MAKING AVAILABLE, COMMUNICATION TO THE PUBLIC & USER INTERACTIVITY

AN ANALYSIS OF THE APPLICATION OF COMMUNICATION AND PERFORMING RIGHTS TO LICENSED MUSIC STREAMING SERVICES AND THE SUBSEQUENT IMPACT ON PERFORMERS

FIONA MCGUGAN

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Executive Summary

One of the most prevalent and recurring topics of recent times has been that of changing consumer behaviour characterised by an increasing shift away from ownership towards access models of music consumption, specifically streaming services.

The rate of conversion (too fast or too slow), the price point (too high or too low), and whether it is cannibalising or stimulating commerce in other areas are just some of the points of contention between the various parties.

One such area of dispute is the Making Available Right.

Forgetting the front-of-house economics of the streaming model for a moment, it is important to examine the activities behind the scenes, legally speaking, both pre and post-digital, to understand fully how the rights of authors and performers have changed and how they make money from online distribution. This is the aim of this paper.

The creation of the Making Available Right initially at a global level through the WIPO Performances and Phonograms Treaty (WPPT) and thereafter, the European InfoSoc Directive, before each individual State implemented it, is a convoluted process.

Its intention was to account for digital works accessed by a user “at a time and a place chosen by them”. However, omissions at each stage of legislation are caused by the uncertainty rooted within the WPPT where WIPO admits that “It is understood that [the WPPT] does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on different proposals for aspects of exclusivity to be provided in certain circumstances”.

This paper demonstrates a number of disparities with this right including the fact that it has been implemented in many countries, including the UK, as a subset of the
Communication To The Public right (CtoP), yet it is not treated in a similar fashion to this right, except, sometimes, in the case of authors.

Additionally, the scope of the right varies with each type of creative work, is subject to differing territorial interpretation, and took many years to define through case law, implying that the original language with which the right was conceived was perhaps ambiguous. Indeed, has it yet been defined? Many would argue that it has and that it applies specifically to on-demand, digital content. Whether it is effective in delivering the intention of the law – a fair balance between performers and rightsholders - remains to be seen.

This is a complex area of the law, best explained in terms of ‘performer approvals’ and ‘performer ER’ paid on ‘performing rights’ income (I credit Chris Cooke for this explanation that he so eloquently lays out in “Dissecting The Digital Dollar”).

**Performer approvals** apply to any artist involved in the making of a sound recording and consist of controls over that sound recording (similar to the controls enjoyed by the copyright owner, which will usually be a record label). These are the rights that are generally assigned to the record label by the Featured Artist through their recording contract. **Performer ER** on the other hand, is unassignable and applies to the exploitation of **performing rights** i.e. public performance and communication.

**ER** - Equitable Remuneration - is a guaranteed remuneration right that sends income directly to the performer or author. It is important to note that ER is generally a fifty per cent split, **but does not have to be** - it just means that it should be fair. The Making Available right is the only performing right that does not have performer ER applied to it (even though on the publishing side, the collection societies have treated MA in the same way as the other performing rights).

The debate around the Making Available right is closely linked with the huge variety in business models that offer diverging levels of consumer interactivity. Many say that ER should apply to radio-style models such as Pandora and Spotify’s radio feature as they clearly use the communication rights of performers, however record labels argue that
even minor evidence of interactivity such as the ability to pause or skip a track determines that these services fall under the Making Available right and don’t constitute a Communication to the Public, under which ER would apply (akin to broadcast radio or webcasting). Conversely, on the songwriters side, ER applies to both interactive and non-interactive services.

Therefore, and perhaps unsurprisingly, the single biggest issue this paper found is that where ER is not applied to Making Available and where Making Available is becoming a prevalent communication and performer right as consumer uptake in streaming services grows (e.g. the UK), many performers including both Featured Artists and Session Musicians are generally not seeing the same level of increase in digital revenue enjoyed by so many of their partners.

Several changes in this area could go a long way to clarify Making Available including harmonisation at European level that better advises individual states on the best way to implement the right and define its parameters. More controversially perhaps, compulsory licensing or applying ER to the MA right has been suggested. Several Member States have in fact already supplied performers with a non-assignable remuneration right that sits alongside the MA right, however, it appears that it is too early to decipher whether this has benefitted performers or not.

The debate over whether performers would prefer their record labels handling their entire MA-related income or collection societies taking ownership of a part of it is a difficult one. Whilst UK collecting society PPL arguably sets a high bar for distribution and transparency, sadly, this is not always the case throughout Europe.

In summary, the clarification of the origins of Communication To The Public and the Making Available rights as well as the four recommendations in the paper kickstart an urgent debate to ensure that those with little negotiation power fairly share in the evolution of any new market that exploits their performances.

The forthcoming MusicTank panel debate - Creators' Rights In The Digital Landscape, Tue 10th November - will explore many of these issues and their nuances as well as the recommendations of this paper to consider what might be a realistic course of action, should it be found that one is needed.
Author’s Note

This paper started life as an assessment for the Technology, Rights and the Law module as part of my Entertainment Law LLM course work at the University of Westminster in the academic year 2013/14. It has since been updated to include recent developments in both the music industry and IP law and comes at a time of heightened concern and discussion about the licensing of digital platforms, in particular, music streaming services.

As such it complements the recent publication of the MMF’s Digital Dollar report, which for the first time, lays out the fractured landscape of digital music licensing and builds on Just A Click Away: How Copyright Law Is Failing Musicians – a short paper intended to demonstrate the legal mechanisms that occur behind each consumer 'click' on streaming platforms and how the payment structure to labels, publishers and artists can change with each one. All of these papers have been published concurrently.

I would like to thank all those who gave guidance and support in preparing this paper, including Brian Message, Chris Cooke, Chris Ellins, Danilo Mandic, Guy Osborn, Nick Yule, James Barton, Jenny Tyler, Jon Webster, Jonathan Robinson, Keith Harris, Paul Pacifico and Sandie Shaw, and to family and friends for their unfailing support and encouragement.
Foreword

Fiona McGugan’s paper is an important intervention looking at the nuances and intricacies of creators’ rights in the digital age. Drawing both on her insider status within, and in-depth knowledge of, the music industry and her academic expertise, she has produced an important and incisive overview with some concrete proposals for the future.

Fiona continues a fine tradition of exemplary work being produced as part of the Entertainment Law LLM at Westminster Law School.

Fiona’s timely and illuminating piece follows in the footsteps of previous graduates who have published work produced on the LLM in myriad journals and edited collections.

Chris Ellins Course Leader, and Danilo Mandic Research Fellow
Centre for Law, Society and Popular Culture, University of Westminster

The quality of work produced by our students never ceases to delight and humble me, and of which this paper is a fine example. Fiona elicits much food for thought, particularly around issues of ownership and access, and future implications that the music industry would do well to heed.

Professor Guy Osborn, Co-Director
Centre for Law, Society and Popular Culture, University of Westminster

Entertainment Law LLM
University of Westminster’s Entertainment Law LLM combines academic analysis with the commercial practice elements of entertainment law. Entertainment is one area that we can all associate with in some shape or form, and the interaction of this exciting subject with the law produces an interesting and eclectic mix. The diverse nature of entertainment law paves the way for a number of specialisms, all of which are underpinned by the issues of contract and intellectual property.
About MusicTank

MusicTank is a pre-eminent information hub for UK music business, addressing change and innovation through informed debate, objective analysis and industry engagement. Established in 2003, MusicTank has built an enviable reputation for its on-going and unique programme of think tank debates, events and conferences, a natural extension of which is its delivery on incisive reports commissioned from key industry figureheads. MusicTank was shortlisted for the 2012 Times Higher Education Leadership and Management Awards - Knowledge Transfer.

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About The Music Managers Forum

The Music Managers Forum represents over 400 artist managers in the UK, who in turn represent over 1000 of the most successful acts on the planet. Since its inception in 1992, the MMF has worked hard to educate, inform and represent UK managers, as well as offering a network through which members can share experiences, opportunities and information. While this work continues, the MMF is also focusing more on providing a collective voice in this time of change, giving real, meaningful value for members and their artists, from helping to unlock investment and opening up new markets, to encouraging a fair and transparent business environment in this digital age.

themmf.net

About The Featured Artists Coalition

The FAC is a collective of 4,500 artists who advocate for transparency in the music business and a greater connection between artists and fans in the digital age. The Featured Artists Coalition campaigns for the protection of UK performers’ and musicians’ rights. Their aim is for all artists to have more control over their music and have a fairer share of the profits generated in the digital age.

thefac.org
Introduction

A cross-section of industries have undertaken streaming as a content distribution model including video games, television, film, radio and music and a variety of business models have been launched.\(^1\) The most common of which are a mixture of advertising-supported (providing free access for the user), and subscription (a flat-rate monthly fee charged to the user providing additional benefits such as offline usage, unrestricted access and mobile apps).\(^2\) Free access models that have become hugely popular, such as YouTube\(^3\) have become a preferred method for music listening and discovery by Generation ‘Z’.\(^4\) They have conditioned consumers into using on-demand content that is accessed temporarily and never downloaded and owned by them. Alongside YouTube, platforms such as Spotify,\(^5\) Deezer and Apple Music,\(^6\) have also become leading models of licensed music distribution, all with the underlying concept of inducing music consumers to listen to streaming music on-demand.\(^7\)

The various models of streaming that are available imply distinct levels of user interactivity with the content being consumed. Live and on-demand require different initiation processes\(^8\) and it can be argued that on-demand streaming singularly contains a subset of differential interactivities. For example, user control can extend to creating personalised playlists, picking exactly which tracks they want at the exact time they want, or they can initiate streaming radio, where they are fed tracks based on certain genres or decades.\(^9\)

But why is this important? Historical law has dictated the application of rights to content consumed by the public in different ways. In some cases, it is supplied with an exclusive right, where the rightsowner can control all licenses of the music\(^10\). In others, the law sees fit to apply collective licensing to certain uses, ensuring that neutral institutions licence works and pay rightsowners equitably.\(^11\) Collecting Societies purport an ability to supply combined bargaining power, ensuring reasonable pay rates for more vulnerable constituents.\(^12\)
HOWEVER, THE SPEED AT WHICH STREAMING TECHNOLOGIES ARE GATHERING MOMENTUM IS LEAVING BEHIND GREAT GAPS IN LEGISLATIVE SOLUTIONS FOR THE APPLICATION OF INTELLECTUAL PROPERTY RIGHTS.

This paper will begin by examining nuances of technological development that have impinged upon the traditional role of the reproduction right, analysing its evolving nature. The second part will examine the historical development of communication rights that are beginning to overshadow conventional distribution and reproduction rights as the consumption of music moves from an ownership model to an access one. The third part of this paper will examine the application of communication rights to streaming technologies and looks at a cross-section of EU Member States, comparing and contrasting the various means of implementation. It also examines specific examples of streaming models from the viewpoint of their licensing structures in relation to the interactivity of the user. It will be argued that the paradoxes arising from European case law and the contrasting implementation of Member States’ legislation have created confusion around the legal definition of a stream, both in broadcast and on-demand contexts.

Finally, it examines the practical implications this has on performers, specifically highlighting paradoxes present involving the nature of industry practice together with the intentions of the law. It analyses whether, through current EU Law, equitable remuneration\(^\text{13}\) is payable to performers in respect of certain types of digital media and makes recommendations in light of this paper’s findings.
The Shift From Ownership To Access

Streaming technologies are rapidly becoming a dominant mode of consumption of digital content.\textsuperscript{14,15} It can be argued that the sharp incline seen in music streaming statistics in the IFPI Digital Report 2014\textsuperscript{16} hinges on the ‘real-time’ aspect of consumption.\textsuperscript{17} From the perspective of the end user, it seems that downloading tracks has now become the less necessary or desirable option for access to content.\textsuperscript{18} Coupled with the increased availability of broadband connection from almost anywhere in the western world, real-time, on-demand access to many forms of content has become intrinsic in people’s daily lives.\textsuperscript{19}

In tandem with the growing trend of streaming is the increase in users’ spending on the available licensed subscription services and using ad-funded models for free.\textsuperscript{20} In 2013, subscription services’ revenues increased by 51 per cent enabling Europe’s music market to expand for the first time in twelve years.\textsuperscript{21} Global revenues from subscription and advertising-supported models accounted for 27 per cent of digital revenues in the same year, up from 14 per cent in 2011\textsuperscript{22} and the number of subscribing users increased by 250 per cent between 2010 and 2013.\textsuperscript{23}

Two years on in 2015, exclusive IFPI-commissioned research demonstrated that consumer engagement with licensed music DSP’s is high with 69 per cent of Internet users accessing a licensed service within six months over 13 of the world’s leading music markets.\textsuperscript{24} This accounts for significantly more people who say they use streaming services more than they did 12 months ago.

The traditional method of online consumption of music involves the transferral of technologically protected files through downloading\textsuperscript{25}, a requirement of which is that a full copy of the file is permanently stored on a device, which the user can then access repeatedly at their discretion.\textsuperscript{26} Streaming, on the other hand, introduces the ‘real-time’ notion that users no longer need to own a copy of the content in order to enjoy it.\textsuperscript{27} In contrast to downloading, the act of streaming involves the constant transmission and
receiving of data between the host and the user via an Internet connection.\textsuperscript{28} The storage element of streaming only ever occurs on a temporary basis using buffering\textsuperscript{29} and is a sequential storing motion\textsuperscript{30}, which does not imply the making of ‘copies.’\textsuperscript{31} Therefore, streaming is a transient act and not necessarily an act of reproduction in the legal sense\textsuperscript{32}.

From a copyright perspective, the key distinction between the models of ownership of, and access to, digital files has marked a significant shift in the way the reproduction right is regarded.\textsuperscript{33} This is partly due to the fact that the access model applies to any form of content and arguably does involve an act of reproduction, however transient or incidental.\textsuperscript{34} Hence it has been observed that the “reproduction” in a digital environment is “no longer a good predictor of whether there will be a distribution to the public”\textsuperscript{35} and it is thus difficult to consider the reproduction right as a ‘core’ copyright.\textsuperscript{36} For example, web pages are copied into temporary caches so that browsers can display them quickly, programs are copied from hard drive to RAM so that they can run and file systems are backed up to cloud services to ensure they are protected. Digital music is one of the most versatile forms of content and can be copied by the user in various forms and on various devices. The point is that, in computers and networks, copies are made constantly, often without explicit instruction by or even knowledge of a particular user and without any evidence that there is an intention to distribute that copy further.\textsuperscript{37} The relevance of this seismic shift within the world of music is integral. However, before examining the legal implications of this impact on music distribution, it is necessary to clarify the technological nuances of streaming.

In the distribution of digital works, streaming has been classified as two separate entities.\textsuperscript{38} Live streaming involves delivering content from a single source to multiple users concurrently in real-time, also known as ‘web-casting’ or ‘simulcasting’\textsuperscript{39}. Examples of usage are in the form of conferences, live shows and concerts, university lectures as well as internet-produced content, comparable to traditional radio or television.\textsuperscript{40} Distinct from live streaming, on-demand streaming permits the user to initiate the transmission of content.\textsuperscript{41} The nature of on-demand requires data storage
on a central server from where the content is streamed at the users request,\textsuperscript{42} conversely live streaming demands an original source, from where data is captured, processed into a digital signal and transmitted to numerous users at the same time which is only accessible at the time which it is broadcast.\textsuperscript{43}

Within the context of streaming, the undermining of the reproduction and distribution rights by the technological process brings the application of the communication right into focus.\textsuperscript{44} \textbf{HOWEVER, CONSIDERING THAT THE WAY OF COMMUNICATING THE CONTENT TO THE PUBLIC IS DIFFERENT, ON-DEMAND AND LIVE STREAMING (‘BROADCAST’) CONSEQUENTLY OPERATE DIFFERENTLY UNDER THE COMMUNICATION RIGHT.} De rigueur analysis of the development of the law in terms of the new medium of streaming content is necessary in order to identify the practical implications the law has on performers.
The Development Of Communication To The Public

The right of ‘communication to the public’ (CtoP) has been embroiled in a tangled web of law making from its very inception. It first appeared in the 1928 (Rome) Revision of the Berne Convention to account for the advent of radio and TV broadcasting. ‘Berne Authors’45 - which included performers - were granted an exclusive right over their own works to communicate them to the public.46 WIPO’s guide to the Berne Convention, published in 2012, reflects that the original wording of CtoP was “slightly muddled.”47 The right was later revised in the Brussels edit of the Berne Convention in Article 11bis(1), however, an actual definition of CtoP still did not appear in the Berne Convention after this revision.48 Also, due to the lack of mention of neighbouring rightsholders49, it was necessary for the Rome 1961 Convention to introduce specific reference to record labels, performers and broadcasters and provide exclusive rights for them.50 The exclusive right as applied in both the Rome and Berne Conventions is exceptionally limited due to its preventative nature; performers were given the right to prevent broadcasting and other communications of live performances51 and broadcasters were given the right to prevent the rebroadcasting of their broadcasts52 as well as any communication to the public in locations where admission is charged.53

The Paris 1971 Act added further complications by applying variations in the scope of the right depending on the nature of the work. Musical and dramatic works were awarded the broadest protection, images the least, and literary works were left somewhere in-between.54 Ginsburg (2004) sums up the way in which the Paris Act covered CtoP as “incomplete and imperfect through a tangle of occasionally redundant or self contradictory provisions on ‘public performance’, ‘communication to the public’, ‘public communication’, ‘broadcasting’ and other forms of transmission.”55
Overdue updates and clarifications arrived in the adoption of the WIPO Treaties 1996. The aims of the WIPO Copyright Treaty\textsuperscript{56} (WCT) and the WIPO Performances and Phonograms Treaty\textsuperscript{57} (WPPT) were to establish full coverage of CtoP for both Berne Authors and Neighbouring Rights respectively, thereby modernising and streamlining protection for these works.\textsuperscript{58} In contrast to the preventive nature of the Berne Convention, the \textbf{WIPO Treaties granted exclusive ‘authorising’ rights and in so doing formulated a stronger exclusive right for rightsholders and performers.}\textsuperscript{59}

Notably, the first endeavour to define communication to the public appears in the WPPT, a point that has been inexplicably overlooked by the WCT. Article 2(g) of the WPPT delineates:

\textit{“Communication to the public’ of a performance or phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representation of sounds fixed in a phonogram. For the purposes of Article 15, ‘communication to the public’ includes making the sounds or representations of sounds fixed in a phonogram audible to the public.”}\textsuperscript{60}

This definition is only valuable in part due to the lack of specific meanings for ‘transmission’ and ‘public’. At European level, these \textit{lacunae} have left a cross-section of EC Directives, Member States’ nationally implemented legislation and case law endeavouring to close the gaps of interpretation in terms of the scope of CtoP. For example, the determination of ‘transmission’ has been decided as referring to communicating the work to the public not present at the place where the communication originates,\textsuperscript{61} but a mere technical means to improve reception of the original transmission in its catchment area does not constitute a communication\textsuperscript{62}. Case law defined CtoP to include any retransmission of a work by specific technical means different from that of the original communication\textsuperscript{63} and where it is not, it is necessary to prove that the communication is to a new public, i.e. one that was not considered by the original authors in their initial authorisation.\textsuperscript{64}
In reference to the definition of ‘the public’, several cases have concluded that the term refers to an “indeterminate number of potential recipients and implies a fairly large number of persons”\(^{65}\) and for that purpose, the cumulative effect of making the works available to potential recipients should be taken into account\(^{66}\). This is particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively. It is also implicit, therefore that any group comprising of the non-public should be economically insignificant.\(^{67}\)

The significance of the term ‘public’ relates to the concept of right to ‘Equitable Remuneration’ under UK law. To the extent the right was comprehended within the Berne Convention Art. 11bis, CtoP is subject to compulsory licensing. Article 12 of the Rome Convention states:

> “If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both.”\(^{68}\)

However, conflicting judgments continue to arise. In 2012, the ECJ ruled on three cases involving CtoP, determining that in the case of broadcasting phonograms in hotel bedrooms was considered CtoP and therefore gave rise to a right of remuneration for performers and phonogram producers\(^{69}\), however, applying the same criteria\(^{70}\) for the same action in a dentist’s waiting room and a spa\(^{72}\) was not.\(^{73}\)

**FACTORING THE INTERNET INTO CtoP ONLY SERVES TO COMPLICATE EQUITABLE REMUNERATION FURTHER.**
The Making Available Right

With the aim of further strengthening the right of CtoP, in addition to the authorising nature of the Treaties’ language, the ‘Making Available’ (MA) right was created.\(^7^4\) Article 10 of the WPPT states:

“Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”\(^7^5\)

The adoption of MA signified the recognition that record producers needed this right in order to disseminate their recordings online as a primary form of exploitation. The IFPI reported on MA as being “fundamental for promoting the development of electronic works and of new business models by the recording industry.”\(^7^6\) This is justifiable as it is generally accepted that the public communication right is infringed whenever a work is made available to the public “by any means”, irrelevant of whether a member of the public has actually accessed it or not.\(^7^7\) However, whilst the IFPI’s report gives reasoning for the strength the MA right gives to record producers, it makes no mention of the potential impact it might have on performers. The exclusive nature of MA means that it sits within contractual terms between record companies and performers\(^7^8\), an issue that will be discussed further on.

The phrasing of Article 10 of the WPPT implies its association with technological advance, specifically the communication of works on the Internet. The MA right differs from ‘broadcasting’ in the sense that the former allows the user to access the work whenever he decides, whereas a broadcast only gives the user access to the work at the time that it is transmitted.\(^7^9\) Consequently, referring back to the definitions of streaming earlier, in theory all on-demand streaming should fall under the MA right whilst ‘live’ streaming should have broadcasting rights applied.\(^8^0\)
However, there is uncertainty surrounding the application of a broadcasting right in a digital context. Ficsor argues that whilst live Internet streaming may be regarded as ‘broadcasts’, “the prescription of mandatory collective management would hardly be compatible with the Berne Convention” where the global nature of the Internet conflicts with the individual State focus of Berne.\(^81\) Therefore, it is evident that Internet live streaming is currently in a ‘legal limbo’.\(^82\) It is undoubtedly a form of CtoP, not within the technical definition of MA but does not fit with the traditional form of ‘broadcast’ either.

Concerning the scope of the MA right, when communication occurs over the Internet, it is sufficient that a work is made available by any means, including peer-to-peer\(^83\) and hyperlinking for it to be considered making available to the public.\(^84\) In a recent case, four journalists addressed the issue of hyperlinking under the making available right. \(^85\) proved that in the case of authors, the ECJ found that “making material available to the public in such a way that they may access it via hyperlinking… provides that there is a making available and therefore a communication to the public”\(^86\) under Article 3(1) of the Information Society Directive.\(^87\) The wording of this judgement brings the relationship between MA and CtoP into focus. If the former is ‘therefore’ the latter for authors, do the same provisions apply for performers?
Where Does Equitable Remuneration Apply?

The WPPT addresses Equitable Remuneration with a level of uncertainty. Article 15(1) states, “Performers and producers of phonograms shall enjoy the right to single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.” For defining ‘commercial purposes’ the WPPT uses language applied to the MA right, therefore implying that a remuneration right can be given to both on-demand and live transmission, but that Member States may apply this Article only to certain uses of phonograms. WIPO has admitted,

“It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on different proposals for aspects of exclusivity to be provided in certain circumstances.”

It is also important to note the allowance for contractual circumstances to supersede the right of Equitable Remuneration for performers as the treaty allows for domestic law to lay down conditions relating to the sharing of remuneration.

At European level, the ambiguity of the application of the remuneration right is apparent. Whilst the Rental and Related Rights Directive reiterates Article 15(1) of the WPPT, the InfoSoc Directive does not contain remuneration rights for performers at all, rather it contains only the exclusive right. Notably, this exclusive right is worded differently for performers than it is for authors:

Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
(a) for performers, of fixations of their performances…

It is clear from one directive that, for authors, making available to the public is included as part of the communication right, a circumstance substantiated by Svensson. It would therefore be logical to assume that making available would be part of the CtoP for performers as well, however the Rental Directive does not specifically mention the MA right in relation to CtoP, allowing for a broad interpretation.
The Implementation Of Communication To The Public, Making Available And Equitable Remuneration In EU Law

Ficsor has described Article 8 of the WCT as simply an “umbrella solution”\textsuperscript{96} and the InfoSoc Directive reiterates the principles of Article 8 of the WCT, thereby maintaining the broad regulation of the CtoP right in the EU.\textsuperscript{97} This is also reaffirmed through the Explanatory Memorandum accompanying the InfoSoc Directive;

\textit{“The expression ‘communication to the public’ of a work covers any means or process other than the distribution of physical copies”}\textsuperscript{98}

As such, the Treaties’ leave open the possibility to implement the MA right on the basis of an existing exclusive right or through enactment of a new right.\textsuperscript{99} Distinct legal systems throughout the world have justified different approaches in terms of CtoP, MA and how equitable remuneration relates to both. AEPO-ARTIS carried out an in depth study into ten Member States establishing that whilst all legislate a right to remuneration for broadcasting and CtoP of phonograms, the extent of application differs dependent on use.\textsuperscript{100}

Pertaining to ‘digital media,’ most States, despite Ficsor’s reservations, consider that Equitable Remuneration is due for ‘webcasting’ and ‘simulcasting’ due to their broadcasting nature.\textsuperscript{101} However, in French and Belgian legislation, narrowed interpretations of CtoP to ‘public places’ mean that they do not apply broadcasting rights to these uses.\textsuperscript{102} This contradicts the Recommendation of the Commission\textsuperscript{103} that “\textit{webcasting, Internet radio, simulcasting and near-on-demand services received either}”
on a personal computer, or on a mobile phone as belonging to the right of communication to the public, in the form of a right to remuneration.”¹⁰⁴

Most countries studied in the AEPO report have provided performers with an exclusive MA right.¹⁰⁵ Notably, French legislation did not originally mention the MA right explicitly as the CPI¹⁰⁶ on CtoP was considered broad enough to envelop it.¹⁰⁷ However, from the adoption of the Rental Directive, the MA right should be explicitly recognised as a new, exclusive right,¹⁰⁸ and therefore French legislation was adapted. Only in Croatian and Lithuanian legislations is the making available on-demand of phonograms considered to be an act of communication to the public for which an Equitable Remuneration is due.¹⁰⁹ Spain has delivered on performers rights to remuneration by ensuring that, where the performer transfers his or her exclusive MA right to a record label, they should retain an un-assignable right to Equitable Remuneration.¹¹⁰

Considering that performers are required to transfer their MA right to the record label under contractual terms, collective administration for this right is almost non-existent.¹¹¹ Before the impacts of this are analysed, it is essential to discuss some real world examples of streaming models and where they sit in the licensing framework.
Making Available And The Interactivity Of Streaming

The broad definition of interactivity within the WIPO Treaties; “at a time and from a place individually chosen by them”\(^{112}\) allows for all forms of transmission that allocates a degree of interactivity, measured by individual members of the public rather than the public at large.\(^{113}\) Theoretically this covers all content that allows a consumer to choose which content and the moment of enjoyment of that content. It is difficult to identify a principle that can be applied to such a wide variety of services, many of which were unlikely to have been considered when drafting the Treaties.\(^{114}\)

Tappin endeavoured to define the key features of a music streaming service, which amounts to an exercise of the MA right and concluded that it is any service where “the user is in control” and can “individually decide when (and from where) he accesses the sound recording.”\(^{115}\) Maintaining that each sound recording should be treated individually,\(^{116}\) he deduced that, in the case of albums and compilations, even when the user initiates the first track, the expectation that further tracks will follow gives sufficient substance to say that the music is being accessed at a time chosen by him. Furthermore, the added element of allowing users to skip tracks clarifies the application of the MA right even more.

He also asserts that by this definition, the Napster radio station\(^{117}\), and Jazz FM\(^{118}\) are all examples where providers cede control of the timing of the transmission to the user and add elements of skip and pause.\(^{119}\) The availability of the tracks in library form meant that the user has the option of choosing the starting piece of content. In addition, services such as BBC Radio ‘Listen Again’\(^{120}\) and ‘Jazz FM archive’\(^{121}\) that re-transmit programmes in full are still within the users control, he argues; “The fact that the contents of the programme have been chosen, ordered and timed within that programme by the programme-maker does not seem to me to detract from the fact that those sound

\(^{112}\) See WCT Art. 8, WPPT Art. 10, and WPPT. Art 14

\(^{113}\) Supra note. 68

\(^{114}\) 115

\(^{116}\) 117

\(^{118}\) 119

\(^{120}\) 121
recordings, embedded in the programme, are being made available in such a way that they can be accessed at a time individually chosen by the user.\(^{122}\)

However, Tappin notes that Last.fm\(^{123}\) and Pandora\(^{124}\) should not be counted under the MA right, even though they both allow user interactivity by giving them the option to pause and skip tracks, because “it is not possible to identify any posted works”\(^{125}\), which are accessible to members of the public at a time of their own choosing. There is no stored playlist but instead the provider transmits sound recordings in an order generated semi-randomly by a computer according to user preferences. This in effect is a ‘personalised broadcast’.\(^{126}\)

Tappin’s opinions were offered before the advent of some current services but can be applied all the same. For example, in light of his analysis, it is questionable whether certain features of some streaming models have been licensed correctly. Spotify, who license all their works through the exclusive rights held by record labels\(^{127}\), provide a radio feature and mobile tier that both fit within Tappin’s definition of ‘personalised broadcast’ in that they place limits on user interactivity and transmit sound recordings in a random fashion.\(^{128}\)
The Practical Impacts On Performers

Historically, performers have not been highly valued, legally speaking. The advent of recording and broadcasting technologies served to undermine the protection of performances and UK legislation has been slow to fortify performers’ rights. The Directives and Treaties discussed hitherto have aimed at granting more rights to performers and although jurisprudence argues that they are given protection equivalent to that of authors, it is evident that, through the application of MA and CtoP, they are not. It can be deduced that the main cause of this is that their protection serves under performers’ rights and not the stronger copyright and that unlike other performing rights, MA is not subject to Equitable Remuneration.

The intention of the Rental Directive to supply a remuneration right for performers was “to correct perceived market failure for equity rather than efficiency reasons”. One of the imbalances it aims to supplant is the distinction of treatment between featured and non-featured performers, which is illustrated through industry contracts. The former is given a share of royalties, whilst the latter are usually given a singular payment for their performance. The introduction of an unwaivable remuneration right for performers was to provide a level of income for those who do not benefit from royalty payments and also partially to supersede any unfair terms in contracts.

The UK has implemented its obligation to performers in two ways. In some cases, including the application of the MA right, it has created rights for performers directly enforceable against users, which sit alongside the directly enforceable rights of the owner of the copyright in the sound recording. In other cases, such as broadcast, only the owner of the copyright in the sound recording has a right directly enforceable against a user, but the performer has a right to equitable remuneration from the owner of the copyright in the sound recording. The CDPA only allows a retainable remuneration right
to authors when they assign their exclusive MA right for on-demand services.\textsuperscript{142}

Industry practice indicates that most, if not all, performers transfer their exclusive rights in the event of a recording contract\textsuperscript{143}, giving only a few featured performers a chance to negotiate the payment of royalties for the exploitation of their MA right.\textsuperscript{144} The majority of performers have not seen their economical situation change\textsuperscript{145} with the introduction of the MA right; therefore, its original intention has been undermined by the contractual practices of the music industry.\textsuperscript{146} Interestingly, recent cases demonstrate that performers have begun to question whether record labels have the right to licence the MA right in contracts that pre-date digital services and have had some success in their assertion. Johansson brought a successful civil action against MNW\textsuperscript{147} regarding the labels right to exploit the MA right and Järvinen the son of a member of Hurriganes did the same against Universal.\textsuperscript{148}

If performers are to receive equitable remuneration for the making available of their performances via on-demand services, the current legal framework is in need of reform. The current deficiencies denote that the MA right remains purely hypothetical for most performers. Pacifico articulates that; \textit{“the Making Available Right that was meant reward creators in the digital age has failed. Most artists simply do not have the negotiating power to get a good deal from dominant players in music”}\textsuperscript{149}
Recommendations

1. Precision And Clarification In The EU Directive And WIPO Treaty

Arguably, prior to the advent of digital, each Member States’ subset of copyright legislation acted satisfactorily within its own jurisdiction and complexities in this area of law has arisen from the new global approach to copyright. Content is now available on a worldwide basis and a closer harmonisation of performer rights, especially in Europe, is needed. The broad level of interpretation that now exists in Europe coupled with cross-border digital transmissions that occur under these conflicting legal approaches has only served to complicate the MA right further.

The definition of the exclusive rights and the qualification of online exploitation could be a solution - requiring a sharper distinction between the making available right and the reproduction right. Consequently each act of exploitation would be qualified as either an act of making available or distribution of a reproduction. Whilst the topic of complete European harmonisation is outside the scope of this paper, elements of the Treaty can be criticised for their lack of detail, particularly note 12 of Art. 15 of the WPPT, which exposes the fact that an agreement could not be reached regarding ER for performers. It is for this reason that Member States were able to implement the MA right with such differing scope.

Clarification by specifically listing the uses on which ER applies would go a long way in harmonising legislation in this area. For example, this could be enshrined through the recommendation of the Commission that ER applies to “webcasting, Internet radio, simulcasting and near-on-demand services received either on a personal computer, or on a mobile phone as belonging to the right of communication to the public, in the form of a right to remuneration”, although this would demand further definition in the case of near-on-demand services.
2. A New Deal For Legacy Contracts

Whilst newer recording contracts explicitly state that the MA right must be assigned to the label in order for them to digitally distribute, contracts that pre-date the creation of the MA right are under scrutiny. **Labels have used a catchment clause within contracts that states that the performer assigns both current and future rights to the label.**\(^{152}\) In addition, the fact that the MA right exists as a sub-set of CtoP, which is already covered in recording contracts gives strength to this argument. However, the cases of Johansson\(^ {153}\) and Järvinen\(^ {154}\) demonstrate that it is possible that much of the catalogue licensed to streaming services has been done so without the ownership of the MA right. Therefore, it can be argued that the MA right must be secured through negotiation with legacy performers, which could give them the opportunity to obtain a fairer royalty on digital income.

3. Collective Licensing For The MA Right

The proliferation of on-demand streaming and the applicability of the MA right to it have demonstrated that the potential financial benefit for performers for the exploitation of their performances is significant. However, the fact that the stronger, exclusive right yields less return for performers than the right of remuneration in other areas\(^ {155}\) proves an imbalance in the legal framework.

**A suitable resolution to overcome the weak contractual position of the performer would be to provide an unwaivable right of remuneration retained by the performer in the event that his or her MA right has been assigned. The right would then be licensed collectively.** This follows the current Spanish model and being obligatorily exercised by a collecting society. In a similar way, collective licensing has been imposed by the Satellite and Cable Directive (SatCab) with regard to cable retransmission rights. In this case, the MA right keeps its exclusive nature but it can in principle only be exercised by a Collective Management Organisation (CMO)\(^ {156}\) Should this legislation be applied, the performer, as the content provider, would have the right to individually authorise or prohibit the making available of the work to the public but not
the first reproduction following from this availability. With the CMO concluding these agreements for the first reproduction in its repertoire, direct income would be guaranteed to the performer. The collective negotiating power of collecting societies would work in performers’ favour by obtaining and enforcing global agreements in the first instance of making available.

When comparing the labels’ position to the cable distributors referenced in the SatCab Directive, the desirability of this system for performers becomes apparent. As secondary exploiters of the MA right, they are reliant on the primary distributer (in this case, the broadcaster), which alone determines the broadcasting programme and clears the rights accordingly. Instead of these actions being independently achieved, they are both acts of the same exploitation, and therefore the content provider making the work available would also control the resulting reproduction through the same technical process. However, the feasibility of this system comes into question when considering that it was created for a very specific sector; the retransmission of radio and TV broadcasts, which is far more delineated sector and therefore easier to discern sector practices.

The advantage of Collective Licensing is that is yields equitable remuneration, however, it is important to note that European legislation does not currently specify the division of this remuneration between performers and record labels. Belgium, France, Lithuania and The Netherlands all stipulate equal shares, which the rest of the EU Members States would be advised to follow to ensure performer protection. In addition, collective licensing for authors within an on-demand streaming context has presented challenges of its own. As well as being faced with criticism of their efficiency of administration in the digital environment, the global nature of the Internet has presented anti-trust challenges in cross-border licensing. However, it has been stipulated that even with the issues of efficiency in revenue and data processing, artists often prefer CMOs to collect money on their behalf rather than labels and publishers. Therefore it is arguably still desirable for performers’ entitlement to remuneration for their MA rights to be collectively administered, if there is to be any change in their circumstance.

\[\text{Footnote numbers}\]
4. Compulsory Licensing For First Reproductions

As an alternative to Recommendation (3), a compulsory license covering the first reproductions following directly from on demand availability to the public could be introduced.\(^{164}\) This would allow labels to maintain complete control over the licensing of the making available right whilst concurrently holding them accountable to the performer and subjecting them to a more rigorous and transparent process when doing so.

Instead of requiring that either the content provider or the end-user negotiate a licence, the grant of a compulsory licence would be subject to a minimum remuneration for both the label and the performer. The Berne Convention contains provisions that allow for these licenses but enacts two restrictions; that the impacts of the compulsory licenses in each Member State should not impose beyond their territory and that the performer should receive a fair remuneration which is negotiated between the parties involved or fixed by a competent authority.\(^ {165}\) According to jurisprudence, the debtor of such remuneration should be the party making the work available to the public i.e. the content provider; in most cases, the label. Regarding the latter, as seen in the US with the Copyright Royalty Board, this creates an important burden and also may negatively impact on performers and labels by instilling an upper limit for the negotiated fee for the licence.\(^ {166}\)
Conclusion

The growth of legal, on-demand streaming services has generated new forms of income via licensing exclusive rights.\textsuperscript{167} Therefore, it would be expectant for performers to benefit in parallel with increases in revenue and for the law to support their right to financial gain. Throughout the EU, the implementation of Art.3 of the InfoSoc Directive changed legislation to include the right for the making available of works on-demand streaming services. In most case this has been implicitly recognised as a subset of CtoP.

However, it can be seen that whilst the strength of the exclusive MA right is weighted to the record producers, the economical situation of performers has not necessarily changed in correlation with that of other beneficiaries of digital income. Furthermore, where in most countries, performer ER is payable when the performing rights of a sound recording copyright are exploited, but the MA right, (despite being implemented in the UK and numerous other territories as a division of CtoP) is omitted from this.

Therefore, if the same streaming service is exploiting communication rights, ER should be paid to the performer, but if the MA right is at play, no automatic payments to performers are due. The result of this is to confuse the legal definition of a stream and create uncertainty in the performer community\textsuperscript{168}. Contractual agreements requiring the transferral of the making available right only allows for major featured artists to negotiate higher royalty rates from the exploitation for this right.

From the research here, it can be observed that legislation is seriously lacking in terms of protection for performers in the digital age. The fact that CtoP has to be interpreted broadly for the protection of performers and phonogram producers\textsuperscript{169} has resulted in a miscellany of implementation throughout Europe.

However, this has allowed for the growth of diverse licensing systems allowing for scrutiny of the impact these systems have on various counterparts.
It is vital that performers with little negotiation power share in the evolution of any new market that exploits their performances. On-demand streaming of music is one such area, where some States are implementing economically sustainable solutions for performers through collective licensing. Despite the drawbacks of collective licensing, it seems that this remains the strongest recommendation to change the financial position of the majority of performers.

If you have any comments about this paper or suggestions for any future MusicTank activities we would love to hear from you:

musictank.co.uk/about/contacts | jenny.tyler@musictank.co.uk

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Bibliography


ALAI, (2014) *Report and Opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the Internet* E.I.P.R 149


Borghi, M. (2011) *Chasing Copyright Infringement in the Streaming Landscape* IIC 2011, 42(3) 316-343


Case Comment, (2012) *Playing Music to Dental Patients is not communication to the public, but doing so in hotel rooms is*, EU Focus, 26.


Foley, S. (2001) *Buffering and the reproduction right: When is a copy a copy*


IFPI, (2014) *Music Subscription Revenues help Drive Growth in Most Major Markets* 18th March


Rosati, E. (2014) *Early Thoughts on Svensson*’ communication/making available, ‘new’ public, altering the scope of exclusive rights, IPKat


WIPO Guide To The Berne Convention For The Protection Of Literary And Artistic Works Paris Act 1971

References


3. www.youtube.com Youtube is now the second largest search engine in the world, with one billion unique monthly visitors, six billion hours of video are consumed every month and one hundred hours of video are uploaded every minute. See infographic at http://www.mushroomnetworks.com/infographics/youtube---the-2nd-largest-search-engine-infographic accessed 15th Feb 2014

4. Generation ‘Z’ are described as those born between 1995 and 2012 and having grown up with a highly sophisticated media and computer environment, are more Internet and content savvy than their Gen ‘Y’ forerunners. For full description, see http://www.socialmarketing.org/newsletter/features/generation3.htm accessed 28th Feb 2014

5. www.spotify.com

6. www.deezer.com


9. For examples of this see the nuanced differences between services as analysed in Supra note 2. [Tschmuck]


11. Ibid.


13. Legally speaking, equitable remuneration, which means equal pay, can have a more narrowly defined purpose in the business environment. A common legal review of the term attempts to ensure that remuneration represents good faith practices and is proportionate to the performance of the individual. In the music industry, Equitable Remuneration refers specifically to the fifty per cent split between performers and labels and between publishers and writers through PPL and PRS respectively. The legal term equitable remuneration refers to the principle of fair pay.


17. Supra note. 8

18. Ibid.


21. Ibid.

22. Ibid.


25. Ibid. [Klym]


27. Supra note. 8

28. Ibid. Borghi states that buffering is an act of temporary storage in the temporary memory and is inherent to the act of streaming.

29. Ibid. “In buffering, the storage of segments of data are subsequently replaced by other segments and the RAM retains only enough data sufficient for the time it takes to deliver the content via a media player.”


31. Ibid. In the case of caching tracks to a device, there are arguments over whether this constitutes a reproduction of the sound recording of a musical work. Permitting the user to access the sound
recording again from local access rather than by means of a transmission would suggest that a copy has been made, however, these are ‘borrowed’ and it has been argued that, in terms of infringement, the allegation that caching data is a form of recreating an illegal copy has only served to retard the distribution of legal content. Either way, the arguments surrounding caching data are outside the scope of this paper.

32. Supra note 8: Borghi states that the “broad reproduction right laid down in the WIPO Copyright Treaty and the Information Society Directive, coupled with the exemption for acts of temporary reproduction, is probably the last attempt to keep the reproduction right as a “core copyright” in a meaningful sense”

33. Ibid. For example, web pages browsed on a laptop, will always create a temporary cache version within the computer's hard drive that is later automatically deleted.


35. Supra note. 8

36. Ibid.

37. Ibid.

38. Ibid.

39. For examples of this see  www.ustream.tv and www.livestream.com

40. Supra note. 8

41. Ibid.

42. Ibid.


44. See Berne Convention for the Protection of Literary and Artistic Works available at www.wipo.int/treaties/en/ip/berne/ The Convention is stated (in art.2) to apply to “literary and artistic works”, which “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”. The Guide to the Berne Convention (available at ftp://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/GuideToTheBerneConventionForTheProtectionOfLiteraryAndArtisticWorksParisAct1971.pdf ) explains that this could include sound recordings in those countries wishing to extend protection to sound recordings.

45. See Art. 2 of Berne Convention


48. Neighbouring rights or “Related Rights” refer to the rights of performers or makers and broadcasters of the sound recording. They are the exact equivalent of Authors Rights but are not connected to the Author. It is also worth noting that there is not a single definition of the term “Related Rights” and they vary much more widely in scope between different countries than Authors Rights.


51. Apparently by any means Rome Convention art. 7

52. Rome Convention art. 13 (a) and (d)


54. Supra note. 45 [Ginsburg]


57. Supra note. 49


59. WPPT Art. 2(g)


62. ITV Broadcasting Ltd v TVCatchup Ltd [2013] ECDR 9


65. Ibid.


67. Rome Convention Art. 12 See also Council Directive 92/100 EEC Art. 8.2 for European implementation of remuneration right for broadcasting and communication to the public of commercial phonograms.

68. Phonographic Performance (Ireland) Ltd (PPIL) v Ireland, Attorney General (C-162/10) [2012] 2 C.M.L.R 29
69. All three cases refer to Articles 3 and 5 of the InfoSoc Directive

70. Societa Consortile Fonografici (SCF) v Marco Del Corso (C-135/10) [2012] E.C.D.R

71. Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s. (Case C-351/12) [2012]

72. The nuances of these cases surround the number of people able to hear the broadcast at any one time, PPI.L took into account all hotel customers present in the building who ‘might’ be able to hear the phonogram, whereas in the SCF case, patients in a dentist’s waiting room were not numerous enough to be considered ‘public’. It could be argued that the term ‘public’ is still not properly defined, as there are no set de minima’s. Supra notes. 63 and 64. See also Case Comment, (2012) Playing Music to Dental Patients is not communication to the public, but doing so in hotel rooms is, EU Focus, 26. And Rizzuto, F. (2012) The European Law concept of communication to the public and the protection of copyright in electronic transmissions, C.T.L.R 2012, 18(6) 179-197

73. WPPT. Art. 10 See also Carson, D. (2009) Making the "Making Available" Right Available, 22nd Annual Horace S. Manges Lecture, 3rd Feb

74. An equivalent version of this right was also given to authors through WCT Art. 8 and to record producers through WPPT. Art. 14


76. The ECJ clearly made this point in SGAE v. Rafael Hoteles SA, a case on the transmission of musical works via televisions into hotel rooms; “It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be a communication to the public it is sufficient that the work be made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions [of the defendants], that customers who have not switched on the television have not actually had access to the works.” See Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA [2006] ECR I-11519

77. Supra note. 68

78. See Art. 10 WPPT: “Members of the public may access them from a place and at a time individually chosen by them”

79. Broadcasting rights automatically include right to equitable remuneration, see the Council Directive 2006/115/EC Rental and Lending Rights Art. 8(2)


81. Supra note 8

82. For instance in Polydor Limited & Others v. Brown & Others [2005] EWGC 3191 (Ch) UK

83. As stated by the Italian Supreme Court in "Suprema Corte di Cassazione", sentenza 4 luglio 2006 n.39945

84. Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, CJEU, Case C. 466/12 2014 See also Rosati, E. (2014) Early Thoughts on Svensson” communication/making available, ‘new’ public, altering the scope of exclusive rights available at
85. Ibid. See also ALAI, (2014) Report and Opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the Internet E.I.P.R 149


87. WPPT Art. 15

88. Article 15 WPPT "for the purpose of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes."

89. WPPT at note 12

90. WPPT Art.15(3)


93. Council Directive 2001/29/EC Article 3(1) states: “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”

94. Ibid.

95. Supra Note. 73

96. It can be seen that the InfoSoc Directive took WCT Art. 8 word for word: See Recital 23 of the InfoSoc Directive “This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.”


98. Supra note. 68


100. Ibid. at [18] Croatia, The Netherlands and the Czech Republic consider “webcasting” to be a type of broadcasting. In Spain and Sweden it falls under “communication to the public” and France and Lithuania stipulate that a “simultaneous retransmission by cable of the broadcast” deserve equitable remuneration.

101. Ibid. at [19]

103. In accordance with Directive 92/100 EEC

104. Supra note. 92 at [33]

105. See Art. 212-3 of the French Code of Practice on Intellectual Property

106. French jurisprudence considered that “making available to the public through a network” such as the Internet is considered to be a communication to the public, See La Semaine Juridique JCP 3rd March 1997, Paris Available at http://jurisguide.univ-paris1.fr/RD/index.php?view=SSSEARCH&action=SHOWFICHE&fid=FR2105

107. Supra note. 92 at [34]

108. Supra note. 92 at [19]

109. Art 108,3 of Spanish IP Law

110. However, there are a few exceptions such as the Czech Republic where some performers have retained their MA right and licensed its administration to INTERGRAM, and the French collection society SPEDIDAM indicates in its membership terms that a performers MA right should be transferred to them, which unsurprisingly contradicts a record contract. For a more in depth analysis of their interpretations of the exclusive right for making available on-demand services see ADAMI, (2006) Filière de la musique enregistrée: quels sont les véritables revenus des artistes interprètes Available at: http://www.irma.asso.fr/IMG/pdf/4063_Etude_remuneration_musique_avril2006.pdf Accessed 28th April 2014

111. See WCT Art. 8, WPPT Art. 10 and WPPT Art. 14

112. Supra note. 68

113. Supra note. 92


115. Each track will contain a separate performance and a separate sound recording.

116. www.napster.co.uk/radio/featured

117. www.jazzfm.com

118. Supra note. 107 at [41(a) and (b)]

119. Now known as BBC Radio iPlayer www.bbc.co.uk/radio

120. www.jazzfm.com/uncut/ondemand

121. Supra note. 107 at [41(c)]

122. www.last.fm

123. www.pandora.com

124. Supra note. 107 at [41(d)]

125. Ibid.

127. Spotify describes it mobile tier as “Play any artist, album or playlist in shuffle mode for free” See www.spotify.com/us/free It also only allows for tracks to be played a certain number of times.


130. Supra note. 123. Bently L. et al. “In all but two respects, namely duration and depth of protection, performers’ protection is at al level virtually equivalent to that of authors”

131. Supra note. 124


133. PPL defines a “Contracted Featured Artist” as “A performer who is bound by an exclusive agreement with the relevant record company to perform on the recorded music track. This does not include agreements to do session work, or producer/ remixer agreements” and “Other Featured Artist” as “A performer who contributes an audible performance to the recorded music track and is: A lead vocalist not exclusively contracted to the commissioning record company; A performer not exclusively contracted to the commissioning record company but whose personal or professional name appears with or is linked to the name of the featured artist on the track; or A performer who is entitled under the terms of a contract with the featured artist to receive royalties from sales of the recording. See myPPL User Guide Available at http://www.ppluk.com/Documents/Member%20Services/myPPL%20User%20Guide%20-%20Register%20Repertoire%20GEM.pdf Accessed 2nd May 2014

134. Ibid. PPL defines a “Non-featured Performer” as “a performer who is not a contracted featured artist or another featured artist. Examples of non-featured artists include session musicians and backing singers. Studio personnel should also be listed as a non-featured artist if they make an audible contribution to the recording or if they conduct or provide a similar musical direction to another performer’s live performance as it is being recorded.”

135. Either live or the fixation of. Supra note. 124

136. Ibid.

137. Copyright, Designs and Patents Act 1988 Sec.20 [CDPA] and Sec. 182CA

138. Ibid.

139. CDPA Sec. 182D(1a)

140. CDPA Sec. 182A allows equitable remuneration when a phonogram “is communicated to the public otherwise than by its being made available to the public in the way mentioned in section 182CA(1)”

141. CDPA Sec. 93B

142. Supra note. 107 at [34]

143. However, there is very little data on the specifics of how much income major performers actually receive from the exploitation of their MA right through Recording contracts. Supra note. 124

144. Supra note. 107 Table 1.4

145. Ibid. at [36]
146. formerly Musiknatet Waxholm


150. Supra note 103


152. Supra note 147

153. Ibid.


155. art. 9 SatCab Dir) 329

156. Supra note. 107 at [22]

157. Supra Note 149

158. Ibid.

159. Supra note. 107 at [22]

160. Ibid. For Example France has linked the amount of remuneration directly to the revenues from exploitation as it gives performers’ organisations a clear guideline in their discussions with users.


163. Supra note. 149

164. Ibid.

165. Ibid.

166. See Gillieron, P. (2006) Collecting Societies and the Digital Environment, IIC 939 “The assumption that the development of online music stores will likely lead to a substantial increase in the royalties collected on the internet was confirmed on March 13, 2006, when ASCAP announced that revenues generated by online music stores in 2005 had increased by 50% in comparison with 2004, for a total amount of US$8.1 million. See full press release at

168. See SGAE at [36], [54], FAPL at [186], ITV at [20].