and plays to individual receivers in people’s homes, a ‘far wider audience than possible at one specific location’.<sup>115</sup> For the most part, domestic legislators grappled with the new reality by interpreting existing law to protect authors against unauthorized exploitation of works through the new technology.<sup>116</sup>

## 2.3.2 PROTECTION UNDER INTERNATIONAL LAW

### 2.3.2.1 Radio and Television

In a 1925 resolution, the ALAI urged that ‘radio electric transmission’ of literary and artistic works be treated as a public performance.<sup>117</sup> This was in the middle of the period of consolidation of broadcasting, but almost a decade before the advent of FM radio transmission.<sup>118</sup> The ALAI resolution

112. Austin 2012, pp. 123–128.

113. J. Ginsburg, ‘Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions’, *Revue Internationale du Droit d’Auteur (RIDA)* (2001), pp. 1620–1621.

114. G. Lunney, ‘Copyright Collectives and Collecting Societies: The United States Experience’, in: *Collective Management of Copyright and Related Rights*, D. Gervais (ed.), Kluwer Law International (2016), D. Gervais ed. (2016), pp. 319–348 (cit. p. 323, discussing ASCAP). See also Austin 2012, pp. 127–128.

115. Ricketson 1987, pp. 434–435.

116. Depreeuw, 2014, p. 267 (& n. 65); Ricketson 1987, p. 437.

117. *Actes de la Conférence réunie à Rome du 7 Mai au 2 Juin 1928* (Berne: Bureau de l’Union Internationale pour la Protection Des Œuvres Littéraires et Artistiques, 1929) [Records BC Rome 1928], p. 59, referring to the 1925 ALAI conference.

118. On the development of FM radio transmission as from 1934, see Wu 2011.

eventually led to the discussion of a broadcasting right in the 1928 Rome revision conference of the Berne Convention.<sup>119</sup> The programme proposal initially referred to a right of communication to the public by ‘telegraphy’, ‘telephony’, or ‘other analogous means serving to transmit the sounds or images’.<sup>120</sup> The reference to ‘artistic works’ and ‘images’ seems to indicate the ‘possibilities posed by the imminent advent of television’.<sup>121</sup> However, television was still in its infancy, explaining why specific discussions regarding television broadcasting are found only in the preparatory works of the 1948 Brussels Act of the Berne Convention.

The wording finally adopted in the Rome conference of 1928, in Article 11*bis*, referred to an exclusive right for authors to authorize the communication to the public of their works ‘by radio-diffusion’.<sup>122</sup> The provision was described as a reaction to the ‘new discovery of broadcasting’, an innovative medium for dissemination of works that introduced ‘a dramatically different vehicle of thought’.<sup>123</sup> Its regulation, through the ‘application of the principle of the exclusive privilege to radio broadcasting ... whatever may be the conditions governing the exercise of the privilege that national legislation adopts’, was classified as a ‘victory for copyright of considerable importance’.<sup>124</sup>

The article was balanced by the introduction – in paragraph (2) – of the possibility to subject the right to compulsory licensing. This was justified by a combination of public interest associated with the educational and informative role of broadcasting – as ‘in many countries this function was carried out by, or under the close supervision of, governmental or public authorities’ – with the specific group interest of broadcasters.<sup>125</sup> In particular, broadcasting organizations were concerned that CMOs representing the broadcasting rights of authors would abuse their monopoly positions on national markets in negotiations with commercial users.<sup>126</sup> In sum, the purpose of the provision ‘was to enable the contracting states to balance the

author’s exclusive rights with other policy considerations in other domains (e.g., education and culture)’.<sup>127</sup> When all is said and done, this article was considered one of the most important achievements of the conference.<sup>128</sup>

After the war, in 1948, the Brussels Act amended the Berne Convention regulation of broadcasting in an attempt to capture the developments of radio broadcasting and the relatively new invention of television.<sup>129</sup> The Brussels Act extended the scope of the exclusive right in Article 11*bis*(1) by introducing new items: point (ii) on communication to the public by wire or by rebroadcasting by a different organization, and point (iii) on communication by loudspeaker. From this moment onwards, the provision also covered acts of rebroadcasting, such as cable retransmission (*see* section 2.4 below). These new means of exploitation were therefore included in the scope of the author’s exclusive right.

The Brussels conference also incorporated a corresponding scope extension in paragraph (2) through some minor drafting changes and, more substantially, replacing ‘right’ with ‘rights’, thus covering all the new entitlements in paragraph (1), including cable retransmission.<sup>130</sup> This simple solution hides the ‘impassionate debate’ behind the adoption of paragraphs (2) and (3), which saw the opposing tendencies that manifested in 1928 resurface with vigour.<sup>131</sup> The conference did not yield a definition of broadcasting. The likely reason was the existence of a general international understanding of the term as an act of communication to the public.<sup>132</sup> The

119. Note that the term ‘broadcasting’ was only adopted in the 1971 Stockholm Act of the BC as the English translation of the French ‘*radiodiffusion*’. Until then, both English and French texts used ‘*radiodiffusion*’. This terminology choice, however, does not imply the exclusion of broadcasting of visual content from the scope of the provision. *See* Depreeuw 2014, pp. 268–270; and Records BC Rome 1928, p. 76.

120. Records BC Rome 1928, p. 76.

121. Ricketson 1987, p. 437.

122. *See* Depreeuw, p. 269, noting the different definitions of the term advanced in the reports of the 1928 Rome Conference and concluding that, although no definition was provided, the notion ‘was quite clear in the then technical and socio-economic context’.

123. Records BC Rome 1928, p. 255 (General Report).

124. *Ibid.* (statement by Mr Caselli, Rapporteur-General to the 1928 Rome revision conference).

125. Ricketson & Ginsburg 2006, p. 819.

126. Ricketson & Ginsburg, 2006, p. 819 (& n. 283), citing the comments of the national delegations (of Australia, New Zealand, Scandinavia, and the Netherlands) in the records of the 1928 Rome revision conference.

127. *Ibid.*, p. 297.

128. Records BC Rome 1928, p. 248 (General Report). The other main achievement was the recognition of the protection of moral rights in Art. 6*bis* BC. For further detail on the historical background of Art. 11*bis*(2), *see* Quintais, 2017, pp. 61–70.

129. In a communication before the ALAI Congress in 1958 on copyright and television, a former head of the copyright division at UNESCO argued for the need for an analogy between the legal regimes for radio broadcasting and television. *See* M.F. Hepp, ‘Droit d’Auteur et Télévision’, in: ALAI 1955–1958, *Compte Rendu du 47ème Congrès d’Amsterdam (3-8 septembre 1956) et des Journées ‘Art et Droit d’Auteur’ de Knokke-le-Zoute (14-17 mai 1958)*, pp. 190–192. For a discussion on the interpretation of Art. 11*bis* and its application to television after the Brussels Acts, *see* G. Straschnov, ‘Television and the Berne Convention’, *Revue Internationale du Droit d’Auteur (RIDA)* 9 – 10, 1955, pp. 40–59.

130. *See* Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission, COM(91) 276 final – SYN 358, 11 September 1991 [Explanatory Memorandum SatCab Directive], p. 16.

131. Records BC Brussels 1948, pp. 263–264 (General Report).

132. *See* M.H. Pilcher, *Copyright Problems of Satellite and Cable Television in Europe*, Martinus Nijhoff (1987), p. 22, and Ricketson 1987, p. 440. This understanding was embodied in the radio regulations of the International Telecommunications Union, which in that same year defined broadcasting as a ‘radiocommunications service of transmissions to be received directly by the general public’.



consensus as to the meaning of the term is also apparent from the preparatory documents of the Brussels Act.<sup>133</sup>

The 1967 Stockholm revision introduced an important clarification in terminology by adopting the term ‘broadcasting’ as the English translation of the French ‘*radiodiffusion*’. Until then, both English and French texts used ‘*radiodiffusion*’.<sup>134</sup> The impact of broadcasting was magnified by the advent of satellites (and later cable), which expanded its scope ‘enormously’, making possible ‘the diffusion of programmes from one continent to another, and even to most of the world at one time’. The result was an erosion of the relevance of national boundaries in the realm of communications technology, and ‘profound effects’ on fields like ‘popular education and entertainment, the conduct of international trade and business, diplomacy and defense’.<sup>135</sup>

This more versatile use of wireless technologies, as well as technical solutions for rebroadcasting and communication by wire, complicated the task of copyright. In particular, the introduction of separate technical steps in the process of disseminating the signals to the public (e.g., intermediary transmissions between providers before reaching the public) meant that copyright law struggled to qualify these technical acts.<sup>136</sup>

The current scope of Article 11*bis*(1) grants authors different exclusive rights to authorize the broadcasting of their work:

- Communication to the public by broadcast or by means of wireless diffusion.
- Communication to the public by wire or by rebroadcasting.
- ‘Public communication’ of broadcasts by loudspeaker or any other analogous instrument.<sup>137</sup>

133. Records BC Brussels 1948, p. 265.

134. See Depreeuw 2014, pp. 268–270; Ricketson 1987, pp. 438–439. Note that in Stockholm there was an unsuccessful proposal to exclude certain uses of cinematographic works from the scope of the compulsory licence. However, the licence remained unchanged as it ‘provided an acceptable compromise between opposing interests’. Actes de la Conférence de Stockholm de la propriété intellectuelle: 11 juin–14 juillet 1967: Records of the intellectual property conference of Stockholm: 11 June to 14 July, 2 vols (Geneva: OMPI/WIPO, 1971) [Records BC Stockholm 1967], pp. 1168, 1181–1182.

135. Ricketson 1987, pp. 436–437. See also Austin 2012.

136. Depreeuw 2014, pp. 264–265, 273, 280–282.

137. We are using ‘public communication’ here to mean something different from ‘communication to the public’. Following Ricketson and Ginsburg, the first term refers to secondary communication to a public place, rather than communication to a remote audience (the primary act). See S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Vol. I) (2nd ed.), Oxford University Press (2006), pp. 750–754 (*Comparative Table of Performance and Communication Rights*, 12.63).

### 2.3.2.2 Satellite

At this stage, it is important to note that the Berne Convention does not deal expressly with satellite broadcasting. The communicative capacities of satellites were recognized early on, after the launch of the first satellites in 1957 by the USSR (Sputnik 1) and in 1958 by the US (Explorer I). Their use for telecommunications proved to be an affordable and reliable alternative means of long-distance transmission of information, especially when compared to conventional broadcasting. Such use was ‘particularly revolutionary in the field of television transmission’, where it brought about ‘a dramatic increase in the number of potential viewing audiences’.<sup>138</sup> In 1965, the first commercial communications satellite INTELSAT I<sup>39</sup> entered geostationary orbit, triggering the spectacular growth in the adoption of this type of satellite.<sup>140</sup> In 1981, the European spacecraft launcher Ariane launched its first satellites, soon to be followed by dozens more.<sup>141</sup>

Despite not expressly mentioning communication by satellite, Article 11*bis*(1) Berne Convention applies to most acts of satellite broadcasting, as well as to acts of retransmission via wire or cable (on which see section 2.4 below).<sup>142</sup> In particular, this provision covers transmission of copyright-protected content by satellite where the signals are received directly by members of the public through the use of the necessary equipment (e.g., a satellite dish).

More controversial was the case of *intermediate* satellite transmission, where the ‘content is transmitted between distributors by means of satellite signals that cannot be captured by means normally at the disposal of the general public’ but that eventually reach that public over cable networks through the intervention of a cable distributor that picks up the transmission and distributes the signal to its subscribers.<sup>143</sup> These transmissions between point-to-point and distribution satellites, as opposed to direct-broadcasting satellites, were not aimed at reception by the public (through satellite dishes), but were rather intended ‘to assist programmers and broadcasting organizations to distribute their signals’.<sup>144</sup> Depending on its legal qualification, the

138. Pilcher, p. 8.

139. Nicknamed ‘Early Bird’ after the proverb ‘the early bird catches the worm’.

140. Pilcher, pp. 9–10. See also, International Telecommunication Union, *Overview of ITU’s History*, <http://search.itu.int/history/HistoryDigitalCollectionDocLibrary/12.28.71.en.pdf> (accessed 26 September 2017).

141. Tydeman and Kelm, p. 86.

142. Explanatory Memorandum SatCab Directive, pp. 9–13, describing the application of Art. 11*bis* BC to different acts of satellite broadcasting. See also Depreeuw 2014, p. 389, explaining the development of the international understanding of the scope of Art. 11*bis* to the acceptance ‘that satellite transmissions that the public could receive directly were also *broadcasts*’.

143. Depreeuw 2014, p. 318.

144. Pilcher 1987, p. 26. See also E. Ulmer, ‘Protection of Authors in Relation to the Transmission via Satellite of Broadcast Programmes’, *RIDA* 93 – 07, 1977, pp. 4–41.



'injection' or uplink of the work into the satellite by the broadcaster would be free from copyright (because it did not reach a 'public') or a restricted act of broadcasting. The issue was hotly debated, but no unanimous consensus on the qualification of intermediate satellite transmissions as acts of broadcasting emerged, leaving the issue to be determined by national laws and courts.<sup>145</sup>

Outside the Berne Convention, no international *copyright* instrument dealt with satellite broadcasting in the decades following the Stockholm Act, notwithstanding some attempts to do so in the context of UNESCO, WIPO, and the ILO.<sup>146</sup> In fact, only the broad exclusive right of communication to the public for authors in Article 8 WCT deals with this reality at an international level.<sup>147</sup> This right, which applies without prejudice to the different rights of communication in the Berne Convention,<sup>148</sup> covers any communication to the public of works by wire or wireless means, thereby applying to all types of broadcasting of works, including by satellite.

In the EU, despite there having been discussions on copyright aspects of satellite broadcasting since at least the 1970s, the issue was only settled in the 1993 SatCab Directive, following the CJEU decision in *Coditel I* (1980), the Green Paper on Television without Frontiers (1894), and the White Paper setting out the Commission's intention to create a 'Single European Broadcasting Area' (1985), a Commission Notification, and a Discussion Paper.<sup>149</sup> The directive recognizes, *inter alia*, an exclusive right for the

author to authorize the communication to the public by satellite of copyright works.<sup>150</sup>

The right applies to all types of satellite transmissions (whether from direct broadcasting or point-to-point satellites), whether the signal is received directly, or after decoding by an intermediary.<sup>151</sup> The right applies only where the signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, under the control and responsibility of the broadcasting organization, for reception by the public.<sup>152</sup> An important feature is that this is a 'Community-wide right' protected only in the Member State of origin of the satellite transmission, i.e., in the country where 'uplink of the programme-carrying signal occurs' rather than the countries in the reception area.<sup>153</sup> This right has been for the most part superseded by Article 3 InfoSoc Directive, which provides for a general right of communication to the public, including acts of satellite broadcasting.<sup>154</sup>

## 2.4 CABLE RETRANSMISSION

This section addresses cable retransmission, meaning the secondary communication, by cable networks to subscribers, of an initial transmission of originally broadcast or otherwise transmitted programmes. It does not discuss the initial transmission of 'cable-originated' programmes, also known as 'cable-casting'.<sup>155</sup>

145. For a description of the relevant discussions, see: Ulmer 1977; H. Cohen Jehoram, 'Legal Issues of Satellite Television in Europe', *RIDA* 122 – 10, 1984; Pilcher 1987, pp. 26–38; and Depreeuw 2014, pp. 318–329.

146. See Pilcher 1987, pp. 6–7, making reference to different initiatives. Note that the Brussels Convention of 1974 is not a copyright convention *stricto sensu* and deals primarily with the problem of unauthorized interception of signals. *Id.*, pp. 27–30.

147. Performers and phonogram producers are granted more limited exclusive rights of making available in Arts 10 and 14 WPPT, as well as a right to remuneration for broadcasting and communication to the public in Art. 15 WPPT.

148. Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii), and 14bis(1) BC.

149. See, CJEU Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films and others*, 19.03.1980 [*Coditel I*]; European Commission, 'Television without Frontiers', Green Paper, COM (84) def, Brussels, 14.06.1984 [Green Paper 'Television Without Frontiers']. European Commission, 'Completing the Internal Market, White Paper from the Commission to the European Council' (Milan, 28–29 June), COM (1985) 310 final, June 1985; Communication of the Commission to the Council and Parliament on Audiovisual Policy of 21 February 1990, COM (1990) 0078 final; European Commission, *Broadcasting and copyright in the internal market. Discussion paper*, III/F/5263/90-EN, Brussels, November 1990, p. 2. For earlier discussions, see A. Lokrantz-Bernitz, 'Telecommunications with Satellites and Copyright', *RIDA* 68 – 04, 1971; R. Plaisant, 'Intellectual Property and Communications by Satellites', *RIDA* 70 – 10, 1971 (citing studies by BIRPI/WIPO and UNESCO on the topic); ALAI, *Compte Rendu des Journées D'Études tenues à l'Hôtel de Massa à Paris (Société des Gens de Lettres) du 3 au 8 juillet 1972*, Paris (1974), pp. 152–171, containing the communications of J.V. Ungern-Sternberg ('*La transmission*

*d'émissions de radiodiffusion par satellites et le droit d'auteur*'), and R. Castelain ('*Les satellites*'). See also Pilcher 1987, pp. 18–50.

150. Article 2 SatCab Directive. Art. 1(1) and 1(2) define the act and place of the communication to the public by satellite. Note that the directive clarifies in Art. 4 that the concept of 'broadcasting by wireless means' under Arts 8 and 10 Rental Right Directive also encompasses 'communication to the public by satellite'. See also Common Statement by the Council and Commission at the internal market Council meeting of 18 June 1992. The Rental and Lending Rights Directive contains specific exclusive and remuneration rights regarding acts of broadcasting and communication to the public for related rights holders.

151. Articles 1(1) and (2)(c) and recital 6 SatCab Directive.

152. Article 1(2)(a) SatCab Directive. On the interpretation of these conditions, see Depreeuw 2014, pp. 370–381.

153. Hugenholtz 2009, p. 9, notes that 'Art. 1(2)(b) does not rule out that licence fees and other contractual conditions take into account the size of the footprint (i.e., the number of countries reached) of the satellite broadcast.' In this respect, see recital 17, which encourages parties to 'take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version'.

154. Hugenholtz 2009, p. 10; P.B. Hugenholtz, in Dreier/Hugenholtz, *Concise Copyright*, 'Satellite and Cable Directive' (2016), p. 322.

155. For a distinction between these two different types of service, see Pilcher, pp. 56–58.

## 2.4.1 THE RISE OF CABLE RETRANSMISSION

Just as for broadcasting, retransmission of radio signals preceded that of television. In the early twentieth century, radio retransmission over telephone lines served two distinct purposes. First, and primarily in the US, point-to-point telephone line connections were used to increase coverage of radio stations. Rather than using more powerful transmitters, less powerful radio stations were connected using telephone lines to create national coverage. Second, and primarily in Europe, radio lines were used as early as the 1920s in a point-to-multipoint setting to deliver radio signals to subscribers without the need to obtain a radio receiver.<sup>156</sup>

Retransmission gained economic significance in the 1950s, when subscription-based cable retransmission of commercial television channels, known as Community Antenna Television (CATV), was introduced in the US, to provide reception in areas where there was no or poor reception of the broadcast signal. Initially, commercial entrepreneurs built antennae to capture existing broadcast signals from neighbouring communities. The Federal Communications Commission did not require a licence for such retransmission, as long as no new services were included and the entrepreneurs were allowed to charge a fee to subscribers.<sup>157</sup> Cable television proved popular, and from 1959 onwards it was no longer limited to providing access to locally available television stations: its *raison d'être* started shifting towards providing access to remote channels. As a consequence, the industry tripled between 1959 and 1965.<sup>158</sup>

In Europe, cable networks developed more slowly than in the US. Master Antenna Television (MATV), aimed at improving the reception for apartment complexes or blocks of houses in cities (and at getting rid of individual rooftop antennae), emerged simultaneously with more extensive CATV networks operated by public entities. Either way, improving reception of national broadcast channels and in some cases receiving foreign channels, were the main purposes of cable networks. In many European countries the public telephony incumbents initially had a monopoly on the construction and operation of cable systems. The growth of (commercial) cable in the US rekindled the interest in cable networks in Europe. Still, by 1985, the European cable industry was claimed to be where the US industry had been ten years earlier, i.e., only on the brink of commercialization. In that year, there were about 12.3 million cable households in Western Europe. The

156. T.H. White, *United States Early Radio History*, <http://earlyradiohistory.us/index.html> (accessed 26 September 2017).

157. Tydeman and Kelm, p. 131.

158. N. Schaumann, 'Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption', *Fordham Law Review* 51(4), 1983, pp. 637–665.

countries with the largest percentage of cable subscribers were Belgium (80%), The Netherlands (70%), and Switzerland (40%).<sup>159</sup>

During the 1980s and 1990s, cable networks in Europe expanded rapidly, spurred by the development of satellite and commercial television, and followed by privatization and consolidation of local networks throughout much of Europe, which turned cable television into a multi-billion euro industry in Europe alone. By 2014, the average coverage (homes passed) of cable in the EU-28 was 54%. Excluding Italy and Greece where there is no coverage, this percentage was 63%, while in some countries, such as Belgium and the Netherlands, it is more than 95%.<sup>160</sup> About 29% of EU households with a television subscribed to a cable TV network (20% digital, 9% analogue) in 2015.<sup>161</sup> This made it the second largest TV infrastructure in Europe, after digital terrestrial television (DTT). Including TV reception of telephone networks, wired television accounts for 41% of EU households.

## 2.4.2 PROTECTION UNDER INTERNATIONAL LAW

The history of the legal protection of cable retransmission acts in the Berne Convention is intertwined with that of broadcasting, described above in section 2.3. As noted, wireless broadcasting (then: *radiodiffusion*) came under the Convention with the Rome Act of 1928. At that time, there was already discussion on the possible protection of retransmission and other secondary use of radio broadcasts. Yet, despite a proposal to that effect by the French Delegation, this did not come to pass.<sup>162</sup>

The issue was debated in national laws and courts. In the Netherlands, for instance, the 1930 *Radiocentrale* judgment of the Supreme Court ruled that a system allowing the passing of signals from a commercial broadcast, through a radio distribution system owned by a third party, to paying members of the public did not involve the rights of performance or reproduction. The decision turned on the fact that the broadcast signal was already available to the public in that geographic reception zone for the average consumer, and that the radio distribution system merely facilitated and simplified its reception.<sup>163</sup> However, this judgment was overturned eight

159. Tydeman and Kelm, pp. 131–138.

160. Arthur D. Little, *Cable Operator's Contribution to the European Digital landscape*, <http://www.cable-europe.eu/wp-content/uploads/2010/09/ADL-full-report.pdf> (accessed 26 September 2017).

161. European Commission (2016), *E-Communications and the Digital Single Market. Special Eurobarometer 438*, p. 23.

162. M. de Cock Buning, 'Cable Retransmission and Other Secondary Use', in: *A Century of Dutch Copyright Law: Auteurswet 1912–2012*, DeLex (2012), p. 261.

163. Supreme Court of the Netherlands, 3 April 1930, *NJ* 1931, p. 53 (*Radiocentrale*). Cf. De Cock Buning 2012, pp. 271–272; and Depreeuw 2014, pp. 306–307.

years later in *Caféradio*.<sup>164</sup> In this later case, the Supreme Court considered the use in a café of ‘service equipment with which radio signals could be received and made perceptible through speakers’ to be a restricted act of communication to the public, more precisely a secondary and simultaneous *openbaarmaking*.<sup>165</sup>

Turning back to the Berne Convention, the matter was considered in greater detail in Brussels (1948) when discussing proposed amendments to Article 11*bis*, aimed at accounting for different methods and techniques for exploitation of works in broadcasting and communication to the public.<sup>166</sup> The inclusion of retransmission and other secondary use of radio broadcasts was proposed by the *Bureau de l’Union* and the Belgian Government. Retransmission acts were necessary to respond to certain technical limitations of territorial broadcasting at that time, largely concerning the reach and quality of the signal.<sup>167</sup>

The proposal was for a new paragraph 2, which mentioned an exclusive right to authorize ‘*toute nouvelle communication publique, soit par fil, soit sans fil, de l’oeuvre radiodiffusée*’.<sup>168</sup> The idea was therefore to distinguish primary communications (the original transmission) from subsequent secondary use, such as retransmission by cable. The latter use would require the author’s consent if it reached a new circle of listeners as compared to the primary transmission.<sup>169</sup>

During the discussions it became clear that the criterion of ‘new audience’ – which can also be perceived to underlie the Dutch Supreme Court’s decision in *Radiocentrale* – was of difficult application. It was noted that, regardless of whether a new audience was reached, the broadcasting organization authorized to carry out the primary transmission should not require a separate authorization for the secondary transmission.<sup>170</sup> In this light, and facing opposition from other delegations, the Belgian delegation suggested replacing the word ‘*nouvelle*’ with the sentence ‘*lorsque cette communication est effectuée par un autre organisme que celui d’origine*’, i.e., replacing the criterion of ‘new audience’ or ‘new public’ with that of ‘new organization’ (i.e., ‘a body other than the original one’). This more functional requirement was considered ‘easier to apply in practice because the identity of the retransmitting organisation can usually be readily

ascertained’.<sup>171</sup> Although this makes practical sense, it is questionable whether the organizational structure of the industry should determine whether a retransmission requires authorization, especially due to the risk that such a requirement may incentivize vertical integration to avoid payment of retransmission fees.

The current wording of the provision was thus settled, having remained unchanged in the Stockholm (1967) and Paris (1971) revision conferences, with the exception of linguistic changes ‘to provide a more suitable translation in the newly authentic English text’.<sup>172</sup> Article 11*bis*(1)(ii) grants authors an exclusive right for secondary acts of communication by wire of the broadcast of the work, when made by an organization other than the original one. This means that the author has the right to authorize the cable retransmission of his works. As noted in section 2.3 above, the acts of cable retransmission covered by this provision are subject to the possibility of compulsory licensing under Article 11*bis*(2) Berne Convention.

Although the Berne Convention text appears to clearly cover secondary acts of cable retransmission, it is noteworthy that the 1970s and 1980s witnessed serious debates as to the legal qualification of certain activities under this right. In particular, national legislators and courts struggled with the technological overlap between broadcasting and cable retransmission, and whether the retransmission right should apply solely to a ‘new public’. The latter theory also went by many other names, sometimes referred to as arguments for each theory: ‘double payment’, ‘direct reception zone’, ‘license area’, or ‘service area’ (see section 2.3 above).<sup>173</sup>

However, and despite certain deviations, a mid-1980s study on, *inter alia*, the national legislation and higher court decisions in key European jurisdictions shows a trend towards the autonomous recognition of a cable retransmission right and the rejection of the ‘new public’ approach.<sup>174</sup> This trend coincided with the growing importance of cable networks for the reception of television in European households, and the commercialization of cable networks, described above. To apply the anachronism once more, it can be argued that a substantial and widening value gap had emerged, which the recognition of the retransmission right aimed to bridge.

For the sake of completeness, it is noted that cable retransmission is covered by the general right in Article 8 WCT, which refers to the respective provision in Article 11*bis*(ii) Berne Convention, discussed in section 2.3

164. Supreme Court of the Netherlands, 6 May 1938, *NJ* 1938, 635 (*Caféradio*).

165. De Cock Buning 2012, p. 272.

166. Guide to the Berne Convention for the Protection of Literary and Artistic Works, WIPO Geneva (1978) [WIPO Guide 1978], p. 66.

167. Depreuw 2014, pp. 278, 280.

168. Records BC Brussels, 1948, p. 270.

169. De Cock Buning 2012, p. 264.

170. *Ibid.*, pp. 263–264, describing the discussions of the amendment to Art. 11*bis* in 1948, and in particular the positions expressed by the Delegations of Monaco, the Netherlands, and Luxembourg.

171. P.B. Hugenoltz and S.C. van Velze, ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’, *International Review of Intellectual Property and Competition Law (IIC)* 47(7), 2016, p. 808.

172. WIPO Guide 1978, p. 66.

173. H. Cohen Jehoram, ‘General Report: Cable Television, Media and Copyright Law Aspects’, in ALAI Symposium 1982 on ‘Cable Television: Media and Copyright Law Aspects’ (Paris, 1983), pp. 217–233. See also Pilcher 1987, pp. 66–76.

174. Pilcher 1987, pp. 76–96, noting that countries were more divided on the introduction of systems of non-voluntary licence. See also Cohen Jehoram 1983, pp. 225–231.



above. Interestingly, the Basic Proposal for the WCT made no reference to Article 11*bis*(ii), leading to speculation that the WCT covered only primary acts of communication (e.g., broadcasting), but not secondary cable retransmission. Still, the provision did however apply to communication ‘by wire or wireless means’, leaving the status of cable retransmission unclear.<sup>175</sup> This apparent shortcoming was corrected in the final version by adding the safeguard reference to the Berne provision. As a result, the broad exclusive right of communication to the public in Article 8 WCT is without prejudice to the continued applicability of the Berne right of cable retransmission.

#### 2.4.3 PROTECTION UNDER EU LAW

In EU law, the SatCab Directive makes a legal distinction between satellite broadcasting and cable retransmission, the latter regulated by Articles 8–12. Like satellite broadcasting, the recognition of copyright protection in the EU for cable retransmission can be traced back to the *Coditel I* judgment (1980) and the Green Paper on ‘Television without Frontiers’ (1984).<sup>176</sup>

In *Coditel I*, the Court refused to recognize the application of the exhaustion doctrine to acts of cable retransmission.<sup>177</sup> At stake was the unauthorized retransmission in Belgium of a film broadcast in Germany with the authorization of the rights holder. The Court recognized the territorial exclusivity of the film producer’s right, which prevailed over the freedom to provide services across borders (Article 56 TFEU; ex Article 59 EC Treaty). To arrive at this decision, the Court relied on the fact that, at the time, television broadcasting services in the Member States were ‘traditionally organized on the basis of national monopolies’.<sup>178</sup> Article 8 SatCab Directive can be viewed as the legislative confirmation of this ruling.<sup>179</sup>

The 1984 Green Paper pointed out national differences regarding the scope of national rights of retransmission, reserved to the author under Article 11*bis*(1)(ii) Berne Convention. This right, and the existing national differences, posed a conflict with the freedom to provide services, at least regarding the possibility that rights holders could prevent unauthorized cable

retransmissions in territories other than that of an initial authorized transmission.<sup>180</sup>

To deal with potential obstacles to the free flow of broadcasts, the Commission considered dealing with cable retransmission through a system of statutory licensing.<sup>181</sup> However, by the time of the 1990 Discussion Paper, this possibility was off the table. This was largely due to existing contractual arrangements under the framework of collective rights management schemes in different Member States, such as Belgium, the Netherlands, and Germany – the most significant countries in Europe for cable retransmission.<sup>182</sup> The success of these arrangements led the Commission to suggest a mandatory collective management scheme for the cable retransmission right.<sup>183</sup>

The directive does not mandate an exclusive right for cable retransmission per se, but merely requires these acts to be restricted under copyright.<sup>184</sup> However, as Depreeuw notes, several elements in the directive confirm the exclusive nature of the retransmission right, and exclude the possibility of subjecting it to statutory licensing.<sup>185</sup>

The right applies only to simultaneous, unaltered, and unabridged retransmissions by cable of television or radio programmes for reception by the public originating in another Member State, following an initial transmission over the air or (unlike the Berne Convention) by wire.<sup>186</sup> The scope of the right aligns with economic reality, as in the 1980s this was already the most important ‘form of border-crossing television programmes’.<sup>187</sup> Furthermore, the right by definition requires a primary transmission and the use of the specific technology of cable as the means for the secondary transmission.<sup>188</sup> Unlike Berne, no requirement of a ‘new organization’ applies.

The reason why the directive focuses on cross-border cable retransmission of broadcasts is related to competence. There was no established case for harmonization of purely national retransmissions, since these did not affect the main objective of creating a single European audiovisual area. The directive also leaves to national law the issue of retransmissions of programmes originating from outside the EU.<sup>189</sup>

175. Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions 1996 (vols I and II), WIPO Publication 348 (WIPO: Geneva 1999) [Records WIPO Treaties], p. 12 (Art. 10 Basic Proposal for the 1996 Diplomatic Conference).

176. Cf. Pilcher 1987, pp. 52–56, referring also to a number of studies in the context of WIPO, UNESCO, and the Council of Europe.

177. M. van Eechoud, P.B. Hugenholtz, S. van Gompel, L. Guibault & N. Helberger, *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*. Kluwer Law International (2009), p. 312.

178. Van Eechoud et al. 2009, p. 312. Cf. *Coditel I*, paras 15–17.

179. Hugenholtz 2016, p. 327.

180. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable, ‘Television Without Frontiers’, COM (84) 300 final/annex, Communication from the Commission to the Council, 1984 [Green Paper 1984], p. 304.

181. *Ibid.*

182. EC Discussion Paper 1990, p. 27.

183. *Ibid.*, pp. 80–82; Explanatory Memorandum SatCab Directive, pp. 4–5, 8, 24–25.

184. Depreeuw 2014, p. 393.

185. *Ibid.*, p. 402, referring to recital 27 and the wording of Art. 8 SatCab Directive, which mentions individual or collective contractual agreements.

186. Articles 1(3) and 8 SatCab Directive.

187. Pilcher 1987, p. 96.

188. On the requirements of initial transmission and retransmission by cable, see Depreeuw 2014, pp. 393–400.

189. See Explanatory Memorandum SatCab Directive, p. 23; and Hugenholtz 2016, p. 320.

The exercise of the right is subject to a special regime of mandatory collective management in Articles 9–12 SatCab Directive, from which only broadcasting organizations are exempt. Still, despite this special regime, the right remains exclusive.<sup>190</sup> In essence, the proposed scheme determines the conditions of exercise of the right. This solution, consistent with Article 11bis(2) Berne Convention, enhances the bargaining position of authors, who retain the (collective) right to prohibit the exploitation of their works.<sup>191</sup>

The main rationale behind this option was not so much the protection of authors' interests but the facilitation of 'the practicable exploitation of programmes'.<sup>192</sup> The objective was to put in place a system that ensured cable operators could acquire cable retransmission rights in a timely manner and in their entirety.<sup>193</sup> Mandatory collective management would shield cable operators from refusals to licence by individual rights holders not represented by CMOs, in relation to their rights in retransmitted programmes (the so-called outsider problem).<sup>194</sup> Such refusals would have the effect of creating "black-outs" in programmes retransmitted by cable operators'.<sup>195</sup> The system would likewise provide that rights holders interested in cable retransmission 'would not be prevented from exploiting their rights'.<sup>196</sup>

Finally, it should be noted that the cable retransmission right was at a later date substantially harmonized (for authors) by Article 3(1) InfoSoc Directive as an integral part of that provision's broad right of communication to the public.

In sum, the recognition of a cable retransmission right in EU law, in line with the protection granted in the Berne Convention, was the result of a need to articulate the protection of rights holders with the fundamental freedom to provide services. The exclusive right prevailed as an exception to that freedom, but its exercise is restricted by a special regime of mandatory collective management, justified by the need to enable the exploitation of rights across the EU. Like with the Berne Convention's rejection of the 'new public' criterion in favour of that of a 'new organization', practical considerations related to the application of the right and its commercial exploitation shaped the choices for its legal design.

190. Hugenholtz 2006, p. 280. Art. 10 SatCab Directive contains the exemption for broadcasting organizations.

191. Depreeuw, 2014, pp. 403–404.

192. *Ibid.*, p. 406.

193. Explanatory Memorandum SatCab Directive, p. 32.

194. Depreeuw, 2014, pp. 402–403; and J. Rosén, 'The Satellite and Cable Directive', in: *EU Copyright Law. A Commentary*, Cheltenham, I. Stamatoudi & P. Torremans (eds), Edward Elgar (2014), pp. 234–235. See also Explanatory Memorandum SatCab Directive, pp. 20, 24, 32.

195. Hugenholtz 2016, p. 309.

196. Explanatory Memorandum SatCab Directive, p. 32.

## 2.5 COMMERCIAL RENTAL

From a legal perspective, rental can be defined as 'the transfer of the possession of a *copy* of a work or an object of *related rights* for a limited period of time, and for direct or indirect economic or commercial advantage'.<sup>197</sup> Some national laws include the concept under the general right of distribution, as an exception to or deviation from the exhaustion of the distribution right resulting from first sale or transfer of ownership of a physical copy. Other laws grant a specific right of rental alongside the right of distribution.<sup>198</sup>

### 2.5.1 THE RISE AND FALL OF COMMERCIAL VIDEO AND DVD RENTAL

Commercial rental of print books (outside the school book segment) never gathered steam for several reasons. For one thing, there is competition from public libraries lending books for free or against highly subsidized prices for social reasons. Second, the timeframe within which commercial rental of a specific title would be attractive is relatively short, as readers will want to keep rental books for a number of weeks at least, unlike video rentals. Rentals would be most attractive over such a period of high demand, but it would take a large number of copies during a brief window to actually make money. Lastly, delivery and return of print books involve significant costs and books are prone to damage and stains.<sup>199</sup> These arguments apply far less to commercial rental of, in particular, audiovisual material, which can explain why commercial rental of copyright works only became a business model of significance after the mass introduction of the video cassette recorder (VCR).

VCRs were introduced in the late 1970s, and in Europe there were initially three competing formats: VHS developed by JVC, Beta developed by Sony, and V-2000 developed by Philips and Grundig.<sup>200</sup> VHS eventually became the most widely adopted standard; despite its alleged technical superiority, V-2000 lost the race because of its relatively late market introduction and the unavailability of porn for this format.<sup>201</sup> Until 1979, total sales of VCRs in Western Europe were only 340,000, but sales more than doubled in each of the ensuing three years. By the end of 1984, VCRs' penetration had exceeded 20% of households in the UK, Western Germany,

197. WIPO Guide 2003, p. 307.

198. *Ibid.*, p. 307.

199. J. Poort, I. Akker, N. van Eijk, B. van der Sloot & P. Rutten (2012), *Digitally Binding. Examining the Feasibility of Charging a Fixed Price for e-books*. SEO-report 2012-18, p. 72.

200. Tydeman and Kelm, p. 160.

201. M. Naaijkens, *Video 2000 vs VHS*, <http://www.briljantemislukkingen.nl/nl/2012/02/03/video-2000-vs-vhs/> (accessed 26 September 2017).

the Netherlands, Ireland, and Norway.<sup>202</sup> It continued to grow rapidly in the following years and, according to estimates from the OECD for a selection of countries, diffusion from 20% to 50% penetration only took between three and six years. This diffusion rate is inferior to that of the PC and is largely comparable to that of the colour TV.<sup>203</sup>

The two main reasons for people to buy a VCR were time-shifting programmes broadcast at inconvenient times and – particularly in countries with limited local programming or poor reception – to rent or buy pre-recorded cassettes. In Europe, halfway through the 1980s, 80% of pre-recorded tapes were commercially rented rather than bought and rental outlets had sprung up across Europe.<sup>204</sup> Tape rental boomed throughout the 1990s. From the development of the DVD standard in 1995 onwards, VHS rental gradually lost terrain to this digital video disc of superior technical quality. Including sales, the home video industry (DVD plus video-cassette) was the largest source of revenue for the film industry in the US in 1999, when it accounted for 55% of industry revenues. About half of this came from rental, the other half from sales.<sup>205</sup> In the Netherlands, turnover from VHS and DVD rentals was roughly equal to that from cinema and art-house theatre admissions during the first few years of the century.

Around 2005, however, the rental market started to decline very rapidly. This can be linked to the emergence of digital rental (video on demand), streaming video subscriptions, and unauthorized file sharing. To illustrate this: between 1998 and 2004, there were between 1,000 and 1,150 DVD/video rental shops in the Netherlands. In the following years, this number declined by more than 10% each year, and there were only 470 such shops left by the end of 2008.<sup>206</sup> By February 2015, this number had dropped to 176,<sup>207</sup> and by 2017 there seem to be only a few left.<sup>208</sup>

## 2.5.2 PROTECTION UNDER EU LAW

In international law, despite discussions in the context of WIPO in the 1980s, a right of rental is only granted in TRIPS (1994) and in the WIPO Treaties

202. Tydeman and Kelm, p. 159.

203. OECD 2004, *OECD Information Technology Outlook 2004*, Paris, pp. 143–144.

204. Tydeman and Kelm, p. 165.

205. Video Software Dealers Association (VSDA), *Annual Report on the Home Video Market* (2000).

206. CBS, *Aantal videotheken gehalveerd in tien jaar tijd*, <https://www.cbs.nl/nl-nl/nieuws/2008/47/aantal-videotheken-gehalveerd-in-tien-jaar-tijd> (accessed 26 September 2017).

207. RTL, *Wanneer verdwijnt de laatste videotheek*, <https://www.rtlnieuws.nl/economie/home/wanneer-verdwijnt-laatste-videotheek> (accessed 26 September 2017).

208. For example see: M. van den Tempel, *Longread, Last Action Heroes: de laatste videotheken van Nederland*, <http://revu.nl/uit-ons-archief/longread-last-action-heroes-de-laatste-videotheken-van-nederland/> (accessed 26 September 2017); J. Chorus, *De laatste videotheek*, <https://www.nrc.nl/nieuws/2016/08/28/de-laatste-videotheek-4036790-a1518381> (accessed 26 September 2017).

(1996). In EU law, the right is found in the Computer Programs Directive (1991, codified 2009) and in the Rental and Lending Rights Directive (1992, codified 2006).<sup>209</sup> Because the European directives preceded the international provisions, they are addressed here first.

Having said that, legal discussions on copyright and video-cassettes largely predate the boom in the market for VCRs and cassette tapes, and can be traced back as early as the 1960s. For example, based on a Report by Professor Torben Lund, an ALAI Resolution of 1961 advocates the participation of authors in the revenues from the rental of books and records.<sup>210</sup>

About a decade later, it is possible to find discussions on the topic in the 1972 ALAI conference, which contains a couple of reports and communications on the legal aspects of the use of works on video-cassettes. However, the legal questions that arose relate mainly to the rights of reproduction (namely private use) and ‘représentation’ of video-cassettes, despite some prescient references to the possibility of rental.<sup>211</sup>

In a 1983 study on rental of videograms and related market phenomena, Karnell discusses the commercial practices emerging at the beginning of the decade, including the practice by videoclubs to enable both the hire (rental) and ‘swapping’ (exchange) of videograms. At this time, the growing relevance of these practices for the general public meant that the retail sale of videograms was already but a ‘marginal part of the market’.<sup>212</sup> A key element in the discussions at the time was the uncertain application of the exhaustion principle to the right(s) of distribution and rental in different national laws, seen as one of the main ‘evils ... haunting the videogram (and phonogram) market’.<sup>213</sup>

The Computer Programs Directive was the first copyright instrument to be adopted in the EU following the publication of the White Paper on completing the Single Market by 1992. The directive was adopted in 1991 and repealed, replaced, and codified in 2009. Prior to its adoption, in 1989,

209. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). This instrument repeals Directive 91/250/EEC, as amended [Computer Programs Directive]. For the international discussions in the 1980s, see Karnell 1983, p. 79; and T. Desurmont, ‘The Author’s Right to Control the Destination of Copies Reproducing His Work’, *RIDA* 134 – 10, 1987, p. 8.

210. See ALAI Congress 1961 (Florence), 11–16 September, pp. 161–162, Resolutions et Voeu, ‘Pret et Location des Livres et des Disques’.

211. ALAI 1974, pp. 95–139, containing the Reports and Communications of D. Gaudel (‘Videogrammes et droits d’auteurs’: *Droit Français et Convention de Berne*); M. Fabiani (‘*les Aspects Juridiques de L’Utilisation par Video-Cassete d’œuvres protégées*’); and G. Karnell (‘*Les Problèmes des Video-Cassettes Envisagées du Point de Vue Scandinave*’). The latter authors make express mention of renting as a problem ‘relating to the ulterior use of copies of works’. *Id.*, pp. 131–133.

212. G. Karnell, ‘Rental and Related Market Phenomena Concerning Videograms and the Right of Distribution’, *RIDA* 115 – 01, 1983, p. 83.

213. G. Karnell 1983, pp. 93 et seq. (cit. p. 95).



available figures showed that the cost of piracy of computer programs in seven countries of the Community alone amounted to USD 4.5 billion. The directive was therefore aimed at stemming 'this enormous illicit trade in computer programs'.<sup>214</sup>

The directive has its roots in the 1985 White Paper on the Completion of the Internal market and the 1988 Green Paper on Copyright and the Challenge of Technology.<sup>215</sup> The rationale for the grant of a rental right is explained in the 1989 proposal for a directive.<sup>216</sup> Contrary to analogue private copies of music and video content, which were of inferior quality to originals, it was possible to make a large number of perfect digital copies of software from a single copy. This increased the risk that an unregulated rental market would potentially substitute for the sale of copies by rights holders.<sup>217</sup>

Among the restricted acts identified in the directive, Article 4(1)(c) grants an exclusive right 'to do or to authorise ... any form of distribution to the public, including the rental, of the original computer program or of copies thereof'. Article 4(2) clarifies that the right of distribution of a copy of a program is subject to exhaustion after the 'first sale in the Community of a copy of a program by the rightholder or with his consent', but that such exhaustion does not apply to 'the right to control further rental of the program or a copy thereof'. The right is granted to authors, legal persons (where allowed by national law<sup>218</sup>), or employers (by virtue of a legal presumption<sup>219</sup>).

The year after the adoption of the Computer Programs Directive, the EU adopted the Rental and Lending Rights Directive, which contained a more general approach to the rental right. The directive was preceded by two significant developments in 1988: the landmark CJEU (then ECJ) judgment in *Warner v. Christiansen* (17 May), and the aforementioned Green Paper on Copyright and the Challenge of Technology (7 June).<sup>220</sup>

214. European Commission, Press Release, *The Twelve Decide To Protect Computer Programs: Piracy Costs More Than Four Billion Dollars A Year*, 15.05.1991, [http://europa.eu/rapid/press-release\\_IP-91-420\\_en.htm](http://europa.eu/rapid/press-release_IP-91-420_en.htm) (accessed 26 September 2017).

215. European Commission, 'Completing the Internal Market', White Paper, COM (85) 310 final, Brussels, 14.06.1985 [White Paper 1985], and European Commission, 'Copyright and the Challenge of Technology', Green Paper, COM (88) 172 final, Brussels, 07.06.1988 [Green Paper 1988]. For a historical account of the development of copyright protection for software, see T. Dreier, 'The International Development of Copyright Protection for Computer Programs', in *A Handbook of European Software Law*, Lehman and Tapper (eds), Oxford (1993), pp. 216–238.

216. Proposal for a Council Directive on the legal protection of computer programs, COM (1988) 816.

217. *Ibid.* See also Walter & von Lewinski, p. 140.

218. See Art. 2(1) in fine Computer Programs Directive.

219. See Art. 2(3) Computer Programs Directive.

220. CJEU, Case C-158/86 *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen* [*Warner v. Christiansen*].

By way of background, it is noted that in 1988 there were substantial differences in national laws regarding the rental right for sound recordings. In a first group of countries, the right was exhausted on first sale (Italy, Netherlands). In a second group there was no exhaustion (Denmark, Spain, and Portugal). In a third group, no clear right of rental existed, although a similar effect could sometimes be achieved through contract or conditional exercise of the reproduction right. For the most part the right belonged to the author, only rarely to producers, and never to performers.<sup>221</sup> The situation was similar for rental of video recordings, with the significant difference that film producers were considered authors pursuant to Article 2(1) Berne Convention.<sup>222</sup>

The first major development in 1988 was the *Warner v. Christiansen* judgment, which laid bare the community dimension of rental rights. The case concerned the interpretation of Articles 30 and 36 of the EEC Treaty (current Articles 34 and 36 TFEU) and the compatibility of the freedom to provide services with national copyright legislation. By that time, Danish copyright law already contained a lending right, giving authors the right to authorize or prohibit the hiring-out of video-cassettes. This right was to apply even when the same cassettes were put into circulation with his consent in another Member State whose legislation allows authors to control the initial sale but not the subsequent hiring-out.<sup>223</sup>

In this case, a video-cassette was purchased in the UK and then imported to Denmark by the manager of a video shop in Copenhagen, for the purpose of hiring it out to his clients. The rental right recognized under Danish law had not been cleared by the video shop owner, who was relying on its exhaustion. However, Danish law applied without distinction to video-cassettes produced in situ or imported from another Member State, merely distinguishing the type of transaction in question, i.e., whether it was a sale or a rental. The Court took this into consideration to conclude that the national law did not operate an arbitrary discrimination in trade between Member States, rejecting exhaustion of the rental right.<sup>224</sup>

The Court pointed out the emergence of a specific market for hiring-out of video-cassettes, distinct from their sale.<sup>225</sup> It further noted that granting

221. Green Paper 1988, pp. 157–159. Note that the exceptional cases where the right also belonged to producers were Portugal and France.

222. Green Paper 1988, p. 159.

223. *Warner v. Christiansen*, paras 1–9.

224. *Ibid.*, paras 12, 18.

225. *Ibid.*, para. 14: 'The existence of that market was made possible by various factors such as the improvement of manufacturing methods for video-cassettes which increased their strength and life in use, the growing awareness amongst viewers that they watch only occasionally the video-cassettes which they have bought and, lastly, their relatively high purchase price. The market for the hiring-out of video-cassettes reaches a wider public than the market for their sale and, at present, offers great potential as a source of revenue for makers of films.'



right holders control only over sales would be insufficient to secure 'for them a satisfactory share of the rental market'. This explained why some national laws (such as in Denmark) already contained a specific rental right. For the Court, this made such a right 'clearly justified on grounds of the protection of industrial and commercial property pursuant to Article 36 of the Treaty'.<sup>226</sup> In this light, it stated that the lawful putting into circulation of a video-cassette in a Member State that does not specifically protect hiring-out of the same, will not prevent the rights holder from benefitting from this type of protection in another Member State where such a right is granted.<sup>227</sup>

In the end, the legislation at issue was considered compatible with the freedom to provide services, meaning that rights holders could rely on it to exercise their exclusive right of rental, even if a video-cassette was lawfully acquired in another Member State.<sup>228</sup> In essence, like with the cable retransmission right in *Coditel*, the Court established that the doctrine of exhaustion did not apply to the rental right.

Similar to what was observed in the cases discussed in the preceding sections, the motivation to create rental rights in EU Law was primarily the fact that the rental market generated revenues that rights holders felt entitled to, and could not be captured by the reproduction right: a new value gap was born. In the Green Paper on Copyright and the Challenge of Technology, the Commission set out its rationale for introducing a general rental right in EU law. The paper analyses rental in the context of distribution of sound and video recordings.<sup>229</sup> It states that commercial exploitation of rental is profitable where the recording media is less susceptible to damage. This was for example the case for tape cassettes and (laser-read) Compact Discs (CDs). For sound and video recordings, different factors were considered to have a negative effect on the income of rights holders. First, the development of the audio tape recorder allowed high quality and low-cost home copying by hirers. Second, the increasing number of VCR rental outlets in and outside of Europe was diverting legitimate business from licensing distributors. Third, those outlets often rented out pirated copies. For VCR in particular, rental had become the predominant distribution method, due to the high price of purchasing a cassette and the degradation in quality resulting from repeated playing.<sup>230</sup> It is worth pointing out that some of these factors are remarkably similar to the arguments advanced at national and EU level to justify the adoption and continuing extension of private copying levies.<sup>231</sup>

Against this background, the Commission was of the view that commercial rental would be of increasing importance as a means of

226. *Warner v. Christiansen*, para. 16.

227. *Ibid.*, para. 18.

228. *Ibid.*, para. 19.

229. Green Paper 1988, pp. 155–166.

230. *Ibid.*, pp. 155–157.

231. *See, e.g.*, Poort and Quintais.

distribution. It argued that uncontrolled rental posed a risk of economic damage to rights holders, who would likely respond by raising sales prices, therefore also prejudicing the position of consumers intending to purchase recordings.<sup>232</sup>

After a narrower initial proposal, comments and suggestions on Chapter 4 of the Green Paper (1 December 1988), and hearings held by the Commission in 1989, the proposal for a directive was finalized in December 1990 and published on 24 January 1991.<sup>233</sup> The proposal defined rental as an exclusive right and extended its scope to include all categories of rights holders and subject matter.<sup>234</sup> The exclusive nature of the right was justified on the need to prohibit rental to preserve the sales in certain sectors (e.g., newly released CDs) and to provide rights holders with a stronger bargaining position in licensing negotiations.<sup>235</sup>

Following some amendments proposed by the European Parliament, and a few additional steps in the legislative proposal, the directive was finally adopted on 19 November 1992.<sup>236</sup> It requires Member States to provide exclusive rental rights for originals and copies of works and related subject matter.<sup>237</sup> 'Rental' is defined as the 'making available for use, for a limited period of time and for direct or indirect economic or commercial advantage'.<sup>238</sup> It is distinguished from 'lending', which refers to the same type of use but 'not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public'.<sup>239</sup> Rental rights are not subject to exhaustion.<sup>240</sup>

The exclusive right belongs to authors (for the original and copies of his work), performers (for fixations of their performances), phonogram producers (for their phonograms), and producers of the first fixation of a film (for the original and copies of their films).<sup>241</sup> There is a presumption of transfer

232. Green Paper 1988, pp. 161–165. *See also* Reinbothe & von Lewinski 1993, p. 5.

233. For a historical account, *see* Reinbothe & von Lewinski 1993, pp. 5–6; Green Paper 1988, pp. 161–165; and Follow-up Green Paper – Working Programme of the Commission in the Field of Copyright and Neighbouring Rights, COM (90) 584 final, 17.01.1991 [Follow-up Green Paper 1991].

234. Follow-up Green Paper 1991, p. 15; Reinbothe & von Lewinski 1993, pp. 6–7.

235. Reinbothe & von Lewinski 1993, pp. 10–12, and 16–19 (on the reception of the proposal by the affected stakeholders).

236. For the relevant documents, *see* Procedure 1990/0319/SYN, COM (1990) 586: Proposal for a Council Directive on Rental Right, Lending Right, and on Certain Rights Related to Copyright, [http://eur-lex.europa.eu/procedure/EN/1990\\_319](http://eur-lex.europa.eu/procedure/EN/1990_319) (accessed 26 September 2017).

237. Article 1(1) Rental and Lending Rights Directive.

238. Article 2(1)(a) Rental and Lending Rights Directive.

239. Article 2(1)(b) Rental and Lending Rights Directive.

240. Article 1(2) Rental and Lending Rights Directive, referring to 'any sale or other act of distribution of originals and copies of copyright works and other subject matter'.

241. Article 3(1) Rental and Lending Rights Directive.

of rental rights of performers in favour of producers in the context of film production contracts, a presumption which might be extended to authors.<sup>242</sup>

In addition, if an author or performer transfers or assigns their right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer retains an unwaivable right to equitable remuneration.<sup>243</sup> This right can be subject to mandatory collective management by a CMO, who will claim and collect the remuneration from parties to be identified by law, typically producers and rental shops.<sup>244</sup> As regards subject matter, although the right applies to all works, its main focus of protection is video and sound recordings, as these generated the highest economic investments.<sup>245</sup> Only excluded are buildings or works of applied art.<sup>246</sup> Furthermore, the directive is without prejudice to Article 4(c) of the Computer Programs Directive, discussed above. As a final remark, it is noted that subsequent judgments of the CJEU, and the InfoSoc Directive, confirm that the exhaustion of the distribution right does not apply to the rental right.<sup>247</sup>

### 2.5.3 PROTECTION UNDER INTERNATIONAL LAW

The TRIPS Agreement contains two provisions on rental rights: Articles 11 and 14(4). It is the first international agreement to recognize such a right, and is therefore considered to be 'Berne-plus' in this respect. The background to these provisions can be found in the 1990 *Anell* (23 July) and *Brussels* (3 December) drafts of the agreement.<sup>248</sup>

The discussions on the *Anell Draft* clarify that national delegations could not agree on the recognition of a general distribution right. Rather, agreement was only possible on a subset thereof – a rental right – as applied to two categories of works: computer programs and cinematographic works.<sup>249</sup> The right to control commercial rental of computer programs in

particular 'was considered a priority by many negotiators', as such rental activities had led to widespread copying by users.<sup>250</sup>

By the time of the *Brussels Draft*, no proposals for a general distribution right were advanced.<sup>251</sup> This draft subjected the obligation to grant the rental right to a material impairment test vis-à-vis the reproduction right. That is to say, Members only had to grant the right if the rental of works led to their 'unauthorized' copying. Such term was later replaced by 'widespread' copying, thereby shifting the core of the material impairment test from the *illegal nature* of copying activities to their *economic impact*.<sup>252</sup> Here, as with the debate at the EU level, the justification of the rental right as a means to preserve the economic core of the reproduction right – a 'legal firewall' of sorts – comes to the surface, as do echoes of the economic concerns with private copying activities.

According to Gervais, one of the aims of the impairment test was to ensure the imposition of the rental right 'on as many countries as possible, while leaving in particular the United States out'. Such a right had failed to make it into legislation in the US, despite lobbying from the film industry. It was therefore politically difficult to pass it at this stage. Thus, forcing the US to accept it 'could have endangered ratification of the Round as a whole'.<sup>253</sup>

In the US, section 106(3) of the Copyright Act gives copyright owners the exclusive 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'. This right is subject to a general limit, known as the first sale doctrine (the US equivalent of the European exhaustion doctrine), codified in section 109. That provision allows the owner of a particular copy or phonorecord that was lawfully made, or any person authorized by such owner, to sell or otherwise dispose of the possession of that copy or phonorecord without the owner's prior consent. However, section 109 excludes from its scope the rental, lease, or lending of sound recordings and computer programs, prohibiting such subsequent uses without the express permission of the copyright owner.<sup>254</sup>

Despite the aforementioned lobbying efforts, the US movie and video rental industry never benefited from this exclusion. As an alternative, that industry developed – with great commercial success – 'a pricing structure for new-release videos that is designed to compensate for the rental market',

242. See Arts 3(3)–(5) Rental and Lending Rights Directive.

243. Article 5(1)–(2) Rental and Lending Rights Directive.

244. Article 5(3)–(4) Rental and Lending Rights Directive.

245. Recital 5 Rental and Lending Rights Directive.

246. Article 3(2) Rental and Lending Rights Directive.

247. See CJEU, Case C-61/97 *Laserdisken*; and CJEU, Case C-200/96 *Metronome Musik v. Music Point Hokamp*. See also recital 28 and Art. 4 InfoSoc Directive.

248. GATT, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Anell Draft* (MTN.GNG/NG11/W/76), 23 July 1990; Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (MTN.TNC/W/35/Rev.1), 3 December 1990.

249. UNCTAD–ICTSD, *Resource Book on TRIPS and Development*, Cambridge: CUP (2005), p. 173.

250. D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 1st ed., Sweet & Maxwell (1998), p. 84.

251. Note that this draft 'still contained a bracketed reference to a remuneration right as an alternative to the right to prohibit or authorize the commercial rental of copyrighted works'. Cf. UNCTAD–ICTSD 2005, p. 174.

252. UNCTAD–ICTSD 2005, p. 174.

253. D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed., Sweet & Maxwell (2008), p. 231.

254. J.E. Cohen, L.P. Loren, R.L. Okediji, and M.A. O'Rourke, *Copyright in A Global Information Economy*, 3rd ed., Wolters Kluwer (2010), pp. 351–352.

coupled with technological protection measures to limit follow-on copying of rental videos.<sup>255</sup> By the time the TRIPS Agreement was being negotiated, the prevailing view in the US favoured this approach and opposed restricting the commercial rental of films. It was this context that led to the current version of Article 11 TRIPS.<sup>256</sup>

The final version of the provision grants authors and their successors an exclusive right regarding the 'commercial rental to the public' of originals or copies of their copyright works. The provision sets a minimum standard: it is applicable 'at least' in respect of computer programs and cinematographic works, but members can extend the right to other subject matter.<sup>257</sup> The right has further qualifications. First, protection of cinematographic works is subject to an impairment test. There is only an obligation to grant the right if the rental of such works has led to their widespread copying and this is materially impairing the exclusive right of reproduction conferred in that Member country. Second, regarding computer programs, the obligation to grant protection is only imposed where the program itself is not the essential object of the rental.<sup>258</sup>

Article 14(4) TRIPS applies the provisions of Article 11 in respect of computer programs *mutatis mutandis* to phonogram producers and any 'other right holders in phonograms' under a Member's law. Other rights holders likely include the authors of the underlying musical composition and lyrics, as well as performers. The *mutatis mutandis* application means that there is no obligation to grant protection to rentals where the phonogram itself is not the essential object of the rental.<sup>259</sup>

The provision is limited by a 'grandfathering clause'. The clause allows the survival of existing equitable remuneration systems for rental of phonograms, provided that on the relevant date (15 April 1994) 'the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders'.<sup>260</sup>

The WIPO Treaties recognize exclusive rental rights for authors, performers, and phonogram producers.<sup>261</sup> A general rental right in the WCT was initially advanced by Article 9(1) of the Basic Proposal I for the 1996 Diplomatic Conference.<sup>262</sup> Article 9(2) of the proposal allowed the exclusion of specific types of works from the general right, but prohibited such exclusion from applying to computer programs, collections of data or other

255. *Ibid.* p. 352.

256. *Ibid.* pp. 351–352.

257. Dreier and Hugenholtz, in: *Concise Copyright* (2016), 'TRIPS', Art. 11, note 1, p. 228.

258. This aspect is a novelty in relation to the Brussels Draft. Cf. UNCTAD–ICTSD 2005, p. 174.

259. Dreier and Hugenholtz, in: *Concise Copyright* (2016), 'TRIPS', Art. 14, note 5, p. 235.

260. Article 14(4) TRIPS. See also P. Kamina, in: Cottier/Véron (eds), *Concise IP Law*, 'TRIPS Agreement' (2015), Art. 14, note 5.

261. Article 7 WCT and Arts 9 and 13 WPPT.

262. Records WIPO Treaties, p. 10.

material in machine-readable form, and musical works embodied in phonograms.<sup>263</sup>

Despite the initial approach favouring a general right, it was ultimately agreed not to go beyond the TRIPS level of harmonization. The final version of the WIPO Treaties was adopted on 20 December 1996, and they were implemented in the EU on 16 March 2000.<sup>264</sup> The WCT grants a general distribution right in Article 6 and specific rental right in Article 7. The latter provision grants authors of: (i) computer programs, (ii) cinematographic works, and (iii) works embodied in phonograms, an exclusive right to authorize the 'commercial rental to the public of the originals or copies of their works'.<sup>265</sup>

The right comes with restrictions similar to TRIPS. For computer programs, it does not apply if the program itself is not the essential object of the rental. For cinematographic works, recognition of the right is only possible if such commercial rental has led to widespread copying of such works, materially impairing the exclusive right of reproduction.

The WCT deviates from Article 14(4) TRIPS in relation to phonograms. First, the WCT recognizes a rental right for authors of works embodied in phonograms, in terms to be defined by national law.<sup>266</sup> Second, it grandfathered 'pre-existing national practices dealing with record rentals' – namely systems of equitable remuneration of authors for the rental of copies of their works embodied in phonograms – by subjecting them to an identical impairment test to that applied to audiovisual works.<sup>267</sup>

## 2.6 PATTERNS AND CONCLUSIONS

This chapter described the evolution of economic rights recognized in international copyright law in the pre-internet era, against the backdrop of

263. *Ibid.*

264. Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ L 089, 11/04/2000 pp. 6–7.

265. According to the Agreed Statements on Arts 6 and 7, the expressions 'copies' and 'original and copies', being subject to the right of rental under this provision 'refer exclusively to fixed copies that can be put into circulation as tangible objects'.

266. UNCTAD–ICTSD 2005, p. 176, noting that Art. 14(4) TRIPS recognizes such a rental right for 'producers of phonograms and any other right holders in phonograms as determined by domestic law'. The Agreed Statements on Art. 7 clarify that 'the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.'

267. Article 7(3) WCT. Regarding performers and phonogram producers, Arts 9 and 13 WPPT are similar to their TRIPS counterparts, differing solely on the beneficiary rights holders. See UNCTAD–ICTSD 2005, p. 176.



related developments in the commercial exploitation of works and technological development. It did so by analysing four case studies that relate to communication and dissemination of works: public performance, radio and TV broadcasting, cable retransmission, and commercial rental. In each case, the history of protection under international and EU copyright law is described. Alongside this, the development of relevant technology and exploitation models was outlined.

The first reason to focus on the communication and dissemination of works in the selected case studies, rather than on reproduction, is that reproduction rights emerged much earlier in history than communication rights. The second, and more important, reason is that the right of reproduction appears to have been less controversial than various rights relating to communication or making works available to the public.

The discussion of the evolution of the *public performance right* reveals that it started in France in 1777 on the basis of a claim by playwrights for remuneration for the public performance of their plays. This was a time when theatres were important in social and cultural life in France. The rise in the number of theatres in Paris, and the production and performance of many new plays around the end of the eighteenth century, however, is linked to the abolition of the existing legal privileges and government control over theatres in 1791, not to the recognition of performing rights for playwrights.

Extension of the public performance right to musical works occurred in 1847, around the time café-concerts became the epicentre of social life in Paris. It was clear that these establishments monetized the value generated by the performances by charging entry fees and raising the price of their drinks. The performance right transferred some of that value to the authors.

Between then and 1971, the scope of the right was gradually expanded in response to technological and commercial developments, such as the introduction of pianolas and gramophone records, cinema, and the theatre-phonograph. A public performance right was also recognized in the Berne Convention, albeit through the mechanism of national treatment. By 1971, a general exclusive public performance right had been introduced in the Berne Convention (in the 1948 Act), taking the scope of the right beyond direct presentation by natural persons to include performances through the use of *any* equipment. Meanwhile, the protected subject matter was broadened to include musical and dramatico-musical and (in a separate provision) cinematographic reproductions and adaptations of works. The general formulation of a performance right in relation to any equipment made it future-proof with respect to new technologies and exploitation models for public performance. At the same time, however, it introduced the risk that certain activities would come to fall under the right without clear normative justification.

*Radio broadcasting* emerged in the interbellum of the twentieth century. By the 1930s, radio challenged the influence of film and had become the dominant form of entertainment. In the early days, radio manufacturers were

an important sponsor of radio broadcasts, hoping to sell more radio sets and transmitters. However, in most of Western Europe, radio broadcasting quickly turned into a state monopoly which lasted until the 1980s. Although the first *television broadcasts* started halfway through the 1930s, due to the Second World War no television service was developed in most European countries until the 1950s. Like radio, in those days television broadcasting was commonly operated by the state. The major breakthrough for television in terms of household penetration came with the introduction of the colour TV in the late 1960s.

Since protected works, such as phonograph recordings, constituted a significant portion of the content transmitted, there was a clear link between broadcasting and copyright. Music radio broadcasts became part of social interactions as well as a tool to promote musical works and artists, the technology itself, and other types of content. Advertising grew into the standard business model for radio, together with sponsorship. Even for government-run television channels in Europe, advertising became an important source of revenue.

In the early days of broadcasting, the question of how to balance this new means of communication with the rights of authors arose. The call for extending existing rights or creating new ones stems from the view of the recorded music industry that airplay would hurt record sales while radio, and later television stations, were generating considerable amounts of money through advertising and sponsorship.

As with broadcasting, radio preceded television in the field of *cable retransmission*. In the early twentieth century, radio retransmission over telephone lines was used to increase coverage of radio stations via point-to-point connections. In Europe, radio lines were also used as early as the 1920s in a point-to-multipoint setting to deliver radio signals to subscribers without the need to obtain a radio receiver: an early case of music streaming.

In economic terms, retransmission did not become significant until the introduction of subscription-based cable retransmission of commercial television in the US. In Europe, cable networks developed more slowly than in the US, and improving reception of national broadcast channels and in some cases receiving foreign channels were the main purpose of these networks. From the 1980s onwards, cable networks in Europe expanded rapidly, followed by privatization and consolidation of local networks throughout much of Europe. This turned cable television into a multi-billion euro industry.

The history of the legal protection of cable retransmission is intertwined with that of broadcasting. Initially, the idea was to distinguish the original broadcast from subsequent secondary use, such as cable retransmission, which would require authorization from rights holders if it reached a new audience as compared to the primary transmission. However, from the mid-1980s onwards, there has been a trend in judicial interpretation towards

the autonomous recognition of a cable retransmission right and the rejection of the 'new public' approach, consistent with the text of the Berne Convention since its Brussels Act of 1948 (which adopted a 'new organization' criterion instead). This trend coincided with the growing importance of cable networks for the reception of television in European households and the commercialization of cable networks.

Finally, *commercial rental* gained economic significance with the diffusion of the VCR in the 1980s, followed by the DVD player in the late 1990s. For about two decades, rental outlets for physical carriers of audiovisual works boomed and provided a revenue stream comparable to that of cinemas. At the beginning of this century, however, this industry collapsed as quickly as it had grown, due to the emergence of digital rental, streaming video subscriptions, and unauthorized file sharing.

Halfway through this golden age of commercial rental, a separate rental right was created in EU Law in 1991, which was not subject to exempting exhaustion. This was meant to harmonize diverging national laws, which oscillated between those that had no such right and those where such a right was recognized, but exhausted at first sale. Justification for the creation of a separate rental right was found in the possibility of making good quality home copies from rented tapes, the emergence of a booming rental industry, and the renting out of pirated copies by some rental shops. It is noteworthy that some of these justifications mirror those advanced in the private copying levies debate. For the introduction of a rental right in TRIPS, concerns with widespread home copying and its potential harmful effects on the exploitation of the reproduction right of copyright owners appeared to be more pivotal.

What general patterns can be discerned throughout these cases and what lessons can be learnt or conclusions drawn? A first overarching observation is that the scope of rights has expanded gradually over time. Since the early days of the Statute of Anne, the protected acts in national laws and international treaties have stretched to include all kinds of public performance, wired and wireless transmission or retransmission, and rental. Furthermore, rights have been recognized in international treaties as substantive minima, beyond the mere protection pursuant to reciprocity or national treatment mechanisms.

The focus of this chapter (and indeed this book) is on the evolution of the scope of economic rights in relation to the development of business models and technology. Through that lens, it can be observed in each of the case studies that whenever a new exploitation model or technology enabled entrepreneurs to generate money using copyright-protected works, new rights were tailored to reap some of these benefits. This is what happened to theatres and café-concerts staging plays and musical performances, radio and television stations broadcasting music and audiovisual works, cable networks retransmitting free-to-air television broadcasts, and rental shops renting out

cassette tapes and DVDs. This development is consistent with the premise underlying the project that led to this book, as the expansion of economic rights appears to track the evolution of economic and technological realities.

The call for the creation of additional rights stems from the assertion by rights holders of an entitlement to the value created in connection with 'their works' by those performers, radio and television stations, cable networks, and rental shops, and the materialization of that assertion into law. In the cases discussed here, the expansion of rights takes place with the emergence and adoption by the public of new technologies and exploitation models: new technological means for works to reach an audience and new ways for entrepreneurs to create value with a work are generally followed (or occasionally anticipated) by new exclusive or remuneration rights. Each time a new exploitation model or technology enabled entrepreneurs to generate money using copyright-protected works, new rights were created to reap some of these benefits. Often, this is supported by the claim that the new model is undermining existing revenue streams, such as with radio broadcasting and rental harming record and video sales.

Fast-forward to the twenty-first century, and this resembles the 'value gap' debate in current EU copyright law and the initiative to create new exclusive rights for publishers of press publications.<sup>268</sup> Thus, from this perspective, we can read the historical evolution of copyright as a tale of value gaps, and the creation of new rights to bridge these gaps. History suggests that if a business user generates value by developing a new product or service where protected works play a role, this will trigger debates about creating new rights – or extending existing rights – to cover that product or service.

A difference in this value gap analogy is that past claims for extension of protection and the corresponding evolution in the legal definition of rights presented a clear and incremental link to novel technology-influenced modes of exploitation. This link is not always visible in contemporary copyright policy debate, as a consequence of the increasingly abstract and generic formulation of economic rights. While such formulation may have served the purpose of making copyright law technologically neutral and future-proof, it likewise enhances the risk of overprotection – 'false positives' – and may undermine copyright's normative content and focus. These observations raise a related but fundamental question of how to justify or explain the proliferation of rights to capture (some of) the downstream value.

From a utilitarian or normative economic perspective, the above is unsatisfactory. As argued by Poort in his chapter of this volume, downstream value can, to a large extent, be appropriated through the initial sale or access

268. See Proposal for a Directive on copyright in the Digital Single Market 2016, Arts 11–13.

agreement as long as these new business models acquire the content they work with legally.<sup>269</sup> If that is accepted, then one must turn to a 'natural rights' perspective for a more compelling background to understand the historical evolution of rights.<sup>270</sup>

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269. For a more extensive discussion of the utilitarian justification of copyright, see J. Poort in this volume.

270. This perspective is epitomized by the Lockean labour-desert (fairness) theory. Under such theory, one could argue that the author is entitled, as reward for his intellectual labour, to rents from the future exploitation (by whichever method) of his work. Following this logic, a broad application of the fairness theory for copyright could be used to justify the continual creation of new copyright entitlements whenever new technology or business models emerge in connection with the use of protected works. On the application of the fairness theory to copyright, see e.g., W. Fisher, 'Theories of Intellectual Property', in: *New Essays in the Legal and Political Theory of Property*, S.R. Munzer (ed.), Cambridge University Press (2001), pp. 168–200; and D.J. Gervais, 'Human Rights and the Philosophical Foundation of Intellectual Property', in: *Research Handbook on Human Rights and Intellectual Property*, C. Geiger (ed.), Edward Elgar (2015), pp. 89–97, pp. 89–90.

## Chapter 3 Deconstructing Copyright

Stefan Bechtold\*

### 3.1 INTRODUCTION

When the United States (US) Congress enacted the Sherman Act in 1890, it created a regulatory system whose power unfolded only in the following decades. The Act prohibited 'every contract, combination or conspiracy in restraint of trade', as well as every monopolization 'or attempt to monopolize ... any part of the trade or commerce among the several States, or with foreign nations'.<sup>1</sup> US Congress did not merely prohibit such activities. It also criminalized them, thereby providing a particularly powerful tool against anticompetitive behaviour by corporate executives.

What the Sherman Act did not provide, however, was clear guidance to courts on how they should assess firm conduct. When it came to determining whether a contract actually restrains trade or whether conduct monopolizes trade, it was up to the courts to decide whether and how to analyse the economic effects of firm conduct. In *Standard Oil Co. v. United States*,<sup>2</sup> the US Supreme Court introduced a rule of reason standard into antitrust

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1. 15 U.S.C. §§ 1, 2.

2. 221 U.S. 1 (1911).