periodicals enjoyed a conditional protection. This residual category of articles could be reproduced without the author's consent, unless it was expressly mentioned that reproduction was forbidden.[25] Thirdly, the reproduction of *articles of political discussion, news of the day or miscellaneous information* could not be forbidden. These could in any case be taken over without the author's consent.

According to Desbois, Françon and Kerever these limitations were inspired by different motivations: on the one hand, the free circulation of information (in particular for the articles of political discussions), on the other hand, the absence of an expression worthy of protection (in case of the news of the day ("*nouvelles du jour*", in contrast to "*nouvelles*" in general) and the miscellaneous facts).[26]

18. The scope of the restrictions in favour of the press was further narrowed down during the Berlin revision (1908).[27] The works published in news publications were in principle protected, especially serial stories and tales.[28] However, a (narrower) restriction of this protection was maintained.

Firstly, only articles published in *newspapers* could be reproduced in other newspapers, *unless* this was expressly forbidden and on condition that the source was mentioned. An article published in a daily newspaper could not be freely reproduced in a periodical. Articles published in a periodical could not be borrowed at all. This distinction was explained by the fact that these publications had different practices. For one, newspaper journalists generally wanted their works to appear in as many publications as possible, but this was not the case for writers whose works appeared in magazines.[29] Also, magazine publishers worked under different time constraints to publishers of daily newspapers. While the latter supposedly did not have the time to secure the consent of all journalists, the former did not need to proceed with the same haste in order to fully inform its readers.[30]

Secondly, the reproduction of news and miscellaneous facts remained unrestricted,[31] but articles of political discussion were no longer given the same treatment. These were from then on assimilated to the *other* articles, for

25. It was understood that the exception only covered the reproduction in other newspapers or periodicals: see Actes de la Conférence de Paris réunie à Paris, 15 April to 4 May 1896, *Bureau International de l'Union* 1897, 41.
26. Desbois, Françon & Kerever, *Les conventions internationales du droit d'auteur et des droits voisins*, 20.
27. Actes de la Conférence réunie à Berlin, 14 October to 14 November 1908, Bureau de l'Union internationale littéraire et artistique, 1910, 44.
28. De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, 385.
29. *Ibid.*
30. Actes de la Conférence réunie à Berlin, 14 October to 14 November 1908, 205.
31. It was admitted that these did not enjoy copyright protection as long as they lacked any literary character. *Ibid.* Proposals to restrict the practice of copying such news (e.g. within 24 hours) were rejected, as they belonged not to the domain of copyright but competition and the regulation of fair practices.

which the exclusive right of reproduction could be reserved by an express mention.[32]

As both the exploitation mode and the subject matter of the restriction in favour of the press were narrowed, the scope of the reproduction right enlarged accordingly.

19. The movement to expand the protection of works in relation to press publications did not stop there. The Rome act of 1928 maintained three types of cases, but the outline of the categories was changed.[33]

The reproduction right was restored to its full extent for *all articles other* than articles on current economic, political or religious topics (whereas this full right was previously applicable to *romans-feuilletons*, novels and other works that were not qualified as "articles").

For such articles on current economic, political or religious topics, an exception could be foreseen in the national copyright legislations to the effect that these could be freely reproduced "by the press", unless the reproduction was expressly reserved. The distinction between newspapers and periodicals was thus lifted because it was difficult to find a clear criterion to mark the difference.[34]

News of the day and miscellaneous facts could still be freely reproduced. At that point this restriction was explained as one that favoured the free dissemination of information. Accordingly, this restriction was later rephrased as a limitation of the protected subject matter (Article 2(8) BC).

20. The Brussels revision of 1948 did not change this provision, not even in the light of new news media (especially broadcasting media).

New exceptions were to reconcile copyright and the needs of faster information circulation, namely the right to make short quotations from articles published in newspaper and periodicals, even in the form of press summaries (current Article 10 BC), and the optional exception for the recording, reproduction and communication of short fragments for reporting on current events, by means of photography, cinematography or broadcasting (Article 10*bis* BC).[35]

By keeping the limitations separate, it was possible to balance the interests of the author and those of the general public and to articulate these in relation to the specific news medium.

21. Finally, when the Berne Convention was revised in 1967 to include the general reproduction right, this particular vertical regime for the press was

32. Desbois, Françon & Kerever, *Les conventions internationales du droit d'auteur et des droits voisins*, 31.
33. Actes de la conférence réunie à Rome, 7 May to 2 June 1928, Bureau de l'Union internationale pour la protection des oeuvres littéraires et artistiques, 1929, 71, 207.
34. Actes de la conférence réunie à Rome, 7 May to 2 June 1928.
35. Desbois, Françon & Kerever, *Les conventions internationales du droit d'auteur et des droits voisins*, 52-53.

performance, justified for one type of work and its proper exploitation dynamics, had no ground for other creations.

52. This issue of musical works in sound films was further addressed at the Brussels conference in 1948. It was considered that, if this use were qualified as an adaptation to instruments for mechanical reproduction (Article 13 BC 1928), then the national restrictions of this right (compulsory licences) would also apply to sound films.[110]

The international bureau and the Belgian administration, which prepared the conference, did not take a stance on the matter, but they foresaw that some courts and tribunals would qualify sound films as mechanical instruments and consequently apply the national compulsory licence to the musical works included in the film.[111]

The programme did force the members to qualify sound recordings in an audiovisual film as an audiovisual reproduction (rather than a mechanical one), but made it perfectly clear that the regime for musical works recorded for mechanical music instruments could not be applied to sound films. Firstly, a musical work could be integrated and be an indivisible part of a *new work*, to which the regime of Article 13 (provided for musical works alone) should not apply. Secondly, it would be inappropriate to extend the possibility to provide a compulsory licence to the recording of a musical work in a sound film. The reason that such limitation was tolerated was the protection of the gramophone industry – "or, les motifs invoqués en faveur de cette catégorie d'exploitants n'existent pas pour l'industrie du film".

These considerations resulted in a new paragraph in Article 14, to the effect that "cinematographic adaptations of literary, scientific or artistic works shall not be subject to the reservations and conditions contained in Article 13, paragraph (2)".

At the Stockholm conference in 1967, the proper place of this statement (inclusion in the first paragraph versus a separate paragraph) and its wording were debated, which resulted in current Article 14(3) BC to the effect that "the provisions of Article 13(1) shall not apply". The concern was to clarify that "countries of the Union cannot establish compulsory licences with respect to the composers' exclusive right to authorize the cinematographic reproduction of their works, that is to say, the cinematographic production of

110. The Association littéraire et artistique internationale (ALAI) had defended the view that the recording of music on a sound film should be treated as a musical recording in the sense of Art. 13 BC1928, not as a cinematographic adaptation in the sense of Art. 14 BC1928.

111. Documents de la Conférence réunie à Bruxelles, 5 to 26 June 1948, 348: "Plusieurs juristes compétents sont d'avis que le film sonore est, au sens de l'article 13, un instrument mécanique servant à la fixation et à l'exécution d'une oeuvre. Nous n'avons pas besoin de rechercher si cette conception est juste, mais il faut en tout cas prévoir qu'elle sera partagée par certains tribunaux".

these works on film".[112] So even if it does not appear in the text of the Berne Convention, it appears that the recording of a musical work in a sound film should indeed be qualified as a cinematographic reproduction, rather than a sound recording.

53. Various factors were thus considered to qualify a recording as a *sound recording* or a *cinematographic reproduction*.

The *support* on which the work is fixated (a film or gramophone disk) is not decisive.

The *type of work* reproduced could play a role. Some have argued that only works that are can be visually represented (*mise-en-scène*) such as theatre plays, operas, ballets and original cinematographic works or, after adaptation, other literary works[113] can be reproduced "by cinematography". For Van Isacker, the filming of a performance of other works, such as a musical concert or a lecture – without *mise en scène* – would not be a cinematographic reproduction, but a sound reproduction.[114] However, the Berne Convention does not contain indications that the nature of the work should determine the qualification of the reproduction. One can wonder why the mere registration of a dramatic or operatic performance ought to be qualified as a cinematographic reproduction, whereas an audiovisual recording of a live concert would be a musical recording. Furthermore, this qualification was questionable for a visually attractive and spectacular concert by a music band and arguably such event could earn its authors a right of cinematographic reproduction – unlike an acoustic set that could only result in a musical recording.

The *form of exploitation* (determined by the production and distribution process, the actors involved, the income models, etc.) is an alternative criterion, perhaps more suitable to characterise the reproduction (especially in view of the later application (or not) of exceptions and limitations). If the exclusive economic rights should indeed enable the author to protect the exploitation of her work, then it seems consistent to qualify the type of reproduction in function of the type of exploitation. So if the performance of a musical work were reproduced using audiovisual techniques and resulting in a record suitable to be exploited via the channels of cinematographic

112. Records of the intellectual property conference of Stockholm, June 11 to July 14, 1967, *World Intellectual Property Organization (WIPO)* 1971, 127.

113. Ricketson & Ginsburg, *International Copyright and Neighbouring Rights*, 63; de Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, 41; Van Isacker, *De exploitatierechten van de auteur*, 213. de Beaufort could not imagine how scientific works could be reproduced by means of cinematography and suggested to read this Art. 14 as if scientific works were not included. The reference to "scientific" works was deleted at the Stockholm revision. In this sense also Trib. féd. suisse, Masse en faillite de la s.a. de l'Alhambra de Genève c. Société des auteurs, compositeurs et éditeurs de musique à Paris (SACEM).

114. Van Isacker, *De exploitatierechten van de auteur*, 213. The performer could still claim protection based on her own neighbouring rights.

served the subsequent broadcast – for which the authors' consent was anyhow required. Should they deserve the qualification of "reproductions" in the first place, then an exception should apply, such as the exception for personal and private use.[143]

The authors and derived holders of the (mechanical) reproduction right, by contrast, defended that any recording constituted a reproduction protected by the exclusive right of reproduction.

68. The national regulations also diverged: the Italian copyright act held an exception to the reproduction right, allowing such recordings within certain limits.

By contrast, the authors' thesis was backed by some court decisions in France on "*enregistrements radiophoniques*".[144] In 1937, the *tribunal commercial de la Seine* had ruled that the recording of a concert organised by a publicity agency meant for broadcasts by several stations was a reproduction that required the author's consent. It was decided that the reproduction right covered recordings, regardless of the technique used, and that the exception for private use (given the broadcasts) was not applicable.[145] Similarly the French *Conseil d'état* decided in 1939 that the partial recording of a melody, which a public broadcaster used as its feature tune, was a *édition* for which compensation was due.[146]

69. The question was submitted for discussion at the Brussels Conference of 1948.[147] During that conference, the extension of the broadcasting rights to the rebroadcast (other than relaying) and the retransmission by cable was discussed but also the "deferred broadcasting after recording", a point of fierce controversy.[148] This led to the regime that is currently still in force.

143. *Contra*: E. D. Hirsch-Ballin, "Les enregistrements radiophoniques, du point de vue de l'usage personnel et privé", *Le droit d'auteur* 1952, (119) 121. This author explains that recordings in view of a broadcast are indeed protected reproductions. The recording could however not be exempted. Firstly, the recording was made with commercial intent. Secondly, the division of the broadcasting practice in a preparatory stage of recording a work in the privacy of the broadcaster's studios and a separate stage of broadcasting it to the public was untenable. The Dutch exception for private copy imposed an assessment of the purpose of the reproduction as a factor of its legitimacy. As the purpose is the broadcast to the public, the purpose of "private and personal use" is manifestly missing.
144. X., "Etudes générales: Les enregistrements éphémères selon l'article 11bis de la Convention de Berne revisée à Bruxelles", 37-38.
145. X., "L'union internationale au seuil de 1938", *Le droit d'auteur* 1938, (4); X., "Disque et radio", *Le droit d'auteur* 1940, (97) 98.
146. C.E. fr. 5 May 1939, Bureau international de l'édition musico-mécanique c. Administration française des P.T.T., *Le droit d'auteur* 1939 (117) 117 avec note de la rédaction.
147. See for the history of Art. 11*bis* BC1948: G. Straschnov, *Le droit d'auteur et les droits connexes en radiodiffusion*, Bruxelles, Etablissements Emile Bruylant, 1948, 80 et seq.
148. M.V., "Radiodiffusion et droit d'auteur (1-6)", *Le droit d'auteur* 1948, (14) 132 et seq.

(1) Recording right

70. The principles are clear: firstly, the author has the right to control both the recording and the broadcasting of her work and, secondly, the reproduction right is independent of the broadcasting right. Consequently, the authorisation to broadcast a work does not entail or imply the authorisation "to record, by means of instruments recording sounds or images, the work broadcast". This provision was included as a rule to guide the *interpretation* of contracts between broadcasters and authors.[149]

In other words, the broadcasters have to obtain the author's consent for the recordings made in relation to the broadcast. The author's consent to broadcast does not suffice. And "recording" means all types of recording, both permanent and ephemeral,[150] as it was considered "difficile de faire la démarcation entre cet enregistrement périssable à l'usage d'une représentation reportée, et l'enregistrement durable qui est fort d'un potentiel de droit".[151] The Polish delegation (taking over the proposition of the *Union internationale de radiodiffusion*) proposed to provide a negative statement in the sense that the authorisation to broadcast did not imply the authorisation the recording *for sale to the public* of the broadcast work (so *a contrario* other recordings would thus be authorised) but this proposal was not accepted.[152]

71. The recording right covers ephemeral recordings as well. This can be derived *a contrario* from the second sentence of the paragraph. Ephemeral reproductions could not be distinguished, by their nature or their technical character, from other types of reproduction, such as printed or mechanical reproductions. There were no material or physical features that set "ephemeral" recordings apart from other recordings, so these could not be objectively excluded from the reproduction right.

Instead, their function or their purpose justified the provision of an *exception* to the reproduction right. In absence of such exception, the author's consent to such recording was however required in a contract between the author and the broadcasting organisation. If the contract is not clear on this point, then it is presumed that the recording right is not transferred, even if the reproduction is merely ephemeral.[153]

149. P. Bolla, "La Convention de Berne pour la protection des oeuvres littéraires et artistiques, dans le texte revisé à Bruxelles", *Le droit d'auteur* 1949, (25) 32.
150. M.V., "Radiodiffusion et droit d'auteur (1-6)", 133.
151. Documents de la Conférence réunie à Bruxelles, 5 to 26 June 1948, 102.
152. See note in C.E. fr., Bureau international de l'édition musico-mécanique c. Administration française des P.T.T., 118.
153. Documents de la Conférence réunie à Bruxelles, 5 to 26 June 1948, 102.

necessarily entail that only material reproductions without any incidence on the exploitation of the work should be admissible. Exceptions can be justified by social, cultural or other concerns, as Recht rightly observed concerning the quotation right: "it is not because competition causes no prejudice that [a quotation] must be authorised but because the public interests so demands".[238] In such case, the conditions and modalities of a restriction (e.g. the payment of a remuneration) should be defined in function of the definition of the reproduction right (i.e. the exploitation of the work). This concern was indeed explored in the three-step test.

(2) In the conditions of the exceptions: the "three-step test"

113. Instead of incorporating the protection of the exploitation of the work as an explicit condition in the definition of the reproduction right, all legislative efforts were directed to limiting the effects of exceptions to and limitations of the reproduction right.

This approach ultimately resulted in Article 9(2) BC, the so-called three-step test[239]:

> it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Although an in-depth analysis exceeds our ambitions here, an analysis of this test (its conditions, its origin) leads us to a better understanding of the substance of the reproduction right.

114. The genesis of the three-step test is in our understanding indissociably connected to the introduction of the general reproduction right in the Berne Convention (and the corresponding removal of two specific reproduction rights).

The primary concern was to make sure that exploitation of the work by means of reproductions was safeguarded. This objective was stated from the start, during the preparations of the Stockholm conference, and was not questioned afterwards.

When discussing the opportunity and the form of a general reproduction right, the study group that had the task of preparing the Stockholm revision summarised the general objective: "it is obvious that all the forms of

238. Recht, "Should the Berne Convention include a Definition of the Right of Reproduction?", 86.

239. See for contextual background: M. Senftleben, *Copyright, Limitations and the Three-Step Test. An analysis of the Three-Step Test in International and EC Copyright Law*, The Hague, Kluwer Law International, 2004, 43 et seq.

exploiting a work which have, or are likely to acquire, considerable economic or practical importance must in principle be reserved to the authors".[240] Regardless of the type of work or the technology deployed, the reproduction right should grant the author control over the forms of exploitation that this combination would give rise to.

115. It was feared that, paradoxically, the introduction of a general reproduction right and the abolition of specific reproduction rights would result in a lower level of protection.

As explained, the Berne Convention provided specific regimes that balanced the reproduction right and the exception in function of the exploitation modes of a work, in a particular sector. It was feared that the replacement of these specific reproduction rights by one reproduction right, covering all types of works and all forms of exploitation but without specific exceptions, would tempt national legislators to provide too many or too far-reaching exceptions.[241] This would upset the balance that was otherwise guarded (at least marginally) in the convention and undermine the protection that the reproduction right was meant to confer in the first place.

Furthermore, technical developments brought reproduction technologies to individuals and organisations other than the professionals of the publishing, music and film industries. It was never easier, cheaper and faster to make a photocopy of a literary work, to record a broadcast or to copy a music recording. Such copies, often for "personal use", would nevertheless affect the exploitation of these works, e.g. the sales of these publications (especially scientific publications) or music records. The impact of national exceptions for "private copies" or for "personal use" on the exploitation of the work would thus change due to these technical innovations.

116. In order to keep the balance between the protection of the author's economic interests and the protection of other worthy causes, the three-step test was introduced. As an "interface between the authors' exclusive rights and privileged uses", the three steps would "make it possible to approach the core of copyright's balance in stages".[242]

In preparation of the Stockholm conference, the Swedish/BIRPI Study group emphasised that a general reproduction right could only be accepted on condition that "a satisfactory formula [were] found for the inevitable exceptions to this right",[243] the general objective being to guarantee the

240. *General report of the Swedish/BIRPI study group established at July 1, 1964*, 47. Desjeux, "Le droit de reproduction dans la Convention de Berne revisée à Stockholm le 14 juillet 1967".

241. A wide variety of exceptions – of various impact – already existed in the national copyright legislations (which the Member States wanted to preserve): Ricketson & Ginsburg, *International Copyright and Neighbouring Rights*, 75; Senftleben, *Copyright, Limitations and the Three-Step Test*, 48.

242. Senftleben, *Copyright, Limitations and the Three-Step Test*, 132.

243. *General report of the Swedish/BIRPI study group established at July 1, 1964*, 47.

a material support, with this understanding that the information is not lost when the power to this device or support is cut.[353]

174. But then, of course, there is the argument that the "storage" of a work in a computer's memory has been regarded as a reproduction since Ulmer qualified it as such in his study in 1970. In our opinion, this argument cannot be accepted unequivocally: the reasoning is untenable because it reverses the application of the notions "storage" and "reproduction" in the process of shaping the reproduction right. Ulmer may indeed have concluded that the storage of a work in a memory could be a protected reproduction, this did not entail that the material act of storing a work automatically results in a reproduction.

As established before, there is more to Ulmer's conclusion than what its appearance may suggest. We have demonstrated that the content of this principle cannot be dissociated from the factual context and reasoning that led to the qualification of the storage of a work in a computer system as a reproduction. Ulmer came to the first expression of this principle after a thorough analysis and careful consideration of the technological framework *and* the uses these technologies enabled, which he resumed in a schematic representation of "storage" and "retrieval".[354] On this basis, he considered the "storage" of the work in the memory of the computer system the most suitable anchor point for the protection of the author's interests. Finally, he verified whether this "storage" could constitute a "reproduction" in the sense of Article 9 BC and he came to the conclusion that it could. The subsequent "retrieval" could not be assessed independently from the preceding "storage" and should more "reproductions" follow, then an overall agreement should be concluded.

During later discussions, it was stated that fixations of a work that lasted long enough to make the work perceptible, to enable the further reproductions or communication, should in any case be considered reproductions.[355] This was the legal translation of the criterion set to distinguish some acts of copying that were not sufficiently lasting to constitute a reproduction and, indeed, to exclude some acts. Some forms of "storage" did *not* necessarily entail a "reproduction", i.e. copies that were "transient" (*transitoire*) and only kept as long as needed to complete another purpose ("one use input", e.g. scientific analysis of data or indexing). There was temporary "storage"

353. D. J. G. Visser, *Auteursrecht op toegang. De exploitatierechten van de auteur in het tijdperk van digitale informatie en netwerkcommunicatie*, 's-Gravenhage, VUGA Uitgeverij B.V., 1997, 64: "Onder opslag wordt verstaan: de vastlegging van informatie op een stoffelijke drager waarbij de informatie niet verloren gaat als de elektriciteitstoevoer ophoudt (als de stroom uitvalt of uitgeschakeld wordt of de batterij op is".

354. Ulmer, "Problèmes de droit d'auteur découlant de la mémorisation dans l'ordinateur et de la récupération d'oeuvres protégées", 38-46, Les données de fait.

355. Rapport du deuxième Comité d'experts gouvernementaux sur les problèmes découlant, sur le plan du droit d'auteur, de l'utilisation d'ordinateurs pour l'accès aux oeuvres ou pour la création d'oeuvres (Paris, 7 to 11 June 1982), 238.

but the Berne members were free to qualify these copies as protected reproductions – or not.

175. But even before this step in the reasoning, another operation of distinction and exclusion can be perceived. It appears that not all material copies were considered as a *storage* of the work.

In the description of the then technological framework, some temporary copies have been excluded as reproductions. In Ulmer's scheme, works in analogue form were first "digitised", i.e. fixated on a "machine-readable" support. The computer would then "read" the works and "store" these in the computer system, either on the internal memory or on external memories (reason why these were called computer *systems*). Because the capacities of the computers were then fairly limited, large volumes of data were commonly saved on external supports (e.g. magnetic tape), which were referred to as "external storage".

Ulmer's wording could suggest that the "internal storage" was rather a theoretical possibility:

> Les mémoires internes [internal storage] d'un ensemble de traitement électronique d'informations font partie de l'unité centrale de l'ordinateur. Elles sont caractérisées par un temps d'accès court; [...] *Cependant*, ces mémoires n'ont encore qu'une capacité limitée. On les utilise donc surtout comme mémoires de travail ou mémoires rapides pour le traitement continu mais non comme mémoires permanentes pour des volumes importants d'informations[356] (our emphasis).

This would suggest that the (then mostly hypothetical) saving a work on the internal memory was regarded as the "storage" of works but *not* the use of the computer as a working memory, where works would be kept for a short time only before they were transferred to an external memory.

If the reproduction is characterised by a "lasting fixation", understood in a functional way, then this is probably due to this conception of the "storage" of a work in a computer memory. This criterion incorporated, in other words, the *selection* of certain "copies" and a justification for the *exclusion* of others, notably those transient copies (a matter left to the discretion of the national legislators).

We cannot agree with the representation that this criterion of duration was conceived *in abstracto* as an inherent property of a clearly established notion of "reproduction", from which should necessarily ensue that "the storage" of the work is a reproduction. On the contrary, we conclude that the notion of reproduction was shaped by this technology. A context-specific stable storage has provided the factual basis for a more abstract legal criterion. A particular "storage", in a particular context, shaped the notion of

356. Ulmer, "Problèmes de droit d'auteur découlant de la mémorisation dans l'ordinateur et de la récupération d'oeuvres protégées", 40.

the exhaustion rule would be undermined and could be circumvented merely by naming a transaction a "licence" rather than a "sale".[479]

Secondly, the Court stated that the computer programs had not been "made available to the public" in the sense of Article 3(1) InfoSoc Dir. It had been argued that this provision applied, rather than the distribution right of the Computer Programs Directive, and that consequently the exhaustion rule could not restrict the right holder's control (Article 3(3) InfoSoc Dir). The CJEU did not follow this reasoning and it decided that the making available of copies of a computer program does not constitute a "making available to the public" in the sense of Article 3(1) of the InfoSoc Directive.[480] The Court reminded that the InfoSoc Directive does not affect the Computer Programs Directive; moreover, Article 4(2) CPD was considered a *lex specialis* so the first sale rule in the Computer Programs Directive would anyhow trigger the exhaustion of the distribution right.[481] The Court went even further and derived from Article 6(1) WCT:

> in the light of which Articles 3 and 4 of Directive 2001/29 must, so far as possible, be interpreted (...), that the existence of a transfer of ownership changes an 'act of communication to the public' provided for in Article 3 of that directive into an act of distribution referred to in Article 4 of the directive which, if the conditions in Article 4(2) of the directive are satisfied, can, like a 'first sale ... of a copy of a program' referred to in Article 4(2) of Directive 2009/24, give rise to exhaustion of the distribution right.[482]

Thirdly, it was decided that the exhaustion rule could restrict the distribution right with regard to both tangible and intangible copies of computer programs.[483] Such distinction would allow the right holder to avoid the exhaustion of her rights. In addition to its legal arguments, the Court further developed economic reasons, considering the sale of a computer program on CD-ROM or DVD is a *functional equivalent* of the sale by download via the Internet.[484] It was reminded that the purpose of the exhaustion rule is to avoid the partitioning of markets and to limit the restrictions to the distribution (redistribution) of the works to what is necessary to protect the specific subject matter of the IP.[485] If the exhaustion rule were restricted to material copies, then the right holder would be able to control the redistribution of downloaded copies and demand further remuneration, even if she had the

479. *Ibid.*, para. 49.
480. *Ibid.*, para. 50.
481. *Ibid.*, para. 51.
482. *Ibid.*, para. 52.
483. *Ibid.*, para. 55.
484. *Ibid.*, para. 61.
485. *Ibid.*, para. 62.

occasion to obtain appropriate remuneration at the first sale. This restriction of the resale of downloaded copies would go beyond what is necessary to safeguard the specific subject-matter of the copyright.[486]

Advocate General Bot had advised in the same sense on this point. He argued that the refusal to apply the exhaustion rule to Internet downloads would restrict its scope and the freedom of movement. A restriction of the freedom of movement is only justified for the protection of the specific subject-matter of that IP right,[487] i.e. an appropriate remuneration and not the highest possible remuneration. According to the Advocate General, the right holder has received appropriate remuneration if she has been paid for the right to use a copy of the computer program. Allowing the right holder to control the resale of a copy and to demand further remuneration (when the copy is downloaded, not incorporated in a tangible object) does not pertain to the specific subject matter but extends the monopoly of the exploitation.[488]

Fourthly, it was argued that the object of the first sale was not the same as the used software that was further distributed, which had been patched and updated on the basis of the maintenance contract. The Court decided that, even though the exhaustion rule does not apply to services, it did extend to the altered software since the user had the right to use of the altered software for an unlimited period – even after the maintenance agreement had ended.[489]

228. The exhaustion rule could only apply on condition that the original acquirer/reseller has made her copy of the computer program unusable when she resells "her copy". The application of the exhaustion principle then had far-reaching consequences. The first sale of a computer program with the right holder's consent leads to the exhaustion of the distribution right, which entails that she can no longer oppose the resale of that copy, notwithstanding the existence of contractual terms prohibiting a further transfer.[490] It can be understood that the exhaustion principle even applies when the first copy sold is technically not the same copy as the one re-distributed by UsedSoft.

The distribution right is not only exhausted regarding the copy of the program as it was originally downloaded from Oracle's website, but also regarding the functionalities corrected, altered or added on the basis of a maintenance agreement (patches and updates), which formed an integral part of the originally downloaded copy.[491] By contrast, the exhaustion rule does not permit the first acquirer to divide the licence and sell the rights for the

486. *Ibid.*, para. 63.
487. Opinion of the Advocate General in case nr. C-128/11, *UsedSoft*, para. 78.
488. *Ibid.*, para. 83.
489. CJEU, *UsedSoft*, paras 67-68.
490. *Ibid.*, para. 77.
491. *Ibid.*, para. 67.

information and, of course, had important ramifications for the exploitation of copyright works. Consultations on these technological, economic, socio-cultural changes started in the early 90s and ultimately resulted in the 2001 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.[581]

The *objective* of this Directive is the harmonisation of the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society (Article 1 (1) InfoSoc Dir). The purpose is to further the achievement of the common market (rec. 1) and to foster the development of the information society in Europe (rec. 2) through the harmonisation of the legal framework on copyright and related rights (rec. 3). This need was especially pressing in the light of the rapid development and adoption of digital information and communication technologies, especially the Internet and the World Wide Web.

276. Although it was acknowledged that "*the vectors for creation, production and exploitation*" had "*multiplied and diversified*", it was felt that there was no need for new concepts for the protection of intellectual property. Instead, "the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation" (recital 5).

The substance of the newly harmonised copyright notions was thus shaped in a larger, pre-existing international and European copyright framework. Firstly, the European Community and its Member States were bound by the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (rec. 15). Secondly, the principles laid down in the existing directives regarding copyright and related rights determined the notions in the InfoSoc Directive (recital 20).[582]

The InfoSoc Directive is applicable to all kinds of copyright works, except for computer programs and databases. It regulates two aspects of

581. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *O.J.* 2001, (10), hereafter InfoSoc Directive or InfoSoc Dir. See on the origin of the InfoSoc Directive: S. Von Lewinski & M. M. Walter, "Information Society Directive" in M. M. Walter & S. Von Lewinski (ed.), *European Copyright Law. A Commentary*, Oxford, University Press, 2010, 937-951. See also L. Bently & R. Burrell, "Copyright and the information society in Europe: a matter of timing as well as content", *CML Rev.* 1997, (1197) 1200 et seq. These authors, writing in 1997, advised to postpone the adoption of a regulation for Internet use.

582. In particular the directive 91/250 (now 2009/24) on the legal protection of computer programs, Directive 92/100 (now 2006/115) on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, directive 93/98/EEC (now 2006/116) harmonising the term of protection of copyright and certain related rights and directive 96/9/EC on the legal protection of databases.

particular importance in the information society: the rights and exceptions (chapter II) and the protection of technological measures and rights-management information (chapter III).

277. Among the nine priorities for harmonisation in the Commission's 1995 Green Paper was the right of reproduction.[583] Yet, on the whole, little attention was given to the reproduction right.

Except for a minor change,[584] the final version of the InfoSoc Directive contains the same reproduction right as the first Commission's proposal. The reproduction right was clearly not made up from scratch. Even before the InfoSoc Directive, the national copyright legislations of the Member States had been created and evolved within the same international framework. Previous harmonisation efforts had taken place, in the Berne and later WIPO framework but also on the European level. With regard to Internet use, however, the national courts had come to different solutions, based on the reproduction right (in some cases the right of communication to the public was applied as well).[585]

1.2.3.1. Protected Act of Reproduction

278. The InfoSoc Directive grants a general reproduction right on copyright protected works and on subject matter protected under neighbouring rights (i.e. performances, phonograms, films and broadcasts).

This general reproduction right provides authors with the "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" (Article 2 InfoSoc Directive). These acts should be defined broadly, to ensure legal certainty within the internal market (rec. 21).

For the Commission, the reproduction right is at the core of copyright.[586] Although the scope of the InfoSoc Directive is not restricted to the world of digital (network) technologies, the application of the reproduction right in the world of hard copies has hardly been discussed. The directive provides authors with a separate distribution right, subject to the exhaustion

583. Green Paper Copyright and Related Rights in the Information Society, European Commission, 1995, COM(95) 382 final. The Commission wanted to focus on the reproduction right, the right of communication to the public, the digital dissemination or transmission right, the digital broadcasting right, the moral rights and two question relating to the exploitation of rights, i.e. the acquisition and management of rights and the technical systems of identification and protection.

584. Report on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 - C4-0079/98 - 97/0359(COD)), *O.J. C* 150, 28 May 1999, 15.

585. For some early decisions and the different solutions: Gendreau, "Le droit de reproduction et l'Internet", 23-37.

586. Green Paper Copyright and Related Rights in the Information Society, 49.

This condition could be read as an expression of the core value of the reproduction right: the protection of the author's economic interests in the reproduction of her work. As the Commission explained:

> the purpose of Article 5(1) is to exclude from the scope of the reproduction right certain acts of reproduction which are dictated by technology, but which have no separate economic significance of their own. (...) In such cases, it is appropriate to limit the scope of the reproduction right and only protect those acts of reproduction which are of a separate economic relevance.[730]

This seems simple enough: reproductions that are not "*by themselves economically irrelevant*"[731] surpass "*technical necessity*"[732] and should therefore be eliminated from the scope of the exception.

322. The indications in the Directive and in the preparatory documents barely solve the questions how the "economic significance" should be understood, what acts it should be "independent" of and whose position should be taken for this assessment.[733]

The "economic significance" suggests a very broad appreciation that includes every economic advantage that could be realised by each reproduction. This is larger than the "monetary value"[734] that the EP suggested or than the "materially independent economic exploitation".[735] Reproductions with a direct commercial value have economic significance, but so do reproductions that make a process more efficient, like caching processes.[736] Understood in this sense, any (technical) copy that is not entirely obsolete may have economic significance.

323. The circumstance that a copy has an economic significance does not prevent the application of the exception though. Only if the copy has an *independent* economic significance should the author's consent be sought.

730. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 29.
731. Von Lewinski & Walter, "Information Society Directive" in Walter & Von Lewinski (ed.), *European Copyright Law. A Commentary*, 1026-1027.
732. Bechtold, "Information Society Dir." in Dreier & Hugenholtz (ed.), *Concise European Copyright Law*, 373.
733. See also Opinion of the Advocate General in *Infopaq*, paras 122 et seq.
734. Report on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 - C4-0079/98 - 97/0359(COD)), 27.
735. Report on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 - C4-0079/98 - 97/0359(COD)), 27.
736. Opinion of the Advocate General in *Infopaq*, para. 125.

The economic advantage of the copy should be attributable to the intended use only; the intermediate copies should exclusively contribute to the advantage of the intended use. For the Economic and Social Committee, this means "independent economic significance to the use of the work in question, not to its transmission".[737]

A reproduction should only play a part in the completion of the intended use, it should not be otherwise exploited (e.g. with another purpose, addressing another need or another public, giving access to another source of income). For Advocate General Trstenjak, this independence means that "an economic advantage stems directly from the temporary acts of reproduction".[738] According to her, reproduction that contributes to a more efficient process is not a reproduction with *independent* economic significance. Also, the mere *possibility* to gain an independent advantage from the reproduction is not sufficient to rule out the application of the exception.

In a digital networked context, this requires a complex economic[739] and technical assessment: one property of digital reproductions is indeed that these are not bound to one particular purpose.

324. How should the independent economic significance be assessed in the network transmission of a work between third parties by an intermediary?

From the point of view of the network operator, each technical copy can enhance the technical efficiency of the transmission and the routing or caching activities are exactly the core of the business of these service providers. The intermediate copies per se are economically quite valuable to the ISP, not the ultimate use by the parties.

Should it then be concluded that the reproductions made as "dedicated services (e.g. proxy caching performed by an independent service provider)"[740] cannot be exempted and should in every case require the author's prior consent? An affirmative answer risks impairing the purpose of this particular exception. If all technical copies occurring during a network transmission somewhere generate economic value for the intermediary, then which technical copies do still fall within the scope of the exception?

Also, one could wonder how such interpretation would affect the principle that "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within

737. Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society', 31. It should however be noted that this was comment on the Commission's first proposal that only referred to the "use" of the work, in which the transmissions were included.
738. Opinion of the Advocate General in *Infopaq*, paras 126-129.
739. Hugenholtz, "Caching and copyright: the right of temporary copy", 488.
740. *Ibid.*

receives a broadcast by means of loudspeakers but one is alone in the room or in a private space: this was considered a "listening mode", like headphones.[160]

Still, some legal uncertainty remained until the Berne Convention was revised.[161]

425. So the right to authorise "*the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work*" was recognised at the Brussels Conference in 1948.

The wide-spread use of *loudspeakers* to diffuse broadcast radio programmes and the controversy on its copyright status had come to the attention of the international bureau responsible for the preparation of the Brussels Conference: "*Partout où les hommes se réunissent: au cinéma, au restaurant, à l'hôtel, au salon de thé et jusque dans les wagons de chemin de fer, on entend aujourd'hui de la musique, ou des lectures, récitations et conférences transmises par radio et haut-parleur*".[162] This affected the sales of the recorded music and the attendance of live performances. It was even estimated that this form of exploitation would become increasingly important, reason why the authors should be protected in this respect.

Mutatis mutandis the same was valid for the public viewing of television broadcasts, by means of a television set in a public place (hence the expression that to loudspeakers are assimilated *tout instrument analogue transmetteur de sons ou d'images*). In fact, this expression kept the door open for innovations to come, "*droit vivant, mais aussi droit virtuel pour qui veut bien imaginer la capacité infinie des inventions*".[163]

The ratio of this right was the *economic interest* of the authors, as it was thought unfair that the author did not benefit from new practices, while others made profits by diffusing her broadcast works. The communication by loudspeakers was considered as a form of exploitation of the work, reason why it should indeed be protected: "*le législateur national ou international devrait interdire une telle exploitation lucrative de la part des sans-filistes, si l'auteur n'y a pas expressément consenti*".[164]

The argument that a broadcast would reach an unlimited number of people anyhow was also addressed: only the owners of radios and televisions were taken into account (and their close circle of intimates) for the calculation of the remuneration of the author. It would be unfair to have radio owners who only listened to in their private circles pay as much as those who would initiate the public enjoyment of these works (and could enjoy direct or indirect commercial returns).

160. Poirier, "La radiophonie et le droit", 10.
161. Desbois, "L'évolution des droits de l'auteur en matière de reproduction et d'exécution publique", 14.
162. Documents de la Conférence réunie à Bruxelles, 5 to 26 June 1948, 266.
163. *Ibid.*, 101.
164. *Ibid.*, 267.

Another argument was that it was impossible for café owners and the like to obtain the authors' prior consent, since they didn't know the content of the broadcast programmes in advance. This argument was not considered decisive, as the authors' societies were well organised to collect the due remunerations.

According to Makeen, the recognition of the reception – in public – of a broadcast as a separate exclusive right implies that the Berne Convention embraces the "*single rendition/multiple prohibited acts*" principle.[165] One act of exploitation (at the end of the chain) is indeed preceded by several other restricted acts.

426. Whether or not the listening or viewing is a new and independent act of communication thus depends on its *public or private character*.

The notion "public" was not clarified, apart from the indication that places "where people meet" are public. From the preparatory documents, it appears essential that the broadcast reached a "new public". This communication to the public was indeed a *new form of exploitation*, a use of the work to gain a commercial advantage by presenting it to a new "public". While this criterion was ultimately rejected for the act of communicating a broadcast work to the public, the negotiators saw no harm in using it for the communication by loudspeakers. Yet the distinction between the "public" and the "private" was entirely left to the discretion of the national states, a difficult task.

It may be noted, finally, that the term used in relation to broadcasts is the public "communication", rather than "performance" – the term used in Article 11, 14 and 14*bis* BC. Yet all these acts have in common that the work is rendered and can be perceived by a public that is assembled at the same time and the same location where the loudspeakers or analogous instruments are installed, be it by means of a recorded performance, a film or a broadcast.

2.1.1.2.1.3. Limitation of the Exclusive Right

427. One reason why the qualification of a transmission as a "broadcast" is important is that the Berne Convention allows national legislators to limit the exercise of this right.

Article 11*bis* (2) BC indeed provides that "*it shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised*". However, these restrictions may apply only in the countries where they have been prescribed. Furthermore, the moral rights of the author may not be prejudiced and she must receive an equitable remuneration.

National legislators thus enjoy an important margin to limit the author's prerogatives in favour of other interests, in particular by imposing a

165. Makeen, *Copyright in a Global Information Society*, 76.

Dittrich suggested that solutions be modelled on the national level, entirely in function of the chain through which the authors receive remuneration. The reception and the enjoyment of protected works are outside the author's control, but the possibility to *offer* the work for reception and enjoyment to users is not. As the user pays the intermediary for access to a work and the exploiter generally pays the author for the possibility of granting access to the work, the final user pays indirectly for the reception and enjoyment of the work. Copyright's exclusive rights, according to Dittrich, are thus nothing but a multi-levelled system that allows retrieving – indirectly – remuneration from the final user, the consumer of the work, by means of an intermediary, the exploiter of the work.[226] In this view, simple household antennas must be seen as equipment to receive broadcasts, as are those installations that serve the same function because no additional remuneration level is created.

In the same vein, the WIPO/UNESCO working group summarised that a restricted act of cable retransmission takes place when an intermediary intervenes in the distribution of the broadcast programme and thus takes the role of "le rôle d'entrepreneur de spectacles tout comme l'a fait auparavant l'organisme d'origine".[227] This quality is expressed in two conditions, firstly that the communication is made to the public and secondly that the distributor is a third party, an intermediary between the broadcaster and the recipients. Certain elements can be indicative of this quality, such as the intention of communicating the programmes to the public, the initiatives to attract clients, the quality of the technical installation and the commercial objectives. It was argued that there is no such intermediary, when homeowners share an antenna without commercial intent.

It was remarked that such commercial intent should suffice for finding a new act of communication to the public, either directly or indirectly. So a homeowner who rents her apartment and offers the connection to the collective antenna as an additional service could be a distributor in the sense of the Berne Convention and thus obliged to pay remunerations for this distribution. This interpretation was counterbalanced by the distinction between the profitable aim resulting from the distributor's *main* activity (i.e. exploitation of a cable network) and the commercial intent *accessory* to the main activity (i.e. the management of all kinds of buildings, such as renting apartments, but also running a hospital or a hotel).

Inversely, the absence of a commercial intent would not disqualify the transmission as a protected communication.

226. Dittrich, "De l'interprétation de l'article 11bis.1) et 2) de la Convention de Berne", 284.
227. Rapport du Groupe de travail sur les problèmes que pose sur le plan du droit d'auteur et des droits voisins du droit d'auteur la distribution par câble de programmes de télévision (Paris, 13 to 17 June 1977), 236.

458. Finally, recourse was had to the condition that the communication of the broadcast work was made to the *public*, as a criterion to distinguish the reception from the act of distribution.

It was argued that the cable transmission following the reception by means of a collective antenna to a restricted number of houses should not be qualified as an act of cable distribution, as the "public" aspect was lacking.

Thus making the connection between the proposed notion of "*voisinage*" (characteristic for the small-scale collective antenna installations) and the right of communication to the public by wire, Gotzen further clarified the criterion to apply. If the broadcast works are transmitted only to a (geographically) restricted group, fixated by the location of the houses in which they receive the works, which is not open for any third party to join at any time, then the communication was not a public one.[228]

By contrast, if the territorial restriction is loosened and any person living in the same neighbourhood can acquire a connection to the network, then the installation is no longer a means of reception but an act of communication to the public.[229]

459. A similar approach was taken when in the WIPO/UNESCO/ILO framework guidelines were issued for national legislators in the implementation of the international copyright provisions. A separate section was devoted to this issue.

Principle 8 stated:

> Ne saurait être assimilé à la distribution par câble de l'oeuvre radiodiffusée le fait que l'émission de radiodiffusion, captée par une antenne de plus grandes dimensions que celles qui sont généralement utilisées pour la réception individuelle, soit transmise par câble à des récepteurs individuels situés dans une zone limitée constituée d'un même immeuble ou d'un groupe d'immeubles voisins, pour autant que la transmission soit effectuée à partir de cette zone et qu'elle n'ait pas de but lucratif.[230]

228. F. Gotzen, "La télévision par câble et le droit d'auteur en Belgique. Etude de la loi belge par rapport à la Convention de Berne et au Traité de Rome", *Le droit d'auteur* 1982, (293) 298. Gaudel had proposed a less developed notion: a transmission would take place in a private circle if the wires did not cross the public road or a third party's property. Gaudel, "La télédistribution", 139.
229. A Brussels tribunal ruled that a cable network, open to any paying subscriber, transmitted programmes to a *public*, in contrast to a shared antenna that transmits programmes to the inhabitants of a building. See Trib. Bruxelles, 19 June 1975, Ciné Vog c. Les Films La Boétie, CODITEL, Chambre syndicale des Producteurs et Exportateurs de Films français, R.I.D.A. 1975, LXXXVI, 124.
230. *Principes commentés de protection des auteurs, des artistes interprètes ou exécutants, des producteurs de phogrammes et des organismes de radiodiffusion en ce qui concerne la distribution de programmes par câble*, 152. This principle was repeated in Oeuvres audiovisuelles et phonogrammes. Document préparatoire pour le Comité d'experts gouvernementaux OMPI/Unesco et rapport de ce Comité (Paris, 2 to 6 June 1986), 204: «*AW26 Ne saurait être assimilé à la distribution par câble de l'oeuvre radiodiffusée le*

"public" be assembled to see the work appear on the screen, so if one user or only a small number of people could see it, the author had no means of forbidding such use.[309,310]

Gotzen considered the case where a centrally stored work could be accessed via several computers.[311] Such remote access would only exceptionally result in a communication to the public, in his early opinion, since a work would rarely be transmitted to several users (who could constitute a *public*) at the same time. The infrastructure was of limited capacity at that time so it was most probable that only one user would perceive a work at any given time.

Later, more elaborate and powerful systems were discussed, where users could retrieve information by text broadcasts (teletext) or, interactively, over cable or telephone networks (videotext or the French Minitel).[312] The types of works thus distributed were more diverse: not only television and radio programmes but also text, images or photographs could be transmitted to a public.

506. An update of the international copyright framework was thus felt necessary. The profound impact of the development and convergence of information and communication technologies was recognised and a new copyright treaty was adopted in December 1996, in the framework of the WIPO.[313]

To remedy the fragmented protection of the immaterial exploitation of copyright works, a general right of communication to the public was introduced – modelled after the general reproduction right in the Berne Convention.[314]

The WIPO Copyright Treaty contains a provision regarding the right of communication to the public, of general scope (Article 8 WCT):

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

309. Ulmer proposed to consider extending the protection to the case where a work is projected at different locations and different times.
310. In order to circumvent this condition, the theory was developed that the display on a screen was in fact a reproduction.
311. Gotzen, "Le droit d'auteur face à l'ordinateur", 19.
312. Oeuvres imprimées: Document préparatoire pour le Comité d'experts gouvernementaux OMPI/Unesco et rapport de ce comité (Genève, 7 to 11 December 1987), 72, 74.
313. WIPO Copyright Treaty, adopted in Geneva on December 20, 1996, preamble, hereafter also WCT.
314. F. W. Grosheide, "Enkele kanttekeningen bij het WIPO Copyright Treaty 1996", *Informatierecht/AMI* 1997, 4 (74) 76.

The wording of Article 8 WCT was quite close to the text that the European Commission had proposed and that was reproduced in the Basic proposal of the chairman of the committee of experts in August 1996.[315]

507. The adopted article deals with two issues: firstly, a general right of communication to the public, extended to all categories of works and to all means of communication (by wire or wireless means), secondly a right of making available to the public.[316] The national legislator must guarantee such protection but may choose in which form the protection should be implemented into domestic copyright law.[317]

Importantly, the WCT only regulates the scope of the exclusive rights, not the liability for possible infringements, which is decided according to the domestic rules in that domain.

2.1.2.1. General Right of Communication to the Public

508. The authors are granted a full-fledged right of communication to the public. Unlike the specific rights in the Berne Convention, this right is a general right of communication to the public. The protection is given to authors of all types of works, in respect of all forms of communication, by wire or wireless means. The WCT thus completes the protection granted in the Berne Convention.

2.1.2.1.1. All Types of Literary and Artistic Works

509. Unlike the Berne Convention, the WCT's right of communication to the public offers protection to authors (and derived rightholders) of all types of works.

315. Basic proposal for the substantive provisions of the treaty on certain questions concerning the protection of literary and artistic works to be considered by the diplomatic conference on certain copyright and neighboring rights questions, Geneva, December 2-20, 1996, 44, note 10.07. See for a historic overview: Reinbothe & Von Lewinski, *The WIPO Treaties 1996*, 100 et seq.; Ficsor, *The law of copyright and the internet*, 184 et seq.; E. J. Arkenbout, "Nieuwe verdragen over auteursrecht en naburige rechten", *Informatierecht/AMI* 1997, 4 (67) 67.
316. Basic proposal for the substantive provisions of the treaty on certain questions concerning the protection of literary and artistic works to be considered by the diplomatic conference on certain copyright and neighboring rights questions, Geneva, December 2-20, 1996, 44, note 10.09-10.10.
317. Ficsor, *The law of copyright and the internet*, 24; Reinbothe & Von Lewinski, *The WIPO Treaties 1996*, 102. *Contra*: Makeen, *Copyright in a Global Information Society*, 290-292.

Authors shall have the exclusive right "*to authorize the communication to the public by satellite of copyright works*" (Article 2 SatCab Dir). The act takes place solely in the Member State of emission (Article 1(2)(b) SatCab Dir).

These seemingly straightforward rules allow us to understand how the act of communication was conceived and which role this particular technology played in the delineation of the restricted act.

2.2.1.1.1. *Protected Act of Communication to the Public by Satellite Broadcasting*

541. The author alone has the right *to authorise the communication to the public by satellite* of her copyright works (Article 2 SatCab Dir).

The "communication to the public by satellite" is defined as the "*act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth*" (Article 1(2)(a) SatCab Dir).

The Directive regulates a specific form of communication, i.e. the communication to the public of a copyright work by *satellite broadcasting*. Different terms are used to indicate the act that is the object of this regulation. This restricted act is described as "satellite broadcasting" (in the title of the directive), as "broadcasting by satellite" (in the title of Chapter II of the directive) and the right is called the broadcasting right (in the title and Article 2).

There is no immediate explanation for this imprecise terminology other than nonchalance: no legal consequences are attached to the one or the other qualification.

542. The Directive treats satellite broadcasting as a particular form of *communication to the public*. This was the first instance of a harmonised right of communication to the public at the European level hence there was no (European) reference point for the notions of "broadcasting" or "communication to the public".

Yet the choice for these terms (instead of defining a new right of satellite transmission or a *sui generis* injection right) was not neutral. It meant that the protection of this particular type of transmission is embedded – at least implicitly – in a long-standing copyright tradition, at the international and national levels.

Arguably, the broadcasting notion of the Berne Convention (and the national legislations) shapes the broadcasting notion of the SatCab Directive. It was never seriously questioned that the broadcasting right in the Berne Convention covered this type of satellite broadcasting. The SatCab directive

thus – inversely – confirms this protection explicitly for the broadcasting by satellite (without recognising a general right of broadcasting for other forms of communication). The preparatory documents confirm the connection between the European and the existing notions of broadcasting, where it was stated that the "intention is simply to make clear that communication by satellite can constitute communication to the public in the same way as communication via a terrestrial broadcasting network. Both forms are covered by the broadcasting right".[372]

However, no consideration was given to the special treatment that "broadcasting" receives in the Berne Convention or the legislative history of this specific right of communication to the public. The broadcasting right under the Berne Convention originally protected the transmission of radio programmes by Hertzian waves and was later extended to television programmes. Later still, it was accepted that satellite transmissions that the public could receive directly were also *broadcasts*. The Directive picks out this last step of the evolution and explicitly confirms its protection.

543. The Directive harmonises this particular right of communication to the public but the Member States are free to qualify this specific type of communication to the public and fit it in their national copyright legislation. The Directive does not determine that these transmissions should be protected under a general broadcasting right.[373] The Commission chose not to protect this form of exploitation by means of a new satellite exploitation right or a *sui generis droit d'injection* (although the injection does mark the beginning of the restricted act).

Similarly to terrestrial broadcasts, the emission of the programme carrying signals requires the author's consent. By contrast, the actual reception of the signal is not a relevant act under this right: the transmission of the signal counts and the fact that these signals are accessible to the public (and that public has access to the appropriate antennas and/or decoders).[374]

372. Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighbouring rights applicale to satellite broadcasting and cable retransmission, Explanatory Memorandum, 36. See also Broadcasting and Copyright in the internal market. Discussion paper prepared by the Commission of the European Communities on copyright questions concerning cable and satellite broadcasts, III/F5263/90-EN, 1990, 36: The Commission described the "*traditional copyright concept of broadcasting*" as the "*communication of a work to the public. What counts is simply that the programme signals are made accessible to the public. The means used by a broadcasting organisation to transmit signals and the classification in telecommunications law of the respective means of broadcasting are of no significance as regards copyright*".

373. Dreier, "Broadcasting and copyright in the internal market: the new proposal by the EC Commission concerning cable and satellite broadcasts", 43.

374. Dreier, "Satellite and Cable Directive" in Walter & Von Lewinski (ed.), *European Copyright Law. A Commentary*, 4090.

programmes be retransmitted by cable, not just the programmes. This expression suggests that only retransmissions that are technically dependent on the initial transmission are taken into considerations. By contrast, simultaneous transmissions of programmes via technically autonomous channels would then not come within the scope of the Directive. Such communications via the cable network are considered "cable originating" programmes rather than retransmissions by cable, even if there is a parallel exploitation via other communication networks.

The initial transmission may be performed by wireless means (over the air) or by wire (cable), by contrast to the Berne Convention where the form of the primary communication is decisive. The distribution of a terrestrial broadcast over a (commercially exploited) coaxial cable network is such a secondary cable retransmission but the further diffusion of another primary cable transmission is one as well. The cable transmission of a "public performance" (which is not a "transmission") is not a retransmission under the Directive.

574. The initial transmission of television or radio programmes should be intended for reception by the public. It was considered that notion of "public" is not defined and left to the interpretation of the Member States. However, the CJEU have issued several decisions on the notion of "public" under other Directives and it can be expected that it thinks of the "public" of the right of retransmission by cable as a harmonised notion as well.

An important question is whether a transmission by cable to the public is a cable retransmission in the sense of the Directive if it follows a direct transmission between the "broadcaster" and the cable operator.[435] Based on the wording of the Directive and its explanatory memorandum, it seems that a cable transmission following a point-to-point transmission should not be qualified as a retransmission in the sense of the Directive.[436] Consequently, the Directive does not impose the mandatory collective management of these communication rights.[437]

435. The technical scheme is similar to the one described in *Lagardère* (*supra* para. 545).

436. Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighbouring rights applicale to satellite broadcasting and cable retransmission, Explanatory Memorandum, 10: The cable distribution of a work, following the point-to-point transmission, was not to be qualified as a wireless transmission but was comparable to a *primary transmission by wire*.

437. This question has led to decisions of national courts in Member States with a dense cable network, such as Belgium and The Netherlands. In the Netherlands it is considered that the communication by cable of television programmes is not a retransmission by cable if the television producer/broadcaster sent the programmes via an encrypted satellite signal to the cable distributor for further retransmission. The acting collecting society could therefore not impose its intervention in the licensing of communication rights. See Hoge Raad 19 juni 2009, BUMA c. Chellomedia Programming, *AMI* 2010 (12). This ruling has been confirmed in later decisions, such as Gerechtshof 's Gravenhage 10 April 2012, NORMA v Vereniging NLKabel e.a., *IER* 2012 (38). In Belgium, the courts have taken less consistent decisions. Finding a retransmisison by cable (subsequent to a "direct injection"): Court of Appeal Brussels 25 June 1998, Uradex, *AM* 1999 (212). Contra: Court of First Instance Brussels 27 January 2005, RTBF v Société Intercommunale Namuroise de Télédistribution e.a., *AM* 2005 (138); Court of First Instance Mechelen 12 April 2011, Telenet, *IRDI* 2011 (238) and Court of Appeal of Antwerpen 4 February 2013, Telenet t. Sabam, *I.R. D.I.* 2013/3, 161, although the decision of the Court of Appeal of Antwerp is ambiguous. A preliminary question will be asked to the CJEU following Commercial court of Trib. Bruxelles 29 January 2013, Société des Auteurs et Compositeurs Dramatiques (SACD), Société Civile des Auteurs Multimédia (SCAM), Société Multimédia des Auteurs des arts Visuels (SOFAM) c. Coditel, *AM* 2013, 233. See on the Dutch decisions: E. B. Traple, "TV Signal Delivery to Cable Operators and DTH Platform Operators: Primary Copyright Use, Retransmission, or Another Form of Communication to Public?", *JIPITEC* 2011, 2 (75) 78. See on the Belgian developments: A. Maqua & F. Vanbossele, "De Coditel à Telenet. Le nouveau périmétre de la «communication au public» des programmes de télévision linéaires", *R.D.T.I.* 2011, 44 (5).

575. Traple points out that this qualification of this type of transmission systems (direct transmission between the broadcaster and the cable operator, cable transmission to the public) as one restricted act of communication to the public makes it difficult for right holders to obtain an "equitable remuneration", reflecting the (commercial) value of the programmes for the broadcaster and the cable operator. The broadcaster commonly has its advertisement income, while the cable operator receives the subscribers' fees. If a contract is concluded between the right holders and the broadcasters only, the value for the cable operators will not be taken into account for the determination of the licence fee. Since there is no "retransmission by cable", the right holders cannot obtain remuneration via the collecting societies either. This author rightly observes that the negotiated remuneration may not be "equitable" with reference to the commercial value for broadcasters and cable operators combined. She concludes that the operations by the broadcaster and the cable operator should be seen as two technically and economically separate "procedures".[438]

An alternative would be to consider this complex transmission system as one whole, given the circumstance that the programme reaches the public in only one way (by cable). Both the broadcaster and the cable operator bear joint responsibility for this composite communication to the public and consequently the licence fee should be calculated based on the "trade value" for both parties.

2.2.1.2.1.2. Retransmission by Cable

576. The Directive only applies to retransmissions *by cable or microwave systems*. The Directive is different from the Berne Convention in this respect, which regulates both rebroadcasts (i.e. by wireless means) and communications to the public by wire (Article 11*bis* (1)(ii) BC). Moreover, the Berne Convention defines the cable retransmission as a communication made "by

438. Traple, "TV Signal Delivery to Cable Operators and DTH Platform Operators", 81.

her copy, yet another copy of the database is transferred (unless she gets rid of the device on which the database is stored). The exhaustion rule does not apply to new reproductions of the database. Since the online transmission of databases can be considered a distribution to the public under the national copyright laws, the Directive clarified that the exhaustion principle applies only with regard to certain aspects of the distribution right and not others.

606. Inversely, the qualification of a material act under the general right of communication to the public entails other legal consequences. In the WIPO Copyright Treaty, online exploitations were protected under this right of communication to the public, especially the newly introduced right of making available to the public. The rights of communication to the public generally cover a wide range of acts of *immaterial* exploitation (e.g. broadcasting or cable transmission), a protection that is attached to the *transmission* of the work but that leaves the reception (viewing, listening) of the work aside.

The online transmission of databases is an immaterial form of exploitation (at least where no permanent copy of the database is downloaded) akin to these forms traditionally protected under the right of communication to the public. Yet this qualification was not even considered in preparation of the Database Directive. Although Member States were free to choose this qualification, it was overlooked that the some acts at the receiver's end are functionally equivalent to the reception of a communication and therefore outside the scope of copyright protection. It seems that such "functional" approach was not discussed on the European level; this question could not even be expected as long as the online exploitation was regarded as some kind of "distribution".

607. Further confusion is caused by the reference to the person who **accesses** the database.

It is stated correctly in the Directive that the author's exclusive rights should include the right to "*determine the way in which [her] work is exploited and by whom*" but then it is added that she has the right to control the distribution [her] work to "*unauthorized persons*" (rec. 33). Oddly, this recital suggests that the person to whom the work is distributed has the obligation of obtaining the author's prior consent. From a copyright angle, it is neither the reception nor the access to a work that requires authorisation, but the *granting of access* to the work – both under the rights of communication and distribution to the public. This is what the "exploitation" of a work refers to: making the database accessible to a public makes it possible to impose a fee (while the person accessing the database pays the fee). A person reading a stolen book or attending a performance without having paid a ticket does not infringe copyright. It is the person who publishes the copies of the book or who performs the work without the consent who infringes the author's right.

An alternative explanation is that the Directive's recital implies that the author has the right to define the conditions to access the database (in terms of geographical restrictions or the requirement to pay a fee). This could have been formulated in a clearer manner.

608. Moreover, in addition to the distribution right and the right of communication to the public, the Directive provided a reproduction right in anticipation of a market for hard copies of the databases. The construction of a large reproduction right and a narrow exception for temporary copies provided in the Computer Program Directive was copied in the Database Directive (*supra* Chapter 1, 1.2.2.2 Exploitation of databases). This construction was based on the then dominant exploitation models for computer programs, which were not protected by a right of communication to the public.

In the Database Directive, by contrast, the protection of these copies came *in addition* to the rights of distribution or communication, which adequately protected the online exploitation of the database. The anticipated exploitation of databases in the form of tangible copies was sufficiently covered by the distribution right (as in the Computer Programs Directive) and did not require the protection of temporary copies or the *use* of the database. The online exploitation was protected under the distribution right or the right of communication to the public (allowing to calculate licence fees in function of the size of the "public").

Although not required from a legal point of view to protect the exploitation of databases, the Directive covers those technical copies and exempts some acts necessary for access to or normal use of the database (Article 6(1) DBD). Apparently, the European legislator stopped its endeavour at the protection of morphologically similar acts and it changed its more functional approach (still somewhat present in the Computer Program Directive) to a more technical approach.

609. With hindsight, this lack of conceptual determination was regrettable. As more attention was given to the *sui generis* protection of the content of databases and the copyright protection of the database structure was of secondary importance, the notions and the scope of the exclusive rights remained underdeveloped. While the acts protected under copyright are generally aligned to the form of exploitation, the European legislator has left this structure and emphasised the fact of the protection rather than the mode of protection.

This neglect has opened the door for the dilution of some fundamental copyright concepts, the fading of the conceptual consistency of the exclusive rights and a further confusion in the construction of copyright protection that has troubled the system of copyright protection ever after.

This openness regarding the qualification of databases in digital form (in the first place online databases) obliged the European legislator to add some clarification, e.g. that the principle of exhaustion does not apply to

clarified by using the term 'public'".[582] So whenever the composition and the timing or chronology of a programme is pre-defined (e.g. a TV schedule determined by the broadcaster, a "radio" programme by a webcaster[583] or "near on demand")[584] and the user can exercise no control over which work to access when, the work is not made available on demand (it may still be communicated to the public).[585]

Incidentally, it can be observed that broadcasting is not only characterised by its wireless nature but by its "linear" character (i.e. the transmission of content following a pre-defined programme), which requires an assessment of the exploitation form rather than the transmission technology used. This linear character of broadcasting is opposed to the interactive character of on demand transmissions.

In *Del Corso*, the Court of Justice rephrased the question of the referring judge in this sense.[586] In this case, SCF, a collecting society for phonogram producers, and the association of Italian dentists conducted negotiations on the payment of an equitable remuneration for communications to the public of phonograms, including in private dental practices. The negotiations failed and SCF brought an action against Marco Del Corso, a dentist, in view of obtaining a declaration that the background music in his dental practice was a broadcast of phonograms and that an equitable remuneration was due. The national court stayed the proceedings and submitted a question for preliminary ruling to the CJEU, asking whether "*the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, for the benefit of patients of those practices and enjoyed by them without any active choice on their part, constitute 'communication to the public' or 'making available to the public'*

582. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 25-26.

583. Bodson, "Partage de fichiers sur Internet: le 'peer to peer' est-il une 'communication au public'?", 286, footnote 5; B. Aalberts & H. Bannink, "Internet kills the radiostar? Auteurs- en nabuurrechtelijke aspecten van webcasting", *AMI* 2001, 5 (101) 104. See on other aspects of webcasting: L. E. Gillies & A. Morrison, "Securing webcast content in the European Union: copyright, technical protection and problems of jurisdiction on the Internet", *E.I.P.R.* 2002, 2 (74) 74-80.

584. "*The protection offered by the provision thus does not comprise broadcasting, including new forms of it, such as pay-TV or pay-per-view, as the requirement of 'individual choice' does not cover works offered in the framework of a pre-defined programme. Similarly, it does not over so-called near-video-on-demand, where the offer of a non-interactive programme is broadcast several times in parallel at short intervals*": Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 25-26.

585. Bechtold, "Information Society Dir." in Dreier & Hugenholtz (ed.), *Concise European Copyright Law*, 361, M. Van Eechoud, "Het Communautair Acquis voor auteursrecht en naburige rechten: Zeven zonden of zestien gelukkige jaren?", *AMI* 2007, 4 (109) 115.

586. CJEU, *SCF*.

for the purposes of the application of Article 3(2)(b) of Directive 2001/29". The Court decided to rephrase the question: Article 3(2)(b) InfoSoc Dir treats the exclusive right of making a phonogram available to the public, a right that is "intended to refer to 'interactive on-demand transmissions' characterised by the fact that members of the public may access them from a place and at a time individually chosen by them".[587] This case, however, the issue was the "broadcasting (sic) of music in a dental practice for the benefit of the patients present and not interactive on-demand transmission".[588] The Court then reformulated the question with reference to Article 8(2) of Directive 92/100 and the "use for broadcasting by wireless means for any communication to the public".[589]

634. The qualification as an act of making available is not always straightforward. Some services cannot be readily classified as either broadcasting, making available or some other unspecified form of communication to the public.

In theory, it is clear that the interactive nature of a service entails that it should be seen as a making available to the public, but ambiguous cases remain:

> with digital distribution technology still developing, it is difficult to conceive of a precise definition of "on demand" distribution, (...) Precisely what level of interactivity it implies is not quite clear. In practice, dissemination on line is done through models along a sliding scale of interactivity.[590]

Moreover, many online service providers (such as music streaming platforms) offer services with mixed features: the end-user can pick songs and

587. *Ibid.*, paras 58-59.

588. *Ibid.*, para. 60.

589. *Ibid.*, para. 63. "*In those circumstances, the fourth and fifth questions of the referring court must be interpreted as asking, in essence, whether the concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it covers the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, for the benefit of patients of those practices and enjoyed by them without any active choice on their part, and whether such an act of transmission entitles the phonogram producers to the payment of remuneration*". *Ibid.*, para. 64.

590. *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 56. See on simulcasting, webcasting, near-video on demand and podcasts: Von Lewinski & Walter, "Information Society Directive" in Walter & Von Lewinski (ed.), *European Copyright Law. A Commentary*, 984. These authors propose the criterion of the simultaneity between the transmission and the access to the work and the continuity of the programme in case of the broadcasts. A more nuanced approach can be found in the "Recasting report", p. 57. To the distinctive features of broadcasting we would add its fleeting, ephemeral character, in addition to the linear character. When qualifying a distribution mode, one should bear in mind the *ratio legis* of the broadcasting regime in the Berne Convention, which was to allow Member States to administer certain restrictions to balance the authors' interests against the wide diffusion of culture and information.

merely 'caught' by chance",[679] allowing the CJEU to make the connection between the profitable nature and the public of the communication.

The general right of communication to the public, stripped of all its implicit references to technological and socio-economical context in which the protection is required, seems to open the door for a certain *technology-relativism*: the importance of the technology or the technical constellations in which the acts take place is downplayed in favour of an enhanced protection of copyright works. This lenience is in stark contrast with the strictly technical approach of the reproduction right.

It seems that the technical nature of the transmission as a point of reference has given way to the *intentional* character of the transmission. The underlying rationale of the exclusive right has arguably not changed though: the protection of the *exploitation of the work* by making it perceptible to a public. It is from this angle that it should be verified whether a "deliberate intervention" is indeed an act of "communication" in the sense of the Directive[680] and whether such communication is indeed meant to reach a "public". The intention of the operator can arguably appear from interminable factors, such as the presentation of the communication (e.g. language, payment systems, delivery systems), (targeted) advertisement, the public or open nature of the environment where the work can be accessed (Web, blog). These criteria will require courts to examine all circumstance of the cases submitted to them, which entails that not all transmissions are in fact communications to the public.

This interpretation also offers a guiding principle in more complex or multi-layered environments (such as social media environments, where a work may be shared among friends (which may or may not constitute a "public" depending on the size and the nature of the "friends") but the social media environment or platform is aimed at gaining a revenue from the cumulative effect of these transmissions.

2.2.3.4.2. *Composite Transmission Process*

659. As communication technologies continue to evolve, the transmission of content has changed a great deal, due to larger networks, more powerful

679. *Ibid.*, para. 91.

680. Substantially this angle offers a valid and valuable framework for the interpretation of the right of communication of the public. We do however not share the CJEU's interpretation that the presentation of a work via screens and speakers in a place accessible to the public constitutes a communication to a distant public. In our opinion, such presentation should be qualified as a public performance by technical means (in the sense of the Berne Convention) or a communication to a public present at the place of the communication. Such forms of communication are however excluded from the scope of the Information Society Directive. On the other hand, this does not affect the possibility for the Member States to interpret the communications to a public present at the location of the communication according to the same principles.

hardware and more sophisticated processes and efficient transmission architectures. Many of these processes are complex and involve many copies on many servers and many more transmissions on the informatics infrastructure. The question is, once again, how one act of communication to the public is delineated: should one focus on technical criteria ("transmissions") or are there other reference points? If the right of communication to the public requires a deliberate intervention of bringing protected content to a targeted public, should a technical transmission as part of a technical process then be protected as an act of communication to the public per se?

The Information Society Directive does not give a clear-cut answer but some indications can be found in the preparatory documents to the InfoSoc Directive. The Commission hinted at this situation: "*an act of communication to the public may involve a series of acts of transmission or reproduction, such as, for example, the temporary storage of a work*".[681] This implies that a transmission process, consisting of several acts of transmission (that could be set up to communicate a work to the public), is regarded as one act of communication. By contrast, the act of communication to the public does not absorb the intermediate copies – which remain governed by the reproduction right.

In presence of such composite transmission processes, the act of communication should be identified with reference to the public that is thus reached: "*if, during or at the end of a transmission, the work is communicated to the public (for example through display on a screen), each communication to the public requires authorisation from the author*". At the same time, the "*concept of 'communication to the public' is used in the same way as in the* acquis communautaire *and in international provisions such as the Berne Convention and the WIPO Treaty on Copyright*".[682] It seems that the *publicity* of the communication is indeed the marker between the restricted acts of communication to the public.[683]

660. At the international level, it had been suggested to consider composite transmission processes as one whole, based on the continuity of the transmission and ultimately the exploitation of the work (*supra* Chapter 2, section 2.1.1.3). It was proposed to look at the design of a transmission

681. Report on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 - C4-0079/98 - 97/0359(COD)), 28.

682. *Ibid.*, 28. See also Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 25.

683. The public display the work on a screen is perhaps an unfortunate example, as this would not be considered a *communication to a remote* public under the Berne Convention. Instead it would be judged as a performance by technical means or a public communication in the context of Art. 11*bis* (3) BC.