

## **Right of Communication to the Public in Digital Environment**

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**ABSTRACT:***The development of new digital technologies has led to fundamental changes in the ways that copyright works are created, accessed and distributed. Digital technology blurs the line between different categories of copyrightable works and the means of communication to the public as well. The computer networks, in particular the Internet, brings forth a point-to-point way of transmitting works on an on-demand and interactive basis. The interactivity and individuality afforded by this new method of exploiting works, makes it possible for any member of the public to have the full discretion in determining the place and the time one is intended to access and use works in digital form. This Paper examines the right of communication to the public in digital environment in the light of existing national and international legal framework.*

**Keywords:***Digital Technology, Copyright, Communication to the Public, WIPO, DMCA, Indian Copyright Act.*

### **1. INTRODUCTION**

The digital technology is considered a unique test of the copyright system because it affects every aspect of a creative work: its creation, its dissemination, and its protection. Copyright law has a long history, and for much of this time, copyright material was created and accessed solely in analogue form; ordinary users could not access technology to copy works at commercial scales. However, during the twentieth century, two technological revolutions changed this position. The first was the development of cheap and widespread photocopying technology in the 1950s and 1960s. The second was the digital revolution since the 1980s. These revolutions have certain commonalities: they significantly increased ordinary people's ability to create multiple copies of copyright material, and were viewed with concern by copyright owners. Each led to important copyright law reform. However, despite some continuity between analogue and digital copyright issues, digital communications have changed the magnitude of the problems and raised their own unique concerns. For instance, digital technology has allowed unprecedented quality and volume in communications, particularly online, and trans-border information flows are now a significant concern for copyright owners. The problem of access and access control under copyright law closely relates to more general deliberations over the future of copyright in the digital environment.

### **2. THE RIGHT OF COMMUNICATION TO THE PUBLIC**

'Communication to the public' means making a work, phonogram or broadcast perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group. This notion is broader than publication and also covers, among others, forms of use such as public performance, broadcasting, communication to the public by wire, or direct communication to the public of the reception of a broadcast'.<sup>1</sup> Digital technology blurs the line between different categories of copyrightable works<sup>2</sup> and the means of communication to the public as well. On the other hand, in the midst of fast development in digital technology, the computer networks, in particular the Internet, brings forth a point-to-point way of transmitting works on an on-demand and interactive basis. The interactivity and individuality afforded by this new method of exploiting works, makes it possible for any member of the public to have the full discretion in determining the place and the time one is intended to access and use works in digital form. Against this backdrop, a new form of unitary, technology-neutral right of communication to the public is suggested to be ushered in to replace the fragmentary, technology-specific protection to this right. Paradoxically, it seems that the Berne Convention has become an incomplete and outdated international instrument for the protection of the right of communication to the public, unable to respond to the challenges

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<sup>1</sup> WIPO, *Glossary of Terms of the Law of Copyright and Neighbouring Rights*, Geneva, 1980.

<sup>2</sup> Boon, Daniel S. K., "Copyright Norms and the Internet: The Problems of Works Convergence" (1998)2 *Singapore Journal of International and Comparative Law*, 76-116. (Arguing that digital technology has greatly blurred the line between the different categories of works that have been recognised under copyright law, so much so that perhaps we need a new perspective to deal with these problems).

posed by the shift in the ways of exploiting works. First and foremost, the Berne Convention has lagged behind the trend in the digital conversions of the telecommunications, media and information technology. The right of communication to the public is regulated in a fragmented manner by the Berne Convention in terms of the means of communication.<sup>3</sup> Second, the scope of the right of communication to the public does not cover all the categories of copyrightable subject-matter, including computer programs, photographic works, works of pictorial art, graphic works.<sup>4</sup> These works however have been and are being widely disseminated over the Internet yet are vulnerable to the unauthorised access and use. Further, it remains ambiguous under Berne Convention as to whether the traditional right of communication to the public would regulate interactive, on-demand transmission of works over the computer networks. Concern has been expressed that the Berne Convention may only be able to squarely regulate the point-to-multipoint communication of works, leaving right owners in the grey area where they probably do not have the right to exclude others from communicating their works to the public on a point-to-point basis with the interactive, on-demand nature.<sup>5</sup> The perceived loopholes or the ambiguities within the Berne Convention, therefore, make it evident that relevant obligations need to be clarified by providing a unitary, technologically neutral right of communication to the public.

### **2.1 Right of Communication under WIPO Internet Treaties**

After rigorous debate on the WIPO Diplomatic Conference 1996, a broad right of communication to the public was eventually established by the WIPO Treaties 1996. Article 8 of the WIPO Copyright Treaty provides:

Without prejudice to the provisions of Articles 11(1) (ii), 11<sup>bis</sup> (1)(i) and (ii), 11<sup>ter</sup>(1)(ii), 14(1)(ii) and 14<sup>bis</sup>(i) 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.

This new extended right of communication to the public is clearly meant to cover online dissemination of works, and in that sense is broader than the existing rights of communication to the public in the Berne Convention, which are confined to performances, broadcasts, and recitations of works. Specifically, Article 11(1) (ii) of the Berne Convention provides that authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing “any communication to the public of the performance of their works.” Article 11bis (1) (ii) provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing “any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one.” Finally, Article 11ter (1) (ii) provides that authors of literary works shall enjoy the exclusive right of authorizing “any communication to the public of the recitation of their works.”

The WIPO Performances and Phonograms Treaty contains two similar provisions that accord performers and phonogram producers with the right of making available to the public of fixed performances and phonograms respectively.<sup>6</sup> Articles 10 and 14 of the WIPO Performances and Phonograms Treaty grant analogous rights for performers and producers of phonograms to the right of “communication to the public” contained in Article 8 of the WIPO Copyright Treaty. The WIPO Performances and Phonograms Treaty, however, cast these rights as ones of “making available to the public.” Specifically, Article 10 of the WIPO Performances and Phonograms Treaty provides: Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. Thus,

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<sup>3</sup> The Berne Convention grants a fragmented right of communication to the public to the author. Article 11(1) (ii) gives the authors of dramatic, dramatico-musical works a right to authorise “any communication to the public of the performance of their works”. Article 11<sup>bis</sup> vests authors of literary and artistic works with a right to authorise any communication to the public” by wire or by broadcasting of the broadcast of the work”, and “by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work”. Article 11<sup>ter</sup> grants authors of literary works with a right to authorise” any communication to the public of the recital of their works”. Articles 14 and 14<sup>bis</sup>, accords a communication right to the authors in respect of cinematographic works and works underlying the cinematographic adaptation.

<sup>4</sup> WIPO, *Basic Proposal for the Substantive Provisions of the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference* (hereinafter WIPO Basic Proposal) (WIPO DOC. CRNR/DC/ 4, August 1996), Para 10.06.

<sup>5</sup> *ibid* Para 10.13.

<sup>6</sup> The WIPO Performances and Phonograms Treaty, 1996, Articles 10 and 14.

Article 10 provides an exclusive right with respect to analog and digital on-demand transmission of fixed performances.<sup>7</sup> Similarly, Article 14 provides:

Producers of phonograms shall enjoy the exclusive right of authorizing 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.

No Agreed Statements pertaining to Articles 10 and 14 were issued. Article 2(b) of the WIPO Performances and Phonograms Treaty defines a “phonogram” to mean “the fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.” Article 2(c) defines “fixation” broadly as “the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.” Under this definition, storage of sounds on a computer would constitute a “fixation,” and the fixed copy of such sounds would therefore constitute a “phonogram.” Accordingly, the making available to the public of sounds stored on a computer would seem to fall within the access rights of Articles 10 and 14. Because there were no Agreed Statements generated in conjunction with Sections 10 and 14 of the WIPO Performances and Phonograms Treaty, there is no Agreed Statement similar to that accompanying Article 8 in the WIPO Copyright Treaty for limiting liability for the mere provision of physical facilities for enabling or making transmissions. Accordingly, one will have to await the implementing legislation in the various countries to know how broadly the rights set up in Articles 10 and 14 will be codified into copyright laws throughout the world.

Under the WIPO Treaties 1996, two categories of the minimum standards for the protection of the right of communication to the public have been set up. First, regarding the point-to-multipoint communication routinely involving an active sender and passive recipients, they usher in a unitary right of communication to the public by wire or wireless means, technologically neutral in terms of copyrightable subject-matter and means of communication as well. This right fills up the lacunae existing in the Berne Convention and is designed to apply all copyrightable subject-matter, including computer programs and databases that are not protected by the fragmented right of communication to the public under the Berne Convention. By supplementing the relevant provisions in the Berne Convention<sup>8</sup> the new right of communication to the public is able to fully accommodate all the means of wire or wireless communication of copyrighted subject-matter that may be developed in the future.

With respect to point-to-point communication routinely involving an active sender and an active recipient, the new right of making available by wire and wireless means has been embedded in to the general right of communication to the public. The main objectives to establish this new right are first to make it clear that interactive on-demand acts of communication are within the scope of copyright protection<sup>9</sup>; and second to harmonise the obligations in order to avoid any discrepancies that may be caused by different interpretations of the traditional communication right under the Berne Convention.<sup>10</sup> Excluding the physical distribution of works, fixed performances and phonograms<sup>11</sup>, the right of making available to the public specifically regulates interactive, on-demand online communication that is shiftable both in terms of place and time. Acts of communication subject to this new right, include those that enable members of the public to access protected subject-matter from a place and at a time individually chosen by them”. In this way the control over the interactive means of exploiting copyrightable subject-matter is conferred upon copyright owners under the

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<sup>7</sup> Martin, Rebecca F., “The WIPO Performances and Phonograms Treaty: Will the U.S. Whistle a New Tune?”(Spring 1997) *Journal of Copyright Society, U.S.A.*, 157, 178.

Art. 8 provides a correlative distribution right with respect to more traditional forms of distribution:

Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.” The WIPO Performances and Phonograms Treaty also grants to authors in Art. 6 the exclusive right of authorizing “the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance” as well as “the fixation of their unfixed performances.

<sup>8</sup> These provisions include Articles 11(1) (ii), 11<sup>bis</sup> (1)(i) and (ii), 11<sup>ter</sup>(1)(ii), 14(1)(ii) and 14<sup>bis</sup>(1) of the Berne Convention.

<sup>9</sup>WIPO,*Basic Proposal*, *Supra* note 4Para 10.11.

<sup>10</sup>*ibid* Para 10.14.

<sup>11</sup> The right of communication to the public would not apply to and would be distinguishable from the distribution of physical copies of copyrighted material, such as books and sound recordings. This mode of dissemination is regulated by the distribution right and rental right under the WIPO Treaties. *See* WCT, at Articles 6 and 7; WPPT, Articles 8,9,12 and 13.

rubric of the right of making available.<sup>12</sup> However, any other form of exploitation by way of offering, at specified times, predetermined programs for reception by the general public<sup>13</sup>, fall outside the ambit of this new right.

On the other hand, the new right of making available targets the whole process of the making available of works, performances, and phonograms to the public by wire and wireless means, particularly the initial acts of putting protected materials on an interactive network. As explained by the *Basic Proposal*, the prohibited acts of communication include the making available of the work by providing access to it and what counts more in this right is the initial act of making the work available.<sup>14</sup> In this respect, the right of making available has twofold implications. On the one hand, the accessibility of the work that has been made available, rather than whether the work has been accessed by users, is the decisive factor in determining as to whether this right has been infringed.<sup>15</sup> On the other hand, the indirect acts of making available of the copyrighted subject-matter will be subjected to the right of making available. Such indirect acts may mainly include the provision of the links that connect to the downloadable works, photos and songs. Therefore, the right to control the initial making available provides the right owners with a solid legal basis to prevent control or eliminate direct or indirect acts of making available of works particularly the unauthorised peer-to-peer sharing of files over the Internet. Although the WIPO Treaties 1996 significantly expand the scope of the right of communication to the public, the following two issues have been left unsettled. First and foremost, the term ‘the public’, has not been given a clear cut definition in the context of new right of communication to the public. The endeavours to delimit this term for the protection of the right of public performance have sparked much controversy. This is because technological developments in digital dissemination of works carry the effect of blurring the public-private distinction.<sup>16</sup> Given the increased difficulty to draw the line between private and public transmissions, it is understandable that the WIPO Treaties 1996 are silent on the benchmark with which the public-private distinction could be decided and leave the discretion to determine the scope of public communication to each contracting party.<sup>17</sup>

Moreover, the issue concerning the secondary liability of those who facilitate the infringing communication of works to the public, including Internet Service Providers (ISPs), has not yet been addressed.<sup>18</sup> The Agreed Statement concerning Article 8 of the WCT emphasizes that the mere provision of physical facilities, such as server space, communication connections, or facilities for the carriage and routing of signals, for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.<sup>19</sup> What has been made clear by this statement is that ISP should not be held liable as passive conduits that merely offer physical facilities to bring the communication of information to fruition.<sup>20</sup> It does not, however, deal with the issue pertaining to the indirect liability of those who normally act as passive conduits for communication yet in fact actively participate in the infringing transmission of protected works.

## **2.2 The Right of Transmission and Access under WIPO Implementing Legislations**

### **2.2.1 United States Legislation**

The Digital Millennium Copyright Act (DMCA), 1998 does not contain any express implementation of a right of communication to the public or of making available to the public. In view of this, the uncertainties concerning whether the mere transmission or access of a copyrighted work through an online medium falls within existing United States rights of reproduction, distribution, public display, or public performance remain under the DMCA. With respect to the Article 10 right of making available to the public of fixed performances, the recently enacted Digital Performance Rights in Sound Recordings Act grants these rights for digital

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<sup>12</sup>IFPI: *The WIPO Treaties: Making Available Right*, available at: [www.ifpi.org/sitecontent/library/wipo\\_treaties\\_making\\_available\\_right.pdf](http://www.ifpi.org/sitecontent/library/wipo_treaties_making_available_right.pdf).

<sup>13</sup>Reinbothe, J. and Lewinski, S., *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis*, London: Butterworth, 2002, 109.

<sup>14</sup>WIPO, *Basic Proposal*, *Supra* note 4Para 10.10.

<sup>15</sup>IFPI, *Supra* note 12.

<sup>16</sup>Goldstein, P., *Copyright*, New York, Aspen Law & Business, 1998, §5.7.2.

<sup>17</sup>*The Basic Proposal* generally stated that the new right “excludes mere private communication by using the term ‘public’”, and furthermore “the public” consist of “individual members of the public who may access the works from different places at different times”. However, it also admitted that it is a matter of national legislation and case law to define what is ‘public’. See WIPO: *Basic Proposal*, *Supra* note 10Paras 10.12 and 10.17.

<sup>18</sup>*ibid*Para 10.21.

<sup>19</sup>*ibid*Para 10.10.

<sup>20</sup>Ginsberg, J., “Achieving Balance in International Copyright Law” 26 *Columbia Journal of Law*, 509-510.

transmissions, although not for analog transmissions.<sup>21</sup> However, because the WIPO Performances and Phonograms Treaty grants these rights with respect to both digital and analog transmissions, as well as with respect to spoken or other sounds in addition to musical works, it would seem that the United States might have to amend its copyright laws to comply with the requirements of Article 10.<sup>22</sup>

Although the DMCA does not contain any express rights of transmission or access, recent case law suggests that courts may interpret existing copyright rights to afford the equivalent of a right of transmission and access. For example, in the recent case of *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*,<sup>23</sup> the court concluded that the mere making available of the files for downloading was sufficient for liability, because once the files were uploaded onto the web server, they were available for downloading by Internet users and the OSP server transmitted the files to some Internet users when requested.<sup>24</sup> From this statement, it appears that the court construed the distribution and public display rights to cover both the making available of the clip art to the public on the Web page (a right of access), as well as subsequent downloads by users (a right of transmission). In *Perfect 10 Inc v Amazon.com Inc and others*<sup>25</sup> the defendant provided thumbnail size images of certain photograph for which copyright vested with the plaintiff. The question raised before the US Court of Appeals was whether display of the image in a reduced size will amount to violation of their right to communicate the work to the public. The Court here held that a computer owner that stores an image as electronic information and serves that electronic information directly to the user is displaying the electronic information in violation of the copyright holders exclusive display right. The Court stated that as there was no dispute that Google's computers store thumbnail versions of Perfect 10's copyrighted images and communicate copies of those thumbnails to Google users, they are infringing Perfect 10's copyright.

### **2.2.2 The EC Information Society Directive<sup>26</sup>**

The EC Information Society Directive adopts a parallel approach with WCT and WPPT in respect to communication to the public. According to Article 3 of the Directive, with respect to copyrighted works, Member States shall provide authors with exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The comments to Article 3 define 'communication to the public' to cover any means or process other than the distribution of physical copies. This includes communication by wire or by wireless means,<sup>27</sup> which clearly encompasses a right of transmission. Indeed, the comments explicitly note: 'One of the main objectives of the provision is to make it clear that interactive on-demand acts of transmissions are covered by this right.'<sup>28</sup> This theme is picked up in Recital (25) of the EC Information Society Directive, which states, 'It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.' Recital (27), however, echoes similar statements in the WIPO Copyright Treaty when it states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive. The Recitals do not clear up the ambiguity previously noted in the WIPO Treaty as to who the mere provider of physical facilities was meant to reference – only the provider of telecommunications lines (such as phone companies) through which a work is transmitted, or other service providers such as OSPs or BBS operators.

The comments to the EC Information Society Directive also make clear that Article 3(1) affords a right to control online access to a work, apart from actual transmissions of the work. As was stressed during the WIPO Diplomatic Conference, the critical act is the making available of the work to the public, thus the offering a work on a publicly accessible site, which precedes the stage of its actual on-demand transmission. It is not relevant whether it actually has been retrieved by any person or not. The 'public' consists of individual members of the public.<sup>29</sup> Similarly, Article 3(2) of the Directive affords a right of making available to the public of fixed performances by wire or wireless means. Member States shall provide for the exclusive right to authorize or

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<sup>21</sup> 17 U.S.C. § 106(6).

<sup>22</sup> Martin, *Supra* note 7, 178-79.

<sup>23</sup> 45 U.S.P.Q.2d 1236 (N.D. Ill. 1997).

<sup>24</sup> *ibid.*

<sup>25</sup> 508 F.3d 1146 (US Court of Appeal, 9<sup>th</sup> Circuit, 2007).

<sup>26</sup> Directive 2001/29/EC of the European Parliament and of the council on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>27</sup> Commentary to Art.3, Para 1.

<sup>28</sup> *ibid* Para 2.

<sup>29</sup> *ibid.*

prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixation of films, of the original and copies of their films;
- (d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

The right of Article 3(2) of the EC Information Society Directive is actually broader than the right required under Article 10 of the WIPO Performances and Phonograms Treaty. The Article 10 right of making available to the public applies only to performances fixed in phonograms, which Article 2 defines to mean the fixation of the sounds of a performance or of other sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work. The Article 3(2) right of the EC Information Society Directive goes further, covering fixed performances of audiovisual material as well. The comments to Article 3(2) of the Directive justify this extension of the right on the ground that audiovisual productions or multimedia products are as likely to be available online as are sound recordings.<sup>30</sup>

In sum, the EC Information Society Directive explicitly grants a right of transmission and access to copyrighted works and fixed performances, whereas the DMCA does not. It remains to be seen how broadly these rights mandated under the EC Information Society Directive will be adopted in implementing legislation in EC member countries. However, this disparity between the express rights afforded under United States law and the EC Information Society Directive raises considerable potential uncertainty. First, at a minimum, use of different language to denominate the various rights among countries may breed confusion. Second, differences of scope of the rights of transmission and access are likely to arise between the United States and the EC by virtue of the fact that these rights are spelled out as separate rights in the EC, whereas, if they exist at all, they are subsumed under a collection of various other rights in the United States. Adding further to the potential confusion is the possibility that some EC member countries may adopt these rights expressly, as mandated by the EC Information Society Directive, whereas other countries may, like the United States, deem them to be subsumed in other rights already afforded under that country's laws.

Because online transmissions through the Internet are inherently global, these disparities raise the possibility that rights of varying scope will apply to an online transmission as it travels through computers in various countries on the way to its ultimate destination. Similarly, legal rights of varying scope may apply depending upon in which country a work is actually first accessed. Given the ubiquitous nature of caching on the Internet, the site of the access may be arbitrary from a technical point of view, but significant from a legal point of view. Such a situation would not afford the international uniformity that the WIPO treaties seek to establish.

### **2.2.3 Right of Communication under FTAs**

The recent proliferation of Free Trade Agreements (FTAs) concluded between the US and her trading partners, including Singapore<sup>31</sup>, Chile<sup>32</sup>, Australia<sup>33</sup>, Central American countries<sup>34</sup>, and Morocco<sup>35</sup>, have set the far-reaching and stringent standards for IP protection and enforcement. Under the recent FTAs, contracting states are obligated to grant authors, performers and producers of phonograms with a unitary, technological-neutral right of communication to the public that has been provided for in the WIPO Treaty 1996.<sup>36</sup> Simultaneously, contracting states are permitted to carve out limited limitations on this right for analog or digital free over-the-air terrestrial broadcasting of performances and phonograms, and other non-interactive

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<sup>30</sup>ibidPara 3.

<sup>31</sup> U.S. - Singapore Free Trade Agreement (hereinafter "Singapore FTA"), concluded on Jan. 15, 2003, available at: [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final/Final_Texts/Section_Index.html) .

<sup>32</sup> U.S. -Chile Free Trade Agreement (hereinafter "Chile FTA"), concluded on June 6, 2003, available at: [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final/Final_Texts/Section_Index.html) .

<sup>33</sup> U.S. - Australia Free Trade Agreement (hereinafter "Australia FTA"), concluded on May 18, 2004, available at: [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final/Final_Texts/Section_Index.html) .

<sup>34</sup> U.S. - D.R.-Central American Free Trade Agreement (hereinafter "D.R.-Central American FTA"), concluded on August 5, 2004, available at: [http://www.ustr.gov/Trade\\_Agreements/Bilateral/DR\\_CAFTA/Final/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/DR_CAFTA/Final/Final_Texts/Section_Index.html) .

<sup>35</sup> U.S. -Morocco Free Trade Agreement (hereinafter "Morocco FTA"), concluded on June 15, 2004, available at: [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final/Final_Texts/Section_Index.html) .

<sup>36</sup>Singapore FTA, Art. 16.4.2; Chile FTA, Arts. 17.5.2 and 15.6.5(a); Australia FTA, Arts. 17.5 and 17.6.3(a); D.R.-Central American FTA, Arts. 15.6 and 15.7.3; Morocco FTA, Arts. 15.6 and 15.7.3(a).

transmissions.<sup>37</sup> However, contracting states are not allowed to permit the retransmission of television signals on the Internet without the authorization of the right holder.<sup>38</sup> It is, therefore, invalid to grant a compulsory license to override the right of communication to the public with respect to online retransmission of television signals.

### **3. RIGHT OF COMMUNICATION UNDER INDIAN COPYRIGHT LAW**

The Indian Copyright Law mainly consists of the Copyright Act 1957<sup>39</sup>. The amendments in 1994 were a response to technological changes in the means of communication like broadcasting and telecasting and the emergence of new technology like computer software<sup>40</sup>. The Amendments introduced by the Copyright Amendment Act, 2012 are significant in terms of range as they address the challenges posed by the Internet and go beyond these challenges in their scope. The latest Amendment harmonizes the Copyright Act, 1957 with WCT and WPPT. With these amendments, the Indian Copyright Law has become a forward-looking piece of legislation and the general opinion is that, barring a few aspects, the amended Act is capable of facing copyright challenges of digital technologies including those of Internet. According to the Indian Act, 'publication' for purposes of copyright means, making a work available to the public by issue of copies or by communicating the work to the public.<sup>41</sup> This definition, by virtue of its non-restrictiveness, can be construed as covering electronic publishing and, thereby, 'publication' on the Internet.<sup>42</sup> Under the Act the right of communication to the public was introduced in the 1994 Amendment to extend the rights to Internet. The Act defined 'communication to the Public' as:

(ff) making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

The explanation appended to the definition is to the following effect:

For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

The definition of 'communication to the Public' has been amended by 2012 Amendment by inserting a new definition, as below, extending the right to performances (the changed portions are in *italics*, the explanation clause remains unchanged):

(ff) communication to the public means making any work *or performance* available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing *physical copies of it, whether simultaneously or at places and times chosen individually*, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work *or performance* so made available.

The 2012 Amendment thus amends the definition by adding 'or performance' after 'work' and extending communication to the public simultaneously or at places and times chosen individually, which has significance for performers. The rights hitherto limited to authors have been extended to performers by the amendment. Thus, on demand services (video on demand, music on demand), will clearly be considered as 'communication to public'.

### **4. CONCLUSION**

The notion of digital copyright generally describes relatively recent changes in the law. Those changes maintain a direct relationship to various efforts and attempts to adjust the traditional copyright system to the digital reality. The study has sufficiently demonstrated that The WIPO Treaties have significantly expanded the subject matter coverage of the Berne Convention's communication to the public right, filling in the kinds of

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<sup>37</sup> Singapore FTA, Art. 16.4.2(a); Chile FTA, Art. 15.6.5(b); Australia FTA, Art. 17.6.3(b); D.R.-Central American FTA, Art. 15.7.3(b); Morocco FTA, Art. 15.7.3(b).

<sup>38</sup> Singapore FTA, Art. 16.4.2(b); Australia FTA, Art. 17.4.10(b); D.R.-Central American FTA, Art.15.5.10(b); Morocco FTA, Art.15.7.3 (b).

<sup>39</sup> The latest amendment being, Act 27 of 2012 that came into force on 21 June, 2012.

<sup>40</sup> The 1999 amendments have made the copyright fully compatible with Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

<sup>41</sup> This definition, by virtue of its non-restrictiveness, can be construed as covering electronic publishing and, thereby, 'publication' on the Internet. *Vide* Section 3.

<sup>42</sup> Saha, S.&Keshri, S., "Challenges to Copyrightable Work in Cyberspace", (2008) 13, *Journal of Intellectual Property Rights*, 38.

blank spots that this study has exposed. The WIPO Treaties have also eliminated the disparate treatment of wired and wireless transmissions. Although the WIPO Treaties 1996 significantly expand the scope of the right of communication to the public, some issues have been left unsettled. Under the Treaties the term “the public”, has not been given a clear cut definition in the context of new right of communication to the public. The endeavours to delimit this term for the protection of the right of public performance have sparked much controversy. Moreover, the issue concerning the secondary liability of those who facilitate the infringing communication of works to the public, including Internet Service Providers (ISPs), has not yet been addressed. It is suggested that the abovementioned two issues be addressed at the earliest to vindicate the effective and meaningful protection of copyright in digital environment. The DMCA does not set up separate rights of transmission and access, although the EC Information Directive recognizes such rights explicitly.

In India the amendments introduced by the Copyright Amendment Act, 2012 are significant in terms of range as they address the challenges posed by the Internet and go beyond these challenges in their scope. The latest Amendment harmonizes the Copyright Act, 1957 with WCT and WPPT. With these amendments, the Indian Copyright Law has become a forward-looking piece of legislation and the general opinion is that, barring a few aspects, the amended Act is capable of facing copyright challenges of digital technologies including those of Internet. Indeed, it seems inevitable that the digital networked environment will eventually necessitate more radical changes to the copyright system not only to insure adequate protection to right holders, but also to protect the legitimate interests of users of protected works.

#### **ACKNOWLEDGEMENT**

*I would like to acknowledge the love and support of my parents, beneath whose feet my Paradise lies. The affection and cooperation shown by my wife FirdosaShahnaz and my beloved son Haseeb-ul-Hassan during the preparation of the manuscript also merits the mention.*