

*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
E-mail: sales@kluwerlaw.com  
Website: www.kluwerlaw.com

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: customer.service@aspublishers.com

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: kluwerlaw@turpin-distribution.com

*Printed on acid-free paper.*

ISBN 978-90-411-4915-2

© 2014 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

## Table of Contents

<b>Foreword</b>	<b>xi</b>
<b>Acknowledgements</b>	<b>xiii</b>
<b>Introduction</b>	<b>1</b>
<b>Chapter 1</b>	
<b>The Reproduction Right</b>	<b>3</b>
1.1. International Framework	3
1.1.1. Berne Convention	4
1.1.1.1. Before the Introduction of a General Reproduction Right	5
1.1.1.1.1. Assimilation Principle	5
1.1.1.1.2. Fragmentary Regulation	9
1.1.1.1.3. Conclusions on the Specific Reproduction Provisions	57
1.1.1.2. General Reproduction Right	60
1.1.1.2.1. Legislative History	61
1.1.1.2.2. General Scope	65
1.1.1.2.3. Content of the Reproduction Right	68
1.1.1.2.4. Conclusion on the General Reproduction Right in the Berne Convention	95
1.1.1.3. Reproduction and Digitisation under the Berne Convention	97
1.1.1.3.1. The 1971 Ulmer Report	98
1.1.1.3.2. The WIPO/UNESCO Guidelines	103

1.1.1.3.3.	Evolving Approaches to "Reproduction"	108
1.1.2.	WIPO Copyright Treaty	112
1.1.2.1.	Legislative History	112
1.1.2.2.	Agreed Statement	114
1.2.	European Framework	121
1.2.1.	Computer Programs Directive	122
1.2.1.1.	Protected Act of Reproduction	124
1.2.1.1.1.	No Definition of "Reproduction"	124
1.2.1.1.2.	By Any Means, in Any Form	127
1.2.1.1.3.	Permanent or Temporary	129
1.2.1.1.4.	In Whole or in Part	130
1.2.1.2.	"Exploitation" of Computer Programs	132
1.2.1.2.1.	Notion of "Reproduction"	133
1.2.1.2.2.	Exception for the Use of the Computer Program	137
1.2.1.2.3.	Revisiting the Reproduction of Computer Programs	149
1.2.1.2.4.	Distribution Right	151
1.2.1.3.	Conclusion on the Reproduction Right in the Computer Programs Directive	161
1.2.2.	Database Directive	164
1.2.2.1.	Protected Act of Reproduction	167
1.2.2.1.1.	Protected Subject-Matter	168
1.2.2.1.2.	No Definition of "Reproduction"	171
1.2.2.1.3.	Temporary or Permanent	173
1.2.2.1.4.	By Any Means and in Any Form	174
1.2.2.1.5.	In Whole or in Part	175
1.2.2.2.	Exploitation of Database Structures?	178
1.2.2.2.1.	Actual and Anticipated Exploitation	178
1.2.2.2.2.	Exception for Access and Normal Use	180
1.2.2.3.	Conclusion on the Reproduction Right in the Database Directive	188
1.2.3.	Information Society Directive	189
1.2.3.1.	Protected Act of Reproduction	191
1.2.3.1.1.	No Definition of "Reproduction"	192
1.2.3.1.2.	Direct and Indirect	194
1.2.3.1.3.	Temporary and Permanent	195
1.2.3.1.4.	By Any Means and in Any Form	199
1.2.3.1.5.	In Whole or in Part	201
1.2.3.2.	Exploitation of a Copyright Work	205
1.2.3.2.1.	Technology and Economic Exploitation	205

1.2.3.2.2.	Technical Notion	206
1.2.3.2.3.	Exception for Temporary Acts of Reproduction	208
1.2.3.2.4.	Modus Operandi	230
1.2.3.2.5.	Three-Step Test	235
1.2.3.3.	Conclusion on the Reproduction Right in the Information Society Directive	238
1.3.	Conclusions on the Reproduction Right	242
<b>Chapter 2</b>		
<b>The Rights of Communication to the Public</b>		
2.1.	International Framework	245
2.1.1.	Berne Convention	246
2.1.1.1.	Public Performance	246
2.1.1.1.1.	Selected Categories of Works	247
2.1.1.1.2.	Performance	247
2.1.1.1.3.	Public	257
2.1.1.1.4.	Coexistence with the Reproduction Right	259
2.1.1.1.5.	Conclusion regarding the Public Performance Rights	263
2.1.1.2.	Communications to the Public	264
2.1.1.2.1.	Broadcasting and Further Diffusion	266
2.1.1.2.2.	Other Transmissions to the Public	300
2.1.1.3.	Delineation of the Restricted Acts	305
2.1.1.3.1.	Distribution within the Reach of the Broadcast	306
2.1.1.3.2.	Collective Antenna and Cable Networks	309
2.1.1.3.3.	Intermediate Satellite Transmission	318
2.1.1.4.	The "Public" under the Berne Convention	329
2.1.1.4.1.	"Public" versus "Private" Circle	330
2.1.1.4.2.	Remote Public	333
2.1.1.4.3.	Public Nature as a Marker for Exploitation	336
2.1.1.4.4.	Conclusions on the Rights of Communication to the Public in the Berne Convention	341
2.1.2.	WIPO Copyright Treaty	345
2.1.2.1.	General Right of Communication to the Public	347
2.1.2.1.1.	All Types of Literary and Artistic Works	347
2.1.2.1.2.	Any Communication	349

	2.1.2.1.3. Including the Making Available of Works	352
	2.1.2.2. The "Public" in the WCT	359
	2.1.2.3. Conclusions on the Right of Communication to the Public in the WCT	361
2.2.	European Framework	364
	2.2.1. Satellite and Cable Directive	365
	2.2.1.1. Communication to the Public by Satellite	367
	2.2.1.1.1. Protected Act of Communication to the Public by Satellite Broadcasting	368
	2.2.1.1.2. Regulation of Satellite Broadcasting	381
	2.2.1.2. Cable Retransmission	391
	2.2.1.2.1. Cable Retransmission between Member States	392
	2.2.1.2.2. Protection of the Right of Cable Retransmission	400
	2.2.1.2.3. Conclusion on Cable Retransmission	406
	2.2.1.3. Conclusions on the Right of Communication to the Public in the Satellite and Cable Directive	407
	2.2.2. Database Directive	409
	2.2.2.1. Any Form of Distribution to the Public	411
	2.2.2.2. Communication, Display or Performance to the Public	412
	2.2.2.3. Exploitation of the Database	414
	2.2.2.3.1. Qualification: Distribution versus Communication	415
	2.2.2.4. Conclusions on the Rights of Distribution or Communication in the Database Directive	418
	2.2.3. Information Society Directive	419
	2.2.3.1. Need for Harmonisation	420
	2.2.3.2. Protected Act of "Communication"	422
	2.2.3.2.1. Notion of "Communication"	423
	2.2.3.2.2. Remote Communication	431
	2.2.3.2.3. Not the Mere Provision of Physical Facilities	435
	2.2.3.2.4. Making the Work Available to the Public	438
	2.2.3.3. The "Public" in the Information Society Directive	445
	2.2.3.3.1. Public versus Private	446

	2.2.3.3.2. Indeterminate Number of Potential Recipients	448
	2.2.3.4. Delineation and Qualification	456
	2.2.3.4.1. Coexisting Exploitations	458
	2.2.3.4.2. Composite Transmission Process	470
	2.2.3.4.3. Overlap with Reproduction Right	483
	2.2.3.5. Conclusion on Right of Communication to the Public in the Information Society Directive	486
2.3.	Conclusions on the Rights of Communication to the Public	489
<b>Chapter 3</b>		
<b>Towards a Consistent Scope of Protection</b>		<b>493</b>
3.1.	Accumulation of Economic Rights	494
	3.1.1. Reproduction Right: From Protection of the Exploitation to Protection of the Copy	494
	3.1.2. Disintegration of "Communication" and the "Public"	496
	3.1.3. The Relation between Economic Rights	499
	3.1.4. The Case of Web Search Engines	503
3.2.	Copyright Consistence and Exploitation	505
	3.2.1. Alternative Approaches	507
	3.2.2. Reinstating the Exploitation in the Exploitation Rights	510
	3.2.3. Refining the Concepts	514
	3.2.3.1. "Exploitation"	516
	3.2.3.2. Technology versus Exploitation	518
	3.2.4. Exploitation by Reproduction or by Communication to the Public	522
	3.2.4.1. Exploitation by Reproduction	522
	3.2.4.2. Exploitation by Communication to the Public	526
	3.2.4.3. Method	532
	3.2.4.3.1. Central: Act of Exploitation	533
	3.2.4.3.2. Anchor Point for Protection	535
	3.2.4.3.3. Reach and End Point of the Protected Act	535
	3.2.4.3.4. The Case of Web Search Engines	537
<b>Bibliography</b>		<b>539</b>
<b>Table of Cases</b>		<b>555</b>
<b>Index</b>		<b>561</b>