

The WIPO Treaties: 'Making Available' Right

March 2003

WHAT IS THE 'MAKING AVAILABLE' RIGHT?

The 'making available' right is an exclusive right for authors, performers and 'phonogram producers' to authorise or prohibit the dissemination of their works and other protected material through interactive networks such as the internet.

This exclusive right is one of the most important achievements of the WIPO Treaties and constitutes a basic requirement for the development of electronic commerce.

The international community, in the 1996 Diplomatic Conference that adopted the treaties, unanimously acknowledged that record producers in particular needed this exclusive right to cover the use of their phonograms in the digital environment.

The reason was not only to fight piracy. The international community also recognised that the dissemination of phonograms in digital networks such as the internet constitutes

a primary form of exploitation of music, and therefore should be subject to the control of the rights owner.

The making available right covers both the actual offering of the phonogram or other protected material and its subsequent transmission to members of the public. The exclusive right provides control over the act of 'making available' by all means of delivery—**by wire or wireless means**—and whenever **members of the public may access the work or phonogram from a place and at a time individually chosen by them**.

This broad formulation is capable of accommodating many different types of exploitation, from services allowing only the listening of music, to services allowing the download of permanent copies of music tracks, to exciting future uses of technology.

The key element is that the exclusive right covers all types

of exploitation that allow the consumer to have a choice as to the time and the place to enjoy music. Therefore, not only 'music on demand' services but also all other services with a like effect (e.g. digital transmissions allowing for the identification and recording of specific music tracks) should be covered by this right.

The act of making available is subject to the control of the phonogram producer or other rights owner from the moment the work or phonogram is accessible to members of the public, regardless whether it has been accessed yet or not. It is the *accessibility* of the phonogram or work—the potential for it to be received or perceived by members of the public—that is the decisive factor. (WIPO Performances and Phonograms Treaty (WPPT), Articles 10, 14 and 16; WIPO Copyright Treaty (WCT), Article 8, 10 and Agreed Statement concerning Article 8.)

EXECUTIVE SUMMARY

The 'making available' right is one of the most important innovations of the WIPO Treaties. It is an 'exclusive right' that allows authors, phonogram producers, performers and other rights owners to fight piracy on the internet and offer new interactive uses of their works and recordings.

Implementing legislation should cover the initial act of putting a work or phonogram on an interactive network, as well as any subsequent transmissions. All services that have a degree of interactivity, target individual needs and/or have an impact on the primary market for a work or phonogram should be covered.

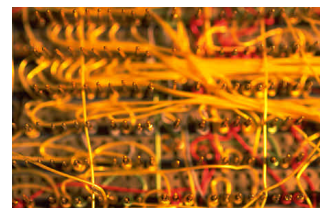
WHY IS THIS RIGHT IMPORTANT?

This right is fundamental for the dissemination of music over digital networks and therefore for promoting the development of electronic commerce and of new business models by the recording industry. The development of such new business models is immensely attractive not only to

copyright holders but also to consumers, who will be able to determine the content, timing and place of the transmissions they receive and therefore enjoy greater and easier access to music.

This right is also of the greatest importance, alongside the

reproduction right, for phonogram producers to stop the unauthorised exploitation of their phonograms over the internet, for instance by pirates who upload and open to the public databases containing thousands of music tracks without the authorisation of the producer.



The 'making available' right covers all kinds of interactive uses of music, from listen-only services, to music downloads, to exciting future uses of the internet and other networks.

HOW SHOULD THIS BE IMPLEMENTED?

WIPO TREATY TEXT

WCT Art. 8. *Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising 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.*

WPPT Art. 10. *Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.*

WPPT Art. 14. *Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.*

■ Existing or new exclusive right.

The treaties leave open the possibility to implement this provision either on the basis of an existing exclusive right or through enactment of a new right. Different legal systems may justify different approaches.

In principle, countries can include the ‘making available’ right within the sphere of the ‘communication to the public’ right—probably the preferred choice in most countries—or the distribution right.

■ Acts taking place by wire or wireless means.

‘Making available’ can happen either via physical networks such as a cable network or the internet, or via wireless means such as mobile phone networks or broadcasting signals.

Implementing legislation therefore should make clear

that this right applies notwithstanding the media or the transmission means by which music or other protected material is made available.

■ Broad definition of interactivity.

The treaty defines the ‘interactivity’ criterion in a broad manner (*‘from a place and at a time individually chosen’*). The right is thus designed to cover all forms of transmission that allow for a degree of interactivity. This should be measured by whether individual members of the public (not the public at large) can determine when and where they want to access a work or phonogram.

Not only should on-demand delivery of music over a network be covered, but also any service that allows the consumer a choice of content and of the moment of enjoyment of that content. This should include, for example, multi-

channel digital services (by online or wireless means) that play the same content several times a day and allow for the automatic identification and recording of all or part of the content. All new services that have a degree of interactivity, target individual needs and/or have an impact on the primary market should be covered.

Note that any implementation of this right must cover not only actual transmissions, but also the initial act of opening an interactive server to the public.

■ Protection of authors, phonogram producers and performers.

The treaties require that authors (WCT Art. 8), phonogram producers (WPPT Art. 14) and performers whose performances are fixed in phonograms (WPPT Art. 10) benefit from the exclusive ‘making available’ right.

FREQUENTLY ASKED QUESTIONS (FAQS)

Are exceptions to the “making available” right allowed?

In some cases. The new treaties allow limitations and exceptions to the ‘making available’ right that comply with the ‘three-step-test’ of Berne Article 9(2) (WCT Art. 10, WPPT Art. 16). These must be confined to certain special cases, must not conflict with a normal exploitation and must not prejudice the legitimate interest of the rights owner.

Note that this approach is more rigorous than the Rome Convention, which vaguely allowed exceptions for ‘private use’.

The three-part test highlights

the need to take account of the economic effects of any exceptions. Many traditional exceptions are inappropriate for the making-available right.

For example, a library exception should not allow a library to ‘make available’ a phonogram to all 500 million internet users. A time-shifting exception would be inappropriate when works are made available interactively—the very nature of the exploitation is to allow the user to select the listening or viewing time.

Do the treaties require dealing with the issue of the liability of internet service providers?

No. Service-provider liability

was not addressed in the treaties, and needs not be addressed in implementing legislation to comply with the treaties.

The WCT contains an agreed statement to Art. 8: *‘It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication.’* This clarification is narrow and clear: merely providing wires and equipment does not itself amount to an act of communication.

The treaty does not exclude, however, treating a service that transmits signals over any such ‘physical facilities’ as an act of communication to the public.

SAMPLE IMPLEMENTING LEGISLATION

IFPI Model Legislation: Authors, producers of phonograms and performers shall have the exclusive right to authorise or prohibit any communication to the public of their works, phonograms or performances fixed in phonograms, by wire or wireless means, including the making available to the public of their works, phonograms or performances fixed in phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

EU Copyright Directive: Art. 3(2). Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chose by them:...(b) for phonogram producers, of their phonograms.

IFPI has represented the international recording industry since 1933. Its membership comprises more than 1,400 record producers and distributors in over 70 countries. For more information, please contact

IFPI
54 Regent Street
London, England, W1B 5RE
Phone: +44 (0)20 7878 7900
Fax: +44 (0)20 7878 7950
E-mail: info@ifpi.org
Web site: www.ifpi.org