



The Right of Making Available and Other Exclusive Rights in the Digital Environment

Wang Qian, ECUPL

1.1 Various Rights in the Copyright Law

Right of Communication through Information Network
(right of making available in WCT and WPPT)

Right of Distribution (of the original or copies)

Right of Presentation
(of work of fine arts, photographic work, a cinematographic work)

Right of Performance

Other rights shall be enjoyed by the copyright owner
("catch-all" right)

1.2 Basic Principles of statutory Interpretation



Giving effect to each statutory provision.



No rendering another provision superfluous.



Making a provision harmonious with other provisions



Making a provision consistent with Treaties

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2.1 The Right of Making available and the Right of Distribution

US Court: the act of making works available for downloading is covered by the right of distribution when the downloading actually happens.

The Right of Communication through Information Network (Right of Making Available)

- to make a **work** available to the public by wire or by wireless means, so that the public may have access to the **work** from a place and at a time individually chosen by them.

The Right of Distribution

- to provide the **original** or **copies** of a work to the public by selling or donating.

original or copy = work + physical object

2.2 work vs. physical object embodying work

Yuan Quan Culture Media vs. Baidu (The First Intermediate Court of Shanghai, 2010)

- As far as the logics of statutory provision are concerned, exclusive rights enumerated by the Copyright Law are inter-dependent from each other, and they should not be overlapped. The plain meanings of the statutory provisions indicate that the right of distribution is the right to transfer the physical object embodying the work while the right of communication through information network is to cover the interactive communication of the work. ... therefore, the right of communication through information network is different from the right of distribution.

2.3 Exhaustion of the Right

Basic Proposal for WCT

- Para.10.20 It should be pointed out that **no rights are exhausted in connection with communication** to the public. ... Exhaustion of rights is only associated with the distribution of tangible copies.

EU Copyright Directive

- Article 3.3 The rights referred to in paragraphs 1 (general right of communication to the public) and 2 (right of making available) **shall not be exhausted by any act of communication** to the public or making available to the public as set out in this Article.

3.1 The Right of Making available and the Right of Presentation

The Right of Communication through Information Network (Right of Making Available)

- to make a work available to the public by wire or by wireless means, so that the public may have access to the work **from a place and at a time individually chosen by them**.

The Right of Presentation

- To publicly **present** an artistic work, a photographic work, a cinematographic work, or other works, by projector, slide projector or any other technology or instrument.
- .

Interactive communication of a film is not “presenting” a film

3.2 The Right of Making available and Webcasting

No general right of communication in the Copyright Law
as provided in Article 8 of WCT

Edko Films vs. UUSee (Beijing High Court, 2009)

- The right of communication through information network **only covers the interactive** network communications. ... The network users in this case cannot access the work in dispute at the time individually chosen by them. Therefore the act of communication **(streaming) in this case is not covered by the right** of communication through information network. In addition, the act concerned is not covered by any other economic rights either. ... It is correct to **apply “other rights that shall be enjoyed by the copyright owner”** in this case.

3.3 The Right of Making available and “Film Pub”



Film Pub: consumers may individually choose films to watch through the “Internet-TV” (TV set connected to Internet)

German Copyright Act (Section 22)

- The right of communication of broadcasts and of **communication of the making available to the public** shall constitute the right to make perceivable to the public by screen, loudspeaker or similar technical device, broadcasts and communications of the work as are based on its making available to the public. Section 19 .3 (right of mechanical performance) shall apply mutatis mutandis.

4.1 The Right of Making available and the Right of Performance

US Court: the act of making works available for streaming (interactive or not) is covered by the right of performance.

The Right of Communication through Information Network (Right of Making Available)

- to make a work available to the public by wire or by wireless means, so that the public may have access to the work **from a place and at a time individually chosen by them.**

The Right of Performance

- To publicly **perform** a work, and to publicly **communicate** the performance of a work by any means or process.

Making the recording embodying musical performance available for downloading or streaming (interactive communication) is covered by the right of communication through information network)

4.2 General Right vs. Special Right

The Berne Convention, Article 11(1)

- the right to (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:.... (ii) **any communication to the public** of the performance of their works.

The Berne Convention, Article 11bis(1)

- Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.

Guide to the Berne Convention

- Para. 11.5 It (the right of communication to the public of a performance of the work) covers all public communication **except broadcasting** which is dealt with in Article 11bis.

4.3 The Right of Making available and the Webcasting of Performance



Stars are singing songs
in the live webcasting

Guide to Trial of Cases involving Infringement of the Right of Communication through Information Network (The High Court of Sichuan Province 2018)

- It is not an Infringement of the Right of Communication through Information Network to sing others' songs in the webcasting.

4.4 The Right of Performance and the Webcasting of Music

the Right of Performance in the China Copyright Law

- the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process.

the Right of Performance the Berne Convention

- Article 11 (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
 - (i) the public performance of their works, including such public performance by any means or process;
 - (ii) any communication to the public of the performance of their works.

The Report of NCAC's Director to the National Congress

- Copyright owners' right of performance include the live performance (of work) by performers and the performance of work by technical means (i.e., **mechanical performance**)

Interactive streaming/downloading
of works in all categories

**Right of communication through
information network
(Right of Making Available)**

Providing Internet TV service
in Film Pubs

**Right of Presentation
(not the right of communication
through information network)**

webcasting (non-interactive) of
cinematographic works

**“Catch-all” right
(not the right of presentation)**

webcasting (non-interactive) of musical
works

**“Catch-all ”right vs.
the right of performance**

Thank You for the Attention !

Email : wangqian75@126.com