Vol. 1, Issue 2, 2021 (April – June)
ISSN 2710-4532 (Online) *ISSN 2710-4524 (Print)* *ISSN 2710-4540 (ISSN-L)*
Journal of Educational Research & Social Science Review (JERSSR)

Challenges of Digital Media and the Internet and changes in Copyright Law after WIPO Copyright Treaty, 1996 with reference to the Right of Communication to the Public

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Abstract
In this age of electronic media digital transmissions has blurred the difference between two types of well organised and well-defined rights namely; "copy related rights and non-copy related rights" which creates the problems of interpretation and treatment of law. The right of communication to the public has the potential to be the major component of the "Digital Copyright Law" subject to its effective implementation which requires the involvement at all levels i.e., legislations, Courts of Law, professionals, and service providers etc. Changes in national copy right laws with the adoption of WIPO copy right treaty and issues relating to the concept of the public right of communication is discussed in detail in the present article.
Keywords: Digital Media, Internet, WIPO Treaty, Copy Right, Right of Communication

Introduction

Over the years technological development has brought a wide range of creations within the province of copyright. Latest addition to this range is internet and digital media. Copyright Law is facing various challenges as a result of increasing use of internet and digital media which are used almost everywhere which may be business, profession, education, communication, entertainment and so on. Old Copyright Law had to be changed to meet with the new challenges created by this 'digitisation'. WIPO Copyright Treaty, 1996 is certainly a positive attempt in that direction. It is a major step towards overall international copyright protection.

Issues such as protection of software and computer programmes, database protection, rental right of works, right of reproduction, right of distribution, protection of technological measures and circumvention, right of communication to public etc. are important with reference to today's digital age. The right of reproduction, the right of distribution and the right of communication to public are particularly three main significant areas which pose challenges before today's copyright law. Focus of this essay will be on the "right of communication to the public" and provisions related to it under "WIPO Copyright Treaty" as well as under previous Copyright Treaties and other related legal instruments.

Before "WIPO Copyright Treaty," three major international legal instruments in this area were available namely; "Rome Convention 1961", "Berne Convention 1971" and "WTO/TRIPS Agreement 1994." Similarities and differences in provisions related to the "right of communication to the public" in all of them and in WIPO Copyright Treaty will be discussed in this essay. EU has been very active in this field and has taken some concrete steps towards the implementation of WIPO Copyright Treaty which will be discussed as well.

As mentioned earlier, internet and digital media is now a part of our day-to-day life. It is used from education to entertainment and research to retailing, and thus directly related with public at large. The "Right of communication to the public" is thus one of the major rights and worth discussing. It is concerned with interest of creator of work or right holder as well as interest of society. Right of communication is also interwoven with other important rights such as right of

reproduction, right of distribution etc. All these complexities make the issue of the "right of communication to the public" more important.

Various aspects of the "right of communication to the public" such as provisions in different international treaties prior to "WIPO Copyright Treaty," changes in the concept as well as changes in some of the national and regional copyright laws after WIPO Treaty, issues regarding the whole concept of the "communication right," including liability issues, its development, implementation and application will be discussed.

Right of Communication to the Public:

The "Right of communication to the public" is as important as the "right of reproduction" and the "right of distribution" with special reference to internet and other digital media. WIPO Committees of Experts for both the treaties namely; for WCT [1] and for WPPT [2], had put this particular right in their so-called "digital agenda." This right is one of the non-copy-related rights [3] which have different provisions in different conventions and treaties concerned with copyright and other neighbouring rights which is the next point of discussion but before that general understanding of the "right of communication to the public" is necessary.

The Right of communication to the public is an exclusive right of author to authorize all on-line transmissions. In other words, the communication to the public right "protects the transmission and distribution of copyright works other than in physical form to members of the public not present at the place where the communication originates and it covers communication to the public of copyright works via on-line means of distribution such as internet and broadcasting." [4] This concept has given different treatment under different conventions and other legal instruments. So before moving further towards the changes in scope and concept of the right of communication after WCT, it is necessary to know how it was prior to this treaty.

Berne Convention 1971 and the Right of Communication:

Berne Convention [5] is one of the key multilateral treaties in the field of copyright protection; however, it does not include any direct provision for "right to communication." There are four provisions under the Berne Convention about this right; Article 11(1)(i), Article 11*ter*(1)(i), Article 14(1)(i) and Article 14*bis* (1). But all these provisions are related with the concept of "public performance" and do not use the term "communication to public."

All the above said provisions are related with "right of public performance", "right of communication to the public by cable and right of broadcasting" but they are used in narrower meaning of communication compared to Article 8 of WCT and obviously have no direct impact on today's digital network environment especially in terms of interactive transmissions in digital networks.

Rome Convention 1961 and the Right of Communication:

ome Convention [6] also provides for the right to broadcasting and a specific right of communication to the public, however, this Convention does not define the term "communication to the public." Article 3(f) and (g) define the terms broadcasting and re-broadcasting and Article 7(1)(a) and 12 provide for "the right of communication to the public", not directly though. Article 12 covers "communication" in three ways namely; by wireless means, by wire and directly in presence of public but all are in field of "performances and phonograms."

WTO/TRIPS Agreement 1994 and the Right of Communication:

Article 9(1) of the TRIPS Agreement [7] says that "members of the WTO must comply with Article 1 to 21 of the Berne Convention and the Appendix thereto" (except Article 6*bis* and some other provisions). So it is clear that TRIPS provides for right of communication along with the permissible exceptions and limitations as Berne Convention. TRIPS Agreement also, does not give definition of terms "public" or "communication."

It can be said that the concept of "communication to public" varies in different Conventions, as Berne Convention has three categories of "non-copy-related rights" namely; "the right of public performance and public recitation," "the right of broadcasting and the right of communication to the public by wire." Whereas Rome Convention provides for only two namely; "the right of broadcasting" and "the right of communication to the public" and TRIPS Agreement applies same provisions of Berne Convention. All these provisions proved to be inadequate and are having some major gaps regarding the "right of communication" especially to meet with the challenges posed by

internet and digital media. WIPO Copyright Treaty has been drafted in a manner so as to eliminate these gaps.

WIPO Copyright Treaty, 1996 and the Right of Communication:

All Conventions prior to WIPO Treaties were not very clear about the concept of the "right of communication to the public" and its various elements like communication, public, transmission etc. To resolve this issue, the WIPO Expert Committee put it into 'digital agenda' and tried to draft the provision in a manner that it could become the effective remedy to challenges of internet and digitisation and get proper response of international community in its implementation.

There were two major rights namely; the "right of distribution" (with its sub-rights: the right of rental and the right of importation) and the "right of communication to the public" (with its sub-rights: the right of broadcasting and the right of communication to the public by wire/cable) which were 'candidates' to be applied for interactive transmissions in digital networks, according to Dr. Ficsor, who then suggested the "Umbrella Solution" under which the right of communication to the public was given precedence over the right of distribution in final draft of WCT [3].

"Umbrella Solution" is the solution between two extremes; first could be, new interpretations of existing concepts and rules and second could be, adoption of new norms that would recognise specific exclusive right of authorisation. "Umbrella Solution" is a compromised solution which fills the gaps in previous treaties and creates some practicable and relevant provisions under new "WIPO Copyright Treaty" [3]. Ultimately "Umbrella Solution" which is based on the "neutral concept of making available" with relative freedom of Contracting Parties to characterise such transmissions legally and to enforce the relevant obligations under the WCT and WPPT, was adopted and Article 8 of "WIPO Copyright Treaty" with an agreed statement was finally drafted as given below.

> Article 8
>
> Right of communication to the public
>
> "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 work 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 public of their work in such a way that members of the public may access these works from a place and at a time individually chosen by them."
>
> Agreed Statement concerning Article 8
>
> "It is understood 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 Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)."

This Article applies "without prejudice to the provisions of Berne Convention," which means that it covers all existing provisions for the right of communication to public and in addition to that it extends its boundaries up to interactive transmissions. Thus, it provides a very broad and exclusive "right of communication to the public" which confirms that interactive on-demand transmissions/act of communication are under its scope. It provides for communication by both, wire and wireless that includes communication through online means of distribution such as internet, and by broadcasting. This provision is certainly of major importance because Berne Convention does not grant this right to all categories of work. Berne Convention's provision of the "right of communication to the public by wire" [8] does not extend to works which are transmitted in interactive digital networks.

Second part of the Article provides for the "making available" to the public of works by wire or wireless which means that "members of public may access the work from a place and at a time individually chosen by them." This simply means that providing access to members of public, of works, as per their convenience. The element of choice of place and time individually indicates the interactive transmission. So, it can be said that making of the work of an author or creator available to the public by electronic transmission at a place and time individually chosen by them is "on-demand transmission" e.g., online services. Here the act of "making available" is important in terms of 'communication', mere availability of server space, facilities for the carriage of signals or communication connection will not be 'communication' for the purpose of application of Article 8 but the work must be available for on-demand transmission. Agreed Statement of Article 8 contains this

point as it says, "it is understood that….. does not in itself amount to communication…." In fact, this part of agreed statement states about the issue of liability.

It is difficult to answer the question that whether facilitating or enabling copying by others can create issue of liability. This part of agreed statement answers that provision of physical facilities for communication merely will not create any liability except in certain circumstances, where situation can give rise to contributory or vicarious liability for that particular act. However, liability issues are very complex by nature, highly debatable and very difficult to provide for at international level in international treaties and conventions. WIPO Treaties are certainly not an exception to it. WCT or Article 8 does not have any direct provision for liability issues except some provisions in form of limitations.

Exceptions and limitations to the rights provided to authors are dealt in Article 10 of WCT subject to the provision of "three-step test" under Article 9(2) of "Berne Convention." However, it is the issue, left to the implementation through national legislations. Usually, national laws provide exceptions in case of use of material for education and research, criticism and review, news reporting etc. Here the concept of "fair use and fair dealing" is relevant. Especially due to technological advancements copyright infringement has become very easy, so exceptions to the "right of communication to the public" including the right of making the work available should not be adversely affected. As discussed above national laws can be the best to resolve the issue of "fair use and fair dealing." Agreed statement contains a sentence that "it is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)of Berne Convention', which indirectly provides for non-voluntary licence system.

WIPO Copyright Treaty has certainly gone further to provide effectively for "the right of communication to the public" but still there are some unresolved issues regarding Article 8 such as definition of public and communication. The term 'public' has not been defined anywhere which creates problems of interpretation which finally goes to the courts for its interpretation according to the facts of a case before them. It becomes more problematic to define 'public communication' or 'private communication' without having proper definition of the term 'public' [9].

As Makeen [10] says, the main limitation to the concept of "the right of communication" is the territorial nature of copyright. In fact, there were two basic theories for the treatment of law for consequences of trans-national exercises of the communication right namely; Emission theory and Bogsch Theory. Emission theory is based on the treatment of law of the emitting country and Bogsch Theory is founded on the treatment through the law of the recipient or "footprint" country, for exercise of "the right of communication." But third so-called hybrid theory was worked out in the International Bureau of WIPO known as "the communication theory." Article 8 of WCT recognises this theory and the fact based on it that broadcasting is a sub-right of "the right of communication" or a special form of communication to the public and the process of "making available" should be covered by notion of broadcasting [3]. Interactive transmissions are not "broadcasting" just because broadcasting requires active communicator and passive recipients.

As discussed above "Umbrella Solution" was proposed to give "relative freedom to national legislators in choosing the right of distribution and the right of communication to the public, the combination of these rights or a new right, to fulfil obligations under Article 8 of WCT." [3] This solution was accepted and used very well in various legal systems. Some of those are discussed below.

European Union and the Right of Communication after WIPO Copyright Treaty:

EU has been very active in field of protection of intellectual property rights. "European Commission's *Follow up Paper"* (after the *Green Paper*) showed the readiness of EU to accept "the right of communication to the public" as a major copyright in digital environment. [3] EU has applied "right of communication" to the public in very broader sense. In fact, the wording of Article 8 of WCT was proposed by E.C. and included in "basic proposal" which ultimately resulted in final draft of Article 8. EU adopted the "Directive on the Harmonisation of certain aspects of Copyright" and related rights in the Information Society [11] which provides for exclusive right of communication to the public. "Harmonisation of three fundamental exclusive rights namely; the right of reproduction, the communication to the public right and the right of distribution, was one of the main aims of this directive." [4] Article 3 of the Directive deals with the right of communication to the public and it has almost same wording as Article 8 of WCT. Article 3 has two provisions 3(1) and 3(2) which are wider

and more descriptive. For example, provisions under Article 3 provide "one important point, that the permission of the rights holder is required at the point when the work is first made available to the public." [12] Article 5(3) of the Directive, also touches the right of communication as it mentions of exceptions from the reproduction and the communication right. Some of the recitals also provide references to the right of communication.

EU Countries are bound to implement EC Directives in their national legislations, so we can say that uniformity for exercise of the "right to communication to the public" can easily be achieved, by giving effect to this Directive in national laws of member countries of EU, at least within the EU. For example, the definition of broadcasting has been changed in "UK's Copyright, Designs and Patents Act 1988" after WIPO Treaty and entering into force of this Directive. It was debatable that whether internet transmissions could be a cable programme service under Section. 7(1), CDPA, 1988. Judgements of "*Shetland Times Ltd v Dr. Jonathan Wills and Zetnews Ltd"* [13] and "*Sony Music Entertainment (UK) Ltd & Others v Easyinternetcafe Ltd"* [14] are authorities that they are cable programme service. But after the Copyright Directive the scenario has been changed as new definition of on-demand service has been given.

United States and the Right of Communication:

US presented certain important proposals including its *white paper* and *Green Paper* during the period of 'making of WIPO treaties' regarding "the right of distribution", "the right of reproduction: and "the right of communication." Legal system of United States shows the combination of "the right of distribution" and "the right of communication." In US Copyright Act, there were provisions for the right of distribution under Section. 106(3) and provisions for the right of public performance under Sec. 106(4) and (6). However, there is no separate provision for the right of communication, thus it can be said that in US, provisions of the right to distribution and that of the right of public performance are applied in a combined way to digital interactive transmissions.

It should be noted here that US Courts especially US Supreme Court has given various landmark judgements while interpreting "fair use and fair dealing" which is relevant here with the issue of access to information in digital environment. Approach of US courts seems to be 'users oriented' and not 'right owner oriented'.

Japan and the Right of Communication:

Japanese law [15] is advanced in the field of "right of communication to the public." Japanese legislation, adopted to implement WCT, has extended this right to "any kinds of transmissions" i.e., both types of transmissions; analogue and digital. It has also included a new specific "right of making transmittable" under Article 23(1) of Japanese Copyright Law which gives author "the exclusive right to transmit his work publicly, including the making transmittable of his work in the case of interactive transmission." However, it can be said that the concept of "making transmittable" is narrower than that of "making available" because "making available" includes making "on-demand transmissions" possible and the actual on-demand transmissions carried out on the basis of this possibility, and Japanese Copyright Law does not differentiate between these two. [3]

Conclusion:

Before "WIPO Copyright Treaty", provisions for the right of communication to the public did not include "on-demand or interactive transmissions." These transmissions were used to be treated under different provisions and mostly relied on the interpretation of Courts of law individually according to facts of case concerned. With increased use of internet and other electronic media the protection offered to author under 'communication right' needed to include all those interactive on-demand transmissions. So it can be said in conclusion that changes in terms of 'inclusion of on-demand interactive transmission' into the provisions of the "right of communication to public" is the very essence of the new "Digital Copyright Law."

Right of communication can be seen as a balanced right with reference to interests of right-holder as well as interests of society because it is a basic aim of copyright laws to provide some protection to creators so that they can earn fruits of their own creation and to put their work before other members of society who can access them for further development and research or even for enjoyment purposes, however, co-ordination or balance between these two interests is very difficult to achieve in digital environment. But right to communication may be a good solution as it covers right of a creator or author to authorise communication of his/her work to public by way of all interactive

transmissions and at the same time "making available" his/her work to public for access at a place and time individually chosen by member of public.

WIPO Treaties are undoubtedly a very welcome step towards protection of Copyright at international level but it has left a lot of things to be done by Signatories or Member Nations who are bound to implement the Treaties in their national legislation. This can lead away from the aim to achieve uniformity in Copyright Law at international level. It can further be said that, even if WIPO Copyright Treaty has very relevant solutions for challenges of digital or electronic environment, they can be effective only if implemented properly by member states through their national laws.

One major concern is the imbalance between the right of communication and the right to access of information, especially in case of industrialised-developed nations and developing or underdeveloped nations, which require access to information for their development because usually it can be seen that source of information is mainly developed nations and users are mostly from developing countries, particularly for information via digital or electronic media. Here, the answer can be, the concept of 'fair use or fair dealing' of information and provisions for exceptions and limitations to related rights of copyright holder, however, the more important thing is interpretation of these rights. Courts can interpret them in a best suitable way according to the facts and requirements of cases and situations. These interpretations should reflect harmonisation between rights under copyright law and need of society especially in fast moving, digitised, global world interconnected with electronic media.

In this age of electronic media, digital transmissions has blurred the difference between two types of well organised and well defined rights namely; "copy related rights" and "non-copy related rights" which creates the problems of interpretation and treatment of law. The "right of communication to the public" has the potential to be the major component of the "Digital Copyright Law" subject to its effective implementation which requires the involvement at all levels i.e. legislations, Courts of Law, professionals and service providers etc. Changes in national copy right laws with the adoption of WIPO copy right treaty and issues relating to the concept of the right of communication is discussed in detail in the present article.

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