The New Right of Communication in Australia †

ANDREW CHRISTIE* AND ELOISE DIAS**

1. Introduction

The difficulties posed to copyright law by the Internet and global digital networks have rarely been understated. The ability to make unlimited numbers of copies, virtually instantaneously, without perceptible degradation in quality, and the capacity to transmit these copies to locations around the world, virtually simultaneously, has caused significant disruption to traditional markets for copyright industries, especially the music industry.[1] Thus, it has been said that copyright is at a crossroads: it must adapt to the increasing demand for legitimate online access to protected works and yet it must do so in a way that preserves the rights of the copyright owner.[2]

This situation reflects a perpetual policy pendulum: on the one hand, a copyright system should create incentives for the production of intellectual works; on the other hand, it should not unduly stifle the widespread dissemination of such works, especially for educational and a variety of other uses. As a recent report

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* Davies Collison Cave Professor of Intellectual Property, Faculty of Law, University of Melbourne; Director, Intellectual Property Research Institute of Australia (www.ipria.org).

** BA, LLB (Hons) *Melb*. This article was completed whilst the author was a Legal Researcher at the Intellectual Property Research Institute of Australia, University of Melbourne.

1 See Thomas Dreier, *Copyright Law and Digital Exploitation of Works* (1997): <http://www.ipa-uie.org/copyright/copyright_pub/dreier.html> (1 July 2003); P Bernt Hugenholtz, 'Adapting Copyright to the Information Superhighway' in P Bernt Hugenholtz, *The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium* (Amsterdam, Royal Netherlands Academy of Sciences (KNAW) and the Institute for Information Law, 1995) at 81, 83; Eric Schlachter, 'The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet' (1997) 12 *Berkeley Technology Law Journal* 15.

2 Daniel Gervais, 'Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom and the United States' (2001) 34 *Vanderbilt Journal of Transnational Law* 1363 at 1365.

from the World Intellectual Property Organization ('WIPO') on 'Intellectual Property and the Internet' has emphasised, it is essential that legal rules are set and applied appropriately — and arguably, uniformly — to ensure that digital technology does not undermine these basic tenets of copyright.[3]

On 20 December 1996, at the WIPO Diplomatic Conference in Geneva, over 130 countries adopted by consensus two new Protocols to the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*'),[4] both of which aim to offer responses to the challenges of digital technology, particularly the Internet.[5] One such response, contained in both the *WIPO Copyright Treaty* ('*WCT*')[6] and the *WIPO Performances and Phonograms Treaty* ('*WPPT*'),[7] was the granting to authors of an exclusive right to authorise the communication of their works over the Internet and other digital networks.[8] This was seen as necessary to enable authors to adequately control on-demand transmissions of their works or other subject matter. Article 8 of the *WCT* states that:

> 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.

In trying to bridge the two major proposals that emerged from the negotiations — one based on the right of distribution and one based on a more general right of communication to the public — this so-called 'umbrella solution'[9] was drafted in broad, neutral terms. The model was intended to encompass the relevant acts of digital transmission that were seen to require protection whilst giving member states sufficient freedom to choose which rights they would use to protect those acts under national law.[10]

Australia implemented the provisions of the *WCT* by enacting the *Copyright Amendment (Digital Agenda) Act* 2000 ('*Digital Agenda Act*').[11] This enactment

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3 World Intellectual Property Organization, *Intellectual Property on the Internet: A Survey of the Issues* (2002): <http://www.wipo.int/copyright/ecommerce/en/html> at [43] (5 May 2005).

4 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, Paris Act of July 24, 1971, as amended on September 28, 1979.

5 WIPO, *Press Release (WIPO Secretariat) no 106, Geneva*, 20 December 1996. See also WIPO, *Intellectual Property Handbook: Policy, Law and Use* (2001) at 271.

6 *WIPO Copyright Treaty*, opened for signature 20 Dec 1996, entered into force 6 March 2002.

7 *WIPO Performances and Phonograms Treaty*, opened for signature 20 Dec 1996, entered into force 20 May 2002.

8 The relevant provision is Article 8 in the *WCT*, and Article 10 in the *WPPT*.

9 See below, Part 2B.

10 It was stated in the WIPO Diplomatic Conference that Contracting Parties are free to implement the obligation to grant an exclusive right to authorise such 'making available to the public' also through the application of a right other than the right to communication to the public or through the combination of different rights. By the 'other' right, it was apparent that the right of distribution was meant, but 'other' right might also be a specific new right, such as that of making available to the public as provided for in Articles 10, 14 of the *WPPT*.

11 *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

amended the *Copyright Act* 1968 ('*Copyright Act*')[12] in numerous ways, including by introducing, for owners of copyright in literary, dramatic, musical and artistic works, a new exclusive right 'to communicate the work to the public'.[13] The amending legislation contained a moderately detailed definition of 'communicate'.[14]

Commentators have rightly observed that, by leaving the detail of the interpretation of the *WCT* Article 8 right to national regulation, member states did not realise the prospect of achieving greater uniformity of copyright law, but rather, deferred debate as to what a valid interpretation should entail.[15] Consequently, doubt now surrounds the true implications of Article 8 for copyright law. National discrepancies in implementation have also arisen as a consequence. There is therefore an urgent need for clarification: for legislators, courts and for interest groups such as copyright owners, users and intermediaries.

This paper seeks to provide that clarification. In particular, it offers a conceptualisation of Article 8, and in so doing attempts to resolve the following questions and sub-questions. *What* exactly does Article 8 mandate: does it grant a 'primary' or a 'secondary' right; does it embody one right or two separate rights? *When* and *where* do 'making available' and 'communication' of a work occur? These questions are discussed and answered in Part 3 of the article.

This paper also seeks to understand the manner in which Australia has implemented Article 8 in its domestic copyright legislation. Part 4 of the article provides answers to the above questions as they apply under the *Copyright Act*. It also seeks to determine the extent to which the Australian provisions operate extraterritorially (this being a matter on which Article 8 is silent).

The questions explored here are not of mere abstract or theoretical importance. Rather, they have meaningful consequences in today's globalised, digital age in which the online dissemination of works is rapidly overtaking analogue transmission. Consideration of these issues may help to resolve problems of liability and damage, as well as choice of law dilemmas — the latter being particularly problematic in a world where territorial borders are increasingly rendered meaningless. Moreover, conceptualising the 'what', 'when' and 'where' of digital dissemination rights makes it possible to consider, critically, the functioning of those rights and thereby assess whether they meet (and are able to meet) the needs of stakeholders within the international copyright system.

12 *Copyright Act* 1968 (Cth).

13 *Copyright Act* 1968 (Cth) at ss31(1)(a)(vi) and 31(1)(b)(iii). The same exclusive right was also introduced for sound recordings, cinematograph films, television broadcasts and sound broadcasts: ss85(1)(c), 86(c) and 87(c).

14 *Copyright Act* 1968 (Cth) at s10.

15 Simon Fitzpatrick, 'Copyright Imbalance: US and Australian Responses to the WIPO Digital Copyright Treaty' (2000) 22 *EIPR* 214 at 222.

2. Background to WCT Article 8

A. Communication Rights under the Berne Convention

Article 8 of the *WCT* performed two key roles. Firstly, it filled perceived 'gaps' in the *Berne Convention* and, secondly, it functioned as a compromise — what Ficsor has called an 'umbrella solution',[16] — between competing national models.

Since its formation in 1886, the *Berne Convention* has periodically been adapted to meet shifting needs in response to technological developments.[17] Communication rights have existed in the *Berne Convention* since 1925, but in their original form were designed to control classic 'broadcasting' situations.[18] The *Berne Convention* does not provide for a general right of communication to the public but rather grants certain communication rights to specific subject matters.[19] Article 11 grants to authors of dramatic, dramatico-musical and musical works the exclusive right of authorising the communication to the public of the performance of their works; Article 11*ter* grants authors of literary works the same right in respect of recitations of their works; Article 14*bis*(1) grants both these rights to the owner of copyright in a cinematograph work; and Article 14(1)(ii) grants to authors of literary or artistic works the right of communication to the public by wire of a cinematographic adaptation of their work. In contrast, the right of *broadcasting* to the public (itself a form of communication, but by wire) extends to all categories of literary and artistic works (which includes dramatic, musical and cinematographic works): Article 11*bis*(1)(i). Similarly, the exclusive right of communication to the public by *wire* or by *rebroadcasting* is granted to authors of all works in Article 11*bis*(1)(ii).

16 See Mihaly Ficsor, *The Law of Copyright and the Internet* (2002) at 493.

17 See Graeme Austin, 'Social Policy Choice and Choice of Law for Copyright Infringement in Cyberspace' (2000) 79 *Or L Rev* 575 at 575–576.

18 The provisions in the *Berne Convention* pertinent to the right of public performance concern performance of works in the presence of the public or, at least, at a place open to the public: see Articles 11(1)(i), 11*ter*(1)(i), 14(1)(i), 14*bis*(1). They are not, therefore, relevant directly to the digital networked environment and do not extend to communication to the public either by wire or broadcasting: see Ficsor, *The Law of Copyright and the Internet*, above n16 at 155.

19 As far as neighbouring rights are concerned, the *Rome Convention* protects performers only in respect of broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation (Article 7). As regards a phonogram published for commercial purposes, the performers or producers of the phonogram have a right to a single equitable remuneration for its broadcast or any communication to the public (Article 12). Broadcasters enjoy a right in respect of rebroadcasting of their broadcasts and in respect of communication to the public of television broadcasts (Article 13). The *TRIPS Agreement* does not contain any specific provisions on the right of communication to the public as far as authors and phonogram producers are concerned. Performers have a right to prevent broadcasting by wireless means and the communication to the public of live performances (Article 14(1)). Broadcasting organisations enjoy a right to prohibit the re-broadcasting of wireless means of broadcasts as well as the communication to the public of television broadcasts (Article 14(3)).

The *Berne Convention* therefore fragments communication rights along two lines: first, along the lines of subject matter, and second, along the lines of technology or mode of communication. For example, Article 11 concerns dramatic and musical works; Article 14 concerns cinematographic works; and Article 11*ter* concerns literary works;[20] while distinctions are made between broadcasting,[21] communication by wire[22] or by rebroadcasting,[23] and communication by loudspeaker.[24] The gaps left by this fragmentation would need to be filled in order to provide copyright owners with the right to control digital transmissions of their works. In particular, perhaps the most important gap or uncertainty perceived to exist in the *Berne Convention* scheme was whether any of the communication rights provided in the *Berne Convention* covered transmissions of works to third parties 'on-demand' — as epitomises Internet transmissions.

The first part of Article 8 eliminated the subject matter gaps:

> Without prejudice to the provision of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 14(1)(ii) and 14*bis*(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 …

As a result, authors of *all* literary and artistic works now enjoy the right of communication to the public.

The second part of Article 8 states expressly that a 'making available' right is included within this general right of communication to the public:

> … 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.

It is this development that is most important, for the rights in the *Berne Convention* had never mentioned that 'making a work available' — as opposed to actively transmitting it to the public at large — constituted a communication to the public.[25] The expression 'making available …', appearing in the *Berne*

20 Paul Gellar, 'Conflicts of Law in Cyberspace: International Copyright in a Digitally Networked World' in P Bernt Hugenholtz, *The Future of Copyright in a Digital Environment*, above n1 at 27, 41.

21 See, for example, Article 11*bis*(1)(i) (authors of literary and artistic works are granted the exclusive right of authorising the broadcasting of their works or the communication thereof).

22 See, for example, Article 11*bis*(1)(ii) (authors of literary or artistic works are granted the exclusive right of communication to the public by wire); Article 14(1)(ii) (authors of literary or artistic works that are adapted or reproduced as cinematographic works are granted the exclusive right of communication to the public by wire of the adaptation or reproduction).

23 See, for example, Article 11*bis*(1)(ii) (authors of literary or artistic works are granted the exclusive right of rebroadcasting of the broadcast of the work).

24 See, for example, Article 11*bis*(1)(iii).

25 Kimberlee Weatherall, 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 1' (1999) 7 *EIPR* 342 at 343. On this issue more generally, see Jane Ginsburg, 'The (new?) right of making available to the public' in David Vaver & Lionel Bentley (eds), *Intellectual Property in the New Millennium* (2004) at 234–247.

Convention's definition of publication since the Brussels revision of 1948, was limited to only one of the possible ways of making available, namely making available (analogue) *copies* of works.[26] Even the more general use of the term, introduced at the 1967 Stockholm revision conference, referred only to the first publication of a work for the purposes of determining the duration of protection.

B. The 'Umbrella' Solution of Article 8

Until the introduction of Article 8 in the *WCT*, therefore, international treaty law and most national laws did not deal with the mere act of making a work *accessible* (by electronic or other means) to the public.[27] Point-to-point transmissions would amount to a restricted act if the process involved reproduction or distribution of copies (for example), but there was considerable doubt as to whether the traditional rights granted by most copyright laws would cover the mere act of offering the work to the public for access. This gap in international and national legislation had to be filled.

Of course, there was considerable debate among the member states of WIPO as to how this should be accomplished. The US delegation submitted draft treaty language calling for digital transmissions to be treated as *distributions of copies* to the public, in line with the approach recommended in the US White Paper.[28] In contrast, the EU delegation called for digital transmissions to be regulated under the rubric of the *right to control communications* of protected works to the public.[29] They perceived a strong similarity between digital transmissions and the broadcast transmissions that Europeans had long regulated as communications to the public. The disagreement was a symptom of the broader discord between US and European copyright law — the differences in legal approaches and in the specific legal characterisation of the acts involved.[30] US law contained no exclusive right to communicate works to the public, while the laws of most other countries (including many EU member states) contained no exclusive distribution right.[31]

As Ficsor, then Assistant Director General of WIPO and Secretary to the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, has explained, the 'umbrella solution' found in Article 8 had, as its main objective, the elimination of these obstacles.[32] Interestingly, there was a consensus that it

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26 Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987) at 177.

27 Hugenholtz, above n1 at 89. Compare *Spanish Copyright Act*, Article 20§2(h) Law on Intellectual Property, no 22, of 11 November 1987, as amended on 7 July 1992.

28 See Report of the Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: US White Paper* (1995) at 213.

29 See Commission of the European Communities, *Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society* (1996).

30 See Mihaly Ficsor, 'Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument' in P Bernt Hugenholtz, *The Future of Copyright in a Digital Environment*, above n1 at 136.

31 See 17 USC §106 (exclusive rights provision). More generally, see Pamela Samuelson, 'The US Digital Agenda at WIPO' (1997) 37 *Va J Int'l L* 369 at 392–393.

would not be appropriate to propose a completely new right to protect digital transmissions of works or other subject matter. Such a solution would not be easy; not only because of the usual difficulties in reaching agreement at the international level on a new right, but also because any legal proposal would involve established practices which would invariably differ from state to state.[33] Rather, it was seemingly accepted that a traditional right (be it distribution, performance, communication) ought to apply, albeit in a somewhat adapted form, due to the gaps in the *Berne Convention* which would require alteration to existing concepts and rules, and possibly even new norms.

The 'umbrella solution', whilst certainly no panacea, resolved the difficult question in favour of *domestic resolution*, whereby that which was considered paramount was not the *legal characterisation*, but rather the *acts* which should be covered by appropriate rights. The final provision 'encompassed any and all such rights' and 'took into account a given status of communication and distribution technologies'.[34] Thus, *Berne Convention* members would be free to determine whether rights such as reproduction, public performance, communication to the public, or distribution, or any combination of such rights, should come into play in specific cases.[35]

The key point here is that no further clarification is given in Article 8 as to what exactly constitutes the 'making available' of a work, except that it at least covers the situation where a member of the public individually accesses a work from a time and place chosen by them. The only act expressly carved out of the exclusive right is the 'mere provision of physical facilities for enabling or making a communication'[36] in order to protect such facilitating intermediaries as Internet service providers ('ISPs'). Thus, in reaching a much-needed compromise on the wording of Article 8, member states left a broad discretion to domestic legislatures to decide and define the meaning of 'making available' and 'communication' to the public. The need to understand how countries have chosen to approach Article 8 is therefore more apparent and urgent than ever. Part 4 of the article seeks to do just that in respect of Australia.

3. Conceptualising WCT Article 8

A. What Sort of Right?

In order to start framing Article 8 conceptually we must first consider the provision itself. This entails two preliminary questions, which are largely ones of interpretation.

32 Ficsor, *The Law of Copyright and the Internet*, above n16 at 501.

33 Mihaly Ficsor, 'International Harmonization of Copyright and Neighboring Rights' in *Mexico Symposium Book* (1995) at 374–377.

34 Ficsor, *The Law of Copyright and the Internet*, above n16 at 246–247.

35 Ibid.

36 The Agreed Statement to Article 8 provides that this does not in itself amount to communication of the work. Most states have incorporated a similar protection for Internet service providers (ISPs): see, for example, United States (17 USC §512), Australia (*Copyright Act* 1968 (Cth) s39B), Canada (*Copyright Act*, RSC 1985, c 42, para 2.4(1)(b)).

The first question is whether Article 8 embodies an exclusive primary *right* at all. This question arises because of the literal wording of the provision, which on a plain reading grants an 'exclusive right of *authorizing* any communication …'. [Empasis added.] Thus, it could be argued that Article 8 creates a secondary 'authorisation right' rather than a primary exclusive right. That is, it could be seen to bestow on the copyright owner the right to 'approve, countenance or sanction' such a communication (to use the typical common law conceptualisation of such rights).

It is submitted, however, that this would be an incorrect and invalid interpretation. Firstly, it would be illogical to grant such a secondary right in the absence of the grant of a primary right, that is, in the absence of an exclusive right to make a communication to the public. For there to be infringement by authorisation, the defendant must expressly or impliedly authorise the doing of an act by a third person which infringes copyright, and the person said to be authorised must commit an infringement by doing the act itself (or threaten to commit such an infringing act).[37] It would be illogical (not to mention unjust) if the authorised person did not infringe copyright and yet the authoriser did. Secondly, one should be careful not to give undue emphasis to the word 'authorisation' in Article 8. As Gendreau notes, if one looks at the other rights in the *WCT*, they are all framed as 'authorisations' to do something and, indeed, this turn of phrase is also found in the *Berne Convention*: rights are typically phrased as rights to authorise some act (being the main right).[38] Thus, it would be incorrect to interpret Article 8 as granting the right of authorising communication, however logical this may seem on a literal reading.[39]

The second question is whether Article 8 embodies one right or two separate rights. That is: does Article 8 grant (i) a right of communication *or* (ii) a right of communication and a right of making available? On a plain reading of the provision, the right of communication *includes*, but is not limited to, the making available of the work for online demand.[40] This conforms to the literal wording of the provision ('including …') but also stems from its preparatory background. The Records from the Diplomatic Conference note that:

> [o]ne of the main objectives of the second part of Article [8] is to make it clear that interactive *on-demand acts of communication* [that is, making available] *are*

37 See, for example, *A & M Records Inc v Audio Magnetics Inc (UK) Ltd* [1979] FSR 1; *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91; *Copyright Agency Ltd v Haines* (1982) 40 ALR 264; *WEA International Inc v Hanimex Corp Ltd* (1987) 10 IPR 349; *Subafilms, Ltd v MGM-Pathe Communications Co* 24 F 3d 1088 (1994), 1090–1094.

38 Ysolde Gendreau, 'Authorization Revisited' (2001) 48 *Journal of the Copyright Society of the USA* 341 at 358–359.

39 The Canadian Copyright Board made this mistake, it is submitted, in finding that its interpretation of the communication by telecommunication right under the Canadian *Copyright Act* corresponded with Article 8 of the *WCT*: see *Re Statement or Royalties to be Collected for the Performance or the Communication by Telecommunication of Musical or Dramatico-Musical Works (Tariff 22 — Transmission of Musical Works to Subscribers Via a Telecommunications Service not Covered under Tariff Nos 16 or 17) (Phase 1: Legal Issues)* 1 CPR (4th) 417.

> *within the scope* of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public have access to the works from different places and at different times.[41] [Emphasis added.]

Indeed, it was noted that 'the "making available" part of the provision, *could* fall within a fair interpretation of the right of communication in the existing provisions of the *Berne Convention*' (although given the possibility of other interpretations, the need for harmonisation and the avoidance of discrepancies was seen to demand clarification).[42] Furthermore, the preparatory documents also state that '[i]f at any point, [a] stored work is made available to the public, such making available constitutes a further act of communication which requires authorization.'[43]

Therefore, it is concluded that the right of making available is a *subset* of the broader exclusive right of communication. That broader right embraces *other* acts of communication to the public; including, in particular, the acts of communication recognised by the *Berne Convention* — for example, communication by broadcasting or other wireless means, and communication by loudspeaker or other analogous instrument. This conceptualisation of the *WCT* Article 8 communication right is illustrated in Figure 1.

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40 The *WCT* must be distinguished from the *WPPT* in this respect. The *WPPT* separates the 'right of communication of performances' from the 'right of making available to the public originals or copies of performances'. Article 10 provides that performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, and Article 14 provides the same right to producers of phonograms in respect of their phonograms. Article 15, on the other hand, provides the right of equitable remuneration for broadcasting and communication to the public for both performers and producers of phonograms. However, the difference between the two treaties seems to have arisen from the different exceptions member countries were willing to have for the broadcasting of performances, as illustrated in the Agreed Statement accompanying Article 15: 'It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.' See Ficsor, *The Law of Copyright and the Internet*, above n16 at 629. Also see Ficsor, 'Towards a Global Solution', above n30 at 135. It is submitted here that it would be both misleading and incorrect to use the *WPPT* to resolve interpretative questions in the *WCT* — and vice-versa — and they are not compared or contrasted here for this reason.

41 Notes on Article 10, WIPO CRNR/DC/4, [10.11]. The EU delegation, whose suggested drafting was the genesis of Article 8, also stated that it was not intended to create a new right but rather was attempting to bring the acts of making available to the public in the electronic system within the coverage of existing rights. 'The completion of the act of communication would not require that actual transmission take place, the *mere making available of the work … is sufficient*': see Ficsor, *The Law of Copyright and the Internet*, above n16 at 240. [Emphasis added.]

42 Id at [10.13].

43 Id at [10.14].

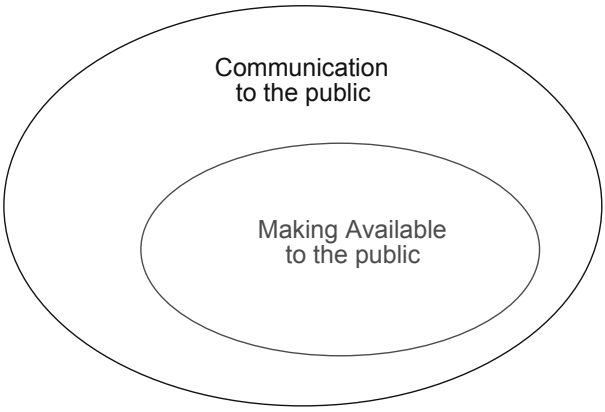

Figure 1: 'Making Available' as a subset of 'Communication'

We note that this outcome is not just logical, it is arguably desirable. From a policy standpoint, the existence of only one broad right is attractive. The alternative — the multiplication of rights — is a potentially problematic path down which to proceed, because it risks multiplying the royalties due for one particular action and may call for complicated allocations of joint and several liability among different actors. Furthermore, as alluded to by Gendreau, there is the risk of the dissection of the copyright transaction becoming too artificial.[44] Having only one broad right may also be appropriate in terms of coping with future technological developments. A flexible, technologically neutral right can be extended to include acts that can not be foreseen at present.[45]

B. When Does a Communication Occur?

The next question for consideration in pursuing a conceptualisation of Article 8 is *when* does the 'making available' of a work occur?[46] In considering this question, it is helpful to use the transmission of data over the Internet as a paradigm.

In order for a transmission of data to take place over the Internet, several events take place, which can be represented on the continuum shown in Figure 2. The circles in Figure 2 depict, in simple terms,[47] the different acts by which a work is

44 Gendreau, above n38 at 356. This is especially apparent in the context of digital transmissions where uploading and downloading can take place within nanoseconds, such that the splitting of the continuum into separate but related acts with separate concomitant 'rights' risks becoming arbitrary and confusing.

45 See, for example, Ysolde Gendreau, 'A Technologically Neutral Solution for the Internet: Is It Wishful Thinking?' in Irini Stamatoudi & Paul Torremans (eds), *Perspectives on Intellectual Property: Copyright in the New Digital Environment* (2000) 1; Andrew Christie, 'Simplifying Australian Copyright Law: The Why and the How' (2000) 11 *IPJ* 40.

46 There is, of course, the separate question of when does any *other* act of communication (for example, communication to the public by loudspeaker) occur? The answer to that question depends on the particular act of communication in issue, and is beyond the scope of the article.

uploaded from a computer that is not publicly accessible (hereafter Uploading Computer) to a server that is publicly accessible via the Internet (hereafter Internet Server),[48] and then is subsequently downloaded via the Internet and received at another computer (hereafter Downloading Computer).[49] These acts take place at different points in time, as illustrated by the time-line continuum along the bottom of Figure 2. Logically, it seems clear that the act of transmission via the Internet begins at a point in time no earlier than point 1, being when the digital signal comprising of the transmission is emitted by the Internet Server (hereafter the time of Emission). Likewise, it also seems clear that the act of transmission ends at a point in time no later than point 3, being when the digital signal comprising of the transmission is received at the Downloading Computer (hereafter the time of Reception).[50]

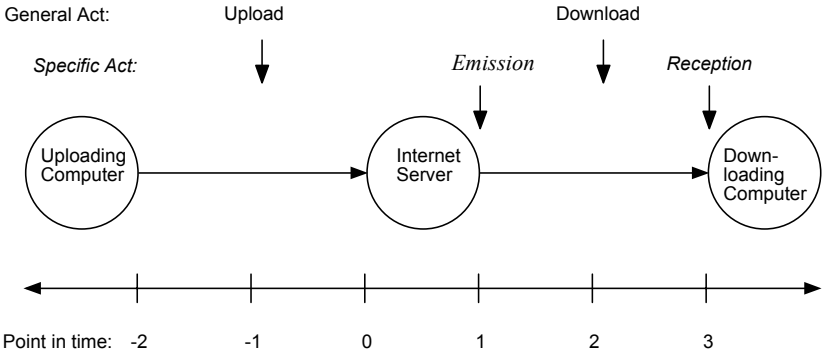

Figure 2: Time continuum of an Internet transmission

47 We recognise that the paradigm used herein is a substantial simplification of the complex and varied means by which a transmission over the Internet actually occurs. Nevertheless, we believe this paradigm is sufficiently representative of the realities as to be valid. In most, if not in all, cases the means by which any particular Internet transmission might actually differ from this paradigm are not of such substance as to make the conclusions we reach inapplicable.

48 It is possible, of course, that the Uploading Computer is the same machine as the Internet Server. This is the situation in the case of peer-to-peer 'file sharing', when a user designates certain files on his or her computer's hard drive to be available for access and downloading by other users of the peer-to-peer network.

49 This diagram in no way seeks to gauge the real time over which a transmission may take place or the (potentially almost infinite) routes it may take to reach its destination. It is recognised that, in practice, the work being downloaded will be split into a number of components, and the individual components will be sent by different routes to the Downloading Computer. What happens upon receipt of these components at the Downloading Computer will vary, depending on the technology being used. In some situations — such as, for example, 'streaming' — what is received arguably is not a complete embodiment of the unitary work. Also, it is possible that an individual transmission may not reach the Downloading Computer.

50 For clarity, it is explained here that point 2 is a point in time in between point 1 and point 3, namely a time after the digital signal comprising the transmission is emitted and before it is received.

Which of the above specific acts, if any, constitutes the act of 'making available' for the purposes of Article 8 of the *WCT*? One possibility is that a work is 'made available' to the public when it first becomes accessible by an individual member of the public, namely when it is received by the Internet server — that is, at time point 0. Another possibility, however, is that a work is only truly 'made available' when, in response to a request for download made by a member of the public, the Internet server *emits* the work as a digital signal — that is, at time point 1. Yet another possibility is that a work should be considered to have been 'made available' at the time when the member of the public subsequently *receives* that signal — that is, at time point 3.[51] A still further possibility is to not confine the scope of the making available act to any particular point on the continuum at all. Under this last conceptualisation, 'making available' can occur at each and every point in the continuum.

From first principles, we have seen that the 'making available' right is a subset of the broader communication right granted in *WCT* Article 8. On such a reading of Article 8, the act of communication, *in the form of making available*, is complete by merely making a work available for on-demand transmission. Viewed in this way, the act of making available occurs when the work is made available 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 corresponds most clearly and closely with point 0 on the continuum. At this point, any member from the public can access the work from the server at any time they choose. Article 8 states no requirement that the member of the public actually request the work, that the work actually be emitted to the member of the public, or that the member of the public actually receive the work, before the work can be considered 'made available' to the public. Nor does a plain reading of Article 8 support the contention that making available is coterminous with all the stages of transmission.

51 This latter interpretation parallels the so-called 'Bogsch theory' of direct broadcasting by satellite, which proposes that the right of broadcasting to the public by wireless diffusion (as provided by Article 11*bis* of the *Berne Convention*), is exercised when and where a member of the public receives the broadcast. The Bogsch theory, as it came to be known, was put forward by then Director General of WIPO, Dr Arpad Bogsch, at the WIPO/UNESCO Group of Experts on Copyright Aspects of Direct Broadcasting by Satellite in 1985. The traditional position in relation to satellite communications was that the act of broadcasting occurs in the country from which the signal emanates (the emission theory). This theory appealed largely to pragmatic concerns, especially those of conflicts of law which could be easily resolved if the country of emission was the focal point. The position which applies under the European Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC) by virtue of Article 2 is representative of this approach. At the 1985 meeting, Bogsch advanced the alternative view that in a DBS broadcast, the communication takes place in all countries which are covered by the footprint of the satellite. The person responsible for the sending of the broadcast must therefore comply with the law of each footprint country, although there would be flexibility for a *de minimis* situation where the footprint 'bled' into only part of the country. For further discussion see Ficsor, *The Law of Copyright and the Internet*, above n16 at 172–178.

Adopting the subset view of the *WCT* Article 8 communication right, it follows that the act of making available occurs at point 0 in time. Also, although the issue does not need to be decided in this discussion, it would seem that the other types of communication encompassed by Article 8 occur at a point in time later than the point in time of a making available. Depending on the particular type of communication in issue, the point in time of the occurrence of the act of a communication other than making available is point 1, 2 or 3. This conceptualisation of the *WCT* Article 8 rights is illustrated in Figure 3.

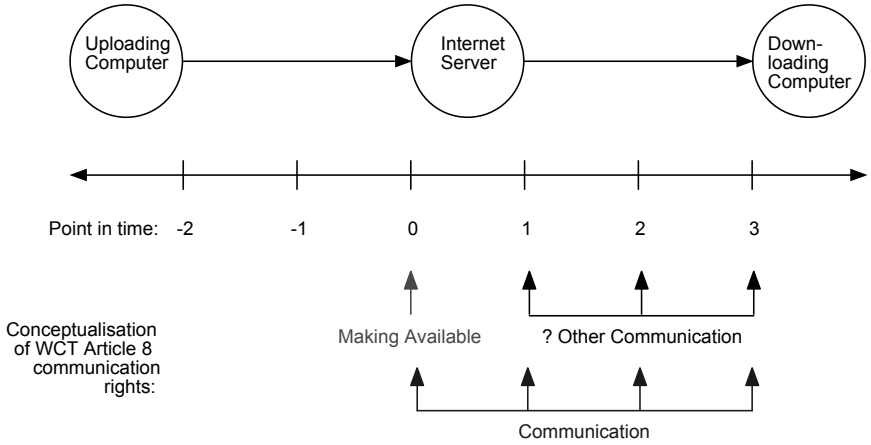

Figure 3: 'Making Available' and 'Communication' in an Internet transmission

C. Where Does a Communication Take Place?

The question of *where* does a making available take place is harder to answer than *when* does it occur.[52] There is nothing in the wording of Article 8 which gives any indication of how we should conceive of the locus of the act of either communication generally or making available in particular. One must, therefore, reason from first principles. Three possibilities suggest themselves as to where a making available occurs: (i) it occurs in the location where the uploading computer is situated; (ii) it occurs in the location where the Internet server is situated; and (iii) it occurs in the location where the downloading computer is situated.

52 As with the issue of when does a communication occur, the issue of *where* does a communication occur involves two separate questions: (i) where does a making available occur, and (ii) where does any *other* act of communication (for example, communication to the public by loudspeaker) occur? The answer to the second question depends, again, on the particular act of communication in issue; and, again, it is beyond the scope of this paper.

The first possibility (the location of the uploading computer) is superficially attractive, because it focuses on the primary actor — that is, the person who is responsible for making the work available. Upon reflection, however, it will be seen that this possibility is flawed. As a matter of logic, the *place* of the making available should be connected with the *time* of making available, because it is only once the act has occured that seeking a location for it becomes necessary (and, indeed, possible). At the commencement of the upload of a work, there is no making available. Making available only occurs once the work is received at the Internet server. Because receipt at the Internet computer is separate in time from the commencement of upload, the location of the uploading computer is not connected in time with the act of making available. It follows, therefore, that the location of the uploading computer should not be considered determinative of the where the making available occurs.

The second possibility (the location of the Internet server) looks a very likely candidate, because it clearly connects the time of the making available with the place of making available. Upon reflection, however, this possibility should also be considered flawed. As a matter of logic, the *place* of the making available should be connected not just with the *time* of making available, but also with the *concept* of making available. As the words of Article 8 indicate, the act of making available is one of enabling members of the public to access the work 'from a place ... chosen by them'. The place where this occurs is not the place where the uploading computer is located; rather, it is the place from where the member of the public may access the work.[53] Thus, the true location of the act of making available is the location of the downloading computer (this being the third possibility described above). This possibility connects the *place*, *time* and *concept* of making available.

To this point, when discussing transmission on the Internet we have described only a single download. The reality is, of course, that there may be (and usually are) multiple downloads, in the sense of downloads to more than one recipient. Put another way, when a work is made available online it is made accessible to numerous people — namely, all the people able to access the Internet server (which, in the case of an Internet server that is publicly accessible, is all the people capable of connecting to the web). It follows, therefore, that there is not just one location at which the making available occurs. Rather, there are multiple locations — being the locations of each and every individual capable of accessing the Internet server.

At first blush such a conclusion might appear ridiculous, because it effectively makes the location of making available everywhere in the world. On reflection, however, it will be seen that it is not ridiculous. The very nature of the act of making a work available online, involving as it does an omnipresence of the work, compels this result.

53 Ginsburg recognises that these words of Article 8 provide support for 'the argument favouring localization in the country(ies) of receipt': Ginsburg, above n25 at 236. However, Ginsburg also argues that support for a contrary view is found in the purported goal of the WCT to facilitate 'the implementation of authors' … rights in networked commerce': id at 237.

4. Implementing WCT Article 8 in Australia

The discussion in Part 2B showed that the drafters of *WCT* Article 8 intended the provision to be capable of different interpretations, and hence different implementations, at the level of the national legislature. One state may define making available as a subset right of the broader communication right. Another state may wish to define making available as coterminous with communication. A further alternative still is for a state to rely on other, pre-existing, rights to encompass making available and communication, thereby avoiding having to define either. The next part of this paper discusses the particular approach that Australia has adopted to implement *WCT* Article 8.

A. What Sort of Right?

The enactment of *Digital Agenda Act* was motivated by, and was a response to, the pressures exerted by digital technology and the online environment, and was a major step towards aligning Australia's copyright laws with the obligations prescribed in the WIPO treaties.[54] The 'centrepiece' of the Act,[55] which came into effect on 4 March 2001, was undoubtedly the technology-neutral 'right to communicate the work to the public'.[56] This broad right filled a number of gaps in Australian copyright law as there was some doubt as to whether the traditional communication rights, of broadcast and (cable) diffusion, could extend to uploading for 'on-demand' access by the public. The new communication right thus replaced both the broadcasting right, which was limited to the act of wireless telegraphy, and the cable diffusion right, which applied only in relation to works and excluded other forms of subject matter,[57] and is clearly separate from the right of public performance.[58]

Unlike the wording of *WCT* Article 8, the wording of the Australian legislation leaves no doubt that the right to communicate is a primary exclusive right of the copyright owner, separate from the exclusive right of authorisation. Thus, the copyright owner is given both the right to communicate the work and the right to authorise another person to communicate the work.[59]

Section 10 of the *Copyright Act* defines 'communicate' in the following manner:

> communicate *means* make available online *or* electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter …[60] [Emphasis added.]

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54 Revised Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) at 4.

55 Ian Campbell, Commonwealth, Senate, *Parliamentary Debates (Hansard)* 14 August 2000 at 16246.

56 See *Copyright Act* ss31(1)(a)(iv) and 31(1)(b)(iii). For the equivalent right in relation to sound recordings, cinematograph films, television broadcasts and sound broadcasts, see ss85(1)(c), 86(c) and 87(c). The right does not extend to published editions of works.

57 Fitzpatrick, above n15 at 223.

58 See *Copyright Act* ss31(1)(a)(iii).

59 *Copyright Act* s31(1)(a)(vii), in relation to literary, dramatic and musical works.

The notable features of this definition are that the right of communication is defined exclusively (by virtue of the word 'means'), and that the right comprises two sub-rights (by virtue of the conjunctive 'or'). Adopting standard means of legislative interpretation, it follows that the act of communication can occur in only one of two ways: as a making available online, and as an electronic transmission. It also follows that these two acts are conceptually different. That is to say, a making available online is different from an electronic transmission.

There are, therefore, two exclusive rights of communication provided to copyright owners under Australian law: (i) the right to make a work available online (hereafter the making available right), and (ii) the right to electronically transmit a work (hereafter the electronic transmission right). This understanding of the new communication right is depicted in Figure 4.

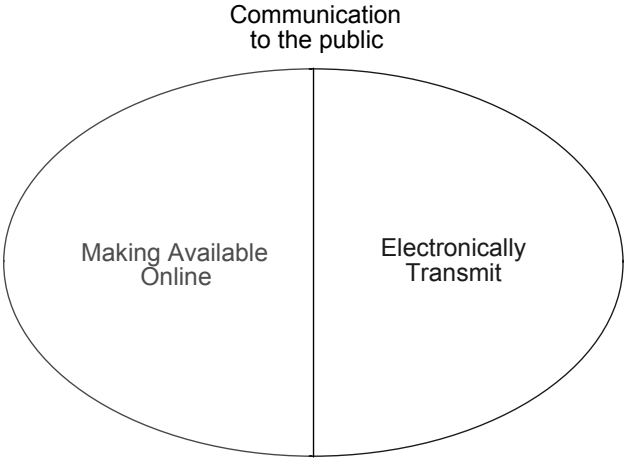

Figure 4: Communication rights under Australian law

B. When Does a Communication Occur?

Drawing on the analysis of *WCT* Article 8, on which the Australian communication right is based, it seems clear that the act of making available online occurs at point 0 in time. That is to say, a work is made available online once it has been uploaded to the Internet server from which the public may access it.

The matter is not so straightforward, however, in relation to the act of electronic transmission. Although it seems incontrovertible that a transmission cannot occur at least until there is an emission, it is not clear if more is required. In particular, it is not clear whether there needs to be a reception of that emission for an act to constitute a transmission. To put the issue in the form of a question: can there be an electronic transmission to the public without any evidence that the public actually received the transmission?

60 *Copyright Act* s10.

There are arguments both for and against a reception being a necessary part of a transmission. An argument *for* a reception being a necessary part of a transmission is that this seems to be the ordinary meaning of the word. For example, the definitions of 'transmit' in *The Oxford Dictionary of English* include the following: 'cause (something) to pass on from one person or place to another: *knowledge is transmitted from teacher to pupil*'.[61] [Emphasis added.]

Under that definition, the concept of 'transmit' involves a recipient, and the use of the preposition 'to' in the definition implies that the concept requires a reception by the recipient. It must be noted, however, that there are other definitions of the word 'transmit' which do not imply the need for reception. For example, another definition of 'transmit' in *The Oxford Dictionary of English* is: 'broadcast or send out (an electrical signal or a radio or television programme): *the programme was transmitted on 7* October'.[62] [Emphasis added.]

Under this definition, the concept of 'transmit' is one of sending something *towards* a recipient, not sending it *to* a recipient. Given that 'transmit' appears in the phrase 'electronically transmit', and the context is one of a broadcast-style of exclusive right, there are solid grounds for preferring the latter definition to the former definition.

Another, more legal, argument *against* reception being a necessary part of a transmission is based on the interpretation given to the earlier communication rights that the electronic transmission right replaced. Prior to the amendments introduced by the *Digital Agenda Act*, the Australian copyright legislation provided two communication rights: the right 'to broadcast the work' and the right 'to cause the work to be transmitted to subscribers to a diffusion service'.[63] Although there was no judicial decision definitively determining the issue in Australia, it seems to have been generally accepted that evidence of actual reception was not required to establish that either of these exclusive rights had been exercised.[64] Rather, it was sufficient to show that the work had been sent on the way to potential receivers of it.[65]

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61 Catherine Soanes & Angus Stevenson (eds), *The Oxford Dictionary of English* (2003). See also the *Merriam-Webster Online* dictionary: <http://www.merriamwebster.com> (8 May 2005), which includes the following definition of 'transmit': 'to send or convey from one person or place to another'.

62 Ibid. See also the *Merriam-Webster Online* dictionary which provides this other definition of 'transmit': 'to send out (a signal) either by radio waves or over a wire'.

63 See, for example, *Copyright Act* 1968 (Cth) ss31(1)(a)(iv) and (v).

64 See, for example, James Lahore & Warwick Rothnie, *Copyright and Designs* (2003) Service 61, Volume 1 at [34,035]. Support for this view can be found in the fact that the Act defined the word 'broadcast' to mean 'transmit by wireless telegraphy to the public', and defined 'wireless telegraphy' to mean 'the *emitting or receiving*, otherwise than over a path that is provided by a material substance, of electromagnetic energy'. [Emphasis added.] The phrase 'emitting or receiving' in the definition of wireless telegraphy could be taken as indicating that either emission or reception will suffice — that is, that reception is not required for an act to amount to a broadcast.

The electronic transmission right was intended by the legislature to be a technologically neutral version of the former rights of broadcasting and transmitting to subscribers to a diffusion service. Given that the weight of opinion was in favour of reception *not* being a necessary element of either act, the better view seems to be that reception is *not* a necessary element in the act of electronic transmission. Under that view, a work is electronically transmitted once it is emitted from the Internet server — that is, at point 1 in time.

Figure 5 illustrates the above conceptualisations of when a making available online and an electronic transmission occur in the context of a transmission over the Internet.

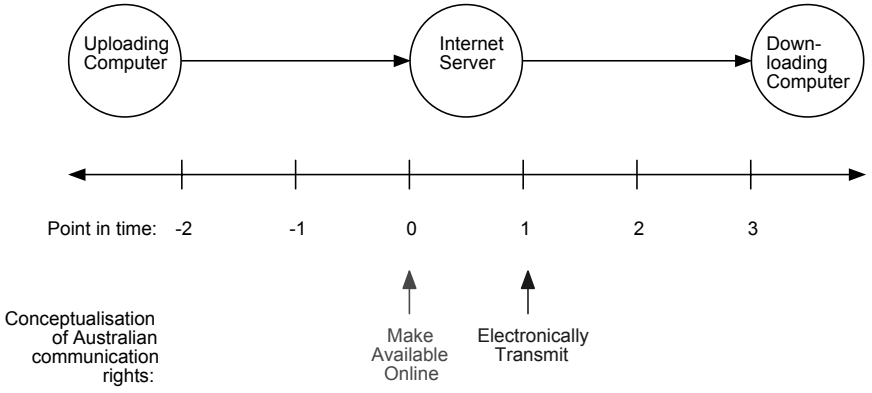

Figure 5: Internet transmission under Australian law

C. Who Makes the Communication?

Importantly, the amendments implementing *WCT* Article 8 in Australian copyright law contain a provision dealing with the issue of who makes a communication. According to *Copyright Act* s22(6):

> For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

65 Support for this view can be found in the dicta of Carnwarth J in the UK High Court decision *Film Investors Overseas SA v The Home Video Channel Limited* [1997] EMLR 347. Having noted that the s6 definition of 'broadcast' includes the phrase 'is capable of being lawfully received by members of the public', the court concluded that 'it is clear from these definitions that … [a]ctual reception of the transmission by viewers is not an essential part of "broadcasting"': id at 351. The relevance of this decision is that the previous Australian copyright provisions concerning broadcasting were based on, and were similar to, the UK provisions being interpreted in this case.

The question that arises is who is 'the person responsible for determining the content of the communication'? The Explanatory Memorandum accompanying the amendments indicated that the provision aimed to exclude carriers and ISPs from being directly liable for communicating material to the public via their networks, in the situation where they do not generate the online content that is transmitted or made available.[66] This information is helpful, in that it tells us who does *not* make the communication (namely, one who merely provides the means by which the communication is effected). Unfortunately, however, it does not tell us who *does* make the communication.

Two possibilities suggest themselves in the context of Internet communication being considered in this article: the person who downloads the work from the Internet server, and the person who uploads the work to the Internet server. The first possibility is superficially attractive, because it focuses on the actor who makes the transmission take effect (the downloader requests the work to be downloaded). Thus, it can be said that the downloader determines what will be the content of any particular transmission, by electing for that transmission, and not some other transmission, to occur.

There is, however, a flaw with the reasoning that it is the downloader who determines the content of a communication. The flaw is that it does not apply to a communication that is a 'making available' (as distinct from an electronic transmission). In the case of an act of making available, the downloader is not an actor. This is because a making available occurs in the absence of an actual download. The only relevant actor is the uploader. In the case of a making available, therefore, it must be the uploader (the second possibility identified above) who determines the content of the making available.

Although it would not be totally illogical to do so, there does not seem to be any good policy reason why the legislature would wish to make different people responsible for the two different types of communication (that is, for a making available on the one hand, and an electronic transmission on the other hand), when they are both parts of the same general act — namely communication to the public. That is to say, there seems no good reason why it is the uploader who is deemed to make the communication in the case of a work being made available online, but it is the downloader who is deemed to make the communication when the same work is subsequently transmitted. Rather, it seems clear that it should be the same person in both instances — namely, the uploader. To the extent to which the legislative intent can be discerned, this conclusion is consistent with it.[67]

D. Where Does a Communication Take Place?

The conclusion reached in respect of who makes a communication does not, unfortunately, provide assistance with divining *where* a making available online or electronic transmission can be said to take place. The determination of that issue depends on reasoning from first principles, combined with the indirect assistance provided by the legislation.

66 Revised Explanatory Memorandum, above n54 at 10.

It was argued from first principles in Part 3C that the better conceptualisation of the *WCT* Article 8 making available right is that it is exercised in the location where a member of the public may access the work – that is, at the location of each and every individual capable of accessing the Internet server. Given that the Australian communication right is an express implementation of Article 8, it is strongly arguable that the same principle applies to the issue of where the Australian making available right occurs. Furthermore, there is indirect support for this view in a decision of Australia's highest court.[68] Accordingly, the authors are of the opinion that the act of making available online, as provided in the Australian legislation, takes place at the location of the users who may access the work.

As with the consideration of where a making available takes place, the consideration of where an electronic transmission occurs should, as a matter of logic, be connected with both the *time* of act and the *concept* of the act. It was argued in Part 4B that a transmission should be considered to occur at the time when the emission (that is, commencement of download) takes place. The concept of a transmission is the sending of a work on its way towards a recipient; the concept does not require a reception of the work by a recipient. Therefore, the place where the transmission occurs is not the place of reception; rather, it is the place of emission. That place is the location of the Internet server from which the download is effected.

E. Extraterritoriality and the Communication Right

The nature of electronic communication is such that it is just as likely to occur across national boundaries as it is within those boundaries. This raises the issue of the extent to which the new Australian communication right has an extraterritorial effect. In considering that issue, two particular legislative provisions must be borne in mind.

The first provision is the definition of 'to the public', introduced into the *Copyright Act* by the amending legislation that contained the new communication

67 For example, see Nick Bolkus, Commonwealth, Senate, *Parliamentary Debates (Hansard)* 17 August 2000 at 16580: 'Typically, the person responsible for determining the content of copyright material online would be a *website proprietor*, not a carrier or Internet Service Provider. Under the amendments, therefore, carriers and Internet Service Providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material.' [Emphasis added.] Similarly, see Explanatory Memorandum accompanying the Copyright Amendments (Digital Agenda) Bill 2000 at 10, which states that 'It is proposed that the person who is responsible for determining the content of a communication to the public is the *person who directly exercises the right over that activity*. This would mean that [ISPs] who are not responsible for determining the content of the transmission would not be directly liable for those transmissions'. [Emphasis added.]

68 See *Dow Jones v Gutnick* (2002) 210 CLR 575; (2002) 194 ALR 433, a case in which the High Court held that, for choice of law purposes, the tort of defamation could be seen to occur where the defamatory material was received by an audience. In that case, the defamatory material was uploaded to an Internet server in the US. The High Court held that the material was received in Victoria, where the plaintiff's reputation was strongest, because it could be (and, indeed, had been) downloaded to computers in Victoria.

right. Section 10 of the *Copyright Act* provides that 'to the public means to the public within or outside Australia'. When applied to the exclusive right of 'communication to the public', this definition produces an *outward* extraterritorial effect that is new to Australian copyright law. In particular, as was noted in the material explaining the amendments introducing the communication right:

> The inclusion of such a definition would mean that Australian copyright owners could control the communication from Australia of their material directed to overseas audiences.[69]

Before the amendments, the *Copyright Act* did not provide copyright owners with the exclusive right to control transmissions that originated from Australia but that were intended only for reception by a public outside Australia. After the amendments, the maker of the communication is required to obtain the licence of the Australian owner of copyright in the material being transmitted, regardless of whether the material is communicated to a public within or outside Australia.

However, the extraterritorial effect of this definition is not absolute. For there to be an infringement of Australian copyright law, the alleged infringing act must be sufficiently connected to Australia. This requirement is provided by s36(1) of the Act, which states:

> the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, *does in Australia*, or authorizes the *doing in Australia* of, any act comprised in the copyright.[70] [Emphasis added.]

With the above principles in mind, we turn to consider eight scenarios that may help bring into relief the precise nature of the exclusive rights of making available and electronic transmission as provided in the Australian copyright legislation. Before doing so, however, it must be noted that the following analysis is about whether or not the communication right has been *exercised*; it is not about whether or not the communication right has been *infringed*. An analysis of the latter issue requires facts in addition to those set out in the eight scenarios.[71] Put another way, a conclusion that the communication right has been exercised does not mean necessarily that the communication right has been infringed.

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69 See *Digital Agenda Copyright Amendments: Exposure Draft and Commentary*, February 1999 at [28].

70 See also s101(1) of the *Copyright Act*, which introduces the same requirement in relation to infringement of subject matter protected under Part IV of the Act.

71 For example, to determine if an exercise of the communication right constitutes an infringement of copyright, it must be known whether copyright subsists in the work and whether the act was done by or with the consent of the owner of copyright in the work.

(i) Scenario 1

In Scenario 1, a content provider uploads a work onto an Internet server in Australia. The work is available for access by users in Australia (whether or not individuals outside Australia can also access the work). There is, however, no evidence that the work has been downloaded by anyone (whether in Australia or otherwise).

In relation to the making available right, it is clear that an unauthorised making available has occurred under Australian copyright law. The authors' preferred view is that the act of making available occurs in the place where the work is accessible by the public — which, in this Scenario, is Australia. Thus, the work has been made available online to the public in Australia.

The position is different, however, in relation to the electronic transmission right. In the absence of any evidence of a download of the work, it cannot be said that the work has been transmitted to the public. Transmission requires, at the very least, an emission (even if not a reception).

Thus, in Scenario 1, there is an exercise of the communication right under Australian copyright law, but only by virtue of there being a making available online.

(ii) Scenario 2

Scenario 2 is the same as Scenario 1, except that there is evidence of a download of the work by an individual in Australia.

As with Scenario 1, and for the same reason, the act of making available online has occurred under Australian law.

The act of electronic transmission of the work has also occurred. There has been an emission (download) of the work, and so it may be said that the work has been electronically transmitted to the public in Australia. Further, this transmission has been 'done' in Australia (as required by s36) because, in the authors' view, the act of electronic transmission occurs where the *emission* takes place. The emission takes place at the location of the Internet server from which the work is emitted — which, in this Scenario, is Australia.

Thus, in Scenario 2, there has been a communication of the work under Australian law, by virtue of there being *both* a making available online of the work and an electronic transmission of the work.

(iii) Scenario 3

Scenario 3 is the same as Scenario 1, except that the work is available for download only in foreign countries (that is, it is not available for download in Australia).

At first blush it might seem as though the making available right has been exercised in Australia, because the work is available to the public in a foreign country and the s10 definition of 'to the public' includes the public outside Australia. Such an interpretation is wrong, however, because it fails to take into account the requirement, set out in s36 of the Act, that an infringement occurs by the *doing in Australia* of an act comprised in the copyright of a work. Although the

work has been made available to the public for the purposes of the Australian legislation, the act of making available has not been done in Australia. Under the assumption that the act of making available occurs in the location in which the work is accessible by the public, the making available in this Scenario occurs outside Australia. Thus, there is no making available in Australia.

In relation to the electronic transmission right, however, there is no exercise of that right because there is no evidence of emission (that is, download).

Thus, the outcome in Scenario 3 is that there is no exercise of the communication right under Australian law.

(iv) Scenario 4

Scenario 4 is the same as Scenario 3, except that there is evidence of a download of the work by an individual outside Australia.

As with Scenario 3, and for the same reason, the act of making available online has not occurred under Australian law.

Interestingly, however, the act of electronic transmission of the work has occurred. The work has been emitted to a member of the public overseas. Because of the s10 definition of 'to the public', the transmission to a member of the public outside Australia constitutes transmission to the public for the purposes of the Australian legislation. Further, the act of emission has occurred in Australia (since this is where the Internet server is located), and so it may be said that the electronic transmission has been 'done' in Australia.

Thus, the outcome in Scenario 4 is that there is an exercise of the communication right under Australian copyright law, but only by virtue of there being an electronic transmission of the work.

(v) Scenario 5

Scenario 5 is essentially the reverse of the situation in Scenario 1. A content provider uploads a work onto an Internet server in a foreign country. The work is available for access by users in that foreign country (and/or other foreign countries) but not by users in Australia. There is no evidence of downloading of the work by anyone.

As with Scenario 3, and for the same reason, the act of making available online has not occurred under Australian law. Although the work has been made accessible to the public for the purposes of the Australian legislation (by virtue of the s10 definition of 'to the public'), the act of making available has not been 'done' in Australia (as required by s36).

As with Scenario 1, in the absence of any evidence of a download of the work, it cannot be said that the work has been electronically transmitted to the public. This is because transmission requires, at the very least, an emission.

The outcome in Scenario 5 is that there is no exercise of the communication right under Australian law.

(vi) Scenario 6

Scenario 6 is the same as Scenario 5, except that there is evidence of a download of the work by an individual in the foreign country.

As with Scenario 5, and for the same reason, the act of making available online has not occurred under Australian law.

There is no exercise of the electronic transmission right under Australian copyright law. Although there has been a transmission to the public for the purposes of the legislation (by virtue of the s10 definition), the act of transmission has not been 'done' in Australia (as required by s36) because the emission took place in the foreign country.

Thus, the outcome in Scenario 6 is that there is no exercise of the communication right under Australian law.

(vii) Scenario 7

Scenario 7 is the same as Scenario 5, except that the work is available for download in Australia.

The authors consider that the act of making available has occurred under Australian copyright law. In the authors' view, the act of making available takes place in the locations where the work is accessible by the public — which, in this Scenario, includes Australia. Thus, the work has been made available online to the public in Australia. This is despite the fact that the Internet server from which the work is made available is located outside Australia.

As with Scenario 1, and for the same reason, there is no act of electronically transmitting the work to the public.

The outcome of Scenario 7 is that there is an exercise of the communication right under Australian copyright law, but only by virtue of there being a making available online.

(viii) Scenario 8

Scenario 8 is the same as Scenario 7, except that there is evidence of a download of the work by an individual in Australia.

As with Scenario 7, and for the same reason, the act of making available online has occurred under Australian law.

The act of electronic transmission, however, has not occurred under Australian law. As with Scenario 6, although there has been a transmission to the public for the purposes of the legislation, the act of transmission has not been 'done' in Australia because the emission took place in the foreign country.

5. Conclusion

In this paper, we have explored the possible interpretations of the communication right embodied in Article 8 of the *WCT*.[72] We have also considered the implementation of that right in the Australian copyright legislation, and in particular its extraterritorial effect.

We have shown that, from first principles, the making available right is a subset of a broader right of communication provided by way of the 'umbrella solution' that is Article 8 of the *WCT*. We have reasoned that the act of making available is complete by merely making a work available for on-demand transmission. Viewed in this way, the act of making available occurs when the work is made available in such a way that members of the public may access the work from a place and at a time individually chosen by them. For there to be an exercise of the making available right, it is not necessary that the work actually be downloaded; it is sufficient that the work could be downloaded by a member of the public.

It follows that the act of making available occurs at the time when a work is uploaded to a publicly accessible computer. It also follows that the place at which a making available occurs should be considered to be the location from which members of the public may access the work — which means, in practice, the locations of each and every individual capable of accessing the Internet server onto which the work has been uploaded.

The Australian copyright legislation has implemented the *WCT* Article 8 right of communication to the public by way of two separate rights — a right of making available online, and a right of electronic transmission. The right of making available online, like the making available right in *WCT* Article 8 from which it is derived, occurs when a work has been uploaded to an Internet server from which the public may access it. In contrast, the right of electronic transmission occurs when it is emitted from the Internet server — that is, at the commencement of an act of downloading.

The authors consider that the place where an act of making available under the Australian legislation occurs is the same as the place where an act of making available under *WCT* Article 8 occurs — namely, the locations of each and every individual capable of accessing the Internet server onto which the work has been uploaded. In contrast, the place where an act of electronic transmission occurs is the place where the act of emission of the work occurs — namely, the location of the Internet server from which the work may be downloaded.

When these conceptualisations of the Australian communication right are applied in the context of the legislation, it is seen that the right has an extraterritorial effect. This extraterritorial effect is both *outward* and *inward*. The *outward* extraterritorial effect is that the communication right is exercised by the uploading of a work to an Internet server in Australia that is not accessible by the Australian public, so long as the work is accessible by the public in a foreign country and is in fact accessed (downloaded) by a member of the public in that foreign country (Scenario 4). The *inward* extraterritorial effect is that the communication right is exercised by the uploading of a work to an Internet server located in a foreign country, so long as the work is accessible by the Australian public (Scenarios 7 and 8). It will be appreciated that this extraterritorial effect of

72 The authors wish to reiterate that this paper considers only those rights contained in Article 8 of the *WCT*. The arguments contained in this paper in no way pertain to the *WPPT*. See above n40.

the Australian communication right is significant. In particular, the communication right will be exercised in a number of situations in which the factual connection with Australia is slight.

Looked at another way, there are only a limited number of situations concerning Internet transmission of copyright works in which the Australian comunication right will *not* be exercised. One situation is where the Internet server is located in Australia, but is not accessible by members of the Australian public and there is no evidence that it has been accessed by anyone (Scenario 3).[73] Another situation is where the Internet server is located outside Australia and is not accessible by members of the Australian public (Scenarios 5 and 6).

Such situations will be rare, if they occur at all. More likely than not, such situations will never occur. If that proposition is correct, then the Australian communication right has total extraterritorial effect. Such an outcome no doubt has significant policy ramifications for Australian copyright law in the future.

73 If there is evidence that the Internet server has been accessed by members of the public, the right of electronic transmission will have been exercised even though the public is located outside Australia (Scenario 4).